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of

The Supreme Court

December 18, 1979 through January 21, 1980

Henry J. Lind
Reporter of Dicisions

READEX FICHE

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, Chief Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM H. REHNQUIST, Associate Justice.
JOHN PAUL STEVENS, Associate Justice.

RETIRED

STANLEY REED, Associate Justice.
WILLIAM O. DOUGLAS, Associate Justice.*

OFFICERS OF THE COURT

BENJAMIN R. CIVILETTI, Attorney General.
WADE H. McCREE, Jr., Solicitor General.
MICHAEL RODAK, Jr., Clerk.
HENRY C. LIND, Reporter of Decisions.
ALFRED WONG, Marshal.
ROGER F. JACOBS, Librarian.

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*Mr. Justice Douglas, who retired effective November 12, 1975 (423 U. S. iv), died January 19, 1980. See *post*, p. iii.

SUPREME COURT OF THE UNITED STATES

Allotment of Justices

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, *viz.:*

For the District of Columbia Circuit, Warren E. Burger, Chief Justice.

For the First Circuit, William J. Brennan, Jr., Associate Justice.

For the Second Circuit, Thurgood Marshall, Associate Justice.

For the Third Circuit, William J. Brennan, Jr., Associate Justice.

For the Fourth Circuit, Warren E. Burger, Chief Justice.

For the Fifth Circuit, Lewis F. Powell, Jr., Associate Justice.

For the Sixth Circuit, Potter Stewart, Associate Justice.

For the Seventh Circuit, John Paul Stevens, Associate Justice.

For the Eighth Circuit, Harry A. Blackmun, Associate Justice.

For the Ninth Circuit, William H. Rehnquist, Associate Justice.

For the Tenth Circuit, Byron R. White, Associate Justice.

December 19, 1975.

(For next previous allotment, see 404 U. S., p. v.)

DEATH OF MR. JUSTICE DOUGLAS

SUPREME COURT OF THE UNITED STATES

MONDAY, JANUARY 21, 1980

Present: MR. CHIEF JUSTICE BURGER, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, MR. JUSTICE BLACKMUN, MR. JUSTICE REHNQUIST, and MR. JUSTICE STEVENS.

THE CHIEF JUSTICE said:

It is my sad duty to announce that our friend and colleague William O. Douglas died Saturday, January 19, 1980.

For five years, since he suffered a severe stroke on New Year's Eve of 1974, Justice Douglas' courage and determination exemplified a quality that characterized his entire life. All of us who knew him well, and thousands who had no personal acquaintance with him, shared an admiration for his brave struggle to regain health and strength.

His retirement in November 1975 came after the longest tenure in the history of this Court. When he achieved this record in October 1973, we took note from this Bench of his extraordinary career, his devotion to freedom, his concern for our environment, his involvement in countless causes relating to the improvement of the human condition.

Justice Douglas' public and judicial career spanned more than four decades of massive social, political and economic changes in our country, and upheavals in the established order all over the world. Those changes had large impact on the kinds of issues coming before this Court. His mark on this crucial period in our history is a very significant one. His judicial opinions appear in nearly one fourth of the more than 440 volumes of the United States Reports.

I last saw Justice Douglas within the hour before he returned to the hospital and at that time I could see no lessening of that firm, even fierce, determination he showed in every contest in his life. He fought to the very end as he had always done.

We mourn his passing but we will not forget the comradeship and friendship that overshadowed the inescapable differences on the vexing issues that historically confront this Court.

In due course a memorial service of the Bar will be held in this Chamber to more fully pay our respects, and those of the Supreme Court Bar, to Mr. Justice Douglas.

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STRYCKER'S BAY NEIGHBORHOOD COUNCIL, INC. v. KARLEN ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 79-168. Decided January 7, 1980*

Held: The Court of Appeals erred in concluding that when the Department of Housing and Urban Development (HUD) considered alternative sites before redesignating a proposed site for middle-income housing as one for low-income housing it should have given determinative weight to environmental factors such as crowding low-income housing into a concentrated area and should not have considered the delay that would occur in developing an alternative site as an overriding factor. Once an agency has made a decision subject to the procedural requirements of the National Environmental Policy Act of 1969, the only role for a court is to insure that the agency has considered the environmental consequences; it cannot interject itself within the area of discretion of the executive as to the choice of the action to be taken. Here, there is no doubt that HUD considered the environmental consequences of its decision to redesignate the proposed site for low-income housing, and the Act requires no more.

Certiorari granted; 590 F. 2d 39, reversed.

PER CURIAM.

The protracted nature of this litigation is perhaps best illustrated by the identity of the original federal defendant, "George Romney, Secretary of the Department of Housing and Urban Development." At the center of this dispute is the site of a proposed low-income housing project to be constructed on Manhattan's Upper West Side. In 1962, the New York City Planning Commission (Commission), acting in conjunction with the United States Department of Housing and Urban Development (HUD), began formulating a

*Together with No. 79-181, *City of New York* v. *Karlen et al.;* and No. 79-184, *Secretary of Housing and Urban Development* v. *Karlen et al.*, also on petitions for certiorari to the same court.

plan for the renewal of 20 square blocks known as the "West Side Urban Renewal Area" (WSURA) through a joint effort on the part of private parties and various government agencies. As originally written, the plan called for a mix of 70% middle-income housing and 30% low-income housing and designated the site at issue here as the location of one of the middle-income projects. In 1969, after substantial progress toward completion of the plan, local agencies in New York determined that the number of low-income units proposed for WSURA would be insufficient to satisfy an increased need for such units. In response to this shortage the Commission amended the plan to designate the site as the future location of a high-rise building containing 160 units of low-income housing. HUD approved this amendment in December 1972.

Meanwhile, in October 1971, the Trinity Episcopal School Corp. (Trinity), which had participated in the plan by building a combination school and middle-income housing development at a nearby location, sued in the United States District Court for the Southern District of New York to enjoin the Commission and HUD from constructing low-income housing on the site. The present respondents, Roland N. Karlen, Alvin C. Hudgins, and the Committee of Neighbors To Insure a Normal Urban Environment (CONTINUE), intervened as plaintiffs, while petitioner Strycker's Bay Neighborhood Council, Inc., intervened as a defendant.

The District Court entered judgment in favor of petitioners. See *Trinity Episcopal School Corp.* v. *Romney,* 387 F. Supp. 1044 (1974). It concluded, *inter alia,* that petitioners had not violated the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852, 42 U. S. C. § 4321 *et seq.*

On respondents' appeal, the Second Circuit affirmed all but the District Court's treatment of the NEPA claim. See *Trinity Episcopal School Corp.* v. *Romney,* 523 F. 2d 88

(1975). While the Court of Appeals agreed with the District Court that HUD was not required to prepare a full-scale environmental impact statement under § 102 (2)(C) of NEPA, 42 U. S. C. § 4332 (2)(C), it held that HUD had not complied with § 102 (2)(E),[1] which requires an agency to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U. S. C. § 4332 (2)(E). See 523 F. 2d., at 92–95. According to the Court of Appeals, any consideration by HUD of alternatives to placing low-income housing on the site "was either highly limited or nonexistent." *Id.*, at 94. Citing the "background of urban environmental factors" behind HUD's decision, the Court of Appeals remanded the case, requiring HUD to prepare a "statement of possible alternatives, the consequences thereof and the facts and reasons for and against. . . ." *Ibid.* The statement was not to reflect "HUD's concept or the Housing Authority's views as to how these agencies would choose to resolve the city's low income group housing situation," but rather was to explain "how within the framework of the Plan its objective of economic integration can best be achieved with a minimum of adverse environmental impact." *Ibid.* The Court of Appeals believed that, given such an assessment of alternatives, "the agencies with the cooperation of the interested parties should be able to arrive at an equitable solution." *Id.*, at 95.

On remand, HUD prepared a lengthy report entitled Special Environmental Clearance (1977). After marshaling the data, the report asserted that, "while the choice of Site 30 for development as a 100 percent low-income project has raised

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[1] At the time of the Court of Appeals' decision, this section was numbered 102 (2)(D) and was codified at 42 U. S. C. § 4332 (2)(D) (1970 ed.). Congress redesignated it two weeks later. See Act of Aug. 9, 1975, Pub. L. 94–83, 89 Stat. 424.

valid questions about the potential social environmental impacts involved, the problems associated with the impact on social fabric and community structures are not considered so serious as to require that this component be rated as unacceptable." Special Environmental Clearance Report 42. The last portion of the report incorporated a study wherein the Commission evaluated nine alternative locations for the project and found none of them acceptable. While HUD's report conceded that this study may not have considered all possible alternatives, it credited the Commission's conclusion that any relocation of the units would entail an unacceptable delay of two years or more. According to HUD, "[m]eased against the environmental costs associated with the minimum two-year delay, the benefits seem insufficient to justify a mandated substitution of sites." *Id.*, at 54.

After soliciting the parties' comments on HUD's report, the District Court again entered judgment in favor of petitioners. See *Trinity Episcopal School Corp.* v. *Harris*, 445 F. Supp. 204 (1978). The court was "impressed with [HUD's analysis] as being thorough and exhaustive," *id.*, at 209–210, and found that "HUD's consideration of the alternatives was neither arbitrary nor capricious"; on the contrary, "[i]t was done in good faith and in full accordance with the law." *Id.*, at 220.

On appeal, the Second Circuit vacated and remanded again. *Karlen* v. *Harris*, 590 F. 2d 39 (1978). The appellate court focused upon that part of HUD's report where the agency considered and rejected alternative sites, and in particular upon HUD's reliance on the delay such a relocation would entail. The Court of Appeals purported to recognize that its role in reviewing HUD's decision was defined by the Administrative Procedure Act (APA), 5 U. S. C. § 706 (2) (A), which provides that agency actions should be set aside if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . ." Additionally,

however, the Court of Appeals looked to "[t]he provisions of NEPA" for "the substantive standards necessary to review the merits of agency decisions. . . ." 590 F. 2d, at 43. The Court of Appeals conceded that HUD had "given 'consideration' to alternatives" to redesignating the site. *Id.*, at 44. Nevertheless, the court believed that " 'consideration' is not an end in itself." *Ibid.* Concentrating on HUD's finding that development of an alternative location would entail an unacceptable delay, the appellate court held that such delay could not be "an overriding factor" in HUD's decision to proceed with the development. *Ibid.* According to the court, when HUD considers such projects, "environmental factors, such as crowding low-income housing into a concentrated area, should be given determinative weight." *Ibid.* The Court of Appeals therefore remanded the case to the District Court, instructing HUD to attack the shortage of low-income housing in a manner that would avoid the "concentration" of such housing on Site 30. *Id.*, at 45.

In *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U. S. 519, 558 (1978), we stated that NEPA, while establishing "significant substantive goals for the Nation," imposes upon agencies duties that are "essentially procedural." As we stressed in that case, NEPA was designed "to insure a fully informed and well-considered decision," but not necessarily "a decision the judges of the Court of Appeals or of this Court would have reached had they been members of the decisionmaking unit of the agency." *Ibid. Vermont Yankee* cuts sharply against the Court of Appeals' conclusion that an agency, in selecting a course of action, must elevate environmental concerns over other appropriate considerations. On the contrary, once an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences; it cannot " 'interject itself within the area of discretion of the executive as to the choice of the action to

be taken.'" *Kleppe* v. *Sierra Club*, 427 U. S. 390, 410, n. 21 (1976). See also *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 423 U. S. 326 (1976).[2]

In the present case there is no doubt that HUD considered the environmental consequences of its decision to redesignate the proposed site for low-income housing. NEPA requires no more. The petitions for certiorari are granted, and the judgment of the Court of Appeals is therefore

Reversed.

MR. JUSTICE MARSHALL, dissenting.

The issue raised by these cases is far more difficult than the *per curiam* opinion suggests. The Court of Appeals held that the Secretary of Housing and Urban Development (HUD) had acted arbitrarily in concluding that prevention of a delay in the construction process justified the selection of a housing site which could produce adverse social environmental effects, including racial and economic concentration. Today the majority responds that "once an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences," and that in this case "there is no doubt that HUD considered the environmental consequences of its decision to redesignate the proposed site for low-income housing. NEPA requires no more." The majority finds support for this conclusion in the closing para-

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[2] If we could agree with the dissent that the Court of Appeals held that HUD had acted "arbitrarily" in redesignating the site for low-income housing, we might also agree that plenary review is warranted. But the District Court expressly concluded that HUD had not acted arbitrarily or capriciously and our reading of the opinion of the Court of Appeals satisfies us that it did not overturn that finding. Instead, the appellate court required HUD to elevate environmental concerns over other, admittedly legitimate, considerations. Neither NEPA nor the APA provides any support for such a reordering of priorities by a reviewing court.

graph of our decision in *Vermont Yankee Nuclear Power Corp.* v. *NRDC,* 435 U. S. 519, 558 (1978).

Vermont Yankee does not stand for the broad proposition that the majority advances today. The relevant passage in that opinion was meant to be only a "further observation of some relevance to this case," *id.,* at 557. That "observation" was a response to this Court's perception that the Court of Appeals in that case was attempting "under the guise of judicial review of agency action" to assert its own policy judgment as to the desirability of developing nuclear energy as an energy source for this Nation, a judgment which is properly left to Congress. *Id.,* at 558. The Court of Appeals had remanded the case to the agency because of "a single alleged oversight on a peripheral issue, urged by parties who never fully cooperated or indeed raised the issue below," *ibid.* It was in this context that the Court remarked that "NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is *essentially* procedural." *Ibid.* (emphasis supplied). Accordingly, "[a]dministrative decisions should be set aside in this context, *as in every other,* only for substantial procedural *or substantive* reasons as mandated by statute," *ibid.* (emphasis supplied). Thus *Vermont Yankee* does not stand for the proposition that a court reviewing agency action under NEPA is limited solely to the factual issue of whether the agency "considered" environmental consequences. The agency's decision must still be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U. S. C. § 706 (2)(A), and the reviewing court must still insure that the agency "has taken a 'hard look' at environmental consequences," *Kleppe* v. *Sierra Club,* 427 U. S. 390, 410, n. 21 (1976).

In the present case, the Court of Appeals did not "substitute its judgment for that of the agency as to the environmental consequences of its actions," *ibid.,* for HUD in its

Special Environmental Clearance Report acknowledged the adverse environmental consequences of its proposed action: "the choice of Site 30 for development as a 100 percent low-income project has raised valid questions about the potential social environmental impacts involved." These valid questions arise from the fact that 68% of all public housing units would be sited on only one crosstown axis in this area of New York City. As the Court of Appeals observed, the resulting high concentration of low-income housing would hardly further racial and economic integration. The environmental "impact . . . on social fabric and community structures" was given a B rating in the report, indicating that from this perspective the project is "questionable" and ameliorative measures are "mandated." The report lists 10 ameliorative measures necessary to make the project acceptable. The report also discusses two alternatives, Sites 9 and 41, both of which are the appropriate size for the project and require "only minimal" amounts of relocation and clearance. Concerning Site 9 the report explicitly concludes that "[f]rom the standpoint of social environmental impact, this location would be superior to Site 30 for the development of low-rent public housing." The sole reason for rejecting the environmentally superior site was the fact that if the location were shifted to Site 9, there would be a projected delay of two years in the construction of the housing.

The issue before the Court of Appeals, therefore, was whether HUD was free under NEPA to reject an alternative acknowledged to be environmentally preferable solely on the ground that any change in sites would cause delay. This was hardly a "peripheral issue" in the case. Whether NEPA, which sets forth "significant substantive goals," *Vermont Yankee Nuclear Power Corp.* v. *NRDC, supra,* at 558, permits a projected 2-year time difference to be controlling over environmental superiority is by no means clear. Resolution of the issue, however, is certainly within the normal scope of review of agency action to determine if it is arbitrary,

capricious, or an abuse of discretion.* The question whether HUD can make delay the paramount concern over environmental superiority is essentially a restatement of the question whether HUD in considering the environmental consequences of its proposed action gave those consequences a "hard look," which is exactly the proper question for the reviewing court to ask. *Kleppe* v. *Sierra Club, supra,* at 410, n. 21.

The issue of whether the Secretary's decision was arbitrary or capricious is sufficiently difficult and important to merit plenary consideration in this Court. Further, I do not subscribe to the Court's apparent suggestion that *Vermont Yankee* limits the reviewing court to the essentially mindless task of determining whether an agency "considered" environmental factors even if that agency may have effectively decided to ignore those factors in reaching its conclusion. Indeed, I cannot believe that the Court would adhere to that position in a different factual setting. Our cases establish that the arbitrary or capricious standard prescribes a "searching and careful" judicial inquiry designed to ensure that the agency has not exercised its discretion in an unreasonable manner. *Citizens To Preserve Overton Park, Inc.* v. *Volpe,* 401 U. S. 402, 416 (1971). Believing that today's summary reversal represents a departure from that principle, I respectfully dissent.

It is apparent to me that this is not the type of case for a summary disposition. We should at least have a plenary hearing.

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*The Secretary concedes that if an agency gave little or no weight to environmental values its decision might be arbitrary or capricious. Pet. for Cert. in No. 79-184, p. 15, n. 16.

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McLAIN ET AL. *v.* REAL ESTATE BOARD OF NEW ORLEANS, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 78-1501. Argued November 6, 1979—Decided January 8, 1980

Petitioners, claiming individually and on behalf of a certain class of real estate purchasers and sellers, instituted this private antitrust action in Federal District Court against respondents, certain real estate firms and trade associations and a class consisting of real estate brokers who had transacted realty brokerage business in the Greater New Orleans area during the four years preceding the filing of the complaint. Petitioners alleged, *inter alia,* that respondents had engaged in a price-fixing conspiracy in violation of § 1 of the Sherman Act through an agreement to conform to a fixed rate of brokerage commissions on sales of residential property. The complaint also included allegations that respondents' activities were "within the flow of interstate commerce and have an effect upon that commerce," and that respondents assisted their clients in securing financing and title insurance which came from sources outside the State. Respondents moved to dismiss the complaint for failure to state a claim under the Sherman Act, contending that their activities were purely local in nature and did not substantially affect interstate commerce. The District Court granted the motion to dismiss the complaint, holding that under *Goldfarb* v. *Virginia State Bar,* 421 U. S. 773, there must be a substantial volume of interstate commerce involved in the overall real estate transaction and the challenged activity must be an essential, integral part of the transaction, inseparable from its interstate aspects; and that here a broker's participation in the presumably interstate aspects of securing title insurance and financing was only incidental rather than indispensable. The Court of Appeals affirmed, holding that under *Goldfarb* v. *Virginia State Bar, supra,* Sherman Act jurisdiction did not exist because petitioners had failed to demonstrate that real estate brokers are either necessary or integral participants in the interstate aspects of residential real estate financing and title insurance.

Held: The complaint should not have been dismissed at this stage of the proceedings. Pp. 241-247.

(a) To establish jurisdiction under the Sherman Act, a plaintiff must allege the relationship between the activity involved and some aspect of

interstate commerce and, if these allegations are controverted, must submit evidence to demonstrate either that the defendants' activity is itself in interstate commerce or, if it is local in nature, that it has an effect on some other appreciable activity demonstrably in interstate commerce. Here, petitioners may establish the jurisdictional element of a Sherman Act violation by demonstrating a substantial effect on interstate commerce generated by respondents' brokerage activity, and petitioners need not make the more particularized showing of an effect on interstate commerce caused by the alleged conspiracy to fix commission rates, or by those other aspects of respondents' activity that are alleged to be unlawful. Pp. 241–243.

(b) The courts below misinterpreted *Goldfarb* v. *Virginia State Bar, supra,* as requiring that petitioners demonstrate that real estate brokers are either necessary or integral participants in the interstate aspects of residential real estate financing and title insurance. The *Goldfarb* holding was not addressed to the "effect on commerce" test of jurisdiction and in no way restricted it to those challenged activities that have an integral relationship to an activity in interstate commerce. Pp. 243–245.

(c) Here, what was submitted to the District Court shows a sufficient basis for satisfying the Act's jurisdictional requirements under the "effect on commerce" theory so as to entitle petitioners to go forward. The record makes it clear that there is a basis for petitioners to proceed to trial where there will be opportunity to establish that an appreciable amount of commerce is involved in the financing of residential property in the Greater New Orleans area and in the insuring of titles to such property, that this appreciable commercial activity has occurred in interstate commerce, and that respondents' activities which allegedly have been infected by a price-fixing conspiracy have, as a matter of practical economics, a not insubstantial effect on the interstate commerce involved. Pp. 245–247.

583 F. 2d 1315, vacated and remanded.

BURGER, C. J., delivered the opinion of the Court, in which all other Members joined, except MARSHALL, J., who took no part in the consideration or decision of the case.

Richard G. Vinet argued the cause for petitioners. With him on the brief was *John P. Nelson, Jr.*

Harry McCall, Jr., argued the cause for respondents. With him on the brief for respondents Real Estate Board of New

Orleans et al. were *Arthur L. Ballin, Frank C. Dudenhefer, Edward F. Wegmann, Harry S. Redmon, Jr., Rutledge Clement, Jr., Charles F. Barbera, Moise S. Steeg, Jr.,* and *William D. North. Edward F. Schiff, Paul B. Hewitt,* and *Moise W. Dennery* filed a brief for respondent Latter & Blum, Inc.

Deputy Solicitor General Easterbrook argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General McCree, Assistant Attorney General Shenefield, John J. Powers III,* and *Margaret G. Halpern.**

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question in this case is whether the Sherman Act extends to an agreement among real estate brokers in a market area to conform to a fixed rate of brokerage commissions on sales of residential property.

I

The complaint in this private antitrust action, filed in the Eastern District of Louisiana in 1975, alleges that real estate brokers in the Greater New Orleans area have engaged in a price-fixing conspiracy in violation of § 1 of the Sherman Act, ch. 647, 26 Stat. 209, as amended, 15 U. S. C. § 1. No trial has as yet been had on the merits of the claims since the complaint was dismissed for failure to establish the interstate commerce component of Sherman Act jurisdiction.

The complaint asserts a claim individually and on behalf of that class of persons who employed the services of a respondent real estate broker in the purchase or sale of

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**William D. North* and *Valentine A. Weber, Jr.,* filed a brief for the National Association of Realtors as *amicus curiae* urging affirmance.

Ellen Broadman and *Alan Mark Silbergeld* filed a brief for Consumers Union of United States, Inc., as *amicus curiae.*

residential property in the Louisiana parishes of Jefferson or Orleans (the Greater New Orleans area) during the four years preceding the filing of the complaint. The respondents are two real estate trade associations, six named real estate firms, and that class of real estate brokers who at some time during the period covered by the complaint transacted realty brokerage business in the Greater New Orleans area and charged a brokerage fee for their services. The unlawful conduct alleged is a continuing combination and conspiracy among the respondents to fix, control, raise, and stabilize prices for the purchase and sale of residential real estate by the systematic use of fixed commission rates, widespread fee splitting, suppression of market information useful to buyers and sellers, and other allegedly anticompetitive practices. The complaint asserts that respondents' conduct has injured petitioners in their business or property because the fees and commissions charged for brokerage services have been maintained at an artificially high and noncompetitive level, with the effect that the prices of residential properties have been artificially raised. The complaint seeks treble damages and injunctive relief as authorized by §§ 4 and 16 of the Clayton Act, 38 Stat. 731, 737, as amended, 15 U. S. C. §§ 15, 26.

The allegations of the complaint pertinent to establishing federal jurisdiction are:

(1) that the activities of the respondents are "within the flow of interstate commerce and have an effect upon that commerce";

(2) that the services of respondents were employed in connection with the purchase and sale of real estate by "persons moving into and out of the Greater New Orleans area";

(3) that respondents "assist their clients in securing financing and insurance involved with the purchase of real estate in the Greater New Orleans area," which "financing and insurance are obtained from sources outside the State of Louisiana and move in interstate commerce into the State of Louisiana through the activities of the [respondents]"; and

(4) that respondents have engaged in an unlawful restraint of "interstate trade and commerce in the offering for sale and sale of real estate brokering services."

Respondents moved in the District Court to dismiss the complaint for failure to state a claim within the ambit of the Sherman Act. This motion was supported by a memorandum and by the affidavits of two officers of respondent Real Estate Board of New Orleans. The affiants testified that real estate brokers in Louisiana were licensed to perform their function in that State only, that there was no legal or other requirement that real estate brokers be employed in connection with the purchase or sale of real estate within Louisiana, and that the affiants had personal knowledge of such transactions occurring without the assistance of brokers. The function of real estate brokers was described as essentially completed when buyer and seller had been brought together on agreeable terms. The affiants also stated that real estate brokers did not obtain and were not instrumental in obtaining financing of credit sales, save in a few special cases, nor were they involved with examination of titles in connection with the sale of real estate or the financing of such sales.

The memorandum in support of the motion to dismiss sought to distinguish this case from *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773 (1975), in which we held that § 1 of the Sherman Act had been violated by conformance with a bar association's minimum-fee schedule that established fees for title examination services performed by attorneys in connection with the financing of real estate purchases. The respondents construed the applicability of *Goldfarb* as limited by certain language in the opinion that described the activities of lawyers in the examination of titles as an inseparable and integral part of the interstate commerce in real estate financing. 421 U. S., at 784–785. In contrast, with respect to this case, respondents asserted on the basis of the affidavits that "the role of . . . real estate brokers in financing such purchases is neither integral nor inseparable." Respondents

contended (1) that the activities of respondent real estate brokers were purely local in nature; (2) that the allegation that respondents assisted in securing financing or insurance in connection with the purchase of real estate had been controverted by the affidavits; and, (3) that the conclusory assertion in the complaint that respondents' activities "are within the flow of interstate commerce and have an effect upon that commerce" was insufficient by itself to establish federal jurisdiction.

Petitioners' response to the motion to dismiss asserted that since adequate pretrial discovery up to that time had been precluded pursuant to a pretrial order, petitioners had not had a full opportunity to substantiate the jurisdictional allegations of their complaint. Petitioners advanced two independent theories to support federal jurisdiction: (1) that respondents' activities occurred within the stream of interstate commerce; and (2) that even if respondents' activities were wholly local in character they depended upon and affected the interstate flow of both services and people.

Accompanying the response was an affidavit stating that one of the named petitioners had employed the services of a respondent real estate broker to assist in an interstate relocation. There was also an affidavit from a loan guarantee officer of the Veterans' Administration disclosing that VA-insured loans for residential purchases in the Greater New Orleans area for the years 1973–1975 amounted to $46.3 million, $45.9 million, and $53.5 million, respectively.

After briefing on the jurisdictional issue, the District Court heard oral argument and received postargument briefs. The court then held a conference with counsel, the substance of which was carefully recorded in the minute entries by the District Judge:

> "The Court advised counsel that it appears plaintiffs may satisfy said jurisdictional requirement only by bringing the facts of this case within the parameters of the

> Supreme Court's holding in *Goldfarb v. Virginia State Bar*. . . . It is recognized, however, that further discovery is needed on the issue of *Goldfarb's* applicability *sub judice*. More specifically, such discovery should determine whether, in the first place, there is the requisite interdependence between the brokerage activity of defendants and the financing and/or insuring of real estate transactions in the New Orleans area and, secondly, whether there is a substantial involvement of interstate commerce in such real estate transactions *via* the financing and/or insurance aspects thereof."

Following this conference, petitioners deposed nine witnesses, who produced various documents. The deponents included government officials, real estate brokers, mortgage lenders, and real estate title insurers. This evidence was directed to establishing that an appreciable amount of interstate commerce was involved in various aspects of the purchase and sale of residential property in the Greater New Orleans area.

The deposition testimony of the president of Security Homestead Association, one of nearly 40 savings and loan institutions in the Greater New Orleans area, revealed that during the period covered by the complaint the Association lent in excess of $100 million for local purchases of residential property. The Association obtained loan capital from deposits by investors, some of whom lived out of state, and from borrowings from the Federal Home Loan Bank of Little Rock, Ark. Toward the close of the relevant period, the Association entered the interstate secondary mortgage market, in which existing mortgages were sold to raise new capital for future loans.

Another deponent was the president of Carruth Mortgage Corp., an Arkansas corporation doing business in Louisiana, Mississippi, and Texas. Its business was to originate home loans, then to sell the financial paper in the secondary mortgage market. The testimony showed that during the

relevant period Carruth made in excess of $100 million in loans on residential real estate in the Greater New Orleans area. The overwhelming proportion of these home loans was guaranteed by either the Federal Housing Administration or the Veterans' Administration. With respect to the FHA-guaranteed loans, Carruth collected and remitted premiums for the guarantee to the FHA in Washington, D. C., on a periodic basis for each account.

Both deponents testified that real estate brokers often play a role in securing financing information on behalf of a borrower and in bringing borrower and lender together, but that after the introductory phases the substance of the mortgage transaction progressed without the involvement of a real estate broker. The president of Carruth testified that his company required title insurance on all the home loans it made. This testimony was accompanied by the deposition of the president of Lawyers Title Insurance Co. of Louisiana, which revealed that each of the nearly 30 title insurance companies then writing coverage in the Greater New Orleans area was a subsidiary or branch of a corporation in another state.

Following the close of the discovery period and the filing of additional briefs, the District Court took the matter under submission and, having considered the memoranda of counsel and the relevant documents of record, issued a memorandum opinion and order granting the motion to dismiss the complaint. 432 F. Supp. 982 (1977). The court stated that the ground upon which respondents had challenged jurisdiction was that "brokerage activities are wholly intrastate in nature and, since they neither occur in nor substantially affect interstate commerce, are beyond the ambit of federal anti-trust prohibition." *Id.*, at 983. In line with the view expressed at the earlier conference, see *supra*, at 237–238, the District Court viewed the jurisdictional inquiry as narrowly confined: the question was whether the facts of this case

could be brought within the *Goldfarb* holding. In the District Court's view, "any inquiry based upon [*Goldfarb*] must be twofold: 1) whether a 'substantial' volume of interstate commerce is involved in the overall real estate transaction, and 2) whether the challenged activity is an essential, integral part of the transaction and inseparable from its interstate aspects." 432 F. Supp., at 984. The District Court assumed, *arguendo,* that the title insurance and financing aspects of the New Orleans residential real estate market were interstate in character, but ruled that federal jurisdiction was not established because in its view "the inescapable conclusion to be drawn from the evidence is that the participation of the broker in these (presumably interstate) phases of the real estate transaction is an incidental rather than indispensable occurrence in the transactional chain of events." *Id.,* at 985.

The United States Court of Appeals for the Fifth Circuit affirmed the dismissal of the complaint. 583 F. 2d 1315 (1978). Examining first the specific acts complained of in this case, the Court of Appeals concluded that they failed to satisfy the "in commerce" test. Realty was viewed as a quintessentially local product, and the brokerage activity described in the pleadings was found to occur wholly intrastate. *Id.,* at 1319. Second, that court rejected petitioners' "effect on commerce" argument. The interpretation of *Goldfarb* that had guided the District Court's analysis was adopted by the Court of Appeals, which ruled that "unlike the attorneys in *Goldfarb* whose participation in title insurance was statutorily mandated, real estate brokers are neither necessary nor integral participants in the 'interstate aspects' of realty financing and insurance." 583 F. 2d, at 1321–1323.

The Court of Appeals noted that the District Court had styled its judgment as a dismissal under Federal Rule of Civil Procedure 12 (b)(6) for failure to state a claim upon which relief could be granted, to be treated as a summary judgment insofar as matters outside of the pleadings were considered.

The Court of Appeals concluded that the appropriate designation of the dismissal was for lack of subject-matter jurisdiction under Rule 12 (b)(1), and affirmed the dismissal on that basis.

We granted certiorari. 441 U. S. 942.

II

A

The broad authority of Congress under the Commerce Clause has, of course, long been interpreted to extend beyond activities actually *in* interstate commerce to reach other activities that, while wholly local in nature, nevertheless substantially *affect* interstate commerce. *Wickard* v. *Filburn*, 317 U. S. 111 (1942); *United States* v. *Darby*, 312 U. S. 100 (1941). This Court has often noted the correspondingly broad reach of the Sherman Act. *Hospital Building Co.* v. *Rex Hospital Trustees*, 425 U. S. 738, 743 (1976); *United States* v. *Employing Plasterers Assn.*, 347 U. S. 186, 189 (1954); *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533, 558 (1944); *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U. S. 427, 435 (1932). During the near century of Sherman Act experience, forms and modes of business and commerce have changed along with changes in communication and travel, and innovations in methods of conducting particular businesses have altered relationships in commerce. Application of the Act reflects an adaptation to these changing circumstances. Compare *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 12–15 (1895), and *Hopkins* v. *United States*, 171 U. S. 578, 587–592 (1898), with *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U. S. 219, 231–235 (1948), and *United States* v. *Employing Plasterers Assn.*, *supra*, at 189.

The conceptual distinction between activities "in" interstate commerce and those which "affect" interstate commerce has been preserved in the cases, for Congress has seen fit to pre-

serve that distinction in the antitrust and related laws by limiting the applicability of certain provisions to activities demonstrably "in commerce." *United States* v. *American Building Maintenance Industries*, 422 U. S. 271 (1975); *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U. S. 186 (1974); *FTC* v. *Bunte Bros., Inc.*, 312 U. S. 349 (1941). It can no longer be doubted, however, that the jurisdictional requirement of the Sherman Act may be satisfied under either the "in commerce" or the "effect on commerce" theory. *Hospital Building Co.* v. *Rex Hospital Trustees, supra*, at 743; *Gulf Oil Corp.* v. *Copp Paving Co., supra*, at 194–195; *United States* v. *Women's Sportswear Manufacturers Assn.*, 336 U. S. 460, 464 (1949); *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co., supra*, at 235–237.

Although the cases demonstrate the breadth of Sherman Act prohibitions, jurisdiction may not be invoked under that statute unless the relevant aspect of interstate commerce is identified; it is not sufficient merely to rely on identification of a relevant local activity and to presume an interrelationship with some unspecified aspect of interstate commerce. To establish jurisdiction a plaintiff must allege the critical relationship in the pleadings and if these allegations are controverted must proceed to demonstrate by submission of evidence beyond the pleadings either that the defendants' activity is itself in interstate commerce or, if it is local in nature, that it has an effect on some other appreciable activity demonstrably in interstate commerce. *Gulf Oil Corp.* v. *Copp Paving Co., supra*, at 202.

To establish the jurisdictional element of a Sherman Act violation it would be sufficient for petitioners to demonstrate a substantial effect on interstate commerce generated by respondents' brokerage activity. Petitioners need not make the more particularized showing of an effect on interstate commerce caused by the alleged conspiracy to fix commission rates, or by those other aspects of respondents' activity that

are alleged to be unlawful. The validity of this approach is confirmed by an examination of the case law. If establishing jurisdiction required a showing that the unlawful conduct itself had an effect on interstate commerce, jurisdiction would be defeated by a demonstration that the alleged restraint failed to have its intended anticompetitive effect. This is not the rule of our cases. See *American Tobacco Co.* v. *United States*, 328 U. S. 781, 811 (1946); *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 225, n. 59 (1940). A violation may still be found in such circumstances because in a civil action under the Sherman Act, liability may be established by proof of *either* an unlawful purpose or an anticompetitive effect. *United States* v. *United States Gypsum Co.*, 438 U. S. 422, 436, n. 13 (1978); see *United States* v. *Container Corp.*, 393 U. S. 333, 337 (1969); *United States* v. *National Assn. of Real Estate Boards*, 339 U. S. 485, 489 (1950); *United States* v. *Socony-Vacuum Oil Co.*, *supra*, at 224–225, n. 59.

Nor is jurisdiction defeated in a case relying on anticompetitive effects by plaintiff's failure to quantify the adverse impact of defendant's conduct. See *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U. S. 100, 123–125 (1969); *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U. S. 251, 265–266 (1946). Even where there is an inability to prove that concerted activity has resulted in legally cognizable damages, jurisdiction need not be impaired, though such a failure may confine the available remedies to injunctive relief. See *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, 452–463 (1945); *Keogh* v. *Chicago & N. W. R. Co.*, 260 U. S. 156 (1922).

B

The interpretation and application of our holding in *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773 (1975), has figured prominently in this case. The District Court held that petitioners could establish federal jurisdiction only if the facts of

this case could be brought within *Goldfarb*. As previously noted, as interpreted by that court, "any inquiry based upon [*Goldfarb*] must be twofold: 1) whether a 'substantial' volume of interstate commerce is involved in the overall real estate transaction, and 2) whether the challenged activity is an essential, intergral part of the transaction and inseparable from its interstate aspects." 432 F. Supp., at 984. The Court of Appeals took a similar view of *Goldfarb*, holding that Sherman Act jurisdiction did not exist because petitioners had failed to demonstrate that real estate brokers are either necessary or integral participants in the interstate aspects of residential real estate financing and title insurance. 583 F. 2d, at 1322.

It is with the second phase of the analysis of the District Court and of the Court of Appeals that we disagree. The facts of *Goldfarb* revealed an application of the state bar association's minimum-fee schedule to fix fees for attorneys' title examination services. Since the financing depended on a valid and insured title we concluded that title examination was "an integral part" of the interstate transaction of obtaining financing for the purchase of residential property and, because of the "inseparability" of the attorneys' services from the title examination process, we held that the legal services were in turn an "integral part of an interstate transaction." 421 U. S., at 784–785. By placing the *Goldfarb* holding on the available ground that the activities of the attorneys were within the stream of interstate commerce, Sherman Act jurisdiction was established. The *Goldfarb* holding was not addressed to the "effect on commerce" test of jurisdiction and in no way restricted it to those challenged activities that have an integral relationship to an activity in interstate commerce. To adopt the restrictive interpretation urged upon us by respondents would return to a jurisdictional analysis under the Sherman Act of an era long past. It has been more than 30 years since this Court stated: "At this late day we are not

willing to take that long backward step." *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U. S., at 235.

C

On the record thus far made, it cannot be said that there is an insufficient basis for petitioners to proceed at trial to establish Sherman Act jurisdiction. It is clear that an appreciable amount of commerce is involved in the financing of residential property in the Greater New Orleans area and in the insuring of titles to such property. The presidents of two of the many lending institutions in the area stated in their deposition testimony that those institutions committed hundreds of millions of dollars to residential financing during the period covered by the complaint. The testimony further demonstrates that this appreciable commercial activity has occurred in interstate commerce. Funds were raised from out-of-state investors and from interbank loans obtained from interstate financial institutions. Multistate lending institutions took mortgages insured under federal programs which entailed interstate transfers of premiums and settlements. Mortgage obligations physically and constructively were traded as financial instruments in the interstate secondary mortgage market. Before making a mortgage loan in the Greater New Orleans area, lending institutions usually, if not always, required title insurance, which was furnished by interstate corporations. Reading the pleadings, as supplemented, most favorably to petitioners, for present purposes we take these facts as established.

At trial, respondents will have the opportunity, if they so choose, to make their own case contradicting this factual showing. On the other hand, it may be possible for petitioners to establish that, apart from the commerce in title insurance and real estate financing, an appreciable amount of interstate commerce is involved with the local residential real estate market arising out of the interstate movement of people, or otherwise.

To establish federal jurisdiction in this case, there remains only the requirement that respondents' activities which allegedly have been infected by a price-fixing conspiracy be shown "as a matter of practical economics" to have a not insubstantial effect on the interstate commerce involved. *Hospital Building Co.* v. *Rex Hospital Trustees*, 425 U. S., at 745; see *Goldfarb* v. *Virginia State Bar, supra*, at 784, n. 11; *Burke* v. *Ford*, 389 U. S. 320, 321–322 (1967). It is clear, as the record shows, that the function of respondent real estate brokers is to bring the buyer and seller together on agreeable terms. For this service the broker charges a fee generally calculated as a percentage of the sale price. Brokerage activities necessarily affect both the frequency and the terms of residential sales transactions. Ultimately, whatever stimulates or retards the volume of residential sales, or has an impact on the purchase price, affects the demand for financing and title insurance, those two commercial activities that on this record are shown to have occurred in interstate commerce. Where, as here, the services of respondent real estate brokers are often employed in transactions in the relevant market, petitioners at trial may be able to show that respondents' activities have a not insubstantial effect on interstate commerce.

It is axiomatic that a complaint should not be dismissed unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson*, 355 U. S. 41, 45–46 (1957); see 5 C. Wright & A. Miller, Federal Practice and Procedure §§ 1202, 1205–1207, 1215–1224, 1228 (1969). This rule applies with no less force to a Sherman Act claim, where one of the requisites of a cause of action is the existence of a demonstrable nexus between the defendants' activity and interstate commerce. Here, what was submitted to the District Court shows a sufficient basis for satisfying the Act's jurisdictional requirements under the effect-on-commerce theory so as to

entitle the petitioners to go forward. We therefore conclude that it was error to dismiss the complaint at this stage of the proceedings. The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

Vacated and remanded.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

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THOMPSON *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 79-5180. Decided January 14, 1980

The Court of Appeals, in affirming petitioner's conviction, accepted the Government's position that there had been no violation of the Department of Justice's *"Petite"* policy—whereby United States attorneys are forbidden to prosecute any person if the allegedly criminal behavior was an ingredient of a previous state prosecution against that person (as in the instant case), except where federal prosecution is specifically authorized in advance by the Department itself upon a finding that the prosecution will serve compelling interests of federal law enforcement. But in this Court the Solicitor General conceded that the United States Attorney had not obtained the proper authorization before bringing the prosecution.

Held: This Court will vacate the Court of Appeals' judgment and remand the case for that court's reconsideration in light of the Government's present position, rather than, as requested by the Government, vacate the Court of Appeals' judgment and remand the case to the District Court with instructions to grant the Government's motion to dismiss the indictment.

Certiorari granted; 601 F. 2d 591, vacated and remanded.

PER CURIAM.

The Department of Justice has a firmly established policy, known as the *"Petite"* policy, under which United States Attorneys are forbidden to prosecute any person for allegedly criminal behavior if the alleged criminality was an ingredient of a previous state prosecution against that person. An exception is made only if the federal prosecution is specifically authorized in advance by the Department itself, upon a finding that the prosecution will serve "compelling interests of federal law enforcement." [1]

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[1] Promulgated in the wake of this Court's decision in *Abbate* v. *United States,* 359 U. S. 187 (1959), the policy was first recognized by the Court

In this case the Solicitor General has advised us that this established Department policy was violated. Accordingly, he urges the Court "to permit the effectuation of the government's policy against successive prosecutions by granting the petition, vacating the judgment of the court of appeals, and remanding the case to the district court with instructions to grant the government's motion to dismiss the indictment."

In 1978, the petitioner was brought to trial in a Kentucky court on a charge of armed burglary, and was convicted by a jury of a lesser included offense. He was then prosecuted and convicted in a Federal District Court on a charge of unlawfully possessing a firearm—a charge that grew out of the same criminal transaction that had been the basis of the Kentucky prosecution. This federal conviction was affirmed by the Court of Appeals for the Sixth Circuit, which accepted the Government's then position that the *"Petite"* policy had not been violated.[2]

The Solicitor General now concedes that the United States Attorney did not obtain the authorization required under the established Department policy before bringing the federal prosecution. Moreover, "after careful review [of whether to grant *nunc pro tunc* authorization,]" the Solicitor General has concluded "that petitioner's prosecution for unlawfully possessing a firearm was not supported by an independent compelling federal interest not satisfied by the state prosecution for armed burglary."

Ever since the Justice Department established the *"Petite"* policy in 1959, the Court has consistently responded to requests by the Government in cases such as this by granting certiorari and vacating the judgments. See, *e. g.*, *Hammons* v. *United States*, 439 U. S. 810 (1978); *Frakes* v. *United*

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in *Petite* v. *United States*, 361 U. S. 529, 531 (1960). It has since been known as the *"Petite"* policy.

[2] The *per curiam* opinion of the Court of Appeals is unreported, but the affirmance order is reported at 601 F. 2d 591.

States, 435 U. S. 911 (1978); *Rinaldi* v. *United States*, 434 U. S. 22 (1977); *Croucher* v. *United States*, 429 U. S. 1034 (1977); *Watts* v. *United States*, 422 U. S. 1032 (1975); *Ackerson* v. *United States*, 419 U. S. 1099 (1975); *Hayles* v. *United States*, 419 U. S. 892 (1974); *Thompson* v. *United States*, 400 U. S. 17 (1970); *Marakar* v. *United States*, 370 U. S. 723 (1962); *Petite* v. *United States*, 361 U. S. 529 (1960).

This practice, which rests on the power of the Court to "afford relief which is 'just under the circumstances,' 28 U. S. C. § 2106," *Rinaldi* v. *United States*, *supra*, at 25, n. 8, is not unique to violations of the "*Petite*" policy. The Court has also consistently vacated the judgments in other cases which the Solicitor General has represented were in violation of other Justice Department policies. See, *e. g.*, *Blucher* v. *United States*, 439 U. S. 1061 (1979) (obscenity prosecution); *Nunley* v. *United States*, 434 U. S. 962 (1977) (prosecution for willfully making false statements concerning matters within jurisdiction of the Department of Treasury); *Margraf* v. *United States*, 414 U. S. 1106 (1973) (prosecution for carrying a "concealed deadly or dangerous" weapon while boarding an aircraft); *Robison* v. *United States*, 390 U. S. 198 (1968) (addition of counts upon retrial); *Redmond* v. *United States*, 384 U. S. 264 (1966) (obscenity prosecution).

The instant case differs from this long line of decisions only in that here the Government mistakenly, and successfully, represented to the Court of Appeals that Justice Department policy had not been violated. Because of this circumstance, we do not accept the Solicitor General's suggestion. Rather, in response to his suggestion and upon an independent examination of the record, we grant leave to proceed *in forma pauperis* and certiorari, vacate the judgment, and remand the case to the Court of Appeals for reconsideration in light of the Government's present position. This course is one that the Court has frequently taken when, as here, the Government has changed its position while a criminal case is pending on

petition for certiorari. See, *e. g., Garner* v. *United States,* 430 U. S. 942 (1977).

It is so ordered.

THE CHIEF JUSTICE and MR. JUSTICE WHITE dissent.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE REHNQUIST joins, dissents for the reason that in this case the United States already has presented the *"Petite"* policy issue to the Court of Appeals and that court has passed upon the issue adversely to the Government's present position.

VANCE, SECRETARY OF STATE *v.* TERRAZAS

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 78-1143. Argued October 30, 1979—Decided January 15, 1980

Section 349 (a)(2) of the Immigration and Nationality Act provides that "a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by . . . taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state or a political subdivision thereof." Section 349 (c) provides that the party claiming such loss of citizenship must "establish such claim by a preponderance of the evidence" and that a person who commits any act of expatriation "shall be presumed to have done so voluntarily, but such presumption may be rebutted upon a showing, by a preponderance of the evidence, that the act or acts committed or performed were not done voluntarily." Appellee, who was a citizen of both the United States and Mexico at birth, subsequently obtained a certificate of Mexican citizenship after executing an application in which he swore allegiance to Mexico and expressly renounced his United States citizenship. Thereafter, the Department of State issued a certificate of loss of nationality, and the Board of Appellate Review of the Department of State affirmed. Appellee then brought suit for a declaration of his United States nationality, but the District Court concluded that the United States had proved by a preponderance of the evidence that appellee had knowingly and voluntarily taken an oath of allegiance to Mexico and renounced allegiance to the United States, thus voluntarily relinquishing United States citizenship pursuant to § 349 (a)(2). The Court of Appeals reversed and remanded, holding that Congress had no power to legislate the evidentiary standard contained in § 349 (c) and that the Constitution required that proof be not merely by a preponderance of the evidence, but by "clear, convincing and unequivocal evidence."

Held:

1. In establishing loss of citizenship, the Government must prove an intent to surrender United States citizenship, not just the voluntary commission of an expatriating act such as swearing allegiance to a foreign nation. Congress does not have any general power to take away an American citizen's citizenship without his "assent," which means an intent to relinquish citizenship, whether the intent is expressed in

words or is found as a fair inference from his conduct. The expatriating acts specified in § 349 (a) cannot be treated as conclusive evidence of the indispensable voluntary assent of the citizen. The trier of fact must in the end conclude that the citizen not only voluntarily committed the expatriating act prescribed in the statute, but also intended to relinquish his citizenship. Cf. *Afroyim* v. *Rusk*, 387 U. S. 253. Pp. 258–263.

2. However, the Constitution permits Congress to prescribe the standard of proof in expatriation proceedings. The specific evidentiary standard provided in § 349 (c) is not invalid under either the Citizenship Clause of the Fourteenth Amendment or the Due Process Clause of the Fifth Amendment. Although the Due Process Clause imposes requirements of proof beyond a preponderance of the evidence in criminal and involuntary commitment contexts, nevertheless expatriation proceedings are civil in nature and do not threaten a loss of liberty, and thus Congress did not exceed its powers by requiring proof of an intentional expatriating act by only a preponderance of evidence. Pp. 264–267.

3. Nor is the presumption of voluntariness provided in § 349 (c) constitutionally infirm. While the statute provides that any of the statutory expatriating acts, if proved, is presumed to have been committed voluntarily, it does not also direct a presumption that the act has been performed with the intent to relinquish United States citizenship, which matter remains the burden of the party claiming expatriation to prove by a preponderance of the evidence. Section 349 (c) and its legislative history make clear that Congress preferred the ordinary rule that voluntariness of an act is presumed and that duress is an affirmative defense to be proved by the party asserting it, and to invalidate the rule here would give the Citizenship Clause far more scope in this context than the relevant circumstances that brought the Fourteenth Amendment into being would suggest appropriate. Pp. 267–270.

577 F. 2d 7, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, and REHNQUIST, JJ., joined. MARSHALL, J., *post*, p. 270, and STEVENS, J., *post*, p. 272, filed opinions concurring in part and dissenting in part. BRENNAN, J., filed a dissenting opinion, in Part II of which STEWART, J., joined, *post*, p. 274. STEWART, J., filed a dissenting statement, *post*, p. 270.

Allan A. Ryan, Jr., argued the cause for appellant. With him on the briefs were *Solicitor General McCree, Assistant*

Attorney General Heymann, Deputy Solicitor General Geller, William G. Otis, and *William C. Brown.*

Kenneth K. Ditkowsky argued the cause and filed a brief for appellee.

MR. JUSTICE WHITE delivered the opinion of the Court.

Section 349 (a)(2) of the Immigration and Nationality Act (Act), 66 Stat. 267, 8 U. S. C. § 1481 (a)(2), provides that "a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by . . . taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state or a political subdivision thereof." The Act also provides that the party claiming such loss of citizenship must "establish such claim by a preponderance of the evidence" and that the voluntariness of the expatriating conduct is rebuttably presumed. § 349 (c), as added, 75 Stat. 656, 8 U. S. C. § 1481 (c).[1] The

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[1] The relevant statutory provisions are §§ 349 (a)(2), (c) of the Act, 66 Stat. 267, as amended, 75 Stat. 656, as set forth in 8 U. S. C. § 1481:

"(a) From and after the effective date of this chapter a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by—

. . . . .

"(2) taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state or a political subdivision thereof;

. . . . .

"(c) Whenever the loss of United States nationality is put in issue in any action or proceeding commenced on or after September 26, 1961 under, or by virtue of, the provisions of this chapter or any other Act, the burden shall be upon the person or party claiming that such loss occurred, to establish such claim by a preponderance of the evidence. Except as otherwise provided in subsection (b) of this section, any person who commits or performs, or who has committed or performed, any act of expatriation under the provisions of this chapter or any other Act shall be presumed to have done so voluntarily, but such presumption may be rebutted upon a showing, by a preponderance of the evidence, that the act or acts committed or performed were not done voluntarily."

issues in this case are whether, in establishing loss of citizenship under § 1481 (a)(2), a party must prove an intent to surrender United States citizenship and whether the United States Constitution permits Congress to legislate with respect to expatriation proceedings by providing the standard of proof and the statutory presumption contained in § 1481 (c).

I

Appellee, Laurence J. Terrazas, was born in this country, the son of a Mexican citizen. He thus acquired at birth both United States and Mexican citizenship. In the fall of 1970, while a student in Monterrey, Mexico, and at the age of 22, appellee executed an application for a certificate of Mexican nationality, swearing "adherence, obedience, and submission to the laws and authorities of the Mexican Republic" and "expressly renounc[ing] United States citizenship, as well as any submission, obedience, and loyalty to any foreign government, especially to that of the United States of America. . . ." App. to Brief for Appellant 5a.[2] The certificate, which issued upon this application on April 3, 1971, recited that Terrazas had sworn adherence to the United Mexican States and that he "has expressly renounced all rights inherent to any other nationality, as well as all submission, obedience, and loyalty to any foreign government, especially to those which have recognized him as that na-

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[2] The application contained the following statement:

"I therefore hereby expressly renounce ..... citizenship, as well as any submission, obedience, and loyalty to any foreign government, especially to that of ....., of which I might have been subject, all protection foreign to the laws and authorities of Mexico, all rights which treaties or international law grant to foreigners; and furthermore I swear adherence, obedience, and submission to the laws and authorities of the Mexican Republic."

The blank spaces in the statement were filled in with the words "Estados Unidos" (United States) and "Norteamerica" (North America), respectively. Brief for Appellant 4.

tional." *Id.*, at 8a. Terrazas read and understood the certificate upon receipt. App. to Juris. Statement 21a.

A few months later, following a discussion with an officer of the United States Consulate in Monterrey, proceedings were instituted to determine whether appellee had lost his United States citizenship by obtaining the certificate of Mexican nationality. Appellee denied that he had, but in December 1971 the Department of State issued a certificate of loss of nationality. App. to Brief for Appellant 31a. The Board of Appellate Review of the Department of State, after a full hearing, affirmed that appellee had voluntarily renounced his United States citizenship. App. to Juris. Statement 31a. As permitted by § 360 (a) of the Act, 66 Stat. 273, 8 U. S. C. § 1503 (a), appellee then brought this suit against the Secretary of State for a declaration of his United States nationality. Trial was *de novo*.

The District Court recognized that the first sentence of the Fourteenth Amendment,[3] as construed in *Afroyim* v. *Rusk*, 387 U. S. 253, 268 (1967), " 'protect[s] every citizen of this Nation against a congressional forcible destruction of his citizenship' " and that every citizen has " 'a constitutional right to remain a citizen . . . unless he voluntarily relinquishes that citizenship.' " App. to Juris. Statement 25a. A person of dual nationality, the District Court said, "will be held to have expatriated himself from the United States when it is shown that he voluntarily committed an act whereby he unequivocally renounced his allegiance to the United States." *Ibid.* Specifically, the District Court found that appellee had taken an oath of allegiance to Mexico, that he had "knowingly and understandingly renounced allegiance to the United States in connection with his Application for a Certificate of Mexican Nationality," *id.*, at 28a, and that "[t]he taking of

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[3] The Fourteenth Amendment, § 1 reads: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

an oath of allegiance to Mexico and renunciation of a foreign country [*sic*] citizenship is a condition precedent under Mexican law to the issuance of a Certificate of Mexican Nationality." *Ibid.* The District Court concluded that the United States had "proved by a preponderance of the evidence that Laurence J. Terrazas knowingly, understandingly and voluntarily took an oath of allegiance to Mexico, and concurrently renounced allegiance to the United States," *id.*, at 29a, and that he had therefore "voluntarily relinquished United States citizenship pursuant to § 349 (a)(2) of the . . . Act." *Ibid.*

In its opinion accompanying its findings and conclusions, the District Court observed that appellee had acted "voluntarily in swearing allegiance to Mexico and renouncing allegiance to the United States," *id.*, at 25a, and that appellee "knew he was repudiating allegiance to the United States through his actions." *Ibid.* The court also said, relying upon and quoting from *United States* v. *Matheson*, 400 F. Supp. 1241, 1245 (SDNY 1975), aff'd, 532 F. 2d 809 (CA2), cert. denied, 429 U. S. 823 (1976), that "the declaration of allegiance to a foreign state in conjunction with the renunciatory language of United States citizenship 'would leave no room for ambiguity as to the intent of the applicant.'" App. to Juris. Statement 23a.

The Court of Appeals reversed. 577 F. 2d 7 (1978). As the Court of Appeals understood the law—and there appears to have been no dispute on these basic requirements in the Courts of Appeals—the United States had not only to prove the taking of an oath to a foreign state, but also to demonstrate an intent on appellee's part to renounce his United States citizenship. The District Court had found these basic elements to have been proved by a preponderance of the evidence; and the Court of Appeals observed that, "[a]ssuming that the proper [evidentiary] standards were applied, we are convinced that the record fully supports the court's findings." *Id.*, at 10. The Court of Appeals ruled, however, that under *Afroyim* v. *Rusk*, *supra*, Congress had no power to legislate the

evidentiary standard contained in § 1481 (c) and that the Constitution required that proof be not merely by a preponderance of the evidence, but by "clear, convincing and unequivocal evidence." 577 F. 2d, at 11. The case was remanded to the District Court for further proceedings.[4]

The Secretary took this appeal under 28 U. S. C. § 1252. Because the invalidation of § 1481 (c) posed a substantial constitutional issue, we noted probable jurisdiction. 440 U. S. 970.

II

The Secretary first urges that the Court of Appeals erred in holding that a "specific intent to renounce U. S. citizenship" must be proved "before the mere taking of an oath of allegiance could result in an individual's expatriation." 577 F. 2d, at 11.[5] His position is that he need prove only the

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[4] In remanding the case to the District Court, the Court of Appeals did not "necessarily requir[e] that court to conduct a new trial." 577 F. 2d, at 12. The Court of Appeals recognized that, even granting the higher standard of proof it had imposed on the District Court, the factual determinations already on the record might be adequate to permit consideration of the case on remand without the holding of another trial or evidentiary hearing. *Ibid.*

[5] The Court of Appeals' discussion of specific intent is submerged in its analysis of proper evidentiary standards. *Id.*, at 11. The absence of independent analysis undoubtedly resulted from the Secretary's failure to contend in either the District Court or the Court of Appeals that it was unnecessary to prove an intent to relinquish citizenship. Indeed, the jurisdictional statement filed by the Secretary in this Court presented the single question whether 8 U. S. C. § 1481 (c) is unconstitutional under the Citizenship Clause of the Fourteenth Amendment; it did not present separately the question whether proof of a specific intent to relinquish is essential to expatriation.

Our Rule 15 (1)(c) states that "[o]nly the questions set forth in the jurisdictional statement or fairly comprised therein will be considered by the court." The Secretary now argues that resolution of the intent issue is an essential, or at least an advisable, predicate to an intelligent resolution of the constitutionality of § 1481 (c). There is some merit in this position: arguably the intent issue is fairly comprised in the question set

voluntary commission of an act, such as swearing allegiance to a foreign nation, that "is so inherently inconsistent with the continued retention of American citizenship that Congress may accord to it its natural consequences, *i. e.*, loss of nationality." Brief for Appellant 24. We disagree.

In *Afroyim* v. *Rusk*, 387 U. S. 253 (1967), the Court held that § 401 (e) of the Nationality Act of 1940, 54 Stat. 1168–1169, which provided that an American citizen "shall lose his nationality by . . . [v]oting in a political election in a foreign state," contravened the Citizenship Clause of the Fourteenth Amendment. Afroyim was a naturalized American citizen who lived in Israel for 10 years. While in that nation, Afroyim voted in a political election. He in consequence was stripped of his United States citizenship. Consistently with *Perez* v. *Brownell*, 356 U. S. 44 (1958), which had sustained § 401 (e), the District Court affirmed the power of Congress to expatriate for such conduct regardless of the citizen's intent to renounce his citizenship. This Court, however, in overruling *Perez*, "reject[ed] the idea . . . that, aside from the Four-

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forth in the jurisdictional statement. In any event, consideration of issues not present in the jurisdictional statement or petition for certiorari and not presented in the Court of Appeals is not beyond our power, and in appropriate circumstances we have addressed them. *Blonder-Tongue Laboratories, Inc.* v. *University Foundation*, 402 U. S. 313, 320, n. 6 (1971); *Erie R. Co. v. Tompkins*, 304 U. S. 64, 66, 68–69 (1938) (parties agreed that *Swift* v. *Tyson*, 16 Pet. 1 (1842), was still good law). Cf. *Vachon* v. *New Hampshire*, 414 U. S. 478 (1974); *Moragne* v. *States Marine Lines*, 398 U. S. 375 (1970); *Silber* v. *United States*, 370 U. S. 717 (1962). See generally R. Stern & E. Gressman, Supreme Court Practice §§ 6.27 & 7.14 (5th ed. 1978).

As will be more apparent below, the Secretary, represented in this Court by the Solicitor General, has changed his position on the intent issue since the decision of the Court of Appeals; and his present position is at odds with a 1969 opinion of the Attorney General, 42 Op. Atty. Gen. 397, which interpreted *Afroyim* v. *Rusk* and guided the administrative actions of the State Department and the Immigration and Naturalization Service. The issue of intent is important, the parties have briefed it, and we shall address it.

teenth Amendment, Congress has any general power, express or implied, to take away an American citizen's citizenship without his assent." *Afroyim* v. *Rusk, supra*, at 257. The *Afroyim* opinion continued: § 1 of the Fourteenth Amendment is "most reasonably . . . read as defining a citizenship which a citizen keeps unless he voluntarily relinquishes it." 387 U. S., at 262.

The Secretary argues that *Afroyim* does not stand for the proposition that a specific intent to renounce must be shown before citizenship is relinquished. It is enough, he urges, to establish one of the expatriating acts specified in § 1481 (a) because Congress has declared each of those acts to be inherently inconsistent with the retention of citizenship. But *Afroyim* emphasized that loss of citizenship requires the individual's "assent," 387 U. S., at 257, in addition to his voluntary commission of the expatriating act. It is difficult to understand that "assent" to loss of citizenship would mean anything less than an intent to relinquish citizenship, whether the intent is expressed in words or is found as a fair inference from proven conduct. *Perez* had sustained congressional power to expatriate without regard to the intent of the citizen to surrender his citizenship. *Afroyim* overturned this proposition. It may be, as the Secretary maintains, that a requirement of intent to relinquish citizenship poses substantial difficulties for the Government in performance of its essential task of determining who is a citizen. Nevertheless, the intent of the Fourteenth Amendment, among other things, was to define citizenship; and as interpreted in *Afroyim*, that definition cannot coexist with a congressional power to specify acts that work a renunciation of citizenship even absent an intent to renounce. In the last analysis, expatriation depends on the will of the citizen rather than on the will of Congress and its assessment of his conduct.

The Secretary argues that the dissent in *Perez*, which it is said the Court's opinion in *Afroyim* adopted, spoke of con-

duct so contrary to undivided allegiance to this country that it could result in loss of citizenship without regard to the intent of the actor and that "assent" should not therefore be read as a code word for intent to renounce. But *Afroyim* is a majority opinion, and its reach is neither expressly nor implicitly limited to that of the dissent in *Perez*. Furthermore, in his *Perez* dissent, Mr. Chief Justice Warren, in speaking of those acts that were expatriating because so fundamentally inconsistent with citizenship, concluded by saying that in such instances the "Government is simply giving formal recognition to the inevitable consequence of the citizen's own voluntary surrender of his citizenship." *Perez* v. *Brownell, supra,* at 69. This suggests that the Chief Justice's conception of "actions in derogation of undivided allegiance to this country," 356 U. S., at 68, in fact would entail an element of assent.

In any event, we are confident that it would be inconsistent with *Afroyim* to treat the expatriating acts specified in § 1481 (a) as the equivalent of or as conclusive evidence of the indispensable voluntary assent of the citizen. "Of course," any of the specified acts "may be highly persuasive evidence in the particular case of a purpose to abandon citizenship." *Nishikawa* v. *Dulles,* 356 U. S. 129, 139 (1958) (Black, J., concurring). But the trier of fact must in the end conclude that the citizen not only voluntarily committed the expatriating act prescribed in the statute, but also intended to relinquish his citizenship.

This understanding of *Afroyim* is little different from that expressed by the Attorney General in his 1969 opinion explaining the impact of that case. 42 Op. Atty. Gen. 397. An "act which does not reasonably manifest an individual's transfer or abandonment of allegiance to the United States," the Attorney General said, "cannot be made a basis for expatriation." *Id.,* at 400. Voluntary relinquishment is "not confined to a written renunciation," but "can also be

manifested by other actions declared expatriative under the [A]ct, if such actions are in derogation of allegiance to this country." *Ibid.* Even in these cases, however, the issue of intent was deemed by the Attorney General to be open; and once raised, the burden of proof on the issue was on the party asserting that expatriation had occurred. *Ibid.* "In each case," the Attorney General stated, "the administrative authorities must make a judgment, based on all the evidence, whether the individual comes within the terms of an expatriation provision and has in fact voluntarily relinquished his citizenship." *Id.*, at 401. It was under this advice, as the Secretary concedes, that the relevant departments of the Government have applied the statute and the Constitution to require an ultimate finding of an intent to expatriate. Brief for Appellant 56–57, n. 28.[6]

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[6] As the Secretary states in his brief, Brief for Appellant 57, n. 28, "both the State Department and the Immigration and Naturalization Service have adopted administrative guidelines that attempt to ascertain the individual's intent by taking into consideration the nature of the expatriating act and the individual's statements and actions made in connection with that act."

The State Department's guideline evidences a position on intent quite similar to that adopted here:

"In the light of the *Afroyim* decision and the Attorney General's Statement of Interpretation of that decision, the Department now holds that the taking of a *meaningful* oath of allegiance to a foreign state is highly persuasive evidence of an intent to transfer or abandon allegiance. The taking of an oath that is not meaningful does not result in expatriation. The meaningfulness of the oath must be decided by the Department on the individual merits of each case." Department of State, 8 Foreign Affairs Manual § 224.2, p. 2 (1970) (emphasis in original).

Cf. Immigration and Naturalization Service, Interpretations § 349.1 (d)(2), p. 6976.4 (1970) (characterizing *Afroyim* as overruling *Perez's* holding "that expatriation could flow from a voluntary act even though the citizen did not intend thereby to relinquish his United States citizenship").

Contemporaneous academic commentary agreed that *Afroyim* imposed the requirement of intent to relinquish citizenship on a party seeking to

Accordingly, in the case now before us, the Board of Appellate Review of the State Department found that appellee not only swore allegiance to Mexico, but also intended to abandon his United States citizenship: "In consideration of the complete record, we view appellant's declaration of allegiance to Mexico and his concurrent repudiation of any and all submission, obedience, and loyalty to the United States as compelling evidence of a specific intent to relinquish his United States citizenship." App. to Juris. Statement 50a. This same view—that expatriation depends on the will of a citizen as ascertained from his words and conduct—was also reflected in the United States' response to the petition for certiorari in *United States* v. *Matheson*, 532 F. 2d 809, cert. denied, 429 U. S. 823 (1976).[7] Insofar as we are advised, this view remained the official position of the United States until the appeal in this case.

As we have said, *Afroyim* requires that the record support a finding that the expatriating act was accompanied by an intent to terminate United States citizenship. The submission of the United States is inconsistent with this holding, and we are unprepared to reconsider it.

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establish expatriation. See Comment, An Expatriation Enigma: Afroyim v. Rusk, 48 B. U. L. Rev. 295, 298 (1968); Note, Acquisition of Foreign Citizenship: The Limits of *Afroyim* v. *Rusk*, 54 Cornell L. Rev. 624, 624–625 (1969); The Supreme Court: 1966 Term, 81 Harv. L. Rev. 69, 126 (1967); Note, 29 Ohio St. L. J. 797, 801 (1968).

[7] In his response to the petition for certiorari in *Matheson*, the Solicitor General argued that "*Afroyim* broadly held that Congress has no power to prescribe any objective conduct that will automatically result in expatriation, absent the individual's voluntary relinquishment of citizenship. . . ." Brief in Opposition in *Matheson* v. *United States*, O. T. 1976, No. 75–1651, p. 8. In *Matheson*, it was maintained, "there is nothing in the record that would support a finding that decedent's application for a certificate of Mexican nationality was prompted by a specific intent to relinquish her American citizenship." *Id.*, at 7. Thus, the Solicitor General concluded no expatriation could be said to have taken place.

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III

With respect to the principal issues before it, the Court of Appeals held that Congress was without constitutional authority to prescribe the standard of proof in expatriation proceedings and that the proof in such cases must be by clear and convincing evidence rather than by the preponderance standard prescribed in § 1481 (c). We are in fundamental disagreement with these conclusions.

In *Nishikawa* v. *Dulles*, 356 U. S. 129 (1958), an American-born citizen, temporarily in Japan, was drafted into the Japanese Army. The Government later claimed that, under § 401 (c) of the Nationality Act of 1940, 54 Stat. 1169, he had expatriated himself by serving in the armed forces of a foreign nation. The Government agreed that expatriation had not occurred if Nishikawa's army service had been involuntary. Nishikawa contended that the Government had to prove that his service was voluntary, while the Government urged that duress was an affirmative defense that Nishikawa had the burden to prove by overcoming the usual presumption of voluntariness. This Court held the presumption unavailable to the Government and required proof of a voluntary expatriating act by clear and convincing evidence.

Section 1481 (c) soon followed; its evident aim was to supplant the evidentiary standards prescribed by *Nishikawa*.[8]

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[8] The House Report accompanying § 1481 (c), H. R. Rep. No. 1086, 87th Cong., 1st Sess., 40 (1961), took direct aim at *Nishikawa's* holding that "the Government must in each case prove voluntary conduct by clear, convincing and unequivocal evidence." *Nishikawa* v. *Dulles*, 356 U. S., at 138. The Report quoted with approval from Mr. Justice Harlan's dissenting opinion in *Nishikawa:*

"'Although the Court recognizes the general rule that consciously performed acts are presumed voluntary [citations omitted], it in fact alters this rule in all denationalization cases by placing the burden of proving voluntariness on the Government, thus relieving citizen-claimants in such cases from the duty of proving that their presumably voluntary acts were actually involuntary.

"'One of the prime reasons for imposing the burden of proof on the

The provision "sets up rules of evidence under which the burden of proof to establish loss of citizenship by preponderance of the evidence would rest upon the Government. The presumption of voluntariness under the proposed rules of evidence, would be rebuttable—similarly—by preponderance of the evidence. . . ." H. R. Rep. No. 1086, 87th Cong., 1st Sess., 41 (1961).

We see no basis for invalidating the evidentiary prescriptions contained in § 1481 (c). *Nishikawa* was not rooted in the Constitution. The Court noted, moreover, that it was acting in the absence of legislative guidance. *Nishikawa* v. *Dulles*, 356 U. S., at 135. Nor do we agree with the Court of Appeals that, because under *Afroyim* Congress is constitutionally devoid of power to impose expatriation on a citizen, it is also without power to prescribe the evidentiary standards to govern expatriation proceedings. 577 F. 2d, at 10. Although § 1481 (c) had been law since 1961, *Afroyim* did not address or advert to that section; surely the Court would have said so had it intended to construe the Constitution to exclude expatriation proceedings from the traditional powers of Congress to prescribe rules of evidence and standards of proof in the federal courts. This power, rooted in the au-

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party claiming involuntariness is that the evidence normally lies in his possession.

"'I . . . find myself compelled to dissent because in my opinion the majority's position can be squared neither with congressional intent nor with proper and well-established rules governing the burden of proof on the issue of duress.'" H. R. Rep. No. 1086, *supra*, at 41 (quoting *Nishikawa* v. *Dulles*, *supra*, at 144–145).

The Report continued:

"In order to forestall further erosion of the statute designed to preserve and uphold the dignity and the priceless value of U. S. citizenship, with attendant obligations, . . . [§ 1481 (c)] sets up rules of evidence under which the burden of proof to establish loss of citizenship by preponderance of the evidence would rest upon the Government." H. R. Rep. No. 1086, *supra*, at 41. The Report concluded by describing the rebuttable presumption of voluntariness in § 1481 (c).

thority of Congress conferred by Art. 1, § 8, cl. 9, of the Constitution to create inferior federal courts, is undoubted and has been frequently noted and sustained. See, *e. g.*, *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S. 1, 31 (1976); *Hawkins* v. *United States*, 358 U. S. 74, 78 (1958); *Tot* v. *United States*, 319 U. S. 463, 467 (1943).

We note also that the Court's opinion in *Afroyim* was written by Mr. Justice Black who, in concurring in *Nishikawa*, said that the question whether citizenship has been voluntarily relinquished is to be determined on the facts of each case and that Congress could provide rules of evidence for such proceedings. *Nishikawa* v. *Dulles*, *supra*, at 139. In this respect, we agree with Mr. Justice Black; and since Congress has the express power to enforce the Fourteenth Amendment, it is untenable to hold that it has no power whatsoever to address itself to the manner or means by which Fourteenth Amendment citizenship may be relinquished.

We are unable to conclude that the specific evidentiary standard provided by Congress in § 1481 (c) is invalid under either the Citizenship Clause or the Due Process Clause of the Fifth Amendment. It is true that in criminal and involuntary commitment contexts we have held that the Due Process Clause imposes requirements of proof beyond a preponderance of the evidence. *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975); *Addington* v. *Texas*, 441 U. S. 418 (1979). This Court has also stressed the importance of citizenship and evinced a decided preference for requiring clear and convincing evidence to prove expatriation. *Nishikawa* v. *United States*, *supra*. But expatriation proceedings are civil in nature and do not threaten a loss of liberty. Moreover, as we have noted, *Nishikawa* did not purport to be a constitutional ruling, and the same is true of similar rulings in related areas. *Woodby* v. *INS*, 385 U. S. 276, 285 (1966) (deportation); *Schneiderman* v. *United States*, 320 U. S. 118, 125 (1943) (denaturalization). None of these cases involved a congressional judg-

ment, such as that present here, that the preponderance standard of proof provides sufficient protection for the interest of the individual in retaining his citizenship. Contrary to the Secretary's position, we have held that expatriation requires the ultimate finding that the citizen has committed the expatriating act with the intent to renounce his citizenship. This in itself is a heavy burden, and we cannot hold that Congress has exceeded its powers by requiring proof of an intentional expatriating act by a preponderance of evidence.

IV

The Court of Appeals did not discuss separately the validity of the statutory presumption provided in § 1481 (c). By holding that the section was beyond the power of Congress, however, and by requiring that the expatriating act be proved voluntary by clear and convincing evidence, the Court of Appeals effectively foreclosed use of the § 1481 (c) presumption of voluntariness, not only in the remand proceedings in the District Court, but also in other expatriation proceedings in that Circuit. As we have indicated, neither the Citizenship Clause nor *Afroyim* places suits such as this wholly beyond the accepted power of Congress to prescribe rules of evidence in federal courts. We also conclude that the presumption of voluntariness provided in § 1481 (c) is not otherwise constitutionally infirm.

Section 1481 (c) provides in relevant part that "any person who commits or performs, or who has committed or performed, any act of expatriation under the provisions of this chapter or any other Act shall be presumed to have done so voluntarily, but such presumption may be rebutted upon a showing, by a preponderance of the evidence, that the act or acts committed or performed were not done voluntarily." In enacting § 1481 (c), Congress did not dispute the holding of *Nishikawa* that the alleged expatriating act—there, service in a foreign army—must be performed voluntarily, but it did

insist that the Government have the benefit of the usual presumption of voluntariness and that one claiming that his act was involuntary make out his claim of duress by a preponderance of the evidence.

It is important at this juncture to note the scope of the statutory presumption. Section 1481 (c) provides that any of the statutory expatriating acts, if proved, is presumed to have been committed voluntarily. It does not also direct a presumption that the act has been performed with the intent to relinquish United States citizenship. That matter remains the burden of the party claiming expatriation to prove by a preponderance of the evidence. As so understood, we cannot invalidate the provision.[9]

The majority opinion in *Nishikawa* referred to the "ordinary rule that duress is a matter of affirmative defense" to be proved by the party claiming the duress. *Nishikawa* v. *Dulles*, 356 U. S., at 134. Justices Frankfurter and Burton, concurring in the result, also referred to the "ordinarily controlling principles of evidence [that] would suggest that the individual, who is peculiarly equipped to clarify an ambiguity in the meaning of outward events, should have the burden of proving what his state of mind was." *Id.*, at 141. And Mr. Justice Harlan, in dissent with Mr. Justice Clark, pointed to the "general rule that consciously performed acts are presumed voluntary" and referred to Federal Rule of Civil Procedure 8 (c), which treats duress as a matter of affirmative defense. 356 U. S., at 144. Yet the Court in *Nishikawa*,

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[9] The Secretary asserts that the § 1481 (c) presumption cannot survive constitutional scrutiny if we hold that intent to relinquish citizenship is a necessary element in proving expatriation. Brief for Appellant 26. The predicate for this assertion seems to be that § 1481 (c) presumes intent to relinquish as well as voluntariness. We do not so read it. Even if we did, and even if we agreed that presuming the necessary intent is inconsistent with *Afroyim*, it would be unnecessary to invalidate the section insofar as it presumes that the expatriating act itself was performed voluntarily.

because it decided that "the consequences of denationalization are so drastic" and because it found nothing indicating a contrary result in the legislative history of the Nationality Act of 1940, held that the Government must carry the burden of proving that the expatriating act was performed voluntarily. *Id.*, at 133–138.[10]

Section 1481 (c), which was enacted subsequently, and its legislative history, H. R. Rep. No. 1086, 87th Cong., 1st Sess., 40–41 (1961), make clear that Congress preferred the ordinary rule that voluntariness is presumed and that duress is an affirmative defense to be proved by the party asserting it. See *Hartsville Oil Mill* v. *United States*, 271 U. S. 43, 49–50 (1926); *Towson* v. *Moore*, 173 U. S. 17, 23–24 (1899); *Savage* v. *United States*, 92 U. S. 382, 387–388 (1876). "Duress, if proved, may be a defence to an action . . . but the burden of proof to establish the charge . . . is upon the party making it. . . ." *Mason* v. *United States*, 17 Wall. 67, 74 (1873).[11] The rationality of the procedural rule with respect to claims of involuntariness in ordinary civil cases cannot be doubted. To invalidate the rule here would be to disagree flatly with Con-

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[10] The Court's departure from the normal rule that duress is an affirmative defense to be proved by the party seeking to rely on it was noted when *Nishikawa* was handed down. See The Supreme Court: 1957 Term, 72 Harv. L. Rev. 77, 166, 171 (1958) (*Nishikawa* "not only extended the Government's burden in expatriation proceedings to include the absence of duress if this issue is raised, but also determined the standard by which it must be shown. The position of the majority runs counter to the usual rule that duress is an affirmative defense").

[11] The rule that duress is an affirmative defense to be pleaded and proved by the party attempting to rely on it is well established. Even where a plaintiff's complaint improperly contains allegations that seek to avoid or defeat a potential affirmative defense, "it is inappropriate for the court to shift the burden of proof on the anticipated defense to plaintiff as a 'sanction' for failing to follow the burden of pleading structure established by Rule 8 or by adopting the fiction that plaintiff's anticipation of the issue evidences his intention to 'assume' the burden of proving it." 5 C. Wright & A. Miller, Federal Practice and Procedure § 1276, p. 327 (1969). On affirmative defenses generally, see *id.*, § 1270, at 289 *et seq.*

gress on the balance to be struck between the interest in citizenship and the burden the Government must assume in demonstrating expatriating conduct. It would also constitutionalize that disagreement and give the Citizenship Clause of the Fourteenth Amendment far more scope in this context than the relevant circumstances that brought the Amendment into being would suggest appropriate. Thus we conclude that the presumption of voluntariness included in § 1481 (c) has continuing vitality.

V

In sum, we hold that in proving expatriation, an expatriating act and an intent to relinquish citizenship must be proved by a preponderance of the evidence. We also hold that when one of the statutory expatriating acts is proved, it is constitutional to presume it to have been a voluntary act until and unless proved otherwise by the actor. If he succeeds, there can be no expatriation. If he fails, the question remains whether on all the evidence the Government has satisfied its burden of proof that the expatriating act was performed with the necessary intent to relinquish citizenship.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

MR. JUSTICE STEWART dissents for the reasons stated in Part II of MR. JUSTICE BRENNAN's dissenting opinion, which he joins.

MR. JUSTICE MARSHALL, concurring in part and dissenting in part.

I agree with the Court's holding that a citizen of the United States may not lose his citizenship in the absence of a finding that he specifically intended to renounce it. I also concur in the adoption of a saving construction of 8 U. S. C. § 1481

(a)(2) to require that the statutorily designated expatriating acts be done with a specific intent to relinquish citizenship.

I cannot, however, accept the majority's conclusion that a person may be found to have relinquished his American citizenship upon a preponderance of the evidence that he intended to do so. The Court's discussion of congressional power to "prescribe rules of evidence and standards of proof in the federal courts," *ante*, at 265, is the beginning, not the end, of the inquiry. It remains the task of this Court to determine when those rules and standards impinge on constitutional rights. As my Brother STEVENS indicates, the Court's casual dismissal of the importance of American citizenship cannot withstand scrutiny. And the mere fact that one who has been expatriated is not locked up in a prison does not dispose of the constitutional inquiry. As Mr. Chief Justice Warren stated over 20 years ago:

> "[T]he expatriate has lost the right to have rights.
>
> "This punishment is offensive to cardinal principles for which the Constitution stands. It subjects the individual to a fate of ever-increasing fear and distress. He knows not what discriminations may be established against him, what proscriptions may be directed against him, and when and for what cause his existence in his native land may be terminated. He may be subject to banishment, a fate universally decried by civilized people. He is stateless, a condition deplored in the international community of democracies. It is no answer to suggest that all the disastrous consequences of this fate may not be brought to bear on a stateless person. The threat makes the punishment obnoxious." *Trop* v. *Dulles*, 356 U. S. 86, 102 (1958) (plurality opinion) (footnotes omitted).

For these reasons I cannot understand, much less accept, the Court's suggestion that "expatriation proceedings . . . do not threaten a loss of liberty." *Ante*, at 266. Recognizing that

a standard of proof ultimately "'reflects the value society places'" on the interest at stake, *Addington* v. *Texas*, 441 U. S. 418, 425 (1979), I would hold that a citizen may not lose his citizenship in the absence of clear and convincing evidence that he intended to do so.

MR. JUSTICE STEVENS, concurring in part and dissenting in part.

The Court today unanimously reiterates the principle set forth in *Afroyim* v. *Rusk*, 387 U. S. 253, that Congress may not deprive an American of his citizenship against his will, but may only effectuate the citizen's own intention to renounce his citizenship. I agree with the Court that Congress may establish certain standards for determining whether such a renunciation has occurred. It may, for example, provide that expatriation can be proved by evidence that a person has performed an act that is normally inconsistent with continued citizenship and that the person thereby specifically intended to relinquish his American citizenship.

I do not agree, however, with the conclusion that Congress has established a permissible standard in 8 U. S. C. § 1481 (a)(2). Since we accept dual citizenship, taking an oath of allegiance to a foreign government is not necessarily inconsistent with an intent to remain an American citizen. Moreover, as now written, the statute cannot fairly be read to require a finding of specific intent to relinquish citizenship. The statute unambiguously states that:

> "a national of the United States . . . shall lose his nationality by—
>
> . . . . .
>
> "(2) taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state or a political subdivision thereof."

There is no room in this provision to imply a requirement of a specific intent to relinquish citizenship. The Court does

not attempt to do so, nor does it explain how any other part of the statute supports its conclusion that Congress required proof of specific intent.[1]

I also disagree with the holding that a person may be deprived of his citizenship upon a showing by a mere preponderance of the evidence that he intended to relinquish it. The Court reasons that because the proceedings in question are civil in nature and do not result in any loss of physical liberty, no greater burden of proof is required than in the ordinary civil case. Such reasoning construes the constitutional concept of "liberty" too narrowly.

The House Report accompanying the 1961 amendment to the Immigration and Naturalization Act of 1952 refers to "the dignity and the priceless value of U. S. citizenship." H. R.

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[1] It could perhaps be argued that a specific intent requirement can be derived from 8 U. S. C. § 1481 (c). That subsection creates a rebuttable presumption that any expatriating act set forth in subsection (a) was performed "voluntarily." The term "voluntary" could conceivably be stretched to include the concept of a specific intent to renounce one's citizenship. While the person seeking to retain his citizenship would thus have the burden of showing a lack of specific intent, such a construction would at least provide a statutory basis for bringing the issue of intent into the proceeding. The majority apparently would not be willing to accept such a construction in order to salvage the statute, however, inasmuch as it rejects the appellant Secretary's argument that, if there is a requirement of specific intent, it is also subject to the presumption applicable to voluntariness. *Ante*, at 268.

The majority's assumption that the statute can be read to require specific intent to relinquish citizenship as an element of proof is also contradicted by the Court's treatment in *Afroyim* of a different subsection of the same statute. Like the subsection at issue here, subsection (a)(5) provided that an American automatically lost his nationality by performing a specific act: in that case, voting in a foreign election. If the majority's analysis in this case were correct, the Court in *Afroyim* should not have invalidated that provision of the statute; rather, it should merely have remanded for a finding as to whether Afroyim had voted in a foreign election with specific intent to relinquish his American citizenship. That the Court did not do so is strong evidence of its belief that the statute could not be reformed as it is today.

Rep. No. 1086, 87th Cong., 1st Sess., 41 (1961). That characterization is consistent with this Court's repeated appraisal of the quality of the interest at stake in this proceeding.[2] In my judgment a person's interest in retaining his American citizenship is surely an aspect of "liberty" of which he cannot be deprived without due process of law. Because the interest at stake is comparable to that involved in *Addington* v. *Texas*, 441 U. S. 418, essentially for the reasons stated in THE CHIEF JUSTICE's opinion for a unanimous Court in that case, see *id.*, at 425–427, 431–433, I believe that due process requires that a clear and convincing standard of proof be met in this case as well before the deprivation may occur.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART joins as to Part II, dissenting.

The Court holds that one may lose United States citizenship if the Government can prove by a preponderance of the evidence that certain acts, specified by statute, were done with the specific intent of giving up citizenship. Accordingly, the Court, in reversing the judgment of the Court of Appeals, holds that the District Court applied the correct evidentiary standards in determining that appellee was properly stripped of his citizenship. Because I would hold that one who acquires United States citizenship by virtue of being born in the United States, U. S. Const., Amdt. 14, § 1, can lose that citizenship only by formally renouncing it, and because I would hold that the act of which appellee is accused in this case cannot be an expatriating act, I dissent.

I

This case is governed by *Afroyim* v. *Rusk*, 387 U. S. 253

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[2] See *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 160, where the Court quoted another report describing American citizenship as "'one of the most valuable rights in the world today.'" See also *Afroyim* v. *Rusk*, 387 U. S. 253, 267–268; *Trop* v. *Dulles*, 356 U. S. 86 92.

(1967). *Afroyim*, emphasizing the crucial importance of the right of citizenship, held unequivocally that a citizen has "a constitutional right to remain a citizen . . . unless he voluntarily relinquishes that citizenship." *Id.*, at 268. "[T]he only way the citizenship . . . could be lost was by the voluntary renunciation or abandonment by the citizen himself." *Id.*, at 266. The Court held that because Congress could not "abridge," "affect," "restrict the effect of," or "take . . . away" citizenship, Congress was "without power to rob a citizen of his citizenship" because he voted in a foreign election. *Id.*, at 267.

The same clearly must be true of the Government's attempt to strip appellee of citizenship because he swore an oath of allegiance to Mexico.[1] Congress has provided for a procedure by which one may formally renounce citizenship.[2] In this case the appellant concedes that appellee has not renounced his citizenship under that procedure.[3] Brief for Appellant 56. Because one can lose citizenship only by voluntarily renouncing it and because appellee has not formally renounced his, I would hold that he remains a citizen. Accordingly, I would remand the case with orders that appellee be given a declaration of United States nationality.[4]

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[1] He was a Mexican citizen by virtue of his father's citizenship.

[2] Title 8 U. S. C. § 1481 (a)(6) provides that "a national of the United States whether by birth or naturalization, shall lose his nationality by . . .

. . . . .

making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State." The Secretary of State has prescribed such procedures in 22 CFR § 50.50 (1979). See Department of State, 8 Foreign Affairs Manual § 225.6 (1972). Congress also provided for renunciation by citizens while in the United States in 8 U. S. C. § 1481 (a)(7). This last provision is not relevant to our case.

[3] Therefore, the appellant does not argue that he can be expatriated under 8 U. S. C. § 1481 (a)(6). See n. 2, *supra*.

[4] I would not reach the issues concerning 8 U. S. C. § 1481 (c).

II

I reach the same result by another, independent line of reasoning. Appellee was born a dual national. He is a citizen of the United States because he was born here and a citizen of Mexico because his father was Mexican. The only expatriating act of which appellee stands accused is having sworn an oath of allegiance to Mexico. If dual citizenship, *per se*, can be consistent with United States citizenship, *Perkins* v. *Elg*, 307 U. S. 325, 329 (1939),[5] then I cannot see why an oath of allegiance to the other country of which one is already a citizen should create inconsistency. One owes allegiance to any country of which one is a citizen, especially when one is living in that country. *Kawakita* v. *United States*, 343 U. S. 717, 733–735 (1952).[6] The formal oath adds nothing to the existing foreign citizenship and, therefore, cannot affect his United States citizenship.

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[5] *Rogers* v. *Bellei*, 401 U. S. 815 (1971), is not to the contrary. Bellei's citizenship was not based on the Fourteenth Amendment, *id.*, at 833, 835, and the issue before the Court was whether Bellei could lose his statutory citizenship for failure to satisfy a condition subsequent contained in the same statute that accorded him citizenship.

[6] Indeed, the opinion of the State Department once was "that a person with a dual citizenship who lives abroad in the other country claiming him as a national owes an allegiance to it which is paramount to the allegiance he owes the United States." *Kawakita* v. *United States*, 343 U. S., at 734–735.

MARTINEZ ET AL. v. CALIFORNIA ET AL.

APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT

No. 78-1268. Argued November 5, 1979—Decided January 15, 1980

Appellants' decedent, a 15-year-old girl, was murdered by a parolee five months after he was released from prison despite his history as a sex offender. Appellants brought an action in a California court under state law and 42 U. S. C. § 1983, claiming that appellee state officials, by their action in releasing the parolee, subjected the decedent to a deprivation of her life without due process of law and were therefore liable in damages for the harm caused by the parolee. The trial court sustained a demurrer to the complaint. The California Court of Appeal affirmed, holding that a California statute granting public employees absolute immunity from liability for any injury resulting from parole-release determinations provided appellees with a complete defense to appellants' state-law claims, and that appellees enjoyed quasi-judicial immunity from liability under 42 U. S. C. § 1983.

Held:

1. The California immunity statute is not unconstitutional when applied to defeat a tort claim arising under state law. Pp. 280–283.

(a) The statute, which merely provides a defense to potential state tort-law liability, did not deprive appellants' decedent of her life without due process of law because it condoned a parole decision that led indirectly to her death. A legislative decision that has an incremental impact on the probability that death will result in any given situation cannot be characterized as state action depriving a person of life just because it may set in motion a chain of events that ultimately leads to the random death of an innocent bystander. P. 281.

(b) Even if the statute can be characterized as a deprivation of property, the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from wholly arbitrary or irrational state action. The statute is not irrational because the California Legislature could reasonably conclude that judicial review of parole decisions "would inevitably inhibit the exercise of discretion" and that this inhibiting effect could impair the State's ability to implement a parole program designed to promote rehabilitation of inmates

as well as security within prisons by holding out a promise of potential rewards. Pp. 281–283.

2. Appellants did not allege a claim for relief under federal law. Pp. 283–285.

(a) The Fourteenth Amendment protected appellants' decedent only from deprivation by the *State* of life without due process of law, and although the decision to release the parolee from prison was action by the State, the parolee's action five months later cannot be fairly characterized as state action. Pp. 284–285.

(b) Regardless of whether, as a matter of state tort law, the parole board either had a "duty" to avoid harm to the parolee's victim or proximately caused her death, appellees did not "deprive" appellants' decedent of life within the meaning of the Fourteenth Amendment. P. 285.

(c) Under the particular circumstances where the parolee was in no sense an agent of the parole board, and the board was not aware that appellants' decedent, as distinguished from the public at large, faced any special danger, appellants' decedent's death was too remote a consequence of appellees' action to hold them responsible under § 1983. P. 285.

85 Cal. App. 3d 430, 149 Cal. Rptr. 519, affirmed.

STEVENS, J., delivered the opinion for a unanimous Court.

Donald McGrath II argued the cause for appellants. With him on the brief was *Walter P. Christensen*.

Jeffrey T. Miller, Deputy Attorney General of California, argued the cause for appellees. With him on the brief were *George Deukmejian*, Attorney General, and *Robert L. Bergman*, Assistant Attorney General.*

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*Briefs of *amici curiae* urging reversal were filed by *Frank Carrington* for Americans for Effective Law Enforcement, Inc.; and by *Ronald A. Zumbrun* and *John H. Findley* for the Pacific Legal Foundation.

Briefs of *amici curiae* urging affirmance were filed by *Solicitor General McCree, Acting Assistant Attorney General Daniel, Robert E. Kopp*, and *Barbara L. Herwig* for the United States; by *John J. Degnan*, Attorney General, and *Erminie L. Conley*, Assistant Attorney General, for the State of New Jersey; and by *William J. Brown*, Attorney General, and *Simon B. Karas, George Stricker, Jr.*, and *Dennis L. Sipe*, Assistant Attorneys General, for the State of Ohio.

MR. JUSTICE STEVENS delivered the opinion of the Court.

The two federal questions that appellants ask us to decide are (1) whether the Fourteenth Amendment invalidates a California statute granting absolute immunity to public employees who make parole-release determinations, and (2) whether such officials are absolutely immune from liability in an action brought under the federal Civil Rights Act of 1871, 42 U. S. C. § 1983.[1] We agree with the California Court of Appeal that the state statute is valid when applied to claims arising under state law, and we conclude that appellants have not alleged a claim for relief under federal law.

The case arises out of the murder of a 15-year-old girl by a parolee. Her survivors brought this action in a California court claiming that the state officials responsible for the parole-release decision are liable in damages for the harm caused by the parolee.

The complaint alleged that the parolee, one Thomas, was convicted of attempted rape in December 1969. He was first committed to a state mental hospital as a "Mentally Disordered Sex Offender not amenable to treatment" and thereafter sentenced to a term of imprisonment of 1 to 20 years, with a recommendation that he not be paroled. Nevertheless, five years later, appellees decided to parole Thomas to the care of his mother. They were fully informed about his history, his propensities, and the likelihood that he would commit another violent crime. Moreover, in making their release determination they failed to observe certain "requisite formalities." Five months after his release Thomas tortured

[1] "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

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and killed appellants' decedent. We assume, as the complaint alleges, that appellees knew, or should have known, that the release of Thomas created a clear and present danger that such an incident would occur. Their action is characterized not only as negligent, but also as reckless, willful, wanton and malicious.[2] Appellants prayed for actual and punitive damages of $2 million.

The trial judge sustained a demurrer to the complaint and his order was upheld on appeal. 85 Cal. App. 3d 430, 149 Cal. Rptr. 519 (1978). After the California Supreme Court denied appellants' petition for a hearing, we noted probable jurisdiction. 441 U. S. 960.

I

Section 845.8 (a) of the Cal. Gov't Code Ann. (West Supp. 1979) provides:

> "Neither a public entity nor a public employee is liable for:
>
> (a) Any injury resulting from determining whether to parole or release a prisoner or from determining the terms and conditions of his parole or release or from determining whether to revoke his parole or release."

The California courts held that this statute provided appellees with a complete defense to appellants' state-law claims.[3] They considered and rejected the contention that the immu-

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[2] Although the complaint refers to the failure to supervise Thomas after his release, a failure to warn females in the area of potential danger, and a failure to revoke the original parole decision, the litigation has focused entirely on the original decision. The individual appellees are not alleged to have responsibility for postrelease supervision of Thomas.

[3] The dismissal of appellants' cause of action charging negligent failure to warn females in the area of danger was predicated on appellants' concession that there was no "continuing relationship between the state and the victim," 85 Cal. App. 3d 430, 435, 149 Cal. Rptr. 519, 523 (1978), a requirement of state law.

nity statute as so construed violates the Due Process Clause of the Fourteenth Amendment to the Federal Constitution.[4]

Like the California courts, we cannot accept the contention that this statute deprived Thomas' victim of her life without due process of law because it condoned a parole decision that led indirectly to her death. The statute neither authorized nor immunized the deliberate killing of any human being. It is not the equivalent of a death penalty statute which expressly authorizes state agents to take a person's life after prescribed procedures have been observed. This statute merely provides a defense to potential state tort-law liability. At most, the availability of such a defense may have encouraged members of the parole board to take somewhat greater risks of recidivism in exercising their authority to release prisoners than they otherwise might. But the basic risk that repeat offenses may occur is always present in any parole system. A legislative decision that has an incremental impact on the probability that death will result in any given situation—such as setting the speed limit at 55-miles-per-hour instead of 45—cannot be characterized as state action depriving a person of life just because it may set in motion a chain of events that ultimately leads to the random death of an innocent bystander.

Nor can the statute be characterized as an invalid deprivation of property. Arguably, the cause of action for wrongful death that the State has created is a species of "property"

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[4] ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U. S. Const., Amdt. 14, § 1.

Although the question presented in the jurisdictional statement posits an Equal Protection Clause challenge to the statute, that point was not actually briefed in this Court. It was also neither raised in nor treated by the courts below. We therefore make no further reference to that challenge.

protected by the Due Process Clause. On that hypothesis, the immunity statute could be viewed as depriving the plaintiffs of that property interest insofar as they seek to assert a claim against parole officials.[5] But even if one characterizes the immunity defense as a statutory deprivation, it would remain true that the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational.

We have no difficulty in accepting California's conclusion that there "is a rational relationship between the state's purposes and the statute."[6] In fashioning state policy in a "prac-

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[5] It is arguable, however, that the immunity defense, like an element of the tort claim itself, is merely one aspect of the State's definition of that property interest. Recently, in considering a lawyer's claim of immunity in a state malpractice action, we noted that

"when state law creates a cause of action, the State is free to define the defenses to that claim, including the defense of immunity, unless, of course, the state rule is in conflict with federal law." *Ferri* v. *Ackerman, ante,* at 198.

[6] "Martinez says the statute, Government Code section 845.8, subdivision (a), is unconstitutional because it permits the deprivation of life, a fundamental right, without due process. He suggests the statute, if it confers absolute immunity, encouraged the actions resulting in Mary Ellen's death and, thus, requires a compelling state interest. However, the Legislature has broad powers to control governmental tort liability limited only by the rule it not act arbitrarily (*Reed* v. *City & County of San Francisco,* 237 Cal. App. 2d 23, 24 . . .). The California Tort Claims Act as a whole (Gov. Code § 810 et seq.) has been found constitutional (*Datil* v. *City of Los Angeles,* 263 Cal. App. 2d 655, 660–661 . . .). The stated purpose of section 845.8, subdivision (a), is to allow correctional personnel to make determinations of release or parole unfettered by any fear of tort liability (Law Revision Com. com.). To impose tort liability would have a chilling effect on the decision-making process, impede implementation of trial release programs and prolong incarceration unjustifiably for many prisoners. There is a rational relationship between the state's purposes and the statute." 85 Cal. App. 3d, at 437, 149 Cal. Rptr., at 524.

The opinion of the California Court of Appeal does not expressly mention the Federal Constitution. But it is clear from appellants' response to

tical and troublesome area" like this, see *McGinnis* v. *Royster,* 410 U. S. 263, 270, the California Legislature could reasonably conclude that judicial review of a parole officer's decisions "would inevitably inhibit the exercise of discretion," *United States ex rel. Miller* v. *Twomey,* 479 F. 2d 701, 721 (CA7 1973), cert. denied, 414 U. S. 1146. That inhibiting effect could impair the State's ability to implement a parole program designed to promote rehabilitation of inmates as well as security within prison walls by holding out a promise of potential rewards. Whether one agrees or disagrees with California's decision to provide absolute immunity for parole officials in a case of this kind, one cannot deny that it rationally furthers a policy that reasonable lawmakers may favor. As federal judges, we have no authority to pass judgment on the wisdom of the underlying policy determination. We therefore find no merit in the contention that the State's immunity statute is unconstitutional when applied to defeat a tort claim arising under state law.

II

We turn then to appellants' § 1983 claim that appellees, by their action in releasing Thomas, subjected appellants' decedent to a deprivation of her life without due process of law.[7]

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the demurrer that they were relying on "a federally protected right to life under the Constitution of the United States." Record 59.

[7] We note that the California courts accepted jurisdiction of this federal claim. That exercise of jurisdiction appears to be consistent with the general rule that where

"'an act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a State court.'" *Testa* v. *Katt,* 330 U. S. 386, 391, quoting *Claflin* v. *Houseman,* 93 U. S. 130, 137.

See also *Aldinger* v. *Howard,* 427 U. S. 1, 36, n. 17 (BRENNAN, J., dissenting); *Grubb* v. *Public Utilities Comm'n,* 281 U. S. 470, 476. We have never considered, however, the question whether a State *must* entertain a claim under § 1983. We note that where the same type of claim, if arising under state law, would be enforced in the state courts, the state courts

It is clear that the California immunity statute does not control this claim even though the federal cause of action is being asserted in the state courts.[8] We also conclude that it is not necessary for us to decide any question concerning the immunity of state parole officials as a matter of federal law because, as we recently held in *Baker* v. *McCollan*, 443 U. S. 137, "[t]he first inquiry in any § 1983 suit . . . is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws'" of the United States.[9] The answer to that inquiry disposes of this case.

Appellants contend that the decedent's right to life is protected by the Fourteenth Amendment to the Constitution. But the Fourteenth Amendment protected her only from deprivation by the "*State* . . . of life . . . without due process of law." Although the decision to release Thomas from prison

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are generally not free to refuse enforcement of the federal claim. *Testa* v. *Katt*, *supra*, at 394. But see *Chamberlain* v. *Brown*, 223 Tenn. 25, 442 S. W. 2d 248 (1969).

[8] "Conduct by persons acting under color of state law which is wrongful under 42 U. S. C. § 1983 or § 1985 (3) cannot be immunized by state law. A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced. See *McLaughlin* v. *Tilendis*, 398 F. 2d 287, 290 (7th Cir. 1968). The immunity claim raises a question of federal law." *Hampton* v. *Chicago*, 484 F. 2d 602, 607 (CA7 1973), cert. denied, 415 U. S. 917.

[9] *Baker* v. *McCollan*, 443 U. S., at 140. Although there was a dissent in that case, the issue that divided the Court was assuming the plaintiff had been deprived of constitutionally protected liberty, what process was due. There was no disagreement with the majority's methodology of isolating the particular constitutional infringement complained of. Since we decide here that the State did not "deprive" appellants' decedent of a constitutionally protected right, we need not reach the question whether a lack of "due process" was adequately alleged by the reference to a failure to observe "requisite formalities." It must be remembered that even if a state decision does deprive an individual of life or property, and even if that decision is erroneous, it does not necessarily follow that the decision violated that individual's right to due process.

was action by the State, the action of Thomas five months later cannot be fairly characterized as state action. Regardless of whether, as a matter of state tort law, the parole board could be said either to have had a "duty" to avoid harm to his victim or to have proximately caused her death, see *Grimm* v. *Arizona Bd. of Pardons and Paroles,* 115 Ariz. 260, 564 P. 2d 1227 (1977); *Palsgraf* v. *Long Island R. Co.,* 248 N. Y. 339, 162 N. E. 99 (1928), we hold that, taking these particular allegations as true, appellees did not "deprive" appellants' decedent of life within the meaning of the Fourteenth Amendment.

Her life was taken by the parolee five months after his release.[10] He was in no sense an agent of the parole board. Cf. *Scheuer* v. *Rhodes,* 416 U. S. 232. Further, the parole board was not aware that appellants' decedent, as distinguished from the public at large, faced any special danger. We need not and do not decide that a parole officer could never be deemed to "deprive" someone of life by action taken in connection with the release of a prisoner on parole.[11] But we do hold that at least under the particular circumstances of this parole decision, appellants' decedent's death is too remote a consequence of the parole officers' action to hold them responsible under the federal civil rights law. Although a § 1983 claim has been described as "a species of tort liability," *Imbler* v. *Pachtman,* 424 U. S. 409, 417, it is perfectly clear that not every injury in which a state official has played some part is actionable under that statute.

The judgment is affirmed.

So ordered.

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[10] Compare the facts in *Screws* v. *United States,* 325 U. S. 91, where local law enforcement officials themselves beat a citizen to death.

[11] We reserve the question of what immunity, if any, a state parole officer has in a § 1983 action where a constitutional violation is made out by the allegations.

WORLD-WIDE VOLKSWAGEN CORP. ET AL. *v.* WOODSON, DISTRICT JUDGE OF CREEK COUNTY, OKLAHOMA, ET AL.

CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

No. 78–1078. Argued October 3, 1979—Decided January 21, 1980

A products-liability action was instituted in an Oklahoma state court by respondents husband and wife to recover for personal injuries sustained in Oklahoma in an accident involving an automobile that had been purchased by them in New York while they were New York residents and that was being driven through Oklahoma at the time of the accident. The defendants included the automobile retailer and its wholesaler (petitioners), New York corporations that did no business in Oklahoma. Petitioners entered special appearances, claiming that Oklahoma's exercise of jurisdiction over them would offend limitations on the State's jurisdiction imposed by the Due Process Clause of the Fourteenth Amendment. The trial court rejected petitioners' claims, and they then sought, but were denied, a writ of prohibition in the Oklahoma Supreme Court to restrain respondent trial judge from exercising *in personam* jurisdiction over them.

Held: Consistently with the Due Process Clause, the Oklahoma trial court may not exercise *in personam* jurisdiction over petitioners. Pp. 291–299.

(a) A state court may exercise personal jurisdiction over a nonresident defendant only so long as there exist "minimum contacts" between the defendant and the forum State. *International Shoe Co.* v. *Washington*, 326 U. S. 310. The defendant's contacts with the forum State must be such that maintenance of the suit does not offend traditional notions of fair play and substantial justice, *id.*, at 316, and the relationship between the defendant and the forum must be such that it is "reasonable . . . to require the corporation to defend the particular suit which is brought there," *id.*, at 317. The Due Process Clause "does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations." *Id.*, at 319. Pp. 291–294.

(b) Here, there is a total absence in the record of those affiliating circumstances that are a necessary predicate to any exercise of state-court jurisdiction. Petitioners carry on no activity whatsoever in Oklahoma; they close no sales and perform no services there, avail

themselves of none of the benefits of Oklahoma law, and solicit no business there either through salespersons or through advertising reasonably calculated to reach that State. Nor does the record show that they regularly sell cars to Oklahoma residents or that they indirectly, through others, serve or seek to serve the Oklahoma market. Although it is foreseeable that automobiles sold by petitioners would travel to Oklahoma and that the automobile here might cause injury in Oklahoma, "foreseeability" alone is not a sufficient benchmark for personal jurisdiction under the Due Process Clause. The foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State, but rather is that the defendant's conduct and connection with the forum are such that he should reasonably anticipate being haled into court there. Nor can jurisdiction be supported on the theory that petitioners earn substantial revenue from goods used in Oklahoma. Pp. 295–299.

585 P. 2d 351, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, POWELL, REHNQUIST, and STEVENS, JJ., joined. BRENNAN, J., filed a dissenting opinion, *post*, p. 299. MARSHALL, J., filed a dissenting opinion, in which BLACKMUN, J., joined, *post*, p. 313. BLACKMUN, J., filed a dissenting opinion, *post*, p. 317.

Herbert Rubin argued the cause for petitioners. With him on the briefs were *Dan A. Rogers, Bernard J. Wald,* and *Ian Ceresney.*

Jefferson G. Greer argued the cause for respondents. With him on the brief was *Charles A. Whitebook.*

MR. JUSTICE WHITE delivered the opinion of the Court.

The issue before us is whether, consistently with the Due Process Clause of the Fourteenth Amendment, an Oklahoma court may exercise *in personam* jurisdiction over a nonresident automobile retailer and its wholesale distributor in a products-liability action, when the defendants' only connection with Oklahoma is the fact that an automobile sold in New York to New York residents became involved in an accident in Oklahoma.

I

Respondents Harry and Kay Robinson purchased a new Audi automobile from petitioner Seaway Volkswagen, Inc. (Seaway), in Massena, N. Y., in 1976. The following year the Robinson family, who resided in New York, left that State for a new home in Arizona. As they passed through the State of Oklahoma, another car struck their Audi in the rear, causing a fire which severely burned Kay Robinson and her two children.[1]

The Robinsons[2] subsequently brought a products-liability action in the District Court for Creek County, Okla., claiming that their injuries resulted from defective design and placement of the Audi's gas tank and fuel system. They joined as defendants the automobile's manufacturer, Audi NSU Auto Union Aktiengesellschaft (Audi); its importer, Volkswagen of America, Inc. (Volkswagen); its regional distributor, petitioner World-Wide Volkswagen Corp. (World-Wide); and its retail dealer, petitioner Seaway. Seaway and World-Wide entered special appearances,[3] claiming that Oklahoma's exercise of jurisdiction over them would offend the limitations on the State's jurisdiction imposed by the Due Process Clause of the Fourteenth Amendment.[4]

The facts presented to the District Court showed that World-Wide is incorporated and has its business office in New

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[1] The driver of the other automobile does not figure in the present litigation.

[2] Kay Robinson sued on her own behalf. The two children sued through Harry Robinson as their father and next friend.

[3] Volkswagen also entered a special appearance in the District Court, but unlike World-Wide and Seaway did not seek review in the Supreme Court of Oklahoma and is not a petitioner here. Both Volkswagen and Audi remain as defendants in the litigation pending before the District Court in Oklahoma.

[4] The papers filed by the petitioners also claimed that the District Court lacked "venue of the subject matter," App. 9, or "venue over the subject matter," *id.*, at 11.

York. It distributes vehicles, parts, and accessories, under contract with Volkswagen, to retail dealers in New York, New Jersey, and Connecticut. Seaway, one of these retail dealers, is incorporated and has its place of business in New York. Insofar as the record reveals, Seaway and World-Wide are fully independent corporations whose relations with each other and with Volkswagen and Audi are contractual only. Respondents adduced no evidence that either World-Wide or Seaway does any business in Oklahoma, ships or sells any products to or in that State, has an agent to receive process there, or purchases advertisements in any media calculated to reach Oklahoma. In fact, as respondents' counsel conceded at oral argument, Tr. of Oral Arg. 32, there was no showing that any automobile sold by World-Wide or Seaway has ever entered Oklahoma with the single exception of the vehicle involved in the present case.

Despite the apparent paucity of contacts between petitioners and Oklahoma, the District Court rejected their constitutional claim and reaffirmed that ruling in denying petitioners' motion for reconsideration.[5] Petitioners then sought a writ of prohibition in the Supreme Court of Oklahoma to restrain the District Judge, respondent Charles S. Woodson, from exercising *in personam* jurisdiction over them. They renewed their contention that, because they had no "minimal contacts," App. 32, with the State of Oklahoma, the actions of the District Judge were in violation of their rights under the Due Process Clause.

The Supreme Court of Oklahoma denied the writ, 585 P. 2d 351 (1978),[6] holding that personal jurisdiction over petitioners was authorized by Oklahoma's "long-arm" statute,

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[5] The District Court's rulings are unreported, and appear at App. 13 and 20.

[6] Five judges joined in the opinion. Two concurred in the result, without opinion, and one concurred in part and dissented in part, also without opinion.

Okla. Stat., Tit. 12, § 1701.03 (a)(4) (1971).[7] Although the court noted that the proper approach was to test jurisdiction against both statutory and constitutional standards, its analysis did not distinguish these questions, probably because § 1701.03 (a)(4) has been interpreted as conferring jurisdiction to the limits permitted by the United States Constitution.[8] The court's rationale was contained in the following paragraph, 585 P. 2d, at 354:

> "In the case before us, the product being sold and distributed by the petitioners is by its very design and purpose so mobile that petitioners can foresee its possible use in Oklahoma. This is especially true of the distributor, who has the exclusive right to distribute such automobile [*sic*] in New York, New Jersey and Connecticut. The evidence presented below demonstrated that goods sold and distributed by the petitioners were used in the State of Oklahoma, and under the facts we believe it reasonable to infer, given the retail value of the automobile, that the petitioners derive substantial income from automobiles which from time to time are used in the State of Oklahoma. This being the case, we hold that under the facts presented, the trial court was justified

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[7] This subsection provides:

"A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action or claim for relief arising from the person's . . . causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state. . . ."

The State Supreme Court rejected jurisdiction based on § 1701.03 (a)(3), which authorizes jurisdiction over any person "causing tortious injury in this state by an act or omission in this state." Something in addition to the infliction of tortious injury was required.

[8] *Fields* v. *Volkswagen of America, Inc.*, 555 P. 2d 48 (Okla. 1976); *Carmack* v. *Chemical Bank New York Trust Co.*, 536 P. 2d 897 (Okla. 1975); *Hines* v. *Clendenning*, 465 P. 2d 460 (Okla. 1970).

in concluding that the petitioners derive substantial revenue from goods used or consumed in this State."

We granted certiorari, 440 U. S. 907 (1979), to consider an important constitutional question with respect to state-court jurisdiction and to resolve a conflict between the Supreme Court of Oklahoma and the highest courts of at least four other States.[9] We reverse.

II

The Due Process Clause of the Fourteenth Amendment limits the power of a state court to render a valid personal judgment against a nonresident defendant. *Kulko* v. *California Superior Court,* 436 U. S. 84, 91 (1978). A judgment rendered in violation of due process is void in the rendering State and is not entitled to full faith and credit elsewhere. *Pennoyer* v. *Neff,* 95 U. S. 714, 732–733 (1878). Due process requires that the defendant be given adequate notice of the suit, *Mullane* v. *Central Hanover Trust Co.,* 339 U. S. 306, 313–314 (1950), and be subject to the personal jurisdiction of the court, *International Shoe Co.* v. *Washington,* 326 U. S. 310 (1945). In the present case, it is not contended that notice was inadequate; the only question is whether these particular petitioners were subject to the jurisdiction of the Oklahoma courts.

As has long been settled, and as we reaffirm today, a state court may exercise personal jurisdiction over a nonresident defendant only so long as there exist "minimum contacts" between the defendant and the forum State. *International Shoe Co.* v. *Washington, supra,* at 316. The concept of minimum contacts, in turn, can be seen to perform two related, but

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[9] Cf. *Tilley* v. *Keller Truck & Implement Corp.,* 200 Kan. 641, 438 P. 2d 128 (1968); *Granite States Volkswagen, Inc.* v. *District Court,* 177 Colo. 42, 492 P. 2d 624 (1972); *Pellegrini* v. *Sachs & Sons,* 522 P. 2d 704 (Utah 1974); *Oliver* v. *American Motors Corp.,* 70 Wash. 2d 875, 425 P. 2d 647 (1967).

distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.

The protection against inconvenient litigation is typically described in terms of "reasonableness" or "fairness." We have said that the defendant's contacts with the forum State must be such that maintenance of the suit "does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co.* v. *Washington, supra,* at 316, quoting *Milliken* v. *Meyer,* 311 U. S. 457, 463 (1940). The relationship between the defendant and the forum must be such that it is "reasonable . . . to require the corporation to defend the particular suit which is brought there." 326 U. S., at 317. Implicit in this emphasis on reasonableness is the understanding that the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum State's interest in adjudicating the dispute, see *McGee* v. *International Life Ins. Co.,* 355 U. S. 220, 223 (1957); the plaintiff's interest in obtaining convenient and effective relief, see *Kulko* v. *California Superior Court, supra,* at 92, at least when that interest is not adequately protected by the plaintiff's power to choose the forum, cf. *Shaffer* v. *Heitner,* 433 U. S. 186, 211, n. 37 (1977); the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies, see *Kulko* v. *California Superior Court, supra,* at 93, 98.

The limits imposed on state jurisdiction by the Due Process Clause, in its role as a guarantor against inconvenient litigation, have been substantially relaxed over the years. As we noted in *McGee* v. *International Life Ins. Co., supra,* at 222–

223, this trend is largely attributable to a fundamental transformation in the American economy:

> "Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity."

The historical developments noted in *McGee*, of course, have only accelerated in the generation since that case was decided.

Nevertheless, we have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution. The economic interdependence of the States was foreseen and desired by the Framers. In the Commerce Clause, they provided that the Nation was to be a common market, a "free trade unit" in which the States are debarred from acting as separable economic entities. *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U. S. 525, 538 (1949). But the Framers also intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.

Hence, even while abandoning the shibboleth that "[t]he authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established," *Pennoyer* v. *Neff*, *supra*, at 720, we emphasized that the reasonableness of asserting jurisdiction over the defendant must be assessed "in the context of our federal system of govern-

ment," *International Shoe Co.* v. *Washington, supra,* at 317, and stressed that the Due Process Clause ensures not only fairness, but also the "orderly administration of the laws," 326 U. S., at 319. As we noted in *Hanson* v. *Denckla,* 357 U. S. 235, 250–251 (1958):

> "As technological progress has increased the flow of commerce between the States, the need for jurisdiction over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome. In response to these changes, the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of *Pennoyer* v. *Neff,* 95 U. S. 714, to the flexible standard of *International Shoe Co.* v. *Washington,* 326 U. S. 310. But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. [Citation omitted.] Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States."

Thus, the Due Process Clause "does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations." *International Shoe Co.* v. *Washington,* 326 U. S., at 319. Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment. *Hanson* v. *Denckla, supra,* at 251, 254.

III

Applying these principles to the case at hand,[10] we find in the record before us a total absence of those affiliating circumstances that are a necessary predicate to any exercise of state-court jurisdiction. Petitioners carry on no activity whatsoever in Oklahoma. They close no sales and perform no services there. They avail themselves of none of the privileges and benefits of Oklahoma law. They solicit no business there either through salespersons or through advertising reasonably calculated to reach the State. Nor does the record show that they regularly sell cars at wholesale or retail to Oklahoma customers or residents or that they indirectly, through others, serve or seek to serve the Oklahoma market. In short, respondents seek to base jurisdiction on one, isolated occurrence and whatever inferences can be drawn therefrom: the fortuitous circumstance that a single Audi automobile, sold in New York to New York residents, happened to suffer an accident while passing through Oklahoma.

It is argued, however, that because an automobile is mobile by its very design and purpose it was "foreseeable" that the Robinsons' Audi would cause injury in Oklahoma. Yet "foreseeability" alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause. In *Hanson* v. *Denckla*, *supra*, it was no doubt foreseeable that the settlor of a Delaware trust would subsequently move to Florida and seek to exercise a power of appointment there; yet we held that Florida courts could not constitutionally

[10] Respondents argue, as a threshold matter, that petitioners waived any objections to personal jurisdiction by (1) joining with their special appearances a challenge to the District Court's subject-matter jurisdiction, see n. 4, *supra*, and (2) taking depositions on the merits of the case in Oklahoma. The trial court, however, characterized the appearances as "special," and the Oklahoma Supreme Court, rather than finding jurisdiction waived, reached and decided the statutory and constitutional questions. Compare *Kulko* v. *California Superior Court*, 436 U. S. 84, 91, n. 5 (1978).

exercise jurisdiction over a Delaware trustee that had no other contacts with the forum State. In *Kulko* v. *California Superior Court*, 436 U. S. 84 (1978), it was surely "foreseeable" that a divorced wife would move to California from New York, the domicile of the marriage, and that a minor daughter would live with the mother. Yet we held that California could not exercise jurisdiction in a child-support action over the former husband who had remained in New York.

If foreseeability were the criterion, a local California tire retailer could be forced to defend in Pennsylvania when a blowout occurs there, see *Erlanger Mills, Inc.* v. *Cohoes Fibre Mills, Inc.*, 239 F. 2d 502, 507 (CA4 1956); a Wisconsin seller of a defective automobile jack could be haled before a distant court for damage caused in New Jersey, *Reilly* v. *Phil Tolkan Pontiac, Inc.*, 372 F. Supp. 1205 (NJ 1974); or a Florida soft-drink concessionaire could be summoned to Alaska to account for injuries happening there, see *Uppgren* v. *Executive Aviation Services, Inc.*, 304 F. Supp. 165, 170–171 (Minn. 1969). Every seller of chattels would in effect appoint the chattel his agent for service of process. His amenability to suit would travel with the chattel. We recently abandoned the outworn rule of *Harris* v. *Balk*, 198 U. S. 215 (1905), that the interest of a creditor in a debt could be extinguished or otherwise affected by any State having transitory jurisdiction over the debtor. *Shaffer* v. *Heitner*, 433 U. S. 186 (1977). Having interred the mechanical rule that a creditor's amenability to a *quasi in rem* action travels with his debtor, we are unwilling to endorse an analogous principle in the present case.[11]

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[11] Respondents' counsel, at oral argument, see Tr. of Oral Arg. 19–22, 29, sought to limit the reach of the foreseeability standard by suggesting that there is something unique about automobiles. It is true that automobiles are uniquely mobile, see *Tyson* v. *Whitaker & Son, Inc.*, 407 A. 2d 1, 6, and n. 11 (Me. 1979) (McKusick, C. J.), that they did play a crucial role in the expansion of personal jurisdiction through the fiction of implied consent, *e. g.*, *Hess* v. *Pawloski*, 274 U. S. 352 (1927), and that

This is not to say, of course, that foreseeability is wholly irrelevant. But the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there. See *Kulko* v. *California Superior Court, supra,* at 97–98; *Shaffer* v. *Heitner,* 433 U. S., at 216; and see *id.,* at 217–219 (STEVENS, J., concurring in judgment). The Due Process Clause, by ensuring the "orderly administration of the laws," *International Shoe Co.* v. *Washington,* 326 U. S., at 319, gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.

When a corporation "purposefully avails itself of the privilege of conducting activities within the forum State," *Hanson* v. *Denckla,* 357 U. S., at 253, it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State. Hence if the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others. The forum State does not

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some of the cases have treated the automobile as a "dangerous instrumentality." But today, under the regime of *International Shoe,* we see no difference for jurisdictional purposes between an automobile and any other chattel. The "dangerous instrumentality" concept apparently was never used to support personal jurisdiction; and to the extent it has relevance today it bears not on jurisdiction but on the possible desirability of imposing substantive principles of tort law such as strict liability.

exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State. Compare *Gray* v. *American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N. E. 2d 761 (1961).

But there is no such or similar basis for Oklahoma jurisdiction over World-Wide or Seaway in this case. Seaway's sales are made in Massena, N. Y. World-Wide's market, although substantially larger, is limited to dealers in New York, New Jersey, and Connecticut. There is no evidence of record that any automobiles distributed by World-Wide are sold to retail customers outside this tristate area. It is foreseeable that the purchasers of automobiles sold by World-Wide and Seaway may take them to Oklahoma. But the mere "unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State." *Hanson* v. *Denckla, supra,* at 253.

In a variant on the previous argument, it is contended that jurisdiction can be supported by the fact that petitioners earn substantial revenue from goods used in Oklahoma. The Oklahoma Supreme Court so found, 585 P. 2d, at 354–355, drawing the inference that because one automobile sold by petitioners had been used in Oklahoma, others might have been used there also. While this inference seems less than compelling on the facts of the instant case, we need not question the court's factual findings in order to reject its reasoning.

This argument seems to make the point that the purchase of automobiles in New York, from which the petitioners earn substantial revenue, would not occur *but for* the fact that the automobiles are capable of use in distant States like Oklahoma. Respondents observe that the very purpose of an automobile is to travel, and that travel of automobiles sold by petitioners is facilitated by an extensive chain of Volkswagen service centers throughout the country, including some in Okla-

homa.[12] However, financial benefits accruing to the defendant from a collateral relation to the forum State will not support jurisdiction if they do not stem from a constitutionally cognizable contact with that State. See *Kulko* v. *California Superior Court*, 436 U. S., at 94–95. In our view, whatever marginal revenues petitioners may receive by virtue of the fact that their products are capable of use in Oklahoma is far too attenuated a contact to justify that State's exercise of *in personam* jurisdiction over them.

Because we find that petitioners have no "contacts, ties, or relations" with the State of Oklahoma, *International Shoe Co.* v. *Washington, supra,* at 319, the judgment of the Supreme Court of Oklahoma is

Reversed.

MR. JUSTICE BRENNAN, dissenting.*

The Court holds that the Due Process Clause of the Fourteenth Amendment bars the States from asserting jurisdiction over the defendants in these two cases. In each case the Court so decides because it fails to find the "minimum contacts" that have been required since *International Shoe Co.* v. *Washington*, 326 U. S. 310, 316 (1945). Because I believe that the Court reads *International Shoe* and its progeny too narrowly, and because I believe that the standards enunciated by those cases may already be obsolete as constitutional boundaries, I dissent.

I

The Court's opinions focus tightly on the existence of contacts between the forum and the defendant. In so doing, they accord too little weight to the strength of the forum State's interest in the case and fail to explore whether there

[12] As we have noted, petitioners earn no direct revenues from these service centers. See *supra*, at 288–289.

*[This opinion applies also to No. 78–952, *Rush et al.* v. *Savchuk*, *post*, p. 320.]

would be any actual inconvenience to the defendant. The essential inquiry in locating the constitutional limits on state-court jurisdiction over absent defendants is whether the particular exercise of jurisdiction offends " 'traditional notions of fair play and substantial justice.' " *International Shoe, supra,* at 316, quoting *Milliken* v. *Meyer,* 311 U. S. 457, 463 (1940). The clear focus in *International Shoe* was on fairness and reasonableness. *Kulko* v. *California Superior Court,* 436 U. S. 84, 92 (1978). The Court specifically declined to establish a mechanical test based on the quantum of contacts between a State and the defendant:

> "Whether due process is satisfied must depend rather upon the quality and nature of the activity *in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.* That clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has *no* contacts, ties, or relations." 326 U. S., at 319 (emphasis added).

The existence of contacts, so long as there were some, was merely one way of giving content to the determination of fairness and reasonableness.

Surely *International Shoe* contemplated that the significance of the contacts necessary to support jurisdiction would diminish if some other consideration helped establish that jurisdiction would be fair and reasonable. The interests of the State and other parties in proceeding with the case in a particular forum are such considerations. *McGee* v. *International Life Ins. Co.,* 355 U. S. 220, 223 (1957), for instance, accorded great importance to a State's "manifest interest in providing effective means of redress" for its citizens. See also *Kulko* v. *California Superior Court, supra,* at 92; *Shaffer* v. *Heitner,* 433 U. S. 186, 208 (1977); *Mullane* v. *Central Hanover Trust Co.,* 339 U. S. 306, 313 (1950).

Another consideration is the actual burden a defendant

must bear in defending the suit in the forum. *McGee, supra.* Because lesser burdens reduce the unfairness to the defendant, jurisdiction may be justified despite less significant contacts. The burden, of course, must be of constitutional dimension. Due process limits on jurisdiction do not protect a defendant from all inconvenience of travel, *McGee, supra,* at 224, and it would not be sensible to make the constitutional rule turn solely on the number of miles the defendant must travel to the courtroom.[1] Instead, the constitutionally significant "burden" to be analyzed relates to the mobility of the defendant's defense. For instance, if having to travel to a foreign forum would hamper the defense because witnesses or evidence or the defendant himself were immobile, or if there were a disproportionately large number of witnesses or amount of evidence that would have to be transported at the defendant's expense, or if being away from home for the duration of the trial would work some special hardship on the defendant, then the Constitution would require special consideration for the defendant's interests.

That considerations other than contacts between the forum and the defendant are relevant necessarily means that the Constitution does not require that trial be held in the State which has the "best contacts" with the defendant. See *Shaffer* v. *Heitner, supra,* at 228 (BRENNAN, J., dissenting). The defendant has no constitutional entitlement to the best forum or, for that matter, to any particular forum. Under even the most restrictive view of *International Shoe,* several States could have jurisdiction over a particular cause of action. We need only determine whether the forum States in these cases satisfy the constitutional minimum.[2]

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[1] In fact, a courtroom just across the state line from a defendant may often be far more convenient for the defendant than a courtroom in a distant corner of his own State.

[2] The States themselves, of course, remain free to choose whether to extend their jurisdiction to embrace all defendants over whom the Constitution would permit exercise of jurisdiction.

II

In each of these cases, I would find that the forum State has an interest in permitting the litigation to go forward, the litigation is connected to the forum, the defendant is linked to the forum, and the burden of defending is not unreasonable. Accordingly, I would hold that it is neither unfair nor unreasonable to require these defendants to defend in the forum State.

A

In No. 78–952, a number of considerations suggest that Minnesota is an interested and convenient forum. The action was filed by a bona fide resident of the forum.[3] Consequently, Minnesota's interests are similar to, even if lesser than, the interests of California in *McGee, supra,* "in providing a forum for its residents and in regulating the activities of insurance companies" doing business in the State.[4] *Post,* at 332. Moreover, Minnesota has "attempted to assert [its] particularized interest in trying such cases in its courts by . . . enacting a special jurisdictional statute." *Kulko, supra,* at 98; *McGee, supra,* at 221, 224. As in *McGee,* a resident forced to travel to a distant State to prosecute an action

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[3] The plaintiff asserted jurisdiction pursuant to Minn. Stat. § 571.41, subd. 2 (1978), which allows garnishment of an insurer's obligation to defend and indemnify its insured. See *post,* at 322–323, n. 3, and accompanying text. The Minnesota Supreme Court has interpreted the statute as allowing suit only to the insurance policy's liability limit. The court has held that the statute embodies the rule of *Seider* v. *Roth,* 17 N. Y. 2d 111, 216 N. E. 2d 312 (1966).

[4] To say that these considerations are relevant is a far cry from saying that they are "substituted for . . . contacts with the defendant and the cause of action." *Post,* at 332. The forum's interest in the litigation is an independent point of inquiry even under traditional readings of *International Shoe*'s progeny. If there is a shift in focus, it is not away from "the relationship *among* the defendant, the forum, and the litigation." *Post,* at 332 (emphasis added). Instead it is a shift within the same accepted relationship from the connections *between* the defendant and the forum to those between the forum and the litigation.

against someone who has injured him could, for lack of funds, be entirely unable to bring the cause of action. The plaintiff's residence in the State makes the State one of a very few convenient fora for a personal injury case (the others usually being the defendant's home State and the State where the accident occurred).[5]

In addition, the burden on the defendant is slight. As Judge Friendly has recognized, *Shaffer* emphasizes the importance of identifying the real impact of the lawsuit. *O'Connor* v. *Lee-Hy Paving Corp.*, 579 F. 2d 194, 200 (CA2 1978) (upholding the constitutionality of jurisdiction in a very similar case under New York's law after *Shaffer*). Here the real impact is on the defendant's insurer, which is concededly amenable to suit in the forum State. The defendant is carefully protected from financial liability because the action limits the prayer for damages to the insurance policy's liability limit.[6] The insurer will handle the case for the defendant. The defendant is only a nominal party who need be no more active in the case than the cooperation clause of his policy requires. Because of the ease of airline transportation, he need not lose significantly more time than if the case were at home. Consequently, if the suit went for-

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[5] In every *International Shoe* inquiry, the defendant, necessarily, is outside the forum State. Thus it is inevitable that either the defendant or the plaintiff will be inconvenienced. The problem existing at the time of *Pennoyer* v. *Neff*, 95 U. S. 714 (1878), that a resident plaintiff could obtain a binding judgment against an unsuspecting, distant defendant, has virtually disappeared in this age of instant communication and virtually instant travel.

[6] It is true that the insurance contract is not the subject of the litigation. *Post*, at 329. But one of the undisputed clauses of the insurance policy is that the insurer will defend this action and pay any damages assessed, up to the policy limit. The very purpose of the contract is to relieve the insured from having to defend himself, and under the state statute there could be no suit absent the insurance contract. Thus, in a real sense, the insurance contract is the source of the suit. See *Shaffer* v. *Heitner*, 433 U. S. 186, 207 (1977).

ward in Minnesota, the defendant would bear almost no burden or expense beyond what he would face if the suit were in his home State. The real impact on the named defendant is the same as it is in a direct action against the insurer, which would be constitutionally permissible. *Watson* v. *Employers Liability Corp.*, 348 U. S. 66 (1954); *Minichiello* v. *Rosenberg*, 410 F. 2d 106, 109–110 (CA2 1968). The only distinction is the formal, "analytica[l] prerequisite," *post*, at 331, of making the insured a named party. Surely the mere addition of appellant's name to the complaint does not suffice to create a due process violation.[7]

Finally, even were the relevant inquiry whether there are sufficient contacts between the forum and the named defendant, I would find that such contacts exist. The insurer's presence in Minnesota is an advantage to the defendant that may well have been a consideration in his selecting the policy he did. An insurer with offices in many States makes it easier for the insured to make claims or conduct other business that may become necessary while traveling. It is simply not true that "State Farm's decision to do business in Minnesota was completely adventitious as far as Rush was concerned." *Post*, at 328–329. By buying a State Farm policy, the defendant availed himself of the benefits he might derive from having an insurance agent in Minnesota who could, among other things, facilitate a suit for appellant against a Minnesota resident. It seems unreasonable to read the Constitution as permitting one to take advantage of his nationwide insurance network but not to be burdened by it.

In sum, I would hold that appellant is not deprived of due process by being required to submit to trial in Minnesota, first because Minnesota has a sufficient interest in and con-

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[7] Were the defendant a real party subject to actual liability or were there significant noneconomic consequences such as those suggested by the Court's note 20, *post*, at 331, a more substantial connection with the forum State might well be constitutionally required.

nection to this litigation and to the real and nominal defendants, and second because the burden on the nominal defendant is sufficiently slight.

B

In No. 78–1078 the interest of the forum State and its connection to the litigation is strong. The automobile accident underlying the litigation occurred in Oklahoma. The plaintiffs were hospitalized in Oklahoma when they brought suit. Essential witnesses and evidence were in Oklahoma. See *Shaffer* v. *Heitner*, 433 U. S., at 208. The State has a legitimate interest in enforcing its laws designed to keep its highway system safe, and the trial can proceed at least as efficiently in Oklahoma as anywhere else.

The petitioners are not unconnected with the forum. Although both sell automobiles within limited sales territories, each sold the automobile which in fact was driven to Oklahoma where it was involved in an accident.[8] It may be true, as the Court suggests, that each sincerely intended to limit its commercial impact to the limited territory, and that each intended to accept the benefits and protection of the laws only of those States within the territory. But obviously these were unrealistic hopes that cannot be treated as an automatic constitutional shield.[9]

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[8] On the basis of this fact the state court inferred that the petitioners derived substantial revenue from goods used in Oklahoma. The inference is not without support. Certainly, were use of goods accepted as a relevant contact, a plaintiff would not need to have an exact count of the number of petitioners' cars that are used in Oklahoma.

[9] Moreover, imposing liability in this case would not so undermine certainty as to destroy an automobile dealer's ability to do business. According jurisdiction does not expand liability except in the marginal case where a plaintiff cannot afford to bring an action except in the plaintiff's own State. In addition, these petitioners are represented by insurance companies. They not only could, but did, purchase insurance to protect them should they stand trial and lose the case. The costs of the insurance no doubt are passed on to customers.

An automobile simply is not a stationary item or one designed to be used in one place. An automobile is *intended* to be moved around. Someone in the business of selling large numbers of automobiles can hardly plead ignorance of their mobility or pretend that the automobiles stay put after they are sold. It is not merely that a dealer in automobiles foresees that they will move. *Ante*, at 295. The dealer actually intends that the purchasers will use the automobiles to travel to distant States where the dealer does not directly "do business." The sale of an automobile does *purposefully* inject the vehicle into the stream of interstate commerce so that it can travel to distant States. See *Kulko*, 436 U. S., at 94; *Hanson* v. *Denckla*, 357 235, 253 (1958).

This case is similar to *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U. S. 493 (1971). There we indicated, in the course of denying leave to file an original-jurisdiction case, that corporations having no direct contact with Ohio could constitutionally be brought to trial in Ohio because they dumped pollutants into streams outside Ohio's limits which ultimately, through the action of the water, reached Lake Erie and affected Ohio. No corporate acts, only their consequences, occurred in Ohio. The stream of commerce is just as natural a force as a stream of water, and it was equally predictable that the cars petitioners released would reach distant States.[10]

The Court accepts that a State may exercise jurisdiction over a distributor which "serves" that State "indirectly" by "deliver[ing] its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." *Ante*, at 297–298. It is difficult to see why the Constitution should distinguish between a case involving

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[10] One might argue that it was more predictable that the pollutants would reach Ohio than that one of petitioners' cars would reach Oklahoma. The Court's analysis, however, excludes jurisdiction in a contiguous State such as Pennsylvania as surely as in more distant States such as Oklahoma.

goods which reach a distant State through a chain of distribution and a case involving goods which reach the same State because a consumer, using them as the dealer knew the customer would, took them there.[11] In each case the seller purposefully injects the goods into the stream of commerce and those goods predictably are used in the forum State.[12]

Furthermore, an automobile seller derives substantial benefits from States other than its own. A large part of the value of automobiles is the extensive, nationwide network of highways. Significant portions of that network have been constructed by and are maintained by the individual States, including Oklahoma. The States, through their highway programs, contribute in a very direct and important way to the value of petitioners' businesses. Additionally, a network of other related dealerships with their service departments operate throughout the country under the protection of the laws of the various States, including Oklahoma, and enhance the value of petitioners' businesses by facilitating their customers' traveling.

Thus, the Court errs in its conclusion, *ante*, at 299 (emphasis added), that "petitioners have *no* 'contacts, ties, or relations' " with Oklahoma. There obviously are contacts, and, given Oklahoma's connection to the litigation, the contacts are sufficiently significant to make it fair and reasonable for the petitioners to submit to Oklahoma's jurisdiction.

III

It may be that affirmance of the judgments in these cases would approach the outer limits of *International Shoe*'s juris-

[11] For example, I cannot understand the constitutional distinction between selling an item in New Jersey and selling an item in New York expecting it to be used in New Jersey.

[12] The manufacturer in the case cited by the Court, *Gray* v. *American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N. E. 2d 761 (1961), had no more control over which States its goods would reach than did the petitioners in this case.

dictional principle. But that principle, with its almost exclusive focus on the rights of defendants, may be outdated. As MR. JUSTICE MARSHALL wrote in *Shaffer* v. *Heitner*, 433 U. S., at 212: " '[T]raditional notions of fair play and substantial justice' can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures. . . ."

International Shoe inherited its defendant focus from *Pennoyer* v. *Neff*, 95 U. S. 714 (1878), and represented the last major step this Court has taken in the long process of liberalizing the doctrine of personal jurisdiction. Though its flexible approach represented a major advance, the structure of our society has changed in many significant ways since *International Shoe* was decided in 1945. Mr. Justice Black, writing for the Court in *McGee* v. *International Life Ins. Co.*, 355 U. S. 220, 222 (1957), recognized that "a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents." He explained the trend as follows:

> "In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." *Id.*, at 222–223.

As the Court acknowledges, *ante*, at 292–293, both the nationalization of commerce and the ease of transportation and communication have accelerated in the generation since 1957.[13]

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[13] Statistics help illustrate the amazing expansion in mobility since *International Shoe*. The number of revenue passenger-miles flown on

The model of society on which the *International Shoe* Court based its opinion is no longer accurate. Business people, no matter how local their businesses, cannot assume that goods remain in the business' locality. Customers and goods can be anywhere else in the country usually in a matter of hours and always in a matter of a very few days.

In answering the question whether or not it is fair and reasonable to allow a particular forum to hold a trial binding on a particular defendant, the interests of the forum State and other parties loom large in today's world and surely are entitled to as much weight as are the interests of the defendant. The "orderly administration of the laws" provides a firm basis for according some protection to the interests of plaintiffs and States as well as of defendants.[14] Certainly, I cannot see how a defendant's right to due process is violated if the defendant suffers no inconvenience. See *ante*, at 294.

The conclusion I draw is that constitutional concepts of fairness no longer require the extreme concern for defendants that was once necessary. Rather, as I wrote in dissent from *Shaffer* v. *Heitner, supra*, at 220 (emphasis added), minimum

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domestic and international flights increased by nearly three orders of magnitude between 1945 (450 million) and 1976 (179 billion). U. S. Department of Commerce, Historical Statistics of the United States, pt. 2, p. 770 (1975); U. S. Department of Commerce, Statistical Abstract of the United States 670 (1978). Automobile vehicle-miles (including passenger cars, buses, and trucks) driven in the United States increased by a relatively modest 500% during the same period, growing from 250 billion in 1945 to 1,409 billion in 1976. Historical Statistics, *supra*, at 718; Statistical Abstract, *supra*, at 647.

[14] The Court has recognized that there are cases where the interests of justice can turn the focus of the jurisdictional inquiry away from the contacts between a defendant and the forum State. For instance, the Court indicated that the requirement of contacts may be greatly relaxed (if indeed any personal contacts would be required) where a plaintiff is suing a nonresident defendant to enforce a judgment procured in another State. *Shaffer* v. *Heitner*, 433 U. S., at 210–211, nn. 36, 37.

contacts must exist "among the *parties*, the contested transaction, and the forum State." [15] The contacts between any two of these should not be determinative. "[W]hen a suitor seeks to lodge a suit in a State with a substantial interest in seeing its own law applied to the transaction in question, we could wisely act to minimize conflicts, confusion, and uncertainty by adopting a liberal view of jurisdiction, unless considerations of fairness or efficiency strongly point in the opposite direction." [16] 433 U. S., at 225–226. Mr. Justice Black, dissenting in *Hanson* v. *Denckla*, 357 U. S., at 258–259, expressed similar concerns by suggesting that a State should have jurisdiction over a case growing out of a transaction significantly related to that State "unless litigation there would impose such a heavy and disproportionate burden on a nonresident defendant that it would offend what this Court has referred to as 'traditional notions of fair play and substantial justice.'" [17] Assuming

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[15] In some cases, the inquiry will resemble the inquiry commonly undertaken in determining which State's law to apply. That it is fair to apply a State's law to a nonresident defendant is clearly relevant in determining whether it is fair to subject the defendant to jurisdiction in that State. *Shaffer* v. *Heitner*, *supra*, at 225 (BRENNAN, J., dissenting); *Hanson* v. *Denckla*, 357 U. S. 235, 258 (1958) (Black, J., dissenting). See n. 19, *infra*.

[16] Such a standard need be no more uncertain than the Court's test "in which few answers will be written 'in black and white. The greys are dominant and even among them the shades are innumerable.' *Estin* v. *Estin*, 334 U. S. 541, 545 (1948)." *Kulko* v. *California Superior Court*, 436 U. S. 84, 92 (1978).

[17] This strong emphasis on the State's interest is nothing new. This Court, permitting the forum to exercise jurisdiction over nonresident claimants to a trust largely on the basis of the forum's interest in closing the trust, stated:

"[T]he interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident, provided its procedure accords full opportunity to appear

that a State gives a nonresident defendant adequate notice and opportunity to defend, I do not think the Due Process Clause is offended merely because the defendant has to board a plane to get to the site of the trial.

The Court opinion in No. 78–1078 suggests that the defendant ought to be subject to a State's jurisdiction only if he has contacts with the State "such that he should reasonably anticipate being haled into court there."[18] *Ante,* at 297. There is nothing unreasonable or unfair, however, about recognizing commercial reality. Given the tremendous mobility of goods and people, and the inability of businessmen to control where goods are taken by customers (or retailers), I do not think that the defendant should be in complete control of the geographical stretch of his amenability to suit. Jurisdiction is no longer premised on the notion that nonresident defendants have somehow impliedly consented to suit. People should understand that they are held responsible for the consequences of their actions and that in our society most actions have consequences affecting many States. When an action in fact causes injury in another State, the actor should be prepared to answer for it there unless defending in that State would be unfair for some reason other than that a state boundary must be crossed.[19]

In effect the Court is allowing defendants to assert the sov-

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and be heard." *Mullane* v. *Central Hanover Trust Co.,* 339 U. S. 306, 313 (1950).

[18] The Court suggests that this is the critical foreseeability rather than the likelihood that the product will go to the forum State. But the reasoning begs the question. A defendant cannot know if his actions will subject him to jurisdiction in another State until we have declared what the law of jurisdiction is.

[19] One consideration that might create some unfairness would be if the choice of forum also imposed on the defendant an unfavorable substantive law which the defendant could justly have assumed would not apply. See n. 15, *supra.*

ereign rights of their home States. The expressed fear is that otherwise all limits on personal jurisdiction would disappear. But the argument's premise is wrong. I would not abolish limits on jurisdiction or strip state boundaries of all significance, see *Hanson, supra,* at 260 (Black, J., dissenting); I would still require the plaintiff to demonstrate sufficient contacts among the parties, the forum, and the litigation to make the forum a reasonable State in which to hold the trial.[20]

I would also, however, strip the defendant of an unjustified veto power over certain very appropriate fora—a power the defendant justifiably enjoyed long ago when communication and travel over long distances was slow and unpredictable and when notions of state sovereignty were impractical and exaggerated. But I repeat that that is not today's world. If a plaintiff can show that his chosen forum State has a sufficient interest in the litigation (or sufficient contacts with the defendant), then the defendant who cannot show some real injury to a constitutionally protected interest, see *O'Connor* v. *Lee-Hy Paving Corp.*, 579 F. 2d, at 201, should have no constitutional excuse not to appear.[21]

The plaintiffs in each of these cases brought suit in a forum with which they had significant contacts and which had significant contacts with the litigation. I am not convinced that the defendants would suffer any "heavy and disproportionate burden" in defending the suits. Accordingly, I would hold

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[20] For instance, in No. 78–952, if the plaintiff were not a bona fide resident of Minnesota when the suit was filed or if the defendant were subject to financial liability, I might well reach a different result. In No. 78–1078, I might reach a different result if the accident had not occurred in Oklahoma.

[21] Frequently, of course, the defendant will be able to influence the choice of forum through traditional doctrines, such as venue or *forum non conveniens*, permitting the transfer of litigation. *Shaffer* v. *Heitner,* 433 U. S., at 228, n. 8 (BRENNAN, J., dissenting).

that the Constitution should not shield the defendants from appearing and defending in the plaintiffs' chosen fora.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BLACKMUN joins, dissenting.

For over 30 years the standard by which to measure the constitutionally permissible reach of state-court jurisdiction has been well established:

> "[D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co.* v. *Washington*, 326 U. S. 310, 316 (1945), quoting *Milliken* v. *Meyer*, 311 U. S. 457, 463 (1940).

The corollary, that the Due Process Clause forbids the assertion of jurisdiction over a defendant "with which the state has no contacts, ties, or relations," 326 U. S., at 319, is equally clear. The concepts of fairness and substantial justice as applied to an evaluation of "the quality and nature of the [defendant's] activity," *ibid.*, are not readily susceptible of further definition, however, and it is not surprising that the constitutional standard is easier to state than to apply.

This is a difficult case, and reasonable minds may differ as to whether respondents have alleged a sufficient "relationship among the defendant[s], the forum, and the litigation," *Shaffer* v. *Heitner*, 433 U. S. 186, 204 (1977), to satisfy the requirements of *International Shoe*. I am concerned, however, that the majority has reached its result by taking an unnecessarily narrow view of petitioners' forum-related conduct. The majority asserts that "respondents seek to base jurisdiction on one, isolated occurrence and whatever inferences can be drawn therefrom: the fortuitous circumstance that a single Audi automobile, sold in New York to New York

residents, happened to suffer an accident while passing through Oklahoma." *Ante*, at 295. If that were the case, I would readily agree that the minimum contacts necessary to sustain jurisdiction are not present. But the basis for the assertion of jurisdiction is not the happenstance that an individual over whom petitioners had no control made a unilateral decision to take a chattel with him to a distant State. Rather, jurisdiction is premised on the deliberate and purposeful actions of the defendants themselves in choosing to become part of a nationwide, indeed a global, network for marketing and servicing automobiles.

Petitioners are sellers of a product whose utility derives from its mobility. The unique importance of the automobile in today's society, which is discussed in MR. JUSTICE BLACKMUN's dissenting opinion, *post*, at 318, needs no further elaboration. Petitioners know that their customers buy cars not only to make short trips, but also to travel long distances. In fact, the nationwide service network with which they are affiliated was designed to facilitate and encourage such travel. Seaway would be unlikely to sell many cars if authorized service were available only in Massena, N. Y. Moreover, local dealers normally derive a substantial portion of their revenues from their service operations and thereby obtain a further economic benefit from the opportunity to service cars which were sold in other States. It is apparent that petitioners have not attempted to minimize the chance that their activities will have effects in other States; on the contrary, they have chosen to do business in a way that increases that chance, because it is to their economic advantage to do so.

To be sure, petitioners could not know in advance that this particular automobile would be driven to Oklahoma. They must have anticipated, however, that a substantial portion of the cars they sold would travel out of New York. Seaway, a local dealer in the second most populous State, and World-

Wide, one of only seven regional Audi distributors in the entire country, see Brief for Respondents 2, would scarcely have been surprised to learn that a car sold by them had been driven in Oklahoma on Interstate 44, a heavily traveled transcontinental highway. In the case of the distributor, in particular, the probability that some of the cars it sells will be driven in every one of the contiguous States must amount to a virtual certainty. This knowledge should alert a reasonable businessman to the likelihood that a defect in the product might manifest itself in the forum State—not because of some unpredictable, aberrant, unilateral action by a single buyer, but in the normal course of the operation of the vehicles for their intended purpose.

It is misleading for the majority to characterize the argument in favor of jurisdiction as one of " 'foreseeability' alone." *Ante*, at 295. As economic entities petitioners reach out from New York, knowingly causing effects in other States and receiving economic advantage both from the ability to cause such effects themselves and from the activities of dealers and distributors in other States. While they did not receive revenue from making direct sales in Oklahoma, they intentionally became part of an interstate economic network, which included dealerships in Oklahoma, for pecuniary gain. In light of this purposeful conduct I do not believe it can be said that petitioners "had no reason to expect to be haled before a[n Oklahoma] court." *Shaffer* v. *Heitner, supra,* at 216; see *ante,* at 297, and *Kulko* v. *California Superior Court,* 436 U. S. 84, 97–98 (1978).

The majority apparently acknowledges that if a product is purchased in the forum State by a consumer, that State may assert jurisdiction over everyone in the chain of distribution. See *ante,* at 297–298. With this I agree. But I cannot agree that jurisdiction is necessarily lacking if the product enters the State not through the channels of distribution but in the course of its intended use by the consumer. We have recog-

nized the role played by the automobile in the expansion of our notions of personal jurisdiction. See *Shaffer* v. *Heitner*, *supra*, at 204; *Hess* v. *Pawloski*, 274 U. S. 352 (1927). Unlike most other chattels, which may find their way into States far from where they were purchased because their owner takes them there, the intended use of the automobile is precisely as a means of traveling from one place to another. In such a case, it is highly artificial to restrict the concept of the "stream of commerce" to the chain of distribution from the manufacturer to the ultimate consumer.

I sympathize with the majority's concern that persons ought to be able to structure their conduct so as not to be subject to suit in distant forums. But that may not always be possible. Some activities by their very nature may foreclose the option of conducting them in such a way as to avoid subjecting oneself to jurisdiction in multiple forums. This is by no means to say that all sellers of automobiles should be subject to suit everywhere; but a distributor of automobiles to a multistate market and a local automobile dealer who makes himself part of a nationwide network of dealerships can fairly expect that the cars they sell may cause injury in distant States and that they may be called on to defend a resulting lawsuit there.

In light of the quality and nature of petitioners' activity, the majority's reliance on *Kulko* v. *California Superior Court*, *supra*, is misplaced. *Kulko* involved the assertion of state-court jurisdiction over a nonresident individual in connection with an action to modify his child custody rights and support obligations. His only contact with the forum State was that he gave his minor child permission to live there with her mother. In holding that the exercise of jurisdiction violated the Due Process Clause, we emphasized that the cause of action as well as the defendant's actions in relation to the forum State arose "*not from the defendant's commercial transactions in interstate commerce*, but rather from his personal,

domestic relations," 436 U. S., at 97 (emphasis supplied), contrasting Kulko's actions with those of the insurance company in *McGee* v. *International Life Ins. Co.*, 355 U. S. 220 (1957), which were undertaken for commercial benefit.*

Manifestly, the "quality and nature" of commercial activity is different, for purposes of the *International Shoe* test, from actions from which a defendant obtains no economic advantage. Commercial activity is more likely to cause effects in a larger sphere, and the actor derives an economic benefit from the activity that makes it fair to require him to answer for his conduct where its effects are felt. The profits may be used to pay the costs of suit, and knowing that the activity is likely to have effects in other States the defendant can readily insure against the costs of those effects, thereby sparing himself much of the inconvenience of defending in a distant forum.

Of course, the Constitution forbids the exercise of jurisdiction if the defendant had no judicially cognizable contacts with the forum. But as the majority acknowledges, if such contacts are present the jurisdictional inquiry requires a balancing of various interests and policies. See *ante*, at 292; *Rush* v. *Savchuk*, *post*, at 332. I believe such contacts are to be found here and that, considering all of the interests and policies at stake, requiring petitioners to defend this action in Oklahoma is not beyond the bounds of the Constitution. Accordingly, I dissent.

MR. JUSTICE BLACKMUN, dissenting.

I confess that I am somewhat puzzled why the plaintiffs in this litigation are so insistent that the regional distributor and the retail dealer, the petitioners here, who handled the ill-fated Audi automobile involved in this litigation, be named defendants. It would appear that the manufacturer and the

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*Similarly, I believe the Court in *Hanson* v. *Denckla*, 357 U. S. 235 (1958), was influenced by the fact that trust administration has traditionally been considered a peculiarly local activity.

importer, whose subjectability to Oklahoma jurisdiction is not challenged before this Court, ought not to be judgment-proof. It may, of course, ultimately amount to a contest between insurance companies that, once begun, is not easily brought to a termination. Having made this much of an observation, I pursue it no further.

For me, a critical factor in the disposition of the litigation is the nature of the instrumentality under consideration. It has been said that we are a Nation on wheels. What we are concerned with here is the automobile and its peripatetic character. One need only examine our national network of interstate highways, or make an appearance on one of them, or observe the variety of license plates present not only on those highways but in any metropolitan area, to realize that any automobile is likely to wander far from its place of licensure or from its place of distribution and retail sale. Miles per gallon on the highway (as well as in the city) and mileage per tankful are familiar allegations in manufacturers' advertisements today. To expect that any new automobile will remain in the vicinity of its retail sale—like the 1914 electric car driven by the proverbial "little old lady"—is to blink at reality. The automobile is intended for distance as well as for transportation within a limited area.

It therefore seems to me not unreasonable—and certainly not unconstitutional and beyond the reach of the principles laid down in *International Shoe Co.* v. *Washington,* 326 U. S. 310 (1945), and its progeny—to uphold Oklahoma jurisdiction over this New York distributor and this New York dealer when the accident happened in Oklahoma. I see nothing more unfair for them than for the manufacturer and the importer. All are in the business of providing vehicles that spread out over the highways of our several States. It is not too much to anticipate at the time of distribution and at the time of retail sale that this Audi would be in Oklahoma. Moreover, in assessing "minimum contacts," foreseeable use in another State seems to me to be little different from foreseeable resale

in another State. Yet the Court declares this distinction determinative. *Ante,* at 297–299.

MR. JUSTICE BRENNAN points out in his dissent, *ante,* at 307, that an automobile dealer derives substantial benefits from States other than its own. The same is true of the regional distributor. Oklahoma does its best to provide safe roads. Its police investigate accidents. It regulates driving within the State. It provides aid to the victim and thereby, it is hoped, lessens damages. Accident reports are prepared and made available. All this contributes to and enhances the business of those engaged professionally in the distribution and sale of automobiles. All this also may benefit defendants in the very lawsuits over which the State asserts jurisdiction.

My position need not now take me beyond the automobile and the professional who does business by way of distributing and retailing automobiles. Cases concerning other instrumentalities will be dealt with as they arise and in their own contexts.

I would affirm the judgment of the Supreme Court of Oklahoma. Because the Court reverses that judgment, it will now be about parsing every variant in the myriad of motor vehicle fact situations that present themselves. Some will justify jurisdiction and others will not. All will depend on the "contact" that the Court sees fit to perceive in the individual case.

RUSH ET AL. *v.* SAVCHUK

APPEAL FROM THE SUPREME COURT OF MINNESOTA

No. 78-952. Argued October 3, 1979—Decided January 21, 1980

While a resident of Indiana, appellee was injured in an accident in Indiana while riding as a passenger in a car driven by appellant Rush, also an Indiana resident. After moving to Minnesota, appellee commenced this action against Rush in a Minnesota state court, alleging negligence and seeking damages. As Rush had no contacts with Minnesota that would support *in personam* jurisdiction, appellee attempted to obtain *quasi in rem* jurisdiction by garnishing the contractual obligation of State Farm Mutual Automobile Insurance Co. (State Farm) to defend and indemnify Rush in connection with such a suit. State Farm, which does business in Minnesota, had insured the car, owned by Rush's father, under a liability insurance policy issued in Indiana. Rush was personally served in Indiana, and after State Farm's response to the garnishment summons asserted that it owed the defendant nothing, appellee moved the trial court for permission to file a supplemental complaint making the garnishee, State Farm, a party to the action. Rush and State Farm moved to dismiss the complaint for lack of jurisdiction over the defendant. The trial court denied the motion to dismiss and granted the motion for leave to file the supplemental complaint. The Minnesota Supreme Court affirmed, ultimately holding that the assertion of *quasi in rem* jurisdiction under the Minnesota garnishment statute complied with the due process standards enunciated in *Shaffer* v. *Heitner*, 433 U. S. 186.

Held: A State may not constitutionally exercise *quasi in rem* jurisdiction over a defendant who has no forum contacts by attaching the contractual obligation of an insurer licensed to do business in the State to defend and indemnify him in connection with the suit. Pp. 327–333.

(a) A State may exercise jurisdiction over an absent defendant only if the defendant has certain minimum contacts with the forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *International Shoe Co.* v. *Washington*, 326 U. S. 310. In determining whether a particular exercise of state-court jurisdiction is consistent with due process, the inquiry must focus on "the relationship among the defendant, the forum, and the litigation." *Shaffer* v. *Heitner*, *supra*, at 204. P. 327.

(b) Here, the only affiliating circumstance offered to show a relationship among Rush, Minnesota, and this lawsuit is that Rush's insurance

company does business in the State. However, the fictional presence in Minnesota of State Farm's policy obligation to defend and indemnify Rush—derived from combining the legal fiction that assigns a situs to a debt, for garnishment purposes, wherever the debtor is found with the legal fiction that a corporation is "present," for jurisdictional purposes, wherever it does business—cannot be deemed to give the State the power to determine Rush's liability for the out-of-state accident. The mere presence of property in a State does not establish a sufficient relationship between the owner of the property and the State to support the exercise of jurisdiction over an unrelated cause of action, and it cannot be said that the *defendant* engaged in any purposeful activity related to the forum that would make the exercise of jurisdiction fair, just, or reasonable merely because his insurer does business there. Nor does the policy provide significant contacts between the litigation and the forum, for the policy obligations pertain only to the conduct, not the substance, of the litigation. Pp. 327–330.

(c) Moreover, the requisite minimum contacts with the forum cannot be established under an alternative approach attributing the insurer's forum contacts to the defendant by treating the attachment procedure as the functional equivalent of a direct action against the insurer, and considering the insured a "nominal defendant" in order to obtain jurisdiction over the insurer. The State's ability to exert its power over the "nominal defendant" is analytically prerequisite to the insurer's entry into the case as a garnishee, and if the Constitution forbids the assertion of jurisdiction over the insured based on the policy, then there is no conceptual basis for bringing the "garnishee" into the action. Nor may the Minnesota court attribute State Farm's contacts to Rush by considering the "defending parties" together and aggregating their forum contacts in determining whether it has jurisdiction. The parties' relationships with each other may be significant in evaluating their ties to the forum, but the requirements of *International Shoe* must be met as to each defendant over whom a state court exercises jurisdiction. Pp. 330–332.

272 N. W. 2d 888, reversed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., *ante*, p. 299, and STEVENS, J., *post*, p. 333, filed dissenting opinions.

O. C. Adamson II argued the cause for appellants. With him on the briefs was *James F. Roegge*.

Edward H. Borkon argued the cause and filed a brief for appellee.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This appeal presents the question whether a State may constitutionally exercise *quasi in rem* jurisdiction over a defendant who has no forum contacts by attaching the contractual obligation of an insurer licensed to do business in the State to defend and indemnify him in connection with the suit.

I

On January 13, 1972, two Indiana residents were involved in a single-car accident in Elkhart, Ind. Appellee Savchuk, who was a passenger in the car driven by appellant Rush, was injured. The car, owned by Rush's father, was insured by appellant State Farm Mutual Automobile Insurance Co. (State Farm) under a liability insurance policy issued in Indiana. Indiana's guest statute would have barred a claim by Savchuk. Ind. Code § 9–3–3–1 (1976).

Savchuk moved with his parents to Minnesota in June 1973.[1] On May 28, 1974, he commenced an action against Rush in the Minnesota state courts.[2] As Rush had no contacts with Minnesota that would support *in personam* jurisdiction, Savchuk attempted to obtain *quasi in rem* jurisdiction by garnishing State Farm's obligation under the insurance policy to defend and indemnify Rush in connection with such a suit.[3] State Farm does business in Minnesota.[4] Rush was

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[1] Savchuk moved to Pennsylvania after this appeal was filed.

[2] The suit was filed after the 2-year Indiana statute of limitations had run. 272 N. W. 2d 888, 891, n. 5 (1978).

[3] Minn. Stat. § 571.41, subd. 2 (1978) provides, in relevant part: "Notwithstanding anything to the contrary herein contained, a plaintiff in

[*Footnote 4 is on p. 323*]

personally served in Indiana. The complaint alleged negligence and sought $125,000 in damages.[5]

As provided by the state garnishment statute, Savchuk moved the trial court for permission to file a supplemental complaint making the garnishee, State Farm, a party to the action after State Farm's response to the garnishment summons asserted that it owed the defendant nothing.[6] Rush and State

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any action in a court of record for the recovery of money may issue a garnishee summons before judgment therein in the following instances only:

. . . . .

"(b) If the court shall order the issuance of such summons, if a summons and complaint is filed with the appropriate court and either served on the defendant or delivered to a sheriff for service on the defendant not more than 30 days after the order is signed, and if, upon application to the court it shall appear that:

. . . . .

"(2) The purpose of the garnishment is to establish quasi in rem jurisdiction and that

. . . . .

"(b) defendant is a nonresident individual, or a foreign corporation, partnership or association.

"(3) The garnishee and the debtor are parties to a contract of suretyship, guarantee, or insurance, because of which the garnishee may be held to respond to any person for the claim asserted against the debtor in the main action."

The Minnesota Supreme Court cited this version of the statute, enacted in 1976, in its opinion in 272 N. W. 2d 888 (1978) (*Savchuk II*). The version of the statute that was in effect at the time of the original opinion, 311 Minn. 480, 245 N. W. 2d 624 (1976) (*Savchuk I*), does not differ in any important respect.

[4] State Farm is an Illinois corporation that does business in all 50 States, the District of Columbia, and several Canadian Provinces. The Insurance Almanac 431–432 (1977).

[5] The prayer was later reduced voluntarily to $50,000, the face amount of the policy.

[6] Minn. Stat. § 571.495 (1978) requires the garnishee to disclose the amount of his debt to the defendant. Section 571.51 provides, in relevant part:

"[I]n all . . . cases where the garnishee denies liability, the judgment creditor may move the court at any time before the garnishee is discharged,

Farm moved to dismiss the complaint for lack of jurisdiction over the defendant.[7] The trial court denied the motion to dismiss and granted the motion for leave to file the supplemental complaint.

On appeal, the Minnesota Supreme Court affirmed the trial court's decision. 311 Minn. 480, 245 N. W. 2d 624 (1976) (*Savchuk I*). It held, first, that the obligation of an insurance company to defend and indemnify a nonresident insured under an automobile liability insurance policy is a garnishable res in Minnesota for the purpose of obtaining *quasi in rem* jurisdiction when the incident giving rise to the action occurs outside Minnesota but the plaintiff is a Minnesota resident when the suit is filed. Second, the court held that the assertion of jurisdiction over Rush was constitutional because he had notice of the suit and an opportunity to defend, his liability was limited to the amount of the policy, and the garnishment procedure may be used only by Minnesota residents. The court expressly recognized that Rush had engaged in no voluntary activity that would justify the exercise of *in personam* jurisdiction. The court found, however, that considerations of fairness supported the exercise of *quasi in rem* jurisdiction because in accident litigation the insurer controls the defense of the case, State Farm does business in and is regulated by the State, and the State has an interest in protecting its residents and providing them with a forum in which to litigate their claims.

Rush appealed to this Court. We vacated the judgment and remanded the cause for further consideration in light of

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on notice to both the judgment debtor and the garnishee, for leave to file a supplemental complaint making the latter a party to the action, and setting forth the facts upon which he claims to charge him; and, if probable cause is shown, such motion shall be granted. . . ." Minn. Stat. § 571.51 (1978).

The party-garnishee is not a defendant.

[7] The motion to dismiss also alleged lack of subject-matter jurisdiction, insufficiency of process, and insufficiency of service of process.

Shaffer v. *Heitner,* 433 U. S. 186 (1977). 433 U. S. 902 (1977).

On remand, the Minnesota Supreme Court held that the assertion of *quasi in rem* jurisdiction through garnishment of an insurer's obligation to an insured complied with the due process standards enunciated in *Shaffer.* 272 N. W. 2d 888 (1978) (*Savchuk II*). The court found that the garnishment statute differed from the Delaware stock sequestration procedure held unconstitutional in *Shaffer* because the garnished property was intimately related to the litigation and the garnishment procedure paralleled the asserted state interest in "facilitating recoveries for resident plaintiffs." 272 N. W. 2d, at 891.[8] This appeal followed.

II

The Minnesota Supreme Court held that the Minnesota garnishment statute embodies the rule stated in *Seider* v. *Roth,* 17 N. Y. 2d 111, 216 N. E. 2d 312 (1966), that the contractual obligation of an insurance company to its insured under a liability insurance policy is a debt subject to attachment under state law if the insurer does business in the State.[9] *Seider* jurisdiction was upheld against a due process challenge in *Simpson* v. *Loehmann,* 21 N. Y. 2d 305, 234 N. E. 2d 669 (1967), reargument denied, 21 N. Y. 2d 990, 238 N. E. 2d 319 (1968). The New York court relied on *Harris* v. *Balk,* 198 U. S. 215 (1905), in holding that the presence of the debt

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[8] Minnesota would apply its own comparative negligence law, rather than Indiana's contributory negligence rule. See *Schwartz* v. *Consolidated Freightways Corp.,* 300 Minn. 487, 221 N. W. 2d 665 (1974). Appellants assert that Minnesota would also decline to apply the Indiana guest statute if this case were tried in Minnesota. Juris. Statement 10, n. 2; cf. *Savchuk II, supra,* at 891–892. The constitutionality of a choice-of-law rule that would apply forum law in these circumstances is not before us. Cf. *Home Ins. Co.* v. *Dick,* 281 U. S. 397 (1930).

[9] 272 N. W. 2d., at 891.

in the State was sufficient to permit *quasi in rem* jurisdiction over the absent defendant. The court also concluded that the exercise of jurisdiction was permissible under the Due Process Clause because, "[v]iewed realistically, the insurer in a case such as the present is in full control of the litigation" and "where the plaintiff is a resident of the forum state and the insurer is present in and regulated by it, the State has a substantial and continuing relation with the controversy." *Simpson* v. *Loehmann, supra,* at 311, 234 N. E. 2d, at 672.

The United States Court of Appeals for the Second Circuit gave its approval to *Seider* in *Minichiello* v. *Rosenberg,* 410 F. 2d 106, adhered to en banc, 410 F. 2d 117 (1968), cert. denied, 396 U. S. 844 (1969), although on a slightly different rationale. Judge Friendly construed *Seider* as "in effect a judicially created direct action statute. The insurer doing business in New York is considered the real party in interest and the nonresident insured is viewed simply as a conduit, who has to be named as a defendant in order to provide a conceptual basis for getting at the insurer." 410 F. 2d, at 109; see *Donawitz* v. *Danek,* 42 N. Y. 2d 138, 142, 366 N. E. 2d 253, 255 (1977). The court held that New York could constitutionally enact a direct action statute, and that the restriction of liability to the amount of the policy coverage made the policyholder's personal stake in the litigation so slight that the exercise of jurisdiction did not offend due process.

New York has continued to adhere to *Seider.*[10] New Hampshire has followed *Seider* if the defendant resides in a *Seider* jurisdiction,[11] but not in other cases.[12] Minnesota is the only

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[10] *Baden* v. *Staples,* 45 N. Y. 2d 889, 383 N. E. 2d 110 (1978). The State has declined, however, to make the attachment procedure available to nonresident plaintiffs. *Donawitz* v. *Danek,* 42 N. Y. 2d 138, 366 N. E. 2d 253 (1977).

[11] *Forbes* v. *Boynton,* 113 N. H. 617, 313 A. 2d 129 (1973). But cf. *Rocca* v. *Kenney,* 117 N. H. 1057, 381 A. 2d 330 (1977).

[12] *Camire* v. *Scieszka,* 116 N. H. 281, 358 A. 2d 397 (1976).

other State that has adopted *Seider*-type jurisdiction.[13] The Second Circuit recently reaffirmed its conclusion that *Seider* does not violate due process after reconsidering the doctrine in light of *Shaffer* v. *Heitner*. *O'Conner* v. *Lee-Hy Paving Corp.*, 579 F. 2d 194, cert. denied, 439 U. S. 1034 (1978).

III

In *Shaffer* v. *Heitner* we held that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny." 433 U. S., at 212. That is, a State may exercise jurisdiction over an absent defendant only if the defendant has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co.* v. *Washington*, 326 U. S. 310, 316 (1945). In determining whether a particular exercise of state-court jurisdiction is consistent with due process, the inquiry must focus on "the relationship among the defendant, the forum, and the litigation." *Shaffer* v. *Heitner*, *supra*, at 204.

It is conceded that Rush has never had any contacts with Minnesota, and that the auto accident that is the subject of

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[13] The practice has been rejected, based on state law or constitutional grounds, in *Belcher* v. *Government Employees Ins. Co.*, 282 Md. 718, 387 A. 2d 770 (1978); *Javorek* v. *Superior Court*, 17 Cal. 3d 629, 552 P. 2d 728 (1976); *Hart* v. *Cote*, 145 N. J. Super. 420, 367 A. 2d 1219 (Law Div. 1976); *Grinnell* v. *Garrett*, 295 So. 2d 496 (La. App. 1974); *Johnson* v. *Farmers Alliance Mutual Ins. Co.*, 499 P. 2d 1387 (Okla. 1972); *State ex rel. Government Employees Ins. Co.* v. *Lasky*, 454 S. W. 2d 942 (Mo. App. 1970); *Howard* v. *Allen*, 254 S. C. 455, 176 S. E. 2d 127 (1970); *De Rentiis* v. *Lewis*, 106 R. I. 240, 258 A. 2d 464 (1969); *Housley* v. *Anaconda Co.*, 19 Utah 2d 124, 427 P. 2d 390 (1967); *Jardine* v. *Donnelly*, 413 Pa. 474, 198 A. 2d 513 (1964). See also *Tessier* v. *State Farm Mutual Ins. Co.*, 458 F. 2d 1299 (CA1 1972); *Kirchman* v. *Mikula*, 443 F. 2d 816 (CA5 1971); *Robinson* v. *O. F. Shearer & Sons*, 429 F. 2d 83 (CA3 1970); *Sykes* v. *Beal*, 392 F. Supp. 1089 (Conn. 1975); *Ricker* v. *Lajoie*, 314 F. Supp. 401 (Vt. 1970).

this action occurred in Indiana and also had no connection to Minnesota. The only affiliating circumstance offered to show a relationship among Rush, Minnesota, and this lawsuit is that Rush's insurance company does business in the State. *Seider* constructed an ingenious jurisdictional theory to permit a State to command a defendant to appear in its courts on the basis of this factor alone. State Farm's contractual obligation to defend and indemnify Rush in connection with liability claims is treated as a debt owed by State Farm to Rush. The legal fiction that assigns a situs to a debt, for garnishment purposes, wherever the debtor is found is combined with the legal fiction that a corporation is "present," for jurisdictional purposes, wherever it does business to yield the conclusion that the obligation to defend and indemnify is located in the forum for purposes of the garnishment statute. The fictional presence of the policy obligation is deemed to give the State the power to determine the policyholder's liability for the out-of-state accident.[14]

We held in *Shaffer* that the mere presence of property in a State does not establish a sufficient relationship between the owner of the property and the State to support the exercise of jurisdiction over an unrelated cause of action. The ownership of property in the State is *a* contact between the defendant and the forum, and it may suggest the presence of other ties. 433 U. S., at 209. Jurisdiction is lacking, however, unless there are sufficient contacts to satisfy the fairness standard of *International Shoe*.

Here, the fact that the defendant's insurer does business in the forum State suggests no further contacts between the defendant and the forum, and the record supplies no evidence of any. State Farm's decision to do business in Minnesota

[14] The conclusion that State Farm's obligation under the insurance policy was garnishable property is a matter of state law and therefore is not before us. Assuming that it was garnishable property, the question is what significance that fact has to the relationship among the defendant, the forum, and the litigation.

was completely adventitious as far as Rush was concerned. He had no control over that decision, and it is unlikely that he would have expected that by buying insurance in Indiana he had subjected himself to suit in any State to which a potential future plaintiff might decide to move. In short, it cannot be said that the *defendant* engaged in any purposeful activity related to the forum that would make the exercise of jurisdiction fair, just, or reasonable, see *Kulko* v. *California Superior Court,* 436 U. S. 84, 93–94 (1978); *Hanson* v. *Denckla,* 357 U. S. 235, 253 (1958), merely because his insurer does business there.

Nor are there significant contacts between the litigation and the forum. The Minnesota Supreme Court was of the view that the insurance policy was so important to the litigation that it provided contacts sufficient to satisfy due process.[15] The insurance policy is not the subject matter of the case, however, nor is it related to the operative facts of the negligence action. The contractual arrangements between the defendant and the insurer pertain only to the conduct, not the substance, of the litigation, and accordingly do not affect the court's jurisdiction unless they demonstrate ties between the defendant and the forum.

In fact, the fictitious presence of the insurer's obligation in Minnesota does not, without more, provide a basis for concluding that there is *any* contact in the *International Shoe* sense

[15] The court explained: "In the instant case, the insurer's obligation to defend and indemnify, while theoretically separable from the tort action, has *no* independent value or significance apart from accident litigation. In the accident litigation, however, it is inevitably the focus, determining the rights and obligation [*sic*] of the insurer, the insured, and practically speaking, the victim." *Savchuk II,* 272 N. W. 2d, at 892 (emphasis in original). The court considered the "practical relationship between the insurer and the nominal defendant," *ibid.,* the limitation of liability to the policy amount, and the restriction of the garnishment procedure to resident plaintiffs, and concluded that "the relationship between the defending parties, the litigation, and the forum state," *id.,* at 893, was sufficient to sustain the exercise of jurisdiction.

between Minnesota and the insured. To say that "a debt follows the debtor" is simply to say that intangible property has no actual situs, and a debt may be sued on wherever there is jurisdiction over the debtor. State Farm is "found," in the sense of doing business, in all 50 States and the District of Columbia. Under appellee's theory, the "debt" owed to Rush would be "present" in each of those jurisdictions simultaneously. It is apparent that such a "contact" can have no jurisdictional significance.

An alternative approach for finding minimum contacts in *Seider*-type cases, referred to with approval by the Minnesota Supreme Court,[16] is to attribute the insurer's forum contacts to the defendant by treating the attachment procedure as the functional equivalent of a direct action against the insurer. This approach views *Seider* jurisdiction as fair both to the insurer, whose forum contacts would support *in personam* jurisdiction even for an unrelated cause of action, and to the "nominal defendant." Because liability is limited to the policy amount, the defendant incurs no personal liability,[17] and the judgment is satisfied from the policy proceeds which are not available to the insured for any purpose other than paying accident claims, the insured is said to have such a slight stake in the litigation as a practical matter that it is not unfair to make him a "nominal defendant" in order to obtain jurisdiction over the insurance company.

Seider actions are not equivalent to direct actions, however.[18] The State's ability to exert its power over the "nomi-

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[16] *Id.*, at 892–893; but see *Savchuk I*, 311 Minn., at 488, 245 N. W. 2d, at 629.

[17] See *Savchuk II*, 272 N. W. 2d, at 892; *Simpson* v. *Loehmann*, 21 N. Y. 2d 990, 991, 238 N. E. 2d 319, 320 (1968).

[18] In *Savchuk I*, the Minnesota Supreme Court rejected Rush's argument that the garnishment procedure amounted to a direct action, observing: "The defendant, not the insurer, is the party sued. There is nothing in the statute which suggests that the insurer should be named as a defendant." 311 Minn., at 488, 245 N. W. 2d, at 629. See n. 6, *supra*.

nal defendant" is analytically prerequisite to the insurer's entry into the case as a garnishee. If the Constitution forbids the assertion of jurisdiction over the insured based on the policy, then there is no conceptual basis for bringing the "garnishee" into the action. Because the party with forum contacts can only be reached through the out-of-state party, the question of jurisdiction over the nonresident cannot be ignored.[19] Moreover, the assumption that the defendant has no real stake in the litigation is far from self-evident.[20]

The Minnesota court also attempted to attribute State Farm's contacts to Rush by considering the "defending parties" together and aggregating their forum contacts in determining whether it had jurisdiction.[21] The result was the

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[19] Compare the direct action statute upheld in *Watson* v. *Employers Liability Assurance Corp.*, 348 U. S. 66 (1954), which was applicable only if the accident or injury occurred in the State or the insured was domiciled there and which permitted the plaintiff to sue the insurer alone, without naming the insured as a defendant. *Id.*, at 68, n. 4.

[20] A party does not extinguish his legal interest in a dispute by insuring himself against having to pay an eventual judgment out of his own pocket. Moreover, the purpose of insurance is simply to make the defendant whole for the economic costs of the lawsuit; but noneconomic factors may also be important to the defendant. Professional malpractice actions, for example, question the defendant's integrity and competence and may affect his professional standing. Cf. *Donawitz* v. *Danek*, 42 N. Y. 2d 138, 366 N. E. 2d 253 (1977) (medical malpractice action premised on *Seider* jurisdiction dismissed because plaintiff was a nonresident). Further, one can easily conceive of cases in which the defendant might have a substantial economic stake in *Seider* litigation—if, for example, multiple plaintiffs sued in different States for an aggregate amount in excess of the policy limits, or if a successful claim would affect the policyholder's insurability. For these reasons, the defendant's interest in the adjudication of his liability cannot reasonably be characterized as *de minimis*.

[21] The court stated: "We view as relevant the relationship between the *defending parties*, the litigation, and the forum state. It cannot be said that Minnesota lacks such minimally-requisite 'contacts, ties or relations' to those *defending parties* as to offend the requirements of due process." *Savchuk II*, 272 N. W. 2d, at 893 (emphasis added).

assertion of jurisdiction over Rush based solely on the activities of State Farm. Such a result is plainly unconstitutional. Naturally, the parties' relationships with each other may be significant in evaluating their ties to the forum. The requirements of *International Shoe*, however, must be met as to each defendant over whom a state court exercises jurisdiction.

The justifications offered in support of *Seider* jurisdiction share a common characteristic: they shift the focus of the inquiry from the relationship among the defendant, the forum, and the litigation to that among the plaintiff, the forum, the insurer, and the litigation. The insurer's contacts with the forum are attributed to the defendant because the policy was taken out in anticipation of such litigation. The State's interests in providing a forum for its residents and in regulating the activities of insurance companies are substituted for its contacts with the defendant and the cause of action. This subtle shift in focus from the defendant to the plaintiff is most evident in the decisions limiting *Seider* jurisdiction to actions by forum residents on the ground that permitting nonresidents to avail themselves of the procedure would be unconstitutional.[22] In other words, the plaintiff's contacts with the forum are decisive in determining whether the defendant's due process rights are violated.

Such an approach is forbidden by *International Shoe* and its progeny. If a defendant has certain judicially cognizable ties with a State, a variety of factors relating to the particular cause of action may be relevant to the determination whether the exercise of jurisdiction would comport with "traditional notions of fair play and substantial justice." See *McGee* v. *International Life Ins. Co.*, 355 U. S. 220 (1957); cf. *Kulko* v. *California Superior Court*, 436 U. S., at 98–101. Here, however, the defendant has *no* contacts with the forum, and the

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[22] See, *e. g.*, *Farrell* v. *Piedmont Aviation, Inc.*, 411 F. 2d 812 (CA2 1969); *Rintala* v. *Shoemaker*, 362 F. Supp. 1044 (Minn. 1973); *Donawitz* v. *Danek, supra; Savchuk I.*

Due Process Clause "does not contemplate that a state may make binding a judgment . . . against an individual or corporate defendant with which the state has no contacts, ties, or relations." *International Shoe Co.* v. *Washington,* 326 U. S., at 319. The judgment of the Minnesota Supreme Court is, therefore,

Reversed.

[For dissenting opinion of MR. JUSTICE BRENNAN, see *ante,* p. 299.]

MR. JUSTICE STEVENS, dissenting.

As the Court notes, appellant Rush had no contact with Minnesota that would support personal jurisdiction over him in that State. *Ante,* at 322. Moreover, *Shaffer* v. *Heitner,* 433 U. S. 186, precludes the assertion of *quasi in rem* jurisdiction over his property in that forum if the intangible property attached is unrelated to the action. It does not follow, however, that the plaintiff may not obtain *quasi in rem* jurisdiction over appellant's insurance policy, since his carrier does business in Minnesota and since it has also specifically contracted in the policy attached to defend the very litigation that plaintiff has instituted in Minnesota.

In this kind of case, the Minnesota statute authorizing jurisdiction is correctly characterized as the "functional equivalent" of a so-called direct-action statute. The impact of the judgment is against the insurer.* I believe such a direct-action statute is valid as applied to a suit brought by a forum resident, see *Watson* v. *Employers Liability Corp.,* 348 U. S. 66, 72, even if the accident giving rise to the action did not occur in the forum State, see *Minichiello* v. *Rosenberg,* 410 F. 2d 106

*It seems to me that the possible impact of a default judgment on the reputation of an individual, see *ante,* at 331, n. 20, who has no contacts whatever with the forum State is far too remote to affect the analysis of the constitutional issue in this case.

(CA2 1968), cert. denied, 396 U. S. 844, so long as it is understood that the forum may exercise no power whatsoever over the individual defendant. As so understood, it makes no difference whether the insurance company is sued in its own name or, as Minnesota law provides, in the guise of a suit against the individual defendant.

In this case, although appellant Rush may have a contractual obligation to his insurer to appear in court to testify and generally to cooperate in the defense of the lawsuit, it is my understanding that Minnesota law does not compel him to do so through the contempt power or otherwise. Moreover, any judgment formally entered against the individual defendant may only be executed against the proceeds of his insurance policy. In my opinion, it would violate the Due Process Clause to make any use of such a judgment against that individual—for example, by giving the judgment collateral-estoppel effect in a later action against him arising from the same accident. Accord, *Minichiello* v. *Rosenberg*, *supra*, at 112; Note, The Constitutionality of *Seider* v. *Roth* after *Shaffer* v. *Heitner*, 78 Colum. L. Rev. 409, 418–419 (1978). But we are not now faced with any problem concerning use of a *quasi in rem* judgment against an individual defendant personally. I am therefore led to the conclusion that the Federal Constitution does not require the Minnesota courts to dismiss this action.

OHIO *v.* KENTUCKY

ON EXCEPTIONS TO REPORT OF SPECIAL MASTER

No. 27, Orig. Argued December 3, 1979—Decided January 21, 1980

Held: The boundary between Ohio and Kentucky is the low-water mark on the northerly side of the Ohio River as it existed in 1792 when Kentucky was admitted to the Union, not the current low-water mark on the northerly side of the river. Historical factors establish that the boundary is not the Ohio River just as a boundary river, but is the northerly edge. Thus, the accepted rules of accretion and avulsion attendant upon a wandering river that are applicable in customary situations involving river boundaries between States, do not apply here. *Indiana* v. *Kentucky*, 136 U. S. 479, controls this case. Pp. 337–341.

Exceptions to Special Master's report overruled, report adopted, and case remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, MARSHALL, and STEVENS, JJ., joined. POWELL, J., filed a dissenting opinion, in which WHITE and REHNQUIST, JJ., joined, *post*, p. 341.

James M. Ringo, Attorney General of Kentucky, argued the cause for defendant on exceptions to the report of the Special Master. With him on the briefs were *Robert F. Stephens*, Attorney General, and *George F. Rabe*.

Michael R. Szolosi argued the cause for plaintiff in answer to exceptions to the report of the Special Master. With him on the brief were *William J. Brown*, Attorney General of Ohio, *Howard B. Abramoff*, Assistant Attorney General, and *Stephen C. Fitch*.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

The State of Ohio, in 1966, instituted this action, under the Court's original jurisdiction, against the Commonwealth of Kentucky. By its bill of complaint as initially filed, Ohio asked that the Court declare and establish that the boundary

line between the two States is "the low water mark on the northerly side of the Ohio River in the year 1792." Leave to file the bill of complaint was granted. 384 U. S. 982 (1966). In due course, Kentucky filed its answer and a Special Master was appointed. 385 U. S. 803 (1966). In its answer, Kentucky alleged that the boundary line is the current low-water mark on the northerly side of the Ohio River.

Ohio later moved for leave to file an amended complaint that would assert, primarily, that the boundary between Ohio and Kentucky is the middle of the Ohio River, and, only alternatively, is the 1792 low-water mark on the northerly shore. That motion was referred to the Special Master. 404 U. S. 933 (1971). The Special Master held a hearing and in due course filed his report recommending that Ohio's petition for leave to amend be denied. 406 U. S. 915 (1972). Upon the filing of Ohio's exceptions and Kentucky's reply, the matter was set for hearing. 409 U. S. 974 (1972). After argument, the Special Master's recommendation was adopted, Ohio's motion for leave to amend was denied, and the case was remanded. 410 U. S. 641 (1973).

The Honorable Robert Van Pelt, who by then had been appointed Special Master following the resignation of his predecessor, thereafter filed his report on the case as shaped by the original pleadings. That report was received and ordered filed. 439 U. S. 1123 (1979). Kentucky lodged exceptions to the report, and Ohio filed its reply. Oral argument followed.

The Special Master recommends that this Court determine that the boundary between Ohio and Kentucky "is the low-water mark on the northerly side of the Ohio River as it existed in the year 1792"; that the boundary "is not the low-water mark on the northerly side of the Ohio River as it exists today"; and that such boundary, "as nearly as it can now be ascertained, be determined either a) by agreement of the parties, if reasonably possible, or b) by joint survey agreed upon by the parties," or, in the absence of such an agreement or

survey, after hearings conducted by the Special Master and the submission by him to this Court of proposed findings and conclusions. Report of Special Master 16.

We agree with the Special Master. Much of the history concerning Virginia's cession to the United States of lands "northwest of the river Ohio" was reviewed and set forth in the Court's opinion concerning Ohio's motion for leave to amend its 1966 complaint. 410 U. S., at 645–648. Upon the denial of Ohio's motion, the case was left in the posture that the boundary between the two States was the River's northerly low-water mark. The litigation, thus, presently centers on where that northerly low-water mark is—is it the mark of 1792 when Kentucky was admitted to the Union, ch. IV, 1 Stat. 189, or is it a still more northerly mark due to the later damming of the river and the consequent rise of its waters?

It should be clear that the Ohio River between Kentucky and Ohio, or, indeed, between Kentucky and Indiana, is not the usual river boundary between States. It is not like the Missouri River between Iowa and Nebraska, see, *e. g.*, *Nebraska* v. *Iowa*, 143 U. S. 359 (1892), or the Mississippi River between Arkansas and Mississippi. See *Mississippi* v. *Arkansas*, 415 U. S. 289 (1974), and 415 U. S. 302 (1974). See also *Iowa* v. *Illinois*, 147 U. S. 1 (1893); *Missouri* v. *Nebraska*, 196 U. S. 23 (1904); *Minnesota* v. *Wisconsin*, 252 U. S. 273 (1920); *New Jersey* v. *Delaware*, 291 U. S. 361 (1934); *Arkansas* v. *Tennessee*, 310 U. S. 563 (1940). In these customary situations the well-recognized and accepted rules of accretion and avulsion attendant upon a wandering river have full application.

A river boundary situation, however, depending upon historical factors, may well differ from that customary situation. See, for example, *Texas* v. *Louisiana*, 410 U. S. 702 (1973), where the Court was concerned with the Sabine River, Lake, and Pass. And in the Kentucky-Ohio and Kentucky-Indiana boundary situation, it is indeed different. Here the boundary

is not the Ohio River just as a boundary river, but is the northerly edge, with originally Virginia and later Kentucky entitled to the river's expanse. This is consistently borne out by, among other documents, the 1781 Resolution of Virginia's General Assembly for the cession to the United States ("the lands northwest of the river Ohio"), 10 W. Hening, Laws of Virginia 564 (1822); the Virginia Act of 1783 ("the territory . . . to the north-west of the river Ohio"), 11 W. Hening, Laws of Virginia 326, 327 (1823); and the deed from Virginia to the United States ("the territory . . . to the northwest of the river Ohio") accepted by the Continental Congress on March 1, 1784, 1 Laws of the United States 472, 474 (B. & D. ed. 1815). The Court acknowledged this through Mr. Chief Justice Marshall's familiar pronouncement with respect to the Ohio River in *Handly's Lessee* v. *Anthony*, 5 Wheat. 374, 379 (1820):

> "When a great river is the boundary between two nations or states, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream. But when, as in this case, one State is the original proprietor, and grants the territory on one side only, it retains the river within its own domain, and the newly-created State extends to the river only. The river, however, is its boundary."

The dissent concedes as much. *Post*, at 342. The dissent then, however, would be persuaded by whatever is "the current low-water mark on the northern shore." *Post*, at 343. But it is far too late in the day to equate the Ohio with the Missouri, with the Mississippi, or with any other boundary river that does not have the historical antecedents possessed by the Ohio, antecedents that fix the boundary not as the river itself, but as its northerly bank. *Handly's Lessee*, in our view, supports Ohio's position, not the dissent's. If there could be any doubt about this, it surely was dispelled completely when the Court decided *Indiana* v. *Kentucky*, 136 U. S. 479 (1890).

There Mr. Justice Field, speaking for a unanimous Court, said:

> "[Kentucky] succeeded to the ancient right and possession of Virginia, and they could not be affected by any subsequent change of the Ohio River, or by the fact that the channel in which that river once ran is now filled up from a variety of causes, natural and artificial, so that parties can pass on dry land from the tract in controversy to the State of Indiana. Its water might so depart from its ancient channel as to leave on the opposite side of the river entire counties of Kentucky, and the principle upon which her jurisdiction would then be determined is precisely that which must control in this case. *Missouri* v. *Kentucky,* 11 Wall. 395, 401. Her dominion and jurisdiction continue as they existed at the time she was admitted into the Union, unaffected by the action of the forces of nature upon the course of the river.
>
> . . . . .
>
> "Our conclusion is, that the waters of the Ohio River, when Kentucky became a State, flowed in a channel north of the tract known as Green River Island, and that the jurisdiction of Kentucky at that time extended, and ever since has extended, to what was then low-water mark on the north side of that channel, and the boundary between Kentucky and Indiana must run on that line, as nearly as it can now be ascertained, after the channel has been filled." *Id.*, at 508, 518–519.

The fact that *Indiana* v. *Kentucky* concerned a portion of the Ohio River in its Indiana-Kentucky segment, rather than a portion in its Ohio-Kentucky segment, is of no possible legal consequence; the applicable principles are the same, and the holding in *Indiana* v. *Kentucky* has pertinent application and is controlling precedent here. The Court's flat pronouncements in *Indiana* v. *Kentucky* are not to be rationalized away so readily as the dissent, *post*, at 343–345, would have

them cast aside. Kentucky's present contentions, and those of the dissent, were rejected by this Court 90 years ago.

We are not disturbed by the fact that boundary matters between Ohio and Kentucky by the Court's holding today will turn on the 1792 low-water mark of the river. Locating that line, of course, may be difficult, and utilization of a current, and changing, mark might well be more convenient. But knowledgeable surveyors, as the Special Master's report intimates, have the ability to perform this task. Like difficulties have not dissuaded the Court from concluding that locations specified many decades ago are proper and definitive boundaries. See, *e. g.*, *Utah* v. *United States*, 420 U. S. 304 (1975), and 427 U. S. 461 (1976); *New Hampshire* v. *Maine*, 426 U. S. 363 (1976), and 434 U. S. 1 (1977). The dissent's concern about the possibility, surely extremely remote, that the comparatively stable Ohio River might "pass completely out of Kentucky's borders," *post*, at 343, is of little weight. Situations where land of one State comes to be on the "wrong" side of its boundary river are not uncommon. See *Wilson* v. *Omaha Indian Tribe*, 442 U. S. 653 (1979); *Owen Equipment & Erection Co.* v. *Kroger*, 437 U. S. 365, 369, n. 5 (1978); *Missouri* v. *Nebraska*, 196 U. S. 23 (1904).

Finally, it is of no little interest that Kentucky sources themselves, in recent years, have made reference to the 1792 low-water mark as the boundary. Informational Bulletin No. 93 (1972), issued by the Legislative Research Commission of the Kentucky General Assembly, states:

> "Kentucky's North and West boundary, to-wit, the low water mark on the North shore of the Ohio River as of 1792, has been recognized as the boundary based upon the fact that Kentucky was created from what was then Virginia." *Id.*, at 3.

See also the opinion of the Attorney General of Kentucky, OAG 63-847, contained in Kentucky Attorney General Opinions 1960–1964. See also *Perks* v. *McCracken*, 169 Ky. 590,

184 S. W. 891 (1916), where the court stated that the question in the case was "where was the low water mark at the time Kentucky became a State."

The exceptions of the Commonwealth of Kentucky to the report of the Special Master are overruled. The report is hereby adopted, and the case is remanded to the Special Master so that with the cooperation of the parties he may prepare and submit to the Court an appropriate form of decree.

MR. JUSTICE POWELL, with whom MR. JUSTICE WHITE and MR. JUSTICE REHNQUIST join, dissenting.

The Court today holds that the present boundary between Ohio and Kentucky is the low-water mark of the northern shore of the Ohio River when Kentucky was admitted to the Union in 1792. This curious result frustrates the terms of the Virginia Cession of 1784 that first established the Ohio-Kentucky border, ignores Mr. Chief Justice Marshall's construction of that grant in *Handly's Lessee* v. *Anthony*, 5 Wheat. 374 (1820), is contrary to common-law rules of riparian boundaries, and creates a largely unidentifiable border. Accordingly, I dissent.

I

In 1784, the Commonwealth of Virginia ceded to the United States all of its territory "to the northwest of the river Ohio." 1 Laws of the United States 472, 474 (J. Bioren & W. Duane ed. 1815). As this Court recently observed, the border question " 'depends chiefly on the land law of Virginia, and on the cession made by that State to the United States.' " *Ohio* v. *Kentucky*, 410 U. S. 641, 645 (1973), quoting *Handly's Lessee* v. *Anthony*, *supra*, at 376. The 1784 Cession was construed definitively in *Handly's Lessee*, a case involving a dispute over land that was connected to Indiana when the Ohio River was low, but which was separated from Indiana when the water was high. The Court held that since the 1784 Cession required that the river remain within Kentucky, the proper

border was the low-water mark on the northern or northwestern shore. Consequently, the land in issue belonged to Indiana.

Mr. Chief Justice Marshall, writing for the Court, pointed out that Virginia originally held the land that became both Indiana and Kentucky. Under the terms of the Virginia Cession, he stated: "These States, then, are to have *the* [*Ohio*] *river itself, wherever that may be, for their boundary.*" 5 Wheat., at 379 (emphasis supplied). The Chief Justice found support for that conclusion in the original Cession:

> "[W]hen, as in this case, one State [Virginia] is the original proprietor, and grants the territory on one side only, it retains the river within its own domain, and the newly-created State [Indiana] extends to the river only. The river, however, is its boundary." *Ibid.*

Such a riparian border, the Chief Justice emphasized, cannot be stationary over time. He wrote: "Any gradual accretion of land, then, on the Indiana side of the Ohio, would belong to Indiana. . . ." *Id.*, at 380. This rule avoids the "inconvenience" of having a strip of land belonging to one State between another State and the river.

> "Wherever the river is a boundary between States, it is the main, the permanent river, which constitutes that boundary; and the mind will find itself embarrassed with insurmountable difficulty in attempting to draw any other line than the low water mark." *Id.*, at 380–381.

Because the boundary between Ohio and Kentucky was established by the same events that drew the line between Indiana and Kentucky, the holding in *Handly's Lessee* should control this case.[1] The Ohio River must remain the border between the States and within the domain of Kentucky. The

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[1] Both parties to this litigation agree that the boundary between Kentucky and Ohio is controlled by the same legal and historical considerations that define the boundary between Indiana and Kentucky.

only way to ensure this result is to recognize the current low-water mark on the northern shore as the boundary.

The approach taken by the Court today defeats the express terms of the Virginia Cession and ignores the explicit language of Mr. Chief Justice Marshall in *Handly's Lessee*.[2] The Court's holding that the boundary forever remains where the low-water mark on the northern shore of the river was in 1792, regardless of the river's movements over time, may produce bizarre results. If erosion and accretion were to shift the river to the north of the 1792 low-water mark, today's ruling would place the river entirely within the State of Ohio. The river would thus pass completely out of Kentucky's borders despite the holding in *Handly's Lessee* that the Ohio "[R]iver itself, wherever that may be, [is the] boundary." *Id.*, at 379. The river would not be the boundary between the two States nor would Kentucky as successor to Virginia "retai[n] the river within its own domain" as Mr. Chief Justice Marshall declared that it must. *Ibid.* Similarly, if the river were to move to the south of the 1792 line, Ohio would be denied a shore on the river. Sensible people could not have intended such results, which not only would violate the plain language of the 1784 Cession, but also would mock the congressional resolution accepting Ohio into the Union as a State "bounded . . . on the South by the Ohio river." Ch. XL, 2 Stat. 173.

II

The Court, like the Special Master, disregards the teaching of *Handly's Lessee*. Instead, the Court relies heavily on the

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[2] Mr. Chief Justice Marshall, the author of *Handly's Lessee*, would seem a particularly reliable interpreter of the 1784 Cession. The Chief Justice was not only a practicing lawyer in Richmond in 1783 and 1784, but also served as a member of the General Assembly of Virginia that approved the Cession. 1 A. Beveridge, The Life of John Marshall 202–241 (1919).

decision in *Indiana* v. *Kentucky*, 136 U. S. 479 (1890), where Mr. Justice Field wrote that with respect to Kentucky's northern border, the State's "dominion and jurisdiction continue as they existed at the time she was admitted into the Union [1792], unaffected by the action of the forces of nature upon the course of the river." *Id.*, at 508; *ante*, at 339. Kentucky argues, with some force, that the Court in 1890 found no change from the 1792 boundary because that case concerned the abandonment of a channel by the river, the sort of avulsive change in course that ordinarily does not alter riparian boundaries. There is no sign of an avulsive change in the length of the Ohio River at issue in this case. Moreover, *Indiana* v. *Kentucky* went on to find that Indiana had acquiesced in Kentucky's prescription of the land at issue. There has been no showing before us that Kentucky has acquiesced to Ohio's claim that the 1792 low-water mark establishes the entire boundary between the two States. See n. 3, *infra*. Absent such a showing, I do not believe the holding in *Indiana* v. *Kentucky* should be applied here.

In any event, the force of Mr. Justice Field's opinion as a precedent may be questioned on its face. The decision cannot be reconciled with *Handly's Lessee* or with any normal or practical construction of Virginia's Cession in 1784. Indeed, the Court's opinion is essentially devoid of reasoning. After reproducing the passages in *Handly's Lessee* that establish that Kentucky must retain jurisdiction over the river, Mr. Justice Field states abruptly that, nevertheless, the boundary should be set at the low-water mark "when Kentucky became a State." 136 U. S., at 508. Mr. Justice Field apparently was unaware that, in effect, he was overruling the case on which he purported to rely. His conclusion is based simply on the startling view that when Kentucky "succeeded to the ancient right and possession of Virginia" in 1792, the new State received a boundary that "could not be affected by any subsequent change of the Ohio River."

Ibid. The opinion offers no further explanation for its holding.

Of course, Kentucky did succeed to Virginia's rights in 1792. After the Cession of 1784, Virginia was entitled to have the river within its jurisdiction and to have the northern low-water mark as the boundary between it and that part of the Northwest Territory that became Ohio and Indiana. Kentucky's entry into the Union could not, without more, replace those rights with the immutable boundary found by Mr. Justice Field. Neither Mr. Justice Field in 1890 nor the State of Ohio in this litigation pointed to any suggestion by Congress in 1792 that it intended such a result.

III

Today's decision also contravenes the common law of riparian boundaries. In a dispute over the line between Arkansas and Tennessee along the Mississippi River, this Court noted:

> "[W]here running streams are the boundaries between States, the same rule applies as between private proprietors, namely, that when the bed and channel are changed by the natural and gradual processes known as erosion and accretion, the boundary follows the varying course of the stream." *Arkansas* v. *Tennessee,* 246 U. S. 158, 173 (1918).

See *Bonelli Cattle Co.* v. *Arizona,* 414 U. S. 313 (1973). This rule has an intensely practical basis, since it is exceedingly difficult to establish where a river flowed many years ago. Physical evidence of the river's path is almost certain to wash away over time, and documentary evidence either may not survive or may not be reliable.

The Court suggests that the Ohio-Kentucky boundary should not be determined by reference to previous river boundary decisions because the border in this case is not "the river itself, but . . . its northerly bank." *Ante,* at 338. This

contention contradicts Mr. Chief Justice Marshall's statement, quoted by the Court, that with respect to Kentucky's northern border, "'[t]he river, however, is its boundary.'" *Ibid.* In addition, the Court does not explain why established principles of riparian law are inapplicable simply because the northern low-water mark, not the center of the river, is the boundary. Since both lines shift over time, it is only sensible to adopt the common-law view that borders defined by those lines will move with them.[3]

IV

Following today's decision, all boundary matters between Ohio and Kentucky will turn on the location almost 200 years

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[3] The Court seeks support for today's decision from a recent statement by the Legislative Research Committee of the Kentucky General Assembly and a 1963 opinion of the Kentucky Attorney General. *Ante*, at 340–341. Although both documents refer to the 1792 low-water mark as the proper boundary, they are hardly authoritative pronouncements that should control our outcome. Indeed, other legislative and judicial statements refer to the northern low-water mark without any mention of the 1792 line. See 57 Stat. 248 (interstate Compact between Indiana and Kentucky defining the boundary as the "low-water mark of the right side of the Ohio River"); *Commonwealth* v. *Henderson County*, 371 S. W. 2d 27, 29 (Ky. App. 1963) (Kentucky's boundary is "north or northwest low watermark of the Ohio River"); *Louisville Sand & Gravel Co.* v. *Ralston*, 266 S. W. 2d 119, 121 (Ky. App. 1954) ("'our state boundary is along the north bank of the Ohio river at low-water mark,'" quoting *Willis* v. *Boyd*, 224 Ky. 732, 735, 7 S. W. 2d 216, 218 (1928)).

Under the doctrine of prescription and acquiescence, it may be proved that one party has recognized through its actions a riparian boundary claimed by another party. See *Michigan* v. *Wisconsin*, 270 U. S. 295, 308 (1926). That question, however, is one of fact. The Special Master did not request evidence from the parties on this issue, so it is not properly before us now. We cannot decide such a question on the basis of particular shards of evidence that may come to our attention. In view of the conflicting evidence on the claim of prescription and acquiescence, the correct course would be to return this litigation to the Special Master for findings of fact on that question.

ago of the northern low-water mark of the Ohio River. This cumbersome and uncertain outcome might be justified if it were dictated by unambiguous language in the Virginia Cession. But since the Court's decision is not only unworkable but also does violence to that deed as it has been construed by this Court, I cannot agree with its ruling today.

BROWN, SECRETARY OF DEFENSE, ET AL. *v.* GLINES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 78-1006. Argued November 6, 1979—Decided January 21, 1980

Air Force regulations require members of that service to obtain approval from their commanders before circulating petitions on Air Force bases. Respondent Air Force Reserve officer was removed from active duty for distributing on an Air Force base petitions to Members of Congress and the Secretary of Defense, which complained about Air Force grooming standards, without having obtained approval of the base commander as required by the regulations. Respondent then brought suit in District Court challenging the validity of the regulations. That court granted summary judgment for respondent, declaring the regulations facially invalid, and the Court of Appeals affirmed.

Held: The regulations are not invalid on their face. Pp. 353–361.

(a) Such regulations do not violate the First Amendment. *Greer* v. *Spock*, 424 U. S. 828. They protect a substantial Government interest unrelated to the suppression of free expression—the interest in maintaining the respect for duty and discipline so vital to military effectiveness—and restrict speech no more than is reasonably necessary to protect such interest. Since a military commander is charged with maintaining morale, discipline, and readiness, he must have authority over the distribution of materials that could affect adversely these essential attributes of an effective military force. Pp. 353–358.

(b) Nor do the regulations violate 10 U. S. C. § 1034, which proscribes unwarranted restrictions on a serviceman's right to communicate with a Member of Congress. As § 1034's legislative history makes clear, Congress enacted the statute to ensure that an individual member of the Armed Services could write to his elected representatives without sending his communication through official channels, and not to protect the circulation of collective petitions within a military base. Permitting an individual serviceman to submit a petition directly to any Member of Congress serves § 1034's legislative purpose without unnecessarily endangering a commander's ability to preserve morale and good order among his troops. Pp. 358–361.

586 F. 2d 675, reversed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., WHITE, BLACKMUN, and REHNQUIST, JJ., joined. BRENNAN, J., filed a

dissenting opinion, *post*, p. 361. STEWART, J., filed a dissenting opinion in which BRENNAN, J., joined, *post*, p. 374. STEVENS, J., filed a dissenting opinion, *post*, p. 378. MARSHALL, J., took no part in the consideration or decision of the case.

Kent L. Jones argued the cause *pro hac vice* for petitioners. With him on the briefs were *Solicitor General McCree, Assistant Attorney General Babcock*, and *Robert E. Kopp*.

David M. Cobin, by appointment of the Court, 441 U. S. 930, argued the cause for respondent. With him on the brief was *Melvin K. Dayley*.

MR. JUSTICE POWELL delivered the opinion of the Court.

This case involves challenges to United States Air Force regulations that require members of the service to obtain approval from their commanders before circulating petitions on Air Force bases. The first question is whether the regulations violate the First Amendment. The second question is whether prohibiting the unauthorized circulation of petitions to Members of Congress violates 10 U. S. C. § 1034, which proscribes unwarranted restrictions on a serviceman's right to communicate with a Member of Congress.

I

The Air Force regulations recognize that Air Force personnel have the right to petition Members of Congress and other public officials. Air Force Reg. 30–1 (9) (1971). The regulations, however, prohibit "any person within an Air Force facility" and "any [Air Force] member . . . in uniform or . . . in a foreign country" from soliciting signatures on a petition without first obtaining authorization from the appropriate commander. *Ibid.*[1] They also provide that "[n]o member

[1] Air Force Reg. 30–1 (9) (1971) provides:

"Right of Petition. Members of the Air Force, their dependents and civilian employees have the right, in common with all other citizens, to petition the President, the Congress or other public officials. However,

of the Air Force will distribute or post any printed or written material . . . within any Air Force installation without permission of the commander. . . ." Air Force Reg. 35–15 (3)(a)(1) (1970). The commander can deny permission only if he determines that distribution of the material would result in "a clear danger to the loyalty, discipline, or morale of members of the Armed Forces, or material interference with the accomplishment of a military mission. . . ." *Id.*, 35–15 (3)(a)(2).[2]

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the public solicitation or collection of signatures on a petition by any person within an Air Force facility or by a member when in uniform or when in a foreign country is prohibited unless first authorized by the commander." This regulation has been superseded by Air Force Reg. 30–1 (19)(b) (1977), which contains substantially the same provisions.

[2] Air Force Reg. 35–15 (3)(a) (1970) provides:

"(1) No member of the Air Force will distribute or post any printed or written material other than publications of an official governmental agency or base regulated activity within any Air Force installation without permission of the commander or his designee. A copy of the material with a proposed plan or method of distribution or posting will be submitted when permission is requested. Distribution of publications and other materials through the United States mail or through official outlets, such as military libraries and exchanges, may not be prohibited under this regulation.

"(2) When prior approval for distribution or posting is required, the commander will determine if a clear danger to the loyalty, discipline, or morale of members of the Armed Forces, or material interference with the accomplishment of a military mission, would result. If such a determination is made, distribution or posting will be prohibited and HQ USAF (SAFOI) will be notified of the circumstances.

"(3) Mere possession of materials unauthorized for distribution or posting may not be prohibited unless otherwise unlawful. However, such material may be impounded if a member of the Armed Forces distributes or posts or attempts to distribute or post such material within the installation. Impounded materials will be returned to the owner when departing the installation unless determined to be evidence of a crime.

"(4) Distribution or posting may not be prohibited solely on the ground that the material is critical of Government policies or officials.

"(5) In general, installation commanders should encourage and promote

Albert Glines was a captain in the Air Force Reserves. While on active duty at the Travis Air Force Base in California, he drafted petitions to several Members of Congress and to the Secretary of Defense complaining about the Air Force's grooming standards.[3] Aware that he needed command approval in order to solicit signatures within a base, Glines at first circulated the petitions outside his base. During a routine training flight through the Anderson Air Force Base in Guam, however, Glines gave the petitions to an Air Force sergeant without seeking approval from the base commander. The sergeant gathered eight signatures before military authorities halted the unauthorized distribution. Glines' commander promptly removed him from active duty, determined that he had failed to meet the professional standards expected of an officer, and reassigned him to the standby reserves. Glines then brought suit in the United States District Court for the Northern District of California claiming that the Air Force regulations requiring prior approval for the circulation of petitions violated the First Amendment and 10 U. S. C. § 1034.[4] The court granted Glines' motion for

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the availability to service personnel of books, periodicals, and other media which present a wide range of viewpoints on public issues."

[3] The petition to the Secretary of Defense, for example, read:

"Dear Secretary of Defense:

"We, the undersigned, all American citizens serving in the Armed Services of our nation, request your assistance in changing the grooming standards of the United States Air Force.

"We feel that the present regulations on grooming have caused more racial tension, decrease in morale and retention, and loss of respect for authorities than any other official Air Force policy.

"We are similarly petitioning Senator Cranston, Senator Tunney, Senator Jackson, and Congressman Moss in the hope that one of our elected or appointed officials will help correct this problem." *Glines* v. *Wade*, 586 F. 2d 675, 677, n. 1 (CA9 1978).

[4] Glines named as defendants three of his superior officers, the Secretary of the Air Force, and the Secretary of Defense.

summary judgment and declared the regulations facially invalid. *Glines* v. *Wade*, 401 F. Supp. 127 (1975).[5]

The Court of Appeals for the Ninth Circuit affirmed the finding of facial invalidity. *Glines* v. *Wade*, 586 F. 2d 675 (1978).[6] Following its decision in an earlier case involving collective petitions to Members of Congress, the court first determined that the regulations violated 10 U. S. C. § 1034.[7] The statute prohibits any person from restricting a serviceman's communication with Congress "unless the communication is unlawful or violates a regulation necessary to the security of the United States." The Air Force regulations against unauthorized petitioning on any base did not satisfy the statutory standard, the court concluded, because the Government had not shown that such restraints on servicemen in Guam were necessary to the national security. 586 F. 2d, at 679. Since § 1034 did not cover Glines' petition to the Secretary of Defense, the court next considered whether the regulations violated the First Amendment. The court acknowledged that requirements of military discipline could justify otherwise impermissible restrictions on speech. It held, however, that

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[5] The District Court also awarded Glines backpay and ordered him restored to active service. 401 F. Supp., at 132. The Court of Appeals affirmed the reinstatement order, but it vacated the backpay award on the ground that all monetary claims against the United States for more than $10,000 are within the exclusive jurisdiction of the Court of Claims. 586 F. 2d, at 681–682. Neither issue is before this Court.

[6] The Court of Appeals held that Glines was not required to exhaust his administrative remedies by seeking relief from the Air Force Board for the Correction of Military Records. The court found that Glines' claim involved statutory and constitutional matters over which the Board had no jurisdiction. *Id.*, at 678. Since the petitioners expressly declined to raise the exhaustion issue in this Court, Pet. for Cert. 6, n. 2, error in the Court of Appeals' resolution of the issue would not affect our jurisdiction. Cf. *Mathews* v. *Eldridge*, 424 U. S. 319, 330 (1976).

[7] The Court of Appeals' decision and the discussion of this issue appear in its opinion in *Allen* v. *Monger*, 583 F. 2d 438, 440–442 (CA9 1978), cert. pending *sub nom. Brown* v. *Allen*, No. 78–1005.

the Air Force regulations are unconstitutionally overbroad because they might allow commanders to suppress "virtually all controversial written material." 586 F. 2d, at 681. Such restrictions the court concluded, "exceed anything essential to the government's interests." *Ibid.* We granted certiorari, 440 U. S. 957 (1979), and we now reverse.

II

In *Greer* v. *Spock*, 424 U. S. 828, 840 (1976), MR. JUSTICE STEWART wrote for the Court that "nothing in the Constitution . . . disables a military commander from acting to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of troops on the base under his command." In that case, civilians who wished to distribute political literature on a military base challenged an Army regulation substantially identical to the Air Force regulations now at issue. See *id.*, at 831, and n. 2. The civilians claimed that the Army regulation was an unconstitutional prior restraint on speech, invalid on its face. We disagreed. We recognized that a base commander may prevent the circulation of material that he determines to be a clear threat to the readiness of his troops. See *id.*, at 837–839. We therefore sustained the Army regulation. *Id.*, at 840.[8] For the same reasons, we now uphold the Air Force regulations.[9]

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[8] We specifically emphasized that the Army regulation at issue in *Greer* v. *Spock* did "not authorize the [base] authorities to prohibit the distribution of conventional political campaign literature." 424 U. S., at 840, 831, n. 2. Thus, our decision to sustain that regulation was distinct from our concomitant decision to uphold another regulation that prevented civilians from using a military base as a forum for the expression of political views, *id.*, at 838–839. See *id.*, at 841 (BURGER, C. J., concurring); *id.*, at 848–849 (POWELL, J., concurring).

[9] MR. JUSTICE STEVENS' dissenting opinion seems to suggest that we should avoid the constitutional issue in this case by applying 10 U. S. C. § 1034 to petitioning activity that the statute otherwise would not protect. *Post*, p. 378. Since Glines' petition to the Secretary of Defense was not covered by the statute, however, we agree with the Court of

These regulations, like the Army regulation in *Spock*, protect a substantial government interest unrelated to the suppression of free expression. See *Procunier* v. *Martinez*, 416 U. S. 396, 413 (1974). The military is, "by necessity, a specialized society separate from civilian society." *Parker* v. *Levy*, 417 U. S. 733, 743 (1974). Military personnel must be ready to perform their duty whenever the occasion arises. *Ibid.* To ensure that they always are capable of performing their mission promptly and reliably, the military services "must insist upon a respect for duty and a discipline without counterpart in civilian life." *Schlesinger* v. *Councilman*, 420 U. S. 738, 757 (1975); see *Department of Air Force* v. *Rose*, 425 U. S. 352, 367–368 (1976).

" 'Speech that is protected in the civil population may . . . undermine the effectiveness of response to command.' " *Parker* v. *Levy*, *supra*, at 759, quoting *United States* v. *Priest*, 21 U. S. C. M. A. 564, 570, 45 C. M. R. 338, 344 (1972). Thus, while members of the military services are entitled to the protections of the First Amendment, "the different character of the military community and of the military mission requires a different application of those protections." *Parker* v. *Levy*, 417 U. S., at 758. The rights of military men must yield somewhat " 'to meet certain overriding demands of discipline and duty. . . .' " *Id.*, at 744, quoting *Burns* v. *Wilson*, 346 U. S. 137, 140 (1953) (plurality opinion).[10] Speech likely to interfere with these vital prerequisites for military effectiveness therefore can be excluded from a military base. *Spock*,

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Appeals that "[t]his petition requires us to decide whether the First Amendment also protects Glines' activities." 586 F. 2d, at 679. As the Court of Appeals understood, Glines' petition to the Secretary was itself a sufficient reason for his reassignment to the standby reserves.

[10] See Emerson, Toward a General Theory of the First Amendment, 72 Yale L. J. 877, 935–936 (1936); Terrell, Petitioning Activities on Military Bases: The First Amendment Battle Rages Again, 28 Emory L. J. 3, 5–14 (1979).

424 U. S., at 840; *id.*, at 841 (BURGER, C. J., concurring); *id.*, at 848 (POWELL, J., concurring).

Like the Army regulation that we upheld in *Spock*, the Air Force regulations restrict speech no more than is reasonably necessary to protect the substantial governmental interest. See *Procunier* v. *Martinez, supra*. Both the Army and the Air Force regulations implement the policy set forth in Department of Defense (DOD) Directive 1325.6 (1969).[11] That directive advises commanders to preserve servicemen's "right of expression . . . to the maximum extent possible, consistent with good order and discipline and the national security." *Id.*, ¶ II. Thus, the regulations in both services prevent commanders from interfering with the circulation of any materials other than those posing a clear danger to military loyalty, discipline, or morale. Air Force Reg. 35–15 (3)(a)(2) (1970); Army Reg. 210–10, ¶ 5–5 (c) (1970); see DOD Dir. 1325.6, ¶ III (A)(1) (1969). Indeed, the Air Force regulations specifically prevent commanders from halting the distribution of materials that merely criticize the Government or its policies. Air Force Reg. 35–15 (3)(a)(4) (1970); see DOD Dir. 1325.6, ¶ III (A)(3) (1969). Under the regulations, Air Force commanders have no authority whatever to prohibit the distribution of magazines and newspapers through regular outlets such as the post exchange newsstands. Air Force Reg. 35–15 (3)(a)(1) (1970); see DOD Dir. 1325.6, ¶ III (A)(1) (1969).[12] Nor may they interfere with the "[d]istribution of publications and other materials through

[11] The Navy regulations adopted pursuant to DOD Dir. 1325.6 are at issue in *Secretary of Navy* v. *Huff, post*, p. 453, which we also decide today.

[12] The Army regulations allowed a commander to delay, and the Department of the Army to prevent, the distribution within a military base of particular issues of a commercial publication. Army Reg. 210–10, ¶¶ 5–5 (c), (d) (1970). That part of the Army regulations was not at issue in *Greer* v. *Spock*. See 424 U. S., at 832, n. 2. The Air Force regulations contain no such provision.

the United States mail. . . ." Air Force Reg. 35–15 (3)(a)(1) (1970). The Air Force regulations also require any commander who prevents the circulation of materials within his base to notify his superiors of that decision. Air Force Reg. 35–15 (3)(a)(2) (1970); see Army Reg. 210–10, ¶ 5–5 (d) (1970). *Spock* held that such limited restrictions on speech within a military base do not violate the First Amendment. 424 U. S., at 840; *id.*, at 848 (POWELL, J., concurring).

Spock also established that a regulation requiring members of the military services to secure command approval before circulating written materials within a military base is not invalid on its face. *Id.*, at 840.[13] Without the opportunity to review materials before they are dispersed throughout his base, a military commander could not avert possible disruptions among his troops. Since a commander is charged with maintaining morale, discipline, and readiness, he must have authority over the distribution of materials that could affect adversely these essential attributes of an effective military force.[14] "[T]he accuracy and effect of a superior's command

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[13] Glines would distinguish *Spock* on the ground that the plaintiffs in that case were civilians who had no specific right to enter a military base. The distinction is unpersuasive. Our decision in *Spock* rejected a facial challenge to a regulation that required "any person," civilian or military, to obtain prior permission for the distribution of literature within a base. *Id.*, at 831. Unauthorized distributions of literature by military personnel are just as likely to undermine discipline and morale as similar distributions by civilians. Furthermore, the military has greater authority over a serviceman than over a civilian. See *Parker* v. *Levy*, 417 U. S. 733, 749–751 (1974). Even when not confronted with the special requirements of the military, we have held that a governmental employer may subject its employees to such special restrictions on free expression as are reasonably necessary to promote effective government. See *Civil Service Comm'n* v. *Letter Carriers*, 413 U. S. 548, 565 (1973); *Cole* v. *Richardson*, 405 U. S. 676, 684 (1972); cf. *Kelley* v. *Johnson*, 425 U. S. 238, 245–248 (1976).

[14] The special dangers present in certain military situations may warrant different restrictions on the rights of servicemen. But those restrictions necessary for the inculcation and maintenance of basic discipline and pre-

depends critically upon the specific and customary reliability of [his] subordinates, just as the instinctive obedience of subordinates depends upon the unquestioned specific and customary reliability of the superior." *Department of Air Force* v. *Rose,* 425 U. S., at 368. Because the right to command and the duty to obey ordinarily must go unquestioned, this Court long ago recognized that the military must possess substantial discretion over its internal discipline. See, *e. g., Schlesinger* v. *Councilman,* 420 U. S. 738 (1975); *Parker* v. *Levy,* 417 U. S. 733 (1974); *Burns* v. *Wilson,* 346 U. S. 137 (1953); *Orloff* v. *Willoughby,* 345 U. S. 83 (1953); *In re Grimley,* 137 U. S. 147 (1890). In *Spock,* we found no facial constitutional infirmity in regulations that allow a commander to determine before distribution whether particular materials pose a clear danger to the good order of his troops.[15]

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paredness are as justified on a regular base in the United States, *Schneider* v. *Laird,* 453 F. 2d 345 (CA10) (*per curiam*), cert. denied, 407 U. S. 914 (1972); *Dash* v. *Commanding General,* 307 F. Supp. 849 (SC 1969), aff'd, 429 F. 2d 427 (CA4 1970) (*per curiam*), cert. denied, 401 U. S. 981 (1971), as on a training base, *Greer* v. *Spock, supra,* or a combat-ready installation in the Pacific, *Carlson* v. *Schlesinger,* 167 U. S. App. D. C. 325, 511 F. 2d 1327 (1975). Loyalty, morale, and discipline are essential attributes of all military service. Combat service obviously requires them. And members of the Armed Services, wherever they are assigned, may be transferred to combat duty or called to deal with civil disorder or natural disaster. Since the prior approval requirement supports commanders' authority to maintain basic discipline required at nearly every military installation, it does not offend the First Amendment. "This Court has . . . repeatedly expressed its reluctance to strike down a statute on its face where there [are] a substantial number of situations to which it might be validly applied." *Parker* v. *Levy, supra,* at 760.

[15] Commanders sometimes may apply these regulations "irrationally, invidiously, or arbitrarily," thus giving rise to legitimate claims under the First Amendment. *Greer* v. *Spock, supra,* at 840; see *Secretary of Navy* v. *Huff, post,* at 457–458, n. 5. But Glines, who—like the civilians in *Spock*—never requested permission to circulate his materials, has not and cannot raise such a claim. *Greer* v. *Spock,* 424 U. S., at 840; *id.,* at 849 (POWELL, J., concurring).

The Air Force regulations at issue here are identical in purpose and effect to the regulation that we upheld in *Spock*. We therefore conclude that they do not violate the First Amendment.

III

The only novel question in this case is whether 10 U. S. C. § 1034 bars military regulations that require prior command approval for the circulation within a military base of petitions to Members of Congress. The statute says that "[n]o person may restrict *any member* of an armed force in communicating with a member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States." (Emphasis added.) Glines contends that this law protects the circulation of his collective petitions as well as the forwarding of individual communications. We find his contention unpersuasive.

Section 1034 was introduced as a floor amendment to the Universal Military Training and Service Act of 1951 in response to a specific and limited problem. While Congress was debating the Act, Congressman Byrnes of Wisconsin learned that a young constituent seeking a hardship discharge from the Navy "had been told by his commanding officer . . . that a direct communication with his Congressman was prohibited and [that] it would make him subject to court-martial." 97 Cong. Rec. 3776 (1951). When the Congressman made inquiry about the regulations imposing this restriction, the Secretary of the Navy informed him that they required "any letter from a member of the naval service . . . to a Congressman which affects the Naval Establishment . . . [to] be sent through official channels." *Ibid.*[16] The Con-

[16] The relevant Navy regulation actually imposed restrictions on "[a]ll petitions, remonstrances, memorials and communications of any person or persons in the naval service. . . ." Navy Regs., art. 1248 (1948). Glines argues that Congress intended to remove all restrictions imposed by the regulation, including those on collective as well as individual petition-

gressman then proposed an amendment to the pending military legislation that would outlaw this requirement.

Congressman Byrnes' purpose was "to permit any man who is inducted to sit down and take a pencil and paper and write to his Congressman or Senator." *Ibid.*[17] The entire legislative history of the measure focuses on providing an avenue for the communication of individual grievances. The Chairman of the Armed Services Committee succinctly summarized the legislative understanding. The amendment, he said, was intended "to let every man in the armed services have the privilege of writing his Congressman or Senator on any subject if it does not violate the law or if it does not deal with some secret matter." *Id.*, at 3877. It therefore is clear that Congress enacted § 1034 to ensure that an individual member of the Armed Services could write to his elected representatives without sending his communication through official channels.[18]

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ing. But the plain language of § 1034 reflects no such intention. Indeed, nothing in the legislative history suggests that Congress even was aware of the full scope of the Navy regulation.

[17] The original proposal protected any person from induction into a branch of the Armed Forces that restricted the "rights of its members to communicate directly with Members of Congress. . . ." 97 Cong. Rec. 3776 (1951). After the Chairman of the Armed Services Committee pointed out that the Navy did not induct its members, *ibid.*, the proposal was amended to substantially its present form, *id.*, at 3877, 3883. Universal Military Training and Service Act of 1951, § 1 (d), 65 Stat. 78. The statute underwent minor revisions when codified in 1956. Act of Aug. 10, 1956, 70A Stat. 80. No change in substance was intended. See S. Rep. No. 2484, 84th Cong., 2d Sess., 95–96, 19–21 (1956); H. R. Rep. No. 970, 84th Cong., 1st Sess., 85, 8–10 (1955).

[18] Section 1034 stands in marked contrast to an analogous statute enacted about 40 years earlier in order to guarantee federal civil servants the right to petition Congress. That statute provides: "The right of employees, *individually or collectively*, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied." 5 U. S. C. § 7211 (1976 ed., Supp. II). (Emphasis added.)

Both Congress and this Court have found that the special character of the military requires civilian authorities to accord military commanders some flexibility in dealing with matters that affect internal discipline and morale. See, *e. g.*, *Middendorf* v. *Henry*, 425 U. S. 25, 37–40, 43 (1976); *id.*, at 49–51 (POWELL, J., concurring); *Parker* v. *Levy*, 417 U. S., at 756; *Orloff* v. *Willoughby*, 345 U. S., at 93–94.[19] In construing a statute that touches on such matters, therefore, courts must be careful not to "circumscribe the authority of military commanders to an extent never intended by Congress." *Huff* v. *Secretary of Navy*, 188 U. S. App. D. C. 26, 35, 575 F. 2d 907, 916 (1978) (Tamm, J., concurring in part and dissenting in part), rev'd, *post*, p. 453. Permitting an individual member of the Armed Services to submit a petition directly to any Member of Congress serves the legislative purpose of § 1034 without unnecessarily endangering a commander's ability to preserve morale and good order among his troops. The unrestricted circulation of collective petitions could imperil discipline. We find no legislative purpose that requires the military to assume this risk and no indication that Congress contemplated such a result.[20] We therefore decide

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[19] See also *Curry* v. *Secretary of Army*, 194 U. S. App. D. C. 66, 595 F. 2d 873 (1979).

[20] Glines says DOD Dir. 1325.6, ¶ III (G) (1969) shows that the Department of Defense itself construes the statute more broadly. The directive, however, adds nothing to the statutory language or the legislative history. It simply says that the Uniform Code of Military Justice, Art. 138, 10 U. S. C. § 938, protects the "right of members [of the Armed Forces] to complain and request redress of grievances against actions of their commander." It then cites 10 U. S. C. § 1034 for the statement that "a member may petition or present any grievance to any member of Congress. . . ." In *Huff* v. *Secretary of Navy*, 188 U. S. App. D. C. 26, 32, 575 F. 2d 907, 913 (1978), rev'd, *post*, p. 453, the court concluded that this reference to § 1034 implied approval of group petitioning. But the regulations enforced in the Air Force and the other services demonstrate that the Department of Defense has construed its own directive otherwise. See *supra*, at 355–356, and n. 11.

that § 1034 does not protect the circulation of collective petitions within a military base.

IV

We conclude that neither the First Amendment nor 10 U. S. C. § 1034 prevents the Air Force from requiring members of the service to secure approval from the base commander before distributing petitions within a military base. We therefore hold that the regulations at issue in this case are not invalid on their face. Accordingly, the judgment of the Court of Appeals is

Reversed.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

MR. JUSTICE BRENNAN, dissenting.*

I join my Brother STEWART's dissent on statutory grounds in Nos. 78–599 and 78–1006. Since that opinion does not command a Court, it is appropriate to express my view on the constitutional questions presented. I believe that the military regulations at issue are prohibited by the First Amendment; accordingly, I would hold them to be unconstitutional, and affirm the judgments of the two Courts of Appeals.

Two sets of military regulations are challenged. Respondents in *Huff* (No. 78–599), *post*, p. 453, attack Navy and Marine Corps regulations that require prior approval by commanding officers before the origination, distribution, or circulation of petitions or other written material on ships, aircraft, military installations, and "anywhere within a foreign country." Fleet Marine Force Pacific Order 5370.3 (1974). Respondent in *Glines* (No. 78–1006) challenges parallel Air Force regulations that require command approval before the

*[This opinion applies also to No. 78–599, *Secretary of Navy et al.* v. *Huff et al.*, *post*, p. 453.]

distribution or posting of nonofficial printed material and for the circulation of petitions for signature.[1] Air Force Regs. 30–1 (9) (1971) and 35–15 (3)(a) (1970). Both the Navy and Marine and the Air Force regulations authorize withholding of approval if the commander determines that distribution would pose a "clear danger" to loyalty, discipline, or morale of servicemen or if the distribution would "[m]aterially interfere" with military duties.[2] The Air Force regulation explicitly declares, however, that "[d]istribution or posting may not be prohibited *solely* on the ground that the material is critical of Government policies or officials." Air Force Reg. 35–15 (3)(a)(4). (Emphasis added.)[3]

I

Respondents contend that the regulations impermissibly interfere with First Amendment rights to communicate and petition. That contention finds solid support in First Amendment doctrine as explicated in a variety of settings by decisions of this Court. These regulations plainly establish an essentially discretionary regime of censorship that arbitrarily deprives respondents of precious communicative rights.

The circulation of petitions is indisputably protected First Amendment activity. Petitioning involves a bundle of related First Amendment rights: the right to express ideas, see, *e. g.*,

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[1] The Air Force regulations exempt from prior command approval the distribution of published material "through the United States mail or through official outlets, such as military libraries and exchanges. . . ." Air Force Reg. 35–15 (3)(a)(1) (1970). Department of Defense guidelines are to the same effect. DOD Directive 1325.6 (1969).

[2] In addition, the Navy and Marine Corps regulations bar circulation of material that advocates insubordination, disloyalty, mutiny, or desertion, that discloses classified information, that contains obscene matter, or that involves the planning of unlawful acts.

[3] A counterpart to this declaration is the statement in DOD Directive 1325.6, ¶ III (A)(3) (1969), that "[t]he fact that a publication is critical of Government policies or *officials is not, in itself, a ground upon which* distribution may be prohibited."

Street v. *New York*, 394 U. S. 576, 593 (1969); *Martin* v. *City of Struthers*, 319 U. S. 141, 143 (1943), the right to be exposed to ideas expressed by others, see, *e. g.*, *Stanley* v. *Georgia*, 394 U. S. 557, 564 (1969); *Lamont* v. *Postmaster General*, 381 U. S. 301 (1965); *id.*, at 308 (BRENNAN, J., concurring); *Martin* v. *City of Struthers*, *supra*, at 143, the right to communicate with government, see, *e. g.*, *Edwards* v. *South Carolina*, 372 U. S. 229, 235 (1963); cf. *Hague* v. *CIO*, 307 U. S. 496, 513 (1939) (Roberts, J.), and the right to associate with others in the expression of opinion, see, *e. g.*, *Buckley* v. *Valeo*, 424 U. S. 1, 15 (1976); *Healy* v. *James*, 408 U. S. 169, 181 (1972); *NAACP* v. *Alabama*, 357 U. S. 449, 460 (1958).[4] The petition is especially suited for the exercise of all of these rights: It serves as a vehicle of communication; as a classic means of individual affiliation with ideas or opinions; and as a peaceful yet effective method of amplifying the views of the individual signers. Indeed, the petition is a traditionally favored method of political expression and participation. See, *e. g.*, *United States* v. *Cruikshank*, 92 U. S. 542, 552–553 (1876); 2 J. Story, Commentaries on the Constitution of the United States 619–620 (Cooley ed., 1873); cf. *White* v. *Nicholls*, 3 How. 266, 289 (1845). Thus, petitioning of officials has been expressly held to be a right secured by the First Amendment.[5] *Bridges* v. *California*, 314 U. S. 252, 277 (1941).

This First Amendment shield for petitioning is impermissibly breached in at least three ways by the regulations before us.

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[4] It may be that the Petition Clause, in some contexts, enhances the protections of the Speech Clause. There is no need, however, to explore the distinctive attributes of the Petition Clause in these cases, for conventional First Amendment analysis amply suffices to dispose of the constitutional issues presented here.

[5] Because the petition so effectively promotes a number of First Amendment interests—especially those that are associational in nature—petitioning is not merely fungible with other expressive activities.

First. By mandating that proposed petitions be subjected to command approval, the regulations impose a prior restraint.[6] See *Greer* v. *Spock*, 424 U. S. 828, 865 (1976) (BRENNAN, J., dissenting); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546, 552–553 (1975); *Times Film Corp.* v. *Chicago*, 365 U. S. 43, 45–46 (1961). Although the First Amendment bar against prior restraints is not absolute, *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539, 590 (1976) (BRENNAN, J., concurring in judgment), the Court has repeatedly emphasized that the prior censorship of expression can be justified only by the most compelling governmental interests, see, *e. g., Nebraska Press Assn.* v. *Stuart, supra*, at 558–559; *New York Times Co.* v. *United States*, 403 U. S. 713, 714 (1971) (*per curiam* opinion); *Organization for a Better Austin* v. *Keefe*, 402 U. S. 415, 419 (1971); *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 70 (1963); *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697, 715–716 (1931). Thus far, only the interest in averting a virtually certain prospect of imminent, severe injury to the Nation in time of war has been generally considered a sufficiently weighty ground for prior restraint of constitutionally protected speech.[7] See, *e. g., New York*

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[6] The command-approval requirement is not simply a "time, place, and manner" regulation valid under the First Amendment. See *Police Department of Chicago* v. *Mosley*, 408 U. S. 92, 98 (1972). The constitutional touchstone of permissible time, place, and manner regulation is that it focus upon the circumstances—not the content of expression. *Id.*, at 99. The military regulations in this case—facially and as applied—look to the content of petitions, as well as to the manner in which they are circulated.

[7] To be sure, we have upheld restraints directed against obscenity, *Times Film Corp.* v. *Chicago*, 365 U. S. 43, 47–48 (1961), or against so-called "fighting words," *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942). Such restraints have been permitted on the theory that the censored expression does not enjoy First Amendment protection. We have always been careful to insist, however, that restrictions aimed at unprotected speech be carefully crafted and applied to avoid trenching upon

Times, 403 U. S., at 726–727 (BRENNAN, J., concurring); *id.*, at 730 (STEWART, J., concurring). The instant regulations, however, explicitly require commanding officers to suppress petitioning for reasons far less urgent than imminent, serious, peril to the United States or its citizens. The maintenance of military discipline, morale, and efficiency are undeniably important, but they are not always, and in every situation, to be regarded as more compelling than a host of other governmental interests which we have found insufficient to warrant censorship. See, *e. g.*, *New York Times Co.* v. *United States, supra; Tinker* v. *Des Moines School District*, 393 U. S. 503 (1969); see also *Buckley* v. *Valeo, supra.* Moreover, terms as amorphous as "discipline" and "morale" invite latitudinous interpretation that intolerably disadvantages the exercise of First Amendment rights. See *Procunier* v. *Martinez*, 416 U. S. 396, 415–416 (1974). As these very cases illustrate, the perceived threat to discipline and morale will often correlate with the commanding officer's personal or political biases.[8] See *infra*, at 372–373.

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communication that comes within the ambit of the First Amendment. See, *e. g.*, *Freedman* v. *Maryland*, 380 U. S. 51 (1965).

It has also been speculated that the direct, immediate threat of interference with the trial process might warrant a restraint upon constitutionally protected expression. *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539, 569–570 (1976) (dictum). But see *id.*, at 588, 594–595 (BRENNAN, J., concurring in judgment). Significantly, however, this Court has repeatedly rejected efforts to wield the judicial contempt power against expression that assertedly jeopardized the administration of justice. See *Landmark Communications, Inc.* v. *Virginia*, 435 U. S. 829, 844–845 (1978); *Wood* v. *Georgia*, 370 U. S. 375 (1962); *Craig* v. *Harney*, 331 U. S. 367 (1947); *Pennekamp* v. *Florida*, 328 U. S. 331 (1946); *Bridges* v. *California*, 314 U. S. 252 (1941).

[8] Among the suppressed communications were a petition to a Congressman supporting amnesty for Vietnam War resisters and a leaflet outlining certain respondents' views about the constitutional rights of servicemen. Both were censored, the former because it "contain[ed] gross misstatements and implications of law and fact [and] impugn[ed] by innuendo the

Second. The command-approval procedure implementing these regulations is seriously flawed. Time and again, the Court has underscored the principle that restraints upon communication must be hedged about by procedures that guarantee against infringement of protected expression and that eliminate the play of discretion that epitomizes arbitrary censorship. See, *e. g., Southeastern Promotions, Ltd.* v. *Conrad, supra,* at 558–562; *Blount* v. *Rizzi,* 400 U. S. 410, 416–417 (1971); *Carroll* v. *President & Comm'rs of Princess Anne,* 393 U. S. 175, 181 (1968); *Freedman* v. *Maryland,* 380 U. S. 51 (1965); *Bantam Books, Inc.* v. *Sullivan, supra,* at 70–71; cf. *Schneider* v. *New Jersey,* 308 U. S. 147 (1939). We have identified specific safeguards that are indispensable if a system of prior approval is to avoid First Amendment pitfalls. These include (1) the requirement that the burden of justifying censorship fall upon the censor, see *New York Times Co.* v. *United States, supra,* at 714; *Freedman* v. *Maryland, supra,* at 58, (2) the condition that administrative suppression must be subject to speedy judicial review, see *Blount* v. *Rizzi, supra,* at 417, and (3) the rule that those whose First Amendment interests are at stake be given notice and an opportunity to be heard during suppression proceedings, see *Carroll* v. *President & Comm'rs of Princess Anne, supra,* at 181–183; cf. *Procunier* v. *Martinez, supra,* at 417–419.

None of these safeguards is present under the prior command-approval scheme. There is no indication that the burden of justifying censorship rests upon the authorities. Not only does the commanding officer make his own determination to suppress, but no provision is made for prompt judi-

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motives and conduct of the Commander-in-Chief of the Armed Forces"; the latter because it was "by transparent implication, disrespectful and contemptuous of all of your superiors. . . ." App. in No. 78–599, pp. 46–47, 50. The petitioners conceded below that suppression of the leaflet was improper under military regulations. Brief for Petitioners in No. 78–599, p. 8, n. 3.

cial review.[9] And we search the regulations in vain for any provision affording the right to appear before the censoring officer to argue for approval. Thus, the regulations utterly fail to meet even the minimum procedural dictates of the First Amendment; rather, as designed, they countenance the arbitrary and nonneutral suppression of communication by petition.[10]

Third. The regulations demonstrably do not serve the military interests offered as their compelling justification, and for that reason alone violate the First Amendment. If regulation of communicative rights is to be justified by a compelling governmental interest, the regulation must *precisely* further that interest; where constitutional rights are at stake, important ends do not sustain mismatched means. See *Nebraska Press Assn.* v. *Stuart*, 427 U. S., at 563–567, 569; *Procunier* v. *Martinez, supra*, at 413. In this respect, the regulations here plainly founder. The most important purpose that can be posited for them is prevention of incitement to military disorder. But if the danger of incitement necessitates prior clearance of servicemen's messages, it would be logical for the military to mandate preclearance of all messages, whether

[9] It is unnecessary to consider whether servicemen might challenge censorship decisions by bringing suits against their commanding officers. See *Huff, post*, at 457–458, n. 5. The lack of provision for immediate judicial review is not cured by the possibility that an individual might assume the burden of commencing a collateral action. Cf. *Blount* v. *Rizzi*, 400 U. S. 410, 418 (1971). Moreover, it is unlikely as a practical matter that persons serving at sea or on foreign soil will have ready access to domestic federal courts.

[10] Again, the factual background of these cases is instructive. Two respondents individually submitted a single leaflet for approval. The commanding general denied one respondent permission to distribute the leaflet on base, because of its disrespectful and "contemptuous" tone. The same officer permitted the other respondent to circulate the identical leaflet outside the main gate. App. in No. 78–599, pp. 36, 50. Since the on-post/off-post distinction had not been considered dispositive with respect to other requests, see *id.*, at 44, 46–47, it is difficult to identify the principle underlying the differing decisions about the leaflet.

circulated by petition or disseminated orally. Since oral discussion is not subjected to preliminary censorship, doubt must be raised as to the urgency and the efficacy of such censorship when communication is by petition. In other words, inasmuch as the content of an oral communication may be identical to the content of a petition, there is no reason to single out petitions for a content preclearance requirement.

The only rational basis for disparate treatment of petitioning and oral communication would be the presence of some danger *peculiar to the process of petitioning.* But petitioning differs from simple oral expression only in that it involves an element of physical conduct. Insofar as that physical element of the petitioning process poses a greater threat of disruption than does simple verbal expression, recourse to content-neutral regulation of the time, place, and manner of circulation is surely an appropriate and sufficient alternative to suppression. By ordering prior official review of the content of petitions, these regulations are an excessive response to any distinctive problems of petitioning. Even the most important governmental purpose cannot justify a regulation that unduly burdens First Amendment liberties. See *Shelton* v. *Tucker,* 364 U. S. 479, 488–490 (1960).

II

All that the Court offers to palliate these fatal constitutional infirmities is a series of platitudes about the special nature and overwhelming importance of military necessity.[11] *Ante,* at 353–354.

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[11] The Court, *ante,* at 356, n. 13, also suggests that curtailment of First Amendment freedoms might be warranted inasmuch as service personnel are Government employees, citing *Civil Service Comm'n* v. *Letter Carriers,* 413 U. S. 548 (1973). That doctrine is inapposite. The predicate for upholding liberty restrictions as a condition of public employment must, at least in part, be the voluntariness of the decision to accept Government employment. At various times, however, this country has inducted citizens into military service as a matter of compulsion. Moreover, unlike

Military (or national) security is a weighty interest, not least of all because national survival is an indispensable condition of national liberties. See *United States* v. *Robel*, 389 U. S. 258, 264 (1967). But the concept of military necessity is seductively broad, and has a dangerous plasticity. Because they invariably have the visage of overriding importance, there is always a temptation to invoke security "necessities" to justify an encroachment upon civil liberties. For that reason, the military-security argument must be approached with a healthy skepticism: its very gravity counsels that courts be cautious when military necessity is invoked by the Government to justify a trespass on First Amendment rights.

Such skepticism lay at the heart of our decision in *New York Times Co.* v. *United States*. There, the Government urged that publication of the so-called Pentagon Papers would damage the Nation's security during a period of armed conflict. We rejected that assertion. 403 U. S., at 714. Separate opinions scrutinized the security argument, and declined to rely merely upon the Government's characterization of the interest at stake. *Id.*, at 719–720 (Black, J.); *id.*, at 722–724 (Douglas, J.); *id.*, at 726–727 (BRENNAN, J.); *id.*, at 730 (STEWART, J.); *id.*, at 731, 733 (WHITE, J.). Similarly, *United States* v. *Robel*, *supra*, at 263–264, spurned simple deference to "talismanic incantation[s]" of "'war power.'" Analogously, we have stringently viewed the national-security argument when it has been proffered to support domestic warrantless surveillance. *United States* v. *United States District Court*, 407 U. S. 297, 320 (1972).

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other employees, servicemen may not freely resign their posts should they decide to unburden themselves of restraints upon their freedom of expression.

It is also noteworthy that the statutory scheme considered in *Letter Carriers* permitted employees to "[s]ign a political petition as an individual," *Letter Carriers*, 413 U. S., at 577, n. 21, and evidently further allowed the full panoply of petitioning rights with respect to petitions addressed to the Federal Government, *id.*, at 572–574, 587–588 (appendix).

To be sure, generals and admirals, not federal judges, are expert about military needs. But it is equally true that judges, not military officers, possess the competence and authority to interpret and apply the First Amendment. Moreover, in the context of this case, the expertise of military officials is, to a great degree, tainted by the natural self-interest that inevitably influences their exercise of the power to control expression. Partiality must be expected when government authorities censor the views of subordinates, especially if those views are critical of the censors. Larger, but vaguely defined, interests in discipline or military efficiency may all too easily become identified with officials' personal or bureaucratic preferences. This Court abdicates its responsibility to safeguard free expression when it reflexively bows before the shibboleth of military necessity. Cf. *Landmark Communications, Inc.* v. *Virginia,* 435 U. S. 829, 842–845 (1978).

A properly detached—rather than unduly acquiescent—approach to the military-necessity argument here would doubtless have led the Court to a different result. The military's omission to regulate the content of oral communication suggests the pointlessness of controlling the identical message when embodied in a petition. It is further troubling that these regulations apply to all military bases, not merely to those that operate under combat or near-combat conditions. The "front line" and the rear echelon may be difficult to identify in the conditions of modern warfare, but there is a difference between an encampment that faces imminent conflict and a military installation that provides staging, support, or training services. It is simply impossible to credit the contention that national security is significantly promoted by the control of petitioning throughout *all* installations.

Finally, and fundamentally, the Court has been deluded into unquestioning acceptance of the very flawed assumption that discipline and morale are enhanced by restricting peaceful communication of various viewpoints. Properly regulated as

to time, place, and manner, petitioning provides a useful outlet for airing complaints and opinions that are held as strongly by citizens in uniform as by the rest of society. The forced absence of peaceful expression only creates the illusion of good order; underlying dissension remains to flow into the more dangerous channels of incitement and disobedience. In that sense, military efficiency is only disserved when First Amendment rights are devalued.

III

The Court egregiously errs in holding that *Greer* v. *Spock*, 424 U. S. 828 (1976), compels the validation of these regulations. I dissented in *Greer*, and continue to disagree with the decision in that case. But, in any event, *Greer* is not dispositive here; indeed, if it governs at all in these cases, *Greer* is authority that the regulations are constitutionally indefensible.

Greer arose because of the rejection by military authorities of Dr. Benjamin Spock's request to hold a Presidential campaign meeting and distribute campaign literature at Fort Dix. Although the case involved a number of Army regulations restricting various expressive activities—including regulations parallel to those before us now—the actual issue in *Greer* was the exclusion of a politically partisan campaign effort. And there were three critical elements in *Greer* that prompted the Court to sustain that exclusion:

First, the Court relied upon the proposition that civilians lack expressive rights on military reservations from which they can be excluded. Significantly, the previous decision in *Flower* v. *United States*, 407 U. S. 197 (1972) (*per curiam*), was distinguished on the ground that leafletting in *Flower* had taken place on a portion of Fort Sam Houston that had been effectively dedicated to public use.

Second, the Court noted that servicemen stationed at Fort Dix had easy access to off-base public fora where they could be exposed to communications by Dr. Spock and others. By the

same token, although not discussed in *Greer*, these off-base fora provided Dr. Spock with ample opportunity for expressive activity. Thus, from the standpoint of speaker and listeners, the Fort Dix regulations only effected a partial cutoff of communicative rights because other equivalent avenues of interchange remained open.

Finally, *Greer* repeatedly emphasized the lack of *any* claim that the Fort Dix regulations had been applied in biased fashion. It explicitly noted the complete absence of any question of "irrationa[l], invidiou[s], or arbitrar[y]" application of the Army regulations. 424 U. S., at 840. Accordingly, the Court did not confront the problem of official discrimination among political viewpoints. Indeed, *Greer* placed weight upon a perceived "American constitutional tradition" that the military be institutionally free of political entanglement, and that it avoid "the appearance of acting as a handmaiden for partisan political causes or candidates." *Id.*, at 839.

These three predicates to *Greer* are wholly absent in the setting in which we review the regulations before us. On their face, and as applied in these cases, the regulations restrict the expressive activities of individuals who are mandatorily, not permissively, present on military reservations. For soldiers and sailors, as opposed to civilians, military installations *must be* the place for "free . . . communication of thoughts," *Greer* v. *Spock*, *supra*, at 838. Further, when service personnel are stationed abroad or at sea, the base or warship is very likely the *only* place for free communication of thoughts.[12] Thus, in contrast to *Greer*, the regulations here permit complete foreclosure of a distinctive mode of expression by servicemen, who lack the civilian's option to depart the sphere of military authority.

These cases also differ from *Greer* because they exemplify

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[12] The regulations permit commanding officers to restrain petitioning activities off-base in foreign countries.

pervasive official partiality in the regulation of messages.[13] The orders refusing command approval for respondents' petitioning or leafletting flowed from the obviously biased official judgment that the content was "erroneous and misleading commentary," App. in No. 78-599, p. 34, or that it "impugn[ed] by innuendo the motives and conduct" of the President, *id.*, at 46. Far from being evenhanded regulation, this sort of command judgment is quintessentially political; in suppressing communication that "impugns" Presidential conduct "by innuendo," military authorities entangle themselves in national politics. Since these cases involve discriminatory regulation of communication, *Greer*'s assumption of military neutrality—and, consequently, *Greer*'s result—cannot govern here. Actually, the "tradition of a politically neutral military," *Greer, supra,* at 839, strongly counsels invalidation of these regulations, which demonstrably encourage commanding officers to exercise personal political judgment in deciding whether to permit petitioning.[14]

Today's decisions, then, clash, rather than comport, with the underlying premises of *Greer* v. *Spock*. The Court unnecessarily trammels important First Amendment rights by uncritically accepting the dubious proposition that military security requires—or is furthered by—the discretionary sup-

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[13] While the respondents in these cases mount a facial challenge to the military regulations, an appreciation of the theoretical dangers posed by the regulations is best gained by considering their operation in practice.

[14] Indeed, inasmuch as the regulations state that distribution or posting of petitions or other writings "may not be prohibited *solely* on the ground that the material is critical of Government policies or officials," Air Force Reg. 35-15 (3)(a)(4) (1970) (emphasis added), the implication is that prohibition may be partly based upon the fact that the material in question challenges Government policy or officials.

Further, at least one command response to a petitioning request indicates that the officer in charge considered his censoring function to include the duty to "afford proper guidance to the men under my command," App. in No. 78-599, pp. 46-47.

pression of a classic form of peaceful group expression. Service men and women deserve better than this. I respectfully dissent.

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN joins, dissenting.

The Department of the Navy used to have a regulation mandating that every communication to a Member of Congress from anybody in the Navy had to be forwarded through official channels, if the communication "affect[ed] the Naval Establishment." See 97 Cong. Rec. 3776 (1951). Congress was informed about this regulation in 1951, and its reaction was to enact a statute that currently reads:

> "No person may restrict any member of an armed force in communicating with a member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States." 10 U. S. C. § 1034.

Today, the Court holds that this statute does not in any way protect the circulation by servicemen on United States military bases of petitions addressed to Members of Congress. Specifically, the Court holds that the statute does not apply to a military regulation requiring that the content of petitions addressed to Members of Congress be precleared,[1] even when

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[1] On their face, the regulations at issue strongly suggest that the content of prospective petitions may be considered by the commanding officer in determining whether or not to grant servicemen permission to circulate the documents. Air Force Reg. 35-15 (3)(a) (1970) requires that, in order to obtain permission to circulate any petition, a serviceman must submit to his commander "[a] copy of the material with a proposed plan or method of distribution or posting. . . ." The regulation further provides that permission to distribute will be denied where the commander determines that "a clear danger to the loyalty, discipline, or morale of members of the Armed Forces, or material interference with the accomplishment of a military mission, would result." Finally, the regulation admonishes the commander that "[d]istribution or posting may not be

the petitioning activity occurs on a base located in a noncombat area in time of peace. To reach this result, the Court necessarily concludes either that petitions are not "communication[s]" within the meaning of § 1034 or that the compelled prescreening of petitions is not a "restrict[ion]" within the meaning of that statute. Since, in my view, each of these conclusions is at odds with the express language of the statute and with its legislative history, I respectfully dissent.

Section 1034 protects those servicemen who "communicat[e]" with Members of Congress. As the Court necessarily acknowledges, a letter bearing one signature is a "communication" protected by § 1034. Nothing in logic would suggest that such a letter forfeits the statute's protection simply by acquiring additional signatures. Accordingly, reason would indicate that petitions are a form of "communication" protected under § 1034: they are no more than letters bearing many signatures. Moreover, it seems clear that a serviceman "communicates' with his Congressman just as much when he signs a letter drafted by a third person as when he writes and signs that letter himself.

Yet the Court's opinion appears to conclude that petitions are not "communications" within the meaning of § 1034. To reach this conclusion, the Court relies on the statute's legislative history. As the Court points out, the specific situation brought to the attention of Congress in 1951 was that of a

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prohibited *solely* on the ground that the material is critical of Government policies or officials." (Emphasis added.)

Any doubt that the regulations involved here permit the appropriate commanding officer to review the contents of prospective petitions is dispelled by what occurred in *Secretary of Navy* v. *Huff, post*, p. 453. There, a commanding officer, acting under the authority of similar regulations, prohibited the circulation of petitions because they contained "gross misstatements and implications of law and fact as well as impugning by innuendo the motives and conduct of the Commander-in-Chief of the Armed Forces. . . ."

serviceman who had been threatened with court-martial proceedings if he sent a letter to his Congressman without prior command approval. By enacting the predecessor of § 1034, Congress made clear that it wanted to prohibit this kind of restraint. But the legislative history cited by the Court shows that the purpose of the law was considerably broader than simply "to permit any man who is inducted to sit down and take a pencil and paper and write to his Congressman or Senator." 97 Cong. Rec. 3776 (1951).

The historic matrix of the law contains no suggestion that Congress intended § 1034 to cover no more than a letter written and signed by one individual person.[2] If anything is to be drawn from § 1034's history, it is that Congress intended to protect more than such single-signature letters. A precise and particularized problem was brought to the attention of Congress in 1951, one that could easily have been remedied by a similarly circumscribed solution. Congress chose instead to write broadly so as to accord protection to all "communications" sent by military personnel to Members of Congress. Clearly, the legislative purpose was to cover the myriad of ways in which a citizen may communicate with his Congressman. By limiting the scope of § 1034 to the particular case brought to the attention of Congress in 1951, the Court, I think, reads the legislative history as mistakenly as it reads the language of the statute itself.[3]

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[2] It is worth noting that nothing in § 1034's legislative history indicates that when Congress drafted that provision it had in mind the slightly different wording of 5 U. S. C. § 7211 (1976 ed., Supp. II), which explicitly protects the petitioning rights of federal civil servants.

[3] In support of its conclusion, the Court states: "The unrestricted circulation of collective petitions could imperil discipline. We find no legislative purpose that requires the military to assume this risk and no indication that Congress contemplated such a result." *Ante*, at 360. Contrary to the Court's implication, a reading of § 1034 to include petitions within that statute's ambit would not leave the military without the ability to protect its vital interests. The statute expressly permits the

The Court's opinion can be interpreted alternatively to hold that the regulations at issue do not constitute a "restrict[ion]" within the meaning of § 1034. That position also gives the statute an unjustifiably narrow scope. An absolute ban of petitions or petitioning activity on military bases would obviously constitute a "restrict[ion]."[4] The regulations before us amount to such a ban, but with one difference. They permit a limited exception for petitions whose content has been precleared by command authority. This kind of exception, however, is precisely the type of "restrict[ion]" on the free flow of communication between servicemen and Congress that the law prohibits. As stated by the law's sponsor, a requirement that a serviceman send his communications through channels "is a restriction in and of itself." 97 Cong. Rec. 3776 (1951).

That the preclearance regulations at issue here restrict the free flow of communication between servicemen and Members of Congress could not be more clearly demonstrated than by the facts presented in *Secretary of Navy* v. *Huff*, *post*, p. 453. There, servicemen invoked the preclearance procedures contained in similar regulations, but were denied permission to collect signatures on several petitions addressed to Members of Congress, which denials the Government now concedes were improper.[5] Not only did the prescreening procedure unjustifiably prevent the circulation of those particular petitions; it necessarily discouraged further collective and individual

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promulgation of rules regulating communicative conduct if "necessary to the security of the United States."

[4] Without some activity aimed at the acquisition of signatures, no petition could ever be created.

[5] Permission was denied to circulate a petition to Senator Cranston opposing the use of military personnel in labor disputes and a petition to Representative Dellums requesting amnesty for Vietnam war resisters, even though the requesters had stated that they would circulate the petitions out of uniform, during their off-duty hours, and away from the work areas of the base.

attempts by those servicemen to communicate with Congress.

It seems clear to me that the application of the challenged regulations in this case violated the provisions of § 1034. Under that statute only those rules that prohibit "unlawful" communications or that are "necessary to the security of the United States" may be enforced. No claim is made here that the communicative content of any of the respondent's petitions was in any way "unlawful." Moreover, no contention is made that the respondent disclosed anything secret or confidential in the proposed petitions to the Members of Congress.[6] And surely it could not conceivably be argued that, as a general proposition, a regulation requiring the preclearance of the content of all petitions to be circulated by servicemen in time of peace is "necessary to the security of the United States."

For these reasons, I believe that the judgment of the Court of Appeals should be affirmed.[7] Accordingly, I respectfully dissent from the opinion and judgment of the Court.

MR. JUSTICE STEVENS, dissenting.

The question whether 10 U. S. C. § 1034 includes a right to circulate petitions is not an easy one for me. I must confess that I think the plain language of the statute and its sparse legislative history slightly favor the Court's reading that it does not. Nevertheless, I agree with MR. JUSTICE STEWART's

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[6] Congress included the "necessary to the security" exception in § 1034 so that the Government could prohibit servicemen from imparting "secret matter" in their communications with Congress. 97 Cong. Rec. 3877 (1951).

[7] The respondent was demoted to the standby reserves because he had failed to submit for preclearance a petition addressed to the Secretary of Defense as well as petitions separately addressed to various Members of Congress. While the latter petitions were protected by 10 U. S. C. § 1034, the former was not. I would nonetheless affirm the judgment of the Court of Appeals. There is no reason to believe that the respondent suffered the demotion only for his circulation of the petition addressed to the Secretary of Defense.

construction of the statute for two reasons. First, in a doubtful case I believe a statute enacted to remove impediments to the flow of information to Congress should be liberally construed. Second, the potentially far-reaching consequences of deciding the constitutional issue [1] counsel avoidance of that issue if the "case can be fairly decided on a statutory ground." [2] MR. JUSTICE STEWART has surely demonstrated that that test is met here. I therefore respectfully dissent.

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[1] For the reasons stated by MR. JUSTICE BRENNAN, I do not consider the constitutional question foreclosed by the Court's decision in *Greer* v. *Spock*, 424 U. S. 828. Nor do I view it as so easy as to justify the novel practice of deciding the constitutional question before addressing the statutory issue. *Ante*, at 349.

[2] "Our settled practice . . . is to avoid the decision of a constitutional issue if a case can be fairly decided on a statutory ground. 'If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.' *Spector Motor Co.* v. *McLaughlin*, 323 U. S. 101, 105. The more important the issue, the more force there is to this doctrine." *University of California Regents* v. *Bakke*, 438 U. S. 265, 411–412 (opinion of STEVENS, J.) (footnote omitted).

IDAHO EX REL. EVANS, GOVERNOR OF IDAHO, ET AL. *v.* OREGON ET AL.

ON EXCEPTIONS TO REPORT OF SPECIAL MASTER

No. 67, Orig. Argued November 26, 1979—Decided January 21, 1980

Held: Failure to join the United States as a party to Idaho's action against Oregon and Washington to secure equitable apportionment of various runs of anadromous fish migrating between spawning grounds in Idaho and the Pacific Ocean, will not prevent this Court from entering an adequate judgment. Pp. 387–393.

(a) None of the federal interests cited by the Special Master as rendering impossible an adequate judgment in the absence of the United States as a party—the Government's control over the ocean fishery on the runs of the fish at issue, its management of the various dams that separate the spawning grounds in Idaho from the Pacific Ocean, and its role as trustee for the various Indian tribes with treaty rights in the fish at issue—constitutes a sufficient reason for dismissing the action for the failure to join the United States as the Special Master recommends. *Arizona* v. *California*, 298 U. S. 558; *Texas* v. *New Mexico*, 352 U. S. 991, distinguished. Pp. 387–391.

(b) Washington's additional argument in favor of dismissing the complaint that any allocation of nontreaty fish to Idaho would abrogate an agreement between the Indian tribes and Oregon and Washington for managing the fish originating in the Columbia River System, is without merit, since such agreement only divides the available fish between treaty and nontreaty fishermen and does not purport to allocate the nontreaty share among the various States. Pp. 391–392.

(c) Washington's further assertion that for some time few if any fish have been taken from the runs at issue and that hence any further restrictions on fishing in zones open to commercial fishermen will have no appreciable effect upon the number of fish arriving in Idaho, goes to the merits of Idaho's claim and has little or nothing to do with the need to join the United States as a party. P. 392.

Exceptions to Special Master's report sustained, and case remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, BLACKMUN, POWELL, and STEVENS, JJ., joined. STEWART and MARSHALL, JJ., filed a dissenting statement, *post*, p. 393.

David H. Leroy, Attorney General of Idaho, *pro se,* argued the cause for plaintiffs on exceptions to the report of the Special Master. With him on the plaintiffs' exceptions to the report were *W. Hugh O'Riordan* and *John C. Vehlow,* Deputy Attorneys General.

James A. Redden, Attorney General, argued the cause for defendant State of Oregon in answer to exceptions to the report of the Special Master. With him on the responses to the plaintiffs' exceptions to the report were *Raymond P. Underwood* and *Beverly B. Hall,* Assistant Attorneys General. *Slade Gorton,* Attorney General, argued the cause for defendant State of Washington in answer to exceptions to the report of the Special Master. With him on the response to the plaintiffs' exceptions to the report was *Edward B. Mackie,* Deputy Attorney General.

Louis F. Claiborne argued the cause for the United States as *amicus curiae* in support of the report of the Special Master. With him on the memorandum were *Solicitor General McCree, Assistant Attorney General Moorman, Myles E. Flint,* and *Steven E. Carroll.*

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Invoking this Court's original jurisdiction, the State of Idaho brought suit against the States of Oregon and Washington to secure equitable apportionment of various runs of anadromous fish migrating between spawning grounds in Idaho and the Pacific Ocean. We granted Idaho leave to file its complaint, but left open the questions whether that complaint stated a claim upon which relief may be granted and whether the United States was an indispensable party to the action. 429 U. S. 163 (1976). We later referred the action to a Special Master. 431 U. S. 952 (1977). On February 2, 1979, the Special Master recommended that Idaho's action be dismissed for failure to join the United States, but that the dismissal be without prejudice to Idaho's right to refile its

suit at some later date if it is wholly unable to obtain a remedy through negotiation with Oregon and Washington. Idaho has filed exceptions to that recommendation.

I

The Snake River rises in northwest Wyoming and flows across southern Idaho, eventually turning northward and forming the boundary between Idaho and Oregon for approximately 165 miles and between Idaho and Washington for approximately 30 miles. It then turns westward and enters Washington, whence it proceeds for approximately 100 miles to its confluence with the Columbia River. The Columbia River rises in British Columbia and flows southward through eastern Washington to its confluence with the Snake River. Just below that confluence it turns westward, forming the boundary between Oregon and Washington until it empties into the Pacific Ocean 270 miles downstream.

Numerous species of anadromous fish spawn in the gravel bars of the Columbia/Snake River System. After remaining in their hatch area for approximately two years, these fish migrate downstream to the Pacific Ocean, where they spend anywhere from one to four years. Near the end of their life cycle the anadromous fish return to the Columbia River and migrate upstream toward the waters of their origin to spawn. At issue in the present case are three particular runs of anadromous fish: spring chinook salmon, summer chinook salmon, and steelhead trout. To a significant extent, these three runs originate in, and would return to, spawning grounds within the State of Idaho.

A number of manmade conditions have combined with natural obstacles to deplete seriously the number of fish that return to Idaho successfully. During both their downstream and upstream migrations, anadromous fish originating in Idaho must cross a series of eight dams built and maintained by the United States Army Corps of Engineers. The Bonneville Dam, built in 1938, lies closest to the mouth of the Columbia River.

Fish crossing the Bonneville Dam on their way to Idaho also encounter the Dalles Dam, the John Day Dam, the McNary Dam, the Ice Harbor Dam, the Lower Monumental Dam, the Little Goose Dam, and, finally, the Lower Granite Dam. During their downstream migration, of course, the fish cross these dams in the reverse order.

At each of these dams, a portion of the water is released through turbines used to generate hydroelectric power. Water passing through these turbines is not conducive to either the "smolts" migrating downstream or the mature fish migrating upstream. Each dam is therefore equipped with a spillway, over which smolts can pass, and a "fish ladder," up which mature fish can climb. Because water sent over the spillways or fish ladders is not available to generate power, and because river conditions vary over time, the Corps of Engineers [1] is often faced with a choice between generating power and facilitating migration. Even under optimal conditions, when the Corps can allocate adequate water to the spillways and the fish ladders, those mechanisms themselves will cause a significant number of mortalities among migrating fish.

In addition to confronting these hurdles, anadromous fish afford a catch for both sport and commercial fishermen. The Federal Government regulates the ocean fishery in a zone stretching seaward from 3 to 200 miles from the seacoast. See Fishery Conservation and Management Act of 1976, 16 U. S. C. §§ 1801–1882. Within the 3-mile limit and throughout their in-river migrations, however, the anadromous fish are the subject of state regulation.

In 1918, with the consent of Congress, Oregon and Washington entered into the Oregon-Washington Columbia River Fish Compact, ch. 47, 40 Stat. 515. The Compact attempts to

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[1] To a certain extent, the United States Bureau of Reclamation and the Federal Energy Regulatory Commission also exercise some control over water releases. See Report of the Special Master 8.

assure uniformity in the regulation of anadromous fish in the Columbia River by preventing either State from altering its fishing regulations without the consent of the other State. Pursuant to this compact, Oregon and Washington have divided the Columbia River below the McNary Dam into six zones, with Zones 1 through 5 stretching between the Pacific Ocean and the Bonneville Dam and Zone 6 stretching between the Bonneville Dam and the McNary Dam. Idaho has attempted on a number of occasions to become a party to the Compact, but its efforts thus far have been unsuccessful.

In 1968, a number of Indian tribes who fished along the Columbia River brought suit against Oregon to protect fishing rights allegedly granted them under various treaties with the United States. See *Sohappy* v. *Smith*, 302 F. Supp. 899 (Ore. 1969). The District Court concluded that Oregon was obligated to structure its regulations so that the Indians would have "an opportunity to catch fish at their usual and accustomed places equal to that of other users to catch fish at locations preferred by them or by the state." *Id.*, at 910. The suit remained pending in the District Court, and, in 1974, Washington moved to intervene as a defendant. Eventually, the District Court determined that the treaties in question gave the Indians a right to 50% of the fish taken from the Columbia River. The United States Court of Appeals for the Ninth Circuit affirmed this determination. See *Sohappy* v. *Smith*, 529 F. 2d 570 (1976).

On February 25, 1977, the parties in the *Sohappy* litigation entered into a 5-year agreement for managing the fisheries on stocks of anadromous fish originating in the Columbia River System above the Bonneville Dam. Under the agreement, Zones 1 through 5 are open to all commercial fishermen. Zone 6, which extends from the Bonneville Dam 130-miles upstream to the McNary Dam, is restricted for use by Indians fishing pursuant to their treaty rights. A "technical advisory committee" estimates the number of fish in various

runs entering the Columbia River "destined to pass [the] Bonneville Dam." An agreed-upon "escapement" for spawning is subtracted from this total in-river run size; the remaining fish in the run are then allocated between treaty and nontreaty fishermen. Thus, for spring chinook salmon, one of the runs at issue here, the plan sets an escapement goal of 120,000 fish passing into Zone 6.[2] Where the run size exceeds the escapement goal by less than 30,000 fish, no nontreaty fishermen may take spring chinook salmon at any time before the fish pass into the Snake River on the other side of Zone 6. Where the run size exceeds the escapement goal by more than 30,000 fish, nontreaty fishermen may take 60% of that excess while treaty fishermen may take 40%. Other runs of fish are regulated similarly, with a predetermined escapement goal and with the remainder of the fish being divided between treaty and nontreaty fishermen.[3]

In the present suit, Idaho alleges that nontreaty fishermen in Oregon and Washington take a disproportionate share of fish destined for Idaho, thereby depleting those runs to the detriment of Idaho fishermen.[4] It seeks equitable apportionment of anadromous fish destined for Idaho in the Columbia River. Significantly, Idaho does not contend that the Indians' share of anadromous fish should be reduced, but rather seeks to share in that portion of the catch now taken exclusively by nontreaty fishermen in Oregon and Washington.

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[2] The plan estimates that, under normal river conditions, an escapement of 120,000 spring chinook salmon above the Bonneville Dam will provide 30,000 spring chinook salmon at the Lower Granite Dam, the last dam separating the fish from Idaho's spawning grounds.

[3] For summer steelhead trout, the agreement sets an escapement goal of 150,000 fish passing the Bonneville Dam or 30,000 fish at the Lower Granite Dam. If the run exceeds these goals, the excess is apportioned entirely to nontreaty fishermen. As for summer chinook salmon, the third run at issue here, the agreement states that runs of those fish "are precariously low and do not warrant any fishery at the present time. . . ."

[4] According to Idaho, it has no significant commercial fishery, but only sport fisheries.

The Special Master concluded that Idaho's complaint presents a justiciable controversy, and indicated that he found some merit in Idaho's claim that it was entitled to equitable apportionment. Nevertheless, the Special Master recommended that this suit be dismissed for failure to join the United States Government, which has invoked its sovereign immunity and has steadfastly refused to intervene as a party.[5] In deciding that the United States was an indispensable party to this litigation, the Special Master looked for guidance to Rule 19 (b) of the Federal Rules of Civil Procedure, which lists four factors to be considered in deciding whether a suit can proceed in the absence of an allegedly necessary party. These factors are (1) the extent to which a judgment rendered in the party's absence might be prejudicial to that party or those already parties; (2) the extent to which the court could lessen or avoid such prejudice by shaping the judgment or relief; (3) the court's ability to render an adequate judgment in the party's absence; and (4) the adequacy of remedies available to the plaintiff should the suit be dismissed.

The Special Master concluded that factors (1), (2), and (4) weighed in favor of allowing Idaho to prosecute this suit. Because the United States could not be bound by any judgment rendered in its absence, and because Idaho was seeking no relief against the treaty fishermen for whom the United States acts as trustee, no absent party would be prejudiced by the relief sought by Idaho. Furthermore, the Special Master felt that this suit offered Idaho its only practical avenue of relief. Oregon and Washington had consistently rebuffed Idaho's attempts to join the Columbia River Fish Compact or to otherwise negotiate some sort of accommodation. Nor did it appear that Idaho could intervene in the *Sohappy* litigation

[5] The United States has adopted this position despite its repeated concession that Idaho appears to be entitled to some sort of equitable relief. See Memorandum from Louis F. Claiborne to the Solicitor General, reproduced as Appendix C to Idaho's exceptions, p. C–5; Tr. of Oral Arg. 60.

to assert its interest. Given the pendency of the 5-year agreement, the *Sohappy* court quite probably would reject Idaho's motion to intervene as untimely. Moreover, any attempt by Idaho to assert in that litigation an interest adverse to Oregon and Washington might convert that suit into a dispute among the States, a dispute over which the District Court would have no jurisdiction.

Although these factors weighed heavily in favor of allowing Idaho's suit to proceed, the Special Master held that federal interests were so intertwined in this suit that this Court could not possibly render an adequate judgment in the absence of the United States as a party. In particular, the Special Master cited the United States Government's control over the ocean fishery, its management of the various dams along the Columbia and Snake Rivers, and its role as trustee for the various Indian tribes with fishing rights in the anadromous fish at issue here. Balancing factor (3) of Rule 19 (b) against the other three factors, the Special Master concluded that Idaho's complaint should be dismissed. At the suggestion of the United States, however, the Special Master recommended that the dismissal be without prejudice to Idaho's right to reinstitute the suit if it is wholly unable to obtain a remedy through negotiation with Oregon and Washington. In suggesting this disposition, the United States implied that it would intervene in a later action brought by Idaho should Oregon and Washington remain intractable.

II

Idaho has filed exceptions to the Special Master's report and has asked us to reject his conclusion that the United States is a necessary party to this suit. In deciding this issue, we consider separately each of the federal interests cited by the Special Master as rendering impossible an adequate judgment without joinder of the United States Government.

First, the Special Master noted that the United States controls the ocean fishery on the runs of anadromous fish at issue

here during that portion of their lifespan when they are outside the 3-mile limit in the Pacific Ocean. Nevertheless, we do not understand either the Special Master or the defendants to rely heavily upon this interest as evidence of the necessity for joining the United States Government as a party in this litigation. Idaho seeks apportionment of those fish entering the Columbia River destined for spawning grounds in Idaho. While regulation of the ocean fishery may have some effect upon the total number of anadromous fish returning to the Columbia River,[6] it has little to do with proper allocation of the rights to take those fish once they have entered the river.

Second, the Special Master cited the role of the United States in operating the eight dams that separate the hatching grounds in Idaho from the Pacific Ocean. He pointed out that, at each dam, the Corps of Engineers must allocate water among the turbines, fish ladders, and spillways. Under varying river conditions, this allocation often requires a choice between the generation of power and the survival of migrating fish. The Special Master felt that, without authority to bind the United States to whatever judgment was entered in this case, he could not ensure that any additional fish allowed to pass through the first five fishing zones would ever reach the State of Idaho.

We do not find this consideration a persuasive reason for dismissing Idaho's suit. We can assume, as suggested by defendants, that the eight dams along the Columbia and Snake Rivers are the primary reason why more fish do not successfully migrate back to Idaho. Nevertheless, Idaho stresses that it has no quarrel with the operation of the various dams. It argues, quite persuasively we believe, that greater numbers of fish reaching each dam will, under all but the most adverse

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[6] The *Sohappy* agreement, however, is "based upon the premise" that the United States, through the Pacific Fishery Management Council, will regulate ocean fishing on the runs at issue here so that the ocean catches will be "essentially *de minimis* portions" of those runs.

river conditions, result in greater numbers of fish crossing each dam. The mortality rate at each dam for any given set of river conditions can be, and has been, estimated and taken into account in apportionment formulas. In the case of spring chinook salmon, for example, the *Sohappy* agreement states that "[u]nder average river flow conditions, 120,000 fish at Bonneville Dam will generally provide 30,000 fish at Lower Granite Dam and 150,000 fish at Bonneville Dam will generally provide 37,500 fish at Lower Granite Dam." If Oregon and Washington fishermen are taking more than their fair share of Idaho-bound anadromous fish, this Court could set aside a portion of those fish for Idaho, taking into account the estimable mortality rate at each dam.

Third, the Special Master cited the role of the United States Government as trustee for the various Indian tribes that fish the runs at issue here. Although, as noted above, the Special Master found that a judgment rendered in this case would not adversely affect the interests of those Indians, he felt that this Court could not render a complete judgment unless it could guarantee that the Indians would not take the fish allocated to Idaho.

As a mathematical proposition, the relief sought by Idaho need not involve the Indians at all. Any particular run of anadromous fish entering the Columbia River destined to pass the Bonneville Dam must be allocated to one of three categories: nontreaty catch, treaty catch, and spawning escapement. Under present practices, as memorialized in the *Sohappy* agreement, nontreaty fishermen conduct their operations almost entirely in Zones 1 through 5. Fish allocated to Indian fisheries and to escapement are then allowed to pass the Bonneville Dam and into Zone 6. The treaty fishermen take their allocation in that zone and allow the spawning escapement to continue upriver. Idaho would have this Court order Oregon and Washington to allow a portion of the nontreaty share to pass into Zone 6 along with the treaty share

and the escapement. According to the Special Master, however, without some control over treaty fishermen this Court could not guarantee that Idaho's allocation would ever get out of Zone 6.

We do not share the Special Master's pessimism. Under the *Sohappy* agreement the Indians are limited to a fixed share of the fish entering Zone 1 and destined for the waters above the Bonneville Dam. Absent evidence to the contrary, we cannot assume that the Indians would violate that agreement by taking more fish than have been allocated to them. Nor can we assume that Oregon and Washington, the other parties to the *Sohappy* agreement, would ignore any such violation. Because the treaty and nontreaty commercial fisheries undoubtedly compete to a certain extent, Oregon and Washington might find it in their own interests to enforce the ceiling on treaty fishing in Zone 6. Finally, should other remedies fail, Idaho might be able to intervene in the *Sohappy* litigation for the sole purpose of enforcing the limitations on treaty fishing. Thus, we cannot agree with the Special Master that failure to join the United States as a party to this litigation would prevent this Court from rendering an adequate judgment.[7]

This case is quite different from earlier cases where we found the United States to be an indispensable party to the

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[7] The Special Master also implied that he felt dismissal was warranted because of the complexity of apportioning runs of anadromous fish and because this Court might have to retain continuing jurisdiction over the management of the fisheries in the Columbia and Snake Rivers. We rejected a similar argument in *Nebraska* v. *Wyoming*, 325 U. S. 589, 616 (1945), a case involving apportionment of water:

"There is some suggestion that if we undertake an apportionment of the waters of this interstate river, we embark upon an enterprise involving administrative functions beyond our province. . . . But the efforts at settlement in this case have failed. A genuine controversy exists. . . . The difficulties of drafting and enforcing a decree are no justification for us to refuse to perform the important function entrusted to us by the Constitution."

prosecution of a suit within our original jurisdiction. In *Arizona* v. *California*, 298 U. S. 558 (1936), a suit involving the division of theretofore unapportioned water in the Colorado River, we found that the Federal Government already had exercised its authority to impound that water and to control its disposition. See *id.*, at 570. Here, by contrast, the United States has made no attempt to control apportionment of the in-river harvest of anadromous fish, except to the extent that it has acted to protect treaty rights. In *Texas* v. *New Mexico*, 352 U. S. 991 (1957), another suit involving the apportionment of water flowing in an interstate river, we adopted the finding of the Special Master that the United States was indispensable in its role as trustee for various Indians. A decree in that case, however, would have "necessarily affect[ed] adversely and immediately the United States" in its fiduciary capacity. See Report of the Special Master, O. T. 1956, No. 9 Orig., p. 41. In this case, the Special Master specifically dismissed the possibility of prejudice to the United States, either in its role as trustee for the Indians or in its role as manager of the ocean fishery and the dams. Cf. *United States* v. *Candelaria*, 271 U. S. 432, 438, 443 (1926).

Moving beyond the report of the Special Master, Washington has advanced two additional arguments in favor of dismissing Idaho's complaint. First, Washington asserted at oral argument that the *Sohappy* agreement was founded on the assumption that nontreaty fishermen in Washington and Oregon were entitled to take any fish not allocated either to treaty fishermen or to spawning escapement. According to Washington, any allocation of nontreaty fish to Idaho would result in abrogation of the *Sohappy* agreement. See Tr. of Oral Arg. 46–47. The *Sohappy* agreement, however, only divides the available fish between treaty and nontreaty fishermen. It does not purport to allocate the nontreaty share among the various States. Even if the agreement did guarantee Washington or Oregon fishermen any fish not allocated

to treaty fishermen or to escapement, such an agreement could not and should not survive a finding by this Court that Idaho is entitled to some of those fish presently being taken by Oregon and Washington. Moreover, should Oregon or Washington seek to reopen negotiations in the *Sohappy* litigation, an attempt by Idaho to intervene in that litigation might meet with more success than an attempt to intervene in the face of an extant 5-year agreement.

Washington also argues that, at present and for the past several years, few if any fish have been taken from the runs at issue here and that further restrictions on fishing in Zones 1 through 5 will have no appreciable effect upon the number of spring chinook salmon, summer chinook salmon, and steelhead trout arriving in Idaho. This assertion, however, goes to the merits of Idaho's claim and has little or nothing to do with the need to join the United States as a party to this litigation. Idaho's narrow complaint is a two-edged sword. It has sidestepped the need to join the United States as a party by seeking only a share of the fish now being caught by nontreaty fishermen in Oregon and Washington. It now must shoulder the burden of proving that the nontreaty fisheries in those two States have adversely and unfairly affected the number of fish arriving in Idaho. A trial on the merits may well demonstrate that the target fisheries have, in fact, had no effect upon the runs of anadromous fish at issue here. Alternatively, a trial may demonstrate that natural and man-made obstacles will prevent any additional fish allowed to pass out of Zone 5 from reaching Idaho in numbers justifying additional restrictions on nontreaty fisheries in Oregon and Washington. Cf. *Washington* v. *Oregon*, 297 U. S. 517 (1936) (water not used by Oregon would sink into deep gravel in the bed of the river and never reach users in Washington). Neither of these possibilities, however, persuades us that an adequate judgment is impossible without a joinder of the United States Government.

III

We therefore sustain Idaho's exceptions to the Special Master's report recommending that Idaho's complaint be dismissed, and remand the case to the Special Master for further proceedings not inconsistent with this opinion.

So ordered.

MR. JUSTICE STEWART and MR. JUSTICE MARSHALL dissent. Agreeing with the Special Master's report, they would overrule Idaho's exceptions thereto and would order that the complaint be dismissed.

UNITED STATES *v.* BAILEY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-990. Argued November 7, 1979—Decided January 21, 1980*

Upon being apprehended after their escape from the District of Columbia jail, respondents were indicted for violating 18 U. S. C. § 751 (a), which governs escape from federal custody. At the trial of respondents Cooley, Bailey, and Walker, the District Court, after respondents had adduced evidence of conditions in the jail and their reasons for not returning to custody, rejected their proffered jury instruction on duress as a defense, ruling that they had failed as a matter of law to present evidence sufficient to support such a defense because they had not turned themselves in after they had escaped the allegedly coercive conditions, and, after receiving instructions to disregard the evidence of the jail conditions, the jury convicted respondents of violating § 751 (a). At respondent Cogdell's trial, the District Court ruled that, absent testimony of what he did between the time of his escape and his apprehension, he could not present evidence of conditions at the jail, and he was also convicted by the jury of violating § 751 (a). The Court of Appeals reversed each respondent's conviction and remanded for new trials, holding that the District Court should have allowed the respective juries to consider the evidence of coercive conditions at the jail in determining whether respondents had formulated the requisite intent to sustain a conviction under § 751 (a), which required the prosecution to prove that a particular defendant left federal custody voluntarily, without permission, and "with an intent to avoid confinement," an escapee not acting with the requisite intent if he escaped in order to avoid "non-confinement conditions" as opposed to "normal aspects of 'confinement.'" The court further held that since respondents had been indicted for fleeing and escaping on or about a certain date and not for leaving and staying away from custody, and since the jury instructions gave the impression that respondents were being tried only for leaving the jail on a certain date, and not for failing to return at some later date, neither respondents nor the juries were acquainted with the proposition that the escapes in question were continuing

*Together with *United States* v. *Cogdell*, also on certiorari to the same court.

offenses, an omission which constituted a violation of respondents' right to a jury trial.

Held:

1. The prosecution fulfills its burden under § 751 (a) if it demonstrates that an escapee knew his actions would result in his leaving physical confinement without permission. Nothing in § 751 (a)'s language or legislative history indicates that Congress intended to require such a heightened standard of culpability or such a narrow definition of confinement as the Court of Appeals required. Pp. 403–409.

2. In order to be entitled to an instruction on duress or necessity as a defense to a charge of escape, an escapee must first offer evidence justifying his continued absence from custody as well as his initial departure, and an indispensable element of such an offer is testimony of a bona fide effort to surrender or return to custody as soon as the claimed duress or necessity had lost its coercive force. On the record here, such evidence and testimony were lacking, and hence respondents were not entitled to any instruction on duress or necessity. Pp. 409–415.

(a) Escape from federal custody as defined in § 751 (a) is a continuing offense, and an escapee can be held liable for failure to return to custody as well as for his initial departure. Pp. 413–414.

(b) But there was no significant "variance" in the indictments here merely because respondents were not indicted under a theory of escape as a continuing offense and because the District Court did not explain such theory to the juries. The indictments, which tracked closely § 751 (a)'s language, were sufficient under the standard deeming an indictment sufficient "if it, first, contains the elements of the offense charged and fairly informs the defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense," *Hamling* v. *United States*, 418 U. S. 87, 117. And it was unnecessary for the District Court to elaborate for the juries' benefit on the continuing nature of the charged offense, where the evidence failed as a matter of law in a crucial particular to reach the minimum threshold that would have required an instruction on respondents' theory of the case generally. Pp. 414–415.

3. If an affirmative defense consists of several elements and testimony supporting one element is, as here, insufficient to sustain it even if believed, the trial court and jury need not be burdened with testimony supporting other elements of the defense. If it were held that the juries in these cases should have been subjected to a potpourri of evidence as to the jail conditions even though a critical element of the proffered defense of duress or necessity was absent, every trial

under § 751 (a) would be converted into a hearing on the current state of the federal penal system. Pp. 416–417.

190 U. S. App. D. C. 142, 585 F. 2d 1087; and 190 U. S. App. D. C. 185, 585 F. 2d 1130, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, POWELL, and STEVENS, JJ., joined. STEVENS, J., filed a concurring opinion, *post*, p. 417. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 419. MARSHALL, J., took no part in the consideration or decision of the case.

Edwin S. Kneedler argued the cause for the United States. With him on the briefs were *Solicitor General McCree, Assistant Attorney General Heymann, Kenneth S. Geller,* and *Jerome M. Feit.*

Richard S. Kohn argued the cause for respondents. With him on the brief were *John Townsend Rich, Robert A. Robbins, Jr.,* and *Dorothy Sellers.*

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

In the early morning hours of August 26, 1976, respondents Clifford Bailey, James T. Cogdell, Ronald C. Cooley, and Ralph Walker, federal prisoners at the District of Columbia jail, crawled through a window from which a bar had been removed, slid down a knotted bedsheet, and escaped from custody. Federal authorities recaptured them after they had remained at large for a period of time ranging from one month to three and one-half months. Upon their apprehension, they were charged with violating 18 U. S. C. § 751 (a), which governs escape from federal custody.[1] At their trials, each of the

[1] Title 18 U. S. C. § 751 (a) provides:

"Whoever escapes or attempts to escape from the custody of the Attorney General or his authorized representative, or from any institution or facility in which he is confined by direction of the Attorney General, or from any custody under or by virtue of any process issued under the laws of the United States by any court, judge, or magistrate, or from the custody of an officer or employee of the United States pursuant to lawful

respondents adduced or offered to adduce evidence as to various conditions and events at the District of Columbia jail, but each was convicted by the jury. The Court of Appeals for the District of Columbia Circuit reversed the convictions by a divided vote, holding that the District Court had improperly precluded consideration by the respective juries of respondents' tendered evidence. We granted certiorari, 440 U. S. 957, and now reverse the judgments of the Court of Appeals.

In reaching our conclusion, we must decide the state of mind necessary for violation of § 751 (a) and the elements that comprise defenses such as duress and necessity. In explaining the reasons for our decision, we find ourselves in a position akin to that of the mother crab who is trying to teach her progeny to walk in a straight line, and finally in desperation exclaims: "Don't do as I do, do as I say." The Act of Congress we construe consists of one sentence set forth in the margin, n. 1, *supra;* our own pragmatic estimate, expressed *infra,* at 417, is that "[i]n general, trials for violations of § 751 (a) should be simple affairs." Yet we have written, reluctantly but we believe necessarily, a somewhat lengthy opinion supporting our conclusion, because in enacting the Federal Criminal Code Congress legislated in the light of a long history of case law that is frequently relevant in fleshing out the bare bones of a crime that Congress may have proscribed in a single sentence. See *Morissette* v. *United States,* 342 U. S. 246 (1952).

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arrest, shall, if the custody or confinement is by virtue of an arrest on a charge of felony, or conviction of any offense, be fined not more than $5,000 or imprisoned not more than five years, or both; or if the custody or confinement is for extradition or by virtue of an arrest or charge of or for a misdemeanor, and prior to conviction, be fined not more than $1,000 or imprisoned not more than one year, or both."

Respondents were also charged with violating 22 D. C. Code § 2601 (1973), the District of Columbia's statute proscribing escape from prison. The District Court instructed the juries that if they found the respondents guilty of violating 18 U. S. C. § 751 (a) they should not consider the charges under 22 D. C. Code § 2601.

I

All respondents requested jury trials and were initially scheduled to be tried jointly. At the last minute, however, respondent Cogdell secured a severance. Because the District Court refused to submit to the jury any instructions on respondents' defense of duress or necessity and did not charge the jury that escape was a continuing offense, we must examine in some detail the evidence brought out at trial.

The prosecution's case in chief against Bailey, Cooley, and Walker was brief. The Government introduced evidence that each of the respondents was in federal custody on August 26, 1976, that they had disappeared, apparently through a cell window, at approximately 5:35 a. m. on that date, and that they had been apprehended individually between September 27 and December 13, 1976.

Respondents' defense of duress or necessity centered on the conditions in the jail during the months of June, July, and August 1976, and on various threats and beatings directed at them during that period. In describing the conditions at the jail, they introduced evidence of frequent fires in "Northeast One," the maximum-security cellblock occupied by respondents prior to their escape. Construed in the light most favorable to them, this evidence demonstrated that the inmates of Northeast One, and on occasion the guards in that unit, set fire to trash, bedding, and other objects thrown from the cells. According to the inmates, the guards simply allowed the fires to burn until they went out. Although the fires apparently were confined to small areas and posed no substantial threat of spreading through the complex, poor ventilation caused smoke to collect and linger in the cellblock.

Respondents Cooley and Bailey also introduced testimony that the guards at the jail had subjected them to beatings and to threats of death. Walker attempted to prove that he was an epileptic and had received inadequate medical attention for his seizures.

Consistently during the trial, the District Court stressed that, to sustain their defenses, respondents would have to introduce some evidence that they attempted to surrender or engaged in equivalent conduct once they had freed themselves from the conditions they described. But the court waited for such evidence in vain. Respondent Cooley, who had eluded the authorities for one month, testified that his "people" had tried to contact the authorities, but "never got in touch with anybody." App. 119. He also suggested that someone had told his sister that the FBI would kill him when he was apprehended.

Respondent Bailey, who was apprehended on November 19, 1976, told a similar story. He stated that he "had the jail officials called several times," but did not turn himself in because "I would still be under the threats of death." Like Cooley, Bailey testified that "the FBI was telling my people that they was going to shoot me." *Id.*, at 169, 175–176.

Only respondent Walker suggested that he had attempted to negotiate a surrender. Like Cooley and Bailey, Walker testified that the FBI had told his "people" that they would kill him when they recaptured him. Nevertheless, according to Walker, he called the FBI three times and spoke with an agent whose name he could not remember. That agent allegedly assured him that the FBI would not harm him, but was unable to promise that Walker would not be returned to the D. C. jail. *Id.*, at 195–200.[2] Walker testified that he last called the FBI in mid-October. He was finally apprehended on December 13, 1976.

At the close of all the evidence, the District Court rejected respondents' proffered instruction on duress as a defense to

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[2] On rebuttal, the prosecution called Joel Dean, the FBI agent who had been assigned to investigate Walker's escape in August 1976. He testified that, under standard Bureau practice, he would have been notified of any contact made by Walker with the FBI. According to Dean, he never was informed of any such contact. App. 203–204.

prison escape.[3] The court ruled that respondents had failed as a matter of law to present evidence sufficient to support such a defense because they had not turned themselves in after they had escaped the allegedly coercive conditions. After receiving instructions to disregard the evidence of the conditions in the jail, the jury convicted Bailey, Cooley, and Walker of violating § 751 (a).

Two months later, respondent Cogdell came to trial before the same District Judge who had presided over the trial of his co-respondents. When Cogdell attempted to offer testimony concerning the allegedly inhumane conditions at the D. C. jail, the District Judge inquired into Cogdell's conduct between his escape on August 26 and his apprehension on September 28. In response to Cogdell's assertion that he "may have written letters," the District Court specified that Cogdell could testify only as to "what he did . . . [n]ot what he may have done." App. 230. Absent such testimony, however, the District Court ruled that Cogdell could not present evidence of conditions at the jail. Cogdell subsequently chose not to testify on his own behalf, and was convicted by the jury of violating § 751 (a).

By a divided vote, the Court of Appeals reversed each respondent's conviction and remanded for new trials. See 190 U. S. App. D. C. 142, 585 F. 2d 1087 (1978); 190 U. S.

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[3] Respondents asked the District Court to give the following instruction:

"Coercion which would excuse the commission of a criminal act must result from:

"1) Threathening [*sic*] conduct sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm;

"2) The conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant;

"3) The fear or duress was operating upon the mind of the defendant at the time of the alleged act; and

"4) The defendant committed the act to avoid the threathened [*sic*] harm."

App. D. C. 185, 585 F. 2d 1130 (1978). The majority concluded that the District Court should have allowed the jury to consider the evidence of coercive conditions in determining whether the respondents had formulated the requisite intent to sustain a conviction under § 751 (a). According to the majority, § 751 (a) required the prosecution to prove that a particular defendant left federal custody voluntarily, without permission, and "with an intent to avoid confinement." 190 U. S. App. D. C., at 148, 585 F. 2d, at 1093. The majority then defined the word "confinement" as encompassing only the "normal aspects" of punishment prescribed by our legal system. Thus, where a prisoner escapes in order to avoid "non-confinement" conditions such as beatings or homosexual attacks, he would not necessarily have the requisite intent to sustain a conviction under § 751 (a). According to the majority:

> "When a defendant introduces evidence that he was subject to such 'non-confinement' conditions, the crucial factual determination on the intent issue is . . . whether the defendant left custody only to avoid these conditions or whether, in addition, the defendant *also* intended to avoid confinement. In making this determination the jury is to be guided by the trial court's instructions pointing out those factors that are most indicative of the presence or absence of an intent to avoid confinement." 190 U. S. App. D. C., at 148, n. 17, 585 F. 2d, at 1093, n. 17 (emphasis in original).

Turning to the applicability of the defense of duress or necessity, the majority assumed that escape as defined by § 751 (a) was a "continuing offense" as long as the escapee was at large. Given this assumption, the majority agreed with the District Court that, under normal circumstances, an escapee must present evidence of coercion to justify his continued absence from custody as well as his initial departure. Here, however, respondents had been indicted for "flee[ing]

and escap[ing]" "[o]n or about August 26, 1976," and not for "leaving *and staying away from* custody." 190 U. S. App. D. C., at 155, 585 F. 2d, at 1100 (emphasis in original). Similarly, "[t]he trial court's instructions when read as a whole clearly give the impression that [respondents] were being tried only for leaving the jail on August 26, and not for failing to return at some later date." *Id.*, at 155, n. 50, 585 F. 2d, at 1100, n. 50. Under these circumstances, the majority believed that neither respondents nor the juries were acquainted with the proposition that the escapes in question were continuing offenses. This failure, according to the majority, constituted "an obvious violation of [respondents'] constitutional right to jury trial." *Id.*, at 156, 585 F. 2d, at 1101.

The dissenting judge objected to what he characterized as a revolutionary reinterpretation of criminal law by the majority. He argued that the common-law crime of escape had traditionally required only "general intent," a mental state no more sophisticated than an "intent to go beyond permitted limits." *Id.*, at 177, 585 F. 2d, at 1122 (emphasis deleted). The dissent concluded that the District Court had properly removed from consideration each respondent's contention that conditions and events at the D. C. jail justified his escape, because each respondent had introduced no evidence whatsoever justifying his continued absence from jail following that escape.

II

Criminal liability is normally based upon the concurrence of two factors, "an evil-meaning mind [and] an evil-doing hand. . . ." *Morissette* v. *United States*, 342 U. S., at 251. In the present case, we must examine both the mental element, or *mens rea*, required for conviction under § 751 (a) and the circumstances under which the "evil-doing hand" can avoid liability under that section because coercive conditions or necessity negate a conclusion of guilt even though the necessary *mens rea* was present.

A

Few areas of criminal law pose more difficulty than the proper definition of the *mens rea* required for any particular crime. In 1970, the National Commission on Reform of Federal Criminal Laws decried the "confused and inconsistent ad hoc approach" of the federal courts to this issue and called for "a new departure." See 1 Working Papers of the National Commission on Reform of Federal Criminal Laws 123 (hereinafter Working Papers). Although the central focus of this and other reform movements has been the codification of workable principles for determining criminal culpability, see, *e. g.*, American Law Institute, Model Penal Code §§ 2.01–2.13 (Prop. Off. Draft 1962) (hereinafter Model Penal Code); S. 1, 94th Cong., 2d Sess. §§ 301–303 (1976), a byproduct has been a general rethinking of traditional *mens rea* analysis.

At common law, crimes generally were classified as requiring either "general intent" or "specific intent." This venerable distinction, however, has been the source of a good deal of confusion. As one treatise explained:

> "Sometimes 'general intent' is used in the same way as 'criminal intent' to mean the general notion of *mens rea*, while 'specific intent' is taken to mean the mental state required for a particular crime. Or, 'general intent' may be used to encompass all forms of the mental state requirement, while 'specific intent' is limited to the one mental state of intent. Another possibility is that 'general intent' will be used to characterize an intent to do something on an undetermined occasion, and 'specific intent' to denote an intent to do that thing at a particular time and place." W. LaFave & A. Scott, Handbook on Criminal Law § 28, pp. 201–202 (1972) (footnotes omitted) (hereinafter LaFave & Scott).

This ambiguity has led to a movement away from the traditional dichotomy of intent and toward an alternative analysis of *mens rea*. See *id.*, at 202. This new approach, exemplified

in the American Law Institute's Model Penal Code, is based on two principles. First, the ambiguous and elastic term "intent" is replaced with a hierarchy of culpable states of mind. The different levels in this hierarchy are commonly identified, in descending order of culpability, as purpose, knowledge, recklessness, and negligence.[4] See LaFave & Scott 194; Model Penal Code § 2.02. Perhaps the most significant, and most esoteric, distinction drawn by this analysis is that between the mental states of "purpose" and "knowledge." As we pointed out in *United States* v. *United States Gypsum Co.*, 438 U. S. 422, 445 (1978), a person who causes a particular result is said to act purposefully if "'he consciously desires that result, whatever the likelihood of that result happening from his conduct,'" while he is said to act knowingly if he is aware "'that that result is practically certain to follow from his conduct, whatever his desire may be as to that result.'"[5]

In the case of most crimes, "the limited distinction between knowledge and purpose has not been considered important since 'there is good reason for imposing liability whether the defendant desired or merely knew of the practical certainty of the results.'" *United States* v. *United States Gypsum Co.*, *supra*, at 445, quoting LaFave & Scott 197. Thus, in *Gypsum* we held that a person could be held criminally liable under § 1 of the Sherman Act if that person exchanged prices

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[4] This hierarchy does not attempt to cover those offenses where criminal liability is imposed in the absence of any *mens rea* whatsoever. Such "strict liability" crimes are exceptions to the general rule that criminal liability requires an "evil-meaning mind." Compare *Morissette* v. *United States*, 342 U. S. 246, 250–263 (1952), with *United States* v. *Dotterweich*, 320 U. S. 277, 280–281, 284 (1943). Under the Model Penal Code, the only offenses based on strict liability are "violations," actions punishable by a fine, forfeiture, or other civil penalty rather than imprisonment. See Model Penal Code § 2.05 (1)(a). See also LaFave & Scott 218–223.

[5] Quoting LaFave & Scott 196.

with a competitor either with the knowledge that the exchange would have unreasonable anticompetitive effects or with the purpose of producing those effects. 438 U. S., at 444–445, and n. 21.

In certain narrow classes of crimes, however, heightened culpability has been thought to merit special attention. Thus, the statutory and common law of homicide often distinguishes, either in setting the "degree" of the crime or in imposing punishment, between a person who knows that another person will be killed as the result of his conduct and a person who acts with the specific purpose of taking another's life. See LaFave & Scott 196–197. Similarly, where a defendant is charged with treason, this Court has stated that the Government must demonstrate that the defendant acted with a purpose to aid the enemy. See *Haupt* v. *United States*, 330 U. S. 631, 641 (1947). Another such example is the law of inchoate offenses such as attempt and conspiracy, where a heightened mental state separates criminality itself from otherwise innocuous behavior. See Model Penal Code § 2.02, Comments, p. 125 (Tent. Draft No. 4, 1955) (hereinafter MPC Comments).

In a general sense, "purpose" corresponds loosely with the common-law concept of specific intent, while "knowledge" corresponds loosely with the concept of general intent. See *ibid.;* LaFave & Scott 201–202. Were this substitution of terms the only innovation offered by the reformers, it would hardly be dramatic. But there is another ambiguity inherent in the traditional distinction between specific intent and general intent. Generally, even time-honored common-law crimes consist of several elements, and complex statutorily defined crimes exhibit this characteristic to an even greater degree. Is the same state of mind required of the actor for each element of the crime, or may some elements require one state of mind and some another? In *United States* v. *Feola*, 420 U. S. 671 (1975), for example, we were asked to decide

whether the Government, to sustain a conviction for assaulting a federal officer under 18 U. S. C. § 111, had to prove that the defendant knew that his victim was a federal officer. After looking to the legislative history of § 111, we concluded that Congress intended to require only "an intent to assault, not an intent to assault a federal officer." 420 U. S., at 684. What *Feola* implied, the American Law Institute stated: "[C]lear analysis requires that the question of the kind of culpability required to establish the commission of an offense be faced separately with respect to each material element of the crime." MPC Comments 123. See also Working Papers 131; LaFave & Scott 194.

Before dissecting § 751 (a) and assigning a level of culpability to each element, we believe that two observations are in order. First, in performing such analysis courts obviously must follow Congress' intent as to the required level of mental culpability for any particular offense. Principles derived from common law as well as precepts suggested by the American Law Institute must bow to legislative mandates. In the case of § 751 (a), however, neither the language of the statute nor the legislative history mentions the *mens rea* required for conviction.[6]

Second, while the suggested element-by-element analysis is a useful tool for making sense of an otherwise opaque concept, it is not the only principle to be considered. The administration of the federal system of criminal justice is confided to ordinary mortals, whether they be lawyers, judges, or jurors. This system could easily fall of its own weight if courts or

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[6] This omission does not mean, of course, that § 751 (a) defines a "strict liability" crime for which punishment can be imposed without proof of any *mens rea* at all. As we held in *Morissette* v. *United States*, *supra*, at 263, "mere omission [from the statute] of any mention of intent will not be construed as eliminating that element from the crimes denounced." See also *United States* v. *United States Gypsum Co.*, 438 U. S. 422, 437 (1978).

scholars become obsessed with hair-splitting distinctions, either traditional or novel, that Congress neither stated nor implied when it made the conduct criminal.

As relevant to the charges against Bailey, Cooley, and Walker, § 751 (a) required the prosecution to prove (1) that they had been in the custody of the Attorney General, (2) as the result of a conviction, and (3) that they had escaped from that custody. As for the charges against respondent Cogdell, § 751 (a) required the same proof, with the exception that his confinement was based upon an arrest for a felony rather than a prior conviction. Although § 751 (a) does not define the term "escape," courts and commentators are in general agreement that it means absenting oneself from custody without permission. See, *e. g.*, 190 U. S. App. D. C., at 148, 585 F. 2d, at 1093; *id.*, at 177, 585 F. 2d, at 1122 (Wilkey, J., dissenting); *United States* v. *Wilke*, 450 F. 2d 877 (CA9 1971), cert. denied, 409 U. S. 918 (1972). See also 2 J. Bishop, Criminal Law § 1103, p. 819 (9th ed. 1923); 1 W. Burdick, Law of Crime 462–463 (1946); R. Perkins, Criminal Law 429 (1957); 3 F. Wharton, Criminal Law § 2003, p. 2178 (11th ed. 1912).

Respondents have not challenged the District Court's instructions on the first two elements of the crime defined by § 751 (a). It is undisputed that, on August 26, 1976, respondents were in the custody of the Attorney General as the result of either arrest on charges of felony or conviction. As for the element of "escape," we need not decide whether a person could be convicted on evidence of recklessness or negligence with respect to the limits on his freedom. A court may someday confront a case where an escapee did not know, but should have known, that he was exceeding the bounds of his confinement or that he was leaving without permission. Here, the District Court clearly instructed the juries that the prosecution bore the burden of proving that respondents "knowingly committed an act which the law makes a crime" and that they

acted "knowingly, intentionally, and deliberately. . . ." App. 221–223, 231–233. At a minimum, the juries had to find that respondents knew they were leaving the jail and that they knew they were doing so without authorization. The sufficiency of the evidence to support the juries' verdicts under this charge has never seriously been questioned, nor could it be.

The majority of the Court of Appeals, however, imposed the added burden on the prosecution to prove as a part of its case in chief that respondents acted "with an intent to avoid confinement." While, for the reasons noted above, the word "intent" is quite ambiguous, the majority left little doubt that it was requiring the Government to prove that the respondents acted with the purpose—that is, the conscious objective—of leaving the jail without authorization. In a footnote explaining their holding, for example, the majority specified that an escapee did not act with the requisite intent if he escaped in order to avoid " 'non-confinement' conditions" as opposed to "normal aspects of 'confinement.' " 190 U. S. App. D. C., at 148, n. 17, 585 F. 2d, at 1093, n. 17.

We find the majority's position quite unsupportable. Nothing in the language or legislative history of § 751 (a) indicates that Congress intended to require either such a heightened standard of culpability or such a narrow definition of confinement. As we stated earlier, the cases have generally held that, except in narrow classes of offenses, proof that the defendant acted knowingly is sufficient to support a conviction. Accordingly, we hold that the prosecution fulfills its burden under § 751 (a) if it demonstrates that an escapee knew his actions would result in his leaving physical confinement without permission. Our holding in this respect comports with parallel definitions of the crime of escape both in the Model Penal Code and in a proposed revision of the Federal Criminal Code. See Model Penal Code §§ 2.02 (3), 242.6 (1); Report of Senate Committee on the Judiciary to Accompany S. 1, S. Rep. No. 94–00, pp. 333–334 (Comm.

Print 1976).[7] Moreover, comments accompanying the proposed revision of the Federal Criminal Code specified that the new provision covering escape "substantially carrie[d] forward existing law. . . ." *Id.*, at 332.

B

Respondents also contend that they are entitled to a new trial because they presented (or, in Cogdell's case, could have presented) sufficient evidence of duress or necessity to submit such a defense to the jury. The majority below did not confront this claim squarely, holding instead that, to the extent that such a defense normally would be barred by a prisoner's failure to return to custody, neither the indictment nor the jury instructions adequately described such a requirement. See 190 U. S. App. D. C., at 155–156, 585 F. 2d, at 1100–1101.

Common law historically distinguished between the defenses of duress and necessity. Duress was said to excuse criminal conduct where the actor was under an unlawful threat of imminent death or serious bodily injury, which threat caused the actor to engage in conduct violating the literal terms of the criminal law. While the defense of duress covered the situation where the coercion had its source in the

[7] Under the Model Penal Code, a defendant is guilty of escape if he acts even recklessly toward the material elements of the offense, since § 2.02 (3) provides that, unless otherwise provided in the definition of the offense, an element of any offense "is established if a person acts purposely, knowingly or recklessly with respect thereto." S. 1, a proposed revision of the Federal Criminal Code, would have imposed liability on an escapee "if (1) he is reckless as to the fact that he is subject to official detention, that is, he is aware that he may be in official detention . . . but disregards the risk that he is in fact in official detention, and (2) knowingly leaves the detention area or breaks from custody." S. Rep. No. 94-00, at 334. As noted earlier, we do not have to decide whether or under what circumstances an escapee can be held liable under § 751 (a) if he acted only recklessly with respect to the material elements of the offense. See *supra*, at 407.

actions of other human beings, the defense of necessity, or choice of evils, traditionally covered the situation where physical forces beyond the actor's control rendered illegal conduct the lesser of two evils. Thus, where A destroyed a dike because B threatened to kill him if he did not, A would argue that he acted under duress, whereas if A destroyed the dike in order to protect more valuable property from flooding, A could claim a defense of necessity. See generally LaFave & Scott 374–384.

Modern cases have tended to blur the distinction between duress and necessity. In the court below, the majority discarded the labels "duress" and "necessity," choosing instead to examine the policies underlying the traditional defenses. See 190 U. S. App. D. C., at 152, 585 F. 2d, at 1097. In particular, the majority felt that the defenses were designed to spare a person from punishment if he acted "under threats or conditions that a person of ordinary firmness would have been unable to resist," or if he reasonably believed that criminal action "was necessary to avoid a harm more serious than that sought to be prevented by the statute defining the offense." *Id.*, at 152–153, 585 F. 2d, at 1097–1098. The Model Penal Code redefines the defenses along similar lines. See Model Penal Code § 2.09 (duress) and § 3.02 (choice of evils).

We need not speculate now, however, on the precise contours of whatever defenses of duress or necessity are available against charges brought under § 751 (a). Under any definition of these defenses one principle remains constant: if there was a reasonable, legal alternative to violating the law, "a chance both to refuse to do the criminal act and also to avoid the threatened harm," the defenses will fail. LaFave & Scott 379.[8] Clearly, in the context of prison escape, the escapee is

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[8] See also *R. I. Recreation Center, Inc.* v. *Aetna Casualty & Surety Co.*, 177 F. 2d 603, 605 (CA1 1949) (a person acting under a threat of death to his relatives was denied defense of duress where he committed the crime

not entitled to claim a defense of duress or necessity unless and until he demonstrates that, given the imminence of the threat, violation of § 751 (a) was his only reasonable alternative. See *United States* v. *Boomer*, 571 F. 2d 543, 545 (CA10), cert. denied *sub nom. Heft* v. *United States*, 436 U. S. 911 (1978); *People* v. *Richards*, 269 Cal. App. 2d 768, 75 Cal. Rptr. 597 (1969).

In the present case, the Government contends that respondents' showing was insufficient on two grounds. First, the Government asserts that the threats and conditions cited by respondents as justifying their escape were not sufficiently immediate or serious to justify their departure from lawful custody. Second, the Government contends that, once the respondents had escaped, the coercive conditions in the jail were no longer a threat and respondents were under a duty to terminate their status as fugitives by turning themselves over to the authorities.

Respondents, on the other hand, argue that the evidence of coercion and conditions in the jail was at least sufficient to go to the jury as an affirmative defense to the crime charged. As for their failure to return to custody after gaining their freedom, respondents assert that this failure should be but one factor in the overall determination whether their initial departure was justified. According to respondents, their failure to surrender "may reflect adversely on the bona fides of [their] motivation" in leaving the jail, but should not with-

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even though he had an opportunity to contact the police). *People* v. *Richards*, 269 Cal. App. 2d 768, 75 Cal. Rptr. 597 (1969) (prisoner must resort to administrative or judicial channels to remedy coercive prison conditions); Model Penal Code § 2.09 (1) (actor must succumb to a force or threat that "a person of reasonable firmness in his situation would have been unable to resist"); *id.*, § 3.02 (1) (actor must believe that commission of crime is "necessary" to avoid a greater harm); Working Papers 277 (duress excuses criminal conduct, "if at all, because given the circumstances other reasonable men must concede that they too would not have been able to act otherwise").

draw the question of their motivation from the jury's consideration. Brief for Respondents 67. See also n. 3, *supra*.

We need not decide whether such evidence as that submitted by respondents was sufficient to raise a jury question as to their initial departures. This is because we decline to hold that respondents' failure to return is "just one factor" for the jury to weigh in deciding whether the initial escape could be affirmatively justified. On the contrary, several considerations lead us to conclude that, in order to be entitled to an instruction on duress or necessity as a defense to the crime charged, an escapee must first offer evidence justifying his continued absence from custody as well as his initial departure [9] and that an indispensable element of such an offer

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[9] We appreciate the fact that neither the prosecution nor the defense in a criminal case may put in all its evidence simultaneously, and to the extent that applicable rules of case law do not otherwise preclude such an approach, a district court is bound to find itself in situations where it admits evidence provisionally, subject to that evidence being later "tied in" or followed up by other evidence that makes the evidence conditionally admitted unconditionally admissible. In a civil action, the question whether a particular affirmative defense is sufficiently supported by testimony to go to the jury may often be resolved on a motion for summary judgment, but of course motions for summary judgment are creatures of civil, not criminal, trials. Thus, when we say that in order to have the theory of duress or necessity as a defense submitted to the jury an escapee must "first" offer evidence justifying his continuing absence from custody, we do not mean to impose a rigid mechanical formula on attorneys and district courts as to the order in which evidence supporting particular elements of a defense must be offered. The convenience of the jurors, the court, and the witnesses may all be best served by receiving the testimony "out of order" in certain circumstances subject to an avowal by counsel that such testimony will later be "tied in" by testimony supporting the other necessary elements of a particular affirmative defense. Our holding here is a substantive one: an essential element of the defense of duress or necessity is evidence sufficient to support a finding of a bona fide effort to surrender or return to custody as soon as the claimed duress or necessity has lost its coercive force. As a general practice, trial courts will find it saves considerable time to require testimony on this element of the affirmative defense of duress or necessity first, simply because such

is testimony of a bona fide effort to surrender or return to custody as soon as the claimed duress or necessity had lost its coercive force.

First, we think it clear beyond peradventure that escape from federal custody as defined in § 751 (a) is a continuing offense and that an escapee can be held liable for failure to return to custody as well as for his initial departure. Given the continuing threat to society posed by an escaped prisoner, "the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one." *Toussie* v. *United States,* 397 U. S. 112, 115 (1970). Moreover, every federal court that has considered this issue has held, either explicitly or implicitly, that § 751 (a) defines a continuing offense. See, *e. g., United States* v. *Michelson,* 559 F. 2d 567 (CA9 1977); *United States* v. *Cluck,* 542 F. 2d 728 (CA8), cert. denied, 429 U. S. 986 (1976); *United States* v. *Joiner,* 496 F. 2d 1314 (CA5), cert. denied, 419 U. S. 1002 (1974); *United States* v. *Chapman,* 455 F. 2d 746 (CA5 1972).

Respondents point out that *Toussie* calls for restraint in labeling crimes as continuing offenses. The justification for that restraint, however, is the tension between the doctrine of continuing offenses and the policy of repose embodied in stat-

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testimony can be heard in a fairly short time, whereas testimony going to the other necessary elements of duress or necessity may take considerably longer to present. Here, for example, the jury heard five *days* of testimony as to prison conditions, when in fact the trial court concluded, correctly, that testimony as to another essential element of this defense did not even reach a minimum threshold such that if the jury believed it that element of defense could be said to have been made out. But trial judges presiding over indictments based on § 751 (a) are in a far better position than are we to know whether, as a matter of the order of presenting witnesses and evidence, testimony from a particular witness may be allowed "out of order" subject to avowal, proffer, and the various other devices employed to avoid wasting the time of the court and jury with testimony that is irrelevant while at the same time avoiding if possible the necessity for recalling or seriously inconveniencing a witness.

utes of limitations. See 397 U. S., at 114–115. This tension is wholly absent where, as in the case of § 751 (a), the statute of limitations is tolled for the period that the escapee remains at large.[10]

The remaining considerations leading to our conclusion are, perhaps ironically, derived from the same concern for the statutory and constitutional right of jury trial upon which the majority of the Court of Appeals based its reasoning. There was no significant "variance" in the indictment merely because respondents had not been indicted under a theory of escape as a continuing offense and because the District Court did not explain this theory to the juries. We have held on several occasions that "an indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs the defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling* v. *United States*, 418 U. S. 87, 117 (1974). These indictments, which track closely the language of § 751 (a), were undoubtedly sufficient under this standard. See 418 U. S., at 117. As for the alleged failure of the District Court to elaborate for the benefit of the jury on the continuing nature of the charged offense, we believe that such elaboration was unnecessary where, as here, the evidence failed as a matter of law in a crucial particular to reach the minimum threshold that would have required an instruction on their theory of the case generally.

The Anglo-Saxon tradition of criminal justice, embodied in the United States Constitution and in federal statutes, makes jurors the judges of the credibility of testimony offered by witnesses. It is for them, generally, and not for appellate

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[10] Title 18 U. S. C. § 3290 provides that "[n]o statute of limitations shall extend to any person fleeing from justice." Because an escaped prisoner is, by definition, a fugitive from justice, the statute of limitations normally applicable to federal offenses would be tolled while he remained at large. See, *e. g.*, *Howgate* v. *United States*, 7 App. D. C. 217 (1895).

courts, to say that a particular witness spoke the truth or fabricated a cock-and-bull story. An escapee who flees from a jail that is in the process of burning to the ground may well be entitled to an instruction on duress or necessity, " 'for he is not to be hanged because he would not stay to be burnt.' " *United States* v. *Kirby*, 7 Wall. 482, 487 (1869). And in the federal system it is the jury that is the judge of whether the prisoner's account of his reason for flight is true or false. But precisely because a defendant is entitled to have the credibility of his testimony, or that of witnesses called on his behalf, judged by the jury, it is essential that the testimony given or proffered meet a minimum standard as to each element of the defense so that, if a jury finds it to be true, it would support an affirmative defense—here that of duress or necessity.

We therefore hold that, where a criminal defendant is charged with escape and claims that he is entitled to an instruction on the theory of duress or necessity, he must proffer evidence of a bona fide effort to surrender or return to custody as soon as the claimed duress or necessity had lost its coercive force. We have reviewed the evidence examined elaborately in the majority and dissenting opinions below, and find the case not even close, even under respondents' versions of the facts, as to whether they either surrendered or offered to surrender at their earliest possible opportunity. Since we have determined that this is an indispensable element of the defense of duress or necessity, respondents were not entitled to any instruction on such a theory. Vague and necessarily self-serving statements of defendants or witnesses as to future good intentions or ambiguous conduct simply do not support a finding of this element of the defense.[11]

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[11] Contrary to the implication of MR. JUSTICE BLACKMUN'S dissent describing the rationale of the necessity defense as "a balancing of harms," *post*, at 427, we are construing an Act of Congress, not drafting it. The statute itself, as we have noted, requires no heightened *mens rea* that might be negated by any defense of duress or coercion. We nonetheless recognize that Congress in enacting criminal statutes legislates against a

III

In reversing the judgments of the Court of Appeals, we believe that we are at least as faithful as the majority of that court to its expressed policy of "allowing the jury to perform its accustomed role" as the arbiter of factual disputes. 190 U. S. App. D. C., at 151, 585 F. 2d, at 1096. The requirement of a threshold showing on the part of those who assert an affirmative defense to a crime is by no means a derogation of the importance of the jury as a judge of credibility. Nor is it based on any distrust of the jury's ability to separate fact from fiction. On the contrary, it is a testament to the importance of trial by jury and the need to husband the resources necessary for that process by limiting evidence in a trial to that directed at the elements of the crime or at affirmative defenses. If, as we here hold, an affirmative defense consists of several elements and testimony supporting one element is insufficient to sustain it even if believed, the trial court and jury need not be burdened with testimony supporting other elements of the defense.

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background of Anglo-Saxon common law, see *Morissette* v. *United States*, 342 U. S. 246 (1952), and that therefore a defense of duress or coercion may well have been contemplated by Congress when it enacted § 751 (a). But since the express purpose of Congress in enacting that section was to punish escape from penal custody, we think that some duty to return, a duty described more elaborately in the text, must be an essential element of the defense unless the congressional judgment that escape from prison is a crime be rendered wholly nugatory. Our principal difference with the dissent, therefore, is not as to the existence of such a defense but as to the importance of surrender as an element of it. And we remain satisfied that, even if credited by the jury, the testimony set forth at length in Mr. Justice Blackmun's dissenting opinion could not support a finding that respondents had no alternatives but to remain at large until recaptured anywhere from one to three and one-half months after their escape. To hold otherwise would indeed quickly reduce the overcrowding in prisons that has been universally condemned by penologists. But that result would be accomplished in a manner quite at odds with the purpose of Congress when it made escape from prison a federal criminal offense.

This case presents a good example of the potential for wasting valuable trial resources. In general, trials for violations of § 751 (a) should be simple affairs. The key elements are capable of objective demonstration; the *mens rea,* as discussed above, will usually depend upon reasonable inferences from those objective facts. Here, however, the jury in the trial of Bailey, Cooley, and Walker heard five days of testimony. It was presented with evidence of every unpleasant aspect of prison life from the amount of garbage on the cellblock floor, to the meal schedule, to the number of times the inmates were allowed to shower. Unfortunately, all this evidence was presented in a case where the defense's reach hopelessly exceeded its grasp. Were we to hold, as respondents suggest, that the jury should be subjected to this potpourri even though a critical element of the proffered defenses was concededly absent, we undoubtedly would convert every trial under § 751 (a) into a hearing on the current state of the federal penal system.

Because the juries below were properly instructed on the *mens rea* required by § 751 (a), and because the respondents failed to introduce evidence sufficient to submit their defenses of duress and necessity to the juries, we reverse the judgments of the Court of Appeals.

Reversed.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

MR. JUSTICE STEVENS, concurring.

The essential difference between the majority and the dissent is over the question whether the record contains enough evidence of a bona fide effort to surrender or return to custody to present a question of fact for the jury to resolve. On this issue, I agree with the Court that the evidence introduced by defendants Cooley, Bailey, and Cogdell was plainly insuffi-

cient. Vague references to anonymous intermediaries are so inherently incredible that a trial judge is entitled to ignore them. With respect to Walker, however, the question is much closer because he testified that he personally telephoned an FBI agent three times in an effort to negotiate a surrender.[1] But since he remained at large for about two months after his last effort to speak with the FBI, I am persuaded that even under his version of the facts he did not make an adequate attempt to satisfy the return requirement.

The fact that I have joined the Court's opinion does not indicate that I—or indeed that any other Member of the majority—is unconcerned about prison conditions described by MR. JUSTICE BLACKMUN. Because we are construing the federal escape statute, however, I think it only fair to note that such conditions are more apt to prevail in state or county facilities than in federal facilities.[2] Moreover, reasonable men may well differ about the most effective methods of redressing the situation. In my view, progress toward acceptable solutions involves formulating enforceable objective standards for civilized prison conditions,[3] keeping the channels of communication between prisoners and the outside world open,[4] and guaranteeing access to the courts,[5] rather than relying on ad hoc judgments about the good faith of

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[1] The rebuttal testimony described by the Court, *ante*, at 399, n. 2, indicates that Walker was probably not telling the truth; but in deciding whether Walker's testimony was sufficient, I assume its veracity.

[2] Compare, for example, *Hutto* v. *Finney*, 437 U. S. 678, with *Bell* v. *Wolfish*, 441 U. S. 520.

[3] See *Estelle* v. *Gamble*, 429 U. S. 97, 116–117 (STEVENS, J., dissenting).

[4] See *Houchins* v. *KQED, Inc.*, 438 U. S. 1, 19 (STEVENS, J., dissenting); *Jones* v. *North Carolina Prisoners' Union*, 433 U. S. 119, 138 (STEVENS, J., dissenting in part); *Morales* v. *Schmidt*, 489 F. 2d 1335, 1344 (CA7 1973) (Stevens, J., dissenting), modified, 494 F. 2d 85, 87 (CA7 1974) (en banc) (Stevens, J., concurring).

[5] See, *e. g.*, *Harris* v. *Pate*, 440 F. 2d 315 (CA7 1971). Cf. *Meachum* v. *Fano*, 427 U. S. 215, 229 (STEVENS, J., dissenting).

prison administrators,[6] giving undue deference to their "expertise"[7] or encouraging self-help by convicted felons.[8] In short, neither my agreement with much of what MR. JUSTICE BLACKMUN has written, nor my disagreement with the Court about related issues, prevents me from joining its construction of the federal escape statute.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE BRENNAN joins, dissenting.

The Court's opinion, it seems to me, is an impeccable exercise in undisputed general principles and technical legalism: The respondents were properly confined in the District of Columbia jail. They departed from that jail without authority or consent. They failed promptly to turn themselves in when, as the Court would assert by way of justification, *ante*, at 413, 415, the claimed duress or necessity "had lost its coercive force." Therefore, the Court concludes, there is no defense for a jury to weigh and consider against the respondents' prosecution for escape violative of 18 U. S. C. § 751 (a).

It is with the Court's assertion that the claimed duress or necessity had lost its coercive force that I particularly disagree. The conditions that led to respondents' initial departure from the D. C. jail continue unabated. If departure was justified—and on the record before us that issue, I feel, is for the jury to resolve as a matter of fact in the light of

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[6] See, *e. g.*, *Procunier* v. *Navarette*, 434 U. S. 555, 568 (STEVENS, J., dissenting).

[7] See *Bell* v. *Wolfish*, *supra*, at 584–585 (STEVENS, J., dissenting).

[8] It would be unwise, and perhaps counterproductive, to immunize escapes that would otherwise be unlawful in the hope that they would motivate significant reforms. "An unselfish motive affords no assurance that a crime will produce the results its perpetrator intends." *United States* v. *Cullen*, 454 F. 2d 386, 392, n. 17 (CA7 1971). Minimizing the risk of escape is, of course, the classic justification for imposing rigid discipline within prison walls.

the evidence, and not for this Court to determine as a matter of law—it seems too much to demand that respondents, in order to preserve their legal defenses, return forthwith to the hell that obviously exceeds the normal deprivations of prison life and that compelled their leaving in the first instance. The Court, however, requires that an escapee's action must amount to nothing more than a mere and temporary gesture that, it is to be hoped, just might attract attention in responsive circles. But life and health, even of convicts and accuseds, deserve better than that and are entitled to more than pious pronouncements fit for an ideal world.

The Court, in its carefully structured opinion, does reach a result that might be a proper one were we living in that ideal world, and were our American jails and penitentiaries truly places for humane and rehabilitative treatment of their inmates. Then the statutory crime of escape could not be excused by duress or necessity, by beatings, and by guard-set fires in the jails, for these would not take place, and escapees would be appropriately prosecuted and punished.

But we do not live in an ideal world "even" (to use a self-centered phrase) in America, so far as jail and prison conditions are concerned. The complaints that this Court, and every other American appellate court, receives almost daily from prisoners about conditions of incarceration, about filth, about homosexual rape, and about brutality are not always the mouthings of the purely malcontent. The Court itself acknowledges, *ante*, at 398, that the conditions these respondents complained about do exist. It is in the light of this stark truth, it seems to me, that these cases are to be evaluated. It must follow, then, that the jail-condition evidence proffered by respondent Cogdell should have been admitted, and that the jury before whom respondents Bailey, Cooley, and Walker were tried should not have been instructed to disregard the jail-condition evidence that did come in. I therefore dissent.

I

The atrocities and inhuman conditions of prison life in America are almost unbelievable; surely they are nothing less than shocking. The dissent in the *Bailey* case in the Court of Appeals acknowledged that "the circumstances of prison life are such that at least a colorable, if not credible, claim of duress or necessity can be raised with respect to virtually every escape." 190 U. S. App. D. C. 142, 167, 585 F. 2d 1087, 1112. And the Government concedes: "In light of prison conditions that even now prevail in the United States, it would be the rare inmate who could not convince himself that continued incarceration would be harmful to his health or safety." Brief for United States 27. See *Furtado* v. *Bishop*, 604 F. 2d 80 (CA1 1979), cert. denied, *post*, p. 1035. Cf. *Bell* v. *Wolfish*, 441 U. S. 520 (1979).

A youthful inmate can expect to be subjected to homosexual gang rape his first night in jail, or, it has been said, even in the van on the way to jail.[1] Weaker inmates become the property of stronger prisoners or gangs, who sell the sexual services of the victim. Prison officials either are disinterested in stopping abuse of prisoners by other prisoners or are incapable of doing so, given the limited resources society allocates to the prison system.[2] Prison officials often are merely indifferent to serious health and safety needs of prisoners as well.[3]

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[1] See, *e. g.*, C. Silberman, Criminal Violence, Criminal Justice 389 (1978); Report on Sexual Assaults in a Prison System and Sheriff's Vans, in 3 L. Radzinowicz & M. Wolfgang, eds., Crime and Justice 223–228 (2d ed. 1977).

[2] See generally Silberman, *supra*, at 379–382, 386–392; C. Bartollas, S. Miller, & S. Dinitz, Juvenile Victimization—The Institutional Paradox (1976); C. Weiss & D. Friar, Terror in the Prisons (1974); O. Ballesteros, Behind Jail Bars 26–27 (1979); M. Luttrell, Behind Prison Walls 64–65 (1974).

[3] *E. g.*, Weiss & Friar, *supra*, at 183–184 (youth having epileptic seizure sprayed with tear gas, resulting in severe trauma); G. Mueller, Medical Services in Prison: Lessons from Two Surveys, in CIBA Founda-

Even more appalling is the fact that guards frequently participate in the brutalization of inmates.[4] The classic example is the beating or other punishment in retaliation for prisoner complaints or court actions.[5]

The evidence submitted by respondents in these cases fits that pattern exactly. Respondent Bailey presented evidence that he was continually mistreated by correctional officers during his stay at the D. C. jail. He was threatened that his testimony in the Brad King case would bring on severe retribution. App. 142, 145. Other inmates were beaten by guards as a message to Bailey. *Id.*, at 36. An inmate testified that on one occasion, three guards displaying a small knife told him that they were going "to get your buddy, that nigger Bailey. We're going to kill him." *Id.*, at 94. The threats culminated in a series of violent attacks on Bailey. Blackjacks, mace, and slapjacks (leather with a steel insert) were used in beating Bailey. *Id.*, at 94, 101, 146–150.

Respondent Cooley also elicited testimony from other inmates concerning beatings of Cooley by guards with slapjacks, blackjacks, and flashlights. *Id.*, at 46–47, 97–98, 106, 116–118,

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tion Symposium 16, Medical Care of Prisoners and Detainees 7, 11–16 (1973); J. Mitford, Kind & Usual Punishment 135 (1973); Univ. of Pa. Law School, Health Care and Conditions in Pennsylvania's State Prisons (1972), reprinted in ABA Comm'n on Correctional Facilities and Services, Standards and Materials on Medical and Health Care in Jails, Prisons, and Other Correctional Facilities 71 (1974); Report of the Medical Advisory Committee on State Prisons to Comm'r of Correction and Sec'y of Human Services, Commonwealth of Mass. (1971), reprinted in ABA Standards and Materials 89.

[4] See, *e. g.*, Weiss & Friar, *supra*, at 54–60, 163–164, 176–181, 188, 199–200, 222.

[5] See, *e. g.*, Note, Escape From Cruel and Unusual Punishment: A Theory of Constitutional Necessity, 59 B. U. L. Rev. 334, 358–360 (1979); *Landman* v. *Royster*, 333 F. Supp. 621, 633–634 (ED Va. 1971); *Sostre* v. *Rockefeller*, 312 F. Supp. 863, 869 (SDNY 1970), rev'd in part, modified in part, aff'd in part *sub nom. Sostre* v. *McGinnis*, 442 F. 2d 178 (CA2 1971) (en banc), cert. denied *sub nom. Sostre* v. *Oswald*, 404 U. S. 1049 (1972); Mitford, *supra*, at 260–262.

166–167, 185–186. There was evidence that guards threatened to kill Cooley. *Id.*, at 107.

It is society's responsibility to protect the life and health of its prisoners. "[W]hen a sheriff or a marshall [*sic*] takes a man from the courthouse in a prison van and transports him to confinement for two or three or ten years, *this is our act. We* have tolled the bell for him. And whether we like it or not, we have made him our collective responsibility. We are free to do something about him; he is not" (emphasis in original). Address by THE CHIEF JUSTICE, 25 Record of the Assn. of the Bar of the City of New York 14, 17 (Mar. 1970 Supp.). Deliberate indifference to serious and essential medical needs of prisoners constitutes "cruel and unusual" punishment violative of the Eighth Amendment. *Estelle* v. *Gamble*, 429 U. S. 97, 104 (1976).

> "An inmate must rely on prison authorities to treat his medical needs. . . . In the worst cases, such a failure may actually produce physical 'torture or a lingering death'. . . . In less serious cases, denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose. . . . The infliction of such unnecessary suffering is inconsistent with contemporary standards of decency." *Id.*, at 103.

It cannot be doubted that excessive or unprovoked violence and brutality inflicted by prison guards upon inmates violates the Eighth Amendment. See, *e. g.*, *Jackson* v. *Bishop*, 404 F. 2d 571 (CA8 1968). The reasons that support the Court's holding in *Estelle* v. *Gamble* lead me to conclude that failure to use reasonable measures to protect an inmate from violence inflicted by other inmates also constitutes cruel and unusual punishment. Homosexual rape or other violence serves no penological purpose. Such brutality is the equivalent of torture, and is offensive to any modern standard of human dignity. Prisoners must depend, and rightly so, upon the prison administrators for protection from abuse of this kind.

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There can be little question that our prisons are badly overcrowded and understaffed and that this in large part is the cause of many of the shortcomings of our penal systems. This, however, does not excuse the failure to provide a place of confinement that meets minimal standards of safety and decency.

Penal systems in other parts of the world demonstrate that vast improvement surely is not beyond our reach. "The contrast between our indifference and the programs in some countries of Europe—Holland and the Scandinavian countries in particular—is not a happy one for us." Address by THE CHIEF JUSTICE, *supra*, at 20. "It has been many years since Swedish prisoners were concerned with such problems as 'adequate food, water, shelter'; 'true religious freedom'; and 'adequate medical treatment.'" Ward, Inmate Rights and Prison Reform in Sweden and Denmark, 63 J. Crim. L., C. & P. S. 240 (1972). See also Profile/Sweden, Corrections Magazine 11 (June 1977). Sweden's prisons are not overcrowded, and most inmates have a private cell. Salomon, Lessons from the Swedish Criminal Justice System: A Reappraisal, 40 Fed. Probation 40, 43 (Sept. 1976). The prisons are small. The largest accommodate 300–500 inmates; most house 50–150. *Id.*, at 43; Profile/Sweden, *supra*, at 14. "There appears to be a relaxed atmosphere between staff and inmates, and a prevailing attitude that prisoners must be treated with dignity and respect." Siegel, Criminal Justice—Swedish Style: A Humane Search for Answers, 1 Offender Rehabilitation 291, 292 (1977).

II

The real question presented in this case is whether the prisoner should be punished for helping to extricate himself from a situation where society has abdicated completely its basic responsibility for providing an environment free of life-threatening conditions such as beatings, fires, lack of essential medical care, and sexual attacks. To be sure, Congress in so

many words has not enacted specific statutory duress or necessity defenses that would excuse or justify commission of an otherwise unlawful act. The concept of such a defense, however, is "anciently woven into the fabric of our culture." J. Hall, General Principles of Criminal Law 416 (2d ed. 1960), quoted in Brief for United States 21. And the Government concedes that "it has always been an accepted part of our criminal justice system that punishment is inappropriate for crimes committed under duress because the defendant in such circumstances cannot fairly be blamed for his wrongful act." *Id.*, at 23.

Although the Court declines to address the issue, it at least implies that it would recognize the common-law defenses of duress and necessity to the federal crime of prison escape, if the appropriate prerequisites for assertion of either defense were met. See *ante*, at 410–413. Given the universal acceptance of these defenses in the common law, I have no difficulty in concluding that Congress intended the defenses of duress and necessity to be available to persons accused of committing the federal crime of escape.

I agree with most of the Court's comments about the essential elements of the defenses. I, too, conclude that intolerable prison conditions are to be taken into account through affirmative defenses of duress and necessity, rather than by way of the theory of intent espoused by the Court of Appeals. That court's conclusion that intent to avoid the *normal* aspects of confinement is an essential element of the offense of escape means that the burden of proof is on the Government to prove that element. According to our precedents, *e. g.*, *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975), the Government would have to prove that intent beyond a reasonable doubt. It is unlikely that Congress intended to place this difficult burden on the prosecution. The legislative history is sparse, and does not specifically define the requisite intent. Circumstances that compel or coerce a person to

commit an offense, however, traditionally have been treated as an affirmative defense, with the burden of proof on the defendant. Although intolerable prison conditions do not fit within the standard definition of a duress or necessity defense, see 190 U. S. App. D. C., at 151–152, n. 29, 585 F. 2d, at 1096–1097, n. 29, they are analogous to these traditional defenses. I therefore agree that it is appropriate to treat unduly harsh prison conditions as an affirmative defense.

I also agree with the Court that the absence of reasonable less drastic alternatives is a prerequisite to successful assertion of a defense of necessity or duress to a charge of prison escape. One must appreciate, however, that other realistic avenues of redress seldom are open to the prisoner. Where prison officials participate in the maltreatment of an inmate, or purposefully ignore dangerous conditions or brutalities inflicted by other prisoners or guards, the inmate can do little to protect himself. Filing a complaint may well result in retribution, and appealing to the guards is a capital offense under the prisoners' code of behavior.[6] In most instances, the question whether alternative remedies were thoroughly "exhausted" should be a matter for the jury to decide.

I, too, conclude that the jury generally should be instructed that, in order to prevail on a necessity or duress defense, the defendant must justify his continued absence from custody, as well as his initial departure. I agree with the

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[6] See, *e. g.*, R. Goldfarb, Jails: The Ultimate Ghetto 325–326 (1975) (Official of Oklahoma Crime Commission describes gang rape and concludes, "[if the kid tells the guards] . . . his life isn't worth a nickel"); *State* v. *Green*, 470 S. W. 2d 565, 569 (Mo. 1971) (dissenting opinion), cert. denied *sub nom. Green* v. *Missouri*, 405 U. S. 1073 (1972).

The alleged facts in this case appear to be typical. Respondent Bailey filed suit in the Superior Court of the District of Columbia to "stop the administrators from threatening my life." App. 176. Bailey testified that the suit caused the guards to threaten him in an attempt to persuade him to withdraw the action, to beat him, and to transfer him to the mental ward. *Id.*, at 154–155. Bailey's suit subsequently was dismissed with prejudice. Brief for Respondents 15–16, n. 7.

Court that the very nature of escape makes it a continuing crime. But I cannot agree that the only way continued absence can be justified is evidence "of a bona fide effort to surrender or return to custody." *Ante*, at 413, 415. The Court apparently entertains the view, naive in my estimation, that once the prisoner has escaped from a life- or health-threatening situation, he can turn himself in, secure in the faith that his escape somehow will result in improvement in those intolerable prison conditions. While it may be true in some rare circumstance that an escapee will obtain the aid of a court or of the prison administration once the escape is accomplished, the escapee, realistically, faces a high probability of being returned to the same prison and to exactly the same, or even greater, threats to life and safety.

The rationale of the necessity defense is a balancing of harms. If the harm caused by an escape is less than the harm caused by remaining in a threatening situation, the prisoner's initial departure is justified. The same rationale should apply to hesitancy and failure to return. A situation may well arise where the social balance weighs in favor of the prisoner even though he fails to return to custody. The escapee at least should be permitted to present to the jury the possibility that the harm that would result from a return to custody outweighs the harm to society from continued absence.

Even under the Court's own standard, the defendant in an escape prosecution should be permitted to submit evidence to the jury to demonstrate that surrender would result in his being placed again in a life- or health-threatening situation. The Court requires return to custody once the "claimed duress or necessity had lost its coercive force." *Ante*, at 413, 415. Realistically, however, the escapee who reasonably believes that surrender will result in return to what concededly is an intolerable prison situation remains subject to the same "coercive force" that prompted his escape in the first instance. It is ironic to say that that force is automatically "lost" once the prison wall is passed.

The Court's own phrasing of its test demonstrates that it is deciding factual questions that should be presented to the jury. It states that a "bona fide" effort to surrender must be proved. *Ibid.* Whether an effort is "bona fide" is a jury question. The Court also states that "[v]ague and necessarily self-serving statements of defendants or witnesses as to future good intentions or ambiguous conduct simply do not support a finding of this element of the defense." *Ante*, at 415. Traditionally, it is the function of the jury to evaluate the credibility and meaning of "necessarily self-serving statements" and "ambiguous conduct." See *People* v. *Luther*, 394 Mich. 619, 232 N. W. 2d 184 (1975); *People* v. *Unger*, 66 Ill. 2d 333, 362 N. E. 2d 319 (1977); *Esquibel* v. *State*, 91 N. M. 498, 576 P. 2d 1129 (1978).

Finally, I of course must agree with the Court that use of the jury is to be reserved for the case in which there is sufficient evidence to support a verdict. I have no difficulty, however, in concluding that respondents here did indeed submit sufficient evidence to support a verdict of not guilty, if the jury were so inclined, based on the necessity defense. Respondent Bailey testified that he was in fear for his life, that he was afraid he would still face the same threats if he turned himself in, and that "[t]he FBI was telling my people that they was going to shoot me." App. 176.[7] Respondent

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[7] "Q Why didn't you surrender yourself?

"A I was in fear of my life. I know that if I turned myself in I would still be under the threats of death. Always knew that the FBI wanted to kill me, after I escaped, so I was in limbo. I didn't know what to do. I did have some people call to the officials at the jail on several occasions.

"Q Let me ask you a question: You stated that you never surrendered yourself, because you were still fearful of the threats?

"A That is right.

"Q Did you understand where you would be returned to?

"A Yes, sir.

"Q Where?

Cooley testified that he did not know anyone to call, and that he feared that the police would shoot him when they came to get him. *Id.*, at 119.[8] Respondent Walker testified that he had been in "constant rapport," *id.*, at 195, with an FBI agent, who assured him that the FBI would not harm him, but who would not promise that he would not be returned to the D. C. jail. *Id.*, at 200. Walker also stated

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"A The new detention center, 1901 D Street, Southeast.

"Q What section?

"A Northeast 1.

"Q Did you know who the guards would be?

"A The same officers that was there before I left.

"Q Did you ever hear that the FBI was looking for you?

"A Yes, I did.

"Q Didn't you feel that you could tell the FBI that you didn't want to return to the D. C. Jail in Northeast 1?

"A No. The FBI was telling my people that they was going to shoot me." App. 175–176.

[8] "Q Once you left the jail, Mr. Cooley, did you make any attempt to notify anybody in authority to say you were out and did you make any attempt to notify anybody that you were out?

"A Yeah.

"Q To whom?

"A Like I ain't do it per se. But, like when I went home, you know, my people called and I told them that I had, I told them what happened. Why I had done it. They was mad. I told them why I had done it. They understood, but they called and never got in touch with anybody.

"Q Did you ever make any attempt to call anybody, yourself?

"A I don't know nobody to call. I'm thinking like this here: They don't like me in the jail. Ain't nobody I can call.

"Q Why did you not call anybody at the jail?

"A For what?

"Q Did you feel that there would be any purpose in doing that?

"A It wouldn't have been none. They probably came and got me, and then make me try to run and they shoot me in half when they come and get me.

"Q So you feared for your life. You could not call for that reason?

"A That is right.

"Q Did you ever leave Washington, D. C., after you left the jail?

"A No." *Id.*, at 119.

that he had heard through his sister that the FBI "said that if they ran down on me they was going to kill me." *Id.*, at 195.[9]

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[9] The defendant Walker:

"Now, there is one more issue that I want to briefly touch on here and that is the fact that after I was released from the detention facility I did in fact contact the proper authorities. I contacted the FBI on a number of occasions. As a matter of fact I kept a constant rapport with the FBI. I had people who had told me that they had brought this information to my sisters that the FBI said that if they ran down on me they was going to kill me. So, in actuality I was never out of immediate danger. I was never out of immediate threat of losing my life. If I would have given myself up I had this FBI threat to contend with and I also had to go back over to the same jail that I had just left from, and this was the reason that I consequently never turned myself into the authorities That is my testimony.

. . . . .

"CROSS-EXAMINATION

"Q Mr. Walker, do you know the names of the individuals in the FBI that you retained this constant rapport with during the course of your escape?

"A One of them was an Officer Troy or Fauntroy, or something of that nature. I don't know if that is his exact name or not.

"Q When did you call him, sir?

"A I called him the second day after I was out, and after that I had occasion to call him on several different occasions.

"Q Did you identify yourself at those times?

"A Yes, I identified myself.

"Q Did you indicate where you were?

"A No, I didn't indicate where I was.

"Q Did you tell him that you were going to surrender yourself?

"A I told him that I would surrender myself if I wasn't being subjected to the same conditions and put on the same penitentiary that I had just left from.

"Q How many days did you call this gentleman?

"A I don't know. I called him two or three different times during the period that I was in the streets.

"Q You were out until December 13th, is that correct?

"A I think that is the date.

. . . . .

Perhaps it is highly unlikely that the jury would have believed respondents' stories that the FBI planned to shoot them on sight, or that respondent Walker had been in con-

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"Q Now, sir, where did you make the phone call from to the FBI?

"A I made the first one from a public phone booth.

"Q How did you know what number to call, sir? Did you look it up in the directory?

"A I looked it up in the directory.

"Q Did you ask for anybody in particular at the FBI?

"A No, I just asked to speak to someone on the warrant squad or someone who was connected with escapees.

"Q Would the name Fluharty, does that ring a bell? Would that name Fluharty ring a bell with you as the name of a gentleman you may have spoken to, if you spoke to someone?

"A Sounds halfway familiar.

"Q Exactly what did you tell him, sir?

"A I explained to him that I was one of the four gentlemen that had escaped from the detention facility on August 26th, because of the conditions that existed there.

"I explained to him how terminal the conditions were there and asked him was it any kind of way that I could get with him to make some type of arrangements as far as turning myself in, if I wouldn't have to go back to the detention facility at 1901 D Street, Southeast and also asked him had there been anything issued concerning, or had he told a man named Earl Berman, whether or not the FBI—or, did he have knowledge that anybody at the FBI had told Mr. Earl Berman that he had intended to kill me if I was arrested.

"Q Who is Earl Berman, sir?

"A Earl Berman is a personal friend of mine.

"Q Are you saying that Mr. Berman told you that the FBI was going to kill you?

"A Yes, he did. He didn't tell me, but he told my sister and my sister related this information to me.

"Q So, you heard it third-hand?

"A Yes, I heard it second-hand.

. . . . .

"BY MR. SCHAARS:

. . . . .

"Q Now, sir, when exactly was the first time that you called Agent Fluharty or someone by the name of Fauntroy with the FBI?

[*Footnote 9 is continued on p. 432*]

stant communication with an FBI agent. Nevertheless, such testimony, even though "self-serving," and possibly extreme and unwarranted in part, was sufficient to permit the jury to decide whether the failure to surrender immediately was jus-

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"A The second day I was out.

"Q Would that be on the 28th, sir?

"A That would be on the 28th.

"Q Do you recall about what time of day it was, sir?

"A I don't know. It was in the early morning hours. I would say have to be between 4:00 and 6:00.

"Q A. M., sir?

"A A. M.

"Q And, do you know [how] long your conversation lasted at that point?

"A It had—no longer than a three-minute duration at the most.

"Q And you did identify yourself?

"A I did identify myself.

"Q When was the second time that you spoke to somebody from the FBI?

"A Approximately a week and a half later.

"Q Would it be fair to say that that would be about ten days later, sir?

"A I think that would be fair.

"Q To whom did you speak at that time?

"A To the same person.

"Q Did you ask for him at that time, sir or—

"A Yes, I did. I had called the FBI building previous to that, told them that I was going to call.

"Q Do you recall what time of day you called at that time, sir?

"A It was about 2:00 in the afternoon.

"Q How long did your conversation take at that time?

"A No more than a three-minute duration then.

"Q Did you identify yourself, sir?

"A Yes, I identified myself.

"Q At that time did you indicate to Agent Fluharty that you were going to turn yourself in?

"A I indicated to him if he could work out the conditions for which I wanted to turn myself in, I would turn myself in.

"Q What were the conditions?

"A Those conditions would be the fact that I wouldn't be harmed by

tified or excused. This is routine grist for the jury mill and the jury usually is able to sort out the fabricated and the incredible.

In conclusion, my major point of disagreement with the Court is whether a defendant may get his duress or necessity

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any agent of the FBI, I wouldn't be taken back to the detention facility, 1901 D Street, Southeast.

"Q Did there come a time that you spoke to somebody from the FBI again?

"A Yes, there did.

"Q When was that, sir?

"A I would say that would have been about a month later.

"Q Would that be mid-October, sir, or late October or mid-November? I'm sorry, I don't mean to confuse you.

"A It was in—it was in October. I don't know whether it was late or—It was around—it was in October, around, between the middle and first part of October.

"Q Now, whom did you speak to at that time, sir?

"A The same guy.

"Q Agent Fluharty?

"A I assume that is his name.

"Q It was somebody on the warrant or escape squad that you were speaking to each time, sir?

"A I assume that he was.

"Q Did you ask specifically for somebody on that squad the first time you called?

"A The first time I called I did.

"Q And the second time, did you ask for the same agent by name?

"A Yes, I did.

"Q And the third time, did you ask for the same agent by name?

"A Yes.

"Q Now, sir, on that third occasion did you offer to come down and turn yourself in?

"A Under certain specified conditions.

"Q The same conditions as you have indicated on the two prior occasions?

"A The very same conditions.

"Q Now, sir, did there come a time when you called the FBI again?

"A To my recollection, no.

"Q So, from the beginning to the middle of October, whenever that

defense to the jury when it is supported only by "self-serving" testimony and "ambiguous conduct." It is difficult to imagine any case, criminal or civil, in which the jury is asked

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third phone call occurred, to December 13th, you had no contact with the FBI?

"A To my recollection, no.

"Q Did you call any other law enforcement agency during that period of time, sir?

"A No, I didn't.

"Q Did you ever appear in any court of the District of Columbia to turn yourself in during that period of time?

"A No, I didn't.

"Q Did you ever talk to a minister or a priest or any kind of religious leader in an effort to turn yourself in during that period of time?

"A Yes, I did. I'm a minister myself.

"Q You are, sir? Did you speak to another member of your faith, a minister?

"A Yes, I did.

"Q To whom did you speak, sir?

"A I don't want to give his name at this time. I don't want to incriminate him as far as anything, as far as my escape and everything is concerned. You'd have him up here for a charge.

"Q Did you tell that gentleman that you were going to turn yourself in?

"A I told him—I had discussed turning myself in with a member of the FBI and I thought very seriously about it, if the conditions that I had specified to you could be worked out.

"Q When you spoke to this gentleman from the FBI, did he ever indicate that he would agree to those conditions?

"A No, he didn't.

"Q Did he indicate that he would agree with anything?

"A He indicated that he would agree that I wouldn't be harmed by any members of the Federal Bureau of Investigation, but that he couldn't agree that I wouldn't be taken back to the detention facility, 1901 D Street.

"Q So, he did promise you that the FBI wasn't going to hurt you?

"A Yes, he told me that the FBI wouldn't hurt me.

"Q Did you have any contact with a warrant squad officer of the District of Columbia Department of Corrections during your period of elopment [*sic*]?

"A Not to my recollection, unless he is part of that warrant squad." App. 195–200.

to decide a factual question based on completely disinterested testimony and unambiguous actions. The very essence of a jury issue is a dispute over the credibility of testimony by interested witnesses and the meaning of ambiguous actions.

Ruling on a defense as a matter of law and preventing the jury from considering it should be a rare occurrence in criminal cases. "[I]n a criminal case the law assigns [the fact-finding function] solely to the jury." *Sandstrom* v. *Montana*, 442 U. S. 510, 523 (1979). The jury is the conscience of society and its role in a criminal prosecution is particularly important. *Duncan* v. *Louisiana*, 391 U. S. 145, 156 (1968). Yet the Court here appears to place an especially strict burden of proof on defendants attempting to establish an affirmative defense to the charged crime of escape. That action is unwarranted. If respondents' allegations are true, society is grossly at fault for permitting these conditions to persist at the D. C. jail. The findings of researchers and government agencies, as well as the litigated cases, indicate that in a general sense these allegations are credible.[10] The case for recognizing the duress or necessity defenses is even more compelling when it is society, rather than private actors, that creates the coercive conditions. In such a situation it is especially appropriate

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[10] In addition to the sources cited above, see American Assembly, Prisoners in America (1973); S. Sheehan, A Prison and a Prisoner (1978); V. Williams & M. Fish, Convicts, Codes, and Contraband (1974); Inside—Prison American Style (R. Minton, ed. 1971); T. Murton, The Dilemma of Prison Reform (1976); American Friends Service Committee, Struggle for Justice, A Report on Crime and Punishment in America (1971); Behind Bars: Prisoners in America (R. Kwartler ed. 1977); B. Bagdikian & L. Dash, The Shame of the Prisons (1972); Note, 13 Ga. L. Rev. 300 (1978); Note, Intolerable Conditions as a Defense to Prison Escapes, 26 UCLA L. Rev. 1126 (1979); Comment, 127 U. Pa. L. Rev. 1142 (1979); Note, 54 Chi.-Kent L. Rev. 913 (1978); Comment, 26 Buffalo L. Rev. 413 (1977); Plotkin, Surviving Justice: Prisoners' Rights to be Free from Physical Assault, 23 Cleve. St. L. Rev. 387 (1974); Note, 45 S. Cal. L. Rev. 1062 (1972); Note, 36 Albany L. Rev. 428 (1972).

that the jury be permitted to weigh all the factors and strike the balance between the interests of prisoners and that of society. In an attempt to conserve the jury for cases it considers truly worthy of that body, the Court has ousted the jury from a role it is particularly well-suited to serve.

ESTES ET AL. v. METROPOLITAN BRANCHES OF THE DALLAS NAACP ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 78-253. Argued October 29, 1979—Decided January 21, 1980*

Certiorari dismissed. Reported below: 572 F. 2d 1010.

Warren Whitham argued the cause for petitioners in No. 78-253. With him on the brief was *Mark Martin*. *Robert L. Blumenthal* argued the cause for petitioners in No. 78-282. With him on the briefs was *Robert H. Mow, Jr.* *James A. Donohoe* argued the cause and filed a brief for petitioners in No. 78-283.

E. Brice Cunningham argued the cause for respondents Metropolitan Branches of the Dallas NAACP et al. With him on the brief were *Nathaniel R. Jones*, *Merle W. Loper*, and *Louis R. Lucas*. *Edward B. Cloutman III* argued the cause for respondents Tasby et al. With him on the brief were *Jack Greenberg*, *James M. Nabrit III*, and *Bill Lann Lee*.

Deputy Solicitor General Wallace argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General McCree*, *Assistant Attorney General Days*, *Sara Sun Beale*, *Brian K. Landsberg*, and *Mildred M. Matesich*.†

PER CURIAM.

The writs of certiorari are dismissed as improvidently granted.

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*Together with No. 78-282, *Curry et al.* v. *Metropolitan Branches of the Dallas NAACP et al.*; and No. 78-283, *Brinegar et al.* v. *Metropolitan Branches of the Dallas NAACP et al.*, also on certiorari to the same court.

†*H. Ron White* filed a brief for the Dallas Alliance et al. as *amici curiae* urging reversal.

MR. JUSTICE MARSHALL took no part in the consideration or decision of these cases.

MR. JUSTICE POWELL, with whom MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST join, dissenting.

The Court today dismisses the writs previously granted in this litigation and thereby reinstates the ruling of the Court of Appeals. The suit now will be returned to the District Court for elaboration of that court's conclusions on the feasibility of extensive busing to achieve racial balance in the Dallas public schools. The Court of Appeals directed the trial court to supplement the record with formal studies of the anticipated times and distances of likely bus routes, and to make additional findings on desegregation in the city's high schools.

Although the remand is narrow, aimed solely at the sufficiency of the record on which the District Court based its desegregation order, I do not think it is justified. After studying the schools of the Dallas Independent School District through the many years of this litigation, the trial judge drew on his familiarity with Dallas and its schools, and on the advice of many community groups, to fashion an effective and fair desegregation order. The Court of Appeals failed to accord proper deference to the District Court's conscientious execution of this delicate task.

In addition, this case presents a long-needed opportunity to re-examine the considerations relevant to framing a remedy in a desegregation suit. It is increasingly evident that use of the busing remedy to achieve racial balance can conflict with the goals of equal educational opportunity and quality schools. In all too many cities, well-intentioned court decrees have had the primary effect of stimulating resegregation. The experience in Dallas during this litigation presents a striking illustration of this problem. If the District Court orders substantial additional busing, as the Court of Appeals ap-

parently thinks it should, recent history suggests that the Dallas school district will be well on the road to the "separate but equal" conditions mistakenly approved in *Plessy* v. *Ferguson*, 163 U. S. 537 (1896). Such an outcome is no less real or less regrettable when caused by courts with benign motives. The promise of *Brown* v. *Board of Education*, 347 U. S. 483 (1954), cannot be fulfilled by continued imposition of self-defeating remedies.

I

The Dallas Independent School District (School District) has been in desegregation litigation since 1955, although the present case is not part of the original suit. During this quarter of a century, the School District has grown into the eighth largest school district in the country, covering 351 square miles and spanning 35 miles at its widest point. Since the present action first was tried in 1971, the student population of the district has changed dramatically. Total enrollment has dropped from 163,000 to 133,000, while the racial distribution of students has shifted from 69% Anglo in 1971 to 33.5% Anglo, 49.1% black, and 16.3% Mexican-American in 1979. There were 112,000 Anglo students in the School District in 1970; there are now fewer than 45,000.

This suit was brought by several parents, acting on behalf of their children, against the superintendent and the Board of Trustees of the School District (Board). Other parents groups have intervened in the suit.[1] In the summer of 1971, the District Court found that "elements" of a segregated school system "still remain" in the Dallas schools. *Tasby* v. *Estes*, 342 F. Supp. 945, 947 (ND Tex. 1971). The court imposed a number of remedies, including the busing of approx-

[1] The original plaintiffs, respondents here, represent a class of black and Mexican-American students. The Curry petitioners represent a group of North Dallas pupils, and the Brinegar petitioners represent a class of persons living in an integrated area of East Dallas.

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imately 15,000 students. The original plaintiffs appealed to the Court of Appeals for the Fifth Circuit for more extensive reassignment and transportation of pupils. That court declared that "nothing less than the elimination of predominantly one-race schools is constitutionally required. . . ." *Tasby* v. *Estes*, 517 F. 2d 92, 103, cert. denied, 423 U. S. 939 (1975). Finding that the District Court's decree failed to satisfy this standard, the Court of Appeals remanded for the formulation of a new desegregation plan.

In a month-long trial on remand, the District Court considered in detail six plans submitted by the various parties and a court-appointed expert. It heard nearly 50 witnesses, including numerous experts, and produced a trial transcript of some 4,000 pages. The court also conferred with concerned community groups, the most prominent of which was the Educational Task Force of the Dallas Alliance (Alliance), a multiracial, nonpartisan organization.[2] In a thorough opinion, *Tasby* v. *Estes*, 412 F. Supp. 1192 (ND Tex. 1976), the District Court found that the decline in Anglo enrollment between 1971 and 1976 was not the result of actions taken by the Board. In fact, the court noted the Board's continuing "good faith" efforts to establish a unitary school system. *Id.*, at 1207. See *Pasadena City Bd. of Education* v. *Spangler*, 427 U. S. 424, 435–436 (1976). The court's duty, it asserted, was to adopt a plan that would "realistically and effectively"

[2] The Task Force consisted of seven Mexican-Americans, seven Anglos, six blacks, and one American Indian. The Dallas Alliance comprises 77 cooperating organizations, including local branches of the AFL–CIO and the Chamber of Commerce, religious groups, civic organizations, and several local chapters of the NAACP. The Alliance Task Force proposed a comprehensive desegregation plan that largely was adopted by the District Court. Of course, a group's participation in the Alliance need not signify approval of the desegregation plan proposed by the Educational Task Force, but the Alliance clearly has many ties to the entire Dallas community.

achieve desegregation in light of demographic changes in the School District. 412 F. Supp., at 1207.

With careful attention to the special characteristics and history of the School District, the District Court promulgated a progressive and comprehensive plan that drew heavily on the proposals of the Alliance.[3] For purposes of student assignment, the plan divides the School District into six subdistricts. In integrated areas within each subdistrict, present student assignments are retained wherever possible. In other areas, children in grades K–3 remain in neighborhood schools; those in grades 4–8 are assigned to central schools in each subdistrict; and high school students are assigned to schools in their own subdistricts on the basis of geographical attendance zones. The plan provides for a number of "magnet high schools" that offer enriched educational programs.[4] The pupil assignment plan is supplemented by majority-to-minority transfers upon request.[5]

This case now focuses on student assignment and busing.[6]

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[3] In a brief *amicus curiae* to the Court, the Alliance stated that the plan submitted by its Educational Task Force "reflects compromise" and was reached by consensus. Brief for Dallas Alliance as *Amicus Curiae* 21.

[4] The District Court ordered the School District to establish seven new magnet high schools by 1979. Each must offer special career training, and the racial makeup of each school must be within 10% of the racial distribution of the School District's high school population. *Tasby* v. *Estes*, 412 F. Supp. 1192, 1215–1216 (ND Tex. 1976). Free transportation is available for students at magnet schools.

[5] The Court of Appeals correctly determined that the District Court's plan is deficient in not explicitly providing transportation at public expense to children who exercise this option. *Tasby* v. *Estes*, 572 F. 2d 1010, 1015 (CA5 1978).

[6] The initial District Court ruling also dealt, apparently to the satisfaction of the plaintiffs, with staff desegregation, school construction, bilingual education for Mexican-Americans, and other programs designed to supplement the opportunities of minority students. *Tasby* v. *Estes*, 342 F. Supp. 945, 953 (ND Tex. 1971). These matters are no longer issues in this litigation.

Each of the six plans considered by the District Court provided for substantial busing.[7] Although the court did not estimate the number of pupils to be bused under its decree, the Alliance proposal which paralleled the court's plan anticipated the busing of some 20,000 students. The court concluded that the racial composition of the student population in each subdistrict "will approximate the racial makeup of the [district] as a whole, with the exception of [East] Oak Cliff," a black neighborhood. *Id.*, at 1204.

Respondents argue that the District Court's plan leaves 62 schools, about one-third of the 176 schools in the district, with "one-race" student bodies (defined as those where more than 75% of the students are of one race).[8] Fifty-two of these schools would be predominantly black, nine Anglo, and one Mexican-American. A majority of these one-race schools result from the District Court's refusal to bus very young children.[9] This Court has recognized that concern for the health and welfare of younger children may dictate their exclusion from student transportation plans, see *Swann* v. *Charlotte-Mecklenburg Bd. of Education*, 402 U. S. 1, 31 (1971), and respondents do not dispute that feature of the District Court order. In addition, several high schools have one-race student bodies because the District Court declined to order the busing of high school students. It noted that "of approximately 1,000 Anglos ordered to be transported to formerly all-black high schools under this Court's 1971 student assignment plan, fewer than 50 Anglo students attend those schools today." 412 F. Supp., at 1205. The court

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[7] The estimates of the number of students to be bused ranged from 14,000 under the plan originally proposed by the Board to 69,000 under the NAACP plaintiffs' Plan A.

[8] Tr. of Oral Arg. 46.

[9] In their brief to this Court, the NAACP respondents concede that more than half of the one-race schools are in the elementary grade, K–3 category. Brief for Respondents NAACP et al. 9.

also concluded that the establishment of magnet high schools was the "most realistic, feasible, and effective method for eliminating the remaining vestiges of a dual [school] system on the 9–12 level. . . ." *Ibid.*

Viewed on a geographic basis, the order left 28 "predominantly black" schools in East Oak Cliff, which is bounded by the Trinity River bottom on one side and by Interstate 35 on the other. The court found that the "practicalities of time and distance" prevent the effective integration of the schools in this neighborhood through busing. *Id.*, at 1204. In contrast, the Seagoville subdistrict remains predominantly white. Seagoville, however, is "geographically isolated" from the rest of the city, *Tasby* v. *Estes*, 572 F. 2d 1010, 1013 (CA5 1978), and its school population represents less than 2% of the School District's student body.

The Court of Appeals was not impressed by the District Court's carefully structured plan. It concentrated almost exclusively on the "large number of one-race schools" remaining in Dallas. *Id.*, at 1012.

> "We cannot properly review any student assignment plan that leaves many schools in a system one race without specific findings by the district court as to the feasibility of [student assignment] techniques. . . . There are no adequate time-and-distance studies in the record in this case. Consequently, we have no means of determining whether the natural boundaries and traffic considerations preclude either the pairing and clustering of schools or the use of transportation to eliminate the large number of one-race schools still existing." *Id.*, at 1014.

The Court of Appeals remanded "for the formulation of a new student assignment plan and for findings to justify the maintenance of *any* one-race schools that may be part of that plan." *Id.*, at 1018 (emphasis added).

II

The duration and complexity of this litigation demonstrate the difficulty of providing effective relief in a school desegregation case. The school board and the court must consider many economic, social, and educational factors, and those factors vary widely from community to community. Courts frequently are caught between the constitutional prohibition against segregation and the severe limitations on their ability to implement an effective plan with public support. See *Columbus Bd. of Education* v. *Penick*, 443 U. S. 449, 486–488 (1979) (POWELL, J., dissenting). Consequently, this Court has been reluctant to give more than general instructions for desegregation orders, and those instructions have not always been completely consistent.[10] The result in too many instances has been confusion in the lower courts. See *infra*, at 449–450.

I believe that two rules provide the basic outline for responsible exercise of the courts' equitable powers in school desegregation cases. First, "the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation." *Milliken* v. *Bradley*, 433 U. S. 267, 280 (1977) (*Milliken II*). The constitutional deprivation must be identified accurately, and the remedy must be related closely to that deprivation. Otherwise, a desegregation order may exceed both the power and the competence of courts. Second, "[t]he measure of any desegregation plan is its effectiveness." *Davis* v. *School Comm'rs of Mobile County*, 402 U. S. 33, 37 (1971). A court must act decisively to remove purposeful segregation, but it also must avoid the danger of inciting resegregation by unduly disrupting the public schools.

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[10] See Yudof, School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court, 42 Law & Contemp. Prob. 57, 87–102 (Autumn 1978).

Much of the confusion that has plagued this litigation derives from neglect of these principles. The District Court failed to identify the link between the constitutional violation and the desegregation remedy, and the Court of Appeals showed little concern for either that problem or the question of effectiveness. Unless courts carefully consider those issues, judicial school desegregation will continue to be a haphazard exercise of equitable power that can, "like a loose cannon, . . . inflict indiscriminate damage" on our schools and communities.[11]

A

The opinion of the Court of Appeals focuses almost entirely on the one-race schools remaining in the School District. This preoccupation apparently derives from the oft-repeated language in *Green* v. *County School Board,* 391 U. S. 430, 442 (1968), that desegregation must create "a system without a 'white' school [or] a 'Negro' school." As I have noted before, this language was suitable to the small rural county before the Court in that case, where there were only two schools and 1,300 schoolchildren of both races scattered throughout the county. But it makes no sense to apply that statement to the Dallas Independent School District or any major metropolitan school district. In large cities, the principal cause of segregation in the schools is residential segregation, which results largely from demographic and economic conditions over which school authorities have no control. *E. g., Pasadena City Bd. of Education* v. *Spangler,* 427 U. S., at 435–437; see *Keyes* v. *School Dist. No. 1, Denver, Colo.,* 413 U. S. 189, 222–223 (1973) (POWELL, J., concurring in part and dissenting in part).[12] In cases since *Green,* the Court has stated ex-

[11] The language quoted comes from MR. JUSTICE STEWART's dissenting opinion in *Stump* v. *Sparkman,* 435 U. S. 349, 367 (1978).

[12] See Coleman, New Incentives for Desegregation, 7 Human Rights 10, 11 (Fall 1978); Farley, Residential Segregation and Its Implications for School Integration, 39 Law & Contemp. Probs. 164 (Winter 1975).

plicitly that the existence of "predominantly white or predominantly black [schools,] without more, . . . does not offend the Constitution." *Dayton Bd. of Education* v. *Brinkman*, 433 U. S. 406, 417 (1977); *Milliken II*, *supra*, at 280, n. 14; *Swann* v. *Charlotte-Mecklenburg Bd. of Education*, 402 U. S., at 26.[13] It is puzzling that many trial and appellate courts continue to misapply *Green* and largely to ignore more recent statements on this issue.

The important distinction is between "desegregated" schools and "integrated" schools. There can be no legitimate claim that "racial balance" in the public schools is constitutionally required. *Milliken* v. *Bradley*, 418 U. S. 717, 740–741 (1974) (*Milliken I*). Rather, the Constitution mandates that no school system be structured to segregate the races. The proposition was stated fully in *Swann:*

> "Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no

[13] Some federal courts continue to read *Swann* v. *Charlotte-Mecklenburg Bd. of Education*, 402 U. S. 1 (1971), as requiring extensive transportation because of its language endorsing the need "to achieve the greatest possible degree of actual desegregation." *Id.*, at 26. *Swann*, however, simply laid down a broad rule of reason under which desegregation remedies must remain flexible and due consideration must be given to other values and interests. In *Swann*, we recognized that special difficulties arise when extensive busing is used in metropolitan areas "with dense and shifting population[s], numerous schools, [and] congested and complex traffic patterns." *Id.*, at 14. Although *Swann* approved pupil transportation as a remedial device, the Court said that transportation orders would be suspect "when the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process." *Id.*, at 30–31. The Court's more recent decisions have dispelled any doubt that may have existed as to whether *Swann* mandates busing to establish racial balance. In this regard, one should note that the Court of Appeals in this case failed to mention *Milliken* v. *Bradley*, 418 U. S. 717 (1974) (*Milliken I*), *Dayton Bd. of Education* v. *Brinkman*, 433 U. S. 406 (1977), or *Milliken* v. *Bradley*, 433 U. S. 267 (1977) (*Milliken II*), while it relied heavily, and mistakenly, upon *Green*. *Tasby* v. *Estes*, 517 F. 2d 92, 103 (1975).

pupil of a racial minority from any school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools." 402 U. S., at 23.

The question in this case, as in countless others, is how equitably to remedy unconstitutional state action or inaction. A desegregation decree "must be designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.'" *Milliken II*, 433 U. S., at 280, quoting *Milliken I*, *supra*, at 746. But the courts cannot pursue this goal responsibly without identifying those features of the current situation that can be attributed to the previous dual system.[14]

In this case, the District Court ordered the busing of 15,000 students in 1971, 342 F. Supp., at 956, while the current decree is likely to result in the transportation of some 20,000 students. See *supra*, at 442. On the record before us, we cannot determine whether the trial court made findings of constitutional violations that justified these and other reme-

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[14] Last Term, the Court decided school desegregation cases from Columbus and Dayton, Ohio. *Columbus Bd. of Education* v. *Penick*, 443 U. S. 449 (1979); *Dayton Bd. of Education* v. *Brinkman*, 443 U. S. 526 (1979) (*Dayton II*). As the dissent by MR. JUSTICE REHNQUIST argued, the opinions in those cases appeared to depart from prior precedents of this Court. But instead of criticizing either the reasoning or the holdings of any of those cases, the Court simply avoided their force by accepting uncritically the findings made by the courts below. In *Columbus*, it emphasized that the District Court had found "purposefully segregative practices with current, systemwide impact." 443 U. S., at 466, citing 429 F. Supp. 229, 252, 259–260, 264, 266 (SD Ohio 1977). Although the District Court had made no such findings in *Dayton II*, the Court of Appeals for the Sixth Circuit tailored its own factual findings to accord with those in *Columbus*, and these again were adopted by this Court. 443 U. S., at 538–540.

In the instant case, neither the District Court nor the Court of Appeals made comparable findings.

dies that were ordered. For the purpose of deciding the case in this Court, we may assume that such violations were duly found. In any event, since the 1975 ruling of the District Court this litigation has concentrated solely on the need to eliminate one-race schools through further busing. The petition for certiorari raised only that issue, see Pet. for Cert. in No. 78–253, pp. 2–3, and both the Board, the principal petitioner here, and the Dallas Alliance have asked only that the District Court's order be reinstated. See Brief for Petitioners in No. 78–253, pp. 71–72; Brief for Dallas Alliance as *Amicus Curiae* 28. Consequently, I believe this Court should reach the merits of the remedial question and review the decision of the Court of Appeals that the District Court must explain why "any" one-race schools remain in Dallas. 572 F. 2d, at 1018.

B

Court orders to remedy constitutional deprivations in formerly segregated school systems must be drawn "in light of the circumstances present and the options available," *Green* v. *County School Board,* 391 U. S., at 439, "taking into account the practicalities of the situation." *Davis* v. *School Comm'rs of Mobile County,* 402 U. S., at 37. Although this Court's guidance in desegregation cases necessarily has been general, its emphasis on effectiveness and practicalities reflects an appreciation that perfect solutions may be unattainable in the context of the demographic, geographic, and sociological complexities of modern urban communities. The imperfect nature of court action in school cases is evident in the phenomenon of self-defeating "remedies," desegregation plans and continuing court oversight so unacceptable that many parents seek to avoid the reach of the court's decree. The impact of such remedies may be seen in higher enrollment in private schools, in further migration to the suburbs, or in refusals to move into the school district.

This Court has not considered seriously the relationship between the resegregation problem and desegregation decrees.

The most helpful precedent is *Pasadena City Bd. of Education* v. *Spangler,* which arose several years after a local desegregation plan had been implemented.[15] We held in that case that the Constitution does not require that a desegregation decree be modified periodically as migration patterns shift the distribution of the races within the school district. The Court recognized that, absent further segregation by the State, there is no constitutional obligation to remedy resegregation after an approved plan is implemented. That holding accents the need for courts to consider with care the impact a remedy is likely to have on resegregation. As *Pasadena* establishes, once resegregation occurs without state action courts have no power to impose an additional remedy.

Surprisingly few courts, however, have understood this imperative. One exception is the decision on remand in *Milliken I,* 418 U. S. 717 (1974), where a desegregation plan that left many one-race schools was approved by the Court of Appeals for the Sixth Circuit. The court explained that the available alternatives would have "accelerate[d] the trend toward rendering all or nearly all of Detroit's schools so identifiably black as to represent universal school segregation. . . ." *Bradley* v. *Milliken,* 540 F. 2d 229, 239 (1976), aff'd, *Milliken II,* 433 U. S. 267 (1977).[16] In a case involving a school

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[15] In *United States* v. *Scotland Neck Bd. of Education,* 407 U. S. 484, 491 (1972), we disapproved an attempt to create a small new school district within a county conceded to have been operating a dual school system. In a concluding sentence, the Court stated that while the possibility of resegregation "may be cause for deep concern to the respondents, it cannot . . . be accepted as a reason for achieving anything less than complete uprooting of the dual public school system." The Court concluded that the new school district would "interfer[e] with the desegregation of the . . . [c]ounty [s]chool system." *Id.,* at 489. Given the context of the Court's passing reference to resegregation, *Scotland Neck* affords no guidance for the more usual desegregation case.

[16] See *Mapp* v. *Chattanooga Bd. of Education,* 525 F. 2d 169 (CA6 1975), cert. denied, 427 U. S. 911 (1976). The California Supreme Court has expressly authorized the consideration of resegregation patterns in

district in Alabama, however, the Court of Appeals for the Fifth Circuit approved a plan " 'that will probably result in an all-black student body, where nothing in the way of desegregation is accomplished and where neither the white students nor black students are benefited.' " *Lee* v. *Macon County Bd. of Education,* 465 F. 2d 369, 370 (1972). Even though the court acknowledged that the remedy was self-defeating, it ordered the plan implemented unless the local school board could come forward with a plan "equally effective" in eliminating one-race schools. *Ibid.*[17]

The pursuit of racial balance at any cost—the unintended legacy of *Green*—is without constitutional or social justification. Out of zeal to remedy one evil, courts may encourage or set the stage for other evils. By acting against one-race schools, courts may produce one-race school systems. Parents with school-age children are highly motivated to seek access to schools perceived to afford quality education. A desegregation plan without community support, typically one with objectionable transportation requirements and continuing judicial oversight, accelerates the exodus to the suburbs of families able to move. The children of families remaining in the area affected by the court's decree are denied the opportunity to be part of an ethnically diverse student body. See *Parents Assn.*

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designing decrees for school litigation under the State Constitution. *Crawford* v. *Los Angeles Bd. of Education,* 17 Cal. 3d 280, 308–309, 551 P. 2d 28, 47 (1976).

[17] The position taken by counsel for one group of respondents in this case is identical to that of the court in *Lee* v. *Macon County Bd. of Education,* 465 F. 2d 369 (CA5 1972). At oral argument, counsel was asked if he still would support the remand ordered by the Court of Appeals if he were certain that additional busing "would result in these black children next year or the year afterwards . . . going to an all-black school because there wouldn't be any whites or any people of any other color to go to school with [in the District]." Counsel replied that his clients' position would be no different in that situation. Tr. of Oral Arg. 49.

of Andrew Jackson High School v. *Ambach*, 598 F. 2d 705, 717 (CA2 1979). The general quality of the schools also tends to decline when substantial elements of the community abandon them.

The effects of resegregation can be even broader, reaching beyond the quality of education in the inner city to the life of the entire community. When the more economically advantaged citizens leave the city, the tax base shrinks and all city services suffer. And students whose parents elect to live beyond the reach of the court decree lose the benefits of attending ethnically diverse schools, an experience that prepares a child for citizenship in our pluralistic society.[18]

III

The District Court in this case was properly concerned over resegregation and community support for the Dallas schools.[19] The facts before the court made that concern unavoidable. In the five years following the 1971 desegregation decree, the proportion of Anglo students in the Dallas public schools had dropped by almost half. That destabiliz-

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[18] As I noted in dissent in the *Columbus* case, courts are the branch of government least competent to provide long-range solutions to the resegregation problem. Because the causes of segregation in residential housing are usually beyond judicial correction, wider solutions that will be acceptable to concerned parents must be sought by legislators and executive officials. See 443 U. S., at 480–481 (POWELL, J., dissenting). See also Coleman, *supra* n. 12, at 48–49; Willie, Racial Balance or Quality Education?, in School Desegregation, Shadow and Substance 7 (Levinsohn & Wright eds. 1976).

[19] The District Court appears to have succeeded in enlisting active support from much of the Dallas community for the desegregation plan. The voters have approved an $80 million school bond issue that will assist in implementing the court's decree. In addition, business and civic organizations have "adopted" 144 schools in a community-wide effort to channel volunteers, equipment, and private money to those schools, and to provide part-time and full-time job opportunities for students in those schools. See Brief for Dallas Alliance as *Amicus Curiae* 25.

ing trend has continued in the School District, as reflected by the following figures:

Year	Percentage of Anglo Students
1971	69%
1975	41.1%
1979	33.5% [20]

In view of these far-reaching demographic changes, the futility of administering larger doses of a remedy that has failed is self-evident. In this situation, I can see no justification for reverting now to "time and distance studies" with the goal of attaining increased racial balance through additional busing.

A desegregation remedy that does not take account of the social and educational consequences of extensive student transportation can be neither fair nor effective. The District Court's plan is properly sensitive both to existing demographic realities and to the likely consequences of increased busing. The Court of Appeals seriously erred when it remanded this case with a mandate that seems certain to accelerate the destructive trend toward resegregation.

As this Court should not tolerate this error, even by silence that might give rise to an inference of approval, I dissent from the Court's failure to decide the case and reinstate the District Court's plan—a plan that does have promise for success.

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[20] The Anglo population in the School District is likely to fall off even more since current Anglo enrollment is highest in the high schools and declines steadily through the lower grades.

SECRETARY OF THE NAVY ET AL. v. HUFF ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-599. Argued November 6, 1979—Decided January 21, 1980

Held: Navy and Marine Corps regulations which require military personnel on an overseas base to obtain command approval before circulating petitions do not, insofar as they affect the circulation within a base of petitions addressed to Members of Congress, violate 10 U. S. C. § 1034, which provides that "[n]o person may restrict any member of an armed force in communicating with a member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States." Congress enacted § 1034 to ensure that an individual member of the Armed Forces could write to his elected representatives without sending his communication through official channels. Permitting an individual member of the Armed Forces to submit a petition directly to any Member of Congress serves the purpose of § 1034 without unnecessarily endangering a commander's ability to preserve morale and good order among his troops. Thus, the statute does not invalidate regulations such as those involved here. *Brown* v. *Glines, ante,* p. 348.

188 U. S. App. D. C. 26, 575 F. 2d 907, reversed.

Kent L. Jones argued the cause *pro hac vice* for petitioners. On the briefs was *Solicitor General McCree.*

Alan Dranitzke argued the cause for respondents. With him on the brief was *David Addlestone.*

PER CURIAM.

The question in this case is whether Navy and Marine Corps regulations violate 10 U. S. C. § 1034 by requiring military personnel on an overseas base to obtain command approval before circulating petitions addressed to Members of Congress. Section 1034 provides that "[n]o person may restrict any member of an armed force in communicating with a member of Congress, unless the communication is unlawful

or violates a regulation necessary to the security of the United States."

I

In 1974, Frank L. Huff, Robert A. Falatine, and Robert E. Gabrielson were serving in the Marine Corps at the United States Marine Corps Air Station in Iwakuni, Japan. On separate occasions, each of them sought the base commander's permission to circulate a petition addressed to a Member of Congress. The petitions dealt with the use of military forces in labor disputes within the United States, amnesty for men who resisted the draft or deserted the Armed Forces during the Vietnam war, and United States support for the Government of South Korea. The first two requests proposed circulation within the base; the last proposed circulation both within and without the base. The commander denied the first two requests, but he allowed the petition about South Korea to circulate within the base.

On another occasion, Huff and Falatine each asked to distribute a leaflet annotating the Declaration of Independence and the First Amendment with commentary critical of military commanders who restrict petitioning. The base commander denied Falatine's request on the ground that the commentary was disrespectful and contemptous, but on the same day and without explanation, he granted Huff leave to distribute the same material. Finally, respondents Huff and Falatine were arrested for circulating outside the base a petition to a Member of Congress that objected to American support for the Government of South Korea. They were charged with violating regulations because they had circulated the petition without requesting command approval. Huff was convicted and sentenced to confinement, forfeiture of half-pay, and reduction in grade. The charges against Falatine were dismissed for lack of evidence.

The respondents then brought a class action in the United States District Court for the District of Columbia, seeking

declaratory and injunctive relief against future enforcement of four Navy and Marine Corps regulations.[1] Each regulation provides, in relevant part, that members of the Marine Corps shall not "originate, sign, distribute, or promulgate petitions, publications, . . . or other . . . written material . . . on any military installation on duty or in uniform, or anywhere within a foreign country irrespective of uniform or duty status, unless prior command approval is obtained."[2] The

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[1] The class consists of "all members of the Marine Corps stationed at, assigned to, or on duty at the Marine Corps Air Station at Iwakuni, Japan." 413 F. Supp. 863, 864–865 (1976).

The respondents also sought a judgment expunging Falatine's arrest record, invalidating Huff's conviction, and restoring to Huff all benefits denied as the result of his conviction. *Id.*, at 865. Those claims, however, are no longer part of the case. See *infra*, at 456, and n. 4.

[2] Fleet Marine Force Pacific Order 5370.3, ¶ 3 (b) (1974). The full subparagraph reads:

"No Fleet Marine Force, Pacific or Marine Corps Bases, Pacific, personnel will originate, sign, distribute, or promulgate petitions, publications, including pamphlets, newspapers, magazines, handbills, flyers, or other printed or written material, on board any ship, craft, aircraft, or in any vehicle of the Department of the Navy, on any military installation on duty or in uniform, or anywhere within a foreign country irrespective of uniform or duty status, unless prior command approval is obtained."

The other three regulations, although different in geographic scope, use substantially identical language. See Pacific Fleet Instruction 5440.3C, § 2604.2 (2) (1974); First Marine Aircraft Wing Order 5370.1B, ¶ 5 (a) (2) (1974); Iwakuni Marine Corps Air Station Order 5370.3A, ¶ 5 (a) (2) (1973).

Each regulation directs a commander to "control or prohibit" the circulation of written materials that, in his judgment, would:

"(1) Materially interfere with the safety, operation, command, or control of his unit or the assigned duties of particular members of the command; or,

"(2) Present a clear danger to the loyalty, discipline, morale, or safety to [*sic*] personnel of his command; or,

"(3) Involve distribution of material or the rendering of advice or counsel that causes, attempts to cause, or advocates, insubordination, disloyalty,

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respondents contended that this requirement violated 10 U. S. C. § 1034 and the First Amendment. The petitioners conceded that the base commander had misapplied the regulations when he denied respondents permission to circulate their petitions within the base, and the respondents sought no relief for these past wrongs. Thus, the issue presented was the facial validity of the regulations that require prior command approval for petitioning inside and outside the Iwakuni air station.

On cross-motions for summary judgment, the court declared the regulations invalid with respect to materials distributed within the base during off-duty hours and away from restricted or work areas. The court upheld the regulations with respect to distributions outside the base. In that situation, the court concluded, command approval was necessary to prevent political activity in violation of the Status of Forces Agreement between the United States and Japan.[3] 413 F. Supp. 863 (1976). The petitioners appealed, but the respondents did not cross appeal.[4]

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mutiny, refusal of duty, solicits desertion, discloses classified information, or contains obscene or pornographic matter; or,

"(4) Involve the planning or perpetration of an unlawful act or acts." Fleet Marine Force Pacific Order 5370.3, ¶ 4 (a) (1974).

See Pacific Fleet Instruction 5440.3C, § 2604.2 (4) (1974); First Marine Aircraft Wing Order 5370.1B, ¶ 6 (c) (1974); Iwakuni Marine Corps Air Station Order 5370.3A, ¶ 5 (c) (1973). The respondents' complaint did not challenge these standards, App. 5–7, and the Court of Appeals did not review them, 188 U. S. App. D. C. 26, 32–33, 575 F. 2d 907, 913–914 (1978). Thus, the only issue before us is the validity of the prior approval requirement.

[3] Article XVI of the Status of Forces Agreement between the United States and Japan specifically proscribes political activity by American servicemen within the host country. [1960] 11 U. S. T. 1664, T. I. A. S. No. 4510.

[4] The respondents had sought expungement of Falatine's arrest record, invalidation of Huff's conviction for petitioning outside the base without permission, and restoration of all benefits denied to Huff as the result of his conviction. Since the District Court found the regulations valid as

The Court of Appeals for the District of Columbia Circuit affirmed in part and vacated in part. 188 U. S. App. D. C. 26, 575 F. 2d 907 (1978). It concluded that the only real controversy between the parties concerned the application of the challenged regulations to petitions addressing Members of Congress. The court therefore considered only the validity of the regulations as they affect circulation within the base of petitions to Congress. It held that requiring prior command approval for the circulation of such petitions violated 10 U. S. C. § 1034. That statute, the court concluded, gives both individuals and groups the right to petition Members of Congress. It allows only such restrictions on that right as are "necessary to the security of the United States." Since the record in this case showed that the Iwakuni base was not within "an actual and current combat zone," the court concluded that petitioners had not shown that a prior restraint on petitioning within the base was necessary to the national security. The court therefore did not reach the question whether the command approval requirement also violated the First Amendment.

We granted certiorari to consider whether the challenged regulations, as they affect the circulation of petitions within a military base, violate 10 U. S. C. § 1034. 440 U. S. 957 (1979).[5]

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applied to petitioning outside the base, the court denied these claims for relief. 413 F. Supp., at 870.

[5] At oral argument, the respondents also contended that regulations requiring members of the Armed Forces to secure command approval before circulating petitions within a military base violate the First Amendment. Tr. of Oral Arg. 30. Our decision today in *Brown* v. *Glines*, *ante*, p. 348, sustains the facial validity of this type of regulation and, therefore, disposes of respondents' First Amendment contention.

We have had no occasion, either in *Glines* or in this case, to consider a claim that regulations were misapplied in a particular instance. See *ante*, at 357, n. 15; *supra*, at 456. We have noted, however, that regulations in each Armed Service were promulgated under a Department of Defense directive that "advises commanders to preserve servicemen's 'right of

II

In *Brown* v. *Glines, ante,* p. 348, decided today, we concluded that "Congress enacted § 1034 to ensure that an individual member of the Armed Services could write to his elected representatives without sending his communication through official channels." *Ante,* at 359. Nothing in the legislative history suggests that Congress intended to authorize the unrestricted circulation of petitions within a military base. Indeed, both Congress and this Court have determined that "the special character of the military requires civilian authorities to accord military commanders some flexibility in dealing with matters that affect internal discipline and morale." *Ante,* at 360. Thus, in construing statutes that affect such matters, we must not limit a commander's authority more than the legislative purpose requires. Permitting an individual member of the Armed Services to submit a petition directly to any Member of Congress serves the purpose of § 1034 without unnecessarily endangering a commander's ability to preserve morale and good order among his troops. In *Glines,* therefore, we held that § 1034 does not invalidate regulations requiring members of the Armed Forces to secure command approval before circulating petitions within a military base.

Since the Court of Appeals reached a contrary conclusion in this case, its judgment is

Reversed.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

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expression . . . to the maximum extent possible, consistent with good order and discipline and the national security.' " *Brown* v. *Glines, ante,* at 355. A member of the service who thinks that his commander has misapplied the regulations can seek remedies within the service. See, *e. g.,* Uniform Code of Military Justice, Art. 138, 10 U. S. C. § 938. Furthermore, the federal courts are open to assure that, in applying the regulations, commanders do not abuse the discretion necessarily vested in them.

[For dissenting opinion of MR. JUSTICE BRENNAN, see *ante*, p. 361.]

MR. JUSTICE STEWART and MR. JUSTICE STEVENS dissent. For the reasons stated in their dissenting opinions in *Brown* v. *Glines*, *ante*, pp. 374 and 378, they would affirm the judgment of the Court of Appeals in this case.

HATZLACHH SUPPLY CO., INC. *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

No. 78-1175. Argued December 5, 1979—Decided January 21, 1980

Held: The United States may be held liable in an action under the Tucker Act for breach of an implied contract of bailment when goods are lost while held by the United States Customs Service following their seizure for customs violations.

(a) Title 28 U. S. C. § 2680 (c), which excepts from the Government's tort liability under the Federal Tort Claims Act (FTCA) any claim arising in respect of the detention of merchandise by any customs officer, does not foreclose a remedy on an implied-in-fact contract of bailment. Although the section excludes certain claims from the statutory waiver of immunity from tort liability, it does not limit or otherwise affect immunity waivers contained in other statutes such as the Tucker Act, which invests the Court of Claims with jurisdiction to render judgment "upon any claim against the United States founded . . . upon any express or implied contract with the United States." Neither does § 2680 (c)'s legislative history support the view that it was intended to declare the immunity of the United States from express or implied contracts with customs officers that would, or might, otherwise be within the Court of Claims' jurisdiction under the Tucker Act, but on the contrary it appears that in exempting from the FTCA those claims described in § 2680 (c), Congress did not further intend to disturb other existing statutory remedies.

(b) The fact that individual customs officers are subject to tort liability for negligent loss of goods, does not preclude a contractual remedy against the Government, neither the existence nor lack of a tort remedy being relevant to determining whether there is an implied-in-fact contract of bailment upon which the United States is liable pursuant to its waiver of sovereign immunity under the Tucker Act.

— Ct. Cl. —, 579 F. 2d 617, vacated and remanded.

Nathan Lewin argued the cause for petitioner. With him on the briefs were *Jamie S. Gorelick* and *Mark Landesman.*

Kent L. Jones argued the cause for the United States *pro hac vice.* With him on the brief were *Solicitor General*

McCree, Acting Assistant Attorney General Daniel, Eloise E. Davies, and *Frank A. Rosenfeld.*

PER CURIAM.

We granted certiorari in this case to consider whether the United States may be held liable for breach of an implied contract of bailment when goods are lost while held by the United States Customs Service (USCS) following their seizure for customs violations. 441 U. S. 942 (1979). The Court of Claims granted the Government's motion for summary judgment, finding that petitioner had failed to state a claim upon which the court could grant relief. — Ct. Cl. —, 579 F. 2d 617 (1978). We vacate the Court of Claims' judgment and remand the case for further proceedings.

Petitioner imported camera supplies and other items which USCS seized upon their arrival in port and declared forfeited for customs violations. On petitioner's appropriate procedure for relief, USCS agreed to return the forfeited materials upon petitioner's payment of a $40,000 penalty. When the shipment was returned to petitioner, however, merchandise valued in excess of $165,000 was missing. Petitioner brought suit under the Tucker Act, 28 U. S. C. § 1491, for the value of the missing merchandise,[1] alleging breach of an implied contract of bailment.[2]

The Court of Claims initially conceded that "the statutes cited by the plaintiff, along with the action of the USCS in agreeing to return the seized goods upon payment of a $40,000 fine by Hatzlachh, could make a strong case for the existence of an implied-in-fact contract properly to preserve and redeliver all the goods to Hatzlachh." — Ct. Cl., at —, 579

[1] Petitioner also sought damages, no longer in issue, for loss of "face and good will."

[2] As a second cause of action, petitioner alleged a capricious and arbitrary seizure, "unreasonable detainer" of property, and "deprivation without due process." Petitioner does not challenge the dismissal of this cause of action.

F. 2d, at 620. The court noted, however, that 28 U. S. C. § 2680 (c) excepts from the tort liability of the Government under the Federal Tort Claims Act any claim "arising in respect of . . . the detention of any goods or merchandise by any officer of customs." Because in its view this provision would bar a tort claim for the loss that occurred in this case, the court thought that it "would certainly be a trespass on congressional prerogatives for this court now to hold that, by seizing subject to forfeiture certain merchandise, the Government *assented* to, or agreed to be bound by, an implied-in-fact contract to return the merchandise whole." — Ct. Cl., at —, 579 F. 2d, at 621. The Court of Claims accordingly declined to find an implied-in-fact contract, remarking that it could not "judicially allow by the back door a claim which was, rather clearly and explicitly, legislatively barred at the front." *Ibid.*

We cannot agree with the Court of Claims that § 2680 (c) is such a major obstacle to awarding judgment against the Government on an implied contract. Section 2680, which is entitled "Exceptions," declares that "[t]he provisions of this chapter . . . shall not apply to" certain kinds of claims, which are then described. Among the excepted claims are those specified in § 2680 (c)—claims "arising in respect of . . . the detention of any goods or merchandise" by any customs officer. The section, although excluding certain claims from the statutory waiver of immunity from tort liability,[3] does

[3] We proceed in the text on the assumption, but without deciding, that the Court of Claims was correct in holding that the loss alleged in this case was a claim arising from the detention of goods by a customs officer and hence within the exception carved out by § 2680 (c). Petitioner disputes this holding, claiming that the section is limited to wrongful detentions and does not deal with *losses* and that the courts are divided on the interpretation of the section. *A-Mark, Inc.* v. *United States Secret Service*, 593 F. 2d 849 (CA9 1978), and *Alliance Assurance Co.* v. *United States*, 252 F. 2d 529 (CA2 1958), it is said, permit recovery under the Tort Claims Act for the loss of goods detained by customs officers; whereas this case, *United States* v. *One (1) 1972 Wood, 19 Foot Custom*

not limit or otherwise affect immunity waivers contained in other statutes such as the Tucker Act, which invests the Court of Claims with jurisdiction to render judgment "upon any claim against the United States founded . . . upon any express or implied contract with the United States."

Neither does its legislative history support the view that § 2680 (c), first passed in 1946 as part of the Federal Tort Claims Act, was intended to declare the immunity of the United States from express or implied contracts with customs officers that would, or might, otherwise be within the jurisdiction of the Court of Claims under the Tucker Act. On the contrary, it appears that in exempting from the Tort Claims Act those claims described in § 2680 (c), Congress did not further intend to disturb other existing statutory remedies. H. R. Rep. No. 2245, 77th Cong., 2d Sess., 10 (1942); S. Rep. No. 1196, 77th Cong., 2d Sess., 7 (1942); H. R. Rep. No. 1287, 79th Cong., 1st Sess., 6 (1945); S. Rep. No. 1400, 79th Cong., 2d Sess., 33 (1946); Tort Claims Against the United States: Hearings on S. 2690 before a Subcommittee of the Senate Committee on the Judiciary, 76th Cong., 3d Sess., 38 (1940); Tort Claims: Hearings on H. R. 5373 and H. R. 6463 before the House Committee on the Judiciary, 77th Cong., 2d Sess., 28, 44 (1942).[4] Nothing in these sources, nor anything else

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Boat, FL8443AY, 501 F. 2d 1327 (CA5 1974), and *S. Schonfeld Co.* v. *S. S. Akra Tenaron*, 363 F. Supp. 1220 (SC 1973), construe § 2680 (c) to except such losses from the Tort Claims Act.

We need not resolve the conflict. If petitioner is correct in its interpretation, § 2680 (c) would itself present no barrier to either contractual or tort liability. Nor would the existence of a Tort Claims Act remedy in this case be preclusive of pre-existing contractual remedies under the Tucker Act, at least absent some reasonably clear evidence that Congress intended to foreclose contractual remedies in the circumstances obtaining here.

[4] When Congress first considered the exception in 1940, Judge Alexander Holtzoff, then a Special Assistant to the Attorney General, testified before the Senate Judiciary Subcommittee considering the bill. As the then Mr. Holtzoff described the intended effect of the various exemptions, cer-

called to our attention, indicates that the Tort Claims Act withdrew to any extent existing remedies for the breach of express or implied contracts. Others have read the statute and its legislative history to this effect. See 2 L. Jayson, Personal Injury: Handling Federal Tort Claims § 256 (1979); Gellhorn & Schenck, Tort Actions Against the Federal Government, 47 Colum. L. Rev. 722, 729–730 (1947); Gottlieb, The Federal Tort Claims Act—A Statutory Interpretation, 35 Geo. Law J. 1, 45 (1946); Comment, The Federal Tort Claims Act, 42 Ill. L. Rev. 344, 360 (1947); Note, The Federal Tort Claims Act, 56 Yale L. J. 534, 547–548 (1947).

The Court of Claims relied on *Stencel Aero Engineering Corp.* v. *United States,* 431 U. S. 666 (1977), where it was held that the United States is not liable under the Tort Claims Act to indemnify a third party for damages paid to a member of the Armed Forces who was injured in military training. Recognizing that the Veterans' Benefits Act provided compensation to injured servicemen, which we understood Congress intended to be the sole remedy for service-connected injuries, we declined to construe the Tort Claims Act to permit third-party indemnity suits that in effect would expose the Government to greater liability than that contemplated under the statutory compensation scheme. In *Stencel,* Congress had provided a remedy, which we thought to be exclusive. Here, however, § 2680 (c) denies a tort remedy for cer-

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tain of them, such as the loss or miscarriage of postal matter and certain intentional torts, were included because they related to activities for which, as a policy matter, the Government should be free from tort claims. Other exemptions, such as the assessment or collection of taxes or customs duties, the detention of goods by customs officers, and admiralty or maritime torts, were included because various other laws provided the machinery for recovery on these claims and "[t]here was no purpose in interfering with that machinery." Tort Claims Against the United States: Hearings on S. 2690 before a Subcommittee of the Senate Committee on the Judiciary, 76th Cong., 3d Sess., 38–39 (1940). The purpose was to avoid duplication; there was no indication that existing remedies, if any, were withdrawn.

tain claims; and we fail to see how the *Stencel* holding that the existence of an exclusive statutory compensation remedy negates tort liability supports the conclusion that if the Tort Claims Act bars a tort remedy, neither is there a contractual remedy.

The absence of Government tort liability has not been thought to bar contractual remedies on implied-in-fact contracts, even in those cases also having elements of a tort. In *Keifer & Keifer* v. *RFC*, 306 U. S. 381 (1939), the Government argued that because a Government corporation could not be sued for negligence, neither could it be sued for breach of contract of bailment. The Court rejected the argument, holding that even if there was tort immunity, the waiver of immunity with respect to contract claims was not limited to "suits on contract, express or implied, not sounding in tort." See also *Aleutco Corp.* v. *United States*, 244 F. 2d 674, 679 (CA3 1957); *New England Helicopter Service, Inc.* v. *United States*, 132 F. Supp. 938, 939 (RI 1955).[5]

The United States does not now defend the reasoning of the Court of Claims that § 2680 (c) forecloses a remedy on an implied-in-fact contract of bailment. Tr. of Oral Arg. 37–38. It does support the judgment on a ground concededly not urged in the Court of Claims: that the contractual remedy should be rejected because individual customs officers are subject to tort liability and because 28 U. S. C. § 2006 provides that judgments against customs officers for negligent

[5] The Tucker Act itself is only a jurisdictional statute, of course, and does not create a substantive right to money damages. *United States* v. *Testan*, 424 U. S. 392, 398 (1976). The enforceable claim in this case must arise from the alleged contract. Moreover, the Court of Claims' jurisdiction with respect to contracts extends only to actual contracts, either express or implied in fact; it does not reach claims on contracts implied in law. *Alabama* v. *United States*, 282 U. S. 502, 507 (1931); *Goodyear Tire & Rubber Co.* v. *United States*, 276 U. S. 287, 292–293 (1928); *United States* v. *Minnesota Mutual Investment Co.*, 271 U. S. 212, 217 (1926); *Hill* v. *United States*, 149 U. S. 593, 598 (1893).

loss of goods, where seizure was made with probable cause, shall be paid by the United States. The existence of this private recourse, it is urged, counsels against recognizing a contractual remedy under the Tucker Act. We find the argument unpersuasive. There is no inconsistency between a contractual remedy against the Government and a tort remedy against customs officers. Cf. *Keifer & Keifer, supra.* Without more, neither the existence of a tort remedy nor the lack of one is relevant to determining whether there is an implied-in-fact contract of bailment upon which the United States is liable in the Court of Claims pursuant to its waiver of sovereign immunity contained in the Tucker Act.

Because the Court of Claims' judgment rested heavily on a mistaken view of the legal significance of § 2680 (c) and because the Court of Claims should first address the question of an implied-in-fact contract without regard to that section, we vacate the judgment of the Court of Claims and remand the case to that court for further proceedings consistent with this opinion.[6]

So ordered.

MR. JUSTICE BLACKMUN, dissenting.

I do not disagree with the legal principles pronounced by the Court in its *per curiam* opinion to the effect that 28 U. S. C. § 2680 (c) is not an obstacle to the awarding of judgment against the Government on an implied contract, *ante,* at 462; or that, in exempting from the Tort Claims Act those claims described in § 2680 (c), Congress did not also intend to disturb other existing statutory remedies, *ante,* at 463; or that *Stencel Aero Engineering Corp.* v. *United States,* 431 U. S. 666 (1977), does not control this case, *ante,* at 464–465; or that the absence of governmental tort liability does

[6] We indicate no view, one way or the other, as to whether an implied-in-fact contract could be found on the record in this case.

not bar contractual remedies on implied-in-fact contracts, *ante*, at 465; or that there is no inconsistency between a contractual remedy against the Government and a tort remedy against customs officers, *ante*, at 466. But I dissent from the Court's vacating the judgment of the Court of Claims and its remanding the case to that court for further proceedings.

I dissent because I am persuaded that an implied-in-fact contract is not to be found on the record in this case, and because I believe the remand is, or should be, a useless exercise leading to an inevitable result.

It is clear that jurisdiction of the Court of Claims extends to contracts implied in fact but not to those implied in law. See *United States* v. *Minnesota Mutual Investment Co.*, 271 U. S. 212, 217–218 (1926); *Merritt* v. *United States*, 267 U. S. 338, 341 (1925). Here, the Customs Service seized the goods and declared them forfeited for customs violations. There is no question as to the legality of that seizure. See *One Lot Emerald Cut Stones* v. *United States*, 409 U. S. 232, 234 (1972). Indeed, petitioner has admitted that the customs declaration was improper. — Ct. Cl. —, —, 579 F. 2d 617, 618 (1978); App. 11a, 18a. The Government's action, thus, was a claim of forfeiture and an assertion of ownership. There was no uninterrupted title in petitioner, recognized by the parties, as would constitute the basis of a contract implied in fact to return the goods. See *Baltimore & Ohio R. Co.* v. *United States*, 261 U. S. 592, 597 (1923). If the forfeiture is not upheld, the duty to return the goods is one implied, not in fact, but in law, and is so implied from the duty imposed upon the Customs Service by statute. See 28 U. S. C. § 2465. Any recovery for failure on the part of the Service to fulfill that duty would be founded in tort, or perhaps in equity, but not in contract.

It therefore seems to me inevitably to follow that there is no jurisdiction over this case in the Court of Claims. See *Baltimore & Ohio R. Co.* v. *United States*, *supra*; *Russell*

Corp. v. *United States*, 210 Ct. Cl. 596, 609, 537 F. 2d 474, 482 (1976), cert. denied, 429 U. S. 1073 (1977). Any remedy for petitioner lies elsewhere. Accordingly, I would affirm the judgment of the Court of Claims, albeit on a different ground from the one advanced by that court.

TAGUE v. LOUISIANA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

No. 79-5386. Decided January 21, 1980

Held: Petitioner's inculpatory statement to the arresting officer was erroneously admitted in evidence at his state-court trial at which he was convicted, where no evidence was introduced to prove that petitioner knowingly and intelligently waived his rights under *Miranda* v. *Arizona*, 384 U. S. 436, before making the statement.

Certiorari granted; 372 So. 2d 555, reversed and remanded.

PER CURIAM.

Petitioner was charged with armed robbery in violation of La. Rev. Stat. Ann. § 14:64 (West 1974). He was convicted by a jury and sentenced to 65 years at hard labor without benefit of parole. His conviction was affirmed by the Supreme Court of Louisiana in a brief *per curiam* opinion. 372 So. 2d 555, 556 (1979). On rehearing, a divided court reaffirmed petitioner's conviction. *Ibid.* It rejected his contention that an inculpatory statement made to the arresting officer and introduced at trial had been obtained in violation of his rights under *Miranda* v. *Arizona*, 384 U. S. 436 (1966).

At the suppression hearing in the trial court, the arresting officer testified that he read petitioner his *Miranda* rights from a card, that he could not presently remember what those rights were, that he could not recall whether he asked petitioner whether he understood the rights as read to him, and that he "couldn't say yes or no" whether he rendered any tests to determine whether petitioner was literate or otherwise capable of understanding his rights. 372 So. 2d, at 557.

A majority of the Supreme Court of Louisiana held that an arresting officer is not

"compelled to give an intelligence test to a person who

has been advised of his rights to determine if he understands them. . . .

"Absent a clear and readily apparent lack thereof, it can be presumed that a person has capacity to understand, and the burden is on the one claiming a lack of capacity to show that lack. LSA—C. C. arts. 25 and 1782. . . ." *Id.*, at 557–558.

Justice Dennis in dissent wrote that

"[c]ontrary to the explicit requirements of the United States Supreme Court in *Miranda* v. *Arizona*, 384 U. S. 436, . . . the majority today creates a presumption that the defendant understood his constitutional rights and places the burden of proof upon the defendant, instead of the state, to demonstrate whether the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Id.*, at 558.

We agree. The majority's error is readily apparent. *Miranda* v. *Arizona* clearly stated the principles that govern once the required warnings have been given.

"If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. *Escobedo* v. *Illinois*, 378 U. S. 478, 490, n. 14. This Court has always set high standards of proof for the waiver of constitutional rights, *Johnson* v. *Zerbst*, 304 U. S. 458 (1938), and we re-assert these standards as applied to in-custody interrogation. Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interroga-

> tion, the burden is rightly on its shoulders." 384 U. S., at 475.

Just last Term, in holding that a waiver of *Miranda* rights need not be explicit but may be inferred from the actions and words of a person interrogated, we firmly reiterated that

> "[t]he courts must presume that a defendant did not waive his rights; the prosecution's burden is great. . . ." *North Carolina* v. *Butler,* 441 U. S. 369, 373 (1979).

In this case no evidence at all was introduced to prove that petitioner knowingly and intelligently waived his rights before making the inculpatory statement. The statement was therefore inadmissible.

Accordingly, the motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted, the judgment is reversed, and the case is remanded to the Supreme Court of Louisiana for further proceedings not inconsistent with this opinion.

So ordered.

THE CHIEF JUSTICE would set the case for oral argument.

MR. JUSTICE REHNQUIST dissents. He thinks that, under the circumstances described in the opinion of the Supreme Court of Louisiana, the judgment of that court was fully consistent with *North Carolina* v. *Butler,* 441 U. S. 369 (1979), and not inconsistent with any other decision of this Court.

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Reporter's Note

Orders commencing with December 13, 1979, begin with page 996. The preceding orders in 444 U. S., from October 1, 1979, through December 10, 1979, were reported in Part 1, at 801–996. These page numbers are the same as they will be in the bound volume, thus making the *permanent* citations available upon publication of the preliminary prints of the United States Reports.

No. 79-643. COMMISSIONER OF INTERNAL REVENUE *v.* QUINLIVAN ET AL. C. A. 8th Cir. Certiorari denied. MR. JUSTICE STEWART and MR. JUSTICE POWELL would grant certiorari. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 599 F. 2d 269.

No. 79-663. FRIAS *v.* BOARD OF TRUSTEES OF ECTOR COUNTY INDEPENDENT SCHOOL DISTRICT ET AL. Ct. Civ. App. Tex., 8th Sup. Jud. Dist. Motion of respondent Board of Trustees of Ector County Independent School District for damages and certiorari denied. Reported below: 584 S. W. 2d 944.

Rehearing Denied

No. 78-6936. SCOTT *v.* GEORGIA, *ante,* p. 925. Petition for rehearing denied.

No. 78-1692. SOLOMON *v.* WEST VIRGINIA, *ante,* p. 831. Motion for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

No. 78-6677. FIGUEROA *v.* LEFEVRE, CORRECTIONAL SUPERINTENDENT, *ante,* p. 850;

No. 79-5095. DAVIS *v.* BRYAN, U. S. DISTRICT JUDGE, *ante,* p. 821; and

No. 79-5181. DAVIS *v.* RUSSELL ET AL., U. S. CIRCUIT JUDGES, *ante,* p. 821. Motions for leave to file petitions for rehearing denied.

DECEMBER 13, 1979

Certiorari Granted—Vacated and Remanded

No. 79-856. GOLDWATER ET AL. *v.* CARTER, PRESIDENT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari granted, judgment vacated, and case remanded with directions to dismiss the complaint. MR. JUSTICE MARSHALL concurs in the result. MR. JUSTICE POWELL concurs in the judgment

and filed a statement. MR. JUSTICE REHNQUIST concurs in the judgment and filed a statement in which THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE STEVENS join. MR. JUSTICE WHITE and MR. JUSTICE BLACKMUN join in the grant of the petition for writ of certiorari but would set the case for argument and give it plenary consideration. MR. JUSTICE BLACKMUN filed a statement in which MR. JUSTICE WHITE joins. MR. JUSTICE BRENNAN would grant the petition for writ of certiorari and affirm the judgment of the Court of Appeals and filed a statement. Reported below: — U. S. App. D. C. —, — F. 2d —.

MR. JUSTICE POWELL, concurring.

Although I agree with the result reached by the Court, I would dismiss the complaint as not ripe for judicial review.

I

This Court has recognized that an issue should not be decided if it is not ripe for judicial review. *Buckley* v. *Valeo*, 424 U. S. 1, 113–114 (1976) (*per curiam*). Prudential considerations persuade me that a dispute between Congress and the President is not ready for judicial review unless and until each branch has taken action asserting its constitutional authority. Differences between the President and the Congress are commonplace under our system. The differences should, and almost invariably do, turn on political rather than legal considerations. The Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse. Otherwise, we would encourage small groups or even individual Members of Congress to seek judicial resolution of issues before the normal political process has the opportunity to resolve the conflict.

In this case, a few Members of Congress claim that the President's action in terminating the treaty with Taiwan has deprived them of their constitutional role with respect to

a change in the supreme law of the land. Congress has taken no official action. In the present posture of this case, we do not know whether there ever will be an actual confrontation between the Legislative and Executive Branches. Although the Senate has considered a resolution declaring that Senate approval is necessary for the termination of any mutual defense treaty, see 125 Cong. Rec. S7015, S7038–S7039 (June 6, 1979), no final vote has been taken on the resolution. See *id.*, at S16683–S16692 (Nov. 15, 1979). Moreover, it is unclear whether the resolution would have retroactive effect. See *id.*, at S7054–S7064 (June 6, 1979); *id.*, at S7862 (June 18, 1979). It cannot be said that either the Senate or the House has rejected the President's claim. If the Congress chooses not to confront the President, it is not our task to do so. I therefore concur in the dismissal of this case.

II

MR. JUSTICE REHNQUIST suggests, however, that the issue presented by this case is a nonjusticiable political question which can never be considered by this Court. I cannot agree. In my view, reliance upon the political-question doctrine is inconsistent with our precedents. As set forth in the seminal case of *Baker* v. *Carr*, 369 U. S. 186, 217 (1962), the doctrine incorporates three inquiries: (i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of Government? (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? (iii) Do prudential considerations counsel against judicial intervention? In my opinion the answer to each of these inquiries would require us to decide this case if it were ready for review.

First, the existence of "a textually demonstrable constitutional commitment of the issue to a coordinate political department," *ibid.*, turns on an examination of the constitutional provisions governing the exercise of the power in question.

Powell v. *McCormack*, 395 U. S. 486, 519 (1969). No constitutional provision explicitly confers upon the President the power to terminate treaties. Further, Art. II, § 2, of the Constitution authorizes the President to make treaties with the advice and consent of the Senate. Article VI provides that treaties shall be a part of the supreme law of the land. These provisions add support to the view that the text of the Constitution does not unquestionably commit the power to terminate treaties to the President alone. Cf. *Gilligan* v. *Morgan*, 413 U. S. 1, 6 (1973); *Luther* v. *Borden*, 7 How. 1, 42 (1849).

Second, there is no "lack of judicially discoverable and manageable standards for resolving" this case; nor is a decision impossible "without an initial policy determination of a kind clearly for nonjudicial discretion." *Baker* v. *Carr*, *supra*, at 217. We are asked to decide whether the President may terminate a treaty under the Constitution without congressional approval. Resolution of the question may not be easy, but it only requires us to apply normal principles of interpretation to the constitutional provisions at issue. See *Powell* v. *McCormack*, *supra*, at 548–549. The present case involves neither review of the President's activities as Commander in Chief nor impermissible interference in the field of foreign affairs. Such a case would arise if we were asked to decide, for example, whether a treaty required the President to order troops into a foreign country. But "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker* v. *Carr*, *supra*, at 211. This case "touches" foreign relations, but the question presented to us concerns only the constitutional division of power between Congress and the President.

A simple hypothetical demonstrates the confusion that I find inherent in MR. JUSTICE REHNQUIST's opinion concurring in the judgment. Assume that the President signed a mutual defense treaty with a foreign country and announced that it

would go into effect despite its rejection by the Senate. Under MR. JUSTICE REHNQUIST's analysis that situation would present a political question even though Art. II, § 2, clearly would resolve the dispute. Although the answer to the hypothetical case seems self-evident because it demands textual rather than interstitial analysis, the nature of the legal issue presented is no different from the issue presented in the case before us. In both cases, the Court would interpret the Constitution to decide whether congressional approval is necessary to give a Presidential decision on the validity of a treaty the force of law. Such an inquiry demands no special competence or information beyond the reach of the Judiciary. Cf. *Chicago & Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U. S. 103, 111 (1948).[1]

Finally, the political-question doctrine rests in part on prudential concerns calling for mutual respect among the three branches of Government. Thus, the Judicial Branch should avoid "the potentiality of embarrassment [that would result] from multifarious pronouncements by various departments on one question." Similarly, the doctrine restrains judicial action where there is an "unusual need for unquestioning adherence to a political decision already made." *Baker* v. *Carr*, *supra*, at 217.

If this case were ripe for judicial review, see Part I, *supra*, none of these prudential considerations would be present.

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[1] The Court has recognized that, in the area of foreign policy, Congress may leave the President with wide discretion that otherwise might run afoul of the nondelegation doctrine. *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304 (1936). As stated in that case, "the President alone has the power to speak or listen as a representative of the Nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates." *Id.*, at 319 (emphasis in original). Resolution of this case would interfere with neither the President's ability to negotiate treaties nor his duty to execute their provisions. We are merely being asked to decide whether a treaty, which cannot be ratified without Senate approval, continues in effect until the Senate or perhaps the Congress take further action.

Interpretation of the Constitution does not imply lack of respect for a coordinate branch. *Powell* v. *McCormack, supra,* at 548. If the President and the Congress had reached irreconcilable positions, final disposition of the question presented by this case would eliminate, rather than create, multiple constitutional interpretations. The specter of the Federal Government brought to a halt because of the mutual intransigence of the President and the Congress would require this Court to provide a resolution pursuant to our duty " 'to say what the law is.' " *United States* v. *Nixon,* 418 U. S. 683, 703 (1974), quoting *Marbury* v. *Madison,* 1 Cranch 137, 177 (1803).

III

In my view, the suggestion that this case presents a political question is incompatible with this Court's willingness on previous occasions to decide whether one branch of our Government has impinged upon the power of another. See *Buckley* v. *Valeo,* 424 U. S., at 138; *United States* v. *Nixon, supra,* at 707; *The Pocket Veto Case,* 279 U. S. 655, 676–678 (1929); *Myers* v. *United States,* 272 U. S. 52 (1926).[2] Under the

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[2] *Coleman* v. *Miller,* 307 U. S. 433 (1939), is not relevant here. In that case, the Court was asked to review the legitimacy of a State's ratification of a constitutional amendment. Four Members of the Court stated that Congress has exclusive power over the ratification process. *Id.,* at 456–460 (Black, J., concurring, joined by Roberts, Frankfurter, and Douglas, JJ.). Three Members of the Court concluded more narrowly that the Court could not pass upon the efficacy of state ratification. They also found no standards by which the Court could fix a reasonable time for the ratification of a proposed amendment. *Id.,* at 452–454.

The proposed constitutional amendment at issue in *Coleman* would have overruled decisions of this Court. Compare *id.,* at 435, n. 1, with *Child Labor Tax Case,* 259 U. S. 20 (1922); *Hammer* v. *Dagenhart,* 247 U. S. 251 (1918). Thus, judicial review of the legitimacy of a State's ratification would have compelled this Court to oversee the very constitutional process used to reverse Supreme Court decisions. In such circumstances it may be entirely appropriate for the Judicial Branch of Government to step aside. See Scharpf, Judicial Review and The Political

criteria enunciated in *Baker* v. *Carr*, we have the responsibility to decide whether both the Executive and Legislative Branches have constitutional roles to play in termination of a treaty. If the Congress, by appropriate formal action, had challenged the President's authority to terminate the treaty with Taiwan, the resulting uncertainty could have serious consequences for our country. In that situation, it would be the duty of this Court to resolve the issue.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE STEVENS join, concurring in the judgment.

I am of the view that the basic question presented by the petitioners in this case is "political" and therefore nonjusticiable because it involves the authority of the President in the conduct of our country's foreign relations and the extent to which the Senate or the Congress is authorized to negate the action of the President. In *Coleman* v. *Miller*, 307 U. S. 433 (1939), a case in which members of the Kansas Legislature brought an action attacking a vote of the State Senate in favor of the ratification of the Child Labor Amendment, Mr. Chief Justice Hughes wrote in what is referred to as the "Opinion of the Court":

> "We think that . . . the question of the efficacy of ratifications by state legislatures, in the light of previous rejection or attempted withdrawal, should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the Amendment.
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> "The precise question as now raised is whether, when the legislature of the State, as we have found, has actually ratified the proposed amendment, the Court should

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Question: A Functional Analysis, 75 Yale L. J. 517, 589 (1966). The present case involves no similar principle of judicial nonintervention.

> restrain the state officers from certifying the ratification to the Secretary of State, because of an earlier rejection, and thus prevent the question from coming before the political departments. We find no basis in either Constitution or statute for such judicial action. Article V, speaking solely of ratification, contains no provision as to rejection. . . ." *Id.*, at 450.

Thus, Mr. Chief Justice Hughes' opinion concluded that "Congress in controlling the promulgation of the adoption of a constitutional amendment has the final determination of the question whether by lapse of time its proposal of the amendment had lost its vitality prior to the required ratifications." *Id.*, at 456.

I believe it follows *a fortiori* from *Coleman* that the controversy in the instant case is a nonjusticiable political dispute that should be left for resolution by the Executive and Legislative Branches of the Government. Here, while the Constitution is express as to the manner in which the Senate shall participate in the ratification of a treaty, it is silent as to that body's participation in the abrogation of a treaty. In this respect the case is directly analogous to *Coleman, supra.* As stated in *Dyer* v. *Blair,* 390 F. Supp. 1291, 1302 (ND Ill. 1975) (three-judge court):

> "A question that might be answered in different ways for different amendments must surely be controlled by political standards rather than standards easily characterized as judicially manageable."

In light of the absence of any constitutional provision governing the termination of a treaty, and the fact that different termination procedures may be appropriate for different treaties (see, *e. g.*, n. 1, *infra*), the instant case in my view also "must surely be controlled by political standards."

I think that the justifications for concluding that the question here is political in nature are even more compelling than in *Coleman* because it involves foreign relations—specifically

a treaty commitment to use military force in the defense of a foreign government if attacked. In *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304 (1936), this Court said:

> "Whether, if the Joint Resolution had related solely to internal affairs it would be open to the challenge that it constituted an unlawful delegation of legislative power to the Executive, we find it unnecessary to determine. The whole aim of the resolution is to affect a situation entirely external to the United States, and falling within the category of foreign affairs. . . ." *Id.*, at 315.

The present case differs in several important respects from *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952), cited by petitioners as authority both for reaching the merits of this dispute and for reversing the Court of Appeals. In *Youngstown*, private litigants brought a suit contesting the President's authority under his war powers to seize the Nation's steel industry, an action of profound and demonstrable domestic impact. Here, by contrast, we are asked to settle a dispute between coequal branches of our Government, each of which has resources available to protect and assert its interests, resources not available to private litigants outside the judicial forum.[1] Moreover, as in *Curtiss-Wright*, the

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[1] As observed by Chief Judge Wright in his concurring opinion below:

"Congress has initiated the termination of treaties by directing or requiring the President to give notice of termination, without any prior presidential request. Congress has annulled treaties without any presidential notice. It has conferred on the President the power to terminate a particular treaty, and it has enacted statutes practically nullifying the domestic effects of a treaty and thus caused the President to carry out termination. . . .

"Moreover, Congress has a variety of powerful tools for influencing foreign policy decisions that bear on treaty matters. Under Article I, Section 8 of the Constitution, it can regulate commerce with foreign nations, raise and support armies, and declare war. It has power over the appointment of ambassadors and the funding of embassies and consulates.

effect of this action, as far as we can tell, is "entirely external to the United States, and [falls] within the category of foreign affairs." Finally, as already noted, the situation presented here is closely akin to that presented in *Coleman*, where the Constitution spoke only to the procedure for ratification of an amendment, not to its rejection.

Having decided that the question presented in this action is nonjusticiable, I believe that the appropriate disposition is for this Court to vacate the decision of the Court of Appeals and remand with instructions for the District Court to dismiss the complaint. This procedure derives support from our practice in disposing of moot actions in federal courts.[2] For more than 30 years, we have instructed lower courts to vacate any decision on the merits of an action that has become moot prior to a resolution of the case in this Court. *United States* v. *Munsingwear, Inc.*, 340 U. S. 36 (1950). The Court has required such decisions to be vacated in order to "prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." *Id.*, at 41. It is even more imperative that this Court invoke this procedure to ensure that resolution of a "political question," which should not have been decided by a lower court, does not "spawn any legal consequences." An Art. III court's resolution of a question that is "political" in character can create far more dis-

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Congress thus retains a strong influence over the President's conduct in treaty matters.

"As our political history demonstrates, treaty creation and termination are complex phenomena rooted in the dynamic relationship between the two political branches of our government. We thus should decline the invitation to set in concrete a particular constitutionally acceptable arrangement by which the President and Congress are to share treaty termination." App. to Pet. for Cert. 44A–45A (footnotes omitted).

[2] This Court, of course, may not prohibit state courts from deciding political questions, any more than it may prohibit them from deciding questions that are moot, *Doremus* v. *Board of Education*, 342 U. S. 429, 434 (1952), so long as they do not trench upon exclusively federal questions of foreign policy. *Zschernig* v. *Miller*, 389 U. S. 429, 441 (1968).

ruption among the three coequal branches of Government than the resolution of a question presented in a moot controversy. Since the political nature of the questions presented should have precluded the lower courts from considering or deciding the merits of the controversy, the prior proceedings in the federal courts must be vacated, and the complaint dismissed.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE WHITE joins, dissenting in part.

In my view, the time factor and its importance are illusory; if the President does not have the power to terminate the treaty (a substantial issue that we should address only after briefing and oral argument), the notice of intention to terminate surely has no legal effect. It is also indefensible, without further study, to pass on the issue of justiciability or on the issues of standing or ripeness. While I therefore join in the grant of the petition for certiorari, I would set the case for oral argument and give it the plenary consideration it so obviously deserves.

MR. JUSTICE BRENNAN, dissenting.

I respectfully dissent from the order directing the District Court to dismiss this case, and would affirm the judgment of the Court of Appeals insofar as it rests upon the President's well-established authority to recognize, and withdraw recognition from, foreign governments. App. to Pet. for Cert. 27A–29A.

In stating that this case presents a nonjusticiable "political question," MR. JUSTICE REHNQUIST, in my view, profoundly misapprehends the political-question principle as it applies to matters of foreign relations. Properly understood, the political-question doctrine restrains courts from reviewing an exercise of foreign policy judgment by the coordinate political branch to which authority to make that judgment has been "constitutional[ly] commit[ted]." *Baker* v. *Carr*, 369 U. S.

186, 211–213, 217 (1962). But the doctrine does not pertain when a court is faced with the *antecedent* question whether a particular branch has been constitutionally designated as the repository of political decisionmaking power. Cf. *Powell* v. *McCormack*, 395 U. S. 486, 519–521 (1969). The issue of decisionmaking authority must be resolved as a matter of constitutional law, not political discretion; accordingly, it falls within the competence of the courts.

The constitutional question raised here is prudently answered in narrow terms. Abrogation of the defense treaty with Taiwan was a necessary incident to Executive recognition of the Peking Government, because the defense treaty was predicated upon the now-abandoned view that the Taiwan Government was the only legitimate political authority in China. Our cases firmly establish that the Constitution commits to the President alone the power to recognize, and withdraw recognition from, foreign regimes. See *Banco Nacional de Cuba* v. *Sabbatino*, 376 U. S. 398, 410 (1964); *Baker* v. *Carr*, *supra*, at 212; *United States* v. *Pink*, 315 U. S. 203, 228–230 (1942). That mandate being clear, our judicial inquiry into the treaty rupture can go no further. See *Baker* v. *Carr*, *supra*, at 212; *United States* v. *Pink*, *supra*, at 229.

January 7, 1980

Affirmed on Appeal

No. 79–704. Slate *v.* Noll. Affirmed on appeal from D. C. W. D. Wis. Mr. Justice Marshall would note probable jurisdiction and set case for oral argument. Reported below: 474 F. Supp. 882.

Appeals Dismissed

No. 79–409. Cahill *v.* Governmental Ethics Commission. Appeal from Sup. Ct. Kan. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 225 Kan. 772, 594 P. 2d 1103.

No. 79–270. HEADS *v.* LOUISIANA. Appeal from Sup. Ct. La. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari granted, judgment vacated, and case remanded for further consideration in light of *Sandstrom* v. *Montana*, 442 U. S. 510 (1979). Reported below: 370 So. 2d 564.

No. 79–665. PICKERING *v.* COMMISSIONER OF INTERNAL REVENUE. Appeal from C. A. 2d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 79–699. HEYNE *v.* HEYNE ET AL. Appeal from Ct. App. Ohio, Summit County, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 79–413. CRAWFORD *v.* NEW YORK. Appeal from Ct. App. N. Y. dismissed for want of a properly presented federal question. Reported below: 47 N. Y. 2d 884, 393 N. E. 2d 488.

No. 79–5411. SAMMONS *v.* OHIO. Appeal from Sup. Ct. Ohio dismissed for want of substantial federal question. Reported below: 58 Ohio St. 2d 460, 391 N. E. 2d 713.

Certiorari Granted—Vacated and Remanded. (See No. 79–270, *supra.*)

Certiorari Granted—Reversed. (See Nos. 79–168, 79–181, and 79–184, *ante*, p. 223.)

Miscellaneous Orders

No. A–154. STEPPE *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. D. C. N. D. Fla. Application for bail, addressed to MR. JUSTICE BRENNAN and referred to the Court, denied.

No. A-465 (79-5777). HAYES *v.* BOARD OF TRUSTEES OF CLARK COUNTY SCHOOL DISTRICT. Sup. Ct. Nev. Application for an extension of time to docket appeal, addressed to MR. JUSTICE BRENNAN and referred to the Court, denied.

No. A-507. SAYLES *v.* HART, U. S. DISTRICT JUDGE. C. A. D. C. Cir. Application for injunction, addressed to MR. JUSTICE BRENNAN and referred to the Court, denied.

No. D-177. IN RE DISBARMENT OF PANEK. Disbarment entered. [For earlier order herein, see *ante,* p. 912.]

No. 8, Orig. ARIZONA *v.* CALIFORNIA ET AL. Memorandum and Report of the Special Master on preliminary issues received and ordered filed. Motion of Arizona et al. for leave to file exceptions to the Memorandum and Report of the Special Master denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of these matters. [For earlier order herein, see, *e. g.,* 440 U. S. 942.]

No. 78-1557. NACHMAN CORP. *v.* PENSION BENEFIT GUARANTY CORP. ET AL. C. A. 7th Cir. [Certiorari granted, 442 U. S. 940.] Motion of respondent union for divided argument granted.

No. 78-1577. SEARS, ROEBUCK & CO. *v.* COUNTY OF LOS ANGELES ET AL. Ct. App. Cal., 2d App. Dist. [Certiorari granted, *ante,* p. 823.] Motion of petitioner for divided argument granted. MR. JUSTICE STEWART took no part in the consideration or decision of this motion.

No. 78-1870. WHIRLPOOL CORP. *v.* MARSHALL, SECRETARY OF LABOR. C. A. 6th Cir. [Certiorari granted, *ante,* p. 823.] Motions of Philadelphia Area Project on Occupational Safety & Health, American Public Health Assn., and American Federation of Labor & Congress of Industrial Organizations et al. for leave to file briefs as *amici curiae* granted.

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No. 78-1595. LEWIS *v.* UNITED STATES. C. A. 4th Cir. [Certiorari granted, 442 U. S. 939.] Motion of the Solicitor General to permit Andrew J. Levander, Esquire, to present oral argument *pro hac vice* granted.

No. 79-97. CALIFORNIA RETAIL LIQUOR DEALERS ASSN. *v.* MIDCAL ALUMINUM, INC., ET AL. Ct. App. Cal., 3d App. Dist. [Certiorari granted, *ante,* p. 824.] Motion of Consumers Union of the United States, Inc., for leave to file a brief as *amicus curiae* granted. MR. JUSTICE BRENNAN took no part in the consideration or decision of this motion.

No. 79-584. RESEARCH EQUITY FUND, INC. *v.* INSURANCE COMPANY OF NORTH AMERICA. C. A. 9th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States. MR. JUSTICE REHNQUIST took no part in the consideration or decision of this order.

No. 79-621. ARIZONA *v.* MANYPENNY. C. A. 9th Cir.; and

No. 79-664. VENTURA COUNTY *v.* GULF OIL CORP. C. A. 9th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 79-5114. WARREN *v.* MISSISSIPPI, *ante,* p. 956. Respondent requested to file a response to petition for rehearing within 30 days.

No. 79-5604. LOCKETT *v.* BLACKBURN, WARDEN. Motion for leave to file petition for writ of certiorari denied.

No. 79-676. CHILDS *v.* APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, SECOND JUDICIAL DEPARTMENT, ET AL.;

No. 79-5547. WATKINS *v.* MARTIN, WARDEN, ET AL.;

No. 79-5554. WILLIAMS *v.* UNITED STATES; and

No. 79-5598. FERRANTE *v.* BRANWELL, U. S. DISTRICT JUDGE. Motions for leave to file petitions for writs of mandamus denied.

No. 79-5686. BARR *v.* PHELPS, CORRECTIONS SECRETARY. Motion for leave to file petition for writ of habeas corpus denied.

No. 79-681. SHUFFMAN, EXECUTRIX *v.* HARTFORD TEXTILE CORP. ET AL. Motion of petitioner to strike memorandum for federal respondents in opposition denied. Motion for leave to file petition for writ of mandamus denied.

No. 79-5667. PAUL *v.* STAFFORD, U. S. DISTRICT JUDGE, ET AL. Motion for leave to file petition for writ of mandamus and other relief denied.

No. 79-5609. BOTTOS *v.* PIVARNICK ET AL. Motion for leave to file petition for writ of prohibition denied.

Probable Jurisdiction Noted

No. 79-343. SUN SHIP, INC. *v.* PENNSYLVANIA ET AL. Appeal from Pa. Commw. Ct. Probable jurisdiction noted. Reported below: 41 Pa. Commw. 302, 398 A. 2d 1111.

No. 79-602. AGINS ET UX. *v.* CITY OF TIBURON. Appeal from Sup. Ct. Cal. Probable jurisdiction noted. Reported below: 24 Cal. 3d 266, 598 P. 2d 25.

No. 79-703. CAREY, STATE'S ATTORNEY OF COOK COUNTY *v.* BROWN ET AL. Appeal from C. A. 7th Cir. Probable jurisdiction noted. Reported below: 602 F. 2d 791.

Certiorari Granted

No. 79-383. STANDEFER *v.* UNITED STATES. C. A. 3d Cir. Certiorari granted. Reported below: 610 F. 2d 1076.

No. 79-672. NATIONAL LABOR RELATIONS BOARD *v.* RETAIL STORE EMPLOYEES UNION, LOCAL 1001, RETAIL CLERKS INTERNATIONAL ASSN., AFL-CIO. C. A. D. C. Cir. Certiorari granted. Reported below: 194 U. S. App. D. C. 400, 600 F. 2d 280.

No. 79-701. ROADWAY EXPRESS, INC. *v.* MONK ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 599 F. 2d 1378.

No. 79-669. DAWSON CHEMICAL CO. ET AL. *v.* ROHM & HAAS CO. C. A. 5th Cir. Motions of American Rice Growers Exchange and Pesticide Producers Assn. for leave to file briefs as *amici curiae* and certiorari granted. Reported below: 599 F. 2d 685.

No. 79-5499. SKIPPER *v.* BRUMMER ET AL. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 598 F. 2d 427.

Certiorari Denied. (See also Nos. 79-409, 79-665, and 79-699, *supra.*)

No. 79-73. ADELAIDE SHIPPING LINES, LTD., ET AL. *v.* SUNKIST GROWERS, INC. C. A. 9th Cir. Certiorari denied. Reported below: 603 F. 2d 1327.

No. 79-142. WELLS FARGO BANK, N. A., ET AL. *v.* GARFINKLE ET VIR. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 79-320. HALL *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 66 Ill. App. 3d 891, 384 N. E. 2d 578.

No. 79-338. CASKEY *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: — S. C. —, 256 S. E. 2d 737.

No. 79-341. FIRSTENBERG *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 92 Cal. App. 3d 570, 155 Cal. Rptr. 80.

No. 79-352. DELAY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 602 F. 2d 173.

No. 79-391. LUKEFAHR ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 595 F. 2d 1086.

No. 79–396. ROSE ET AL. *v.* BRADLEY, MAYOR OF LOS ANGELES, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 605 F. 2d 563.

No. 79–400. GEORGIA ET AL. *v.* FREEMAN. C. A. 5th Cir. Certiorari denied. Reported below: 599 F. 2d 65.

No. 79–429. LUCKY STORES, INC. *v.* VILLAGE OF LOMBARD. C. A. 7th Cir. Certiorari denied. Reported below: 601 F. 2d 598.

No. 79–432. EL CAMINO COMMUNITY COLLEGE DISTRICT ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 600 F. 2d 1258.

No. 79–449. TURCIO *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: — Conn. —, — A. 2d —.

No. 79–464. OSTROW *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 608 F. 2d 1370.

No. 79–477. FIRST STATE BANK OF HUDSON COUNTY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 599 F. 2d 558.

No. 79–508. AMOCO PRODUCTION CO. *v.* FEDERAL ENERGY REGULATORY COMMISSION. C. A. 5th Cir. Certiorari denied. Reported below: 598 F. 2d 370.

No. 79–515. AMERICAN SECURITY COUNCIL EDUCATION FOUNDATION *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: — U. S. App. D. C. —, 607 F. 2d 438.

No. 79–518. TERKEL *v.* WEBSTER, DIRECTOR, FEDERAL BUREAU OF INVESTIGATION, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 599 F. 2d 214.

No. 79–535. LAMPKIN-ASAM *v.* SUPREME COURT OF FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 601 F. 2d 760.

No. 79–560. VISLISEL *v.* UNITED STATES DEPARTMENT OF LABOR ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 605 F. 2d 1209.

No. 79–563. LIOSI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 605 F. 2d 1196.

No. 79–564. INDIANA & MICHIGAN ELECTRIC CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. Reported below: 599 F. 2d 185.

No. 79–575. RICHARDSON ET UX. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 599 F. 2d 290.

No. 79–577. DAMERON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 601 F. 2d 590.

No. 79–582. COLORADO ET AL. *v.* VETERANS' ADMINISTRATION ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 602 F. 2d 926.

No. 79–586. KRAYNAK ET AL. *v.* MARSHALL, SECRETARY OF LABOR. C. A. 3d Cir. Certiorari denied. Reported below: 604 F. 2d 231.

No. 79–589. LULL ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. Reported below: 602 F. 2d 1166.

No. 79–592. LARIMER COUNTY DEPARTMENT OF SOCIAL SERVICES ET AL. *v.* KANE, U. S. DISTRICT JUDGE, ET AL. C. A. 10th Cir. Certiorari denied.

No. 79–599. RIZZO *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied.

No. 79–600. SARMIENTO ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 604 F. 2d 304.

No. 79–604. MOUNTAIN FUEL SUPPLY CO. ET AL. *v.* UTAH COMMITTEE OF CONSUMER SERVICES ET AL. Sup. Ct. Utah. Certiorari denied. Reported below: 595 P. 2d 871.

No. 79-612. RUNCK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 601 F. 2d 968.

No. 79-614. STOUDT'S FERRY PREPARATION CO. *v.* MARSHALL, SECRETARY OF LABOR. C. A. 3d Cir. Certiorari denied. Reported below: 602 F. 2d 589.

No. 79-615. BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF CINCINNATI ET AL. *v.* WALTER, SUPERINTENDENT OF PUBLIC INSTRUCTION, ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 58 Ohio St. 2d 368, 390 N. E. 2d 813.

No. 79-635. DEUTSCH *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 599 F. 2d 44.

No. 79-638. POE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 599 F. 2d 1058.

No. 79-644. ATELIERS ROANNAIS DE CONSTRUCTIONS TEXTILES ET AL. *v.* DUPLAN CORP. ET AL.;

No. 79-658. DEERING MILLIKEN RESEARCH CORP. ET AL. *v.* DUPLAN CORP. ET AL.;

No. 79-659. DEERING MILLIKEN, INC. *v.* DUPLAN CORP. ET AL.; and

No. 79-660. DUPLAN CORP. ET AL. *v.* DEERING MILLIKEN, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 594 F. 2d 979.

No. 79-648. WOOLSEY *v.* TRUSTEES FOR WESTGATE-CALIFORNIA CORP.; and

No. 79-712. ASH ET UX. *v.* TRUSTEES FOR WESTGATE-CALIFORNIA CORP. C. A. 9th Cir. Certiorari denied. Reported below: 601 F. 2d 395.

No. 79-649. AVCOLLIE *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: — Conn. —, — A. 2d

No. 79-651. AMES ET UX. *v.* MCCARTY ET AL. Ct. App. N. M. Certiorari denied.

No. 79-652. NATIONAL BANCSHARES CORPORATION OF TEXAS ET AL. *v.* BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS OF TEXAS, ET AL.; and

No. 79-653. REIDY INTERNATIONAL, INC. *v.* BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS OF TEXAS, ET AL. Sup. Ct. Tex. Certiorari denied. Reported below: 584 S. W. 2d 268.

No. 79-655. J. B. K., INC., ET AL. *v.* CARON ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 600 F. 2d 710.

No. 79-657. AD HOC COMMITTEE TO INVESTIGATE THE FEDERAL GRAND JURY *v.* KOCH, ASSISTANT UNITED STATES ATTORNEY. C. A. 5th Cir. Certiorari denied. Reported below: 601 F. 2d 1192.

No. 79-670. CRANE *v.* ILLINOIS INDUSTRIAL COMMISSION ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 601 F. 2d 596.

No. 79-671. TURNER ET AL. *v.* MARION COUNTY, TEXAS. Ct. Civ. App. Tex., 6th Sup. Jud. Dist. Certiorari denied.

No. 79-680. OLSEN *v.* GUAM. C. A. 9th Cir. Certiorari denied. Reported below: 607 F. 2d 234.

No. 79-682. KONCZAK ET UX. *v.* TYRRELL, SHERIFF, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 603 F. 2d 13.

No. 79-684. VISION CENTER *v.* OPTICKS, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 596 F. 2d 111.

No. 79-690. MAGBY *v.* MORAN, CORRECTIONS DIRECTOR, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 605 F. 2d 562.

No. 79-694. GUNTHARP *v.* PLANTERS OIL MILL. Sup. Ct. Miss. Certiorari denied. Reported below: 372 So. 2d 1274.

No. 79-696. COUGHLIN *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 374 So. 2d 291.

No. 79-702. EKAS ET AL. *v.* CARLING NATIONAL BREWERIES, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 602 F. 2d 664.

No. 79-709. LOCAL 520, INTERNATIONAL UNION OF OPERATING ENGINEERS, ET AL. *v.* JONES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 603 F. 2d 664.

No. 79-714. MARTY'S FLOOR COVERING CO., INC. *v.* GAF CORP. C. A. 4th Cir. Certiorari denied. Reported below: 604 F. 2d 266.

No. 79-715. NATIONAL STUDENT FILM CORP. *v.* FENSTER SCHOOL. Ct. App. Ariz. Certiorari denied.

No. 79-716. ABBEY *v.* CONTROL DATA CORP. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 603 F. 2d 724.

No. 79-717. FRISTOE *v.* REYNOLDS METALS CO. C. A. 9th Cir. Certiorari denied. Reported below: 603 F. 2d 223.

No. 79-719. THOMPSON ET UX. *v.* PEOPLES LIBERTY BANK ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 601 F. 2d 590.

No. 79-722. JACKSON *v.* ARKANSAS. Ct. App. Ark. Certiorari denied. Reported below: — Ark. —, 585 S. W. 2d 367.

No. 79-727. RENTSCHLER *v.* FREEMAN ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 79-728. STAR SHIPPING A/S ET AL. *v.* PACIFIC LUMBER & SHIPPING CO., INC., ET AL. C. A. 9th Cir. Certiorari denied.

No. 79–733. HIGHWAY & CITY TRANSPORTATION, INC. *v.* BALESTRI. Sup. Ct. Ill. Certiorari denied. Reported below: 76 Ill. 2d 451, 394 N. E. 2d 391.

No. 79–734. MCDONNELL DOUGLAS CORP. *v.* HYCOM, INC. C. A. 9th Cir. Certiorari denied. Reported below: 603 F. 2d 224.

No. 79–737. BLUE BELL, INC. *v.* FOWLER. C. A. 5th Cir. Certiorari denied. Reported below: 596 F. 2d 1276.

No. 79–746. BUCHHOLTZ ET AL. *v.* SWIFT & CO. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 609 F. 2d 317.

No. 79–756. ABUJASEN *v.* UNITED STATES; and
No. 79–5668. SORZANO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 602 F. 2d 1201.

No. 79–762. DIFONZO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 603 F. 2d 1260.

No. 79–763. CHAVEZ ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 603 F. 2d 143.

No. 79–780. CONTINENTAL PLASTICS OF OKLAHOMA, INC. *v.* PLASTIC CONTAINER CORP. C. A. 10th Cir. Certiorari denied. Reported below: 607 F. 2d 885.

No. 79–786. MARKS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 603 F. 2d 582.

No. 79–803. LARKE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 603 F. 2d 226.

No. 79–810. KNAPP *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 585 S. W. 2d 416.

No. 79–817. MACKENZIE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 601 F. 2d 221.

No. 79–852. LIEBERMAN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 608 F. 2d 889.

No. 79–859. CORTINA ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 605 F. 2d 1269.

No. 79–864. PERRY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 79–5191. LAGRONE *v.* ALFORD, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 79–5246. MARQUES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 600 F. 2d 742.

No. 79–5291. MATTHEWS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 603 F. 2d 48.

No. 79–5305. NEUMANN *v.* UNITED STATES. Ct. Cl. Certiorari denied.

No. 79–5311. ROBINSON *v.* WOLFF, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 603 F. 2d 635.

No. 79–5330. BILLINGSLEY *v.* GUNN, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 601 F. 2d 602.

No. 79–5335. WILSON *v.* WARDEN, ILLINOIS STATE PENITENTIARY. C. A. 7th Cir. Certiorari denied. Reported below: 600 F. 2d 66.

No. 79–5370. STOUT *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 578 S. W. 2d 761.

No. 79–5373. JONAS *v.* ROBINSON, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 79–5392. DOMINGUEZ-LAURA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 601 F. 2d 1193.

No. 79–5396. BULLOCK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 599 F. 2d 1058.

No. 79-5404. BACA *v.* MALLEY, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 79-5414. BERRY *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 90 Wis. 2d 316, 280 N. W. 2d 204.

No. 79-5436. CRAWFORD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 601 F. 2d 962.

No. 79-5439. IRVING *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 485 Pa. 596, 403 A. 2d 549.

No. 79-5442. GULLEY *v.* HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 5th Cir. Certiorari denied. Reported below: 597 F. 2d 281.

No. 79-5446. VANDER PAUWERT *v.* UNITED STATES DEPARTMENT OF JUSTICE. C. A. 10th Cir. Certiorari denied.

No. 79-5448. OLIVERO *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 70 App. Div. 2d 789, 416 N. Y. S. 2d 159.

No. 79-5471. JOHNSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 605 F. 2d 729.

No. 79-5475. ENGLAND *v.* UNITED STATES; and
No. 79-5541. SOLANO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 605 F. 2d 1141.

No. 79-5480. THORNTON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 607 F. 2d 1007.

No. 79-5503. MILLER *v.* UNITED STATES. Ct. Cl. Certiorari denied.

No. 79-5513. ORTIZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 603 F. 2d 76.

No. 79-5523. UMBOWER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 602 F. 2d 754.

No. 79-5526. LENZA *v.* MISSOURI. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 582 S. W. 2d 703.

No. 79-5534. HIBBARD-HUGHES *v.* O'NEIL ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 601 F. 2d 588.

No. 79-5536. PROPOTNICK *v.* HENNEPIN COUNTY SHERIFF ET AL. C. A. 8th Cir. Certiorari denied.

No. 79-5544. WAGNER *v.* MABRY, CORRECTION COMMISSIONER. C. A. 8th Cir. Certiorari denied. Reported below: 615 F. 2d 1365.

No. 79-5548. FRANCOIS *v.* FRANCOIS. C. A. 3d Cir. Certiorari denied. Reported below: 599 F. 2d 1286.

No. 79-5556 HOLDEN *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 79-5559. FERRELL *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 149 Ga. App. 405, 254 S. E. 2d 404.

No. 79-5562. CHODOS *v.* FEDERAL BUREAU OF INVESTIGATION. C. A. 2d Cir. Certiorari denied.

No. 79-5568. JOHNSON *v.* HOWERTON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 609 F. 2d 507.

No. 79-5581. BREWSTER *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied.

No. 79-5582. SELLERS *v.* RIDDLE, CORRECTIONAL SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. Reported below: 609 F. 2d 510.

No. 79-5586. ROBESON *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 285 Md. 498, 403 A. 2d 1221.

No. 79-5588. D. C. C. *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. Reported below: — Colo. —, 599 P. 2d 881.

No. 79-5591. MARSH *v.* MORGAN, MARION COUNTY CLERK. Sup. Ct. Ore. Certiorari denied.

No. 79-5592. WOOD *v.* JEFFES, CORRECTIONAL SUPERINTENDENT, ET AL.; and WOOD *v.* DAVIS ET AL. C. A. 3d Cir. Certiorari denied.

No 79-5593. KIMBLE *v.* PLEASANT HILLS CHILDREN'S HOME OF THE ASSEMBLIES OF GOD, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 601 F. 2d 1193.

No. 79-5595. TENNART *v.* AUCOIN ET AL. C. A. 5th Cir. Certiorari denied.

No. 79-5596. SMITH *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 599 P. 2d 413.

No. 79-5597. HAMPTON *v.* WYRICK, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 606 F. 2d 834.

No. 79-5606. LUMAS *v.* COMMERCIAL CARTAGE CO. C. A. 8th Cir. Certiorari denied. Reported below: 605 F. 2d 1209.

No. 79-5608. BUSACCA *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 69 App. Div. 2d 1021, 415 N. Y. S. 2d 314.

No. 79-5611. MORROW *v.* DAYTON NEWSPAPERS, INC. C. A. 6th Cir. Certiorari denied.

No. 79-5615. TOLBERT *v.* JAGO, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 607 F. 2d 753.

No. 79-5616. JOHNS *v.* WOODBRIDGE TOWNSHIP ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 609 F. 2d 501.

No. 79-5622. CARTER *v.* LYNN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 597 F. 2d 281.

No. 79–5627. SANDERS ET AL. *v.* TARBUTTON ET AL. C. A. 4th Cir. Certiorari denied.

No. 79–5628. TEPLITSKY *v.* ENVIRONMENTAL PROTECTION AGENCY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 608 F. 2d 1369.

No. 79–5630. CHIARELLO *v.* CHAIRMAN OF THE NEW YORK STATE PAROLE BOARD ET AL. C. A. 2d Cir. Certiorari denied.

No. 79–5633. TAMI ET UX. *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 79–5636. GAINES *v.* MERCHANTS NATIONAL BANK & TRUST COMPANY OF INDIANAPOLIS. C. A. 7th Cir. Certiorari denied.

No. 79–5637. FALES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 607 F. 2d 1003.

No. 79–5638. SINCLAIR *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 599 F. 2d 673.

No. 79–5640. THOMAS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 601 F. 2d 590.

No. 79–5646. ESHAM *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 611 F. 2d 374.

No. 79–5651. YOPP *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 611 F. 2d 375.

No. 79–5654. CERVANTES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 609 F. 2d 974.

No. 79–5656. RODRIGUEZ *v.* SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 1st Cir. Certiorari denied. Reported below: 607 F. 2d 993.

No. 79–5658. SCRUGGS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 610 F. 2d 819.

No. 79-5664. PHILLIPS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 606 F. 2d 884.

No. 79-5666. EVANKO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 604 F. 2d 21.

No. 79-5671. NEWTOP *v.* JAMES ET AL. C. A. 9th Cir. Certiorari denied.

No. 79-5673. COOPER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 606 F. 2d 96.

No. 79-5675. CHESTNUT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 608 F. 2d 1374.

No. 79-5690. FRANKLIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 611 F. 2d 374.

No. 79-5692. ALEXANDER ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 610 F. 2d 814.

No. 79-5706. JOHNSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 607 F. 2d 1007.

No. 79-5713. JOHNSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 608 F. 2d 1374.

No. 79-5716. VEYTIA-BRAVO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 603 F. 2d 1187.

No. 79-5718. TENSLEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 609 F. 2d 512.

No. 79-5723. SCALF *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 603 F. 2d 1168.

No. 79-5729. PALACIOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 605 F. 2d 564.

No. 79-5735. MOORE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 599 F. 2d 310.

No. 79-5768. LONG *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 79-101. BLUM, COMMISSIONER, DEPARTMENT OF SOCIAL SERVICES OF NEW YORK, ET AL. *v.* SWIFT ET AL. C. A. 2d Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 598 F. 2d 312.

No. 79-836. MITCHELL, WARDEN *v.* HARRIS. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 607 F. 2d 1081.

No. 79-377. DOW JONES & CO., INC., ET AL. *v.* UNITED STATES POSTAL SERVICE;

No. 79-378. MAGAZINE PUBLISHERS ASSN., INC., ET AL. *v.* UNITED STATES POSTAL SERVICE; and

No. 79-379. AMERICAN BUSINESS PRESS, INC. *v.* UNITED STATES POSTAL SERVICE. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE WHITE would grant certiorari. Reported below: — U. S. App. D. C. —, 607 F. 2d 392.

No. 79-519. HANDGARDS, INC. *v.* ETHICON, INC.; and

No. 79-674. ETHICON, INC. *v.* HANDGARDS, INC. C. A. 9th Cir. Certiorari denied. MR. JUSTICE WHITE would grant certiorari. Reported below: 601 F. 2d 986.

No. 79-667. MICHIGAN *v.* ROSALES. Sup. Ct. Mich. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 406 Mich. 624, 281 N. W. 2d 126.

No. 79-726. LOUISVILLE AND JEFFERSON COUNTY METROPOLITAN SEWER DISTRICT ET AL. *v.* CITY OF EVANSVILLE, INDIANA, ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEWART would grant certiorari. Reported below: 604 F. 2d 1008.

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No. 79–738. PALMER *v.* BOARD OF EDUCATION OF THE CITY OF CHICAGO ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE BRENNAN would grant certiorari. Reported below: 603 F. 2d 1271.

No. 79–739. THORNBURGH, GOVERNOR OF PENNSYLVANIA, ET AL. *v.* PHILADELPHIA WELFARE RIGHTS ORGANIZATION ET AL. C. A. 3d Cir. Motion of respondent Louise Brookins for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 602 F. 2d 1114.

No. 79–5552. THIGPEN *v.* ALABAMA. Ct. Crim. App. Ala.; and

No. 79–5632. ROACH *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: No. 79–5552, 372 So. 2d 385; No. 79–5632, — S. C. —, 255 S. E. 2d 799.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia,* 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 79–5575. JAGNANDAN ET AL. *v.* MISSISSIPPI STATE UNIVERSITY ET AL. Sup. Ct. Miss. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 373 So. 2d 252.

Rehearing Denied

No. 78–1848. UNITED STATES EX REL. PETROFSKY *v.* VAN COTT, BAGLEY, CORNWALL & MCCARTHY ET AL., *ante,* p. 839;

No. 78–6529. TURNER *v.* MASSEY, CORRECTIONAL SUPERINTENDENT, *ante,* p. 914;

No. 78–6683. STODDARD *v.* WEAVER ET AL., *ante,* p. 850; and

No. 78–6785. SILO *v.* WARDEN, HOLMESBURG PRISON, ET AL., *ante,* p. 855. Petitions for rehearing denied.

No. 78-6928. POPE *v.* UNITED STATES, *ante,* p. 925;

No. 79-197. SKOKO ET AL., BOARD OF COUNTY COMMISSIONERS OF CLACKAMAS COUNTY, OREGON *v.* ANDRUS, SECRETARY OF THE INTERIOR, ET AL., *ante,* p. 927;

No. 79-570. STONER *v.* HUTSON ET AL., *ante,* p. 967;

No. 79-5052. GILBERT *v.* YALANZON ET AL., *ante,* p. 873; and

No. 79-5162. LEUSCHNER *v.* MARYLAND, *ante,* p. 933. Petitions for rehearing denied.

No. 78-6903. DYKES *v.* ILLINOIS, *ante,* p. 940;

No. 79-454. SHURE BROS., INC. *v.* KORVETTES, INC., DBA E. J. KORVETTE, *ante,* 942;

No. 79-532. HARTE *v.* COUNTY OF LOS ANGELES, *ante,* p. 952;

No. 79-5247. SHAW *v.* SOUTH CAROLINA, *ante,* p. 957;

No. 79-5376. JONES *v.* GEORGIA, *ante,* p. 957;

No. 79-5388. WOJLOH *v.* ADDISON ET AL., *ante,* p. 945;

No. 79-5398. GEORGE *v.* LOUISIANA, *ante,* p. 953;

No. 79-5399. TORGERSON *v.* MCCLAY, *ante,* p. 953;

No. 79-5407. STEVENS *v.* HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, *ante,* p. 945; and

No. 79-5424. JAFREE *v.* SCOTT, ATTORNEY GENERAL OF ILLINOIS, *ante,* p. 945. Petitions for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of these petitions.

No. 78-6762. ROGERS *v.* LING ET AL., *ante,* p. 854. Motion for leave to file petition for rehearing denied.

No. 79-203. OCHS *v.* UNITED STATES, *ante,* p. 955; and

No. 79-5125. RUIZ *v.* CALIFORNIA, *ante,* p. 943. Motions for leave to file petitions for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of these motions.

JANUARY 11, 1980

Miscellaneous Order

No. A-600 (79-5919). TRIMBLE *v.* CONLEY, JUDGE, ET AL. Sup. Ct. Mo. Application for stay, addressed to THE CHIEF JUSTICE, and by him referred to the Court, denied.

JANUARY 14, 1980

Appeals Dismissed

No. 78-1422. RETIREMENT FUND TRUST OF THE PLUMBING, HEATING & PIPING INDUSTRY OF SOUTHERN CALIFORNIA *v.* JOHNS. Appeal from Ct. App. Cal., 4th App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 85 Cal. App. 3d 511, 149 Cal. Rptr. 551.

No. 78-1881. CARPENTERS PENSION TRUST FUND FOR NORTHERN CALIFORNIA *v.* CAMPA ET AL. Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of substantial federal question. Reported below: 89 Cal. App. 3d 113, 152 Cal. Rptr. 362.

Vacated and Remanded After Certiorari Granted

No. 79-136. DIAMOND, COMMISSIONER OF PATENTS AND TRADEMARKS *v.* CHAKRABARTY. C. C. P. A. [Certiorari granted *sub nom. Parker* v. *Bergy, ante,* p. 924.] Judgment as to *In re Bergy* et al. vacated and case remanded with directions to dismiss the appeal as moot. Motion of Cornell D. Cornish for leave to file a brief as *amicus curiae* granted.

Certiorari Granted—Vacated and Remanded. (See also 79-5180, *ante,* p. 248.)

No. 79-759. PERINI NORTH RIVER ASSOCIATES ET AL. *v.* FUSCO ET AL. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light

of *P. C. Pfeiffer Co.* v. *Ford, ante,* p. 69. MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN dissent. Reported below: 601 F. 2d 659.

Miscellaneous Orders

No. A–538. GUSIKOFF ET AL. *v.* UNITED STATES. D. C. S. D. Fla. Application for stay pending appeal to the United States Court of Appeals for the Fifth Circuit, addressed to MR. JUSTICE MARSHALL and referred to the Court, denied.

No. A–592. BURLINGTON NORTHERN, INC. *v.* UNITED STATES ET AL. Application for stay of an order of the Interstate Commerce Commission pending appeal to the United States Court of Appeals for the Sixth Circuit, presented to MR. JUSTICE STEWART, and by him referred to the Court, denied.

No. D–170. IN RE DISBARMENT OF COHEN. Disbarment entered. [For earlier order herein, see *ante,* p. 894.]

No. D–172. IN RE DISBARMENT OF BENDES. Disbarment entered. [For earlier order herein, see *ante,* p. 894.]

No. D–174. IN RE DISBARMENT OF SPOONER. Disbarment entered. [For earlier order herein, see *ante,* p. 894.]

No. D–183. IN RE DISBARMENT OF BARNES. It is ordered that Harry Davis Barnes, of Elkton, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 9, Orig. UNITED STATES *v.* LOUISIANA ET AL. Exceptions to Report of the Special Master set for oral argument in due course. MR. JUSTICE MARSHALL took no part in the consideration or decision of this order. [For earlier order herein, see, *e. g., ante,* p. 816.]

No. 78–6029. LaRocca *v.* United States. C. A. 3d Cir. [Certiorari granted, 442 U. S. 916.] Motion for appointment of counsel granted, and it is ordered that Gerald Goldman, Esquire, of Washington, D. C., be appointed to serve as counsel for petitioner in this case.

No. 79–4. Williams et al. *v.* Zbaraz et al.;

No. 79–5. Miller, Acting Director, Department of Public Aid of Illinois, et al. *v.* Zbaraz et al.; and

No. 79–491. United States *v.* Zbaraz et al. D. C. N. D. Ill. [Probable jurisdiction postponed, *ante*, p. 962.] Motion of Alan Ernest to be appointed counsel for children unborn and born alive denied. Motion of Legal Defense Fund for Unborn Children for leave to file a brief as *amicus curiae* denied.

No. 79–48. Andrus, Secretary of the Interior, et al. *v.* Glover Construction Co. C. A. 10th Cir. [Certiorari granted, *ante*, p. 962.] Motion of petitioner to dispense with printing appendix granted.

No. 79–134. Consolidated Edison Company of New York, Inc. *v.* Public Service Commission of New York. Ct. App. N. Y. [Probable jurisdiction noted, *ante*, p. 822.] Motions of New England Legal Foundation, Long Island Lighting Co., and New York State Consumer Protection Board et al. for leave to file briefs as *amici curiae* granted.

No. 79–192. New York Gaslight Club, Inc., et al. *v.* Carey. C. A. 2d Cir. [Certiorari granted, *ante*, p. 897.] Motion of New York State Division of Human Rights et al. for leave to file a brief as *amici curiae* granted.

No. 79–5863. Godwin *v.* United States. C. A. 2d Cir. Motion of petitioner to seal petition denied.

Probable Jurisdiction Noted

No. 79-492. FUNGAROLI *v.* FUNGAROLI. Appeal from Ct. App. N. C. Motion of appellee for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 40 N. C. App. 397, 252 S. E. 2d 849.

Certiorari Granted

No. 79-677. REEVES, INC. *v.* KELLEY ET AL. C. A. 8th Cir. Certiorari granted. Reported below: 603 F. 2d 736.

No. 79-5601. GOMEZ *v.* TOLEDO. C. A. 1st Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 602 F. 2d 1018.

Certiorari Denied. (See also No. 79-1422, *supra.*)

No. 79-107. CONNECTICUT COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES ET AL. *v.* PERVEL INDUSTRIES, INC. C. A. 2d Cir. Certiorari denied. Reported below: 603 F. 2d 214.

No. 79-218. ZIPERSTEIN ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 601 F. 2d 281.

No. 79-258. BUCYRUS-ERIE CO. *v.* DEPARTMENT OF INDUSTRY, LABOR, AND HUMAN RELATIONS OF WISCONSIN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 599 F. 2d 205.

No. 79-505. UNIHEALTH SERVICES CORP. *v.* HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL. C. A. 5th Cir. Certiorari denied.

No. 79-554. ALPINE INVESTMENTS, INC. *v.* BARTON ET AL. Sup. Ct. Okla. Certiorari denied. Reported below: 596 P. 2d 532.

No. 79–595. NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL. *v.* LONG ISLAND LIGHTING CO.; and

No. 79–629. LONG ISLAND LIGHTING CO. *v.* NEW YORK STATE PUBLIC SERVICE COMMISSION ET AL. C. A. 2d Cir. Certiorari before judgment denied.

No. 79–598. MICHAEL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 605 F. 2d 1198.

No. 79–603. HOTEL CONQUISTADOR, INC. *v.* UNITED STATES; and

No. 79–742. UNITED STATES *v.* HOTEL CONQUISTADOR, INC. Ct. Cl. Certiorari denied. Reported below: — Ct. Cl. —, 597 F. 2d 1348.

No. 79–661. LAGORGA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 79–662. BIRDMAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 602 F. 2d 547.

No. 79–679. CONTINENTAL GROUP, INC., ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 603 F. 2d 444.

No. 79–758. GASORAMA, INC. *v.* IMPERIAL GAS COMPANY OF PUERTO RICO, INC. Super. Ct. P. R. Certiorari denied.

No. 79–760. FLORES *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 581 S. W. 2d 490.

No. 79–767. STATE FARM FIRE & CASUALTY CO. *v.* HIME. Sup. Ct. Minn. Certiorari denied. Reported below: 284 N. W. 2d 829.

No. 79–768. DEJOHN *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: — Pa. —, 403 A. 2d 1283.

No. 79–769. TRUSTEES OF THE COLORADO CEMENT MASONS APPRENTICE TRUST FUND ET AL. *v.* LEVY ET AL. C. A. 10th Cir. Certiorari denied. Reported below: — F. 2d —.

No. 79–773. VAGLE *v.* PICKANDS MATHER & Co. C. A. 8th Cir. Certiorari denied.

No. 79–781. HAMLIN *v.* F. GREGORIE & SON ET AL. Sup. Ct. S. C. Certiorari denied. Reported below: — S. C. —, 257 S. E. 2d 699.

No. 79–785. PEACHES *v.* CITY OF EVANSVILLE, INDIANA, ET AL. Ct. App. Ind. Certiorari denied. Reported below: — Ind. App. —, 389 N. E. 2d 322.

No. 79–806. DUNGAN *v.* KENTUCKY BAR ASSN. Sup. Ct. Ky. Certiorari denied. Reported below: 586 S. W. 2d 15.

No. 79–857. RAIMONDI *v.* COURT OF APPEALS OF MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 285 Md. 607, 403 A. 2d 1234.

No. 79–865. SCHIFALACQUA *v.* CONTINENTAL CASUALTY Co., AKA CNA INSURANCE, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 605 F. 2d 1197.

No. 79–871. MAYO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 610 F. 2d 814.

No. 79–874. TREASURE ISLE, INC. *v.* CARR, U. S. DISTRICT JUDGE. C. A. 5th Cir. Certiorari denied.

No. 79–5139. SINCLAIR *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 79–5520. JOHNSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 605 F. 2d 1025.

No. 79–5527. TONEY ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 598 F. 2d 1349.

No. 79-5529. COOK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 608 F. 2d 1175.

No. 79-5535. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 600 F. 2d 14.

No. 79-5574. DE VITO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 609 F. 2d 503.

No. 79-5589. RIVERA *v.* SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 1st Cir. Certiorari denied. Reported below: 607 F. 2d 993.

No. 79-5645. KYLES *v.* KLEIN, DIRECTOR, DEPARTMENT OF HEALTH AND WELFARE OF IDAHO, ET AL. C. A. 9th Cir. Certiorari denied.

No. 79-5648. WILSON *v.* AMERICAN CAN CO. ET AL. C. A. 3d Cir. Certiorari denied.

No. 79-5660. MOLDOVAN *v.* ALLIS CHALMERS MANUFACTURING CO. ET AL. Ct. App. Mich. Certiorari denied. Reported below: 83 Mich. App. 373, 268 N. W. 2d 656.

No. 79-5678. CURRY *v.* BUREAU OF CORRECTIONS OF KENTUCKY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 611 F. 2d 371.

No. 79-5687. RAMSEY *v.* WESTERN UNION TELEGRAPH CO. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 368 So. 2d 1377.

No. 79-5743. MARTINEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 604 F. 2d 361.

No. 79-5749. BURNET *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 612 F. 2d 575.

No. 79-5750. LUCK *v.* STRICKLAND, CORRECTIONS SUPERINTENDENT, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 605 F. 2d 1203.

No. 79-5756. MANN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 612 F. 2d 575.

No. 79-5758. HODGES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 606 F. 2d 520.

No. 79-5759. MCGILL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 604 F. 2d 1252.

No. 79-5770. DEL PRETE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 608 F. 2d 1374.

No. 79-5772. CORRAL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 79-5781. WOODING *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 611 F. 2d 375.

No. 78-1445. SOUTHERN CALIFORNIA IBEW-NECA PENSION PLAN ET AL. *v.* JOHNSTON ET VIR. Ct. App. Cal., 2d App. Dist. Motion of respondent Frances E. Johnston for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 85 Cal. App. 3d 900, 149 Cal. Rptr. 798.

No. 79-583. MINNESOTA *v.* HELENBOLT. Sup. Ct. Minn. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 280 N. W. 2d 631.

No. 79-666. BISHOP ET AL. *v.* FURTADO ET AL. C. A. 1st Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 604 F. 2d 80.

No. 79-486. UNITED STATES STEEL CORP. ET AL. *v.* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY. C. A. 7th Cir. Certiorari denied. Reported below: 605 F. 2d 283.

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE WHITE and MR. JUSTICE POWELL join, dissenting.

On August 7, 1977, Congress enacted the Clean Air Act Amendments of 1977, Pub. L. 95-95, 91 Stat. 685. These

Amendments required compliance by 1982 with various ambient air quality standards promulgated earlier by the United States Environmental Protection Agency (EPA). Under the Amendments, the States were to submit to EPA a list of "nonattainment areas," *i. e.*, those regions measured as not complying with EPA's standards. The deadline for this submission was December 5, 1977. EPA was then to promulgate a composite list of nonattainment areas by February 3, 1978. Finally, the States were to rely upon EPA's list in formulating "State Implementation Plans" by January 1, 1979. According to the Amendments, these plans were to impose certain stringent restrictions upon industries located in regions designated as nonattainment areas.

Both petitioners have facilities located in Lake County, Ind., which was included in the list of nonattainment areas submitted by the State of Indiana to EPA on December 5, 1977. EPA promulgated its list, which included Lake County, on March 3, 1978. At the same time, EPA announced that the designations were immediately applicable and effective. In explaining its failure to promulgate the list as a proposed rule and to comply with the notice-and-comment provisions of the Administrative Procedure Act, 5 U. S. C. § 553, EPA asserted that it had "good cause" to dispense with the requirements as provided in 5 U. S. C. §§ 553 (b)(B) and 553 (d)(3). In particular it cited the need to give the States immediate guidance on the location of nonattainment areas so that those States could meet the deadline of January 1, 1979, for their implementation plans. EPA did solicit after-the-fact comments, due by May 2, 1978, and subsequently amended its list in certain respects not relevant here.

Petitioners brought the present action for review in the United States Court of Appeals for the Seventh Circuit, claiming, *inter alia*, that EPA's designation of Lake County as a nonattainment area was "not in accordance with law" under the APA because of EPA's failure to follow the notice-and-

comment procedure. The Court of Appeals rejected this claim on two grounds. First, it held that the tight statutory schedule under which EPA was operating provided that agency with "good cause" to dispense with the usual procedures. 605 F. 2d 283, 286 (1979). Second, it held that, under 42 U. S. C. § 7607 (d)(9) (1976 ed., Supp. I), even if EPA had failed to abide by the procedural requirements of the APA its action would not be reversed unless petitioners demonstrated that they had objected to the procedure during the grace period provided by EPA for after-the-fact comments and that the error was " 'so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.' " 605 F. 2d, at 290, quoting 42 U. S. C. § 7607 (d)(8) (1976 ed. Supp. I) as incorporated by § 7607 (d)(9)(D) (1976 ed., Supp. I). According to the Court of Appeals, petitioners had failed to carry their burden as to either of these factors.

The first holding of the court below is in square conflict with the decisions of two other Courts of Appeals. In *Sharon Steel Corp.* v. *EPA*, 597 F. 2d 377 (CA3 1979), and *United States Steel Corp.* v. *EPA*, 595 F. 2d 207 (CA5 1979), the Courts of Appeals for the Third and Fifth Circuits held that EPA did not have good cause to dispense with notice-and-comment rulemaking in promulgating the very list at issue here.

While conceding that a conflict exists, EPA argues that "the unique statutory circumstances that created the practical need to promulgate the original designations without prior notice and comment no longer exist, and the issue presented . . . will not recur." Brief in Opposition 7. In the area of environmental regulation, however, tight statutory schedules are both quite common and frequently unmet. If EPA's actions in the present case pass without review by this Court, persons subject to EPA's jurisdiction in different parts of the country will be entitled to different procedural protections when either they or EPA find themselves up against a dead-

line. Moreover, these recurring deadlines will almost invariably have passed by the time this Court receives a petition, allowing EPA to argue in each case that, because the deadline has passed, the issue is no longer ripe for review. While no party claims this case is moot, the fact that the issue is "capable of repetition, yet evad[es] review," *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498, 515 (1911), makes this a classic case for a grant of certiorari.

As for the alternative holding of the court below, it appears that the unusually strong showing demanded by § 7607 (d)(9)(D), but not by the APA, is required only in certain types of actions listed in § 7607 (d)(1). See 42 U. S. C. § 7607 (d)(9) (1976 ed., Supp. I). Although the Court of Appeals suggested that promulgation of the list "arguably" could be characterized as one of those enumerated actions, it went well beyond the statutory language to hold that "Congress meant this limitation on review of procedural errors to extend to all rulemaking by the EPA whether or not it is in the explicit categories covered by all the provisions of section 7607 (d)." 605 F. 2d, at 291. As petitioners point out, this ruling has the effect of establishing two Administrative Procedure Acts, one for the EPA and one for all other agencies.

Apparently uncomfortable with this holding, EPA attempts to dismiss it as dicta. Brief in Opposition 9. It clearly is not. It was an independent, alternative basis for the decision of the court below, no more dicta than its companion holding that EPA demonstrated good cause. In fact, the Court of Appeals relied on its interpretation of § 7607 (d)(9) as a reason for rejecting the conclusions of the Third Circuit and the Fifth Circuit as to the legality of EPA's action. See 605 F. 2d, at 291, n. 14.

Either of these issues might merit certiorari in its own right; in tandem they present a formidable candidate for review. The fact that the requirements of the Clean Air Act Amendments virtually swim before one's eyes is not a rational basis, under these circumstances, for refusing to exercise our discre-

tionary jurisdiction. Admittedly, it would be easier to decide a case turning on common-law principles of property or contract, and more interesting to decide a case involving competing fundamental principles of constitutional law. But here, in grappling with the problem of air pollution on a nationwide basis, Congress has quite understandably enacted a very complex statute that seeks to accomplish regulatory goals while at the same time providing procedural protection for the regulated. It might have avoided some of the complexity by making the EPA administrator a virtual czar to the extent allowed by the Constitution, but it chose a more balanced approach. Congress has made this choice and has designated the courts of appeals to construe the innumerable provisions of the Act. We can avoid invocation of our jurisdiction to resolve conflicts among the decisions of the courts of appeals construing important sections of the statute only by breaking faith with the spirit, if not the letter, of those Acts of Congress making our jurisdiction in virtually all cases discretionary rather than obligatory. I therefore would grant the writ of certiorari.

No. 79-765. WEBSTER *v.* BOARD OF EDUCATION OF THE CITY OF CHICAGO ET AL. C. A. 7th Cir. Motion of Chicago Lawyers' Committee for Civil Rights Under Law, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 599 F. 2d 793.

No. 79-766. MCGHEE *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. MR. JUSTICE WHITE would grant certiorari. Reported below: 280 N. W. 2d 436.

No. 79-5383. G. G. *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. MR. JUSTICE MARSHALL would grant certiorari.

No. 79-5401. T.A.S. *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. MR. JUSTICE MARSHALL would grant certiorari.

No. 79-5462. KAUFMAN *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL would grant certiorari and reverse the conviction. Reported below: — S. W. 2d —.

Rehearing Denied

No. 79-585. DOUBLEDAY & CO., INC. *v.* BINDRIM, *ante,* p. 984. Petition for rehearing denied.

JANUARY 17, 1980

Dismissal Under Rule 60

No. 79-438. GALLAGHER ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari dismissed under this Court's Rule 60. Reported below: 602 F. 2d 1139.

JANUARY 21, 1980

Appeals Dismissed

No. 79-606. LUMBER, PRODUCTION & INDUSTRIAL WORKERS LOCAL 2362 *v.* WONDZELL ET AL. Appeal from Sup. Ct. Alaska dismissed for want of substantial federal question. MR. JUSTICE WHITE and MR. JUSTICE REHNQUIST would note probable jurisdiction and set case for oral argument. Reported below: 601 P. 2d 584.

No. 79-776. KOKER ET UX. *v.* SAGE ET AL. Appeal from Ct. App. Wash. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 79-834. AUTOMOBILE DRIVERS & DEMONSTRATORS UNION LOCAL NO. 882 ET AL. *v.* DEPARTMENT OF RETIREMENT SYSTEMS OF WASHINGTON. Appeal from Sup. Ct. Wash. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 92 Wash. 2d 415, 598 P. 2d 379.

No. 79-5694. PARISH *v.* PARISH. Appeal from Sup. Ct. Ala. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 374 So. 2d 351.

No. 79-820. MINNESOTA MINING & MANUFACTURING CO. *v.* MINNESOTA, BY WILSON, COMMISSIONER, DEPARTMENT OF HUMAN RIGHTS. Appeal from Sup. Ct. Minn. dismissed for want of substantial federal question. THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN took no part in the consideration or decision of this case. Reported below: 289 N. W. 2d 396.

No. 79-5465. MARKOFF *v.* AMERICAN HERITAGE LIFE INSURANCE CORP. ET AL. Appeal from Sup. Ct. Nev. dismissed for want of a properly presented federal question.

No. 79-787. KAVANAGH ET AL. *v.* LONDON GROVE TOWNSHIP ET AL. Appeal from Sup. Ct. Pa. dismissed for want of substantial federal question. Reported below: — Pa. —, 404 A. 2d 393.

Certiorari Granted—Reversed and Remanded. (See No. 79-5386, *ante*, p. 469.)

Miscellaneous Orders

No. A-435 (79-851). CLAUSER *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Application for bail, addressed to MR. JUSTICE POWELL and referred to the Court, denied.

No. A-576. CITIZENS CONCERNED FOR SEPARATION OF CHURCH AND STATE *v.* CITY AND COUNTY OF DENVER. Application to vacate stay entered by the United States Court of Appeals for the Tenth Circuit, presented to MR. JUSTICE WHITE, and by him referred to the Court, denied. MR. JUSTICE MARSHALL would grant the application.

No. A-596. IN RE OBERKOETTER. C. A. 1st Cir. Application for stay, addressed to MR. JUSTICE MARSHALL and referred to the Court, denied.

309-761 O - 80 - 27 QL 1

No. D–181. IN RE DISBARMENT OF FREEDSON. Disbarment entered. [For earlier order herein, see *ante,* p. 922.]

No. D–184. IN RE DISBARMENT OF CAIN. It is ordered that Carl L. Cain, of Los Angeles, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 5, Orig. UNITED STATES *v.* CALIFORNIA. Exception to Report of the Special Master set for oral argument in due course. MR. JUSTICE MARSHALL took no part in the consideration or decision of this order. [For earlier order herein, see, *e. g., ante,* p. 816.]

No. 79–66. AARON *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 2d Cir. [Certiorari granted, *ante,* p. 914.] Motion of Securities Industry Assn. for leave to file a brief as *amicus curiae* granted.

No. 79–192. NEW YORK GASLIGHT CLUB, INC., ET AL. *v.* CAREY. C. A. 2d Cir. [Certiorari granted, *ante,* p. 897.] Motion of the Attorney General of New York et al. for leave to participate in oral argument as *amici curiae* denied.

No. 79–813. AMERICAN COMMERCIAL LINES, INC. *v.* GRIFFITH ET AL. C. A. 3d Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

Certiorari Granted

No. 79–1082. NATIONAL LABOR RELATIONS BOARD *v.* INTERNATIONAL LONGSHOREMEN'S ASSN., AFL–CIO, ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: — U. S. App. D. C. —, 613 F. 2d 890.

No. 79–838. MAINE ET AL. *v.* THIBOUTOT ET VIR. Sup. Jud. Ct. Me. Motion of respondents for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 405 A. 2d 230.

Certiorari Denied. (See also Nos. 79–776, 79–834, and 79–5694, *supra.*)

No. 78–1737. FOLEY ET AL. *v.* UNITED STATES;

No. 78–1838. ROBERT L. GRUEN, INC. *v.* UNITED STATES;

No. 79–93. SHANNON & LUCHS CO. *v.* UNITED STATES; and

No. 79–186. BOGLEY, INC., ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 598 F. 2d 1323.

No. 79–248. CERILLI ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 603 F. 2d 415.

No. 79–355. SANCHEZ *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 582 S. W. 2d 813.

No. 79–373. JONES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 597 F. 2d 485.

No. 79–385. MCCARTHY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 602 F. 2d 1139.

No. 79–471. STRINGER *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 79–496. MOORE *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 65 Ill. App. 3d 712, 382 N. E. 2d 810.

No. 79–529. CHURCH OF SCIENTOLOGY OF CALIFORNIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 591 F. 2d 533.

No. 79–531. NEWELL ET AL. *v.* ORLEANS PARISH SCHOOL BOARD. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 370 So. 2d 655 and 658.

No. 79–542. HAY *v.* TEXAS BOARD OF PARDONS AND PAROLE. C. A. 5th Cir. Certiorari denied. Reported below: 599 F. 2d 447.

No. 79–568. OCCIDENTAL LIFE INSURANCE COMPANY OF CALIFORNIA *v.* SAFFO ET AL.; and

No. 79–573. KAVNER *v.* OCCIDENTAL LIFE INSURANCE COMPANY OF CALIFORNIA ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 602 F. 2d 1265.

No. 79–569. WEATHERSBY *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 79–647. COPELAND *v.* MARTINEZ, DIRECTOR, COMMUNITY SERVICES ADMINISTRATION. C. A. D. C. Cir. Certiorari denied. Reported below: 195 U. S. App. D. C. 399, 603 F. 2d 981.

No. 79–685. DRESSER INDUSTRIES, INC. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 596 F. 2d 1231.

No. 79–686. POWER *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: — Ct. Cl. —, 597 F. 2d 258.

No. 79–687. KYZAR *v.* HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 5th Cir. Certiorari denied. Reported below: 597 F. 2d 68.

No. 79–691. INDIANAPOLIS POWER & LIGHT CO. ET AL. *v.* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY. C. A. 7th Cir. Certiorari denied. Reported below: 605 F. 2d 558.

No. 79–695. BOSCH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 590 F. 2d 165.

No. 79–705. HOUSEHOLD FINANCE CORP. ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 602 F. 2d 1255.

No. 79–707. UPTEGROVE ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 600 F. 2d 1248.

No. 79–708. PHILADELPHIA FOOD STORE EMPLOYERS' LABOR COUNCIL *v.* RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL 1349, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 601 F. 2d 575.

No. 79–723. SHELBY COUNTY GOVERNMENT *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 6th Cir. Certiorari denied. Reported below: 601 F. 2d 588.

No. 79–730. PUERTO RICO ET AL. *v.* COMMONWEALTH OIL REFINING CO., INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 596 F. 2d 1239.

No. 79–732. PHELPS *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 226 Kan. 371, 598 P. 2d 180.

No. 79–778. BOARD OF TRUSTEES OF KEENE STATE COLLEGE ET AL. *v.* SWEENEY. C. A. 1st Cir. Certiorari denied. Reported below: 604 F. 2d 106.

No. 79–794. DEVITO, DIRECTOR, DEPARTMENT OF MENTAL HEALTH & DEVELOPMENTAL DISABILITIES *v.* LANG. Sup. Ct. Ill. Certiorari denied. Reported below: 76 Ill. 2d 311, 391 N. E. 2d 350.

No. 79–798. DEAN ET AL. *v.* AUSTIN, SECRETARY OF STATE OF MICHIGAN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 602 F. 2d 121.

No. 79–818. KARIJOLIC *v.* ILLINOIS BELL TELEPHONE CO. C. A. 7th Cir. Certiorari denied. Reported below: 601 F. 2d 596.

No. 79–821. MORGAN & CO., INC. *v.* OLIN CORP., INC. C. A. 4th Cir. Certiorari denied. Reported below: 599 F. 2d 1048.

No. 79–828. EDWARDS & HANLEY *v.* WELLS FARGO SECURITIES CLEARANCE CORP. C. A. 2d Cir. Certiorari denied. Reported below: 602 F. 2d 478.

No. 79–845. ALAMEDA COUNTY WATER DISTRICT *v.* SETHY. C. A. 9th Cir. Certiorari denied. Reported below: 602 F. 2d 894.

No. 79–891. SAXON *v.* JOHNSTON ET AL. Sup. Ct. Miss. Certiorari denied.

No. 79–892. DORMINEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 602 F. 2d 1220.

No. 79–941. EDGEWOOD HEALTH CARE CENTER, INC. *v.* UNITED STATES C. A. 1st Cir. Certiorari denied. Reported below: 608 F. 2d 13.

No. 79–5447. IN RE APPLICATION FOR ADMISSION TO THE BAR OF MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: — Mass. —, 392 N. E. 2d 533.

No. 79–5452. FELTS ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 602 F. 2d 146.

No. 79–5511. WILLIAMS *v.* ANDERSON ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 599 F. 2d 923.

No. 79–5558. EATON *v.* NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES. Super. Ct. N. J. Certiorari denied.

No. 79–5572. LILLIBRIDGE ET UX. *v.* MORTON, COMMISSIONER OF INTERNAL REVENUE, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 605 F. 2d 557.

No. 79–5600. HINES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 605 F. 2d 132.

No. 79–5603. COLON *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 364 So. 2d 899.

No. 79–5607. DAVIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 609 F. 2d 503.

No. 79–5643. FORD *v.* CIMINO ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 601 F. 2d 574.

No. 79-5661. THOMAS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 79-5669. PFISTER *v.* ANDERSON CLINIC, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 601 F. 2d 581.

No. 79-5676. GATTERMANN ET AL. *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 79-5682. JASPER *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 79-5684. BRINLEE *v.* CRISP, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 608 F. 2d 839.

No. 79-5689. WILLIS *v.* CUYLER, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 3d Cir. Certiorari denied.

No. 79-5691. MCCLOUD *v.* FOGG, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 79-5695. SANDERS *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 151 Ga. App. 590, 260 S. E. 2d 504.

No. 79-5696. KENNEDY *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: — Ind. —, 393 N. E. 2d 139.

No. 79-5698. FRANCISSE *v.* HOLLYWOOD CHEROKEE APARTMENTS ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 79-5701. TIAO-MING WU *v.* BOARD OF HIGHER EDUCATION, CUNY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 79-5708. PHILLIPS *v.* SMITH, CORRECTIONAL SUPERINTENDENT. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 70 App. Div. 2d 764, 419 N. Y. S. 2d 440.

No. 79–5711. SAYLOR *v.* OVERBERG, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 614 F. 2d 773.

No. 79–5715. GERSON *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied.

No. 79–5717. TAYLOR *v.* DALSHEIM, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 610 F. 2d 807.

No. 79–5720. STONECIPHER *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 581 S. W. 2d 491.

No. 79–5730. CRANE *v.* YOUNGER, ATTORNEY GENERAL OF CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied.

No. 79–5748. WRAY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 608 F. 2d 722.

No. 79–5766. DOBY *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: — S. C. —, 258 S. E. 2d 896.

No. 79–5771. GRINDSTAFF *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 614 F. 2d 773.

No. 79–5786. LANCELIN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 79–5787. MONTOYA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 79–5796. HILL ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 79–5810. SHANKS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 608 F. 2d 73.

No. 79–777. VERMONT *v.* WILLIAMS. Sup. Ct. Vt. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 137 Vt. 360, 406 A. 2d 375.

No. 79–772. CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION *v.* SUPERIOR COURT OF LOS ANGELES COUNTY (INSTITUTE OF GOVERNMENTAL ADVOCATES, REAL PARTY IN INTEREST). Sup. Ct. Cal. Certiorari denied. MR. JUSTICE WHITE and MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 25 Cal. 3d 33, 599 P. 2d 46.

No. 79–5704. CLARK *v.* VIRGINIA. Sup. Ct. Va.; and

No. 79–5722. CARRIGER *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: No. 79–5704, 219 Va. 237, 257 S. E. 2d 784; No. 79–5722, 123 Ariz. 335, 599 P. 2d 788.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia,* 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 78–5937. YBARRA *v.* ILLINOIS, *ante,* p. 85;

No. 79–534. PARRISH *v.* KENTUCKY, *ante,* p. 966;

No. 79–611. VASILIOS *v.* UNITED STATES, *ante,* p. 967;

No. 79–5255. AMADEO *v.* GEORGIA, *ante,* p. 974; and

No. 79–5418. WALDROP *v.* COMMISSIONER OF INTERNAL REVENUE, *ante,* p. 993. Petitions for rehearing denied.

No. 79–245. UNITED METHODIST CHURCH ET AL. *v.* BARR ET AL., *ante,* p. 973. Petition for rehearing denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

No. 79–5355. MAHLER *v.* WEISS, *ante,* p. 944. Motion for leave to file petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

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Reporter's Note

The next page is purposely numbered 1307. Preceding in-chambers opinions were reported in Part 1, at 1301–1306. These page numbers are the same as they will be in the bound volume, thus making the *permanent* citations available upon publication of the preliminary prints of the United States Reports.

SYNANON FOUNDATION, INC., ET AL. v. CALIFORNIA ET AL.

ON APPLICATION FOR STAY

No. A-556. Decided December 28, 1979

Application for a stay of the District Court's order denying a preliminary injunction sought by a church (applicant) to preclude respondents from instituting an action against the applicants in state court, is denied.

MR. JUSTICE REHNQUIST, Circuit Justice.

Upon consideration of the applicants' request for a stay of the order of the United States District Court for the Eastern District of California denying their prayer for a preliminary injunction precluding respondents, including George Deukmejian, the Attorney General of California, from instituting an action against the applicants in state court, the request is hereby denied.

The District Court's opinion denying the prayer for a preliminary injunction indicates that the Attorney General of California has the traditional power of the chief law enforcement officer of most jurisdictions to intervene in the administration of charitable trusts or corporations when he has reason to believe that they are not being administered in accordance with the trust instrument or in contravention of state law. We have stated previously that a trial judge's determination of a preliminary injunction should be reversed by this Court or by other appellate courts in the federal system only when the judge's "discretion was improvidently exercised." *Alabama* v. *United States*, 279 U. S. 229, 231 (1929). See also *Aberdeen & Rockfish R. Co.* v. *SCRAP*, 409 U. S. 1207 (1972) (BURGER, C. J., in chambers); *Keyes* v. *School Dist. No. 1, Denver, Colo.*, 396 U. S. 1215 (1969) (BRENNAN, J., in chambers).

Applicants contend, however, that by reason of the fact that they are a church, under the First and Fourteenth Amend-

ments to the United States Constitution they are somehow entitled to different treatment than that accorded to other charitable trusts. But we held only last Term that state courts might resolve property disputes in which hierarchical church organizations were involved in accordance with "neutral principles" of state law. *Jones* v. *Wolf*, 443 U. S. 595, 602 (1979); see also *Presbyterian Church* v. *Hull Church*, 393 U. S. 440, 449 (1969). The District Court presumably found that this principle will probably be applicable in this litigation. The Court of Appeals for the Ninth Circuit also denied the application for a stay. I find no reason to differ with the conclusion of these two courts. Applicants' request for relief is accordingly denied.

CALIFORNIA v. BRAESEKE

ON APPLICATION FOR STAY

No. A-636. Decided January 31, 1980

Application for a stay of the California Supreme Court's judgment holding that the State had not carried its burden of showing that respondent had waived his rights under *Miranda* v. *Arizona*, 384 U. S. 436, is granted pending referral of the matter to the next scheduled full Conference of this Court.

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicant, the State of California, has asked me to stay a judgment of the Supreme Court of California in which that court held that the State had not carried its burden of showing that respondent had waived the rights to which he is entitled under *Miranda* v. *Arizona*, 384 U. S. 436 (1966). The respondent, on the other hand, contends that the Supreme Court of California, which divided by a vote of 4–3 on the question, decided the question on a state-law ground.

If respondent is correct, that is the end of the matter. My own reading of the majority and dissenting opinions in the case leaves me in doubt, since the three dissenters concluded that "[t]here can be no doubt this twenty-year-old defendant knowingly and intelligently waived his *Miranda* protections."

Within the past month we have summarily reversed a judgment of the Supreme Court of Louisiana, holding that it did not hold the State to a high enough standard of proof as to the waiver of a defendant's "*Miranda*" rights. *Tague* v. *Louisiana*, *ante*, p. 469. On the other hand, last Term we twice reversed State Supreme Courts for imposing additional or stricter requirements than we thought were required by the *Miranda* decision as a matter of federal constitutional law. *Fare* v. *Michael C.*, 442 U. S. 707 (1979); *North*

Carolina v. *Butler*, 441 U. S. 369 (1979). In the latter case we said:

> "The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case. As we unequivocally said in *Miranda*, mere silence is not enough. That does not mean that the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that a defendant has waived his rights. The courts must presume that a defendant did not waive his rights; the prosecution's burden is great; but in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated." *Id.*, at 373.

Obviously this Court cannot review all decisions of other courts which hold that the prosecution has or has not carried its burden of showing that a defendant waived his "*Miranda*" rights. But my reading of the opinion of the Supreme Court of California in this case makes me think that if it was decided on the basis of federal constitutional law, it comes extraordinarily close to the adoption of a rule that in *no* cases can waiver be inferred from the actions and words of the person interrogated. I believe that four Members of the Court are sufficiently likely to share this view that I shall grant the stay requested by the State pending referral of the matter to the next scheduled full Conference of the Court, at which time the Court will have the opportunity of deciding whether to continue the stay, pending the filing of a petition for certiorari by the State, in order to remand the case to the Supreme Court of California so that it may say whether its judgment was based "on an adequate and independent nonfederal ground." *California* v. *Krivda*, 409 U. S. 33, 35 (1972).

The application for stay pending consideration by the full Court is accordingly granted.

PORTLEY v. GROSSMAN, WARDEN, ET AL.

ON APPLICATION FOR STAY

No. A-638 (79-5885). Decided February 1, 1980

Application by a federal prisoner—as to whom the Parole Commission, after revoking his parole, had applied current guidelines in establishing his next presumptive parole date, rather than the standards for reparole in effect when he was sentenced—for a stay of execution of the Court of Appeals' judgment denying a habeas corpus writ, pending review on certiorari in this Court, is denied.

MR. JUSTICE REHNQUIST, Circuit Justice.

The United States District Court for the Central District of California granted applicant's petition for a writ of habeas corpus and released him from federal custody pending appeal in the Ninth Circuit. The Ninth Circuit reversed, denying the writ, and declined to issue an order staying its mandate pending review on certiorari in this Court. Applicant then filed this request for a stay of execution of the Ninth Circuit's mandate, scheduled for issuance on February 11, 1980.

In April 1972, after pleading guilty to federal offenses, applicant was sentenced to serve six years in federal custody. Applicant was released on parole July 1, 1974. During his parole term, applicant was convicted of two separate offenses in state court. On June 20, 1978, the Parole Commission held a hearing and revoked applicant's parole on the basis of the two convictions. The Commission applied its guidelines currently in force, 28 CFR § 2.21 (1978), in establishing applicant's next presumptive parole date, indicating that a customary range of 34 to 44 months would be served before re-release.

Applicant filed a writ of habeas corpus in federal court, and the trial judge granted the writ, ordering the Parole Commission to reconsider and determine applicant's parole eligibility under the standards for reparole in effect when the applicant

was sentenced in April 1972. The Ninth Circuit reversed, relying on its decision in *Rifai* v. *United States Parole Comm'n,* 586 F. 2d 695 (1978), holding that the Parole Commission did not violate the constitutional prohibition against *ex post facto* laws by failing to rely on the guidelines in effect at the time of sentencing, rather than at the time of parole eligibility.

When applicant was sentenced in April 1972, the statutes then in force provided that if an individual was found to have violated parole, "the said prisoner may be required to serve all or any part of the remainder of the term for which he was sentenced." 18 U. S. C. § 4207 (1970 ed.). Now, as in 1972, the Commission's determination to grant or deny parole is "committed to agency discretion." 18 U. S. C. § 4218 (d). The administrative guidelines articulating the factors relied on by the Commission in making parole and reparole decisions have changed from those in effect at the time of applicant's sentencing. But even assuming for purposes of this application that the *Ex Post Facto* Clause applies to parole in the manner it does to trial and sentence, the changes in issue are not impermissible, as applicant contends. In *Dobbert* v. *Florida,* 432 U. S. 282, 293 (1977), this Court held that the prohibition of *ex post facto* laws does not extend to every change of law that "may work to the disadvantage of a defendant." It is intended to secure "substantial personal rights" from retroactive deprivation and does not "limit the legislative control of remedies and modes of procedure which do not affect matters of substance." *Ibid.*

The guidelines operate only to provide a framework for the Commission's exercise of its statutory discretion. The terms of the sentence originally imposed have in no way been altered. Applicant cannot be held in confinement beyond the term imposed by the judge, and at the time of his sentence he knew that parole violations would put him at risk of serving the balance of his sentence in federal custody. The guidelines, therefore, neither deprive applicant of any pre-existing right

nor enhance the punishment imposed. The change in guidelines assisting the Commission in the exercise of its discretion is in the nature of a procedural change found permissible in *Dobbert, supra.*

Since I do not believe that applicant is being held in custody in violation of the Constitution, I deny the application for a stay.

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The Supreme Court

February 4 through February 22, 1980

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Henry J. Lind
Reporter of Dicisions

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, Chief Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM H. REHNQUIST, Associate Justice.
JOHN PAUL STEVENS, Associate Justice.

RETIRED

STANLEY REED, Associate Justice.

OFFICERS OF THE COURT

BENJAMIN R. CIVILETTI, Attorney General.
WADE H. McCREE, Jr., Solicitor General.
MICHAEL RODAK, Jr., Clerk.
HENRY C. LIND, Reporter of Decisions.
ALFRED WONG, Marshal.
ROGER F. JACOBS, Librarian.

SUPREME COURT OF THE UNITED STATES

Allotment of Justices

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, *viz.:*

For the District of Columbia Circuit, Warren E. Burger, Chief Justice.

For the First Circuit, William J. Brennan, Jr., Associate Justice.

For the Second Circuit, Thurgood Marshall, Associate Justice.

For the Third Circuit, William J. Brennan, Jr., Associate Justice.

For the Fourth Circuit, Warren E. Burger, Chief Justice.

For the Fifth Circuit, Lewis F. Powell, Jr., Associate Justice.

For the Sixth Circuit, Potter Stewart, Associate Justice.

For the Seventh Circuit, John Paul Stevens, Associate Justice.

For the Eighth Circuit, Harry A. Blackmun, Associate Justice.

For the Ninth Circuit, William H. Rehnquist, Associate Justice.

For the Tenth Circuit, Byron R. White, Associate Justice.

December 19, 1975.

(For next previous allotment, see 404 U. S., p. v.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1979

BOEING CO. *v.* VAN GEMERT ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 78-1327. Argued December 3, 1979—Decided February 19, 1980

Petitioner company called for the redemption of certain convertible debentures, fixing a date by which debenture holders could convert their debentures into shares of petitioner's stock and after which debenture holders could only redeem their debentures for slightly more than face value. After the deadline expired, some of the nonconverting debenture holders brought a class action against petitioner, claiming that it had violated federal and state laws by failing to give reasonably adequate notice of the redemption. The District Court ultimately entered judgment against petitioner, establishing the amount of its liability to the class as a whole, and fixing the amount that each class member could recover on a principal amount of $100 in debentures, with each individual recovery to carry its proportionate share of the total amount allowed for attorney's fees, expenses, and disbursements. Petitioner appealed only the judgment's provision as to attorney's fees, contending that such fees should be awarded only from the portion of the fund actually claimed by class members, not from the unclaimed portion of the judgment fund. The Court of Appeals affirmed, holding that since each class member had a present vested interest in the class recovery and could collect his share of the judgment upon request, absentee class members had received a benefit within the meaning of the common-fund doctrine, which allows the assessment of attorney's fees against a common fund created by the lawyers' efforts.

Held:

1. The attorney's fee award in this case is a proper application of the common-fund doctrine, which rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched at the successful litigants' expense. The criteria for application of the doctrine are satisfied when, as here, each member of a certified class has an undisputed and mathematically ascertainable claim to part of a lump-sum judgment recovered on his behalf. In this case, absentee class members need prove only their membership in the injured class to claim their logically ascertainable shares of the judgment fund. Their right to share the harvest of the suit upon proof of their identity, whether or not they exercise it, is a benefit in the fund created by the efforts of the class representatives and their counsel, and

unless absentees contribute to the payment of attorney's fees incurred on their behalves, they will pay nothing for the creation of the fund and their representatives may bear additional costs. This inequity is rectified by the District Court's judgment requiring every class member to share attorney's fees to the same extent that he can share the recovery. Pp. 478–481.

2. The common-fund doctrine, as applied in this case, is entirely consistent with the American rule against taxing the losing party with the victor's attorney's fees. The class members, whether or not they assert their rights, are at least the equitable owners of their respective shares in the recovery, whereas petitioner's present interest is limited to its stake in resisting third-party claims against the fund in view of petitioner's colorable claim for the return of any unclaimed money. Although petitioner itself cannot be obliged to pay fees awarded to the class lawyers, its latent claim against unclaimed money may not defeat each class member's equitable obligation to share the expenses of litigation. Pp. 481–482.

590 F. 2d 433, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. REHNQUIST, J., filed a dissenting opinion, *post*, p. 482.

S. Hazard Gillespie argued the cause for petitioner. With him on the briefs were *Sheila T. McMeen* and *Bruce A. Baird.*

Norman Winer argued the cause for respondents and filed a brief for certain respondents. *Stuart D. Wechsler, Samuel K. Rosen,* and *Samuel Weinstein* filed a brief for other respondents.*

MR. JUSTICE POWELL delivered the opinion of the Court.

The question presented in this class action is whether a proportionate share of the fees awarded to lawyers who represented the successful class may be assessed against the unclaimed portion of the fund created by a judgment.

**George J. Solleder, Jr.*, Special Master, *pro se*, filed a brief as *amicus curiae*.

I

In March 1966, The Boeing Co. called for the redemption of certain convertible debentures. Boeing announced the call through newspaper notices and mailings to investors who had registered their debentures. The notices, given in accordance with the indenture agreement, recited that each $100 amount of principal could be redeemed for $103.25 or converted into two shares of the company's common stock. They set March 29 as the deadline for the exercise of conversion rights. Two shares of the company's common stock on that date were worth $316.25. When the deadline expired, the holders of debentures with a face value of $1,544,300 had not answered the call. These investors were left with the right to redeem their debentures for slightly more than face value.

Van Gemert and several other nonconverting debenture holders brought a class action against Boeing in the United States District Court for the Southern District of New York. They claimed that Boeing had violated federal securities statutes as well as the law of New York by failing to give them reasonably adequate notice of the redemption. As damages, they sought the difference between the amount for which their debentures could be redeemed and the value of the shares into which the debentures could have been converted. The District Court dismissed the action on the ground that Boeing had given its debenture holders the notice required by the indenture agreement. The Court of Appeals for the Second Circuit reversed and remanded. It held that, under the New York law of contracts, the indenture agreement contained an implied obligation to give debenture holders reasonable notice of a redemption. The court concluded that the notice actually given was inadequate. 520 F. 2d 1373, cert. denied, 423 U. S. 947 (1975).

On remand, the District Court awarded as damages the difference between the redemption price of the outstanding debentures and the price at which two shares of Boeing's

common stock traded on the last day for exercising conversion rights. The court, however, refused to assess prejudgment interest against Boeing. There followed a second appeal. The class claimed that the stock should have been valued as of a later date and that Boeing was liable for prejudgment interest. Class members who had filed individual claims also contended that they were entitled to receive pro rata shares of any unclaimed damages. At the least, they argued, they should receive enough of the unclaimed money to pay their legal expenses.

The Court of Appeals found the class entitled to prejudgment interest on the award, but it approved the valuation date. The court also concluded that class members who proved their individual claims should not share in the unclaimed portion of the judgment. Allowing these class members to receive a proportionate part of the unclaimed money, the court held, would create the sort of "fluid class" recovery rejected in *Eisen* v. *Carlisle & Jacquelin*, 479 F. 2d 1005 (CA2 1973), vacated and remanded on other grounds, 417 U. S. 156 (1974). Such a recovery would expropriate funds belonging to class members who had not asserted their claims and give a windfall to those who had claimed. Finally, the court decided that claiming class members could not use the unclaimed portion of the judgment to defray their legal expenses. Since Boeing could have a right to money that never was claimed, the court thought that awarding attorney's fees from the remaining funds might shift fees to the losing party in violation of the American rule reaffirmed in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. 240 (1975). 553 F. 2d 812 (1977).

On the second remand, the District Court entered the judgment now at issue. The court first established the amount of Boeing's liability to the class as a whole. It provided that respondents, "in behalf of all members of the plaintiff class, . . . shall recover as their damages . . . the principal sum

of $3,289,359 together with [prejudgment] interest. . . ." App. 40a.[1] The court then fixed the amount that each member of the class could recover on a principal amount of $100 in debentures. Each individual recovery was to carry its proportionate share of the total amount allowed for attorney's fees, expenses, and disbursements.[2] That share, the court declared, "shall bear the same ratio to all such fees, expenses and disbursements as such class member's recovery shall bear to the total recovery" awarded the class. *Id.*, at 40a–41a. Finally, the court ordered Boeing to deposit the amount of the judgment into escrow at a commercial bank,[3] and it appointed a Special Master to administer the judgment and pass on the validity of individual claims.[4] The court retained jurisdiction pending implementation of its judgment.

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[1] The relevant paragraph of the District Court's judgment declares in full:

"ORDERED, ADJUDGED AND DECREED that plaintiffs in behalf of all members of the plaintiff class, which consists of all holders on March 29, 1966 of 4½% Convertible Subordinated Debentures of the Boeing Company who failed to exercise their conversion right before it terminated on March 29, 1966, shall recover as their damages herein from the defendants the principal sum of $3,289,359 together with interest thereon at the legal rates fixed by the State of New York, N. Y. C. P. L. R. § 5001 (a) from March 9, 1966 to the date of this judgment, with costs to be taxed. . . ." App. 40a.

[2] The class lawyers have requested fees totaling about $2 million. *Van Gemert* v. *Boeing Co.*, 573 F. 2d 733, 735, n. 3 (CA2 1978) (panel opinion).

[3] Interest on the principal sum of $3,289,359 from the conversion deadline to the date of judgment amounted to $2,459,647, bringing the judgment to $5,749,006. With income earned on investments and other additions, the fund now totals over $7 million. Brief for Special Master as *Amicus Curiae* 4–6.

[4] The District Court gave the Special Master a broad mandate to "direct the parties in the necessary ministerial steps to effectuate the Judgment, receive all proofs of claim to participate in the Fund established by the Judgment, pass on the validity of same, direct the giving of notices to interested persons of hearings on disputed claims, conduct the

Boeing appealed only one provision of the judgment. It claimed that attorney's fees could not be awarded from the unclaimed portion of the judgment fund for at least two reasons. First, the equitable doctrine that allows the assessment of attorney's fees against a common fund created by the lawyers' efforts was inapposite because the money in the judgment fund would not benefit those class members who failed to claim it. Second, because Boeing had a colorable claim for the return of the unclaimed money, awarding attorney's fees from those funds might violate the American rule against shifting fees to the losing party. Therefore, Boeing contended, the District Court should award attorney's fees from only the portion of the fund actually claimed by class members. A panel of the Court of Appeals agreed with Boeing, 573 F. 2d 733 (1978), but the court en banc affirmed the District Court's judgment, 590 F. 2d 433 (1978).

The Court of Appeals en banc found that each class member had a "present vested interest in the class recovery" and that each could collect his share of the judgment upon request.

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necessary hearings, submit reports thereon and in general supervise the administration of the Judgment and decide all disputed questions of law and fact connected therewith subject to confirmation by the Court. . . ." App. 42a.

In the year following his appointment, the Special Master mailed notices to debenture holders who could be identified and published notices in two national newspapers. By July 15, 1978, the Special Master had received claims accounting for $290,000 worth of the $1,544,300 in unconverted debentures. Brief for Special Master as *Amicus Curiae* 11. The District Court then extended the time for filing proofs of claims, and the Master renewed his efforts to locate holders of the remaining debentures. Further research in files kept by the trustee under the indenture agreement revealed the identity of additional debenture holders. A professional search firm endeavored to trace holders who had relocated. Banks and brokerage houses also were furnished with information that might help them to locate clients who had invested in the debentures. As of July 18, 1979, shortly before he filed his brief with this Court, the Master had received claims accounting for $706,600 worth of debentures or about 47% of the unconverted securities. *Id.*, at 14.

Thus, the court held, absentee class members had received a benefit within the meaning of the common-fund doctrine. *Id.*, at 439. The court also found its holding consistent with the American rule. It noted that lawyers for the class would receive their fees "from the amount for which Boeing has *already* been held liable. There is no 'surcharge' on the defeated litigant." *Id.*, at 441–442. We granted certiorari, 441 U. S. 942 (1979), and we now affirm.

II

Since the decisions in *Trustees* v. *Greenough*, 105 U. S. 527 (1882), and *Central Railroad & Banking Co.* v. *Pettus*, 113 U. S. 116 (1885), this Court has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole. See *Mills* v. *Electric Auto-Lite Co.*, 396 U. S. 375 (1970); *Sprague* v. *Ticonic National Bank*, 307 U. S. 161 (1939); cf. *Hall* v. *Cole*, 412 U. S. 1 (1973). The common-fund doctrine reflects the traditional practice in courts of equity, *Trustees* v. *Greenough*, *supra*, at 532–537, and it stands as a well-recognized exception to the general principle that requires every litigant to bear his own attorney's fees, *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S., at 257–258. The doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense. See, *e. g.*, *Mills* v. *Electric Auto-Lite Co.*, 396 U. S., at 392. Jurisdiction over the fund involved in the litigation allows a court to prevent this inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit. See *id.*, at 394.

In *Alyeska Pipeline Service Co.* v. *Wilderness Society*, *supra*, we noted the features that distinguished our common-fund cases from cases where the shifting of fees was inappropriate. First, the classes of persons benefited by the lawsuits "were

small in number and easily identifiable." 421 U. S., at 265, n. 39. Second, "[t]he benefits could be traced with some accuracy. . . ." *Ibid.* Finally, "there was reason for confidence that the costs [of litigation] could indeed be shifted with some exactitude to those benefiting." *Ibid.* Those characteristics are not present where litigants simply vindicate a general social grievance. *Id.*, at 263–267, and n. 39. On the other hand, the criteria are satisfied when each member of a certified class has an undisputed and mathematically ascertainable claim to part of a lump-sum judgment recovered on his behalf. Once the class representatives have established the defendant's liability and the total amount of damages, members of the class can obtain their share of the recovery simply by proving their individual claims against the judgment fund. This benefit devolves with certainty upon the identifiable persons whom the court has certified as members of the class. Although the full value of the benefit to each absentee member cannot be determined until he presents his claim, a fee awarded against the entire judgment fund will shift the costs of litigation to each absentee in the exact proportion that the value of his claim bears to the total recovery. See generally Dawson, Lawyers and Involuntary Clients in Public Interest Litigation, 88 Harv. L. Rev. 849, 916–922 (1975).

In this case, the named respondents have recovered a determinate fund for the benefit of every member of the class whom they represent. Boeing did not appeal the judgment awarding the class a sum certain.[5] Nor does Boeing contend

[5] Boeing contends that the judgment in this case was simply a procedural device ordering Boeing to pay into escrow its maximum potential liability to the class. The judgment will not be final, Boeing argues, until absentee class members have presented their individual claims. Thus, Boeing concludes, the judgment fund confers no benefit on class members who fail to claim against it. Brief for Petitioner 25–26, and n. *.

We think that Boeing misreads the judgment. The District Court explicitly ordered that "plaintiffs in behalf of all members of the plaintiff

that any class member was uninjured by the company's failure adequately to inform him of his conversion rights. Thus, the damage to each class member is simply the difference between the redemption price of his debentures and the value of the common stock into which they could have been converted. To claim their logically ascertainable shares of the judgment fund, absentee class members need prove only their membership in the injured class. Their right to share the harvest of the lawsuit upon proof of their identity, whether or not they exercise it, is a benefit in the fund created by the efforts of the class representatives and their counsel. Unless absentees contribute to the payment of attorney's fees incurred on their behalves, they will pay nothing for the creation of the fund and their representatives may bear additional costs. The judgment entered by the District Court and affirmed by the Court of Appeals rectifies this inequity by requiring every member of the class to share attorney's fees to the same extent that he can share the recovery.[6] Since the benefits of the class

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class . . . shall recover as their damages herein from the defendants the principal sum of $3,289,359 together with interest. . . ." See n. 1, *supra*. Nothing in the court's order made Boeing's liability for this amount contingent upon the presentation of individual claims. Thus, we need not decide whether a class-action judgment that simply requires the defendant to give security against all potential claims would support a recovery of attorney's fees under the common-fund doctrine.

We also think that Boeing's arguments come too late. Although the District Court did not fix the amount of attorney's fees to be assessed against absentee class members, its judgment terminated the litigation between Boeing and the class concerning the extent of Boeing's liability. See *Swanson* v. *American Consumer Industries, Inc.*, 517 F. 2d 555, 559–561 (CA7 1975). This is not a case, like *Liberty Mutual Ins. Co.* v. *Wetzel*, 424 U. S. 737 (1976), where a prayer for attorney's fees against an opposing party remains unanswered. See *Richerson* v. *Jones*, 551 F. 2d 918, 921–922 (CA3 1977). Thus, the judgment awarding the class a fixed recovery was final and appealable. Since Boeing did not appeal it, we cannot now consider whether the judgment was in error.

[6] Since an award of attorney's fees under the common-fund doctrine simply relieves claiming class members of costs incurred for the benefit

recovery have been "traced with some accuracy" and the costs of recovery have been "shifted with some exactitude to those benefiting," *Alyeska Pipeline Service Co.* v. *Wilderness Society, supra,* at 265, n. 39, we conclude that the attorney's fee award in this case is a proper application of the common-fund doctrine.

III

The common-fund doctrine, as applied in this case, is entirely consistent with the American rule against taxing the losing party with the victor's attorney's fees. See *Alyeska Pipeline Service Co.* v. *Wilderness Society, supra,* at 247. The District Court's judgment assesses attorney's fees against a fund awarded to the prevailing class. Since there was no appeal from the judgment that quantified Boeing's liability, Boeing presently has no interest in any part of the fund.[7] The members of the class, whether or not they assert their

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of others, we see no merit in Boeing's contention that the award amounts to a "fluid class" recovery. See Tr. of Oral Arg. 20. Here, as in *Eisen* v. *Carlisle & Jacquelin,* 417 U. S. 156, 172, n. 10 (1974), we express no opinion on the validity of judgments permitting such recoveries.

[7] Although we recognize that this 14-year-old case has had a fractured career in the courts, we do not agree with MR. JUSTICE REHNQUIST's dissenting view that the judgment before us lacks finality. *Post,* at 482. The District Court's judgment first ordered Boeing to pay a specified sum to the entire class and then assessed undetermined attorney's fees against the entire fund created by the judgment. The judgment on the merits stripped Boeing of any present interest in the fund. Thus, Boeing had no cognizable interest in further litigation between the class and its lawyers over the amount of the fees ultimately awarded from money belonging to the class. But Boeing did have an interest, arising from its colorable claim for the return of excess money, in whether attorney's fees could be assessed against the entire fund rather than against the portion actually claimed. Since the District Court's order assessed attorney's fees against the entire fund, it was a final judgment on the only issue in which Boeing still had an interest. In the peculiar circumstances of this case, Boeing could secure review of the allocation of fees only by appealing from this adverse judgment.

rights, are at least the equitable owners of their respective shares in the recovery. Any right that Boeing may establish to the return of money eventually unclaimed is contingent on the failure of absentee class members to exercise their present rights of possession.[8] Although Boeing itself cannot be obliged to pay fees awarded to the class lawyers, its latent claim against unclaimed money in the judgment fund may not defeat each class member's equitable obligation to share the expenses of litigation.

The judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE REHNQUIST, dissenting.

In disposing of this case on the merits, the Court gives short shrift to the question of appealability, a threshold issue by no means free from doubt even under the most generous view of our decided cases. I have concluded from these cases, viewed in light of the longstanding policy of the federal judicial system against piecemeal appeals, that the judgment now before us lacks the finality required by 28 U. S. C. § 1291, and I would therefore remand this case to the Court of Appeals with instructions to dismiss Boeing's appeal. Exhibit "A" of the shortsightedness of the Court's sloughing off the issue of appealability as it does is the fact that the parties are obliged to refer to the present case not merely as *"Van Gemert,"* but as *"Van Gemert III."* This case, which began in March 1966, has been appealed to the Court of Appeals for the Second Circuit three times, and now, after 14 years of litigation, this Court affirms the third decision of the Court of Appeals.

There is no doubt as to the appealability of the first of the three decisions of the District Court, since it dismissed

[8] The Court of Appeals did not consider the ultimate disposition of whatever money may remain in the fund after the District Court enforces a deadline for the presentation of individual claims. 590 F. 2d 433, 440, n. 17 (1978). We likewise express no opinion on that question.

respondents' complaint with prejudice. The second appeal was also by respondents from a determination by the District Court that respondents were not entitled to any prejudgment interest; this decision was also reversed by the Court of Appeals. Following this second remand, the District Court entered a "Judgment and Order" stating that Boeing was liable to respondent class in the amount of $3,289,359 plus interest, ordering Boeing to pay this amount into escrow, and indicating that respondents' attorneys could recover their fees "out of said total amount of this judgment." At this point, Boeing appealed for the first time, asserting that respondents' attorneys should collect their fees only out of that portion of the fund actually claimed. As noted by the Court, the Court of Appeals en banc affirmed this aspect of the District Court's order.

The novelty of the question posed by Boeing is attributable in large part to the historic prevalence of the "American rule," which generally prevents a court from requiring the losing party to pay the prevailing party's attorney's fees. In recent years, however, the proliferation of class actions and the enactment of various statutes modifying the American rule [1] have multiplied the opportunities for recovering attorney's fees and have simultaneously spawned a great deal of litigation over assessment of those fees. These developments lend added significance to the procedural implications of our decisions in this area.

In the typical American-rule case, the federal judicial system, by statute and rule, has generally made a final order a prerequisite to appellate review. A judgment is not considered final, and therefore appealable, until the district court has completed all but the most ministerial acts. Arguably,

[1] See, *e. g.*, 5 U. S. C. § 552 (a)(4)(E) (permitting award of attorney's fees in actions brought under Freedom of Information Act); 15 U. S. C. § 1691e (d) (suits under Equal Credit Opportunity Act); 42 U. S. C. § 2000e-5 (k) (Title VII suits under Civil Rights Act of 1964); 42 U. S. C. § 1988 (civil-rights suits).

litigation necessitating an award of attorney's fees should be treated no differently. It would be quite reasonable, I believe, to postpone appeal in such cases until the District Court had entered judgment not only on liability and damages, but also on whether and in what amount attorney's fees will be assessed. Cf. *Liberty Mutual Ins. Co.* v. *Wetzel*, 424 U. S. 737 (1976) (dismissing appeal from judgment of liability in Title VII action under Civil Rights Act of 1964 where requests for injunction, damages, and attorney's fees remained pending in the District Court).

For better or for worse, the little precedent that exists in this area has tended to deviate from such a sensible approach. This deviation has been particularly noticeable when the right to attorney's fees has been based on the existence of a "common fund" such as that discussed in the opinion of the Court. Beginning with *Trustees* v. *Greenough*, 105 U. S. 527 (1882), the Court has evidenced a willingness to treat the division of the common fund as a separate piece of litigation for purposes of appeal. In *Greenough*, for example, this Court entertained an appeal from an order allowing a successful plaintiff bondholder to recover attorney's fees even though the original action remained pending in the trial court for purposes of administration. The Court stated that the award of fees, "though incidental to the [original] cause," was sufficiently "collateral," "distinct," and "independent," to be appealable in its own right. *Id.*, at 531.

From *Greenough* it was an analytically short, though temporally long, step to the decision of the Court of Appeals for the Seventh Circuit in *Swanson* v. *American Consumer Industries, Inc.*, 517 F. 2d 555 (1975). In that shareholders' derivative suit, the District Court entered judgment in favor of plaintiffs and awarded damages. Seven months later it granted attorney's fees to prevailing counsel under an "extension" of *Greenough*. 517 F. 2d, at 560. Two notices of appeal were filed from this latter order, one on behalf of

plaintiffs challenging the amount of damages and the other on behalf of plaintiffs and their attorneys challenging the amount of attorney's fees. The Court of Appeals dismissed the appeal on the question of damages as untimely, reasoning that the District Court's determination of damages was final, and therefore appealable, upon entry of the first order.

Greenough and *Swanson* represent two sides of the same coin. If an attorney's attempt to secure fees from the common fund is "collateral" enough to support an independent appeal despite the continued pendency of the main litigation,[2] then the judgment establishing the fact and amount of the defendant's liability in the main litigation should also support a separate appeal despite the continued pendency of a dispute over division of the fund between the beneficiaries and their attorneys.[3]

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[2] See also *Sprague* v. *Ticonic National Bank*, 307 U. S. 161, 169 (1939) (claim for fees out of common fund "sufficiently different" from parent claim to support separate appeal); *Preston* v. *United States*, 284 F. 2d 514 (CA9 1960) (attorney's appeal from District Court's refusal to award fees on common-fund theory); *Angoff* v. *Goldfine*, 270 F. 2d 185 (CA1 1959) (attorney's appeal from District Court's refusal to grant him fees out of settlement fund).

[3] Outside the common-fund context, the consensus in the lower courts over the permissibility of bifurcated appeals dissolves. Two Courts of Appeals, including the Seventh Circuit, appear to have carried the *Greenough/Swanson* approach over into cases where one party recovers attorney's fees directly from an opposing party. In *Hidell* v. *International Diversified Investments*, 520 F. 2d 529 (CA7 1975), for example, appellee had brought suit under the securities laws. The District Court entered a judgment granting appellee an injunction, damages, and "reasonable" attorney's fees. The Court of Appeals, citing *Swanson*, allowed the defendant to appeal the merits of the dispute prior to the actual determination of those fees.

In *Lowe* v. *Pate Stevedoring Co.*, 595 F. 2d 256, 257 (CA5 1979), the plaintiff had prevailed on the merits of an unfair-representation suit against his union. The District Court granted plaintiff's attorney fees as the result of the union's "bad faith," but denied plaintiff's attorney a lien against the union to secure his fee. The Court of Appeals, relying on

Implicit in this bifurcated approach to appealability in common-fund cases is a strict bifurcation of the issues that can be litigated in either appeal. Thus, this Court would not have permitted the trustees in *Greenough* to contest in their appeal the merits of the dispute that generated the common fund. Nor, I venture, would the Court of Appeals for the Seventh Circuit have allowed a timely appeal on the issue

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Swanson, Preston v. *United States, supra,* and *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949), allowed the attorney to prosecute his appeal even though his client's prayer for reinstatement remained pending in the District Court. To the extent that the Fifth Circuit treats such an appeal as severable from the main cause of action, it might also treat an appeal from the main litigation as severable from the attorney's-fees proceeding.

Two other Courts of Appeals have rejected the bifurcated model of appealability in non-common-fund cases. In *Richerson* v. *Jones*, 551 F. 2d 918, 922 (CA3 1977), the Third Circuit confronted an appeal by the United States from a judgment of liability in a discrimination suit. The District Court's order had awarded plaintiff promotion, backpay, and interest, but had not yet ruled on plaintiff's request for attorney's fees. In holding that the United States had not appealed from a final order, the Court of Appeals relied upon *Liberty Mutual Ins. Co.* v. *Wetzel*, 424 U. S. 737 (1976), and distinguished *Swanson* as a case where plaintiff was not seeking to collect fees from his adversary.

Employing similar analysis, the Second Circuit twice has held that, where the obligation to pay an opposing party's attorney's fees arises out of an agreement that is also the subject of the original litigation, the attorney's-fees issue is not sufficiently collateral to allow appeal from a judgment on the merits prior to a determination of the attorney's fees. See *Aetna Casualty & Surety Co.* v. *Giesow*, 412 F. 2d 468 (1969) (suit for breach of subordination agreement); *Union Tank Car Co. v. Isbrandtsen*, 416 F. 2d 96 (1969) (suit to enforce settlement agreement). Judge Friendly has attempted to reconcile *Giesow* with the common-fund cases. See *Cinerama, Inc.* v. *Sweet Music, S. A.*, 482 F. 2d 66, 70, n. 2 (CA2 1973). See also *Union Tank Car Co.* v. *Isbrandtsen, supra,* at 97.

This overview is offered only to illustrate the complexity of this issue. Perhaps all these cases can be reconciled in some principled manner; if not, it is only a matter of time before this Court will have to try its hand at an issue that obviously has been perplexing other federal courts. In the meantime, I believe that we should tread quite carefully in this area.

of damages to challenge the amount of attorney's fees assessed, an issue that was the subject of a later, separate appeal. In each case, appellant would be powerless to reach backward or forward from the "collateral" proceeding to the "merits" of the lawsuit.

But this is exactly what the Court permits Boeing to do in this case. Assuming, as seems likely, that the *Greenough/Swanson* model of bifurcated appealability will prevail, I have no doubt that Boeing could have appealed, at this stage of the proceedings, from the judgment that it was liable to the plaintiff class in the amount of $3,289,359 plus interest. But as the Court concedes, indeed stresses, Boeing has not challenged either the fact of liability or the amount. See *ante*, at 479–480, n. 5. Such an appeal must have appeared futile in light of *Van Gemert I*, 520 F. 2d 1373 (1975), which established liability, and *Van Gemert II*, 553 F. 2d 812 (1977), which established the precise amount of damages payable to each member of the class. Instead, Boeing relies on the "finality" of the District Court's judgment on the merits, the *Swanson* side of the coin, to prosecute an appeal on the division of the common fund, the *Greenough* side of the coin. As noted above, such crisscrossing of contentions is inconsistent with a bifurcated approach to appellate litigation in common-fund cases.

Even if Boeing is to be allowed to appeal under the "collateral order" rubric in this case, the order from which it appealed was not final even under that doctrine. *Greenough* itself noted that the trustees brought their appeal from "a *final* determination of the particular matter arising upon the complainant's petition for allowances. . . ." 105 U. S., at 531 (emphasis added). Similarly, *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949), which formalized the "collateral order" doctrine presaged in *Greenough*, requires that the order appealed from be the "*final* disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it." 337 U. S., at 546–547 (em-

phasis added). In this case, however, that portion of the litigation involving the attorney's fees is still in its most nascent phase. We do not know, for example, when these fees are going to be assessed, how they will be calculated, or what will become of that portion of the fund that is neither claimed nor paid out in fees.

Nowhere does this lack of finality manifest itself more than in the Court's holding that Boeing has standing to litigate over the division of the spoils even though it may not have any continuing interest whatsoever in the money held in escrow.[4] In allowing Boeing to base its appeal on a "colorable claim for the return of [any] excess," *ante*, at 481, n. 7, the Court comes dangerously close to assuming in a single phrase that Boeing has standing. At best this analysis is unnecessary, since final settlement of the conflicting claims to the fund would establish Boeing's standing once and for all. At worst it represents a dangerous dilution of the standing requirement. In any event, the anticipatory nature of the analysis necessary to reach the merits of Boeing's appeal buttresses the notion that the Court is using a dubious technique to gloss over a lack of finality.

The procedural implications of our decision today will, I fear, have a more far-reaching effect than the decision on the

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[4] Boeing's only interest in the funds now held in escrow is its assertion that the unclaimed portion of the judgment eventually will revert to it. But respondents have argued with some force that the unclaimed funds will eventually escheat to the State of New York. See N. Y. Aband. Prop. Law § 1200 (McKinney 1944). In fact, the Attorney General of New York already has presented such a claim to the District Court. See Brief for Respondents filed by Stuart D. Wechsler 23. If the Attorney General and respondents are correct, then Boeing has no more standing to press its appeal than would a losing defendant have standing to contest the division of an award between plaintiff and his attorney pursuant to a contingent-fee arrangement.

Although respondents have not challenged Boeing's standing, we are obligated to consider the issue *sua sponte*, if necessary. See, *e. g.*, *Juidice* v. *Vail*, 430 U. S. 327, 331 (1977).

propriety of the application of the common-fund rule for allowing fees. Were I an attorney representing a party in common-fund litigation at a juncture similar to that encountered by Boeing prior to its appeal, I would be quite confused about the propriety of an immediate appeal, either on the merits of the main cause of action or on the details of an impending assessment of fees. Fearful that, by waiting for a "final order" in the strict sense, I might forfeit my right to appeal certain aspects of the litigation, cf. *Swanson* v. *American Consumer Industries, Inc.*, I probably would err in favor of filing an immediate appeal on whatever aspects of the case were bothersome at that time.[5] From the standpoint of the federal appellate courts, such uncertainty can only result in numerous interlocutory, precautionary appeals.

In sum, I believe that the District Court's order on the division of the "common fund" lacks the finality necessary to support Boeing's appeal, and would remand this matter to the Court of Appeals with instructions to dismiss the appeal. I therefore dissent.

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[5] The potential for confusion is even greater outside the context of common-fund litigation. See n. 3, *supra*.

NORFOLK & WESTERN RAILWAY CO. *v.* LIEPELT, ADMINISTRATRIX

CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

No. 78–1323. Argued November 5, 1979—Decided February 19, 1980

Held: In a wrongful-death action brought under the Federal Employers' Liability Act (FELA) in an Illinois court, the trial court erred in excluding evidence offered by petitioner-defendant to show the effect of income taxes on the decedent's estimated future earnings, and in refusing petitioner's requested jury instruction that "your award will not be subject to any income taxes, and you should not consider such taxes in fixing the amount of your award." Pp. 493–498.

62 Ill. App. 3d 653, 378 N. E. 2d 1232, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, POWELL, and REHNQUIST, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 498.

Howard J. Trienens argued the cause for petitioner. With him on the briefs were *Robert L. Landess* and *Tobin M. Richter.*

Richard S. Fleisher argued the cause for respondent. With him on the brief was *Sidney Z. Karasik.**

MR. JUSTICE STEVENS delivered the opinion of the Court.

In cases arising under the Federal Employers' Liability Act,[1] most trial judges refuse to allow the jury to receive evidence

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**Francis D. Morrissey, Gus A. Svolos, Patrick F. Healy, Jr.,* and *John T. Rank* filed a brief for the National Association of Railroad Trial Counsel as *amicus curiae* urging reversal.

Edward J. Kionka and *Sheldon S. Cohen* filed a brief for the Association of Trial Lawyers of America as *amicus curiae* urging affirmance.

Edward I. Pollock and *Leonard Sacks* filed a brief for the Alabama Trial Lawyers Assn. et al. as *amici curiae.*

[1] 35 Stat. 65, as amended, 45 U. S. C. § 51 *et seq.*

or instruction concerning the impact of federal income taxes on the amount of damages to be awarded. Because the prevailing practice developed at a time when federal taxes were relatively insignificant, and because some courts are now following a different practice, we decided to answer the two questions presented by the certiorari petition in this wrongful-death action: (1) whether it was error to exclude evidence of the income taxes payable on the decedent's past and estimated future earnings; and (2) whether it was error for the trial judge to refuse to instruct the jury that the award of damages would not be subject to income taxation.

In 1973, a fireman employed by petitioner suffered fatal injuries in a collision caused by petitioner's negligence.[2] Respondent, as administratrix of the fireman's estate, brought suit under the FELA to recover the damages that his survivors suffered as a result of his death. In 1976, after a full trial in the Circuit Court of Cook County, the jury awarded respondent $775,000. On appeal, the Appellate Court of Illinois held that it was "not error to refuse to instruct a jury as to the nontaxability of an award" and also that it was "not error to exclude evidence of the effect of income taxes on future earnings of the decedent." 62 Ill. App. 3d 653, 669, 378 N. E. 2d 1232, 1245 (1978). The Illinois Supreme Court denied leave to appeal.[3]

The evidence supporting the damages award included biographical data about the decedent and his family and the expert testimony of an economist. The decedent, a 37-year-old man, was living with his second wife and two young children and was contributing to the support of two older children by his first marriage. His gross earnings in the 11 months prior to his death on November 22, 1973, amounted to $11,988.

[2] The issue of liability was vigorously contested at the trial and was the subject of extensive consideration by the Appellate Court of Illinois, First District. See 62 Ill. App. 3d 653, 378 N. E. 2d 1232 (1978). No aspect of that issue, however, is now before us.

[3] App. to Pet. for Cert. A27–A28.

Assuming continued employment, those earnings would have amounted to $16,828.26 in 1977.

The expert estimated that the decedent's earnings would have increased at a rate of approximately five percent per year, which would have amounted to $51,600 in the year 2000, the year of his expected retirement. The gross amount of those earnings, plus the value of the services he would have performed for his family, less the amounts the decedent would have spent upon himself, produced a total which, when discounted to present value at the time of trial, amounted to $302,000.

Petitioner objected to the use of gross earnings, without any deduction for income taxes, in respondent's expert's testimony and offered to prove through the testimony of its own expert, an actuary, that decedent's federal income taxes during the years 1973 through 2000 would have amounted to about $57,000. Taking that figure into account, and making different assumptions about the rate of future increases in salary and the calculation of the present value of future earnings, petitioner's expert computed the net pecuniary loss at $138,327. As already noted, the jury returned a verdict of $775,000.

Petitioner argues that the jury must have assumed that its award was subject to federal income taxation; otherwise, it is argued, the verdict would not have exceeded respondent's expert's opinion by such a large amount.[4] For that reason, petitioner contends that it was prejudiced by the trial judge's refusal to instruct the jury that "your award will not be subject to any income taxes, and you should not consider such taxes in fixing the amount of your award."

Whether it was error to refuse that instruction, as well as the question whether evidence concerning the federal taxes on

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[4] Respondent argues that the excess is adequately explained by the jury's estimate of the pecuniary value of the guidance, instruction, and training that the decedent would have provided to his children.

the decedent's earnings was properly excluded, is a matter governed by federal law. It has long been settled that questions concerning the measure of damages in an FELA action are federal in character. See, *e. g., Michigan Central R. Co.* v. *Vreeland,* 227 U. S. 59. This is true even if the action is brought in state court. See, *e. g., Chesapeake & Ohio R. Co.* v. *Kelly,* 241 U. S. 485, 491.[5] In this case the Appellate Court of Illinois recognized that the practice then being followed in Illinois was subject to change when this Court addresses the issue.[6] We do so now, first considering the evidence question and then the proposed instruction.

I

In a wrongful-death action under the FELA, the measure of recovery is "the damages . . . [that] flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received. . . ." *Michigan Central R. Co.* v. *Vreeland, supra,* at 70. The amount of money that a wage earner is able to contribute to the support of his family is unquestionably affected by the amount of the tax he must pay to the Federal Government. It is his after-tax income, rather than his gross income before taxes, that provides the only realistic measure of his ability to support his family. It fol-

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[5] One of the purposes of the Federal Employers' Liability Act was to "create uniformity throughout the Union" with respect to railroads' financial responsibility for injuries to their employees. H. R. Rep. No. 1386, 60th Cong., 1st Sess., 3 (1908). See also *Dice* v. *Akron, C. & Y. R. Co.,* 342 U. S. 359, 362; *Brady* v. *Southern R. Co.,* 320 U. S. 476, 479; Hill, Substance and Procedure in State FELA Actions—The Converse of the Erie Problem?, 17 Ohio St. L. J. 384 (1956).

[6] "The Supreme Court of the United States has not spoken on this issue. Absent an authoritative pronouncement by that court we will follow the decisions of our own supreme court in *Raines* v. *New York Central R. R. Co.* (1972), 51 Ill. 2d 428, 430, 283 N. E. 2d 230, *cert. denied* (1972), 409 U. S. 983, . . . and *Hall* v. *Chicago & North Western Ry. Co.* (1955), 5 Ill. 2d 135, 149–52, 125 N. E. 2d 77. . . ." 62 Ill. App. 3d, at 668–669, 378 N. E. 2d, at 1245.

lows inexorably that the wage earner's income tax is a relevant factor in calculating the monetary loss suffered by his dependents when he dies.

Although federal courts have consistently received evidence of the amount of the decedent's personal expenditures, see, *e. g., Kansas City S. R. Co.* v. *Leslie,* 238 U. S. 599, 604, and have required that the estimate of future earnings be reduced by "taking account of the earning power of the money that is presently to be awarded," *Chesapeake & Ohio R. Co.* v. *Kelly, supra,* at 489, they have generally not considered the payment of income taxes as tantamount to a personal expenditure and have regarded the future prediction of tax consequences as too speculative and complex for a jury's deliberations. See, *e. g., Johnson* v. *Penrod Drilling Co.,* 510 F. 2d 234, 236–237 (CA5 1975), cert. denied, 423 U. S. 839.

Admittedly there are many variables that may affect the amount of a wage earner's future income-tax liability. The law may change, his family may increase or decrease in size, his spouse's earnings may affect his tax bracket, and extra income or unforeseen deductions may become available. But future employment itself, future health, future personal expenditures, future interest rates, and future inflation are also matters of estimate and prediction. Any one of these issues might provide the basis for protracted expert testimony and debate. But the practical wisdom of the trial bar and the trial bench has developed effective methods of presenting the essential elements of an expert calculation in a form that is understandable by juries that are increasingly familiar with the complexities of modern life. We therefore reject the notion that the introduction of evidence describing a decedent's estimated after-tax earnings is too speculative or complex for a jury.[7]

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[7] This is not to say, however, that introduction of such evidence must be permitted in every case. If the impact of future income tax in calculating

Respondent argues that if this door is opened, other equally relevant evidence must also be received. For example, she points out that in discounting the estimate of future earnings to its present value, the tax on the income to be earned by the damages award is now omitted.[8] Logically, it would certainly seem correct that this amount, like future wages, should be estimated on an after-tax basis. But the fact that such an after-tax estimate, if offered in proper form, would also be admissible does not persuade us that it is wrong to use after-tax figures instead of gross earnings in projecting what the decedent's financial contributions to his survivors would have been had this tragic accident not occurred.

Respondent also argues that evidence concerning costs of litigation, including her attorney's fees, is equally pertinent to a determination of what amount will actually compensate the survivors for their monetary loss. In a sense this is, of course, true. But the argument that attorney's fees must be added to a plaintiff's recovery if the award is truly to make him whole is contrary to the generally applicable "American Rule." See *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U. S. 240, 247. The FELA, however, unlike a number of other federal statutes,[9] does not authorize recovery of attorney's fees by the successful litigant. Only if the Congress were to provide for such a recovery would it be proper to consider them. In any event, it surely is not proper for the Judiciary to ignore the demonstrably relevant factor of income tax in measuring damages in order to offset

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the award would be *de minimis,* introduction of the evidence may cause more confusion than it is worth. Cf. Fed. Rule Evid. 403.

[8] See *McWeeney* v. *New York, N. H. & H. R. Co.,* 282 F. 2d 34, 37 (CA2 1960), cert. denied, 364 U. S. 870.

[9] See Civil Rights Act of 1964, Tit. VII, § 706 (k), 78 Stat. 261, 42 U. S. C. § 2000e–5 (k); Clayton Act, § 4, 38 Stat. 731, 15 U. S. C. § 15; and numerous others collected in *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U. S., at 260–261, n. 33.

what may be perceived as an undesirable or unfair rule regarding attorney's fees.[10]

II

Section 104 (a)(2) of the Internal Revenue Code of 1954, 26 U. S. C. § 104 (a)(2), provides that the amount of any damages received on account of personal injuries is not taxable income.[11] The section is construed to apply to wrongful-death awards; they are not taxable income to the recipient.[12]

Although the law is perfectly clear, it is entirely possible that the members of the jury may assume that a plaintiff's recovery in a case of this kind will be subject to federal taxation, and that the award should be increased substantially in order to be sure that the injured party is fully compensated. The Missouri Supreme Court expressed the opinion that "it is reasonable to assume the average juror would believe [that its

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[10] The dissent takes the position that § 104 (a)(2) of the Internal Revenue Code, see nn. 11–12, *infra*, which makes personal injury awards nontaxable, "appropriates for the tortfeasor a benefit intended to be conferred on the victim or his survivors." *Post*, at 498–499. But we see nothing in the language and are aware of nothing in the legislative history of § 104 (a)(2) to suggest that it has any impact whatsoever on the proper measure of damages in a wrongful-death action. Moreover, netting out the taxes that the decedent would have paid does not confer a benefit on the tortfeasor any more than netting out the decedent's personal expenditures. Both subtractions are required in order to determine "the pecuniary benefits which the beneficiaries might have reasonably received. . . ." *Michigan Central R. Co.* v. *Vreeland*, 227 U. S. 59, 70.

[11] The statute contains an exception for the reimbursement of medical expenses that have been taken as a deduction. The section provides in relevant part:

"Except in the case of amounts attributable to (and not in excess of) deductions allowed under Section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include—

. . . . .

(2) the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness. . . ."

[12] See Rev. Rul. 54–19, 1954–1 Cum. Bull. 179.

verdict will] be subject to such taxes." *Dempsey* v. *Thompson*, 363 Mo. 339, 346, 251 S. W. 2d 42, 45 (1952). And Judge Aldisert, writing for the Third Circuit, agreed:

> "We take judicial notice of the 'tax consciousness' of the American public. Yet, we also recognize, as did the court in Dempsey v. Thompson, 363 Mo. 339, 251 S. W. 2d 42 (1952), that few members of the general public are aware of the special statutory exception for personal injury awards contained in the Internal Revenue Code.
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> " '[T]here is always danger that today's tax-conscious juries may assume (mistakenly of course) that the judgment will be taxable and therefore make their verdict big enough so that plaintiff would get what they think he deserves after the imaginary tax is taken out of it.'
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> "II Harper & James, The Law of Torts § 25.12, at 1327–28 (1956)." (Footnote omitted.) *Domeracki* v. *Humble Oil & Refining Co.*, 443 F. 2d 1245, 1251 (1971), cert. denied, 404 U. S. 883.

A number of other commentators have also identified that risk.[13]

In this case the respondent's expert witness computed the amount of pecuniary loss at $302,000, plus the value of the care and training that decedent would have provided to his young children; the jury awarded damages of $775,000. It is surely not fanciful to suppose that the jury erroneously believed that a large portion of the award would be payable to the Federal Government in taxes and that therefore it improperly inflated the recovery. Whether or not this specu-

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[13] See, *e. g.*, Burns, A Compensation Award for Personal Injury or Wrongful Death is Tax-Exempt: Should We Tell the Jury?, 14 DePaul L. Rev. 320 (1965); Feldman, Personal Injury Awards: Should Tax-Exempt Status Be Ignored?, 7 Ariz. L. Rev. 272 (1966); Nordstrom, Income Taxes and Personal Injury Awards, 19 Ohio St. L. J. 212 (1958).

lation is accurate, we agree with petitioner that, as Judge Ely wrote for the Ninth Circuit,

> "[t]o put the matter simply, giving the instruction can do no harm, and it can certainly help by preventing the jury from inflating the award and thus overcompensating the plaintiff on the basis of an erroneous assumption that the judgment will be taxable." *Burlington Northern, Inc.* v. *Boxberger*, 529 F. 2d 284, 297 (1975).

We hold that it was error to refuse the requested instruction in this case. That instruction was brief and could be easily understood. It would not complicate the trial by making additional qualifying or supplemental instructions necessary. It would not be prejudicial to either party, but would merely eliminate an area of doubt or speculation that might have an improper impact on the computation of the amount of damages.

The judgment is reversed, and the case is remanded to the Appellate Court of Illinois for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE MARSHALL joins, dissenting.

In this action for wrongful death arising under the Federal Employers' Liability Act, 35 Stat. 65, as amended, 45 U. S. C. §§ 51–60, the Court today holds that if an award is granted, federal income taxes on the decedent's lost earnings are to be taken into account and are to reduce the amount of the award. The Court further holds that, on request, the jury must be instructed that the award is not subject to federal income tax.

I agree with neither ruling. In my view, by mandating adjustment of the award by way of reduction for federal income taxes that would have been paid by the decedent on his earnings, the Court appropriates for the tortfeasor a bene-

fit intended to be conferred on the victim or his survivors. And in requiring that the jury be instructed that a wrongful-death award is not subject to federal income tax, the Court opens the door for a variety of admonitions to the jury not to "misbehave," and unnecessarily interjects what is now to be federal law into the administration of a trial in a state court.

In this day of substantial income taxes, one is sorely tempted, in jury litigation, to accept the propriety of admitting evidence as to a tort victim's earnings *net* after estimated income taxes, and of instructing the jury that an award will be tax-free. This, it could be urged, is only common sense and a recognition of financial realities.

Ordinarily, however, the effect of an income tax upon the recipient of a payment is of no real or ultimate concern to the payer. Apart from required withholding, it just is not the payer's responsibility or, indeed, "any of his business." The concept of "net after taxes" and the omnipresence of the tax collector, to be sure, are present facts of life and are within the constant awareness of both recipient and payer. But these factors do not change the basic character of an award for damages, whether that award be one to compensate the surviving victim for his injury, or one to compensate the deceased victim's survivors, by way of statutory wrongful-death benefit, for their loss. The income tax effect should flow and be retained in its own channel. Surely, it should not operate to assist the tortfeasor by way of a benefit, perhaps even a windfall.

I

The employer-petitioner argues, and the Court holds, that federal income taxes that would have been paid by the deceased victim must be subtracted in computing the amount of the wrongful-death award. Were one able to ignore and set aside the uncertainties, estimates, assumptions, and complexities involved in computing and effectuating that subtraction, this might not be an unreasonable legislative proposition

in a compensatory tort system. Neither petitioner nor the Court, however, recognizes that the premise of such an argument is the nontaxability, under the Internal Revenue Code, of the wrongful-death award itself.

By not taxing the award, Congress has bestowed a benefit.[1] Although the parties disagree over the origin of the tax-free status of the wrongful-death award,[2] it is surely clear that the lost earnings could be taxed as income. Cf. *Commissioner* v. *Glenshaw Glass Co.*, 348 U. S. 426, 430–431 (1955). See generally M. Chirelstein, Federal Income Taxation 39–40 (1977). In my view, why Congress created this benefit under one statute is relevant in deciding where the benefit should be allocated under another statute enacted by Congress.[3]

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[1] The parties agree that these awards are not taxable. Of course, it would not be in the interest of either party to take the position that the award is taxable.

[2] Respondent maintains that a wrongful-death award is within the exclusion of § 104 (a)(2) of the Internal Revenue Code of 1954, 26 U. S. C. § 104 (a)(2), which provides that "gross income does not include . . . the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness." Brief for Respondent 8–9, and n. 2. Petitioner, on the other hand, contends that a wrongful-death award is not, in the words of the statute, "received . . . on account of personal injuries." Petitioner points to an early ruling that wrongful-death damages are not within the Code's definition of income because they merely replace contributions the decedent's relatives would have received from the decedent. I. T. 2420, VII–2 Cum. Bull. 123 (1928); see Rev. Rul. 54–19, 1954–1 Cum. Bull. 179. Alternatively, petitioner argues that even if wrongful-death damages are covered by § 104 (a)(2), Congress' purpose in enacting that subsection was not to aid tort victims. Rather, § 104 (a)(2) can be traced to Congress' concern in 1918 that personal injury damages were not income within the meaning of the Sixteenth Amendment, citing H. R. Rep. No. 767, 65th Cong., 2d Sess., 9–10 (1918). Brief for Petitioner 31–32, n. 23.

[3] Petitioner argues that a decision in this case that would rest on Congress' purpose not to subject wrongful-death awards to federal income taxation would "fundamentally alter all forms of injury compensation in this country," Reply Brief for Petitioner 10–11, since this nontaxability

While Congress has not articulated its reasons for not taxing a wrongful-death award, it is highly unlikely that it intended to confer this benefit on the tortfeasor. Two more probable purposes for the exclusion are apparent. First, taxing the award could involve the same uncertainties and complexities noted by respondent and the majority of the courts of this country as a reason for not taking income taxes into account in computing the award. Congress may have decided that it is simply not worthwhile to enact a complex and administratively burdensome system in order to approximate the tax treatment of the income if, in fact, it had been earned over a period of time by the decedent. Second, Congress may have intended to confer a humanitarian benefit on the victim or victims of the tort. One District Court has reasoned:

> "The court can divine no societal purpose that would be furthered by awarding wrongdoing defendants with the benefit of this Congressional largesse. A societal purpose would be served by benefiting innocent victims of tortious conduct. Indeed, since the victims' chances of needing public relief are thereby diminished, this concern would be greater, not less, in the case of death, where the loss of earning capacity is total. This court therefore concludes that Congress, as with all exemptions under Section 104, '. . . intended to relieve a taxpayer who has the misfortune to become ill or injured. . . .'" *Huddell* v. *Levin,* 395 F. Supp. 64, 87 (NJ 1975),[4] quoting *Epmeier* v. *United States,* 199 F. 2d 508, 511 (CA7 1952), quoted in turn in *Haynes* v. *United States,* 353 U. S. 81, 84–85, n. 3 (1957).

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is not limited to awards under the FELA. My position, however, is merely that the policies embodied in one federal statute are relevant in aid of the interpretation of another federal statute. Absent a more explicit statement of Congress' intent, I would not infer a congressional purpose to override the States' traditional power to define the measure of damages applicable to state-created causes of action.

[4] Vacated on other grounds, 537 F. 2d 726 (CA3 1976).

See also Comment, Income Tax Effects on Personal Injury Recoveries, 30 La. L. Rev. 672, 685 (1970); Note, 69 Harv. L. Rev. 1495, 1496 (1956); Note, Taxation of Damage Recoveries from Litigation, 40 Cornell L. Q. 345, 346 (1955).

Whichever of these concerns it was that motivated Congress, transfer of the tax benefit to the FELA tortfeasor-defendant is inconsistent with that purpose. If Congress felt that it was not worth the effort to estimate the decedent's prospective tax liability on behalf of the public fisc, it is unlikely that it would want to require this effort on behalf of the tortfeasor. And Congress would not confer a humanitarian benefit on tort victims or their survivors in the Internal Revenue Code, only to take it away from victims or their survivors covered by the FELA. I conclude, therefore, that any income tax effect on lost earnings should not be considered in the computation of a damages award under the FELA.

II

The Court concludes that, as a matter of federal law, the jury in an FELA case must be instructed, on request, that the damages award is not taxable. This instruction is mandated, it is said, because "it is entirely possible that the members of the jury may assume that a plaintiff's recovery . . . will be subject to federal taxation, and that the award should be increased substantially in order to be sure that the injured party is fully compensated." *Ante*, at 496. The Court finds it "surely not fanciful to suppose" that the jury acted on that assumption in this case. *Ante*, at 497.

The required instruction is purely cautionary in nature. It does not affect the determination of liability or the measure of damages. It does nothing more than call a basically irrelevant factor to the jury's attention, and then directs the jury to forget that matter. Even if federal law governed such an admonition to the jury not to misbehave, the instruction required by the Court seems to me to be both unwise

and unjustified, and almost an affront to the practical wisdom of the jury.

It also is "entirely possible" that the jury "may" increase its damages award in the belief that the defendant is insured, or that the plaintiff will be obligated for substantial attorney's fees, or that the award is subject to state (as well as federal) income tax, or on the basis of any number of other extraneous factors. Charging the jury about every conceivable matter as to which it should not misbehave or miscalculate would be burdensome and could be confusing. Yet the Court's decision today opens the door to that possibility. There certainly is no evidence in this record to indicate that the jury is any more likely to act upon an erroneous assumption about an award's being subject to federal income tax than about any other collateral matter. Although the Court suggests that the difference in the expert's estimation of the pecuniary loss and the total amount of the award represents inflation of the award for federal income taxes, *ante*, at 496–498, this is pure surmise. The jury was instructed that it could compensate for factors on which experts could not place a precise dollar value, and it is "entirely possible" that these, instead, were the basis of the award.

In any event, it has long been settled that the giving of cautionary instructions is governed by state law when an FELA action is brought in state court. "[Q]uestions of procedure and evidence [are] to be determined according to the law of the forum [in cases arising under the FELA]." *Chesapeake & Ohio R. Co.* v. *Kelly*, 241 U. S. 485, 491 (1916). This Court, to be sure, has asserted federal control over a number of incidents of state trial practice that might appear to be procedural, and has done so out of concern, apparently, for protecting the rights of FELA plaintiffs. See, *e. g.*, *Brown* v. *Western R. of Alabama*, 338 U. S. 294 (1949) (a State cannot apply, in an FELA case, its usual rule that pleadings are construed against the pleader); *Dice* v. *Akron, C. & Y. R. Co.*,

342 U. S. 359 (1952) (FELA plaintiff is entitled to a jury trial in state court notwithstanding a contrary state rule); C. Wright, Law of Federal Courts 195–196 (3d ed. 1976); Hill, Substance and Procedure in State FELA Actions—The Converse of the Erie Problem?, 17 Ohio St. L. J. 384 (1956). I agree, of course, that state rules that interfere with federal policy are to be rejected, even if they might be characterized as "procedural." See, *e. g.*, Note, State Enforcement of Federally Created Rights, 73 Harv. L. Rev. 1551, 1560–1561 (1960). See generally Note, Procedural Protection for Federal Rights in State Courts, 30 U. Cin. L. Rev. 184 (1961). I cannot conclude, however, that a purely cautionary instruction to the jury not to misbehave implicates any federal interest. This issue truly can be characterized as one of the "ordinary incidents of state procedure," *Dickinson* v. *Stiles*, 246 U. S. 631, 633 (1918), which should be governed by state law.

Since the law of Illinois, where this case arose, is that it is not error to refuse to instruct the jury as to the nontaxability of the award, *Raines* v. *New York Central R. Co.*, 51 Ill. 2d 428, 430, 283 N. E. 2d 230, 232, cert. denied, 409 U. S. 983 (1972), and since I believe the trial court correctly excluded evidence of the prospective tax liability of the deceased victim, I would affirm the judgment of the Appellate Court of Illinois.

CROWELL, SECRETARY OF STATE OF TENNESSEE, ET AL. v. MADER ET AL.

ON PETITION FOR REHEARING

No. 78–1780. Judgment vacated and case remanded October 1, 1979—Rehearing granted and case decided February 19, 1980

After the State had appealed to this Court from the District Court's judgment invalidating a legislative senatorial districting plan, the Tennessee Legislature enacted a new plan. This Court then vacated the District Court's judgment and directed that the action be dismissed as moot.

Held: Since the recent legislation did not moot the entire case, but only the issue raised on appeal, this Court's prior order is vacated and, in lieu thereof, the District Court's judgment is vacated without prejudice to such further proceedings in that court as may be appropriate.

Rehearing granted; — F. Supp. —, vacated.

PER CURIAM.

The petition for rehearing is granted.

In *Kopald* v. *Carr*, 343 F. Supp. 51 (MD Tenn. 1972), the District Court applied this Court's earlier holding in *Baker* v. *Carr*, 369 U. S. 186 (1962), to invalidate two senatorial districting plans. That decision resulted in the formulation of a so-called court ordered "Kopald Plan." That plan was superseded by a 1973 legislative plan.

In this litigation the District Court invalidated the 1973 legislative plan. It enjoined the defendants from conducting any elections pursuant to that plan and retained jurisdiction to review whatever substitute the Tennessee General Assembly might enact prior to June 1, 1979, or, if necessary, to reinstate the 1972 "Kopald Plan." The court further ordered a hearing to award fees to plaintiff's counsel.

In response to the State's appeal to this Court, appellees pointed out that the legislature had enacted a new plan effective on June 6, 1979, argued that the controversy over the

validity of the 1973 legislative plan had therefore become moot, and requested that the appeal therefore be dismissed. This Court, following a practice that is appropriate when an entire case has become moot but which is inappropriate when only the issues raised on appeal have been resolved, entered an order directing that the judgment of the District Court be vacated and that the entire action be dismissed as moot. 444 U. S. 806 (1979).

The recent legislation did not moot the entire case, but only the issues raised on appeal. Appellees may still wish to attack the newly enacted legislation or apply for attorney's fees. We therefore vacate our prior order. In lieu thereof, we direct that the judgment of the District Court be vacated without prejudice to such further proceedings in the District Court as may be appropriate. See *Diffenderfer* v. *Central Baptist Church,* 404 U. S. 412 (1972).

It is so ordered.

SNEPP v. UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 78-1871. Decided February 19, 1980*

Held: A former employee of the Central Intelligence Agency, who had agreed not to divulge classified information without authorization and not to publish any information relating to the Agency without prepublication clearance, breached a fiduciary obligation when he published a book about certain Agency activities without submitting his manuscript for prepublication review. The proceeds of his breach are impressed with a constructive trust for the benefit of the Government.

Certiorari granted; 595 F. 2d 926, reversed in part and remanded.

PER CURIAM.

In No. 78-1871, Frank W. Snepp, III, seeks review of a judgment enforcing an agreement that he signed when he accepted employment with the Central Intelligence Agency (CIA). He also contends that punitive damages are an inappropriate remedy for the breach of his promise to submit all writings about the Agency for prepublication review. In No. 79-265, the United States conditionally cross-petitions from a judgment refusing to find that profits attributable to Snepp's breach are impressed with a constructive trust. We grant the petitions for certiorari in order to correct the judgment from which both parties seek relief.

I

Based on his experiences as a CIA agent, Snepp published a book about certain CIA activities in South Vietnam. Snepp published the account without submitting it to the Agency for prepublication review. As an express condition of his employment with the CIA in 1968, however, Snepp had

*Together with No. 79-265, *United States* v. *Snepp*, also on petition for certiorari to the same court.

executed an agreement promising that he would "not . . . publish . . . any information or material relating to the Agency, its activities or intelligence activities generally, either during or after the term of [his] employment . . . without specific prior approval by the Agency." App. to Pet. for Cert. in No. 78–1871, p. 59a. The promise was an integral part of Snepp's concurrent undertaking "not to disclose any classified information relating to the Agency without proper authorization." *Id.*, at 58a.[1] Thus, Snepp had pledged not to divulge *classified* information and not to publish *any* information without prepublication clearance. The Government brought this suit to enforce Snepp's agreement. It sought a declaration that Snepp had breached the contract, an injunction requiring Snepp to submit future writings for prepublication review, and an order imposing a constructive trust for the Government's benefit on all profits that Snepp might earn from publishing the book in violation of his fiduciary obligations to the Agency.[2]

The District Court found that Snepp had "willfully, deliberately and surreptitiously breached his position of trust with the CIA and the [1968] secrecy agreement" by publishing his book without submitting it for prepublication review. 456 F. Supp. 176, 179 (ED Va. 1978). The court also found that Snepp deliberately misled CIA officials into believing that he would submit the book for prepublication clearance. Finally, the court determined as a fact that publication of the book had "caused the United States irreparable harm and loss."

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[1] Upon the eve of his departure from the Agency in 1976, Snepp also executed a "termination secrecy agreement." That document reaffirmed his obligation "never" to reveal "any classified information, or any information concerning intelligence or CIA that has not been made public by CIA . . . without the express written consent of the Director of Central Intelligence or his representative." App. to Pet. for Cert. in No. 78–1871, p. 61a.

[2] At the time of suit, Snepp already had received about $60 000 in advance payments. His contract with his publisher provides for royalties and other potential profits. 456 F. Supp. 176, 179 (ED Va. 1978).

Id., at 180. The District Court therefore enjoined future breaches of Snepp's agreement and imposed a constructive trust on Snepp's profits.

The Court of Appeals accepted the findings of the District Court and agreed that Snepp had breached a valid contract.[3] It specifically affirmed the finding that Snepp's failure to submit his manuscript for prepublication review had inflicted "irreparable harm" on intelligence activities vital to our national security. 595 F. 2d 926, 935 (CA4 1979). Thus, the court upheld the injunction against future violations of Snepp's prepublication obligation. The court, however, concluded that the record did not support imposition of a constructive trust. The conclusion rested on the court's percep-

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[3] The Court of Appeals and the District Court rejected each of Snepp's defenses to the enforcement of his contract. 595 F. 2d 926, 931–934 (CA4 1979); 456 F. Supp., at 180–181. In his petition for certiorari, Snepp relies primarily on the claim that his agreement is unenforceable as a prior restraint on protected speech.

When Snepp accepted employment with the CIA, he voluntarily signed the agreement that expressly obligated him to submit any proposed publication for prior review. He does not claim that he executed this agreement under duress. Indeed, he voluntarily reaffirmed his obligation when he left the Agency. We agree with the Court of Appeals that Snepp's agreement is an "entirely appropriate" exercise of the CIA Director's statutory mandate to "protec[t] intelligence sources and methods from unauthorized disclosure," 50 U. S. C. § 403 (d)(3). 595 F. 2d, at 932. Moreover, this Court's cases make clear that—even in the absence of an express agreement—the CIA could have acted to protect substantial government interests by imposing reasonable restrictions on employee activities that in other contexts might be protected by the First Amendment. *CSC* v. *Letter Carriers*, 413 U. S. 548, 565 (1973); see *Brown* v. *Glines*, *ante*, p. 348; *Buckley* v. *Valeo*, 424 U. S. 1, 25–28 (1976); *Greer* v. *Spock*, 424 U. S. 828 (1976); *id.*, at 844–848 (POWELL, J., concurring); *Cole* v. *Richardson*, 405 U. S. 676 (1972). The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service. See *infra*, at 511–512. The agreement that Snepp signed is a reasonable means for protecting this vital interest.

tion that Snepp had a First Amendment right to publish unclassified information and the Government's concession—for the purposes of this litigation—that Snepp's book divulged no classified intelligence. *Id.*, at 935–936.[4] In other words, the court thought that Snepp's fiduciary obligation extended only to preserving the confidentiality of classified material. It therefore limited recovery to nominal damages and to the possibility of punitive damages if the Government—in a jury trial—could prove tortious conduct.

Judge Hoffman, sitting by designation, dissented from the refusal to find a constructive trust. The 1968 agreement, he wrote, "was no ordinary contract; it gave life to a fiduciary relationship and invested in Snepp the trust of the CIA." *Id.*, at 938. Prepublication clearance was part of Snepp's undertaking to protect confidences associated with his trust. Punitive damages, Judge Hoffman argued, were both a speculative and inappropriate remedy for Snepp's breach. We agree with Judge Hoffman that Snepp breached a fiduciary obligation and that the proceeds of his breach are impressed with a constructive trust.

II

Snepp's employment with the CIA involved an extremely high degree of trust. In the opening sentence of the agreement that he signed, Snepp explicitly recognized that he was entering a trust relationship.[5] The trust agreement specifi-

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[4] The Government's concession distinguished this case from *United States* v. *Marchetti*, 466 F. 2d 1309 (CA4), cert. denied, 409 U. S. 1063 (1972). There, the Government claimed that a former CIA employee intended to violate his agreement not to publish any *classified* information. 466 F. 2d, at 1313. *Marchetti* therefore did not consider the appropriate remedy for the breach of an agreement to submit *all* material for prepublication review. By relying on *Marchetti* in this case, the Court of Appeals overlooked the difference between Snepp's breach and the violation at issue in *Marchetti*.

[5] The first sentence of the 1968 agreement read: "I, Frank W. Snepp, III, understand that upon entering duty with the Central Intelligence

cally imposed the obligation not to publish *any* information relating to the Agency without submitting the information for clearance. Snepp stipulated at trial that—after undertaking this obligation—he had been "assigned to various positions of trust" and that he had been granted "frequent access to classified information, including information regarding intelligence sources and methods." 456 F. Supp., at 178.[6] Snepp published his book about CIA activities on the basis of this background and exposure. He deliberately and surreptitiously violated his obligation to submit all material for prepublication review. Thus, he exposed the classified information with which he had been entrusted to the risk of disclosure.

Whether Snepp violated his trust does not depend upon whether his book actually contained classified information. The Government does not deny—as a general principle—Snepp's right to publish unclassified information. Nor does it contend—at this stage of the litigation—that Snepp's book contains classified material. The Government simply claims that, in light of the special trust reposed in him and the agreement that he signed, Snepp should have given the CIA an opportunity to determine whether the material he proposed to publish would compromise classified information or sources. Neither of the Government's concessions undercuts its claim that Snepp's failure to submit to prepublication review was a breach of his trust.

Both the District Court and the Court of Appeals found that a former intelligence agent's publication of unreviewed material relating to intelligence activities can be detrimental

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Agency I am undertaking a position of trust in that Agency of the Government. . . ." App. to Pet. for Cert. in No. 78-1871, p. 58a.

[6] Quite apart from the plain language of the agreement, the nature of Snepp's duties and his conceded access to confidential sources and materials could establish a trust relationship. See 595 F. 2d, at 939 (Hoffman, J., concurring in part and dissenting in part). Few types of governmental employment involve a higher degree of trust than that reposed in a CIA employee with Snepp's duties.

to vital national interests even if the published information is unclassified. When a former agent relies on his own judgment about what information is detrimental, he may reveal information that the CIA—with its broader understanding of what may expose classified information and confidential sources—could have identified as harmful. In addition to receiving intelligence from domestically based or controlled sources, the CIA obtains information from the intelligence services of friendly nations[7] and from agents operating in foreign countries. The continued availability of these foreign sources depends upon the CIA's ability to guarantee the security of information that might compromise them and even endanger the personal safety of foreign agents.

Undisputed evidence in this case shows that a CIA agent's violation of his obligation to submit writings about the Agency for prepublication review impairs the CIA's ability to perform its statutory duties. Admiral Turner, Director of the CIA, testified without contradiction that Snepp's book and others like it have seriously impaired the effectiveness of American intelligence operations. "Over the last six to nine months," he said,

> "we have had a number of sources discontinue work with us. We have had more sources tell us that they are very nervous about continuing work with us. We have had very strong complaints from a number of foreign intelligence services with whom we conduct liaison, who have questioned whether they should continue exchanging information with us, for fear it will not remain secret. I

[7] Every major nation in the world has an intelligence service. Whatever fairly may be said about some of its past activities, the CIA (or its predecessor the Office of Strategic Services) is an agency thought by every President since Franklin D. Roosevelt to be essential to the security of the United States and—in a sense—the free world. It is impossible for a government wisely to make critical decisions about foreign policy and national defense without the benefit of dependable foreign intelligence. See generally T. Powers, The Man Who Kept the Secrets (1979).

> cannot estimate to you how many potential sources or liaison arrangements have never germinated because people were unwilling to enter into business with us." 456 F. Supp., at 179–180.[8]

In view of this and other evidence in the record, both the District Court and the Court of Appeals recognized that Snepp's breach of his explicit obligation to submit his material—classified or not—for prepublication clearance has irreparably harmed the United States Government. 595 F. 2d, at 935; 456 F. Supp., at 180.[9]

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[8] In questioning the force of Admiral Turner's testimony, MR. JUSTICE STEVENS' dissenting opinion suggests that the concern of foreign intelligence services may not be occasioned by the hazards of allowing an agent like Snepp to publish whatever he pleases, but by the release of classified information or simply the disagreement of foreign agencies with our Government's classification policy. *Post*, at 522–523. MR. JUSTICE STEVENS' views in this respect not only find no support in the record, but they also reflect a misapprehension of the concern reflected by Admiral Turner's testimony. If in fact information is unclassified or in the public domain, neither the CIA nor foreign agencies would be concerned. The problem is to ensure *in advance*, and by proper procedures, that information detrimental to national interest is not published. Without a dependable prepublication review procedure, no intelligence agency or responsible Government official could be assured that an employee privy to sensitive information might not conclude on his own—innocently or otherwise—that it should be disclosed to the world.

The dissent argues that the Court is allowing the CIA to "censor" its employees' publications. *Post*, at 522. Snepp's contract, however, requires no more than a clearance procedure subject to judicial review. If Snepp, in compliance with his contract, had submitted his manuscript for review and the Agency had found it to contain sensitive material, presumably—if one accepts Snepp's present assertion of good intentions—an effort would have been made to eliminate harmful disclosures. Absent agreement in this respect, the Agency would have borne the burden of seeking an injunction against publication. See *Alfred A. Knopf, Inc.* v. *Colby*, 509 F. 2d 1362 (CA4), cert. denied, 421 U. S. 992 (1975); *United States* v. *Marchetti*, 466 F. 2d 1309 (CA4), cert. denied, 409 U. S. 1063 (1972).

[9] Although both the District Court and the Court of Appeals expressly found otherwise, MR. JUSTICE STEVENS says that "the interest in con-

III

The decision of the Court of Appeals denies the Government the most appropriate remedy for Snepp's acknowledged wrong. Indeed, as a practical matter, the decision may well leave the Government with no reliable deterrent against similar breaches of security. No one disputes that the actual damages attributable to a publication such as Snepp's generally are unquantifiable. Nominal damages are a hollow alternative, certain to deter no one. The punitive damages recoverable after a jury trial are speculative and unusual. Even if recovered, they may bear no relation to either the Government's irreparable loss or Snepp's unjust gain.

The Government could not pursue the only remedy that the Court of Appeals left it[10] without losing the benefit of the bargain it seeks to enforce. Proof of the tortious conduct necessary to sustain an award of punitive damages might force the Government to disclose some of the very confidences that Snepp promised to protect. The trial of such a suit, before a jury if the defendant so elects, would subject the CIA and its

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fidentiality that Snepp's contract was designed to protect has not been compromised." *Post*, at 516–517. Thus, on the basis of a premise wholly at odds with the record, the dissent bifurcates Snepp's 1968 agreement and treats its interdependent provisions as if they imposed unrelated obligations. MR. JUSTICE STEVENS then analogizes Snepp's prepublication review agreement with the Government to a private employee's covenant not to compete with his employer. *Post*, at 518–520. A body of private law intended to preserve competition, however, simply has no bearing on a contract made by the Director of the CIA in conformity with his statutory obligation to "protec[t] intelligence sources and methods from unauthorized disclosure." 50 U. S. C. § 403 (d)(3).

[10] Judge Hoffman's dissent suggests that even this remedy may be unavailable if the Government must bring suit in a State that allows punitive damages only upon proof of compensatory damages. 595 F. 2d., at 940. The Court of Appeals majority, however, held as a matter of *federal* law that the nominal damages recoverable for any breach of a trust agreement will support an exemplary award. See *id.*, at 936, and n. 10, 937–938.

officials to probing discovery into the Agency's highly confidential affairs. Rarely would the Government run this risk. In a letter introduced at Snepp's trial, former CIA Director Colby noted the analogous problem in criminal cases. Existing law, he stated, "requires the revelation in open court of confirming or additional information of such a nature that the potential damage to the national security precludes prosecution." App. to Pet. for Cert. in No. 78–1871, p. 68a. When the Government cannot secure its remedy without unacceptable risks, it has no remedy at all.

A constructive trust, on the other hand, protects both the Government and the former agent from unwarranted risks. This remedy is the natural and customary consequence of a breach of trust.[11] It deals fairly with both parties by conforming relief to the dimensions of the wrong. If the agent secures prepublication clearance, he can publish with no fear of liability. If the agent publishes unreviewed material in violation of his fiduciary and contractual obligation, the trust remedy simply requires him to disgorge the benefits of his faithlessness. Since the remedy is swift and sure, it is tailored to deter those who would place sensitive information at risk. And since the remedy reaches only funds attributable to the

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[11] See *id.*, at 939 (Hoffman, J., concurring in part and dissenting in part).

MR. JUSTICE STEVENS concedes that, even in the absence of a written contract, an employee has a fiduciary obligation to protect confidential information obtained during the course of his employment. *Post*, at 518. He also concedes that all personal profits gained from the exploitation of such information are impressed with a constructive trust in favor of the employer. *Post*, at 521. In this case, he seems to think that the common law would not treat information as "confidential" unless it were "classified." See, *e. g.*, *post*, at 518. We have thought that the common-law obligation was considerably more expansive. See, *e. g.*, Restatement (Second) of Agency §§ 396 (c), 400 and Comment *c*, 404 and Comments *b*, *d* (1958); 5 A. Scott, Trusts § 505 (3d ed. 1967). But since this case involves the breach of a trust agreement that specifically required the prepublication review of all information about the employer, we need not look to the common law to determine the scope of Snepp's fiduciary obligation.

breach, it cannot saddle the former agent with exemplary damages out of all proportion to his gain. The decision of the Court of Appeals would deprive the Government of this equitable and effective means of protecting intelligence that may contribute to national security. We therefore reverse the judgment of the Court of Appeals insofar as it refused to impose a constructive trust on Snepp's profits, and we remand the case to the Court of Appeals for reinstatement of the full judgment of the District Court.

So ordered.

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

In 1968, Frank W. Snepp signed an employment agreement with the CIA in which he agreed to submit to the Agency any information he intended to publish about it for prepublication review.[1] The purpose of such an agreement, as the Fourth Circuit held, is not to give the CIA the power to censor its employees' critical speech, but rather to ensure that classified, nonpublic information is not disclosed without the Agency's permission. 595 F. 2d 926, 932 (1979); see also *United States* v. *Marchetti*, 466 F. 2d 1309, 1317 (CA4 1972), cert. denied, 409 U. S. 1063.

In this case Snepp admittedly breached his duty to submit the manuscript of his book, Decent Interval, to the CIA for prepublication review. However, the Government has conceded that the book contains no classified, nonpublic material.[2] Thus, by definition, the interest in confidentiality

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[1] Snepp also signed a termination agreement in 1976 in which he made substantially the same commitment.

[2] In response to an interrogatory asking whether it contended that ". . . *Decent Interval* contains classified information or any information concerning intelligence or CIA that has not been made public by CIA," the Government stated that "[f]or the purpose of this action, plaintiff does not so contend." Record Item No. 24, p. 14. Because of this concession, the District Judge sustained the Government's objections to defense efforts

that Snepp's contract was designed to protect has not been compromised. Nevertheless, the Court today grants the Government unprecedented and drastic relief in the form of a constructive trust over the profits derived by Snepp from the sale of the book. Because that remedy is not authorized by any applicable law and because it is most inappropriate for the Court to dispose of this novel issue summarily on the Government's conditional cross-petition for certiorari, I respectfully dissent.

I

The rule of law the Court announces today is not supported by statute, by the contract, or by the common law. Although Congress has enacted a number of criminal statutes punishing the unauthorized dissemination of certain types of classified information,[3] it has not seen fit to authorize the constructive trust remedy the Court creates today. Nor does either of the contracts Snepp signed with the Agency provide for any such remedy in the event of a breach.[4] The Court's *per curiam*

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to determine whether Decent Interval in fact contains information that the Government considers classified. See, *e. g.*, the testimony of Admiral Stansfield Turner, Director of the CIA, Tr. 135; and of Herbert Hetu, the CIA's Director of Public Affairs, Tr. 153.

[3] See, *e. g.*, 18 U. S. C. § 798, which imposes a prison term of 10 years and a $10,000 fine for knowingly and willfully publishing certain types of classified information; 18 U. S. C. § 794, which makes it a criminal offense punishable by life in prison to communicate national defense information to a foreign government; and 5 U. S. C. § 8312, which withdraws the right to government retirement benefits from a person convicted of violating these statutes. See also Exec. Order No. 12065, 3 CFR 190 (1979), note following 50 U. S. C. § 401 (1976 ed., Supp. II), which provides administrative sanctions, including discharge, against employees who publish classified information. Thus, even in the absence of a constructive trust remedy, an agent like Snepp would hardly be free, as the majority suggests, "to publish whatever he pleases." *Ante*, at 513, n. 8.

[4] In both his original employment agreement and the termination agreement Snepp acknowledged the criminal penalties that might attach to any publication of classified information. In his employment agreement he also agreed that a breach of the agreement would be cause for termina-

opinion seems to suggest that its result is supported by a blend of the law of trusts and the law of contracts.[5] But neither of these branches of the common law supports the imposition of a constructive trust under the circumstances of this case.

Plainly this is not a typical trust situation in which a settlor has conveyed legal title to certain assets to a trustee for the use and benefit of designated beneficiaries. Rather, it is an employment relationship in which the employee possesses fiduciary obligations arising out of his duty of loyalty to his employer. One of those obligations, long recognized by the common law even in the absence of a written employment agreement, is the duty to protect confidential or "classified" information. If Snepp had breached that obligation, the common law would support the implication of a constructive trust upon the benefits derived from his misuse of confidential information.[6]

But Snepp did not breach his duty to protect confidential information. Rather, he breached a contractual duty, imposed in aid of the basic duty to maintain confidentiality, to

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tion of his employment. No other remedies were mentioned in either agreement.

[5] In a footnote, see *ante*, at 515, n. 11, the Court suggests that it need not look to the common law to support its holding because the case involves a written contract. But, inasmuch as the contract itself does not state what remedy is to be applied in the event of a breach, the common law is the only source of law to which we can look to determine what constitutes an appropriate remedy.

[6] See, *e. g.*, *Sperry Rand Corp.* v. *A-T-O, Inc.*, 447 F. 2d 1387, 1392 (CA4 1971), cert. denied, 405 U. S. 1017 (Virginia law); *Tlapek* v. *Chevron Oil Co.*, 407 F. 2d 1129 (CA8 1969) (Arkansas law); *Structural Dynamics Research Corp.* v. *Engineering Mechanics Research Corp.*, 401 F. Supp. 1102, 1120 (ED Mich. 1975) (Michigan law); Restatement (Second) of Agency § 396 (c) (1958) ("Unless otherwise agreed, after the termination of the agency, the agent: . . . (c) has a duty to account for profits made by the sale or use of trade secrets and other confidential information, whether or not in competition with the principal . . .").

obtain prepublication clearance. In order to justify the imposition of a constructive trust, the majority attempts to equate this contractual duty with Snepp's duty not to disclose, labeling them both as "fiduciary." I find nothing in the common law to support such an approach.

Employment agreements often contain covenants designed to ensure in various ways that an employee fully complies with his duty not to disclose or misuse confidential information. One of the most common is a covenant not to compete. Contrary to the majority's approach in this case, the courts have not construed such covenants broadly simply because they support a basic fiduciary duty; nor have they granted sweeping remedies to enforce them. On the contrary, because such covenants are agreements in restraint of an individual's freedom of trade, they are enforceable only if they can survive scrutiny under the "rule of reason." That rule, originally laid down in the seminal case of *Mitchel* v. *Reynolds*, 1 P. Wms. 181, 24 Eng. Rep. 347 (1711), requires that the covenant be reasonably necessary to protect a legitimate interest of the employer (such as an interest in confidentiality), that the employer's interest not be outweighed by the public interest,[7] and that the covenant not be of any longer duration or wider geographical scope than necessary to protect the employer's interest.[8]

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[7] As the court held in *Herbert Morris, Ltd.* v. *Saxelby*, [1916] A. C. 688, 704, the employer's interest in protecting trade secrets does not outweigh the public interest in keeping the employee in the work force:

"[A]n employer can[not] prevent his employee from using the skill and knowledge in his trade or profession which he has learnt in the course of his employment by means of directions or instructions from the employer. That information and that additional skill he is entitled to use for the benefit of himself and the benefit of the public who gain the advantage of his having had such admirable instruction. The case in which the Court interferes for the purpose of protection is where use is made, not of the skill which the man may have acquired, but of the secrets of the trade or profession which he had no right to reveal to any one else. . . ."

[8] See, *e. g.*, *Briggs* v. *R. R. Donnelley & Sons Co.*, 589 F. 2d 39, 41 (CA1

The Court has not persuaded me that a rule of reason analysis should not be applied to Snepp's covenant to submit to prepublication review. Like an ordinary employer, the CIA has a vital interest in protecting certain types of information; at the same time, the CIA employee has a countervailing interest in preserving a wide range of work opportunities (including work as an author) and in protecting his First Amendment rights. The public interest lies in a proper accommodation that will preserve the intelligence mission of the Agency while not abridging the free flow of unclassified information. When the Government seeks to enforce a harsh restriction on the employee's freedom,[9] despite its admission that the interest the agreement was designed to protect—the confidentiality of classified information—has not been compromised, an equity court might well be persuaded that the case is not one in which the covenant should be enforced.[10]

1978) (Illinois law); *American Hot Rod Assn., Inc.* v. *Carrier*, 500 F. 2d 1269, 1277 (CA4 1974) (North Carolina law); *Alston Studios, Inc.* v. *Lloyd V. Gress & Associates*, 492 F. 2d 279, 282 (CA4 1974) (Virginia law); *Mixing Equipment Co.* v. *Philadelphia Gear, Inc.*, 436 F. 2d 1308, 1312 (CA3 1971) (New York law); *Water Services, Inc.* v. *Tesco Chemicals, Inc.*, 410 F. 2d 163, 167 (CA5 1969) (Georgia law); Restatement (Second) of Contracts § 330 (Tent. Draft No. 12, Mar. 1, 1977).

[9] The covenant imposes a serious prior restraint on Snepp's ability to speak freely, see n. 17, *infra*, and is of indefinite duration and scope—factors that would make most similar covenants unenforceable. See, *e. g.*, *Alston Studios, Inc.* v. *Lloyd V. Gress & Associates*, *supra*, at 283 (holding void under Virginia law a covenant with no geographical limitation); *American Hot Rod Assn., Inc.* v. *Carrier*, *supra*, at 1279 (holding void under North Carolina law a covenant with no durational or geographical limitation); *E. L. Conwell & Co.* v. *Gutberlet*, 429 F. 2d 527, 528 (CA4 1970) (holding void under Maryland law a covenant with no durational or geographical limitation).

[10] The Court correctly points out that the Government may regulate certain activities of its employees that would be protected by the First Amendment in other contexts. *Ante*, at 509, n. 3. But none of the cases it cites involved a requirement that an employee submit all proposed public statements for prerelease censorship or approval. The Court has not pre-

But even assuming that Snepp's covenant to submit to prepublication review should be enforced, the constructive trust imposed by the Court is not an appropriate remedy. If an employee has used his employer's confidential information for his own personal profit, a constructive trust over those profits is obviously an appropriate remedy because the profits are the direct result of the breach. But Snepp admittedly did not use confidential information in his book; nor were the profits from his book in any sense a product of his failure to submit the book for prepublication review. For, even if Snepp had submitted the book to the Agency for prepublication review, the Government's censorship authority would surely have been limited to the excision of classified material. In this case, then, it would have been obliged to clear the book for publication in precisely the same form as it now stands.[11] Thus, Snepp has not gained any profits as a result of his breach; the Government, rather than Snepp, will be unjustly enriched if he is required to disgorge profits attributable entirely to his own legitimate activity.

Despite the fact that Snepp has not caused the Government the type of harm that would ordinarily be remedied by

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viously considered the enforceability of this kind of prior restraint or the remedy that should be imposed in the event of a breach.

[11] If he had submitted the book to the Agency and the Agency had refused to consent to the publication of certain material in it, Snepp could have obtained judicial review to determine whether the Agency was correct in considering the material classified. See *United States* v. *Marchetti*, 466 F. 2d 1309, 1317 (CA4 1972), cert. denied, 409 U. S. 1063. It is noteworthy that the Court does not disagree with the Fourth Circuit's view in *Marchetti*, reiterated in *Snepp*, that a CIA employee has a First Amendment right to publish unclassified information. Thus, despite its reference in footnote 3 of its opinion to the Government's so-called compelling interest in protecting "the appearance of confidentiality," *ante*, at 509, n. 3, and despite some ambiguity in the Court's reference to "detrimental" and "harmful" as opposed to "classified" information, *ante*, at 511–512, I do not understand the Court to imply that the Government could obtain an injunction against the publication of unclassified information.

the imposition of a constructive trust, the Court attempts to justify a constructive trust remedy on the ground that the Government has suffered *some* harm. The Court states that publication of "unreviewed material" by a former CIA agent "can be detrimental to vital national interests even if the published information is unclassified." *Ante*, at 511–512. It then seems to suggest that the injury in such cases stems from the Agency's inability to catch "harmful" but unclassified information before it is published. I do not believe, however, that the Agency has any authority to censor its employees' publication of unclassified information on the basis of its opinion that publication may be "detrimental to vital national interests" or otherwise "identified as harmful." *Ibid.* The CIA never attempted to assert such power over Snepp in either of the contracts he signed; rather, the Agency itself limited its censorship power to preventing the disclosure of "classified" information. Moreover, even if such a wide-ranging prior restraint would be good national security policy, I would have great difficulty reconciling it with the demands of the First Amendment.

The Court also relies to some extent on the Government's theory at trial that Snepp caused it harm by flouting his prepublication review obligation and thus making it appear that the CIA was powerless to prevent its agents from publishing any information they chose to publish, whether classified or not. The Government theorized that this appearance of weakness would discourage foreign governments from cooperating with the CIA because of a fear that their secrets might also be compromised. In support of its position that Snepp's book had in fact had such an impact, the Government introduced testimony by the Director of the CIA, Admiral Stansfield Turner, stating that Snepp's book and others like it had jeopardized the CIA's relationship with foreign intelligence services by making them unsure of the Agency's ability to maintain confidentiality. Admiral Turner's truncated testimony does not explain, however, whether these unidentified

"other" books actually contained classified information.[12] If so, it is difficult to believe that the publication of a book like Snepp's, which does not reveal classified information, has significantly weakened the Agency's position. Nor does it explain whether the unidentified foreign agencies who have stopped cooperating with the CIA have done so because of a legitimate fear that secrets will be revealed or because they merely disagree with our Government's classification policies.[13]

In any event, to the extent that the Government seeks to punish Snepp for the generalized harm he has caused by failing to submit to prepublication review and to deter others from following in his footsteps, punitive damages is, as the Court of Appeals held, clearly the preferable remedy ". . . since a constructive trust depends on the concept of unjust enrichment rather than deterrence and punishment. *See* D. Dobbs, Law of Remedies § 3.9 at 205 and § 4.3 at 246 (1973)." 595 F. 2d, at 937.[14]

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[12] The District Judge sustained the Government's objections to questions concerning the identity of other agents who had published the unauthorized works to which Admiral Turner referred. Tr. 136. However, Admiral Turner did testify that the harmful materials involved "[p]rimarily the appearance in the United States media of identification of sources and methods of collecting intelligence. . . ." *Id.*, at 143. This type of information is certainly classified and is specifically the type of information that Snepp has maintained he did *not* reveal in Decent Interval. See, *e. g.*, Snepp's December 7, 1977, interview on the Tomorrow show, in which he stated: ". . . I have made a very determined effort not to expose sources or methods. . . ." Government's Requests for Admissions, Record Item 19, Exhibit I, p. 5.

[13] Snepp's attorneys were foreclosed from asking Admiral Turner whether particular foreign sources had stopped cooperating with United States' authorities as a direct result of the publication of Decent Interval. Tr. 138. Thus, it is unclear whether or why foreign sources may have reacted unfavorably to its publication. However, William E. Colby, the CIA's former Director, did indicate in his testimony that foreign nations generally have a stricter secrecy code than does the United States. *Id.*, at 175–176.

[14] One of the Court's justifications for its constructive trust remedy is that "it cannot saddle the former agent with exemplary damages out of all

II

The Court's decision to dispose of this case summarily on the Government's conditional cross-petition for certiorari is just as unprecedented as its disposition of the merits.

Snepp filed a petition for certiorari challenging the Fourth Circuit's decision insofar as it affirmed the entry of an injunction requiring him to submit all future manuscripts for prepublication review and remanded for a determination of whether punitive damages would be appropriate for his failure to submit Decent Interval to the Agency prior to its publication. The Government filed a brief in opposition as well as a cross-petition for certiorari; the Government specifically stated, however, that it was cross-petitioning only to bring the entire case before the Court in the event that the Court should decide to grant Snepp's petition. The Government explained that "[b]ecause the contract remedy provided by the court of appeals appears to be sufficient in this case to protect the Agency's interest, the government has not independently sought review in this Court." In its concluding paragraph the Government stated that "[i]f this Court grants [Snepp's] . . . petition for a writ of certiorari in No. 78–1871, it should also grant this cross-petition. If the petition in No. 78–1871 is denied, this petition should also be denied." Pet. for Cert. in No. 79–265, p. 5.

Given the Government's position, it would be highly inappropriate, and perhaps even beyond this Court's jurisdiction, to grant the Government's petition while denying Snepp's. Yet that is in essence what has been done.[15] The majority obviously does not believe that Snepp's claims merit this Court's consideration, for they are summarily dismissed in a

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proportion to his gain." *Ante*, at 516. This solicitude for Snepp's welfare is rather ironic in view of the draconian nature of the remedy imposed by the Court today.

[15] I have been unable to discover any previous case in which the Court has acted as it does today, reaching the merits of a conditional cross-petition despite its belief that the petition does not merit granting certiorari.

footnote. *Ante,* at 509, n. 3. It is clear that Snepp's petition would not have been granted on its own merits.

The Court's opinion is a good demonstration of why this Court should not reach out to decide a question not necessarily presented to it, as it has done in this case. Despite the fact that the Government has specifically stated that the punitive damages remedy is "sufficient" to protect its interests, the Court forges ahead and summarily rejects that remedy on the grounds that (a) it is too speculative and thus would not provide the Government with a "reliable deterrent against similar breaches of security," *ante,* at 514, and (b) it might require the Government to reveal confidential information in court, the Government might forgo damages rather than make such disclosures, and the Government might thus be left with "no remedy at all," *ante,* at 515. It seems to me that the Court is foreclosed from relying upon either ground by the Government's acquiescence in the punitive damages remedy. Moreover, the second rationale [16] is entirely speculative and, in this case at least, almost certainly wrong. The Court states that:

> "Proof of the tortious conduct necessary to sustain an award of punitive damages might force the Government to disclose some of the very confidences that Snepp promised to protect." *Ante,* at 514.

Yet under the Court of Appeals' opinion the Government would be entitled to punitive damages simply by proving that Snepp deceived it into believing that he was going to comply with his duty to submit the manuscript for prepublication review and that the Government relied on these misrepresentations to its detriment. I fail to see how such a showing would require the Government to reveal any confidential information or to expose itself to "probing discovery into the Agency's highly confidential affairs." *Ante,* at 515.

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[16] Which, it should be noted, does not appear anywhere in the Government's 5-page cross-petition.

III

The uninhibited character of today's exercise in lawmaking is highlighted by the Court's disregard of two venerable principles that favor a more conservative approach to this case.

First, for centuries the English-speaking judiciary refused to grant equitable relief unless the plaintiff could show that his remedy at law was inadequate. Without waiting for an opportunity to appraise the adequacy of the punitive damages remedy in this case, the Court has jumped to the conclusion that equitable relief is necessary.

Second, and of greater importance, the Court seems unaware of the fact that its drastic new remedy has been fashioned to enforce a species of prior restraint on a citizen's right to criticize his government.[17] Inherent in this prior restraint is the risk that the reviewing agency will misuse its authority to delay the publication of a critical work or to persuade an author to modify the contents of his work beyond the demands of secrecy. The character of the covenant as a prior restraint on free speech surely imposes an especially heavy burden on the censor to justify the remedy it seeks. It would take more than the Court has written to persuade me that that burden has been met.

I respectfully dissent.

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[17] The mere fact that the Agency has the authority to review the text of a critical book in search of classified information before it is published is bound to have an inhibiting effect on the author's writing. Moreover, the right to delay publication until the review is completed is itself a form of prior restraint that would not be tolerated in other contexts. See, *e. g., New York Times Co.* v. *United States,* 403 U. S. 713; *Nebraska Press Assn.* v. *Stuart,* 427 U. S. 539. In view of the national interest in maintaining an effective intelligence service, I am not prepared to say that the restraint is necessarily intolerable in this context. I am, however, prepared to say that, certiorari having been granted, the issue surely should not be resolved in the absence of full briefing and argument.

STAFFORD, U. S. ATTORNEY, ET AL. v. BRIGGS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1546. Argued April 24, 1979—Reargued November 7, 1979—Decided February 20, 1980*

In No. 77-1546, respondents, who had been among those subpoenaed to appear before a federal grand jury in Florida investigating a possible conspiracy to cause a riot, brought suit in the United States District Court for the District of Columbia against petitioners (the then United States Attorney and Assistant United States Attorney for the Northern District of Florida, and a Federal Bureau of Investigation agent) and a Department of Justice attorney, individually and in their official capacities, alleging a conspiracy to deprive respondents of various statutory and constitutional rights, and seeking damages and a declaratory judgment. Petitioners, each of whom resided in Florida, were served by certified mail, and the Department of Justice attorney, who resided in the District of Columbia, was served personally. Respondents relied on § 2 of the Mandamus and Venue Act of 1962 (Act), 28 U. S. C. § 1391 (e), which provides in part that "[a] civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority . . . may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, or (2) the cause of action arose . . . , or (4) the plaintiff resides if no real property is involved in the action," and that delivery of the summons and complaint to the officer in such an action may be made by certified mail beyond the territorial limits of the district in which the action is brought. The District Court dismissed the action, ruling that venue was improper and that the court lacked *in personam* jurisdiction over petitioners. The Court of Appeals reversed, holding that § 2 permits damages actions against federal officials to be brought in any district in which any one defendant resides, and that since the Department of Justice attorney was a resident of the District of Columbia venue there was proper. In No. 78-303, respondents, whose mail between the United States and the Soviet Union had allegedly been opened by the Central Intelligence

*Together with No. 78-303, *Colby, Director, Central Intelligence Agency, et al.* v. *Driver et al.*, on certiorari to the United States Court of Appeals for the First Circuit.

Agency, brought suit in the United States District Court for the District of Rhode Island against petitioners (the then Director and Deputy Director of the CIA) and others, in their individual and official capacities, alleging that interference with respondents' mail violated their constitutional rights, and seeking damages, as well as declaratory and injunctive relief. Petitioners and the other defendants were served outside of Rhode Island by certified mail. The District Court denied the defendants' motion to dismiss the complaint for lack of personal jurisdiction, improper venue, and insufficiency of process, but certified the questions involved for an immediate appeal. The Court of Appeals affirmed the District Court's order as to petitioners, who were CIA officials when the complaint was filed, but reversed as to those defendants who had left their Government positions at the time of filing, holding that § 2 applied to damages actions against federal officials in their individual capacities and provided the mechanism for obtaining personal jurisdiction over them, and that accordingly venue was proper in Rhode Island because one of the respondents resided there.

Held: Section 2 of the Act does not apply to actions for money damages brought against federal officials in their individual capacities. Pp. 533–545.

(a) Section 2's language "is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority" can reasonably be read as describing the character of the defendant at the time of suit, and, so read, limits a covered "civil action" to one against a federal official who is at that time acting, or failing to act, in an official or apparently official way. Such a "civil action" is that referred to in § 1 of the Act, 28 U. S. C. § 1361, which gives district courts jurisdiction of "any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." Pp. 535–536.

(b) The Act's legislative history clearly indicates that Congress intended nothing more than to provide nationwide venue for the convenience of individual plaintiffs in actions that are nominally against an individual officer but are in reality against the Government. A suit for money damages which must be paid out of the pocket of the private individual who happens to be—or formerly was—employed by the Government plainly is not one "essentially against the United States," and thus is not encompassed by the venue provisions of § 2. Pp. 536–543.

(c) If § 2 were construed to govern damages actions against federal officers individually, suits could be brought against those officers while in Government service—and could be pressed even after the officer has

left service—in any one of the 95 federal districts covering the 50 states and other areas within federal jurisdiction. This would place federal officers, solely by reason of their Government service, in a very different posture in personal damages suits from that of all other persons, since under 28 U. S. C. § 1391 (b) damages suits against private persons must be brought in the district where all the defendants reside or in which the claim arose. Such was not the intent of Congress. Pp. 544–545.

No. 77–1546, 186 U. S. App. D. C. 170, 569 F. 2d 1; No. 78–303, 577 F. 2d 147, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined. STEWART, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 545. WHITE, J., took no part in the consideration or decision of the cases. MARSHALL, J., took no part in the decision of the cases.

Peter Megargee Brown reargued the cause for petitioners in No. 77–1546. With him on the briefs was *Earl H. Nemser*. *Mr. Nemser* reargued the cause for petitioners in No. 78–303. With him on the briefs was *Mr. Brown*.

Doris Peterson reargued the cause for respondents in No. 77–1546. With her on the briefs were *Morton Stavis, Nancy Stearns, Robert L. Boehm, Cameron Cunningham, Brady Coleman, Jack Levine,* and *Philip Hirschkop*. *Melvin L. Wulf* reargued the cause for respondents in No. 78–303. With him on the brief were *Leon Friedman* and *Burt Neuborne*.

Elinor H. Stillman reargued the cause for the United States as *amicus curiae* urging reversal in No. 78–303. On the brief urging reversal in both cases were *Solicitor General McCree, Assistant Attorney General Babcock, Deputy Solicitor General Easterbrook, Allan A. Ryan, Jr.,* and *Robert E. Kopp*.

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari in these cases to decide whether the venue provisions contained in § 2 of the Mandamus and Venue Act of 1962, 28 U. S. C. § 1391 (e), apply to actions

for money damages brought against federal officials in their individual capacities. 439 U. S. 1113 (1979).

I

No. 77-1546

Stafford et al. v. *Briggs et al.*

In 1972, petitioner William Stafford was United States Attorney and petitioner Stuart Carrouth was an Assistant United States Attorney for the Northern District of Florida. Guy Goodwin was an attorney in the Department of Justice.[1] Together they conducted grand jury proceedings in Florida, inquiring into the possibility that various individuals had conspired and engaged in interstate travel with intent to cause a riot. Respondents were among those subpoenaed to appear. At the request of respondents' counsel, the District Judge responsible for the proceedings called Goodwin to the stand and asked him to state, under oath, whether any of the witnesses represented by respondents' counsel was an agent or informant of the Government. Goodwin replied that none was.

Respondents later brought this suit in the United States District Court for the District of Columbia against Goodwin, Stafford, Carrouth, and petitioner Claude Meadow, an agent for the Federal Bureau of Investigation. Each was sued individually and in his official capacity. Respondents alleged that Goodwin had testified falsely in furtherance of a conspiracy among petitioners and Goodwin to deprive respondents of various statutory and constitutional rights. Each respondent sought a declaratory judgment, $50,000 in compensatory damages, and $100,000 in punitive damages. Petitioners, each of whom resided in Florida, were served by certified mail; Goodwin, whose residence was in the District of Columbia, was served personally.

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[1] Goodwin is not a party in the case before this Court.

Respondents relied on § 2 of the Mandamus and Venue Act of 1962, which, as amended and codified in Title 28 of the United States Code, provides:

"§ 1391. Venue generally

. . . . .

"(e) A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action. Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.

"The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought."

Petitioners requested transfer of the action to the Northern District of Florida, or, alternatively, dismissal for improper venue and insufficiency of process. The District Court denied the motion to transfer but granted the motion to dismiss, ruling that venue was improper and that the court lacked *in personam* jurisdiction over the petitioners.[2]

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[2] Goodwin joined petitioners in making the transfer request. He also moved for dismissal on grounds of prosecutorial immunity. This motion was denied. See *Briggs* v. *Goodwin*, 384 F. Supp. 1228 (DC 1974),

Respondents appealed the District Court's order dismissing the case against petitioners, and the Court of Appeals for the District of Columbia Circuit reversed, holding that 28 U. S. C. § 1391 (e) permits damages actions against federal officials to be brought in any district in which any one defendant resides. *Briggs* v. *Goodwin,* 186 U. S. App. D. C. 170, 569 F. 2d 1 (1977). Because Goodwin was a resident of the District of Columbia, venue there was proper. The court also held that there was no constitutional infirmity in the statute as applied. It refused to apply the "minimum contacts" analysis of *International Shoe Co.* v. *Washington,* 326 U. S. 310 (1945), and held that in a case such as this there is no constitutional requirement that defendants have any contacts with the place in which a particular federal court sits before they may be sued in that court.

No. 78-303

Colby et al. v. *Driver et al.*

From 1953 to 1973 at the International Airport in New York, the Central Intelligence Agency opened and made photographic copies of certain mail traveling between the United States and the Soviet Union.[3]

Petitioner Vernon Walters was appointed Deputy Director of Central Intelligence in 1972; petitioner William Colby was appointed Director of Central Intelligence in 1973. Both petitioners were in office in 1975 when respondents, acting on behalf of themselves and others whose mail had allegedly been opened by the CIA, brought suit in the United States District Court for the District of Rhode Island. Respondents alleged that the interference with their mail to and from the

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aff'd, 186 U. S. App. D. C. 179, 569 F. 2d 10 (1977), cert. denied, 437 U. S. 904 (1978).

[3] See Senate Select Committee to Study Governmental Operations with respect to Intelligence Activities, Final Report, S. Rep. No. 94-755, Book 3, pp. 559-677 (1976).

Soviet Union violated their constitutional rights. Their suit, brought against both present and former federal officials in their individual and official capacities, requested declaratory, injunctive, and monetary relief, including $20,000 for each letter opened and punitive damages of $100,000 for each member of the plaintiff class.

Petitioners and the other defendants were served outside of Rhode Island by certified mail. All the defendants moved to dismiss the complaint for lack of personal jurisdiction, improper venue, and insufficiency of process, claiming that no defendant resided in or had substantial contacts with Rhode Island and that the complaint failed to allege that any activity had occurred there. The District Court denied these motions but certified the questions involved for an immediate appeal.

The Court of Appeals for the First Circuit affirmed the order of the District Court as to petitioners, who were CIA officials when the complaint was filed, but it reversed as to those defendants who had left their Government positions at the time of filing. *Driver* v. *Helms,* 577 F. 2d 147 (CA1 1978).[4] The court held that § 1391 (e) applied to damages actions against federal officials in their individual capacities and provided the mechanism for obtaining personal jurisdiction over them. Venue was proper in Rhode Island because one of the respondents resided there. The court also rejected petitioners' challenge to the constitutionality of the statute, ruling that minimum contacts analysis was not relevant in this situation.

II

Soon after the passage of the Judiciary Act of 1789, 1 Stat. 73, this Court held that Congress had not granted the federal

[4] The court concluded that because 28 U. S. C. § 1391 (e) was drafted in the present tense, Congress did not mean it to apply to former officials. Although respondents sought certiorari on this question, we declined review. 439 U. S. 1114 (1979).

trial courts generally the power to issue writs of mandamus. *McIntire* v. *Wood*, 7 Cranch 504 (1813). The federal courts in the District of Columbia, which derived power to issue the writ from the common law of the State of Maryland, were the sole exception. *Kendall* v. *United States ex rel. Stokes*, 12 Pet. 524 (1838).

To avoid this jurisdictional obstacle, litigants seeking mandamus-type relief outside of the District of Columbia often brought suits for injunctive or declaratory relief instead. But in most cases a superior federal officer was an indispensable party. See, *e. g.*, *Williams* v. *Fanning*, 332 U. S. 490 (1947). Because of the legal fiction that officers of such rank resided only where they were stationed—usually the District of Columbia—effective service could be obtained only there. And with the restrictive venue provisions then in effect, joinder of such an official required that the action be brought in the District of Columbia. See 28 U. S. C. § 1391 (b) (1946 ed., Supp. II), amended in Pub. L. 89–714, 80 Stat. 1111 (1966). The net result was that persons in distant parts of the country claiming injury by reason of the acts or omissions of a federal officer or agency were faced with significant expense and inconvenience in bringing suits for enforcement of claimed rights.

In response to this problem, Congress enacted the Mandamus and Venue Act of 1962. Section 1 of the Act, 28 U. S. C. § 1361, provides that actions in the nature of mandamus can be brought in any district court of the United States.[5] Section 2 of the Act, 28 U. S. C. § 1391 (e), provides a similarly expanded choice of venue and authorizes service by certified mail on federal officers or agencies located outside the district in which such a suit is filed.

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[5] "§ 1361. Action to compel an officer of the United States to perform his duty

"The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

The 1962 legislation thus makes it more convenient for aggrieved persons to file actions in the nature of mandamus. Respondents argue, however, that much more was intended. They contend that by using the general language "civil action," Congress intended to include in the expanded venue provision not only mandamus-type actions but all civil actions, including those seeking money damages from federal officers as individuals.

The language of § 1391 (e) does refer to "a civil action." Recitation of that fact, however, but begins our inquiry, as this Court noted over a century ago when faced with a similar problem of statutory interpretation:

> "The general words used in the clause . . . taken by themselves, and literally construed, without regard to the object in view, would seem to sanction the claim of the plaintiff. But this mode of expounding a statute has never been adopted by any enlightened tribunal—because it is evident that in many cases it would defeat the object which the Legislature intended to accomplish. And it is well settled that, in interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute . . . and the objects and policy of the law. . . ." *Brown* v. *Duchesne*, 19 How. 183, 194 (1857).

Looking first to "the whole statute," two things are apparent: (1) Section 1 of the Mandamus and Venue Act of 1962 is explicitly limited to "action[s] in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U. S. C. § 1361. (2) The "civil action" referred to in Section 2 of the Act is one "in which a defendant *is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority*. . . ." 28 U. S. C. § 1391 (e) (emphasis

added). The highlighted language, cast by Congress in the present tense, can reasonably be read as describing the character of the defendant at the time of the suit. So read, it limits a covered "civil action" to one against a federal official or agency who is at that time acting—or failing to act—in an official or apparently official way.[6] Such "civil actions" are those referred to in Section 1 of the Act, *i. e.*, "action[s] in the nature of mandamus."

Our analysis does not stop with the language of the statute; we must also look to "the objects and policy of the law." *Brown* v. *Duchesne*, 19 How., at 194. In order to "give [the Act] such a construction as will carry into execution the will of the Legislature . . . according to its true intent and meaning," *ibid.*, we turn to the legislative history. *Schlanger* v. *Seamans*, 401 U. S. 487, 490, n. 4 (1971). See also *United States* v. *Culbert*, 435 U. S. 371, 374, n. 4 (1978); *Train* v. *Colorado Public Interest Research Group*, 426 U. S. 1, 9–10 (1976).

III

H. R. 10089, 86th Cong., 2d Sess. (1960), was a precursor of the bill which eventually became the 1962 Act. Congressman Budge, the author of H. R. 10089, explained its purpose:

> "As it is now, there is no opportunity for a judicial review of the action of any decision that is made by a Federal officer in charge out there [in the field], no matter how arbitrary or capricious, because it is too expensive to come back here [to Washington, D. C.] to litigate it." Hearings on H. R. 10089 before Subcommittee No. 4 of the House Committee on the Judiciary, 86th Cong., 2d Sess., 19–20 (May 26 and June 2, 1960).[7]

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[6] Congress' use of the language "under color of legal authority" is explained in the House Committee Report as an effort to circumvent the sovereign immunity doctrine. See *infra*, at 538–539.

[7] A certified copy of these unpublished hearings has been lodged with the Clerk of this Court.

As often happens, the dialogue between witnesses, Members, and Committee Counsel reveals considerable initial confusion as to the extent of the problem and the proposed solution. Of course, the very purpose of hearing witnesses is to expose problems, probe for solutions, and reach a consensus. At one point Congressman Poff, in an obvious effort to clarify the responses, asked the Department of Justice witness, Donald MacGuineas:

> "Mr. POFF. Wouldn't you say the author's objective is to give a citizen who has a legitimate complaint against his Government the right to sue his Government at the place where the wrong was committed?
>
> "Mr. MacGUINEAS. The difficulty, if I may say so, Congressman, with your statement, is you speak of the right to sue his Government. Now, that proposition in itself raises very difficult and complicated legal questions which I touched upon at my appearance last week.
>
> "You must first decide whether a particular suit is actually a suit against the man in his official capacity or whether it i[s] a suit against the Government officer in his individual capacity. If it is the latter, it is not in any sense a suit against the Government." *Id.*, at 54.

Committee Counsel later asked the Department of Justice witness:

> "Suppose in order to take care of a body of law which seems to say that when a government official does something wrong he is acting in his individual capacity, we added the following language—'acting in his official capacity or under color of legal authority'?" *Id.*, at 61.

Mr. MacGuineas' response, which must now be recognized as prophetic, was that such language might later be misinterpreted as covering a damages action against a person holding Government office. This, he said, would raise "serious policy questions" by allowing a Government official to be sued in the

plaintiff's home district while a private defendant in the same kind of action could be sued only in the district of his residence. The Chairman, Mr. Forrester, and the ranking senior Committee Member, Mr. Poff, both stated that they shared the same concern. *Id.*, at 62–63.

Judge Albert Maris, then Chairman of the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, testified that such an "injustice" to the Government officer could be avoided only by requiring a damages suit to be brought in the district of his residence or where the cause of action arose. "That," said Judge Maris, "is the normal procedure in the law. That is what ordinarily happens in the ordinary law suit." *Id.*, at 86. Congressman Dowdy, one of the four Members present, then said:

> "Speaking to the point you were talking about, I don't understand that we have in consideration suits for money damages. That would be maybe where a person is being sued as an individual." *Id.*, at 87.

When Judge Maris stated his view that cases involving money damages would not be involved, Mr. Dowdy agreed: "They would not be covered by this [proposed legislation]." *Ibid.*

Finally, near the conclusion of the hearing, the bill's author, Mr. Budge, stated:

> "We always get off into these slander type actions which is not what I am seeking at all. When Mr. MacGuineas stated here this morning that he was not sure of the purpose of the legislation, I think that is perhaps true, because *I have no intention of bringing* [within this bill] *tort actions against individual government employees.* All I am seeking to do is to have the review of their official actions take place in the United States District Court where the determination was made." *Id.*, at 102 (emphasis added).

Following the hearings, the subcommittee redrafted H. R. 10089. The revised version, H. R. 12622, 86th Cong., 2d

Sess. (1960), among other things, added the language "or under color of legal authority" to the phrase "acting in his official capacity." Far from being intended as the master key which would unlock the door to nationwide venue for money damages actions brought against an official as an individual, this language was specifically intended only to alleviate the hardships caused by a relatively narrow but nagging problem, as the Committee Report made clear:

> "By including the officer or employee, both in his official capacity and acting under color of legal authority, the committee intends to make the proposed section 1391 (e) applicable not only to those cases where an action may be brought against an officer or employee in his official capacity. It intends to include also those cases where the action is nominally brought against the officer in his individual capacity even though he was acting within the apparent scope of his authority and not as a private citizen. *Such actions are also in essence against the United States but are brought against the officer or employee as an individual only to circumvent what remains of the doctrine of sovereign immunity.* The considerations of policy which demand that an action against an official may be brought locally rather than in the District of Columbia require similar venue provisions where the action is based upon the fiction that the officer is acting as an individual. There is no intention, however, to alter the venue requirements of Federal law insofar as suits resulting from the official's private actions are concerned." H. R. Rep. No. 1936, 86th Cong., 2d Sess., 3–4 (1960) (emphasis added).

The Committee's statement of the legislation's purpose also sheds considerable light on the congressional intent:

> "The purpose of this bill is to make it possible to bring actions against Government officials and agencies in U. S. district courts outside the District of Columbia, *which,*

> *because of certain existing limitations on jurisdiction and venue, may now be brought only in the U. S. District Court for the District of Columbia.*" *Id.*, at 1 (emphasis added).

In context, this clearly confines the intended thrust of § 1391 (e) to mandamus-type actions. See *supra*, at 533–534. The Report continues:

> "Section 2 [§ 1391 (e)] is the venue section of the bill. Its purpose is similar to that of section 1. It is designed to permit an action *which is essentially against the United States* to be brought locally rather than requiring that it be brought in the District of Columbia simply because Washington is the official residence of the officer or agency sued." H. R. Rep. No. 1936, *supra*, at 2 (emphasis added).[8]

Although H. R. 12622 passed the House in 1960, the Senate adjourned without acting on it. See H. R. Rep. No. 536, 87th Cong., 1st Sess., 1 (1961). The same bill was reintroduced in the next Congress as H. R. 1960, 87th Cong., 1st Sess. (1961). The Committee Report was republished as H. R. Rep. No. 536, 87th Cong., 1st Sess. (1961), and the bill was referred to the Senate.

The Senate Judiciary Committee also solicited comments on the bill from the Department of Justice. The Department suggested, *inter alia*, that it would be prudent to effect the

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[8] Respondents' argument that § 1391 (e) should apply to personal damages actions is based on an isolated passage in the Committee Report:

"The venue problem also arises in an action against a Government official seeking damages from him for actions which are claimed to be without legal authority but which were taken by the official in the course of performing his duty." H. R. Rep. No. 1936, at 3.

In the face of the consistently expressed intent of the Committee to include only actions essentially against the Government, we decline to treat this one cryptic sentence as dispositive of the legislative intent. See *Blackburn* v. *Goodwin*, 608 F. 2d 919 (CA2 1979).

venue reform by amending the Administrative Procedure Act so that "suits for money judgments against officers" would be "unquestionably eliminate[d]." See Letter from Deputy Attorney General White to Senator Eastland (Feb. 28, 1962), reprinted in S. Rep. No. 1992, 87th Cong., 2d Sess., 6 (1962). Although the Senate Committee in its Report commented on other suggestions proffered by the Justice Department, in this instance it made no response at all.[9] Respondents and the Courts of Appeals rely on this failure to respond as indicating an intention that the venue provisions were to apply to actions for money damages brought against a federal official in his individual capacity.

We are not persuaded by this negative inference. Several passages affirmatively state the limited nature of the bill: The Senate Committee's statement of the bill's purpose is exactly the same as that found in the House Report. Compare S. Rep. No. 1992, *supra,* at 2, with H. R. Rep. No. 536, *supra,* at 1. The Committee also states that "[t]he bill, as amended, is intended to facilitate review by the Federal courts of *administrative* actions," S. Rep. No. 1992, *supra,* at 2 (emphasis added), which does not afford a basis for reading the language of the statute to include money damages actions against individuals. And the following comment as to the bill's venue provisions appears in the Report:

> "The committee is of the view that the current state of the law respecting venue in actions against Government officials is contrary to the sound and equitable administration of justice. Frequently, the administrative determinations involved are made not in Washington

[9] The only arguable reference is a passage taken verbatim from the House Report which mentions that the venue problem also arises in suits against officials for damages for acts taken in the course of performing official duties. See S. Rep. No. 1992, at 3. Inasmuch as this passage, like much of the Senate Report, is but a recitation of language found earlier in the House Report, see n. 8, *supra,* it obviously was not drafted in response to the Justice Department's letter.

> but in the field. In either event, these are actions *which are in essence against the United States.* The Government official is defended by the Department of Justice whether the action is brought in the District of Columbia or in any other district. U. S. attorneys are present in every judicial district. Requiring the Government to defend Government officials and agencies in places other than Washington would not appear to be a burdensome imposition." S. Rep. No. 1992, *supra*, at 3 (emphasis added).

Here again is confirmation that there was no thought to expand the venue provisions except as to actions "in essence against the United States," since the Government is not "required" to defend personal actions in which a Government employee is a defendant.

What emerges is that the bill's author, the Committees, and the Congress intended nothing more than to provide nationwide venue for the convenience of individual plaintiffs in actions which are nominally against an individual officer but are in reality against the Government. A suit for money damages which must be paid out of the pocket of the private individual who happens to be—or formerly was—employed by the Federal Government plainly is not one "essentially against the United States," and thus is not encompassed by the venue provisions of § 1391 (e).[10]

This is not the first time an overbroad interpretation of § 1391 (e) has been rejected by this Court. In *Schlanger* v. *Seamans*, 401 U. S. 487 (1971), the question was whether in a habeas corpus proceeding "any custodian, or one in the chain of command, as well as the person detained, must be

[10] In deciding whether an action is in reality one against the Government, the identity of the named parties defendant is not controlling; the dispositive inquiry is "who will pay the judgment?" See *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682 (1949). Here, it is against individuals and not against the Government that a money judgment is sought.

in the territorial jurisdiction of the District Court." *Id.*, at 489. While recognizing that habeas corpus is "a civil action," we noted that reference to § 1391 (e) did not provide the answer. In the opinion for the Court, Mr. Justice Douglas stated:

> "Although by 28 U. S. C. § 1391 (e) . . . Congress has provided for nationwide service of process in a 'civil action in which each defendant is an officer or employee of the United States,' the legislative history of that section is barren of any indication that Congress extended habeas corpus jurisdiction. *That section was enacted to broaden the venue of civil actions which could previously have been brought only in the District of Columbia.* See H. R. Rep. No. 536, 87th Cong., 1st Sess., 1; S. Rep. No. 1992, 87th Cong., 2d Sess., 2." 401 U. S., at 490, n. 4. (Emphasis added.)

As we have noted, the "civil actions which could previously have been brought only in the District of Columbia" were suits for mandamus, not actions for money damages. See *supra*, at 533–534. The clear purport of our statement in *Schlanger* is that Congress did not intend the phrase "civil action" to be given the sweeping definition argued for it in that case, and that the Court was required to turn to the legislative history to determine which "civil actions" § 1391 (e) governed.

IV

The conclusion derived from the legislative history that § 1391 (e) does not cover the type of suits here at issue is buttressed by consideration of the consequences of the broad interpretation urged upon us by respondents. The conditions and venue provisions under which officers of the United States may be sued, while in office or after leaving office, have serious implications for defendants as well as for those seeking relief. An officer of the Government while so employed may have numerous mandamus-type suits naming him or her as a party.

Without doubt, under § 1391 (e), venue lies in every one of the 95 federal districts, and suits may be pending in a dozen or several dozen at any one time. Even though the burden of defending multiple suits while in office may be onerous, the United States Attorney in each of the districts and the Department of Justice carry that burden. In a mandamus suit only rarely would the officer himself be obliged to travel to the district in which the case was heard; if so obliged, the travel would be at Government expense. When an official leaves office, his personal involvement in a mandamus suit effectively ends and his successor carries on. No personal cost or inconvenience is incurred, either while in office or later. It was with this understanding that Congress sought to ameliorate the inconvenience and expense to private plaintiffs seeking relief from the action or inaction of their Government. H. R. Rep. No. 536, at 3; S. Rep. No. 1992, at 3.

Suits for money damages for which an individual officeholder may be found personally liable are quite different. If § 1391 (e) were construed to govern actions for money damages against federal officers individually, suits could be brought against these federal officers while in Government service—and could be pressed even after the official has left federal service—in any one of the 95 federal districts covering the 50 states and other areas within federal jurisdiction. This would place federal officers, solely by reason of their Government service, in a very different posture in personal damages suits from that of all other persons, since under 28 U. S. C. § 1391 (b), suits against private persons for money damages must be brought "in the judicial district where all defendants reside, or in which the claim arose." [11]

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[11] Under this provision the case against petitioner Stafford could have been brought only in the Northern District of Florida where the alleged claim arose. As to petitioner Colby, the proper venue would have been the Eastern District of New York where the alleged claim arose, or perhaps the Eastern District of Virginia, where some acts may have occurred at the headquarters of the CIA.

There is, however, no indication that a Congress concerned with "the sound and equitable administration of justice," H. R. Rep. No. 536, at 3; S. Rep. No. 1992, at 3, intended to impose on those serving their Government the burden of defending personal damages actions in a variety of distant districts after leaving office. Absent a clear indication that Congress intended such a sweeping effect, we will not infer such a purpose nor will we interpret a statute to effect that result. "We think these laws ought to be construed in the spirit in which they were made—that is, as founded in justice—and should not be strained by technical constructions to reach cases which Congress evidently could not have contemplated, without departing from the principle upon which they were legislating, and going far beyond the object they intended to accomplish." *Brown* v. *Duchesne*, 19 How., at 197.

The judgments of the Courts of Appeals in No. 77-1546 and No. 78-303 are reversed, and the cases are remanded for further proceedings consistent with this opinion.

Reversed and remanded.

MR. JUSTICE WHITE took no part in the consideration or decision of these cases.

MR. JUSTICE MARSHALL took no part in the decision of these cases.

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN joins, dissenting.

The Court today holds that in a suit against a federal officer for allegedly wrongful actions under color of legal authority, the venue provisions of § 2 of the Mandamus and Venue Act of 1962, 28 U. S. C. § 1391 (e), are applicable only if the officer is simply a nominal defendant, and the plaintiff's real grievance is against the Government. I disagree. It is my view that § 1391 (e) means what it says, and that it thus

applies as well to a suit for damages against a federal officer for his own wrongdoing.

I

When Congress enacted § 1391 (e) in 1962, this Court had recognized two types of suits against federal officers acting under color of legal authority.[1] See *Larson* v. *Domestic & Foreign Corp.*, 337 U. S. 682. The first of these two types of suits was based on a legal fiction designed to circumvent the doctrine of sovereign immunity. This fiction enabled an aggrieved party to obtain equitable relief in a case nominally directed against a federal officer if the officer had acted either unconstitutionally or in excess of his statutory authority. The theory underlying the fiction was that the relief sought was against the officer in his individual capacity, rather than against the Government. *Id.*, at 689–690. But, since any sovereign can act only through its agents, the reality was that the relief sought was in fact against the Government itself. The second type of suit, by contrast, was a direct action against the federal officer in his individual capacity for actions taken under color of legal authority. *Id.*, at 687. Such a suit typically sought to assess personal monetary liability against the officer.

The issue here is whether the venue and service of process provisions of § 1391 (e) were intended to apply to both of these kinds of suits. Section 1391 (e) provides in relevant part:

> "A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority . . . , may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, or (2) the cause of action arose, or

[1] For purposes of brevity, I hereafter refer to "suits against federal officers acting under color of legal authority" simply as "suits against federal officers."

(3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action. . . .

"The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer . . . as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought."

Since either of the two types of suits described above is properly characterized as "[a] civil action in which a defendant is an officer or employee of the United States . . . acting . . . under color of legal authority," it is quite clear that they both fall within the plain meaning of § 1391 (e).[2] Thus, by its own terms, § 1391 (e) unambiguously extends to the second type of suit against a federal officer, that is, one in which, as here, money damages are sought directly from the federal officer himself.

II

Relying on legislative history and policy considerations, the Court turns its back on the words of the statute and holds that it does not cover a suit against a federal officer for money damages. The legislative history, according to the Court, indicates that the general purpose of Congress in enacting the Mandamus and Venue Act of 1962 (Act) was to remove then

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[2] The Court argues that since § 1391 (e) is written in the present tense ("[a] civil action in which a defendant *is* an officer or employee of the United States . . . *acting* in his official capacity or under color of legal authority" (emphasis added)), the phrase "acting . . . under color of legal authority" is properly construed as applying only to a nominal suit against a federal officer for equitable relief. Such a suit, the Court notes, is necessarily brought against a defendant who is presently serving as a federal officer. *Ante*, at 535–536. This argument falls short of the mark, however, for many suits against federal officers for money damages, such as those at issue here, are brought against the officers while they are still in Government service.

existing jurisdictional and venue obstacles to suits against federal officers for mandamus-type relief outside the District of Columbia. The legislative history further indicates, in the Court's view, that the specific, and *exclusive*, concern of Congress in adding to § 1391 (e) the phrase at issue here, "acting . . . under color of legal authority," was to ensure that the provision would govern suits against federal officers for equitable relief. Thus the Court concludes that the proper construction of the phrase "acting . . . under color of legal authority" is coextensive with the sole concern to which it was purportedly addressed. This construction is said to find further support in the policies underlying the Act.[3]

The Court thus purports to rely on the familiar rule that " 'in interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute . . . and the objects and policy of the law.' " *Ante*, at 535, quoting *Brown* v. *Duchesne*, 19 How. 183, 194. See *Steelworkers* v. *Weber*, 443 U. S. 193, 201–202. This reliance is misplaced, however, since neither the legislative history nor public policy is inconsistent with the plain meaning of § 1391 (e).

A

The forerunner of the Act was introduced as H. R. 10089, 86th Cong., 2d Sess. (1960). That bill provided:

> "A civil action in which each defendant is an officer of the United States *in his official capacity*, a person acting under him, or an agency of the United States, may be brought in any judicial district where a plaintiff in the action resides." (Emphasis added.)

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[3] The Court also finds support for its construction of § 1391 (e) in our holding in *Schlanger* v. *Seamans*, 401 U. S. 487, 490, n. 4, that § 1391 (e) does not apply to habeas corpus actions. This reliance is misplaced, because the *Schlanger* decision turned on the *sui generis* nature of habeas corpus actions which, though "technically 'civil,' . . . [are] not automatically subject to all the rules governing ordinary civil actions." *Ibid.*

Following hearings and the submission of written comments on H. R. 10089 to a House Subcommittee of the Committee on the Judiciary, a new bill was introduced that parallels closely the current language of the Act. The new bill, H. R. 12622, 86th Cong., 2d Sess. (1960), contained two sections: the first vested all district courts with jurisdiction to hear suits seeking mandamus-type relief; [4] the second broadened the venue alternatives for a suit against a federal officer "acting in his official capacity *or under color of legal authority.*" (Emphasis added.) This bill passed the House in 1960, but the Senate adjourned without acting on it. The same bill was then reintroduced in the next Congress, H. R. 1960, 87th Cong., 1st Sess. (1961), and, with only minor amendments, was enacted by both the House and the Senate.

The question here is why Congress expanded the ambit of the second section of the Act, now § 1391 (e), to include not only a suit against a federal officer "acting in his official capacity," but also a suit against a federal officer "acting . . . under color of legal authority." The Court says that the legislative history reveals that the phrase "acting . . . under color of legal authority" was added to § 1391 (e) for the sole purpose of including within its coverage suits against federal officers for equitable relief. This view is said to find support in the positions announced by members of the House Subcommittee during the hearings on H. R. 10089, and in the Committee Reports that accompanied the subsequent versions of the bill.

I would have to agree that a principal purpose of adding the phrase "acting . . . under color of legal authority" to § 1391 (e) was to ensure that the venue provisions would apply to suits against federal officers for equitable relief. At the Sub-

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[4] This section of the bill, with minor modifications, was later enacted as § 1 of the Act, 28 U. S. C. § 1361, which provides: "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

committee Hearings on H. R. 10089, the proponent of the bill, Representative Budge, explained the basic problem to which it was addressed—that, in light of then existing venue and jurisdictional obstacles, "there is no opportunity for a judicial review of the action of any decision that is made by a Federal officer in charge out there [in the field], no matter how arbitrary or capricious, because it is too expensive to come back here [to Washington, D. C.] to litigate it." Hearings on H. R. 10089 before Subcommittee No. 4 of the House Committee on the Judiciary, 86th Cong., 2d Sess., 19–20 (1960).

The record of the testimony at the Subcommittee Hearings, however, reveals substantial confusion both as to the scope of the problem and the manner in which it ought to be resolved. During the hearings, a representative of the Justice Department observed that since the bill, as drafted, applied only to a suit against a federal officer "in his official capacity," there would remain unresolved the venue and jurisdictional problems in the context of a suit for equitable relief brought against a federal officer in his individual capacity to sidestep the problem of sovereign immunity. *Id.*, at 32–33. In response, the Subcommittee's counsel proposed the addition of the language at issue here: "Suppose in order to take care of a body of law which seems to say that when a government official does something wrong he is acting in his individual capacity, we added the following language—'acting in his official capacity *or under color of legal authority.*'" *Id.*, at 61 (emphasis added). That phrase was then incorporated in the redrafted bill, H. R. 12622, as well as subsequent bills. The Committee Reports accompanying those bills confirm that Congress intended § 1391 (e) to govern suits against federal officers for equitable relief.

Although a principal purpose of adding the phrase "acting . . . under color of legal authority" to § 1391 (e) thus undoubtedly was to ensure that the venue provision would apply to suits against federal officers for equitable relief, it is not at all clear

from the legislative history that Congress sought *only* to include such suits within the broadened ambit of the provision. Whatever may have been the intent of the Subcommittee members who conducted the hearings on the original bill, the Committee Reports accompanying subsequent bills—all of which included the phrase "acting . . . under color of legal authority"—indicated an intent to reach suits against federal officers not only for equitable relief, but also for money damages. In describing the scope of the problem addressed by the Act, the Committee Reports indicated that "[t]he venue problem also arises in an action against a Government official *seeking damages from him* for actions which are claimed to be without legal authority but which were taken by the official in the course of performing his duty." H. R. Rep. No. 1936, 86th Cong., 2d Sess., 3 (1960); H. R. Rep. No. 536, 87th Cong., 1st Sess., 3 (1961); S. Rep. No. 1992, 87th Cong., 2d Sess., 3 (1961) (emphasis added).

It is also significant that at least one of these Committee Reports, that of the Senate Judiciary Committee, was issued after the then Deputy Attorney General had recommended that the venue reform be tied in directly to the Administrative Procedure Act. Letter from Deputy Attorney General White to Senator Eastland (Feb. 28, 1962), reprinted in S. Rep. No. 1992, *supra*, at 6. "This," he observed, "[would] unquestionably eliminat[e] suits for money judgments against officers." *Ibid.* Although the Committee acted upon other suggestions in that letter, it took no steps whatsoever to narrow the ambit of § 1391 (e) to exclude suits for money damages. Rather, as stated above, the Committee Report indicated that the venue problem to which the bill was addressed applied to such suits.

B

It is also instructive that shortly after the Act was signed into law, then Deputy Attorney General Katzenbach circulated a memorandum to all United States Attorneys to assist

them in defending suits brought under the newly enacted legislation. In that memorandum, he noted:

> "The venue provision [§ 1391 (e)] is applicable to suits against Government officials and agencies for injunctions and damages as well as suits for mandatory relief. . . . As an example, suits for damages for alleged libel or slander by Government officials (which the Department defends on the ground that statements made by a Government official within the scope of his authority are absolutely privileged . . .) fall within the venue provision of this statute."

It is thus clear that the Justice Department regarded § 1391 (e) as applicable to suits against federal officers for money damages for actions taken under color of legal authority.

The significance of this memorandum is twofold. First, it represents a contemporaneous interpretation of § 1391 (e) that is wholly at odds with that adopted by the Court. Second, it indicates that the Justice Department has long assumed a special responsibility for representing federal officers sued for money damages for actions taken under color of legal authority. This longstanding responsibility is carried forth in current regulations. See 28 CFR §§ 50.15, 50.16 (1979).

The fact that the Justice Department, in most circumstances, will provide such representation substantially undercuts the Court's policy argument that to construe § 1391 (e) to govern suits for money damages would undermine the "sound and equitable administration of justice," see H. R. Rep. No. 536, *supra*, at 3; S. Rep. No. 1992, *supra*, at 3, by "plac[ing] federal officers, solely by reason of their Government service, in a very different posture in personal damages suits from that of all other persons, since under 28 U. S. C. § 1391 (b), suits against private persons for money damages must be brought 'in the judicial district where all the defendants reside, or in which the claim arose.'" *Ante*, at 544. The Court's argument overlooks the fact that since the Government

is willing to provide representation in a suit against a federal officer for money damages, the federal officer is relieved of the greatest burden involved in defending himself.

III

The petitioners also argue that principles of due process militate against construing § 1391 (e) to govern suits against federal officers for money damages. This argument turns on the fact that § 1391 (e) provides not only for expanded venue, but also for nationwide service of process. It is the petitioners' position that a serious due process problem arises when the provisions of § 1391 (e) are taken to mean what they say, so as to permit a federal district court to exercise personal jurisdiction over a federal officer who lacks sufficient "minimum contacts" with the State or district in which the federal court sits.[5]

The petitioners concede that previous cases in this area have involved the Fourteenth Amendment requirement that a state court may acquire personal jurisdiction only if there exist "minimum contacts" between the defendant and the forum State. Reasoning by analogy, however, the petitioners

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[5] The petitioners also argue, on statutory grounds, that § 1391 (e) does not confer personal jurisdiction. It is the petitioners' position that § 1391 (e) was designed only to govern venue and service of process, not to confer personal jurisdiction. The flaw in this argument is that, as a general rule, service of process is the means by which a court obtains personal jurisdiction over a defendant, and in the cases before us the petitioners have failed to demonstrate that there was any defect in the means by which service of process was effected.

It cannot seriously be argued that § 1391 (e) does not authorize extraterritorial service of process, for it provides that in civil actions governed by § 1391 (e) "the delivery of the summons and complaint to the officer or agency as required by the [Federal Rules of Civil Procedure] may be made by certified mail beyond the territorial limits of the district in which the action is brought." The legislative history, moreover, confirms that Congress intended extraterritorial service of process for all cases governed by § 1391 (e). See H. R. Rep. No. 536, 87th Cong., 1st Sess., 4 (1961).

argue that traditional notions of fair play and substantial justice inherent in the Due Process Clause of the Fifth Amendment similarly limit the exercise of congressional power to provide for nationwide *in personam* jurisdiction.

The short answer to this argument is that due process requires only certain minimum contacts between the defendant and the sovereign that has created the court. See *Shaffer* v. *Heitner*, 433 U. S. 186; *International Shoe Co.* v. *Washington*, 326 U. S. 310. The issue is not whether it is unfair to require a defendant to assume the burden of litigating in an inconvenient forum, but rather whether the court of a particular sovereign has power to exercise personal jurisdiction over a named defendant. The cases before us involve suits against residents of the United States in the courts of the United States. No due process problem exists.

This not to say that a federal officer in a suit for money damages is without recourse in the event he is sued in an inconvenient place. A federal district court is vested with broad authority "[f]or the convenience of parties and witnesses, in the interest of justice, [to] . . . transfer any civil action to any other district . . . where it might have been brought." 28 U. S. C. § 1404 (a). It is not unreasonable to expect that district courts would look sympathetically upon a motion for a change of venue in any case where a federal officer could show that he would be substantially prejudiced if the suit were not transferred to a more convenient forum.

For the reasons stated, I think that § 1391 (e) means exactly what it says, and that its provisions present no constitutional problem whatever. Accordingly, I would affirm the judgments in both of these cases.

Syllabus

FORD MOTOR CREDIT CO. ET AL. *v.* MILHOLLIN* ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 78–1487. Argued December 4, 1979—Decided February 20, 1980

Respondents financed their purchases of automobiles through standard retail installment contracts that were assigned to petitioner finance company. Each contract provided that respondents were to pay a precomputed finance charge, and, as required by the Truth in Lending Act (TILA) and implementing Federal Reserve Board (FRB) Regulation Z, the front page of each contract disclosed and explained certain features of the contract, including a disclosure that the buyer could prepay his obligations under the contract in full at any time prior to maturity of the final installment and that if he did so he would receive a rebate of the unearned portion of the finance charge. The face of the contract also stated that temporary default on a particular installment would result in a delinquency charge, but no mention was made of a clause in the contract giving the creditor a right to accelerate payment of the entire debt upon the buyer's default. Respondents thereafter brought separate suits in District Court, alleging, *inter alia*, that petitioner finance company had violated TILA and Regulation Z by failing to disclose on the front page of the contract that the creditor retained the right to accelerate payment of the debt. The District Court in two of the suits held that facial disclosure of the acceleration clauses was mandated by the provisions of TILA, 15 U. S. C. §§ 1638 (a)(9), 1639 (a)(7), that compel publication of "default, delinquency, or similar charges payable in the event of late payments." On a consolidated appeal, the Court of Appeals agreed that TILA imposes a general acceleration-clause disclosure requirement, but rather than holding that acceleration is a default charge, the Court of Appeals based its decision on the principle that under Regulation Z the creditor must disclose whether a rebate of unearned interest will be made upon acceleration and also must disclose the method by which the amount of unearned interest will be computed if the debt is accelerated. In so

*Although respondents spell their name "Millhollin," throughout this litigation their name has been misspelled as "Milhollin." Because legal research catalogs and computers are governed by the principle of consistency, not correctness, we feel constrained to adhere to the erroneous spelling.

holding, the court rejected the FRB staff's contrary interpretation of the pertinent statutory and regulatory provisions that specific disclosure of an acceleration rebate policy is only necessary when that policy varies from the custom with respect to voluntary prepayment rebates.

Held: TILA does not mandate a general rule of disclosure for acceleration clauses. Pp. 559–570.

(a) The issue of acceleration disclosure is not governed by clear expression in the statute or regulations. An acceleration clause cannot be equated with a "default, delinquency, or similar charg[e]," subject to disclosure under §§ 1638 (a)(9) and 1639 (a)(7) and Regulation Z, and the prepayment rebate disclosure requirement of Regulation Z also fails to afford direct support for an invariable specific acceleration disclosure rule. Pp. 559–562.

(b) In the absence of an express statutory mandate that acceleration procedures be invariably disclosed, a high degree of deference to the FRB staff's consistent administrative interpretation that the statute and regulations impose no such uniform requirement is warranted. Although the staff might have decided that acceleration rebates are so analytically distinct from identical voluntary prepayment rebates as to warrant separate disclosure, it was reasonable to conclude, alternatively, that ordinary consumers would be concerned chiefly about differing financial consequences. Pp. 562–570.

588 F. 2d 753, reversed and remanded.

BRENNAN, J., delivered the opinion for a unanimous Court. BLACKMUN, J., filed a concurring opinion, in which BURGER, C. J., joined, *post*, p. 570.

William M. Burke argued the cause for petitioners. With him on the briefs were *George R. Richter, Jr.*, *Ronald M. Bayer*, *Herbert H. Anderson*, and *John M. Berman*.

Richard A. Slottee argued the cause for respondents. With him on the brief were *William H. Clendenen, Jr.*, and *Richard Kanter*.

Stuart A. Smith argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General McCree*, *Assistant Attorney General Shenefield*, *John J. Powers III*, and *Marion L. Jetton*.†

†Briefs of *amici curiae* urging reversal were filed by *Roland E. Brandel* for the California Bankers Assn.; by *Peter D. Schellie* and *Theodore R.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The issue for decision in this case is whether the Truth in Lending Act (TILA), 82 Stat. 146, as amended, 15 U. S. C. § 1601 *et seq.*, requires that the existence of an acceleration clause always be disclosed on the face of a credit agreement. The Federal Reserve Board staff has consistently construed the statute and regulations as imposing no such uniform requirement. Because we believe that a high degree of deference to this administrative interpretation is warranted, we hold that TILA does not mandate a general rule of disclosure for acceleration clauses.

I

The several respondents in this case purchased automobiles from various dealers, financing their purchases through standard retail installment contracts that were assigned to petitioner Ford Motor Credit Co. (FMCC), a finance company. Each contract provided that respondents were to pay a precomputed finance charge. As required by TILA and Federal Reserve Board Regulation Z, which implements the Act, the front page of each contract disclosed and explained certain features of the agreement. See 15 U. S. C. § 1631; 12 CFR § 226.6 (a) (1979). Among these disclosures was a paragraph informing the buyer that he

> "may prepay his obligations under this contract in full at any time prior to maturity of the final instalment hereunder, and, if he does so, shall receive a rebate of the unearned portion of the Finance Charge computed under the sum of the digits method. . . ."

The face of the contract also stated that temporary default on a particular installment would result in a predetermined

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Boehm for the Consumer Bankers Assn.; and by *William H. Allen* and *Vernon L. Evans* for the National Consumer Finance Assn. et al.

Margaret S. Rigg and *Willard P. Ogburn* filed a brief for the National Clients Council, Inc., as *amicus curiae* urging affirmance.

delinquency charge. Not mentioned on the disclosure page was a clause in the body of the contract giving the creditor a right to accelerate payment of the entire debt upon the buyer's default.[1]

Respondents subsequently commenced four separate suits against FMCC in the United States District Court for the District of Oregon, alleging, *inter alia*, that FMCC had violated TILA and Regulation Z by failing to disclose on the front page of the contract that the creditor retained the right to accelerate payment of the debt.[2] In two of the suits,[3] the District Court held that facial disclosure of the acceleration clauses was mandated by the provision of TILA that compels publication of "default, delinquency, or similar charges payable in the event of late payments," 15 U. S. C. §§ 1638 (a)(9), 1639 (a)(7). App. 30–31, 37, 69–71. Respondents in the other two actions prevailed on different grounds.[4] All four cases were consolidated on appeal to the Ninth Circuit.

The Court of Appeals agreed with the District Court that TILA imposes a general acceleration-clause disclosure requirement.[5] Rather than resting on the District Court's holding that acceleration is a default charge, however, the Court of Appeals based its decision on the narrower principle that under Regulation Z "[t]he creditor must disclose whether a rebate of unearned interest will be made upon acceleration

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[1] "In the event Buyer defaults in any payment . . . [s]eller shall have the right to declare all amounts due or to become due hereunder to be immediately due and payable. . . ."

[2] The individual suits were *Milhollin* v. *Ford Motor Credit Co.*, Civ. No. 75–334 (1976); *Eaton* v. *Ford Motor Credit Co.*, Civ. No. 76–575 (1977); *Andresen* v. *Ford Motor Credit Co.*, Civ. No. 76–1090 (1977); and *Messinger* v. *Ford Motor Credit Co.*, Civ. No. 76–475 (1977).

[3] *Milhollin* and *Eaton*, *supra* n. 2.

[4] *Andresen* and *Messinger*, *supra* n. 2.

[5] The Court of Appeals rejected the grounds for TILA liability relied upon by the District Court in *Andresen* and *Messinger*, and remanded those two cases for consideration under the acceleration-clause theory.

and also disclose the method by which the amount of unearned interest will be computed if the debt is accelerated." 588 F. 2d 753, 757 (1978), quoting *St. Germain* v. *Bank of Hawaii*, 573 F. 2d 572, 577 (CA9 1977). See 12 CFR § 226.8 (b)(7) (1979). Implicit in the conclusion of the Court of Appeals—and explicit in its preceding *St. Germain* decision—was the rejection of a contrary administrative interpretation of the pertinent statutory and regulatory provisions. In adopting its particular approach, the Court of Appeals mapped a path through the disclosure thicket that diverges from the routes traveled by the Courts of Appeals for several other Circuits.[6] We granted certiorari, 442 U. S. 940 (1979), to resolve the conflict. We reverse.

II

The Truth in Lending Act has the broad purpose of promoting "the informed use of credit" by assuring "meaningful disclosure of credit terms" to consumers. 15 U. S. C. § 1601. Because of their complexity and variety, however, credit transactions defy exhaustive regulation by a single statute. Congress therefore delegated expansive authority to

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[6] The Courts of Appeals for the Eighth and Tenth Circuits have flatly declared that a creditor's rebate practice upon acceleration never need be disclosed. *Griffith* v. *Superior Ford*, 577 F. 2d 455 (CA8 1978); *United States ex rel. Hornell* v. *One 1976 Chevrolet*, 585 F. 2d 978 (CA10 1978). The Courts of Appeals for the Third and District of Columbia Circuits have held that acceleration rebate policies need not be separately disclosed when state law or the contract compels the creditor to rebate under acceleration, as under voluntary prepayment. *Johnson* v. *McCrackin-Sturman Ford, Inc.*, 527 F. 2d 257 (CA3 1975); *Price* v. *Franklin Investment Co.*, 187 U. S. App. D. C. 383, 574 F. 2d 594 (1978). The Court of Appeals for the Fifth Circuit has also adopted the position that separate disclosure is not required when the creditor is obliged to treat acceleration and voluntary prepayment alike for rebate purposes; that court has emphasized that the critical factor is the creditor's legal obligation to rebate, rather than its unbidden rebate policy. *McDaniel* v. *Fulton Nat. Bank*, 571 F. 2d 948 (en banc), clarified, 576 F. 2d 1156 (1978) (en banc).

the Federal Reserve Board to elaborate and expand the legal framework governing commerce in credit. 15 U. S. C. § 1604; *Mourning* v. *Family Publications Service, Inc.*, 411 U. S. 356 (1973). The Board executed its responsibility by promulgating Regulation Z, 12 CFR Part 226 (1979), which at least partly fills the statutory gaps. Even Regulation Z, however, cannot speak explicitly to every credit disclosure issue. At the threshold, therefore, interpretation of TILA and Regulation Z demands an examination of their express language; absent a clear expression, it becomes necessary to consider the implicit character of the statutory scheme. For the reasons following we conclude that the issue of acceleration disclosure is not governed by clear expression in the statute or regulation, and that it is appropriate to defer to the Federal Reserve Board and staff in determining what resolution of that issue is implied by the truth-in-lending enactments.

Respondents have advanced two theories to buttress their claim that the Act and Regulation expressly mandate disclosure of acceleration clauses. In the District Court, they contended that acceleration clauses were comprehended by the general statutory prescription that a creditor shall disclose "default, delinquency, or similar charges payable in the event of late payments," 15 U. S. C. §§ 1638 (a)(9), 1639 (a)(7), and were included within the provision of Regulation Z requiring disclosure of the "amount, or method of computing the amount, of any default, delinquency, or similar charges payable in the event of late payments," 12 CFR § 226.8 (b)(4) (1979). Before this Court, respondents follow the Court of Appeals in arguing that 12 CFR § 226.8 (b)(7) may be the source of an obligation to disclose procedures governing the rebate of unearned finance charges that accrue under acceleration. That section commands

> "[i]dentification of the method of computing any unearned portion of the finance charge in the event of prepayment in full of an obligation which includes pre-

computed finance charges and a statement of the amount or method of computation of any charge that may be deducted from the amount of any rebate of such unearned finance charge that will be credited to an obligation or refunded to the customer."

A fair reading of the pertinent provisions does not sustain respondents' contention that acceleration clauses are within their terms.

An acceleration clause cannot be equated with a "default, delinquency, or similar charg[e]," subject to disclosure under 15 U. S. C. §§ 1638 (a)(9), 1639 (a)(7), and 12 CFR § 226.8 (b)(4). The prerogative of acceleration affords the creditor a mechanism for collecting the outstanding portion of a debt on which there has been a partial default. In itself, acceleration entails no monetary penalty, although a creditor may independently impose such a penalty, for example, by failing to rebate unearned finance charges. A "default, delinquency, or similar *charg[e]*," on the other hand, self-evidently refers to a specific assessable sum. Thus, within the trade, delinquency charges are understood to be "the *compensation* a creditor receives on a precomputed contract for the debtor's delay in making timely instalment payments," 1 CCH Consumer Credit Guide ¶¶ 4230, 4231 (1977) (emphasis added). Acceleration is not compensatory; a creditor accelerates to avoid further delay by demanding immediate payment of the outstanding debt. See *id.*, ¶ 4231; Uniform Consumer Credit Code of 1968, § 2.203, official comment 2, 7 U. L. A. 315–316 (1978); § 2.204 (3), 7 U. L. A. 317 (1978).

The language employed in TILA sections 1638 (a)(9) and 1639 (a)(7), and in 12 CFR 226.8 (b)(4) (1979), confirms the interpretation of "charges" as specific penalty sums. The statutory provisions speak of "charges *payable* in the event of late payments." (Emphasis added.) Even if one considers the burdensomeness of acceleration as a form of "charge" upon the debtor, it would hardly make sense to speak

of that burden as "payable" to the creditor. Similarly Regulation Z orders disclosure of the *"amount, or method of computing the amount,* of any default, delinquency, or similar charges. . . ." (Emphasis added.) That command has no sensible application to the remedy of acceleration. In short, we would have to stretch these provisions beyond their obvious limits to construe them as a mandate for the disclosure of acceleration clauses.[7]

The prepayment rebate disclosure regulation, 12 CFR § 226.8 (b)(7) (1979), also fails to afford direct support for an invariable specific acceleration disclosure rule. To be sure, payment by the debtor in response to acceleration might be deemed a prepayment within the ambit of that regulation. But so long as the creditor's rebate practice under acceleration is identical to its policy with respect to voluntary prepayments, *separate* disclosure of the acceleration policy does not seem obligatory under a literal reading of the regulation. Section 226.8 (b)(7), therefore, squares with the position of the Federal Reserve Board staff that specific disclosure of acceleration rebate policy is only necessary when that policy varies from the custom with respect to voluntary prepayment rebates. FRB Official Staff Interpretation No. FC–0054, 12 CFR Part 226 Appendix, p. 627 (1979).

III

Notwithstanding the absence of an express statutory mandate that acceleration procedures be invariably disclosed, the

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[7] Seven of the Courts of Appeals, including that for the Ninth Circuit, have refused to treat acceleration *simpliciter* as a "charge" within 15 U. S. C. § 1638 (a)(9) and 12 CFR § 226.8 (b)(4) (1979). *Johnson* v. *McCrackin-Sturman Ford, Inc.*, 527 F. 2d, at 265–268 (CA3); *McDaniel* v. *Fulton Nat. Bank*, 576 F. 2d, at 1157 (CA5) (en banc); *Croysdale* v. *Franklin Sav. Assn.*, 601 F. 2d 1340, 1342–1343, and n. 2 (CA7 1979); *Griffith* v. *Superior Ford*, 577 F. 2d, at 457–459 (CA8); *St. Germain* v. *Bank of Hawaii*, 573 F. 2d 572, 573–574 (CA9 1977); *United States ex rel. Hornell* v. *One 1976 Chevrolet*, 585 F. 2d, at 981 (CA10); *Price* v. *Franklin Investment Co.*, 187 U. S. App. D. C., at 393, 574 F. 2d, at 604.

Court of Appeals has held that the "creditor must [always] disclose whether a rebate of unearned interest will be made upon acceleration and also disclose the method by which the amount of unearned interest will be computed if the debt is accelerated." *St. Germain* v. *Bank of Hawaii*, 573 F. 2d, at 577; accord, 588 F. 2d, at 757–758. In so deciding, the Court of Appeals in *St. Germain* explicitly rejected the view of the Federal Reserve Board staff that the right of acceleration need *not* be disclosed, and that rebate practice under acceleration must be disclosed only if it differs from the creditor's rebate policy with respect to voluntary prepayment. FRB Official Staff Interpretation No. FC–0054, *supra;* see FRB Public Information Letter No. 851, [1974–1977 Transfer Binder] CCH Consumer Credit Guide ¶ 31,173; FRB Public Information Letter No. 1208, *id.*, ¶ 31,647; FRB Public Information Letter No. 1324, 5 CCH Consumer Credit Guide ¶ 31,827 (1979).[8] Rather, *St. Germain* declared that it would

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[8] Official Staff Interpretation No. FC–0054 provides, in pertinent part: "It is staff's opinion that the phrase 'default, delinquency, or similar charges in the event of late payments,' found in § 128 (a) (9) and § 129 (a) (7) of the Truth in Lending Act and § 226.8 (b) (4) of Regulation Z, refers to specific sums assessed against a borrower solely because of failure to make payments when due. It is staff's opinion that the mere right to accelerate contained in a contractual provision which sets out the creditor's right to accelerate the entire obligation upon a certain event (generally the obligor's failure to make a payment when due) is not a *charge* payable in the event of late payment. Therefore, it need not be disclosed under § 226.8 (b) (4).

"Your [*sic*] refer to a prior Public Information Letter, No. 851, which discusses the right of acceleration. . . . Staff understands that letter to say that early payment of the balance of a precomputed finance charge obligation by a customer upon acceleration by the creditor is essentially the same as a prepayment of the obligation. Therefore, if the creditor does not rebate unearned finance charges in accordance with the rebate provisions disclosed under § 226.8 (b) (7) when the customer pays the balance of the obligation upon acceleration, any amounts retained beyond those which would have been rebated under the disclosed rebate provisions

"choose the direction that makes more sense to us in trying to achieve the congressional purpose of providing meaningful disclosure to the debtor about the costs of his borrowing." 573 F. 2d, at 576–577.

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do represent the type of charge that must be disclosed under § 226.8 (b)(4)." (Emphasis added.)

Information Letter No. 851 states, in part:

"For the purposes of Truth in Lending disclosures, this staff views an acceleration of payments as essentially a prepayment of the contract obligation. As such, the disclosure provisions of § 226.8 (b)(7) . . . of the Regulation, which require the creditor to identify the method of rebating any unearned portion of the finance charge or to disclose that no rebate would be made, apply. If the creditor rebates under one method for acceleration and another for voluntary prepayment, both methods would need to be identified under § 226.8 (b)(7). . . .

"If, under the acceleration provision, a rebate is made by the creditor in accordance with the disclosure of the rebate provisions of § 226.8 (b)(7), we believe that there is no *additional* 'charge' for late payments made by the customer and therefore no need to disclose under the provisions of § 226.8 (b)(4). On the other hand, if upon acceleration of the unpaid remainder of the total of payments, the creditor does not rebate unearned finance charges in accordance with the rebate provisions disclosed in § 226.8 (b)(7), any amounts retained beyond those which would have been rebated under the disclosed rebate provisions represent a 'charge' which should be disclosed under § 226.8 (b)(4)."

Information Letter No. 1208 states, in part:

"In FC–0054, staff took the position that a creditor's right of acceleration upon default by the obligor need not be disclosed as a default, delinquency, or late payment charge within the context of § 226.8 (b)(4). The interpretation went on to state, however, that since early payment of the balance of an obligation upon acceleration is essentially the same as voluntary prepayment, if the creditor does not rebate unearned finance charges in the former situation in accordance with the rebate provisions disclosed under § 226.8 (b)(7), any extra amounts retained represent the type of charge that must be disclosed under § 226.8 (b)(4)."

Information Letter No. 1324 states, in part:

"The staff's position . . . is that if a creditor rebates unearned finance charges in connection with prepayment upon acceleration using the same method as for voluntary prepayment and that method has been properly

It is a commonplace that courts will further legislative goals by filling the interstitial silences within a statute or a regulation. Because legislators cannot foresee all eventualities, judges must decide unanticipated cases by extrapolating from related statutes or administrative provisions. But legislative silence is not always the result of a lack of prescience; it may instead betoken permission or, perhaps, considered abstention from regulation. In that event, judges are not accredited to supersede Congress or the appropriate agency by embellishing upon the regulatory scheme. Accordingly, caution must temper judicial creativity in the face of legislative or regulatory silence.

At the very least, that caution requires attentiveness to the views of the administrative entity appointed to apply and enforce a statute. And deference is especially appropriate in the process of interpreting the Truth in Lending Act and Regulation Z. Unless demonstrably irrational, Federal Reserve Board staff opinions construing the Act or Regulation should be dispositive for several reasons.

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disclosed in accordance with § 226.8 (b) (7), there is no default charge. However, any amounts retained by a creditor upon acceleration which would have been rebated under the disclosed rebate provisions would represent the type of default charge which must be disclosed pursuant to § 226.8 (b) (4)."

In *St. Germain*, the Court of Appeals spurned these administrative opinions as a source of interpretive guidance on the ground that the several letters were "conflicting signals." 573 F. 2d, at 576. As we read the Staff Opinion and Letters, however, they are fundamentally consistent, if somewhat inartfully drafted. The staff's position in each appears to be that separate disclosure of acceleration rebate practices is unnecessary when those practices parallel voluntary prepayment rebate policy. On the other hand, where acceleration rebates are less than voluntary prepayment rebates, acceleration policy must be separately explained under § 226.8 (b) (4) and, perhaps as well, under § 226.8 (b) (7). Neither the Opinion nor the Letters suggest that acceleration rebate policy must be separately disclosed in all instances.

The Court has often repeated the general proposition that considerable respect is due "'the interpretation given [a] statute by the officers or agency charged with its administration.'" *Zenith Radio Corp.* v. *United States*, 437 U. S. 443, 450 (1978), quoting *Udall* v. *Tallman*, 380 U. S. 1, 16 (1965); see, *e. g.*, *Power Reactor Co.* v. *Electricians*, 367 U. S. 396, 408 (1961). An agency's construction of its own regulations has been regarded as especially due that respect. See *Bowles* v. *Seminole Rock Co.*, 325 U. S. 410, 413–414 (1945). This traditional acquiescence in administrative expertise is particularly apt under TILA, because the Federal Reserve Board has played a pivotal role in "setting [the statutory] machinery in motion. . . ." *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 315 (1933). As we emphasized in *Mourning* v. *Family Publications Service*, 411 U. S. 356 (1973), Congress delegated broad administrative lawmaking power to the Federal Reserve Board when it framed TILA. The Act is best construed by those who gave it substance in promulgating regulations thereunder.[9]

Furthermore, Congress has specifically designated the Federal Reserve Board and staff as the primary source for interpretation and application of truth-in-lending law. Because creditors need sure guidance through the "highly technical" Truth in Lending Act, S. Rep. No. 93–278, p. 13 (1973), legislators have twice acted to promote reliance upon Federal Reserve pronouncements. In 1974, TILA was amended to

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[9] To be sure, the administrative interpretations proffered in this case were issued by the Federal Reserve staff rather than the Board. But to the extent that deference to administrative views is bottomed on respect for agency expertise, it is unrealistic to draw a radical distinction between opinions issued under the imprimatur of the Board and those submitted as official staff memoranda. See FRB Public Information Letter No. 444, [1969–1974 Transfer Binder] CCH Consumer Credit Guide ¶ 30,640. At any rate, it is unnecessary to explore the Board/staff difference at length, because Congress has conferred special status upon official staff interpretations. See 15 U. S. C. § 1640 (f); see 12 CFR § 226.1 (d) (1979).

provide creditors with a defense from liability based upon good-faith compliance with a "rule, regulation, or interpretation" of the Federal Reserve Board itself. § 406, 88 Stat. 1518, codified at 15 U. S. C. § 1640 (f). The explicit purpose of the amendment was to relieve the creditor of the burden of choosing "between the Board's construction of the Act and the creditor's own assessment of how a court may interpret the Act." S. Rep. No. 93-278, *supra*, at 13. The same rationale prompted a further change in the statute in 1976, authorizing a liability defense for "conformity with any interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the Board to issue such interpretations or approvals. . . ." § 3 (b), 90 Stat. 197, codified at 15 U. S. C. § 1640 (f); see 122 Cong. Rec. 2836 (1976) (remarks of Sen. Garn); *id.*, at 2852 (remarks of Rep. Annunzio, chairman of Consumer Affairs Subcommittee); *ibid.* (remarks of Rep. Rousselot); 121 Cong. Rec. 36927 (1975) (remarks of Rep. Annunzio); *id.*, at 36927–36928 (remarks of Rep. Wylie).[10]

The enactment and expansion of § 1640 (f) has significance beyond the express creation of a good-faith immunity.[11] That statutory provision signals an unmistakable congressional decision to treat administrative rulemaking and inter-

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[10] Title 12 CFR § 226.1 (d) authorizes the issuance of official staff interpretations that trigger the application of § 1640 (f). Official interpretations are published in the Federal Register, and opportunity for public comment may be requested. 12 CFR § 226.1 (d). Unofficial interpretations have no special status under § 1640 (f).

[11] Although FMCC claims that its pre-1976 disclosure policy comported with Official Staff Interpretation No. FC-0054 (issued in 1977), it has not argued before this Court that it is entitled to the immunity afforded by the 1976 amendment to § 1640 (f). We need not decide, therefore, whether the 1976 amendment may be invoked with respect to contracts formed before its enactment or whether conformity with a subsequently issued official staff interpretation constitutes "compliance" within the terms of § 1640 (f).

pretation under TILA as authoritative. Moreover, language in the legislative history evinces a decided preference for resolving interpretive issues by uniform administrative decision, rather than piecemeal through litigation.[12] See S. Rep. No. 93-278, *supra*, at 13-14; 122 Cong. Rec. 2852 (1976) (remarks of Rep. Annunzio); 121 Cong. Rec. 36927 (1975) (remarks of Rep. Annunzio). Courts should honor that congressional choice. Thus, while not abdicating their ultimate judicial responsibility to determine the law, cf. generally *SEC* v. *Chenery Corp.*, 318 U. S. 80, 92-94 (1943), judges ought to refrain from substituting their own interstitial lawmaking for that of the Federal Reserve, so long as the latter's lawmaking is not irrational.

Finally, wholly apart from jurisprudential considerations or congressional intent, deference to the Federal Reserve is compelled by necessity; a court that tries to chart a true course to the Act's purpose embarks upon a voyage without a compass when it disregards the agency's views. The concept of "meaningful disclosure" that animates TILA, see *St. Germain*, 573 F. 2d, at 577, cannot be applied in the abstract. *Meaningful* disclosure does not mean *more* disclosure. Rather, it describes a balance between "competing considerations of complete disclosure . . . and the need to avoid . . . [informational overload]." S. Rep. 96-73, p. 3 (1979) (accompanying S. 108, Truth in Lending Simplification and Reform Act); see S. Rep. No. 95-720, pp. 2-3 (1978); 63 Federal Reserve Board Ann. Rep. 326, 349-350 (1976); Comment, Acceleration Clause Disclosure Under the Truth in Lending Act, 77 Colum. L. Rev. 649, 662-663 (1977). And striking the appropriate balance is an empirical process that entails investigation into consumer psychology and that presupposes

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[12] That preference is understandable. As the divergence of judicial views on the acceleration disclosure issue illustrates, see n. 6, *supra*, litigation is not always the optimal process by means of which to formulate a coherent and predictable body of technical rules.

broad experience with credit practices. Administrative agencies are simply better suited than courts to engage in such a process.

The Federal Reserve Board staff treatment of acceleration disclosure rationally accommodates the conflicting demands for completeness and for simplicity. In determining that acceleration rebate practices need be disclosed only when they diverge from other prepayment rebate practices, the Federal Reserve has adopted what may be termed a "bottom-line" approach: that the most important information in a credit purchase is that which explains differing net charges and rates. Cf. S. Rep. No. 96–73, *supra*, at 3–4; 63 Federal Reserve Board Ann. Rep., *supra*, at 350–352. Although the staff might have decided that acceleration rebates are so analytically distinct from identical voluntary prepayment rebates as to warrant separate disclosure, it was reasonable to conclude, alternatively, that ordinary consumers would be concerned chiefly about differing financial consequences.[13]

[13] The Federal Reserve might reasonably have adopted the disclosure approach of the Court of Appeals for the Fifth Circuit, focusing upon a creditor's contractual acceleration rebate *rights*, rather than upon the creditor's operating rebate *policy*. See *McDaniel* v. *Fulton Nat. Bank*, 576 F. 2d, at 1157. But, again, it was equally logical to conclude that so long as the creditor's actual practice upon acceleration was the same as its practice upon prepayment, it was not necessary to require disclosure of the creditor's unexercised rights in the disclosure statement itself.

In arguing for affirmance, respondents contend that disclosure of a creditor's rebate policy at the time of credit contract formation is no guarantee against a change in that policy at some future date, perhaps after the TILA statute of limitations has run. See 15 U. S. C. § 1640 (e). But when a genuine change in policy occurs after disclosure, the statute itself may arguably contemplate that the creditor be immune from liability. See 15 U. S. C. § 1634; S. Rep. No. 392, 90th Cong., 1st Sess., 18 (1967). On the other hand, if the creditor envisioned a change in policy at the time it disclosed practices contemporaneously in force, then the debtor might conceivably have a claim for fraud. In any event, it is open to the Federal Reserve to consider this question when reviewing its position on acceleration rebate disclosure.

Faced with an apparent lacuna in the express prescriptions of TILA and Regulation Z, the Court of Appeals had no ground for displacing the Federal Reserve staff's expert judgment.

Accordingly, we decide that the Court of Appeals erred in rejecting the views of the Federal Reserve Board and staff, and holding that separate disclosure of acceleration rebate practices is always required.[14]

Reversed and remanded.

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE joins, concurring.

I join the Court's opinion but write separately because I do not fully agree with the statement in note 13 of the opinion, *ante*, at 569, that the Federal Reserve Board's approach to the disclosure of acceleration rebates is "equally logical" with other alternatives it might have chosen. In particular, I am concerned that the Board's emphasis on a creditor's rebate *policy* rather than its contract *rights* steers the Truth in Lending Act away from the moorings of contract law in a manner that may not prove salutary for the welfare of consumers of financial credit.

To be sure, consumers contemplating installment purchases are concerned with the "bottom line," *ante*, at 569, of how much they will be required to pay. But there is little doubt, in my view, that consumers who read the required disclosures

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[14] Respondents argue before this Court that even under the Federal Reserve staff's view, petitioners violated TILA and Regulation Z because the credit contract itself contained language concerning acceleration rebates that assertedly contradicted the disclosures on the face of the contract. That contradiction, if present, could run afoul of 12 CFR § 226.8 (b)(7) or § 226.6 (c) (1979), as those provisions are understood by the agency staff. See FRB Public Information Letter No. 1324, *supra* n. 8. But respondents prevailed in the District Court and in the Court of Appeals upon broader rulings that acceleration clause disclosure was generally required; neither court addressed the specific allegation of contradiction. Therefore, if properly presented, the contradiction issue is open for decision on remand.

think that they are reading a description of their legal rights and obligations, and not merely an explanation of "practices" or "policies" of the creditor that may be changed to their detriment at the creditor's will. Although there may be reason to believe that a major finance company, such as Ford Motor Credit Co., will adhere to its rebate practices despite the legal right to demand more upon acceleration than it said it would, I am not sanguine that a less responsible organization always will do the same. The result could be confusion and unanticipated financial loss, as well as fruitless litigation.

Ultimately, I think the interpretation adopted by the Fifth Circuit in *McDaniel* v. *Fulton Nat. Bank*, 571 F. 2d 948 (en banc), clarified, 576 F. 2d 1156 (1978) (en banc), which requires disclosure of the creditor's right to retain finance charges upon acceleration when it differs from the right to such charges upon prepayment, may prove to be a sounder and more durable application of the statute than the position currently adopted by the Board. Nevertheless, I agree with the Court that the Board's approach is reasonable. In order to uphold the Board's position, "we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." *Udall* v. *Tallman*, 380 U. S. 1, 16 (1965), quoting *Unemployment Comm'n* v. *Aragon*, 329 U. S. 143, 153 (1946). Accordingly, I agree that the courts should not add to the disclosure obligations that the Board has outlined through its staff opinions.

SEATRAIN SHIPBUILDING CORP. ET AL. *v.* SHELL OIL CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1651. Argued November 28, 1979—Decided February 20, 1980

Petitioner Seatrain Shipbuilding Corp. (Seatrain) received a construction-differential subsidy (CDS) under Title V of the Merchant Marine Act, 1936 (Act), to construct a supertanker, and, as required by § 506 of the Act, Seatrain and petitioner Polk Tanker Corp., the initial owner of the vessel, agreed to operate it exclusively in foreign trade except as otherwise authorized in § 506. When the vessel was completed, petitioners asked the Secretary of Commerce to terminate all restrictions on the vessel's operation in domestic trade in exchange for their fully secured note repaying in full the vessel's CDS. The Secretary granted their application. Thereafter, certain competitors in the domestic trade (respondents) brought suit in District Court seeking declaratory and injunctive relief prohibiting the Secretary from granting a permanent release from the § 506 foreign-trade-only requirement. The District Court held, *inter alia*, that the Secretary had the authority permanently to release vessels from trade restrictions imposed pursuant to § 506 in exchange for full CDS repayment, but remanded the case to the Secretary for consideration of the competitive consequences of granting the release in question. Apparently relying on Federal Rule of Civil Procedure 54 (b), the court subsequently certified its decision as a "final judgment." The Court of Appeals reversed, concluding that by specifying certain exceptions to the foreign-trade-only requirement § 506 occupied the field and impliedly prohibited the Secretary from making any other exceptions under the Act's more general provisions.

Held:

1. The District Court's determination that the Secretary was empowered to waive permanently the restrictions required by § 506 was a "final decision" certifiable under Rule 54 (b) and appealable to the Court of Appeals under 28 U. S. C. § 1291, and thus this Court has jurisdiction to hear the case. Although respondents' claim that the Secretary's waiver of § 506 restrictions as to petitioners' vessel was an abuse of discretion caused the District Court to remand to the agency for consideration of the economic consequences of granting the release, respondents' request for a general declaration that the Secretary lacks

authority to grant a permanent release from § 506 restrictions under any circumstances was finally decided and meets the case-or-controversy requirement of Art. III of the Constitution. Pp. 579–584.

2. The Act empowers the Secretary to approve full-repayment/permanent-release transactions of the type at issue here. On the face of the statute, the Secretary's broad contracting powers and discretion to administer the Act seem to comprehend the authority to grant permanent releases. The specific exceptions to the foreign-trade-only requirement in § 506 speak only to *temporary* releases from that requirement, and nothing in § 506, or in any other provision of Title V of the Act, either expressly or implicitly addresses the issue of permanent revocation of a CDS contract. Furthermore, the legislative history does not demonstrate that Congress intended to rule out permanent releases of the type involved here, and the agency has consistently concluded that the Act permits such releases. Pp. 584–596.

194 U. S. App. D. C. 7, 595 F. 2d 814, reversed and remanded.

BRENNAN, J., delivered the opinion for a unanimous Court.

William E. McDaniels argued the cause for petitioners. With him on the briefs were *John W. Vardaman, Jr.*, *Neal M. Mayer*, and *Jonathan Blank*.

Andrew J. Levander argued the cause *pro hac vice* for the federal parties as respondents under this Court's Rule 21 (4) in support of petitioners. With him on the brief were *Solicitor General McCree*, *Acting Assistant Attorney General Daniel*, *Ronald R. Glancz*, *Michael Kimmel*, and *Michael J. McMorrow*.

Amy Loeserman Klein and *Stephen N. Shulman* argued the cause for respondents. With *Ms. Klein* on the brief for respondents Alaska Bulk Carriers, Inc., et al. were *William Karas*, *Francis Ballard*, and *Alan G. Choate*. With *Mr. Shulman* on the brief for respondent Shell Oil Co. were *Joseph A. Artabane* and *Mark C. Ellenberg*.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

In 1972, petitioner Seatrain Shipbuilding Corp. (Seatrain) received a construction-differential subsidy (CDS) of $27.2

million pursuant to Title V of the Merchant Marine Act, 1936, 49 Stat. 1995, as amended, 46 U. S. C. § 1151 *et seq.*, to construct the 225,000-deadweight-ton supertanker *Stuyvesant*. As required by § 506 of the Act, 46 U. S. C. § 1156, Seatrain and its affiliate, petitioner Polk Tanker Corp., the initial owner of the *Stuyvesant*, agreed to operate the supertanker exclusively in the foreign trade except as otherwise authorized in that section. By the time the vessel was completed in 1977, however, petitioners wanted to operate it in the domestic trade. Accordingly, they asked the Secretary of Commerce permanently to lift all restrictions on the *Stuyvesant*'s operation in domestic commerce in exchange for their fully secured, 20-year interest-bearing note repaying in full the vessel's CDS. The Secretary granted the application, accepted the promissory note, and deleted the applicable restrictions from the CDS contract. The primary question for decision is whether the Secretary of Commerce may terminate the restrictions imposed pursuant to § 506 when the owners of a vessel constructed with a CDS repay that subsidy in full. The District Court for the District of Columbia concluded that the Secretary had such authority, *Shell Oil Co.* v. *Kreps*, 445 F. Supp. 1128 (1977). The Court of Appeals for the District of Columbia Circuit disagreed and reversed. *Alaska Bulk Carriers, Inc.* v. *Kreps*, 194 U. S. App. D. C. 7, 595 F. 2d 814 (1979). We granted certiorari. 442 U. S. 940 (1979). We reverse.

I

The costs of constructing ships in American shipyards and manning them with American crews are higher than comparable costs in foreign ports. Accordingly, Congress has taken a number of steps to protect and support the United States' shipping and shipbuilding industries. The Jones Act, 46 U. S. C. § 883, has, since 1920, reserved the United States domestic trade exclusively for vessels built in this country and

owned by its citizens.[1] The Merchant Marine Act, 1936, 46 U. S. C. § 1101 *et seq.*, established a number of programs to help American vessels compete effectively in foreign trade with vessels constructed and staffed abroad. Specifically, Title V of that Act, 46 U. S. C. § 1151 *et seq.*, authorizes the Secretary of Commerce to grant a CDS for up to 50% of the cost of constructing a ship in this country. The owners of vessels built with these subsidies are required by § 506, 46 U. S. C. § 1156,[2] to agree that they will operate only in for-

[1] Some form of prohibition on use of foreign vessels in domestic trade predates the Jones Act by more than a century. See, *e. g.*, Act of Mar. 1, 1817, 3 Stat. 351. See generally G. Gilmore & C. Black, The Law of Admiralty 963, and nn. 34 and 35 (2d ed. 1975).

[2] Section 506 of the Act, 49 Stat. 1999, as amended, 46 U. S. C. § 1156, provides as follows:

"Every owner of a vessel for which a construction-differential subsidy has been paid shall agree that the vessel shall be operated exclusively in foreign trade, or on a round-the-world voyage, or on a round voyage from the west coast of the United States to a European port or ports which includes intercoastal ports of the United States, or a round voyage from the Atlantic coast of the United States to the Orient which includes intercoastal ports of the United States, or on a voyage in foreign trade on which the vessel may stop at the State of Hawaii, or an island possession or island territory of the United States, and that if the vessel is operated in the domestic trade on any of the above-enumerated services, he will pay annually to the Secretary of Commerce that proportion of one-twenty-fifth of the construction-differential subsidy paid for such vessel as the gross revenue derived from the domestic trade bears to the gross revenue derived from the entire voyages completed during the preceding year. The Secretary may consent in writing to the temporary transfer of such vessel to service other than the service covered by such agreement for periods not exceeding six months in any year, whenever the Secretary may determine that such transfer is necessary or appropriate to carry out the purposes of this chapter. Such consent shall be conditioned upon the agreement by the owner to pay to the Secretary, upon such terms and conditions as he may prescribe, an amount which bears the same proportion to the construction-differential subsidy paid by the Secretary as such temporary period bears to the entire economic life of the vessel. No operating-differential subsidy shall be paid for the operation of such vessel for such temporary period."

eign trade unless they come within one of two explicit statutory exceptions. Neither exception may be invoked unless the owner remits to the Government an appropriate pro rata portion of the outstanding subsidy.

In 1969, petitioner Seatrain began constructing a series of supertankers at the former Brooklyn Navy Yard. The venture received substantial amounts of federal aid. By its completion, the Economic Development Administration (EDA) of the Department of Commerce had advanced $5 million as a direct loan and had guaranteed 90% of $82 million in loans from other sources to help finance modernization and operation of the Navy Yard facilities and a major on-the-job training program.[3] Moreover, the Department granted a CDS for each of the four supertankers built by Seatrain,[4] in addition to guaranteeing various construction loans.

The *Stuyvesant* was the third of the Seatrain tankers.[5] In the mid-1970's, while it was under construction, demand for such vessels began to decline in the wake of the Arab oil embargo, increasing crude oil prices and the economic problems that ensued.[6] By 1977, when the vessel was completed,

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[3] Seatrain also invested some $38 million of its own funds in the project.

[4] The first two tankers, the *Brooklyn* and the *Williamsburg*, initially found employment in the foreign trade and subsequently were placed in layup. App. 112. The decision in this case may have some bearing on the fate of the fourth, the *Bay Ridge*. See *infra*, at 580–582.

[5] In addition to the $27.2 million CDS, loans of $30.2 million were guaranteed under Title XI of the Act, 46 U. S. C. § 1271 *et seq.*, for construction of the *Stuyvesant*. Similar financial support was made available for the *Bay Ridge*, which received a CDS of $28.8 million and Title XI loan guarantees of $34.5 million.

[6] This drop in tanker demand had caused Seatrain to halt construction of both the *Stuyvesant* and the *Bay Ridge* in early 1975—a halt that necessitated the layoff of most of the shipyard's 2,500 employees and virtually shut the facility down. The yard reopened and construction resumed only after the EDA provided 90% guarantees for additional bank loans of $40 million. From that time on Seatrain apparently was on the lookout for prospects for employing the two supertankers in the domestic trade.

there was a significant oversupply of tankers on the world market and no opportunity in foreign trade for the fledgling *Stuyvesant*. Foreseeing this problem, the owners had begun to explore prospects for employing the vessel in the transportation of Alaskan crude from Valdez around Cape Horn to the Eastern United States and the Caribbean. This relatively new trade required sizeable tankers, and since the Jones Act restricted it to American-flag vessels[7] the demand remained high despite the abundance of otherwise suitable foreign vessels.

In mid-1977, petitioner Polk Tanker Corp. executed an agreement with Standard Oil of Ohio (SOHIO) for a 3-year charter of the *Stuyvesant* for use in the Alaskan trade. The agreement was conditioned upon Polk's obtaining from the Secretary of Commerce a release from the foreign-trade-only restriction imposed pursuant to § 506. This was obtained at the end of August[8] in the form of letters to Polk and Queensway Tankers, Inc., the proposed operator of the vessel. Those letters recited the findings upon which the agency based its decision. These were: (1) that there were no other opportunities for employment of the *Stuyvesant*, (2) that the SOHIO charter would strengthen the collateral securing obligations the Government had guaranteed, (3) that the charter might prevent default on those obligations, and (4) that failure to approve the proposal would jeopardize the continued operation of Seatrain.[9]

The complex closing of several transactions necessary to finance repayment of the CDS, refinance various other obligations, and transfer the *Stuyvesant* to new owners and operators

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[7] See 46 U. S. C. § 883; n. 1, *supra*.

[8] The preceding month, Polk had sought permission to operate the *Stuyvesant* in coastal trade for three years in exchange for pro rata repayment of the CDS. This application was withdrawn in the face of strong protests from prospective competitors.

[9] Letter of James S. Dawson, Jr., Secretary of Maritime Administration, to Polk Tanker Corp., Aug. 31, 1977, App. 530.

was scheduled for September 23, 1977. On September 22, respondents, three competitors in the Alaskan trade, brought suit in the District Court for the District of Columbia against various Department of Commerce officials. The complaints sought declaratory and injunctive relief prohibiting the Secretary from granting a permanent release from the § 506 foreign-trade-only requirement.[10] They argued (1) that the Secretary lacked authority to grant such a release and (2) that, even if the Secretary had authority to do so in certain cases, that authority should not have been exercised with regard to the *Stuyvesant*. In addition, they alleged violations of various procedural requirements of the Administrative Procedure Act and asserted that the Secretary was without power to accept a promissory note as repayment for the CDS. Petitioners Seatrain and Polk were permitted to intervene as defendants.

On November 22, 1977, ruling on the parties' cross-motions for summary judgment, the District Court held (1) that the Secretary had the authority to release vessels from trade restrictions imposed pursuant to § 506 in exchange for full CDS repayment and could accept a promissory note, (2) that releasing the *Stuyvesant* from such restrictions without analyzing the economic effect of that vessel's entry into the Alaskan trade was an abuse of discretion, and (3) that there existed material issues of fact which made summary judgment on portions of the Administrative Procedure Act claim improper. The court remanded the case to the Secretary for consideration of the competitive consequences of the *Stuyvesant* decision.[11] Eight days later, on the motion of the respondents,

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[10] Two separate complaints were filed, one by Alaska Bulk Carriers, Inc., and Trinidad Corp., and the other by Shell Oil Co. They were consolidated before the District Court.

[11] The remand proceedings were completed on January 6, 1978, prior to oral argument in the Court of Appeals. The Secretary concluded that there would continue to be a shortage of tankers in the Alaskan trade for the foreseeable future and that the entry of the *Stuyvesant* into that trade

the court amended its decision by dismissing the Administrative Procedure Act claim and—relying on Rule 54 (b) of the Federal Rules of Civil Procedure—certifying its decision as a "final judgment." [12]

Respondents appealed from this certified final judgment, and a divided panel of the Court of Appeals reversed, concluding that by specifying two exceptions to the foreign-trade-only requirement § 506 occupied the field and impliedly prohibited the Secretary from making any other exceptions under the Act's more general provisions. 194 U. S. App. D. C., at 15–22, 595 F. 2d, at 822–829. Judge Bazelon dissented, *id.*, at 33, 595 F. 2d, at 840, stating that he would hold that § 506 did not limit the Secretary's power in this regard. He observed that after full repayment of the CDS and appropriate interest the *Stuyvesant* would be on precisely the same footing as other vessels in the unsubsidized domestic fleet.

II

We are met at the outset with the contention that we lack jurisdiction to hear this case. Raised for the first time in a footnote to the federal parties' petition for rehearing in the Court of Appeals, the argument is that the District Court's November 30 judgment and order was not a "final decision" for purposes of 28 U. S. C. § 1291 because it remanded the case to the Secretary for consideration of the economic consequences of permitting the *Stuyvesant* to enter the Alaskan oil trade.[13] Respondents, the federal parties assert, sought but one form of relief—an order barring the *Stuyvesant* from competing with their own vessels. They advanced two

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would accordingly have little or no adverse effect on the respondents. *Id.*, at 568–569. Thereafter, Shell filed suit in the District Court challenging these findings. Its complaint was dismissed without prejudice following the decision of the Court of Appeals in the present case.

[12] *Id.*, at 558–559.

[13] Title 28 U. S. C. § 1291 states that "[t]he courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . ."

legal theories to support that prayer, one general—that the Secretary has no power to grant a permanent release from restrictions imposed pursuant to § 506—and the other particular—that even if the Secretary has the power to do so in some circumstances, the exercise of that power with regard to the *Stuyvesant* was an abuse of discretion. On remand, the federal parties continue, the Secretary might have concluded that the termination of § 506 restrictions was unwise. Alternatively, the Secretary might have decided to adhere to the original administrative decision and then been reversed by the courts. In either case, the federal parties argue, respondents would have obtained all the relief they sought. Accordingly, the District Court's November 30 order did not "'en[d] the litigation on the merits and leav[e] nothing for the court to do but execute the judgment,'" *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 467 (1978), quoting from *Catlin* v. *United States*, 324 U. S. 229, 233 (1945), and thus was not a "final decision." As a result, the argument concludes, the November 30, 1977, order was not appealable to the Court of Appeals and this Court is therefore without jurisdiction to hear the case.

The difficulty with the federal parties' argument is that it misapprehends the nature of at least one of the complaints which commenced this litigation—that of Alaska Bulk Carriers, Inc., and Trinidad Corp.[14] Fairly read, that complaint seeks not only relief from competition from the *Stuyvesant*, but also a general declaration that the Secretary of Commerce is without power to permit *any* vessel constructed with the assistance of a CDS to enter the domestic trade under *any* circumstances save those narrow exceptions specifically mentioned in the statute itself. In this regard, the complaint alleged that the Secretary would in the future grant a *Stuyvesant*-like waiver to that vessel's sister ship, the *Bay Ridge*.[15] It stated that the

[14] The Alaska Bulk Carriers complaint is reproduced at App. 45–63.

[15] Complaint ¶¶ 33 and 42, App. 57, 61–62.

owners of unsubsidized vessels would be harmed by competition from the *Stuyvesant* "and from other CDS-built vessels with respect to which . . . the agency may likewise lift operating restrictions if this action is permitted to stand." [16] And its prayer for relief sought (1) declaratory and injunctive relief relating to the *Stuyvesant* itself, (2) a declaration that the Secretary lacks authority permanently to waive § 506 restrictions under any circumstances, (3) an injunction barring the Secretary from amending CDS contracts or taking any other action to lift § 506 restrictions, and (4) such other relief as the court deemed necessary.[17] There were, in short, two claims made and two quite different sorts of relief sought.[18]

In their reply brief, the federal parties attempt to answer the contention that respondents made two separate claims for relief by asserting that as to one of them—the request for a determination that the Secretary lacked power to grant a permanent release—the case-or-controversy requirement of Art. III of the Constitution has not been satisfied. Terming the question "abstract" and "hypothetical," the federal parties maintain that this claim was in effect a request for an advisory

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[16] *Id.*, ¶ 41, App. 61.

[17] *Id.*, at 62–63. The Shell complaint is reproduced *id.*, at 6–17. It focuses far more specifically on the *Stuyvesant*, and were it the only complaint before us there might be more force to the federal parties' characterization of this litigation as presenting a single claim supported by two theories. In that event, we would have had to explore some of the alternative bases of jurisdiction advanced by the respondents. The clear presence of two claims in the Alaska Bulk Carriers complaint makes such an inquiry unnecessary.

[18] The two are not, of course, unrelated. In particular, a favorable disposition of respondents' statutory claim would leave respondents with no reason to press the administrative one. The contrary proposition, however, is not true. The complaint strongly suggests that respondents would have pressed for resolution of their statutory claim even if the Secretary or the courts had concluded that under the circumstances existing at the time the administrative determination was made the *Stuyvesant* could not lawfully have been permitted to enter the Alaskan trade.

opinion, that it could not stand alone. We disagree. In our judgment, respondents' claim that the Merchant Marine Act does not permit the Secretary to grant a permanent release from § 506 restrictions satisfies the case-or-controversy requirement quite apart from the fate of the particular decision with respect to the *Stuyvesant*. First, there is at least one other vessel on the horizon as to which a similar waiver may well be sought and granted—the *Bay Ridge*. Built in the same yard for the same purpose, faced with a similar plight, and likely to have a similar effect on the Alaskan market if the same solution to that plight is sought, the *Bay Ridge* is a prime candidate for release from § 506 restrictions, and the prospect of its release is sufficient to create a live controversy. In this respect, the present case is very different from *Golden* v. *Zwickler*, 394 U. S. 103, 106–107, 109–110 (1969), on which the federal parties rely. Second, the Secretary's decision to grant a full release for the *Stuyvesant* is clear evidence of administrative willingness to grant such releases in appropriate cases if they are in fact lawful. Accordingly, there is nothing speculative about the assertion that, unless restrained or at least given the benefit of an authoritative ruling of law by this Court, the agency will grant such waivers in the future.[19] Compare *Steffel* v. *Thompson*, 415 U. S. 452, 459 (1974), and *id.*, at 476 (concurring opinion), with *O'Shea* v. *Littleton*, 414 U. S. 488, 493–498 (1974).[20] And third, the *Stuyvesant* itself contributes to the concrete controversy between respondents and the agency. As a practical matter, whether that vessel operates in the Alaskan trade is likely to depend almost entirely on the outcome of this litigation. And even were it determined on review of the remand decision that under the circumstances existing at the time a waiver was improper, both the *Stuyvesant* and the *Bay Ridge* would remain in the wings

[19] Prior administrative practice supports this conclusion as well. See *infra*, at 595.

[20] See also *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 152–154 (1967).

as likely prospects for future waivers if circumstances were to change. Accordingly, we conclude that the respondents' claim for relief respecting the general powers of the Secretary meets the case-or-controversy requirement of Art. III.

Having determined that there were two separate claims, each within the jurisdiction of the courts below, we need only note that the appeal from the District Court decision comported fully with Rule 54 (b) of the Federal Rules of Civil Procedure.[21] That Rule states in relevant part that "[w]hen more than one claim for relief is presented in an action . . . the court may direct the entry of a final judgment as to one or more but fewer than all of the claims . . . only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." In the present case, more than one claim for relief was presented and the District Court found there was no reason for delay prior to directing the entry of final judgment as to one of the claims.[22] As a result, the determination that the Secretary was empowered to waive permanently the re-

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[21] We recognize that the District Court could not by purporting to comply with Rule 54 (b) render final for purposes of 28 U. S. C. § 1291 a decision that was in fact not final. *Liberty Mutual Ins. Co.* v. *Wetzel*, 424 U. S. 737, 742–743 (1976); *Sears, Roebuck & Co.* v. *Mackey*, 351 U. S. 427, 435 (1956). These cases make clear that Rule 54 (b) may properly be applied only to actions in which there has been a final decision on one or more but fewer than all the multiple claims raised. This condition is fully satisfied here, and the federal parties' reliance on *Liberty Mutual* is thus misplaced. There the District Court had made a determination of liability but had finally disposed of none of the original plaintiff's prayers for relief. Accordingly, Rule 54 (b) was not applicable. Here, one of the respondents' claims for relief was actually decided against them.

[22] App. 558–559. All parties proceeded as though the November 30 order were final. Indeed, even the federal parties initially appealed from that judgment, although that appeal was later dismissed on the federal parties' motion. Brief for Respondents Alaska Bulk Carriers, Inc., et al. 36, n. 26.

strictions required by § 506 was a final decision certifiable under Rule 54 (b) and appealable under 28 U. S. C. § 1291.

III

Prior to 1936, Congress assisted the American maritime industry in two ways: (1) it provided substantial low-interest loans to aid the construction of vessels destined for foreign trade, and (2) it appropriated large amounts of money for oceangoing mail contracts—amounts considerably in excess of actual cost and clearly intended as a subsidy for American shipping.[23] Neither effort was very successful. Loan repayment was difficult to secure, few ships were constructed, and the hidden mail subsidy proved unwieldy in addition to being somewhat disingenuous.[24]

In 1935, President Roosevelt proposed that Congress end the subterfuge and adopt a forthright and sensibly tailored program to subsidize and stimulate American shipping and shipbuilding. The result was the Merchant Marine Act, 1936. Its basic goals were set forth in § 101, 46 U. S. C. § 1101. There Congress declared it to be the policy of the United States "to foster the development and encourage the maintenance" of a large and effective merchant marine capable of meeting the Nation's future commercial and military needs. The fleet was to be modern and efficient. And Congress intended that it be supported by substantial shipbuilding and repair facilities.[25]

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[23] See H. R. Doc. No. 118, 74th Cong., 1st Sess., 1–3 (1935) (message from the President). In addition to these measures aimed at making it possible for American vessels to compete in foreign trade, of course, the Jones Act, 46 U. S. C. § 883, reserved the domestic trade for American vessels. See *supra*, at 574–575, and n. 1.

[24] H. R. Doc. No. 118, *supra*, at 3–19 (Report of the Postmaster General).

[25] Section 101, 49 Stat. 1985, as amended, provides in full as follows:

"It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine

The Secretary of Commerce was given broad authority to oversee administration of the Act. Thus, he was called upon to undertake a survey of the merchant marine, to note its needs, and to adopt a long-range program for meeting those needs. § 210, 46 U. S. C. § 1120. He was directed to investigate and keep current records of essential routes and lines to foreign ports, bulk-cargo carrying service requirements, needs for various types of vessels in various routes, construction and operating costs here and abroad, shipyard conditions, and new designs and technologies. § 211, 46 U. S. C. § 1121. He was authorized to devise means of encouraging use of American-flag vessels and improving those vessels in collaboration with vessel owners and shipbuilders. § 212, 46 U. S. C. § 1122. And he was empowered to "enter into such contracts, upon behalf of the United States, . . . as may, in . . . his discretion, be necessary to carry on the activities authorized by this chapter, or to protect, preserve, or improve the collateral held by the [Federal Maritime] Commission or Secretary to secure indebtedness, in the same manner that a private corporation may contract within the scope of the authority conferred by its charter." § 207, as set forth in 46 U. S. C. § 1117.

Central to the legislative scheme was the creation of an arsenal of grant and loan programs for use in the Secretary's efforts to stimulate domestic construction and make operation

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(a) sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping service essential for maintaining the flow of such domestic and foreign water-borne commerce at all times, (b) capable of serving as a naval and military auxiliary in time of war or national emergency, (c) owned and operated under the United States flag by citizens of the United States, insofar as may be practicable, (d) composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizen personnel, and (e) supplemented by efficient facilities for shipbuilding and ship repair. It is declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine." 46 U. S. C. § 1101.

by domestic crews competitive. Included were an operating subsidy program, Title VI, 46 U. S. C. § 1171 *et seq.*; a program pursuant to which the Secretary could directly acquire new or reconditioned vessels and charter or sell them, Title VII, 46 U. S. C. § 1191 *et seq.*; a loan guarantee program, Title XI, 46 U. S. C. § 1271 *et seq.*; and the CDS program that lies at the core of the present litigation, Title V, 46 U. S. C. § 1151 *et seq.*[26] Again, the Secretary's discretion in administering these programs was substantial.

It was recognized from the outset that substantial limits would have to be placed upon the entry of subsidized vessels into the domestic trade.[27] Any other result would have been disastrous for the unsubsidized Jones Act fleet for which that trade was (and is) reserved. Burdened by higher construction costs, greater outstanding debt, and higher operating expenses,

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[26] The first section dealing with the CDS program, § 501, 46 U. S. C. § 1151, gives the Secretary considerable discretion to process, accept, and reject subsidy applications. Sections 502 and 504, 46 U. S. C. §§ 1152, 1154, authorize him to subsidize construction either by contracting directly with a shipyard for a vessel and then selling the completed ship to private parties at a cost corresponding to the cost of constructing a similar vessel abroad, or by contracting to pay only the appropriate CDS to the shipyard and letting the owner-operator remit the balance of the cost to the yard and take title directly. Those sections also set forth means of calculating foreign costs and subsidies, various limitations on such subsidies, terms of sale, and other requirements. Section 503, 46 U. S. C. § 1153, requires that subsidized vessels be documented under the laws of the United States and spells out various financial requirements. Section 505, 46 U. S. C. § 1155, requires that domestic shipyards and materials be used to construct subsidized vessels. And § 506, 46 U. S. C. § 1156, see n. 2, *supra*, contains the requirement that owners of subsidized vessels agree not to operate in domestic commerce except as specifically provided.

[27] H. R. Doc. No. 118, 74th Cong., 1st Sess., 22 (1935) (Report of the Interdepartmental Committee on Shipping Policy). See also H. R. Rep. No. 1277, 74th Cong., 1st Sess., 22 (1935) (describing 1935 version of the Act and noting that the Government may in certain circumstances consent to the operation of a subsidized vessel in the domestic trade "in which case the amount of the subsidy shall be repaid to the United States proportionately. . .").

that fleet would simply have been unable to compete with new vessels enjoying the benefits of the 1936 Act.

The congressional response to this problem as it relates to the CDS program was § 506.[28] Basically, that section confines subsidized vessels to the foreign trade. Congress recognized, however, that an entirely rigid prohibition on entry into domestic commerce might be impractical—incidental domestic operation on one segment of a voyage in foreign trade might well be efficient, and other circumstances might also arise in which some flexibility would be desirable. Accordingly, Congress permitted subsidized vessels to carry domestic cargoes on one leg of certain foreign voyages and provided in addition that the Secretary could authorize such vessels actually to enter the domestic trade for six months or less in any year upon finding that such entry would be "necessary or appropriate to carry out the purposes of this chapter." In an effort to ensure that subsidized vessels operating in domestic trade pursuant to these exceptions would compete on an equal footing with unsubsidized vessels similarly employed, Congress required the repayment of that portion of the outstanding subsidy allocable to the vessel's domestic activities.

The Court of Appeals was of the view that the specific exceptions in § 506 marked the limit of the Secretary's authority to approve entry of subsidized vessels into the domestic trade. By its logic, detail, and legislative history, the panel majority reasoned, that section prohibits transactions like the one before us. In consequence, that court found the broad sweep of the Secretary's power under the balance of the Act irrelevant, the express language giving the Secretary authority to make and amend contracts[29] unimportant, and the policy arguments advanced by the Secretary unpersuasive.

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[28] See n. 2, *supra*.

[29] See § 504 of the Act, 46 U. S. C. § 1154, and § 207, 46 U. S. C. § 1117. The former provision expressly authorizes the Secretary to make and amend CDS contracts.

We disagree. On the face of the statute, the Secretary's broad contracting powers and discretion to administer the Act seem to comprehend the authority urged by petitioners here. Indeed, as the Secretary found in the present case, a permanent release from the foreign-trade-only requirement may quite directly further the general goals of the Act by protecting the Government's position as guarantor of substantial financial obligations and improving the chances that a domestic shipyard will survive. Further, we are hard pressed to find anything in § 506 that suggests that the Secretary is forbidden to approve transactions of this sort under these circumstances. Certainly nothing in the language of that section so manacles the Secretary as to require the result reached below. Rather, § 506 simply mandates that vessels enjoying the benefits of a subsidy may move *in and out* of domestic commerce only under narrowly circumscribed conditions. It speaks to *temporary* releases from the foreign-trade-only requirement, and *only* to such releases. Moreover, for Congress to draft a section directed to the particular problems posed by temporary entry into the domestic trade was entirely logical since such releases pose problems not present in *permanent* releases of the sort at issue here. Specifically, a vessel with an outstanding CDS that was completely free to enter and depart the domestic trade would be in an extraordinarily favorable competitive situation even if it was required to repay a proportionate amount of its subsidy whenever it did so. Absent some restriction on its ability to move from one market to the other, it would be a formidable force in both, capable of taking advantage of every shift in trade and profitability, skimming the cream and leaving what remains to those less mobile. It could, in a very real sense, have the best of both worlds.[30]

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[30] The discussion in the text demonstrates that regardless of subsidy repayment there is considerable reason to restrict the extent to which subsidized vessels may enter and exit the domestic market. The need for limits is

Section 506 responds to this problem by permitting a vessel that enjoys the benefits of a CDS to operate outside the foreign market only in narrow circumstances, generally upon a highly discretionary administrative decision, and for no more than six months a year. And we have no doubt that it would be flatly inconsistent with the congressional intent were the Secretary or this Court to conclude that a *temporary* release not meeting these conditions was proper. But a *permanent* release upon full repayment is quite different. It irrevocably locates the vessel in the unsubsidized fleet and thus poses no danger of a supercompetitor skimming the cream from each market. It creates no long-term instability. And it confers no windfall. On the contrary, at least where repayment of the CDS includes some amount reflecting capital costs which would have been incurred had no subsidy been available,[31]

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heightened by the fact that proportionate subsidy repayment will generally fail to equalize the actual costs borne by owners of subsidized and unsubsidized vessels in domestic commerce. The problem is that the repayment formula in § 506 does not require the subsidized vessel to make any repayment to compensate for the interest it has not had to pay. To give a somewhat oversimplified example, comp two hypothetical vessels that operate for six months in domestic co nerce, one unsubsidized and constructed with a $100 million, 10% loan, and the other subsidized and built with a $50 million CDS and a $50 million, 10% loan. During a given 6-month period the former vessel's interest will be $5 million (½ x 10% x $100 million). The latter will pay interest of $2.5 million (½ x 10% x $50 million) and a CDS repayment of $1.25 million (6/240 (months' useful life) x $50 million). In short, the subsidized vessel's expenses will be $1.25 million less, and its competitive posture all the more formidable. On the importance of interest in the permanent-release/full-repayment situation, see *infra*, this page, and n. 31.

[31] The need for some payment reflecting avoided capital costs was highlighted by Judge Bazelon's dissent to the opinion below. *Alaska Bulk Carriers, Inc.* v. *Kreps*, 194 U. S. App. D. C. 7, 36, n. 15, 595 F. 2d 814, 843, n. 15 (1979). In its brief, the federal parties represent that, while the Secretary originally concluded that no payment for interest would be required, the agency now intends to seek a reasonable amount of interest. Brief for Federal Parties 54, n. 59. Failure to do so might raise serious questions of inconsistency with the entire thrust of the Act.

such a transaction merely permits a once subsidized vessel to enter the domestic trade on a footing equal to that of vessels already in that trade. It was not the purpose of the Act to prohibit such entry, and we accordingly agree with the District Court that "*nothing* in section 506, [or] in any other provision of Title V, . . . either expressly or implicitly addresses the issue of *permanent* revocation of a CDS contract." 445 F. Supp., at 1135 (emphasis in original).

We turn now to the Court of Appeals' arguments concerning the legislative history of § 506. The panel majority was of the view that that history demonstrates that Congress addressed the problem before us and affirmatively decided not to permit the Secretary to approve transactions like the one at issue. We disagree. At most, we find the legislative history ambiguous, even puzzling. We do not find that it demonstrates that Congress has decided the present question.

We begin with the version of § 506 originally enacted as part of the 1936 Act. The first sentence of that version stated that it would be unlawful to operate any subsidized vessel other than exclusively in foreign trade or on incidental domestic portions of voyages in foreign trade, but provided that the Maritime Commission had authority to consent to operation that would otherwise be unlawful so long as the owner agreed to repay "an amount which bears the same proportion to the construction subsidy theretofore paid . . . as the remaining economic life of the vessel bears to its entire economic life." The second sentence provided that in cases of "emergency" the Commission could permit transfer of a subsidized vessel to "service other than exclusive operation in foreign trade" provided that no operating subsidy were paid during the emergency period and that period was limited to three months. And the third sentence specified that owners of a vessel operated on incidental domestic portions of voyages in foreign trade would have to make a proportionate subsidy repay-

ment.[32] It seems abundantly clear that this section provided for three different exceptions to the foreign-trade-only requirement: (1) subsidized vessels could also carry out incidental tasks in domestic trade (sentence one)—in which case consent of the Commission would not be required, but pro rata subsidy repayment would have to be made (sentence three), (2) such vessels could operate *permanently* in domestic trade

[32] As originally enacted, Section 506, 49 Stat. 1999, provided in its entirety as follows:

"It shall be unlawful to operate any vessel, for the construction of which any subsidy has been paid pursuant to this title, other than exclusively in foreign trade, or on a round-the-world voyage or a round voyage from the west coast of the United States to a European port or ports or a round voyage from the Atlantic coast to the Orient which includes intercoastal ports of the United States, or on a voyage in foreign trade on which the vessel may stop at an island possession or island territory of the United States, unless the owner of such vessel shall receive the written consent of the Commission so to operate and prior to such operation shall agree to pay to the Commission, upon such terms and conditions as the Commission may prescribe, an amount which bears the same proportion to the construction subsidy theretofore paid or agreed to be paid (excluding cost of national-defense features as hereinbefore provided), as the remaining economic life of the vessel bears to its entire economic life. If an emergency arises which, in the opinion of the Commission, warrants the temporary transfer of a vessel, for the construction of which any subsidy has been paid pursuant to this title, to service other than exclusive operation in foreign trade, the Commission may permit such transfer: *Provided*, That no operating differential subsidy shall be paid during the duration of such temporary or emergency period, and such period shall not exceed three months. Every contractor receiving a contract for a construction-differential subsidy under the provisions of this title shall agree that if the subsidized vessel engages in domestic trade on a round-the-world voyage or a round voyage from the west coast of the United States to a European port or ports or loads or discharges cargo or passengers at an island possession or island territory as permitted by this section, that the contractor will repay annually to the Commission that proportion of one-twentieth of such construction subsidy as the gross revenue of such protected trade bears to the gross revenue derived from the entire voyages completed during the preceding year."

upon the consent of the Commission and repayment of the unamortized portion of the subsidy (sentence one),[33] and (3) such vessels could, upon a Commission finding of emergency, enter domestic trade for up to three months without subsidy repayment (sentence two).

In 1938, § 506 was rewritten into substantially its present form. The objective consequences of that rewriting were, first, that all the language suggesting that a permanent release from trade restrictions upon full subsidy repayment would be appropriate was deleted and, second, that the provision authorizing a 3-month "emergency" release with no subsidy repayment was altered by eliminating the emergency requirement, changing the 3-month limit to six months and requiring proportionate subsidy repayment. In substance, the balance of the provision was left unchanged.

Respondents and the Court of Appeals contend that this rewriting embodied a considered congressional judgment that permanent release upon full repayment should not be permitted. They rely to a considerable extent upon the comments of Joseph P. Kennedy, Chairman of the Maritime

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[33] The Court of Appeals conceded that permanent domestic operation was permitted under this second exception, and respondents appear reluctantly to have followed suit. Further, as the Court of Appeals recognized, this reading is buttressed by the legislative history of the 1936 Act. See 194 U. S. App. D. C., at 19, n. 43, 595 F. 2d, at 826, n. 43 (citing legislative history). Moreover, the statute itself admits of no other interpretation. It provides for repayment of "an amount which bears the same proportion to the construction subsidy . . . as the remaining economic life of the vessel bears to its entire economic life." That amount necessarily would represent the entire portion of the subsidy allocable to the vessel's remaining life—for a new vessel it would constitute the entire subsidy, for a vessel halfway through its life, half the subsidy, etc. It is hardly conceivable that Congress would have intended repayment of the *entire* unamortized subsidy in exchange for only a temporary release from the foreign-trade-only requirement. Thus, only permanent release could have been contemplated.

Commission. During hearings on the measure he stated as follows:

> "Section 506 has been entirely rewritten to remove ambiguities and confusion. The section now provides that the owner can only engage in foreign trade exclusively with certain enumerated excepted services, for which services the owner is required to repay part of the construction-differential subsidy. There are also provisions which appear to give owners the right to engage in services other than the excepted ones, if the Commission consents to such use and the owner repays part of the construction-differential subsidy. Whether this right is restricted to the cases of emergency and to periods of 3 months as mentioned in the section, it is difficult to determine." [34]

The ambiguity referred to by Mr. Kennedy, the Court of Appeals concluded, was that hinted at in the final sentence of the quoted remarks—whether the "right to engage in services other than excepted ones" upon subsidy repayment was restricted to 3-month emergencies. And that ambiguity was resolved, the argument goes, by the decision to delete all language authorizing a permanent release and to rewrite the temporary release provision so that the "right" referred to by Mr. Kennedy could only be exercised for six months in any year. Accordingly, we are told, the intention of Congress to bar the transaction at issue here was "unmistakably manifested." 194 U. S. App. D. C., at 22, 595 F. 2d, at 829.

We find the contention that anything was unmistakable in these snippets of legislative history exceedingly curious. In the first place, it seems scarcely possible that Congress actually thought the original version ambiguous in the regard apparently referred to by Mr. Kennedy. As we have already

[34] Amending Merchant Marine Act, 1936: Hearings on H. R. 8532 before the House Committee on Merchant Marine and Fisheries, 75th Cong., 2d and 3d Sess., 8 (1937–1938).

noted, no reading of that provision other than one permitting permanent waiver is possible given the mechanism set forth for calculation of the amount of subsidy repayment due.[35] Moreover, there is in fact no indication that Congress intended to make the major alterations claimed. Indeed, the House Report states that "[n]o fundamental change in the original purpose of the section has been effected,"[36] and the Senate Report, while to some extent tracking Mr. Kennedy's comments, seems to identify the major change effected by the amendments as the addition of language making it "perfectly clear that unless the owner operates exclusively in foreign trade, he must repay a portion of the construction-differential subsidy for any service in which the vessel is engaged which includes domestic ports. . . ."[37] There is no language suggesting that Congress intended to rule out permanent releases of the type at issue here.[38]

We do not go so far as to assert with confidence that the deletion of the authorization contained in the second half of the first sentence of the 1936 version was inadvertent. Rather

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[35] See n. 33, *supra*.

[36] H. R. Rep. No. 2168, 75th Cong., 3d Sess., 21 (1938).

[37] S. Rep. No. 1618, 75th Cong., 3d Sess., 13 (1938). Similarly, the House Report stated that under the new version "the obligations of the owner to repay part of the subsidy are clearly defined." H. R. Rep. No. 2168, *supra*, at 21. Petitioners argue that such language supports the contention that the ambiguity actually troubling to Congress was whether proportional subsidy repayment would be required for temporary or incidental use in domestic trade and had nothing to do with the permanent release issue.

[38] Interestingly, one of the spokesmen for unsubsidized carriers who testified during the Senate hearings suggested that Congress should substitute for the amendments to § 506 then under discussion a new section "prohibiting subsidized vessels and vessels which have at any time been subsidized, from the intercoastal service." Amending The Merchant Marine Act of 1936: Hearings on S. 3078 before the Senate Committee on Commerce and the Committee on Education and Labor, 75th Cong., 2d Sess., pt. 2, p. 44 (1937).

we are simply unsure of the precise significance of that deletion. What does seem clear is that it did not represent a considered congressional judgment that the permanent-release/full-repayment transaction before us should be prohibited.

IV

Our conclusion that Congress did not forbid the transactions here at issue is buttressed by two additional factors. First, the agency has consistently interpreted the Act to permit full-repayment/permanent-release arrangements.[39] Thus, in 1964 two vessels owned by Grace Line were permitted to repay the unamortized portion of subsidies in exchange for the removal of restrictions on their entry into domestic trade.[40] And in late 1976 and early 1977 two conditional requests for permanent release were granted to the owners of vessels employed in the Virgin Islands trade. The owners were concerned with the prospect that that trade might in the future be classified as domestic and were informed that they could obtain waivers if that eventuality were to occur.[41] While the agency's rationale has not always been entirely persuasive,[42] it has not wavered from its general understanding of its powers and the extent to which their exercise is consistent with the goals of the Act.

More importantly, in 1971 and 1972 Congress seems clearly to have contemplated transactions of the sort challenged here.

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[39] The relevant precedents are listed in Affidavit of James S. Dawson, Jr., Secretary of Maritime Administration, App. 164–166.

[40] Comptroller General Decision B-155039, 44 Comp. Gen. 180 (1964). The Court of Appeals sought to distinguish the Grace Line precedent on grounds the subsidies there were not used in initial construction of the vessels, but rather to convert them from cargo to container. We fail to see the relevance of this distinction.

[41] App. 165.

[42] See 194 U. S. App. D. C., at 35, 595 F. 2d, at 842 (dissenting opinion of Judge Bazelon criticizing administrative rationale in the Grace Line case).

In 1972, a new § 1104 (a)(3), 86 Stat. 911, 46 U. S. C. § 1274 (a)(3), was added to the Act. As originally proposed, the section provided that the agency could aid in financing repayment of "any amount of construction-differential subsidy paid with respect to a vessel pursuant to Title V of this Act . . . in order to release such vessel from all restrictions imposed as a result of the payment of [that] subsidy. . . ."[43] As enacted, the section did not include the language relating to release from all restrictions. The House Committee explained the deletion as follows:

> "In the entire history of the administration of the 1936 Act there has been only one instance where a construction-differential subsidy repayment, authorized by the Secretary under very special circumstances, could have called into play the provisions of this paragraph. Your Committee questions the desirability of general legislation to deal with such an unusual situation, and feels that Title XI assistance should be extended to all instances of subsidy repayments under Title V, so as to include the relatively frequent situation of repayments under the first sentence of section 506 of the Act. Your Committee has therefore amended the legislation by deleting the language [relating to release from all restrictions]. This paragraph in Title XI does not in any way extend or affect the application of Title V of the Act."[44]

The understanding of the 92d Congress seems clear. And while the views of subsequent Congresses cannot override the unmistakable intent of the enacting one, *Teamsters* v. *United States*, 431 U. S. 324, 354, n. 39 (1977), such views are entitled to significant weight, *NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267, 275 (1974), and particularly so when the precise intent of the enacting Congress is obscure.

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[43] H. R. 9756, 92d Cong., 1st Sess., § 3 (1971).

[44] H. R. Rep. No. 92-688, p. 10 (1971).

V

In conclusion, we hold that the Act empowers the Secretary to approve full-repayment/permanent-release transactions of the type at issue here. We express no view upon respondents' claim that if such authority exists under the Act full repayment may not be made by promissory note. This issue was not addressed by the Court of Appeals and is open for its consideration on remand. Further, we express no view upon the merits of the Secretary's particular exercise of discretion with regard to the *Stuyvesant* since that issue is not before us.

Reversed and remanded.

CALIFORNIA BREWERS ASSN. ET AL. *v.* BRYANT ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 78-1548. Argued November 27, 1979—Decided February 20, 1980

As an exception to the rule making it unlawful for an employer to engage in practices, procedures, or tests that operate to "freeze" the status quo of prior discriminatory employment practices, § 703 (h) of Title VII of the Civil Rights Act of 1964 provides that it shall not be an unlawful employment practice for an employer to apply different standards of compensation, terms, conditions, or privileges of employment pursuant to a bona fide seniority system if such differences are not the result of an intention to discriminate because of race. A multiemployer brewery industry collective-bargaining agreement accorded greater benefits, with respect to hiring and layoffs, to "permanent" than to "temporary" employees, and provided that a temporary employee must work at least 45 weeks in a single calendar year before he can become a permanent employee. Respondent Bryant (hereafter respondent), a Negro, brought a class action in District Court against petitioner association, petitioner employers, and several labor unions, alleging, *inter alia*, that the defendants had discriminated against him and other Negroes in violation of Title VII, and, in particular, that the agreement's 45-week requirement had operated to preclude him and the members of his class from achieving, or from a reasonable opportunity of achieving, permanent employee status. The District Court dismissed the complaint for failure to state a claim on which relief could be granted. The Court of Appeals reversed, holding that the 45-week requirement was not a "seniority system" or part of a "seniority system" within the meaning of § 703 (h), and accordingly remanded the case to the District Court to enable respondent to prove that such requirement has had a discriminatory impact on Negroes.

Held: The Court of Appeals erred in holding that the 45-week requirement is not a component of a "seniority system" within the meaning of § 703 (h). The fact that the system created by the agreement establishes two parallel seniority ladders, one allocating benefits due temporary employees and the other identifying the benefits owed permanent employees, does not prevent it from being a "seniority system" within the meaning of § 703 (h). The 45-week requirement, correspondingly, serves the needed function of establishing the threshold requirement for entry into the permanent employee seniority track. Cf. *Teamsters* v.

United States, 431 U. S. 324. Unlike such criteria as educational standards, aptitude or physical tests, or standards that give effect to subjectivity, but like any "seniority" rule, the 45-week requirement focuses on length of employment. Moreover, the requirement does not distort the operation of the basic system established by the agreement, which rewards employment longevity with heightened benefits, since, as a general rule, the more seniority a temporary employee accumulates, the more likely it is that he will be able to satisfy the 45-week requirement. Pp. 605–611.

585 F. 2d 421, vacated and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE and REHNQUIST, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN and BLACKMUN, JJ., joined, *post*, p. 611. POWELL and STEVENS, JJ., took no part in the consideration or decision of the case.

Willard Z. Carr, Jr., argued the cause for petitioners. With him on the briefs were *Michael D. Ryan, Aaron M. Peck, George Christensen, James R. Madison,* and *William F. Alderman.*

Roland P. Wilder, Jr., argued the cause for respondent unions as respondents under this Court's Rule 21 (4), urging reversal. With him on the briefs were *David Previant, George A. Pappy,* and *Robert D. Vogel.*

James Wolpman argued the cause for respondent Bryant. With him on the brief was *Michael P. Goldstein.*

Deputy Solicitor General Wallace argued the cause for the United States as *amicus curiae* urging affirmance. On the brief were *Solicitor General McCree, Assistant Attorney General Days, Richard A. Allen, Leroy D. Clark, Joseph T. Eddins,* and *Beatrice Rosenberg.**

**J. Albert Woll* and *Laurence Gold* filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Gerald A. Rosenberg, John B. Jones, Jr., Norman Redlich, William L. Robinson,* and

MR. JUSTICE STEWART delivered the opinion of the Court.

Title VII of the Civil Rights Act of 1964 [1] makes unlawful, practices, procedures, or tests that "operate to 'freeze' the status quo of prior discriminatory employment practices." *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 430. To this rule, § 703 (h) of the Act, 42 U. S. C. § 2000e–2 (h), provides an exception:

> "[I]t shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system, . . . provided that such differences are not the result of an intention to discriminate because of race. . . ."

In *Teamsters* v. *United States*, 431 U. S. 324, 352, the Court held that "the unmistakable purpose of § 703 (h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII . . . even where the employer's pre-Act discrimination resulted in whites having greater existing seniority rights than Negroes." [2]

The present case concerns the application of § 703 (h) to a particular clause in a California brewery industry collective-bargaining agreement. That agreement accords greater benefits to "permanent" than to "temporary" employees, and the

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Richard T. Seymour for the Lawyers' Committee for Civil Rights Under Law; and by *Jack Greenberg, James M. Nabrit III, Barry L. Goldstein, O. Peter Sherwood, Daniel B. Edelman, Vilma S. Martinez*, and *Morris J. Baller* for the NAACP Legal Defense and Educational Fund, Inc., et al.

Bruce A. Nelson, Raymond L. Wheeler, Robert E. Williams, and *Douglas S. McDowell* filed a brief for the Equal Employment Advisory Council as *amicus curiae*.

[1] 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.*

[2] *United Air Lines, Inc.* v. *Evans*, 431 U. S. 553, extended this holding to preclude Title VII challenges to seniority systems that perpetuated the effects of discriminatory post-Act practices that had not been the subject of a timely complaint. See also *Teamsters* v. *United States*, 431 U. S., at 348, n. 30.

clause in question provides that a temporary employee must work at least 45 weeks in a single calendar year before he can become a permanent employee. The Court of Appeals for the Ninth Circuit held that the 45-week requirement was not a "seniority system" or part of a "seniority system" within the meaning of § 703 (h). 585 F. 2d 421. We granted certiorari to consider the important question presented under Title VII of the Civil Rights Act of 1964. 442 U. S. 916.

I

In 1973, the respondent, a Negro, filed a complaint in the United States District Court for the Northern District of California, on behalf of himself and other similarly situated Negroes, against the California Brewers Association and seven brewing companies (petitioners here), as well as against several unions. The complaint alleged that the defendants had discriminated against the respondent and other Negroes in violation of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.*, and in violation of 42 U. S. C. § 1981.[3]

The complaint, as amended, alleged that the respondent had been intermittently employed since May 1968, as a temporary employee of one of the defendants, the Falstaff Brewing Corp. It charged that all the defendant employers had discriminated in the past against Negroes, that the unions had acted in concert with the employers in such discrimination, and that the unions had discriminated in referring applicants from hiring halls to the employers. The complaint further asserted that this historical discrimination was being perpetuated by the seniority and referral provisions of the collective-bargaining agreement (Agreement) that governed

[3] The complaint also alleged, under 29 U. S. C. §§ 159 and 185, that the union defendants had breached their duty of fair representation by, among other things, negotiating "unreasonable privileges for some employees over others. . . ."

industrial relations at the plants of the seven defendant employers. In particular, the complaint alleged, the Agreement's requirement that a temporary employee work 45 weeks in the industry in a single calendar year to reach permanent status had, as a practical matter, operated to preclude the respondent and the members of his putative class from achieving, or from a reasonable opportunity of achieving, permanent employee status.[4] Finally, the complaint alleged that on at least one occasion one of the defendant unions had passed over the respondent in favor of more junior white workers in making referrals to job vacancies at a plant of one of the defendant employers.

The Agreement is a multiemployer collective-bargaining agreement negotiated more than 20 years ago, and thereafter updated, by the California Brewers Association (on behalf of the petitioner brewing companies) and the Teamsters Brewery and Soft Drink Workers Joint Board of California (on behalf of the defendant unions). The Agreement establishes several classes of employees and the respective rights of each with respect to hiring and layoffs. Three of these classes are pertinent here: "permanent," "temporary," and "new" employees.

A permanent employee is "any employee . . . who . . . has completed forty-five weeks of employment under this Agreement in one classification [5] in one calendar year as an employee of the brewing industry in [the State of California]." An employee who acquires permanent status re-

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[4] In this Court, the respondent emphasizes that he has not contended that there is anything illegal in classifying employees as permanent and temporary or in according greater rights to permanent than to temporary employees. His sole Title VII challenge in this respect has been to the 45-week rule on its face and as it has been applied by the defendant unions and employers.

[5] The Agreement classifies employees into brewers, bottlers, drivers, shipping and receiving clerks, and checkers. Under the Agreement, separate seniority lists have to be maintained for each of these classifications of employees. The respondent is a brewer.

tains that status unless he "is not employed under this Agreement for any consecutive period of two (2) years. . . ."[6] A temporary employee under the Agreement is "any person other than a permanent employee . . . who worked under this agreement . . . in the preceding calendar year for at least sixty (60) working days. . . ." A new employee is any employee who is not a permanent or temporary employee.

The rights of employees with respect to hiring and layoffs depend in substantial part on their status as permanent, temporary, or new employees.[7] The Agreement requires that employees at a particular plant be laid off in the following order: new employees in reverse order of their seniority at the plant, temporary employees in reverse order of their plant seniority, and then permanent employees in reverse order of their plant seniority. Once laid off, employees are to be rehired in the reverse order from which they were laid off.

The Agreement also gives permanent employees special "bumping" rights. If a permanent employee is laid off at any plant subject to the Agreement, he may be dispatched by the union hiring hall to any other plant in the same local area with the right to replace the temporary or new employee with the lowest plant seniority at that plant.

Finally, the Agreement provides that each employer shall obtain employees through the local union hiring hall to fill needed vacancies. The hiring hall must dispatch laid-off workers to such an employer in the following order: first, employees of that employer in the order of their seniority with that employer; second, permanent employees registered in the area in order of their industry seniority; third, temporary employees in the order of their seniority in the industry; and

[6] An employee may also lose permanent status if he "quits the industry" or is discharged for certain specified reasons.

[7] In addition, permanent employees are given preference over temporary employees with respect to various other employment matters, such as the right to collect supplemental unemployment benefits upon layoff, wages and vacation pay, and choice of vacation times.

fourth, new employees in the order of their industry seniority. The employer then "shall have full right of selection among" such employees.

The District Court granted the defendants' motions to dismiss the complaint for failure to state a claim on which relief could be granted. No opinion accompanied this order. A divided panel of the Court of Appeals reversed, 585 F. 2d 421, concluding that the 45-week rule is not a "seniority system" or part of a "seniority system" within the meaning of § 703 (h) of Title VII. In the appellate court's view the provision "lacks the fundamental component of such a system" which is "the concept that employment rights should increase as the length of an employee's service increases." 585 F. 2d, at 426. The court pointed out that under the Agreement some employees in the industry could acquire permanent status after a total of only 45 weeks of work if those weeks were served in one calendar year, while others "could work for many years and never attain permanent status because they were always terminated a few days before completing 45 weeks of work in any one year." *Id.*, at 426–427.

The Court of Appeals concluded that "while the collective bargaining agreement does contain a seniority system, the 45-week provision is not a part of it." *Id.*, at 427:

> "The 45-week rule is simply a classification device to determine who enters the permanent employee seniority line and this function does not make the rule part of a seniority system. Otherwise any hiring policy (*e. g.*, an academic degree requirement) or classification device (*e. g.*, merit promotion) would become part of a seniority system merely because it affects who enters the seniority line." *Id.*, at 427, n. 11.[8]

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[8] The Court of Appeals also observed that "the 45-week requirement makes the system particularly susceptible to discriminatory application since employers and unions can manipulate their manpower requirements and employment patterns to prevent individuals who are disfavored from

Accordingly, the Court of Appeals remanded the case to the District Court to enable the respondent to prove that the 45-week provision has had a discriminatory impact on Negroes under the standards enunciated in *Griggs* v. *Duke Power Co.*, 401 U. S. 424. 585 F. 2d, at 427–428.[9]

II

Title VII does not define the term "seniority system," and no comprehensive definition of the phrase emerges from the legislative history of § 703 (h).[10] Moreover, our cases have not purported to delineate the contours of its meaning.[11] It is appropriate, therefore, to begin with commonly accepted notions about "seniority" in industrial relations, and to consider those concepts in the context of Title VII and this country's labor policy.

In the area of labor relations, "seniority" is a term that connotes length of employment.[12] A "seniority system" is a

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ever achieving permanent status." 585 F. 2d, at 427. This danger, according to the court, is almost never present in any "true" seniority system, in which rights "usually accumuate automatically over time. . . ." *Ibid.*

[9] The Court of Appeals directed the trial court on remand to consider as well the respondent's claims under 42 U. S. C. § 1981, and 29 U. S. C. §§ 159 and 185.

[10] See 110 Cong. Rec. 1518, 5423, 7207, 7213, 7217, 12723, 15893 (1964). The example of a "seniority system" most frequently cited in the congressional debates was one that provided that the "last hired" employee would be the "first fired." Nowhere in the debates, however, is there any suggestion that this model was intended to be anything other than an illustration.

[11] See *Trans World Airlines, Inc.* v. *Hardison*, 432 U. S. 63; *United Air Lines, Inc.* v. *Evans*, 431 U. S. 553; *Teamsters* v. *United States*, 431 U. S. 324; *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747.

[12] Webster's Third New International Dictionary 2066 (unabridged ed. 1961) defines "seniority," in pertinent part, as the "status attained by length of continuous service . . . to which are attached by custom or prior collective agreement various rights or privileges . . . on the basis of ranking relative to others. . . ."

scheme that, alone or in tandem with non-"seniority" criteria,[13] allots to employees ever improving employment rights and benefits as their relative lengths of pertinent employment increase.[14] Unlike other methods of allocating employment benefits and opportunities, such as subjective evaluations or educational requirements, the principal feature of any and every "seniority system" is that preferential treatment is dispensed on the basis of some measure of time served in employment.

Viewed as a whole, most of the relevant provisions of the Agreement before us in this case conform to these core concepts of "seniority." Rights of temporary employees and rights of permanent employees are determined according to length of plant employment in some respects, and according to length of industry employment in other respects. Notwithstanding this fact, the Court of Appeals concluded that the 45-week rule should not be viewed for purposes of § 703 (h), as part of what might otherwise be considered a "seniority system." For the reasons that follow, we hold that this conclusion was incorrect.

First, by legislating with respect to "systems" [15] of seniority

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[13] A collective-bargaining agreement could, for instance, provide that transfers and promotions are to be determined by a mix of seniority and other factors, such as aptitude tests and height requirements. That the "seniority" aspects of such a scheme of transfer and promotion might be covered by § 703 (h) does not mean that the aptitude tests or the height requirements would also be so covered.

[14] See E. Beal, E. Wickersham, & P. Kienast, The Practice of Collective Bargaining 430–431 (1972); Cooper & Sobol, Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv. L. Rev. 1598, 1602 (1969); Aaron, Reflections on the Legal Nature and Enforceability of Seniority Rights, 75 Harv. L. Rev. 1532, 1534 (1962).

[15] Webster's Third New International Dictionary 2322 (unabridged ed. 1961) defines "system," in pertinent part, as a "complex unity formed of many often diverse parts subject to a common plan or serving a common purpose."

in § 703 (h), Congress in 1964 quite evidently intended to exempt from the normal operation of Title VII more than simply those components of any particular seniority scheme that, viewed in isolation, embody or effectuate the principle that length of employment will be rewarded. In order for any seniority system to operate at all, it has to contain ancillary rules that accomplish certain necessary functions, but which may not themselves be directly related to length of employment.[16] For instance, every seniority system must include rules that delineate how and when the seniority time-clock begins ticking,[17] as well as rules that specify how and when a particular person's seniority may be forfeited.[18] Every seniority system must also have rules that define which passages of time will "count" towards the accrual of seniority and which will not.[19] Every seniority system must, moreover, contain rules that particularize the types of employment conditions that will be governed or influenced by seniority, and those that will not.[20] Rules that serve these necessary pur-

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[16] See generally S. Slichter, J. Healy, & E. Livernash, The Impact of Collective Bargaining on Management 115–135 (1960).

[17] By way of example, a collective-bargaining agreement could specify that an employee begins to accumulate seniority rights at the time he commences employment with the company, at the time he commences employment within the industry, at the time he begins performing a particular job function, or only after a probationary period of employment.

[18] For example, a collective-bargaining agreement could provide that accumulated seniority rights are permanently forfeited by voluntary resignation, by severance for cause, or by nonemployment at a particular plant or in the industry for a certain period.

[19] For instance, the time an employee works in the industry or with his current employer might not be counted for the purpose of accumulating seniority rights, whereas the time the employee works in a particular job classification might determine his seniority.

[20] By way of example, a collective-bargaining agreement could provide that an employee's seniority will govern his entitlement to vacation time and his job security in the event of layoffs, but will have no influence on promotions or job assignments.

poses do not fall outside § 703 (h) simply because they do not, in and of themselves, operate on the basis of some factor involving the passage of time.[21]

Second, Congress passed the Civil Rights Act of 1964 against the backdrop of this Nation's longstanding labor policy of leaving to the chosen representatives of employers and employees the freedom through collective bargaining to establish conditions of employment applicable to a particular business or industrial environment. See generally *Steelworkers* v. *Weber*, 443 U. S. 193. It does not behoove a court to second-guess either that process or its products. *Porter Co.* v. *NLRB*, 397 U. S. 99. Seniority systems, reflecting as they do, not only the give and take of free collective bargaining, but also the specific characteristics of a particular business or industry, inevitably come in all sizes and shapes. See *Ford Motor Co.* v. *Huffman*, 345 U. S. 330; *Aeronautical Lodge* v. *Campbell*, 337 U. S. 521. As we made clear in the *Teamsters* case, seniority may be "measured in a number of ways" and the legislative history of § 703 (h) does not suggest that it was enacted to prefer any particular variety of seniority system over any other. 431 U. S., at 355, n. 41.

What has been said does not mean that § 703 (h) is to be given a scope that risks swallowing up Title VII's otherwise broad prohibition of "practices, procedures, or tests" that disproportionately affect members of those groups that the Act protects. Significant freedom must be afforded employers and unions to create differing seniority systems. But that freedom must not be allowed to sweep within the ambit of § 703 (h) employment rules that depart fundamentally from commonly accepted notions concerning the acceptable contours of a seniority system, simply because those rules are dubbed "seniority" provisions or have some nexus to an arrangement that concededly operates on the basis of seniority.

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[21] The examples in the text of the types of rules necessary to the operation of a seniority system are not intended to and do not comprise an exhaustive list.

There can be no doubt, for instance, that a threshold requirement for entering a seniority track that took the form of an educational prerequisite would not be part of a "seniority system" within the intendment of § 703 (h).

The application of these principles to the case at hand is straightforward. The Agreement sets out, in relevant part, two parallel seniority ladders. One allocates the benefits due temporary employees; the other identifies the benefits owed permanent employees. The propriety under § 703 (h) of such parallel seniority tracks cannot be doubted after the Court's decision in the *Teamsters* case. The collective-bargaining agreement at issue there allotted one set of benefits according to each employee's total service with the company, and another set according to each employee's service in a particular job category. Just as in that case the separation of seniority tracks did not derogate from the identification of the provisions as a "seniority system" under § 703 (h), so in the present case the fact that the system created by the Agreement establishes two or more seniority ladders does not prevent it from being a "seniority system" within the meaning of that section.

The 45-week rule, correspondingly, serves the needed function of establishing the threshold requirement for entry into the permanent-employee seniority track. As such, it performs the same function as did the employment rule in *Teamsters* that provided that a line driver began to accrue seniority for certain purposes only when he started to work as a line driver, even though he had previously spent years as a city driver for the same employer. In *Teamsters*, the Court expressed no reservation about the propriety of such a threshold rule for § 703 (h) purposes. There is no reason why the 45-week threshold requirement at issue here should be considered any differently.

The 45-week rule does not depart significantly from commonly accepted concepts of "seniority." The rule is not an educational standard, an aptitude or physical test, or a stand-

ard that gives effect to subjectivity. Unlike such criteria, but like any "seniority" rule, the 45-week requirement focuses on length of employment.

Moreover, the rule does not distort the operation of the basic system established by the Agreement, which rewards employment longevity with heightened benefits. A temporary employee's chances of achieving permanent status increase inevitably as his industry employment and seniority accumulate. The temporary employees with the most industry seniority have the first choice of new jobs within the industry available for temporary employees. Similarly, the temporary employees with the most plant seniority have the first choice of temporary employee jobs within their plant and enjoy the greatest security against "bumping" by permanent employees from nearby plants. As a general rule, therefore, the more seniority a temporary employee accumulates, the more likely it is that he will be able to satisfy the 45-week requirement. That the correlation between accumulated industry employment and acquisition of permanent employee status is imperfect does not mean that the 45-week requirement is not a component of the Agreement's seniority system. Under any seniority system, contingencies such as illnesses and layoffs may interrupt the accrual of seniority and delay realization of the advantages dependent upon it.[22]

For these reasons, we conclude that the Court of Appeals was in error in holding that the 45-week rule is not a component of a "seniority system" within the meaning of § 703 (h) of Title VII of the Civil Rights Act of 1964. In the District Court the respondent will remain free to show that, in respect to the 45-week rule or in other respects, the se-

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[22] There are indications in the record of this case that a long-term decline in the California brewing industry's demand for labor is a reason why the accrual of seniority as a temporary employee has not led more automatically to the acquisition of permanent status. But surely, what would be part of a "seniority system" in an expanding labor market does not become something else in a declining labor market.

niority system established by the Agreement is not "bona fide," or that the differences in employment conditions that it has produced are "the result of an intention to discriminate because of race."

For the reasons stated, the judgment before us is vacated, and the case is remanded to the Court of Appeals for the Ninth Circuit for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE POWELL and MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN and MR. JUSTICE BLACKMUN join, dissenting.

In the California brewing industry, an employee's rights and benefits are largely dependent on whether he is a "permanent" employee within the meaning of the collective-bargaining agreement. Permanent employees are laid off after all other employees. If laid off at one facility, a permanent employee is permitted to replace the least senior nonpermanent employee at any other covered facility within the local area. Permanent employees are selected before temporary employees to fill vacancies. They have exclusive rights to supplemental unemployment benefits upon layoff and receive higher wages and vacation pay for the same work performed by other employees. Permanent employees have first choice of vacation times, less rigorous requirements for qualifying for holiday pay, exclusive access to veterans' reinstatement and seniority rights, and priority in assignment of overtime work among bottlers.

According to respondent's complaint, no Negro has ever attained permanent employee status in the California brewing industry.[1]

[1] In the present procedural posture of the case, of course, the allegations of the complaint must be accepted as true.

The provision of the collective-bargaining agreement at issue here defines a permanent employee as one "who . . . has completed forty-five weeks of employment . . . in one classification in one calendar year as an employee of the brewing industry in this State." An employee who works 44 weeks per year for his entire working life remains a temporary employee. By contrast, an employee who works 45 weeks in his first year in the industry attains permanent employee status. This simple fact belies the Court's conclusion that the 45-week requirement "does not depart significantly from commonly accepted concepts of 'seniority.'" *Ante*, at 609. Since I am unable to agree that the provision at issue is part of a "seniority system" under § 703 (h) of Title VII, I dissent.

I

Neither Title VII nor its legislative history provides a comprehensive definition of the term "seniority system."[2] The Court is therefore correct in concluding that the term must be defined by reference to "commonly accepted notions about 'seniority' in industrial relations" and "in the context of Title VII and this country's labor policy." *Ante*, at 605. Those "commonly accepted notions," however, do not lead to the Court's holding today. And I believe that the relevant policies do not support that holding, but instead require that it be rejected.

The concept of "seniority" is not a complicated one. The fundamental principle, as the Court recognizes, *ante*, at 606, is that employee rights and benefits increase with length of service. This principle is reflected in the very definition of the term, as found in dictionaries[3] and treatises and articles in

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[2] The legislative history does, however, provide a bit more guidance than the Court admits. The fact that the sole example of a seniority system given in the congressional debates is one in which rights increase with cumulative length of service is at least suggestive. See *ante*, at 605, n. 10.

[3] See, *e. g.*, Webster's Third New International Dictionary 2066 (unabridged ed. 1961) ("a status attained by length of continuous service

the field of industrial relations.[4] To quote from a few of the sources on which the Court purports to rely today: "Seniority is a system of employment preference based on length of serv-

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(as in a company . . .) to which are attached by custom or prior collective agreement various rights or privileges"); Random House Dictionary of the English Language 1299 (1966) ("priority, precedence, or status obtained as the result of a person's length of service"); Black's Law Dictionary 1222 (5th ed. 1979) ("As used with reference to job seniority, worker with most years of service is first promoted within range of jobs subject to seniority, and is the last laid off, proceeding so on down the line to the youngest in point of service"); Ballentine's Law Dictionary 1160 (1969) ("the principle in labor relations that length of employment determines the order of layoffs, rehirings, and advancements").

[4] See, *e. g.*, Roberts' Dictionary of Industrial Relations 390 (1966) ("The length of service an individual employee has in the plant. . . . The seniority principle rests on the assumption that the individuals with the greatest length of service within the company should be given preference in employment"); United States Department of Labor, Bureau of Labor Statistics, Bulletin No. 908–11, p. 1 (1949) ("A seniority program aims to provide maximum security in employment to those with the longest service"); E. Dangel & I. Shriber, The Law of Labor Unions § 15 (1941) ("Seniority . . . is an employment advantage in the matter of the choice of and the right to work in one's occupation on the basis of an employee's length of service"); BNA, Collective Bargaining Contracts, Techniques of Negotiation and Administration with Topical Classification of Clauses 488 (1941) ("The term [seniority] refers to length of service with the employer or in some division of an enterprise"); Meyers, The Analytic Meaning of Seniority, Industrial Relations Research Association, Proceedings of Eighteenth Annual Meeting 194 (1966) ("Seniority is the application of the criterion of length of service for the calculation of relative equities among employees"); McCaffrey, Development and Administration of Seniority Provisions, Proceedings of New York University Second Annual Conference on Labor 132 (1949) ("seniority may be defined as the length of company-recognized service as applied to certain employer-employee relationships"); Christenson, Seniority Rights Under Labor Union Working Agreements, 11 Temp. L. Q. 355 (1937) ("seniority is a rule providing that employers promote, lay-off and re-employ labor, according to length of previous service"). Cf. P. Selznick, Law, Society, and Industrial Justice 203 (1969) (referring to the "'rather general feeling that a worker who has spent many years on his job has some stake in that job and in the business of which it is a part'").

ice; employees with the longest service are given the greatest job security and the best opportunities for advancement." Aaron, Reflections on the Legal Nature and Enforceability of Seniority Rights, 75 Harv. L. Rev. 1532, 1534 (1962). "The variations and combinations of seniority principles are very great, but in all cases the basic measure is length of service, with preference accorded to the senior worker." Cooper & Sobol, Seniority and Testing under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv. L. Rev. 1598, 1602 (1969). "Seniority grants certain preferential treatment to long-service employees almost at the expense of short-service employees. . . . [S]eniority is defined as length of service." E. Beal, E. Wickersham, & P. Kienast, The Practice of Collective Bargaining 430 (1972).

It is hardly surprising that seniority has uniformly been defined in terms of cumulative length of service. No other definition could accord with the policies underlying the recognition of seniority rights. A seniority system provides an objective standard by which to ascertain employee rights and protections, thus reducing the likelihood of arbitrariness or caprice in employer decisions. At the same time, it promotes stability and certainty among employees, furnishing a predictable method by which to measure future employment position. See, *e. g.*, Sayles, Seniority: An Internal Union Problem, 30 Harv. Bus. Rev. 55 (1952); C. Golden & H. Ruttenberg, The Dynamics of Industrial Democracy 128–131 (1973); Cooper & Sobol, *supra*, at 1604–1605.

The Court concedes this general point, recognizing that a " 'seniority system' is a scheme that, alone or in tandem with non-'seniority' criteria, allots to employees ever improving employment rights and benefits as their relative lengths of pertinent employment increase." *Ante*, at 605–606 (footnote omitted). In my view, that concession is dispositive of this case. The principal effect of the 45-week requirement is to ensure that employee rights and benefits in the California

brewing industry are not "ever improving" as length of service increases. Indeed, cumulative length of service is only incidentally relevant to the 45-week rule. The likelihood that a temporary employee will attain permanent employee status is largely unpredictable. The 45-week period, which is exclusive of vacation, leaves of absence, and time lost because of injury or sickness, represents almost 90% of the calendar year. Even if an employee is relatively senior among temporaries, his ability to work 45 weeks in a year will rest in large part on fortuities over which he has no control. The most obvious reason that employees have been prevented from attaining permanent employee status—a reason barely referred to by the Court—is that the brewing industry is a seasonal one. An employee may also be prevented from becoming permanent because of replacement by permanent employees or an employer's unexpected decision to lay off a particular number of employees during the course of a year.[5] It is no wonder that the accrual of seniority by temporary employees has not led with any regularity to the acquisition of permanent employee status.[6] In sum, the 45-week rule does not have

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[5] Indeed, the agreement expressly provides that a permanent employee laid off at one facility will replace (or "bump") the temporary employee with the lowest *plant* seniority, even if that employee has more industry seniority than others. As a result, temporaries who are relatively senior in terms of industry seniority may have less opportunity to work 45 weeks in a calendar year than temporaries with less industry seniority but more plant seniority. Thus, it is simply not true that temporary employees obtain permanent employee status in order of cumulative length of employment, for the requisite 45 weeks is computed on the basis of service in the industry rather than in particular plants.

[6] The Court acknowledges this point, *ante*, at 610, n. 22, but responds that a system which would fall within § 703 (h) in an expanding labor market does not lose that status by virtue of the fact that the labor market is contracting. In the Court's words, however, the question is whether the 45-week rule is a part of a seniority system because it "allots to employees ever improving employment rights and benefits as their relative lengths of pertinent employment increase." In that context it is

the feature of providing employees with a reasonably certain route by which to measure future employment position. So understood, the 45-week rule has very little to do with seniority, for it makes permanent status turn on fortuities over which the employee has no control, not on length of service with the employer or in the relevant unit.

The Court avoids this conclusion by little more than assertion. It observes that the 45-week rule acts as a threshold requirement for entry onto the seniority track composed of permanent employees, but eliminates the force of that observation with the inevitable concession that such threshold requirements are not necessarily entitled to § 703 (h) exemption.[7] It notes that the 45-week requirement "focuses on length of employment," and proceeds to the unexplained conclusion that it therefore "does not depart significantly from commonly accepted concepts of 'seniority.'" And it adds that more senior temporary employees tend to have a greater opportunity to obtain work and thus to attain permanent status through 45 weeks of employment in a calendar year.

The Court's analysis, of course, is largely dependent on its conclusion that since the 45-week requirement is one measured by time of service, it does not depart from common concepts of seniority. That conclusion, however, is foreclosed by the Court's own definition of a seniority system as one in which employee rights increase with cumulative length of

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surely relevant whether the 45-week provision does in fact operate to reward cumulative length of service, or serves instead as a virtually impassable barrier to advancement.

[7] As the Court's own analysis suggests, the 45-week provision is entirely different from the seniority provisions involved in *Teamsters* v. *United States*, 431 U. S. 324 (1977). At issue in that case was a seniority system granting some benefits on the basis of an employee's cumulative length of service with the company, and others on the basis of cumulative length of service in a particular job category. In both cases employee rights and benefits depended on total length of service in the relevant unit, not on the length of service within a calendar year.

service—not length of service within a calendar year. The mere fact that the 45-week rule is in some sense a measure of "time" does not demonstrate a valid relation to concepts of seniority. Such a conclusion would make the § 703 (h) exemption applicable to a rule under which permanent employee status is dependent on number of days served within a week, or hours served within a day.[8]

Nor is there much force to the suggestion that the 45-week requirement somehow becomes part of a seniority system because permanent employee status is more easily achieved by the more senior temporary employees. I could agree with the Court's decision if petitioners demonstrated that the collective-bargaining agreement actually operates to reward employees in order of cumulative length of service. But at this stage of the litigation there is no evidence that temporary employees attain permanent status in a way correlating even roughly with total length of employment. The mere possibility that senior temporary employees are more likely to work for 45 weeks is, in my view, insufficient.[9] It might as well be said that a law conditioning permanent employee status on the attainment of a certain level of skill is a "seniority" provision since skills tend to increase with length of service. A temporary employee is always subject to a risk that for some reason

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[8] For example, there can be no serious question that a provision making permanent status dependent on 7 days of work per week, or 12 hours per day, would not be part of a "seniority system" within the meaning of § 703 (h).

[9] I could understand, although I do not favor, a decision remanding this case for factual findings on the question whether temporary employees in fact acquire permanent status and, if so, whether they do so in order of cumulative length of service. In my view, it is extraordinary for the Court to conclude, in a factual vacuum and on the authority of nothing other than petitioners' word, that "the rule does not distort the operation of the basic system established by the Agreement, which rewards employment longevity with heightened benefits." See also n. 5, *supra*.

beyond his control, he will be unable to work the full 45 weeks and be forced to start over again.

II

Since the 45-week rule operates as a threshold requirement with no relation to principles of seniority, I believe that the rule is for analytical purposes no different from an educational standard or physical test which, as the Court indicates, is plainly not entitled to § 703 (h) exemption. Accordingly, I think it clear that the 45-week requirement is not part of a "seniority system" within the meaning of § 703 (h). But if the question were perceived to be close, I would be guided by the familiar principle that exemptions to remedial statutes should be construed narrowly. "To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people." *Phillips Co.* v. *Walling*, 324 U. S. 490, 493 (1945). See, *e. g.*, *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U. S. 205, 231 (1979); *Abbott Laboratories* v. *Portland Retail Druggists Assn.*, 425 U. S. 1, 12 (1976); *Peyton* v. *Rowe*, 391 U. S. 54, 65 (1968). The effect of § 703 (h) is to exempt seniority systems from the general prohibition on practices which perpetuate the effects of racial discrimination. This exception is a limited one in derogation of the overarching purpose of Title VII, "the integration of blacks into the mainstream of American society." *Steelworkers* v. *Weber*, 443 U. S. 193, 202 (1979). A statute designed to remedy the national disgrace of discrimination in employment should be interpreted generously to comport with its primary purpose; exemptions should be construed narrowly so as not to undermine the effect of the general prohibition. Today the Court not only refuses to apply this familiar principle of statutory construction, it does not even acknowledge it.

In my view, the Court's holding is fundamentally at odds with the purposes of Title VII and the basic function of the § 703 (h) exemption. I dissent.[10]

[10] To decide this case we are not required to offer a complete definition of the term "seniority system" within the meaning of § 703 (h). Nor are we called upon to canvass and evaluate rules "ancillary" to seniority systems. The question whether all of the rules listed by the Court, *ante*, at 607, nn. 17–20, are part of a seniority system is not at all easy, and the Court's own reasoning demonstrates that its discussion of those rules is gratuitous and does little to advance analysis of the 45-week requirement. That requirement serves none of the functions of an "ancillary" rule.

VILLAGE OF SCHAUMBURG *v.* CITIZENS FOR A BETTER ENVIRONMENT ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 78–1335. Argued October 30, 1979—Decided February 20, 1980

Petitioner village has an ordinance prohibiting door-to-door or on-street solicitation of contributions by charitable organizations that do not use at least 75 percent of their receipts for "charitable purposes," such purposes being defined to exclude solicitation expenses, salaries, overhead, and other administrative expenses. After petitioner denied respondent Citizens for a Better Environment (CBE) (a nonprofit environmental-protection organization) a solicitation permit because it could not meet the ordinance's 75-percent requirement, CBE sued petitioner in Federal District Court, alleging that such requirement violated the First and Fourteenth Amendments, and seeking declaratory and injunctive relief. The District Court granted summary judgment for CBE. The Court of Appeals affirmed, rejecting petitioner's argument that summary judgment was inappropriate because there was an unresolved factual dispute as to the true character of CBE's organization, and holding that since CBE challenged the facial validity of the ordinance on First Amendment grounds the facts as to CBE's internal affairs and operations were immaterial and therefore not an obstacle to the granting of summary judgment. The court concluded that even if the 75-percent requirement might be valid as applied to other types of charitable solicitation, the requirement was unreasonable on its face because it barred solicitation by advocacy-oriented organizations even where the contributions would be used for reasonable salaries of those who gathered and disseminated information relevant to the organization's purpose.

Held: The ordinance in question is unconstitutionally overbroad in violation of the First and Fourteenth Amendments. Pp. 628–639.

(a) Charitable appeals for funds, on the street or door to door, involve a variety of speech interests—communication of information, dissemination and propagation of views and ideas, and advocacy of causes—that are within the First Amendment's protection. While soliciting financial support is subject to reasonable regulation, such regulation must give due regard to the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on eco-

nomic, political, or social issues, and to the reality that without solicitation the flow of such information and advocacy would likely cease. Moreover, since charitable solicitation does more than inform private economic decisions and is not primarily concerned with providing information about the characteristics and costs of goods and services, it is not dealt with as a variety of purely commercial speech. Pp. 628–632.

(b) The Court of Appeals was free to inquire whether the ordinance was overbroad, a question of law that involved no dispute about CBE's characteristics, and thus properly proceeded to rule on the merits of the summary judgment. CBE was entitled to its judgment of facial invalidity if the ordinance purported to prohibit canvassing by a substantial category of charities to which the 75-percent limitation could not be applied consistently with the First and Fourteenth Amendments, even if there was no demonstration that CBE itself was one of these organizations. Pp. 633–635.

(c) The 75-percent limitation is a direct and substantial limitation on protected activity that cannot be sustained unless it serves a sufficiently strong, subordinating interest that petitioner is entitled to protect. Here, petitioner's proffered justifications that such limitation is intimately related to substantial governmental interests in preventing fraud and protecting public safety and residential privacy are inadequate, and such interests could be sufficiently served by measures less destructive of First Amendment interests. Pp. 635–639.

590 F. 2d 220, affirmed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. REHNQUIST, J., filed a dissenting opinion, *post*, p. 639.

Jack M. Siegel argued the cause and filed briefs for petitioner.

Milton I. Shadur argued the cause for respondents. With him on the brief were *Geraldine Soat Brown* and *David Goldberger*.

Adam Yarmolinsky argued the cause and filed a brief for the Coalition of National Voluntary Organizations et al. as *amici curiae* urging affirmance.*

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*Briefs of *amici curiae* urging affirmance were filed by *J. Albert Woll* and *Laurence Gold* for the American Federation of Labor and Congress of

MR. JUSTICE WHITE delivered the opinion of the Court.

The issue in this case is the validity under the First and Fourteenth Amendments of a municipal ordinance prohibiting the solicitation of contributions by charitable organizations that do not use at least 75 percent of their receipts for "charitable purposes," those purposes being defined to exclude solicitation expenses, salaries, overhead, and other administrative expenses. The Court of Appeals held the ordinance unconstitutional. We affirm that judgment.

I

The Village of Schaumburg (Village) is a suburban community located 25 miles northwest of Chicago, Ill. On March 12, 1974, the Village adopted "An Ordinance Regulating Soliciting by Charitable Organizations," codified as Art. III of Chapter 22 of the Schaumburg Village Code (Code), which regulates the activities of "peddlers and solicitors," Code § 22–1 *et seq.* (1975).[1] Article III[2] provides that

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Industrial Organizations; by *Barry A. Fisher* for the Holy Spirit Association for the Unification of World Christianity; by *Arnold H. Gold* for the Los Angeles Council of National Voluntary Health Agencies; by *Alan B. Morrison* for the National Committee for Responsive Philanthropy et al.; and by *Sanford Jay Rosen* for the National Council of Churches of Christ in the U. S. A. et al.

[1] Article II of Chapter 22 regulates commercial solicitation by requiring "for profit peddlers and solicitors" to obtain a commercial license. For the purposes of Art. II, peddlers and solicitors are defined as any persons who, going from place to place without appointment, offer goods or services for sale or take orders for future delivery of goods or services. Code § 22–6. Section 22–7 requires any person "engage[d] in the business of a peddler or solicitor within the village" to obtain a license. Licenses can be obtained by application to the village collector and payment of an annual fee ranging from $10 to $25. License applications must contain a variety of information, including the kind of merchandise to be offered, the address of the applicant, the name of the applicant's employer, and whether the applicant has ever been arrested for a misdemeanor or felony.

[*Footnote 2 is on p. 623*]

"[e]very charitable organization, which solicits or intends to solicit contributions from persons in the village by door-to-door solicitation or the use of public streets and public ways, shall prior to such solicitation apply for a permit." § 22–20.[3]

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§ 22–8. A license must be denied to anyone "who is not found to be a person of good character and reputation." § 22–9.

Solicitation is permitted between the hours of 9 a. m. and 6 p. m., Monday through Saturday. § 22–13. Cheating, deception, or fraudulent misrepresentation by peddlers or solicitors is prohibited by § 22–12. Peddlers and solicitors are required to depart "immediately and peacefully" from the premises of any home displaying a sign, "No Solicitors or Peddlers Invited," near the main entrance. §§ 22–15 and 22–16.

Persons violating the provisions of Art. II may be fined up to $500 for each offense. § 22–18. The village manager may revoke the license of any peddler or solicitor who violates any village ordinance or any state or federal law or who ceases to possess good character. § 22–11.

[2] Article III of Chapter 22 includes §§ 22–19 to 22–24 of the Code. Section 22–19 defines a "charitable organization" as "[a]ny benevolent, philanthropic, patriotic, not-for-profit, or eleemosynary group, association or corporation, or such organization purporting to be such, which solicits and collects funds for charitable purposes." A "charitable purpose" is defined as "[a]ny charitable, benevolent, philanthropic, patriotic, or eleemosynary purpose." A "contribution" is defined as "[t]he promise or grant of any money or property of any kind or value, including payments for literature in excess of the fair market value of said literature."

[3] Applications for charitable solicitation permits must include the following information: the names and addresses of the persons and organizations involved, the dates and times solicitation is to be undertaken, the geographic area in which solicitation will occur, and proof that the organization has complied with state laws governing charitable solicitation and is tax exempt under the Internal Revenue Code. The information contained in permit applications must be verified under oath by a responsible officer of the organization desiring to solicit funds. Completed applications, which must be accompanied by payment of a $10 fee, are submitted by the village clerk to the village board. "If the village board shall find and determine that all requirements of [Article III] have been met, a permit shall be issued specifying the dates and times at which solicitation may take place." § 22–21.

Charitable solicitation permits may permit solicitation only between the hours of 9 a. m. and 6 p. m., Monday through Saturday. No person who has been convicted of a felony or is under indictment for a felony may be

Solicitation of contributions for charitable organizations without a permit is prohibited and is punishable by a fine of up to $500 for each offense. Schaumburg Ordinance No. 1052, §§ 1, 8 (1974).

Section 22–20 (g), which is the focus of the constitutional challenge involved in this case, requires that permit applications, among other things, contain "[s]atisfactory proof that at least seventy-five per cent of the proceeds of such solicitations will be used directly for the charitable purpose of the organization."[4] In determining whether an organization satisfies the 75-percent requirement, the ordinance provides that

> "the following items shall not be deemed to be used for the charitable purposes of the organization, to wit:
>
> "(1) Salaries or commissions paid to solicitors;
>
> "(2) Administrative expenses of the organization, including, but not limited to, salaries, attorneys' fees, rents, telephone, advertising expenses, contributions to other organizations and persons, except as a charitable contribution and related expenses incurred as administrative or overhead items." § 22–20 (g).

Respondent Citizens for a Better Environment (CBE) is an Illinois not-for-profit corporation organized for the purpose of promoting "the protection of the environment." CBE is registered with the Illinois Attorney General's Charitable Trust Division pursuant to Illinois law,[5] and has been afforded

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used as a solicitor. § 22–23. Section 22–24 provides that "[n]othing herein provided shall permit a solicitor to go upon any premises which has posted a sign indicating 'no solictors or peddlers invited.'"

[4] The "satisfactory proof" of compliance with the 75-percent requirement must include "a certified audit of the last full year of operations, indicating the distribution of funds collected by the organization, or such other comparable evidence as may demonstrate the fact that at least seventy-five per cent of the funds collected are utilized directly and solely for the charitable purpose of the organization." § 22–20.

[5] Illinois law requires "[e]very charitable organization . . . which solicits or intends to solicit contributions from persons in th[e] State by any

tax-exempt status by the United States Internal Revenue Service, and gifts to it are deductible for federal income tax purposes. CBE requested permission to solicit contributions in the Village, but the Village denied CBE a permit because CBE could not demonstrate that 75 percent of its receipts would be used for "charitable purposes" as required by § 22–20 (g) of the Code. CBE then sued the Village in the United States District Court for the Northern District of Illinois, charging that the 75-percent requirement of § 22–20 (g) violated the First and Fourteenth Amendments. Declaratory and injunctive relief was sought.

In its amended complaint, CBE alleged that "[i]t was organized for the purpose, among others, of protecting, maintaining, and enhancing the quality of the Illinois environment." The complaint also alleged:

> "That incident to its purpose, CBE employs 'canvassers' who are engaged in door-to-door activity in the Chicago metropolitan area, endeavoring to distribute literature on environmental topics and answer questions of an environmental nature when posed; solicit contributions to financially support the organization and its programs; receive grievances and complaints of an environmental nature regarding which CBE may afford assistance in the evaluation and redress of these grievances and complaints."

The Village's answer to the complaint averred that the foregoing allegations, even if true, would not be material to

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means whatsoever" to file a registration statement with the Illinois Attorney General. Ill. Rev. Stat., ch. 23, § 5102 (a) (1977). The registration statement must include a variety of information about the organization and its fundraising activities.

Charitable organizations are required to "maintain accurate and detailed books and records" which "shall be open to inspection at all reasonable times by the Attorney General or his duly authorized representative." § 5102 (f). Registration statements filed with the Attorney General are also open to public inspection.

the issues of the case, acknowledged that CBE employed "canvassers" to solicit funds, but alleged that "CBE is primarily devoted to raising funds for the benefit and salary of its employees and that its charitable purposes are negligible as compared with the primary objective of raising funds." The Village also alleged "that more than 60% of the funds collected [by CBE] have been spent for benefits of employees and not for any charitable purposes." [6]

CBE moved for summary judgment and filed affidavits describing its purposes and the activities of its "canvassers" as outlined in the complaint. One of the affidavits also alleged that "the door-to-door canvass is the single most important source of funds" for CBE. A second affidavit offered by CBE stated that in 1975 the organization spent 23.3% of its income on fundraising and 21.5% of its income on administration, and that in 1976 these figures were 23.3% and 16.5%, respectively. The Village opposed the motion but filed no counteraffidavits taking issue with the factual representations in CBE's affidavits.

The District Court awarded summary judgment to CBE. The court recognized that although "the government may regulate solicitation in order to protect the community from

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[6] The Village appended to its answer a copy of an article appearing in a local newspaper. "Is $$ Real Cause in Clean-Air Fight?" Suburban Trib, Nov. 10, 1976, p. 1. Based on reports on file with the Illinois Attorney General's office, the article stated that more than two-thirds of the funds collected by CBE in fiscal year 1975 were spent on salaries and employee health benefits. The article noted that in 1971 the Illinois Attorney General had sued CBE for failing to register its solicitors and for making false claims that CBE was working to "'increase the size of the attorney general's staff and consequently their effectiveness in the fight against pollution.'" The suit was settled by a consent decree with CBE agreeing to register its solicitors and to change some of the claims it was making. The article stated that the chief of the Charitable Trusts and Solicitation Division of the Illinois Attorney General's office was convinced of CBE's commitment to environmental issues, but that his division would continue to monitor carefully the group's solicitation activities.

fraud, . . . [a]ny action impinging upon the freedom of expression and discussion . . . must be minimal, and intimately related to an articulated, substantial government interest." The court concluded that the 75-percent requirement of § 22–20 (g) of the Code on its face was "a form of censorship" prohibited by the First and Fourteenth Amendments. Section 22–20 (g) was declared void on its face, its enforcement was enjoined, and the Village was ordered to issue a charitable solicitation permit to CBE.

The Court of Appeals for the Seventh Circuit affirmed. 590 F. 2d 220 (1978). The court rejected the Village's argument that summary judgment was inappropriate because material issues of fact were disputed. Because CBE challenged the facial validity of the village ordinance on First Amendment grounds, the court held that "any issue of fact as to the nature of CBE's particular activities is not material . . . and is therefore not an obstacle to the granting of summary judgment." *Id.*, at 223. Like the District Court, the Court of Appeals recognized that the Village had a legitimate interest in regulating solicitation to protect its residents from fraud and the disruption of privacy, but that such regulation "must be done 'with narrow specificity' " when First Amendment interests are affected. *Id.*, at 223–224. The court concluded that even if the 75-percent requirement might be valid as applied to other types of charitable solicitation, the Village's requirement was unreasonable on its face because it barred solicitation by advocacy-oriented organizations even "where it is made clear that the contributions will be used for reasonable salaries of those who will gather and disseminate information relevant to the organization's purpose." *Id.*, at 226. The court distinguished *National Foundation* v. *Fort Worth*, 415 F. 2d 41 (CA5 1969), cert. denied, 396 U. S. 1040 (1970), which upheld an ordinance authorizing denial of charitable solicitation permits to organizations with excessive solicitation costs, on the ground that although the Fort Worth ordinance deemed unreasonable solicitation costs in excess of

20 percent of gross receipts, it nevertheless permitted organizations that demonstrated the reasonableness of such costs to obtain solicitation permits.

We granted certiorari, 441 U. S. 922 (1979), to review the Court of Appeals' determination that the village ordinance violates the First and Fourteenth Amendments.

II

It is urged that the ordinance should be sustained because it deals only with solicitation and because any charity is free to propagate its views from door to door in the Village without a permit as long as it refrains from soliciting money. But this represents a far too limited view of our prior cases relevant to canvassing and soliciting by religious and charitable organizations.

In *Schneider* v. *State*, 308 U. S. 147 (1939), a canvasser for a religious society, who passed out booklets from door to door and asked for contributions, was arrested and convicted under an ordinance which prohibited canvassing, soliciting, or distribution of circulars from house to house without a permit, the issuance of which rested much in the discretion of public officials. The state courts construed the ordinance as aimed mainly at house-to-house canvassing and solicitation. This distinguished the case from *Lovell* v. *Griffin*, 303 U. S. 444 (1938), which had invalidated on its face and on First Amendment grounds an ordinance criminalizing the distribution of any handbill at any time or place without a permit. Because the canvasser's conduct "amounted to the solicitation . . . of money contributions without a permit" *Schneider*, *supra*, at 159, and because the ordinance was thought to be valid as a protection against fraudulent solicitations, the conviction was sustained. This Court disagreed, noting that the ordinance not only applied to religious canvassers but also to "one who wishes to present his views on political, social or economic questions," 308 U. S., at 163, and holding that the city could not, in the name of preventing fraudulent appeals, subject

door-to-door advocacy and the communication of views to the discretionary permit requirement. The Court pointed out that the ordinance was not limited to those "who canvass for private profit," *ibid.*, and reserved the question whether "commercial soliciting and canvassing" could be validly subjected to such controls. *Id.*, at 165.

Cantwell v. *Connecticut*, 310 U. S. 296 (1940), involved a state statute forbidding the solicitation of contributions of anything of value by religious, charitable, or philanthropic causes without obtaining official approval. Three members of a religious group were convicted under the statute for selling books, distributing pamphlets, and soliciting contributions or donations. Their convictions were affirmed in the state courts on the ground that they were soliciting funds and that the statute was valid as an attempt to protect the public from fraud. This Court set aside the convictions, holding that although a "general regulation, in the public interest, of solicitation, which does not involve any religious test and does not unreasonably obstruct or delay the collection of funds, is not open to any constitutional objection," *id.*, at 305, to "condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause," *id.*, at 307, was considered to be an invalid prior restraint on the free exercise of religion. Although *Cantwell* turned on the Free Exercise Clause, the Court has subsequently understood *Cantwell* to have implied that soliciting funds involves interests protected by the First Amendment's guarantee of freedom of speech. *Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U. S. 748, 761 (1976); *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 363 (1977).

In *Valentine* v. *Chrestensen*, 316 U. S. 52 (1942), an arrest was made for distributing on the public streets a commercial advertisement in violation of an ordinance forbidding this distribution. Addressing the question left open in *Schneider*,

the Court recognized that while municipalities may not unduly restrict the right of communicating information in the public streets, the "Constitution imposes no such restraint on government as respects purely commercial advertising." 316 U. S., at 54. The Court reasoned that unlike speech "communicating information and disseminating opinion" commercial advertising implicated only the solicitor's interest in pursuing "a gainful occupation." *Ibid.*

The following Term in *Jamison* v. *Texas*, 318 U. S. 413 (1943), the Court, without dissent, and with the agreement of the author of the *Chrestensen* opinion, held that although purely commercial leaflets could be banned from the streets, a State could not "prohibit the distribution of handbills in the pursuit of a clearly religious activity merely because the handbills invite the purchase of books for the improved understanding of the religion or because the handbills seek in a lawful fashion to promote the raising of funds for religious purposes." 318 U. S., at 417. The Court reaffirmed what it deemed to be an identical holding in *Schneider*, as well as the ruling in *Cantwell* that "a state might not prevent the collection of funds for a religious purpose by unreasonably obstructing or delaying their collection." 318 U. S., at 417. See also, *Largent* v. *Texas*, 318 U. S. 418 (1943).

In the course of striking down a tax on the sale of religious literature, the majority opinion in *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943), reiterated the holding in *Jamison* that the distribution of handbills was not transformed into an unprotected commercial activity by the solicitation of funds. Recognizing that drawing the line between purely commercial ventures and protected distributions of written material was a difficult task, the Court went on to hold that the sale of religious literature by itinerant evangelists in the course of spreading their doctrine was not a commercial enterprise beyond the protection of the First Amendment.

On the same day, the Court invalidated a municipal ordinance that forbade the door-to-door distribution of handbills.

circulars, or other advertisements. None of the justifications for the general prohibition was deemed sufficient; the right of the individual resident to warn off such solicitors was deemed sufficient protection for the privacy of the citizen. *Martin* v. *Struthers,* 319 U. S. 141 (1943). On its facts, the case did not involve the solicitation of funds or the sale of literature.

Thomas v. *Collins,* 323 U. S. 516 (1945), held that the First Amendment barred enforcement of a state statute requiring a permit before soliciting membership in any labor organization. Solicitation and speech were deemed to be so intertwined that a prior permit could not be required. The Court also recognized that "espousal of the cause of labor is entitled to no higher constitutional protection than the espousal of any other lawful cause." *Id.,* at 538. The Court rejected the notion that First Amendment claims could be dismissed merely by urging "that an organization for which the rights of free speech and free assembly are claimed is one 'engaged in business activities' or that the individual who leads it in exercising these rights receives compensation for doing so." *Id.,* at 531. Concededly, the "collection of funds" might be subject to reasonable regulation, but the Court ruled that such regulation "must be done, and the restriction applied, in such a manner as not to intrude upon the rights of free speech and free assembly." *Id.,* at 540–541.

In 1951, *Breard* v. *Alexandria,* 341 U. S. 622, was decided. That case involved an ordinance making it criminal to enter premises without an invitation to sell goods, wares, and merchandise. The ordinance was sustained as applied to door-to-door solicitation of magazine subscriptions. The Court held that the sale of literature introduced "a commercial feature," *id.,* at 642, and that the householder's interest in privacy outweighed any rights of the publisher to distribute magazines by uninvited entry on private property. The Court's opinion, however, did not indicate that the solicitation of gifts or contributions by religious or charitable organizations should be deemed commercial activities, nor did the facts of

Breard involve the sale of religious literature or similar materials. *Martin* v. *Struthers, supra,* was distinguished but not overruled.

Hynes v. *Mayor of Oradell,* 425 U. S. 610 (1976), dealt with a city ordinance requiring an identification permit for canvassing or soliciting from house to house for charitable or political purposes. Based on its review of prior cases, the Court held that soliciting and canvassing from door to door were subject to reasonable regulation so as to protect the citizen against crime and undue annoyance, but that the First Amendment required such controls to be drawn with "'narrow specificity.'" *Id.,* at 620. The ordinance was invalidated as unacceptably vague.

Prior authorities, therefore, clearly establish that charitable appeals for funds, on the street or door to door, involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment. Soliciting financial support is undoubtedly subject to reasonable regulation but the latter must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease. Canvassers in such contexts are necessarily more than solicitors for money. Furthermore, because charitable solicitation does more than inform private economic decisions and is not primarily concerned with providing information about the characteristics and costs of goods and services, it has not been dealt with in our cases as a variety of purely commercial speech.[7]

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[7] To the extent that any of the Court's past decisions discussed in Part II hold or indicate that commercial speech is excluded from First Amendment protections, those decisions, to that extent, are no longer good law. *Virginia Pharmacy Board* v. *Virginia Consumer Council,* 425 U. S. 748,

III

The issue before us, then, is not whether charitable solicitations in residential neighborhoods are within the protections of the First Amendment. It is clear that they are. "[O]ur cases long have protected speech even though it is in the form of . . . a solicitation to pay or contribute money, *New York Times Co.* v. *Sullivan*, [376 U. S. 254 (1964)]." *Bates* v. *State Bar of Arizona*, 433 U. S., at 363.

The issue is whether the Village has exercised its power to regulate solicitation in such a manner as not unduly to intrude upon the rights of free speech. *Hynes* v. *Mayor of Oradell, supra*, at 616. In pursuing this question we must first deal with the claim of the Village that summary judgment was improper because there was an unresolved factual dispute concerning the true character of CBE's organization. Although CBE's affidavits in support of its motion for summary judgment and describing its interests, the activities of its canvassers, and the percentage of its receipts devoted to salaries and administrative expenses were not controverted, the District Court made no findings with respect to the nature of CBE's activities; and the Court of Appeals expressly stated that the facts with respect to the internal affairs and operations of the organization were immaterial to a proper resolution of the case. The Village claims, however, that it should have had a chance to prove that the 75-percent requirement is valid as applied to CBE because CBE spends so much of its resources for the benefit of its employees that it may appropriately be deemed an organization existing for private profit rather than for charitable purposes.

We agree with the Court of Appeals that CBE was en-

758–759, 762 (1976). For the purposes of applying the overbreadth doctrine, however, see *infra*, at 634, it remains relevant to distinguish between commercial and noncommercial speech. *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 381 (1977).

titled to its judgment of facial invalidity if the ordinance purported to prohibit canvassing by a substantial category of charities to which the 75-percent limitation could not be applied consistently with the First and Fourteenth Amendments, even if there was no demonstration that CBE itself was one of these organizations.[8] Given a case or controversy, a litigant whose own activities are unprotected may nevertheless challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the court. *Grayned* v. *City of Rockford*, 408 U. S. 104, 114–121 (1972); *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942); *Schneider* v. *State*, 308 U. S., at 162–165; *Lovell* v. *Griffin*, 303 U. S., at 451; *Thornhill* v. *Alabama*, 310 U. S. 88, 97 (1940). See also the discussion in *Broadrick* v. *Oklahoma*, 413 U. S. 601, 612–616 (1973); and in *Bigelow* v. *Virginia*, 421 U. S. 809, 815–817 (1975). In these First Amendment contexts, the courts are inclined to disregard the normal rule against permitting one whose conduct may validly be prohibited to challenge the proscription as it applies to others because of the possibility that protected speech or associative activities may be inhibited by the overly broad reach of the statute.

We have declared the overbreadth doctrine to be inapplicable in certain commercial speech cases, *Bates* v. *State Bar of Arizona*, *supra*, at 381, but as we have indicated, that limitation does not concern us here. The Court of Appeals was thus free to inquire whether § 22–20 (g) was overbroad, a question of law that involved no dispute about the characteristics of CBE. On this basis, proceeding to rule on the merits of

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[8] CBE defends the rationale of the Court of Appeals, but it also asserts that the facts concerning its purposes and its operations were uncontroverted and are sufficiently complete to demonstrate that the 75-percent limitation is invalid as applied to it. As a respondent, CBE is entitled to urge its position although the Court of Appeals did not reach it; but we need not pursue it since we do not conclude that the Court of Appeals was in error.

the summary judgment was proper. As we have indicated, we also agree with the Court of Appeals' ruling on the motion.

IV

Although indicating that the 75-percent limitation might be enforceable against the more "traditional charitable organizations" or "where solicitors represent themselves as mere conduits for contributions," 590 F. 2d, at 225, 226, the Court of Appeals identified a class of charitable organizations as to which the 75-percent rule could not constitutionally be applied. These were the organizations whose primary purpose is not to provide money or services for the poor, the needy or other worthy objects of charity, but to gather and disseminate information about and advocate positions on matters of public concern. These organizations characteristically use paid solicitors who "necessarily combine" the solicitation of financial support with the "functions of information dissemination, discussion, and advocacy of public issues." *Id.*, at 225. These organizations also pay other employees to obtain and process the necessary information and to arrive at and announce in suitable form the organizations' preferred positions on the issues of interest to them. Organizations of this kind, although they might pay only reasonable salaries, would necessarily spend more than 25 percent of their budgets on salaries and administrative expenses and would be completely barred from solicitation in the Village.[9] The Court of Appeals

[9] The village ordinance requires all charitable organizations that seek "to solicit contributions from persons in the village by door-to-door solicitation or the use of public streets and public ways" to obtain a charitable solicitation permit. Code § 22–20. Solicitation without a permit is prohibited. Schaumburg Ordinance No. 1052, § 1 (1974). Unlike the ordinance upheld in *National Foundation* v. *Fort Worth*, 415 F. 2d 41 (CA5 1969), cert. denied, 396 U. S. 1040 (1970), the village ordinance has no provision permitting an organization unable to comply with the 75-percent requirement to obtain a permit by demonstrating that its solicitation costs are nevertheless reasonable. Moreover, because compliance with the 75-percent requirement depends on organizations' receipts and expenses dur-

concluded that such a prohibition was an unjustified infringement of the First and Fourteenth Amendments.

We agree with the Court of Appeals that the 75-percent limitation is a direct and substantial limitation on protected activity that cannot be sustained unless it serves a sufficiently strong, subordinating interest that the Village is entitled to protect. We also agree that the Village's proffered justifications are inadequate and that the ordinance cannot survive scrutiny under the First Amendment.

The Village urges that the 75-percent requirement is intimately related to substantial governmental interests "in protecting the public from fraud, crime and undue annoyance." These interests are indeed substantial, but they are only peripherally promoted by the 75-percent requirement and could be sufficiently served by measures less destructive of First Amendment interests.

Prevention of fraud is the Village's principal justification for prohibiting solicitation by charities that spend more than one-quarter of their receipts on salaries and administrative expenses. The submission is that any organization using more than 25 percent of its receipts on fundraising, salaries, and overhead is not a charitable, but a commercial, for-profit enterprise and that to permit it to represent itself as a charity is fraudulent. But, as the Court of Appeals recognized, this cannot be true of those organizations that are primarily engaged in research, advocacy, or public education and that use their own paid staff to carry out these functions as well as

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ing the previous year, there appears to be no way an organization can alter its spending patterns to comply with the ordinance in the short run. Thus, the village ordinance effectively bars all in-person solicitation by organizations who spent more than one-quarter of their receipts in the previous year on salaries and administrative expenses.

Although there is some suggestion that organizations unable to comply with the 75-percent requirement may be able to obtain commercial solicitation permits, the ordinance governing issuance of such permits appears to apply only to solicitors offering goods or services for sale. Code § 22-6.

to solicit financial support. The Village, consistently with the First Amendment, may not label such groups "fraudulent" and bar them from canvassing on the streets and house to house.[10] Nor may the Village lump such organizations with those that in fact are using the charitable label as a cloak for profitmaking and refuse to employ more precise measures to separate one kind from the other. The Village may serve its legitimate interests, but it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms. *Hynes* v. *Mayor of Oradell*, 425 U. S., at 620; *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 786 (1978). "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone. . . ." *NAACP* v. *Button*, 371 U. S. 415, 438 (1963) (citations omitted).

The Village's legitimate interest in preventing fraud can be better served by measures less intrusive than a direct prohibition on solicitation. Fraudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly. *Schneider* v. *State*, 308 U. S., at 164; *Cantwell* v. *Connecticut*, 310 U. S., at 306; *Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U. S., at 771.[11] Efforts to

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[10] There is no dispute that organizations of the kind described in CBE's affidavits are considered to be nonprofit, charitable organizations under both federal and state law, despite the fact that they devote more than one-quarter of their receipts to salaries and administrative expenses. The costs incurred by charitable organizations conducting fundraising campaigns can vary dramatically depending upon a wide range of variables, many of which are beyond the control of the organization.

[11] The Village Code, for example, already contains direct proscriptions of fraud by commercial solicitors. Section 22-12 makes it "unlawful for any peddler or solicitor to cheat, deceive or fraudulently misrepresent, whether through himself or through an employee, while acting as a peddler or solicitor in the village. . . ." Unlike the situation in *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447 (1978), where we upheld disciplinary action taken against an attorney who solicited accident victims for the purpose of

promote disclosure of the finances of charitable organizations also may assist in preventing fraud by informing the public of the ways in which their contributions will be employed.[12] Such measures may help make contribution decisions more informed, while leaving to individual choice the decision whether to contribute to organizations that spend large amounts on salaries and administrative expenses.

We also fail to perceive any substantial relationship between the 75-percent requirement and the protection of public safety or of residential privacy. There is no indication that organizations devoting more than one-quarter of their funds to salaries and administrative expenses are any more likely to employ solicitors who would be a threat to public safety than are other charitable organizations.[13] Other provisions in the ordinance that are not challenged here, such as the provision making it unlawful for charitable organizations to use convicted felons as solicitors, Code § 22–23, may bear some relation to public safety; the 75-percent requirement does not.

The 75-percent requirement is related to the protection of privacy only in the most indirect of ways. As the Village concedes, householders are equally disturbed by solicitation on behalf of organizations satisfying the 75-percent requirement as they are by solicitation on behalf of other organizations. The 75-percent requirement protects privacy only by reducing the total number of solicitors, as would any prohibition on solicitation. The ordinance is not directed to the unique privacy interests of persons residing in their homes

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obtaining remunerative employment, charitable solicitation is not so inherently conducive to fraud and overreaching as to justify its prohibition.

[12] Illinois law, for example, requires charitable organizations to register with the State Attorney General's Office and to report certain information about their structure and fundraising activities. Ill. Rev. Stat., ch. 23, § 5102 (a) (1977). See n. 5, *supra*.

[13] Indeed, solicitation by organizations employing paid solicitors carefully screened in advance may be even less of a threat to public safety than solicitation by organizations using volunteers.

because it applies not only to door-to-door solicitation, but also to solicitation on "public streets and public ways." § 22–20. Other provisions of the ordinance, which are not challenged here, such as the provision permitting homeowners to bar solicitors from their property by posting signs reading "No Solicitors or Peddlers Invited," § 22–24, suggest the availability of less intrusive and more effective measures to protect privacy. See *Rowan* v. *Post Office Dept.*, 397 U. S. 728 (1970); *Martin* v. *Struthers*, 319 U. S., at 148.

The 75-percent requirement in the village ordinance plainly is insufficiently related to the governmental interests asserted in its support to justify its interference with protected speech. "Frauds may be denounced as offenses and punished by law. Trespasses may similarly be forbidden. If it is said that these means are less efficient and convenient than . . . [deciding in advance] what information may be disseminated from house to house, and who may impart the information, the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press." *Schneider* v. *State*, *supra*, at 164.

We find no reason to disagree with the Court of Appeals' conclusion that § 22–20 (g) is unconstitutionally overbroad. Its judgment is therefore affirmed.

It is so ordered.

MR. JUSTICE REHNQUIST, dissenting.

The Court holds that Art. III of the Schaumburg Village Code is unconstitutional as applied to prohibit respondent Citizens for a Better Environment (CBE) from soliciting contributions door to door. If read in isolation, today's decision might be defensible. When combined with this Court's earlier pronouncements on the subject, however, today's decision relegates any local government interested in regulating door-to-door activities to the role of Sisyphus.

The Court's opinion first recites the litany of language from 40 years of decisions in which this Court has considered various

restrictions on the right to distribute information or solicit door to door, concluding from these decisions that "charitable appeals for funds, on the street or door to door, involve a variety of speech interests . . . that are within the protection of the First Amendment." *Ante*, at 632. I would have thought this proposition self-evident now that this Court has swept even the most banal commercial speech within the ambit of the First Amendment. See *Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U. S. 748 (1976). But, having arrived at this conclusion on the basis of earlier cases, the Court effectively departs from the reasoning of those cases in discussing the limits on Schaumburg's authority to place limitations on so-called "charitable" solicitors who go from house to house in the village.

The Court's neglect of its prior precedents in this regard is entirely understandable, since the earlier decisions striking down various regulations covering door-to-door activities turned upon factors not present in the instant case. A plurality of these decisions turned primarily, if not exclusively, upon the amount of discretion vested in municipal authorities to grant or deny permits on the basis of vague or even nonexistent criteria. See *Schneider* v. *State*, 308 U. S. 147, 163–164 (1939); *Cantwell* v. *Connecticut*, 310 U. S. 296, 305–306 (1940); *Largent* v. *Texas*, 318 U. S. 418, 422 (1943); *Hynes* v. *Mayor of Oradell*, 425 U. S. 610, 620–621 (1976). In *Schneider*, for example, the Court invalidated such an ordinance as applied to Jehovah's Witnesses because "in the end, [the applicant's] liberty to communicate with the residents of the town at their homes depends upon the exercise of the officer's discretion." 308 U. S., at 164. These cases clearly do not control the validity of Schaumburg's ordinance, which leaves virtually no discretion in the hands of the licensing authority.

Another line of earlier cases involved the distribution of information, as opposed to requests for contributions. *Martin* v. *Struthers*, 319 U. S. 141 (1943), for example, dealt with

Jehovah's Witnesses who had gone door to door with invitations to a religious meeting despite a local ordinance prohibiting distribution of any "handbills, circulars or other advertisements" door to door. The Court noted that such an ordinance "limits the dissemination of knowledge," and that it could "serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas." *Id.*, at 144, 147.

Here, however, the challenged ordinance deals not with the dissemination of ideas, but rather with the solicitation of money. That the *Martin* Court would have found this distinction important is apparent not only from *Martin*'s emphasis on the dissemination of knowledge, but also from various other decisions of the same period. In *Breard* v. *Alexandria*, 341 U. S. 622 (1951), for example, the Court upheld an ordinance prohibiting "solicitors, peddlers, hawkers, itinerant merchants, or transient vendors of merchandise" from entering private property without permission. The petitioner in *Breard* had been going door to door soliciting subscriptions for magazines. Despite petitioner's invocation of both freedom of speech and freedom of the press, the Court distinguished the "commercial feature" of the transactions from their informational overtone. See *id.*, at 642. Because *Martin* "was narrowly limited to the precise fact of the free distribution of an invitation to religious services," the Court found that it was "not necessarily inconsistent with the conclusion reached in this case." 341 U. S., at 643.

Shunning the guidance of these cases, the Court sets out to define a new category of solicitors who may not be subjected to regulation. According to the Court, Schaumburg cannot prohibit door-to-door solicitation for contributions by "organizations whose primary purpose is . . . to gather and disseminate information about and advocate positions on matters of public concern." *Ante*, at 635. In another portion of its opinion, the majority redefines this immunity as extending to all

organizations "primarily engaged in research, advocacy, or public education and that use their own paid staff to carry out these functions as well as to solicit financial support." *Ante*, at 636–637. This result—or perhaps, more accurately, these results—seem unwarranted by the First and Fourteenth Amendments for three reasons.

First, from a legal standpoint, the Court invites municipalities to draw a line it has already erased. Today's opinion strongly, and I believe correctly, implies that the result here would be otherwise if CBE's primary objective were to provide "information about the characteristics and costs of goods and services," *ante*, at 632, rather than to "advocate positions on matters of public concern." *Ante*, at 635. Four years ago, however, the Court relied upon the supposed bankruptcy of this very distinction in overturning a prohibition on advertising by pharmacists. See *Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U. S. 748 (1976). According to *Virginia Pharmacy*, while "not all commercial messages contain the same or even a very great public interest element[,] [t]here are few to which such an element . . . could not be added." *Id.*, at 764. This and other considerations led the Court in that case to conclude that "no line between publicly 'interesting' or 'important' commercial advertising and the opposite kind could ever be drawn." *Id.*, at 765. To the extent that the Court found such a line elusive in *Virginia Pharmacy*, I venture to suggest that the Court, as well as local legislators, will find the line equally elusive in the context of door-to-door solicitation.

Second, from a practical standpoint, the Court gives absolutely no guidance as to how a municipality might identify those organizations "whose primary purpose is . . . to gather and disseminate information about and advocate positions on matters of public concern," and which are therefore exempt from Art. III. Earlier cases do provide one guideline: the municipality must rely on objective criteria, since reliance

upon official discretion in any significant degree would clearly run afoul of *Schneider*, *Cantwell*, *Largent*, and *Hynes*.[1] In requiring municipal authorities to use "more precise measures to separate" constitutionally preferred organizations from their less preferred counterparts, *ante*, at 637, the Court would do well to remember that these local bodies are poorly equipped to investigate and audit the various persons and organizations that will apply to them for preferred status. Stripped of discretion, they must be able to resort to a line-drawing test capable of easy and reliable application without the necessity for an exhaustive case-by-case investigation of each applicant.[2]

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[1] In this regard, I find somewhat surprising the Court's reference to the ordinance considered in *National Foundation* v. *Fort Worth*, 415 F. 2d 41 (CA5 1969), cert. denied, 396 U. S. 1040 (1970), as if it were an improvement on Schaumburg's ordinance. See *ante*, at 635, n. 9. Fort Worth requires solicitors to demonstrate that the cost of soliciting will not exceed 20 percent of the amount expected to be raised. The Court finds appeal, however, in the ability of Fort Worth's officials to waive that requirement if the applicant can show that the costs of solicitation are "not unreasonable." See 415 F. 2d, at 44, n. 2. Given the potential for abuse of this open-ended grant of discretion, I would think that Fort Worth's ordinance would be more, not less, suspect than Schaumburg's.

[2] The Court implies that an organization's eligibility for tax-exempt status under state or federal law could determine its eligibility for preferred constitutional status in its fundraising efforts. See *ante*, at 637, n. 10. Such a rule, although superficially appealing, suffers from serious drawbacks. The availability of such exemptions and deductions is a matter of legislative grace, not constitutional privilege. See *Commissioner* v. *Sullivan*, 356 U. S. 27, 28 (1958). See also *Lewyt Corp.* v. *Commissioner*, 349 U. S. 237, 240 (1955). Indeed, prior to the Tax Reform Act of 1976, a federal exemption was not available to any organization that devoted a "substantial part" of its activities to attempts "to influence legislation." See 26 U. S. C. § 501 (c)(3), as amended by Pub. L. 94–455, 90 Stat. 1727. See also 1976 U. S. Code Cong. & Admin. News 2897, 4104–4109. Even today there are strict limitations on the amount a tax-exempt organization can spend on such activities. See 26 U. S. C. § 501 (h). Nevertheless, I imagine that the lobbying activities previously excluded from, and now closely regulated by, § 501 would lie close to the core of those activities that the Court seeks to protect. For this reason, I cannot believe that

Finally, I believe that the Court overestimates the value, in a constitutional sense, of door-to-door solicitation for financial contributions and simultaneously underestimates the reasons why a village board might conclude that regulation of such activity was necessary. In *Hynes* v. *Mayor of Oradell*, this Court referred with approval to Professor Zechariah Chafee's observation that "[o]f all the methods of spreading unpopular ideas, [house-to-house convassing] seems the least entitled to extensive protection." 425 U. S., at 619, quoting Z. Chafee, Free Speech in the United States 406 (1954). While such activity may be worthy of heightened protection when limited to the dissemination of information, see, *e. g.*, *Martin* v. *Struthers*, 319 U. S. 141 (1943), or when designed to propagate religious beliefs, see, *e. g.*, *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940), I believe that a simple request for money lies far from the core protections of the First Amendment as heretofore interpreted. In the case of such solicitation, the community's interest in insuring that the collecting organization meet some objective financial criteria is indisputably valid. Regardless whether one labels noncharitable solicitation "fraudulent," nothing in the United States Constitution should prevent residents of a community from making the collective judgment that certain worthy charities may solicit door to door while at the same time insulating themselves against panhandlers, profiteers, and peddlers.

The central weakness of the Court's decision, I believe, is its failure to recognize, let alone confront, the two most important issues in this case: how does one define a "charitable" organization, and to which authority in our federal system is application of that definition confided? I would uphold Schaumburg's ordinance as applied to CBE because that ordi-

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the Court bases CBE's First-Amendment protection on such sandy soil. Yet it gives no indication what other objectively verifiable characteristics might render an organization eligible for preferred status under the First Amendment.

nance, while perhaps too strict to suit some tastes, affects only door-to-door solicitation for financial contributions, leaves little or no discretion in the hands of municipal authorities to "censor" unpopular speech, and is rationally related to the community's collective desire to bestow its largess upon organizations that are truly "charitable." I therefore dissent.

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY ET AL. *v.* REGAN, COMPTROLLER OF NEW YORK, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 78-1369. Argued November 27, 1979—Decided February 20, 1980

After a New York statute that appropriated public funds to reimburse both church-sponsored and secular nonpublic schools for performing various services mandated by the State, including the administration, grading, and reporting of the results of tests, both state-prepared and teacher-prepared tests, had been held to be violative of the Establishment Clause of the First Amendment in *Levitt* v. *Committee for Public Education*, 413 U. S. 472, the New York Legislature enacted a new statute directing payment to nonpublic schools of the costs incurred by them in complying with certain state-mandated requirements, including requirements as to testing (pupil evaluation, achievement, and scholarship and college qualification tests) and as to reporting and recordkeeping. The new statute, unlike the earlier version, also provides a means by which state funds are audited, thus ensuring that only the actual costs incurred in providing the covered secular services are reimbursed out of state funds. The District Court ultimately upheld the new statute.

Held: The New York statute does not violate the First and Fourteenth Amendments. Pp. 653–662.

(a) A legislative enactment does not contravene the Establishment Clause if it has a secular legislative purpose, if its principal or primary effect neither advances nor inhibits religion, and if it does not foster an excessive government entanglement with religion. P. 653.

(b) The New York statute has the secular purpose of providing educational opportunity of a quality that will prepare New York citizens for the challenges of American life. The statutory plan calls for tests that are prepared by the State and administered on the premises by personnel of the nonpublic schools, which, however, have no control over the contents of the tests. Although some of the tests are graded by nonpublic school personnel, in view of the nature of the tests, which deal only with secular academic matters, the grading by nonpublic school employees affords no control to the school over the outcome of

any of the tests, and there is no substantial risk that the examinations can be used for religious educational purposes. While the recordkeeping and reporting services for which the State reimburses the nonpublic school pertain to furnishing information regarding the student body, faculty, support staff, physical facilities, curriculum, and student attendance, and thus are related to the educational program, nevertheless they are not part of the teaching process and cannot be used to foster an ideological outlook. Thus, reimbursement for the costs of so complying with state law has primarily a secular, rather than a religious purpose and effect. *Wolman* v. *Walter*, 433 U. S. 229, controlling. Pp. 654–657.

(c) The New York statute is not invalid simply because it provides for direct cash reimbursement to the nonpublic school for administering the state-prescribed examinations and for grading some of them. Grading the secular tests furnished by the State is a function that has a secular purpose and primarily a secular effect, and this is not changed simply because the State pays the school for performing the grading function rather than paying state employees or some independent service to perform the task. The same results obtain as to reimbursement for the recordkeeping and reporting functions because they also have neither a religious purpose nor a primarily religious effect. Pp. 657–659.

(d) The New York law provides ample safeguards against excessive or misdirected reimbursement. The services for which the private schools are reimbursed are discrete and clearly identifiable, and the statutory reimbursement process is straightforward and susceptible to the routinization that characterizes most reimbursement schemes. On its face, therefore, the New York plan suggests no excessive entanglement, and the bad faith upon which any future excessive entanglement would be predicated will not be read into the plan as an inevitability. Pp. 659–661.

(e) The decision in *Meek* v. *Pittenger*, 421 U. S. 349, is not to be interpreted as holding that any aid to even secular educational functions of a sectarian school is forbidden, or, more broadly still, that any aid to a sectarian school is suspect since its religious teaching is so pervasively intermixed with each of its activities. The District Court in the instant case properly put the *Meek* case and the *Wolman* case, *supra*, together and sustained the reimbursements involved here because it had been shown with sufficient clarity that they would serve the State's legitimate secular ends without any appreciable risk of being used to transmit or teach religious views. Pp. 661–662.

461 F. Supp. 1123, affirmed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, POWELL, and REHNQUIST, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 662. STEVENS, J., filed a dissenting opinion, *post*, p. 671.

Leo Pfeffer argued the cause and filed a brief for appellants.

Shirley Adelson Siegel, Solicitor General of New York, argued the cause for appellees Regan et al. With her on the brief were *Robert Abrams*, Attorney General, and *John Q. Driscoll*, Assistant Attorney General. *Richard E. Nolan* argued the cause for appellee schools. With him on the brief was *Thomas J. Aquilino, Jr.* *Nathan Lewin* and *Dennis Rapps* filed a brief for appellee Yeshivah Rambam.

MR. JUSTICE WHITE delivered the opinion of the Court.

The issue in this case is the constitutionality under the First and Fourteenth Amendments of the United States Constitution of a New York statute authorizing the use of public funds to reimburse church-sponsored and secular nonpublic schools for performing various testing and reporting services mandated by state law. The District Court sustained the statute. *Committee for Public Ed. & Rel. Lib.* v. *Levitt*, 461 F. Supp. 1123 (1978). We noted probable jurisdiction, 442 U. S. 928 (1979), and now affirm the District Court's judgment.

I

In 1970, the New York Legislature appropriated public funds to reimburse both church-sponsored and secular nonpublic schools for performing various services mandated by the State. The most expensive of these services was the "administration, grading and the compiling and reporting of the results of tests and examinations." 1970 N. Y. Laws, ch. 138, § 2. Covered tests included both state-prepared examinations and the more common and traditional teacher-prepared tests. Although the legislature stipulated that "[n]othing contained in this act shall be construed to authorize the making of any payment under this act for religious

worship or instruction," § 8, the statute did not provide for any state audit of school financial records that would ensure that public funds were used only for secular purposes.

In *Levitt* v. *Committee for Public Education,* 413 U. S. 472 (1973) (*Levitt I*), the Court struck down this enactment as violative of the Establishment Clause.[1] The majority focused its concern on the statute's reimbursement of funds spent by schools on traditional teacher-prepared tests. The Court was troubled that, "despite the obviously integral role of such testing in the total teaching process, no attempt is made under the statute, and no means are available, to assure that internally prepared tests are free of religious instruction." *Id.,* at 480. It was not assumed that nonpublic school teachers would attempt in bad faith to evade constitutional requirements. Rather, the Court simply observed that "the potential for conflict 'inheres in the situation,' and because of that the State is constitutionally compelled to assure that the state-supported activity is not being used for religious indoctrination." *Ibid.* quoting *Lemon* v. *Kurtzman,* 403 U. S. 602, 617 (1971). Because the State failed to provide the required assurance, the challenged statute was deemed to constitute an impermissible aid to religion.

The Court distinguished its earlier holdings in *Everson* v. *Board of Education,* 330 U. S. 1 (1947), and *Board of Education* v. *Allen,* 392 U. S. 236 (1968), on grounds that the state aid upheld in those cases, in the form of bus rides and loaned secular textbooks for sectarian schoolchildren, was "of a substantially different character" from that presented in *Levitt I. Levitt I, supra,* at 481. Teacher-prepared tests were deemed by the Court to be an integral part of the teaching process. But obviously so are textbooks an integral part of the teaching

[1] The First Amendment provides that "Congress shall make no law respecting an establishment of religion. . . ." This Court has repeatedly held the Establishment Clause applicable to the States through the Fourteenth Amendment. *E. g., Meek* v. *Pittenger,* 421 U. S. 349, 351 (1975); *Cantwell* v. *Connecticut,* 310 U. S. 296, 303 (1940).

process. The crucial feature that distinguished tests, according to the Court, was that, "'[i]n terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not.'" 413 U. S., at 481, quoting *Lemon* v. *Kurtzman*, *supra*, at 617. Thus, the inherent teacher discretion in devising, presenting, and grading traditional tests, together with the failure of the legislature to provide for a method of auditing to ensure that public funds would be spent exclusively on secular services, disabled the enactment from withstanding constitutional scrutiny.[2]

Almost immediately the New York Legislature attempted to eliminate these defects from its statutory scheme. A new statute was enacted in 1974,[3] and it directed New York's Com-

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[2] The majority in *Levitt I* concluded:

"We hold that the lump-sum payments under Chapter 138 violate the Establishment Clause. Since Chapter 138 provides only for a single per-pupil allotment for a variety of specified services, some secular and some potentially religious, neither this Court nor the District Court can properly reduce that allotment to an amount corresponding to the actual costs incurred in performing reimbursable secular services. That is a legislative, not a judicial, function." 413 U. S., at 482.

[3] Chapter 507, 1974 N. Y. Laws, as amended by ch. 508, note following N. Y. Educ. Law § 3601 (McKinney Supp. 1971–1979), provides in relevant part:

"Section 1. Legislative findings. The legislature hereby finds and declares that:

"The state has the responsibility to provide educational opportunity of a quality which will prepare its citizens for the challenges of American life in the last decades of the twentieth century.

"To fulfill this responsibility, the state has the duty and authority to evaluate, through a system of uniform state testing and reporting procedures, the quality and effectiveness of instruction to assure that those who are attending instruction, as required by law, are being adequately educated within their individual capabilities.

"In public schools these fundamental objectives are accomplished in part through state financial assistance to local school districts.

"More than seven hundred thousand pupils in the state comply with the compulsory education law by attending nonpublic schools. It is a

missioner of Education to apportion and to pay to nonpublic schools the actual costs incurred as a result of compliance with certain state-mandated requirements, including

"the requirements of the state's pupil evaluation program,

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matter of state duty and concern that such nonpublic schools be reimbursed for the actual costs which they incur in providing services to the state which they are required by law to render in connection with the state's responsibility for reporting, testing and evaluating.

. . . . .

"§ 3. Apportionment. The commissioner shall annually apportion to each qualifying school, for school years beginning on and after July first, nineteen hundred seventy-four, an amount equal to the actual cost incurred by each such school during the preceding school year for providing services required by law to be rendered to the state in compliance with the requirements of the state's pupil evaluation program, the basic educational data system, regents examinations, the statewide evaluation plan, the uniform procedure for pupil attendance reporting, and other similar state prepared examinations and reporting procedures.

. . . . .

"§ 7. Audit. No application for financial assistance under this act shall be approved except upon audit of vouchers, or other documents by the commissioner as are necessary to insure that such payment is lawful and proper.

"The state department of audit and control shall from time to time examine any and all necessary accounts and records of a qualifying school to which an apportionment has been made pursuant to this act for the purpose of determining the cost to such school of rendering the services referred to in section three of this act. If after such audit it is determined that any qualifying school has received funds in excess of the actual cost of providing the services enumerated in section three of this act, such school shall immediately reimburse the state in such excess amount.

. . . . .

"§ 9. In enacting this chapter it is the intention of the legislature that if section seven or any other provision of this act or any rules or regulations promulgated thereunder shall be held by any court to be invalid in whole or in part or inapplicable to any person or situation, all remaining provisions or parts thereof or remaining rules and regulations or parts thereof not so invalidated shall nevertheless remain fully effective as if the invalidated portion had not been enacted or promulgated, and

the basic educational data system, regents examinations, the statewide evaluation plan, the uniform procedure for pupil attendance reporting, and other similar state prepared examinations and reporting procedures." 1974 N. Y. Laws, ch. 507, § 3.

Of signal interest and importance in light of *Levitt I*, the new scheme does not reimburse nonpublic schools for the preparation, administration, or grading of teacher-prepared tests. Further, the 1974 statute, unlike the 1970 version struck down in *Levitt I*, provides a means by which payments of state funds are audited, thus ensuring that only the actual costs incurred in providing the covered secular services are reimbursed out of state funds. § 7.

Although the new statutory scheme was tailored to comport with the reasoning in *Levitt I*, the District Court invalidated the enactment with respect to both the tests and the reporting procedure. *Committee for Public Education* v. *Levitt*, 414 F. Supp. 1174 (1976) (*Levitt II*). The District Court understood the decision in *Meek* v. *Pittenger*, 421 U. S. 349 (1975), to require this result. In *Meek*, decided after *Levitt I*, this Court held unconstitutional two Pennsylvania statutes insofar as they provided auxiliary services and instructional material and equipment apart from textbooks to nonpublic schools in the State, most of which were sectarian. The Court ruled that in "religion-pervasive" institutions, secular and religious education are so "inextricably intertwined" that "[s]ubstantial aid to the education function of such schools . . . necessarily results in aid to the sectarian school enterprise as a whole" and hence amounts to a forbidden establishment of religion. 421 U. S., at 366.

Levitt II was appealed to this Court. We vacated the District Court's judgment and remanded the case in light of our decision in *Wolman* v. *Walter*, 433 U. S. 229 (1977). On

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the application of any such invalidated portion to other persons not similarly situated or other situations shall not be affected thereby."

remand the District Court ruled that under *Wolman* "state aid may be extended to [a sectarian] school's educational activities if it can be shown with a high degree of certainty that the aid will only have secular value of legitimate interest to the State and does not present any appreciable risk of being used to aid transmission of religious views." 461 F. Supp., at 1127. Applying this "more flexible concept," *ibid.*, the District Court concluded that New York's statutory scheme of reimbursement did not violate the Establishment Clause.

Our jurisdiction to review the District Court's judgment lies under 28 U. S. C. § 1253.

II

Under the precedents of this Court a legislative enactment does not contravene the Establishment Clause if it has a secular legislative purpose, if its principal or primary effect neither advances nor inhibits religion, and if it does not foster an excessive government entanglement with religion. See *Roemer* v. *Maryland Public Works Bd.*, 426 U. S. 736, 748 (1976); *Committee for Public Education* v. *Nyquist*, 413 U. S. 756, 772–773 (1973); *Lemon* v. *Kurtzman*, 403 U. S., at 612–613.

In *Wolman* v. *Walter*, *supra*, this Court reviewed and sustained in relevant part an Ohio statutory scheme that authorized, *inter alia*, the expenditure of state funds

> "[t]o supply for use by pupils attending nonpublic schools within the district such standardized tests and scoring services as are in use in the public schools of the state." Ohio Rev. Code Ann. § 3317.06 (J) (Supp. 1976).

We held that this provision, which was aimed at providing the young with an adequate secular education, reflected a secular state purpose. As the opinion of MR. JUSTICE BLACKMUN stated, "[t]he State may require that schools that are utilized to fulfill the State's compulsory-education requirement meet certain standards of instruction, . . . and may examine both

teachers and pupils to ensure that the State's legitimate interest is being fulfilled." *Wolman* v. *Walter, supra,* at 240. See *Levitt I,* 413 U. S., at 479–480, n. 7; *Lemon* v. *Kurtzman, supra,* at 614. MR. JUSTICE BLACKMUN further explained that under the Ohio provision the nonpublic school did not control the content of the test or its result. This "serves to prevent the use of the test as a part of religious teaching, and thus avoids that kind of direct aid to religion found present in *Levitt* [*I*]." *Wolman* v. *Walter,* 433 U. S., at 240. The provision of testing services hence did not have the primary effect of aiding religion. *Ibid.* It was also decided that "the inability of the school to control the test eliminates the need for the supervision that gives rise to excessive entanglement." *Id.,* at 240–241. We thus concluded that the Ohio statute, insofar as it concerned examinations, passed our Establishment Clause tests.

III

We agree with the District Court that *Wolman* v. *Walter* controls this case. Although the Ohio statute under review in *Wolman* and the New York statute before us here are not identical, the differences are not of constitutional dimension. Addressing first the testing provisions, we note that here, as in *Wolman,* there is clearly a secular purpose behind the legislative enactment: "[T]o provide educational opportunity of a quality which will prepare [New York] citizens for the challenges of American life in the last decades of the twentieth century." 1974 N. Y. Laws, ch. 507, § 1. Also like the Ohio statute, the New York plan calls for tests that are prepared by the State and administered on the premises by nonpublic school personnel. The nonpublic school thus has no control whatsoever over the content of the tests. The Ohio tests, however, were graded by the State; here there are three types of tests involved, one graded by the State and the other two by nonpublic school personnel, with the costs of the grading service, as well as the cost of administering all three

tests, being reimbursed by the State. In view of the nature of the tests, the District Court found that the grading of the examinations by nonpublic school employees afforded no control to the school over the outcome of any of the tests.

The District Court explained that the State-prepared tests are primarily of three types: pupil evaluation program (PEP) tests, comprehensive ("end-of-the-course") achievement tests, and Regents Scholarship and College Qualifications Tests (RSCQT). 461 F. Supp., at 1125. Each of the tests addresses a secular academic subject; none deals with religious subject matter.[4] The RSCQT examinations are graded by State Education Department personnel, and the District Court correctly concluded that "the risk of [RSCQT examinations] being used for religious purposes through grading is non-existent." *Id.*, at 1128. The PEP tests, administered universally in grades 3 and 6 and optionally in grade 9, are graded by nonpublic school employees, but they "consist entirely of objective, multiple-choice questions, which can be graded by machine and, even if graded by hand, afford the schools no more control over the results than if the tests were graded by the State." *Ibid.* The comprehensive tests, based on state courses of study for use in grades 9 through 12, are also graded on the premises by school employees, but "consist

[4] PEP tests are "standardized reading and mathematics achievement tests developed and published by the Educational Department and based on New York State courses of study." App. 28a. Comprehensive tests correspond to the following subject areas: biology; bookkeeping and accounting II; business law; business mathematics; chemistry; earth science; English; French; German; Hebrew; Italian; Latin; 9th year mathematics; 10th year mathematics; 11th year mathematics; physics; shorthand II and transcription; social studies; and Spanish. 461 F. Supp., at 1125, n. 3. The RSCQT tests are divided into two parts. Part 1 is a "test of general scholastic aptitude, containing questions intended to measure ability to think clearly and accurately." App. 38a. Part 2 is "a test of subject matter achievement directly related to courses studied in high school." *Ibid.*

Clearly, the tests at issue are secular in character.

largely or entirely of objective questions with multiple-choice answers." *Id.*, at 1125. Even though some of the comprehensive tests may include an essay question or two, *ibid.*, the District Court found that the chance that grading the answers to state-drafted questions in secular subjects could or would be used to gauge a student's grasp of religious ideas was "minimal," especially in light of the "complete" state procedures designed to guard against serious inconsistencies in grading and any misuse of essay questions. *Id.*, at 1128–1129. These procedures include the submission of completed and graded comprehensive tests to the State Department of Education for review off the school premises.

We see no reason to differ with the factual or legal characterization of the testing procedure arrived at by the District Court. As in *Wolman* v. *Walter*, 433 U. S., at 240, "[t]he nonpublic school does not control the content of the test or its result"; and here, as in *Wolman*, this factor "serves to prevent the use of the test as a part of religious teaching," *ibid.*, thus avoiding the kind of direct aid forbidden by the Court's prior cases. The District Court was correct in concluding that there was no substantial risk that the examinations could be used for religious educational purposes.

The District Court was also correct in its characterization of the recordkeeping and reporting services for which the State reimburses the nonpublic school. Under the New York law, "[e]ach year, private schools must submit to the State a Basic Educational Data System (BEDS) report. This report contains information regarding the student body, faculty, support staff, physical facilities, and curriculum of each school. Schools are also required to submit annually a report showing the attendance record of each minor who is a student at the school." 461 F. Supp., at 1126. Although recordkeeping is related to the educational program, the District Court characterized it and the reporting function as "ministerial [and] lacking ideological content or use." *Id.*,

at 1130. These tasks are not part of the teaching process and cannot "be used to foster an ideological outlook." *Ibid.* Reimbursement for the costs of so complying with state law, therefore, has primarily a secular, rather than a religious, purpose and effect.[5]

IV

The New York statute, unlike the Ohio statute at issue in *Wolman*, provides for direct cash reimbursement to the nonpublic school for administering the state-prescribed examinations and for grading two of them. We agree with the District Court that such reimbursement does not invalidate the New York statute. If the State furnished state-prepared tests, thereby relieving the nonpublic schools of the expense of preparing their own examinations, but left the grading of the tests to the schools, and if the grading procedures could be used to further the religious mission of the school, serious Establishment Clause problems would be posed under the Court's cases, for by furnishing the tests it might be concluded that the State was directly aiding religious education. But as we have already concluded, grading the secular tests furnished by the State in this case is a function that has a secular purpose and primarily a secular effect. This conclusion is not changed simply because the State pays the school for perform-

[5] The recordkeeping function, according to the parties' stipulation of facts, involves "collection of data requested from homeroom teachers, pupil personnel services staff, attendance secretaries and administrators; compilation and correlation of data; and filling out and mailing of report." App. 31a. The attendance-taking function is described in similar ministerial terms. *Id.*, at 37a. Of interest is the District Court's finding that "[t]he lion's share of the reimbursements to private schools under the Statute would be for attendance-reporting. According to applications prepared by intervenor-defendant private schools for the 1973–1974 school year, between 85% and 95% of the total reimbursement is accounted for by the costs attributable to attendance-taking, of which all but a negligible portion represents compensation to personnel for this service." 461 F. Supp., at 1126.

ing the grading function. As the District Court observed, "[p]utting aside the question of whether direct financial aid can be administered without excessive entanglement by the State in the affairs of a sectarian institution, there does not appear to be any reason why payments to sectarian schools to cover the cost of specified activities would have the impermissible effect of advancing religion if the same activities performed by sectarian school personnel without reimbursement but with State-furnished materials have no such effect." 461 F. Supp., at 1129.

A contrary view would insist on drawing a constitutional distinction between paying the nonpublic school to do the grading and paying state employees or some independent service to perform that task, even though the grading function is the same regardless of who performs it and would not have the primary effect of aiding religion whether or not performed by nonpublic school personnel. In either event, the nonpublic school is being relieved of the cost of grading state-required, state-furnished examinations. We decline to embrace a formalistic dichotomy that bears so little relationship either to common sense or to the realities of school finance. None of our cases requires us to invalidate these reimbursements simply because they involve payments in cash. The Court "has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends." *Hunt* v. *McNair*, 413 U. S. 734, 743 (1973).[6] Because the recordkeeping and

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[6] As Mr. Justice Blackmun wrote in *Roemer* v. *Maryland Public Works Bd.*, 426 U. S. 736, 747 (1976) (footnote omitted): "The Court has not been blind to the fact that in aiding a religious institution to perform a secular task, the State frees the institution's resources to be put to sectarian ends. If this were impermissible, however, a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair. The Court never has held that religious activities must be discriminated against in this way." Cf. *New York* v. *Cathedral Academy*, 434 U. S. 125, 134 (1977) ("[T]his Court has never held that freeing

reporting functions also have neither a religious purpose nor a primarily religious effect, we reach the same results with respect to the reimbursements for these services.

Of course, under the relevant cases the outcome would likely be different were there no effective means for insuring that the cash reimbursements would cover only secular services. See *Levitt I*, 413 U. S., at 480; *Committee for Public Education* v. *Nyquist*, 413 U. S., at 774; *Lemon* v. *Kurtzman*, 403 U. S., at 619–622. But here, as we shall see, the New York law provides ample safeguards against excessive or misdirected reimbursement.

V

The District Court recognized that "[w]here a state is required in determining what aid, if any, may be extended to a sectarian school, to monitor the day-to-day activities of the teaching staff, to engage in onerous, direct oversight, or to make on-site judgments from time to time as to whether different school activities are religious in character, the risk of entanglement is too great to permit governmental involvement." 461 F. Supp., at 1130. After examining the New York statute and its operation, however, the District Court concluded that "[t]he activities subsidized under the Statute here at issue . . . do not pose any substantial risk of such entanglement." *Ibid.* (footnote omitted).

The District Court described the process of reimbursement:

> "Schools which seek reimbursement must 'maintain a separate account or system of accounts for the expenses incurred in rendering' the reimbursable services, and they must submit to the N. Y. State Commissioner of Education an application for reimbursement with additional reports and documents prescribed by the Commissioner. . . . Reimbursable costs include proportionate shares of the teachers' salaries and fringe benefits attrib-

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private funds for sectarian uses invalidates otherwise secular aid to religious institutions . . .").

utable to administration of the examinations and reporting of State-required data on pupil attendance and performance, plus the cost of supplies and other contractual expenditures such as data processing services. Applications for reimbursement cannot be approved until the Commissioner audits vouchers or other documents submitted by the schools to substantiate their claims. . . . The Statute further provides that the State Department of Audit and Control shall from time to time inspect the accounts of recipient schools in order to verify the cost to the schools of rendering the reimbursable services. If the audit reveals that a school has received an amount in excess of its actual costs, the excess must be returned to the State immediately. . . ." *Id.*, at 1126, quoting 1974 N. Y. Laws, ch. 507.

We agree with the District Court that "[t]he services for which the private schools would be reimbursed are discrete and clearly identifiable." 461 F. Supp., at 1131.[7] The reimbursement process, furthermore, is straightforward and susceptible to the routinization that characterizes most reimbursement schemes. On its face, therefore, the New York plan suggests no excessive entanglement, and we are not prepared to read into the plan as an inevitability the bad faith

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[7] As the District Court wrote:

"The services for which the private schools would be reimbursed are discrete and clearly identifiable. A teacher's taking of attendance, administration of examinations, and recordkeeping can hardly be confused with his or her other activities. Although there might be a possibility of fraud or mistake in the records submitted by private schools of the teachers' time spent on such activities, the careful auditing procedures anticipated by § 7 of the Statute should provide an adequate safeguard against inflated claims. In addition, since the services subsidized under the Statute are highly routinized, costs of the services for a given size of class should vary little from school to school, thus enabling the State to check claims filed by private schools against records maintained by hundreds of public schools under State supervision." 461 F. Supp., at 1131 (footnote omitted).

upon which any future excessive entanglement would be predicated.[8]

VI

It is urged that the District Court judgment is unsupportable under *Meek* v. *Pittenger*, 421 U. S. 349 (1975), which is said to have held that any aid to even secular educational functions of a sectarian school is forbidden, or more broadly still, that any aid to a sectarian school is suspect since its religious teaching is so pervasively intermixed with each and every one of its activities. Brief for Appellants 9–11. The difficulty with this position is that a majority of the Court, including the author of *Meek* v. *Pittenger*, upheld in *Wolman* a state statute under which the State, by preparing and grading tests in secular subjects, relieved sectarian schools of the cost of these functions, functions that they otherwise would have had to perform themselves and that were intimately connected with the educational processes. Yet the *Wolman* opinion at no point suggested that this holding was inconsistent with the decision in *Meek*. Unless the majority in *Wolman* was silently disavowing *Meek*, in whole or in part, that case was simply not understood by this Court to stand for the broad proposition urged by appellants and espoused by the District Court in *Levitt II*.

That *Meek* was understood more narrowly was suggested by Mr. Justice Powell in his separate opinion in *Wolman:* "I am not persuaded," he said, "nor did *Meek* hold, that all loans

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[8] We find no merit whatever in appellants' argument, which was not made below, that the extent of entanglement here is sufficient to raise the danger of future political divisiveness along religious lines. Brief for Appellants 16–18. *Wolman* was decided without reference to any such potential discord. Moreover, the New York plan reimburses "actual costs." Thus it cannot be maintained that the New York system will provoke religious battles over legislative appropriations, an eventuality that could conceivably occur under a system of state aid involving direct appropriations. Cf. *Committee for Public Education* v. *Nyquist*, 413 U. S. 756, 794–798 (1973).

of secular instructional material and equipment" inescapably have the effect of direct advancement of religion. *Wolman* v. *Walter*, 433 U. S., at 263. And obviously the testing services furnished by the State in *Wolman* were approved on the premise that those services did not and could not have the primary effect of advancing the sectarian aims of the nonpublic schools. With these indicators before it, the District Court properly put the two cases together and sustained the reimbursements involved here because it had been shown with sufficient clarity that they would serve the State's legitimate secular ends without any appreciable risk of being used to transmit or teach religious views.

This is not to say that this case, any more than past cases, will furnish a litmus-paper test to distinguish permissible from impermissible aid to religiously oriented schools. But Establishment Clause cases are not easy; they stir deep feelings; and we are divided among ourselves, perhaps reflecting the different views on this subject of the people of this country. What is certain is that our decisions have tended to avoid categorical imperatives and absolutist approaches at either end of the range of possible outcomes. This course sacrifices clarity and predictability for flexibility, but this promises to be the case until the continuing interaction between the courts and the States—the former charged with interpreting and upholding the Constitution and the latter seeking to provide education for their youth—produces a single, more encompassing construction of the Establishment Clause.

The judgment of the District Court is

Affirmed.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

The Court in this case, I fear, takes a long step backwards in the inevitable controversy that emerges when a state legislature continues to insist on providing public aid to parochial schools.

I thought that the Court's judgments in *Meek* v. *Pittenger*, 421 U. S. 349 (1975), and in *Wolman* v. *Walter*, 433 U. S. 229 (1977) (which the Court concedes, *ante*, at 654, is the controlling authority here), at last had fixed the line between that which is constitutionally appropriate public aid and that which is not. The line necessarily was not a straight one. It could not be, when this Court, on the one hand, in *Everson* v. *Board of Education*, 330 U. S. 1 (1947), by a 5–4 vote, decided that there was no barrier under the First and Fourteenth Amendments to parental reimbursement of the cost of fares for the transportation of children attending parochial schools, and in *Board of Education* v. *Allen*, 392 U. S. 236 (1968), by a 6–3 vote, ruled that New York's lending of approved textbooks to students in private secondary schools was not violative of those Amendments, and yet, on the other hand, in *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971), struck down, as violative of the Religion Clauses, statutes that, respectively, would have supplemented nonpublic school teachers' salaries and would have authorized the "purchase" of certain "secular educational services" from nonpublic schools, and also in *Levitt* v. *Committee for Public Education*, 413 U. S. 472 (1973) (*Levitt I*), struck down New York's previous attempt to reimburse nonpublic schools for the expenses of tests and examinations. See also *Committee for Public Education* v. *Nyquist*, 413 U. S. 756 (1973), where the Court nullified New York's financial aid programs for "maintenance and repair" of facilities and equipment, a tuition reimbursement plan, and tax relief for parents who did not qualify for tuition reimbursement, and *Sloan* v. *Lemon*, 413 U. S. 825 (1973), where the Court ruled invalid a state plan for parental reimbursement of a portion of nonpublic school tuition expenses. And see *Roemer* v. *Maryland Public Works Bd.*, 426 U. S. 736 (1976).

But, I repeat, the line, wavering though it may be, was indeed drawn in *Meek* and in *Wolman*, albeit with different

combinations of Justices, those who perceive no barrier under the First and Fourteenth Amendments and who would rule in favor of almost any aid a state legislature saw fit to provide, on the one hand, and those who perceive a broad barrier and would rule against aid of almost any kind, on the other hand, in turn joining Justices in the center on these issues, to make order and a consensus out of the earlier decisions. Now, some of those who joined in *Lemon*, *Levitt I*, *Meek*, and *Wolman* in invalidating, depart and validate. I am able to attribute this defection only to a concern about the continuing and emotional controversy and to a persuasion that a good-faith attempt on the part of a state legislature is worth a nod of approval.

I

In order properly to analyze the amended school aid plan that the New York Legislature produced in response to its defeat in *Levitt I*, it is imperative, it seems to me, to examine the statute's operational details with great precision and with fewer generalities than the Court does today. One should do more than give a passing glance at selected provisions of the statute, and one should not ignore the considerations that prompted the three-judge District Court initially and *unanimously* to hold New York's revised plan to be unconstitutional, *Committee for Public Education* v. *Levitt*, 414 F. Supp. 1174 (SDNY 1976) (*Levitt II*), and that prompted Judge Ward, in his persuasive dissent in *Levitt III*, *Committee for Public Education* v. *Levitt*, 461 F. Supp. 1123 (SDNY 1978), after our remand, to differ so vigorously with his two colleagues who meanwhile changed their minds, mistakenly in my view.

II

The Court, *ante*, at 653, and all three judges of the District Court, 461 F. Supp., at 1126, 1131, n. 1, are correct, of course, in recognizing that the "mode of analysis for Establishment

Clause questions is defined by the three-part test that has emerged from the Court's decisions." *Wolman* v. *Walter*, 433 U. S., at 235–236 (plurality opinion). To pass constitutional muster under this test, the New York statute now challenged, Chapter 507, 1974 N. Y. Laws, as amended, "must have a secular legislative purpose, must have a principal or primary effect that neither advances nor inhibits religion, and must not foster an excessive government entanglement with religion." 433 U. S., at 236.

I have no trouble in agreeing with the Court that Chapter 507 manifests a clear secular purpose. See *Levitt I*, 413 U. S., at 479, n. 7. I therefore would evaluate Chapter 507 under the two remaining inquiries of the three-part test.

In deciding whether Chapter 507 has an impermissible primary effect of advancing religion, or whether it fosters excessive government entanglement with sectarian affairs, one must keep in focus the nature of the assistance prescribed by the New York statute. The District Court found that $8–$10 million annually would be expended under Chapter 507, with the great majority of these funds going to sectarian schools to pay for personnel costs associated with attendance reporting. The court found that such payments would amount to from 1% to 5.4% of the personnel budget of an individual religious school receiving assistance under Chapter 507. Moreover, Chapter 507 provides direct cash payments by the State of New York to religious schools, as opposed to providing services or providing cash payments to third parties who have rendered services. And the money paid sectarian schools under Chapter 507 is designated to reimburse costs that are incurred by religious schools in order to meet basic state testing and reporting requirements, costs that would have been incurred regardless of the availability of reimbursement from the State.

This direct financial assistance provided by Chapter 507 differs significantly from the types of state aid to religious schools approved by the Court in *Wolman* v. *Walter*. For

example, in *Wolman* the Court approved that portion of the Ohio statute that provided to religious schools the standardized tests and scoring services furnished to public schools. But, unlike New York's Chapter 507, Ohio's statute provided only the tests themselves and scoring by employees of neutral testing organizations. It did not authorize direct financial aid of any type to religious schools. *Wolman* v. *Walter*, 433 U. S., at 238–239, and n. 7 (plurality opinion).

Similarly, the other forms of assistance upheld in *Wolman* did not involve direct cash assistance. Rather, the Court approved the State's providing sectarian school students therapeutic, remedial, and guidance programs administered by public employees on public property. It also approved certain public health services furnished by public employees to religious school pupils, even though administered in part on the sectarian premises, on the basis of its recognition in a number of cases, see, *e. g.*, *Meek* v. *Pittenger*, 421 U. S., at 364, 368, n. 17, that provision of health services to all schoolchildren does not advance religion so as to contravene the Establishment Clause. 433 U. S., at 241–248. And it upheld the lending by Ohio of textbooks to pupils under the "unique presumption," *id.*, at 252, n. 18, created by *Board of Education* v. *Allen*, 392 U. S. 236 (1968), and reaffirmed since that time. *E. g.*, *Meek* v. *Pittenger*, 421 U. S., at 359–362 (plurality opinion); *id.*, at 388 (opinion concurring in the judgment in part and dissenting in part).

It is clear, however, that none of the programs upheld in *Wolman* provided direct financial support to sectarian schools. At the very least, then, the Court's holding today goes further in approving state assistance to sectarian schools than the Court had gone in past decisions. But beyond merely failing to approve the type of direct financial aid at issue in this case, *Wolman* reaffirmed the finding of the Court in *Meek* v. *Pittenger* that *direct* aid to the educational function of religious schools necessarily advances the sectarian enterprise as a whole.

Thus, the Court in *Wolman* invalidated Ohio's practice of loaning instructional materials directly to sectarian schools, "even though the loan ostensibly was limited to neutral and secular instructional material and equipment, [because] it inescapably had the primary effect of providing a direct and substantial advancement of the sectarian enterprise." 433 U. S., at 250. In the same vein, the Court disapproved Ohio's provision of field-trip transportation directly to religious schools as impermissible direct aid that, because of the pervasively religious nature of the schools involved, furthered the religious goals of the schools, and that also required government surveillance of expenditures to such a degree as to foster entanglement of the State in religion. *Id.*, at 252–255.

Wolman thus re-enforces the conclusion that substantial direct financial aid to a religious school, even though ostensibly for secular purposes, runs the great risk of furthering the religious mission of the school as a whole because that religious mission so pervades the functioning of the school. The Court specifically recognized this in *Meek:*

> "[F]aced with the substantial amounts of direct support authorized by [the statute at issue], it would simply ignore reality to attempt to separate secular educational functions from the predominantly religious role performed by many . . . church-related elementary and secondary schools and to then characterize [the statute] as channeling aid to the secular without providing direct aid to the sectarian. Even though earmarked for secular purposes, 'when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission,' state aid has the impermissible primary effect of advancing religion. *Hunt* v. *McNair,* 413 U. S. 734, 743." 421 U. S., at 365–366.

See *Wolman* v. *Walter,* 433 U. S., at 249–250; *Committee for Public Education* v. *Nyquist,* 413 U. S., at 781–783, and n. 39.

Under the principles announced in these decided cases, I am compelled to conclude that Chapter 507, by providing substantial financial assistance directly to sectarian schools, has a primary effect of advancing religion. The vast majority of the schools aided under Chapter 507 typify the religious-pervasive institution the very purpose of which is to provide an integrated secular and sectarian education. The aid provided by Chapter 507 goes primarily to reimburse such schools for personnel costs incurred in complying with state reporting and testing requirements, costs that must be incurred if the school is to be accredited to provide a combined sectarian-secular education to school-age pupils. To continue to function as religious schools, sectarian schools thus are required to incur the costs outlined in § 3 of Chapter 507, or else lose accreditation by the State of New York. See, *e. g.*, N. Y. Educ. Law §§ 3210, 3211 (McKinney 1970). These reporting and testing requirements would be met by the schools whether reimbursement were available or not. As such, the attendance, informational, and testing expenses compensated by Chapter 507 are essential to the overall educational functioning of sectarian schools in New York in the same way instruction in secular subjects is essential. Therefore, just as direct aid for ostensibly secular purposes by provision of instructional materials or direct financial subsidy is forbidden by the Establishment Clause, so direct aid for the performance of recordkeeping and testing activities that are an essential part of the sectarian school's functioning also is interdicted. The Court stated in *Meek*, and reaffirmed in *Wolman:*

> "The very purpose of many [religious] schools is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious values and belief. See *Lemon* v. *Kurtzman*, 403 U. S., at 616–617. Substantial aid to the educational function of such schools, accordingly, necessarily results in aid to the sectarian school enterprise as

a whole. '[T]he secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence. Within the institution, the two are inextricably intertwined.' *Id.*, at 657 (opinion of BRENNAN, J.)." 421 U. S., at 366, quoted in 433 U. S., at 249–250.

It is also true that the keeping of pupil attendance records is essential to the religious mission of sectarian schools. To ensure that the school is fulfilling its religious mission properly, it is necessary to provide a way to determine whether pupils are attending the sectarian classes required of them. Accordingly, Chapter 507 not only advances religion by aiding the educational mission of the sectarian school as a whole; it also subsidizes directly the religious mission of such schools. Chapter 507 makes no attempt, and none is possible, to separate the portion of the overall expense of attendance-taking attributable to the desire to ensure that students are attending religious instruction from that portion attributable to the desire to ensure that state attendance laws are complied with. This type of direct aid the Establishment Clause does not permit. *Committee for Public Education* v. *Nyquist*, 413 U. S., at 774–780; *Levitt I*, 413 U. S., at 480.

I thus would hold that the aid provided by Chapter 507 constitutes a direct subsidy of the operating costs of the sectarian school that aids the school as a whole, and that the statute therefore directly advances religion in violation of the Establishment Clause of the First Amendment.

III

Beyond this, Chapter 507 also fosters government entanglement with religion to an impermissible extent. Unlike *Wolman*, under Chapter 507 sectarian employees are compensated by the State for grading examinations. In some cases, such grading requires the teacher to exercise subjective judgment. For the State properly to ensure that judgment is

not exercised to inculcate religion, a "comprehensive, discriminating, and continuing state surveillance will inevitably be required." *Lemon* v. *Kurtzman*, 403 U. S., at 619.

Moreover, Chapter 507 provides for continuing reimbursement with regard to examinations in which the questions may vary from year to year, and for examinations that may be offered in the future. This will require the State continually to evaluate the examinations to ensure that reimbursement for expenses incurred in connection with their administration and grading will not offend the First Amendment. This, too, fosters impermissible government involvement in sectarian affairs, since it is likely to lead to continuing adjudication of disputes between the State and others as to whether certain questions or new examinations present such opportunities for the advancement of religion that reimbursement for administering and grading them should not be permitted. Cf. *New York* v. *Cathedral Academy*, 434 U. S. 125 (1977).

Finally, entanglement also is fostered by the system of reimbursement for personnel expenses. The State must make sure that it reimburses sectarian schools only for those personnel costs attributable to the sectarian employees' secular activities described in § 3 of Chapter 507. It is difficult to see how the State adequately may discover whether the time for which reimbursement is made available was devoted only to secular activities without some type of ongoing surveillance of the sectarian employees and religious schools at issue. It is this type of extensive entanglement that the Establishment Clause forbids. *Lemon* v. *Kurtzman*, 403 U. S., at 617–621. I fail to see, and I am uncomfortable with, the so-called "ample safeguards," *ante*, at 659, upon which the Court and the District Court's majority, *Levitt III*, 461 F. Supp., at 1131, are content to rest so assured.

I therefore conclude that Chapter 507 has a primary effect of advancing religion and also fosters excessive government entanglement with religion. The statute, consequently, is unconstitutional under the Establishment Clause.

at least to the extent it provides reimbursement directly to sectarian nonpublic schools.

I would reverse the judgment of the District Court.

MR. JUSTICE STEVENS, dissenting.

Although I agree with MR. JUSTICE BLACKMUN's demonstration of why today's holding is not compelled by precedent, my vote also rests on a more fundamental disagreement with the Court. The Court's approval of a direct subsidy to sectarian schools to reimburse them for staff time spent in taking attendance and grading standardized tests is but another in a long line of cases making largely ad hoc decisions about what payments may or may not be constitutionally made to nonpublic schools. In groping for a rationale to support today's decision, the Court has taken a position that could equally be used to support a subsidy to pay for staff time attributable to conducting fire drills or even for constructing and maintaining fireproof premises in which to conduct classes. Though such subsidies might represent expedient fiscal policy, I firmly believe they would violate the Establishment Clause of the First Amendment.

The Court's adoption of such a position confirms my view, expressed in *Wolman* v. *Walter*, 433 U. S. 229, 264 (STEVENS, J., concurring in part and dissenting in part), and *Roemer* v. *Maryland Public Works Bd.*, 426 U. S. 736, 775 (STEVENS, J., dissenting), that the entire enterprise of trying to justify various types of subsidies to nonpublic schools should be abandoned. Rather than continuing with the sisyphean task of trying to patch together the "blurred, indistinct, and variable barrier" described in *Lemon* v. *Kurtzman*, 403 U. S. 602, 614, I would resurrect the "high and impregnable" wall between church and state constructed by the Framers of the First Amendment. See *Everson* v. *Board of Education*, 330 U. S. 1, 18.

NATIONAL LABOR RELATIONS BOARD *v.* YESHIVA UNIVERSITY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 78-857. Argued October 10, 1979—Decided February 20, 1980*

Yeshiva University Faculty Association (Union) filed a representation petition with the National Labor Relations Board (Board), seeking certification as bargaining agent for the full-time faculty members of certain schools of Yeshiva University, a private university. The University opposed the petition on the ground that all of its faculty members are managerial or supervisory personnel and hence not employees within the meaning of the National Labor Relations Act (Act). The evidence at hearings before the Board's hearing officer showed, *inter alia*, that a central administrative hierarchy serves all of the University's schools, with University-wide policies being formulated by the central administration upon approval of the Board of Trustees. However, the individual schools within the University are substantially autonomous, and the faculty members at each school effectively determine its curriculum, grading system, admission and matriculation standards, academic calendars, and course schedules. Also, the overwhelming majority of faculty recommendations as to faculty hiring, tenure, sabbaticals, termination, and promotion are implemented. The Board granted the Union's petition and directed an election. Summarily rejecting the University's contention that its faculty members are managerial employees, the Board held that the faculty members are professional employees entitled to the Act's protection. After the Union won the election and was certified, the University refused to bargain. In subsequent unfair labor practice proceedings, the Board ordered the University to bargain and sought enforcement in the Court of Appeals, which denied the petition. The court agreed that the faculty members are professional employees under § 2 (12) of the Act, found that the Board had ignored "the extensive control of Yeshiva's faculty" over academic and personnel decisions as well as its "crucial role . . . in determining other central policies of the institution," and accordingly held that the faculty members are endowed with "managerial status" sufficient to remove them from the Act's coverage.

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*Together with No. 78-997, *Yeshiva University Faculty Assn.* v. *Yeshiva University,* also on certiorari to the same court.

Held: The University's full-time faculty members are managerial employees excluded from the Act's coverage. Pp. 679–691.

(a) The authority structure of a university does not fit neatly into the statutory scheme, because authority in the typical "mature" private university is divided between a central administration and one or more collegial bodies. The absence of explicit congressional direction does not preclude the Board from reaching any particular type of employment, and the Board has approved the formation of bargaining units composed of faculty members on the ground that they are "professional employees" under § 2 (12) of the Act. Nevertheless professionals may be exempted from coverage under the judicially implied exclusion for "managerial employees" when they are involved in developing and implementing employer policy. Pp. 679–682.

(b) Here, application of the managerial exclusion to the University's faculty members is not precluded on the theory that they are not aligned with management because they are expected to exercise "independent professional judgment" while participating in academic governance and to pursue professional values rather than institutional interests. The controlling consideration is that the faculty exercises authority which in any other context unquestionably would be managerial, its authority in academic matters being absolute. The faculty's professional interests—as applied to governance at a university like Yeshiva which depends on the professional judgment of its faculty to formulate and apply policies—cannot be separated from those of the institution, and thus it cannot be said that a faculty member exercising independent judgment acts primarily in his own interest and does not represent the interest of his employer. Pp. 682–690.

(c) The deference ordinarily due the Board's expertise does not require reversal of the Court of Appeals' decision. This Court respects the Board's expertise when its conclusions are rationally based on articulated facts and consistent with the Act, but here the Board's decision satisfies neither criterion. P. 691.

582 F. 2d 686, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, REHNQUIST, and STEVENS, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which WHITE, MARSHALL, and BLACKMUN, JJ., joined, *post*, p. 691.

Norton J. Come argued the cause for petitioner in No. 78–857. With him on the briefs were *Solicitor General McCree, Deputy Solicitor General Wallace, Stephen M. Shapiro, John*

S. Irving, Robert E. Allen, Linda Sher, and *David S. Fishback. Ronald H. Shechtman* argued the cause for petitioner in No. 78–997. With him on the brief was *Murray A. Gordon.*

Marvin E. Frankel argued the cause for respondent in both cases. With him on the brief were *Saul G. Kramer, Mark L. Goldstein,* and *Gerald A. Bodner.*†

MR. JUSTICE POWELL delivered the opinion of the Court.

Supervisors and managerial employees are excluded from the categories of employees entitled to the benefits of collective bargaining under the National Labor Relations Act.[1] The question presented is whether the full-time faculty of Yeshiva University fall within those exclusions.

I

Yeshiva is a private university which conducts a broad range of arts and sciences programs at its five undergraduate and eight graduate schools in New York City. On October 30, 1974, the Yeshiva University Faculty Association (Union) filed a representation petition with the National Labor Relations Board (Board). The Union sought certification as bargaining agent for the full-time faculty members at 10 of the 13

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† Briefs of *amici curiae* urging reversal were filed by *Woodley B. Osborne, Victor J. Stone,* and *Robert A. Goldstein* for the American Association of University Professors; and by *Donald H. Wollett* and *Robert H. Chanin* for the National Education Assn.

Briefs of *amici curiae* urging affirmance were filed by *Estelle A. Fishbein, Fred Vinson, Daniel Riesel,* and *David Sive* for Johns Hopkins University et al.; and by *Kenneth C. McGuiness, Robert E. Williams,* and *Daniel R. Levinson* for the National Society of Professional Engineers.

Lawrence A. Poltrock filed a brief in No. 78–857 for the American Federation of Teachers, AFL–CIO, as *amicus curiae.*

[1] 49 Stat. 449, as amended, 61 Stat. 136, 73 Stat. 519, 29 U. S. C. § 151 *et seq.*; see 29 U. S. C. §§ 152 (3), 152 (11), 164 (a); *NLRB* v. *Bell Aerospace Co.,* 416 U. S. 267 (1974).

schools.[2] The University opposed the petition on the ground that all of its faculty members are managerial or supervisory personnel and hence not employees within the meaning of the National Labor Relations Act (Act). A Board-appointed hearing officer held hearings over a period of five months, generating a voluminous record.

The evidence at the hearings showed that a central administrative hierarchy serves all of the University's schools. Ultimate authority is vested in a Board of Trustees, whose members (other than the President) hold no administrative positions at the University. The President sits on the Board of Trustees and serves as chief executive officer, assisted by four vice presidents who oversee, respectively, medical affairs and science, student affairs, business affairs, and academic affairs. An Executive Council of deans and administrators makes recommendations to the President on a wide variety of matters.

University-wide policies are formulated by the central administration with the approval of the Board of Trustees, and include general guidelines dealing with teaching loads, salary scales, tenure, sabbaticals, retirement, and fringe benefits. The budget for each school is drafted by its dean or director, subject to approval by the President after consultation with a committee of administrators.[3] The faculty participate

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[2] The schools involved are Yeshiva College, Stern College for Women, Teacher's Institute for Women, Erna Michael College, Yeshiva Program, James Striar School of General Jewish Studies, Belfer Graduate School of Sciences, Ferkauf Graduate School of Humanities and Social Sciences, Wurzweiler School of Social Work, and Bernard Revel Graduate School. The Union did not seek to represent the faculty of the medical school, the graduate school of medical sciences, the Yeshiva High School, or any of the theological programs affiliated with the University. A law school has been opened since the time of the hearings, but it does not figure in this case.

[3] At Yeshiva College, budget requests prepared by the senior professor in each subject area receive the "perfunctory" approval of the Dean "99 percent" of the time and have never been rejected by the central administration. App. 298–299. A council of elected department chairmen at

in University-wide governance through its representatives on an elected student-faculty advisory council. The only University-wide faculty body is the Faculty Review Committee, composed of elected representatives who adjust grievances by informal negotiation and also may make formal recommendations to the dean of the affected school or to the President. Such recommendations are purely advisory.

The individual schools within the University are substantially autonomous. Each is headed by a dean or director, and faculty members at each school meet formally and informally to discuss and decide matters of institutional and professional concern. At four schools, formal meetings are convened regularly pursuant to written bylaws. The remaining faculties meet when convened by the dean or director. Most of the schools also have faculty committees concerned with special areas of educational policy. Faculty welfare committees negotiate with administrators concerning salary and conditions of employment. Through these meetings and committees, the faculty at each school effectively determine its curriculum, grading system, admission and matriculation standards, academic calendars, and course schedules.[4]

Ferkauf approves the school's budget allocations when discretionary funds are available. *Id.*, at 626–627. All of these professors were included in the bargaining unit approved by the Board.

[4] For example, the deans at Yeshiva and Erna Michael Colleges regard faculty actions as binding. *Id.*, at 248–249, 312–313. Administrators testified that no academic initiative of either faculty had been vetoed since at least 1968. *Id.*, at 250, 313. When the Stern College faculty disagreed with the dean's decision to delete the education major, the major was reinstituted. *Id.*, at 191. The Director of the Teacher's Institute for Women testified that "the faculty is the school," *id.*, at 379, while the Director of the James Striar School described his position as the "executive arm of the faculty," which had overruled him on occasion, *id.*, at 360–361. All decisions regarding academic matters at the Yeshiva Program and Bernard Revel are made by faculty consensus. *Id.*, at 574, 583–586. The "internal operation of [Wurzweiler] has been heavily governed by faculty decisions," according to its Dean. *Id.*, at 502.

Faculty power at Yeshiva's schools extends beyond strictly academic concerns. The faculty at each school make recommendations to the dean or director in every case of faculty hiring, tenure, sabbaticals, termination and promotion. Although the final decision is reached by the central administration on the advice of the dean or director, the overwhelming majority of faculty recommendations are implemented.[5] Even when financial problems in the early 1970's restricted Yeshiva's budget, faculty recommendations still largely controlled personnel decisions made within the constraints imposed by the administration. Indeed, the faculty of one school recently drew up new and binding policies expanding their own role in these matters. In addition, some faculties make final decisions regarding the admission, expulsion, and graduation of individual students. Others have decided questions involving teaching loads, student absence policies, tuition and enrollment levels, and in one case the location of a school.[6]

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[5] One dean estimated that 98% of faculty hiring recommendations were ultimately given effect. *Id.*, at 624. Others could not recall an instance when a faculty recommendation had been overruled. *Id.*, at 193–194. At Stern College, the Dean in six years has never overturned a promotion decision. *Ibid.* The President has accepted all decisions of the Yeshiva College faculty as to promotions and sabbaticals, including decisions opposed by the Dean. *Id.*, at 268–270. At Erna Michael, the Dean has never hired a full-time faculty member without the consent of the affected senior professor, *id.*, at 333–335, and the Director of Teacher's Institute for Women stated baldly that no teacher had ever been hired if "there was the slightest objection, even on one faculty member's part." *Id.*, at 388. The faculty at both these schools have overridden recommendations made by the deans. No promotion or grant of tenure has ever been made at Ferkauf over faculty opposition. *Id.*, at 620, 633. The Dean of Belfer testified that he had no right to override faculty decisions on tenure and nonrenewal. *Id.*, at 419.

[6] The Director of Teacher's Institute for Women once recommended that the school move to Brooklyn to attract students. The faculty rejected the proposal and the school remained in Manhattan. *Id.*, at 379–380.

II

A three-member panel of the Board granted the Union's petition in December 1975, and directed an election in a bargaining unit consisting of all full-time faculty members at the affected schools. 221 N. L. R. B. 1053. The unit included assistant deans, senior professors, and department chairmen, as well as associate professors, assistant professors, and instructors.[7] Deans and directors were excluded. The Board summarily rejected the University's contention that its entire faculty are managerial, viewing the claim as a request for reconsideration of previous Board decisions on the issue. Instead of making findings of fact as to Yeshiva, the Board referred generally to the record and found no "significan[t]" difference between this faculty and others it had considered. The Board concluded that the faculty are professional employees entitled to the protection of the Act because "faculty participation in collegial decision making is on a collective rather than individual basis, it is exercised in the faculty's own interest rather than 'in the interest of the employer,' and final authority rests with the board of trustees." *Id.*, at 1054 (footnote omitted).[8]

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[7] "Full-time faculty" were defined as those

"appointed to the University in the titles of professor, associate professor, assistant professor, instructor, or any adjunct or visiting thereof, department chairmen, division chairmen, senior faculty and assistant deans, but excluding . . . part-time faculty; lecturers; principal investigators; deans, acting deans and directors; [and others not relevant to this action]." 221 N. L. R. B., at 1057.

The term "faculty" in this opinion refers to the members of this unit as defined by the Board.

[8] Identical language had been employed in at least two other Board decisions. See *infra*, at 684–685. In this case, it was not supported by a single citation to the record. MR. JUSTICE BRENNAN's dissent relies on this language, *post*, at 696, and adds that a faculty's "primary concerns are academic and relate solely to its own professional reputation," *post*, at 701. The view that faculty governance authority "is exercised in the

The Union won the election and was certified by the Board. The University refused to bargain, reasserting its view that the faculty are managerial. In the subsequent unfair labor practice proceeding, the Board refused to reconsider its holding in the representation proceeding and ordered the University to bargain with the Union. 231 N. L. R. B. 597 (1977). When the University still refused to sit down at the negotiating table, the Board sought enforcement in the Court of Appeals for the Second Circuit, which denied the petition. 582 F. 2d 686 (1978).

Since the Board had made no findings of fact, the court examined the record and related the circumstances in considerable detail. It agreed that the faculty are professional employees under § 2 (12) of the Act. 29 U. S. C. § 152 (12). But the court found that the Board had ignored "the extensive control of Yeshiva's faculty" over academic and personnel decisions as well as the "crucial role of the full-time faculty in determining other central policies of the institution." 582 F. 2d, at 698. The court concluded that such power is not an exercise of individual professional expertise. Rather, the faculty are, "in effect, substantially and pervasively operating the enterprise." *Ibid.* Accordingly, the court held that the faculty are endowed with "managerial status" sufficient to remove them from the coverage of the Act. We granted certiorari, 440 U. S. 906 (1979), and now affirm.

III

There is no evidence that Congress has considered whether a university faculty may organize for collective bargaining under the Act. Indeed, when the Wagner and Taft-Hartley Acts were approved, it was thought that congressional power did not extend to university faculties because they were employed by nonprofit institutions which did not "affect com-

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faculty's own interest" rather than that of the University assumes a lack of responsibility that certainly is not reflected in this record.

merce." See *NLRB* v. *Catholic Bishop of Chicago*, 440 U. S. 490, 504–505 (1979).[9] Moreover, the authority structure of a university does not fit neatly within the statutory scheme we are asked to interpret. The Board itself has noted that the concept of collegiality "does not square with the traditional authority structures with which th[e] Act was designed to cope in the typical organizations of the commercial world." *Adelphi University*, 195 N. L. R. B. 639, 648 (1972).

The Act was intended to accommodate the type of management-employee relations that prevail in the pyramidal hierarchies of private industry. *Ibid.* In contrast, authority in the typical "mature" private university is divided between a central administration and one or more collegial bodies. See J. Baldridge, Power and Conflict in the University 114 (1971). This system of "shared authority" evolved from the medieval model of collegial decisionmaking in which guilds of scholars were responsible only to themselves. See N. Fehl, The Idea of a University in East and West 36–46 (1962); D. Knowles, The Evolution of Medieval Thought 164–168 (1962). At early universities, the faculty were the school. Although faculties have been subject to external control in the United States since colonial times, J. Brubacher & W. Rudy, Higher Education in Transition: A History of American Colleges and Universities, 1636–1976, pp. 25–30 (3d ed. 1976), traditions of collegiality continue to play a significant role at many universities, including Yeshiva.[10] For these reasons, the Board has

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[9] See also S. Rep. No. 573, 74th Cong., 1st Sess., 7 (1935) (dispute between employer and college professor would not be covered); H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 36 (1947) (listing professional employees covered by new statutory provision without mentioning teachers); S. Rep. No. 105, 80th Cong., 1st Sess., 11, 19 (1947) (same).

[10] See the inaugural address of Williams College President Paul Ansel Chadbourne, quoted in Kahn, The NLRB and Higher Education: The Failure of Policymaking Through Adjudication, 21 UCLA L. Rev. 63, 70, n. 16 (1973) ("'Professors are sometimes spoken of as working for the college. They *are* the college'") (emphasis in original); Davis, Unions

recognized that principles developed for use in the industrial setting cannot be "imposed blindly on the academic world." *Syracuse University*, 204 N. L. R. B. 641, 643 (1973).

The absence of explicit congressional direction, of course, does not preclude the Board from reaching any particular type of employment. See *NLRB* v. *Hearst Publications, Inc.*, 322 U. S. 111, 124–131 (1944). Acting under its responsibility for adapting the broad provisions of the Act to differing workplaces, the Board asserted jurisdiction over a university for the first time in 1970. *Cornell University*, 183 N. L. R. B. 329 (1970). Within a year it had approved the formation of bargaining units composed of faculty members. *C. W. Post Center*, 189 N. L. R. B. 904 (1971).[11] The Board reasoned that faculty members are "professional employees" within the meaning of § 2 (12) of the Act and therefore are entitled to the benefits of collective bargaining. 189 N. L. R. B., at 905; 29 U. S. C. § 152 (12).[12]

Yeshiva does not contend that its faculty are not professionals under the statute. But professionals, like other employees, may be exempted from coverage under the Act's ex-

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and Higher Education: Another View, 49 Ed. Record 139, 143 (1968) ("The president . . is not the faculty's master. He is as much the faculty's administrator as he is the board [of trustees']"); n. 4, *supra*.

[11] The Board has suggested that Congress tacitly approved the formation of faculty units in 1974, when the Act was amended to eliminate the exemption accorded to nonprofit hospitals. Although Congress appears to have agreed that nonprofit institutions "affect commerce" under modern economic conditions, H. R. Rep. No. 93–1051, p. 4 (1974); 120 Cong. Rec. 12938 (1974) (remarks of Sen. Williams), there is nothing to suggest that Congress considered the status of university faculties.

[12] The Act provides broadly that "employees" have organizational and other rights. 29 U. S. C. § 157. Section 2 (3) defines "employee" in general terms, 29 U. S. C. § 152 (3); § 2 (12) defines "professional employee" in some detail, 29 U. S. C. § 152 (12); and § 9 (b) (1) prohibits the Board from creating a bargaining unit that includes both professional and nonprofessional employees unless a majority of the professionals vote for inclusion, 29 U. S. C. § 159 (b) (1).

clusion for "supervisors" who use independent judgment in overseeing other employees in the interest of the employer,[13] or under the judicially implied exclusion for "managerial employees" who are involved in developing and enforcing employer policy.[14] Both exemptions grow out of the same concern: That an employer is entitled to the undivided loyalty of its representatives. *Beasley* v. *Food Fair of North Carolina*, 416 U. S. 653, 661–662 (1974); see *NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267, 281–282 (1974). Because the Court of Appeals found the faculty to be managerial employees, it did not decide the question of their supervisory status. In view of our agreement with that court's application of the managerial exclusion, we also need not resolve that issue of statutory interpretation.

IV

Managerial employees are defined as those who " 'formulate and effectuate management policies by expressing and making operative the decisions of their employer.' " *NLRB* v. *Bell Aerospace Co.*, *supra*, at 288 (quoting *Palace Laundry Dry Cleaning Corp.*, 75 N. L. R. B. 320, 323, n. 4 (1947)). These employees are "much higher in the managerial structure" than those explicitly mentioned by Congress, which "regarded [them] as so clearly outside the Act that no specific exclusionary provision was thought necessary." 416 U. S., at 283.

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[13] An employee may be excluded if he has authority over any one of 12 enumerated personnel actions, including hiring and firing. 29 U. S. C. §§ 152 (3), 152 (11), 164 (a). The Board has held repeatedly that professionals may be excluded as supervisors. *E. g.*, *University of Vermont*, 223 N. L. R. B. 423, 426 (1976); *Presbyterian Medical Center*, 218 N. L. R. B. 1266, 1267–1269 (1975).

[14] *NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267 (1974). The Board never has doubted that the managerial exclusion may be applied to professionals in a proper case. *E. g.*, *Sutter Community Hospitals of Sacramento*, 227 N. L. R. B. 181, 193 (1976); see *General Dynamics Corp.*, 213 N. L. R. B. 841, 857–858 (1974); *Westinghouse Electric Corp.*, 113 N. L. R. B. 337, 339 (1955).

Managerial employees must exercise discretion within, or even independently of, established employer policy and must be aligned with management. See *id.*, at 286–287 (citing cases). Although the Board has established no firm criteria for determining when an employee is so aligned, normally an employee may be excluded as managerial only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy.[15]

The Board does not contend that the Yeshiva faculty's decisionmaking is too insignificant to be deemed managerial.[16] Nor does it suggest that the role of the faculty is merely advisory and thus not managerial.[17] Instead, it contends that the managerial exclusion cannot be applied in a straightforward fashion to professional employees because those em-

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[15] *E. g., Sutter Community Hospitals of Sacramento, supra,* at 193; *Bell Aerospace,* 219 N. L. R. B. 384, 385–386 (1975) (on remand); *General Dynamics Corp., supra,* at 857; see *NLRB* v. *Bell Aerospace Co., supra,* at 274, 286–289.

[16] The Board has found decisions of far less significance to the employer to be managerial when the affected employees were aligned with management. *Swift & Co.,* 115 N. L. R. B. 752, 753 (1956) (procurement drivers who made purchases for employers); *Firestone Tire & Rubber Co.,* 112 N. L. R. B. 571, 573 (1955) (production schedulers); *Peter Kiewit Sons' Co.,* 106 N. L. R. B. 194, 196 (1953) (lecturers who indoctrinated new employees); *Western Electric Co.,* 100 N. L. R. B. 420, 423 (1952) (personnel investigators who made hiring recommendations); *American Locomotive Co.,* 92 N. L. R. B. 115, 116–117 (1950) (buyers who made substantial purchases on employer's behalf).

[17] The Union does argue that the faculty's authority is merely advisory. But the fact that the administration holds a rarely exercised veto power does not diminish the faculty's effective power in policymaking and implementation. See nn. 4, 5, *supra.* The statutory definition of "supervisor" expressly contemplates that those employees who "effectively . . . recommend" the enumerated actions are to be excluded as supervisory. 29 U. S. C. § 152 (11). Consistent with the concern for divided loyalty, the relevant consideration is effective recommendation or control rather than final authority. That rationale applies with equal force to the managerial exclusion.

ployees often appear to be exercising managerial authority when they are merely performing routine job duties. The status of such employees, in the Board's view, must be determined by reference to the "alignment with management" criterion. The Board argues that the Yeshiva faculty are not aligned with management because they are expected to exercise "independent professional judgment" while participating in academic governance, and because they are neither "expected to conform to management policies [nor] judged according to their effectiveness in carrying out those policies." Because of this independence, the Board contends there is no danger of divided loyalty and no need for the managerial exclusion. In its view, union pressure cannot divert the faculty from adhering to the interests of the university, because the university itself expects its faculty to pursue professional values rather than institutional interests. The Board concludes that application of the managerial exclusion to such employees would frustrate the national labor policy in favor of collective bargaining.

This "independent professional judgment" test was not applied in the decision we are asked to uphold. The Board's opinion relies exclusively on its previous faculty decisions for both legal and factual analysis. 221 N. L. R. B., at 1054. But those decisions only dimly foreshadow the reasoning now proffered to the Court. Without explanation, the Board initially announced two different rationales for faculty cases,[18]

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[18] Two cases simply announced that faculty authority is neither managerial nor supervisory because it is exercised collectively. *C. W. Post Center*, 189 N. L. R. B. 904, 905 (1971); *Fordham University*, 193 N. L. R. B. 134, 135 (1971). The Board later acknowledged that "a genuine system of collegiality would tend to confound us," but held that the modern university departs from that system because "ultimate authority" is vested in a board of trustees which neither attempts to convert the faculty into managerial entities nor advises them to advocate management interests. *Adelphi University*, 195 N. L. R. B. 639, 648 (1972). See *Fairleigh Dickinson University*, 227 N. L. R. B. 239, 241 (1976).

then quickly transformed them into a litany to be repeated in case after case: (i) faculty authority is collective, (ii) it is exercised in the faculty's own interest rather than in the interest of the university, and (iii) final authority rests with the board of trustees. *Northeastern University*, 218 N. L. R. B. 247, 250 (1975); *University of Miami*, 213 N. L. R. B. 634, 634 (1974); see *Tusculum College*, 199 N. L. R. B. 28, 30 (1972).[19] In their arguments in this case, the Board's lawyers have abandoned the first and third branches of this analysis,[20] which in any event were flatly inconsistent with its precedents,[21] and have transformed the second into a theory that does not appear clearly in any Board opinion.[22]

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[19] Citing these three factors, the Board concludes in each case that faculty are professional employees. It has never explained the reasoning connecting the premise with the conclusion, although an argument similar to that made by its lawyers in this case appears in one concurring opinion. *Northeastern University*, 218 N. L. R. B., at 257 (opinion of Member Kennedy).

[20] Although the Board has preserved the points in footnotes to its brief, it no longer contends that "collective authority" and "lack of ultimate authority" are legal rationales. They are now said to be facts which, respectively, "fortif[y]" the Board's view that faculty members act in their own interest, and contradict the premise that the university is a "self-governing communit[y] of scholars." Reply Brief for Petitioner in No. 78-857, p. 11, n. 8. Cf. n. 8, *supra*.

[21] The "collective authority" branch has never been applied to supervisors who work through committees. *E. g., Florida Southern College*, 196 N. L. R. B. 888, 889 (1972). Nor was it thought to bar managerial status for employees who owned enough stock to give them, as a group, a substantial voice in the employer's affairs. See *Sida of Hawaii, Inc.*, 191 N. L. R. B. 194, 195 (1971); *Red and White Airway Cab Co.*, 123 N. L. R. B. 83, 85 (1959); *Brookings Plywood Corp.*, 98 N. L. R. B. 794, 798-799 (1952). Ultimate authority, the third branch, has never been thought to be a prerequisite to supervisory or managerial status. Indeed, it could not be since every corporation vests that power in its board of directors.

[22] We do not, of course, substitute counsel's *post hoc* rationale for the reasoning supplied by the Board itself. *SEC* v. *Chenery Corp.*, 332 U. S. 194, 196 (1947). Because the first and third branches of the Board's

V

The controlling consideration in this case is that the faculty of Yeshiva University exercise authority which in any other context unquestionably would be managerial. Their authority in academic matters is absolute. They decide what courses will be offered, when they will be scheduled, and to whom they will be taught. They debate and determine teaching methods, grading policies, and matriculation standards. They effectively decide which students will be admitted, retained, and graduated. On occasion their views have determined the size of the student body, the tuition to be charged, and the location of a school. When one considers the function of a university, it is difficult to imagine decisions more managerial than these. To the extent the industrial analogy applies, the faculty determines within each school the product to be produced, the terms upon which it will be offered, and the customers who will be served.[23]

The Board nevertheless insists that these decisions are not managerial because they require the exercise of independent professional judgment. We are not persuaded by this argument. There may be some tension between the Act's exclusion of managerial employees and its inclusion of professionals, since most professionals in managerial positions continue to draw on their special skills and training. But we have been directed to no authority suggesting that that tension can be resolved by reference to the "independent professional judgment" cri-

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analysis are insupportable, the Board's only colorable theory is the "interest of the employer" branch. The argument presented to us is an expanded and considerably refined version of that notion.

[23] The record shows that faculty members at Yeshiva also play a predominant role in faculty hiring, tenure, sabbaticals, termination and promotion. See *supra*, at 677, and n. 5. These decisions clearly have both managerial and supervisory characteristics. Since we do not reach the question of supervisory status, we need not rely primarily on these features of faculty authority.

terion proposed in this case.[24] Outside the university context, the Board routinely has applied the managerial and supervisory exclusions to professionals in executive positions without inquiring whether their decisions were based on management policy rather than professional expertise.[25] Indeed, the Board has twice implicitly rejected the contention that decisions based on professional judgment cannot be managerial.[26] Since the Board does not suggest that the "independent professional judgment" test is to be limited to university faculty, its new approach would overrule *sub silentio* this body of Board precedent and could result in the indiscriminate recharacterization as covered employees of professionals working in supervisory and managerial capacities.

Moreover, the Board's approach would undermine the goal it purports to serve: To ensure that employees who exercise discretionary authority on behalf of the employer will not

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[24] The Board has cited no case directly applying an "independent professional judgment" standard. On the related question of accountability for implementation of management policies, it cites only *NLRB* v. *Fullerton Publishing Co.*, 283 F. 2d 545, 550 (CA9 1960), which held that a news editor "responsibly directed" his department so as to fall within the definition of a supervisor, 29 U. S. C. § 152 (11). The court looked in part to accountability in rejecting the claim that the editor merely relayed assignments and thus was not "responsible" for directing employees as required by the statute. The case did not involve the managerial exclusion and has no application to the issues before us.

[25] See cases cited in nn. 13 and 14, *supra*. A strict "conformity to management policy" test ignores the dual nature of the managerial role, since managers by definition not only conform to established policies but also exercise their own judgment within the range of those policies. See *Bell Aerospace*, 219 N. L. R. B., at 385 (quoting *Eastern Camera & Photo Corp.*, 140 N. L. R. B. 569, 571 (1963)).

[26] *University of Chicago Library*, 205 N. L. R. B. 220, 221–222, 229 (1973), enf'd, 506 F. 2d 1402 (CA7 1974) (reversing an Administrative Law Judge's decision which had been premised on the "professional judgment" rationale); *Sutter Community Hospitals of Sacramento*, 227 N. L. R. B., at 193 (excluding as managerial a clinical specialist who used interdisciplinary professional skills to run a hospital department).

divide their loyalty between employer and union. In arguing that a faculty member exercising independent judgment acts primarily in his own interest and therefore does not represent the interest of his employer, the Board assumes that the professional interests of the faculty and the interests of the institution are distinct, separable entities with which a faculty member could not simultaneously be aligned. The Court of Appeals found no justification for this distinction, and we perceive none. In fact, the faculty's professional interests—as applied to governance at a university like Yeshiva—cannot be separated from those of the institution.

In such a university, the predominant policy normally is to operate a quality institution of higher learning that will accomplish broadly defined educational goals within the limits of its financial resources. The "business" of a university is education, and its vitality ultimately must depend on academic policies that largely are formulated and generally are implemented by faculty governance decisions. See K. Mortimer & T. McConnell, Sharing Authority Effectively 23–24 (1978). Faculty members enhance their own standing and fulfill their professional mission by ensuring that the university's objectives are met. But there can be no doubt that the quest for academic excellence and institutional distinction is a "policy" to which the administration expects the faculty to adhere, whether it be defined as a professional or an institutional goal. It is fruitless to ask whether an employee is "expected to conform" to one goal or another when the two are essentially the same.[27] See *NLRB* v. *Scott Paper Co.*,

[27] At Yeshiva, administrative concerns with scarce resources and University-wide balance have led to occasional vetoes of faculty action. But such infrequent administrative reversals in no way detract from the institution's primary concern with the academic responsibilities entrusted to the faculty. The suggestion that faculty interests depart from those of the institution with respect to salary and benefits is even less meritorious. The same is true of every supervisory or managerial employee. Indeed, there is arguably a greater community of interest on this point in the

440 F. 2d 625, 630 (CA1 1971) (tractor owner-operators); *Deaton Truck Line, Inc.* v. *NLRB*, 337 F. 2d 697, 699 (CA5 1964), cert. denied, 381 U. S. 903 (1965) (same).

The problem of divided loyalty is particularly acute for a university like Yeshiva, which depends on the professional judgment of its faculty to formulate and apply crucial policies constrained only by necessarily general institutional goals. The university requires faculty participation in governance because professional expertise is indispensable to the formulation and implementation of academic policy.[28] It may appear, as the Board contends, that the professor performing governance functions is less "accountable" for departures from institutional policy than a middle-level industrial manager whose discretion is more confined. Moreover, traditional systems of collegiality and tenure insulate the professor from some of the sanctions applied to an industrial manager who fails to adhere to company policy. But the analogy of the university to industry need not, and indeed cannot, be complete. It is clear that Yeshiva and like universities must rely on their faculties to participate in the making and implementation of their policies.[29] The large measure of independ-

university than in industry, because the nature and quality of a university depend so heavily on the faculty attracted to the institution. B. Richman & R. Farmer, Leadership, Goals, and Power in Higher Education 258 (1974); see D. Bornheimer, G. Burns, & G. Dumke, The Faculty in Higher Education 174–175 (1973).

[28] See American Association for Higher Education, Faculty Participation in Academic Governance 22–24 (1967); Bornheimer, Burns, & Dumke, *supra*, at 149–150; Kadish, The Theory of the Profession and Its Predicament, 58 A. A. U. P. Bull. 120, 121 (1972). The extent to which Yeshiva faculty recommendations are implemented is no "mere coincidence," as Mr. Justice Brennan's dissent suggests. *Post*, at 701. Rather this is an inevitable characteristic of the governance structure adopted by universities like Yeshiva.

[29] The dissent concludes, citing several secondary authorities, that the modern university has undergone changes that have shifted "the task of operating the university enterprise" from faculty to administration. *Post*, at 703. The shift, if it exists, is neither universal nor complete. See

ence enjoyed by faculty members can only increase the danger that divided loyalty will lead to those harms that the Board traditionally has sought to prevent.

We certainly are not suggesting an application of the managerial exclusion that would sweep all professionals outside the Act in derogation of Congress' expressed intent to protect them. The Board has recognized that employees whose decisionmaking is limited to the routine discharge of professional duties in projects to which they have been assigned cannot be excluded from coverage even if union membership arguably may involve some divided loyalty.[30] Only if an employee's activities fall outside the scope of the duties routinely performed by similarly situated professionals will he be found aligned with management. We think these decisions accurately capture the intent of Congress, and that they provide an appropriate starting point for analysis in cases involving professionals alleged to be managerial.[31]

K. Mortimer & T. McConnell, Sharing Authority Effectively 27–28, 158–162, 164–165 (1978). In any event, our decision must be based on the record before us. Nor can we decide this case by weighing the probable benefits and burdens of faculty collective bargaining. See *post*, at 702–705. That, after all, is a matter for Congress, not this Court.

[30] For this reason, architects and engineers functioning as project captains for work performed by teams of professionals are deemed employees despite substantial planning responsibility and authority to direct and evaluate team members. See *General Dynamics Corp.*, 213 N. L. R. B., at 857–858; *Wurster, Bernardi & Emmons, Inc.*, 192 N. L. R. B. 1049, 1051 (1971); *Skidmore, Owings & Merrill*, 192 N. L. R. B. 920, 921 (1971). See also *Doctors' Hospital of Modesto, Inc.*, 183 N. L. R. B. 950, 951–952 (1970), enf'd, 489 F. 2d 772 (CA9 1973) (nurses); *National Broadcasting Co.*, 160 N. L. R. B. 1440, 1441 (1966) (broadcast newswriters). In the health-care context, the Board asks in each case whether the decisions alleged to be managerial or supervisory are "incidental to" or "in addition to" the treatment of patients, a test Congress expressly approved in 1974. S. Rep. No. 93–766, p. 6 (1974).

[31] We recognize that this is a starting point only, and that other factors not present here may enter into the analysis in other contexts. It is plain, for example, that professors may not be excluded merely because they

VI

Finally, the Board contends that the deference due its expertise in these matters requires us to reverse the decision of the Court of Appeals. The question we decide today is a mixed one of fact and law. But the Board's opinion may be searched in vain for relevant findings of fact. The absence of factual analysis apparently reflects the Board's view that the managerial status of particular faculties may be decided on the basis of conclusory rationales rather than examination of the facts of each case. The Court of Appeals took a different view, and determined that the faculty of Yeshiva University "in effect, substantially and pervasively operat[e] the enterprise." 582 F. 2d, at 698. We find no reason to reject this conclusion. As our decisions consistently show, we accord great respect to the expertise of the Board when its conclusions are rationally based on articulated facts and consistent with the Act. *Beth Israel Hospital* v. *NLRB*, 437 U. S. 483, 501 (1978). In this case, we hold that the Board's decision satisfies neither criterion.

Affirmed.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN join, dissenting.

In holding that the full-time faculty members of Yeshiva University are not covered employees under the National Labor Relations Act, but instead fall within the exclusion for

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determine the content of their own courses, evaluate their own students, and supervise their own research. There thus may be institutions of higher learning unlike Yeshiva where the faculty are entirely or predominantly nonmanagerial. There also may be faculty members at Yeshiva and like universities who properly could be included in a bargaining unit. It may be that a rational line could be drawn between tenured and untenured faculty members, depending upon how a faculty is structured and operates. But we express no opinion on these questions, for it is clear that the unit approved by the Board was far too broad.

supervisors and managerial employees, the Court disagrees with the determination of the National Labor Relations Board. Because I believe that the Board's decision was neither irrational nor inconsistent with the Act, I respectfully dissent.

I

Ten years ago the Board first asserted jurisdiction over private nonprofit institutions of higher education. *Cornell University*, 183 N. L. R. B. 329 (1970). Since then, the Board has often struggled with the Procrustean task of attempting to implement in the altogether different environment of the academic community the broad directives of a statutory scheme designed for the bureaucratic industrial workplace. See, *e. g.*, *Adelphi University*, 195 N. L. R. B. 639, 648 (1972). Resolution of the particular issue presented in this case—whether full-time faculty members are covered "employees" under the Act—is but one of several challenges confronting the Board in this "unchartered area." *C. W. Post Center*, 189 N. L. R. B. 904, 905 (1971).

Because at the time of the Act's passage Congress did not contemplate its application to private universities, it is not surprising that the terms of the Act itself provide no answer to the question before us. Indeed, the statute evidences significant tension as to congressional intent in this respect by its explicit inclusion, on the one hand, of "professional employees" under § 2 (12), 29 U. S. C. § 152 (12), and its exclusion, on the other, of "supervisors" under § 2 (11), 29 U. S. C. § 152 (11). Similarly, when transplanted to the academic arena, the Act's extension of coverage to professionals under § 2 (12) cannot easily be squared with the Board-created exclusion of "managerial employees" in the industrial context. See generally *NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267 (1974).

Primary authority to resolve these conflicts and to adapt the Act to the changing patterns of industrial relations was

entrusted to the Board, not to the judiciary. *NLRB* v. *Weingarten, Inc.*, 420 U. S. 251, 266 (1975). The Court has often admonished that "[t]he ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *NLRB* v. *Truck Drivers*, 353 U. S. 87, 96 (1957). Accord, *Beth Israel Hospital* v. *NLRB*, 437 U. S. 483, 501 (1978); *NLRB* v. *Erie Resistor Corp.*, 373 U. S. 221, 235–236 (1963). Through its cumulative experience in dealing with labor-management relations in a variety of industrial and nonindustrial settings, it is the Board that has developed the expertise to determine whether coverage of a particular category of employees would further the objectives of the Act.[1] And through its continuous oversight of industrial conditions, it is the Board that is best able to formulate and adjust national labor policy to conform to the realities of industrial life. Accordingly, the judicial role is limited; a court may not substitute its own judgment for that of the Board. The Board's decision may be reviewed for its rationality and its consistency with the

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[1] "It is not necessary in this case to make a completely definitive limitation around the term 'employee.' That task has been assigned primarily to the agency created by Congress to administer the Act. Determination of 'where all the conditions of the relation require protection' involves inquiries for the Board charged with this duty. Everyday experience in the administration of the statute gives it familiarity with the circumstances and backgrounds of employment relationships in various industries, with the abilities and needs of the workers for self-organization and collective action, and with the adaptability of collective bargaining for the peaceful settlement of their disputes with their employers. The experience thus acquired must be brought frequently to bear on the question who is an employee under the Act. Resolving that question . . . 'belongs to the usual administrative routine' of the Board." *NLRB* v. *Hearst Publications, Inc.*, 322 U. S. 111, 130 (1944). Accord, *NLRB* v. *Seven-Up Bottling Co.*, 344 U. S. 344, 349 (1953).

Act, but once these criteria are satisfied, the order must be enforced. See *Beth Israel Hospital* v. *NLRB*, *supra*, at 501.

II

In any event, I believe the Board reached the correct result in determining that Yeshiva's full-time faculty is covered under the NLRA. The Court does not dispute that the faculty members are "professional employees" for the purposes of collective bargaining under § 2 (12), but nevertheless finds them excluded from coverage under the implied exclusion for "managerial employees."[2] The Court explains that "[t]he controlling consideration in this case is that the faculty of Yeshiva University exercise authority which in any other context unquestionably would be managerial." *Ante*, at 686. But the academic community is simply not "any other context." The Court purports to recognize that there are fundamental differences between the authority structures of the typical industrial and academic institutions which preclude the blind transplanting of principles developed in one arena onto the other; yet it nevertheless ignores those very differences in concluding that Yeshiva's faculty is excluded from the Act's coverage.

As reflected in the legislative history of the Taft-Hartley Amendments of 1947, the concern behind the exclusion of supervisors under § 2 (11) of the Act is twofold. On the one hand, Congress sought to protect the rank-and-file employees from being unduly influenced in their selection of leaders by the presence of management representatives in their union. "If supervisors were members of and active in the union which represented the employees they supervised it could be pos-

[2] Because the Court concludes that Yeshiva's full-time faculty are managerial employees, it finds it unnecessary to reach the University's contention that the faculty are also excluded as "supervisors" under § 2 (11). *Ante*, at 682. My discussion therefore focuses on the question of the faculty's managerial status, but I would resolve the issue of their supervisory status in a similar fashion.

sible for the supervisors to obtain and retain positions of power in the union by reason of their authority over their fellow union members while working on the job." *NLRB* v. *Metropolitan Life Ins. Co.*, 405 F. 2d 1169, 1178 (CA2 1968). In addition, Congress wanted to ensure that employers would not be deprived of the undivided loyalty of their supervisory foremen. Congress was concerned that if supervisors were allowed to affiliate with labor organizations that represented the rank and file, they might become accountable to the workers, thus interfering with the supervisors' ability to discipline and control the employees in the interest of the employer.[3]

Identical considerations underlie the exclusion of managerial employees. See *ante*, at 682. Although a variety of verbal formulations have received judicial approval over the years, see *Retail Clerks International Assn.* v. *NLRB*, 125 U. S. App. D. C. 63, 65–66, 366 F. 2d 642, 644–645 (1966), this Court has recently sanctioned a definition of "managerial employee" that comprises those who "'formulate and effectuate management policies by expressing and making operative the decisions of their employer.'" See *NLRB* v. *Bell Aerospace Co.*, 416 U. S., at 288. The touchstone of managerial status is thus an alliance with management, and the pivotal inquiry is whether the employee in performing his

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[3] See H. R. Rep. No. 245, 80th Cong., 1st Sess., 14 (1947):

"The evidence before the committee shows clearly that unionizing supervisors under the Labor Act is inconsistent with the purpose of the act . . . . It is inconsistent with the policy of Congress to assure to workers freedom from domination or control by their supervisors in their organizing and bargaining activities. It is inconsistent with our policy to protect the rights of employers; they, as well as workers, are entitled to loyal representatives in the plants, but when the foremen unionize, even in a union that claims to be 'independent' of the union of the rank and file, they are subject to influence and control by the rank and file union, and, instead of their bossing the rank and file, the rank and file bosses them."

See also S. Rep. No. 105, 80th Cong., 1st Sess., 3–5 (1947).

duties represents his own interests or those of his employer.[4] If his actions are undertaken for the purpose of implementing the employer's policies, then he is accountable to management and may be subject to conflicting loyalties. But if the employee is acting only on his own behalf and in his own interest, he is covered under the Act and is entitled to the benefits of collective bargaining.

After examining the voluminous record in this case,[5] the Board determined that the faculty at Yeshiva exercised its decisionmaking authority in its own interest rather than "in the interest of the employer." 221 N. L. R. B. 1053, 1054 (1975). The Court, in contrast, can perceive "no justification for this distinction" and concludes that the faculty's interests "cannot be separated from those of the institution." *Ante*, at 688.[6] But the Court's vision is clouded by its failure fully to discern and comprehend the nature of the faculty's role in university governance.

Unlike the purely hierarchical decisionmaking structure that prevails in the typical industrial organization, the bureaucratic foundation of most "mature" universities is characterized by dual authority systems. The primary decisional

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[4] Section 2 (11) of the Act requires, as a condition of supervisory status, that authority be exercised "in the interest of the employer." 29 U. S. C. § 152 (11). See also *NLRB* v. *Master Stevedores Assn.*, 418 F. 2d 140 (CA5 1969); *International Union of United Brewery Workers* v. *NLRB*, 111 U. S. App. D. C. 383, 298 F. 2d 297 (1961).

[5] The Board held hearings over a 5-month period and compiled a record containing more than 4,600 pages of testimony and 200 exhibits.

[6] The Court thus determines that all of Yeshiva's full-time faculty members are managerial employees, even though their role in university decisionmaking is limited to the professional recommendations of the faculty acting as a collective body, and even though they supervise and manage no personnel other than themselves. The anomaly of such a result demonstrates the error in extending the managerial exclusion to a class of essentially rank-and-file employees who do not represent the interests of management and who are not subject to the danger of conflicting loyalties which motivated the adoption of that exemption.

network is hierarchical in nature: Authority is lodged in the administration, and a formal chain of command runs from a lay governing board down through university officers to individual faculty members and students. At the same time, there exists a parallel professional network, in which formal mechanisms have been created to bring the expertise of the faculty into the decisionmaking process. See J. Baldridge, Power and Conflict in the University 114 (1971); Finkin, The NLRB in Higher Education, 5 U. Toledo L. Rev. 608, 614–618 (1974).

What the Board realized—and what the Court fails to apprehend—is that whatever influence the faculty wields in university decisionmaking is attributable solely to its collective expertise as professional educators, and not to any managerial or supervisory prerogatives. Although the administration may look to the faculty for advice on matters of professional and academic concern, the faculty offers its recommendations in order to serve its own independent interest in creating the most effective environment for learning, teaching, and scholarship.[7] And while the administration may attempt to defer to the faculty's competence whenever possible, it must and does apply its own distinct perspective to those recommendations, a perspective that is based on fiscal

[7] As the Board has recognized, due to the unique nature of their work, professional employees will often make recommendations on matters that are of great importance to management. But their desire to exert influence in these areas stems from the need to maintain their own professional standards, and this factor—common to all professionals—should not, by itself, preclude their inclusion in a bargaining unit. See *Westinghouse Electric Corp.*, 113 N. L. R. B. 337, 339–340 (1955). In fact, Congress clearly recognized both that professional employees consistently exercise independent judgment and discretion in the performance of their duties, see 29 U. S. C. § 152 (12), and that they have a significant interest in maintaining certain professional standards, see S. Rep. No. 105, 80th Cong., 1st Sess., 11 (1947). Yet Congress specifically included professionals within the Act's coverage. See *NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267, 298 (1974) (WHITE, J., dissenting in part).

and other managerial policies which the faculty has no part in developing. The University always retains the ultimate decisionmaking authority, see *ante*, at 675–676, and the administration gives what weight and import to the faculty's collective judgment as it chooses and deems consistent with its own perception of the institution's needs and objectives.[8]

The premise of a finding of managerial status is a determination that the excluded employee is acting on behalf of management and is answerable to a higher authority in the exercise of his responsibilities. The Board has consistently implemented this requirement—both for professional and nonprofessional employees—by conferring managerial status only upon those employees "whose interests are closely aligned with management *as true representatives of management.*" (Emphasis added.) *E. g., Sutter Community Hospitals of Sacramento*, 227 N. L. R. B. 181, 193 (1976); *Bell Aero-*

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[8] One must be careful not to overvalue the significance of the faculty's influence on academic affairs. As one commentator has noted, "it is not extraordinary for employees to seek to exert influence over matters embedded in an employment relationship for which they share a concern, or that management would be responsive to their strongly held desires." Finkin, The NLRB in Higher Education, 5 U. Toledo L. Rev. 608, 616 (1974). Who, after all, is better suited than the faculty to decide what courses should be offered, how they should be taught, and by what standards their students should be graded? Employers will often attempt to defer to their employees' suggestions, particularly where—as here—those recommendations relate to matters within the unique competence of the employees.

Moreover, insofar as faculty members are given some say in more traditional managerial decisions such as the hiring and promotion of other personnel, such discretion does not constitute an adequate basis for the conferral of managerial or supervisory status. Indeed, in the typical industrial context, it is not uncommon for the employees' union to be given the *exclusive* right to recommend personnel to the employer, and these hiring-hall agreements have been upheld even where the union requires a worker to pass a union-administered skills test as a condition of referral. See, *e. g., Local 42 (Catalytic Constr. Co.)*, 164 N. L. R. B. 916 (1967); see generally *Teamsters* v. *NLRB*, 365 U. S. 667 (1961).

space, 219 N. L. R. B. 384, 385 (1975); *General Dynamics Corp.*, 213 N. L. R. B. 851, 857 (1974).[9] Only if the employee is expected to conform to management policies and is judged by his effectiveness in executing those policies does the danger of divided loyalties exist.

Yeshiva's faculty, however, is not accountable to the administration in its governance function, nor is any individual faculty member subject to personal sanction or control based on the administration's assessment of the worth of his recommendations. When the faculty, through the schools' advisory committees, participates in university decisionmaking on subjects of academic policy, it does not serve as the "representative of management."[10] Unlike industrial supervisors

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[9] The Board has also explained that the ability of the typical professional employee to influence company policy does not bestow managerial authority:

"Work which is based on professional competence necessarily involves a consistent exercise of discretion and judgment, else professionalism would not be involved. Nevertheless, professional employees plainly are not the same as management employees either by definition or in authority, and managerial authority is not vested in professional employees merely by virtue of their professional status, or because work performed in that status may have a bearing on company direction." *General Dynamics Corp.*, 213 N. L. R. B., at 857–858.

[10] Where faculty members actually do serve as management's representatives, the Board has not hesitated to exclude them from the Act's coverage as managerial or supervisory personnel. Compare *University of Vermont*, 223 N. L. R. B. 423 (1976) (excluding department chairmen as supervisors), and *University of Miami*, 213 N. L. R. B. 634 (1974) (excluding deans as supervisors), with *Northeastern University*, 218 N. L. R. B. 247 (1975) (department chairmen included within bargaining unit because they act primarily as instruments of the faculty), and *Fordham University*, 193 N. L. R. B. 134 (1971) (including department chairmen because they are considered to be representatives of the faculty rather than of the administration). In fact, the bargaining unit approved by the Board in the present case excluded deans, acting deans, directors, and principal investigators of research and training grants, all of whom were deemed to exercise supervisory or managerial authority. See *ante*, at 678, n. 7.

and managers, university professors are not hired to "make operative" the policies and decisions of their employer. Nor are they retained on the condition that their interests will correspond to those of the university administration. Indeed, the notion that a faculty member's professional competence could depend on his undivided loyalty to management is antithetical to the whole concept of academic freedom. Faculty members are judged by their employer on the quality of their teaching and scholarship, not on the compatibility of their advice with administration policy. Board Member Kennedy aptly concluded in his concurring opinion in *Northeastern University*, 218 N. L. R. B. 247, 257 (1975) (footnote omitted):

> "[T]he influence which the faculty exercises in many areas of academic governance is insufficient to make them 'managerial' employees. Such influence is not exercised 'for management' or 'in the interest of the employer,' but rather is exercised in their own professional interest. The best evidence of this fact is that faculty members are generally not held accountable by or to the administration for their faculty governance functions. Faculty criticism of administration policies, for example, is viewed not as a breach of loyalty, but as an exercise in academic freedom. So, too, intervention by the university administration in faculty deliberations would most likely be considered an infringement upon academic freedoms. Conversely, university administrations rarely consider themselves bound by faculty recommendations."

It is no answer to say, as does the Court, that Yeshiva's faculty and administration are one and the same because their interests tend to coincide. In the first place, the National Labor Relations Act does not condition its coverage on an antagonism of interests between the employer and the em-

ployee.[11] The mere coincidence of interests on many issues has never been thought to abrogate the right to collective bargaining on those topics as to which that coincidence is absent. Ultimately, the performance of an employee's duties will always further the interests of the employer, for in no institution do the interests of labor and management totally diverge. Both desire to maintain stable and profitable operations, and both are committed to creating the best possible product within existing financial constraints. Differences of opinion and emphasis may develop, however, on exactly how to devote the institution's resources to achieve those goals. When these disagreements surface, the national labor laws contemplate their resolution through the peaceful process of collective bargaining. And in this regard, Yeshiva University stands on the same footing as any other employer.

Moreover, the congruence of interests in this case ought not to be exaggerated. The university administration has certain economic and fiduciary responsibilities that are not shared by the faculty, whose primary concerns are academic and relate solely to its own professional reputation. The record evinces numerous instances in which the faculty's recommendations have been rejected by the administration on account of fiscal constraints or other managerial policies. Disputes have arisen between Yeshiva's faculty and administration on such fundamental issues as the hiring, tenure, promotion, retirement, and dismissal of faculty members,

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[11] Nor does the frequency with which an employer acquiesces in the recommendations of its employees convert them into managers or supervisors. See *Stop & Shop Cos., Inc.* v. *NLRB*, 548 F. 2d 17, 19 (CA1 1977). Rather, the pertinent inquiries are who retains the ultimate decisionmaking authority and in whose interest the suggestions are offered. A different test could permit an employer to deny its employees the benefits of collective bargaining on important issues of wages, hours, and other conditions of employment merely by consulting with them on a host of less significant matters and accepting their advice when it is consistent with management's own objectives.

academic standards and credits, departmental budgets, and even the faculty's choice of its own departmental representative.[12] The very fact that Yeshiva's faculty has voted for the Union to serve as its representative in future negotiations with the administration indicates that the faculty does not perceive its interests to be aligned with those of management. Indeed, on the precise topics which are specified as mandatory subjects of collective bargaining—wages, hours, and other terms and conditions of employment[13]—the interests of teacher and administrator are often diametrically opposed.

Finally, the Court's perception of the Yeshiva faculty's status is distorted by the rose-colored lens through which it views the governance structure of the modern-day university. The Court's conclusion that the faculty's professional interests are indistinguishable from those of the administration is bottomed on an idealized model of collegial decisionmaking that is a vestige of the great medieval university. But the university of today bears little resemblance to the "community of scholars" of yesteryear.[14] Education has become

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[12] See, *e. g.*, App. 740–742 (faculty hiring); *id.*, at 232–233, 632, 667 (tenure); *id.*, at 194, 620, 742–743 (promotion); *id.*, at 713, 1463–1464 (retirement); *id.*, at 241 (dismissal); *id.*, at 362 (academic credits); *id.*, at 723–724, 1469–1470 (cutback in departmental budget leading to loss of accreditation); *id.*, at 410, 726–727 (election of department chairman and representative).

[13] See 29 U. S. C. § 158 (d).

[14] See generally J. Brubacher & W. Rudy, Higher Education in Transition: A History of American Colleges and Universities, 1636–1976 (3d ed. 1976). In one of its earliest decisions in this area, the Board recognized that the governance structure of the typical modern university does not fit the mold of true collegiality in which authority rests with a peer group of scholars. *Adelphi University*, 195 N. L. R. B. 639, 648 (1972). Accord, *New York University*, 205 N. L. R. B. 4, 5 (1973). Even the concept of "shared authority," in which university decisionmaking is seen as the joint responsibility of both faculty and administration, with each exerting a dominant influence in its respective sphere of expertise, has

"big business," and the task of operating the university enterprise has been transferred from the faculty to an autonomous administration, which faces the same pressures to cut costs and increase efficiencies that confront any large industrial organization.[15] The past decade of budgetary cutbacks, declining enrollments, reductions in faculty appointments, curtailment of academic programs, and increasing calls for accountability to alumni and other special interest groups has only added to the erosion of the faculty's role in the institution's decisionmaking process.[16]

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been found to be "an ideal rather than a widely adopted practice." K. Mortimer & T. McConnell, Sharing Authority Effectively 4 (1978). The authors conclude:

"Higher education is in the throes of a shift from informal and consensual judgments to authority based on formal criteria. . . . There have been changes in societal and legislative expectations about higher education, an increase in external regulation of colleges and universities, an increase in emphasis on managerial skills and the technocratic features of modern management, and a greater codification of internal decision-making procedures. These changes raise the question whether existing statements of shared authority provide adequate guidelines for internal governance." *Id.*, at 269.

[15] In 1976–1977, the total expenditures of institutions of higher education in the United States exceeded $42 billion. National Center for Education Statistics, Digest of Education Statistics 137 (Table 133) (1979). In the same year, Yeshiva University, a private institution, received over $34 million in revenues from the Federal Government. *Id.*, at 132 (Table 127).

[16] University faculty members have been particularly hard hit by the current financial squeeze. Because of inflation, the purchasing power of the faculty's salary has declined an average of 2.9% every year since 1972. Real salaries are thus 13.6% below the 1972 levels. Hansen, An Era of Continuing Decline: Annual Report on the Economic Status of the Profession, 1978–1979, 65 Academe: Bulletin of the American Association of University Professors 319, 323–324 (1979). Moreover, the faculty at Yeshiva has fared even worse than most. Whereas the average salary of a full professor at a comparable institution is $31,100, a full professor at Yeshiva averages only $27,100. *Id.*, at 334, 348. In fact, a severe financial crisis at the University in 1971–1972 forced the president to order a freeze on all faculty promotions and pay increases. App. 1459.

These economic exigencies have also exacerbated the tensions in university labor relations, as the faculty and administration more and more frequently find themselves advocating conflicting positions not only on issues of compensation, job security, and working conditions, but even on subjects formerly thought to be the faculty's prerogative. In response to this friction, and in an attempt to avoid the strikes and work stoppages that have disrupted several major universities in recent years, many faculties have entered into collective-bargaining relationships with their administrations and governing boards.[17] An even greater number of schools—Yeshiva among them—have endeavored to negotiate and compromise their differences informally, by establishing avenues for faculty input into university decisions on matters of professional concern.

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[17] As of January 1979, 80 private and 302 public institutions of higher education had engaged in collective bargaining with their faculties, and over 130,000 academic personnel had been unionized. National Center for the Study of Collective Bargaining in Higher Education, Directory of Faculty Contracts and Bargaining Agents in Institutions of Higher Education i–ii (1979). Although the NLRA is not applicable to any public employer, see 29 U. S. C. § 152 (2), as of 1976, 22 States had enacted legislation granting faculties at public institutions the right to unionize and requiring public employers to bargain with duly constituted bargaining agents. Mortimer & McConnell, *supra* n. 14, at 53. See also Livingston & Christensen, State and Federal Regulation of Collective Negotiations in Higher Education, 1971 Wis. L. Rev. 91, 102.

The upsurge in the incidence of collective bargaining has generally been attributed to the faculty's desire to use the process as a countervailing force against increased administrative power and to ensure that the ideals of the academic community are actually practiced. As the Carnegie Commission found, "[u]nionization for [faculty] is more a protective than an aggressive act, more an effort to preserve the status quo than to achieve a new position of influence and affluence. . . ." Carnegie Commission on Higher Education, Governance of Higher Education 40 (1973). See also Mortimer & McConnell, *supra* n. 14, at 56; Lindeman, The Five Most Cited Reasons for Faculty Unionization, 102 Intellect 85 (1973); Nielsen & Polishook, Collective Bargaining and Beyond, The Chronicle of Higher Education 7 (May 21, 1979).

Today's decision, however, threatens to eliminate much of the administration's incentive to resolve its disputes with the faculty through open discussion and mutual agreement. By its overbroad and unwarranted interpretation of the managerial exclusion, the Court denies the faculty the protections of the NLRA and, in so doing, removes whatever deterrent value the Act's availability may offer against unreasonable administrative conduct.[18] Rather than promoting the Act's objective of funneling dissension between employers and employees into collective bargaining, the Court's decision undermines that goal and contributes to the possibility that "recurring disputes [will] fester outside the negotiation process until strikes or other forms of economic warfare occur." *Ford Motor Co.* v. *NLRB,* 441 U. S. 488, 499 (1979).

III

In sum, the Board analyzed both the essential purposes underlying the supervisory and managerial exclusions and the nature of the governance structure at Yeshiva University. Relying on three factors that attempt to encapsulate the fine distinction between those professional employees who are entitled to the NLRA's protections and those whose managerial responsibilities require their exclusion,[19] the Board concluded

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[18] The Carnegie Commission, in concluding that "faculty members should have the right to organize and to bargain collectively, if they so desire," Carnegie Commission on Higher Education, *supra,* at 43, observed:

"We may be involved in a long-term period of greater social conflict in society and greater tension on campus. If so, it may be better to institutionalize this conflict through collective bargaining than to have it manifest itself with less restraint. Collective bargaining does provide agreed-upon rules of behavior, contractual understandings, and mechanisms for dispute settlement and grievance handling that help to manage conflict." *Id.,* at 51.

[19] Contrary to the Court's assertion, see *ante,* at 685, the Board has not abandoned the "collective authority" and "ultimate authority" branches of its analysis. See Reply Brief for Petitioner in No. 78-857, pp. 11-12, n. 8. Although the "interest/alignment analysis" rationale goes to the

that Yeshiva's full-time faculty qualify as the former rather than the latter. I believe the Board made the correct determination. But even were I to have reservations about the specific result reached by the Board on the facts of this case, I would certainly have to conclude that the Board applied a proper mode of analysis to arrive at a decision well within the zone of reasonableness. Accordingly, in light of the deference due the Board's determination in this complex area, I would reverse the judgment of the Court of Appeals.

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heart of the basis for the managerial and supervisory exclusions and therefore provides the strongest support for the Board's determination, the other two rationales are significant because they highlight two aspects of the university decisionmaking process relevant to the Board's decision: That the faculty's influence is exercised collectively—and only collectively—indicates that the faculty's recommendations embody the views of the rank and file rather than those of a select group of persons charged with formulating and implementing management policies. Similarly, that the administration retains ultimate authority merely indicates that a true system of collegiality is simply not the mode of governance at Yeshiva University.

UNITED STATES ET AL. v. EUGE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 78-1453. Argued November 26, 1979—Decided February 20, 1980

Section 7602 of the Internal Revenue Code of 1954 authorizes the Internal Revenue Service to summon individuals to "appear," and "to produce such books, papers, records, or other data, and to give such testimony," as may be relevant to a tax investigation. During an investigation of respondent's income tax liability, in an effort to determine whether deposits in certain bank accounts not registered in respondent's name represented income attributable to him, an IRS agent issued a summons requiring respondent to appear and execute handwriting exemplars of the various signatures appearing on the bank signature cards. When respondent refused to comply with the summons, the United States brought suit to enforce it. The District Court held that the summons should be enforced, but the Court of Appeals reversed, holding that the summons authority under § 7602 does not authorize the IRS to compel the execution of handwriting exemplars.

Held: The IRS is empowered to compel handwriting exemplars under its summons authority conferred by § 7602. Pp. 710–719.

(a) While § 7602's language may not be explicit in authorizing handwriting exemplars, the duty to appear and give testimony has traditionally encompassed a duty to provide some forms of nontestimonial, physical evidence, including handwriting exemplars. By imposing an obligation to produce documents as well as to appear and give testimony, § 7602's language suggests an intention to codify a broad testimonial obligation, including an obligation to provide some physical evidence relevant and material to a tax investigation. From this authority to compel the production of some physical evidence, it can properly be concluded that the authority extends to the execution of handwriting exemplars, one variety of physical evidence. Pp. 712–714.

(b) This Court has consistently construed congressional intent to require that if the claimed summons authority is necessary for the effective performance of congressionally imposed responsibilities to enforce the Internal Revenue Code, that authority should be upheld absent express statutory prohibition or substantial countervailing congressional policies. Pp. 714–716.

(c) The authority claimed here is necessary for the effective exercise of the IRS's enforcement responsibilities. Handwriting exemplars are often an important evidentiary component in establishing tax liability, the use of such exemplars being an effective method for determining whether a particular name is an alias of a taxpayer. Pp. 716–717.

(d) Moreover, the authority claimed here is entirely consistent with the statutory language and is not in derogation of any countervailing policies or any constitutional rights, compulsion of handwriting exemplars being neither a search or seizure subject to Fourth Amendment protections nor testimonial evidence protected by the Fifth Amendment privilege against self-incrimination. Pp. 717–718.

587 F. 2d 25, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, and POWELL, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and STEVENS, JJ., joined, *post*, p. 719. MARSHALL, J., filed a dissenting opinion, *post*, p. 720.

Stuart A. Smith argued the cause for the United States et al. With him on the brief were *Acting Solicitor General Wallace, Assistant Attorney General Ferguson, Robert E. Lindsay,* and *Carleton D. Powell.*

James W. Erwin, by appointment of the Court, 442 U. S. 915, argued the cause for respondent. With him on the brief were *William L. Hungate* and *Charles A. Newman.*

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

The United States sued in the District Court seeking enforcement of an Internal Revenue Service summons requiring respondent to appear and provide handwriting exemplars. Enforcement was denied by the Court of Appeals for the Eighth Circuit, 587 F. 2d 25 (1978) (en banc), and we granted certiorari.[1] 441 U. S. 942. We now hold that Con-

[1] The Fourth Circuit reached a contrary result in *United States* v. *Rosinsky*, 547 F. 2d 249 (1977). The Sixth Circuit decided this issue in accord with the Eighth Circuit. *United States* v. *Brown*, 536 F. 2d 117 (1976).

gress has empowered the IRS to compel handwriting exemplars under its summons authority conferred by 26 U. S. C. § 7602.

I

The facts are not in dispute. In October 1977, an agent in the Intelligence Division of the Internal Revenue Service was assigned to investigate respondent's income tax liability for the years 1973 through 1976. Respondent had not filed any tax returns for those years. The Service sought to employ the "bank deposits method" of reconstructing respondent's income for those years, as a means of calculating his tax liability. Under this method of proof, the sums deposited in the taxpayer's bank accounts are scrutinized to determine whether they represent taxable income.

During the course of the investigation, the agent found only two bank accounts registered in respondent's name. Twenty other bank accounts were discovered, however, which the agent had reason to believe were being maintained by respondent under aliases to conceal taxable income. The statements for these accounts were sent to post office boxes held in respondent's name; the signature cards for the accounts listed addresses of properties owned by respondent; and the agent had documented frequent transfers of funds between the accounts.

In an effort to determine whether the sums deposited in these accounts represented income attributable to respondent, the agent issued a summons on October 7, 1977, requiring respondent to appear and execute handwriting exemplars of the various signatures appearing on the bank signature cards. Respondent declined to comply with the summons.

The United States commenced this action under 26 U. S. C. § 7604 (a). The District Court held that the summons should be enforced, ordering respondent to provide 10 handwriting exemplars of 8 different signatures. The Court of Appeals reversed, ruling that the summons authority vested in the Internal Revenue Service under 26 U. S. C. § 7602 does not

authorize the IRS to compel the execution of handwriting exemplars.[2]

II

The structure and history of the statutory authority of the Internal Revenue Service to summon witnesses to produce evidence necessary for tax investigations has been repeatedly reviewed by this Court in recent years. See *Reisman* v. *Caplin*, 375 U. S. 440 (1964); *United States* v. *Powell*, 379 U. S. 48 (1964); *Donaldson* v. *United States*, 400 U. S. 517 (1971); *United States* v. *Bisceglia*, 420 U. S. 141 (1975); *Fisher* v. *United States*, 425 U. S. 391 (1976); *United States* v. *LaSalle National Bank*, 437 U. S. 298 (1978). Under § 7602, the Secretary of the Treasury, and therefore the IRS as his designate,[3] is authorized to summon individuals to "appear before the Secretary . . . and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry. . . ."[4] The ques-

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[2] The precise reasons for the court's holding are not clear. In the opinion, the court suggests that the statute does not authorize the IRS to compel a taxpayer to create evidence "out of thin air." 587 F. 2d 25, 27, n. 3 (1978). The opinion also states, however, that it adopts the views expressed in the dissenting opinion in *United States* v. *Campbell*, 524 F. 2d 604, 608 (CA8 1975). The principal reason forwarded in that decision for declining to construe § 7602 to authorize production of handwriting exemplars was the conclusion that such an order would constitute a seizure in violation of the Fourth Amendment. As discussed *infra*, neither rationale supports the conclusion reached by the Court of Appeals.

[3] Responsibility for administration and enforcement of the revenue laws is vested in the Secretary of the Treasury. 26 U. S. C. § 7801 (a). The Internal Revenue Service, however, is organized to carry out those responsibilities for the Secretary. See *Donaldson* v. *United States*, 400 U. S., at 534; 35 Fed. Reg. 2417 *et seq.* (1970). For the purposes of this opinion, we refer to the authority and responsibilities of the Secretary and the Service interchangeably.

[4] "SEC. 7602. Examination of Books and Witnesses.

"For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person

tion presented here is whether this power to compel a witness to "appear," to produce "other data," and to "give testimony," includes the power to compel the execution of handwriting exemplars. We conclude that it does, for several reasons. While the language may not be explicit in its authorization of handwriting exemplars, the duty to appear and give testimony, a duty imposed by § 7602, has traditionally encompassed a duty to provide some forms of nontestimonial, physical evidence, including handwriting exemplars. Further, this Court has consistently construed congressional intent to require that if the summons authority claimed is necessary for the effective performance of congressionally imposed responsibilities to enforce the tax Code, that authority should be upheld absent express statutory prohibition or substantial countervailing policies. The authority claimed here is necessary for the effective exercise of the Service's enforcement responsibilities; it is entirely consistent with the statutory language; and it is not in derogation of any constitutional rights or countervailing policies enunciated by Congress.

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for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

"(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

"(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

"(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry."

A

Through § 7602, Congress has imposed a duty on persons possessing information "relevant or material" to an investigation of federal tax liability to produce that information at the request of the Secretary or his delegate. That duty to provide relevant information expressly obligates the person summoned to produce documentary evidence and to "appear" and "give testimony." Imposition of such an evidentiary obligation is, of course, not a novel innovation attributable to § 7602. The common law has been the source of a comparable evidentiary obligation for centuries. In determining the scope of the obligation Congress intended to impose by use of this language, we have previously analogized, as an interpretive guide, to the common-law duties attaching to the issuance of a testimonial summons. See *United States* v. *Bisceglia*, *supra*, at 147–148; *United States* v. *Powell*, *supra*, at 57. Congress, through legislation, may expand or contract the duty imposed,[5] but absent some contrary expression, there is a wealth of history helpful in defining the duties imposed by the issuance of a summons.

The scope of the "testimonial"[6] or evidentiary duty imposed by common law or statute has traditionally been interpreted as an expansive duty limited principally by relevance and privilege. As this Court described the contours of the duty in *United States* v. *Bryan*, 339 U. S. 323, 331 (1950): "[P]ersons summoned as witnesses by competent authority have certain minimum duties and obligations which are necessary concessions to the public interest in the orderly operation of legislative and judicial machinery. . . . We have often iterated the importance of this public duty, which every person within

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[5] Legislative efforts to *expand* the scope of the testimonial obligation would, of course, be limited by the applicable constitutional guarantees.

[6] The word "testimony" has been used loosely in this context to refer to physical and documentary, as well as oral, evidence. See 8 J. Wigmore, Evidence § 2194, p. 76 (McNaughton Rev. 1961).

the jurisdiction of the Government is bound to perform when properly summoned." While the Court recognized that certain exemptions would be upheld, the "primary assumption" was that a summoned party must "give what testimony one is capable of giving" absent an exemption "grounded in a substantial individual interest which has been found, through centuries of experience, to outweigh the public interest in the search for truth." *Ibid.*

One application of this broad duty to provide relevant evidence has been the recognition, since early times, of an obligation to provide certain forms of nontestimonial physical evidence.[7] In *Holt* v. *United States*, 218 U. S. 245, 252–253 (1910) (Holmes, J.), the Court found that the common-law evidentiary duty permitted the compulsion of various forms of physical evidence. In *Schmerber* v. *California*, 384 U. S. 757, 764 (1966), this Court observed that traditionally witnesses could be compelled, in both state and federal courts, to submit to "fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture." See also *United States* v. *Wade*, 388 U. S. 218 (1967). In *Gilbert* v. *California*, 388 U. S. 263, 266–267 (1967), handwriting was held, "like the . . . body itself" to be an "identifying physical characteristic," subject to production. In *United States* v. *Dionisio*, 410 U. S. 1 (1973), and *United States* v. *Mara*, 410 U. S. 19 (1973), this Court again confirmed that handwriting is in the nature of physical evidence which can be compelled by a grand jury in the exercise of its subpoena power. See also *United States* v. *Mullaney*, 32 F. 370 (CC Mo. 1887).

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[7] Wigmore has identified the testimonial duty as including an obligation "to disclose for the purpose of justice all that is in his control which can serve the ascertainment of the truth, [and] this duty includes not only mental impressions preserved in his brain and the documents preserved in his hands, but also the corporal facts existing on his *body*." *Ibid.*

This broad duty to provide most relevant, nonprivileged evidence has not been considered to exist only in the common law. The Court has recognized that by statute "Congress may provide for the performance of this duty." *Blackmer* v. *United States*, 284 U. S. 421, 438 (1932). By imposing an obligation to produce documents as well as to appear and give testimony, we believe the language of § 7602 suggests an intention to codify a broad testimonial obligation, including an obligation to provide some physical evidence relevant and material to a tax investigation, subject to the traditional privileges and limitations. This conclusion seems inherent in the imposition of an obligation to "appear," since an obligation to appear necessarily entails an obligation to display physical features to the summoning authority. Congress thereby authorized the Service to compel the production of some physical evidence, and it is certainly possible to conclude that this authorization extended to the execution of handwriting exemplars, one variety of relevant physical evidence. This construction of the language conforms with the historical notions of the testimonial duty attaching to the issuance of a summons.[8]

B

Congress certainly could have narrowed the common-law testimonial duty in enacting § 7602, and thus we do not rely solely on the common-law meaning of the statutory language. Section 7602 does not, by its terms, compel the production of handwriting exemplars, and therefore, a narrower interpretation of the duty imposed is not precluded by the actual language of the statute. A narrower interpretation *is* precluded, however, by the precedents of this Court construing that statute. As early as 1911, this Court established the benchmarks for interpreting the authority of the Internal Revenue Service

[8] As indicated elsewhere, we do not suggest that the evidentiary obligation codified in § 7602 in all respects conforms to the common law. We rely on the analogy only as one interpretive *guide*. *Supra*, at 712.

to enforce tax obligations in holding that, "the administration of the statute may well be taken to embrace all appropriate measures for its enforcement, [unless] there is . . . substantial reason for assigning to the phrase[s] . . . a narrower interpretation." *United States* v. *Chamberlin,* 219 U. S. 250, 269. This precise mode of construction has consistently been applied by this Court in construing the breadth of the summons authority Congress intended to confer in § 7602. In *United States* v. *Powell,* 379 U. S. 48 (1964), the Court declined to construe § 7605 (b), prohibiting the Secretary from conducting "unnecessary examination[s]," to require probable cause for the issuance of a § 7602 summons. The Court found that "[a]lthough a more stringent interpretation is possible, one which would require some showing of cause for suspecting fraud, we reject such an interpretation because it might seriously hamper the Commissioner in carrying out investigations he thinks warranted. . . ." 379 U. S., at 53–54. In *Donaldson* v. *United States,* 400 U. S. 517 (1971), the Court refused to hold that the summons authority could not be used whenever there was a potential that the civil investigation might later lead to criminal prosecution. In construing the scope of the summons authority, the Court emphasized that it refused to draw the line in a manner that would "stultify enforcement of federal law." *Id.,* at 536. Finally, in *United States* v. *Bisceglia,* 420 U. S. 141 (1975), the Court upheld the Service's authority to issue a John Doe summons to a bank in order to discover the identity of an individual unknown to the Service. The Court reasoned that absent that construction, "no meaningful investigation of such events could be conducted" and thus "[s]ettled principles of statutory interpretation require that we avoid such a result absent unambiguous directions from Congress." *Id.,* at 150. There is thus a formidable line of precedent construing congressional intent to uphold the claimed enforcement authority of the Service if authority is necessary for the effective enforcement of the

revenue laws and is not undercut by contrary legislative purposes.[9]

Applying these principles, we conclude that Congress empowered the Service to seek, and obliged the witness to provide, handwriting exemplars relevant to the investigation. First, there is no question that handwriting exemplars will often be an important evidentiary component in establishing tax liability. The statutory framework, as reviewed in the numerous precedents recited, *supra*, imposes on the Secretary of the Treasury, and the IRS as his designate, a broad duty to enforce the tax laws. 26 U. S. C. § 7601 (a). Congress has legislated that the Secretary is "required to make the inquiries, determinations, and assessments of all taxes . . . imposed by this title. . . ." 26 U. S. C. § 6201 (a). Under § 6301 the Secretary "shall collect the taxes imposed by the internal revenue laws." In order to fulfill these duties, the Service will often need to determine whether a particular name is an alias of a taxpayer. One effective method for resolving that issue is through the use of handwriting exemplars.[10] As we recognized in *Bisceglia*, the IRS does have a need for investigative devices which assist them in ascertaining the identity of tax

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[9] Congressional intent to provide the Secretary with broad latitude to adopt enforcement techniques helpful in the performance of his tax collection and assessment responsibilities is expressed throughout the Code. In § 6302, for example, Congress has conferred the Secretary with discretion to devise methods of tax collection not specifically provided by statute:

"Whether or not the method of collecting any tax imposed . . . is specifically provided for by this title, any such tax may . . . be collected by . . . other reasonable devices or methods as may be necessary or helpful in securing a complete and proper collection of the tax."

[10] The United States suggests there are numerous uses of handwriting exemplars helpful to the Service. Not only are they useful in identifying the holder of a bank account, but they are also said to be useful for identifying persons who file multiple tax returns under false names claiming income tax refunds, purchase of money orders under false names, and forgery of joint returns to take advantage of lower joint rates.

evaders. In *Bisceglia,* we held, in language relevant to this case:

> "[I]f criminal activity is afoot the persons involved may well have used aliases or taken other measures to cover their tracks. Thus, if the Internal Revenue Service is unable to issue a summons to determine the identity of such persons, the broad inquiry authorized by § 7601 will be frustrated in this class of cases. Settled principles of statutory interpretation require that we avoid such a result absent unambiguous directions from Congress." 420 U. S., at 150.

There is certainly nothing in the statutory language,[11] or in the legislative history,[12] precluding the interpretation

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[11] Respondent argues that the language of § 7602 suggests that it only requires the production of documents already in existence. Since handwriting exemplars must be created by the witness, it is argued that the statute is inapplicable. First, we do not view the exhibition of physical characteristics to be equivalent to the creation of documentary evidence. See *United States* v. *Dionisio,* 410 U. S. 1, 6 (1973). Further, the statute obviously contemplates the transformation of some evidence not formerly tangible, since it obligates the summoned individual to provide testimony. The testimony, of course, creates evidence not previously in existence. We see no difference between the nature of the evidence created when the witness is ordered to talk and that created when he is ordered to write.

We express no opinion on the scope of the Service's authority to otherwise order the witness to generate previously nonexistent documentation under § 7602. The Service in fact has expressly disclaimed any intention to order the creation of documents. The Internal Revenue Manual § 4022.64 (4) (CCH 1977) provides that an administrative summons:

"should not require the witness to do anything other than to appear on a given date to give testimony and to bring with him/her existing books, papers and records. A witness cannot be required to prepare or create documents."

The section states, however, that "[t]he giving of exemplars, for example, handwriting exemplars, at an appearance pursuant to a summons is not 'creating a document.'"

[12] The legislative history is simply unilluminating. The only conclusion which that history supports is that Congress did not intend to change the

asserted by the Service. Nor is there any constitutional privilege of the taxpayer or other parties that is violated by this construction. Compulsion of handwriting exemplars is neither a search or seizure subject to Fourth Amendment protections, *United States* v. *Mara*, 410 U. S. 19 (1973), nor testimonial evidence protected by the Fifth Amendment privilege against self-incrimination. *Gilbert* v. *California*, 388 U. S. 263 (1967). The compulsion of handwriting exemplars has been the subject of far less protection than the compulsion of testimony and documents.[13] Since Congress has explicitly established an obligation to provide the more protected forms of evidence, it would seem curious had it chosen not to impose an obligation to produce a form of evidence tradition has found it less important to protect.[14]

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expanse of the § 7602 summons authority by its amendments in 1954. H. R. Rep. No. 1337, 83d Cong., 2d Sess. (1954); S. Rep. No. 1622, 83d Cong., 2d Sess. (1954). Since there are no pre-1954 interpretations of the statute precluding the issuance of handwriting exemplars, the legislative history sheds no light on the construction intended by Congress.

[13] *Gilbert* v. *California*, 388 U. S. 263 (1967), demonstrates the minimal level of protection afforded handwriting exemplars, and the reasons why such protection is unnecessary. The Court found that production of the exemplars was not subject to the Fifth Amendment privilege, and that their creation did not represent a critical stage requiring counsel. The Court found only a "minimal risk that the absence of counsel might derogate from [a] right to a fair trial." *Id.*, at 267. The Court concluded that "[i]f, for some reason, an unrepresentative exemplar is taken, this can be brought out and corrected through the adversary process at trial since the accused can make an unlimited number of additional exemplars for analysis and comparison by government and defense handwriting experts." *Ibid.*

[14] *Palmer* v. *United States*, 530 F. 2d 787 (CA8 1976), similarly construed 28 U. S. C. § 1826 (a). That statute authorizes the imposition of contempt on witnesses who refuse to "testify or provide other information." The statute does not explicitly authorize contempt sanctions for refusal to execute handwriting exemplars. The court found that the legislative history indicated that Congress had intended, through the use of the language employed in the statute, to "codify present civil contempt practice." Since that practice had included the power to punish a witness for refusing

As we have emphasized in other cases dealing with § 7602 proceedings, the summoned party is entitled to challenge the issuance of the summons in an adversary proceeding in federal court prior to enforcement, and may assert appropriate defenses. See *Bisceglia,* 420 U. S., at 151. The Service must also establish compliance with the good-faith requirements recognized by this Court, *United States* v. *LaSalle National Bank,* 437 U. S., at 318, and with the requirement of § 7605 (b) that "[n]o taxpayer shall be subjected to unnecessary examination or investigation. . . ." These protections are quite sufficient to lead us to refuse to strain to imply additional ones from the neutral language Congress has used in § 7602.

We accordingly reverse the judgment of the Court of Appeals refusing enforcement of the summons.

Reversed.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL and MR. JUSTICE STEVENS join, dissenting.

The Internal Revenue Service, unlike common-law courts, has only such authority as Congress gives it. Cf. *United States* v. *LaSalle National Bank,* 437 U. S. 298, 307 (1978) (validity of Service summonses depends on "whether they were among those authorized by Congress"). Congress has granted the Service authority to summon individuals "to appear before the Secretary . . . at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry. . . ." 26 U. S. C. § 7602. The Court holds today that this authority to compel "testimony" includes authority to compel the creation of handwriting exemplars.[1]

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to create a handwriting exemplar, the court reasoned that Congress must have thought this phrasing adequate to cover production of handwriting samples.

[1] The Court also places some reliance on the word "appear," which the Court suggests "necessarily entails an obligation to display physical fea-

The Court, however, is unable to point to anything in the statutory language or legislative history that even suggests that the obligation to "give testimony" includes an obligation to *create* a handwriting exemplar. Indeed, the Court concedes, as it must, that a handwriting exemplar is a kind of *nontestimonial* physical evidence.[2] Certainly, Congress has the power to authorize the Service to compel the creation of exemplars, but it has not chosen to do so in § 7602.[3] Accordingly, I dissent.

MR. JUSTICE MARSHALL, dissenting.

In my view, the Fifth Amendment's privilege against compulsory self-incrimination prohibits the Government from requiring a person to provide handwriting exemplars. As I stated in my dissenting opinion in *United States* v. *Mara*, 410 U. S. 19, 33 (1973), "I cannot accept the notion that the Government can compel a man to cooperate affirmatively in securing incriminating evidence when that evidence could not be obtained without the cooperation of the suspect." The Fifth Amendment privilege is rooted in "the basic stream of religious and political principle[,] . . . reflects the limits of the individual's attornment to the state," *In re Gault*, 387

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tures to the summoning authority." *Ante*, at 714. Plainly "appear" adds nothing to the authority of the Service. The word is used only to indicate that the person summoned must deliver the requested testimony or documents at the designated time and place.

[2] The Court's use of the label "nontestimonial" is meaningful, for "[t]estimony properly means only such evidence as is delivered by a witness . . . , either orally or in the form of affidavits or depositions." Black's Law Dictionary 1324 (5th ed. 1979). Testimony is a statement of knowledge or belief by a witness as opposed to the mere display of a physical characteristic.

[3] Even if I thought the statute were ambiguous, I would reach the same result because I strongly believe that "until Congress has stated otherwise, our duty to protect the rights of the individual should hold sway over the interest in more effective law enforcement." *Dalia* v. *United States*, 441 U. S. 238, 263 (1979) (STEVENS, J., dissenting).

U. S. 1, 47 (1967), and embodies the "respect a government—state or federal—must accord to the dignity and integrity of its citizens," *Miranda* v. *Arizona,* 384 U. S. 436, 460 (1966). I continue to believe, then, that "[i]t is only by prohibiting the Government from compelling an individual to cooperate affirmatively in securing incriminating evidence which could not be obtained without his active assistance, that 'the inviolability of the human personality' is assured." *United States* v. *Mara, supra,* at 34–35 (dissenting opinion) (quoting *Miranda* v. *Arizona, supra,* at 460).

In order to avoid this constitutional problem, I agree with my Brother BRENNAN, see *ante,* p. 719, that 26 U. S. C. § 7602 should be construed not to permit Internal Revenue Service personnel to compel the production of handwriting exemplars. Accordingly, I dissent.

Reporter's Note

Orders commencing with February 4, 1980, begin with page 1050. The preceding orders in 444 U. S., from October 1, 1979, through January 21, 1980, were reported in Parts 1 and 2 at 801–1049. These page numbers are the same as they will be in the bound volume, thus making the *permanent* citations available upon publication of the preliminary prints of the United States Reports.

FEBRUARY 4, 1980

Dismissal Under Rule 60

No. 79-847. SANDINI *v.* UNITED STATES. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 60.

FEBRUARY 12, 1980

Dismissal Under Rule 60

No. 79-713. MORRILTON SCHOOL DISTRICT No. 32 ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari dismissed as to petitioner Plumerville School District No. 39 under this Court's Rule 60. Reported below: 606 F. 2d 222.

FEBRUARY 19, 1980

Affirmed on Appeal

No. 79-504. UNITED STATES ET AL. *v.* MISSISSIPPI; and

No. 79-528. HENRY ET AL. *v.* MISSISSIPPI. Affirmed on appeal from D. C. D. C. Reported below: — F. Supp. —.

MR. JUSTICE STEVENS, concurring in the judgment.

In 1965, a three-judge District Court was convened in Mississippi to deal with allegations of malapportionment in Mississippi's State Legislature. By 1975, an acceptable reapportionment plan still had not been formulated; nevertheless, quadrennial elections were held under a court-ordered plan.[1] In 1978, the Mississippi Legislature enacted a statutory reapportionment plan, which was submitted to the Attorney General of the United States for preclearance under the Voting Rights Act of 1965, 79 Stat. 437, as amended, 42 U. S. C. § 1973 *et seq.* When the Attorney General objected to the plan, the State brought this action in a three-judge District Court in the District of Columbia, seeking a declaratory judgment that the plan was in compliance with the Act. In 1979, while the Voting Rights Act case was still pending, the three-judge court in Mississippi entered a judgment putting into

[1] The history of that litigation is described at length in MR. JUSTICE MARSHALL's dissenting opinion in *Connor* v. *Coleman*, 440 U. S. 612, 614.

effect a reapportionment plan agreed to by all parties. *Connor* v. *Finch,* 469 F. Supp. 693 (SD Miss.). That plan was essentially a modified version of the statutory plan.

Under the Voting Rights Act the task confronting the District of Columbia court was to determine whether the statutory plan had the purpose or effect of denying or abridging the right to vote on account of race or color. 42 U. S. C. § 1973c. An impermissible effect is created whenever a reapportionment plan has the effect of diluting existing black voting strength. See *Beer* v. *United States,* 425 U. S. 130, 141. The District of Columbia court compared the statutory reapportionment plan to the 1979 court-ordered plan in order to determine whether any prohibited retrogression had occurred. Concluding that it had not and that there was no purpose to discriminate evident in the statutory plan, the court granted the State a declaratory judgment approving the plan. Both the United States and intervenors (black voters in Mississippi) appealed. The Court today affirms, without opinion.

In my judgment the only significant issue presented on appeal is whether the statutory plan had the impermissible effect of diluting black voting strength. In his dissenting opinion MR. JUSTICE MARSHALL presents a persuasive case that there were significant discrepancies between the statutory plan and the 1979 court-ordered plan. Because I believe that the 1979 plan was not the proper benchmark to be used in determining whether there was an impermissible effect, I have no occasion to comment on his conclusion that the differences between the two plans were sufficient to constitute a "dilution" of black voting strength.

As a technical matter, the court-ordered plan was the plan "in effect" at the time the District of Columbia court decided the case.[2] Nevertheless, all of the parties to both actions realized that the statutory plan would be used in the 1979

[2] The statutory plan could not become effective until it was cleared pursuant to the Voting Rights Act by either the Attorney General or the three-judge court in the District of Columbia. *Connor* v. *Waller,* 421

elections if it received court approval in time. See *Connor* v. *Coleman*, 440 U. S. 612, 622 (MARSHALL, J., dissenting). Thus, in practical terms, the court-ordered plan was never more than a backup. To use such a plan as a benchmark for judging the effect of the statutory plan on voting rights seems to me to be logically indefensible. No voting rights in Mississippi were ever affected by the backup plan and thus any "changes" due to the imposition of the statutory plan could hardly have diluted those rights. Moreover, to require a state legislature to predict what court-ordered plans may be entered while a Voting Rights Act suit is pending and then to draw its plan to ensure that no dilution occurs seems to me to be a futile exercise clearly not required by the statute.

Thus, in my view the statutory plan was permissible under the Act so long as it did not have a discriminatory purpose and did not dilute black voting strength as it existed at the time the legislation was passed. The District Court's findings of fact make it clear that the plan met these conditions.[3] I therefore concur in the judgment affirming the decision of the court below.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN and MR. JUSTICE WHITE join, dissenting.

For more than 15 years private litigants, often joined by the United States, have sought to obtain an apportionment

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U. S. 656. The judgment entered by the Mississippi court, on the other hand, specifically provided that the court-ordered plan was to be in "full force and effect for the 1979 regular state legislative elections and thereafter unless and until altered according to law." *Connor* v. *Finch*, 469 F. Supp. 693, 694 (SD Miss. 1979). Thus, the court-ordered plan would have remained in effect if the District of Columbia court had not approved the statutory plan.

[3] The court noted that when compared to the 1975 apportionment plan that had governed the last elections, the statutory plan constituted a "clear enhancement of the position of racial minorities with respect to their effective exercise of the electoral franchise. . . ." App. to Juris. Statement in No. 79-504, p. 32a, n. 6.

plan in Mississippi which satisfies the requirements of the Equal Protection Clause and the Voting Rights Act of 1965. By today's summary affirmance, the Court assures that these efforts will remain to a substantial degree unsuccessful. I dissent.

I

Brought in 1965, this case has a procedural history that can charitably be described as bizarre. Both state officials and the three-judge District Court for the Southern District of Mississippi have shown a firm determination to avoid implementation of an apportionment plan which complies with constitutional and statutory requirements.[1] The case has been before this Court no fewer than eight times; we have invalidated plans proposed by the District Court on four occasions. *Connor* v. *Johnson*, 402 U. S. 690 (1971); *Connor* v. *Williams*, 404 U. S. 549 (1972); *Connor* v. *Waller*, 421 U. S. 656 (1975); *Connor* v. *Finch*, 431 U. S. 407 (1977).

In *Connor* v. *Finch*, we ordered the District Court to draw a lawful apportionment plan "with a compelling awareness of the need for its expeditious accomplishment, so that the citizens of Mississippi at long last will be enabled to elect a legislature that properly represents them." *Id.*, at 426. Two more years passed, and no such plan was drawn. When the case was here last Term, the plaintiffs sought leave to file a petition for a writ of mandamus to require the District Court to do what we have ordered. On March 26, 1979, the Court granted leave to file the petition, but it postponed action for 30 days, instructing the District Court to enter a plan "forthwith and without further delay." *Connor* v. *Coleman*, 440 U. S. 612, 614.[2] On April 13, 1979, the District Court entered a final judgment embodying a plan agreed to by all

[1] The procedural background is described in detail in my dissenting opinion in *Connor* v. *Coleman*, 440 U. S. 612, 614–621 (1979).

[2] I would have issued the writ immediately. See *Connor* v. *Coleman*, *supra*, at 614 (dissenting opinion).

parties.[3] Unfortunately, this settlement plan did not end the litigation.

Almost a year earlier, on April 21, 1978, the Governor of Mississippi had approved a statutory reapportionment plan designed to supersede any court-ordered plan to be produced in this litigation. The statutory plan was submitted to the Attorney General of the United States for preclearance under the Voting Rights Act of 1965, 42 U. S. C. § 1973 *et seq.* On July 31, 1978, the Attorney General entered a timely objection on the ground that the State had failed to carry its burden of proving the absence of a discriminatory purpose or effect. See 42 U. S. C. § 1973c. The State of Mississippi filed the present action in the United States District Court for the District of Columbia, seeking a declaratory judgment under the Voting Rights Act that the statutory plan did not have the prohibited purpose or effect. Ten Mississippi Negro voters intervened, urging that the statutory plan be declared invalid. On June 1, 1979, the District Court entered the declaration requested by the State, and it is that judgment which is the subject of the present appeal.

II

The legality of the statutory plan depends on whether it has the purpose or effect of diluting Negro voting strength in Mississippi. If the statutory plan is retrogressive, it is forbidden under the Voting Rights Act. *Beer* v. *United States*, 425 U. S. 130 (1976). The District Court correctly measured the statutory plan against the present apportionment of the Mississippi Legislature, which is the settlement plan embodied in the final judgment entered by the District Court for the

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[3] The petition for a writ of mandamus was denied on May 21, 1979, *Connor* v. *Coleman*, 441 U. S. 792; we noted that the Clerk of the District Court had "stated that all parties to the litigation have announced in open court that there will be no appeal." *Ibid.*

Southern District of Mississippi in response to our instruction to enter a plan "forthwith and without further delay." [4]

The District Court's findings reveal a long history of denial of Negro voting rights in Mississippi. Official use of racially discriminatory devices such as literacy tests, poll taxes, and white primaries effectively excluded Negroes from participation in the electoral process until the passage of the Voting Rights Act in 1965. The current effects of past discrimination are manifested in serious underrepresentation of Negroes in the state legislature. Although the latest census showed that Mississippi's population is 36.8% Negro, prior to the 1979 elections there were only four Negroes in the 122-member House of Representatives and none in the 52-member Senate. Because of racial bloc voting and low Negro voter registration and turnout, Negroes must constitute a substantial majority of citizens in a district in order to have a reasonable opportunity to elect a candidate of their choice. The court concluded that either a Negro population of 65% or a Negro voting age population of 60% was necessary to provide such an opportunity.

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[4] The argument that retrogression should be measured against the 1975 court-ordered plan which was in effect when the legislature adopted the statutory plan is manifestly incorrect. The mandate of the Voting Rights Act is that a plan may not be adopted if it would dilute existing Negro voting strength. There is no dispute that the 1979 court-ordered plan was the governing law at the time the court below rendered its decision. If the statutory plan were not put into effect, future elections would be conducted under the court-ordered plan. Accordingly, it is simply incorrect to suggest that Negro voting rights were not "affected" by the 1979 court-ordered plan or that a subsequent statutory plan could not dilute the rights won under that plan. To suggest, as does MR. JUSTICE STEVENS, *ante*, that the court-ordered plan that is now the law in Mississippi may be disregarded because the parties viewed it as a mere "backup" not only denigrates a final judgment of a federal court, entered at our direction after over a decade of litigation; it would also permit a state legislature freely to dilute Negro voting strength gained through any court-ordered plan under which elections had not yet been held. Such a result is plainly contrary to the Voting Rights Act.

It is evident from the findings of the District Court that the statutory plan significantly weakens the voting strength of Negroes in a number of ways. The statutory plan divides and diminishes Negro population concentrations, combines them with heavily white populations, and creates oddly shaped districts for no apparent reason other than to dilute the Negro vote. Under the plan presently in effect, 49 districts contain a majority of Negro voters; the statutory plan contains only 46 such districts. As the District Court acknowledged, under "the statutory plan's redistricting of Warren County, a heavy black population concentration is divided among three proposed house districts, turning a black majority into a black minority in all three districts." App. to Juris. Statement in No. 79-504, pp. 18a-19a.

The court concluded that the elimination of three majority districts was insignificant, relying on its finding that a Negro voting-age population of 60% was necessary in order for Negroes to have a fair opportunity to elect a candidate of their choice. Apparently the court reasoned that the diminution in the number of districts with a mere majority of Negro voters was not retrogressive since even under the plan presently in effect, Negro voters in those districts could not elect candidates. But a majority population gives Negroes at least some opportunity to elect a candidate of their choice; a minority gives them practically none. Indeed, in some of the counties with Negro majorities under the existing plan but not under the statutory plan, Negroes have been extremely active in city government and have a genuine opportunity to elect a candidate of their choice.[5] The District Court's mechanical application of the 60% standard eliminates that opportunity.

In a number of other districts appellees failed to carry

[5] For example, in the Warren County district the community of Vicksburg has recently elected a Negro to the City Council. In addition, Bolton and Edwards, primarily Negro towns in the Hinds County district, have predominantly Negro city governments.

their burden of disproving retrogression within the meaning of *Beer*. In Leflore County, for example, existing law provides for a Negro voting-age population of 71.72%; the statutory plan reduces that population to 64.26%. The statutory plan fragments a heavily Negro population in that county, combining the larger portion with a white community. The record showed that because of past discrimination, Negro voting strength was severely inhibited in the county, in part because most Negroes reside in rural areas, where voter turnout is far less than in urban districts. There was testimony that a 65% Negro voting-age population substantially composed of rural Negroes was insufficient to provide a fair opportunity to elect candidates. By contrast, the 71.72% population provided by the existing plan is fully adequate.

The District Court's findings show that the statutory plan fragments a number of cohesive voting districts, combining communities where Negroes have been politically active with white populations for no discernible reason. There was uncontradicted testimony that in seven districts, the statutory plan deprives Negro voters of an opportunity to elect a candidate of their choice.[6] In these circumstances, I am unable to accept

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[6] For example, in western Hinds County, a heavily Negro district under the present law is divided into three sections, each of which is combined with greater white populations in surrounding suburbs. In Marshall County, the only district that has elected a Negro supervisor is split up, and the voting strength of Negro voters in the county's House district is diluted by the inclusion of the predominantly white Holly Springs precinct. The county's Negro voting population is thus reduced from 62% to 56%. In Adams County, the statutory plan divides the only supervisors' district with a majority Negro population into two districts. The northern portion of Adams County is then combined with heavily white populations, which reduces the Negro population from almost 70% to 63%.

The District Court altogether ignored the retrogression in the electoral strength of Negro voters within the counties. This was a serious error, for county delegations to the Mississippi Legislature play a crucial role in local government. Legislation affecting the county is enacted by a scheme

the conclusion that the statutory plan would not lead to a retrogression in the position of Negro voters.

The District Court acknowledged these differences between the two plans, but upheld the statutory plan nonetheless, concluding that the differences were insufficient to constitute a discriminatory effect. The court pointed out that both plans had the same number of districts with Negro voting-age populations of 60% or more, and it relied heavily on "the fact that legislative reapportionment is the preferred vehicle for reapportionment, as is reflected by the broader tolerances which are allowed to legislatures, but not to courts, in the matter of deviations from uniform population requirements." App. to Juris. Statement in No. 79–504, p. 32a.[7] It also relied on findings that the intervenors had not offered sufficient objections during the formulation of the statutory plan.

The District Court's reasoning amounts to a conclusion that there is a *de minimis* exception to the fundamental proposition that changes may not be made if they would produce a retrogression in the electoral potential of Negro voters. *Beer* v. *United States*, 425 U. S. 130 (1976). I am unable to dis-

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of bills of local application in the state legislature; boards of supervisors exercise little legislative power. As a result, the county delegation is largely responsible for local governance. If the statutory plan is viewed from the perspective of particular counties, it is even more difficult to account for the District Court's finding that any retrogression was "insignificant."

[7] The court also found that the State had carried its burden of proving that the statutory plan was not the product of a discriminatory intent, a conclusion that is in my view highly questionable. The unexplained discriminatory elements of the statutory plan, when combined with the State's prior history of discrimination, suggest that the State had not carried its burden. Indeed, the court entirely ignored testimony tending to show that members of the state legislature's joint reapportionment committee were aware that the statutory plan dilutes the strength of the Negro vote and that alternative configurations would preserve existing Negro population concentrations.

cern such an exception in the Voting Rights Act or in any of our decisions. Such a gloss on the Act would invite a series of changes, seemingly insignificant in themselves, which over the course of years could result in a substantial decline in Negro voting strength. Nor is the decision below justified by the principle that legislatures may deviate more broadly than courts from uniform population requirements. The Voting Rights Act flatly prohibits state legislatures from "'undo[ing] or defeat[ing] the rights recently won' by Negroes." *Beer* v. *United States, supra,* at 140. Finally, the asserted failure of the intervenors to offer sufficient objections to the statutory plan is wholly irrelevant to the inquiry required by the Voting Rights Act. The Act's proscription on retrogression is simply not subject to waiver. The District Court's conclusion would permit a State freely to dilute Negro voting strength whenever the Negro community is unable or unwilling to participate in the apportionment process.

By today's summary affirmance, the Court permits the rights won less than a year ago, after generations of political efforts and well over a decade of litigation, to be thwarted by recalcitrant state officials. In so doing, the Court appears to condone a novel interpretation of the law that would find a *de minimis* exception to the clear and absolute requirements of the Voting Rights Act, and sanctions the application of this new doctrine to a case in which, as the record amply demonstrates, the dilution of Negro voting strength is not *de minimis* at all, but substantial. The plan approved today ensures that the Negro voters of Mississippi will not yet obtain an apportionment plan which meets the requirements of the Act. I dissent.

No. 79–555. DONNELL ET AL. *v.* UNITED STATES ET AL. Affirmed on appeal from D. C. D. C. MR. JUSTICE BRENNAN and MR. JUSTICE WHITE would note probable jurisdiction and set case for oral argument.

Appeals Dismissed

No. 78-1914. UNIROYAL ENGLEBERT BELGIQUE, S. A. *v.* CONNELLY. Appeal from Sup. Ct. Ill. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 75 Ill. 2d 393, 389 N. E. 2d 155.

No. 79-771. ORR *v.* ORR. Appeal from Ct. Civ. App. Ala. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 374 So. 2d 895.

No. 79-894. PARKER *v.* TEXAS. Appeal from Ct. Crim. App. Tex. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 578 S. W. 2d 755.

No. 79-825. BAKER ET AL. *v.* OREGON STATE BAR ET AL. Appeal from Ct. App. Ore. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 40 Ore. App. 133, 595 P. 2d 850.

No. 79-945. WALL *v.* VERMONT. Appeal from Sup. Ct. Vt. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 137 Vt. 482, 408 A. 2d 632.

No. 79-971. CEFALU *v.* GLOBE NEWSPAPER CO. Appeal from Ct. App. Mass. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: — Mass. App. —, 391 N. E. 2d 935.

No. 79-5740. WAYLAND *v.* KURTZ ET AL. Appeal from C. A. 1st Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 607 F. 2d 993.

No. 79-5777. HAYES *v.* BOARD OF TRUSTEES OF CLARK COUNTY SCHOOL DISTRICT. Appeal from Sup. Ct. Nev. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 79-533. JACKSON *v.* WHITE, ADMINISTRATOR, ET AL. Appeal from Sup. Ct. Ohio dismissed for want of substantial federal question. MR. JUSTICE WHITE and MR. JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 59 Ohio St. 2d 6, 391 N. E. 2d 333.

No. 79-546. HOME FEDERAL SAVINGS & LOAN ASSOCIATION OF HOLLYWOOD *v.* CHEMICAL REALTY CORP. Appeal from Ct. App. N. C. dismissed for want of substantial federal question. Reported below: 40 N. C. App. 675, 253 S. E. 2d 621.

No. 79-841. BAILEY ET UX. *v.* PENNINGTON. Appeal from Sup. Ct. Del. dismissed for want of substantial federal question. Reported below: 406 A. 2d 44.

No. 79-844. FURMAN, DBA NORTHSIDE SECRETARIAL SERVICE *v.* FLORIDA BAR. Appeal from Sup. Ct. Fla. dismissed for want of substantial federal question. Reported below: 376 So. 2d 378.

No. 79-933. PORTER *v.* PORTER. Appeal from Ct. App. Tenn. dismissed for want of substantial federal question.

No. 79-1007. HUGHES *v.* HUGHES. Appeal from Ct. Civ. App. Ala. dismissed for want of substantial federal question. Reported below: 372 So. 2d 845.

No. 79-948. NORTH RIDGE GENERAL HOSPITAL, INC., ET AL. *v.* CITY OF OAKLAND PARK ET AL. Appeal from Sup. Ct. Fla. dismissed for want of substantial federal question. Reported below: 374 So. 2d 461.

No. 79-981. MINNESOTA EDUCATION ASSN. ET AL. *v.* MINNESOTA ET AL. Appeal from Sup. Ct. Minn. dismissed for want of substantial federal question. Reported below: 282 N. W. 2d 915.

No. 79-1023. POLYVEND, INC. *v.* PUCKORIUS ET AL. Appeal from Sup. Ct. Ill. dismissed for want of substantial federal question. Reported below: 77 Ill. 2d 287, 395 N. E. 2d 1376.

No. 79-1048. CARLSON *v.* MINNESOTA. Appeal from Sup. Ct. Minn. dismissed for want of substantial federal question. Reported below: 283 N. W. 2d 516.

No. 79-992. AUSTIN MUTUAL INSURANCE CO. *v.* GUDVANGEN. Appeal from Sup. Ct. Minn. dismissed for want of substantial federal question. MR. JUSTICE BLACKMUN would note probable jurisdiction and set case for oral argument. Reported below: 284 N. W. 2d 813.

No. 79-5521. THOMPSON *v.* THOMPSON. Appeal from Ct. App. Md. dismissed for want of substantial federal question. MR. JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 285 Md. 488, 404 A. 2d 269.

No. 79-5816. FIELDHOUSE ET UX. *v.* PUBLIC HEALTH TRUST OF DADE COUNTY. Appeal from Sup. Ct. Fla. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE WHITE would note probable jurisdiction and set case for oral argument. Reported below: 374 So. 2d 476.

No. 79-5532. STRUBE *v.* SUMNER. Appeal from Ct. App. Ind. dismissed for want of substantial federal question. Reported below: — Ind. App. —, 385 N. E. 2d 948.

Certiorari Granted—Reversed and Remanded. (See Nos. 78-1871 and 79-265, *ante*, p. 507.)

Certiorari Granted—Vacated and Remanded

No. 78-1005. BROWN, SECRETARY OF DEFENSE, ET AL. *v.* ALLEN ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Secretary of Navy* v. *Huff*, *ante*, p. 453. Reported below: 583 F. 2d 438.

No. 79-517. ESCHMANN BROS. & WALSH, LTD. *v.* V. MUELLER & Co. Ct. App. Colo. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *World-Wide Volkswagen Corp.* v. *Woodson*, *ante*, p. 286.

Vacated and Remanded After Certiorari Granted

No. 79-5215. IN RE OTIS ET AL. (SUBLER, PETITIONER). Ct. App. Ohio, Van Wert County. [Certiorari granted, *ante*, p. 924.] Upon consideration of motion of petitioner for summary reversal, it is ordered that the judgment be vacated and case remanded for further consideration in light of *State ex rel. Heller* v. *Miller*, 61 Ohio St. 2d 6, 399 N. E. 2d 66 (1980).

No. 79-5499. SKIPPER *v.* BRUMMER ET AL. C. A. 5th Cir. [Certiorari granted, *ante*, p. 1012.] Upon consideration of motion of the State of Florida for reconsideration of the order of this Court entered on January 7, 1980 [*ante*, p. 1012], it is ordered that the judgment be vacated and case remanded for further consideration in light of subsequent proceedings referred to in respondent's motion for reconsideration and supplement thereto.

Miscellaneous Orders

No. A-636. CALIFORNIA *v.* BRAESEKE. Application for stay of execution and enforcement of judgment of the Supreme Court of California, presented to MR. JUSTICE REHNQUIST, and by him referred to the Court, granted pending timely filing and disposition of petition for writ of certiorari. MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE STEVENS would deny the application.

No. A-644. MEAD CORP. ET AL. *v.* ADAMS EXTRACT CO. ET AL. Application for stay of order of the United States District Court for the Southern District of Texas, addressed to MR. JUSTICE BRENNAN and referred to the Court, denied. MR. JUSTICE POWELL took no part in the consideration or decision of this application.

No. A-663. BUCKLEY ET AL. *v.* MCRAE ET AL. Application for stay of judgment of the United States District Court for the Eastern District of New York, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied. THE CHIEF JUSTICE, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST would grant the application.

No. 9, Orig. UNITED STATES *v.* LOUISIANA ET AL. Motion of Mississippi for entry of a supplemental decree and cross-motion of the United States referred to the Special Master. [For earlier order herein, see, *e. g.*, *ante*, p. 1029.]

No. 65, Orig. TEXAS *v.* NEW MEXICO. Motion of New Mexico to strike response of the United States denied. Alternative request to file a reply granted. Objections to Report of the Special Master on the obligations of New Mexico to Texas under the Pecos River Compact set for oral argument in due course. [For earlier order herein, see *e. g.*, *ante*, p. 912.]

No. 73, Orig. CALIFORNIA *v.* NEVADA. Exceptions to Report of the Special Master set for oral argument in due course. The Solicitor General is invited to file a brief in this case expressing the views of the United States. [For earlier order herein, see, *e. g., ante,* p. 922.]

No. 84, Orig. UNITED STATES *v.* ALASKA. It is ordered that J. Keith Mann, Esquire, of Stanford, Cal., be appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem necessary to call for. The Master is directed to submit such reports as he may deem appropriate.

The Master shall be allowed his actual expenses. The allowances to him, the compensation paid to his technical, stenographic and clerical assistants, the cost of printing his report, and all other proper expenses shall be charged against and be borne by the parties in such proportion as the Court may hereafter direct.

It is further ordered that if the position of Special Master in this case becomes vacant during a recess of the Court, THE CHIEF JUSTICE shall have authority to make a new designation which shall have the same effect as if originally made by the Court. [For earlier order herein, see, *e. g.,* 442 U. S. 937.]

No. 85, Orig. TEXAS *v.* OKLAHOMA. Motion for leave to file a bill of complaint granted and the defendant shall have 60 days to answer.

No. 78–1793. ROBERTS *v.* UNITED STATES. C. A. D. C. Cir. [Certiorari granted, *ante,* p. 822.] Motion of petitioner for leave to file a supplemental brief after argument granted.

No. 78–6899. GODFREY *v.* GEORGIA. Sup. Ct. Ga. [Certiorari granted, *ante*, p. 897.] Motion of Rayfield Newlon for leave to file a brief as *amicus curiae* denied.

No. 79–1. AMERICAN EXPORT LINES, INC. *v.* ALVEZ ET AL. Ct. App. N. Y. [Certiorari granted, *ante*, p. 924.] Motion of respondent Vinal Ship Maintenance for divided argument denied.

No. 79–4. WILLIAMS ET AL. *v.* ZBARAZ ET AL.;

No. 79–5. MILLER, ACTING DIRECTOR, DEPARTMENT OF PUBLIC AID OF ILLINOIS, ET AL. *v.* ZBARAZ ET AL.; and

No. 79–491. UNITED STATES *v.* ZBARAZ ET AL. D. C. N. D. Ill. [Probable jurisdiction postponed, *ante*, p. 962.] Motions of Washington Legal Foundation and United States Catholic Conference for leave to file briefs as *amici curiae* granted.

No. 79–8. UNITED STATES *v.* RADDATZ. C. A. 7th Cir. [Certiorari granted, *ante*, p. 824.] Motion of the Solicitor General to permit Andrew J. Levander, Esquire, to present oral argument *pro hac vice* granted.

No. 79–48. ANDRUS, SECRETARY OF THE INTERIOR, ET AL. *v.* GLOVER CONSTRUCTION CO. C. A. 10th Cir. [Certiorari granted, *ante*, p. 962.] Motion of Association of American Indian Affairs et al. for leave to file a brief as *amici curiae* granted.

No. 79–81. COFFY *v.* REPUBLIC STEEL CORP. C. A. 6th Cir. [Certiorari granted, *ante*, p. 924.] Motion of the Solicitor General to permit Alan I. Horowitz, Esquire, to present oral argument *pro hac vice* granted.

No. 79–116. THOMAS *v.* WASHINGTON GAS LIGHT CO. ET AL. C. A. 4th Cir. [Certiorari granted, *ante*, p. 962.] Motion of the Solicitor General for divided argument granted.

No. 79-192. New York Gaslight Club, Inc., et al. *v.* Carey. C. A. 2d Cir. [Certiorari granted, *ante*, p. 897.] Motion of the Solicitor General for divided argument granted.

No. 79-244. United States *v.* Salvucci et al. C. A. 1st Cir. [Certiorari granted, *ante*, p. 989.] Motions of respondents for appointment of counsel granted, and it is ordered that John C. McBride, Esquire, of Everett, Mass., be appointed to serve as counsel for respondent Zackular; and it is ordered that Willie J. Davis, Esquire, of Boston, Mass., be appointed to serve as counsel for respondent Salvucci in this case. Motions of respondents for divided argument granted.

No. 79-394. United States *v.* Ward, dba L. O. Ward Oil & Gas Operations. C. A. 10th Cir. [Certiorari granted, *ante*, p. 939.] Motion of Mountain States Legal Foundation et al. for leave to participate in oral argument as *amici curiae* denied.

No. 79-421. Bryant et al. *v.* Yellen et al.;
No. 79-425. California et al. *v.* Yellen et al.; and
No. 79-435. Imperial Irrigation District et al. *v.* Yellen et al. C. A. 9th Cir. [Certiorari granted, *ante*, p. 978.] Motion of petitioners for additional time for oral argument granted, and 15 additional minutes allotted for that purpose. Respondents also allotted 15 additional minutes for oral argument.

No. 79-509. Exxon Corp. *v.* Department of Revenue of Wisconsin. Sup. Ct. Wis. [Probable jurisdiction noted, *ante*, p. 961.] Motion of Associated Dry Goods Corp. for leave to file a brief as *amicus curiae* granted.

No. 79-701. Roadway Express, Inc. *v.* Monk et al. C. A. 5th Cir. [Certiorari granted, *ante*, p. 1012.] Joint motion to dispense with printing appendix granted.

No. 79-725. MAINE PUBLIC UTILITIES COMMISSION *v.* CENTRAL MAINE POWER CO. Sup. Jud. Ct. Me.; and

No. 79-907. INGRAM, SECRETARY, DEPARTMENT OF HUMAN SERVICES OF NEW MEXICO *v.* NOLAN. C. A. 10th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 79-972. WESTVACO CORP. ET AL. *v.* ADAMS EXTRACT CO. ET AL. C. A. 5th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States. MR. JUSTICE POWELL took no part in the consideration or decision of this order.

No. 79-5927. BURKS *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari denied.

No. 79-5888. BRADIN *v.* DAY, WARDEN. Motion for leave to file petition for writ of habeas corpus denied.

No. 79-5857. CLARK *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO; and

No. 79-5925. FORD *v.* ALDISERT, U. S. CIRCUIT JUDGE, ET AL. Motions for leave to file petitions for writs of mandamus denied.

No. 79-5699. RYAN ET AL. *v.* UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT. Motion for leave to file a petition for writ of mandamus denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this motion.

Probable Jurisdiction Noted or Postponed

No. 79-983. UNITED STATES *v.* WILL ET AL. Appeal from D. C. N. D. Ill. Further consideration of question of jurisdiction postponed to hearing of case on the merits. In addition to the questions presented by the statement as to jurisdiction, the parties are directed to address the effect of 28 U. S. C. § 455 on the jurisdiction of the District Court and on the jurisdiction of this Court. Reported below: 478 F. Supp. 621.

No. 79–870. UNITED STATES RAILROAD RETIREMENT BOARD *v.* FRITZ. Appeal from D. C. S. D. Ind. Motions of National Railway Conference and Railway Labor Executives' Assn. for leave to file briefs as *amici curiae* granted. Probable jurisdiction noted.

No. 79–1268. HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* MCRAE ET AL. Application for stay of judgment of the United States District Court for the Eastern District of New York, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied. THE CHIEF JUSTICE, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST would grant the application. Treating the application as a statement as to jurisdiction, probable jurisdiction noted. Appellees' request to expedite the briefing schedule granted. Opening briefs on the merits shall be filed on or before March 18, 1980. Replies thereto shall be filed on or before April 10, 1980. Case set for oral argument in tandem with No. 79–4, *Williams* v. *Zbaraz;* No. 79–5, *Miller* v. *Zbaraz;* and No. 79–491, *United States* v. *Zbaraz* [probable jurisdiction postponed, *ante*, p. 962]. Reported below: — F. Supp. —.

Certiorari Granted

No 78–1841. CUYLER, CORRECTIONAL SUPERINTENDENT, ET AL. *v.* ADAMS. C. A. 3d Cir. Certiorari granted. Reported below: 592 F. 2d 720.

No. 79–770. ENVIRONMENTAL PROTECTION AGENCY *v.* NATIONAL CRUSHED STONE ASSN. ET AL.; and COSTLE, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY *v.* CONSOLIDATION COAL CO. ET AL. C. A. 4th Cir. Certiorari granted. Reported below: 601 F. 2d 111 (first case); 604 F. 2d 239 (second case).

No. 79–816. POTOMAC ELECTRIC POWER CO. *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U. S. DEPARTMENT OF LABOR, ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 196 U. S. App. D. C. 417, 606 F. 2d 1324.

No. 79-927. BOARD OF GOVERNORS OF FEDERAL RESERVE SYSTEM *v.* INVESTMENT COMPANY INSTITUTE. C. A. D. C. Cir. Certiorari granted. Reported below: 196 U. S. App. D. C. 97, 606 F. 2d 1004.

No. 79-938. ALLSTATE INSURANCE CO. *v.* HAGUE. Sup. Ct. Minn. Certiorari granted. Reported below: 289 N. W. 2d 43.

No. 79-952. THOMAS *v.* REVIEW BOARD OF THE INDIANA EMPLOYMENT SECURITY DIVISION ET AL. Sup. Ct. Ind. Certiorari granted. Reported below: — Ind. —, 391 N. E. 2d 1127.

No. 79-567. UNITED STATES *v.* DIFRANCESCO. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 604 F. 2d 769.

No. 79-935. ALLEN ET AL. *v.* MCCURRY. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 606 F. 2d 795.

No. 79-939. DELAWARE STATE COLLEGE ET AL. *v.* RICKS. C. A. 3d Cir. Certiorari granted limited to Questions 1, 2, and 3 presented by the petition. Reported below: 605 F. 2d 710.

No. 79-5267. PEREZ *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 594 F. 2d 159.

No. 79-5602. FEDORENKO *v.* UNITED STATES. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 597 F. 2d 946.

Certiorari Denied. (See also Nos. 78-1914, 79-771, 79-894, 79-825, 79-945, 79-971, 79-5740, 79-5777, and 79-5816, *supra.*)

No. 78-1100. BROWN *v.* BLAMEY. Sup. Ct. Minn. Certiorari denied. Reported below: 270 N. W. 2d 884.

No. 78-6798. BRYAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 591 F. 2d 1161.

No. 79-419. WEAVER *v.* IOWA. Ct. App. Iowa. Certiorari denied. Reported below: 281 N. W. 2d 38.

No. 79-422. TAIBE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 591 F. 2d 1333.

No. 79-527. JOCK ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 601 F. 2d 577.

No. 79-579. ERWIN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 602 F. 2d 1183.

No. 79-601. DRIVER ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 599 F. 2d 1056.

No. 79-613. MOSS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 604 F. 2d 569.

No. 79-650. CRUZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 603 F. 2d 673.

No. 79-654. MERLINO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 595 F. 2d 1016.

No. 79-673. PROVIDENCE JOURNAL CO. *v.* FEDERAL BUREAU OF INVESTIGATION ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 602 F. 2d 1010.

No. 79-692. SCHWARTZE ET AL. *v.* WENZ ET AL. Sup. Ct. Mont. Certiorari denied. Reported below: — Mont. —, 598 P. 2d 1086.

No. 79-713. MORRILTON SCHOOL DISTRICT NO. 32 ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 606 F. 2d 222.

No. 79–710. HONICKER *v.* HENDRIE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 605 F. 2d 556.

No. 79–718. VIGNOLA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 605 F. 2d 1199.

No. 79–724. CORTELLESSO ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 601 F. 2d 28.

No. 79–736. SOUTH AFRICAN MARINE CORP., LTD. *v.* ELGIE & CO. C. A. 2d Cir. Certiorari denied. Reported below: 599 F. 2d 1177.

No. 79–741. SAFEWAY TRAILS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. D. C. Cir. Certiorari denied. Reported below: — U. S. App. D. C. —, — F. 2d —.

No. 79–745. CHENOWETH ET AL. *v.* NEVADA ET AL. C. A. 9th Cir. Certiorari denied.

No. 79–747. NAVAJO TRIBE OF INDIANS *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: — Ct. Cl. —, 601 F. 2d 536.

No. 79–748. GOLDMAN ET AL., TRUSTEES *v.* WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY. C. A. 4th Cir. Certiorari denied. Reported below: 599 F. 2d 1050.

No. 79–749. BLANCO ET UX. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: — Ct. Cl. —, 602 F. 2d 324.

No. 79–750. LIBERTY NATIONAL LIFE INSURANCE CO. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 600 F. 2d 1106.

No. 79–752. CERTIFIED MEATS, INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. Reported below: 605 F. 2d 559.

No. 79–753. HOFFMAN ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 600 F. 2d 590.

No. 79–754. JONES *v.* LOUISIANA STATE BAR ASSN. Sup. Ct. La. Certiorari denied. Reported below: 372 So. 2d 1186.

No. 79–757. CUMMINS ENGINE CO., INC. *v.* CARNEY. C. A. 7th Cir. Certiorari denied. Reported below: 602 F. 2d 763.

No. 79–761. PACKARD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 79–774. LABRIOLA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1292.

No. 79–779. DRYWALL TAPERS & POINTERS OF GREATER NEW YORK, LOCAL 1974, ET AL. *v.* OPERATIVE PLASTERERS' & CEMENT MASONS' INTERNATIONAL ASSOCIATION OF THE UNITED STATES AND CANADA ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 601 F. 2d 675.

No. 79–789. FATICO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 603 F. 2d 1053.

No. 79–791. CONSOLIDATED GAS SUPPLY CORP. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 196 U. S. App. D. C. 57, 606 F. 2d 323.

No. 79–792. HIATT GRAIN & FEED, INC. *v.* BERGLAND, SECRETARY OF AGRICULTURE, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 602 F. 2d 929.

No. 79–793. HOUSTON LIGHTING & POWER CO. ET AL. *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 196 U. S. App. D. C. 224, 606 F. 2d 1131.

No. 79-799. JONES ET AL. *v.* FEDERAL ELECTION COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: — U. S. App. D. C. —, 613 F. 2d 864.

No. 79-800. COMMITTEE TO ELECT LYNDON LAROUCHE ET AL. *v.* FEDERAL ELECTION COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: — U. S. App. D. C. —, 613 F. 2d 849.

No. 79-801. COMMITTEE TO ELECT LYNDON LAROUCHE ET AL. *v.* FEDERAL ELECTION COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: — U. S. App. D. C. —, 613 F. 2d 834.

No. 79-805. COMMUNITY CASH STORES, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 4th Cir. Certiorari denied. Reported below: 603 F. 2d 217.

No. 79-808. FREZZO BROTHERS, INC., ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 602 F. 2d 1123.

No. 79-811. CLAIBORNE HARDWARE CO. ET AL. *v.* HENRY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 595 F. 2d 291.

No. 79-823. HANSON *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied.

No. 79-829. FIRST JERSEY SECURITIES, INC., ET AL. *v.* BIUNNO, U. S. DISTRICT JUDGE (BERGEN ET AL., REAL PARTIES IN INTEREST). C. A. 3d Cir. Certiorari denied. Reported below: 605 F. 2d 690.

No. 79-830. VINSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 606 F. 2d 149.

No. 79-831. CROWN CENTRAL PETROLEUM CORP. *v.* PHILLIPS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 602 F. 2d 616.

No. 79-832. DEAN *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 79-833. KONDRAT *v.* CITY OF WILLOUGHBY HILLS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 601 F. 2d 589.

No. 79-835. WILSON ET AL. *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: — Cal. App. 3d —, — Cal. Rptr. —.

No. 79-839. IRONS & SEARS *v.* COMMISSIONER OF PATENTS AND TRADEMARKS. C. A. D. C. Cir. Certiorari denied. Reported below: 196 U. S. App. D. C. 308, 606 F. 2d 1215.

No. 79-840. WICKHAM CONTRACTING CO., INC., ET AL. *v.* ROBERT J. HARDER, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 607 F. 2d 1000.

No. 79-842. RIVERSIDE MEMORIAL MAUSOLEUM, INC., T/A DELAWARE VALLEY MEMORIAL CENTER, ET AL. *v.* SONNENBLICK-GOLDMAN CORP. C. A. 3d Cir. Certiorari denied. Reported below: 605 F. 2d 1196.

No. 79-846. BRAMSCHER, TRUSTEE IN BANKRUPTCY *v.* ZAHN ET UX. C. A. 7th Cir. Certiorari denied. Reported below: 605 F. 2d 323.

No. 79-849. SMITH'S FOOD KING *v.* RETAIL CLERKS UNION, LOCAL 1442, RETAIL CLERKS INTERNATIONAL ASSN., AFL-CIO. C. A. 9th Cir. Certiorari denied. Reported below: 605 F. 2d 563.

No. 79-853. ELIAS ET AL. *v.* A & C DISTRIBUTING CO., INC., ET AL. Ct. App. Tenn. Certiorari denied. Reported below: 588 S. W. 2d 768.

No. 79-858. KIRKPATRICK *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 605 F. 2d 1160.

No. 79-860. ROBERTS *v.* UPPER MILFORD TOWNSHIP ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 605 F. 2d 1197.

No. 79-861. CONNELLY CONTAINERS, INC. *v.* LAKE UTOPIA PAPER, LTD. C. A. 2d Cir. Certiorari denied. Reported below: 608 F. 2d 928.

No. 79-863. GREGG *v.* U. S. INDUSTRIES, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 605 F. 2d 1199.

No. 79-866. JAGO, CORRECTIONAL SUPERINTENDENT *v.* SPEIGNER. C. A. 6th Cir. Certiorari denied.

No. 79-867. THOMPSON *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 589 S. W. 2d 897.

No. 79-868. ADOLPH COORS CO. *v.* R. E. SPRIGGS CO., INC., ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 94 Cal. App. 3d 419, 156 Cal. Rptr. 738.

No. 79-869. CHAUFFEURS, TEAMSTERS & HELPERS LOCAL 150 ET AL. *v.* SHERROD. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 79-872. BAILEY, ADMINISTRATRIX *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1285.

No. 79-873. LITTLE ROCK NEWSPAPERS, INC. *v.* DODRILL. Sup. Ct. Ark. Certiorari denied. Reported below: 265 Ark. 628, 590 S. W. 2d 840.

No. 79-875. SHUI PING WU ET AL. *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 43 Md. App. 109, 403 A. 2d 819.

No. 79-877. LORCH ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 605 F. 2d 657.

No. 79-878. WESTMORELAND HOSPITAL ASSN. ET AL. *v.* BLUE CROSS OF WESTERN PENNSYLVANIA. C. A. 3d Cir. Certiorari denied. Reported below: 605 F. 2d 119.

No. 79-879. TRACY, JUDGE *v.* GOLSTON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 603 F. 2d 225.

No. 79-887. TERRY *v.* INDIANA SUPREME COURT DISCIPLINARY COMMISSION. Sup. Ct. Ind. Certiorari denied. Reported below: — Ind. —, 394 N. E. 2d 94.

No. 79-888. BILLINGSLEY ET UX. *v.* MOORE ET AL. Ct. Sp. App. Md. Certiorari denied.

No. 79-889. ROMEROS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 600 F. 2d 1104.

No. 79-890. LAMERS DAIRY, INC., ET AL. *v.* SECRETARY OF AGRICULTURE. C. A. 7th Cir. Certiorari denied. Reported below: 607 F. 2d 1007.

No. 79-893. ROY ET UX. *v.* ONONDAGA COUNTY DEPARTMENT OF SOCIAL SERVICES. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 71 App. Div. 2d 815, 418 N. Y. S. 2d 913.

No. 79-895. INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 701, ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: — F. 2d —.

No. 79-898. EDGAR ET UX. *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 92 Wash. 2d 217, 595 P. 2d 534.

No. 79-905. JOSIAH *v.* GOVERNMENT OF THE VIRGIN ISLANDS;

No. 79-916. RIVERA *v.* GOVERNMENT OF THE VIRGIN ISLANDS; and

No. 79-5734. RIOS *v.* GOVERNMENT OF THE VIRGIN ISLANDS. C. A. 3d Cir. Certiorari denied. Reported below: 609 F. 2d 501.

No. 79-906. RANCHO LA COSTA, INC., DBA LA COSTA COUNTRY CLUB *v.* ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 79-909. SMITH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 611 F. 2d 375.

No. 79-911. KOEHL, ADMINISTRATOR, ET AL. *v.* UNITED STATES FIRE INSURANCE CO. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 79-918. SHUFFMAN, EXECUTRIX *v.* HARTFORD TEXTILE CORP. ET AL. C. A. 2d Cir. Certiorari denied.

No. 79-919. WHISKERS ET AL. *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 600 F. 2d 1332.

No. 79-922. GOULD *v.* GAVETT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 591 F. 2d 1339.

No. 79-931. HAYES ET AL. *v.* SOLOMON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 597 F. 2d 958.

No. 79-940. DE TOLEDANO *v.* NADER. Ct. App. D. C. Certiorari denied. Reported below: 408 A. 2d 31.

No. 79-942. SHUFFMAN, EXECUTRIX *v.* HARTFORD TEXTILE CORP. ET AL. C. A. 2d Cir. Certiorari denied.

No. 79-946. RAMEY *v.* RAMEY. Sup. Ct. S. C. Certiorari denied. Reported below: — S. C. —, 258 S. E. 2d 883.

No. 79-947. CALHOUN ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 604 F. 2d 647.

No. 79-950. SAVERSLAK, TRUSTEE *v.* DAVIS-CLEAVER PRODUCE CO. C. A. 7th Cir. Certiorari denied. Reported below: 606 F. 2d 208.

No. 79–954. SHANAHAN *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 404 A. 2d 975.

No. 79–957. PANARELLA *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 48 N. Y. 2d 783, 399 N. E. 2d 952.

No. 79–961. AMBASSADOR COLLEGE *v.* GOETZKE. Sup. Ct. Ga. Certiorari denied. Reported below: 244 Ga. 322, 260 S. E. 2d 27.

No. 79–964. HIXSON *v.* ARKANSAS. Ct. App. Ark. Certiorari denied. Reported below: 266 Ark. 146, 587 S. W. 2d 70.

No. 79–966. LYKOS ET AL. *v.* AMERICAN HOME ASSURANCE CO. C. A. 7th Cir. Certiorari denied. Reported below: 609 F. 2d 314.

No. 79–967. FLOYD *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 375 So. 2d 280.

No. 79–968. COUGHENOUR *v.* MILLS. Ct. Sp. App. Md. Certiorari denied.

No. 79–970. LLINAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 603 F. 2d 506.

No. 79–976. FALSTAFF BREWING CORP. *v.* LOCAL NO. 153, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA. C. A. 3d Cir. Certiorari denied. Reported below: 609 F. 2d 501.

No. 79–977. NEILSON ET AL. *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied. Reported below: 599 P. 2d 1326.

No. 79–982. ROBERTS, ATTORNEY GENERAL OF RHODE ISLAND *v.* NARRAGANSETT ELECTRIC CO. Sup. Ct. R. I. Certiorari denied. Reported below: — R. I. —, 404 A. 2d 821.

No. 79-985. SEWELL *v.* PHILLIPS PETROLEUM CO. C. A. 10th Cir. Certiorari denied. Reported below: 606 F. 2d 274.

No. 79-987. JONES ET AL. *v.* WOLF ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 244 Ga. 388, 260 S. E. 2d 84.

No. 79-988. KRAUSE ET AL. *v.* CITY OF BRUNSWICK ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 244 Ga. 395, 260 S. E. 2d 348.

No. 79-990. CAMPBELL *v.* DISCIPLINARY BOARD OF THE WASHINGTON STATE BAR ASSN. Sup. Ct. Wash. Certiorari denied.

No. 79-993. JACKSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 607 F. 2d 1219.

No. 79-995. AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES (AFL-CIO) *v.* GALE, JUDGE. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 366 So. 2d 901.

No. 79-997. LIBRACH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 609 F. 2d 919.

No. 79-998. GLICKMAN ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 604 F. 2d 625.

No. 79-999. FLORIDA EAST COAST RAILROAD CO. *v.* DEPARTMENT OF REVENUE OF FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 378 So. 2d 344.

No. 79-1001. SHUFFMAN, EXECUTRIX *v.* HARTFORD TEXTILE CORP. ET AL. C. A. 2d Cir. Certiorari denied.

No. 79-1002. MARCHIONDO *v.* TRAUB, JUDGE. Sup. Ct. N. M. Certiorari denied.

No. 79-1004. STUYVESANT INSURANCE CO. *v.* MASSACHUSETTS. Ct. App. Mass. Certiorari denied. Reported below: — Mass. App. —, 391 N. E. 2d 277.

No. 79–1008. ILLINOIS *v.* BISHOP. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 71 Ill. App. 3d 52, 388 N. E. 2d 1144.

No. 79–1010. SIEBERT *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 72 Ill. App. 3d 895, 390 N. E. 2d 1322.

No. 79–1011. RANDELL *v.* BANZHOFF. Sup. Ct. Ala. Certiorari denied. Reported below: 375 So. 2d 445.

No. 79–1012. LASHMETT *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 71 Ill. App. 3d 429, 389 N. E. 2d 888.

No. 79–1021. GRANVILLE CENTRAL SCHOOL DISTRICT ET AL. *v.* THOMAS ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 607 F. 2d 1043.

No. 79–1026. VAHALIK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 606 F. 2d 99.

No. 79–1032. REFRIGERATED FOOD LINE, ET AL. *v.* REPUBLIC INDUSTRIES, INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 605 F. 2d 412.

No. 79–1034. PANKO *v.* RODAK, CLERK OF U. S. SUPREME COURT, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 606 F. 2d 168.

No. 79–1037. STOCKTON & HING *v.* EVANS, TRUSTEE, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 607 F. 2d 1243.

No. 79–1046. SMITH *v.* SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 6th Cir. Certiorari denied. Reported below: 611 F. 2d 374.

No. 79–1052. PRICE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 610 F. 2d 819.

No. 79-1054. Poe *v.* King, U. S. District Judge. C. A. 9th Cir. Certiorari denied.

No. 79-1066. Fuselier *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 606 F. 2d 320.

No. 79-1081. Dressel *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 611 F. 2d 801.

No. 79-1083. Pride *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 612 F. 2d 1311.

No. 79-1086. Foshee et al. *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 606 F. 2d 111.

No. 79-1089. Smith *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 606 F. 2d 320.

No. 79-1095. Jizmejian *v.* Department of Air Force. C. A. 4th Cir. Certiorari denied. Reported below: 607 F. 2d 1001.

No. 79-1113. Scott *v.* Maryland. Ct. Sp. App. Md. Certiorari denied.

No. 79-1114. Cary *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 612 F. 2d 575.

No. 79-1118. Gleason *v.* United States; and
No. 79-1125. Luftig *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 616 F. 2d 2.

No. 79-1131. Awerkamp *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 605 F. 2d 560.

No. 79-5440. Foley *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 605 F. 2d 564.

No. 79-5483. Sosa *v.* Texas. Ct. Crim. App. Tex. Certiorari denied. Reported below: 579 S. W. 2d 937.

No. 79-5519. GREEN *v.* WHITE, TRAINING CENTER SUPERINTENDENT. C. A. 8th Cir. Certiorari denied. Reported below: 605 F. 2d 376.

No. 79-5522. BROWN *v.* UNITED STATES;
No. 79-5579. PARSONS *v.* UNITED STATES; and
No. 79-5580. CALDWELL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: No. 79-5522, 605 F. 2d 1197; No. 79-5579, 605 F. 2d 1198; No. 79-5580, 605 F. 2d 1197.

No. 79-5537. WALKER *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 599 F. 2d 448.

No. 79-5540. HEATH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 609 F. 2d 503.

No. 79-5550. DICKINSON *v.* GOLDEN ET AL. C. A. 5th Cir. Certiorari denied.

No. 79-5557. GOODE *v.* MARKLEY, WARDEN, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 195 U. S. App. D. C. 391, 603 F. 2d 973.

No. 79-5560. BAILEY *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 273 S. C. 467, 257 S. E. 2d 231.

No. 79-5566. TAYLOR *v.* HOOPER, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 596 F. 2d 1284.

No. 79-5578. FIORENTINO *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: — Ct. Cl. —, 607 F. 2d 963.

No. 79-5583. PERRY *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA, ET AL. C. A. 5th Cir. Certiorari denied.

No. 79-5590. MAYFIELD *v.* MOHN, PENITENTIARY SUPERINTENDENT. Sup. Ct. App. W. Va. Certiorari denied.

No. 79-5613. HOUGH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 598 F. 2d 619.

No. 79-5614. JACOBS *v.* SMITH, SUPERINTENDENT, MARYLAND STATE POLICE, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 605 F. 2d 1202.

No. 79-5619. MOREL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 609 F. 2d 502.

No. 79-5623. MCCLANAHAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 610 F. 2d 808.

No. 79-5625. BROWN *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied. Reported below: 93 N. M. 236, 599 P. 2d 389.

No. 79-5629. ALCORTA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 603 F. 2d 859.

No. 79-5641. ENRIQUEZ-SANCHEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 604 F. 2d 1184.

No. 79-5642. HATCHER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 10th Cir. Certiorari denied.

No. 79-5647. LAWRENCE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 605 F. 2d 1321.

No. 79-5650. FRAZIER *v.* LANE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 611 F. 2d. 372.

No. 79-5652. BELVIN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 608 F. 2d 294.

No. 79-5655. FLORES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 598 F. 2d 995.

No. 79-5657. HILL *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 404 A. 2d 525.

No. 79-5659. MONTALALOU *v.* SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 607 F. 2d 997.

No. 79-5665. JOHNSON v. MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 79-5674. HUBER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 79-5677. COYLE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 611 F. 2d 374.

No. 79-5679. PATTERSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 607 F. 2d 1008.

No. 79-5680. VITAGLIANO *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 601 F. 2d 73.

No. 79-5681. YOUNG *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 79-5683. JONES ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 607 F. 2d 269.

No. 79-5702. FIGUEROA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 609 F. 2d 642.

No. 79-5719. CALFON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 607 F. 2d 29.

No. 79-5728. ROSS *v.* CAREY, GOVERNOR OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1290.

No. 79-5733. JONES ET UX. *v.* GEORGIA-PACIFIC CORP. C. A. 5th Cir. Certiorari denied. Reported below: 604 F. 2d 669.

No. 79-5732. WOLFEL *v.* JAGO, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 595 F. 2d 1227.

No. 79-5736. JOHNSON *v.* HILTON, PRISON SUPERINTENDENT, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 609 F. 2d 502.

No. 79-5737. JOHNSON *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 79-5738. SIMS *v.* ROWE, CORRECTIONS DIRECTOR, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 607 F. 2d 1007.

No. 79-5739. BRICE *v.* DAY, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 604 F. 2d 664.

No. 79-5745. HAILS *v.* SMITH, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 79-5746. TRAYLOR *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 79-5751. HUDSON *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 601 F. 2d 785.

No. 79-5752. JONES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 608 F. 2d 1004.

No. 79-5753. RUSSO *v.* SUPREME COURT OF NEW YORK, KINGS COUNTY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1290.

No. 79-5754. GINSBURG *v.* OVERLOOK HOSPITAL ET AL. Sup. Ct. N. J. Certiorari denied.

No. 79-5755. SOLOMON *v.* FRAME ET AL. Sup. Ct. App. W. Va. Certiorari denied.

No. 79-5757. WILKERSON *v.* BLAKENSHIP, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 609 F. 2d 512.

No. 79-5761. OSVALDO M. *v.* CITY OF NEW YORK; JOSE L. *v.* CITY OF NEW YORK; and WALTER B. *v.* CITY OF NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 48 N. Y. 2d 603, 396 N. E. 2d 207 (first and third cases); 48 N. Y. 2d 633, 396 N. E. 2d 478 (second case).

No. 79-5764. BLAKE *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 603 F. 2d 858.

No. 79-5767. FLOYD *v.* JACKSONVILLE SHIPYARDS, INC., ET AL. C. A. 5th Cir. Certiorari denied.

No. 79-5773. SAWAYA *v.* BERNALILLO COUNTY ASSESSOR. Ct. App. N. M. Certiorari denied.

No. 79-5774. WASILOWSKI *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied.

No. 79-5776. GORE *v.* LEEKE, CORRECTIONS COMMISSIONER, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 605 F. 2d 741.

No. 79-5783. GAMEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 610 F. 2d 823.

No. 79-5785. MCPHERSON *v.* TENNESSEE. C. A. 6th Cir. Certiorari denied. Reported below: 611 F. 2d 373.

No. 79-5789. MOORE *v.* CLEMENTS, SHERIFF. C. A. 4th Cir. Certiorari denied. Reported below: 607 F. 2d 1002.

No. 79-5792. FOSTER *v.* SOUTH SUBURBAN SAFEWAY LINES, INC. Sup. Ct. Ill. Certiorari denied.

No. 79-5793. JOHNSON *v.* KOEHLER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 79-5797. BUSTILLO *v.* WILKINSON, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 79-5798. BERRY *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 79-5799. MOORE *v.* MITCHELL, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 607 F. 2d 1002.

No. 79-5800. RINEHART *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 283 N. W. 2d 319.

No. 79-5801. TAYLOR *v.* GARRISON. C. A. 4th Cir. Certiorari denied. Reported below: 609 F. 2d 510.

No. 79-5802. CLARK *v.* PAYNE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: — F. 2d —.

No. 79-5803. SIMMONS *v.* MCDANIEL ET AL. C. A. 8th Cir. Certiorari denied.

No. 79-5807. NEWTOP *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. 9th Cir. Certiorari denied.

No. 79-5811. STUART *v.* PONDER, JUDGE. Sup. Ct. Ark. Certiorari denied.

No. 79-5812. SHEPTIN *v.* CITY OF HOUSTON ET AL. C. A. 5th Cir. Certiorari denied.

No. 79-5813. COLE *v.* RANDLES ET AL. C. A. 6th Cir. Certiorari denied.

No. 79-5814. KNOWLES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 79-5815. CONNER *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied. Reported below: — Ohio App. 2d —, — N. E. 2d —.

No. 79-5818. MILLER *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: — Ind. —, 392 N. E. 2d 445.

No. 79-5819. REED *v.* SCHWAB ET AL. Sup. Ct. Ore. Certiorari denied. Reported below: 287 Ore. 441, 600 P. 2d 387.

No. 79-5822. PAIGE *v.* BROOKS, ATTORNEY GENERAL OF NORTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 612 F. 2d 1309.

No. 79-5824. PRENZLER *v.* PIKE ET AL. C. A. 9th Cir. Certiorari denied.

No. 79-5827. AYALA-CARAPIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 610 F. 2d 822.

No. 79-5828. HOLSEY *v.* WATKINS, U. S. DISTRICT JUDGE. C. A. 4th Cir. Certiorari denied. Reported below: 605 F. 2d 1202.

No. 79-5829. KENNEDY *v.* OHIO. Ct. App. Ohio, Warren County. Certiorari denied. Reported below: — Ohio App. 2d —, — N. E. 2d —.

No. 79-5832. FITZPATRICK *v.* WARD. C. A. 2d Cir. Certiorari denied.

No. 79-5833. HANNON *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 395 A. 2d 118.

No. 79-5834. CLARK *v.* UNITED STATES; and
No. 79-5896. ARTEZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 610 F. 2d 521.

No. 79-5836. WINFIELD *v.* VAN MALE BUICK, INC., ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 71 Ill. App. 3d 1114, 392 N. E. 2d 1387.

No. 79-5843. LITTLE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 608 F. 2d 296.

No. 79-5845. CARTER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 79-5847. SIMMONS *v.* EGELER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 605 F. 2d 557.

No. 79-5848. BEARDSLEE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 609 F. 2d 914.

No. 79-5850. RABAGO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 79-5852. ZUNIGA *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 70 Ill. App. 3d 1103, 392 N. E. 2d 801.

No. 79-5854. CRAWFORD *v.* DIAL, JUDGE, ET AL. C. A. 5th Cir. Certiorari denied.

No. 79-5855. BROWN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 610 F. 2d 814.

No. 79-5856. OWEN *v.* HEYNE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 605 F. 2d 559.

No. 79-5859. WHITE *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 69 Ill. App. 3d 830, 387 N. E. 2d 728.

No. 79-5862. HAYDEN *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 586 S. W. 2d 720.

No. 79-5865. WAGNER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 611 F. 2d 375.

No. 79-5866. DORTCH *v.* FENTON, WARDEN. C. A. 3d Cir. Certiorari denied.

No. 79-5868. MOORE *v.* MEDICAB OF MICHIGAN, INC., ET AL. C. A. 6th Cir. Certiorari denied.

No. 79-5869. TONEY, DBA TRADEWINDS LTD., INC. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 605 F. 2d 200.

No. 79-5870. COLE *v.* LANE, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied.

No. 79–5874. LAWSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 608 F. 2d 1129.

No. 79–5875. MOORE *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 72 Ill. App. 3d 462, 391 N. E. 2d 139.

No. 79–5880. LANG *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 79–5881. WILSON *v.* ILLINOIS. C. A. 7th Cir. Certiorari denied. Reported below: 610 F. 2d 820.

No. 79–5882. OPDAHL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 610 F. 2d 490.

No. 79–5884. GONZALEZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 614 F. 2d 774.

No. 79–5887. LIVINGSTONE *v.* LITTLE, BROWN & CO. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 610 F. 2d 812.

No. 79–5889. SHAPIRO ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 610 F. 2d 823.

No. 79–5890. YAPLE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 608 F. 2d 1375.

No. 79–5891. JOHNSON *v.* CARTER, PRESIDENT OF THE UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 612 F. 2d 581.

No. 79–5907. MCDONALD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 612 F. 2d 1311.

No. 79–5912. KAEWNIL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 610 F. 2d 823.

No. 79–5913. HOLLIDAY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 610 F. 2d 823.

No. 79–5914. HUMBEL *v.* FOLTZ, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 611 F. 2d 372.

No. 79–5922. LAJUNE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 610 F. 2d 822.

No. 79–5923. KARSKY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 610 F. 2d 548.

No. 79–5924. GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 607 F. 2d 1005.

No. 79–5928. GAMBLE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 607 F. 2d 820.

No. 79–5955. MAHLER *v.* NELSON, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 610 F. 2d 806.

No. 79–5960. ADAM ET AL. *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 408 A. 2d 313.

No. 79–5963. NELSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 79–5967. LYONS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 609 F. 2d 1338.

No. 79–5972. NOLEN *v.* DEPARTMENT OF HUMAN RESOURCES OF GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 151 Ga. App. 455, 260 S. E. 2d 353.

No. 79–5981. RIVERA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 608 F. 2d 1028.

No. 79–5986. MAHLER *v.* NELSON, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 610 F. 2d 806.

No. 79–5990. TAYLOR *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 612 F. 2d 1272.

No. 79-88. CALIFORNIA *v.* WHYTE. Ct. App. Cal., 1st App. Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 90 Cal. App. 3d 235, 152 Cal. Rptr. 280.

No. 79-920. WHITE, TRAINING CENTER SUPERINTENDENT *v.* GREEN. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 605 F. 2d 376.

No. 79-934. PENNSYLVANIA *v.* STARR. Sup. Ct. Pa. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 486 Pa. 530, 406 A. 2d 1017.

No. 79-943. MICHIGAN *v.* GARDNER. Sup. Ct. Mich. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 406 Mich. 369, 279 N. W. 2d 785.

No. 79-427. BERKEY PHOTO, INC. *v.* EASTMAN KODAK CO.; and

No. 79-499. EASTMAN KODAK CO. *v.* BERKEY PHOTO, INC. C. A. 2d Cir. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari and set cases for oral argument. Reported below: 603 F. 2d 263.

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE POWELL joins, dissenting.

An obviously carefully considered opinion of the Court of Appeals comprising 99 pages in a separate appendix to the petition for certiorari in this case, dealing as it does with the complexities, refinements, and contradictions embodied in the decisional law construing §§ 1 and 2 of the Sherman Act is obviously not an attractive candidate for review under our discretionary certiorari jurisdiction. Nonetheless, I do not

think we may "let this cup pass from us" unless we are prepared to forgo the opportunity to review some propositions enunciated by the Court of Appeals in this case which strike me as little less than bizarre.

One of the principal issues decided by the Court of Appeals was the obligation of respondent and cross-petitioner Kodak to "predisclose" information about its camera and film system to competing camera manufacturers prior to offering such camera and film for sale to the public. As to the camera market issues, the Court of Appeals held that Kodak had no such obligation, but as to the photofinishing and photofinishing equipment markets, the Court of Appeals held that Kodak violated § 2 of the Sherman Act by using its market power over films and cameras to obtain a competitive advantage with respect to photofinishing and photofinishing equipment. 603 F. 2d 263, 279–285, 304. And as to the joint development project, the court held that Kodak violated § 1 of the Sherman Act by including in the agreement a nondisclosure provision, even though Kodak made an investment of millions of dollars in the project that presumably was essential to its success.

To one not schooled in the niceties of antitrust litigation, the notion that a statute designed to foster competition requires one competitor to disclose to another, in advance of marketing a product to the general public, its plan to introduce the new product, is difficult to fathom. And this Court has held as recently as *United States* v. *Grinnell Corp.*, 384 U. S. 563 (1966), that it is not a violation of § 2 of the Sherman Act for a business with monopoly power to achieve "growth or development as a consequence of a superior product, business acumen, or historic accident." 384 U. S., at 570–571. I should think this reasoning is equally applicable to the alleged violation of § 1 of the Sherman Act which the Court of Appeals also dealt with in its opinion.

But the Court of Appeals in this case held that "the rule of *Grinnell* must be read together with the teaching of *Griffith* [*United States* v. *Griffith*, 334 U. S. 100, 107 (1948)], that the mere existence of monopoly power 'whether lawfully or unlawfully acquired,' is in itself violative of § 2, 'provided it is coupled with the purpose or intent to exercise that power,'" 603 F. 2d, at 274, even though this Court in *Grinnell* did not express a similar limitation on its holding.

One can understand the exasperation revealed by the statement in the opinion of the Court of Appeals that "[d]espite the daunting complexity of the case—the exhibits numbered in the thousands—Kodak demanded a jury." *Id.*, at 268. The trial lasted from July 1977 until March 1978, and since Kodak is entitled as a matter of constitutional right under the Seventh Amendment to demand a jury trial in a case such as this, perhaps the "daunting complexity" of the case—and presumably many other similar cases being litigated in other federal courts—suggests that either the forest is being lost sight of because of the trees, or that an Act of Congress has been battered, tortured, and encrusted with layer after layer of refinement not required by any necessary construction of the Act, but by the results wrought by a century of case-by-case adjudication of it in this Court and other federal courts.

If the Sherman Act requires "predisclosure" by one competitor to another before a new product can be marketed, I think that the raised eyebrows resulting from such a holding should come from this Court, and not from extrapolations by other federal courts of the decisions of this Court interpreting the Sherman Act. I likewise think that the conclusion of the Court of Appeals that significant parts of a defendant's conduct which take place before the statute of limitations period may nonetheless be introduced in evidence is open to serious question under our prior cases.

So long as there are institutes for federal judges concerning the management of complex cases, and judicial panels for

handling multidistrict litigation, this Court cannot remain wholly above the battle. In this case, it is conceded that the claimed antitrust violations all arise directly from Kodak's competitive superiority and technological innovation leading to the development of new products that consumers consider to be desirable. Because I believe that all three of these violations are interrelated, I would grant the petitions for certiorari and limit the questions as follows: (1) Was Kodak's introduction of the 110 camera and Kodacolor II film system either an attempt to monopolize or actual monopolization of the camera market in violation of § 2 of the Sherman Act? (2) Did Kodak violate § 2 of the Sherman Act by impermissibly using its film monopoly as "leverage" to enhance its position in the photofinishing and photofinishing equipment markets? And (3) did Kodak's joint development agreements with General Electric and Sylvania violate § 1 of the Sherman Act? I would also grant certiorari on this question raised in the conditional cross-petition: "Did the court of appeals err in not entering judgment for Kodak on the film and color print paper claims, and instead remanding both claims for a determination of whether 'conduct occurring many years before the commencement of suit contributed to an overcharge . . . within the limitations period'?"

No. 79-485. ELI LILLY & CO. *v.* COSTLE, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY. C. A. 1st Cir. Certiorari denied. Reported below: 598 F. 2d 637.

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE POWELL joins, dissenting.

This case presents an issue of great importance, which cannot help but become greater as time goes on and more and more administrative proceedings are conducted either directly under the Administrative Procedure Act, 5 U. S. C. § 553, or similar provisions in new Acts of Congress for review of agency action. That question is the degree to which an agency, which publishes a rule for notice and comment under

§ 4 of the Administrative Procedure Act and very substantially changes the rule in response to the comments it receives, is obliged to publish the revised rule to allow another opportunity for notice and comment. In deciding this case, the Court of Appeals for the First Circuit was fully aware of the problems that could result from a complete "about face" by the administrative agency, see *BASF Wyandotte Corp.* v. *Costle,* 598 F. 2d 637 (1979), as can be seen from this portion of the first paragraph of its opinion concluding the respondent *had* complied with the Administrative Procedure Act:

> "Petitioners' first complaint is that EPA failed to comply with the requirements of the Administrative Procedure Act in that the final regulations were so different from the interim final regulations that the interims were not notice of 'either the terms or substance of the proposed rule or a description of the subjects and issues involved.' 5 U. S. C. § 553 (b)(3). This requirement is a *critical* one because it supports the assumption we make with regard to EPA's substantive decisions that those decisions are in fact the product of informed, expert reasoning tested by exposure to diverse public comment." *Id.,* at 641 (emphasis supplied).

Petitioner claims that the differences between the effluent limitations imposed in the original regulations and the ones finally promulgated were so great as to make impossible any such judgment by a reviewing court in the absence of further opportunity for notice and comment on the revised regulations. The Court of Appeals' conclusion to the contrary is a carefully reasoned one, and I am not at this point willing to say that I disagree with it. But when we consider the very significant effects that a "rulemaking" procedure may have upon the parties involved, see *United States* v. *Florida East Coast R. Co.,* 410 U. S. 224, 244–245 (1973), I think this Court should grant certiorari to examine the question. It is the sort of question upon which there will never be a

"square conflict" among the various Courts of Appeals, since the differences between the originally promulgated regulations and the finally promulgated regulations will necessarily be ones of degree. Thus, one need not accept at full face value the contention of petitioner that the Court of Appeals' decision squarely conflicts with decisions from the Courts of Appeals for the Second, Fourth, and District of Columbia Circuits in order to realize that the question is a recurring one that will ultimately require interpretation of important statutory language by this Court. Accordingly, I would grant the petition limited to the question whether § 4 of the Administrative Procedure Act, 5 U. S. C. § 553, required EPA to provide an additional opportunity to comment on the final regulations proposed here.

No. 79-539. MAINE *v.* DANA ET AL. Sup. Jud. Ct. Me. Certiorari denied. MR. JUSTICE WHITE and MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 404 A. 2d 551.

No. 79-955. DEHAVILLAND AIRCRAFT OF CANADA, LTD. *v.* BETAR, PUBLIC ADMINISTRATOR OF COOK COUNTY, ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE WHITE and MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 603 F. 2d 30.

No. 79-633. COUNTY OF VENTURA *v.* CASTRO. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 93 Cal. App. 3d 462, 156 Cal. Rptr. 66.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE REHNQUIST joins, dissenting.

I believe that this case presents the substantial question whether the ruling of the California Court of Appeal is consistent with this Court's decision in *D. H. Overmyer Co.* v. *Frick Co.*, 405 U. S. 174 (1972). See also *Isbell* v. *County of Sonoma*, 21 Cal. 3d 61, 577 P. 2d 188, cert. denied as out of time, 439 U. S. 996 (1978).

The case concerns an agreement of paternity signed by the alleged father of the unborn child of a welfare recipient. The mother-to-be applied for welfare assistance and informed county employees that respondent was the father of her unborn child. At the request of the District Attorney's office, respondent came to that office and spoke with Juanita Hickman, a family support officer.

Although respondent expressed some doubts, he told Hickman that "more than likely I am the father." Hickman explained to respondent that he could sign an agreement of paternity which would be filed in court and which would result in a judgment of paternity and an order to pay child support. He was advised, alternatively, that if he was not certain he was the father, the office would institute a paternity action and serve him with a summons and complaint; he then would have 30 days to answer and a trial would follow. Respondent signed a paternity agreement, prepared by Hickman. It was filed with the Ventura County Superior Court. The pertinent part of the agreement read:

> "It is hereby agreed by plaintiff, through C. STANLEY TROM, District Attorney for the County of Ventura, and Rudy Castro, Jr., defendant, that the following facts are true and that a judgment be entered against the defendant in accordance with this agreement.
>
> "1. Defendant acknowledges that the District Attorney of Ventura County, does not represent him and that he understands that he has had an opportunity to have an attorney advise and represent him in this matter.
>
> "2. Defendant understands that a judgment for child support will be entered against him based upon this agreement.
>
> "3. The defendant is the father of: unborn child of Viola Gonzales, due to be born December 1977.
>
> "4. The defendant agrees to pay $125.00 per child per month commencing on Sept. 1, 1977, and on the same date

each month thereafter until termination by operation of law or further order of court."

Six months after entry of judgment, respondent moved to set aside the agreement and judgment on the grounds that he had signed the agreement out of fear that he would be criminally prosecuted, that he did not realize all the rights he was giving up, such as the right to discovery and blood tests of the mother and child, and that he did not know he would be liable for child support until the child reached the age of 18 years. The Superior Court denied the motion. The California Court of Appeal reversed. 93 Cal. App. 3d 462, 156 Cal. Rptr. 66 (1979).

The signed agreement was authorized by § 11476.1 of Cal. Welf. & Inst. Code Ann. (West Supp. 1973–1978). That section reads as set forth in the margin.*

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*"In any case where the district attorney has undertaken enforcement of support, the district attorney may enter into an agreement with the noncustodial parent, on behalf of the custodial parent, a minor child, or children, for the entry of a judgment determining paternity, if applicable, and for periodic child support payments based on the noncustodial parent's reasonable ability to pay. Prior to entering into this agreement, the noncustodial parent shall be informed that a judgment will be entered based on the agreement. The clerk shall file the agreement without the payment of any fees or charges. The court shall enter judgment thereon without action. The provisions of Civil Code Section 4702 shall apply to such judgment. The district attorney shall be directed to effect service upon the obligor of a copy of the judgment and notify the obligor in writing of the right to seek modification of the amount of child support order upon a showing of changes of circumstances and upon such showing the court shall immediately modify the order and set the amount of child support payment pursuant to § 11350, and to promptly file proof of service thereof.

"For the purposes of this section, in making a determination of the noncustodial parent's reasonable ability to pay, the following factors shall be considered:

"(a) The standard of living and situation of the parties;

"(b) The relative wealth and income of the parties;

"(c) The ability of the noncustodial parent to earn;

Although the Court of Appeal commented on the facts of the particular case, and the likelihood that there had been no knowing and voluntary waiver of due process rights, the court found § 11476.1 unconstitutional on its face. The statute was declared defective because it does not make adequate provision for the protection of due process rights of the noncustodial parent and it does not address the manner in which the defendant may waive those rights. "Glaringly absent," 93 Cal. App. 3d., at 469, 156 Cal. Rptr., at 70, was a requirement that the defendant be informed of his right to trial. The court also based its decision on the absence of any provision for prejudgment judicial determination of the voluntariness of a waiver of due process rights and on the disparity of bargaining power between petitioner and respondent.

In *Overmyer* this Court stated that "a cognovit clause is not, *per se*, violative of Fourteenth Amendment due process." 405 U. S., at 187. We emphasized the need to consider the facts of each situation. *Id.*, at 178, 187–188. While one may sympathize with respondent's position, the Court of Appeal's declaration that the California statute is unconstitutional on its face, as violative of the Fourteenth Amendment, appears to contravene the case-by-case approach of *Overmyer*. We indicated in *Overmyer, id.*, at 188, that a different result might follow where there is great disparity in bargaining power between the parties, but that question never has been decided specifically by the Court. See *Swarb* v. *Lennox*, 405 U. S. 191 (1972). Because the issue is bound to recur, I would grant the petition for certiorari and set the case for argument.

"(d) The ability of the custodial parent to earn;

"(e) The needs of the custodial parent and any other persons dependent on such person for their support;

"(f) The age of the parties;

"(g) Any previous court order imposing an obligation of support."

No. 79-782. MISSISSIPPI POWER & LIGHT CO. ET AL. *v.* UNITED STATES NUCLEAR REGULATORY COMMISSION ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 601 F. 2d 223.

No. 79-796. AMAREX, INC. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL. C. A. 10th Cir. Certiorari denied. MR. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 603 F. 2d 127.

No. 79-788. DIANA ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE MARSHALL would grant certiorari. Reported below: 605 F. 2d 1307.

No. 79-837. MILLER BREWING CO. *v.* JOS. SCHLITZ BREWING CO. C. A. 7th Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 605 F. 2d 990.

No. 79-848. DONOFRIO ET AL. *v.* MARSHALL, SECRETARY OF LABOR. C. A. 3d Cir. Certiorari denied. MR. JUSTICE POWELL would grant certiorari. Reported below: 605 F. 2d 1196.

No. 79-897. STOSKUS, ADMINISTRATRIX *v.* CITY OF BALDWIN PARK ET AL. C. A. 9th Cir. Motion to substitute Frances Stoskus, Administratrix of the Estate of Bertha Stoskus, in place of Bertha Stoskus, deceased, granted. Certiorari denied. Reported below: 605 F. 2d 563.

No. 79-5765. JARZAB *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE WHITE would grant certiorari. Reported below: 123 Ariz. 308, 599 P. 2d 761.

No. 79-5849. HAUGHTON *v.* HAUGHTON, SPECIAL ADMINISTRATOR. Sup. Ct. Ill. Motion of respondent for damages and certiorari denied. Reported below: 76 Ill. 2d 439, 394 N. E. 2d 385.

No. 79–5705. STANLEY *v.* ZANT, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER. Sup. Ct. Ga.;

No. 79–5714. THOMAS *v.* ZANT, WARDEN. Sup. Ct. Ga.;

No. 79–5744. ALDERMAN *v.* BALKCOM, WARDEN. Sup. Ct. Ga.;

No. 79–5830. BOWDEN *v.* ZANT, WARDEN. Sup. Ct. Ga.; and

No. 79–5861. COPPOLA *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: No. 79–5830, 244 Ga. 260, 260 S. E. 2d 465; No. 79–5861, — Va. —, 257 S. E. 2d 797.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Granted. (See No. 78–1780, *ante*, p. 505.)

Rehearing Denied

No. 78–6687. RUFFIN *v.* GEORGIA, *ante*, p. 995;

No. 79–444. FERNOS-LOPEZ *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO ET AL., *ante*, p. 931;

No. 79–479. GENINS *v.* GEIGER ET UX., *ante*, p. 991;

No. 79–525. MOENCKMEIER *v.* UNITED STATES ET AL., *ante*, p. 991;

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No. 79–699. HEYNE *v.* HEYNE ET AL., *ante*, p. 1008; and

No. 79–712. ASH ET UX. *v.* TRUSTEES FOR WESTGATE-CALIFORNIA CORP., *ante*, p. 1015. Petitions for rehearing denied.

No. 79-5004. PARKER *v.* ROTH, *ante*, p. 920;

No. 79-5546. PLATEL *v.* CLARK, JUDGE, ET AL., *ante*, p. 994;

No. 79-5554. WILLIAMS *v.* UNITED STATES, *ante*, p. 1010;

No. 79-5562. CHODOS *v.* FEDERAL BUREAU OF INVESTIGATION, *ante*, p. 1021;

No. 79-5572. LILLIBRIDGE ET UX. *v.* MORTON, COMMISSIONER OF INTERNAL REVENUE, ET AL., *ante*, p. 1046;

No. 79-5616. JOHNS *v.* WOODBRIDGE TOWNSHIP ET AL., *ante*, p. 1022;

No. 79-5621. BRETZ *v.* MONTANA, *ante*, p. 994;

No. 79-5632. ROACH *v.* SOUTH CAROLINA, *ante*, p. 1026;

No. 79-5636. GAINES *v.* MERCHANTS NATIONAL BANK & TRUST COMPANY OF INDIANAPOLIS, *ante*, p. 1023;

No. 79-5667. PAUL *v.* STAFFORD, U. S. DISTRICT JUDGE, ET AL., *ante*, p. 1011; and

No. 79-5696. KENNEDY *v.* INDIANA, *ante*, p. 1047. Petitions for rehearing denied.

No. 78-6694. THIESS *v.* FRANKLIN SQUARE HOSPITAL, INC., ET AL., *ante*, pp. 851 and 975; and

No. 79-5030. SANDERS ET AL. *v.* HANKINS ET AL., *ante*, pp. 872 and 975. Motions for leave to file second petitions for rehearing denied.

No. 79-177. JACKA *v.* UNITED STATES, *ante*, p. 949. Motion for leave to file petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. 79-545. HOLLOWAY *v.* TIMES MIRROR PRESS CO., *ante*, p. 966. Motion for leave to file petition for rehearing denied.

FEBRUARY 22, 1980

Dismissal Under Rule 60

No. 79-960. CHANDLER *v.* UNITED STATES. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 60. Reported below: 604 F. 2d 972.

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End of Volume

Henry J. Lind
Reporter of Decisions

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, Chief Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM H. REHNQUIST, Associate Justice.
JOHN PAUL STEVENS, Associate Justice.

RETIRED

STANLEY REED, Associate Justice.

OFFICERS OF THE COURT

BENJAMIN R. CIVILETTI, Attorney General.
WADE H. McCREE, Jr., Solicitor General.
MICHAEL RODAK, Jr., Clerk.
HENRY C. LIND, Reporter of Decisions.
ALFRED WONG, Marshal.
ROGER F. JACOBS, Librarian.

SUPREME COURT OF THE UNITED STATES

Allotment of Justices

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, *viz.:*

For the District of Columbia Circuit, Warren E. Burger, Chief Justice.

For the First Circuit, William J. Brennan, Jr., Associate Justice.

For the Second Circuit, Thurgood Marshall, Associate Justice.

For the Third Circuit, William J. Brennan, Jr., Associate Justice.

For the Fourth Circuit, Warren E. Burger, Chief Justice.

For the Fifth Circuit, Lewis F. Powell, Jr., Associate Justice.

For the Sixth Circuit, Potter Stewart, Associate Justice.

For the Seventh Circuit, John Paul Stevens, Associate Justice.

For the Eighth Circuit, Harry A. Blackmun, Associate Justice.

For the Ninth Circuit, William H. Rehnquist, Associate Justice.

For the Tenth Circuit, Byron R. White, Associate Justice.

December 19, 1975.

(For next previous allotment, see 404 U. S., p. v.)

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FEDERAL RULES OF EVIDENCE. See **Witnesses.**

FEDERAL WATER POLLUTION CONTROL ACT.

Judicial review—EPA's denial of permits.—Environmental Protection Agency's action in vetoing issuance to pulpmill operators of National Pollutant Discharge Elimination System permits that were proposed by an agency of a State authorized to issue such permits and that granted operators' requests for variances from certain EPA effluent limitations and established alternative effluent limitations if EPA disapproved variances, is directly reviewable in United States Court of Appeals under § 509 (b) (1) (F) of Act as constituting "denial" of permits. Crown Simpson Pulp Co. v. Costle, p. 193.

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"Agency records"—Report of private study under federal grants—Underlying raw data.—Raw data underlying reports of a group of private physicians and scientists as to its study of effectiveness of certain diabetes treatment regimens, which reports were used by Government in proceedings to restrict labeling and use of certain drugs, are not "agency records" within meaning of Act, notwithstanding that study was conducted under grants from a federal agency which had right to supervise private group and could have obtained custody of such data. Forsham v. Harris, p. 169.

"Agency records"—Transcripts of telephone conversations of former Presidential Assistant.—While the "Executive Office of the President" is an agency subject to Act, it does not include the Office of the President, and thus summaries and transcripts of telephone conversations of a former Presidential Assistant are not "agency records" subject to disclosure under Act. Kissinger v. Reporters Committee, p. 136.

Transcripts of telephone conversations—Wrongful removal from Government custody—Private right of action.—Neither Freedom of Information Act, Federal Records Act of 1950, which establishes a records management program for federal agencies, nor Records Disposal Act, which provides exclusive means for record disposal, expressly or impliedly confers a private right of action to recover records wrongfully removed from Government custody, and thus District Court had no authority thereunder, at behest of private parties seeking access to certain materials, to order Library of Congress to return to State Department summaries and transcripts of telephone conversations of a former Presidential Assistant and Secretary of State that had been donated by him to Library under agreement restricting public access to such materials. Kissinger v. Reporters Committee, p. 136.

"Withholding" agency records—Transcripts of telephone conversations—Removal from agency custody.—State Department did not "withhold" agency records within meaning of Act, since, at time requests for disclosure were made, summaries and transcripts of telephone conversations of a former Secretary of State had been donated by him to Library of Congress and he and Library were holding documents under a claim of right, an agency's failure to sue a third party to obtain possession not being a withholding under Act. Kissinger v. Reporters Committee, p. 136.

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Longshoreman's recovery from shipowner—Stevedore's lien for compensation payment.—A stevedore's lien, for amount of its compensation payment to an injured longshoreman under Act, against longshoreman's recovery in a negligence action against shipowner may not be reduced by an amount representing stevedore's proportionate share of longshoreman's legal expenses in obtaining recovery from shipowner. Bloomer v. Liberty Mutual Ins. Co., p. 74.

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Safety of workplace—Employees' refusal to work—Regulation.—Regulation providing that an employee has the right not to perform his assigned task because of a reasonable apprehension of death or serious injury, was promulgated in valid exercise of Secretary of Labor's authority under Act and is valid. Whirlpool Corp. v. Marshall, p. 1.

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Convicted felon's possession of firearm—Validity of prior conviction.—Even though petitioner's extant prior state-court felony conviction may be subject to collateral attack because he was without counsel, it may properly be used as a predicate for his subsequent conviction under § 1202 (a) (1) of Act, which proscribes possession of firearms by any person previously convicted of a felony in federal or state court, such regulatory scheme being consonant with concept of equal protection in Due Process Clause of Fifth Amendment. Lewis v. United States, p. 55.

PARENT AND CHILD. See **Civil Service Retirement Act.**

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"WITHHOLDING" AGENCY RECORDS. See **Freedom of Information Act.**

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Privileges—Criminal trial—Spouse's adverse testimony.—Witness spouse, who alone has a privilege to refuse to testify against accused spouse in criminal case, may be neither compelled to testify nor foreclosed from testifying, and that accused's wife chose to testify against him after a grant of immunity and assurances of lenient treatment did not render her testimony involuntary, accused's claim of privilege thus being properly rejected. Trammel v. United States, p. 40.

WORDS AND PHRASES.

1. *"Agency records."* Freedom of Information Act, 5 U. S. C. § 552 (a)(4)(B). Kissinger v. Reporters Committee, p. 136; Forsham v. Harris, p. 169.

2. *"Has been convicted by a court of the United States or of a State . . . of a felony."* § 1202 (a)(1), Omnibus Crime Control and Safe Streets Act of 1968, 18 U. S. C. App. § 1202 (a)(1). Lewis v. United States, p. 55.

3. *"In issuing or denying any permit."* § 509 (b)(1)(F), Federal Water Pollution Control Act, 33 U. S. C. § 1369 (b)(1)(F). Crown Simpson Pulp Co. v. Costle, p. 193.

4. *"Lived with the employee . . . in a regular parent-child relationship."* Civil Service Retirement Act, 5 U. S. C. § 8341 (a)(3)(A). United States v. Clark, p. 23.

5. *"Withholding agency records."* Freedom of Information Act, 5 U. S. C. § 552 (a)(4)(B). Kissinger v. Reporters Committee, p. 136.

WORKMEN'S COMPENSATION. See **Longshoremen's and Harbor Workers' Compensation Act.**

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1979

WHIRLPOOL CORP. *v.* MARSHALL, SECRETARY OF LABOR

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 78–1870. Argued January 9, 1980—Decided February 26, 1980

Section 11 (c)(1) of the Occupational Safety and Health Act of 1970 (Act) prohibits an employer from discharging or discriminating against any employee who exercises "any right afforded by" the Act. Respondent Secretary of Labor promulgated a regulation providing that, among other rights protected by the Act, is the right of an employee to choose not to perform his assigned task because of a reasonable apprehension of death or serious injury coupled with a reasonable belief that no less drastic alternative is available. Claiming that a suspended wire-mesh screen in petitioner's manufacturing plant used to protect employees from objects occasionally falling from an overhead conveyor was unsafe, two employees of petitioner refused to comply with their foreman's order to perform their usual maintenance duties on the screen. They were then ordered to punch out without working or being paid for the remainder of their shift, and subsequently received written reprimands, which were placed in their employment files. Thereafter, respondent brought suit in Federal District Court, alleging that petitioner's actions against the two employees constituted discrimination in violation of § 11 (c)(1) of the Act, and seeking injunctive and other relief. While finding that the implementing regulation justified the employees' refusals to obey their foreman's order, the District Court

nevertheless denied relief, holding that the regulation was inconsistent with the Act and therefore invalid. The Court of Appeals reversed and remanded, agreeing that the employees' actions were justified under the regulation but disagreeing with the conclusion that the regulation was invalid.

Held: The regulation in question was promulgated by respondent in the valid exercise of his authority under the Act, and constitutes a permissible gloss on the Act, in light of the Act's language, structure, and legislative history. Pp. 8–22.

(a) The regulation clearly conforms to the Act's fundamental objective of preventing occupational deaths and serious injuries. Moreover, the regulation is an appropriate aid to the full effectuation of the Act's "general duty" clause, which requires an employer to furnish to each of his employees employment and a place of employment free from recognized hazards that are causing or likely to cause death or serious injury to the employees. The regulation thus on its face appears to further the Act's overriding purpose and rationally complements its remedial scheme. Pp. 11–13.

(b) The facts that Congress, at the time it was considering passage of the Act, rejected a so-called "strike with pay" provision (whereby an obligation would be imposed on employers to continue to pay employees who absented themselves from work for reasons of safety), and also rejected a provision that would have given the Labor Department, in imminent-danger situations, the power temporarily to shut down all or part of an employer's plant, do not indicate a congressional intent incompatible with an administrative interpretation of the Act such as is embodied in the regulation at issue. In contrast to the "strike with pay" provision, the regulation does not require employers to pay workers who refuse to perform assigned tasks in face of imminent danger, but simply provides that in such case the employer may not "discriminate" against the employees involved. And in contrast to the "shutdown" provision, the regulation accords no authority to Government officials but simply permits private employees to avoid workplace conditions that they believe pose grave dangers to their own safety and does not empower such employees to order their employers to correct the hazardous condition. Pp. 13–21.

593 F. 2d 715, affirmed.

STEWART, J., delivered the opinion for a unanimous Court.

Robert E. Mann argued the cause for petitioner. With

him on the briefs were *Ronald J. Hein, Jr.,* and *Mark A. Lies II.*

Solicitor General McCree argued the cause for respondent. With him on the brief were *Deputy Solicitor General Geller, Edwin S. Kneedler, Benjamin W. Mintz,* and *Dennis K. Kade.**

MR. JUSTICE STEWART delivered the opinion of the Court.

The Occupational Safety and Health Act of 1970 (Act) [1] prohibits an employer from discharging or discriminating against any employee who exercises "any right afforded by" the Act.[2] The Secretary of Labor (Secretary) has promulgated a regulation providing that, among the rights that the Act so protects, is the right of an employee to choose not to perform his assigned task because of a reasonable appre-

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**Robert T. Thompson, Stephen A. Bokat,* and *Stanley T. Kaleczyc* filed a brief for the Chamber of Commerce of the United States as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Warren Spannaus,* Attorney General, and *Steven M. Gunn* and *Sharon L'Herault,* Special Assistant Attorneys General, for the State of Minnesota; by *J. Albert Woll, Elliott Bredhoff, John Fillion, George H. Cohen, Robert M. Weinberg, Laurence Gold,* and *George Kaufmann* for the American Federation of Labor and Congress of Industrial Organizations et al.; and by *Michael Churchill* for the Philadelphia Area Project on Occupational Safety and Health.

Jeffrey B. Schwartz filed a brief for the American Public Health Assn. as *amicus curiae.*

[1] 84 Stat. 1590, as amended, 92 Stat. 183, 29 U. S. C. § 651 *et seq.* (1976 ed. and Supp. II).

[2] Section 11 (c)(1) of the Act, 84 Stat. 1603, 29 U. S. C. § 660 (c)(1), provides in full:

"No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act."

hension of death or serious injury coupled with a reasonable belief that no less drastic alternative is available.[3] The question presented in the case before us is whether this regulation is consistent with the Act.

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[3] The regulation, 29 CFR § 1977.12 (1979), provides in full:

"(a) In addition to protecting employees who file complaints, institute proceedings, or testify in proceedings under or related to the Act, section 11 (c) also protects employees from discrimination occurring because of the exercise 'of any right afforded by this Act.' Certain rights are explicitly provided in the Act; for example, there is a right to participate as a party in enforcement proceedings (sec. 10). Certain other rights exist by necessary implication. For example, employees may request information from the Occupational Safety and Health Administration; such requests would constitute the exercise of a right afforded by the Act. Likewise, employees interviewed by agents of the Secretary in the course of inspections or investigations could not subsequently be discriminated against because of their cooperation.

"(b)(1) On the other hand, review of the Act and examination of the legislative history discloses that, as a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace. Hazardous conditions which may be violative of the Act will ordinarily be corrected by the employer, once brought to his attention. If corrections are not accomplished, or if there is dispute about the existence of a hazard, the employee will normally have opportunity to request inspection of the workplace pursuant to section 8 (f) of the Act, or to seek the assistance of other public agencies which have responsibility in the field of safety and health. Under such circumstances, therefore, an employer would not ordinarily be in violation of section 11 (c) by taking action to discipline an employee for refusing to perform normal job activities because of alleged safety or health hazards.

"(2) However, occasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that

I

The petitioner company maintains a manufacturing plant in Marion, Ohio, for the production of household appliances. Overhead conveyors transport appliance components throughout the plant. To protect employees from objects that occasionally fall from these conveyors, the petitioner has installed a horizontal wire-mesh guard screen approximately 20 feet above the plant floor. This mesh screen is welded to angle-iron frames suspended from the building's structural steel skeleton.

Maintenance employees of the petitioner spend several hours each week removing objects from the screen, replacing paper spread on the screen to catch grease drippings from the material on the conveyors, and performing occasional maintenance work on the conveyors themselves. To perform these duties, maintenance employees usually are able to stand on the iron frames, but sometimes find it necessary to step onto the steel mesh screen itself.

In 1973, the company began to install heavier wire in the screen because its safety had been drawn into question. Several employees had fallen partly through the old screen, and on one occasion an employee had fallen completely through to the plant floor below but had survived. A number of maintenance employees had reacted to these incidents by bringing the unsafe screen conditions to the attention of their foremen. The petitioner company's contemporaneous safety instructions admonished employees to step only on the angle-iron frames.

On June 28, 1974, a maintenance employee fell to his death through the guard screen in an area where the newer, stronger

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there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition."

mesh had not yet been installed.[4] Following this incident, the petitioner effectuated some repairs and issued an order strictly forbidding maintenance employees from stepping on either the screens or the angle-iron supporting structure. An alternative but somewhat more cumbersome and less satisfactory method was developed for removing objects from the screen. This procedure required employees to stand on power-raised mobile platforms and use hooks to recover the material.

On July 7, 1974, two of the petitioner's maintenance employees, Virgil Deemer and Thomas Cornwell, met with the plant maintenance superintendent to voice their concern about the safety of the screen. The superintendent disagreed with their view, but permitted the two men to inspect the screen with their foreman and to point out dangerous areas needing repair. Unsatisfied with the petitioner's response to the results of this inspection, Deemer and Cornwell met on July 9 with the plant safety director. At that meeting, they requested the name, address, and telephone number of a representative of the local office of the Occupational Safety and Health Administration (OSHA). Although the safety director told the men that they "had better stop and think about what [they] were doing," he furnished the men with the information they requested. Later that same day, Deemer contacted an official of the regional OSHA office and discussed the guard screen.[5]

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[4] As a result of this fatality, the Secretary conducted an investigation that led to the issuance of a citation charging the company with maintaining an unsafe walking and working surface in violation of 29 U. S. C. § 654 (a)(1). The citation required immediate abatement of the hazard and proposed a $600 penalty. Nearly five years following the accident, the Occupational Safety and Health Review Commission affirmed the citation, but decided to permit the petitioner six months in which to correct the unsafe condition. *Whirlpool Corp.*, 1979 CCH OSHD ¶ 23,552. A petition to review that decision is pending in the United States Court of Appeals for the District of Columbia Circuit.

[5] The record does not disclose the substance of this conversation beyond the fact that it concerned the safety of the guard screen.

The next day, Deemer and Cornwell reported for the night shift at 10:45 p. m. Their foreman, after himself walking on some of the angle-iron frames, directed the two men to perform their usual maintenance duties on a section of the old screen.[6] Claiming that the screen was unsafe, they refused to carry out this directive. The foreman then sent them to the personnel office, where they were ordered to punch out without working or being paid for the remaining six hours of the shift.[7] The two men subsequently received written reprimands, which were placed in their employment files.

A little over a month later, the Secretary filed suit in the United States District Court for the Northern District of Ohio, alleging that the petitioner's actions against Deemer and Cornwell constituted discrimination in violation of § 11 (c)(1) of the Act.[8] As relief, the complaint prayed, *inter alia,* that the petitioner be ordered to expunge from its personnel files all references to the reprimands issued to the two employees, and for a permanent injunction requiring the petitioner to compensate the two employees for the six hours of pay they had lost by reason of their disciplinary suspensions.

Following a bench trial, the District Court found that the regulation in question[9] justified Deemer's and Cornwell's refusals to obey their foreman's order on July 10, 1974. The court found that the two employees had "refused to perform the cleaning operation because of a genuine fear of death or serious bodily harm," that the danger presented had been "real and not something which [had] existed only in the minds of the employees," that the employees had acted in good faith,

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[6] This order appears to have been in direct violation of the outstanding company directive that maintenance work was to be accomplished without stepping on the screen apparatus.

[7] Both employees apparently returned to work the following day without further incident.

[8] See n. 2, *supra.*

[9] See n. 3, *supra.*

and that no reasonable alternative had realistically been open to them other than to refuse to work. The District Court nevertheless denied relief, holding that the Secretary's regulation was inconsistent with the Act and therefore invalid. *Usery* v. *Whirlpool Corp.*, 416 F. Supp. 30, 32–34.

The Court of Appeals for the Sixth Circuit reversed the District Court's judgment. 593 F. 2d 715. Finding ample support in the record for the District Court's factual determination that the actions of Deemer and Cornwell had been justified under the Secretary's regulation, *id.*, at 719, n. 5,[10] the appellate court disagreed with the District Court's conclusion that the regulation is invalid. *Id.*, at 721–736. It accordingly remanded the case to the District Court for further proceedings. *Id.*, at 736. We granted certiorari, 444 U. S. 823, because the decision of the Court of Appeals in this case conflicts with those of two other Courts of Appeals on the important question in issue. See *Marshall* v. *Daniel Construction Co.*, 563 F. 2d 707 (CA5 1977); *Marshall* v. *Certified Welding Corp.*, No. 77–2048 (CA10 Dec. 28, 1978). That question, as stated at the outset of this opinion, is whether the Secretary's regulation authorizing employee "self-help" in some circumstances, 29 CFR § 1977.12 (b)(2) (1979), is permissible under the Act.

II

The Act itself creates an express mechanism for protecting workers from employment conditions believed to pose an emergent threat of death or serious injury. Upon receipt of an employee inspection request stating reasonable grounds to believe that an imminent danger is present in a workplace,

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[10] In its petition for certiorari, the petitioner did not cite this aspect of the Court of Appeals' decision as raising a question for review. Accordingly, the issue of whether the regulation covers the particular circumstances of this case is not before the Court. This Court's Rule 23 (1)(c); *General Pictures Co.* v. *Electric Co.*, 304 U. S. 175, 177–179.

OSHA must conduct an inspection. 29 U. S. C. § 657 (f)(1). In the event this inspection reveals workplace conditions or practices that "could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by" the Act,[11] 29 U. S. C. § 662 (a), the OSHA inspector must inform the affected employees and the employer of the danger and notify them that he is recommending to the Secretary that injunctive relief be sought. § 662 (c). At this juncture, the Secretary can petition a federal court to restrain the conditions or practices giving rise to the imminent danger. By means of a temporary restraining order or preliminary injunction, the court may then require the employer to avoid, correct, or remove the danger or to prohibit employees from working in the area. § 662 (a).[12]

To ensure that this process functions effectively, the Act expressly accords to every employee several rights, the exercise of which may not subject him to discharge or discrimination. An employee is given the right to inform OSHA of an imminently dangerous workplace condition or practice and request that OSHA inspect that condition or practice. 29 U. S. C.

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[11] These usual enforcement procedures involve the issuance of citations and imposition of penalties. When an OSHA inspection reveals a violation of 29 U. S. C. § 654 or of any standard promulgated under the Act, the Secretary may issue a citation for the alleged violation, fix a reasonable time for the dangerous condition's abatement, and propose a penalty. §§ 658 (a), 659 (a), 666. The employer may contest the citation and proposed penalty. §§ 659 (a), (c). Should he do so, the effective date of the abatement order is postponed until the completion of all administrative proceedings initiated in good faith. §§ 659 (b), 666 (d). Such proceedings may include a hearing before an administrative law judge and review by the Occupational Safety and Health Review Commission. §§ 659 (c), 661 (i).

[12] Such an order may continue pending the consummation of the Act's normal enforcement proceedings. § 662 (b).

§ 657 (f)(1).[13] He is given a limited right to assist the OSHA inspector in inspecting the workplace, §§ 657 (a)(2), (e), and (f)(2), and the right to aid a court in determining whether or not a risk of imminent danger in fact exists. See § 660 (c)(1). Finally, an affected employee is given the right to bring an action to compel the Secretary to seek injunctive relief if he believes the Secretary has wrongfully declined to do so. § 662 (d).

In the light of this detailed statutory scheme, the Secretary is obviously correct when he acknowledges in his regulation that, "as a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace." [14] By providing for prompt notice to the employer of an inspector's intention to seek an injunction against an imminently dangerous condition, the legislation obviously contemplates that the employer will normally respond by voluntarily and speedily eliminating the danger. And in the few instances where this does not occur, the legislative provisions authorizing prompt judicial action are designed to give employees full protection in most situations from the risk of injury or death resulting from an imminently dangerous condition at the worksite.

As this case illustrates, however, circumstances may sometimes exist in which the employee justifiably believes that the express statutory arrangement does not sufficiently protect him from death or serious injury. Such circumstances will probably not often occur, but such a situation may arise when (1) the employee is ordered by his employer to work under conditions that the employee reasonably believes pose an imminent risk of death or serious bodily injury, and (2) the employee has reason to believe that there is not sufficient time

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[13] Should the Secretary determine that "there are no reasonable grounds to believe that a violation or danger exists he shall notify the employe[e] . . . of such determination." § 657 (f)(1).

[14] See n. 3, *supra*.

or opportunity either to seek effective redress from his employer or to apprise OSHA of the danger.

Nothing in the Act suggests that those few employees who have to face this dilemma must rely exclusively on the remedies expressly set forth in the Act at the risk of their own safety. But nothing in the Act explicitly provides otherwise. Against this background of legislative silence, the Secretary has exercised his rulemaking power under 29 U. S. C. § 657 (g)(2) and has determined that, when an employee in good faith finds himself in such a predicament, he may refuse to expose himself to the dangerous condition, without being subjected to "subsequent discrimination" by the employer.

The question before us is whether this interpretative regulation [15] constitutes a permissible gloss on the Act by the Secretary, in light of the Act's language, structure, and legislative history. Our inquiry is informed by an awareness that the regulation is entitled to deference unless it can be said not to be a reasoned and supportable interpretation of the Act. *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 139–140. See *Ford Motor Credit Co.* v. *Milhollin*, 444 U. S. 555; *Mourning* v. *Family Publications Service, Inc.*, 411 U. S. 356.

A

The regulation clearly conforms to the fundamental objective of the Act—to prevent occupational deaths and serious injuries.[16] The Act, in its preamble, declares that its purpose

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[15] The petitioner has raised no issue concerning whether or not this regulation was promulgated in accordance with the procedural requirements of the Administrative Procedure Act (APA), 5 U. S. C. § 553. Thus, we accept the Secretary's designation of the regulation as "interpretative," and do not consider whether it qualifies as an "interpretative rule" within the meaning of the APA, 5 U. S. C. § 553 (b)(A).

[16] The Act's legislative history contains numerous references to the Act's preventive purpose and to the tragedy of each individual death or accident. See, *e. g.*, S. Rep. No. 91–1282, p. 2 (1970) (hereinafter S. Rep.), Leg. Hist. 142; 116 Cong. Rec. 37628 (1970), Leg. Hist. 516–517 (Sen. Nelson);

and policy is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to *preserve* our human resources. . . ." 29 U. S. C. § 651 (b). (Emphasis added.)

To accomplish this basic purpose, the legislation's remedial orientation is prophylactic in nature. See *Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n*, 430 U. S. 442, 444–445. The Act does not wait for an employee to die or become injured. It authorizes the promulgation of health and safety standards and the issuance of citations in the hope that these will act to prevent deaths or injuries from ever occurring. It would seem anomalous to construe an Act so directed and constructed as prohibiting an employee, with no other reasonable alternative, the freedom to withdraw from a workplace environment that he reasonably believes is highly dangerous.

Moreover, the Secretary's regulation can be viewed as an appropriate aid to the full effectuation of the Act's "general duty" clause. That clause provides that "[e]ach employer . . .

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116 Cong. Rec. 37628, 37630 (1970), Leg. Hist. 518, 522 (Sen. Cranston); 116 Cong. Rec. 37630 (1970), Leg. Hist. 522–523 (Sen. Randolph); H. R. Rep. No. 91–1291, pp. 14, 23 (1970) (hereinafter H. R. Rep.), Leg. Hist. 844, 853; 116 Cong. Rec. 38366 (1970), Leg. Hist. 978 (Rep. Young); 116 Cong. Rec. 38367–38368 (1970), Leg. Hist. 981 (Rep. Anderson); 116 Cong. Rec. 38386 (1970), Leg. Hist. 1031, 1032 (Rep. Dent); 116 Cong. Rec. 42203 (1970), Leg. Hist. 1210 (Rep. Daniels). As stated by Senator Yarborough, a sponsor of the Senate bill:

"We are talking about people's lives, not the indifference of some cost accountants. We are talking about assuring the men and women who work in our plants and factories that they will go home after a day's work with their bodies intact." 116 Cong. Rec. 37625 (1970), Leg. Hist. 510.

House and Senate debates are reprinted, along with the House, Senate, and Conference Reports, in a one-volume Committee Print entitled Legislative History of the Occupational Safety and Health Act of 1970, Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 1st Sess. (June 1971) (cited *supra* and hereafter as Leg. Hist.).

shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U. S. C. § 654 (a)(1). As the legislative history of this provision reflects,[17] it was intended itself to deter the occurrence of occupational deaths and serious injuries by placing on employers a mandatory obligation independent of the specific health and safety standards to be promulgated by the Secretary. Since OSHA inspectors cannot be present around the clock in every workplace, the Secretary's regulation ensures that employees will in all circumstances enjoy the rights afforded them by the "general duty" clause.

The regulation thus on its face appears to further the overriding purpose of the Act, and rationally to complement its remedial scheme.[18] In the absence of some contrary indication in the legislative history, the Secretary's regulation must, therefore, be upheld, particularly when it is remembered that safety legislation is to be liberally construed to effectuate the congressional purpose. *United States* v. *Bacto-Unidisk*, 394 U. S. 784, 798; *Lilly* v. *Grand Trunk R. Co.*, 317 U. S. 481, 486.

B

In urging reversal of the judgment before us, the petitioner relies primarily on two aspects of the Act's legislative history.

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[17] See S. Rep. 9–10, Leg. Hist. 149–150; H. R. Rep. 21–22, Leg. Hist. 851–852.

[18] It is also worth noting that the Secretary's interpretation of 29 U. S. C. § 660 (c)(1) conforms to the interpretation that Congress clearly wished the courts to give to the parallel antidiscrimination provision of the Federal Mine Safety and Health Act of 1977, 30 U. S. C. § 801 *et seq.* (1976 ed. and Supp. II). The legislative history of that provision, 30 U. S. C. § 815 (c)(1) (1976 ed., Supp. II), establishes that Congress intended it to protect "the refusal to work in conditions which are believed to be unsafe or unhealthful." S. Rep. No. 95–181, p. 35 (1977). See *id.*, at 36; 123 Cong. Rec. S10287–S10288 (daily ed. June 21, 1977) (remarks of Sen. Church, Sen. Williams, Sen. Javits).

1

Representative Daniels of New Jersey sponsored one of several House bills that led ultimately to the passage of the Act.[19] As reported to the House by the Committee on Education and Labor, the Daniels bill contained a section that was soon dubbed the "strike with pay" provision.[20] This section provided that employees could request an examination by

[19] H. R. 16785, 91st Cong., 2d Sess. (1970), Leg. Hist. 893–976 (bill as reported to the House). See H. R. Rep., Leg. Hist. 831.

[20] Section 19 (a)(5) of H. R. 16785, *supra*, Leg. Hist. 969–970 (as reported to the House floor) provided in relevant part:

"The Secretary of Health, Education, and Welfare shall publish . . . a list of all known or potentially toxic substances and the concentrations at which such toxicity is known to occur; and shall determine following a request by any employer or authorized representative of any group of employees whether any substance normally found in the working place has potentially toxic or harmful effects in such concentration as used or found; and shall submit such determination both to employers and affected employees as soon as possible. Within sixty days of such determination by the Secretary of Health, Education, and Welfare of potential toxicity of any substance, an employer shall not require any employee to be exposed to such substance designated above in toxic or greater concentrations unless it is accompanied by information, made available to employees, by label or other appropriate means, of the known hazards or toxic or long-term ill effects, the nature of the substance, and the signs, symptoms, emergency treatment and proper conditions and precautions of safe use, and personal protective equipment is supplied which allows established work procedures to be performed with such equipment, or unless such exposed employee may absent himself from such risk of harm for the period necessary to avoid such danger without loss of regular compensation for such period."

The Committee Report explained the provision as follows:

"There is still a real danger that an employee may be economically coerced into self-exposure in order to earn his livelihood, so the bill allows an employee to absent himself from that specific danger for the period of its duration without loss of pay. . . . Nothing herein restricts the right of the employer, except as he is obligated under other agreements, to assign a worker to other non-prohibited work during this time. This should eliminate possible abuse by allowing the employer to avoid payment for work not performed." H. R. Rep. 30, Leg. Hist. 860.

the Department of Health, Education, and Welfare (HEW) of the toxicity of any materials in their workplace. If that examination revealed a workplace substance that had "potentially toxic or harmful effects in such concentration as used or found," the employer was given 60 days to correct the potentially dangerous condition. Following the expiration of that period, the employer could not require that an employee be exposed to toxic concentrations of the substance unless the employee was informed of the hazards and symptoms associated with the substance, the employee was instructed in the proper precautions for dealing with the substance, and the employee was furnished with personal protective equipment. If these conditions were not met, an employee could "absent himself from such risk of harm for the period necessary to avoid such danger without loss of regular compensation for such period."

This provision encountered stiff opposition in the House. Representative Steiger of Wisconsin introduced a substitute bill containing no "strike with pay" provision.[21] In response, Representative Daniels offered a floor amendment that, among other things, deleted his bill's "strike with pay" provision.[22]

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[21] H. R. 19200, 91st Cong., 2d Sess. (1970), Leg. Hist. 763–830 (bill as originally introduced). See H. Res. 1218, 91st Cong., 2d Sess. (1970), Leg. Hist. 977.

[22] 116 Cong. Rec. 38376, 38377–38378, 38707 (1970), Leg. Hist. 1004, 1005, 1008–1009, 1071 (Rep. Daniels). See 116 Cong. Rec. 38369 (1970), Leg. Hist. 986 (Rep. Perkins). Representative Daniels explained to the House why he was proposing his amendment:

"The provision on employees not losing pay was so generally misunderstood that we have decided to drop it. We have no provision for payment of employees who want to absent themselves from risk of harm; instead, we have this amendment which enables employees subject to a risk of harm to get the Secretary into the situation quickly. Instead of making provisions for employees when their employer is not providing a safe workplace, we have strengthened the enforcement by this amendment provision to try and minimize the amount that employees will be subject to the risk of harm." 116 Cong. Rec. 38377–38378 (1970), Leg. Hist. 1009.

He suggested that employees instead be afforded the right to request an immediate OSHA inspection of the premises, a right which the Steiger bill did not provide. The House ultimately adopted the Steiger bill.[23]

The bill that was reported to and, with a few amendments, passed by the Senate never contained a "strike with pay" provision.[24] It did, however, give employees the means by which they could request immediate Labor Department inspections.[25] These two characteristics of the bill were underscored on the floor of the Senate by Senator Williams, the bill's sponsor.[26]

After passage of the Williams bill by the Senate, it and the Steiger bill were submitted to a Conference Committee. There, the House acceded to the Senate bill's inspection request provisions.[27]

The petitioner reads into this legislative history a congressional intent incompatible with an administrative interpretation of the Act such as is embodied in the regulation at issue in this case. The petitioner argues that Congress' overriding

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[23] 116 Cong. Rec. 38715 (teller vote), 38723–38724 (roll call vote) (1970), Leg. Hist. 1091, 1112–1115.

Representative Daniels' proposed amendments were never acted upon. His original bill was voted down in favor of the Steiger bill. See 116 Cong. Rec. 38704–38705 (1970), Leg. Hist. 1064 (the Chairman and Rep. Perkins); 116 Cong. Rec. 38707 (1970), Leg. Hist. 1072 (Rep. O'Hara).

[24] S. 2193, 91st Cong., 2d Sess. (1970), Leg. Hist. 204–295 (bill as reported to Senate by Senate Committee on Labor and Public Welfare). See S. Rep., Leg. Hist. 141.

[25] See S. 2193, *supra*, § 8 (f) (1), Leg. Hist. 252–253.

[26] "[D]espite some wide-spread contentions to the contrary, . . . the committee bill does not contain a so-called strike-with-pay provision. Rather than raising a possibility for endless disputes over whether employees were entitled to walk off the job with full pay, it was decided in committee to enhance the prospects of compliance by the employer through such means as giving the employees the right to request a special Labor Department investigation or inspection." 116 Cong. Rec. 37326 (1970), Leg. Hist. 416.

[27] H. R. Conf. Rep. No. 91–1765, pp. 37–38 (1970), Leg. Hist. 1190–1191. See 29 U. S. C. § 657 (f)

concern in rejecting the "strike with pay" provision was to avoid giving employees a unilateral authority to walk off the job which they might abuse in order to intimidate or harass their employer. Congress deliberately chose instead, the petitioner maintains, to grant employees the power to request immediate administrative inspections of the workplace which could in appropriate cases lead to coercive judicial remedies. As the petitioner views the regulation, therefore, it gives to workers precisely what Congress determined to withhold from them.

We read the legislative history differently. Congress rejected a provision that did not concern itself at all with conditions posing real and immediate threats of death or severe injury. The remedy which the rejected provision furnished employees could have been invoked only after 60 days had passed following HEW's inspection and notification that improperly high levels of toxic substances were present in the workplace. Had that inspection revealed employment conditions posing a threat of imminent and grave harm, the Secretary of Labor would presumably have requested, long before expiration of the 60-day period, a court injunction pursuant to other provisions of the Daniels bill.[28] Consequently, in rejecting the Daniels bill's "strike with pay" provision, Congress was not rejecting a legislative provision dealing with the highly perilous and fast-moving situations covered by the regulation now before us.

It is also important to emphasize that what primarily troubled Congress about the Daniels bill's "strike with pay" provision was its requirement that employees be paid their regular salary after having properly invoked their right to refuse to work under the section.[29] It is instructive that virtually

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[28] See H. R. 16785, *supra* n. 19, § 12 (b), Leg. Hist. 956 (bill as reported to House).

[29] Congress' concern necessarily was with the provision's compensation requirement. The law then, as it does today, already afforded workers a

every time the issue of an employee's right to absent himself from hazardous work was discussed in the legislative debates, it was in the context of the employee's right to continue to receive his usual compensation.[30]

When it rejected the "strike with pay" concept, therefore, Congress very clearly meant to reject a law unconditionally imposing upon employers an obligation to continue to pay

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right, under certain circumstances, to walk off their jobs when faced with hazardous conditions. See 116 Cong. Rec. 42208 (1970), Leg. Hist. 1223–1224 (Rep. Scherle) (reference to Taft-Hartley Act). Under Section 7 of the National Labor Relations Act, 29 U. S. C. § 157, employees have a protected right to strike over safety issues. See *NLRB* v. *Washington Aluminum Co.*, 370 U. S. 9. Similarly, Section 502 of the Labor Management Relations Act, 29 U. S. C. § 143, provides that "the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees [shall not] be deemed a strike." The effect of this section is to create an exception to a no-strike obligation in a collective-bargaining agreement. *Gateway Coal Co.* v. *Mine Workers*, 414 U. S. 368, 385.

The existence of these statutory rights also makes clear that the Secretary's regulation does not conflict with the general pattern of federal labor legislation in the area of occupational safety and health. See also 29 CFR § 1977.18 (1979).

[30] See 116 Cong. Rec. 37326 (1970), Leg. Hist. 416 (Sen. Williams); 116 Cong. Rec. 38369 (1970), Leg. Hist. 986 (Rep. Perkins); 116 Cong. Rec. 38376, 38377–38378, 38707 (1970), Leg. Hist. 1005, 1009, 1071 (Rep. Daniels); 116 Cong. Rec. 38379 (1970), Leg. Hist. 1011 (Rep. Randall); 116 Cong. Rec. 38391 (1970), Leg. Hist. 1046 (Rep. Feighan); 116 Cong. Rec. 38714 (1970), Leg. Hist. 1089 (Rep. Horton).

The petitioner cites two passages in the legislative debates that, at first blush, appear to suggest that Congress was also concerned with employee walkouts not accompanied by pay. One is a statement by Representative Cohelan, a supporter of the Daniels bill, that "a comprehensive occupational safety and health program . . . must permit the worker to leave his post whenever and wherever conditions exist that endanger his health or safety." 116 Cong. Rec. 38375 (1970), Leg. Hist. 1001. The other is a statement by another Member that the Daniels bill did not authorize "strikes without pay." 116 Cong. Rec. 38708 (1970), Leg. Hist. 1075. Read in context, however, it is clear that both statements were referring to the "strike with pay" provision contained in the Daniels bill.

their employees their regular paychecks when they absented themselves from work for reasons of safety. But the regulation at issue here does not require employers to pay workers who refuse to perform their assigned tasks in the face of imminent danger. It simply provides that in such cases the employer may not "discriminate" against the employees involved. An employer "discriminates" against an employee only when he treats that employee less favorably than he treats others similarly situated.[31]

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The second aspect of the Act's legislative history upon which the petitioner relies is the rejection by Congress of provisions contained in both the Daniels and the Williams bills that would have given Labor Department officials, in imminent-danger situations, the power temporarily to shut down all or part of an employer's plant.[32] These provisions aroused con-

[31] Deemer and Cornwell were clearly subjected to "discrimination" when the petitioner placed reprimands in their respective employment files. Whether the two employees were also discriminated against when they were denied pay for the approximately six hours they did not work on July 10, 1974, is a question not now before us. The District Court dismissed the complaint without indicating what relief it thought would have been appropriate had it upheld the Secretary's regulation. The Court of Appeals expressed no view concerning the limits of the relief to which the Secretary might ultimately be entitled. On remand, the District Court will reach this issue.

[32] The version contained in the Daniels bill would have authorized the Secretary to issue a shutdown order of no more than five days' duration. See H. R. 16785, *supra* n. 19, § 12 (a), Leg. Hist. 955–956 (bill as reported to the House); H. R. Rep. 25, Leg. Hist. 855.

As reported to the Senate, the version contained in the Williams bill limited the permissible duration of the administrative order to 72 hours and required that a Regional Director of the Labor Department concur in the order. S. 2193, *supra* n. 24, § 11 (b), Leg. Hist. 263–264. See S. Rep. 12–13, Leg. Hist. 152–153; S. Rep. 56–57, Leg. Hist. 195–196 (individual views of Sen. Javits). On the floor of the Senate, amendments were adopted that would have required the Labor Department official

siderable opposition in both Houses of Congress. The hostility engendered in the House of Representatives led Representative Daniels to delete his version of the provision in proposing amendments to his original bill.[33] The Steiger bill that ultimately passed the House gave the Labor Department no such authority.[34] The Williams bill, as approved by the Senate, did contain an administrative shutdown provision, but the Conference Committee rejected this aspect of the Senate bill.[35]

The petitioner infers from these events a congressional will hostile to the regulation in question here. The regulation, the petitioner argues, provides employees with the very authority to shut down an employer's plant that was expressly denied a more expert and objective United States Department of Labor.

As we read the pertinent legislative history, however, the petitioner misconceives the thrust of Congress' concern. Those in Congress who prevented passage of the administra-

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authorizing the inspector's actions to be an official appointed with the advice and consent of the Senate and that would have mandated that the employer be given prior notice of the reasons for the shutdown. 116 Cong. Rec. 37621–37622 (1970), Leg. Hist. 499–500; 116 Cong. Rec. 37624–37625 (1970), Leg. Hist. 508–509. See S. 2193, *supra* n. 24, § 12 (b), Leg. Hist. 562–563 (bill as passed by Senate).

[33] 116 Cong. Rec. 38372, 38376, 38378, 38707 (1970), Leg. Hist. 993, 1005, 1009–1010, 1011, 1071 (Rep. Daniels). As Representative Daniels explained:

"[B]usiness groups have expressed great fears about the potential for abuse. They believe that the power to shut down a plant should not be vested in an inspector. While there is no documentation for this fear, we recognize that it is very prevalent. The Courts have shown their capacity to respond quickly in emergency situations, and we believe that the availability of temporary restraining orders will be sufficient to deal with emergency situations. Under the Federal rules of civil procedure, these orders can be used *ex parte*. If the Secretary uses the authority that he is given efficiently and expeditiously, he should be able to get a court order within a matter of minutes rather than hours." 116 Cong. Rec. 38378 (1970), Leg. Hist. 1009–1010.

[34] H. R. 19200, *supra* n. 21, § 12, Leg. Hist. 796–798.

[35] H. R. Conf. Rep. No. 91–1765, *supra* n. 27, at 40, Leg. Hist. 1193.

tive shutdown provisions in the Daniels and Williams bills were opposed to the unilateral authority those provisions gave to federal officials, without any judicial safeguards, drastically to impair the operation of an employer's business.[36] Congressional opponents also feared that the provisions might jeopardize the Government's otherwise neutral role in labor-management relations.[37]

Neither of these congressional concerns is implicated by the regulation before us. The regulation accords no authority to Government officials. It simply permits private employees of a private employer to avoid workplace conditions that they believe pose grave dangers to their own safety. The employees have no power under the regulation to order their employer to correct the hazardous condition or to clear the dangerous workplace of others. Moreover, any employee who acts in reliance on the regulation runs the risk of discharge or reprimand in the event a court subsequently finds that he acted unreasonably or in bad faith. The regulation, therefore, does not remotely resemble the legislation that Congress rejected.

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[36] See 116 Cong. Rec. 35607, 37602 (1970), Leg. Hist. 299, 452–453 (Sen. Saxbe); 116 Cong. Rec. 37338 (1970), Leg. Hist. 425 (Sen. Dominick); 116 Cong. Rec. 37602 (1970), Leg. Hist. 453–454 (Sen. Schweiker); 116 Cong. Rec. 41763 (1970), Leg. Hist. 1149 (Sen. Prouty); H. R. Rep. 55–57, Leg. Hist. 885–887 (minority report); 116 Cong. Rec. 38368 (1970), Leg. Hist. 983 (Rep. Anderson); 116 Cong. Rec. 38372, 38702 (1970), Leg. Hist. 992, 1058 (Rep. Steiger); 116 Cong. Rec. 38378–38379 (1970), Leg. Hist. 1011–1012 (Rep. Randall); 116 Cong. Rec. 38393 (1970), Leg. Hist. 1050 (Rep. Michel); 116 Cong. Rec. 38394 (1970), Leg. Hist. 1052 (Rep. Broomfield); 116 Cong. Rec. 38704 (1970), Leg. Hist. 1062 (Rep. Sikes); 116 Cong. Rec. 38713 (1970), Leg. Hist. 1087 (Rep. Robison); 116 Cong. Rec. 42203 (1970), Leg. Hist. 1210 (Rep. Daniels).

[37] See 116 Cong. Rec. 37346 (1970), Leg. Hist. 448 (Sen. Tower); H. R. Rep. 55–57, Leg. Hist. 885–887 (minority report); 116 Cong. Rec. 38393 (1970), Leg. Hist. 1050 (Rep. Michel). Some of these Members of Congress expressed particular fears over the possible pressures which might be brought to bear on an inspector during a strike.

C

For these reasons we conclude that 29 CFR § 1977.12 (b)(2) (1979) was promulgated by the Secretary in the valid exercise of his authority under the Act. Accordingly, the judgment of the Court of Appeals is affirmed.

It is so ordered.

UNITED STATES v. CLARK, GUARDIAN

APPEAL FROM THE UNITED STATES COURT OF CLAIMS

No. 78-1513. Argued October 31, 1979—Decided February 26, 1980

Held: Under the provisions of the Civil Service Retirement Act whereby a deceased federal employee's legitimate children under 18 years of age qualify for survivors' benefits but "recognized natural" children under 18 may recover only if they "lived with the employee . . . in a regular parent-child relationship," a recognized natural child is entitled to survivors' benefits when the child has lived with the deceased employee in a "regular parent-child relationship," regardless of whether the child was living with the employee at the time of his death. This construction of the statutory provisions is fair and reasonable in light of the language, purpose, and history of the enactment and avoids a serious constitutional question under the equal protection component of the Due Process Clause of the Fifth Amendment. Even if the "lived with" requirement is assumed to serve as a device to thwart fraudulent claims of dependency or parentage or to promote efficient administration by facilitating the prompt identification of eligible annuitants, to construe the provision as applying only to illegitimate children living with the employee at the time of death would raise serious equal protection problems that this Court must seek to avoid by adopting a saving statutory construction not at odds with fundamental legislative purposes. Pp. 26-34.

218 Ct. Cl. —, 590 F. 2d 343, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BRENNAN, WHITE, BLACKMUN, and STEVENS, JJ., joined. POWELL, J., filed an opinion concurring in the judgment, in which BURGER, C. J., joined, *post*, p. 34. REHNQUIST, J., filed a dissenting opinion, in which STEWART, J., joined, *post*, p. 36.

Harriet S. Shapiro argued the cause for the United States. With her on the briefs were *Solicitor General McCree, Acting Assistant Attorney General Schiffer,* and *Deputy Solicitor General Easterbrook.*

Edward L. Merrigan argued the cause and filed a brief for appellee.*

**Toby S. Edelman, Edward C. King,* and *Bruce K. Miller* filed a brief for Barbara Jenkins as *amicus curiae* urging affirmance.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This appeal presents the question whether illegitimate children of a federal civil service employee are entitled to survivors' benefits under the Civil Service Retirement Act when the children once lived with the employee in a familial relationship, but were not living with the employee at the time of his death.

I

George Isaacson and the appellee Patricia Clark lived together from 1965 through 1971 without benefit of matrimony. They had two children, Shawn and Tricia Clark, born in 1968 and 1971, respectively, and the four lived together as a family. After the appellee and Isaacson separated, the appellee filed a state-court action in Montana seeking a determination of the paternity of the children. In June 1972, the Montana court issued a decree determining that Isaacson was the natural father of the children and ordering him to contribute to their support. Isaacson provided monthly support payments up to the time of his death in 1974.

At the time of death, Isaacson was a federal employee covered by the Civil Service Retirement Act, 5 U. S. C. § 8331 *et seq.* The Act provides that each surviving child of a deceased federal employee is entitled to a survivors' annuity. 5 U. S. C. § 8341 (e)(1). All legitimate and adopted children under 18 years of age qualify for these benefits, but stepchildren or "recognized natural" children under 18 may recover only if they "lived with the employee . . . in a regular parent-child relationship." 5 U. S. C. § 8341 (a)(3)(A). In September 1974, the Civil Service Commission's Bureau of Retirement, Insurance, and Occupational Health denied the appellee's application for such annuities for Shawn and Tricia. The Bureau held that 5 U. S. C. § 8341 (a)(3)(A) bars recovery for otherwise qualified children born out of wedlock who, like Shawn and Tricia, were not living with the employee

at the time of his death. The Commission's Board of Appeals and Review affirmed.[1]

The appellee then filed this action in the Court of Claims on behalf of her children. She argued that 5 U. S. C. § 8341 (a)(3)(A) allows recovery where, as here, the recognized natural children had once lived with the employee in a parent-child relationship. Alternatively she contended that, if the Commission's interpretation of 5 U. S. C. § 8341 (a)(3)(A) was correct, that provision violated the equal protection component of the Due Process Clause of the Fifth Amendment because it impermissibly discriminated against illegitimate children.

The Court of Claims granted the appellee's motion for summary judgment. 218 Ct. Cl. —, 590 F. 2d 343. Ignoring the statutory issue, the court granted relief on the authority of its earlier decision in *Gentry* v. *United States*, 212 Ct. Cl. 1, 546 F. 2d 343 (1976), rehearing denied, 212 Ct. Cl. 27, 551 F. 2d 852 (1977), which held that the "lived with" requirement of 5 U. S. C. § 8341 (a)(3)(A) unconstitutionally discriminated against illegitimate children. We postponed consideration of our jurisdiction pending hearing on the merits, 441 U. S. 960 (1979), and now affirm on the statutory ground presented to but not addressed by the Court of Claims.[2]

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[1] On January 1, 1979, the Civil Service Commission was abolished, and the Office of Personnel Management assumed primary responsibility for the civil service retirement program. See Civil Service Reform Act of 1978, Pub. L. No. 95–454, 92 Stat. 1111; Reorg. Plan No. 2 of 1978, 3 CFR 323 (1979). For convenience, throughout this opinion we shall refer to the agency administering the retirement program as the Civil Service Commission.

[2] The appellee contends that this Court does not have jurisdiction to entertain this appeal. We disagree.

By an order dated January 27, 1978, the Court of Claims held that the "lived with" requirement of 5 U. S. C. § 8341 (a)(3)(A) applicable to illegitimate children violated the equal protection component of the Due Process Clause of the Fifth Amendment. The court then resolved the issue

II

The Civil Service Retirement Act provides survivors' annuities to all legitimate children, but grants the same benefits to

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of relief and entered final judgment on November 6, 1978. The Government filed its notice of appeal on December 5, 1978.

The appeal statute relied upon by the Government, 28 U. S. C. § 1252, provides:

"Any party *may* appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States . . . holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party." (Emphasis added.)

The appellee first contends that the Government failed to file a timely notice of appeal because it did not appeal the January 27, 1978, decision on the liability issue. Section 1252 would have allowed the Government to seek review of this interlocutory order declaring a federal statute unconstitutional, but its permissive language providing that any party "may appeal . . . from an interlocutory or final judgment" plainly did not require the Government to appeal before final judgment was entered. Cf. *United States* v. *Carlo Bianchi & Co.*, 373 U. S. 709 (1963) (review of final judgment under 28 U. S. C. § 1255 entails review of any interlocutory decisions on liability); *Marconi Wireless Telegraph Co.* v. *United States*, 320 U. S. 1, 47–48 (1943) (same); *American Foreign S. S. Co.* v. *Matise*, 423 U. S. 150 (1975) (same rule when jurisdiction based on 28 U. S. C. § 1254); *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399, 418 (1923) (same).

The appellee also argues that no appeal will lie under 28 U. S. C. § 1252 because the Court of Claims did not declare an Act of Congress unconstitutional. To the contrary, a determination that the "lived with" requirement of 5 U. S. C. § 8341 (a)(3)(A) was unconstitutional was a necessary predicate to the relief the Court of Claims granted to the appellee's children, and this determination of unconstitutionality may be appealed under § 1252. *McLucas* v. *DeChamplain*, 421 U. S. 21, 30 (1975); *United States* v. *Raines*, 362 U. S. 17, 20 (1960). It is irrelevant that the Court of Claims reached this holding by relying on its earlier decision in *Gentry* v. *United States*, 212 Ct. Cl. 1, 546 F. 2d 343 (1976), rehearing denied, 212 Ct. Cl. 27, 551 F. 2d 852 (1977). An appeal under § 1252 lies for any federal-court decision declaring an Act of Congress unconstitutional in a civil action in which the United States is a party, not just for

children born out of wedlock only if they "lived with the employee . . . in a regular parent-child relationship." Such a classification based on illegitimacy is unconstitutional unless it bears "an evident and substantial relation to the particular . . . interests this statute is designed to serve." *Lalli* v. *Lalli*, 439 U. S. 259, 268 (1978) (plurality opinion); see *id.*, at 279 (BRENNAN, J., dissenting). See also *Trimble* v. *Gordon*, 430 U. S. 762, 767 (1977).[3] The Government's asserted justification for the classification—that it is an administratively convenient means of identifying children who actually were deprived of support by the employee's death—is itself open to constitutional question, since the statute does not condition benefits to legitimate children on such a showing.

It is well settled that this Court will not pass on the constitutionality of an Act of Congress if a construction of the statute is fairly possible by which the question may be avoided. *E. g., Califano* v. *Yamasaki*, 442 U. S. 682, 693 (1979); *New York City Transit Authority* v. *Beazer*, 440 U. S. 568, 582, and n. 22 (1979); *Machinists* v. *Street*, 367 U. S. 740, 749–750 (1961); *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U. S. 101, 105 (1944). Where both a constitutional issue and an issue of statutory construction are raised, we are not, of course, foreclosed from considering the statutory question merely because the lower court failed to address it. *Califano* v. *Yamasaki, supra*, at 693; *University of California Regents* v. *Bakke*, 438 U. S. 265, 328 (1978)

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the first such decision. Cf. *Garment Workers* v. *Donnelly Garment Co.*, 304 U. S. 243, 249 (1938).

[3] The lower federal courts have uniformly held that the "lived with" requirement violates the equal protection component of the Due Process Clause of the Fifth Amendment. *Gentry* v. *United States, supra; Jenkins* v. *U. S. Civil Service Comm'n*, 460 F. Supp. 611 (DC 1978); *Proctor* v. *United States*, 448 F. Supp. 418 (DC 1977) (three-judge court); *Tenny* v. *United States*, 441 F. Supp. 224 (ED Mo. 1977); *Myers* v. *Commissioners of Civil Service Comm'n*, Civ. No. 8682 (SD Ohio, Aug. 8, 1977).

(opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.); *id.*, at 281 (opinion of POWELL, J.); *id.*, at 411–412 (opinion of STEVENS, J.). Accordingly, we turn to the statute to determine whether resolution of the constitutional question is necessary to the disposition of this case.

Shawn and Tricia Clark were denied annuities on the ground that they did not meet the statutory requirement that they "lived with the employee . . . in a regular parent-child relationship." The appellee contended that her children did meet the requirement because they had lived with the decedent as a family from their birth through 1971. If the appellee's construction of the statutory language is correct, the children are entitled to survivors' annuities and decision of the constitutional question is unnecessary. The Civil Service Commission, however, has construed the "lived with" language to require that the children be living with the employee at the time of the employee's death.

When the statutory language is considered on its face, the appellee's reading is at least as plausible as that of the Government. Shawn and Tricia had "lived with" their father, and we believe those words would not ordinarily imply a temporal limitation. Moreover, Congress has demonstrated in other social welfare legislation that it knows how to restrict the class of eligible beneficiaries to those living with an individual at a particular time.[4]

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[4] See 45 U. S. C. § 231e (c)(1)(i) (Railroad Retirement Act benefits payable in certain circumstances to "the widow or widower of the deceased employee who was living with such employee at the time of such employee's death"); 42 U. S. C. § 416 (e) (Social Security Act in part defines legally adopted child as a person who "was at the time of such individual's death living in such individual's household"); 42 U. S. C. § 416 (h)(3)(A)(ii) (Social Security Act's definition of qualified child is met in part when "such insured individual is shown . . . to be the father of the applicant and was living with or contributing to the support of the applicant at the time such insured individual became entitled to benefits or attained age 65, whichever first occurred").

We can find nothing in the legislative history of the statute to indicate that appellee's construction of the statute is out of harmony with the congressional intent. The original enactment in 1948 made an annuity payable to "an unmarried child, including a dependent stepchild or an adopted child, under the age of eighteen years, or such unmarried child who because of physical or mental disability is incapable of self-support." Act of Feb. 28, 1948, § 11, 62 Stat. 55. The amount of the annuity depended on whether another parent survived. Although children born out of wedlock were not expressly included, the provision was seemingly broad enough to cover them.[5] The Government argues that, in granting annuities to surviving children, Congress intended to provide funds to replace support lost by the wage earner's dependents. The Government views the statutory scheme as designed to pay benefits only to those children Congress thought most likely to have been dependent on the wage earner, and to take account of the likelihood of supplementary support from the other parent. We note, however, that only stepchildren were required to show dependency.[6]

In 1956, Congress amended the definition of an entitled child to include "an unmarried child, including (1) an adopted child, and (2) a stepchild or recognized natural child who received more than one-half his support from and lived with the . . . employee in a regular parent-child relationship." Act of July 31, 1956, Title IV, § 1 (j), 70 Stat. 744.[7] For the

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[5] See *Visor* v. *United States*, Civ. No. 9922 (2) (ED Mo. Feb. 12, 1955).

[6] By authorizing the payment of benefits to an "unmarried child who because of physical or mental disability is incapable of self-support," Act of Feb. 28, 1948, 62 Stat. 55, Congress apparently intended that, though disabled children over 18 years of age had to show they were unable to support themselves, they did not have to show they were dependent on the deceased parent.

[7] The 1956 amendments also provided that a survivors' annuity was payable to a legitimate child with a surviving parent only if the child proved that he had received more than one-half his support from the

first time children born out of wedlock were explicitly included, but their eligibility was made subject both to the "lived with" requirement and to the dependency requirement originally applicable only to stepchildren.

The legislative history is devoid of any indication whether Congress intended that annuities could be recovered by all recognized natural children who had once lived with the employee in a familial relationship, or only by such children who were living with the employee at the time of death. Nor do the congressional materials illuminate the purpose of the "lived with" requirement. The Government defends the provision as a rational indicator of both dependency and parentage. An illegitimate child who lived with the natural parent, according to this view, is both more likely to have received support from the parent and more likely to be the true issue of that parent than is any illegitimate child who lived apart from the natural parent. It seems unlikely that Congress viewed the requirement as a means of ascertaining either dependency or parentage, however, since the statute also required the child to prove both that he had received more than one-half of his support from the deceased employee and that he was the employee's "recognized natural child." Those provisions speak directly to the concerns raised by the Government, and the additional requirement that the child must have lived with the parent would therefore be superfluous regardless of whether it mandated that the child must have lived with the parent at the time of the parent's death rather than at some other time.

The Government also urges that Congress intended the "lived with" requirement to serve as a means of thwarting fraudulent claims of dependency or parentage, and to promote efficient administration by facilitating the prompt identification of eligible annuitants. It is evident from the facts

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deceased employee. Act of July 31, 1956, amending Title IV, § 10 (d), 70 Stat. 754.

of this case, however, that the classification is not narrowly tailored as a means of furthering either goal. As we recognized in *Jimenez* v. *Weinberger*, 417 U. S. 628, 636 (1974), the prevention of fraud is a legitimate goal, but it does not necessarily follow "that the blanket and conclusive exclusion of [appellee's] subclass of illegitimates is reasonably related to the prevention of spurious claims." Thus, even if the "lived with" requirement is assumed to serve as a device to prevent fraud or to promote efficient administration, it raises serious equal protection problems that this Court must seek to avoid by adopting a saving statutory construction not at odds with fundamental legislative purposes.

In sum, the legislative history of the 1956 amendments provides no direct guidance on the purpose of the "lived with" provision or on whether it was intended to be restricted to children living with the parent at a particular time. The less restrictive construction proposed by the appellee appears fair and reasonable in light of the language, purpose, and history of the enactment, and it avoids a serious constitutional question. Before we conclude our inquiry, however, we must consider whether a 1966 amendment to the statute affected the children's right to recovery.

Congress enacted the 1966 amendments to the Act upon the request of the Executive Branch's Committee on Federal Staff Retirement Systems. One of these amendments removed the requirement that children must prove they received one-half of their support from the deceased employee in order to recover survivors' annuities. Act of July 18, 1966, Title V, § 502, 80 Stat. 300. Congress deleted the dependency requirement in order to ensure recovery for the children of female civil servants, who typically earned less than their husbands and accordingly contributed less than half of the support of their children.[8] Congress also deleted the require-

[8] See S. Rep. No. 1187, 89th Cong., 2d Sess., 5 (1966); The Federal Salary and Fringe Benefits Act of 1966: Hearings on H. R. 14122 before

ment of proof of dependency for stepchildren and "recognized natural" children, but retained the "lived with" requirement for those claimants. The reason for retaining the requirement was not clearly explained in the Cabinet Committee report, which simply stated:

> "Stepchildren and natural children are eligible for benefits at present only when they have been dependent on the deceased parent and living with the parent in a regular parent-child relationship. The latter requirement should be retained; but, if it is fulfilled, the benefits should be paid as for any other child, without regard to the dependency requirement." H. R. Doc. No. 402, 89th Cong., 2d Sess., 41 (1966).

The Government views the 1966 amendment as evidence that Congress intended the "lived with" requirement to serve as a convenient method of determining whether the child received support from the deceased employee. This proposition appears implausible, since in the same sentence the Committee recommended that if the "lived with" requirement were met benefits should be paid "as for any other child, without regard to the dependency requirement." The Committee's use of the word "retained" is a further indication that Congress did not intend the "lived with" provision to assume a new function previously performed by the dependency requirement. Moreover, the Government's position again unnecessarily raises the equal protection question, because legitimate children and adopted children were not required to demonstrate that they had received support from the decedent. In the absence of any persuasive evidence to the contrary, therefore, we assume that Congress' failure to alter the "lived

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the Senate Committee on Post Office and Civil Service, 89th Cong., 2d Sess., 7 (1966); Joint Annual Report of the Director of the Bureau of the Budget and the Chairman of the Civil Service Commission and the Report of the Cabinet Committee on Federal Staff Retirement Systems, H. R. Doc. No. 402, 89th Cong., 2d Sess., 41 (1966).

with" requirement likewise failed to modify the purpose of that provision as envisioned by the Congress that enacted it.[9]

We conclude that the "lived with" requirement is satisfied when a recognized natural child has lived with the deceased employee in a "regular parent-child relationship," regardless of whether the child was living with the employee at the time of the employee's death. Our consideration of the language and purpose of the statute and of the available legislative history convinces us that this construction is a fair and reasonable reading of the congressional enactment.[10] Furthermore,

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[9] Two Committees of Congress, in passing on requests for legislation by the Civil Service Commission, have referred to the "lived with" requirement as a "living with" requirement. S. Rep. No. 92-527, p. 1 (1971); S. Rep. No. 1070, 89th Cong., 2d Sess., 1 (1966). See also H. R. Rep. No. 92-811, p. 3 (1972); H. R. Rep. No. 33, 89th Cong., 1st Sess., 3 (1965). We read the Committees' statements as nothing more than acknowledgements of the Commission's interpretation of the requirement, which was made known to each Committee by letters from the Commission. S. Rep. No. 92-527, *supra*, at 2-3; S. Rep. No. 1070, *supra*, at 3-4. In any event, the views of some Congressmen as to the construction of a statute adopted years before by another Congress have "'very little, if any, significance.'" *United States* v. *Southwestern Cable Co.*, 392 U. S. 157, 170 (1968) (quoting *Rainwater* v. *United States*, 356 U. S. 590, 593 (1958)).

The 1966 recommendation of the Cabinet Committee on Federal Staff Retirement Systems referred to the "lived with" requirement as allowing benefits to recognized natural children "when they have been . . . living with the parent in a regular parent-child relationship." H. R. Doc. No. 402, 89th Cong., 2d Sess., 41 (1966). This language might appear to be inconsistent with our construction of the "lived with" requirement. The language was formulated by the Executive Branch, however, not by Congress, and at most simply reflects the Civil Service Commission's interpretation of the statute.

[10] We recognize that the Civil Service Commission has interpreted the "lived with" requirement to be a "living with" requirement, although the Government does not inform us whether the agency interpretation was contemporaneous with the 1956 enactment. We do not disregard this evidence of the meaning of the statute. See, *e. g.*, *Batterton* v. *Francis*, 432 U. S. 416, 425, n. 9 (1977). In view of our analysis of the statute and its legislative history, and considering the need to avoid unnecessary con-

the construction is necessary to avoid a serious constitutional question. By so holding, we do not believe that we are creating undue administrative difficulties for the Civil Service Commission. In this case, for example, the Commission relied on the Montana court's paternity decree and affidavits concerning when the appellee's children lived with the deceased employee. Similar documentary evidence would be equally probative of whether an illegitimate child claiming a survivors' annuity had ever lived with the deceased employee in a regular parent-child relationship.[11]

The judgment of the Court of Claims is

Affirmed.

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE joins, concurring in the judgment.

The question in this case is whether the illegitimate children of a federal employee, who lived with his children after their birth and had a legal obligation to contribute to their support until his death, are eligible to receive survivors' benefits under the Civil Service Retirement Act, 5 U. S. C. § 8331 *et seq.* The statutory definition of "child" under that Act includes a "recognized natural child who lived with the employee . . . in a regular parent-child relationship." 5 U. S. C. § 8341 (a)(3)

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stitutional adjudication, however, the agency interpretation would not be decisive even if it were contemporaneous.

[11] Because we hold that the Civil Service Retirement Act expressly allows the appellee's children to receive survivors' annuities, there is no question that the Court of Claims below had both jurisdiction to entertain their claims and authority to grant recovery. See *United States* v. *Testan*, 424 U. S. 392, 397–398 (1976); *Eastport S. S. Corp.* v. *United States*, 178 Ct. Cl. 599, 606–607, 372 F. 2d 1002, 1007–1009 (1967). In light of our holding, we need not address the Government's argument that the Court of Claims exceeded its jurisdiction when it declared 5 U. S. C. § 8341 (a)(3)(A)'s "lived with" requirement unconstitutional, severed that requirement from the statute, and awarded relief to the appellee's children based on the remaining language in the statute. Cf. *United States* v. *Testan, supra.*

(A)(ii). Because I agree that these children satisfy the statutory definition, I concur in the judgment of the Court. I write separately because I do not believe that the Court's broad construction of the "lived with" requirement is compatible with congressional intent or necessary to avoid constitutional difficulties.

The Court recognizes that the "lived with" requirement could serve governmental purposes by providing proof of either paternity or dependence. The Court concludes that the "lived with" requirement is not designed to prove paternity because the statute separately requires that an eligible illegitimate be a "recognized natural child." *Ante*, at 30. I agree.

I cannot accept so easily the Court's further conclusion that the "lived with" requirement was not designed to prove dependency. Although the 1966 amendment demonstrates that the "lived with" requirement cannot be interpreted to demand that more than one-half of a child's support come from the deceased parent, it does not demonstrate that Congress intended to eliminate entirely the dependency requirement. As a matter of statutory construction and common sense, the statement that an illegitimate who fulfills the "lived with" requirement need not meet an additional dependency requirement, *ante*, at 32, quoting H. R. Doc. No. 402, 89th Cong., 2d Sess., 41 (1966), indicates that Congress intended the "lived with" test to serve as the functional equivalent of a dependency requirement. The Court's assumption to the contrary deprives the "lived with" requirement of any legislative purpose. Rather than construe a statutory provision to serve no identifiable congressional goal, I would conclude that Congress intended the "lived with" requirement to serve as a means through which illegitimate children may prove actual dependency on the deceased parent.

Congress may require illegitimate children to demonstrate actual dependency even though legitimate children are presumed to be dependent, *Mathews* v. *Lucas*, 427 U. S. 495, 507–509 (1976), so long as the means by which illegitimates

must demonstrate such dependency are substantially related to achievement of the statutory goal. *Lalli* v. *Lalli*, 439 U. S. 259, 275–276 (1978) (opinion of POWELL, J.); see *Trimble* v. *Gordon*, 430 U. S. 762, 770–773 (1977). The possible constitutional infirmity in the Government's construction of the statute is its assumption that only illegitimates who "lived with" a parent at the time of his death were actually dependent. Such a requirement may be unconstitutionally restrictive because, as in this case, it would bar the claims of children who lived with their father for some part of their lives, and who received support from their father until his death.*

The recognition of the children's claim in this case clearly does not frustrate the congressional intent that only dependent illegitimate children receive survivors' annuities. I therefore would hold that children who show a continuing relationship of dependency with their father, which includes living with him in the past and receiving support from him when they lived apart, satisfy the requirement of 5 U. S. C. § 8341 (a)(3)(A)(ii). I do not believe, however, that the Court needs to find the requirement satisfied no matter when the child lived with the deceased parent. In some circumstances proof of a domestic living situation at some far distant period in the child's life may not demonstrate actual dependency. Accordingly, I would go no further than concluding that these children have satisfied the "lived with" requirement.

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE STEWART joins, dissenting.

I am in full agreement with the Court that the statutory question should have been resolved in this case prior to any application of the constitutional issue decided by the Court

*I believe that the Court errs in assuming that its broad interpretation of the "lived with" requirement will always avoid constitutional difficulty. The imposition of the "lived with" requirement as a test of actual dependency may be unconstitutional in a case in which a father had always supported, but never lived with, an illegitimate child.

of Claims in *Gentry* v. *United States*, 212 Ct. Cl. 1, 546 F. 2d 343 (1976). Nor do I disagree with the Court's construction of the statute in issue. I dissent, however, because I believe that the Court should remand the case to the Court of Claims for consideration of the statutory claim in the first instance.

Federal courts should not, of course, resolve cases on the basis of constitutional questions when a nonconstitutional ground might be available. A federal court also may not award relief on the basis of a constitutional decision absent jurisdiction conferred by Congress. When a federal court violates either of these prudential or jurisdictional limitations, our standard practice is to remand the case for consideration of the statutory question. In *Youakim* v. *Miller*, 425 U. S. 231 (1976), this Court found that a constitutional holding of a lower court might possibly be avoided by the construction of statutory requirements. The Court remanded, finding that the statutory issue might be dispositive, "but that the claim should be aired first in the District Court. Vacating the judgment and remanding the case for this purpose will require the District Court first to decide the statutory issue, . . . and if appellants prevail on that question, it will be unnecessary for either the District Court or this Court to reach the equal protection issue at all." *Id.*, at 236. See also *Wyman* v. *Rothstein*, 398 U. S. 275 (1970); *Alma Motor Co.* v. *Timken-Detroit Axle Co.*, 329 U. S. 129 (1946). In *Richardson* v. *Morris*, 409 U. S. 464 (1973), the District Court decided a constitutional question under an erroneous assumption of Tucker Act jurisdiction, and this Court found it necessary to remand the case so that the District Court could determine what other permissible grounds of decision may have been open to it.

The Court of Claims in this case was wrong in resolving this case on the basis of its constitutional holding, both as a matter of prudential considerations as well as jurisdiction. See *United States* v. *Testan*, 424 U. S. 392, 397–398 (1976). While the Court of Claims did have jurisdiction to entertain the statu-

tory question presented in this case, we should have permitted it the opportunity to exercise that jurisdiction. Only this Term, we remanded a case to the Court of Claims for consideration of an issue not resolved by that court. *Hatzlachh Supply Co.* v. *United States,* 444 U. S. 460 (1980). By remanding here, we would conform the disposition of this case to our customary practice which recognizes the usefulness of district and appellate court opinions on the questions ultimately reviewed here, as well as the need to reserve this Court's plenary consideration for questions still warranting final decision here after decision by another court.

MASSACHUSETTS *v.* MEEHAN

CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

No. 78–1874. Argued January 9, 1980—Decided February 26, 1980

Certiorari dismissed. Reported below: — Mass. —, 387 N. E. 2d 527.

Barbara A. H. Smith, Assistant Attorney General of Massachusetts, argued the cause for petitioner. With her on the briefs were *Francis X. Bellotti,* Attorney General, and *Stephen R. Delinsky,* Assistant Attorney General.

David A. Mills argued the cause for respondent. With him on the brief was *Walter J. Hurley.*

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

TRAMMEL *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 78-5705. Argued October 29, 30, 1979—Decided February 27, 1980

Prior to his trial with others on federal drug charges, petitioner advised the District Court that the Government intended to call his wife (who had been named in the indictment as an unindicted co-conspirator) as an adverse witness and asserted a privilege to prevent her from testifying. The District Court ruled that confidential communications between petitioner and his wife were privileged and therefore inadmissible, but the wife was permitted to testify to any act she observed before or during the marriage and to any communication made in the presence of a third person. Primarily on the basis of his wife's testimony, petitioner was convicted, and the Court of Appeals affirmed, rejecting petitioner's contention that the admission of his wife's adverse testimony, over his objection, contravened the decision in *Hawkins* v. *United States*, 358 U. S. 74, barring the testimony of one spouse against the other unless both consent.

Held: The Court modifies the *Hawkins* rule so that the witness spouse alone has a privilege to refuse to testify adversely; the witness may be neither compelled to testify nor foreclosed from testifying. Here, petitioner's spouse chose to testify against him; that she did so after a grant of immunity and assurances of lenient treatment does not render her testimony involuntary, and thus petitioner's claim of privilege was properly rejected. Pp. 43–53.

(a) The modern justification for the privilege against adverse spousal testimony is its perceived role in fostering the harmony and sanctity of the marriage relationship. While this Court, in *Hawkins, supra,* reaffirmed the vitality of the common-law privilege in the federal courts, it made clear that its decision was not meant to "foreclose whatever changes in the rule may eventually be dictated by 'reason and experience.'" 358 U. S., at 79. Pp. 43–46.

(b) Rule 501 of the Federal Rules of Evidence acknowledges the federal courts' authority to continue the evolutionary development of testimonial privileges in federal criminal trials "governed by the principles of the common law as they may be interpreted . . . in the light of reason and experience." P. 47.

(c) Since 1958, when *Hawkins* was decided, the trend in state law

has been toward divesting the accused of the privilege to bar adverse spousal testimony. Pp. 48–50.

(d) Information privately disclosed between husband and wife in the confidence of the marital relationship is privileged under the independent rule protecting confidential marital communications, *Blau* v. *United States*, 340 U. S. 332; and the *Hawkins* privilege, which sweeps more broadly than any other testimonial privilege, is not limited to confidential communications but is invoked to also exclude evidence of criminal acts and of communications in the presence of third persons. The ancient foundations for so sweeping a privilege—whereby a woman was regarded as a chattel and denied a separate legal identity—have long since disappeared, and the contemporary justification for affording an accused such a privilege is unpersuasive. When one spouse is willing to testify against the other in a criminal proceeding—whatever the motivation—there is probably little in the way of marital harmony for the privilege to preserve. Consideration of the foundations for the privilege and its history thus shows that "reason and experience" no longer justify so sweeping a rule as that found acceptable in *Hawkins*. Pp. 50–53.

583 F. 2d 1166, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined. STEWART, J., filed an opinion concurring in the judgment, *post*, p. 53.

J. Terry Wiggins argued the cause for petitioner. With him on the brief was *Frederick A. Fielder, Jr.*

Solicitor General McCree argued the cause for the United States. With him on the brief were *Assistant Attorney General Heymann, Deputy Solicitor General Frey, Elinor Hadley Stillman,* and *Joel M. Gershowitz.**

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to consider whether an accused may invoke the privilege against adverse spousal testimony so as

*Briefs of *amici curiae* were filed by *Frank E. Booker* for the Michigan Bar Association Standing Committee on Civil Procedure; and by *Mr. Booker* for the Missouri Bar.

to exclude the voluntary testimony of his wife. 440 U. S. 934 (1979). This calls for a re-examination of *Hawkins* v. *United States,* 358 U. S. 74 (1958).

I

On March 10, 1976, petitioner Otis Trammel was indicted with two others, Edwin Lee Roberts and Joseph Freeman, for importing heroin into the United States from Thailand and the Philippine Islands and for conspiracy to import heroin in violation of 21 U. S. C. §§ 952 (a), 962 (a), and 963. The indictment also named six unindicted co-conspirators, including petitioner's wife Elizabeth Ann Trammel.

According to the indictment, petitioner and his wife flew from the Philippines to California in August 1975, carrying with them a quantity of heroin. Freeman and Roberts assisted them in its distribution. Elizabeth Trammel then travelled to Thailand where she purchased another supply of the drug. On November 3, 1975, with four ounces of heroin on her person, she boarded a plane for the United States. During a routine customs search in Hawaii, she was searched, the heroin was discovered, and she was arrested. After discussions with Drug Enforcement Administration agents, she agreed to cooperate with the Government.

Prior to trial on this indictment, petitioner moved to sever his case from that of Roberts and Freeman. He advised the court that the Government intended to call his wife as an adverse witness and asserted his claim to a privilege to prevent her from testifying against him. At a hearing on the motion, Mrs. Trammel was called as a Government witness under a grant of use immunity. She testified that she and petitioner were married in May 1975 and that they remained married.[1] She explained that her cooperation with the Government was based on assurances that she would be given

[1] In response to the question whether divorce was contemplated, Mrs. Trammel testified that her husband had said that "I would go my way and he would go his." App. 27.

lenient treatment.[2] She then described, in considerable detail, her role and that of her husband in the heroin distribution conspiracy.

After hearing this testimony, the District Court ruled that Mrs. Trammel could testify in support of the Government's case to any act she observed during the marriage and to any communication "made in the presence of a third person"; however, confidential communications between petitioner and his wife were held to be privileged and inadmissible. The motion to sever was denied.

At trial, Elizabeth Trammel testified within the limits of the court's pretrial ruling; her testimony, as the Government concedes, constituted virtually its entire case against petitioner. He was found guilty on both the substantive and conspiracy charges and sentenced to an indeterminate term of years pursuant to the Federal Youth Corrections Act, 18 U. S. C. § 5010 (b).[3]

In the Court of Appeals petitioner's only claim of error was that the admission of the adverse testimony of his wife, over his objection, contravened this Court's teaching in *Hawkins* v. *United States, supra,* and therefore constituted reversible error. The Court of Appeals rejected this contention. It concluded that *Hawkins* did not prohibit "the voluntary testimony of a spouse who appears as an unindicted co-conspirator under grant of immunity from the Government in return for her testimony." 583 F. 2d 1166, 1168 (CA10 1978).

II

The privilege claimed by petitioner has ancient roots. Writing in 1628, Lord Coke observed that "it hath beene resolved

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[2] The Government represents to the Court that Elizabeth Trammel has not been prosecuted for her role in the conspiracy.

[3] Roberts and Freeman were also convicted. Roberts was sentenced to two years' imprisonment. Freeman received an indeterminate sentence under the Youth Corrections Act.

by the Justices that a wife cannot be produced either against or for her husband." 1 E. Coke, A Commentarie upon Littleton 6b (1628). See, generally, 8 J. Wigmore, Evidence § 2227 (McNaughton rev. 1961). This spousal disqualification sprang from two canons of medieval jurisprudence: first, the rule that an accused was not permitted to testify in his own behalf because of his interest in the proceeding; second, the concept that husband and wife were one, and that since the woman had no recognized separate legal existence, the husband was that one. From those two now long-abandoned doctrines, it followed that what was inadmissible from the lips of the defendant-husband was also inadmissible from his wife.

Despite its medieval origins, this rule of spousal disqualification remained intact in most common-law jurisdictions well into the 19th century. See *id.*, § 2333. It was applied by this Court in *Stein* v. *Bowman*, 13 Pet. 209, 220–223 (1839), in *Graves* v. *United States*, 150 U. S. 118 (1893), and again in *Jin Fuey Moy* v. *United States*, 254 U. S. 189, 195 (1920), where it was deemed so well established a proposition as to "hardly requir[e] mention." Indeed, it was not until 1933, in *Funk* v. *United States*, 290 U. S. 371, that this Court abolished the testimonial disqualification in the federal courts, so as to permit the spouse of a defendant to testify in the defendant's behalf. *Funk*, however, left undisturbed the rule that either spouse could prevent the other from giving adverse testimony. *Id.*, at 373. The rule thus evolved into one of privilege rather than one of absolute disqualification. See J. Maguire, Evidence, Common Sense and Common Law 78–92 (1947).

The modern justification for this privilege against adverse spousal testimony is its perceived role in fostering the harmony and sanctity of the marriage relationship. Notwithstanding this benign purpose, the rule was sharply criticized.[4]

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[4] See Brosman, Edward Livingston and Spousal Testimony in Louisiana, 11 Tulane L. Rev. 243 (1937); Hutchins & Slesinger, Some Observations

Professor Wigmore termed it "the merest anachronism in legal theory and an indefensible obstruction to truth in practice." 8 Wigmore § 2228, at 221. The Committee on Improvements in the Law of Evidence of the American Bar Association called for its abolition. 63 American Bar Association Reports 594–595 (1938). In its place, Wigmore and others suggested a privilege protecting only private marital communications, modeled on the privilege between priest and penitent, attorney and client, and physician and patient. See 8 Wigmore § 2332 *et seq.*[5]

These criticisms influenced the American Law Institute, which, in its 1942 Model Code of Evidence, advocated a privilege for marital confidences, but expressly rejected a rule vesting in the defendant the right to exclude all adverse testimony of his spouse. See American Law Institute, Model Code of Evidence, Rule 215 (1942). In 1953 the Uniform Rules of Evidence, drafted by the National Conference of Commissioners on Uniform State Laws, followed a similar course; it limited the privilege to confidential communications and "abolishe[d] the rule, still existing in some states, and largely a sentimental relic, of not requiring one spouse to testify against the other in a criminal action." See Rule 23 (2) and comments. Several state legislatures enacted similarly patterned provisions into law.[6]

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on the Law of Evidence: Family Relations, 13 Minn. L. Rev. 675 (1929); Note, 24 Calif. L. Rev. 472 (1936); Note, 35 Mich. L. Rev. 329 (1936); Note, 10 So. Cal. L. Rev. 94 (1936); Note, 20 Minn. L. Rev. 693 (1936).

[5] This Court recognized just such a confidential marital communications privilege in *Wolfle* v. *United States*, 291 U. S. 7 (1934), and in *Blau* v. *United States*, 340 U. S. 332 (1951). In neither case, however, did the Court adopt the Wigmore view that the communications privilege be substituted *in place of* the privilege against adverse spousal testimony. The privilege as to confidential marital communications is not at issue in the instant case; accordingly, our holding today does not disturb *Wolfle* and *Blau*.

[6] See Note, Competency of One Spouse to Testify Against the Other in

In *Hawkins* v. *United States*, 358 U. S. 74 (1958), this Court considered the continued vitality of the privilege against adverse spousal testimony in the federal courts. There the District Court had permitted petitioner's wife, over his objection, to testify against him. With one questioning concurring opinion, the Court held the wife's testimony inadmissible; it took note of the critical comments that the common-law rule had engendered, *id.*, at 76, and n. 4, but chose not to abandon it. Also rejected was the Government's suggestion that the Court modify the privilege by vesting it in the witness spouse, with freedom to testify or not independent of the defendant's control. The Court viewed this proposed modification as antithetical to the widespread belief, evidenced in the rules then in effect in a majority of the States and in England, "that the law should not force or encourage testimony which might alienate husband and wife, or further inflame existing domestic differences." *Id.*, at 79.

Hawkins, then, left the federal privilege for adverse spousal testimony where it found it, continuing "a rule which bars the testimony of one spouse against the other unless both consent." *Id.*, at 78. Accord, *Wyatt* v. *United States*, 362 U. S. 525, 528 (1960).[7] However, in so doing, the Court made clear that its decision was not meant to "foreclose whatever changes in the rule may eventually be dictated by 'reason and experience.'" 358 U. S., at 79.

Criminal Cases Where the Testimony Does Not Relate to Confidential Communications: Modern Trend, 38 Va. L. Rev. 359 (1952).

[7] The decision in *Wyatt* recognized an exception to *Hawkins* for cases in which one spouse commits a crime against the other. 362 U. S., at 526. This exception, placed on the ground of necessity, was a longstanding one at common law. See *Lord Audley's Case*, 123 Eng. Rep. 1140 (1631); 8 Wigmore § 2239. It has been expanded since then to include crimes against the spouse's property, see *Herman* v. *United States*, 220 F. 2d 219, 226 (CA4 1955), and in recent years crimes against children of either spouse, *United States* v. *Allery*, 526 F. 2d 1362 (CA8 1975). Similar exceptions have been found to the confidential marital communications privilege. See 8 Wigmore § 2338.

III

A

The Federal Rules of Evidence acknowledge the authority of the federal courts to continue the evolutionary development of testimonial privileges in federal criminal trials "governed by the principles of the common law as they may be interpreted . . . in the light of reason and experience." Fed. Rule Evid. 501. Cf. *Wolfle* v. *United States*, 291 U. S. 7, 12 (1934). The general mandate of Rule 501 was substituted by the Congress for a set of privilege rules drafted by the Judicial Conference Advisory Committee on Rules of Evidence and approved by the Judicial Conference of the United States and by this Court. That proposal defined nine specific privileges, including a husband-wife privilege which would have codified the *Hawkins* rule and eliminated the privilege for confidential marital communications. See proposed Fed. Rule Evid. 505. In rejecting the proposed Rules and enacting Rule 501, Congress manifested an affirmative intention not to freeze the law of privilege. Its purpose rather was to "provide the courts with the flexibility to develop rules of privilege on a case-by-case basis," 120 Cong. Rec. 40891 (1974) (statement of Rep. Hungate), and to leave the door open to change. See also S. Rep. No. 93–1277, p. 11 (1974); H. R. Rep. No. 93–650, p. 8 (1973).[8]

Although Rule 501 confirms the authority of the federal courts to reconsider the continued validity of the *Hawkins*

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[8] Petitioner's reliance on 28 U. S. C. § 2076 for the proposition that this Court is without power to reconsider *Hawkins* is ill-founded. That provision limits this Court's *statutory* rulemaking authority by providing that rules "creating, abolishing, or modifying a privilege shall have no force or effect unless . . . approved by act of Congress." It was enacted principally to insure that state rules of privilege would apply in diversity jurisdiction cases unless Congress authorized otherwise. In Rule 501 Congress makes clear that § 2076 was not intended to prevent the federal courts from developing testimonial privilege law in federal criminal cases on a case-by-case basis "in light of reason and experience"; indeed Congress encouraged such development.

rule, the long history of the privilege suggests that it ought not to be casually cast aside. That the privilege is one affecting marriage, home, and family relationships—already subject to much erosion in our day—also counsels caution. At the same time, we cannot escape the reality that the law on occasion adheres to doctrinal concepts long after the reasons which gave them birth have disappeared and after experience suggests the need for change. This was recognized in *Funk* where the Court "decline[d] to enforce . . . ancient rule[s] of the common law under conditions as they now exist." 290 U. S., at 382. For, as Mr. Justice Black admonished in another setting, "[w]hen precedent and precedent alone is all the argument that can be made to support a court-fashioned rule, it is time for the rule's creator to destroy it." *Francis* v. *Southern Pacific Co.*, 333 U. S. 445, 471 (1948) (dissenting opinion).

B

Since 1958, when *Hawkins* was decided, support for the privilege against adverse spousal testimony has been eroded further. Thirty-one jurisdictions, including Alaska and Hawaii, then allowed an accused a privilege to prevent adverse spousal testimony. 358 U. S., at 81, n. 3 (STEWART, J., concurring). The number has now declined to 24.[9] In 1974, the National

[9] Eight States provide that one spouse is incompetent to testify against the other in a criminal proceeding: see Haw. Rev. Stat. § 621-18 (1976); Iowa Code § 622.7 (1979); Miss. Code Ann. § 13-1-5 (Supp. 1979); N. C. Gen. Stat. § 8-57 (Supp. 1977); Ohio Rev. Code Ann. § 2945.42 (Supp. 1979); Pa. Stat. Ann., Tit. 42, §§ 5913, 5915 (Purdon Supp. 1979); Tex. Crim. Proc. Code Ann., Art. 38.11 (Vernon 1979); Wyo. Stat. § 1-12-104 (1977).

Sixteen States provide a privilege against adverse spousal testimony and vest the privilege in both spouses or in the defendant-spouse alone: see Alaska Crim. Proc. Rule 26 (b)(2); Colo. Rev. Stat. § 13-90-107 (1973); Idaho Code § 9-203 (Supp. 1979); Mich. Comp. Laws § 600.2162 (1968); Minn. Stat. § 595.02 (1978); Mo. Rev. Stat. § 546.260 (1978); Mont. Code Ann. § 46-16-212 (1979); Neb. Rev. Stat. § 27-505 (1975); Nev. Rev. Stat. § 49.295 (1977); N. J. Stat. Ann. § 2A:84A-17 (West 1976); N. M. Stat. Ann. § 20-4-505 (Supp. 1977); Ore. Rev. Stat. § 44.040

Conference on Uniform State Laws revised its Uniform Rules of Evidence, but again rejected the *Hawkins* rule in favor of a limited privilege for confidential communications. See Uniform Rules of Evidence, Rule 504. That proposed rule has been enacted in Arkansas, North Dakota, and Oklahoma—each of which in 1958 permitted an accused to exclude adverse spousal testimony.[10] The trend in state law toward

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(1977); Utah Code Ann. § 78–24–8 (1977); Va. Code § 19.2–271.2 (Supp. 1979); Wash. Rev. Code § 5.60.060 (Supp. 1979); W. Va. Code § 57–3–3 (1966).

Nine States entitle the witness-spouse alone to assert a privilege against adverse spousal testimony: see Ala. Code § 12–21–227 (1975); Cal. Evid. Code Ann. §§ 970–973 (West 1966 and Supp. 1979); Conn. Gen. Stat. § 54–84 (1979); Ga. Code § 38–1604 (1978); Ky. Rev. Stat. § 421.210 (Supp. 1978); La. Rev. Stat. Ann. § 15:461 (West 1967); Md. Cts. & Jud. Proc. Code Ann. §§ 9–101, 9–106 (1974); Mass. Gen. Laws Ann., ch. 233, § 20 (West Supp. 1979); R. I. Gen. Laws § 12–17–10 (1970).

The remaining 17 States have abolished the privilege in criminal cases: see Ariz. Rev. Stat. Ann. § 12–2231 (Supp. 1978); Ark. Stat. Ann. § 28–101, Rules 501 and 504 (1979); Del. Code Ann., Tit. 11, § 3502 (1975); Fla. Stat. §§ 90.501, 90.504 (1979); Ill. Rev. Stat., ch. 38, § 155–1 (1977); Ind. Code §§ 34–1–14–4, 34–1–14–5 (1976); Kan. Stat. Ann. §§ 60–407, 60–428 (1976); Maine Rules of Evidence 501, 504; N. H. Rev. Stat. Ann. § 516.27 (1974); N. Y. Crim. Proc. Law § 60.10 (McKinney 1971); N. Y. Civ. Proc. Law §§ 4502, 4512 (McKinney 1963); N. D. Rules of Evidence 501, 504; Okla. Stat., Tit. 12, §§ 2103, 2501, 2504 (West Supp. 1979); S. C. Code § 19–11–30 (1976); S. D. Comp. Laws Ann. §§ 19–13–1, 19–13–12 to 19–13–15 (1979); Tenn. Code Ann. § 40–2404 (1975); Vt. Stat. Ann., Tit. 12, § 1605 (1973); Wis. Stat. §§ 905.01, 905.05 (1975).

In 1901, Congress enacted a rule of evidence for the District of Columbia that made husband and wife "competent but not compellable to testify for or against each other," except as to confidential communications. This provision, which vests the privilege against adverse spousal testimony in the witness spouse, remains in effect. See 31 Stat. 1358, §§ 1068, 1069, recodified as D. C. Code § 14–306 (1973).

[10] In 1965, California took the privilege from the defendant-spouse and vested it in the witness-spouse, accepting a study commission recommendation that the "latter [was] more likely than the former to determine whether or not to claim the privilege on the basis of the probable effect on the marital relationship." See Cal. Evid. Code Ann. §§ 970–973 (West

divesting the accused of the privilege to bar adverse spousal testimony has special relevance because the law of marriage and domestic relations are concerns traditionally reserved to the states. See *Sosna* v. *Iowa*, 419 U. S. 393, 404 (1975). Scholarly criticism of the *Hawkins* rule has also continued unabated.[11]

C

Testimonial exclusionary rules and privileges contravene the fundamental principle that " 'the public . . . has a right to every man's evidence.' " *United States* v. *Bryan*, 339 U. S. 323, 331 (1950). As such, they must be strictly construed and accepted "only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Elkins* v. *United States*, 364 U. S. 206, 234 (1960) (Frankfurter, J., dissenting). Accord, *United States* v. *Nixon*, 418 U. S. 683,

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1966 and Supp. 1979) and 1 California Law Revision Commission, Recommendation and Study relating to The Marital "For and Against" Testimonial Privilege, at F-5 (1956). See also 6 California Law Revision Commission, Tentative Privileges Recommendation—Rule 27.5, pp. 243–244 (1964).

Support for the common-law rule has also diminished in England. In 1972, a study group there proposed giving the privilege to the witness-spouse, on the ground that "if [the wife] is willing to give evidence . . . the law would be showing excessive concern for the preservation of marital harmony if it were to say that she must not do so." Criminal Law Revision Committee, Eleventh Report, Evidence (General) 93.

[11] See Reutlinger, Policy, Privacy, and Prerogatives: A Critical Examination of the Proposed Federal Rules of Evidence as They Affect Marital Privilege, 61 Calif. L. Rev. 1353, 1384–1385 (1973); Orfield, The Husband-Wife Privileges in Federal Criminal Procedure, 24 Ohio St. L. J. 144 (1963); Rothstein, A Re-evaluation of the Privilege Against Adverse Spousal Testimony in the Light of its Purpose, 12 Int'l and Comp. L. Q. 1189 (1963); Note, 1977 Ariz. St. L. J. 411; Comment, 17 St. Louis L. J. 107 (1972); Comment, 15 Wayne L. Rev. 1287, 1334–1337 (1969); Comment, 52 J. Crim. L. 74 (1961); Note, 56 Nw. U. L. Rev. 208 (1961); Note, 32 Temp. L. Q. 351 (1959); Note, 33 Tulane L. Rev. 884 (1959).

709–710 (1974). Here we must decide whether the privilege against adverse spousal testimony promotes sufficiently important interests to outweigh the need for probative evidence in the administration of criminal justice.

It is essential to remember that the *Hawkins* privilege is not needed to protect information privately disclosed between husband and wife in the confidence of the marital relationship—once described by this Court as "the best solace of human existence." *Stein* v. *Bowman*, 13 Pet., at 223. Those confidences are privileged under the independent rule protecting confidential marital communications. *Blau* v. *United States*, 340 U. S. 332 (1951); see n. 5, *supra*. The *Hawkins* privilege is invoked, not to exclude private marital communications, but rather to exclude evidence of criminal acts and of communications made in the presence of third persons.

No other testimonial privilege sweeps so broadly. The privileges between priest and penitent, attorney and client, and physician and patient limit protection to private communications. These privileges are rooted in the imperative need for confidence and trust. The priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return. The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out. Similarly, the physician must know all that a patient can articulate in order to identify and to treat disease; barriers to full disclosure would impair diagnosis and treatment.

The *Hawkins* rule stands in marked contrast to these three privileges. Its protection is not limited to confidential communications; rather it permits an accused to exclude all adverse spousal testimony. As Jeremy Bentham observed more than a century and a half ago, such a privilege goes far beyond making "every man's house his castle," and permits a person

to convert his house into "a den of thieves." 5 Rationale of Judicial Evidence 340 (1827). It "secures, to every man, one safe and unquestionable and ever ready accomplice for every imaginable crime." *Id.*, at 338.

The ancient foundations for so sweeping a privilege have long since disappeared. Nowhere in the common-law world—indeed in any modern society—is a woman regarded as chattel or demeaned by denial of a separate legal identity and the dignity associated with recognition as a whole human being. Chip by chip, over the years those archaic notions have been cast aside so that "[n]o longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas." *Stanton* v. *Stanton*, 421 U. S. 7, 14–15 (1975).

The contemporary justification for affording an accused such a privilege is also unpersuasive. When one spouse is willing to testify against the other in a criminal proceeding—whatever the motivation—their relationship is almost certainly in disrepair; there is probably little in the way of marital harmony for the privilege to preserve. In these circumstances, a rule of evidence that permits an accused to prevent adverse spousal testimony seems far more likely to frustrate justice than to foster family peace.[12] Indeed, there is reason to believe that vesting the privilege in the accused could actually undermine the marital relationship. For example, in a case such as this, the Government is unlikely to offer a wife immunity and lenient treatment if it knows that her husband can prevent her from giving adverse testimony. If the Government is dissuaded from making such an offer, the privilege can have the untoward effect of permitting one

[12] It is argued that abolishing the privilege will permit the Government to come between husband and wife, pitting one against the other. That, too, misses the mark. Neither *Hawkins*, nor any other privilege, prevents the Government from enlisting one spouse to give information concerning the other or to aid in the other's apprehension. It is only the spouse's testimony in the courtroom that is prohibited.

spouse to escape justice at the expense of the other. It hardly seems conducive to the preservation of the marital relation to place a wife in jeopardy solely by virtue of her husband's control over her testimony.

IV

Our consideration of the foundations for the privilege and its history satisfy us that "reason and experience" no longer justify so sweeping a rule as that found acceptable by the Court in *Hawkins*. Accordingly, we conclude that the existing rule should be modified so that the witness spouse alone has a privilege to refuse to testify adversely; the witness may be neither compelled to testify nor foreclosed from testifying. This modification—vesting the privilege in the witness spouse—furthers the important public interest in marital harmony without unduly burdening legitimate law enforcement needs.

Here, petitioner's spouse chose to testify against him. That she did so after a grant of immunity and assurances of lenient treatment does not render her testimony involuntary. Cf. *Bordenkircher* v. *Hayes*, 434 U. S. 357 (1978). Accordingly, the District Court and the Court of Appeals were correct in rejecting petitioner's claim of privilege, and the judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE STEWART, concurring in the judgment.

Although agreeing with much of what the Court has to say, I cannot join an opinion that implies that "reason and experience" have worked a vast change since the *Hawkins* case was decided in 1958. In that case the Court upheld the privilege of a defendant in a criminal case to prevent adverse spousal testimony, in an all-but-unanimous opinion by Mr. Justice Black. Today the Court, in another all-but-unanimous opinion, obliterates that privilege because of the pur-

ported change in perception that "reason and experience" have wrought.

The fact of the matter is that the Court in this case simply accepts the very same arguments that the Court rejected when the Government first made them in the *Hawkins* case in 1958. I thought those arguments were valid then,[1] and I think so now.

The Court is correct when it says that "[t]he ancient foundations for so sweeping a privilege have long since disappeared." *Ante*, at 52. But those foundations had disappeared well before 1958; their disappearance certainly did not occur in the few years that have elapsed between the *Hawkins* decision and this one. To paraphrase what Mr. Justice Jackson once said in another context, there is reason to believe that today's opinion of the Court will be of greater interest to students of human psychology than to students of law.[2]

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[1] "The rule of evidence we are here asked to re-examine has been called a 'sentimental relic.' It was born of two concepts long since rejected: that a criminal defendant was incompetent to testify in his own case, and that in law husband and wife were one. What thus began as a disqualification of either spouse from testifying at all yielded gradually to the policy of admitting all relevant evidence, until it has now become simply a privilege of the criminal defendant to prevent his spouse from testifying against him.

"Any rule that impedes the discovery of truth in a court of law impedes as well the doing of justice. When such a rule is the product of a conceptualism long ago discarded, is universally criticized by scholars, and has been qualified or abandoned in many jurisdictions, it should receive the most careful scrutiny. Surely 'reason and experience' require that we do more than indulge in mere assumptions, perhaps naive assumptions, as to the importance of this ancient rule to the interests of domestic tranquillity." *Hawkins* v. *United States*, 358 U. S. 74, 81–82 (concurring opinion) (citations and footnotes omitted).

[2] See *Zorach* v. *Clauson*, 343 U. S. 306, 325 (dissenting opinion).

LEWIS v. UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 78-1595. Argued January 7, 1980—Decided February 27, 1980

Held: Even though petitioner's extant prior state-court felony conviction may be subject to collateral attack under *Gideon* v. *Wainwright*, 372 U. S. 335, it could properly be used as a predicate for his subsequent conviction for possession of a firearm in violation of § 1202 (a)(1) of Title VII of the Omnibus Crime Control and Safe Streets Act of 1968. Pp. 60–68.

(a) The plain meaning of § 1202 (a)(1)'s sweeping language proscribing the possession of firearms by any person who "has been convicted by a court of the United States or of a State . . . of a felony," is that the fact of a felony conviction imposes firearm disability until the conviction is vacated or the felon is relieved of his disability by some affirmative action. Other provisions of the statute demonstrate and reinforce its broad sweep, and there is nothing in § 1202 (a)(1)'s legislative history to suggest that Congress was willing to allow a defendant to question the validity of his prior conviction as a defense to a charge under § 1202 (a)(1). Moreover, the fact that there are remedies available to a convicted felon—removal of the firearm disability by a qualifying pardon or the Secretary of the Treasury's consent, as specified in the Act, or a challenge to the prior conviction in an appropriate court proceeding—suggests that Congress intended that the defendant clear his status *before* obtaining a firearm, thereby fulfilling Congress' purpose to keep firearms away from persons classified as potentially irresponsible and dangerous. Pp. 60–65.

(b) The firearm regulatory scheme at issue here is consonant with the concept of equal protection embodied in the Due Process Clause of the Fifth Amendment, since Congress could rationally conclude that any felony conviction, even an allegedly invalid one, is a sufficient basis on which to prohibit the possession of a firearm. And use of an uncounseled felony conviction as the basis for imposing a civil firearms disability, enforceable by criminal sanction, is not inconsistent with *Burgett* v. *Texas*, 389 U. S. 109; *United States* v. *Tucker*, 404 U. S. 443; and *Loper* v. *Beto*, 405 U. S. 473. Pp. 65–67.

591 F. 2d 978, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, REHNQUIST, and STEVENS, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and POWELL, JJ., joined, *post*, p. 68.

Andrew W. Wood argued the cause for petitioner. With him on the briefs was *Neal P. Rutledge*.

Andrew J. Levander argued the cause for the United States *pro hac vice*. With him on the brief were *Solicitor General McCree, Assistant Attorney General Heymann, Deputy Solicitor General Frey, Jerome M. Feit,* and *Joel M. Gershowitz*.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the question whether a defendant's extant prior conviction, flawed because he was without counsel, as required by *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), may constitute the predicate for a subsequent conviction under § 1202 (a)(1), as amended, of Title VII of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U. S. C. App. § 1202 (a)(1).[1]

I

In 1961, petitioner George Calvin Lewis, Jr., upon his plea of guilty, was convicted in a Florida state court of a felony

[1] Section 1202 (a) reads in full:

"Any person who—

"(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, or

"(2) has been discharged from the Armed Forces under dishonorable conditions, or

"(3) has been adjudged by a court of the United States or of a State or any political subdivision thereof of being mentally incompetent, or

"(4) having been a citizen of the United States has renounced his citizenship, or

"(5) being an alien is illegally or unlawfully in the United States,

"and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both."

for breaking and entering with intent to commit a misdemeanor. See Fla. Stat. § 810.05 (1961). He served a term of imprisonment. That conviction has never been overturned, nor has petitioner ever received a qualifying pardon or permission from the Secretary of the Treasury to possess a firearm. See 18 U. S. C. App. § 1203 (2) and 18 U. S. C. § 925 (c).

In January 1977, Lewis, on probable cause, was arrested in Virginia, and later was charged by indictment with having knowingly received and possessed at that time a specified firearm, in violation of 18 U. S. C. App. § 1202 (a)(1).[2] He waived a jury and was given a bench trial. It was stipulated that the weapon in question had been shipped in interstate commerce. The Government introduced in evidence an exemplified copy of the judgment and sentence in the 1961 Florida felony proceeding. App. 10.

Shortly before the trial, petitioner's counsel informed the court that he had been advised that Lewis was not represented by counsel in the 1961 Florida proceeding.[3] He claimed that under *Gideon* v. *Wainwright, supra,* a violation of § 1202

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[2] The indictment also charged petitioner with a violation of 18 U. S. C. § 922 (h)(1). That statute reads in pertinent part:

"It shall be unlawful for any person—

"(1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

. . . . .

"to receive any firearm . . . which has been shipped or transported in interstate . . . commerce."

Petitioner was acquitted on the § 922 (h)(1) charge and it is not before us here.

[3] Petitioner's counsel stated that a Florida attorney had advised him that the court records in that State showed affirmatively that Lewis had no lawyer. He noted also that Lewis had been charged with the same offense as had the defendant in *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), and that petitioner had been tried in the same State about six months before Gideon was tried. App. 2–3.

(a)(1) could not be predicated on a prior conviction obtained in violation of petitioner's Sixth and Fourteenth Amendment rights. The court rejected that claim, ruling that the constitutionality of the outstanding Florida conviction was immaterial with respect to petitioner's status under § 1202 (a)(1) as a previously convicted felon at the time of his arrest. Petitioner, accordingly, offered no evidence as to whether in fact he had been convicted in 1961 without the aid of counsel. We therefore assume, for present purposes, that he was without counsel at that time.

On appeal, the United States Court of Appeals for the Fourth Circuit, by a divided vote, affirmed. 591 F. 2d 978 (1979). It held that a defendant, purely as a defense to a prosecution under § 1202 (a)(1), could not attack collaterally an outstanding prior felony conviction, and that the statutory prohibition applied irrespective of whether that prior conviction was subject to collateral attack. The Court of Appeals also rejected Lewis' constitutional argument to the effect that the use of the prior conviction as a predicate for his prosecution under § 1202 (a)(1) violated his rights under the Fifth and Sixth Amendments.

Because of conflict among the Courts of Appeals,[4] we granted certiorari. 442 U. S. 939 (1979).

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[4] Compare *United States* v. *Lufman*, 457 F. 2d 165 (CA7 1972) (use an underlying felony conviction unconstitutionally obtained to support a conviction under § 1202 (a)(1) is reversible error), with the Fourth Circuit's ruling in the present case, and with *United States* v. *Maggard*, 573 F. 2d 926 (CA6 1978); and *United States* v. *Graves*, 554 F. 2d 65 (CA3 1977) (en banc) (claim of constitutional error in the underlying conviction may not be raised). The Ninth Circuit has distinguished between a claim of constitutional invalidity in the underlying conviction, which it has held may be raised, and a claim that the underlying conviction has been, or should be, reversed on other grounds. Compare *United States* v. *O'Neal*, 545 F. 2d 85 (1976), and *United States* v. *Pricepaul*, 540 F. 2d 417 (1976), with *United States* v. *Liles*, 432 F. 2d 18 (1970). See also *United States* v. *Herrell*, 588 F. 2d 711 (CA9 1978), cert. denied, 440

II

Four cases decided by this Court provide the focus for petitioner's attack upon his conviction. The first, and pivotal one, is *Gideon* v. *Wainwright, supra,* where the Court held that a state felony conviction without counsel, and without a valid waiver of counsel, was unconstitutional under the Sixth and Fourteenth Amendments. That ruling is fully retroactive. *Kitchens* v. *Smith,* 401 U. S. 847 (1971).

U. S. 964 (1979) (underlying conviction in a prosecution under 18 U. S. C. § 922 (h)(1) may not be challenged on nonconstitutional grounds).

The identical issue that is presented in this case has also arisen in the context of challenges to convictions under 18 U. S. C. § 922 (g)(1) (proscribing shipping or transport of a firearm in interstate or foreign commerce by a person under indictment for, or convicted of, a felony) and § 922 (h)(1) (proscribing receipt of a firearm shipped in interstate or foreign commerce by such a person). Compare *United States* v. *Scales,* 599 F. 2d 78 (CA5 1979); *Dameron* v. *United States,* 488 F. 2d 724 (CA5 1974); *Pasterchik* v. *United States,* 466 F. 2d 1367 (CA9 1972); and *United States* v. *DuShane,* 435 F. 2d 187 (CA2 1970) (underlying conviction may be attacked as unconstitutional), with *Barker* v. *United States,* 579 F. 2d 1219, 1226 (CA10 1978) (underlying conviction may not be so challenged in prosecution under § 922 (h)(1)).

The Courts of Appeals have treated the issue somewhat differently in prosecutions under 18 U. S. C. § 922 (a)(6) (prohibiting the falsification of one's status as a convicted felon in purchasing a firearm). Nonuniformity has prevailed nonetheless on the question whether a defendant charged with violating that statute may challenge the constitutionality of the underlying felony conviction. Compare *United States* v. *O'Neal, supra,* and *United States* v. *Pricepaul, supra* (permitting the challenge), with *United States* v. *Allen,* 556 F. 2d 720 (CA4 1977); *United States* v. *Graves, supra;* and *Cassity* v. *United States,* 521 F. 2d 1320 (CA6 1975) (holding that the challenge may not be made). The Eighth Circuit has stated that it will not permit a challenge to the constitutionality of the underlying conviction where the defendant is charged under § 922 (a)(6), while reserving the question under § 1202 (a)(1) and §§ 922 (g)(1) and (h)(1). *United States* v. *Edwards,* 568 F. 2d 68, 70–72, and n. 3 (1977). See also *United States* v. *Graves,* 554 F. 2d, at 83–88 (Garth, J., and Seitz, C. J., concurring in part and dissenting in part) (the Government need not prove the validity of the underlying conviction in a prosecution brought under § 922 (a)(6), but it must do so in a prosecution under § 1202 (a)(1)).

The second case is *Burgett* v. *Texas,* 389 U. S. 109 (1967). There the Court held that a conviction invalid under *Gideon* could not be used for enhancement of punishment under a State's recidivist statute. The third is *United States* v. *Tucker,* 404 U. S. 443 (1972), where it was held that such a conviction could not be considered by a court in sentencing a defendant after a subsequent conviction. And the fourth is *Loper* v. *Beto,* 405 U. S. 473 (1972), where the Court disallowed the use of the conviction to impeach the general credibility of the defendant. The prior conviction, the plurality opinion said, "lacked reliability." *Id.,* at 484, quoting *Linkletter* v. *Walker,* 381 U. S. 618, 639, and n. 20 (1965).

We, of course, accept these rulings for purposes of the present case. Petitioner's position, however, is that the four cases require a reversal of his conviction under § 1202 (a)(1) on both statutory and constitutional grounds.

III

The Court has stated repeatedly of late that in any case concerning the interpretation of a statute the "starting point" must be the language of the statute itself. *Reiter* v. *Sonotone Corp.,* 442 U. S. 330, 337 (1979). See also *Touche Ross & Co.* v. *Redington,* 442 U. S. 560, 568 (1979); *Southeastern Community College* v. *Davis,* 442 U. S. 397, 405 (1979). An examination of § 1202 (a)(1) reveals that its proscription is directed unambiguously at any person who "has been convicted by a court of the United States or of a State . . . of a felony." No modifier is present, and nothing suggests any restriction on the scope of the term "convicted." "Nothing on the face of the statute suggests a congressional intent to limit its coverage to persons [whose convictions are not subject to collateral attack]." *United States* v. *Culbert,* 435 U. S. 371, 373 (1978); see *United States* v. *Naftalin,* 441 U. S. 768, 772 (1979). The statutory language is sweeping, and its plain meaning is that the fact of a felony conviction imposes a firearm disability until the conviction is vacated or the felon is

relieved of his disability by some affirmative action, such as a qualifying pardon or a consent from the Secretary of the Treasury.[5] The obvious breadth of the language may well reflect the expansive legislative approach revealed by Congress' express findings and declarations, in 18 U. S. C. App. § 1201,[6] concerning the problem of firearm abuse by felons and certain specifically described persons.

Other provisions of the statute demonstrate and reinforce its broad sweep. Section 1203 enumerates exceptions to

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[5] One might argue, of course, that the language is so sweeping that it includes in its proscription even a person whose predicate conviction in the interim had been finally reversed on appeal and thus no longer was outstanding. The Government, however, does not go so far, Tr. of Oral Arg. 29–30, 37–40, and though we have no need to pursue that extreme argument in this case, we reject it. We are not persuaded that the mere possibility of making that argument renders the statute, as petitioner suggests, unconstitutionally vague. And unlike the dissent, *post*, at 69, we view the language Congress chose as consistent with the common-sense notion that a disability based upon one's status as a convicted felon should cease only when the conviction upon which that status depends has been vacated.

We note, nonetheless, that the disability effected by § 1202 (a)(1) would apply while a felony conviction was pending on appeal. See Note, Prior Convictions and the Gun Control Act of 1968, 76 Colum. L. Rev. 326, 334, and n. 42 (1976).

[6] "The Congress hereby finds and declares that the receipt, possession, or transportation of a firearm by felons, veterans who are discharged under dishonorable conditions, mental incompetents, aliens who are illegally in the country, and former citizens who have renounced their citizenship, constitutes—

"(1) a burden on commerce or threat affecting the free flow of commerce,

"(2) a threat to the safety of the President of the United States and Vice President of the United States,

"(3) an impediment or a threat to the exercise of free speech and the free exercise of a religion guaranteed by the first amendment to the Constitution of the United States, and

"(4) a threat to the continued and effective operation of the Government of the United States and of the government of each State guaranteed by article IV of the Constitution."

§ 1202 (a)(1) (a prison inmate who by reason of his duties has expressly been entrusted with a firearm by prison authority; a person who has been pardoned and who has expressly been authorized to receive, possess, or transport a firearm). In addition, § 1202 (c)(2) defines "felony" to exclude certain state crimes punishable by no more than two years' imprisonment. No exception, however, is made for a person whose outstanding felony conviction ultimately might turn out to be invalid for any reason. On its face, therefore, § 1202 (a)(1) contains nothing by way of restrictive language. It thus stands in contrast with other federal statutes that explicitly permit a defendant to challenge, by way of defense, the validity or constitutionality of the predicate felony. See, *e. g.*, 18 U. S. C. § 3575 (e) (dangerous special offender) and 21 U. S. C. § 851 (c)(2) (recidivism under the Comprehensive Drug Abuse Prevention and Control Act of 1970).

When we turn to the legislative history of § 1202 (a)(1), we find nothing to suggest that Congress was willing to allow a defendant to question the validity of his prior conviction as a defense to a charge under § 1202 (a)(1). The section was enacted as part of Title VII of the Omnibus Crime Control and Safe Streets Acts of 1968, 82 Stat. 236. It was added by way of a floor amendment to the Act and thus was not a subject of discussion in the legislative reports. See *United States* v. *Batchelder*, 442 U. S. 114, 120 (1979); *Scarborough* v. *United States*, 431 U. S. 563, 569–570 (1977); *United States* v. *Bass*, 404 U. S. 336, 344, and n. 11 (1971). What little legislative history there is that is relevant reflects an intent to impose a firearms disability on any felon based on the fact of conviction. Senator Long, who introduced and directed the passage of Title VII, repeatedly stressed *conviction*, not a "valid" conviction, and not a conviction not subject to constitutional challenge, as the criterion. For example, the Senator observed:

"So, under Title VII, every citizen could possess a gun

until the commission of his first felony. Upon his conviction, however, Title VII would deny every assassin, murderer, thief and burglar of the right to possess a firearm in the future except where he has been pardoned by the President or a State Governor and had been expressedly authorized by his pardon to possess a firearm." 114 Cong. Rec. 14773 (1968).

See also *id.*, at 13868, 14774. Inasmuch as Senator Long was the sponsor and floor manager of the bill, his statements are entitled to weight. *Simpson* v. *United States,* 435 U. S. 6, 13 (1978).

It is not without significance, furthermore, that Title VII, as well as Title IV of the Omnibus Act, was enacted in response to the precipitous rise in political assassinations, riots, and other violent crimes involving firearms, that occurred in this country in the 1960's. See, *e. g.,* S. Rep. No. 1097, 90th Cong., 2d Sess., 76–78 (1968); H. R. Rep. No. 1577, 90th Cong., 2d Sess., 7 (1968); S. Rep. No. 1501, 90th Cong., 2d Sess., 22–23 (1968). This Court, accordingly, has observed:

"The legislative history [of Title VII] in its entirety, while brief, further supports the view that Congress sought to rule broadly—to keep guns out of the hands of those who have demonstrated that 'they may not be trusted to possess a firearm without becoming a threat to society.' " *Scarborough* v. *United States,* 431 U. S., at 572.

The legislative history, therefore, affords no basis for a loophole, by way of a collateral constitutional challenge, to the broad statutory scheme enacted by Congress. Section 1202 (a) was a sweeping prophylaxis, in simple terms, against misuse of firearms. There is no indication of any intent to require the Government to prove the validity of the predicate conviction.

The very structure of the Omnibus Act's Title IV, enacted

simultaneously with Title VII, reinforces this conclusion. Each Title prohibits categories of presumptively dangerous persons from transporting or receiving firearms. See 18 U. S. C. §§ 922 (g) and (h). Actually, with regard to the statutory question at issue here, we detect little significant difference between Title IV and Title VII. Each seeks to keep a firearm away from "any person . . . who has been convicted" of a felony, although the definition of "felony" differs somewhat in the respective statutes. But to limit the scope of §§ 922 (g)(1) and (h)(1) to a validly convicted felon would be at odds with the statutory scheme as a whole. Those sections not only impose a disability on a convicted felon but also on a person under a felony indictment, even if that person subsequently is acquitted of the felony charge. Since the fact of mere indictment is a disabling circumstance, *a fortiori* the much more significant fact of conviction must deprive the person of a right to a firearm.

Finally, it is important to note that a convicted felon is not without relief. As has been observed above, the Omnibus Act, in §§ 1203 (2) and 925 (c), states that the disability may be removed by a qualifying pardon or the Secretary's consent. Also, petitioner, before obtaining his firearm, could have challenged his prior conviction in an appropriate proceeding in the Florida state courts. See Fla. Const., Art. 5, § 5 (3); *L'Hommedieu* v. *State*, 362 So. 2d 72 (Fla. App. 1978); *Weir* v. *State*, 319 So. 2d 80 (Fla. App. 1975). See also *United States* v. *Morgan*, 346 U. S. 502 (1954).[7]

It seems fully apparent to us that the existence of these remedies, two of which are expressly contained in the Omnibus Act itself, suggests that Congress clearly intended that the defendant clear his status *before* obtaining a firearm, thereby fulfilling Congress' purpose "broadly to keep firearms away

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[7] This being so, § 1202 (a)(1) does not attach "what may amount to lifelong sanctions to a mere finding of probable cause," as has been argued by one commentator. See Comment, 92 Harv. L. Rev. 1790, 1795 (1979).

from the persons Congress classified as potentially irresponsible and dangerous." *Barrett* v. *United States*, 423 U. S. 212, 218 (1976).

With the face of the statute and the legislative history so clear, petitioner's argument that the statute nevertheless should be construed so as to avoid a constitutional issue is inapposite. That course is appropriate only when the statute provides a fair alternative construction. This statute could not be more plain. *Swain* v. *Pressley*, 430 U. S. 372, 378, and n. 11 (1977); *United States* v. *Batchelder*, 442 U. S., at 122–123. Similarly, any principle of lenity, see *Rewis* v. *United States*, 401 U. S. 808, 812 (1971), has no application. The touchstone of that principle is statutory ambiguity. *Huddleston* v. *United States*, 415 U. S. 814, 832 (1974); *United States* v. *Batchelder*, 442 U. S., at 121–122. There is no ambiguity here.

We therefore hold that § 1202 (a)(1) prohibits a felon from possessing a firearm despite the fact that the predicate felony may be subject to collateral attack on constitutional grounds.

IV

The firearm regulatory scheme at issue here is consonant with the concept of equal protection embodied in the Due Process Clause of the Fifth Amendment if there is "some 'rational basis' for the statutory distinctions made . . . or . . . they 'have some relevance to the purpose for which the classification is made.'" *Marshall* v. *United States*, 414 U. S. 417, 422 (1974), quoting from *McGinnis* v. *Royster*, 410 U. S. 263, 270 (1973), and *Baxstrom* v. *Herold*, 383 U. S. 107, 111 (1966). See *Vance* v. *Bradley*, 440 U. S. 93, 97 (1979).[8]

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[8] These legislative restrictions on the use of firearms are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties. See *United States* v. *Miller*, 307 U. S. 174, 178 (1939) (the Second Amendment guarantees no right to keep and bear a firearm that does not have "some reasonable relationship to the

Section 1202 (a)(1) clearly meets that test. Congress, as its expressed purpose in enacting Title VII reveals, 18 U. S. C. App. § 1201, was concerned that the receipt and possession of a firearm by a felon constitutes a threat, among other things, to the continued and effective operation of the Government of the United States. The legislative history of the gun control laws discloses Congress' worry about the easy availability of firearms, especially to those persons who pose a threat to community peace. And Congress focused on the nexus between violent crime and the possession of a firearm by any person with a criminal record. 114 Cong. Rec. 13220 (1968) (remarks of Sen. Tydings); *id.*, at 16298 (remarks of Rep. Pollock). Congress could rationally conclude that any felony conviction, even an allegedly invalid one, is a sufficient basis on which to prohibit the possession of a firearm. See, *e. g.*, *United States* v. *Ransom*, 515 F. 2d 885, 891–892 (CA5 1975), cert. denied, 424 U. S. 944 (1976). This Court has recognized repeatedly that a legislature constitutionally may prohibit a convicted felon from engaging in activities far more fundamental than the possession of a firearm. See *Richardson* v. *Ramirez*, 418 U. S. 24 (1974) (disenfranchisement); *De Veau* v. *Braisted*, 363 U. S. 144 (1960) (proscription against holding office in a waterfront labor organization); *Hawker* v. *New York*, 170 U. S. 189 (1898) (prohibition against the practice of medicine).

We recognize, of course, that under the Sixth Amendment an uncounseled felony conviction cannot be used for certain purposes. See *Burgett*, *Tucker*, and *Loper*, all *supra*. The Court, however, has never suggested that an uncounseled con-

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preservation or efficiency of a well regulated militia"); *United States* v. *Three Winchester 30–30 Caliber Lever Action Carbines*, 504 F. 2d 1288, 1290, n. 5 (CA7 1974); *United States* v. *Johnson*, 497 F. 2d 548 (CA4 1974); *Cody* v. *United States*, 460 F. 2d 34 (CA8), cert. denied, 409 U. S. 1010 (1972) (the latter three cases holding, respectively, that § 1202 (a)(1), § 922 (g), and § 922 (a)(6) do not violate the Second Amendment).

viction is invalid for all purposes. See *Scott* v. *Illinois*, 440 U. S. 367 (1979); *Loper* v. *Beto*, 405 U. S., at 482, n. 11 (plurality opinion).

Use of an uncounseled felony conviction as the basis for imposing a civil firearms disability, enforceable by a criminal sanction, is not inconsistent with *Burgett*, *Tucker*, and *Loper*. In each of those cases, this Court found that the subsequent conviction or sentence violated the Sixth Amendment because it depended upon the reliability of a past uncounseled conviction. The federal gun laws, however, focus not on reliability, but on the mere fact of conviction, or even indictment, in order to keep firearms away from potentially dangerous persons. Congress' judgment that a convicted felon, even one whose conviction was allegedly uncounseled, is among the class of persons who should be disabled from dealing in or possessing firearms because of potential dangerousness is rational.[9] Enforcement of that essentially civil disability through a criminal sanction does not "support guilt or enhance punishment," see *Burgett*, 389 U. S., at 115, on the basis of a conviction that is unreliable when one considers Congress' broad purpose. Moreover, unlike the situation in *Burgett*, the sanction imposed by § 1202 (a)(1) attaches immediately upon the defendant's first conviction.

Again, it is important to note that a convicted felon may challenge the validity of a prior conviction, or otherwise remove his disability, before obtaining a firearm. We simply hold today that the firearms prosecution does not open the predicate conviction to a new form of collateral attack. See Note, Prior Convictions and the Gun Control Act of 1968,

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[9] The dissent's assertion that Congress' judgment in this regard cannot rationally be supported, *post*, at 72, is one we do not share. Moreover, such an assertion seems plainly inconsistent with the deference that a reviewing court should give to a legislative determination that, in essence, predicts a potential for future criminal behavior.

76 Colum. L. Rev. 326, 338–339 (1976). Cf. *Walker* v. *City of Birmingham,* 388 U. S. 307 (1967).

The judgment of the Court of Appeals is affirmed.

It is so ordered.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL and MR. JUSTICE POWELL join, dissenting.

In disagreement with every other Court of Appeals that has addressed the issue,[1] the Court of Appeals for the Fourth Circuit, held, by a divided vote, that an uncounseled and hence unconstitutional felony conviction may form the predicate for conviction under § 1202 (a)(1) of the Omnibus Crime Control and Safe Streets Act of 1968. Today the Court affirms that judgment, but by an analysis that cannot be squared either with the literal language of the statute or controlling decisions of this Court. I respectfully dissent.

I

Two longstanding principles of statutory construction independently mandate reversal of petitioner's conviction. The first is the precept that "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States* v. *Universal C. I. T. Credit Corp.,* 344 U. S. 218, 221–222 (1952). The Court has repeatedly reaffirmed this "rule of lenity." See, *e. g., Simpson* v. *United States,* 435 U. S. 6, 14 (1978); *United States* v. *Bass,* 404 U. S. 336, 347–349 (1971); *Rewis* v. *United States,* 401 U. S. 808, 812 (1971); *Ladner* v. *United States,* 358 U. S. 169,

[1] See, *e. g., Dameron* v. *United States,* 488 F. 2d 724 (CA5 1974); *United States* v. *Lufman,* 457 F. 2d 165 (CA7 1972); *United States* v. *DuShane,* 435 F. 2d 187 (CA2 1970); *United States* v. *Thoresen,* 428 F. 2d 654 (CA9 1970). See generally Comment, 92 Harv. L. Rev. 1790 (1979).

177 (1958); *Bell* v. *United States*, 349 U. S. 81 (1955). Indeed, the principle that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity" has previously been invoked in interpreting the very provision at issue in this case. See *United States* v. *Bass*, *supra*.

The Court declines to apply this established rule of construction in this case because, in its view, "[t]here is no ambiguity here." *Ante*, at 65. In light of the gloss the Court places on the literal language of the statute, I find this to be a curious conclusion. By its own terms, § 1202 (a)(1) reaches "[a]ny person *who has been convicted* . . . of a felony." The provision on its face admits of no exception to its sweeping proscription. Yet despite the absence of any qualifying phrase, the Court concedes—as it must—that the statute cannot be interpreted so as to include those persons whose predicate convictions have been vacated or reversed on appeal. *Ante*, at 60–61, and n. 5.

It thus appears that the plain words of § 1202 (a)(1) are not so clear after all, and we therefore must determine the section's reach. Two alternative constructions are offered: The first is the Government's—that § 1202 (a)(1) may be read to permit only *outstanding* felony convictions to serve as the basis for prosecution. Tr. of Oral Arg. 29–30. The second is petitioner's—that the predicate conviction must not only be outstanding, but also constitutionally *valid*. Because either interpretation fairly comports with the statutory language, surely the principle of lenity requires us to resolve any doubts against the harsher alternative and to read the statute to prohibit the possession of firearms only by those who have been *constitutionally* convicted of a felony.

The Court nevertheless adopts the Government's construction, relying on a supposed legislative resolve to enact a sweeping measure against the misuse of firearms. But however expansive § 1202 was meant to be, we are not faithful to "our duty to protect the rights of the individual," *Dalia* v. *United States*, 441 U. S. 238, 263 (1979) (STEVENS, J., dis-

senting), when we are so quick to ascribe to Congress the intent to punish the possession of a firearm by a person whose predicate felony conviction was obtained in violation of the right to the assistance of counsel, "one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty." *Johnson* v. *Zerbst*, 304 U. S. 458, 462 (1938). Petitioner has once already been imprisoned in violation of the Constitution. In the absence of any clear congressional expression of its intent, I cannot accept a construction of § 1202 (a)(1) that reflects such an indifference to petitioner's plight and such a derogation of the principles of *Gideon* v. *Wainwright*, 372 U. S. 335 (1963).[2]

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[2] As the Court has previously observed, § 1202 "was hastily passed, with little discussion, no hearings, and no report." *United States* v. *Bass*, 404 U. S. 336, 344 (1971). "In short, 'the legislative history of [the] Act hardly speaks with that clarity of purpose which Congress supposedly furnishes courts in order to enable them to enforce its true will.'" *Id.*, at 346 (quoting *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474, 483 (1951)). It is thus little wonder that the Court finds no explicit support in the statute's legislative history for petitioner's construction.

Nor do the few signposts that do exist in the history and structure of Title VII point unambiguously to the Court's conclusion. That Congress included provisions within the Omnibus Act whereby a convicted felon could have his disability removed by a qualifying pardon or the Secretary's consent, see §§ 1203 (2) and 925 (c), does not mean that Congress intended them to be exclusive remedies. Indeed, these provisions were clearly designed only to provide a mechanism for those persons with *valid* felony convictions to seek relief from the prohibitions of § 1202.

Similarly, a comparison between the scope of Title IV and Title VII is unenlightening on the question before us. Simply because the former section imposes a disability on any person under a felony indictment, it by no means follows, *a fortiori* or otherwise, that Congress intended by the latter section to impose a somewhat harsher disability on those persons with unconstitutional felony convictions. Cf. *ante*, at 64. Significantly, the restrictions attaching to an individual under indictment are necessarily temporary, while those imposed on the basis of a previous conviction are indefinite in duration. Moreover, Congress' failure to include persons "under indictment" within the proscriptions of § 1202 more plausibly signals its desire to demand a greater indication of potential danger-

II

The second maxim of statutory construction that compels a narrow reading of § 1202 (a)(1) is the "cardinal principle" that "if a serious doubt of constitutionality is raised, . . . this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell* v. *Benson*, 285 U. S. 22, 62 (1932). Accord, *Schneider* v. *Smith*, 390 U. S. 17, 26 (1968); *United States* v. *Rumely*, 345 U. S. 41, 45 (1953); *United States* v. *C. I. O.*, 335 U. S. 106, 120–121, and n. 20 (1948). And doubts as to the constitutionality of a statute that could predicate criminal liability solely on the existence of a previous uncounseled felony conviction are indeed serious, for a trilogy of this Court's decisions would seem to prohibit precisely such a result.

Burgett v. *Texas*, 389 U. S. 109 (1967), held that a prior uncounseled felony conviction was void and thus inadmissible in a prosecution under a Texas recidivist statute. *Burgett* stated: "To permit a conviction obtained in violation of *Gideon* v. *Wainwright* to be used against a person either to support guilt or enhance punishment for another offense . . . is to erode the principle of that case. Worse yet, since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right." *Id.*, at 115 (citation omitted). *United States* v. *Tucker*, 404 U. S. 443 (1972), and *Loper* v. *Beto*, 405 U. S. 473 (1972), respectively prohibited the use of uncounseled felony convictions as a factor to be considered in sentencing, and to impeach the defendant's credibility.

Burgett and its progeny appear to control the result in this case. The clear teaching of those decisions is that an uncoun-

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ousness than would be provided by the mere fact of indictment—or, for that matter, by an uncounseled felony conviction. In fact, in a slightly different context, Congress has expressly rejected the proposition that an invalid prior conviction is a reliable indicator of "dangerousness." See 18 U. S. C. § 3575 (e) (dangerous special offender).

seled felony conviction can never be used "to support guilt or enhance punishment for another offense." Here, petitioner could not have been tried and convicted for violating § 1202 (a)(1) in the absence of his previous felony conviction. It could not be plainer that his constitutionally void conviction was therefore used "to support guilt" for the current offense. The Court's bald assertion to the contrary is simply inexplicable.

The Court's attempt to distinguish *Burgett, Tucker,* and *Loper* on the ground that the validity of the subsequent convictions or sentences in those cases depended on the *reliability* of the prior uncounseled felony convictions, while in the present case the law focuses on the mere *fact* of the prior conviction, is unconvincing. The fundamental rationale behind those decisions was the concern that according any credibility to an uncounseled felony conviction would seriously erode the protections of the Sixth Amendment. Congress' decision to include convicted felons within the class of persons prohibited from possessing firearms can rationally be supported only if the historical fact of conviction is indeed a reliable indicator of potential dangerousness. As we have so often said, denial of the right to counsel impeaches "the very integrity of the fact-finding process." *Linkletter* v. *Walker,* 381 U. S. 618, 639 (1965). Accord, *Lakeside* v. *Oregon,* 435 U. S. 333, 341 (1978); *Argersinger* v. *Hamlin,* 407 U. S. 25, 31 (1972). And the absence of counsel impairs the reliability of a felony conviction just as much when used to prove potential dangerousness as when used as direct proof of guilt. Cf. *Loper* v. *Beto, supra,* at 483 (opinion of STEWART, J.).

III

Finally, it is simply irrelevant that petitioner could have challenged the validity of his prior conviction in appropriate proceedings in the state courts. Nor can the existence of such a remedy prohibit him from raising the unconstitutionality of that conviction as a defense to the present charge.

In the first place, neither *Burgett* nor *Loper* imposed any requirement that a defendant collaterally attack his uncounseled conviction *before* he faces prosecution under § 1202 (a)(1); in both cases the Court held the use of the prior invalid convictions impermissible even though the defendants had taken no affirmative steps to have them overturned. More to the point, however, where the very defect in the initial proceedings was that the accused did not have the assistance of counsel in defending the felony charges against him, it simply defies reason and sensibility to suggest that the defendant must be regarded as having waived his defense to the § 1202 (a)(1) prosecution because he failed first to retain counsel to seek an extraordinary writ of *coram nobis.*

BLOOMER *v.* LIBERTY MUTUAL INSURANCE CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 78-1418. Argued December 4, 1979—Decided March 3, 1980

Held: A stevedore's lien for the amount of its compensation payment to an injured longshoreman under the Longshoremen's and Harbor Workers' Compensation Act against the longshoreman's recovery in a negligence action against the shipowner may not be reduced by an amount representing the stevedore's proportionate share of the longshoreman's legal expenses in obtaining recovery from the shipowner. The language, structure, and history of the Act support this conclusion, rather than the application of the equitable "common fund" doctrine that when a third person benefits from litigation instituted by another, that person may be required to bear a portion of the expenses of suit. Pp. 77-88.

586 F. 2d 908, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, POWELL, REHNQUIST, and STEVENS, JJ., joined. BLACKMUN, J., filed a dissenting opinion, *post*, p. 88.

Alan C. Rassner argued the cause and filed briefs for petitioner.

Douglas A. Boeckmann argued the cause and filed a brief for respondent.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Under the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U. S. C. § 901 *et seq.*, a longshoreman is entitled to receive compensation payments from his stevedore for disability or death resulting from an injury occurring on the navigable waters of the United States.

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*Briefs of *amici curiae* were filed by *Paul S. Edelman, Arthur Abarbanel,* and *Theodore I. Koskoff* for the Association of Trial Lawyers of America; and by *Dennis Lindsay* and *Robert Babcock* for the Master Contracting Stevedore Association of the Pacific Coast, Inc.

If the longshoreman believes that his injuries warrant a recovery in excess of the compensation provided under the Act, he may also bring a negligence action against the owner of the vessel on which the injury occurred. The longshoreman's recovery from the shipowner is subject to the stevedore's lien in the amount of the compensation payment. The question for decision is whether the stevedore's lien must be reduced by a proportionate share of the longshoreman's expenses in obtaining recovery from the shipowner, or whether the stevedore is instead entitled to be reimbursed for the full amount of the compensation payment.

I

Petitioner William E. Bloomer, Jr., was injured during the course of his employment on board the vessel S. S. *Pacific Breeze*. He received $17,152.83 in compensation from respondent Liberty Mutual Insurance Co., the designated carrier of workers' compensation for petitioner's employer, Connecticut Terminal Co.[1] Thereafter petitioner brought this diversity action against the owner of the vessel. He alleged that the shipowner had negligently created hazardous conditions on board the vessel, that the ship's deck was slippery and dangerous, and that as a result he had fallen and incurred severe injuries.

During settlement negotiations, petitioner's counsel gave respondent notice of the pending action and requested it to reduce its lien by a share of the costs of recovery. That share would be computed as an amount bearing the same ratio to the total cost of recovery as the compensation payments bear to the total recovery. Respondent refused petitioner's request, asserted its right to full reimbursement, and successfully moved to intervene in the action. Soon thereafter petitioner settled with the shipowner for $60,000. He moved for sum-

[1] For convenience we shall use the term "stevedore" to refer to both the employer and its insurer.

mary judgment directing that respondent's lien on the recovery be reduced by an amount representing its proportionate share of the expenses of the suit against the shipowner. Petitioner claimed that since the recovery from the shipowner would benefit respondent, equity required that respondent bear a portion of the expenses of obtaining that recovery.

The District Court denied petitioner's motion,[2] and the United States Court of Appeals for the Second Circuit affirmed. *Bloomer* v. *Tong*, 586 F. 2d 908 (1978). The Court of Appeals concluded that a stevedore should not be required to pay a share of the longshoreman's legal expenses in a suit

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[2] The District Court's distribution was as follows:

Recovery	$60,000.00
less expenses	(202.80)
balance for distribution	59,797.20
less attorney's fee of one-third	(19,932.40)
balance	39,864.80
less lien of respondent	(17,152.83)
net to petitioner	22,711.97

Under this distribution scheme, petitioner received a total of $39,864.80 from the stevedore and shipowner, an amount equivalent to the full $60,000 recovery minus expenses.

Petitioner sought to have the fund distributed in the following manner:

Recovery		$60,000.00
less expenses		(202.80)
balance for distribution		59,797.20
less attorney's fee of one-third		(19,932.40)
balance		39,864.80
lien of respondent	17,152.83	
less proportionate share of fees and expenses (.3355866 × $17,152.83)	(5,756.26)	
	11,396.57	(11,396.57)
net to petitioner		28,468.23

Under this distribution, petitioner would receive a total of $45,621.06, $5,756.26 over and above the amount representing his $60,000 damages recovery minus expenses.

brought against the shipowner. We granted certiorari to resolve this recurring question, on which the Courts of Appeals have been divided.[3] 441 U. S. 942 (1979). We affirm.

II

Petitioner's argument amounts to an appeal to the equitable principle that when a third person benefits from litigation instituted by another, that person may be required to bear a portion of the expenses of suit. He invokes cases establishing that in certain circumstances, courts should exercise their equitable powers to charge beneficiaries with a share of the expenses of obtaining a "common fund" through litigation. See *Boeing Co.* v. *Van Gemert*, 444 U. S. 472 (1980); *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. 240, 257–259 (1975); *id.*, at 275–280 (MARSHALL, J., dissenting); *Mills* v. *Electric Auto-Lite Co.*, 396 U. S. 375 (1970); *Sprague* v. *Ticonic National Bank*, 307 U. S. 161 (1939). When measured against the language, structure, and history of the Longshoremen's and Harbor Workers' Compensation Act, however, petitioner's argument must fail.

The Act provides a comprehensive scheme governing an injured longshoreman's rights against the stevedore and shipowner. The longshoreman is not required to make an election between the receipt of compensation and a damages action against a third person, 33 U. S. C. § 933 (a). After receiving a compensation award from the stevedore, the longshoreman is given six months within which to bring suit against the third

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[3] The Ninth and Fourth Circuits have held that the stevedore should be charged with a share of the longshoremen's legal expenses, *Bachtel* v. *Mammoth Bulk Carriers, Ltd.*, 605 F. 2d 438 (CA9 1979); *Swift* v. *Bolten*, 517 F. 2d 368 (CA4 1975). The First Circuit, like the Second, has disallowed apportionment, *Cella* v. *Partenreederei MS Ravenna*, 529 F. 2d 15 (1975), cert. denied, 425 U. S. 975 (1976). The Fifth Circuit has adopted a third approach calling for an individualized inquiry into whether apportionment is fair in the particular case, *Mitchell* v. *Scheepvaart Maatschappij Trans-Ocean*, 579 F. 2d 1274 (1978).

party. 33 U. S. C. § 933 (b). If he fails to seek relief within that period, the acceptance of the compensation award operates as an assignment to the stevedore of the longshoreman's rights against the third party. The Act makes explicit provision for the distribution of any amount obtained by the stevedore in a suit brought pursuant to that assignment. The stevedore is entitled to reimbursement of all compensation benefits paid the employee, and its costs, including attorney's fees. Of the remainder, four-fifths is distributed to the longshoreman, and one-fifth "shall belong to the employer." 33 U. S. C. § 933 (e).[4]

The Act does not expressly provide for the distribution of amounts recovered in a suit brought by the longshoreman. The unambiguous provision that the stevedore shall be reimbursed for all of his legal expenses if he obtains the recovery does, however, speak with considerable force against requiring him to bear a part of the longshoreman's costs when the longshoreman recovers on his own. There is no reason to believe that Congress intended a different distribution of the expenses of suit merely because the longshoreman has brought

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[4] That section provides:

"Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

"(1) The employer shall retain an amount equal to—

"(A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner or Board);

"(B) the cost of all benefits actually furnished by him to the employee under section 907 of this title;

"(C) all amounts paid as compensation;

"(D) the present value of all amounts thereafter payable as compensation, . . . and the present value of the cost of all benefits thereafter to be furnished under section 907 of this title . . . ; and

"(2) The employer shall pay any excess to the person entitled to compensation or to the representative, less one-fifth of such excess which shall belong to the employer."

the action. Petitioner asserts, however, that in the absence of an explicit statutory resolution, the recovery against the shipowner represents a common fund for whose creation the stevedore may properly be charged. To evaluate this argument we turn to the history of the relevant provisions of the Act.

III

As originally enacted in 1927, the Act required a longshoreman to choose between the receipt of a compensation award from his employer and a damages suit against the third party. Act of Mar. 4, 1927, § 33, 44 Stat. 1440. If the longshoreman elected to receive compensation, his right of action was automatically assigned to his employer. In 1938, however, Congress provided that in cases in which compensation was not made pursuant to an award by a deputy commissioner (appointed by the Secretary of Labor, see 33 U. S. C. § 940), the longshoreman would not be required to choose between the compensation award and an action for damages. Under the 1938 amendments, no election was required unless compensation was paid pursuant to such an award. See Act of June 25, 1938, ch. 685, §§ 12, 13, 52 Stat. 1168.

Like the present version, the Act as amended in 1938 did not make provision for the distribution of amounts recovered from the third party in a suit brought by the longshoreman. The lower courts, however, interpreted the Act to require that the stevedore be reimbursed for his compensation payment out of the sum recovered from the third party. Congress was understood not to contemplate double recovery on the longshoreman's part, and the stevedore did not, therefore, lose the right to reimbursement for its compensation payment. See, *e. g.*, *The Etna*, 138 F. 2d 37 (CA3 1943); *Miranda* v. *Galveston*, 123 F. Supp. 889 (SD Tex. 1954); *Fontana* v. *Pennsylvania R. Co.*, 106 F. Supp. 461 (SDNY 1952) (Weinfeld, J.), aff'd on opinion below *sub nom. Fontana* v. *Grace Line, Inc.*, 205 F. 2d 151 (CA2), cert. denied, 346 U. S. 886 (1953).

Under the 1938 legislation the lower courts also decided that the stevedore should not be required to bear a proportionate share of the longshoreman's legal expenses. To force the stevedore to do so, it was observed, would guarantee the longshoreman a total recovery in excess of the amount he received in his third-party action. Solely by virtue of the compensation scheme, then, the longshoreman would receive a greater sum than would be possible in an ordinary suit for damages. At the same time the stevedore would be prevented from recovering the full amount of its compensation payment. The courts concluded that these results would violate legislative purposes made manifest by the express provision that the employer may recover its legal expenses from the fund created by its own suit against the third party. See *Davis* v. *United States Lines Co.*, 253 F. 2d 262 (CA3 1958); *Oleszczuk* v. *Calmar S. S. Corp.*, 163 F. Supp. 370 (Md. 1958); *Fontana* v. *Pennsylvania R. Co., supra*, at 463–464.

In 1959, Congress amended the Act to delete the election-of-remedies requirement altogether. Act of Aug. 18, 1959, 73 Stat. 391. Existing law was felt to "wor[k] a hardship on an employee by in effect forcing him to take compensation under the act because of the risks involved in pursuing a lawsuit against a third party." S. Rep. No. 428, 86th Cong., 1st Sess., 2 (1959). The result was that an injured employee "usually elects to take compensation for the simple reason that his expenses must be met immediately, not months or years after when he has won his lawsuit." *Ibid.;* see H. R. Rep. No. 229, 86th Cong., 1st Sess. (1959).

Responding to this inequity, the 1959 amendment provided that even when compensation was paid pursuant to an award of the deputy commissioner, the longshoreman's right of action would not be assigned to the stevedore until six months from the date of the award. The legislative history demonstrates that Congress did not intend to alter the rule allowing the stevedore to recover the full amount of its lien from the long-

shoreman's third-party recovery. An employee "would not be entitled to double compensation," for "an employer must be reimbused for any compensation paid to the employee out the net proceeds of the recovery." S. Rep. No. 428, *supra*, at 2. During the hearings on the 1959 amendments, the rule that an employer would not be required to bear a proportionate share of the longshoreman's cost of recovery was specifically drawn to Congress' attention, and one witness suggested that it should be abandoned.[5] Instead, Congress elected not to disturb the existing rule.[6] Recognizing that no change had

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[5] See Hearings on Bills Relating to the Longshoremen's and Harbor Workers' Compensation Act before a Special Subcommittee of the House Committee on Education and Labor, 84th Cong., 2d Sess., 51–58 (1956) (discussing difference between New York law, which allowed an employer to receive full reimbursement of its workmen's compensation payment, and New Jersey law, which required proportionate payment of expenses); see also *id.*, at 38. Indeed, the 1959 bill was largely modeled after the New York workmen's compensation provisions, see S. Rep. No. 428, 86th Cong., 1st Sess., 3 (1959), and under New York law it was well established that the longshoreman would be required to pay his own legal fees. See *Kussack* v. *Ring Constr. Corp.*, 1 App. Div. 2d 634, 153 N. Y. S. 2d 646 (1956), aff'd, 4 N. Y. 2d 1011, 152 N. E. 2d 540 (1958); *Hobbs* v. *Dairymen's League Co-op Assn.*, 258 App. Div. 836, 15 N. Y. S. 2d 694 (1939), appeal dismissed, 282 N. Y. 710, 26 N. E. 2d 823 (1940).

[6] That rule was expressly approved on the floor of the Senate:

"Mr. BUTLER. . . . I understand that the bill merely amends section 33 of the Longshoremen's and Harbor Workers' Act, so as to permit an employee to bring a third-party liability suit without forfeiting his right to compensation under the act. It is my further understanding that the courts have consistently held that the present section 33 of the act gives the employer a lien on the employee's third party recovery for the compensation and benefits paid by the employer.

"Is it the Senator's understanding, then, that the passage of this measure *would in no way affect the present construction of the act with respect to the employer's lien on the employee's third-party recovery for compensation and benefits paid by the employer?*

"Mr. BARTLETT. The distinguished Senator from Maryland is correct.

"In further explanation on this point, I ask unanimous consent to have

been contemplated, the courts continued to hold that a stevedore would not be required to bear a proportionate share of the longshoreman's legal expenses. See *Haynes* v. *Rederi A/S Aladdin*, 362 F. 2d 345 (CA5 1966); *Ashcraft & Gerel* v. *Liberty Mutual Ins. Co.*, 120 U. S. App. D. C. 51, 343 F. 2d 333 (1965); *Petition of Sheffield Tankers Corp.*, 222 F. Supp. 441 (ND Cal. 1963).

In 1972, Congress enacted more extensive amendments to the Act, see *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U. S. 256, 262 (1979), and it is these Amendments that according to petitioner, justify a change in the rule with respect to attorney's fees. Concerned that compensation benefits had been far too low, Congress altered the benefit structure of the Act so as to increase both maximum and minimum

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printed at this point in the RECORD a brief statement from the Committee on Labor and Public Welfare . . . .

" 'There is no necessity for a provision giving the employer a lien on the employee's third-party recovery for the compensation and benefits paid by the employer, inasmuch as the courts have construed the present section 33 as providing such lien. In addition, as a result of judicial construction of the existing section, the employee is entitled to deduct his expenses incurred in third-party proceedings,' " 105 Cong. Rec. 12674 (1959) (emphasis added).

The express statement that the employee should deduct his expenses from the recovery is, of course, a plain indication that those expenses would not be borne by the stevedore. Cf. n. 13, *infra*.

The House version of the amendment would have provided: "[T]he carrier liable for the payment of . . . compensation shall have a lien on the proceeds of any recovery from [a] third person, whether by judgment, settlement, or otherwise, after the deduction of the reasonable and necessary expenditures, including attorney's fees, incurred in effecting such recovery, to the extent of the total amount of compensation awarded under, or provided, or estimated, by this Act . . . ." H. R. Rep. No. 229, 86th Cong., 1st Sess., 6 (1959). The House passed this version of the amendment, 105 Cong. Rec. 5561–5562 (1959), but later concurred in the Senate version on the evident assumption that the Senate version also adopted existing judicial practice. See 105 Cong. Rec. 15343 (1959).

benefits substantially.[7] These increases were linked to two provisions designed to reduce litigation and to ensure that stevedores would have sufficient funds to pay the additional compensation. First, Congress abolished the unseaworthiness remedy for longshoremen, recognized in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85 (1946), and limited the longshoreman's action against the shipowner to one based on negligence. Second, Congress eliminated the third-party action by the shipowner against the stevedore, recognized in *Ryan Stevedoring Co.* v. *Pan-Atlantic S. S. Corp.*, 350 U. S. 124 (1956). In that case the Court held that a shipowner could obtain damages from the stevedore when it showed that the stevedore had breached its warranty to the shipowner of workmanlike service. As the House Report notes, the consequence was that "a stevedore-employer is indirectly liable for damages to an injured longshoreman who utilizes the technique of suing the vessel," with the result "that much of the financial resources which could better be utilized to pay improved compensation benefits were now being spent to defray litigation costs." H. R. Rep. No. 92–1441, p. 5 (1972); see S. Rep. No. 92–1125, p. 9 (1972). Indeed, there was considerable testimony during the hearings that third-party actions had resulted in congested courts and that the primary beneficiaries had been lawyers, not injured longshoremen.[8] The Senate

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[7] Before the Amendments, the maximum weekly compensation payment was $70; after the Amendments, the maximum is 200% of the national average weekly wage, to be determined annually by the Secretary of Labor. Before the Amendments, the minimum weekly payment was $18; the Amendments provide for a minimum in the amount of the lesser of the employee's full average weekly wage or 50% of the national average weekly wage. The Amendments increased or improved benefits in other ways not material here. See 33 U. S. C. §§ 906–910.

[8] See Hearings on S. 2318 et al. before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 2d Sess., 33, 38–39, 244, 258, 263, 271, 290, 304, 416, 431, 621–623, 632, 642, 661,

Report stated that "[t]he social costs of these law suits, the delays, crowding of court calendars and the need to pay for lawyers' services have seldom resulted in a real increase in actual benefits for injured workers." *Id.*, at 4. The elimination of the shipowner's cause of action against the stevedore was intended to reduce litigation, immunize stevedores and their insurers from liability in third-party actions, and assure conservation of stevedore resources for compensation awards to longshoremen.

Witnesses also brought to the attention of Congress the longstanding rule[9] that an employer could recover the full amount of its compensation award from the longshoreman's recovery against the shipowner.[10] Congress did not, however, enact any legislation concerning that rule.

Petitioner argues that the 1972 Amendments so altered the equities as to compel a holding that a stevedore must pay a proportionate share of the longshoreman's expenses in a third-party action brought against the shipowner. He observes that before the Amendments, the longshoreman and the stevedore had adverse interests in the third-party action: if the longshoreman were successful in that suit, the shipowner frequently would attempt to require the stevedore to make payment of amounts due the longshoreman. With the abolition of the shipowner's cause of action, the stevedore and the

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725, 730 (1972); Hearings on H. R. 247 et al. before the Select Subcommittee on Labor of the House Committee on Education and Labor, 92d Cong., 2d Sess., 47–48, 60, 85–86, 176 (1972).

[9] Contrary to MR. JUSTICE BLACKMUN's suggestion, see *post*, at 92, that the somewhat divergent rationales adopted by the lower courts demonstrate that there was no settled rule prior to the 1972 Amendments, we have been unable to find a single case, and none is cited in the dissenting opinion, in which a court held that a stevedore would be required to pay a share of the longshoreman's legal expenses. The uniform rule was to the contrary, and it is that rule of which Congress was informed in 1959 and 1972 and which it approved in 1959. See n. 6, *supra*.

[10] See Hearings on S. 2318 et al., *supra* n. 8, at 160, 371, 720; Hearings on H. R. 247 et al., *supra* n. 8, at 119, 157–158, 295.

longshoreman had a common interest in the longshoreman's recovery against the shipowner. Petitioner concludes that the common-fund doctrine should be available to permit the employee to recover from the stevedore a proportionate share of the expenses of suit.

In light of the Act and its legislative history, however, we are unable to accept petitioner's argument. It is of course true that the stevedore and longshoreman now have a common interest in the longshoreman's recovery against the shipowner, but it does not follow that the stevedore should be required to pay a share of the longshoreman's legal expenses. Congress has not modified 33 U. S. C. § 933 (e), providing that the stevedore is not required to pay its legal expenses in cases in which it has recovered against the shipowner pursuant to an assignment from the longshoreman. Moreover, in 1972 Congress was informed of, but did not alter, the uniform rule that the longshoreman's legal fees would be paid by the longshoreman alone. In these circumstances we are reluctant to take steps to change that rule on our own. See *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U. S., at 273.

In addition, to the extent that the 1972 Amendments offer guidance, they strongly suggest that the rule for payment of attorney's fees was not intended to be altered. The legal expenses incurred by stevedores in connection with third-party actions were understood to be a major obstacle to the funding of increased compensation payments. Numerous witnesses testified that third-party actions frequently inured to the benefit of lawyers, depleting the stevedore's resources and congesting the courts without aiding the injured employee. It would be ironic indeed if statutory amendments designed to eliminate the stevedore's liability in connection with third-party actions were interpreted to give birth to an entirely new liability in the form of a charge for the longshoreman's legal expenses.[11]

[11] The dissenting opinion suggests that the "chief" purpose of the 1972 Amendments was to benefit longshoremen, and that the distribution we approve would disserve this purpose in favor of the merely "incidental"

We are unwilling to attribute to Congress an intention to allow creation of a new liability irreconcilable with its general desire to reduce litigation and to ensure conservation of the legal expenses of stevedores and their insurers.[12]

Finally, we return to the original basis for the rule that a stevedore would not be required to pay a portion of the longshoremen's expenses in his suit against the shipowner. The compensation award was intended to be an immediate and readily available payment to the injured longshoreman. By receiving this payment, the longshoreman was not foreclosed from pursuing an action against the shipowner. At the same time, he was not entitled to double recovery, and the stevedore would be reimbursed in full for his compensation payment.[13]

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intention to conserve stevedore expenses. *Post*, at 94–95. The attempted separation of the two legislative purposes is unpersuasive. Congress found it necessary to eliminate stevedore liability in connection with third-party actions precisely in order to assure that stevedores would have sufficient funds to pay vastly increased compensation benefits to longshoremen. In these circumstances it is for Congress, not this Court, to determine whether a requirement of proportional payment of legal expenses would ultimately benefit injured longshoremen, or instead longshoremen's lawyers, who were found to have been the primary beneficiaries of third-party actions in the past. See *supra*, at 82–84.

[12] Petitioner suggests that a requirement of proportional payment would ultimately aid stevedores by encouraging third-party suits and thus making it more likely that stevedores will receive reimbursement for the compensation payment. The Act, however, contains special incentives designed to encourage the stevedore to bring suit on its own if the longshoreman elects not to do so. See n. 4, *supra*.

[13] Respondent does not challenge the approach adopted in *Fontana* v. *Pennsylvania R. Co.*, 106 F. Supp. 461, 463–464 (SDNY 1952), aff'd on opinion below *sub nom. Fontana* v. *Grace Line, Inc.*, 205 F. 2d 151 (CA2), cert. denied, 346 U. S. 886 (1953), under which the expenses of suit, including attorney's fees, represent the first charge on the recovery against the third party. See S. Rep. No. 428, 86th Cong., 1st Sess., 2 (1959); n. 6, *supra*. Under this view, if the recovery against the shipowner is less than the sum of the lien and the expenses of suit, the longshoreman will receive the full amount of his expenses even if the remainder is in-

The result we reach enables the longshoreman to recover an amount no less than that which he would receive through an ordinary negligence action,[14] and also immunizes the stevedore from liability in connection with the third-party action. If we were to accept petitioner's view, an injured longshoreman would ultimately receive a sum equal to the full amount of his recovery against the shipowner and, in addition, a supplement consisting of the stevedore's contribution to the longshoreman's legal expenses. This supplement would represent a windfall in excess of the amount the longshoreman received as compensation for the injuries he has suffered. The stevedore would not obtain reimbursement for the full amount of its compensation payment, but would instead have that amount reduced by a possibly substantial legal fee. This result would be contrary to the allocation of attorney's fees expressly provided by Congress for suits brought by the stevedore pursuant to an assignment from the longshoreman. In these circumstances we do not believe that the Act and its legislative his-

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sufficient to reimburse the stevedore for its lien. See *Valentino* v. *Ricknerns Rhederei, G. M. B. H., SS Etha,* 552 F. 2d 466 (CA2 1977). We do not today address the *Valentino* situation, and contrary to the implication of the dissent, nothing in our decision suggests that the stevedore's lien has priority over the longshoreman's expenses.

[14] See n. 2, *supra,* illustrating that petitioner's distribution scheme would result in a recovery of $5,756.26 in excess of the amount he would receive if there were a simple negligence action and no compensation scheme.

The Act explicitly allows attorney's fees in cases in which an employer declines to pay compensation, 33 U. S. C. § 928, and in cases in which the employer brings suit pursuant to an assignment from the longshoreman. These provisions reinforce the conclusion that if Congress had intended to allow proportionate sharing of legal expenses, it would have done so expressly.

Petitioner suggests that the distribution we approve will result in a $5,756.26 windfall to the respondent, since it is in effect permitted to recover its lien without contributing to the costs of the recovery. But as explained in the text, our review of the Act and its legislative history persuades us that Congress intended the stevedore to recover the full amount of its lien, regardless of who brings the action.

tory can fairly be read to support the distribution proposed by petitioner.[15]

The judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE BLACKMUN, dissenting.

The Court's approach in this case strikes me as somewhat crabbed. By tilting with the specter of "double recovery," the Court adopts a construction of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 901 *et seq.*, that relegates the injured longshoreman's welfare to secondary

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[15] Nothing we say today is intended to affect the established power of a court of equity to charge beneficiaries with a proportionate share of the costs of creating a common fund through litigation. See Dawson, Lawyers and Involuntary Clients: Attorney Fees From Funds, 87 Harv. L. Rev. 1597 (1974). Nor are we presented the question whether that power would be properly exercised in the setting of a workers' compensation scheme if the particular Act and its legislative history were ambiguous on the subject. For disparate results in the state courts, compare *Burt* v. *Hartford Acc. & Indem. Co.*, 252 Ark. 1236, 483 S. W. 2d 218 (1972); *Liberty Mut. Ins. Co.* v. *Western Cas. & Sur. Co.*, 111 Ariz. 259, 527 P. 2d 1091 (1974); *Commercial Union Ins. Co.* v. *Scott*, 116 Ga. App. 633, 158 S. E. 2d 295 (1967); *Tucker* v. *Nason*, 249 Iowa 496, 87 N. W. 2d 547 (1958), with *Quinn* v. *State*, 15 Cal. 3d 162, 539 P. 2d 761 (1975); *Security Ins. Co. of Hartford* v. *Norris*, 439 S. W. 2d 68 (Ky. 1969); *Broussard, Broussard & Moresi, Ltd.* v. *State Auto & Cas. Underwriters Co.*, 287 So. 2d 544 (La. App. 1973), cert. denied, 290 So. 2d 908 (La. 1974); *Carter* v. *Wooley*, 521 P. 2d 793 (Okla. 1974). See generally 2A A. Larson, Workmen's Compensation § 74.32 (1976 and 1979 Supp.).

A number of States have required proportional sharing of legal expenses by statute. See, *e. g.*, Idaho Code § 72–223 (1973); Ill. Rev. Stat., ch. 48, § 138.5 (1977); Mich. Comp. Laws Ann. § 418.827 (Supp. 1978); New York Work. Comp. Law § 29 (McKinney Supp. 1979); Pa. Stat. Ann., Tit. 77, § 671 (Purdon Supp. 1979); Va. Code § 65.1–43 (1973); Wash. Rev. Code Ann. § 51.24.010 (Supp. 1978). See generally Larson, *supra;* Atleson, Workmen's Compensation: Third Party Actions and the Apportionment of Attorney's Fees, 19 Buffalo L. Rev. 515 (1970). That route, of course, remains available to Congress.

status, well behind the interest of his stevedore-employer in conserving resources.

Under the Court's rule, the stevedore has everything to gain and nothing to lose. The longshoreman takes the risk and the worry of the litigation and, if he gains enough, the stevedore is home free. This result does not seem to me to square with the Court's recent recognition that the Act should be construed with the beneficent purpose of worker protection foremost in mind. *Northeast Marine Terminal Co.* v. *Caputo,* 432 U. S. 249, 268 (1977). Nor does it entirely square with the modern concept that the costs of industrial accidents are expenses to be borne by the industrial enterprise and not by the injured workman.[1] It also fails to do equity where equity is due. Since I cannot agree that Congress has required us so to deviate from the principles of equity and the governing purposes of the Act, I respectfully dissent.

The Court recognizes, *ante,* at 79, that although Congress has provided a detailed scheme for the distribution of the amount recovered in a third-party action initiated by the *stevedore,* it has never fixed by statute the details of distribution when it is the *longshoreman* who brings suit. The Court, nonetheless, discovers and espouses a settled judicial rule for division of the recovery in an action by the longshoreman, and it transforms that rule into a statutory mandate by pronouncing that we should not presume to change what the Court thinks Congress, by inaction, apparently has left in force. *Ante,* at 85–86. I feel the Court has oversimplified the variegated history of the judicial "rule," has overdrawn the clarity of congressional approval of it, and has failed to estimate the degree to which the rationale for exonerating the stevedore from bearing a portion of the attorney's fees was undermined by the 1972 Amendments to the Act.

The earliest cases mentioned by the Court, *The Etna,* 138

[1] See J. Boyd, The Law of Compensation for Injuries to Workmen 10 (1913); H. Somers & A. Somers, Workmen's Compensation 26 (1954).

F. 2d 37 (CA3 1943), and *Fontana* v. *Pennsylvania R. Co.*, 106 F. Supp. 461 (SDNY 1952), aff'd mem. *sub nom. Fontana* v. *Grace Line, Inc.*, 205 F. 2d 151 (CA2), cert. denied, 346 U. S. 886 (1953), chiefly concerned the broad question, not at issue here, whether the stevedore is entitled to *any* recoupment from the longshoreman's recovery against the shipowner. These cases established that the stevedore is entitled to recoupment, and thus that the longshoreman is not to receive the "double recovery" of full statutory compensation plus full damages in an action at law. No one, at this juncture, doubts the validity of this holding or its approval by Congress. See 33 U. S. C. § 933 (f); S. Rep. No. 428, 86th Cong., 1st Sess., 2 (1959). The question we presently face is a much narrower one that a general dislike for any double recovery does not at all resolve.

To be sure, *Fontana, supra,* and *Davis* v. *United States Lines Co.*, 253 F. 2d 262 (CA3 1958), held, as the Court does today, that attorney's fees for a third-party action must be borne in their entirety by the longshoreman. These cases drew support for this conclusion from both the statutory division of recovery when the stevedore brings suit and the view that the "expense of securing the recovery is, as in equity it should be, a first charge against the fund itself." *Fontana* v. *Pennsylvania R. Co.*, 106 F. Supp., at 464. As a review of subsequent case law demonstrates, however, this reasoning never has achieved the broad acceptance that the Court's opinion implies. In the Fourth and the Fifth Circuits, and perhaps even in the Second Circuit, alternative approaches to the problem have been advocated and applied.

In *Ballwanz* v. *Jarka Corp.*, 382 F. 2d 433 (1967), the Fourth Circuit adopted an entirely different rationale. The court recognized that *Ryan Stevedoring Co.* v. *Pan-Atlantic S. S. Corp.*, 350 U. S. 124 (1956), which permitted shipowners to bring indemnity actions against stevedores, produced a "rotary situation" in which the stevedore was effectively aligned

with the shipowner against the third-party suit. 382 F. 2d, at 434. As a result, recoupment of the stevedore's compensation lien from the longshoreman's recovery involved "no more than a transfer of the charge in that amount from its [insurer's] loss as compensation carrier to its loss as liability carrier." *Id.*, at 435. It was the contrariety of interests and lack of true benefit to the stevedore, and not the arguments advanced in *Fontana* and *Davis*, that led the court to refuse proration of fees.

In the Fifth Circuit, the proper distribution of recoveries in third-party actions initiated by longshoremen has been the subject of continuing debate. *Strachan Shipping Co.* v. *Melvin*, 327 F. 2d 83 (1964), applied *Fontana*'s conclusion that attorney's fees are a "first charge" against the recovery in a case where the recovery was so small that nothing was left for the longshoreman. The decision provoked a vigorous dissent, which proposed a different reading of *Fontana* and *Davis* that would give the compensation lien priority over the fees. *Id.*, at 87–89. This alternative appears to have been applied in *Haynes* v. *Rederi A/S Aladdin*, 362 F. 2d 345, 351 (1966), cert. denied, 385 U. S. 1020 (1967), albeit on the ground that the stevedore was represented in the action by its own counsel. Eventually, however, both readings of the *Fontana-Davis* "rule" were displaced in the Fifth Circuit by an approach that, in certain circumstances, required the longshoreman and the stevedore to "pay attorney's fees and litigation expenses in proportion to their recoveries." *Chouest* v. *A & P Boat Rentals, Inc.*, 472 F. 2d 1026, 1035–1036, cert. denied *sub nom. Travelers Ins. Co.* v. *Chouest*, 412 U. S. 949 (1973).

In the Second Circuit, *Fontana*'s approach has not been uniformly followed. *Landon* v. *Lief Hoegh & Co.*, 521 F. 2d 756, 761 (1975), cert. denied *sub nom. A/S Arcadia* v. *Gulf Ins. Co.*, 423 U. S. 1053 (1976), treated the compensation lien as an "express trust for the benefit of the employer" with the

longshoreman as statutory trustee. In the District Courts, moreover, both the "conflict" theory developed in *Ballwanz* and the approach advocated by the *Strachan* dissent gained some currency. See, *e. g.*, *Spano* v. *N. V. Stoomvaart Maatschappij "Nederland,"* 340 F. Supp. 1194 (SDNY 1971); *Russo* v. *Flota Mercante Grancolombiana*, 303 F. Supp. 1404, 1407 (SDNY 1969). These cases were subsequently "sapproved in *Valentino* v. *Rickners Rhederei, G. M. B. H., SS Etha*, 552 F. 2d 466 (CA2 1977), which reinstated the *Fontana* rationale.

I mention these variations and counterpoints to the *Fontana-Davis* theme not to challenge the Court's assertion that, prior to the 1959 and 1972 amendments to the Act, stevedores generally were exonerated from bearing a portion of attorney's fees incurred in longshoreman-initiated actions, but rather to suggest that the Court errs when it implies that the case law presented a *settled* judicial construction of the Act for Congress to approve. Indeed, the situation was even more complicated than this brief exposition illustrates, since the various rationales employed by the courts led them into disarray over the handling of attorney's fees in cases where the third-party recovery was insufficient to satisfy both the fees and the stevedore's compensation lien in their entirety. See *Valentino* v. *Rickners Rhederei, G. m. B. H., SS Etha*, 417 F. Supp. 176, 177–179 (EDNY 1976), aff'd on other grounds, 552 F. 2d 466 (CA2 1977). The legislative history relied upon by the Court, *ante*, at 80–81, 84, fails to show that Congress delved into the intricacies of this judicial debate, or indeed that it did more than barely scratch the surface in consideration of fee allocations in actions brought by longshoremen. The most that can be gleaned from this history is that Congress intended not to interfere with judicial developments in this sphere.

As a result, I think that the Court informs congressional inaction with the wrong meaning, and that it draws an analogy to the statutory allocation of stevedore-initiated recoveries where none, in fact, exists. Had Congress intended rote ap-

plication of the allocation scheme in 33 U. S. C. § 933 (e) to recovery in a longshoreman-initiated action, specification of this result would have been a simple task, and one would have expected Congress to say so. Instead, despite the obvious prevalence of such suits,[2] Congress left the matter to the judicial process. Although it is somewhat precarious to find significance in a congressional omission, I view the absence of action in this case as a clear signal that Congress regarded the allocation of a recovery in a suit by a longshoreman as a more fluid and complicated matter than allocation in a suit by a stevedore, and that it left the courts free to balance the equities instead of commanding adherence to a strict "arithmetic ranking" of liens. See *Mitchell* v. *Scheepvaart Maatschappij Trans-Ocean*, 579 F. 2d 1274, 1279 (CA5 1978).

Adaptation of the statutory framework, of course, might be desirable if it achieved an equitable result. But it does not. Indeed, the analogy to the division of a recovery under § 933 (e) itself is flawed. When the stevedore brings the lawsuit, its own recovery comes first after expenses and costs of litigation have been paid; the longshoreman, as nonparticipating beneficiary, receives only a portion of the remainder. In contrast, under the Court's ruling, the longshoreman who brings suit must wait in line until the nonparticipating stevedore's interests have been satisfied in full. Under the statute, then, the party who takes the risk of loss receives priority of treatment. Under the Court's ruling, he does not. The apparent symmetry of a strict analogy to the statutory formula thus produces, for the longshoreman, an asymmetrical result. Considerations of equity surely do not require that approach.

As I weigh the equities, the most persuasive reason heretofore for exonerating the stevedore from bearing a proportion-

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[2] See *Valentino* v. *Rickners Rhederei, G. M. B. H., SS Etha*, 552 F. 2d 466, 469 (CA2 1977), where the court took notice that "stevedores do not, as a practical matter, pursue these lawsuits—presumably for fear of antagonizing their customers."

ate share of attorney's fees has been the stevedore's contingent liability for indemnity of the shipowner under *Ryan Stevedoring Co.* v. *Pan-Atlantic S. S. Corp.*, 350 U. S. 124 (1956). That liability, of course, was eliminated by the 1972 Amendments to the Act. See *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U. S. 256, 262 (1979); *Northeast Marine Terminal Co.* v. *Caputo*, 432 U. S., at 261–262. Thus, it is now clear from the outset of each longshoreman's suit that the attorney's efforts serve the interests of the stevedore as well as those of the longshoreman. If the action is successful, the stevedore obtains recoupment of the compensation benefits it has paid, without risk, without the jeopardy to customer relations that might arise if the stevedore or its insurer brought the suit, and without adjustment for the possibility that the stevedore itself is partly responsible for the injury. The amount of the stevedore's recoupment ordinarily depends directly on the lawyer's skill in proving both the shipowner's negligence and damages. This direct pecuniary interest in the outcome of the litigation justifies, in my view, an equitable allocation of the costs of bringing suit in proportion to recovery from the common fund. See *Sprague* v. *Ticonic National Bank*, 307 U. S. 161, 166–167 (1939). Without that allocation, the longshoreman must bear all the risk for only a limited part of the benefit.

In addition to eliminating the only sound reason for refusing an allocation on equitable grounds, the 1972 Amendments also show clearly that congressional concern was primarily for the workman and not for the stevedore-employer or for the shipowner. The chief purpose of the Amendments was to benefit the longshoreman. Congress' desire to reduce excessive litigation and thus to conserve stevedore resources, of which the Court makes so much, was incidental and secondary to this purpose. When, for example, Congress eliminated the litigation merry-go-round produced by the indemnity and unseaworthiness actions created in *Ryan Stevedoring Co.* v.

Pan-Atlantic S. S. Corp., supra, and *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85 (1946), see *ante,* at 82–83, it did so not out of naked solicitude for shipowners and stevedores, but because this layering of recoveries failed to produce "a real increase in actual benefits for injured workers." S. Rep. No. 92–1125, p. 4 (1972), quoted *ante,* at 84. Yet the Court now advances this secondary purpose to justify a reduction of the longshoreman's recovery in the third-party negligence action that Congress retained primarily for his benefit; and it does so *because* proration of attorney's fees would result in a "real increase" in the longshoreman's total compensation. I cannot avoid the suspicion that congressional intent has been stood on its head.

The Court also makes much of the putative "windfall" a longshoreman would receive if petitioner prevailed. *Ante,* at 87. The longshoreman would receive no windfall. Any costs or fees he must pay reduce his net recovery below the amount of his adjudicated injuries. This deficit would be alleviated, but never exceeded, if the stevedore were charged with a proportionate share of the attorney's fees. The longshoreman, of course, would be better off than if he had to depend either on the statutory compensation or on the negligence suit alone. But Congress long ago eliminated the necessity of electing a remedy, and an increase in total recovery accomplished by resort to both methods of redress is fully consistent with the statutory scheme. So long as the longshoreman's total compensation remains less than his actual damages, there is no true "double recovery."

To use the Court's own adjective, *ante,* at 85, it is "ironic" that from this litigation petitioner will receive, by today's ruling, only $2,779.57 more than the attorney's fees of $19,932.40. The Court thus acts to ensure that third-party actions will remain, as they were before the 1972 Amendments, a litigation playground for others instead of a method by which the injured longshoreman realistically may hope to

recover for losses that are not covered by the statutory compensation scheme. I shall be interested to see whether the Court adheres to its present logic when presented with a case where the third-party recovery is so small that virtually nothing is left for the longshoreman. Where the recovery against the shipowner is less than the stevedore's lien and the expenses of the suit, see *ante,* at 86–87, n. 13, it is to be hoped that the injured longshoreman will not be required to disgorge part of his compensation payments. Yet such disgorgement would not be inconsistent with the gloss on congressional priorities that the Court imposes today.

CALIFORNIA RETAIL LIQUOR DEALERS ASSN. *v.* MIDCAL ALUMINUM, INC., ET AL.

CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, THIRD APPELLATE DISTRICT

No. 79-97. Argued January 16, 1980—Decided March 3, 1980

A California statute requires all wine producers and wholesalers to file fair trade contracts or price schedules with the State. If a producer has not set prices through a fair trade contract, wholesalers must post a resale price schedule and are prohibited from selling wine to a retailer at other than the price set in a price schedule or fair trade contract. A wholesaler selling below the established prices faces fines or license suspension or revocation. After being charged with selling wine for less than the prices set by price schedules and also for selling wines for which no fair trade contract or schedule had been filed, respondent wholesaler filed suit in the California Court of Appeal asking for an injunction against the State's wine pricing scheme. The Court of Appeal ruled that the scheme restrains trade in violation of the Sherman Act, and granted injunctive relief, rejecting claims that the scheme was immune from liability under that Act under the "state action" doctrine of *Parker* v. *Brown,* 317 U. S. 341, and was also protected by § 2 of the Twenty-first Amendment, which prohibits the transportation or importation of intoxicating liquors into any State for delivery or use therein in violation of the State's laws.

Held:

1. California's wine pricing system constitutes resale price maintenance in violation of the Sherman Act, since the wine producer holds the power to prevent price competition by dictating the prices charged by wholesalers. And the State's involvement in the system is insufficient to establish antitrust immunity under *Parker* v. *Brown, supra.* While the system satisfies the first requirement for such immunity that the challenged restraint be "one clearly articulated and affirmatively expressed as state policy," it does not meet the other requirement that the policy be "actively supervised" by the State itself. Under the system the State simply authorizes price-setting and enforces the prices established by private parties, and it does not establish prices, review the reasonableness of price schedules, regulate the terms of fair trade contracts, monitor market conditions, or engage in any "pointed reexamination"

of the program. The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement. Pp. 102–106.

2. The Twenty-first Amendment does not bar application of the Sherman Act to California's wine pricing system. Pp. 106–114.

(a) Although under that Amendment States retain substantial discretion to establish liquor regulations over and above those governing the importation or sale of liquor and the structure of the liquor distribution system, those controls may be subject to the federal commerce power in appropriate situations. Pp. 106–110.

(b) There is no basis for disagreeing with the view of the California courts that the asserted state interests behind the resale price maintenance system of promoting temperance and protecting small retailers are less substantial than the national policy in favor of competition. Such view is reasonable and is supported by the evidence, there being nothing to indicate that the wine pricing system helps sustain small retailers or inhibits the consumption of alcohol by Californians. Pp. 110–114.

90 Cal. App. 3d 979, 153 Cal. Rptr. 757, affirmed.

POWELL, J., delivered the opinion of the Court, in which all other Members joined, except BRENNAN, J., who took no part in the consideration or decision of the case.

William T. Chidlaw argued the cause and filed briefs for petitioner.

George J. Roth, Deputy Attorney General of California, argued the cause for the State of California as *amicus curiae* urging reversal. With him on the brief was *George Deukmejian,* Attorney General.

Jack B. Owens argued the cause for respondent Midcal Aluminum, Inc. With him on the brief were *Elliot S. Kaplan* and *Frank C. Damrell, Jr.**

**W. Curtis Sewell* filed a brief for the Virginia Beer Wholesalers Assn. as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Solicitor General McCree, Assistant Attorney General Shenefield, Deputy Solicitor General Wallace, Elinor Hadley Stillman, Barry Grossman, Ron M. Landsman,* and

MR. JUSTICE POWELL delivered the opinion of the Court.

In a state-court action, respondent Midcal Aluminum, Inc., a wine distributor, presented a successful antitrust challenge to California's resale price maintenance and price posting statutes for the wholesale wine trade. The issue in this case is whether those state laws are shielded from the Sherman Act by either the "state action" doctrine of *Parker* v. *Brown*, 317 U. S. 341 (1943), or § 2 of the Twenty-first Amendment.

I

Under § 24866 (b) of the California Business and Professions Code, all wine producers, wholesalers, and rectifiers must file fair trade contracts or price schedules with the State.[1] If a wine producer has not set prices through a fair trade contract, wholesalers must post a resale price schedule for that producer's brands. § 24866 (a). No state-licensed wine merchant may sell wine to a retailer at other than the price set "either in an effective price schedule or in an effective fair trade contract. . . ." § 24862 (West Supp. 1980).

The State is divided into three trading areas for administration of the wine pricing program. A single fair trade contract or schedule for each brand sets the terms for all wholesale transactions in that brand within a given trading area. §§ 24862, 24864–24865 (West Supp. 1980). Similarly, state

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Michael N. Sohn for the United States; and by *A. Kirk McKenzie* for Consumers Union of United States, Inc.

[1] The statute provides:

"Each wine grower, wholesaler licensed to sell wine, wine rectifier, and rectifier shall:

"(a) Post a schedule of selling prices of wine to retailers or consumers for which his resale price is not governed by a fair trade contract made by the person who owns or controls the brand.

"(b) Make and file a fair trade contract and file a schedule of resale prices, if he owns or controls a brand of wine resold to retailers or consumers." Cal. Bus. & Prof. Code Ann. § 24866 (West 1964).

regulations provide that the wine prices posted by a single wholesaler within a trading area bind all wholesalers in that area. *Midcal Aluminum, Inc.* v. *Rice,* 90 Cal. App. 3d 979, 983–984, 153 Cal. Rptr. 757, 760 (1979). A licensee selling below the established prices faces fines, license suspension, or outright license revocation. Cal. Bus. & Prof. Code Ann. § 24880 (West Supp. 1980).[2] The State has no direct control over wine prices, and it does not review the reasonableness of the prices set by wine dealers.

Midcal Aluminum, Inc., is a wholesale distributor of wine in southern California. In July 1978, the Department of Alcoholic Beverage Control charged Midcal with selling 27 cases of wine for less than the prices set by the effective price schedule of the E. & J. Gallo Winery. The Department also alleged that Midcal sold wines for which no fair trade contract or schedule had been filed. Midcal stipulated that the allegations were true and that the State could fine it or suspend its license for those transgressions. App. 19–20. Midcal then filed a writ of mandate in the California Court of Appeal for the Third Appellate District asking for an injunction against the State's wine pricing system.

The Court of Appeal ruled that the wine pricing scheme restrains trade in violation of the Sherman Act, 15 U. S. C. § 1 *et seq.* The court relied entirely on the reasoning in *Rice* v. *Alcoholic Beverage Control Appeals Bd.,* 21 Cal. 3d 431, 579 P. 2d 476 (1978), where the California Supreme Court struck down parallel restrictions on the sale of distilled liquors. In that case, the court held that because the State played only a passive part in liquor pricing, there was no *Parker* v. *Brown* immunity for the program.

> "In the price maintenance program before us, the state plays no role whatever in setting the retail prices. The

[2] Licensees that sell wine below the prices specified in fair trade contracts or schedules also may be subject to private damage suits for unfair competition. § 24752 (West 1964).

prices are established by the producers according to their own economic interests, without regard to any actual or potential anticompetitive effect; the state's role is restricted to enforcing the prices specified by the producers. There is no control, or 'pointed re-examination,' by the state to insure that the policies of the Sherman Act are not 'unnecessarily subordinated' to state policy." 21 Cal. 3d, at 445, 579 P. 2d, at 486.

Rice also rejected the claim that California's liquor pricing policies were protected by § 2 of the Twenty-first Amendment, which insulates state regulation of intoxicating liquors from many federal restrictions. The court determined that the national policy in favor of competition should prevail over the state interests in liquor price maintenance—the promotion of temperance and the preservation of small retail establishments. The court emphasized that the California system not only permitted vertical control of prices by producers, but also frequently resulted in horizontal price fixing. Under the program, many comparable brands of liquor were marketed at identical prices.[3] Referring to congressional and state legislative studies, the court observed that resale price maintenance has little positive impact on either temperance or small retail stores. See *infra*, at 112–113.

In the instant case, the State Court of Appeal found the analysis in *Rice* squarely controlling. 90 Cal. App. 3d, at 984, 153 Cal. Rptr., at 760. The court ordered the Department of Alcoholic Beverage Control not to enforce the resale price maintenance and price posting statutes for the wine trade. The Department, which in *Rice* had not sought certiorari from

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[3] The court cited record evidence that in July 1976, five leading brands of gin each sold in California for $4.89 for a fifth of a gallon, and that five leading brands of Scotch whiskey sold for either $8.39 or $8.40 a fifth. *Rice* v. *Alcoholic Beverage Control Appeals Bd.*, 21 Cal. 3d, at 454, and nn. 14, 16, 579 P. 2d, at 491–492, and nn. 14, 16.

this Court, did not appeal the ruling in this case.[4] An appeal was brought by the California Retail Liquor Dealers Association, an intervenor.[5] The California Supreme Court declined to hear the case, and the Dealers Association sought certiorari from this Court. We granted the writ, 444 U. S. 824 (1979), and now affirm the decision of the state court.

II

The threshold question is whether California's plan for wine pricing violates the Sherman Act. This Court has ruled consistently that resale price maintenance illegally restrains trade. In *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373, 407 (1911), the Court observed that such arrangements are "designed to maintain prices . . . , and to prevent competition among those who trade in [competing goods]." See *Albrecht* v. *Herald Co.*, 390 U. S. 145 (1968); *United States* v. *Parke, Davis & Co.*, 362 U. S. 29 (1960); *United States* v. *A. Schrader's Son, Inc.*, 252 U. S. 85 (1920). For many years, however, the Miller-Tydings Act of 1937 permitted the States to authorize resale price maintenance. 50 Stat. 693. The goal of that statute was to allow the States to protect small retail establishments that Congress thought might otherwise be driven from the marketplace by large-volume discounters. But in 1975 that congressional permission was rescinded. The Consumer Goods Pricing Act of 1975, 89 Stat. 801, repealed the Miller-Tydings Act and related legislation.[6] Consequently, the Sherman Act's ban on resale price

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[4] The State also did not appeal the decision in *Capiscean Corp.* v. *Alcoholic Beverage Control Appeals Bd.*, 87 Cal. App. 3d 996, 151 Cal. Rptr. 492 (1979), which used the analysis in *Rice* to invalidate California's resale price maintenance scheme for retail wine sales to consumers.

[5] The California Retail Liquor Dealers Association, a trade association of independent retail liquor dealers in California, claims over 3,000 members.

[6] The congressional Reports accompanying the Consumer Goods Pricing Act of 1975 noted that repeal of fair trade authority would not alter

maintenance now applies to fair trade contracts unless an industry or program enjoys a special antitrust immunity.

California's system for wine pricing plainly constitutes resale price maintenance in violation of the Sherman Act. *Schwegmann Bros.* v. *Calvert Corp.*, 341 U. S. 384 (1951); see *Albrecht* v. *Herald Co., supra; Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons*, 340 U. S. 211 (1951); *Dr. Miles Medical Co.* v. *John D. Park & Sons Co., supra.* The wine producer holds the power to prevent price competition by dictating the prices charged by wholesalers. As Mr. Justice Hughes pointed out in *Dr. Miles*, such vertical control destroys horizontal competition as effectively as if wholesalers "formed a combination and endeavored to establish the same restrictions . . . by agreement with each other." 220 U. S., at 408.[7] Moreover, there can be no claim that the California program is simply intrastate regulation beyond the reach of the Sherman Act. See *Schwegmann Bros.* v. *Calvert Corp., supra; Burke* v. *Ford*, 389 U. S. 320 (1967) (*per curiam*).

Thus, we must consider whether the State's involvement in the price-setting program is sufficient to establish antitrust immunity under *Parker* v. *Brown*, 317 U. S. 341 (1943). That immunity for state regulatory programs is grounded in our federal structure. "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority,

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whatever power the States hold under the Twenty-first Amendment to control liquor prices. S. Rep. No. 94-466, p. 2 (1975); H. R. Rep. No. 94-341, p. 3, n. 2 (1975). We consider the effect of the Twenty-first Amendment on this case in Part III, *infra*.

[7] In *Rice*, the California Supreme Court found direct evidence that resale price maintenance resulted in horizontal price fixing. See *supra*, at 101, and n. 3. Although the Court of Appeal made no such specific finding in this case, the court noted that the wine pricing system "cannot be upheld for the same reasons the retail price maintenance provisions were declared invalid in *Rice*." *Midcal Aluminum, Inc.* v. *Rice*, 90 Cal. App. 3d 979, 983, 153 Cal. Rptr. 757, 760 (1979).

an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Id.*, at 351. In *Parker* v. *Brown*, this Court found in the Sherman Act no purpose to nullify state powers. Because the Act is directed against "individual and not state action," the Court concluded that state regulatory programs could not violate it. *Id.*, at 352.

Under the program challenged in *Parker*, the State Agricultural Prorate Advisory Commission authorized the organization of local cooperatives to develop marketing policies for the raisin crop. The Court emphasized that the Advisory Commission, which was appointed by the Governor, had to approve cooperative policies following public hearings: "It is the state which has created the machinery for establishing the prorate program. . . . [I]t is the state, acting through the Commission, which adopts the program and enforces it. . . ." *Ibid.* In view of this extensive official oversight, the Court wrote, the Sherman Act did not apply. Without such oversight, the result could have been different. The Court expressly noted that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. . . ." *Id.*, at 351.

Several recent decisions have applied *Parker*'s analysis. In *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773 (1975), the Court concluded that fee schedules enforced by a state bar association were not mandated by ethical standards established by the State Supreme Court. The fee schedules therefore were not immune from antitrust attack. "It is not enough that . . . anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign." *Id.*, at 791. Similarly, in *Cantor* v. *Detroit Edison Co.*, 428 U. S. 579 (1976), a majority of the Court found that no antitrust immunity was conferred when a state agency passively accepted a public utility's tariff. In contrast, Arizona rules against lawyer advertising were held immune from Sherman Act challenge be-

cause they "reflect[ed] a clear articulation of the State's policy with regard to professional behavior" and were "subject to pointed re-examination by the policymaker—the Arizona Supreme Court—in enforcement proceedings." *Bates* v. *State Bar of Arizona,* 433 U. S. 350, 362 (1977).

Only last Term, this Court found antitrust immunity for a California program requiring state approval of the location of new automobile dealerships. *New Motor Vehicle Bd. of Cal.* v. *Orrin W. Fox Co.,* 439 U. S. 96 (1978). That program provided that the State would hold a hearing if an automobile franchisee protested the establishment or relocation of a competing dealership. *Id.,* at 103. In view of the State's active role, the Court held, the program was not subject to the Sherman Act. The "clearly articulated and affirmatively expressed" goal of the state policy was to "displace unfettered business freedom in the matter of the establishment and relocation of automobile dealerships." *Id.,* at 109.

These decisions establish two standards for antitrust immunity under *Parker* v. *Brown.* First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy"; second, the policy must be "actively supervised" by the State itself. *City of Lafayette* v. *Louisiana Power & Light Co.,* 435 U. S. 389, 410 (1978) (opinion of BRENNAN, J.).[8] The California system for wine pricing satisfies the first standard. The legislative policy is forthrightly stated and clear in its purpose to permit resale price maintenance. The program, however, does not meet the second requirement for *Parker* immunity. The State simply authorizes price-setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate

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[8] See *Norman's On the Waterfront, Inc.* v. *Wheatley,* 444 F. 2d 1011, 1018 (CA3 1971); *Asheville Tobacco Bd.* v. *FTC,* 263 F. 2d 502, 509–510 (CA4 1959); Note, *Parker v. Brown* Revisited: The State Action Doctrine After *Goldfarb, Cantor,* and *Bates,* 77 Colum. L. Rev. 898, 916 (1977).

the terms of fair trade contracts. The State does not monitor market conditions or engage in any "pointed reexamination" of the program.[9] The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement. As *Parker* teaches, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. . . ." 317 U. S., at 351.

III

Petitioner contends that even if California's system of wine pricing is not protected state action, the Twenty-first Amendment bars application of the Sherman Act in this case. Section 1 of that Amendment repealed the Eighteenth Amendment's prohibition on the manufacture, sale, or transportation of liquor. The second section reserved to the States certain power to regulate traffic in liquor: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." The remaining question before us is whether § 2 permits California to countermand the congressional policy—adopted under the commerce power—in favor of competition.

A

In determining state powers under the Twenty-first Amendment, the Court has focused primarily on the language of the

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[9] The California program contrasts with the approach of those States that completely control the distribution of liquor within their boundaries. *E. g.*, Va. Code §§ 4–15, 4–28 (1979). Such comprehensive regulation would be immune from the Sherman Act under *Parker* v. *Brown*, 317 U. S. 341 (1943), since the State would "displace unfettered business freedom" with its own power. *New Motor Vehicle Bd. of Cal.* v. *Orrin W. Fox Co.*, 439 U. S. 96, 109 (1978); see *State Board* v. *Young's Market Co.*, 299 U. S. 59, 63 (1936).

provision rather than the history behind it. *State Board* v. *Young's Market Co.*, 299 U. S. 59, 63–64 (1936).[10] In terms, the Amendment gives the States control over the "transportation or importation" of liquor into their territories. Of course, such control logically entails considerable regulatory power not strictly limited to importing and transporting alcohol. *Ziffrin, Inc.* v. *Reeves*, 308 U. S. 132, 138 (1939). We should not, however, lose sight of the explicit grant of authority.

This Court's early decisions on the Twenty-first Amendment recognized that each State holds great powers over the importation of liquor from other jurisdictions. *Young's Market, supra,* concerned a license fee for interstate imports of alcohol; another case focused on a law restricting the types of liquor that could be imported from other States, *Mahoney* v. *Joseph Triner Corp.*, 304 U. S. 401 (1938); two others

[10] The approach is supported by sound canons of constitutional interpretation and demonstrates a wise reluctance to wade into the complex currents beneath the congressional proposal of the Amendment and its ratification in the state conventions. The Senate sponsor of the Amendment resolution said the purpose of § 2 was "to restore to the States . . . absolute control in effect over interstate commerce affecting intoxicating liquors. . . ." 76 Cong. Rec. 4143 (1933) (remarks of Sen. Blaine). Yet he also made statements supporting Midcal's claim that § 2 was designed only to ensure that "dry" States could not be forced by the Federal Government to permit the sale of liquor. See 76 Cong. Rec., at 4140–4141. The sketchy records of the state conventions reflect no consensus on the thrust of § 2, although delegates at several conventions expressed their hope that state regulation of liquor traffic would begin immediately. E. Brown, Ratification of the Twenty-first Amendment to the Constitution 104 (1938) (Wilson, President of the Idaho Convention); *id.*, at 191–192 (Darnall, President of Maryland Convention); *id.*, at 247 (Gaylord, Chairman of Missouri Convention); *id.*, at 469–473 (resolution adopted at Washington Convention calling for state action "to regulate the liquor traffic"). See generally Note, The Effect of the Twenty-first Amendment on State Authority to Control Intoxicating Liquors, 75 Colum. L. Rev. 1578, 1580 (1975); Note, Economic Localism in State Alcoholic Beverage Laws—Experience Under the Twenty-First Amendment, 72 Harv. L. Rev. 1145, 1147 (1959).

involved "retaliation" statutes barring imports from States that proscribed shipments of liquor from other States, *Joseph S. Finch & Co.* v. *McKittrick*, 305 U. S. 395 (1939); *Indianapolis Brewing Co.* v. *Liquor Control Comm'n*, 305 U. S. 391 (1939). The Court upheld the challenged state authority in each case, largely on the basis of the States' special power over the "importation and transportation" of intoxicating liquors. Yet even when the States had acted under the explicit terms of the Amendment, the Court resisted the contention that § 2 "freed the States from all restrictions upon the police power to be found in other provisions of the Constitution." *Young's Market, supra,* at 64.

Subsequent decisions have given "wide latitude" to state liquor regulation, *Joseph E. Seagram & Sons, Inc.* v. *Hostetter*, 384 U. S. 35, 42 (1966), but they also have stressed that important federal interests in liquor matters survived the ratification of the Twenty-first Amendment. The States cannot tax imported liquor in violation of the Export-Import Clause. *Department of Revenue* v. *James Beam Co.*, 377 U. S. 341 (1964). Nor can they insulate the liquor industry from the Fourteenth Amendment's requirements of equal protection, *Craig* v. *Boren*, 429 U. S. 190, 204–209 (1976), and due process, *Wisconsin* v. *Constantineau*, 400 U. S. 433, 436 (1971).

More difficult to define, however, is the extent to which Congress can regulate liquor under its interstate commerce power. Although that power is directly qualified by § 2, the Court has held that the Federal Government retains some Commerce Clause authority over liquor. In *William Jameson & Co.* v. *Morgenthau*, 307 U. S. 171 (1939) (*per curiam*), this Court found no violation of the Twenty-first Amendment in a whiskey-labeling requirement prescribed by the Federal Alcohol Administration Act, 49 Stat. 977. And in *Ziffrin, Inc.* v. *Reeves, supra,* the Court did not uphold Kentucky's system of licensing liquor haulers until it was satisfied that the state program was reasonable. 308 U. S., at 139.

The contours of Congress' commerce power over liquor were sharpened in *Hostetter* v. *Idlewild Liquor Corp.*, 377 U. S. 324, 331–332 (1964).

> "To draw a conclusion . . . that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification. If the Commerce Clause had been *pro tanto* 'repealed,' then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor. Such a conclusion would be patently bizarre and is demonstrably incorrect."

The Court added a significant, if elementary, observation: "Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." *Id.*, at 332. See *Craig* v. *Boren*, *supra*, at 206.[11]

This pragmatic effort to harmonize state and federal powers has been evident in several decisions where the Court held liquor companies liable for anticompetitive conduct not mandated by a State. See *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211 (1951); *United States* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293 (1945). In *Schwegmann Bros.* v. *Calvert Corp.*, 341 U. S. 384 (1951), for example, a liquor manufacturer attempted to force a distributor to comply with Louisiana's resale price maintenance program, a

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[11] In *Nippert* v. *Richmond*, 327 U. S. 416 (1946), the Court commented in a footnote:

"[E]ven the commerce in intoxicating liquors, over which the Twenty-first Amendment gives the States the highest degree of control, is not altogether beyond the reach of the federal commerce power, at any rate when the State's regulation squarely conflicts with regulation imposed by Congress. . . ." *Id.*, at 425, n. 15.

program similar in many respects to the California system at issue here. The Court held that because the Louisiana statute violated the Sherman Act, it could not be enforced against the distributor. Fifteen years later, the Court rejected a Sherman Act challenge to a New York law requiring liquor dealers to attest that their prices were "no higher than the lowest price" charged anywhere in the United States. *Joseph E. Seagram & Sons, Inc.* v. *Hostetter,* 384 U. S. 35 (1966). The Court concluded that the statute exerted "no irresistible economic pressure on the [dealers] to violate the Sherman Act in order to comply," but it also cautioned that "[n]othing in the Twenty-first Amendment, of course, would prevent enforcement of the Sherman Act" against an interstate conspiracy to fix liquor prices. *Id.,* at 45–46. See *Burke* v. *Ford,* 389 U. S. 320 (1967) (*per curiam*).

These decisions demonstrate that there is no bright line between federal and state powers over liquor. The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system. Although States retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations. The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a "concrete case." *Hostetter* v. *Idlewild Liquor Corp.,* 377 U. S., at 332.

B

The federal interest in enforcing the national policy in favor of competition is both familiar and substantial.

> "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."

> *United States* v. *Topco Associates, Inc.*, 405 U. S. 596, 610 (1972).

See *Northern Pacific R. Co.* v. *United States*, 356 U. S. 1, 4 (1958). Although this federal interest is expressed through a statute rather than a constitutional provision, Congress "exercis[ed] all the power it possessed" under the Commerce Clause when it approved the Sherman Act. *Atlantic Cleaners & Dyers* v. *United States*, 286 U. S. 427, 435 (1932); see *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S., at 398. We must acknowledge the importance of the Act's procompetition policy.

The state interests protected by California's resale price maintenance system were identified by the state courts in this case, 90 Cal. App. 3d, at 983, 153 Cal. Rptr., at 760, and in *Rice* v. *Alcoholic Beverage Control Appeals Bd.*, 21 Cal. 3d, at 451, 579 P. 2d, at 490.[12] Of course, the findings and conclusions of those courts are not binding on this Court to the extent that they undercut state rights guaranteed by the Twenty-first Amendment. See *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 659 (1945); *Creswill* v. *Knights of Pythias*, 225 U. S. 246, 261 (1912). Nevertheless, this Court accords "respectful consideration and great weight to the views of the state's highest court" on matters of state law, *Indiana ex rel. Anderson* v. *Brand*, 303 U. S. 95, 100 (1938), and we customarily accept the factual findings of state courts in the

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[12] As the unusual posture of this case reflects, the State of California has shown less than an enthusiastic interest in its wine pricing system. As we noted, the state agency responsible for administering the program did not appeal the decision of the California Court of Appeal. See *supra*, at 101–102; Tr. of Oral Arg. 20. Instead, this action has been maintained by the California Retail Liquor Dealers Association, a private intervenor. But neither the intervenor nor the State Attorney General, who filed a brief *amicus curiae* in support of the legislative scheme, has specified any state interests protected by the resale price maintenance system other than those noted in the state court opinions cited in text.

absence of "exceptional circumstances." *Lloyd A. Fry Roofing Co.* v. *Wood,* 344 U. S. 157, 160 (1952).

The California Court of Appeal stated that its review of the State's system of wine pricing was "controlled by the reasoning of the [California] Supreme Court in *Rice* [*supra*]." 90 Cal. App. 3d, at 983, 153 Cal. Rptr., at 760. Therefore, we turn to that opinion's treatment of the state interests in resale price maintenance for distilled liquors.

In *Rice,* the State Supreme Court found two purposes behind liquor resale price maintenance: "to promote temperance and orderly market conditions." 21 Cal. 3d, at 451, 579 P. 2d, at 490.[13] The court found little correlation between resale price maintenance and temperance. It cited a state study showing a 42% increase in per capita liquor consumption in California from 1950 to 1972, while resale price maintenance was in effect. *Id.,* at 457–458, 579 P. 2d, at 494, citing California Dept. of Finance, Alcohol and the State: A Reappraisal of California's Alcohol Control Policies, xi, 15 (1974). Such studies, the court wrote, "at the very least raise a doubt regarding the justification for such laws on the ground that they promote temperance." 21 Cal. 3d, at 457–458, 579 P. 2d, at 494.[14]

The *Rice* opinion identified the primary state interest in orderly market conditions as "protect[ing] small licensees from predatory pricing policies of large retailers." *Id.,* at 456, 579 P. 2d, at 493.[15] In gauging this interest, the court

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[13] The California Court of Appeal found no additional state interests in the instant case. 90 Cal. App. 3d, at 984, 153 Cal. Rptr., at 760–761. That court rejected the suggestion that the wine price program was designed to protect the State's wine industry, pointing out that the statutes "do not distinguish between California wines and imported wines." *Ibid.*

[14] See *Joseph E. Seagram & Sons, Inc.* v. *Hostetter,* 384 U. S. 35, 39 (1966) (citing study concluding that resale price maintenance in New York State had "no significant effect upon the consumption of alcoholic beverages").

[15] The California Supreme Court also stated that orderly market conditions might "reduce excessive consumption, thereby encouraging temper-

adopted the views of the Appeals Board of the Alcoholic Beverages Control Department, which first ruled on the claim in *Rice*. The state agency "rejected the argument that fair trade laws were necessary to the economic survival of small retailers. . . ." *Ibid.* The agency relied on a congressional study of the impact on small retailers of fair trade laws enacted under the Miller-Tydings Act. The study revealed that "states with fair trade laws had a 55 percent higher rate of firm failures than free trade states, and the rate of growth of small retail stores in free trade states between 1956 and 1972 was 32 per cent higher than in states with fair trade laws." *Ibid.*, citing S. Rep. No. 94–466, p. 3 (1975). Pointing to the congressional abandonment of fair trade in the 1975 Consumer Goods Pricing Act, see *supra*, at 102, the State Supreme Court found no persuasive justification to continue "fair trade laws which eliminate price competition among retailers." 21 Cal. 3d, at 457, 579 P. 2d, at 494. The Court of Appeal came to the same conclusion with respect to the wholesale wine trade. 90 Cal. App. 3d, at 983, 153 Cal. Rptr., at 760.

We have no basis for disagreeing with the view of the California courts that the asserted state interests are less substantial than the national policy in favor of competition. That evaluation of the resale price maintenance system for wine is reasonable, and is supported by the evidence cited by the State Supreme Court in *Rice*. Nothing in the record in this case suggests that the wine pricing system helps sustain small retail establishments. Neither the petitioner nor the State Attorney General in his *amicus* brief has demonstrated that the program inhibits the consumption of alcohol by Californians. We need not consider whether the legitimate state interests in temperance and the protection of small retailers

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ance." 21 Cal. 3d, at 456, 579 P. 2d, at 493. The concern for temperance, however, was considered by the court as an independent state interest in resale price maintenance for liquor.

ever could prevail against the undoubted federal interest in a competitive economy. The unsubstantiated state concerns put forward in this case simply are not of the same stature as the goals of the Sherman Act.

We conclude that the California Court of Appeal correctly decided that the Twenty-first Amendment provides no shelter for the violation of the Sherman Act caused by the State's wine pricing program.[16] The judgment of the California Court of Appeal, Third Appellate District, is

Affirmed.

MR. JUSTICE BRENNAN did not take part in the consideration or decision of this case.

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[16] Since Midcal requested only injunctive relief from the state court, there is no question before us involving liability for damages under 15 U. S. C. § 15.

UNITED STATES v. APFELBAUM

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 78-972. Argued December 3, 1979—Decided March 3, 1980

After initially invoking his Fifth Amendment privilege against self-incrimination while being questioned before a federal grand jury, respondent ultimately testified when the Government granted him immunity in accordance with 18 U. S. C. § 6002, which provides that when a witness is compelled to testify over his claim of a Fifth Amendment privilege, no testimony or other information compelled under the order to testify may be used against the witness in any criminal case, "except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." Respondent was later indicted and convicted under 18 U. S. C. § 1623 (a) (1976 ed., Supp. II) for false swearing in his grand jury testimony with regard to certain statements. At trial, respondent objected to the use of any of his immunized testimony except that portions charged in the indictment as false, but the District Court admitted other portions of the testimony as being relevant to prove that he had knowingly made the charged false statements. The Court of Appeals reversed, holding that because such immunized testimony did not constitute the "*corpus delicti*" or "core" of the false-statements offense, it could not be introduced.

Held: Because proper invocation of the Fifth Amendment privilege against self-incrimination allows a witness to remain silent, but not to swear falsely, neither § 6002 nor the Fifth Amendment precludes the use of respondent's immunized grand jury testimony at a subsequent prosecution for making false statements, so long as that testimony conforms to otherwise applicable rules of evidence. Pp. 121–132.

(a) Section 6002's language makes no distinction between truthful and untruthful statements made during the course of immunized testimony, but, rather, creates a blanket exemption from the bar against the use of such testimony where the witness is subsequently prosecuted for making false statements. And § 6002's legislative history shows that Congress intended the perjury and false declarations exception to be interpreted as broadly as constitutionally permissible. Thus, it is evident that Congress intended to permit the use of both truthful and false statements made during the course of immunized testimony if such use was not prohibited by the Fifth Amendment. Pp. 121–123.

(b) It is analytically incorrect to equate the benefits of remaining silent as a result of invocation of the Fifth Amendment privilege with the protections conferred by the privilege—protections that may be invoked with respect to matters that pose substantial and real hazards of subjecting a witness to criminal liability at the time he asserts the privilege. For a grant of immunity to provide protection "coextensive" with that of the Fifth Amendment, it need not treat the witness as if he had remained silent. Here, the Fifth Amendment does not prevent the use of respondent's immunized testimony at his trial for false swearing because, at the time he was granted immunity, the privilege would not have protected him against false testimony that he later might decide to give. Pp. 123–132.

584 F. 2d 1264, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, POWELL, and STEVENS, JJ., joined. BRENNAN, J., filed an opinion concurring in the judgment, *post*, p. 132. BLACKMUN, J., filed an opinion concurring in the judgment, in which MARSHALL, J., joined, *post*, p. 133.

William C. Bryson argued the cause for the United States. With him on the brief were *Solicitor General McCree, Assistant Attorney General Heymann, Deputy Solicitor General Frey, Sidney M. Glazer,* and *Vincent L. Gambale.*

Joel Harvey Slomsky argued the cause and filed a brief for respondent.

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Apfelbaum invoked his privilege against compulsory self-incrimination while being questioned before a grand jury in the Eastern District of Pennsylvania. The Government then granted him immunity in accordance with 18 U. S. C. § 6002, and he answered the questions propounded to him. He was then charged with and convicted of making false statements in the course of those answers.[1] The Court

[1] Title 18 U. S. C. § 1623 (a) (1976 ed., Supp. II) provides in pertinent part:

"Whoever under oath . . . in any proceeding before . . . [a] grand jury of the United States knowingly makes any false material declara-

of Appeals reversed the conviction, however, because the District Court had admitted into evidence relevant portions of respondent's grand jury testimony that had not been alleged in the indictment to constitute the *"corpus delicti"* or "core" of the false statements offense. Because proper invocation of the Fifth Amendment privilege against compulsory self-incrimination allows a witness to remain silent, but not to swear falsely, we hold that neither the statute nor the Fifth Amendment requires that the admissibility of immunized testimony be governed by any different rules than other testimony at a trial for making false statements in violation of 18 U. S. C. § 1623 (a) (1976 ed., Supp. II). We therefore reverse the judgment of the Court of Appeals.

I

The grand jury had been investigating alleged criminal activities in connection with an automobile dealership located in the Chestnut Hill section of Philadelphia. The investigation focused on a robbery of $175,000 in cash that occurred at the dealership on April 16, 1975, and on allegations that two officers of the dealership staged the robbery in order to repay loan-shark debts.[2] The grand jury also heard testimony that the officers were making extortionate extensions of credit through the Chestnut Hill Lincoln-Mercury dealership.

In 1976, respondent Apfelbaum, then an administrative assistant to the District Attorney in Philadelphia, was called to testify because it was thought likely that he was an aider or abettor or an accessory after the fact to the allegedly staged robbery. When the grand jury first sought to question him about his relationship with the two dealership officials sus-

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tion . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both."

[2] One of the officers was subsequently convicted of collecting extensions of credit by extortionate means in violation of 18 U. S. C. § 894, mail fraud in violation of 18 U. S. C. § 1341, racketeering in violation of 18 U. S. C. § 1962, and conspiracy in violation of 18 U. S. C. § 371.

pected of the staged robbery, he claimed his Fifth Amendment privilege against compulsory self-incrimination and refused to testify. The District Judge entered an order pursuant to 18 U. S. C. § 6002 granting him immunity and compelling him to testify.[3] Respondent ultimately complied with this order to testify.[4]

During the course of his grand jury testimony, respondent made two series of statements that served as the basis for his subsequent indictment and conviction for false swearing. The first series was made in response to questions concerning whether respondent had attempted to locate Harry Brown, one of the two dealership officials, while on a "fishing trip" in Ft. Lauderdale, Fla., during the month of December 1975. Respondent testified that he was "positive" he had not attempted to locate Brown, who was also apparently in the Ft. Lauderdale area at the time. In a second series of statements, respondent denied that he had told FBI agents that he had lent $10,000 to Brown. The grand jury later indicted respond-

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[3] Title 18 U. S. C. § 6002 provides:

"Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

"(1) a court or grand jury of the United States,

"(2) an agency of the United States, or

"(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

"and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."

[4] After the issuance of the immunity order, respondent had still refused to testify before the grand jury. He agreed to testify after being held in civil contempt under 28 U. S. C. § 1826 and confined for six days.

ent pursuant to 18 U. S. C. § 1623 (a) (1976 ed., Supp. II) for making these statements, charging that the two series of statements were false and that respondent knew they were false.

At trial, the Government introduced into evidence portions of respondent's grand jury testimony in order to put the charged statements in context and to show that respondent knew they were false. The excerpts concerned respondent's relationship with Brown, his 1976 trip to Florida to visit Brown, the discussions he had with Brown on that occasion, and his denial that he had financial dealings with the automobile dealership in Philadelphia or had cosigned a loan for Brown. Respondent objected to the use of all the immunized testimony except the portions charged in the indictment as false. The District Court overruled the objection and admitted the excerpts into evidence on the ground that they were relevant to prove that respondent had knowingly made the charged false statements. The jury found respondent guilty on both counts of the indictment.

The Court of Appeals for the Third Circuit reversed, holding that because the immunized testimony did not constitute "the *corpus delicti* or core of a defendant's false swearing indictment" it could not be introduced. 584 F. 2d 1264, 1265 (1978). We granted certiorari because of the importance of the issue and because of a difference in approach to it among the Courts of Appeals.[5] 444 U. S. 957 (1979).

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[5] The Seventh Circuit agrees with the Court of Appeals below that the Government may introduce into evidence so much of the witness' testimony as is essential to establish the *corpus delicti* of the offense of perjury. *United States* v. *Patrick*, 542 F. 2d 381, 385 (1976). The Second and Tenth Circuits have held that false immunized testimony is admissible, but truthful immunized testimony is not, in a subsequent prosecution for perjury. *United States* v. *Dunn*, 577 F. 2d 119, 125–126 (CA10 1978), rev'd on other grounds, 442 U. S. 100 (1979); *United States* v. *Berardelli*, 565 F. 2d 24, 28 (CA2 1977); *United States* v. *Moss*, 562 F. 2d 155, 165 (CA2 1977), cert. denied, 435 U. S. 914 (1978); *United States* v. *Housand*,

The differing views that this question has elicited from the Courts of Appeals are not surprising, because there are considered statements in one line of cases from this Court, and both statements and actual holdings in another line of cases, that as a matter of strict and literal reading cannot be wholly reconciled.[6] Though most of the decisions of the Courts of

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550 F. 2d 818, 822 (CA2 1977); *United States* v. *Kurzer*, 534 F. 2d 511, 518 (CA2 1976). The Sixth and Eighth Circuits have held that immunized testimony may be used for any purpose in such a prosecution. *Daniels* v. *United States*, 196 F. 459, 462–463 (CA6 1912); *Edelstein* v. *United States*, 149 F. 636, 642–644 (CA8 1906).

[6] A principal reason for this divergence in approach originates in the statement in *Counselman* v. *Hitchcock*, 142 U. S. 547, 585 (1892), that an immunity statute "cannot abridge a constitutional privilege, and that it cannot replace or supply one, at least unless it is so broad as to have the same extent in scope and effect." This language was reiterated only last Term in *New Jersey* v. *Portash*, 440 U. S. 450, 456–457 (1979).

As discussed in Part III, *infra*, strictly speaking even a "transactional" immunity statute, to say nothing of a "use" immunity statute, does not conform to this definition: The mere grant of immunity and consequent compulsion to testify places a witness asserting his Fifth Amendment privilege in the dilemma of having to decide whether to answer the questions truthfully or falsely, a dilemma he never would have faced had he simply been permitted to remain silent upon the invocation of his privilege. Yet properly drawn immunity statutes have long been recognized as valid in this country. *Infra*, at 125. And it is likewise well established that one may be prosecuted for making false statements while giving immunized testimony. *Infra*, at 126–127.

A source of further difficulty for the Courts of Appeals is language from our recent decisions that, if taken literally, would preclude the introduction of immunized testimony even for the purpose of establishing the "*corpus delicti*" or core of the perjury offense. In *Kastigar* v. *United States*, 406 U. S. 441, 453 (1972), in which we upheld the constitutionality of this immunity statute against a challenge that it did not provide protection coextensive with the Fifth Amendment, we said that it "prohibits the prosecutorial authorities from using the compelled testimony in *any* respect." And in *New Jersey* v. *Portash*, *supra*, at 459, we stated that under the Fifth and Fourteenth Amendments "a defendant's compelled statements . . . may not be put to any testimonial use whatever against him in a criminal trial. '. . . [*A*]*ny* criminal trial use against a

Appeals turn on the interaction between perjury and immunity statutes enacted by Congress and the privilege against compulsory self-incrimination conferred by the Fifth Amendment to the United States Constitution, it is of course our first duty to decide whether the statute relied upon in this case to sustain the conviction of respondent may properly be interpreted to do so. We turn now to decision of that question.

II

Did Congress intend the Federal Immunity Statute, 18 U. S. C. § 6002, to limit the use of a witness' immunized grand jury testimony in a subsequent prosecution of the witness for false statements made at the grand jury proceeding? Respondent contends that while § 6002 permits the use of a witness' false statements in a prosecution for perjury or for making false declarations, it establishes an absolute prohibition against the use of truthful immunized testimony in such prosecutions. But this contention is wholly at odds with the explicit language of the statute, and finds no support even in its legislative history.

It is a well-established principle of statutory construction that absent clear evidence of a contrary legislative intention, a statute should be interpreted according to its plain language. Here 18 U. S. C. § 6002 provides that when a witness is compelled to testify over his claim of a Fifth Amendment privilege, "no testimony or other information compelled under the order (or any information directly or indirectly derived from

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defendant of his *involuntary* statement is a denial of due process of law.'" (Emphasis in original.)

Doubtless as a result of these divergent holdings and statements none of the Court of Appeals decisions referred to in footnote 5, *supra*, holds that *false* immunized testimony may not form the basis for a prosecution for perjury or false swearing, but they differ as to how much of the relevant immunized testimony other than that asserted by the Government to be false may be introduced in such a prosecution.

such testimony or other information) may be used against the witness in any criminal case, *except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.*" (Emphasis added.) The statute thus makes no distinction between truthful and untruthful statements made during the course of the immunized testimony. Rather, it creates a blanket exemption from the bar against the use of immunized testimony in cases in which the witness is subsequently prosecuted for making false statements.

The legislative history of § 6002 shows that Congress intended the perjury and false declarations exception to be interpreted as broadly as constitutionally permissible. The present statute was enacted as a part of the Organized Crime Control Act of 1970,[7] after a re-examination of the broad transactional immunity statute enacted in response to this Court's decision in *Counselman* v. *Hitchcock,* 142 U. S. 547 (1892). See *Kastigar* v. *United States,* 406 U. S. 441, 452, and n. 36 (1972). Its design was not only to bring about uniformity in the operation of immunity grants within the federal system,[8] but also to restrict the grant of immunity to that required by the United States Constitution. Thus, the statute derives from a 1969 report of the National Commission on the Reform of the Federal Criminal Laws, which proposed a general use immunity statute under which "the immunity conferred would

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[7] Pub. L. No. 91–452, § 201 (a), 84 Stat. 926. The purpose of the Act was "to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." 84 Stat. 923.

[8] See, *e. g.,* Measures Relating to Organized Crime, Hearings on S. 30, Etc., before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 91st Cong., 1st Sess., 282–284 (1969) (remarks of Representative Poff and Senator McClellan). At the time the new statute was being considered, there were more than 50 separate federal immunity statutes. *Id.,* at 282.

be confined to the scope required by the Fifth Amendment." [9] And as stated in both the Senate and House Reports on the proposed legislation:

> "This statutory immunity is intended to be as broad as, but no broader than, the privilege against self-incrimination. . . . It is designed to reflect the use-restriction immunity concept of *Murphy* v. *Waterfront Commission*, 378 U. S. 52 (1964) rather [than] the transaction immunity concept of *Counselman* v. *Hitchcock*, 142 U. S. 547 (1892)." [10]

In light of the language and legislative history of § 6002, the conclusion is inescapable that Congress intended to permit the use of both truthful and false statements made during the course of immunized testimony if such use was not prohibited by the Fifth Amendment.

III

The limitation placed on the use of relevant evidence by the Court of Appeals may be justified, then, only if required by the Fifth Amendment. Respondent contends that his conviction was properly reversed because under the Fifth Amendment his truthful immunized statements were inadmissible at his perjury trial, and the Government never met its burden of showing that the immunized statements it introduced into evidence were not truthful. The Court of Appeals, as noted

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[9] Second Interim Report of the National Commission on Reform of Federal Criminal Laws, Mar. 17, 1969, reproduced in Hearings on S. 30, *supra* n. 8, at 292. See also *id.*, at 15, 326; National Commission on Reform of Federal Criminal Laws, Working Papers, 1405 (1970).

[10] S. Rep. No. 91-617, p. 145 (1969); H. R. Rep. No. 91-1549 p. 42 (1970). Representative Poff, the bill's chief sponsor in the House, quoted MR. JUSTICE WHITE's observation in *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52, 107 (1964), that "'[i]mmunity must be as broad as, but not harmfully and wastefully broader than, the privilege against self-incrimination.'" 116 Cong. Rec. 35291 (1970). We express no opinion as to the possible intimation in the Reports that the Fifth Amendment would have prohibited an immunity statute any broader than § 6002.

above, concluded that the Fifth Amendment prohibited the use of all immunized testimony except the *"corpus delicti"* or "core" of the false swearing indictment.

In reaching its conclusion, the Court of Appeals initially observed that a grant of immunity must be coextensive with the Fifth Amendment. *Kastigar* v. *United States, supra,* at 449. It then reasoned that had respondent not been granted immunity, he would have been entitled under the Fifth Amendment to remain silent. And if he had remained silent, he would not have answered any questions, truthfully or falsely. There consequently would have been no testimony whatsoever to use against him. A prosecution for perjury committed at the immunized proceeding, the Court of Appeals continued, must be permitted because "as a practical matter, if immunity constituted a license to lie, the purpose of immunity would be defeated." Such a prosecution is but a "narrow exception" carved out to preserve the integrity of the truth-seeking process. But the subsequent use of statements made at the immunized proceeding, other than those alleged in the indictment to be false, is impermissible because the introduction of such statements cannot be reconciled with the privilege against self-incrimination. 584 F. 2d, at 1269–1271.

A

There is more than one flaw in this reasoning. Initially, it presumes that in order for a grant of immunity to be "coextensive with the Fifth Amendment privilege," the witness must be treated as if he had remained silent. This presumption focuses on the *effect* of the assertion of the Fifth Amendment privilege, rather than on the *protection* the privilege is designed to confer. In so doing, it calls into question the constitutionality of all immunity statutes, including "transactional" immunity statutes as well as "use" immunity statutes such as § 6002. Such grants of immunity would not provide a full and complete substitute for a witness' silence because, for example, they do not bar the use of the witness' state-

ments in civil proceedings. Indeed, they fail to prevent the use of such statements for any purpose that might cause detriment to the witness other than that resulting from subsequent criminal prosecution.

This Court has never held, however, that the Fifth Amendment requires immunity statutes to preclude all uses of immunized testimony. Such a requirement would be inconsistent with the principle that the privilege does not extend to consequences of a noncriminal nature, such as threats of liability in civil suits, disgrace in the community, or the loss of employment. See, *e. g., Brown* v. *Walker,* 161 U. S. 591, 605–606 (1896); *Smith* v. *United States,* 337 U. S. 137, 147 (1949); *Ullmann* v. *United States,* 350 U. S. 422, 430–431 (1956); *Uniformed Sanitation Men Assn.* v. *Commissioner of Sanitation,* 392 U. S. 280, 284–285 (1968); *Gardner* v. *Broderick,* 392 U. S. 273, 279 (1968).

And this Court has repeatedly recognized the validity of immunity statutes. *Kastigar* v. *United States, supra,* at 449, acknowledged that Congress included immunity statutes in many of the regulatory measures adopted in the first half of this century, and that at the time of the enactment of 18 U. S. C. § 6002, the statute under which this prosecution was brought, there were in force over 50 federal immunity statutes as well as similar laws in every State of the Union. 406 U. S., at 447. This Court in *Ullmann* v. *United States, supra,* stated that such statutes have "become part of our constitutional fabric." 350 U. S., at 438. And the validity of such statutes may be traced in our decisions at least as far back as *Brown* v. *Walker, supra.*

These cases also establish that a strict and literal reading of language in cases such as *Counselman* v. *Hitchcock,* 142 U. S., at 585—that an immunity statute "cannot abridge a constitutional privilege, and that it cannot replace or supply one, at least unless it is so broad as to have the same extent in scope and effect"—does not require the sort of "but for" analysis used by the Court of Appeals in order to enable it to survive

attack as being violative of the privilege against compulsory self-incrimination. Indeed, in *Brown* v. *Walker, supra,* at 600, this Court stated that "[t]he danger of extending the principle announced in *Counselman* v. *Hitchcock* is that the privilege may be put forward for a sentimental reason, or for a purely fanciful protection of the witness against an imaginary danger, and for the real purpose of securing immunity to some third person, who is interested in concealing the facts to which he would testify." And in *Kastigar* v. *United States,* we concluded that "[t]he broad language in *Counselman* relied upon by petitioners was unnecessary to the Court's decision, and cannot be considered binding authority." 406 U. S., at 454–455. *Kastigar* also expressly declined a request by the petitioner to reconsider and overrule *Brown* v. *Walker, supra,* and *Ullmann* v. *United States, supra,* and went on to expressly reaffirm the validity of those decisions.

The reasoning of the Court of Appeals is also internally inconsistent in that logically it would not permit a prosecution for perjury or false swearing committed during the course of the immunized testimony. If a witness must be treated as if he had remained silent, the mere requirement that he answer questions, thereby subjecting himself to the possibility of being subsequently prosecuted for perjury or false swearing, places him in a position that is substantially different from that he would have been in had he been permitted to remain silent.

All of the Courts of Appeals, however, have recognized that the provision in 18 U. S. C. § 6002 allowing prosecutions for perjury in answering questions following a grant of immunity does not violate the Fifth Amendment privilege against compulsory self-incrimination. And we ourselves have repeatedly held that perjury prosecutions are permissible for false answers to questions following the grant of immunity. See, *e. g., United States* v. *Wong,* 431 U. S. 174 (1977); *United States* v. *Mandujano,* 425 U. S. 564 (1976) (plurality opinion); *id.,* at 584–585 (BRENNAN, J., concurring in judgment);

id., at 609 (STEWART, J., joined by BLACKMUN, J., concurring in judgment).

It is therefore analytically incorrect to equate the benefits of remaining silent as a result of invocation of the Fifth Amendment privilege with the protections conferred by the privilege—protections that may be invoked with respect to matters that pose substantial and real hazards of subjecting a witness to criminal liability at the time he asserts the privilege. For a grant of immunity to provide protection "coextensive" with that of the Fifth Amendment, it need not treat the witness as if he had remained silent. Such a conclusion, as noted above, is belied by the fact that immunity statutes and prosecutions for perjury committed during the course of immunized testimony are permissible at all.

B

The principle that the Fifth Amendment privilege against compulsory self-incrimination provides no protection for the commission of perjury has frequently been cited without any elaboration as to its underlying rationale. See, *e. g.*, *Bryson* v. *United States*, 396 U. S. 64, 72 (1969); *United States* v. *Knox*, 396 U. S. 77, 82 (1969). Its doctrinal foundation, as relied on in both *Wong* and *Mandujano*, is traceable to *Glickstein* v. *United States*, 222 U. S. 139, 142 (1911). *Glickstein* stated that the Fifth Amendment "does not endow the person who testifies with a license to commit perjury," *ibid.*, and that statement has been so often repeated in our cases as to be firmly established constitutional law. But just as we have refused to read literally the broad dicta of *Counselman*, *supra*, we are likewise unwilling to decide this case solely upon an epigram contained in *Glickstein*, *supra*. Thus, even if, as the Court of Appeals said, a perjury prosecution is but a "narrow exception" to the principle that a witness should be treated as if he had remained silent, it does not follow that the Court of Appeals was correct in its view of the question before us now.

Perjury prosecutions based on immunized testimony, even if they be but a "narrow exception" to the principle that a witness should be treated as if he had remained silent after invoking the Fifth Amendment privilege, *are* permitted by our cases. And so long as they are, there is no principle or decision that limits the admissibility of evidence in a manner peculiar only to them. To so hold would not be an exercise in the balancing of competing constitutional rights, but in a comparison of apples and oranges.[11] For even if both truthful and untruthful testimony from the immunized proceeding are admissible in a subsequent perjury prosecution, the exception surely would still be properly regarded as "narrow," once it is recognized that the testimony remains inadmissible in all prosecutions for offenses committed prior to the grant of immunity that would have permitted the witness to invoke his Fifth Amendment privilege absent the grant.

While the application of the Fifth Amendment privilege to various types of claims has changed in some respects over the past three decades, the basic test reaffirmed in each case has been the same.

> "The central standard for the privilege's application has been whether the claimant is confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination. *Rogers* v. *United States*, 340 U. S. 367, 374; *Brown* v. *Walker*, 161 U. S. 591, 600." *Marchetti* v. *United States*, 390 U. S. 39, 53 (1968).

Marchetti, which overruled earlier decisions of this Court in *United States* v. *Kahriger*, 345 U. S. 22 (1953), and *Lewis* v. *United States*, 348 U. S. 419 (1955), invalidated the fed-

[11] Thus, the Court of Appeals' position is basically a halfway house that does not withstand logical analysis. If the rule is that a witness who is granted immunity may be placed in no worse a position than if he had been permitted to remain silent, the principle that the Fifth Amendment does not protect false statements serves merely as a piece of a legal mosaic justified solely by *stare decisis*, rather than as part of a doctrinally consistent view of that Amendment.

eral wagering statutes at issue in *Kahriger* and *Lewis* on the ground that they contravened the petitioner's Fifth Amendment right against compulsory self-incrimination. The practical effect of the requirements of those statutes was to compel petitioner, a professional gambler engaged in ongoing gambling activities that he had commenced and was likely to continue, to choose between openly exposing himself as acting in violation of state and federal gambling laws and risking federal prosecution for tax avoidance.[12] The Court held that petitioner was entitled to assert his Fifth Amendment privilege in these circumstances. But it also observed that "prospective acts will doubtless ordinarily involve only speculative and insubstantial risks of incrimination." 390 U. S., at 54. Thus, although *Marchetti* rejected "the rigid chronological distinction adopted in *Kahriger* and *Lewis*," *id.*, at 53, that distinction does not aid respondent here.

In *United States* v. *Freed*, 401 U. S. 601 (1971), this Court rejected the argument that a registration requirement of the National Firearms Act violated the Fifth Amendment because the information disclosed could be used in connection with offenses that the transferee of the firearm might commit in the future. In so doing, the Court stated:

> "Appellees' argument assumes the existence of a periphery of the Self-Incrimination Clause which protects a

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[12] Thus, the Court observed:

"Petitioner was confronted by a comprehensive system of federal and state prohibitions against wagering activities; he was required, on pain of criminal prosecution, to provide information which he might reasonably suppose would be available to prosecuting authorities, and which would surely prove a significant 'link in a chain' of evidence tending to establish his guilt." 390 U. S., at 48.

And "[e]very aspect of petitioner's wagering activities," the Court continued, "subjected him to possible state or federal prosecution," and the "[i]nformation obtained as a consequence of the federal wagering tax laws is readily available to assist the efforts of state and federal authorities to enforce these penalties." *Id.*, at 47.

> person against incrimination not only against past or present transgressions but which supplies insulation for a career of crime about to be launched. We cannot give the Self-Incrimination Clause such an expansive interpretation." *Id.*, at 606–607.

And MR. JUSTICE BRENNAN in his concurring opinion added:

> "I agree with the Court that the Self-Incrimination Clause of the Fifth Amendment does not require that immunity be given as to the use of such information in connection with crimes that the transferee might possibly commit in the future with the registered firearm." *Id.*, at 611.

In light of these decisions, we conclude that the Fifth Amendment does not prevent the use of respondent's immunized testimony at his trial for false swearing because, at the time he was granted immunity, the privilege would not have protected him against false testimony that he later might decide to give. Respondent's assertion of his Fifth Amendment privilege arose from his claim that the questions relating to his connection with the Chestnut Hill auto dealership would tend to incriminate him. The Government consequently granted him "use" immunity under § 6002, which prevents the use and derivative use of his testimony with respect to any subsequent criminal case except prosecutions for perjury and false swearing offenses, in exchange for his compelled testimony.

The Government has kept its part of the bargain; this is a perjury prosecution and not any other kind of criminal prosecution. The Court of Appeals agreed that such a prosecution might be maintained, but as noted above severely limited the admissibility of immunized testimony to prove the Government's case. We believe that it could not be fairly said that respondent, at the time he asserted his privilege and was consequently granted immunity, was confronted with more than a "trifling or imaginary" hazard of compelled self-incrimination as a result of the possibility that he might com-

mit perjury during the course of his immunized testimony. In *United States* v. *Bryan*, 339 U. S. 323 (1950), we held that an immunity statute that provided that "[n]o testimony given by a witness before . . . any committee of either House . . . shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony," did not bar the use at respondent's trial for willful default of the testimony given by her before a congressional committee. In so holding, we stated that "[t]here is, in our jurisprudence, no doctrine of 'anticipatory contempt.'" *Id.*, at 341.

We hold here that in our jurisprudence there likewise is no doctrine of "anticipatory perjury." In the criminal law, both a culpable *mens rea* and a criminal *actus reus* are generally required for an offense to occur.[13] Similarly, a future intention to commit perjury or to make false statements if granted immunity because of a claim of compulsory self-incrimination is not by itself sufficient to create a "substantial and 'real'" hazard that permits invocation of the Fifth Amendment. *Brown* v. *Walker*, 161 U. S. 591 (1896); *Rogers* v. *United States*, 340 U. S. 367 (1951). Therefore, neither the immunity statute nor the Fifth Amendment precludes the use of respondent's immunized testimony at a subsequent prosecution for making false statements, so long as that testimony conforms to otherwise applicable rules of evidence. The exception of a perjury prosecution from the prohibition against the use of immunized testimony may be a narrow

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[13] As recognized by one commentator, Shakespeare's lines here express sound legal doctrine:

"His acts did not o'ertake his bad intent;
And must be buried but as an intent
That perish'd by the way: thoughts are no subjects,
Intents but merely thoughts."

Measure for Measure, Act V, Scene 1; G. Williams, Criminal Law, The General Part 1 (2d ed. 1961).

one, but it is also a complete one. The Court of Appeals having held otherwise, its judgment is accordingly

Reversed.

MR. JUSTICE BRENNAN, concurring in the judgment.

The Fifth Amendment guarantees the right to be free from compulsory self-incrimination. It permits an individual to refuse to answer questions; but it does not give him the right to answer falsely. *United States* v. *Mandujano,* 425 U. S. 564, 584–585 (1976) (BRENNAN, J., concurring in judgment); *United States* v. *Wong,* 431 U. S. 174 (1977). When the Government compels testimony via a grant of immunity it is constitutionally required to place the victim in a position similar to the one he would have occupied had he exercised his Fifth Amendment privilege. The scope of immunity, in other words, must be "coextensive with the scope of the privilege." *Kastigar* v. *United States,* 406 U. S. 441, 449 (1972). This does not, however, bar a prosecution for perjury committed in the course of immunized testimony, even though such a prosecution will obviously place the witness in a worse position than he would have been in had he invoked the privilege. The perjury exception seems to have two sources. First, it stems from the aforementioned fact that prior to the immunity grant the witness had no Fifth Amendment right to answer falsely, and, second, it flows from the simple reality that affording the witness a right to lie with impunity would render the entire immunity transaction futile.

Because I think it follows from the logic and exigencies of the perjury exception that the Government should be permitted to introduce other portions of the immunized testimony to prove elements of the offense of perjury, I concur in the judgment reversing the decision of the Court of Appeals for the Third Circuit. And because I find this ground adequate to decide the present case I see no reason to explore the terrain which the majority probes via what is in one sense dicta.

More particularly, (1) I do not think that the present result compels the conclusion that there are no special constitutional constraints on the use to which immunized testimony may be put in a perjury prosecution, and (2) I am by no means persuaded that the result here would be correct were this a prosecution for false swearing occurring after the immunized testimony rather than in the course of it.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE MARSHALL joins, concurring in the judgment.

I do not join the Court's opinion. I agree, however, that the Court of Appeals too narrowly confined the use of immunized testimony in the prosecution of respondent for giving false testimony. I do not fully subscribe to the Court's holding that "neither the statute nor the Fifth Amendment requires that the admissibility of immunized testimony be governed by any different rules than other testimony at a trial for making false statements." *Ante,* at 117. And I do not fully agree with the Court's conclusion that the practical effect of asserting the privilege against self-incrimination is an unimportant factor in determining whether a grant of immunity is coextensive with Fifth Amendment protection. See *ante,* at 125. I therefore concur only in the judgment.

The Court's statement of its holding troubles me primarily for two reasons. First, it apparently makes no distinction between a prosecution for false testimony given under a grant of immunity and a prosecution for false testimony in other contexts. This case concerns the use of immunized testimony to prove that respondent made contemporaneous false statements. There is no occasion to determine whether the immunized testimony could have been used to prove perjury or false statements occurring at some other time. The Court thus states its holding in language that is broader than necessary. At the moment, I am not prepared to go so far.

Second, I am not sure I agree that the use of immunized

testimony in perjury prosecutions requires no special analysis with respect to the usual rules of evidence. How the testimony is to be used may well be an important factor in determining whether the protection against self-incrimination has been honored. For example, a witness' truthful admission of prior perjury conceivably might be protected from use even though independent evidence of such a prior similar crime were admissible. Again, I would prefer to await further developments before deciding this question.

Perhaps a more fundamental reservation about the Court's opinion concerns its attempted distinction between, on the one hand, the protection afforded by the privilege against self-incrimination and, on the other, the effect of the invocation of the privilege. Since the privilege itself is *defined* in terms of the incriminating effect of truthful testimony, it does not seem irrational to weigh alternative methods for protecting this constitutional right in terms of their effect as well. As the Court demonstrates, *ante,* at 124–125, a grant of immunity may be a constitutionally adequate response to invocation of the privilege without perfectly replicating the effect of total silence, at least where a civil use of the testimony is concerned. But that observation, for me, does not obviate the relevance of a comparison between silence and immunity in determining whether the protection afforded by the latter ensures that the privilege against self-incrimination has been properly preserved. Whether as a matter of logic, history, or experience, it does not follow that an analogy is robbed of all force merely because it is not always or singly controlling in every imaginable circumstance. Compare *Kastigar* v. *United States,* 406 U. S. 441, 449 (1972), and *Ullmann* v. *United States,* 350 U. S. 422, 438 (1956), with *ante,* at 127–128. See also O. Holmes, The Common Law 1 (1881). The Court's cases long have regarded the right to remain silent in the face of compelled incrimination as a touchstone for Fifth Amendment protection. See *Kastigar* v. *United States,* 406 U. S., at 461; *Brown* v. *Walker,* 161 U. S.

591, 596–597 (1896). The Court may be prepared now to deviate from that course; I am not so prepared.

Nonetheless, I remain convinced that "[t]he Fifth Amendment privilege against compulsory self-incrimination provides no protection for the commission of perjury." *United States* v. *Mandujano,* 425 U. S. 564, 609 (1976) (opinion concurring in judgment). The privilege operates only to protect the witness from compulsion of *truthful* testimony of an incriminating nature. Perjury or the making of false statements under a grant of immunity thus violates a basic assumption upon which the privilege and hence the immunity depend. Preserving the integrity of the immunity "bargain," *ante,* at 130, by allowing the use of immunized testimony for the limited purpose of proving that the terms of immunity have been criminally breached, is an integral part of the "rational accommodation between the imperatives of the privilege and the legitimate demands of government" upon which the entire theory of immunity rests. *Kastigar* v. *United States,* 406 U. S., at 446. See *Glickstein* v. *United States,* 222 U. S. 139, 141 (1911); *United States* v. *Tramunti,* 500 F. 2d 1334, 1342 (CA2), cert. denied, 419 U. S. 1079 (1974). Prosecutions for perjury or making false statements differ in this respect from all other instances in which, but for the grant of immunity, the witness' testimony might be used. It is for this reason, in my view, that they have been regarded as "a 'narrow exception' to the principle that a witness should be treated as if he had remained silent after invoking the Fifth Amendment privilege." *Ante,* at 128. Since I find this ground sufficient to dispose of the present case, I need not decide at this juncture whether I fully agree with what seem to be the broader implications of the Court's analysis and opinion.

KISSINGER *v.* REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1088. Argued October 31, 1979—Decided March 3, 1980*

Henry Kissinger served as an Assistant to the President for National Security Affairs from 1969 to 1975 and as Secretary of State from 1973 to 1977. Throughout these periods, his secretaries monitored his telephone conversations and recorded their contents either by shorthand or on tape. The stenographic notes or tapes were used to prepare summaries and sometimes verbatim transcripts of the conversations (hereafter notes or telephone notes). In 1976, after the notes had been moved from Kissinger's office in the State Department to a private estate in New York, he donated them to the Library of Congress, subject to an agreement restricting public access to them for a specified period, and they were transported to the Library. Three requests for the notes were made to the State Department under the Freedom of Information Act (FOIA): (1) a request by a newspaper columnist (Safire), at a time when the notes were still located in Kissinger's State Department office, for any notes covering certain dates in which Safire's name appeared or in which Kissinger discussed information "leaks" with certain White House officials; (2) a request by the Military Audit Project, after the notes had been transferred to the Library of Congress, for all notes made while Kissinger was Secretary of State; and (3) a request at about the same time by the Reporters Committee for Freedom of the Press and others for notes made both while Kissinger was Presidential Assistant and while he was Secretary of State. The State Department denied the first request on the ground that the requested notes had been made while Kissinger was Presidential Assistant and therefore were not agency records subject to FOIA disclosure. The second and third requests were denied on the grounds both that the requested notes were not agency records and that their deposit with the Library of Congress prior to the requests terminated the State Department's custody and control. During this period when he was no longer Secretary of State, Kissinger refused the Government Archivist's

*Together with No. 78-1217, *Reporters Committee for Freedom of the Press et al.* v. *Kissinger,* also on certiorari to the same court.

requests for return of the notes. Suits were filed by the various FOIA requesters against Kissinger, the Library of Congress, the Secretary of State, and the State Department, seeking enforcement of the FOIA requests and a declaratory judgment that the telephone notes were agency records that had been unlawfully removed and were being improperly withheld. The District Court ruled in the plaintiffs' favor as to the notes made while Kissinger was Secretary of State but denied relief as to the notes made while he was Presidential Assistant, finding that the former notes were "agency records" subject to disclosure under the FOIA, and that Kissinger had wrongfully removed them from the State Department in violation of the Federal Records Disposal Act. An order was entered requiring the Library of Congress to return the Secretary of State notes to the State Department and requiring the Department to determine which of the notes are exempt from disclosure under the FOIA and to provide the required materials to the plaintiffs. The Court of Appeals affirmed.

Held:

1. The District Court had no authority to order transfer of the notes, including those made while Kissinger was Secretary of State, from the Library of Congress to the State Department at the behest of the named plaintiffs. Pp. 146–155.

(a) No provision of either the Federal Records Act of 1950, which establishes a records management program for federal agencies, or the complementary Records Disposal Act, which provides the exclusive means for record disposal, expressly confers a right of action on private parties nor can such a right of action be implied. The language of these Acts merely "proscribes certain conduct" and does not "create or alter civil liabilities," *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U. S. 11, 19, and the Records Act also expressly provides administrative remedies for violations of the Act. Moreover, the legislative history of the Acts confirms that congressional silence as to a private right of action was purposeful, indicating that their purpose was not to benefit private parties but solely to benefit the agencies themselves and the Federal Government as a whole. Thus, regardless of whether Kissinger had violated these Acts, Congress has not vested federal courts with jurisdiction to adjudicate that question upon suit by a private party, such responsibility being vested in the administrative authorities. Pp. 147–150.

(b) Nor does the FOIA furnish the congressional intent to permit private actions to recover records wrongfully removed from Government custody. Under this Act, federal jurisdiction is dependent upon a showing that an agency has (1) "improperly" (2) "withheld" (3) "agency

records." Here, the State Department, a covered agency, has not "withheld" agency records within the meaning of the FOIA, since Congress did not mean that an agency improperly withholds a document that has been removed from the agency's possession prior to the filing of the FOIA request, the agency in such case having neither the custody nor control necessary to enable it to withhold. And an agency's failure to sue a third party to obtain possession is not a withholding under the Act. This conclusion that possession or control is a prerequisite to FOIA disclosure is reinforced by an examination of the Act's purposes, from which it is apparent that Congress never intended, when it enacted the FOIA, to displace the statutory scheme embodied in the Federal Records and Records Disposal Acts providing for administrative remedies to safeguard against, as well as to retrieve, wrongfully removed agency records. Pp. 150–154.

(c) Under the circumstances of this case where Kissinger had refused the Archivist's requests for return of the documents and he and the Library of Congress as his donee are holding the documents in question under a claim of right, the State Department cannot be said to have had possession or control of the documents at the time the requests were received, and, therefore, it did not withold any agency records, an indispensable prerequisite to liability in a suit under the FOIA. Pp. 154–155.

2. Safire's request sought disclosure of documents that were not "agency records" within the meaning of the FOIA. While the FOIA makes the "Executive Office of the President" an agency subject to the Act, the legislative history makes it clear that the "Executive Office" does not include the Office of the President. Thus, since Safire's request sought notes made by Kissinger while acting in his capacity as Presidential Assistant, the requested notes were not "agency records" when they were made. Pp. 155–157.

191 U. S. App. D. C. 213, 589 F. 2d 1116, affirmed in part and reversed in part.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, and POWELL, JJ., joined. BRENNAN, J., *post*, p. 158, and STEVENS, J., *post*, p. 161, filed opinions concurring in part and dissenting in part. MARSHALL, J., took no part in the consideration or decision of the cases. BLACKMUN, J., took no part in the decision of the cases.

David Ginsburg argued the cause for petitioner in No. 78–1088 and respondent in No. 78–1217. With him on the briefs

was *James E. Wesner*. *William Alsup* argued the cause for the federal parties in both cases. With him on the briefs were *Solicitor General McCree, Acting Assistant Attorney General Schiffer, Deputy Solicitor General Easterbrook,* and *Michael Kimmel.*

Robert M. Sussman argued the cause for the Reporters Committee for Freedom of the Press in both cases. With him on the brief were *Charles A. Horsky* and *Peter Barton Hutt. William A. Dobrovir* argued the cause for the Military Audit Project in both cases. With him on the brief was *Andra N. Oakes.*

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

The Freedom of Information Act (FOIA) vests jurisdiction in federal district courts to enjoin an "agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U. S. C. § 552 (a)(4)(B). We hold today that even if a document requested under the FOIA is wrongfully in the possession of a party not an "agency," the agency which received the request does not "improperly withhold" those materials by its refusal to institute a retrieval action. When an agency has demonstrated that it has not "withheld" requested records in violation of the standards established by Congress, the federal courts have no authority to order the production of such records under the FOIA.

I

This litigation arises out of FOIA requests seeking access to various transcriptions of petitioner Kissinger's telephone conversations. The questions presented by the petition necessitate a thorough review of the facts.

A

Henry Kissinger served in the Nixon and Ford administrations for eight years. He assumed the position of Assistant

to the President for National Security Affairs in January 1969. In September 1973, Kissinger was appointed to the office of Secretary of State, but retained his National Security Affairs advisory position until November 3, 1975. After his resignation from the latter position, Kissinger continued to serve as Secretary of State until January 20, 1977. Throughout this period of Government service, Kissinger's secretaries generally monitored his telephone conversations and recorded their contents either by shorthand or on tape. The stenographic notes or tapes were used to prepare detailed summaries, and sometimes verbatim transcripts, of Kissinger's conversations.[1] Since Kissinger's secretaries generally monitored all of his conversations, the summaries discussed official business as well as personal matters. The summaries and transcripts prepared from the electronic or stenographic recording of his telephone conversations throughout his entire tenure in Government service were stored in his office at the State Department in personal files.

On October 29, 1976, while still Secretary of State, Kissinger arranged to move the telephone notes from his office in the State Department to the New York estate of Nelson Rockefeller. Before removing the notes, Kissinger did not consult the State Department's Foreign Affairs Document and Reference Center (FADRC), the center responsible for implementing the State Department's record maintenance and disposal program. Nor did he consult the National Archives and Records Service (NARS), a branch of the General Services Administration (GSA) which is responsible for records preservation throughout the Federal Government. Kissinger had obtained an opinion from the Legal Adviser of the Department of State, however, advising him that the telephone summaries were not agency records but were his personal

[1] Tapes and stenographic notes were always destroyed immediately after they were summarized or transcribed.

papers which he would be free to take when he left office.[2]

After Kissinger effected this physical transfer of the notes, he entered into two agreements with the Library of Congress deeding his private papers. In the first agreement, dated November 12, 1976, Kissinger deeded to the United States, in care of the Library of Congress, one collection of papers. Kissinger's telephone notes were not included in this collection. The agreement established terms obligating Kissinger to comply with certain restrictions on the inclusion of official documents in the collection and obligating the Library to respect restrictions on access. The agreement required that official materials in the collection would consist of "copies of government papers of which there is an original or record copy in government files." It also provided that all such materials must have been "approved for inclusion in the Collection" by "authorized officials."

Public access to the collection, under the terms of the deed, will not begin until 25 years after the transfer or 5 years after Kissinger's death, whichever is later. Until that time, access is restricted to (1) employees of the Library of Congress who have been jointly approved by the Library of Congress and Mr. Kissinger; (2) persons who have received the written permission of Mr. Kissinger; and (3) after Kissinger's death, persons who have received the written permission of a committee to be named in his will. Kissinger and all of his research assistants who have appropriate security clearance retain unrestricted access to the collection.

After this agreement was executed, the Department of State formulated procedures for the review and transfer of the documents to the Library of Congress. Employees reviewed the collection and retained (a) original or record copies of

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[2] This conclusion was premised on the Adviser's finding that the notes were covered by a Department regulation providing that a retiring official may retain papers "explicitly designated or filed as personal at the time of origin or receipt." 5 FAM § 417.1 (a) (1974).

documents belonging to the agency, and (b) any materials containing classified information. In the donation process, Kissinger was also required to sign the Department's Standard Separation Statement affirming that he had "surrendered to responsible officials . . . documents or material containing classified or administratively controlled information furnished . . . during the course of [Government] employment or developed as a consequence thereof, including any diaries, memorandums of conversations, or other documents of a personal nature. . . ."

On December 24, 1976, by a second deed, Kissinger donated a second collection consisting of his telephone notes. This second agreement with the Library of Congress incorporated by reference all of the terms and conditions of the first agreement. It provided in addition, however, that public access to the transcripts would be permitted only with the consent, or upon the death, of the other parties to the telephone conversations in question.

On December 28, 1976, the transcripts were transported directly to the Library from the Rockefeller estate. Thus the transcripts were not reviewed by the Department of State Document and Reference Center with the first collection of donated papers before they were delivered into the possession of the Library of Congress. Several weeks after they were moved to the Library, however, one of Kissinger's personal aides did extract portions of the transcripts for inclusion in the files of the State Department and the National Security Council. Pursuant to the instructions of the State Department Legal Adviser, the aide included in the extracts, "any significant policy decisions or actions not otherwise reflected in the Department's records."

B

Three separate FOIA requests form the basis of this litigation. All three requests were filed while Kissinger was Secretary of State, but only one request was filed prior to the

removal of the telephone notes from the premises of the State Department. This first request was filed by William Safire, a New York Times columnist, on January 14, 1976. Safire requested the Department of State to produce any transcripts of Kissinger's telephone conversations between January 21, 1969, and February 12, 1971, in which (1) Safire's name appeared or (2) Kissinger discussed the subject of information "leaks" with certain named White House officials. The Department denied Safire's FOIA request by letter of February 11, 1976. The Department letter reasoned that the requested notes had been made while Kissinger was National Security Adviser and therefore were not agency records subject to FOIA disclosure.[3]

The second FOIA request was filed on December 28 and 29, 1976, by the Military Audit Project (MAP) after Kissinger publicly announced the gift of his telephone notes to the United States and their placement in the Library of Congress. The MAP request, filed with the Department of State, sought records of all Kissinger's conversations made while Secretary of State and National Security Adviser. On January 18, 1977, the Legal Adviser of the Department of State denied the request on two grounds. First, he found that the notes were not agency records. Second, the deposit of the notes with the Library of Congress prior to the request terminated the Department's custody and control. The denial was affirmed on administrative appeal.

The third FOIA request was filed on January 13, 1977, by the Reporters Committee for Freedom of the Press (RCFP), the American Historical Association, the American Political Science Association, and a number of other journalists (collectively referred to as the RCFP requesters). This request also sought production of the telephone notes made by Kissinger both while he was National Security Adviser and

[3] Safire filed an administrative appeal from this decision contending that the notes were agency records by virtue of their relocation to the State Department. The appeal was denied.

Secretary of State. The request was denied for the same reasons given to the MAP requesters.

The United States has taken some action to seek recovery of the notes for record processing. On January 4, 1977, the Government Archivist wrote to Kissinger, requesting that he be permitted to inspect the telephone notes so that he could determine whether they were Department records, and to determine whether Kissinger had authority to remove them from Department custody. The State Department Legal Adviser, however, analyzed the Archivist's request and issued a memorandum concluding that so long as extracts of the official business contained in the notes were filed as agency records, Kissinger had complied with the Department's regulations. The Legal Adviser also concluded that the inspection procedures suggested by the Archivist would compromise the Department's policy of respecting the privacy of such secretarial notes and would discourage the creation of historical materials in the first instance. On January 18, 1977, Kissinger replied to the Archivist, declining to permit access.

The Archivist renewed his request for an inspection on February 11, 1977, by which time Kissinger was no longer Secretary of State. With the request, he enclosed a memorandum of law prepared by the General Counsel of the GSA concluding that the materials in question might well be records rather than personal files and that the Archivist was entitled to inspect them under the Federal Records and Records Disposal Acts, 44 U. S. C. §§ 2901–2909, 3101–3107; 44 U. S. C. §§ 3301–3314 (1976 ed. and Supp. II). Kissinger did not respond to the Archivist's second request.

C

Proceedings in the United States District Court for the District of Columbia commenced February 8, 1977. The RCFP requesters and Safire instituted an action under the FOIA, seeking enforcement of their FOIA requests. On March 8, 1977, MAP filed a similar suit. Both suits named

Kissinger, the Library of Congress, the Secretary of State and the Department of State as defendants. The plaintiffs sought a judgment declaring that the summaries were agency records that had been unlawfully removed and were being improperly withheld. Plaintiffs requested as ultimate relief that the court require the Library to return the transcripts to the Department with directions to process them for disclosure under the FOIA.

Cross-motions for summary judgment were filed by all plaintiffs and by Kissinger. The District Judge ruled in plaintiffs' favor as to transcripts produced while Kissinger was Secretary of State, but denied relief as to transcripts of conversations produced while Kissinger was Special Assistant to the President. The court first found that the transcripts of telephone conversations were "agency records" subject to disclosure under the FOIA. The court also found that Kissinger had wrongfully removed these records by not obtaining the prior approval of the Administrator of General Services. The court recognized that the FOIA did not directly provide for relief since the records were in the custody of the Library of Congress, which is not an "agency" under the Act. Nevertheless, the court held that the FOIA permitted the court to invoke its equitable powers "to order the return of wrongfully removed agency documents where a statutory retrieval action appears unlikely."

An order was entered requiring the Library to return the documents to the Department of State; requiring the Department of State to determine which of the summaries are exempt from disclosure under the FOIA, and to provide the required materials to the plaintiffs. The court denied the production of summaries made during Kissinger's tenure as National Security Adviser on the basis of a mistaken assumption that plaintiffs had withdrawn their request for these summaries.

Both Kissinger and the private parties appealed from the lower court judgment. The Court of Appeals, without dis-

cussion, affirmed the trial court judgment ordering production of the summaries made while Kissinger was Secretary of State. The Court of Appeals also held that the summaries made during Kissinger's service as National Security Adviser need not be produced. The court found that this request had not been withdrawn, and reasoned that three considerations supported nonproduction: (1) the FOIA does not cover those Presidential advisers "who are so close to him as to be within the White House"; (2) the relocation of the transcripts to the State Department did not bring them within its disclosure responsibilities under the FOIA; and (3) the fact that portions of the transcripts may reflect the affairs of the NSC, an agency to which the FOIA *does* apply, provided no basis for disclosure in the absence of an FOIA request directed to that agency.

Kissinger filed a petition for certiorari requesting this Court to review the Court of Appeals' determination that the State Department had improperly withheld agency records, thereby permitting their production from the Library of Congress. The RCFP requesters filed a cross-petition seeking review of that court's judgment denying production of the conversations transcribed while Kissinger served as National Security Adviser. We granted both petitions, 441 U. S. 904, and we now affirm in part and reverse in part.

II

We first address the issue presented by Kissinger—whether the District Court possessed the authority to order the transfer of that portion of the deeded collection, including the transcripts of all conversations Kissinger made while Secretary of State, from the Library of Congress to the Department of State at the behest of the named plaintiffs. The lower courts premised this exercise of jurisdiction on their findings that the papers were "agency records" and that they had been wrongfully removed from State Department custody in viola-

tion of the Federal Records Disposal Act, 44 U. S. C. § 3303. We need not, and do not, decide whether the telephone notes are agency records, or were wrongfully removed, for even assuming an affirmative answer to each of these questions, the FOIA plaintiffs were not entitled to relief.

The question must be, of course, whether Congress has conferred jurisdiction on the federal courts to impose this remedy. Two statutory schemes are relevant to this inquiry. First, if Congress contemplated a private right of action under the Federal Records Act and the Federal Records Disposal Act, this would in itself justify the remedy imposed if Kissinger in fact wrongfully removed the documents. In the alternative, the lower court order could be sustained if authorized by the FOIA.

A

The Federal Records Act of 1950, 44 U. S. C. § 2901 *et seq.*, authorizes the "head of each Federal agency" to establish a "records management program" and to define the extent to which documents are "appropriate for preservation" as agency records. The records management program requires that adequate documentation of agency policies and procedures be retained. The Records Disposal Act, a complementary records management Act, provides the exclusive means for record disposal. 44 U. S. C. § 3314.

Under the Records Disposal Act, once a document achieves the status of a "record" as defined by the Act, it may not be alienated or disposed of without the consent of the Administrator of General Services, who has delegated his authority in such matters to the Archivist of the United States. 44 U. S. C. §§ 3303–3303a, 3308–3314 (1976 ed. and Supp. II); GSA, Delegations of Authority Manual, ADM P. 5450.39A. Thus if Kissinger's telephone notes were "records" within the meaning of the Federal Records Act, a question we do not reach, then Kissinger's transfer might well violate the Act since he did not seek the approval of the Archivist prior to

transferring custody to himself and then to the Library of Congress. We assume such a wrongful removal *arguendo* for the purposes of this opinion.

But the Federal Records Act establishes only one remedy for the improper removal of a "record" from the agency. The head of the agency is required under 44 U. S. C. § 3106 to notify the Attorney General if he determines or "has reason to believe" that records have been improperly removed from the agency. The Administrator of General Services is obligated to assist in such actions. 44 U. S. C. § 2905. At the behest of these administrators, the Attorney General may bring suit to recover the records.

The Archivist did request return of the telephone notes from Kissinger on the basis of his belief that the documents may have been wrongfully removed under the Act. Despite Kissinger's refusal to comply with the Archivist's request, no suit has been instituted against Kissinger to retrieve the records under 44 U. S. C. § 3106.

Plaintiff requesters effectively seek to enforce these requirements of the Acts by seeking the return of the records to State Department custody. No provision of either Act, however, expressly confers a right of action on private parties. Nor do we believe that such a private right of action can be implied.

This Court has spent too many pages identifying the factors relevant to uncovering congressional intent to imply a private cause of action to belabor the topic here.[4] Our most recent pronouncement on the subject, *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U. S. 11 (1979), readily disposes of the question. First, the language of the Records Acts merely "proscribes certain conduct" and does not "create or alter any civil liabilities." *Id.*, at 19. The Records Act also expressly provides administrative remedies for violations of the duties

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[4] See *Touche Ross & Co.* v. *Redington*, 442 U. S. 560 (1979); *Cannon* v. *University of Chicago*, 441 U. S. 677 (1979).

it imposes, implicating our conclusion in *Transamerica Mortgage* that it is "an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Ibid.* Finally, the legislative history does not detract from the inference to be drawn from congressional silence, but rather confirms that such silence is purposeful.

The legislative history of the Acts reveals that their purpose was not to benefit private parties, but solely to benefit the agencies themselves and the Federal Government as a whole. The Senate Report to the Federal Records Act of 1950 reveals this focus. S. Rep. No. 2140, 81st Cong., 2d Sess., 4 (1950). The Report states:

> "It is well to emphasize that records come into existence, or should do so, not in order to fill filing cabinets or occupy floor space, or even to satisfy the archival needs of this and future generations, but first of all to serve the administrative and executive purposes of the organization that creates them. There is danger of this simple, self-evident fact being lost for lack of emphasis. The measure of effective records management should be its usefulness to the executives who are responsible for accomplishing the substantive purposes of the organization. . . . [The] first interest is in the establishment of a useful system of documentation that will enable [the executive] to have the information he needs available when he needs it."

Congress expressly recognized the need for devising adequate statutory safeguards against the unauthorized removal of agency records, and opted in favor of a system of administrative standards and enforcement. See U. S. Commission on Organization of the Executive Branch of the Government, Task Force Report on Records Management 27 (1949). Thus, regardless of whether Kissinger has violated the Records and Records Disposal Acts, Congress has not vested fed-

eral courts with jurisdiction to adjudicate that question upon suit by a private party. That responsibility is vested in the administrative authorities.[5]

B

The plaintiff requesters contend that even though the Federal Records and Records Disposal Acts do not contemplate a private right of action, the FOIA nevertheless supplies what was missing from those Acts—congressional intent to permit private actions to recover records wrongfully removed from Government custody. We are, however, unable to read the FOIA as supplying that congressional intent.

The FOIA represents a carefully balanced scheme of public rights and agency obligations designed to foster greater access to agency records than existed prior to its enactment. That statutory scheme authorizes federal courts to ensure private access to requested materials when three requirements have been met. Under 5 U. S. C. § 552 (a)(4)(B) federal jurisdiction is dependent upon a showing that an agency has (1) "improperly"; (2) "withheld"; (3) "agency records." Judicial authority to devise remedies and enjoin agencies can only be invoked, under the jurisdictional grant conferred by § 552, if the agency has contravened all three components of this obligation. We find it unnecessary to decide whether the telephone notes were "agency records" since we conclude that a covered agency—here the State Department—has not "withheld" those documents from the plaintiffs. We also need not decide the full contours of a prohibited "withholding." We do decide, however, that Congress did not mean that an agency improperly withholds a document which has been removed from the possession of the agency prior to the filing of the FOIA request. In such a case, the agency has neither

[5] We need not decide what remedies might be available to private plaintiffs complaining that the administrators and the Attorney General have breached a duty to enforce the Records Act, since no such action was brought here. See 5 U. S. C. §§ 704, 701 (a)(2), 706 (1).

the custody nor control necessary to enable it to withhold.

In looking for congressional intent, we quite naturally start with the usual meaning of the word "withhold" itself. The requesters would have us read the "hold" out of "withhold." The act described by this word presupposes the actor's possession or control of the item withheld. A refusal to resort to legal remedies to obtain possession is simply not conduct subsumed by the verb "withhold."

The Act and its legislative history do not purport to define the word. An examination of the structure and purposes of the Act, however, indicates that Congress used the word in its usual sense. An agency's failure to sue a third party to obtain possession is not a withholding under the Act.

Several sources suggest directly that agency possession or control is prerequisite to triggering any duties under the FOIA. In the debates, the Act was described as ensuring "access to the information *possessed* by [Government] servants." (Emphasis added.) 112 Cong. Rec. 13652 (1966), reprinted in Freedom of Information Act Source Book, S. Doc. No. 93–82, p. 69 (1974) (remarks of Rep. Monagan) (hereinafter Source Book I).

Following FOIA's enactment in 1966, the Attorney General issued guidelines for the use of all federal departments and agencies in complying with the new statute. The guidelines state that FOIA

> "refers, of course, only to records in being and in the possession or control of an agency. . . . [It] imposes no obligation to compile or *procure* a record in response to a request." Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act 23–24 (June 1967), Source Book I, pp. 222–223.

Most courts which have considered the question have concluded that the FOIA is only directed at requiring agencies to disclose those "agency records" for which they have chosen

to retain possession or control.[6] See also *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U. S. 214, 221 (1978), describing the Act as reaching "records and material in the possession of federal agencies. . . ."

The conclusion that possession or control is a prerequisite to FOIA disclosure duties is reinforced by an examination of the purposes of the Act. The Act does not obligate agencies to create or retain documents; it only obligates them to provide access to those which it in fact has created and retained.[7] It has been settled by decision of this Court that only the Federal Records Act, and not the FOIA requires an agency to actually create records, even though the agency's failure to do so deprives the public of information which might have otherwise been available to it. *NLRB* v. *Sears, Roebuck & Co.*, 421 U. S. 132, 161–162 (1975); *Renegotiation Board* v. *Grumman Aircraft Engineering Corp.*, 421 U. S. 168, 192 (1975).

If the agency is not required to create or to retain records under the FOIA, it is somewhat difficult to determine why the agency is nevertheless required to retrieve documents which have escaped its possession, but which it has not endeavored to recover. If the document is of so little interest to the agency that it does not believe the retrieval effort to be justified, the effect of this judgment on an FOIA request seems little different from the effect of an agency determina-

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[6] See *Nolen* v. *Rumsfeld*, 535 F. 2d 890, 891 (CA5 1976), cert. denied, 429 U. S. 1104 (1977) (suit "seeking production of missing records . . . is not within the purview of the Freedom of Information Act"); *Nichols* v. *United States*, 325 F. Supp. 130, 137 (Kan. 1971), aff'd, 460 F. 2d 671 (CA10), cert. denied, 409 U. S. 966 (1972) ("the Court may not require production of records not in [the] custody or control of an agency"); *Ciba-Geigy Corp.* v. *Mathews*, 428 F. Supp. 523, 531 (SDNY 1977) ("[T]he government cannot be compelled to obtain possession of documents not under its control or furnish an opinion when none is written").

[7] Congress has imposed some very limited record-creating obligations with regard to indexing under the FOIA. See 5 U. S. C. § 552 (a)(2).

tion that a record should never be created, or should be discarded.[8]

The procedural provisions of the Act, in particular, reflect the nature of the obligation which Congress intended to impose on agencies in the production of agency records. First, Congress has provided that agencies normally must decide within 10 days whether to comply with an FOIA request unless they can establish "unusual circumstances" as defined in the Act. 5 U. S. C. §§ 552 (a)(6)(A), (B). The "unusual circumstances" specified by the Act include "the need to search for and collect the requested records from field facilities and other establishments that are separate from the office processing the request." This exception for searching and collecting certainly does not suggest that Congress expected an agency to commence lawsuits in order to obtain possession of documents requested, particularly when it is seen that where an extension is allowable, the period of the extension is only for 10 days. Either Congress was operating under the assumption that lawsuits could be waged and won in 10 days, or it was operating under the assumption that agencies would not be obligated to file lawsuits in order to comply with FOIA requests.

A similarly strong expression of congressional expectations emerges in 5 U. S. C. § 552 (a)(4)(A) providing for recovery of certain costs incurred in complying with FOIA requests. This section was included in the Act in order to reduce the burdens imposed on the agencies. The agency is authorized to establish fees for the "direct costs" of "document search and duplication." The costs allowed reflect the congressional judgment as to the nature of the costs which would be incurred. Congress identified these costs, and thus the agency burdens, as consisting of "search" and "duplication." During

[8] This is not to suggest that this discretionary determination by the agency relieves it of other obligations imposed by the records management Acts. The observation goes only to the nature of the public right of access provided by the FOIA.

the enactment of the 1974 amendments to the FOIA, it was emphasized that agencies generally are not obligated to provide extensive services in fulfilling FOIA requests. S. Rep. No. 93-854, p. 12 (1974), reprinted in House Committee on Government Operations and Senate Committee on the Judiciary, Freedom of Information Act and Amendments of 1974: Source Book, 94th Cong., 1st Sess., 164 (Joint Comm. Print 1975) (hereinafter Source Book II). When agencies do provide additional services in conducting a search, they are clearly authorized to allocate that cost to the requester. *Ibid.* It is doubtful that Congress intended that a "search" include legal efforts to retrieve wrongfully removed documents, since such an intent would authorize agency assessment to the private requester of its litigation costs in such an endeavor.

It is therefore clear that Congress never intended, when it enacted the FOIA, to displace the statutory scheme embodied in the Federal Records Act and the Federal Records Disposal Act providing for administrative remedies to safeguard against as well as to retrieve wrongfully removed agency records. This result is buttressed by our decisions in *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U. S. 1 (1974), and *NLRB* v. *Robbins Tire & Rubber Co., supra,* both demonstrating reluctance to construe the FOIA as silently departing from prior longstanding practice. *Bannercraft, supra,* of course held that Congress intended federal district courts to retain traditional equitable jurisdiction in adjudicating FOIA actions. But historic equitable practice has long recognized that an individual does not improperly withhold a document sought pursuant to a subpoena by his refusal to sue a third party to obtain or recover possession. *Amey* v. *Long,* 9 East 473, 482, 103 Eng. Rep. 653, 657 (K. B. 1808).

C

This construction of "withholding" readily disposes of the RCFP and MAP requests. Both of these requests were filed after Kissinger's telephone notes had been deeded to the Li-

brary of Congress.[9] The Government, through the Archivist, has requested return of the documents from Kissinger. The request has been refused. The facts make it apparent that Kissinger, and the Library of Congress as his donee, are holding the documents under a claim of right. Under these circumstances, the State Department cannot be said to have had possession or control of the documents at the time the requests were received. It did not, therefore, withhold any agency records, an indispensable prerequisite to liability in a suit under the FOIA.

III

The Safire request raises a separate question. At the time when Safire submitted his request for certain notes of Kissinger's telephone conversations, all the notes were still located in Kissinger's office at the State Department. For this reason, we do not rest our resolution of his claim on the grounds that there was no withholding by the State Department. As outlined above, the Act only prohibits the withholding of "agency records." We conclude that the Safire request sought disclosure of documents which were not "agency records" within the meaning of the FOIA.

Safire's request sought only a limited category of documents. He requested the Department to produce all transcripts of telephone conversations made by Kissinger from his White House office between January 21, 1969 and Febru-

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[9] There is no question that a "withholding" must here be gauged by the time at which the request is made since there is no FOIA obligation to retain records prior to that request. This temporal factor has always governed requests under the subpoena power, *Jurney* v. *MacCracken*, 294 U. S. 125 (1935), as well as under other access statutes. See Fed. Rules Civ. Proc. 34, 45. We need not decide whether this standard might be displaced in the event that it was shown that an agency official purposefully routed a document out of agency possession in order to circumvent a FOIA request. No such issue is presented here. We also express no opinion as to whether an agency withholds documents which have been wrongfully removed by an individual after a request is filed.

ary 12, 1971, in which (1) Safire's name appeared; or (2) in which Kissinger discussed the subject of information "leaks" with General Haig, Attorney General John Mitchell, President Richard Nixon, J. Edgar Hoover, or any other official of the FBI.

The FOIA does render the "Executive Office of the President" an agency subject to the Act. 5 U. S. C. § 552 (e). The legislative history is unambiguous, however, in explaining that the "Executive Office" does not include the Office of the President. The Conference Report for the 1974 FOIA Amendments indicates that "the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President" are not included within the term "agency" under the FOIA. H. R. Conf. Rep. No. 93–1380, p. 15 (1974), reprinted in Source Book II, p. 232. Safire's request was limited to a period of time in which Kissinger was serving as Assistant to the President. Thus these telephone notes were not "agency records" when they were made.

The RCFP requesters have argued that since some of the telephone notes made while Kissinger was adviser to the President may have related to the National Security Council they may have been National Security Council records and therefore subject to the Act. See H. R. Rep. No. 93–876, p. 8 (1974), Source Book II, p. 128, indicating that the National Security Council is an executive agency to which the FOIA applies. We need not decide when records which, in the words of the RCFP requesters, merely "relate to" the affairs of an FOIA agency become records of that agency. To the extent Safire sought discussions concerning information leaks which threatened the internal secrecy of White House policy-making, he sought conversations in which Kissinger had acted in his capacity as a Presidential adviser, only.

Nor does his request for conversations in which his name appeared require a different conclusion. Safire never identi-

fied the request as implicating any National Security Council records. The request did not mention the National Security Council or any subject relating to the NSC. To the contrary, he requested to see transcripts Kissinger made from his White House office. Moreover, after the State Department denied the request on the grounds that these were White House records, Safire's appeal argued these were State Department records, again never suggesting they were NSC records. The FOIA requires the requester to adequately identify the records which are sought. 5 U. S. C. § 552 (a)(3)(A). Safire's request did not describe the records as relating to the NSC or in any way put the agency on notice that it should refer the request to the NSC. See 5 U. S. C. § 552 (a)(6)(B)(iii). Therefore, we also need not address the issue of when an agency violates the Act by refusing to produce records of another agency, or failing to refer a request to the appropriate agency.

The RCFP requesters nevertheless contend that if the transcripts of telephone conversations made while adviser to the President were not then "agency records," they acquired that status under the Act when they were removed from White House files and physically taken to Kissinger's office at the Department of State. We simply decline to hold that the physical location of the notes of telephone conversations renders them "agency records." The papers were not in the control of the State Department at any time. They were not generated in the State Department. They never entered the State Department's files, and they were not used by the Department for any purpose. If mere physical location of papers and materials could confer status as an "agency record" Kissinger's personal books, speeches, and all other memorabilia stored in his office would have been agency records subject to disclosure under the FOIA. It requires little discussion or analysis to conclude that the lower courts correctly resolved this question in favor of Kissinger. See also *Forsham* v. *Harris, post,* p. 169.

Accordingly, we reverse the order of the Court of Appeals compelling production of the telephone manuscripts made by Kissinger while Secretary of State and affirm the order denying the requests for transcripts produced while Kissinger served as National Security Adviser.

It is so ordered.

MR. JUSTICE MARSHALL took no part in the consideration or decision of these cases.

MR. JUSTICE BLACKMUN took no part in the decision of these cases.

MR. JUSTICE BRENNAN, concurring in part and dissenting in part.

Today's decision explores hitherto uncharted territory in a complicated statutory scheme. I cannot agree with what is to me the Court's crabbed interpretation of "improper withholding" under the Freedom of Information Act (FOIA). At the same time, I am not without some uncertainty about the contours of the "improper withholding" standard. Accordingly, although the result reached by my Brother STEVENS strikes me as the most workable for the present, I write separately to articulate some ideas on this difficult problem.

As an abstract matter, I concur in the Court's view that FOIA's reach should not be conditioned upon the legality of a documents transfer under the Federal Records and Records Disposal Acts. 44 U. S. C. § 2901 *et seq.;* 44 U. S. C. § 3301 *et seq.* (1976 ed. and Supp. II). These Acts establish a fairly comprehensive scheme for internal records management, one element of which is an administrative process for regulating and enforcing records disposal standards. Thus, the "legality" of a document transfer for purposes of the Records Acts is, in a practical sense, partly a matter of administrative discretion. Conceptually, it seems strange to import such a discretionary factor into the legal standards that govern

private rights of action under FOIA. And it is not surprising that the Records Acts and FOIA fail to mesh: The former scheme is evidently directed toward fostering administrative interests, while the latter is definitely designed to serve the needs of the general public. Consequently, the Records Acts either may fail to promote the interests embodied in FOIA, or may address concerns that are irrelevant to FOIA.[1]

Although I agree that the Records Acts cannot be neatly interpolated into FOIA, I part company with the Court when it concludes that FOIA does not reach records that have been removed from a federal agency's custody. If FOIA is to be more than a dead letter, it must necessarily incorporate some restraint upon the agency's powers to move documents beyond the reach of the FOIA requester. Even the Court's opinion implies—as I think it must—that an agency would be improperly withholding documents if it failed to take steps to recover papers removed from its custody deliberately to evade a FOIA request. *Ante,* at 155, n. 9. Beyond that minimal rule, I would think it also plainly unacceptable for an agency to devise a records routing system aimed at frustrating FOIA requests in general by moving documents outside agency custody with unseemly haste.

Indeed, I would go further. If the purpose of FOIA is to provide public access to the records incorporated into Government decisionmaking, see *Forsham* v. *Harris, post,* at 188 (BRENNAN, J., dissenting), then agencies may well have a concomitant responsibility to retain possession of, or control over, those records.[2] But, as with so many questions that

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[1] For example, a document transfer may comport with the formal requirements of the Records Acts, and yet be motivated by the desire to avoid a pending FOIA request.

[2] This notion is not incompatible with *NLRB* v. *Sears, Roebuck & Co.,* 421 U. S. 132, 161–162 (1975), and *Renegotiation Board* v. *Grumman Aircraft Engineering Corp.,* 421 U. S. 168, 192 (1975), which held that FOIA does not compel agencies to write opinions where not otherwise required. The Freedom of Information Act neither compels the Govern-

the Court must resolve, the difficulty is where to draw the line. We could hardly assume that Congress intended agencies to be prevented from surrendering all documents that might be of interest to requesters—so broad a rule would not only swamp the agencies with paper, but would seem incompatible with the records management goals of the Records Acts. See S. Rep. No. 2140, 81st Cong., 2d Sess., 4 (1950). Perhaps the appropriate test would take into account the importance of specific records; it might also consider the length of time records would be held, and the historical frequency of requests for documents of a particular type. To suggest the elements of such a test, however, is to expose how ill-suited a court is to define them adequately. It is Congress which has the resources and responsibility to fashion a rule about document retention that comports with the objectives of the Freedom of Information Act.

Although one might hope that Congress will soon address this problem, we must decide the case currently before us. I have little difficulty concluding that records which should have been retained for FOIA purposes may be reached under FOIA even though they have already passed beyond the agency's control.[3] In the absence of an analytically satisfying standard for determining *which* records should be retained, however, it is necessary to resolve this case by looking to an approach that is currently practicable. My Brother STEVENS'

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ment to conduct research on behalf of private citizens, nor duplicates administrative law requirements of adequate explanation for Government action, see *id.*, at 191–192. What the Act does mandate is exposure of the research and explanations which the Government has chosen to memorialize; an agency's obligation to *retain* records, therefore, may be inferred from FOIA without contradicting the principle that agencies need not *create* records.

[3] This will not necessarily entail the agency's litigating against the third party in possession of the documents, as the Court suggests. Rather, the third party might be joined in the FOIA suit. Cf. *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U. S. 1, 18–20 (1974).

position fairly fits this prescription. While turning a FOIA suit upon the Records Acts is, as I have recognized, conceptually problematic, the records statutes do formulate document retention criteria that are not unduly burdensome and that carry a congressional imprimatur.

Accordingly, I agree with MR. JUSTICE STEVENS' conclusion with respect to the "improper withholding" issue, and therefore dissent from Part II of the Court's opinion.

MR. JUSTICE STEVENS, concurring in part and dissenting in part.

As the Court recognizes, the requesters are entitled to prevail in this FOIA action if the State Department "has (1) 'improperly'; (2) 'withheld'; (3) 'agency records.'" *Ante,* at 150. The Court assumes, without deciding, that "agency records" have been requested and then concludes that no such records have been "withheld." The Court states, and I agree, that an agency cannot "withhold" documents unless it has either custody or control of them. It then goes on, however, to equate "custody" and "control" with physical possession, holding that FOIA is simply inapplicable to any "document which has been removed from the possession of the agency prior to the filing of the FOIA request." *Ibid.*[1]

I cannot agree that this conclusion is compelled by the plain language of the statute; moreover, it seems to me wholly inconsistent with the congressional purpose underlying the Freedom of Information Act. The decision today exempts documents that have been wrongfully removed from the agency's files from any scrutiny whatsoever under FOIA. It thus creates an incentive for outgoing agency officials to remove potentially embarrassing documents from their files in order to frustrate future FOIA requests. It is the creation

[1] The Court states that "[i]n such a case, the agency has neither the custody nor control necessary to enable it to withhold." *Ante,* at 150–151.

of such an incentive, which is directly contrary to the purpose of FOIA, rather than the result in this particular case,[2] that prompts me to write in dissent.

In my judgment, a "withholding" occurs within the meaning of FOIA whenever an agency declines to produce agency records which it has a legal right to possess or control. A determination that documents have been withheld does not end the inquiry, of course, for a court must still determine whether the withholding was "improper" for purposes of the Act. Thus, in my view, correct analysis requires us to confront three separate questions in the following order: (1) are any of the requested documents "agency records"; (2) if so, have any of them been withheld because they are in the *legal* custody of the agency; and (3) if so, was the withholding improper?

I

Everyone seems to agree that the summaries of Dr. Kissinger's State Department telephone conversations[3] should be considered "agency records" subject to disclosure under FOIA if they were "agency records" under the definitions set forth in the Federal Records Act (FRA). The parties disagree,

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[2] I do not mean to imply that there was any improper motive for Dr. Kissinger's removal of the documents in this case. Nor do I believe that the decision the Court reaches today will necessarily lessen the requesters' access to the information contained in the summaries of Dr. Kissinger's telephone conversations. Many, if not all, of the significant decisions reflected in those summaries are also reflected in other agency records, which are still in the State Department's possession. Also, it is not clear how many of the summaries, even if subject to FOIA, would be exempt from production because they contain either classified or purely personal information. See 5 U. S. C. §§ 552 (b)(1) and (b)(6).

[3] I agree with Part III of the Court's opinion that the summaries of Dr. Kissinger's telephone conversations when he was a Presidential adviser were not "agency records" subject to disclosure under FOIA when they were created and did not become "agency records" when they were later stored in Dr. Kissinger's files at the State Department.

however, as to the proper application of that Act to the facts of this case. The requesters argue that the summaries were "records" under the FRA because they were documents "appropriate for preservation" by the agency under 44 U. S. C. § 3301. Dr. Kissinger, on the other hand, argues that the summaries were personal papers which he could dispose of at will under the FRA and which were never subject to disclosure under FOIA. The Government takes an intermediate position, arguing that the summaries were "agency records" only to the extent that they contained significant information that was not reflected in other agency records.[4]

I cannot accept Dr. Kissinger's argument that the summaries are private papers. As the District Court noted, they were made in the regular course of conducting the agency's business, were the work product of agency personnel and agency assets, and were maintained in the possession and control of the agency prior to their removal by Dr. Kissinger.

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[4] The Government argues that Dr. Kissinger had an obligation under the State Department's records management program to record permanently all oral "[d]ecisions, commitments, and discussions of any significance." 5 FAM § 423.2-1 (1974). Thus, he should have extracted all significant information pertaining to agency business from his telephone summaries and entered that information in the agency's permanent records. To the extent that he did not do so, the telephone summaries remain the sole written evidence of that information and thus should be considered "agency records." However, to the extent that Dr. Kissinger saw to it that the information was properly recorded elsewhere, the Government argues that the summaries became "non-record materials" which could be disposed of with the agency's permission. (The Government concedes that some nonrecord materials may be subject to disclosure under FOIA while in the agency's possession; it takes the position, however, that such materials are not subject to either the FOIA or the FRA after they have been relinquished.)

Because it believes that the degree of duplication between the summaries and records still in the agency's possession cannot be determined from the evidence presented in this case, the Government argues that a remand would be appropriate if the issue of whether the summaries were "agency records" must be decided.

They were also regularly circulated to Dr. Kissinger's immediate staff and presumably used by the staff in making day-to-day decisions on behalf of the agency. Finally, Dr. Kissinger himself recognized that the State Department continued to have an interest in the summaries even after they had been removed, since he had a State Department employee review them in order to extract information that was not otherwise in the agency's files. App. 248a. Under these circumstances, I find it difficult to believe that none of the summaries was "appropriate for preservation" by the agency. Thus, although a remand might be necessary, as the Government suggests, see n. 4, *supra*, to determine which summaries were agency records and which were not, it is clear that at least some of them fell within that category at the time Dr. Kissinger removed them from his files at the State Department.[5]

II

The second question to be considered is whether the State Department continued to have custody or control of the telephone summaries after they were removed from its files so that its refusal to take steps to regain them should be deemed a "withholding" within the meaning of the Freedom of Information Act. As I stated at the outset, I do not agree with the Court that the broad concepts of "custody" and "control" can be equated with the much narrower concept of physical possession.[6] In my view, those concepts should be applied to

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[5] The fact that extracts were not made until *after* the summaries had been transferred to the Library of Congress indicates that, even under the Government's view, some of the summaries must have been "agency records" at the time they were removed from the State Department. Moreover, during the course of the litigation Dr. Kissinger granted permission to the Archivist and the State Department to review the summaries in order to determine whether they should seek their return as "agency records" despite the existence of the summaries. Brief for Federal Parties 14, n. 11.

[6] The Court's reference to subpoenas is instructive. See *ante*, at 154. Under Rule 34 of the Federal Rules of Civil Procedure, a party is required

bring all documents within the *legal* custody or control of the agency within the purview of FOIA. Thus, if an agency has a legal right to regain possession of documents wrongfully removed from its files, it continues to have custody of those documents. If it then refuses to take any steps whatsoever to demand, or even to request, that the documents be returned, then the agency is "withholding" those documents for purposes of FOIA.

In this case, I think it is rather clear that the telephone summaries were wrongfully removed from the State Department's possession.[7] Under these circumstances, the State

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to produce requested documents if they are within his "possession, custody or control." The same standard applies to subpoenas *duces tecum* issued under Rule 45, see 9 C. Wright & A. Miller, Federal Practice and Procedure § 2454, p. 425 (1971). In construing these Rules the courts have rejected a narrow physical-possession test, focusing instead on whether the subpoenaed party has a legal right to custody or control of the documents in question. See, *e. g.*, *United States* v. *International Business Machines Corp.*, 71 F. R. D. 88, 91 (SDNY 1976); *Buckley* v. *Vidal*, 50 F. R. D. 271, 274 (SDNY 1970); 8 C. Wright & A. Miller, Federal Practice and Procedure § 2210 (1970). Thus, if this case involved compliance with a discovery request rather than an FOIA request, I doubt very much that the agency could justify its failure to produce the documents on the ground that the agency head had wrongfully removed them from the agency's physical possession just before the subpoena was served.

[7] Once Dr. Kissinger's argument that the summaries were private papers is rejected, it becomes clear that the Federal Records Act and Records Disposal Act were violated by the transfer of the papers to the Library of Congress. If the summaries were agency records, as the requesters argue, then the State Department could not properly relinquish them without obtaining the approval of the General Services Administration. Under the Records Disposal Act GSA's approval would be conditioned on a showing that the documents were no longer needed in the "transaction of its current business" and did not have "sufficient administrative, legal, research, or other value to warrant their further preservation by the Government." 44 U. S. C. §§ 3303, 3303a (1976 ed. and Supp. II).

If, on the other hand, the summaries could have been converted from "records" to "non-record materials" as the Government suggests, the State Department still would have been required to take steps prior to

Department's failure even to request their return [8] constituted a "withholding" for purposes of FOIA.

III

The third and most difficult question is whether the State Department's "withholding" was "improper." In my view, the answer to that question depends on the agency's explanation for its failure to attempt to regain the documents. If the explanation is reasonable, then the withholding is not improper. For example, I would not find an agency's inaction improper in a case in which it simply did not know where the documents were located or had no interest whatsoever in retrieving them. The FOIA does not require federal agencies to engage in prolonged searches for documents or institute legal proceedings that will not yield any appreciable benefits to the agency.

On the other hand, if the agency is unable to advance a reasonable explanation for its failure to act, a presumption arises that the agency is motivated by a desire to shield the documents from FOIA scrutiny.[9] Thus, if the agency be-

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relinquishing them to assure itself that all significant information had been properly extracted for inclusion in more formal State Department files. The fact that such steps were not taken until *after* the summaries had been deeded over to the Library of Congress makes their removal from the agency by Dr. Kissinger unlawful even under the Government's theory.

[8] The Archivist did make several requests for the documents. App. 99a–116a. The fact that Dr. Kissinger refused those requests, however, does not demonstrate that a similar request by the State Department would also have been refused.

[9] The Court recognizes that there might be situations where documents were removed from the agency in order to avoid FOIA requests and suggests that its strict "physical-possession" standard might be "displaced" under these circumstances, *ante*, at 155, n. 9. As a practical matter, however, the Court's suggestion provides little comfort to the intended beneficiaries of the Act. For, if an agency can make a sufficient response to a request by simply denying physical possession, it will be a rare case indeed

lieved or had reason to believe that it had a legal right to the documents and that the documents were still valuable for its own internal purposes and nevertheless did not attempt to regain them, its inaction should be deemed ar improper withholding.

In this case the State Department refused the FOIA requests on the ground that the telephone summaries were not agency records and, in any event, were no longer within the agency's custody or control. By the time the FOIA actions were filed, there was substantial reason for doubting the Department's resolution of the first issue, inasmuch as the General Counsel of GSA had rendered a legal opinion that the documents were probably agency records and should be returned to the Government for proper archival screening.[10] Because of their very nature, there was also substantial reason for believing that, if they were agency records, the summaries would have to be considered valuable documents. Finally, the fact that the documents had been removed by the head of the agency shortly before the expiration of his term of office raised an inference that the removal had been motivated by a desire to avoid FOIA disclosure.

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in which the ordinary citizen can overcome that denial by proof of improper motivation. Moreover, it would be unseemly to invite litigation and discovery into the subjective motivation of agency officials responsible for processing the flood of paper that threatens to engulf today's bureaucracy. Focusing attention on the agency's reason for not reacquiring the documents, rather than on the individual employee's motive for removing them in the first place, seems to me to be a preferable way of eliminating the incentive to transfer documents to avoid disclosure under FOIA.

[10] GSA, and in particular the Archivist, has supervisory responsibility over the various agencies' records management and disposal programs. See, *e. g.*, 44 U. S. C. §§ 2904, 2906, 3102, 3302, and 3303a (1976 ed. and Supp. II). Thus, an opinion by GSA's General Counsel could be expected to give a more authoritative and impartial view of the technical issue of what constitutes an agency record than an opinion by the State Department's legal counsel, given after the documents had already been removed.

Under these circumstances, it is at least arguable that the continued inaction of the State Department, contrary to the views of the Archivist, was improper.

Accordingly, I believe the District Court had jurisdiction under FOIA to determine (a) whether the telephone summaries were in fact agency records and (b) if so, whether the State Department's failure to seek return of the documents was improper. The court's disposition of those issues seems to me to have been somewhat premature, however. Once the litigation began, the State Department changed its position and contended that it could not determine whether it should seek return of the summaries without first inspecting them. Pursuant to an agreement with Dr. Kissinger, the Department and the Archivist began the process of sifting through the records. That process had not yet been completed when the District Court handed down its decision. Because the agency's informed opinion of the documents' status and their value was in my view relevant to a determination of whether its actions were "improper," I think the court's order was premature. I would therefore remand to give the Government an opportunity to finish its examination of the documents.

FORSHAM ET AL. v. HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1118. Argued October 31, 1979—Decided March 3, 1980

Under federal grants awarded by the National Institute of Arthritis, Metabolism, and Digestive Diseases (NIAMDD) (a federal agency), the University Group Diabetes Program (UGDP), a group of private physicians and scientists, conducted a long-term study of the effectiveness of certain diabetes treatment regimens. Pertinent federal regulations authorized some supervision of UGDP and gave NIAMDD the right of access to, or permanent custody of, the raw data generated by UGDP. However, the day-to-day administration of grant-supported activities was in UGDP's hands, and NIAMDD did not exercise its right to review or obtain custody of the raw data, which remained at all times in UGDP's possession and under its ownership. The UGDP's reports on the results of its study, indicating that the use of certain drugs in diabetes treatment increased the risk of heart disease, ultimately resulted in proceedings by the Secretary of Health, Education, and Welfare (HEW) and the Food and Drug Administration (FDA) to restrict the labeling and use of the drugs. After both UGDP and HEW denied petitioners' request for access to the UGDP raw data underlying its published reports, petitioners filed suit in Federal District Court to require HEW to make the raw data available under the Freedom of Information Act (FOIA), which empowers federal courts to order an "agency" to produce "agency records improperly withheld" from an individual requesting access. The District Court granted summary judgment for respondents, holding that HEW properly denied the request on the ground that the data did not constitute "agency" records under the FOIA. The Court of Appeals affirmed.

Held: HEW need not produce the requested data because they are not "agency records" within the meaning of the FOIA. Data generated by a privately controlled organization which has received federal grants (grantee), but which data has not at any time been obtained by the agency, are not "agency records" accessible under the FOIA. Pp. 177–187.

(a) There is no merit to petitioners' claim that the data were at least records of UGDP, and that the federal funding and supervision of UGDP alone provide the close connection necessary to render its

records "agency records" as that term is used in the FOIA. While "agency record" is not defined in the Act, Congress excluded private grantees from FOIA disclosure obligations by excluding them from the Act's definition of "agency," an action consistent with its prevalent practice of preserving the autonomy of federal grantees and their records. Since Congress found that federal funding and supervision (short of Government control) did not justify direct access to the grantee's records, it cannot be concluded that those identical activities were intended to permit indirect access through an expansive definition of "agency records." Pp. 178–182.

(b) Nor may a broad definition of "agency records" be invoked so as to include all documents created by a private grantee to which the Government has access and which the Government has used. Such a broad definition is not supported by either the language, structure, or legislative history of the FOIA. Instead, Congress contemplated that an agency must first either create or obtain a record as a prerequisite to its becoming an "agency record" within the meaning of the FOIA. This conclusion is also supported by other Acts in which Congress has associated creation or acquisition with the concept of a governmental record. Although in this case HEW has a right of access to the data, and a right if it so chooses to obtain permanent custody of the UGDP records, in this context the FOIA applies to records which have been *in fact* obtained, and not to records which merely *could have been* obtained. Without first establishing that the agency has created or obtained the document, the agency's reliance on or use of the document is similarly irrelevant. Pp. 182–186.

190 U. S. App. D. C. 231, 587 F. 2d 1128, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, POWELL, and STEVENS, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 187.

Michael R. Sonnenreich argued the cause for petitioners. With him on the brief were *Neil L. Chayet, Harvey W. Freishtat,* and *Michael X. Morrell.*

Deputy Solicitor General Geller argued the cause for the federal respondents. With him on the brief were *Solicitor General McCree, Acting Assistant Attorney General Daniel, William Alsup, Richard M. Cooper,* and *Michael P. Peskoe. Thomas E. Plank,* Assistant Attorney General of Maryland,

argued the cause for respondent Klimt. With him on the brief were *Stephen H. Sachs,* Attorney General, and *David H. Feldman,* Assistant Attorney General.*

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

The Freedom of Information Act, 5 U. S. C. § 552, empowers federal courts to order an "agency" to produce "agency records improperly withheld" from an individual requesting access. § 552 (a)(4)(B). We hold here that written data generated, owned, and possessed by a privately controlled organization receiving federal study grants are not "agency records" within the meaning of the Act when copies of those data have not been obtained by a federal agency subject to the FOIA. Federal participation in the generation of the data by means of a grant from the Department of Health, Education, and Welfare (HEW) does not make the private organization a federal "agency" within the terms of the Act. Nor does this federal funding in combination with a federal right of access render the data "agency records" of HEW, which *is* a federal "agency" under the terms of the Act.

I

In 1959, a group of private physicians and scientists specializing in the treatment of diabetes formed the University Group Diabetes Program (UGDP). The UGDP conducted a long-term study of the effectiveness of five diabetes treatment regimens. Two of these treatment regimens involved diet control in combination with the administration of either tolbutamide, or phenformin hydrochloride, both "oral hypoglycemic" drugs. The UGDP's participating physicians were located at 12 clinics nationwide and the study was coordinated at the Coordinating Center of the University of Maryland.

**Sheldon Elliot Steinbach* and *Joseph Anthony Keyes, Jr.,* filed a brief for the American Council on Education et al. as *amici curiae.*

The study generated more than 55 million records documenting the treatment of over 1,000 diabetic patients who were monitored for a 5- to 8-year period. In 1970, the UGDP presented the initial results of their study indicating that the treatment of adult-onset diabetics with tolbutamide increased the risk of death from cardiovascular disease over that present when diabetes was treated by the other methods studied. The UGDP later expanded these findings to report a similarly increased incidence of heart disease when patients were treated with phenformin hydrochloride. These findings have in turn generated substantial professional debate.

The Committee on the Care of the Diabetic (CCD), a national association of physicians involved in the treatment of diabetes mellitus patients, have been among those critical of the UGDP study. CCD requested the UGDP to grant it access to the raw data in order to facilitate its review of the UGDP findings, but UGDP has declined to comply with that request. CCD therefore sought to obtain the information under the Freedom of Information Act. The essential facts are not in dispute, and we hereafter set forth those relevant to our decision.

The UGDP study has been solely funded by federal grants in the neighborhood of $15 million between 1961 and 1978. These grants were awarded UGDP by the National Institute of Arthritis, Metabolism, and Digestive Diseases (NIAMDD), a federal agency,[1] pursuant to the Public Health Service Act, 42 U. S. C. § 241 (c). NIAMDD has not only awarded the federal grants to UGDP, but has exercised a certain amount

[1] The NIAMDD is one of several Institutes of the National Institutes of Health (NIH). It is authorized by statute to conduct and fund research on diabetes and other diseases. 42 U. S. C. §§ 289a, 289c–1. The NIH are a component of the federal Public Health Service, which is itself a part of the Department of Health, Education, and Welfare. See Reorg. Plan No. 3 of 1966, 3 CFR 1023 (1966–1970 Comp.), note following 42 U. S. C. § 202, and Reorganization Order of April 1, 1968, 33 Fed. Reg. 5426.

of supervision over the funded activity. Federal regulations governing supervision of grantees allow for the review of periodic reports submitted by the grantee, on-site visits, and require agency approval of major program or budgetary changes. 45 CFR §§ 74.80–74.85 (1979); 42 CFR § 52.20 (b) (1979). It is undisputed, however, both that the day-to-day administration of grant-supported activities is in the hands of a grantee, and that NIAMDD's supervision of UGDP conformed to these regulations.[2]

The grantee has also retained control of its records: the patient records and raw data generated by UGDP have at all times remained in the possession of that entity, and neither the NIAMDD grants nor related regulations shift ownership of such data to the Federal Government. NIAMDD does, however, have a right of access to the data in order to insure compliance with the grant. 45 CFR § 74.24 (a) (1979). And the Government may obtain permanent custody of the documents upon request. § 74.21 (c). But NIAMDD has not exercised its right either to review or to obtain permanent custody of the data.

Although no employees of the NIAMDD have reviewed the UGDP records, the Institute did contract in 1972 with another private grantee, the Biometric Society, for an assessment of the validity of the UGDP study. The Biometric Society was given direct access to the UGDP raw data by the terms of its contract with NIAMDD. The contract with the Biometric Society, however, did not require the Society to seek access to the UGDP raw data, nor did it require that any data actually reviewed be transmitted to the NIAMDD. While the Society did review some UGDP data, it did not submit any raw data reviewed by it to the NIAMDD. The Society

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[2] Petitioners do contend that the federal supervision of the UGDP study was substantial and more extensive than that ordinarily exercised. They do not, however, maintain that there was day-to-day supervision. See *infra*, at 180, and n. 11.

issued a report to the Institute in 1974 concluding that the UGDP results were "mixed" but "moderately strong."

An additional connection between the Federal Government and the UGDP study has occurred through the activities of the Food and Drug Administration. After the FDA was apprised of the UGDP results, the agency issued a statement recommending that physicians use tolbutamide in the treatment of diabetes only in limited circumstances. After the UGDP reported finding a similarly higher incidence of cardiovascular disease with the administration of phenformin, the FDA proposed changes in the labeling of these oral hypoglycemic drugs to warn patients of cardiovascular hazards. FDA Drug Bulletin (June 23, 1971). The FDA deferred further action on this labeling proposal, however, until the Biometric Society completed its review of the UGDP study.[3]

After the Biometric study was issued, FDA renewed its proposal to require a label warning that oral hypoglycemics should be used only in cases of adult-onset, stable diabetes that could not be treated adequately by a combination of diet and insulin. The FDA clearly relied on the UGDP study in renewing this position. 40 Fed. Reg. 28587, 28591 (1975). At the time the proposal was published, the FDA invited public comment. In response to criticism of the UGDP study and the Biometric Society's audit, the FDA conducted its own audit of the UGDP study pursuant to a delegation of NIAMDD's authority to audit grantee records. In conducting this audit, the FDA examined and copied a small sample of the UGDP raw data. This audit report has been made available for public inspection. 43 Fed. Reg. 52733 (1978).

Although this labeling proposal has not yet become final, other FDA regulatory action has been taken. On July 25,

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[3] Prior to the FDA's decision to defer action, petitioners in this case sued the FDA to enjoin the proposed labeling, contesting the validity of the UGDP study. The First Circuit remanded the case to the FDA for exhaustion of administrative remedies. *Bradley* v. *Weinberger*, 483 F. 2d 410 (1973).

1977, the Secretary of HEW suspended the New Drug Application for phenformin, one of the oral hypoglycemic medications studied by the UGDP. The decision was premised in part on the findings of the UGDP study. See Order of the Secretary of Health, Education, and Welfare, July 25, 1977. After the Secretary's temporary order of suspension was issued, proceedings before the FDA continued. The Administrative Law Judge ordered the FDA to produce all UGDP data in its possession. The FDA then produced those portions of the UGDP raw data which the agency had copied, abstracted, or directly transferred to Government premises during its audit. The ALJ found that the HEW suspension order was supported by the evidence. On November 15, 1978, the Commissioner of Food and Drugs affirmed the ALJ finding that phenformin was not shown to be safe and ordered it withdrawn from the market. 44 Fed. Reg. 20967 (1979). This decision was not based substantially on the UGDP study.[4]

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[4] The order of the Commissioner discounts reliance on the UGDP study. The order states that the ALJ was correct in concluding that from "an evidentiary standpoint" the "lack of availability of underlying data casts considerable doubt on the reliability of the UGDP conclusions." 44 Fed. Reg. 20969 (1979). The ALJ did permit reference to the UGDP study as a basis for expert opinion. The Commissioner concluded that this use of the study was permissible since the data underlying expert opinions need not always be admitted to substantiate the opinions. Nearly 400 published articles were included in the record of the phenformin proceeding and none of the articles was accompanied by the raw data on which they were based. The Commissioner noted that the ALJ referenced the UGDP study in only one paragraph of his eight-page summary.

The Commissioner concluded that the agency was not required to submit the UGDP data since it had not relied upon that data, but only upon the actual study. 21 CFR § 12.85 (1979). Nevertheless, the Commissioner stated that he "reviewed the testimony of the Bureau of Drug's expert witnesses and [found] that their reliance upon the UGDP study was not substantial and cannot reasonably be characterized as pivotal to the opinions expressed by those witnesses." 44 Fed. Reg. 20969 (1979).

Petitioners had long since initiated a series of FOIA requests seeking access to the UGDP raw data. On August 7, 1975, HEW denied their request for the UGDP data on the grounds that no branch of HEW had ever reviewed or seen the raw data; that the FDA's proposed relabeling action relied on the UGDP published reports and not on an analysis of the underlying data; that the data was the property of the UGDP, a private group; and that the agencies were not required to acquire and produce those data under the FOIA.[5] The following month petitioners filed this FOIA suit in the United States District Court for the District of Columbia to require HEW to make available all of the raw data compiled by UGDP. The District Court granted summary judgment in favor of respondents, holding that HEW properly denied the request on the ground that the patient data did not constitute "agency records" under the FOIA.

The Court of Appeals affirmed on the same rationale. *Forsham* v. *Califano*, 190 U. S. App. D. C. 231, 587 F. 2d 1128 (1978). The court found that although NIAMDD is a federal agency, its grantees are not federal agencies. The court rejected the petitioners' argument that the UGDP's records were nevertheless also the federal agency's records. Although HEW has a right of access to the documents, the court reasoned that this right did not render the documents "agency records" since FOIA only applies to records which have been "created or obtained . . . in the course of doing its work."[6] *Id.*, at 239, 587 F. 2d, at 1136. The dissenting

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[5] The denial of this FOIA request preceded the FDA's audit of the UGDP data.

[6] The court opinion also suggested that a document is an "agency record" if the federal agency has a duty to obtain the record. 190 U. S. App. D. C., at 239, and n. 18, 587 F. 2d, at 1136, and n. 18 (Leventhal, J.). Judge MacKinnon concurred separately to reserve the question of whether or not records which an agency had a duty to obtain were recoverable under the FOIA. We side with Judge MacKinnon on the

judge concluded that the UGDP data were "agency records" under the FOIA since the Government had been "significantly involved" in the study through its funding, access to the raw data, and reliance on the study in its regulatory actions.

II

As we hold in the companion case of *Kissinger* v. *Reporters Committee for Freedom of the Press, ante,* p. 136, it must be established that an "agency" has "improperly withheld agency records" for an individual to obtain access to documents through an FOIA action. We hold here that HEW need not produce the requested data because they are *not* "agency records" within the meaning of the FOIA. In so holding, we reject three separate but related claims of petitioners: (1) the data they seek are "agency records" because they were at least "records" of UGDP, and UGDP in turn received its funds from a federal agency and was subject to some supervision by the agency in its use of those funds; (2) the data they seek are "agency records" because HEW, concededly a federal agency, had sufficient authority under its grant agreement to have obtained the data had it chosen to do so; and, (3) the data are agency records because they formed the basis for the published reports of UGDP, which in turn were relied upon by the FDA in the actions described above.[7]

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breadth of the principle necessary to the decision in this case. *Id.*, at 242, 587 F. 2d, at 1139.

[7] Petitioners maintain that the FDA has relied on all the raw data through reliance on the report and through reliance on information obtained pursuant to its audit of a sample of the data. The Court of Appeals found, however, that data reviewed by the FDA have been made available to petitioners. *Id.*, at 236, 587 F. 2d, at 1133. As we indicate *infra*, reliance on a document does not make it an agency record if it has not been created or obtained by a federal agency. Reliance or use may well be relevant, however, to the question of whether a record in the possession of an agency is an "agency record." See *Kissinger, ante,* at 157.

Congress undoubtedly sought to expand public rights of access to Government information when it enacted the Freedom of Information Act, but that expansion was a finite one. Congress limited access to "agency records," 5 U. S. C. § 552 (a)(4)(B),[8] but did not provide any definition of "agency records" in that Act. The use of the word "agency" as a modifier demonstrates that Congress contemplated some relationship between an "agency" and the "record" requested under the FOIA. With due regard for the policies and language of the FOIA, we conclude that data generated by a privately controlled organization which has received grant funds from an agency (hereafter grantee),[9] but which data has not at any time been obtained by the agency, are not "agency records" accessible under the FOIA.

A

We first examine petitioners' claim that the data were at least records of UGDP, and that the federal funding and supervision of UGDP alone provides the close connection necessary to render *its* records "agency records" as that term is used in the Freedom of Information Act. Congress did not define "agency record" under the FOIA, but it did define "agency." The definition of "agency" reveals a great deal about congressional intent as to the availability of records

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[8] In § 552 (a)(3) Congress did not use the term "agency records." That section provides: "[E]ach agency, upon any request for records . . . shall make the records promptly available to any person." Since the enforcement provision of the Act, § 552 (a)(4)(B), refers only to "agency records" it is certain that the disclosure obligations imposed by § 522 (a)(3) were only intended to extend to agency records. That limitation is implicit throughout the Act.

[9] We use the term "grantee" or "private grantee" to describe private recipients of federal funds not subjected to sufficient Government control to render them federal agencies. We do not suggest, by use of this term, that an organization receiving federal grant funds could never be found to be a federal agency. See *infra*, at 180, and n. 11.

from private grantees under the FOIA, and thus, a great deal about the relevance of federal funding and supervision to the definitional scope of "agency records." Congress excluded private grantees from FOIA disclosure obligations by excluding them from the definition of "agency," an action consistent with its prevalent practice of preserving grantee autonomy. It has, for example, disclaimed any federal property rights in grantee records by virtue of its funding. We cannot agree with petitioners in light of these circumstances that the very federal funding and supervision which Congress found insufficient to make the grantee an *agency* subject to the FOIA nevertheless makes its *records* accessible under the same Act.

Under 5 U. S. C. § 552 (e) an "agency" is defined as

> "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government . . . , or any independent regulatory agency."

The legislative history indicates unequivocally that private organizations receiving federal financial assistance grants are not within the definition of "agency." In their Report, the conferees stated that they did "not intend to include corporations which receive appropriated funds but are neither chartered by the Federal Government nor controlled by it, such as the Corporation for Public Broadcasting." H. Conf. Rep. No. 93–1380, pp. 14–15 (1974), reprinted in Freedom of Information Act and Amendments of 1974 Source Book 231–232 (Jt. Comm. Print 1975). Through operation of this exclusion, Congress chose not to confer any direct public rights of access to such federally funded project information.[10]

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[10] Numerous bills seeking to extend the FOIA to federal grantees have been introduced in each Congress since the 92d, but none has yet been reported out of committee. See H. R. 11013, 92d Cong., 1st Sess. (1969); H. R. 1291, 93d Cong., 1st Sess. (1973); H. R. 1205, 94th Cong., 1st Sess. (1975); H. R. 3207, 95th Cong., 1st Sess. (1977); H. R. 1465, 96th Cong., 1st Sess. (1979).

This treatment of federal grantees under FOIA is consistent with congressional treatment of them in other areas of federal law. Grants of federal funds generally do not create a partnership or joint venture with the recipient, nor do they serve to convert the acts of the recipient from private acts to governmental acts absent extensive, detailed, and virtually day-to-day supervision. *United States* v. *Orleans,* 425 U. S. 807, 818 (1976). Measured by these standards, the UGDP is not a federal instrumentality or an FOIA agency.[11]

Congress could have provided that the records generated by a federally funded grantee were federal property even though the grantee has not been adopted as a federal entity. But Congress has not done so, reflecting the same regard for the autonomy of the grantee's records as for the grantee itself. Congress expressly requires an agency to use "procurement contracts" when the "principal purpose of the instrument is the acquisition . . . of property or services for the direct benefit or use of the Federal Government. . . ." Federal Grant and Cooperative Agreement Act of 1977, § 4, 92 Stat. 4, 41 U. S. C. § 503 (1976 ed., Supp. II). In contrast, "grant agreements" must be used when money is given to a recipient "in order to accomplish a public purpose of support or stimulation authorized by Federal statute, rather than acquisition . . . of property or services. . . ." § 5, 41 U. S. C. § 504 (1976 ed., Supp. II). As in this case, where a grant was used,

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[11] Before characterizing an entity as "federal" for some purpose, this Court has required a threshold showing of substantial federal supervision of the private activities, and not just the exercise of regulatory authority necessary to assure compliance with the goals of the federal grant. See *United States* v. *Orleans,* 425 U. S. 807 (1976). While the petitioners emphasize the Government's interest in monitoring the UGDP's study, they do not contend that this supervision is sufficient to render UGDP a satellite federal agency. The funding and supervision indicated by the facts of this case are consistent with the usual grantor-grantee relationship and do not suggest the requisite magnitude of Government control. *Orleans, supra,* at 815–816.

there is no dispute that the documents created are the property of the recipient, and not the Federal Government. See 45 CFR § 74.133 (1979). The HEW regulations do retain a right to acquire the documents. Those regulations, however, clearly demonstrate that unless and until that right is exercised, the records are only the "records of grantees." 45 CFR § 74.24 (1979).[12] Therefore, we petitioners to prevail in this action, they would have obtained a right of access to some 55 million documents created, owned, and possessed by a private recipient of federal funds. While this fact itself is not dispositive of the outcome, it is nonetheless an important consideration when viewed in light of these congressional attempts to maintain the autonomy of federal grantees and their records.

The fact that Congress has chosen not to make a federal grantee an "agency" or to vest ownership of the records in the Government does not resolve with mathematical precision the question of whether the granting agency's funding and supervisory activities nevertheless make the grantee's records "agency records." Records of a nonagency certainly could become records of an agency as well. But if Congress found that federal funding and supervision did not justify direct access to the grantee's records, as it clearly did, we fail to see why we should nevertheless conclude that those identical activities were intended to permit indirect access through an expansive definition of "agency records."[13] Such a con-

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[12] The particular grant agreement in issue similarly confers on the NIAMDD a limited right of access to "records of the grantee."

[13] Nor could this distinction be explained by a hypothetical congressional preference for placing the burdens of production on the agency rather than the private grantee. Although under the petitioners' construction of the Act the request would have to be made by the agency, the administrative burdens of searching and producing, or providing access, would necessarily accrue substantially to the party in possession, *i. e.*, the private grantee.

clusion would not implement the intent of Congress; it would defeat it.

These considerations do not finally conclude the inquiry, for conceivably other facts might indicate that the documents could be "agency records" even though generated by a private grantee. The definition of "agency" and congressional policy towards grantee records indicate, however, that Congress did not intend that grant supervision short of Government control serve as a sufficient basis to make the private records "agency records" under the Act, and reveal a congressional determination to keep federal grantees free from the direct obligations imposed by the FOIA. In ascertaining the intended expanse of the term "agency records" then, we must, of course, construe the Act with regard both for the congressional purpose of increasing public access to governmental records and for this equally explicit purpose of retaining grantee autonomy.

B

Petitioners seek to prevail on their second and third theories, even though their first be rejected, by invoking a broad definition of "agency records," so as to include all documents created by a private grantee to which the Government has access, and which the Government has used. We do not believe that this broad definition of "agency records," a term undefined in the FOIA, is supported by either the language of that Act or its legislative history. We instead agree with the opinions of the courts below that Congress contemplated that an agency must first either create or obtain a record as a prerequisite to it becoming an "agency record" within the meaning of the FOIA. While it would be stretching the ordinary meaning of the words to call the data in question here "agency records," we need not rest our conclusions solely on the "plain language" rule of statutory construction. The use of the term "record" by Congress in two other Acts, and the structure

and legislative history of FOIA alike support the same conclusion.

Although Congress has supplied no definition of agency records in the FOIA, it has formulated a definition in other Acts. The Records Disposal Act, in effect at the time Congress enacted the Freedom of Information Act, provides the following threshold requirement for agency records:

> " 'records' includes all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, *made or received* by an agency of the United States Government under Federal law or in connection with the transaction of public business. . . ." 44 U. S. C. § 3301.[14] (Emphasis added.)

The Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act 23–24 (1967), S. Doc. No. 93–82, pp. 222–223 (1974), concludes that Congress intended this aspect of the Records Act definition to apply to the Freedom of Information Act.

The same standard emerges in the Presidential Records Act of 1978. The term "presidential records" is defined as "documentary materials . . . *created or received* by the President. . . ." 44 U. S. C. § 2201 (2) (1976 ed., Supp. II). (Emphasis added.) While these definitions are not disposi-

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[14] The definition of "records" under the Records Disposal Act further requires that records made or received by the agency also be "preserved or appropriate for preservation by that agency . . . as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them." Government documents made or received by an agency that are not appropriate for preservation are referred to as "nonrecord materials." 41 CFR § 101–11.401–3 (d) (1979). It has not been settled whether the FOIA definition of agency records extends to "nonrecord materials." We need not reach that question since the documents sought by petitioners do not meet the threshold requirement that they be "made or received" by a federal agency.

tive of the proper interpretation of congressional use of the word in the FOIA, it is not insignificant that Congress has associated creation or acquisition with the concept of a governmental record. The text, structure, and legislative history of the FOIA itself reinforces that significance in this case.

The only direct reference to a definition of records in the legislative history, of which we are aware, occurred during the Senate hearings leading to the enactment of FOIA. A representative of the Interstate Commerce Commission commented that "[s]ince the word 'records' . . . is not defined, we assume that it includes all papers which an agency preserves in the performance of its functions." Administrative Procedure Act: Hearings on S. 1160 et al. before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 89th Cong., 1st Sess., 244 (1965).[15] The legislative history of the FOIA abounds with other references to records acquired by an agency. For example, the legislative Reports clarify that confidential information "submitted . . . to a Government . . . agency," "obtained by the Government," or "given to an agency" otherwise subject to disclosure, was made exempt. S. Rep. No. 813, 89th Cong., 1st Sess., 9 (1965), reprinted in Freedom of Information Act Source Book, S. Doc. No. 93–82, p. 44 (Comm. Print 1974); H. R. Rep. No. 1497, 89th Cong., 2d Sess. (1966), reprinted in Source Book, at 31.

Section 552 (b)(4) provides the strongest structural support for this construction. This section exempts trade secrets and commercial or financial information "obtained from a person." This exemption was designed to protect confidential information "submitted" by a borrower to a lending agency or "obtained by the Government" through questionnaires or other inquiries, where such information "would customarily not be released to the public by the person from whom it was

[15] It is interesting to note that the witness expressed concern that such an "all-expansive meaning" necessitated clear categorical exemptions.

obtained." S. Rep. No. 813, *supra,* at 9; H. R. Rep. No. 1497, *supra,* at 10. It is significant that Congress did not include a similar exemption for confidential information contained in records which had never been "obtained from a person." It is obvious that this omission does not reflect a congressional judgment that records remaining in private control are not similarly deserving of this exemption, but rather a judgment that records which have never passed from private to agency control are *not* agency records which would require any such exemption. This possessory emphasis is buttressed by similar considerations implicit in the use of the word "withholding" in the statutory framework. See *Kissinger* v. *Reporters Committee for Freedom of the Press, ante,* p. 136.[16]

The same focus emerges in a congressional amendment to the Securities Exchange Act of 1934. That Act had provided its own standards for public access to documents generated by the Act. Congress amended the Act to provide:

> "For purposes of [the FOIA] the term 'records' includes all applications, statements, reports, contracts, correspondence, notices, and other documents *filed with* or otherwise *obtained* by the Commission pursuant to this chapter or otherwise." (Emphasis added.) 15 U. S. C. § 78x.

We think that the weight this construction lends to our conclusion is overborne neither by an agency's potential access to the grantee's information nor by its reliance on that information in carrying out the various duties entrusted to it by Congress. The Freedom of Information Act deals with "agency records," not information in the abstract. Petitioners place great reliance on the fact that HEW has a right of access to the data, and a right if it so chooses to obtain permanent custody of the UGDP records. 45 CFR §§ 74.24,

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[16] We certainly do not indicate, however, that physical possession, or initial creation, is by itself always sufficient. See *Kissinger, ante,* at 157.

74.21 (1979). But in this context FOIA applies to records which have been *in fact* obtained, and not to records which merely *could have been* obtained.[17] To construe FOIA to embrace the latter class of documents would be to extend the reach of the Act beyond what we believe Congress intended. We rejected a similar argument in *NLRB* v. *Sears, Roebuck & Co.*, 421 U. S. 132, 161–162 (1975), by holding that the FOIA imposes no duty on the agency to create records. By ordering HEW to exercise its right of access, we effectively would be compelling the agency to "create" an agency record since prior to that exercise the record was not a record of the agency. Thus without first establishing that the agency has created or obtained the document, reliance or use is similarly irrelevant.

We think the foregoing reasons dispose of all petitioners' arguments. We therefore conclude that the data petitioners seek are not "agency records" within the meaning of FOIA. UGDP is not a "federal agency" as that term is defined in the FOIA, and the data petitioners seek have not been created or obtained by a federal agency. Having failed to establish

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[17] We need not categorize what agency conduct is necessary to support a finding that it has "obtained" documents, since an unexercised right of access clearly does not satisfy this requirement. Government access to documents clearly could not be the central component of the definition of agency records contemplated by Congress since the Federal Government has access to near astronomical numbers of private documents. A mere sampling of access statutes includes: Internal Revenue Code of 1954, § 7602, 26 U. S. C. § 7602 (taxpayers or potential taxpayers); 15 U. S. C. §§ 78q, 78u (persons subject to the Securities Exchange Act of 1934); 29 U. S. C. § 657 (each employer subject to the Occupational Safety and Health Act of 1970).

Even if the Court were to accept petitioners' argument that only contractual access should give rise to "agency record" status, a limitation which does not appear readily supportable, the class of documents subject to FOIA disclosure would still be staggering. The record in this case indicates that NIAMDD alone has some 18,000 research grants outstanding.

this threshold requirement, petitioners' FOIA claim must fail, and the judgment of the Court of Appeals is accordingly

Affirmed.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

I agree with the Court that "[r]ecords of a nonagency certainly could become records of an agency as well." *Ante*, at 181. But the Court does not explain why such a conversion does not occur in this case.[1] Because I believe we should articulate standards under which to analyze such cases and because I believe that under a proper test UGDP's data should be treated as "agency records," I dissent.

I

The Court argues at length that UGDP is not an agency. But whether or not UGDP is an "agency" is simply not at issue in this case. Rather, the only question is whether data generated in the course of this UGDP study are "agency records."

The Court concedes, of course, that the statute itself does not define "agency records."[2] Therefore, our task is to con-

[1] The Court suggests that if a federal grant created a partnership or joint venture between the agency and the grantee, the grantee might become an agency and, thus, its records might become agency records. *Ante*, at 180. Likewise, the Court might reach a different result where the agency has chosen to buy data through a procurement contract instead of a grant. *Ibid.* But neither of these is an instance involving records of a nonagency. In the first the grantee becomes an agency, and in the second the records do not belong to the nonagency.

[2] Therefore, the Court surely overstates the fact in saying that Congress "clearly" found that federal funding and supervision are not relevant to whether direct access to grantee's records is justified, *ante*, at 181, and the Court does not explain why Congress' silence "reflect[s] the same regard for the autonomy of the grantee's records as for the grantee itself," *ante*, at 180. Moreover, nothing whatever is cited in the legislative history to support the Court's claim that the "purpose of retaining grantee autonomy"

strue the statutory language consistently with the purposes of FOIA.[3] As detailed in the dissenting opinion below, *Forsham* v. *Califano*, 190 U. S. App. D. C. 231, 244–245, 587 F. 2d 1128, 1141–1142 (1978) (Bazelon, J., dissenting), FOIA is a broad enactment meant to open the processes of Government to public inspection. It reflects a finding that if left to themselves agencies would operate in near secrecy.[4] FOIA was, therefore, enacted to provide access to information to enable "an informed electorate," so "vital to the proper operation of a democracy," to govern itself. S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965). Nothing whatever in the legislative history suggests that Congress meant to allow agencies to insulate important steps in decisionmaking on the basis of the technical niceties of who "owns" crucial documents.

Where the nexus between the agency and the requested information is close, and where the importance of the information to public understanding of the decisions or the operation

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was "equally explicit" as a purpose of FOIA as was increasing public access to governmental records. *Ante*, at 182.

[3] I find the Court's references to other statutes unenlightening. The Records Disposal Act and Presidential Records Act of 1978 are properly limited to records created or received because the agencies or the Executive cannot physically dispose of what they do not possess. These Acts are aimed at monitoring the physical destruction of agency documents and settling claims of ownership of Presidential documents. The agencies and the Executive cannot destroy or take for private use what they have never possessed.

As for the "structural" argument drawn from 5 U. S. C. § 552 (b)(4), I cannot imagine that trade secrets or commercial information not submitted to the Government would have been created or used for governmental purposes or with governmental funds. In short, the Government would have no claim of any kind on the information if it had not been submitted.

[4] FOIA was enacted because agencies had turned the predecessor statute on its head, transforming a public information statute into a secrecy statute. H. R. Rep. No. 1497, 89th Cong., 2d Sess. (1966), reprinted in Freedom of Information Act Source Book, S. Doc. No. 93–82, pp. 22, 25–27 (Comm. Print 1974).

of the agency is great, I believe the congressional purposes require us to hold that the information sought is an "agency record" within the meaning of FOIA.

Admittedly, this test does not establish a bright line, but the evaluation of a calculus of relevant factors is nothing new to the law.[5] The first such factor is the importance of the record to an understanding of Government activities. If, for instance, the significance of the record is limited to understanding the workings of the nonagency, the public has no FOIA-protected interest in access. The weight to be given this factor can be tested by examining the role accorded the material in agency writings and the extent to which the agency reached its conclusions in reliance upon the particular source.

Mere materiality of information, standing alone, of course, is not enough.[6] FOIA does not give the public any unrestricted right to examine all data relied on by an agency. Congress required that the information constitute an "agency record." Thus, another necessary factor is that there be a link between the agency and the record.[7] Nothing in FOIA or its history suggests, however, that the connection must amount to outright possession or creation. Instead, again drawing from the legislative purposes, I believe the link must be such that the agency has treated the record as if it were

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[5] The Court offers no manageable standards of any kind. No guidance is given to the decisionmaker as to how to determine at what point a relationship between an agency and another organization ripens into a "joint venture." And, of course, we are given no key to guide the determination of what nonagency records "become records of an agency as well." *Ante*, at 181.

[6] The Court, by insisting on analyzing petitioners' contentions separately, never addresses the full, combined force of the arguments. It is only in combination that the various factors alluded to by petitioners tell the full story of governmental reliance on and involvement with the data and, thus, the importance to the success of Congress' FOIA scheme of disclosing this information.

[7] See Note, The Definition of "Agency Records" Under the Freedom of Information Act, 31 Stan. L. Rev. 1093, 1106–1114 (1979).

part of the regulatory process, as if it were in effect a record which exists to serve the regulatory process. Government by secrecy is no less destructive of democracy if it is carried on within agencies or within private organizations serving agencies. The value of the record to the electorate is not affected by whether the relationship between the agency and the private organization is governed formally by a procurement contract, a "joint venture" agreement, or a grant.[8] The existence of this factor can be tested by examining, *inter alia*, the degree to which the impetus for the creation of the record came from the agency or was developed independently, the degree to which the creation of the record was funded publicly or privately, the extent of governmental supervision of the creation of the record, and the extent of continuing governmental control over the record.

II

On the facts of this case, I would conclude that UGDP's raw data are records of HEW. Both HEW and the FDA have taken significant actions in complete reliance on the UGDP study. The FDA has directly endorsed the study's conclusions and, in reliance thereon, sought mandatory labeling warnings on the drugs criticized by the UGDP. HEW cited the UGDP study as one of its basic sources when it suspended one of the drugs as an immediate hazard. The suggestion that these administrative actions relied solely on the published reports and not on the underlying raw data at issue here is unrealistic. The conclusions can be no stronger or weaker than the data on which they are based. One cannot even begin to evaluate an agency action without access to the raw data on which the conclusions were based, especially in a case such as this where the data are nonduplicable. The importance of the raw data in evaluating derivative conclusions was

[8] Certainly the agency cannot control the legal consequences simply by the label it attaches to a relationship.

recognized by the FDA when it employed another independent organization, the Biometric Society, to check UGDP's work. FDA secured access for the Society to the raw data, and the Society used a sample of the data.

This case is set against the background of an intense, often bitter,[9] battle being waged in the medical community over the validity of the UGDP study and the correct treatment regimen for diabetes. By endorsing the UGDP study the Federal Government has aligned itself on one side of the fight and has all but outlawed the regimen recommended by the other side. Petitioners in this case are medical scientists seeking to resolve questions that have been raised about the scientific and statistical methods underlying an agency's conclusions. This seems to me to be an archetypical instance of the need for public dissemination of the information.

Even so, I doubt that the information could be held to be an "agency record" had the Government not been so deeply involved in its creation. Petitioners have argued that the National Institutes of Health, in effect, did create these records. The agency not only completely funded the project's operation, but initiated the project and took responsibility for developing its research protocol as well. See *Forsham* v. *Califano*, 190 U. S. App. D. C., at 251, 587 F. 2d, at 1148 (Bazelon, J., voting for rehearing). They contend further that, beyond the normal level of NIH involvement in its grantees' studies set out by the Court, *ante*, at 173, the NIH exercised continuing supervision over this study through a "Policy Advisory Board" as a condition of the grant renewals.[10] *Forsham* v. *Califano*, *supra*. Finally, as the Court also

[9] One former UGDP investigator has challenged the scientific honesty of the research coordinator, who is also the current custodian of the raw data.

[10] Because the case comes to us on affirmance of the grant of respondents' motion for summary judgment, we must accept petitioners' version of any disputed facts. Thus, for instance, we are not free to de-emphasize the extent of federal supervision of the UGDP study alleged by petitioners.

acknowledges, there is no question that the Government has full access to the data under the terms of the grant and under federal regulations. Indeed, if it so chose, the Government could obtain permanent custody of the data merely by requesting it from UGDP. Thus, the data remain with the grantee only at the pleasure of the Government. In my view the record abundantly establishes that these data were developed with public funds and with Government assistance and, in large part, for governmental purposes. Therefore, I would hold that they are agency records, and I respectfully dissent.

III

I emphasize that the standards I suggest do not mean opening to the public the files of all grantees or of all who submit information to the Government. In many cases grantees' records should not be treated as agency records. But the Court's approach must inevitably undermine FOIA's great purpose of exposing Government to the people. It is unavoidable that as the work of federal agencies mushrooms both in quantity and complexity the agencies must look to outside organizations to assist in governmental tasks. Just as the explosion of federal agencies, which are not directly responsible to the electorate, worked to hide the workings of the Federal Government from voters before enactment of FOIA, S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965), the understandable tendency of agencies to rely on nongovernmental grantees to perform myriad projects distances the electorate from important information by one more step. If the records of such organizations, when drawn directly into the regulatory process, are immune from public inspection, then government by secrecy must surely return.

CROWN SIMPSON PULP CO. ET AL. v. COSTLE, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 79-797. Decided March 17, 1980

Held: The action of the Environmental Protection Agency (EPA) under the Federal Water Pollution Control Act in vetoing the issuance to petitioner pulpmill operators of National Pollutant Discharge Elimination System (NPDES) permits that were proposed by an agency of a State authorized by the EPA to issue such permits through its own program, and that granted petitioners' requests for variances from certain EPA effluent limitations and established alternative effluent limitations if the EPA disapproved the variances, is directly reviewable in the United States Court of Appeals under § 509 (b)(1)(F) of the Act, which provides for review in the courts of appeals of EPA actions "in issuing or denying" any NPDES permit. When the EPA, as here, objects to effluent limitations contained in a state-issued permit, the precise effect of its action is to "deny" a permit within the meaning of § 509 (b)(1)(F).

Certiorari granted; 599 F. 2d 897, reversed and remanded.

PER CURIAM.

Pursuant to § 301 of the Federal Water Pollution Control Act (Act), as added by the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 844, and amended by the Clean Water Act of 1977, 91 Stat. 1582, 33 U. S. C. § 1311 (1976 ed. and Supp. II), the Environmental Protection Agency (EPA) [1] promulgates regulations limiting the amount of effluent that can be discharged into navigable waters from a category or class of point sources of pollution. Requirements for particular plants or mills are implemented through National Pollutant Discharge Elimination System (NPDES) permits. EPA issues NPDES permits directly except in those States authorized by EPA to issue permits through

their own programs. §§ 402 (b), 402 (c) of the Act, 33 U. S. C. §§ 1342 (b), 1342 (c) (1976 ed. and Supp. II). EPA is notified of the actions taken by state permit-issuing authorities and may veto the issuance of any permit by state authorities by objecting in writing within 90 days. § 402 (d)(2), 33 U. S. C. § 1342 (d)(2) (1976 ed., Supp. II). This case presents the question of whether the EPA's action denying a variance and disapproving effluent restrictions contained in a permit issued by an authorized state agency is directly reviewable in the United States Court of Appeals under § 509 (b) of the Act, 86 Stat. 892, 33 U. S. C. § 1369 (b).[2]

Petitioners operate bleached kraft pulpmills which discharge pollutants into the Pacific Ocean near Eureka, Cal. In 1976, they sought NPDES permits from the California Regional Water Resources Board, North Coast Region (Regional Board).[3] The Director of EPA's Region IX Enforcement Division objected to the permits proposed by the Regional Board. Petitioners sought direct review of the EPA's action in the Court of Appeals for the Ninth Circuit.

Those direct review proceedings were stayed pending action by the California State Water Resources Control Board (State Board). The State Board set aside the orders of the Regional Board and proposed to issue new permits in their stead. App. to Pet. for Cert. 54. It granted petitioners' re-

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[1] We refer to the Administrator of EPA and to the Agency itself as EPA.

[2] Section 402 was amended in 1977, after the permits in the present case were vetoed, to give EPA the power, which it did not then have, to issue its own permit if the State fails to meet EPA's objection within a specified time. § 402 (d)(4) of the Act, as added, 91 Stat. 1599, 33 U. S. C. § 1342 (d)(4) (1976 ed., Supp. II). We do not consider the impact, if any, of this amendment on the jurisdictional issue presented herein.

[3] The EPA has authorized the State of California to administer the NPDES program through the State Water Resources Control Board. The Regional Board exercises power delegated by the latter agency.

quests for variances from EPA's effluent limitations[4] for Biochemical Oxygen Demand (BOD) and pH, but established alternative effluent limitations for BOD and pH to apply in case EPA disapproved the variances in the proposed permits. EPA denied the requested variances and vetoed the permits to the extent that they exempted petitioners from full compliance with the BOD and pH effluent limitations. Petitioners brought a direct review action in the Ninth Circuit, which was consolidated with the actions which they had individually filed earlier.[5]

The Court of Appeals dismissed the petitions for lack of jurisdiction. 599 F. 2d 897 (1979). It concluded that it had no jurisdiction under § 509 (b)(1)(E) of the Act, 33 U. S. C. § 1369 (b)(1)(E), which provides for review in the courts of appeals of actions "approving or promulgating any effluent limitation or other limitation. . . ." The Court of Appeals found this subsection inapplicable since EPA did not approve or promulgate anything when it rejected a proposed permit. 599 F. 2d, at 902. Further, the court found that the subsection applied to effluent limitations affecting categories of point sources rather than to decisions affecting particular plants only. *Ibid.*

The court also found jurisdiction lacking under § 509 (b)(1)(F) of the Act, 33 U. S. C. § 1369 (b)(1)(F), which provides for review in the courts of appeals of EPA actions "in issuing or denying any permit under [§ 402 of the Act]. . . ."[6] The court recognized that in States where EPA itself admin-

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[4] EPA's national effluent limitations for the bleached segment of the American paper industry were substantially upheld in *Weyerhaeuser Co.* v. *Costle*, 191 U. S. App. D. C. 309, 590 F. 2d 1011 (1978).

[5] The petitions challenging the actions of the Regional Board became moot once the State Board set aside the Regional Board's orders. The only live administrative decision under review at the time of the Court of Appeals' decision would appear to be that of the State Board.

[6] State-proposed NPDES permits are issued under authority of § 402 (b) of the Act, 33 U. S. C. § 1342 (b) (1976 ed. and Supp. II).

isters the permit program, this subsection unquestionably provides for direct review in the courts of appeals. 599 F. 2d, at 903. However, because California administers its own permit-issuing program, EPA in the present case did no more than veto an NPDES permit proposed by the state authority. The Court of Appeals found that under its decision in *Washington* v. *EPA*, 573 F. 2d 583 (1978) (*Scott Paper*), EPA's veto of a state-issued permit did not constitute "issuing or denying" a permit and therefore did not clothe the court with jurisdiction.

District Judge Renfrew, sitting by designation, concurred in the majority's analysis of § 509 (b)(1)(E), and also agreed that the § 509 (b)(1)(F) question was foreclosed by *Scott Paper*. 599 F. 2d, at 905. However, Judge Renfrew, believing that *Scott Paper* was wrongly decided, urged the Court of Appeals to take the present case en banc in order to consider overruling that decision. He argued that vesting jurisdiction in the courts of appeals under § 509 (b)(1)(F) would best comport with the congressional goal of ensuring prompt resolution of challenges to EPA's actions and would recognize that EPA's veto of a state-issued permit is functionally similar to its denial of a permit in States which do not administer an approved permit-issuing program.

We agree with the concurring opinion and hold that the Court of Appeals had jurisdiction over this action under § 509 (b)(1)(F).[7] When EPA, as here, objects to effluent limitations contained in a state-issued permit, the precise effect of its action is to "den[y]" a permit within the meaning of § 509 (b)(1)(F). Under the contrary construction of the Court of Appeals, denials of NPDES permits would be reviewable at different levels of the federal-court system depending on the fortuitous circumstance of whether the State

[7] Because we find that the Court of Appeals had jurisdiction over this action under § 509 (b)(1)(F), we do not decide whether it might also have had jurisdiction under § 509 (b)(1)(E).

in which the case arose was or was not authorized to issue permits.[8] Moreover, the additional level of judicial review in those States with permit-issuing authority would likely cause delays in resolving disputes under the Act. Absent a far clearer expression of congressional intent, we are unwilling to read the Act as creating such a seemingly irrational bifurcated system.[9] We therefore grant the petition for certiorari, reverse the judgment of the Court of Appeals, and remand the case for further proceedings consistent with this opinion.

So ordered.

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[8] Cf. *E. I. du Pont de Nemours & Co.* v. *Train*, 430 U. S. 112, 127–128, n. 18 (1977).

[9] Our holding is consistent with the approach taken by the Court of Appeals for the Sixth Circuit, *Republic Steel Corp.* v. *Costle*, 581 F. 2d 1228, 1230, n. 1 (1978), cert. denied, 440 U. S. 909 (1979); *Ford Motor Co.* v. *EPA*, 567 F. 2d 661, 668 (1977), and with dicta in the Second and Ninth Circuits, *Mianus River Preservation Comm.* v. *Administrator, EPA*, 541 F. 2d 899, 909 (CA2 1976); *Shell Oil Co.* v. *Train*, 585 F. 2d 408, 412 (CA9 1978). The Court of Appeals in the present case relied on decisions holding that the EPA's failure to object to a state-issued permit is not reviewable in the courts of appeals under § 509. *Save the Bay, Inc.* v. *Administrator, EPA*, 556 F. 2d 1282 (CA5 1977); *Mianus River Preservation Comm., supra*. However, those cases may be distinguishable because EPA's failure to object, as opposed to its affirmative veto of a state-issued permit, would not necessarily amount to "Administrator's action" within the meaning of § 509 (b)(1).

Reporter's Note

The next page is purposely numbered 901. The numbers between 197 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FROM FEBRUARY 25 THROUGH MARCH 17, 1980

February 25, 1980

Affirmed on Appeal

No. 79–953. Feeney *v.* Personnel Administrator of Massachusetts et al. Affirmed on appeal from D. C. Mass. Reported below: 475 F. Supp. 109.

Miscellaneous Orders

No. D–173. In re Disbarment of Salls. Disbarment entered. [For earlier order herein, see 444 U. S. 894.]

No. D–178. In re Disbarment of Smith. Disbarment entered. [For earlier order herein, see 444 U. S. 912.]

No. 9, Orig. United States *v.* Louisiana et al. Motion of Louisiana for divided argument granted. Mr. Justice Marshall took no part in the consideration or decision of this motion. [For earlier order herein, see, *e. g.*, 444 U. S. 1064.]

No. 78–6885. Hicks *v.* Oklahoma. Ct. Crim. App. Okla. [Certiorari granted, 444 U. S. 963.] Motion of Jan Eric Cartwright, Attorney General of Oklahoma, to permit Janet L. Cox to present oral argument *pro hac vice* granted.

No. 79–4. Williams et al. *v.* Zbaraz et al.;

No. 79–5. Miller, Acting Director, Department of Public Aid of Illinois, et al. *v.* Zbaraz et al.; and

No. 79–491. United States *v.* Zbaraz et al. D. C. N. D. Ill. [Probable jurisdiction postponed, 444 U. S. 962.] Petition for rehearing of denial of motion for appointment of Alan Ernest as counsel for children unborn and born alive denied.

No. 79–66. AARON *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 2d Cir. [Certiorari granted, 444 U. S. 914.] Motion of Securities Industry Assn. for leave to participate in oral argument as *amicus curiae* denied.

No. 79–509. EXXON CORP. *v.* DEPARTMENT OF REVENUE OF WISCONSIN. Sup. Ct. Wis. [Probable jurisdiction noted, 444 U. S. 961.] Motions of Frank M. Keesling and Multistate Tax Commission for leave to file briefs as *amici curiae* granted.

No. 79–521. CONSUMER PRODUCT SAFETY COMMISSION ET AL. *v.* GTE SYLVANIA, INC., ET AL. C. A. 3d Cir. [Certiorari granted, 444 U. S. 979.] Motion of Consumer Federation of America for leave to participate in oral argument as *amicus curiae* denied.

No. 79–672. NATIONAL LABOR RELATIONS BOARD *v.* RETAIL STORE EMPLOYEES UNION LOCAL 1001, RETAIL CLERKS INTERNATIONAL ASSN., AFL–CIO. C. A. D. C. Cir. [Certiorari granted, 444 U. S. 1011.] Motion of respondent Safeco Title Insurance Co. for additional time for oral argument denied.

No. 79–1056. NORTHWEST AIRLINES, INC. *v.* TRANSPORT WORKERS UNION OF AMERICA, AFL–CIO, ET AL. C. A. D. C. Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this order.

No. 79–6019. BRAUDRICK *v.* ESTELLE, CORRECTIONS DIRECTOR; and

No. 79–6044. SMITH *v.* HEEDE, CLERK, U. S. DISTRICT COURT, ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

Probable Jurisdiction Noted

No. 79-5903. H. L. *v.* MATHESON, GOVERNOR OF UTAH, ET. AL. Appeal from Sup. Ct. Utah. Motion of appellant for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 604 P. 2d 907.

Certiorari Granted

No. 79-900. FEDERAL TRADE COMMISSION ET AL. *v.* STANDARD OIL COMPANY OF CALIFORNIA. C. A. 9th Cir. Certiorari granted. Reported below: 596 F. 2d 1381.

No. 79-1003. IMPERIAL COUNTY, CALIFORNIA, ET AL. *v.* MUNOZ ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 604 F. 2d 1174.

Certiorari Denied

No. 79-552. MITSUI & CO., LTD., ET AL. *v.* INDUSTRIAL INVESTMENT DEVELOPMENT CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 594 F. 2d 48.

No. 79-693. CONSUMER CREDIT INSURANCE AGENCY, INC., ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 599 F. 2d 770.

No. 79-743. MOORE *v.* UNITED STATES;
No. 79-5612. PALMER *v.* UNITED STATES; and
No. 79-5624. RICHARDSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 610 F. 2d 808.

No. 79-764. FALK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 605 F. 2d 1005.

No. 79-775. WHITMAN, SHERIFF *v.* FORD. C. A. 5th Cir. Certiorari denied. Reported below: 601 F. 2d 1192.

No. 79-783. PAYNE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 602 F. 2d 1215.

No. 79-884. TUCKER *v.* HARTFORD NATIONAL BANK & TRUST CO. Sup. Ct. Conn. Certiorari denied. Reported below: — Conn. —, — A. 2d —.

No. 79-908. TANKERSLEY ET AL. *v.* TRINITY PRESBYTERIAN CHURCH OF MONTGOMERY, ALA., ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 374 So. 2d 861.

No. 79-913. GONZALEZ *v.* DEPARTMENT OF HUMAN RESOURCES OF TEXAS. Ct. Civ. App. Tex., 13th Sup. Jud. Dist. Certiorari denied. Reported below: 581 S. W. 2d 522.

No. 79-924. THOMPSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 606 F. 2d 149.

No. 79-937. VARGO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 609 F. 2d 504.

No. 79-944. DAYTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 604 F. 2d 931.

No. 79-951. WOODSIDE, ADMINISTRATRIX *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 606 F. 2d 134.

No. 79-974. MINNESOTA *v.* CLARK ET AL. Sup. Ct. Minn. Certiorari denied. Reported below: 282 N. W. 2d 902.

No. 79-991. HOWARD *v.* DES MOINES REGISTER & TRIBUNE CO. ET AL. Sup. Ct. Iowa. Certiorari denied. Reported below: 283 N. W. 2d 289.

No. 79-1024. AMERICAN CONTINENTAL HOMES, INC., ET AL. *v.* KFK CORP. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 71 Ill. App. 3d 304, 389 N. E. 2d 232.

No. 79-1025. ATKINS *v.* WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied. Reported below: — W. Va. —, 261 S. E. 2d 55.

No. 79-1038. PALMER *v.* INDUSTRIAL COMMISSION OF THE STATE OF COLORADO ET AL. Ct. App. Colo. Certiorari denied.

No. 79-1043. City of Black Jack et al. *v.* Bates et al. C. A. 8th Cir. Certiorari denied. Reported below: 605 F. 2d 1033.

No. 79-1045. Murphy *v.* Owens-Corning Fiberglas Corp. C. A. 10th Cir. Certiorari denied.

No. 79-1049. Smith *v.* Arkansas. Ct. App. Ark. Certiorari denied. Reported below: — Ark. —, 587 S. W. 2d 50.

No. 79-1065. O'Hair *v.* Texas. C. A. 5th Cir. Certiorari denied. Reported below: 607 F. 2d 1005.

No. 79-1067. McMillan *v.* Marine Sulphur Shipping Corp. C. A. 2d Cir. Certiorari denied. Reported below: 607 F. 2d 1034.

No. 79-1115. James *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 609 F. 2d 36.

No. 79-1151. Ellis *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 610 F. 2d 823.

No. 79-1155. Gardner *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1292.

No. 79-5685. Hooker *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 607 F. 2d 286.

No. 79-5712. Strong *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 612 F. 2d 575.

No. 79-5724. McNear *v.* Kentucky. Sup. Ct. Ky. Certiorari denied. Reported below: 586 S. W. 2d 720.

No. 79-5763. Starks *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 611 F. 2d 374.

No. 79-5788. Marinoff *v.* Environmental Protection Agency. C. A. 2d Cir. Certiorari denied. Reported below: 610 F. 2d 806.

No. 79–5784. EVANS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 605 F. 2d 553.

No. 79–5794. RICHMAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 602 F. 2d 547.

No. 79–5806. HUNT *v.* NUCLEAR REGULATORY COMMISSION ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 611 F. 2d 332.

No. 79–5879. STEBBINS *v.* GOVERNMENT EMPLOYEES INSURANCE CO. C. A. D. C. Cir. Certiorari denied.

No. 79–5883. MONTALBANO *v.* NEW JERSEY. Super Ct. N. J. Certiorari denied.

No. 79–5893. YOUNG *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: — Ind. —, 394 N. E. 2d 123.

No. 79–5895. BROWN *v.* HILTON, PRISON SUPERINTENDENT, ET AL. C. A. 3d Cir. Certiorari denied.

No. 79–5897. DRAPER *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 79–5898. VON ARX *v.* HARRISBURG STATE HOSPITAL ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 605 F. 2d 1199.

No. 79–5905. SKOLNICK *v.* INDIANA ET AL. Ct. App. Ind. Certiorari denied. Reported below: — Ind. App. —, 388 N. E. 2d 1156.

No. 79–5908. GREEN *v.* WALTERS ET AL. C. A. 8th Cir. Certiorari denied.

No. 79–5909. KIRKLAND *v.* LEEKE, ATTORNEY GENERAL OF SOUTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 609 F. 2d 508.

No. 79–5910. COLE *v.* FORD, JUDGE. Ct. App. Tenn. Certiorari denied.

No. 79–5906. GILLIAM *v.* LOS ANGELES MUNICIPAL COURT (CALIFORNIA, REAL PARTY IN INTEREST). Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 97 Cal. App. 3d 704, 159 Cal. Rptr. 74.

No. 79–5915. KORN *v.* OHIO. Ct. App. Ohio, Butler County. Certiorari denied.

No. 79–5929. TAYLOR *v.* CITY OF ATLANTA ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 602 F. 2d 990.

No. 79–5944. RODRIGUEZ *v.* SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 1st Cir. Certiorari denied. Reported below: 612 F. 2d 569.

No. 79–5965. AMISTADI *v.* SPANGENBERG ET AL. Sup. Ct. Ohio. Certiorari denied.

No. 79–5976. JOHNSON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 79–5997. BARRY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1291.

No. 79–6001. DELAY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 615 F. 2d 1365.

No. 79–6005. BROWN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 612 F. 2d 1310.

No. 79–6010. WILLIAMS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 611 F. 2d 375.

No. 79–376. LAKESIDE BRIDGE & STEEL CO. *v.* MOUNTAIN STATE CONSTRUCTION CO., INC. C. A. 7th Cir. Certiorari denied. Reported below: 597 F. 2d 596.

MR. JUSTICE WHITE, with whom MR. JUSTICE POWELL joins, dissenting.

I dissent from the denial of the petition for certiorari.

Petitioner, a Wisconsin corporation with its place of business in Milwaukee, Wis., contracted with respondent, a West

Virginia corporation with its principal place of business in Charleston, W. Va., to sell structural assemblies for incorporation by respondent into the outlet works of a dam and reservoir in Virginia. Aside from the contacts arising from the negotiation, execution, and performance of this contract, respondent has never had any connection with the State of Wisconsin. Petitioner's agent initiated the negotiations by visiting respondent's offices in West Virginia and delivering a quotation. The quotation provided that "[a]ny order arising out of this proposal . . . is subject to home office acceptance at Milwaukee, Wisconsin." Respondent then mailed petitioner its purchase order referring to petitioner's quotation. Petitioner signed the purchase order in Milwaukee and returned it to respondent together with a proposed modification, which became part of the contract when respondent treated the modified order as effective. During the course of their negotiations both parties initiated other communications between their respective offices either by telephone or by mail.

The contract provided that the goods were to be shipped "F. O. B. SELLERS [*sic*] PLANT MILWAUKEE, WISCONSIN with freight allowed to rail siding nearest project site," and stated that Wisconsin law would govern the transaction. According to petitioner, Pet. for Cert. 4, the total contract price was $1,281,750.00. Petitioner proceeded to manufacture the goods at its plant in Wisconsin and ship them to the project site in Virginia. Respondent asserted that some of the goods were defective and withheld part of the purchase price.

Petitioner thereupon filed the present action in a Wisconsin state court to recover the unpaid balance on the contract. It alleged personal jurisdiction under Wisconsin's long-arm statute, Wis. Stat. §§ 801.05, 801.11 (1975), which has been interpreted to reach as far as due process will allow, *Flambeau Plastics Corp.* v. *King Bee Mfg. Co.*, 24 Wis. 2d 459, 464, 129 N. W. 2d 237, 240 (1964). Respondent removed the case

to the United States District Court for the Eastern District of Wisconsin. It there filed a motion to dismiss for lack of personal jurisdiction or, in the alternative, to transfer the case to a federal district court in Virginia or West Virginia. The court denied the motion and entered summary judgment for petitioner on the merits.

The Court of Appeals for the Seventh Circuit reversed, 597 F. 2d 596 (1979), holding that respondent's contacts with the Wisconsin forum were not sufficient to satisfy the "minimum contacts" test of *International Shoe Co.* v. *Washington*, 326 U. S. 310, 316 (1945). The court found that the contacts with the forum consisted solely of "unilateral activity of [one] who claim[s] some relationship with a nonresident defendant" of the type found insufficient to sustain personal jurisdiction in *Hanson* v. *Denckla*, 357 U. S. 235, 253 (1958). Although respondent ordered the goods from a Wisconsin corporation with knowledge that they were likely to be manufactured in Wisconsin, respondent did not thereby "purposefully avai[l] itself of the privilege of conducting activities within the forum State," *ibid.*, since the contract left petitioner with absolute discretion as to where the goods would be manufactured. Nor did the Court of Appeals find the requisite minimum contacts in (a) the contract provision requiring shipment f. o. b. petitioner's plant in Milwaukee, (b) respondent's use of interstate telephone and mail services to communicate with petitioner in Wisconsin, or (c) respondent's sending the purchase order to Wisconsin. The Court of Appeals therefore remanded the case to the District Court with directions to vacate the judgment and either dismiss the case or transfer it to another district.

As the Court of Appeals noted, 597 F. 2d, at 601, the question of personal jurisdiction over a nonresident corporate defendant based on contractual dealings with a resident plaintiff has deeply divided the federal and state courts. Cases arguably in conflict with the decision below include: *Pedi Bares, Inc.* v. *P & C Food Markets, Inc.*, 567 F. 2d 933 (CA10

1977); *United States R. Equipment Co.* v. *Port Huron & Detroit R. Co.*, 495 F. 2d 1127 (CA7 1974); *Product Promotions, Inc.* v. *Cousteau*, 495 F. 2d 483, 494–499 (CA5 1974); *Ajax Realty Corp.* v. *J. F. Zook, Inc.*, 493 F. 2d 818 (CA4 1972), cert. denied *sub nom. Durell Products, Inc.* v. *Ajax Realty Corp.*, 411 U. S. 966 (1973); *In-Flight Devices Corp.* v. *Van Dusen Air, Inc.*, 466 F. 2d 220 (CA6 1972); *O'Hare Int'l Bank* v. *Hampton*, 437 F. 2d 1173 (CA7 1971); *Electro-Craft Corp.* v. *Maxwell Electronics Corp.*, 417 F. 2d 365 (CA8 1969); *Manufacturers' Lease Plans, Inc.* v. *Alverson Draughon College*, 115 Ariz. 358, 565 P. 2d 864 (1977) (en banc); *Colony Press, Inc.* v. *Fleeman*, 17 Ill. App. 3d 14, 308 N. E. 2d 78 (1974); *Miller* v. *Glendale Equipment & Supply, Inc.*, 344 So. 2d 736 (Miss. 1977); *McIntosh* v. *Navaro Seed Co.*, 81 N. M. 302, 466 P. 2d 868 (1970); *State ex rel. White Lumber Sales, Inc.* v. *Sulmonetti*, 252 Ore. 121, 448 P. 2d 571 (1968) (en banc); *Proctor & Schwartz, Inc.* v. *Cleveland Lumber Co.*, 228 Pa. Super. 12, 323 A. 2d 11 (1974); *Zerbel* v. *H. L. Federman & Co.*, 48 Wis. 2d 54, 179 N. W. 2d 872 (1970), appeal dismissed, 402 U. S. 902 (1971). Cases arguably supporting the decision below include: *Republic Int'l Corp.* v. *Amco Engineers, Inc.*, 516 F. 2d 161, 167 (CA9 1975) (dictum); *Whittaker Corp.* v. *United Aircraft Corp.*, 482 F. 2d 1079, 1084–1085 (CA1 1973) (construing state law); *E. R. Callender Printing Co.* v. *District Court*, 182 Colo. 25, 510 P. 2d 889 (1973) (en banc) (construing state law); *Rath Packing Co.* v. *Intercontinental Meat Traders, Inc.*, 181 N. W. 2d 184 (Iowa 1970); *O. N. Jonas Co.* v. *B & P Sales Corp.*, 232 Ga. 256, 206 S. E. 2d 437 (1974) (construing state law); *Marshall Egg Transport Co.* v. *Bender-Goodman Co.*, 275 Minn. 534, 148 N. W. 2d 161 (1967) (construing state law); *Conn* v. *Whitmore*, 9 Utah 2d 250, 342 P. 2d 871 (1959) (construing state law); *Sun-X Int'l Co.* v. *Witt*, 413 S. W. 2d 761 (Tex. Civ. App. 1967). The question at issue is one of considerable importance to contractual dealings between purchasers and sellers located in

different States. The disarray among federal and state courts noted above may well have a disruptive effect on commercial relations in which certainty of result is a prime objective. That disarray also strongly suggests that prior decisions of this Court offer no clear guidance on the question. I would grant the petition in order to address this important problem.

No. 79-802. JANELLE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE MARSHALL would grant certiorari. Reported below: 601 F. 2d 604.

No. 79-901. OHIO *v.* KORN. Ct. App. Ohio, Butler County. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 79-959. IOWA ELECTRIC LIGHT & POWER CO. *v.* ATLAS CORP. C. A. 8th Cir. Certiorari denied. MR. JUSTICE WHITE and MR. JUSTICE POWELL would grant certiorari in order to address the conflict among state and federal courts noted in MR. JUSTICE WHITE's dissent from denial of certiorari in *Lakeside Bridge & Steel Co.* v. *Mountain State Construction Co.*, No. 79-376, *ante*, p. 907. MR. JUSTICE BLACKMUN would grant certiorari and set case for oral argument. Reported below: 603 F. 2d 1301.

No. 79-1005. ALTON BOX BOARD CO. ET AL. *v.* THREE J. FARMS, INC., ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 609 F. 2d 112.

No. 79-1057. GILBERT *v.* UNION CARBIDE CORP. C. A. 7th Cir. Motion of Louis Robertson for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 601 F. 2d 600.

No. 79-1064. HANKINSON *v.* RUHLMAN. C. A. 3d Cir. Certiorari denied. MR. JUSTICE WHITE and MR. JUSTICE POWELL would grant certiorari. Reported below: 605 F. 2d 1197.

Rehearing Denied

No. 79-681. SHUFFMAN, EXECUTRIX *v.* HARTFORD TEXTILE CORP. ET AL., 444 U. S. 1011;

No. 79-810. KNAPP *v.* KENTUCKY, 444 U. S. 1018;

No. 79-5305. NEUMANN *v.* UNITED STATES, 444 U. S. 1019;

No. 79-5558. EATON *v.* NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES, 444 U. S. 1046;

No. 79-5604. LOCKETT *v.* BLACKBURN, WARDEN, 444 U. S. 1010; and

No. 79-5627. SANDERS ET AL. *v.* TARBUTTON ET AL., 444 U. S. 1023. Petitions for rehearing denied.

No. 79-5114. WARREN *v.* MISSISSIPPI, 444 U. S. 956. Petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

MARCH 3, 1980

Appeals Dismissed

No. 79-928. BRIDGEPORT HYDRAULIC CO. ET AL. *v.* DIVISION OF PUBLIC UTILITY CONTROL OF CONNECTICUT; and

No. 79-936. NEW HAVEN WATER CO. ET AL. *v.* DIVISION OF PUBLIC UTILITY CONTROL OF CONNECTICUT. Appeals from Super. Ct. Conn., Hartford-New Britain Jud. Dist., dismissed for want of substantial federal question.

No. 79-1073. MUTUAL OF OMAHA INSURANCE CO. *v.* EGAN. Appeal from Sup. Ct. Cal. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 24 Cal. 3d 809, 598 P. 2d 452.

Certiorari Granted—Vacated and Remanded

No. 78-67. TRUSTEES OF BOSTON UNIVERSITY *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 1st Cir. Certiorari granted, judgment vacated, and case remanded for further

consideration in light of *NLRB* v. *Yeshiva University,* 444 U. S. 672 (1980). Reported below: 575 F. 2d 301.

Miscellaneous Orders

No. 83, Orig. MARYLAND ET AL. *v.* LOUISIANA. Motion for appointment of Special Master granted. Motion of Columbia Gas Transmission Corp. et al. for leave to file an answer to motion for appointment of Special Master granted.

It is ordered that John F. Davis, Esquire, of Washington, D. C., be appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem necessary to call for. The Special Master is directed to submit such reports as he may deem appropriate.

The compensation of the Special Master, the allowances to him, the compensation paid to his technical, stenographic and clerical assistants, the cost of printing his report, and all other proper expenses shall be charged against and be borne by the parties in such proportion as the Court may hereafter direct.

It is further ordered that if the position of Special Master in this case becomes vacant during a recess of the Court, THE CHIEF JUSTICE shall have authority to make a new designation which shall have the same effect as if originally made by the Court herein.

Motions of Columbia Gas Transmission Corp. et al. and New Jersey for leave to intervene referred to the Special Master. Motion of plaintiffs for judgment on the pleadings and motion of Columbia Gas Transmission Corp. et al. for leave to file motion for judgment on the pleadings referred to the Special Master. Motion of Associated Gas Distributors for leave to file a brief as *amicus curiae* referred to the Special Master. [For earlier order herein, see 442 U. S. 937.]

No. 84, Orig. UNITED STATES *v.* ALASKA. Motion for leave to file a counterclaim referred to the Special Master. [For earlier order herein, see, *e. g.*, 444 U. S. 1065.]

No. 79–289. PRUNEYARD SHOPPING CENTER ET AL. *v.* ROBINS ET AL. Sup. Ct. Cal. [Probable jurisdiction postponed, 444 U. S. 949.] Motion of Solicitor General for divided argument granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. 79–703. CAREY, STATE'S ATTORNEY OF COOK COUNTY *v.* BROWN ET AL. C. A. 7th Cir. [Probable jurisdiction noted, 444 U. S. 1011.] Motions of New England Legal Foundation and Pacific Legal Foundation et al. for leave to file briefs as *amici curiae* granted.

No. 79–1082. NATIONAL LABOR RELATIONS BOARD *v.* INTERNATIONAL LONGSHOREMEN'S ASSN., AFL–CIO, ET AL. C. A. D. C. Cir. [Certiorari granted, 444 U. S. 1042.] Motion of the Solicitor General for additional time for oral argument granted and 15 additional minutes allotted for that purpose. Respondents also allotted 15 additional minutes for oral argument.

Certiorari Granted

No. 79–824. FEDERAL COMMUNICATIONS COMMISSION ET AL. *v.* WNCN LISTENERS GUILD ET AL.;

No. 79–825. INSILCO BROADCASTING CORP. ET AL. *v.* WNCN LISTENERS GUILD ET AL.;

No. 79–826. AMERICAN BROADCASTING COS., INC., ET AL. *v.* WNCN LISTENERS GUILD ET AL.; and

No. 79–827. NATIONAL ASSOCIATION OF BROADCASTERS ET AL. *v.* WNCN LISTENERS GUILD ET AL. C. A. D. C. Cir. Certiorari granted, cases consolidated, and a total of two hours allotted for oral argument. Reported below: 197 U. S. App. D. C. 319, 610 F. 2d 838.

Certiorari Denied. (See also No. 79–1073, *supra.*)

No. 79–374. BIRMINGHAM TRUST NATIONAL BANK *v.* HARRISON ET AL.; and

No. 79–386. HARRISON *v.* BIRMINGHAM TRUST NATIONAL BANK ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 371 So. 2d 883.

No. 79–729. MILLICAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 600 F. 2d 273.

No. 79–784. GROVER, TRUSTEE IN BANKRUPTCY *v.* COUNTY OF NAPA. C. A. 9th Cir. Certiorari denied. Reported below: 597 F. 2d 181.

No. 79–790. COMMITTEE FOR AUTO RESPONSIBILITY ET AL. *v.* FREEMAN, ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 195 U. S. App. D. C. 410, 603 F. 2d 992.

No. 79–815. DIPALERMO *v.* UNITED STATES; and

No. 79–819. LOMBARDI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 606 F. 2d 17.

No. 79–876. MCILVANE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 611 F. 2d 375.

No. 79–956. FORT VANCOUVER PLYWOOD CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 604 F. 2d 596.

No. 79–963. TRANSCONTINENTAL GAS PIPE LINE CORP. *v.* FEDERAL ENERGY REGULATORY COMMISSION. C. A. 5th Cir. Certiorari denied. Reported below: 589 F. 2d 186.

No. 79–973. BURGETT ET UX. *v.* FEDERAL LAND BANK OF WICHITA. Sup. Ct. N. M. Certiorari denied.

No. 79–984. INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRON WORKERS, LOCAL 433 *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 600 F. 2d 770.

No. 79-1006. First Multifund for Daily Income, Inc. *v.* United States. Ct. Cl. Certiorari denied. Reported below: — Ct. Cl. —, 602 F. 2d 332.

No. 79-1055. Federal Energy Regulatory Commission *v.* United Gas Pipe Line Co. C. A. 5th Cir. Certiorari denied. Reported below: 597 F. 2d 581.

No. 79-1058. Champion Spark Plug Co. *v.* Gyromat Corp. C. A. 2d Cir. Certiorari denied. Reported below: 603 F. 2d 361.

No. 79-1071. Arkansas Louisiana Gas Co. *v.* Luster et al. C. A. 8th Cir. Certiorari denied. Reported below: 604 F. 2d 31.

No. 79-1072. Flores *v.* Cabot Corp. et al. C. A. 5th Cir. Certiorari denied. Reported below: 604 F. 2d 385.

No. 79-1075. Guyton, a Minor by Shepherd, Administratrix *v.* Jensen et al. C. A. 9th Cir. Certiorari denied. Reported below: 606 F. 2d 248.

No. 79-1076. Trustees of the Operating Engineers Pension Trust et al. *v.* Pilatti. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 96 Cal. App. 3d 63, 157 Cal. Rptr. 594.

No. 79-1077. Galich *v.* Catholic Bishop of Chicago. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 75 Ill. App. 3d 538, 394 N. E. 2d 572.

No. 79-1079. Rohrer *v.* Missouri. Ct. App. Mo., Southern Dist. Certiorari denied. Reported below: 589 S. W. 2d 121.

No. 79-1085. Lumpkin *v.* City of Little Rock. C. A. 8th Cir. Certiorari denied. Reported below: 608 F. 2d 291.

No. 79-1087. Leeward Petroleum, Ltd. *v.* Mene Grande Oil Co. et al. C. A. 3d Cir. Certiorari denied.

No. 79–1088. BORA *v.* MITCHELL BROTHERS FILM GROUP ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 604 F. 2d 852.

No. 79–1091. NODVIN *v.* NODVIN. Sup. Ct. Ga. Certiorari denied. Reported below: 244 Ga. 447, 259 S. E. 2d 636.

No. 79–1129. MANSION HOUSE CENTER NORTH REDEVELOPMENT CO. ET AL. *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 605 F. 2d 1090.

No. 79–1137. FOTOMAT CORP. *v.* PHOTOVEST CORP. C. A. 7th Cir. Certiorari denied. Reported below: 606 F. 2d 704.

No. 79–1167. GOLDSMITH *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied.

No. 79–5360. MORRIS *v.* CATE-MCLAURIN CO. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 599 F. 2d 1048.

No. 79–5551. JACKSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 601 F. 2d 1193.

No. 79–5639. KING *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 374 So. 2d 808.

No. 79–5662. FEASTER *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 79–5663. WILLIAMS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 79–5672. SHIELDS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 76 Ill. 2d 543, 394 N. E. 2d 1161.

No. 79–5693. BRYANT *v.* MARYLAND. C. A. 4th Cir. Certiorari denied. Reported below: 610 F. 2d 809.

No. 79–5697. LOUDHAWK ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: — F. 2d —.

No. 79-5725. WILLERS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 608 F. 2d 1375.

No. 79-5726. DAVIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 608 F. 2d 698.

No. 79-5762. MALONEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 607 F. 2d 222.

No. 79-5769. DALL *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 608 F. 2d 910.

No. 79-5842. BROWN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 79-5851. ALSTON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 197 U. S. App. D. C. 276, 609 F. 2d 531.

No. 79-5864. EVANS *v.* STEPHENSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 609 F. 2d 507.

No. 79-5894. CHAPMAN *v.* JAGO, CORRECTIONAL SUPERINTENDANT. C. A. 6th Cir. Certiorari denied. Reported below: 612 F. 2d 580.

No. 79-5917. HUNT *v.* GREENBERG, DISTRICT ATTORNEY OF ALBANY COUNTY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 79-5918. TINDER *v.* SISTER ROSE PAULA ET AL. C. A. 1st Cir. Certiorari denied.

No. 79-5934. MILLER *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 79-5936. HENTGES *v.* TORAL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 79-5939. SHAFFNER *v.* WADE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 612 F. 2d 582.

No. 79-5950. CAMPBELL ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 609 F. 2d 922.

No. 79-5973. SELLARS *v.* COMMUNITY RELEASE BOARD OF CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 605 F. 2d 563.

No. 79-5978. BROWN *v.* THOMPSON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 611 F. 2d 371.

No. 79-6023. JOHNSON *v.* HANBERRY, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 608 F. 2d 1371.

No. 79-6024. MITCHELL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 613 F. 2d 779.

No. 79-6030. MCMILLIAN ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 611 F. 2d 257.

No. 79-6032. THOMAS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 612 F. 2d 575.

No. 79-6034. SHUCKAHOSEE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 609 F. 2d 1351.

No. 79-6048. IVES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 609 F. 2d 930.

No. 79-6060. DUPREE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 606 F. 2d 829.

No. 79-608. TEXAS *v.* MIXON; and TEXAS *v.* DIXON. Ct. Crim. App. Tex. Motion of respondent Mixon for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 583 S. W. 2d 378 (first case); 583 S. W. 2d 793 (second case).

No. 79-1084. ESTELLE, CORRECTIONS DIRECTOR *v.* CORPUS ET AL. C. A. 5th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 605 F. 2d 175.

No. 79–949. TEXAS *v.* REYNOLDS; and TEXAS *v.* COLUNGA. Ct. Crim. App. Tex. Motion of respondent Reynolds for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 588 S. W. 2d 900 (first case); 587 S. W. 2d 426 (second case).

No. 79–962. TENNESSEE GAS PIPELINE CO., A DIVISION OF TENNECO, INC. *v.* FEDERAL ENERGY REGULATORY COMMISSION. C. A. D. C. Cir. Motion of petitioner to defer consideration of petition for writ of certiorari and certiorari denied. Reported below: 196 U. S. App. D. C. 187, 606 F. 2d 1094.

No. 79–5942. GIBSON *v.* RICKETTS, WARDEN. Sup. Ct. Ga. Certiorari denied. Reported below: 244 Ga. 482, 260 S. E. 2d 877.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia,* 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

Rehearing Denied

No. 78–1143. VANCE, SECRETARY OF STATE *v.* TERRAZAS, 444 U. S. 252;

No. 78–1268. MARTINEZ ET AL. *v.* CALIFORNIA ET AL., 444 U. S. 277;

No. 79–766. MCGHEE *v.* IOWA, 444 U. S. 1039;

No. 79–5481. MCELROY *v.* WILSON ET AL., 444 U. S. 971; and

No. 79–5698. FRANCISSE *v.* HOLLYWOOD CHEROKEE APARTMENTS ET AL., 444 U. S. 1047. Petitions for rehearing denied.

March 17, 1980

Affirmed on Appeal

No. 79–923. Stein, Secretary of the Business and Transportation Agency of California *v.* Conference of Federal Savings and Loan Associations et al. Appeal from C. A. 9th Cir. Motions of NAACP Legal Defense & Educational Fund, Inc., and American Savings & Loan League for leave to file briefs as *amici curiae* granted. Judgment affirmed. Reported below: 604 F. 2d 1256.

Appeals Dismissed

No. 79–996. Cargill, Administrator, et al. *v.* City of Rochester, New Hampshire. Appeal from Sup. Ct. N. H. dismissed for want of jurisdiction. Reported below: — N. H. —, 406 A. 2d 704.

No. 79–6075. Conrad *v.* Greene, U. S. District Judge, et al. Appeal from D. C. D. C. dismissed for want of jurisdiction.

No. 79–1102. Pickering *v.* County of Erie, New York. Appeal from C. A. 2d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 614 F. 2d 1289.

No. 79–1132. Mountain States Telephone & Telegraph Co. *v.* Commissioner of Labor and Industry of Montana. Appeal from Sup. Ct. Mont. dismissed for want of substantial federal question. Reported below: — Mont. —, 608 P. 2d 1047.

No. 79–1158. Ricco *v.* Ohio. Appeal from Ct. App. Ohio, Cuyahoga County, dismissed for want of substantial federal question.

Certiorari Granted—Reversed and Remanded. (See No. 79–797, *ante,* p. 193.)

Certiorari Granted—Vacated and Remanded

No. 78–1849. ATTORNEY GENERAL OF NEW YORK *v.* SHARGEL. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Apfelbaum, ante,* p. 115. Reported below: 596 F. 2d 42.

No. 79–5731. BROWN *v.* UNITED STATES. C. A. 10th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of the position presently asserted by the Solicitor General in his memorandum filed February 15, 1980.

Miscellaneous Orders

No. A–682. MCGOFF ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION. Application for stay of order of the United States District Court for the District of Columbia entered December 12, 1979, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

No. A–697. HUDSPETH *v.* THURMAN. 147th Jud. Dist. Ct. Tex., Travis County. Application for stay, addressed to MR. JUSTICE MARSHALL and referred to the Court, denied.

No. A–720. ANDRUS, SECRETARY OF THE INTERIOR *v.* VIRGINIA SURFACE MINING & RECLAMATION ASSN., INC., ET AL.; and

No. A–725. VIRGINIA CITIZENS FOR BETTER RECLAMATION, INC., ET AL. *v.* VIRGINIA SURFACE MINING & RECLAMATION ASSN., ET AL. Applications for stay of judgment of the United States District Court for the Western District of Virginia, presented to THE CHIEF JUSTICE, and by him referred to the Court, granted pending timely filing and disposition of the appeals in this Court.

No. A-747. FEDERATION FOR AMERICAN IMMIGRATION REFORM ET AL. *v.* KLUTZNICK, SECRETARY OF COMMERCE, ET AL. D. C. D. C. Application for injunction, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Motion to treat the application as a statement as to jurisdiction denied.

No. A-758. HALSTON BUILDERS ASSOCIATES ET AL. *v.* KRAMER, TAX COLLECTOR FOR HAMILTON TOWNSHIP, ET AL. Application for stay of judgment of the Supreme Court of New Jersey, presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied. MR. JUSTICE BLACKMUN would grant the application.

No. 9, Orig. UNITED STATES *v.* LOUISIANA ET AL. Motion of Alabama for entry of a supplemental decree and cross-motion of the United States for entry of a supplemental decree referred to the Special Master. MR. JUSTICE MARSHALL took no part in the consideration or decision of this order. [For earlier order herein, see, *e. g., ante,* p. 901.]

No. 79-1. AMERICAN EXPORT LINES, INC. *v.* ALVEZ ET AL. Ct. App. N. Y. [Certiorari granted, 444 U. S. 924.] Motion of petitioner for leave to file a supplemental brief after argument granted.

No. 79-48. ANDRUS, SECRETARY OF THE INTERIOR, ET AL. *v.* GLOVER CONSTRUCTION CO. C. A. 10th Cir. [Certiorari granted, 444 U. S. 962.] Motion of the Solicitor General to permit Andrew J. Levander, Esquire, to present oral argument *pro hac vice* granted.

No. 79-66. AARON *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 2d Cir. [Certiorari granted, 444 U. S. 914.] Motion of Securities Industry Assn. for leave to file a supplemental brief as *amicus curiae* after argument denied.

No. 79–116. THOMAS *v.* WASHINGTON GAS LIGHT CO. ET AL. C. A. 4th Cir. [Certiorari granted, 444 U. S. 962.] Motion of the Solicitor General to permit Alan I. Horowitz, Esquire, to present oral argument *pro hac vice* granted.

No. 79–602. AGINS ET UX. *v.* CITY OF TIBURON. Sup. Ct. Cal. [Probable jurisdiction noted, 444 U. S. 1011.] Motion of appellants for additional time for oral argument, or in the alternative for divided argument, denied.

No. 79–616. MOHASCO CORP. *v.* SILVER. C. A. 2d Cir. [Certiorari granted, 444 U. S. 990.] Motion of the Solicitor General for divided argument granted.

No. 79–639. UNITED STATES *v.* SIOUX NATION OF INDIANS ET AL. Ct. Cl. [Certiorari granted, 444 U. S. 989.] Motion of Indian Law Resource Center for leave to file a brief as *amicus curiae* granted.

No. 79–703. CAREY, STATE'S ATTORNEY OF COOK COUNTY *v.* BROWN ET AL. C. A. 7th Cir. [Probable jurisdiction noted, 444 U. S. 1011.] Motion of Paul P. Biebel, Jr., Esquire, to permit Ellen G. Robinson to present oral argument *pro hac vice* granted.

No. 79–880. KISSINGER ET AL. *v.* HALPERIN ET AL. C. A. D. C. Cir. Motion of respondents to defer filing of a brief in opposition denied and respondents are allowed 30 days in which to file the brief. MR. JUSTICE REHNQUIST took no part in the consideration or decision of this order.

No. 79–1268. HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* MCRAE ET AL. D. C. E. D. N. Y. [Probable jurisdiction noted, 444 U. S. 1069.] Motion of the Solicitor General to dispense with printing the District Court's opinion and accompanying annex, granted.

No. A-731 (79-1190). LaSalle National Bank, Trustee, et al. *v.* Peoples Gas Light & Coke Co. App. Ct. Ill., 1st Dist. Application for stay, addressed to Mr. Justice Brennan and referred to the Court, denied.

No. A-760 (79-1384). Exxon Corp. *v.* United States; No. A-756 (79-1394). Shell Oil Co. *v.* United States; and

No. A-761 (79-1395). Marathon Oil Co. *v.* United States. Applications for stay of order of the United States District Court for the District of Columbia, entered December 17, 1979, as affirmed and modified by the United States Court of Appeals for the District of Columbia Circuit on February 25, 1980, denied.

No. 79-5364. Brown *v.* Louisiana. Sup. Ct. La. [Certiorari granted, 444 U. S. 990.] Motion of Louise Korns to permit Thomas Chester, Esquire, to present oral argument *pro hac vice* granted.

Probable Jurisdiction Noted

No. 79-1033. Webb's Fabulous Pharmacies, Inc., et al. *v.* Beckwith, Clerk of the Circuit Court of Seminole County, et al. Appeal from Sup. Ct. Fla. Probable jurisdiction noted. Reported below: 374 So. 2d 951.

Certiorari Granted

No. 78-1945. Universities Research Assn., Inc. *v.* Coutu et al. C. A. 7th Cir. Certiorari granted. Reported below: 595 F. 2d 396.

No. 79-886. Upjohn Co. et al. *v.* United States et al. C. A. 6th Cir. Certiorari granted. Reported below: 600 F. 2d 1223.

No. 79-1157. Rosewell, Treasurer of Cook County, Illinois, et al. *v.* LaSalle National Bank, Trustee. C. A. 7th Cir. Certiorari granted. Reported below: 604 F. 2d 530.

No. 79–408. CITY OF MILWAUKEE ET AL. *v.* ILLINOIS ET AL. C. A. 7th Cir. Motions of Mid-America Legal Foundation and Association of Metropolitan Sewerage Agencies et al. for leave to file briefs as *amici curiae* and certiorari granted. Reported below: 599 F. 2d 151.

No. 79–855. DIAMOND, COMMISSIONER OF PATENTS AND TRADEMARKS *v.* BRADLEY ET AL. C. C. P. A. Certiorari granted and case set for oral argument in tandem with No. 79–1112, *Diamond* v. *Diehr, infra.* Reported below: 600 F. 2d 807.

No. 79–1068. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION *v.* ASSOCIATED DRY GOODS CORP. C. A. 4th Cir. Certiorari granted. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 607 F. 2d 1075.

No. 79–1112. DIAMOND, COMMISSIONER OF PATENTS AND TRADEMARKS *v.* DIEHR ET AL. C. C. P. A. Certiorari granted and case set for oral argument in tandem with No. 79–855, *Diamond* v. *Bradley, supra.* Reported below: 602 F. 2d 982.

No. 79–1127. ESTELLE, CORRECTIONS DIRECTOR *v.* SMITH. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 602 F. 2d 694.

No. 79–5949. WATKINS *v.* BORDENKIRCHER, WARDEN; and No. 79–5951. SUMMITT *v.* BORDENKIRCHER, WARDEN. C. A. 6th Cir. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari in No. 79–5949 granted limited to Question 1 presented by the petition. Certiorari in No. 79–5951 granted. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 608 F. 2d 247.

No. 79–5780. WEAVER *v.* GRAHAM, GOVERNOR OF FLORIDA. Sup. Ct. Fla. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1 presented by the petition. Reported below: 376 So. 2d 855.

Certiorari Denied. (See also No. 79–1102, *supra.*)

No. 78–1924. GOLAND ET AL. *v.* CENTRAL INTELLIGENCE AGENCY ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 197 U. S. App. D. C. 25, 607 F. 2d 339.

No. 79–854. BERGER *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 150 Ga. App. 166, 257 S. E. 2d 8.

No. 79–896. HUBER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 603 F. 2d 387.

No. 79–899. GEORGE BANTA CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 604 F. 2d 830.

No. 79–903. POSNER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 607 F. 2d 1007.

No. 79–917. LECOMPTE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 599 F. 2d 81.

No. 79–929. RSR CORP. *v.* FEDERAL TRADE COMMISSION. C. A. 9th Cir. Certiorari denied. Reported below: 602 F. 2d 1317.

No. 79–932. WARINNER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 607 F. 2d 210.

No. 79–965. MICHIGAN *v.* YOUNG. Ct. App. Mich. Certiorari denied. Reported below: 89 Mich. App. 753, 282 N. W. 2d 211.

No. 79–980. MORTON-NORWICH PRODUCTS, INC. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: — Ct. Cl. —, 602 F. 2d 270.

No. 79–986. CURRIE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 609 F. 2d 1193.

No. 79–1000. DICHNE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 612 F. 2d 632.

No. 79–1017. SORKIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1291.

No. 79–1019. RANEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 610 F. 2d 820.

No. 79–1031. SOUTHWEST TEXAS METHODIST HOSPITAL *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 5th Cir. Certiorari denied. Reported below: 606 F. 2d 63.

No. 79–1039. WILLIAM C. HAAS & CO., INC. *v.* CITY AND COUNTY OF SAN FRANCISCO. C. A. 9th Cir. Certiorari denied. Reported below: 605 F. 2d 1117.

No. 79–1047. MIROFF ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 606 F. 2d 777.

No. 79–1053. BLEVINAL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 607 F. 2d 1124.

No. 79–1069. RONCI MANUFACTURING CO., INC. *v.* RHODE ISLAND ET AL. Sup. Ct. R. I. Certiorari denied. Reported below: — R. I. —, 403 A. 2d 1094.

No. 79–1093. BLY ET AL. *v.* MCLEOD, ATTORNEY GENERAL OF SOUTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 605 F. 2d 134.

No. 79–1106. ZAMBITO *v.* BLAIR, SHERIFF. C. A. 4th Cir. Certiorari denied. Reported below: 610 F. 2d 1192.

No. 79–1107. YOTT *v.* NORTH AMERICAN ROCKWELL CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 602 F. 2d 904.

No. 79–1111. TALMAN FEDERAL SAVINGS & LOAN ASSOCIATION OF CHICAGO *v.* CARROLL. C. A. 7th Cir. Certiorari denied. Reported below: 604 F. 2d 1028.

No. 79–1117. HARVEY *v.* HARRIS TRUST & SAVINGS BANK. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 73 Ill. App. 3d 280, 391 N. E. 2d 461.

No. 79–1119. AMERICAN INTERINSURANCE EXCHANGE *v.* COMMERCIAL UNION ASSURANCE CO. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 605 F. 2d 731.

No. 79–1126. THOMAS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 77 Ill. 2d 396, 396 N. E. 2d 812.

No. 79–1133. CLAWSON, ADMINISTRATRIX *v.* INTERNATIONAL HARVESTER CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 609 F. 2d 501.

No. 79–1134. GOLDMAN *v.* SEARS, ROEBUCK & CO. C. A. 1st Cir. Certiorari denied. Reported below: 607 F. 2d 1014.

No. 79–1135. CANADIAN UNIVERSAL INSURANCE CO. *v.* CONTINENTAL CASUALTY CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 605 F. 2d 1340.

No. 79–1140. BURDETTE *v.* INDIANA & MICHIGAN ELECTRIC CO. C. A. 4th Cir. Certiorari denied. Reported below: 607 F. 2d 1001.

No. 79–1142. CHRISTIAN BEACON PRESS, INC. *v.* CITY OF CAPE MAY. Super. Ct. N. J. Certiorari denied.

No. 79–1153. KEM MANUFACTURING CO., INC. *v.* DRACKETT PRODUCTS CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 598 F. 2d 402 and 604 F. 2d 320.

No. 79–1154. COLAO ET AL. *v.* MERIT INSURANCE CO., INC. C. A. 7th Cir. Certiorari denied. Reported below: 603 F. 2d 654.

No. 79–1159. Pool, Administrator *v.* Downtown Nursing Home, Inc. Sup. Ct. Ala. Certiorari denied. Reported below: 375 So. 2d 465.

No. 79–1160. Valeron Corp. *v.* General Electric Co. C. A. 6th Cir. Certiorari denied. Reported below: 608 F. 2d 265.

No. 79–1174. Marc Rich & Co., A. G. *v.* Transmarine Seaways Corp. of Monrovia. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1291.

No. 79–1185. Ambrosiani *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 610 F. 2d 65.

No. 79–1191. Borcherding et al. *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 611 F. 2d 374.

No. 79–1208. Long *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 608 F. 2d 1372.

No. 79–1211. Frink *v.* United States Navy PERA (CRUDES) et al. C. A. 3d Cir. Certiorari denied. Reported below: 609 F. 2d 501.

No. 79–1218. McCarty *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 611 F. 2d 220.

No. 79–1219. Sims, Trustee, et al. *v.* Mack Trucks, Inc. C. A. 3d Cir. Certiorari denied. Reported below: 608 F. 2d 87.

No. 79–1223. Kirven *v.* Committee on Character and Fitness of the South Carolina Supreme Court. Sup. Ct. S. C. Certiorari denied.

No. 79–1275. Ortiz *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 610 F. 2d 280.

No. 79–1279. CARTER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 616 F. 2d 2.

No. 79–5549. HOUSE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 604 F. 2d 1135.

No. 79–5670. HOLLAND *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 91 Wis. 2d 134, 280 N. W. 2d 288.

No. 79–5721. PRIVETT *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 79–5727. IN RE A. G. M. Ct. App. D. C. Certiorari denied.

No. 79–5742. TIAO-MING WU *v.* NEW YORK CITY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1293.

No. 79–5760. BISHOP *v.* LANE, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 605 F. 2d 556.

No. 79–5779. RACKSTRAW *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 79–5817. VON ESSEN *v.* MCKEAN, FORMERLY VON ESSEN. Sup. Ct. Wash. Certiorari denied.

No. 79–5823. JOHNSON *v.* HARRIS, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 615 F. 2d 1351.

No. 79–5825. EVERAGE *v.* GIBSON ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 372 So. 2d 829.

No. 79–5838. PRESSLEY ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 610 F. 2d 814.

No. 79–5840. LOPEZ-BELTRAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 619 F. 2d 19.

No. 79-5846. GRUBBS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 79-5863. GODWIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 610 F. 2d 808.

No. 79-5872. HARRISON *v.* NAIFEH, JUDGE, ET AL. Ct. Crim. App. Okla. Certiorari denied.

No. 79-5892. ALTRO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 612 F. 2d 575.

No. 79-5919. TRIMBLE *v.* CONLEY, JUDGE, ET AL. Sup. Ct. Mo. Certiorari denied.

No. 79-5947. WEXLER *v.* PHILADELPHIA CONSUMER DISCOUNT CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 612 F. 2d 576.

No. 79-5952. GINTER *v.* WALLIN ET AL. C. A. 8th Cir. Certiorari denied.

No. 79-5956. GRISSO *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 79-5961. CUPPS *v.* SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 10th Cir. Certiorari denied.

No. 79-5968. MABERY *v.* NEW YORK STATE PAROLE COMMISSION. C. A. 2d Cir. Certiorari denied.

No. 79-5970. MICKENS *v.* TOWNLEY. C. A. 4th Cir. Certiorari denied. Reported below: 607 F. 2d 1002.

No. 79-5971. GRIFFIN *v.* PERINI, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 611 F. 2d 372.

No. 79-5979. RIVERA ET AL. *v.* AQUEDUCT AND SEWER AUTHORITY OF PUERTO RICO. Sup. Ct. P. R. Certiorari denied.

No. 79-5982. STEBBINS *v.* PEOPLES LIFE INSURANCE CO. C. A. D. C. Cir. Certiorari denied. Reported below: 197 U. S. App. D. C. 180, 607 F. 2d 494.

No. 79-5984. WIMBUSH *v.* MITCHELL, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 605 F. 2d 1208.

No. 79-5989. BECKNELL *v.* ESTELLE, CORRECTIONS DIRECTOR, ET AL. C. A. 5th Cir. Certiorari denied.

No. 79-6003. MCDOUGLE ET AL. *v.* MITCHELL, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 605 F. 2d 1203.

No. 79-6006. LITTLE *v.* CITY OF JACKSON. Sup. Ct. Miss. Certiorari denied. Reported below: 375 So. 2d 1031.

No. 79-6007. SMITH *v.* CITY OF BELLINGHAM. Ct. App. Wash. Certiorari denied.

No. 79-6008. KENT *v.* ALABAMA. C. A. 5th Cir. Certiorari denied. Reported below: 606 F. 2d 319.

No. 79-6009. INDIVIGLIO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 612 F. 2d 624.

No. 79-6011. HOLSEY *v.* INMATE GRIEVANCE COMMISSION. Ct. Sp. App. Md. Certiorari denied.

No. 79-6013. MONK ET AL. *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 605 F. 2d 837.

No. 79-6014. HERNANDEZ *v.* ELIO M. ROSSY, INC., ET AL. Sup. Ct. P. R. Certiorari denied.

No. 79-6018. STEELE *v.* BARRETT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 605 F. 2d 563.

No. 79-6036. FROEMBGEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 610 F. 2d 823.

No. 79-6042. KINARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 611 F. 2d 881.

No. 79-6056. De Fazio *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 614 F. 2d 771.

No. 79-6061. Widemon *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 106.

No. 79-6066. Friedman *v.* Fairhill Hospital et al. Sup. Ct. Ohio. Certiorari denied.

No. 79-6078. Whitney *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 607 F. 2d 237.

No. 79-6086. Gamez *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 610 F. 2d 823.

No. 79-6088. Prosak *v.* Boeing Co. et al. C. A. 3d Cir. Certiorari denied. Reported below: 605 F. 2d 1196.

No. 79-6096. Bush *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1291.

No. 79-6104. Frye et al. *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: — U. S. App. D. C. —, 610 F. 2d 1000.

No. 79-6107. Joseph *v.* Government of the Virgin Islands. C. A. 3d Cir. Certiorari denied. Reported below: 612 F. 2d 572.

No. 79-6109. Williams *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 612 F. 2d 735.

No. 79-6112. Williams *v.* Duckworth, Warden. Sup. Ct. Ind. Certiorari denied.

No. 79-697. Encyclopaedia Britannica, Inc., et al. *v.* Federal Trade Commission. C. A. 7th Cir. Certiorari denied. Mr. Justice Blackmun would grant certiorari. Reported below: 605 F. 2d 964.

No. 79-804. CLEVELAND BOARD OF EDUCATION ET AL. *v.* REED ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 607 F. 2d 714.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE POWELL join, dissenting.

Petitioners seek to present two questions for decision: (a) whether the District Court properly found systemwide segregative intent on the part of petitioner school Board, and, (b) "[w]hether the systemwide student reassignment plan ordered by the District Court, whereby every grade in every school must have a ratio of black and white students in approximate proportion to the systemwide ratio, exceeded the violation found, particularly where the evidence showed that Cleveland's residential areas are highly segregated by race." Pet. for Cert. 3. With respect to the first issue of systemwide desegregation, the District Court found as follows in its exhaustive opinion:

> ". . . the local defendants offered evidence to show that various actions complained of by the plaintiffs were supported by valid, racially neutral, educationally sound reasons. For instance, the defendants argued that they created optional attendance zones to permit students to avoid heavy traffic or other such safety hazards, or to address the problems of overcrowding. Various school construction decisions were defended as being responsive to sincere desires of local residents for neighborhood facilities. The assignment of black teachers and administrators to schools with majority black student enrollments was defended on the ground that such faculty or staff would be better able to relate to students of the same race. Where there was factual support for the claim that such decisions had compelling educational bases, or where legitimate safety concerns were being met in a plausible and nonracial manner, the allegations of the plaintiffs were set aside. However, there remain

more than 200 enumerated actions cited in the liability opinion for which the explanations of the defendants either were not credible or were not legally permissible. In these instances, the Court finds that the defendants acted (1) *not only* with awareness of the natural, probable, and foreseeable consequences of their acts, (2) *but also* with the purpose and intent to maintain racial segregation." *Reed* v. *Rhodes,* 455 F. Supp. 546, 555 (ND Ohio 1978).

The Court of Appeals affirmed this conclusion of the District Court in this language:

"Our review of this record supports the District Judge's findings of fact in this regard and we find no fault in his conclusions of law, as stated above. The findings of fact certainly cannot be termed clearly erroneous, and the conclusions of law which pertain to his 1973 findings and his 1964 findings are both entirely consistent with the opinions of the Supreme Court in *Columbus Board of Education* v. *Penick,* [443] U. S. [449] (1979), and *Dayton Board of Education* v. *Brinkman,* [443] U. S. [526] (1979)." *Reed* v. *Rhodes,* 607 F. 2d 714, 717 (CA6 1979).

The Court of Appeals, I think, was undoubtedly correct in upholding this District Court's finding of systemwide segregative intent on the basis of this Court's decisions last Term in the *Columbus* and *Dayton* cases. I would therefore not vote to grant the petition on this first issue.

The Court of Appeals, however, devoted virtually no attention to the second issue—the propriety of the *remedy* imposed by the District Court. In the Court of Appeals' opinion, which comprises 46 pages of the appendix to the petition, less than 4 are devoted to the propriety of the remedy decreed, and none of these 4 pages deal with whether the remedy was appropriate, *conceding* that a systemwide remedy could be imposed. The court focused solely on the legitimacy

of imposing a systemwide remedy, neglecting to address the propriety of the *terms* imposed by that remedy. The Court of Appeals extensively quoted language in this Court's opinion in *Columbus, supra,* to support its approval of this remedy, but that language simply has no application to the issue of whether as drastic a remedy as this may be imposed once a systemwide violation has been found.

In *Milliken* v. *Bradley,* 418 U. S. 717, 744 (1974), we held:

> "The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation. *Swann* [v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1 (1971)], at 16."

This was not a novel principle then any more than it is now. It simply reflects the traditional rule that the remedy imposed by a United States district court exercising its equitable powers must restore, as nearly as possible, the situation which would have existed had the wrong not occurred. We have certainly never held that racial balance is constitutionally required once a violation is established. To the contrary, in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1, 24 (1971), this Court stated explicitly that, "[t]he constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole."

The District Court then either ignored the statement in *Swann* or formulated this remedy on the hypothesis that had there been no segregative conduct on the part of the Cleveland School Board, there would have been no racially segregated housing patterns in the city of Cleveland. For the reasons persuasively stated by MR. JUSTICE POWELL in his opinion dissenting from the dismissal of the writ of certiorari in *Estes* v. *Metropolitan Branch, Dallas NAACP,* 444 U. S. 437, 438 (1980), this is simply not a realistic hypothesis. Conceding that there was a systemwide violation, and allowing for

the discretion and flexibility necessary for the District Court to fashion an equitable decree which would requite the constitutional wrong, that discretion did not extend to restructuring the entire demography of the city of Cleveland as reflected in its schools, unless that demography was attributable to the conduct of the petitioner school Board. While the District Court found that some of the racial housing patterns *were* attributable to the conduct of the Board, it also made clear that other factors, including the location of public housing by entities other than the petitioner, also had a causative effect. Even if the Constitution required it, and it were possible for federal courts to do it, no equitable decree can fashion an "Emerald City" where all races, ethnic groups, and persons of various income levels live side by side in a large metropolitan area. Because the decree of the District Court here seems flatly contrary to the language of *Swann, supra,* and *Milliken, supra,* I would grant the petition for certiorari limited to the second question.

No. 79–994. EL PASO NATURAL GAS CO. *v.* ARIZONA ET AL. Sup. Ct. Ariz. Certiorari denied. MR. JUSTICE STEWART and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 123 Ariz. 219, 599 P. 2d 175.

No. 79–1172. HARVEY *v.* HARRIS. C. A. 7th Cir. Motion of Voluntary Association of Trial Judges of Wisconsin for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 605 F. 2d 330.

No. 79–5626. SIMON *v.* TEXAS ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 606 F. 2d 320.

No. 79–5933. DOUTHIT *v.* GEORGIA; and

No. 79–5959. GATES *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: No. 79–5933, 239 Ga. 81, 235

S. E. 2d 493, and 244 Ga. 471, 260 S. E. 2d 875; No. 79–5959, 244 Ga. 587, 261 S. E. 2d 349.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

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No. 27, Orig. OHIO *v.* KENTUCKY, 444 U. S. 335;

No. 79–486. UNITED STATES STEEL CORP. ET AL. *v.* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, 444 U. S. 1035;

No. 79–531. NEWELL ET AL. *v.* ORLEANS PARISH SCHOOL BOARD, 444 U. S. 1043; and

No. 79–5669. PFISTER *v.* ANDERSON CLINIC, INC., ET AL., 444 U. S. 1047. Petitions for rehearing denied.

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March 18 through Mar 25, 1980

Henry J. Lind
Reporter of Decisions

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, Chief Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM H. REHNQUIST, Associate Justice.
JOHN PAUL STEVENS, Associate Justice.

RETIRED

STANLEY REED, Associate Justice.

OFFICERS OF THE COURT

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ALFRED WONG, Marshal.
ROGER F. JACOBS, Librarian.

SUPREME COURT OF THE UNITED STATES

Allotment of Justices

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, *viz.:*

For the District of Columbia Circuit, Warren E. Burger, Chief Justice.

For the First Circuit, William J. Brennan, Jr., Associate Justice.

For the Second Circuit, Thurgood Marshall, Associate Justice.

For the Third Circuit, William J. Brennan, Jr., Associate Justice.

For the Fourth Circuit, Warren E. Burger, Chief Justice.

For the Fifth Circuit, Lewis F. Powell, Jr., Associate Justice.

For the Sixth Circuit, Potter Stewart, Associate Justice.

For the Seventh Circuit, John Paul Stevens, Associate Justice.

For the Eighth Circuit, Harry A. Blackmun, Associate Justice.

For the Ninth Circuit, William H. Rehnquist, Associate Justice.

For the Tenth Circuit, Byron R. White, Associate Justice.

December 19, 1975.

(For next previous allotment, see 404 U. S., p. v.)

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1. *"After opportunity for public hearing."* § 402 (a)(1), Federal Water Pollution Control Act, 33 U. S. C. § 1342 (a)(1). Costle v. Pacific Legal Foundation, p. 198.

2. *"Agency records improperly withheld."* Freedom of Information Act, 5 U. S. C. § 552 (a)(4)(B). GTE Sylvania, Inc. v. Consumers Union, p. 375.

3. *"Condemned."* 25 U. S. C. § 357. United States v. Clarke, p. 253.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1979

COSTLE, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY *v.* PACIFIC LEGAL FOUNDATION ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 78-1472. Argued December 5, 1979—Decided March 18, 1980

Section 402 (a)(1) of the Federal Water Pollution Control Act (FWPCA) authorizes the Administrator of the Environmental Protection Agency (EPA), "after opportunity for public hearing," to issue a permit for the discharge of any pollutant upon condition that such discharge will meet all applicable requirements of the FWPCA or such conditions as the Administrator determines are necessary to carry out the Act's goals and objectives. Implementing regulations provide for public notice of the proposed issuance, denial, or modification of a permit; direct the EPA Regional Administrator to hold a public hearing on the proposed action if he finds a significant degree of public interest; and permit any interested person to request an "adjudicatory hearing" after the EPA's determination to take the proposed action. Such a request will be granted if it "[s]ets forth material issues of fact relevant to the questions of whether a permit should be issued, denied or modified." Respondent city of Los Angeles (city) owns a sewage treatment plant that is operated under permits issued by the EPA pursuant to the National Pollutant Discharge Elimination System (NPDES), established by the FWPCA. The city's current permit, as issued in 1975, conditioned continued discharges from the sewage treatment plant into the Pacific Ocean on the city's compliance with a schedule for achieving full secondary treatment of wastewater by October 1, 1979. In April 1977, the EPA advised the city that it proposed to extend the expiration date of the 1975 permit for a second time, to December 17, 1979, with all other terms and conditions of the permit to remain unchanged. Notice of the proposed action was published in the Los Angeles Times, but neither the city nor any other party, including respondent Pacific Legal Foundation, requested a hearing or filed comments on the proposed extension, and the EPA Regional Administrator determined that public interest in the modification proposal was insufficient to warrant a public hearing. After respondent Kilroy's postdetermination request for an adjudicatory hearing was denied on the ground that it did not set forth material

issues of fact relevant to the question whether the permit should be extended, respondents filed petitions with the Court of Appeals seeking review of the Regional Administrator's action. The Court of Appeals held that the EPA had failed to provide the "opportunity for public hearing" required by § 402 (a) (1) when it extended the federal permit, and remanded for a "proper hearing." In so holding, the court concluded that the EPA is required to justify every failure to hold a hearing on a permit action by proof that the material facts supporting the action "are not subject to dispute."

Held:

1. The Court of Appeals erred in concluding that the EPA is required to hold a public hearing on every NPDES permit action it takes unless it can show that the material facts supporting its action "are not subject to dispute." Rather, the implementing regulations in question are fully consistent with the FWPCA's purpose to provide the public with an "opportunity" for a hearing concerning agency actions respecting water pollution control, and are valid. Pp. 213–216.

2. Respondents have failed to demonstrate that the regulations in question were not applied properly in the context of this case. Pp. 216–220.

(a) Under the circumstances presented here, it was reasonable for the Regional Administrator to extend the permit's expiration date without further public hearing, on the grounds that the public had not exhibited a significant degree of interest in the proposed action, and that information pertinent to such a decision would not have been adduced if a hearing had been held. Pp. 216–218.

(b) The form of notice by newspaper publication was adequate. The city's argument that the notice was inadequate because its understanding of the compliance schedules was contrary to the EPA's was not pertinent to the agency's decision to extend the permit's expiration date. Pp. 218–219.

(c) The EPA did not err in failing to hold an adjudicatory hearing on the issues raised in respondent Kilroy's request because that request did not set forth material issues of fact pertinent to the question whether the permit's expiration date should be extended. Pp. 219–220.

586 F. 2d 650, reversed.

BLACKMUN, J., delivered the opinion for a unanimous Court.

William Alsup argued the cause for petitioner. With him on the briefs were *Solicitor General McCree, Assistant Attor-*

ney General Moorman, Deputy Solicitor General Claiborne, Angus Macbeth, and *Raymond W. Mushal.*

Robert K. Best argued the cause for respondents. With him on the brief for respondents Pacific Legal Foundation et al. were *Ronald A. Zumbrun* and *Thomas E. Hookano. Burt Pines* and *Frederick N. Merkin* filed a brief for respondent City of Los Angeles.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case, in a sense, is a tale of a great city's—and the Nation's—basic problems in disposing of human waste. "How" and "where" are the ultimate questions, and they are intertwined. The issues presently before the Court, however, center in the administrative processes by which the city and the Nation seek to resolve those basic problems.

I

Respondent city of Los Angeles owns and operates the Hyperion Wastewater Treatment Plant located in Playa Del Rey, Cal. Since 1960, the Hyperion plant has processed most of the city's sewage, and has discharged the wastes through three "outfalls" extending into the Pacific Ocean. The shortest outfall terminates about one mile from the coastline in 50 feet of water. It is operative only during emergencies caused by increased sewage flow during wet weather or by power failures at the pumping plant. The second outfall terminates about five miles out. Approximately 340 million gallons of treated wastewater are discharged every day into the ocean, at a depth of 187 feet, through that outfall. This wastewater receives at least "primary treatment," [1] but about

[1] Under applicable regulations, the Environmental Protection Agency defines "primary treatment" as "the first stage in wastewater treatment where substantially all floating or settleable solids, are removed by floatation and/or sedimentation." 40 CFR § 125.58 (m) (1979).

one-third of the flow also receives "secondary treatment" [2] by an activated sludge process. The third outfall terminates about seven miles from the coast. It is through this third outfall that the solids that have been removed during treatment are discharged into the ocean, at a depth of 300 feet. Prior to discharge the solid materials, commonly referred to as sludge, have been digested, screened, and diluted with secondary effluent. App. 3–4.

The Hyperion plant is operated under permits issued by the Environmental Protection Agency (EPA) and the California Regional Water Quality Control Board (CRWQCB). Such permits are issued pursuant to the National Pollutant Discharge Elimination System (NPDES), established by § 402 of the Federal Water Pollution Control Act (FWPCA), as added by the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 880, and as amended, 33 U. S. C. § 1342 (1976 ed. and Supp. II).[3] The FWPCA was enacted with a

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[2] The agency by its regulations describes "secondary treatment" as that treatment which will attain "the minimum level of effluent quality . . . in terms of . . . parameters [*sic*]." These so-called "parameters" (but compare any dictionary's definition of this term) are specified levels of biochemical oxygen demand, suspended solids, and pH values. 40 CFR §§ 125.58 (r) and 133.102 (1979).

[3] In March 1973, the EPA and the California State Water Resources Control Board entered into an understanding that gave the State primary responsibility for administering the NPDES program in California, with the EPA retaining jurisdiction over discharges beyond the limits of the territorial sea, that is, more than three miles out from the coastline. EPA permits are thus required for the Hyperion plant's discharges through the 5- and 7-mile outfalls. The CRWQCB, acting pursuant to California's Porter-Cologne Act, Cal. Water Code Ann. § 13260 *et seq.* (West 1971), also requires a state permit for these outfalls.

A general description of the original Federal Water Pollution Control Act passed in 1948, 62 Stat. 1155, the events that led to the 1972 Amendment, and the operation of the NPDES program, with particular emphasis on its implementation in California, is set forth in *EPA* v. *State Water Resources Control Board*, 426 U. S. 200, 202–209 (1976), and need not be repeated here.

stated and obviously worthy objective, that is, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." § 101 (a), 86 Stat. 816, 33 U. S. C. § 1251 (a). In order to achieve that objective, Congress declared that "it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985." § 101 (a)(1).

As one means of reaching that goal, Congress in § 301 (a) of the FWPCA provided: "Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act [33 U. S. C. §§ 1312, 1316, 1317, 1328, 1342, and 1344], the discharge of any pollutant by any person shall be unlawful." 86 Stat. 844, 33 U. S. C. § 1311 (a). Section 402 (a)(1) authorizes the Administrator of the EPA, "after opportunity for public hearing," to issue a permit for the discharge of any pollutant, notwithstanding § 301 (a), upon condition that such discharge will meet all applicable requirements established in other sections of the Act, or such conditions as the Administrator determines are necessary to carry out the Act's goals and objectives. 86 Stat. 880, 33 U. S. C. § 1342 (a)(1). One of the requirements applicable to an NPDES permit for a publicly owned treatment works, such as the Hyperion plant, is specified in § 301 (b)(1)(B). That provision requires such works in existence on July 1, 1977, to achieve "effluent limitations based upon secondary treatment as defined by the Administrator." [4] 86 Stat. 845, 33 U. S. C. § 1311 (b)(1)(B).

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[4] Although the EPA has taken the position in this litigation that § 301 (b)(1)(B) required the city to end the Hyperion plant's discharge of sludge into the ocean by July 1, 1977, the compliance schedule incorporated in the 1975 NPDES permit required the city to achieve total "sludge-out" by April 1978. The EPA asserts that this less stringent compliance schedule was necessitated by the practical inability of Los Angeles to meet the FWPCA's requirements. Reply Brief for Petitioner 8, n. 5. Congress subsequently has acted to permit the operator of a publicly owned treatment works, in certain circumstances, to request the

II

The EPA has promulgated regulations providing for notice and public participation in any permit proceeding under the NPDES. Those regulations, implementing the statutory requirement that any NPDES permit be issued "after opportunity for public hearing," are the focus of this case. The regulations state: "Public notice of the proposed issuance, denial or modification of every permit or denial shall be circulated in a manner designed to inform interested and potentially interested persons of the discharge and of the proposed determination to issue, deny, or modify a permit for the discharge." 40 CFR § 125.32 (a) (1978).[5] That public notice "shall include at least": (1) circulation of the notice within the affected geographical area by posting in the post office and "public places" nearest the applicant's premises, or posting "near the entrance to the applicant's premises and in nearby places," or publication in local newspapers; (2) the mailing of notice to the permit applicant and "appropriate" federal and state authorities; and (3) the mailing of notice to any person or group who has requested placement on the NPDES permit mailing list for actions affecting the geographical area. *Ibid.*

Following the issuance of public notice the EPA Regional

EPA Administrator to extend the time allowed for achieving the limitations of § 301 (b)(1)(B). Compliance must be attained, however, by July 1, 1983. Clean Water Act of 1977, Pub. L. 95–217, § 45, 91 Stat. 1584, 33 U. S. C. § 1311 (i)(1) (1976 ed., Supp. II). The city has applied for an extension of the July 1, 1977, secondary-treatment deadline established by § 301 (b)(1)(B), but that application has not yet been acted upon by the EPA. Brief for Respondent City of Los Angeles 6, n. 5.

[5] The EPA's public participation regulations were modified after the events central to this case took place. 44 Fed. Reg. 32854 (1979). Many features of the regulations that are at issue here, however, have been retained. See 40 CFR §§ 124.41–45, 124.61–64, 124.71–101, 124.111–127, and 124.131–135 (1979). All references in this opinion to the EPA's public participation regulations, unless otherwise designated, are to the 1978 compilation.

Administrator is directed to provide at least a 30-day period during which interested persons may submit written views concerning the proposed action or may request that a hearing be held. § 125.32 (b)(1). If the Regional Administrator "finds a significant degree of public interest in a proposed permit," he is directed to hold a public hearing on the proposed action at which interested parties may submit oral or written statements and data. § 125.34. Following a determination by the Regional Administrator to take a proposed permit action, he is directed to forward a copy of that determination to any person who has submitted written comments. If the determination is substantially changed from the initial proposed action, he must give public notice of that determination. In either event, his determination constitutes the final action of the EPA unless a timely request for an adjudicatory hearing is granted. § 125.35.

Any interested person, within 10 days following the date of the determination, may request an "adjudicatory hearing" or a "legal decision" with respect to the determination. § 125.36 (b). A request for an adjudicatory hearing is to be granted by the Regional Administrator if the request "[s]ets forth material issues of fact relevant to the questions of whether a permit should be issued, denied or modified." § 125.36 (c)(1)(ii). Issues of law, on the other hand, are not to be considered at an adjudicatory hearing. If a request for an adjudicatory hearing raises a legal issue, that issue is to be referred by the hearing officer to the EPA's Assistant Administrator for Enforcement and the General Counsel for resolution. If a request for an adjudicatory hearing raises only legal issues, a hearing will not be granted and the Regional Administrator will refer those issues to the aforementioned officers. § 125.36 (m).

III

The EPA and the CRWQCB first issued a joint permit to the city of Los Angeles for discharges of treated sewage

om the Hyperion plant in November 1974. See App. 4. at permit, covering only the 1- and 5-mile outfalls, was ued following EPA publication of notice of its intent to ue a permit, an opportunity for the submission of written mments, and a public hearing. On August 18, 1975, the 74 permit was rescinded by the federal and state authorities, d replaced with a permit covering all three outfalls. *Id.*, 3. The 1975 permit conditioned continued discharges from e Hyperion plant on compliance by the city with a schedule signed to achieve full secondary treatment of wastewater October 1, 1979, and the gradual elimination of the disarge of sludge into the ocean over a 30-month period folwing "concept approval" of a plan for alternative disposal the sludge. *Id.*, at 17–19.[6]

In July 1976, the EPA notified Los Angeles that its 1975 PDES permit would expire on February 1, 1977, and that new permit would be needed if discharges were to continue yond that date. Record 44. The city filed an application r a new permit on July 30. *Id.*, at 45–80. Thereafter, in ptember 1976, the CRWQCB suggested to the EPA that e city's current permit might be extended for six months take into account any effect of pending federal legislation at would modify the FWPCA's mandatory compliance dates

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[6] On December 1, 1975, the CRWQCB issued an order modifying the y's compliance schedule for alternative sludge disposal. That order nounced that "concept approval" had been given on October 1, 1975, l fixed definite dates for achieving the elimination of sludge discharge o the ocean. Total "sludge-out" was to be achieved by April 1, 1978. p. 51. In subsequent orders, the CRWQCB found that the city had led to meet several deadlines for the submission of plans and specificans for various phases of the sludge discharge elimination project. The RWQCB then modified the relevant compliance dates, and extended the adline for total "sludge-out" to April 1, 1980. *Id.*, at 57. The city s taken the position in this litigation that the CRWQCB's extension of e deadline for total "sludge-out" has been incorporated within the comance schedule of the Hyperion plant's federal permit as well. See *infra*, 218–219.

for achievement of effluent limitations based upon secondary treatment. *Id.*, at 119. See n. 4, *supra*. On January 24, 1977, after a public hearing, the EPA and the CRWQCB did extend the expiration date of the 1975 permit from February 1 to June 30, 1977, citing inadequate time to review the city's application for a new permit. App. 93.[7]

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[7] In the meantime, a significant public controversy had developed concerning the EPA's approval of the city's alternative sludge disposal project. That project, to be funded by construction grants awarded under Title II of the FWPCA, 86 Stat. 833, 33 U. S. C. § 1281 *et seq.* (1976 ed. and Supp. II), has been referred to as the Hyperion Treatment Plant Interim Sludge Disposal Project. (The parties, commendably, have refrained from referring to this project as the HTPISDP, and so shall we.) The project called for the implementation of a process at the plant by which the digested sludge would be dewatered, formed into cakes, and hauled by truck to a sanitary landfill in Palos Verdes. An environmental impact appraisal developed by the EPA has estimated that when the trucking project is fully operational it will require 255 round trips per week over a distance of 42 miles. The city of Los Angeles and its Chamber of Commerce opposed the project, and objected when the EPA decided to fund it without preparing and evaluating an environmental impact statement (EIS), which they alleged to be required under the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852, 42 U. S. C. § 4321 *et seq.* App. 63. Respondent Pacific Legal Foundation (PLF) also objected. It requested the EPA to suspend those conditions on the city's NPDES permit that required it to cease ocean discharge of sewage sludge from the Hyperion plant. This request was based on PLF's interpretation of the requirements of the FWPCA with respect to the discharge of pollutants into the oceans. The PLF argued that § 403 of the FWPCA, 86 Stat. 883, 33 U. S. C. § 1343, required the EPA to perform a full environmental analysis of the effects on the ocean of the cessation of sludge discharge from the Hyperion plant, as well as the economic and social costs that would be involved in replacing ocean discharge with the landfill project. App. 84. The Regional Administrator of the EPA denied the PLF's request on January 31, 1977, taking the view that the FWPCA required all publicly owned treatment works to achieve effluent limitations based upon secondary treatment by July 1, 1977, and that this requirement mandated that the Hyperion plant cease the discharge of sewage sludge into the ocean. The Regional Administrator also noted that the conditions placed upon the 1975 permit had not been challenged during

On April 26, 1977, the EPA advised the city that it again proposed to extend the expiration date of its NPDES permit for the Hyperion plant, this time from June 30, 1977, to December 17, 1979.[8] All other terms and conditions of the

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the public hearings that preceded its issuance, and that no interested party had requested an adjudicatory hearing concerning those conditions. He therefore refused to reopen consideration of the 1975 permit. *Id.*, at 89. By the time of the Regional Administrator's response to the PLF, the city's permit already had been extended to June 30, 1977.

The PLF then attempted, unsuccessfully, to prevent the EPA from funding the Interim Sludge Disposal Project without preparing an EIS on its decision to do so. See *Pacific Legal Foundation* v. *Quarles*, 440 F. Supp. 316 (CD Cal. 1977), appeal docketed, No. 77-3844 (CA9). Subsequent to the District Court's decision in *Quarles*, however, the EPA voluntarily agreed to prepare an EIS on the project's funding. Brief for Petitioner 15, n. 12.

Still another PLF lawsuit relating to the Hyperion permit and its "sludge-out" schedule is pending. In that action the PLF has sued officials of the EPA and the Department of the Interior claiming that those agencies have failed to carry out their statutory obligations under the Endangered Species Act of 1973, 87 Stat. 884, 16 U. S. C. § 1531 *et seq.*, in approving the alternative sludge disposal project. The PLF contends that the elimination of sludge discharge into the ocean will adversely affect the food chain that supports the existence of gray whales and brown pelicans, and that trucks going to and from the landfill site will kill the El Segundo butterfly. Brief for Petitioner 15, n. 12. The District Court granted the PLF's motion for partial summary judgment on its contention that the agencies had not fulfilled their statutory obligation, and has required the EPA to consider, during the course of the hearing ordered by the Court of Appeals in this case, the effects of the permit's "sludge-out" schedule on endangered species. *Pacific Legal Foundation* v. *Andrus*, Civ. No. C-78-3464-AAH(SX) (CD Cal. May 8, 1979), appeals docketed, Nos. 79-3472, 79-3566, 79-3661 (CA9).

We, of course, express no view on the merits of these related PLF challenges to the Hyperion permit's compliance schedules.

[8] The Administrator of the EPA has the authority to issue NPDES permits "for fixed terms not exceeding five years." §§ 402 (a)(3), (b)(1)(B), 86 Stat. 880, 881, 33 U. S. C. §§ 1342 (a)(3), (b)(1)(B) (1976 ed. and Supp. II). The respondents have not challenged the substantive authority of the Administrator to extend the expiration of a per-

permit were to remain unchanged. App. 115–120. Notice of the proposed action was published in the Los Angeles Times the following day. See L. A. Times, Apr. 27, 1977, part V, p. 2, cols. 6–7. That notice described the permit and its proposed modification, and advised persons wishing to comment upon objections or to appear at a public hearing to submit their comments or requests for a hearing to the regional office of the EPA within 30 days. Neither the city nor the respondent Pacific Legal Foundation (PLF), nor any other party, requested a hearing or filed comments on the proposed extension, and the EPA's Regional Administrator determined that public interest in the modification proposal was insufficient to warrant convening a public hearing. On May 23, at a public hearing, the CRWQCB officially extended the expiration date of the state permit for the Hyperion plant until December 17, 1979. App. 154. On June 2, 1977, the Regional Administrator of the EPA transmitted to the city his final determination to extend the time of expiration of the federal permit to the same 1979 date. *Id.*, at 149.

On June 10, 1977, the PLF filed a Freedom of Information Act request with the regional enforcement division of the EPA seeking information concerning the proposed extension of the expiration date of the Hyperion permit and, specifically, whether that extension had been approved. *Id.*, at 157. When informed by telephone on June 13 that the EPA's final determination had been made on June 2, and that a request for an adjudicatory hearing could be accepted only if filed that day, see 40 CFR § 125.36 (b)(1), respondent Kilroy, represented by PLF attorneys, filed such a request. Under EPA regulations, Kilroy's request for a hearing, if granted, would automatically stay the effectiveness of the permit modification pending disposition of the request. § 125.35 (d)(2).

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mit to a date within five years of its initial issuance, so long as such permit modification is implemented in accordance with applicable procedural requirements.

Respondent Kilroy's request for an adjudicatory hearing presented two issues that he wished to raise:

> "1. Whether the requirements of the permit should be modified in that the project that is the subject of the compliance schedule set forth in NPDES permit CA010991 [the Hyperion permit] is being evaluated in an EIS by the EPA pursuant to the requirements of NEPA, the compliance schedule should not be mandated in an NPDES permit until the NEPA study is completed; and
>
> "2. Whether the procedures used and the record developed were adequate [for the] issuance of an NPDES permit." App. 160.

Within 10 days of receiving Kilroy's request, the Regional Administrator responded by certified mail, stating his determination that the request did not set forth material issues of fact relevant to the question whether the permit should be extended. Thus, he concluded that Kilroy's request had not met the requirements of 40 CFR § 125.36 (c)(1)(ii). The Regional Administrator did construe the request, however, as one raising issues of law relating to the appropriate interpretation to be given regulations that had been promulgated under the FWPCA. He therefore certified to the EPA's General Counsel three issues of law raised by the request. App. 166.[9] Before the General Counsel's ruling

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[9] The following were the issues of law certified by the Regional Administrator to the General Counsel:

"1. Must EPA conduct an informal public hearing prior to taking action to extend the expiration date of an NPDES permit where public notice of the proposed action was published more than 30 days in advance of the action?

"2. Must a detailed factual record be developed prior to modification of an NPDES permit where the only modification made to the permit is the extension of the permit's expiration date?

"3. May the expiration date of an NPDES permit be extended where a project covered by the compliance schedule is being evaluated by EPA

on the certified issues of law was announced, respondents PLF and Kilroy, joined now by the city of Torrance, theretofore a stranger to the formal proceedings, filed a timely petition with the United States Court of Appeals for the Ninth Circuit seeking review of the Regional Administrator's action extending the expiration date of the Hyperion permit. A similar petition was filed by respondent city of Los Angeles. The petitions were consolidated for review. The Court of Appeals stayed the effect of the compliance schedules incorporated within the 1975 permit, pending final disposition of the consolidated cases. Even though the city's NPDES permit for the Hyperion plant, as modified by the EPA on June 2, 1977, stated that it expired December 17, 1979, the terms of the permit, other than those aspects of the compliance schedules requiring completion after January 1, 1977, have remained in effect, both through the Court of Appeals' stay and by operation of law.[10] The case, therefore, clearly has not become moot.

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in an Environmental Impact Statement for the purpose of determining whether a grant should be made to assist in the construction of the project?" App. 168.

Following the parties' presentation of written briefs on these and related issues, the General Counsel ruled against respondent Kilroy. She concluded that the EPA has the authority to extend the expiration date of an NPDES permit through modification, and that an opportunity for a public hearing on such a modification must be provided. A hearing is to be held, however, only if the Regional Administrator finds a significant degree of public interest in the proposed modification. The General Counsel refrained from addressing the second certified issue because Kilroy's brief did not challenge specifically the adequacy of the record supporting the permit modification. Finally, she ruled that the EPA has the authority to extend the expiration date of a permit requiring the implementation of a project, even though funding for that project is undergoing evaluation in an EIS. The General Counsel relied on the District Court's decision in *Pacific Legal Foundation* v. *Quarles*, see n. 7, *supra*, as support for the latter ruling. App. 194.

[10] The Court of Appeals in December 1977 stayed the compliance schedules incorporated within the Hyperion plant's NPDES permit pend-

IV

The Court of Appeals remanded the matter to the Administrator for the holding of a "proper hearing." 586 F. 2d 650, 660–661 (CA9 1978). After first determining that it had jurisdiction to hear respondents' petitions, and rejecting Los Angeles' argument that only the State of California had the authority to extend the Hyperion NPDES permit, *id.*, at 654–657, the court held that the EPA had failed to provide the "opportunity for public hearing" required by § 402 (a)(1) when it extended that permit. All parties agreed that the EPA had not in fact conducted a hearing prior to its extension of the permit on June 2, 1977. The EPA contended, however, that an *opportunity* for a hearing had been provided; it claimed that notice of the proposed extension had been published and that, when no one requested a hearing, it was proper under agency regulations for the Regional Administrator to conclude that there was insufficient public interest in the permit extension to necessitate a hearing. See 40 CFR § 125.34 (a). The Court of Appeals rejected the EPA's contention, holding:

> "The fact that no one requested a hearing prior to the decision is appropriately considered in this analysis, but it is not decisive. It must be shown that the material facts supporting the decision are not subject to dispute." 586 F. 2d, at 658–659 (footnotes omitted).

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ing proceedings on remand to the EPA. The effluent limitations that were in effect on January 1, 1977, however, as well as the permit's monitoring and reporting requirements, have remained operative pending final resolution of this dispute. 586 F. 2d 650, 660–661 (CA9 1978). Because the EPA has not yet acted upon the city's application, filed July 30, 1976, for a new NPDES permit, the terms and conditions of the 1975 permit have remained in effect by operation of law, even though the permit expiration date has now passed. See 5 U. S. C. § 558 (c) (a federal license with reference to an activity of a continuing nature does not expire until a timely application for renewal thereof has been finally determined by the pertinent agency); Tr. of Oral Arg. 4.

The court also relied on language in *Independent Bankers Assn.* v. *Board of Governors,* 170 U. S. App. D. C. 278, 516 F. 2d 1206 (1975), to the effect that certain "opportunity for hearing" requirements of the Bank Holding Company Act of 1956, as amended, 84 Stat. 1765, 12 U. S. C. § 1843 (c)(8), required the Board of Governors of the Federal Reserve System to hold an evidentiary hearing unless it could "show that the parties could gain nothing thereby, because they disputed none of the material facts upon which the agency's decision could rest." 170 U. S. App. D. C., at 292, 516 F. 2d, at 1220.

The Court of Appeals distinguished decisions of this Court in which it was held that a failure to request a hearing constituted a waiver of any right thereto under the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 742, 30 U. S. C. § 801 *et seq.*, and that an agency may place the burden of demonstrating that a case presents disputed issues of material fact on the party challenging the agency's action. 586 F. 2d, at 658–659, nn. 3 and 4 (discussing *National Coal Operators' Assn.* v. *Kleppe,* 423 U. S. 388, 397–398 (1976); *Weinberger* v. *Hynson, Westcott & Dunning, Inc.,* 412 U. S. 609, 620 (1973); and *United States* v. *Storer Broadcasting Co.,* 351 U. S. 192, 205 (1956)).

On the record before it, the Court of Appeals concluded that "the reasonableness of the EPA's compliance schedule [incorporated within the Hyperion NPDES permit] depends upon facts that may be disputed and with respect to which the record in this case is silent." 586 F. 2d, at 659. With respect to such factors as the adequacy of the Palos Verdes or other landfill site, the ability of the city to acquire the capacity to transport sludge to that site within designated time limits, and the possible effect on navigable waters of land disposal of the sludge, the court stated: "[W]e can conclude unequivocally neither that the parties have no dispute about these matters nor that they do." *Ibid.* Thus, the court found itself unable to deny respondents an adjudicatory hearing on the ground that there was no dispute concerning the

material facts upon which the EPA's decision to extend the permit had been based.

The Administrator of the EPA petitioned this Court for review of the question whether § 402 (a)(1) requires the EPA to conduct an adjudicatory hearing before taking action on an NPDES permit issuance or modification where, after notice of the proposed action, no one requested a hearing before the action was taken and the only request filed subsequently raised no material issue of fact.[11] We granted certiorari to review this important issue in a rapidly developing area of the law. 442 U. S. 928 (1979).

V

A

Petitioner's basic contentions are that the EPA was entitled to condition the availability of a public hearing on the extension of the Hyperion permit on the filing of a proper request, and that it similarly was entitled to condition an adjudicatory hearing following its extension decision on the identification of a disputed issue of material fact by an interested party. We agree with both contentions.

Initially, we must state our disagreement with respondents' characterization of the holding of the Court of Appeals. They argue that the court's decision was based on a finding that the EPA in this case did not comply with its own regulations governing public participation in the NPDES permit issuance process, rather than on a legal conclusion that the regulations

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[11] Respondents PLF and Kilroy suggest that the writ of certiorari should be dismissed as having been improvidently granted because petitioner has inserted issues in his brief on the merits that were not included within the question presented in his petition for certiorari. We decline the invitation to dismiss the writ. We note, however, that a decision in this case does not require us to resolve petitioner's contention, challenged by respondents as a "new issue," that Congress did not intend adjudicatory hearings under § 402 of the FWPCA to be governed by the formal requirements of an adjudication "on the record" set forth in the Administrative Procedure Act, 5 U. S. C. § 554 (1976 ed. and Supp. II).

are invalid. We conclude, on the contrary, that, although the court did not explicitly hold the regulations to be invalid, its decision renders them essentially meaningless. Rather than permitting the Regional Administrator to decide, in the first instance, whether there is sufficient public interest in a proposed issuance or modification of a permit to justify a public hearing, 40 CFR § 125.34 (a), and to limit any adjudicatory hearing to the situation where an interested party raises a material issue of fact, § 125.36 (c)(1)(ii), the Court of Appeals would require the agency to justify every failure to hold a hearing by proof that the material facts supporting its action "are not subject to dispute." 586 F. 2d, at 659. This holding is contrary to this Court's approval in past decisions of agency rules, similar to those at issue here, that have required an applicant who seeks a hearing to meet a threshold burden of tendering evidence suggesting the need for a hearing. See, *e. g., Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U. S., at 620–621, and cases cited therein.

Moreover, it is important to note that the regulations described in Part II of this opinion, *supra,* were designed to implement the statutory command that permits be issued "after *opportunity* for public hearing." § 402 (a)(1), 86 Stat. 880, 33 U. S. C. § 1342 (a)(1) (emphasis supplied). In the past, this Court has held that a similar statutory requirement that an "opportunity" for a hearing be provided may be keyed to a *request* for a hearing. See *National Coal Operators' Assn.* v. *Kleppe,* 423 U. S., at 398–399.[12] And only recently

[12] To the extent the Court of Appeals' holding to the contrary relied upon the decision in *Independent Bankers Assn.* v. *Board of Governors,* 170 U. S. App. D. C. 278, 516 F. 2d 1206 (1975), such reliance was misplaced. The passage from that opinion relied upon by the Court of Appeals itself demonstrates that the decision stands for the proposition that a party waives its right to an adjudicatory hearing where it fails to dispute the material facts upon which the agency's decision rests. See *supra,* at 212.

the Court re-emphasized the fundamental administrative law principle that "the formulation of procedures was basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments." *Vermont Yankee Nuclear Power Corp.* v. *NRDC,* 435 U. S. 519, 524 (1978).

Neither can we ignore the fact that under the standard applied by the Court of Appeals, the EPA would be required to hold hearings on most of the actions it takes with respect to NPDES permit issuances and modifications. Hearings would be required even in cases, such as this, in which the proposed action only extends a permit's expiration date without at all affecting the substantive conditions that had been considered during earlier hearings. The Administrator advises us that each year the EPA grants about 100 requests for adjudicatory hearings under the NPDES program, issues about 2,200 permits, and takes thousands of actions with respect to permits. Brief for Petitioner 34–35; see *United States Steel Corp.* v. *Train,* 556 F. 2d 822, 834, n. 14 (CA7 1977). Affirmance of the Court of Appeals' rationale obviously would raise serious questions about the EPA's ability to administer the NPDES program. See *Weinberger,* 412 U. S., at 621; *E. I. du Pont de Nemours & Co.* v. *Train,* 430 U. S. 112, 132–133 (1977).

We recognize the validity of respondents' contention that the legislative history of the FWPCA indicates a strong congressional desire that the public have input in decisions concerning the elimination of water pollution. The FWPCA itself recites:

> "Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator . . . under this Act shall be provided for, encouraged, and assisted by the Administrator." § 101 (e), 86 Stat. 817, 33 U. S. C. § 1251 (e).

Passages in the FWPCA's legislative history indicate that this general policy of encouraging public participation is applicable to the administration of the NPDES permit program. See, *e. g.*, 118 Cong. Rec. 37060 (1972) (remarks of Rep. Dingell during debate on override of the President's veto of the FWPCA). The Report of the Committee on Public Works accompanying the Senate bill emphasized that an essential element of the NPDES program is public participation, and that "[t]he public must have a genuine opportunity to speak on the issue of protection of its waters." S. Rep. No. 92–414, p. 72 (1971).

Nonetheless, we conclude that the regulations the EPA has promulgated to implement this congressional policy are fully consistent with the legislative purpose, and are valid. Respondents, in fact, do not contest seriously the proposition that the EPA's regulations are valid on their face; the thrust of their arguments before this Court has been that the EPA, in this instance, failed to apply its regulations consistently with their purpose.

B

Having rejected the Court of Appeals' invalidation of the EPA's public participation regulations, we turn to the issues framed by respondents. First, PLF and Kilroy contend that the EPA's regulations required the Regional Administrator to hold a public hearing in this case because there was a "significant degree of public interest" in the extension of the Hyperion permit. See 40 CFR § 125.34 (a). They also place substantial reliance upon those agency regulations that set general guidelines for public participation in water pollution control. During the period at issue here, one such regulation provided:

> "Where the opportunity for public hearing is called for in the Act, and in other appropriate instances, a public hearing shall be held if the hearing official finds significant public interest (including the filing of requests or

petitions for such hearing) or pertinent information to be gained. Instances of doubt should be resolved in favor of holding the hearing, or if necessary, of providing alternative opportunity for public participation." 40 CFR § 105.7 (c).

Notwithstanding the orientation of these regulations toward the encouragement of public participation in the NPDES permit issuance process, our examination of the record leads us to reject respondents' contention that the EPA failed to comply with its regulations in this case. It is undisputed that the most controversial aspects of the Hyperion permit—the compliance schedule for secondary treatment, the "sludge-out" requirement, and the resultant requirement that the city develop an alternative method of sludge disposal—were all included within the 1975 permit. That permit was issued following EPA publication of advance notice of its tentative determination to revise the initial 1974 permit, and a hearing on the proposed revisions. None of the respondents objected to the issuance of the 1975 permit or requested an adjudicatory hearing. We agree with the position advanced by petitioner that respondents may not reopen consideration of substantive conditions contained within the 1975 permit through hearing requests relating to a proposed permit modification that did not even purport to affect those conditions.

The EPA's determination to modify the 1975 permit by extending its expiration date to December 17, 1979, was made following newspaper publication of the proposed action, including notice of an opportunity for submission of comments and hearing requests. Respondent Los Angeles received an individual notice of the EPA's tentative determination to extend the permit, and raised no objection. Respondents PLF and Kilroy, who argue that the EPA was aware of their interest in the Hyperion permit and their opposition to the Interim Sludge Disposal Project, could have received such individual notice if they had asked to be placed on the EPA's

mailing list for notices of proposed agency actions within the pertinent geographical area. 40 CFR § 125.32 (a)(3). They made no such request. Under the circumstances, we think it reasonable that the Regional Administrator decided to extend the expiration date of the permit without another public hearing, on the grounds that the public had not exhibited a significant degree of interest in the action under consideration, and that information pertinent to such a decision would not have been adduced if a hearing had been held. This simply is not a case in which doubt existed concerning the need for a hearing.

Second, respondents suggest that the EPA's provision of notice to the general public concerning the proposed permit extension was inadequate. The PLF and Kilroy argue that notice by newspaper publication was not adequate to apprise interested parties of the EPA's tentative determination, and was inconsistent with the policy of encouraging public participation that underlies the statute and regulations. Based on our conclusion that the EPA's regulations implementing the rather amorphous "opportunity for public hearing" requirement of § 402 are valid, we have no hesitancy in concluding that the form of notice provided in this case, fully consistent with the regulations, was not inadequate.

Los Angeles argues that it was not given adequate notice of the proposed extension of its permit because it was never informed that the EPA regarded the federal "sludge-out" compliance schedule contained in the 1975 permit not to have been modified by subsequent orders of the CRWQCB. See n. 6, *supra*. This argument was not addressed directly by the Court of Appeals. It would be appropriate, therefore, for this Court not to attempt to resolve it here, even if we had an adequate record to do so. More fundamentally, however, an additional reason dictates that the city's argument not be resolved in the context of this lawsuit at all. Los Angeles claims that the more lenient sludge-out schedule adopted by

the CRWQCB in its order of May 24, 1976 (incorporating within the Hyperion permit a four-phase alternative sludge disposal plan to be completed by April 1, 1980) has been approved by the EPA with respect to the federal permit. The EPA presently takes the position that state modifications of the sludge-out plan, adopted pursuant to California law, did not alter the initial compliance schedule incorporated in the 1975 federal permit. The agency's position will be tested in *United States* v. *City of Los Angeles,* No. CV 77 3047 R (CD Cal., filed Aug. 12, 1977), an enforcement action brought by the Government under § 309 of the FWPCA, 86 Stat. 859, 33 U. S. C. § 1319 (1976 ed. and Supp. II).

The enforcement action seeks to enjoin the city from violating the conditions of its permit and to impose civil penalties against the city for past failures to comply with the permit's schedules. App. 181. It has been stayed by the Court of Appeals pending the outcome of this case. Brief for Petitioner 17, n. 13. The argument that the city raises here concerning its understanding of the compliance schedules will be resolved far more effectively in the Government's enforcement action than in the adjudicatory hearing the Court of Appeals would have awarded respondents in this case.[13] Furthermore, even if the city had raised its argument in a public hearing on the proposed permit extension, that argument would have had little relevance to the EPA's final determination because the EPA's proposed action did not purport to change the substantive conditions that are the focus of the city's complaint.

Finally, respondents suggest that the EPA erred in not holding an adjudicatory hearing on the issues raised in respondent Kilroy's request. We agree with petitioner, however, who contends that Kilroy's request raised legal, rather

[13] The Court of Appeals' stay of the compliance schedules incorporated within the 1975 permit did not remove the basis for the Government's enforcement action. That action challenges several alleged violations of the Hyperion NPDES permit that predated January 1, 1977. App. 183–187. See n. 10, *supra.*

than factual, issues, and who notes that respondents treated the request in that fashion in arguing the issues Kilroy presented before the EPA's General Counsel. See n. 9, *supra*. Even in their arguments before this Court, respondents have continued to raise factual issues that are relevant only to their contention that greater adverse effects on both the marine and land environment will result from the Interim Sludge Disposal Project than from the continued discharge of sludge into the ocean. If such issues had been raised in a timely request for an adjudicatory hearing, we agree with petitioner that the EPA could have taken the position that such issues, regardless of their merits, were not pertinent to a determination to extend the Hyperion permit's expiration date. That determination had no impact on the compliance schedule for "sludge-out" that already had long been in effect.[14]

C

In sum, we hold that the Court of Appeals erred in concluding that the EPA is required to hold a public hearing on every NPDES permit action it takes unless it can show that the material facts supporting its action "are not subject to

[14] Respondents' litigation strategy throughout the proceedings culminating in this opinion seems to have been based, at least in part, on a fear that the EPA may evade further public scrutiny of the compliance schedules incorporated within the 1975 NPDES permit by issuing continued extensions of that permit rather than acting upon the city's application for a new permit. See *supra*, at 205–206. If that potential for evasion ever did exist, it was a limited one. Under § 402 (b)(1)(B) of the FWPCA, the EPA could have set the expiration date for the initial 1975 permit as late as August 1980, and the agency actions that culminated in this lawsuit would have been unnecessary. Now that the outside date for extensions of the 1975 permit is approaching, any additional extension for purposes of avoiding further hearings on the permit's compliance schedules would have little practical impact. We note, as well, that Los Angeles, under the Administrative Procedure Act, 5 U. S. C. § 706 (1) (a reviewing court shall "compel agency action unlawfully withheld or unreasonably delayed") may obtain judicial review of prolonged agency inaction with respect to its application for a new permit.

dispute." We hold, rather, that the agency's regulations implementing the statutory requirement of "an opportunity for public hearing" under § 402 of the FWPCA are valid. Respondents have failed to demonstrate that those regulations were not applied properly in the context of this case. The Court of Appeals' judgment remanding the case to the agency for an adjudicatory hearing on the EPA's extension of the expiration date of Los Angeles' NPDES permit for its Hyperion Wastewater Treatment Plant is reversed.

It is so ordered.

CHIARELLA *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 78-1202. Argued November 5, 1979—Decided March 18, 1980

Section 10 (b) of the Securities Exchange Act of 1934 (Act) prohibits the use "in connection with the purchase or sale of any security . . . [of] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe." Rule 10b-5 of the Securities and Exchange Commission (SEC), promulgated thereunder, makes it unlawful for any person to "employ any device, scheme, or artifice to defraud," or to "engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security." Petitioner, who was employed by a financial printer that had been engaged by certain corporations to print corporate takeover bids, deduced the names of the target companies from information contained in documents delivered to the printer by the acquiring companies and, without disclosing his knowledge, purchased stock in the target companies and sold the shares immediately after the takeover attempts were made public. After the SEC began an investigation of his trading activities, petitioner entered into a consent decree with the SEC in which he agreed to return his profits to the sellers of the shares. Thereafter, petitioner was indicted and convicted for violating § 10 (b) of the Act and SEC Rule 10b-5. The District Court's charge permitted the jury to convict the petitioner if it found that he willfully failed to inform sellers of target company securities that he knew of a forthcoming takeover bid that would make their shares more valuable. Petitioner's conviction was affirmed by the Court of Appeals.

Held: Petitioner's conduct did not constitute a violation of § 10 (b), and hence his conviction was improper. Pp. 225-237.

(a) Administrative and judicial interpretations have established that silence in connection with the purchase or sale of securities may operate as a fraud actionable under § 10 (b) despite the absence of statutory language or legislative history specifically addressing the legality of nondisclosure. However, such liability is premised upon a duty to disclose (such as that of a corporate insider to shareholders of his cor-

poration) arising from a relationship of trust and confidence between parties to a transaction. Pp. 225–230.

(b) Here, petitioner had no affirmative duty to disclose the information as to the plans of the acquiring companies. He was not a corporate insider, and he received no confidential information from the target companies. Nor could any duty arise from petitioner's relationship with the sellers of the target companies' securities, for he had no prior dealings with them, was not their agent, was not a fiduciary, and was not a person in whom the sellers had placed their trust and confidence. A duty to disclose under § 10 (b) does not arise from the mere possession of nonpublic market information. Pp. 231–235.

(c) This Court need not decide whether petitioner's conviction can be supported on the alternative theory that he breached a duty to the acquiring corporation, since such theory was not submitted to the jury. The jury instructions demonstrate that petitioner was convicted merely because of his failure to disclose material, nonpublic information to sellers from whom he bought the stock of target corporations. The conviction cannot be affirmed on the basis of a theory not presented to the jury. Pp. 235–237.

588 F. 2d 1358, reversed.

POWELL, J., delivered the opinion of the Court, in which STEWART, WHITE, REHNQUIST, and STEVENS, JJ., joined. STEVENS, J., filed a concurring opinion, *post*, p. 237. BRENNAN, J., filed an opinion concurring in the judgment, *post*, p. 238. BURGER, C. J., filed a dissenting opinion, *post*, p. 239. BLACKMUN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 245.

Stanley S. Arkin argued the cause for petitioner. With him on the briefs were *Mark S. Arisohn* and *Arthur T. Cambouris.*

Stephen M. Shapiro argued the cause for the United States. With him on the brief were *Solicitor General McCree, Assistant Attorney General Heymann, Deputy Solicitor General Geller, Sara Criscitelli, John S. Siffert, Ralph C. Ferrara,* and *Paul Gonson.**

**Arthur Fleischer, Jr., Harvey L. Pitt, Richard A. Steinwurtzel,* and *Richard O. Scribner* filed a memorandum for the Securities Industry Assn. as *amicus curiae.*

MR. JUSTICE POWELL delivered the opinion of the Court.

The question in this case is whether a person who learns from the confidential documents of one corporation that it is planning an attempt to secure control of a second corporation violates § 10 (b) of the Securities Exchange Act of 1934 if he fails to disclose the impending takeover before trading in the target company's securities.

I

Petitioner is a printer by trade. In 1975 and 1976, he worked as a "markup man" in the New York composing room of Pandick Press, a financial printer. Among documents that petitioner handled were five announcements of corporate takeover bids. When these documents were delivered to the printer, the identities of the acquiring and target corporations were concealed by blank spaces or false names. The true names were sent to the printer on the night of the final printing.

The petitioner, however, was able to deduce the names of the target companies before the final printing from other information contained in the documents. Without disclosing his knowledge, petitioner purchased stock in the target companies and sold the shares immediately after the takeover attempts were made public.[1] By this method, petitioner realized a gain of slightly more than $30,000 in the course of 14 months. Subsequently, the Securities and Exchange Commission (Commission or SEC) began an investigation of his trading activities. In May 1977, petitioner entered into a consent decree with the Commission in which he agreed to return his profits to the sellers of the shares.[2] On the same day, he was discharged by Pandick Press.

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[1] Of the five transactions, four involved tender offers and one concerned a merger. 588 F. 2d 1358, 1363, n. 2 (CA2 1978).

[2] *SEC v. Chiarella*, No. 77 Civ. Action No. 2534 (GLG) (SDNY May 24, 1977).

In January 1978, petitioner was indicted on 17 counts of violating § 10 (b) of the Securities Exchange Act of 1934 (1934 Act) and SEC Rule 10b–5.[3] After petitioner unsuccessfully moved to dismiss the indictment,[4] he was brought to trial and convicted on all counts.

The Court of Appeals for the Second Circuit affirmed petitioner's conviction. 588 F. 2d 1358 (1978). We granted certiorari, 441 U. S. 942 (1979), and we now reverse.

II

Section 10 (b) of the 1934 Act, 48 Stat. 891, 15 U. S. C. § 78j, prohibits the use "in connection with the purchase or sale of any security . . . [of] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe." Pursuant to this section, the SEC promulgated Rule 10b–5 which provides in pertinent part: [5]

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

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[3] Section 32 (a) of the 1934 Act sanctions criminal penalties against any person who willfully violates the Act. 15 U. S. C. § 78ff (a) (1976 ed., Supp. II). Petitioner was charged with 17 counts of violating the Act because he had received 17 letters confirming purchase of shares.

[4] 450 F. Supp. 95 (SDNY 1978).

[5] Only Rules 10b–5 (a) and (c) are at issue here. Rule 10b–5 (b) provides that it shall be unlawful "[t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." 17 CFR § 240.10b–5 (b) (1979). The portion of the indictment based on this provision was dismissed because the petitioner made no statements at all in connection with the purchase of stock.

"(a) To employ any device, scheme, or artifice to defraud, [or]

. . . . .

"(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security." 17 CFR § 240.10b–5 (1979).

This case concerns the legal effect of the petitioner's silence. The District Court's charge permitted the jury to convict the petitioner if it found that he willfully failed to inform sellers of target company securities that he knew of a forthcoming takeover bid that would make their shares more valuable.[6] In order to decide whether silence in such circumstances violates § 10 (b), it is necessary to review the language and legislative history of that statute as well as its interpretation by the Commission and the federal courts.

Although the starting point of our inquiry is the language of the statute, *Ernst & Ernst* v. *Hochfelder,* 425 U. S. 185, 197 (1976), § 10 (b) does not state whether silence may constitute a manipulative or deceptive device. Section 10 (b) was designed as a catchall clause to prevent fraudulent practices. 425 U. S., at 202, 206. But neither the legislative history nor the statute itself affords specific guidance for the resolution of this case. When Rule 10b–5 was promulgated in 1942, the SEC did not discuss the possibility that failure to provide information might run afoul of § 10 (b).[7]

The SEC took an important step in the development of § 10 (b) when it held that a broker-dealer and his firm violated that section by selling securities on the basis of undisclosed information obtained from a director of the issuer corporation who was also a registered representative of the brokerage firm. In *Cady, Roberts & Co.,* 40 S. E. C. 907

[6] Record 682–683, 686.

[7] See SEC Securities Exchange Act Release No. 3230 (May 21, 1942), 7 Fed. Reg. 3804 (1942).

(1961), the Commission decided that a corporate insider must abstain from trading in the shares of his corporation unless he has first disclosed all material inside information known to him. The obligation to disclose or abstain derives from

> "[a]n affirmative duty to disclose material information[, which] has been traditionally imposed on corporate 'insiders,' particularly officers, directors, or controlling stockholders. We, and the courts have consistently held that insiders must disclose material facts which are known to them by virtue of their position but which are not known to persons with whom they deal and which, if known, would affect their investment judgment." *Id.*, at 911.

The Commission emphasized that the duty arose from (i) the existence of a relationship affording access to inside information intended to be available only for a corporate purpose, and (ii) the unfairness of allowing a corporate insider to take advantage of that information by trading without disclosure. *Id.*, at 912, and n. 15.[8]

That the relationship between a corporate insider and the stockholders of his corporation gives rise to a disclosure obligation is not a novel twist of the law. At common law, misrepresentation made for the purpose of inducing reliance

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[8] In *Cady, Roberts*, the broker-dealer was liable under § 10 (b) because it received nonpublic information from a corporate insider of the issuer. Since the insider could not use the information, neither could the partners in the brokerage firm with which he was associated. The transaction in *Cady, Roberts* involved sale of stock to persons who previously may not have been shareholders in the corporation. 40 S. E. C., at 913, and n. 21. The Commission embraced the reasoning of Judge Learned Hand that "the director or officer assumed a fiduciary relation to the buyer by the very sale; for it would be a sorry distinction to allow him to use the advantage of his position to induce the buyer into the position of a beneficiary although he was forbidden to do so once the buyer had become one." *Id.*, at 914, n. 23, quoting *Gratz* v. *Claughton*, 187 F. 2d 46, 49 (CA2), cert. denied, 341 U. S. 920 (1951).

upon the false statement is fraudulent. But one who fails to disclose material information prior to the consummation of a transaction commits fraud only when he is under a duty to do so. And the duty to disclose arises when one party has information "that the other [party] is entitled to know because of a fiduciary or other similar relation of trust and confidence between them."[9] In its *Cady, Roberts* decision, the Commission recognized a relationship of trust and confidence between the shareholders of a corporation and those insiders who have obtained confidential information by reason of their position with that corporation.[10] This relationship gives rise to a duty to disclose because of the "necessity of preventing a corporate insider from . . . tak[ing] unfair advantage of the

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[9] Restatement (Second) of Torts § 551 (2)(a) (1976). See James & Gray, Misrepresentation—Part II, 37 Md. L. Rev. 488, 523–527 (1978). As regards securities transactions, the American Law Institute recognizes that "silence when there is a duty to . . . speak may be a fraudulent act." ALI, Federal Securities Code § 262 (b) (Prop. Off. Draft 1978).

[10] See 3 W. Fletcher, Cyclopedia of the Law of Private Corporations § 838 (rev. 1975) (hereinafter Fletcher); 3A Fletcher §§ 1168.2, 1171, 1174; 3 L. Loss, Securities Regulation 1446–1448 (2d ed. 1961); 6 *id.*, at 3557–3558 (1969 Supp.). See also *Brophy* v. *Cities Service Co.*, 31 Del. Ch. 241, 70 A. 2d 5 (1949). See generally Note, Rule 10b–5: Elements of a Private Right of Action, 43 N. Y. U. L. Rev. 541, 552–553, and n. 71 (1968); 75 Harv. L. Rev. 1449, 1450 (1962); Daum & Phillips, The Implications of Cady, Roberts, 17 Bus. L. 939, 945 (1962).

The dissent of MR. JUSTICE BLACKMUN suggests that the "special facts" doctrine may be applied to find that silence constitutes fraud where one party has superior information to another. *Post*, at 247–248. This Court has never so held. In *Strong* v. *Repide*, 213 U. S. 419, 431–434 (1909), this Court applied the special-facts doctrine to conclude that a corporate insider had a duty to disclose to a shareholder. In that case, the majority shareholder of a corporation secretly purchased the stock of another shareholder without revealing that the corporation, under the insider's direction, was about to sell corporate assets at a price that would greatly enhance the value of the stock. The decision in *Strong* v. *Repide* was premised upon the fiduciary duty between the corporate insider and the shareholder. See *Pepper* v. *Litton*, 308 U. S. 295, 307, n. 15 (1939).

uninformed minority stockholders." *Speed* v. *Transamerica Corp.*, 99 F. Supp. 808, 829 (Del. 1951).

The federal courts have found violations of § 10 (b) where corporate insiders used undisclosed information for their own benefit. *E. g., SEC* v. *Texas Gulf Sulphur Co.*, 401 F. 2d 833 (CA2 1968), cert. denied, 404 U. S. 1005 (1971). The cases also have emphasized, in accordance with the common-law rule, that "[t]he party charged with failing to disclose market information must be under a duty to disclose it." *Frigitemp Corp.* v. *Financial Dynamics Fund, Inc.*, 524 F. 2d 275, 282 (CA2 1975). Accordingly, a purchaser of stock who has no duty to a prospective seller because he is neither an insider nor a fiduciary has been held to have no obligation to reveal material facts. See *General Time Corp.* v. *Talley Industries, Inc.*, 403 F. 2d 159, 164 (CA2 1968), cert. denied, 393 U. S. 1026 (1969).[11]

This Court followed the same approach in *Affiliated Ute Citizens* v. *United States*, 406 U. S. 128 (1972). A group of American Indians formed a corporation to manage joint assets derived from tribal holdings. The corporation issued stock to its Indian shareholders and designated a local bank as its transfer agent. Because of the speculative nature of the corporate assets and the difficulty of ascertaining the true value of a share, the corporation requested the bank to stress to its stockholders the importance of retaining the stock. *Id.*, at 146. Two of the bank's assistant managers aided the shareholders in disposing of stock which the managers knew was traded in two separate markets—a primary market of

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[11] See also *SEC* v. *Great American Industries, Inc.*, 407 F. 2d 453, 460 (CA2 1968), cert. denied, 395 U. S. 920 (1969); *Kohler* v. *Kohler Co.*, 319 F. 2d 634, 637–638 (CA7 1963); Note, 43 N. Y. U. L. Rev., *supra* n. 10, at 554; Note, The Regulation of Corporate Tender Offers Under Federal Securities Law: A New Challenge for Rule 10b–5, 33 U. Chi. L. Rev. 359, 373–374 (1966). See generally Note, Civil Liability under Rule X–10b–5, 42 Va. L. Rev. 537, 554–561 (1956).

Indians selling to non-Indians through the bank and a resale market consisting entirely of non-Indians. Indian sellers charged that the assistant managers had violated § 10 (b) and Rule 10b–5 by failing to inform them of the higher prices prevailing in the resale market. The Court recognized that no duty of disclosure would exist if the bank merely had acted as a transfer agent. But the bank also had assumed a duty to act on behalf of the shareholders, and the Indian sellers had relied upon its personnel when they sold their stock. 406 U. S., at 152. Because these officers of the bank were charged with a responsibility to the shareholders, they could not act as market makers inducing the Indians to sell their stock without disclosing the existence of the more favorable non-Indian market. *Id.*, at 152–153.

Thus, administrative and judicial interpretations have established that silence in connection with the purchase or sale of securities may operate as a fraud actionable under § 10 (b) despite the absence of statutory language or legislative history specifically addressing the legality of nondisclosure. But such liability is premised upon a duty to disclose arising from a relationship of trust and confidence between parties to a transaction. Application of a duty to disclose prior to trading guarantees that corporate insiders, who have an obligation to place the shareholder's welfare before their own, will not benefit personally through fraudulent use of material, nonpublic information.[12]

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[12] "Tippees" of corporate insiders have been held liable under § 10 (b) because they have a duty not to profit from the use of inside information that they know is confidential and know or should know came from a corporate insider, *Shapiro* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 495 F. 2d 228, 237–238 (CA2 1974). The tippee's obligation has been viewed as arising from his role as a participant after the fact in the insider's breach of a fiduciary duty. Subcommittees of American Bar Association Section of Corporation, Banking, and Business Law, Comment Letter on Material, Non-Public Information (Oct. 15, 1973), reprinted in BNA, Securities Regulation & Law Report No. 233, pp. D–1, D–2 (Jan. 2, 1974).

III

In this case, the petitioner was convicted of violating § 10 (b) although he was not a corporate insider and he received no confidential information from the target company. Moreover, the "market information" upon which he relied did not concern the earning power or operations of the target company, but only the plans of the acquiring company.[13] Petitioner's use of that information was not a fraud under § 10 (b) unless he was subject to an affirmative duty to disclose it before trading. In this case, the jury instructions failed to specify any such duty. In effect, the trial court instructed the jury that petitioner owed a duty to everyone; to all sellers, indeed, to the market as a whole. The jury simply was told to decide whether petitioner used material, nonpublic information at a time when "he knew other people trading in the securities market did not have access to the same information." Record 677.

The Court of Appeals affirmed the conviction by holding that "[*a*]*nyone*—corporate insider or not—who regularly receives material nonpublic information may not use that information to trade in securities without incurring an affirmative duty to disclose." 588 F. 2d, at 1365 (emphasis in original). Although the court said that its test would include only persons who regularly receive material, nonpublic information, *id.*, at 1366, its rationale for that limitation is unrelated to the existence of a duty to disclose.[14] The Court of

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[13] See Fleischer, Mundheim, & Murphy, An Initial Inquiry into the Responsibility to Disclose Market Information, 121 U. Pa. L. Rev. 798, 799 (1973).

[14] The Court of Appeals said that its "regular access to market information" test would create a workable rule embracing "those who occupy . . . strategic places in the market mechanism." 588 F. 2d, at 1365. These considerations are insufficient to support a duty to disclose. A duty arises from the relationship between parties, see nn. 9 and 10, *supra*, and

Appeals, like the trial court, failed to identify a relationship between petitioner and the sellers that could give rise to a duty. Its decision thus rested solely upon its belief that the federal securities laws have "created a system providing equal access to information necessary for reasoned and intelligent investment decisions." *Id.*, at 1362. The use by anyone of material information not generally available is fraudulent, this theory suggests, because such information gives certain buyers or sellers an unfair advantage over less informed buyers and sellers.

This reasoning suffers from two defects. First, not every instance of financial unfairness constitutes fraudulent activity under § 10 (b). See *Santa Fe Industries, Inc.* v. *Green*, 430 U. S. 462, 474–477 (1977). Second, the element required to make silence fraudulent—a duty to disclose—is absent in this case. No duty could arise from petitioner's relationship with the sellers of the target company's securities, for petitioner had no prior dealings with them. He was not their agent, he was not a fiduciary, he was not a person in whom the sellers had placed their trust and confidence. He was, in fact, a com-

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accompanying text, and not merely from one's ability to acquire information because of his position in the market.

The Court of Appeals also suggested that the acquiring corporation itself would not be a "market insider" because a tender offeror creates, rather than receives, information and takes a substantial economic risk that its offer will be unsuccessful. 588 F. 2d, at 1366–1367. Again, the Court of Appeals departed from the analysis appropriate to recognition of a duty. The Court of Appeals for the Second Circuit previously held, in a manner consistent with our analysis here, that a tender offeror does not violate § 10 (b) when it makes preannouncement purchases precisely because there is no relationship between the offeror and the seller:

"We know of no rule of law . . . that a purchaser of stock, who was not an 'insider' and had no fiduciary relation to a prospective seller, had any obligation to reveal circumstances that might raise a seller's demands and thus abort the sale." *General Time Corp.* v. *Talley Industries, Inc.*, 403 F. 2d 159, 164 (1968), cert. denied, 393 U. S. 1026 (1969).

plete stranger who dealt with the sellers only through impersonal market transactions.

We cannot affirm petitioner's conviction without recognizing a general duty between all participants in market transactions to forgo actions based on material, nonpublic information. Formulation of such a broad duty, which departs radically from the established doctrine that duty arises from a specific relationship between two parties, see n. 9, *supra*, should not be undertaken absent some explicit evidence of congressional intent.

As we have seen, no such evidence emerges from the language or legislative history of § 10 (b). Moreover, neither the Congress nor the Commission ever has adopted a parity-of-information rule. Instead the problems caused by misuse of market information have been addressed by detailed and sophisticated regulation that recognizes when use of market information may not harm operation of the securities markets. For example, the Williams Act [15] limits but does not completely prohibit a tender offeror's purchases of target corporation stock before public announcement of the offer. Congress' careful action in this and other areas [16] contrasts, and

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[15] Title 15 U. S. C. § 78m (d)(1) (1976 ed., Supp. II) permits a tender offeror to purchase 5% of the target company's stock prior to disclosure of its plan for acquisition.

[16] Section 11 of the 1934 Act generally forbids a member of a national securities exchange from effecting any transaction on the exchange for its own account. 15 U. S. C. § 78k (a)(1). But Congress has specifically exempted specialists from this prohibition—broker-dealers who execute orders for customers trading in a specific corporation's stock, while at the same time buying and selling that corporation's stock on their own behalf. § 11 (a)(1)(A), 15 U. S. C. § 78k (a)(1)(A); see S. Rep. No. 94–75, p. 99 (1975); Securities and Exchange Commission, Report of Special Study of Securities Markets, H. R. Doc. No. 95, 88th Cong., 1st Sess., pt. 2, pp. 57–58, 76 (1963). See generally S. Robbins, The Securities Markets 191–193 (1966). The exception is based upon Congress' recognition that specialists contribute to a fair and orderly marketplace at the same time they exploit the informational advantage that comes from their pos-

is in some tension, with the broad rule of liability we are asked to adopt in this case.

Indeed, the theory upon which the petitioner was convicted is at odds with the Commission's view of § 10 (b) as applied to activity that has the same effect on sellers as the petitioner's purchases. "Warehousing" takes place when a corporation gives advance notice of its intention to launch a tender offer to institutional investors who then are able to purchase stock in the target company before the tender offer is made public and the price of shares rises.[17] In this case, as in warehousing, a buyer of securities purchases stock in a target corporation on the basis of market information which is unknown to the seller. In both of these situations, the seller's behavior presumably would be altered if he had the nonpublic information. Significantly, however, the Commission has acted to bar warehousing under its authority to regulate tender offers[18] after recognizing that action under § 10 (b) would rest on a "somewhat different theory" than that previously used to regulate insider trading as fraudulent activity.[19]

We see no basis for applying such a new and different theory of liability in this case. As we have emphasized before, the 1934 Act cannot be read " 'more broadly than its language and the statutory scheme reasonably permit.' " *Touche Ross & Co.* v. *Redington*, 442 U. S. 560, 578 (1979), quoting *SEC* v. *Sloan*, 436 U. S. 103, 116 (1978). Section 10 (b) is aptly

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session of buy and sell orders. H. R. Doc. No. 95, *supra*, at 78–80. Similar concerns with the functioning of the market prompted Congress to exempt market makers, block positioners, registered odd-lot dealers, bona fide arbitrageurs, and risk arbitrageurs from § 11's general prohibition on member trading. 15 U. S. C. §§ 78k (a) (1) (A)–(D); see S. Rep. No. 94–75, *supra*, at 99. See also Securities Exchange Act Release No. 34–9950, 38 Fed. Reg. 3902, 3918 (1973).

[17] Fleischer, Mundheim, & Murphy, *supra* n. 13, at 811–812.

[18] SEC Proposed Rule § 240.14e–3, 44 Fed. Reg. 70352–70355, 70359 (1979).

[19] 1 SEC Institutional Investor Study Report, H. R. Doc. No. 92–64, pt. 1, p. xxxii (1971).

described as a catchall provision, but what it catches must be fraud. When an allegation of fraud is based upon nondisclosure, there can be no fraud absent a duty to speak. We hold that a duty to disclose under § 10 (b) does not arise from the mere possession of nonpublic market information. The contrary result is without support in the legislative history of § 10 (b) and would be inconsistent with the careful plan that Congress has enacted for regulation of the securities markets. Cf. *Santa Fe Industries, Inc.* v. *Green,* 430 U. S., at 479.[20]

IV

In its brief to this Court, the United States offers an alternative theory to support petitioner's conviction. It argues that petitioner breached a duty to the acquiring corporation when he acted upon information that he obtained by virtue of his position as an employee of a printer employed by the corporation. The breach of this duty is said to support a

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[20] MR. JUSTICE BLACKMUN's dissent would establish the following standard for imposing criminal and civil liability under § 10 (b) and Rule 10b–5:

"[P]ersons having access to confidential material information that is not legally available to others generally are prohibited . . . from engaging in schemes to exploit their structural informational advantage through trading in affected securities." *Post*, at 251.

This view is not substantially different from the Court of Appeals' theory that anyone "who regularly receives material nonpublic information may not use that information to trade in securities without incurring an affirmative duty to disclose," 588 F. 2d, at 1365, and must be rejected for the reasons stated in Part III. Additionally, a judicial holding that certain undefined activities "generally are prohibited" by § 10 (b) would raise questions whether either criminal or civil defendants would be given fair notice that they have engaged in illegal activity. Cf. *Grayned* v. *City of Rockford,* 408 U. S. 104, 108–109 (1972).

It is worth noting that this is apparently the first case in which criminal liability has been imposed upon a purchaser for § 10 (b) nondisclosure. Petitioner was sentenced to a year in prison, suspended except for one month, and a 5-year term of probation. 588 F. 2d, at 1373, 1378 (Meskill, J., dissenting).

conviction under § 10 (b) for fraud perpetrated upon both the acquiring corporation and the sellers.

We need not decide whether this theory has merit for it was not submitted to the jury. The jury was told, in the language of Rule 10b–5, that it could convict the petitioner if it concluded that he either (i) employed a device, scheme, or artifice to defraud or (ii) engaged in an act, practice, or course of business which operated or would operate as a fraud or deceit upon any person. Record 681. The trial judge stated that a "scheme to defraud" is a plan to obtain money by trick or deceit and that "a failure by Chiarella to disclose material, non-public information in connection with his purchase of stock would constitute deceit." *Id.*, at 683. Accordingly, the jury was instructed that the petitioner employed a scheme to defraud if he "did not disclose . . . material non-public information in connection with the purchases of the stock." *Id.*, at 685–686.

Alternatively, the jury was instructed that it could convict if "Chiarella's alleged conduct of having purchased securities without disclosing material, non-public information would have or did have the effect of operating as a fraud upon a seller." *Id.*, at 686. The judge earlier had stated that fraud "embraces all the means which human ingenuity can devise and which are resorted to by one individual to gain an advantage over another by false misrepresentation, suggestions or by suppression of the truth." *Id.*, at 683.

The jury instructions demonstrate that petitioner was convicted merely because of his failure to disclose material, non-public information to sellers from whom he bought the stock of target corporations. The jury was not instructed on the nature or elements of a duty owed by petitioner to anyone other than the sellers. Because we cannot affirm a criminal conviction on the basis of a theory not presented to the jury, *Rewis* v. *United States*, 401 U. S. 808, 814 (1971), see *Dunn* v. *United States*, 442 U. S. 100, 106 (1979), we will not speculate upon whether such a duty exists, whether it has been

breached, or whether such a breach constitutes a violation of § 10 (b).[21]

The judgment of the Court of Appeals is

Reversed.

MR. JUSTICE STEVENS, concurring.

Before liability, civil or criminal, may be imposed for a Rule 10b–5 violation, it is necessary to identify the duty that the defendant has breached. Arguably, when petitioner bought securities in the open market, he violated (a) a duty to disclose owed to the sellers from whom he purchased target company stock and (b) a duty of silence owed to the acquiring companies. I agree with the Court's determination that petitioner owed no duty of disclosure to the sellers, that his conviction rested on the erroneous premise that he did owe them such a duty, and that the judgment of the Court of Appeals must therefore be reversed.

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[21] The dissent of THE CHIEF JUSTICE relies upon a single phrase from the jury instructions, which states that the petitioner held a "confidential position" at Pandick Press, to argue that the jury was properly instructed on the theory "that a person who has misappropriated nonpublic information has an absolute duty to disclose that information or to refrain from trading." *Post*, at 240. The few words upon which this thesis is based do not explain to the jury the nature and scope of the petitioner's duty to his employer, the nature and scope of petitioner's duty, if any, to the acquiring corporation, or the elements of the tort of misappropriation. Nor do the jury instructions suggest that a "confidential position" is a necessary element of the offense for which petitioner was charged. Thus, we do not believe that a "misappropriation" theory was included in the jury instructions.

The conviction would have to be reversed even if the jury had been instructed that it could convict the petitioner either (1) because of his failure to disclose material, nonpublic information to sellers or (2) because of a breach of a duty to the acquiring corporation. We may not uphold a criminal conviction if it is impossible to ascertain whether the defendant has been punished for noncriminal conduct. *United States* v. *Gallagher*, 576 F. 2d 1028, 1046 (CA3 1978); see *Leary* v. *United States*, 395 U. S. 6, 31–32 (1969); *Stromberg* v. *California*, 283 U. S. 359, 369–370 (1931).

The Court correctly does not address the second question: whether the petitioner's breach of his duty of silence—a duty he unquestionably owed to his employer and to his employer's customers—could give rise to criminal liability under Rule 10b–5. Respectable arguments could be made in support of either position. On the one hand, if we assume that petitioner breached a duty to the acquiring companies that had entrusted confidential information to his employers, a legitimate argument could be made that his actions constituted "a fraud or a deceit" upon those companies "in connection with the purchase or sale of any security."* On the other hand, inasmuch as those companies would not be able to recover damages from petitioner for violating Rule 10b–5 because they were neither purchasers nor sellers of target company securities, see *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, it could also be argued that no actionable violation of Rule 10b–5 had occurred. I think the Court wisely leaves the resolution of this issue for another day.

I write simply to emphasize the fact that we have not necessarily placed any stamp of approval on what this petitioner did, nor have we held that similar actions must be considered lawful in the future. Rather, we have merely held that petitioner's criminal conviction cannot rest on the theory that he breached a duty he did not owe.

I join the Court's opinion.

MR. JUSTICE BRENNAN, concurring in the judgment.

The Court holds, correctly in my view, that "a duty to disclose under § 10 (b) does not arise from the mere posses-

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*See *Eason* v. *General Motors Acceptance Corp.*, 490 F. 2d 654 (CA7 1973), cert. denied, 416 U. S. 960. The specific holding in *Eason* was rejected in *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723. However, the limitation on the right to recover pecuniary damages in a private action identified in *Blue Chip* is not necessarily coextensive with the limits of the rule itself. Cf. *Piper* v. *Chris-Craft Industries, Inc.*, 430 U. S. 1, 42, n. 28, 43, n. 30, 47, n. 33.

sion of nonpublic market information." *Ante*, at 235. Prior to so holding, however, it suggests that no violation of § 10 (b) could be made out absent a breach of some duty arising out of a fiduciary relationship between buyer and seller. I cannot subscribe to that suggestion. On the contrary, it seems to me that Part I of THE CHIEF JUSTICE's dissent, *post*, at 239–243, correctly states the applicable substantive law—a person violates § 10 (b) whenever he improperly obtains or converts to his own benefit nonpublic information which he then uses in connection with the purchase or sale of securities.

While I agree with Part I of THE CHIEF JUSTICE's dissent, I am unable to agree with Part II. Rather, I concur in the judgment of the majority because I think it clear that the legal theory sketched by THE CHIEF JUSTICE is not the one presented to the jury. As I read them, the instructions in effect permitted the jurors to return a verdict of guilty merely upon a finding of failure to disclose material, nonpublic information in connection with the purchase of stock. I can find no instruction suggesting that one element of the offense was the improper conversion or misappropriation of that nonpublic information. Ambiguous suggestions in the indictment and the prosecutor's opening and closing remarks are no substitute for the proper instructions. And neither reference to the harmless error doctrine nor some *post hoc* theory of constructive stipulation can cure the defect. The simple fact is that to affirm the conviction without an adequate instruction would be tantamount to directing a verdict of guilty, and that we plainly may not do.

MR. CHIEF JUSTICE BURGER, dissenting.

I believe that the jury instructions in this case properly charged a violation of § 10 (b) and Rule 10b–5, and I would affirm the conviction.

I

As a general rule, neither party to an arm's-length business transaction has an obligation to disclose information to the

other unless the parties stand in some confidential or fiduciary relation. See W. Prosser, Law of Torts § 106 (2d ed. 1955). This rule permits a businessman to capitalize on his experience and skill in securing and evaluating relevant information; it provides incentive for hard work, careful analysis, and astute forecasting. But the policies that underlie the rule also should limit its scope. In particular, the rule should give way when an informational advantage is obtained, not by superior experience, foresight, or industry, but by some unlawful means. One commentator has written:

> "[T]he way in which the buyer acquires the information which he conceals from the vendor should be a material circumstance. The information might have been acquired as the result of his bringing to bear a superior knowledge, intelligence, skill or technical judgment; it might have been acquired by mere chance; or it might have been acquired by means of some tortious action on his part. . . . *Any time information is acquired by an illegal act it would seem that there should be a duty to disclose that information.*" Keeton, Fraud—Concealment and Non-Disclosure, 15 Texas L. Rev. 1, 25–26 (1936) (emphasis added).

I would read § 10 (b) and Rule 10b–5 to encompass and build on this principle: to mean that a person who has misappropriated nonpublic information has an absolute duty to disclose that information or to refrain from trading.

The language of § 10 (b) and of Rule 10b–5 plainly support such a reading. By their terms, these provisions reach *any* person engaged in *any* fraudulent scheme. This broad language negates the suggestion that congressional concern was limited to trading by "corporate insiders" or to deceptive practices related to "corporate information."[1] Just as surely

[1] Academic writing in recent years has distinguished between "corporate information"—information which comes from within the corporation

Congress cannot have intended one standard of fair dealing for "white collar" insiders and another for the "blue collar" level. The very language of § 10 (b) and Rule 10b–5 "by repeated use of the word 'any' [was] obviously meant to be inclusive." *Affiliated Ute Citizens* v. *United States*, 406 U. S. 128, 151 (1972).

The history of the statute and of the Rule also supports this reading. The antifraud provisions were designed in large measure "to assure that dealing in securities is fair and without undue preferences or advantages among investors." H. R. Conf. Rep. No. 94–229, p. 91 (1975). These provisions prohibit "those manipulative and deceptive practices which have been demonstrated to fulfill no useful function." S. Rep. No. 792, 73d Cong., 2d Sess., 6 (1934). An investor who purchases securities on the basis of misappropriated nonpublic information possesses just such an "undue" trading advantage; his conduct quite clearly serves no useful function except his own enrichment at the expense of others.

This interpretation of § 10 (b) and Rule 10b–5 is in no sense novel. It follows naturally from legal principles enunciated by the Securities and Exchange Commission in its seminal *Cady, Roberts* decision. 40 S. E. C. 907 (1961). There, the Commission relied upon two factors to impose a duty to disclose on corporate insiders: (1) ". . . access . . . to information intended to be available only for a corporate purpose *and not for the personal benefit of anyone*" (emphasis added); and (2) the unfairness inherent in trading on such information when it is inaccessible to those with whom one is dealing. Both of these factors are present whenever a party gains an

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and reflects on expected earnings or assets—and "market information." See, *e. g.*, Fleischer, Mundheim, & Murphy, An Initial Inquiry into the Responsibility to Disclose Market Information, 121 U. Pa. L. Rev. 798, 799 (1973). It is clear that § 10 (b) and Rule 10b–5 by their terms and by their history make no such distinction. See Brudney, Insiders, Outsiders, and Informational Advantages Under the Federal Securities Laws, 93 Harv. L. Rev. 322, 329–333 (1979).

informational advantage by unlawful means.[2] Indeed, in *In re Blyth & Co.*, 43 S. E. C. 1037 (1969), the Commission applied its *Cady, Roberts* decision in just such a context. In that case a broker-dealer had traded in Government securities on the basis of confidential Treasury Department information which it received from a Federal Reserve Bank employee. The Commission ruled that the trading was "improper use of inside information" violative of § 10 (b) and Rule 10b–5. 43 S. E. C., at 1040. It did not hesitate to extend *Cady, Roberts* to reach a "tippee" of a Government insider.[3]

Finally, it bears emphasis that this reading of § 10b and Rule 10b–5 would not threaten legitimate business practices. So read, the antifraud provisions would not impose a duty on a tender offeror to disclose its acquisition plans during the period in which it "tests the water" prior to purchasing a full 5% of the target company's stock. Nor would it proscribe "warehousing." See generally SEC, Institutional Investor Study Report, H. R. Doc. No. 92–64, pt. 4, p. 2273 (1971). Likewise, market specialists would not be subject to a disclose-or-refrain requirement in the performance of their every-

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[2] See Financial Analysts Rec., Oct. 7, 1968, pp. 3, 5 (interview with SEC General Counsel Philip A. Loomis, Jr.) (the essential characteristic of insider information is that it is "received in confidence for a purpose other than to use it for the person's own advantage and to the disadvantage of the investing public in the market"). See also Note, The Government Insider and Rule 10b–5: A New Application for an Expanding Doctrine, 47 S. Cal. L. Rev. 1491, 1498–1502 (1974).

[3] This interpretation of the antifraud provisions also finds support in the recently proposed Federal Securities Code prepared by the American Law Institute under the direction of Professor Louis Loss. The ALI Code would construe the antifraud provisions to cover a class of "quasi-insiders," including a judge's law clerk who trades on information in an unpublished opinion or a Government employee who trades on a secret report. See ALI Federal Securities Code § 1603, comment 3 (d), pp. 538–539 (Prop. Off. Draft 1978). These quasi-insiders share the characteristic that their informational advantage is obtained by conversion and not by legitimate economic activity that society seeks to encourage.

day market functions. In each of these instances, trading is accomplished on the basis of material, nonpublic information, but the information has not been unlawfully converted for personal gain.

II

The Court's opinion, as I read it, leaves open the question whether § 10 (b) and Rule 10b–5 prohibit trading on misappropriated nonpublic information.[4] Instead, the Court apparently concludes that this theory of the case was not submitted to the jury. In the Court's view, the instructions given the jury were premised on the erroneous notion that the mere failure to disclose nonpublic information, however acquired, is a deceptive practice. And because of this premise, the jury was not instructed that the means by which Chiarella acquired his informational advantage—by violating a duty owed to the acquiring companies—was an element of the offense. See *ante*, at 236.

The Court's reading of the District Court's charge is unduly restrictive. Fairly read as a whole and in the context of the trial, the instructions required the jury to find that Chiarella obtained his trading advantage by misappropriating the property of his employer's customers. The jury was charged that "[i]n simple terms, the charge is that Chiarella wrongfully took advantage of information he acquired *in the course of his confidential position at Pandick Press* and secretly used that information when he knew other people trading in the securities market did not have access to the same information

[4] There is some language in the Court's opinion to suggest that only "a relationship between petitioner and the sellers . . . could give rise to a duty [to disclose]." *Ante*, at 232. The Court's holding, however, is much more limited, namely, that mere possession of material nonpublic information is insufficient to create a duty to disclose or to refrain from trading. *Ante*, at 235. Accordingly, it is my understanding that the Court has not rejected the view, advanced above, that an absolute duty to disclose or refrain arises from the very act of misappropriating nonpublic information.

that he had at a time when he knew that that information was material to the value of the stock." Record 677 (emphasis added). The language parallels that in the indictment, and the jury had that indictment during its deliberations; it charged that Chiarella had traded "without disclosing the material non-public information he had obtained in connection with his employment." It is underscored by the clarity which the prosecutor exhibited in his opening statement to the jury. No juror could possibly have failed to understand what the case was about after the prosecutor said: "In sum what the indictment charges is that Chiarella misused material non-public information for personal gain and that he took unfair advantage of his position of trust with the full knowledge that it was wrong to do so. That is what the case is about. It is that simple." *Id.*, at 46. Moreover, experienced defense counsel took no exception and uttered no complaint that the instructions were inadequate in this regard.

In any event, even assuming the instructions were deficient in not charging misappropriation with sufficient precision, on this record any error was harmless beyond a reasonable doubt. Here, Chiarella, himself, testified that he obtained his informational advantage by decoding confidential material entrusted to his employer by its customers. *Id.*, at 474–475. He admitted that the information he traded on was "confidential," not "to be use[d] . . . for personal gain." *Id.*, at 496. In light of this testimony, it is simply inconceivable to me that any shortcoming in the instructions could have "possibly influenced the jury adversely to [the defendant]." *Chapman* v. *California*, 386 U. S. 18, 23 (1967). See also *United States* v. *Park*, 421 U. S. 658, 673–676 (1975). Even more telling perhaps is Chiarella's counsel's statement in closing argument:

> "Let me say right up front, too, Mr. Chiarella got on the stand and he conceded, he said candidly, 'I used clues I got while I was at work. I looked at these various doc-

uments and I deciphered them and I decoded them and I used that information as a basis for purchasing stock.' There is no question about that. We don't have to go through a hullabaloo about that. It is something he concedes. There is no mystery about that." Record 621.

In this Court, counsel similarly conceded that "[w]e do not dispute the proposition that Chiarella *violated his duty as an agent of the offeror corporations not to use their confidential information for personal profit.*" Reply Brief for Petitioner 4 (emphasis added). See Restatement (Second) of Agency § 395 (1958). These statements are tantamount to a formal stipulation that Chiarella's informational advantage was unlawfully obtained. And it is established law that a stipulation related to an essential element of a crime must be regarded by the jury as a fact conclusively proved. See 8 J. Wigmore, Evidence § 2590 (McNaughton rev. 1961); *United States* v. *Houston,* 547 F. 2d 104 (CA9 1976).

In sum, the evidence shows beyond all doubt that Chiarella, working literally in the shadows of the warning signs in the printshop, misappropriated—stole to put it bluntly—valuable nonpublic information entrusted to him in the utmost confidence. He then exploited his ill-gotten informational advantage by purchasing securities in the market. In my view, such conduct plainly violates § 10 (b) and Rule 10b–5. Accordingly, I would affirm the judgment of the Court of Appeals.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE MARSHALL joins, dissenting.

Although I agree with much of what is said in Part I of the dissenting opinion of THE CHIEF JUSTICE, *ante,* p. 239, I write separately because, in my view, it is unnecessary to rest petitioner's conviction on a "misappropriation" theory. The fact that petitioner Chiarella purloined, or, to use THE CHIEF

JUSTICE's word, *ante*, at 245, "stole," information concerning pending tender offers certainly is the most dramatic evidence that petitioner was guilty of fraud. He has conceded that he knew it was wrong, and he and his co-workers in the print-shop were specifically warned by their employer that actions of this kind were improper and forbidden. But I also would find petitioner's conduct fraudulent within the meaning of § 10 (b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78j (b), and the Securities and Exchange Commission's Rule 10b–5, 17 CFR § 240.10b–5 (1979), even if he had obtained the blessing of his employer's principals before embarking on his profiteering scheme. Indeed, I think petitioner's brand of manipulative trading, with or without such approval, lies close to the heart of what the securities laws are intended to prohibit.

The Court continues to pursue a course, charted in certain recent decisions, designed to transform § 10 (b) from an intentionally elastic "catchall" provision to one that catches relatively little of the misbehavior that all too often makes investment in securities a needlessly risky business for the uninitiated investor. See, *e. g., Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185 (1976); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723 (1975). Such confinement in this case is now achieved by imposition of a requirement of a "special relationship" akin to fiduciary duty before the statute gives rise to a duty to disclose or to abstain from trading upon material, nonpublic information.[1] The Court admits that this conclusion finds no mandate in the language of the statute or its legislative history. *Ante*, at 226. Yet the Court fails even to attempt a justification of its ruling in terms of the purposes

[1] The Court fails to specify whether the obligations of a special relationship must fall directly upon the person engaging in an allegedly fraudulent transaction, or whether the derivative obligations of "tippees," that lower courts long have recognized, are encompassed by its rule. See *ante*, at 230, n. 12; cf. *Foremost-McKesson, Inc.* v. *Provident Securities Co.*, 423 U. S. 232, 255, n. 29 (1976).

of the securities laws, or to square that ruling with the long-standing but now much abused principle that the federal securities laws are to be construed flexibly rather than with narrow technicality. See *Affiliated Ute Citizens* v. *United States,* 406 U. S. 128, 151 (1972); *Superintendent of Insurance* v. *Bankers Life & Casualty Co.,* 404 U. S. 6, 12 (1971); *SEC* v. *Capital Gains Research Bureau,* 375 U. S. 180, 186 (1963).

I, of course, agree with the Court that a relationship of trust can establish a duty to disclose under § 10 (b) and Rule 10b–5. But I do not agree that a failure to disclose violates the Rule only when the responsibilities of a relationship of that kind have been breached. As applied to this case, the Court's approach unduly minimizes the importance of petitioner's *access* to confidential information that the honest investor, no matter how diligently he tried, could not legally obtain. In doing so, it further advances an interpretation of § 10 (b) and Rule 10b–5 that stops short of their full implications. Although the Court draws support for its position from certain precedent, I find its decision neither fully consistent with developments in the common law of fraud, nor fully in step with administrative and judicial application of Rule 10b–5 to "insider" trading.

The common law of actionable misrepresentation long has treated the possession of "special facts" as a key ingredient in the duty to disclose. See *Strong* v. *Repide,* 213 U. S. 419, 431–433 (1909); 1 F. Harper & F. James, Law of Torts § 7.14 (1956). Traditionally, this factor has been prominent in cases involving confidential or fiduciary relations, where one party's inferiority of knowledge and dependence upon fair treatment is a matter of legal definition, as well as in cases where one party is on notice that the other is "acting under a mistaken belief with respect to a material fact." *Frigitemp Corp.* v. *Financial Dynamics Fund, Inc.,* 524 F. 2d 275, 283 (CA2 1975); see also Restatement of Torts § 551 (1938). Even at common law, however, there has been a trend away from strict adherence to the harsh maxim *caveat emptor* and

toward a more flexible, less formalistic understanding of the duty to disclose. See, *e. g.*, Keeton, Fraud—Concealment and Non-disclosure, 15 Texas L. Rev. 1, 31 (1936). Steps have been taken toward application of the "special facts" doctrine in a broader array of contexts where one party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair. See James & Gray, Misrepresentation—Part II, 37 Md. L. Rev. 488, 526–527 (1978); 3 Restatement (Second) of Torts § 551 (e), Comment *l* (1977); *id.*, at 166–167 (Tent. Draft No. 10, 1964). See also *Lingsch* v. *Savage,* 213 Cal. App. 2d 729, 735–737, 29 Cal. Rptr. 201, 204–206 (1963); *Jenkins* v. *McCormick,* 184 Kan. 842, 844–845, 339 P. 2d 8, 11 (1959); *Jones* v. *Arnold,* 359 Mo. 161, 169–170, 221 S. W. 2d 187, 193–194 (1949); *Simmons* v. *Evans,* 185 Tenn. 282, 285–287, 206 S. W. 2d 295, 296–297 (1947).

By its narrow construction of § 10 (b) and Rule 10b–5, the Court places the federal securities laws in the rearguard of this movement, a position opposite to the expectations of Congress at the time the securities laws were enacted. Cf. H. R. Rep. No. 1383, 73d Cong., 2d Sess., 5 (1934). I cannot agree that the statute and Rule are so limited. The Court has observed that the securities laws were not intended to replicate the law of fiduciary relations. *Santa Fe Industries, Inc.* v. *Green,* 430 U. S. 462, 474–476 (1977). Rather, their purpose is to ensure the fair and honest functioning of impersonal national securities markets where common-law protections have proved inadequate. Cf. *United States* v. *Naftalin,* 441 U. S. 768, 775 (1979). As Congress itself has recognized, it is integral to this purpose "to assure that dealing in securities is fair and without undue preferences or advantages among investors." H. R. Conf. Rep. No. 94–229, p. 91 (1975).

Indeed, the importance of access to "special facts" has been a recurrent theme in administrative and judicial application

of Rule 10b–5 to insider trading. Both the SEC and the courts have stressed the insider's misuse of secret knowledge as the gravamen of illegal conduct. The Court, I think, unduly minimizes this aspect of prior decisions.

Cady, Roberts & Co., 40 S. E. C. 907 (1961), which the Court discusses at some length, provides an illustration. In that case, the Commission defined the category of "insiders" subject to a disclose-or-abstain obligation according to two factors:

> "[F]irst, the existence of a relationship giving access, directly or indirectly, to information intended to be available only for a corporate purpose and not for the personal benefit of anyone, and second, the inherent unfairness involved where a party takes advantage of such information knowing it is unavailable to those with whom he is dealing." *Id.*, at 912 (footnote omitted).

The Commission, thus, regarded the insider "relationship" primarily in terms of *access* to nonpublic information, and not merely in terms of the presence of a common-law fiduciary duty or the like. This approach was deemed to be in keeping with the principle that "the broad language of the anti-fraud provisions" should not be "circumscribed by fine distinctions and rigid classifications," such as those that prevailed under the common law. *Ibid.* The duty to abstain or disclose arose, not merely as an incident of fiduciary responsibility, but as a result of the "inherent unfairness" of turning secret information to account for personal profit. This understanding of Rule 10b–5 was reinforced when *Investors Management Co.*, 44 S. E. C. 633, 643 (1971), specifically rejected the contention that a "special relationship" between the alleged violator and an "insider" source was a necessary requirement for liability.

A similar approach has been followed by the courts. In *SEC* v. *Texas Gulf Sulphur Co.*, 401 F. 2d 833, 848 (CA2

1968) (en banc), cert. denied *sub nom. Coates* v. *SEC*, 394 U. S. 976 (1969), the court specifically mentioned the common-law "special facts" doctrine as one source for Rule 10b–5, and it reasoned that the rule is "based in policy on the justifiable expectation of the securities marketplace that all investors trading on impersonal exchanges have relatively equal access to material information." See also *Lewelling* v. *First California Co.*, 564 F. 2d 1277, 1280 (CA9 1977); *Speed* v. *Transamerica Corp.*, 99 F. Supp. 808, 829 (Del. 1951). In addition, cases such as *Myzel* v. *Fields*, 386 F. 2d 718, 739 (CA8 1967), cert. denied, 390 U. S. 951 (1968), and *A. T. Brod & Co.* v. *Perlow*, 375 F. 2d 393, 397 (CA2 1967), have stressed that § 10 (b) and Rule 10b–5 apply to any kind of fraud by any person. The concept of the "insider" itself has been flexible; wherever confidential information has been abused, prophylaxis has followed. See, *e. g.*, *Zweig* v. *Hearst Corp.*, 594 F. 2d 1261 (CA9 1979) (financial columnist); *Shapiro* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 495 F. 2d 228 (CA2 1974) (institutional investor); *SEC* v. *Shapiro*, 494 F. 2d 1301 (CA2 1974) (merger negotiator); *Chasins* v. *Smith, Barney & Co.*, 438 F. 2d 1167 (CA2 1970) (market maker). See generally 2 A. Bromberg & L. Lowenfels, Securities Law & Commodities Fraud § 7.4 (6)(b) (1979).

I believe, and surely thought, that this broad understanding of the duty to disclose under Rule 10b–5 was recognized and approved in *Affiliated Ute Citizens* v. *United States*, 406 U. S. 128 (1972). That case held that bank agents dealing in the stock of a Ute Indian development corporation had a duty to reveal to mixed-blood Indian customers that their shares could bring a higher price on a non-Indian market of which the sellers were unaware. *Id.*, at 150–153. The Court recognized that "by repeated use of the word 'any,'" the statute and Rule "are obviously meant to be inclusive." *Id.*, at 151. Although it found a relationship of trust between

the agents and the Indian sellers, the Court also clearly established that the bank and its agents were subject to the strictures of Rule 10b–5 because of their strategic position in the marketplace. The Indian sellers had no knowledge of the non-Indian market. The bank agents, in contrast, had intimate familiarity with the non-Indian market, which they had promoted actively, and from which they and their bank both profited. In these circumstances, the Court held that the bank and its agents "possessed the affirmative duty under the Rule" to disclose market information to the Indian sellers, and that the latter "had the right to know" that their shares would sell for a higher price in another market. *Id.*, at 153.

It seems to me that the Court, *ante*, at 229–230, gives *Affiliated Ute Citizens* an unduly narrow interpretation. As I now read my opinion there for the Court, it lends strong support to the principle that a structural disparity in access to material information is a critical factor under Rule 10b–5 in establishing a duty either to disclose the information or to abstain from trading. Given the factual posture of the case, it was unnecessary to resolve the question whether such a structural disparity could sustain a duty to disclose even absent "a relationship of trust and confidence between parties to a transaction." *Ante*, at 230. Nevertheless, I think the rationale of *Affiliated Ute Citizens* definitely points toward an affirmative answer to that question. Although I am not sure I fully accept the "market insider" category created by the Court of Appeals, I would hold that persons having access to confidential material information that is not legally available to others generally are prohibited by Rule 10b–5 from engaging in schemes to exploit their structural informational advantage through trading in affected securities. To hold otherwise, it seems to me, is to tolerate a wide range of manipulative and deceitful behavior. See *Blyth & Co.*, 43 S. E. C. 1037 (1969); *Herbert L. Honohan*, 13 S. E. C. 754 (1943); see generally Brudney, Insiders, Outsiders, and Informational Advantages

under the Federal Securities Laws, 93 Harv. L. Rev. 322 (1979).[2]

Whatever the outer limits of the Rule, petitioner Chiarella's case fits neatly near the center of its analytical framework. He occupied a relationship to the takeover companies giving him intimate access to concededly material information that was sedulously guarded from public access. The information, in the words of *Cady, Roberts & Co.*, 40 S. E. C., at 912, was "intended to be available only for a corporate purpose and not for the personal benefit of anyone." Petitioner, moreover, knew that the information was unavailable to those with whom he dealt. And he took full, virtually riskless advantage of this artificial information gap by selling the stocks shortly after each takeover bid was announced. By any reasonable definition, his trading was "inherent[ly] unfai[r]." *Ibid.* This misuse of confidential information was clearly placed before the jury. Petitioner's conviction, therefore, should be upheld, and I dissent from the Court's upsetting that conviction.

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[2] The Court observes that several provisions of the federal securities laws limit but do not prohibit trading by certain investors who may possess nonpublic market information. *Ante*, at 233–234. It also asserts that "neither the Congress nor the Commission ever has adopted a parity-of-information rule." *Ante*, at 233. In my judgment, neither the observation nor the assertion undermines the interpretation of Rule 10b–5 that I support and that I have endeavored briefly to outline. The statutory provisions cited by the Court betoken a congressional purpose not to leave the exploitation of structural informational advantages unregulated. Letting Rule 10b–5 operate as a "catchall" to ensure that these narrow exceptions granted by Congress are not expanded by circumvention completes this statutory scheme. Furthermore, there is a significant conceptual distinction between parity of information and parity of *access* to material information. The latter gives free rein to certain kinds of informational advantages that the former might foreclose, such as those that result from differences in diligence or acumen. Indeed, by limiting opportunities for profit from manipulation of confidential connections or resort to stealth, equal access helps to ensure that advantages obtained by honest means reap their full reward.

UNITED STATES v. CLARKE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 78-1693. Argued January 15, 16, 1980—Decided March 18, 1980

Held: Title 25 U. S. C. § 357, which provides that lands allotted in severalty to Indians may be "condemned" for any public purpose under the laws of the State or Territory where located, does not authorize a state or local government to "condemn" allotted Indian trust lands by physical occupation. Under the "plain meaning" canon of statutory construction, the term "condemned" in § 357 refers to a formal condemnation proceeding instituted by the condemning authority for the purpose of acquiring title to private property and paying just compensation for it, not to an "inverse condemnation" action by a landowner to recover compensation for a taking by physical intrusion. Thus, the Court of Appeals erred in holding that § 357 permitted acquisition of allotted lands by inverse condemnation by certain cities in Alaska, even though Alaska law might allow the exercise of the power of eminent domain through inverse condemnation. Pp. 254–259.

590 F. 2d 765, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, MARSHALL, POWELL, and STEVENS, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which WHITE, J., joined, *post*, p. 259.

Harlon L. Dalton argued the cause for the United States. With him on the brief were *Solicitor General McCree, Assistant Attorney General Moorman, Dirk Snel,* and *Carl Strass. Robert S. Pelcyger* argued the cause for Bertha Mae Tabbytite, respondent under this Court's Rule 21 (4), in support of the United States. With him on the briefs was *Vincent Vitale.*

Richard Arthur Weinig argued the cause and filed a brief for respondents.

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

We granted the petition for certiorari of the United States in this case, 444 U. S. 822, to decide the question "[w]hether 25 U. S. C. [§] 357 authorizes a state or local government to 'condemn' allotted Indian trust lands by physical occupation." Pet. for Cert. 2. That statute, in turn, provides in pertinent part:

> "[L]ands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee." 31 Stat. 1084.

We think this is a case in which the meaning of a statute may be determined by the admittedly old-fashioned but nonetheless still entirely appropriate "plain meaning" canon of statutory construction. We further believe that the word "condemned," at least as it was commonly used in 1901, when 25 U. S. C. § 357 was enacted, had reference to a judicial proceeding instituted for the purpose of acquiring title to private property and paying just compensation for it.

Both the factual and legal background of the case are complicated, but these complications lose their significance under our interpretation of § 357. For it is conceded that neither the city of Glen Alps nor the city of Anchorage, both Alaska municipal corporations, ever brought an action to condemn the lands here in question in federal court as required by *Minnesota* v. *United States*, 305 U. S. 382 (1939). And since we hold that only in such a formal judicial proceeding may lands such as this be acquired, the complex factual and legal history of the dispute between the Government, respondents Glen M. Clarke et al., and respondent Bertha Mae Tabbytite need not be recited in detail.[1]

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[1] Respondent Tabbytite lost in the Court of Appeals for the Ninth Circuit and did not petition for certiorari from that decision. She is there-

The Court of Appeals for the Ninth Circuit held that § 357 permits acquisition of allotted lands by what has come to be known as "inverse condemnation." 590 F. 2d 765 (1979). In so holding, the court reasoned that "once the taking has been accomplished by the state it serves little purpose to interpret the statute to refuse to permit an inverse condemnation suit to be maintained on the groun[d] that the state should have filed an eminent domain action prior to the taking." *Id.*, at 767. We disagree with the Court of Appeals and accordingly reverse the judgment.

There are important legal and practical differences between an inverse condemnation suit and a condemnation proceeding. Although a landowner's action to recover just compensation for a taking by physical intrusion has come to be referred to as "inverse" or "reverse" condemnation, the simple terms "condemn" and "condemnation" are not commonly used to describe such an action. Rather, a "condemnation" proceeding is commonly understood to be an action brought *by* a condemning authority such as the Government in the exercise of its power of eminent domain. In *United States* v. *Lynah*, 188 U. S. 445 (1903), for example, which held that the Federal Government's permanent flooding of the plaintiff's land constituted a compensable "taking" under the Fifth Amendment, this Court consistently made separate reference to condemnation proceedings and to the landowner's cause of action to recover damages for the taking. *Id.*, at 462, 467, 468.[2]

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fore a respondent in this Court. This Court's Rule 21 (4). Her counsel has filed both a brief and reply brief adopting the statements of the case and the arguments set forth in the brief for the United States, but principally devoted to "matters not included in the Brief of the United States." Since we agree with the position advanced by the United States, we need not decide whether Tabbytite's arguments comply with this Court's Rule 40 (1)(d)(2). See also Rule 40 (3).

[2] The landowner's right to sue for damages was based on the theory that if a landowner were entitled to have governmental agents enjoined from taking his land without implementing condemnation proceedings, he also was entitled to waive that right and to demand just compensation as if the

More recent decisions of this Court reaffirm this well-established distinction between condemnation actions and physical takings by governmental bodies that may entitle a landowner to sue for compensation. Thus, in *Ivanhoe Irrigation District* v. *McCracken*, 357 U. S. 275, 291 (1958), when discussing the acquisition by the Government of property rights necessary to carry out a reclamation project, this Court stated that such rights must be acquired by "paying just compensation therefor, either through condemnation or, if already taken, through action of the owners in the courts." And in *United States* v. *Dickinson*, 331 U. S. 745, 749 (1947), this Court referred to the Government's choice "not to condemn land but to bring about a taking by a continuous process of physical events." See also *id.*, at 747–748; *Dugan* v. *Rank*, 372 U. S. 609, 619 (1963).[3]

Government had taken his property under its sovereign right of eminent domain. 188 U. S., at 462. See also, *e. g.*, *United States* v. *Great Falls Manufacturing Co.*, 112 U. S. 645, 656 (1884). Cf. *United States* v. *Lee*, 106 U. S. 196 (1882) (holding that landowner could bring suit for ejectment against federal officials who took possession of land without bringing condemnation proceedings); *Winslow* v. *Baltimore & Ohio R. Co.*, 188 U. S. 646, 660–661 (1903) (after declining to treat a suit for damages by a landowner as a condemnation action, the Court directed the lower court to enjoin temporarily proceedings brought by the landowner to dispossess the railroad company from the land "in order to enable [the railroad company] to condemn such land in proper proceedings for that purpose, which cannot be taken in the present suit").

[3] Also, in *United States* v. *Dow*, 357 U. S. 17, 21 (1958), this Court stated:

"Broadly speaking, the United States may take property pursuant to its power of eminent domain in one of two ways: it can enter into physical possession of property without authority of a court order; or it can institute condemnation proceedings under various Acts of Congress providing authority for such takings. Under the first method—physical seizure—no condemnation proceedings are instituted, and the property owner is provided a remedy under the Tucker Act, 28 U. S. C. §§ 1346 (a)(2) and 1491, to recover just compensation. See *Hurley* v. *Kincaid*, 285 U. S. 95, 104. Under the second procedure the Government may either employ statutes

The phrase "inverse condemnation" appears to be one that was coined simply as a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted. As defined by one land use planning expert, "[i]nverse condemnation is '*a cause of action against a governmental defendant* to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency.'" D. Hagman, Urban Planning and Land Development Control Law 328 (1971) (emphasis added). A landowner is entitled to bring such an action as a result of "the self-executing character of the constitutional provision with respect to compensation. . . ." See 6 P. Nichols, Eminent Domain § 25.41 (3d rev. ed. 1972). A condemnation proceeding, by contrast, typically involves an action by the condemnor to effect a taking and acquire title. The phrase "inverse condemnation," as a common understanding of that phrase would suggest, simply describes an action that is the "inverse" or "reverse" of a condemnation proceeding.

There are also important practical differences between condemnation proceedings and actions by landowners to recover compensation for "inverse condemnation." Condemnation proceedings, depending on the applicable statute, require various affirmative action on the part of the condemning authority. To accomplish a taking by seizure, on the other hand, a condemning authority need only occupy the land in question. Such a taking thus shifts to the landowner the burden to discover the encroachment and to take affirmative action to recover just compensation. And in the case of Indian trust

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which require it to pay over the judicially determined compensation before it can enter upon the land, . . . or proceed under other statutes which enable it to take immediate possession upon order of court before the amount of just compensation has been ascertained."

lands, which present the Government " 'with an almost staggering problem in attempting to discharge its trust obligations with respect to thousands upon thousands of scattered Indian allotments,' " *Poafpybitty* v. *Skelly Oil Co.,* 390 U. S. 365, 374 (1968), the United States may be placed at a significant disadvantage by this shifting of the initiative from the condemning authority to the condemnee.

Likewise, the choice of the condemning authority to take property by physical invasion rather than by a formal condemnation action may also have important monetary consequences. The value of property taken by a governmental body is to be ascertained as of the date of taking. *United States* v. *Miller,* 317 U. S. 369, 374 (1943). In a condemnation proceeding, the taking generally occurs sometime during the course of the proceeding, and thus compensation is based on a relatively current valuation of the land. See 1 L. Orgel, Valuation in Eminent Domain § 21, n. 29 (2d ed. 1953). When a taking occurs by physical invasion, on the other hand, the usual rule is that the time of the invasion constitutes the act of taking, and "[i]t is that event which gives rise to the claim for compensation and fixes the date as of which the land is to be valued. . . ." *United States* v. *Dow,* 357 U. S. 17, 22 (1958).

Thus, even assuming that the term "inverse condemnation" were in use in 1901 to the same extent as it is today, there are sufficient legal and practical differences between "condemnation" and "inverse condemnation" to convince us that when § 357 authorizes the condemnation of lands pursuant to the laws of a State or Territory, the term "condemned" refers not to an action by a landowner to recover compensation for a taking, but to a formal condemnation proceeding instituted by the condemning authority.[4]

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[4] The legislative history of § 357 does not provide any meaningful guidance as to the meaning of "condemned." The language eventually adopted as § 357 was not part of the original bill. It was inserted, without com-

Respondent municipality of Anchorage argues that the action authorized by the Court of Appeals here should be regarded as one in condemnation because Alaska law allows the "exercise of the power of eminent domain through inverse condemnation or a taking in the nature of inverse condemnation." Brief for Respondent Municipality of Anchorage 16. But we do not reach questions of Alaska law here because 25 U. S. C. § 357, although prescribing that allotted lands "may be condemned for any public purpose under the laws of the State or Territory where located," requires that they nonetheless be "condemned." It is conceded that there has never been a formal condemnation action instituted in this case. Since we construe such an action to be an indispensable prerequisite for the reliance of any State or Territory on the other provisions of this section, we therefore reverse the judgment of the Court of Appeals.

Reversed.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE WHITE joins, dissenting.

Since the Court's opinion sets forth none of the facts of this case, it may be well to mention at least a few.

Bertha Mae Tabbytite, an American Indian, in 1954 settled on a 160-acre plot in the Chugach Mountains southeast of Anchorage, Alaska. She initially sought to perfect her claim to the land under the homestead laws and thereby to obtain an unrestricted fee title. Her applications for this were unsuccessful, however, and in 1966 Tabbytite agreed to accept a restricted trust patent to the land as an Indian allottee. As a result, the legal title remains in the United States, and

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ment or discussion, on the Senate floor. 34 Cong. Rec. 1448 (1901). And the House Report only briefly discussed § 3 of the Act, to which § 357 was added. It stated: "Fifth. Providing for the opening of highways through like lands under State and Territorial laws and upon the payment of compensation." H. R. Rep. No. 2064, 56th Cong., 2d Sess., 3 (1900).

Tabbytite's powers of alienation are restricted. See 25 U. S. C. § 348.

Meanwhile, in 1958 Glen Clarke and his wife applied for a homestead patent on 80 acres adjoining the Tabbytite allotment. Two months later, without obtaining an easement, they constructed a road across that land. The Clarkes repeatedly contested Tabbytite's homestead application and prevented her from perfecting her patent. After securing their own patent in 1961, the Clarkes subdivided their property into 40 parcels, most of which were sold to others before this litigation began. That subdivision and surrounding lands were incorporated in June 1961 as a third-class city called Glen Alps. As a third-class city under Alaska law, Glen Alps did not possess the power of eminent domain.

In 1969, the United States filed the present action for damages and to enjoin the use of the road across the Tabbytite allotment. The District Court awarded damages for trespass but denied the injunction. The court concluded that the road was a "way of necessity," and that closing the road would cause "hardship" to the defendants. On the initial appeal to the United States Court of Appeals for the Ninth Circuit, that court reversed and did so on the grounds that upon entry in 1954 Tabbytite's title to the land was good against everyone except the United States Government, and that the Clarkes were not successors in interest to an easement implicitly retained by the Government. 529 F. 2d 984 (1976).

That ruling, however, was not the end of the case. In September 1975, the municipality of Anchorage annexed Glen Alps and apparently took over maintenance of the roadway. On the remand to the District Court, the municipality entered the proceedings and opposed an injunction on the ground that it already had effectively exercised its power of eminent domain by "inverse condemnation." The United States took the position that the federal statute consenting to condemnation of allotted lands, 25 U. S. C. § 357, does not authorize

inverse condemnation. The District Court ruled that under the federal statute, state law determines the propriety of condemnation proceedings and that Alaska law, indeed, recognized "inverse condemnation." The court held, accordingly, that Tabbytite was entitled to just compensation, but that an injunction should not issue.

On appeal, the Ninth Circuit affirmed and remanded the case for further proceedings. 590 F. 2d 765 (1979). It agreed with the District Court that § 357 permits a State to take Indian land by paying compensation in an inverse condemnation action. It reasoned that "once the taking has been accomplished by the state it serves little purpose to interpret the statute to refuse to permit an inverse condemnation suit to be maintained on the grounds that the state should have filed an eminent domain action prior to the taking." 590 F. 2d, at 767. It observed that "it seems a contradiction to deny Indian beneficial owners a cause of action for damages under the guise of protecting their rights." It predicted that its holding would encourage States and political subdivisions to act "with more circumspection, not less, when governmental activities conflict with ownership rights of Indian trust lands." *Ibid.*

I find the opinion of the Ninth Circuit persuasive. The present case is not a dispute about a right but about a remedy. There is, of course, no question that if § 357 applies, Anchorage has the right to take Tabbytite's property through traditional eminent domain proceedings, and that Tabbytite has a right to just compensation if it does so. The case centers, however, in the fact that the municipality already has taken an interest in the property without a formal proceeding; the issue, then, is whether an after-the-fact award of just compensation is an adequate remedy. The dispute is in the measure of damages.

There is no question that inverse condemnation is recognized by Alaska law in circumstances similar to the present case. *State, Dept. of Highways* v. *Crosby,* 410 P. 2d 724

(Alaska 1966); *City of Anchorage* v. *Nesbett*, 530 P. 2d 1324 (Alaska 1975).* As I read § 357, it does not prohibit resort to inverse condemnation under state law. The statute explicitly refers to state law, and I read in the statute no specialized definition of the term "condemned" as a matter of federal law.

The United States and Tabbytite perhaps are concerned that in an action for inverse condemnation, the property interest will be valued at the earlier date of the entry rather than at the subsequent date of the institution of formal condemnation proceedings. The inference, of course, is that the property interest will have appreciated in value in the interim, to the advantage of the Indian allottee. I suspect that this argument has more form than substance. Interest during the intervening period will make up much of the difference. And still more of that difference might well be the result of the improvement for which eminent domain is belatedly invoked. There is perhaps little reason to doubt, in this very case, that the Tabbytite property is more valuable because it is crossed by a graded, improved, and publicly maintained road.

For these reasons, I would affirm the judgment of the Court of Appeals, and I respectfully dissent from the Court's reversal of that judgment.

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*It is not clear that Alaska law would permit deliberate resort to inverse condemnation as a means of avoiding initiation of formal condemnation proceedings. That issue is not before us, since Anchorage first assumed responsibility for the road under a claim of right under the first judgment of the District Court.

RUMMEL v. ESTELLE, CORRECTIONS DIRECTOR

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 78-6386. Argued January 7, 1980—Decided March 18, 1980

Petitioner, who previously on two separate occasions had been convicted in Texas state courts and sentenced to prison for felonies (fraudulent use of a credit card to obtain $80 worth of goods or services, and passing a forged check in the amount of $28.36), was convicted of a third felony, obtaining $120.75 by false pretenses, and received a mandatory life sentence pursuant to Texas' recidivist statute. After the Texas appellate courts had rejected his direct appeal as well as his subsequent collateral attacks on his imprisonment, petitioner sought a writ of habeas corpus in Federal District Court, claiming that his life sentence was so disproportionate to the crimes he had committed as to constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The District Court rejected this claim, and the Court of Appeals affirmed, attaching particular importance to the probability that petitioner would be eligible for parole within 12 years of his initial confinement.

Held: The mandatory life sentence imposed upon petitioner does not constitute cruel and unusual punishment under the Eighth and Fourteenth Amendments. Pp. 268-285.

(a) Texas' interest here is not simply that of making criminal the unlawful acquisition of another person's property, but is in addition the interest, expressed in all recidivist statutes, in dealing in a harsher manner with those who by repeated criminal acts have shown that they are incapable of conforming to the norms of society as established by its criminal law. The Texas recidivist statute thus is nothing more than a societal decision that when a person, such as petitioner, commits yet another felony, he should be subjected to the serious penalty of life imprisonment, subject only to the State's judgment as to whether to grant him parole. Pp. 276-278.

(b) While petitioner's inability to enforce any "right" to parole precludes treating his life sentence as equivalent to a 12 years' sentence, nevertheless, because parole is an established variation on imprisonment, a proper assessment of Texas' treatment of petitioner could not ignore the possibility that he will not actually be imprisoned for the rest of his life. Pp. 280-281.

(c) Texas is entitled to make its own judgment as to the line dividing felony theft from petty larceny, subject only to those strictures of the Eighth Amendment that can be informed by objective factors. Moreover, given petitioner's record, Texas was not required to treat him in the same manner as it might treat him were this his first "petty property offense." Pp. 284–285.

587 F. 2d 651, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, and BLACKMUN, JJ., joined. STEWART, J., filed a concurring opinion, *post*, p. 285. POWELL, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined, *post*, p. 285.

Scott J. Atlas, by appointment of the Court, 442 U. S. 939, argued the cause for petitioner. With him on the briefs was *Charles Alan Wright*.

Douglas M. Becker, Assistant Attorney General of Texas, argued the cause for respondent. With him on the brief were *Mark White*, Attorney General, *John W. Fainter, Jr.*, First Assistant Attorney General, *Ted L. Hartley*, Executive Assistant Attorney General, *Gilbert J. Pena*, Assistant Attorney General, and *W. Barton Boling*.*

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner William James Rummel is presently serving a life sentence imposed by the State of Texas in 1973 under its "recidivist statute," formerly Art. 63 of its Penal Code, which provided that "[w]hoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary." [1] On January

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*Briefs of *amici curiae* urging affirmance were filed by *Keith W. Burris* for the Criminal District Attorney of Bexar County, Texas; and by *Michael Kuhn* for the District Attorney of Harris County, Texas.

[1] With minor revisions, this article has since been recodified as Texas Penal Code Ann. § 12.42 (d) (1974).

19, 1976, Rummel sought a writ of habeas corpus in the United States District Court for the Western District of Texas, arguing that life imprisonment was "grossly disproportionate" to the three felonies that formed the predicate for his sentence and that therefore the sentence violated the ban on cruel and unusual punishments of the Eighth and Fourteenth Amendments. The District Court and the United States Court of Appeals for the Fifth Circuit rejected Rummel's claim, finding no unconstitutional disproportionality. We granted certiorari, 441 U. S. 960, and now affirm.

I

In 1964 the State of Texas charged Rummel with fraudulent use of a credit card to obtain $80 worth of goods or services.[2] Because the amount in question was greater than $50, the charged offense was a felony punishable by a minimum of 2 years and a maximum of 10 years in the Texas Department of Corrections.[3] Rummel eventually pleaded guilty to the charge and was sentenced to three years' confinement in a state penitentiary.

In 1969 the State of Texas charged Rummel with passing a forged check in the amount of $28.36, a crime punishable by imprisonment in a penitentiary for not less than two nor more

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[2] In 1964 Texas Penal Code Ann., Art. 1555b, provided:

"Section 1. It shall be unlawful for any person to present a credit card or alleged credit card, with the intent to defraud, to obtain or attempt to obtain any item of value or service of any type; or to present such credit card or alleged credit card, with the intent to defraud, to pay for items of value or services rendered." App. to Tex. Penal Code Ann., p. 712 (1974).

[3] In 1964 Texas Penal Code Ann., Art. 1555b (4)(d), provided:

"For a violation of this Act, in the event the amount of the credit obtained or the value of the items or services is Fifty Dollars ($50) or more, punishment shall be confinement in the penitentiary for not less than two (2) nor more than ten (10) years." App. to Tex. Penal Code Ann., p. 713 (1974).

than five years.[4] Rummel pleaded guilty to this offense and was sentenced to four years' imprisonment.

In 1973 Rummel was charged with obtaining $120.75 by false pretenses.[5] Because the amount obtained was greater than $50, the charged offense was designated "felony theft," which, by itself, was punishable by confinement in a penitentiary for not less than 2 nor more than 10 years.[6] The prosecution chose, however, to proceed against Rummel under Texas' recidivist statute, and cited in the indictment his 1964 and 1969 convictions as requiring imposition of a life sentence if Rummel were convicted of the charged offense. A jury convicted Rummel of felony theft and also found as true the allegation that he had been convicted of two prior felonies. As a result, on April 26, 1973, the trial court imposed upon Rummel the life sentence mandated by Art. 63.

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[4] In 1969 Texas Penal Code Ann., Art. 996, provided:

"If any person shall knowingly pass as true, or attempt to pass as true, any such forged instrument in writing as is mentioned and defined in the preceding articles of this chapter, he shall be confined in the penitentiary not less than two nor more than five years." App. to Tex. Penal Code Ann., p. 597 (1974).

[5] In 1973 Texas Penal Code Ann., Art. 1410, provided:

" 'Theft' is the fraudulent taking of corporeal personal property belonging to another from his possession, or from the possession of some person holding the same for him, without his consent, with intent to deprive the owner of the value of the same, and to appropriate it to the use or benefit of the person taking." App. to Tex. Penal Code Ann., p. 688 (1974).

In 1973 Texas Penal Code Ann., Art. 1413, provided:

"The taking must be wrongful, so that if the property came into the possession of the person accused of theft by lawful means, the subsequent appropriation of it is not theft, but if the taking, though originally lawful, was obtained by false pretext, or with any intent to deprive the owner of the value thereof, and appropriate the property to the use and benefit of the person taking, and the same is so appropriated, the offense of theft is complete." App. to Tex. Penal Code Ann., p. 689 (1974).

[6] In 1973 Texas Penal Code § 1421 provided:

"Theft of property of the value of fifty dollars or over shall be punished by confinement in the penitentiary not less than two nor more than ten years." App. to Tex. Penal Code Ann., p. 690 (1974).

The Texas appellate courts rejected Rummel's direct appeal as well as his subsequent collateral attacks on his imprisonment.[7] Rummel then filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Texas. In that petition, he claimed, *inter alia*, that his life sentence was so disproportionate to the crimes he had committed as to constitute cruel and unusual punishment. The District Court rejected this claim, first noting that this Court had already rejected a constitutional attack upon Art. 63, see *Spencer* v. *Texas*, 385 U. S. 554 (1967), and then crediting an argument by respondent that Rummel's sentence could not be viewed as life imprisonment because he would be eligible for parole in approximately 12 years.

A divided panel of the Court of Appeals reversed. 568 F. 2d 1193 (CA5 1978). The majority relied upon this Court's decision in *Weems* v. *United States*, 217 U. S. 349 (1910), and a decision of the United States Court of Appeals for the Fourth Circuit, *Hart* v. *Coiner*, 483 F. 2d 136 (1973), cert. denied, 415 U. S. 983 (1974), in holding that Rummel's life sentence was "so grossly disproportionate" to his offenses as to constitute cruel and unusual punishment. 568 F. 2d, at 1200. The dissenting judge argued that "[n]o neutral principle of adjudication permits a federal court to hold that in a given situation individual crimes are too trivial in relation to the punishment imposed." *Id.*, at 1201–1202.

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[7] Preliminary, the respondent argues that Rummel's claim is barred by *Wainwright* v. *Sykes*, 433 U. S. 72 (1977), because he did not object at the punishment stage of his trial to the imposition of a mandatory life sentence. Respondent raised this claim for the first time in his petition to the Court of Appeals for rehearing en banc, which was filed shortly after *Wainwright* was decided. The Court of Appeals rejected this argument because it did not believe that Texas' contemporaneous-objection requirement extended to a challenge like that raised by Rummell. See 587 F. 2d 651, 653–654 (CA5 1978). Deferring to the Court of Appeals' interpretation of Texas law, we decline to hold that *Wainwright* bars Rummel from presenting his claim.

Rummel's case was reheard by the Court of Appeals sitting en banc. That court vacated the panel opinion and affirmed the District Court's denial of habeas corpus relief on Rummel's Eighth Amendment claim. 587 F. 2d 651 (CA5 1978). Of particular importance to the majority of the Court of Appeals en banc was the probability that Rummel would be eligible for parole within 12 years of his initial confinement. Six members of the Court of Appeals dissented, arguing that Rummel had no enforceable right to parole and that *Weems* and *Hart* compelled a finding that Rummel's life sentence was unconstitutional.

II

Initially, we believe it important to set forth two propositions that Rummel does not contest. First, Rummel does not challenge the constitutionality of Texas' recidivist statute as a general proposition. In *Spencer* v. *Texas, supra,* this Court upheld the very statute employed here, noting in the course of its opinion that similar statutes had been sustained against contentions that they violated "constitutional strictures dealing with double jeopardy, *ex post facto* laws, cruel and unusual punishment, due process, equal protection, and privileges and immunities." 385 U. S., at 560. Here, Rummel attacks only the result of applying this concededly valid statute to the facts of his case.

Second, Rummel does not challenge Texas' authority to punish each of his offenses as felonies, that is, by imprisoning him in a state penitentiary.[8] Cf. *Robinson* v. *California,* 370 U. S. 660 (1962) (statute making it a crime to be addicted to the use of narcotics violates the Eighth and Fourteenth Amendments). See also *Ingraham* v. *Wright,* 430 U. S. 651,

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[8] Texas, like most States, defines felonies as offenses that "may—not must—be punishable by death or by confinement in the penitentiary. . . ." Tex. Penal Code Ann., Art. 47 (Vernon 1925), recodified without substantive change at Tex. Penal Code Ann. § 1.07 (14) (1974). See also W. LaFave & A. Scott, Handbook on Criminal Law 26 (1972).

667 (1977) (Eighth Amendment "imposes substantive limits on what can be made criminal and punished as such . . ."). Under Texas law Rummel concededly could have received sentences totaling 25 years in prison for what he refers to as his "petty property offenses." Indeed, when Rummel obtained $120.75 by false pretenses he committed a crime punishable as a felony in at least 35 States and the District of Columbia.[9] Similarly, a large number of States authorized

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[9] See Ala. Code §§ 13-3-50, 13-3-90 (1975) (1 to 10 years); Alaska Stat. Ann. § 11.20.360 (1970) (1 to 5 years); Ariz. Rev. Stat. Ann. §§ 13-661 (A)(3), 13-663 (A)(1), 13-671 (1956 and Supp. 1957-1978) (1 to 10 years); Ark. Stat. Ann. §§ 41-1901, 41-3907 (1964) (1 to 21 years); Colo. Rev. Stat. §§ 18-4-401, 18-1-105 (1973) (fine or up to 10 years); Del. Code Ann., Tit. 11, §§ 841, 843, 4205 (1974) (fine or up to 7 years); D. C. Code § 22-1301 (1973) (1 to 3 years); Fla. Stat. § 811.021 (1965) (fine or up to 5 years); Ga. Code Ann. §§ 26-1803, 26-1812 (1977) (fine or up to 10 years); Ind. Code Ann. §§ 10-3030 (b), 10-3039 (3) (Supp. 1975) (fine or up to 10 years); Kan. Stat. Ann. §§ 21-3701, 21-4501 (1974) (1 to 3 years); Ky. Rev. Stat. §§ 514.040, 532.080 (1975) (1 to 5 years); La. Rev. Stat. Ann. § 14:67 (West 1974) (up to 2 years); Me. Rev. Stat. Ann., Tit. 17, § 1601 (1965) (fine or up to 7 years); Md. Ann. Code, Art. 27, § 140 (1957) (fine or up to 10 years); Mass. Gen. Laws Ann., ch. 266, § 30 (West 1970) (fine or up to 5 years); Mich. Comp. Laws § 750.218 (1968) (fine or up to 10 years); Minn. Stat. § 609.52 (Supp. 1978) (fine or up to 5 years); Miss. Code Ann. § 97-19-39 (1972) (fine or up to 3 years); Mont. Rev. Code Ann. §§ 94-2701 (1), 94-2704 (1), 94-2706 (1947) (1 to 14 years); Nev. Rev. Stat. §§ 205.380, 205.380 (1) (1977) (fine or 1 to 10 years); N. H. Rev. Stat. Ann. §§ 637:4 (I), 637:11 (II)(a), 651:2 (1974) (fine or up to 7 years); N. C. Gen. Stat. § 14-100 (1969) (fine or 4 months to 10 years); N. D. Cent. Code §§ 12.1-23-02, 12.1-23-05 (2)(a), 12.1-32-01 (3) (1976) (fine or up to 5 years); Ohio Rev. Code Ann. § 2911.01 (Supp. 1974) (1 to 3 years), committee comment following Ohio Rev. Stat. Ann. § 2913.02 (1975); Okla. Stat., Tit. 21, §§ 1541.1, 1541.2 (Supp. 1979-1980) (fine or 1 to 10 years); S. D. Comp. Laws Ann. §§ 22-37-1, 22-37-2, 22-37-3 (1969) (up to 10 years); Tenn. Code Ann. §§ 39-1901, 39-4203, 39-4204 (1975) (3 to 10 years); Tex. Penal Code Ann., Arts. 1410, 1413, 1421 (Vernon 1925) (2 to 10 years); Utah Code Ann. §§ 76-3-203 (3), 76-6-405, 76-6-412 (1978), and accompanying Compiler's Note (up to 5 years); Vt. Stat. Ann., Tit. 13, § 2002

significant terms of imprisonment for each of Rummel's other offenses at the times he committed them.[10] Rummel's challenge thus focuses only on the State's authority to impose a

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(1958) (up to 10 years); Va. Code §§ 18.2-178, 18.2-95 (1975) (fine or 1 to 20 years); Wash. Rev. Code Ann. §§ 9.54.010 (2), 9.54.090 (6) (1974) (up to 15 years); W. Va. Code §§ 61-3-24, 61-3-13 (1977) (1 to 10 years); Wis. Stat. Ann. §§ 943.20 (1958) (fine or up to 5 years); Wyo. Stat. § 6-3-106 (1977) (up to 10 years).

[10] In 1969, Rummel's passing of a forged check would have been punishable by imprisonment in 49 States and the District of Columbia, even though the amount in question was only $28.36. See Ala. Code, Tit. 14, §§ 199, 207 (1958) (1 to 20 years); Ariz. Rev. Stat. Ann. § 13-421 (Supp. 1957-1978) (1 to 14 years); Ark. Stat. Ann. § 41-1806 (1964) (2 to 10 years); Cal. Penal Code Ann. §§ 470, 473 (West 1970) (up to 14 years); Colo. Rev. Stat. § 40-6-1 (1963) (1 to 14 years); Conn. Gen. Stat. § 53-346 (1968) (up to 5 years); Del. Code Ann., Tit. 11, §§ 861, 4205 (1974) (fine or up to 7 years); D. C. Code § 22-1401 (1973) (1 to 10 years); Fla. Stat. §§ 831.01, 831.02 (1965) (fine or up to 10 years); Ga. Code Ann. § 26-1701 (1977) (1 to 10 years); Haw. Rev. Stat. §§ 743-9, 743-11 (1968) (fine or up to 5 years' hard labor); Idaho Code §§ 18-3601, 18-3604 (1948) (1 to 14 years); Ill. Rev. Stat., ch. 38, § 17-3 (1971) (fine and/or 1 to 14 years); Ind. Code § 10-2102 (1956) (2 to 14 years plus fine); Iowa Code § 718.2 (1950) (fine or up to 10 years); Kan. Stat. Ann. §§ 21-609, 21-631 (1964) (up to 10 years' hard labor); Ky. Rev. Stat. § 434.130 (1962) (2 to 10 years); La. Rev. Stat. Ann. § 14:72 (West 1974) (fine or up to 10 years' hard labor); Me. Rev. Stat. Ann., Tit. 17, § 1501 (1965) (up to 10 years); Md. Ann. Code, Art. 27, § 44 (1957) (1 to 10 years); Mass. Gen. Laws Ann., ch. 267, § 5 (West 1970) (2 to 10 years); Mich. Comp. Laws § 750.253 (1968) (fine or up to 5 years); Minn. Stat. § 609.625 (3) (1964) (fine or up to 10 years); Miss. Code Ann. §§ 2172, 2187 (1942) (2 to 15 years); Mo. Rev. Stat. § 561.011 (1969) (fine or up to 10 years); Mont. Rev. Code Ann. §§ 94-2001, 94-2044 (1947) (1 to 14 years); Neb. Rev. Stat. § 28-601 (1943) (1 to 20 years plus fine); Nev. Rev. Stat. § 205.090 (1959) (1 to 14 years); N. H. Rev. Stat. Ann. §§ 581:1, 581:2 (1955) (up to 7 years); N. J. Stat. Ann. §§ 2A:109-1, 2A:85-6 (West 1969) (fine or up to 7 years); N. M. Stat. Ann. §§ 40A-16-9, 40A-29-3 (C) (Supp. 1963) (fine or 2 to 10 years); N. Y. Penal Law § 70.00 (2)(d), 170.10, 170.25 (McKinney 1967 and 1975) (up to 7 years); N. C. Gen. Stat. § 14-120 (1969) (4 months to 10 years); N. D. Cent. Code §§ 12-39-23, 12-39-27 (1960) (up to 10

sentence of life imprisonment, as opposed to a substantial term of years, for his third felony.

This Court has on occasion stated that the Eighth Amendment prohibits imposition of a sentence that is grossly disproportionate to the severity of the crime. See, *e. g.*, *Weems* v.

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years); Ohio Rev. Code Ann. § 2913.01 (1954) (1 to 20 years); Okla. Stat., Tit. 21, §§ 1577, 1621 (2) (1958) (up to 7 years); Ore. Rev. Stat. §§ 165.105, 165.115 (Supp. 1967) (up to 10 years); Pa. Stat. Ann., Tit. 18, § 5014 (Purdon 1963) (fine or up to 10 years); R. I. Gen. Laws § 11-17-1 (1956) (fine or up to 10 years); S. C. Code § 16-13-10 (1976) (1 to 7 years plus fine); S. D. Comp. Laws Ann. §§ 22-39-14, 22-39-17 (1967) (fine or up to 5 years); Tenn. Code Ann. §§ 39-1704, 39-1721, 39-4203, 39-4204 (1955 and Supp. 1974) (1 to 5 years); Tex. Penal Code Ann., Art. 996 (Vernon 1925) (2 to 5 years); Utah Code Ann. §§ 76-26-1, 76-26-4 (1953) (1 to 20 years); Vt. Stat. Ann., Tit. 13, § 1802 (1958) (fine or up to 10 years); Va. Code § 18.1-96 (1960) (up to 10 years); Wash. Rev. Code Ann. §§ 9.44.020, 9.44.060 (1956) (up to 20 years); W. Va. Code § 61-4-5 (1966) (up to 10 years); Wis. Stat. Ann. § 943.38 (1958) (fine or up to 10 years); Wyo. Stat. § 6-2-101 (1977) (up to 14 years).

In 1964, at least five of the States that had specific statutes covering credit-card fraud authorized terms of imprisonment for a crime like Rummel's. See Cal. Penal Code Ann. § 484a (b)(6) (Deering Supp. 1964), § 18 (Deering 1960) (up to 5 years); Kan. Stat. Ann. §§ 21-533, 21-534, 21-590 (1964) (up to 5 years' hard labor); 1963 Ore. Laws, ch. 588, § 3 (6) (up to 5 years); Tex. Penal Code Ann., Art. 1555b (Vernon Supp. 1973) (2 to 10 years); Va. Code § 18.1-119.1 (Supp. 1964) (up to 10 years). A number of other States, while lacking specific statutes dealing with credit-card fraud, apparently authorized an equivalent degree of punishment for such a crime under their general fraud provisions. See, *e. g.*, Ala. Code, Tit. 14, §§ 209, 331 (1958 and Supp. 1973) (1 to 10 years); Mont. Rev. Code Ann. §§ 94-1805, 94-2704 (1), 94-2706 (1947) (1 to 14 years); N. H. Rev. Stat. Ann. § 580:1 (1955) (fine or up to 7 years); N. C. Gen. Stat. § 14-100 (1953) (fine or up to 10 years); N. D. Cent. Code § 12-38-04 (1960) (fine or up to 3 years); Tenn. Code Ann. §§ 39-1901, 39-4203, 39-4204 (1955 and Supp. 1974) (1 to 5 years); Vt. Stat. Ann., Tit. 13, § 2002 (1958) (fine or up to 10 years). After 1964, at least two other States adopted specific statutes dealing with credit-card fraud and authorizing imprisonment for crimes like Rummel's. See Idaho Code §§ 18-112, 18-3113, 18-3119 (1979) (fine or up to 5 years); Wash. Rev. Code Ann. § 9.26A.040 (1972) (up to 20 years).

United States, 217 U. S., at 367; *Ingraham* v. *Wright,* 430 U. S., at 667 (dictum); *Trop* v. *Dulles,* 356 U. S. 86, 100 (1958) (plurality opinion). In recent years this proposition has appeared most frequently in opinions dealing with the death penalty. See, *e. g., Coker* v. *Georgia,* 433 U. S. 584, 592 (1977) (plurality opinion); *Gregg* v. *Georgia,* 428 U. S. 153, 173 (1976) (opinion of STEWART, POWELL, and STEVENS, JJ.); *Furman* v. *Georgia,* 408 U. S. 238, 458 (1972) (POWELL, J., dissenting). Rummel cites these latter opinions dealing with capital punishment as compelling the conclusion that his sentence is disproportionate to his offenses. But as MR. JUSTICE STEWART noted in *Furman:*

> "The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity." *Id.,* at 306.

This theme, the unique nature of the death penalty for purposes of Eighth Amendment analysis, has been repeated time and time again in our opinions. See, *e. g., Furman* v. *Georgia, supra,* at 287, 289 (BRENNAN, J., concurring); *Gregg* v. *Georgia, supra,* at 187 (opinion of STEWART, POWELL, and STEVENS, JJ.); *Woodson* v. *North Carolina,* 428 U. S. 280, 305 (1976); *Coker* v. *Georgia, supra,* at 598 (plurality opinion). Because a sentence of death differs in kind from any sentence of imprisonment, no matter how long, our decisions applying the prohibition of cruel and unusual punishments to capital cases are of limited assistance in deciding the constitutionality of the punishment meted out to Rummel.

Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare. In *Weems* v. *United States, supra,* a case coming to this Court from the Supreme Court of the Philippine

Islands, petitioner successfully attacked the imposition of a punishment known as *"cadena temporal"* for the crime of falsifying a public record. Although the Court in *Weems* invalidated the sentence after weighing "the mischief and the remedy," 217 U. S., at 379, its finding of disproportionality cannot be wrenched from the extreme facts of that case. As for the "mischief," Weems was convicted of falsifying a public document, a crime apparently complete upon the knowing entry of a single item of false information in a public record, "though there be no one injured, though there be no fraud or purpose of it, no gain or desire of it." *Id.*, at 365. The mandatory "remedy" for this offense was *cadena temporal,* a punishment described graphically by the Court:

> "Its minimum degree is confinement in a penal institution for twelve years and one day, a chain at the ankle and wrist of the offender, hard and painful labor, no assistance from friend or relative, no marital authority or parental rights or rights of property, no participation even in the family council. These parts of his penalty endure for the term of imprisonment. From other parts there is no intermission. His prison bars and chains are removed, it is true, after twelve years, but he goes from them to a perpetual limitation of his liberty. He is forever kept under the shadow of his crime, forever kept within voice and view of the criminal magistrate, not being able to change his domicil without giving notice to the 'authority immediately in charge of his surveillance,' and without permission in writing." *Id.*, at 366.

Although Rummel argues that the length of Weems' imprisonment was, by itself, a basis for the Court's decision, the Court's opinion does not support such a simple conclusion. The opinion consistently referred jointly to the length of imprisonment and its "accessories" or "accompaniments." See *id.*, at 366, 372, 377, 380. Indeed, the Court expressly rejected an argument made on behalf of the United States that "the pro-

vision for imprisonment in the Philippine Code is separable from the accessory punishment, and that the latter may be declared illegal, leaving the former to have application." According to the Court, "[t]he Philippine Code unites the penalties of *cadena temporal,* principal and accessory, and it is not in our power to separate them. . . ." *Id.,* at 382. Thus, we do not believe that *Weems* can be applied without regard to its peculiar facts: the triviality of the charged offense, the impressive length of the minimum term of imprisonment, and the extraordinary nature of the "accessories" included within the punishment of *cadena temporal.*

Given the unique nature of the punishments considered in *Weems* and in the death penalty cases, one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative.[11] Only six years after *Weems,* for example, Mr. Justice Holmes wrote for a unanimous Court in brushing aside a proportionality challenge to concurrent sentences of five years' imprisonment and cumulative fines of $1,000 on each of seven counts of mail fraud. See *Badders* v. *United States,* 240 U. S. 391 (1916). According to the Court, there was simply "no ground for declaring the punishment unconstitutional." *Id.,* at 394.

Such reluctance to review legislatively mandated terms of imprisonment is implicit in our more recent decisions as well. As was noted by MR. JUSTICE WHITE, writing for the plurality in *Coker* v. *Georgia, supra,* at 592, our Court's "Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible ex-

[11] This is not to say that a proportionality principle would not come into play in the extreme example mentioned by the dissent, *post,* at 288, if a legislature made overtime parking a felony punishable by life imprisonment.

tent." Since *Coker* involved the imposition of capital punishment for the rape of an adult female, this Court could draw a "bright line" between the punishment of death and the various other permutations and commutations of punishments short of that ultimate sanction. For the reasons stated by MR. JUSTICE STEWART in *Furman*, see *supra*, at 272, this line was considerably clearer than would be any constitutional distinction between one term of years and a shorter or longer term of years.

Similarly, in *Weems* the Court could differentiate in an objective fashion between the highly unusual *cadena temporal* and more traditional forms of imprisonment imposed under the Anglo-Saxon system. But a more extensive intrusion into the basic line-drawing process that is pre-eminently the province of the legislature when it makes an act criminal would be difficult to square with the view expressed in *Coker* that the Court's Eighth Amendment judgments should neither be nor appear to be merely the subjective views of individual Justices.

In an attempt to provide us with objective criteria against which we might measure the proportionality of his life sentence, Rummel points to certain characteristics of his offenses that allegedly render them "petty." He cites, for example, the absence of violence in his crimes. But the presence or absence of violence does not always affect the strength of society's interest in deterring a particular crime or in punishing a particular criminal. A high official in a large corporation can commit undeniably serious crimes in the area of antitrust, bribery, or clean air or water standards without coming close to engaging in any "violent" or short-term "life-threatening" behavior. Additionally, Rummel cites the "small" amount of money taken in each of his crimes. But to recognize that the State of Texas could have imprisoned Rummel for life if he had stolen $5,000, $50,000, or $500,000, rather than the $120.75 that a jury convicted him of stealing, is virtually to concede that the lines to be drawn are indeed "subjective," and therefore properly within the province of

legislatures, not courts. Moreover, if Rummel had attempted to defraud his victim of $50,000, but had failed, no money whatsoever would have changed hands; yet Rummel would be no less blameworthy, only less skillful, than if he had succeeded.

In this case, however, we need not decide whether Texas could impose a life sentence upon Rummel merely for obtaining $120.75 by false pretenses. Had Rummel only committed that crime, under the law enacted by the Texas Legislature he could have been imprisoned for no more than 10 years. In fact, at the time that he obtained the $120.75 by false pretenses, he already had committed and had been imprisoned for two other felonies, crimes that Texas and other States felt were serious enough to warrant significant terms of imprisonment even in the absence of prior offenses. Thus the interest of the State of Texas here is not simply that of making criminal the unlawful acquisition of another person's property; it is in addition the interest, expressed in all recidivist statutes, in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law. By conceding the validity of recidivist statutes generally, Rummel himself concedes that the State of Texas, or any other State, has a valid interest in so dealing with that class of persons.

Nearly 70 years ago, and only 2 years after *Weems,* this Court rejected an Eighth Amendment claim that seems factually indistinguishable from that advanced by Rummel in the present case. In *Graham* v. *West Virginia,* 224 U. S. 616 (1912), this Court considered the case of an apparently incorrigible horsethief who was sentenced to life imprisonment under West Virginia's recidivist statute. In 1898 Graham had been convicted of stealing "one bay mare" valued at $50; in 1901 he had been convicted of "feloniously and burglariously" entering a stable in order to steal "one brown horse, named Harry, of the value of $100"; finally, in 1907 he was convicted of stealing "one red roan horse" valued at $75 and

various tack and accessories valued at $85.[12] Upon conviction of this last crime, Graham received the life sentence mandated by West Virginia's recidivist statute. This Court did not tarry long on Graham's Eighth Amendment claim,[13] noting only that it could not be maintained "that cruel and unusual punishment [had] been inflicted." *Id.*, at 631.[14]

Undaunted by earlier cases like *Graham* and *Badders*, Rummel attempts to ground his proportionality attack on an alleged "nationwide" trend away from mandatory life sentences and toward "lighter, discretionary sentences." Brief for Petitioner 43–44. According to Rummel, "[n]o jurisdiction in the United States or the Free World punishes habitual offenders as harshly as Texas." *Id.*, at 39. In support of this proposition, Rummel offers detailed charts and tables documenting the history of recidivist statutes in the United States since 1776.

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[12] See Transcript of Record in *Graham* v. *West Virginia*, O. T. 1911, No. 721, pp. 4, 5, 9.

[13] While at the time this Court decided *Graham* the Eighth Amendment's proscription against cruel and unusual punishments had not been held applicable to the States through the Fourteenth Amendment, see, *e. g.*, *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S. 459, 462 (1947) (plurality opinion), earlier cases had assumed, without deciding, that the States could not inflict cruel and unusual punishments. See, *e. g.*, *Howard* v. *Fleming*, 191 U. S. 126, 135–136 (1903); *McDonald* v. *Massachusetts*, 180 U. S. 311, 313 (1901). *Graham's* reference to *Howard*, *McDonald*, and other cases indicates that it followed a similar course. See 224 U. S., at 631.

[14] Rummel characterizes *Graham* as a case where petitioner argued only that imposition of a life sentence under West Virginia's recidivist statute was, *per se*, a violation of the Eighth Amendment. See Brief for Petitioner 18–19, n. 6. We do not share that reading. The brief submitted on Graham's behalf clearly attacked the alleged disproportionality of his sentence. See Brief for Plaintiff in Error in *Graham* v. *West Virginia*, O. T. 1911, No. 721, pp. 37–38. The brief on behalf of the State of West Virginia, moreover, expressly assumed that Graham was arguing that "the sentence in this case is so disproportionate to the offense as to be cruel and unusual." Brief for Defendant in Error in *Graham* v. *West Virginia*, *supra*, at 19.

Before evaluating this evidence, we believe it important to examine the exact operation of Art. 63 as interpreted by the Texas courts. In order to qualify for a mandatory life sentence under that statute, Rummel had to satisfy a number of requirements. First, he had to be convicted of a felony and actually sentenced to prison.[15] Second, at some time subsequent to his first conviction, Rummel had to be convicted of another felony and again sentenced to imprisonment.[16] Finally, after having been sent to prison a second time, Rummel had to be convicted of a third felony. Thus, under Art. 63, a three-time felon receives a mandatory life sentence, with possibility of parole, only if commission and conviction of each succeeding felony followed conviction for the preceding one, and only if each prior conviction was followed by actual imprisonment. Given this necessary sequence, a recidivist must twice demonstrate that conviction and actual imprisonment do not deter him from returning to crime once he is released. One in Rummel's position has been both graphically informed of the consequences of lawlessness and given an opportunity to reform, all to no avail. Art. 63 thus is nothing more than a societal decision that when such a person commits yet another felony, he should be subjected to the admittedly serious penalty of incarceration for life, subject only to the State's judgment as to whether to grant him parole.[17]

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[15] Texas courts have interpreted the recidivist statute as requiring not merely that the defendant be convicted of two prior felonies, but also that he actually serve time in prison for each of those offenses. See *Cromeans* v. *State*, 160 Tex. Crim. 135, 138, 268 S. W. 2d 133, 135 (1954).

[16] As the statute has been interpreted, the State must prove that each succeeding conviction was subsequent to both the commission of and the conviction for the prior offense. See *Tyra* v. *State*, 534 S. W. 2d 695, 697–698 (Tex. Crim. App. 1976); *Rogers* v. *State*, 168 Tex. Crim. 306, 308, 325 S. W. 2d 697, 698 (1959).

[17] Thus, it is not true that, as the dissent claims, the Texas scheme subjects a person to life imprisonment "merely because he is a three-time felon." *Post*, at 299, n. 18. On the contrary, Art. 63 mandates such a

In comparing this recidivist program with those presently employed in other States, Rummel creates a complex hierarchy of statutes and places Texas' recidivist scheme alone on the top rung. This isolation is not entirely convincing. Both West Virginia and Washington, for example, impose mandatory life sentences upon the commission of a third felony.[18] Rummel would distinguish those States from Texas because the Supreme Court of Washington and the United States Court of Appeals for the Fourth Circuit, which includes West Virginia, have indicated a willingness to review the proportionality of such sentences under the Eighth Amendment. See *State* v. *Lee*, 87 Wash. 2d 932, 937, n. 4, 558 P. 2d 236, 240, n. 4 (1976) (dictum); *Hart* v. *Coiner*, 483 F. 2d 136 (CA4 1973). But this Court must ultimately decide the meaning of the Eighth Amendment. If we disagree with the decisions of the Supreme Court of Washington and the Court of Appeals for the Fourth Circuit on this point, Washington and West Virginia are for practical purposes indistinguishable from Texas. If we agree with those courts, then of course sentences imposed in Texas, as well as in Washington and West Virginia, are subject to a review for proportionality under the Eighth Amendment. But in either case, the legislative judgment as to punishment in Washington and West Virginia has been the same as that in Texas.

Rummel's charts and tables do appear to indicate that he might have received more lenient treatment in almost any State other than Texas, West Virginia, or Washington. The distinctions, however, are subtle rather than gross. A number of States impose a mandatory life sentence upon conviction of four felonies rather than three.[19] Other States require one

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sentence only after shorter terms of actual imprisonment have proved ineffective.

[18] See Wash. Rev. Code § 9.92.090 (1976); W. Va. Code § 61-11-18 (1977).

[19] See, *e. g.*, Colo. Rev. Stat. § 16-13-101 (1973 and Supp. 1976); Nev.

or more of the felonies to be "violent" to support a life sentence.[20] Still other States leave the imposition of a life sentence after three felonies within the discretion of a judge or jury.[21] It is one thing for a court to compare those States that impose capital punishment for a specific offense with those States that do not. See *Coker* v. *Georgia*, 433 U. S., at 595–596. It is quite another thing for a court to attempt to evaluate the position of any particular recidivist scheme within Rummel's complex matrix.[22]

Nor do Rummel's extensive charts even begin to reflect the complexity of the comparison he asks this Court to make. Texas, we are told, has a relatively liberal policy of granting "good time" credits to its prisoners, a policy that historically has allowed a prisoner serving a life sentence to become eligible for parole in as little as 12 years. See Brief for Respondent 16–17. We agree with Rummel that his inability to enforce any "right" to parole precludes us from treating his life sentence as if it were equivalent to a sentence of 12 years. Nevertheless, because parole is "an established variation on imprisonment of convicted criminals," *Morrissey* v. *Brewer*, 408 U. S. 471, 477 (1972), a proper assessment of Texas'

Rev. Stat. § 207.010 (1977); S. D. Comp. Laws Ann. §§ 22–6–1, 22–7–8 (Supp. 1978); Wyo. Stat. § 6–1–110 (1977).

[20] See, *e. g.*, Miss. Code Ann. § 99–19–83 (Supp. 1979).

[21] See, *e. g.*, D. C. Code § 22–104a (1973); Idaho Code § 19–2514 (1979); Okla. Stat., Tit. 21, § 51 (Supp. 1979–1980).

[22] Nor do we have another sort of objective evidence found in *Coker*. After *Furman*, where the Court had declared unconstitutional the death penalty statutes of all of the States as then applied, a majority of the States had re-enacted the death penalty for killings, but had not done so for rape. In *Coker* the plurality found this fact of some importance. See 433 U. S., at 594–595. Here, if there was a watershed comparable to *Furman*, it was *Spencer* v. *Texas*, 385 U. S. 554 (1967), which confirmed, rather than undercut, the constitutionality of recidivist statutes. There thus has been no comparable occasion for contemporary expression of legislative or public opinion on the question of what sort of penalties should be applied to recidivists, or to those who have committed crimes against property.

treatment of Rummel could hardly ignore the possibility that he will not actually be imprisoned for the rest of his life. If nothing else, the possibility of parole, however slim, serves to distinguish Rummel from a person sentenced under a recidivist statute like Mississippi's, which provides for a sentence of life without parole upon conviction of three felonies including at least one violent felony. See Miss. Code Ann. § 99–19–83 (Supp. 1979).

Another variable complicating the calculus is the role of prosecutorial discretion in any recidivist scheme. It is a matter of common knowledge that prosecutors often exercise their discretion in invoking recidivist statutes or in plea bargaining so as to screen out truly "petty" offenders who fall within the literal terms of such statutes. See *Oyler v. Boles*, 368 U. S. 448, 456 (1962) (upholding West Virginia's recidivist scheme over contention that it placed unconstitutional discretion in hands of prosecutor). Indeed, in the present case the State of Texas has asked this Court, in the event that we find Rummel's sentence unconstitutionally disproportionate, to remand the case to the sentencing court so that the State might introduce Rummel's entire criminal record. If, on a remand, the sentencing court were to discover that Rummel had been convicted of one or more felonies in addition to those pleaded in the original indictment, one reasonably might wonder whether that court could then sentence Rummel to life imprisonment even though his recidivist status based on only three felonies had been held to be a "cruel and unusual" punishment.

We offer these additional considerations not as inherent flaws in Rummel's suggested interjurisdictional analysis but as illustrations of the complexities confronting any court that would attempt such a comparison. Even were we to assume that the statute employed against Rummel was the most stringent found in the 50 States, that severity hardly would render Rummel's punishment "grossly disproportionate" to his offenses or to the punishment he would have received in the other States. As Mr. Justice Holmes noted in his dissenting

opinion in *Lochner* v. *New York*, 198 U. S. 45, 76 (1905), our Constitution "is made for people of fundamentally differing views. . . ." Until quite recently, Arizona punished as a felony the theft of any "neat or horned animal," regardless of its value;[23] California considers the theft of "avocados, olives, citrus or deciduous fruits, nuts and artichokes" particularly reprehensible.[24] In one State theft of $100 will earn the offender a fine or a short term in jail;[25] in another State it could earn him a sentence of 10 years' imprisonment.[26] Absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State.[27]

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[23] See Ariz. Rev. Stat. Ann. § 13-663 (A) (Supp. 1957-1978) (repealed in 1977).

[24] See Cal. Penal Code Ann. § 487 (1) (West 1970).

[25] See, *e. g.*, Idaho Code §§ 18-4604, 18-4607 (1979).

[26] See, *e. g.*, Nev. Rev. Stat. § 205.220 (1973).

[27] The dissent draws some support for its belief that Rummel's sentence is unconstitutional by comparing it with punishments imposed by Texas for crimes other than those committed by Rummel. Other crimes, of course, implicate other societal interests, making any such comparison inherently speculative. Embezzlement, dealing in "hard" drugs, and forgery, to name only three offenses, could be denominated "property related" offenses, and yet each can be viewed as an assault on a unique set of societal values as defined by the political process. The notions embodied in the dissent that if the crime involved "violence," see *post*, at 295-296, n. 12, a more severe penalty is warranted under objective standards simply will not wash, whether it be taken as a matter of morals, history, or law. Caesar's death at the hands of Brutus and his fellow conspirators was undoubtedly violent; the death of Hamlet's father at the hands of his brother, Claudius, by poison, was not. Yet there are few, if any, States which do not punish just as severely murder by poison (or attempted murder by poison) as they do murder or attempted murder by stabbing. The highly placed executive who embezzles huge sums from a state savings and loan association, causing many shareholders of limited means to lose substantial parts of their savings, has committed a crime very different from a man who takes a smaller amount of money from the same savings

Perhaps, as asserted in *Weems,* "time works changes" upon the Eighth Amendment, bringing into existence "new conditions and purposes." 217 U. S., at 373. We all, of course, would like to think that we are "moving down the road toward human decency." *Furman* v. *Georgia,* 408 U. S., at 410 (BLACKMUN, J., dissenting). Within the confines of this judicial proceeding, however, we have no way of knowing in which direction that road lies. Penologists themselves have been unable to agree whether sentences should be light or heavy,[28] discretionary or determinate.[29] This uncertainty

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and loan at the point of a gun. Yet rational people could disagree as to which criminal merits harsher punishment. By the same token, a State cannot be required to treat persons who have committed three "minor" offenses less severely than persons who have committed one or two "more serious" offenses. If nothing else, the three-time offender's conduct supports inferences about his ability to conform with social norms that are quite different from possible inferences about first- or second-time offenders.

In short, the "seriousness" of an offense or a pattern of offenses in modern society is not a line, but a plane. Once the death penalty and other punishments different in kind from fine or imprisonment have been put to one side, there remains little in the way of objective standards for judging whether or not a life sentence imposed under a recidivist statute for several separate felony convictions not involving "violence" violates the cruel-and-unusual-punishment prohibition of the Eighth Amendment. As Mr. Justice Frankfurter noted for the Court in *Gore* v. *United States,* 357 U. S. 386, 393 (1958), "[w]hatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility, . . . these are peculiarly questions of legislative policy."

[28] Compare A. Von Hirsch, Doing Justice: The Choice of Punishments, Report of the Committee for the Study of Incarceration 140 (1976); M. Yeager, Do Mandatory Prison Sentences for Handgun Offenders Curb Violent Crime?, Technical Report for the United States Conference of Mayors 25–26 (1976); with E. van den Haag, Punishing Criminals: Concerning a Very Old and Painful Question 158–159, 177 (1975). See generally F. Zimring & G. Hawkins, Deterrence: The Legal Threat in Crime Control 234–241, 245–246 (1973).

[29] Compare R. McKay, It's Time to Rehabilitate the Sentencing Process, An Occasional Paper—Aspen Institute for Humanistic Studies 4–5 (1977); Von Hirsch, *supra,* at 98–104; with R. Dawson, Sentencing: The Decision

reinforces our conviction that any "nationwide trend" toward lighter, discretionary sentences must find its source and its sustaining force in the legislatures, not in the federal courts.

III

The most casual review of the various criminal justice systems now in force in the 50 States of the Union shows that the line dividing felony theft from petty larceny, a line usually based on the value of the property taken, varies markedly from one State to another. We believe that Texas is entitled to make its own judgment as to where such lines lie, subject only to those strictures of the Eighth Amendment that can be informed by objective factors. See *Coker* v. *Georgia*, 433 U. S., at 592. Moreover, given Rummel's record, Texas was not required to treat him in the same manner as it might treat him were this his first "petty property offense." Having twice imprisoned him for felonies, Texas was entitled to place upon Rummel the onus of one who is simply unable to bring his conduct within the social norms prescribed by the criminal law of the State.

The purpose of a recidivist statute such as that involved here is not to simplify the task of prosecutors, judges, or juries. Its primary goals are to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time. This segregation and its duration are based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes.

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as to Type, Length, and Conditions of Sentence, Report of the American Bar Foundation's Survey of the Administration of Criminal Justice in the United States 381, 414 (1969); Yeager, *supra*, at 25–26. See generally U. S. Dept. of Justice, Determinate Sentencing: Reform or Regression?, Proceedings of the Special Conference on Determinate Sentencing, June 2–3, 1977.

Like the line dividing felony theft from petty larceny, the point at which a recidivist will be deemed to have demonstrated the necessary propensities and the amount of time that the recidivist will be isolated from society are matters largely within the discretion of the punishing jurisdiction.

We therefore hold that the mandatory life sentence imposed upon this petitioner does not constitute cruel and unusual punishment under the Eighth and Fourteenth Amendments. The judgment of the Court of Appeals will be

Affirmed.

MR. JUSTICE STEWART, concurring.

I am moved to repeat the substance of what I had to say on another occasion about the recidivist legislation of Texas:

> "If the Constitution gave me a roving commission to impose upon the criminal courts of Texas my own notions of enlightened policy, I would not join the Court's opinion. For it is clear to me that the recidivist procedures adopted in recent years by many other States . . . are far superior to those utilized [here]. But the question for decision is not whether we applaud or even whether we personally approve the procedures followed in [this case]. The question is whether those procedures fall below the minimum level the [Constitution] will tolerate. Upon that question I am constrained to join the opinion and judgment of the Court." *Spencer* v. *Texas*, 385 U. S. 554, 569 (concurring opinion).

MR. JUSTICE POWELL, with whom MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE STEVENS join, dissenting.

The question in this case is whether petitioner was subjected to cruel and unusual punishment in contravention of the Eighth Amendment, made applicable to the States by the Fourteenth Amendment, when he received a mandatory life sentence upon his conviction for a third property-related

felony. Today, the Court holds that petitioner has not been punished unconstitutionally. I dissent.

I

The facts are simply stated. In 1964, petitioner was convicted for the felony of presenting a credit card with intent to defraud another of approximately $80. In 1969, he was convicted for the felony of passing a forged check with a face value of $28.36. In 1973, petitioner accepted payment in return for his promise to repair an air conditioner. The air conditioner was never repaired, and petitioner was indicted for the felony offense of obtaining $120.75 under false pretenses. He was also charged with being a habitual offender. The Texas habitual offender statute provides a mandatory life sentence for any person convicted of three felonies. See Tex. Penal Code Ann., Art. 63 (Vernon 1925), as amended and recodified, Tex. Penal Code Ann. § 12.42 (1974). Petitioner was convicted of the third felony and, after the State proved the existence of the two earlier felony convictions, was sentenced to mandatory life imprisonment.

After exhausting state remedies, petitioner sought a writ of habeas corpus in the Federal District Court for the Western District of Texas. Petitioner contended that his sentence constituted cruel and unusual punishment in violation of the Eighth Amendment. Petitioner did not suggest that the method of punishment—life imprisonment—was constitutionally invalid. Rather, he argued that the punishment was unconstitutional because it was disproportionate to the severity of the three felonies. A panel of the Court of Appeals for the Fifth Circuit accepted petitioner's view, 568 F. 2d 1193 (1978), but the court en banc vacated that decision and affirmed the District Court's denial of the writ of habeas corpus. 587 F. 2d 651 (1979).

This Court today affirms the Fifth Circuit's decision. I dissent because I believe that (i) the penalty for a noncapital offense may be unconstitutionally disproportionate, (ii) the

possibility of parole should not be considered in assessing the nature of the punishment, (iii) a mandatory life sentence is grossly disproportionate as applied to petitioner, and (iv) the conclusion that this petitioner has suffered a violation of his Eighth Amendment rights is compatible with principles of judicial restraint and federalism.

II

A

The Eighth Amendment prohibits "cruel and unusual punishments." That language came from Art. I, § 9, of the Virginia Declaration of Rights, which provided that "excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The words of the Virginia Declaration were taken from the English Bill of Rights of 1689. See Granucci, "Nor Cruel and Unusual Punishments Inflicted": The Original Meaning, 57 Calif. L. Rev. 839, 840 (1969).

Although the legislative history of the Eighth Amendment is not extensive, we can be certain that the Framers intended to proscribe inhumane methods of punishment. See *Furman* v. *Georgia*, 408 U. S. 238, 319–322 (1972) (MARSHALL, J., concurring); Granucci, *supra*, at 839–842. When the Virginia delegates met to consider the Federal Constitution, for example, Patrick Henry specifically noted the absence of the provisions contained within the Virginia Declaration. Henry feared that without a "cruel and unusual punishments" clause, Congress "may introduce the practice . . . of torturing, to extort a confession of the crime." [1] Indeed, during debate in the First Congress on the adoption of the Bill of Rights, one Congressman objected to adoption of the Eighth Amendment precisely because "villains often deserve whipping, and perhaps having their ears cut off." [2]

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[1] 3 J. Elliot, Debates on the Federal Constitution 447–448 (1876).

[2] 1 Annals of Cong. 754 (1789) (Rep. Livermore).

In two 19th-century cases, the Court considered constitutional challenges to forms of capital punishment. In *Wilkerson* v. *Utah*, 99 U. S. 130, 135 (1879), the Court held that death by shooting did not constitute cruel and unusual punishment. The Court emphasized, however, that torturous methods of execution, such as burning a live offender, would violate the Eighth Amendment. *In re Kemmler*, 136 U. S. 436 (1890), provided the Court with its second opportunity to review methods of carrying out a death penalty. That case involved a constitutional challenge to New York's use of electrocution. Although the Court did not apply the Eighth Amendment to state action, it did conclude that electrocution would not deprive the petitioner of due process of law. See also *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S. 459, 464 (1947).

B

The scope of the Cruel and Unusual Punishments Clause extends not only to barbarous methods of punishment, but also to punishments that are grossly disproportionate. Disproportionality analysis measures the relationship between the nature and number of offenses committed and the severity of the punishment inflicted upon the offender. The inquiry focuses on whether a person deserves such punishment, not simply on whether punishment would serve a utilitarian goal. A statute that levied a mandatory life sentence for overtime parking might well deter vehicular lawlessness, but it would offend our felt sense of justice. The Court concedes today that the principle of disproportionality plays a role in the review of sentences imposing the death penalty, but suggests that the principle may be less applicable when a noncapital sentence is challenged. Such a limitation finds no support in the history of Eighth Amendment jurisprudence.

The principle of disproportionality is rooted deeply in English constitutional law. The Magna Carta of 1215 insured that "[a] free man shall not be [fined] for a trivial offence,

except in accordance with the degree of the offence; and for a serious offence he shall be [fined] according to its gravity."[3] By 1400, the English common law had embraced the principle, not always followed in practice, that punishment should not be excessive either in severity or length.[4] One commentator's survey of English law demonstrates that the "cruel and unusual punishments" clause of the English Bill of Rights of 1689 "was first, an objection to the imposition of punishments which were unauthorized by statute and outside the jurisdiction of the sentencing court, and second, a reiteration of the English policy against disproportionate penalties." Granucci, *supra,* at 860. See *Gregg* v. *Georgia,* 428 U. S. 153, 169 (1976) (opinion of STEWART, POWELL, and STEVENS, JJ.).

In *Weems* v. *United States,* 217 U. S. 349 (1910), a public official convicted for falsifying a public record claimed that he suffered cruel and unusual punishment when he was sentenced to serve 15 years' imprisonment in hard labor with chains.[5] The sentence also subjected Weems to loss of civil rights and perpetual surveillance after his release. This Court agreed that the punishment was cruel and unusual. The Court was attentive to the methods of the punishment, *id.,* at 363–364, but its conclusion did not rest solely upon the nature of punishment. The Court relied explicitly upon the

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[3] J. Holt, Magna Carta 323 (1965).

[4] R. Perry, Sources of Our Liberties 236 (1959).

[5] The principle that grossly disproportionate sentences violate the Eighth Amendment was first enunciated in this Court by Mr. Justice Field in *O'Neil* v. *Vermont,* 144 U. S. 323 (1892). In that case, a defendant convicted of 307 offenses for selling alcoholic beverages in Vermont had been sentenced to more than 54 years in prison. The Court did not reach the question whether the sentence violated the Eighth Amendment because the issue had not been raised properly, and because the Eighth Amendment had yet to be applied against the States. *Id.,* at 331–332. But Mr. Justice Field dissented, asserting that the "cruel and unusual punishment" Clause was directed "against all punishments which by their excessive length or severity are greatly disproportioned to the offences charged." *Id.,* at 339–340.

relationship between the crime committed and the punishment imposed:

> "Such penalties for such offenses amaze those who have formed their conception of the relation of a state to even its offending citizens from the practice of the American commonwealths, and believe that it is a precept of justice that punishment for crime should be graduated and proportioned to offense." *Id.*, at 366–367.

In both capital and noncapital cases this Court has recognized that the decision in *Weems* v. *United States* "proscribes punishment grossly disproportionate to the severity of the crime." *Ingraham* v. *Wright*, 430 U. S. 651, 667 (1977); see *Hutto* v. *Finney*, 437 U. S. 678, 685 (1978); *Coker* v. *Georgia*, 433 U. S. 584, 592 (1977) (opinion of WHITE, J.); *Gregg* v. *Georgia, supra*, at 171 (opinion of STEWART, POWELL, and STEVENS, JJ.); *Furman* v. *Georgia*, 408 U. S., at 325 (MARSHALL, J., concurring).[6]

In order to resolve the constitutional issue, the *Weems* Court measured the relationship between the punishment and the offense. The Court noted that Weems had been punished more severely than persons in the same jurisdiction who committed more serious crimes, or persons who committed a similar crime in other American jurisdictions. 217 U. S., at 381–382.[7]

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[6] See also Jeffries & Stephan, Defenses, Presumptions, and Burden of Proof in the Criminal Law, 88 Yale L. J. 1325, 1377 (1979); Note, Disproportionality in Sentences of Imprisonment, 79 Colum. L. Rev. 1119 (1979).

[7] The Court notes that *Graham* v. *West Virginia*, 224 U. S. 616, 631 (1912), rejected an Eighth Amendment claim brought by a person sentenced under the West Virginia statute to mandatory life imprisonment for the commission of three felonies. But the *Graham* Court's entire discussion of that claim consists of one sentence: "Nor can it be maintained that cruel and unusual punishment has been inflicted." The Court then cited six cases in support of its statement. The first case was *In re Kemmler*, 136 U. S. 436, 448–449 (1890), in which the Court declined to apply the Eighth Amendment against state action. The *Graham* opinion also cited *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86, 111 (1909), in

Robinson v. *California*, 370 U. S. 660, 667 (1962), established that the Cruel and Unusual Punishments Clause applies to the States through the operation of the Fourteenth Amendment. The Court held that imprisonment for the crime of being a drug addict was cruel and unusual. The Court based its holding not upon the method of punishment, but on the nature of the "crime." Because drug addiction is an illness which may be contracted involuntarily, the Court said that "imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Ibid.*

In *Furman* v. *Georgia*, 408 U. S. 238 (1972), the Court held that the death penalty may constitute cruel and unusual punishment in some circumstances. The special relevance of *Furman* to this case lies in the general acceptance by Members of the Court of two basic principles. First, the Eighth Amendment prohibits grossly excessive punishment.[8]

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which the Court recognized that no claim was made that the Eighth Amendment controlled state action, and stated that "[w]e can only interfere with such legislation and judicial action of the States enforcing it if the fines imposed are so grossly excessive as to amount to a deprivation of property without due process of law." The Eighth Amendment was not applied as a prohibition on state action until this Court's decision in *Robinson* v. *California*, 370 U. S. 660, 667 (1962). A one-sentence holding in a preincorporation decision is hardly relevant to the determination of the case before us today.

Badders v. *United States*, 240 U. S. 391 (1916), also adds "little to our knowledge of the scope of the cruel and unusual language." *Furman* v. *Georgia*, 408 U. S. 238, 325 (1972) (MARSHALL, J., concurring). In *Badders*, this Court rejected a claim that concurrent 5-year sentences and a $7,000 fine for seven counts of mail fraud violated the Eighth Amendment. 240 U. S., at 394. *Badders* merely teaches that the Court did not believe that a 5-year sentence for the commission of seven crimes was cruel and unusual.

[8] *Furman* v. *Georgia*, 408 U. S., at 280 (BRENNAN, J., concurring); *id.*, at 312 (WHITE, J., concurring); *id.*, at 331–332 (MARSHALL, J., con-

Second, the scope of the Eighth Amendment is to be measured by "evolving standards of decency." See *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (opinion of Warren, C. J.).[9]

In *Coker* v. *Georgia*, 433 U. S. 584 (1977), this Court held that rape of an adult woman may not be punished by the death penalty. The plurality opinion of MR. JUSTICE WHITE stated that a punishment is unconstitutionally excessive "if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime." *Id.*, at 592.[10] The plurality concluded that the death penalty was a grossly disproportionate punishment for the crime of rape. The plurality recognized that "Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent." *Ibid.* To this end, the plurality examined the nature of the crime and attitudes of state legislatures and sentencing juries toward use of the death penalty in rape cases. In a separate opinion, I concurred in the plurality's reasoning that death ordinarily is disproportionate punishment for the crime of raping an adult woman. *Id.*, at 601. Nothing in the *Coker* analysis suggests that principles of dispro-

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curring); *id.*, at 457–458 (POWELL, J., dissenting, joined by BURGER, C. J., and BLACKMUN and REHNQUIST, JJ.).

[9] *Id.*, at 266 (BRENNAN, J., concurring); *id.*, at 329 (MARSHALL, J., concurring); *id.*, at 382 (BURGER, C. J., dissenting, joined by BLACKMUN, POWELL, and REHNQUIST, JJ.); *id.*, at 409 (BLACKMUN, J., dissenting); *id.*, at 420 (POWELL, J., dissenting, joined by BURGER, C. J., and BLACKMUN and REHNQUIST, JJ.).

[10] The *Coker* standard derived from the joint opinion in *Gregg* v. *Georgia*, 428 U. S. 153, 173 (1976) (opinion of STEWART, POWELL, and STEVENS, JJ.), which stated that "the inquiry into 'excessiveness' has two aspects. First, the punishment must not involve the unnecessary and wanton infliction of pain. . . . Second, the punishment must not be grossly out of proportion to the severity of the crime."

portionality are applicable only to capital cases. Indeed, the questions posed in *Coker* and this case are the same: whether a punishment that can be imposed for one offense is grossly disproportionate when imposed for another.

In sum, a few basic principles emerge from the history of the Eighth Amendment. Both barbarous forms of punishment and grossly excessive punishments are cruel and unusual. A sentence may be excessive if it serves no acceptable social purpose, or is grossly disproportionate to the seriousness of the crime. The principle of disproportionality has been acknowledged to apply to both capital and noncapital sentences.

III

Under Texas law, petitioner has been sentenced to a mandatory life sentence. Even so, the Court of Appeals rejected the petitioner's Eighth Amendment claim primarily because it concluded that the petitioner probably would not serve a life sentence. 587 F. 2d, at 659 (en banc). In view of good-time credits available under the Texas system, the court concluded that Rummel might serve no more than a 10-year sentence. *Ibid.* Thus, the Court of Appeals equated petitioner's sentence to 10 years of imprisonment without the possibility of parole. *Id.*, at 660.

It is true that imposition in Texas of a mandatory life sentence does not necessarily mean that petitioner will spend the rest of his life behind prison walls. If petitioner attains sufficient good-time credits, he may be eligible for parole within 10 or 12 years after he begins serving his life sentence. But petitioner will have no right to early release; he will merely be eligible for parole. And parole is simply an act of executive grace.

Last Term in *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1 (1979), we held that a criminal conviction extinguishes whatever liberty interest a prisoner has in securing freedom before the end of his lawful sentence. The Court stated unequivocally that a convicted person has "no constitutional or

inherent right . . . to be conditionally released before the expiration of a valid sentence." *Id.*, at 7. Of course, a State may create legitimate expectations that are entitled to procedural protection under the Due Process Clause of the Fourteenth Amendment, but Texas has not chosen to create a cognizable interest in parole. The Court of Appeals for the Fifth Circuit has held that a Texas prisoner has no constitutionally enforceable interest in being freed before the expiration of his sentence. See *Johnson* v. *Wells*, 566 F. 2d 1016, 1018 (1978); *Craft* v. *Texas Board of Pardons and Paroles*, 550 F. 2d 1054, 1056 (1977).

A holding that the possibility of parole discounts a prisoner's sentence for the purposes of the Eighth Amendment would be cruelly ironic. The combined effect of our holdings under the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment would allow a State to defend an Eighth Amendment claim by contending that parole is probable even though the prisoner cannot enforce that expectation. Such an approach is inconsistent with the Eighth Amendment. The Court has never before failed to examine a prisoner's Eighth Amendment claim because of the speculation that he might be pardoned before the sentence was carried out.

Recent events in Texas demonstrate that parole remains a matter of executive grace. In June 1979, the Governor of Texas refused to grant parole to 79% of the state prisoners whom the parole board recommended for release.[11] The State's chief executive acted well within his rights in declining to follow the board, but his actions emphasize the speculative nature of the Court of Appeals' reasoning. As this case comes to us, petitioner has been deprived by operation of state law of his right to freedom from imprisonment for the rest of his life. We should judge the case accordingly.

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[11] Austin American-Statesman, Sept. 23, 1979, p. A1, col. 4. The newspaper reported that in a 6-month period including June 1979, the Governor rejected 33% of the parole board recommendations that prisoners be released. *Ibid.*

IV

The Eighth Amendment commands this Court to enforce the constitutional limitation of the Cruel and Unusual Punishments Clause. In discharging this responsibility, we should minimize the risk of constitutionalizing the personal predilections of federal judges by relying upon certain objective factors. Among these are (i) the nature of the offense, see *Coker* v. *Georgia,* 433 U. S., at 598; *id.,* at 603 (POWELL, J., concurring in judgment in part and dissenting in part); (ii) the sentence imposed for commission of the same crime in other jurisdictions, see *id.,* at 593–594; *Gregg* v. *Georgia,* 428 U. S., at 179–180; *Weems* v. *United States,* 217 U. S., at 380; cf. *Trop* v. *Dulles,* 356 U. S., at 102–103, and (iii) the sentence imposed upon other criminals in the same jurisdiction, *Weems* v. *United States, supra,* at 380–381.

A

Each of the crimes that underlies the petitioner's conviction as a habitual offender involves the use of fraud to obtain small sums of money ranging from $28.36 to $120.75. In total, the three crimes involved slightly less than $230. None of the crimes involved injury to one's person, threat of injury to one's person, violence, the threat of violence, or the use of a weapon. Nor does the commission of any such crimes ordinarily involve a threat of violent action against another person or his property. It is difficult to imagine felonies that pose less danger to the peace and good order of a civilized society than the three crimes committed by the petitioner. Indeed, the state legislature's recodification of its criminal law supports this conclusion. Since the petitioner was convicted as a habitual offender, the State has reclassified his third offense, theft by false pretext, as a misdemeanor. Tex. Penal Code Ann. § 31.03 (d)(3) (Supp. 1980).[12]

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[12] The Court suggests that an inquiry into the nature of the offense at issue in this case inevitably involves identifying subjective distinctions beyond the province of the judiciary. *Ante,* at 275–276. Yet the distinc-

B

Apparently, only 12 States have ever enacted habitual offender statutes imposing a mandatory life sentence for the commission of two or three nonviolent felonies and only 3, Texas, Washington, and West Virginia, have retained such a statute.[13] Thus, three-fourths of the States that experimented

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tion between forging a check for $28 and committing a violent crime or one that threatens violence is surely no more difficult for the judiciary to perceive than the distinction between the gravity of murder and rape. See *Coker* v. *Georgia*, 433 U. S. 584, 598 (1977); *id.*, at 603 (POWELL, J., concurring in judgment in part and dissenting in part). I do not suggest that all criminal acts may be separated into precisely identifiable compartments. A professional seller of addictive drugs may inflict greater bodily harm upon members of society than the person who commits a single assault. But the difficulties of line-drawing that might be presented in other cases need not obscure our vision here.

[13] The nine States that previously enforced such laws include: (1) California, 1927 Cal. Stats., ch. 634, § 1, p. 1066, repealed, 1935 Cal. Stats., ch. 602–603, p. 1699; ch. 754, § 1, p. 2121. See Cal. Penal Code Ann. § 667.5 (West Supp. 1979) (Habitual offender statute allows no more than three years' additional sentence for the commission of a previous felony). (2) Indiana, 1907 Ind. Acts, ch. 82, § 1, p. 109, repealed, 1977 Ind. Acts No. 340, § 121, p. 1594. See Ind. Code § 35–50–2–8 (Supp. 1979) (30 years' additional sentence upon the conviction of a third felony). (3) Kansas, 1927 Kan. Sess. Laws, ch. 191, § 1, p. 247, repealed, 1939 Kan. Sess. Laws, ch. 178, § 1, p. 299. See 1978 Kan. Sess. Laws, ch. 120, § 4 (2) (Up to the treble maximum penalty may be given upon the commission of the third felony). (4) Kentucky, 1893 Ky. Acts, ch. 182, Art. I, § 4, p. 757, repealed, 1974 Ky. Acts, ch. 406, § 280, p. 873. See Ky. Rev. Stat. § 532.080 (Supp. 1978) (A persistent felony offender may receive a discretionary life sentence upon the conviction of a Class A or B felony). (5) Massachusetts, 1818 Mass. Acts, ch. 176, §§ 5–6, p. 603, repealed, 1833 Mass. Acts, ch. 85, p. 618. See Mass. Gen. Laws Ann., ch. 279, § 25 (West 1972) (A person convicted of three specified felonies receives the maximum penalty provided for the third offense). (6) New York, 1796 N. Y. Laws, ch. 30, p. 669, repealed, 1881 N. Y. Laws, ch. 676, §§ 688–690, p. 181. See N. Y. Penal Code §§ 70.04, 70.06–70.10 (McKinney 1975 and Supp. 1979–1980) (mandatory life imprisonment upon the conviction for a third violent felony). (7) Ohio, 1885 Ohio Leg. Acts, No. 751, § 2, p. 236, repealed, 1929 Ohio Leg. Acts, No. 8, §§ 1–2, p. 40. See Ohio

with the Texas scheme appear to have decided that the imposition of a mandatory life sentence upon some persons who have committed three felonies represents excess punishment. Kentucky, for example, replaced the mandatory life sentence with a more flexible scheme "because of a judgment that under some circumstances life imprisonment for an habitual criminal is not justified. An example would be an offender who has committed three Class D felonies, none involving injury to person." Commentary following Criminal Law of Kentucky Annotated, Penal Code § 532.080, p. 790 (1978). The State of Kansas abolished its statute mandating a life sentence for the commission of three felonies after a state legislative commission concluded that "[t]he legislative policy as expressed in the habitual criminal law bears no particular resemblance to the enforcement policy of prosecutors and judges." Kansas Legislative Council, The Operation of the Kansas Habitual Criminal Law, Pub. No. 47, p. 4 (1936). In the eight years following enactment of the Kansas statute, only 96 of the 733 defendants who committed their third felony were sentenced to life imprisonment. *Id.*, at 32–33. This statistic strongly supports the belief that prosecutors and judges thought the habitual offender statute too severe.[14] In Wash-

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Rev. Code Ann. §§ 2929.01, 2929.11, 2929.12 (Supp. 1979) (no mandatory habitual offender penalties). (8) Oregon, 1921 Ore. Laws, ch. 70, § 1, p. 97, repealed, 1927 Ore. Laws, ch. 334, §§ 1–3, p. 432. See Ore. Rev. Stat. §§ 161.725, 166.230 (1977) (life sentence upon conviction of fourth armed felony or attempted felony). (9) Virginia, 1848 Va. Acts, ch. 199, § 26, p. 752, repealed, 1916 Va. Acts, ch. 29–30, pp. 34–35. See 1979 Va. Acts, ch. 411 (no habitual offender statute).

In addition to Texas, Washington, see Wash. Rev. Code § 9.92.090 (1976), and West Virginia, see W. Va. Code § 61-11-18 (1977), continue to provide mandatory life imprisonment upon the commission of a third nonviolent felony.

[14] See Note, The Kansas Habitual Criminal Act, 9 Washburn L. J. 244, 247–250 (1970); see also *State* v. *Lee*, 87 Wash. 2d 932, 940–942, 558 P. 2d 236, 241–242 (1976) (Rosellini, J., dissenting); *State* v. *Thomas*, 16 Wash. App. 1, 13–15, 553 P. 2d 1357, 1365–1366 (1976); Commentary fol-

ington, which retains the Texas rule, the State Supreme Court has suggested that application of its statute to persons like the petitioner might constitute cruel and unusual punishment. See *State* v. *Lee*, 87 Wash. 2d 932, 937, n. 4, 558 P. 2d 236, 240, n. 4 (1976).

More than three-quarters of American jurisdictions have never adopted a habitual offender statute that would commit the petitioner to mandatory life imprisonment. The jurisdictions that currently employ habitual offender statutes either (i) require the commission of more than three offenses,[15] (ii) require the commission of at least one violent crime,[16] (iii) limit a mandatory penalty to less than life,[17] or (iv) grant discretion to the sentencing authority.[18] In none of the

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lowing Criminal Law of Kentucky Annotated, Penal Code § 532.080, p. 790 (1978).

[15] Four States impose a mandatory life sentence upon the commission of a fourth felony. See Colo. Rev. Stat. § 16–13–101 (2) (1978); Nev. Rev. Stat. § 207.010 (2) (1977); S. D. Comp. Laws Ann. §§ 22–6–1, 22–7–8 (1979); Wyo. Stat. § 6–1–110 (1977). Thus, even if the line between these States and Texas, West Virginia, and Washington, is "subtle rather than gross," *ante*, at 279, the most that one can say is that 7 of the 50 States punish the commission of four or fewer felonies with a mandatory life sentence.

[16] See, *e. g.*, Del. Code Ann., Tit. 11, §§ 4214, 4215 (1975 and Supp. 1978) (mandatory life sentence for one who has committed two felonies and commits a third specified felony involving violence or the threat of violence); Miss. Code Ann. § 99–19–83 (Supp. 1979) (mandatory life sentence for one who commits three felonies at least one of which is violent).

[17] See, *e. g.*, N. M. Stat. Ann. § 31–18–17 (Supp. 1979) (Persons who have committed two felonies punishable by at least one year in prison receive four years' additional sentence upon the commission of a third felony and eight years upon the commission of a fourth felony); Wis. Stat. § 939.62 (1977) (Persons who have committed one felony within 5 years may be sentenced to 10 years' additional sentence upon the commission of an offense punishable by a term greater than 10 years).

[18] See, *e. g.*, D. C. Code § 22–104a (1973) (Persons who commit three felonies may be sentenced to life); Idaho Code § 19–2514 (1979) (Persons who have committed three felonies may receive a sentence ranging from

jurisdictions could the petitioner have received a mandatory life sentence merely upon the showing that he committed three nonviolent property-related offenses.[19]

The federal habitual offender statute also differs materially from the Texas statute. Title 18 U. S. C. § 3575 provides increased sentences for "dangerous special offenders" who have been convicted of a felony. A defendant is a "dangerous special offender" if he has committed two or more previous felonies, one of them within the last five years, if the current felony arose from a pattern of conduct "which constituted a substantial source of his income, and in which he manifested special skill or expertise," or if the felony involved a criminal conspiracy in which the defendant played a supervisory role. § 3575 (e). Federal courts may sentence such persons "to imprisonment for an appropriate term not to exceed twenty-five years and not disproportionate in severity to the maximum term otherwise authorized by law for such felony."

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five years to life). Statutes that permit the imposition of a discretionary life sentence for the commission of three felonies are fundamentally different from the statute under review in this case. In a discretionary jurisdiction, the question at sentencing is whether a three-time felon has engaged in behavior other than the commission of three felonies that justifies the imposition of the maximum permissible sentence. In such a jurisdiction, therefore, other evidence of dangerousness may justify imposition of a life sentence. In Texas, a person receives a mandatory life sentence merely because he is a three-time felon.

[19] A State's choice of a sentence will, of course, never be unconstitutional simply because the penalty is harsher than the sentence imposed by other States for the same crime. Such a rule would be inconsistent with principles of federalism. The Eighth Amendment prohibits grossly disproportionate punishment, but it does not require local sentencing decisions to be controlled by majority vote of the States. Nevertheless, a comparison of the Texas standard with the sentencing statutes of other States is one method of "assess[ing] contemporary values concerning the infliction of a challenged sanction." *Gregg* v. *Georgia*, 428 U. S., at 173 (opinion of STEWART, POWELL, and STEVENS, JJ.). The relevant objective factors should be considered together and, although the weight assigned to each may vary, no single factor will ever be controlling.

§ 3575 (b).[20] Thus, Congress and an overwhelming number of state legislatures have not adopted the Texas scheme. These legislative decisions lend credence to the view that a mandatory life sentence for the commission of three nonviolent felonies is unconstitutionally disproportionate.[21]

C

Finally, it is necessary to examine the punishment that Texas provides for other criminals. First and second offenders who commit more serious crimes than the petitioner may receive markedly less severe sentences. The only first-time offender subject to a mandatory life sentence is a person

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[20] The proportionality principle was incorporated into the bill after the Senate Judiciary Committee heard testimony that a sentencing authority considering the punishment due a dangerous special offender should "examine each substantive offense and make some determination based upon the gravity of that offense as to the ultimate maximum which seems to be wise." Hearings before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 91st Cong., 1st Sess., 205 (1969) (testimony of Professor Peter W. Low of the University of Virginia School of Law). See Katkin, Habitual Offender Laws: A Reconsideration, 21 Buffalo L. Rev. 99, 118 (1972).

[21] The American Law Institute proposes that a felon be sentenced to an extended term of punishment only if he is a persistent offender, professional criminal, dangerous mentally abnormal person whose extended commitment is necessary for the protection of the public, or "a multiple offender whose criminality was so extensive that a sentence of imprisonment for an extended term is warranted." ALI, Model Penal Code § 7.03 (Prop. Off. Draft 1962). The term for a multiple offender may not exceed the longest sentences of imprisonment authorized for each of the offender's crimes if they ran consecutively. *Ibid.* Under this proposal the petitioner could have been sentenced up to 25 years. *Ante*, at 269.

The American Bar Association has proposed that habitual offenders be sentenced to no more than 25 years and that "[a]ny increased term which can be imposed because of prior criminality should be related in severity to the sentence otherwise provided for the new offense." The choice of sentence would be left to the discretion of the sentencing court. ABA Project on Standards for Criminal Justice, Sentencing Alternatives and Procedures § 3.3 (App. Draft 1968).

convicted of capital murder. Tex. Penal Code §§ 12.31, 19.03 (1974). A person who commits a first-degree felony, including murder, aggravated kidnaping, or aggravated rape, may be imprisoned from 5 to 99 years. §§ 19.02, 21.03; 12.32 (1974 and Supp. 1980). Persons who commit a second-degree felony, including voluntary manslaughter, rape, or robbery, may be punished with a sentence of between 2 and 20 years. § 12.33 (1974). A person who commits a second felony is punished as if he had committed a felony of the next higher degree. §§ 12.42 (a)–(b) (1974). Thus, a person who rapes twice may receive a 5-year sentence. He also may, but need not, receive a sentence functionally equivalent to life imprisonment.

The State argues that these comparisons are not illuminating because a three-time recidivist may be sentenced more harshly than a first-time offender. Of course, the State may mandate extra punishment for a recidivist. See *Oyler* v. *Boles*, 368 U. S. 448 (1962). In Texas a person convicted twice of the unauthorized use of a vehicle receives a greater sentence than a person once convicted for that crime, but he does not receive a sentence as great as a person who rapes twice. Compare §§ 12.42 (a) and 31.07 with § 12.42 (b); § 21.02 (1974 and Supp. 1980). Such a statutory scheme demonstrates that the state legislature has attempted to choose a punishment in proportion to the nature and number of offenses committed.

Texas recognizes when it sentences two-time offenders that the amount of punishment should vary with the severity of the offenses committed. But all three-time felons receive the same sentence. In my view, imposition of the same punishment upon persons who have committed completely different types of crimes raises serious doubts about the proportionality of the sentence applied to the least harmful offender. Of course, the Constitution does not bar mandatory sentences. I merely note that the operation of the Texas habitual offender system raises a further question about the extent to which a

mandatory life sentence, no doubt a suitable sentence for a person who has committed three violent crimes, also is a proportionate punishment for a person who has committed the three crimes involved in this case.

D

Examination of the objective factors traditionally employed by the Court to assess the proportionality of a sentence demonstrates that petitioner suffers a cruel and unusual punishment. Petitioner has been sentenced to the penultimate criminal penalty because he committed three offenses defrauding others of about $230. The nature of the crimes does not suggest that petitioner ever engaged in conduct that threatened another's person, involved a trespass, or endangered in any way the peace of society. A comparison of the sentence petitioner received with the sentences provided by habitual offender statutes of other American jurisdictions demonstrates that only two other States authorize the same punishment. A comparison of petitioner to other criminals sentenced in Texas shows that he has been punished for three property-related offenses with a harsher sentence than that given first-time offenders or two-time offenders convicted of far more serious offenses. The Texas system assumes that all three-time offenders deserve the same punishment whether they commit three murders or cash three fraudulent checks.

The petitioner has committed criminal acts for which he may be punished. He has been given a sentence that is not inherently barbarous. But the relationship between the criminal acts and the sentence is grossly disproportionate. For having defrauded others of about $230, the State of Texas has deprived petitioner of his freedom for the rest of his life. The State has not attempted to justify the sentence as necessary either to deter other persons or to isolate a potentially violent individual. Nor has petitioner's status as a habitual offender been shown to justify a mandatory life sentence. My view, informed by examination of the "objective indicia

that reflect the public attitude toward a given sanction," *Gregg* v. *Georgia,* 428 U. S., at 173, is that this punishment violates the principle of proportionality contained within the Cruel and Unusual Punishments Clause.

V

The Court today agrees with the State's arguments that a decision in petitioner's favor would violate principles of federalism and, because of difficulty in formulating standards to guide the decision of the federal courts, would lead to excessive interference with state sentencing decisions. Neither contention is convincing.

Each State has sovereign responsibilities to promulgate and enforce its criminal law. In our federal system we should never forget that the Constitution "recognizes and preserves the autonomy and independence of the States—independence in their legislative and independence in their judicial departments." *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, 78–79 (1938), quoting *Baltimore & Ohio R. Co.* v. *Baugh,* 149 U. S. 368, 401 (1893) (Field, J., dissenting). But even as the Constitution recognizes a sphere of state activity free from federal interference, it explicitly compels the States to follow certain constitutional commands. When we apply the Cruel and Unusual Punishments Clause against the States, we merely enforce an obligation that the Constitution has created. As MR. JUSTICE REHNQUIST has stated, "[c]ourts are exercising no more than the judicial function conferred upon them by Art. III of the Constitution when they assess, in a case before them, whether or not a particular legislative enactment is within the authority granted by the Constitution to the enacting body, and whether it runs afoul of some limitation placed by the Constitution on the authority of that body." *Furman* v. *Georgia,* 408 U. S., at 466 (dissenting opinion). See *Weems* v. *United States,* 217 U. S., at 379.

Because the State believes that the federal courts can formulate no practicable standard to identify grossly dispropor-

tionate sentences, it fears that the courts would intervene into state criminal justice systems at will. Such a "floodgates" argument can be easy to make and difficult to rebut. But in this case we can identify and apply objective criteria that reflect constitutional standards of punishment and minimize the risk of judicial subjectivity. Moreover, we can rely upon the experience of the United States Court of Appeals for the Fourth Circuit in applying criteria similar to those that I believe should govern this case.

In 1974, the Fourth Circuit considered the claim of a West Virginia prisoner who alleged that the imposition of a mandatory life sentence for three nonviolent crimes violated the Eighth Amendment. In *Hart* v. *Coiner*, 483 F. 2d 136 (1973), cert. denied, 415 U. S. 983 (1974), the court held that the mandatory sentence was unconstitutional as applied to the prisoner. The court noted that none of the offenses involved violence or the danger of violence, that only a few States would apply such a sentence, and that West Virginia gave less severe sentences to first- and second-time offenders who committed more serious offenses. The holding in *Hart* v. *Coiner* is the holding that the State contends will undercut the ability of the States to exercise independent sentencing authority. Yet the Fourth Circuit subsequently has found only twice that noncapital sentences violate the Eighth Amendment. In *Davis* v. *Davis*, 601 F. 2d 153 (1979) (en banc), the court held that a 40-year sentence for possession and distribution of less than nine ounces of marihuana was cruel and unusual. In *Roberts* v. *Collins*, 544 F. 2d 168 (1976), the court held that a person could not receive a longer sentence for a lesser included offense (assault) than he could have received for the greater offense (assault with intent to murder).[22]

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[22] In *Ralph* v. *Warden*, 438 F. 2d 786 (1970), the Fourth Circuit also applied the Eighth Amendment to hold that rape may not be punished by death. This Court reached the same result seven years later in *Coker* v. *Georgia*, 433 U. S. 584 (1977).

More significant are those cases in which the Fourth Circuit held that the principles of *Hart* v. *Coiner* were inapplicable. In a case decided the same day as *Hart* v. *Coiner*, the Court of Appeals held that a 10-year sentence given for two obscene telephone calls did not violate the Cruel and Unusual Punishments Clause. The court stated that "[w]hatever may be our subjective view of the matter, we fail to discern here objective factors establishing disproportionality in violation of the eighth amendment." *Wood* v. *South Carolina*, 483 F. 2d 149, 150 (1973). In *Griffin* v. *Warden*, 517 F. 2d 756 (1975), the court refused to hold that the West Virginia statute was unconstitutionally applied to a person who had been convicted of breaking and entering a gasoline and grocery store, burglary of a residence, and grand larceny. The court distinguished *Hart* v. *Coiner* on the ground that Griffin's offenses "clearly involve the potentiality of violence and danger to life as well as property." 517 F. 2d, at 757. Similarly, the Fourth Circuit turned aside an Eighth Amendment challenge to the imposition of a 10- to 20-year sentence for statutory rape of a 13-year-old female. *Hall* v. *McKenzie*, 537 F. 2d 1232, 1235–1236 (1976). The court emphasized that the sentence was less severe than a mandatory life sentence, that the petitioner would have received a similar sentence in 17 other American jurisdictions, and that the crime involved violation of personal integrity and the potential of physical injury. The Fourth Circuit also has rejected Eighth Amendment challenges brought by persons sentenced to 12 years for possession and distribution of heroin, *United States* v. *Atkinson*, 513 F. 2d 38, 42 (1975), 2 years for unlawful possession of a firearm, *United States* v. *Wooten*, 503 F. 2d 65, 67 (1974), 15 years for assault with intent to commit murder, *Robinson* v. *Warden*, 455 F. 2d 1172 (1972), and 40 years for kidnaping, *United States* v. *Martell*, 335 F. 2d 764 (1964).[23]

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[23] The Fourth Circuit also has held that a sentence of eight years for possessing a firearm as a convicted felon, given to a felon previously con-

I do not suggest that each of the decisions in which the Court of Appeals for the Fourth Circuit applied *Hart* v. *Coiner* is necessarily correct. But I do believe that the body of Eighth Amendment law that has developed in that Circuit constitutes impressive empirical evidence that the federal courts are capable of applying the Eighth Amendment to disproportionate noncapital sentences with a high degree of sensitivity to principles of federalism and state autonomy.[24]

VI

I recognize that the difference between the petitioner's grossly disproportionate sentence and other prisoners' constitutionally valid sentences is not separated by the clear distinction that separates capital from noncapital punishment. "But the fact that a line has to be drawn somewhere does not justify its being drawn anywhere." *Pearce* v. *Commissioner*, 315 U. S. 543, 558 (1942) (Frankfurter, J., dissenting). The

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victed of manslaughter and breaking and entering, was not disproportionate under 18 U. S. C. § 3575. *United States* v. *Williamson*, 567 F. 2d 610, 616 (1977). See n. 20, *supra*, and accompanying text.

[24] The District Courts in the Fourth Circuit also have applied the Eighth Amendment carefully. Although one District Court has held that a sentence of 48 years for safecracking is constitutionally disproportionate, see *Thacker* v. *Garrison*, 445 F. Supp. 376 (WDNC 1978), other District Courts have found no constitutional infirmity in the disenfranchisement of convicted persons, *Thiess* v. *State Board*, 387 F. Supp. 1038, 1042 (Md. 1974) (three-judge court), a 5-year sentence for distributing marihuana, *Queen* v. *Leeke*, 457 F. Supp. 476 (SC 1978), and a 5-year sentence for possession of marihuana with intent to distribute that was suspended for 20 years on condition of payment of a $1,500 fine and nine months in jail. *Wolkind* v. *Selph*, 473 F. Supp. 675 (ED Va. 1979.)

Supreme Courts in two States within the Fourth Circuit have upheld as constitutional a 20-year sentence for a person convicted of burglary who had a prior conviction for armed robbery, *Martin* v. *Leverette*, — W. Va. —, — — —, 244 S. E. 2d 39, 43–44 (1978), and a life sentence for murder, *Simmons* v. *State*, 264 S. C. 417, 420, 215 S. E. 2d 883, 884 (1975).

Court has, in my view, chosen the easiest line rather than the best.[25]

It is also true that this Court has not heretofore invalidated a mandatory life sentence under the Eighth Amendment. Yet our precedents establish that the duty to review the disproportionality of sentences extends to noncapital cases. *Supra*, at 289–293. The reach of the Eighth Amendment cannot be restricted only to those claims previously adjudicated under the Cruel and Unusual Punishments Clause. "Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is particularly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, 'designed to approach immortality as nearly as human institutions can approach it.'" *Weems* v. *United States*, 217 U. S., at 373.

We are construing a living Constitution. The sentence imposed upon the petitioner would be viewed as grossly unjust by virtually every layman and lawyer. In my view, objective criteria clearly establish that a mandatory life sentence for defrauding persons of about $230 crosses any rationally drawn line separating punishment that lawfully may be imposed from that which is proscribed by the Eighth Amendment. I would reverse the decision of the Court of Appeals.

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[25] The Court concedes, as it must, that a mandatory life sentence may be constitutionally disproportionate to the severity of an offense. *Ante*, at 274, n. 11. Yet its opinion suggests no basis in principle for distinguishing between permissible and grossly disproportionate life imprisonment.

VANCE ET AL. *v.* UNIVERSAL AMUSEMENT CO., INC., ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 78-1588. Argued November 28, 1979—Decided March 18, 1980

Held: A Texas public nuisance statute, construed as authorizing state judges, on the basis of a showing that a theater exhibited obscene films in the past, to enjoin its future exhibition of films not yet found to be obscene, is unconstitutional as authorizing an invalid prior restraint. The statute cannot be considered to be valid on the asserted ground that it constitutes no greater a prior restraint than any criminal statute, since presumably an exhibitor would be subject to contempt proceedings for violating a preliminary restraining order under the statute even if the film is ultimately found to be nonobscene, whereas nonobscenity would be a defense to any criminal prosecution. Nor is the statute saved merely because the temporary restraint is entered by a state trial judge rather than an administrative censor. That a judge might be thought more likely than an administrative censor to determine accurately that a work is obscene does not change the unconstitutional character of the restraint if erroneously entered. Thus, the absence of any special safeguards governing the entry and review of orders restraining the exhibition of named or unnamed motion pictures, without regard to the context in which they are displayed, precludes the enforcement of the nuisance statute against motion picture exhibitors. Cf. *Freedman* v. *Maryland*, 380 U. S. 51; *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546.

587 F. 2d 159, affirmed.

Lonny F. Zwiener, Assistant Attorney General of Texas, argued the cause for appellants. With him on the brief were *Mark White*, Attorney General, *John W. Fainter, Jr.*, First Assistant Attorney General, *Ted L. Hartley*, and *Douglas B. Owen* and *Gerald C. Carruth*, Assistant Attorneys General.

Frierson M. Graves, Jr., argued the cause for appellees and filed a brief for appellee King Arts Theatre, Inc.*

**Charles H. Keating, Jr., pro se, Richard M. Bertsch, James J. Clancy,*

PER CURIAM.

The question presented in this unusual obscenity case is whether the United States Court of Appeals for the Fifth Circuit correctly held a Texas public nuisance statute unconstitutional. The Court of Appeals read the Texas statute as authorizing a prior restraint of indefinite duration on the exhibition of motion pictures without a final judicial determination of obscenity and without any guarantee of prompt review of a preliminary finding of probable obscenity. Cf. *Freedman* v. *Maryland*, 380 U. S. 51 (1965); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546 (1975). In this Court, appellants argue that such a restraint is no more serious than that imposed by Texas' criminal statutes and that it is therefore constitutional. We find appellants' argument unpersuasive and affirm the judgment of the Court of Appeals.

In 1973, appellee King Arts Theatre, Inc. (hereafter appellee), operated an indoor, adults-only motion picture theater. In October of that year, appellee's landlord gave notice that the theater's lease would be terminated. The notice stated that the County Attorney had informed the landlord that he intended to obtain an injunction to abate the theater as a public nuisance in order to prevent the future showing of allegedly obscene motion pictures. Appellee responded by filing suit in the United States District Court for the Northern District of Texas seeking an injunction and declaratory relief to forestall any action by the County Attorney under the Texas nuisance statutes. The case was transferred to a three-judge District Court sitting in the Southern District of Texas for consolidation with a number of other pending obscenity cases.

Two different Texas statutes were in issue at that point.

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and *Bruce A. Taylor* filed a brief for Charles H. Keating, Jr., as *amicus curiae* urging reversal.

Michael A. Bamberger filed a brief for the American Booksellers Assn., Inc., et al. as *amici curiae* urging affirmance.

The first, Tex. Rev. Civ. Stat. Ann., Art. 4666 (Vernon 1952),[1] authorizes injunction suits in the name of the State against alleged nuisances. If successful, "judgment shall be rendered abating said nuisance and enjoining the defendants from maintaining the same, and ordering that said house be closed for one year," unless certain conditions are met. The second nuisance statute, Art. 4667 (a) (Vernon Supp. 1978), provides that certain habitual uses of premises shall constitute a public nuisance and shall be enjoined at the suit of either the State or any citizen. Among the prohibited uses is "the commercial manufacturing, commercial distribution, or commercial exhibition of obscene material." [2]

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[1] "Art. 4666. Nuisance; prosecution

"Whenever the Attorney General, or the district or county attorney has reliable information that such a nuisance exists, either of them shall file suit in the name of this State in the county where the nuisance is alleged to exist against whoever maintains such nuisance to abate and enjoin the same. If judgment be in favor of the State, then judgment shall be rendered abating said nuisance and enjoining the defendants from maintaining the same, and ordering that said house be closed for one year from the date of said judgment, unless the defendants in said suit, or the owner, tenant or lessee of said property make bond payable to the State at the county seat of the county where such nuisance is alleged to exist, in the penal sum of not less than one thousand nor more than five thousand dollars, with sufficient sureties to be approved by the judge trying the case, conditioned that the acts prohibited in this law shall not be done or permitted to be done in said house. On violation of any condition of such bond, the whole sum may be recovered as a penalty in the name and for the State in the county where such conditions are violated, all such suits to be brought by the district or county attorney of such county."

In the early stages of the litigation the parties appear to have assumed that this statute applied to the exhibition of obscene motion pictures; at least the District Court so understood the statute. The Court of Appeals, however, read Art. 4666 as applicable only to the types of nuisance specified in Art. 4664 none of which relates to obscenity. See n. 6, *infra*.

[2] "Art. 4667. Injunctions to abate public nuisances

"(a) The habitual use, actual, threatened or contemplated, of any premises, place or building or part thereof, for any of the following uses

The three-judge District Court held that both of these statutes authorize state judges, on the basis of a showing that obscene films have been exhibited in the past, to prohibit the future exhibition of motion pictures that have not yet been found to be obscene. 404 F. Supp. 33 (1975). Recognizing that it is not unusual in nuisance litigation to prohibit future conduct on the basis of a finding of undesirable past or present conduct, the District Court read *Near* v. *Minnesota ex rel. Olson,* 283 U. S. 697 (1931), to require a special analysis when the prohibited future conduct may be protected by the First Amendment.[3] The routine abatement procedure, which the District Court characterized as "the heavy hand of the public nuisance statute," was considered constitutionally deficient in the First Amendment context.

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shall constitute a public nuisance and shall be enjoined at the suit of either the State or any citizen thereof:

"(1) For gambling, gambling promotion, or communicating gambling information prohibited by law;

"(2) For the promotion or aggravated promotion of prostitution, or compelling prostitution;

"(3) For the commercial manufacturing, commercial distribution, or commercial exhibition of obscene material;

"(4) For the commercial exhibition of live dances or exhibition which depicts real or simulated sexual intercourse or deviate sexual intercourse;

"(5) For the voluntary engaging in a fight between a man and a bull for money or other thing of value, or for any championship, or upon result of which any money or anything of value is bet or wagered, or to see which any admission fee is charged either directly or indirectly, as prohibited by law."

[3] "In its defense the state has tried to distinguish the instant case from *Near* v. *Minnesota, supra,* but the attempt is not successful. In both cases the state made the mistake of prohibiting future conduct after a finding of undesirable present conduct. When that future conduct may be protected by the first amendment, the whole system must fail because the dividing line between protected and unprotected speech may be 'dim and uncertain.' *Bantam Books* v. *Sullivan,* 372 U. S. [58, 66 (1963)]. The separation of these forms of speech calls for 'sensitive tools,' *Speiser* v. *Randall,* 357 U. S. 513 . . . (1958), not the heavy hand of the public nuisance statute." 404 F. Supp., at 44.

Specifically, the District Court noted that a general prohibition would operate as a prior restraint on unnamed motion pictures, and that even orders temporarily restraining the exhibition of specific films could be entered *ex parte*.[4] Moreover, such a temporary restraining order could be extended by a temporary injunction based on a showing of probable success on the merits and without a final determination of obscenity.[5] The District Court concluded that the nuisance statutes, when coupled with the Texas Rules of Civil Procedure governing injunctions, operate as an invalid prior restraint on the exercise of First Amendment rights.

Because the three-judge District Court granted only declaratory and not injunctive relief, the State appealed to the United States Court of Appeals for the Fifth Circuit. See *Gerstein* v. *Coe*, 417 U. S. 279 (1974). A divided panel of that court reversed. 559 F. 2d 1286 (1977). The panel

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[4] In dissent, MR. JUSTICE WHITE incorrectly assumes that it is "undisputed that any injunction granted under Art. 4667 (a) will be phrased in terms of the *Miller* v. *California*, 413 U. S. 15 (1973), definition of obscenity." *Post*, at 321. This is by no means necessarily so. Under the Texas statutes a temporary injunction prohibiting the exhibition of specific named films could be entered on the basis of a showing of probability of success on the merits of the obscenity issue. Even if it were ultimately determined that the film is not obscene, the exhibitor could be punished for contempt of court for showing the film before the obscenity issue was finally resolved.

[5] "The specific requirements of obtaining an injunction in Texas, which would presumably be utilized in actions pursuant to article 4667, leave much to be desired if they are used in the obscenity context. Rules 680-693a of the Texas Rules of Civil Procedure provide the injunction procedures for Texas. Pursuant to those rules, the state could obtain a temporary restraining order lasting up to ten days, ex parte. As soon as possible, within that ten days, however, a hearing on a temporary injunction is obtainable. The temporary injunction is not a final adjudication on the merits but, once it is obtained, there is no provision for treating the case any differently from any other civil case. The lack of a provision for a swift final adjudication on the obscenity question raises serious doubts of the constitutional usability of the injunction process in Texas for an obscenity situation." 404 F. Supp., at 46.

majority acknowledged that if Art. 4666 authorized the closing of a motion picture theater for all uses for a year, it "would pose serious first amendment questions," 559 F. 2d, at 1290, but held that the District Court had misconstrued Art. 4666 in that it was not intended to apply to obscenity cases.[6]

The panel majority disagreed more fundamentally with the District Court's view of Art. 4667 (a). It held that the injunction procedure authorized by that statute was "basically sound" in its application to an establishment such as appellee's:

> "The statute authorizes an injunction against the commercial manufacture, distribution or exhibition of *obscene* material only. Because the injunction follows, rather than precedes, a judicial determination that obscene material has been shown or distributed or manufactured on the premises and because its prohibitions can apply only to further dealings with obscene and unprotected material, it does not constitute a prior restraint." 559 F. 2d, at 1292 (emphasis in original).

Further, the panel majority found no problem under *Freedman* v. *Maryland*, 380 U. S. 51 (1965), because any temporary restraint entered pending a final adjudication on the issue of obscenity would be imposed by a judge, not an administrative censor. The judgment of the District Court was therefore reversed.[7]

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[6] The panel interpreted the "such a nuisance" language in the first sentence of Art. 4666, see n. 1, *supra*, as referring to the definition of "common nuisance[s]" in Art. 4664 (Vernon Supp. 1978): gambling houses, houses of prostitution, and places where intoxicating liquors are kept.

[7] Judge Thornberry, dissenting in part, relied on the reasoning of the three-judge District Court:

"As the district court wrote:

'Pursuant to [Rules 680–693a of the Texas Rules of Civil Procedure], the state could obtain a temporary restraining order lasting up to ten days, ex parte. As soon as possible, within that ten days, however, a hearing on a temporary injunction is obtainable. The temporary injunc-

The Court of Appeals granted rehearing en banc, and reversed the panel's holding that Art. 4667 (a) is constitutional. 587 F. 2d 159 (1978).[8] The eight to six majority found the statute objectionable because it "would allow the issuance of an injunction against the future exhibition of unnamed films that depict particular acts enumerated in the state's obscenity statute," 587 F. 2d, at 168, and "lacks the procedural safeguards required under *Freedman* v. *Maryland,* 380 U. S. 51. . . ." *Id.,* at 169.[9] The dissenters wrote that a pragmatic assessment of the statute's operation indicated that once the contemplated injunction was in effect, it would impose no greater a prior restraint than a criminal statute forbidding exhibition of materials deemed obscene under *Miller* v. *California,* 413 U. S. 15 (1973).[10]

The Texas defendants appealed to this Court, and we noted probable jurisdiction. 442 U. S. 928. We limit our review

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tion is not a final adjudication on the merits but, once it is obtained, there is no provision for treating the [obscenity] case any differently from any other civil case. The lack of a provision for a swift final adjudication on the obscenity question raises serious doubts of the constitutional usability of the injunction process in Texas for an obscenity situation.'" 559 F. 2d, at 1303.

[8] It accepted the panel majority's construction of Art. 4666, *i. e.,* that it was inapplicable in obscenity cases.

[9] In *Freedman,* the Court gave three reasons for holding Maryland's censorship procedures unconstitutional:

"It is readily apparent that the Maryland procedural scheme does not satisfy these criteria. First, once the censor disapproves the film, the exhibitor must assume the burden of instituting judicial proceedings and of persuading the courts that the film is protected expression. Second, once the Board has acted against a film, exhibition is prohibited pending judicial review, however protracted. Under the statute, appellant could have been convicted if he had shown the film after unsuccessfully seeking a license, even though no court had ever ruled on the obscenity of the film. Third, it is abundantly clear that the Maryland statute provides no assurance of prompt judicial determination." 380 U. S., at 59–60.

[10] The dissenters also relied on the panel majority's distinction between a temporary restraint entered by a judge and one entered by an administrative censor.

to the two arguments advanced in appellants' brief: [11] first, that an "obscenity injunction" under Art. 4667 (a)(3) constitutes no greater a prior restraint than any criminal statute and, second, that the Court of Appeals erroneously held that no prior restraint of possible First Amendment materials is permissible.

I

The Court of Appeals was quite correct in concluding both (a) that the regulation of a communicative activity such as the exhibition of motion pictures must adhere to more narrowly drawn procedures than is necessary for the abatement of an ordinary nuisance,[12] and (b) that the burden of supporting

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[11] The brief is confined to an attack on the Court of Appeals' holding that Art. 4667 (a) is unconstitutional as applied to allegedly obscene material. At oral argument, appellants' counsel invited us also to review issues relating to Art. 4666 and the question whether the District Court should have abstained. Since the former contention would require us to review a construction of Art. 4666 which all members of the en banc Court of Appeals ultimately accepted, and since the latter contention was not raised in the Court of Appeals, we decline the invitation.

[12] Emphasizing the difference between a regulation touching freedom of expression and the regulation of ordinary commercial activity, in *Freedman* v. *Maryland*, the Court wrote:

"In the area of freedom of expression it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, whether or not his conduct could be proscribed by a properly drawn statute, and whether or not he applied for a license. 'One who might have had a license for the asking may . . . call into question the whole scheme of licensing when he is prosecuted for failure to procure it.' *Thornhill* v. *Alabama*, 310 U. S. 88, 97; see *Staub* v. *City of Baxley*, 355 U. S. 313, 319; *Saia* v. *New York*, 334 U. S. 558; *Thomas* v. *Collins*, 323 U. S. 516; *Hague* v. *CIO*, 307 U. S. 496; *Lovell* v. *City of Griffin*, 303 U. S. 444, 452–453. Standing is recognized in such cases because of the '. . . danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application.' *NAACP* v. *Button*, 371 U. S. 415, 433; see also Amsterdam, Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67, 75–76, 80–81, 96–104 (1960)." 380 U. S., at 56.

an injunction against a future exhibition is even heavier than the burden of justifying the imposition of a criminal sanction for a past communication.[13]

As the District Court and the Court of Appeals construed Art. 4667 (a), when coupled with the Texas Rules of Civil Procedure, it authorizes prior restraints of indefinite duration on the exhibition of motion pictures that have not been finally adjudicated to be obscene.[14] Presumably, an exhibitor would be required to obey such an order pending review of its merits and would be subject to contempt proceedings even if the film is ultimately found to be nonobscene.[15] Such prior restraints would be more onerous and more objectionable than the threat of criminal sanctions after a film has been exhibited, since nonobscenity would be a defense to any criminal prosecution.

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[13] "Any system of prior restraint, however, 'comes to this Court bearing a heavy presumption against its constitutional validity.' *Bantam Books, Inc.* v. *Sullivan*, 372 U. S., at 70; *New York Times Co.* v. *United States*, 403 U. S. [713, 714 (1971)]; *Organization for a Better Austin* v. *Keefe*, 402 U. S. 415, 419 (1971); *Carroll* v. *Princess Anne*, 393 U. S. 175, 181 (1968); *Near* v. *Minnesota ex rel. Olson*, 283 U. S. [697, 716 (1931)]. The presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable. See *Speiser* v. *Randall*, 357 U. S. 513 (1958)." *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546, 558–559 (1975).

[14] Those courts believed that a short-lived temporary restraining order could be issued on the basis of an *ex parte* showing, and that a temporary injunction of indefinite duration could be obtained on the basis of a showing of probable success on the merits.

We accept their construction of Texas law for purposes of decision. See *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198, 204–205 (1956).

[15] Cf. *Walker* v. *City of Birmingham*, 388 U. S. 307, 317–321 (1967); *United States* v. *Mine Workers*, 330 U. S. 258, 293 (1947).

Nor does the fact that the temporary prior restraint is entered by a state trial judge rather than an administrative censor sufficiently distinguish this case from *Freedman* v. *Maryland*. "*Any* system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 70 (1963) (emphasis added). That a state trial judge might be thought more likely than an administrative censor to determine accurately that a work is obscene does not change the unconstitutional character of the restraint if erroneously entered.

Accordingly, we agree with the Court of Appeals' conclusion that the absence of any special safeguards governing the entry and review of orders restraining the exhibition of named or unnamed motion pictures, without regard to the context in which they are displayed, precludes the enforcement of these nuisance statutes against motion picture exhibitors.

II

Contrary to appellants' second argument, the Court of Appeals did not hold that there can never be a valid prior restraint on communicative activity. The Court of Appeals simply held that these Texas statutes were procedurally deficient, and that they authorize prior restraints that are more onerous than is permissible under *Freedman* v. *Maryland* and *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546 (1975).

Because we find no merit in the contentions advanced on behalf of appellants, the judgment is affirmed.

It is so ordered.

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE POWELL joins, dissenting.

I would dismiss the appeal for failure to present a real and substantial controversy "of the immediacy which is an indis-

pensable condition of constitutional adjudication." *Poe* v. *Ullman*, 367 U. S. 497, 508 (1961) (plurality opinion). Alternatively, I would abstain from decision until the Texas courts interpret the challenged statute. I would not reach the merits of this "dispute" at this stage.

This Court's power of constitutional review is "most securely founded when it is exercised under the impact of a lively conflict between antagonistic demands, actively pressed, which make resolution of the controverted issue a practical necessity." *Id.*, at 503. This case quite plainly fails to satisfy that rigorous standard. Here, Texas has conceded at oral argument that the injunctive remedy of Art. 4667 (a) is not likely to be used by any Texas prosecutor.[1] In light of this concession, this case recalls *Poe*, where Mr. Justice Frankfurter concluded:

> "The fact that [the State] has not chosen to press the enforcement of this statute deprives these controversies of the immediacy which is an indispensable condition of constitutional adjudication. This Court cannot be umpire to debates concerning harmless, empty shadows." 367 U. S., at 508.

By passing on the constitutionality of the Texas statute, the Court ignores this wise counsel.[2]

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[1] "QUESTION: Well, what does it—why, then, do you need [this statute], if it is the equivalent of the Texas criminal law?

"MR. ZWEINER: I am not sure that we do, to be frank; but—

"QUESTION: What does it add to the criminal law. It changes the burden of proof, it deprives a person of a jury trial.

"MR. ZWEINER: I don't think it adds anything. As a matter of fact I think it is a cumbersome process and I don't know that the prosecutor after more than two rounds will ever use it again. . . ." Tr. of Oral Arg. 36–37.

[2] It is true that the State was the appellee in *Poe* and that it is the appellant here. This difference, however, should not be controlling for purposes of determining whether the dispute is a real one. Here, the challenged statute was defended in perfunctory fashion, apparently more

Moreover, the need for constitutional decision could be obviated in this case by permitting the Texas courts an opportunity to interpret Texas law. The Court today assumes (1) that "a temporary injunction of indefinite duration" could be issued against a named motion picture "on the basis of a showing of probable success on the merits," *ante,* at 316, n. 14; and (2) that an exhibitor would be subject to criminal contempt proceedings for violating such an injunction even if the motion picture is ultimately adjudged nonobscene, *ante,* at 316, and n. 15. If these assumptions are correct, the statute is obviously flawed. See *Freedman* v. *Maryland,* 380 U. S. 51 (1965). But there is ample reason to believe that the Court may be wrong in today's conjectures; indeed, there is a serious question as to whether the Texas statute even authorizes an injunction against a *named* film. Compare *ante,* at 312, and dissenting opinion of MR. JUSTICE WHITE, *post,* at 325. If such an injunction is permitted, the decision of the Texas Court of Civil Appeals in *Locke* v. *State,* 516 S. W. 2d 949 (1974), casts doubt on the assumption that it can be obtained on a showing of probable success. There, the Texas court in reviewing the validity of a temporary injunction entered against a motion picture exhibitor made a *de novo* on-the-merits determination of obscenity.[3] Are we really to believe that the trial court applies a less stringent, probable-success standard? At the very least, *Locke* demonstrates that if an injunction is

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out of a sense of duty than anything else. The State filed a nine-page brief with only three pages devoted to analysis; it derided the injunctive remedy as "cumbersom[e] and ineffectua[l]." Brief 6.

[3] In *Locke,* the Texas court wrote as follows:

"In accordance with the requirement that an independent determination of the obscene nature of the material is made by the reviewing court, we have viewed the films introduced as exhibits below, and we find them to be obscene by any reasonable definition. The films have practically no plot or story content. . . . Their appeal is wholly to the prurient interest in sexual conduct. They are obscene according to both the Texas statutory definition and the test approved by the United States Supreme Court in Miller v. California." 516 S. W. 2d, at 954.

obtainable on such a slender showing, it is likely to enjoy a short life. It provides stark proof that only by abstaining from decision can we know whether Texas law is as the Court today "forecasts" it to be. See *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496, 499 (1941).[4] "So fragile a record is an unsatisfactory basis on which to entertain this action for declaratory relief." *Public Affairs Press* v. *Rickover*, 369 U. S. 111, 114 (1962).

In sum, I am unwilling to join the Court in "umpiring" an empty debate on a question of Texas law on which the Texas courts have not yet had an opportunity to speak. I therefore would dismiss the appeal.

MR. JUSTICE WHITE, with whom MR. JUSTICE REHNQUIST joins, dissenting.

The Court of Appeals invalidated Tex. Rev. Civ. Stat. Ann., Art. 4667 (a) (Vernon Supp. 1978) for what I understand to be two distinct reasons. Neither is valid, and to the extent that the Court falls into the same error, I respectfully dissent.

I

The Court of Appeals first characterized Art. 4667 (a) as a prior restraint on expression and invalidated it for this reason. I disagree. In my view, Art. 4667 (a), standing alone, intrudes no more on First Amendment values than would a criminal statute barring exhibition of obscene films in terms that would be valid under our cases.

The Court of Appeals' analysis of Art. 4667 (a), and that of this Court as well, glosses over what I take to be a crucial

[4] Equally dubious is the Court's second assumption that an exhibitor could be punished for disobeying a temporary injunction even if the motion picture shown is ultimately found nonobscene. It is an open question whether Texas in these circumstances would apply a rule analogous to that invoked in *Walker* v. *City of Birmingham*, 388 U. S. 307 (1967), to bar a defendant from raising a First Amendment defense in an action for contempt.

feature of that law. Before an exhibitor can be found to have violated an Art. 4667 (a) injunction, there must be two quite separate judicial proceedings. First, the plaintiff must obtain temporary or permanent injunctive relief against the habitual use of the subject premises for the commercial exhibition of obscene motion pictures. Second, the exhibitor must be found in criminal or civil contempt for violating the terms of the injunction. When these separate proceedings are carefully distinguished, it becomes apparent that neither individually nor jointly do they impose an impermissible burden on the exercise of First Amendment freedoms.

The initial injunctive proceeding is both substantively and procedurally sound under our precedents. Although the lack of an actual Art. 4667 (a) injunction in the present case gives a somewhat abstract and hypothetical tone to the analysis, it seems undisputed that any injunction granted under Art. 4667 (a) will be phrased in terms of the *Miller* v. *California*, 413 U. S. 15 (1973), definition of obscenity.[1] Hence an Art. 4667 (a) injunction would not by its terms forbid the exhibition of any materials protected by the First Amendment and would impose no greater functional burden on First Amendment values than would an equivalent—and concededly

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[1] The en banc Fifth Circuit and the District Court both found that the term "obscene" in Art. 4667 (a) would be defined with reference to Tex. Penal Code Ann. § 43.21 (Supp. 1979). 587 F. 2d 159, 168, and n. 18 (1978); 404 F. Supp. 33, 39 (1975). See also *Locke* v. *State*, 516 S. W. 2d 949, 952 (Tex. Civ. App. 1974). Section 43.21, in turn, tracks nearly verbatim the *Miller* guidelines. The Fifth Circuit panel, in an aspect of its decision that was not repudiated by the Circuit en banc, held:

"The statute authorizes an injunction against the commercial manufacture, distribution or exhibition of *obscene* material only. . . . Were a Texas court to issue an overbroad injunction restricting nonobscene (and therefore protected) matter, it would exceed both its constitutional and its statutory authority." 559 F. 2d 1286, 1292 (1977) (emphasis in original).

I do not read today's decision as disputing that under Texas law a valid Art. 4667 (a) injunction will be phrased in terms of a constitutionally adequate definition of obscenity.

valid—criminal statute. It simply declares to the exhibitor that the future showing of obscene motion pictures will be punishable.[2] It is true that an Art. 4667 (a) injunction is issued by a court of law while a criminal statute is imposed by a legislature. Yet this distinction seems irrelevant for First Amendment purposes.

Of course, an exhibitor who continues to show arguably obscene motion pictures after an Art. 4667 (a) injunction has issued against him does run the risk of being held in contempt. The Court implies that this danger renders Art. 4667 (a) unconstitutional because under *Walker* v. *City of Birmingham*, 388 U. S. 307, 317–321 (1967), an exhibitor could be held in contempt even if the film is ultimately found to be nonobscene. *Ante,* at 316, and n. 15. This conclusion is plainly wrong. As I have noted, and as the majority does not dispute, an Art. 4667 (a) injunction, temporary injunction, or temporary restraining order will be phrased in terms of a constitutionally adequate definition of obscenity. Therefore, contrary to the Court's inference, the motion picture's nonobscenity would clearly defeat any contempt proceeding brought under Art. 4667 (a), since if the film were not obscene, there would be no violation of the injunction.

There remains the question of whether the procedures employed at a contempt proceeding satisfy First Amendment requirements. I believe that they do. An exhibitor who shows a film arguably violative of the injunction would likely be tried for criminal contempt. At such a proceeding the exhibitor would have the constitutional rights of any criminal defendant. In particular, the State would bear the burden of proving beyond a reasonable doubt that the film which

[2] Indeed, the Art. 4667 (a) procedure provides greater protection to speech than would an equivalent criminal statute, since no one is punishable for violating an Art. 4667 (a) injunction unless a plaintiff has already gone to the considerable trouble of first obtaining a public nuisance injunction against the defendant.

allegedly violated the injunction was obscene.[3] Such procedures seem more than adequate to satisfy any procedural requirements that may exist with respect to criminal contempt proceedings in the First Amendment context.

The defendant might also be held in civil contempt if he refused to cease showing a specific motion picture proved to be obscene and contrary to the terms of the injunction. A civil contempt proceeding, unlike the original Art. 4667 (a) injunction, could result in jailing or fining the exhibitor until he ceased showing a film that had been publicly determined to be obscene. But such procedures would fully satisfy the requirements of our cases. Under Texas law, no one may be held in civil contempt unless he has received notice, in the form of an order to show cause, and a hearing on the charge against him. *E. g., Ex parte Mouille,* 572 S. W. 2d 60, 62 (Tex. Civ. App. 1978). The burden of bringing civil contempt charges is on the party seeking to suppress the exhibition; presumably, that party as plaintiff also bears the burden of showing noncompliance with the injunction, and in particular of proving that the exhibitor has shown obscene films. Since contempt proceedings are held before a court, a civil contempt order will not issue until there has been a final judicial determination that the defendant has exhibited and

[3] The Fifth Circuit majority expressed some doubt as to whether the State will have the burden of proof of showing that the film is obscene. 587 F. 2d, at 171, n. 23, citing *Railroad Comm'n* v. *Sample,* 405 S. W. 2d 338, 343 (Tex. 1966). The *Sample* case was a challenge to an order of the State Railroad Commission, not a contempt proceeding; it stands at most for the proposition that in Texas an order to show cause does not conclusively establish which party bears the burden of proof. The case does not establish that a party receiving an order to show cause why he should not be held in criminal contempt bears the burden of proof on any element of the contempt. To the contrary, obscenity is one element of the injunction, and if the State has the burden of showing violation of the injunction beyond a reasonable doubt, it follows that the State as a matter of due process has the burden of showing that the particular film shown was obscene.

continues to exhibit obscene films. And even then the exhibitor could purge his contempt by ceasing to exhibit such films.

The Court of Appeals and the Court, therefore, too easily equate an injunction against the exhibition of unnamed, obscene films with a typical "prior restraint." The Art. 4667 (a) injunction does, in a sense, "restrain" future speech by declaring punishable future exhibitions of obscene motion pictures. But in this weak sense of the term criminal obscenity statutes would also be considered "prior restraints." Prior restraints are distinct from, and more dangerous to free speech than, criminal statutes because, through caprice, mistake, or purpose, the censor may forbid speech which is constitutionally protected, and because the speaker may be punished for disobeying the censor even though his speech was protected. Those dangers are entirely absent here. An injunction against the showing of unnamed obscene motion pictures does not and cannot bar the exhibitor from showing protected material, nor can the exhibitor be punished, through contempt proceedings, for showing such material. The Art. 4667 (a) injunction, in short, does not impose a traditional prior restraint. On the contrary, it seems to me functionally indistinguishable from a criminal obscenity statute. Since an appropriately worded criminal statute is constitutionally valid, I believe that Art. 4667 (a) is valid also.

II

The second reason given by the Court of Appeals for invalidating Art. 4667 (a) and apparently adopted by this Court, was the "failure to provide the safeguards mandated by" *Freedman* v. *Maryland,* 380 U. S. 51 (1965), and *Southeastern Promotions, Ltd.* v. *Conrad,* 420 U. S. 546 (1975). Those cases held that injunctions against showing allegedly obscene films are invalid unless (1) the burdens of instituting proceedings and of proving the material is obscene are on the censor; (2) the restraint prior to judicial review continues

only for a limited time and only to preserve the status quo; and, (3) there is an assurance of prompt final judicial determination of the films' obscenity.

I fail to see, however, how the *Freedman* restraints are relevant to the injunction contemplated by Art. 4667 (a). The *Freedman* restraints are wholly appropriate with respect to injunctions against specific, named films, but the injunction contemplated by Art. 4667 (a) is one directed against the future showing of *unnamed* obscene motion pictures. Because the films enjoined are unnamed, a final judicial determination of obscenity is logically impossible prior to or at the time the injunction issues. As I have said, an Art. 4667 (a) injunction no more restrains the showing of *particular* films than would a similarly worded criminal statute.

The Court of Appeals referred to the Texas Rules of Civil Procedure and declared that injunctions under those Rules could be issued without compliance with *Freedman* requirements. I would agree that the Texas procedures for enjoining the showing of named films must comply with the First Amendment requirements set out in our cases, but I fail to perceive why the inadequacy of the Texas procedures in this respect invalidates Art. 4667 (a), a separate statutory provision, contemplating only injunctions against unnamed films.

In this light, striking down Art. 4667 (a) is wholly gratuitous, and I respectfully dissent.

DEPOSIT GUARANTY NATIONAL BANK OF JACKSON, MISSISSIPPI *v.* ROPER ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 78-904. Argued October 2, 1979—Decided March 19, 1980

Respondents, holders of credit cards issued by petitioner bank, sued petitioner for damages in Federal District Court, seeking to represent both their own interests and those of a class of similarly situated credit card customers. The complaint, based on the National Bank Act, alleged that usurious finance charges had been made against the accounts of respondents and the putative class. The District Court denied respondents' motion to certify the class, ruling that the circumstances did not meet all the requirements of Federal Rule of Civil Procedure 23 (b)(3). After the Court of Appeals denied respondents' motion for interlocutory appeal, petitioner tendered to each respondent the maximum amount that each could have recovered, but respondents refused to accept the tender. The District Court, over respondents' objections, then entered judgment in their favor on the basis of the tender and dismissed the action, the amount of the tender being deposited by petitioner in the court's registry. Respondents thereafter sought review of the class certification ruling, and the Court of Appeals concluded, *inter alia*, that the case had not been mooted by the entry of judgment in respondents' favor and reversed the adverse certification ruling.

Held: Neither petitioner's tender nor the District Court's entry of judgment in favor of respondents over their objections mooted their private case or controversy, and their individual interest in the litigation—as distinguished from whatever may be their representative responsibilities to the putative class—is sufficient to permit their appeal of the adverse certification ruling. Pp. 331-340.

(a) In an appropriate case appeal may be permitted from an adverse ruling collateral to the judgment on the merits at the behest of the party who has prevailed on the merits, so long as that party retains a stake in the appeal satisfying Art. III's case-or-controversy requirements. Here, neither the rejected tender nor the dismissal of the action over respondents' objections mooted their claim on the merits so long as they retained an economic interest in class certification. Pp. 332-335.

(b) The denial of class certification is an example of a procedural ruling, collateral to the merits of a litigation, that is appealable after

the entry of final judgment. The denial of certification stands as an adjudication of one of the issues litigated. Respondents have asserted throughout this appellate litigation a continuing individual interest in the resolution of the class certification question in their desire to shift part of the costs of litigation to those who will share in its benefits if the class is certified and ultimately prevails. Thus, they are entitled to have this portion of the District Court's judgment reviewed. To deny the right to appeal simply because the defendant has sought to "buy off" the individual claims of the named plaintiffs would be contrary to sound judicial administration. Pp. 336–340.

578 F. 2d 1106, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, REHNQUIST, and STEVENS, JJ., joined. REHNQUIST, J., *post*, p. 340, and STEVENS, J., *post*, p. 342, filed concurring opinions. BLACKMUN, J., filed an opinion concurring in the judgment, *post*, p. 344. POWELL, J., filed a dissenting opinion, in which STEWART, J., joined, *post*, p. 344.

William F. Goodman, Jr., argued the cause for petitioner. With him on the briefs was *Vardaman S. Dunn*.

Champ Lyons, Jr., argued the cause for respondents. With him on the brief were *Frederick G. Helmsing* and *W. Roberts Wilson*.

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether a tender to named plaintiffs in a class action of the amounts claimed in their individual capacities, followed by the entry of judgment in their favor on the basis of that tender, over their objection, moots the case and terminates their right to appeal the denial of class certification.

I

Respondents, holders of credit cards issued on the "Bank-Americard" plan by petitioner Deposit Guaranty National Bank, sued the bank in the United States District Court for the Southern District of Mississippi, seeking to represent both

their own interests and those of a class of similarly aggrieved customers. The complaint alleged that usurious finance charges had been made against the accounts of respondents and a putative class of some 90,000 other Mississippi credit card holders.

Respondents' cause of action was based on provisions of the National Bank Act, Rev. Stat. §§ 5197, 5198, as amended, 12 U. S. C. §§ 85 and 86. Section 85 permits banks within the coverage of the Act to charge interest "at the rate allowed by the laws of the State, Territory, or District where the bank is located." In a case where a higher rate of interest than allowed has been "knowingly" charged, § 86 allows a person who has paid the unlawful interest to recover twice the total interest paid.[1]

The modern phenomenon of credit card systems is largely dependent on computers, which perform the myriad accounting functions required to charge each transaction to the customer's account. In this case, the bank's computer was programmed so that, on the billing date, it added charges, subtracted credits, added any finance charges due under the BankAmericard plan, and prepared the customers' statements. During the period in question, the bank made a monthly service charge of 1½% on the unpaid balance of each account. However, customers were allowed 30 days within which to pay accounts without any service charge. If payment was not received within that time, the computer added to the customer's next bill 1½% of the unpaid portion of the prior bill, which was shown as the new balance. The actual finance charges paid by each customer varied depending on the stream of transactions and the repayment plan selected. In addition, the effective annual interest rate paid by a customer would vary because the same 1½% service charge was assessed

[1] Respondents' complaint also alleged a cause of action based on the Truth in Lending Act, 15 U. S. C. § 1601 *et seq.*, but that claim was dismissed with prejudice at respondents' request.

against the unpaid balance no matter when the charged transactions occurred within the 30–60-day period prior to the billing date. This 1½% monthly service charge is asserted to have been usurious because under certain circumstances the resulting effective annual interest rate allegedly exceeded the maximum interest rate permitted under Mississippi law.

The District Court denied respondents' motion to certify the class, ruling that the circumstances did not meet all the requirements of Federal Rule of Civil Procedure 23 (b)(3).[2] The District Court certified the order denying class certification for discretionary interlocutory appeal, pursuant to 28 U. S. C. § 1292 (b); the proceedings were stayed for 30 days pending possible appellate review of the denial of class certification.

The United States Court of Appeals for the Fifth Circuit denied respondents' motion for interlocutory appeal. The bank then tendered to each named plaintiff, in the form of an "Offer of Defendants to Enter Judgment as by Consent and Without Waiver of Defenses or Admission of Liability," the maximum amount that each could have recovered. The amounts tendered to respondents Roper and Hudgins were $889.42 and $423.54, respectively, including legal interest and court costs. Respondents declined to accept the tender and made a counteroffer of judgment in which they attempted to reserve the right to appeal the adverse class certification ruling. This counteroffer was declined by the bank.

[2] The District Court found that the requirements of Rule 23 (b)(3) were not met because the putative class representatives had failed to establish the predominance of questions of law and fact common to class members, and because a class action was not shown to be a superior method of adjudication due to (1) the availability of traditional procedures for prosecuting individual claims in Mississippi courts; (2) the "horrendous penalty," which could result in "destruction of the bank" if claims were successfully aggregated; (3) the substantive law of Mississippi which views the aggregation of usury claims as undesirable; and (4) the tremendous burden of handling 90,000 claims, particularly if counterclaims were filed.

Based on the bank's offer, the District Court entered judgment in respondents' favor, over their objection, and dismissed the action. The bank deposited the amount tendered into the registry of the court, where it remains. At no time has any putative class member sought to intervene either to litigate the merits or to appeal the certification ruling. It appears that by the time the District Court entered judgment and dismissed the case, the statute of limitations had run on the individual claims of the unnamed class members.[3]

When respondents sought review of the class certification ruling in the Court of Appeals, the bank argued that the case had been mooted by the entry of judgment in respondents' favor. In rejecting the bank's contention, the court relied in part on *United Airlines, Inc.* v. *McDonald,* 432 U. S. 385 (1977), in which we held that a member of the putative class could appeal the denial of class certification by intervention, after entry of judgment in favor of the named plaintiff, but before the statutory time for appeal had run. *Roper* v. *Consurve, Inc.,* 578 F. 2d 1106 (CA5 1978). Two members of the panel read Rule 23 as providing for a fiduciary-type obligation of the named plaintiffs to act in a representative capacity on behalf of the putative class by seeking certification at the outset of the litigation and by appealing an adverse certification ruling. In that view, the District Court also had a responsibility to ensure that any dismissal of the suit of the named plaintiffs did not prejudice putative class members. One member of the panel, concurring specially, limited the ruling on mootness to the circumstances of the case, *i. e.,* that, after filing of a class action, the mere tender of an offer of settlement to the named plaintiffs, without ac-

[3] Reversal of the District Court's denial of certification by the Court of Appeals may relate back to the time of the original motion for certification for the purposes of tolling the statute of limitations on the claims of the class members. See *United Airlines, Inc.* v. *McDonald,* 432 U. S. 385 (1977).

ceptance, does not moot the controversy so as to prevent the named plantiffs from appealing an adverse certification ruling.

Having rejected the bank's mootness argument, the Court of Appeals reviewed the District Court's ruling on the class certification question. It concluded that all the requisites of Rule 23 had been satisfied and accordingly reversed the adverse certification ruling; it remanded with directions to certify the class and for further proceedings.

Certiorari was sought to review the holdings of the Court of Appeals on both mootness and class certification. We granted the writ limited to the question of mootness, to resolve conflicting holdings in the Courts of Appeals.[4] 440 U. S. 945.

II

We begin by identifying the interests to be considered when questions touching on justiciability are presented in the class-action context. First is the interest of the named plaintiffs: their personal stake in the substantive controversy and their related right as litigants in a federal court to employ in appropriate circumstances the procedural device of a Rule 23 class action to pursue their individual claims. A separate consideration, distinct from their private interests, is the responsibility of named plaintiffs to represent the collective interests of the putative class. Two other interests are implicated: the rights of putative class members as potential intervenors, and the responsibilities of a district court to protect both the absent class and the integrity of the judicial process by monitoring the actions of the parties before it.

The Court of Appeals did not distinguish among these distinct interests. It reviewed all possible interests that in its view had a bearing on whether an appeal of the denial of certification should be allowed. These diverse interests are interrelated, but we distinguish among them for purposes

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[4] *E. g., Winokur* v. *Bell Federal Savings & Loan Assn.*, 560 F. 2d 271 (CA7 1977), cert. denied, 435 U. S. 932 (1978).

of analysis, and conclude that resolution of the narrow question presented requires consideration only of the private interest of the named plaintiffs.

A

The critical inquiry, to which we now turn, is whether respondents' individual and private case or controversy became moot by reason of petitioner's tender or the entry of judgment in respondents' favor. Respondents, as holders of credit cards issued by the bank, claimed damages in their private capacities for alleged usurious interest charges levied in violation of federal law. Their complaint asserted that they had suffered actual damage as a result of illegal acts of the bank. The complaint satisfied the case-or-controversy requirement of Art. III of the Constitution.

As parties in a federal civil action, respondents exercised their option as putative members of a similarly situated cardholder class to assert their claims under Rule 23. Their right to assert their own claims in the framework of a class action is clear. However, the right of a litigant to employ Rule 23 is a procedural right only, ancillary tc the litigation of substantive claims. Should these substantive claims become moot in the Art. III sense, by settlement of all personal claims for example, the court retains no jurisdiction over the controversy of the individual plaintiffs.

The factual context in which this question arises is important. At no time did the named plaintiffs accept the tender in settlement of the case; instead, judgment was entered in their favor by the court without their consent and the case was dismissed over their continued objections.[5] Neither the

[5] We note that Rule 23 (e) prescribes certain responsibilities of a district court in a case brought as a class action: once a class is certified, a class action may not be "dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." Conceivably, there also may be circumstances, which need not be defined here,

rejected tender nor the dismissal of the action over plaintiffs' objections mooted the plaintiffs' claim on the merits so long as they retained an economic interest in class certification. Although a case or controversy is mooted in the Art. III sense upon payment and satisfaction of a final, unappealable judgment, a decision that is "final" for purposes of appeal does not absolutely resolve a case or controversy until the time for appeal has run. Nor does a confession of judgment by defendants on less than all the issues moot an entire case; other issues in the case may be appealable. We can assume that a district court's final judgment fully satisfying named plaintiffs' private substantive claims would preclude their appeal on that aspect of the final judgment; however, it does not follow that this circumstance would terminate the named plaintiffs' right to take an appeal on the issue of class certification.

Congress has vested appellate jurisdiction in the courts of appeals for review of final decisions of the district courts. 28 U. S. C. § 1291. Ordinarily, only a party aggrieved by a judgment or order of a district court may exercise the statutory right to appeal therefrom. A party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it. *Public Service Comm'n* v. *Brashear Freight Lines, Inc.*, 306 U. S. 204 (1939); *New York Telephone Co.* v. *Maltbie*, 291 U. S. 645 (1934); *Corning* v. *Troy Iron & Nail Factory*, 15 How. 451 (1854); 9 J. Moore, Federal Practice ¶ 203.06 (2d ed. 1975). The rule is one of federal appellate practice, however, derived from the statutes granting appellate jurisdiction and the historic practices of the appellate courts; it does not have its source in the

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where the district court has a responsibility, prior to approval of a settlement and its dismissal of the class action, to provide an opportunity for intervention by a member of the putative class for the purpose of appealing the denial of class certification. Such intervention occurred in *United Airlines, Inc.* v. *McDonald, supra.*

jurisdictional limitations of Art. III. In an appropriate case, appeal may be permitted from an adverse ruling collateral to the judgment on the merits at the behest of the party who has prevailed on the merits, so long as that party retains a stake in the appeal satisfying the requirements of Art. III.[6]

An illustration of this principle in practice is *Electrical Fittings Corp.* v. *Thomas & Betts Co.*, 307 U. S. 241 (1939). In that case, respondents sued petitioners for infringement of a patent. In such a suit, the defense may prevail either by successfully attacking the validity of the patent or by successfully defending the charge of infringement. In *Electrical Fittings* the decree of the District Court adjudged the patent valid but dismissed the complaint for failure to prove infringement. The respondents did not appeal, but petitioners sought review in the Court of Appeals of so much of the decree as adjudicated the patent valid. Respondents filed a motion to dismiss the appeal "based on the ground that the appeal can raise no questions not already moot because of the fact that the [petitioners] have already been granted in the dismissal of the bill all the relief to which they are entitled." 100 F. 2d 403, 404 (CA2 1938). The Court of Appeals dismissed the appeal on this ground after ruling that the decree of the District Court would not in subsequent suits, as a matter of collateral estoppel or otherwise, influence litigation on the issue of the patent's validity. On review here, this Court did not question the view that the ruling on patent validity would

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[6] The dissent construes the notice of appeal as a complete abandonment by respondents of their Art. III personal stake in the appeal. *Post*, at 346. Such is not the case. Indeed, the appeal was taken by the named plaintiffs, although its only purpose was to secure class certification; throughout this litigation, respondents have asserted as their personal stake in the appeal their desire to shift to successful class litigants a portion of those fees and expenses that have been incurred in this litigation and for which they assert a continuing obligation. See Plaintiffs-Appellants' Brief in Opposition to Motion to Dismiss Appeal and Reply Brief in No. 76-3600 (CA5), pp. 4, 12, 16, 17.

have no effect on subsequent litigation. Nevertheless, a unanimous Court allowed the appeal to reform the decree:

> "A party may not appeal from a judgment or decree in his favor, for the purpose of obtaining a review of findings he deems erroneous which are not necessary to support the decree. But here the decree itself purports to adjudge the validity of [the patent], and though the adjudication was immaterial to the disposition of the cause, it stands as an adjudication of one of the issues litigated. We think the petitioners were entitled to have this portion of the decree eliminated, and that the Circuit Court of Appeals had jurisdiction, as we have held this court has, to entertain the appeal, not for the purpose of passing on the merits, but to direct the reformation of the decree." 307 U. S., at 242 (footnotes omitted).

Although the Court limited the appellate function to reformation of the decree, the holding relevant to the instant case was that the federal courts retained jurisdiction over the controversy notwithstanding the District Court's entry of judgment in favor of petitioners. This Court had the question of mootness before it, yet because policy considerations permitted an appeal from the District Court's final judgment and because petitioners alleged a stake in the outcome, the case was still live and dismissal was not required by Art. III. The Court perceived the distinction between the definitive mootness of a case or controversy, which ousts the jurisdiction of the federal courts and requires dismissal of the case, and a judgment in favor of a party at an intermediate stage of litigation, which does not in all cases terminate the right to appeal.[7]

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[7] In a sense, the petitioner in *Electrical Fittings* sought review of the District Court's procedural error. The District Court was correct in inquiring fully into the validity of the patent, *Sinclair & Carroll Co.* v. *Interchemical Corp.*, 325 U. S. 327, 330 (1945), but was incorrect to ad-

B

We view the denial of class certification as an example of a procedural ruling, collateral to the merits of a litigation, that is appealable after the entry of final judgment.[8] The denial of class certification stands as an adjudication of one of the issues litigated. As in *Electrical Fittings*, the respondents here, who assert a continuing stake in the outcome of the appeal, were entitled to have this portion of the District Court's judgment reviewed. We hold that the Court of Appeals had jurisdiction to entertain the appeal only to review the asserted procedural error, not for the purpose of passing on the merits of the substantive controversy.

Federal appellate jurisdiction is limited by the appellant's personal stake in the appeal. Respondents have maintained throughout this appellate litigation that they retain a continuing individual interest in the resolution of the class certification question in their desire to shift part of the costs of litigation to those who will share in its benefits if the class is certified and ultimately prevails. See n. 6, *supra*. This individual interest may be satisfied fully once effect is given to the decision of the Court of Appeals setting aside what it held

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judge the patent valid after ruling that there had been no infringement. By doing so, the District Court had decided a hypothetical controversy, *Altvater* v. *Freeman*, 319 U. S. 359, 363 (1943); yet petitioners could take the appeal to correct this error because there had been an adverse decision on a litigated issue, they continued to assert an interest in the outcome of that issue, and for policy reasons this Court considered the procedural question of sufficient importance to allow an appeal.

[8] In *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463 (1978), we held that the class certification ruling did not fall within that narrow category of circumstances where appeal was allowed prior to final judgment as a matter of right under 28 U. S. C. § 1291. However, our ruling in *Livesay* was not intended to preclude motions under 28 U. S. C. § 1292 (b) seeking discretionary interlocutory appeal for review of the certification ruling. See 437 U. S., at 474–475. In some cases such an appeal would promise substantial savings of time and resources or for other reasons should be viewed hospitably.

to be an erroneous District Court ruling on class certification. In *Electrical Fittings,* the petitioners asserted a concern that their success in some unspecified future litigation would be impaired by *stare decisis* or collateral-estoppel application of the District Court's ruling on patent validity. This concern supplied the personal stake in the appeal required by Art. III. It was satisfied fully when the petitioners secured an appellate decision eliminating the erroneous ruling from the decree. After the decree in *Electrical Fittings* was reformed, the then unreviewable judgment put an end to the litigation, mooting all substantive claims. Here the proceedings after remand may follow a different pattern, but they are governed by the same principles.

We cannot say definitively what will become of respondents' continuing personal interest in their own substantive controversy with the petitioner when this case returns to the District Court. Petitioner has denied liability to the respondents, but tendered what they appear to regard as a "nuisance settlement." Respondents have never accepted the tender or judgment as satisfaction of their substantive claims. Cf. *Cover* v. *Schwartz,* 133 F. 2d 541 (CA2 1942). The judgment of the District Court accepting petitioner's tender has now been set aside by the Court of Appeals. We need not speculate on the correctness of the action of the District Court in accepting the tender in the first instance, or on whether petitioner may now withdraw its tender.

Perhaps because the question was not thought to be open to doubt we have stated in the past, without extended discussion, that "an order denying class certification is subject to effective review after final judgment at the behest of the named plaintiff. . . ." *Coopers & Lybrand* v. *Livesay,* 437 U. S. 463, 469 (1978). In *Livesay,* we unanimously rejected the argument, advanced in favor of affording prejudgment appeal *as a matter of right,* that an adverse class certification ruling came within the "collateral order" exception to the final-judgment rule. The appealability of the class certifica-

tion question *after* final judgment on the merits was an important ingredient of our ruling in *Livesay*. For that proposition, the Court cited *United Airlines, Inc.* v. *McDonald*, 432 U. S. 385 (1977). That case involved, as does this, a judgment entered on the merits in favor of the named plaintiff. The *McDonald* Court assumed that the named plaintiff would have been entitled to appeal a denial of class certification.

The use of the class-action procedure for litigation of individual claims may offer substantial advantages for named plaintiffs; it may motivate them to bring cases that for economic reasons might not be brought otherwise.[9] Plainly there has been a growth of litigation stimulated by contingent-fee agreements and an enlargement of the role this type of fee arrangement has played in vindicating the rights of individuals who otherwise might not consider it worth the candle to embark on litigation in which the optimum result might be more than consumed by the cost. The prospect of such fee arrangements offers advantages for litigation by named plaintiffs in class actions as well as for their attorneys.[10] For better or worse, the financial incentive that class actions offer to the legal profession is a natural outgrowth of the increasing reliance on the "private attorney general" for the vindication of legal rights; obviously this development has been facilitated by Rule 23.

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[9] A significant benefit to claimants who choose to litigate their individual claims in a class-action context is the prospect of reducing their costs of litigation, particularly attorney's fees, by allocating such costs among all members of the class who benefit from any recovery. Typically, the attorney's fees of a named plaintiff proceeding without reliance on Rule 23 could exceed the value of the individual judgment in favor of any one plaintiff. Here the damages claimed by the two named plaintiffs totaled $1,006.00. Such plaintiffs would be unlikely to obtain legal redress at an acceptable cost, unless counsel were motivated by the fee-spreading incentive and proceeded on a contingent-fee basis. This, of course, is a central concept of Rule 23.

[10] This case does not raise any question as to the propriety of contingent-fee agreements.

The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device. That there is a potential for misuse of the class-action mechanism is obvious. Its benefits to class members are often nominal and symbolic, with persons other than class members becoming the chief beneficiaries. But the remedy for abuses does not lie in denying the relief sought here, but with re-examination of Rule 23 as to untoward consequences.

A district court's ruling on the certification issue is often the most significant decision rendered in these class-action proceedings.[11] To deny the right to appeal simply because the defendant has sought to "buy off" the individual private claims of the named plaintiffs would be contrary to sound judicial administration. Requiring multiple plaintiffs to bring separate actions, which effectively could be "picked off" by a defendant's tender of judgment before an affirmative ruling on class certification could be obtained, obviously would frustrate the objectives of class actions; moreover it would invite waste of judicial resources by stimulating successive suits brought by others claiming aggrievement. It would be in the interests of a class-action defendant to forestall any appeal of denial of class certification if that could be accomplished by tendering the individual damages claimed by the named plaintiffs. Permitting appeal of the district court's certification ruling—either at once by interlocutory appeal, or after entry of judgment on the merits—also minimizes problems raised by "forum shopping" by putative class

[11] See A. Miller, An Overview of Federal Class Actions: Past, Present, and Future 12 (Federal Judicial Center 1977).

representatives attempting to locate a judge perceived as sympathetic to class actions.

That small individual claims otherwise might be limited to local and state courts rather than a federal forum does not justify ignoring the overall problem of wise use of judicial resources. Such policy considerations are not irrelevant to the determination whether an adverse procedural ruling on certification should be subject to appeal at the behest of named plaintiffs. Courts have a certain latitude in formulating the standards that govern the appealability of procedural rulings even though, as in this case, the holding may determine the absolute finality of a judgment, and thus, indirectly, determine whether the controversy has become moot.

We conclude that on this record the District Court's entry of judgment in favor of named plaintiffs over their objections did not moot their private case or controversy, and that respondents' *individual* interest in the litigation—as distinguished from whatever may be their representative responsibilities to the putative class [12]—is sufficient to permit their appeal of the adverse certification ruling.

Affirmed.

MR. JUSTICE REHNQUIST, concurring.

I write briefly to state what seems to me to be sufficient differences between this case and *United States Parole Comm'n* v. *Geraghty*, *post*, p. 388, to allow the appeal of the denial of class certification in this case, and to dismiss the attempted appeal of the same question in *Geraghty* as moot. If I were writing on a clean slate, I might well resolve both these cases against the respondents. But the Court today has not cleaned the slate or been successful in formulating any sound princi-

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[12] Difficult questions arise as to what, if any, are the named plaintiffs' responsibilities to the putative class *prior* to certification; this case does not require us to reach these questions.

ples to replace what seem to me to be the muddled and inconsistent ones of the past. Compare *Sosna* v. *Iowa*, 419 U. S. 393 (1975), with *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747 (1976); *United Airlines, Inc.* v. *McDonald*, 432 U. S. 385, 393 (1977), with *Pasadena City Bd. of Education* v. *Spangler*, 427 U. S. 424, 430 (1976); *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 469, 470, n. 15 (1978), with *Indianapolis School Comm'rs* v. *Jacobs*, 420 U. S. 128 (1975); and now this case, with *United States Parole Comm'n* v. *Geraghty*.

Article III, and this Court's precedents in *Jacobs, supra,* and *Spangler, supra,* require dismissal of the action in *Geraghty* because there is simply no individual interest remaining, no certified class or intervenors to supply that interest, and the action is not within that "narrow class of cases" that are "distinctly 'capable of repetition, yet evading review.'" *Gerstein* v. *Pugh*, 420 U. S. 103, 110, n. 11 (1975). The facts in this case, in contrast, fit within the framework of the precedents permitting continuation of the action.

The distinguishing feature here is that the defendant has made an *unaccepted* offer of tender in settlement of the individual putative representative's claim. The action is moot in the Art. III sense only if this Court adopts a rule that an individual seeking to proceed as a class representative is required to accept a tender of only his individual claims. So long as the court does not require such acceptance, the individual is required to prove his case and the requisite Art. III adversity continues. Acceptance need not be mandated under our precedents since the defendant has not offered all that has been requested in the complaint (*i. e.*, relief for the class) and any other rule would give the defendant the practical power to make the denial of class certification questions unreviewable. Since adversity is in fact retained, and this set of facts fits within a "narrow class of cases" where a contrary rule would lead to the "reality" that "otherwise the issue would evade review," I think our precedents provide for the main-

tenance of this action. *Sosna, supra,* at 402, n. 11; *Gerstein, supra.* Accordingly, I join in the opinion of the Court in this case and in MR. JUSTICE POWELL's dissent in *Geraghty.*

MR. JUSTICE STEVENS, concurring.

In his dissenting opinion MR. JUSTICE POWELL states that, because the District Court erroneously refused to certify the class and because no member of the class attempted to intervene, the respondents "are the only plaintiffs arguably present in court." *Post,* at 346. This position is apparently based on the notion that, unless class members are present for all purposes (and thus may be liable for costs, bound by the judgment, etc.), they cannot be considered "present" for any purpose. I respectfully disagree. In my opinion, when a proper class-action complaint is filed, the absent members of the class should be considered parties to the case or controversy at least for the limited purpose of the court's Art. III jurisdiction. If the district judge fails to certify the class, I believe they remain parties until a final determination has been made that the action may not be maintained as a class action. Thus, the continued viability of the case or controversy, as those words are used in Art. III, does not depend on the district judge's initial answer to the certification question; rather, it depends on the plaintiffs' right to have a class certified.[1]

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[1] There is general agreement that, if a class has been properly certified, the case does not become moot simply because the class representative's individual interest in the merits of the litigation has expired. In such a case the absent class members' continued stake in the controversy is sufficient to maintain its viability under Art. III. In a case in which certification has been denied by the district court, however, a court of appeals cannot determine whether the members of the class continue to have a stake in the outcome until it has determined whether the action can properly be maintained as a class action. If it is not a proper class action, then the entire case is moot. If, on the other hand, the district court's refusal to certify the class was erroneous, I believe there remains

Accordingly, even if the named plaintiff's personal stake in the lawsuit is effectively eliminated,[2] no question of mootness arises simply because the remaining adversary parties are unnamed.[3] Rather, the issue which arises is whether the

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a live controversy which the courts have jurisdiction to resolve under Art. III.

I recognize that there is tension between the approach I have suggested and the Court's *sua sponte* decision in *Indianapolis School Comm'rs* v. *Jacobs,* 420 U. S. 128. See also *Pasadena City Bd. of Education* v. *Spangler,* 427 U. S. 424, 430. As MR. JUSTICE BLACKMUN points out in *United States Parole Comm'n* v. *Geraghty, post,* at 400, n. 7, that case is distinguishable from this case because it involved an attempt to litigate the merits of an appeal on behalf of an improperly certified class. I agree that the Court could not properly consider the merits until the threshold question of whether a class should have been certified was resolved. However, I disagree with the Court's conclusion that the entire action had to be dismissed as moot. In my view, the absent class members remained sufficiently present so that a remand on the class issue would have been a more appropriate resolution.

Just as absent class members whose status has not been fully adjudicated are not "present" for purposes of litigating the merits of the case, I would not find them present for purposes of sharing costs or suffering an adverse judgment. If a class were ultimately certified, the class members would, of course, retain the right to opt out.

[2] I agree with the Court's determination in this case and in *Geraghty* that the respective named plaintiffs continue to have a sufficient personal stake in the outcome to satisfy Art. III requirements. See *ante,* at 340; *Geraghty, post,* at 404.

[3] The status of unnamed members of an uncertified class has always been difficult to define accurately. Such persons have been described by this Court as "parties in interest," see *Smith* v. *Swormstedt,* 16 How. 288, 303; as "interested parties," see *Supreme Tribe of Ben-Hur* v. *Cauble,* 255 U. S. 356, 366; or as "absent parties," see *Hansberry* v. *Lee,* 311 U. S. 32, 42–45. There is nothing novel in my suggestion that such "absent parties" may be regarded as parties for the limited purpose of analyzing the status of the case or controversy before a certification order has been entered. Indeed, since the concept of "absent parties" was developed long before anyone conceived of certification orders, I find it difficult to understand why the existence of a case or controversy in a constitutional sense should depend on compliance with a procedural requirement that was first created in 1966.

named plaintiff continues to be a proper class representative for the purpose of appealing the adverse class determination. Cf. *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U. S. 395, 403–406; *United States Parole Comm'n* v. *Geraghty*, *post*, at 407. In my judgment, in this case, as in *Geraghty*, the named plaintiffs clearly remained appropriate representatives of the class at least for that limited purpose.[4]

I therefore join the opinion of the Court.

MR. JUSTICE BLACKMUN, concurring in the judgment.

I concur in the judgment because, under *United States Parole Comm'n* v. *Geraghty*, *post*, p. 388, respondents' appeal of the order denying class certification is not moot. I agree with the Court that the ruling on a class certification motion stands as a litigated issue which does not become moot just because the named plaintiff's suit on the merits is mooted. I would not limit appealability of this procedural motion, however, to situations where there is a possibility that the named plaintiff will be able to recover attorney's fees from either the defendant or the fund awarded to the class.

MR. JUSTICE POWELL, with whom MR. JUSTICE STEWART joins, dissenting.

Respondents are two credit card holders who claim that petitioner charged them usurious interest in violation of the National Bank Act and Mississippi law.[1] They filed this

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[4] My view of the jurisdictional issue would not necessarily enlarge the fiduciary responsibilities of the class representative as MR. JUSTICE POWELL suggests, see *post*, at 358–359, n. 21. In any event, I do not share the concern expressed in his opinion about the personal liability of a class representative for costs and attorney's fees if the case is ultimately lost. Anyone who voluntarily engages in combat—whether in the courtroom or elsewhere—must recognize that some of his own blood may be spilled.

[1] Jurisdiction was premised on the National Bank Act, 12 U. S. C. §§ 85, 86, which adopts the interest limits set by state law, and on 28 U. S. C. § 1355.

action late in 1971 to recover those charges plus a penalty equal to the same amount, for individual totals of $683.30 and $322.70. App. 59. Respondents also sought relief on behalf of a class alleged to include 90,000 persons with claims aggregating $12 million. After four years of litigation, the District Court denied respondents' motion for class certification. Seven months later, petitioner tendered to respondents the full amount of their individual claims plus legal interest and court costs. Over respondents' objection, the District Court entered final judgment in their favor. Petitioner then deposited the full amount due with the clerk of the court.

No one disputes that the petitioner has tendered everything that respondents could have recovered from it in this action. Nevertheless, the Court of Appeals for the Fifth Circuit rejected petitioner's suggestion of mootness and reversed the denial of class certification. This Court affirms the judgment of the Court of Appeals, after finding that respondents retain a personal stake in sharing the expense of litigation with members of the putative class. *Ante*, at 334, n. 6, 336. This speculative interest simply will not sustain the jurisdiction of an Art. III court under established and controlling precedents. Accordingly, I dissent.

I

Although there are differences, this case is similar to *United States Parole Comm'n* v. *Geraghty*, *post*, p. 388, in one important respect: both require us to decide whether putative class representatives may appeal the denial of class certification when they can derive no benefit whatever from the relief sought in the action. Here, as in *Geraghty*, the District Court refused to certify a class. In this case, however, the Court recognizes established Art. III doctrine. It states that the "right . . . to employ Rule 23" is a "procedural right only, ancillary to the litigation of substantive claims." *Ante*, at 332. It also agrees that a federal court "retains no juris-

diction over the controversy" when the parties' "substantive claims become moot in the Art. III sense." *Ibid.* Moreover, the Court acknowledges the familiar principle that a party who has no personal stake in the outcome of an action presents no case or controversy cognizable in a federal court of appeals. *Ante*, at 334, 336. These are indeed the dispositive principles. My disagreement is with the way in which the Court applies them in this case. In my view, these principles unambiguously require a finding of mootness.

A

Since no class has been certified and no one has sought to intervene, respondents are the only plaintiffs arguably present in court. Yet respondents have no continuing interest in the injuries alleged in their complaint. They sought only damages; those damages have been tendered in full.[2] Respondents make no claim that success on the certification motion would entitle them to additional relief of any kind from the petitioner.[3] Their personal claims to relief have been abandoned so completely that no appeal was taken in their own names. The notice of appeal filed with the District Court recites that respondents appeal only "on behalf of all others similarly situated. . . ." App. 63.

This in itself is compelling evidence that respondents have no interest in the "individual and private case or controversy" relied on by the Court today. *Ante*, at 332. But even without such evidence, this and other courts routinely have held that

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[2] Although respondents also asked for attorney's fees, their complaint shows that fees were to be granted only from the damages ultimately awarded to them or the class. App. 13–14. There is no possibility of prospective relief because the Mississippi usury statute was amended in 1974 to authorize, *inter alia*, the charges at issue in this case. 1974 Miss. Gen. Laws, ch. 564, § 7; see Miss. Code Ann. § 75–17–1 (6) (Supp. 1979).

[3] Neither the Court nor the respondents have asserted that the petitioner's tender fails to include all costs and fees for which it could be held liable. See Part II–B, *infra*.

a tender of full relief remedies a plaintiff's injuries and eliminates his stake in the outcome. *California* v. *San Pablo & Tulare R. Co.*, 149 U. S. 308, 313–314 (1893); *Drs. Hill & Thomas Co.* v. *United States*, 392 F. 2d 204 (CA6 1968) (*per curiam*); *Lamb* v. *Commissioner*, 390 F. 2d 157 (CA2 1968) (*per curiam*); *A. A. Allen Revivals, Inc.* v. *Campbell*, 353 F. 2d 89 (CA5 1965) (*per curiam*). It is the tender itself that moots the case whether or not a judgment is entered. *Ibid.* Thus, the law is clear that a federal court is powerless to review the abstract questions remaining in a case when the plaintiff has refused to accept a proffered settlement that fully satisfies his claims.

I know of no authority remotely suggesting that the result should differ because the District Court has entered a judgment in favor of respondents instead of dismissing their lawsuit as moot.[4] It is certainly true, as the Court observes, that the entry of judgment in favor of a party does not in itself moot his case. *Ante*, at 332–333. There never has been any doubt that a party may appeal those aspects of a generally favorable judgment that affect him adversely. See 15 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3902 (1976); 9 J. Moore, Federal Practice ¶ 203.06 (2d ed. 1975). But the requirement of adverse effect is more than a rule "of federal appellate practice." *Ante*, at 333. As we have held repeatedly, and as the Court concedes, *ante*, at 334, 336, Art. III itself requires a live controversy in which a personal stake is at issue "throughout the entirety of the litigation." *Sosna* v. *Iowa*, 419 U. S. 393, 402 (1975). See, *e. g.*, *Preiser* v. *Newkirk*, 422 U. S. 395, 401–402 (1975).

It is this constitutional limitation, and not any rule of practice, that has impelled federal courts uniformly to require a

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[4] The "statutory right" to appeal, *ante*, at 333, itself cannot supply a personal stake in the outcome, for Congress cannot abrogate Art. III limitations on the jurisdiction of the federal courts. *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91, 100 (1979).

showing of continuing adverse effect in order to confer "standing to appeal." *Barry* v. *District of Columbia Bd. of Elections*, 188 U. S. App. D. C. 432, 433, 580 F. 2d 695, 696 (1978); 15 Wright, Miller, & Cooper, *supra*, § 3902; see *Altvater* v. *Freeman*, 319 U. S. 359 (1943); *Electrical Fittings Corp.* v. *Thomas & Betts Co.*, 307 U. S. 241 (1939); *Kapp* v. *National Football League*, 586 F. 2d 644, 650 (CA9 1978); *Cover* v. *Schwartz*, 133 F. 2d 541 (1942), cert. denied, 319 U. S. 748 (1943).[5] As these cases show, the requirements of Art. III are not affected by the "factual context" in which a suggestion of mootness arises. See *ante*, at 332. Whatever the context, Art. III asks but a single question: Is there a continuing controversy between adverse parties who retain the requisite stake in the outcome of the action?

Electrical Fittings Corp. v. *Thomas & Betts Co.*, *supra*, is the case primarily relied upon by the Court. It provides little or no support for today's ruling. In *Electrical Fittings*, a limited appeal was allowed because the petitioner himself was prejudiced by the inclusion of an unnecessary and adverse finding in a generally favorable decree. See *ante*, at 337.

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[5] *United Airlines, Inc.* v. *McDonald*, 432 U. S. 385 (1977), and *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463 (1978), are not to the contrary. Incidental dictum in both cases stated that the denial of class certification is subject to appellate review after final judgment at the behest of the named plaintiffs. Neither case discussed mootness, and neither analyzed the proposition in any way. Indeed, the only authority cited in *Coopers & Lybrand* was *United Airlines*, see 437 U. S., at 469, and the only authority cited in *United Airlines* was a concession made by the defendant and a list of cases from the Courts of Appeals, not one of which dealt with a suggestion of mootness in an analogous situation, see 432 U. S., at 393, and n. 14. Such statements, casually enunciated without a word of explanation in opinions dealing with unrelated legal questions, are not controlling or even persuasive when they are shown on further reflection to have been inconsistent with settled law. As the Court agrees today, neither case creates an exception to the fundamental rule that "[f]ederal appellate jurisdiction is limited by the appellant's personal stake in the appeal." *Ante*, at 336.

Here, the existence of the District Court's order denying certification has no effect whatever on the respondents. Thus, the personal stake that justified the *Electrical Fittings* appeal is not present in this case. Absent such a stake, it is simply irrelevant that "policy considerations" sometimes may favor an appeal from "a procedural ruling, collateral to the merits of a litigation." Nor is it significant that the ruling "stands as an adjudication of one of the issues litigated." *Ante*, at 335, 336. Collateral rulings—like other rulings—may be appealed only when the requirements of Art. III are satisfied.

B

After recognizing that the right to appeal is subject to the "jurisdictional limitations of Art. III," the Court agrees that only a "party [who] retains a stake in the appeal [can satisfy] the requirements of Art. III." *Ante*, at 334; see *ante*, at 336. The Court also agrees that respondents have no remaining stake in "the merits of the substantive controversy." *Ibid.* Nevertheless, it holds that respondents retain a personal stake in this appeal because they "desire to shift to successful class litigants a portion of those fees and expenses that have been incurred in this litigation and for which they assert a continuing obligation." *Ante*, at 334, n. 6; see *ante*, at 336.[6] This conclusion is neither legally sound nor supported by the record.

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[6] The Court also mentions that "[t]he use of the class-action procedure for litigation of individual claims may offer substantial advantages for named plaintiffs. . . ." *Ante*, at 338. But any such advantages cannot accrue to these respondents, who will not be litigating their own claims on remand. Indeed, the Court refers to respondents in this context only to point out that their total damages were so small that they "would be unlikely to obtain legal redress at an acceptable cost" if they could not do so by means of a class action. *Ante*, at 338, n. 9. We may assume that respondents had some interest in the class-action procedure as a means of interesting their lawyers in the case or obtaining a satisfactory

The Court fails to identify a single item of expense, chargeable to the petitioner, that was incurred by respondents before the petitioner's tender. Similarly, respondents have been conspicuously vague in identifying the "fees and expenses" relied upon as supplying the adverse interest essential to a live controversy.[7] The only expense mentioned by respondents, apart from court costs included in the petitioner's tender, is not a present obligation at all. It is an offer to provide security for costs in the event a class ultimately is certified. Brief for Respondents 33; App. 78. Nor does the attorney's fee arrangement in this case create any obligation, present or future, that can be affected by the certification of a class. Respondents' complaint identifies the fee to be paid, subject to court approval, as "twenty-five per cent (25%)" of the amount of the final judgment. *Id.*, at 14, 16.[8] No arrange-

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settlement. This may be an interest properly furthered by Rule 23, but once respondents obtained both access to court and full individual relief that interest disappeared.

[7] Perhaps the strongest of respondents' statements is:

"Of course, the interest of the [respondents] in assertion of the right to proceed on behalf of the class includes such matters as the prospect for spreading attorney's fees and expenses among more claimants and thus reducing the percentage that would otherwise be payable by them." Plaintiffs-Appellants' Brief in Opposition to Motion to Dismiss Appeal and Reply Brief, filed in *Roper* v. *Consurve, Inc.*, No. 76-3600 (CA5, Jan. 10, 1977).

[8] Respondents' "Demand for Judgment" asks the court to award the "[c]ost of this action as well as attorney fees in the amount of 25% as hereinabove alleged, or such other amount as may be deemed fit and proper by the Court." App. 16. The request for fees was clarified in Paragraph VI of the amended complaint, which reads as follows:

"Plaintiff alleges that the Clerk of this Court be designated custodian of the funds and judgment to be paid Plaintiff and other persons similarly situated, by Defendants and the Clerk deposit said funds in a suitable depository and, upon proper order of this Court, disburse said funds after deduction of necessary expenses and attorney fees to Plaintiff's attorneys herein of twenty-five per cent (25%) of the amount so paid, the same being reasonable by all standards, including that alleged and

ment other than this customary type contingent fee is identified in the record or the briefs. Yet, no one has explained how respondents' obligation to pay 25% of their recovery to counsel could be reduced if a class is certified and its members become similarly obligated to pay 25% of their recovery. Thus, the asserted interest in "spreading [of] attorney's fees and expenses"[9] relates to no present obligation. It is at most an expectation—of the respondents' and particularly of their counsel—that certain fees and expenses may become payable in the event a class is certified. That expectation is wholly irrelevant to the existence of a present controversy between petitioner and respondents.

The Court's reliance on unidentified fees and expenses cannot be reconciled with the repeated admonition that "unadorned speculation will not suffice to invoke the federal judicial power." *E. g., Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U. S. 26, 44 (1976). Such speculation is particularly inappropriate in this case, since neither the Court nor the respondents have suggested that the *petitioner* is or ever will be liable for the fees or expenses relied upon. Indeed, the American Rule would bar an award of attorney's fees against this petitioner. Thus, respondents' "injury"—if any exists—is not one that "fairly can be traced" to the petitioner. *Id.*, at 41–42; see *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91, 99 (1979).[10] Whatever may be the basis for the

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utilized by Defendants in suing certain members in of [*sic*] the class in State Courts for unpaid accounts." App. 13–14.

[9] See n. 7, *supra*.

[10] Far-reaching consequences could flow from a rule that fees recoverable from putative class members may be "traced" to the class defendant for purposes of the case-or-controversy requirement. At the least, this rule would support a claim that a person who has accepted full settlement of his individual claim is entitled to file suit on behalf of an unrecompensed class. Apparently, the putative plaintiff need only "asser[t]," *ante*, at 334, n. 6, that fees incurred in anticipation of the litigation ultimately might be shared with a prevailing class.

respondents' asserted desire to share fees and expenses with unnamed members of a class, the petitioner is merely a bystander. "[F]ederal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina* v. *Rice*, 404 U. S. 244, 246 (1971). This elementary principle should dispose of the case.

C

Since respondents have no continuing personal stake in the outcome of this action, Art. III and the precedents of this Court require that the case be dismissed as moot. *E. g., Ashcroft* v. *Mattis*, 431 U. S. 171, 172–173 (1977) (*per curiam*); *Weinstein* v. *Bradford*, 423 U. S. 147 (1975) (*per curiam*); *Preiser* v. *Newkirk*, 422 U. S., at 401–404; *Indianapolis School Comm'rs* v. *Jacobs*, 420 U. S. 128 (1975); *DeFunis* v. *Odegaard*, 416 U. S. 312, 316–320 (1974) (*per curiam*); *North Carolina* v. *Rice*, *supra*, at 246; *SEC* v. *Medical Committee for Human Rights*, 404 U. S. 403, 407 (1972).[11]

Respondents do not suggest that their claims are "capable of repetition, yet evading review." Cf. *Gerstein* v. *Pugh*, 420 U. S. 103, 110–111, n. 11 (1975).[12] And not a single one of the alleged 90,000 class members has sought to intervene in the nine years since this action was filed. Cf. *United Airlines, Inc.* v. *McDonald*, 432 U. S. 385 (1977). Nor has anyone challenged the allegedly usurious charges by informal com-

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[11] These cases are discussed more fully in *United States Parole Comm'n* v. *Geraghty*, *post*, at 410–413, 417–419 (POWELL, J., dissenting).

[12] If a class-action defendant were shown to have embarked on a course of conduct designed to insulate the class certification issue from appellate review in order to avoid classwide liability, a court in proper circumstances might find the *Gerstein* test satisfied and the case not moot. See *Susman* v. *Lincoln American Corp.*, 587 F. 2d 866 (CA7 1978); 13 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3533, p. 208 (Cum. Supp. 1980); Comment, Continuation and Representation of Class Actions Following Dismissal of the Class Representative, 1974 Duke L. J. 573, 599–600.

plaint or protest. Tr. of Oral Arg. 4. Even after certification was denied, the action lay dormant during the seven months in which respondents sought to take an interlocutory appeal, without provoking a response from anyone who previously may have thought that the class action would protect his rights. Apart from the persistence of the lawyers, this has been a noncase since the petitioner tendered full satisfaction of the respondents' individual claims. To be sure, respondents' counsel may have the same interest in an enlarged recovery that is inherent in any contingent fee arrangement. But I know of no decision by any court that holds that a lawyer's interest in a larger fee, to be paid by third persons not present in court, creates the personal stake in the outcome required by Art. III.

II

Despite the absence of an Art. III controversy, the Court directs a remand in which this federal action will be litigated by lawyers whose only "clients" are unidentified class members who have shown no desire to be represented by anyone.[13] The Court appears to endorse this form of litigation for reasons of policy and practice. It is said to be an effective "response to the existence of injuries unremedied by the regulatory action of government." *Ante,* at 339. I am not aware that such a consideration ever before has influenced this Court in determining whether the *Constitution* confers jurisdiction on the federal courts. In any event, the consequences of a finding of mootness are not likely to be as restrictive as the Court seems to fear. And the Court fails to recognize that allowing this action to proceed without an interested plaintiff will itself generate practical difficulties of some magnitude.

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[13] I do not suggest that counsel acted improperly in pursuing this case. Since they have prevailed both in this Court and in the Court of Appeals, the responsibility for allowing clientless litigation falls on the federal courts.

A

A finding of mootness would have repercussions primarily in two situations. The first involves a named plaintiff who fails to obtain class certification and then pursues his case to a successful, litigated judgment. I believe that a subsequent attempt by that plaintiff to appeal the denial of certification generally would be barred by Art. III. But the consequences of applying settled rules of mootness in that situation would not be unjust. If injunctive or declaratory relief were granted, the absent members of the putative class would have obtained by force of *stare decisis* or the decree itself most of the benefits of actual class membership. If, on the other hand, damages were awarded and an appeal permitted, reversal of the certification ruling would enable putative class members to take advantage of a favorable judgment on the issue of liability without assuming the risk of being bound by an unfavorable judgment. Thus, the Court's decision to allow appeals in this situation will reinstate the "one-way intervention" that the 1966 amendments to Rule 23 were intended to eliminate.[14]

Perhaps more commonly, the mootness question will arise when the defendant attempts to force a settlement before judgment, as petitioner did in this case. A defendant certainly will have a substantial incentive to use this tactic in some cases. The Court argues that the result will be to deny compensation to putative class members and jeopardize the enforcement of certain legal rights by "'private attorney[s] general.'" *Ante*, at 338. The practical argument is not without force. But predicating a judgment on these concerns

[14] See Comment, Immediate Appealability of Orders Denying Class Certification, 40 Ohio St. L. J. 441, 470–471 (1979). In actions brought under Rule 23 (b)(3), a class member must decide at the time of certification whether to "opt out" of the action under Rule 23 (c)(2). This provision was designed to bring an end to the "spurious" class action in which class members were permitted to intervene after a decision on the merits in order to secure the benefits of that decision. Notes of the Advisory Committee on 1966 Amendments to Rule 23, 28 U. S. C. App., p. 430.

amounts to judicial policymaking with respect to the adequacy of compensation and enforcement available for particular substantive claims. Such a judgment ordinarily is best left to Congress. At the very least, the result should be consistent with the substantive law giving rise to the claim. Today, however, the Court never pauses to consider the law of usury. Since Mississippi law condemns the aggregation of usury claims,[15] the Court's concern for compensation of putative class members in this case is at best misplaced and at worst inconsistent with the command of the Rules Enabling Act.[16]

The Court's concern for putative class members would be more telling in a more appropriate case. A pattern of forced settlement could indeed waste judicial resources on the litigation of successive suits by members of the putative class. I do not doubt that the consequent problems of judicial administration would be real. But these problems can and should be addressed by measures short of undercutting the law of mootness, as the Court seems to have done today. The first step should be the authorization of interlocutory appeals from the denial of class certification in appropriate circumstances.[17]

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[15] *Liddell* v. *Litton Systems, Inc.*, 300 So. 2d 455 (1974) (rejecting borrower's class action); *Fry* v. *Layton*, 191 Miss. 17, 2 So. 2d 561 (1941). Petitioner is a national bank, and its alleged failure to comply with Mississippi's interest limits would violate the National Bank Act. 12 U. S. C. § 85. But I do not understand that the National Bank Act displaces state policy disfavoring the aggregation of usury claims. A primary purpose of that Act is to protect national banks from discriminatory treatment or undue penalties that may be imposed by state law. See 12 U. S. C. § 86.

[16] The Act provides that rules of procedure promulgated by this Court "shall not . . . enlarge or modify any substantive right." 28 U. S. C. § 2072. See *American Pipe & Construction Co.* v. *Utah*, 414 U. S. 538, 557–558 (1974); Developments in the Law—Class Actions, 89 Harv. L. Rev. 1318, 1358–1359 (1976). See generally Landers, Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma, 47 S. Cal. L. Rev. 842 (1974).

[17] In *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463 (1978), this Court held that the denial of class certification is not a "final decision" appeal-

District courts already are empowered by 28 U. S. C. § 1292 (b) to certify such appeals when they involve certain controlling questions of law. In many cases, a class-action defendant undoubtedly would forgo the opportunity to settle with an individual plaintiff in order to obtain an immediate and final determination of the class certification question on appeal.

Where a defendant does attempt to moot a class action by forced settlement, the district court is not powerless. In at least some circumstances, it may require that putative class members receive some sort of notice and an opportunity to intervene within the appeal period. Rule 23 (d)(2). The availability of such measures could be a significant deterrent to the deliberate mooting of class actions. Indeed, district court management of the problem by measures tailored to the case at hand may well be preferable to the Court's open-ended approval of appeals in all circumstances. To the extent interlocutory appeals are unavailable or managerial powers are lacking, it is for Congress—not this Court—to correct the deficiency.[18]

B

Since a court is limited to the decision of the case before it, judicially fashioned "solutions" to legislative problems often

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able as of right under 28 U. S. C. § 1291. We relied in that case on the dangers of "indiscriminate" interlocutory review. 437 U. S., at 474. Although *Coopers & Lybrand* now prevents review in cases in which it would be desirable, Congress may remedy the problem by appropriate legislation.

[18] Congress currently has before it a bill that attempts to remedy the difficulties infecting this troubled area. H. R. 5103, 96th Cong., 1st Sess. (1979). The bill, supported by the Department of Justice, proposes to bypass the Rules Enabling Act problem, see n. 17, *supra*, and to eliminate some of the problems of claims too small to justify individual lawsuits, by creating a new federal right of action for damages. The bill provides for the enforcement of this right in some instances through actions brought in the name of the United States. The bill also authorizes interlocutory appeals from the grant or denial of the ruling that will replace class certification under the proposed procedures.

are attended by unfortunate practical consequences of their own. Today's holding is no exception. On remand, respondents will serve as "quasi-class representatives" solely for the purpose of obtaining class certification. Since they can gain nothing more from the action, their participation can be intended only to benefit counsel and the members of a putative class who have indicated no interest in the claims asserted in this case. Respondents serve on their own motion—if indeed they serve at all.[19] Since no court has certified the class, there has been no considered determination that respondents will fairly and adequately represent its members. Nothing in Rule 23 authorizes this novel procedure, and the requirements of the Rule are not easily adapted to it. Are respondents members of the class they seek to represent? See *East Texas Motor Freight* v. *Rodriguez,* 431 U. S. 395, 403–404 (1977). Are their currently nonexistent claims "typical of the claims . . . of the class" within the meaning of Rule 23 (a)(3)?[20]

The Court's holding well may prevent future "forced settlements" of class-action litigation. Thus, the difficulties faced by the District Court on remand in this case may not arise again in precisely analogous circumstances. But today's result also authorizes appeals by putative class representatives who have litigated and prevailed on the merits of their individual claims. If the order denying class certification is reversed in that situation, the named plaintiffs on remand will have no more continuing relationship to the putative class than respondents have here. A remand for certification could also lead to "one-way intervention" in direct violation of Rule 23. See *supra,* at 354, and n. 14. These tensions,

[19] As noted above, *supra,* at 346, respondents took no appeal in their own names. One would think that this candid disclaimer of personal interest would destroy the foundation upon which the Court predicates Art. III jurisdiction. *Ante,* at 336; see *supra,* at 349.

[20] The District Court properly may conclude on remand that respondents, for these or other reasons, cannot adequately represent the class.

arising from the express terms of the Rule, undermine the Court's conclusion that the policies underlying Rule 23 dictate the result reached today.

III

In sum, the Court's attempted solution to the problem of forced settlements in consumer class actions departs from settled principles of Art. III jurisprudence.[21] It unneces-

[21] MR. JUSTICE STEVENS states in his concurring opinion that all persons alleged to be members of a putative class "should be considered parties to the case or controversy at least for the limited purpose" of Art. III, and that they "remain parties until a final determination has been made that the action may not be maintained as a class action." *Ante*, at 342. This novel view apparently derives from early cases in which the Court referred to class members who would be bound by a judgment as "absent parties," *Hansberry* v. *Lee*, 311 U. S. 32, 42 (1940), or "parties in interest," *Smith* v. *Swormstedt*, 16 How. 288, 303 (1854). *Ante*, at 343, n. 3. But these cases were decided before certification was established as the method by which a class achieves judicial recognition. Under Rule 23, the members of a putative class will not be bound by a judgment unless a proper certification order is entered. That they may be "interested parties," before that time does not make them parties to the litigation in any sense, as this Court has recognized. In *Indianapolis School Comm'rs* v. *Jacobs*, 420 U. S. 128 (1975), the Court held that an oral certification order was insufficient to identify the interests of absent class members for Art. III purposes. The result hardly could be different when the class has not been identified at all. See also *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U. S. 1, 8 (1978); *Baxter* v. *Palmigiano*, 425 U. S. 308, 310–311, n. 1 (1976); *Weinstein* v. *Bradford*, 423 U. S. 147 (1975); *Pasadena City Bd. of Education* v. *Spangler*, 427 U. S. 424, 430 (1976).

MR. JUSTICE STEVENS indicates that unnamed members of an uncertified class may be "present" as parties for some purposes and not for others. No authority is cited for such selective "presence" in an action. Nor is any explanation offered as to how a court is to determine when these unidentified "parties" are present. If their presence is to be limited to the satisfaction of the Art. III case-or-controversy requirement, then the rule of party status would have no content apart from Art. III and could only be described as a legal fiction. If, on the other hand, the proposed rule is to apply outside the Art. III context, it may have troublesome and far-reaching implications that could prejudice the bringing of

sarily creates significant problems in the administration of Rule 23. And it may work a serious injustice in this case.[22] I would vacate the judgment of the Court of Appeals and remand with instructions to dismiss the appeal as moot.

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class actions. Presumably, a purpose of the rule of party status would be to assure that satisfaction of the claims of named parties would not terminate the litigation. Nor could the rights of unnamed parties be extinguished by the failure of the named parties to appeal. Thus, if the rule proposed by MR. JUSTICE STEVENS is to accomplish its purpose, I suppose that a fiduciary duty must be imposed upon named parties to continue the litigation where—as here—the unnamed parties remain unidentified and fail to intervene. As fiduciaries, would the named parties be required not only to continue to litigate, but also to assume personal responsibility for costs and attorney's fees if the case ultimately is lost? Would responsible litigants be willing to file class actions if they thereby assumed such long-term fiduciary obligations? These and like questions are substantial. They are not resolved by Rule 23. I believe they merit careful study by Congress before this Court—perhaps unwittingly—creates a major category of clientless litigation unique in our system.

[22] The Court's resurrection of this dead controversy may result in irreparable injury to innocent parties, as well as to the petitioner bank. When the District Court denied certification on September 29, 1975, it assigned as one of its reasons the possible "destruction of the [petitioner] bank" by damages then alleged to total $12 million and now potentially augmented by the accrual of interest. App. 47; see *ante*, at 329, n. 2. The possible destruction of the bank is irrelevant to the jurisdictional issue, but serious indeed to depositors, stockholders, and the community served. It is said that this is necessary to redress injuries possibly suffered by members of the putative class. Yet, no such person has come forward in the nearly nine years that have passed since this action was filed. Indeed, the challenged conduct was authorized by statute almost six years ago. As the District Court may be called upon to determine whether the equitable doctrine of "relation back" permits it to toll the statute of limitations on remand, *ante*, at 330, n. 3, it will hardly be inappropriate for that court to consider the equities on both sides. In the circumstances presented, the District Court may well see no reason to exercise its equitable discretion in favor of putative class members who have slept on their rights these many years.

UNITED STATES v. GILLOCK

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 78-1455. Argued December 4, 1979—Decided March 19, 1980

A federal indictment charged respondent, then a Tennessee state senator, with accepting money as fees for using his public office to block the extradition of a defendant from Tennessee to Illinois, and for agreeing to introduce state legislation which would enable four persons to obtain master electricians' licenses they had been unable to obtain by way of existing examination processes. The District Court granted respondent's motion to suppress all evidence relating to his legislative activities, holding that as a state senator respondent was entitled to a judicially created evidentiary privilege. The District Court relied on Rule 501 of the Federal Rules of Evidence, which provides in relevant part that "the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." The Court of Appeals affirmed the District Court's recognition of a privilege and its suppression of certain items of evidence; it held that other items of evidence were insufficiently related to the legislative process to be protected by the privilege.

Held: In a federal criminal prosecution against a state legislator there is no legislative privilege barring the introduction of evidence of the legislative acts of the legislator. Pp. 366–374.

(a) Rule 501's language and legislative history do not support respondent's arguments that a speech-or-debate type privilege for state legislators in federal criminal cases is an established part of the federal common law and is therefore applicable through the Rule, or that such a privilege is compelled by principles of federalism. Rule 501 requires the application of federal privilege law in criminal cases brought in federal court, and thus the fact that there is an evidentiary privilege under the Tennessee Constitution which respondent could assert in a state criminal prosecution does not compel an analogous privilege in a federal prosecution. Pp. 366–368.

(b) The historical antecedents and policy considerations which inspired the Speech or Debate Clause of the Federal Constitution do not require recognition of a comparable evidentiary privilege for state legislators in federal prosecutions. The first rationale underlying the Speech or Debate Clause, resting solely on the separation-of-powers

doctrine, gives no support to the grant of a privilege to state legislators in federal prosecutions. As to the second rationale underlying the Speech or Debate Clause, that is, the need to insure legislative independence, this Court's decisions on immunity of state officials from suit have drawn the line at civil actions. Cf., *e. g.*, *Tenney* v. *Brandhove*, 341 U. S. 367; *O'Shea* v. *Littleton*, 414 U. S. 488. Where important federal interests are at stake, as in the enforcement of federal criminal statutes, principles of comity must yield. Recognition of an evidentiary privilege for state legislators for their legislative acts would impair the legitimate interest of the Federal Government in enforcing its criminal statutes with only speculative benefits to the state legislative process. Pp. 368–373.

(c) Congress has not chosen either to provide that a state legislator prosecuted under federal law should be accorded the same evidentiary privileges as a Member of Congress, or to direct federal courts to apply to a state legislator the same evidentiary privileges available in a prosecution of a similar charge in the state courts. In the absence of a constitutional limitation on Congress' power to make state officials, like all other persons, subject to federal criminal sanctions, there is no basis in these circumstances for a judicially created limitation that excludes proof of the relevant facts. P. 374.

587 F. 2d 284, reversed.

BURGER, C. J., delivered the opinion of the Court, in which BRENNAN, STEWART, WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. REHNQUIST, J., filed a dissenting statement, in which POWELL, J., joined, *post*, p. 374.

Solicitor General McCree argued the cause for the United States. With him on the briefs were *Assistant Attorney General Heymann, Deputy Solicitor General Frey, Jerome M. Feit,* and *Louis M. Fischer.*

James V. Doramus argued the cause for respondent. With him on the brief were *James F. Neal, James F. Sanders,* and *Hal Gerber.*

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to resolve a conflict in the Circuits over whether the federal courts in a federal criminal prosecu-

tion should recognize a legislative privilege barring the introduction of evidence of the legislative acts of a state legislator charged with taking bribes or otherwise obtaining money unlawfully through exploitation of his official position.[1] 441 U. S. 942 (1979).

I

Respondent Edgar H. Gillock was indicted on August 12, 1976, in the Western District of Tennessee on five counts of obtaining money under color of official right in violation of 18 U. S. C. § 1951, one count of using an interstate facility to distribute a bribe in violation of 18 U. S. C. § 1952,[2] and one count of participating in an enterprise through a pattern of racketeering activity in violation of 18 U. S. C. § 1962. The indictment charged Gillock, then a Tennessee state senator and practicing attorney, with accepting money as a fee for using his public office to block the extradition of a defendant from Tennessee to Illinois, and for agreeing to introduce in the State General Assembly legislation which would enable four persons to obtain master electrician licenses they had been unable to obtain by way of existing examination processes.

Before trial, Gillock moved to suppress all evidence relating to his legislative activities. The District Court granted his motion, holding that as a state senator, Gillock had an evidentiary privilege cognizable under Rule 501 of the Federal Rules of Evidence. This privilege, deemed by the District Court to be equivalent to that granted Members of both Houses of Congress under the Speech or Debate Clause, Art. I, § 6, cl. 1, was limited to prohibiting the introduction of evidence of Gillock's legislative acts and his underlying motivations.

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[1] Compare *United States* v. *DiCarlo*, 565 F. 2d 802 (CA1 1977), cert. denied, 435 U. S. 924 (1978), and *United States* v. *Craig*, 537 F. 2d 957 (CA7) (en banc), cert. denied, 429 U. S. 999 (1976), with *In re Grand Jury Proceedings*, 563 F. 2d 577 (CA3 1977).

[2] The count based on 18 U. S. C. § 1952 was subsequently dismissed by the District Court.

The court stated that the privilege is necessary "to protect the integrity of the [state's] legislative process by insuring the independence of individual legislators" and "to preserve the constitutional relation between our federal and state governments in our federal system."

The Government appealed the pretrial suppression order to the United States Court of Appeals for the Sixth Circuit, see 18 U. S. C. § 3731, which vacated the order and remanded for additional consideration. 559 F. 2d 1222 (1977). The Court of Appeals noted that although the District Court had expressed its willingness to recognize a legislative privilege, it had not applied the principle to particularize items of evidence.

On remand, the Government submitted a formal offer of proof and requested a ruling on the applicability of the legislative privilege to 15 specifically described items of evidence.[3] The offer first detailed the evidence the Government proposed to introduce at trial in support of the count of the indictment charging Gillock with soliciting money from one Ruth Howard in exchange for using his influence as a state senator to block the extradition of Howard's brother, James Michael Williams. Williams had been arrested in Tennessee in November 1974, and was being held as a fugitive from Illinois. According to the offer of proof, in January 1975 Howard met in Memphis with her brother's attorney, John Hundley, who allegedly told her that he had a "friend" who could help her brother. A meeting between Gillock and Howard was arranged by Hundley, and Gillock agreed to exercise his influence to block the extradition for a fee.

The Government declared its intention to prove that on March 6, 1975, Gillock appeared at Williams' extradition

[3] The Government stated that the offer was made on the assumption that the District Court's prior ruling was correct. The Government, however, explicitly reserved its position that state legislators in federal criminal prosecutions are not entitled to an evidentiary privilege comparable to the Speech or Debate Clause.

hearing. Although he denied that he was attending the hearing either as an attorney or in his capacity as a state senator, Gillock reviewed the extradition papers and questioned the hearing officer about the propriety of extradition on a misdemeanor charge. Later that day, Gillock requested an official opinion from the Tennessee Attorney General concerning "Extradition on a Misdemeanor."[4]

In addition, the Government stated it intended to introduce at trial the transcript of a telephone call Gillock made to Howard on March 25, 1975. During that conversation, Gillock allegedly advised Howard that he had delayed the extradition proceedings, and could have blocked them entirely, by exerting pressure on the extradition hearing officer who had appeared before Gillock's senate judiciary committee on a budgetary matter. To corroborate that conversation, the Government indicated it would prove that on March 19, 1975, Gillock attended a meeting of the senate judiciary committee where the same extradition hearing officer who conducted Williams' extradition hearing presented his department's budget request.

Next, the Government recited the evidence it proposed to introduce showing that Gillock used his influence as a member of the Tennessee State Senate to assist four individuals in obtaining master electricians' licenses valid in Shelby County, Tenn. According to the offer of proof, the four contacted Gillock in early 1972. Two weeks later, Gillock advised them that he could get legislation enacted by the General Assembly which would provide for reciprocity in licensing. Under his proposal, a person who received a license in another county could be admitted without a test in Shelby County. The prosecution represented it would offer evidence that Gillock

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[4] Gillock would be entitled to request an opinion from the state Attorney General by virtue of his status as a state senator. Only state government officials, not private attorneys, can secure official opinions. Tenn. Code Ann. § 8-609 (b)(6) (Supp. 1979).

fixed a contingent fee of $5,000 per person, to be refunded if the legislation was not passed.

The Government also represented that it would offer evidence that Gillock introduced reciprocity legislation in the senate and that he arranged for the introduction of a similar bill in the house. The Government further proposed to introduce statements made by Gillock on the floor of the senate in support of the bill. After the bill was passed by both branches of the legislature and forwarded to the Governor, several private persons, including union representatives, allegedly met with Gillock and voiced their opposition to the legislation. The Government intended to prove that Gillock replied that he could not financially afford to withdraw the legislation because he had already accepted "fees" for introducing it. Finally, the Government intended to prove that on April 13, 1972, Gillock moved to override the Governor's veto of the legislation, and stated that it would introduce into evidence any and all statements made by Gillock on the floor of the senate in support of his motion to override.

Based on this offer of proof, the District Court granted Gillock's renewed motion to exclude evidence of his legislative acts under Rule 501. It ruled inadmissible Gillock's official request for an opinion from the Attorney General regarding extradition and the answer to that request, and Gillock's statements to Howard that he could exert pressure on the extradition hearing officer to block the extradition because the hearing officer had appeared before Gillock's legislative committee. Similarly, the court ruled that all evidence regarding Gillock's introduction and support of the electricians' reciprocal licensing bill, his conversation with the private individuals who opposed the legislation, and the Governor's veto letter would be inadmissible.

The Government again appealed the District Court's suppression order. The Court of Appeals by a divided vote held that "the long history and the felt need for protection of

legislative speech or debate and the repeated and strong recognition of that history in the cases . . . from the Supreme Court, fully justify our affirming [the District Court] in [its] protection of the privilege in this case." 587 F. 2d 284, 290 (1978). Turning to the scope of the privilege, the court affirmed the suppression of evidence of Gillock's request for a formal opinion from the Attorney General, his participation in the senate judiciary committee, his introduction of the reciprocity legislation, his motion on the floor of the senate to override the Governor's veto, and all the statements he made on the floor of the senate. The other items of evidence were considered to be insufficiently related to the legislative process to be protected by the privilege.

II

Gillock urges that we construct an evidentiary privilege barring the introduction of evidence of legislative acts in federal criminal prosecutions against state legislators. He argues first that a speech or debate type privilege for state legislators in federal criminal cases is an established part of the federal common law and is therefore applicable through Rule 501.[5] Second, he contends that even apart from Rule 501, a legislative speech or debate privilege is compelled by principles of federalism rooted in our constitutional structure.

It is clear that were we to recognize an evidentiary privilege similar in scope to the Federal Speech or Debate Clause, much of the evidence at issue here would be inadmissible. Recently, in *United States* v. *Helstoski*, 442 U. S. 477, 489 (1979), we reaffirmed our holding in *United States* v. *Brewster*, 408 U. S. 501, 525 (1972), that with respect to Members of Congress "[t]he Clause protects 'against inquiry into acts that occur

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[5] Gillock makes no claim that state legislators are entitled to the benefits of the Federal Speech or Debate Clause, which by its terms applies only to "Senators and Representatives." See *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U. S. 391, 404 (1979).

in the regular course of the legislative process and into the motivation for those acts.' " Under that standard, evidence of Gillock's participation in the state senate committee hearings and his votes and speeches on the floor would be privileged and hence inadmissible.

The language and legislative history of Rule 501 give no aid to Gillock. The Rule provides in relevant part that "the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." [6] Congress substituted the present language of Rule 501 for the draft proposed by the Advisory Committee of the Judicial Conference of the United States to provide the courts with greater flexibility in developing rules of privilege on a case-by-case basis. Under the Judicial Conference proposed rules submitted to Congress, federal courts would have been permitted to apply only nine specifically enumerated privileges, except as otherwise required by the Constitution or provided by Acts of Congress. See Proposed Federal Rules of Evidence 501–513, H. R. Doc. No. 93–46, pp. 9–19 (1973). Neither the Advisory Committee, the Judicial Conference, nor this Court saw fit, however, to provide the privilege sought by Gillock. Although that fact standing alone would not compel the federal courts to refuse to recognize a privilege omitted from the proposal, it does suggest that

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[6] Rule 501 provides in full:

"Except as otherwise required by the Constitution of the United States as provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law."

the claimed privilege was not thought to be either indelibly ensconced in our common law or an imperative of federalism.[7]

Moreover, the House Conference Committee Report on the Federal Rules of Evidence leaves little doubt that Rule 501 requires the application of federal privilege law in criminal cases brought in federal court.[8] H. R. Conf. Rep. No. 93–1597, p. 7 (1974). Cf. *Wolfle* v. *United States*, 291 U. S. 7, 13 (1934) (the admissibility of evidence in criminal trials in the federal courts "is to be controlled by common law principles, not by local statute"); *Funk* v. *United States*, 290 U. S. 371 (1933). Thus, the fact that there is an evidentiary privilege under the Tennessee Constitution, Art. II, § 13, which Gillock could assert in a criminal prosecution in state court does not compel an analogous privilege in a federal prosecution.

III

Gillock argues that the historical antecedents and policy considerations which inspired the Speech or Debate Clause of the Federal Constitution should lead this Court to recognize a comparable evidentiary privilege for state legislators in federal prosecutions. The important history of the Speech or Debate Clause has been related abundantly in opinions of this Court and need not be repeated. See, *e. g.*, *United States* v. *Helstoski*, *supra*; *United States* v. *Brewster*, *supra*; *United States* v. *Johnson*, 383 U. S. 169 (1966). Suffice it to recall that England's experience with monarchs exerting pressure

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[7] We also find it significant that we have not been cited to a single instance in the legislative history of Rule 501 where any Member of Congress manifested interest in providing an evidentiary privilege for state legislators charged in federal court with a violation of a federal criminal statute.

[8] This is not to suggest that the privilege law as developed in the states is irrelevant. This Court has taken note of state privilege law in determining whether to retain them in the federal system. See, *e. g.*, *Trammel* v. *United States*, *ante*, p. 40 (rejection of the antimarital facts privilege).

on members of Parliament by using judicial process to make them more responsive to their wishes led the authors of our Constitution to write an explicit legislative privilege into our organic law. In statutes subject to repeal or in judge-made rules of evidence readily changed by Congress or the judges who made them, the protection would be far less than the legislative privilege created by the Federal Constitution.

Our cases, however, have made clear that "[a]lthough the Speech or Debate Clause's historic roots are in English history, it must be interpreted in light of the American experience, and in the context of the American constitutional scheme of government rather than the English parliamentary system." *United States* v. *Brewster, supra,* at 508. In deciding whether the principles underlying the federal constitutional speech or debate privilege compel a similar evidentiary privilege on behalf of state legislators, the analysis must look primarily to the American experience, including our structure of federalism which had no counterpart in England.

Two interrelated rationales underlie the Speech or Debate Clause: first, the need to avoid intrusion by the Executive or Judiciary into the affairs of a coequal branch, and second, the desire to protect legislative independence. *Eastland* v. *United States Servicemen's Fund,* 421 U. S. 491, 502–503 (1975). Cases considering the Speech or Debate Clause have frequently arisen in the context of a federal criminal prosecution of a Member of Congress and have therefore accented the first rationale. Only recently in such a case, we re-emphasized that a central purpose of the Clause is "to preserve the constitutional structure of separate, coequal, and independent branches of government. The English and American history of the privilege suggests that any lesser standard would risk intrusion by the executive and the judiciary into the sphere of protected legislative activities." *United States* v. *Helstoski,* 442 U. S., at 491. Accord, *United States* v. *Johnson, supra,* at 180–181. The Framers viewed the speech or debate privilege as fundamental to the system of checks and balances. 8 The

Works of Thomas Jefferson 322 (Ford ed. 1904); 1 The Works of James Wilson 421 (R. McCloskey ed. 1967).

The first rationale, resting solely on the separation of powers doctrine, gives no support to the grant of a privilege to state legislators in federal criminal prosecutions. It requires no citation of authorities for the proposition that the Federal Government has limited powers with respect to the states, unlike the unfettered authority which English monarchs exercised over the Parliament. By the same token, however, in those areas where the Constitution grants the Federal Government the power to act, the Supremacy Clause dictates that federal enactments will prevail over competing state exercises of power. Thus, under our federal structure, we do not have the struggles for power between the federal and state systems such as inspired the need for the Speech or Debate Clause as a restraint on the Federal Executive to protect federal legislators.

Apart from the separation of powers doctrine, it is also suggested that principles of comity require the extension of a speech or debate type privilege to state legislators in federal criminal prosecutions. However, as we have noted, federal interference in the state legislative process is not on the same constitutional footing with the interference of one branch of the Federal Government in the affairs of a coequal branch. *Baker* v. *Carr*, 369 U. S. 186, 210 (1962). Cf. *Dombrowski* v. *Pfister*, 380 U. S. 479, 489–492 (1965) (federal court may enjoin state-court application of a clearly unconstitutional statute).[9] Our opinion in *National League of Cities* v. *Usery*, 426 U. S. 833 (1976), is not to the contrary. There, we held that a federal statute regulating the wages of state

[9] Compare *Powell* v. *McCormack*, 395 U. S. 486 (1969) (suit for injunction against individual Members of Congress to require the seating of Representative Adam Clayton Powell barred by the Speech or Debate Clause), with *Bond* v. *Floyd*, 385 U. S. 116 (1966) (individual state legislators enjoined from depriving Julian Bond of his seat in the Georgia Legislature).

employees was unconstitutional because it "operate[d] to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions." *Id.*, at 852.

The absence of a judicially created evidentiary privilege for state legislators is not, however, comparable intervention by the Federal Government into essential state functions. First, Gillock's argument, resting on the Tenth Amendment, has no special force with regard to state legislators; on the rationale advanced, state executive officers and members of the state judiciary would have equally plausible claims that the denial of an evidentiary privilege to them resulted in a direct federal impact on traditional state governmental functions. Moreover, we recognized in *National League of Cities* that the regulation by Congress under the Commerce Clause of individuals is quite different from legislation which directly regulates the internal functions of States. *Id.*, at 840–841. Although the lack of an evidentiary privilege for a state legislator might conceivably influence his conduct while in the legislature, it is not in any sense analogous to the direct regulation imposed by the federal wage-fixing legislation in *National League of Cities*.

The second rationale underlying the Speech or Debate Clause is the need to insure legislative independence. Gillock relies heavily on *Tenney* v. *Brandhove*, 341 U. S. 367 (1951), where this Court was cognizant of the potential for disruption of the state legislative process. The issue there, however, was whether state legislators were immune from civil suits for alleged violations of civil rights under 42 U. S. C. § 1983. The claim was made by a private individual who alleged that a state legislative committee hearing was conducted to prevent him from exercising his First Amendment rights. The Court surveyed the history of the speech or debate privilege from its roots in the British parliamentary experience through its adoption in our own Federal Constitu-

tion. In light of these "presuppositions of our political history," 341 U.S., at 372, the Court stated:

> "We cannot believe that Congress—itself a staunch advocate of legislative freedom—would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language [of § 1983] before us." *Id.*, at 376.

Accordingly, the Court held that a state legislator's common-law absolute immunity from civil suit survived the passage of the Civil Rights Act of 1871.[10]

Although *Tenney* reflects this Court's sensitivity to interference with the functioning of state legislators, we do not read that opinion as broadly as Gillock would have us. First, *Tenney* was a civil action brought by a private plaintiff to vindicate private rights. Moreover, the cases in this Court which have recognized an immunity from civil suit for state officials have presumed the existence of federal criminal liability as a restraining factor on the conduct of state officials. As recently as *O'Shea* v. *Littleton*, 414 U.S. 488 (1974), we stated:

> "Whatever may be the case with respect to civil liability generally, . . . or civil liability for willful corruption, . . . we have never held that the performance of the duties of judicial, legislative, or executive officers, requires or contemplates the immunization of otherwise criminal deprivations of constitutional rights. . . . *On the contrary, the judicially fashioned doctrine of official immunity does not reach 'so far as to immunize criminal conduct proscribed by an Act of Congress. . . .'* *Gravel* v. *United States*, 408 U.S. 606, 627 (1972)." *Id.*, at 503 (emphasis supplied).

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[10] Despite the frequent invocation of the federal Speech or Debate Clause in *Tenney*, the Court has made clear that the holding was grounded on its interpretation of federal common law, not on the Speech or Debate Clause. See *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U.S., at 404.

Accord, *Imbler* v. *Pachtman*, 424 U. S. 409, 429 (1976); *Scheuer* v. *Rhodes*, 416 U. S. 232 (1974). Thus, in protecting the independence of state legislators, *Tenney* and subsequent cases on official immunity have drawn the line at civil actions.[11]

We conclude, therefore, that although principles of comity command careful consideration, our cases disclose that where important federal interests are at stake, as in the enforcement of federal criminal statutes, comity yields. We recognize that denial of a privilege to a state legislator may have some minimal impact on the exercise of his legislative function; however, similar arguments made to support a claim of Executive privilege were found wanting in *United States* v. *Nixon*, 418 U. S. 683 (1974), when balanced against the need of enforcing federal criminal statutes. There, the genuine risk of inhibiting candor in the internal exchanges at the highest levels of the Executive Branch was held insufficient to justify denying judicial power to secure all relevant evidence in a criminal proceeding. See also *United States* v. *Burr*, 25 F. Cas. 187 (No. 14,694) (CC Va. 1807). Here, we believe that recognition of an evidentiary privilege for state legislators for their legislative acts would impair the legitimate interest of the Federal Government in enforcing its criminal statutes with only speculative benefit to the state legislative process.[12]

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[11] Federal prosecutions of state and local officials, including state legislators, using evidence of their official acts are not infrequent. See, *e. g.*, *United States* v. *Rabbitt*, 583 F. 2d 1014 (CA8 1978), cert. denied, 439 U. S. 1116 (1979); *United States* v. *Mazzei*, 521 F. 2d 639 (CA3), cert. denied, 423 U. S. 1014 (1975); *United States* v. *Homer*, 411 F. Supp. 972 (WD Pa. 1976). See also *Anderson* v. *United States*, 417 U. S. 211, 214–215 (1974). Of course, even a Member of Congress would not be immune under the federal Speech or Debate Clause from prosecution for the acts which form the basis of the Hobbs Act, 18 U. S. C. § 1951, and RICO, 18 U. S. C. § 1962, charges here. See *United States* v. *Helstoski*, 442 U. S. 477 (1979).

[12] Cf. *Gravel* v. *United States*, 408 U. S. 606, 627 (1972) ("[W]e cannot

IV

The Federal Speech or Debate Clause, of course, is a limitation on the Federal Executive, but by its terms is confined to federal legislators. The Tennessee Speech or Debate Clause is in terms a limit only on the prosecutorial powers of that State. Congress might have provided that a state legislator prosecuted under federal law should be accorded the same evidentiary privileges as a Member of Congress. Alternatively, Congress could have imported the "spirit" of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), into federal criminal law and directed federal courts to apply to a state legislator the same evidentiary privileges available in a prosecution of a similar charge in the courts of the state. But Congress has chosen neither of these courses.

In the absence of a constitutional limitation on the power of Congress to make state officials, like all other persons, subject to federal criminal sanctions, we discern no basis in these circumstances for a judicially created limitation that handicaps proof of the relevant facts. Accordingly, the judgment of the Court of Appeals for the Sixth Circuit is

Reversed.

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE POWELL joins, dissenting.

For the reasons stated by Chief Judge Edwards in his opinion in this case for the Court of Appeals for the Sixth Circuit, I would affirm the judgment of that court.

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carry a judicially fashioned privilege so far as to immunize criminal conduct proscribed by an Act of Congress or to frustrate the grand jury's inquiry into whether publication of these classified documents violated a federal criminal statute").

GTE SYLVANIA, INC., ET AL. *v.* CONSUMERS UNION OF THE UNITED STATES, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1248. Argued November 28, 1979—Decided March 19, 1980

In connection with an investigation of hazards in the operation of television receivers, respondent Consumer Product Safety Commission (CPSC) obtained various accident reports from television manufacturers, including petitioners. Respondents Consumers Union of the United States, Inc., and Public Citizen's Health Research Group (requesters) sought disclosure of the accident reports under the Freedom of Information Act (FOIA), and the CPSC determined that the reports did not fall within any of the FOIA's exemptions and notified the requesters and the manufacturers that it would release the material on a specified date. Petitioners then filed suits in various Federal District Courts to enjoin disclosure of the allegedly confidential reports, which suits were consolidated in the Federal District Court for the District of Delaware. While those suits were pending, the requesters filed the instant action against CPSC, its Chairman, Commissioners, and Secretary, and petitioners in the Federal District Court for the District of Columbia, seeking release of the accident reports under the FOIA. That court dismissed the complaint while a motion for a preliminary injunction was still pending in Delaware, observing that the CPSC had assured the court that disclosure would be made as soon as the agency was not enjoined from doing so, and concluding, *inter alia*, that there was no Art. III case or controversy between the requesters and the federal defendants and therefore no jurisdiction. Ultimately, the Court of Appeals reversed, holding that there was a case or controversy between the requesters and the CPSC as to the scope and effect of the proceedings in Delaware, and that a permanent injunction which meanwhile had been issued in the Delaware proceedings did not foreclose the requesters' FOIA suit.

Held:

1. There is a case or controversy as required to establish jurisdiction pursuant to Art. III even though the CPSC agrees with the requesters that the documents should be released under the FOIA. While there is no case or controversy when the parties desire "precisely the same result," here the parties do not desire "precisely the same result," since

the CPSC contends that the Delaware injunction prevents it from releasing the documents, whereas the requesters believe that an equitable decree obtained by the manufacturers in a suit in which the requesters were not parties cannot deprive them of their rights under the FOIA. Pp. 382–383.

2. Information may not be obtained under the FOIA when the agency holding the material has been enjoined from disclosing it by a federal district court. The Act gives federal district courts jurisdiction to order the production of "improperly" withheld agency records, but here the CPSC has not "improperly" withheld the accident reports. The Act's legislative history shows that Congress was largely concerned with the unjustified suppression of information by agency officials in the exercise of their discretion, but here the CPSC had no discretion to exercise since its sole basis for not releasing the documents was the injunction issued by the Federal District Court in Delaware. The CPSC was required to obey the injunction out of respect for judicial process, and there is nothing in the legislative history to suggest that Congress intended to require an agency to commit contempt of court in order to release documents. Pp. 384–387.

192 U. S. App. D. C. 93, 590 F. 2d 1209, reversed.

MARSHALL, J., delivered the opinion for a unanimous Court.

Harry L. Shniderman argued the cause for petitioners. With him on the briefs were *Bernard G. Segal, James D. Crawford, Deena Jo Schneider, Robert W. Steele, Alan M. Grimaldi, Stephen B. Clarkson, William F. Patten, D. Clifford Crook III, Burton Y. Weitzenfeld, Michael A. Stiegel, Nancy L. Buc, Peter Gartland,* and *J. Wallace Adair.*

Deputy Solicitor General Geller argued the cause for the federal respondents. With him on the brief were *Solicitor General McCree* and *Richard A. Allen.*

Alan B. Morrison argued the cause for respondents Consumers Union of the United States, Inc., et al. With him on the brief was *Diane B. Cohn.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This case presents the issue whether information may be obtained under the Freedom of Information Act, 5 U. S. C.

§ 552, when the agency holding the material has been enjoined from disclosing it by a federal district court.

I

In March 1974, respondent Consumer Product Safety Commission (CPSC) announced that it would hold a public hearing to investigate hazards in the operation of television receivers and to consider the need for safety standards for televisions. 39 Fed. Reg. 10929. In the notice the CPSC requested from television manufacturers certain information on television-related accidents. After reviewing the material voluntarily submitted, the CPSC through orders, 15 U. S. C. § 2076 (b)(1), and subpoenas, 15 U. S. C. § 2076 (b)(3), obtained from the manufacturers, including petitioners, various accident reports. Claims of confidentiality accompanied most of the reports.

Respondents Consumers Union of the United States, Inc., and Public Citizen's Health Research Group (the requesters) sought disclosure of the accident reports from the CPSC under the Freedom of Information Act. The requesters were given access only to those documents for which no claim of confidentiality had been made by the manufacturers. As for the rest, the CPSC gave the manufacturers an opportunity to substantiate their claims of confidentiality. The requesters agreed to wait until mid-March 1975 for the CPSC's determination of the availability of those allegedly confidential documents.

In March 1975, the CPSC informed the requesters and the manufacturers that the documents sought did not fall within any of the exemptions of the Freedom of Information Act, and that even if disclosure was not mandated by that Act, the CPSC would exercise its discretion to release the material on May 1, 1975. Upon receiving the notice, petitioners filed suit in the United States District Court for the District of Dela-

ware and three other Federal District Courts[1] seeking to enjoin disclosure of the allegedly confidential reports. Petitioners contended that release of the information was prohibited by § 6 of the Consumer Product Safety Act, 15 U. S. C. § 2055, by exemptions to the Freedom of Information Act,[2] and by the Trade Secrets Act, 18 U. S. C. § 1905. Petitioners sought temporary restraining orders in all of the actions, and the CPSC consented to such orders in at least some of the cases. Subsequently the manufacturers' individual actions were consolidated in the District of Delaware, and that court issued a series of temporary restraining orders. Finally, in October 1975 the Delaware District Court entered a preliminary injunction prohibiting release of the documents pending trial. *GTE Sylvania Inc.* v. *Consumer Product Safety Comm'n,* 404 F. Supp. 352 (1975).

The requesters did not seek to intervene in the Delaware action, nor did petitioners or the CPSC attempt to have the requesters joined. Instead, on May 5, 1975, the requesters filed the instant action in Federal District Court for the District of Columbia, seeking release of the accident reports under the Freedom of Information Act. Named as defendants in that suit were the CPSC, its Chairman, Commissioners,

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[1] GTE Sylvania, Inc., RCA Corp., Magnavox Co., Zenith Radio Corp., Motorola, Inc., Warwick Electronics, Inc., and Aeronutronic Ford Corp. filed individual actions in the District of Delaware. Matsushita Electric Corp. of America, Sharp Electronic Corp., and Toshiba-America, Inc., filed actions in the Southern District of New York. General Electric Co. filed suit in the Northern District of New York. Admiral Corp. filed suit in the Western District of Pennsylvania. A 13th manufacturer, Teledyne Mid-America Corp., also brought suit, but that action was voluntarily dismissed. See *GTE Sylvania Inc.* v. *Consumer Product Safety Comm'n,* 438 F. Supp. 208, 210, n. 1 (Del. 1977).

[2] The theory of the so-called "reverse Freedom of Information Act" suit, that the exemptions to the Act were mandatory bars to disclosure and that therefore submitters of information could sue an agency under the Act in order to enjoin release of material, was squarely rejected in *Chrysler Corp.* v. *Brown,* 441 U. S. 281, 290–294 (1979).

and Secretary, and all of the petitioners. In September 1975, while the motion for a preliminary injunction was still pending in Delaware, the District Court for the District of Columbia dismissed the requesters' complaint. The court observed that the CPSC had determined that the reports should be disclosed and had assured the court on the public record that disclosure would be made as soon as the agency was not enjoined from doing so. The court concluded that there was no Art. III case or controversy between the plaintiffs and the federal defendants and therefore no jurisdiction. It also held that the complaint failed to state a claim against petitioners upon which relief could be granted since they no longer possessed the records sought by the requesters. Nor could petitioners be subject to suit under the compulsory joinder provision of Federal Rule of Civil Procedure 19 (a) since that Rule is predicated on the pre-existence of federal jurisdiction over the cause of action, which was not present here. *Consumers Union of United States, Inc.* v. *Consumer Product Safety Comm'n,* 400 F. Supp. 848 (DC 1975).

The United States Court of Appeals for the District of Columbia Circuit reversed. *Consumers Union of United States, Inc.* v. *Consumer Product Safety Comm'n,* 182 U. S. App. D. C. 351, 561 F. 2d 349 (1977). That court concluded that there was a case or controversy between the plaintiffs and the CPSC on "the threshold question of the scope and effect of the proceedings in Delaware." *Id.,* at 356, 561 F. 2d, at 354. In addition, the CPSC's conduct of the Delaware litigation was "not easily reconcilable with its ostensible acceptance of [the requesters'] argument that the requested documents should be disclosed." *Id.,* at 357, 561 F. 2d, at 355.[3] The Court of Appeals held that the preliminary in-

[3] The Court of Appeals noted that the CPSC took nine months from the date of the initial request for the documents to announce its determination that the material should be disclosed. In addition, the CPSC failed to make even *pro forma* opposition to the motions for temporary restraining orders and did not object to the manufacturers' requests for extensions of

junction issued by the Delaware court did not foreclose the requesters' suit under the Freedom of Information Act. That injunction did not resolve the merits of the claim, but instead was merely *pendente lite* relief. Thus, the order could not bar the Freedom of Information Act suit in the District of Columbia, although it would weigh in the decision as to which of the two suits should be stayed pending the outcome of the other. The court concluded, however, that such balancing was not required because the Delaware court had entered an order "closing out" that case without further action.[4] The Delaware action was effectively dismissed and therefore the preliminary injunction was "dead" and did not bar the Freedom of Information Act suit.[5] In addition, the CPSC's efforts in the Delaware action, which the court below considered "less than vigilant," and the resulting absence of full representation of the prodisclosure argument prevented the preliminary injunction from having preclusive effect.[6]

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those orders. Finally, the CPSC moved to dismiss its own interlocutory appeal to the United States Court of Appeals for the Third Circuit, which motion was granted. 182 U. S. App. D. C., at 357, n. 27, 561 F. 2d, at 355, n. 27.

[4] The minute order entered by the Delaware District Court provided that "since the parties do not now know whether further action [after the grant of the preliminary injunction] is contemplated in this litigation, there is no need to maintain these cases as open litigation for statistical purposes." Accordingly, the Clerk of that court was ordered to "close these cases for statistical purposes." The entry specifically stated that "[n]othing contained herein shall be considered a dismissal or disposition of the matter and should further proceedings become necessary or desirable, any party may initiate in the same manner as if this minute order had not been entered." App. to Pet. for Cert. A108.

[5] On petition for rehearing the Court of Appeals was informed that the Delaware case had only been marked "closed" for statistical purposes and that in fact the Delaware case had become active again soon after the Court of Appeals' initial ruling. The court nevertheless concluded that "there appears no reason why the litigation should not proceed here," 184 U. S. App. D. C. 146, 147, 565 F. 2d 721, 722 (1977) (*per curiam*).

[6] The CPSC then moved the Federal District Court in Delaware to

The manufacturers filed a petition for writ of certiorari. While that petition was pending, the Delaware District Court granted the manufacturers' motion for summary judgment and permanently enjoined the CPSC from disclosing the accident data. *GTE Sylvania, Inc.* v. *Consumer Product Safety Comm'n,* 443 F. Supp. 1152 (1977). We granted certiorari, vacated the judgment of the Court of Appeals for the District of Columbia Circuit, and remanded the case "for further consideration in light of the permanent injunction" entered in Delaware. *GTE Sylvania, Inc.* v. *Consumers Union of United States, Inc.,* 434 U. S. 1030 (1978).

On remand, the Court of Appeals reaffirmed its holding that there was a case or controversy within the meaning of Art. III.[7] *Consumers Union of United States* v. *Consumer Product Safety Comm'n,* 192 U. S. App. D. C. 93, 100, 590 F. 2d 1209, 1216 (1978). The court also held that the Delaware permanent injunction should not prevent the continuation of the District of Columbia action. *Stare decisis* would not require deference to the Delaware court's decision if it was in error. Collateral estoppel was inapplicable because the requesters were not parties to the Delaware action and an agency's interests diverge too widely from the private interests of Freedom of Information Act requesters for the agency to constitute an adequate representative. Finally, the prin-

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transfer that litigation to the District of Columbia pursuant to 28 U. S. C. § 1404. This motion was denied on the grounds that the Delaware action was much further advanced than the District of Columbia suit and a transfer at that late date would only delay a decision on the merits. *GTE Sylvania Inc.* v. *Consumer Product Safety Comm'n,* 438 F. Supp. 208 (Del. 1977).

[7] The CPSC had initially taken the position before the Court of Appeals that there was no Art. III case or controversy. However, when the case was first before this Court the CPSC announced that it was now persuaded there was a case or controversy, and it has continued to hold that view throughout this litigation. See Brief for Federal Respondents 21, n. 10; *Consumers Union of United States* v. *Consumer Product Safety Comm'n,* 192 U. S. App. D. C. 93, 100, n. 33, 590 F. 2d 1209, 1216, n. 33 (1978).

ciple of comity did not mandate a different result since the requesters were not before the Delaware court. The court below concluded that "none of the familiar anti-relitigation doctrines operates to deprive nonparty requesters of their right to sue for enforcement of the Freedom of Information Act; rather, they remain unaffected by prior litigation solely between the submitters and the involved agency." *Id.*, at 103, 590 F. 2d, at 1219. The case was remanded to the District Court for a decision on the merits. If that court concluded that the Freedom of Information Act required disclosure of the reports, it could consider enjoining petitioners from enforcing their final judgment awarded by the Delaware court.

We granted certiorari, 441 U. S. 942 (1979), because of the importance of the issue presented.[8] We now reverse.

II

The threshold question raised by petitioners is whether there is a case or controversy as required to establish jurisdiction pursuant to Art. III. Petitioners urge here, as the District Court held below, that since the CPSC agrees with the requesters that the documents should be released under the Freedom of Information Act, there is no actual controversy presented in this suit. We do not agree.

The purpose of the case-or-controversy requirement is to "limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process." *Flast* v. *Cohen*, 392 U. S. 83, 95 (1968). The clash of adverse parties " 'sharpens the presentation of issues upon which the court

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[8] The United States Court of Appeals for the Third Circuit has affirmed the grant of the permanent injunction by the Federal District Court in Delaware, *GTE Sylvania, Inc.* v. *Consumer Product Safety Comm'n*, 598 F. 2d 790 (1979), and we have granted certiorari to review that judgment. *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 444 U. S. 979 (1979).

so largely depends for illumination of difficult . . . questions.' " *O'Shea* v. *Littleton*, 414 U. S. 488, 494 (1974), quoting *Baker* v. *Carr*, 369 U. S. 186, 204 (1962). See also *Flast* v. *Cohen*, *supra*, at 96–97. Accordingly, there is no Art. III case or controversy when the parties desire "precisely the same result," *Moore* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 47, 48 (1971) (*per curiam*). See also *Muskrat* v. *United States*, 219 U. S. 346, 361 (1911).

The CPSC and the requesters do not want "precisely the same result" in this litigation. It is true that the federal defendants have expressed the view that the reports in question should be released and in fact notified the District Court that absent the Delaware injunction the information would be disclosed. See 400 F. Supp., at 853, n. 14. That injunction has been issued, however, and the basic question in this case is the effect of that order on the requesters. The CPSC contends that the injunction prevents it from releasing the documents, while the requesters believe that an equitable decree obtained by the manufacturers in a suit in which those seeking disclosure were not parties cannot deprive them of their rights under the Freedom of Information Act. In short, the issue in this case is whether, given the existence of the Delaware injunction, the CPSC has violated the Freedom of Information Act at all. The federal defendants and the requesters sharply disagree on this question, as has been evidenced at every stage of this litigation. If the requesters prevail on the merits of their claim, the CPSC will be subject to directly contradictory court orders, a prospect which the federal defendants naturally wish to avoid. It cannot be said, therefore, that the parties desire "precisely the same result." The requirements of Art. III have been satisfied.[9]

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[9] We need not reach the requesters' argument that the clear conflict between them and the petitioners would produce the necessary case or controversy even if there was no such controversy between the requesters and the federal defendants. We also need not discuss the suggestion of the Court of Appeals that the CPSC does not in fact agree with the re-

III

The issue squarely presented is whether the Court of Appeals erred in holding that the requesters may obtain the accident reports under the Freedom of Information Act when the agency with possession of the documents has been enjoined from disclosing them by a federal district court. The terms of the Act and its legislative history demonstrate that the court below was in error.

The Freedom of Information Act gives federal district courts the jurisdiction "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld." 5 U. S. C. § 552 (a)(4)(B). This section requires a showing of three components: the agency must have (1) improperly (2) withheld (3) agency records. *Kissinger* v. *Reporters Committee for Freedom of the Press, ante,* at 150. In this case the sole question is whether the first requirement, that the information has been "improperly" withheld, has been satisfied.

The statute provides no definition of the term "improperly." The legislative history of the Act, however, makes clear what Congress intended. The Freedom of Information Act was a revision of § 3, the "public information" section, of the Administrative Procedure Act, 5 U. S. C. § 1002 (1964 ed.). The prior law had failed to provide the desired access to information relied upon in Government decisionmaking, and in fact had become "the major statutory excuse for withholding Government records from public view." H. R. Rep. No. 1497, 89th Cong., 2d Sess., 3 (1966) (hereinafter H. R. Rep. No. 1497). See also *id.*, at 4, 12; S. Rep. No. 813, 89th Cong., 1st Sess., 3, 5 (1965) (hereinafter S. Rep. No. 813); *EPA* v. *Mink,* 410 U. S. 73, 79 (1973). Section 3 had several vague phrases upon which officials could rely to refuse requests for disclosure: "in the public interest," "relating solely to the in-

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questers that the documents should be disclosed even absent the Delaware injunction. See n. 3, *supra.*

ternal management of an agency," "for good cause." Even material on the public record was available only to "persons properly and directly concerned." These undefined phrases placed broad discretion in the hands of agency officials in deciding what information to disclose, and that discretion was often abused. The problem was exacerbated by the lack of an adequate judicial remedy for the requesters. See generally H. R. Rep. No. 1497, at 4–6; S. Rep. No. 813, at 4–5; 112 Cong. Rec. 13642, reprinted in Freedom of Information Act Source Book, 93d Cong., 2d Sess., 47 (Comm. Print 1974) (remarks of Rep. Moss) (hereinafter Source Book); *id.*, at 52 (remarks of Rep. King); *id.*, at 71 (remarks of Rep. Rumsfeld); *EPA* v. *Mink, supra,* at 79.

The Freedom of Information Act was intended "to establish a general philosophy of full agency disclosure," S. Rep. No. 813, at 3, and to close the "loopholes which allow agencies to deny legitimate information to the public," *ibid.* The attention of Congress was primarily focused on the efforts of officials to prevent release of information in order to hide mistakes or irregularities committed by the agency. *Ibid.;* H. R. Rep. No. 1497, at 6; Source Book 69 (remarks of Rep. Monagan); *id.*, at 70 (remarks of Rep. Rumsfeld); *id.*, at 73–74 (remarks of Rep. Hall), and on needless denials of information. Examples considered by Congress included the refusal of the Secretary of the Navy to release telephone directories, the decision of the National Science Foundation not to disclose cost estimates submitted by unsuccessful contractors as bids for a multimillion-dollar contract, and the Postmaster General's refusal to release the names of postal employees. See H. R. Rep. No. 1497, at 5–6.

Thus Congress was largely concerned with the unjustified suppression of information by agency officials. S. Rep. No. 813, at 5. Federal employees were denying requests for documents without an adequate basis for nondisclosure, and Congress wanted to curb this apparently unbridled discretion. Source Book 46–47 (remarks of Rep. Moss); *id.*, at 61 (re-

marks of Rep. Fascell); *id.*, at 70 (remarks of Rep. Rumsfeld); *id.*, at 71 (remarks of Rep. Skubitz); *id.*, at 80 (remarks of Rep. Anderson). It is in this context that Congress gave the federal district courts under the Freedom of Information Act jurisdiction to order the production of "improperly" withheld agency records. It is enlightening that the Senate Report uses the terms "improperly" and "wrongfully" interchangeably. S. Rep. No. 813, at 3, 5, 8.

The present case involves a distinctly different context. The CPSC has not released the documents sought here solely because of the orders issued by the Federal District Court in Delaware. At all times since the filing of the complaint in the instant action the agency has been subject to a temporary restraining order or a preliminary or permanent injunction barring disclosure. There simply has been no discretion for the agency to exercise. The concerns underlying the Freedom of Information Act are inapplicable, for the agency has made no effort to avoid disclosure; indeed, it is not the CPSC's decision to withhold the documents at all.

The conclusion that the information in this case is not being "improperly" withheld is further supported by the established doctrine that persons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order. See *Howat* v. *Kansas*, 258 U. S. 181, 189–190 (1922); *United States* v. *Mine Workers*, 330 U. S. 258 (1947); *Walker* v. *City of Birmingham*, 388 U. S. 307, 314–321 (1967); *Pasadena City Bd. of Education* v. *Spangler*, 427 U. S. 424, 439 (1976). There is no doubt that the Federal District Court in Delaware had jurisdiction to issue the temporary restraining orders and preliminary and permanent injunctions. Nor were those equitable decrees challenged as "only a frivolous pretense to validity," *Walker* v. *City of Birmingham*, *supra*, at 315, although of course there is disagreement over whether the District Court erred in

issuing the permanent injunction.[10] Under these circumstances, the CPSC was required to obey the injunctions out of "respect for judicial process," 388 U. S., at 321.

There is nothing in the legislative history to suggest that in adopting the Freedom of Information Act to curb agency discretion to conceal information, Congress intended to require an agency to commit contempt of court in order to release documents. Indeed, Congress viewed the federal courts as the necessary protectors of the public's right to know. To construe the lawful obedience of an injunction issued by a federal district court with jurisdiction to enter such a decree as "improperly" withholding documents under the Freedom of Information Act would do violence to the common understanding of the term "improperly" and would extend the Act well beyond the intent of Congress.

We conclude that the CPSC has not "improperly" withheld the accident reports from the requesters under the Freedom of Information Act.[11] The judgment of the United States Court of Appeals for the District of Columbia Circuit accordingly is

Reversed.

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[10] We intimate no view on that issue, which is raised in *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, No. 79-521, cert. granted, 444 U. S. 979 (1979).

[11] We need not address the issue whether the principle of comity mandated that the District of Columbia court stay or dismiss the action because the Delaware court had jurisdiction over the manufacturers' suit prior to the filing of the requesters' complaint.

UNITED STATES PAROLE COMMISSION ET AL. *v.* GERAGHTY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 78-572. Argued October 2, 1979—Decided March 19, 1980

Respondent, after twice being denied parole from a federal prison, brought suit against petitioners in Federal District Court challenging the validity of the United States Parole Commission's Parole Release Guidelines. The District Court denied respondent's request for certification of the suit as a class action on behalf of a class of "all federal prisoners who are or who will become eligible for release on parole," and granted summary judgment for petitioners on the merits. Respondent was released from prison while his appeal to the Court of Appeals was pending, but that court held that this did not render the case moot, and went on to hold, with respect to the question whether the District Court had erroneously denied class certification, that class certification would not be inappropriate, since the problems of overbroad classes and of a potential conflict of interest between respondent and other members of the putative class could be remedied by the mechanism of subclasses. Accordingly, the Court of Appeals reversed the denial of class certification and remanded the case to the District Court for an initial evaluation *sua sponte* of the proper subclasses.

Held: An action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim, even though class certification has been denied, since the proposed representative of the class retains a "personal stake" in obtaining class certification sufficient to assure that Art. III values are not undermined. If the appeal from denial of the class certification results in reversal of the denial, and a class subsequently is properly certified, the merits of the class claim then may be adjudicated pursuant to the holding in *Sosna* v. *Iowa*, 419 U. S. 393, that mootness of the named plaintiff's individual claim *after* a class has been duly certified does not render the action moot. Pp. 395–408.

(a) The fact that a named plaintiff's substantive claims are mooted due to an occurrence other than a judgment on the merits, cf. *Gerstein* v. *Pugh*, 420 U. S. 103; *Deposit Guaranty Nat. Bank* v. *Roper*, *ante*, p. 326, does not mean that all other issues in the case are mooted. A plaintiff who brings a class action presents two separate issues, one

being the claim on the merits and the other being the claim that he is entitled to represent a class. "The denial of class certification stands as an adjudication of one of the issues litigated," *Roper, ante,* at 336, and in determining whether the plaintiff may continue to press the class certification claim after the claim on the merits "expires," the nature of the "personal stake" in the class certification claim must be examined. P. 402.

(b) The imperatives of a dispute capable of judicial resolution—sharply presented issues in a concrete factual setting and self-interested parties vigorously advocating opposing positions—can exist with respect to the class certification issue notwithstanding that the named plaintiff's claim on the merits has expired. Such imperatives are present in this case where the question whether class certification is appropriate remains as a concrete, sharply presented issue, and respondent continues vigorously to advocate his right to have a class certified. Pp. 403–404.

(c) Respondent was a proper representative for the purpose of appealing the ruling denying certification of the class that he initially defined, and hence it was not improper for the Court of Appeals to consider whether the District Court should have granted class certification. P. 407.

(d) The Court of Appeals' remand of the case for consideration of subclasses was a proper disposition, except that the burden of constructing subclasses is not upon the District Court but upon the respondent. Pp. 407–408.

579 F. 2d 238, vacated and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, and STEVENS, JJ., joined. POWELL, J., filed a dissenting opinion, in which BURGER, C. J., and STEWART and REHNQUIST, JJ., joined, *post,* p. 409.

Kent L. Jones argued the cause for petitioners *pro hac vice.* With him on the briefs were *Solicitor General McCree, Assistant Attorney General Heymann, Deputy Solicitor General Easterbrook, Jerome M. Feit,* and *Elliott Schulder.*

Kenneth N. Flaxman argued the cause for respondent. With him on the brief was *Thomas R. Meites.**

**Robert J. Hobbs* filed a brief for the National Client Council, Inc., et al. as *amici curiae* urging affirmance.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case raises the question whether a trial court's denial of a motion for certification of a class may be reviewed on appeal after the named plaintiff's personal claim has become "moot." The United States Court of Appeals for the Third Circuit held that a named plaintiff, respondent here, who brought a class action challenging the validity of the United States Parole Commission's Parole Release Guidelines, could continue his appeal of a ruling denying class certification even though he had been released from prison while the appeal was pending. We granted certiorari, 440 U. S. 945 (1979), to consider this issue of substantial significance, under Art. III of the Constitution, to class-action litigation,[1] and to resolve the conflict in approach among the Courts of Appeals.[2]

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[1] The grant of certiorari also included the question of the validity of the Parole Release Guidelines, an issue left open in *United States* v. *Addonizio*, 442 U. S. 178, 184 (1979). We have concluded, however, that it would be premature to reach the merits of that question at this time. See *infra*, at 408.

While the petition for a writ of certiorari was pending, respondent Geraghty filed a motion to substitute as respondents in this Court five prisoners, then incarcerated, who also were represented by Geraghty's attorneys. In the alternative, the prisoners sought to intervene. We deferred our ruling on the motion to the hearing of the case on the merits. 440 U. S. 945 (1979). These prisoners, or most of them, now also have been released from incarceration. On September 25, 1979, a supplement to the motion to substitute or intervene was filed, proposing six new substitute respondents or intervenors; each of these is a presently incarcerated federal prisoner who, allegedly, has been adversely affected by the guidelines and who is represented by Geraghty's counsel.

Since we hold that respondent may continue to litigate the class certification issue, there is no need for us to consider whether the motion should be granted in order to prevent the case from being moot. We conclude that the District Court initially should rule on the motion.

[2] See, *e. g.*, *Armour* v. *City of Anniston*, 597 F. 2d 46, 48–49 (CA5 1979); *Susman* v. *Lincoln American Corp.*, 587 F. 2d 866 (CA7 1978), cert. pending, No. 78–1169; *Goodman* v. *Schlesinger*, 584 F. 2d 1325, 1332–1333 (CA4 1978); *Camper* v. *Calumet Petrochemicals, Inc.*, 584

I

In 1973, the United States Parole Board adopted explicit Parole Release Guidelines for adult prisoners.[3] These guidelines establish a "customary range" of confinement for various classes of offenders. The guidelines utilize a matrix, which combines a "parole prognosis" score (based on the prisoner's age at first conviction, employment background, and other personal factors) and an "offense severity" rating, to yield the "customary" time to be served in prison.

Subsequently, in 1976, Congress enacted the Parole Commission and Reorganization Act (PCRA), Pub. L. 94–233, 90 Stat. 219, 18 U. S. C. §§ 4201–4218. This Act provided the first legislative authorization for parole release guidelines. It required the newly created Parole Commission to "promulgate rules and regulations establishing guidelines for the powe[r] . . . to grant or deny an application or recommendation to parole any eligible prisoner." § 4203. Before releasing a prisoner on parole, the Commission must find, "upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner," that release "would not depreciate the seriousness of his offense or promote disrespect for the law" and that it "would not jeopardize the public welfare." § 4206 (a).

Respondent John M. Geraghty was convicted in the United States District Court for the Northern District of Illinois of

F. 2d 70 (CA5 1978); *Roper* v. *Consurve, Inc.*, 578 F. 2d 1106 (CA5 1978), aff'd *sub nom. Deposit Guaranty Nat. Bank* v. *Roper, ante*, p. 326; *Satterwhite* v. *City of Greenville*, 578 F. 2d 987 (CA5 1978) (en banc), cert. pending, No. 78–1008; *Vun Cannon* v. *Breed*, 565 F. 2d 1096 (CA9 1977); *Winokur* v. *Bell Federal Savings & Loan Assn.*, 560 F. 2d 271 (CA7 1977), cert. denied, 435 U. S. 932 (1978); *Lasky* v. *Quinlan*, 558 F. 2d 1133 (CA2 1977); *Kuahulu* v. *Employers Ins. of Wausau*, 557 F. 2d 1334 (CA9 1977); *Boyd* v. *Justices of Special Term*, 546 F. 2d 526 (CA2 1976); *Napier* v. *Gertrude*, 542 F. 2d 825 (CA10 1976), cert. denied, 429 U. S. 1049 (1977).

[3] 38 Fed. Reg. 31942–31945 (1973). The guidelines currently in force appear at 28 CFR § 2.20 (1979).

conspiracy to commit extortion, in violation of 18 U. S. C. § 1951, and of making false material declarations to a grand jury, in violation of 18 U. S. C. § 1623 (1976 ed. and Supp. II).[4] On January 25, 1974, two months after initial promulgation of the release guidelines, respondent was sentenced to concurrent prison terms of four years on the conspiracy count and one year on the false declarations count. The United States Court of Appeals for the Seventh Circuit affirmed respondent's convictions. *United States* v. *Braasch*, 505 F. 2d 139 (1974), cert. denied *sub nom. Geraghty* v. *United States*, 421 U. S. 910 (1975).

Geraghty later, pursuant to a motion under Federal Rule of Criminal Procedure 35, obtained from the District Court a reduction of his sentence to 30 months. The court granted the motion because, in the court's view, application of the guidelines would frustrate the sentencing judge's intent with respect to the length of time Geraghty would serve in prison. *United States* v. *Braasch*, No. 72 CR 979 (ND Ill., Oct. 9, 1975), appeal dism'd and mandamus denied, 542 F. 2d 442 (CA7 1976).

Geraghty then applied for release on parole. His first application was denied in January 1976 with the following explanation:

> "Your offense behavior has been rated as very high severity. You have a salient factor score of 11. You have been in custody for a total of 4 months. Guidelines established by the Board for adult cases which consider the above factors indicate a range of 26–36 months to be served before release for cases with good institutional program performance and adjustment. After review of all relevant factors and information presented, it is found

[4] The extortion count was based on respondent's use of his position as a vice squad officer of the Chicago police force to "shake down" dispensers of alcoholic beverages; the false declarations concerned his involvement in this scheme.

> that a decision at this consideration outside the guidelines does not appear warranted." App. 5, 24.

If the customary release date applicable to respondent under the guidelines were adhered to, he would not be paroled before serving his entire sentence minus good-time credits. Geraghty applied for parole again in June 1976; that application was denied for the same reasons. He then instituted this civil suit as a class action in the United States District Court for the District of Columbia, challenging the guidelines as inconsistent with the PCRA and the Constitution, and questioning the procedures by which the guidelines were applied to his case.

Respondent sought certification of a class of "all federal prisoners who are or who will become eligible for release on parole." *Id.,* at 17. Without ruling on Geraghty's motion, the court transferred the case to the Middle District of Pennsylvania, where respondent was incarcerated. Geraghty continued to press his motion for class certification, but the court postponed ruling on the motion until it was prepared to render a decision on cross-motions for summary judgment.

The District Court subsequently denied Geraghty's request for class certification and granted summary judgment for petitioners on all the claims Geraghty asserted. 429 F. Supp. 737 (1977). The court regarded respondent's action as a petition for a writ of habeas corpus, to which Federal Rule of Civil Procedure 23 applied only by analogy. It denied class certification as "neither necessary nor appropriate." 429 F. Supp., at 740. A class action was "necessary" only to avoid mootness. The court found such a consideration not comprehended by Rule 23. It found class certification inappropriate because Geraghty raised certain individual issues and, inasmuch as some prisoners might be benefited by the guidelines, because his claims were not typical of the entire proposed class. 429 F. Supp., at 740–741. On the merits, the court ruled that the guidelines are consistent with the PCRA and

do not offend the Ex Post Facto Clause, U. S. Const., Art. I, § 9, cl. 3. 429 F. Supp., at 741–744.

Respondent, individually "and on behalf of a class," appealed to the United States Court of Appeals for the Third Circuit. App. 29. Thereafter, another prisoner, Becher, who had been denied parole through application of the guidelines and who was represented by Geraghty's counsel, moved to intervene. Becher sought intervention to ensure that the legal issue raised by Geraghty on behalf of the class "will not escape review in the appeal in this case." Pet. to Intervene After Judgment 2. The District Court, concluding that the filing of Geraghty's notice of appeal had divested it of jurisdiction, denied the petition to intervene. Becher then filed a timely notice of appeal from the denial of intervention. The two appeals were consolidated.

On June 30, 1977, before any brief had been filed in the Court of Appeals, Geraghty was mandatorily released from prison; he had served 22 months of his sentence, and had earned good-time credits for the rest. Petitioners then moved to dismiss the appeals as moot. The appellate court reserved decision of the motion to dismiss until consideration of the merits.

The Court of Appeals, concluding that the litigation was not moot, reversed the judgment of the District Court and remanded the case for further proceedings. 579 F. 2d 238 (CA3 1978). If a class had been certified by the District Court, mootness of respondent Geraghty's personal claim would not have rendered the controversy moot. See, *e. g.*, *Sosna* v. *Iowa*, 419 U. S. 393 (1975). The Court of Appeals reasoned that an erroneous *denial* of a class certification should not lead to the opposite result. 579 F. 2d, at 248–252. Rather, certification of a "certifiable" class, that erroneously had been denied, relates back to the original denial and thus preserves jurisdiction. *Ibid.*

On the question whether certification erroneously had been denied, the Court of Appeals held that necessity is not a pre-

requisite under Rule 23. 579 F. 2d, at 252. The court expressed doubts about the District Court's finding that class certification was "inappropriate." While Geraghty raised some claims not applicable to the entire class of prisoners who are or will become eligible for parole, the District Court could have "certif[ied] certain issues as subject to class adjudication, and . . . limite[d] overbroad classes by the use of sub-classes." *Id.*, at 253. Failure "to consider these options constituted a failure properly to exercise discretion." *Ibid.* "Indeed, this authority may be exercised *sua sponte*." *Ibid.* The Court of Appeals also held that refusal to certify because of a potential conflict of interest between Geraghty and other members of the putative class was error. The subclass mechanism would have remedied this problem as well. *Id.*, at 252–253. Thus, the Court of Appeals reversed the denial of class certification and remanded the case to the District Court for an initial evaluation of the proper subclasses. *Id.*, at 254. The court also remanded the motion for intervention. *Id.*, at 245, n. 21.[5]

In order to avoid "improvidently dissipat[ing] judicial effort," *id.*, at 254, the Court of Appeals went on to consider whether the trial court had decided the merits of respondent's case properly. The District Court's entry of summary judgment was found to be error because "if Geraghty's recapitulation of the function and genesis of the guidelines is supported by the evidence," the guidelines "may well be" unauthorized or unconstitutional. *Id.*, at 259, 268. Thus, the dispute on the merits also was remanded for further factual development.

II

Article III of the Constitution limits federal "judicial Power," that is, federal-court jurisdiction, to "Cases" and "Controversies." This case-or-controversy limitation serves

[5] Apparently Becher, too, has now been released from prison.

"two complementary" purposes. *Flast* v. *Cohen*, 392 U. S. 83, 95 (1968). It limits the business of federal courts to "questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process," and it defines the "role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government." *Ibid.* Likewise, mootness has two aspects: "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell* v. *McCormack*, 395 U. S. 486, 496 (1969).

It is clear that the controversy over the validity of the Parole Release Guidelines is still a "live" one between petitioners and at least some members of the class respondent seeks to represent. This is demonstrated by the fact that prisoners currently affected by the guidelines have moved to be substituted, or to intervene, as "named" respondents in this Court. See n. 1, *supra*. We therefore are concerned here with the second aspect of mootness, that is, the parties' interest in the litigation. The Court has referred to this concept as the "personal stake" requirement. *E. g.*, *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 755 (1976); *Baker* v. *Carr*, 369 U. S. 186, 204 (1962).

The personal-stake requirement relates to the first purpose of the case-or-controversy doctrine—limiting judicial power to disputes capable of judicial resolution. The Court in *Flast* v. *Cohen*, 392 U. S., at 100–101, stated:

> "The question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government. . . . Thus, in terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adver-

> sary context and in a form historically viewed as capable of judicial resolution. It is for that reason that the emphasis in standing problems is on whether the party invoking federal court jurisdiction has 'a personal stake in the outcome of the controversy,' *Baker* v. *Carr*, [369 U. S.], at 204, and whether the dispute touches upon 'the legal relations of parties having adverse legal interests,' *Aetna Life Insurance Co.* v. *Haworth*, [300 U. S.], at 240–241."

See also *Schlesinger* v. *Reservists to Stop the War*, 418 U. S. 208, 216–218 (1974).

The "personal stake" aspect of mootness doctrine also serves primarily the purpose of assuring that federal courts are presented with disputes they are capable of resolving. One commentator has defined mootness as "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." Monaghan, Constitutional Adjudication: The Who and When, 82 Yale L. J. 1363, 1384 (1973).

III

On several occasions the Court has considered the application of the "personal stake" requirement in the class-action context. In *Sosna* v. *Iowa*, 419 U. S. 393 (1975), it held that mootness of the named plaintiff's individual claim *after* a class has been duly certified does not render the action moot. It reasoned that "even though appellees . . . might not again enforce the Iowa durational residency requirement against [the class representative], it is clear that they will enforce it against those persons in the class that appellant sought to represent and that the District Court certified." *Id.*, at 400. The Court stated specifically that an Art. III case or controversy "may exist . . . between a named defendant and a member of the class represented by the named plaintiff, even

though the claim of the named plaintiff has become moot." *Id.*, at 402.[6]

Although one might argue that *Sosna* contains at least an implication that the critical factor for Art. III purposes is the timing of class certification, other cases, applying a "relation back" approach, clearly demonstrate that timing is not crucial. When the claim on the merits is "capable of repetition, yet evading review," the named plaintiff may litigate the class certification issue despite loss of his personal stake in the outcome of the litigation. *E. g., Gerstein* v. *Pugh,* 420 U. S. 103, 110, n. 11 (1975). The "capable of repetition, yet evading review" doctrine, to be sure, was developed outside the class-action context. See *Southern Pacific Terminal Co.* v. *ICC,* 219 U. S. 498, 514–515 (1911). But it has been applied where the named plaintiff does have a personal stake at the outset of the lawsuit, and where the claim may arise again with respect to that plaintiff; the litigation then may continue notwithstanding the named plaintiff's current lack of a personal stake. See, *e. g., Weinstein* v. *Bradford,* 423 U. S. 147, 149 (1975); *Roe* v. *Wade,* 410 U. S. 113, 123–125 (1973). Since the litigant faces some likelihood of becoming involved in the same controversy in the future, vigorous advocacy can be expected to continue.

When, however, there is no chance that the named plaintiff's expired claim will reoccur, mootness still can be avoided through certification of a class prior to expiration of the named plaintiff's personal claim. *E. g., Franks* v. *Bowman Transportation Co.,* 424 U. S., at 752–757. See *Kremens* v. *Bart-*

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[6] The claim in *Sosna* also fit the traditional category of actions that are deemed not moot despite the litigant's loss of personal stake, that is, those "capable of repetition, yet evading review." See *Southern Pacific Terminal Co.* v. *ICC,* 219 U. S. 498, 515 (1911). In *Franks* v. *Bowman Transportation Co.,* 424 U. S. 747, 753–755 (1976), however, the Court held that the class-action aspect of mootness doctrine does not depend on the class claim's being so inherently transitory that it meets the "capable of repetition, yet evading review" standard.

ley, 431 U. S. 119, 129–130 (1977). Some claims are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires. The Court considered this possibility in *Gerstein* v. *Pugh,* 420 U. S., at 110, n. 11. *Gerstein* was an action challenging pretrial detention conditions. The Court assumed that the named plaintiffs were no longer in custody awaiting trial at the time the trial court certified a class of pretrial detainees. There was no indication that the particular named plaintiffs might again be subject to pretrial detention. Nonetheless, the case was held not to be moot because:

> "The length of pretrial custody cannot be ascertained at the outset, and it may be ended at any time by release on recognizance, dismissal of the charges, or a guilty plea, as well as by acquittal or conviction after trial. It is by no means certain that any given individual, named as plaintiff, would be in pretrial custody long enough for a district judge to certify the class. Moreover, in this case the constant existence of a class of persons suffering the deprivation is certain. The attorney representing the named respondents is a public defender, and we can safely assume that he has other clients with a continuing live interest in the case." *Ibid.*

See also *Sosna* v. *Iowa,* 419 U. S., at 402, n. 11.

In two different contexts the Court has stated that the proposed class representative who proceeds to a judgment on the merits may appeal *denial* of class certification. First, this assumption was "an important ingredient," *Deposit Guaranty Nat. Bank* v. *Roper, ante,* at 338, in the rejection of interlocutory appeals, "as of right," of class certification denials. *Coopers & Lybrand* v. *Livesay,* 437 U. S. 463, 469, 470, n. 15 (1978). The Court reasoned that denial of class status will not necessarily be the "death knell" of a small-claimant action, since there still remains "the prospect of prevailing on

the merits and reversing an order denying class certification." *Ibid.*

Second, in *United Airlines, Inc.* v. *McDonald*, 432 U. S. 385, 393–395 (1977), the Court held that a putative class member may intervene, for the purpose of appealing the denial of a class certification motion, after the named plaintiffs' claims have been satisfied and judgment entered in their favor. Underlying that decision was the view that "refusal to certify was subject to appellate review after final judgment at the behest of the named plaintiffs." *Id.*, at 393. See also *Coopers & Lybrand* v. *Livesay*, 437 U. S., at 469. And today, the Court holds that named plaintiffs whose claims are satisfied through entry of judgment over their objections may appeal the denial of a class certification ruling. *Deposit Guaranty Nat. Bank* v. *Roper, ante*, p. 326.

Gerstein, *McDonald*, and *Roper* are all examples of cases found not to be moot, despite the loss of a "personal stake" in the merits of the litigation by the proposed class representative. The interest of the named plaintiffs in *Gerstein* was precisely the same as that of Geraghty here. Similarly, after judgment had been entered in their favor, the named plaintiffs in *McDonald* had no continuing narrow personal stake in the outcome of the class claims. And in *Roper* the Court points out that an individual controversy is rendered moot, in the strict Art. III sense, by payment and satisfaction of a final judgment. *Ante*, at 333.

These cases demonstrate the flexible character of the Art. III mootness doctrine.[7] As has been noted in the past,

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[7] Three of the Court's cases might be described as adopting a less flexible approach. In *Indianapolis School Comm'rs* v. *Jacobs*, 420 U. S. 128 (1975), and in *Weinstein* v. *Bradford*, 423 U. S. 147 (1975), dismissal of putative class suits, as moot, was ordered after the named plaintiffs' claims became moot. And in *Pasadena City Bd. of Education* v. *Spangler*, 427 U. S. 424, 430 (1976), it was indicated that the action would have been moot, upon expiration of the named plaintiffs' claims, had not the United States intervened as a party plaintiff. Each of these, however,

Art. III justiciability is "not a legal concept with a fixed content or susceptible of scientific verification." *Poe* v. *Ullman*, 367 U. S. 497, 508 (1961) (plurality opinion). "[T]he justiciability doctrine [is] one of uncertain and shifting contours." *Flast* v. *Cohen*, 392 U. S., at 97.

IV

Perhaps somewhat anticipating today's decision in *Roper*, petitioners argue that the situation presented is entirely different when mootness of the individual claim is caused by "expiration" of the claim, rather than by a judgment on the claim. They assert that a proposed class representative who individually prevails on the merits still has a "personal stake" in the outcome of the litigation, while the named plaintiff whose claim is truly moot does not. In the latter situation, where no class has been certified, there is no party before the court with a live claim, and it follows, it is said, that we have no jurisdiction to consider whether a class should have been certified. Brief for Petitioners 37–39.

We do not find this distinction persuasive. As has been noted earlier, Geraghty's "personal stake" in the outcome of the litigation is, in a practical sense, no different from that of the putative class representatives in *Roper*. Further, the opinion in *Roper* indicates that the approach to take in applying Art. III is issue by issue. "Nor does a confession of judg-

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was a case in which there was an attempt to appeal the merits without first having obtained proper certification of a class. In each case it was the defendant who petitioned this Court for review. As is observed subsequently in the text, appeal from denial of class classification is permitted in some circumstances where appeal on the merits is not. In the situation where the proposed class representative has lost a "personal stake," the merits cannot be reached until a class properly is certified. Although the Court perhaps could have remanded *Jacobs* and *Weinstein* for reconsideration of the class certification issue, as the Court of Appeals did here, the parties in those cases did not suggest "relation back" of class certification. Thus we do not find this line of cases dispositive of the question now before us.

ment by defendants on less than all the issues moot an entire case; other issues in the case may be appealable. We can assume that a district court's final judgment fully satisfying named plaintiffs' private substantive claims would preclude their appeal on that aspect of the final judgment; however, it does not follow that this circumstance would terminate the named plaintiffs' right to take an appeal on the issue of class certification." *Ante*, at 333. See also *United Airlines, Inc.* v. *McDonald*, 432 U. S., at 392; *Powell* v. *McCormack*, 395 U. S., at 497.

Similarly, the fact that a named plaintiff's substantive claims are mooted due to an occurrence other than a judgment on the merits does not mean that all the other issues in the case are mooted. A plaintiff who brings a class action presents two separate issues for judicial resolution. One is the claim on the merits; the other is the claim that he is entitled to represent a class. "The denial of class certification stands as an adjudication of one of the issues litigated," *Roper, ante*, at 336. We think that in determining whether the plaintiff may continue to press the class certification claim, after the claim on the merits "expires," we must look to the nature of the "personal stake" in the class certification claim. Determining Art. III's "uncertain and shifting contours," see *Flast* v. *Cohen*, 392 U. S., at 97, with respect to nontraditional forms of litigation, such as the class action, requires reference to the purposes of the case-or-controversy requirement.

Application of the personal-stake requirement to a procedural claim, such as the right to represent a class, is not automatic or readily resolved. A "legally cognizable interest," as the Court described it in *Powell* v. *McCormack*, 395 U. S., at 496, in the traditional sense rarely ever exists with respect to the class certification claim.[8] The justifications that led to the development of the class action include the protection of

[8] Were the class an indispensable party, the named plaintiff's interests in certification would approach a "legally cognizable interest."

the defendant from inconsistent obligations, the protection of the interests of absentees, the provision of a convenient and economical means for disposing of similar lawsuits, and the facilitation of the spreading of litigation costs among numerous litigants with similar claims. See, *e. g.*, Advisory Committee Notes on Fed. Rule Civ. Proc. 23, 28 U. S. C. App., pp. 427–429; Note, Developments in the Law, Class Actions, 89 Harv. L. Rev. 1318, 1321–1323, 1329–1330 (1976). Although the named representative receives certain benefits from the class nature of the action, some of which are regarded as desirable and others as less so,[9] these benefits generally are by-products of the class-action device. In order to achieve the primary benefits of class suits, the Federal Rules of Civil Procedure give the proposed class representative the right to have a class certified if the requirements of the Rules are met. This "right" is more analogous to the private attorney general concept than to the type of interest traditionally thought to satisfy the "personal stake" requirement. See *Roper, ante*, at 338.

As noted above, the purpose of the "personal stake" requirement is to assure that the case is in a form capable of judicial resolution. The imperatives of a dispute capable of judicial resolution are sharply presented issues in a concrete factual setting and self-interested parties vigorously advocating opposing positions. *Franks* v. *Bowman Transportation Co.*, 424 U. S., at 753–756; *Baker* v. *Carr*, 369 U. S., at 204; *Poe* v. *Ullman*, 367 U. S., at 503 (plurality opinion). We conclude that these elements can exist with respect to the class certification issue notwithstanding the fact that the named plaintiff's claim on the merits has expired. The question whether class certification is appropriate remains as a concrete, sharply pre-

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[9] See, *e. g.*, Landers, Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma, 47 S. Cal. L. Rev. 842 (1974); Simon, Class Actions—Useful Tool or Engine of Destruction, 55 F. R. D. 375 (1972).

sented issue. In *Sosna* v. *Iowa* it was recognized that a named plaintiff whose claim on the merits expires *after* class certification may still adequately represent the class. Implicit in that decision was the determination that vigorous advocacy can be assured through means other than the traditional requirement of a "personal stake in the outcome." Respondent here continues vigorously to advocate his right to have a class certified.

We therefore hold that an action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim, even though class certification has been denied.[10] The proposed representative retains a "personal stake" in obtaining class certification sufficient to assure that Art. III values are not undermined. If the appeal results in reversal of the class certification denial, and a class subsequently is properly certified, the merits of the class claim then may be adjudicated pursuant to the holding in *Sosna*.

Our holding is limited to the appeal of the denial of the class certification motion. A named plaintiff whose claim expires may not continue to press the appeal on the merits until a class has been properly certified. See *Roper*, *ante*, at 336–337. If, on appeal, it is determined that class certification properly was denied, the claim on the merits must be dismissed as moot.[11]

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[10] We intimate no view as to whether a named plaintiff who settles the individual claim after denial of class certification may, consistent with Art. III, appeal from the adverse ruling on class certification. See *United Airlines, Inc.* v. *McDonald*, 432 U. S. 385, 393–394, and n. 14 (1977).

[11] MR. JUSTICE POWELL, in his dissent, advocates a rigidly formalistic approach to Art. III, *post*, at 412, and suggests that our decision today is the Court's first departure from the formalistic view. *Post*, at 414–419. We agree that the issue at hand is one of first impression and thus, in that narrow sense, is "unprecedented," *post*, at 419. We do not believe, however, that the decision constitutes a redefinition of Art. III principles or a "significant departur[e]," *post*, at 409, from "carefully considered" precedents, *post*, at 418.

The erosion of the strict, formalistic perception of Art. III was begun

Our conclusion that the controversy here is not moot does not automatically establish that the named plaintiff is entitled to continue litigating the interests of the class. "[I]t does

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well before today's decision. For example, the protestations of the dissent are strikingly reminiscent of Mr. Justice Harlan's dissent in *Flast* v. *Cohen*, 392 U. S. 83, 116, in 1968. Mr. Justice Harlan hailed the taxpayer-standing rule pronounced in that case as a "new doctrine" resting "on premises that do not withstand analysis." *Id.*, at 117. He felt that the problems presented by taxpayer standing "involve nothing less than the proper functioning of the federal courts, and so run to the roots of our constitutional system." *Id.*, at 116. The taxpayers were thought to complain as "private attorneys-general," and "[t]he interests they represent, and the rights they espouse, are bereft of any personal or proprietary coloration." *Id.*, at 119. Such taxpayer actions "are and must be . . . 'public actions' brought to vindicate public rights." *Id.*, at 120.

Notwithstanding the taxpayers' lack of a formalistic "personal stake," even Mr. Justice Harlan felt that the case should be held nonjusticiable on purely prudential grounds. His interpretation of the cases led him to conclude that "it is . . . clear that [plaintiffs in a public action] as such are not *constitutionally* excluded from the federal courts." *Ibid.* (emphasis in original).

Is it not somewhat ironic that MR. JUSTICE POWELL, who now seeks to explain *United Airlines, Inc.* v. *McDonald, supra*, as a straightforward application of settled doctrine, *post*, at 416–417, expressed in his dissent in *McDonald*, 432 U. S., at 396, the view that the holding rested on a fundamental misconception about the mootness of an uncertified class action after settlement of the named plaintiffs' claims? He stated:

"Pervading the Court's opinion is the assumption that the class action somehow continued after the District Court denied class status. But that assumption is supported neither by the text nor by the history of Rule 23. To the contrary, . . . the denial of class status converts the litigation to an ordinary nonclass action." *Id.*, at 399.

The dissent went on to say:

"[Petitioner] argues with great force that, as a result of the settlement of their individual claims, the named plaintiffs 'could no longer appeal the denial of class' status that had occurred years earlier. . . . Although this question has not been decided by this Court, the answer on principle is clear. The settlement of an individual claim typically moots any issues associated with it. . . . This case is sharply distinguishable from cases such as *Sosna* v. *Iowa* . . . and *Franks* v. *Bowman Transp. Co.* . . . where

shift the focus of examination from the elements of justiciability to the ability of the named representative to 'fairly and adequately protect the interests of the class.' Rule 23 (a)."

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we allowed named plaintiffs whose individual claims were moot to continue to represent their classes. In those cases, the District Courts previously had certified the classes, thus giving them 'a legal status separate from the interest[s] asserted by [the named plaintiffs].' *Sosna* v. *Iowa*, *supra*, at 399. This case presents precisely the opposite situation: The prior denial of class status had extinguished any representative capacity." *Id.*, at 400 (footnote omitted).

Thus, the assumption thought to be "[p]ervading the Court's opinion" in *McDonald*, and so vigorously attacked by the dissent there, is now relegated to "gratuitous" "dictum," *post*, at 416. MR. JUSTICE POWELL, who finds the situation presented in the case at hand "fundamentally different" from that in *Sosna* and *Franks*, *post*, at 413, also found the facts of *McDonald* "sharply distinguishable" from those previous cases. 432 U. S., at 400.

We do not recite these cases for the purpose of showing that our result is mandated by the precedents. We concede that the prior cases may be said to be somewhat confusing, and that some, perhaps, are irreconcilable with others. Our point is that the strict, formalistic view of Art. III jurisprudence, while perhaps the starting point of all inquiry, is riddled with exceptions. And, in creating each exception, the Court has looked to practicalities and prudential considerations. The resulting doctrine can be characterized, aptly, as "flexible"; it has been developed, not irresponsibly, but "with some care," *post*, at 410, including the present case.

The dissent is correct that once exceptions are made to the formalistic interpretation of Art. III, principled distinctions and bright lines become more difficult to draw. We do not attempt to predict how far down the road the Court eventually will go toward premising jurisdiction "upon the bare existence of a sharply presented issue in a concrete and vigorously argued case," *post*, at 421. Each case must be decided on its own facts. We hasten to note, however, that this case does not even approach the extreme feared by the dissent. This respondent suffered actual, concrete injury as a result of the putatively illegal conduct, and this injury would satisfy the formalistic personal-stake requirement if damages were sought. See, *e. g.*, *Powell* v. *McCormack*, 395 U. S., at 495–500. His injury continued up to and beyond the time the District Court denied class certification. We merely hold that when a District Court erroneously denies a procedural motion, which, if correctly decided, would have prevented the

Sosna v. *Iowa,* 419 U. S., at 403. We hold only that a case or controversy still exists. The question of who is to represent the class is a separate issue.[12]

We need not decide here whether Geraghty is a proper representative for the purpose of representing the class on the merits. No class as yet has been certified. Upon remand, the District Court can determine whether Geraghty may continue to press the class claims or whether another representative would be appropriate. We decide only that Geraghty was a proper representative for the purpose of appealing the ruling denying certification of the class that he initially defined. Thus, it was not improper for the Court of Appeals to consider whether the District Court should have granted class certification.

V

We turn now to the question whether the Court of Appeals' decision on the District Court's class certification ruling was proper. Petitioners assert that the Court of Appeals erred in requiring the District Court to consider the possibility of cer-

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action from becoming moot, an appeal lies from the denial and the corrected ruling "relates back" to the date of the original denial.

The judicial process will not become a vehicle for "concerned bystanders," *post,* at 413, even if one in respondent's position can conceivably be characterized as a bystander, because the issue on the merits will not be addressed until a class with an interest in the outcome has been certified. The "relation back" principle, a traditional equitable doctrine applied to class certification claims in *Gerstein* v. *Pugh,* 420 U. S. 103 (1975), serves logically to distinguish this case from the one brought a day after the prisoner is released. See *post,* at 420–421, n. 15. If the named plaintiff has no personal stake in the outcome at the time class certification is denied, relation back of appellate reversal of that denial still would not prevent mootness of the action.

[12] See, *e. g.,* Comment, A Search for Principles of Mootness in the Federal Courts: Part Two—Class Actions, 54 Texas L. Rev. 1289, 1331–1332 (1976); Comment, Continuation and Representation of Class Actions Following Dismissal of the Class Representative, 1974 Duke L. J. 573, 602–608.

tifying subclasses *sua sponte*. Petitioners strenuously contend that placing the burden of identifying and constructing subclasses on the trial court creates unmanageable difficulties. Brief for Petitioners 43–51. We feel that the Court of Appeals' decision here does not impose undue burdens on the district courts. Respondent had no real opportunity to request certification of subclasses after the class he proposed was rejected. The District Court denied class certification at the same time it rendered its adverse decision on the merits. Requesting subclass certification at that time would have been a futile act. The District Court was not about to invest effort in deciding the subclass question after it had ruled that no relief on the merits was available. The remand merely gives respondent the opportunity to perform his function in the adversary system. On remand, however, it is not the District Court that is to bear the burden of constructing subclasses. That burden is upon the respondent and it is he who is required to submit proposals to the court. The court has no *sua sponte* obligation so to act. With this modification, the Court of Appeals' remand of the case for consideration of subclasses was a proper disposition.

It would be inappropriate for this Court to reach the merits of this controversy in the present posture of the case. Our holding that the case is not moot extends only to the appeal of the class certification denial. If the District Court again denies class certification, and that decision is affirmed, the controversy on the merits will be moot. Furthermore, although the Court of Appeals commented upon the merits for the sole purpose of avoiding waste of judicial resources, it did not reach a final conclusion on the validity of the guidelines. Rather, it held only that summary judgment was improper and remanded for further factual development. Given the interlocutory posture of the case before us, we must defer decision on the merits of respondent's case until after it is determined affirmatively that a class properly can be certified.

The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE REHNQUIST join, dissenting.

Respondent filed this suit as a class action while he was serving time in a federal prison. He sought to represent a class composed of "all federal prisoners who are or who will become eligible for release on parole." App. 17. The District Court denied class certification and granted summary judgment for petitioners. Respondent appealed, but before briefs were filed, he was unconditionally released from prison. Petitioners then moved to dismiss the appeal as moot. The Court of Appeals denied the motion, reversed the judgment of the District Court, and remanded the case for further proceedings. Conceding that respondent's personal claim was moot, the Court of Appeals nevertheless concluded that respondent properly could appeal the denial of class certification. The Court today agrees with this conclusion.

The Court's analysis proceeds in two steps. First, it says that mootness is a "flexible" doctrine which may be adapted as we see fit to "nontraditional" forms of litigation. *Ante*, at 400–402. Second, the Court holds that the named plaintiff has a right "analogous to the private attorney general concept" to appeal the denial of class certification even when his personal claim for relief is moot. *Ante*, at 402–404. Both steps are significant departures from settled law that rationally cannot be confined to the narrow issue presented in this case. Accordingly, I dissent.

I

As the Court observes, this case involves the "personal stake" aspect of the mootness doctrine. *Ante*, at 396. There

is undoubtedly a "live" issue which an appropriate plaintiff could present for judicial resolution. The question is whether respondent, who has no further interest in this action, nevertheless may—through counsel—continue to litigate it.

Recent decisions of this Court have considered the personal stake requirement with some care. When the issue is presented at the outset of litigation as a question of standing to sue, we have held that the personal stake requirement has a double aspect. On the one hand, it derives from Art. III limitations on the power of the federal courts. On the other, it embodies additional, self-imposed restraints on the exercise of judicial power. *E. g., Singleton* v. *Wulff*, 428 U. S. 106, 112 (1976); *Warth* v. *Seldin*, 422 U. S. 490, 498 (1975). The prudential aspect of standing aptly is described as a doctrine of uncertain contours. *Ante*, at 402. But the constitutional minimum has been given definite content: "In order to satisfy Art. III, the plaintiff must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91, 99 (1979).[1] Although noneconomic injuries can confer standing, the Court has rejected all attempts to substitute abstract concern with a subject—or with the rights of third parties—for "the concrete injury required by Art. III." *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U. S. 26, 40 (1976).[2]

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[1] See, *e. g., Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U. S. 59, 72 (1978); *Arlington Heights* v. *Metropolitan Housing Dev. Corp.* 429 U. S. 252, 260–261 (1977); *Warth* v. *Seldin*, 422 U. S. 490, 499 (1975); *Linda R. S.* v. *Richard D.*, 410 U. S. 614, 617 (1973). Each of these cases rejects the view, once expressed by Mr. Justice Harlan and now apparently espoused by the Court, that the personal stake requirement lacks constitutional significance. *Ante*, at 404–407, n. 11; *Flast* v. *Cohen*, 392 U. S. 83, 120 (1968) (Harlan, J., dissenting); see also *United States* v. *Richardson*, 418 U. S. 166, 180 (1974) (POWELL, J., concurring). Until today, however, that view never had commanded a majority.

[2] See, *e. g., Schlesinger* v. *Reservists to Stop the War*, 418 U. S. 208, 227

As the Court notes today, the same threshold requirement must be satisfied throughout the action. *Ante*, at 397; see *Sosna* v. *Iowa*, 419 U. S. 393, 402 (1975). Prudential considerations not present at the outset may support continuation of an action in which the parties have invested substantial resources and generated a factual record.[3] But an actual case or controversy in the constitutional sense "'must be extant at all stages of review.'" *Preiser* v. *Newkirk*, 422 U. S. 395, 401 (1975), quoting *Steffel* v. *Thompson*, 415 U. S. 452, 459, n. 10 (1974). Cases that no longer "'touc[h] the legal relations of parties having adverse legal interests'" are moot because "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina* v. *Rice*, 404 U. S. 244, 246 (1971) (*per curiam*), quoting *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240–241 (1937). The limitation flows directly from Art. III. *DeFunis* v. *Odegaard*, 416 U. S. 312, 316 (1974) (*per curiam*).[4]

Since the question is one of power, the practical importance of review cannot control. *Sosna* v. *Iowa*, *supra*, at 401, n. 9; *Richardson* v. *Ramirez*, 418 U. S. 24, 36 (1974); *United States* v. *Alaska S. S. Co.*, 253 U. S. 113, 116 (1920). Nor can public interest in the resolution of an issue replace the

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(1974); *O'Shea* v. *Littleton*, 414 U. S. 488, 494 (1974); *Moose Lodge No. 107 v. Irvis*, 407 U. S. 163, 166–167 (1972); *Sierra Club* v. *Morton*, 405 U. S. 727, 736–738 (1972); *Tileston* v. *Ullman*, 318 U. S. 44, 46 (1943) (*per curiam*). The rule is the same when the question is mootness and a litigant can assert no more than emotional involvement in what remains of the case. *Ashcroft* v. *Mattis*, 431 U. S. 171, 172–173 (1977) (*per curiam*).

[3] See 13 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3533, p. 265 (1975); Note, The Mootness Doctrine in the Supreme Court, 88 Harv. L. Rev. 373, 376–377 (1974).

[4] See, *e. g.*, *Preiser* v. *Newkirk*, 422 U. S. 395, 401–402 (1975); *SEC* v. *Medical Comm. for Human Rights*, 404 U. S. 403, 407 (1972); *Powell* v. *McCormack*, 395 U. S. 486, 496, n. 7 (1969); *Liner* v. *Jafco, Inc.*, 375 U. S. 301, 306, n. 3 (1964).

necessary individual interest in the outcome. See *DeFunis* v. *Odegaard, supra,* at 316. Collateral consequences of the original wrong may supply the individual interest in some circumstances. *Sibron* v. *New York,* 392 U. S. 40, 53–58 (1968). So, too, may the prospect of repeated future injury so inherently transitory that it is unlikely to outlast the normal course of litigation. *Super Tire Engineering Co.* v. *McCorkle,* 416 U. S. 115 (1974); *Southern Pacific Terminal Co.* v. *ICC,* 219 U. S. 498, 515 (1911). The essential and irreducible constitutional requirement is simply a nonfrivolous showing of continuing or threatened injury at the hands of the adversary.

These cases demonstrate, contrary to the Court's view today, that the core requirement of a personal stake in the outcome is not "flexible." Indeed, the rule barring litigation by those who have no interest of their own at stake is applied so rigorously that it has been termed the "one major proposition" in the law of standing to which "the federal courts have consistently adhered . . . without exception." Davis, Standing: Taxpayers and Others, 35 U. Chi. L. Rev. 601, 617 (1968) (emphasis deleted).[5] We have insisted upon the personal stake requirement in mootness and standing cases because it is embedded in the case-or-controversy limitation imposed by the Constitution, "founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Worth* v. *Seldin,* 422 U. S., at 498. In this

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[5] The Court states that "the erosion of the strict, formalistic perception of Art. III was begun well before today's decision," and that the Art. III personal stake requirement is "riddled with exceptions." *Ante,* at 404–405, 406, n. 11. It fails, however, to cite a single Court opinion in support of either statement. To the extent that the decision in *Flast* v. *Cohen, supra,* supports the position ascribed to it in the dissent, 392 U. S., at 117–120, it does not survive the long line of express holdings that began with *Warth* v. *Seldin, supra,* and were reaffirmed only last Term. *Gladstone, Realtors* v. *Village of Bellwood,* 441 U. S. 91, 99 (1979). See nn. 1 and 2, *supra.* Even before *Warth,* Professor Davis observed that the personal stake requirement had no exceptions. 35 U. Chi. L. Rev., at 616, 617.

way we have, until today, "prevent[ed] the judicial process from becoming no more than a vehicle for the vindication of the value interests of concerned bystanders." *United States* v. *SCRAP*, 412 U. S. 669, 687 (1973); see *Simon* v. *Eastern Kentucky Welfare Rights Org.*, *supra*, at 60 (BRENNAN, J., concurring in judgment); *Sierra Club* v. *Morton*, 405 U. S. 727, 740 (1972).

II

The foregoing decisions establish principles that the Court has applied consistently. These principles were developed outside the class action context. But Art. III contains no exception for class actions. Thus, we have held that a putative class representative who alleges no individual injury "may [not] seek relief on behalf of himself or any other member of the class." *O'Shea* v. *Littleton*, 414 U. S. 488, 494 (1974). Only after a class has been certified in accordance with Rule 23 can it "acquir[e] a legal status separate from the interest asserted by [the named plaintiff]." *Sosna* v. *Iowa*, *supra*, at 399. "Given a properly certified class," the live interests of unnamed but identifiable class members may supply the personal stake required by Art. III when the named plaintiff's individual claim becomes moot. *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 755–756 (1976); *Sosna* v. *Iowa*, *supra*, at 402.

This case presents a fundamentally different situation. No class has been certified, and the lone plaintiff no longer has any personal stake in the litigation.[6] In the words of his own

[6] No one suggests that respondent could be affected personally by any ruling on the class certification question that is remanded today. In fact, the Court apparently concedes that respondent has no personal stake—"in the traditional sense"—in obtaining certification. *Ante*, at 402.

Several prisoners now in federal custody have filed a motion to intervene as parties respondent in this Court. Although the Court does not rule on that motion, I note that the motion was received well over a year after respondent was released from prison. In the interim, respondent obtained a ruling from the Court of Appeals and filed his

lawyer, respondent "can obtain absolutely no additional personal relief" in this case. Tr. of Oral Arg. 25. Even the lawyer has evinced no interest in continuing to represent respondent as named plaintiff, as distinguished from other persons presently incarcerated. *Ibid.*[7] In these circumstances, Art. III and the precedents of this Court require dismissal. But the Court views the case differently, and constructs new doctrine to breathe life into a lawsuit that has no plaintiff.

The Court announces today for the first time—and without attempting to reconcile the many cases to the contrary—that there are two categories of "the Art. III mootness doctrine": "flexible" and "less flexible." *Ante*, at 400, and n. 7. The Court then relies on cases said to demonstrate the application of "flexible" mootness to class action litigation. The cases principally relied upon are *Gerstein* v. *Pugh*, 420 U. S. 103, 110–111, n. 11 (1975), *United Airlines, Inc.* v. *McDonald*, 432 U. S. 385 (1977), and today's decision in *Deposit Guaranty Nat. Bank* v. *Roper*, *ante*, p. 326. Each case is said to show that a class action is not mooted by the loss of the class representative's personal stake in the outcome of the lawsuit, even though no class has been certified. *Ante*, at 400. *Sosna* itself is cited for the proposition that the requirements of Art. III may be met "through means other than the traditional requirement of a 'personal stake in the outcome.'" *Ante*, at 404. In my view, the Court misreads these precedents.

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petition for certiorari in this Court. Such untimely intervention comes too late to save the action under *United Airlines, Inc.* v. *McDonald*, 432 U. S. 385 (1977).

[7] Respondent's lawyer opened his argument by saying that "[t]he mootness question in this case is, from a practical standpoint, not very significant." If the action is dismissed as moot he plans simply to "file a new case" on behalf of prisoners serving longer terms. Tr. of Oral Arg. 25. On the basis of this representation by counsel, there is reason to believe that members of the putative class at issue ultimately will be included in a class action that will not moot out.

A

In *Sosna*, the Court simply acknowledged that actual class certification gives legal recognition to additional adverse parties. Cf. *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S., at 240.[8] And in *Gerstein*, the Court applied a rule long established, outside the class action context, by cases that never have been thought to erode the requirement of a personal stake in the outcome. *Gerstein* held that a class action challenging the constitutionality of pretrial detention procedures could continue after the named plaintiffs' convictions had brought their detentions to an end. The Court did not suggest that a personal stake in the outcome on the merits was unnecessary. The action continued only because of the transitory nature of pretrial detention, which placed the claim within "that

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[8] Certification is no mere formality. It represents a judicial finding that injured parties other than the named plaintiff exist. It also provides a definition by which they can be identified. Certification identifies and sharpens the interests of unnamed class members in the outcome; only thereafter will they be bound by the outcome. After certification, class members can be certain that the action will not be settled or dismissed without appropriate notice. Fed. Rule Civ. Proc. 23 (c); 3 H. Newberg, Class Actions § 5050 (1977); cf. Almond, Settling Rule 23 Class Actions at the Precertification Stage: Is Notice Required?, 56 N. C. L. Rev. 303 (1978). Vigorous advocacy is assured by the authoritative imposition on the named plaintiffs of a duty adequately to represent the entire class. If the named plaintiff's own claim becomes moot after certification, the court can re-examine his ability to represent the interests of class members. Should it be found wanting, the court may seek a substitute representative or even decertify the class. Fed. Rule Civ. Proc. 23 (c)(1), 23 (d); see 1 Newberg, *supra*, § 2192; Comment, Continuation and Representation of Class Actions Following Dismissal of the Class Representative, 1974 Duke L. J. 573, 589–590, 602–603. After certification, the case is no different in principle from more traditional representative actions involving, for example, a single party who cannot participate himself because of his incompetence but is permitted to litigate through an appointed fiduciary.

narrow class of cases" that are "distinctly 'capable of repetition, yet evading review.'" 420 U. S., at 110, n. 11.[9]

McDonald and *Roper* sanction some appeals from the denial of class certification notwithstanding satisfaction of the class representative's claim on the merits. But neither case holds that Art. III may be satisfied in the absence of a personal stake in the outcome. In *McDonald*, a putative class member intervened within the statutory time limit to appeal the certification ruling. 432 U. S., at 390.[10] Because the Court found that her claim was not time-barred, the intervenor in *McDonald* possessed the stake necessary to pursue the action. Indeed, the Court devoted its entire opinion to showing that the intervenor's claim for relief had not expired.[11] At most, *McDonald* holds only that an action which is kept alive by interested parties within prescribed periods of limitations does not "die" in an Art. III sense.

There is dictum in *McDonald* that the "refusal to certify was subject to appellate review after final judgment at the behest of the named plaintiffs. . . ." 432 U. S., at 393. That gratuitous sentence, repeated in *Coopers & Lybrand* v. *Livesay*,

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[9] The Court's *Gerstein* analysis, which emphasized that "[p]retrial detention is by nature temporary" and that "[t]he individual could . . . suffer repeated deprivations" with no access to redress, falls squarely within the rule of *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498, 515 (1911). See *Roe* v. *Wade*, 410 U. S. 113, 125 (1973). In similar cases we have noted that the continuation of the action will depend "'especially [upon] the reality of the claim that otherwise the issue would evade review.'" *Swisher v. Brady*, 438 U. S. 204, 213, n. 11 (1978), quoting *Sosna* v. *Iowa*, 419 U. S. 393, 402, n. 11 (1975). These limitations are inconsistent with the concept of "flexible" mootness and the redefinition of "personal stake" adopted today.

[10] The individual claims of the original named plaintiffs had been settled after judgment on the question of liability. 432 U. S., at 389, 393, n. 14.

[11] This extensive inquiry would have been unnecessary if, as the Court holds today, the intervenor had a personal stake in the class certification issue itself. Since the present respondent's claim long since has "expired," he stands in the same position as a member of the putative class whose claim has "expired" by reason of the statute of limitations.

437 U. S. 463, 469, 470, n. 15 (1978), apparently is elevated by the Court's opinion in this case to the status of new doctrine. There is serious tension between this new doctrine and the much narrower reasoning adopted today in *Roper*. In *Roper* the Court holds that the named plaintiffs, who have refused to accept proffered individual settlements, retain a personal stake in sharing anticipated litigation costs with the class. *Ante,* at 334, n. 6, 336. Finding that Art. III is satisfied by this alleged economic interest, *Roper* reasons that the rules of federal practice governing appealability permit a party to obtain review of certain procedural rulings that are collateral to a generally favorable judgment. See *ante,* at 333–334, 336. The Court concludes that the denial of class certification falls within this category, as long as the named plaintiffs "assert a continuing stake in the outcome of the appeal." *Ante,* at 336.

It is far from apparent how *Roper* can be thought to support the decision in this case. Indeed, the opinion by THE CHIEF JUSTICE in *Roper* reaffirms the obligation of a federal court to dismiss an appeal when the parties no longer retain the personal stake in the outcome required by Art. III. *Ibid.* Here, there is not even a speculative interest in sharing costs, and respondent affirmatively denies that he retains any stake or personal interest in the outcome of his appeal. See *supra,* at 413–414. Thus, a fact that was critical to the analysis in *Roper* is absent in this case. One can disagree with that analysis yet conclude that *Roper* affords no support for the Court's ruling here.

B

The cases cited by the Court as "less flexible"—and therefore less authoritative—apply established Art. III doctrine in cases closely analogous to this one. *Indianapolis School Comm'rs* v. *Jacobs,* 420 U. S. 128 (1975) (*per curiam*); *Weinstein* v. *Bradford,* 423 U. S. 147 (1975) (*per curiam*); *Pasadena City Board of Education* v. *Spangler,* 427 U. S. 424, 430

(1976). As they are about to become second class precedents, these cases are relegated to a footnote. *Ante*, at 400–401, n. 7. But the cases are recent and carefully considered decisions of this Court. They applied long settled principles of Art. III jurisprudence. And no Justice who participated in them suggested the distinction drawn today. The Court's backhanded treatment of these "less flexible" cases ignores their controlling relevance to the issue presented here.

In *Jacobs*, six named plaintiffs brought a class action to challenge certain high school regulations. The District Court stated on the record that class treatment was appropriate and that the plaintiffs were proper representatives, but the court failed to comply with Rule 23. After this Court granted review, we were informed that the named plaintiffs had graduated. We held that the action was entirely moot because the "class action was never properly certified nor the class properly identified by the District Court." 420 U. S., at 130.[12] Since the faulty certification prevented the class from acquiring separate legal status, Art. III required a dismissal. We reached precisely the same conclusion in *Spangler*, an action saved from mootness only by the timely intervention of a third party. 427 U. S., at 430–431. See also *Baxter* v. *Palmigiano*, 425 U. S. 308, 310, n. 1 (1976). And in *Bradford*, where the District Court had denied certification outright, the Court held that the named plaintiff's release from prison required the

[12] The vitality of the *Jacobs* result is underscored by the repeated dictum that a properly certified class is necessary to supply adverseness once the named plaintiff's claim becomes moot. *East Texas Motor Freight* v. *Rodriguez*, 431 U. S. 395, 406, n. 12 (1977); *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 754, n. 6, 755–756 (1976); see *Kremens* v. *Bartley*, 431 U. S. 119, 129–130 (1977); *Richardson* v. *Ramirez*, 418 U. S. 24, 39 (1974). Conversely, we have often stated that the named plaintiff's individual claim must be a live one both at the time the action is filed and at the time of certification. *Kremens* v. *Bartley*, *supra*, at 143, n. 6 (BRENNAN, J., dissenting); *Sosna* v. *Iowa*, *supra*, at 402, 403; see *Bell* v. *Wolfish*, 441 U. S. 520, 526, n. 5 (1979); *Zablocki* v. *Redhail*, 434 U. S. 374, 382, n. 9 (1978).

dismissal of his complaint about parole release procedures. 423 U. S., at 149. See also *Memphis Light, Gas & Water Div.* v. *Craft,* 436 U. S. 1, 8 (1978).

The Court suggests that *Jacobs* and *Spangler* may be distinguished because the plaintiffs there were not appealing the denial of class certification. The Court overlooks the fact that in each case the class representatives were defending a judgment on the merits from which the defendants had appealed. The plaintiffs/respondents continued vigorously to assert the claims of the class. They did not take the procedural route of appealing a denial of certification only because the District Court had granted—albeit defectively—class status. We chose not to remand for correction of the oral certification order in *Jacobs* because we recognized that the putative class representative had suffered no injury that could be redressed by adequate certification. Underlying *Jacobs,* and *Bradford* as well, is the elementary principle that no one has a personal stake in obtaining relief for third parties, through the mechanism of class certification or otherwise.[13] The Court rejects that principle today.

III

While the Court's new concept of "flexible" mootness is unprecedented, the content given that concept is even more disturbing. The Court splits the class aspects of this action into two separate "claims": (i) that the action may be maintained by respondent on behalf of a class, and (ii) that the class is entitled to relief on the merits. Since no class has been certified, the Court concedes that the claim on the merits is moot. *Ante,* at 404, 408. But respondent is said to

[13] In some circumstances, litigants are permitted to argue the rights of third parties in support of their claims. *E. g., Singleton* v. *Wulff* 428 U. S. 106, 113 (1976); *Barrows* v. *Jackson,* 346 U. S. 249, 255–256 (1953). In each such case, however, the Court has identified a concrete, individual injury suffered by the litigant himself. *Ibid.;* see n. 2, *supra,* and accompanying text.

have a personal stake in his "procedural claim" despite his lack of a stake in the merits.

The Court makes no effort to identify any injury to respondent that may be redressed by, or any benefit to respondent that may accrue from, a favorable ruling on the certification question.[14] Instead, respondent's "personal stake" is said to derive from two factors having nothing to do with concrete injury or stake in the outcome. First, the Court finds that the Federal Rules of Civil Procedure create a "right," "analogous to the private attorney general concept," to have a class certified. Second, the Court thinks that the case retains the "imperatives of a dispute capable of judicial resolution," which are identified as (i) a sharply presented issue, (ii) a concrete factual setting, and (iii) a self-interested party actually contesting the case. *Ante,* at 403.[15]

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[14] In a footnote, *ante,* at 406, n. 11, the Court states:

"This respondent suffered actual, concrete injury as a result of the putatively illegal conduct, and this injury would satisfy the formalistic personal-stake requirement if damages were sought. See, *e. g., Powell* v. *McCormack,* 395 U. S., at 495–500."

This appears to be a categorical claim of the actual, concrete injury our cases have required. Yet, again, the Court fails to identify the injury. The reference to damages is irrelevant here, as respondent sought no damages—only injunctive and declaratory relief. Moreover, counsel for respondent frankly conceded that his client "can obtain absolutely no additional personal relief" in this case. Tr. of Oral Arg. 25. If the Court seriously is claiming concrete injury "at all stages of review," see *supra,* at 411, it would be helpful for it to identify specifically this injury that was not apparent to respondent's counsel. Absent such identification, the claim of injury is indeed an empty one.

[15] The Court attempts to limit the sweeping consequences that could flow from the application of these criteria, see *infra,* at 421–422, and n. 18, by asserting that "[e]ach case must be decided on its own facts" on the basis of "practicalities and prudential considerations." *Ante,* at 406, n. 11. The Court long has recognized a difference between the prudential and constitutional aspects of the standing and mootness doctrines. See *supra,* at 410. I am not aware that the Court, until today, ever has merged these considerations for the purpose of eliminating the Art. III requirement of a

The Court's reliance on some new "right" inherent in Rule 23 is misplaced. We have held that even Congress may not confer federal court jurisdiction when Art. III does not. *Gladstone, Realtors* v. *Village of Bellwood,* 441 U. S., at 100; *O'Shea* v. *Littleton,* 414 U. S., at 494, and n. 2; see *Marbury* v. *Madison,* 1 Cranch 137, 175–177 (1803). Far less so may a rule of procedure which "shall not be construed to extend . . . the jurisdiction of the United States district courts." Fed. Rule Civ. Proc. 82. Moreover, the "private attorney general concept" cannot supply the personal stake necessary to satisfy Art. III. It serves only to permit litigation by a party who has a stake of his own but otherwise might be barred by prudential standing rules. See *Warth* v. *Seldin,* 422 U. S., at 501; *Sierra Club* v. *Morton,* 405 U. S., at 737–738.

Since neither Rule 23 nor the private attorney general concept can fill the jurisdictional gap, the Court's new perception of Art. III requirements must rest entirely on its tripartite test of concrete adverseness. Although the components of the test are no strangers to our Art. III jurisprudence, they operate only in " 'cases confessedly within [the Court's] jurisdiction.' " *Franks* v. *Bowman Transportation Co.,* 424 U. S., at 755–756, and n. 8, quoting *Flast* v. *Cohen,* 392 U. S. 83, 97 (1968). The Court cites no decision that has premised jurisdiction upon the bare existence of a sharply presented issue in a concrete and vigorously argued case, and I am aware of none.[16] Indeed, each of these characteristics is

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personal stake in the litigation. The Court cites no prior case for this view. Moreover, the Court expounds no limiting principle of any kind. Adverse practical consequences, even if relevant to Art. III analysis, cannot justify today's holding as none whatever would flow from a finding of mootness. See n. 18, *infra.* Nor does the Court's reliance upon a " 'relation back' principle," *ante,* at 407, n. 11, further the analysis. Although this fiction may provide a shorthand label for the Court's conclusion, it is hardly a principle and certainly not a limiting one.

[16] The Court often has rejected the contention that a "spirited dispute" alone is sufficient to confer jurisdiction. *E. g., Richardson* v. *Ramirez,* 418 U. S., at 35–36; *Hall* v. *Beals,* 396 U. S. 45, 48–49 (1969) (*per curiam*).

sure to be present in the typical "private attorney general" action brought by a public-spirited citizen.[17] Although we have refused steadfastly to countenance the "public action," the Court's redefinition of the personal stake requirement leaves no principled basis for that practice.[18]

The Court reasons that its departure from precedent is compelled by the difficulty of identifying a personal stake in a "procedural claim," particularly in "nontraditional forms of litigation." *Ante,* at 402. But the Court has created a false dilemma. As noted in *Roper,* class certification issues are "ancillary to the litigation of substantive claims." *Ante,*

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[17] The Court's assertion to the contrary notwithstanding, there is nothing in the record to suggest that respondent has any interest whatever in his new-found "right to have a class certified." *Ante,* at 403. In fact, the record shows that respondent's interest in the merits was the sole motivation for his attempt to represent a class. The class claims were added to his complaint only because his lawyer feared that mootness might terminate the action. App. 17; Brief for Respondent 23, 33. The record does not reveal whether respondent—as distinguished from his lawyer—now wishes to continue with the case. If he does, it is clear that his interest has nothing to do with the procedural protections described by the Court as the "primary benefits of class suits." *Ante,* at 403. It is neither surprising nor improper that respondent should be concerned with parole procedures. But respondent's actual interest is indistinguishable from the generalized interest of a "private attorney general" who might bring a "public action" to improve the operation of a parole system.

[18] The Court's view logically cannot be confined to moot cases. If a plaintiff who is released from prison the day after filing a class action challenging parole guidelines may seek certification of the class, why should a plaintiff who is released the day before filing the suit be barred? As an Art. III matter, there can be no difference.

Even on prudential grounds, there is little difference between this action and one filed promptly after the named plaintiff's release from prison. In the present case, this Court has ruled on neither the merits nor the propriety of the class action. At the same time, it has vacated a judgment by the Court of Appeals that in turn reversed the judgment of the District Court. No determination on any issue is left standing. For every practical purpose, the action must begin anew—this time without a plaintiff. The prudential considerations in favor of a finding of mootness could scarcely be more compelling.

at 332. Any attempt to identify a personal stake in such ancillary "claims" often must end in frustration, for they are not claims in any ordinary sense of the word. A motion for class certification, like a motion to join additional parties or to try the case before a jury instead of a judge, seeks only to present a substantive claim in a particular context. Such procedural devices generally have no value apart from their capacity to facilitate a favorable resolution of the case on the merits. Accordingly, the moving party is neither expected nor required to assert an interest in them independent of his interest in the merits.

Class actions may advance significantly the administration of justice in appropriate cases. Indeed, the class action is scarcely a new idea. Rule 23 codifies, and was intended to clarify, procedures for dealing with a form of action long known in equity. See 1 H. Newberg, Class Actions § 1004 (1977). That federal jurisdiction can attach to the class aspect of litigation involving individual claims has never been questioned. But even when we deal with truly new procedural devices, our freedom to "adapt" Art. III is limited to the recognition of different " 'means for presenting a case or controversy *otherwise cognizable by the federal courts.*' " *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S., at 240 (Declaratory Judgment Act), quoting *Nashville, C. & St. L. R. Co.* v. *Wallace*, 288 U. S. 249, 264 (1933) (emphasis added). The effect of mootness on the vitality of a device like the class action may be a relevant prudential consideration.[19] But it

[19] I do not imply that the result reached today is necessary in any way to the continued vitality of the class action device. On the contrary, the practical impact of mootness in this case would be slight indeed. See n. 18, *supra*. And this may well be typical of class actions brought under Rule 23 (b)(1) or (2) to seek injunctive or declaratory relief. Such actions are not subject to frustration through sequential settlement offers that "buy off" each intervening plaintiff. Cf. *Deposit Guaranty Nat. Bank* v. *Roper*, *ante*, at 339. Nor will substitute plaintiffs be deterred by the notice costs that attend certification of a class under Rule 23 (b)(3).

cannot provide a plaintiff when none is before the Court, for we are powerless to assume jurisdiction in violation of Art. III.[20]

IV

In short, this is a case in which the putative class representative—respondent here—no longer has the slightest interest in the injuries alleged in his complaint. No member of the class is before the Court; indeed, none has been identified. The case therefore lacks a plaintiff with the minimal personal stake that is a constitutional prerequisite to the jurisdiction of an Art. III court. In any realistic sense, the only persons before this Court who appear to have an interest are the defendants and a lawyer who no longer has a client.[21]

I would vacate the decision of the Court of Appeals and remand with instructions to dismiss the action as moot.

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[20] The Court's efforts to "save" this action from mootness lead it to depart strikingly from the normal role of a reviewing court. The Court fails to identify how, if at all, the District Court has erred. Nothing is said about the District Court's ruling on the merits or its refusal to certify the broad class sought by respondent. Nor does the Court adopt the Court of Appeals' conclusion that the District Court erred in failing to consider the possibility of subclasses *sua sponte*. Nevertheless, respondent—or his lawyer—is given the opportunity to raise the subclass question on remand. That result cannot be squared with the rule that a litigant may not raise on appeal those issues he has failed to preserve by appropriate objection in the trial court. The Court intimates that the District Court waited too long to deny the class certification motion, thus making a motion for subclasses a "futile act." *Ante*, at 408. But nothing in the record suggests that the District Court would not have entertained such a motion. Since respondent sought certification in the first place only to avoid mootness on appeal, the entry of an order against him on the merits provides no excuse for his subsequent failure to present a subclass proposal to the District Court.

[21] I imply no criticism of counsel in this case. The Court of Appeals agreed with counsel that the certification issue was appealable, and the case was brought to this Court by the United States.

MOBIL OIL CORP. v. COMMISSIONER OF TAXES OF VERMONT

APPEAL FROM THE SUPREME COURT OF VERMONT

No. 78-1201. Argued November 7, 1979—Decided March 19, 1980

Appellant is a corporation organized under the laws of New York, where it has its principal place of business and its "commercial domicile." It does business in many States, including Vermont, where it engages in the wholesale and retail marketing of petroleum products. Vermont imposed a corporate income tax, calculated by means of an apportionment formula, upon "foreign source" dividend income received by appellant from its subsidiaries and affiliates doing business abroad. Appellant challenged the tax on the grounds, *inter alia*, that it violated the Due Process Clause of the Fourteenth Amendment and the Commerce Clause, but the tax ultimately was upheld by the Vermont Supreme Court.

Held:

1. The tax does not violate the Due Process Clause. There is a sufficient "nexus" between Vermont and appellant to justify the tax, and neither the "foreign source" of the income in question nor the fact that it was received in the form of dividends from subsidiaries and affiliates precludes its taxability. Appellant failed to establish that its subsidiaries and affiliates engage in business activities unrelated to its sale of petroleum products in Vermont, and accordingly it has failed to sustain its burden of proving that its "foreign source" dividends are exempt, as a matter of due process, from fairly apportioned income taxation by Vermont. Pp. 436–442.

2. Nor does the tax violate the Commerce Clause. Pp. 442–449.

(a) The tax does not impose a burden on interstate commerce by virtue of its effect relative to appellant's income tax liability in other States. Assuming that New York, the State of "commercial domicile," has the authority to impose some tax on appellant's dividend income, there is no reason why that power should be exclusive when the dividends reflect income from a unitary business, part of which is conducted in other States. The income bears relation to benefits and privileges conferred by several States, and in these circumstances apportionment, rather than allocation, is ordinarily the accepted method of taxation. Vermont's interest in taxing a proportionate share of appellant's divi-

dend income thus is not overridden by any interest of the State of "commercial domicile." Pp. 443–446.

(b) Nor does the tax impose a burden on foreign commerce. Appellant's argument that the risk of multiple taxation abroad requires allocation of "foreign source" income to a single situs at home, is without merit in the present context. That argument attempts to focus attention on the effect of foreign taxation when the effect of domestic taxation is the only real issue; its logic is not limited to dividend income but would apply to any income arguably earned from foreign commerce, so that acceptance of the argument would make it difficult for state taxing authorities to determine whether income does or does not have a foreign source; the argument underestimates this Court's power to correct discriminatory taxation of foreign commerce that results from multiple state taxation; and its acceptance would not guarantee a lesser domestic tax burden on dividend income from foreign sources. *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U. S. 434, which concerned property taxation of instrumentalities of foreign commerce, does not provide an analogy for this case. Pp. 446–449.

136 Vt. 545, 394 A. 2d 1147, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, POWELL, and REHNQUIST, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 449. STEWART and MARSHALL, JJ., took no part in the consideration or decision of the case.

Jerome R. Hellerstein argued the cause for appellant. With him on the briefs were *John Dwight Evans, Jr.*, and *William B. Randolph*.

Richard Johnston King argued the cause for appellee. With him on the brief was *Gregory A. McKenzie*, Deputy Attorney General of Vermont.

William D. Dexter argued the cause for the Multistate Tax Commission et al. as *amici curiae* urging affirmance. With him on the brief were the Attorneys General and other officials for their respective States as follows: *J. D. McFarlane*, Attorney General of Colorado; *James Redden*, Attorney General of Oregon; *Jeff Bingaman*, Attorney General of New Mexico; *Carl R. Ajello*, Attorney General of Connecticut; *Albert R. Hausauer*, Special Assistant Attorney General of

North Dakota; *Robert B. Hanen,* Attorney General of Utah; *David H. Leroy,* Attorney General of Idaho, and *Theodore V. Spangler, Jr.,* Deputy Attorney General; *Paul L. Douglas,* Attorney General of Nebraska; *Edward G. Eiester, Jr.,* Attorney General of Pennsylvania; *Mike Greely,* Attorney General of Montana; *Warren R. Spannaus,* Attorney General of Minnesota; *Richard Gebelein,* Attorney General of Delaware; *Avrum M. Gross,* Attorney General of Alaska; and *William J. Baxley,* Attorney General of Alabama.*

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

In this case we are called upon to consider constitutional limits on a nondomiciliary State's taxation of income received by a domestic corporation in the form of dividends from subsidiaries and affiliates doing business abroad. The State of Vermont imposed a tax, calculated by means of an apportionment formula, upon appellant's so-called "foreign source" dividend income for the taxable years 1970, 1971, and 1972. The Supreme Court of Vermont sustained that tax.

I

A

Appellant Mobil Oil Corporation is a corporation organized under the laws of the State of New York. It has its principal place of business and its "commercial domicile" in New York City. It is authorized to do business in Vermont.

**Thomas J. Houser* and *William E. Blasier* filed a brief for the National Association of Manufacturers as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *William J. Scott,* Attorney General of Illinois, *Carl R. Ajello,* Attorney General of Connecticut, *Francis X. Bellotti,* Attorney General of Massachusetts, and *Thomas D. Rath,* Attorney General of New Hampshire, for the State of Illinois et al.; and by *C. Douglas Floyd* for Standard Oil Company of California.

Briefs of *amici curiae* were filed by *George S. Koch* for the Committee on State Taxation of the Council of State Chambers of Commerce, and by *John H. Larson* and *James Dexter Clark* for the County of Los Angeles.

Mobil engages in an integrated petroleum business, ranging from exploration for petroleum reserves to production, refining, transportation, and distribution and sale of petroleum and petroleum products. It also engages in related chemical and mining enterprises. It does business in over 40 of our States and in the District of Columbia as well as in a number of foreign countries.

Much of appellant's business abroad is conducted through wholly and partly owned subsidiaries and affiliates. Many of these are corporations organized under the laws of foreign nations; a number, however, are domestically incorporated in States other than Vermont.[1] None of appellant's subsidiaries or affiliates conducts business in Vermont, and appellant's shareholdings in those corporations are controlled and managed elsewhere, presumably from the headquarters in New York City.

In Vermont, appellant's business activities are confined to wholesale and retail marketing of petroleum and related products. Mobil has no oil or gas production or refineries within the State. Although appellant's business activity in Vermont is by no means insignificant, it forms but a small part of the corporation's worldwide enterprise. According to the Vermont corporate income tax returns Mobil filed for the three taxable years in issue, appellant's Vermont sales were $8,554,200, $9,175,931, and $9,589,447, respectively; its payroll in the State was $236,553, $244,577, and $254,938, respectively; and the

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[1] Appellant has supplied the following table listing the number of foreign subsidiary (more than 50% owned) and nonsubsidiary corporations, as well as domestic nonsubsidiary corporations, of which, on December 31 of the taxable year, it owned, directly or indirectly, 5% or more of the capital stock:

	1970	1971	1972
Foreign Subsidiary Corporations	203	208	216
Foreign Nonsubsidiary Corporations	185	189	197
Domestic Nonsubsidiary Corporations	26	27	27

App. 82.

value of its property in Vermont was $3,930,100, $6,707,534, and $8,236,792, respectively. App. 35–36, 49–50, 63–64. Substantial as these figures are, they, too, represent only tiny portions of the corporation's total sales, payroll, and property.[2]

Vermont imposes an annual net income tax on every corporation doing business within the State. Under its scheme, net income is defined as the taxable income of the taxpayer "under the laws of the United States." Vt. Stat. Ann., Tit. 32, § 5811 (18) (1970 and Supp. 1978).[3] If a taxpayer corporation does business both within and without Vermont, the State taxes only that portion of the net income attributable to it under a three-factor apportionment formula. In order to determine that portion, net income is multiplied by a fraction representing the arithmetic average of the ratios of sales, payroll, and property values within Vermont to those of the corporation as a whole. § 5833 (a).[4]

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[2] For the same taxable years, appellant reported aggregate sales of $3,577,148,701, $3,889,353,228, and $4,049,824,161, respectively; total payroll of $380,818,887, $400,087,593, and $428,900,681, respectively; and property valued in the aggregate at $2,871,922,965, $2,995,950,125 and $3,291,757,721, respectively. *Id.*, at 35, 49, 63. For 1972, which is not unrepresentative, the ratios of appellant's Vermont sales, payroll, and property to its sales, payroll, and property "everywhere" were approximately .24%, .06% and .25%, respectively. *Id.*, at 63, 64.

[3] Section 5811 (18) states in pertinent part:

"'Vermont net income' means, for any taxable year and for any corporate taxpayer, the taxable income of the taxpayer for that taxable year under the laws of the United States, excluding income which under the laws of the United States is exempt from taxation by the states."

[4] Section 5833 (1970 and Supp. 1978) provides in pertinent part:

"(a) . . . If the income of a taxable corporation is derived from any trade, business, or activity conducted both within and without this state, the amount of the corporation's Vermont net income which shall be apportioned to this state, so as to allocate to this state a fair and equitable portion of that income, shall be determined by multiplying that Vermont net income by the arithmetic average of the following factors:

"(1) The average of the value of all the real and tangible property within this state (A) at the beginning of the taxable year and (B) at the

Appellant's net income for 1970, 1971, and 1972, as defined by the Federal Internal Revenue Code, included substantial amounts received as dividends from its subsidiaries and affiliates operating abroad. Mobil's federal income tax returns for the three years showed taxable income of approximately $220 million, $308 million, and $233 million, respectively, of which approximately $174 million, $283 million, and $280 million was net dividend income.[5] On its Vermont returns for these years, however, appellant subtracted from federal taxable income items it regarded as "nonapportionable," including the net dividends. As a result of these subtractions, Mobil's Vermont returns showed a net income of approximately $23 million for 1970 and losses for the two succeeding years. After application of Vermont's apportionment formula, an aggregate tax liability of $1,871.90 to Vermont remained for the 3-year period; except for a minimum tax of $25 for each of 1971 and 1972, all of this was attributable to 1970.[6]

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end of the taxable year . . . expressed as a percentage of all such property both within and without this state;

"(2) The total wages, salaries, and other personal service compensation paid during the taxable year to employees within this state, expressed as a percentage of all such compensation paid whether within or without this state;

"(3) The gross sales, or charges for services performed, within this state, expressed as a percentage of such sales or charges whether within or without this state."

[5] This information is taken from appellant's Vermont income tax returns, to which copies of its federal returns were attached. App. 33–73.

It appears that the major share of appellant's dividend income for the three years was received from three wholly owned subsidiaries incorporated abroad (Mobil Marine Transportation, Ltd.; Mobil Oil Iraq with Limited Liability; and Pegasus Overseas, Ltd.) and from one affiliate incorporated in Delaware (Arabian American Oil Co. (ARAMCO)) of which appellant owned 10% of the capital stock. *Id.*, at 75–78.

[6] Appellant subtracted amounts representing interest and foreign taxes as well as dividends. It no longer presses its claim that interest and taxes should have been excluded from Vermont's preapportionment tax

The Vermont Department of Taxes recalculated appellant's income by restoring the asserted nonapportionable items to the preapportionment tax base. It determined that Mobil's

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base. Appellant's original calculations for the years in question were as follows:

Year 1970		
Federal Taxable Income		$220,035,244.23
Less:		
Nonapportionable Income		
Dividends	$174,211,073.60	
Interest	10,520,792.51	
Foreign Taxes	12,221,476.88	
Total		196,953,342.99
Apportionable Income		$23,081,901.24
Net Income Allocable to Vermont		30,361.11
Total Vermont Tax		$1,821.67
Year 1971		
Federal Taxable Income		$308,253,570.02
Less:		
Nonapportionable Income		
Dividends	$282,817,008.65	
Interest	12,609,826.23	
Foreign Taxes	34,659,576.05	
Total		330,086,410.93
Apportionable Income		($21,832,840.91)
Net Income Allocable to Vermont		0.00
Total Vermont Tax (minimum tax)		$25.00
Year 1972		
Federal Taxable Income		$232,825,728.27
Less:		
Nonapportionable Income		
Dividends	$280,623,403.93	
Interest	3,905,208.04	
Foreign Taxes	38,260,249.40	
Total		$322,788,861.37
Apportionable Income		($89,963,133.20)
Net Income Allocable to Vermont		0.00
Total Vermont Tax (minimum tax)		$25.00

App. 37, 34; 51, 48; 65, 62.

aggregate tax liability for the three years was $76,418.77, and deficiencies plus interest were assessed accordingly.[7] Appellant challenged the deficiency assessments before the Commissioner of Taxes. It argued, among other things, that taxation of the dividend receipts under Vermont's corporate income tax violated the Due Process Clause of the Fourteenth Amendment, as well as the Interstate and Foreign Commerce Clause, U. S. Const., Art. I, § 8, cl. 3. Appellant also argued that inclusion of the dividend income in its tax base was inconsistent with the terms of the Vermont tax statute, because it would not result in a "fair" and "equitable" apportionment, and it petitioned for modification of the apportionment. See Vt. Stat. Ann., Tit. 32, § 5833 (b) (1970 and Supp. 1978).[8] It is evident from the transcript of the hearing before the Commissioner that appellant's principal object was to achieve the subtraction of the asserted nonapportionable income from the preapportionment tax base; the alternative request for modification of the apportionment formula went largely undeveloped. See App. 18–31.

The Commissioner held that inclusion of dividend income

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[7] The Department calculated Mobil's tax liability for 1970 at $19,078.56; for 1971 at $31,955.52; and for 1972 at $25,384.69. App. to Juris. Statement 1a.

[8] Section 5833 (b) provides:

"If the application of the provisions of this section does not fairly represent the extent of the business activities of a corporation within this state, the corporation may petition for, or the commissioner may require, with respect to all or any part of the corporation's business activity, if reasonable:

"(1) Separate accounting;

"(2) The exclusion or modification of any or all of the factors;

"(3) The inclusion of one or more additional factors which will fairly represent the corporation's business activity in this state; or

"(4) The employment of any other method to effectuate an equitable allocation and apportionment of the corporation's income."

By amendment effected by 1971 Vt. Laws, No. 73, § 16, the words "any or all" in subsection (2) replaced the words "either or both."

in the tax base was required by the Vermont statute, and he rejected appellant's Due Process Clause and Commerce Clause arguments.[9]

Mobil sought review by the Superior Court of Washington County. That court reversed the Commissioner's ruling. It held that inclusion of dividend income in the tax base unconstitutionally subjected appellant to prohibitive multiple taxation because New York, the State of appellant's commercial domicile, had the authority to tax the dividends in their entirety. Since New York could tax without apportionment, the court concluded, Vermont's use of an apportionment formula would not be an adequate safeguard against multiple taxation. It agreed with appellant that subtraction of dividend income from the Vermont tax base was the only acceptable approach. App. to Juris. Statement 14a.

The Commissioner, in his turn, appealed to the Supreme Court of Vermont. That court reversed the judgment of the Superior Court. 136 Vt. 545, 394 A. 2d 1147 (1978). The court noted that appellant's quarrel was with the calculation of the tax base and not with the method or accuracy of the statutory apportionment formula. *Id.*, at 547, 394 A. 2d, at 1148. It found a sufficient "nexus" between the corporation and the State to justify an apportioned tax on both appel-

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[9] In reaching this decision, the Commissioner followed *F. W. Woolworth Co.* v. *Commissioner of Taxes*, 130 Vt. 544, 298 A. 2d 839 (1972), and *Gulf Oil Corp.* v. *Morrison*, 120 Vt. 324, 141 A. 2d 671 (1958). App. to Juris. Statement 6a–7a, 9a–11a. He also rejected, for lack of proof, Mobil's petition for modification of the apportionment formula:

"Any diversion from the standard formula imposes a strong burden of proof on the taxpayer to show that the formula does not fairly represent its business activities in the State of Vermont. . . . Mobil has made no such showing in this case." *Id.*, at 11a.

The Commissioner did allow a modification of the method of dividend "gross-up" for the year 1970 in a manner consistent with *F. W. Woolworth Co.* v. *Commissioner of Taxes*, 133 Vt. 93, 328 A. 2d 402 (1974). This modification is not germane to the present controversy.

lant's investment income and its operating income.[10] The court rejected the "multiple taxation" theory that had prevailed in the Superior Court. In its view, appellant had failed to prove that multiple taxation would actually ensue. New York did not tax the dividend income during the taxable years in question, and "[i]n a conflict between Vermont's apportioned tax on Mobil's investment income and an attempt on New York's part to tax that same income without apportionment, New York might very well have to yield." *Id.*, at 552, 394 A. 2d, at 1151. Accordingly, the court held that no constitutional defect had been established. It remanded the case for reinstatement of the deficiency assessments.

The substantial federal question involved prompted us to note probable jurisdiction. 441 U. S. 941 (1979).

B

In keeping with its litigation strategy, appellant has disclaimed any dispute with the accuracy or fairness of Vermont's apportionment formula. See Juris. Statement 10; Brief for Appellant 11. Instead, it claims that dividends from a "foreign source" by their very nature are not apportionable income.[11] This election to attack the tax base rather than the formula substantially narrows the issues before us. In deciding this appeal, we do not consider whether application of Vermont's formula produced a fair attribution of appellant's dividend income to that State. Our inquiry is confined

[10] The Court also observed, 136 Vt., at 547–548, 394 A. 2d, at 1149, that due process contentions similar to those advanced by Mobil here had been rejected in two Vermont cases that came down after the decision in the present case in the Superior Court. *In re Goodyear Tire & Rubber Co.*, 133 Vt. 132, 335 A. 2d 310 (1975); *F. W. Woolworth Co.* v. *Commissioner of Taxes*, 133 Vt. 93, 328 A. 2d 402 (1974).

[11] The dissent raises *de novo* the issue of appellant's dividend receipts from stockholdings in corporations that apparently operate principally in the United States. See *post*, at 455–457, 460–461. This issue is not encompassed in the questions presented by appellant. See Juris. Statement 2–3.

to the question whether there is something about the character of income earned from investments in affiliates and subsidiaries operating abroad that precludes, as a constitutional matter, state taxation of that income by the apportionment method.

In addressing this question, moreover, it is necessary to bear in mind that Mobil's "foreign source" dividend income is of two distinct types. The first consists of dividends from domestic corporations, organized under the laws of States other than Vermont, that conduct all their operations, and hence earn their income, outside the United States.[12] The second type consists of dividends from corporations both organized and operating abroad. The record in this case fails to supply much detail concerning the activities of the corporations whose dividends allegedly fall into these two categories, but it is apparent, from perusal of such documents in the record as appellant's corporate reports for the years in question, that many of these subsidiaries and affiliates, including the principal contributors to appellant's dividend income, engage in business activities that form part of Mobil's integrated petroleum enterprise. Indeed, although appellant is unwilling to concede the legal conclusion that these activities form part of a "unitary business," see Reply Brief for Appellant 2, n. 1, it has offered no evidence that would undermine the conclusion that most, if not all, of its subsidiaries and affiliates contribute to appellant's worldwide petroleum enterprise.

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[12] Under the Vermont tax scheme, income falling into this category is subject to apportionment only in part. Because Vermont's statute is geared to the definition of taxable income under federal law, it excludes from the preapportionment tax base 85% of all dividends earned from domestic corporations in which the taxpayer owns less than 80% of the capital stock, and 100% of all dividends earned from domestic corporations in which the taxpayer owns 80% or more of the capital stock. See § 243 of the Internal Revenue Code of 1954, as amended, 26 U. S. C. § 243; Vt. Stat. Ann., Tit. 32, § 5811 (18) (1970 and Supp. 1978).

To justify exclusion of the dividends from income subject to apportionment in Vermont, Mobil offers three principal arguments. First, it argues that the dividends may not be taxed in Vermont because there is no "nexus" between that State and either appellant's management of its investments or the business activities of the payor corporations. Second, it argues that taxation of the dividends in Vermont would create an unconstitutional burden of multiple taxation because the dividends would be taxable in full in New York, the State of commercial domicile. In this context, appellant relies on the traditional rule that dividends are taxable at their "business situs," a rule which it suggests is of constitutional dimension. Third, Mobil argues that the "foreign source" of the dividends precludes state income taxation in this country, at least in States other than the commercial domicile, because of the risk of multiple taxation at the international level. In a related argument, appellant contends that local taxation of the sort undertaken in Vermont prevents the Nation from speaking with a single voice in foreign commercial affairs. We consider each of these arguments in turn.

II

It long has been established that the income of a business operating in interstate commerce is not immune from fairly apportioned state taxation. *Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U. S. 450, 458–462 (1959); *Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S. 113, 120 (1920); *United States Glue Co.* v. *Oak Creek,* 247 U. S. 321, 328–329 (1918). "[T]he entire net income of a corporation, generated by interstate as well as intrastate activities, may be fairly apportioned among the States for tax purposes by formulas utilizing in-state aspects of interstate affairs." *Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U. S., at 460. For a State to tax income generated in interstate commerce, the Due Process Clause of the Fourteenth Amendment imposes two requirements: a "minimal connection" be-

tween the interstate activities and the taxing State, and a rational relationship between the income attributed to the State and the intrastate values of the enterprise. *Moorman Mfg. Co.* v. *Bair*, 437 U. S. 267, 272–273 (1978); see *National Bellas Hess, Inc.* v. *Department of Revenue*, 386 U. S. 753, 756 (1967); *Norfolk & Western R. Co.* v. *Missouri Tax Comm'n*, 390 U. S. 317, 325 (1968). The requisite "nexus" is supplied if the corporation avails itself of the "substantial privilege of carrying on business" within the State; and "[t]he fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a state for which the tax is an exaction." *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 444–445 (1940).

We do not understand appellant to contest these general principles. Indeed, in its Vermont tax returns for the years in question, Mobil included all its operating income in apportionable net income, without regard to the locality in which it was earned. Nor has appellant undertaken to prove that the amount of its tax liability as determined by Vermont is "out of all appropriate proportion to the business transacted by the appellant in that State." *Hans Rees' Sons* v. *North Carolina ex rel. Maxwell*, 283 U. S. 123, 135 (1931).[13] What appellant does seek to establish, in the due process phase of its argument, is that its *dividend* income must be excepted from the general principle of apportionability because it lacks a satisfactory nexus with appellant's business activities in Vermont. To carve that out as an exception, appellant must demonstrate something about the nature of this income that distinguishes it from operating income, a

[13] Application of the Vermont three-factor formula for the three years resulted in attributing to the State the following percentages of the corporation's net income:

1970	0.146032%
1971	0.173647%
1972	0.182151%

App. 36, 50, 64.

proper portion of which the State concededly may tax. From appellant's argument we discern two potential differentiating factors: the "foreign source" of the income, and the fact that it is received in the form of dividends from subsidiaries and affiliates.

The argument that the source of the income precludes its taxability runs contrary to precedent. In the past, apportionability often has been challenged by the contention that income earned in one State may not be taxed in another if the source of the income may be ascertained by separate geographical accounting. The Court has rejected that contention so long as the intrastate and extrastate activities formed part of a single unitary business. See *Butler Bros.* v. *McColgan,* 315 U. S. 501, 506–508 (1942); *Ford Motor Co.* v. *Beauchamp,* 308 U. S. 331, 336 (1939); cf. *Moorman Mfg. Co.* v. *Bair,* 437 U. S., at 272. In these circumstances, the Court has noted that separate accounting, while it purports to isolate portions of income received in various States, may fail to account for contributions to income resulting from functional integration, centralization of management, and economies of scale. *Butler Bros.* v. *McColgan,* 315 U. S., at 508–509. Because these factors of profitability arise from the operation of the business as a whole, it becomes misleading to characterize the income of the business as having a single identifiable "source." Although separate geographical accounting may be useful for internal auditing, for purposes of state taxation it is not constitutionally required.

The Court has applied the same rationale to businesses operating both here and abroad. *Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Comm'n,* 266 U. S. 271 (1924), is the leading example. A British corporation manufactured ale in Great Britain and sold some of it in New York. The corporation objected on due process grounds to New York's imposition of an apportioned franchise tax on the corporation's net income. The Court sustained the tax on the strength of its earlier decision in *Underwood Typewriter Co.* v. *Chamberlain, supra,*

where it had upheld a similar tax as applied to a business operating in several of our States. It ruled that the brewer carried on a unitary business, involving "a series of transactions beginning with the manufacture in England and ending in sales in New York and other places," and that "the State was justified in attributing to New York a just proportion of the profits earned by the Company from such unitary business." 266 U. S., at 282.

As these cases indicate, the linchpin of apportionability in the field of state income taxation is the unitary-business principle.[14] In accord with this principle, what appellant must show, in order to establish that its dividend income is not subject to an apportioned tax in Vermont, is that the income was earned in the course of activities unrelated to the sale of petroleum products in that State. *Bass, Ratcliff & Gretton* forecloses the contention that the foreign source of the dividend income alone suffices for this purpose. Moreover, appellant has made no effort to demonstrate that the foreign operations of its subsidiaries and affiliates are distinct in any business or economic sense from its petroleum sales activities in Vermont. Indeed, all indications in the record are to the contrary, since it appears that these foreign activities are part of appellant's integrated petroleum enterprise. In the absence of any proof of discrete business enterprise, Vermont was entitled to conclude that the dividend income's

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[14] See *United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U. S. 452, 473–474, nn. 25, 26 (1978). For scholarly discussions of the unitary-business concept see G. Altman & F. Keesling, Allocation of Income in State Taxation 97–102 (2d ed. 1950); Dexter, Taxation of Income from Intangibles of Multistate-Multinational Corporations, 29 Vand. L. Rev. 401 (1976); Hellerstein, Recent Developments in State Tax Apportionment and the Circumscription of Unitary Business, 21 Nat. Tax J. 487, 496 (1968); Keesling & Warren, The Unitary Concept in the Allocation of Income, 12 Hastings L. J. 42 (1960); Rudolph, State Taxation of Interstate Business: The Unitary Business Concept and Affiliated Corporate Groups, 25 Tax L. Rev. 171 (1970).

foreign source did not destroy the requisite nexus with in-state activities.

It remains to be considered whether the form in which the income was received serves to drive a wedge between Mobil's foreign enterprise and its activities in Vermont. In support of the contention that dividend income ought to be excluded from apportionment, Mobil has attempted to characterize its ownership and management of subsidiaries and affiliates as a business distinct from its sale of petroleum products in this country. Various *amici* also have suggested that the division between parent and subsidiary should be treated as a break in the scope of unitary business, and that the receipt of dividends is a discrete "taxable event" bearing no relation to Vermont.

At the outset, we reject the suggestion that anything is to be gained by characterizing receipt of the dividends as a separate "taxable event." In *Wisconsin* v. *J. C. Penney Co., supra,* the Court observed that "tags" of this kind "are not instruments of adjudication but statements of result," and that they add little to analysis. 311 U. S., at 444. Mobil's business entails numerous "taxable events" that occur outside Vermont. That fact alone does not prevent the State from including income earned from those events in the preapportionment tax base.

Nor do we find particularly persuasive Mobil's attempt to identify a separate business in its holding company function. So long as dividends from subsidiaries and affiliates reflect profits derived from a functionally integrated enterprise, those dividends are income to the parent earned in a unitary business. One must look principally at the underlying activity, not at the form of investment, to determine the propriety of apportionability.

Superficially, intercorporate division might appear to be a more attractive basis for limiting apportionability. But the form of business organization may have nothing to do with the underlying unity or diversity of business enterprise. Had

appellant chosen to operate its foreign subsidiaries as separate divisions of a legally as well as a functionally integrated enterprise, there is little doubt that the income derived from those divisions would meet due process requirements for apportionability. Cf. *General Motors Corp.* v. *Washington*, 377 U. S. 436, 441 (1964). Transforming the same income into dividends from legally separate entities works no change in the underlying economic realities of a unitary business, and accordingly it ought not to affect the apportionability of income the parent receives.[15]

We do not mean to suggest that all dividend income received by corporations operating in interstate commerce is necessarily taxable in each State where that corporation does

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[15] In its reply brief, Mobil submits a new due process argument based on Vermont's failure to require "combined apportionment" which, while including the income of subsidiaries and affiliates as part of appellant's net income, would eliminate intercorporate transfers, such as appellant's dividend income, from that calculation. A necessary concomitant of this would be inclusion of the subsidiaries' and affiliates' sales, payroll, and property in the calculation of the apportionment formula. Reply Brief for Appellant 1–6. The result, presumably, would be advantageous to appellant, since virtually nothing would be added to the "Vermont" numerators of the apportionment factors, while there would be substantial increases in the "everywhere" denominators, resulting in a diminution of the apportionment fraction.

This argument appears to be an afterthought that was not presented to the Vermont tax authorities or to the courts of that State. The evidence in the record surely is inadequate to evaluate the effect of the proposal, its relative impact on appellant, or its potential implications. Moreover, the principal focus of this suggestion is the apportionment formula, not the apportionability of foreign source income. Appellant, we reiterate, took this appeal on the assumption that Vermont's apportionment formula was fair. At this juncture and on these facts, we need not, and do not, decide whether combined apportionment of this type is constitutionally required. In any event, we note that appellant's latter-day advocacy of this combined approach virtually concedes that income from foreign sources, produced by the operations of subsidiaries and affiliates, as a matter of due process is attributable to the parent and amenable to fair apportionment. That is all we decide today.

business. Where the business activities of the dividend payor have nothing to do with the activities of the recipient in the taxing State, due process considerations might well preclude apportionability, because there would be no underlying unitary business. We need not decide, however, whether Vermont's tax statute would reach extraterritorial values in an instance of that kind. Cf. *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S., at 121. Mobil has failed to sustain its burden of proving any unrelated business activity on the part of its subsidiaries and affiliates that would raise the question of nonapportionability. See *Norton Co.* v. *Department of Revenue*, 340 U. S. 534, 537 (1951); *Butler Bros.* v. *McColgan*, 315 U. S., at 507.[16] We therefore hold that its foreign-source dividends have not been shown to be exempt, as a matter of due process, from apportionment for state income taxation by the State of Vermont.

III

In addition to its due process challenge, appellant contends that Vermont's tax imposes a burden on interstate and foreign commerce by subjecting appellant's dividend income to a substantial risk of multiple taxation. We approach this argument in two steps. First, we consider whether there was a burden on interstate commerce by virtue of the effect of the Vermont tax relative to appellant's income tax liability in

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[16] The dissent argues that unrelated business activity is "readily apparent" from the record because "a large number of the corporations . . . from which [Mobil] derived significant dividend income *would seem* neither to be engaged in the petroleum business nor to have any connection whatsoever with Mobil's marketing business in Vermont." *Post*, at 460 (emphasis added). The only evidence advanced in support of this assertion is a list of the names of corporations whose dividend payments are not at issue. See n. 11, *supra*. Furthermore, it may bear repeating that the burden of proof rests upon the appellant and not upon the Commissioner of Taxes. The absence of evidence in the record to decide the issues on which the dissent speculates, *post*, at 460–461, cuts against and not in favor of appellant's cause.

other States. Next, we determine whether constitutional protections for foreign commerce pose additional considerations that alter the result.

A

The effect of the Commerce Clause on state taxation of interstate commerce is a frequently litigated subject that appears to be undergoing a revival of sorts.[17] In several recent cases, this Court has addressed the issue and has attempted to clarify the apparently conflicting precedents it has spawned. See, *e. g., Moorman Mfg. Co.* v. *Bair,* 437 U. S., at 276–281; *Washington Revenue Dept.* v. *Association of Wash. Stevedoring Cos.,* 435 U. S. 734, 743–751 (1978); *Complete Auto Transit, Inc.* v. *Brady,* 430 U. S. 274 (1977). In an endeavor to establish a consistent and rational method of inquiry, we have examined the practical effect of a challenged tax to determine whether it "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Id.,* at 279.

Appellant asserts that Vermont's tax is discriminatory because it subjects interstate business to a burden of duplicative taxation that an intrastate taxpayer would not bear. Mobil does not base this claim on a comparison of Vermont's apportionment formula with those used in other States where appellant pays income taxes. Cf. *Moorman Mfg. Co.* v. *Bair, supra; Western Live Stock* v. *Bureau of Revenue,* 303 U. S. 250, 255–256 (1938). Rather, it contends that *any* appor-

[17] In particular, there has been a flurry of litigation in state courts over the Commerce Clause implications of apportioned taxation of income from intangibles. See, *e. g., Qualls* v. *Montgomery Ward & Co.,* 266 Ark. 207, 585 S. W. 2d 18 (1979); *American Smelting & Refining Co.* v. *Idaho Tax Comm'n,* 99 Idaho 924, 592 P. 2d 39 (1979), appeal docketed *sub nom. ASARCO Inc.* v. *Idaho Tax Comm'n,* No. 78–1839; *W. R. Grace & Co.* v. *Commissioner of Revenue,* — Mass. —, 393 N. E. 2d 330 (1979); *Montana Dept. of Revenue* v. *American Smelting & Refining Co.,* — Mont. —, 567 P. 2d 901 (1977), appeal dism'd, 434 U. S. 1042 (1978).

tioned tax on its dividends will place an undue burden on that specific source of income, because New York, the State of commercial domicile, has the power to tax dividend income without apportionment. For the latter proposition, appellant cites property tax cases that hold that intangible property is to be taxed either by the State of commercial domicile or by the State where the property has a "business situs." See, *e. g., First Bank Stock Corp.* v. *Minnesota,* 301 U. S. 234, 237 (1937); *Wheeling Steel Corp.* v. *Fox,* 298 U. S. 193, 208–210 (1936); *Louisville & Jeffersonville Ferry Co.* v. *Kentucky,* 188 U. S. 385, 396 (1903); cf. *New York ex rel. Whitney* v. *Graves,* 299 U. S. 366, 372–373 (1937).

Inasmuch as New York does not presently tax the dividends in question, actual multiple taxation is not demonstrated on this record. The Vermont courts placed some reliance on this fact, see, *e. g.,* 136 Vt., at 548, 394 A. 2d, at 1149, and much of the debate in this Court has aired the question whether an actual burden need be shown. Compare *Standard Pressed Steel Co.* v. *Department of Revenue,* 419 U. S. 560, 563–564 (1975), and *Freeman* v. *Hewit,* 329 U. S. 249, 256 (1946), with *Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U. S., at 462–463, and *Northwest Airlines, Inc.* v. *Minnesota,* 322 U. S. 292 (1944). See also *Japan Line, Ltd.* v. *County of Los Angeles,* 441 U. S. 434, 452, n. 17 (1979). We agree with Mobil that the constitutionality of a Vermont tax should not depend on the vagaries of New York tax policy. But the absence of any existing duplicative tax does alter the nature of appellant's claim. Instead of seeking relief from a present tax burden, appellant seeks to establish a theoretical constitutional preference for one method of taxation over another. In appellant's view, the Commerce Clause requires allocation of dividend income to a single situs rather than apportionment among the States.

Taxation by apportionment and taxation by allocation to a single situs are theoretically incommensurate, and if the latter method is constitutionally preferred, a tax based on the former

cannot be sustained. See *Standard Oil Co.* v. *Peck*, 342 U. S. 382, 384 (1952). We find no adequate justification, however, for such a preference. Although a fictionalized situs for intangible property sometimes has been invoked to avoid multiple taxation of ownership, there is nothing talismanic about the concepts of "business situs" or "commercial domicile" that automatically renders those concepts applicable when taxation of income from intangibles is at issue. The Court has observed that the maxim *mobilia sequuntur personam*, upon which these fictions of situs are based, "states a rule without disclosing the reasons for it." *First Bank Stock Corp.* v. *Minnesota*, 301 U. S., at 241. The Court also has recognized that "the reason for a single place of taxation no longer obtains" when the taxpayer's activities with respect to the intangible property involve relations with more than one jurisdiction. *Curry* v. *McCanless*, 307 U. S. 357, 367 (1939). Even for property or franchise taxes, apportionment of intangible values is not unknown. See *Ford Motor Co.* v. *Beauchamp*, 308 U. S., at 335–336; *Adams Express Co.* v. *Ohio State Auditor*, 166 U. S. 185, 222 (1897). Moreover, cases upholding allocation to a single situs for property tax purposes have distinguished income tax situations where the apportionment principle prevails. See *Wheeling Steel Corp.* v. *Fox*, 298 U. S., at 212.

The reasons for allocation to a single situs that often apply in the case of property taxation carry little force in the present context. Mobil no doubt enjoys privileges and protections conferred by New York law with respect to ownership of its stock holdings, and its activities in that State no doubt supply some nexus for jurisdiction to tax. Cf. *First Bank Stock Corp.* v. *Minnesota*, 301 U. S., at 240–241. Although we do not now presume to pass on the constitutionality of a hypothetical New York tax, we may assume, for present purposes, that the State of commercial domicile has the authority to lay some tax on appellant's dividend income as well as on the value of its stock. But there is no reason in theory why

that power should be exclusive when the dividends reflect income from a unitary business, part of which is conducted in other States. In that situation, the income bears relation to benefits and privileges conferred by several States. These are the circumstances in which apportionment is ordinarily the accepted method. Since Vermont seeks to tax income, not ownership, we hold that its interest in taxing a proportionate share of appellant's dividend income is not overridden by any interest of the State of commercial domicile.

B

What has been said thus far does not fully dispose of appellant's additional contention that the Vermont tax imposes a burden on foreign commerce. Relying upon the Court's decision last Term in *Japan Line, Ltd.* v. *County of Los Angeles,* 441 U. S. 434 (1979), Mobil suggests that dividends from foreign sources must be allocated to the State of commercial domicile, even if dividends from subsidiaries and affiliates operating domestically are not. By accepting the power of the State of commercial domicile to tax foreign-source dividend income, appellant eschews the broad proposition that foreign-source dividends are immune from state taxation. It presses the narrower contention that, because of the risk of multiple taxation abroad, allocation of foreign-source income to a single situs is required at home. Appellant's reasoning tracks the rationale of *Japan Line,* that is, that allocation is required because apportionment necessarily entails some inaccuracy and duplication. This inaccuracy may be tolerable for businesses operating solely within the United States, it is said, because this Court has power to correct any gross overreaching. The same inaccuracy, however, becomes intolerable when it is added to the risk of duplicative taxation abroad, which this Court is powerless to control. Accordingly, the only means of alleviating the burden of overlapping taxes is to adopt an allocation rule.

This argument is unpersuasive in the present context for

several reasons. First, it attempts to focus attention on the effect of foreign taxation when the effect of domestic taxation is the only real issue. By admitting the power of the State of commercial domicile to tax foreign-source dividends *in full*, Mobil necessarily forgoes any contention that local duplication of foreign taxes is proscribed. Thus, the only inquiry of constitutional dimension is the familiar question whether taxation by apportionment at home produces significantly greater tax burdens than taxation by allocation. Once appellant's argument is placed in this perspective, the presence or absence of taxation abroad diminishes in importance.

Second, nothing about the logic of Mobil's position is limited to dividend income. The same contention could be advanced about any income arguably earned from foreign commerce. If appellant's argument were accepted, state taxing commissions would face substantial difficulties in attempting to determine what income does or does not have a foreign source.

Third, appellant's argument underestimates the power of this Court to correct excessive taxation on the field where appellant has chosen to pitch its battle. A discriminatory effect on foreign commerce as a result of multiple state taxation is just as detectable and corrigible as a similar effect on commerce among the States. Accordingly, we see no reason why the standard for identifying impermissible discrimination should differ in the two instances.

Finally, acceptance of appellant's argument would provide no guarantee that allocation will result in a lesser domestic tax burden on dividend income from foreign sources. By appellant's own admission, allocation would give the State of commercial domicile the power to tax that income in full, without regard to the extent of taxation abroad. Unless we indulge in the speculation that a State will volunteer to become a tax haven for multinational enterprises, there is no reason to suspect that a State of commercial domicile will be any less vigorous in taxing the whole of the dividend income

than a State like Vermont will be in taxing a proportionate share.

Appellant's attempted analogy between this case and *Japan Line* strikes us as forced. That case involved ad valorem property taxes assessed directly upon instrumentalities of foreign commerce. As has been noted, the factors favoring use of the allocation method in property taxation have no immediate applicability to an income tax. *Japan Line*, moreover, focused on problems of duplicative taxation at the international level, while appellant here has confined its argument to the wholly different sphere of multiple taxation among our States. Finally, in *Japan Line* the Court was confronted with actual multiple taxation that could be remedied only by adoption of an allocation approach. As has already been explained, in the present case we are not similarly impelled.

Nor does federal tax policy lend additional weight to appellant's arguments. The federal statutes and treaties that Mobil cites, Brief for Appellant 38–43, concern problems of multiple taxation at the international level and simply are not germane to the issue of multiple state taxation that appellant has framed. Concurrent federal and state taxation of income, of course, is a well-established norm. Absent some explicit directive from Congress, we cannot infer that treatment of foreign income at the federal level mandates identical treatment by the States. The absence of any explicit directive to that effect is attested by the fact that Congress has long debated, but has not enacted, legislation designed to regulate state taxation of income. See H. R. Rep. No. 1480, 88th Cong., 2d Sess. (1964); H. R. Rep. No. 565, 89th Cong., 1st Sess. (1965); H. R. Rep. No. 952, 89th Cong., 1st Sess. (1965); Hearings on State Taxation of Interstate Commerce before the Subcommittee on State Taxation of Interstate Commerce of the Senate Committee on Finance, 93d Cong., 1st Sess. (1973); cf. *United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U. S. 452, 456, n. 4 (1978). Legislative proposals have provoked debate over issues closely related to the

present controversy. See, *e. g.*, New York State Bar Assn. Tax Section Committee on Interstate Taxation, Proposals for Improvement of Interstate Taxation Bills (H. R. 1538 and S. 317), 25 Tax Lawyer 433 (1971). Congress in the future may see fit to enact legislation requiring a uniform method for state taxation of foreign dividends. To date, however, it has not done so.

IV

In sum, appellant has failed to demonstrate any sound basis, under either the Due Process Clause or the Commerce Clause, for establishing a constitutional preference for allocation of its foreign-source dividend income to the State of commercial domicile. Because the issue has not been presented, we need not, and do not, decide what the constituent elements of a fair apportionment formula applicable to such income would be. We do hold, however, that Vermont is not precluded from taxing its proportionate share.

The judgment of the Supreme Court of Vermont is affirmed.

It is so ordered.

MR. JUSTICE STEWART and MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

MR. JUSTICE STEVENS, dissenting.

The Court today decides one substantive question and two procedural questions. Because of the way in which it resolves the procedural issues, the Court's substantive holding is extremely narrow. It is carefully "confined to the question whether there is something about the character of income earned from investments in affiliates and subsidiaries operating abroad that precludes, as a constitutional matter, state taxation of that income by the apportionment method." *Ante*, at 434–435.[1] Since that question has long since been

[1] Moreover, in the last few sentences of n. 15, *ante*, at 441, the Court emphatically repeats that it has decided nothing more than that the Due

answered in the negative, see, *e. g., Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Comm'n,* 266 U. S. 271, the Court's principal holding is unexceptional.

The Court's substantive holding rests on the assumed premises (1) that Mobil's investment income and its income from operations in Vermont are inseparable parts of one unitary business and (2) that the entire income of that unitary business has been accurately and fairly apportioned between Vermont and the rest of the world—assuming the constitutional validity of including any foreign income in the allocation formula. The Court holds—as I understand its opinion—that Mobil "offered no evidence" challenging the first premise,[2] and that it expressly disclaimed any attack on the second.[3]

Process Clause does not preclude the attribution of foreign-source income to a parent and subjecting such income to fair apportionment. It states: "Appellant, we reiterate, took this appeal on the assumption that Vermont's apportionment formula was fair. At this juncture and on these facts, we need not, and do not, decide whether combined apportionment of this type is constitutionally required. In any event, we note that appellant's latter-day advocacy of this combined approach virtually concedes that income from foreign sources, produced by the operations of subsidiaries and affiliates, as a matter of due process is attributable to the parent and amenable to fair apportionment. That is all we decide today."

[2] *Ante,* at 435. See also *ante,* at 441–442:

"We do not mean to suggest that all dividend income received by corporations operating in interstate commerce is necessarily taxable in each State where that corporation does business. Where the business activities of the dividend payor have nothing to do with the activities of the recipient in the taxing State, due process considerations might well preclude apportionability, because there would be no underlying unitary business. We need not decide, however, whether Vermont's tax statute would reach extraterritorial values in an instance of that kind. Cf. *Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S., [113,] 121. Mobil has failed to sustain its burden of proving any unrelated business activity on the part of its subsidiaries and affiliates that would raise the question of nonapportionability."

[3] "In keeping with its litigation strategy, appellant has disclaimed any

I disagree with both of these procedural holdings. I am persuaded that the record before us demonstrates either (1) that Mobil's income from its investments and its income from the sale of petroleum products in Vermont are not parts of the same "unitary business," as that concept has developed in this Court's cases; or (2) if the unitary business is defined to include both kinds of income, that Vermont's apportionment formula has been applied in an arbitrary and unconstitutional way. To explain my position, it is necessary first to recall the limited purpose that the unitary-business concept serves in this kind of case, then to identify the two quite different formulations of Mobil's "unitary business" that could arguably support Vermont's application of its apportionment formula to Mobil's investment income, and finally to show why on this record Mobil is entitled to relief using either formulation. Because I also believe that Mobil has done nothing to waive its entitlement, I conclude that the Court's substantive holding is inadequate to dispose of Mobil's contentions.

I

It is fundamental that a State has no power to impose a tax on income earned outside of the State.[4] The out-of-state

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dispute with the accuracy or fairness of Vermont's apportionment formula. See Juris. Statement 10; Brief for Appellant 11. Instead, it claims that dividends from a 'foreign source' by their very nature are not apportionable income. This election to attack the tax base rather than the formula substantially narrows the issues before us. In deciding this appeal, we do not consider whether application of Vermont's formula produced a fair attribution of appellant's dividend income to that State." *Ante*, at 434.

[4] As we said in *Moorman Mfg. Co.* v. *Bair*, 437 U. S. 267, 272–273: "The Due Process Clause places two restrictions on a State's power to tax income generated by the activities of an interstate business. First, no tax may be imposed unless there is some minimal connection between those activities and the taxing State. *National Bellas Hess, Inc.* v. *Department of Revenue*, 386 U. S. 753, 756. This requirement was plainly satisfied here. Second, the income attributed to the State for tax purposes

income of a business that operates in more than one State is subject to examination by the taxing State only because of "the impossibility of allocating specifically the profits earned by the processes conducted within its borders." *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113, 121. An apportionment formula is an imperfect, but nevertheless acceptable, method of measuring the in-state earnings of an integrated business. "It owes its existence to the fact that with respect to a business earning income through a series of transactions beginning with manufacturing in one State and ending with a sale in another, a precise—or even wholly logical—determination of the State in which any specific portion of the income was earned is impossible." *Moorman Mfg. Co.* v. *Bair*, 437 U. S. 267, 286 (POWELL, J., dissenting).

In the absence of any decision by Congress to prescribe uniform rules for allocating the income of interstate businesses to the appropriate geographical source, the Court has construed the Constitution as allowing the States wide latitude in the selection and application of apportionment formulas. See, *e. g.*, *id.*, at 278–280. Thus an acceptable formula may allocate income on the basis of the location of tangible assets,

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must be rationally related to 'values connected with the taxing State.' *Norfolk & Western R. Co.* v. *State Tax Comm'n*, 390 U. S. 317, 325."

See also Rudolph, State Taxation of Interstate Business: The Unitary Business Concept and Affiliated Corporate Groups, 25 Tax L. Rev. 171, 181 (1970) (hereinafter State Taxation): "The basic proposition can be simply stated: At least as far as nondomiciliary corporations are concerned, a state may only tax income arising from sources within the state. Or, put differently, it cannot give its income tax extraterritorial effect."

To put it still differently, if, in a particular case, use of an allocation formula has the effect of taxing income earned by an interstate entity outside the State, it could alternatively be said to have the effect of taxing the income earned by that entity inside the State at a rate higher than that used for a comparable, wholly intrastate business, a discrimination that violates the Commerce Clause.

Underwood Typewriter, supra, on the basis of gross sales, *Moorman, supra,* or—as is more typical today—by an averaging of three factors: payroll, sales, and tangible properties. See, *e. g., Butler Bros.* v. *McColgan,* 315 U. S. 501, 505. In that case the Court explained:

> "We cannot say that property, pay roll, and sales are inappropriate ingredients of an apportionment formula. We agree with the Supreme Court of California that these factors may properly be deemed to reflect 'the relative contribution of the activities in the various states to the production of the total unitary income,' so as to allocate to California its just proportion of the profits earned by appellant from this unitary business. And no showing has been made that income unconnected with the unitary business has been used in the formula." *Id.,* at 509.

The justification for using an apportionment formula to measure the in-state earnings of a unitary business is inapplicable to out-of-state earnings from a source that is unconnected to the business conducted within the State. This rather obvious proposition is recognized by the commentators [5] and is noted in our opinions.[6] If a taxpayer proves by

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[5] See, *e. g.,* Keesling & Warren, The Unitary Concept In the Allocation of Income, 12 Hastings L. J. 42, 48 (1960):

"In applying the foregoing definitions, it must be kept clearly in mind that although in particular instances all the activities of a given taxpayer may constitute a single business, in other instances the activities may be segregated or divided into a number of separate businesses. It is only where the activities within and without the state constitute inseparable parts of a single business that the classification of unitary should be used."

[6] In *Butler Bros.,* the Court pointed out that no showing had been made that "income unconnected with the unitary business has been used in the formula," 315 U. S., at 509. And in *Moorman Mfg. Co., supra,* we noted:

"'Interest, dividends, rents, and royalties (less related expenses) received in connection with business in the state, shall be allocated to the

clear and cogent evidence that the income attributed to the State by an apportionment formula is " 'out of all appropriate proportion to the business transacted . . . in that State,' " see *Moorman, supra,* at 274, the assessment cannot stand.

As Mr. Justice Holmes wrote, with respect to an Indiana property tax on the unitary business conducted by an express company:

> "It is obvious however that this notion of organic unity may be made a means of unlawfully taxing the privilege [of carrying on commerce among the States], or property outside the State, under the name of enhanced value or good will, if it is not closely confined to its true meaning. So long as it fairly may be assumed that the different parts of a line are about equal in value a division by mileage is justifiable. But it is recognized in the cases that if for instance a railroad company had terminals in one State equal in value to all the rest of the line through another, the latter State could not make use of the unity of the road to equalize the value of every mile. That would be taxing property outside of the State under a pretense." *Fargo* v. *Hart,* 193 U. S. 490, 499–500.

In this case the "notion of organic unity" of Mobil's far-flung operations is applied solely for the purpose of making a fair determination of its Vermont earnings. Mobil does not dispute Vermont's right to treat its operations in Vermont as part of a unitary business and to measure the income attibut-

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state, and where received in connection with business outside the state, shall be allocated outside of the state.' Iowa Code § 422.33 (1)(*a*) (1977). "In describing this section, the Iowa Supreme Court stated that 'certain income, the geographical source of which is easily identifiable, is allocated to the appropriate state.' 254 N. W. 2d 737, 739. Thus, for example, rental income would be attributed to the State where the property was located. And in appellant's case, this section operated to exclude its investment income from the tax base." 437 U. S., at 269, n. 1.

See also State Taxation, *supra* n. 4, at 185.

able to Vermont on the basis of the three-factor formula that compares payroll, sales and tangible properties in that State with the values of those factors in the whole of the unitary business. Mobil's position, simply stated, is that it is grossly unfair to assign any part of its investment income to Vermont on the basis of those factors. To evaluate that position, it is necessary to identify the unitary business that produces the income subject to taxation by Vermont.

II

Mobil's operations in Vermont consist solely of wholesale and retail marketing of petroleum products. Those operations are a tiny part of a huge unitary business that might be defined in at least three different ways.

First, as Mobil contends, the business might be defined to include all of its operations, but to exclude the income derived from dividends paid by legally separate entities.[7]

Second, as the Supreme Court of Vermont seems to have done,[8] the unitary business might be defined to include not only all of Mobil's operations, but also the income received from all of its investments in other corporations, regardless

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[7] Under this definition, Mobil computes its Vermont tax base for 1970 at approximately $23 million. On the basis of Vermont's three-factor formula, it computes Vermont's share of its total operating income as .146%, and it attributes the remaining 99.854% of the total to other locations. Using those figures, Mobil stated its Vermont taxable income to be approximately $30,000, which, when multiplied by 6%, the applicable tax rate, produced a total tax liability for 1970 of $1,821.67.

It would seem that in defining the unitary business in this way, it would be open to Vermont to exclude the payroll and property connected with the management of Mobil's investment income from the denominator of the apportionment factor, which would effectively raise Vermont's share of Mobil's total operating income above the .146% figure. Thus, while I believe that the amount Vermont claims Mobil earned in the State is obviously excessive, it is also probably true that Mobil's Vermont earnings for 1970 are somewhat greater than the approximately $30,000 it computed.

[8] 136 Vt. 545, 546, 394 A. 2d 1147, 1148 (1978).

of whether those other corporations are engaged in the same kind of business as Mobil,[9] and regardless of whether Mobil has a controlling interest in those corporations.[10]

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[9] Vermont has treated Mobil's dividend income from the following corporations as part of the relevant unitary business:

Baltimore Gas & Electric
Bank of New York
Business Development Corporation of N. C.
Cincinnati Gas & Electric
Connecticut Gas & Power
Canner's Steam Company, Inc.
Continental Oil and Asphalt Company
Dallas Power & Light
Dayton Power & Light
Duke Power Company
Duquesne Light Company
Florida Power Corporation
General Royalties
Gulf States Utilities Company
Hartford Electric Light Company
Houston Lighting and Power Company
Illinois Power Company
Monongahela Power Company
Northern Indiana Public Service Company
Northern State Power Company
Pacific Gas and Electric Company
Pacific Lighting Corporation
Public Service Electric & Gas Company
Rochester Gas & Electric Company
San Diego Gas & Electric Company
Southern California Edison Company
Texas Electric Service Company
Texas Power & Light Company
Union Electric Company
United Illuminating Company
West Penn Power Company
Atlantic City Electric Company
Brooklyn Union Gas Company
Detroit Edison Company
Iowa-Illinois Gas & Electric Company

[*Footnote 10 is on p. 457*]

Third, Mobil's unitary business might be defined as encompassing not only the operations of the taxpayer itself but also the operations of all affiliates that are directly or indirectly engaged in the petroleum business. The Court seems to assume that this definition justifies Vermont's assessment in this case.

Mobil does not contend that it would be unfair for Vermont to apply its three-factor formula to the first definition of its unitary business. It has no quarrel with apportionment formulas generally, not even Vermont's. But by consistently arguing that its income from dividends should be entirely excluded from the apportionment calculation, Mobil has directly challenged any *application* of Vermont's formula based on either the second or the third definition of its unitary business. I shall briefly explain why the record is sufficient to support that challenge.

III

Under the Supreme Court of Vermont's conception of the relevant unitary business—the second of the three alternative definitions just posited—there is no need to consider the character of the operations of the corporations that have paid dividends to Mobil. For Vermont automatically included all of the taxpaying entity's investment income in the tax base. Such an approach simply ignores the *raison d'être* for apportionment formulas.

Indiana & Michigan Electric Company
Philadelphia Electric Company
Public Service Company of Colorado
New York Incorporated Corporation

See App. 77–78.

[10] Mobil has only small minority interests in the corporations listed in footnote 9. It also received dividends in 1970 of over $115 million from a 10% interest in the Arabian American Oil Company. By including Mobil's dividend income, some $174 million in 1970, in the apportionable tax base, and multiplying the apportionable tax base thus comprised by .146%, Vermont computed Mobil's 1970 tax liability to be $19,078.56.

We may assume that there are cases in which it would be appropriate to regard modest amounts of investment income as an incidental part of a company's overall operations and to allocate it between the taxing State and other jurisdictions on the basis of the same factors as are used to allocate operating income.[11] But this is not such a case. Mobil's investment income is far greater than its operating income.[12]

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[11] Because there is no necessary correlation between the levels of profitability of investment income and marketing income, if more than incidental amounts of investment income are used in an averaging formula intended to measure marketing income, inaccuracy is sure to result.

[12] For the year 1970, appellant had dividend income of approximately $174 million as compared with what it calculated to be apportionable income of approximately $23 million. This case is therefore comparable to the example given by Keesling and Warren in their article, The Unitary Concept in the Allocation of Income, 12 Hastings L. J. 42, 52–53 (1960):

"*Example* 1. A company with a commercial domicile in California, where its headquarters are located, is engaged in the operation of a system of railway lines throughout the western part of the United States. Over the years it has accumulated large reserves which are invested for the most part in stocks and bonds of other companies, from which it derives substantial income in the form of dividends and interest. The investment activities are carried on in the headquarters' office where the railroad operations are managed and controlled. Some individuals devote their entire time to the investment activities, whereas others, including a number of officers, devote part of their time to both the investment activities and the railroad operations.

"Although both activities are commonly owned and managed, and there is some common use of personnel and facilities, and although some practical difficulties may be experienced in segregating the expenses of the investment activities, clearly it would be wrong to consider that the company is engaged in only one business and that the entire income of the company should be apportioned within and without the state by means of a formula. Notwithstanding the common elements, there are two distinct series of income-producing activities. This conclusion follows from the fact that the income from dividends and interest can be identified as being derived from the stocks and bonds and the activities related thereto, and not in any way attributable to the general railroad operations carried on within and without the state. Since stocks and bonds and other intangibles are considered to have a location at the commercial domicile of the

Clearly, it is improper simply to lump huge quantities of investment income that have no special connection with the taxpayer's operations in the taxing State into the tax base and to apportion it on the basis of factors that are used to allocate operating income.[13] The Court does not reject this reasoning; rather, its opinion at least partly disclaims reliance on any such theory.[14]

The Court appears to rely squarely on the third alternative approach to defining a unitary business. It assumes that Vermont's inclusion of the dividends in Mobil's apportionable tax base is predicated on the notion that the dividends represent the income of what would be the operating divisions of the Mobil Oil Corporation if Mobil and its affiliates were a single, legally integrated enterprise, rather than a corporation with numerous interests in other, separate corporations that pay it dividends. *Ante*, at 440–441.[15] Theoretically, that sort

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owner, and since all of the investment activities take place in California, the investment income should be computed separately and assigned entirely to California.

"The income from the railroad operations can likewise be identified as being derived from a distinct series of transactions, which should be considered as constituting a business separate and distinct from the investment activities. Since the railroad operations are carried on partly within and partly without the state, it is a unitary business and hence the income from the railway business as a whole should first be computed and apportioned within and without California by means of an appropriate allocation formula." (Footnote omitted.)

[13] No one could seriously maintain that if a wealthy New York resident should open a gas station in Vermont, Vermont could use his dividends as a measure of the profitability of his gas station.

[14] See n. 2, *supra*.

[15] "Had appellant chosen to operate its foreign subsidiaries as separate divisions of a legally as well as a functionally integrated enterprise, there is little doubt that the income derived from those divisions would meet due process requirements for apportionability. Cf. *General Motors Corp.* v. *Washington*, 377 U. S. 436, 441 (1964). Transforming the same income into dividends from legally separate entities works no change in the underlying economic realities of a unitary business, and accordingly it ought not to affect the apportionability of income the parent receives."

of definition is unquestionably acceptable.[16] But there are at least three objections to its use in this case.

First, notwithstanding the Court's characterization of the record, it is readily apparent that a large number of the corporations in which Mobil has small minority interests and from which it derived significant dividend income would seem neither to be engaged in the petroleum business nor to have any connection whatsoever with Mobil's marketing business in Vermont.[17] Second the record does not disclose whether the earnings of the companies that pay dividends to Mobil are even approximately equal to the amount of the dividends.[18]

But of greatest importance, the record contains no information about the payrolls, sales or property values of any of those corporations, and Vermont has made no attempt to incorporate them into the apportionment formula computa-

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[16] "It seems clear, strictly as a logical proposition, that foreign source income is no different from any other income when it comes to determining, by formulary apportionment, the appropriate share of the income of a unitary business taxable by a particular state. This does not involve state taxation of foreign source income any more than does apportionment—in the case of a multistate business—involve the taxation of income arising in other states. In both situations the total income of the unitary business simply provides the starting point for computing the in-state income taxable by the particular state. . . .

"Obviously, if the foreign source income is included in the base for apportionment, foreign property, payrolls and sales must be included in the apportionment fractions. This was recognized in *Bass* [, *Ratcliff & Gretton, Ltd.* v. *State Tax Comm'n*, 266 U. S. 271]. . . ." State Taxation, *supra* n. 4, at 205.

[17] See n. 9, *supra*.

[18] A corporation's decision as to how much of its earnings to pay out in dividends is subject to many variables. Nothing says that 100% must be passed through to the stockholders. A corporation is not a partnership. Indeed, depending on the state of the corporation's finances, dividends could conceivably even exceed 100% of the earnings. In any event, at least for those corporations in which it has only a minority interest, Mobil cannot control the percentage of their earnings that is paid out in dividends.

tions. Unless the sales, payroll and property values connected with the production of income by the payor corporations are added to the denominator of the apportionment formula, the inclusion of earnings attributable to those corporations in the apportionable tax base will inevitably cause Mobil's Vermont income to be overstated.[19]

Either Mobil's worldwide "petroleum enterprise," *ante*, at 435, is all part of one unitary business, or it is not; if it is, Vermont must evaluate the entire enterprise in a consistent manner. As it is, it has indefensibly used its apportionment methodology artificially to multiply its share of Mobil's 1970 taxable income perhaps as much as tenfold.[20] In my judgment, the record is clearly sufficient to establish the validity of Mobil's objections to what Vermont has done here.

IV

The Court does not confront these problems because it concludes that Mobil has in effect waived any objections with respect to them. Although the Court's effort to avoid constitutional issues by narrowly constricting its holding is commendable, I believe it has seriously erred in its assessment of the procedural posture of this case.

It is true that appellant has disclaimed any dispute with "Vermont's method of apportionment." Brief for Appellant 11. And, admittedly, appellant has confused its cause by variously characterizing its attack in its main brief and reply brief. But contrary to the Court's assertions, see nn. 1, 3, *supra*, appellant did not disclaim any dispute with the accuracy or fairness of the application of the formula in this case. Mobil merely disclaimed any attack on Vermont's

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[19] See n. 16, *supra*.

[20] The net result of the inclusion of the out-of-state investment income and the exclusion of the sales, payroll and property factors that produce that investment income is to increase Mobil's tax liability to Vermont for 1970 from the $1,821.67 computed by Mobil to $19,078.56.

method of apportionment generally to contrast its claims in this case with the sort of challenge to Iowa's single-factor formula that was rejected in *Moorman*.

The question whether Vermont may include investment income in the apportionable tax base should not be answered in the abstract without consideration of the other factors in the allocation formula. The apportionable tax base is but one multiplicand in the formula. Appellant's challenge to the inclusion of investment income in that component necessarily carries with it a challenge to the product.

Because of the inherent interdependence of the issues in a case of this kind, it seems clear to me that Mobil has not waived its due process objections to Vermont's assessment. Appellant's disclaimer of a *Moorman* style attack cannot fairly be interpreted as a concession that makes its entire appeal a project without a purpose. On the contrary, its argument convincingly demonstrates that the inclusion of its dividend income in the apportionable tax base has produced a palpably arbitrary measure of its Vermont income.

In sum, if Vermont is to reject Mobil's calculation of its tax liability, two courses are open to it: (1) it may exclude Mobil's investment income from the apportionable tax base and also exclude the payroll and property used in managing the investments from the denominator of the apportionment factor; or (2) it may undertake the more difficult and risky task of trying to create a consolidated income statement of Mobil's entire unitary business, properly defined. The latter alternative is permissible only if the statement fairly summarizes consolidated earnings, and takes the payroll, sales and property of the payor corporations into account. Because Vermont has employed neither of these alternatives, but has used a method that inevitably overstates Mobil's earnings in the State, I would reverse the judgment of the Supreme Court of Vermont.

UNITED STATES *v.* CREWS

CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

No. 78-777. Argued October 31, 1979—Decided March 25, 1980

Immediately after being assaulted and robbed at gunpoint, the victim notified the police and gave them a full description of her assailant. Several days later, respondent, who matched the suspect's description, was seen by the police around the scene of the crime. After an attempt to photograph him proved unsuccessful, respondent was taken into custody, ostensibly as a suspected truant from school, and was detained at police headquarters, where he was briefly questioned, photographed, and then released. Thereafter, the victim identified respondent's photograph as that of her assailant. Respondent was again taken into custody and at a court-ordered lineup was identified by the victim. Respondent was then indicted for armed robbery and other offenses. On respondent's pretrial motion to suppress all identification testimony, the trial court found that respondent's initial detention at the police station constituted an arrest without probable cause and accordingly ruled that the products of that arrest—the photographic and lineup identifications—could not be introduced at trial, but further held that the victim's ability to identify respondent in court was based upon independent recollection untainted by the intervening identifications and that therefore such testimony was admissible. At trial, the victim once more identified respondent as her assailant, and respondent was convicted of armed robbery. The District of Columbia Court of Appeals reversed, holding that the in-court identification testimony should have been excluded as a product of the violation of respondent's Fourth Amendment rights.

Held: The judgment is reversed. Pp. 470–477; 477; 477–479.

389 A. 2d 277, reversed.

MR. JUSTICE BRENNAN delivered the opinion of the Court with respect to Parts I, II-A, II-B, and II-C, concluding that:

The in-court identification need not be suppressed as the fruit of respondent's concededly unlawful arrest but is admissible because the police's knowledge of respondent's identity and the victim's independent recollections of him both antedated the unlawful arrest and were thus untainted by the constitutional violation. Pp. 470–474, 477.

(a) The victim's presence in the courtroom at respondent's trial was not the product of any police misconduct. Her identity was known long before there was any official misconduct, and her presence in court was thus not traceable to any Fourth Amendment violation. Pp. 471–472.

(b) Nor did the illegal arrest infect the victim's ability to give accurate identification testimony. At trial, she merely retrieved her mnemonic representation of the assailant formed at the time of the crime, compared it to the figure of respondent in the courtroom, and positively identified him as the robber. Pp. 472–473.

(c) Insofar as respondent challenges his own presence at trial, he cannot claim immunity from prosecution simply because his appearance in court was precipitated by an unlawful arrest. Respondent is not himself a suppressible "fruit," and the illegality of his detention cannot deprive the Government of the opportunity to prove his guilt through the introduction of evidence wholly untainted by the police misconduct. P. 474.

Mr. Justice Brennan, joined by Mr. Justice Stewart and Mr. Justice Stevens, concluded in Part II–D that the Court need not decide whether respondent's person should be considered evidence and therefore a possible "fruit" of police misconduct, since the Fourth Amendment violation in question yielded nothing of evidentiary value that the police did not already have. Respondent's unlawful arrest served merely to link together two extant ingredients in his identification. While the exclusionary rule enjoins the Government from benefiting from evidence it has unlawfully obtained, it does not reach backward to taint information that was in official hands prior to any illegality. *Davis* v. *Mississippi*, 394 U. S. 721, distinguished. Pp. 474–477.

Brennan, J., announced the Court's judgment and delivered an opinion of the Court with respect to Parts I, II–A, II–B, and II–C, in which Stewart, Blackmun, Powell, and Stevens, JJ., joined, and an opinion with respect to Part II–D, in which Stewart and Stevens, JJ., joined. Powell, J., filed an opinion concurring in part, in which Blackmun, J., joined, *post*, p. 477. White, J., filed an opinion concurring in the result, in which Burger, C. J., and Rehnquist, J., joined, *post*, p. 477. Marshall, J., took no part in the consideration or decision of the case.

Deputy Solicitor General Frey argued the cause for the United States. With him on the briefs were *Solicitor General McCree, Assistant Attorney General Heymann, Richard A. Allen,* and *Frank J. Marine.*

W. Gary Kohlman argued the cause for respondent. With him on the brief was *Silas J. Wasserstrom.**

MR. JUSTICE BRENNAN delivered the opinion of the Court, except as to Part II–D.

We are called upon to decide whether in the circumstances of this case an in-court identification of the accused by the victim of a crime should be suppressed as the fruit of the defendant's unlawful arrest.

I

On the morning of January 3, 1974, a woman was accosted and robbed at gunpoint by a young man in the women's restroom on the grounds of the Washington Monument. Her assailant, peering at her through a 4-inch crack between the wall and the door of the stall she occupied, asked for $10 and demanded that he be let into the stall. When the woman refused, the robber pointed a pistol over the top of the door and repeated his ultimatum. The victim then surrendered the money, but the youth demanded an additional $10. When the woman opened her purse and showed her assailant that she had no more cash, he gained entry to her stall and made sexual advances upon her. She tried to resist and pleaded with him to leave. He eventually did, warning his victim that he would shoot her if she did not wait at least 20 minutes before following him out of the restroom. The woman complied, and upon leaving the restroom 20 minutes later, immediately reported the incident to the police.

On January 6, two other women were assaulted and robbed in a similar episode in the same restroom. A young man threatened the women with a broken bottle, forced them to hand over $20, and then departed, again cautioning his victims not to leave for 20 minutes. The description of the

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**Frank G. Carrington, Jr., Wayne W. Schmidt, Fred E. Inbau,* and *James P. Manak* filed a brief for Americans for Effective Law Enforcement, Inc., as *amicus curiae*.

robber given to the police by these women matched that given by the first victim: All three described their assailant as a young black male, 15–18 years old, approximately 5′5″ to 5′8″ tall, slender in build, with a very dark complexion and smooth skin.

Three days later, on January 9, Officer David Rayfield of the United States Park Police observed respondent in the area of the Washington Monument concession stand and restrooms. Aware of the robberies of the previous week and noting respondent's resemblance to the police "lookout" that described the perpetrator, the officer and his partner approached respondent.[1] Respondent gave the officers his name and said that he was 16 years old. When asked why he was not in school, respondent replied that he had just "walked away from school."[2] The officers informed respondent of his likeness to the suspect's description, but there was no further questioning about those events. Respondent was allowed to leave, and the officers watched as he entered the nearby restrooms.

While respondent was still inside, Officer Rayfield saw and spoke to James Dickens, a tour guide who had previously reported having seen a young man hanging around the area of the Monument on the day of the January 3d robbery. In response to the officer's request to observe respondent as he left the restroom, Dickens tentatively identified him as the individual he had seen on the day of the robbery.

On the basis of this additional information, the officers again approached respondent and detained him. Detective Earl Ore, the investigator assigned to the robberies, was immediately summoned. Upon his arrival some 10 or 15 minutes later, Detective Ore attempted to take a Polaroid photo-

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[1] Officer Rayfield testified that his suspicions were further aroused both by respondent's presence on the almost deserted park grounds and by his apparently aimless meanderings around the restroom and concessions area.

[2] Tr. 52. References are to the transcript of the suppression hearing and trial held on April 22 and 23, 1974, in the Superior Court of the District of Columbia.

graph of respondent, but the inclement weather conditions frustrated his several efforts to produce a picture suitable for display to the robbery victims. Respondent was therefore taken into custody, ostensibly because he was a suspected truant. He was then transported to Park Police headquarters, where the police briefly questioned him, obtained the desired photograph, telephoned his school, and released him. Respondent was never formally arrested or charged with any offense, and his detention at the station lasted no more than an hour.

On the following day, January 10, the police showed the victim of the first robbery an array of eight photographs, including one of respondent. Although she had previously viewed over a hundred pictures of possible suspects without identifying any of them as her assailant, she immediately selected respondent's photograph as that of the man who had robbed her. On January 13, one of the other victims made a similar identification.[3] Respondent was again taken into custody, and at a court-ordered lineup held on January 21, he was positively identified by the two women who had made the photographic identifications.

The grand jury returned an indictment against respondent on February 22, 1974, charging him with two counts of armed robbery, two counts of robbery, one count of attempted armed robbery, and three counts of assault with a dangerous weapon.[4] Respondent filed a pretrial motion to suppress all identification testimony, contending that his detention on the truancy charges had been merely a pretext to allow the police to obtain evidence for the robbery investigation. After hearing extensive testimony from the three victims, the police officers, and respondent, the trial court found that the respondent's detention at Park Police headquarters on January 9 consti-

[3] The third victim did not review the photographic array, nor did she attend the subsequent lineup.

[4] See D. C. Code §§ 22–502, 22–2901, and 22–3202 (1973).

tuted an arrest without probable cause.[5] Accordingly, the court ruled that the products of that arrest—the photographic and lineup identifications—could not be introduced at trial. But the judge concluded that the victims' ability to identify respondent in court was based upon independent recollection untainted by the intervening identifications, and therefore held such testimony admissible. At trial, all three victims identified respondent as their assailant. On April 23, the jury convicted him of armed robbery of the first victim, but returned verdicts of not guilty on all other charges.[6] Respondent was sentenced to four years' probation under the Federal Youth Corrections Act, 18 U. S. C. § 5010 (a).

On appeal, the District of Columbia Court of Appeals, sitting en banc, reversed respondent's conviction and ordered the suppression of the first robbery victim's in-court identi-

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[5] The suppression hearing produced conflicting testimony as to the reasons for the attempt to photograph respondent. Officer Rayfield asserted that respondent was processed as a routine juvenile truant, a procedure that involves photographing the suspect and then calling his school and home to determine whether he is in fact truant. Tr. 53–54. Rayfield did acknowledge, however, that he had some suspicion that respondent was the robber described in the police description. *Id.*, at 55, 57. Similarly, Detective Ore, while maintaining that respondent was apprehended and taken down to Park Police headquarters as a suspected truant, *id.*, at 61, 63, admitted that his intent in trying to photograph him was to obtain a picture that could be shown to the complaining witnesses. *Id.*, at 59.

The Government does not now attempt to justify respondent's detention on the truancy charge, nor did it raise that argument in the court below. The Court of Appeals found that the procedures followed in respondent's case did not conform to the typical truancy practices described by the police and that the officers never even superficially pursued the truancy matter. By the same token, the court expressly disavowed the existence of a "sham" or "pretext" arrest, and it analyzed respondent's apprehension as a traditional arrest for armed robbery and assault without probable cause. 389 A. 2d 277, 299–300, n. 32 (DC 1978).

[6] Because respondent was acquitted of all charges in connection with the robberies of January 6, the only issue raised on his appeal was the admissibility of the first robbery victim's in-court identification.

fication.[7] 389 A. 2d 277 (1978). The court viewed its decision to be a wholly conventional application of the familiar "fruit of the poisonous tree" doctrine. See *Wong Sun* v. *United States*, 371 U. S. 471 (1963); *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385 (1920). After upholding the trial court's finding that respondent was detained without probable cause—a determination that is not challenged in this Court[8]—the Court of Appeals turned to consideration of what evidentiary consequences ought to flow from that Fourth Amendment violation. In deciding whether the in-court identification should have been suppressed, the court observed that the analysis must focus on whether the evidence was obtained by official "exploitation" of the "primary illegality" within the meaning of *Wong Sun, supra*,[9] and that the principal issue was whether the unlawful police behavior bore a causal relationship to the acquisition of the challenged testimony. The court answered that question in the affirmative, reasoning that but for respondent's unlawful arrest, the police would not have obtained the photograph that led to his subsequent identification by the complaining witnesses and, ultimately, prosecution of the case.[10] Satisfied that the

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[7] On February 16, 1977, a division of the Court of Appeals originally affirmed respondent's conviction, 369 A. 2d 1063. Three months later, however, the full court granted respondent's motion for rehearing and vacated its earlier judgment. Record 356.

[8] See Brief for United States 5, n. 4.

[9] "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' Maguire, Evidence of Guilt, 221 (1959)." *Wong Sun* v. *United States*, 371 U. S., at 487–488.

[10] "[T]he unlawful arrest produced photographs which were shown to the complaining witnesses who, as a result, identified [respondent]; this resulted in his reapprehension, which yielded a court-ordered lineup iden-

in-court identification was thus at least indirectly the product of official misconduct, the court then considered whether any of three commonly advanced exceptions to the exclusionary rule—the "independent source," "inevitable discovery," or "attentuation" doctrines [11]—nonetheless justified its admission. Finding these exceptions inapplicable, the Court of Appeals concluded that the in-court identification testimony should have been excluded as a product of the violation of respondent's Fourth Amendment rights. We granted certiorari. 440 U. S. 907 (1979). We reverse.

II

Wong Sun, supra, articulated the guiding principle for determining whether evidence derivatively obtained from a violation of the Fourth Amendment is admissible against the accused at trial: "The exclusionary prohibition extends as well to the indirect as the direct products of such invasions." 371 U. S., at 484. See *Silverthorne Lumber Co.* v. *United States, supra; Weeks* v. *United States,* 232 U. S. 383 (1914). As subsequent cases have confirmed, the exclusionary sanction applies to any "fruits" of a constitutional violation—whether such evidence be tangible, physical material actually seized in an illegal search,[12] items observed or words overheard in the course of the unlawful activity,[13] or confessions or statements of the accused obtained during an illegal arrest and detention.[14]

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tification and, eventually, in-court identification testimony during prosecution of the case." 389 A. 2d, at 289.

[11] See *Nardone* v. *United States,* 308 U. S. 338, 341 (1939) (attenuation); *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, 392 (1920) (independent source); *United States ex rel. Owens* v. *Twomey,* 508 F. 2d 858, 865 (CA7 1974) (inevitable discovery).

[12] *E. g., Whiteley* v. *Warden,* 401 U. S. 560 (1971); *Sibron* v. *New York,* 392 U. S. 40 (1968); *Beck* v. *Ohio,* 379 U. S. 89 (1964).

[13] *E. g., United States* v. *Giordano,* 416 U. S. 505 (1974); see *Silverman* v. *United States,* 365 U. S. 505 (1961); *McGinnis* v. *United States,* 227 F. 2d 598 (CA1 1955).

[14] *E. g., Dunaway* v. *New York,* 442 U. S. 200 (1979); *Brown* v. *Illinois,* 422 U. S. 590 (1975).

In the typical "fruit of the poisonous tree" case, however, the challenged evidence was acquired by the police *after* some initial Fourth Amendment violation, and the question before the court is whether the chain of causation proceeding from the unlawful conduct has become so attenuated or has been interrupted by some intervening circumstance so as to remove the "taint" imposed upon that evidence by the original illegality. Thus most cases begin with the premise that the challenged evidence is in some sense the product of illegal governmental activity. It is the Court of Appeals' application of that premise to the facts of this case that we find erroneous.

A victim's in-court identification of the accused has three distinct elements. First, the victim is present at trial to testify as to what transpired between her and the offender, and to identify the defendant as the culprit. Second, the victim possesses knowledge of and the ability to reconstruct the prior criminal occurrence and to identify the defendant from her observations of him at the time of the crime. And third, the defendant is also physically present in the courtroom, so that the victim can observe him and compare his appearance to that of the offender. In the present case, it is our conclusion that none of these three elements "has been come at by exploitation" of the violation of the defendant's Fourth Amendment rights. *Wong Sun, supra,* at 488.

A

In this case, the robbery victim's presence in the courtroom at respondent's trial was surely not the product of any police misconduct. She had notified the authorities immediately after the attack and had given them a full description of her assailant. The very next day, she went to the police station to view photographs of possible suspects, and she voluntarily assisted the police in their investigation at all times. Thus this is not a case in which the witness' identity was discovered or her cooperation secured only as a result of an unlawful

search or arrest of the accused.[15] Here the victim's identity was known long before there was any official misconduct, and her presence in court is thus not traceable to any Fourth Amendment violation.

B

Nor did the illegal arrest infect the victim's ability to give accurate identification testimony. Based upon her observations at the time of the robbery, the victim constructed a mental image of her assailant. At trial, she retrieved this mnemonic representation, compared it to the figure of the defendant, and positively identified him as the robber.[16] No part of this process was affected by respondent's illegal arrest. In the language of the "time-worn metaphor" of the poisonous tree, *Harrison* v. *United States*, 392 U. S. 219, 222 (1968), the toxin in this case was injected only after the evidentiary bud had blossomed; the fruit served at trial was not poisoned.

This is not to say that the intervening photographic and lineup identifications—both of which are conceded to be suppressible fruits of the Fourth Amendment violation—could not under some circumstances affect the reliability of the in-court identification and render it inadmissible as well. Indeed, given the vagaries of human memory and the inherent suggestibility of many identification procedures,[17] just

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[15] See generally Ruffin, Out on a Limb of the Poisonous Tree: The Tainted Witness, 15 UCLA L. Rev. 32 (1967).

[16] At oral argument, the Government compared the witness' mental image to an undeveloped photograph of the robber that is given to the police immediately after the crime, but which becomes visible only at the trial. Tr. of Oral Arg. 11–12. Although this analogy may not comport precisely with current psychological theories of perception, see, *e. g.*, Buckout, Eyewitness Testimony, Scientific American 23 (Dec. 1974), it is apt for purposes of analysis.

[17] See, *e. g.*, P. Wall, Eye-Witness Identification in Criminal Cases 40–64 (1965); Note, Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification, 29 Stan. L. Rev. 969, 974–989 (1977).

the opposite may be true. But in the present case the trial court expressly found that the witness' courtroom identification rested on an independent recollection of her initial encounter with the assailant, uninfluenced by the pretrial identifications, and this determination finds ample support in the record.[18] In short, the victim's capacity to identify her assailant in court neither resulted from nor was biased by the unlawful police conduct committed long after she had developed that capacity.[19]

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[18] *United States* v. *Wade*, 388 U. S. 218 (1967), enumerated several factors for consideration in applying the "independent origins" test. *Id.*, at 241. Cf. *Manson* v. *Brathwaite*, 432 U. S. 98 (1977); *Neil* v. *Biggers*, 409 U. S. 188 (1972). We attach particular significance to the following circumstances which support the trial court's determination in this case: the victim viewed her assailant at close range for a period of 5–10 minutes under excellent lighting conditions and with no distractions, Tr. 4, 7, 111; respondent closely matched the description given by the victim immediately after the robbery, *id.*, at 52, 59; the victim failed to identify anyone other than respondent, *id.*, at 8, but twice selected respondent without hesitation in nonsuggestive pretrial identification procedures, *id.*, at 9–11; and only a week had passed between the victim's initial observation of respondent and her first identification of him, *id.*, at 8–9.

Our reliance on the fact that the witness twice identified respondent in out-of-court confrontations is not intended to assign any independent evidentiary value to those identifications for to do so would undermine the exclusionary rule's objectives in denying the Government the benefit of any evidence wrongfully obtained. Rather, the accurate pretrial identifications assume significance only to the extent that they indicate that the witness' ability to identify respondent antedated any police misconduct, and hence that her in-court identification had an "independent source."

[19] Respondent contends that the "independent source" test of *United States* v. *Wade*, *supra*, and *Stovall* v. *Denno*, 388 U. S. 293 (1967), although derived from an identical formulation in *Wong Sun*, see 388 U. S., at 241, seeks only to determine whether the in-court identification is sufficiently reliable to satisfy due process, and is thus inapplicable in the context of this Fourth Amendment violation. We agree that a satisfactory resolution of the reliability issue does not provide a complete answer to the considerations underlying *Wong Sun*, but note only that in the present case both concerns are met.

C

Insofar as respondent challenges his own presence at trial, he cannot claim immunity from prosecution simply because his appearance in court was precipitated by an unlawful arrest. An illegal arrest, without more, has never been viewed as a bar to subsequent prosecution, nor as a defense to a valid conviction. *Gerstein* v. *Pugh*, 420 U. S. 103, 119 (1975); *Frisbie* v. *Collins*, 342 U. S. 519 (1952); *Ker* v. *Illinois*, 119 U. S. 436 (1886).[20] The exclusionary principle of *Wong Sun* and *Silverthorne Lumber Co.* delimits what proof the Government may offer against the accused at trial, closing the courtroom door to evidence secured by official lawlessness. Respondent is not himself a suppressible "fruit," and the illegality of his detention cannot deprive the Government of the opportunity to prove his guilt through the introduction of evidence wholly untainted by the police misconduct.

D*

Respondent argues, however, that in one respect his corpus is itself a species of "evidence." When the victim singles out respondent and declares, "That's the man who robbed me," his physiognomy becomes something of evidentary value, much like a photograph showing respondent at the scene of the

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[20] Cf. *United States* v. *Blue*, 384 U. S. 251, 255 (1966):

"Our numerous precedents ordering the exclusion of such illegally obtained evidence assume implicitly that the remedy does not extend to barring the prosecution altogether. So drastic a step might advance marginally some of the ends served by exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book."

In some cases, of course, prosecution may effectively be foreclosed by the absence of the challenged evidence. But this contemplated consequence is the product of the exclusion of specific evidence tainted by the Fourth Amendment violation and is not the result of a complete bar to prosecution.

*This part is joined only by MR. JUSTICE STEWART and MR. JUSTICE STEVENS.

crime.[21] And, as with the introduction of such a photograph, he contends that the crucial inquiry for Fourth Amendment purposes is whether that evidence has become available only as a result of official misconduct. We read the Court of Appeals' opinion as essentially adopting this analysis to support its suppression order. See 389 A. 2d, at 285–287.

We need not decide whether respondent's person should be considered evidence, and therefore a possible "fruit" of police misconduct. For in this case the record plainly discloses that prior to his illegal arrest, the police both knew respondent's identity and had some basis to suspect his involvement in the very crimes with which he was charged. Moreover, before they approached respondent, the police had already obtained access to the "evidence" that implicated him in the robberies, *i. e.*, the mnemonic representations of the criminal retained by the victims and related to the police in the form of their agreement upon his description. In short, the Fourth Amendment violation in this case yielded nothing of evidentiary value that the police did not already have in their grasp.[22] Rather, respondent's unlawful arrest served merely to link together two extant ingredients in his identification. The exclusionary rule enjoins the Government from benefiting from evidence it has unlawfully obtained; it does not reach backward to taint information that was in official hands prior to any illegality.

Accordingly, this case is very different from one like *Davis* v. *Mississippi*, 394 U. S. 721 (1969), in which the defendant's identity and connection to the illicit activity were only first discovered through an illegal arrest or search. In that case, the defendant's fingerprints were ordered suppressed as the

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[21] Cf. *Stevenson* v. *Mathews*, 529 F. 2d 61, 63 (CA7 1976).

[22] Thus we are not called upon in this case to hypothesize about whether routine investigatory procedures would eventually have led the police to discover respondent's culpability. His involvement in the robberies was already suspected, and no new evidence was acquired through the violation of his Fourth Amendment rights.

fruits of an unlawful detention. A woman had been raped in her home, and during the next 10 days, the local police rounded up scores of black youths, randomly stopping, interrogating, and fingerprinting them. Davis' prints were discovered to match a set found at the scene of the crime, and on that basis he was arrested and convicted. Had it not been for Davis' illegal detention, however, his prints would not have been obtained and he would never have become a suspect. Here, in contrast, the robbery investigation had already focused on respondent, and the police had independent reasonable grounds to suspect his culpability.

We find *Bynum* v. *United States*, 104 U. S. App. D. C. 368, 262 F. 2d 465 (1958), cited with approval in *Davis*, *supra*, at 724, helpful in our analysis as well. In *Bynum*, the defendant voluntarily came down to the police station to look for his brother, who had been arrested earlier that day while driving an auto sought in connection with a robbery. After telling one of the officers that he owned the car, Bynum was arrested and fingerprinted. Those prints were later found to match a set at the scene of the robbery, and Bynum was convicted based in part on that evidence. The Court of Appeals held that the police lacked probable cause at the time of Bynum's arrest, and it ordered the prints suppressed as "something of evidentiary value which the public authorities have caused an arrested person to yield to them during illegal detention." 104 U. S. App. D. C., at 370, 262 F. 2d, at 467. As this Court noted in *Davis*, however, 394 U. S., at 725–726, n. 4, Bynum was subsequently reindicted for the same offense, and the Government on retrial introduced an older set of his fingerprints, taken from an FBI file, that were in no way connected with his unlawful arrest. The Court of Appeals affirmed that conviction, holding that the fingerprint identification made on the basis of information already in the FBI's possession was not tainted by the subsequent illegality and was therefore admissible. *Bynum* v. *United States*, 107 U. S. App. D. C. 109, 274 F. 2d 767 (1960).

The parallels between *Bynum* and this case are apparent: The pretrial identification obtained through use of the photograph taken during respondent's illegal detention cannot be introduced; but the in-court identification is admissible, even if respondent's argument be accepted, because the police's knowledge of respondent's identity and the victim's independent recollections of him both antedated the unlawful arrest and were thus untainted by the constitutional violation. The judgment of the Court of Appeals is accordingly

Reversed.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

MR. JUSTICE POWELL, with whom MR. JUSTICE BLACKMUN joins, concurring in part.

I join the Court's opinion except for Part II–D. I would reject explicitly, rather than appear to leave open, the claim that a defendant's face can be a suppressible fruit of an illegal arrest. I agree with MR. JUSTICE WHITE's view, *post*, at 477–478, that this claim is foreclosed by the rationale of *Frisbie* v. *Collins*, 342 U. S. 519 (1952), and *Ker* v. *Illinois*, 119 U. S. 436 (1886). Those cases establish that a defendant properly may be brought into court for trial even though he was arrested illegally. Thus, the only evidence at issue in this case is the robbery victims' identification testimony. I agree with the Court that the victims' testimony is not tainted.

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, concurring in the result.

The Court today holds that an in-court identification of the accused by the victim of a crime should not be suppressed as the fruit of the defendant's unlawful arrest. Although we are unanimous in reaching this result, MR. JUSTICE BRENNAN's opinion reserves the question whether a defendant's face can ever be considered evidence suppressible as the "fruit" of an

illegal arrest. Because I consider this question to be controlled by the rationale of *Frisbie* v. *Collins*, 342 U. S. 519 (1952), I write separately.

Respondent Crews was convicted after an in-court identification by the victim whose own presence at trial, recollection, and identification the Court holds were untainted by prior illegal conduct by the police. Under these circumstances the manner in which the defendant's presence at trial was obtained is irrelevant to the admissibility of the in-court identification. We held in *Frisbie* v. *Collins, supra,* at 522, "that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction" unlawfully. A holding that a defendant's face can be considered evidence suppressible for no reason other than that the defendant's presence in the courtroom is the fruit of an illegal arrest would be tantamount to holding that an illegal arrest effectively insulates one from conviction for any crime where an in-court identification is essential. Such a holding would be inconsistent with the underlying rationale of *Frisbie* from which we have not retreated. *Stone* v. *Powell,* 428 U. S. 465, 485 (1976); *Gerstein* v. *Pugh,* 420 U. S. 103, 119 (1975).

Although the presence of Crews in the courtroom would not have occurred but for his arrest without probable cause, the in-court identification is held admissible. As I understand Part II–D of MR. JUSTICE BRENNAN's opinion, however, the in-court identification might have been inadmissible had there not been some reason to suspect Crews of the offense at the time of his illegal arrest. Such a rule excluding an otherwise untainted, in-court identification is wholly unsupported by our previous decisions. Nor do I perceive a constitutional basis for dispensing with probable cause but requiring reasonable suspicion.

Assume that a person is arrested for crime X and that answers to questions put to him without *Miranda* warnings implicate him in crime Y for which he is later tried. The

victim of crime Y identifies him in the courtroom; the identification has an independent, untainted basis. I would not suppress such an identification on the grounds that the police had no reason to suspect the defendant of crime Y prior to their illegal questioning and that it is only because of that questioning that he is present in the courtroom for trial. I would reach the same result whether or not his arrest for crime X was without probable cause or reasonable suspicion.

I agree that this case is very different from *Davis* v. *Mississippi*, 394 U. S. 721 (1969), but not for the reason given in my Brother BRENNAN's opinion. In *Davis* we held that fingerprints obtained from a defendant during an illegal detention had to be suppressed because they were the direct product of the unlawful arrest. Here, however, the evidence ordered suppressed was eyewitness testimony of the victim which was not the product of respondent's arrest. The fact that respondent was present at trial and therefore capable of being identified by the victim is merely the inevitable result of the trial being held, which is permissible under *Frisbie*, despite respondent's unlawful arrest. Suppression would be required in the *Davis* situation, but not here, regardless of whether the respective arrests were made without any reasonable suspicion or with something just short of probable cause.

Because MR. JUSTICE BRENNAN leaves open the question whether a defendant's face can be considered a suppressible fruit of an illegal arrest, a question I think has already been sufficiently answered in *Frisbie*, I cannot join his opinion, although I concur in the result.* I note that a majority of the Court agrees that the rationale of *Frisbie* forecloses the claim that respondent's face can be suppressible as a fruit of the unlawful arrest.

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*For the same reason I cannot join the analysis at the beginning of Part II of the Court's opinion because it implies that a courtroom identification would be inadmissible if the defendant's physical presence had resulted from exploitation of a violation of the defendant's Fourth Amendment rights.

VITEK, CORRECTIONAL DIRECTOR, ET AL. v. JONES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

No. 78-1155. Argued December 3, 1979—Decided March 25, 1980

Appellee, a convicted felon, was transferred from state prison to a mental hospital pursuant to a Nebraska statute (§ 83-180 (1)) which provides that if a designated physician or psychologist finds that a prisoner "suffers from a mental disease or defect" that "cannot be given proper treatment" in prison, the Director of Correctional Services may transfer the prisoner to a mental hospital. In an action challenging the constitutionality of § 83-180 (1) on procedural due process grounds, the District Court declared the statute unconstitutional as applied to appellee, holding that transferring him to the mental hospital without adequate notice and opportunity for a hearing deprived him of liberty without due process of law contrary to the Fourteenth Amendment, and that such transfers must be accompanied by adequate notice, an adversary hearing before an independent decisionmaker, a written statement by the factfinder of the evidence relied on and the reasons for the decision, and the availability of appointed counsel for indigent prisoners. The court permanently enjoined the State from transferring appellee (who meanwhile had been transferred back to prison) to the mental hospital without following the prescribed procedures. Subsequently, appellee was paroled on condition that he accept mental treatment, but he violated that parole and was returned to prison. Relying on appellee's history of mental illness and the State's representation that he was a serious threat to his own and others' safety, the District Court held that the parole and revocation thereof did not render the case moot because appellee was still subject to being transferred to the mental hospital.

Held: The judgment is affirmed as modified. Pp. 486-497; 497-500.

Affirmed as modified.

MR. JUSTICE WHITE delivered the opinion of the Court with respect to Parts I, II, III, IV-A, and V, concluding that:

1. The District Court properly found that the case is not moot. The reality of the controversy between appellee and the State has not been lessened by the cancellation of his parole and his return to prison, where he is protected from further transfer by the District Court's judgment

and injunction. Under these circumstances, it is not "absolutely clear," absent the injunction, that the State's alleged wrongful behavior could not reasonably be expected to recur. Pp. 486–487.

2. The involuntary transfer of appellee to a mental hospital implicates a liberty interest that is protected by the Due Process Clause of the Fourteenth Amendment. Pp. 487–494.

(a) The District Court properly identified a liberty interest rooted in § 83–180 (1), under which a prisoner could reasonably expect that he would not be transferred to a mental hospital without a finding that he was suffering from a mental illness for which he could not secure adequate treatment in prison. The State's reliance on the opinion of a designated physician or psychologist for determining whether the conditions warranting transfer exist neither removes the prisoner's interest from due process protection nor answers the question of what process is due under the Constitution. Pp. 488–491.

(b) The District Court was also correct in holding that, independently of § 83–180 (1), the transfer of a prisoner from a prison to a mental hospital must be accompanied by appropriate procedural protections. Involuntary commitment to a mental hospital is not within the range of conditions of confinement to which a prison sentence subjects an individual. While a conviction and sentence extinguish an individual's right to freedom from confinement for the term of his sentence, they do not authorize the State to classify him as mentally ill and to subject him to involuntary psychiatric treatment without affording him additional due process protections. Here, the stigmatizing consequences of a transfer to a mental hospital for involuntary psychiatric treatment, coupled with the subjection of the prisoner to mandatory behavior modification as a treatment for mental illness, constitute the kind of deprivations of liberty that requires procedural protections. Pp. 491–494.

3. The District Court properly identified and weighed the relevant factors in arriving at its judgment. Pp. 495–496.

(a) Although the State's interest in segregating and treating mentally ill patients is strong, the prisoner's interest in not being arbitrarily classified as mentally ill and subjected to unwelcome treatment is also powerful, and the risk of error in making the determinations required by § 83–180 (1) is substantial enough to warrant appropriate procedural safeguards against error. P. 495.

(b) The medical nature of the inquiry as to whether or not to transfer a prisoner to a mental hospital does not justify dispensing with due process requirements. P. 495.

(c) Because prisoners facing involuntary transfer to a mental hospital are threatened with immediate deprivation of liberty interests and because of the risk of mistaken transfer, the District Court properly determined that certain procedural protections, including notice and an adversary hearing, were appropriate in the circumstances present in this case. Pp. 495–496.

MR. JUSTICE WHITE, joined by MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE STEVENS, concluded in Part IV–B that it is appropriate that counsel be provided to indigent prisoners whom the State seeks to treat as mentally ill. Such a prisoner has an even greater need for legal assistance than does a prisoner who is illiterate and uneducated, because he is more likely to be unable to understand or exercise his rights. Pp. 496–497.

MR. JUSTICE POWELL concluded that although the State is free to appoint a licensed attorney to represent a prisoner who is threatened with involuntary transfer to a mental hospital, it is not constitutionally required to do so, and that due process will be satisfied so long as such a prisoner is provided qualified and independent assistance. Pp. 497–500.

WHITE, J., announced the Court's judgment and delivered an opinion of the Court with respect to Parts I, II, III, IV–A, and V, in which BRENNAN, MARSHALL, POWELL, and STEVENS, JJ., joined, and an opinion with respect to Part IV–B , in which BRENNAN, MARSHALL, and STEVENS, JJ., joined. POWELL, J., filed an opinion concurring in part, *post*, p. 497. STEWART, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 500. BLACKMUN, J., filed a dissenting opinion, *post*, p. 501.

Melvin Kent Kammerlohr, Assistant Attorney General of Nebraska, argued the cause for appellants. With him on the brief was *Paul L. Douglas*, Attorney General.

Thomas A. Wurtz, by appointment of the Court, 441 U. S. 960, argued the cause and filed a brief for appellee.

MR. JUSTICE WHITE delivered the opinion of the Court, except as to Part IV–B.

The question in this case is whether the Due Process Clause of the Fourteenth Amendment entitles a prisoner convicted and incarcerated in the State of Nebraska to certain proce-

dural protections, including notice, an adversary hearing, and provision of counsel, before he is transferred involuntarily to a state mental hospital for treatment of a mental disease or defect.

I

Nebraska Rev. Stat. § 83–176 (2) (1976) authorizes the Director of Correctional Services to designate any available, suitable, and appropriate residence facility or institution as a place of confinement for any state prisoner and to transfer a prisoner from one place of confinement to another. Section 83–180 (1), however, provides that when a designated physician or psychologist finds that a prisoner "suffers from a mental disease or defect" and "cannot be given proper treatment in that facility," the director may transfer him for examination, study, and treatment to another institution within or without the Department of Corrections.[1] Any prisoner so transferred to a mental hospital is to be returned to the Department if, prior to the expiration of his sentence, treatment is no longer necessary. Upon expiration of sentence, if

[1] Section 83–180 (1) provides:

"When a physician designated by the Director of Correctional Services finds that a person committed to the department suffers from a physical disease or defect, or when a physician or psychologist designated by the director finds that a person committed to the department suffers from a mental disease or defect, the chief executive officer may order such person to be segregated from other persons in the facility. If the physician or psychologist is of the opinion that the person cannot be given proper treatment in that facility, the director may arrange for his transfer for examination, study, and treatment to any medical-correctional facility, or to another institution in the Department of Public Institutions where proper treatment is available. A person who is so transferred shall remain subject to the jurisdiction and custody of the Department of Correctional Services and shall be returned to the department when, prior to the expiration of his sentence, treatment in such facility is no longer necessary."

the State desires to retain the prisoner in a mental hospital, civil commitment proceedings must be promptly commenced. § 83–180 (3).[2]

On May 31, 1974, Jones was convicted of robbery and sentenced to a term of three to nine years in state prison. He was transferred to the penitentiary hospital in January 1975. Two days later he was placed in solitary confinement, where he set his mattress on fire, burning himself severely. He was treated in the burn unit of a private hospital. Upon his release and based on findings required by § 83–180 that he was suffering from a mental illness or defect and could not receive proper treatment in the penal complex, he was transferred to the security unit of the Lincoln Regional Center, a state mental hospital under the jurisdiction of the Department of Public Institutions.

Jones then intervened in this case, which was brought by other prisoners against the appropriate state officials (the State) challenging on procedural due process grounds the adequacy of the procedures by which the Nebraska statutes permit transfers from the prison complex to a mental hospital.[3] On August 17, 1976, a three-judge District Court, convened

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[2] Section 83–180 (3) provides:

"When two psychiatrists designated by the Director of Correctional Services find that a person about to be released or discharged from any facility suffers from a mental disease or defect of such a nature that his release or discharge will endanger the public safety or the safety of the offender, the director shall transfer him to, or if he has already been transferred, permit him to remain in, a psychiatric facility in the Department of Public Institutions and shall promptly commence proceedings applicable to the civil commitment and detention of persons suffering from such disease or defect."

[3] After initially certifying this case as a class action, the District Court decertified the class, but permitted intervention by three individual plaintiffs, including Jones. The District Court subsequently dismissed the claims of all plaintiffs except Jones, who is the sole appellee to this Court.

pursuant to 28 U. S. C. § 2281 (1970 ed.),[4] denied the State's motion for summary judgment and trial ensued. On September 12, 1977, the District Court declared § 83–180 unconstitutional as applied to Jones, holding that transferring Jones to a mental hospital without adequate notice and opportunity for a hearing deprived him of liberty without due process of law contrary to the Fourteenth Amendment and that such transfers must be accompanied by adequate notice, an adversary hearing before an independent decisionmaker, a written statement by the factfinder of the evidence relied on and the reasons for the decision, and the availability of appointed counsel for indigent prisoners. *Miller* v. *Vitek*, 437 F. Supp. 569 (Neb. 1977). Counsel was requested to suggest appropriate relief.

In response to this request, Jones revealed that on May 27, 1977, prior to the District Court's decision, he had been transferred from Lincoln Regional Center to the psychiatric ward of the penal complex but prayed for an injunction against further transfer to Lincoln Regional Center. The State conceded that an injunction should enter if the District Court was firm in its belief that the section was unconstitutional. The District Court then entered its judgment declaring § 83–180 unconstitutional as applied to Jones and permanently enjoining the State from transferring Jones to Lincoln Regional Center without following the procedures prescribed in its judgment.

We noted probable jurisdiction 434 U. S. 1060 (1978). Meanwhile, Jones had been paroled, but only on condition that he accept psychiatric treatment at a Veterans' Administration hospital. We vacated the judgment of the District Court and remanded the case to that court for consideration

[4] The statute authorizing the convening of a three-judge court, 28 U. S. C. § 2281 (1970 ed.), was repealed by Pub. L. 94–381, 90 Stat. 1119, effective for actions commenced after August 12, 1976. Because the instant action was filed on November 12, 1975, the three-judge court was properly convened.

of the question of mootness. *Vitek* v. *Jones*, 436 U. S. 407 (1978). Both the State and Jones at this juncture insisted that the case was not moot. The State represented that because "Jones' history of mental illness indicates a serious threat to his own safety, as well as to that of others . . . there is a very real expectation" that he would again be transferred if the injunction was removed. App. to Juris. Statement 24. Jones insisted that he was receiving treatment for mental illness against his will and that he was continuing to suffer from the stigmatizing consequences of the previous determination that he was mentally ill. On these representations, the District Court found that the case was not moot because Jones "is subject to and is in fact under threat of being transferred to the state mental hospital under § 83–180." *Ibid.* The District Court reinstated its original judgment. We postponed consideration of jurisdiction to a hearing on the merits. 441 U. S. 922 (1979). Meanwhile, Jones had violated his parole, his parole had been revoked, and he had been reincarcerated in the penal complex.

II

We agree with the parties in this case that a live controversy exists and that the case is not moot. Jones was declared to be mentally ill pursuant to § 83–180 and was transferred to a mental hospital and treated. He was later paroled but only on condition that he accept mental treatment. He violated that parole and has been returned to the penal complex. On our remand to consider mootness, the District Court, relying on Jones' history of mental illness and the State's representation that he represented a serious threat to his own safety as well as to that of others, found that Jones "is in fact under threat of being transferred to the state mental hospital under § 83–180." We see no reason to disagree with the District Court's assessment at that time, and the reality of the controversy between Jones and the State has not been lessened by the cancellation of his parole and his return to the state prison,

where he is protected from further transfer by the outstanding judgment and injunction of the District Court. The State, believing that the case is not moot, wants the injunction removed by the reversal of the District Court's judgment. Jones, on the other hand, insists that the judgment of the District Court be sustained and the protection against transfer to a mental hospital, except in accordance with the specified procedures, be retained.

Against this background, it is not "absolutely clear," absent the injunction, "that the allegedly wrongful behavior could not reasonably be expected to recur." *United States* v. *Phosphate Export Assn.,* 393 U. S. 199, 203 (1968); *County of Los Angeles* v. *Davis,* 440 U. S. 625, 631 (1979); *United States* v. *W. T. Grant Co.,* 345 U. S. 629, 633 (1953).[5] Furthermore, as the matter now stands, the § 83–180 determination that Jones suffered from mental illness has been declared infirm by the District Court. Vacating the District Court's judgment as moot would not only vacate the injunction against transfer but also the declaration that the procedures employed by the State afforded an inadequate basis for declaring Jones to be mentally ill. In the posture of the case, it is not moot.

III

On the merits, the threshold question in this case is whether the involuntary transfer of a Nebraska state prisoner to a mental hospital implicates a liberty interest that is protected by the Due Process Clause. The District Court held that it did and offered two related reasons for its conclusion. The District Court first identified a liberty interest rooted in

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[5] Because Jones has not completed serving his sentence, he remains subject to the transfer procedures he challenges, unlike the plaintiff in *Weinstein* v. *Bradford,* 423 U. S. 147 (1975), where a challenge to parole procedures was held to be moot because plaintiff had completed his sentence and there was no longer any likelihood whatsoever that he would again be subjected to the parole procedures he challenged.

§ 83-180 (1), under which a prisoner could reasonably expect that he would not be transferred to a mental hospital without a finding that he was suffering from a mental illness for which he could not secure adequate treatment in the correctional facility. Second, the District Court was convinced that characterizing Jones as a mentally ill patient and transferring him to the Lincoln Regional Center had "some stigmatizing" consequences which, together with the mandatory behavior modification treatment to which Jones would be subject at the Lincoln Center, constituted a major change in the conditions of confinement amounting to a "grievous loss" that should not be imposed without the opportunity for notice and an adequate hearing. We agree with the District Court in both respects.

A

We have repeatedly held that state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment. There is no "constitutional or inherent right" to parole, *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1, 7 (1979), but once a State grants a prisoner the conditional liberty properly dependent on the observance of special parole restrictions, due process protections attach to the decision to revoke parole. *Morrissey* v. *Brewer*, 408 U. S. 471 (1972). The same is true of the revocation of probation. *Gagnon* v. *Scarpelli*, 411 U. S. 778 (1973). In *Wolff* v. *McDonnell*, 418 U. S. 539 (1974), we held that a state-created right to good-time credits, which could be forfeited only for serious misbehavior, constituted a liberty interest protected by the Due Process Clause. We also noted that the same reasoning could justify extension of due process protections to a decision to impose "solitary" confinement because "[it] represents a major change in the conditions of confinement and is normally imposed only when it is claimed and proved that there has been a major act of misconduct." *Id.*, at 571-572, n. 19. Once a State has

granted prisoners a liberty interest, we held that due process protections are necessary "to insure that the state-created right is not arbitrarily abrogated." *Id.*, at 557.

In *Meachum* v. *Fano*, 427 U. S. 215 (1976), and *Montanye* v. *Haymes*, 427 U. S. 236 (1976), we held that the transfer of a prisoner from one prison to another does not infringe a protected liberty interest. But in those cases transfers were discretionary with the prison authorities, and in neither case did the prisoner possess any right or justifiable expectation that he would not be transferred except for misbehavior or upon the occurrence of other specified events. Hence, "the predicate for invoking the protection of the Fourteenth Amendment as construed and applied in *Wolff* v. *McDonnell* [was] totally nonexistent." *Meachum* v. *Fano, supra,* at 226–227.

Following *Meachum* v. *Fano* and *Montanye* v. *Haymes*, we continued to recognize that state statutes may grant prisoners liberty interests that invoke due process protections when prisoners are transferred to solitary confinement for disciplinary or administrative reasons. *Enomoto* v. *Wright*, 434 U. S. 1052 (1978), summarily aff'g 462 F. Supp. 397 (ND Cal. 1976). Similarly, in *Greenholtz* v. *Nebraska Penal Inmates, supra,* we held that state law granted petitioners a sufficient expectancy of parole to entitle them to some measure of constitutional protection with respect to parole decisions.

We think the District Court properly understood and applied these decisions. Section 83–180 (1) provides that if a designated physician finds that a prisoner "suffers from a mental disease or defect" that "cannot be given proper treatment" in prison, the Director of Correctional Services may transfer a prisoner to a mental hospital. The District Court also found that in practice prisoners are transferred to a mental hospital only if it is determined that they suffer from a mental disease or defect that cannot adequately be treated within the penal complex. This "objective expectation, firmly fixed in state law and official Penal Complex practice," that

a prisoner would not be transferred unless he suffered from a mental disease or defect that could not be adequately treated in the prison, gave Jones a liberty interest that entitled him to the benefits of appropriate procedures in connection with determining the conditions that warranted his transfer to a mental hospital. Under our cases, this conclusion of the District Court is unexceptionable.

Appellants maintain that any state-created liberty interest that Jones had was completely satisfied once a physician or psychologist designated by the director made the findings required by § 83–180 (1) and that Jones was not entitled to any procedural protections.[6] But if the State grants a pris-

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[6] A majority of the Justices rejected an identical position in *Arnett* v. *Kennedy*, 416 U. S. 134, 166–167 (1974) (opinion of POWELL, J., joined by BLACKMUN, J.), 177–178 (opinion of WHITE, J.), 210–211 (opinion of MARSHALL, J., joined by Douglas and BRENNAN, JJ.). As MR. JUSTICE POWELL's opinion observed:

"The plurality opinion evidently reasons that the nature of appellee's interest in continued federal employment is necessarily defined and limited by the statutory procedures for discharge and that the constitutional guarantee of procedural due process accords to appellee no procedural protections against arbitrary or erroneous discharge other than those expressly provided in the statute. The plurality would thus conclude that the statute governing federal employment determines not only the nature of appellee's property interest, but also the extent of the procedural protections to which he may lay claim. It seems to me that this approach is incompatible with the principles laid down in [*Board of Regents* v.] *Roth*[, 408 U. S. 564 (1972)] and [*Perry* v.] *Sindermann*[, 408 U. S. 593 (1972)]. Indeed, it would lead directly to the conclusion that whatever the nature of an individual's statutorily created property interest, deprivation of that interest could be accomplished without notice or a hearing at any time. This view misconceives the origin of the right to procedural due process. That right is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in federal employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards. As our cases have consistently recognized, the adequacy of statutory procedures for deprivation of a statu-

oner a right or expectation that adverse action will not be taken against him except upon the occurrence of specified behavior, "the determination of whether such behavior has occurred becomes critical, and the minimum requirements of procedural due process appropriate for the circumstances must be observed." *Wolff* v. *McDonnell, supra,* at 558. These minimum requirements being a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action. In *Morrissey, Gagnon,* and *Wolff,* the States had adopted their own procedures for determining whether conditions warranting revocation of parole, probation, or good-time credits had occurred; yet we held that those procedures were constitutionally inadequate. In like manner, Nebraska's reliance on the opinion of a designated physician or psychologist for determining whether the conditions warranting a transfer exist neither removes the prisoner's interest from due process protection nor answers the question of what process is due under the Constitution.

B

The District Court was also correct in holding that independently of § 83–180 (1), the transfer of a prisoner from a prison to a mental hospital must be accompanied by appropriate procedural protections. The issue is whether after a conviction for robbery, Jones retained a residuum of liberty that would be infringed by a transfer to a mental hospital without complying with minimum requirements of due process.

We have recognized that for the ordinary citizen, commitment to a mental hospital produces "a massive curtailment of liberty," *Humphrey* v. *Cady,* 405 U. S. 504, 509 (1972), and in

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torily created property interest must be analyzed in constitutional terms. *Goldberg* v. *Kelly,* 397 U. S. 254 (1970); *Bell* v. *Burson,* 402 U. S. 535 (1971); *Board of Regents* v. *Roth, supra; Perry* v. *Sindermann, supra.*" *Id.,* at 166–167.

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consequence "requires due process protection." *Addington* v. *Texas*, 441 U. S. 418, 425 (1979); *O'Connor* v. *Donaldson*, 422 U. S. 563, 580 (1975) (BURGER, C. J., concurring). The loss of liberty produced by an involuntary commitment is more than a loss of freedom from confinement. It is indisputable that commitment to a mental hospital "can engender adverse social consequences to the individual" and that "[w]hether we label this phenomena 'stigma' or choose to call it something else . . . we recognize that it can occur and that it can have a very significant impact on the individual." *Addington* v. *Texas, supra*, at 425–426. See also *Parham* v. *J. R.*, 442 U. S. 584, 600 (1979). Also, "[a]mong the historic liberties" protected by the Due Process Clause is the "right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security." *Ingraham* v. *Wright*, 430 U. S. 651, 673 (1977). Compelled treatment in the form of mandatory behavior modification programs, to which the District Court found Jones was exposed in this case, was a proper factor to be weighed by the District Court. Cf. *Addington* v. *Texas, supra*, at 427.

The District Court, in its findings, was sensitive to these concerns:

> "[T]he fact of greater limitations on freedom of action at the Lincoln Regional Center, the fact that a transfer to the Lincoln Regional Center has some stigmatizing consequences, and the fact that additional mandatory behavior modification systems are used at the Lincoln Regional Center combine to make the transfer a 'major change in the conditions of confinement' amounting to a 'grievous loss' to the inmate." *Miller* v. *Vitek*, 437 F. Supp., at 573.

Were an ordinary citizen to be subjected involuntarily to these consequences, it is undeniable that protected liberty interests would be unconstitutionally infringed absent compliance with the procedures required by the Due Process Clause.

We conclude that a convicted felon also is entitled to the benefit of procedures appropriate in the circumstances before he is found to have a mental disease and transferred to a mental hospital.

Undoubtedly, a valid criminal conviction and prison sentence extinguish a defendant's right to freedom from confinement. *Greenholtz* v. *Nebraska Penal Inmates,* 442 U. S., at 7. Such a conviction and sentence sufficiently extinguish a defendant's liberty "to empower the State to confine him in any of its prisons." *Meachum* v. *Fano,* 427 U. S., at 224 (emphasis deleted). It is also true that changes in the conditions of confinement having a substantial adverse impact on the prisoner are not alone sufficient to invoke the protections of the Due Process Clause "[a]s long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him." *Montanye* v. *Haymes,* 427 U. S., at 242.

Appellants maintain that the transfer of a prisoner to a mental hospital is within the range of confinement justified by imposition of a prison sentence, at least after certification by a qualified person that a prisoner suffers from a mental disease or defect. We cannot agree. None of our decisions holds that conviction for a crime entitles a State not only to confine the convicted person but also to determine that he has a mental illness and to subject him involuntarily to institutional care in a mental hospital. Such consequences visited on the prisoner are qualitatively different from the punishment characteristically suffered by a person convicted of crime. Our cases recognize as much and reflect an understanding that involuntary commitment to a mental hospital is not within the range of conditions of confinement to which a prison sentence subjects an individual. *Baxstrom* v. *Herold,* 383 U. S. 107 (1966); *Specht* v. *Patterson,* 386 U. S. 605 (1967); *Humphrey* v. *Cady,* 405 U. S. 504 (1972); *Jackson* v. *Indiana,* 406 U. S. 715, 724–725 (1972). A criminal conviction and sentence of imprisonment extinguish an individ-

ual's right to freedom from confinement for the term of his sentence, but they do not authorize the State to classify him as mentally ill and to subject him to involuntary psychiatric treatment without affording him additional due process protections.

In light of the findings made by the District Court, Jones' involuntary transfer to the Lincoln Regional Center pursuant to § 83–180, for the purpose of psychiatric treatment, implicated a liberty interest protected by the Due Process Clause. Many of the restrictions on the prisoner's freedom of action at the Lincoln Regional Center by themselves might not constitute the deprivation of a liberty interest retained by a prisoner, see *Wolff* v. *McDonnell*, 418 U. S., at 572, n. 19; cf. *Baxter* v. *Palmigiano*, 425 U. S. 308, 323 (1976). But here, the stigmatizing consequences of a transfer to a mental hospital for involuntary psychiatric treatment, coupled with the subjection of the prisoner to mandatory behavior modification as a treatment for mental illness, constitute the kind of deprivations of liberty that requires procedural protections.

IV

The District Court held that to afford sufficient protection to the liberty interest it had identified, the State was required to observe the following minimum procedures before transferring a prisoner to a mental hospital:

> "A. Written notice to the prisoner that a transfer to a mental hospital is being considered;
>
> "B. A hearing, sufficiently after the notice to permit the prisoner to prepare, at which disclosure to the prisoner is made of the evidence being relied upon for the transfer and at which an opportunity to be heard in person and to present documentary evidence is given;
>
> "C. An opportunity at the hearing to present testimony of witnesses by the defense and to confront and cross-examine witnesses called by the state, except

upon a finding, not arbitrarily made, of good cause for not permitting such presentation, confrontation, or cross-examination;

"D. An independent decisionmaker;

"E. A written statement by the factfinder as to the evidence relied on and the reasons for transferring the inmate;

"F. Availability of legal counsel, furnished by the state, if the inmate is financially unable to furnish his own; and

"G. Effective and timely notice of all the foregoing rights." 437 F. Supp., at 575.

A

We think the District Court properly identified and weighed the relevant factors in arriving at its judgment. Concededly the interest of the State in segregating and treating mentally ill patients is strong. The interest of the prisoner in not being arbitrarily classified as mentally ill and subjected to unwelcome treatment is also powerful, however; and as the District Court found, the risk of error in making the determinations required by § 83–180 is substantial enough to warrant appropriate procedural safeguards against error.

We recognize that the inquiry involved in determining whether or not to transfer an inmate to a mental hospital for treatment involves a question that is essentially medical. The question whether an individual is mentally ill and cannot be treated in prison "turns on the meaning of the facts which must be interpreted by expert psychiatrists and psychologists." *Addington* v. *Texas*, 441 U. S., at 429. The medical nature of the inquiry, however, does not justify dispensing with due process requirements. It is precisely "[t]he subtleties and nuances of psychiatric diagnoses" that justify the requirement of adversary hearings. *Id.*, at 430.

Because prisoners facing involuntary transfer to a mental hospital are threatened with immediate deprivation of liberty

interests they are currently enjoying and because of the inherent risk of a mistaken transfer, the District Court properly determined that procedures similar to those required by the Court in *Morrissey* v. *Brewer*, 408 U. S. 471 (1972), were appropriate in the circumstances present here.

The notice requirement imposed by the District Court no more than recognizes that notice is essential to afford the prisoner an opportunity to challenge the contemplated action and to understand the nature of what is happening to him. *Wolff* v. *McDonnell*, *supra*, at 564. Furthermore, in view of the nature of the determinations that must accompany the transfer to a mental hospital, we think each of the elements of the hearing specified by the District Court was appropriate. The interests of the State in avoiding disruption was recognized by limiting in appropriate circumstances the prisoner's right to call witnesses, to confront and cross examine. The District Court also avoided unnecessary intrusion into either medical or correctional judgments by providing that the independent decisionmaker conducting the transfer hearing need not come from outside the prison or hospital administration. 437 F. Supp., at 574.

B*

The District Court did go beyond the requirements imposed by prior cases by holding that counsel must be made available to inmates facing transfer hearings if they are financially unable to furnish their own. We have not required the automatic appointment of counsel for indigent prisoners facing other deprivations of liberty, *Gagnon* v. *Scarpelli*, 411 U. S., at 790; *Wolff* v. *McDonnell*, 418 U. S., at 569–570; but we have recognized that prisoners who are illiterate and uneducated have a greater need for assistance in exercising their rights. *Gagnon* v. *Scarpelli*, *supra*, at 786–787; *Wolff* v. *McDonnell*, *supra*, at 570. A prisoner thought to be suffering

*This part is joined only by MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE STEVENS.

from a mental disease or defect requiring involuntary treatment probably has an even greater need for legal assistance, for such a prisoner is more likely to be unable to understand or exercise his rights. In these circumstances, it is appropriate that counsel be provided to indigent prisoners whom the State seeks to treat as mentally ill.

V

Because MR. JUSTICE POWELL, while believing that Jones was entitled to competent help at the hearing, would not require the State to furnish a licensed attorney to aid him, the judgment below is affirmed as modified to conform with the separate opinion filed by MR. JUSTICE POWELL.

So ordered.

MR. JUSTICE POWELL, concurring in part.

I join the opinion of the Court except for Part IV–B. I agree with Part IV–B insofar as the Court holds that qualified and independent assistance must be provided to an inmate who is threatened with involuntary transfer to a state mental hospital. I do not agree, however, that the requirement of independent assistance demands that a licensed attorney be provided.[1]

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[1] I also agree with the Court's holding that this case is not moot. The question is whether appellee faces a substantial threat that he will again be transferred to a state mental hospital. See *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922, 930–932 (1975); *Steffel* v. *Thompson*, 415 U. S. 452, 458–460 (1974); *Doe* v. *Bolton*, 410 U. S. 179, 188 (1973). He was involuntarily transferred from the prison complex to a mental institution, and thereafter paroled upon condition that he continue to receive psychiatric treatment. When he violated parole, he was returned to prison. The State advises us that appellee's "history of mental illness indicates a serious threat to his own safety, as well as to that of others," and "there is a very real expectation" of transfer if the District Court injunction were removed. App. to Juris. Statement 24. The District Court concluded that appellee is under threat of transfer. In these circumstances it is clear that a live controversy remains in which appellee has a personal stake. See *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U. S. 572, 581–583 (1980).

I

In *Gagnon* v. *Scarpelli*, 411 U. S. 778 (1973), my opinion for the Court held that counsel is not necessarily required at a probation revocation hearing. In reaching this decision the Court recognized both the effects of providing counsel to each probationer and the likely benefits to be derived from the assistance of counsel. "The introduction of counsel into a revocation proceeding [would] alter significantly the nature of the proceeding," *id.*, at 787, because the hearing would inevitably become more adversary. We noted that probationers would not always need counsel because in most hearings the essential facts are undisputed. In lieu of a *per se* rule we held that the necessity of providing counsel should be determined on a case-by-case basis. In particular, we stressed that factors governing the decision to provide counsel include (i) the existence of factual disputes or issues which are "complex or otherwise difficult to develop or present," and (ii) "whether the probationer appears to be capable of speaking effectively for himself." *Id.*, at 790, 791.

Consideration of these factors, and particularly the capability of the inmate, persuades me that the Court is correct that independent assistance must be provided to an inmate before he may be transferred involuntarily to a mental hospital. The essence of the issue in an involuntary commitment proceeding will be the mental health of the inmate. The resolution of factual disputes will be less important than the ability to understand and analyze expert psychiatric testimony that is often expressed in language relatively incomprehensible to laymen. It is unlikely that an inmate threatened with involuntary transfer to mental hospitals will possess the competence or training to protect adequately his own interest in these state-initiated proceedings. And the circumstances of being imprisoned without normal access to others who may assist him places an additional handicap upon an inmate's ability to represent himself. I therefore agree

that due process requires the provision of assistance to an inmate threatened with involuntary transfer to a mental hospital.

II

I do not believe, however, that an inmate must always be supplied with a licensed attorney. "[D]ue Process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey* v. *Brewer*, 408 U. S. 471, 481 (1972). See *Mathews* v. *Eldridge*, 424 U. S. 319, 334–335 (1976). Our decisions defining the necessary qualifications for an impartial decisionmaker demonstrate that the requirements of due process turn on the nature of the determination which must be made. "Due Process has never been thought to require that the neutral and detached trier of fact be law trained or a judicial or administrative officer." *Parham* v. *J. R.*, 442 U. S. 584, 607 (1979). In that case, we held that due process is satisfied when a staff physician determines whether a child may be voluntarily committed to a state mental institution by his parents. That holding was based upon recognition that the issues of civil commitment "are essentially medical in nature," and that "'neither judges nor administrative hearing officers are better qualified than psychiatrists to render psychiatric judgments.'" *Id.*, at 607, 609, quoting *In re Roger S.*, 19 Cal. 3d 921, 942, 569 P. 2d 1286, 1299 (1977) (Clark, J., dissenting). See also *Morrissey* v. *Brewer*, *supra*, at 489; *Goldberg* v. *Kelly*, 397 U. S. 254, 271 (1970).

In my view, the principle that due process does not always require a law-trained decisionmaker supports the ancillary conclusion that due process may be satisfied by the provision of a qualified and independent adviser who is not a lawyer. As in *Parham* v. *J. R.*, the issue here is essentially medical. Under state law, a prisoner may be transferred only if he "suffers from a mental disease or defect" and "cannot be given proper treatment" in the prison complex. Neb. Rev.

Stat. § 83–180 (1) (1976). The opinion of the Court allows a nonlawyer to act as the impartial decisionmaker in the transfer proceeding. *Ante*, at 496.[2]

The essence of procedural due process is a fair hearing. I do not think that the fairness of an informal hearing designed to determine a medical issue requires participation by lawyers. Due process merely requires that the State provide an inmate with qualified and independent assistance. Such assistance may be provided by a licensed psychiatrist or other mental health professional. Indeed, in view of the nature of the issue involved in the transfer hearing, a person possessing such professional qualifications normally would be preferred. As the Court notes, "[t]he question whether an individual is mentally ill and cannot be treated in prison 'turns on the meaning of the facts which must be interpreted by expert psychiatrists and psychologists.'" *Ante*, at 495, quoting *Addington* v. *Texas*, 441 U. S. 418, 429 (1979). I would not exclude, however, the possibility that the required assistance may be rendered by competent laymen in some cases. The essential requirements are that the person provided by the State be competent and independent, and that he be free to act solely in the inmate's best interest.

In sum, although the State is free to appoint a licensed attorney to represent an inmate, it is not constitutionally required to do so. Due process will be satisfied so long as an inmate facing involuntary transfer to a mental hospital is provided qualified and independent assistance.

MR. JUSTICE STEWART, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, dissenting.

It seems clear to me that this case is now moot. Accordingly, I would vacate the judgment and remand the case to

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[2] The District Court specifically held that "a judicial officer is not required, and the decisionmaker need not be from outside the prison or hospital administration." *Miller* v. *Vitek*, 437 F. Supp. 569, 574 (Neb. 1977) (three-judge court).

the District Court with directions to dismiss the complaint. *United States* v. *Munsingwear, Inc.*, 340 U. S. 36.

As the Court points out, this is not a class action, and the appellee is now incarcerated in the Nebraska Penal and Correctional Complex with an anticipated release date in March 1982. See *ante*, at 485–487, and n. 3. In that status, the appellee is simply one of thousands of Nebraska prisoners, with no more standing than any other to attack the constitutionality of Neb. Rev. Stat. § 83–180 (1) (1976) on the sole basis of the mere possibility that someday that statute might be invoked to transfer him to another institution.

Although the appellee was once transferred in accord with § 83–180 (1), there is no demonstrated probability that that will ever happen again. *Weinstein* v. *Bradford*, 423 U. S. 147. And this case is not one that by its nature falls within the ambit of the "capable of repetition, yet evading review" exception to established principles of mootness. See *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498; *Super Tire Engineering Co.* v. *McCorkle*, 416 U. S. 115. If the appellee should again be threatened with transfer under the allegedly infirm statute, there will be ample time to reach the merits of his claim.

" 'To adjudicate a cause which no longer exists is a proceeding which this Court uniformly has declined to entertain.' *Brownlow* v. *Schwartz*, 261 U. S. 216, 217–218." *Oil Workers* v. *Missouri*, 316 U. S. 363, 371.

MR. JUSTICE BLACKMUN, dissenting.

I agree with MR. JUSTICE STEWART that this case is not properly before us. I write separately to express my own reasons for reaching that conclusion.

The claimed harm that gave birth to this lawsuit was the alleged deprivation of liberty attending appellee's transfer to the Lincoln Regional Center. It is clear to me that that asserted injury disappeared, at the latest, when appellee was

granted parole.[1] Cf. *Preiser* v. *Newkirk*, 422 U. S. 395 (1975). So did any immediate threat that that injury would be suffered again. Appellee has been returned to custody, however, and the

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[1] The Court does not appear to share this view. It states that, even while at the Veterans' Administration Hospital, appellee Jones "insisted that he was receiving treatment for mental illness against his will." *Ante*, at 486. It adds that appellee was "paroled, but only on condition that he accept psychiatric treatment." *Ibid.* The Court does not identify the precise import of these facts, but a fair inference is that they are meant to suggest that this case—even during the time of appellee's parole—might properly have been pursued on the theory that the appellee was continuing to feel the effects of the alleged deprivation of constitutional rights in receiving in-patient care at the Veterans' Administration Hospital.

I cannot accept this suggestion. First, its premise appears to be faulty. The District Court did not find, and it does not appear clearly in the record, that the parole board's offer or appellee's acceptance of parole was in any way related to his prior transfer to the Lincoln Regional Center. Appellee chose to accept conditional parole. Moreover, at the time appellee elected to go on parole, he was being housed at the penal complex, not at the Lincoln Regional Center. Thus, it is not surprising that the District Court based its finding of nonmootness solely on its conclusion that appellee—notwithstanding his conditioned release—was "under threat of being transferred to the state mental hospital under § 83-180." App. to Juris. Statement 24. Second, the "continuing injury" theory seems to me to be incorrect as a matter of law. Appellee did not seek or evince any interest in seeking release from the Veterans' Administration Hospital, and a declaration that his initial transfer had been illegal would have neither justified nor predictably led to appellee's removal from that facility. In other words, after accepting the conditional grant of parole, appellee could no longer show, as required by the case-or-controversy requirement, "that he personally would benefit in a tangible way from the court's intervention." *Warth* v. *Seldin*, 422 U. S. 490, 508 (1975).

The Court also finds some support for its holding in the fact that vacating the District Court's order would remove the declaration that the challenged procedures "afforded an inadequate basis for declaring Jones to be mentally ill." *Ante*, at 487. If the Court, by this statement, means to imply that appellee's suit is somehow mootness-proof due to the continuing stigma resulting from the transfer to the mental hospital, I cannot accept that sweeping proposition. The Court has never suggested that the "collateral consequences" doctrine of *Sibron* v. *New York*, 392 U. S. 40 (1968), which saves an action challenging the validity of a con-

parties agree that his reincarceration, coupled with his history of mental problems, has brought the controversy back to life.

Given these facts, the issue is not so much one of mootness as one of ripeness. At most, although I think otherwise, it is a case presenting a "mixed question" of ripeness and mootness, hinging on the possibility that the challenged procedures will be applied again to appellee. This Court has confronted mixed questions of this kind in cases presenting issues "capable of repetition, yet evading review," see, *e. g.*, *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539 (1976), and *Sosna* v. *Iowa*, 419 U. S. 393 (1975), and in cases concerning the cessation of challenged conduct during the pendency of litigation, see, *e. g.*, *Walling* v. *Helmerich & Payne, Inc.*, 323 U. S. 37, 43 (1944). In those contexts, the Court has lowered the ripeness threshold so as to preclude manipulation by the parties or the mere passage of time from frustrating judicial review. MR. JUSTICE STEWART correctly observes, and the Court apparently concedes, however, that the "capable of repetition" doctrine does not apply here. Neither does the liberal rule applied in "voluntary cessation" cases, since the current state of affairs is in no way the product of the appellants' voluntary discontinuation of their challenged conduct.[2] Certainly it is not the result of any effort on the part of the appellants to avoid review by this Court. Thus, since these mixed mootness/ripeness rules are inapplicable, this case presents for me nothing more than a plain, old-fashioned question of ripeness.[3]

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viction after a prisoner has served his sentence, also saves a challenge to a commitment by a patient who has been released from a mental hospital. Nor does the logic of *Sibron*—focusing on tangible and remediable collateral consequences, such as use of a prior conviction to enhance a sentence for a later crime, or to impeach credibility if one appears as a witness—comfortably extend to the claim of a former mental patient. See *id.*, at 55 (referring to "adverse collateral legal consequences").

[2] The decisions to award and revoke parole were made by the Nebraska Parole Board, not by appellants.

[3] It is not clear whether the Court views this as a "voluntary cessation" case. It nowhere expressly relies on the doctrine and does not explain

The Court's cases lay down no mechanistic test for determining whether a dispute is ripe for adjudication. But past formulations are uniformly more rigorous than the one the Court now applies. The Court has observed that "[p]ast exposure to illegal conduct does not in itself show a present case or controversy," *O'Shea* v. *Littleton*, 414 U. S. 488, 495 (1974), and that "general assertions or inferences" that illegal conduct will recur do not render a case ripe. *Id.*, at 497. "A hypothetical threat is not enough." *Public Workers* v. *Mitchell*, 330 U. S. 75, 90 (1947). There must be "actual present or immediately threatened injury resulting from unlawful governmental action." *Laird* v. *Tatum*, 408 U. S. 1, 15 (1972). See *Linda R. S.* v. *Richard D.*, 410 U. S. 614, 617 (1973) (requiring "some threatened or actual injury"); *Massachusetts* v. *Mellon*, 262 U. S. 447, 488 (1923) (requiring that the litigant "has sustained or is immediately in danger of sustaining some direct injury"). A "substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality" is required. *Golden* v. *Zwickler*, 394 U. S. 103, 108 (1969), quoting *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U. S. 270, 273 (1941).

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what factors might justify characterizing appellee's present situation as the result of voluntary cessation of illegal conduct by appellants. On the other hand, each of the three decisions cited by the Court to support its application of a "creampuff" ripeness standard, *County of Los Angeles* v. *Davis*, 440 U. S. 625, 631 (1979); *United States* v. *Phosphate Export Assn.*, 393 U. S. 199, 203 (1968); *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 633 (1953), pivoted on the presence of "voluntary cessation." It is therefore unclear whether the Court deems this a "voluntary cessation" case (without explaining why) or deems the "no reasonable expectation of recurrence" standard—to date a litmus carefully confined by a policy-tailored and principled "voluntary cessation" rule—applicable to an amorphous cluster of facts having nothing to do with parties' artful dodging of well-founded litigation. In either event, the Court's analysis invites the criticism, increasingly voiced, that this Court's decisions on threshold issues "are concealed decisions on the merits of the underlying constitutional claim." Tushnet, The New Law of Standing: A Plea for Abandonment, 62 Cornell L. Rev. 663 (1977).

Applying these principles, I have difficulty in perceiving an existing "case or controversy" here. Since our remand, the state officials have indicated nothing more than that they have a general right to apply their statute, and to apply it to appellee if necessary.[4] They have not expressed a present intent or desire to transfer appellee to a mental facility pursuant to the challenged provisions. Nor have they suggested that they may transfer appellee to the Lincoln Regional Center now on the basis of the diagnosis made five years ago. And they have not suggested that they would subject appellee immediately to a "fresh" psychiatric evaluation if the District Court's injunction were lifted. The appellee has represented that he "does not reside in the psychiatric unit of the Nebraska Penal and Correctional Complex, nor is he receiving or accepting psychiatric treatment." Brief for Appellee 11–12. The brief containing that statement was filed some six months ago and some nine months after the revocation of appellee's parole.

In sum, for all that appears, appellee has been assimilated once again into the general prison population, and appellants, at least at this time, are content to leave him where he is.[5] Given these facts, determining whether prison officials within two years again will seek to send appellee to a mental institu-

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[4] Appellants, to be sure, have announced their intention to continue to use the challenged procedures. That fact, however, is of small, if any, significance, for it is hardly surprising to hear state officials say that they plan to abide by the State's own laws. See *Public Workers* v. *Mitchell*, 330 U. S. 75, 91 (1947) ("the existence of the law and the regulations" does not alone render a suit ripe). Cf. *Poe* v. *Ullman*, 367 U. S. 497 (1961) (desuetude statute).

[5] I do not go so far as MR. JUSTICE STEWART does when he says that appellee is "simply one of thousands of Nebraska prisoners." *Ante*, at 501. For purposes of the "case or controversy" requirement, appellee differs from his fellow inmates in two relevant respects: he has a recent history of perceived psychiatric problems, and in fact he was previously transferred pursuant to the challenged statutes. Cf. *O'Shea* v. *Littleton*, 414 U. S., at 496 ("Of course, past wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury").

tion "takes us into the area of speculation and conjecture." *O'Shea* v. *Littleton*, 414 U. S., at 497. Cf. *Longshoremen* v. *Boyd*, 347 U. S. 222 (1954).

It is for these reasons that I would vacate the judgment of the District Court and remand the case to that court with directions to dismiss the complaint.

Reporter's Note

Orders for March 24, 1980, begin with page 939. The preceding orders in 445 U. S., from February 25 through March 17, 1980, were reported in Part 1, at 901–939. These page numbers are the same as they will be in the bound volume, thus making the *permanent* citations available upon publication of the preliminary prints of the United States Reports.

S. E. 2d 493, and 244 Ga. 471, 260 S. E. 2d 875; No. 79–5959, 244 Ga. 587, 261 S. E. 2d 349.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 27, Orig. OHIO *v.* KENTUCKY, 444 U. S. 335;

No. 79–486. UNITED STATES STEEL CORP. ET AL. *v.* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, 444 U. S. 1035;

No. 79–531. NEWELL ET AL. *v.* ORLEANS PARISH SCHOOL BOARD, 444 U. S. 1043; and

No. 79–5669. PFISTER *v.* ANDERSON CLINIC, INC., ET AL., 444 U. S. 1047. Petitions for rehearing denied.

MARCH 24, 1980

Vacated and Remanded on Appeal

No. 78–1839. ASARCO INC. (FORMERLY AMERICAN SMELTING & REFINING CO.) *v.* IDAHO STATE TAX COMMISSION. Appeal from Sup. Ct. Idaho. Judgment vacated and case remanded for further consideration in light of *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont*, *ante*, p. 425. Reported below: 99 Idaho 924, 592 P. 2d 39.

Appeals Dismissed

No. 79–1143. RINGLING BROS.-BARNUM & BAILEY COMBINED SHOWS, INC. *v.* MIKOS, PROPERTY APPRAISER OF SARASOTA COUNTY, FLORIDA, ET AL. Appeal from Dist. Ct. App. Fla., 2d Dist., dismissed for want of substantial federal question. MR. JUSTICE WHITE, MR. JUSTICE BLACKMUN, and MR. JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 368 So. 2d 884.

No. 79–1182. RUSSO, TRUSTEE, ET AL. *v.* TOWN OF EAST HARTFORD. Appeal from Sup. Ct. Conn., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: — Conn. —, — A. 2d —.

No. 79–1284. KNEELAND *v.* NEW ENGLAND MERCHANTS NATIONAL BANK ET AL. Appeal from C. A. 1st Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 607 F. 2d 993.

Certiorari Granted—Vacated and Remanded

No. 78–1008. SATTERWHITE *v.* CITY OF GREENVILLE, TEXAS. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States Parole Comm'n* v. *Geraghty, ante,* p. 388, and *Deposit Guaranty Nat. Bank* v. *Roper, ante,* p. 326. Reported below: 578 F. 2d 987.

No. 79–5649. ARMOUR *v.* CITY OF ANNISTON, DBA ANNISTON MEMORIAL HOSPITAL, ET AL. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *United States Parole Comm'n* v. *Geraghty, ante,* p. 388, and *Deposit Guaranty Nat. Bank* v. *Roper, ante,* p. 326. Reported below: 597 F. 2d 46.

Miscellaneous Orders

No. A–735. HEIR ET AL. *v.* DEGNAN, ATTORNEY GENERAL OF NEW JERSEY, ET AL. Application for stay of judgment of the Supreme Court of New Jersey, addressed to MR. JUSTICE POWELL and referred to the Court, denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of this application.

No. A–776. FREEDOM INSTITUTE OF AMERICA ET AL. *v.* NEW JERSEY. Application for stay of orders of the Supreme Court of New Jersey, addressed to MR. JUSTICE STEVENS and referred to the Court, denied.

No. A–784. SHARPE *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Application for stay and/or continued release on bond, addressed to MR. JUSTICE MARSHALL and referred to the Court, denied.

No. 81, Orig. KENTUCKY *v.* INDIANA ET AL. Report of the Special Master received and ordered filed. Motion of Public Service Company of Indiana, Inc., for leave to intervene denied. Motion of Public Service Company of Indiana, Inc., for leave to file a brief as *amicus curiae* granted. Motion for summary adoption of the Report of the Special Master granted and case remanded to the Special Master so that with the cooperation of the parties he may prepare and submit to the Court an appropriate form of decree. [For earlier order herein, see, *e. g.*, 444 U. S. 816.]

No. 79–1203. LUCKY MC URANIUM CORP. *v.* GEOMET EXPLORATION, LTD. Sup. Ct. Ariz. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 79–1268. HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* MCRAE ET AL. D. C. E. D. N. Y. [Probable jurisdiction noted, 444 U. S. 1069.] Motion of Alan Ernest to be appointed as counsel for children unborn and born alive denied. Motion of Legal Defense Fund for Unborn Children for leave to file a brief as *amicus curiae* denied.

No. 79–1298. UNKNOWN NAMED CHILDREN UNBORN AND BORN ALIVE *v.* GREENE, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of habeas corpus denied.

No. 79–1300. DACEY *v.* NARUK ET AL. Motion for leave to file petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 79–5932. DOE ET AL. *v.* DELAWARE. Appeal from Sup. Ct. Del. Motion of appellants for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 407 A. 2d 198.

Certiorari Granted

No. 79–1186. DENNIS *v.* SPARKS ET AL., DBA SIDNEY A. SPARKS, TRUSTEE. C. A. 5th Cir. Certiorari granted. Reported below: 604 F. 2d 976.

Certiorari Denied. (See also Nos. 79–1182 and 79–1284, *supra.*)

No. 78–1169. LINCOLN AMERICAN CORP. ET AL. *v.* SUSMAN; and

No. 78–1286. EBERSTADT ET AL. *v.* FLAMM ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 587 F. 2d 866.

No. 79–822. SCOTT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 611 F. 2d 375.

No. 79–910. HOROWITZ *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 79–969. KRASNY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 607 F. 2d 840.

No. 79–978. YOUNG ET UX. *v.* TENNESSEE VALLEY AUTHORITY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 606 F. 2d 143.

No. 79–979. WILLAMETTE IRON & STEEL CO. *v.* SECRETARY OF LABOR ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 604 F. 2d 1177.

No. 79–1020. NEWMAN *v.* ELROD, SHERIFF. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 72 Ill. App. 3d 616, 391 N. E. 2d 37.

No. 79–1022. PATRICK ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. Reported below: 601 F. 2d 730.

No. 79–1059. SAWYER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 607 F. 2d 1190.

No. 79–1070. REFRACTARIOS MONTERREY, S. A. *v.* FERRO CORP. ET AL. C. C. P. A. Certiorari denied. Reported below: 606 F. 2d 966.

No. 79–1162. CUEVAS ET AL. *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 151 Ga. App. 605, 260 S. E. 2d 737.

No. 79–1173. STEMPER *v.* INDIANA. Ct. App. Ind. Certiorari denied.

No 79–1189. MAHOMET *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 151 Ga. App. 462, 260 S. E. 2d 363.

No. 79–1190. LASALLE NATIONAL BANK, TRUSTEE, ET AL. *v.* PEOPLES GAS LIGHT & COKE CO. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 79–1226. DITTO *v.* ROSENDALE. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 79–1239. SPARKS ET AL., DBA SIDNEY A. SPARKS, TRUSTEE *v.* DUVAL COUNTY RANCH CO., INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 604 F. 2d 976.

No. 79–1254. SANZA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 603 F. 2d 219.

No. 79–1267. GARCIA *v.* KUEHN, AKA KELLER. C. A. 8th Cir. Certiorari denied. Reported below: 608 F. 2d 1143.

No. 79–1301. GOREL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 79-5775. GRAY *v.* ROWLEY. C. A. 5th Cir. Certiorari denied. Reported below: 604 F. 2d 382.

No. 79-5782. EDDINGTON *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 77 Ill. 2d 41, 394 N. E. 2d 1185.

No. 79-5791. GRAY *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 77 Ill. 2d 75, 394 N. E. 2d 1194.

No. 79-5809. BOIGNER *v.* PERINI, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 611 F. 2d 371.

No. 79-5826. BLANCHARD *v.* GOVERNMENT OF THE CANAL ZONE. C. A. 5th Cir. Certiorari denied. Reported below: 564 F. 2d 95.

No. 79-5844. GALE *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 72 Ill. App. 3d 23, 390 N. E. 2d 921.

No. 79-5871. ALTON ET AL. *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 79-5911. KNIGHT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 612 F. 2d 1311.

No. 79-5931. TAYLOR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 611 F. 2d 375.

No. 79-5945. FORCELLATI *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 610 F. 2d 25.

No. 79-6004. LESSARD *v.* WASHINGTON. Ct. App. Wash. Certiorari denied.

No. 79-6022. MURRAY *v.* STACK, SHERIFF, ET AL. C. A. 5th Cir. Certiorari denied.

No. 79-6028. LOCKETT *v.* SOUTH CENTRAL BELL TELEPHONE CO. C. A. 5th Cir. Certiorari denied. Reported below: 605 F. 2d 553.

No. 79-6046. LITTLEFIELD *v.* FORT DODGE MESSENGER ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 614 F. 2d 581.

No. 79-6047. DYER *v.* CRISP, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 613 F. 2d 275.

No. 79-6062. COUSIN *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 597 F. 2d 511.

No. 79-6089. O'CONNOR *v.* SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 2d Cir. Certiorari denied.

No. 79-6095. LIGON *v.* CUYLER, PRISON SUPERINTENDENT, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 612 F. 2d 573.

No. 79-6103. CAMPBELL *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: — Ct. Cl. —, — F. 2d —.

No. 79-6122. COOPER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 79-6133. CAPPELLETTI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 613 F. 2d 313.

No. 79-6137. PERRY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 614 F. 2d 778.

No. 79-6156. GREENE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 615 F. 2d 1358.

No. 79-584. RESEARCH EQUITY FUND, INC. *v.* INSURANCE COMPANY OF NORTH AMERICA. C. A. 9th Cir. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari. MR. JUSTICE REHNQUIST took no part in the consideration or decision of this petition. Reported below: 602 F. 2d 200.

No. 79-656. MANCHESTER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. MR. JUSTICE STEWART would grant certiorari. Reported below: 605 F. 2d 1198.

No. 79-1009. ALEMAN ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEWART would grant certiorari. Reported below: 609 F. 2d 298.

No. 79-5013. LITTLE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE STEWART would grant certiorari. Reported below: 598 F. 2d 564.

No. 79-5571. ANTONE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE STEWART would grant certiorari. Reported below: 603 F. 2d 535.

No. 79-5902. GISPERT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE STEWART would grant certiorari. Reported below: 603 F. 2d 535.

No. 79-930. CALIFORNIA *v.* DALTON. Sup. Ct. Cal. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 24 Cal. 3d 850, 598 P. 2d 467.

No. 79-1015. LOMBARD, SHERIFF *v.* TAYLOR. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 606 F. 2d 371.

No. 79-5920. DIX *v.* GEORGIA; and

No. 79-5994. COLLIER *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: No. 79-5920, 238 Ga. 209, 232 S. E. 2d 47, and 244 Ga. 464, 260 S. E. 2d 863; No. 79-5994, 244 Ga. 553, 261 S. E. 2d 364.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 79-955. DeHavilland Aircraft of Canada, Ltd. *v.* Betar, Public Administrator of Cook County, et al., 444 U. S. 1098; and

No. 79-5728. Ross *v.* Carey, Governor of New York, et al., 444 U. S. 1085. Petitions for rehearing denied.

No. 79-5447. In re Application for Admission to the Bar of Massachusetts, 444 U. S. 1046. Motion for leave to file petition for rehearing denied.

Reporter's Note

The next page is purposely numbered 1301. The numbers between 947 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions in the current preliminary print of the United States Reports with *permanent* page numbers, thus making the official citations immediately available.

OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

CALIFORNIA *v.* VELASQUEZ

ON APPLICATION FOR STAY

No. A–773. Decided March 24, 1980

California's application for a stay, pending review by certiorari, of enforcement of the California Supreme Court's judgment reversing the imposition of a death sentence but upholding respondent's conviction, is granted.

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicant seeks a stay of the enforcement of the judgment of the Supreme Court of California in *People* v. *Velasquez*, 26 Cal. 3d 425, 606 P. 2d 341 (1980), pending the filing of a petition for certiorari and its disposition by this Court. Applicant contends that the Supreme Court of California has reversed the imposition of a sentence of death, although upholding the conviction, because the trial was conducted in violation of this Court's decision in *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968).

This Court has granted certiorari in *Adams* v. *Texas*, No. 79–5175, 444 U. S. 990, and that case is presently set for argument today. The issues presented there are sufficiently related to the issues which the applicant State says it will raise in its petition for certiorari in this case that I have decided to grant the State's application for stay pending (1) consideration and decision of *Adams* v. *Texas, supra,* by this Court, and (2) the filing and disposition of a timely petition for certiorari in this case by the applicant.

I am not persuaded by the response that the decision below rests upon a reading of state law by the Supreme Court of

California. Neither *In re Anderson*, 69 Cal. 2d 613, 447 P. 2d 117 (1968), which was cited by the court below, nor *People v. Wheeler*, 22 Cal. 3d 258, 583 P. 2d 748 (1978), which was not, supports respondent's position. *Anderson*, as I read it, was based primarily upon this Court's decision in *Witherspoon*. *Wheeler*, while itself based on state law, seems clearly distinguishable from the present case.

The application for stay is accordingly granted.

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Henry J. Lind
Reporter of Decisions

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, Chief Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM H. REHNQUIST, Associate Justice.
JOHN PAUL STEVENS, Associate Justice.

RETIRED

STANLEY REED, Associate Justice.*

OFFICERS OF THE COURT

BENJAMIN R. CIVILETTI, Attorney General.
WADE H. McCREE, Jr., Solicitor General.
MICHAEL RODAK, Jr., Clerk.
HENRY C. LIND, Reporter of Decisions.
ALFRED WONG, Marshal.
ROGER F. JACOBS, Librarian.

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*Mr. Justice Reed, who retired effective February 25, 1957 (352 U. S. xiii), died April 2, 1980. See *post*, p. iii.

SUPREME COURT OF THE UNITED STATES

Allotment of Justices

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, *viz.:*

For the District of Columbia Circuit, Warren E. Burger, Chief Justice.

For the First Circuit, William J. Brennan, Jr., Associate Justice.

For the Second Circuit, Thurgood Marshall, Associate Justice.

For the Third Circuit, William J. Brennan, Jr., Associate Justice.

For the Fourth Circuit, Warren E. Burger, Chief Justice.

For the Fifth Circuit, Lewis F. Powell, Jr., Associate Justice.

For the Sixth Circuit, Potter Stewart, Associate Justice.

For the Seventh Circuit, John Paul Stevens, Associate Justice.

For the Eighth Circuit, Harry A. Blackmun, Associate Justice.

For the Ninth Circuit, William H. Rehnquist, Associate Justice.

For the Tenth Circuit, Byron R. White, Associate Justice.

December 19, 1975.

(For next previous allotment, see 404 U. S., p. v.)

DEATH OF MR. JUSTICE REED

Supreme Court of the United States

MONDAY, APRIL 14, 1980

Present: Mr. Chief Justice Burger, Mr. Justice Brennan, Mr. Justice Stewart, Mr. Justice White, Mr. Justice Marshall, Mr. Justice Blackmun, Mr. Justice Powell, Mr. Justice Rehnquist, and Mr. Justice Stevens.

The Chief Justice said:

Before we proceed today with the regular business of the Court, it is our sad duty to take note of the death of our beloved colleague and friend Mr. Justice Stanley Reed.

He served as a Justice of this Court from 1938 to 1957, after having served as Solicitor General of the United States from 1935 to 1938.

His death came almost 22 years after retiring from this Court, but retirement for Mr. Justice Reed was not the end, but a continuation of his judicial career.

At his own request, he was assigned to sit on United States Courts of Appeals throughout the United States, and particularly on the United States Court of Appeals for the District of Columbia Circuit. I shared the pleasant and valuable experience of sitting with him on many cases on that Court, so I found firsthand what his colleagues of this Court knew: that Mr. Justice Reed was a thoughtful, painstaking, able jurist, dedicated to the American system and the Constitution. His 19 years in this Court spanned one of the most stirring periods of the country's history and the Court's history. But whether in agreement or dissent in cases of great importance, Mr. Justice Reed was the epitome of civility.

His career as lawyer in government was unusual, to say the least. He was successively General Counsel of the Federal Farm Board, General Counsel of the Reconstruction Finance Corporation, and Solicitor General of the United States before his appointment to this Court by President Roosevelt. He lived a rich and full life in every respect.

I speak for all the Members of this Court in expressing our profound sympathy to Mrs. Reed and to her family, the two sons of Mr. Justice Reed and Mrs. Reed.

On an appropriate occasion after the opening of the next Term of this Court in October, the official memorial service of the Bar will be conducted for Mr. Justice Reed in this Chamber.

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BRANTI v. FINKEL ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 78-1654. Argued December 4, 1979—Decided March 31, 1980

Respondents, both Republicans, brought suit in Federal District Court to enjoin petitioner, a Democrat, who had recently been appointed Public Defender of Rockland County, N. Y., by the Democrat-dominated county legislature, from discharging respondents from their positions as Assistant Public Defenders. Finding that respondents had been satisfactorily performing their jobs and had been selected for termination solely because they were Republicans and that an assistant public defender is neither a policymaker nor a confidential employee, the District Court held that petitioner could not terminate respondents' employment consistent with the First and Fourteenth Amendments, and granted injunctive relief. The Court of Appeals affirmed.

Held: The First and Fourteenth Amendments protect respondents from discharge solely because of their political beliefs. Pp. 513–520.

(a) To prevail in this type of action, there is no requirement that dismissed government employees prove that they, or other employees, have been coerced into changing, either actually or ostensibly, their political allegiance. Rather, it was sufficient for respondents here to prove that they were about to be discharged "solely for the reason that they were not affiliated with or sponsored by the Democratic Party." *Elrod* v. *Burns*, 427 U. S. 347, 350. Pp. 513–517.

(b) The issue is not whether the label "policymaker" or "confidential" fits the particular public office in question, but rather whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the office. Here, it is manifest that the continued employment of an assistant public defender cannot properly be conditioned upon his allegiance to the political party in control of the county government. The primary, if not the only, responsibility of an assistant public defender is to represent individual citizens in controversy with the State. Whatever policymaking occurs in his office must relate to individual clients' needs and not to any partisan political interests. Similarly, although an assistant is bound to obtain access to confidential information arising out of various attorney-client relationships, that information has no bearing on partisan political concerns. Under these circumstances,

it would undermine, rather than promote, the effective performance of an assistant public defender's office to make his tenure dependent on his allegiance to the dominant political party. Pp. 517–520.

598 F. 2d 609, affirmed.

STEVENS, J., delivered the opinion for the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., joined. STEWART, J., filed a dissenting opinion, *post*, p. 520. POWELL, J., filed a dissenting opinion, in which REHNQUIST, J., joined and in Part I of which STEWART, J., joined, *post*, p. 521.

Marc L. Parris argued the cause for petitioner. With him on the briefs was *Charles Apotheker*.

David MacRae Wagner argued the cause and filed a brief for respondents.

MR. JUSTICE STEVENS delivered the opinion of the Court.

The question presented is whether the First and Fourteenth Amendments to the Constitution protect an assistant public defender who is satisfactorily performing his job from discharge solely because of his political beliefs.

Respondents, Aaron Finkel and Alan Tabakman, commenced this action in the United States District Court for the Southern District of New York in order to preserve their positions as assistant public defenders in Rockland County, New York.[1] On January 4, 1978, on the basis of a showing that the petitioner public defender was about to discharge them solely because they were Republicans, the District Court entered a temporary restraining order preserving the status quo. After hearing evidence for eight days, the District Court entered detailed findings of fact and permanently enjoined[2] petitioner from terminating or attempting to terminate respondents' employment "upon the sole grounds of

[1] Jurisdiction was based on 42 U. S. C. § 1983 and 28 U. S. C. § 1343 (3).

[2] Pursuant to Rule 65 (a)(2) of the Federal Rules of Civil Procedure, the plenary trial was consolidated with the hearing on the application for a preliminary injunction.

their political beliefs."[3] 457 F. Supp. 1284, 1285 (1978). The Court of Appeals affirmed in an unpublished memorandum opinion, judgment order reported at 598 F. 2d 609 (CA2 1979) (table).

The critical facts can be summarized briefly. The Rockland County Public Defender is appointed by the County Legislature for a term of six years. He in turn appoints nine assistants who serve at his pleasure. The two respondents have served as assistants since their respective appointments in March 1971 and September 1975; they are both Republicans.[4]

Petitioner Branti's predecessor, a Republican, was appointed in 1972 by a Republican-dominated County Legislature. By 1977, control of the legislature had shifted to the Democrats and petitioner, also a Democrat, was appointed to replace the incumbent when his term expired. As soon as petitioner was formally appointed on January 3, 1978, he began executing termination notices for six of the nine assistants then in office. Respondents were among those who were to be terminated. With one possible exception, the nine who were to be appointed

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[3] The District Court explained that its ruling required petitioner to retain respondents in their prior positions, with full privileges as employees: "[C]ompliance with the judgment to be entered herein will require defendant both to permit plaintiffs to work as Assistants and to pay them the normal Assistant's salary. Mere payment of plaintiffs' salary will not constitute full compliance with the judgment entered herein; for plaintiffs' constitutional right, which is upheld herein, is the right not to be dismissed from public employment upon the sole ground of their political beliefs. Defendant cannot infringe that right of plaintiffs with impunity by the mere expedient of paying plaintiffs a sum of money." 457 F. Supp. 1284, 1285–1286, n. 4 (1978).

[4] The District Court noted that Finkel had changed his party registration from Republican to Democrat in 1977 in the apparent hope that such action would enhance his chances of being reappointed as an assistant when a new, Democratic public defender was appointed. The Court concluded that, despite Finkel's formal change of party registration, the parties had regarded him as a Republican at all relevant times. *Id.*, at 1285, n. 2.

or retained were all Democrats and were all selected by Democratic legislators or Democratic town chairmen on a basis that had been determined by the Democratic caucus.[5]

The District Court found that Finkel and Tabakman had been selected for termination solely because they were Republicans and thus did not have the necessary Democratic sponsors:

> "The sole grounds for the attempted removal of plaintiffs were the facts that plaintiffs' political beliefs differed from those of the ruling Democratic majority in the County Legislature and that the Democratic majority had determined that Assistant Public Defender appointments were to be made on political bases." 457 F. Supp., at 1293.

The court rejected petitioner's belated attempt to justify the dismissals on nonpolitical grounds. Noting that both Branti and his predecessor had described respondents as "competent attorneys," the District Court expressly found that both had been "satisfactorily performing their duties as Assistant Public Defenders." *Id.*, at 1292.

Having concluded that respondents had been discharged solely because of their political beliefs, the District Court held that those discharges would be permissible under this Court's decision in *Elrod* v. *Burns*, 427 U. S. 347, only if

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[5] "An examination of the selection process that was employed in arriving at the name of each of the nine 1978 appointees shows that the hiring decisions were, for all practical purposes, made by Democratic legislators or chairpersons in accordance with the procedures that had been decided upon by the Democratic caucus, and, with respect to every selection save that of Sanchez, those procedures excluded from consideration candidates who were affiliated with a party other than the Democratic Party. Moreover, the evidence shows that the only reason for which Branti sought to terminate plaintiffs as Assistants was that they were not recommended or sponsored pursuant to the procedures that had been decided upon by the Democratic caucus." *Id.*, at 1288.

assistant public defenders are the type of policymaking, confidential employees who may be discharged solely on the basis of their political affiliations. He concluded that respondents clearly did not fall within that category. Although recognizing that they had broad responsibilities with respect to particular cases that were assigned to them, the court found that respondents had "very limited, if any, responsibility" with respect to the overall operation of the public defender's office. They did not "act as advisors or formulate plans for the implementation of the broad goals of the office" and, although they made decisions in the context of specific cases, "they do not make decisions about the orientation and operation of the office in which they work." 457 F. Supp., at 1291.

The District Court also rejected the argument that the confidential character of respondents' work justified conditioning their employment on political grounds. He found that they did not occupy any confidential relationship to the policymaking process, and did not have access to confidential documents that influenced policymaking deliberations. Rather, the only confidential information to which they had access was the product of their attorney-client relationship with the office's clients; to the extent that such information was shared with the public defender, it did not relate to the formulation of office policy.

In light of these factual findings, the District Court concluded that petitioner could not terminate respondents' employment as assistant public defenders consistent with the First and Fourteenth Amendments. On appeal, a panel of the Second Circuit affirmed, specifically holding that the District Court's findings of fact were adequately supported by the record. That court also expressed "no doubt" that the District Court "was correct in concluding that an assistant public defender was neither a policymaker nor a confidential employee." We granted certiorari, 443 U. S. 904, and now affirm.

Petitioner advances two principal arguments for reversal: [6] First, that the holding in *Elrod* v. *Burns* is limited to situations in which government employees are coerced into pledging allegiance to a political party that they would not voluntarily support and does not apply to a simple requirement that an employee be sponsored by the party in power; and, second, that, even if party sponsorship is an unconstitutional condition of continued public employment for clerks, deputies, and janitors, it is an acceptable requirement for an assistant public defender.

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[6] Petitioner also makes two other arguments. First, he contends that the action should have been dismissed because the evidence showed that he would have discharged respondents in any event due to their lack of competence as public defenders. See *Mt. Healthy City Board of Ed.* v. *Doyle*, 429 U. S. 274. The Court of Appeals correctly held this contention foreclosed by the District Court's findings of fact, which it found to be adequately supported by the record. In view of our settled practice of accepting, absent the most exceptional circumstances, factual determinations in which the district court and the court of appeals have concurred, we decline to review these and other findings of fact petitioner argues were clearly erroneous. See *Graver Mfg. Co.* v. *Linde Co.*, 336 U. S. 271, 275; *United States* v. *Ceccolini*, 435 U. S. 268, 273.

Second, relying on testimony that an assistant's term in office automatically expires when the public defender's term expires, petitioner argues that we should treat this case as involving a "failure to reappoint" rather than a dismissal and, as a result, should apply a less stringent standard. Petitioner argues that because respondents knew the system was a patronage system when they were hired, they did not have a reasonable expectation of being rehired when control of the office shifted to the Democratic Party. A similar waiver argument was rejected in *Elrod* v. *Burns*, 427 U. S. 347, 360, n. 13; see also *id.*, at 380 (POWELL, J., dissenting). After *Elrod*, it is clear that the lack of a reasonable expectation of continued employment is not sufficient to justify a dismissal based solely on an employee's private political beliefs.

Unlike MR. JUSTICE POWELL in dissent, *post*, at 526–532, petitioners do not ask us to reconsider the holding in *Elrod*.

I

In *Elrod* v. *Burns* the Court held that the newly elected Democratic Sheriff of Cook County, Ill., had violated the constitutional rights of certain non-civil-service employees by discharging them "because they did not support and were not members of the Democratic Party and had failed to obtain the sponsorship of one of its leaders." 427 U. S., at 351. That holding was supported by two separate opinions.

Writing for the plurality, MR. JUSTICE BRENNAN identified two separate but interrelated reasons supporting the conclusion that the discharges were prohibited by the First and Fourteenth Amendments. First, he analyzed the impact of a political patronage system [7] on freedom of belief and association. Noting that in order to retain their jobs, the Sheriff's employees were required to pledge their allegiance to the Democratic Party, work for or contribute to the party's candidates, or obtain a Democratic sponsor, he concluded that the inevitable tendency of such a system was to coerce employees into compromising their true beliefs.[8] That conclusion, in

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[7] MR. JUSTICE BRENNAN noted that many other practices are included within the definition of a patronage system, including placing supporters in government jobs not made available by political discharges, granting supporters lucrative government contracts, and giving favored wards improved public services. In that case, as in this, however, the only practice at issue was the dismissal of public employees for partisan reasons. 427 U. S., at 353; *id.*, at 374 (opinion of STEWART, J.). In light of the limited nature of the question presented, we have no occasion to address petitioner's argument that there is a compelling governmental interest in maintaining a political sponsorship system for filling vacancies in the public defender's office.

[8] "An individual who is a member of the out-party maintains affiliation with his own party at the risk of losing his job. He works for the election of his party's candidates and espouses its policies at the same risk. The financial and campaign assistance that he is induced to provide to another party furthers the advancement of that party's policies to the detriment of his party's views and ultimately his own beliefs, and any assessment of his salary is tantamount to coerced belief. See *Buckley* v. *Valeo*, 424 U. S. 1,

his opinion, brought the practice within the rule of cases like *Board of Education* v. *Barnette*, 319 U. S. 624, condemning the use of governmental power to prescribe what the citizenry must accept as orthodox opinion.[9]

Second, apart from the potential impact of patronage dismissals on the formation and expression of opinion, MR. JUSTICE BRENNAN also stated that the practice had the effect of imposing an unconstitutional condition on the receipt of a public benefit and therefore came within the rule of cases like *Perry* v. *Sindermann*, 408 U. S. 593. In support of the holding in *Perry* that even an employee with no contractual right to retain his job cannot be dismissed for engaging in constitutionally protected speech, the Court had stated:

> "For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the govern-

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19 (1976). Even a pledge of allegiance to another party, however ostensible, only serves to compromise the individual's true beliefs. Since the average public employee is hardly in the financial position to support his party and another, or to lend his time to two parties, the individual's ability to act according to his beliefs and to associate with others of his political persuasion is constrained, and support for his party is diminished." *Id.*, at 355–356.

MR. JUSTICE BRENNAN also indicated that a patronage system may affect freedom of belief more indirectly, by distorting the electoral process. Given the increasingly pervasive character of government employment, he concluded that the power to starve political opposition by commanding partisan support, financial and otherwise, may have a significant impact on the formation and expression of political beliefs.

[9] "Regardless of the nature of the inducement, whether it be by the denial of public employment or, as in *Board of Education* v. *Barnette*, 319 U. S. 624 (1943), by the influence of a teacher over students, '[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.' *Id.* at 642." *Id.* at 356.

ment may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' *Speiser* v. *Randall*, 357 U. S. 513, 526. Such interference with constitutional rights is impermissible.

. . . .

"Thus, the respondent's lack of a contractual or tenure 'right' to re-employment for the 1969–1970 academic year is immaterial to his free speech claim. Indeed, twice before, this Court has specifically held that the non-renewal of a nontenured public school teacher's one-year contract may not be predicated on his exercise of First and Fourteenth Amendment rights. *Shelton* v. *Tucker*, [364 U. S. 479]; *Keyishian* v. *Board of Regents*, [385 U. S. 589]. We reaffirm those holdings here." *Id.*, at 597–598.

If the First Amendment protects a public employee from discharge based on what he has said, it must also protect him from discharge based on what he believes.[10] Under this line of analysis, unless the government can demonstrate "an over-

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[10] "The Court recognized in *United Public Workers* v. *Mitchell*, 330 U. S. 75, 100 (1947), that 'Congress may not "enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office. . . ."' This principle was reaffirmed in *Wieman* v. *Updegraff*, 344 U. S. 183 (1952), which held that a State could not require its employees to establish their loyalty by extracting an oath denying past affiliation with Communists. And in *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 898 (1961), the Court recognized again that the government could not deny employment because of previous membership in a particular party." *Id.*, at 357–358.

riding interest," 427 U. S., at 368, "of vital importance," *id.*, at 362, requiring that a person's private beliefs conform to those of the hiring authority, his beliefs cannot be the sole basis for depriving him of continued public employment.

MR. JUSTICE STEWART's opinion concurring in the judgment avoided comment on the first branch of MR. JUSTICE BRENNAN's analysis, but expressly relied on the same passage from *Perry* v. *Sindermann* that is quoted above.

Petitioner argues that *Elrod* v. *Burns* should be read to prohibit only dismissals resulting from an employee's failure to capitulate to political coercion. Thus, he argues that, so long as an employee is not asked to change his political affiliation or to contribute to or work for the party's candidates, he may be dismissed with impunity—even though he would not have been dismissed if he had had the proper political sponsorship and even though the sole reason for dismissing him was to replace him with a person who did have such sponsorship. Such an interpretation would surely emasculate the principles set forth in *Elrod*. While it would perhaps eliminate the more blatant forms of coercion described in *Elrod*, it would not eliminate the coercion of belief that necessarily flows from the knowledge that one must have a sponsor in the dominant party in order to retain one's job.[11] More importantly, petitioner's interpretation would require the Court to repudiate entirely the conclusion of both MR. JUSTICE BRENNAN and MR. JUSTICE STEWART that the First Amend-

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[11] As MR. JUSTICE BRENNAN pointed out in *Elrod*, political sponsorship is often purchased at the price of political contributions or campaign work in addition to a simple declaration of allegiance to the party. *Id.*, at 355. Thus, an employee's realization that he must obtain a sponsor in order to retain his job is very likely to lead to the same type of coercion as that described by the plurality in *Elrod*. While there was apparently no overt political pressure exerted on respondents in this case, the potentially coercive effect of requiring sponsorship was demonstrated by Mr. Finkel's change of party registration in a futile attempt to retain his position. See n. 4, *supra*.

ment prohibits the dismissal of a public employee solely because of his private political beliefs.

In sum, there is no requirement that dismissed employees prove that they, or other employees, have been coerced into changing, either actually or ostensibly, their political allegiance. To prevail in this type of an action, it was sufficient, as *Elrod* holds, for respondents to prove that they were discharged "solely for the reason that they were not affiliated with or sponsored by the Democratic Party." 427 U. S., at 350.

II

Both opinions in *Elrod* recognize that party affiliation may be an acceptable requirement for some types of government employment. Thus, if an employee's private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency. *Id.*, at 366. In *Elrod*, it was clear that the duties of the employees—the chief deputy of the process division of the sheriff's office, a process server and another employee in that office, and a bailiff and security guard at the Juvenile Court of Cook County—were not of that character, for they were, as MR. JUSTICE STEWART stated, "nonpolicy-making, nonconfidential" employees. *Id.*, at 375.[12]

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[12] The plurality emphasized that patronage dismissals could be justified only if they advanced a governmental, rather than a partisan, interest. 427 U. S., at 362. That standard clearly was not met to the extent that employees were expected to perform extracurricular activities for the party, or were being rewarded for past services to the party. Government funds, which are collected from taxpayers of all parties on a nonpolitical basis cannot be expended for the benefit of one political party simply because that party has control of the government. The compensation of government employees, like the distribution of other public benefits, must be justified by a governmental purpose.

The Sheriff argued that his employees' political beliefs did have a bearing on the official duties they were required to perform because political

As Mr. Justice Brennan noted in *Elrod*, it is not always easy to determine whether a position is one in which political affiliation is a legitimate factor to be considered. *Id.*, at 367. Under some circumstances, a position may be appropriately considered political even though it is neither confidential nor policymaking in character. As one obvious example, if a State's election laws require that precincts be supervised by two election judges of different parties, a Republican judge could be legitimately discharged solely for changing his party registration. That conclusion would not depend on any finding that the job involved participation in policy decisions or access to confidential information. Rather, it would simply rest on the fact that party membership was essential to the discharge of the employee's governmental responsibilities.

It is equally clear that party affiliation is not necessarily relevant to every policymaking or confidential position. The coach of a state university's football team formulates policy, but no one could seriously claim that Republicans make better coaches than Democrats, or vice versa, no matter which party is in control of the state government. On the other hand, it is equally clear that the Governor of a State may appropriately believe that the official duties of various assistants who help him write speeches, explain his views to the press, or communicate with the legislature cannot be performed effectively unless those persons share his political beliefs and party commitments. In sum, the ultimate inquiry is not whether the label "policymaker" or "confidential" fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.

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loyalty was necessary to the continued efficiency of the office. But after noting the tenuous link between political loyalty and efficiency where process servers and clerks were concerned, the plurality held that any small gain in efficiency did not outweigh the employees' First Amendment rights. *Id.*, at 366.

Having thus framed the issue, it is manifest that the continued employment of an assistant public defender cannot properly be conditioned upon his allegiance to the political party in control of the county government. The primary, if not the only, responsibility of an assistant public defender is to represent individual citizens in controversy with the State.[13] As we recently observed in commenting on the duties of counsel appointed to represent indigent defendants in federal criminal proceedings:

> "[T]he primary office performed by appointed counsel parallels the office of privately retained counsel. Although it is true that appointed counsel serves pursuant to statutory authorization and in furtherance of the federal interest in insuring effective representation of criminal defendants, his duty is not to the public at large, except in that general way. His principal responsibility is to serve the undivided interests of his client. Indeed, an indispensable element of the effective performance of his responsibilities is the ability to act independently of the government and to oppose it in adversary litigation." *Ferri* v. *Ackerman*, 444 U. S. 193, 204.

Thus, whatever policymaking occurs in the public defender's office must relate to the needs of individual clients and not to any partisan political interests. Similarly, although an assistant is bound to obtain access to confidential information arising out of various attorney-client relationships, that information has no bearing whatsoever on partisan political concerns. Under these circumstances, it would undermine, rather than promote, the effective performance of an assistant public

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[13] This is in contrast to the broader public responsibilities of an official such as a prosecutor. We express no opinion as to whether the deputy of such an official could be dismissed on grounds of political party affiliation or loyalty. Cf. *Newcomb* v. *Brennan*, 558 F. 2d 825 (CA7 1977), cert. denied, 434 U. S. 968 (dismissal of deputy city attorney).

defender's office to make his tenure dependent on his allegiance to the dominant political party.[14]

Accordingly, the entry of an injunction against termination of respondents' employment on purely political grounds was appropriate and the judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE STEWART, dissenting.

I joined the judgment of the Court in *Elrod* v. *Burns*, 427 U. S. 347, because it is my view that, under the First and Fourteenth Amendments, "a nonpolicymaking, nonconfidential government employee can[not] be discharged . . . from a job that he is satisfactorily performing upon the sole ground of his political beliefs." *Id.*, at 375. That judgment in my opinion does not control the present case for the simple reason

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[14] As the District Court observed at the end of its opinion, it is difficult to formulate any justification for tying either the selection or retention of an assistant public defender to his party affiliation:

"Perhaps not squarely presented in this action, but deeply disturbing nonetheless, is the question of the propriety of political considerations entering into the selection of attorneys to serve in the sensitive positions of Assistant Public Defenders. By what rationale can it even be suggested that it is legitimate to consider, in the selection process, the politics of one who is to represent indigent defendants accused of crime? No 'compelling state interest' can be served by insisting that those who represent such defendants publicly profess to be Democrats (or Republicans)." 457 F. Supp., at 1293, n. 13.

In his brief petitioner attempts to justify the discharges in this case on the ground that he needs to have absolute confidence in the loyalty of his subordinates. In his dissenting opinion, MR. JUSTICE STEWART makes the same point, relying on an "analogy to a firm of lawyers in the private sector." *Post*, at 521. We cannot accept the proposition, however, that there cannot be "mutual confidence and trust" between attorneys, whether public defenders or private practitioners, unless they are both of the same political party. To the extent that petitioner lacks confidence in the assistants he has inherited from the prior administration for some reason other than their political affiliations, he is, of course, free to discharge them.

that the respondents here clearly are not "nonconfidential" employees.

The respondents in the present case are lawyers, and the employment positions involved are those of assistants in the office of the Rockland County Public Defender. The analogy to a firm of lawyers in the private sector is a close one, and I can think of few occupational relationships more instinct with the necessity of mutual confidence and trust than that kind of professional association.

I believe that the petitioner, upon his appointment as Public Defender, was not constitutionally compelled to enter such a close professional and necessarily confidential association with the respondents if he did not wish to do so.*

MR. JUSTICE POWELL, with whom MR. JUSTICE REHNQUIST joins, and with whom MR. JUSTICE STEWART joins as to Part I, dissenting.

The Court today continues the evisceration of patronage practices begun in *Elrod* v. *Burns*, 427 U. S. 347 (1976). With scarcely a glance at almost 200 years of American political tradition, the Court further limits the relevance of political affiliation to the selection and retention of public employees. Many public positions previously filled on the basis of membership in national political parties now must be staffed in accordance with a constitutionalized civil service standard that will affect the employment practices of federal, state, and local governments. Governmental hiring practices long thought to be a matter of legislative and executive discretion now will be subjected to judicial oversight. Today's decision is an exercise of judicial lawmaking that, as THE CHIEF JUSTICE wrote in his *Elrod* dissent, "represents a significant intrusion into the area of legislative and policy concerns." *Id.*, at 375. I dissent.

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*Contrary to repeated statements in the Court's opinion, the present case does not involve "private political beliefs," but public affiliation with a political party.

I

The Court contends that its holding is compelled by the First Amendment. In reaching this conclusion, the Court largely ignores the substantial governmental interests served by patronage. Patronage is a long-accepted practice[1] that never has been eliminated totally by civil service laws and regulations. The flaw in the Court's opinion lies not only in its application of First Amendment principles, see parts II–IV, *infra*, but also in its promulgation of a new, and substantially expanded, standard for determining which governmental employees may be retained or dismissed on the basis of political affiliation.[2]

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[1] When Thomas Jefferson became the first Chief Executive to succeed a President of the opposing party, he made substantial use of appointment and removal powers. Andrew Jackson, the next President to follow an antagonistic administration, used patronage extensively when he took office. The use of patronage in the early days of our Republic played an important role in democratizing American politics. *Elrod* v. *Burns*, 427 U. S., at 378–379 (POWELL, J., dissenting). President Lincoln's patronage practices and his reliance upon the newly formed Republican Party enabled him to build support for his national policies during the Civil War. See E. McKitrick, Party Politics and the Union and Confederate War Efforts, in The American Party System 117, 131–133 (W. Chambers & W. Burnham ed. 1967). Subsequent patronage reform efforts were "concerned primarily with the corruption and inefficiency that patronage was thought to induce in civil service and the power that patronage practices were thought to give the 'professional' politicians who relied on them." *Elrod* v. *Burns*, 427 U. S., at 379 (POWELL, J., dissenting). As a result of these efforts, most federal and state civil service employment was placed on a nonpatronage basis. *Ibid.* A significant segment of public employment has remained, however, free from civil service constraints.

[2] The Court purports to limit the issue in this case to the dismissal of public employees. See *ante*, at 513, n. 7. Yet the Court also states that "it is difficult to formulate any justification for tying either the selection or retention of an assistant public defender to his party affiliation." *Ante*, at 520, n. 14. If this latter statement is not a holding of the Court, it at least suggests that the Court perceives no constitutional distinction between selection and dismissal of public employees.

In *Elrod* v. *Burns*, three Members of the Court joined a plurality opinion concluding that nonpolicymaking employees could not be dismissed on the basis of political affiliation. 427 U. S., at 367 (opinion of BRENNAN, J., with whom WHITE and MARSHALL, JJ., joined). Two Members of the Court joined an opinion concurring in the judgment and stating that nonpolicymaking, nonconfidential employees could not be so dismissed. *Id.*, at 375 (opinion of STEWART, J., with whom BLACKMUN, J., joined). Notwithstanding its purported reliance upon the holding of *Elrod*, *ante*, at 512, n. 6, the Court today ignores the limitations inherent in both views. The Court rejects the limited role for patronage recognized in the plurality opinion by holding that not all policymakers may be dismissed because of political affiliation. *Ante*, at 518–520. And the Court refuses to allow confidential employees to be dismissed for partisan reasons. *Ante*, at 520, n. 14; see *ante*, p. 520 (STEWART, J., dissenting). The broad, new standard is articulated as follows:

> "[T]he ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Ante*, at 518.

The Court gives three examples to illustrate the standard. Election judges and certain executive assistants may be chosen on the basis of political affiliation; college football coaches may not. *Ibid.*[3] And the Court decides in this case that

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[3] The rationale for the Court's conclusion that election judges may be partisan appointments is not readily apparent. The Court states that "if a State's election laws require that precincts be supervised by two election judges of different parties, a Republican judge could be legitimately discharged solely for changing his party registration." *Ante*, at 518. If the mere presence of a state law mandating political affiliation as a requirement for public employment were sufficient, then the Legisla-

party affiliation is not an appropriate requirement for selection of the attorneys in a public defender's office because "whatever policymaking occurs in the public defender's office must relate to the needs of individual clients and not to any partisan political interests." *Ante*, at 519.

The standard articulated by the Court is framed in vague and sweeping language certain to create vast uncertainty. Elected and appointed officials at all levels who now receive guidance from civil service laws, no longer will know when political affiliation is an appropriate consideration in filling a position. Legislative bodies will not be certain whether they have the final authority to make the delicate line-drawing decisions embodied in the civil service laws. Prudent individuals requested to accept a public appointment must consider whether their predecessors will threaten to oust them through legal action.

One example at the national level illustrates the nature and magnitude of the problem created by today's holding. The President customarily has considered political affiliation in removing and appointing United States attorneys. Given the critical role that these key law enforcement officials play in the administration of the Department of Justice, both Democratic and Republican Attorneys General have concluded, not surprisingly, that they must have the confidence and support of the United States attorneys. And political affiliation has been used as one indicator of loyalty.[4]

Yet, it would be difficult to say, under the Court's standard, that "partisan" concerns properly are relevant to the performance of the duties of a United States attorney. This

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ture of Rockland County could reverse the result of this case merely by passing a law mandating that political affiliation be considered when a public defender chooses his assistants. Moreover, it is not apparent that a State could demonstrate, under the standard approved today, that only a political partisan is qualified to be an impartial election judge.

[4] See Lemann, The Case for Political Patronage, The Washington Monthly, Dec. 1977, p. 8.

Court has noted that " '[t]he office of public prosecutor is one which must be administered with courage and independence.' " *Imbler* v. *Pachtman*, 424 U. S. 409, 423 (1976), quoting *Pearson* v. *Reed*, 6 Cal. App. 2d 277, 287, 44 P. 2d 592, 597 (1935). Nevertheless, I believe that the President must have the right to consider political affiliation when he selects top ranking Department of Justice officials. The President and his Attorney General, not this Court, are charged with the responsibility for enforcing the laws and administering the Department of Justice. The Court's vague, overbroad decision may cast serious doubt on the propriety of dismissing United States attorneys, as well as thousands of other policymaking employees at all levels of government, because of their membership in a national political party.[5]

A constitutional standard that is both uncertain in its application and impervious to legislative change will now control selection and removal of key governmental personnel. Federal judges will now be the final arbiters as to who federal, state, and local governments may employ. In my view, the Court is not justified in removing decisions so essential to

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[5] The Court notes that prosecutors hold "broader public responsibilities" than public defenders. *Ante*, at 519, n. 13. The Court does not suggest, however, that breadth of responsibility correlates with the appropriateness of political affiliation as a requirement for public employment. Indeed, such a contention would appear to be inconsistent with the Court's assertion that the "ultimate inquiry is not whether the label 'policymaker' . . . fits a particular position. . . ." *Ante*, at 518.

I do not suggest that the Constitution requires a patronage system. Civil service systems have been designed to eliminate corruption and inefficiency not to protect the political beliefs of public employees. Indeed, merit selection systems often impose restrictions on political activities by public employees. D. Rosenbloom, Federal Service and the Constitution: The Development of the Public Employment Relationship 83–86 (1971); see *CSC* v. *Letter Carriers*, 413 U. S. 548 (1973). Of course, civil service systems further important governmental goals, including continuity in the operation of government. A strength of our system has been the blend of civil service and patronage appointments, subject always to oversight and change by the legislative branches of government.

responsible and efficient governance from the discretion of legislative and executive officials.

II

The Court errs not only in its selection of a standard, but more fundamentally in its conclusion that the First Amendment prohibits the use of membership in a national political party as a criterion for the dismissal of public employees.[6] In reaching this conclusion, the Court makes new law from inapplicable precedents. The Court suggests that its decision is mandated by the principle that governmental action may not "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion. . . ." *Board of Education* v. *Barnette*, 319 U. S. 624, 642 (1943). The Court also relies upon the decisions in *Perry* v. *Sindermann*, 408 U. S. 593 (1972), and *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967). *Ante*, at 514–515; see *Elrod* v. *Burns*, 427 U. S., at 358–359 (opinion of BRENNAN, J.). But the propriety of patronage was neither questioned nor addressed in those cases.

Both *Keyishian* and *Perry* involved faculty members who were dismissed from state educational institutions because of their political views.[7] In *Keyishian*, the Court reviewed a

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[6] In my *Elrod* dissent, I suggested that public employees who lose positions obtained through their participation in the patronage system have not suffered a loss of First Amendment rights. 427 U. S., at 380–381. Such employees assumed the risks of the system and were benefited, not penalized, by its practical operation. But the Court bases its holding on the First Amendment and, accordingly, I consider the constitutional issue.

[7] *Board of Education* v. *Barnette*, 319 U. S. 624 (1943), did not involve public employment. In that case, the Court declared that a state statute compelling each public school student to pledge allegiance to the flag violated the First Amendment. Similarly, *Wieman* v. *Updegraff*, 344 U. S. 183 (1952), *Shelton* v. *Tucker*, 364 U. S. 479 (1960), and *Cafeteria Workers* v. *McElroy*, 367 U. S. 886 (1961), did not concern governmental attempts to hire or dismiss employees pursuant to an established patronage system. The Court also relies upon *United Public Workers* v *Mitchell*, 330 U. S. 75 (1947). *Ante*, at 8, n. 10. In that case, the Court upheld limitations

state statute that permitted dismissals of faculty members from state institutions for "treasonable or seditious" utterances or acts. The Court noted that academic freedom is "a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." 385 U. S., at 603. Because of the ambiguity in the statutory language, the Court held that the law was unconstitutionally vague. The Court also held that membership in the Communist Party could not automatically disqualify a person from holding a faculty position in a state university. *Id.*, at 606. In *Perry*, the Court held that the Board of Regents of a state university system could not discharge a professor in retaliation for his exercise of free speech. 408 U. S., at 598. In neither case did the State suggest that the governmental positions traditionally had been regarded as patronage positions. Thus, the Court correctly held that no substantial state interest justified the infringement of free speech. This case presents a question quite different from that in *Keyishian* and *Perry*.

The constitutionality of appointing or dismissing public employees on the basis of political affiliation depends upon the governmental interests served by patronage. No constitutional violation exists if patronage practices further sufficiently important interests to justify tangential burdening of First Amendment rights. See *Buckley* v. *Valeo*, 424 U. S. 1, 25 (1976). This inquiry cannot be resolved by reference to First Amendment cases in which patronage was neither involved nor discussed. Nor can the question in this case be answered in a principled manner without identifying and weighing the governmental interest served by patronage.

III

Patronage appointments help build stable political parties by offering rewards to persons who assume the tasks necessary

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on the political conduct of public employees that far exceed any burden on First Amendment rights demonstrated in this case.

to the continued functioning of political organizations. "As all parties are concerned with power they naturally operate by placing members and supporters into positions of power. Thus there is nothing derogatory in saying that a primary function of parties is patronage." J. Jupp, Political Parties 25–26 (1968). The benefits of patronage to a political organization do not derive merely from filling policymaking positions on the basis of political affiliation. Many, if not most, of the jobs filled by patronage at the local level may not involve policymaking functions.[8] The use of patronage to fill such positions builds party loyalty and avoids "splintered parties and unrestrained factionalism [that might] do significant damage to the fabric of government." *Storer* v. *Brown*, 415 U. S. 724, 736 (1974).

Until today, I would have believed that the importance of political parties was self-evident. Political parties, dependent in many ways upon patronage, serve a variety of substantial governmental interests. A party organization allows political candidates to muster donations of time and money necessary to capture the attention of the electorate. Particularly in a time of growing reliance upon expensive television advertisements, a candidate who is neither independently wealthy nor capable of attracting substantial contributions must rely upon party workers to bring his message to the voters.[9] In contests for less visible offices, a candidate may have no efficient method of appealing to the voters unless he enlists the efforts of persons who seek reward through the patronage system. Insofar as the Court's decision today

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[8] See E. Costikyan, Behind Closed Doors: Politics in the Public Interest 253–254 (1966).

[9] Television and radio enable well-financed candidates to go directly into the homes of voters far more effectively than even the most well-organized "political machine." See D. Broder, The Party's Over: The Failure of Politics in America 239–240 (1972).

limits the ability of candidates to present their views to the electorate, our democratic process surely is weakened.[10]

Strong political parties also aid effective governance after election campaigns end. Elected officials depend upon appointees who hold similar views to carry out their policies and administer their programs. Patronage—the right to select key personnel and to reward the party "faithful"—serves the public interest by facilitating the implementation of policies endorsed by the electorate.[11] The Court's opinion casts a shadow over this time-honored element of our system. It appears to recognize that the implementation of policy is a legitimate goal of the patronage system and that some, but not all, policymaking employees may be replaced on the basis of their political affiliation. *Ante*, at 518.[12] But the Court

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[10] Patronage also attracts persons willing to perform the jobs that enable voters to gain easy access to the electoral process. In some localities, "[t]he parties saw that the polls were open when they should be, and that the voting machines worked." Costikyan, Cities *Can* Work, Saturday Review, Apr. 4, 1970, pp. 19, 20. At a time when the percentage of Americans who vote is declining steadily, see Statistical Abstract of the United States 516 (1979), the citizen who distributes his party's literature, who helps to register voters, or who transports voters to the polls on Election Day performs a valuable public service.

[11] In addition, political parties raise funds, recruit potential candidates, train party workers, provide assistance to voters, and act as a liaison between voters and governmental bureaucracies. Assistance to constituents is a common form of patronage. At the local level, political clubhouses traditionally have helped procure municipal services for constituents who often have little or no other access to public officials. M. Tolchin & S. Tolchin, To The Victor . . . : Political Patronage from the Clubhouse to the White House 19 (1971). Party organizations have been a means of upward mobility for newcomers to the United States and members of minority groups. See *Elrod* v. *Burns*, 427 U. S., at 382, and n. 6 (POWELL, J., dissenting); S. Lubell, The Future of American Politics 76–77 (1952).

[12] The reasoning of the *Elrod* plurality clearly permitted vestiges of patronage to continue in order to ensure that "representative government not be undercut by tactics obstructing the implementation of policies of the new administration. . . ." 427 U. S., at 367. But in view of the

does not recognize that the implementation of policy often depends upon the cooperation of public employees who do not hold policymaking posts. As one commentator has written: "What the Court forgets is that, if government is to work, policy implementation is just as important as policymaking. No matter how wise the chief, he has to have the right Indians to transform his ideas into action, to get the job done." [13] The growth of the civil service system already has limited the ability of elected politicians to effect political change. Public employees immune to public pressure "can resist changes in policy without suffering either the loss of their jobs or a cut in their salary." [14] Such effects are proper when they follow from legislative or executive decisions to withhold some jobs from the patronage system. But the Court tips the balance between patronage and nonpatronage positions, and, in my view, imposes unnecessary constraints upon the ability of responsible officials to govern effectively and to carry out new policies.

Although the Executive and Legislative Branches of Government are independent as a matter of constitutional law, effective government is impossible unless the two Branches cooperate to make and enforce laws. Over the decades of our national history, political parties have furthered—if not assured—a measure of cooperation between the Executive and

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Court's new holding that some policymaking positions may not be filled on the basis of political affiliation, *ante*, at 518, elected officials may find changes in public policy thwarted by policymaking employees protected from replacement by the Constitution. The official with a hostile or foot-dragging subordinate will now be in a difficult position. In order to replace such a subordinate, he must be prepared to prove that the subordinate's "private political beliefs [will] interfere with the discharge of his public duties." *Ante*, at 517.

[13] Peters, A Kind Word for the Spoils System, The Washington Monthly, Sept. 1976, p. 30.

[14] Tolchin & Tolchin, *supra* n. 11, at 72–73. See Costikyan, *supra* n. 8, at 353–354.

Legislative Branches. A strong party allows an elected executive to implement his programs and policies by working with legislators of the same political organization. But legislators who owe little to their party tend to act independently of its leadership. The result is a dispersion of political influence that may inhibit a political party from enacting its programs into law.[15] The failure to sustain party discipline, at least at the national level, has been traced to the inability of successful political parties to offer patronage positions to their members or to the supporters of elected officials.[16]

The breakdown of party discipline that handicaps elected officials also limits the ability of the electorate to choose wisely among candidates. Voters with little information about individuals seeking office traditionally have relied upon party affiliation as a guide to choosing among candidates. With the decline in party stability, voters are less able to blame or credit a party for the performance of its elected officials. Our national party system is predicated upon the assumption that political parties sponsor, and are responsible for, the performance of the persons they nominate for office.[17]

In sum, the effect of the Court's decision will be to decrease the accountability and denigrate the role of our national political parties. This decision comes at a time when an increasing number of observers question whether our national political parties can continue to operate effectively.[18]

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[15] Herbers, The Party's Over for the Political Parties, The New York Times Magazine, Dec. 9, 1979, pp. 158, 175.

[16] See Costikyan, *supra* n. 8, at 252–253.

[17] In local elections, a candidate's party affiliation may be the most salient information communicated to voters. One study has indicated that affiliation remains the predominant influence on voter choice in low-visibility elections such as contests for positions in the state legislature. See Murray & Vedlitz, Party Voting in Lower-Level Electoral Contests, 59 Soc. Sci. Q. 752, 756 (1979).

[18] See, *e. g.*, W. Burnham, The 1976 Election: Has the Crisis Been Adjourned?, in American Politics and Public Policy 1, 19–22 (W. Burnham & M. Weinberg ed. 1978); Broder, *supra* n. 9; Herbers, *supra* n. 15,

Broad-based political parties supply an essential coherence and flexibility to the American political scene. They serve as coalitions of different interests that combine to seek national goals. The decline of party strength inevitably will enhance the influence of special interest groups whose only concern all too often is how a political candidate votes on a single issue. The quality of political debate, and indeed the capacity of government to function in the national interest, suffer when candidates and officeholders are forced to be more responsive to the narrow concerns of unrepresentative special interest groups than to overarching issues of domestic and foreign policy. The Court ignores the substantial governmental interests served by reasonable patronage. In my view, its decision will seriously hamper the functioning of stable political parties.

IV

The facts of this case also demonstrate that the Court's decision well may impair the right of local voters to structure their government. Consideration of the form of local government in Rockland County, N. Y., demonstrates the antidemocratic effect of the Court's decision.

The voters of the county elect a legislative body. Among the responsibilities that the voters give to the legislature is the selection of a county public defender. In 1972, when the county voters elected a Republican majority in the legislature, a Republican was selected as Public Defender. The Public Defender retained one respondent and appointed the other as Assistant Public Defenders. Not surprisingly, both respondents are Republicans. In 1976, the voters elected a majority of Democrats to the legislature. The Democratic majority, in turn, selected a Democratic Public Defender who replaced both respondents with Assistant Public Defenders approved by the Democratic legislators. *Ante*, at 509–510, and n. 5.

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at 159; Pomper, The Decline of the Party in American Elections, 92 Pol. Sci. Q. 21, 40–41 (1977). See also n. 9, *supra*.

The voters of Rockland County are free to elect their public defender and assistant public defenders instead of delegating their selection to elected and appointed officials.[19] Certainly the Court's holding today would not preclude the voters, the ultimate "hiring authority," from choosing both public defenders and their assistants by party membership. The voters' choice of public officials on the basis of political affiliation is not yet viewed as an inhibition of speech; it is democracy. Nor may any incumbent contend seriously that the voters' decision not to re-elect him because of his political views is an impermissible infringement upon his right of free speech or affiliation. In other words, the operation of democratic government depends upon the selection of elected officials on precisely the basis rejected by the Court today.

Although the voters of Rockland County could have elected both the public defender and his assistants, they have given their legislators a representative proxy to appoint the public defender. And they have delegated to the public defender the power to choose his assistants. Presumably the voters have adopted this course in order to facilitate more effective representative government. Of course, the voters could have instituted a civil service system that would preclude the selection of either the public defender or his assistants on the basis of political affiliation. But the continuation of the present system reflects the electorate's decision to select certain public employees on the basis of political affiliation.

The Court's decision today thus limits the ability of the voters of a county to structure their democratic government in the way that they please. Now those voters must elect both the public defender and his assistants if they are to fill governmental positions on a partisan basis.[20] Because voters

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[19] In Florida, for example, the local public defender is elected. See Fla. Const., Art. 5, § 18; Fla. Stat. § 27.50 (1979).

[20] The Court's description of the policymaking functions of a public defender's office suggests that the public defender may no longer be chosen by the County Legislature on a partisan basis. *Ante*, at 519–520.

certainly may elect governmental officials on the basis of party ties, it is difficult to perceive a constitutional reason for prohibiting them from delegating that same authority to legislators and appointed officials.

V

The benefits of political patronage and the freedom of voters to structure their representative government are substantial governmental interests that justify the selection of the assistant public defenders of Rockland County on the basis of political affiliation. The decision to place certain governmental positions within a civil service system is a sensitive political judgment that should be left to the voters and to elected representatives of the people. But the Court's constitutional holding today displaces political responsibility with judicial fiat. In my view, the First Amendment does not incorporate a national civil service system. I would reverse the judgment of the Court of Appeals.

UNITED STATES v. MITCHELL ET AL.

CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

No. 78-1756. Argued December 3, 1979—Decided April 15, 1980

Section 1 of the Indian General Allotment Act of 1877 authorizes the President to allot to each Indian residing on a reservation specified acreage of agricultural and grazing land within the reservation; § 2 provides that all such allotments shall be selected by the Indians so as to include improvements made by them; and § 5 provides that the United States shall retain title to such allotted lands in trust for the benefit of the allottees. Pursuant to the Act, the Government allotted all of the Quinault Reservation's land in trust to individual Indians. Respondents, individual allottees of land in that Reservation, the Quinault Tribe, which now holds some allotments, and an association of allottees, brought actions, consolidated in the Court of Claims, to recover damages from the Government for alleged mismanagement of timber resources found on the Reservation. Denying the Government's motion to dismiss the actions on the alleged ground that it had not waived its sovereign immunity with respect to the asserted claims, the Court of Claims held that the General Allotment Act created a fiduciary duty on the United States' part to manage the timber resources properly and constituted a waiver of sovereign immunity against a suit for money damages as compensation for breaches of that duty.

Held: The General Allotment Act cannot be read as establishing that the United States has a fiduciary responsibility for management of allotted forest lands, and thus does not provide respondents with a cause of action for the damages sought. Pp. 538–546.

(a) Neither the Tucker Act, under which the individual claimants premised jurisdiction in the Court of Claims, nor § 24 of the Indian Claims Commission Act, on which jurisdiction over the Tribe's claim was based, confers a substantive right against the United States to recover money damages. Pp. 538–540.

(b) The General Allotment Act created only a limited trust relationship between the United States and the allottee that does not impose any duty upon the Government to manage timber resources. The language of § 5 of the Act must be read *in pari materia* with the language of §§ 1 and 2, both of which indicate that the Indian allottee, and not a representative of the United States, is responsible for using the land for agricultural or grazing purposes. The Act's legislative history also

indicates that the trust Congress placed on allotted lands is of limited scope, it appearing that when Congress enacted the Act it intended that the United States hold the lands in trust not because it wished the Government to control use of the lands and be subject to money damages for breaches of fiduciary duty, but simply because it wished to prevent alienation of the lands and to ensure that allottees would be immune from state taxation. Furthermore, certain events surrounding and following the Act's passage indicate that it should not be read as authorizing, much less requiring, the Government to manage timber resources for the benefit of Indian allottees. Pp. 540–546.

219 Ct. Cl. —, 591 F. 2d 1300, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which STEWART, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. WHITE, J., filed a dissenting opinion, in which BRENNAN and STEVENS, JJ., joined, *post*, p. 546. BURGER, C. J., took no part in the decision of the case.

Deputy Solicitor General Claiborne argued the cause for the United States. On the briefs were *Solicitor General McCree, Acting Assistant Attorney General Sagalkin,* and *Robert L. Klarquist.*

Charles A. Hobbs argued the cause for respondents. With him on the brief was *Jerry R. Goldstein.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This case presents the question whether the Indian General Allotment Act of 1887 authorizes the award of money damages against the United States for alleged mismanagement of forests located on lands allotted to Indians under that Act.

I

In 1873, a Reservation was established by Executive Order in the State of Washington for the Quinault Tribe. 1 C. Kappler, Indian Affairs 923 (2d ed. 1904). Much of the land within the Reservation was forested. By 1935, acting under the authority of the General Allotment Act of 1887, ch. 119, 24 Stat. 388, as amended, 25 U. S. C. § 331 *et seq.*, the Government had allotted all of the Reservation's land in trust

to individual Indians. Other enactments of Congress require the Secretary of the Interior to manage these forests, sell the timber, and pay the proceeds of such sales, less administrative expenses, to the allottees.[1]

The respondents are 1,465 individual allottees of land contained in the Quinault Reservation, the Quinault Tribe, which now holds some allotments, and the Quinault Allottees Association, an unincorporated association formed to promote the interests of the allottees of the Quinault Reservation. In four actions consolidated in the Court of Claims, the respondents sought to recover damages from the Government for alleged mismanagement of timber resources found on the Reservation. The respondents asserted that the Government: (1) failed to obtain fair market value for timber sold; (2) failed to manage timber on a sustained-yield basis and to rehabilitate the land after logging; (3) failed to obtain payment for some merchantable timber; (4) failed to develop a proper system of roads and easements for timber operations and exacted improper charges from allottees for roads; (5) failed to pay interest on certain funds and paid insufficient interest on other funds; and (6) exacted excessive administrative charges from allottees. The respondents contended that they were entitled to recover money damages because this alleged misconduct breached a fiduciary duty owed to them by the United States as trustee of the allotted lands under the General Allotment Act.

The United States moved to dismiss the respondents' actions on the ground that it had not waived its sovereign

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[1] Current statutes relevant to the Secretary's responsibilities with respect to Indian timber resources include 25 U. S. C. § 162a (investment of funds of tribe and individual allottee); 25 U. S. C. §§ 318a, 323–325 (roads and rights-of-way); 25 U. S. C. §§ 349, 372 (issuance of fee patents to allottees or heirs found to be capable of managing their affairs); 25 U. S. C. §§ 406–407 (sale of timber); 25 U. S. C. § 413 (collection of administrative expenses incurred on behalf of Indians); 25 U. S. C. § 466 (sustained-yield management of forests).

immunity with respect to the claims raised. The Court of Claims, sitting en banc, denied the Government's motion. 219 Ct. Cl. —, 591 F. 2d 1300 (1979). Reasoning that Government mismanagement of the kind alleged breaches the Government's fiduciary duty under the General Allotment Act, the court held that the Act provides Indian allottees a cause of action for money damages against the United States.

We granted certiorari, 442 U. S. 940 (1979), and now reverse and remand.

II

It is elementary that "[t]he United States, as sovereign, is immune from suit save as it consents to be sued . . . , and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States* v. *Sherwood*, 312 U. S. 584, 586 (1941). A waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." *United States* v. *King*, 395 U. S. 1, 4 (1969). In the absence of clear congressional consent, then, "there is no jurisdiction in the Court of Claims more than in any other court to entertain suits against the United States." *United States* v. *Sherwood*, *supra*, at 587–588.

The individual claimants in this action premised jurisdiction in the Court of Claims upon the Tucker Act, 28 U. S. C. § 1491, which gives that court jurisdiction of "any claim against the United States founded either upon the Constitution, or any Act of Congress." The Tucker Act is "only a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages." *United States* v. *Testan*, 424 U. S. 392, 398 (1976). The Act merely "confers jurisdiction upon [the Court of Claims] whenever the substantive right exists." *Ibid.* The individual claimants, therefore, must look beyond the jurisdictional statute for a waiver of sovereign immunity with respect to their claims.

The same is true for the tribal claimant. Jurisdiction over

its claims was based on § 24 of the Indian Claims Commission Act, 28 U. S. C. § 1505. That provision states:

> "The Court of Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Claims if the claimant were not an Indian tribe, band or group."

By enacting this statute, Congress plainly intended to give tribal claimants the same access to the Court of Claims provided to individuals by the Tucker Act. The House Committee Report stated:

> "As respects claims accruing after its adoption this bill confers jurisdiction on the Court of Claims to determine and adjudicate any tribal claim of a character which would be cognizable in the Court of Claims if the claimant were not an Indian tribe. In such cases the claimants are to be entitled to recover in the same manner, to the same extent, and subject to the same conditions and limitations, and the United States shall be entitled to the same defenses, both at law and in equity, . . . as in cases brought in the Court of Claims by non-Indians under section 145 of the Judicial Code [now 28 U. S. C. § 1491], as amended." H. R. Rep. No. 1466, 79th Cong., 1st Sess., 13 (1945).

See also Hearings on H. R. 1198 and H. R. 1341 before the House Committee on Indian Affairs, 79th Cong., 1st Sess., 149 (1945) (statement of Assistant Solicitor Cohen); H. R. Rep. No. 352, 81st Cong., 1st Sess., 15–16 (1949) (recodifying the statute).

Under 28 U. S. C. § 1505, then, tribal claimants have the same access to the Court of Claims provided to individual claimants by 28 U. S. C. § 1491, and the United States is entitled to the same defenses at law and in equity under both statutes. It follows that 28 U. S. C. § 1505 no more confers a substantive right against the United States to recover money damages than does 28 U. S. C. § 1491.[2]

III

Section 1 of the General Allotment Act authorizes the President to allot to each Indian residing on a reservation up to 80 acres of agricultural land or 160 acres of grazing land found within the reservation. 24 Stat. 388, as amended, 25 U. S. C. § 331. Section 5 of the Act provides that the United

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[2] For claims arising before August 13, 1946, however, the statute did waive the sovereign immunity of the United States. The Indian Claims Commission was directed to "hear and determine" such claims against the United States based on legal and equitable principles and on considerations of "fair and honorable dealings that are not recognized by any existing rule of law or equity." 25 U. S. C. § 70a.

Contrary to respondents' assertions, the comments of then-Representative Jackson, the sponsor of the bill that became 28 U. S. C. § 1505, do not indicate that Congress intended this statute to be a waiver of sovereign immunity for any alleged breach of trust accruing after August 13, 1946. Indeed, Representative Jackson stated that "the bill provides that with respect to all grievances that may arise hereafter Indians shall be treated on the same basis as other citizens of the United States in suits before the Court of Claims." 92 Cong. Rec. 5313 (1946). This statement is consistent with his comment that if the bill was adopted "it will never again be necessary to pass special Indian jurisdictional acts in order to permit the Indians to secure a court adjudication on any misappropriations of Indian funds or of any other Indian property by Federal officials that might occur in the future." *Ibid.* Such misappropriations could constitute takings for which just compensation is required by the Fifth Amendment, and this Court has long held that such a claim is within the jurisdiction of the Court of Claims under 28 U. S. C. § 1491. See *United States* v. *Testan*, 424 U. S. 392, 401 (1976); *United States* v. *Creek Nation*, 295 U. S. 103, 109–110 (1935); *Jacobs* v. *United States*, 290 U. S. 13, 16 (1933).

States shall retain title to such allotted lands in trust for the benefit of the allottees:

> "Upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made . . . and that at the expiration of said period the United States will convey the same by patent to said Indian . . . , in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided,* That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void." 24 Stat. 389, as amended, 25 U. S. C. § 348.

Under § 2 of the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U. S. C. § 462, the United States now holds title to these lands indefinitely.

The Court of Claims held that the General Allotment Act creates a fiduciary duty on the part of the United States to manage timber resources properly and constitutes a waiver of sovereign immunity against a suit for money damages as compensation for breaches of that duty. The court drew both of these conclusions from the Act's language providing that the United States is to "hold the land . . . in trust for the sole use and benefit of the" allottee. The court held that this language created an express trust, and concluded that money damages are available to compensate for breaches of this trust, apparently because that remedy is available in the

ordinary situation in which a trustee has violated a fiduciary duty and because without money damages allottees would have no effective redress for breaches of trust.

We need not consider whether, had Congress actually intended the General Allotment Act to impose upon the Government all fiduciary duties ordinarily placed by equity upon a trustee, the Act would constitute a waiver of sovereign immunity. We conclude that the Act created only a limited trust relationship between the United States and the allottee that does not impose any duty upon the Government to manage timber resources.

The Act does not unambiguously provide that the United States has undertaken full fiduciary responsibilities as to the management of allotted lands. The language of § 5 that imposes the trust in question must be read *in pari materia* with the language of §§ 1 and 2.[3] Both of these sections indicate that the Indian allottee, and not a representative of the United States, is responsible for using the land for agri-

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[3] As originally enacted, § 1 provided in pertinent part:

"[I]n all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, . . . the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon. . . ." 24 Stat. 388.

This language has not been materially altered by amendment, and is presently codified as 25 U. S. C. § 331.

Section 2 provided in pertinent part:

"That all allotments set apart under the provisions of this act shall be selected by the Indians . . . in such manner as to embrace the improvements of the Indians making the selection. Where the improvements of two or more Indians have been made on the same legal subdivision of land, unless they shall otherwise agree, a provisional line may be run dividing said lands between them. . . ." 24 Stat. 388.

This provision has never been amended, and is presently codified as 25 U. S. C. § 332.

cultural or grazing purposes. Furthermore, the legislative history of the Act[4] plainly indicates that the trust Congress placed on allotted lands is of limited scope. Congress intended that, even during the period in which title to allotted land would remain in the United States, the allottee would occupy the land as a homestead for his personal use in agriculture or grazing. See *Mattz* v. *Arnett*, 412 U. S. 481, 496 (1973); 13 Cong. Rec. 3211 (1882) (Sen. Dawes) (the allottee is to be "the occupant of the land and enjoy all its use"). See also H. R. Rep. No. 2247, 48th Cong., 2d Sess., 1 (1885); 17 Cong. Rec. 1630–1631 (1886) (Sens. Plumb and Dawes); *id.*, at 1632 (Sen. Maxey); 18 Cong. Rec. 190–191 (1886) (Rep. Skinner). Under this scheme, then, the allottee, and not the United States, was to manage the land.

The earliest drafts of the Act provided that, during the 25-year period before the allottee would receive fee simple title, the allottee would hold title to the land subject to a restraint on alienation. S. 1773, 46th Cong., 3d Sess. (1880); S. 1455, 47th Cong., 1st Sess. (1882). On Senator Dawes' motion, this language was amended to provide that the United States would hold the land "in trust" for that period. 13 Cong. Rec. 3212 (1882). Senator Dawes explained that the statute as amended would still ensure that title to the land would be transferred to the Indian allottee at the expiration of 25 years. He promoted the amendment because he feared that States might attempt to tax allotted lands if the allottees held title to them subject to a restraint on alienation. By placing title in the United States in trust for the

[4] A bill similar to the General Allotment Act of 1887 was debated in the Senate in 1881. See S. 1773, 46th Cong., 3d Sess. (1880); 11 Cong. Rec. 778–788, 873–882, 904–913, 933–943, 994–1003, 1028–1036, 1060–1070 (1881). Bills essentially identical to the Act as enacted in 1887 were passed by the Senate in 1882 and 1884, but were not acted upon by the House of Representatives. See S. 1455, 47th Cong., 1st Sess. (1882); S. 48, 48th Cong., 1st Sess. (1884). See also 13 Cong. Rec. 3212 (1882); 15 Cong. Rec. 2240–2242, 2277–2280 (1884); 16 Cong. Rec. 218, 580 (1885); H. R. Rep. No. 2247, 48th Cong., 2d Sess. (1885).

allottee, his amendment made it "impossible to raise the question of [state] taxation." *Id.*, at 3211. The next draft of the Act introduced in the Congress reflected this amendment, see S. 48, 48th Cong., 1st Sess. (1884), as, of course, did the Act as enacted, 24 Stat. 388 (1887). It is plain, then, that when Congress enacted the General Allotment Act, it intended that the United States "hold the land . . . in trust" not because it wished the Government to control use of the land and be subject to money damages for breaches of fiduciary duty, but simply because it wished to prevent alienation of the land and to ensure that allottees would be immune from state taxation.[5]

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[5] See also 15 Cong. Rec. 2240–2242 (1884) (Sens. Dawes, Coke, and Conger); *id.*, at 2278–2279 (Sens. Miller, Coke, and Dawes). Representative Skinner, who was the sponsor in the House of Representatives for the bill that became the Act, plainly defined the limited nature of the trust language found in § 5 in commenting on the rationale supporting both the Act's allotment of land and its provision that allottees shall be citizens of the United States:

"The present Commissioner of Indian Affairs, who, in the line of his duty, has given these questions his most earnest thought, says in his annual report, 1885, and reiterates it in his last report, that it should be impressed upon the Indians 'that they must abandon their tribal relation and take lands in severalty as the corner-stone of their complete success in agriculture. . . .'

. . . . .

". . . [W]henever a majority of the male adults on any reservation desire it the reservation can be broken up, and the lands, in certain quantities, specified in the bill, allotted in severalty to the Indians who belong on such reservation; and as soon as the allotment is made the allottee becomes a citizen of the United States, . . . and, in addition thereto, his land *is made inalienable and non-taxable* for a sufficient length of time for the new citizen to become accustomed to his new life, to learn his rights as a citizen, and prepare himself to cope on an equal footing with any white man who might attempt to cheat him out of his newly acquired property. . . .

"Giving the individual Indian a title to the land upon which he resides will have a tendency to stimulate him to work and improve his land and accumulate property. . . ." 18 Cong. Rec. 190 (1886) (emphasis added).

Representative Perkins summarized this approach by stating that "[t]he bill provides for the breaking up, as rapidly as possible, of all the tribal

Furthermore, events surrounding and following the passage of the General Allotment Act indicate that the Act should not be read as authorizing, much less requiring, the Government to manage timber resources for the benefit of Indian allottees. In 1874, this Court determined that Indians held only a right of occupancy, and not title, to Indian lands, and therefore that they could cut timber for the purpose of clearing the land, but not for the primary purpose of marketing the timber. *United States* v. *Cook,* 19 Wall. 591. In 1889, two years after the General Allotment Act was enacted, the Attorney General determined that the rule of *United States* v. *Cook, supra,* applied to allotted as well as unallotted lands, unless a statute explicitly provided to the contrary. 19 Op. Atty. Gen. 232. Congress ratified the Attorney General's opinion by enacting a provision authorizing the sale of dead timber on Indian allotments and reservations, but forbidding the sale of live timber. Act of Feb. 16, 1889, ch. 172, 25 Stat. 673. See also *Pine River Logging Co.* v. *United States,* 186 U. S. 279 (1902).

As time passed, Congress occasionally passed legislation authorizing the harvesting and sale of timber on specific reservations. See, *e. g.,* ch. 1350, 34 Stat. 91 (1906) (Jicarilla Apache Reservation). In 1910, Congress reversed its general policy. It empowered the Secretary of the Interior to sell timber on unallotted lands and apply the proceeds of the sales, less administrative expenses, to the benefit of the Indians. Ch. 431, § 7, 36 Stat. 857, as amended, 25 U. S. C. § 407. The Secretary was also authorized to consent to the sale of timber by the owner of any Indian land "held under a trust or other patent containing restrictions on alienations." *Id.,* § 8, as amended, 25 U. S. C. § 406 (a). The Secretary

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organizations and for the allotment of lands to the Indians in severalty, in order that they may possess them individually and proceed to qualify themselves for the duties and responsibilities of citizenship." *Id.,* at 191. He asserted that one object of the bill was to enable Indians "to support themselves by industry and toil." *Ibid.*

was directed to pay the proceeds of these sales, less administrative expenses, to the "owner" of the allotted lands. *Ibid.* Congress subsequently enacted other legislation directing the Secretary on how to manage Indian timber resources.[6]

The General Allotment Act, then, cannot be read as establishing that the United States has a fiduciary responsibility for management of allotted forest lands. Any right of the respondents to recover money damages for Government mismanagement of timber resources must be found in some source other than that Act.[7]

The judgment of the Court of Claims is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

THE CHIEF JUSTICE took no part in the decision of this case.

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN and MR. JUSTICE STEVENS join, dissenting.

In *United States* v. *Testan*, 424 U. S. 392 (1976), we held that a statute creates a substantive right enforceable against

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[6] See n. 1, *supra*.

[7] The Court of Claims did not consider the respondents' assertion that other statutes, see n. 1, *supra*, render the United States liable in money damages for the mismanagement alleged in this case. Nor did the court address the respondents' contention that the alleged mismanagement is cognizable under the Tucker Act because it involves money improperly exacted or retained. The court may, of course, consider these contentions on remand.

The respondents make two other arguments. They assert that the special relationship between the United States and Indian tribes establishes a right to money damages for timber mismanagement. They also contend that the General Allotment Act and the Treaty of Olympia, 12 Stat. 971 (1859), create trust responsibilities on the part of the United States that constitute implied contracts within the scope of the Tucker Act. Because the respondents did not raise these contentions in the Court of Claims, we will not consider them. *E. g., Adickes* v. *Kress & Co.*, 398 U. S. 144, 147, n. 2 (1970).

the United States in money damages only if it " 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.' " *Id.*, at 400, quoting *Eastport S. S. Corp.* v. *United States*, 178 Ct. Cl. 599, 607, 372 F. 2d 1002, 1009 (1967). The Court today holds that *Testan* bars a damages suit against the Government by Indian allottees, their Tribe, and their association for breach of fiduciary duties in the management of timber lands allotted under the General Allotment Act of 1887 (Act), 24 Stat. 388, 25 U. S. C. § 331 *et seq.* Because I believe that the Act can fairly be interpreted as mandating compensation, I dissent.

The Act could hardly be more explicit as to the status of allotted lands. They are to be held by the United States *"in trust for the sole use and benefit of the Indian,"* § 5 of the Act, 24 Stat. 389, as amended, 25 U. S. C. § 348 (emphasis added). The United States has here unmistakably assumed the obligation to act as trustee of these lands with the Indian allottees as beneficiaries. The Court holds, however, that the "trust" established by § 5 is not a trust as that term is commonly understood, and that Congress had no intention of imposing full fiduciary obligations on the United States. Congress' purposes, it is said, were narrower: to impose a restraint on alienation by Indian allottees while ensuring immunity from state taxation during the period of the restraint.

I do not find this argument convincing. The language of the Act, which is the starting point for all statutory interpretation, *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U. S. 205, 210 (1979); *Teamsters* v. *Daniel*, 439 U. S. 551, 558 (1979), explicitly creates a "trust." This language would surely be a sufficient manifestation of intent to create a trust if the settlor were other than the United States. See Restatement (Second) of Trusts §§ 23, 24 (1959) (hereinafter Restatement); G. Bogert, The Law of Trusts & Trustees § 45 (2d ed. 1965) (hereinafter Bogert); 1 A. Scott, The Law of Trusts § 23 (3d ed. 1967) (hereinafter Scott). The structure

created by the Act has all the necessary elements of a common-law trust—a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (the designated allotment lands). See Restatement § 2, Comment *h*, p. 10. The United States has capacity to take and hold property in trust. *Id.*, § 95; 2 Scott § 95 (discussing the Act). And an essential distinguishing feature of any trust, at common law, was that it entailed a

> "*fiduciary relationship* with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person. . . ." Restatement § 2 (emphasis added).

See 1 Scott § 2.5. Hence, if we are to give the words of the statute their ordinary meaning, as we commonly do when the law does not define a statutory phrase precisely, *Group Life & Health Ins. Co.* v. *Royal Drug Co., supra,* at 211, we should find that the trust established by the Act imposes fiduciary obligations on the United States as trustee.

The legislative history of the Act does not convince me that any narrower reading is required. This statute was enacted against the backdrop of a relationship between the United States and the Indian tribes that had long been considered to "resembl[e] that of a ward to his guardian." *Cherokee Nation* v. *Georgia,* 5 Pet. 1, 17 (1831); see also *Morton* v. *Mancari,* 417 U. S. 535, 541–542 (1974); *United States* v. *Mason,* 412 U. S. 391, 398 (1973); *Squire* v. *Capoeman,* 351 U. S. 1, 2 (1956); *United States* v. *Payne,* 264 U. S. 446, 448 (1924); *United States* v. *Kagama,* 118 U. S. 375, 382 (1886). When Congress established a "trust" for the Indian allottees it is not sensible to assume an intent to depart from these well-known fiduciary principles. Rather, as we noted in *Mattz* v. *Arnett,* 412 U. S. 481, 496 (1973), the policy of the Act was to "*continue* the reservation system and *the trust status of Indian lands.*" (Emphasis added.)

The Court acknowledges that the Act did create a trust relationship between the United States and the allottee. *Ante*, at 542. It holds, however, that the fiduciary obligations imposed on the United States as trustee are very narrow and do not extend to the proper management of Indian timber lands. The lands covered by the Act were mostly agricultural or grazing lands, as to which it was expected that the Indian himself would reside on and manage the allotments. Not until *United States* v. *Payne, supra,* was it established that forested lands such as those of the Quinault Reservation were subject to allotment under the Act. Hence, it is said, if the Government has fiduciary duties they are solely to ensure nonalienation and immunity from state taxation.

This argument takes too narrow a view of the fiduciary duty established by the Act and of the subsequent statutory and administrative developments which clarified and fleshed out that duty. The timberlands of the Quinault Reservation cannot, as a practical matter, be managed by the Indian allottees. In such a case, where management functions must necessarily be performed by the Government, it seems most consistent with the scheme of the Act that the United States was to assume fiduciary obligations in the performance of its management functions. Subsequent Congresses have implicitly acknowledged the existence of such obligations. See 25 U. S. C. § 466 (instructing the Secretary of the Interior to manage Indian forests on a sustained-yield basis); §§ 323–325 (authorizing the Secretary to grant rights-of-way over Indian trust lands upon payment of just compensation); § 162a (authorizing the Secretary to manage tribal funds held in trust). The Secretary has promulgated detailed regulations governing the exercise of his powers under these statutes. While I do not say that the Government's fiduciary responsibility necessarily conforms to the exact terms of these statutes and regulations, their existence at least points to the inference that as a matter of statute and administrative prac-

tice the Government has accepted *some* obligations in the management of allotted timberlands.

The remaining question is whether the Government has consented to liability in damages for the breach of these obligations. Such liability, in my view, follows naturally from the existence of a trust and of fiduciary duties. It is hornbook law that the trustee is accountable in damages for breaches of trust. See Restatement §§ 205–212; Bogert § 862; 3 Scott § 205. Moreover, it would interfere with, if not defeat, the purposes of the Act if the allottees were to be remitted to a suit for prospective, equitable relief in the protection of their rights. Absent a retrospective damages remedy, there would be little to deter federal officials from violating their trust duties, at least until the allottees managed to obtain a judicial decree against future breaches of trust. Finally, it is noteworthy that the Department of the Interior, which as the agency charged with administering the Act is entitled to considerable deference in its interpretation of the statute, *e. g., Zenith Radio Corp.* v. *United States*, 437 U. S. 443, 450 (1978); *Udall* v. *Tallman*, 380 U. S. 1, 16 (1965), apparently disagrees with the position taken by the Solicitor General in this litigation and believes that a money damages remedy should be permitted. See Letter from Departmental Solicitor Krulitz to Assistant Attorney General Moorman, Nov. 21, 1978, reprinted in App. to Brief for Respondents 1a–21a.

In sum, I would find that the Act creates a bona fide trust, imposes fiduciary obligations on the United States as trustee in the management of allotted timberlands, and provides a damages remedy against the United States for breach of these obligations. The Act " 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.' " *United States* v. *Testan*, 424 U. S., at 400, quoting *Eastport S. S. Corp.* v. *United States*, 178 Ct. Cl., at 607, 372 F. 2d, at 1009. In my view, therefore, the

Court of Claims had jurisdiction over this action as one founded on an "Act of Congress," 28 U. S. C. § 1491, and as one brought by an identifiable group of Indians and "otherwise . . . cognizable in the Court of Claims," 28 U. S. C. § 1505. Accordingly, I respectfully dissent.

ROBERTS *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78–1793. Argued January 14, 15, 1980—Decided April 15, 1980

Held: The District Court properly considered, as one factor in imposing consecutive sentences on petitioner who had pleaded guilty to two counts of using a telephone to facilitate the distribution of heroin, petitioner's refusal to cooperate with Government officials investigating a related criminal conspiracy to distribute heroin in which he was a confessed participant. Pp. 556–562.

(a) No misinformation of constitutional magnitude was present in this case; petitioner rebuffed repeated requests for his cooperation over a period of three years and concedes that cooperation with the authorities is a "laudable endeavor" that bears a "rational connection to a defendant's willingness to shape up and change his behavior." By declining to cooperate, petitioner rejected an obligation of community life that should be recognized before rehabilitation can begin and protected his former partners in crime, thereby preserving his ability to resume criminal activities upon release. Pp. 556–558.

(b) Nor can petitioner's failure to cooperate be justified on the basis of fears of physical retaliation and self-incrimination, or on the ground that the District Court punished him for exercising his Fifth Amendment privilege against self-incrimination. These arguments were raised for the first time in petitioner's appellate brief, neither petitioner nor his lawyer having offered any explanation to the sentencing court even though it was known that petitioner's intransigency would be used against him. Although the requirement of *Miranda* v. *Arizona*, 384 U. S. 436, of specific warnings creates a limited exception to the rule that the privilege against self-incrimination is not self-executing and must be claimed, the exception does not apply outside the context of the inherently coercive custodial interrogation for which it was designed, and here there was no custodial interrogation. Petitioner volunteered his confession at his first interview with investigators, after *Miranda* warnings had been given and at a time when he was free to leave. For the next three years until the time when he received the sentence he now challenges, neither he nor his counsel—who were both fully apprised that the extent of petitioner's cooperation could be expected to affect his sentence—ever claimed that petitioner's unwillingness to cooperate

was based upon the right to remain silent or the fear of self-incrimination. Pp. 559–562.

195 U. S. App. D. C. 1, 600 F. 2d 815, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, BLACKMUN, REHNQUIST, and STEVENS, JJ., joined. BRENNAN, J., filed a concurring opinion, *post*, p. 562. MARSHALL, J., filed a dissenting opinion, *post*, p. 563.

Allan M. Palmer argued the cause and filed a brief for petitioner.

Stephen M. Shapiro argued the cause for the United States. With him on the brief were *Solicitor General McCree, Assistant Attorney General Heymann,* and *Deputy Solicitor General Frey.**

MR. JUSTICE POWELL delivered the opinion of the Court.

The question is whether the District Court properly considered, as one factor in imposing sentence, the petitioner's refusal to cooperate with officials investigating a criminal conspiracy in which he was a confessed participant.

I

Petitioner Winfield Roberts accompanied Cecilia Payne to the office of the United States Attorney for the District of Columbia one day in June of 1975. Government surveillance previously had revealed that a green Jaguar owned by Payne was used to transport heroin within the District. Payne told investigators that she occasionally lent the Jaguar to petitioner, who was waiting outside in the hall. At Payne's suggestion, the investigators asked petitioner if he would answer some questions. Although petitioner was present voluntarily, the investigators gave him the warnings required by *Miranda* v. *Arizona*, 384 U. S. 436 (1966). They also told him that he

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**Bruce J. Ennis, Jr.*, filed a brief for the American Civil Liberties Union et al. as *amici curiae*.

was free to leave. When petitioner indicated that he would stay, the investigators asked whether he knew "Boo" Thornton, then the principal target of the heroin investigation. Petitioner admitted that he had delivered heroin to Thornton on several occasions. Confessing also that he had discussed drug transactions with Thornton in certain intercepted telephone conversations, petitioner explained the meaning of code words used in the conversations. When asked to name suppliers, however, petitioner gave evasive answers. Although the investigators warned petitioner that the extent of his cooperation would bear on the charges brought against him, he provided no further information.

Petitioner was indicted on one count of conspiring to distribute heroin, 21 U. S. C. §§ 841, 846, and four counts of using a telephone to facilitate the distribution of heroin, 21 U. S. C. § 843 (b).[1] He retained a lawyer, who rejected the Government's continued efforts to enlist petitioner's assistance. In March 1976, petitioner entered a plea of guilty to the conspiracy count and received a sentence of 4 to 15 years' imprisonment, 3 years' special parole, and a $5,000 fine. The Court of Appeals vacated the conviction on the ground that the terms of the plea agreement were inadequately disclosed to the District Court. *United States* v. *Roberts,* 187 U. S. App. D. C. 90, 570 F. 2d 999 (1977).

On remand, petitioner pleaded guilty to two counts of telephone misuse under an agreement that permitted the Government to seek a substantial sentence. The Government filed a memorandum recommending two consecutive sentences of 16 to 48 months each and a $5,000 fine.[2] The memorandum cited petitioner's previous conviction for 10 counts of bank robbery, his voluntary confession, and his subsequent

[1] Petitioner's intercepted conversations with Thornton apparently could have provided the basis for 13 counts of unlawful use of a telephone. App. 36.

[2] The maximum sentence on each count was four years' imprisonment and a $30,000 fine. 21 U. S. C. § 843 (c).

refusal to name suppliers. The memorandum also emphasized the tragic social consequences of the heroin trade. Since petitioner was not himself an addict and had no familial responsibilities, the Government theorized that he sold heroin to support his extravagant lifestyle while unemployed and on parole. The Government concluded that stern sentences were necessary to deter those who would traffic in deadly drugs for personal profit.

At the sentencing hearing, defense counsel noted that petitioner had been incarcerated for two years pending appeal and that codefendant Thornton had been sentenced to probation. Counsel argued that petitioner should receive concurrent sentences that would result in his immediate release. He directed the court's attention to petitioner's voluntary confession, explaining that petitioner had refused to identify other members of the conspiracy because he "wasn't that involved in it." App. 30. The prosecutor responded that the request for probation was "ironic" in light of petitioner's refusal to cooperate in the investigation over the course of "many, many years, knowing what he faces." *Id.*, at 36. Thus, the Government could not ask the court "to take into account some extenuating and mitigating circumstances, that the defendant has cooperated. . . ." *Ibid.* Stressing the seriousness of the offense and the absence of excuse or mitigation, the Government recommended a substantial prison term.

The District Court imposed consecutive sentences of one to four years on each count and a special parole term of three years, but it declined to impose a fine. The court explained that these sentences were appropriate because petitioner was on parole from a bank robbery conviction at the time of the offenses, and because he was a dealer who had refused to cooperate with the Government.[3] Petitioner again appealed,

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[3] Before imposing sentence, the court explained:

"Mr. Roberts, we have considered your case very carefully. We have noted again you were on parole from a bank robbery conviction, which

contending for the first time that the sentencing court should not have considered his failure to cooperate. The Court of Appeals for the District of Columbia Circuit vacated the special parole term but otherwise affirmed the judgment. 195 U. S. App. D. C. 1, 600 F. 2d 815 (1979). We granted certiorari 444 U. S. 822 (1979), and we now affirm.

II

The principles governing criminal sentencing in the United States district courts require no extensive elaboration. Congress has directed that

> "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." 18 U. S. C. § 3577.

This Court has reviewed in detail the history and philosophy of the modern conception that "the punishment should fit the offender and not merely the crime." *Williams* v. *New York*, 337 U. S. 241, 247 (1949); see *United States* v. *Grayson*, 438 U. S. 41, 45–50 (1978). Two Terms ago, we reaffirmed the "fundamental sentencing principle" that "'a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come.'" *Id.*, at 50, quoting *United States* v. *Tucker*, 404 U. S. 443, 446 (1972). See also *Pennsylvania* v. *Ashe*, 302 U. S. 51, 55 (1937). We have, however, sustained due process objections to sentences imposed on the basis of "misinformation of constitutional magnitude." *United States* v. *Tucker*, *supra*, at 447; see *Townsend* v. *Burke*, 334 U. S. 736, 740–741 (1948).

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you have had prior involvement with the law. In this case you were clearly a dealer, but you had an opportunity and failed to cooperate with the Government." App. 40.

No such misinformation was present in this case. The sentencing court relied upon essentially undisputed facts. There is no question that petitioner rebuffed repeated requests for his cooperation over a period of three years. Nor does petitioner contend that he was unable to provide the requested assistance. Indeed, petitioner concedes that cooperation with the authorities is a "laudable endeavor" that bears a "rational connection to a defendant's willingness to shape up and change his behavior. . . ." Brief for Petitioner 17.[4] Unless a different explanation is provided, a defendant's refusal to assist in the investigation of ongoing crimes gives rise to an inference that these laudable attitudes are lacking.

It hardly could be otherwise. Concealment of crime has been condemned throughout our history. The citizen's duty to "raise the 'hue and cry' and report felonies to the authorities," *Branzburg* v. *Hayes*, 408 U. S. 665, 696 (1972), was an established tenet of Anglo-Saxon law at least as early as the 13th century. 2 W. Holdsworth, History of English Law 101–102 (3d ed. 1927); 4 *id.*, at 521–522; see Statute of Westminster First, 3 Edw. 1, ch. 9, p. 43 (1275);

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[4] See, *e. g.*, ABA Project on Standards for Criminal Justice, Pleas of Guilty § 1.8 (a)(v) (App. Draft 1968); *id.*, at 48–49; Lumbard, Sentencing and Law Enforcement, 40 F. R. D. 406, 413–414 (1966); cf. R. Cross, The English Sentencing System 170 (2d ed. 1975).

We doubt that a principled distinction may be drawn between "enhancing" the punishment imposed upon the petitioner and denying him the "leniency" he claims would be appropriate if he had cooperated. The question for decision is simply whether petitioner's failure to cooperate is relevant to the currently understood goals of sentencing. We do note, however, that Judge MacKinnon, author of the opinion reversing petitioner's first conviction, observed on the basis of his "complete familiarity with the facts of this entire case" that the petitioner's current sentence is a "very light" one. 195 U. S. App. D. C. 1, 9, 600 F. 2d 815, 823 (1979) (separate statement on denial of rehearing *en banc*). The sentence of two to eight years' imprisonment certainly was not a severe penalty for a "substantial drug distributor," *ibid.*, who plied his trade while on parole from a prior conviction for bank robbery.

Statute of Westminster Second, 13 Edw. 1, chs. 1, 4, and 6, pp. 112–115 (1285). The first Congress of the United States enacted a statute imposing criminal penalties upon anyone who, "having knowledge of the actual commission of [certain felonies,] shall conceal, and not as soon as may be disclose and make known the same to [the appropriate] authority. . . ." Act of Apr. 30, 1790, § 6, 1 Stat. 113.[5] Although the term "misprison of felony" now has an archaic ring, gross indifference to the duty to report known criminal behavior remains a badge of irresponsible citizenship.

This deeply rooted social obligation is not diminished when the witness to crime is involved in illicit activities himself. Unless his silence is protected by the privilege against self-incrimination, see Part III, *infra*, the criminal defendant no less than any other citizen is obliged to assist the authorities. The petitioner, for example, was asked to expose the purveyors of heroin in his own community in exchange for a favorable disposition of his case. By declining to cooperate, petitioner rejected an "obligatio[n] of community life" that should be recognized before rehabilitation can begin. See Hart, The Aims of the Criminal Law, 23 Law & Contemp. Prob. 401, 437 (1958). Moreover, petitioner's refusal to cooperate protected his former partners in crime, thereby preserving his ability to resume criminal activities upon release. Few facts available to a sentencing judge are more relevant to " 'the likelihood that [a defendant] will transgress no more, the hope that he may respond to rehabilitative efforts to assist with a lawful future career, [and] the degree to which he does or does not deem himself at war with his society.' " *United States* v. *Grayson*, *supra*, at 51, quoting *United States* v. *Hendrix*, 505 F. 2d 1233, 1236 (CA2 1974).

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[5] The statute, as amended, is still in effect. 18 U. S. C. § 4. It has been construed to require "both knowledge of a crime and some affirmative act of concealment or participation." See *Branzburg* v. *Hayes*, 408 U. S. 665, 696, n. 36 (1972).

III

Petitioner does not seriously contend that disregard for the obligation to assist in a criminal investigation is irrelevant to the determination of an appropriate sentence. He rather contends that his failure to cooperate was justified by legitimate fears of physical retaliation and self-incrimination. In view of these concerns, petitioner asserts that his refusal to act as an informer has no bearing on his prospects for rehabilitation. He also believes that the District Court punished him for exercising his Fifth Amendment privilege against self-incrimination.

These arguments would have merited serious consideration if they had been presented properly to the sentencing judge. But the mere possibility of unarticulated explanations or excuses for antisocial conduct does not make that conduct irrelevant to the sentencing decision. The District Court had no opportunity to consider the theories that petitioner now advances, for each was raised for the first time in petitioner's appellate brief. Although petitioner knew that his intransigency would be used against him, neither he nor his lawyer offered any explanation to the sentencing court. Even after the prosecutor observed that the failure to cooperate could be viewed as evidence of continuing criminal intent, petitioner remained silent.

Petitioner insists that he had a constitutional right to remain silent and that no adverse inferences can be drawn from the exercise of that right. We find this argument singularly unpersuasive. The Fifth Amendment privilege against compelled self-incrimination is not self-executing. At least where the Government has no substantial reason to believe that the requested disclosures are likely to be incriminating, the privilege may not be relied upon unless it is invoked in a timely fashion. *Garner* v. *United States*, 424 U. S. 648, 653–655 (1976); *United States* v. *Kordel*, 397 U. S. 1, 7–10 (1970); see *United States* v. *Mandujano*, 425 U. S. 564, 574–575 (1976)

(opinion of BURGER, C. J.); *id.*, at 591–594 (BRENNAN, J., concurring in judgment).[6]

In this case, as in *Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103, 113 (1927), petitioner "did not assert his privilege or in any manner suggest that he withheld his testimony because there was any ground for fear of self-incrimination. His assertion of it here is evidently an afterthought." The Court added in *Vajtauer* that the privilege "must be deemed waived if not in some manner fairly brought to the attention of the tribunal which must pass upon it." *Ibid.* Thus, if petitioner believed that his failure to cooperate was privileged, he should have said so at a time when the sentencing court could have determined whether his claim was legitimate.[7]

Petitioner would avoid the force of this elementary rule by arguing that *Miranda* warnings supplied additional protection for his right to remain silent. But the right to silence described in those warnings derives from the Fifth Amendment and adds nothing to it. Although *Miranda*'s requirement of specific warnings creates a limited exception to the rule that the privilege must be claimed, the exception does not apply outside the context of the inherently coercive custodial interrogations for which it was designed. The warnings protect persons who, exposed to such interrogation without the assistance of counsel, otherwise might be unable

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[6] The Court recognized in *Garner* v. *United States*, 424 U. S., at 656–657, that this rule is subject to exception when some coercive factor prevents an individual from claiming the privilege or impairs his choice to remain silent. No such factor has been identified in this case. See *infra*, at 561.

[7] See *Garner* v. *United States*, *supra*, at 658, n. 11; *Hoffman* v. *United States*, 341 U. S. 479, 486 (1951); *Mason* v. *United States*, 244 U. S. 362, 364–366 (1917); *United States* v. *Vermeulen*, 436 F. 2d 72, 76–77 (CA2 1970), cert. denied, 402 U. S. 911 (1971). It is the duty of a court to determine the legitimacy of a witness' reliance upon the Fifth Amendment. *Rogers* v. *United States*, 340 U. S. 367, 374–375 (1951). A witness may not employ the privilege to avoid giving testimony that he simply would prefer not to give.

to make a free and informed choice to remain silent. *Miranda* v. *Arizona*, 384 U. S., at 475–476; see *Garner* v. *United States*, *supra*, at 657.[8]

There was no custodial interrogation in this case. Petitioner volunteered his confession at his first interview with investigators in 1975, after *Miranda* warnings had been given and at a time when he was free to leave. He does not claim that he was coerced.[9] Thereafter, petitioner was represented by counsel who was fully apprised—as was petitioner—that the extent of petitioner's cooperation could be expected to affect his sentence. Petitioner did not receive the sentence he now challenges until 1978. During this entire period, neither petitioner nor his lawyer ever claimed that petitioner's unwillingness to provide information vital to law enforcement was based upon the right to remain silent or the fear of self-incrimination.

Petitioner has identified nothing that might have impaired his "'free choice to admit, to deny, or to refuse to answer.'" *Garner* v. *United States*, *supra*, at 657, quoting *Lisenba* v. *California*, 314 U. S. 219, 241 (1941). His conduct bears no resemblance to the "insolubly ambiguous" postarrest silence that may be induced by the assurances contained in *Miranda* warnings. Cf. *Doyle* v. *Ohio*, 426 U. S. 610, 617–618 (1976). We conclude that the District Court committed no constitutional error. If we were to invalidate petitioner's sentence on the record before us, we would sanction an unwarranted interference with a function traditionally vested in the trial courts. See *Dorszynski* v. *United States*, 418 U. S. 424, 440–441

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[8] In *United States* v. *Washington*, 431 U. S. 181, 187, n. 5 (1977), the Court explained that "[a]ll *Miranda*'s safeguards, which are designed to avoid the coercive atmosphere, rest on the overbearing compulsion which the Court thought was caused by isolation of a suspect in police custody."

[9] The District Court found that petitioner freely waived his *Miranda* rights when he first confessed his involvement in the conspiracy. Tr. 40 (Oct. 17, 1975); see App. 16, n. 4.

(1974).[10] Accordingly, the judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE BRENNAN, concurring.

I join the Court's opinion.

The principal divisive issue in this case is whether petitioner's silence should have been understood to imply continued solicitude for his former criminal enterprise, rather than assertion of the Fifth Amendment right against self-incrimination or fear of retaliation. I agree with the Court that the trial judge cannot be faulted for drawing a negative inference from petitioner's noncooperation when petitioner failed to suggest that other, neutral, inferences were available. And because the Government questioning to which he failed to respond was not directed at incriminating him, petitioner may not stand upon a Fifth Amendment privilege that he never invoked at the time of his silence. See *United States* v. *Mandujano*, 425 U. S. 564, 589–594 (1976) (BRENNAN, J., concurring in judgment); *Garner* v. *United States*, 424 U. S. 648, 655–661 (1976); *Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103, 113 (1927).*

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[10] The dissenting opinion asserts that the record reflects an "improper involvement of the judicial office in the prosecutorial function." *Post*, at 567. We find no basis for this contention. The District Court did not participate in the plea-bargaining process; it merely undertook a retrospective review of petitioner's character, record, and criminal conduct in accordance with applicable law. 18 U. S. C. § 3577; Fed. Rule Crim. Proc. 32 (c). And a defendant who failed even to raise the possibility of self-incrimination or retaliation over a course of three years is hardly in a position to complain that he was "put to an unfair choice." *Post*, at 568.

*When the Government actually seeks to incriminate the subject of questioning, failure to invoke the Fifth Amendment privilege is reviewed under the stringent "knowing and completely voluntary waiver" standard. *United States* v. *Mandujano*, 425 U. S., at 593 (BRENNAN, J., concurring in judgment). But when it is only the subject who is reasonably aware of the incriminating tendency of the questions, it is his responsibility to

Nevertheless, the problem of drawing inferences from an ambiguous silence is troubling. As a matter of due process, an offender may not be sentenced on the basis of mistaken facts or unfounded assumptions. *Townsend* v. *Burke*, 334 U. S. 736, 740–741 (1948); see *United States* v. *Grayson*, 438 U. S. 41, 55 (1978) (STEWART, J., dissenting) (collateral inquiry may be required before sentence is enhanced because of trial judge's unreviewable impression that defendant perjured himself at trial). It is of comparable importance to assure that a defendant is not penalized on the basis of groundless inferences. At the least, sentencing judges should conduct an inquiry into the circumstances of silence where a defendant indicates before sentencing that his refusal to cooperate is prompted by constitutionally protected, or morally defensible, motives. Furthermore, especially where conviction is based upon a guilty plea, it may be advisable for trial judges to raise the question of motive themselves when presented with a prosecutorial recommendation for severity due to an offender's noncooperation. During the Rule 32 allocution before sentencing, Fed. Rule Crim. Proc. 32 (a)(1), the defendant could be asked on the record whether he has a reasonable explanation for his silence; if a justification were proffered, the judge would then proceed to determine its veracity and reasonableness. Such an allocution procedure would reduce the danger of erroneous inference and provide a record to support sentencing against subsequent challenge. Cf. *McCarthy* v. *United States*, 394 U. S. 459, 466–467 (1969) (Fed. Rule Crim. Proc. 11 allocution procedure).

MR. JUSTICE MARSHALL, dissenting.

The Court today permits a term of imprisonment to be increased because of a defendant's refusal to identify others

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put the Government on notice by formally availing himself of the privilege. *Id.*, at 589–594; *Garner* v. *United States*, 424 U. S., at 655. At that point, the Government may either cease questioning or continue under a grant of immunity.

involved in criminal activities—a refusal that was not unlawful and that may have been motivated by a desire to avoid self-incrimination or by a reasonable fear of reprisal. I do not believe that a defendant's failure to inform on others may properly be used to aggravate a sentence of imprisonment, and accordingly, I dissent.

The majority does not dispute that a failure to disclose the identity of others involved in criminal activity may often stem from a desire to avoid self-incrimination. This case is an excellent illustration of that possibility. The prosecutor asked petitioner "to identify the person or persons from whom he was getting the drugs, and the location, and to lay out the conspiracy and identify other co-conspirators who were involved with them." App. 36. Disclosure of this information might well have exposed petitioner to prosecution on additional charges.[1] He was never offered immunity from such prosecution. Petitioner's right to refuse to incriminate himself on additional charges was not, of course, extinguished by his guilty plea.

There can be no doubt that a judge would be barred from increasing the length of a jail sentence because of a defendant's refusal to cooperate based on the constitutional privilege against self-incrimination. In such a case, the threat of a longer sentence of imprisonment would plainly be compulsion within the meaning of the Fifth Amendment. Cf. *McGautha* v. *California*, 402 U. S. 183 (1971). Such an aggravation of sentence would amount to an impermissible penalty imposed solely because of the defendant's assertion of the Fifth Amendment privilege.

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[1] The prosecutor stated at the sentencing hearing that the Government's initial offer of leniency in exchange for petitioner's cooperation was made on the assumption that he was a relatively minor figure in the conspiracy. The Government argued for lengthy consecutive sentences, however, because "we were shown to be wrong" about that assumption. It seems plain that if petitioner had provided the information requested, he would have incriminated himself on additional charges.

I also believe that it would be an abuse of discretion for a judge to use a defendant's refusal to become an informer to increase the length of a sentence when the refusal was motivated by a fear of retaliation.[2] In such a case, the failure to identify other participants in the crime is irrevelant to the defendant's prospects for rehabilitation, see *ante*, at 558, and bears no relation to any of the legitimate purposes of sentencing. See *United States* v. *Grayson*, 438 U. S. 41 (1978); *United States* v. *Tucker*, 404 U. S. 443 (1972).

In this case, then, petitioner's refusal to provide the requested information was lawful[3] and may have been motivated by the possibility of self-incrimination or a reasonable fear of reprisal. The majority acknowledges that these claims "would have merited serious consideration if they had been presented properly to the sentencing judge." *Ante*, at 559. Because petitioner did not expressly state these grounds to

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[2] In determining whether a refusal to cooperate can be taken into consideration when based on a fear of reprisal, the relevant inquiry, of course, is whether the defendant in fact has a subjective fear, not whether the fear is objectively reasonable. It is when the defendant is actually afraid of reprisal that his failure to cooperate has no relevance to the legitimate purpose of sentencing.

[3] The Court refers to the ancient offense of misprision of felony, *ante*, at 557–558, but, as its own discussion shows, petitioner could not have been punished under 18 U. S. C. § 4. See *ante*, at 558, n. 5. The Government has never contended that petitioner's behavior was other than lawful. A discussion of the continued vitality of laws making it a crime to fail to report criminal behavior is unnecessary to this case; I observe only that such laws have fallen into virtually complete disuse, a development that reflects a deeply rooted social perception that the general citizenry should not be forced to participate in the enterprise of crime detection. See Note, 27 Hastings L. J. 175, 181–187 (1975); Note, 23 Emory L. J. 1095 (1974). Cf. Glazebrook, Misprision of Felony—Shadow or Phantom?, 8 Am. J. Legal Hist. 189, 283 (1964). As Mr. Chief Justice Marshall stated: "It may be the duty of a citizen to accuse every offender, and to proclaim every offense which comes to his knowledge; but the law which would punish him in every case for not performing this duty is too harsh for man." *Marbury* v. *Brooks*, 7 Wheat. 556, 575–576 (1822).

the sentencing judge, however, the Court indulges the assumption that petitioner's refusal was motivated by a desire to "preserv[e] his ability to resume criminal activities upon release." *Ante*, at 558. I am at a loss to discern any evidentiary basis for this assumption.[4] And I reject the Court's harsh and rigid approach to the issue of waiver, especially in a context in which it was hardly clear that reasons for petitioner's failure to cooperate had to be identified before the sentencing judge.[5]

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[4] Indeed, the record hardly supports the Court's characterization of petitioner's behavior as "intransigency." *Ante*, at 559. Except for his refusal to identify additional participants, petitioner was quite helpful. He voluntarily accompanied Ms. Payne to the office of the United States Attorney. At that time, as the Government conceded at the sentencing hearing, "we had no idea of the identity of who it was who was using that green Jaguar automobile to ferry narcotics about the city." App. 35. Ms. Payne said she lent the car to petitioner, and he agreed to be interviewed. At that initial interview, he confessed, implicated a co-conspirator, and voluntarily explained the meaning of code words used in the conspiracy.

The Court also relies on Judge MacKinnon's assertion that the sentence was "very light" for a "substantial drug distributor." *Ante*, at 557, n. 4. Of course, petitioner did not plead guilty to conspiracy or to distribution of heroin, but to two counts of unlawful use of a telephone to facilitate the distribution of heroin. Each count was punishable by a maximum of four years' imprisonment and a $30,000 fine, and petitioner was sentenced to consecutive 1- to 4-year terms. At the sentencing hearing, petitioner's counsel stated that he had been unable to find a single case "in which any federal judge has ever given consecutive sentences for two or more phone counts." App. 28. The Government has never challenged this assertion.

[5] The sentencing hearing took place on April 21, 1978. At that time, there was no settled law on the question whether failure to cooperate could be considered as an aggravating factor in sentencing. Compare *United States* v. *Garcia*, 544 F. 2d 681, 684–686 (CA3 1976) (improper factor), and *United States* v. *Rogers*, 504 F. 2d 1079 (CA5 1974) (same), with *United States* v. *Chaidez-Castro*, 430 F. 2d 766 (CA7 1970) (proper factor). Nor was there any rule that a defendant was required to identify reasons for his failure to cooperate. For the Court to hold in these circumstances that the defendant's silence amounted to "an intentional relinquishment or abandonment of a known right or privilege," *Johnson* v.

Furthermore, the bare failure to cooperate in an investigation of others cannot, without further inquiry, justify a conclusive negative inference about "the meaning of that conduct with respect to [the defendant's] prospects for rehabilitation and restoration to a useful place in society." *United States* v. *Grayson*, 438 U. S., at 55. A fear of reprisal against one's self or one's family or a desire to avoid further self-incrimination are equally plausible explanations for such conduct. Even the desire to "do his own time" without becoming a police informer might explain petitioner's behavior without necessarily indicating that he intended to "resume criminal activities upon [his] release." *Ante*, at 558. The inference that petitioner was a poor candidate for rehabilitation could not be justified without additional information.[6]

The enhancement of petitioner's sentence, then, was impermissible because it may have burdened petitioner's exercise of his constitutional rights or been based on a factor unrelated to the permissible goals of sentencing. In addition, it represented an improper involvement of the judicial office in the prosecutorial function that should be corrected through our supervisory power over the federal courts.[7]

Zerbst, 304 U. S. 458, 464 (1938), seems to me extraordinarily stern in light of the Court's traditional indulgence of "'every reasonable presumption against waiver' of fundamental constitutional rights." *Ibid.* (citation omitted).

[6] In this respect, petitioner's conduct was quite different from the deliberate perjury involved in *United States* v. *Grayson*, 438 U. S. 41 (1978). Perjury is itself a serious crime, a "'manipulative defiance of the law,'" *id.*, at 51, quoting *United States* v. *Hendrix*, 505 F. 2d 1233, 1236 (CA2 1974), that corrupts the trial process.

[7] As the Court notes, 18 U. S. C. § 3577 provides that "[n]o limitation shall be placed on the information . . . which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." This statute, however, was merely a codification of the sentencing standards set forth in *Williams* v. *New York*, 337 U. S. 241 (1949). Nothing in the statute or its legislative history suggests a congressional intention to overturn or limit this Court's historic powers of supervision

The usual method for obtaining testimony which may be self-incriminatory is through a grant of immunity from prosecution. See 18 U. S. C. § 6001 *et seq.* (1976 ed. and Supp. II). Prosecutors would have little incentive to offer defendants immunity for their testimony if they could achieve the same result without giving up the option to prosecute. There is no suggestion here that an offer of immunity was ever extended to petitioner. If a defendant knows his silence may be used against him to enhance his sentence, he may be put to an unfair choice. He must either give incriminating information with no assurance that he will not be prosecuted on the basis of that information, or face the possibility of an increased sentence because of his noncooperation. Since a prosecutor may overcome a Fifth Amendment claim through an offer of immunity, I see no reason to put defendants to such a choice.

A second method available to the prosecutor for obtaining a defendant's testimony against others is the plea-bargaining process. The Court has upheld that process on the theory that the relative equality of bargaining power between the prosecutor and the defendant prevents the process from being fundamentally unfair. *Santobello* v. *New York*, 404 U. S. 257, 261 (1971). But if the judge can be counted on to increase the defendant's sentence if he fails to cooperate, the balance of bargaining power is tipped in favor of the prosecution. Not only is the prosecutor able to offer less in exchange for cooperation, but a defendant may agree for fear of incurring the displeasure of the sentencing judge. To insure that defendants will not be so intimidated into accepting plea bar-

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over the conduct of criminal cases in the federal courts. See *Mesarosh* v. *United States*, 352 U. S. 1, 14 (1956). There is no warrant for the conclusion that 18 U. S. C. § 3577, which was designed to codify existing judicial practices, operates as a bar to the use of those supervisory powers to safeguard the Fifth Amendment privilege or to protect against irrational sentencing.

gains, federal judges are forbidden from participating in the bargaining process. See Fed. Rule Crim. Proc. 11 (e)(1); ABA Project on Standards for Criminal Justice, Pleas of Guilty § 3.3 (a) (App. Draft 1968). As Judge Bazelon observed below: "The trial judge, whose impartiality is a cornerstone of our criminal justice system, may be tempted, under the guise of exercising discretion in sentencing[,] to join forces with the prosecutor in securing the defendant's cooperation." 195 U. S. App. D. C. 1, 3, 600 F. 2d 815, 817 (1979). I do not believe that we should allow that possibility.

I find disturbing the majority's willingness to brush aside these serious objections to the propriety of petitioner's sentence on the strength of "the duty to report known criminal behavior," *ante*, at 558. According to the Court, petitioner's refusal to become an informer was a rejection of a "deeply rooted social obligation," *ibid.* All citizens apparently are "obliged to assist the authorities" in this way, and petitioner's failure to do so was not only "a badge of irresponsible citizenship," but constituted "antisocial conduct" as well. *Ante*, at 558, 559.

The Court supports its stern conclusions about petitioner's civic duty only by reference to the concepts of "hue and cry" and "misprision of felony." Those concepts were developed in an era in which enforcement of the criminal law was entrusted to the general citizenry rather than to an organized police force.[8] But it is unnecessary to discuss in detail the historical context of such concepts, so different from our present-day society, in order to reject the Court's analysis. American society has always approved those who own up to their wrongdoing and vow to do better, just as it has admired those who come to the aid of the victims of criminal conduct. But our admiration of those who inform on others

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[8] Cf. F. Pollock & F. Maitland, The History of English Law 582–583 (2d ed. 1909).

has never been as unambiguous as the majority suggests. The countervailing social values of loyalty and personal privacy have prevented us from imposing on the citizenry at large a duty to join in the business of crime detection. If the Court's view of social mores were accurate, it would be hard to understand how terms such as "stool pigeon," "snitch," "squealer," and "tattletale" have come to be the common description of those who engage in such behavior.

I do not, of course, suggest that those who have engaged in criminal activity should refuse to cooperate with the authorities. The informer plays a vital role in the struggle to check crime, especially the narcotics trade. We could not do without him. In recognition of this role, it is fully appropriate to encourage such behavior by offering leniency in exchange for "cooperation." [9] Cooperation of that sort may

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[9] The majority expresses "doubt that a principled distinction may be drawn between 'enhancing' the punishment imposed upon the petitioner and denying him the 'leniency' he claims would be appropriate if he cooperated." *Ante*, at 557, n. 4. But as Judge Lumbard has stated: "It is one thing to extend leniency to a defendant who is willing to cooperate with the government; it is quite another thing to administer additional punishment to a defendant who by his silence has committed no additional offense." *United States* v. *Ramos*, 572 F. 2d 360, 363, n. 2 (CA2 1978) (concurring opinion). At the most, the distinction may be difficult to administer; it is certainly a principled one, appearing in similar form in several areas of the law. For example, a distinction has been recognized between extending leniency to a defendant who pleads guilty and augmenting the sentence of a defendant who elects to stand trial. See, *e. g.*, *United States* v. *Araujo*, 539 F. 2d 287 (CA2 1976); *United States* v. *Derrick*, 519 F. 2d 1 (CA6 1975); *United States* v. *Stockwell*, 472 F. 2d 1186 (CA9 1973); *United States* v. *Thompson*, 476 F. 2d 1196, 1201 (CA7 1973); *Scott* v. *United States*, 135 U. S. App. D. C. 377, 419 F. 2d 264 (1969). Writing for the Court, MR. JUSTICE POWELL relied in *Maher* v. *Roe*, 432 U. S. 464, 475–477 (1977), on a closely analogous distinction "between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." (In certain circumstances, of course, "state encouragement of an alternative activity" may also be constitutionally impermissible. See *id.*, at 482–490

be a sign of repentance and the beginning of rehabilitation.[10] But our government has allowed its citizens to decide for themselves whether to enlist in the enterprise of enforcing the criminal laws; it has never imposed a duty to do so, as the Court's opinion suggests. I find no justification for creating such a duty in this case and applying it only to persons about to be sentenced for a crime.

In fact, the notion that citizens may be compelled to become informers is contrary to my understanding of the fundamental nature of our criminal law. Some legal systems have been premised on the obligation of an accused to answer all questions put to him. In other societies law-abiding behavior is encouraged by penalizing citizens who fail to spy on their neighbors or report infractions. Our country, thankfully, has never chosen that path. As highly as we value the directives

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(BRENNAN, J., dissenting); *id.*, at 454–462 (MARSHALL, J., dissenting). In this case, however, it is agreed that no constitutional objection would be raised by an offer of leniency made to induce cooperation on the part of a defendant.)

[10] Petitioner agrees that the extent of a defendant's cooperation with prosecuting authorities may be taken into account in granting leniency. Cooperation, like confession, may be relevant to whether the defendant has taken an initial step toward rehabilitation. The corollary inference, however, that failure to inform on others means that rehabilitation is unlikely, does not necessarily follow. As the United States Court of Appeals for the Second Circuit has explained in a similar setting:

"[W]hile it is true that a defendant's lack of desire for rehabilitation may properly be considered in imposing sentence, to permit the sentencing judge to infer such lack of desire from a defendant's refusal to provide testimony would leave little force to the rule that a defendant may not be punished for exercising his right to remain silent. Moreover, we question how much a refusal to testify indicates an absence of rehabilitative desire, given that defendants often provide such testimony simply to get back at their former associates or to obtain a better deal from the Government. In any event, refusal to testify, particularly in narcotics cases, is more likely to be the result of well-founded fears of reprisal to the witness or his family." *DiGiovanni* v. *United States*, 596 F. 2d 74, 75 (1979).

of our criminal laws, we place their enforcement in the hands of public officers, and we do not give those officers the authority to impress the citizenry into the prosecutorial enterprise. By today's decision, the Court ignores this precept, and it does so in a setting that both threatens Fifth Amendment rights and encourages arbitrary and irrational sentencing.

PAYTON v. NEW YORK

APPEAL FROM THE COURT OF APPEALS OF NEW YORK

No. 78-5420. Argued March 26, 1979—Reargued October 9, 1979—Decided April 15, 1980*

These appeals challenge the constitutionality of New York statutes authorizing police officers to enter a private residence without a warrant and with force, if necessary, to make a routine felony arrest. In each of the appeals, police officers, acting with probable cause but without warrants, had gone to the appellant's residence to arrest the appellant on a felony charge and had entered the premises without the consent of any occupant. In each case, the New York trial judge held that the warrantless entry was authorized by New York statutes and refused to suppress evidence that was seized upon the entry. Treating both cases as involving routine arrests in which there was ample time to obtain a warrant, the New York Court of Appeals, in a single opinion, ultimately affirmed the convictions of both appellants.

Held: The Fourth Amendment, made applicable to the States by the Fourteenth Amendment, prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest. Pp. 583-603.

(a) The physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed. To be arrested in the home involves not only the invasion attendant to all arrests, but also an invasion of the sanctity of the home, which is too substantial an invasion to allow without a warrant, in the absence of exigent circumstances, even when it is accomplished under statutory authority and when probable cause is present. In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant. Pp. 583-590.

(b) The reasons for upholding warrantless arrests in a public place, cf. *United States* v. *Watson*, 423 U. S. 411, do not apply to warrantless invasions of the privacy of the home. The common-law rule on warrantless home arrests was not as clear as the rule on arrests in public places; the weight of authority as it appeared to the Framers of the

*Together with No. 78-5421, *Riddick* v. *New York*, also on appeal from the same court.

Fourth Amendment was to the effect that a warrant was required for a home arrest, or at the minimum that there were substantial risks in proceeding without one. Although a majority of the States that have taken a position on the question permit warrantless home arrests even in the absence of exigent circumstances, there is an obvious declining trend, and there is by no means the kind of virtual unanimity on this question that was present in *United States* v. *Watson*, *supra*, with regard to warrantless public arrests. And, unlike the situation in *Watson*, no federal statutes have been cited to indicate any congressional determination that warrantless entries into the home are "reasonable." Pp. 590–601.

(c) For Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within. Pp. 602–603.

45 N. Y. 2d 300, 380 N. E. 2d 224, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which BRENNAN, STEWART, MARSHALL, BLACKMUN, and POWELL, JJ., joined. BLACKMUN, J., filed a concurring opinion, *post*, p. 603. WHITE, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 603. REHNQUIST, J., filed a dissenting opinion, *post*, p. 620.

William E. Hellerstein reargued the cause for appellants in both cases. With him on the briefs was *David A. Lewis.*

Peter L. Zimroth reargued the cause for appellee in both cases. With him on the briefs were *John J. Santucci, Henry J. Steinglass, Brian Rosner,* and *Vivian Berger.*

MR. JUSTICE STEVENS delivered the opinion of the Court.

These appeals challenge the constitutionality of New York statutes that authorize police officers to enter a private residence without a warrant and with force, if necessary, to make a routine felony arrest.

The important constitutional question presented by this challenge has been expressly left open in a number of our prior opinions. In *United States* v. *Watson,* 423 U. S. 411, we upheld a warrantless "midday public arrest," expressly noting that the case did not pose "the still unsettled ques-

tion . . . 'whether and under what circumstances an officer may enter a suspect's home to make a warrantless arrest.' " *Id.*, at 418, n. 6.[1] The question has been answered in different ways by other appellate courts. The Supreme Court of Florida rejected the constitutional attack,[2] as did the New York Court of Appeals in this case. The courts of last resort in 10 other States, however, have held that unless special circumstances are present, warrantless arrests in the home are unconstitutional.[3] Of the seven United States Courts of Appeals that have considered the question, five have expressed the opinion that such arrests are unconstitutional.[4]

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[1] See also *United States* v. *Watson*, 423 U. S., at 433 (STEWART, J., concurring); *id.*, at 432–433 (POWELL, J., concurring); *Gerstein* v. *Pugh*, 420 U. S. 103, 113, n. 13; *Coolidge* v. *New Hampshire*, 403 U. S. 443, 474–481; *Jones* v. *United States*, 357 U. S. 493, 499–500. Cf. *United States* v. *Santana*, 427 U. S. 38.

[2] See *State* v. *Perez*, 277 So. 2d 778 (Fla. 1973), cert. denied, 414 U. S. 1064.

[3] See *State* v. *Cook*, 115 Ariz. 188, 564 P. 2d 877 (1977) (resting on both state and federal constitutional provisions); *People* v. *Ramey*, 16 Cal. 3d 263, 545 P. 2d 1333 (1976), cert. denied, 429 U. S. 929 (state and federal); *People* v. *Moreno*, 176 Colo. 488, 491 P. 2d 575 (1971) (federal only); *State* v. *Jones*, 274 N. W. 2d 273 (Iowa 1979) (state and federal); *State* v. *Platten*, 225 Kan. 764, 594 P. 2d 201 (1979) (state and federal); *Commonwealth* v. *Forde*, 367 Mass. 798, 329 N. E. 2d 717 (1975) (federal only); *State* v. *Olson*, 287 Ore. 157, 598 P. 2d 670 (1979) (state and federal); *Commonwealth* v. *Williams*, 483 Pa. 293, 396 A. 2d 1177 (1978) (federal only); *State* v. *McNeal*, 251 S. E. 2d 484 (W. Va. 1978) (state and federal); *Laasch* v. *State*, 84 Wis. 2d 587, 267 N. W. 2d 278 (1978) (state and federal).

[4] Compare *United States* v. *Reed*, 572 F. 2d 412 (CA2 1978), cert. denied *sub nom. Goldsmith* v. *United States*, 439 U. S. 913; *United States* v. *Killebrew*, 560 F. 2d 729 (CA6 1977); *United States* v. *Shye*, 492 F. 2d 886 (CA6 1974); *United States* v. *Houle*, 603 F. 2d 1297 (CA8 1979); *United States* v. *Prescott*, 581 F. 2d 1343 (CA9 1978); *Dorman* v. *United States*, 140 U. S. App. D. C. 313, 435 F. 2d 385 (1970), with *United States* v. *Williams*, 573 F. 2d 348 (CA5 1978); *United States ex rel. Wright* v. *Woods*, 432 F. 2d 1143 (CA7 1970), cert. denied, 401 U. S. 966. Three other Circuits have assumed without deciding that warrant-

Last Term we noted probable jurisdiction of these appeals in order to address that question. 439 U. S. 1044. After hearing oral argument, we set the case for reargument this Term. 441 U. S. 930. We now reverse the New York Court of Appeals and hold that the Fourth Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment, *Mapp* v. *Ohio*, 367 U. S. 643; *Wolf* v. *Colorado*, 338 U. S. 25, prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest.

We first state the facts of both cases in some detail and put to one side certain related questions that are not presented by these records. We then explain why the New York statutes are not consistent with the Fourth Amendment and why the reasons for upholding warrantless arrests in a public place do not apply to warrantless invasions of the privacy of the home.

I

On January 14, 1970, after two days of intensive investigation, New York detectives had assembled evidence sufficient to establish probable cause to believe that Theodore Payton had murdered the manager of a gas station two days earlier. At about 7:30 a. m. on January 15, six officers went to Payton's apartment in the Bronx, intending to arrest him. They had not obtained a warrant. Although light and music emanated from the apartment, there was no response to their knock on the metal door. They summoned emergency assistance and, about 30 minutes later, used crowbars to break open the door and enter the apartment. No one was there. In plain view, however, was a .30-caliber shell casing that was

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less home arrests are unconstitutional. *United States* v. *Bradley*, 455 F. 2d 1181 (CA1 1972); *United States* v. *Davis*, 461 F. 2d 1026 (CA3 1972); *Vance* v. *North Carolina*, 432 F. 2d 984 (CA4 1970). And one Circuit has upheld such an arrest without discussing the constitutional issue. *Michael* v. *United States*, 393 F. 2d 22 (CA10 1968).

seized and later admitted into evidence at Payton's murder trial.[5]

In due course Payton surrendered to the police, was indicted for murder, and moved to suppress the evidence taken from his apartment. The trial judge held that the warrantless and forcible entry was authorized by the New York Code of Criminal Procedure,[6] and that the evidence in plain view was properly seized. He found that exigent circumstances justified the officers' failure to announce their purpose before entering the apartment as required by the statute.[7] He had no

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[5] A thorough search of the apartment resulted in the seizure of additional evidence tending to prove Payton's guilt, but the prosecutor stipulated that the officers' warrantless search of the apartment was illegal and that all the seized evidence except the shell casing should be suppressed.

"MR. JACOBS: There's no question that the evidence that was found in bureau drawers and in the closet was illegally obtained. I'm perfectly willing to concede that, and I do so in my memorandum of law. There's no question about that." App. 4.

[6] "At the time in question, January 15, 1970, the law applicable to the police conduct related above was governed by the Code of Criminal Procedure. Section 177 of the Code of Criminal Procedure as applicable to this case recited: 'A peace officer may, without a warrant, arrest a person . . . 3. When a felony has in fact been committed, and he has reasonable cause for believing the person to be arrested to have committed it.' Section 178 of the Code of Criminal Procedure provided: 'To make an arrest, as provided in the last section [177], the officer may break open an outer or inner door or window of a building, if, after notice of his office and purpose, he be refused admittance.'" 84 Misc. 2d 973, 974–975, 376 N. Y. S. 2d 779, 780 (Sup. Ct., Trial Term, N. Y. County, 1974).

[7] "Although Detective Malfer knocked on the defendant's door, it is not established that at this time he announced that his purpose was to arrest the defendant. Such a declaration of purpose is unnecessary when exigent circumstances are present (*People* v. *Wojciechowski*, 31 AD 2d 658; *People* v. *McIlwain*, 28 AD 2d 711).

"'Case law has made exceptions from the statute or common-law rules for exigent circumstances which may allow dispensation with the notice . . . It has also been held or suggested that notice is not required if there is reason to believe that it will allow an escape or increase unreasonably the

occasion, however, to decide whether those circumstances also would have justified the failure to obtain a warrant, because he concluded that the warrantless entry was adequately supported by the statute without regard to the circumstances. The Appellate Division, First Department, summarily affirmed.[8]

On March 14, 1974, Obie Riddick was arrested for the commission of two armed robberies that had occurred in 1971. He had been identified by the victims in June 1973, and in January 1974 the police had learned his address. They did not obtain a warrant for his arrest. At about noon on March 14, a detective, accompanied by three other officers, knocked on the door of the Queens house where Riddick was living. When his young son opened the door, they could see Riddick sitting in bed covered by a sheet. They entered the house and placed him under arrest. Before permitting him to dress, they opened a chest of drawers two feet from the bed in search of weapons and found narcotics and related paraphernalia. Riddick was subsequently indicted on narcotics charges. At a suppression hearing, the trial judge held that the warrantless entry into his home was authorized by the revised New York statute,[9] and that the search of the imme-

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physical risk to the police or to innocent persons.' (*People* v. *Floyd*, 26 NY 2d 558, 562.)

"The facts of this matter indicate that a grave offense had been committed; that the suspect was reasonably believed to be armed and could be a danger to the community; that a clear showing of probable cause existed and that there was strong reason to believe that the suspect was in the premises being entered and that he would escape if not swiftly apprehended. From this fact the court finds that exigent circumstances existed to justify noncompliance with section 178. The court holds, therefore, that the entry into defendant's apartment was valid." *Id.*, at 975, 376 N. Y. S. 2d, at 780–781.

[8] 55 App. Div. 2d 859 (1976).

[9] New York Crim. Proc. Law § 140.15 (4) (McKinney 1971) provides, with respect to arrest without a warrant:

"In order to effect such an arrest, a police officer may enter premises in which he reasonably believes such person to be present, under the same

diate area was reasonable under *Chimel* v. *California*, 395 U. S. 752.[10] The Appellate Division, Second Department, affirmed the denial of the suppression motion.[11]

The New York Court of Appeals, in a single opinion, affirmed the convictions of both Payton and Riddick. 45 N. Y. 2d 300, 380 N. E. 2d 224 (1978). The court recognized that the question whether and under what circumstances an officer may enter a suspect's home to make a warrantless arrest had not been settled either by that court or by this Court.[12] In answering that question, the majority of four judges relied primarily on its perception that there is a

> ". . . substantial difference between the intrusion which attends an entry for the purpose of searching the premises and that which results from an entry for the purpose of

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circumstances and in the same manner as would be authorized, by the provisions of subdivisions four and five of section 120.80, if he were attempting to make such arrest pursuant to a warrant of arrest."

Section 120.80, governing execution of arrest warrants, provides in relevant part:

"4. In order to effect the arrest, the police officer may, under circumstances and in a manner prescribed in this subdivision, enter any premises in which he reasonably believes the defendant to be present. Before such entry, he must give, or make reasonable effort to give, notice of his authority and purpose to an occupant thereof, unless there is reasonable cause to believe that the giving of such notice will:

"(a) Result in the defendant escaping or attempting to escape; or

"(b) Endanger the life or safety of the officer or another person; or

"(c) Result in the destruction, damaging or secretion of material evidence.

"5. If the officer is authorized to enter premises without giving notice of his authority and purpose, or if after giving such notice he is not admitted, he may enter such premises, and by a breaking if necessary."

[10] App. 63–66.

[11] 56 App. Div. 2d 937, 392 N. Y. S. 2d 848 (1977). One justice dissented on the ground that the officers' failure to announce their authority and purpose before entering the house made the arrest illegal as a matter of state law.

[12] 45 N. Y. 2d, at 309–310, 380 N. E. 2d, at 228.

making an arrest, and [a] significant difference in the governmental interest in achieving the objective of the intrusion in the two instances." *Id.*, at 310, 380 N. E. 2d, at 228–229.[13]

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[13] The majority continued:

"In the case of the search, unless appropriately limited by the terms of a warrant, the incursion on the householder's domain normally will be both more extensive and more intensive and the resulting invasion of his privacy of greater magnitude than what might be expected to occur on an entry made for the purpose of effecting his arrest. A search by its nature contemplates a possibly thorough rummaging through possessions, with concurrent upheaval of the owner's chosen or random placement of goods and articles and disclosure to the searchers of a myriad of personal items and details which he would expect to be free from scrutiny by uninvited eyes. The householder by the entry and search of his residence is stripped bare, in greater or lesser degree, of the privacy which normally surrounds him in his daily living, and, if he should be absent, to an extent of which he will be unaware.

"Entry for the purpose of arrest may be expected to be quite different. While the taking into custody of the person of the householder is unquestionably of grave import, there is no accompanying prying into the area of expected privacy attending his possessions and affairs. That personal seizure alone does not require a warrant was established by *United States* v. *Watson* (423 US 411, *supra*), which upheld a warrantless arrest made in a public place. In view of the minimal intrusion on the elements of privacy of the home which results from entry on the premises for making an arrest (as compared with the gross intrusion which attends the arrest itself), we perceive no sufficient reason for distinguishing between an arrest in a public place and an arrest in a residence. To the extent that an arrest will always be distasteful or offensive, there is little reason to assume that arrest within the home is any more so than arrest in a public place; on the contrary, it may well be that because of the added exposure the latter may be more objectionable.

"At least as important, and perhaps even more so, in concluding that entries to make arrests are not 'unreasonable'—the substantive test under the constitutional proscriptions—is the objective for which they are made, viz., the arrest of one reasonably believed to have committed a felony, with resultant protection to the community. The 'reasonableness' of any governmental intrusion is to be judged from two perspectives—that of the defendant, considering the degree and scope of the invasion of his

The majority supported its holding by noting the "apparent historical acceptance" of warrantless entries to make felony arrests, both in the English common law and in the practice of many American States.[14]

Three members of the New York Court of Appeals dissented on this issue because they believed that the Constitution requires the police to obtain a "warrant to enter a home in order to arrest or seize a person, unless there are exigent circumstances." [15] Starting from the premise that, except in carefully circumscribed instances, "the Fourth Amendment forbids police entry into a private home to search for and seize an object without a warrant," [16] the dissenters reasoned that an arrest of the person involves an even greater invasion of privacy and should therefore be attended with at least as

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person or property; that of the People, weighing the objective and imperative of governmental action. The community's interest in the apprehension of criminal suspects is of a higher order than is its concern for the recovery of contraband or evidence; normally the hazards created by the failure to apprehend far exceed the risks which may follow nonrecovery." *Id.*, at 310–311, 380 N. E. 2d, at 229.

[14] "The apparent historical acceptance in the English common law of warrantless entries to make felony arrests (2 Hale, Historia Placitorum Coronae, History of Pleas of Crown [1st Amer ed, 1847], p. 92; Chitty, Criminal Law [3d Amer, from 2d London, ed, 1836] 22–23), and the existence of statutory authority for such entries in this State since the enactment of the Code of Criminal Procedure in 1881 argue against a holding of unconstitutionality and substantiate the reasonableness of such procedure. . . .

"Nor do we ignore the fact that a number of jurisdictions other than our own have also enacted statutes authorizing warrantless entries of buildings (without exception for homes) for purposes of arrest. The American Law Institute's Model Code of Pre-Arraignment Procedure makes similar provision in section 120.6, with suggested special restrictions only as to nighttime entries." *Id.*, at 311–312, 380 N. E. 2d, at 229–230 (footnote omitted).

[15] *Id.*, at 315, 380 N. E. 2d, at 232 (Wachtler, J., dissenting).

[16] *Id.*, at 319–320, 380 N. E. 2d, at 235 (Cooke, J., dissenting).

great a measure of constitutional protection.[17] The dissenters noted "the existence of statutes and the American Law Institute imprimatur codifying the common-law rule authorizing warrantless arrests in private homes" and acknowledged that "the statutory authority of a police officer to make a warrantless arrest in this State has been in effect for almost 100 years," but concluded that "neither antiquity nor legislative unanimity can be determinative of the grave constitutional question presented" and "can never be a substitute for reasoned analysis." [18]

Before addressing the narrow question presented by these appeals,[19] we put to one side other related problems that are

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[17] "Although the point has not been squarely adjudicated since *Coolidge* [v. *New Hampshire*, 403 U. S. 443,] (see *United States* v. *Watson*, 423 US 411, 418, n. 6), its proper resolution, it is submitted, is manifest. At the core of the Fourth Amendment, whether in the context of a search or an arrest, is the fundamental concept that any governmental intrusion into an individual's home or expectation of privacy must be strictly circumscribed (see, *e. g.*, *Boyd* v. *United States*, 116 US 616, 630; *Camara* v. *Municipal Ct.*, 387 US 523, 528). To achieve that end, the framers of the amendment interposed the warrant requirement between the public and the police, reflecting their conviction that the decision to enter a dwelling should not rest with the officer in the field, but rather with a detached and disinterested Magistrate (*McDonald* v. *United States*, 335 US 451, 455–456; *Johnson* v. *United States*, 333 US 10, 13–14). Inasmuch as the purpose of the Fourth Amendment is to guard against arbitrary governmental invasions of the home, the necessity of prior judicial approval should control any contemplated entry, regardless of the purpose for which that entry is sought. By definition, arrest entries must be included within the scope of the amendment, for while such entries are for persons, not things, they are, nonetheless, violations of privacy, the chief evil that the Fourth Amendment was designed to deter (*Silverman* v. *United States*, 365 US 505, 511)." *Id.*, at 320–321, 380 N. E. 2d, at 235–236 (Cooke, J., dissenting).

[18] *Id.*, at 324, 380 N. E. 2d, at 238 (Cooke, J., dissenting).

[19] Although it is not clear from the record that appellants raised this constitutional issue in the trial courts, since the highest court of the State passed on it, there is no doubt that it is properly presented for review by this Court. See *Raley* v. *Ohio*, 360 U. S. 423, 436.

not presented today. Although it is arguable that the warrantless entry to effect Payton's arrest might have been justified by exigent circumstances, none of the New York courts relied on any such justification. The Court of Appeals majority treated both Payton's and Riddick's cases as involving routine arrests in which there was ample time to obtain a warrant,[20] and we will do the same. Accordingly, we have no occasion to consider the sort of emergency or dangerous situation, described in our cases as "exigent circumstances," that would justify a warrantless entry into a home for the purpose of either arrest or search.

Nor do these cases raise any question concerning the authority of the police, without either a search or arrest warrant, to enter a third party's home to arrest a suspect. The police broke into Payton's apartment intending to arrest Payton, and they arrested Riddick in his own dwelling. We also note that in neither case is it argued that the police lacked probable cause to believe that the suspect was at home when they entered. Finally, in both cases we are dealing with entries into homes made without the consent of any occupant. In *Payton*, the police used crowbars to break down the door and in *Riddick*, although his 3-year-old son answered the door, the police entered before Riddick had an opportunity either to object or to consent.

II

It is familiar history that indiscriminate searches and seizures conducted under the authority of "general warrants" were the immediate evils that motivated the framing and adoption of the Fourth Amendment.[21] Indeed, as originally

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[20] 45 N. Y. 2d, at 308, 380 N. E. 2d, at 228. Judge Wachtler in dissent, however, would have upheld the warrantless entry in Payton's case on exigency grounds, and therefore agreed with the majority's refusal to suppress the shell casing. See *id.*, at 315, 380 N. E. 2d, at 232.

[21] "Vivid in the memory of the newly independent Americans were those general warrants known as writs of assistance under which officers of the

proposed in the House of Representatives, the draft contained only one clause, which directly imposed limitations on the issuance of warrants, but imposed no express restrictions on warrantless searches or seizures.[22] As it was ultimately adopted, however, the Amendment contained two separate clauses, the first protecting the basic right to be free from unreasonable searches and seizures and the second requiring that warrants be particular and supported by probable cause.[23] The Amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches

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Crown had so bedeviled the colonists. The hated writs of assistance had given customs officials blanket authority to search where they pleased for goods imported in violation of British tax laws. They were denounced by James Otis as 'the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book,' because they placed 'the liberty of every man in the hands of every petty officer.' The historic occasion of that denunciation, in 1761 at Boston, has been characterized as 'perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. "Then and there," said John Adams, "then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born."' *Boyd* v. *United States*, 116 U. S. 616, 625." *Stanford* v. *Texas*, 379 U. S. 476, 481–482.

See also J. Landynski, Search and Seizure and the Supreme Court 19–48 (1966); N. Lasson, The History and Development of the Fourth Amendment to the United States Constitution 13–78 (1937); T. Taylor, Two Studies in Constitutional Interpretation 19–44 (1969).

[22] "'The rights of the people to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.' Annals of Cong., 1st Cong., 1st sess., p. 452." Lasson, *supra*, at 100, n. 77.

[23] "The general right of security from unreasonable search and seizure was given a sanction of its own and the amendment thus intentionally given a broader scope. That the prohibition against 'unreasonable searches' was intended, accordingly, to cover something other than the form of the

and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

It is thus perfectly clear that the evil the Amendment was designed to prevent was broader than the abuse of a general warrant. Unreasonable searches or seizures conducted without any warrant at all are condemned by the plain language of the first clause of the Amendment. Almost a century ago the Court stated in resounding terms that the principles reflected in the Amendment "reached farther than the concrete form" of the specific cases that gave it birth, and "apply to all invasions on the part of the government and its employés of the sanctity of a man's home and the privacies of life." *Boyd* v. *United States*, 116 U. S. 616, 630. Without pausing to consider whether that broad language may require some qualification, it is sufficient to note that the warrantless arrest of a person is a species of seizure required by the Amendment to be reasonable. *Beck* v. *Ohio*, 379 U. S. 89. Cf. *Delaware* v. *Prouse*, 440 U. S. 648. Indeed, as MR. JUSTICE POWELL noted in his concurrence in *United States* v. *Watson*, the arrest of a person is "quintessentially a seizure." 423 U. S., at 428.

The simple language of the Amendment applies equally to seizures of persons and to seizures of property. Our analysis in this case may therefore properly commence with rules that have been well established in Fourth Amendment litigation involving tangible items. As the Court reiterated just a few years ago, the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States* v. *United States District Court*,

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warrant is a question no longer left to implication to be derived from the phraseology of the Amendment." Lasson, *supra*, at 103. (Footnote omitted.)

407 U. S. 297, 313. And we have long adhered to the view that the warrant procedure minimizes the danger of needless intrusions of that sort.[24]

It is a "basic principle of Fourth Amendment law" that searches and seizures inside a home without a warrant are presumptively unreasonable.[25] Yet it is also well settled that

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[24] As Mr. Justice Jackson so cogently observed in *Johnson* v. *United States*, 333 U. S. 10, 13–14:

"The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent." (Footnotes omitted.)

[25] As the Court stated in *Coolidge* v. *New Hampshire*:

"Both sides to the controversy appear to recognize a distinction between searches and seizures that take place on a man's property—his home or office—and those carried out elsewhere. It is accepted, at least as a matter of principle, that a search or seizure carried out on a suspect's premises without a warrant is *per se* unreasonable, unless the police can show that it falls within one of a carefully defined set of exceptions based on the presence of 'exigent circumstances.'

. . . . .

"It is clear, then, that the notion that the warrantless entry of a man's house in order to arrest him on probable cause is *per se* legitimate is in fundamental conflict with the basic principle of Fourth Amendment law that searches and seizures inside a man's house without warrant are *per se*

objects such as weapons or contraband found in a public place may be seized by the police without a warrant. The seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity. The distinction between a warrantless seizure in an open area and such a seizure on private premises was plainly stated in *G. M. Leasing Corp.* v. *United States,* 429 U. S. 338, 354:

> "It is one thing to seize without a warrant property resting in an open area or seizable by levy without an intrusion into privacy, and it is quite another thing to effect a warrantless seizure of property, even that owned by a corporation, situated on private premises to which access is not otherwise available for the seizing officer."

As the late Judge Leventhal recognized, this distinction has equal force when the seizure of a person is involved. Writing on the constitutional issue now before us for the United States Court of Appeals for the District of Columbia Circuit sitting en banc, *Dorman* v. *United States,* 140 U. S. App. D. C. 313, 435 F. 2d 385 (1970), Judge Leventhal first noted the settled rule that warrantless arrests in public places are valid. He immediately recognized, however, that

> "[a] greater burden is placed . . . on officials who enter a home or dwelling without consent. Freedom from intrusion into the home or dwelling is the archetype of the privacy protection secured by the Fourth Amendment." *Id.,* at 317, 435 F. 2d, at 389. (Footnote omitted.)

His analysis of this question then focused on the long-settled premise that, absent exigent circumstances, a warrant-

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unreasonable in the absence of some one of a number of well defined 'exigent circumstances.'" 403 U. S., at 474–475, 477–478.

Although Mr. Justice Harlan joined this portion of the Court's opinion, he expressly disclaimed any position on the issue now before us. *Id.,* at 492 (concurring opinion).

less entry to search for weapons or contraband is unconstitutional even when a felony has been committed and there is probable cause to believe that incriminating evidence will be found within.[26] He reasoned that the constitutional protection afforded to the individual's interest in the privacy of his own home is equally applicable to a warrantless entry for the purpose of arresting a resident of the house; for it is inherent in such an entry that a search for the suspect may be required before he can be apprehended.[27] Judge Leventhal concluded that an entry to arrest and an entry to search for and to seize property implicate the same interest in preserving the privacy and the sanctity of the home, and justify the same level of constitutional protection.

This reasoning has been followed in other Circuits.[28] Thus, the Second Circuit recently summarized its position:

"To be arrested in the home involves not only the inva-

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[26] As Mr. Justice Harlan wrote for the Court:

"It is settled doctrine that probable cause for belief that certain articles subject to seizure are in a dwelling cannot of itself justify a search without a warrant. *Agnello* v. *United States*, 269 U. S. 20, 33; *Taylor* v. *United States*, 286 U. S. 1, 6. The decisions of this Court have time and again underscored the essential purpose of the Fourth Amendment to shield the citizen from unwarranted intrusions into his privacy. See, *e. g.*, *Johnson* v. *United States*, 333 U. S. 10, 14; *McDonald* v. *United States*, 335 U. S. 451, 455; cf. *Giordenello* v. *United States*, [357 U. S. 480]. This purpose is realized by Rule 41 of the Federal Rules of Criminal Procedure, which implements the Fourth Amendment by requiring that an impartial magistrate determine from an affidavit showing probable cause whether information possessed by law-enforcement officers justifies the issuance of a search warrant. Were federal officers free to search without a warrant merely upon probable cause to believe that certain articles were within a home, the provisions of the Fourth Amendment would become empty phrases, and the protection it affords largely nullified." *Jones* v. *United States*, 357 U. S., at 497–498 (footnote omitted).

[27] See generally Rotenberg & Tanzer, Searching for the Person to be Seized, 35 Ohio St. L. J. 56 (1974).

[28] See n. 4, *supra*.

sion attendant to all arrests but also an invasion of the sanctity of the home. This is simply too substantial an invasion to allow without a warrant, at least in the absence of exigent circumstances, even when it is accomplished under statutory authority and when probable cause is clearly present." *United States* v. *Reed*, 572 F. 2d 412, 423 (1978), cert. denied *sub nom. Goldsmith* v. *United States*, 439 U. S. 913.

We find this reasoning to be persuasive and in accord with this Court's Fourth Amendment decisions.

The majority of the New York Court of Appeals, however, suggested that there is a substantial difference in the relative intrusiveness of an entry to search for property and an entry to search for a person. See n. 13, *supra*. It is true that the area that may legally be searched is broader when executing a search warrant than when executing an arrest warrant in the home. See *Chimel* v. *California*, 395 U. S. 752. This difference may be more theoretical than real, however, because the police may need to check the entire premises for safety reasons, and sometimes they ignore the restrictions on searches incident to arrest.[29]

But the critical point is that any differences in the intrusiveness of entries to search and entries to arrest are merely ones of degree rather than kind. The two intrusions share this fundamental characteristic: the breach of the entrance to an individual's home. The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their . . . houses . . . shall not be violated." That language unequivocally establishes the proposition that "[a]t the very

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[29] See, *e. g.*, the facts in Payton's case, n. 5, *supra*.

core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman* v. *United States*, 365 U. S. 505, 511. In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.

III

Without contending that *United States* v. *Watson*, 423 U. S. 411, decided the question presented by these appeals, New York argues that the reasons that support the *Watson* holding require a similar result here. In *Watson* the Court relied on (a) the well-settled common-law rule that a warrantless arrest in a public place is valid if the arresting officer had probable cause to believe the suspect is a felon; [30] (b) the clear consensus among the States adhering to that well-settled common-law rule; [31] and (c) the expression of the judgment of Congress that such an arrest is "reasonable." [32] We con-

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[30] "The cases construing the Fourth Amendment thus reflect the ancient common-law rule that a peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence as well as for a felony not committed in his presence if there was reasonable ground for making the arrest. 10 Halsbury's Laws of England 344–345 (3d ed. 1955); 4 W. Blackstone, Commentaries *292; 1 J. Stephen, A History of the Criminal Law of England 193 (1883); 2 M. Hale, Pleas of the Crown *72–74; Wilgus, Arrests Without a Warrant, 22 Mich. L. Rev. 541, 547–550, 686–688 (1924); *Samuel* v. *Payne*, 1 Doug. 359, 99 Eng. Rep. 230 (K. B. 1780); *Beckwith* v. *Philby*, 6 Barn. & Cress. 635, 108 Eng. Rep. 585 (K. B. 1827)." 423 U. S., at 418–419.

[31] "The balance struck by the common law in generally authorizing felony arrests on probable cause, but without a warrant, has survived substantially intact. It appears in almost all of the States in the form of express statutory authorization." *Id.*, at 421–422.

[32] "This is the rule Congress has long directed its principal law enforcement officers to follow. Congress has plainly decided against condi-

sider each of these reasons as it applies to a warrantless entry into a home for the purpose of making a routine felony arrest.

A

An examination of the common-law understanding of an officer's authority to arrest sheds light on the obviously relevant, if not entirely dispositive,[33] consideration of what the Framers of the Amendment might have thought to be reasonable. Initially, it should be noted that the common-law rules of arrest developed in legal contexts that substantially differ from the cases now before us. In these cases, which involve application of the exclusionary rule, the issue is whether cer-

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tioning warrantless arrest power on proof of exigent circumstances." *Id.*, at 423.

The Court added in a footnote:

"Until 1951, 18 U. S. C. § 3052 conditioned the warrantless arrest powers of the agents of the Federal Bureau of Investigation on there being reasonable grounds to believe that the person would escape before a warrant could be obtained. The Act of Jan. 10, 1951, c. 1221, § 1, 64 Stat. 1239, eliminated this condition." *Id.*, at 423, n. 13.

[33] There are important differences between the common-law rules relating to searches and seizures and those that have evolved through the process of interpreting the Fourth Amendment in light of contemporary norms and conditions. For example, whereas the kinds of property subject to seizure under warrants had been limited to contraband and the fruits or instrumentalities of crime, see *Gouled* v. *United States*, 255 U. S. 298, 309, the category of property that may be seized, consistent with the Fourth Amendment, has been expanded to include mere evidence. *Warden* v. *Hayden*, 387 U. S. 294. Also, the prohibitions of the Amendment have been extended to protect against invasion by electronic eavesdropping of an individual's privacy in a phone booth not owned by him, *Katz* v. *United States*, 389 U. S. 347, even though the earlier law had focused on the physical invasion of the individual's person or property interests in the course of a seizure of tangible objects. See *Olmstead* v. *United States*, 277 U. S. 438, 466. Thus, this Court has not simply frozen into constitutional law those law enforcement practices that existed at the time of the Fourth Amendment's passage.

tain evidence is admissible at trial.[34] See *Weeks* v. *United States*, 232 U. S. 383. At common law, the question whether an arrest was authorized typically arose in civil damages actions for trespass or false arrest, in which a constable's authority to make the arrest was a defense. See, *e. g.*, *Leach* v. *Money*, 19 How. St. Tr. 1001, 97 Eng. Rep. 1075 (K. B. 1765). Additionally, if an officer was killed while attempting to effect an arrest, the question whether the person resisting the arrest was guilty of murder or manslaughter turned on whether the officer was acting within the bounds of his authority. See M. Foster, Crown Cases 308, 312 (1762). See also *West* v. *Cabell*, 153 U. S. 78, 85.

A study of the common law on the question whether a constable had the authority to make warrantless arrests in the home on mere suspicion of a felony—as distinguished from an officer's right to arrest for a crime committed in his presence—reveals a surprising lack of judicial decisions and a deep divergence among scholars.

The most cited evidence of the common-law rule consists of an equivocal dictum in a case actually involving the sheriff's authority to enter a home to effect service of civil process. In *Semayne's Case*, 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 195–196 (K. B. 1603), the Court stated:

> "In all cases when the King is party, the Sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the K.'s process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors; and that appears well by the stat. of Westm. 1. c. 17. (which is but an affirmance of the common law) as hereafter appears, for the law without a default in the owner abhors the destruc-

[34] The issue is not whether a defendant must stand trial, because he must do so even if the arrest is illegal. See *United States* v. *Crews*, *ante*, at 474.

tion or breaking of any house (which is for the habitation and safety of man) by which great damage and inconvenience might ensue to the party, when no default is in him; for perhaps he did not know of the process, of which, if he had notice, it is to be presumed that he would obey it, and that appears by the book in 18 E. 2. Execut. 252. where it is said, that the K.'s officer who comes to do execution, &c. may open the doors which are shut, and break them, if he cannot have the keys; which proves, that he ought first to demand them, 7 E. 3. 16." (Footnotes omitted.)

This passage has been read by some as describing an entry without a warrant. The context strongly implies, however, that the court was describing the extent of authority in executing the King's writ. This reading is confirmed by the phrase "either to arrest him, or to do *other* execution of the K.'s process" and by the further point that notice was necessary because the owner may "not know of the *process*." In any event, the passage surely cannot be said unambiguously to endorse warrantless entries.

The common-law commentators disagreed sharply on the subject.[35] Three distinct views were expressed. Lord Coke,

[35] Those modern commentators who have carefully studied the early works agree with that assessment. See ALI, A Model Code of Pre-Arraignment Procedure 308 (Prop. Off. Draft 1975) (hereinafter ALI Code); Blakey, The Rule of Announcement and Unlawful Entry: *Miller* v. *United States* and *Ker* v. *California*, 112 U. Pa. L. Rev. 499, 502 (1964); Comment, Forcible Entry to Effect a Warrantless Arrest—The Eroding Protection of the Castle, 82 Dick. L. Rev. 167, 168, n. 5 (1977); Note, The Constitutionality of Warrantless Home Arrests, 78 Colum. L. Rev. 1550, 1553 (1978) ("the major common-law commentators appear to be equally divided on the requirement of a warrant for a home arrest") (hereinafter Columbia Note); Recent Development, Warrantless Arrests by Police Survive a Constitutional Challenge—*United States* v. *Watson*, 14 Am. Crim. L. Rev. 193, 210–211 (1976). Accord, *Miller* v. *United States*, 357 U. S. 301, 307–308; *Accarino* v. *United States*, 85 U. S. App. D. C. 394, 402, 179 F. 2d 456, 464 (1949).

widely recognized by the American colonists "as the greatest authority of his time on the laws of England," [36] clearly viewed a warrantless entry for the purpose of arrest to be illegal.[37]

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[36] "Foremost among the titles to be found in private libraries of the time were the works of Coke, the great expounder of Magna Carta, and similar books on English liberties. The inventory of the library of Arthur Spicer, who died in Richmond County, Virginia, in 1699, included Coke's *Institutes*, another work on Magna Carta, and a 'Table to Cooks Reports.' The library of Colonel Daniel McCarty, a wealthy planter and member of the Virginia House of Burgesses who died in Westmoreland County in 1724, included Coke's *Reports*, an abridgment of Coke's *Reports*, *Coke on Littleton*, and 'Rights of the Comons of England.' Captain Charles Colston, who died in Richmond County, Virginia, in 1724, and Captain Christopher Cocke, who died in Princess Anne County, Virginia, in 1716, each had copies of Coke's *Institutes*. That these libraries were typical is suggested by a study of the contents of approximately one hundred private libraries in colonial Virginia, which revealed that the most common law title found in these libraries was Coke's *Reports*. They were typical of other colonies, too. Another study, of the inventories of forty-seven libraries throughout the colonies between 1652 and 1791, found that of all the books on either law or politics in these libraries the most common was Coke's *Institutes* (found in 27 of the 47 libraries). The second most common title was a poor second; it was Grotius' *War and Peace*, found in 16 of the libraries (even Locke's *Two Treatises on Government* appeared in only 13 of the libraries).

"The popularity of Coke in the colonies is of no small significance. Coke himself had been at the eye of the storm in the clashes between King and Parliament in the early seventeenth century which did so much to shape the English Constitution. He rose to high office at the instance of the Crown—he was Speaker of the House of Commons and Attorney General under Queen Elizabeth, and James I made Coke first his Chief Justice of Common Pleas and then his Chief Justice of King's Bench. During this time Coke gained an unchallenged position as the greatest authority of his time on the laws of England, frequently burying an opponent with learned citations from early Year Books. Having been a champion of the Crown's interests, Coke (in a change of role that recalls the metamorphosis of Thomas à Becket) became instead the defender of the common law." A. Howard, The Road From Runnymede 118–119 (1968). (Footnotes omitted.)

[37] "[N]either the Constable, nor any other can break open any house for the apprehension of the party suspected or charged with the

Burn, Foster, and Hawkins agreed,[38] as did East and Russell, though the latter two qualified their opinions by stating that if an entry to arrest was made without a warrant, the officer was perhaps immune from liability for the trespass if the suspect was actually guilty.[39] Blackstone, Chitty and Stephen took the opposite view, that entry to arrest without a warrant was legal,[40] though Stephen relied on Blackstone who, along with Chitty, in turn relied exclusively on Hale. But Hale's view was not quite so unequivocally expressed.[41]

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felony. . . ." 4 E. Coke, Institutes *177. Coke also was of the opinion that only a King's indictment could justify the breaking of doors to effect an arrest founded on suspicion, and that not even a warrant issued by a justice of the peace was sufficient authority. *Ibid.* He was apparently alone in that view, however.

[38] 1 R. Burn, The Justice of the Peace and Parish Officer 87 (6th ed. 1758) ("where one lies under a probable suspicion only, and is not indicted, it seems the better opinion at this day (Mr. *Hawkins* says) that no one can justify the breaking open doors in order to apprehend him . . ."); M. Foster, Crown Law 321 (1762); 2 W. Hawkins, Pleas of the Crown 139 (6th ed. 1787): "But where one lies under a probable suspicion only, and is not indicted, it seems the better (*d*) opinion at this day, That no one can justify the breaking open doors in order to apprehend him." The contrary opinion of Hale, see n. 42, *infra*, is acknowledged among the authorities cited in the footnote (*d*).

[39] 1 E. East, Pleas of the Crown 322 (1806) ("[Y]et a bare suspicion of guilt against the party will not warrant a proceeding to this extremity [the breaking of doors], unless the officer be armed with a magistrate's warrant grounded on such suspicion. It will at least be at the peril of proving that the party so taken on suspicion was guilty."); 1 W. Russell, A Treatise on Crimes and Misdemeanors 745 (1819) (similar rule).

[40] 4 W. Blackstone, Commentaries *292; 1 J. Chitty, A Practical Treatise on the Criminal Law 23 (1816); 4 H. Stephen, New Commentaries on the Laws of England 359 (1845).

[41] 1 M. Hale, Pleas of the Crown 583 (1736); 2 *id.*, at 90–95. At page 92 of the latter volume, Hale writes that in the case where the constable suspects a person of a felony, "if the supposed offender fly and take house, and the door will not be opened upon demand of the constable and notification of his business, the constable may break the door, tho he have no warrant. 13 *E.* 4. 9. *a.*" Although it would appear that Hale might have

Further, Hale appears to rely solely on a statement in an early Yearbook, quoted in *Burdett* v. *Abbot*, 14 East 1, 155, 104 Eng. Rep. 501, 560 (K. B. 1811): [42]

> " 'that for felony, or suspicion of felony, a man may break open the house to take the felon; for it is for the commonweal to take them.' "

Considering the diversity of views just described, however, it is clear that the statement was never deemed authoritative. Indeed, in *Burdett*, the statement was described as an "extrajudicial opinion." *Ibid.*[43]

It is obvious that the common-law rule on warrantless home arrests was not as clear as the rule on arrests in public places. Indeed, particularly considering the prominence of Lord Coke, the weight of authority as it appeared to the Framers was to the effect that a warrant was required, or at the minimum that there were substantial risks in proceeding without one. The common-law sources display a sensitivity to privacy interests that could not have been lost on the Framers. The zealous and frequent repetition of the adage that a "man's house is his castle," made it abundantly clear that both in England [44]

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meant to limit warrantless home arrests to cases of hot pursuit, the quoted passage has not typically been read that way.

[42] Apparently, the Yearbook in which the statement appears has never been fully translated into English.

[43] That assessment is consistent with the description by this Court of the holding of that Yearbook case in *Miller* v. *United States*, 357 U. S., at 307:

"As early as the 13th Yearbook of Edward IV (1461–1483), at folio 9, there is a recorded holding that it was unlawful for the sheriff to break the doors of a man's house to arrest him in a civil suit in debt or trespass, for the arrest was then only for the private interest of a party."

[44] Thus, in *Semayne's Case*, 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 195 (K. B. 1603), the court stated: "That the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose; and although the life of man is a thing precious and favoured in law; so that although a man kills another in his defence, or kills one *per infortun'*, without any intent, yet it is felony, and in such case he

and in the Colonies "the freedom of one's house" was one of the most vital elements of English liberty.[45]

Thus, our study of the relevant common law does not provide the same guidance that was present in *Watson*. Whereas

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shall forfeit his goods and chattels, for the great regard which the law has to a man's life; but if thieves come to a man's house to rob him, or murder, and the owner of his servants kill any of the thieves in defence of himself and his house, it is not felony, and he shall lose nothing, and therewith agree 3 E. 3. Coron. 303, & 305. & 26 Ass. pl. 23. So it is held in 21 H. 7. 39. every one may assemble his friends and neighbours to defend his house against violence: but he cannot assemble them to go with him to the market, or elsewhere for his safeguard against violence: and the reason of all this is, because *domus sua cuique est tutissimum refugium*." (Footnotes omitted.)

In the report of that case it is noted that although the sheriff may break open the door of a barn without warning to effect service of a writ, a demand and refusal must precede entry into a dwelling house. *Id.*, at 91b, n. (c), 77 Eng. Rep., at 196, n. (c):

"And this privilege is confined to a man's dwelling-house, or out-house adjoining thereto, for the sheriff on a *fieri facias* may break open the door of a barn standing at a distance from the dwelling-house, without requesting the owner to open the door, in the same manner as he may enter a close. *Penton* v. *Brown*, 2 Keb. 698, S. C. 1 Sid. 186."

[45] "Now one of the most essential branches of English liberty is the freedom of one's house. A man's house is his castle; and while he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege." 2 Legal Papers of John Adams 142 (L. Wroth & H. Zobel ed. 1965).

We have long recognized the relevance of the common law's special regard for the home to the development of Fourth Amendment jurisprudence. See, *e. g.*, *Weeks* v. *United States*, 232 U. S. 383, 390:

"Judge Cooley, in his Constitutional Limitations, pp. 425, 426, in treating of this feature of our Constitution, said: 'The maxim that "every man's house is his castle," is made a part of our constitutional law in the clauses prohibiting unreasonable searches and seizures, and has always been looked upon as of high value to the citizen.' 'Accordingly,' says Lieber in his work on Civil Liberty and Self-Government, 62, in speaking of the English law in this respect, 'no man's house can be forcibly opened, or he or his goods be carried away after it has thus been forced, except in cases of felony, and then the sheriff must be furnished with a warrant, and take

the rule concerning the validity of an arrest in a public place was supported by cases directly in point and by the unanimous views of the commentators, we have found no direct authority supporting forcible entries into a home to make a routine arrest and the weight of the scholarly opinion is somewhat to the contrary. Indeed, the absence of any 17th- or 18th-century English cases directly in point, together with the unequivocal endorsement of the tenet that "a man's house is his castle," strongly suggests that the prevailing practice was not to make such arrests except in hot pursuit or when authorized by a warrant. Cf. *Agnello* v. *United States*, 269 U. S. 20, 33. In all events, the issue is not one that can be said to have been definitively settled by the common law at the time the Fourth Amendment was adopted.

B

A majority of the States that have taken a position on the question permit warrantless entry into the home to arrest even in the absence of exigent circumstances. At this time, 24 States permit such warrantless entries; [46] 15 States clearly

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great care lest he commit a trespass. This principle is jealously insisted upon."

Although the quote from Lieber concerning warrantless arrests in the home is on point for today's cases, it was dictum in *Weeks*. For that case involved a warrantless arrest in a public place, and a warrantless search of Week's home in his absence.

[46] Twenty-three States authorize such entries by statute. See Ala. Code § 15-10-4 (1975); Alaska Stat. Ann. § 12.25.100 (1972); Ark. Stat. Ann. § 43-414 (1977); Fla. Stat. § 901.19 (1979); Haw. Rev. Stat. § 803-11 (1977); Idaho Code § 19-611 (1979); Ill. Rev. Stat., ch. 38, § 107—5 (d) (1971); La. Code Crim. Proc. Ann., Art. 224 (West 1967); Mich. Comp. Laws § 764.21 (1970); Minn. Stat. § 629.34 (1978); Miss. Code Ann. § 99-3-11 (1973); Mo. Rev. Stat. § 544.200 (1978); Neb. Rev. Stat. § 29-411 (1975); Nev. Rev. Stat. § 171.138 (1977); N. Y. Crim. Proc. Law §§ 140.15 (4), 120.80 (4), (5) (McKinney 1971); N. C. Gen. Stat. § 15A-401 (e) (1978); N. D. Cent. Code § 29-06-14 (1974); Ohio Rev. Code Ann. § 2935.12 (1975); Okla. Stat., Tit. 22, § 197 (1971); S. D. Comp. Laws Ann. § 23A-3-5 (1979); Tenn. Code Ann. § 40-807 (1975); Utah Code

prohibit them, though 3 States do so on federal constitutional grounds alone;[47] and 11 States have apparently taken no position on the question.[48]

But these current figures reflect a significant decline during the last decade in the number of States permitting warrantless entries for arrest. Recent dicta in this Court raising questions about the practice, see n. 1, *supra*, and Federal Courts of Appeals' decisions on point, see n. 4, *supra*, have led state courts to focus on the issue. Virtually all of the state courts that have had to confront the constitutional issue directly have held warrantless entries into the home to arrest to be invalid in the absence of exigent circumstances. See nn. 2, 3, *supra*. Three state courts have relied on Fourth Amendment

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Ann. § 77-13-12 (Repl. 1978); Wash. Rev. Code § 10.31.040 (1976). One State has authorized warrantless arrest entries by judicial decision. See *Shanks* v. *Commonwealth*, 463 S. W. 2d 312, 315 (Ky. App. 1971).

A number of courts in these States, though not directly deciding the issue, have recognized that the constitutionality of such entries is open to question. See *People* v. *Wolgemuth*, 69 Ill. 2d 154, 370 N. E. 2d 1067 (1977), cert. denied, 436 U. S. 908; *State* v. *Ranker*, 343 So. 2d 189 (La. 1977) (citing both State and Federal Constitutions); *State* v. *Lasley*, 306 Minn. 224, 236 N. W. 2d 604 (1975), cert. denied, 429 U. S. 1077; *State* v. *Novak*, 428 S. W. 2d 585 (Mo. 1968); *State* v. *Page*, 277 N. W. 2d 112 (N. D. 1979); *State* v. *Max*, 263 N. W. 2d 685 (S. D. 1978).

[47] Four States prohibit warrantless arrests in the home by statute, see Ga. Code §§ 27-205, 27-207 (1978) (also prohibits warrantless arrests outside the home absent exigency); Ind. Code §§ 35-1-19-4, 35-1-19-6 (1976); Mont. Code Ann. § 46-6-401 (1979) (same as Georgia); S. C. Code § 23-15-60 (1976), one by state common law, see *United States* v. *Hall*, 468 F. Supp. 123, 131, n. 16 (ED Tex. 1979); *Moore* v. *State*, 149 Tex. Crim. 229, 235-236, 193 S. W. 2d 204, 207 (1946), and ten on constitutional grounds, see n. 3, *supra*.

[48] Connecticut, Delaware, Maine, Maryland, New Hampshire, New Jersey, New Mexico, Rhode Island, Vermont, Virginia and Wyoming. The courts of three of the above-listed States have recognized that the constitutionality of warrantless home arrest is subject to question. See *State* v. *Anonymous*, 34 Conn. Supp. 531, 375 A. 2d 417 (Super. Ct., App. Sess. 1977); *Nilson* v. *State*, 272 Md. 179, 321 A. 2d 301 (1974); *Palmigiano* v. *Mullen*, — R. I. —, 377 A. 2d 242 (1977).

grounds alone, while seven have squarely placed their decisions on both federal and state constitutional grounds.[49] A number of other state courts, though not having had to confront the issue directly, have recognized the serious nature of the constitutional question.[50] Apparently, only the Supreme Court of Florida and the New York Court of Appeals in this case have expressly upheld warrantless entries to arrest in the face of a constitutional challenge.[51]

A longstanding, widespread practice is not immune from constitutional scrutiny. But neither is it to be lightly brushed aside. This is particularly so when the constitutional standard is as amorphous as the word "reasonable," and when custom and contemporary norms necessarily play such a large role in the constitutional analysis. In this case, although the weight of state-law authority is clear, there is by no means the kind of virtual unanimity on this question that was present in *United States* v. *Watson*, with regard to warrantless arrests in public places. See 423 U. S., at 422–423. Only 24 of the 50 States currently sanction warrantless entries into the home to arrest, see nn. 46–48, *supra*, and there is an obvious declining trend. Further, the strength of the trend is greater than the numbers alone indicate. Seven state courts have recently held that warrantless home arrests violate their respective *State* Constitutions. See n. 3, *supra*. That is significant because by invoking a state constitutional provision, a state court immunizes its decision from review by this Court.[52] This heightened degree of immutability underscores the depth of the principle underlying the result.

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[49] See cases cited in n. 3, *supra*.

[50] See cases cited in nn. 46, 48, *supra*.

[51] See n. 2, *supra*.

[52] See, *e. g.*, *Herb* v. *Pitcairn*, 324 U. S. 117, 125–126. See generally Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489 (1977).

C

No congressional determination that warrantless entries into the home are "reasonable" has been called to our attention. None of the federal statutes cited in the *Watson* opinion reflects any such legislative judgment.[53] Thus, that support for the *Watson* holding finds no counterpart in this case.

MR. JUSTICE POWELL, concurring in *United States* v. *Watson, supra,* at 429, stated:

> "But logic sometimes must defer to history and experience. The Court's opinion emphasizes the historical sanction accorded warrantless felony arrests [in public places]."

In this case, however, neither history nor this Nation's experience requires us to disregard the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic.[54]

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[53] The statute referred to in n. 32, *supra,* provides:

"The Director, Associate Director, Assistant to the Director, Assistant Directors, inspectors, and agents of the Federal Bureau of Investigation of the Department of Justice may carry firearms, serve warrants and subpoenas issued under the authority of the United States and make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony." 18 U. S. C. § 3052. It says nothing either way about executing warrantless arrests in the home. See also ALI Code, at 308; Columbia Note 1554–1555, n. 26.

[54] There can be no doubt that Pitt's address in the House of Commons in March 1763 echoed and re-echoed throughout the Colonies:

" 'The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!' " *Miller* v. *United States.* 357 U. S., at 307.

IV

The parties have argued at some length about the practical consequences of a warrant requirement as a precondition to a felony arrest in the home.[55] In the absence of any evidence that effective law enforcement has suffered in those States that already have such a requirement, see nn. 3, 47, *supra*, we are inclined to view such arguments with skepticism. More fundamentally, however, such arguments of policy must give way to a constitutional command that we consider to be unequivocal.

Finally, we note the State's suggestion that only a search warrant based on probable cause to believe the suspect is at home at a given time can adequately protect the privacy interests at stake, and since such a warrant requirement is manifestly impractical, there need be no warrant of any kind. We find this ingenious argument unpersuasive. It is true that an arrest warrant requirement may afford less protection than a search warrant requirement, but it will suffice to interpose the magistrate's determination of probable cause between the zealous officer and the citizen. If there is sufficient evidence of a citizen's participation in a felony to persuade a judicial officer that his arrest is justified, it is constitutionally reason-

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[55] The State of New York argues that the warrant requirement will pressure police to seek warrants and make arrests too hurriedly, thus increasing the likelihood of arresting innocent people; that it will divert scarce resources thereby interfering with the police's ability to do thorough investigations; that it will penalize the police for deliberate planning; and that it will lead to more injuries. Appellants counter that careful planning is possible and that the police need not rush to get a warrant, because if an exigency arises necessitating immediate arrest in the course of an orderly investigation, arrest without a warrant is permissible; that the warrant procedure will decrease the likelihood that an innocent person will be arrested; that the inconvenience of obtaining a warrant and the potential for diversion of resources is exaggerated by the State; and that there is no basis for the assertion that the time required to obtain a warrant would create peril.

able to require him to open his doors to the officers of the law. Thus, for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.

Because no arrest warrant was obtained in either of these cases, the judgments must be reversed and the cases remanded to the New York Court of Appeals for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE BLACKMUN, concurring.

I joined the Court's opinion in *United States* v. *Watson*, 423 U. S. 411 (1976), upholding, on probable cause, the warrantless arrest in a public place. I, of course, am still of the view that the decision in *Watson* is correct. The Court's balancing of the competing governmental and individual interests properly occasioned that result. Where, however, the warrantless arrest is in the suspect's home, that same balancing requires that, absent exigent circumstances, the result be the other way. The suspect's interest in the sanctity of his home then outweighs the governmental interests.

I therefore join the Court's opinion, firm in the conviction that the result in *Watson* and the result here, although opposite, are fully justified by history and by the Fourth Amendment.

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, dissenting.

The Court today holds that absent exigent circumstances officers may never enter a home during the daytime to arrest for a dangerous felony unless they have first obtained a warrant. This hard-and-fast rule, founded on erroneous assumptions concerning the intrusiveness of home arrest entries,

finds little or no support in the common law or in the text and history of the Fourth Amendment. I respectfully dissent.

I

As the Court notes, *ante*, at 591, the common law of searches and seizures, as evolved in England, as transported to the Colonies, and as developed among the States, is highly relevant to the present scope of the Fourth Amendment. *United States* v. *Watson*, 423 U. S. 411, 418–422 (1976); *id.*, at 425, 429 (POWELL, J., concurring); *Gerstein* v. *Pugh*, 420 U. S. 103, 111, 114 (1975); *Carroll* v. *United States*, 267 U. S. 132, 149–153 (1925); *Bad Elk* v. *United States*, 177 U. S. 529, 534–535 (1900); *Boyd* v. *United States*, 116 U. S. 616, 622–630 (1886); *Kurtz* v. *Moffitt*, 115 U. S. 487, 498–499 (1885). Today's decision virtually ignores these centuries of common-law development, and distorts the historical meaning of the Fourth Amendment, by proclaiming for the first time a rigid warrant requirement for all nonexigent home arrest entries.

A

As early as the 15th century the common law had limited the Crown's power to invade a private dwelling in order to arrest. A Year Book case of 1455 held that in civil cases the sheriff could not break doors to arrest for debt or trespass, for the arrest was then only in the private interests of a party. Y. B. 13 Edw. IV, 9a. To the same effect is *Semayne's Case*, 5 Co. Rep. 91a, 77 Eng. Rep. 194 (K. B. 1603). The holdings of these cases were condensed in the maxim that "every man's house is his castle." H. Broom, Legal Maxims *321–329.

However, this limitation on the Crown's power applied only to private civil actions. In cases directly involving the Crown, the rule was that "[t]he king's keys unlock all doors." Wilgus, Arrest Without a Warrant, 22 Mich. L. Rev. 798, 800 (1924). The Year Book case cited above stated a different rule for criminal cases: for a felony, or suspicion of felony, one may break into the dwelling house to take the felon, for

it is for the common weal and to the interest of the King to take him. Likewise, *Semayne's Case* stated in dictum:

> "In all cases when the King is party, the Sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the K[ing]'s process, if otherwise he cannot enter." 5 Co. Rep., at 91b, 77 Eng. Rep., at 195.

Although these cases established the Crown's power to enter a dwelling in criminal cases, they did not directly address the question of whether a constable could break doors to arrest without authorization by a warrant. At common law, the constable's office was twofold. As conservator of the peace, he possessed, *virtute officii*, a "great original and inherent authority with regard to arrests," 4 W. Blackstone, Commentaries *292 (hereinafter Blackstone), and could "without any other warrant but from [himself] arrest felons, and those that [were] probably suspected of felonies," 2 M. Hale, Pleas of the Crown 85 (1736) (hereinafter Hale); see *United States* v. *Watson, supra,* at 418–419. Second, as a subordinate public official, the constable performed ministerial tasks under the authorization and direction of superior officers. See 1 R. Burn, The Justice of the Peace and Parish Officer 295 (6th ed. 1758) (hereinafter Burn); 2 W. Hawkins, Pleas of the Crown 130–132 (6th ed. 1787) (hereinafter Hawkins). It was in this capacity that the constable executed warrants issued by justices of the peace. The warrant authorized the constable to take actions beyond his inherent powers.[1] It also ensured that he actually carried out his instructions, by giving him clear notice of his duty, for the breach of which he could be punished, 4 Blackstone *291; 1 Burn 295; 2 Hale 88, and by relieving him from civil liability even if probable cause to

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[1] For example, a constable could arrest for breaches of the peace committed outside his presence only under authority of a warrant. *Bad Elk* v. *United States,* 177 U. S. 529, 534–535 (1900); 1 Burn 294; 2 Hale 90; 2 Hawkins 130.

arrest were lacking. 4 Blackstone *291; 1 Burn 295–296; M. Dalton, The Country Justice 579 (1727 ed.) (hereinafter Dalton); 2 Hawkins 132–133. For this reason, warrants were sometimes issued even when the act commanded was within the constable's inherent authority. Dalton 576.

As the Court notes, commentators have differed as to the scope of the constable's inherent authority, when not acting under a warrant, to break doors in order to arrest. Probably the majority of commentators would permit arrest entries on probable suspicion even if the person arrested were not in fact guilty. 4 Blackstone *292; 1 Burn 87–88;[2] 1 J. Chitty, Criminal Law 23 (1816) (hereinafter Chitty); Dalton 426; 1 Hale 583; 2 *id.*, at 90–94. These authors, in short, would have permitted the type of home arrest entries that occurred in the present cases. The inclusion of Blackstone in this list is particularly significant in light of his profound impact on the minds of the colonists at the time of the framing of the Constitution and the ratification of the Bill of Rights.

A second school of thought, on which the Court relies, held that the constable could not break doors on mere "bare suspicion." M. Foster, Crown Law 321 (1762); 2 Hawkins 139; 1 E. East, Pleas of the Crown 321–322 (1806); 1 W. Russell, Treatise on Crimes and Misdemeanors 745 (1819) (hereinafter Russell). Cf. 4 E. Coke, Institutes *177. Although this doc-

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[2] The Court cites Burn for the proposition that home arrests on mere suspicion are invalid. *Ante*, at 595, n. 38. In fact, Burn appears to be of the opposite view. Burn contrasts the case of arrests by private citizens, which cannot be justified unless the person arrested was actually guilty of felony, with that of arrests by constables:

"But a *constable* in such case may justify, and the reason of the difference is this: because that in the former case it is but a thing permitted to private persons to arrest for suspicion, and they are not punishable if they omit it, and therefore they cannot break open doors; but in case of a constable, he is punishable if he omit it upon complaint." 1 Burn 87–88 (emphasis in original).

Burn apparently refers to a constable's duty to act without a warrant on complaint of a citizen.

trine imposed somewhat greater limitations on the constable's inherent power, it does not support the Court's hard-and-fast rule against warrantless nonexigent home entries upon probable cause. East and Russell state explicitly what Foster and Hawkins imply: although mere "bare suspicion" will not justify breaking doors, the constable's action would be justifiable if the person arrested were *in fact* guilty of a felony. These authorities can be read as imposing a somewhat more stringent requirement of probable cause for arrests in the home than for arrests elsewhere. But they would not bar nonexigent, warrantless home arrests in all circumstances, as the Court does today. And Coke is flatly contrary to the Court's rule requiring a warrant, since he believed that even a warrant would not justify an arrest entry until the suspect had been indicted.

Finally, it bears noting that the doctrine against home entries on bare suspicion developed in a period in which the validity of *any* arrest on bare suspicion—even one occurring outside the home—was open to question. Not until Lord Mansfield's decision in *Samuel* v. *Payne*, 1 Doug. 359, 99 Eng. Rep. 230 (K. B. 1780), was it definitively established that the constable could arrest on suspicion even if it turned out that no felony had been committed. To the extent that the commentators relied on by the Court reasoned from any general rule against warrantless arrests based on bare suspicion, the rationale for their position did not survive *Samuel* v. *Payne*.

B

The history of the Fourth Amendment does not support the rule announced today. At the time that Amendment was adopted the constable possessed broad inherent powers to arrest. The limitations on those powers derived, not from a warrant "requirement," but from the generally ministerial nature of the constable's office at common law. Far from restricting the constable's arrest power, the institution of the

warrant was used to expand that authority by giving the constable delegated powers of a superior officer such as a justice of the peace. Hence at the time of the Bill of Rights, the warrant functioned as a powerful tool of law enforcement rather than as a protection for the rights of criminal suspects.

In fact, it was the abusive use of the warrant power, rather than any excessive zeal in the discharge of peace officers' inherent authority, that precipitated the Fourth Amendment. That Amendment grew out of colonial opposition to the infamous general warrants known as writs of assistance, which empowered customs officers to search at will, and to break open receptacles or packages, wherever they suspected uncustomed goods to be. *United States* v. *Chadwick*, 433 U. S. 1, 7–8 (1977); N. Lasson, The History and Development of the Fourth Amendment to the United States Constitution 51–78 (1937) (hereinafter Lasson). The writs did not specify where searches could occur and they remained effective throughout the sovereign's lifetime. *Id.*, at 54. In effect, the writs placed complete discretion in the hands of executing officials. Customs searches of this type were beyond the inherent power of common-law officials and were the subject of court suits when performed by colonial customs agents not acting pursuant to a writ. *Id.*, at 55.

The common law was the colonists' ally in their struggle against writs of assistance. Hale and Blackstone had condemned general warrants, 1 Hale 580; 4 Blackstone *291, and fresh in the colonists' minds were decisions granting recovery to parties arrested or searched under general warrants on suspicion of seditious libel. *Entick* v. *Carrington*, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (K. B. 1765); *Huckle* v. *Money*, 2 Wils. 205, 95 Eng. Rep. 768 (K. B. 1763); *Wilkes* v. *Wood*, 19 How. St. Tr. 1153, 98 Eng. Rep. 489 (K. B. 1763). When James Otis, Jr., delivered his courtroom oration against writs of assistance in 1761, he looked to the common law in asserting that the writs, if not construed specially, were void as a

form of general warrant. 2 Legal Papers of John Adams 139–144 (L. Wroth & H. Zobel ed. 1965).[3]

Given the colonists' high regard for the common law, it is indeed unlikely that the Framers of the Fourth Amendment intended to derogate from the constable's inherent common-law authority. Such an argument was rejected in the important early case of *Rohan* v. *Sawin*, 59 Mass. 281, 284–285 (1851):

> "It has been sometimes contended, that an arrest of this character, without a warrant, was a violation of the great fundamental principles of our national and state constitutions, forbidding unreasonable searches and arrests, except by warrant founded upon a complaint made under oath. Those provisions doubtless had another and different purpose, being in restraint of general warrants to make searches, and requiring warrants to issue only upon a complaint made under oath. They do not conflict with the authority of constables or other peace-officers . . . to arrest without warrant those who have committed felonies. The public safety, and the due apprehension of criminals, charged with heinous offences, imperiously require that such arrests should be made without warrant by officers of the law." [4]

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[3] The Court cites Pitt's March 1763 oration in the House of Commons as indicating an "overriding respect for the sanctity of the home." *Ante*, at 601, and n. 54. But this speech was in opposition to a proposed excise tax on cider. 15 Parliamentary History of England 1307 (1813). Nothing in it remotely suggests that Pitt objected to the constable's traditional power of warrantless entry into dwellings to arrest for felony.

[4] See also *North* v. *People*, 139 Ill. 81, 105, 28 N. E. 966, 972 (1891) (Warrant Clause "does not abridge the right to arrest without warrant, in cases where such arrest could be lawfully made at common law before the adoption of the present constitution"); *Wakely* v. *Hart*, 6 Binn. 316, 319 (Pa. 1814) (rules permitting arrest without a warrant are "principles of the common law, essential to the welfare of society, and not intended to be altered or impaired by the constitution. The whole section indeed was nothing more than an affirmance of the common law. . .").

That the Framers were concerned about warrants, and not about the constable's inherent power to arrest, is also evident from the text and legislative history of the Fourth Amendment. That provision first reaffirms the basic principle of common law, that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." The Amendment does not here purport to limit or restrict the peace officer's inherent power to arrest or search, but rather assumes an existing right against actions in excess of that inherent power and ensures that it remain inviolable. As I have noted, it was not generally considered "unreasonable" at common law for officers to break doors in making warrantless felony arrests. The Amendment's second clause is directed at the actions of officers taken in their ministerial capacity pursuant to writs of assistance and other warrants. In contrast to the first Clause, the second Clause does purport to alter colonial practice: "and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

That the Fourth Amendment was directed towards safeguarding the rights at common law, and restricting the warrant practice which gave officers vast new powers beyond their inherent authority, is evident from the legislative history of that provision. As originally drafted by James Madison, it was directed *only* at warrants; so deeply ingrained was the basic common-law premise that it was not even expressed:

> "The rights of the people to be secured in their persons[,] their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized." 1 Annals of Cong. 452 (1789).

The Committee of Eleven reported the provision as follows:

> "The right of the people to be secured in their persons, houses, papers, and effects, shall not be violated by warrants issuing without probable cause, supported by oath or affirmation, and not particularly describing the place to be searched, and the persons or things to be seized." *Id.*, at 783.

The present language was adopted virtually at the last moment by the Committee of Three, which had been appointed only to arrange the Amendments rather than to make substantive changes in them. Lasson 101. The Amendment passed the House; but "the House seems never to have consciously agreed to the Amendment in its present form." *Ibid.* In any event, because the sanctity of the common-law protections was assumed from the start, it is evident that the change made by the Committee of Three was a cautionary measure without substantive content.

In sum, the background, text, and legislative history of the Fourth Amendment demonstrate that the purpose was to restrict the abuses that had developed with respect to warrants; the Amendment preserved common-law rules of arrest. Because it was not considered generally unreasonable at common law for officers to break doors to effect a warrantless felony arrest, I do not believe that the Fourth Amendment was intended to outlaw the types of police conduct at issue in the present cases.

C

Probably because warrantless arrest entries were so firmly accepted at common law, there is apparently no recorded constitutional challenge to such entries in the 19th-century cases. Common-law authorities on both sides of the Atlantic, however, continued to endorse the validity of such arrests. *E. g.*, 1 J. Bishop, Commentaries on the Law of Criminal Procedure §§ 195–199 (2d ed. 1872); 1 Chitty 23; 1 J. Colby, A Practical Treatise upon the Criminal Law and Practice of the State

of New York 73–74 (1868); F. Heard, A Practical Treatise on the Authority and Duties of Trial Justices, District, Police, and Municipal Courts, in Criminal Cases 135, 148 (1879); 1 Russell 745. Like their predecessors, these authorities conflicted as to whether the officer would be liable in damages if it were shown that the person arrested was not guilty of a felony. But all agreed that warrantless home entries would be permissible in at least some circumstances. None endorsed the rule of today's decision that a warrant is always required, absent exigent circumstances, to effect a home arrest.

Apparently the first official pronouncement on the validity of warrantless home arrests came with the adoption of state codes of criminal procedure in the latter 19th and early 20th centuries. The great majority of these codes accepted and endorsed the inherent authority of peace officers to enter dwellings in order to arrest felons. By 1931, 24 of 29 state codes authorized such warrantless arrest entries.[5] By 1975, 31 of 37 state codes authorized warrantless home felony arrests.[6] The American Law Institute included such authority in its model legislation in 1931 and again in 1975.[7]

The first direct judicial holding on the subject of warrantless home arrests seems to have been *Commonwealth* v. *Phelps*, 209 Mass. 396, 95 N. E. 868 (1911). The holding in this case that such entries were constitutional became the settled rule in the States for much of the rest of the century. See Wilgus, Arrest Without a Warrant, 22 Mich. L. Rev. 798, 803 (1924). Opinions of this Court also assumed that such arrests were constitutional.[8]

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[5] American Law Institute, Code of Criminal Procedure 254–255 (Off. Draft 1931) (hereinafter Code).

[6] American Law Institute, A Model Code of Pre-Arraignment Procedure App. XI (Prop. Off. Draft 1975) (hereinafter Model Code).

[7] Code §§ 21, 28; Model Code § 120.6 (1).

[8] See *Johnson* v. *United States*, 333 U. S. 10, 15 (1948) (stating in dictum that officers could have entered hotel room without a warrant in

This Court apparently first questioned the reasonableness of warrantless nonexigent entries to arrest in *Jones* v. *United States*, 357 U. S. 493, 499–500 (1958), noting in dictum that such entries would pose a "grave constitutional question" if carried out at night.[9] In *Coolidge* v. *New Hampshire*, 403 U. S. 443, 480 (1971), the Court stated, again in dictum:

> "[I]f [it] is correct that it has generally been assumed that the Fourth Amendment is not violated by the warrantless entry of a man's house for purposes of arrest, it might be wise to re-examine the assumption. Such a re-examination 'would confront us with a grave constitutional question, namely, whether the forcible nighttime entry into a dwelling to arrest a person reasonably believed within, upon probable cause that he had committed a felony, under circumstances where no reason appears why an arrest warrant could not have been sought, is consistent with the Fourth Amendment.' *Jones* v. *United States*, 357 U. S., at 499–500."

Although *Coolidge* and *Jones* both referred to the special problem of warrantless entries during the nighttime,[10] it is not surprising that state and federal courts have tended to read those dicta as suggesting a broader infirmity applying to daytime entries also, and that the majority of recent decisions have been against the constitutionality of all types of warrantless, nonexigent home arrest entries. As the Court con-

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order to make an arrest "for a crime committed in the presence of the arresting officer or for a felony of which he had reasonable cause to believe defendant guilty") (footnote omitted); *Ker* v. *California*, 374 U. S. 23, 38 (1963) (plurality opinion); *Sabbath* v. *United States*, 391 U. S. 585, 588 (1968).

[9] One Court of Appeals had previously held such entries unconstitutional. *Accarino* v. *United States*, 85 U. S. App. D. C. 394, 179 F. 2d 456 (1949).

[10] As I discuss *infra*, there may well be greater constitutional problems with nighttime entries.

cedes, however, even despite *Coolidge* and *Jones* it remains the case that

> "[a] majority of the States that have taken a position on the question permit warrantless entry into the home to arrest even in the absence of exigent circumstances. At this time, 24 States permit such warrantless entries; 15 States clearly prohibit them, though 3 States do so on federal constitutional grounds alone; and 11 States have apparently taken no position on the question." *Ante*, at 598–599 (footnotes omitted).

This consensus, in the face of seemingly contrary dicta from this Court, is entitled to more deference than the Court today provides. Cf. *United States* v. *Watson*, 423 U. S. 411 (1976).

D

In the present case, as in *Watson*, the applicable federal statutes are relevant to the reasonableness of the type of arrest in question. Under 18 U. S. C. § 3052, specified federal agents may "make arrests without warrants for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States, if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony." On its face this provision authorizes federal agents to make warrantless arrests anywhere, including the home. Particularly in light of the accepted rule at common law and among the States permitting warrantless home arrests, the absence of any explicit exception for the home from § 3052 is persuasive evidence that Congress intended to authorize warrantless arrests there as well as elsewhere.

Further, Congress has not been unaware of the special problems involved in police entries into the home. In 18 U. S. C. § 3109, it provided that

> "[t]he officer may break open any outer or inner door or window of a house, or any part of a house, or anything

therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance. . . ."

See *Miller* v. *United States*, 357 U. S. 301 (1958). In explicitly providing authority to enter when executing a search warrant, Congress surely did not intend to derogate from the officers' power to effect an arrest entry either with or without a warrant. Rather, Congress apparently assumed that this power was so firmly established either at common law or by statute that no explicit grant of arrest authority was required in § 3109. In short, although the Court purports to find no guidance in the relevant federal statutes, I believe that fairly read they authorize the type of police conduct at issue in these cases.

II

A

Today's decision rests, in large measure, on the premise that warrantless arrest entries constitute a particularly severe invasion of personal privacy. I do not dispute that the home is generally a very private area or that the common law displayed a special "reverence . . . for the individual's right of privacy in his house." *Miller* v. *United States, supra*, at 313. However, the Fourth Amendment is concerned with protecting people, not places, and no talismanic significance is given to the fact that an arrest occurs in the home rather than elsewhere. Cf. *Ybarra* v. *Illinois*, 444 U. S. 85 (1979); *Katz* v. *United States*, 389 U. S. 347, 351 (1967); *Boyd* v. *United States*, 116 U. S., at 630. It is necessary in each case to assess realistically the actual extent of invasion of constitutionally protected privacy. Further, as MR. JUSTICE POWELL observed in *United States* v. *Watson*, 423 U. S., at 428 (concurring opinion), all arrests involve serious intrusions into an individual's privacy and dignity. Yet we settled in *Watson* that the intrusiveness of a public arrest is not enough to mandate the obtaining of a warrant. The inquiry in the present case, therefore, is whether the

incremental intrusiveness that results from an arrest's being made *in the dwelling* is enough to support an inflexible constitutional rule requiring warrants for such arrests whenever exigent circumstances are not present.

Today's decision ignores the carefully crafted restrictions on the common-law power of arrest entry and thereby overestimates the dangers inherent in that practice. At common law, absent exigent circumstances, entries to arrest could be made only for felony. Even in cases of felony, the officers were required to announce their presence, demand admission, and be refused entry before they were entitled to break doors.[11] Further, it seems generally accepted that entries could be made only during daylight hours.[12] And, in my view, the officer entering to arrest must have reasonable grounds to believe, not only that the arrestee has committed a crime, but also that the person suspected is present in the house at the time of the entry.[13]

These four restrictions on home arrests—felony, knock and announce, daytime, and stringent probable cause—constitute powerful and complementary protections for the privacy interests associated with the home. The felony requirement guards against abusive or arbitrary enforcement and ensures that invasions of the home occur only in case of the most

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[11] *Miller* v. *United States*, 357 U. S. 301, 308 (1958); *Semayne's Case*, 5 Co. Rep. 91a, 77 Eng. Rep. 194 (K. B. 1603); Dalton 427; 2 Hale 90; 2 Hawkins 138.

[12] Model Code § 120.6 (3). Cf. *Jones* v. *United States*, 357 U. S. 493, 499–500 (1958); *Coolidge* v. *New Hampshire*, 403 U. S. 443, 480 (1971).

[13] I do not necessarily disagree with the Court's discussion of the quantum of probable cause necessary to make a valid home arrest. The Court indicates that only an arrest warrant, and not a search warrant, is required. *Ante*, at 602–603. To obtain the warrant, therefore, the officers need only show probable cause that a crime has been committed and that the suspect committed it. However, under today's decision, the officers apparently need an extra increment of probable cause when executing the arrest warrant, namely, grounds to believe that the suspect is within the dwelling. *Ibid.*

serious crimes. The knock-and-announce and daytime requirements protect individuals against the fear, humiliation, and embarrassment of being roused from their beds in states of partial or complete undress. And these requirements allow the arrestee to surrender at his front door, thereby maintaining his dignity and preventing the officers from entering other rooms of the dwelling. The stringent probable-cause requirement would help ensure against the possibility that the police would enter when the suspect was not home, and, in searching for him, frighten members of the family or ransack parts of the house, seizing items in plain view. In short, these requirements, taken together, permit an individual suspected of a serious crime to surrender at the front door of his dwelling and thereby avoid most of the humiliation and indignity that the Court seems to believe necessarily accompany a house arrest entry. Such a front-door arrest, in my view, is no more intrusive on personal privacy than the public warrantless arrests which we found to pass constitutional muster in *Watson*.[14]

All of these limitations on warrantless arrest entries are satisfied on the facts of the present cases. The arrests here were for serious felonies—murder and armed robbery—and both occurred during daylight hours. The authorizing statutes required that the police announce their business and demand entry; neither Payton nor Riddick makes any contention that these statutory requirements were not fulfilled. And it is not argued that the police had no probable cause to believe that both Payton and Riddick were in their dwellings at the time of the entries. Today's decision, therefore, sweeps away any possibility that warrantless home entries might be permitted in some limited situations other than those in which

[14] If the suspect flees or hides, of course, the intrusiveness of the entry will be somewhat greater; but the policeman's hands should not be tied merely because of the possibility that the suspect will fail to cooperate with legitimate actions by law enforcement personnel.

exigent circumstances are present. The Court substitutes, in one sweeping decision, a rigid constitutional rule in place of the common-law approach, evolved over hundreds of years, which achieved a flexible accommodation between the demands of personal privacy and the legitimate needs of law enforcement.

A rule permitting warrantless arrest entries would not pose a danger that officers would use their entry power as a pretext to justify an otherwise invalid warrantless search. A search pursuant to a warrantless arrest entry will rarely, if ever, be as complete as one under authority of a search warrant. If the suspect surrenders at the door, the officers may not enter other rooms. Of course, the suspect may flee or hide, or may not be at home, but the officers cannot anticipate the first two of these possibilities and the last is unlikely given the requirement of probable cause to believe that the suspect is at home. Even when officers are justified in searching other rooms, they may seize only items within the arrestee's possession or immediate control or items in plain view discovered during the course of a search reasonably directed at discovering a hiding suspect. Hence a warrantless home entry is likely to uncover far less evidence than a search conducted under authority of a search warrant. Furthermore, an arrest entry will inevitably tip off the suspects and likely result in destruction or removal of evidence not uncovered during the arrest. I therefore cannot believe that the police would take the risk of losing valuable evidence through a pretextual arrest entry rather than applying to a magistrate for a search warrant.

B

While exaggerating the invasion of personal privacy involved in home arrests, the Court fails to account for the danger that its rule will "severely hamper effective law enforcement." *United States* v. *Watson*, 423 U. S., at 431 (POWELL, J., concurring); *Gerstein* v. *Pugh*, 420 U. S., at 113. The policeman

on his beat must now make subtle discriminations that perplex even judges in their chambers. As MR. JUSTICE POWELL noted, concurring in *United States* v. *Watson, supra,* police will sometimes delay making an arrest, even after probable cause is established, in order to be sure that they have enough evidence to convict. Then, if they suddenly have to arrest, they run the risk that the subsequent exigency will not excuse their prior failure to obtain a warrant. This problem cannot effectively be cured by obtaining a warrant as soon as probable cause is established because of the chance that the warrant will go stale before the arrest is made.

Further, police officers will often face the difficult task of deciding whether the circumstances are sufficiently exigent to justify their entry to arrest without a warrant. This is a decision that must be made quickly in the most trying of circumstances. If the officers mistakenly decide that the circumstances are exigent, the arrest will be invalid and any evidence seized incident to the arrest or in plain view will be excluded at trial. On the other hand, if the officers mistakenly determine that exigent circumstances are lacking, they may refrain from making the arrest, thus creating the possibility that a dangerous criminal will escape into the community. The police could reduce the likelihood of escape by staking out all possible exits until the circumstances become clearly exigent or a warrant is obtained. But the costs of such a stakeout seem excessive in an era of rising crime and scarce police resources.

The uncertainty inherent in the exigent-circumstances determination burdens the judicial system as well. In the case of searches, exigent circumstances are sufficiently unusual that this Court has determined that the benefits of a warrant outweigh the burdens imposed, including the burdens on the judicial system. In contrast, arrests recurringly involve exigent circumstances, and this Court has heretofore held that a warrant can be dispensed with without undue sacrifice in Fourth Amendment values. The situation should be no dif-

ferent with respect to arrests in the home. Under today's decision, whenever the police have made a warrantless home arrest there will be the possibility of "endless litigation with respect to the existence of exigent circumstances, whether it was practicable to get a warrant, whether the suspect was about to flee, and the like," *United States* v. *Watson, supra,* at 423–424.

Our cases establish that the ultimate test under the Fourth Amendment is one of "reasonableness." *Marshall* v. *Barlow's, Inc.,* 436 U. S. 307, 315–316 (1978); *Camara* v. *Municipal Court,* 387 U. S. 523, 539 (1967). I cannot join the Court in declaring unreasonable a practice which has been thought entirely reasonable by so many for so long. It would be far preferable to adopt a clear and simple rule: after knocking and announcing their presence, police may enter the home to make a daytime arrest without a warrant when there is probable cause to believe that the person to be arrested committed a felony and is present in the house. This rule would best comport with the common-law background, with the traditional practice in the States, and with the history and policies of the Fourth Amendment. Accordingly, I respectfully dissent.

MR. JUSTICE REHNQUIST, dissenting.

The Court today refers to both *Payton* and *Riddick* as involving "routine felony arrests." I have no reason to dispute the Court's characterization of these arrests, but cannot refrain from commenting on the social implications of the result reached by the Court. Payton was arrested for the murder of the manager of a gas station; Riddick was arrested for two armed robberies. If these are indeed "routine felony arrests," which culminated in convictions after trial upheld by the state courts on appeal, surely something is amiss in the process of the administration of criminal justice whereby these convictions are now set aside by this Court under the exclusionary rule which we have imposed upon the States under

the Fourth and Fourteenth Amendments to the United States Constitution.

I fully concur in and join the dissenting opinion of MR. JUSTICE WHITE. There is significant historical evidence that we have over the years misread the history of the Fourth Amendment in connection with searches, elevating the warrant requirement over the necessity for probable cause in a way which the Framers of that Amendment did not intend. See T. Taylor, Two Studies in Constitutional Interpretation 38–50 (1969). But one may accept all of that as *stare decisis*, and still feel deeply troubled by the transposition of these same errors into the area of actual arrests of felons within their houses with respect to whom there is probable cause to suspect guilt of the offense in question.

OWEN *v.* CITY OF INDEPENDENCE, MISSOURI, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 78-1779. Argued January 8, 1980—Decided April 16, 1980

After the City Council of respondent city moved that reports of an investigation of the city police department be released to the news media and turned over to the prosecutor for presentation to the grand jury and that the City Manager take appropriate action against the persons involved in the wrongful activities brought out in the investigative reports, the City Manager discharged petitioner from his position as Chief of Police. No reason was given for the dismissal and petitioner received only a written notice stating that the dismissal was made pursuant to a specified provision of the city charter. Subsequently, petitioner brought suit in Federal District Court under 42 U. S. C. § 1983 against the city, the respondent City Manager, and the respondent members of the City Council in their official capacities, alleging that he was discharged without notice of reasons and without a hearing in violation of his constitutional rights to procedural and substantive due process, and seeking declaratory and injunctive relief. The District Court, after a bench trial, entered judgment for respondents. The Court of Appeals ultimately affirmed, holding that although the city had violated petitioner's rights under the Fourteenth Amendment, nevertheless all the respondents, including the city, were entitled to qualified immunity from liability based on the good faith of the city officials involved.

Held: A municipality has no immunity from liability under § 1983 flowing from its constitutional violations and may not assert the good faith of its officers as a defense to such liability. Pp. 635–658.

(a) By its terms, § 1983 "creates a species of tort liability that on its face admits of no immunities." *Imbler* v. *Pachtman*, 424 U. S. 409, 417. Its language is absolute and unqualified, and no mention is made of any privileges, immunities, or defenses that may be asserted. Rather, the statute imposes liability upon *"every person"* (held in *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, to encompass municipal corporations) who, under color of state law or custom, "subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." And this expansive sweep of § 1983's language is confirmed by its legislative history. Pp. 635–636.

(b) Where an immunity was well established at common law and where its rationale was compatible with the purposes of § 1983, the statute has been construed to incorporate that immunity. But there is no tradition of immunity for municipal corporations, and neither history nor policy supports a construction of § 1983 that would justify the qualified immunity accorded respondent city by the Court of Appeals. Pp. 637–644.

(c) The application and rationale underlying both the doctrine whereby a municipality was held immune from tort liability with respect to its "governmental" functions but not for its "proprietary" functions, and the doctrine whereby a municipality was immunized for its "discretionary" or "legislative" activities but not for those which were "ministerial" in nature, demonstrate that neither of these common-law doctrines could have been intended to limit a municipality's liability under § 1983. The principle of sovereign immunity from which a municipality's immunity for "governmental" functions derives cannot serve as the basis for the qualified privilege respondent city claims under § 1983, since sovereign immunity insulates a municipality from unconsented suits altogether, the presence or absence of good faith being irrelevant, and since the municipality's "governmental" immunity is abrogated by the sovereign's enactment of a statute such as § 1983 making it amenable to suit. And the doctrine granting a municipality immunity for "discretionary" functions, which doctrine merely prevented courts from substituting their own judgment on matters within the lawful discretion of the municipality, cannot serve as the foundation for a good-faith immunity under § 1983, since a municipality has no "discretion" to violate the Federal Constitution. Pp. 644–650.

(d) Rejection of a construction of § 1983 that would accord municipalities a qualified immunity for their good-faith constitutional violations is compelled both by the purpose of § 1983 to provide protection to those persons wronged by the abuse of governmental authority and to deter future constitutional violations, and by considerations of public policy. In view of the qualified immunity enjoyed by most government officials, many victims of municipal malfeasance would be left remediless if the city were also allowed to assert a good-faith defense. The concerns that justified decisions conferring qualified immunities on various government officials—the injustice, particularly in the absence of bad faith, of subjecting the official to liability, and the danger that the threat of such liability would deter the official's willingness to execute his office effectively—are less compelling, if not wholly inapplicable, when the liability of the municipal entity is at issue. Pp. 650–656.

589 F. 2d 335, reversed.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. POWELL, J., filed a dissenting opinion, in which BURGER, C. J., and STEWART and REHNQUIST, JJ., joined, *post*, p. 658.

Irving Achtenberg argued the cause for petitioner. With him on the briefs was *David Achtenberg*.

Richard G. Carlisle argued the cause and filed a brief for respondents.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Monell v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978), overruled *Monroe* v. *Pape*, 365 U. S. 167 (1961), insofar as *Monroe* held that local governments were not among the "persons" to whom 42 U. S. C. § 1983 applies and were therefore wholly immune from suit under the statute.[1] *Monell* reserved decision, however, on the question whether local governments, although not entitled to an absolute immunity, should be afforded some form of official immunity in § 1983 suits. 436 U. S., at 701. In this action brought by petitioner in the District Court for the Western District of Missouri, the Court of Appeals for the Eighth Circuit held that respondent city of Independence, Mo., "is entitled to qualified immunity from liability" based on the good faith

*Briefs of *amici curiae* urging reversal were filed by *Bruce J. Ennis*, *Oscar G. Chase*, and *Nancy Stearns* for the American Civil Liberties Union et al.; and by *Michael H. Gottesman*, *Robert M. Weinberg*, *David Rubin*, *William E. Caldwell*, *John B. Jones, Jr.*, *Norman Redlich*, *William L. Robinson*, and *Norman Chachkin* for the National Education Assn. et al.

[1] Title 42 U. S. C. § 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

of its officials: "We extend the limited immunity the district court applied to the individual defendants to cover the City as well, because its officials acted in good faith and without malice." 589 F. 2d 335, 337–338 (1978). We granted certiorari. 444 U. S. 822 (1979). We reverse.

I

The events giving rise to this suit are detailed in the District Court's findings of fact, 421 F. Supp. 1110 (1976). On February 20, 1967, Robert L. Broucek, then City Manager of respondent city of Independence, Mo., appointed petitioner George D. Owen to an indefinite term as Chief of Police.[2] In 1972, Owen and a new City Manager, Lyle W. Alberg, engaged in a dispute over petitioner's administration of the Police Department's property room. In March of that year, a handgun, which the records of the Department's property room stated had been destroyed, turned up in Kansas City in the possession of a felon. This discovery prompted Alberg to initiate an investigation of the management of the property room. Although the probe was initially directed by petitioner, Alberg soon transferred responsibility for the investigation to the city's Department of Law, instructing the City Counselor to supervise its conduct and to inform him directly of its findings.

Sometime in early April 1972, Alberg received a written report on the investigation's progress, along with copies of confidential witness statements. Although the City Auditor found that the Police Department's records were insufficient to permit an adequate accounting of the goods contained in the property room, the City Counselor concluded that there was no evidence of any criminal acts or of any violation of

[2] Under § 3.3 (1) of the city's charter, the City Manager has sole authority to "[a]ppoint, and when deemed necessary for the good of the service, lay off, suspend, demote, or remove all directors, or heads, of administrative departments and all other administrative officers and employees of the city. . . ."

state or municipal law in the administration of the property room. Alberg discussed the results of the investigation at an informal meeting with several City Council members and advised them that he would take action at an appropriate time to correct any problems in the administration of the Police Department.

On April 10, Alberg asked petitioner to resign as Chief of Police and to accept another position within the Department, citing dissatisfaction with the manner in which petitioner had managed the Department, particularly his inadequate supervision of the property room. Alberg warned that if petitioner refused to take another position in the Department his employment would be terminated, to which petitioner responded that he did not intend to resign.

On April 13, Alberg issued a public statement addressed to the Mayor and the City Council concerning the results of the investigation. After referring to "discrepancies" found in the administration, handling, and security of public property, the release concluded that "[t]here appears to be no evidence to substantiate any allegations of a criminal nature" and offered assurances that "[s]teps have been initiated on an administrative level to correct these discrepancies." *Id.*, at 1115. Although Alberg apparently had decided by this time to replace petitioner as Police Chief, he took no formal action to that end and left for a brief vacation without informing the City Council of his decision.[3]

While Alberg was away on the weekend of April 15 and 16, two developments occurred. Petitioner, having consulted with counsel, sent Alberg a letter demanding written notice of the charges against him and a public hearing with a reason-

[3] Alberg returned from his vacation on the morning of April 17, and immediately met informally with four members of the City Council. Although the investigation of the Police Department was discussed, and although Alberg testified that he had found a replacement for petitioner by that time, he did not inform the Council members of his intention to discharge petitioner.

able opportunity to respond to those charges.[4] At approximately the same time, City Councilman Paul L. Roberts asked for a copy of the investigative report on the Police Department property room. Although petitioner's appeal received no immediate response, the Acting City Manager complied with Roberts' request and supplied him with the audit report and witness statements.

On the evening of April 17, 1972, the City Council held its regularly scheduled meeting. After completion of the planned agenda, Councilman Roberts read a statement he had prepared on the investigation.[5] Among other allegations,

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[4] The letter, dated April 15, 1972, stated in part:

"My counsel . . . have advised me that even though the City Charter may give you authority to relieve me, they also say you cannot do so without granting me my constitutional rights of due process, which includes a written charge and specifications, together with a right to a public hearing and to be represented by counsel and to cross-examine those who may appear against me.

. . . . .

"In spite of your recent investigation and your public statement given to the public press, your relief and discharge of me without a full public hearing upon written charges will leave in the minds of the public and those who might desire to have my services, a stigma of personal wrongdoing on my part.

"Such action by you would be in violation of my civil rights as granted by the Constitution and Congress of the United States and you would be liable in damages to me. Further it would be in violation of the Missouri Administrative Procedure Act.

"May I have an expression from you that you do not intend to relieve me or in the alternative give me a written charge and specifications of your basis for your grounds of intention to relieve me and to grant me a public hearing with a reasonable opportunity to respond to the charge and a right to be represented by counsel."

City Manager Alberg stated that he did not receive the letter until after petitioner's discharge.

[5] Roberts' statement, which is reproduced in full in 421 F. Supp. 1110, 1116, n. 2 (1976), in part recited:

"On April 2, 1972, the City Council was notified of the existence of an investigative report concerning the activities of the Chief of Police of the

Roberts charged that petitioner had misappropriated Police Department property for his own use, that narcotics and money had "mysteriously disappeared" from his office, that traffic tickets had been manipulated, that high ranking police officials had made "inappropriate" requests affecting the police court, and that "things have occurred causing the unusual release of felons." At the close of his statement, Roberts moved that the investigative reports be released to the news media and turned over to the prosecutor for presentation to the grand jury, and that the City Manager "take all direct

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City of Independence, certain police officers and activities of one or more other City officials. On Saturday, April 15th for the first time I was able to see these 27 voluminous reports. The contents of these reports are astoundingly shocking and virtually unbelievable. They deal with the disappearance of 2 or more television sets from the police department and signed statement that they were taken by the Chief of Police for his own personal use.

"The reports show that numerous firearms properly in the police department custody found their way into the hands of others including undesirables and were later found by other law enforcement agencies.

"Reports whow [*sic*] that narcotics held by the Independence Missouri Chief of Police have mysteriously disappeared. Reports also indicate money has mysteriously disappeared. Reports show that traffic tickets have been manipulated. The reports show inappropriate requests affecting the police court have come from high ranking police officials. Reports indicate that things have occurred causing the unusual release of felons. The reports show gross inefficiencies on the part of a few of the high ranking officers of the police department.

"In view of the contents of these reports, I feel that the information in the reports backed up by signed statements taken by investigators is so bad that the council should immediately make available to the news media access to copies of all of these 27 voluminous investigative reports so the public can be told what has been going on in Independence. I further believe that copies of these reports should be turned over and referred to the prosecuting attorney of Jackson County, Missouri for consideration and presentation to the next Grand Jury. I further insist that the City Manager immediately take direct and appropriate action, permitted under the Charter, against such persons as are shown by the investigation to have been involved."

and appropriate action" against those persons "involved in illegal, wrongful, or gross inefficient activities brought out in the investigative reports." After some discussion, the City Council passed Roberts' motion with no dissents and one abstention.[6]

City Manager Alberg discharged petitioner the very next day. Petitioner was not given any reason for his dismissal; he received only a written notice stating that his employment as Chief of Police was "[t]erminated under the provisions of Section 3.3 (1) of the City Charter."[7] Petitioner's earlier demand for a specification of charges and a public hearing was ignored, and a subsequent request by his attorney for an appeal of the discharge decision was denied by the city on the grounds that "there is no appellate procedure or forum provided by the Charter or ordinances of the City of Independence, Missouri, relating to the dismissal of Mr. Owen." App. 26–27.

The local press gave prominent coverage both to the City Council's action and petitioner's dismissal, linking the discharge to the investigation.[8] As instructed by the City Council, Alberg referred the investigative reports and witness statements to the Prosecuting Attorney of Jackson County, Mo.,

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[6] Ironically, the official minutes of the City Council meeting indicate that concern was expressed by some members about possible adverse legal consequences that could flow from their release of the reports to the media. The City Counselor assured the council that although an action might be maintained against any witnesses who made unfounded accusations, "the City does have governmental immunity in this area . . . and neither the Council nor the City as a municipal corporation can be held liable for libelous slander." App. 20–23.

[7] See n. 2, *supra*.

[8] The investigation and its culmination in petitioner's firing received front-page attention in the local press. See, *e. g.*, "Lid Off Probe, Council Seeks Action," Independence Examiner, Apr. 18, 1972, Tr. 24–25; "Independence Accusation. Police Probe Demanded," Kansas City Times, Apr. 18, 1972, Tr. 25; "Probe Culminates in Chief's Dismissal," Independence Examiner, Apr. 19, 1972, Tr. 26; "Police Probe Continues; Chief Ousted," Community Observer, Apr. 20, 1972, Tr. 26.

for consideration by a grand jury. The results of the audit and investigation were never released to the public, however. The grand jury subsequently returned a "no true bill," and no further action was taken by either the City Council or City Manager Alberg.

II

Petitioner named the city of Independence, City Manager Alberg, and the present members of the City Council in their official capacities as defendants in this suit.[9] Alleging that he was discharged without notice of reasons and without a hearing in violation of his constitutional rights to procedural and substantive due process, petitioner sought declaratory and injunctive relief, including a hearing on his discharge, backpay from the date of discharge, and attorney's fees. The District Court, after a bench trial, entered judgment for respondents. 421 F. Supp. 1110 (1976).[10]

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[9] Petitioner did not join former Councilman Roberts in the instant litigation. A separate action seeking defamation damages was brought in state court against Roberts and Alberg in their individual capacities. Petitioner dismissed the state suit against Alberg and reached a financial settlement with Roberts. See 560 F. 2d 925, 930 (CA8 1977).

[10] The District Court, relying on *Monroe* v. *Pape*, 365 U. S. 167 (1961), and *City of Kenosha* v. *Bruno*, 412 U. S. 507 (1973), held that § 1983 did not create a cause of action against the city, but that petitioner could base his claim for relief directly on the Fourteenth Amendment. On the merits, however, the court determined that petitioner's discharge did not deprive him of any constitutionally protected property interest because, as an untenured employee, he possessed neither a contractual nor a *de facto* right to continued employment as Chief of Police. Similarly, the court found that the circumstances of petitioner's dismissal did not impose a stigma of illegal or immoral conduct on his professional reputation, and hence did not deprive him of any liberty interest.

The District Court offered three reasons to support its conclusion: First, because the actual discharge notice stated only that petitioner was "[t]erminated under the provisions of Section 3.3 (1) of the City Charter," nothing in his official record imputed any stigmatizing conduct to him. Second, the court found that the City Council's actions had no causal connection to petitioner's discharge, for City Manager Alberg had apparently

The Court of Appeals initially reversed the District Court. 560 F. 2d 925 (1977).[11] Although it agreed with the District Court that under Missouri law petitioner possessed no property interest in continued employment as Police Chief, the Court of Appeals concluded that the city's allegedly false public accusations had blackened petitioner's name and reputation, thus depriving him of liberty without due process of law. That the stigmatizing charges did not come from the City Manager and were not included in the official discharge notice was, in the court's view, immaterial. What was im-

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made his decision to hire a new Police Chief before the Council's April 17th meeting. Lastly, the District Court determined that petitioner was "completely exonerated" from any charges of illegal or immoral conduct by the City Counselor's investigative report, Alberg's public statements, and the grand jury's return of a "no true bill." 421 F. Supp., at 1121–1122.

As an alternative ground for denying relief, the District Court ruled that the city was entitled to assert, and had in fact established, a qualified immunity against liability based on the good faith of the individual defendants who acted as its agents: "[D]efendants have clearly shown by a preponderance of the evidence that neither they, nor their predecessors, were aware in April 1972, that, under the circumstances, the Fourteenth Amendment accorded plaintiff the procedural rights of notice and a hearing at the time of his discharge. Defendants have further proven that they cannot reasonably be charged with constructive notice of such rights since plaintiff was discharged prior to the publication of the Supreme Court decisions in *Roth* v. *Board of Regents*, [408 U. S. 564 (1972)], and *Perry* v. *Sindermann*, [408 U. S. 593 (1972)]." *Id.*, at 1123.

[11] Both parties had appealed from the District Court's decision. On respondents' challenge to the court's assumption of subject-matter jurisdiction under 28 U. S. C. § 1331, the Court of Appeals held that the city was subject to suit for reinstatement and backpay under an implied right of action arising directly from the Fourteenth Amendment. 560 F. 2d, at 932–934. See *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971). Because the Court of Appeals concluded that petitioner's claim could rest directly on the Fourteenth Amendment, it saw no need to decide whether he could recover backpay under § 1983 from the individual defendants in their official capacities as part of general equitable relief, even though the award would be paid by the city. 560 F. 2d, at 932.

portant, the court explained, was that "the official actions of the city council released charges against [petitioner] contemporaneous and, in the eyes of the public, connected with that discharge." *Id.*, at 937.[12]

Respondents petitioned for review of the Court of Appeals' decision. Certiorari was granted, and the case was remanded for further consideration in light of our supervening decision in *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978). 438 U. S. 902 (1978). The Court of Ap-

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[12] As compensation for the denial of his constitutional rights, the Court of Appeals awarded petitioner damages in lieu of backpay. The court explained that petitioner's termination without a hearing must be considered a nullity, and that ordinarily he ought to remain on the payroll and receive wages until a hearing is held and a proper determination on his retention is made. But because petitioner had reached the mandatory retirement age during the course of the litigation, he could not be reinstated to his former position. Thus the compensatory award was to be measured by the amount of money petitioner would likely have earned to retirement had he not been deprived of his good name by the city's actions, subject to mitigation by the amounts actually earned, as well as by the recovery from Councilman Roberts in the state defamation suit.

The Court of Appeals rejected the municipality's assertion of a good-faith defense, relying upon a footnote in *Wood* v. *Strickland*, 420 U. S. 308, 314–315, n. 6 (1975) ("immunity from damages does not ordinarily bar equitable relief as well"), and two of its own precedents awarding backpay in § 1983 actions against school boards. See *Wellner* v. *Minnesota State Jr. College Bd.*, 487 F. 2d 153 (CA8 1973); *Cooley* v. *Board of Educ. of Forrest City School Dist.*, 453 F. 2d 282 (CA8 1972). The court concluded that the primary justification for a qualified immunity—the fear that public officials might hesitate to discharge their duties if faced with the prospect of personal monetary liability—simply did not exist where the relief would be borne by a governmental unit rather than the individual officeholder. In addition, the Court of Appeals seemed to take issue with the District Court's finding of good faith on the part of the City Council: "The city officials may have acted in good faith in refusing the hearing, but lack of good faith is evidenced by the nature of the unfair attack made upon the appellant by Roberts in the official conduct of the City's business. The District Court did not address the good faith defense in light of Roberts' defamatory remarks." 560 F. 2d, at 941.

peals on the remand reaffirmed its original determination that the city had violated petitioner's rights under the Fourteenth Amendment, but held that all respondents, including the city, were entitled to qualified immunity from liability. 589 F. 2d 335 (1978).

Monell held that "a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." 436 U. S., at 694. The Court of Appeals held in the instant case that the municipality's official policy was responsible for the deprivation of petitioner's constitutional rights: "[T]he stigma attached to [petitioner] in connection with his discharge was caused by the official conduct of the City's lawmakers, or by those whose acts may fairly be said to represent official policy. Such conduct amounted to official policy causing the infringement of [petitioner's] constitutional rights, in violation of section 1983." 589 F. 2d, at 337.[13]

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[13] Although respondents did not cross-petition on this issue, they have raised a belated challenge to the Court of Appeals' ruling that petitioner was deprived of a protected "liberty" interest. See Brief for Respondents 45–46. We find no merit in their contention, however, and decline to disturb the determination of the court below.

Wisconsin v. *Constantineau*, 400 U. S. 433, 437 (1971), held that "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." In *Board of Regents* v. *Roth*, 408 U. S. 564, 573 (1972), we explained that the dismissal of a government employee accompanied by a "charge against him that might seriously damage his standing and associations in his community" would qualify as something "the government is doing to him," so as to trigger the due process right to a hearing at which the employee could refute the charges and publicly clear his name. In the present case, the city—through the unanimous resolution of the City Council—released to the public an allegedly false statement impugning petitioner's honesty and integrity. Petitioner was discharged

Nevertheless, the Court of Appeals affirmed the judgment of the District Court denying petitioner any relief against the respondent city, stating:

> "The Supreme Court's decisions in *Board of Regents* v. *Roth*, 408 U. S. 564 . . . (1972), and *Perry* v. *Sindermann*, 408 U. S. 593 . . . (1972), crystallized the rule establishing the right to a name-clearing hearing for a government employee allegedly stigmatized in the course of his discharge. The Court decided those two cases two months after the discharge in the instant case. Thus, officials of the City of Independence could not have been aware of [petitioner's] right to a name-clearing hearing in connection with the discharge. The City of Independence should not be charged with predicting the future course of constitutional law. We extend the limited immunity the district court applied to the individual defendants to cover the City as well, because its officials acted in good faith and without malice. We hold the City not liable for actions it could not reasonably have known violated [petitioner's] constitutional rights." *Id.*, at 338 (footnote and citations omitted).[14]

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the next day. The Council's accusations received extensive coverage in the press, and even if they did not in point of fact "cause" petitioner's discharge, the defamatory and stigmatizing charges certainly "occur[red] in the course of the termination of employment." Cf. *Paul* v. *Davis*, 424 U. S. 693, 710 (1976). Yet the city twice refused petitioner's request that he be given written specification of the charges against him and an opportunity to clear his name. Under the circumstances, we have no doubt that the Court of Appeals correctly concluded that the city's actions deprived petitioner of liberty without due process of law.

[14] Cf. *Wood* v. *Strickland*, 420 U. S. 308, 322 (1975) ("Therefore, in the specific context of school discipline, we hold that a school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student").

We turn now to the reasons for our disagreement with this holding.[15]

III

Because the question of the scope of a municipality's immunity from liability under § 1983 is essentially one of statutory construction, see *Wood* v. *Strickland*, 420 U. S. 308, 314, 316 (1975); *Tenney* v. *Brandhove*, 341 U. S. 367, 376 (1951), the starting point in our analysis must be the language of the statute itself. *Andrus* v. *Allard*, 444 U. S. 51, 56 (1979); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 756 (1975) (POWELL, J., concurring). By its terms, § 1983 "creates a species of tort liability that on its face admits of no immunities." *Imbler* v. *Pachtman*, 424 U. S. 409, 417 (1976). Its language is absolute and unqualified; no mention is made of any privileges, immunities, or defenses that may be asserted. Rather, the Act imposes liability upon *"every person"* who, under color of state law or custom, "subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws."[16] And *Monell* held that these words were intended to encompass municipal corporations as well as natural "persons."

Moreover, the congressional debates surrounding the passage of § 1 of the Civil Rights Act of 1871, 17 Stat. 13—the forerunner of § 1983—confirm the expansive sweep of the stat-

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[15] The Courts of Appeals are divided on the question whether local governmental units are entitled to a qualified immunity based on the good faith of their officials. Compare *Bertot* v. *School Dist. No. 1*, 613 F. 2d 245 (CA10 1979) (en banc), *Hostrop* v. *Board of Junior College Dist. No. 515*, 523 F. 2d 569 (CA7 1975), and *Hander* v. *San Jacinto Jr. College*, 519 F. 2d 273 (CA5), rehearing denied, 522 F. 2d 204 (1975), all refusing to extend a qualified immunity to the governmental entity, with *Paxman* v. *Campbell*, 612 F. 2d 848 (CA4 1980) (en banc), and *Sala* v. *County of Suffolk*, 604 F. 2d 207 (CA2 1979), granting defendants a "good-faith" immunity.

[16] See n. 1, *supra*.

utory language. Representative Shellabarger, the author and manager of the bill in the House, explained in his introductory remarks the breadth of construction that the Act was to receive:

> "I have a single remark to make in regard to the rule of interpretation of those provisions of the Constitution under which all the sections of the bill are framed. This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. It would be most strange and, in civilized law, monstrous were this not the rule of interpretation. As has been again and again decided by your own Supreme Court of the United States, and everywhere else where there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people." Cong. Globe, 42d Cong., 1st Sess., App. 68 (1871) (hereinafter Globe App.).

Similar views of the Act's broad remedy for violations of federally protected rights were voiced by its supporters in both Houses of Congress. See *Monell* v. *New York City Dept. of Social Services,* 436 U. S., at 683–687.[17]

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[17] As we noted in *Monell* v. *New York City Dept. of Social Services,* see 436 U. S., at 685–686, n. 45, even the opponents of § 1 acknowledged that its language conferred upon the federal courts the entire power that Congress possessed to remedy constitutional violations. The remarks of Senator Thurman are illustrative:

"[This section's] whole effect is to give to the Federal Judiciary that which now does not belong to it—a jurisdiction that may be constitutionally conferred upon it, I grant, but that has never yet been conferred upon it. It authorizes any person who is deprived of any right, privilege, or immunity secured to him by the Constitution of the United States, to bring an action

However, notwithstanding § 1983's expansive language and the absence of any express incorporation of common-law immunities, we have, on several occasions, found that a tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that "Congress would have specifically so provided had it wished to abolish the doctrine." *Pierson* v. *Ray*, 386 U. S. 547, 555 (1967). Thus in *Tenney* v. *Brandhove*, 341 U. S. 367 (1951), after tracing the development of an absolute legislative privilege from its source in 16th-century England to its inclusion in the Federal and State Constitutions, we concluded that Congress "would [not] impinge on a tradition so well grounded in history and reason by covert inclusion in the general language" of § 1983. 341 U. S., at 376.

Subsequent cases have required that we consider the personal liability of various other types of government officials. Noting that "[f]ew doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction," *Pierson* v. *Ray*, *supra*, at 553–554, held that the absolute immunity traditionally accorded judges was preserved under § 1983. In that same case, local police officers were held to enjoy a "good faith and probable cause" defense to § 1983 suits similar to that which existed in false arrest actions at common law. 386 U. S., at 555–557. Several more recent decisions have found immunities of varying scope appropriate for different state and local officials sued under § 1983. See *Procunier* v. *Navarette*, 434 U. S. 555 (1978) (qualified im-

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against the wrong-doer in the Federal courts, and that without any limit whatsoever as to the amount in controversy. . . .

". . . That is the language of this bill. Whether it is the intent or not I know not, but it is the language of the bill; for there is no limitation whatsoever upon the terms that are employed, and they are as comprehensive as can be used." Globe App. 216–217.

munity for prison officials and officers); *Imbler* v. *Pachtman*, *supra* (absolute immunity for prosecutors in initiating and presenting the State's case); *O'Connor* v. *Donaldson*, 422 U. S. 563 (1975) (qualified immunity for superintendent of state hospital); *Wood* v. *Strickland*, 420 U. S. 308 (1975) (qualified immunity for local school board members); *Scheuer* v. *Rhodes*, 416 U. S. 232 (1974) (qualified "good-faith" immunity for state Governor and other executive officers for discretionary acts performed in the course of official conduct).

In each of these cases, our finding of § 1983 immunity "was predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." *Imbler* v. *Pachtman*, 424 U. S., at 421. Where the immunity claimed by the defendant was well established at common law at the time § 1983 was enacted, and where its rationale was compatible with the purposes of the Civil Rights Act, we have construed the statute to incorporate that immunity. But there is no tradition of immunity for municipal corporations, and neither history nor policy support a construction of § 1983 that would justify the qualified immunity accorded the city of Independence by the Court of Appeals. We hold, therefore, that the municipality may not assert the good faith of its officers or agents as a defense to liability under § 1983.[18]

A

Since colonial times, a distinct feature of our Nation's system of governance has been the conferral of political power upon public and municipal corporations for the management of matters of local concern. As *Monell* recounted, by 1871,

[18] The governmental immunity at issue in the present case differs significantly from the official immunities involved in our previous decisions. In those cases, various government officers had been sued in their individual capacities, and the immunity served to insulate them from personal liability for damages. Here, in contrast, only the liability of the municipality itself is at issue, not that of its officers, and in the absence of an immunity, any recovery would come from public funds.

municipalities—like private corporations—were treated as natural persons for virtually all purposes of constitutional and statutory analysis. In particular, they were routinely sued in both federal and state courts. See 436 U. S., at 687–688. Cf. *Cowles* v. *Mercer County*, 7 Wall. 118 (1869). Local governmental units were regularly held to answer in damages for a wide range of statutory and constitutional violations, as well as for common-law actions for breach of contract.[19] And although, as we discuss below,[20] a municipal-

[19] Primary among the constitutional suits heard in federal court were those based on a municipality's violation of the Contract Clause, and the courts' enforcement efforts often included "various forms of 'positive' relief, such as ordering that taxes be levied and collected to discharge federal-court judgments, once a constitutional infraction was found." *Monell* v. *New York City Dept. of Social Services*, 436 U. S., at 681. Damages actions against municipalities for federal statutory violations were also entertained. See, *e. g.*, *Levy Court* v. *Coroner*, 2 Wall. 501 (1865); *Corporation of New York* v. *Ransom*, 23 How. 487 (1860); *Bliss* v. *Brooklyn*, 3 F. Cas. 706 (No. 1,544) (CC EDNY 1871). In addition, state constitutions and statutes, as well as municipal charters, imposed many obligations upon the local governments, the violation of which typically gave rise to damages actions against the city. See generally Note, Streets, Change of Grade, Liability of Cities for, 30 Am. St. Rep. 835 (1893), and cases cited therein. With respect to authorized contracts—and even unauthorized contracts that are later ratified by the corporation—municipalities were liable in the same manner as individuals for their breaches. See generally 1 J. Dillon, Law of Municipal Corporations §§ 385, 394 (2d ed. 1873) (hereinafter Dillon). Of particular relevance to the instant case, included within the class of contract actions brought against a city were those for the wrongful discharge of a municipal employee, and where the claim was adjudged meritorious, damages in the nature of backpay were regularly awarded. See, *e. g.*, *Richardson* v. *School Dist. No. 10*, 38 Vt. 602 (1866); *Paul* v. *School Dist. No. 2*, 28 Vt. 575 (1856); *Inhabitants of Searsmont* v. *Farwell*, 3 Me. *450 (1825); see generally F. Burke, A Treatise on the Law of Public Schools 81–85 (1880). The most frequently litigated "breach of contract" suits, however, at least in federal court, were those for failure to pay interest on municipal bonds. See, *e. g.*, *The Supervisors* v. *Durant*, 9 Wall. 415 (1870); *Commissioners of Knox County* v. *Aspinwall*, 21 How. 539 (1859).

[20] See *infra*, at 644–650.

ity was not subject to suit for all manner of tortious conduct, it is clear that at the time § 1983 was enacted, local governmental bodies did not enjoy the sort of "good-faith" qualified immunity extended to them by the Court of Appeals.

As a general rule, it was understood that a municipality's tort liability in damages was identical to that of private corporations and individuals:

> "There is nothing in the character of a municipal corporation which entitles it to an immunity from liability for such malfeasances as private corporations or individuals would be liable for in a civil action. A municipal corporation is liable to the same extent as an individual for any act done by the express authority of the corporation, or of a branch of its government, empowered to act for it upon the subject to which the particular act relates, and for any act which, after it has been done, has been lawfully ratified by the corporation." T. Shearman & A. Redfield, A Treatise on the Law of Negligence § 120, p. 139 (1869) (hereinafter Shearman & Redfield).

Accord, 2 Dillon § 764, at 875 ("But as respects *municipal corporations proper*, . . . it is, we think, universally considered, even in the absence of statute giving the action, that they are liable for acts of *misfeasance* positively injurious to individuals, done by their authorized agents or officers, in the course of the performance of corporate powers constitutionally conferred, or in the execution of corporate duties") (emphasis in original). See 18 E. McQuillin, Municipal Corporations § 53.02 (3d rev. ed. 1977) (hereinafter McQuillin). Under this general theory of liability, a municipality was deemed responsible for any private losses generated through a wide variety of its operations and functions, from personal injuries due to its defective sewers, thoroughfares, and public utilities, to property damage caused by its trespasses and uncompensated takings.[21]

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[21] See generally C. Rhyne, Municipal Law 729–789 (1957); Shearman &

Yet in the hundreds of cases from that era awarding damages against municipal governments for wrongs committed by them, one searches in vain for much mention of a qualified immunity based on the good faith of municipal officers. Indeed, where the issue was discussed at all, the courts had rejected the proposition that a municipality should be privileged where it reasonably believed its actions to be lawful. In the leading case of *Thayer* v. *Boston,* 36 Mass. 511, 515–516 (1837), for example, Chief Justice Shaw explained:

> "There is a large class of cases, in which the rights of both the public and of individuals may be deeply involved, in which it cannot be known at the time the act is done, whether it is lawful or not. The event of a legal inquiry, in a court of justice, may show that it was unlawful. Still, if it was not known and understood to be unlawful at the time, if it was an act done by the officers having competent authority, either by express vote of the city government, or by the nature of the duties and functions with which they are charged, by their offices, to act upon the general subject matter, and especially if the act was done with an honest view to obtain for the public some lawful benefit or advantage, reason and justice obviously require that the city, in its corporate capacity, should be liable to make good the damage sustained by an individual, in consequence of the acts thus done."

The *Thayer* principle was later reiterated by courts in several jurisdictions, and numerous decisions awarded damages against municipalities for violations expressly found to have been committed in good faith. See, *e. g., Town Council of Akron* v. *McComb,* 18 Ohio 229, 230–231 (1849); *Horton* v. *Inhabitants of Ipswich,* 66 Mass. 488, 489, 492 (1853); *Elliot* v. *Concord,* 27 N. H. 204 (1853); *Hurley* v. *Town of Texas,* 20 Wis. 634, 637–638 (1866); *Lee* v. *Village of Sandy Hill,* 40 N. Y.

Redfield §§ 143–152; W. Williams, Liability of Municipal Corporations for Tort (1901) (hereinafter Williams).

442, 448–451 (1869); *Billings* v. *Worcester*, 102 Mass. 329, 332–333 (1869); *Squiers* v. *Village of Neenah*, 24 Wis 588, 593 (1869); *Hawks* v. *Charlemont*, 107 Mass. 414, 417–418 (1871).[22]

That municipal corporations were commonly held liable for damages in tort was also recognized by the 42d Congress. See *Monell* v. *New York City Dept. of Social Services*, 436 U. S., at 688. For example, Senator Stevenson, in opposing the Sherman amendment's creation of a municipal liability for the riotous acts of its inhabitants, stated the prevailing law: "Numberless cases are to be found where a statutory liability has been created against municipal corporations for injuries resulting from a neglect of corporate duty." Cong.

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[22] Accord, *Bunker* v. *City of Hudson*, 122 Wis. 43, 54, 99 N. W. 448, 452 (1904); *Oklahoma City* v. *Hill Bros.*, 6 Okla. 114, 137–139, 50 P. 242, 249–250 (1897); *Schussler* v. *Board of Comm'rs of Hennepin County*, 67 Minn. 412, 417, 70 N. W. 6, 7 (1897); *McGraw* v. *Town of Marion*, 98 Ky. 673, 680–683, 34 S. W. 18, 20–21 (1896). See generally Note, Liability of Cities for the Negligence and Other Misconduct of their Officers and Agents, 30 Am. St. Rep. 376, 405–411 (1893).

Even in England, where the doctrine of official immunity followed by the American courts was first established, no immunity was granted where the damages award was to come from the public treasury. As Baron Bramwell stated in *Ruck* v. *Williams*, 3 H. & N. 308, 320, 157 Eng. Rep. 488, 493 (Exch. 1858):

"I can well understand if a person undertakes the office or duty of a Commissioner, and there are no means of indemnifying him against the consequences of a slip, it is reasonable to hold that he should not be responsible for it. I can also understand that, if one of several Commissioners does something not within the scope of his authority, the Commissioners as a body are not liable. But where Commissioners, who are a quasi corporate body, are not affected [*i. e.*, personally] by the result of an action, inasmuch as they are authorized by act of parliament to raise a fund for payment of the damages, on what principle is it that, if an individual member of the public suffers from an act bona fide but erroneously done, he is not to be compensated? It seems to me inconsistent with actual justice, and not warranted by any principle of law."

See generally Shearman & Redfield §§ 133, 178.

Globe 42d Cong., 1st Sess., 762 (hereinafter Globe).[23] Nowhere in the debates, however, is there a suggestion that the common law excused a city from liability on account of the good faith of its authorized agents, much less an indication of a congressional intent to incorporate such an immunity into the Civil Rights Act.[24] The absence of any allusion to a municipal immunity assumes added significance in light of the objections raised by the opponents of § 1 of the Act that its unqualified language could be interpreted to abolish the traditional good-faith immunities enjoyed by legislators, judges, governors, sheriffs, and other public officers.[25] Had

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[23] Senator Stevenson proceeded to read from the decision in *Prather* v. *Lexington*, 52 Ky. 559, 560–562 (1852):

"Where a particular act, operating injuriously to an individual, is authorized by a municipal corporation, by a delegation of power either general or special, it will be liable for the injury in its corporate capacity, where the acts done would warrant a like action against an individual. But as a general rule a corporation is not responsible for the unauthorized and unlawful acts of its officers, although done under the color of their office; to render it liable it must appear that it expressly authorized the acts to be done by them, or that they were done in pursuance of a general authority to act for the corporation, on the subject to which they relate. (*Thayer* v. *Boston*, 19 Pick., 511.) It has also been held that cities are responsible to the same extent, and in the same manner, as natural persons for injuries occasioned by the negligence or unskillfulness of their agents in the construction of works for their benefit." Globe 762.

[24] At one point in the debates, Senator Stevenson did protest that the Sherman amendment would, for the first time, "create a corporate liability for personal injury which no prudence or foresight could have prevented." *Ibid.* As his later remarks made clear, however, Stevenson's objection went only to the novelty of the amendment's creation of vicarious municipal liability for the unlawful acts of private individuals, "even if a municipality did not know of an impending or ensuing riot or did not have the wherewithal to do anything about it." *Monell* v. *New York City Dept. of Social Services*, 436 U. S., at 692–693, n. 57.

[25] See, *e. g.*, Globe 365 (remarks of Rep. Arthur) ("But if the Legislature enacts a law, if the Governor enforces it, if the judge upon the bench renders a judgment, if the sheriff levy an execution, execute a writ, serve a summons, or make an arrest, all acting under a solemn, official oath,

there been a similar common-law immunity for municipalities, the bill's opponents doubtless would have raised the spectre of its destruction, as well.

To be sure, there were two doctrines that afforded municipal corporations some measure of protection from tort liability. The first sought to distinguish between a municipality's "governmental" and "proprietary" functions; as to the former, the city was held immune, whereas in its exercise of the latter, the city was held to the same standards of liability as any private corporation. The second doctrine immunized a municipality for its "discretionary" or "legislative" activities, but not for those which were "ministerial" in nature. A brief examination of the application and the rationale underlying each of these doctrines demonstrates that Congress could not have intended them to limit a municipality's liability under § 1983.

The governmental-proprietary distinction [26] owed its existence to the dual nature of the municipal corporation. On

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though as pure in duty as a saint and as immaculate as a seraph, for a mere error in judgment, they are liable. . ."); *id.*, at 385 (remarks of Rep. Lewis); Globe App. 217 (remarks of Sen. Thurman).

[26] In actuality, the distinction between a municipality's governmental and proprietary functions is better characterized not as a line, but as a succession of points. In efforts to avoid the often-harsh results occasioned by a literal application of the test, courts frequently created highly artificial and elusive distinctions of their own. The result was that the very same activity might be considered "governmental" in one jurisdiction, and "proprietary" in another. See 18 McQuillin § 53.02, at 105. See also W. Prosser, Law of Torts § 131, p. 979 (4th ed. 1971) (hereinafter Prosser). As this Court stated, in reference to the " 'nongovernmental'-'governmental' quagmire that has long plagued the law of municipal corporations":

"A comparative study of the cases in the forty-eight States will disclose an irreconcilable conflict. More than that, the decisions in each of the States are disharmonious and disclose the inevitable chaos when courts try to apply a rule of law that is inherently unsound." *Indian Towing Co.* v. *United States*, 350 U. S. 61, 65 (1955) (on rehearing).

the one hand, the municipality was a corporate body, capable of performing the same "proprietary" functions as any private corporation, and liable for its torts in the same manner and to the same extent, as well. On the other hand, the municipality was an arm of the State, and when acting in that "governmental" or "public" capacity, it shared the immunity traditionally accorded the sovereign.[27] But the principle of sovereign immunity—itself a somewhat arid fountainhead for municipal immunity[28]—is necessarily nullified when the

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[27] "While acting in their governmental capacity, municipal corporations proper are given the benefit of that same rule which is applied to the sovereign power itself, and are afforded complete immunity from civil responsibility for acts done or omitted, unless such responsibility is expressly created by statute. When, however, they are not acting in the exercise of their purely governmental functions, but are performing duties that pertain to the exercise of those private franchises, powers, and privileges which belong to them for their own corporate benefit, or are dealing with property held by them for their own corporate gain or emolument, then a different rule of liability is applied and they are generally held responsible for injuries arising from their negligent acts or their omissions to the same extent as a private corporation under like circumstances." Williams § 4, p. 9. See generally 18 McQuillin §§ 53.02, 53.04, 53.24; Prosser § 131, pp. 977–983; James, Tort Liability of Governmental Units and Their Officers, 22 U. Chi. L. Rev. 610, 611–612, 622–629 (1955).

[28] Although it has never been understood how the doctrine of sovereign immunity came to be adopted in the American democracy, it apparently stems from the personal immunity of the English Monarch as expressed in the maxim, "The King can do no wrong." It has been suggested, however, that the meaning traditionally ascribed to this phrase is an ironic perversion of its original intent: "The maxim merely meant that the King was not privileged to do wrong. If his acts were against the law, they were *injuriae* (wrongs). Bracton, while ambiguous in his several statements as to the relation between the King and the law, did not intend to convey the idea that he was incapable of committing a legal wrong." Borchard, Government Liability in Tort, 34 Yale L. J. 1, 2, n. 2 (1924). See also Kates & Kouba, Liability of Public Entities Under Section 1983 of the Civil Rights Act, 45 S. Cal. L. Rev. 131, 142 (1972).

In this country, "[t]he sovereign or governmental immunity doctrine, holding that the state, its subdivisions and municipal entities, may not be

State expressly or impliedly allows itself, or its creation, to be sued. Municipalities were therefore liable not only for their "proprietary" acts, but also for those "governmental" functions as to which the State had withdrawn their immunity. And, by the end of the 19th century, courts regularly held that in imposing a specific duty on the municipality either in its charter or by statute, the State had impliedly withdrawn the city's immunity from liability for the nonperformance or misperformance of its obligation. See, *e. g.*, *Weightman* v. *The Corporation of Washington*, 1 Black 39, 50–52 (1862); *Providence* v. *Clapp*, 17 How. 161, 167–169 (1855). See generally Shearman & Redfield §§ 122–126; Note, Liability of Cities for the Negligence and Other Misconduct of their Officers and Agents, 30 Am. St. Rep. 376, 385 (1893). Thus, despite the nominal existence of an immunity for "governmental" functions, municipalities were found

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held liable for tortious acts, was never completely accepted by the courts, its underlying principle being deemed contrary to the basic concept of the law of torts that liability follows negligence, as well as foreign to the spirit of the constitutional guarantee that every person is entitled to a legal remedy for injuries he may receive in his person or property. As a result, the trend of judicial decisions was always to restrict, rather than to expand, the doctrine of municipal immunity." 18 McQuillin § 53.02, p. 104 (footnotes omitted). See also Prosser § 131, p. 984 ("For well over a century the immunity of both the state and the local governments for their torts has been subjected to vigorous criticism, which at length has begun to have its effect"). The seminal opinion of the Florida Supreme Court in *Hargrove* v. *Town of Cocoa Beach*, 96 So. 2d 130 (1957), has spawned "a minor avalanche of decisions repudiating municipal immunity," Prosser § 131, p. 985, which, in conjunction with legislative abrogation of sovereign immunity, has resulted in the consequence that only a handful of States still cling to the old common-law rule of immunity for governmental functions. See K. Davis, Administrative Law of the Seventies § 25.00 (1976 and Supp. 1977) (only two States adhere to the traditional common-law immunity from torts in the exercise of governmental functions); Harley & Wasinger, Government Immunity: Despotic Mantle or Creature of Necessity, 16 Washburn L. J. 12, 34–53 (1976).

liable in damages in a multitude of cases involving such activities.

That the municipality's common-law immunity for "governmental" functions derives from the principle of sovereign immunity also explains why that doctrine could not have served as the basis for the qualified privilege respondent city claims under § 1983. First, because sovereign immunity insulates the municipality from unconsented suits altogether, the presence or absence of good faith is simply irrelevant. The critical issue is whether injury occurred while the city was exercising governmental, as opposed to proprietary, powers or obligations—not whether its agents reasonably believed they were acting lawfully in so conducting themselves.[29] More fundamentally, however, the municipality's "governmental" immunity is obviously abrogated by the sovereign's enactment of a statute making it amenable to suit. Section 1983 was just such a statute. By including municipalities within the class of "persons" subject to liability for violations of the Federal Constitution and laws, Congress—the supreme sovereign on matters of federal law[30]—abolished whatever ves-

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[29] The common-law immunity for governmental functions is thus more comparable to an absolute immunity from liability for conduct of a certain character, which defeats a suit at the outset, than to a qualified immunity, which "depends upon the circumstances and motivations of [the official's] actions, as established by the evidence at trial." *Imbler* v. *Pachtman*, 424 U. S. 409, 419, n. 13 (1976).

[30] Municipal defenses—including an assertion of sovereign immunity—to a federal right of action are, of course, controlled by federal law. See *Fitzpatrick* v. *Bitzer*, 427 U. S. 445, 455–456 (1976); *Hampton* v. *Chicago*, 484 F. 2d 602, 607 (CA7 1973) (Stevens, J.) ("Conduct by persons acting under color of state law which is wrongful under 42 U. S. C. § 1983 or § 1985 (3) cannot be immunized by state law. A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced").

tige of the State's sovereign immunity the municipality possessed.

The second common-law distinction between municipal functions—that protecting the city from suits challenging "discretionary" decisions—was grounded not on the principle of sovereign immunity, but on a concern for separation of powers. A large part of the municipality's responsibilities involved broad discretionary decisions on issues of public policy—decisions that affected large numbers of persons and called for a delicate balancing of competing considerations. For a court or jury, in the guise of a tort suit, to review the reasonableness of the city's judgment on these matters would be an infringement upon the powers properly vested in a coordinate and coequal branch of government. See *Johnson* v. *State*, 69 Cal. 2d 782, 794, n. 8, 447 P. 2d 352, 361, n. 8 (1968) (en banc) ("Immunity for 'discretionary' activities serves no purpose except to assure that courts refuse to pass judgment on policy decisions in the province of coordinate branches of government"). In order to ensure against any invasion into the legitimate sphere of the municipality's policymaking processes, courts therefore refused to entertain suits against the city "either for the non-exercise of, or for the manner in which in good faith it exercises, *discretionary powers* of a public or legislative character." 2 Dillon § 753, p. 862.[31]

Although many, if not all, of a municipality's activities would seem to involve at least some measure of discretion, the influence of this doctrine on the city's liability was not as significant as might be expected. For just as the courts

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[31] See generally 18 McQuillin § 53.04a; Shearman & Redfield §§ 127–130; Williams § 6, pp. 15–16. Like the governmental/proprietary distinction, a clear line between the municipality's "discretionary" and "ministerial" functions was often hard to discern, a difficulty which has been mirrored in the federal courts' attempts to draw a similar distinction under the Federal Tort Claims Act, 28 U. S. C. § 2680 (a). See generally 3 K. Davis, Administrative Law Treatise § 25.08 (1958 and Supp. 1970).

implied an exception to the municipality's immunity for its "governmental" functions, here, too, a distinction was made that had the effect of subjecting the city to liability for much of its tortious conduct. While the city retained its immunity for decisions as to whether the public interest required acting in one manner or another, once any particular decision was made, the city was fully liable for any injuries incurred in the execution of its judgment. See, *e. g.*, *Hill* v. *Boston*, 122 Mass. 344, 358–359 (1877) (dicta) (municipality would be immune from liability for damages resulting from its decision where to construct sewers, since that involved a discretionary judgment as to the general public interest; but city would be liable for neglect in the construction or repair of any particular sewer, as such activity is ministerial in nature). See generally C. Rhyne, Municipal Law § 30.4, pp. 736–737 (1957); Williams § 7. Thus municipalities remained liable in damages for a broad range of conduct implementing their discretionary decisions.

Once again, an understanding of the rationale underlying the common-law immunity for "discretionary" functions explains why that doctrine cannot serve as the foundation for a good-faith immunity under § 1983. That common-law doctrine merely prevented courts from substituting their own judgment on matters within the lawful discretion of the municipality. But a municipality has no "discretion" to violate the Federal Constitution; its dictates are absolute and imperative. And when a court passes judgment on the municipality's conduct in a § 1983 action, it does not seek to second-guess the "reasonableness" of the city's decision nor to interfere with the local government's resolution of competing policy considerations. Rather, it looks only to whether the municipality has conformed to the requirements of the Federal Constitution and statutes. As was stated in *Sterling* v. *Constantin*, 287 U. S. 378, 398 (1932): "When there is a substantial showing that the exertion of state power has

overridden private rights secured by that Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression."

In sum, we can discern no "tradition so well grounded in history and reason" that would warrant the conclusion that in enacting § 1 of the Civil Rights Act, the 42d Congress *sub silentio* extended to municipalities a qualified immunity based on the good faith of their officers. Absent any clearer indication that Congress intended so to limit the reach of a statute expressly designed to provide a "broad remedy for violations of federally protected civil rights," *Monell* v. *New York City Dept. of Social Services*, 436 U. S., at 685, we are unwilling to suppose that injuries occasioned by a municipality's unconstitutional conduct were not also meant to be fully redressable through its sweep.[32]

B

Our rejection of a construction of § 1983 that would accord municipalities a qualified immunity for their good-faith constitutional violations is compelled both by the legislative purpose in enacting the statute and by considerations of public policy. The central aim of the Civil Rights Act was to provide protection to those persons wronged by the " '[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.' " *Monroe* v. *Pape*, 365 U. S., at 184 (quoting *United States* v. *Classic*, 313 U. S. 299, 326 (1941)). By creating an express federal remedy, Congress sought to "enforce provisions of the Fourteenth Amendment against those

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[32] Cf. P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart and Wechsler's The Federal Courts and the Federal System 336 (2d ed. 1973) ("[W]here constitutional rights are at stake the courts are properly astute, in construing statutes, to avoid the conclusion that Congress intended to use the privilege of immunity . . . in order to defeat them").

who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it." *Monroe* v. *Pape, supra,* at 172.

How "uniquely amiss" it would be, therefore, if the government itself—"the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct"—were permitted to disavow liability for the injury it has begotten. See *Adickes* v. *Kress & Co.,* 398 U. S. 144, 190 (1970) (opinion of BRENNAN, J.). A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees, and the importance of assuring its efficacy is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed. Yet owing to the qualified immunity enjoyed by most government officials, see *Scheuer* v. *Rhodes,* 416 U. S. 232 (1974), many victims of municipal malfeasance would be left remediless if the city were also allowed to assert a good-faith defense. Unless countervailing considerations counsel otherwise, the injustice of such a result should not be tolerated.[33]

Moreover, § 1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well. See *Robertson* v. *Wegmann,* 436 U. S. 584, 590–591 (1978); *Carey* v. *Piphus,* 435 U. S. 247, 256–257 (1978). The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create

[33] The absence of any damages remedy for violations of all but the most "clearly established" constitutional rights, see *Wood* v. *Strickland,* 420 U. S., at 322, could also have the deleterious effect of freezing constitutional law in its current state of development, for without a meaningful remedy, aggrieved individuals will have little incentive to seek vindication of those constitutional deprivations that have not previously been clearly defined.

an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights.[34] Furthermore, the threat that damages might be levied against the city may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights.[35] Such procedures are particularly beneficial in preventing those "systemic" injuries that result not so much from the conduct of any single individual, but from the interactive behavior of several government officials, each of whom may be acting in good faith. Cf. Note, Developments in the Law: Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1218–1219 (1977).[36]

Our previous decisions conferring qualified immunities on various government officials, see *supra*, at 637–638, are not to

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[34] For example, given the discussion that preceded the Independence City Council's adoption of the allegedly slanderous resolution impugning petitioner's integrity, see n. 6, *supra*, one must wonder whether this entire litigation would have been necessary had the Council members thought that the city might be liable for their misconduct.

[35] Cf. *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 417–418 (1975): "If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that 'provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.' *United States* v. *N. L. Industries, Inc.*, 479 F. 2d 354, 379 (CA8 1973)."

[36] In addition, the threat of liability against the city ought to increase the attentiveness with which officials at the higher levels of government supervise the conduct of their subordinates. The need to institute system-wide measures in order to increase the vigilance with which otherwise indifferent municipal officials protect citizens' constitutional rights is, of course, particularly acute where the frontline officers are judgment-proof in their individual capacities.

be read as derogating the significance of the societal interest in compensating the innocent victims of governmental misconduct. Rather, in each case we concluded that overriding considerations of public policy nonetheless demanded that the official be given a measure of protection from personal liability. The concerns that justified those decisions, however, are less compelling, if not wholly inapplicable, when the liability of the municipal entity is at issue.[37]

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[37] On at least two previous occasions, this Court has expressly recognized that different considerations come into play when governmental rather than personal liability is threatened. *Hutto* v. *Finney*, 437 U. S. 678 (1978), affirmed an award of attorney's fees out of state funds for a deprivation of constitutional rights, holding that such an assessment would not contravene the Eleventh Amendment. In response to the suggestion, adopted by the dissent, that any award should be borne by the government officials personally, the Court noted that such an allocation would not only be "manifestly unfair," but would "def[y] this Court's insistence in a related context that imposing personal liability in the absence of bad faith may cause state officers to 'exercise their discretion with undue timidity.' *Wood* v. *Strickland*, 420 U. S. 308, 321." *Id.*, at 699, n. 32. The Court thus acknowledged that imposing personal liability on public officials could have an undue chilling effect on the exercise of their decision-making responsibilities, but that no such pernicious consequences were likely to flow from the possibility of a recovery from public funds.

Our decision in *Lake Country Estates, Inc.* v. *Tahoe Planning Agency*, 440 U. S. 391 (1979), also recognized that the justifications for immunizing officials from personal liability have little force when suit is brought against the governmental entity itself. Petitioners in that case had sought damages under § 1983 from a regional planning agency and the individual members of its governing agency. Relying on *Tenney* v. *Brandhove*, 341 U. S. 367 (1951), the Court concluded that "to the extent the evidence discloses that these individuals were acting in a capacity comparable to that of members of a state legislature, they are entitled to absolute immunity from federal damages liability." 440 U. S., at 406. At the same time, however, we cautioned: "If the respondents have enacted unconstitutional legislation, there is no reason why relief against TRPA itself should not adequately vindicate petitioners' interests. See *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658." *Id.*, at 405, n. 29.

In *Scheuer* v. *Rhodes*, *supra*, at 240, THE CHIEF JUSTICE identified the two "mutually dependent rationales" on which the doctrine of official immunity rested:

> "(1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good." [38]

The first consideration is simply not implicated when the damages award comes not from the official's pocket, but from the public treasury. It hardly seems unjust to require a municipal defendant which has violated a citizen's constitutional rights to compensate him for the injury suffered thereby. Indeed, Congress enacted § 1983 precisely to provide a remedy for such abuses of official power. See *Monroe* v. *Pape*, 365 U. S., at 171–172. Elemental notions of fairness dictate that one who causes a loss should bear the loss.

It has been argued, however, that revenue raised by taxation for public use should not be diverted to the benefit of a single or discrete group of taxpayers, particularly where the municipality has at all times acted in good faith. On the contrary, the accepted view is that stated in *Thayer* v. *Boston*—"that the city, in its corporate capacity, should be liable to make good the damage sustained by an [unlucky] indi-

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[38] *Wood* v. *Strickland*, 420 U. S. 308 (1975), mentioned a third justification for extending a qualified immunity to public officials: the fear that the threat of personal liability might deter citizens from holding public office. See *id.*, at 320 ("The most capable candidates for school board positions might be deterred from seeking office if heavy burdens upon their private resources from monetary liability were a likely prospect during their tenure"). Such fears are totally unwarranted, of course, once the threat of personal liability is eliminated.

vidual, in consequence of the acts thus done." 36 Mass., at 515. After all, it is the public at large which enjoys the benefits of the government's activities, and it is the public at large which is ultimately responsible for its administration. Thus, even where some constitutional development could not have been foreseen by municipal officials, it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated. See generally 3 K. Davis, Administrative Law Treatise § 25.17 (1958 and Supp. 1970); Prosser § 131, at 978; Michelman, Property, Utility, and Fairness: Some Thoughts on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165 (1967).[39]

The second rationale mentioned in *Scheuer* also loses its force when it is the municipality, in contrast to the official, whose liability is at issue. At the heart of this justification for a qualified immunity for the individual official is the concern that the threat of *personal* monetary liability will introduce an unwarranted and unconscionable consideration into the decisionmaking process, thus paralyzing the governing official's decisiveness and distorting his judgment on matters

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[39] *Monell* v. *New York City Dept. of Social Services* indicated that the principle of loss-spreading was an insufficient justification for holding the municipality liable under § 1983 on a *respondeat superior* theory. 436 U. S., at 693–694. Here, of course, quite a different situation is presented. Petitioner does not seek to hold the city responsible for the unconstitutional actions of an individual official "*solely* because it employs a tortfeasor." *Id.*, at 691. Rather, liability is predicated on a determination that "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Id.*, at 690. In this circumstance—when it is the local government itself that is responsible for the constitutional deprivation—it is perfectly reasonable to distribute the loss to the public as a cost of the administration of government, rather than to let the entire burden fall on the injured individual.

of public policy.[40] The inhibiting effect is significantly reduced, if not eliminated, however, when the threat of personal liability is removed. First, as an empirical matter, it is questionable whether the hazard of municipal loss will deter a public officer from the conscientious exercise of his duties; city officials routinely make decisions that either require a large expenditure of municipal funds or involve a substantial risk of depleting the public fisc. See *Kostka* v. *Hogg*, 560 F. 2d 37, 41 (CA1 1977). More important, though, is the realization that consideration of the *municipality's* liability for constitutional violations is quite properly the concern of its elected or appointed officials. Indeed, a decisionmaker would be derelict in his duties if, at some point, he did not consider whether his decision comports with constitutional mandates and did not weigh the risk that a violation might result in an award of damages from the public treasury. As one commentator aptly put it: "Whatever other concerns should shape a particular official's actions, certainly one of them should be the constitutional rights of individuals who will be affected by his actions. To criticize section 1983 liability because it leads decisionmakers to avoid the infringement of constitutional rights is to criticize one of the statute's *raisons d'être*." [41]

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[40] "The imposition of monetary costs for mistakes which were not unreasonable in the light of all the circumstances would undoubtedly deter even the most conscientious school decisionmaker from exercising his judgment independently, forcefully, and in a manner best serving the long-term interest of the school and the students." *Wood* v. *Strickland*, *supra*, at 319–320.

[41] Note, Developments in the Law: Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1224 (1977). See also *Johnson* v. *State*, 69 Cal. 2d 782, 792–793, 447 P. 2d 352, 359–360 (1968):

"Nor do we deem an employee's concern over the potential liability of his employer, the governmental unit, a justification for an expansive definition of 'discretionary,' and hence immune, acts. As a threshold matter, we consider it unlikely that the possibility of government liability will be

IV

In sum, our decision holding that municipalities have no immunity from damages liability flowing from their constitutional violations harmonizes well with developments in the common law and our own pronouncements on official immunities under § 1983. Doctrines of tort law have changed significantly over the past century, and our notions of governmental responsibility should properly reflect that evolution. No longer is individual "blameworthiness" the acid test of liability; the principle of equitable loss-spreading has joined fault as a factor in distributing the costs of official misconduct.

We believe that today's decision, together with prior precedents in this area, properly allocates these costs among the three principals in the scenario of the § 1983 cause of action: the victim of the constitutional deprivation; the officer whose conduct caused the injury; and the public, as represented by the municipal entity. The innocent individual who is harmed by an abuse of governmental authority is assured that he will be compensated for his injury. The offending official, so long as he conducts himself in good faith, may go about his business secure in the knowledge that a qualified immunity will protect him from personal liability for damages that are more appropriately chargeable to the populace as a whole. And the public will be forced to bear only the costs of injury inflicted by the "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy."

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a serious deterrent to the fearless exercise of judgment by the employee. In any event, however, to the extent that such a deterrent effect takes hold, it may be wholesome. An employee in a private enterprise naturally gives some consideration to the potential liability of his employer, and this attention unquestionably promotes careful work; the potential liability of a governmental entity, to the extent that it affects primary conduct at all, will similarly influence public employees." (Citation and footnote omitted.)

Monell v. *New York City Dept. of Social Services*, 436 U. S., at 694.

Reversed.

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE REHNQUIST join, dissenting.

The Court today holds that the city of Independence may be liable in damages for violating a constitutional right that was unknown when the events in this case occurred. It finds a denial of due process in the city's failure to grant petitioner a hearing to clear his name after he was discharged. But his dismissal involved only the proper exercise of discretionary powers according to prevailing constitutional doctrine. The city imposed no stigma on petitioner that would require a "name clearing" hearing under the Due Process Clause.

On the basis of this alleged deprivation of rights, the Court interprets 42 U. S. C. § 1983 to impose strict liability on municipalities for constitutional violations. This strict liability approach inexplicably departs from this Court's prior decisions under § 1983 and runs counter to the concerns of the 42d Congress when it enacted the statute. The Court's ruling also ignores the vast weight of common-law precedent as well as the current state law of municipal immunity. For these reasons, and because this decision will hamper local governments unnecessarily, I dissent.

I

The Court does not question the District Court's statement of the facts surrounding Owen's dismissal. *Ante*, at 625. It nevertheless rejects the District Court's conclusion that no due process hearing was necessary because "the circumstances of [Owen's] discharge did not impose a stigma of illegal or immoral conduct on his professional reputation." 421 F. Supp. 1110, 1122 (WD Mo. 1976); see *ante*, at 633–634, n. 13.

Careful analysis of the record supports the District Court's view that Owen suffered no constitutional deprivation.

A

From 1967 to 1972, petitioner Owen served as Chief of the Independence Police Department at the pleasure of the City Manager.[1] Friction between Owen and City Manager Alberg flared openly in early 1972, when charges surfaced that the Police Department's property room was mismanaged. The City Manager initiated a full internal investigation.

In early April, the City Auditor reported that the records in the property room were so sparse that he could not conduct an audit. The City Counselor reported that "there was no evidence of any criminal acts, or violation of any state law or municipal ordinances, in the administration of the property room." 560 F. 2d 925, 928 (CA8 1977). In a telephone call on April 10, the City Manager asked Owen to resign and offered him another position in the Department. The two met on the following day. Alberg expressed his unhappiness over the property room situation and again requested that Owen step down. When Owen refused, the City Manager responded that he would be fired. 421 F. Supp., at 1114–1115.

On April 13, the City Manager asked Lieutenant Cook of the Police Department if he would be willing to take over as Chief. Alberg also released the following statement to the public:

> "At my direction, the City Counselor's office, [i]n conjunction with the City Auditor ha[s] completed a routine audit of the police property room.

[1] Under § 3.3 (1) of the Independence City Charter in effect in 1972, the City Manager had the power to "[a]ppoint, and when deemed necessary for the good of the service, lay off, suspend, demote, or remove all directors, or heads, of administrative departments. . . ." Section 3.8 of that Charter stated that the Chief of Police is the "director" of the Police Department. Charter of the City of Independence, Mo. (Dec. 5, 1961) (hereinafter cited as Charter).

"Discrepancies were found in the administration, handling and security of recovered property. There appears to be no evidence to substantiate any allegations of a criminal nature. . . ." 560 F. 2d, at 928–929.

The District Court found that the City Manager decided on Saturday, April 15, to replace Owen with Lieutenant Cook as Chief of Police. 421 F. Supp., at 1115. Before the decision was announced, however, City Council Member Paul Roberts obtained the internal reports on the property room. At the April 17 Council meeting, Roberts read a prepared statement that accused police officials of "gross inefficiencies" and various "inappropriate" actions. *Id.*, at 1116, n. 2. He then moved that the Council release the reports to the public, refer them to the Prosecuting Attorney of Jackson County for presentation to a grand jury, and recommend to the City Manager that he "take all direct and appropriate action permitted under the Charter. . . ." *Ibid.* The Council unanimously approved the resolution.

On April 18, Alberg "implemented his prior decision to discharge [Owen] as Chief of Police." 560 F. 2d, at 929. The notice of termination stated simply that Owen's employment was "[t]erminated under the provisions of Section 3.3 (1) of the City Charter." App. 17. That charter provision grants the City Manager complete authority to remove "directors" of administrative departments "when deemed necessary for the good of the service." Owen's lawyer requested a hearing on his client's termination. The Assistant City Counselor responded that "there is no appellate procedure or forum provided by the Charter or ordinances of the City of Independence, Missouri, relating to the dismissal of Mr. Owen." *Id.*, at 27.

The City Manager referred to the Prosecuting Attorney all reports on the property room. The grand jury returned a "no true bill," and there has been no further official action on the matter. Owen filed a state lawsuit against Councilman

Roberts and City Manager Alberg, asking for damages for libel, slander, and malicious prosecution. Alberg won a dismissal of the state-law claims against him, and Councilman Roberts reached a settlement with Owen.[2]

This federal action was filed in 1976. Owen alleged that he was denied his liberty interest in his professional reputation when he was dismissed without formal charges or a hearing. *Id.*, at 8, 10.[3]

B

Due process requires a hearing on the discharge of a government employee "if the employer creates and disseminates a false and defamatory impression about the employee in connection with his termination. . . ." *Codd* v. *Velger*, 429 U. S. 624, 628 (1977) (*per curiam*). This principle was first announced in *Board of Regents* v. *Roth*, 408 U. S. 564 (1972), which was decided in June 1972, 10 weeks *after* Owen was discharged. The pivotal question after *Roth* is whether the circumstances of the discharge so blackened the employee's

[2] In its answer to Owen's complaint in this action, the city cited the state-court action as *Owen* v. *Roberts and Alberg*, Case No. 778,640 (Jackson County, Mo., Circuit Ct.). App. 15.

[3] Owen initially claimed that his property interests in the job also were violated. The Court of Appeals affirmed the District Court's rejection of that contention, 560 F. 2d 925, 937 (CA8 1977), and petitioner has not challenged that ruling in this Court.

The Court suggests that the city should have presented a cross-petition for certiorari in order to argue that Owen has no cause of action. *Ante*, at 633, n. 13. It is well settled that a respondent "may make any argument presented below that supports the judgment of the lower court." *Hankerson* v. *North Carolina*, 432 U. S. 233, 240, n. 6 (1977); see *Massachusetts Mutual Life Ins. Co.* v. *Ludwig*, 426 U. S. 479, 480–481 (1976), citing *United States* v. *American Ry. Exp. Co.*, 265 U. S. 425, 435 (1924). The judgment of the Court of Appeals in the instant case was to "den[y] Owen any relief . . ." by finding that the defendants were immune from suit. 589 F. 2d 335, 338 (1979). Since the same judgment would result from a finding that Owen has no cause of action under the statute, respondents' failure to present a cross-petition does not prevent them from pressing the issue before this Court.

name as to impair his liberty interest in his professional reputation. *Id.*, at 572–575.

The events surrounding Owen's dismissal "were prominently reported in local newspapers." 560 F. 2d, at 930. Doubtless, the public received a negative impression of Owen's abilities and performance. But a "name clearing" hearing is not necessary unless the employer makes a public statement that "might seriously damage [the employee's] standing and associations in his community." *Board of Regents* v. *Roth, supra*, at 573. No hearing is required after the "discharge of a public employee whose position is terminable at the will of the employer when there is no public disclosure of the reasons for the discharge." *Bishop* v. *Wood*, 426 U. S. 341, 348 (1976).

The City Manager gave no specific reason for dismissing Owen. Instead, he relied on his discretionary authority to discharge top administrators "for the good of the service." Alberg did not suggest that Owen "had been guilty of dishonesty, or immorality." *Board of Regents* v. *Roth, supra*, at 573. Indeed, in his "property room" statement of April 13, Alberg said that there was "no evidence to substantiate any allegations of a criminal nature." This exoneration was reinforced by the grand jury's refusal to initiate a prosecution in the matter. Thus, nothing in the actual firing cast such a stigma on Owen's professional reputation that his liberty was infringed.

The Court does not address directly the question whether any stigma was imposed by the discharge. Rather, it relies on the Court of Appeals' finding that stigma derived from events "connected with" the firing. *Ante*, at 633; 589 F. 2d, at 337. That court attached great significance to the resolution adopted by the City Council at its April 17 meeting. But the resolution merely recommended that Alberg take "appropriate action," and the District Court found no "causal connection" between events in the City Council and the firing of Owen. 421 F. Supp., at 1121. Two days

before the Council met, Alberg already had decided to dismiss Owen. Indeed, Councilman Roberts stated at the meeting that the City Manager had asked for Owen's resignation. *Id.*, at 1116, n. 2.[4]

Even if the Council resolution is viewed as part of the discharge process, Owen has demonstrated no denial of his liberty. Neither the City Manager nor the Council cast any aspersions on Owen's character. Alberg absolved all connected with the property room of any illegal activity, while the Council resolution alleged no wrongdoing. That events focused public attention upon Owen's dismissal is undeniable; such attention is a condition of employment—and of discharge—for high government officials. Nevertheless, nothing in the actions of the City Manager or the City Council triggered a constitutional right to a name-clearing hearing.[5]

The statements by Councilman Roberts were neither measured nor benign, but they provide no basis for this action against the city of Independence. Under *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 691 (1978), the city cannot be held liable for Roberts' statements on a theory of *respondeat superior*. That case held that § 1983

[4] The City Charter prohibits any involvement of Council members in the City Manager's personnel decisions. Section 2.11 of the Charter states that Council members may not "participate in any manner in the appointment or removal of officers and employees of the city." Violation of § 2.11 is a misdemeanor that may be punished by ejection from office.

[5] The Court suggests somewhat cryptically that stigma was imposed on Owen when "the city—through the unanimous resolution of the City Council—released to the public an allegedly false statement impugning petitioner's honesty and integrity." *Ante*, at 633, n. 13. The Court fails, however, to identify any "allegedly false statement." The resolution did call for public disclosure of the reports on the property room situation, but those reports were never released. *Ante*, at 630. Indeed, petitioner's complaint alleged that the failure to release those reports left "a cloud or suspicion of misconduct" over him. App. 8. The resolution also referred the reports to the prosecutor and called on the City Manager to take appropriate action. Neither event could constitute the public release of an "allegedly false statement" mentioned by the Court.

makes municipalities liable for constitutional deprivations only if the challenged action was taken "pursuant to official municipal policy of some nature. . . ." As the Court noted, "a municipality cannot be held liable *solely* because it employs a tortfeasor. . . ." 436 U. S., at 691 (emphasis in original). The statements of a single councilman scarcely rise to the level of municipal policy.[6]

As the District Court concluded, "[a]t most, the circumstances . . . suggested that, as Chief of Police, [Owen] had been an inefficient administrator." 421 F. Supp., at 1122. This Court now finds unconstitutional stigma in the interaction of unobjectionable official acts with the unauthorized statements of a lone councilman who had no direct role in the discharge process. The notoriety that attended Owen's firing resulted not from any city policy, but solely from public misapprehension of the reasons for a purely discretionary dismissal. There was no constitutional injury; there should be no liability.[7]

II

Having constructed a constitutional deprivation from the valid exercise of governmental authority, the Court holds that municipalities are strictly liable for their constitutional torts. Until two years ago, municipal corporations enjoyed absolute immunity from § 1983 claims. *Monroe* v. *Pape*, 365 U. S.

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[6] Roberts himself enjoyed absolute immunity from § 1983 suits for acts taken in his legislative capacity. *Lake Country Estates, Inc.* v. *Tahoe Planning Agency*, 440 U. S. 391, 402–406 (1979). Owen did sue him in state court for libel and slander, and reached an out-of-court settlement. See *supra*, at 660–661.

[7] This case bears some resemblance to *Martinez* v. *California*, 444 U. S. 277 (1980), which involved a § 1983 suit against state parole officials for injuries caused by a paroled prisoner. We found that the plaintiffs had no cause of action because they could not show a causal relationship between their injuries and the actions of the defendants. 444 U. S., at 285. That relationship also is absent in this case. Any injury to Owen's reputation was the result of the Roberts statement, not the policies of the city of Independence.

167 (1961). But *Monell* v. *New York City Dept. of Social Services, supra,* held that local governments are "persons" within the meaning of the statute, and thus are liable in damages for constitutional violations inflicted by municipal policies. 436 U. S., at 690. *Monell* did not address the question whether municipalities might enjoy a qualified immunity or good-faith defense against § 1983 actions. 436 U. S., at 695, 701; *id.,* at 713–714 (POWELL, J., concurring).

After today's decision, municipalities will have gone in two short years from absolute immunity under § 1983 to strict liability. As a policy matter, I believe that strict municipal liability unreasonably subjects local governments to damages judgments for actions that were reasonable when performed. It converts municipal governance into a hazardous slalom through constitutional obstacles that often are unknown and unknowable.

The Court's decision also impinges seriously on the prerogatives of municipal entities created and regulated primarily by the States. At the very least, this Court should not initiate a federal intrusion of this magnitude in the absence of explicit congressional action. Yet today's decision is supported by nothing in the text of § 1983. Indeed, it conflicts with the apparent intent of the drafters of the statute, with the common law of municipal tort liability, and with the current state law of municipal immunities.

A

1

Section 1983 provides a private right of action against "[e]very person" acting under color of state law who imposes or causes to be imposed a deprivation of constitutional rights.[8]

[8] "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured. . . ." 42 U. S. C. § 1983.

Although the statute does not refer to immunities, this Court has held that the law "is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them." *Imbler* v. *Pachtman*, 424 U. S. 409, 418 (1976); see *Tenney* v. *Brandhove*, 341 U. S. 367, 376 (1951).

This approach reflects several concerns. First, the common-law traditions of immunity for public officials could not have been repealed by the "general language" of § 1983. *Tenney* v. *Brandhove*, *supra*, at 376; see *Imbler* v. *Pachtman*, *supra*, at 421–424; *Pierson* v. *Ray*, 386 U. S. 547, 554–555 (1967). In addition, "the public interest requires decisions and action to enforce laws for the protection of the public." *Scheuer* v. *Rhodes*, 416 U. S. 232, 241 (1974). Because public officials will err at times, "[t]he concept of immunity assumes . . . that it is better to risk some error and possibly injury from such error than not to decide or act at all." *Id.*, at 242; see *Wood* v. *Strickland*, 420 U. S. 308, 319–320 (1975). By granting some immunity to governmental actors, the Court has attempted to ensure that public decisions will not be dominated by fears of liability for actions that may turn out to be unconstitutional. Public officials "cannot be expected to predict the future course of constitutional law. . . ." *Procunier* v. *Navarette*, 434 U. S. 555, 562 (1978).

In response to these considerations, the Court has found absolute immunity from § 1983 suits for state legislators, *Tenney* v. *Brandhove*, *supra*, judges, *Pierson* v. *Ray*, *supra*, at 553–555, and prosecutors in their role as advocates for the State, *Imbler* v. *Pachtman*, *supra*. Other officials have been granted a qualified immunity that protects them when in good faith they have implemented policies that reasonably were thought to be constitutional. This limited immunity extends to police officers, *Pierson* v. *Ray*, *supra*, at 555–558, state executive officers, *Scheuer* v. *Rhodes*, *supra*, local school board members, *Wood* v. *Strickland*, *supra*, the super-

intendent of a state hospital, *O'Connor* v. *Donaldson*, 422 U. S. 563, 576–577 (1975), and prison officials, *Procunier* v. *Navarette, supra.*

The Court today abandons any attempt to harmonize § 1983 with traditional tort law. It points out that municipal immunity may be abrogated by legislation. Thus, according to the Court, Congress "abolished" municipal immunity when it included municipalities "within the class of 'persons' subject to liability" under § 1983. *Ante*, at 647.

This reasoning flies in the face of our prior decisions under this statute. We have held repeatedly that "immunities 'well grounded in history and reason' [were not] abrogated 'by covert inclusion in the general language' of § 1983." *Imbler* v. *Pachtman, supra,* at 418, quoting *Tenney* v. *Brandhove, supra,* at 376. See *Scheuer* v. *Rhodes, supra,* at 243–244; *Pierson* v. *Ray, supra,* at 554. The peculiar nature of the Court's position emerges when the status of executive officers under § 1983 is compared with that of local governments. State and local executives are personally liable for bad-faith or unreasonable constitutional torts. Although Congress had the power to make those individuals liable for all such torts, this Court has refused to find an abrogation of traditional immunity in a statute that does not mention immunities. Yet the Court now views the enactment of § 1983 as a direct abolition of traditional municipal immunities. Unless the Court is overruling its previous immunity decisions, the silence in § 1983 must mean that the 42d Congress mutely accepted the immunity of executive officers, but silently rejected common-law municipal immunity. I find this interpretation of the statute singularly implausible.

2

Important public policies support the extension of qualified immunity to local governments. First, as recognized by the doctrine of separation of powers, some governmental decisions should be at least presumptively insulated from judicial re-

view. Mr. Chief Justice Marshall wrote in *Marbury* v. *Madison*, 1 Cranch 137, 170 (1803), that "[t]he province of the court is . . . not to inquire how the executive, or executive officers, perform duties in which they have a discretion." Marshall stressed the caution with which courts must approach "[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive." The allocation of public resources and the operational policies of the government itself are activities that lie peculiarly within the competence of executive and legislative bodies. When charting those policies, a local official should not have to gauge his employer's possible liability under § 1983 if he incorrectly—though reasonably and in good faith—forecasts the course of constitutional law. Excessive judicial intrusion into such decisions can only distort municipal decisionmaking and discredit the courts. Qualified immunity would provide presumptive protection for discretionary acts, while still leaving the municipality liable for bad faith or unreasonable constitutional deprivations.

Because today's decision will inject constant consideration of § 1983 liability into local decisionmaking, it may restrict the independence of local governments and their ability to respond to the needs of their communities. Only this Term, we noted that the "point" of immunity under § 1983 "is to forestall an atmosphere of intimidation that would conflict with [officials'] resolve to perform their designated functions in a principled fashion." *Ferri* v. *Ackerman*, 444 U. S. 193, 203–204 (1979).

The Court now argues that local officials might modify their actions unduly if they face personal liability under § 1983, but that they are unlikely to do so when the locality itself will be held liable. *Ante*, at 655–656. This contention denigrates the sense of responsibility of municipal officers, and misunderstands the political process. Responsible local officials will be concerned about potential judgments against

their municipalities for alleged constitutional torts. Moreover, they will be accountable within the political system for subjecting the municipality to adverse judgments. If officials must look over their shoulders at strict municipal liability for unknowable constitutional deprivations, the resulting degree of governmental paralysis will be little different from that caused by fear of personal liability. Cf. *Wood* v. *Strickland*, 420 U. S., at 319–320; *Scheuer* v. *Rhodes*, 416 U. S., at 242.[9]

In addition, basic fairness requires a qualified immunity for municipalities. The good-faith defense recognized under § 1983 authorizes liability only when officials acted with malicious intent or when they "knew or should have known that their conduct violated the constitutional norm." *Procunier* v. *Navarette*, 434 U. S., at 562. The standard incorporates the idea that liability should not attach unless there was notice that a constitutional right was at risk. This idea applies to governmental entities and individual officials alike. Constitutional law is what the courts say it is, and—as demonstrated by today's decision and its precursor, *Monell*—even the most prescient lawyer would hesitate to give a firm opinion on matters not plainly settled. Municipalities, often acting in the utmost good faith, may not know or anticipate when their action or inaction will be deemed a constitutional violation.[10]

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[9] The Court's argument is not only unpersuasive, but also is internally inconsistent. The Court contends that strict liability is necessary to "create an incentive for officials . . . to err on the side of protecting citizens' constitutional rights." *Ante*, at 651–652. Yet the Court later assures us that such liability will not distort municipal decisionmaking because "[t]he inhibiting effect is significantly reduced, if not eliminated, . . . when the threat of personal liability is removed." *Ante*, at 656. Thus, the Court apparently believes that strict municipal liability is needed to modify public policies, but will not have any impact on those policies anyway.

[10] The Court implies that unless municipalities are strictly liable under § 1983, constitutional law could be frozen "in its current state of development." *Ante*, at 651, n. 33. I find this a curious notion. This could be the first time that the period between 1961, when *Monroe* declared local

The Court nevertheless suggests that, as a matter of social justice, municipal corporations should be strictly liable even if they could not have known that a particular action would violate the Constitution. After all, the Court urges, local governments can "spread" the costs of any judgment across the local population. *Ante*, at 655. The Court neglects, however, the fact that many local governments lack the resources to withstand substantial unanticipated liability under § 1983. Even enthusiastic proponents of municipal liability have conceded that ruinous judgments under the statute could imperil local governments. *E. g.*, Note, Damage Remedies Against Municipalities for Constitutional Violations, 89 Harv. L. Rev. 922, 958 (1976).[11] By simplistically applying the theorems of welfare economics and ignoring the reality of municipal finance, the Court imposes strict liability on the level of government least able to bear it.[12] For some municipalities, the result could be a severe limitation on their ability to serve the public.

B

The Court searches at length—and in vain—for legal authority to buttress its policy judgment. Despite its general statements to the contrary, the Court can find no support for its position in the debates on the civil rights legislation that included § 1983. Indeed, the legislative record suggests that

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governments absolutely immune from § 1983 suits, and 1978, when *Monell* overruled *Monroe*, has been described as one of static constitutional standards.

[11] For example, in a recent case in Alaska, a jury awarded almost $500,000 to a policeman who was accused of "racism and brutality" and removed from duty without notice and an opportunity to be heard. *Wayson* v. *City of Fairbanks*, 22 ATLA L. Rep. 222 (Alaska Fourth Dist. Super. Ct. 1979).

[12] Ironically, the State and Federal Governments cannot be held liable for constitutional deprivations. The Federal Government has not waived its sovereign immunity against such claims, and the States are protected by the Eleventh Amendment.

the Members of the 42d Congress would have been dismayed by this ruling. Nor, despite its frequent citation of authorities that are only marginally relevant, can the Court rely on the traditional or current law of municipal tort liability. Both in the 19th century and now, courts and legislatures have recognized the importance of limiting the liability of local governments for official torts. Each of these conventional sources of law points to the need for qualified immunity for local governments.

1

The modern dispute over municipal liability under § 1983 has focused on the defeat of the Sherman amendment during the deliberations on the Civil Rights Act of 1871. *E. g., Monroe* v. *Pape*, 365 U. S., at 187–191; *Monell* v. *New York City Dept. of Social Services*, 436 U. S., at 664–683. Senator Sherman proposed that local governments be held vicariously liable for constitutional deprivations caused by riots within their boundaries. As originally drafted, the measure imposed liability even if municipal officials had no actual knowledge of the impending disturbance.[13] The amendment, which did not affect the part of the Civil Rights Act that we know as § 1983, was approved by the Senate but rejected by the House of Representatives. 436 U. S., at 666. After two revisions by Conference Committees, both Houses passed what is now codified as 42 U. S. C. § 1986. The final version applied not just to local governments but to all "persons," and it imposed no

[13] Cong. Globe, 42d Cong., 1st Sess., 663 (1871). The proposal applied to any property damage or personal injury caused "by any persons riotously and tumultuously assembled together; and if such offense was committed to deprive any person of any right conferred upon him by the Constitution and laws of the United States, or to deter him or punish him for exercising such right, or by reason of his race, color, or previous condition of servitude. . . ." As revised by the first Conference Committee on the Civil Rights Act, the provision still required no showing of notice. *Id.*, at 749.

liability unless the defendant knew that a wrong was "about to be committed." [14]

Because Senator Sherman initially proposed strict municipal liability for constitutional torts, the discussion of his amendment offers an invaluable insight into the attitudes of his colleagues on the question now before the Court. Much of the resistance to the measure flowed from doubts as to Congress' power to impose vicarious liability on local governments. *Monell* v. *New York City Dept. of Social Services*, 436 U.S., at 673–683; *id.*, at 706 (POWELL, J., concurring). But opponents of the amendment made additional arguments that strongly support recognition of qualified municipal immunity under § 1983.

First, several legislators expressed trepidation that the proposal's strict liability approach could bankrupt local governments. They warned that liability under the proposal could bring municipalities "to a dead stop." Cong. Globe, 42d Cong., 1st Sess., 763 (1871) (Sen. Casserly). See *id.*, at 762 (Sen. Stevenson); *id.*, at 772 (Sen. Thurman). Representative Bingham argued that municipal liability might be so great under the measure as to deprive a community "of the means of administering justice." *Id.*, at 798. Some Congressmen argued that strict liability would inhibit the effective operation of municipal corporations. The possibility of liability, Representative Kerr insisted, could prevent local officials from exercising "necessary and customary functions." *Id.*, at 789. See *id.*, at 763 (Sen. Casserly); *id.*, at 808 (Rep. Garfield).

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[14] The final Conference amendment stated:

"That any person or persons having knowledge that any of the wrongs . . . mentioned in the second section of this act, are about to be committed, and having power to prevent or aid in preventing the same, shall neglect or refuse to do so, and such wrongful act shall be committed, such person or persons shall be liable to the person injured or his legal representatives for all damages caused by any such wrongful act. . . ." *Id.*, at 819.

Most significant, the opponents objected to liability imposed without any showing that a municipality knew of an impending constitutional deprivation. Senator Sherman defended this feature of the amendment as a characteristic of riot acts long in force in England and this country. *Id.*, at 760. But Senator Stevenson argued against creating "a corporate liability for personal injury which no prudence or foresight could have prevented." *Id.*, at 762. In the most thorough critique of the amendment, Senator Thurman carefully reviewed the riot acts of Maryland and New York. He emphasized that those laws imposed liability only when a plaintiff proved that the local government had both notice of the impending injury and the power to prevent it. *Id.*, at 771.

> "Is not that right? Why make the county, or town, or parish liable when it had no reason whatsoever to anticipate that any such crime was about to be committed, and when it had no knowledge of the commission of the crime until after it was committed? What justice is there in that?" *Ibid.*

These concerns were echoed in the House of Representatives. Representative Kerr complained that "it is not required, before liability shall attach, that it shall be known that there was any intention to commit these crimes, so as to fasten liability justly upon the municipality." *Id.*, at 788. He denounced the "total and absolute absence of notice, constructive or implied, within any decent limits of law or reason," adding that the proposal "takes the property of one and gives it to another by mere force, without right, in the absence of guilt or knowledge, or the possibility of either." *Ibid.* Similarly, Representative Willard argued that liability "is only warranted when the community . . . has proved faithless to its duties. . . ." *Id.*, at 791. He criticized the absence of a requirement that it be "prov[ed] in court that there has been any default, any denial, any neglect on the part of

the county, city, town, or parish to give citizens the full protection of the laws." *Ibid.*

Partly in response to these objections, the amendment as finally enacted conditioned liability on a demonstration that the defendant knew that constitutional rights were about to be denied. Representative Poland introduced the new measure, noting that "any person *who has knowledge* of any of the offenses named . . . shall [have a] duty to use all reasonable diligence within his power to prevent it." *Id.*, at 804 (emphasis supplied). The same point was made by Representative Shellabarger, the sponsor of the entire Act and, with Representative Poland, a member of the Conference Committee that produced the final draft. *Id.*, at 804–805; see *id.*, at 807 (Rep. Garfield).

On the Senate side, one conferee stated that under the final version

> "in order to make the [municipal] corporation liable as a body it must appear in some way to the satisfaction of the jury that the officers of the corporation, those persons whose duty it was to repress tumult, if they could, had reasonable notice of the fact that there was a tumult, or was likely to be one, and neglected to take the necessary means to prevent it." *Id.*, at 821 (Sen. Edmunds).

Senator Sherman disliked the revised provision. He complained that "before you can make [a person] responsible you have got to show that they had knowledge that the specific wrongs upon the particular person were about to be wrought." *Ibid.*[15]

These objections to the Sherman amendment apply with equal force to strict municipal liability under § 1983. Just

[15] Under 42 U. S. C. § 1986, the current version of the language approved in place of the Sherman amendment, liability "is dependent on proof of actual knowledge by a defendant of the wrongful conduct. . . ." *Hampton* v. *Chicago*, 484 F. 2d 602, 610 (CA7 1973), cert. denied, 415 U. S. 917 (1974).

as the 42d Congress refused to hold municipalities vicariously liable for deprivations that could not be known beforehand, this Court should not hold those entities strictly liable for deprivations caused by actions that reasonably and in good faith were thought to be legal. The Court's approach today, like the Sherman amendment, could spawn onerous judgments against local governments and distort the decisions of officers who fear municipal liability for their actions. Congress' refusal to impose those burdens in 1871 surely undercuts any historical argument that federal judges should do so now.

The Court declares that its rejection of qualified immunity is "compelled" by the "legislative purpose" in enacting § 1983. *Ante*, at 650. One would expect powerful documentation to back up such a strong statement. Yet the Court notes only three features of the legislative history of the Civil Rights Act. Far from "compelling" the Court's strict liability approach, those features of the congressional record provide scant support for its position.

First, the Court reproduces statements by Congressmen attesting to the broad remedial scope of the law. *Ante*, at 636, and n. 17. In view of our many decisions recognizing the immunity of officers under § 1983, *supra*, at 666–667, those statements plainly shed no light on congressional intent with respect to immunity under the statute. Second, the Court cites Senator Stevenson's remark that frequently "a statutory liability has been created against municipal corporations for injuries resulting from a neglect of corporate duty." *Ante*, at 642–643, citing Cong. Globe, 42d Cong., 1st Sess., 762 (1871). The Senator merely stated the unobjectionable proposition that municipal immunity could be qualified or abolished by statute. This fragmentary observation provides no basis for the Court's version of the legislative history.

Finally, the Court emphasizes the lack of comment on municipal immunity when opponents of the bill did discuss the immunities of government officers. "Had there been a

similar common-law immunity for municipalities, the bill's opponents doubtless would have raised the spectre of its destruction, as well." *Ante*, at 643–644. This is but another example of the Court's continuing willingness to find meaning in silence. This example is particularly noteworthy because the very next sentence in the Court's opinion concedes: "To be sure, there were two doctrines that afforded municipal corporations some measure of protection from tort liability." *Ante*, at 644. Since the opponents of the Sherman amendment repeatedly expressed their conviction that strict municipal liability was unprecedented and unwise, the failure to recite the theories of municipal immunity is of no relevance here. In any event, that silence cannot contradict the many contemporary judicial decisions applying that immunity. See *infra*, at 677–678, and nn. 16, 17.

2

The Court's decision also runs counter to the common law in the 19th century, which recognized substantial tort immunity for municipal actions. *E. g.*, 2 J. Dillon, Law of Municipal Corporations §§ 753, 764, pp. 862–863, 875–876 (2d ed. 1873); W. Williams, Liability of Municipal Corporations for Tort 9, 16 (1901). Nineteenth-century courts generally held that municipal corporations were not liable for acts undertaken in their "governmental," as opposed to their "proprietary," capacity.[16] Most States now use other criteria

[16] In the leading case of *Bailey* v. *Mayor &c. of the City of New York*, 3 Hill 531, 539 (N. Y. 1842), the court distinguished between municipal powers "conferred for the benefit of the public" and those "made as well for the private emolument and advantage of the city. . . ." Because the injury in *Bailey* was caused by a water utility maintained for the exclusive benefit of the residents of New York City, the court found the municipality liable "as a private company." *Ibid.* This distinction was construed to provide local governments with immunity in actions alleging inadequate police protection, *Western College of Homeopathic Medicine* v. *Cleveland*, 12 Ohio St. 375 (1861), improper sewer construction, *Child* v.

for determining when a local government should be liable for damages. See *infra*, at 681–683. Still, the governmental/proprietary distinction retains significance because it was so widely accepted when § 1983 was enacted. It is inconceivable that a Congress thoroughly versed in current legal doctrines, see *Monell* v. *New York City Dept. of Social Services*, 436 U. S., at 669, would have intended through silence to create the strict liability regime now imagined by this Court.

More directly relevant to this case is the common-law distinction between the "discretionary" and "ministerial" duties of local governments. This Court wrote in *Harris* v. *District of Columbia*, 256 U. S. 650, 652 (1921): "[W]hen acting in good faith municipal corporations are not liable for the manner in which they exercise discretionary powers of a public or legislative character." See *Weightman* v. *The Corporation of Washington*, 1 Black 39, 49–50 (1862). The rationale for this immunity derives from the theory of separation of powers. In *Carr* v. *The Northern Liberties*, 35 Pa. 324, 329 (1860), the Pennsylvania Supreme Court explained why a local government was immune from recovery for damage caused by an inadequate town drainage plan.

> "[H]ow careful we must be that courts and juries do not encroach upon the functions committed to other public officers. It belongs to the province of town councils to direct the drainage of our towns, according to the best of their means and discretion, and we cannot directly or indirectly control them in either. No law allows us to substitute the judgment of a jury . . . for that of the representatives of the town itself, to whom the business is especially committed by law."

Boston, 86 Mass. 41 (1862), negligent highway maintenance, *Hewison* v. *New Haven*, 37 Conn. 475 (1871), and unsafe school buildings, *Hill* v. *Boston*, 122 Mass. 344 (1877).

That reasoning, frequently applied in the 19th century,[17] parallels the theory behind qualified immunity under § 1983. This Court has recognized the importance of preserving the autonomy of executive bodies entrusted with discretionary powers. *Scheuer* v. *Rhodes* held that executive officials who have broad responsibilities must enjoy a "range of discretion [that is] comparably broad." 416 U. S., at 247. Consequently, the immunity available under § 1983 varies directly with "the scope of discretion and responsibilities of the office. . . ." 416 U. S., at 247. Strict municipal liability can only undermine that discretion.[18]

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[17] *E. g., Goodrich* v. *Chicago*, 20 Ill. 445 (1858); *Logansport* v. *Wright*, 25 Ind. 512 (1865); *Mills* v. *Brooklyn*, 32 N. Y. 489, 498–499 (1865); *Wilson* v. *Mayor &c. of City of New York*, 1 Denio 595, 600–601 (N. Y. 1845); *Wheeler* v. *Cincinnati*, 19 Ohio St. 19 (1869) (*per curiam*); *Richmond* v. *Long's Adm'rs*, 17 Gratt. 375 (Va. 1867); *Kelley* v. *Milwaukee*, 18 Wis. 83 (1864).

[18] The Court cannot wish away these extensive municipal immunities. It quotes two 19th-century treatises as referring to municipal liability for some torts. *Ante*, at 640. Both passages, however, refer to exceptions to the existing immunity rules. The first treatise cited by the Court concedes, though deplores, the fact that many jurisdictions embraced the governmental/proprietary distinction. T. Shearman & A. Redfield, A Treatise on the Law of Negligence § 120, pp. 140–141 (1869). The same volume notes that local governments could not be sued for injury caused by discretionary acts, *id.*, § 127, at 154, or for officers' acts beyond the powers of the municipal corporation, *id.*, § 140, at 169. The Court's quotation from Dillon on Municipal Corporations stops just before that writer acknowledges that local governments are liable only for injury caused by nondiscretionary acts involving "corporate duties." 2 J. Dillon, Law of Municipal Corporations § 764, p. 875 (2d ed. 1873). That writer's full statement of municipal tort liability recognizes immunity for both governmental and discretionary acts. Dillon observes that municipal corporations may be held liable only *"where a duty is a corporate one*, that is, one which rests upon the municipality in respect of its special or local interests, and not as a public agency, *and is absolute and perfect*, and not discretionary or judicial in its nature. . . ." *Id.*, § 778, at 891 (emphasis in original).

The Court takes some solace in the absence in the 19th century of a

The lack of support for the Court's view of the common law is evident in its reliance on *Thayer* v. *Boston*, 36 Mass. 511 (1837), as its principal authority. *Ante*, at 641–642. *Thayer* did hold broadly that a city could be liable for the authorized acts of its officers. 36 Mass., at 516. But *Thayer* was limited severely by later Massachusetts decisions. *Bigelow* v. *Inhabitants of Randolph*, 80 Mass. 541, 544–545 (1860), ruled that *Thayer* applied only to situations involving official malfeasance—or wrongful, bad-faith actions—not to actions based on neglect or nonfeasance. See *Child* v. *Boston*, 86 Mass. 41 (1862); *Buttrick* v. *Lowell*, 83 Mass. 172 (1861). Finally, *Hill* v. *Boston*, 122 Mass. 344, 359 (1877), squarely repudiated the broad holding of *Thayer* and limited municipal liability to acts performed in the proprietary interest of the municipality.[19]

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qualified immunity for local governments. *Ante*, at 644–650. That absence, of course, was due to the availability of absolute immunity for governmental and discretionary acts. There is no justification for discovering strict municipal liability in § 1983 when that statute was enacted against a background of extensive municipal immunity.

The Court also points out that municipalities were subject to suit for some statutory violations and neglect of contractual obligations imposed by State or Federal Constitutions. *Ante*, at 639–640. That amenability to suit is simply irrelevant to the immunity available in tort actions, which controls the immunity available under § 1983.

[19] The Court cites eight cases decided before 1871 as "reiterat[ing]" the principle announced in *Thayer* while awarding damages against municipalities for good-faith torts. Three of those cases involved the "special and peculiar" statutory liability of New England towns for highway maintenance, and are wholly irrelevant to the Court's argument. *Billings* v. *Worcester*, 102 Mass. 329, 332–333 (1869); *Horton* v. *Inhabitants of Ipswich*, 66 Mass. 488, 491 (1853) (trial court "read to the jury the provisions of the statutes prescribing the duties of towns to keep roads safe . . . and giving a remedy for injuries received from defects in highways"); *Elliot* v. *Concord*, 27 N. H. 204 (1853) (citing similar statute); see 2 J. Dillon, Law of Municipal Corporations § 1000, pp. 1013–1015, and n. 2 (3d ed. 1881). A fourth case, *Town Council of Akron* v. *McComb*, 18 Ohio 229 (1849), concerned damages caused by street-grading, and was later expressly restricted to those facts. *Western College of Homeopathic*

3

Today's decision also conflicts with the current law in 44 States and the District of Columbia. All of those jurisdictions provide municipal immunity at least analogous to a "good faith" defense against liability for constitutional torts. Thus, for municipalities in almost 90% of our jurisdictions, the Court creates broader liability for constitutional deprivations than for state-law torts.

Medicine v. *Cleveland*, 12 Ohio St., at 378–379. Two of the other cases cited by the Court involved the performance of ministerial acts that were widely recognized as giving rise to municipal liability. *Lee* v. *Village of Sandy Hill*, 40 N. Y. 442, 451 (1869) (liability for damage caused by street-opening when city was under a "duty" to open that street); *Hurley* v. *Town of Texas*, 20 Wis. 634 (1866) (improper tax collection). The seventh case presented malfeasance, or bad-faith acts, by the municipality's agents. *Hawks* v. *Inhabitants of Charlemont*, 107 Mass. 414 (1871) (city took material from plaintiff's land to repair bridge). Thus, despite any discussion of *Thayer* in the court opinions, seven of the eight decisions noted by the Court involved thoroughly unremarkable exceptions to municipal immunity as provided by statute or common law. They do not buttress the Court's theory of strict liability.

The Court also notes that Senator Stevenson mentioned *Thayer* during the debates on the Sherman amendment. *Ante*, at 642, and nn. 23, 24. That reference, however, came during a speech denouncing the Sherman amendment for imposing tort liability on municipal corporations. To reinforce his contention, Senator Stevenson read from the decision in *Prather* v. *Lexington*, 52 Ky. 559, 560–652 (1852), which cited *Thayer* for the general proposition that a municipal corporation is not liable on a *respondeat superior* basis for the unauthorized acts of its officers. Cong. Globe, 42d Cong., 1st Sess., 762 (1871). But the point of the passage in *Prather* read by Senator Stevenson—and the holding of that case—was that "no principle of law . . . subjects a municipal corporation to a responsibility for the safety of the property within its territorial limits." Cong. Globe, *supra*, quoting *Prather*, *supra*, at 561. So Stevenson cited *Prather* to demonstrate that municipalities should not be held vicariously liable for injuries caused within their boundaries. *Prather*, in turn, cited *Thayer* for a subsidiary point. Nowhere in this sequence is there any support for the Court's idea that local governments should be subjected to strict liability under § 1983.

Twelve States have laws creating municipal tort liability but barring damages for injuries caused by discretionary decisions or by the good-faith execution of a validly enacted, though unconstitutional, regulation.[20] Municipalities in those States have precisely the form of qualified immunity that this Court has granted to executive officials under § 1983. Another 11 States provide even broader immunity for local governments. Five of those have retained the governmental/proprietary distinction,[21] while Arkansas and South Dakota grant even broader protection for municipal corporations.[22] Statutes in four more States protect local governments from tort liability except for particular injuries not relevant to this case, such as those due to motor vehicle accidents or negligent maintenance of public facilities.[23] In

[20] Idaho Code § 6-904 (1) (1979); Ill. Rev. Stat., ch. 85, §§ 2-103, 2-109, 2-201, 2-203 (1977); Ind. Code §§ 34-4-16.5-3 (6), (8) (1976); 1979 Kan. Sess. Laws, ch. 186, § 4 (including specific exceptions to immunity); Mass. Gen. Laws Ann., ch. 258, §§ 10 (a), (b) (West Supp. 1979); Minn. Stat. §§ 466.03 (5), (6) (1978); Mont. Code Ann. §§ 2-9-103, 2-9-111, 2-9-112 (1979); Neb. Rev. Stat. §§ 23-2409 (1), (2) (1977); Nev. Rev. Stat. § 41.032 (1977); N. D. Cent. Code § 32-12.1-03 (3) (Supp. 1979); Okla. Stat., Tit. 51, §§ 155 (1)-(5) (Supp. 1979); Ore. Rev. Stat. §§ 30.265 (3)(c), (f) (1979).

The Federal Tort Claims Act provides a similar exemption for damages suits against the Federal Government. 28 U. S. C. § 2680 (a). The goal of that provision, according to this Court, is to protect this "discretion of the executive or the administrator to act according to one's judgment of the best course. . . ." *Dalehite* v. *United States*, 346 U. S. 15, 34 (1953).

[21] *Mayor and City Council of Baltimore* v. *Seidel*, — Md. App. —, 409 A. 2d 747 (1980); Mich. Comp. Laws § 691.1407 (1970); *Parks* v. *Long Beach*, 372 So. 2d 253, 253-254 (Miss. 1979); *Haas* v. *Hayslip*, 51 Ohio St. 2d 135, 139, 364 N. E. 2d 1376, 1379 (1977); *Virginia Electric & Power Co.* v. *Hampton Redevelopment & Housing Authority*, 217 Va. 30, 34, 225 S. E. 2d 364, 368 (1976).

[22] Ark. Stat. Ann. § 12-2901 (1979); *Shaw* v. *Mission*, 88 S. D. 564, 225 N. W. 2d 593 (1975).

[23] 1977 N. M. Laws, ch. 386, §§ 4-9; Pa. Stat. Ann., Tit. 53, § 5311.202 (b) (Purdon Supp. 1979-1980); *Wright* v. *North Charleston*, 271 S. C.

Iowa, local governments are not liable for injuries caused by the execution with due care of any "officially enacted" statute or regulation.[24]

Sixteen States and the District of Columbia follow the traditional rule against recovery for damages imposed by discretionary decisions that are confided to particular officers or organs of government.[25] Indeed, the leading commentators on governmental tort liability have noted both the appropriateness and general acceptance of municipal immunity for discretionary acts. See Restatement (Second) of Torts § 895C (2) and Comment *g* (1979); K. Davis, Administrative Law of the Seventies § 25.13 (1976); W. Prosser, Law of Torts 986–987 (4th ed. 1971). In four States, local governments enjoy complete immunity from tort actions unless they have taken out liability insurance.[26] Only five States

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515, 516–518, 248 S. E. 2d 480, 481–482 (1978), see S. C. Code §§ 5–7–70, 15–77–230 (1976 and Supp. 1979); 1979 Wyo. Sess. Laws, ch. 157, § 1 (to be codified as Wyo. Stat. §§ 1–39–105 to 112).

[24] Iowa Code § 613A.4 (3) (1979).

[25] Cal. Gov't Code Ann. §§ 815.2, 820.2 (West 1966); *Tango* v. *New Haven*, 173 Conn. 203, 204–205, 377 A. 2d 284, 285 (1977); *Biloon's Electrical Serv., Inc.* v. *Wilmington*, 401 A. 2d 636, 639–640, 643 (Del. Super. 1979); *Spencer* v. *General Hospital of the District of Columbia*, 138 U. S. App. D. C. 48, 53, 425 F. 2d 479, 484 (1969) (en banc); *Commercial Carrier Corp.* v. *Indian River County*, 371 So. 2d 1010, 1020 (Fla. 1979); Ga. Code § 69–302 (1978); *Frankfort Variety, Inc.* v. *Frankfort*, 552 S. W. 2d 653 (Ky. 1977); Me. Rev. Stat. Ann., Tit. 14, § 8103 (2)(C) (Supp. 1965–1979); *Merrill* v. *City of Manchester*, 114 N. H. 722, 729, 332 A. 2d 378, 383 (1974); N. J. Stat. Ann. §§ 59:2–2 (b) and 59:2–3 (West Supp. 1979–1980); *Weiss* v. *Fote*, 7 N. Y. 2d 579, 585–586, 167 N. E. 2d 63, 65–66 (1960); *Calhoun* v. *Providence*, — R. I. —, 390 A. 2d 350, 355–356 (1978); Tenn. Code Ann. § 23–3311 (1) (Supp. 1979); Tex. Rev. Civ. Stat. Ann., Art. 6252–19, § 14 (7) (Vernon 1970); Utah Code Ann. § 63–30–10 (1) (1953); *King* v. *Seattle*, 84 Wash. 2d 239, 246, 525 P. 2d 228, 233 (1974) (en banc); Wis. Stat. § 895.43 (3) (1977).

[26] Colo. Rev. Stat. § 24–10–104 (1973); Mo. Rev. Stat. § 71.185 (1978); N. C. Gen. Stat. § 160A–485 (1976); Vt. Stat. Ann., Tit. 29, § 1403 (1970).

impose the kind of blanket liability constructed by the Court today.[27]

C

The Court turns a blind eye to this overwhelming evidence that municipalities have enjoyed a qualified immunity and to the policy considerations that for the life of this Republic have justified its retention. This disregard of precedent and policy is especially unfortunate because suits under § 1983 typically implicate evolving constitutional standards. A good-faith defense is much more important for those actions than in those involving ordinary tort liability. The duty not to run over a pedestrian with a municipal bus is far less likely to change than is the rule as to what process, if any, is due the bus driver if he claims the right to a hearing after discharge.

The right of a discharged government employee to a "name clearing" hearing was not recognized until our decision in *Board of Regents* v. *Roth*, 408 U. S. 564 (1972). That ruling was handed down 10 weeks after Owen was discharged and 8 weeks after the city denied his request for a hearing. By stripping the city of any immunity, the Court punishes it for failing to predict our decision in *Roth*. As a result, local governments and their officials will face the unnerving prospect of crushing damages judgments whenever a policy valid under current law is later found to be unconstitutional. I can see no justice or wisdom in that outcome.

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[27] Ala. Code § 11-47-190 (1975); *State* v. *Jennings*, 555 P. 2d 248, 251 (Alaska 1976); Ariz. Rev. Stat. Ann. § 11-981 (A)(2) (Supp. 1979-1980); La. Const., Art. 12, § 10 (A); *Long* v. *Weirton*, — W. Va. —, —, 214 S. E. 2d 832, 859 (1975). It is difficult to determine precisely the tort liability rules for local governments in Hawaii.

WHALEN *v.* UNITED STATES

CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

No. 78-5471. Argued November 27, 28, 1979—Decided April 16, 1980

Petitioner was convicted under the District of Columbia Code of the separate statutory offenses of rape and of killing the same victim in the perpetration of the rape. Under the Code, the latter offense is a species of first-degree murder, but the statute, although requiring proof of a killing and of the commission or attempted commission of rape, does not require proof of an intent to kill. Petitioner was sentenced to consecutive terms of imprisonment of 20 years to life for first-degree murder, and of 15 years to life for rape. The District of Columbia Court of Appeals affirmed the convictions and sentences, rejecting petitioner's contention that his sentence for rape was improper because that offense merged for purposes of punishment with the felony-murder offense, and thus that the imposition of cumulative punishments for the two offenses was contrary to the federal statutes and to the Double Jeopardy Clause of the Fifth Amendment.

Held: The Court of Appeals was mistaken in believing that Congress authorized consecutive sentences in the circumstances of this case, and that error denied petitioner his right to be deprived of liberty as punishment for criminal conduct only to the extent authorized by Congress. Pp. 686-695.

(a) The customary deference ordinarily afforded by this Court to the District of Columbia Court of Appeals' construction of local federal legislation is inappropriate with respect to the statutes involved in this case, because petitioner's claim under the Double Jeopardy Clause, which protects against multiple punishments for the same offense, cannot be separated entirely from a resolution of the question of statutory construction. If a federal court exceeds its own authority by imposing multiple punishments not authorized by Congress, it violates not only the specific guarantee against double jeopardy, but also the constitutional principle of separation of powers in a manner that trenches particularly harshly on individual liberty. Pp. 688-690.

(b) Neither of the provisions of the District of Columbia Code specifying the separate offenses involved here indicates whether Congress authorized consecutive sentences where both statutes have been offended in a single criminal episode. However, another Code section, when construed in light of its history and its evident purpose, indicates

that multiple punishments cannot be imposed for two offenses arising out of the same criminal transaction unless each offense "requires proof of a fact which the other does not." The statute embodies in this respect the rule of statutory construction stated in *Blockburger* v. *United States*, 284 U. S. 299, 304, and, in this case, leads to the conclusion that Congress did not authorize consecutive sentences for rape and for a killing committed in the course of the rape, since it is plainly not the case that each provision "requires proof of a fact which the other does not." A conviction for killing in the course of a rape cannot be had without proving all the elements of the offense of rape. Pp. 690–695.

379 A. 2d 1152, reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, POWELL, and STEVENS, JJ., joined. WHITE, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 695. BLACKMUN, J., filed an opinion concurring in the judgment, *post*, p. 696. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., joined, *post*, p. 699.

Silas J. Wasserstrom argued the cause for petitioner. With him on the briefs were *William J. Mertens* and *W. Gary Kohlman.*

Deputy Solicitor General Frey argued the cause for the United States. With him on the brief were *Solicitor General McCree, Assistant Attorney General Heymann, Allan A. Ryan, Jr., Jerome M. Feit,* and *Elliott Schulder.*

MR. JUSTICE STEWART delivered the opinion of the Court.

After a jury trial, the petitioner was convicted in the Superior Court of the District of Columbia of rape, and of killing the same victim in the perpetration of rape. He was sentenced to consecutive terms of imprisonment of 20 years to life for first-degree murder, and of 15 years to life for rape. The District of Columbia Court of Appeals affirmed the convictions and the sentences. 379 A. 2d 1152.[1] We brought

[1] The jury also convicted the petitioner of other felonies, but these convictions were set aside by the District of Columbia Court of Appeals, ex-

the case here to consider the contention that the imposition of cumulative punishments for the two offenses was contrary to federal statutory and constitutional law. 441 U. S. 904.

I

Under the laws enacted by Congress for the governance of the District of Columbia, rape and killing a human being in the course of any of six specified felonies, including rape, are separate statutory offenses. The latter is a species of first-degree murder, but, as is typical of such "felony murder" offenses, the statute does not require proof of an intent to kill. D. C. Code § 22–2401 (1973). It does require proof of a killing and of the commission or attempted commission of rape or of one of five other specified felonies, in the course of which the killing occurred. *Ibid.* A conviction of first-degree murder is punishable in the District of Columbia by imprisonment for a term of 20 years to life. § 22–2404.[2] Forcible rape of a female is punishable by imprisonment for any term of years or for life. § 22–2801.

It is the petitioner's position that his sentence for the offense of rape must be vacated because that offense merged for purposes of punishment with the felony-murder offense, just as, for example, simple assault is ordinarily held to merge into the offense of assault with a dangerous weapon. See *Waller* v. *United States*, 389 A. 2d 801, 808 (D. C. 1978). The District of Columbia Court of Appeals disagreed, finding that "the societal interests which Congress sought to protect by enactment [of the two statutes] are separate and distinct,"

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cept for a second-degree murder conviction upon which the petitioner had received a concurrent sentence. The sentence itself was vacated by the appellate court.

[2] The statute also provides for a sentence of death upon conviction for first-degree murder, but that provision has been held to be unconstitutional. See *United States* v. *Stokes*, 365 A. 2d 615, 616, n. 4 (D. C. 1976); *United States* v. *Lee*, 160 U. S. App. D. C. 118, 123, 489 F. 2d 1242, 1247 (1973).

and that "nothing in th[e] legislation . . . suggest[s] that Congress intended" the two offenses to merge. 379 A. 2d, at 1159. That construction of the legislation, the petitioner argues, is mistaken, and he further argues that, so construed, the pertinent statutes impose on him multiple punishments for the same offense in violation of the Double Jeopardy Clause of the Fifth Amendment. Cf. *North Carolina* v. *Pearce*, 395 U. S. 711.

If this case had come here from a United States court of appeals, we would as a matter of course first decide the petitioner's statutory claim, and, only if that claim were rejected, would we reach the constitutional issue. See *Simpson* v. *United States*, 435 U. S. 6, 11–12. But this case comes from the District of Columbia Court of Appeals, and the statutes in controversy are Acts of Congress applicable only within the District of Columbia. In such cases it has been the practice of the Court to defer to the decisions of the courts of the District of Columbia on matters of exclusively local concern. See *Pernell* v. *Southall Realty*, 416 U. S. 363, 366; see also *Griffin* v. *United States*, 336 U. S. 704, 717–718; *Fisher* v. *United States*, 328 U. S. 463, 476. This practice has stemmed from the fact that Congress, in creating the courts of the District of Columbia and prescribing their jurisdiction, "contemplate[d] that the decisions of the District of Columbia Court of Appeals on matters of local law—both common law and statutory law—will be treated by this Court in a manner similar to the way in which we treat decisions of the highest court of a State on questions of state law." *Pernell* v. *Southall Realty*, 416 U. S., at 368 (footnote omitted).

But it is clear that the approach described in the *Pernell* opinion is a matter of judicial policy, not a matter of judicial power. Acts of Congress affecting only the District, like other federal laws, certainly come within this Court's Art. III jurisdiction, and thus we are not prevented from reviewing the decisions of the District of Columbia Court of Appeals interpreting those Acts in the same jurisdictional sense that we

are barred from reviewing a state court's interpretation of a state statute. *Ibid.* Cf. *Mullaney* v. *Wilbur*, 421 U. S. 684, 691; *Scripto, Inc.* v. *Carson*, 362 U. S. 207, 210; *Murdock* v. *Memphis*, 20 Wall. 590, 632–633.

In this case we have concluded that the customary deference to the District of Columbia Court of Appeals' construction of local federal legislation is inappropriate with respect to the statutes involved, for the reason that the petitioner's claim under the Double Jeopardy Clause cannot be separated entirely from a resolution of the question of statutory construction. The Fifth Amendment guarantee against double jeopardy protects not only against a second trial for the same offense, but also "against multiple punishments for the same offense." *North Carolina* v. *Pearce, supra*, at 717 (footnote omitted). But the question whether punishments imposed by a court after a defendant's conviction upon criminal charges are unconstitutionally multiple cannot be resolved without determining what punishments the Legislative Branch has authorized. See *Gore* v. *United States*, 357 U. S. 386, 390; *id.*, at 394 (Warren, C. J., dissenting on statutory grounds); *Bell* v. *United States*, 349 U. S. 81, 82; *Ex parte Lange*, 18 Wall. 163, 176; see also *Brown* v. *Ohio*, 432 U. S. 161, 165; *United States* v. *Universal C. I. T. Credit Corp.*, 344 U. S. 218; *Blockburger* v. *United States*, 284 U. S. 299; *Ebeling* v. *Morgan*, 237 U. S. 625.

It is not at all uncommon, for example, for Congress or a state legislature to provide that a single criminal offense may be punished both by a monetary fine and by a term of imprisonment. In that situation, it could not be seriously argued that the imposition of both a fine and a prison sentence in accordance with such a provision constituted an impermissible punishment. But if a penal statute instead provided for a fine *or* a term of imprisonment upon conviction, a court could not impose both punishments without running afoul of the double jeopardy guarantee of the Constitution. See *Ex parte Lange, supra*, at 176. Cf. *Bozza* v. *United States*, 330 U. S. 160, 167. In the present case, therefore, if Congress has not authorized

cumulative punishments for rape and for an unintentional killing committed in the course of the rape, contrary to what the Court of Appeals believed, the petitioner has been impermissibly sentenced. The dispositive question, therefore, is whether Congress did so provide.

The Double Jeopardy Clause at the very least precludes federal courts from imposing consecutive sentences unless authorized by Congress to do so. The Fifth Amendment guarantee against double jeopardy embodies in this respect simply one aspect of the basic principle that within our federal constitutional framework the legislative power, including the power to define criminal offenses and to prescribe the punishments to be imposed upon those found guilty of them, resides wholly with the Congress. See *United States* v. *Wiltberger*, 5 Wheat. 76, 95; *United States* v. *Hudson & Goodwin*, 7 Cranch 32, 34.[3] If a federal court exceeds its own authority by imposing multiple punishments not authorized by Congress, it violates not only the specific guarantee against double jeopardy, but also the constitutional principle of separation of powers in a manner that trenches particularly harshly on individual liberty.[4]

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[3] This is not to say that there are not constitutional limitations upon this power. See, *e. g.*, *Coker* v. *Georgia*, 433 U. S. 584; *Roe* v. *Wade*, 410 U. S. 113, 164; *Stanley* v. *Georgia*, 394 U. S. 557, 568; *Loving* v. *Virginia*, 388 U. S. 1, 12; *Robinson* v. *California*, 370 U. S. 660, 666–667.

[4] Although the courts of the District of Columbia were created by Congress pursuant to its plenary Art. I power to legislate for the District, see Art. I, § 8, cl. 17; D. C. Code § 11–101 (2) (1973), and are not affected by the salary and tenure provisions of Art. III, those courts, no less than other federal courts, may constitutionally impose only such punishments as Congress has seen fit to authorize.

The Court has held that the doctrine of separation of powers embodied in the Federal Constitution is not mandatory on the States. *Dreyer* v. *Illinois*, 187 U. S. 71, 84. See *Mayor of Philadelphia* v. *Educational Equality League*, 415 U. S. 605, 615, and n. 13; *Sweezy* v. *New Hampshire*, 354 U. S. 234, 255; *id.*, at 255, 256–257 (Frankfurter, J., concurring in result). It is possible, therefore, that the Double Jeopardy Clause does not, through the Fourteenth Amendment, circumscribe the penal authority

Because we have concluded that the District of Columbia Court of Appeals was mistaken in believing that Congress authorized consecutive sentences in the circumstances of this case, and because that error denied the petitioner his constitutional right to be deprived of liberty as punishment for criminal conduct only to the extent authorized by Congress, we reverse the judgment of the Court of Appeals.

II

As has already been noted, rape and the killing of a person in the course of rape in the District of Columbia are separate statutory offenses for which punishments are separately provided. Neither statute, however, indicates whether Congress authorized consecutive sentences where both statutes have been offended in a single criminal episode. Moreover, the legislative history of those specific penal provisions sheds no light on that question.[5] The issue is resolved, however, by an-

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of state courts in the same manner that it limits the power of federal courts. The Due Process Clause of the Fourteenth Amendment, however, would presumably prohibit state courts from depriving persons of liberty or property as punishment for criminal conduct except to the extent authorized by state law.

[5] Before 1962, conviction of first-degree murder in the District of Columbia led to a mandatory sentence of death by hanging. See Act of Mar. 3, 1901, § 801, 31 Stat. 1321. Accordingly, the question did not arise whether the sentence for another felony could run consecutively to that for first-degree murder. In 1962 Congress replaced the mandatory death penalty with the present language of D. C. Code § 22-2404 (1973), which allows, as an alternative to a penalty of death, a sentence of 20 years to life imprisonment. Pub. L. 87-423, 76 Stat. 46. Congress did not, however, address the matter of consecutive sentences in this amendatory legislation.

The parties in the present case are in agreement that Congress intended a person convicted of felony murder to be subject to the same penalty as a person convicted of premeditated murder, see, *e. g.*, 108 Cong. Rec. 4128-4129 (1962) (remarks of Sen. Hartke), and subject to more severe punishment than persons convicted of second-degree murder, see S. Rep. No. 373, 87th Cong., 1st Sess., 2 (1961); H. R. Rep. No. 677, 87th Cong., 1st Sess., 2 (1961). The parties disagree as to whether the consecutive sentences in

other statute, enacted in 1970. That statute is § 23–112 of the District of Columbia Code (1973), and it provides as follows:

> "A sentence imposed on a person for conviction of an offense shall, unless the court imposing such sentence expressly provides otherwise, run consecutively to any other sentence imposed on such person for conviction of an offense, whether or not the offense (1) arises out of another transaction, or (2) *arises out of the same transaction and requires proof of a fact which the other does not.*" (Emphasis added.)

Although the phrasing of the statute is less than felicitous, the message of the italicized clause, we think, is that multiple punishments cannot be imposed for two offenses arising out of the same criminal transaction unless each offense "requires proof of a fact which the other does not." The clause refers, of course, to a rule of statutory construction stated by this Court in *Blockburger* v. *United States*, 284 U. S. 299, and consistently relied on ever since to determine whether Congress has in a given situation provided that two statutory offenses may be punished cumulatively.[6] The assumption

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this case are in accord with that congressional intent. The petitioner argues that if a consecutive sentence for rape were permitted, he would be punished more severely than if he had committed premeditated murder. The Government counters that the relevant comparison is with the sentences permitted for premeditated murder plus rape, which can be consecutive. Likewise, the Government argues that since consecutive sentences would be permissible for second-degree murder and rape, such sentences should be permitted here to avoid punishing felony murder and rape less harshly. In our view of this case, this controversy need not now be resolved.

[6] The Government would read D. C. Code § 23–112 to mean that courts may ignore the *Blockburger* rule and freely impose consecutive sentences "whether or not" the statutory offenses are different under the rule. While this may be a permissible literal reading of the statute, it would lead to holding that the statute authorizes consecutive sentences for all greater and lesser included offenses—an extraordinary view that the Government

underlying the rule is that Congress ordinarily does not intend to punish the same offense under two different statutes. Accordingly, where two statutory provisions proscribe the "same offense," they are construed not to authorize cumulative punishments in the absence of a clear indication of contrary legislative intent. In the *Blockburger* case the Court held that "[t]he applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Id.*, at 304. See also *Brown* v. *Ohio*, 432 U. S., at 166; *Iannelli* v. *United States*, 420 U. S. 770; *Gore* v. *United States*, 357 U. S. 386.

The legislative history rather clearly confirms that Congress intended the federal courts to adhere strictly to the *Blockburger* test when construing the penal provisions of the District of Columbia Code. The House Committee Report expressly disapproved several decisions of the United States Court of Appeals for the District of Columbia Circuit that had not allowed consecutive sentences notwithstanding the fact that the offenses were different under the *Blockburger* test. See H. R. Rep. No. 91-907, p. 114 (1970). The Report restated the general principle that "whether or not consecutive sentences may be imposed depends on the intent of Congress." *Ibid.* But "[s]ince Congress in enacting legislation rarely specifies its intent on this matter, the courts have long adhered to the rule that Congress did intend to permit consecutive sentences . . . when each offense " 'requires proof of a fact which the other does not.' " *ibid.*, citing *Blockburger* v. *United States*, *supra*, and *Gore* v. *United States*, *supra*. The Com-

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itself disavows. Such an improbable construction of the statute would, moreover, be at odds with the evident congressional intention of requiring federal courts to adhere to the *Blockburger* rule in construing the penal provisions of the District of Columbia Code. See *infra*, this page and 693.

mittee Report observed that the United States Court of Appeals had "retreated from this settled principle of law" by requiring specific evidence of congressional intent to allow cumulative punishments, H. R. Rep. No. 91–907, at 114, and the Report concluded as follows:

> "To obviate the need for the courts to search for legislative intent, section 23–112 clearly states the rule for sentencing on offenses arising from the same transaction. For example, a person convicted of entering a house with intent to steal and stealing therefrom shall be sentenced consecutively on the crimes of burglary and larceny unless the judge provides to the contrary."

We think that the only correct way to read § 23–112, in the light of its history and its evident purpose, is to read it as embodying the *Blockburger* rule for construing the penal provisions of the District of Columbia Code. Accordingly, where two statutory offenses are not the same under the *Blockburger* test, the sentences imposed "shall, unless the court expressly provides otherwise, run consecutively." [7] And where the offenses are the same under that test, cumulative sentences are not permitted, unless elsewhere specially authorized by Congress.

In this case, resort to the *Blockburger* rule leads to the conclusion that Congress did not authorize consecutive sentences for rape and for a killing committed in the course of the rape, since it is plainly not the case that "each provision requires proof of a fact which the other does not." A conviction for

[7] There may be instances in which Congress has not intended cumulative punishments even for offenses that are different under the general provision contained in § 23–112. For example, in this case the District of Columbia Court of Appeals vacated the petitioner's sentence for second-degree murder, for the reason that, in the court's view, second-degree murder is a lesser included offense of first-degree felony murder, notwithstanding the fact that each offense requires proof of an element that the other does not. The correctness of the Court of Appeals' ruling in this regard is not an issue in this case.

killing in the course of a rape cannot be had without proving all the elements of the offense of rape. See *United States* v. *Greene*, 160 U. S. App. D. C. 21, 34, 489 F. 2d 1145, 1158 (1973). Cf. *Harris* v. *Oklahoma*, 433 U. S. 682, 682–683. The Government contends that felony murder and rape are not the "same" offense under *Blockburger*, since the former offense does not in all cases require proof of a rape; that is, D. C. Code § 22–2401 (1973) proscribes the killing of another person in the course of committing rape *or* robbery *or* kidnaping *or* arson, etc. Where the offense to be proved does not include proof of a rape—for example, where the offense is a killing in the perpetration of a robbery—the offense is of course different from the offense of rape, and the Government is correct in believing that cumulative punishments for the felony murder and for a rape would be permitted under *Blockburger*. In the present case, however, proof of rape is a necessary element of proof of the felony murder, and we are unpersuaded that this case should be treated differently from other cases in which one criminal offense requires proof of every element of another offense. There would be no question in this regard if Congress, instead of listing the six lesser included offenses in the alternative, had separately proscribed the six different species of felony murder under six statutory provisions. It is doubtful that Congress could have imagined that so formal a difference in drafting had any practical significance, and we ascribe none to it.[8] To the extent that the Government's argument persuades us that the matter is not entirely free of doubt, the doubt must be resolved in favor of lenity. See *Simpson* v. *United States*, 435 U. S. 6, 14–15; see also n. 10, *infra*.

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[8] Contrary to the view of the dissenting opinion, we do not in this case apply the *Blockburger* rule to the facts alleged in a particular indictment. *Post*, at 708–712. We have simply concluded that, for purposes of imposing cumulative sentences under D. C. Code § 23–112, Congress intended rape to be considered a lesser offense included within the offense of a killing in the course of rape.

Congress is clearly free to fashion exceptions to the rule it chose to enact in § 23–112. A court, just as clearly, is not. Accordingly, notwithstanding the arguments advanced by the Government in favor of imposing consecutive sentences for felony murder and for the underlying felony, we do not speculate about whether Congress, had it considered the matter, might have agreed.[9] It is sufficient for present purposes to observe that a congressional intention to change the general rule of § 23–112 for the circumstances here presented nowhere clearly appears. It would seriously offend the principle of the separation of governmental powers embodied in the Double Jeopardy Clause of the Fifth Amendment if this Court were to fashion a contrary rule with no more to go on than this case provides.[10]

For the foregoing reasons, the judgment of the District of Columbia Court of Appeals is reversed, and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE WHITE, concurring in part and concurring in the judgment.

Because the District of Columbia Court of Appeals did not take account of § 23–112 of the District of Columbia Code, this is one of those exceptional cases in which the judgment of that court is not entitled to the usual deference.

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[9] See n. 5, *supra*.

[10] This view is consistent with the settled rule that " 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity,' " *United States* v. *Bass*, 404 U. S. 336, 347. See *Simpson* v. *United States*, 435 U. S. 6; *Rewis* v. *United States*, 401 U. S. 808; *Ladner* v. *United States*, 358 U. S. 169; *Bell* v. *United States*, 349 U. S. 81. As the Court said in the *Ladner* opinion: "This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." 358 U. S., at 178.

Pernell v. *Southall Realty*, 416 U. S. 363, 369 (1974). This conclusion, in my opinion, need not rest on any constitutional considerations.

I agree for the reasons given by the Court that in light of § 23–112 and its legislative history, the court below erred in holding that Congress intended to authorize cumulative punishments in this case. But as I see it, the question is one of statutory construction and does not implicate the Double Jeopardy Clause. Had Congress authorized cumulative punishments, as the District of Columbia Court of Appeals held in this case, imposition of such sentences would not violate the Constitution. I agree with MR. JUSTICE BLACKMUN and MR. JUSTICE REHNQUIST in this respect.

MR. JUSTICE BLACKMUN, concurring in the judgment.

I join the judgment of the Court and much of its opinion. I write separately primarily to state my understanding of the effect, or what should be the effect, of the Court's holding on general double jeopardy principles.

(1) I agree with the Court that it would be inappropriate in this case to accord complete deference to the District of Columbia Court of Appeals' construction of the local legislation at issue. In addition to the reasons offered in the Court's opinion, *ante*, at 688–689, I would point out that the conclusions of the Court of Appeals concerning the intent of Congress in enacting the felony-murder statute were unsupported by appropriate references to the legislative history. Moreover, that court ignored the effect of § 23–112 of the District of Columbia Code, which I have concluded is dispositive of this case. I view the case, therefore, as one falling within the class of " 'exceptional situations where egregious error has been committed.' " *Pernell* v. *Southall Realty*, 416 U. S. 363, 369 (1974), quoting from *Griffin* v. *United States*, 336 U. S. 704, 718 (1949), and *Fisher* v. *United States*, 328 U. S. 463, 476 (1946). Where such an error has been com-

mitted, this Court is barred neither by Art. III nor past practice from overruling the courts of the District of Columbia on a question of local law. *Pernell*, 416 U. S., at 365–369.

(2) I agree with the Court that "the question whether punishments imposed by a court after a defendant's conviction upon criminal charges are unconstitutionally multiple cannot be resolved without determining what punishments the Legislative Branch has authorized." *Ante*, at 688. I read the opinions cited by the Court in support of that proposition, however, as pronouncing a broader and more significant principle of double jeopardy law. The *only* function the Double Jeopardy Clause serves in cases challenging multiple punishments is to prevent the prosecutor from bringing more charges, and the sentencing court from imposing greater punishments, than the Legislative Branch intended. It serves, in my considered view, nothing more. "Where consecutive sentences are imposed at a single criminal trial, the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense." *Brown* v. *Ohio*, 432 U. S. 161, 165 (1977).[1]

Dicta in recent opinions of this Court at least have suggested, and I now think wrongly, that the Double Jeopardy Clause may prevent the imposition of cumulative punishments in situations in which the Legislative Branch *clearly intended* that multiple penalties be imposed for a single criminal transaction. See *Simpson* v. *United States*, 435 U. S.

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[1] The Court in *Brown* cited the following decisions in support of its observations concerning the role of the Double Jeopardy Clause in multiple punishment cases: *Gore* v. *United States*, 357 U. S. 386 (1958); *Bell* v. *United States*, 349 U. S. 81 (1955); and *Ex parte Lange*, 18 Wall. 163 (1874). See also *Ashe* v. *Swenson*, 397 U. S. 436, 460, n. 14 (1970) (BRENNAN, J., concurring); M. Friedland, Double Jeopardy 205, 212 (1969); Westen & Drubel, Toward a General Theory of Double Jeopardy, 1978 S. Ct. Rev. 81, 112–113, 158–159; Note, Twice in Jeopardy, 75 Yale L. J. 262, 302–313 (1965).

6, 11–13 (1978); *Jeffers* v. *United States*, 432 U. S. 137, 155 (1977) (plurality opinion). I believe that the Court should take the opportunity presented by this case to repudiate those dicta squarely, and to hold clearly that the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed. I must concede that the dicta that seemingly support a contrary view have caused confusion among state courts that have attempted to decipher our pronouncements concerning the Double Jeopardy Clause's role in the area of multiple punishments.[2]

(3) Finally, I agree with the Court that § 23–112 expresses Congress' intent not to authorize the imposition of consecutive sentences in cases in which the two offenses involved do not each require proof of a fact that the other does not. *Ante*, at 690–693. The question then remains whether the crimes of rape and felony murder based upon that rape each require proof of a fact that the other does not. I would agree that they do not, and for the reasons stated by the Court, *ante*, at 693–694. I hasten to observe, however, that this result turns on a determination of Congress' intent. The Court's holding today surely does not require that the same result automatically be reached in a State where the legislature enacts criminal sanctions clearly authorizing cumulative sentences for a defendant convicted on charges of felony murder and the underlying predicate felony. Nor does this Court's *per curiam* opinion in *Harris* v. *Oklahoma*, 433 U. S. 682 (1977),

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[2] See *People* v. *Hughes*, 85 Mich. App. 674, 272 N. W. 2d 567 (1978); *id.*, at 683–687, 272 N. W. 2d, at 569–571 (Bronson, J., concurring); *id.*, at 687–696, 272 N. W. 2d, at 571–575 (Walsh, J., dissenting); *Ennis* v. *State*, 364 So. 2d 497 (Fla. App. 1978); *id.*, at 500 (Grimes, C. J., concurring); and *State* v. *Frye*, 283 Md. 709, 393 A. 2d 1372 (1978); *id.*, at 725–726, 393 A. 2d, at 1380–1381 (Murphy, C. J., concurring). In each of these state cases, the panels divided on the meaning of this Court's pronouncements respecting the Double Jeopardy Clause's prohibition against multiple punishments. See also cases cited in n. 3, *infra*.

holding that *successive prosecutions* for felony murder and the underlying predicate felony are constitutionally impermissible, require the States to reach an analogous result in a multiple punishments case. Unfortunately, the rather obvious holding in *Harris* and the dictum in *Simpson* have combined to spawn disorder among state appellate courts reviewing challenges similar to the one presented here.[3] I would hope that today's holding will remedy, rather than exacerbate, the existing confusion.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

Historians have traced the origins of our constitutional guarantee against double jeopardy back to the days of Demosthenes, who stated that "the laws forbid the same man to be tried twice on the same issue. . . ." 1 Demosthenes 589 (J. Vince trans., 4th ed. 1970). Despite its roots in antiquity, however, this guarantee seems both one of the least understood and, in recent years, one of the most frequently litigated provisions of the Bill of Rights. This Court has done little to alleviate the confusion, and our opinions, including ones authored by me, are replete with *mea culpa*'s occasioned by shifts in assumptions and emphasis. Compare, *e. g.*, *United States* v. *Jenkins*, 420 U. S. 358 (1975), with *United States* v. *Scott*, 437 U. S. 82 (1978) (overruling *Jenkins*). See also *Burks* v. *United States*, 437 U. S. 1, 9 (1978) (Our

[3] Compare *People* v. *Anderson*, 62 Mich. App. 475, 233 N. W. 2d 620 (1975) (a case in which a state court concluded, based on relevant indicia of legislative intent, that cumulative punishments for armed robbery and a felony murder based upon that robbery were not intended), with *State* v. *Pinder*, 375 So. 2d 836 (Fla. 1979); *State* v. *Frye*, 283 Md. 709, 393 A. 2d 1372 (1978); *State* v. *Innis*, — R. I. —, 391 A. 2d 1158 (1978), cert. granted, 440 U. S. 934 (1979); *Mitchell* v. *State*, — Ind. —, 382 N. E. 2d 932 (1978); *Briggs* v. *State*, 573 S. W. 2d 157 (Tenn. 1978) (the latter decisions, erroneously I believe, gave controlling effect to *Harris* in challenges to cumulative punishments for felony murder and the underlying felony).

holdings on this subject "can hardly be characterized as models of consistency and clarity"). Although today's decision takes a tentative step toward recognizing what I believe to be the proper role for this Court in determining the permissibility of multiple punishments, it ultimately compounds the confusion that has plagued us in the double jeopardy area.

I

In recent years we have stated in the manner of "black letter law" that the Double Jeopardy Clause serves three primary purposes. First, it protects against a second prosecution for the same offense after an acquittal. Second, it protects against a second prosecution for the same offense after a conviction. Third, it protects against multiple punishments for the same offense. See *North Carolina* v. *Pearce*, 395 U. S. 711, 717 (1969); *Brown* v. *Ohio*, 432 U. S. 161, 165 (1977). See also *ante*, at 688 (opinion of the Court). Obviously, the scope of each of these three protections turns upon the meaning of the words "same offense," a phrase deceptively simple in appearance but virtually kaleidoscopic in application. Indeed, we have indicated on at least one prior occasion that the meaning of this phrase may vary from context to context, so that two charges considered the same offense so as to preclude prosecution on one charge after an acquittal or conviction on the other need not be considered the same offense so as to bar separate punishments for each charge at a single proceeding. See *Brown* v. *Ohio*, *supra*, at 166–167, n. 6.

In the present case we are asked to decide whether the Double Jeopardy Clause bars the imposition of separate punishments for the crimes of rape and felony murder based on rape. Because the sentences challenged by petitioner were imposed at a single criminal proceeding, this case obviously is not controlled by precedents developed in the context of successive prosecutions. Thus, the Court rightly

eschews reliance upon *Harris* v. *Oklahoma*, 433 U. S. 682 (1977), where we concluded that the crimes of robbery and felony murder predicated on that robbery were similar enough to prevent the State of Oklahoma from prosecuting a person for the former offense after convicting him of the latter offense. See *ante*, at 694 (opinion of the Court). See also *ante*, at 698–699 (BLACKMUN, J., concurring in judgment).

Having determined that this case turns on the permissibility of "multiple punishments" imposed at a single criminal proceeding, the Court takes a tentative step in what I believe to be the right direction by indicating that the "dispositive question" here is whether Congress intended to authorize separate punishments for the two crimes. *Ante*, at 689 (opinion of the Court). As MR. JUSTICE BLACKMUN notes in his concurrence, this Court has not always been so forthright in recognizing that Congress could, if it so desired, authorize cumulative punishments for violation of two separate statutes, whether or not those statutes defined "separate offenses" in some abstract sense. See *ante*, at 698. While we have hinted at this proposition in prior opinions, see, *e. g.*, *Brown* v. *Ohio*, *supra*, at 165; *Gore* v. *United States*, 357 U. S. 386, 394 (1958) (Warren, C. J., dissenting), we have just as often hedged our bets with veiled hints that a legislature might offend the Double Jeopardy Clause by authorizing too many separate punishments for any single "act." See, *e. g.*, *Simpson* v. *United States*, 435 U. S. 6, 11–12 (1978); *Sanabria* v. *United States*, 437 U. S. 54, 69 (1978); *Jeffers* v. *United States*, 432 U. S. 137, 155 (1977) (plurality opinion). To the extent that this latter thesis assumes that any particular criminal transaction is made up of a determinable number of constitutional atoms that the legislature cannot further subdivide into separate offenses, "it demands more of the Double Jeopardy Clause than it is capable of supplying." Westen & Drubel, Toward a General Theory of Double Jeopardy, 1978 S. Ct. Rev. 81, 113. See also Note, Twice in Jeopardy, 75 Yale L. J. 262, 311–313 (1965).

Having come thus far with the Court and the concurrence, I here part company, for it seems clear to me that, if the only question confronting this Court is whether Congress intended to authorize cumulative punishments for rape and for felony murder based upon rape, this Court need decide no constitutional question whatsoever. Axiomatically, we are obligated to avoid constitutional rulings where a statutory ruling would suffice. See *Hagans* v. *Lavine*, 415 U. S. 528, 549 (1974); *Ashwander* v. *TVA*, 297 U. S. 288, 347 (1936) (Brandeis, J., concurring). Thus, to the extent that the trial court exceeded its legislative authorization in sentencing petitioner to consecutive sentences for rape and felony murder where Congress intended the offenses to merge, our holding should rest solely on our interpretation of the relevant statutes rather than on vague references to "the principle of the separation of governmental powers embodied in the Double Jeopardy Clause of the Fifth Amendment. . . ." *Ante*, at 695 (opinion of the Court).

Like many of the false trails we have followed in this area, the Court's confusion of statutory and constitutional inquiries is not without precedent. *Brown* v. *Ohio* contains dictum to the effect that, "[w]here consecutive sentences are imposed at a single criminal trial," the Double Jeopardy Clause prevents the sentencing court from "exceed[ing] its legislative authorization by imposing multiple punishments for the same offense." 432 U. S., at 165. In support of this dictum, which I believe ill-considered, *Brown* cited three cases: *Ex parte Lange*, 18 Wall. 163 (1874); *Bell* v. *United States*, 349 U. S. 81 (1955); and *Gore* v. *United States*, *supra*. In doing so, it tied together three separate strands of cases in what may prove to be a true Gordian knot.

In *Ex parte Lange* petitioner had been convicted under a statute authorizing a punishment of either fine or imprisonment. The District Court nevertheless sentenced him to a fine *and* imprisonment. Petitioner had paid his fine and had begun to serve his sentence when the District Court, appar-

ently recognizing its mistake, held a new sentencing proceeding and resentenced him to imprisonment only. Noting that petitioner had fully satisfied the relevant statute by paying the fine, this Court held that he was entitled to protection from a second punishment "in the same court, on the same facts, for the same statutory offence." 18 Wall., at 168. As is borne out by subsequent cases, the Double Jeopardy Clause as interpreted in *Ex parte Lange* prevents a sentencing court from increasing a defendant's sentence for any particular statutory offense, even though the second sentence is within the limits set by the legislature. See *North Carolina* v. *Pearce,* 395 U. S. 711 (1969); *United States* v. *Benz,* 282 U. S. 304, 307 (1931). See also *United States* v. *Sacco,* 367 F. 2d 368 (CA2 1966); *United States* v. *Adams,* 362 F. 2d 210 (CA6 1966); *Kennedy* v. *United States,* 330 F. 2d 26 (CA9 1964).

In *Bell* v. *United States, supra,* this Court considered a question wholly different from that considered in *Ex parte Lange* and its progeny: the proper units into which a statutory offense was to be divided. The petitioner in *Bell* had been convicted of two counts of violating the Mann Act, 18 U. S. C. § 2421 *et seq.*, for carrying two women across state lines for an immoral purpose. Both counts dealt with the same trip in the same car. The question presented to the Court was whether simultaneous transportation of more than one woman in violation of the Mann Act constituted multiple violations of that Act subjecting the offender to multiple punishments. The Court noted that Congress could, if it so desired, hinge the severity of the punishment on the number of women involved. Finding no evidence of such an intent, the Court applied the traditional "rule of lenity" and held that petitioner could only be punished for a single count.

Most significantly for our purposes, *Bell* was based entirely upon this Court's interpretation of the statute and the relevant legislative intent; it did not mention the Double Jeopardy Clause at all. In finding congressional intent on the

appropriate unit of prosecution dispositive, the Court acted consistently with a long line of cases based in English common law. In *Crepps* v. *Durden*, 2 Cowp. 640, 98 Eng. Rep. 1283 (K. B. 1777), Lord Mansfield, writing for a unanimous court, held that the sale of four loaves of bread on Sunday in violation of a statute forbidding such sale constituted one offense, not four. According to Lord Mansfield: "If the Act of Parliament gives authority to levy but one penalty, there is an end of the question. . . ." *Id.*, at 646, 98 Eng. Rep., at 1287. One hundred years later, this Court expressly adopted the reasoning of *Crepps* that the proper unit of prosecution was completely dependent upon the legislature's intent. See *In re Snow*, 120 U. S. 274, 283–286 (1887). We have consistently abided by this rule since that time, noting on at least one occasion that "[t]here is no constitutional issue presented" in such cases. See *Ladner* v. *United States*, 358 U. S. 169, 173 (1958). See also *United States* v. *Universal C. I. T. Credit Corp.*, 344 U. S. 218 (1952); *Ebeling* v. *Morgan*, 237 U. S. 625 (1915). Cf. *Sanabria* v. *United States*, 437 U. S., at 69–70 (successive prosecutions).

Gore v. *United States*, the third case cited in *Brown*, presented an issue analogous to, but slightly different from, that presented in *Bell* and the other unit-of-prosecution cases, namely, the permissibility of consecutive sentences when a defendant committed a single act that violated two or more criminal provisions. This issue, the precise one confronting us today, has been litigated in an astonishing number of statutory contexts with little apparent analytical consistency. See, *e. g.*, *Simpson* v. *United States*; *Harris* v. *United States*, 359 U. S. 19 (1959); *Heflin* v. *United States*, 358 U. S. 415 (1959); *Prince* v. *United States*, 352 U. S. 322 (1957); *Pereira* v. *United States*, 347 U. S. 1 (1954); *American Tobacco Co.* v. *United States*, 328 U. S. 781 (1946); *Holiday* v. *Johnston*, 313 U. S. 342 (1941); *Blockburger* v. *United States*, 284 U. S. 299 (1932); *Morgan* v. *Devine*, 237 U. S. 632 (1915); *Burton* v. *United States*, 202 U. S. 344 (1906); *Car-*

ter v. *McClaughry*, 183 U. S. 365 (1902). In some of these cases the Court seems to have recognized that it was attempting to divine legislative intent. See, *e. g.*, *Prince* v. *United States*, *supra*, at 328; *Morgan* v. *Devine*, *supra*, at 638–639; *Burton* v. *United States*, *supra*, at 377. In other cases, the Court seemed to apply a "same evidence" test borrowed from cases involving successive prosecutions.[1] See, *e. g.*, *Pereira* v. *United States*, *supra*, at 9; *Carter* v. *McClaughry*, *supra*, at 394–395. In still others it is difficult to determine the precise basis for the Court's decision. See, *e. g.*, *Harris* v. *United States*, *supra*. As in the unit-of-prosecution cases, this Court has specified on at least one occasion that the erroneous imposition of cumulative sentences in a single case raises no constitutional issue at all. See *Holiday* v. *Johnston*, *supra*, at 349.

Unlike the Court, I believe that the Double Jeopardy Clause should play no role whatsoever in deciding whether cumulative punishments may be imposed under different statutes at a single criminal proceeding. I would analogize the

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[1] The "same evidence" test was first formulated in *Morey* v. *Commonwealth*, 108 Mass. 433, 434 (1871), where the Supreme Judicial Court of Massachusetts held:

"A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offence. A single act may be an offence against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other."

This Court has placed varying degrees of reliance upon this test both in the context of successive prosecutions, see, *e. g.*, *Brown* v. *Ohio*, 432 U. S. 161 (1977); *Gavieres* v. *United States*, 220 U. S. 338, 342 (1911), and in the context of multiple punishments imposed at a single criminal proceeding. See, *e. g.*, *Blockburger* v. *United States*, 284 U. S. 299 (1932); *Carter* v. *McClaughry*, 183 U. S. 365 (1902). See also *infra*, at 707–714.

present case to our unit-of-prosecution decisions and ask only whether Congress intended to allow a court to impose consecutive sentences on a person in petitioner's position. To paraphrase Lord Mansfield's statement in *Crepps* v. *Durden*, *supra*, that should be the end of the question. As even the Court's analysis of the merits here makes clear, see *ante*, at 690–694, traditional statutory interpretation as informed by the rule of lenity completely supplants any possible additional protection afforded petitioner by the Double Jeopardy Clause.

The difference in this context between a constitutional decision and a statutory decision is not merely one of judicial semantics. Both the Court and the concurrence appear to invoke the Double Jeopardy Clause to justify their refusal to defer to the District of Columbia Court of Appeals' interpretation of these locally applicable statutes. See *ante*, at 688 (opinion of the Court); *ante*, at 696 (BLACKMUN, J., concurring in judgment). The mischief in this approach, I believe, is well illustrated in a footnote—fairly described as either cryptic or tautological—stating that "[t]he Due Process Clause of the Fourteenth Amendment . . . would presumably prohibit state courts from depriving persons of liberty or property as punishment for criminal conduct except to the extent authorized by state law." *Ante*, at 690, n. 4 (opinion of the Court). The effect of this and similar statements in the opinion of the Court, I fear, will be to raise doubts about questions of state law that heretofore had been thought to be exclusively the province of the highest courts of the individual States. To the extent that the Court implies that a state court can ever err in the interpretation of its own law and that such an error would create a federal question reviewable by this Court, I believe it clearly wrong.[2] For the question in

[2] We are not dealing here, of course, with a case where a state court has engaged in "retroactive lawmaking" by interpreting a local statute in an unforeseeable manner. Compare *Bouie* v. *City of Columbia*, 378 U. S. 347 (1964), with *Rose* v. *Locke*, 423 U. S. 48 (1975).

such cases is not whether the lower court "misread" the relevant statutes or its own common law, but rather who does the reading in the first place.

II

Because the question before us is purely one of statutory interpretation, I believe that we should adhere to our "long-standing practice of not overruling the courts of the District on local law matters 'save in exceptional situations where egregious error has been committed.'" *Pernell* v. *Southall Realty*, 416 U. S. 363, 369 (1974), quoting from *Griffin* v. *United States*, 336 U. S. 704, 718 (1949). In the present case I would suggest that the lower court, far from committing "egregious error," engaged in analysis much more sophisticated than that employed by the Court herein and reached a conclusion that is not only defensible, but quite probably correct.

The Court's attempt to determine whether Congress intended multiple punishment in a case like petitioner's is really quite cramped. It looks first to the legislative history surrounding the adoption of the relevant provisions and finds that history inconclusive. See *ante*, at 690, and n. 5. It then attempts to mechanistically apply the rule of statutory construction employed by this Court in *Blockburger* v. *United States*, 284 U. S. 299 (1932). See *ante*, at 691–694. Under that test, two statutory provisions are deemed to constitute the "same offense" so as to preclude imposition of multiple punishments unless "each provision requires proof of a fact which the other does not." 284 U. S., at 304. In *Blockburger*, for example, this Court determined that a provision forbidding the sale of certain drugs except in or from the original stamped package and a provision forbidding the selling of the same drugs "not in pursuance of a written order of the" purchaser defined separate offenses because "each of the offenses created requires proof of a different element." *Ibid.* Thus, separate penalties could be imposed under each statute, even though both offenses were based on the same sale.

Two observations about the *Blockburger* test are especially relevant in this case. First, the test is a rule of statutory construction, not a constitutional talisman.[3] See *Iannelli* v. *United States*, 420 U. S. 770, 785, n. 17 (1975). Having already posited that the Double Jeopardy Clause imposes no restraint upon a legislature's ability to provide for multiple punishments, I believe it clear that a legislature could, if it so desired, provide for separate punishments under two statutory provisions, even though those provisions define the "same offense" within the meaning of *Blockburger*. To take a simple example, a legislature might set the penalty for assault at two years' imprisonment while setting the penalty for assault with a deadly weapon as "two years for assault and an additional two years for assault with a deadly weapon." Even though the former crime is obviously a lesser included offense of the latter crime—or, in the rubric of *Blockburger*, the first offense does not require proof of any fact that the second does not—neither *Blockburger* nor the Double Jeopardy Clause would preclude the imposition of the "cumulative" sentence of two years.[4]

Second, the *Blockburger* test, although useful in identifying statutes that define greater and lesser included offenses in the traditional sense, is less satisfactory, and perhaps even misdirected, when applied to statutes defining "compound" and "predicate" offenses. Strictly speaking, two crimes do not stand in the relationship of greater and lesser included offenses unless proof of the greater necessarily entails proof of the

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[3] It should not matter whether the *Blockburger* test enters this case as a common canon of statutory construction, see *Iannelli* v. *United States*, 420 U. S. 770, 785, n. 17 (1975), or through the "less than felicitous" phrasing of D. C. Code § 23-112. See *ante*, at 691 (opinion of the Court). In either case, the dispositive question is whether the legislature intended to allow multiple punishments, and the *Blockburger* test should be employed only to the extent that it advances that inquiry.

[4] In this regard, see also the discussion of the sentencing scheme under 18 U. S. C. § 924 (c) (1), *infra*, at 709.

lesser. See *Brown* v. *Ohio*, 432 U. S., at 167–168. See also Black's Law Dictionary 1048 (rev. 4th ed. 1968). In the case of assault and assault with a deadly weapon, proof of the latter offense will always entail proof of the former offense, and this relationship holds true regardless whether one examines the offenses in the abstract or in the context of a particular criminal transaction.

On the other hand, two statutes stand in the relationship of compound and predicate offenses when one statute incorporates several other offenses by reference and compounds those offenses if a certain additional element is present. To cite one example, 18 U. S. C. § 924 (c)(1) states that "[w]hoever . . . uses a firearm to commit any felony for which he may be prosecuted in a court of the United States . . . shall . . . be sentenced to a term of imprisonment for not less than one year nor more than ten years." Clearly, any one of a plethora of felonies could serve as the predicate for a violation of § 924 (c)(1).

This multiplicity of predicates creates problems when one attempts to apply *Blockburger*. If one applies the test in the abstract by looking solely to the wording of § 924 (c)(1) and the *statutes defining* the various predicate felonies, *Blockburger* would always permit imposition of cumulative sentences, since no particular felony is ever "necessarily included" within a violation of § 924 (c)(1). If, on the other hand, one looks to the *facts alleged in a particular indictment* brought under § 924 (c)(1), then *Blockburger* would bar cumulative punishments for violating § 924 (c)(1) and the particular predicate offense charged in the indictment, since proof of the former would necessarily entail proof of the latter.

Fortunately, in the case of § 924 (c)(1) Congress made its intention explicit, stating unequivocally that the punishment for violation of that statute should be imposed "in addition to the punishment provided for the commission of [the predicate] felony. . . ." 18 U. S. C. § 924 (c). But in the present

case, where the statutes at issue also stand in the relationship of compound and predicate offenses, Congress has not stated its intentions so explicitly. The felony-murder statute under consideration here provides:

> "Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson, . . . rape, mayhem, robbery, or kidnapping, or in perpetrating or attempting to perpetrate any housebreaking while armed with or using a dangerous weapon, is guilty of murder in the first degree." D. C. Code § 22-2401 (1973).

The rape statute under consideration reads, in relevant part:

> "Whoever has carnal knowledge of a female forcibly and against her will . . . shall be imprisoned for any term of years or for life." D. C. Code § 22-2801 (1973).

If one tests the above-quoted statutes in the abstract, one can see that rape is not a lesser included offense of felony murder, because proof of the latter will not necessarily require proof of the former. One can commit felony murder without rape and one can rape without committing felony murder. If one chooses to apply *Blockburger* to the *indictment* in the present case, however, rape is a "lesser included offense" of felony murder because, *in this particular case*, the prosecution could not prove felony murder without proving the predicate rape.

Because this Court has never been forced to apply *Blockburger* in the context of compound and predicate offenses,[5]

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[5] But see, *Simpson* v. *United States*, 435 U. S. 6, 11–12, and n. 6 (1978) (reserving application of *Blockburger* in context of 18 U. S. C. § 924 (c)); *Jeffers* v. *United States*, 432 U. S. 137, 149–150 (1977) (BLACKMUN, J.) (assuming, *arguendo*, that 21 U. S. C. § 846 is a lesser

we have not had to decide whether *Blockburger* should be applied abstractly to the statutes in question or specifically to the indictment as framed in a particular case. Our past decisions seem to have assumed, however, that *Blockburger*'s analysis stands or falls on the wording of the statutes alone. Thus, in *Blockburger* itself the Court stated that "the applicable rule is that where the same act or transaction constitutes a violation of two distinct *statutory provisions*, the test to be applied to determine whether there are two offenses or only one, is whether each *provision* requires proof of a fact which the other does not." 284 U. S., at 304 (emphasis added). More recently, we framed the test as whether " 'each *statute* requires proof of an additional fact which the other does not. . . .' " *Brown* v. *Ohio*, 432 U. S., at 166, quoting *Morey* v. *Commonwealth*, 108 Mass. 433, 434 (1871) (emphasis added). See also *Iannelli* v. *United States*, 420 U. S., at 785, n. 17 ("[T]he Court's application of the [*Blockburger*] test focuses on the statutory elements of the offense"); M. Friedland, Double Jeopardy 212–213 (1969) (noting the two possible interpretations and pointing out that "the word 'provision' is specifically used in the test" as stated in *Blockburger*). Moreover, because the *Blockburger* test is simply an attempt to determine legislative intent, it seems more natural to apply it to the language as drafted by the legislature than to the wording of a particular indictment.

The Court notes this ambiguity but chooses instead to apply the test to the indictment in the present case.[6] See

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included offense of 21 U. S. C. § 848). But see also *American Tobacco Co.* v. *United States*, 328 U. S. 781, 788 (1946) (finding, under *Blockburger*, that conspiracies to violate §§ 1 and 2 of the Sherman Act could be punished separately).

[6] The Court denies that it applies the *Blockburger* test to the indictment in this case, asserting instead that it merely concludes that "rape [is] to be considered a lesser offense included within the offense of a killing in the course of rape." *Ante*, at 694, n. 8. Our disagreement on this matter turns on the elusive meaning of the word "offense." Technically,

ante, at 693–694. In doing so, it offers only two reasons for rejecting what would seem to be the more plausible interpretation of *Blockburger*. First, the Court notes that Congress *could* have broken felony murder down in six separate statutory provisions, one for each of the predicate offenses specified in § 22–2401, thereby insuring that, under *Blockburger*, rape would be a lesser included offense of murder in the course of rape. According to the Court, "[i]t is doubtful that Congress could have imagined that so formal a difference in drafting had any practical significance, and we ascribe none to it." *Ante*, at 694. The short answer to this argument is that Congress did *not* break felony murder down into six separate statutory provisions. Thus, it hardly avails the Court to apply *Blockburger* to a statute that Congress did not enact. More significantly, however, I believe that the Court's example illustrates one of my central points: when applied to compound and predicate offenses, the *Blockburger* test has nothing whatsoever to do with legislative intent, turning instead on arbitrary assumptions and syntactical subtleties. Cf. n. 6, *supra*. If the polestar in this case is to be legislative intent, I see no reason to apply *Blockburger* unless it advances that inquiry.

Second, the Court asserts that "to the extent that . . . the matter is not entirely free of doubt, the doubt must be re-

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§ 22–2401 defines only one offense, murder in the first degree, which can be committed in any number of ways. Even if the inquiry is limited to the "sub-offense" of felony murder, § 22–2401 indicates that a person may be convicted if he kills purposely in the course of committing any felony or kills even accidentally in the course of committing one of six specified felonies. Only by limiting the inquiry to a killing committed in the course of a rape, a feat that cannot be accomplished without reference to the facts alleged in this particular case, can the Court conclude that the predicate offense is necessarily included in the compound offense under *Blockburger*. Because this Court has never before had to apply the *Blockburger* test to compound and predicate offenses, see n. 5, *supra*, and accompanying text, there is simply no precedent for parsing a single statutory provision in this fashion.

solved in favor of lenity." *Ante*, at 694. This assertion, I would suggest, forms the real foundation of the Court's decision. Finding no indication in the legislative history whether Congress intended cumulative punishment, and applying *Blockburger* with insolubly ambiguous results, the Court simply resolves its doubts in favor of petitioner and concludes that the rape committed by petitioner must merge into his conviction for felony murder. In doing so, the Court neglects the one source that should have been the starting point for its entire analysis: the lower court's construction of the relevant statutes.

Unlike this Court, the District of Columbia Court of Appeals looked beyond the ambiguous legislative history and the inconclusive *Blockburger* test to examine the common-law roots of the crime of felony murder and to consider the societal interests protected by the relevant statutes. As for the first source, the lower court concluded from the history of felony murder at common law that "while the underlying felony is an element of felony murder it serves a more important function as an intent-divining mechanism" and that merger of the two offenses was therefore "inappropriate." 379 A. 2d 1152, 1160 (1977). In so reasoning, the lower court acted in conformity with this Court's long tradition of reading criminal statutes enacted by Congress "in the light of the common law. . . ." *United States* v. *Carll*, 105 U. S. 611, 612 (1882). See also *Morissette* v. *United States*, 342 U. S. 246, 262–263 (1952).

In addition to looking to the common law for assistance in determining Congress' intent, the lower court examined "the societal interests protected by the statutes under consideration." 379 A. 2d, at 1158–1159. Because § 22–2801 was designed "to protect women from sexual assault" while § 22–2401 was intended "to protect human life," the court concluded that cumulative punishment was permissible. 379 A. 2d, at 1159. Indeed, the *Blockburger* test itself could be

viewed as nothing but a rough proxy for such analysis, since, by asking whether two separate statutes each include an element the other does not, a court is really asking whether the legislature manifested an intention to serve two different interests in enacting the two statutes.

III

In sum, I find the lower court's reliance upon articulated considerations much more persuasive than this Court's capitulation to supposedly hopeless ambiguity. But even if the case were closer, I do not see how the lower court's conclusion could be classified as "egregious error" so as to justify our superimposing our own admittedly dubious construction of the statutes in question on the District of Columbia. Unless we are going to forgo deference to the interpretation of the highest court of the District of Columbia on matters of local applicability and are going to push several other well-recognized principles of statutory and constitutional construction out of shape, with consequences for the federal system for the 50 States, I would hope that the Court's decision would be one ultimately based on the "rule of lenity." Because I believe that the question confronting us is purely one of statutory construction and because I believe the analysis indulged in by the Court of Appeals for the District of Columbia comes far closer to the proper ascertainment of congressional intent than does this Court's opinion, I would affirm the judgment of the District of Columbia Court of Appeals.

Syllabus

ANDRUS, SECRETARY OF THE INTERIOR v. IDAHO ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 79-260. Argued February 25, 1980—Decided April 16, 1980

The Carey Act of 1894, in order to aid covered States in the reclamation of desert lands, "authorize[s] and empower[s]" the Secretary of the Interior (Secretary), with the President's approval, upon proper application by a State to donate, grant, and patent such desert lands, not exceeding a specified acreage, as the State should cause to be irrigated, reclaimed, and occupied, provided however, that the lands may be restored to the public domain if the requirements as to reclamation are not satisfied within stated time limits. Under 43 U. S. C. § 643, the Secretary was also authorized, upon request of a State, to withdraw desert lands temporarily from the public domain prior to the State's submission of a formal plan under the Carey Act. Acting pursuant to 43 U. S. C. § 643, Idaho requested that a certain tract of land be temporarily withdrawn from the public domain pending the submission of a proposed development plan under the Act. The Idaho Office of the Bureau of Land Management rejected the application in part because some of the lands requested had already been withdrawn for other purposes, including a portion being used as a stock driveway. Idaho appealed to the Interior Board of Land Appeals with respect to the lands previously withdrawn for stock-driveway purposes, and also petitioned the Board for reclassification of the stock-driveway lands as suitable for use under the Act. Ultimately, the Board affirmed the rejection of Idaho's Carey Act application and returned the case to the Bureau of Land Management for initial action on the petition for reclassification of the stock-driveway lands and for further action on the remaining lands covered by the application for temporary withdrawal. Meanwhile, Idaho filed suit in Federal District Court for a declaration of its rights under the Act. That court held that the State was entitled to up to 2.4 million acres of desert land for which the Secretary was obligated to contract with the State pursuant to the terms of the Act; that the Act, however, was not a grant *in praesenti*, and the State did not have an absolute right to the particular desert lands that it happened to select; and that if the lands had been withdrawn for another public use pursuant to another statute, the State's remedy was to request reclassification, which the Secretary could not arbitrarily deny. The Court of Appeals affirmed.

Held:

1. There is a real case or controversy with respect to the issue presented in the United States' petition for certiorari as to whether, under the Act, the State was entitled to 2.4 million acres of desert land which the Secretary then must reserve from appropriation to other public or private uses, and not just as to the State's entitlement to the lands that had been withdrawn for stock-driveway purposes and that were involved in its Interior Department appeal. Throughout the administrative and judicial proceedings, the parties have taken contrary positions as to whether the State is absolutely entitled to select and have withdrawn under the Act up to 2.4 million acres of desert land regardless of whether the lands it designates have already been withdrawn for other purposes, provided only that statutory preconditions are satisfied. Pp. 722–725.

2. It is apparent from the language and legislative history of the Act that Congress did not intend to reserve any specific number of acres of desert land for any State under the Act, and the Act does not prevent the Secretary from committing otherwise available parts of the public domain for any of the uses authorized under the various statutes relating to the use and management of the public lands. The Act does not oblige the Secretary automatically to contract for lands chosen by the State even if its application otherwise conforms to the statute. Hence, even though a State's selection has not been withdrawn for other uses, the Secretary need not always approve the application. Pp. 725–731.

595 F. 2d 524, affirmed in part and reversed in part.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 731.

Stuart A. Smith argued the cause for petitioner. On the brief were *Solicitor General McCree, Assistant Attorney General Moorman, Deputy Solicitor General Claiborne, William Alsup, Jacques B. Gelin,* and *Edward J. Shawaker.*

David H. Leroy, Attorney General of Idaho, argued the cause for respondents. With him on the brief were *W. Hugh O'Riordan* and *Josephine P. Beeman,* Deputy Attorneys General.*

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*Briefs of *amici curiae* urging affirmance were filed by *Terry L. Crapo* and *Rex E. Lee* for the Idaho Carey Act Development Assn.; and by

MR. JUSTICE WHITE delivered the opinion of the Court.

The Carey Act of 1894, ch. 301, § 4, 28 Stat. 422, 43 U. S. C. § 641, "to aid public-land States" in the reclamation of desert lands, authorizes the Secretary of the Interior upon proper application "to contract and agree, from time to time . . . binding the United States to donate, grant, and patent" such desert lands, not exceeding a specified acreage, as the State should cause to be irrigated, reclaimed, and occupied, provided, however, that the lands would be restored to the public domain if reclamation had not begun and plans carried out within stated time limits. Originally, each State covered by the Act was limited to 1 million acres; but in 1908, the ceiling for Idaho was raised to 3 million acres. Also, in 1910, upon request of a State, the Secretary was authorized to withdraw desert lands temporarily from the public domain prior to the State's submission of a formal plan under the Carey Act. 36 Stat. 237, 43 U. S. C. § 643 (1970 ed.).[1]

Of all Carey Act patents issued, a large majority were issued early in the century, the scarcity of water for irrigation being primarily responsible for the absence of patents in the past 30 years. Improved technology for pumping from deep water

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the Attorneys General for their respective States as follows: *Robert K. Corbin* of Arizona, *George Deukmejian* of California, *J. D. MacFarlane* of Colorado, *Michael T. Greeley* of Montana, *Richard H. Bryan* of Nevada, *James A. Redden* of Oregon, *Robert B. Hansen* of Utah, *Slade Gorton* of Washington, and *John D. Troughton* of Wyoming.

[1] This legislation was prompted by a desire to prevent speculative filings under entry statutes on land chosen by a State for a Carey Act project. S. Rep. No. 367, 61st Cong., 2d Sess. (1910); H. R. Rep. No. 662, 61st Cong., 2d Sess. (1910). After the decision and judgment of the District Court in this case, this provision was repealed by § 704 (a) of the Federal Land Policy and Management Act of 1976 (FLPMA), Pub. L. No. 94–579, 90 Stat. 2792. Under § 204 of FLPMA, 43 U. S. C. § 1714, however, which gives the Secretary the general authority to make withdrawals, the Secretary construes his authority to allow him to withdraw public lands from entry pending submission of a formal plan under the Carey Act.

sources, however, among other things, has revived interest in reclaiming arid lands.

In 1974, the State of Idaho, acting pursuant to 43 U. S. C. § 643, requested that an identified tract of some 27,400 acres be temporarily withdrawn from the public domain pending the submission of a proposed development plan as required by the Carey Act. In January 1975, the Idaho State Office, Bureau of Land Management, rejected the application in part because some of the lands requested had already been withdrawn for other purposes, including a portion being used as a stock driveway. Idaho appealed to the Interior Board of Land Appeals with respect to the lands previously withdrawn for stock-driveway purposes.[2] Idaho also filed with the Board a petition under § 7 of the Taylor Grazing Act, 48 Stat. 1272, as amended, 49 Stat. 1976, 43 U. S. C. § 315f, for reclassification of the stock-driveway lands as suitable for use under the Carey Act.

The Board, in its decision issued on July 31, 1975, found that the applicable regulations prevented it from withholding action on the Carey Act application pending a decision on the Taylor Act reclassification petition.[3] The Board then rejected Idaho's assertion that its Carey Act application took precedence over any withdrawal subsequent to the date of the Act because the Act was a grant *in praesenti* or because

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[2] On the State's failure to appeal the denial with respect to the lands covered by the application that had been withdrawn for purposes other than a stock driveway, the order as to these lands became final.

[3] The Board cited its stock-driveway regulations providing that "[l]ands withdrawn for driveways for stock . . . are not subject to entry or disposition" and that applications for the acquisition of such lands shall be rejected. 43 CFR § 2313.1 (c) (1974). The Board also relied on a general regulation, 43 CFR § 2091.1 (a) (1974), providing in pertinent part that "applications which are accepted for filing must be rejected and cannot be held pending possible future availability of the land or interests in land, when approval of the application is prevented by . . . [w]ithdrawal or reservation of lands." The Board's prior cases are also to this effect.

the grant, when the specified conditions were fulfilled, related back to the date of the Act. The Board adhered to its prior decision in *State of Wyoming*, 36 L. D. 399 (1908), which held that under the Carey Act "the acceptance of the offer of the State is a matter wholly within the discretion of the Department." That being so, the State had no rights whatsoever to have *any* application approved. The Board further repeated *Wyoming*'s statement that if lands had been withdrawn for other purposes, the presumption that the withdrawal was proper is "conclusive," the lands were not available for a claim under the Carey Act, and the State was not entitled to a hearing "for the purpose of determining whether or not [the Secretary's] discretion has been properly exercised." *Id.*, at 400. The Board, therefore, affirmed the rejection of Idaho's Carey Act application. The case was returned to the Bureau of Land Management for initial action on the petition for reclassification of the stock-driveway lands and for further action on the remaining lands covered by the application for temporary withdrawal.

Meanwhile, in February 1975, the State of Idaho, through its appropriate officials, filed a complaint in the United States District Court for the District of Idaho against the Secretary of the Interior. The State alleged that by virtue of the Carey Act, the United States "has bound itself to donate, grant and patent to the State of Idaho . . . three million acres of desert lands," that "these lands are subject to temporary withdrawal and/or segregation upon [the State's] request," that the Secretary is "without any discretion to deny desert lands once requested," and that the Secretary now asserts that "he will not allow the requests for segregation or withdrawal under the Carey Act as a matter of right." The State prayed for a declaration of its rights under the Carey Act.[4] The Secre-

[4] The State alleged jurisdiction in the District Court "by virtue of a federal question existing and amounts of money involved . . . in excess of $10,000, exclusive of costs and interest." The State also alleged juris-

tary's answer admitted that he would not allow requests for segregation or withdrawal as a matter of right but denied the remainder of the foregoing allegations.

On cross-motions for summary judgment, Idaho submitted that the Carey Act had been an immediately effective grant, or at least that the United States was firmly obligated to contract with and patent the statutory acreage to Idaho when and if Idaho satisfied the statutory preconditions. In the State's view, Carey Act applications took precedence over prior withdrawals. The Secretary, therefore, had been wrong to deny Idaho's request for temporary withdrawal, even though the specified lands had already been withdrawn for other purposes. The United States, to the contrary, asserted that the Carey Act granted nothing to Idaho, had not obligated the Secretary to contract with Idaho with respect to any desert lands selected by the State, but had merely authorized the Secretary to contract if he, in his unbridled discretion, saw fit to do so. The Secretary, therefore, had committed no error and had not exceeded his authority under the Carey Act or any other law when he denied the petition for temporary withdrawal.

The District Court, in its memorandum opinion and decision of July 15, 1976, rejected the State's claim that the Carey Act was an *in praesenti* grant giving the State an absolute right to the acreage specified in the Act. The District Court went on to hold, however, (1) that Idaho was "guaranteed a maximum entitlement of three million acres of suitable desert land . . . which it cannot be deprived of by the Secretary of the Interior, if the State meets the conditions of the Carey Act"; (2) that "[t]he Secretary is under an obligation to preserve enough desert land suitable for Carey Act development to fulfill the State's right of entitlement,

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diction "pursuant to the Federal A. P. A. (5 USC 701 et seq)." The complaint did not recite that the State sought relief pursuant to the Declaratory Judgment Act, 28 U. S. C. § 2201, but the District Court understood the complaint as seeking declaratory relief.

which the Federal Government must contract to donate to the State in accordance with the Act"; and (3) that "[t]o the extent the land has been withdrawn for other purposes" and the State desires the land for Carey Act development, "its remedy is to petition the Secretary to reclassify the lands suitable for Carey Act entry," in which event "[t]he Secretary may not arbitrarily deny the State's application for reclassification," his ruling thereon being subject to judicial review under the Administrative Procedure Act, 5 U. S. C. § 706. 417 F. Supp. 873, 881 (1976). The District Court went on to indicate its affirmance of the Interior Board of Land Appeals' decision and to this extent granted the Secretary's motion for summary judgment.

The Secretary moved for reconsideration and modification of the decision. The District Court again heard oral argument. After first suggesting that the District Court had erred in construing the Carey Act instead of merely sustaining the administrative action, the Secretary then agreed that the case had proceeded as a declaratory judgment action, or at least that it had a declaratory judgment dimension. The Secretary again presented his position that the Carey Act placed no obligation whatsoever on him to enter into any contract with Idaho or to approve any Carey Act application filed by the State.

In this respect, the judge expressed his disagreement and on August 26, 1976, entered his judgment, which, as amended in minor respects on November 15, (1) rejected the State's prayer for declaration of its absolute right to demand three million acres of the public domain without regard to any previous classifications and withdrawals and affirmed the decision of the Interior Board of Land Appeals; (2) declared that Idaho is "entitled to have withdrawn and patented three million acres of the desert lands in the public domain," provided that there are sufficient desert lands within the State of Idaho and provided that Idaho satisfies all the terms and conditions of the Act, and declared that by the Carey Act the

United States had "bound itself to contract, donate, grant and patent to the State of Idaho, upon compliance with the stated conditions, . . . not to exceed three million acres [of desert land], as that sum may be reduced by prior patents issued pursuant to the Carey Act"; and (3) declared that with respect to desert lands presently withdrawn from the public domain for other purposes, the State's remedy, should it desire to initiate Carey Act development on such lands, "is to petition the [Secretary] for temporary withdrawal under 43 U. S. C. Sec. 643 and/or under 43 U. S. C. Sec. 315f, and it is the duty of the [Secretary] to entertain and act upon said petition or petitions in accordance with the public land laws of the United States of America and in accordance with due and proper administrative procedures."

The Ninth Circuit affirmed the judgment "[u]pon the basis of the carefully written opinion" of the District Judge. 595 F. 2d 524 (1979). We granted the petition for writ of certiorari filed by the United States and presenting the single question whether the Carey Act "requires the Secretary of the Interior indefinitely to reserve from appropriation to other public or private uses some 2.4 million acres of desert land within Idaho for the eventuality that the State may be able and willing to select all or any part of such acreage for irrigation and reclamation under the Act." 444 U. S. 914 (1979).

I

There is first the question raised at the oral argument of this cause whether there is a case or controversy between the State and the Secretary as to anything other than the State's entitlement to the lands that had been withdrawn for stock-driveway purposes and that were involved in its Interior Department appeal; or, to put the matter another way, whether there is a real case or controversy with respect to the issue that the United States presented in its petition for certiorari, namely, whether the State was entitled to 2.4 million acres of desert land which the Secretary then must preserve

for Carey Act development. Although the United States urged on appeal in the Court of Appeals that there was no case or controversy whatsoever, even as to any of the lands covered by Idaho's Carey Act application for temporary withdrawal,[5] the Court of Appeals apparently rejected the argument; the United States raised no jurisdictional question in its petition or its brief; and the Solicitor General at oral argument was of the opinion that the District Court and the Court of Appeals had jurisdiction to enter the judgments that appear in this record. We have the same view.

From the very outset, the State took the position that it is absolutely entitled to select and have withdrawn under the Carey Act up to 2.4 million acres of desert land, provided only that it satisfy the statutory preconditions. Whether or not the lands that it designated had already been withdrawn for other purposes, such as a stock driveway, it was the State's view that the Secretary had no discretion to deny withdrawal of desert lands that the State selected. The Secretary, on the other hand, from the outset, denied that the State had any right to contract for desert lands under the Carey Act and asserted that it was within his discretion to deny any and all state requests for withdrawal or segregation of lands of the Carey Act, whether or not the selected lands were already in use for other purposes. These were the respective positions of the parties in the Interior Department proceedings, with the Interior Board of Land Appeals rejecting the State's and adopting the Secretary's position.

These were also the positions of the parties in the District Court. The State and the Secretary were thus at odds over

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[5] In the Court of Appeals, the Secretary conceded that a case or controversy had existed with respect to the stock-driveway lands for which temporary withdrawal had been requested under § 643 but asserted that the controversy had become moot with the repeal of § 643. The Secretary now concedes, however, that under the Federal Land Policy and Management Act of 1976, even though it repealed § 643, he has the same power of temporary withdrawal as he had under § 643. See n. 1, *supra*.

the proper construction of the Carey Act, over the State's entitlement under the statute, and over the extent of the Secretary's discretion. If the State was correct as to the meaning of the Act, the denial of its request for withdrawal of the stock-driveway lands was incorrect; but the denial was correct if the Secretary had the better view of the statute. We thus find it undeniable that there was a case or controversy between the Secretary and the State with respect to the approval of its Carey Act application and that the case or controversy in this respect turned on what rights, if any, the State had under this 1894 statute. Although at the time that the case was filed in the District Court, the State's administrative appeal had not yet been decided, a case or controversy in the Art. III sense existed; and, in any event, administrative appellate procedures were soon exhausted. The District Court accepted the case as involving a review of the Secretary's action and as requiring a declaration of the respective rights of the State and the Secretary under the Act.

In proceeding to address the statutory issues tendered by the State, the District Court rejected both the position of the State and that of the Secretary. The State was entitled to up to 2.4 million acres of desert land for which the Secretary was obligated to contract with the State pursuant to the terms of the Act; but the Act was not a grant *in praesenti*, and the State did not have an absolute right to the particular desert lands that it happened to select. If the lands had been withdrawn for another public use pursuant to another statute, the State's remedy was to request reclassification, which the Secretary could not arbitrarily deny. Under this approach, the Secretary was correct in denying the State's request for immediate withdrawal of the lands already in use as a stock driveway; but the Secretary was quite wrong in claiming absolute discretion to deny any Carey Act application, including the State's pending application insofar as it covered lands that had *not* yet been withdrawn for other purposes.

These elements were included in the District Court's judgment and were supported by its opinion. We find no jurisdictional barrier to the entry of such a judgment or to appellate review of that part of the judgment to which the United States objects as a misconstruction of the Carey Act and as an unwarranted extension of rights to the State that would constitute a substantial interference with the authority of the Secretary to manage the public lands.

II

As was set out above, the judgment declared that Idaho is "entitled" to 2.4 million acres of Carey Act land and that the Secretary is "bound" to contract for such lands. Although the judgment did not prevent the Secretary from putting desert lands to other uses, the judgment, fairly read, would obligate the Secretary to contract with the States for lands selected by it that had not been so withdrawn, if the State complied with the statutory conditions.[6] The Secretary submits that the Act does not so drastically limit his discretion. He also understands these same provisions of the judgment to mean that he "must hold for eventual disposition under the Carey Act approximately 2.4 million acres of unappropriated desert lands." Brief for Petitioner 8. At least that much desert land, he says, must be reserved and may not be put to other uses. Although the judgment does not so provide in so many words, it is fairly arguable that this is what the trial court intended, particularly because in its opinion, which the Court of Appeals made its own, the trial court held that the

[6] The State has not cross-petitioned from the holding that the Carey Act is not a grant *in praesenti* and that a Carey Act application does not automatically take precedence over prior withdrawals. The State as a respondent is not entitled, absent a cross-petition, to bring that issue before us; for a favorable ruling would enlarge the relief granted the State under the Court of Appeals judgment. The State does of course, strongly urge, as it may, that it is entitled to at least what the District Court recognized to be its rights under the Carey Act.

State is "guaranteed" the statutory acreage, "which it cannot be deprived of by the Secretary," and that the Secretary is under an "obligation to preserve enough desert land suitable for Carey Act development" to fulfill the State's entitlement. The precise meaning of the judgment in this respect, however, we do not further pursue; for as we understand the language and legislative history of the Carey Act, it neither requires the Secretary to hold the statutory acreage in reserve nor obliges him always to contract with the State for desert lands that the State selects from those parts of the public domain that have not been withdrawn for other purposes.

The language of the Act[7] "authorize[s] and empower[s]," but does not direct, the Secretary to contract with the State upon the State's proper application. This is permissive language, as compared with the obligatory statutory language requiring the Secretary to issue a patent once he has contracted with the State and the State has satisfied the contractual and statutory conditions. Furthermore, the Secretary may act only with the approval of the President, a provision which strongly suggest that the statutory discretion to con-

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[7] The Carey Act, 43 U. S. C. § 641, provides in pertinent part:

"To aid the public-land States in the reclamation of the desert lands therein, and the settlement, cultivation and sale thereof in small tracts to actual settlers, the Secretary of the Interior with the approval of the President . . . is authorized and empowered, upon proper application of the State to contract and agree, from time to time, with each of the States in which there may be situated desert lands . . . binding the United States to donate, grant, and patent to the State free of cost for survey or price such desert lands, not exceeding one million acres in each State, as the State may cause to be irrigated, reclaimed, occupied, and . . . cultivated by actual settlers . . . within ten years from the date of approval by the Secretary of the Interior of the State's application for the segregation of such lands. . . ."

Section 641 further provides that if the requirements as to reclamation are not satisfied within certain time periods, the Secretary may restore the lands to the public domain or may authorize limited extension of the deadlines.

tract is broader than merely determining whether the application on its face satisfies the statutory requirements.[8]

In ascertaining the meaning of the relevant language of the Act, it is important to note the circumstances of its adoption in 1894. The initial version of the Act was adopted in the Senate as an amendment to an appropriations bill that had already passed the House. The amendment, which was offered by Senator Carey of Wyoming, was in the form of a Senate bill that had previously been offered by the Senator and passed by the Senate but was still pending before a House committee. This bill, and the amendment to the appropriations bill, provided that each State could select up to the specified acreage of desert lands and that upon selection the lands would be immediately reserved from other entry and would be patented to the State upon proof that the selected land had been suitably reclaimed. The House conferees brought the amended appropriations bill before the House where a substitute for the Senate amendment was offered by Representative McRae and was adopted after full debate. The Conference Committee then adopted the House substitute, and it was this version that became known as the Carey Act.

For present purposes, the principal difference between the

[8] The District Court purported to find some support for its conclusion in *Idaho Irrigation Co.* v. *Gooding*, 265 U. S. 518, 521 (1924), where the Court recited that the Carey Act "binds" the United States to donate desert lands to the States. The passage referred to, however, does not say that the United States is bound to contract in the first instance. In any event, that case involved a dispute between an irrigation company and the owners of water rights pursuant to contracts with the company; and it was only in describing the background of the case that the Court referred to the Carey Act. There was no question in that case as to the scope of the State's entitlement under the Act or the scope of the Secretary's discretion. Attaching great significance to this recitation is unwarranted. Nor do we find the other state and federal cases that the District Court cited to be persuasive support for its conclusions as to the Secretary's obligations.

Senate amendment and the McRae substitute was that the former provided for automatic reservation upon selection by the State and the latter did not. As Representative McRae explained, 26 Cong. Rec. 8391 (1894): "The Senate proposition makes a reservation outright for the States and will make it possible for the States to put a million of acres in each State in reservation for an indefinite period. . . . The pending proposition does not make any grant, but only authorizes the Secretary of the Interior with the approval of the President to make a contract with any States in which any of these lands may be situated. . . ." And again, *id.*, at 8431: "This is no grant at all, but only gives authority to the Secretary of the Interior and President to make contracts binding the United States to donate the land to the States when reclaimed." There are some indications during the debates, originating from both proponents and opponents of the provision, that perhaps a more substantive action was intended; but there is nothing that undercuts the explanation of Representative McRae as to the meaning of the markedly different language contained in the House substitute. Nor is there anything persuasive in the several later additions or amendments to the Carey Act to indicate that the Act reserved to the States or obligated the Secretary to contract for any particular acreage for Carey Act development.[9]

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[9] In 1896, Congress provided that patents could be issued when water had been supplied to the land without regard to settlement or cultivation. The same Act provided for liens against the lands prior to patent for the costs of reclamation. Act of June 11, 1896, § 1, 29 Stat. 434, 43 U. S. C. § 642. Although § 642 refers to the "grant" made under § 641, the context indicates that the word is loosely used to refer to the state laws enacted in acceptance of the terms of the Carey Act. Idaho, in fact, stresses that it, like 9 of the 11 other desert land States, specifically referred to the Carey Act's "grants of land" when the State enacted legislative acceptances of the offer to obtain federal lands by reclamation. Brief for Respondents 12–13, and n. 6.

Subsequent legislation did not touch on the issue at all. In 1908, an

It has also been the consistent view of the Department of the Interior that the Carey Act does not grant or reserve any specified acreage of desert lands for development under the Carey Act. *State of Wyoming,* 36 L. D. 399 (1908), relied on by the Secretary in this case, stands for at least this much; and we have in other cases accorded a considerable deference to the responsible agency's construction of the statute which it administers. *Andrus* v. *Charlestone Stone Products Co.,* 436 U. S. 604, 613–614 (1978); *Udall* v. *Tallman,* 380 U. S. 1, 16 (1965); *Cameron* v. *United States,* 252 U. S. 450, 460 (1920). It is also ascertainable from the Congressional Record, reflecting the proceedings connected with the 1908 amendments to the Carey Act, that the eight States covered by the Act had by that time selected approximately 2.72 million acres under the Carey Act but that less than half that amount, 1.12 million acres, had been approved and only 200,000 acres had gone to patent. One of the many reasons for rejections of selected lands had been that they

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additional two million acres of desert lands were authorized for Carey Act selection in the State of Idaho, 43 U. S. C. § 645 and Joint Res. No. 28, 60th Cong., 1st Sess. (1908), see 35 Stat. 577; and an additional one million acres in the State of Wyoming. 43 U. S. C. § 645. In 1909, the provisions of the Carey Act were extended to the States of Arizona and New Mexico, § 646, and to the former Ute Indian Reservation in Colorado. § 647. In 1910, as indicated in the text, § 643 with respect to temporary withdrawals was adopted. In 1911, the Act was extended to the Ft. Bridger Military Reservation in Wyoming, Act of Feb. 16, 1911, ch. 90, 36 Stat. 913; and an additional one million acres were authorized for the States of Nevada and Colorado. 43 U. S. C. § 645. The Act was amended in 1920 with respect to rights of entry by settlers on lands covered by unsuccessful Carey Act projects. § 644. In 1921, the Secretary of the Interior was authorized to extend the period of segregation or to restore the lands to the public domain when States failed to construct the anticipated reclamation works. § 641. Congress at no time indicated disagreement with the way that the Secretary was administering the Carey Act, at least as relevant to the issues in this case.

were already in other legitimate use or that such use was being considered. 42 Cong. Rec. 6437 (1908).[10]

Against this background, we conclude that Congress did not intend to reserve any specific number of acres of desert land for any State under the Carey Act and that the Act does not prevent the Secretary from committing otherwise available parts of the public domain for any of the uses authorized under the various statutes relating to the use and management of the public lands, such as the Taylor Grazing Act under which part of the lands that Idaho sought in this case have been withdrawn. It is also clear that one of the reasons prompting the McRae substitute was to eliminate the right of the State under the Senate version to have automatically reserved and to contract for the particular lands that it selected. As finally adopted, the Act does not oblige the Secretary automatically to contract for lands chosen by the State even if its application otherwise conforms to the statute. Hence, even though a State's selection has not been withdrawn for other uses, as is the case with part of the land that Idaho applied for in this case,[11] the Secretary need not always approve the application.[12]

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[10] During the discussion, Representative Gaines of Tennessee asked Representative French of Idaho to explain why the Secretary had not granted all Carey Act applications. Representative French replied:

"The reason is this: We have a national reclamation law under which lands are being reclaimed; we have the Indian reservation law; we have lands that have passed into private ownership under the desert-land act and other laws. Sometimes it happens that an application for segregation under the Carey Act overlaps one or more of these propositions or tracts of land."

[11] Prior to the District Court's judgment, the Board also ruled on two other Carey Act applications by Idaho covering unwithdrawn and otherwise available land. *Idaho Department of Water Resources*, 25 I. B. L. A. 27 (1976); *Idaho Department of Water Resources*, 24 I. B. L. A. 314 (1976).

[12] The Secretary has not questioned the judgment and opinion of the District Court indicating that the Secretary's refusal to reclassify with-

The District Court was therefore correct in remitting the State to a reclassification proceeding with respect to the land in use as a stock driveway; but the District Court erred in declaring that the Act entitled the State to the statutory acreage in the sense that the Secretary was firmly bound to reserve such acreage and to contract for it as and when the State selected it.

For the foregoing reasons, the judgment of the Court of Appeals is affirmed in part and reversed in part.

So ordered.

MR. JUSTICE STEVENS, dissenting.

Everyone agrees that the District Court correctly rejected Idaho's now-abandoned claim that the Carey Act, as amended, constituted an absolute, present grant of entitlement to any three million acres of arid lands that the State might designate at some time in the future. But the District Court's rejection of that claim did not require it to express any opinion on any of the questions that the Court discusses today.

This record does not present the question of what reasons, if any, are necessary or sufficient to justify a denial by the Secretary of a Carey Act application or a petition for reclassification under the Taylor Grazing Act.[1] I would therefore express no opinion on that question.

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drawn lands for Carey Act purposes would be subject to judicial review and would be set aside if arbitrary or capricious. Neither has the Secretary asserted that his rejection of a State's application for withdrawal or segregation of appropriate desert lands in the public domain would not be subject to judicial review under the Administrative Procedure Act, 5 U. S. C. § 706. To the extent that the claim of absolute discretion to approve or disapprove Carey Act applications is inconsistent with the absence of a direct challenge to this aspect of the District Court's decision or with the general standards for judicial review of agency action under the Administrative Procedure Act, we reject, as did the District Court, the claim of absolute discretion.

[1] Idaho's complaint prayed simply for a declaration that "the State of Idaho has an absolute right to demand up to three million acres of desert

Nor is there anything in this record to suggest that there is any imminent likelihood that the Secretary will reserve for other purposes so much of the federal land in Idaho otherwise suitable for Carey Act contracts that less than 2.4 million acres will be available.[2] Unless and until such a likelihood appears, there is no need to decide whether he may do so. The fact that in the 85-year life of the Carey Act Idaho has used only about one-fifth of the three million acres authorized makes it rather clear that resolution of that issue is of no immediate consequence to either party.

In short, I do not believe either of the questions on which the Court has volunteered its advice is ripe for decision. I would simply vacate the purely advisory portions of the District Court's judgment and refrain from deciding any questions not fairly raised by this record.

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lands under the Carey Act and further . . . that the [Secretary of Interior] . . . has no authority or discretion to deny any request for segregation or withdrawal when presented by the Plaintiff." App. 6.

[2] It was suggested by the State at oral argument that perhaps as much as 8.5 million acres is "susceptible of possible irrigation that is still in Federal hands." Tr. of Oral Arg. 31. To date, Idaho has received approximately 600,000 acres under the Carey Act.

Reporter's Note

Orders commencing with March 31, 1980, begin with page 947. The preceding orders in 445 U. S., from February 25 through March 24, 1980, were reported in Parts 1 and 2 at 901–947. These page numbers are the same as they will be in the bound volume, thus making the *permanent* citations available upon publication of the preliminary prints of the United States Reports.

Rehearing Denied

No. 79–955. DeHavilland Aircraft of Canada, Ltd. *v.* Betar, Public Administrator of Cook County, et al., 444 U. S. 1098; and

No. 79–5728. Ross *v.* Carey, Governor of New York, et al., 444 U. S. 1085. Petitions for rehearing denied.

No. 79–5447. In re Application for Admission to the Bar of Massachusetts, 444 U. S. 1046. Motion for leave to file petition for rehearing denied.

March 31, 1980

Affirmed on Appeal

No. 79–664. Ventura County *v.* Gulf Oil Corp. Affirmed on appeal from C. A. 9th Cir. Reported below: 601 F. 2d 1080.

Appeal Dismissed

No. 79–5877. Poe *v.* North Carolina. Appeal from Sup. Ct. N. C. dismissed for want of substantial federal question. Mr. Justice Brennan and Mr. Justice Stevens would note probable jurisdiction and set case for oral argument. Reported below: 298 N. C. 303, 259 S. E. 2d 304.

Certiorari Granted—Vacated and Remanded

No. 78–1391. Chateau X, Inc., et al. *v.* Andrews, District Attorney for the Fourth District of North Carolina. Sup. Ct. N. C. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Vance* v. *Universal Amusement Co., ante,* p. 308. Mr. Justice White dissents. Reported below: 296 N. C. 251, 250 S. E. 2d 603.

No. 79–482. Hutto, Corrections Director, et al. *v.* Davis. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Rummel* v. *Estelle, ante,* p. 263. Reported below: 601 F. 2d 153.

Miscellaneous Orders

No. 79–4. WILLIAMS ET AL. *v.* ZBARAZ ET AL.;

No. 79–5. MILLER, ACTING DIRECTOR, DEPARTMENT OF PUBLIC AID OF ILLINOIS, ET AL. *v.* ZBARAZ ET AL.; and

No. 79–491. UNITED STATES *v.* ZBARAZ ET AL. D. C. N. D. Ill. [Probable jurisdiction postponed, 444 U. S. 962]; and

No. 79–1268. HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* MCRAE ET AL. D. C. E. D. N. Y. [Probable jurisdiction noted, 444 U. S. 1069.] Motion of the Solicitor General to consolidate the cases for oral argument denied. Motion of intervening appellees and appellees in No. 79–1268 for divided argument denied. Motion of Congressman Jim Wright et al. for leave to participate in oral argument as *amici curiae* in No. 79–1268 denied. Motions of Coalition for Human Justice and Bergen-Passaic Health Systems Agency for leave to file briefs as *amici curiae* in No. 79–1268 granted.

No. 79–669. DAWSON CHEMICAL CO. ET AL. *v.* ROHM & HAAS CO. C. A. 5th Cir. [Certiorari granted, 444 U. S. 1012.] Motions for leave to file briefs as *amici curiae* filed by the following were granted: Chemical Manufacturers Assn., Pharmaceutical Manufacturers Assn., New York Patent Law Assn., Licensing Executives Society (U.S.A.), Inc., American Chemical Society, National Agricultural Chemicals Assn., Society of University Patent Administrators et al., National Small Business Assn., and National Association of Manufacturers. Motion of American Patent Law Assn. for leave to join in the brief, *amicus curiae,* of the National Agricultural Chemicals Assn. denied. Motion of National Agricultural Chemicals Assn. for additional time for oral argument denied, but the alternative request for divided argument granted.

No. A–750 (79–1258). CONFEDERATION OF IRANIAN STUDENTS *v.* CIVILETTI, ATTORNEY GENERAL. C. A. D. C. Cir. Application for stay, addressed to MR. JUSTICE BRENNAN and referred to the Court, denied. MR. JUSTICE BRENNAN would grant the application.

No. 79-5932. DOE ET AL. *v.* DELAWARE. Sup. Ct. Del. [Probable jurisdiction noted, *ante*, p. 942.] Motion to seal the record granted and the parties are directed to proceed on the original record.

No. A-652 (79-6120). BRAZAS ET AL. *v.* UNITED STATES. C. A. 1st Cir. Application for stay, addressed to MR. JUSTICE STEWART and referred to the Court, denied.

No. 79-6064. TARKOWSKI *v.* GRADY, U. S. DISTRICT JUDGE, ET AL. Motion for leave to file petition for writ of mandamus denied.

Certiorari Granted

No. 79-1171. MINNESOTA *v.* CLOVER LEAF CREAMERY CO. ET AL. Sup. Ct. Minn. Certiorari granted. Reported below: 289 N. W. 2d 79.

Certiorari Denied

No. 78-1347. WALL ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 588 F. 2d 840.

No. 79-241. MISSOURI *v.* ALL STAR NEWS AGENCY, INC. Sup. Ct. Mo. Certiorari denied. Reported below: 580 S. W. 2d 245.

No. 79-357. THORNLOW *v.* THORNLOW. Ct. Civ. App. Tex., 13th Sup. Jud. Dist. Certiorari denied. Reported below: 576 S. W. 2d 697.

No. 79-683. MISSOURI *v.* ALL STAR NEWS AGENCY, INC. Sup. Ct. Mo. Certiorari denied. Reported below: 588 S. W. 2d 494.

No. 79-698. BOTHMAN *v.* WARREN B. ET UX. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 92 Cal. App. 3d 796, 156 Cal. Rptr. 48.

No. 79-731. PORTER & DIETSCH, INC., ET AL. *v.* FEDERAL TRADE COMMISSION; and

No. 79-1090. PAY'N SAVE CORP. *v.* FEDERAL TRADE COMMISSION. C. A. 7th Cir. Certiorari denied. Reported below: 605 F. 2d 294.

No. 79-751. SOTTO ET AL. *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 601 F. 2d 184.

No. 79-812. OSMOSE WOOD PRESERVING CO. OF AMERICA, INC., ET AL. *v.* CITY OF LOS ANGELES. C. A. 9th Cir. Certiorari denied. Reported below: 605 F. 2d 562.

No. 79-902. FRIEDMAN *v.* HARBOLD. Ct. App. Ga. Certiorari denied. Reported below: 150 Ga. App. 482, 258 S. E. 2d 154.

No. 79-904. SELLINGER *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied.

No. 79-975. BELL *v.* NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1285.

No. 79-1078. PITTSBURGH METRO AREA POSTAL WORKERS UNION, AFL-CIO *v.* UNITED STATES POSTAL SERVICE. C. A. 3d Cir. Certiorari denied. Reported below: 609 F. 2d 503.

No. 79-1094. AUTHORIZED AIR CONDITIONING CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 606 F. 2d 899.

No. 79-1097. FOWLER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 605 F. 2d 181.

No. 79-1098. DIVIVO *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 611 F. 2d 492.

No. 79-1103. MENOMINEE TRIBE OF INDIANS ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: — Ct. Cl. —, 607 F. 2d 1335.

No. 79–1124. ILLINOIS ET AL. *v.* UNITED STATES ET AL.; and ILLINOIS ET AL. *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 604 F. 2d 519 (first case); 624 F. 2d 1104 (second case).

No. 79–1163. JOHNSON *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 70 Ill. App. 3d 1104, 392 N. E. 2d 803.

No. 79–1170. MCGRAW-EDISON CO. ET AL. *v.* FREMONT ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 606 F. 2d 752.

No. 79–1177. MCBRIDE ET AL. *v.* ROCKEFELLER FAMILY FUND ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 612 F. 2d 34.

No. 79–1201. WRIGHT *v.* WRIGHT. Sup. Ct. Wis. Certiorari denied. Reported below: 92 Wis. 2d 246, 284 N. W. 2d 894.

No. 79–1206. RUFFIN ET AL. *v.* COUNTY OF LOS ANGELES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 607 F. 2d 1276.

No. 79–1207. LYLES *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 587 S. W. 2d 717.

No. 79–1209. COASTAL CORP. ET AL. *v.* WEISBERG. C. A. 2d Cir. Certiorari denied. Reported below: 609 F. 2d 650.

No. 79–1215. LEIFER *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 71 App. Div. 2d 1007, 420 N. Y. S. 2d 244.

No. 79–1224. GENERAL FOOTWEAR CO., LTD., ET AL. *v.* AMERICAN FOOTWEAR CORP. C. A. 2d Cir. Certiorari denied. Reported below: 609 F. 2d 655.

No. 79–1227. PELTZMAN *v.* AMERICAN RADIO ASSN. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1289.

No. 79–1232. JACKSON ET AL. *v.* HAYAKAWA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 605 F. 2d 1121.

No. 79–1257. SEXTON *v.* CLEVELAND ATHLETIC CLUB ET AL. Ct. App. Ohio, Cuyahoga County. Certiorari denied. Reported below: — Ohio App. 2d —, — N. E. 2d —.

No. 79–1293. PLUMMER *v,* KLEPAK, CHAIRMAN, DRUG ABUSE CONTROL COMMISSION OF NEW YORK, ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 48 N. Y. 2d 486, 399 N. E. 2d 897.

No. 79–5747. EDWARDS *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 79–5778. LYKINS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 77 Ill. 2d 35, 394 N. E. 2d 1182.

No. 79–5820. KLOBUCHIR *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 486 Pa. 241, 405 A. 2d 881.

No. 79–5821. ROGERS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 79–5831. MEYER *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 150 Ga. App. 613, 258 S. E. 2d 217.

No. 79–5860. GOOLSBY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 70 Ill. App. 3d 832, 388 N. E. 2d 894.

No. 79–5867. JACKSON *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 226 Kan. 302, 597 P. 2d 255.

No. 79–5878. STREETER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 69 Ill. App. 3d 1100, 391 N. E. 2d 797.

No. 79-5899. BROWN *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 77 Ill. 2d 531, 397 N. E. 2d 809.

No. 79-5900. KRALIK *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 611 F. 2d 343.

No. 79-5937. JACKSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 612 F. 2d 582.

No. 79-5938. CLAYTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 605 F. 2d 1207.

No. 79-6025. MAGEE *v.* MITCHELL, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 610 F. 2d 812.

No. 79-6038. BOWDEN *v.* MITCHELL, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 603 F. 2d 217.

No. 79-6051. BALLARD *v.* SMITH, WARDEN; and
No. 79-6052. CAMPBELL *v.* SOWDERS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 611 F. 2d 371.

No. 79-6054. BREWER *v.* BREWER. Sup. Ct. Ala. Certiorari denied.

No. 79-6059. MARTIN *v.* OHIO. Ct. App. Ohio, Lawrence County. Certiorari denied. Reported below: — Ohio App. 2d —, — N. E. 2d —.

No. 79-6065. GROOMS *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 610 F. 2d 344.

No. 79-6068. CARTER *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 60 Ohio St. 2d 34, 396 N. E. 2d 757.

No. 79-6069. SANDERS, AKA TAYLOR *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 79-6072. FARRELL *v.* DEPARTMENT OF SOCIAL AND HEALTH SERVICES OF WASHINGTON. Ct. App. Wash. Certiorari denied.

No. 79-6076. MASELLI *v.* HENDERSON, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1289.

No. 79-6091. PEREZ-HUERTA *v.* ST. FRANCIS COMMUNITY HOSPITAL. C. A. 4th Cir. Certiorari denied. Reported below: 610 F. 2d 813.

No. 79-6102. BULLOCK ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 614 F. 2d 775.

No. 79-6127. BLAKE *v.* THOMPSON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 611 F. 2d 371.

No. 79-6130. MCCLANAHAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 612 F. 2d 642.

No. 79-6151. HINSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 106.

No. 79-6153. MERROW *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 79-6154. WATSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 615 F. 2d 1363.

No. 79-6169. JOHNSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 612 F. 2d 1193.

No. 79-6171. ATTWELL ET AL. *v.* LASALLE NATIONAL BANK ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 607 F. 2d 1157.

No. 79-6173. LEWIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 111.

No. 79-6185. ALANIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 611 F. 2d 123.

No. 79-6195. TILL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 609 F. 2d 228.

No. 79-6197. MCQUIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 612 F. 2d 1193.

No. 79-6074. POLLARD *v.* UNITED STATES TOBACCO CO. C. A. 4th Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 610 F. 2d 813.

Rehearing Denied

No. 79-5754. GINSBURG *v.* OVERLOOK HOSPITAL ET AL., 444 U. S. 1086;

No. 79-5755. SOLOMON *v.* FRAME ET AL., 444 U. S. 1086;

No. 79-5819. REED *v.* SCHWAB ET AL., 444 U. S. 1088; and

No. 79-5928. GAMBLE *v.* UNITED STATES, 444 U. S. 1092. Petitions for rehearing denied.

APRIL 14, 1980

Affirmed on Appeal

No. 79-1373. REPUBLICAN NATIONAL COMMITTEE ET AL. *v.* FEDERAL ELECTION COMMISSION ET AL. Affirmed on appeal from D. C. S. D. N. Y. Reported below: 487 F. Supp. 280.

No. 79-1375. REPUBLICAN NATIONAL COMMITTEE ET AL. *v.* FEDERAL ELECTION COMMISSION ET AL. Affirmed on appeal from C. A. 2d Cir. Reported below: 616 F. 2d 1.

Appeals Dismissed

No. 79-1152. HEFNER *v.* NEW ORLEANS PUBLIC SERVICE, INC., ET AL. Appeal from C. A. 5th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 605 F. 2d 893.

No. 79-5837. SWINK *v.* TEXAS. Appeal from Sup. Ct. Tex. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: See 575 S. W. 2d 113.

No. 79-6090. WAYLAND *v.* TIFFANY ET AL. Appeal from C. A. 1st Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 618 F. 2d 92.

No. 79-6084. SAVARIN *v.* NATIONAL BANK OF COMMERCE—MASTER CHARGE. Appeal from Ct. App. Tenn. dismissed for want of substantial federal question.

Certiorari Granted—Vacated and Remanded

No. 78-1803. UNITED STATES *v.* HUMPHRIES. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Crews, ante,* p. 463. Reported below: 600 F. 2d 1238.

No. 79-1041. CALIFORNIA *v.* AUSTIN. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari granted, judgment vacated, and case remanded to consider whether its judgment is based on federal or state constitutional grounds, or both.

*Miscellaneous Orders**

No. A-700. SCHULTZ *v.* FLORIDA ET AL. C. A. 5th Cir. Application for injunction and other relief, addressed to MR. JUSTICE BRENNAN and referred to the Court, denied.

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*For the Court's orders prescribing Rules of Procedure for the Trial of Misdemeanors before United States Magistrates, see *post,* p. 976; and adopting amendments to the Rules of this Court, see *post,* p. 984.

No. A-831. OIL, CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL 1-547 *v.* GOUBEAUX, REGIONAL DIRECTOR, NATIONAL LABOR RELATIONS BOARD. D. C. C. D. Cal. Application for stay pending appeal to the United States Court of Appeals for the Ninth Circuit, presented to MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, and by them referred to the Court, denied.

No. A-849. UNITED STATES TAXPAYER'S UNION ET AL. *v.* UNITED STATES ET AL. Application for stay of order of the United States District Court for the District of Colorado pending appeal to the United States Court of Appeals for the Tenth Circuit, presented to MR. JUSTICE WHITE, and by him referred to the Court, denied. MR. JUSTICE BRENNAN would grant the application.

No. A-855. RECORD DATA, INC., ET AL. *v.* NICHOLS ET AL. Application for stay of mandate of the Supreme Court of Alabama, addressed to MR. JUSTICE WHITE and referred to the Court, denied.

No. A-866. GREEN *v.* UNITED STATES ET AL. Application for a writ of habeas corpus and/or release on personal recognizance, presented to MR. JUSTICE BLACKMUN, and by him referred to the Court, denied.

No. 86, Orig. LOUISIANA *v.* MISSISSIPPI ET AL. Motion for leave to file a bill of complaint granted. The defendants are allowed 60 days in which to answer. Application for stay of proceedings in the United States District Court for the Southern District of Mississippi denied.

No. 79-343. SUN SHIP, INC. *v.* PENNSYLVANIA ET AL. Pa. Commw. Ct. [Probable jurisdiction noted, 444 U. S. 1011.] Motion of Local No. 6, Industrial Union of Marine & Shipbuilding Workers of America, AFL-CIO, for leave to file a brief as *amicus curiae* granted.

No. 79-509. EXXON CORP. *v.* DEPARTMENT OF REVENUE OF WISCONSIN. Sup. Ct. Wis. [Probable jurisdiction noted. 444 U. S. 961.] Motion of appellant for leave to file a brief after argument granted. MR. JUSTICE STEWART took no part in the consideration or decision of this motion.

No. 79-521. CONSUMER PRODUCT SAFETY COMMISSION ET AL. *v.* GTE SYLVANIA, INC., ET AL. C. A. 3d Cir. [Certiorari granted, 444 U. S. 979.] Motion of the Solicitor General to permit Peter Buscemi, Esquire, to present oral argument *pro hac vice* granted.

No. 79-701. ROADWAY EXPRESS, INC. *v.* MONK ET AL. C. A. 5th Cir. [Certiorari granted, 444 U. S. 1012.] Motion of the Solicitor General for divided argument granted. Motion of NAACP Legal Defense and Educational Fund, Inc., for leave to file a brief as *amicus curiae* granted.

No. 79-824. FEDERAL COMMUNICATIONS COMMISSION ET AL. *v.* WNCN LISTENERS GUILD ET AL.;

No. 79-825. INSILCO BROADCASTING CORP. ET AL. *v.* WNCN LISTENERS GUILD ET AL.;

No. 79-826. AMERICAN BROADCASTING COS., INC., ET AL. *v.* WNCN LISTENERS GUILD ET AL; and

No. 79-827. NATIONAL ASSOCIATION OF BROADCASTERS ET AL. *v.* WNCN LISTENERS GUILD ET AL. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 914.] Motion to dispense with printing appendix granted except as to those portions designated by the Solicitor General who will bear the costs.

No. 79-935. ALLEN ET AL. *v.* MCCURRY. C. A. 8th Cir. [Certiorari granted, 444 U. S. 1070.] Motion of petitioners to dispense with printing appendix granted.

No. 79-938. ALLSTATE INSURANCE CO. *v.* HAGUE. Sup. Ct. Minn. [Certiorari granted, 444 U. S. 1070.] Joint motion to dispense with printing appendix granted.

No. 79-952. THOMAS *v.* REVIEW BOARD OF THE INDIANA EMPLOYMENT SECURITY DIVISION ET AL. Sup. Ct. Ind. [Certiorari granted, 444 U. S. 1070.] Motion of petitioner to dispense with printing appendix granted.

No. 79-1236. CARSON ET AL. *v.* AMERICAN BRANDS, INC., T/A AMERICAN TOBACCO CO., ET AL. C. A. 4th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. A-723 (79-1323). QUINONES *v.* UNITED STATES. Application for stay of mandate of the United States Court of Appeals for the Third Circuit, presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied.

No. A-793 (79-1434). MANDEL ET AL. *v.* NEW YORK. Ct. App. N. Y. Application for stay, addressed to MR. JUSTICE BRENNAN and referred to the Court, denied.

No. 79-5903. H. L. *v.* MATHESON, GOVERNOR OF UTAH, ET AL. Sup. Ct. Utah. [Probable jurisdiction noted, *ante*, p. 903.] Motion to appoint Alan Ernest as counsel for children unborn and born alive denied. Motion of Legal Defense Fund for Unborn Children for leave to file a brief as *amicus curiae* denied.

No. 79-1028. MANDEL ET AL. *v.* EN BANC COURT OF APPEALS FOR THE FOURTH CIRCUIT ET AL;

No. 79-1246. CONNOLLY ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA (PENSION BENEFIT GUARANTY CORP., REAL PARTY IN INTEREST);

No. 79-6079. MCCLAIN *v.* BLUMENFELD; and

No. 79-6110. GREEN *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI. Motions for leave to file petitions for writs of mandamus denied.

Probable Jurisdiction Postponed

No. 79-5962. VINCENT *v.* TEXAS. Appeal from Ct. Crim. App. Tex. Motion of appellant for leave to proceed *in forma pauperis* granted. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Reported below: 586 S. W. 2d 880.

Certiorari Granted

No. 79-621. ARIZONA *v.* MANYPENNY. C. A. 9th Cir. Certiorari granted. Reported below: 608 F. 2d 1197.

No. 79-1128. MONTANA ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 604 F. 2d 1162.

No. 79-1013. RUBIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 609 F. 2d 51.

No. 79-5688. HUDSON *v.* LOUISIANA. Sup. Ct. La. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 373 So. 2d 1294.

Certiorari Denied. (See also Nos. 79-1152, 79-5837, and 79-6090, *supra.*)

No. 78-6320. PEARSON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 67 Ill. App. 3d 300, 384 N. E. 2d 1331.

No. 78-6374. FLETCHER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 594 F. 2d 868.

No. 79-862. FOSTER *v.* PEARCY. Sup. Ct. Ind. Certiorari denied. Reported below: — Ind. —, 387 N. E. 2d 446.

No. 79-885. SHERMAN *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 42 Md. App. 766.

No. 79–926. PADILLA *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 70 Ill. App. 3d 406, 387 N. E. 2d 985.

No. 79–958. O'BRIEN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 609 F. 2d 895.

No. 79–1014. BUCKNER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 610 F. 2d 570.

No. 79–1016. GIACALONE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 610 F. 2d 807.

No. 79–1029. MANDEL ET AL. *v.* UNITED STATES; and
No. 79–1030. RODGERS ET AL. *v.* UNITED STATES C. A. 4th Cir. Certiorari denied. Reported below: 602 F. 2d 653.

No. 79–1040. GILBERT *v.* CLELAND ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 601 F. 2d 761.

No. 79–1042. DOLESE ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 605 F. 2d 1146.

No. 79–1050. HUDLER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 605 F. 2d 488.

No. 79–1051. CITY OF ROHNERT PARK *v.* LANDRIEU, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 601 F. 2d 1040.

No. 79–1060. ZALMANOWSKI ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 606 F. 2d 673.

No. 79–1063. KEEFE ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 612 F. 2d 570.

No. 79–1100. RIALS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 608 F. 2d 1372.

No. 79-1104. E. I. du Pont de Nemours & Co. *v.* United States. Ct. Cl. Certiorari denied. Reported below: — Ct. Cl. —, 608 F. 2d 445.

No. 79-1108. Jones et al. *v.* Morrison. C. A. 9th Cir. Certiorari denied. Reported below: 607 F. 2d 1269.

No. 79-1116. McInnis *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 601 F. 2d 1319.

No. 79-1121. Scott *v.* United States; and
No. 79-1122. Brown *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 604 F. 2d 347.

No. 79-1138. Schulz *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 624 F. 2d 1103.

No. 79-1146. Petty et al. *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 601 F. 2d 883.

No. 79-1149. Allstate Savings & Loan Assn. *v.* Commissioner of Internal Revenue. C. A. 9th Cir. Certiorari denied. Reported below: 600 F. 2d 760.

No. 79-1150. California, by and through the Department of Transportation of California, et al. *v.* Doria Mining & Engineering Corp. et al. C. A. 9th Cir. Certiorari denied. Reported below: 608 F. 2d 1255.

No. 79-1161. St. Joseph's Hospital Health Center *v.* Blue Cross of Central New York, Inc., et al. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1290.

No. 79-1165. Scott *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 109.

No. 79-1166. Smith *v.* Wilson Freight Co. et al. C. A. 1st Cir. Certiorari denied. Reported below: 604 F. 2d 712.

No. 79-1168. McDonald *v.* Gerberding et al. Sup. Ct. Wash. Certiorari denied. Reported below: 92 Wash. 2d 431, 598 P. 2d 707.

No. 79–1196. TIMMONS *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. Reported below: 605 F. 2d 1206.

No. 79–1198. SPANNAUS, ATTORNEY GENERAL OF MINNESOTA *v.* GOLDSCHMIDT, SECRETARY OF TRANSPORTATION, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 608 F. 2d 861.

No. 79–1212. WEINKLE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 612 F. 2d 581.

No. 79–1231. ELY *v.* UNITED PARCEL SERVICE, INC., ET AL. C. A. 6th Cir. Certiorari denied.

No. 79–1249. BACKUS *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 608 F. 2d 1374.

No. 79–1255. EARP *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 23 Wash. App. 1071.

No. 79–1261. J. C. ATHANS ENGINEERING & CONSTRUCTION CO., INC. *v.* POWELL ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 79–1264. HAAS, EXECUTRIX *v.* MANUFACTURERS HANOVER TRUST CO., TRUSTEE. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1287.

No. 79–1265. CATERINA *v.* PENNSYLVANIA. Pa. Commw. Ct. Certiorari denied. Reported below: 43 Pa. Commw. 19, 401 A. 2d 852.

No. 79–1271. POLLEY *v.* KIRKLAND ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 608 F. 2d 1371.

No. 79–1272. PERRIN, WARDEN, ET AL. *v.* HENRY ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 609 F. 2d 1010.

No. 79–1274. DESERT CHRYSLER-PLYMOUTH, INC., ET AL. *v.* CHRYSLER CORP. Sup. Ct. Nev. Certiorari denied. Reported below: 95 Nev. 640, 600 P. 2d 1189.

No. 79–1278. ELLIS ET UX. *v.* ARKANSAS LOUISIANA GAS CO. C. A. 10th Cir. Certiorari denied. Reported below: 609 F. 2d 436.

No. 79–1283. CHICAGO TITLE & TRUST CO., TRUSTEE, ET AL. *v.* TULLY, ASSESSOR OF COOK COUNTY, ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 76 Ill. App. 3d 336, 395 N. E. 2d 42.

No. 79–1285. MASCHHOFF *v.* INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 611 F. 2d 373.

No. 79–1286. MORIGEAU *v.* LARRIVEE. Sup. Ct. Mont. Certiorari denied. Reported below: — Mont. —, 602 P. 2d 563.

No. 79–1287. STEWART *v.* SUPERIOR COURT OF PIMA COUNTY, ARIZONA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 610 F. 2d 822.

No. 79–1288. WILT ET AL. *v.* OHIO STATE BOARD OF EDUCATION ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 608 F. 2d 1126.

No. 79–1291. TUCKER *v.* NEAL ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1291.

No. 79–1292. NUNNALLY ET AL. *v.* TRUST COMPANY BANK, CO-TRUSTEE, ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 244 Ga. 697, 261 S. E. 2d 621.

No. 79–1302. KENNEDY, TRUSTEE IN BANKRUPTCY *v.* HANCOCK INVESTMENT CO., INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 612 F. 2d 580.

No. 79–1307. DAVIS OIL CO. ET AL. *v.* PARVIN. C. A. 9th Cir. Certiorari denied. Reported below: — F. 2d —.

No. 79–1319. POMERANTZ *v.* NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 79–1322. ISON *v.* FIRST STATE BANK OF CENTRALIA, ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 73 Ill. App. 3d 1112, 395 N. E. 2d 1249.

No. 79–1324. COSDEN OIL & CHEMICAL CO. *v.* INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 826. Ct. Civ. App. Tex., 11th Sup. Jud. Dist. Certiorari denied. Reported below: 585 S. W. 2d 911.

No. 79–1360. SERRANO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 607 F. 2d 1145.

No. 79–1363. ASH *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 608 F. 2d 178.

No. 79–1364. GODE ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 614 F. 2d 777.

No. 79–1374. REPUBLICAN NATIONAL COMMITTEE ET AL. *v.* FEDERAL ELECTION COMMISSION ET AL. C. A. 2d Cir. Certiorari before judgment denied.

No. 79–1379. STATEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 612 F. 2d 578.

No. 79–1381. ESPARZA-CORRAL ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 110.

No. 79–1390. WRIGHT, ADMINISTRATRIX *v.* SOUTHERN BELL TELEPHONE CO. C. A. 5th Cir. Certiorari denied. Reported below: 605 F. 2d 156.

No. 79–1405. KAUFMAN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 605 F. 2d 1381 and 609 F. 2d 826.

No. 79–1413. JACKSTADT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 617 F. 2d 12.

No. 79–1419. JONES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 612 F. 2d 453.

No. 79–1430. STRAUBE *v.* EMANUEL LUTHERAN CHARITY BOARD, DBA EMANUEL HOSPITAL. Sup. Ct. Ore. Certiorari denied. Reported below: 287 Ore. 375, 600 P. 2d 381.

No. 79–1431. FREEMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 612 F. 2d 443.

No. 79–5431. TSINNIJINNIE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 601 F. 2d 1035.

No. 79–5805. BERRYMAN ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 610 F. 2d 814.

No. 79–5916. ALEXANDER *v.* PERINI, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 611 F. 2d 371.

No. 79–5930. BRAY *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 79–5935. HERRING *v.* SANDERS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 610 F. 2d 811.

No. 79–5940. TURNER *v.* MITCHELL, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 609 F. 2d 510.

No. 79–5941. MEIER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 607 F. 2d 215.

No. 79–5943. NICKERSON ET AL. *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 79-5964. METHENY *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied. Reported below: 589 S. W. 2d 943.

No. 79-5977. COLEMAN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 586 S. W. 2d 877.

No. 79-6012. GELESTINO *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: — U. S. App. D. C. —, 617 F. 2d 677.

No. 79-6040. BEEDE *v.* NEW HAMPSHIRE. Sup. Ct. N. H. Certiorari denied. Reported below: — N. H. —, 406 A. 2d 125.

No. 79-6053. WALKER *v.* UNITED STATES; and
No. 79-6063. MACK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: No. 79-6053, 614 F. 2d 772; No. 79-6063, 614 F. 2d 771.

No. 79-6070. LYNN ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 109.

No. 79-6085. CAREY *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 43 Md. App. 246, 405 A. 2d 293.

No. 79-6087. TORRES *v.* ROMERO, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 79-6092. LILLIBRIDGE ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Reported below: 615 F. 2d 1360.

No. 79-6097. DUKE *v.* HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 4th Cir. Certiorari denied. Reported below: 607 F. 2d 1001.

No. 79-6098. MCGRUDER *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 124 Ariz. 377, 604 P. 2d 641.

No. 79-6105. CANTY *v.* MAHONEY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 612 F. 2d 1306.

No. 79-6113. OWENS *v.* MARSHALL, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 612 F. 2d 581.

No. 79-6114. PRESTIGIACOMO *v.* SMITH, REFORMATORY SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 611 F. 2d 374.

No. 79-6115. TERRELL *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 379 So. 2d 1238.

No. 79-6118. SHERROD *v.* MARYLAND HOUSE OF CORRECTION. C. A. 4th Cir. Certiorari denied. Reported below: 612 F. 2d 1310.

No. 79-6119. HALL *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 288 N. W. 2d 908.

No. 79-6124. LEBRUN *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 43 Ore. App. 3, 603 P. 2d 371.

No. 79-6125. COULSTON *v.* HUTTO, CORRECTIONS DIRECTOR. C. A. 4th Cir. Certiorari denied. Reported below: 610 F. 2d 810.

No. 79-6126. HAWKINS *v.* CRIST, WARDEN, ET AL. Sup. Ct. Mont. Certiorari denied.

No. 79-6131. JONES *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 75 Ill. App. 3d 214, 393 N. E. 2d 1132.

No. 79-6132. MASON *v.* HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 4th Cir. Certiorari denied. Reported below: 610 F. 2d 812.

No. 79-6135. CUNNINGHAM *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: — Ct. Cl. —, 618 F. 2d 122.

No. 79-6136. WILLIAMS *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 79-6140. TRICKER *v.* CUPP, PENITENTIARY SUPERINTENDENT. Sup. Ct. Ore. Certiorari denied.

No. 79-6144. ALLEN *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 73 Ill. App. 3d 1112, 395 N. E. 2d 1250.

No. 79-6162. NORMENT ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO. C. A. 6th Cir. Certiorari denied.

No. 79-6186. NOE *v.* CIVILETTI, ATTORNEY GENERAL, ET AL. C. A. 5th Cir. Certiorari denied.

No. 79-6215. MEARS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 106.

No. 79-6233. DAVIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 111.

No. 79-6252. WRIGHT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 615 F. 2d 1363.

No. 79-6256. CALLAHAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 612 F. 2d 443.

No. 79-6259. BURGESS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 615 F. 2d 1358.

No. 79-6268. SUHAIL, AKA KIER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 614 F. 2d 777.

No. 79-807. PEER, DIRECTOR, DEPARTMENT OF PUBLIC WELFARE OF COUNTY OF SAN DIEGO, ET AL. *v.* GRIFFETH ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 603 F. 2d 118.

MR. JUSTICE REHNQUIST, dissenting.

The Court of Appeals has taken a significant step in this case to expand the ruling of this Court in *Goldberg* v. *Kelly*, 397 U. S. 254 (1970), a step that I believe merits plenary consideration by the full Court. The question pertains to whether an *applicant* for state mandated welfare benefits is entitled to a hearing under the procedural guarantees of the Fourteenth Amendment to the United States Constitution before being denied welfare benefits for failure to meet the initial requirements imposed by state law. The California courts themselves, in *Zobriscky* v. *Los Angeles County*, 28 Cal. App. 3d 930, 105 Cal. Rptr. 121 (1972), have concluded that an applicant is not entitled to any hearing because, in the words of the Court of Appeals for the Ninth Circuit, they "refused to find general relief to be a protected property interest." *Griffeth* v. *Detrich*, 603 F. 2d 118, 121 (1979).

There has been much decisional law from this and other courts, and much scholarly commentary, as to what is a protected "property" interest under the Fourteenth Amendment's Due Process Clause, and what procedural guarantees are necessary under that Clause before one may be denied such a property interest. See, *e. g.*, *Goldberg* v. *Kelly*, *supra*; *Board of Regents* v. *Roth*, 408 U. S. 564 (1972); *Mathews* v. *Eldridge*, 424 U. S. 319 (1976); *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1 (1979); Van Alstyne, Cracks in "The New Property": Adjudicative Due Process in the Administrative State, 62 Cornell L. Rev. 445 (1977). Obviously this Court cannot parse every state-law provision to determine whether it creates a protected "property interest" under the Due Process Clause of the Fourteenth Amendment. But

here I believe the District Court put its finger on the significance of the case when it ruled against respondents, saying:

> "Plaintiffs [respondents] argue that the *pretermination* evidentiary hearing required by the Supreme Court in *Goldberg* v. *Kelly,* 397 U. S. 254 . . . (1970) should be applied to protect *denied* applicants for General Relief in San Diego County. . . . Defendants oppose an *extension* of *Goldberg*'s protection of terminated *recipients* of welfare to denied *applicants* for General Relief. The Supreme Court has not ruled on the issue. *Wheeler* v. *Montgomery,* 397 U. S. 280, 284–285 . . . (1970) (BURGER, C. J., dissenting)." (Emphasis supplied in part.) *Griffeth* v. *Detrich,* 448 F. Supp. 1137, 1139 (SD Cal. 1978).

Particularly when the only state appellate court to consider the question has concluded that there is no protected property interest under state law, this extension of *Goldberg* v. *Kelly, supra,* should receive plenary consideration by this Court.

No. 79–1074. UNITED PARCEL SERVICE, INC., ET AL. *v.* UNITED STATES ET AL. C. A. 7th Cir. Motion of petitioner to strike brief of intervening respondents and certiorari denied. Reported below: 612 F. 2d 277.

No. 79–1197. NATIONAL LABOR RELATIONS BOARD *v.* MERCY HOSPITAL ASSN. C. A. 2d Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE WHITE would grant certiorari. Reported below: 606 F. 2d 22.

No. 79–5707. FLANAGAN *v.* UNITED STATES. C. A. 5th Cir. Motion for leave to file a supplement to petition granted. Certiorari denied. Reported below: 592 F. 2d 253.

No. 79–5901. WADE *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. MR. JUSTICE STEWART and MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 375 So. 2d 97.

No. 79-1248. MISSOURI *v.* WANDIX. Sup. Ct. Mo. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 590 S. W. 2d 82.

No. 79-1306. CASTRO *v.* TERRITORY OF GUAM. C. A. 9th Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE STEWART would grant certiorari. Reported below: 612 F. 2d 584.

No. 79-6111. FORD *v.* FLORIDA. Sup. Ct. Fla.;

No. 79-6116. THOMAS *v.* FLORIDA. Sup. Ct. Fla.;

No. 79-6168. STAMPER *v.* VIRGINIA. Sup. Ct. Va.; and

No. 79-6187. TUCKER *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: No. 79-6111, 374 So. 2d 496; No. 79-6116, 374 So. 2d 508; No. 79-6168, 220 Va. 260, 257 S. E. 2d 808; No. 79-6187, 244 Ga. 721, 261 S. E. 2d 635.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 78-1323. NORFOLK & WESTERN RAILWAY CO. *v.* LIEPELT, ADMINISTRATRIX, 444 U. S. 490;

No. 78-1335. VILLAGE OF SCHAUMBURG *v.* CITIZENS FOR A BETTER ENVIRONMENT ET AL., 444 U. S. 620;

No. 78-1871. SNEPP *v.* UNITED STATES, 444 U. S. 507;

No. 79-265. UNITED STATES *v.* SNEPP, 444 U. S. 507;

No. 79-579. ERWIN ET AL. *v.* UNITED STATES, 444 U. S. 1071; and

No. 79-830. VINSON *v.* UNITED STATES, 444 U. S. 1074. Petitions for rehearing denied.

No. 79–833. KONDRAT *v.* CITY OF WILLOUGHBY HILLS ET AL., 444 U. S. 1075;

No. 79–890. LAMERS DAIRY, INC., ET AL. *v.* SECRETARY OF AGRICULTURE, 444 U. S. 1077;

No. 79–894. PARKER *v.* TEXAS, 444 U. S. 1060;

No. 79–918. SHUFFMAN, EXECUTRIX *v.* HARTFORD TEXTILE CORP. ET AL., 444 U. S. 1078;

No. 79–942. SHUFFMAN, EXECUTRIX *v.* HARTFORD TEXTILE CORP. ET AL., 444 U. S. 1078;

No. 79–971. CEFALU *v.* GLOBE NEWSPAPER CO., 444 U. S. 1060;

No. 79–1001. SHUFFMAN, EXECUTRIX *v.* HARTFORD TEXTILE CORP. ET AL., 444 U. S. 1080;

No. 79–5360. MORRIS *v.* CATE-MCLAURIN CO. ET AL., *ante*, p. 917;

No. 79–5733. JONES ET UX. *v.* GEORGIA-PACIFIC CORP., 444 U. S. 1085;

No. 79–5744. ALDERMAN *v.* BALKCOM, WARDEN, 444 U. S. 1103;

No. 79–5777. HAYES *v.* BOARD OF TRUSTEES OF CLARK COUNTY SCHOOL DISTRICT, 444 U. S. 1061;

No. 79–5802. CLARK *v.* PAYNE ET AL., 444 U. S. 1088;

No. 79–5830. BOWDEN *v.* ZANT, WARDEN, 444 U. S. 1103;

No. 79–5872. HARRISON *v.* NAIFEH, JUDGE, ET AL., *ante*, p. 932;

No. 79–5893. YOUNG *v.* INDIANA, *ante*, p. 906;

No. 79–5917. HUNT *v.* GREENBERG, DISTRICT ATTORNEY OF ALBANY COUNTY, ET AL., *ante*, p. 918.

No. 79–5929. TAYLOR *v.* CITY OF ATLANTA ET AL., *ante*, p. 907; and

No. 79–5973. SELLARS *v.* COMMUNITY RELEASE BOARD OF CALIFORNIA, *ante*, p. 919. Petitions for rehearing denied.

No. 78–1548. CALIFORNIA BREWERS ASSN. ET AL. *v.* BRYANT ET AL., 444 U. S. 598. Petition for rehearing denied. MR. JUSTICE POWELL and MR. JUSTICE STEVENS took no part in the consideration or decision of this petition.

No. 79–5986. MAHLER *v.* NELSON, WARDEN, 444 U. S. 1092. Motion for leave to file petition for rehearing denied.

APRIL 17, 1980

Dismissal Under Rule 60

No. 79–5974. BROCKINGTON ET AL. *v.* GEORGIA. Ct. App. Ga. Certiorari dismissed as to petitioner Brockington under this Court's Rule 60. Reported below: 152 Ga. App. 11, 262 S. E. 2d 170.

RULES OF PROCEDURE FOR THE TRIAL OF MISDEMEANORS BEFORE UNITED STATES MAGISTRATES

Effective June 1, 1980

The Rules of Procedure for the Trial of Misdemeanors Before United States Magistrates were prescribed by the Supreme Court of the United States pursuant to 18 U. S. C. § 3402.

These rules, which supersede the rules prescribed by the Court on January 27, 1971 (see 400 U. S. 1037), became effective June 1, 1980, pursuant to the Court's order, *post*, p. 976.

SUPREME COURT OF THE UNITED STATES

MONDAY, APRIL 14, 1980

ORDER PRESCRIBING RULES OF PROCEDURE FOR THE TRIAL OF MISDEMEANORS BEFORE UNITED STATES MAGISTRATES

ORDERED that the following Rules to be known as the Rules of Procedure for the Trial of Misdemeanors before United States Magistrates, be and they are hereby prescribed pursuant to § 3402 of Title 18, United States Code. These Rules shall become effective on June 1, 1980, and shall supersede the Rules for the Trial of Minor Offenses before United States Magistrates heretofore promulgated by this Court on January 27, 1971.

RULES OF PROCEDURE FOR THE TRIAL OF MISDEMEANORS BEFORE UNITED STATES MAGISTRATES

Rule 1. Scope.

(*a*) *In general.*—These rules govern the procedure and practice for the conduct of proceedings in misdemeanor cases, including petty offenses, before United States magistrates under 18 U. S. C. § 3401, and for appeals in such cases to judges of the district courts.

(*b*) *Applicability of Federal Rules of Criminal Procedure.*—Except as specifically provided by these rules, the Federal Rules of Criminal Procedure govern all proceedings except those concerning petty offenses for which no sentence of imprisonment will be imposed. Proceedings concerning petty offenses for which no sentence of imprisonment will be imposed are not governed by the Federal Rules of Criminal Procedure, except as specifically provided therein or by these rules. However, to the extent they are not inconsistent with these rules, a magistrate may follow such provisions of the Federal Rules of Criminal Procedure as he deems appropriate.

(*c*) *Definition.*—The term "petty offenses for which no sentence of imprisonment will be imposed," as used in these rules, means any petty offenses, regardless of the penalty authorized by law, as to which the magistrate determines that, in the event of conviction, no sentence of imprisonment will actually be imposed in the particular case.

Rule 2. Pretrial procedures.

(*a*) *Trial document.*—The trial of a misdemeanor may proceed on an indictment, information, or complaint or, if it be a petty offense, on a citation or violation notice. The district court, by order or local rule, may make provision for the reference of such cases to a magistrate.

(*b*) *Initial appearance.*—At the defendant's initial appearance on a misdemeanor charge, the magistrate shall inform the defendant of the following:

(1) the charge against him, and the maximum possible penalty provided by law;

(2) his right to retain counsel;

(3) unless he is charged with a petty offense for which appointment of counsel is not required, his right to request the assignment of counsel if he is unable to obtain counsel;

(4) that he is not required to make a statement and that any statement made by him may be used against him;

(5) that he has a right to trial, judgment and sentencing before a judge of the district court;

(6) unless the offense charged is a petty offense, that he has a right to trial by jury before either a magistrate or a judge of the district court;

(7) if the prosecution is not on an indictment or information and is for a misdemeanor other than a petty offense, that he has a right to have a preliminary examination unless he consents to be tried before the magistrate; and

(8) if he is in custody, of the general circumstances under which he may secure pretrial release.

(*c*) *Consent and arraignment.*—If the defendant signs a written consent to be tried before the magistrate which specifically waives trial before a judge of the district court, the magistrate shall take the defendant's plea to the misdemeanor charge. The defendant may plead not guilty, guilty or, with the consent of the magistrate, *nolo contendere.* If the defendant pleads not guilty, the magistrate shall either conduct the trial within 30 days upon written consent of the defendant or fix a later time for the trial, giving due regard to the needs of the parties to consult with counsel and prepare for trial.

Rule 3. Additional procedures applicable only to petty offenses for which no sentence of imprisonment will be imposed.

(*a*) *Failure to consent.*—If the defendant charged with a petty offense for which no sentence of imprisonment will be imposed does not consent to trial before the magistrate, he shall be ordered to appear before a judge of the district court for further proceedings on notice. The file shall be transmitted forthwith to the clerk of the district court.

(*b*) *Plea of guilty or nolo contendere.*—No plea of guilty or *nolo contendere* to a petty offense for which no sentence of imprisonment will be imposed shall be accepted unless the magistrate is satisfied that the defendant understands the nature of the charge and the maximum possible penalty provided by law.

(*c*) *Waiver of venue for plea and sentence.*—A defendant charged with a petty offense for which no sentence of imprisonment will be imposed who is arrested, held, or present in a district other than that in which an indictment, information, complaint, citation or violation notice is pending against him may state in writing that he wishes to plead guilty or *nolo contendere*, to waive venue and trial in the district in which the proceeding against him is pending, and to consent to disposition of the case in the district in which he was arrested, is held, or is present. Unless the defendant thereafter pleads not guilty, the prosecution shall be had as if venue were in such district, and notice of same shall be given to the magistrate in the district where the proceeding was originally commenced. The defendant's statement that he wishes to plead guilty or *nolo contendere* shall not be used against him.

(*d*) *Sentence.*—If the defendant charged with a petty offense for which no sentence of imprisonment will be imposed pleads guilty or *nolo contendere* or is found guilty after trial, the magistrate shall afford him an opportunity to be heard in mitigation. The magistrate shall then immediately proceed to sentence the defendant, except that in the discretion of the magistrate sentencing may be continued to allow an investi-

gation by the probation service or the submission of additional information by either party.

(*e*) *Notification of right to appeal.*—After imposing sentence in a case which has gone to trial on a plea of not guilty, the magistrate shall advise the defendant of his right to appeal.

Rule 4. Securing defendant's appearance; payment in lieu of appearance.

(*a*) *Forfeiture of collateral.*—When authorized by local rules of the district court, payment of a fixed sum may be accepted in suitable types of misdemeanor cases in lieu of appearance and as authorizing the termination of the proceedings. Such local rules may make provision for increases in such fixed sums not to exceed the maximum fine which could be imposed upon conviction.

(*b*) *Notice to appear.*—If a defendant fails to pay a fixed sum, request a hearing, or appear in response to a citation or violation notice, the clerk of the district court or a magistrate may issue a notice for the defendant to appear before a magistrate on a date certain. The notice may also afford the defendant an additional opportunity to pay a fixed sum in lieu of appearance, and shall be served upon the defendant by mailing a copy to his last known address.

(*c*) *Summons or warrant.*—Upon an indictment or a showing by one of the other documents specified in Rule 2 (a) of probable cause to believe that a misdemeanor has been committed and that the defendant has committed it, a magistrate may issue an arrest warrant or, if no warrant is requested by the attorney for the government, a summons. The showing shall be made in writing upon oath or under penalty of perjury, but the affiant need not appear before the magistrate. If the defendant fails to appear before the magistrate in response to a summons, the magistrate may summarily issue a warrant for his immediate arrest and appearance before the magistrate.

Rule 5. Record.

Proceedings under these rules shall be taken down by a re-

porter or recorded by suitable sound recording equipment. In the discretion of the magistrate or, in the case of a misdemeanor other than a petty offense, on timely request of either party as provided by local rule, the proceedings shall be taken down by a reporter. With the written consent of the defendant, the keeping of a verbatim record may be waived in petty offense cases.

Rule 6. New trial.

The magistrate, on motion of a defendant, may grant a new trial if required in the interest of justice. The magistrate may vacate the judgment if entered, take additional testimony, and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the magistrate may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after a finding of guilty or within such further time as the magistrate may fix during the 7-day period.

Rule 7. Appeal.

(*a*) *Interlocutory appeal.*—A decision or order by a magistrate which, if made by a judge of the district court, could be appealed by the government or defendant under any provision of law, shall be subject to an appeal to a judge of the district court provided such appeal is taken within 10 days of the entry of the decision or order. An appeal shall be taken by filing with the clerk of the district court a statement specifying the decision or order from which an appeal is taken, and by serving a copy of the statement upon the adverse party, personally or by mail, and by filing a copy with the magistrate.

(*b*) *Appeal from conviction.*—An appeal from a judgment of conviction by a magistrate to a judge of the district court shall be taken within 10 days after entry of the judgment. An appeal shall be taken by filing with the clerk of the district court a statement specifying the judgment from which an appeal is taken, and by serving a copy of the statement upon

the United States Attorney, personally or by mail, and by filing a copy with the magistrate.

(*c*) *Record.*—The record shall consist of the original papers and exhibits in the case together with any transcript, tape, or other recording of the proceedings and a certified copy of the docket entries which shall be transmitted promptly by the magistrate to the clerk of the district court. For purposes of the appeal, a copy of the record of such proceedings shall be made available at the expense of the United States to a person who establishes by affidavit that he is unable to pay or give security therefor, and the expense of such copy shall be paid by the Director of the Administrative Office of the United States Courts.

(*d*) *Stay of execution; release pending appeal.*—The provisions of Rule 38 (a) of the Federal Rules of Criminal Procedure relating to stay of execution shall be applicable to a judgment of conviction entered by a magistrate. The defendant may be released pending appeal by the magistrate or a district judge in accordance with the provisions of law relating to release pending appeal from a judgment of conviction of a district court.

(*e*) *Scope of appeal.*—The defendant shall not be entitled to a trial *de novo* by a judge of the district court. The scope of appeal shall be the same as on an appeal from a judgment of a district court to a court of appeals.

Rule 8. Local rules.

Rules adopted by a district court for the conduct of trials before magistrates shall not be inconsistent with these rules. Copies of all rules made by a district court shall, upon their promulgation, be filed with the clerk of the district court and furnished to the Administrative Office of the United States Courts.

RULES OF THE SUPREME COURT OF THE UNITED STATES

ADOPTED APRIL 14, 1980

EFFECTIVE JUNE 30, 1980

The following are the Rules of the Supreme Court of the United States as amended on April 14, 1980. See *post*, p. 984. The amended Rules became effective June 30, 1980, as provided in Rule 55, *post*, p. 1047.

For previous revisions of the Rules of the Supreme Court see 346 U. S. 949, 388 U. S. 931, and 398 U. S. 1013.

ORDER ADOPTING AMENDMENTS TO THE RULES OF THE SUPREME COURT OF THE UNITED STATES

MONDAY, APRIL 14, 1980

The Rules of this Court as amended on April 14, 1980, have been lodged with the Clerk, and it is ordered that said Rules shall become effective on June 30, 1980, and be printed as an appendix to the United States Reports.

It is further ordered that the Rules promulgated on June 15, 1970, appearing in volume 398 of the United States Reports be, and they hereby are, rescinded, but this shall not affect any proper action taken under them before the Rules hereby adopted become effective.

RULES OF THE SUPREME COURT OF THE UNITED STATES

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RULES OF THE SUPREME COURT OF THE UNITED STATES

ADOPTED APRIL 14, 1980—EFFECTIVE JUNE 30, 1980

PART I. THE COURT

Rule 1

CLERK

.1. The Clerk shall have custody of all the records and papers of the Court and shall not permit any of them to be taken from his custody except as authorized by the Court. After the conclusion of the proceedings in this Court, any original records and papers transmitted as the record on appeal or certiorari will be returned to the court from which they were received. Pleadings, papers, and briefs filed with the Clerk may not be withdrawn by litigants.

.2. The office of the Clerk will be open, except on a federal legal holiday, from 9 a. m. to 5 p. m. Monday through Friday, and from 9 a. m. to noon Saturday.

.3. The Clerk shall not practice as an attorney or counselor while holding his office. See 28 U. S. C. § 955.

Rule 2

LIBRARY

.1. The Bar library will be open to the appropriate personnel of this Court, members of the Bar of this Court, Members of Congress, members of their legal staffs, and attorneys for the United States, its departments and agencies.

.2. The library will be open during such times as the reasonable needs of the Bar require and shall be governed by regulations made by the Librarian with the approval of the Chief Justice or the Court.

.3. Books may not be removed from the building, except by a Justice or a member of his legal staff.

Rule 3

Term

.1. The Court will hold an annual Term commencing on the first Monday in October, and may hold a special term whenever necessary. See 28 U. S. C. § 2.

.2. The Court at every Term will announce the date after which no case will be called for argument at that Term unless otherwise ordered for special cause shown.

.3. At the end of each Term, all cases on the docket will be continued to the next Term.

Rule 4

Sessions, Quorum, and Adjournments

.1. Open sessions of the Court will be held at 10 a. m. on the first Monday in October of each year, and thereafter as announced by the Court. Unless otherwise ordered, the Court will sit to hear arguments from 10 a. m. until noon and from 1 p. m. until 3 p. m.

.2. Any six Members of the Court shall constitute a quorum. See 28 U. S. C. § 1. In the absence of a quorum on any day appointed for holding a session of the Court, the Justices attending, or if no Justice is present the Clerk or a Deputy Clerk, may announce that the Court will not meet until there is a quorum.

.3. The Court in appropriate circumstances may direct the Clerk or the Marshal to announce recesses and adjournments.

PART II. ATTORNEYS AND COUNSELORS

Rule 5

Admission to the Bar

.1. It shall be requisite to the admission to practice in this Court that the applicant shall have been admitted to practice

in the highest court of a State, Territory, District, Commonwealth, or Possession for the three years immediately preceding the date of application, and that the applicant appears to the Court to be of good moral and professional character.

.2. Each applicant shall file with the Clerk (1) a certificate from the presiding judge, clerk, or other duly authorized official of the proper court evidencing the applicant's admission to practice there and present good standing, and (2) an executed copy of the form approved by the Court and furnished by the Clerk containing (i) the applicant's personal statement and (ii) the statement of two sponsors (who must be members of the Bar of this Court and must personally know, but not be related to, the applicant) endorsing the correctness of the applicant's statement, stating that the applicant possesses all the qualifications required for admission, and affirming that the applicant is of good moral and professional character.

.3. If the documents submitted by the applicant demonstrate that the applicant possesses the necessary qualifications, the Clerk shall so notify the applicant. Upon the applicant's signing the oath or affirmation and paying the fee required under Rule 45 (e), the Clerk shall issue a certificate of admission. If the applicant desires, however, the applicant may be admitted in open court on oral motion by a member of the Bar, provided that the requirements for admission have been satisfied.

.4. Each applicant shall take or subscribe the following oath or affirmation:

I, ..., do solemnly swear (or affirm) that as an attorney and as a counselor of this Court I will conduct myself uprightly and according to law, and that I will support the Constitution of the United States.

Rule 6

Argument Pro Hac Vice

.1. An attorney admitted to practice in the highest court of a State, Territory, District, Commonwealth, or Possession

who has not been such for three years, but who is otherwise eligible for admission to practice in this Court under Rule 5.1, may be permitted to present oral argument *pro hac vice* in a particular case.

.2. An attorney, barrister, or advocate who is qualified to practice in the courts of a foreign state may be permitted to present oral argument *pro hac vice* in a particular case.

.3. Oral argument *pro hac vice* shall be allowed only on motion of the attorney of record for the party on whose behalf leave is sought. Such motion must briefly and distinctly state the appropriate qualifications of the attorney for whom permission to argue orally is sought; it must be filed with the Clerk, in the form prescribed by Rule 42, no later than the date on which the appellee's or respondent's brief on the merits is due to be filed and it must be accompanied by proof of service as prescribed by Rule 28.

Rule 7

Prohibition Against Practice

No one serving as a law clerk or secretary to a Justice of this Court and no other employee of this Court shall practice as an attorney or counselor in any court or before any agency of Government while holding that position; nor shall such person after separating from that position participate, by way of any form of professional consultation or assistance, in any case before this Court until two years have elapsed after such separation; nor shall such person ever participate, by way of any form of professional consultation or assistance, in any case that was pending in this Court during the tenure of such position.

Rule 8

Disbarment

Where it is shown to the Court that any member of its Bar has been disbarred or suspended from practice in any court of record, or has engaged in conduct unbecoming a member of the Bar of this Court, such member forthwith

may be suspended from practice before this Court. Such member thereupon will be afforded the opportunity to show good cause, within 40 days, why disbarment should not be effectuated. Upon his response, or upon the expiration of the 40 days if no response is made, the Court will enter an appropriate order.

PART III. ORIGINAL JURISDICTION

Rule 9

Procedure in Original Actions

.1. This Rule applies only to actions within the Court's original jurisdiction under Article III of the Constitution of the United States. Original applications for writs in aid of the Court's appellate jurisdiction are governed by Part VII of these Rules.

.2. The form of pleadings and motions in original actions shall be governed, so far as may be, by the Federal Rules of Civil Procedure, and in other respects those Rules, where their application is appropriate, may be taken as a guide to procedure in original actions in this Court.

.3. The initial pleading in any original action shall be prefaced by a motion for leave to file such pleading, and both shall be printed in conformity with Rule 33. A brief in support of the motion for leave to file, which shall comply with Rule 33, may be filed with the motion and pleading. Sixty copies of each document, with proof of service as prescribed by Rule 28, are required, except that, when an adverse party is a State, service shall be made on the Governor and Attorney General of such State.

.4. The case will be placed upon the original docket when the motion for leave to file is filed with the Clerk. The docket fee must be paid at that time, and the appearance of counsel for the plaintiff entered.

.5. Within 60 days after receipt of the motion for leave to file and allied documents, any adverse party may file, with proof of service as prescribed by Rule 28, 60 printed copies

of a brief in opposition to such motion. The brief shall conform to Rule 33. When such brief in opposition has been filed, or when the time within which it may be filed has expired, the motion, pleading, and briefs will be distributed to the Court by the Clerk. The Court may thereafter grant or deny the motion, set it down for argument, or take other appropriate action.

.6. Additional pleadings may be filed, and subsequent proceedings had, as the Court may direct.

.7. A summons issuing out of this Court in any original action shall be served on the defendant 60 days before the return day set out therein; and if the defendant, on such service, shall not respond by the return day, the plaintiff shall be at liberty to proceed *ex parte*.

.8. Any process against a State issued from the Court in an original action shall be served on the Governor and Attorney General of such State.

PART IV. JURISDICTION ON APPEAL

Rule 10

Appeal—How Taken—Parties—Cross-Appeal

.1. An appeal to this Court permitted by law shall be taken by filing a notice of appeal in the form, within the time, and at the place prescribed by this Rule, and shall be perfected by docketing the case in this Court as provided in Rule 12.

.2. The notice of appeal shall specify the parties taking the appeal, shall designate the judgment or part thereof appealed from, giving the date of its entry, and shall specify the statute or statutes under which the appeal to this Court is taken. A copy of the notice of appeal shall be served on all parties to the proceeding in the court where the judgment appealed from was issued, in the manner prescribed by Rule 28, and proof of service shall be filed with the notice of appeal.

.3. If the appeal is taken from a federal court, the notice of appeal shall be filed with the clerk of that court. If the appeal is taken from a state court, the notice of appeal shall

be filed with the clerk of the court from whose judgment the appeal is taken, and a copy of the notice of appeal shall be filed with the court possessed of the record.

.4. All parties to the proceeding in the court from whose judgment the appeal is being taken shall be deemed parties in this Court, unless the appellant shall notify the Clerk of this Court in writing of appellant's belief that one or more of the parties below has no interest in the outcome of the appeal. A copy of such notice shall be served on all parties to the proceeding below and a party noted as no longer interested may remain a party here by notifying the Clerk, with service on the other parties, that he has an interest in the appeal. All parties other than appellants shall be appellees, but any appellee who supports the position of an appellant shall meet the time schedule for filing papers which is provided for that appellant, except that any response by such appellee to a jurisdictional statement shall be filed within 20 days after receipt of the statement.

.5. The Court may permit an appellee, without filing a cross-appeal, to defend a judgment on any ground that the law and record permit and that would not expand the relief he has been granted.

.6. Parties interested jointly, severally, or otherwise in a judgment may join in an appeal therefrom; or any one or more of them may appeal separately; or any two or more of them may join in an appeal. Where two or more cases that involve identical or closely related questions are appealed from the same court, it will suffice to file a single jurisdictional statement covering all the issues.

.7. An appellee may take a cross-appeal by perfecting an appeal in the normal manner or, without filing a notice of appeal, by docketing the cross-appeal within the time permitted by Rule 12.4.

Rule 11

Appeal, Cross-Appeal—Time for Taking

.1. An appeal to review the judgment of a state court in a criminal case shall be in time when the notice of appeal

prescribed by Rule 10 is filed with the clerk of the court from whose judgment the appeal is taken within 90 days after the entry of such judgment and the case is docketed within the time provided in Rule 12. See 28 U. S. C. § 2101 (d).

.2. An appeal in all other cases shall be in time when the notice of appeal prescribed by Rule 10 is filed with the clerk of the appropriate court within the time allowed by law for taking such appeal and the case is docketed within the time provided in Rule 12. See 28 U. S. C. §§ 2101 (a), (b), and (c).

.3. The time for filing the notice of appeal runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate (or its equivalent under local practice). However, if a petition for rehearing is timely filed by any party in the case, the time for filing the notice of appeal for all parties (whether or not they requested rehearing or joined in the petition for rehearing, or whether or not the petition for rehearing relates to an issue the other parties would raise) runs from the date of the denial of rehearing or the entry of a subsequent judgment.

.4. The time for filing a notice of appeal may not be extended.

.5. A cross-appeal shall be in time if it complies with this Rule or if it is docketed as provided in Rule 12.4.

Rule 12

Docketing Cases

.1. Not more than 90 days after the entry of the judgment appealed from, it shall be the duty of the appellant to docket the case in the manner set forth in paragraph .3 of this Rule, except that in the case of appeals pursuant to 28 U. S. C. §§ 1252 or 1253, the time limit for docketing shall be 60 days from the filing of the notice of appeal. See 28 U. S. C. § 2101 (a). The Clerk will refuse to receive any jurisdictional statement in a case in which the notice of appeal has obviously not been timely filed.

.2. For good cause shown, a Justice of this Court may extend the time for docketing a case for a period not exceeding

60 days. An application for extension of time within which to docket a case must set out the grounds on which the jurisdiction of this Court is invoked, must identify the judgment sought to be reviewed, must have appended a copy of the opinion, must specify the date and place of filing of the notice of appeal and append a copy thereof, and must set forth with specificity the reasons why the granting of an extension of time is thought justified. For the time and manner of presenting such an application, see Rules 29, 42.2, and 43. Such applications are not favored.

.3. Counsel for the appellant shall enter an appearance, pay the docket fee, and file, with proof of service as prescribed by Rule 28, 40 copies of a printed statement as to jurisdiction, which shall comply in all respects with Rule 15. The case then will be placed on the docket. It shall be the duty of counsel for appellant to notify all appellees, on a form supplied by the Clerk, of the date of docketing and of the docket number of the case. Such notice shall be served as required by Rule 28.

.4. Not more than 30 days after receipt of the statement of jurisdiction, counsel for an appellee wishing to cross-appeal shall enter an appearance, pay the docket fee, and file, with proof of service as prescribed by Rule 28, 40 copies of a printed statement as to jurisdiction on cross-appeal, which shall comply in all respects with Rule 15. The cross-appeal will then be placed on the docket. The issues tendered by a timely cross-appeal docketed under this paragraph may be considered by the Court only in connection with a separate and duly perfected appeal over which this Court has jurisdiction without regard to this paragraph. It shall be the duty of counsel for the cross-appellant to notify the cross-appellee on a form supplied by the Clerk of the date of docketing and of the docket number of the cross-appeal. Such notice shall be served as required by Rule 28. A statement of jurisdiction on cross-appeal may not be joined with any other pleading. The Clerk shall not accept any pleadings so joined. The time for filing a cross-appeal may not be extended.

Rule 13

Certification of the Record

.1. An appellant at any time prior to action by this Court on the jurisdictional statement, may request the clerk of the court possessed of the record to certify it, or any part of it, and to provide for its transmission to this Court, but the filing of the record in this Court is not required for the docketing of an appeal. If the appellant has not done so, the appellee may request such clerk to certify and transmit the record or any part of it. Thereafter, the Clerk of this Court or any party to the appeal may request that additional parts of the record be certified and transmitted to this Court. Copies of all requests for certification and transmission shall be sent to all parties. Such requests to certify the record prior to action by the Court on the jurisdictional statement, however, shall not be made as a matter of course but only when the record is deemed essential to a proper understanding of the case by this Court.

.2. When requested to certify and transmit the record, or any part of it, the clerk of the court possessed of the record shall number the documents to be certified and shall transmit with the record a numbered list of the documents, identifying each with reasonable definiteness.

.3. The record may consist of certified copies. But whenever it shall appear necessary or proper, in the opinion of the presiding judge of the court from which the appeal is taken, that original papers of any kind should be inspected in this Court in lieu of copies, the presiding judge may make any rule or order for safekeeping, transporting, and return of the original papers as may seem proper to him. If the record or stipulated portions thereof have been printed for the use of the court below, this printed record plus the proceedings in the court below may be certified as the record unless one of the parties or the Clerk of this Court otherwise requests.

.4. When more than one appeal is taken to this Court from the same judgment, it shall be sufficient to prepare a single

record containing all the matter designated by the parties or the Clerk of this Court, without duplication.

Rule 14

Dismissing Appeals

.1. After a notice of appeal has been filed, but before the case has been docketed in this Court, the parties may dismiss the appeal by stipulation filed in the court whose judgment is the subject of the appeal, or that court may dismiss the appeal upon motion and notice by the appellant. For dismissal after the case has been docketed, see Rule 53.

.2. If a notice of appeal has been filed but the case has not been docketed in this Court within the time for docketing, plus any enlargement thereof duly granted, the court whose judgment is the subject of the appeal may dismiss the appeal upon motion of the appellee and notice to the appellant, and may make such order thereon with respect to costs as may be just.

.3. If a notice of appeal has been filed but the case has not been docketed in this Court within the time for docketing, plus any enlargement thereof duly granted, and the court whose judgment is the subject of the appeal has denied for any reason an appellee's motion to dismiss the appeal, made as provided in the foregoing paragraph, the appellee may have the cause docketed and may seek to have the appeal dismissed in this Court, by producing a certificate, whether in term or vacation, from the clerk of the court whose judgment is the subject of the appeal, establishing the foregoing facts, and by filing a motion to dismiss, which shall conform to Rule 42 and be accompanied by proof of service as prescribed by Rule 28. The clerk's certificate shall be attached to the motion, but it shall not be necessary for the appellee to file the record. In the event that the appeal is thereafter dismissed, the Court may give judgment for costs against the appellant and in favor of appellee. The appellant shall not be entitled to docket the cause after the appeal shall have been

dismissed under this paragraph, except by special leave of Court.

Rule 15

Jurisdictional Statement

.1. The jurisdictional statement required by Rule 12 shall contain, in the order here indicated:

(a) The questions presented by the appeal, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of the questions should be short and concise and should not be argumentative or repetitious. The statement of a question presented will be deemed to comprise every subsidiary question fairly included therein. Only the questions set forth in the jurisdictional statement or fairly included therein will be considered by the Court.

(b) A list of all parties to the proceeding in the court whose judgment is sought to be reviewed, except where the caption of the case in this Court contains the names of all such parties. This listing may be done in a footnote.

(c) A table of contents and table of authorities, if required by Rule 33.5.

(d) A reference to the official and unofficial reports of any opinions delivered in the courts or administrative agency below.

(e) A concise statement of the grounds on which the jurisdiction of this Court is invoked, showing:

(i) The nature of the proceeding and, if the appeal is from a federal court, the statutory basis for federal jurisdiction.

(ii) The date of the entry of the judgment or decree sought to be reviewed, the date of any order respecting a rehearing, the date the notice of appeal was filed, and the court in which it was filed. In the case of a cross-appeal docketed under Rule 12.4, reliance upon that Rule shall be expressly noted, and the date of receipt of the appellant's jurisdictional

statement by the appellee-cross-appellant shall be stated.

(iii) The statutory provision believed to confer jurisdiction of the appeal on this Court, and, if deemed necessary, the cases believed to sustain jurisdiction.

(f) The constitutional provisions, treaties, statutes, ordinances, and regulations that the case involves, setting them out verbatim, and giving the appropriate citation therefor. If the provisions involved are lengthy, their citation alone will suffice at this point, and their pertinent text then shall be set forth in the appendix referred to in subparagraph 1 (j) of this Rule.

(g) A *concise* statement of the case containing the facts material to consideration of the questions presented. The statement of the case shall also specify the stage in the proceedings (both in the court of first instance and in the appellate court) at which the questions sought to be reviewed were raised; the method or manner of raising them; and the way in which they were passed upon by the court.

(h) A statement of the reasons why the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

(i) If the appeal is from a decree of a district court granting or denying a preliminary injunction, a showing of the matters in which it is contended that the court has abused its discretion by such action. See *United States* v. *Corrick*, 298 U. S. 435 (1936); *Mayo* v. *Lakeland Highlands Canning Co.*, 309 U. S. 310 (1940).

(j) An appendix containing, in the following order:

(i) Copies of any opinions, orders, findings of fact, and conclusions of law, whether written or oral (if recorded and transcribed), delivered upon the rendering of the judgment or decree by the court whose decision is sought to be reviewed.

(ii) Copies of any other such opinions, orders, findings of fact, and conclusions of law rendered by courts or administrative agencies in the case, and, if reference thereto is necessary to ascertain the grounds of the judgment or decree, of those in companion cases. Each of these documents shall include the caption showing the name of the issuing court or agency, the title and number of the case, and the date of its entry.

(iii) A copy of the judgment or decree appealed from and any order on rehearing, including in each the caption showing the name of the issuing court or agency, the title and number of the case, and the date of entry of the judgment, decree, or order on rehearing.

(iv) A copy of the notice of appeal showing the date it was filed and the name of the court where it was filed.

(v) Any other appended materials.

If what is required by this paragraph to be appended to the statement is voluminous, it may, if more convenient, be separately presented.

.2. The jurisdictional statement shall be produced in conformity with Rule 33. The Clerk shall not accept any jurisdictional statement that does not comply with this Rule and with Rule 33, except that a party proceeding *in forma pauperis* may proceed in the manner provided in Rule 46.

.3. The jurisdictional statement shall be as short as possible, but may not exceed 30 pages, excluding the subject index, table of authorities, any verbatim quotations required by subparagraph 1 (f) of this Rule, and the appendices.

Rule 16

Motion to Dismiss or Affirm—Reply—Supplemental Briefs

.1. Within 30 days after receipt of the jurisdictional statement, unless the time is enlarged by the Court or a Justice thereof, or by the Clerk under the provisions of Rule 29.4,

the appellee may file a motion to dismiss, or a motion to affirm. Where appropriate, a motion to affirm may be united in the alternative with a motion to dismiss, provided that a motion to affirm or dismiss shall not be joined with any other pleading. The Clerk shall not accept any motion so joined.

(a) The Court will receive a motion to dismiss an appeal on the ground that the appeal is not within this Court's jurisdiction, or because not taken in conformity with statute or with these Rules.

(b) The Court will receive a motion to dismiss an appeal from a state court on the ground that it does not present a substantial federal question; or that the federal question sought to be reviewed was not timely or properly raised and was not expressly passed on; or that the judgment rests on an adequate non-federal basis.

(c) The Court will receive a motion to affirm the judgment sought to be reviewed on appeal from a federal court on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

(d) The Court will receive a motion to dismiss or affirm on any other ground the appellee wishes to present as a reason why the Court should not set the case for argument.

.2. A motion to dismiss or affirm shall comply in all respects with Rules 33 and 42. Forty copies, with proof of service as prescribed by Rule 28, shall be filed with the Clerk. The Clerk shall not accept a motion or brief that does not comply with this Rule and with Rules 33 and 42, except that a party proceeding *in forma pauperis* may proceed in the manner provided in Rule 46.

.3. A motion to dismiss or affirm shall be as short as possible and may not, either separately or cumulatively, exceed 30 pages, excluding the subject index, table of authorities, any verbatim quotations included in accordance with Rule 34.1 (f), and any appendix.

.4. Upon the filing of such motion, or the expiration of the

time allowed therefor, or express waiver of the right to file, the jurisdictional statement and the motion, if any, will be distributed by the Clerk to the Court for its consideration. However, if a jurisdictional statement on cross-appeal has been docketed under Rule 12.4, distribution of both it and the jurisdictional statement on appeal will be delayed until the filing of a motion to dismiss or affirm by the cross-appellee, or the expiration of the time allowed therefor, or express waiver of the right to file.

.5. A brief opposing a motion to dismiss or affirm may be filed by any appellant, but distribution of the jurisdictional statement and consideration thereof by this Court will not be delayed pending the filing of any such brief. Such brief shall be as short as possible but may not exceed 10 pages. Forty copies of any such brief, prepared in accordance with Rule 33 and served as prescribed by Rule 28, shall be filed.

.6. Any party may file a supplemental brief at any time while a jurisdictional statement is pending, calling attention to new cases or legislation or other intervening matter not available at the time of the party's last filing. A supplemental brief, restricted to such new matter, may not exceed 10 pages. Forty copies of any such brief, prepared in accordance with Rule 33 and served as prescribed by Rule 28, shall be filed.

.7. After consideration of the papers distributed pursuant to this Rule, the Court will enter an appropriate order. The order may be a summary disposition on the merits. If the order notes probable jurisdiction or postpones consideration of jurisdiction to the hearing on the merits, the Clerk forthwith shall notify the court below and counsel of record of the noting or postponement. The case then will stand for briefing and oral argument. If the record has not previously been filed, the Clerk of this Court shall request the clerk of the court possessed of the record to certify it and transmit it to this Court.

.8. If consideration of jurisdiction is postponed, counsel, at the outset of their briefs and oral argument, shall address the question of jurisdiction.

PART V. JURISDICTION ON WRIT OF CERTIORARI

Rule 17

Considerations Governing Review on Certiorari

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

.2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, and of any other court whose judgments are reviewable by law on writ of certiorari.

Rule 18

Certiorari to a Federal Court of Appeals before Judgment

A petition for writ of certiorari to review a case pending in a federal court of appeals, before judgment is given in such

court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court. See 28 U. S. C. § 2101 (e); see also, *United States* v. *Bankers Trust Co.*, 294 U. S. 240 (1935); *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330 (1935); *Rickert Rice Mills* v. *Fontenot*, 297 U. S. 110 (1936); *Carter* v. *Carter Coal Co.*, 298 U. S. 238 (1936); *Ex parte Quirin*, 317 U. S. 1 (1942); *United States* v. *Mine Workers*, 330 U. S. 258 (1947); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952); *Wilson* v. *Girard*, 354 U. S. 524 (1957); *United States* v. *Nixon*, 418 U. S. 683 (1974).

Rule 19

Review on Certiorari—How Sought—Parties

.1. A party intending to file a petition for certiorari, prior to filing the case in this Court or at any time prior to action by this Court on the petition, may request the clerk of the court possessed of the record to certify it, or any part of it, and to provide for its transmission to this Court, but the filing of the record in this Court is not a requisite for docketing the petition. If the petitioner has not done so, the respondent may request such clerk to certify and transmit the record or any part of it. Thereafter, the Clerk of this Court or any party to the case may request that additional parts of the record be certified and transmitted to this Court. Copies of all requests for certification and transmission shall be sent to all parties to the proceeding. Such requests to certify the record prior to action by the Court on the petition for certiorari, however, should not be made as a matter of course but only when the record is deemed essential to a proper understanding of the case by this Court.

.2. When requested to certify and transmit the record, or any part of it, the clerk of the court possessed of the record shall number the documents to be certified and shall transmit with the record a numbered list of the documents, identifying each with reasonable definiteness. If the record, or stipulated

portions thereof, has been printed for the use of the court below, such printed record plus the proceedings in the court below may be certified as the record unless one of the parties or the Clerk of this Court otherwise requests. The provisions of Rule 13.3 with respect to original papers shall apply to all cases sought to be reviewed on writ of certiorari.

.3. Counsel for the petitioner shall enter an appearance, pay the docket fee, and file, with proof of service as provided by Rule 28, 40 copies of a petition which shall comply in all respects with Rule 21. The case then will be placed on the docket. It shall be the duty of counsel for the petitioner to notify all respondents, on a form supplied by the Clerk, of the date of filing and of the docket number of the case. Such notice shall be served as required by Rule 28.

.4. Parties interested jointly, severally, or otherwise in a judgment may join in a petition for a writ of certiorari therefrom; or any one or more of them may petition separately; or any two or more of them may join in a petition. When two or more cases are sought to be reviewed on certiorari to the same court and involve identical or closely related questions, it will suffice to file a single petition for writ of certiorari covering all the cases.

.5. Not more than 30 days after receipt of the petition for certiorari, counsel for a respondent wishing to file a cross-petition that would otherwise be untimely shall enter an appearance, pay the docket fee, and file, with proof of service as prescribed by Rule 28, 40 copies of a cross-petition for certiorari, which shall comply in all respects with Rule 21. The cross-petition will then be placed on the docket subject, however, to the provisions of Rule 20.5. It shall be the duty of counsel for the cross-petitioner to notify the cross-respondent on a form supplied by the Clerk of the date of docketing and of the docket number of the cross-petition. Such notice shall be served as required by Rule 28. A cross-petition for certiorari may not be joined with any other pleading. The Clerk shall not accept any pleadings so joined. The time for filing a cross-petition may not be extended.

.6. All parties to the proceeding in the court whose judgment is sought to be reviewed shall be deemed parties in this Court, unless the petitioner shall notify the Clerk of this Court in writing of petitioner's belief that one or more of the parties below has no interest in the outcome of the petition. A copy of such notice shall be served on all parties to the proceeding below and a party noted as no longer interested may remain a party here by notifying the Clerk, with service on the other parties, that he has an interest in the petition. All parties other than petitioners shall be respondents, but any respondent who supports the position of a petitioner shall meet the time schedule for filing papers which is provided for that petitioner, except that any response by such respondent to the petition shall be filed within 20 days after receipt of the petition. The time for filing such response may not be extended.

Rule 20

Review on Certiorari—Time for Petitioning

.1. A petition for writ of certiorari to review the judgment in a criminal case of a state court of last resort or of a federal court of appeals shall be deemed in time when it is filed with the Clerk within 60 days after the entry of such judgment. A Justice of this Court, for good cause shown, may extend the time for applying for a writ of certiorari in such cases for a period not exceeding 30 days.

.2. A petition for writ of certiorari in all other cases shall be deemed in time when it is filed with the Clerk within the time prescribed by law. See 28 U. S. C. § 2101 (c).

.3. The Clerk will refuse to receive any petition for a writ of certiorari which is jurisdictionally out of time.

.4. The time for filing a petition for writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate (or its equivalent under local practice). However, if a petition for rehearing is timely filed by any party in the case, the time for filing the petition for writ of certiorari for all parties (whether or not they requested rehearing or joined in

the petition for rehearing) runs from the date of the denial of rehearing or of the entry of a subsequent judgment entered on the rehearing.

.5. A cross-petition for writ of certiorari shall be deemed in time when it is filed as provided in paragraphs .1, .2, and .4 of this Rule or in Rule 19.5. However, no cross-petition filed untimely except for the provision of Rule 19.5 shall be granted unless a timely petition for writ of certiorari of another party to the case is granted.

.6. An application for extension of time within which to file a petition for writ of certiorari must set out, as in a petition for certiorari (see Rule 21.1, subparagraphs (e) and (h)), the grounds on which the jurisdiction of this Court is invoked, must identify the judgment sought to be reviewed and have appended thereto a copy of the opinion, and must set forth with specificity the reasons why the granting of an extension of time is thought justified. For the time and manner of presenting such an application, see Rules 29, 42, and 43. Such applications are not favored.

Rule 21

The Petition for Certiorari

.1. The petition for writ of certiorari shall contain, in the order here indicated:

(a) The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of the questions should be short and concise and should not be argumentative or repetitious. The statement of a question presented will be deemed to comprise every subsidiary question fairly included therein. Only the questions set forth in the petition or fairly included therein will be considered by the Court.

(b) A list of all parties to the proceeding in the court whose judgment is sought to be reviewed, except where the caption of the case in this Court contains the names of all parties. This listing may be done in a footnote.

(c) A table of contents and table of authorities, if required by Rule 33.5.

(d) A reference to the official and unofficial reports of any opinions delivered in the courts or administrative agency below.

(e) A concise statement of the grounds on which the jurisdiction of this Court is invoked showing:

(i) The date of the judgment or decree sought to be reviewed, and the time of its entry;

(ii) The date of any order respecting a rehearing, and the date and terms of any order granting an extension of time within which to petition for certiorari; and

(iii) Where a cross-petition for writ of certiorari is filed under Rule 19.5, reliance upon that Rule shall be expressly noted and the cross-petition shall state the date of receipt of the petition for certiorari in connection with which the cross-petition is filed.

(iv) The statutory provision believed to confer on this Court jurisdiction to review the judgment or decree in question by writ of certiorari.

(f) The constitutional provisions, treaties, statutes, ordinances, and regulations which the case involves, setting them out verbatim, and giving the appropriate citation therefor. If the provisions involved are lengthy, their citation alone will suffice at this point, and their pertinent text then shall be set forth in the appendix referred to in subparagraph 1 (k) of this Rule.

(g) A *concise* statement of the case containing the facts material to the consideration of the questions presented.

(h) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; such pertinent quotation of specific por-

tions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (*e. g.*, ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari.

Where the portions of the record relied upon under this subparagraph are voluminous, they shall be included in the appendix referred to in subparagraph 1 (k) of this Rule.

(i) If review of the judgment of a federal court is sought, the statement of the case shall also show the basis for federal jurisdiction in the court of first instance.

(j) A direct and concise argument amplifying the reasons relied on for the allowance of the writ. See Rule 17.

(k) An appendix containing, in the following order:

(i) Copies of any opinions, orders, findings of fact, and conclusions of law, whether written or oral (if recorded and transcribed), delivered upon the rendering of the judgment or decree by the court whose decision is sought to be reviewed.

(ii) Copies of any other such opinions, orders, findings of fact, and conclusions of law rendered by courts or administrative agencies in the case, and, if reference thereto is necessary to ascertain the grounds of the judgment or decree, of those in companion cases. Each of these documents shall include the caption showing the name of the issuing court or agency and the title and number of the case, and the date of its entry.

(iii) A copy of the judgment or decree sought to be reviewed and any order on rehearing, including in each the caption showing the name of the issuing court or agency, the title and number of the case, and the date of entry of the judgment, decree, or order on rehearing.

(iv) Any other appended materials.

If what is required by this paragraph or by subparagraphs 1 (f) and (h) of this Rule, to be included in the petition is voluminous, it may, if more convenient, be separately presented.

.2. The petition for writ of certiorari shall be produced in conformity with Rule 33. The Clerk shall not accept any petition for writ of certiorari that does not comply with this Rule and with Rule 33, except that a party proceeding *in forma pauperis* may proceed in the manner provided in Rule 46.

.3. All contentions in support of a petition for writ of certiorari shall be set forth in the body of the petition, as provided in subparagraph 1 (j) of this Rule. No separate brief in support of a petition for a writ of certiorari will be received, and the Clerk will refuse to file any petition for a writ of certiorari to which is annexed or appended any supporting brief.

.4. The petition for writ of certiorari shall be as short as possible, but may not exceed 30 pages, excluding the subject index, table of authorities, any verbatim quotations required by subparagraph 1 (f) of this Rule, and the appendix.

.5. The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition.

Rule 22

Brief in Opposition—Reply—Supplemental Briefs

.1. Respondent shall have 30 days (unless enlarged by the Court or a Justice thereof or by the Clerk pursuant to Rule 29.4) after receipt of a petition, within which to file 40 printed copies of an opposing brief disclosing any matter or ground why the cause should not be reviewed by this Court. See Rule 17. Such brief in opposition shall comply with Rule 33 and with the requirements of Rule 34 governing a respondent's brief, and shall be served as prescribed by Rule 28. The Clerk shall not accept a brief which does not comply with this Rule and with Rule 33, except that a party proceed-

ing *in forma pauperis* may proceed in the manner provided in Rule 46.

.2. A brief in opposition shall be as short as possible and may not, in any single case, exceed 30 pages, excluding the subject index, table of authorities, any verbatim quotations included in accordance with Rule 34.1 (f), and any appendix.

.3. No motion by a respondent to dismiss a petition for writ of certiorari will be received. Objections to the jurisdiction of the Court to grant the writ of certiorari may be included in the brief in opposition.

.4. Upon the filing of a brief in opposition, or the expiration of the time allowed therefor, or express waiver of the right to file, the petition and brief, if any, will be distributed by the Clerk to the Court for its consideration. However, if a cross-petition for certiorari has been filed, distribution of both it and the petition for certiorari will be delayed until the filing of a brief in opposition by the cross-respondent, or the expiration of the time allowed therefor, or express waiver of the right to file.

.5. A reply brief addressed to arguments first raised in the brief in opposition may be filed by any petitioner but distribution under paragraph .4 hereof will not be delayed pending the filing of any such brief. Such brief shall be as short as possible, but may not exceed 10 pages. Forty copies of any such brief, prepared in accordance with Rule 33 and served as prescribed by Rule 28, shall be filed.

.6. Any party may file a supplemental brief at any time while a petition for writ of certiorari is pending calling attention to new cases or legislation or other intervening matter not available at the time of the party's last filing. A supplemental brief, restricted to such new matter, may not exceed 10 pages. Forty copies of any such brief, prepared in accordance with Rule 33 and served as prescribed by Rule 28, shall be filed.

Rule 23

Disposition of Petition for Certiorari

.1. After consideration of the papers distributed pursuant

to Rule 22, the Court will enter an appropriate order. The order may be a summary disposition on the merits.

.2. Whenever a petition for writ of certiorari to review a decision of any court is granted, an order to that effect shall be entered, and the Clerk forthwith shall notify the court below and counsel of record. The case then will stand for briefing and oral argument. If the record has not previously been filed, the Clerk of this Court shall request the clerk of the court possessed of the record to certify it and transmit it to this Court. A formal writ shall not issue unless specially directed.

.3. Whenever a petition for writ of certiorari to review a decision of any court is denied, an order to that effect will be entered and the Clerk forthwith will notify the court below and counsel of record. The order of denial will not be suspended pending disposition of a petition for rehearing except by order of the Court or a Justice thereof.

PART VI. JURISDICTION OF CERTIFIED QUESTIONS

Rule 24

Questions Certified by a Court of Appeals or by the Court of Claims

.1. When a federal court of appeals or the Court of Claims shall certify to this Court a question or proposition of law concerning which it desires instruction for the proper decision of a cause (see 28 U. S. C. §§ 1254 (3), 1255 (2)), the certificate shall contain a statement of the nature of the cause and the facts on which such question or proposition of law arises. Questions of fact cannot be certified. Only questions or propositions of law may be certified, and they must be distinct and definite.

.2. When a question is certified by a federal court of appeals, and if it appears that there is special reason therefor, this Court, on application or on its own motion, may consider and decide the entire matter in controversy. See 28 U. S. C. § 1254 (3).

Rule 25

Procedure in Certified Cases

.1. When a case is certified, the Clerk will notify the respective parties and shall docket the case. Counsel shall then enter their appearances.

.2. After docketing, the certificate shall be submitted to the Court for a preliminary examination to determine whether the case shall be briefed, set for argument, or the certificate dismissed. No brief may be filed prior to the preliminary examination of the certificate.

.3. If the Court orders that the case be briefed or set down for argument, the parties shall be notified and permitted to file briefs. The Clerk of this Court shall request the clerk of the court from which the case comes to certify the record and transmit it to this Court. Any portion of the record to which the parties wish to direct the Court's particular attention shall be printed in a joint appendix prepared by the appellant or plaintiff in the court below under the procedures provided in Rule 30, but the fact that any part of the record has not been printed shall not prevent the parties or the Court from relying on it.

.4. Briefs on the merits in a case on certificate shall comply with Rules 33, 34, and 35, except that the brief of the party who was appellant or plaintiff below shall be filed within 45 days of the order requiring briefs or setting the case down for argument.

PART VII. JURISDICTION TO ISSUE EXTRAORDINARY WRITS

Rule 26

Considerations Governing Issuance of Extraordinary Writs

The issuance by the Court of any extraordinary writ authorized by 28 U. S. C. § 1651 (a) is not a matter of right, but of discretion sparingly exercised. To justify the granting of any writ under that provision, it must be shown that the writ will

be in aid of the Court's appellate jurisdiction, that there are present exceptional circumstances warranting the exercise of the Court's discretionary powers, and that adequate relief cannot be had in any other form or from any other court.

Rule 27

Procedure in Seeking an Extraordinary Writ

.1. The petition in any proceeding seeking the issuance by this Court of a writ authorized by 28 U. S. C. §§ 1651 (a), 2241, or 2254 (a), shall comply in all respects with Rule 33, except that a party proceeding *in forma pauperis* may proceed in the manner provided in Rule 46. The petition shall be captioned "In re (name of petitioner)." All contentions in support of the petition shall be included in the petition. The case will be placed upon the docket when 40 copies, with proof of service as prescribed by Rule 28 (subject to paragraph .3 (b) of this Rule), are filed with the Clerk and the docket fee is paid. The appearance of counsel for the petitioner must be entered at this time. The petition shall be as short as possible, and in any event may not exceed 30 pages.

.2. (a) If the petition seeks issuance of a writ of prohibition, a writ of mandamus, or both in the alternative, it shall identify by names and office or function all persons against whom relief is sought and shall set forth with particularity why the relief sought is not available in any other court. There shall be appended to such petition a copy of the judgment or order in respect of which the writ is sought, including a copy of any opinion rendered in that connection, and such other papers as may be essential to an understanding of the petition.

(b) The petition shall follow, insofar as applicable, the form for the petition for writ of certiorari prescribed by Rule 21. The petition shall be served on the judge or judges to whom the writ is sought to be directed, and shall also be served on every other party to the proceeding in respect of which relief is desired. The judge or judges, and the other parties, within 30 days after receipt of the petition, may file 40 copies of a brief or briefs in opposition thereto, which shall comply fully

with Rules 22.1 and 22.2, including the 30-page limit. If the judge or judges concerned do not desire to respond to the petition, they shall so advise the Clerk and all parties by letter. All persons served pursuant to this paragraph shall be deemed respondents for all purposes in the proceedings in this Court.

.3. (a) If the petition seeks issuance of a writ of habeas corpus, it shall comply with the requirements of 28 U. S. C. § 2242, and in particular with the requirement in the last paragraph thereof that it state the reasons for not making application to the district court of the district in which the petitioner is held. If the relief sought is from the judgment of a state court, the petition shall set forth specifically how and wherein the petitioner has exhausted his remedies in the state courts or otherwise comes within the provisions of 28 U. S. C. § 2254 (b). To justify the granting of a writ of habeas corpus, it must be shown that there are present exceptional circumstances warranting the exercise of the Court's discretionary powers and that adequate relief cannot be had in any other form or from any other court. Such writs are rarely granted.

(b) Proceedings under this paragraph .3 will be *ex parte*, unless the Court requires the respondent to show cause why the petition for a writ of habeas corpus should not be granted. If a response is ordered, it shall comply fully with Rules 22.1 and 22.2, including the 30-page limit. Neither denial of the petition, without more, nor an order of transfer under authority of 28 U. S. C. § 2241 (b), is an adjudication on the merits, and the former action is to be taken as without prejudice to a further application to any other court for the relief sought.

.4. If the petition seeks issuance of a common-law writ of certiorari under 28 U. S. C. § 1651 (a), there may also be filed, at the time of docketing, a certified copy of the record, including all proceedings in the court to which the writ is sought to be directed. However, the filing of such record is not required. The petition shall follow, insofar as applicable, the form for a petition for certiorari prescribed by Rule 21, and

shall set forth with particularity why the relief sought is not available in any other court, or cannot be had through other appellate process. The respondent, within 30 days after receipt of the petition, may file 40 copies of a brief in opposition, which shall comply fully with Rules 22.1 and 22.2, including the 30-page limit.

.5. When a brief in opposition under paragraphs .2 and .4 has been filed, or when a response under paragraph .3 has been ordered and filed, or when the time within which it may be filed has expired, or upon an express waiver of the right to file, the papers will be distributed to the Court by the Clerk.

.6. If the Court orders the cause set down for argument, the Clerk will notify the parties whether additional briefs are required, when they must be filed, and, if the case involves a petition for common-law certiorari, that the parties shall proceed to print a joint appendix pursuant to Rule 30.

PART VIII. PRACTICE

Rule 28

Filing and Service—Special Rule for Service Where Constitutionality of Act of Congress or State Statute Is in Issue

.1. Pleadings, motions, notices, briefs, or other documents or papers required or permitted to be presented to this Court or to a Justice shall be filed with the Clerk. Any document filed by or on behalf of counsel of record whose appearance has not previously been entered must be accompanied by an entry of appearance.

.2. To be timely filed, a document must be received by the Clerk within the time specified for filing, except that any document shall be deemed timely filed if it has been deposited in a United States post office or mailbox, with first-class postage prepaid, and properly addressed to the Clerk of this Court, within the time allowed for filing, and if there is filed with the Clerk a notarized statement by a member of the Bar of this Court, setting forth the details of the mailing, and

stating that to his knowledge the mailing took place on a particular date within the permitted time.

.3. Whenever any pleading, motion, notice, brief, or other document is required by these Rules to be served, such service may be made personally or by mail on each party to the proceeding at or before the time of filing. If the document has been produced under Rule 33, three copies shall be served on each other party separately represented in the proceeding. If the document is typewritten, service of a single copy on each other party separately represented shall suffice. If personal service is made, it may consist of delivery, at the office of counsel of record, to counsel or an employee therein. If service is by mail, it shall consist of depositing the document in a United States post office or mailbox, with first-class postage prepaid, addressed to counsel of record at his post office address. Where a party is not represented by counsel, service shall be upon the party, personally or by mail.

.4. (a) If the United States or any department, office, agency, officer, or employee thereof is a party to be served, service must be made upon the Solicitor General, Department of Justice, Washington, D. C. 20530; and if a response is required or permitted within a prescribed period after service, the time does not begin to run until the document actually has been received by the Solicitor General's office. Where an agency of the United States is authorized by law to appear in its own behalf as a party, or where an officer or employee of the United States is a party, in addition to the United States, such agency, officer, or employee also must be served, in addition to the Solicitor General; and if a response is required or permitted within a prescribed period, the time does not begin to run until the document actually has been received by both the agency, officer, or employee and the Solicitor General's office.

(b) In any proceeding in this Court wherein the constitutionality of an Act of Congress is drawn in question, and the United States or any department, office, agency, officer, or employee thereof is not a party, the initial pleading, motion, or paper in this Court shall recite that 28 U. S. C. § 2403 (a)

may be applicable and shall be served upon the Solicitor General, Department of Justice, Washington, D. C. 20530. In proceedings from any court of the United States, as defined by 28 U. S. C. § 451, the initial pleading, motion, or paper shall state whether or not any such court, pursuant to 28 U. S. C. § 2403 (a), has certified to the Attorney General the fact that the constitutionality of such Act of Congress was drawn in question.

(c) In any proceeding in this Court wherein the constitutionality of any statute of a State is drawn in question, and the State or any agency, officer, or employee thereof is not a party, the initial pleading, motion, or paper in this Court shall recite that 28 U. S. C. § 2403 (b) may be applicable and shall be served upon the Attorney General of the State. In proceedings from any court of the United States as defined by 28 U. S. C. § 451, the initial pleading, motion, or paper shall state whether or not any such court, pursuant to 28 U. S. C. § 2403 (b), has certified to the State Attorney General the fact that the constitutionality of such statute of the State was drawn in question.

.5. Whenever proof of service is required by these Rules, it must accompany or be endorsed upon the document in question at the time the document is presented to the Clerk for filing. Proof of service shall be shown by any one of the methods set forth below, and it must contain or be accompanied by a statement that all parties required to be served have been served, together with a list of the names and addresses of those parties; it is not necessary that service on each party required to be served be made in the same manner or evidenced by the same proof:

(a) By an acknowledgment of service of the document in question, signed by counsel of record for the party served.

(b) By a certificate of service of the document in question, reciting the facts and circumstances of service in compliance with the appropriate paragraph or paragraphs

of this Rule, and signed by a member of the Bar of this Court representing the party on whose behalf such service has been made. (If counsel certifying to such service has not yet entered an appearance in this Court in respect of the cause in which such service is made, an entry of appearance shall accompany the certificate of service.)

(c) By an affidavit of service of the document in question, reciting the facts and circumstances of service in compliance with the appropriate paragraph or paragraphs of this Rule, whenever such service is made by any person not a member of the Bar of this Court.

Rule 29

Computation and Enlargement of Time

.1. In computing any period of time prescribed or allowed by these Rules, by order of Court, or by an applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Sunday or a federal legal holiday, in which event the period runs until the end of the next day which is neither a Sunday nor a federal legal holiday.

.2. Whenever any Justice of this Court or the Clerk is empowered by law or under any provision of these Rules to extend the time for filing any document or paper, an application seeking such extension must be presented to the Clerk within the period sought to be extended. However, an application for extension of time to docket an appeal or to file a petition for certiorari shall be submitted at least 10 days before the specified final filing date and will not be granted, except in the most extraordinary circumstances, if filed less than 10 days before that date.

.3. An application to extend the time within which a party may docket an appeal or file a petition for a writ of certiorari shall be presented in the form prescribed by Rules 12.2 and 20.6, respectively. An application to extend the time within

which to file any other document or paper may be presented in the form of a letter to the Clerk setting forth with specificity the reasons why the granting of an extension of time is thought justified. Any application seeking an extension of time must be presented and served upon all other parties as provided in Rule 43, and any such application, if once denied, may not be renewed.

.4. Any application for extension of time to file a brief, motion, joint appendix, or other paper, to designate parts of a record for printing in the appendix, or otherwise to comply with a time limit provided by these Rules (except an application for extension of time to docket an appeal, to file a petition for certiorari, to file a petition for rehearing, or to issue a mandate) shall in the first instance be acted upon by the Clerk, whether addressed to him, to the Court, or to a Justice. Any party aggrieved by the Clerk's action on such application may request that it be submitted to a Justice or to the Court. The Clerk's action under this Rule shall be reported by him to the Court in accordance with the instructions that may be issued to him by the Court.

Rule 30

The Joint Appendix

.1. Unless the parties agree to use the deferred method allowed in paragraph .4 of this Rule, or the Court so directs, the appellant or petitioner, within 45 days after the order noting or postponing probable jurisdiction or granting the writ of certiorari, shall file 40 copies of a joint appendix, duplicated in the manner prescribed by Rule 33, which shall contain: (1) the relevant docket entries in the courts below; (2) any relevant pleading, jury instruction, finding, conclusion, or opinion; (3) the judgment, order, or decision in question; and (4) any other parts of the record to which the parties wish to direct the Court's attention. However, any of the foregoing items which have already been reproduced in a jurisdictional statement or the petition for certiorari complying

with Rule 33.1 need not be reproduced again in the joint appendix. The appellant or petitioner shall serve at least three copies of the joint appendix on each of the other parties to the proceeding.

.2. The parties are encouraged to agree to the contents of the joint appendix. In the absence of agreement, the appellant or petitioner, not later than 10 days after the order noting or postponing jurisdiction or granting the writ of certiorari, shall serve on the appellee or respondent a designation of the parts of the record which he intends to include in the joint appendix. If in the judgment of the appellee or respondent the parts of the record so designated are not sufficient, he, within 10 days after receipt of the designation, shall serve upon the appellant or petitioner a designation of additional parts to be included in the joint appendix, and the appellant or petitioner shall include the parts so designated, unless, on his motion in a case where the respondent has been permitted by this Court to proceed *in forma pauperis*, he is excused from supplementing the record.

In making these designations, counsel should include only those materials the Court should examine. Unnecessary designations should be avoided. The record is on file with the Clerk and available to the Justices, and counsel may refer in their briefs and oral argument to relevant portions of the record that have not been printed.

.3. At the time that the joint appendix is filed or promptly thereafter, the appellant or petitioner shall file with the Clerk a statement of the costs of preparing the same, and shall serve a copy thereof on each of the other parties to the proceeding. Unless the parties otherwise agree, the cost of producing the joint appendix shall initially be paid by the appellant or petitioner; but if he considers that parts of the record designated by the appellee or respondent are unnecessary for the determination of the issues presented, he may so advise the appellee or respondent who then shall advance the cost of including such parts unless the Court or a Justice otherwise

fixes the initial allocation of the costs. The cost of producing the joint appendix shall be taxed as costs in the case, but if a party shall cause matter to be included in the joint appendix unnecessarily, the Court may impose the cost of producing such matter on that party.

.4. (a) If the parties agree or if the Court shall so order, preparation of the joint appendix may be deferred until after the briefs have been filed, and in that event the appellant or petitioner shall file the joint appendix within 14 days after receipt of the brief of the appellee or respondent. The provisions of paragraphs .1, .2, and .3 of this Rule shall be followed except that the designations referred to therein shall be made by each party at the time his brief is served.

(b) If the deferred method is used, reference in the briefs to the record may be to the pages of the parts of the record involved, in which event the original paging of each part of the record shall be indicated in the joint appendix by placing in brackets the number of each page at the place in the joint appendix where that page begins. Or if a party desires to refer in his brief directly to pages of the joint appendix, he may serve and file typewritten or page-proof copies of his brief within the time required by Rule 35, with appropriate references to the pages of the parts of the record involved. In that event, within 10 days after the joint appendix is filed he shall serve and file copies of the brief in the form prescribed by Rule 33 containing references to the pages of the joint appendix in place of or in addition to the initial references to the pages of the parts of the record involved. No other change may be made in the brief as initially served and filed, except that typographical errors may be corrected.

.5. At the beginning of the joint appendix there shall be inserted a table of the parts of the record which it contains, in the order in which the parts are set out therein, with references to the pages of the joint appendix at which each part begins. The relevant docket entries shall be set out following the table of contents. Thereafter, the other parts of the

record shall be set out in chronological order. When matter contained in the reporter's transcript of proceedings is set out in the joint appendix, the page of the transcript at which such matter may be found shall be indicated in brackets immediately before the matter which is set out. Omissions in the text of papers or of the transcript must be indicated by asterisks. Immaterial formal matters (captions, subscriptions, acknowledgments, etc.) shall be omitted. A question and its answer may be contained in a single paragraph.

.6. Exhibits designated for inclusion in the joint appendix may be contained in a separate volume, or volumes, suitably indexed. The transcript of a proceeding before an administrative agency, board, commission, or officer used in an action in a district court or a court of appeals shall be regarded as an exhibit for the purpose of this paragraph.

.7. The Court by order may dispense with the requirement of a joint appendix and may permit a case to be heard on the original record (with such copies of the record, or relevant parts thereof, as the Court may require), or on the appendix used in the court below, if it conforms to the requirements of this Rule.

.8. For good cause shown, the time limits specified in this Rule may be shortened or enlarged by the Court, by a Justice thereof, or by the Clerk under the provisions of Rule 29.4.

Rule 31

Translations

Whenever any record transmitted to this Court contains any document, paper, testimony, or other proceeding in a foreign language without a translation made under the authority of the lower court or admitted to be correct, the clerk of the court transmitting the record shall report the fact immediately to the Clerk of this Court, to the end that this Court may order that a translation be supplied and, if necessary, printed as a part of the joint appendix.

Rule 32

Models, Diagrams, and Exhibits of Material

.1. Models, diagrams, and exhibits of material forming part of the evidence taken in a case, and brought up to this Court for its inspection, shall be placed in the custody of the Clerk at least two weeks before the case is heard or submitted.

.2. All such models, diagrams, and exhibits of material placed in the custody of the Clerk must be taken away by the parties within 40 days after the case is decided. When this is not done, it shall be the duty of the Clerk to notify counsel to remove the articles forthwith; and if they are not removed within a reasonable time after such notice, the Clerk shall destroy them, or make such other disposition of them as to him may seem best.

Rule 33

Form of Jurisdictional Statements, Petitions, Briefs, Appendices, Motions, and Other Documents Filed with the Court

.1. (a) Except for typewritten filings permitted by Rules 42.2 (c), 43, and 46, all jurisdictional statements, petitions, briefs, appendices, and other documents filed with the Court shall be produced by standard typographic printing, which is preferred, or by any photostatic or similar process which produces a clear, black image on white paper; but ordinary carbon copies may not be used.

(b) The text of documents produced by standard typographic printing shall appear in print as 11-point or larger type with 2-point or more leading between lines. Footnotes shall appear in print as 9-point or larger type with 2-point or more leading between lines. Such documents shall be printed on both sides of the page.

(c) The text of documents produced by a photostatic or similar process shall be done in pica type at no more than 10 characters per inch with the lines double-spaced, except that indented quotations and footnotes may be single-spaced. In

footnotes, elite type at no more than 12 characters per inch may be used. Such documents may be duplicated on both sides of the page, if practicable. They shall not be reduced in duplication.

(d) Whether duplicated under subparagraph (b) or (c) of this paragraph, documents shall be produced on opaque, unglazed paper 6⅛ by 9¼ inches in size, with type matter approximately 4⅛ by 7⅛ inches, and margins of at least ¾ inch on all sides. The paper shall be firmly bound in at least two places along the left margin so as to make an easily opened volume, and no part of the text shall be obscured by the binding. However, appendices in patent cases may be duplicated in such size as is necessary to utilize copies of patent documents.

.2. (a) All documents filed with the Court must bear on the cover, in the following order, from the top of the page: (1) the number of the case or, if there is none, a space for one; (2) the name of this Court; (3) the Term; (4) the caption of the case as appropriate in this Court; (5) the nature of the proceeding and the name of the court from which the action is brought (*e. g.*, On Appeal from the Supreme Court of California; On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit); (6) the title of the paper (*e. g.*, Jurisdictional Statement, Brief for Respondent, Joint Appendix); (7) the name, post office address, and telephone number of the member of the Bar of this Court who is counsel of record for the party concerned, and upon whom service is to be made. The individual names of other members of the Bar of this Court or of the Bar of the highest court in their respective states and, if desired, their post office addresses, may be added, but counsel of record shall be clearly identified. The foregoing shall be displayed in an appropriate typographic manner and, except for the identification of counsel, may not be set in type smaller than 11-point or in upper case pica.

(b) The following documents shall have a suitable cover

consisting of heavy paper in the color indicated: (1) jurisdictional statements and petitions for writs of certiorari, white; (2) motions, briefs, or memoranda filed in response to jurisdictional statements or petitions for certiorari, light orange; (3) briefs on the merits for appellants or petitioners, light blue; (4) briefs on the merits for appellees or respondents, light red; (5) reply briefs, yellow; (6) intervenor or *amicus curiae* briefs (or motions for leave to file, if bound with brief), green; (7) joint appendices, tan; (8) documents filed by the United States, by any department, office, or agency of the United States, or by any officer or employee of the United States, represented by the Solicitor General, gray. All other documents shall have a tan cover. Counsel shall be certain that there is adequate contrast between the printing and the color of the cover.

.3. All documents produced by standard typographic printing or its equivalent shall comply with the page limits prescribed by these Rules. See Rules 15.3; 16.3, 16.5, and 16.6; 21.4; 22.2, 22.5, and 22.6; 27.1, 27.2 (b), 27.3 (b), and 27.4; 34.3 and 34.4; 36.1 and 36.2. Where documents are produced by photostatic or similar process, the following page limits shall apply:

Jurisdictional Statement (Rule 15.3)	65 pages;
Motion to Dismiss or Affirm (Rule 16.3)	65 pages;
Brief Opposing Motion to Dismiss or Affirm (Rule 16.5)	20 pages;
Supplemental Brief (Rule 16.6)	20 pages;
Petition for Certiorari (Rule 21.4)	65 pages;
Brief in Opposition (Rule 22.2)	65 pages;
Reply Brief (Rule 22.5)	20 pages;
Supplemental Brief (Rule 22.6)	20 pages;
Petition Seeking Extraordinary Writ (Rule 27.1)	65 pages;
Brief in Opposition (Rule 27.2 (b))	65 pages;
Response to Petition for Habeas Corpus (Rule 27.3 (b))	65 pages;
Brief in Opposition (Rule 27.4)	65 pages;
Brief on the Merits (Rule 34.3)	110 pages;

Reply Brief (Rule 34.4)	45 pages;
Brief of *Amicus Curiae* (Rule 36.2)	65 pages.

.4. The Court or a Justice, for good cause shown, may grant leave for the filing of a document in excess of the page limits, but such an application is not favored. An application for such leave shall comply in all respects with Rule 43; and it must be submitted at least 15 days before the filing date of the document in question, except in the most extraordinary circumstances.

.5. (a) All documents filed with the Court which exceed five pages, regardless of method of duplication (other than joint appendices, which in this respect are governed by Rule 30), shall be preceded by a table of contents, unless the document contains only one item.

(b) All documents which exceed three pages, regardless of method of duplication, shall contain, following the table of contents, a table of authorities (*i. e.,* cases (alphabetically arranged), constitutional provisions, statutes, textbooks, etc.) with correct references to the pages where they are cited.

.6. The body of all documents at their close shall bear the name of counsel of record and such other counsel identified on the cover of the document in conformity with Rule 33.2 (a) as may be desired. One copy of every motion and application (other than one to dismiss or affirm under Rule 16) in addition must bear at its close the manuscript signature of counsel of record.

.7. The Clerk shall not accept for filing any document presented in a form not in compliance with this Rule, but shall return it indicating to the defaulting party wherein he has failed to comply: the filing, however, shall not thereby be deemed untimely provided that new and proper copies are promptly substituted. If the Court shall find that the provisions of this Rule have not been adhered to, it may impose, in its discretion, appropriate sanctions including but not limited to dismissal of the action, imposition of costs, or disciplinary sanction upon counsel. See also Rule 38 respecting oral argument.

Rule 34

Briefs on the Merits—In General

.1. A brief of an appellant or petitioner on the merits shall comply in all respects with Rule 33, and shall contain in the order here indicated:

(a) The questions presented for review, stated as required by Rule 15.1 (a) or Rule 21.1 (a), as the case may be. The phrasing of the questions presented need not be identical with that set forth in the jurisdictional statement or the petition for certiorari, but the brief may not raise additional questions or change the substance of the questions already presented in those documents. At its option, however, the Court may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide.

(b) A list of all parties to the proceeding in the court whose judgment is sought to be reviewed, except where the caption of the case in this Court contains the names of all such parties. This listing may be done in a footnote.

(c) The table of contents and table of authorities, as required by Rule 33.5.

(d) Citations to the opinions and judgments delivered in the courts below.

(e) A concise statement of the grounds on which the jurisdiction of this Court is invoked, with citation to the statutory provision and to the time factors upon which such jurisdiction rests.

(f) The constitutional provisions, treaties, statutes, ordinances, and regulations which the case involves, setting them out verbatim, and giving the appropriate citation therefor. If the provisions involved are lengthy, their citation alone will suffice at this point, and their pertinent text, if not already set forth in the jurisdictional statement or petition for certiorari, shall be set forth in an appendix to the brief.

(g) A concise statement of the case containing all that is material to the consideration of the questions presented, with appropriate references to the Joint Appendix, *e. g.* (J. A. 12) or to the record, *e. g.* (R. 12).

(h) A summary of argument, suitably paragraphed, which should be a succinct, but accurate and clear, condensation of the argument actually made in the body of the brief. It should not be a mere repetition of the headings under which the argument is arranged.

(i) The argument, exhibiting clearly the points of fact and of law being presented, citing the authorities and statutes relied upon.

(j) A conclusion, specifying with particularity the relief to which the party believes himself entitled.

.2. The brief filed by an appellee or respondent shall conform to the foregoing requirements, except that no statement of the case need be made beyond what may be deemed necessary in correcting any inaccuracy or omission in the statement by the other side, and except that items (a), (b), (d), (e), and (f) need not be included unless the appellee or respondent is dissatisfied with their presentation by the other side.

.3. A brief on the merits shall be as short as possible, but, in any event, shall not exceed 50 pages in length.

.4. A reply brief shall conform to such portions of the Rule as are applicable to the brief of an appellee or respondent, but need not contain a summary of argument, if appropriately divided by topical headings. A reply brief shall not exceed 20 pages in length.

.5. Whenever, in the brief of any party, a reference is made to the Joint Appendix or the record, it must be accompanied by the appropriate page number. If the reference is to an exhibit, the page numbers at which the exhibit appears, at which it was offered in evidence, and at which it was ruled on by the judge must be indicated, *e. g.* (Pl. Ex. 14; R. 199, 2134).

.6. Briefs must be compact, logically arranged with proper

headings, concise, and free from burdensome, irrelevant, immaterial, and scandalous matter. Briefs not complying with this paragraph may be disregarded and stricken by the Court.

Rule 35

Briefs on the Merits—Time for Filing

.1. Counsel for the appellant or petitioner shall file with the Clerk 40 copies of the printed brief on the merits within 45 days of the order noting or postponing probable jurisdiction, or of the order granting the writ of certiorari.

.2. Forty printed copies of the brief of the appellee or respondent shall be filed with the Clerk within 30 days after the receipt by him of the brief filed by the appellant or petitioner.

.3. A reply brief will be received no later than one week before the date of oral argument, and only by leave of Court thereafter.

.4. The periods of time stated in paragraphs .1 and .2 of this Rule may be enlarged as provided in Rule 29, upon application duly made; or, if a case is advanced for hearing, the time for filing briefs may be abridged as circumstances require, pursuant to order of the Court on its own or a party's application.

.5. Whenever a party desires to present late authorities, newly enacted legislation, or other intervening matters that were not available in time to have been included in his brief in chief, he may file 40 printed copies of a supplemental brief, restricted to such new matter and otherwise in conformity with these Rules, up to the time the case is called for hearing, or, by leave of Court, thereafter.

.6. No brief will be received through the Clerk or otherwise after a case has been argued or submitted, except from a party and upon leave of the Court.

.7. No brief will be received by the Clerk unless the same shall be accompanied by proof of service as required by Rule 28.

Rule 36

Brief of an Amicus Curiae

.1. A brief of an *amicus curiae* prior to consideration of the jurisdictional statement or of the petition for writ of certiorari, accompanied by written consent of the parties, may be filed only if submitted within the time allowed for the filing of the motion to dismiss or affirm or the brief in opposition to the petition for certiorari. A motion for leave to file such a brief when consent has been refused is not favored. Any such motion must be filed within the time allowed for filing of the brief and must be accompanied by the proposed brief. In any event, no such brief shall exceed 20 pages in length.

.2. A brief of an *amicus curiae* in a case before the Court for oral argument may be filed when accompanied by written consent of all parties to the case and presented within the time allowed for the filing of the brief of the party supported and if in support of neither party, within the time allowed for filing appellant's or petitioner's brief. Any such brief must identify the party supported, shall be as concise as possible, and in no event shall exceed 30 pages in length. No reply brief of an *amicus curiae* will be received.

.3. When consent to the filing of a brief of an *amicus curiae* in a case before the Court for oral argument is refused by a party to the case, a motion for leave to file, accompanied by the proposed brief, complying with the 30-page limit, may be presented to the Court. No such motion shall be received unless submitted within the time allowed for the filing of an *amicus* brief on written consent. The motion shall concisely state the nature of the applicant's interest, set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties, and their relevancy to the disposition of the case; and it shall in no event exceed five pages in length. A party served with such motion may seasonably file an objection concisely stating the reasons for withholding consent.

.4. Consent to the filing of a brief of an *amicus curiae* need not be had when the brief is presented for the United States

sponsored by the Solicitor General; for any agency of the United States authorized by law to appear in its own behalf, sponsored by its appropriate legal representative; for a State, Territory, or Commonwealth sponsored by its attorney general; or for a political subdivision of a State, Territory, or Commonwealth sponsored by the authorized law officer thereof.

.5. All briefs, motions, and responses filed under this Rule shall comply with the applicable provisions of Rules 33, 34, and 42 (except that it shall be sufficient to set forth the interest of the *amicus curiae,* the argument, the summary of argument, and the conclusion); and shall be accompanied by proof of service as required by Rule 28.

Rule 37

Call and Order of the Calendar

.1. The Clerk, at the commencement of each Term, and periodically thereafter, shall prepare a calendar consisting of cases available for argument. Cases will be calendared so that they will not normally be called for argument less than two weeks after the brief of the appellee or respondent is due. The Clerk shall keep the calendar current throughout the Term, adding cases as they are set down for argument, and making rearrangements as required.

.2. Unless otherwise ordered, the Court, on the first Monday of each Term, will commence calling cases for argument in the order in which they stand on the calendar, and proceed from day to day during the Term in the same order, except that the arrangement of cases on the calendar shall be subject to modification in the light of the availability of appendices, extensions of time to file briefs, orders advancing, postponing or specially setting arguments, and other relevant factors. The Clerk will advise counsel seasonably when they are required to be present in the Court. He shall periodically publish hearing lists in advance of each argument session, for the convenience of counsel and the information of the public.

.3. On the Court's own motion, or on motion of one or more

parties, the Court may order that two or more cases, involving what appear to be the same or related questions, be argued together as one case, or on such terms as may be prescribed.

Rule 38

Oral Argument

.1. Oral argument should undertake to emphasize and clarify the written argument appearing in the briefs theretofore filed. Counsel should assume that all Members of the Court have read the briefs in advance of argument. *The Court looks with disfavor on any oral argument that is read from a prepared text.* The Court is also reluctant to accept the submission of briefs, without oral argument, of any case in which jurisdiction has been noted or postponed to the merits or certiorari has been granted. Notwithstanding any such submission, the Court may require oral argument by the parties.

.2. The appellant or petitioner is entitled to open and conclude the argument. When there is a cross-appeal or a cross-writ of certiorari it shall be argued with the initial appeal or writ as one case and in the time of one case, and the Court will advise the parties which one is to open and close.

.3. Unless otherwise directed, one-half hour on each side is allowed for argument. Counsel is not required to use all the allotted time. Any request for additional time shall be presented by motion to the Court filed under Rule 42 not later than 15 days after service of appellant's or petitioner's brief on the merits, and shall set forth with specificity and conciseness why the case cannot be presented within the half-hour limitation.

.4. Only one counsel will be heard for each side, except by special permission granted upon a request presented not later than 15 days after service of the petitioner's or appellant's brief on the merits. Such request shall be by a motion to the Court under Rule 42, and shall set forth with specificity and conciseness why more than one counsel should be heard. Divided arguments are not favored.

.5. In any case, and regardless of the number of counsel

participating, counsel having the opening will present his case fairly and completely and not reserve points of substance for rebuttal.

.6. Oral argument will not be heard on behalf of any party for whom no brief has been filed.

.7. By leave of Court, and subject to paragraph .4 of this Rule, counsel for an *amicus curiae* whose brief has been duly filed pursuant to Rule 36 may, with the consent of a party, argue orally on the side of such party. In the absence of such consent, argument by counsel for an *amicus curiae* may be made only by leave of Court, on motion particularly setting forth why such argument is thought to provide assistance to the Court not otherwise available. Any such motion will be granted only in the most extraordinary circumstances.

Rule 39

Form of Typewritten Papers

.1. All papers specifically permitted by these Rules to be presented to the Court without being printed shall, subject to Rule 46.3, be typewritten or otherwise duplicated upon opaque, unglazed paper, 8½ by 13 inches in size (legal cap), and shall be stapled or bound at the upper left-hand corner. The typed matter, except quotations, must be double-spaced. All copies presented to the Court must be legible.

.2. The original of any such motion or application, except a motion to dismiss or affirm, must be signed in manuscript by the party or by counsel of record.

Rule 40

Death, Substitution, and Revivor—Public Officers, Substitution and Description

.1. Whenever any party shall die after filing a notice of appeal to this Court or a petition for writ of certiorari, the proper representative of the deceased may appear and, upon motion, may be substituted in an appropriate case as a party to the proceeding. If such representative shall not volun-

tarily become a party, the other party may suggest the death on the record, and on motion obtain an order that, unless such representative shall become a party within a designated time, the party moving for such an order, if appellee or respondent, shall be entitled to have the appeal or petition for writ of certiorari dismissed or the judgment vacated for mootness, as may be appropriate. The party so moving, if an appellant or petitioner, shall be entitled to proceed as in other cases of non-appearance by appellee or respondent. Such substitution, or, in default thereof, such suggestion, must be made within six months after the death of the party, or the case shall abate.

.2. Whenever, in the case of a suggestion made as provided in paragraph .1 of this Rule, the case cannot be revived in the court whose judgment is sought to be reviewed because the deceased party has no proper representative within the jurisdiction of that court, but does have a proper representative elsewhere, proceedings then shall be had as this Court may direct.

.3. When a public officer is a party to a proceeding here in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

.4. When a public officer is a party in a proceeding here in his official capacity, he may be described as a party by his official title rather than by name; but the Court may require his name to be added.

Rule 41

Custody of Prisoners in Habeas Corpus Proceedings

.1. Pending review in this Court of a decision in a habeas corpus proceeding commenced before a court, Justice, or judge of the United States for the release of a prisoner, a person having custody of the prisoner shall not transfer custody to

another unless such transfer is directed in accordance with the provisions of this Rule. Upon application of a custodian showing a need therefor, the court, Justice, or judge rendering the decision under review may make an order authorizing transfer and providing for the substitution of the successor custodian as a party.

.2. Pending such review of a decision failing or refusing to release a prisoner, the prisoner may be detained in the custody from which release is sought, or in other appropriate custody, or may be enlarged upon his recognizance, with or without surety, as may appear fitting to the court, Justice, or judge rendering the decision, or to the court of appeals or to this Court or to a judge or Justice of either court.

.3. Pending such review of a decision ordering release, the prisoner shall be enlarged upon his recognizance, with or without surety, unless the court, Justice, or judge rendering the decision, or the court of appeals or this Court, or a judge or Justice of either court, shall otherwise order.

.4. An initial order respecting the custody or enlargement of the prisoner, and any recognizance or surety taken, shall govern review in the court of appeals and in this Court unless for reasons shown to the court of appeals or to this Court, or to a judge or Justice of either court, the order shall be modified or an independent order respecting custody, enlargement, or surety shall be made.

Rule 42

Motions to the Court

.1. Every motion to the Court shall state clearly its object, the facts on which it is based, and (except for motions under Rule 27) may present legal argument in support thereof. No separate briefs may be filed. All motions shall be as short as possible, and shall comply with any other applicable page limit. For an application or motion addressed to a single Justice, see Rule 43.

.2. (a) A motion in any action within the Court's original jurisdiction shall comply with Rule 9.3.

(b) A motion to dismiss or affirm made under Rule 16, a motion to dismiss as moot (or a suggestion of mootness), a motion for permission to file a brief *amicus curiae*, any motion the granting of which would be dispositive of the entire case or would affect the final judgment to be entered (other than a motion to docket or dismiss under Rule 14, or a motion for voluntary dismissal under Rule 53), and any motion to the Court longer than five pages, shall be duplicated as provided in Rule 33, and shall comply with all other requirements of that Rule. Forty copies of the motion shall be filed.

(c) Any other motion to the Court may be typewritten in accordance with Rule 39, but the Court may subsequently require any such motion to be duplicated by the moving party in the manner provided by Rule 33.

.3. A motion to the Court shall be filed with the Clerk, with proof of service as provided by Rule 28, unless *ex parte* in nature. No motion shall be presented in open court, other than a motion for admission to the Bar, except when the proceeding to which it refers is being argued. Oral argument will not be heard on any motion unless the Court so directs.

.4. A response to a motion shall be made as promptly as possible considering the nature of the relief asked and any asserted need for emergency action, and, in any event, shall be made within 10 days of receipt, unless otherwise ordered by the Court or a Justice, or by the Clerk under the provisions of Rule 29.4. A response to a printed motion shall be printed if time permits. However, in appropriate cases, the Court in its discretion may act on a motion without waiting for a response.

Rule 43

Motions and Applications to Individual Justices

.1. Any motion or application addressed to an individual Justice shall normally be submitted to the Clerk, who will promptly transmit it to the Justice concerned. If oral argument on the application is deemed imperative, request therefor shall be included in the application.

.2. Any motion or application addressed to an individual

Justice shall be filed in the form prescribed by Rule 39, and shall be accompanied by proof of service on all other parties.

.3. The Clerk in due course will advise all counsel concerned, by means as speedy as may be appropriate, of the time and place of the hearing, if any, and of the disposition made of the motion or application.

.4. The motion or application will be addressed to the Justice allotted to the Circuit within which the case arises. When the Circuit Justice is unavailable, for any reason, a motion or application addressed to that Justice shall be distributed to the Justice then available who is next junior to the Circuit Justice; the turn of the Chief Justice follows that of the most junior Justice.

.5. A Justice denying a motion or application made to him will note his denial thereon. Thereafter, unless action thereon is restricted by law to the Circuit Justice or is out of time under Rule 29.3, the party making the motion or application, except in the case of an application for extension of time, may renew it to any other Justice, subject to the provisions of this Rule. Except where the denial has been without prejudice, any such renewed motion or application is not favored.

.6. Any Justice to whom a motion or application for a stay or for bail is submitted may refer it to the Court for determination.

Rule 44

Stays

.1. A stay may be granted by a Justice of this Court as permitted by law; and a writ of injunction may be granted by any Justice in a case where it might be granted by the Court.

.2. Whenever a party desires a stay pending review in this Court, he may present for approval to a judge of the court whose decision is sought to be reviewed, or to such court when action by that court is required by law, or to a Justice of this Court, a motion to stay the enforcement of the judgment of which review is sought. If the stay is to act as a supersedeas, a supersedeas bond shall accompany the motion and shall have such surety or sureties as said judge, court, or Justice may

require. The bond shall be conditioned on satisfaction of the judgment in full, together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and on full satisfaction of any modified judgment and such costs, interest, and damages as this Court may adjudge and award. When the judgment is for the recovery of money not otherwise secured, the amount of bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs, interest, and damages for delay, unless the judge, court, or Justice, after notice and hearing and for good cause shown, fixes a different amount or orders security other than the bond. When the judgment determines the disposition of the property in controversy, as in a real action, replevin, or an action to foreclose a mortgage, or when the property is in the custody of the court, or when the proceeds of such property or a bond for its value is in the custody or control of any court wherein the proceeding appealed from was had, the amount of the bond shall be fixed at such sum as will secure only the amount recovered for the use and detention of the property, costs, interest, and damages for delay.

.3. A petitioner entitled thereto may present to a Justice of this Court an application to stay the enforcement of the judgment sought to be reviewed on certiorari. 28 U. S. C. § 2101 (f).

.4. An application for a stay or injunction to a Justice of this Court shall not be entertained, except in the most extraordinary circumstances, unless application for the relief sought first has been made to the appropriate court or courts below, or to a judge or judges thereof. Any application must identify the judgment sought to be reviewed and have appended thereto a copy of the order and opinion, if any, and a copy of the order, if any, of the court or judge below denying the relief sought, and must set forth with specificity the reasons why the granting of a stay or injunction is deemed justified. Any such application is governed by Rule 43.

.5. If an application for a stay addressed to the Court is

received in vacation, the Clerk will refer it pursuant to Rule 43.4.

Rule 45

Fees

In pursuance of 28 U. S. C. § 1911, the fees to be charged by the Clerk are fixed as follows:

(a) For docketing a case on appeal (except a motion to docket and dismiss under Rule 14.3, wherein the fee is $50) or on petition for writ of certiorari, or docketing any other proceeding, except cases involving certified questions, $200, to be increased to $300 in a case on appeal, or writ of certiorari, or in other circumstances when oral argument is permitted.

(b) For filing a petition for rehearing, $50.

(c) For a photographic reproduction and certification of any record or paper, $1 per page; and for comparing with the original thereof any photographic reproduction of any record or paper, when furnished by the person requesting its certification, 5 cents per page.

(d) For a certificate and seal, $10.

(e) For admission to the Bar and certificate under seal, $100.

(f) For a duplicate certificate of an admission to the Bar under seal, $10.

PART IX. SPECIAL PROCEEDINGS

Rule 46

Proceedings In Forma Pauperis

.1. A party desiring to proceed in this Court *in forma pauperis* shall file a motion for leave so to proceed, together with his affidavit in the form prescribed in Fed. Rules App. Proc., Form 4 (as adapted, if the party is seeking a writ of certiorari), setting forth with particularity facts showing that he comes within the statutory requirements. See 28 U. S. C. § 1915. However, the affidavit need not state the issues to be presented, and if the district court or the court of appeals has

appointed counsel under the Criminal Justice Act of 1964, as amended, the party need not file an affidavit. See 18 U. S. C. § 3006A (d)(6). The motion shall also state whether or not leave to proceed *in forma pauperis* was sought in any court below and, if so, whether leave was granted.

.2. With the motion, and affidavit if required, there shall be filed the appropriate substantive document—jurisdictional statement, petition for writ of certiorari, or motion for leave to file, as the case may be—which shall comply in every respect with the Rules governing the same, except that it shall be sufficient to file a single copy thereof.

.3. All papers and documents presented under this Rule shall be clearly legible and should, whenever possible, comply with Rule 39. While making due allowance for any case presented under this Rule by a person appearing *pro se,* the Clerk will refuse to receive any document sought to be filed that does not comply with the substance of these Rules, or when it appears that the document is obviously and jurisdictionally out of time.

.4. When the papers required by paragraphs .1 and .2 of this Rule are presented to the Clerk, accompanied by proof of service as prescribed by Rule 28, he, without payment of any docket or other fees, will file them, and place the case on the docket.

.5. The appellee or respondent in a case *in forma pauperis* may respond in the same manner and within the same time as in any other case of the same nature, except that the filing of a single response, typewritten or otherwise duplicated, with proof of service as required by Rule 28, will suffice whenever petitioner or appellant has filed typewritten papers. The appellee or respondent, in such response or in a separate document filed earlier, may challenge the grounds for the motion to proceed *in forma pauperis.*

.6. Whenever the Court appoints a member of the Bar to serve as counsel for an indigent party in a case set for oral argument, the briefs prepared by such counsel, unless he requests otherwise, will be printed under the supervision of

the Clerk. The Clerk also will reimburse such counsel for necessary travel expenses to Washington, D. C., and return, in connection with the argument.

.7. Where this Court has granted certiorari or noted or postponed probable jurisdiction in a federal case involving the validity of a federal or state criminal judgment, and where the defendant in the original criminal proceeding is financially unable to obtain adequate representation or to meet the necessary expenses in this Court, the Court will appoint counsel who may be compensated, and whose necessary expenses may be repaid, to the extent provided by the Criminal Justice Act of 1964, as amended (18 U. S. C. § 3006A).

Rule 47

Veterans' and Seamen's Cases

.1. A veteran suing to establish reemployment rights under 38 U. S. C. § 2022, or under similar provisions of law exempting veterans from the payment of fees or court costs, may proceed upon typewritten papers as under Rule 46, except that the motion shall ask leave to proceed as a veteran, and the affidavit shall set forth the moving party's status as a veteran.

.2. A seaman suing pursuant to 28 U. S. C. § 1916 may proceed without prepayment of fees or costs or furnishing security therefor, but he is not relieved of printing costs nor entitled to proceed on typewritten papers except by separate motion, or unless, by motion and affidavit, he brings himself within Rule 46.

PART X. DISPOSITION OF CASES

Rule 48

Opinions of the Court

.1. All opinions of the Court shall be handed to the Clerk immediately upon delivery thereof. He shall deliver copies to the Reporter of Decisions and shall cause the opinions to be issued in slip form. The opinions shall be filed by the Clerk for preservation.

.2. The Reporter of Decisions shall prepare the opinions for publication in preliminary prints and bound volumes of the United States Reports.

Rule 49

Interest and Damages

.1. Unless otherwise provided by law, if a judgment for money in a civil case is affirmed, whatever interest is allowed by law shall be payable from the date the judgment below was entered. If a judgment is modified or reversed with a direction that a judgment for money be entered below, the mandate shall contain instructions with respect to allowance of interest. Interest will be allowed at the same rate that similar judgments bear interest in the courts of the State where the judgment was entered or was directed to be entered.

.2. When an appeal or petition for writ of certiorari is frivolous, the Court may award the appellee or the respondent appropriate damages.

Rule 50

Costs

.1. In a case of affirmance of any judgment or decree by this Court, costs shall be paid by appellant or petitioner, unless otherwise ordered by the Court.

.2. In a case of reversal or vacating of any judgment or decree by this Court, costs shall be allowed to appellant or petitioner, unless otherwise ordered by the Court.

.3. The fees of the Clerk and the costs of serving process and printing the joint appendix in this Court are taxable items. The costs of the transcript of record from the court below is also a taxable item, but shall be taxable in that court as costs in the case. The expenses of printing briefs, motions, petitions, or jurisdictional statements are not taxable.

.4. In a case where a question has been certified, including a case where the certificate is dismissed, costs shall be equally divided unless otherwise ordered by the Court; but where a decision is rendered on the whole matter in controversy (see Rule 24.2), costs shall be allowed as provided in paragraphs .1 and .2 of this Rule.

.5. In a civil action commenced on or after July 18, 1966, costs under this Rule shall be allowed for or against the United States, or an officer or agent thereof, unless expressly waived or otherwise ordered by the Court. See 28 U. S. C. § 2412. In any other civil action, no such costs shall be allowed, except where specifically authorized by statute and directed by the Court.

.6. When costs are allowed in this Court, it shall be the duty of the Clerk to insert the amount thereof in the body of the mandate or other proper process sent to the court below, and annex to the same the bill of items taxed in detail. The prevailing side in such a case is not to submit to the Clerk any bill of costs.

.7. In an appropriate instance, the Court may adjudge double costs.

Rule 51

Rehearings

.1. A petition for rehearing of any judgment or decision other than one on a petition for writ of certiorari, shall be filed within 25 days after the judgment or decision, unless the time is shortened or enlarged by the Court or a Justice. Forty copies, produced in conformity with Rule 33, must be filed (except where the party is proceeding *in forma pauperis* under Rule 46), accompanied by proof of service as prescribed by Rule 28. Such petition must briefly and distinctly state its grounds. Counsel must certify that the petition is presented in good faith and not for delay; one copy of the certificate shall bear the manuscript signature of counsel. A petition for rehearing is not subject to oral argument, and will not be granted except at the instance of a Justice who concurred in the judgment or decision and with the concurrence of a majority of the Court. See also Rule 52.2.

.2. A petition for rehearing of an order denying a petition for writ of certiorari shall comply with all the form and filing requirements of paragraph .1, but its grounds must be limited to intervening circumstances of substantial or controlling effect or to other substantial grounds not previously presented.

Counsel must certify that the petition is restricted to the grounds specified in this paragraph and that it is presented in good faith and not for delay; one copy of the certificate shall bear the manuscript signature of counsel or of the party when not represented by counsel. A petition for rehearing without such certificate shall be rejected by the Clerk. Such petition is not subject to oral argument.

.3. No response to a petition for rehearing will be received unless requested by the Court, but no petition will be granted without an opportunity to submit a response.

.4. Consecutive petitions for rehearings, and petitions for rehearing that are out of time under this Rule, will not be received.

Rule 52

Process; Mandates

.1. All process of this Court shall be in the name of the President of the United States, and shall contain the given names, as well as the surnames, of the parties.

.2. In a case coming from a state court, mandate shall issue as of course after the expiration of 25 days from the day the judgment is entered, unless the time is shortened or enlarged by the Court or a Justice, or unless the parties stipulate that it be issued sooner. The filing of a petition for rehearing, unless otherwise ordered, will stay the mandate until disposition of such petition, and if the petition is then denied, the mandate shall issue forthwith. When, however, a petition for rehearing is not acted upon prior to adjournment, or is filed after the Court adjourns, the judgment or mandate of the Court will not be stayed unless specifically ordered by the Court or a Justice.

.3. In a case coming from a federal court, a formal mandate will not issue, unless specially directed; instead, the Clerk will send the proper court a copy of the opinion or order of the Court and a certified copy of the judgment (which shall include provisions for the recovery of costs, if any are awarded). In all other respects, the provisions of paragraph .2 apply.

Rule 53

Dismissing Causes

.1. Whenever the parties thereto, at any stage of the proceedings, file with the Clerk an agreement in writing that any cause be dismissed, specifying the terms with respect to costs, and pay to the Clerk any fees that may be due, the Clerk, without further reference to the Court, shall enter an order of dismissal.

.2. (a) Whenever an appellant or petitioner in this Court files with the Clerk a motion to dismiss a cause to which he is a party, with proof of service as prescribed by Rule 28, and tenders to the Clerk any fees and costs that may be due, the adverse party, within 15 days after service thereof, may file an objection, limited to the quantum of damages and costs in this Court alleged to be payable, or, in a proper case, to a showing that the moving party does not represent all appellants or petitioners if there are more than one. The Clerk will refuse to receive any objection not so limited.

(b) Where the objection goes to the standing of the moving party to represent the entire side, the party moving for dismissal, within 10 days thereafter, may file a reply, after which time the matter shall be laid before the Court for its determination.

(c) If no objection is filed, or if upon objection going only to the quantum of damages and costs in this Court, the party moving for dismissal, within 10 days thereafter, shall tender the whole of such additional damages and costs demanded, the Clerk, without further reference to the Court, shall enter an order of dismissal. If, after objection as to quantum of damages and costs in this Court, the moving party does not respond with such a tender within 10 days, the Clerk shall report the matter to the Court for its determination.

.3. No mandate or other process shall issue on a dismissal under this Rule without an order of the Court.

PART XI. APPLICATION OF TERMS

Rule 54

Term "State Court"

The term "state court" when used in these Rules normally includes the District of Columbia Court of Appeals and the Supreme Court of the Commonwealth of Puerto Rico (see 28 U. S. C. §§ 1257, 1258), and references in these Rules to the law and statutes of a State normally include the law and statutes of the District of Columbia and of the Commonwealth of Puerto Rico.

Rule 55

Effective Date of Amendments

The amendments to these Rules adopted April 14, 1980, shall become effective June 30, 1980.

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of
The Supreme Court

April 21 Through April 29, 1980

Henry J. Lind
Reporter of Decisions

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, Chief Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM H. REHNQUIST, Associate Justice.
JOHN PAUL STEVENS, Associate Justice.

OFFICERS OF THE COURT

BENJAMIN R. CIVILETTI, Attorney General.
WADE H. McCREE, Jr., Solicitor General.
MICHAEL RODAK, Jr., Clerk.
HENRY C. LIND, Reporter of Decisions.
ALFRED WONG, Marshal.
ROGER F. JACOBS, Librarian.

SUPREME COURT OF THE UNITED STATES

Allotment of Justices

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, *viz.:*

For the District of Columbia Circuit, Warren E. Burger, Chief Justice.

For the First Circuit, William J. Brennan, Jr., Associate Justice.

For the Second Circuit, Thurgood Marshall, Associate Justice.

For the Third Circuit, William J. Brennan, Jr., Associate Justice.

For the Fourth Circuit, Warren E. Burger, Chief Justice.

For the Fifth Circuit, Lewis F. Powell, Jr., Associate Justice.

For the Sixth Circuit, Potter Stewart, Associate Justice.

For the Seventh Circuit, John Paul Stevens, Associate Justice.

For the Eighth Circuit, Harry A. Blackmun, Associate Justice.

For the Ninth Circuit, William H. Rehnquist, Associate Justice.

For the Tenth Circuit, Byron R. White, Associate Justice

December 19, 1975.

(For next previous allotment, see 404 U. S., p. v.)

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to give him proper medical attention, even though such allegations could also support a suit against United States under Federal Tort Claims Act; question whether mother's action survived son's death is one of federal, not state, law. Carlson v. Green, p. 14.

Due process—Fair Labor Standards Act—Violations of child labor provisions—Payment of penalties to agency.—Reimbursement provision of § 16 (e) of Fair Labor Standards Act, whereby sums collected as civil penalties for unlawful employment of child labor are returned to Department of Labor's Employment Standards Administration in reimbursement for Administration's costs of determining violations and assessing penalties, does not violate Due Process Clause of Fifth Amendment by creating an impermissible risk of bias in Administration's enforcement and administration of Act. Marshall v. Jerrico, Inc., p. 238.

Equal protection of the laws—At-large elections—Racial discrimination.—Court of Appeals' judgment affirming District Court's judgment—which held that at-large electoral system for City Commissioners of Mobile, Ala., discriminated against Negroes in violation of Equal Protection Clause of Fourteenth Amendment and also violated Fifteenth Amendment, and which ordered that Commission be replaced by a Mayor and a Council elected from single-member districts—is reversed, and case is remanded. Mobile v. Bolden, p. 55.

Equal protection of the laws—Sex discrimination—Workers' compensation laws.—Provision of Missouri workers' compensation laws denying a widower benefits on his wife's work-related death unless he either is mentally or physically incapacitated or proves dependence on his wife's earnings, but granting a widow death benefits without her having to prove dependence on her husband's earnings, discriminates against both men and women and thus violates Equal Protection Clause of Fourteenth Amendment. Wengler v. Druggists Mutual Ins. Co., p. 142.

Voting rights—Electoral changes—Discriminatory effect—Voting Rights Act of 1965.—Voting Rights Act of 1965, which prohibits covered jurisdiction from making electoral changes that are discriminatory in effect, does not exceed Congress' power to enforce Fifteenth Amendment and does not violate principles of federalism; nor were First, Fifth, Ninth, and Tenth Amendment rights of city officials as private citizens abridged because no city elections were held after Attorney General's refusal under Act to preclear certain changes in city's electoral system, since city could have conducted elections under its prior electoral scheme and thus failure to hold elections was attributable to city officials, not Act's operation. City of Rome v. United States, p. 156.

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Right to counsel—Valid uncounseled misdemeanor conviction—Enhanced penalty upon subsequent conviction.—While an uncounseled misdemeanor conviction is constitutionally valid if the offender is not incarcerated, such a conviction may not be used under an enhanced penalty statute to convert a subsequent misdemeanor into a felony with a prison term. Baldasar v. Illinois, p. 222.

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Court of Appeals, notwithstanding other claims and counterclaims were still to be litigated and might result in a setoff against amount owed to plaintiff. Curtiss-Wright Corp. v. General Electric Co., p. 1.

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Ownership of tidelands—Mineral leases—Disbursement of funds.—In original proceedings between United States and Louisiana wherein an interim agreement provided for disbursement of funds received by parties from mineral leases in disputed tidelands area, United States is not obligated to account for and pay Louisiana either value of use of Louisiana's share of impounded funds that had been awarded and paid to State under mineral leases on lands off its Gulf Coast, or interest upon that portion of those funds; Louisiana is obligated to account to United States for revenues derived by State from mineral leases on areas within zone contiguous to coastline adjudicated to United States, but is not obligated to account for and pay to United States money collected by State as severance taxes on minerals removed from areas adjudicated to United States. United States v. Louisiana, p. 253.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1979

CURTISS-WRIGHT CORP. *v.* GENERAL ELECTRIC CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 79-105. Argued January 14, 1980—Decided April 22, 1980

Petitioner brought a diversity action in Federal District Court against respondent, seeking damages and reformation with regard to a certain series of contracts between the parties. Various claims were asserted, including a $19 million claim for amounts due on the contracts already performed. Respondent filed counterclaims. The facts as to most of the claims and counterclaims are in dispute, but the sole dispute as to petitioner's claim for the $19 million balance due concerns the application of a release clause in each of the contracts. The District Court granted summary judgment for petitioner for $19 million, plus prejudgment interest at the statutory rate of 6%, notwithstanding the release clause. Petitioner then moved for a certification of this judgment as a final judgment under Federal Rule of Civil Procedure 54 (b), which provides that when more than one claim is presented in an action, whether as a claim or counterclaim, a district court may direct the entry of a final judgment as to one or more but fewer than all of the claims upon an express determination that there is no just reason for delay. The court granted the motion and directed entry of final judgment for petitioner after determining that there was "no just reason for delay" and finding, *inter alia*, that certification would not result in unnecessary appellate review; that the claims finally adjudicated were separate from

any of the other claims or counterclaims; that the nature of the claims was such that no appellate court would have to decide the same issues more than once even if there were subsequent appeals; that petitioner would suffer severe financial loss from nonpayment of the $19 million judgment because current interest rates were higher than the statutory prejudgment rates; and that the solvency of the parties was not a significant factor since each appeared to be financially sound. Dismissing the case for want of an appealable order, the Court of Appeals held that the District Court had abused its discretion by granting the Rule 54 (b) certification, since the possibility of a setoff required that the status quo be maintained unless petitioner could show harsh or unusual circumstances and since no such showing had been made.

Held: The District Court did not abuse its discretion in granting petitioner's motion for certification under Rule 54 (b). Pp. 7–13.

(a) In deciding whether there are just reasons to delay an appeal of individual final judgments in a setting such as this, a district court must take into account the interests of sound judicial administration as well as the equities involved. Hence, it was proper for the District Court here to consider such factors as whether the claims under review were separable from the others remaining to be adjudicated and whether the nature of the claims already determined was such that no appellate court would have to decide the same issues more than once even if there were subsequent appeals. The mere presence of nonfrivolous counterclaims does not render a Rule 54 (b) certification inappropriate. Pp. 8–9.

(b) The Court of Appeals' holding that the status quo had to be maintained absent a showing by petitioner of harsh or unusual circumstances reflects a misinterpretation of the standard of review for Rule 54 (b) certifications and a misperception of the appellate function in such cases. Pp. 9–10.

(c) The proper standard against which a district court's exercise of discretion in granting a Rule 54 (b) certification is to be judged is the interest of sound judicial administration. Under this standard, although the court of appeals must scrutinize the district court's evaluation of such factors as the interrelationship of the claims so as to prevent piecemeal appeals, once such juridical concerns have been met, the district court's discretionary judgment should be given substantial deference, and the court of appeals should disturb the district court's assessment of the equities only if it can say that the district judge's conclusion was clearly unreasonable. Pp. 10–11.

(d) The question before the District Court here came down to which of the parties should get the benefit of the difference between the pre-

judgment and market rates of interest on the debts admittedly owing and adjudged to be due while unrelated claims were litigated. While the possibility of a setoff against the amount respondent owed petitioner was not an insignificant factor, the District Court took this into account when it determined that both litigants appeared to be financially sound, and that petitioner would be able to satisfy a judgment on the counterclaims if any were entered. Pp. 11–12.

597 F. 2d 35, vacated and remanded.

BURGER, C. J., delivered the opinion for a unanimous Court.

Ralph N. Del Deo argued the cause for petitioner. With him on the briefs were *Richard S. Zackin, David Lasky,* and *Alfred J. Kovell.*

Isaac N. Groner argued the cause for respondent. With him on the brief were *Walter H. Fleischer, Alfred F. Belcuore,* and *Albert G. Besser.*

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

Federal Rule of Civil Procedure 54 (b) allows a district court dealing with multiple claims or multiple parties to direct the entry of final judgment as to fewer than all of the claims or parties; to do so, the court must make an express determination that there is no just reason for delay. We granted certiorari in order to examine the use of this procedural device. 444 U. S. 823 (1979).

I

From 1968 to 1972, respondent General Electric Co. entered into a series of 21 contracts with petitioner Curtiss-Wright Corp. for the manufacture of components designed for use in nuclear powered naval vessels. These contracts had a total value of $215 million.

In 1976, Curtiss-Wright brought a diversity action in the United States District Court for the District of New Jersey, seeking damages and reformation with regard to the 21 contracts. The complaint asserted claims based on alleged fraud,

misrepresentation, and breach of contract by General Electric. It also sought $19 million from General Electric on the outstanding balance due on the contracts already performed.

General Electric counterclaimed for $1.9 million in costs allegedly incurred as the result of "extraordinary efforts" provided to Curtiss-Wright during performance of the contracts which enabled Curtiss-Wright to avoid a contract default. General Electric also sought, by way of counterclaim, to recover $52 million by which Curtiss-Wright was allegedly unjustly enriched as a result of these "extraordinary efforts."

The facts underlying most of these claims and counterclaims are in dispute. As to Curtiss-Wright's claims for the $19 million balance due, however, the sole dispute concerns the application of a release clause contained in each of the 21 agreements, which states that "Seller . . . agree[s] as a condition precedent to final payment, that the Buyer and the Government . . . are released from all liabilities, obligations and claims arising under or by virtue of this order." App. 103a. When Curtiss-Wright moved for summary judgment on the balance due, General Electric contended that so long as Curtiss-Wright's other claims remained pending, this provision constituted a bar to recovery of the undisputed balance.

The District Court rejected this contention and granted summary judgment for Curtiss-Wright on this otherwise undisputed claim. Applying New York law by which the parties had agreed to be bound, the District Court held that Curtiss-Wright was entitled to payment of the balance due notwithstanding the release clause. The court also ruled that Curtiss-Wright was entitled to prejudgment interest at the New York statutory rate of 6% per annum.

Curtiss-Wright then moved for a certification of the District Court's orders as final judgments under Federal Rule of Civil Procedure 54 (b),[1] which provides:

"When more than one claim for relief is presented in an

[1] This was the second motion by Curtiss-Wright for Rule 54 (b) cer-

> action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

The court expressly directed entry of final judgment for Curtiss-Wright and made the determination that there was "no just reason for delay" pursuant to Rule 54 (b).

The District Court also provided a written statement of reasons supporting its decision to certify the judgment as final. It acknowledged that Rule 54 (b) certification was not to be granted as a matter of course, and that this remedy should be reserved for the infrequent harsh case because of the overload in appellate courts which would otherwise result from appeals of an interlocutory nature. The essential inquiry was stated to be "whether, after balancing the competing factors, finality of judgment should be ordered to advance the interests of sound judicial administration and justice to the litigants."

The District Court then went on to identify the relevant factors in the case before it. It found that certification would not result in unnecessary appellate review; that the claims

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tification. An earlier motion was denied by the District Court because at that time the matter of prejudgment interest had not yet been resolved.

finally adjudicated were separate, distinct, and independent of any of the other claims or counterclaims involved; that review of these adjudicated claims would not be mooted by any future developments in the case; and that the nature of the claims was such that no appellate court would have to decide the same issues more than once even if there were subsequent appeals.

Turning to considerations of justice to the litigants, the District Court found that Curtiss-Wright would suffer severe daily financial loss from nonpayment of the $19 million judgment because current interest rates were higher than the statutory prejudgment rate, a situation compounded by the large amount of money involved. The court observed that the complex nature of the remaining claims could, without certification, mean a delay that "would span many months, if not years."

The court found that solvency of the parties was not a significant factor, since each appeared to be financially sound. Although the presence of General Electric's counterclaims and the consequent possibility of a setoff recovery were factors which weighed against certification, the court, in balancing these factors, determined that they were outweighed by the other factors in the case. Accordingly, it granted Rule 54 (b) certification. It also granted General Electric's motion for a stay without bond pending appeal.

A divided panel of the United States Court of Appeals for the Third Circuit held that the case was controlled by its decision in *Allis-Chalmers Corp.* v. *Philadelphia Electric Co.*, 521 F. 2d 360 (1975), where the court had stated:

> "In the absence of unusual or harsh circumstances,[14] we believe that the presence of a counterclaim, which could result in a set-off against any amounts due and owing to the plaintiff, weighs heavily against the grant of 54 (b) certification." *Id.*, at 366.

In *Allis-Chalmers*, footnote 14 defined unusual or harsh cir-

cumstances as those factors "involving considerations of solvency, economic duress, etc." *Id.*, at 366, n. 14.

In the Third Circuit's view, the question was which of the parties should have the benefit of the amount of the balance due pending final resolution of the litigation. The court held that *Allis-Chalmers* dictated "that the matter remain in status quo when non-frivolous counterclaims are pending, and in the absence of unusual or harsh circumstances." 597 F. 2d 35, 36 (1979) (*per curiam*). The Court of Appeals acknowledged that Curtiss-Wright's inability to have use of the money from the judgment might seem harsh, but noted that the same could be said for General Electric if it were forced to pay Curtiss-Wright now but later prevailed on its counterclaims. *Ibid.*

The Court of Appeals concluded that the District Court had abused its discretion by granting Rule 54 (b) certification in this situation and dismissed the case for want of an appealable order; it also directed the District Court to vacate its Rule 54 (b) determination of finality. Curtiss-Wright's petition for rehearing and suggestion for rehearing en banc were denied. 599 F. 2d 1259 (1979). Four judges dissented from that denial, observing that the case was in conflict with *United Bank of Pueblo* v. *Hartford Accident & Indemnity Co.*, 529 F. 2d 490 (CA10 1976). We reverse.

II

Nearly a quarter of a century ago, in *Sears, Roebuck & Co.* v. *Mackey*, 351 U. S. 427 (1956), this Court outlined the steps to be followed in making determinations under Rule 54 (b). A district court must first determine that it is dealing with a "final judgment." It must be a "judgment" in the sense that it is a decision upon a cognizable claim for relief, and it must be "final" in the sense that it is "an ultimate disposition of an individual claim entered in the course of a multiple claims action." 351 U. S., at 436.

Once having found finality, the district court must go on to determine whether there is any just reason for delay. Not all final judgments on individual claims should be immediately appealable, even if they are in some sense separable from the remaining unresolved claims. The function of the district court under the Rule is to act as a "dispatcher." *Id.*, at 435. It is left to the sound judicial discretion of the district court to determine the "appropriate time" when each final decision in a multiple claims action is ready for appeal. *Ibid.* This discretion is to be exercised "in the interest of sound judicial administration." *Id.*, at 437.

Thus, in deciding whether there are no just reasons to delay the appeal of individual final judgments in a setting such as this, a district court must take into account judicial administrative interests as well as the equities involved. Consideration of the former is necessary to assure that application of the Rule effectively "preserves the historic federal policy against piecemeal appeals." *Id.*, at 438. It was therefore proper for the District Judge here to consider such factors as whether the claims under review were separable from the others remaining to be adjudicated and whether the nature of the claims already determined was such that no appellate court would have to decide the same issues more than once even if there were subsequent appeals.[2]

Here the District Judge saw no sound reason to delay appellate resolution of the undisputed claims already adjudicated. The contrary conclusion of the Court of Appeals was strongly

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[2] We do not suggest that the presence of one of these factors would necessarily mean that Rule 54 (b) certification would be improper. It would, however, require the district court to find a sufficiently important reason for nonetheless granting certification. For example, if the district court concluded that there was a possibility that an appellate court would have to face the same issues on a subsequent appeal, this might perhaps be offset by a finding that an appellate resolution of the certified claims would facilitate a settlement of the remainder of the claims. See *Cold Metal Process Co.* v. *United Engineering & Foundry Co.*, 351 U. S. 445, 450, n. 5 (1956).

influenced by the existence of nonfrivolous counterclaims. The mere presence of such claims, however, does not render a Rule 54 (b) certification inappropriate. If it did, Rule 54 (b) would lose much of its utility. In *Cold Metal Process Co. v. United Engineering & Foundry Co.*, 351 U. S. 445 (1956), this Court explained that counterclaims, whether compulsory or permissive, present no special problems for Rule 54 (b) determinations; counterclaims are not to be evaluated differently from other claims. 351 U. S., at 452. Like other claims, their significance for Rule 54 (b) purposes turns on their interrelationship with the claims on which certification is sought. Here, the District Judge determined that General Electric's counterclaims were severable from the claims which had been determined in terms of both the factual and the legal issues involved. The Court of Appeals did not conclude otherwise.

What the Court of Appeals found objectionable about the District Judge's exercise of discretion was the assessment of the equities involved. The Court of Appeals concluded that the possibility of a setoff required that the status quo be maintained unless petitioner could show harsh or unusual circumstances; it held that such a showing had not been made in the District Court.

This holding reflects a misinterpretation of the standard of review for Rule 54 (b) certifications and a misperception of the appellate function in such cases. The Court of Appeals relied on a statement of the Advisory Committee on the Rules of Civil Procedure, and its error derives from reading a description in the commentary as a standard of construction. When Rule 54 (b) was amended in 1946, the Notes of the Advisory Committee which accompanied the suggested amendment indicated that the entire lawsuit was generally the appropriate unit for appellate review, "and that this rule needed only the exercise of a discretionary power to afford a remedy in the infrequent harsh case to provide a simple, definite, workable rule." 28 U. S. C. App., p. 484; 5 F. R. D. 433, 473 (1946).

However accurate it may be as a description of cases qualifying for Rule 54 (b) treatment, the phrase "infrequent harsh case" in isolation is neither workable nor entirely reliable as a benchmark for appellate review. There is no indication it was ever intended by the drafters to function as such.

In *Sears*, the Court stated that the decision to certify was with good reason left to the sound judicial discretion of the district court. At the same time, the Court noted that "[w]ith equally good reason, any *abuse* of that discretion remains reviewable by the Court of Appeals." 351 U. S., at 437 (emphasis added). The Court indicated that the standard against which a district court's exercise of discretion is to be judged is the "interest of sound judicial administration." *Ibid.* Admittedly this presents issues not always easily resolved, but the proper role of the Court of Appeals is not to reweigh the equities or reassess the facts but to make sure that the conclusions derived from those weighings and assessments are juridically sound and supported by the record.

There are thus two aspects to the proper function of a reviewing court in Rule 54 (b) cases. The Court of Appeals must, of course, scrutinize the District Court's evaluation of such factors as the interrelationship of the claims so as to prevent piecemeal appeals in cases which should be reviewed only as single units. But once such juridical concerns have been met, the discretionary judgment of the District Court should be given substantial deference, for that court is "the one most likely to be familiar with the case and with any justifiable reasons for delay." *Sears, supra*, at 437. The reviewing court should disturb the trial court's assessment of the equities only if it can say that the judge's conclusion was clearly unreasonable.

Plainly, sound judicial administration does not require that Rule 54 (b) requests be granted routinely. That is implicit in commending them to the sound discretion of a district court. Because this discretion "is, with good reason, vested by the rule primarily" in the district courts, *Sears, supra*, at 437, and because the number of possible situations is large, we are

reluctant either to fix or sanction narrow guidelines for the district courts to follow. We are satisfied, however, that on the record here the District Court's assessment of the equities was reasonable.

One of the equities which the District Judge considered was the difference between the statutory and market rates of interest. Respondent correctly points out that adjustment of the statutory prejudgment interest rate is a matter within the province of the legislature, but that fact does not make the existing differential irrelevant for Rule 54 (b) purposes. If the judgment is otherwise certifiable, the fact that a litigant who has successfully reduced his claim to judgment stands to lose money because of the difference in interest rates is surely not a "just reason for delay."

The difference between the prejudgment and market interest rates was not the only factor considered by the District Court. The court also noted that the debts in issue were liquidated and large, and that absent Rule 54 (b) certification they would not be paid for "many months, if not years" because the rest of the litigation could be expected to continue for that period of time. The District Judge had noted earlier in his opinion on the merits of the release clause issue that respondent General Electric contested neither the amount of the debt nor the fact that it must eventually be paid. App. 164a–172a. The only contest was over the effect of the release clause on the timing of the payment, an isolated and strictly legal issue on which summary judgment had been entered against respondent.

The question before the District Court thus came down to which of the parties should get the benefit of the difference between the prejudgment and market rates of interest on debts admittedly owing and adjudged to be due while unrelated claims were litigated. The central factor weighing in favor of General Electric was that its pending counterclaims created the possibility of a setoff against the amount it owed petitioner.

This possibility was surely not an insignificant factor, especially since the counterclaims had survived a motion to dismiss for failure to state a claim. *Id.*, at 173a–174a. But the District Court took this into account when it determined that both litigants appeared to be in financially sound condition, and that Curtiss-Wright would be able to satisfy a judgment on the counterclaims should any be entered.

The Court of Appeals concluded that this was not enough, and suggested that the presence of such factors as economic duress and insolvency would be necessary to qualify the judgment for Rule 54 (b) certification. 597 F. 2d, at 36. But if Curtiss-Wright were under a threat of insolvency, that factor alone would weigh *against* qualifying; that very threat would cast doubt upon Curtiss-Wright's capacity to produce all or part of the $19 million should General Electric prevail on some of its counterclaims. Such a showing would thus in fact be self-defeating.

Nor is General Electric's solvency a dispositive factor; if its financial position were such that a delay in entry of judgment on Curtiss-Wright's claims would impair Curtiss-Wright's ability to collect on the judgment, that would weigh in favor of certification. But the fact that General Electric is capable of paying either now or later is not a "just reason for delay." At most, as the District Court found, the fact that neither party is or will become insolvent renders that factor neutral in a proper weighing of the equities involved.

The question in cases such as this is likely to be close, but the task of weighing and balancing the contending factors is peculiarly one for the trial judge, who can explore all the facets of a case. As we have noted, that assessment merits substantial deference on review. Here, the District Court's assessment of the equities between the parties was based on an intimate knowledge of the case and is a reasonable one. The District Court having found no other reason justifying delay, we conclude that it did not abuse its discretion in

granting petitioner's motion for certification under Rule 54 (b).[3]

Accordingly, the judgment of the Court of Appeals is vacated, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

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[3] We note that Federal Rule of Civil Procedure 62 (h) allows a court certifying a judgment under Rule 54 (b) to stay its enforcement until the entering of a subsequent judgment or judgments. Rule 62 (h) also states that the court "may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered." Under this Rule, we assume it would be within the power of the District Court to protect all parties by having the losing party deposit the amount of the judgment with the court, directing the Clerk to purchase high yield government obligations and to hold them pending the outcome of the case. In this way, valid considerations of economic duress and solvency, which do not affect the juridical considerations involved in a Rule 54 (b) determination, can be provided for without preventing Rule 54 (b) certification.

In the instant case, after certifying the judgment as final under Rule 54 (b), the District Court granted respondent's motion for a stay of judgment without bond, but only pending resolution of the appeal.

CARLSON, DIRECTOR, FEDERAL BUREAU OF PRISONS, ET AL. *v.* GREEN, ADMINISTRATRIX

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 78-1261. Argued January 7, 1980—Decided April 22, 1980

Respondent brought suit in Federal District Court in Indiana on behalf of her deceased son's estate, alleging that her son while a prisoner in a federal prison in Indiana suffered personal injuries from which he died because petitioner prison officials violated, *inter alia*, his Eighth Amendment rights by failing to give him proper medical attention. Asserting jurisdiction under 28 U. S. C. § 1331 (a), respondent claimed compensatory and punitive damages. The District Court held that the allegations pleaded a violation of the Eighth Amendment's proscription against cruel and unusual punishment, thus giving rise to a cause of action for damages under *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, under which it was established that victims of a constitutional violation by a federal official have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right. But the court dismissed the complaint on the ground that, although the decedent could have maintained the action if he had survived, the damages remedy as a matter of federal law was limited to that provided by Indiana's survivorship and wrongful-death laws, which the court construed as making the damages available to the decedent's estate insufficient to meet § 1331 (a)'s $10,000 jurisdictional-amount requirement. While otherwise agreeing with the District Court, the Court of Appeals held that the latter requirement was satisfied because whenever a state survivorship statute would abate a *Bivens*-type action, the federal common law allows survival of the action.

Held:

1. A *Bivens* remedy is available to respondent even though the allegations could also support a suit against the United States under the Federal Tort Claims Act (FTCA). Pp. 18–23.

(a) Neither of the situations in which a cause of action under *Bivens* may be defeated are present here. First, the case involves no special factors counseling hesitation in the absence of affirmative action by Congress, petitioners not enjoying such independent status in our

constitutional scheme as to suggest that judicially created remedies against them might be inappropriate. Second, there is no explicit congressional declaration that persons injured by federal officers' violations of the Eighth Amendment may not recover damages from the officers but must be remitted to another remedy, equally effective in Congress' view. There is nothing in the FTCA or its legislative history to show that Congress meant to pre-empt a *Bivens* remedy or to create an equally effective remedy for constitutional violations. Rather, in the absence of a contrary expression from Congress, the FTCA's provision creating a cause of action against the United States for intentional torts committed by federal law enforcement officers, contemplates that victims of the kind of intentional wrongdoing alleged in the complaint in this case shall have an action under the FTCA against the United States as well as a *Bivens* action against the individual officials alleged to have infringed their constitutional rights. Pp. 18–20.

(b) The following factors also support the conclusion that Congress did not intend to limit respondent to an FTCA action: (i) the *Bivens* remedy, being recoverable against individuals, is a more effective deterrent than the FTCA remedy against the United States; (ii) punitive damages may be awarded in a *Bivens* suit, but are statutorily prohibited in an FTCA suit; (iii) a plaintiff cannot opt for a jury trial in an FTCA action as he may in a *Bivens* suit; and (iv) an action under the FTCA exists only if the State in which the alleged misconduct occurred would permit a cause of action for that misconduct to go forward. Pp. 20–23.

2. Since *Bivens* actions are a creation of federal law, the question whether respondent's action survived her son's death is a question of federal law. Only a uniform federal rule of survivorship will suffice to redress the constitutional deprivation here alleged and to protect against repetition of such conduct. *Robertson* v. *Wegmann*, 436 U. S. 584, distinguished. Pp. 23–25.

581 F. 2d 669, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. POWELL, J., filed an opinion concurring in the judgment, in which STEWART, J., joined, *post*, p. 25. BURGER, C. J., *post*, p. 30, and REHNQUIST, J., *post*, p. 31, filed dissenting opinions.

Deputy Solicitor General Geller argued the cause for petitioners. On the briefs were *Solicitor General McCree, Acting*

Assistant Attorney General Daniel, Robert E. Kopp, and *Barbara L. Herwig.*

Michael Deutsch argued the cause for respondent. With him on the brief was *Charles Hoffman.**

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Respondent brought this suit in the District Court for the Southern District of Indiana on behalf of the estate of her deceased son, Joseph Jones, Jr., alleging that he suffered personal injuries from which he died because the petitioners, federal prison officials, violated his due process, equal protection, and Eighth Amendment rights.[1] Asserting jurisdiction under 28 U. S. C. § 1331 (a), she claimed compensatory and punitive damages for the constitutional violations. Two questions are presented for decision: (1) Is a remedy available directly under the Constitution, given that respondent's allegations could also support a suit against the United States

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**Alvin J. Bronstein, Bruce J. Ennis,* and *William E. Hellerstein* filed a brief for the American Civil Liberties Union Foundation, Inc., et al. as *amici curiae* urging affirmance.

John B. Jones, Jr., Norman Redlich, William L. Robinson, Norman J. Chachkin, and *Richard S. Kohn* filed a brief for the Lawyers' Committee for Civil Rights Under Law as *amicus curiae.*

[1] More specifically, respondent alleged that petitioners, being fully apprised of the gross inadequacy of medical facilities and staff at the Federal Correction Center in Terre Haute, Ind., and of the seriousness of Jones' chronic asthmatic condition, nonetheless kept him in that facility against the advice of doctors, failed to give him competent medical attention for some eight hours after he had an asthmatic attack, administered contra-indicated drugs which made his attack more severe, attempted to use a respirator known to be inoperative which further impeded his breathing, and delayed for too long a time his transfer to an outside hospital. The complaint further alleges that Jones' death resulted from these acts and omissions, that petitioners were deliberately indifferent to Jones' serious medical needs, and that their indifference was in part attributable to racial prejudice.

under the Federal Tort Claims Act?[2] and (2) If so, is survival of the cause of action governed by federal common law or by state statutes?

I

The District Court held that under *Estelle* v. *Gamble*, 429 U. S. 97 (1976), the allegations set out in note 1, *supra*, pleaded a violation of the Eighth Amendment's proscription against infliction of cruel and unusual punishment[3] giving rise to a cause of action for damages under *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971). The court recognized that the decedent could have maintained this action if he had survived, but dismissed the complaint because in its view the damages remedy as a matter of federal law was limited to that provided by Indiana's survivorship and wrongful-death laws and, as the court construed those laws, the damages available to Jones' estate failed to meet § 1331 (a)'s $10,000 jurisdictional-amount requirement. The Court of Appeals for the Seventh Circuit agreed that an Eighth Amendment violation was pleaded under *Estelle* and that a cause of action was stated under *Bivens*, but reversed the holding that § 1331 (a)'s jurisdictional-amount requirement was not met.[4] Rather, the Court of Appeals held that

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[2] This question was presented in the petition for certiorari, but not in either the District Court or the Court of Appeals. However, respondent does not object to its decision by this Court. Though we do not normally decide issues not presented below, we are not precluded from doing so. *E. g.*, *Youakim* v. *Miller*, 425 U. S. 231 (1976). Here, the issue is squarely presented and fully briefed. It is an important, recurring issue and is properly raised in another petition for certiorari being held pending disposition of this case. See *Loe* v. *Armistead*, 582 F. 2d 1291 (CA4 1978), cert. pending *sub nom. Moffitt* v. *Loe*, No. 78–1260. We conclude that the interests of judicial administration will be served by addressing the issue on its merits.

[3] Petitioners do not contest the determination that the allegations satisfy the standards set out in *Estelle*.

[4] The relevant Indiana law provides that a personal injury claim does not survive where the acts complained of caused the victim's death. Ind.

§ 1331 (a) was satisfied because "whenever the relevant State survival statute would abate a *Bivens*-type action brought against defendants whose conduct results in death, the federal common law allows survival of the action." 581 F. 2d 669, 675 (1978). The court reasoned that the Indiana law, if applied, would "subvert" "the policy of allowing complete vindication of constitutional rights" by making it "more advantageous for a tortfeasor to kill rather than to injure." *Id.*, at 674. We granted certiorari. 442 U. S. 940 (1979). We affirm.

II

Bivens established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right. Such a cause of action may be defeated in a particular case, however, in two situations. The first is when defendants demonstrate "special factors counselling hesitation in the absence of affirmative action by Congress." 403 U. S., at 396; *Davis* v. *Passman*, 442 U. S. 228, 245 (1979). The second is when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly

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Code § 34-1-1-1 (1976). Indiana does provide a wrongful-death cause of action for the personal representative of one whose death is caused by an alleged wrongful act or omission. Damages may "includ[e], but [are] not limited to, reasonable medical, hospital, funeral and burial expenses, and lost earnings." But if the decedent is not survived by a spouse, dependent child, or dependent next of kin, then the recovery is limited to expenses incurred in connection with the death. Ind. Code § 34-1-1-2 (1976).

The District Court read the complaint in this case as stating claims under both §§ 34-1-1-1 and 34-1-1-2. Accordingly, the court assumed that recovery on the claim was limited to expenses (all of which would be paid by the Federal Government) only because Jones died without a spouse or any dependents. The Court of Appeals read the complaint as stating only a survivorship claim on behalf of Jones under § 34-1-1-1. Thus it assumed that the claim would have abated even if Jones had left dependents or a spouse. 581 F. 2d 669, 672, n. 4 (1978). Resolution of this conflict is irrelevant in light of our holding today.

under the Constitution and viewed as equally effective. *Bivens, supra,* at 397; *Davis* v. *Passman,* 442 U. S., at 245–247.

Neither situation obtains in this case. First, the case involves no special factors counselling hesitation in the absence of affirmative action by Congress. Petitioners do not enjoy such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate. *Davis* v. *Passman, supra,* at 246. Moreover, even if requiring them to defend respondent's suit might inhibit their efforts to perform their official duties, the qualified immunity accorded them under *Butz* v. *Economou,* 438 U. S. 478 (1978), provides adequate protection. See *Davis* v. *Passman, supra,* at 246.

Second, we have here no explicit congressional declaration that persons injured by federal officers' violations of the Eighth Amendment may not recover money damages from the agents but must be remitted to another remedy, equally effective in the view of Congress. Petitioners point to nothing in the Federal Tort Claims Act (FTCA) or its legislative history to show that Congress meant to pre-empt a *Bivens* remedy or to create an equally effective remedy for constitutional violations.[5] FTCA was enacted long before *Bivens* was decided, but when Congress amended FTCA in 1974 to create a cause of action against the United States for intentional torts committed by federal law enforcement officers, 28 U. S. C. § 2680 (h), the congressional comments accompanying

[5] To satisfy this test, petitioners need not show that Congress recited any specific "magic words." See the dissenting opinion of THE CHIEF JUSTICE, *post,* at 31, and n. 2. Instead, our inquiry at this step in the analysis is whether Congress has indicated that it intends the statutory remedy to replace, rather than to complement, the *Bivens* remedy. Where Congress decides to enact a statutory remedy which it views as fully adequate only in combination with the *Bivens* remedy, *e. g.,* 28 U. S. C. § 2680 (h), that congressional decision should be given effect by the courts.

that amendment made it crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action:

> "[A]fter the date of enactment of this measure, innocent individuals who are subjected to raids [like that in *Bivens*] will have a cause of action against the individual Federal agents *and* the Federal Government. Furthermore, this provision should be viewed as a *counterpart* to the *Bivens* case and its progenty [*sic*], in that it waives the defense of sovereign immunity so as to make the Government independently liable in damages for the same type of conduct that is alleged to have occurred in *Bivens* (and for which that case imposes liability upon the individual Government officials involved)." S. Rep. No. 93–588, p. 3 (1973) (emphasis supplied).

In the absence of a contrary expression from Congress, § 2680 (h) thus contemplates that victims of the kind of intentional wrongdoing alleged in this complaint shall have an action under FTCA against the United States as well as a *Bivens* action against the individual officials alleged to have infringed their constitutional rights.

This conclusion is buttressed by the significant fact that Congress follows the practice of explicitly stating when it means to make FTCA an exclusive remedy. See 38 U. S. C. § 4116 (a), 42 U. S. C. § 233 (a), 42 U. S. C. § 2458a, 10 U. S. C. § 1089 (a), and 22 U. S. C. § 817 (a) (malpractice by certain Government health personnel); 28 U. S. C. § 2679 (b) (operation of motor vehicles by federal employees); and 42 U. S. C. § 247b (k) (manufacturers of swine flu vaccine). Furthermore, Congress has not taken action on other bills that would expand the exclusivity of FTCA. See, *e. g.*, S. 695, 96th Cong., 1st Sess. (1979); H. R. 2659, 96th Cong., 1st Sess. (1979); S. 3314, 95th Cong., 2d Sess. (1978).

Four additional factors, each suggesting that the *Bivens* remedy is more effective than the FTCA remedy, also support our conclusion that Congress did not intend to limit respond-

ent to an FTCA action. First, the *Bivens* remedy, in addition to compensating victims, serves a deterrent purpose. See *Butz* v. *Economou, supra,* at 505.[6] Because the *Bivens* remedy is recoverable against individuals, it is a more effective deterrent than the FTCA remedy against the United States. It is almost axiomatic that the threat of damages has a deterrent effect,[7] *Imbler* v. *Pachtman,* 424 U. S. 409, 442 (1976) (WHITE, J., concurring in judgment), surely particularly so when the individual official faces personal financial liability.

Petitioners argue that FTCA liability is a more effective deterrent because the individual employees responsible for the Government's liability would risk loss of employment[8] and because the Government would be forced to promulgate corrective policies. That argument suggests, however, that the superiors would not take the same actions when an employee is found personally liable for violation of a citizen's constitutional rights. The more reasonable assumption is that responsible superiors are motivated not only by concern for the public fisc but also by concern for the Government's integrity.

Second, our decisions, although not expressly addressing

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[6] Title 42 U. S. C. § 1983 serves similar purposes. See, *e. g., Robertson* v. *Wegmann,* 436 U. S. 584, 590–591 (1978); *Carey* v. *Piphus,* 435 U. S. 247, 256 (1978); *Mitchum* v. *Foster,* 407 U. S. 225, 242 (1972); *Monroe* v. *Pape,* 365 U. S. 167, 172–187 (1961).

[7] Indeed, underlying the qualified immunity which public officials enjoy for actions taken in good faith is the fear that exposure to personal liability would otherwise deter them from acting at all. See *Butz* v. *Economou,* 438 U. S. 478, 497 (1978); *Scheuer* v. *Rhodes,* 416 U. S. 232, 240 (1974).

[8] Some doubt has been cast on the validity of the assumption that there exist adequate mechanisms for disciplining federal employees in such cases. See Testimony of Griffin B. Bell, Attorney General of the United States, Joint Hearing on Amendments to the Federal Tort Claims Act before the Subcommittee on Citizens and Shareholders Rights and Remedies and the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 95th Cong., 2d Sess., pt. 1, p. 6 (1978).

and deciding the question, indicate that punitive damages may be awarded in a *Bivens* suit. Punitive damages are "a particular remedial mechanism normally available in the federal courts." *Bivens*, 403 U. S., at 397, and are especially appropriate to redress the violation by a Government official of a citizen's constitutional rights. Moreover, punitive damages are available in "a proper" § 1983 action, *Carey* v. *Piphus*, 435 U. S. 247, 257, n. 11 (1978) (punitive damages not awarded because District Court found defendants "did not act with a malicious intention to deprive respondents of their rights or to do them other injury"),[9] and *Butz* v. *Economou*, suggests that the "constitutional design" would be stood on its head if federal officials did not face at least the same liability as state officials guilty of the same constitutional transgression. 438 U. S., at 504. But punitive damages in an FTCA suit are statutorily prohibited. 28 U. S. C. § 2674. Thus FTCA is that much less effective than a *Bivens* action as a deterrent to unconstitutional acts.

Third, a plaintiff cannot opt for a jury in an FTCA action, 28 U. S. C. § 2402, as he may in a *Bivens* suit.[10] Petitioners argue that this is an irrelevant difference because juries have been biased against *Bivens* claimants. Reply Brief for Petitioners 7, and n. 6, Brief for Petitioners 30–31, n. 30. Significantly, however, they do not assert that judges trying the claims as FTCA actions would have been more receptive, and

[9] Moreover, after *Carey* punitive damages may be the only significant remedy available in some § 1983 actions where constitutional rights are maliciously violated but the victim cannot prove compensable injury.

[10] Petitioners argue that the availability of punitive damages or a jury trial under *Bivens* is irrelevant because neither is a *necessary* element of a remedial scheme. But that argument completely misses the mark. The issue is not whether a *Bivens* cause of action or any one of its particular features is essential. Rather the inquiry is whether Congress has created what it views as an *equally* effective remedial scheme. Otherwise the two can exist side by side. Moreover, no one difference need independently render FTCA inadequate. It can fail to be equally effective on the cumulative basis of more than one difference.

they cannot explain why the plaintiff should not retain the choice.

Fourth, an action under FTCA exists only if the State in which the alleged misconduct occurred would permit a cause of action for that misconduct to go forward. 28 U. S. C. § 1346 (b) (United States liable "in accordance with the law of the place where the act or omission occurred"). Yet it is obvious that the liability of federal officials for violations of citizens' constitutional rights should be governed by uniform rules. See Part III, *infra*. The question whether respondent's action for violations by federal officials of federal constitutional rights should be left to the vagaries of the laws of the several States admits of only a negative answer in the absence of a contrary congressional resolution.

Plainly FTCA is not a sufficient protector of the citizens' constitutional rights, and without a clear congressional mandate we cannot hold that Congress relegated respondent exclusively to the FTCA remedy.

III

Bivens actions are a creation of federal law and, therefore, the question whether respondent's action survived Jones' death is a question of federal law. See *Burks* v. *Lasker*, 441 U. S. 471, 476 (1979). Petitioners, however, would have us fashion a federal rule of survivorship that incorporates the survivorship laws of the forum State, at least where the state law is not inconsistent with federal law. Respondent argues, on the other hand, that only a uniform federal rule of survivorship is compatible with the goal of deterring federal officials from infringing federal constitutional rights in the manner alleged in respondent's complaint. We agree with respondent. Whatever difficulty we might have resolving the question were the federal involvement less clear, we hold that only a uniform federal rule of survivorship will suffice to redress the constitutional deprivation here alleged and to protect against repetition of such conduct.

In short, we agree with and adopt the reasoning of the Court of Appeals, 581 F. 2d, at 674–675 (footnote omitted):

> "The essentiality of the survival of civil rights claims for complete vindication of constitutional rights is buttressed by the need for uniform treatment of those claims, at least when they are against federal officials. As this very case illustrates, uniformity cannot be achieved if courts are limited to applicable state law. Here the relevant Indiana statute would not permit survival of the claim, while in *Beard* [v. *Robinson*, 563 F. 2d 331 (CA7 1977),] the Illinois statute permitted survival of the *Bivens* action. The liability of federal agents for violation of constitutional rights should not depend upon where the violation occurred. . . . In sum, we hold that whenever the relevant state survival statute would abate a *Bivens*-type action brought against defendants whose conduct results in death, the federal common law allows survival of the action."

Robertson v. *Wegmann*, 436 U. S. 584 (1978), holding that a § 1983 action would abate in accordance with Louisiana survivorship law is not to the contrary. There the plaintiff's death was not caused by the acts of the defendants upon which the suit was based.[11] Moreover, *Robertson* expressly

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[11] *Robertson* fashioned its holding by reference to 42 U. S. C. § 1988 which requires that § 1983 actions be governed by

"the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of [the] civil . . . cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States."

Section 1988 does not in terms apply to *Bivens* actions, and there are cogent reasons not to apply it to such actions even by analogy. *Bivens* defendants are federal officials brought into federal court for violating the Federal Constitution. No state interests are implicated by applying purely federal law to them. While it makes some sense to allow aspects of § 1983 litigation to vary according to the laws of the States under whose authority § 1983 defendants work, federal officials have no similar

recognized that to prevent frustrations of the deterrence goals of § 1983 (which in part also underlie *Bivens* actions, see Part II, *supra*) "[a] state official contemplating illegal activity must always be prepared to face the prospect of a § 1983 action being filed against him." 436 U. S., at 592. A federal official contemplating unconstitutional conduct similarly must be prepared to face the prospect of a *Bivens* action. A uniform rule that claims such as respondent's survive the decedent's death is essential if we are not to "frustrate in [an] important way the achievement" of the goals of *Bivens* actions. *Auto Workers* v. *Hoosier Cardinal Corp.*, 383 U. S. 696, 702 (1966).[12]

Affirmed.

MR. JUSTICE POWELL, with whom MR. JUSTICE STEWART joins, concurring in the judgment.

Although I join the judgment, I do not agree with much of the language in the Court's opinion. The Court states the principles governing *Bivens* actions as follows:

"*Bivens* established that the victims of a constitutional

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claim to be bound only by the law of the State in which they happen to work. *Bivens*, 403 U. S., at 409 (Harlan, J., concurring in judgment). Moreover, these petitioners have the power to transfer prisoners to facilities in any one of several States which may have different rules governing survivorship or other aspects of the case, thereby controlling to some extent the law that would apply to their own wrongdoing. See *Robertson*, 436 U. S., at 592–593, and n. 10. Another aspect of the power to transfer prisoners freely within the federal prison system is that there is no reason to expect that any given prisoner will have any ties to the State in which he is incarcerated, and, therefore, the State will have little interest in having its law applied to that prisoner. Nevertheless, as to other survivorship questions that may arise in *Bivens* actions, it may be that the federal law should choose to incorporate state rules as a matter of convenience. We leave such questions for another day.

[12] Otherwise, an official could know at the time he decided to act whether his intended victim's claim would survive. Cf. *Auto Workers* v. *Hoosier Cardinal Corp.*, 383 U. S. 696 (1966) (whether statute of limitation will matter cannot be known at time of conduct).

> violation . . . have a right to recover damages. . . . Such a cause of action may be defeated . . . in two situations. The first is when defendants demonstrate 'special factors counselling hesitation in the absence of affirmative action by Congress.' . . . The second is when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective. . . ." *Ante,* at 18–19 (emphasis in original).

The foregoing statement contains dicta that go well beyond the prior holdings of this Court.

I

We are concerned here with inferring a right of action for damages directly from the Constitution. In *Davis* v. *Passman,* 442 U. S. 228, 242 (1979), the Court said that persons who have "no [other] effective means" of redress "must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights." The *Davis* rule now sets the boundaries of the "principled discretion" that must be brought to bear when a court is asked to infer a private cause of action not specified by the enacting authority. *Id.,* at 252 (POWELL, J., dissenting). But the Court's opinion, read literally, would restrict that discretion dramatically. Today we are told that a court must entertain a *Bivens* suit unless the action is "defeated" in one of two specified ways.

Bivens recognized that implied remedies may be unnecessary when Congress has provided "equally effective" alternative remedies. *Bivens* v. *Six Unknown Fed. Narcotics Agents,* 403 U. S. 388, 397 (1971); see *Davis* v. *Passman, supra,* at 248. The Court now volunteers the view that a defendant cannot defeat a *Bivens* action simply by showing that there are adequate alternative avenues of relief. The defendant also must show that Congress "explicitly declared [its rem-

edy] to be a *substitute* for recovery directly under the Constitution and viewed [it] as equally effective." *Ante*, at 18–19 (emphasis in original). These are unnecessarily rigid conditions. The Court cites no authority and advances no policy reason—indeed no reason at all—for imposing this threshold burden upon the defendant in an implied remedy case.

The Court does implicitly acknowledge that Congress possesses the power to enact adequate alternative remedies that would be exclusive. Yet, today's opinion apparently will permit *Bivens* plaintiffs to ignore entirely adequate remedies if Congress has not clothed them in the prescribed linguistic garb. No purpose is served by affording plaintiffs a choice of remedies in these circumstances. Nor is there any precedent for requiring federal courts to blind themselves to congressional intent expressed in language other than that which we prescribe.

A defendant also may defeat the *Bivens* remedy under today's decision if "special factors" counsel "hesitation." But the Court provides no further guidance on this point. The opinion states simply that no such factors are present in this case. The Court says that petitioners enjoy no "independent status in our constitutional scheme" that would make judicially created remedies inappropriate. *Ante*, at 19. But the implication that official status may be a "special factor" is withdrawn in the sentence that follows, which concludes that qualified immunity affords all the protection necessary to ensure the effective performance of official duties. No other factors relevant to the purported exception are mentioned.

One is left to wonder whether judicial discretion in this area will hereafter be confined to the question of alternative remedies, which is in turn reduced to the single determination that congressional action does or does not comport with the specifications prescribed by this Court. Such a drastic curtailment of discretion would be inconsistent with the Court's longstanding recognition that Congress is ultimately the appropriate body to create federal remedies. See *ante*, at 19–20;

Bivens v. *Six Unknown Fed. Narcotics Agents, supra,* at 397. A plaintiff who seeks his remedy directly under the Constitution asks the federal courts to perform an essentially legislative task. In this situation, as Mr. Justice Harlan once said, a court should "take into account [a range of policy considerations] at least as broad as the range of those a legislature would consider with respect to an express statutory authorization of a traditional remedy." *Bivens, supra,* at 407. The Court does not explain why this discretion should be limited in the manner announced today.

The Court's absolute language is all the more puzzling because it comes in a case where the implied remedy is plainly appropriate under any measure of discretion. The Federal Tort Claims Act, on which petitioners rely, simply is not an adequate remedy.[1] And there are reasonably clear indications that Congress did not intend that statute to displace *Bivens* claims. See *ante,* at 19–20. No substantial contrary policy has been identified, and I am aware of none. I therefore agree that a private damages remedy properly is inferred from the Constitution in this case. But I do not agree that *Bivens* plaintiffs have a "right" to such a remedy whenever the defendant fails to show that Congress has "provided an [equally effective] alternative remedy which it explicitly

[1] The Federal Tort Claims Act is not a federal remedial scheme at all, but a waiver of sovereign immunity that permits an injured claimant to recover damages against the United States where a private person "would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U. S. C. § 1346 (b); see also 28 U. S. C. § 2674. Here, as in *Bivens* itself, a plaintiff denied his constitutional remedy would be remitted to the vagaries of state law. See 403 U. S., at 394–395. The FTCA gives the plaintiff even less than he would receive under state law in many cases, because the statute is hedged with protections for the United States. As the Court points out, the FTCA allows neither jury trial nor punitive damages. *Ante,* at 21–22. And recovery may be barred altogether if the claim arises from a "discretionary function" or "the execution of a statute or regulation, whether or not such statute or regulation be valid." 28 U. S. C. § 2680 (a).

declared to be a *substitute*. . . ." In my view, the Court's willingness to infer federal causes of action that cannot be found in the Constitution or in a statute denigrates the doctrine of separation of powers and hardly comports with a rational system of justice. Cf. *Cannon* v. *University of Chicago*, 441 U. S. 677, 730–749 (1979) (POWELL, J., dissenting).[2]

II

In Part III of its opinion, the Court holds that " 'whenever the relevant state survival statute would abate a *Bivens*-type action brought against defendants whose conduct results in death, the federal common law allows survival of the action.' " *Ante*, at 24, quoting 581 F. 2d 669, 675 (CA7 1978). I agree that the relevant policies require the application of federal common law to allow survival in this case.

It is not "obvious" to me, however, that "the liability of federal officials for violations of citizens' constitutional rights should be governed by uniform rules" in every case. *Ante*, at 23; see *ante*, at 23–24. On the contrary, federal courts routinely refer to state law to fill the procedural gaps in national remedial schemes. The policy against invoking the federal common law except where necessary to the vitality of a federal claim is codified in 42 U. S. C. § 1988, which directs that state law ordinarily will govern those aspects of § 1983 actions not covered by the "laws of the United States."

The Court's opinion in this case does stop short of mandating uniform rules to govern all aspects of *Bivens* actions. *Ante*, at 24–25, n. 11. But the Court also says that the preference for state law embodied in § 1988 is irrelevant to the selection of rules that will govern actions against federal officers under *Bivens*. *Ibid.* I see no basis for this view. In

[2] I do not suggest that courts enjoy the same degree of freedom to infer causes of action from statutes as from the Constitution. See *Davis* v. *Passman*, 442 U. S. 228, 241–242 (1979). I do believe, however, that the Court today has overstepped the bounds of rational judicial decision-making in both contexts.

Butz v. *Economou*, 438 U. S. 478, 498–504, and n. 25 (1978), the Court thought it unseemly that different rules should govern the liability of federal and state officers for similar constitutional wrongs. I would not disturb that understanding today.

MR. CHIEF JUSTICE BURGER, dissenting.

Although I would be prepared to join an opinion giving effect to *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971)—which I thought wrongly decided—I cannot join today's unwarranted expansion of that decision. The Federal Tort Claims Act provides an adequate remedy for prisoners' claims of medical mistreatment. For me, that is the end of the matter.

Under the test enunciated by the Court the adequacy of the Tort Claims Act remedy is an irrelevancy. The sole inquiry called for by the Court's new test is whether "Congress has provided an alternative remedy which *it explicitly declared* to be a *substitute* for recovery directly under the Constitution." *Ante*, at 18–19 (first emphasis added).[1] That test would seem to permit a person whose constitutional rights have been violated by a state officer to bring suit under *Bivens* even though Congress in 42 U. S. C. § 1983 has already fashioned an equally effective remedy. Compare *Turpin* v. *Mailet*, 591 F. 2d 426 (CA2 1979) (en banc). After all, there is no "explicit congressional declaration," *ante*, at 19, that § 1983 was meant to pre-empt a *Bivens* remedy. Taken to its logical conclusion, the Court's test, coupled with its holding on survivorship, *ante*, at 23, and n. 11, suggests that the plaintiff in *Robertson* v. *Wegmann*, 436 U. S. 584 (1978), might have

[1] The Court pays lipservice to the notion that there must be no "special factors counselling hesitation in the absence of affirmative action by Congress." *Ante*, at 19. Its one-sentence discussion of the point, however, plainly shows that it is unlikely to hesitate unless Congress says that it must. See opinion of MR. JUSTICE POWELL, *ante*, at 27.

escaped the impact of that decision by filing a separate *Bivens*-type claim. And the Court's test throws into doubt the decision in *Brown* v. *GSA*, 425 U. S. 820 (1976), where we held that § 717 of the Civil Rights Act of 1964 provides the exclusive remedy for claims of discrimination in federal employment. In enacting § 717 Congress did not say the magic words which the Court now seems to require.[2]

Until today, I had thought that *Bivens* was limited to those circumstances in which a civil rights plaintiff had no other effective remedy. See 403 U. S., at 410 (Harlan, J., concurring in judgment); *Davis* v. *Passman*, 442 U. S. 228, 245, and n. 23 (1979). Now it would seem that implication of a *Bivens*-type remedy is permissible even though a victim of unlawful official action may be fully recompensed under an existing statutory scheme. I have difficulty believing that the Court has thought through and intends the natural consequences of this novel test; I cannot escape the conclusion that in future cases the Court will be obliged to retreat from the language of today's decision.[3]

MR. JUSTICE REHNQUIST, dissenting.

The Court today adopts a formalistic procedural approach for inferring private damages remedies from constitutional

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[2] In his concurrence in *Bivens*, Mr. Justice Harlan emphasized that judicial implication of a constitutional damages remedy was required because the Bill of Rights is aimed at "restraining the Government as an instrument of the popular will." 403 U. S., at 404. See generally J. Ely, Democracy and Distrust 73–104 (1980). Under the Harlan view, it would seem irrelevant whether Congress "meant to pre-empt a *Bivens* remedy." *Ante*, at 19. Rather the sole inquiry in every case—no matter what magic words Congress had said or failed to say—would be whether the alternative remedy gave satisfactory protection to constitutional interests. I note this point only to show how far the Court today strays from the principles underlying *Bivens*.

[3] In response to this dissent, the Court's opinion tells us that it is merely "giv[ing] effect" to what Congress intended. See *ante*, at 19, n. 5. Pre-

provisions that in my view still further highlights the wrong turn this Court took in *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971). Although ordinarily this Court should exercise judicial restraint in attempting to attain a wise accommodation between liberty and order under the Constitution, to dispose of this case as if *Bivens* were rightly decided would in the words of Mr. Justice Frankfurter be to start with an "unreality." *Kovacs* v. *Cooper*, 336 U. S. 77, 89 (1949) (concurring opinion). *Bivens* is a decision "by a closely divided court, unsupported by the confirmation of time," and, as a result of its weak precedential and doctrinal foundation, it cannot be viewed as a check on "the living process of striking a wise balance between liberty and order as new cases come here for adjudication." Cf. 336 U. S., at 89; *B. & W. Taxicab Co.* v. *B. & Y. Taxicab Co.*, 276 U. S. 518, 532–533 (1928) (Holmes, J., dissenting); *Hudgens* v. *NLRB*, 424 U. S. 507 (1976), overruling *Food Employees* v. *Logan Valley Plaza*, 391 U. S. 308 (1968).[1]

The Court concludes that Congress intended a *Bivens* action under the Eighth Amendment to exist concurrently with actions under the Federal Tort Claims Act (FTCA) because Congress did not indicate that it meant the FTCA "to preempt a *Bivens* remedy or to create an equally effective

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sumably, this is a reference to the legislative history of the 1974 amendment to the FTCA, in which Congress, according to the Court, "made it crystal clear that . . . FTCA and *Bivens* [were] parallel, complementary causes of action." *Ante*, at 20. But as MR. JUSTICE REHNQUIST observes, the legislative history is far from clear. See *post*, at 33, n. 2. In any event, if the Court is correct in its reading of that history, then it is not really implying a cause of action under the Constitution; rather, it is simply construing a statute. If so, almost all of the Court's opinion is dicta.

[1] As observed by Mr. Justice Brandeis: "This Court, while recognizing the soundness of the rule of *stare decisis* where appropriate, has not hesitated to overrule earlier decisions shown, upon fuller consideration, to be erroneous." *Ashwander* v. *TVA*, 297 U. S. 288, 352–353 (1936) (concurring opinion).

remedy for constitutional violations," *ante*, at 19, nor are there any " 'special factors counselling [judicial] hesitation.' " *Ante*, at 18.[2] The Court's opinion otherwise lacks even an arguably principled basis for deciding in what circumstances an inferred constitutional damages remedy is appropriate and for defining the contours of such a remedy. And its "practical" conclusion is all the more anomalous in that Congress in 1974 amended the FTCA to permit private damages recoveries for intentional torts committed by federal law enforcement officers, thereby enabling persons injured by such officers' violations of their federal constitutional rights in many cases to obtain redress for their injuries.[3]

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[2] As suggested by MR. JUSTICE POWELL, this analysis is properly viewed as dicta in light of other statements in the Court's opinion. *Ante*, at 26, 28 (concurring opinion). The Court's opinion entirely disposes of this case by stating that "when Congress amended FTCA in 1974 to create a cause of action against the United States for intentional torts committed by federal law enforcement officers, 28 U. S. C. § 2680 (h), the congressional comments accompanying that amendment *made it crystal clear* that Congress views FTCA and *Bivens* as parallel, complementary causes of action. . . ." *Ante*, at 19–20 (emphasis added). In light of these comments the Court concludes: "In the absence of a contrary expression from Congress, § 2680 (h) thus contemplates that victims of the kind of intentional wrongdoing alleged in this complaint shall have an action under FTCA against the United States as well as a *Bivens* action against the individual officials alleged to have infringed their constitutional rights." *Ante*, at 20.

Although the Court finds these comments conclusive, in my view they do not purport to suggest that it is proper for courts to infer constitutional damages remedies in areas addressed by the FTCA. Rather, I think it more likely that they reflect Congress' understanding (albeit erroneous) that *Bivens* was a constitutionally required decision. If I am correct, the comments comprise merely an effort on the part of the Senate Committee to avoid what it perceived as a constitutional issue. In any event, the Report seems to be an uncertain basis for concluding that Congress supports the inference of a constitutional damages remedy here or in any other context.

[3] Under the FTCA, if a federal agent's official conduct would render a private person liable in accordance with "the law of the place where the

In my view, it is "an exercise of power that the Constitution does not give us" for this Court to infer a private civil damages remedy from the Eighth Amendment or any other constitutional provision. *Bivens*, 403 U. S., at 428 (Black, J., dissenting). The creation of such remedies is a task that is more appropriately viewed as falling within the legislative sphere of authority. *Ibid.*

I

Prior to *Bivens*, this Court in *Bell* v. *Hood*, 327 U. S. 678 (1946), held that an individual who brought suit against federal agents for an alleged violation of his constitutional rights had in a strictly procedural sense stated a claim that "arises" under the Constitution and must be entertained by federal courts. *Id.*, at 681–682. The Court did not, however, hold that the Constitution confers a substantive right to damages in this context. Rather, it merely decided that the proper disposition of the suit was a ruling on the merits, not dismissal for want of jurisdiction.[4]

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act or omission complained of occurred," 28 U. S. C. § 2674, recovery may be had against the United States except as provided in 28 U. S. C. § 2680. See also §§ 2672, 2675. And after *Bivens*, Congress amended the FTCA to allow direct recovery against the Government for certain intentional torts committed by federal officials. § 2680 (h). As the Court notes, however, punitive damages may not be assessed against the United States, § 2674, nor may prejudgment interest be so assessed.

[4] Indeed, on remand the District Court concluded that plaintiff had failed to state a federal claim upon which relief could be granted. *Bell* v. *Hood*, 71 F. Supp. 813 (SD Cal. 1947). In dismissing plaintiff's action the court observed that "[p]laintiffs are unable to point to any constitutional provision or federal statute giving one who has suffered an unreasonable search and seizure or false imprisonment by federal officers any Federal right or cause of action to recover damages from those officers as individuals." *Id.*, at 817. The District Court's opinion provided the foundation for many subsequent decisions reaching the same result. See, *e. g.*, *United States* v. *Faneca*, 332 F. 2d 872, 875 (CA5 1964), cert. denied, 380 U. S. 971 (1965); *Johnston* v. *Earle*, 245 F. 2d 793, 796 (CA9 1957); *Koch* v. *Zuieback*, 194 F. Supp. 651, 656 (SD Cal. 1961), aff'd, 316 F. 2d

Despite the lack of a textual constitutional foundation or any precedential or other historical support, *Bivens* inferred a constitutional damages remedy from the Fourth Amendment, authorizing a party whose constitutional rights had been infringed by a federal officer to recover damages from that officer. *Davis* v. *Passman*, 442 U. S. 228 (1979), subsequently held that such a remedy could also be inferred from the Due Process Clause of the Fifth Amendment. And the Court today further adds to the growing list of Amendments from which a civil damages remedy may be inferred. In so doing, the Court appears to be fashioning for itself a legislative role resembling that once thought to be the domain of Congress, when the latter created a damages remedy for individuals whose constitutional rights had been violated by state officials, 42 U. S. C. § 1983, and separately conferred jurisdiction on federal courts to hear such actions, 28 U. S. C. § 1343. See *Chapman* v. *Houston Welfare Rights Organization*, 441 U. S. 600 (1979).

A

In adding to the number of Amendments from which causes of actions may be inferred, the Court does not provide any guidance for deciding when a constitutional provision permits an inference that an individual may recover damages and when it does not. For example, the Eighth Amendment, from which the Court infers a cause of action today, also provides that "[e]xcessive bail shall not be required, nor excessive fines imposed. . . ." If a cause of action be inferred for violations of these and other constitutional rights—such as the Seventh Amendment right to a jury trial, the Sixth Amendment right to a speedy trial, and the Fifth Amendment privilege against compulsory self-incrimination—I think there is an ever-increasing likelihood that the attention of

1 (CA9 1963); *Garfield* v. *Palmieri*, 193 F. Supp. 582, 586 (EDNY 1960), aff'd *per curiam*, 290 F. 2d 821 (CA2), cert. denied, 368 U. S. 827 (1961).

federal courts will be diverted from needs that in this policy-making context might well be considered to be more pressing. As observed by Mr. Justice Black at the time this Court "inferred" a cause of action under only the Fourth Amendment:

> "My fellow Justices on this Court and our brethren throughout the federal judiciary know only too well the time-consuming task of conscientiously poring over hundreds of thousands of pages of factual allegations of misconduct by police, judicial, and corrections officials. Of course, there are instances of legitimate grievances, but legislators might well desire to devote judicial resources to other problems of a more serious nature." 403 U. S., at 428 (dissenting opinion).

Because the judgments that must be made here involve many "competing policies, goals, and priorities" that are not well suited for evaluation by the Judicial Branch, in my view "[t]he task of evaluating the pros and cons of creating judicial remedies for particular wrongs is a matter for Congress and the legislatures of the States." *Id.*, at 429.

B

It is clear under Art. III of the Constitution that Congress has broad authority to establish priorities for the allocation of judicial resources in defining the jurisdiction of federal courts. *Ex parte McCardle*, 7 Wall. 506 (1869); *Sheldon* v. *Sill*, 8 How. 441 (1850). Congress thus may prevent the federal courts from deciding cases that it believes would be an unwarranted expenditure of judicial time or would impair the ability of federal courts to dispose of matters that Congress considers to be more important. In reviewing Congress' judgment in this area, "[w]e are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution. . . ." *Ex parte McCardle*,

supra, at 514. As stated by Justice Chase in *Turner* v. *Bank of North America*, 4 Dall. 8, 10, n. (1799):

> "The notion has frequently been entertained, that the federal Courts derive their judicial power immediately from the constitution; but the political truth is, that the disposal of the judicial power, (except in a few specified instances) belongs to congress. If congress has given the power to this Court, we posess [*sic*] it, not otherwise: and if congress has not given the power to us, or to any other Court, it still remains at the legislative disposal. Besides, congress is not bound, and it would, perhaps, be inexpedient, to enlarge the jurisdiction of federal Courts, to every subject, in every form, which the constitution might warrant."

See also *Sheldon* v. *Sill*, *supra*, at 449.

While it is analytically correct to view the question of jurisdiction as distinct from that of the appropriate relief to be granted, see *Davis* v. *Passman*, *supra*, at 239–240, n. 18, congressional authority here may all too easily be undermined when the judiciary, under the guise of exercising its authority to fashion appropriate relief, creates expansive damages remedies that have not been authorized by Congress. Just as there are some tasks that Congress may *not* impose on an Art. III court, *Gordon* v. *United States*, 2 Wall. 561 (1865); *United States* v. *Klein*, 13 Wall. 128 (1872), there are others that an Art. III court may not simply seize for itself without congressional authorization. This concern is initially reflected in the notion that federal courts do not have the authority to act as general courts of common law absent congressional authorization.

In *Wheeldin* v. *Wheeler*, 373 U. S. 647, 651 (1963), the Court observed that "[a]s respects the creation by the federal courts of common-law rights, it is perhaps needless to state that we are not in the free-wheeling days antedating *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 [1938]." *Erie* expressly rejected the

view, previously adopted in *Swift* v. *Tyson*, 16 Pet. 1 (1842), that federal courts may declare rules of general common law in civil fields. And it has long been established that federal courts lack the authority to create a common law of crimes. *United States* v. *Hudson & Goodwin*, 7 Cranch 32 (1812). *Hudson & Goodwin* rested on the notion that:

> "The powers of the general Government are made up of concessions from the several states—whatever is not expressly given to the former, the latter expressly reserve. The judicial power of the United States is a constituent part of those concessions—that power is to be exercised by Courts organized for the purpose, and brought into existence by an effort of the legislative power of the Union. Of all the Courts which the United States may, under their general powers, constitute, one only, the Supreme Court, possesses jurisdiction derived immediately from the constitution, and of which the legislative power cannot deprive it. All other Courts created by the general Government possess no jurisdiction but what is given them by the power that creates them, and can be vested with none but what the power ceded to the general Government will authorize them to confer." *Id.*, at 33.

Thus, the Court in *Hudson* concluded:

> "It is not necessary to inquire whether the general Government, in any and what extent, possesses the power of conferring on its Courts a jurisdiction in cases similar to the present; it is enough that such jurisdiction has not been conferred by any legislative act, if it does not result to those Courts as a consequence of their creation." *Ibid.*

In my view the authority of federal courts to fashion remedies based on the "common law" of damages for constitutional violations likewise falls within the legislative domain, and does not exist where not conferred by Congress.

The determination by federal courts of the scope of such a remedy involves the creation of a body of common law analogous to that repudiated in *Erie* and *Hudson & Goodwin*. This determination raises such questions as the types of damages recoverable, the injuries compensable, the degree of intent required for recovery, and the extent to which official immunity will be available as a defense. And the creation of such a remedy by federal courts has the effect of diverting judicial resources from areas that Congress has explicitly provided for by statute. It thereby may impair the ability of federal courts to comply with judicial priorities established by Congress.

Congress' general grant of jurisdiction to federal courts under 28 U. S. C. § 1331 does not permit those courts to create a remedy for the award of damages whenever an individual's constitutional rights have been violated. While § 1331 grants federal courts jurisdiction to hear cases that arise under the Constitution, it makes no provision whatsoever for the award of such damages, nor, as noted above, is there any precedential or other historical support for such a remedy prior to *Bivens*.[5]

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[5] In his concurrence in *Bivens*, Justice Harlan relied heavily on decisions of this Court that have inferred private damages remedies from federal statutes. See, *e. g.*, 403 U. S., at 402, 402–403, n. 4, 406, 407, 410–411. Thus, he states: "The *Borak* [*J. I. Case Co.* v. *Borak*, 377 U. S. 426 (1964)] case is an especially clear example of the exercise of federal judicial power to accord damages as an appropriate remedy in the absence of any express statutory authorization of a federal cause of action. . . . The exercise of judicial power involved in *Borak* simply cannot be justified in terms of statutory construction, . . . nor did the *Borak* Court purport to do so. See *Borak*, *supra*, at 432–434. The notion of 'implying' a remedy, therefore, as applied to cases like *Borak*, can only refer to a process whereby the federal judiciary exercises a choice among *traditionally available* judicial remedies according to reasons related to the substantive social policy embodied in an act of positive law." *Id.*, at 402–403, n. 4.

In light of this Court's recent decisions in *Touche Ross & Co.* v. *Redington*, 442 U. S. 560 (1979) and *Transamerica Mortgage Advisors* v. *Lewis*, 444 U. S. 11 (1979), it is clear that there is nothing left of the rationale

By contrast, it is obvious that when Congress has wished to authorize federal courts to grant damages relief, it has known how to do so and has done so expressly. For example, in 42 U. S. C. § 1983 Congress explicitly provided for federal courts to award damages against state officials who violate an individual's constitutional rights.[6] With respect to federal officials, however, it has never provided for these types of damages awards.[7] Rather, it chose a different route in 1974 by elimi-

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of *Borak*. As observed in both those cases, it is obvious that "when Congress wished to provide a private damages remedy, it knew how to do so and did so expressly." *Touche Ross, supra*, at 572; *Transamerica, supra*, at 21. Because the statutes at issue in those cases did not expressly provide for such a remedy and there was no clear evidence of such a congressional intention in their legislative history, the Court, unlike in *Borak*, declined to imply a damages remedy from the statutes' broad language. *Touche Ross* and *Transamerica* thereby undermine the principal foundation of Mr. Justice Harlan's concurring opinion in *Bivens*. Thus, in spite of his cursory comment that for a *Bivens* plaintiff "it is damages or nothing," 403 U. S., at 410, I doubt that Mr. Justice Harlan would today reach the same conclusion that he did in *Bivens* in 1971, especially in light of his statement that "[m]y initial view of this case was that the Court of Appeals was correct in dismissing the complaint, but for reasons stated in this opinion I am now persuaded to the contrary." *Id.*, at 398.

[6] Title 42 U. S. C. § 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[7] Indeed, in discussing the scope of authority conferred on federal courts by § 1983, Senator Thurman stated at the time § 1983 was adopted:

"[This section's] whole effect is to give to the Federal Judiciary that which now does not belong to it—a jurisdiction that may be constitutionally conferred upon it, I grant, but that has never yet been conferred upon it. It authorizes any person who is deprived of any right, privilege, or immunity secured to him by the Constitution of the United States, to bring an action against the wrong-doer in the Federal courts, and that without any limit whatsoever as to the amount in controversy." Globe

nating the immunity of federal officials under the FTCA. See n. 2, *supra*.

Congress has also created numerous express causes of actions for damages in other areas. See, *e. g.*, Fair Labor Standards Act, 29 U. S. C. § 216 (b); Civil Rights Act of 1968, 42 U. S. C. § 3612 (c); Federal Employers' Liability Act, 45 U. S. C. §§ 51–60. While the injuries for which such damages have been authorized may seem less important than violations of constitutional rights by federal officials, Congress has nonetheless said that it wants federal courts to hear the former, and has not similarly spoken with respect to the latter.

In my view, absent a clear indication from Congress, federal courts lack the authority to grant damages relief for constitutional violations. Although Congress surely may direct federal courts to grant relief in *Bivens*-type actions, it is enough that it has not done so. As stated by this Court in *Wheeldin* v. *Wheeler*, 373 U. S., at 652, which declined to create an implied cause of action for federal officials' abuse of their statutory authority to issue subpoenas:

> "Over the years Congress has considered the problem of state civil and criminal actions against federal officials many times. . . . But no general statute making federal officers liable for acts committed 'under color,' but in violation, of their federal authority has been passed. . . . That state law governs the cause of action alleged is shown by the fact that removal is possible in a nondiversity case such as this one only because the interpretation of a federal defense makes the case one 'arising under'

App. 216–217 (1871), quoted in *Owen* v. *City of Independence*, 445 U. S. 622, 636–637, n. 17 (1980).

Since Senator Thurman was a staunch opponent of § 1983, the latter part of this statement may be viewed as not unlike the "parade of horribles" frequently marshaled against a pending measure and not the most reliable source of legislative history. But the first part of the statement quite certainly expressed the view entertained by students of federal jurisdiction until very recently.

> the Constitution or laws of the United States. . . . [I]t is not for us to fill any *hiatus* Congress has left in this area."

Because Congress also has never provided for a *Bivens*-type damages award, I think the appropriate course is for federal courts to dismiss such actions for failure to state a claim upon which relief can be granted. Congress did not even grant to federal courts a general jurisdiction to entertain cases arising under the Constitution until 1875. Act of Mar. 3, 1875, § 1, 18 Stat. 470. It thus would seem that the most reasonable explanation for Congress' failure explicitly to provide for damages in *Bivens* actions is that Congress intended to leave this responsibility to state courts in the application of their common law, or to put it conversely to preclude federal courts from granting such relief.

The authority of federal courts "to adjust their remedies so as to grant the necessary relief," *Bell* v. *Hood*, 327 U. S., at 684, *Bivens*, 403 U. S., at 392, *Davis* v. *Passman*, 442 U. S., at 245, does not suggest a contrary conclusion. While federal courts have historically had broad authority to fashion equitable remedies,[8] it does not follow that absent congressional authorization they may also grant damages awards for constitutional violations that would traditionally be regarded as remedies at law. The broad power of federal courts to grant equitable relief for constitutional violations has long been established. As this Court observed in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 15 (1971):

> "Once a right and a violation have been shown, the scope

[8] Indeed, the principal cases relied on in *Bell*, *Bivens*, and *Davis* for the principle that federal courts have broad authority to fashion appropriate relief are equitable. *Marbury* v. *Madison*, 1 Cranch 137 (1803), for example, which is referred to in those decisions and relied on in *Bell* for the principle that "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief," 327 U. S., at 684, involved equitable relief by way of mandamus or injunction.

of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.

" 'The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.' *Hecht Co.* v. *Bowles*, 321 U. S. 321, 329–330 (1944), cited in *Brown* [v. *Board of Education*, 349 U. S. 294, 300 (1955)]."

Thus, for example, in *Ex parte Young*, 209 U. S. 123 (1908), it was held that a federal court may enjoin a state officer from enforcing penalties and remedies provided by an unconstitutional statute. See also, *e. g.*, *Osborn* v. *United States Bank*, 9 Wheat. 738, 838–846, 859 (1824).

No similar authority of federal courts to award damages for violations of constitutional rights had ever been recognized prior to *Bivens*.[9] And no statutory grant by Congress supports the exercise of such authority by federal courts. The Rules of Decision Act, for example, provides that "[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U. S. C. § 1652. And the All Writs Act authorizes this Court and lower federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U. S. C. § 1651. Neither these statutes, nor 28 U. S. C. § 1331, authorizes fed-

[9] The Just Compensation Clause of the Fifth Amendment is not an exception here because the express language of that clause requires that "compensation" be paid for any governmental taking.

eral courts to create a body of common-law damages remedies for constitutional violations or any other legal wrong. And as previously discussed, federal courts do not have the authority to act as general courts of common law absent authorization by Congress.

In light of the absence of any congressional authorization or historical support, I do not think the equitable authority of federal courts to grant "the necessary relief" provides a foundation for inferring a body of common-law damages remedies from various constitutional provisions. I believe my conclusion here is further supported by an examination of the difficulties that arise in attempting to delimit the contours of the damages remedy that the Court has held should be available when an individual's constitutional rights are violated.

II

The Court concludes, as noted above, that respondent may recover damages as a result of an inferred remedy under the Eighth Amendment because "nothing in the Federal Tort Claims Act (FTCA) or its legislative history . . . show[s] that Congress meant to pre-empt a *Bivens* remedy or to create an equally effective remedy for constitutional violations," *ante*, at 19, nor are there any " 'special factors counselling [judicial] hesitation.' " *Ante*, at 18. After observing that Congress did not explicitly state in the FTCA or its legislative history that the FTCA was intended to provide such a remedy, the Court points to "[f]our additional factors" that suggest a "*Bivens* remedy is more effective than the FTCA remedy" in attempting to ascertain congressional intention here. *Ante*, at 20. The first is that the *Bivens* remedy is recoverable against individuals whereas the FTCA remedy is against the United States, and thus the *Bivens* remedy more effectively serves the deterrent purpose articulated in *Bivens*.

The Court not only fails to explain why the *Bivens* remedy is effective in the promotion of deterrence, but also does not provide any reason for believing that other sanctions on fed-

eral employees—such as a threat of deductions in pay, reprimand, suspension, or firing—will be ineffective in promoting the desired level of deterrence, or that Congress did not consider the marginal increase in deterrence here to be outweighed by other considerations. See, *e. g.*, Bell, Proposed Amendments to the Federal Tort Claims Act, 16 Harv. J. on Leg. 1, 13 (1979). And while it may be generally true that the extent to which a sanction is imposed directly on a wrongdoer will have an impact on the effectiveness of a deterrent remedy,[10] there are also a number of other factors that must be taken into account—such as the amount of damages necessary to offset the benefits of the objectionable conduct, the risk that the wrongdoer might escape liability, the clarity with which the objectionable conduct is defined, and the perceptions of the individual who is a potential wrongdoer. In a *Bivens* action, however, there is no relationship whatsoever between the damages awarded and the benefits from infringing the individual's rights because the damages award focuses

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[10] It must also be remembered that along with the greater deterrent effect resulting from liability imposed directly on the governmental wrongdoer, there is also strong potential for distortion of governmental decisionmaking as a result of the threat of liability. Thus, MR. JUSTICE BRENNAN in his opinion for the Court in *Owen* v. *City of Independence*, 445 U. S., at 655–656, states:

"At the heart of [the] justification for a qualified immunity for the individual official is the concern that the threat of *personal* monetary liability will introduce an unwarranted and unconscionable consideration into the decisionmaking process, thus paralyzing the governing official's decisiveness and distorting his judgment on matters of public policy. The inhibiting effect is significantly reduced, if not eliminated, however, when the threat of personal liability is removed."

The fact that Congress in the FTCA has provided for a remedy against the United States, rather than against federal officials, thus does not suggest that Congress views a *Bivens* remedy as desirable because of its deterrent effect. Rather, it is at least equally, if not more, plausible that Congress viewed the approach in the FTCA to be preferable because of the potential impact on governmental decisionmaking that might result from the threat of personal liability.

solely on the loss to the plaintiff. The damages in such an action do not take into account the risk that the wrongdoer will escape liability altogether. In addition, it is often not clear what conduct violates the Constitution, see, *e. g.*, *Owen* v. *City of Independence*, 445 U. S. 622 (1980); [11] *California* v. *Minjares*, 443 U. S. 916, 917–919 (1979) (REHNQUIST, J., dissenting from denial of stay). In many cases the uncertainty as to what constitutes a constitutional violation will impair the deterrent impact of a *Bivens* remedy.[12] Finally, the perceptions of the potential wrongdoer as to the above considerations may also detract from the deterrent effect of a *Bivens* action. The Court makes no attempt to assess these factors or to examine them in relation to an FTCA action. In my view, its assertion that the *Bivens* remedy is a more effective deterrent than the FTCA remedy, and that this is a reason for concluding that Congress intended *Bivens* actions to exist concurrently with FTCA actions, remains an unsupported assertion.[13]

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[11] For example, in *Owen*, which relies partially on a deterrence rationale, 445 U. S., at 651–652, the conduct causing the alleged injury to plaintiff had not been held to be a constitutional violation at the time it was committed. It is thus readily apparent that the imposition of damages in *Owen* had no deterrent impact whatsoever.

[12] Even where the legal principles are not in flux, the constitutional standard may be sufficiently general that it is difficult to predict in advance whether a particular set of facts amounts to a constitutional violation. For example, as interpreted by this Court, the Due Process Clause of the Fourteenth Amendment may be violated by conduct that offends traditional notions of "fair play and substantial justice," *Shaffer* v. *Heitner*, 433 U. S. 186, 207, 212 (1977), or which "shocks the conscience," *Rochin* v. *California*, 342 U. S. 165, 172 (1952).

[13] Although the Court states that a *Bivens* remedy is recoverable against individuals, it does not state that the damages paid in a *Bivens* action actually come out of the federal employee's pocket. And even if they did, as explained above, it is not clear that the award would promote deterrence, or that any marginal increase in deterrence would outweigh other considerations that counsel against judicial creation of this type of remedy.

In addition, there are important policy considerations at stake here that Congress may decide outweigh the interest in deterrence promoted by personal liability of federal officials. Indeed, the fear of personal liability may "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Gregoire* v. *Biddle*, 177 F. 2d 579, 581 (CA2 1949) (L. Hand). And, as one commentator has observed: "Despite the small odds an employee will actually be held liable in a civil suit, morale within the federal services has suffered as employees have been dragged through drawn-out lawsuits, many of which are frivolous." Bell, 16 Harv. J. on Leg., *supra*, at 6.

The Court next argues that Congress did not intend the FTCA to displace the *Bivens* remedy because it did not provide for punitive damages in the FTCA. As the Court observes, we have not "expressly address[ed] and decid[ed] the question" whether punitive damages may be awarded in a *Bivens* suit. *Ante*, at 21–22. And despite the Court's assertion to the contrary, we have also not done so with respect to § 1983 actions. In *Carey* v. *Piphus*, 435 U. S. 247, 257, n. 11 (1978), this Court explicitly stated that "we imply no approval or disapproval of any of [the] cases" that have awarded punitive damages in § 1983 actions. Because this Court has never reached the question whether punitive damages may be awarded in either a *Bivens* or § 1983 action, I think serious doubts arise as to the Court's claim that an FTCA action is not as effective as a *Bivens* action because the FTCA does not permit punitive damages awards. Indeed, this Court in *Carey* also stated that "[t]o the extent that Congress intended that [damages] awards under § 1983 should deter the deprivation of constitutional rights, there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of compensatory damages." 435 U. S., at 256–257.

Even if punitive damages were appropriate in a *Bivens* action, such damages are typically determined by reference

to factors such as the character of the wrong, the amount necessary to "punish" the defendant, etc., and the jury has a great deal of discretion in deciding both whether such damages should be awarded and the amount of the punitive award. See, *e. g.*, C. McCormick, Law of Damages § 85 (1935). The determination whether this or some other remedy—such as a fixed fine, a threat of being reprimanded, suspended, or fired, or simply compensatory damages—provides the desired level of deterrence is one for Congress. This Court should defer to Congress even when Congress has not explicitly stated that its remedy is a substitute for a *Bivens* action.

The third factor relied on by the Court to support its conclusion that Congress did not intend the FTCA to serve as a substitute for a *Bivens* action is that a plaintiff cannot opt for a jury in a FTCA action while he can in a *Bivens* suit. The Court, however, offers no reason why a judge is preferable to a jury, or vice versa, in this context. Rather, the Court merely notes that petitioners cannot explain why plaintiffs should not retain the choice between a judge and jury. *Ante*, at 23, and n. 9. I do not think the fact that Congress failed to specify that the FTCA was a substitute for a *Bivens* action supports the conclusion that Congress viewed the plaintiff's ability to choose between a judge and a jury as a reason for retaining a *Bivens* action in addition to an action under the FTCA.

Finally, I do not think it is obvious, as the Court states, that liability of federal officials for violations of constitutional rights should be governed by uniform rules absent an explicit statement by Congress indicating a contrary intention. The importance of federalism in our constitutional system has been recognized both by this Court, see, *e. g.*, *Younger* v. *Harris*, 401 U. S. 37 (1971), and by Congress, see, *e. g.*, 42 U. S. C. § 1988, and in accommodating the values of federalism with other constitutional principles and congressional statutes, this Court has often deferred to state rules. See, *e. g.*, *Rob-*

ertson v. *Wegmann*, 436 U. S. 584 (1978); *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454 (1975). As observed by MR. JUSTICE POWELL, "federal courts routinely refer to state law to fill the procedural gaps in national remedial schemes." *Ante*, at 29 (concurring opinion).[14] Indeed, the Rules of Decision Act would seem ordinarily to require it. 28 U. S. C. § 1652.

Once we get past the level of a high-school civics text, it is simply not self-evident to merely assert that here we have a federal cause of action for violations of federal rights by federal officials, and thus the question whether reference to state procedure is appropriate "admits of only a negative answer in the absence of a contrary congressional resolution." *Ante*, at 23. The Court articulates no solid basis for concluding that there is any interest in uniformity that should generally be viewed as significant. Although the Court identifies "deterrence" as an objective of a *Bivens* action, a § 1983 action, which is also a creation of federal law, has been recognized by this Court as having a similar objective in the promotion of deterrence. See, *e. g.*, *Carey* v. *Piphus*, 435 U. S., at 257; *Robertson* v. *Wegmann*, 436 U. S., at 592; *Imbler* v. *Pachtman*, 424 U. S., at 442 (WHITE, J., concurring in judgment).[15]

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[14] Like a *Bivens* action, a § 1983 action is a creation of federal law and an exclusively federal right. Congress in § 1988 nonetheless "quite clearly instructs [federal courts] to refer to state statutes" when federal law provides no rule of decision for actions brought under § 1983. *Robertson* v. *Wegmann*, 436 U. S., at 593. See also n. 10, *supra*. Although a § 1983 action is against state officers and a *Bivens* action is against federal officers, it does not follow that there is an obvious interest in application of uniform rules. Indeed, the controlling authority is to the contrary. See, *e. g.*, *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S., at 462, and cases cited therein; *infra*, at 50.

[15] *Robertson* reveals that, however one views the appropriateness of the Court's refusal to apply Indiana survivorship law in this case, the objective of deterrence does not mean that application of state law is inappropriate for filling procedural gaps in *Bivens* actions on the ground that the state rule will result in an unfavorable outcome for the plaintiff.

And with respect to such actions state procedural rules are generally controlling, see, *e. g.*, *Robertson* v. *Wegmann*, *supra*. As observed in *Robertson*, 436 U. S., at 593:

> "It is true that § 1983 provides 'a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation.' *Mitchum* v. *Foster*, [407 U. S. 225,] 239. That a federal remedy should be available, however, does not mean that a § 1983 plaintiff (or his representatives) must be allowed to continue an action in disregard of the state law to which § 1988 refers us. A state statute cannot be considered 'inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation. If success of the § 1983 action were the only benchmark, there would be no reason at all to look to state law, for the appropriate rule would then always be the one favoring the plaintiff, and its source would be essentially irrelevant." [16]

I think the congressional determination to defer to state procedural rules in the § 1983 context indicates the weak foundation upon which the Court's analysis here rests.[17]

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[16] The Court states as one justification for its refusal to apply Indiana survivorship law that here the suit is against federal officials whereas § 1983 actions, which are subject to the requirements of § 1988, are against state officers. *Ante*, at 24–25, n. 11. Section 1988, however, applies not only to claims against state officers under § 1983, but also to suits under §§ 1981, 1982, and 1985, which do not require state action. And the Rules of Decision Act applies by its terms to federal causes of action, whether or not against federal officials. Thus, the asserted interest in uniform rules of procedure in federal actions against federal officials, absent more, is unpersuasive and not justified in light of established practice.

[17] Any alleged inconsistency with the policies of federal law here is highly speculative at best. In order to find even a marginal influence on behavior as a result of Indiana's survivorship provisions, one would have to assume not only that federal officials have both the desire and ability to select as victims only those persons who would not be survived by any

In my view, the fact that Congress has created a tort remedy against federal officials at all, as it has done here under the FTCA, is dispositive. The policy questions at issue in the creation of any tort remedies, constitutional or otherwise, involve judgments as to diverse factors that are more appropriately made by the legislature than by this Court in an attempt to fashion a constitutional common law. This Court stated in *TVA* v. *Hill*, 437 U. S. 153, 194 (1978):

> "Our system of government is, after all, a tripartite one, with each branch having certain defined functions delegated to it by the Constitution. While '[i]t is emphatically the province and duty of the judicial department to say what the law is,' *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803), it is equally—and emphatically—the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation. Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought."

Here Congress has provided no indication that it believes sound policy favors damages awards against federal officials for violations of constitutional rights.

III

I think the Court acknowledges the legislative nature of the determinations involved here when it states that such a

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close relatives, but also that (1) they are aware that if the victim dies survivorship law will preclude recovery, (2) they would intentionally kill the individual or permit him to die, rather than violate his constitutional rights to a lesser extent, in order to avoid liability under *Bivens*, and (3) a *Bivens* remedy will have a deterrent impact in these circumstances beyond that of ordinary criminal sanctions. In addition, one must include in the evaluation a consideration of competing policies that Congress may wish to promote.

remedy may be defeated when "Congress has indicated that it intends the statutory remedy to replace, rather than to complement, the *Bivens* remedy." *Ante*, at 19, n. 5. Here Congress did not do so because in the Court's words: "In the absence of a contrary expression from Congress, § 2680 (h) . . . contemplates that victims of the kind of intentional wrongdoing alleged in this complaint shall have an action under FTCA against the United States as well as a *Bivens* action against the individual officials alleged to have infringed their constitutional rights." *Ante*, at 20. But under the Court's rationale if Congress had made clear that it intended the FTCA to displace judicially inferred remedies under the Constitution, this Court must defer to that legislative judgment.[18] This principle was also recognized in *Bivens*, wherein the Court noted that Congress had given no indication that it viewed any other remedy to be as effective as the damages remedy inferred by the Court from the Fourth Amendment. 403 U. S., at 397. See also *Davis* v. *Passman*, 442 U. S., at 245, 246–247; *Butz* v. *Economou*, 438 U. S. 478, 504 (1978).

I agree with the Court that Congress is free to devise whatever remedy it sees fit to redress violations of constitutional rights sued upon in Art. III courts, and to have that

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[18] Thus, although it does not appear that Congress explicitly stated that § 1983 is intended as the exclusive remedy for violations of constitutional rights by state officials, it would clearly be invasion of the legislative province for this Court to fashion a constitutional damages remedy against state officials that would exist concurrently with § 1983. As this Court observed with respect to its creation of a *Bivens* action, "[t]he presence or absence of congressional authorization for suits against federal officials is, of course, relevant to the question whether to infer a right of action for damages for a particular violation of the Constitution." *Butz* v. *Economou*, 438 U. S. 478, 503 (1978). Here Congress' action in adopting 42 U. S. C. § 1983 demonstrates that Congress has exercised its judgment in balancing the relevant policies and in determining the nature and scope of the damages remedy against state officials who violate an individual's federal constitutional rights. In light of traditional notions of separation of powers, its judgment is conclusive.

remedy altogether displace any private civil damages remedies that this Court may devise. I disagree, however, that, unless "special factors" counsel hesitation, Congress must make some affirmative showing that it intends its action to provide such redress before this Court will deem Congress' action to be an adequate substitute for an inferred remedy.[19] The requirement of such congressional action is a formal procedural device that not only serves little useful purpose, but also subverts the policymaking authority vested by the Constitution in the Legislative Branch. Its application in this case, through the Court's attempt to ascertain congressional intention by examining whether the FTCA or a *Bivens* action is "more effective," in my view demonstrates that the creation of constitutional damages remedies involves policy considerations that are more appropriately made by the Legislative rather than the Judicial Branch of our Government.

IV

I think the Court's formalistic procedural approach to this problem is flawed for one additional reason. As noted above, the approach adopted by the Court in *Bivens* and reaffirmed today is one that permits Congress to displace this Court in fashioning a constitutional common law of its choosing merely by indicating that it intends to do so. *Ante*, at 19, n. 5. Otherwise, unless special factors counsel "hesitation," it will be presumed under the Court's analysis that Congress intended any remedy it creates to be enforced simultaneously by federal courts with a *Bivens* action. The Court provides no justification for this canon of divining legislative intention. Presumably when Congress creates and defines the limits of a cause of action, it has taken into account competing considerations and struck what it considers to be an appropriate balance among them. In my view it is wholly at odds with traditional

[19] As MR. JUSTICE POWELL states, the Court did not go this far even in *Bivens*. *Ante*, at 26–27 (concurring opinion).

principles for interpretation of legislative intention and with the constitutional notion of separation of powers to conclude that because Congress failed to indicate that it did not intend the cause of action and its limitations to be defined otherwise, it intended for this Court to exercise free rein in fashioning additional rules for recovery of damages under the guise of an inferred constitutional damages action.

For the foregoing reasons I dissent, and would reverse the judgment.

CITY OF MOBILE, ALABAMA, ET AL. *v.* BOLDEN ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 77-1844. Argued March 19, 1979—Reargued October 29, 1979—Decided April 22, 1980

Mobile, Ala., is governed by a Commission consisting of three members elected at large who jointly exercise all legislative, executive, and administrative power in the city. Appellees brought a class action in Federal District Court against the city and the incumbent Commissioners on behalf of all Negro citizens of the city, alleging, *inter alia*, that the practice of electing the City Commissioners at large unfairly diluted the voting strength of Negroes in violation of the Fourteenth and Fifteenth Amendments. Although finding that Negroes in Mobile "register and vote without hindrance," the District Court nevertheless held that the at-large electoral system violated the Fifteenth Amendment and invidiously discriminated against Negroes in violation of the Equal Protection Clause of the Fourteenth Amendment, and ordered that the Commission be disestablished and replaced by a Mayor and a Council elected from single-member districts. The Court of Appeals affirmed.

Held: The judgment is reversed, and the case is remanded. Pp. 61–80; 80–83; 83–94.

571 F. 2d 238, reversed and remanded.

MR. JUSTICE STEWART, joined by THE CHIEF JUSTICE, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST, concluded:

1. Mobile's at-large electoral system does not violate the rights of the city's Negro voters in contravention of the Fifteenth Amendment. Racially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment violation. The Amendment does not entail the right to have Negro candidates elected but prohibits only purposefully discriminatory denial or abridgment by government of the freedom to vote "on account of race, color, or previous condition of servitude." Here, having found that Negroes in Mobile register and vote without hindrance, the courts below erred in believing that appellants invaded the protection of the Fifteenth Amendment. Pp. 61–65.

2. Nor does Mobile's at-large electoral system violate the Equal Protection Clause of the Fourteenth Amendment. Pp. 65–80.

(a) Only if there is purposeful discrimination can there be a violation of the Equal Protection Clause. And this principle applies to claims of racial discrimination affecting voting just as it does to other claims of racial discrimination. Pp. 66–68.

(b) Disproportionate effects alone are insufficient to establish a claim of unconstitutional racial vote dilution. Where the character of a law is readily explainable on grounds apart from race, as would nearly always be true where, as here, an entire system of local governance is brought into question, disproportionate impact alone cannot be decisive, and courts must look to other evidence to support a finding of discriminatory purpose. Pp. 68–70.

(c) Even assuming that an at-large municipal electoral system such as Mobile's is constitutionally indistinguishable from the election of a few members of a state legislature in multimember districts, it is clear that the evidence in this case fell far short of showing that appellants "conceived or operated [a] purposeful devic[e] to further racial . . . discrimination," *Whitcomb* v. *Chavis*, 403 U. S. 124, 149. Pp. 70–74.

(d) The Equal Protection Clause does not require proportional representation as an imperative of political organization. While the Clause confers a substantive right to participate in elections on an equal basis with other qualified voters, this right does not protect any "political group," however defined, from electoral defeat. Since Mobile is a unitary electoral district and the Commission elections are conducted at large, there can be no claim that the "one person, one vote" principle has been violated, and therefore nobody's vote has been "diluted" in the sense in which that word was used in *Reynolds* v. *Sims*, 377 U. S. 533. Pp. 75–80.

Mr. Justice Blackmun concluded that the relief afforded appellees by the District Court was not commensurate with the sound exercise of judicial discretion. The court at least should have considered alternative remedial orders to converting Mobile's government to a mayor-council system, and in failing to do so the court appears to have been overly concerned with eliminating at-large elections *per se*, rather than with structuring an electoral system that provided an opportunity for black voters to participate in the city's government on an equal footing with whites. Pp. 80–83.

Mr. Justice Stevens concluded that the proper standard for adjudging the constitutionality of a political structure, such as Mobile's, that treats all individuals as equals but adversely affects the political strength of an identifiable minority group, is the same whether the minority is identified by a racial, ethnic, religious, or economic characteristic; that *Gomillion* v. *Lightfoot*, 364 U. S. 339, suggests that the standard asks

(1) whether the political structure is manifestly not the product of a routine or traditional decision; (2) whether it has a significant adverse impact on a minority group; and (3) whether it is unsupported by any neutral justification and thus was either totally irrational or entirely motivated by a desire to curtail the political strength of the minority; and that the standard focuses on the objective effects of the political decision rather than the subjective motivation of the decisionmaker. Under this standard the choice to retain Mobile's commission form of government must be accepted as constitutionally permissible even though the choice may well be the product of mixed motivation, some of which is invidious. Pp. 83–94.

STEWART, J., announced the Court's judgment and delivered an opinion, in which BURGER, C. J., and POWELL and REHNQUIST, JJ., joined. BLACKMUN, J., filed an opinion concurring in the result, *post*, p. 80. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 83. BRENNAN, J., *post*, p. 94, WHITE, J., *post*, p. 94, and MARSHALL, J., *post*, p. 103, filed dissenting opinions.

Charles S. Rhyne reargued the cause for appellants. With him on the brief on reargument were *C. B. Arendall, Jr.*, *William C. Tidwell III*, *Fred G. Collins*, and *William S. Rhyne*. With him on the briefs on the original argument were Messrs. Arendall, Collins, and Rhyne, *Donald A. Carr*, and *Martin W. Matzen*.

J. U. Blacksher reargued the cause for appellees. With him on the briefs were *Larry Menefee*, *Jack Greenberg*, and *Eric Schnapper*.

Deputy Assistant Attorney General Turner reargued the cause for the United States as *amicus curiae* urging affirmance. On the brief were *Solicitor General McCree*, *Assistant Attorney General Days*, *Deputy Solicitor General Wallace*, *Elinor Hadley Stillman*, *Brian K. Landsberg*, *Jessica Dunsay Silver*, *Dennis J. Dimsey*, and *Miriam R. Eisenstein*.*

**Charles A. Bane*, *Thomas D. Barr*, *Norman Redlich*, *Frank R. Parker*, and *Robert A. Murphy* filed a brief for the Lawyers' Committee for Civil Rights Under Law as *amicus curiae* urging affirmance.

MR. JUSTICE STEWART announced the judgment of the Court and delivered an opinion in which THE CHIEF JUSTICE, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST join.

The city of Mobile, Ala., has since 1911 been governed by a City Commission consisting of three members elected by the voters of the city at large. The question in this case is whether this at-large system of municipal elections violates the rights of Mobile's Negro voters in contravention of federal statutory or constitutional law.

The appellees brought this suit in the Federal District Court for the Southern District of Alabama as a class action on behalf of all Negro citizens of Mobile.[1] Named as defendants were the city and its three incumbent Commissioners, who are the appellants before this Court. The complaint alleged that the practice of electing the City Commissioners at large unfairly diluted the voting strength of Negroes in violation of § 2 of the Voting Rights Act of 1965,[2] of the Fourteenth Amendment, and of the Fifteenth Amendment. Following a bench trial, the District Court found that the constitutional rights of the appellees had been violated, entered a judgment in their favor, and ordered that the City Commission be disestablished and replaced by a municipal government consisting of a Mayor and a City Council with members elected from single-member districts. 423 F. Supp. 384.[3] The Court of Appeals affirmed the judgment in its entirety, 571 F. 2d 238, agreeing that Mobile's at-large elections operated to discriminate against Negroes in violation of the Fourteenth and Fifteenth Amendments, *id.*, at 245, and finding that the remedy formulated by the District Court was

[1] Approximately 35.4% of the residents of Mobile are Negro.

[2] 79 Stat. 437, as amended, 42 U. S. C. § 1973. The complaint also contained claims based on the First and Thirteenth Amendments and on 42 U. S. C. § 1983 and 42 U. S. C. § 1985 (3) (1976 ed., Supp. II). Those claims have not been pressed in this Court.

[3] The District Court has stayed its orders pending disposition of the present appeal.

appropriate. An appeal was taken to this Court, and we noted probable jurisdiction, 439 U. S. 815. The case was originally argued in the 1978 Term, and was reargued in the present Term.

I

In Alabama, the form of municipal government a city may adopt is governed by state law. Until 1911 cities not covered by specific legislation were limited to governing themselves through a mayor and city council.[4] In that year, the Alabama Legislature authorized every large municipality to adopt a commission form of government.[5] Mobile established its City Commission in the same year, and has maintained that basic system of municipal government ever since.

The three Commissioners jointly exercise all legislative, executive, and administrative power in the municipality. They are required after election to designate one of their number as Mayor, a largely ceremonial office, but no formal provision is made for allocating specific executive or administrative duties among the three.[6] As required by the state law enacted in 1911, each candidate for the Mobile City Commission runs for election in the city at large for a term of four years in one of three numbered posts, and may be elected

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[4] Ala. Code § 11–43 (1975).

[5] Act No. 281, 1911 Ala. Acts, p. 330.

[6] In 1965 the Alabama Legislature enacted Act No. 823, 1965 Ala. Acts, p. 1539, § 2 of which designated specific administrative tasks to be performed by each Commissioner and provided that the title of Mayor be rotated among the three. After the present lawsuit was commenced, the city of Mobile belatedly submitted Act No. 823 to the Attorney General of the United States under § 5 of the Voting Rights Act of 1965. 42 U. S. C. § 1973c. The Attorney General objected to the legislation on the ground that the city had not shown that § 2 of the Act would not have the effect of abridging the right of Negroes to vote. No suit has been brought in the District Court for the District of Columbia to seek clearance under § 5 of the Voting Rights Act and, accordingly, § 2 of Act No. 823 is in abeyance.

only by a majority of the total vote. This is the same basic electoral system that is followed by literally thousands of municipalities and other local governmental units throughout the Nation.[7]

II

Although required by general principles of judicial administration to do so, *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U. S. 101, 105; *Ashwander* v. *TVA*, 297 U. S. 288, 347 (Brandeis, J., concurring), neither the District Court nor the Court of Appeals addressed the complaint's statutory claim—that the Mobile electoral system violates § 2 of the Voting Rights Act of 1965. Even a cursory examination of that claim, however, clearly discloses that it adds nothing to the appellees' complaint.

Section 2 of the Voting Rights Act provides:

> "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color." 79 Stat. 437, as amended, 42 U. S. C. § 1973.

Assuming, for present purposes, that there exists a private right of action to enforce this statutory provision,[8] it is apparent that the language of § 2 no more than elaborates upon that of the Fifteenth Amendment,[9] and the sparse legislative his-

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[7] According to the 1979 Municipal Year Book, most municipalities of over 25,000 people conducted at-large elections of their city commissioners or council members as of 1977. *Id.*, at 98–99. It is reasonable to suppose that an even larger majority of other municipalities did so.

[8] Cf. *Allen* v. *State Board of Elections*, 393 U. S. 544. But see *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U. S. 11; *Touche Ross & Co.* v. *Redington*, 442 U. S. 560.

[9] Section 1 of the Fifteenth Amendment provides:

"The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

tory of § 2 makes clear that it was intended to have an effect no different from that of the Fifteenth Amendment itself.

Section 2 was an uncontroversial provision in proposed legislation whose other provisions engendered protracted dispute. The House Report on the bill simply recited that § 2 "grants . . . a right to be free from enactment or enforcement of voting qualifications . . . or practices which deny or abridge the right to vote on account of race or color." H. R. Rep. No. 439, 89th Cong., 1st Sess., 23 (1965). See also S. Rep. No. 162, 89th Cong., 1st Sess., pt. 3, pp. 19–20 (1965). The view that this section simply restated the prohibitions already contained in the Fifteenth Amendment was expressed without contradiction during the Senate hearings. Senator Dirksen indicated at one point that all States, whether or not covered by the preclearance provisions of § 5 of the proposed legislation, were prohibited from discriminating against Negro voters by § 2, which he termed "almost a rephrasing of the 15th [A]mendment." Attorney General Katzenbach agreed. See Voting Rights: Hearings on S. 1564 before the Senate Committee on the Judiciary, 89th Cong., 1st Sess., pt. 1, p. 208 (1965).

In view of the section's language and its sparse but clear legislative history, it is evident that this statutory provision adds nothing to the appellees' Fifteenth Amendment claim. We turn, therefore, to a consideration of the validity of the judgment of the Court of Appeals with respect to the Fifteenth Amendment.

III

The Court's early decisions under the Fifteenth Amendment established that it imposes but one limitation on the powers of the States. It forbids them to discriminate against Negroes in matters having to do with voting. See *Ex parte Yarbrough*, 110 U. S. 651, 665; *Neal* v. *Delaware*, 103 U. S. 370, 389–390; *United States* v. *Cruikshank*, 92 U. S. 542, 555–556; *United States* v. *Reese*, 92 U. S. 214. The Amend-

ment's command and effect are wholly negative. "The Fifteenth Amendment does not confer the right of suffrage upon any one," but has "invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude." *Id.*, at 217–218.

Our decisions, moreover, have made clear that action by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose. In *Guinn* v. *United States*, 238 U. S. 347, this Court struck down a "grandfather" clause in a state constitution exempting from the requirement that voters be literate any person or the descendants of any person who had been entitled to vote before January 1, 1866. It was asserted by way of defense that the provision was immune from successful challenge, since a law could not be found unconstitutional either "by attributing to the legislative authority an occult motive," or "because of conclusions concerning its operation in practical execution and resulting discrimination arising . . . from inequalities naturally inhering in those who must come within the standard in order to enjoy the right to vote." *Id.*, at 359. Despite this argument, the Court did not hesitate to hold the grandfather clause unconstitutional, because it was not "possible to discover any basis in reason for the standard thus fixed other than the purpose" to circumvent the Fifteenth Amendment. *Id.*, at 365.

The Court's more recent decisions confirm the principle that racially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment violation. In *Gomillion* v. *Lightfoot*, 364 U. S. 339, the Court held that allegations of a racially motivated gerrymander of municipal boundaries stated a claim under the Fifteenth Amendment. The constitutional infirmity of the state law in that case, according to the allegations of the complaint, was that in drawing the

municipal boundaries the legislature was "solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote." *Id.*, at 341. The Court made clear that in the absence of such an invidious purpose, a State is constitutionally free to redraw political boundaries in any manner it chooses. *Id.*, at 347.[10]

In *Wright* v. *Rockefeller*, 376 U. S. 52, the Court upheld by like reasoning a state congressional reapportionment statute against claims that district lines had been racially gerrymandered, because the plaintiffs failed to prove that the legislature "was either motivated by racial considerations or in fact drew the districts on racial lines"; or that the statute "was the product of a state contrivance to segregate on the basis of race or place of origin." *Id.*, at 56, 58.[11] See also *Lassiter* v. *Northampton Election Bd.*, 360 U. S. 45; *Lane* v. *Wilson*, 307 U. S. 268, 275–277.

While other of the Court's Fifteenth Amendment decisions have dealt with different issues, none has questioned the necessity of showing purposeful discrimination in order to show a Fifteenth Amendment violation. The cases of *Smith* v. *Allwright*, 321 U. S. 649, and *Terry* v. *Adams*, 345 U. S. 461, for

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[10] The Court has repeatedly cited *Gomillion* v. *Lightfoot* for the principle that an invidious *purpose* must be adduced to support a claim of unconstitutionality. See *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256, 272; *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, 265, 266; *Washington* v. *Davis*, 426 U. S. 229, 240.

[11] MR. JUSTICE MARSHALL has elsewhere described the fair import of the *Gomillion* and *Wright* cases: "In the two Fifteenth Amendment redistricting cases, *Wright* v. *Rockefeller*, 376 U. S. 52 (1964), and *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960), the Court suggested that legislative purpose alone is determinative, although language in both cases may be isolated that seems to approve some inquiry into effect insofar as it elucidates purpose." *Beer* v. *United States*, 425 U. S. 130, 148, n. 4 (dissenting opinion).

The Court in the *Wright* case also rejected claims made under the Equal Protection Clause of the Fourteenth Amendment. See *infra*, at 67.

example, dealt with the question whether a State was so involved with racially discriminatory voting practices as to invoke the Amendment's protection. Although their facts differed somewhat, the question in both cases was whether the State was sufficiently implicated in the conduct of racially exclusionary primary elections to make that discrimination an abridgment of the right to vote *by a State*. Since the Texas Democratic Party primary in *Smith* v. *Allwright* was regulated by statute, and only party nominees chosen in a primary were placed on the ballot for the general election, the Court concluded that the state Democratic Party had become the agency of the State, and that the State thereby had "endorse[d], adopt[ed] and enforce[d] the discrimination against Negroes, practiced by a party." 321 U. S., at 664.

Terry v. *Adams, supra,* posed a more difficult question of state involvement. The primary election challenged in that case was conducted by a county political organization, the Jaybird Association, that was neither authorized nor regulated under state law. The candidates chosen in the Jaybird primary, however, invariably won in the subsequent Democratic primary and in the general election, and the Court found that the Fifteenth Amendment had been violated. Although the several supporting opinions differed in their formulation of this conclusion, there was agreement that the State was involved in the purposeful exclusion of Negroes from participation in the election process.

The appellees have argued in this Court that *Smith* v. *Allwright* and *Terry* v. *Adams* support the conclusion that the at-large system of elections in Mobile is unconstitutional, reasoning that the effect of racially polarized voting in Mobile is the same as that of a racially exclusionary primary. The only characteristic, however, of the exclusionary primaries that offended the Fifteenth Amendment was that Negroes were not permitted to vote in them. The difficult question was whether the "State ha[d] had a hand in" the patent dis-

crimination practiced by a nominally private organization. *Terry* v. *Adams*, *supra*, at 473 (opinion of Frankfurter, J.).

The answer to the appellees' argument is that, as the District Court expressly found, their freedom to vote has not been denied or abridged by anyone. The Fifteenth Amendment does not entail the right to have Negro candidates elected, and neither *Smith* v. *Allwright* nor *Terry* v. *Adams* contains any implication to the contrary. That Amendment prohibits only purposefully discriminatory denial or abridgment by government of the freedom to vote "on account of race, color, or previous condition of servitude." Having found that Negroes in Mobile "register and vote without hindrance," the District Court and Court of Appeals were in error in believing that the appellants invaded the protection of that Amendment in the present case.

IV

The Court of Appeals also agreed with the District Court that Mobile's at-large electoral system violates the Equal Protection Clause of the Fourteenth Amendment. There remains for consideration, therefore, the validity of its judgment on that score.

A

The claim that at-large electoral schemes unconstitutionally deny to some persons the equal protection of the laws has been advanced in numerous cases before this Court. That contention has been raised most often with regard to multimember constituencies within a state legislative apportionment system. The constitutional objection to multimember districts is not and cannot be that, as such, they depart from apportionment on a population basis in violation of *Reynolds* v. *Sims*, 377 U. S. 533, and its progeny. Rather the focus in such cases has been on the lack of representation multimember districts afford various elements of the voting population in a system of representative legislative democracy. "Criticism [of multimember districts] is rooted in their winner-

take-all aspects, their tendency to submerge minorities . . . , a general preference for legislatures reflecting community interests as closely as possible and disenchantment with political parties and elections as devices to settle policy differences between contending interests." *Whitcomb* v. *Chavis*, 403 U. S. 124, 158–159.

Despite repeated constitutional attacks upon multimember legislative districts, the Court has consistently held that they are not unconstitutional *per se*, *e. g.*, *White* v. *Regester*, 412 U. S. 755; *Whitcomb* v. *Chavis*, *supra*; *Kilgarlin* v. *Hill*, 386 U. S. 120; *Burns* v. *Richardson*, 384 U. S. 73; *Fortson* v. *Dorsey*, 379 U. S. 433.[12] We have recognized, however, that such legislative apportionments could violate the Fourteenth Amendment if their purpose were invidiously to minimize or cancel out the voting potential of racial or ethnic minorities. See *White* v. *Regester*, *supra*; *Whitcomb* v. *Chavis*, *supra*; *Burns* v. *Richardson*, *supra*; *Fortson* v. *Dorsey*, *supra*. To prove such a purpose it is not enough to show that the group allegedly discriminated against has not elected representatives in proportion to its numbers. *White* v. *Regester*, *supra*, at 765–766; *Whitcomb* v. *Chavis*, 403 U. S., at 149–150. A plaintiff must prove that the disputed plan was "conceived or operated as [a] purposeful devic[e] to further racial . . . discrimination," *id.*, at 149.

This burden of proof is simply one aspect of the basic principle that only if there is purposeful discrimination can there be a violation of the Equal Protection Clause of the Fourteenth Amendment. See *Washington* v. *Davis*, 426 U. S. 229;

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[12] We have made clear, however, that a court in formulating an apportionment plan as an exercise of its equity powers should, as a general rule, not permit multimember legislative districts. "[S]ingle-member districts are to be preferred in court-ordered legislative reapportionment plans unless the court can articulate a 'singular combination of unique factors' that justifies a different result. *Mahan* v. *Howell*, 410 U. S. 315, 333." *Connor* v. *Finch*, 431 U. S. 407, 415.

Arlington Heights v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252; *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256. The Court explicitly indicated in *Washington* v. *Davis* that this principle applies to claims of racial discrimination affecting voting just as it does to other claims of racial discrimination. Indeed, the Court's opinion in that case viewed *Wright* v. *Rockefeller*, 376 U. S. 52, as an apt illustration of the principle that an illicit purpose must be proved before a constitutional violation can be found. The Court said:

> "The rule is the same in other contexts. *Wright* v. *Rockefeller*, 376 U. S. 52 (1964), upheld a New York congressional apportionment statute against claims that district lines had been racially gerrymandered. The challenged districts were made up predominantly of whites or of minority races, and their boundaries were irregularly drawn. The challengers did not prevail because they failed to prove that the New York Legislature 'was either motivated by racial considerations or in fact drew the districts on racial lines'; the plaintiffs had not shown that the statute 'was the product of a state contrivance to segregate on the basis of race or place of origin.' *Id.*, at 56, 58. The dissenters were in agreement that the issue was whether the 'boundaries . . . were purposefully drawn on racial lines.' *Id.*, at 67." *Washington* v. *Davis, supra*, at 240.

More recently, in *Arlington Heights* v. *Metropolitan Housing Dev. Corp., supra*, the Court again relied on *Wright* v. *Rockefeller* to illustrate the principle that "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." 429 U. S., at 265. Although dicta may be drawn from a few of the Court's earlier opinions suggesting that disproportionate effects alone may establish a claim of unconstitutional racial vote dilution, the fact is that such a view is not supported by any decision of

this Court.[13] More importantly, such a view is not consistent with the meaning of the Equal Protection Clause as it has been understood in a variety of other contexts involving alleged racial discrimination. *Washington* v. *Davis*, *supra* (employment); *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, *supra* (zoning); *Keyes* v. *School District No. 1, Denver, Colo.*, 413 U. S. 189, 208 (public schools); *Akins* v. *Texas*, 325 U. S. 398, 403–404 (jury selection).

In only one case has the Court sustained a claim that multimember legislative districts unconstitutionally diluted the voting strength of a discrete group. That case was *White* v. *Regester*. There the Court upheld a constitutional challenge by Negroes and Mexican-Americans to parts of a legislative reapportionment plan adopted by the State of Texas. The plaintiffs alleged that the multimember districts for the two counties in which they resided minimized the effect of their votes in violation of the Fourteenth Amendment, and the Court held that the plaintiffs had been able to "produce evidence to support findings that the political processes lead-

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[13] The dissenting opinion of MR. JUSTICE MARSHALL reads the Court's opinion in *Fortson* v. *Dorsey*, 379 U. S. 433, to say that a claim of vote dilution under the Equal Protection Clause could rest on either discriminatory purpose or effect. *Post*, at 108. In fact, the Court explicitly reserved this question and expressed no view concerning it. That case involved solely a claim, which the Court rejected, that a state legislative apportionment statute creating some multimember districts was constitutionally infirm on its face. Although the Court recognized that "designedly or otherwise," multimember districting schemes might, under the circumstances of a particular case, minimize the voting strength of a racial group, an issue as to the constitutionality of such an arrangement "[was] not presented by the record," and "'our holding ha[d] no bearing on that wholly separate question.'" 379 U. S., at 439.

The phrase "designedly or otherwise" in which this dissenting opinion places so much stock, was repeated, also in dictum, in *Burns* v. *Richardson*, 384 U. S. 73, 88. But the constitutional challenge to the multimember constituencies failed in that case because the plaintiffs demonstrated neither discriminatory purpose nor effect. *Id.*, at 88–90, and nn. 15 and 16.

ing to nomination and election were not equally open to participation by the group[s] in question." 412 U. S., at 766, 767. In so holding, the Court relied upon evidence in the record that included a long history of official discrimination against minorities as well as indifference to their needs and interests on the part of white elected officials. The Court also found in each county additional factors that restricted the access of minority groups to the political process. In one county, Negroes effectively were excluded from the process of slating candidates for the Democratic Party, while the plaintiffs in the other county were Mexican-Americans who "suffer[ed] a cultural and language barrier" that made "participation in community processes extremely difficult, particularly . . . with respect to the political life" of the county. *Id.*, at 768 (footnote omitted).

White v. *Regester* is thus consistent with "the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose," *Washington* v. *Davis*, *supra*, at 240. The Court stated the constitutional question in *White* to be whether the "multimember districts [were] *being used invidiously* to cancel out or minimize the voting strength of racial groups," 412 U. S., at 765 (emphasis added), strongly indicating that only a purposeful dilution of the plaintiffs' vote would offend the Equal Protection Clause.[14]

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[14] In *Gaffney* v. *Cummings*, 412 U. S. 735, a case decided the same day as *White* v. *Regester*, the Court interpreted both *White* and the earlier vote dilution cases as turning on the existence of discriminatory purpose:

"State legislative districts may be equal or substantially equal in population and still be vulnerable under the Fourteenth Amendment. A districting statute otherwise acceptable, may be invalid because it fences out a racial group so as to deprive them of their pre-existing municipal vote. *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960). A districting plan may create multimember districts perfectly acceptable under equal population standards, but invidiously discriminatory because they are *employed* 'to minimize or cancel out the voting strength of racial or political elements of

Moreover, much of the evidence on which the Court relied in that case was relevant only for the reason that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact." *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S., at 264–265. Of course, "[t]he impact of the official action—whether it 'bears more heavily on one race than another,' *Washington* v. *Davis, supra*, at 242—may provide an important starting point." *Arlington Heights* v. *Metropolitan Housing Dev. Corp., supra*, at 266. But where the character of a law is readily explainable on grounds apart from race, as would nearly always be true where, as here, an entire system of local governance is brought into question, disproportionate impact alone cannot be decisive, and courts must look to other evidence to support a finding of discriminatory purpose. See *ibid.; Washington* v. *Davis*, 426 U. S., at 242.

We may assume, for present purposes, that an at-large election of city officials with all the legislative, executive, and administrative power of the municipal government is constitutionally indistinguishable from the election of a few members of a state legislative body in multimember districts—although this may be a rash assumption.[15] But even making this assumption, it is clear that the evidence in the present case fell far short of showing that the appellants "conceived or operated [a] purposeful devic[e] to further racial . . . discrimination." *Whitcomb* v. *Chavis*, 403 U. S., at 149.

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the voting population.' *Fortson* v. *Dorsey*, 379 U. S. 433, 439 (1965). See *White* v. *Regester, post*, p. 755; *Whitcomb* v. *Chavis*, 403 U. S. 124 (1971); *Abate* v. *Mundt*, 403 U. S., at 184, n. 2; *Burns* v. *Richardson*, 384 U. S., at 88–89." 412 U. S., at 751 (emphasis added).

[15] See *Wise* v. *Lipscomb*, 437 U. S. 535, 550 (opinion of REHNQUIST, J.). It is noteworthy that a system of at-large city elections in place of elections of city officials by the voters of small geographic wards was universally heralded not many years ago as a praiseworthy and progressive reform of corrupt municipal government. See, *e. g.*, E. Banfield & J. Wilson, City Politics 151 (1963). Cf. M. Seasongood, Local Government in the United States (1933); L. Steffens, The Shame of the Cities (1904).

The District Court assessed the appellees' claims in light of the standard that had been articulated by the Court of Appeals for the Fifth Circuit in *Zimmer* v. *McKeithen*, 485 F. 2d 1297. That case, coming before *Washington* v. *Davis*, 426 U. S. 229, was quite evidently decided upon the misunderstanding that it is not necessary to show a discriminatory purpose in order to prove a violation of the Equal Protection Clause—that proof of a discriminatory effect is sufficient. See 485 F. 2d, at 1304–1305, and n. 16.[16]

In light of the criteria identified in *Zimmer*, the District Court based its conclusion of unconstitutionality primarily on the fact that no Negro had ever been elected to the City Commission, apparently because of the pervasiveness of racially polarized voting in Mobile. The trial court also found that city officials had not been as responsive to the interests of Negroes as to those of white persons. On the basis of these findings, the court concluded that the political processes in Mobile were not equally open to Negroes, despite its seemingly inconsistent findings that there were no inhibitions against Negroes becoming candidates, and that in fact Negroes had registered and voted without hindrance. 423 F. Supp., at 387. Finally, with little additional discussion, the District Court held that Mobile's at-large electoral system was invidiously discriminating against Negroes in violation of the Equal Protection Clause.[17]

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[16] This Court affirmed the judgment of the Court of Appeals in *Zimmer* v. *McKeithen* on grounds other than those relied on by that court and explicitly "without approval of the constitutional views expressed by the Court of Appeals." *East Carroll Parish School Bd.* v. *Marshall*, 424 U. S. 636, 638 (*per curiam*).

[17] The only indication given by the District Court of an inference that there existed an invidious purpose was the following statement: "It is not a long step from the *systematic exclusion of blacks* from juries which is itself such an 'unequal application of the law . . . as to show intentional discrimination,' *Akins* v. *Texas*, 325 U. S. 398, 404, . . . to [the] present purpose to dilute the black vote as evidenced in this case. There

In affirming the District Court, the Court of Appeals acknowledged that the Equal Protection Clause of the Fourteenth Amendment reaches only purposeful discrimination,[18] but held that one way a plaintiff may establish this illicit purpose is by adducing evidence that satisfies the criteria of its decision in *Zimmer* v. *McKeithen, supra.* Thus, because the appellees had proved an "aggregate" of the *Zimmer* factors, the Court of Appeals concluded that a discriminatory purpose

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is a 'current' condition of dilution of the black vote resulting from intentional state legislative *inaction* which is as effective as the intentional state action referred to in *Keyes* [v. *School District No. 1, Denver Colo.*, 413 U. S. 189]." 423 F. Supp., at 398.

What the District Court may have meant by this statement is uncertain. In any event the analogy to the racially exclusionary jury cases appears mistaken. Those cases typically have involved a consistent pattern of discrete official actions that demonstrated almost to a mathematical certainty that Negroes were being excluded from juries because of their race. See *Castaneda* v. *Partida*, 430 U. S. 482, 495–497, and n. 17; *Patton* v. *Mississippi*, 332 U. S. 463, 466–467; *Pierre* v. *Louisiana*, 306 U. S. 354, 359; *Norris* v. *Alabama*, 294 U. S. 587, 591.

If the District Court meant by its statement that the existence of the at-large electoral system was, like the systematic exclusion of Negroes from juries, unexplainable on grounds other than race, its inference is contradicted by the history of the adoption of that system in Mobile. Alternatively, if the District Court meant that the state legislature may be presumed to have "intended" that there would be no Negro Commissioners, simply because that was a foreseeable consequence of at-large voting, it applied an incorrect legal standard. "'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. . . . It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S., at 279 (footnotes omitted).

[18] The Court of Appeals expressed the view that the District Court's finding of discrimination in light of the *Zimmer* criteria was "buttressed" by the fact that the Attorney General had interposed an objection under § 5 of the Voting Rights Act of 1965 to the state statute designating the functions of each Commissioner. 571 F. 2d 238, 246 (CA5). See n. 6, *supra*.

had been proved. That approach, however, is inconsistent with our decisions in *Washington* v. *Davis, supra,* and *Arlington Heights, supra.* Although the presence of the indicia relied on in *Zimmer* may afford some evidence of a discriminatory purpose, satisfaction of those criteria is not of itself sufficient proof of such a purpose. The so-called *Zimmer* criteria upon which the District Court and the Court of Appeals relied were most assuredly insufficient to prove an unconstitutionally discriminatory purpose in the present case.

First, the two courts found it highly significant that no Negro had been elected to the Mobile City Commission. From this fact they concluded that the processes leading to nomination and election were not open equally to Negroes. But the District Court's findings of fact, unquestioned on appeal, make clear that Negroes register and vote in Mobile "without hindrance," and that there are no official obstacles in the way of Negroes who wish to become candidates for election to the Commission. Indeed, it was undisputed that the only active "slating" organization in the city is comprised of Negroes. It may be that Negro candidates have been defeated, but that fact alone does not work a constitutional deprivation. *Whitcomb* v. *Chavis,* 403 U. S., at 160; see *Arlington Heights,* 429 U. S., at 266, and n. 15.[19]

Second, the District Court relied in part on its finding that the persons who were elected to the Commission discriminated against Negroes in municipal employment and in dispensing public services. If that is the case, those discriminated against may be entitled to relief under the Constitution, albeit of a sort quite different from that sought in the present case. The Equal Protection Clause proscribes purposeful discrimination because of race by any unit of state government, what-

[19] There have been only three Negro candidates for the City Commission, all in 1973. According to the District Court, the Negro candidates "were young, inexperienced, and mounted extremely limited campaigns" and received only "modest support from the black community. . . ." 423 F. Supp., at 388.

ever the method of its election. But evidence of discrimination by white officials in Mobile is relevant only as the most tenuous and circumstantial evidence of the constitutional invalidity of the electoral system under which they attained their offices.[20]

Third, the District Court and the Court of Appeals supported their conclusion by drawing upon the substantial history of official racial discrimination in Alabama. But past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful. The ultimate question remains whether a discriminatory intent has been proved in a given case. More distant instances of official discrimination in other cases are of limited help in resolving that question.

Finally, the District Court and the Court of Appeals pointed to the mechanics of the at-large electoral system itself as proof that the votes of Negroes were being invidiously canceled out. But those features of that electoral system, such as the majority vote requirement, tend naturally to disadvantage any voting minority, as we noted in *White* v. *Regester*, 412 U. S. 755. They are far from proof that the at-large electoral scheme represents purposeful discrimination against Negro voters.[21]

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[20] Among the difficulties with the District Court's view of the evidence was its failure to identify the state officials whose intent it considered relevant in assessing the invidiousness of Mobile's system of government. To the extent that the inquiry should properly focus on the state legislature, see n. 21, *infra*, the actions of unrelated governmental officials would be, of course, of questionable relevance.

[21] According to the District Court, voters in the city of Mobile are represented in the state legislature by three state senators, any one of whom can veto proposed local legislation under the existing courtesy rule. Likewise, a majority of Mobile's 11-member House delegation can prevent a local bill from reaching the floor for debate. Unanimous approval of a local measure by the city delegation, on the other hand, virtually assures passage. 423 F. Supp., at 397.

There was evidence in this case that several proposals that would have

B

We turn finally to the arguments advanced in Part I of MR. JUSTICE MARSHALL's dissenting opinion. The theory of this dissenting opinion—a theory much more extreme than that espoused by the District Court or the Court of Appeals—appears to be that every "political group," or at least every such group that is in the minority, has a federal constitutional right to elect candidates in proportion to its numbers.[22] Moreover, a political group's "right" to have its candidates elected is said to be a "fundamental interest," the infringement of which may be established without proof that a State has acted with the purpose of impairing anybody's access to the political process. This dissenting opinion finds the "right" infringed in the present case because no Negro has been elected to the Mobile City Commission.

Whatever appeal the dissenting opinion's view may have as a matter of political theory, it is not the law. The Equal Protection Clause of the Fourteenth Amendment does not

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altered the form of Mobile's municipal government have been defeated in the state legislature, including at least one that would have permitted Mobile to govern itself through a Mayor and City Council with members elected from individual districts within the city. Whether it may be possible ultimately to prove that Mobile's present governmental and electoral system has been retained for a racially discriminatory purpose, we are in no position now to say.

[22] The dissenting opinion seeks to disclaim this description of its theory by suggesting that a claim of vote dilution may require, in addition to proof of electoral defeat, some evidence of "historical and social factors" indicating that the group in question is without political influence. *Post*, at 111–112, n. 7, 122–124. Putting to the side the evident fact that these gauzy sociological considerations have no constitutional basis, it remains far from certain that they could, in any principled manner, exclude the claims of any discrete political group that happens, for whatever reason, to elect fewer of its candidates than arithmetic indicates it might. Indeed, the putative limits are bound to prove illusory if the express purpose informing their application would be, as the dissent assumes, to redress the "inequitable distribution of political influence." *Post*, at 122.

require proportional representation as an imperative of political organization. The entitlement that the dissenting opinion assumes to exist simply is not to be found in the Constitution of the United States.

It is of course true that a law that impinges upon a fundamental right explicitly or implicitly secured by the Constitution is presumptively unconstitutional. See *Shapiro* v. *Thompson*, 394 U. S. 618, 634, 638; *id.*, at 642–644 (concurring opinion). See also *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1, 17, 30–32. But plainly "[i]t is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws," *id.*, at 33. See *Lindsey* v. *Normet*, 405 U. S. 56, 74; *Dandridge* v. *Williams*, 397 U. S. 471, 485. Accordingly, where a state law does not impair a right or liberty protected by the Constitution, there is no occasison to depart from "the settled mode of constitutional analysis of legislat[ion] . . . involving questions of economic and social policy," *San Antonio Independent School Dist.* v. *Rodriguez*, *supra*, at 33.[23] MR. JUSTICE MARSHALL's dissenting opinion would discard these fixed principles in favor of a judicial inventiveness that would go "far toward making this Court a 'super-legislature.'" *Shapiro* v. *Thompson*, *supra*, at 655, 661 (Harlan, J., dissenting). We are not free to do so.

More than 100 years ago the Court unanimously held that "the Constitution of the United States does not confer the right of suffrage upon any one. . . ." *Minor* v. *Happersett*, 21 Wall. 162, 178. See *Lassiter* v. *Northampton Election Bd.*, 360 U. S., at 50–51. It is for the States "to determine the conditions under which the right of suffrage may be

[23] The presumption of constitutional validity that underlies the settled mode of reviewing legislation disappears, of course, if the law under consideration creates classes that, in a constitutional sense, are inherently "suspect." See *McLaughlin* v. *Florida*, 379 U. S. 184; *Strauder* v. *West Virginia*, 100 U. S. 303. Cf. *Lockport* v. *Citizens for Community Action*, 430 U. S. 259.

exercised . . . , absent of course the discrimination which the Constitution condemns," *ibid.* It is true, as the dissenting opinion states, that the Equal Protection Clause confers a substantive right to participate in elections on an equal basis with other qualified voters. See *Dunn* v. *Blumstein*, 405 U. S. 330, 336; *Reynolds* v. *Sims*, 377 U. S., at 576. But this right to equal participation in the electoral process does not protect any "political group," however defined, from electoral defeat.[24]

The dissenting opinion erroneously discovers the asserted entitlement to group representation within the "one person, one vote" principle of *Reynolds* v. *Sims, supra,* and its progeny.[25] Those cases established that the Equal Protection

[24] The basic fallacy in the dissenting opinion's theory is illustrated by analogy to a defendant's right under the Sixth and Fourteenth Amendments to a trial by a jury of his peers in a criminal case. See *Duncan* v. *Louisiana,* 391 U. S. 145. That right, expressly conferred by the Constitution, is certainly "fundamental" as that word is used in the dissenting opinion. Moreover, under the Equal Protection Clause, a defendant has a right to require that the State not exclude from the jury members of his race. See *Castaneda* v. *Partida,* 430 U. S., at 493. But "[f]airness in selection has never been held to require proportional representation of races upon a jury," *Akins* v. *Texas,* 325 U. S. 398, 403; nor has the defendant any "right to demand that members of his race be included," *Alexander* v. *Louisiana,* 405 U. S. 625, 628. The absence from a jury of persons belonging to racial or other cognizable groups offends the Constitution only "if it results from purposeful discrimination." *Castaneda* v. *Partida, supra,* at 493. See *Alexander* v. *Louisiana, supra;* see also *Washington* v. *Davis,* 426 U. S., at 239–240. Thus, the fact that there is a constitutional right to a system of jury selection that is not purposefully exclusionary does not entail a right to a jury of any particular racial composition. Likewise, the fact that the Equal Protection Clause confers a right to participate in elections on an equal basis with other qualified voters does not entail a right to have one's candidates prevail.

[25] The dissenting opinion also relies upon several decisions of this Court that have held constitutionally invalid various voter eligibility requirements: *Dunn* v. *Blumstein,* 405 U. S. 330 (length of residence requirement); *Evans* v. *Cornman,* 398 U. S. 419 (exclusion of residents of federal property); *Kramer* v. *Union School District,* 395 U. S. 621 (property

Clause guarantees the right of each voter to "have his vote weighted equally with those of all other citizens." 377 U. S., at 576. The Court recognized that a voter's right to "have an equally effective voice" in the election of representatives is impaired where representation is not apportioned substantially on a population basis. In such cases, the votes of persons in more populous districts carry less weight than do those of persons in smaller districts. There can be, of course, no claim that the "one person, one vote" principle has been violated in this case, because the city of Mobile is a unitary electoral district and the Commission elections are conducted at large. It is therefore obvious that nobody's vote has been "diluted" in the sense in which that word was used in the *Reynolds* case.

The dissenting opinion places an extraordinary interpretation on these decisions, an interpretation not justified by *Reynolds* v. *Sims* itself or by any other decision of this Court. It is, of course, true that the right of a person to vote on an equal basis with other voters draws much of its significance from the political associations that its exercise reflects, but it is an altogether different matter to conclude that political groups themselves have an independent constitutional claim to representation.[26] And the Court's decisions hold squarely

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or status requirement); *Harper* v. *Virginia Bd. of Elections*, 383 U. S. 663 (poll tax requirement). But there is in this case no attack whatever upon any of the voter eligibilty requirements in Mobile. Nor do the cited cases contain implicit support for the position of the dissenting opinion. They stand simply for the proposition that "if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest." *Kramer* v. *Union School District*, *supra*, at 627. It is difficult to perceive any similarity between the excluded person's right to equal electoral participation in the cited cases, and the right asserted by the dissenting opinion in the present case, aside from the fact that they both in some way involve voting.

[26] It is difficult to perceive how the implications of the dissenting opin-

that they do not. See *United Jewish Organizations* v. *Carey*, 430 U. S. 144, 166–167; *id.*, at 179–180 (opinion concurring in judgment); *White* v. *Regester*, 412 U. S., at 765–766; *Whitcomb* v. *Chavis*, 403 U. S., at 149–150, 153–154, 156–157.

The fact is that the Court has sternly set its face against the claim, however phrased, that the Constitution somehow guarantees proportional representation. In *Whitcomb* v. *Chavis*, *supra*, the trial court had found that a multimember state legislative district had invidiously deprived Negroes and poor persons of rights guaranteed them by the Constitution, notwithstanding the absence of any evidence whatever of discrimination against them. Reversing the trial court, this Court said:

> "The District Court's holding, although on the facts of this case limited to guaranteeing one racial group representation, is not easily contained. It is expressive of the more general proposition that any group with distinctive interests must be represented in legislative halls if it is numerous enough to command at least one seat and repre-

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ion's theory of group representation could rationally be cabined. Indeed, certain preliminary practical questions immediately come to mind: Can only members of a minority of the voting population in a particular municipality be members of a "political group"? How large must a "group" be to be a "political group"? Can any "group" call itself a "political group"? If not, who is to say which "groups" are "political groups"? Can a qualified voter belong to more than one "political group"? Can there be more than one "political group" among white voters (*e. g.*, Irish-American, Italian-American, Polish-American, Jews, Catholics, Protestants)? Can there be more than one "political group" among nonwhite voters? Do the answers to any of these questions depend upon the particular demographic composition of a given city? Upon the total size of its voting population? Upon the size of its governing body? Upon its form of government? Upon its history? Its geographic location? The fact that even these preliminary questions may be largely unanswerable suggests some of the conceptual and practical fallacies in the constitutional theory espoused by the dissenting opinion, putting to one side the total absence of support for that theory in the Constitution itself.

sents a majority living in an area sufficiently compact to constitute a single-member district. This approach would make it difficult to reject claims of Democrats, Republicans, or members of any political organization in Marion County who live in what would be safe districts in a single-member district system but who in one year or another, or year after year, are submerged in a one-sided multi-member district vote. There are also union oriented workers, the university community, religious or ethnic groups occupying identifiable areas of our heterogeneous cities and urban areas. Indeed, it would be difficult for a great many, if not most, multi-member districts to survive analysis under the District Court's view unless combined with some voting arrangement such as proportional representation or cumulative voting aimed at providing representation for minority parties or interests. At the very least, affirmance of the District Court would spawn endless litigation concerning the multi-member district systems now widely employed in this country." *Whitcomb* v. *Chavis*, *supra*, at 156–157 (footnotes omitted).

V

The judgment is reversed, and the case is remanded to the Court of Appeals for further proceedings.

It is so ordered.

MR. JUSTICE BLACKMUN, concurring in the result.

Assuming that proof of intent is a prerequisite to appellees' prevailing on their constitutional claim of vote dilution, I am inclined to agree with MR. JUSTICE WHITE that, in this case, "the findings of the District Court amply support an inference of purposeful discrimination," *post*, at 103. I concur in the Court's judgment of reversal, however, because I believe that the relief afforded appellees by the District Court was not commensurate with the sound exercise of judicial discretion.

It seems to me that the city of Mobile, and its citizenry, have a substantial interest in maintaining the commission form of government that has been in effect there for nearly 70 years. The District Court recognized that its remedial order, changing the form of the city's government to a mayor-council system, "raised serious constitutional issues." 423 F. Supp. 384, 404 (SD Ala. 1976). Nonetheless, the court was "unable to see how the impermissibly unconstitutional dilution can be effectively corrected by any other approach." *Id.*, at 403.

The Court of Appeals approved the remedial measures adopted by the District Court and did so essentially on three factors: (1) this Court's preference for single-member districting in court-ordered legislative reapportionment, absent special circumstances, see, *e. g.*, *Connor* v. *Finch*, 431 U. S. 407, 415 (1977); (2) appellants' noncooperation with the District Court's request for the submission of proposed municipal government plans that called for single-member districts for councilmen, under a mayor-council system of government; and (3) the temporary nature of the relief afforded by the District Court, the city or State being free to adopt a "constitutional replacement" for the District Court's plan in the future. 571 F. 2d 238, 247 (CA5 1978).

Contrary to the Court of Appeals, I believe that special circumstances are presented when a District Court "reapportions" a municipal government by altering its basic structures. See also the opinion of MR. JUSTICE STEWART, *ante*, at 70, and n. 15. See *Chapman* v. *Meier*, 420 U. S. 1, 20, n. 14 (1975); *Sixty-Seventh Minnesota State Senate* v. *Beens*, 406 U. S. 187 (1972). I also believe that the city's failure to submit a proposed plan to the District Court was excused by the fact that the only proposals the court was interested in receiving were variations on a mayor-council plan utilizing single-member districts. Finally, although the District Court's order may have been temporary, it was unlikely that the courts below would have approved any attempt by Mobile to return to the commission form of government. And even

a temporary alteration of a long-established form of municipal government is a drastic measure for a court to take.

Contrary to the District Court, I do not believe that, in order to remedy the unconstitutional vote dilution it found, it was necessary to convert Mobile's city government to a mayor-council system. In my view, the District Court at least should have considered alternative remedial orders that would have maintained some of the basic elements of the commission system Mobile long ago had selected—joint exercise of legislative and executive power, and citywide representation. In the first place, I see no reason for the court to have separated legislative and executive power in the city of Mobile by creating the office of mayor. In the second place, the court could have, and in my view should have, considered expanding the size of the Mobile City Commission and providing for the election of at least some commissioners at large. Alternative plans might have retained at-large elections for all commissioners while imposing district residency requirements that would have insured the election of a commission that was a cross section of all of Mobile's neighborhoods, or a plurality-win system that would have provided the potential for the effective use of single-shot voting by black voters. See *City of Rome* v. *United States, post,* at 184, n. 19. In failing to consider such alternative plans, it appears to me that the District Court was perhaps overly concerned with the elimination of at-large elections *per se,* rather than with structuring an electoral system that provided an opportunity for black voters in Mobile to participate in the city's government on an equal footing with whites.

In the past, this Court has emphasized that a district court's remedial power "may be exercised only on the basis of a constitutional violation," and that "the nature of the violation determines the scope of the remedy." *Swann* v. *Board of Education,* 402 U. S. 1, 16 (1971). I am not convinced that any violation of federal constitutional rights established by appellees required the District Court to dismantle Mobile's

commission form of government and replace it with a mayor-council system. Accordingly, I, too, would reverse the judgment of the Court of Appeals, and remand the case for reconsideration of an appropriate remedy.

MR. JUSTICE STEVENS, concurring in the judgment.

At issue in this case is the constitutionality of the city of Mobile's commission form of government. Black citizens in Mobile, who constitute a minority of that city's registered voters, challenged the at-large nature of the elections for the three positions of City Commissioner, contending that the system "dilutes" their votes in violation of the Fifteenth Amendment and the Equal Protection Clause of the Fourteenth Amendment. While I agree with MR. JUSTICE STEWART that no violation of respondents' constitutional rights has been demonstrated, my analysis of the issue proceeds along somewhat different lines.

In my view, there is a fundamental distinction between state action that inhibits an individual's right to vote and state action that affects the political strength of various groups that compete for leadership in a democratically governed community. That distinction divides so-called vote dilution practices into two different categories "governed by entirely different constitutional considerations," see *Wright* v. *Rockefeller,* 376 U. S. 52, 58 (Harlan, J., concurring).

In the first category are practices such as poll taxes or literacy tests that deny individuals access to the ballot. Districting practices that make an individual's vote in a heavily populated district less significant than an individual's vote in a smaller district also belong in that category. See *Baker* v. *Carr,* 369 U. S. 186; *Reynolds* v. *Sims,* 377 U. S. 533.[1] Such

[1] In *Reynolds* v. *Sims,* the Court quoted Mr. Justice Douglas' statement that the right to vote "includes the right to have the vote counted at full value without dilution or discount . . . ," 377 U. S., at 555, n. 29, as well as the comment in *Wesberry* v. *Sanders,* 376 U. S. 1, 8, that "'one

practices must be tested by the strictest of constitutional standards, whether challenged under the Fifteenth Amendment or under the Equal Protection Clause of the Fourteenth Amendment. See, *e. g.*, *Dunn* v. *Blumstein*, 405 U. S. 330, 337.

This case does not fit within the first category. The District Court found that black citizens in Mobile "register and vote without hindrance"[2] and there is no claim that any individual's vote is worth less than any other's. Rather, this case draws into question a political structure that treats all individuals as equals but adversely affects the political strength of a racially identifiable group. Although I am satisfied that such a structure may be challenged under the Fifteenth Amendment as well as under the Equal Protection Clause of the Fourteenth Amendment,[3] I believe that under

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man's vote in a congressional election is to be worth as much as another's.'" 377 U. S., at 559.

[2] This finding distinguishes this case from *White* v. *Regester*, 412 U. S. 755. In *White* the Court held that, in order to establish a Fourteenth Amendment violation, a group alleging vote dilution must

"produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." *Id.*, at 766.

The Court affirmed a judgment in favor of black and Mexican-American voters on the basis of the District Court's express findings that black voters had been "'effectively excluded from participation in the Democratic primary selection process,'" *id.*, at 767, and that "'. . . cultural incompatibility . . . conjoined with the poll tax and the most restrictive voter registration procedures in the nation ha[d] operated to effectively deny Mexican-Americans access to the political processes in Texas even longer than the Blacks were formally denied access by the white primary.'" *Id.*, at 768.

[3] Thus, I disagree with MR. JUSTICE STEWART's conclusion for the plurality that the Fifteenth Amendment applies only to practices that directly affect access to the ballot and hence is totally inapplicable to the case at bar. *Ante*, at 65. I also find it difficult to understand why, given this position, he reaches out to decide that discriminatory purpose must be demonstrated in a proper Fifteenth Amendment case. *Ante*, at 61–64.

either provision it must be judged by a standard that allows the political process to function effectively.

My conclusion that the Fifteenth Amendment applies to a case such as this rests on this Court's opinion in *Gomillion* v. *Lightfoot*, 364 U. S. 339. That case established that the Fifteenth Amendment does not simply guarantee the individual's right to vote; it also limits the States' power to draw political boundaries. Although *Gomillion* involved a districting structure that completely excluded the members of one race from participation in the city's elections,[4] it does not stand for the proposition that no racial group can prevail on a Fifteenth Amendment claim unless it proves that an electoral system has the effect of making its members' right to vote, in MR. JUSTICE MARSHALL's words, "nothing more than the right to cast meaningless ballots." *Post*, at 104. I agree with MR. JUSTICE MARSHALL that the Fifteenth Amendment need not and should not be so narrowly construed. I do not agree, however, with his view that every "showing of discriminatory impact" on a historically and socially disadvan-

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[4] "The petitioners here complain that affirmative legislative action deprives them of their votes and the consequent advantages that the ballot affords. When a legislature thus singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment. In no case involving unequal weight in voting distribution that has come before the Court did the decision sanction a differentiation on racial lines whereby approval was given to unequivocal withdrawal of the vote solely from colored citizens.

. . . . .

"According to the allegations here made, the Alabama Legislature has not merely redrawn the Tuskegee city limits with incidental inconvenience to the petitioners; it is more accurate to say that it has deprived the petitioners of the municipal franchise and consequent rights and to that end it has incidentally changed the city's boundaries. While in form this is merely an act redefining metes and bounds, if the allegations are established, the inescapable human effect of this essay in geometry and geography is to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights." 364 U. S., at 346, 347.

taged racial group, *post*, at 104, 111, n. 7, is sufficient to invalidate a districting plan.[5]

Neither *Gomillion* nor any other case decided by this Court establishes a constitutional right to proportional representation for racial minorities.[6] What *Gomillion* holds is that a sufficiently "uncouth" or irrational racial gerrymander violates the Fifteenth Amendment. As Mr. Justice Whittaker's concurrence in that case demonstrates, the same result is compelled by the Equal Protection Clause of the Fourteenth Amendment. See 364 U. S., at 349. The fact that the "gerrymander" condemned in *Gomillion* was equally vulnerable under both Amendments indicates that the essential holding of that case is applicable, not merely to gerrymanders directed against racial minorities, but to those aimed at religious, ethnic, economic, and political groups as well. Whatever the proper standard for identifying an unconstitutional gerrymander may be, I have long been persuaded that it must apply equally to all forms of political gerrymandering—not just to racial gerrymandering. See *Cousins* v. *City Council*

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[5] I also disagree with MR. JUSTICE MARSHALL to the extent that he implies that the votes cast in an at-large election by members of a racial minority can never be anything more than "meaningless ballots." I have no doubt that analyses of Presidential, senatorial and other statewide elections would demonstrate that ethnic and racial minorities have often had a critical impact on the choice of candidates and the outcome of elections. There is no reason to believe that the same political forces cannot operate in smaller election districts regardless of the depth of conviction or emotion that may separate the partisans of different points of view.

[6] And this is true regardless of the apparent need of a particular group for proportional representation because of its historically disadvantaged position in the community. See *Cousins* v. *City Council of Chicago*, 466 F. 2d 830, 852 (CA7 1972) (Stevens, J., dissenting), cert. denied, 409 U. S. 893. This does not mean, of course, that a legislature is constitutionally prohibited from according some measure of proportional representation to a minority group, see *United Jewish Organizations* v. *Carey*, 430 U. S. 144.

of Chicago, 466 F. 2d 830, 848–852 (CA7 1972) (Stevens, J., dissenting), cert. denied, 409 U. S. 893.[7]

This conclusion follows, I believe, from the very nature of a gerrymander. By definition, gerrymandering involves drawing district boundaries (or using multimember districts or at-large elections) in order to maximize the voting strength of those loyal to the dominant political faction and to minimize the strength of those opposed to it.[8] 466 F. 2d, at 847. In seeking the desired result, legislators necessarily make judgments about the probability that the members of certain identifiable groups, whether racial, ethnic, economic, or religious, will vote in the same way. The success of the gerrymander from the legislators' point of view, as well as its impact on the

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[7] This view is consistent with the Court's Fourteenth Amendment cases, in which it has indicated that attacks on apportionment schemes on racial, political, or economic grounds should all be judged by the same constitutional standard. See, *e. g., Whitcomb* v. *Chavis,* 403 U. S. 124, 149 (districts that are "conceived or operated as purposeful devices to further racial *or economic* discrimination" are prohibited by the Fourteenth Amendment) (emphasis supplied); *Fortson* v. *Dorsey,* 379 U. S. 433, 439 (an apportionment scheme would be invalid under the Fourteenth Amendment if it "operate[d] to minimize or cancel out the voting strength of racial *or political* elements of the voting population") (emphasis supplied).

[8] Gerrymanders may also be used to preserve the current balance of power between political parties, see, *e. g., Gaffney* v. *Cummings,* 412 U. S. 735, or to preserve the safe districts of incumbents, cf. *Wright* v. *Rockefeller,* 376 U. S. 52. In *Gaffney* the Court pointed out: "[I]t requires no special genius to recognize the political consequences of drawing a district line along one street rather than another. It is not only obvious, but absolutely unavoidable, that the location and shape of districts may well determine the political complexion of the area. District lines are rarely neutral phenomena. They can well determine what district will be predominantly Democratic or predominantly Republican, or make a close race likely. Redistricting may pit incumbents against one another or make very difficult the election of the most experienced legislator. The reality is that districting inevitably has and is intended to have substantial political consequences." 412 U. S., at 753.

disadvantaged group, depends on the accuracy of those predictions.

A prediction based on a racial characteristic is not necessarily more reliable than a prediction based on some other group characteristic. Nor, since a legislator's ultimate purpose in making the prediction is political in character, is it necessarily more invidious or benign than a prediction based on other group characteristics.[9] In the line-drawing process, racial, religious, ethnic, and economic gerrymanders are all species of political gerrymanders.

From the standpoint of the groups of voters that are affected by the line-drawing process, it is also important to recognize that it is the group's interest in gaining or maintaining political power that is at stake. The mere fact that a number of citizens share a common ethnic, racial, or religious background does not create the need for protection against gerrymandering. It is only when their common interests are strong enough to be manifested in political action that the need arises. For the political strength of a group is not a function of its ethnic, racial, or religious composition; rather, it is a function of numbers—specifically the number of persons who will vote in the same way. In the long run there is no more certainty that individual members of racial groups will vote alike than that members of other identifiable groups will do so. And surely there is no national interest in creating an incentive to define political groups by racial characteristics.[10]

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[9] Thus, for example, there is little qualitative difference between the motivation behind a religious gerrymander designed to gain votes on the abortion issue and a racial gerrymander designed to gain votes on an economic issue.

[10] As Mr. Justice Douglas wrote in his dissent in *Wright* v. *Rockefeller*:

"Racial electoral registers, like religious ones, have no place in a society that honors the Lincoln tradition—'of the people, by the people, for the people.' Here the individual is important, not his race, his creed, or his color. The principle of equality is at war with the notion that District A must be represented by a Negro, as it is with the notion that District B

But if the Constitution were interpreted to give more favorable treatment to a racial minority alleging an unconstitutional impairment of its political strength than it gives to other identifiable groups making the same claim, such an incentive would inevitably result.

My conclusion that the same standard should be applied to racial groups as is applied to other groups leads me also to

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must be represented by a Caucasian, District C by a Jew, District D by a Catholic, and so on. Cf. *Gray* v. *Sanders*, 372 U. S. 368, 379. The racial electoral register system weights votes along one racial line more heavily than it does other votes. That system, by whatever name it is called, is a divisive force in a community, emphasizing differences between candidates and voters that are irrelevant in the constitutional sense. Of course race, like religion, plays an important role in the choices which individual voters make from among various candidates. But government has no business designing electoral districts along racial or religious lines.

. . . . .

"When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan. Since that system is at war with the democratic ideal, it should find no footing here." 376 U. S., at 66–67.

See also my dissent in *Cousins, supra:*

"In my opinion an interpretation of the Constitution which afforded one kind of political protection to blacks and another kind to members of other identifiable groups would itself be invidious. Respect for the citizenry in the black community compels acceptance of the fact that in the long run there is no more certainty that these individuals will vote alike than will individual members of any other ethnic, economic, or social group. The probability of parallel voting fluctuates as the blend of political issues affecting the outcome of an election changes from time to time to emphasize one issue, or a few, rather than others, as dominant. The facts that a political group has its own history, has suffered its own special injustices, and has its own congeries of special political interests, do not make one such group different from any other in the eyes of the law. The members of each go to the polls with equal dignity and with an equal right to be protected from invidious discrimination." 466 F. 2d, at 852.

conclude that the standard cannot condemn every adverse impact on one or more political groups without spawning more dilution litigation than the judiciary can manage. Difficult as the issues engendered by *Baker* v. *Carr*, 369 U. S. 186, may have been, nothing comparable to the mathematical yardstick used in apportionment cases is available to identify the difference between permissible and impermissible adverse impacts on the voting strength of political groups.

In its prior cases the Court has phrased the standard as being whether the districting practices in question "unconstitutionally operate to dilute or cancel the voting strength of racial or political elements." *Whitcomb* v. *Chavis*, 403 U. S. 124, 144. In *Zimmer* v. *McKeithen*, 485 F. 2d 1297 (CA5 1973), aff'd on other grounds *sub nom. East Carroll Parish School Bd.* v. *Marshall*, 424 U. S. 636, the Fifth Circuit attempted to outline the types of proof that would satisfy this rather amorphous test. Today, the plurality rejects the *Zimmer* analysis, holding that the primary, if not the sole, focus of the inquiry must be on the intent of the political body responsible for making the districting decision. While I agree that the *Zimmer* analysis should be rejected, I do not believe that it is appropriate to focus on the subjective intent of the decisionmakers.

In my view, the proper standard is suggested by three characteristics of the gerrymander condemned in *Gomillion:* (1) the 28-sided configuration was, in the Court's word, "uncouth," that is to say, it was manifestly not the product of a routine or a traditional political decision; (2) it had a significant adverse impact on a minority group; and (3) it was unsupported by any neutral justification and thus was either totally irrational or entirely motivated by a desire to curtail the political strength of the minority. These characteristics suggest that a proper test should focus on the objective effects of the political decision rather than the subjective motivation of the decisionmaker. See *United States* v. *O'Brien*, 391 U. S.

367, 384.[11] In this case, if the commission form of government in Mobile were extraordinary, or if it were nothing more than a vestige of history, with no greater justification than the grotesque figure in *Gomillion*, it would surely violate the Constitution. That conclusion would follow simply from its adverse impact on black voters plus the absence of any legitimate justification for the system, without reference to the subjective intent of the political body that has refused to alter it.

Conversely, I am also persuaded that a political decision that affects group voting rights may be valid even if it can be proved that irrational or invidious factors have played some part in its enactment or retention.[12] The standard for testing the acceptability of such a decision must take into account the fact that the responsibility for drawing political boundaries is generally committed to the legislative process and that the process inevitably involves a series of compromises among different group interests. If the process is to work, it must reflect an awareness of group interests and it must tolerate some attempts to advantage or to disadvantage particular segments of the voting populace. Indeed, the same "group interest" may simultaneously support and oppose a particular boundary change.[13] The standard cannot, therefore, be so

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[11] In *O'Brien* the Court described *Gomillion* as standing "not for the proposition that legislative motive is a proper basis for declaring a statute unconstitutional, but that the inevitable effect of a statute on its face may render it unconstitutional."

[12] "It is unrealistic, on the one hand, to require the victim of alleged discrimination to uncover the actual subjective intent of the decisionmaker or, conversely, to invalidate otherwise legitimate action simply because an improper motive affected the deliberation of a participant in the decisional process. A law conscripting clerics should not be invalidated because an atheist voted for it." *Washington* v. *Davis*, 426 U. S. 229, 253 (STEVENS, J., concurring).

[13] For example, if 55% of the voters in an area comprising two districts belong to group A, their interests in electing two representatives would be best served by evenly dividing the voters in two districts, but their inter-

strict that any evidence of a purpose to disadvantage a bloc of voters will justify a finding of "invidious discrimination"; otherwise, the facts of political life would deny legislatures the right to perform the districting function. Accordingly, a political decision that is supported by valid and articulable justifications cannot be invalid simply because some participants in the decisionmaking process were motivated by a purpose to disadvantage a minority group.

The decision to retain the commission form of government in Mobile, Ala., is such a decision. I am persuaded that some support for its retention comes, directly or indirectly, from members of the white majority who are motivated by a desire to make it more difficult for members of the black minority to serve in positions of responsibility in city government. I deplore that motivation and wish that neither it nor any other irrational prejudice played any part in our political processes. But I do not believe otherwise legitimate political choices can be invalidated simply because an irrational or invidious purpose played some part in the decisionmaking process.

As MR. JUSTICE STEWART points out, Mobile's basic election system is the same as that followed by literally thousands of municipalities and other governmental units throughout the Nation. *Ante*, at 60.[14] The fact that these at-large systems

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ests in making sure that they elect at least one representative would be served by concentrating a larger majority in one district. See *Cousins* v. *City Council of Chicago*, 466 F. 2d, at 855, n. 30 (Stevens, J., dissenting). See also *Wright* v. *Rockefeller*, 376 U. S. 52, where the maintenance of racially separate congressional districts was challenged by one group of blacks and supported by another group having the dominant power in the black-controlled district.

[14] I emphasize this point because in my opinion there is a significant difference between a statewide legislative plan that "happens" to use multimember districts only in those areas where they disadvantage discrete minority groups and the use of a generally acceptable municipal form of government that involves the election of commissioners by the

characteristically place one or more minority groups at a significant disadvantage in the struggle for political power cannot invalidate all such systems. See *Whitcomb* v. *Chavis*, 403 U. S., at 156–160. Nor can it be the law that such systems are valid when there is no evidence that they were instituted or maintained for discriminatory reasons, but that they may be selectively condemned on the basis of the subjective motivation of some of their supporters. A contrary view "would spawn endless litigation concerning the multi-member district systems now widely employed in this country," *id.*, at 157, and would entangle the judiciary in a voracious political thicket.[15]

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voters at large. While it is manifest that there is a substantial neutral justification for a municipality's choice of a commission form of government, it is by no means obvious that an occasional multimember district in a State which typically uses single-member districts can be adequately explained on neutral grounds. Nothing in the Court's opinion in *White* v. *Regester*, 412 U. S. 755, describes any purported neutral explanation for the multimember districts in Bexar and Dallas Counties. In this connection, it should be remembered that *Kilgarlin* v. *Hill*, 386 U. S. 120, did not uphold the constitutionality of a "crazy quilt" of single-member and multimember districts; rather, in that case this Court merely upheld the findings by the District Court that the plaintiffs had failed to prove their allegations that the districting plan constituted such a crazy quilt.

[15] Rejection of Mr. Justice Frankfurter's views in the specific controversy presented by *Baker* v. *Carr*, 369 U. S. 186, does not refute the basic wisdom of his call for judicially manageable standards in this area: "Disregard of inherent limits in the effective exercise of the Court's 'judicial Power' not only presages the futility of judicial intervention in the essentially political conflict of forces by which the relation between population and representation has time out of mind been and now is determined. It may well impair the Court's position as the ultimate organ of 'the supreme Law of the Land' in that vast range of legal problems, often strongly entangled in popular feeling, on which this Court must pronounce. The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements." *Id.*, at 267 (Frankfurter, J., dissenting).

In sum, I believe we must accept the choice to retain Mobile's commission form of government as constitutionally permissible even though that choice may well be the product of mixed motivation, some of which is invidious. For these reasons I concur in the judgment of reversal.

MR. JUSTICE BRENNAN, dissenting.*

I dissent because I agree with MR. JUSTICE MARSHALL that proof of discriminatory impact is sufficient in these cases. I also dissent because, even accepting the plurality's premise that discriminatory purpose must be shown, I agree with MR. JUSTICE MARSHALL and MR. JUSTICE WHITE that the appellees have clearly met that burden.

MR. JUSTICE WHITE, dissenting.

In *White* v. *Regester*, 412 U. S. 755 (1973), this Court unanimously held the use of multimember districts for the election of state legislators in two counties in Texas violated the Equal Protection Clause of the Fourteenth Amendment because, based on a careful assessment of the totality of the circumstances, they were found to exclude Negroes and Mexican-Americans from effective participation in the political processes in the counties. Without questioning the vitality of *White* v. *Regester* and our other decisions dealing with challenges to multimember districts by racial or ethnic groups, the Court today inexplicably rejects a similar holding based on meticulous factual findings and scrupulous application of the principles of these cases by both the District Court and the Court of Appeals. The Court's decision is flatly inconsistent with *White* v. *Regester* and it cannot be understood to flow from our recognition in *Washington* v. *Davis*, 426 U. S. 229 (1976), that the Equal Protection Clause forbids only purposeful discrimination. Both the District Court and the

*[This opinion applies also to No. 78-357, *Williams et al.* v. *Brown et al.*, *post*, p. 236.]

Court of Appeals properly found that an invidious discriminatory purpose could be inferred from the totality of facts in this case. The Court's cryptic rejection of their conclusions ignores the principles that an invidious discriminatory purpose can be inferred from objective factors of the kind relied on in *White* v. *Regester* and that the trial courts are in a special position to make such intensely local appraisals.

I

Prior to our decision in *White* v. *Regester,* we upheld a number of multimember districting schemes against constitutional challenges, but we consistently recognized that such apportionment schemes could constitute invidious discrimination "where the circumstances of a particular case may 'operate to minimize or cancel out the voting strength of racial or political elements of the voting population.'" *Whitcomb* v. *Chavis,* 403 U. S. 124, 143 (1971), quoting from *Fortson* v. *Dorsey,* 379 U. S. 433, 439 (1965); *Burns* v. *Richardson,* 384 U. S. 73, 88 (1966). In *Whitcomb* v. *Chavis, supra,* we noted that the fact that the number of members of a particular group who were legislators was not in proportion to the population of the group did not prove invidious discrimination absent evidence and findings that the members of the group had less opportunity than did other persons "to participate in the political processes and to elect legislators of their choice." 403 U. S., at 149.

Relying on this principle, in *White* v. *Regester* we unanimously upheld a District Court's conclusion that the use of multimember districts in Dallas and Bexar Counties in Texas violated the Equal Protection Clause in the face of findings that they excluded Negroes and Mexican-Americans from effective participation in the political processes. With respect to the exclusion of Negroes in Dallas County, "the District Court first referred to the history of official racial discrimination in Texas, which at times touched the right of Negroes to register and vote and to participate in the democratic

processes." 412 U. S., at 766. The District Court also referred to Texas' majority vote requirement and "place" rule, "neither in themselves improper nor invidious," but which "enhanced the opportunity for racial discrimination" by reducing legislative elections from the multimember district to "a head-to-head contest for each position." *Ibid.* We deemed more fundamental the District Court's findings that only two Negro state representatives had been elected from Dallas County since Reconstruction and that these were the only two Negroes ever slated by an organization that effectively controlled Democratic Party candidate slating. *Id.*, at 766–767. We also noted the District Court's findings that the Democratic Party slating organization was insensitive to the needs and aspirations of the Negro community and that at times it had employed racial campaign tactics to defeat candidates supported by the black community. Based on this evidence, the District Court concluded that the black community generally was "not permitted to enter into the political process in a reliable and meaningful manner." *Id.*, at 767. We held that "[t]hese findings and conclusions are sufficient to sustain the District Court's judgment with respect to the Dallas multimember district and, on this record, we have no reason to disturb them." *Ibid.*

With respect to the exclusion of Mexican-Americans from the political process in Bexar County, the District Court referred to the continuing effects of a long history of invidious discrimination against Mexican-Americans in education, employment, economics, health, politics, and other fields. *Id.*, at 768. The impact of this discrimination, coupled with a cultural and language barrier, made Mexican-American participation in the political life of Bexar County extremely difficult. Only five Mexican-Americans had represented Bexar County in the Texas Legislature since 1880, and the county's legislative delegation "was insufficiently responsive to Mexican-American interests." *Id.*, at 769. "Based on the totality of the circumstances, the District Court evolved its

ultimate assessment of the multimember district, overlaid, as it was, on the cultural and economic realities of the Mexican-American community in Bexar County and its relationship with the rest of the county." *Ibid.* "[F]rom its own special vantage point" the District Court concluded that the multimember district invidiously excluded Mexican-Americans from effective participation in the election of state representatives. We affirmed, noting that we were "not inclined to overturn these findings, representing as they do a blend of history and an intensely local appraisal of the design and impact of the Bexar County multimember district in the light of past and present reality, political and otherwise." *Id.*, at 769–770.

II

In the instant case the District Court and the Court of Appeals faithfully applied the principles of *White* v. *Regester* in assessing whether the maintenance of a system of at-large elections for the selection of Mobile City Commissioners denied Mobile Negroes their Fourteenth and Fifteenth Amendment rights. Scrupulously adhering to our admonition that "[t]he plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question," *id.*, at 766, the District Court conducted a detailed factual inquiry into the openness of the candidate selection process to blacks. The court noted that "Mobile blacks were subjected to massive official and private racial discrimination until the Voting Rights Act of 1965" and that "[t]he pervasive effects of past discrimination still substantially affects black political participation." 423 F. Supp. 384, 387 (SD Ala. 1976). Although the District Court noted that "[s]ince the Voting Rights Act of 1965, blacks register and vote without hindrance," the court found that "local political processes are not equally open" to blacks. Despite the fact that Negroes constitute more than 35% of the population of Mobile, no Negro has ever been elected to the Mobile

City Commission. The plaintiffs introduced extensive evidence of severe racial polarization in voting patterns during the 1960's and 1970's with "white voting for white and black for black if a white is opposed to a black" resulting in the defeat of the black candidate or, if two whites are running, the defeat of the white candidate most identified with blacks. *Id.*, at 388. Regression analyses covering every city commission race in 1965, 1969, and 1973, both the primary and general election of the county commission in 1968 and 1972, selected school board races in 1962, 1966, 1970, 1972, and 1974, city referendums in 1963 and 1973, and a countywide legislative race in 1969 confirmed the existence of severe bloc voting. *Id.*, at 388–389. Nearly every active candidate for public office testified that because of racial polarization "it is highly unlikely that anytime in the foreseeable future, under the at-large system, . . . a black can be elected against a white." *Id.*, at 388. After single-member districts were created in Mobile County for state legislative elections, "three blacks of the present fourteen member Mobile County delegation have been elected." *Id.*, at 389. Based on the foregoing evidence, the District Court found "that the structure of the at-large election of city commissioners combined with strong racial polarization of Mobile's electorate continues to effectively discourage qualified black citizens from seeking office or being elected thereby denying blacks equal access to the slating or candidate selection process." *Ibid.*

The District Court also reviewed extensive evidence that the City Commissioners elected under the at-large system have not been responsive to the needs of the Negro community. The court found that city officials have been unresponsive to the interests of Mobile Negroes in municipal employment, appointments to boards and committees, and the provision of municipal services in part because of "the political fear of a white backlash vote when black citizens' needs are at stake." *Id.*, at 392. The court also found that there is no clear-cut state policy preference for at-large elections and that past dis-

crimination affecting the ability of Negroes to register and to vote "has helped preclude the effective participation of blacks in the election system today." *Id.*, at 393. The adverse impact of the at-large election system on minorities was found to be enhanced by the large size of the citywide election district, the majority vote requirement, the provision that candidates run for positions by place or number, and the lack of any provision for at-large candidates to run from particular geographical subdistricts.

After concluding its extensive findings of fact, the District Court addressed the question of the effect of *Washington* v. *Davis*, 426 U. S. 229 (1976), on the *White* v. *Regester* standards. The court concluded that the requirement that a facially neutral statute involve purposeful discrimination before a violation of the Equal Protection Clause can be established was not inconsistent with *White* v. *Regester* in light of the recognition in *Washington* v. *Davis*, *supra*, at 241–242, that the discriminatory purpose may often be inferred from the totality of the relevant facts, including the discriminatory impact of the statute. 423 F. Supp., at 398. After noting that "whenever a redistricting bill of any type is proposed by a county delegation member, a major concern has centered around how many, if any, blacks would be elected," *id.*, at 397, the District Court concluded that there was "a present purpose to dilute the black vote . . . resulting from intentional state legislative *inaction*. . . ." *Id.*, at 398. Based on an "exhaustive analysis of the evidence in the record," the court held that "[t]he plaintiffs have met the burden cast in *White* and *Whitcomb*," and that "the multi-member at-large election of Mobile City Commissioners . . . results in an unconstitutional dilution of black voting strength." *Id.*, at 402.

The Court of Appeals affirmed the District Court's judgment in one of four consolidated "dilution" cases decided on the same day. *Bolden* v. *Mobile*, 571 F. 2d 238 (CA5 1978); *Nevett* v. *Sides*, 571 F. 2d 209 (CA5 1978) (*Nevett II*); *Blacks United for Lasting Leadership, Inc.* v. *Shreveport*, 571

F. 2d 248 (CA5 1978); *Thomasville Branch of NAACP* v. *Thomas County, Georgia*, 571 F. 2d 257 (CA5 1978). In the lead case of *Nevett II, supra*, the Court of Appeals held that under *Washington* v. *Davis, supra*, and *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252 (1977), "a showing of racially motivated discrimination is a necessary element" for a successful claim of unconstitutional voting dilution under either the Fourteenth or Fifteenth Amendment. 571 F. 2d, at 219. The court concluded that the standards for proving unconstitutional voting dilution outlined in *White* v. *Regester* were consistent with the requirement that purposeful discrimination be shown because they focus on factors that go beyond a simple showing that minorities are not represented in proportion to their numbers in the general population. 571 F. 2d, at 219–220, n. 13, 222–224.

In its decision in the instant case the Court of Appeals reviewed the District Court's findings of fact, found them not to be clearly erroneous and held that they "compel the inference that [Mobile's at-large] system has been maintained with the purpose of diluting the black vote, thus supplying the element of intent necessary to establish a violation of the fourteenth amendment, *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252 . . . (1977); *Washington* v. *Davis*, 426 U. S. 229 . . . (1976), and the fifteenth amendment, *Wright* v. *Rockefeller*, 376 U. S. 52 . . . (1964)." *Id.*, at 245. The court observed that the District Court's "finding that the legislature was acutely conscious of the racial consequences of its districting policies," coupled with the attempt to assign different functions to each of the three City Commissioners "to lock in the at-large feature of the scheme," constituted "direct evidence of the intent behind the maintenance of the at-large plan." *Id.*, at 246. The Court of Appeals concluded that "the district court has properly conducted the 'sensitive inquiry into such circumstantial and direct evidence of intent as may be available' that a court must undertake in '[d]etermining whether invidious dis-

criminatory purpose was a motivating factor' in the maintenance or enactment of a districting plan." *Ibid.*, quoting *Arlington Heights* v. *Metropolitan Housing Dev. Corp., supra,* at 266.

III

A plurality of the Court today agrees with the courts below that maintenance of Mobile's at-large system for election of City Commissioners violates the Fourteenth and Fifteenth Amendments only if it is motivated by a racially discriminatory purpose. The plurality also apparently reaffirms the vitality of *White* v. *Regester* and *Whitcomb* v. *Chavis,* which established the standards for determining whether at-large election systems are unconstitutionally discriminatory. The plurality nonetheless casts aside the meticulous application of the principles of these cases by both the District Court and the Court of Appeals by concluding that the evidence they relied upon "fell far short of showing" purposeful discrimination.

The plurality erroneously suggests that the District Court erred by considering the factors articulated by the Court of Appeals in *Zimmer* v. *McKeithen,* 485 F. 2d 1297 (CA5 1973), to determine whether purposeful discrimination has been shown. This remarkable suggestion ignores the facts that *Zimmer* articulated the very factors deemed relevant by *White* v. *Regester* and *Whitcomb* v. *Chavis*—a lack of minority access to the candidate selection process, unresponsiveness of elected officials to minority interests, a history of discrimination, majority vote requirements, provisions that candidates run for positions by place or number, the lack of any provision for at-large candidates to run from particular geographical subdistricts—and that both the District Court and the Court of Appeals considered these factors with the recognition that they are relevant only with respect to the question whether purposeful discrimination can be inferred.

Although the plurality does acknowledge that "the presence of the indicia relied on in *Zimmer* may afford some evidence

of a discriminatory purpose," it concludes that the evidence relied upon by the court below was "most assuredly insufficient to prove an unconstitutionally discriminatory purpose in the present case." The plurality apparently bases this conclusion on the fact that there are no official obstacles barring Negroes from registering, voting, and running for office coupled with its conclusion that none of the factors relied upon by the courts below would alone be sufficient to support an inference of purposeful discrimination. The absence of official obstacles to registration, voting, and running for office heretofore has never been deemed to insulate an electoral system from attack under the Fourteenth and Fifteenth Amendments. In *White* v. *Regester,* 412 U. S. 755 (1973), there was no evidence that Negroes faced official obstacles to registration, voting, and running for office, yet we upheld a finding that they had been excluded from effective participation in the political process in violation of the Equal Protection Clause because a multimember districting scheme, in the context of racial voting at the polls, was being used invidiously to prevent Negroes from being elected to public office. In *Gomillion* v. *Lightfoot,* 364 U. S. 339 (1960), and *Terry* v. *Adams,* 345 U. S. 461 (1953), we invalidated electoral systems under the Fifteenth Amendment not because they erected official obstacles in the path of Negroes registering, voting, or running for office, but because they were used effectively to deprive the Negro vote of any value. Thus, even though Mobile's Negro community may register and vote without hindrance, the system of at-large election of City Commissioners may violate the Fourteenth and Fifteenth Amendments if it is used purposefully to exclude Negroes from the political process.

In conducting "an intensely local appraisal of the design and impact" of the at-large election scheme, *White* v. *Regester, supra,* at 769, the District Court's decision was fully consistent with our recognition in *Washington* v. *Davis,* 426 U. S., at 242, that "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts,

including the fact, if it is true, that the law bears more heavily on one race than another." Although the totality of the facts relied upon by the District Court to support its inference of purposeful discrimination is even more compelling than that present in *White* v. *Regester,* the plurality today rejects the inference of purposeful discrimination apparently because each of the factors relied upon by the courts below is alone insufficient to support the inference. The plurality states that the "fact [that Negro candidates have been defeated] alone does not work a constitutional deprivation," that evidence of the unresponsiveness of elected officials "is relevant only as the most tenuous and circumstantial evidence," that "the substantial history of official racial discrimination . . . [is] of limited help," and that the features of the electoral system that enhance the disadvantages faced by a voting minority "are far from proof that the at-large electoral scheme represents purposeful discrimination." By viewing each of the factors relied upon below in isolation, and ignoring the fact that racial bloc voting at the polls makes it impossible to elect a black commissioner under the at-large system, the plurality rejects the "totality of the circumstances" approach we endorsed in *White* v. *Regester, supra,* at 766–770, *Washington* v. *Davis, supra,* at 241–242, and *Arlington Heights* v. *Metropolitan Housing Dev. Corp.,* 429 U. S., at 266, and leaves the courts below adrift on uncharted seas with respect to how to proceed on remand.

Because I believe that the findings of the District Court amply support an inference of purposeful discrimination in violation of the Fourteenth and Fifteenth Amendments, I respectfully dissent.

MR. JUSTICE MARSHALL, dissenting.*

The American ideal of political equality, conceived in the earliest days of our colonial existence and fostered by the

*[This opinion applies also to No. 78–357, *Williams et al.* v. *Brown et al., post,* p. 236.]

egalitarian language of the Declaration of Independence, could not forever tolerate the limitation of the right to vote to white propertied males. Our Constitution has been amended six times in the movement toward a democracy for more than the few,[1] and this Court has interpreted the Fourteenth Amendment to provide that "a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction," *Dunn* v. *Blumstein*, 405 U. S. 330, 336 (1972). The Court's decision today is in a different spirit. Indeed, a plurality of the Court concludes that, in the absence of proof of intentional discrimination by the State, the right to vote provides the politically powerless with nothing more than the right to cast meaningless ballots.

The District Court in both of these cases found that the challenged multimember districting schemes unconstitutionally diluted the Negro vote. These factual findings were upheld by the Court of Appeals, and the plurality does not question them. Instead, the plurality concludes that districting schemes do not violate the Equal Protection Clause unless it is proved that they were enacted or maintained for the purpose of minimizing or canceling out the voting potential of a racial minority. The plurality would require plaintiffs in vote-dilution cases to meet the stringent burden of establishing discriminatory intent within the meaning of *Washington* v. *Davis*, 426 U. S. 229 (1976); *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252 (1977); and *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256 (1979). In my view, our vote-dilution decisions require only a showing of discriminatory impact to justify the invalidation of a multimember districting scheme, and, because they are premised on the fundamental interest in voting protected by the Fourteenth Amendment, the discriminatory-impact standard adopted by them is unaffected by *Washington* v. *Davis*, *supra*, and its progeny. Furthermore, an intent re-

[1] U. S. Const., Amdts. 15, 17, 19, 23, 24, 26.

quirement is inconsistent with the protection against denial or abridgment of the vote on account of race embodied in the Fifteenth Amendment and in § 2 of the Voting Rights Act of 1965, 79 Stat. 437, as amended, 42 U. S. C. § 1973.[2] Even if, however, proof of discriminatory intent were necessary to support a vote-dilution claim, I would impose upon the plaintiffs a standard of proof less rigid than that provided by *Personnel Administrator of Mass.* v. *Feeney, supra.*

I

The Court does not dispute the proposition that multimember districting can have the effect of submerging electoral minorities and overrepresenting electoral majorities.[3] It is

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[2] I agree with the plurality, see *ante*, at 60–61, that the prohibition on denial or infringement of the right to vote contained in § 2 of the Voting Rights Act, 42 U. S. C. § 1973, contains the same standard as the Fifteenth Amendment. I disagree with the plurality's construction of that Amendment, however. See Part II, *infra*.

[3] The Court does not quarrel with the generalization that in many instances an electoral minority will fare worse under multimember districting than under single-member districting. Multimember districting greatly enhances the opportunity of the majority political faction to elect all representatives of the district. In contrast, if the multimember district is divided into several single-member districts, an electoral minority will have a better chance to elect a candidate of its choice, or at least to exert greater political influence. It is obvious that the greater the degree to which the electoral minority is homogeneous and insular and the greater the degree that bloc voting occurs along majority-minority lines, the greater will be the extent to which the minority's voting power is diluted by multimember districting. See E. Banfield & J. Wilson, City Politics 91–96, 303–308 (1963); R. Dixon, Jr., Democratic Representation 12, 476–484, 503–527 (1968); Bonapfel, Minority Challenges to At-Large Elections: The Dilution Problem, 10 Ga. L. Rev. 353, 358–360 (1976); Derfner, Racial Discrimination and the Right to Vote, 26 Vand. L. Rev. 523, 553–555 (1973); Comment, Effective Representation and Multimember Districts, 68 Mich. L. Rev. 1577, 1577–1579 (1970). Recent empirical studies have documented the validity of this generalization. See Berry & Dye, The Discriminatory Effects of At-Large Elections, 7 Fla. St. U. L. Rev. 85, 113–122 (1979); Jones, The Impact of Local Election Systems on Black

for this reason that we developed a strong preference for single-member districting in court-ordered reapportionment plans. See *ante*, at 66, n. 12. Furthermore, and more important for present purposes, we decided a series of vote-dilution cases under the Fourteenth Amendment that were designed to protect electoral minorities from precisely the combination of electoral laws and historical and social factors found in the present cases.[4] In my view, the plurality's treatment of

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Political Representation, 11 Urb. Aff. Q. 345 (1976); Karnig, Black Resources and City Council Representation, 41 J. Pol. 134 (1979); Karnig, Black Representation on City Councils: The Impact of District Elections and Socioeconomic Factors, 12 Urb. Aff. Q. 223 (1976); Sloan, "Good Government" and the Politics of Race, 17 Soc. Prob. 161 (1969); The Impact of Municipal Reformism: A Symposium, 59 Soc. Sci. Q. 117 (1978).

The electoral schemes in these cases involve majority-vote, numbered-post, and staggered-term requirements. See *Bolden* v. *City of Mobile*, 423 F. Supp. 384, 386–387 (SD Ala. 1976); *Brown* v. *Moore*, 428 F. Supp. 1123, 1126–1127 (SD Ala. 1976). These electoral rules exacerbate the vote-dilutive effects of multimember districting. A requirement that a candidate must win by a majority of the vote forces a minority candidate who wins a plurality of votes in the general election to engage in a runoff election with his nearest competitor. If the competitor is a member of the dominant political faction, the minority candidate stands little chance of winning in the second election. A requirement that each candidate must run for a particular "place" or "post" creates head-to-head contests that minority candidates cannot survive. When a number of positions on a governmental body are to be chosen in the same election, members of a minority will increase the likelihood of election of a favorite candidate by voting only for him. If the remainder of the electorate splits its votes among the other candidates, the minority's candidate might well be elected by the minority's "single-shot voting." If the terms of the officeholders are staggered, the opportunity for single-shot voting is decreased. See *City of Rome* v. *United States*, *post*, p. 156; *Zimmer* v. *McKeithen*, 485 F. 2d 1297, 1305 (CA5 1973) (en banc), aff'd on other grounds *sub nom. East Carroll Parish School Bd. v. Marshall*, 424 U. S. 636 (1976) (*per curiam*); Bonapfel, *supra;* Derfner, *supra*.

[4] The plurality notes that at-large elections were instituted in cities as a reform measure to correct corruption and inefficiency in municipal government, and suggests that it "may be a rash assumption" to apply vote-dilu-

these cases is fanciful. Although we have held that multi-member districts are not unconstitutional *per se*, see *ante*, at 66, there is simply no basis for the plurality's conclusion that

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tion concepts to a municipal government elected in that fashion. See *ante*, at 70, and n. 15. To the contrary, local governments are not exempt from the constitutional requirement to adopt representational districting ensuring that the votes of each citizen will have equal weight. *Avery* v. *Midland County*, 390 U. S. 474 (1968). Indeed, in *Beer* v. *United States*, 425 U. S. 130, 142, n. 14 (1976), and *Abate* v. *Mundt*, 403 U. S. 182, 184, n. 2 (1971), we assumed that our vote-dilution doctrine applied to local governments.

Furthermore, though municipalities must be accorded some discretion in arranging their affairs, see *Abate* v. *Mundt*, *supra*, there is all the more reason to scrutinize assertions that municipal, rather than state, multi-member districting dilutes the vote of an electoral minority:

"In statewide elections, it is possible that a large minority group in one multi-member district will be unable to elect any legislators, while in another multi-member district where the same group is a slight majority, they will elect the entire slate of legislators. Thus, the multi-member electoral system may hinder a group in one district but prove an advantage in another. In at-large elections in cities this is not possible. There is no way to balance out the discrimination against a particular minority group because the entire city is one huge election district. The minority's loss is absolute." Berry & Dye, *supra* n. 3, at 87.

That at-large elections were instituted as part of a "reform" movement in no way ameliorates these harsh effects. Moreover, in some instances the efficiency and breadth of perspective supposedly resulting from a reform structure of municipal government are achieved at a high cost. In a white-majority city in which severe racial bloc voting is common, the citywide view allegedly inculcated in city commissioners by at-large elections need not extend beyond the white community, and the efficiency of the commission form of government can be achieved simply by ignoring the concerns of the powerless minority.

It would be a mistake, then, to conclude that municipal at-large elections provide an inherently superior representational scheme. See also n. 3, *supra*; *Chapman* v. *Meier*, 372 F. Supp. 371, 388–392 (ND 1974) (three-judge court) (Bright, J., dissenting), rev'd, 420 U. S. 1 (1975). It goes without saying that a municipality has the freedom to design its own governance system. When that system is subjected to constitutional attack, however, the question is whether it was enacted or maintained with

under our prior cases proof of discriminatory intent is a necessary condition for the invalidation of multimember districting.

A

In *Fortson* v. *Dorsey*, 379 U. S. 433 (1965), the first vote-dilution case to reach this Court, we stated explicitly that such a claim could rest on either discriminatory purpose or effect:

> "It might well be that, *designedly or otherwise*, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would *operate* to minimize or cancel out the voting strength of racial or political elements of the voting population." *Id.*, at 439 (emphasis added).

We reiterated these words in *Burns* v. *Richardson*, 384 U. S. 73 (1966), interpreted them as the correct test to apply to vote-dilution claims, and described the standard as one involving "invidious effect," *id.*, at 88. We then held that the plaintiffs had failed to meet their burden of proof:

> "[T]he demonstration that a particular multi-member scheme *effects an invidious result* must appear from evidence in the record. . . . That demonstration was not made here. In relying on conjecture as to the effects of multi-member districting rather than demonstrated fact, the court acted in a manner more appropriate to the body responsible for drawing up the districting plan. Speculations do not supply evidence that the multi-member districting *was designed to have or had* the invidious effect necessary to a judgment of the unconstitutionality of the districting." *Id.*, at 88–89 (emphasis added) (footnote omitted).

It could not be plainer that the Court in *Burns* considered

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a discriminatory purpose or has a discriminatory effect, not whether it comports with one or another of the competing notions about "good government."

discriminatory effect a sufficient condition for invalidating a multimember districting plan.

In *Whitcomb* v. *Chavis*, 403 U. S. 124 (1971), we again repeated and applied the *Fortson* standard, 403 U. S., at 143, 144, but determined that the Negro community's lack of success at the polls was the result of partisan politics, not racial vote dilution. *Id.*, at 150–155. The Court stressed that both the Democratic and Republican Parties had nominated Negroes, and several had been elected. Negro candidates lost only when their entire party slate went down to defeat. *Id.*, at 150, nn. 29–30, 152–153. In addition, the Court was impressed that there was no finding that officials had been unresponsive to Negro concerns. *Id.*, at 152, n. 32, 155.[5]

More recently, in *White* v. *Regester*, 412 U. S. 755 (1973), we invalidated the challenged multimember districting plans because their characteristics, when combined with historical and social factors, had the discriminatory effect of denying

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[5] As the plurality notes, see *ante*, at 66, we indicated in *Whitcomb* v. *Chavis*, 403 U. S., at 149, that multimember districts were unconstitutional if they were "conceived or operated as purposeful devices to further racial or economic discrimination." The Court in *Whitcomb* did not, however, suggest that discriminatory purpose was a necessary condition for the invalidation of multimember districting. Our decision in *Whitcomb*, *id.*, at 143, acknowledged the continuing validity of the discriminatory-impact test adopted in *Fortson* v. *Dorsey*, 379 U. S. 433, 439 (1965), and restated it as requiring plaintiffs to prove that "multi-member districts unconstitutionally *operate* to dilute or cancel the voting strength of racial or political elements." *Whitcomb* v. *Chavis*, *supra*, at 144 (emphasis added).

Abate v. *Mundt*, 403 U. S. 182 (1971), decided the same day as *Whitcomb*, provides further evidence that *Whitcomb* did not alter the discriminatory-effects standard developed in earlier cases. In *Abate*, *supra*, at 184, n. 2, we rejected the argument that a multimember districting scheme had a vote-dilutive effect because "[p]etitioners . . . have not shown that these multi-member districts, by themselves, operate to impair the voting strength of particular racial or political elements . . . , see *Burns* v. *Richardson*, 384 U. S. 73, 88 (1966)."

the plaintiff Negroes and Mexican-Americans equal access to the political process. *Id.*, at 765–770. We stated that

> "it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." *Id.*, at 765–766.

We held that the three-judge District Court had properly applied this standard in invalidating the multimember districting schemes in the Texas counties of Dallas and Bexar. The District Court had determined that the characteristics of the challenged electoral systems—multimember districts, a majority-vote requirement for nomination in a primary election, and a rule mandating that a candidate running for a position in a multimember district must run for a specified "place" on the ticket—though "neither in themselves improper nor invidious," reduced the electoral influence of Negroes and Mexican-Americans. *Id.*, at 766.[6] The District Court identified a number of social and historical factors that, when combined with the Texas electoral structure, resulted in vote dilution: (1) a history of official racial discrimination in Texas, including discrimination inhibiting the registration, casting of ballots, and political participation of Negroes; (2) proof that minorities were still suffering the effects of past discrimination; (3) a history of gross underrepresentation of minority interests; (4) proof of official insensitivity to the needs of minority citizens, whose votes were not needed by those in power; (5) the recent use of racial campaign tactics; and (6) a cultural and language barrier inhibiting the participation of

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[6] See n. 3, *supra*.

Mexican-Americans. *Id.*, at 766–770. Based "on the totality of the circumstances," we affirmed the District Court's conclusion that the use of multimember districts excluded the plaintiffs "from effective participation in political life." *Id.*, at 769.[7]

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[7] *White* v. *Regester*, 412 U. S. 755 (1973), makes clear the distinction between the concepts of vote dilution and proportional representation. We have held that, in order to prove an allegation of vote dilution, the plaintiffs must show more than simply that they have been unable to elect candidates of their choice. See *id.*, at 765–766; *Whitcomb* v. *Chavis*, *supra*, at 149–150, 153. The Constitution, therefore, does not contain any requirement of proportional representation. Cf. *United Jewish Organizations* v. *Carey*, 430 U. S. 144 (1977); *Gaffney* v. *Cummings*, 412 U. S. 735 (1973). When all that is proved is mere lack of success at the polls, the Court will not presume that members of a political minority have suffered an impermissible dilution of political power. Rather, it is assumed that these persons have means available to them through which they can have some effect on governmental decisionmaking. For example, many of these persons might belong to a variety of other political, social, and economic groups that have some impact on officials. In the absence of evidence to the contrary, it may be assumed that officials will not be improperly influenced by such factors as the race or place of residence of persons seeking governmental action. Furthermore, political factions out of office often serve as watchdogs on the performance of the government, bind together into coalitions having enhanced influence, and have the respectability necessary to affect public policy.

Unconstitutional vote dilution occurs only when a discrete political minority whose voting strength is diminished by a districting scheme proves that historical and social factors render it largely incapable of effectively utilizing alternative avenues of influencing public policy. See n. 19, *infra*. In these circumstances, the only means of breaking down the barriers encasing the political arena is to structure the electoral districting so that the minority has a fair opportunity to elect candidates of its choice.

The test for unconstitutional vote dilution, then, looks only to the discriminatory effects of the combination of an electoral structure and historical and social factors. At the same time, it requires electoral minorities to prove far more than mere lack of success at the polls.

We have also spoken of dilution of voting power in cases arising under the Voting Rights Act of 1965, 42 U. S. C. § 1971 *et seq.* Under § 5 of

It is apparent that a showing of discriminatory intent in the creation or maintenance of multimember districts is as unnecessary after *White* as it was under our earlier vote-dilution decisions. Under this line of cases, an electoral districting plan is invalid if it has the effect of affording an electoral minority "less opportunity than . . . other residents in the district to participate in the political processes and to elect legislators of their choice," *id.*, at 766. It is also apparent that the Court in *White* considered equal access to the political process as meaning more than merely allowing the minority the opportunity to vote. *White* stands for the proposition that an electoral system may not relegate an electoral minority to political impotence by diminishing the importance of its vote. The plurality's approach requiring proof of discriminatory purpose in the present cases is, then, squarely contrary to *White* and its predecessors.[8]

B

The plurality fails to apply the discriminatory-effect standard of *White* v. *Regester* because that approach conflicts with what the plurality takes to be an elementary principle of law. "[O]nly if there is purposeful discrimination," announces the

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that Act, 42 U. S. C. § 1973c, a state or local government covered by the Act may not enact new electoral procedures having the purpose or effect of denying or abridging the right to vote on account of race or color. We have interpreted this provision as prohibiting *any* retrogression in Negro voting power. *Beer* v. *United States*, 425 U. S. 130, 141 (1976). In some cases, we have labeled such retrogression a "dilution" of the minority vote. See, *e. g.*, *City of Rome* v. *United States*, *post*, p. 156. Vote dilution under § 5, then, involves a standard different from that applied in cases such as *White* v. *Regester*, *supra*, in which diminution of the vote violating the Fourteenth or Fifteenth Amendment is alleged.

[8] The plurality's approach is also inconsistent with our statement in *Dallas County* v. *Reese*, 421 U. S. 477, 480 (1975) (*per curiam*), that multimember districting violates the Equal Protection Clause if it "in fact operates impermissibly to dilute the voting strength of an identifiable element of the voting population." See also *Chapman* v. *Meier*, 420 U. S., at 17.

plurality, "can there be a violation of the Equal Protection Clause of the Fourteenth Amendment." *Ante*, at 66. That proposition is plainly overbroad. It fails to distinguish between two distinct lines of equal protection decisions: those involving suspect classifications, and those involving fundamental rights.

We have long recognized that under the Equal Protection Clause classifications based on race are "constitutionally suspect," *Bolling* v. *Sharpe*, 347 U. S. 497, 499 (1954), and are subject to the "most rigid scrutiny," *Korematsu* v. *United States*, 323 U. S. 214, 216 (1944), regardless of whether they infringe on an independently protected constitutional right. Cf. *University of California Regents* v. *Bakke*, 438 U. S. 265 (1978). Under *Washington* v. *Davis*, 426 U. S. 229 (1976), a showing of discriminatory purpose is necessary to impose strict scrutiny on facially neutral classifications having a racially discriminatory impact. Perhaps because the plaintiffs in the present cases are Negro, the plurality assumes that their vote-dilution claims are premised on the suspect-classification branch of our equal protection cases, and that under *Washington* v. *Davis, supra*, they are required to prove discriminatory intent. That assumption fails to recognize that our vote-dilution decisions are rooted in a different strand of equal protection jurisprudence.

Under the Equal Protection Clause, if a classification "impinges upon a fundamental right explicitly or implicitly protected by the Constitution, . . . strict judicial scrutiny" is required, *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1, 17 (1973), regardless of whether the infringement was intentional.[9] As I will explain, our cases

[9] See *Shapiro* v. *Thompson*, 394 U. S. 618 (1969) (right to travel); *Reynolds* v. *Sims*, 377 U. S. 533 (1964) (right to vote); *Douglas* v. *California*, 372 U. S. 353 (1963); and *Griffin* v. *Illinois*, 351 U. S. 12 (1956) (right to fair access to criminal process). Under the rubric of the fundamental right of privacy, we have recognized that individuals have freedom from unjustified governmental interference with personal decisions involv-

recognize a fundamental right to equal electoral participation that encompasses protection against vote dilution. Proof of discriminatory purpose is, therefore, not required to support a claim of vote dilution.[10] The plurality's erroneous conclusion to the contrary is the result of a failure to recognize the central distinction between *White* v. *Regester*, 412 U. S. 755 (1973), and *Washington* v. *Davis, supra:* the former involved an infringement of a constitutionally protected right, while the latter dealt with a claim of racially discriminatory distribution of an interest to which no citizen has a constitutional entitlement.[11]

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ing marriage, *Zablocki* v. *Redhail*, 434 U. S. 374 (1978); *Loving* v. *Virginia*, 388 U. S. 1 (1967); procreation, *Skinner* v. *Okahoma ex rel. Williamson*, 316 U. S. 535 (1942); contraception, *Carey* v. *Population Services International*, 431 U. S. 678 (1977); *Eisenstadt* v. *Baird*, 405 U. S. 438 (1972); *Griswold* v. *Connecticut*, 381 U. S. 479 (1965); abortion, *Roe* v. *Wade*, 410 U. S. 113 (1973); family relationships, *Prince* v. *Massachusetts*, 321 U. S. 158 (1944); and child rearing and education, *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925); *Meyer* v. *Nebraska*, 262 U. S. 390 (1923). See also *Moore* v. *East Cleveland*, 431 U. S. 494 (1977).

[10] As the present cases illustrate, a requirement of proof of discriminatory intent seriously jeopardizes the free exercise of the fundamental right to vote. Although the right to vote is indistinguishable for present purposes from the other fundamental rights our cases have recognized, see n. 9, *supra*, surely the plurality would not require proof of discriminatory purpose in those cases. The plurality fails to articulate why the right to vote should receive such singular treatment. Furthermore, the plurality refuses to recognize the disutility of requiring proof of discriminatory purpose in fundamental rights cases. For example, it would make no sense to require such a showing when the question is whether a state statute regulating abortion violates the right of personal choice recognized in *Roe* v. *Wade*, *supra*. The only logical inquiry is whether, regardless of the legislature's motive, the statute has the effect of infringing that right. See, *e. g.*, *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S. 52 (1976).

[11] Judge Wisdom of the Court of Appeals below recognized this distinction in a companion case, see *Nevett* v. *Sides*, 571 F. 2d 209, 231–234 (CA5 1978) (specially concurring opinion). See also Comment, Proof of

Nearly a century ago, the Court recognized the elementary proposition upon which our structure of civil rights is based: "[T]he political franchise of voting is . . . a fundamental political right, because preservative of all rights." *Yick Wo* v. *Hopkins,* 118 U. S. 356, 370 (1886). We reiterated that theme in our landmark decision in *Reynolds* v. *Sims,* 377 U. S. 533, 561–562 (1964), and stated that, because "the right of suffrage is a fundamental matter in a free and democratic society[,] . . . any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Ibid.* We realized that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Id.,* at 555. Accordingly, we recognized that the Equal Protection Clause protects "[t]he right of a citizen to equal representation and to have his vote weighted equally with those of all other citizens." *Id.,* at 576. See also *Wes-*

Racially Discriminatory Purpose Under the Equal Protection Clause: *Washington* v. *Davis, Arlington Heights, Mt. Healthy,* and *Williamsburgh,* 12 Harv. Civ. Rights-Civ. Lib. L. Rev. 725, 758, n. 175 (1977); Note, Racial Vote Dilution in Multimember Districts: The Constitutional Standard After *Washington* v. *Davis,* 76 Mich. L. Rev. 694, 722–726 (1978); Comment, Constitutional Challenges to Gerrymanders, 45 U. Chi. L. Rev. 845, 869–877 (1978).

Washington v. *Davis,* 426 U. S. 229 (1976), involved alleged racial discrimination in public employment. By describing interests such as public employment as constitutional gratuities, I do not, of course, mean to suggest that their deprivation is immune from constitutional scrutiny. Indeed, our decisions have referred to the importance of employment, see *Hampton* v. *Mow Sun Wong,* 426 U. S. 88, 116 (1976); *Meyer* v. *Nebraska, supra,* at 399; *Truax* v. *Raich,* 239 U. S. 33, 41 (1915), and we have explicitly recognized that in some circumstances public employment falls within the categories of liberty and property protected by the Fifth and Fourteenth Amendments, see, *e. g., Arnett* v. *Kennedy,* 416 U. S. 134 (1974); *Perry* v. *Sindermann,* 408 U. S. 593 (1972). The Court has not held, however, that a citizen has a constitutional right to public employment.

berry v. *Sanders*, 376 U. S. 1, 17 (1964); *Gray* v. *Sanders*, 372 U. S. 368, 379–380 (1963).[12]

Reynolds v. *Sims* and its progeny[13] focused solely on the discriminatory *effects* of malapportionment. They recognize that, when population figures for the representational districts of a legislature are not similar, the votes of citizens in larger districts do not carry as much weight in the legislature as do votes cast by citizens in smaller districts. The equal protection problem attacked by the "one person, one vote" principle is, then, one of vote dilution: under *Reynolds*, each citizen must have an "equally effective voice" in the election of representatives. *Reynolds* v. *Sims*, *supra*, at 565. In the present cases, the alleged vote dilution, though caused by the combined effects of the electoral structure and social and historical factors rather than by unequal population distribution, is analytically the same concept: the unjustified abridgment of a fundamental right.[14] It follows, then, that a showing of dis-

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[12] We have not, however, held that the Fourteenth Amendment contains an absolute right to vote. As we explained in *Dunn* v. *Blumstein*, 405 U. S. 330 (1972):

"In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction. [Citing cases.] This 'equal right to vote' . . . is not absolute; the States have the power to impose voter qualifications, and to regulate access to the franchise in other ways. . . . But, as a general matter, 'before that right [to vote] can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny.'" *Id.*, at 336 (quoting *Evans* v. *Cornman*, 398 U. S. 419, 426, 422 (1970)).

[13] *Avery* v. *Midland County*, 390 U. S. 474 (1968), applied the equal-representation standard of *Reynolds* v. *Sims* to local governments. See also, *e. g.*, *Connor* v. *Finch*, 431 U. S. 407 (1977); *Lockport* v. *Citizens for Community Action*, 430 U. S. 259 (1977); *Hadley* v. *Junior College Dist.*, 397 U. S. 50 (1970).

[14] In attempting to limit *Reynolds* v. *Sims* to its facts, see *ante*, at 77–79, the plurality confuses the nature of the constitutional right recognized in that decision with the means by which that right can be violated. *Reynolds* held that under the Equal Protection Clause each citizen must

criminatory intent is just as unnecessary under the vote-dilution approach adopted in *Fortson* v. *Dorsey*, 379 U. S. 433 (1965), and applied in *White* v. *Regester*, *supra*, as it is under our reapportionment cases.[15]

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be accorded an essentially equal voice in the election of representatives. The Court determined that unequal population distribution in a multi-district representational scheme was one readily ascertainable means by which this right was abridged. The Court certainly did not suggest, however, that violations of the right to effective political participation mattered only if they were caused by malapportionment. The plurality's assertion to the contrary in this case apparently would require it to read *Reynolds* as recognizing fair apportionment as an end in itself, rather than as simply a means to protect against vote dilution.

[15] Proof of discriminatory purpose has been equally unnecessary in our decisions assessing whether various impediments to electoral participation are inconsistent with the fundamental interest in voting. In the seminal case, *Harper* v. *Virginia Bd. of Elections*, 383 U. S. 663 (1966), we invalidated a $1.50 poll tax imposed as a precondition to voting. Relying on our decision two years earlier in *Reynolds* v. *Sims*, see *Harper*, *supra*, at 667–668, 670, we determined that "the right to vote is too precious, too fundamental to be so burdened or conditioned," 383 U. S., at 670. We analyzed the right to vote under the familiar standard that "where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined." *Ibid.* In accord with *Harper*, we have applied heightened scrutiny in assessing the imposition of filing fees, *e. g.*, *Lubin* v. *Panish*, 415 U. S. 709 (1974); limitations on who may participate in elections involving specialized governmental entities, *e. g.*, *Kramer* v. *Union School District*, 395 U. S. 621 (1969); durational residency requirements, *e. g.*, *Dunn* v. *Blumstein*, *supra;* enrollment time limitations for voting in party primary elections, *e. g.*, *Kusper* v. *Pontikes*, 414 U. S. 51 (1973); and restrictions on candidate access to the ballot, *e. g.*, *Illinois Elections Bd.* v. *Socialist Workers Party*, 440 U. S. 173 (1979).

To be sure, we have approved some limitations on the right to vote. Compare, *e. g.*, *Salyer Land Co.* v. *Tulare Water District*, 410 U. S. 719 (1973), with *Kramer* v. *Union School District*, *supra*. We have never, however, required a showing of discriminatory purpose to support a claim of infringement of this fundamental interest. To the contrary, the Court

Indeed, our vote-dilution cases have explicitly acknowledged that they are premised on the infringement of a fundamental right, not on the Equal Protection Clause's prohibition of racial discrimination. Our first vote-dilution decision, *Fortson* v. *Dorsey, supra,* involved a 1962 Georgia reapportionment statute that allocated the 54 seats of the Georgia Senate among the State's 159 counties. Thirty-three of the senatorial districts were made up of from one to eight counties each, and were single-member districts. The remaining 21 districts were allotted among the 7 most populous counties, with each county containing at least 2 districts and electing all of its senators by countywide vote. The plaintiffs, who were registered voters residing in two of the multidistrict counties,[16] argued that the apportionment plan on its face violated the Equal Protection Clause because countywide voting in the seven multidistrict counties denied their residents a vote equal to that of voters residing in single-member con-

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has accepted at face value the purposes articulated for a qualification of this right, and has invalidated such a limitation under the Equal Protection Clause only if its purpose either lacked sufficient substantiality when compared to the individual interests affected or could have been achieved by less restrictive means. See, *e. g., Dunn* v. *Blumstein,* 405 U. S., at 335, 337, 343–360.

The approach adopted in this line of cases has been synthesized with the one person, one vote doctrine of *Reynolds* v. *Sims* in the following fashion: "It has been established in recent years that the Equal Protection Clause confers the substantive right to participate on an equal basis with other qualified voters whenever the State has adopted an electoral process for determining who will represent any segment of the State's population." *San Antonio Independent School Dist.* v. *Rodriguez,* 411 U. S. 1, 59, n. 2 (1973) (STEWART, J., concurring) (citing *Reynolds* v. *Sims, supra; Kramer* v. *Union School District, supra; Dunn* v. *Blumstein, supra*). It is plain that this standard requires no showing of discriminatory purpose to trigger strict scrutiny of state interference with the right to vote.

[16] See *Dorsey* v. *Fortson,* 228 F. Supp. 259, 261 (ND Ga. 1964) (three-judge court), rev'd, 379 U. S. 433 (1965).

stituencies.[17] We were unconvinced that the plan operated to dilute any Georgian's vote, and therefore upheld the facial validity of the scheme. We cautioned, however, that the Equal Protection Clause would not tolerate a multimember districting plan that "designedly or otherwise, . . . operate[d] to minimize or cancel out the voting strength of racial or *political* elements of the voting population." 379 U. S., at 439 (emphasis added).

The approach to vote dilution adopted in *Fortson* plainly consisted of a fundamental-rights analysis. If the Court had believed that the equal protection problem with alleged vote dilution was one of racial discrimination and not abridgment of the right to vote, it would not have accorded standing to the plaintiffs, who were simply registered voters of Georgia alleging that the state apportionment plan, as a theoretical matter, diluted their voting strength because of where they lived. To the contrary, we did not question their standing, and held against them solely because we found unpersuasive their claim on the merits. The Court did not reach this result by inadvertence; rather, we explicitly recognized that we had adopted a fundamental-rights approach when we stated that the Equal Protection Clause protected the voting strength of political as well as racial groups.

Until today, this Court had never deviated from this principle. We reiterated that our vote-dilution doctrine protects political groups in addition to racial groups in *Burns* v. *Richardson*, 384 U. S., at 88, where we allowed a general class of qualified voters to assert such a vote-dilution claim. In *Whitcomb* v. *Chavis*, 403 U. S. 124 (1971), we again explicitly recognized that political groups could raise such claims, *id.*, at 143, 144. In *White* v. *Regester*, 412 U. S. 755 (1973),

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[17] Specifically, the plaintiffs contended that countywide voting in the multidistrict counties could, as a matter of mathematics, result in the nullification of the unanimous choice of the voters of one district. *Fortson* v. *Dorsey*, 379 U. S., at 436–437.

the plaintiffs were Negroes and Mexican-Americans, and accordingly the Court had no reason to discuss whether non-minority plaintiffs could assert claims of vote dilution.[18] In a companion case to *White*, however, we again recognized that "political elements" were protected against vote dilution. *Gaffney* v. *Cummings*, 412 U. S. 735, 751 (1973). Two years later, in *Dallas County* v. *Reese*, 421 U. S. 477 (1975) (*per curiam*), we accorded standing to urban dwellers alleging vote dilution as to the election of the county commission and stated that multimember districting is unconstitutional if it "in fact operates impermissibly to dilute the voting strength of an *identifiable element* of the voting population." *Id.*, at 480 (emphasis added). And in *United Jewish Organizations* v. *Carey*, 430 U. S. 144 (1977), the plurality opinion of MR. JUSTICE WHITE stated that districting plans were subject to attack if they diluted the vote of "*racial or political groups*." *Id.*, at 167 (emphasis in original).[19]

Our vote-dilution decisions, then, involve the fundamental-interest branch, rather than the antidiscrimination branch, of our jurisprudence under the Equal Protection Clause. They recognize a substantive constitutional right to participate on an equal basis in the electoral process that cannot be denied or diminished for any reason, racial or otherwise, lacking quite substantial justification. They are premised on a rationale wholly apart from that underlying *Washington* v. *Davis*, 426 U. S. 229 (1976). That decision involved application of a different equal protection principle, the prohibition on racial discrimination in the governmental distribution of interests

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[18] The same is true of our most recent case discussing vote dilution, *Wise* v. *Lipscomb*, 437 U. S. 535 (1978).

[19] In contrast to a racial group, however, a political group will bear a rather substantial burden of showing that it is sufficiently discrete to suffer vote dilution. See *Dallas County* v. *Reese*, 421 U. S. 477 (1975) (*per curiam*) (allowing city dwellers to attack a countywide multimember district). See generally Comment, Effective Representation and Multimember Districts, 68 Mich. L. Rev. 1577, 1594–1596 (1970).

to which citizens have no constitutional entitlement.[20] Whatever may be the merits of applying motivational analysis to the allocation of constitutionally gratuitous benefits, that approach is completely misplaced where, as here, it is applied to the distribution of a constitutionally protected interest.[21]

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[20] The dispute in *Washington* v. *Davis* concerned alleged racial discrimination in public employment, an interest to which no one has a constitutional right, see n. 11, *supra*. In that decision, the Court held only that "the invidious quality of a law *claimed to be racially discriminatory* must ultimately be traced to a racially discriminatory purpose." 426 U. S., at 240 (emphasis added). The Court's decisions following *Washington* v. *Davis* have also involved alleged discrimination in the allocation of interests falling short of constitutional rights. *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256 (1979) (alleged sex discrimination in public employment); *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252 (1977) (alleged racial discrimination in zoning). As explained in *Feeney, supra*, "[w]hen some other independent right is not at stake . . . and when there is no 'reason to infer antipathy,' . . . it is presumed that 'even improvident decisions will eventually be rectified by the democratic process.'" 442 U. S., at 272 (quoting *Vance* v. *Bradley*, 440 U. S. 93, 97 (1979)).

[21] Professor Ely has recognized this distinction:

"The danger I see is . . . that the Court, in its newfound enthusiasm for motivation analysis, will seek to export it to fields where it has no business. It therefore cannot be emphasized too strongly that analysis of motivation is appropriate only to claims of improper discrimination in the distribution of goods that are constitutionally gratuitous (that is, benefits to which people are not entitled as a matter of substantive constitutional right). . . . However, *where what is denied is something to which the complainant has a substantive constitutional right*—either because it is granted by the terms of the Constitution, or because it is essential to the effective functioning of a democratic government—*the reasons it was denied are irrelevant*. It may become important in court what justifications counsel for the state can *articulate* in support of its denial or nonprovision, but the reasons that actually inspired the denial never can: To have a right to something is to have a claim on it irrespective of why it is denied. It would be a tragedy of the first order were the Court to expand its burgeoning awareness of the relevance of motivation into the thoroughly mistaken notion that a denial of a constitutional right does not count as such unless it was intentional." Ely, The Centrality and Limits of Motivation Anal-

Washington v. *Davis*, then, in no way alters the discriminatory-impact test developed in *Fortson* v. *Dorsey*, 379 U. S. 433 (1965), and applied in *White* v. *Regester*, *supra*, to evaluate claims of dilution of the fundamental right to vote. In my view, that test is now, and always has been, the proper method of safeguarding against inequitable distribution of political influence.

The plurality's response is that my approach amounts to nothing less than a constitutional requirement of proportional representation for groups. See *ante*, at 75–80. That assertion amounts to nothing more than a red herring: I explicitly reject the notion that the Constitution contains any such requirement. See n. 7, *supra*. The constitutional protection against vote dilution found in our prior cases does not extend to those situations in which a group has merely failed to elect representatives in proportion to its share of the population. To prove unconstitutional vote dilution, the group is also required to carry the far more onerous burden of demonstrating that it has been effectively fenced out of the political process. See *ibid*. Typical of the plurality's mischaracterization of my position is its assertion that I would provide protection against vote dilution for "every 'political group,' or at least every such group that is in the minority." *Ante*, at 75. The vote-dilution doctrine can logically apply only to groups whose electoral discreteness and insularity allow dominant political factions to ignore them. See nn. 7 and 19, *supra*. In short, the distinction between a requirement of proportional representation and the discriminatory-effect test I espouse is by no means a difficult one, and it is hard for me to understand why the plurality insists on ignoring it.

The plaintiffs in No. 77–1844 proved that no Negro had ever been elected to the Mobile City Commission, despite the fact that Negroes constitute about one-third of the electorate, and that the persistence of severe racial bloc voting made it highly

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ysis, 15 San Diego L. Rev. 1155, 1160–1161 (1978) (emphasis in original) (footnotes omitted).

unlikely that any Negro could be elected at large in the foreseeable future. 423 F. Supp. 384, 387–389 (SD Ala. 1976). Contrary to the plurality's contention, see *ante*, at 75–76, however, I do not find unconstitutional vote dilution in this case simply because of that showing. The plaintiffs convinced the District Court that Mobile Negroes were unable to use alternative avenues of political influence. They showed that Mobile Negroes still suffered pervasive present effects of massive historical official and private discrimination, and that the City Commission had been quite unresponsive to the needs of the minority community. The City of Mobile has been guilty of such pervasive racial discrimination in hiring employees that extensive intervention by the Federal District Court has been required. 423 F. Supp., at 389, 400. Negroes are grossly underrepresented on city boards and committees. *Id.*, at 389–390. The city's distribution of public services is racially discriminatory. *Id.*, at 390–391. City officials and police were largely unmoved by Negro complaints about police brutality and a "mock lynching." *Id.*, at 392. The District Court concluded that "[t]his sluggish and timid response is another manifestation of the low priority given to the needs of the black citizens and of the [commissioners'] political fear of a white backlash vote when black citizens' needs are at stake." *Ibid.* See also the dissenting opinion of my Brother WHITE, *ante*, p. 94.

A requirement of proportional representation would indeed transform this Court into a "super-legislature," *ante*, at 76, and would create the risk that some groups would receive an undeserved windfall of political influence. In contrast, the protection against vote dilution recognized by our prior cases serves as a minimally intrusive guarantee of political survival for a discrete political minority that is effectively locked out of governmental decisionmaking processes.[22] So under-

[22] It is at this point that my view most diverges from the position expressed by my Brother STEVENS, *ante*, p. 83. He would strictly scrutinize

stood, the doctrine hardly "'create[s] substantive constitutional rights in the name of guaranteeing equal protection of the laws.'" *ibid.*, quoting *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S., at 33. Rather, the doctrine is a simple reflection of the basic principle that the Equal Protection Clause protects "[t]he right of a citizen to equal representation and to have his vote weighted equally with those of all other citizens." *Reynolds* v. *Sims*, 377 U. S., at 576.[23]

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state action having an adverse impact on an individual's right to vote. In contrast, he would apply a less stringent standard to state action diluting the political influence of a group. See *ante*, at 83–85. The facts of the present cases, however, demonstrate that severe and persistent racial bloc voting, when coupled with the inability of the minority effectively to participate in the political arena by alternative means, can effectively disable the individual Negro as well as the minority community as a whole. In these circumstances, MR. JUSTICE STEVENS' distinction between the rights of individuals and the political strength of groups becomes illusory.

[23] The foregoing disposes of any contention that, merely by citing *Wright* v. *Rockefeller*, 376 U. S. 52 (1964), the Court in *Washington* v. *Davis*, 426 U. S., at 240, and *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S., at 264, intended to bring vote-dilution cases within the discriminatory-purpose requirement. *Wright* v. *Rockefeller*, *supra*, was a racial gerrymander case, and the plaintiffs had alleged only that they were the victims of an intentional scheme to draw districting lines discriminatorily. In focusing solely on whether the plaintiffs had proved intentional discrimination, the Court in *Wright* v. *Rockefeller* was merely limiting the scope of its inquiry to the issue raised by the plaintiffs. If *Wright* v. *Rockefeller* had been brought after this Court had decided our vote-dilution decisions, the plaintiffs perhaps would have recognized that, in addition to a claim of intentional racial gerrymandering, they could allege an equally sufficient cause of action under the Equal Protection Clause—that the districting lines had the effect of diluting their vote.

Wright v. *Rockefeller*, then, treated proof of discriminatory purpose as a sufficient condition to trigger strict scrutiny of a districting scheme, but had no occasion to consider whether such proof was necessary to invoke that standard. Its citations in *Washington* v. *Davis*, *supra*, and *Arlington*

II

Section 1 of the Fifteenth Amendment provides:

> "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

Today the plurality gives short shrift to the argument that proof of discriminatory intent is not a necessary condition to relief under this Amendment. See *ante*, at 61–65.[24] I have examined this issue in another context and reached the contrary result. *Beer* v. *United States*, 425 U. S. 130, 146–149, and nn. 3–5 (1976) (dissenting opinion). I continue to be-

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Heights, *supra*, were useful to show the relevancy, but not the necessity, of evidence of discriminatory intent. These citations are in no way inconsistent with my view that proof of discriminatory purpose is not a necessary condition to the invalidation of multimember districts that dilute the vote of racial or political elements.

In addition, any argument that, merely by citing *Wright* v. *Rockefeller*, the Court in *Washington* v. *Davis* and *Arlington Heights* intended to apply the discriminatory-intent requirement to vote-dilution claims is premised on two unpalatable assumptions. First, because the discussion of *Wright* v. *Rockefeller* was unnecessary to the resolution of the issues in both of those decisions, the argument assumes that the Court in both cases decided important issues in brief dicta. Second, the argument assumes that the Court twice intended covertly to overrule the discriminatory-effects test applied in *White* v. *Regester*, 412 U. S. 755 (1973), without even citing *White*. Neither assumption is tenable.

[24] It is important to recognize that only the four Members of the plurality are committed to this view. In addition to my Brother BRENNAN and myself, my Brother STEVENS expressly states that proof of discriminatory effect can be a sufficient condition to support the invalidation of districting, see *ante*, at 90. My Brother WHITE finds the proof of discriminatory purpose in these cases sufficient to support the decisions of the Courts of Appeals, and accordingly he does not reach the issue whether proof of discriminatory impact, standing alone, would suffice under the Fifteenth Amendment. My Brother BLACKMUN also expresses no view on this issue, since he too finds the proof of discriminatory intent sufficient to support the findings of violations of the Constitution.

lieve that "a showing of purpose or of effect is alone sufficient to demonstrate unconstitutionality," *id.*, at 149, n. 5, and wish to explicate further why I find this standard appropriate for Fifteenth Amendment claims. First, however, it is necessary to address the plurality's apparent suggestion that the Fifteenth Amendment protects against only denial, and not dilution, of the vote.[25]

A

The Fifteenth Amendment does not confer an absolute right to vote. See *ante*, at 62. By providing that the right to vote cannot be discriminatorily "denied *or* abridged," however, the Amendment assuredly strikes down the diminution as well as the outright denial of the exercise of the franchise. An interpretation holding that the Amendment reaches only complete abrogation of the vote would render the Amendment essentially useless, since it is no difficult task to imagine schemes in which the Negro's marking of the ballot is a meaningless exercise.

The Court has long understood that the right to vote encompasses protection against vote dilution. "[T]he right to have one's vote counted" is of the same importance as "the right to put a ballot in a box." *United States* v. *Mosley*, 238 U. S. 383, 386 (1915). See *United States* v. *Classic*, 313 U. S. 299 (1941); *Swafford* v. *Templeton*, 185 U. S. 487 (1902); *Wiley* v. *Sinkler*, 179 U. S. 58 (1900); *Ex parte Yarbrough*, 110 U. S. 651 (1884). The right to vote is protected against the diluting effect of ballot-box stuffing. *United States* v. *Saylor*, 322 U. S. 385 (1944); *Ex parte Siebold*, 100 U. S. 371 (1880). Indeed, this Court has explicitly recognized that the Fifteenth Amendment protects against vote dilution. In *Terry* v. *Adams*, 345 U. S. 461 (1953), and *Smith* v. *Allwright*, 321 U. S.

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[25] The plurality states that "[h]aving found that Negroes in Mobile 'register and vote without hindrance,' the District Court and Court of Appeals were in error in believing that the appellants invaded the protection of that Amendment in the present case." *Ante*, at 65.

649 (1944), the Negro plaintiffs did not question their access to the ballot for general elections. Instead they argued, and the Court recognized, that the value of their votes had been diluted by their exclusion from participation in primary elections and in the slating of candidates by political parties. The Court's struggles with the concept of "state action" in those decisions were necessarily premised on the understanding that vote dilution was a claim cognizable under the Fifteenth Amendment.

Wright v. *Rockefeller*, 376 U. S. 52 (1964), recognized that an allegation of vote dilution resulting from the drawing of district lines stated a claim under the Fifteenth Amendment. The plaintiffs in that case argued that congressional districting in New York violated the Fifteenth Amendment because district lines had been drawn in a racially discriminatory fashion. Each plaintiff had access to the ballot; their complaint was that because of intentional discrimination they resided in a district with population characteristics that had the effect of diluting the weight of their votes. The Court treated this claim as cognizable under the Fifteenth Amendment. More recently, in *United Jewish Organizations* v. *Carey*, 430 U. S. 144 (1977), we again treated an allegation of vote dilution arising from a redistricting scheme as stating a claim under the Fifteenth Amendment. See *id.*, at 155, 161–162, 165–168 (opinion of WHITE, J.). Indeed, in that case MR. JUSTICE STEWART found no Fifteenth Amendment violation in part because the plaintiffs had failed to prove "that the redistricting scheme was employed . . . to minimize or cancel out the voting strength of a minority class or interest; or otherwise to impair or burden the opportunity of affected persons to participate in the political process." *Id.*, at 179 (STEWART, J., joined by POWELL, J., concurring in judgment) (citing, *e. g.*, *White* v. *Regester*, 412 U. S. 755 (1973); *Fortson* v. *Dorsey*, 379 U. S. 433 (1965); *Wright* v. *Rockefeller*, *supra*). See also *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960).

It is plain, then, that the Fifteenth Amendment shares the concept of vote dilution developed in such Fourteenth Amendment decisions as *Reynolds* v. *Sims*, 377 U. S. 533 (1964), and *Fortson* v. *Dorsey, supra.* In fact, under the Court's unified view of the protections of the right to vote accorded by disparate portions of the Constitution, the concept of vote dilution is a core principle of the Seventeenth and Nineteenth Amendments as well as the Fourteenth and Fifteenth:

> "The Fifteenth Amendment prohibits a State from denying or abridging a Negro's right to vote. The Nineteenth Amendment does the same for women. If a State in a statewide election weighted the male vote more heavily than the female vote or the white vote more heavily than the Negro vote, none could successfully contend that that discrimination was allowable. See *Terry* v. *Adams*, 345 U. S. 461. . . . Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment.
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> . . . . .
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> "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote." *Gray* v. *Sanders*, 372 U. S., at 379, 381.

The plurality's suggestion that the Fifteenth Amendment reaches only outright denial of the ballot is wholly inconsistent not only with our prior decisions, but also with the gloss the plurality would place upon the Fourteenth Amendment's protection against vote dilution. As I explained in Part I, *supra*, I strongly disagree with the plurality's conclusion that our

Fourteenth Amendment vote-dilution decisions have been based upon the Equal Protection Clause's prohibition of racial discrimination. Be that as it may, the plurality at least does not dispute that the Fourteenth Amendment's language—that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws"—protects against dilution, as well as outright denial, of the right to vote on racial grounds, even though the Amendment does not mention any right to vote and speaks only of the denial, and not the diminution, of rights. Yet, when the plurality construes the language of the Fifteenth Amendment—which explicitly acknowledges the right to vote and prohibits its denial *or* abridgement on account of race—it seemingly would accord protection against only the absolute abrogation of the ballot.

An interpretation of the Fifteenth Amendment limiting its prohibitions to the outright denial of the ballot would convert the words of the Amendment into language illusory in symbol and hollow in substance. Surely today's decision should not be read as endorsing that interpretation.[26]

B

The plurality concludes that our prior decisions establish the principle that proof of discriminatory intent is a necessary element of a Fifteenth Amendment claim.[27] In contrast, I

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[26] Indeed, five Members of the Court decline the opportunity to ascribe to this view. In addition to my Brother BRENNAN and myself, my Brother STEVENS expressly states that the Fifteenth Amendment protects against diminution as well as denial of the ballot, see *ante*, at 84, and n. 3. The dissenting opinion of my Brother WHITE and the separate opinion of my Brother BLACKMUN indicate that they share this view.

[27] The plurality does not attempt to support this proposition by relying on the history surrounding the adoption of the Fifteenth Amendment. I agree that we should resolve the issue of the relevancy of proof of discriminatory purpose and effect by examining our prior decisions and by considering the appropriateness of alternative standards in light of contemporary circumstances. That was, of course, the approach used in *Washington* v. *Davis*, 426 U. S. 229 (1976), to evaluate that issue with regard to Fourteenth Amendment racial discrimination claims.

continue to adhere to my conclusion in *Beer* v. *United States*, 425 U. S., at 148, n. 4 (dissenting opinion), that "[t]he Court's decisions relating to the relevance of purpose-and/or-effect analysis in testing the constitutionality of legislative enactments are somewhat less than a seamless web." As I there explained, at various times the Court's decisions have seemed to adopt three inconsistent approaches: (1) that purpose alone is the test for unconstitutionality; (2) that effect alone is the test; and (3) that purpose or effect, either alone or in combination, is sufficient to show unconstitutionality. *Ibid.* In my view, our Fifteenth Amendment jurisprudence on the necessity of proof of discriminatory purpose is no less unsettled than was our approach to the importance of such proof in Fourteenth Amendment racial discrimination cases prior to *Washington* v. *Davis*, 426 U. S. 229 (1976). What is called for in the present cases is a fresh consideration—similar to our inquiry in *Washington* v. *Davis, supra*, with regard to Fourteenth Amendment discrimination claims—of whether proof of discriminatory purpose is necessary to establish a claim under the Fifteenth Amendment. I will first justify my conclusion that our Fifteenth Amendment precedents do not control the outcome of this issue, and then turn to an examination of how the question should be resolved.

I

The plurality cites *Guinn* v. *United States*, 238 U. S. 347 (1915); *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960); *Wright* v. *Rockefeller*, 376 U. S. 52 (1964); *Lassiter* v. *Northampton Election Bd.*, 360 U. S. 45 (1959); and *Lane* v. *Wilson*, 307 U. S. 268 (1939), as holding that proof of discriminatory purpose is necessary to support a Fifteenth Amendment claim. To me, these decisions indicate confusion, not resolution of this issue. As the plurality suggests, *ante*, at 62, the Court in *Guinn* v. *United States, supra*, did examine the purpose of a "grandfather clause" in the course of invalidating it. Yet 24 years later, in *Lane* v. *Wilson, supra*, at 277, the Court

struck down a more sophisticated exclusionary scheme because it "operated unfairly" against Negroes. In accord with the prevailing doctrine of the time, see *Arizona* v. *California*, 283 U. S. 423, 455, and n. 7 (1931), the Court in *Lane* seemingly did not question the motives of public officials.

In upholding the use of a literacy test for voters in *Lassiter* v. *Northampton Election Bd.*, *supra*, the Court apparently concluded that the plaintiff had failed to prove either discriminatory purpose or effect. *Gomillion* v. *Lightfoot*, *supra*, can be read as turning on proof of discriminatory motive, but the Court also stressed that the challenged redrawing of municipal boundaries had the "essential inevitable effect" of removing Negro voters from the city, 364 U. S., at 341, and that "the inescapable human effect of this essay in geometry and geography is to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights," *id.*, at 347. Finally, in *Wright* v. *Rockefeller*, *supra*, the plaintiffs alleged only purposeful discriminatory redistricting, and therefore the Court had no reason to consider whether proof of discriminatory effect would satisfy the Fifteenth Amendment.[28]

The plurality ignores cases suggesting that discriminatory purpose is not necessary to support a Fifteenth Amendment claim. In *Terry* v. *Adams*, 345 U. S. 461 (1953), a case in which no majority opinion was issued, three Justices approvingly discussed two decisions of the United States Court of Appeals for the Fourth Circuit[29] holding "that no election machinery could be sustained if its purpose *or* effect was to deny Negroes on account of their race an effective voice in the governmental affairs of their country, state, or community." *Id.*, at 466 (opinion of Black, J., joined by Douglas and Burton, JJ.) (emphasis added). More recently, in rejecting a First Amendment challenge to a federal statute provid-

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[28] See n. 23, *supra*.

[29] *Rice* v. *Elmore*, 165 F. 2d 387 (1947), cert. denied, 333 U. S. 875 (1948), and *Baskin* v. *Brown*, 174 F. 2d 391 (1949).

ing criminal penalties for knowing destruction of a Selective Service registration certificate, the Court in *United States* v. *O'Brien*, 391 U. S. 367, 383 (1968), stated that "[i]t is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." The Court in *O'Brien, supra,* at 385, interpreted *Gomillion* v. *Lightfoot, supra,* as turning on the discriminatory effect, and not the alleged discriminatory purpose, of the challenged redrawing of municipal boundaries. Three years later, in *Palmer* v. *Thompson*, 403 U. S. 217, 224–225 (1971), the Court relied on *O'Brien* to support its refusal to inquire whether a city had closed its swimming pools to avoid racial integration. As in *O'Brien*, the Court in *Palmer, supra,* at 225, interpreted *Gomillion* v. *Lightfoot* as focusing "on the actual effect" of the municipal boundary change, and not upon what motivated the city to redraw its borders. See also *Wright* v. *Council of City of Emporia*, 407 U. S. 451, 461–462 (1972).

In holding that racial discrimination claims under the Equal Protection Clause must be supported by proof of discriminatory intent, the Court in *Washington* v. *Davis, supra,* signaled some movement away from the doctrine that such proof is irrelevant to constitutional adjudication. Although the Court, 426 U. S., at 242–244, and n. 11, attempted mightily to distinguish *Palmer* v. *Thompson, supra,* its decision was in fact based upon a judgment that, in light of modern circumstances, the Equal Protection Clause's ban on racial discrimination in the distribution of constitutional gratuities should be interpreted as prohibiting only intentional official discrimination.[30]

These vacillations in our approach to the relevance of discriminatory purpose belie the plurality's determination that our prior decisions require such proof to support Fifteenth Amendment claims. To the contrary, the Court today is in

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[30] See nn. 20, 21, *supra,* and accompanying text.

the same unsettled position with regard to the Fifteenth Amendment as it was four years ago in *Washington* v. *Davis*, *supra*, regarding the Fourteenth Amendment's prohibition on racial discrimination. The absence of old answers mandates a new inquiry.

2

The Court in *Washington* v. *Davis* required a showing of discriminatory purpose to support racial discrimination claims largely because it feared that a standard based solely on disproportionate impact would unduly interfere with the far-ranging governmental distribution of constitutional gratuities.[21] Underlying the Court's decision was a determination that, since the Constitution does not entitle any person to such governmental benefits, courts should accord discretion to those officials who decide how the government shall allocate its scarce resources. If the plaintiff proved only that governmental distribution of constitutional gratuities had a disproportionate effect on a racial minority, the Court was willing to presume that the officials who approved the allocation scheme either had made an honest error or had foreseen that the decision would have a discriminatory impact and had found persuasive, legitimate reasons for imposing it nonetheless. These assumptions about the good faith of officials allowed the Court to conclude that, standing alone, a showing that a governmental policy had a racially discriminatory impact did not indicate that the affected minority had suffered the stigma, frustration, and unjust treatment prohibited

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[21] The Court stated:

"A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white." 426 U. S., at 248.

See n. 20, *supra*.

under the suspect-classification branch of our equal protection jurisprudence.

Such judicial deference to official decisionmaking has no place under the Fifteenth Amendment. Section 1 of that Amendment differs from the Fourteenth Amendment's prohibition on racial discrimination in two crucial respects: it explicitly recognizes the right to vote free of hindrances related to race, and it sweeps no further. In my view, these distinctions justify the conclusion that proof of racially discriminatory impact should be sufficient to support a claim under the Fifteenth Amendment. The right to vote is of such fundamental importance in the constitutional scheme that the Fifteenth Amendment's command that it shall not be "abridged" on account of race must be interpreted as providing that the votes of citizens of all races shall be of substantially equal weight. Furthermore, a disproportionate-impact test under the Fifteenth Amendment would not lead to constant judicial intrusion into the process of official decisionmaking. Rather, the standard would reach only those decisions having a discriminatory effect upon the minority's vote. The Fifteenth Amendment cannot tolerate that kind of decision, even if made in good faith, because the Amendment grants racial minorities the full enjoyment of the right to vote, not simply protection against the unfairness of intentional vote dilution along racial lines.[32]

In addition, it is beyond dispute that a standard based solely upon the motives of official decisionmakers creates significant problems of proof for plaintiffs and forces the inquiring court to undertake an unguided, tortuous look into the minds of officials in the hope of guessing why certain policies were adopted and others rejected. See *Palmer* v. *Thomp-*

[32] Even if a municipal policy is shown to dilute the right to vote, however, the policy will not be struck down if the city shows that it serves highly important local interests and is closely tailored to effectuate only those interests. See *Dunn* v. *Blumstein*, 405 U. S. 330 (1972). Cf. *Abate* v. *Mundt*, 403 U. S. 182 (1971).

son, 403 U. S., at 224–225; *United States* v. *O'Brien*, 391 U. S., at 382–386; cf. *Keyes* v. *School District No. 1, Denver, Colo.*, 413 U. S. 189, 224, 227 (1973) (POWELL, J., concurring in part and dissenting in part). An approach based on motivation creates the risk that officials will be able to adopt policies that are the products of discriminatory intent so long as they sufficiently mask their motives through the use of subtlety and illusion. *Washington* v. *Davis* is premised on the notion that this risk is insufficient to overcome the deference the judiciary must accord to governmental decisions about the distribution of constitutional gratuities. That risk becomes intolerable, however, when the precious right to vote protected by the Fifteenth Amendment is concerned.

I continue to believe, then, that under the Fifteenth Amendment an "[e]valuation of the purpose of a legislative enactment is just too ambiguous a task to be the sole tool of constitutional analysis. . . . [A] demonstration of effect ordinarily should suffice. If, of course, purpose may conclusively be shown, it too should be sufficient to demonstrate a statute's unconstitutionality." *Beer* v. *United States*, 425 U. S., at 149–150, n. 5 (MARSHALL, J., dissenting). The plurality's refusal in this case even to consider this approach bespeaks an indifference to the plight of minorities who, through no fault of their own, have suffered diminution of the right preservative of all other rights.[33]

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[33] In my view, the standard of *White* v. *Regester*, 412 U. S. 755 (1973), see n. 7, *supra*, and accompanying text, is the proper test under both the Fourteenth and Fifteenth Amendments for determining whether a districting scheme has the unconstitutional effect of diluting the Negro vote. It is plain that the District Court in both of the cases before us made the "intensely local appraisal" necessary under *White*, *supra*, at 769, and correctly decided that the at-large electoral schemes for the Mobile City Commission and County School Board violated the *White* standard. As I earlier note with respect to No. 77–1844, see *supra*, at 122–123, the District Court determined: (1) that Mobile Negroes still suffered pervasive present effects of massive historical official and private discrimination; (2) that the City Commission and County School Board had been quite

III

If it is assumed that proof of discriminatory intent is necessary to support the vote-dilution claims in these cases, the question becomes what evidence will satisfy this requirement.[34]

The plurality assumes, without any analysis, that these cases are appropriate for the application of the rigid test developed in *Personnel Administrator of Mass.* v. *Feeney,* 442 U. S., at 279, requiring that "the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." In my view, the *Feeney* standard creates a burden of proof far too extreme to apply in vote-dilution cases.[35]

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unresponsive to the needs of the minority community; (3) that no Negro had ever been elected to either body, despite the fact that Negroes constitute about one-third of the electorate; (4) that the persistence of severe racial bloc voting made it highly unlikely that any Negro could be elected at large to either body in the foreseeable future; and (5) that no state policy favored at-large elections, and the local preference for that scheme was outweighed by the fact that the unconstitutional vote dilution could be corrected only by the imposition of single-member districts. *Bolden* v. *City of Mobile,* 423 F. Supp. 384 (SD Ala. 1976); *Brown* v. *Moore,* 428 F. Supp. 1123 (SD Ala. 1976). The Court of Appeals affirmed these findings in all respects. *Bolden* v. *City of Mobile,* 571 F. 2d 238 (CA5 1978); *Brown* v. *Moore,* 575 F. 2d 298 (CA5 1978). See also the dissenting opinion of my Brother WHITE, *ante,* p. 94.

[34] The statutes providing for at-large election of the members of the two governmental bodies involved in these cases, see n. 33, *supra,* have been in effect since the days when Mobile Negroes were totally disenfranchised by the Alabama Constitution of 1901. The District Court in both cases found, therefore, that the at-large schemes could not have been adopted for discriminatory purposes. *Bolden* v. *City of Mobile,* 423 F. Supp., at 386, 397; *Brown* v. *Moore,* 428 F. Supp., at 1126–1127, 1138. The issue is, then, whether officials have maintained these electoral systems for discriminatory purposes. Cf. *Arlington Heights* v. *Metropolitan Housing Dev. Corp.,* 429 U. S., at 257–258, 267–271, and n. 17.

[35] As the dissenting opinion of my Brother WHITE demonstrates, however, the facts of these cases compel a finding of unconstitutional vote dilution even under the plurality's standard.

This Court has acknowledged that the evidentiary inquiry involving discriminatory intent must necessarily vary depending upon the factual context. See *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S., at 264–268; *Washington* v. *Davis*, 426 U. S., at 253 (STEVENS, J., concurring). One useful evidentiary tool, long recognized by the common law, is the presumption that "[e]very man must be taken to contemplate the probable consequences of the act he does." *Townsend* v. *Wathen*, 9 East. 277, 280, 103 Eng. Rep. 579, 580–581 (K. B. 1808). The Court in *Feeney, supra*, at 279, n. 25, acknowledged that proof of foreseeability of discriminatory consequences could raise a "strong inference that the adverse effects were desired," but refused to treat this presumption as conclusive in cases alleging discriminatory distribution of constitutional gratuities.

I would apply the common-law foreseeability presumption to the present cases. The plaintiffs surely proved that maintenance of the challenged multimember districting would have the foreseeable effect of perpetuating the submerged electoral influence of Negroes, and that this discriminatory effect could be corrected by implementation of a single-member districting plan.[36] Because the foreseeable disproportionate impact was so severe, the burden of proof should have shifted to the defendants, and they should have been required to show that they refused to modify the districting schemes in spite of, not because of, their severe discriminatory effect. See *Feeney, supra*, at 284 (MARSHALL, J., dissenting). Reallocation of the burden of proof is especially appropriate in these cases, where the challenged state action infringes the exercise of a fundamental right. The defendants would carry their burden of proof only if they showed that they considered submergence

[36] Indeed, the District Court in the present cases concluded that the evidence supported the plaintiffs' position that unconstitutional vote dilution was the natural and foreseeable consequence of the maintenance of the challenged multimember districting. *Brown* v. *Moore*, 428 F. Supp., at 1138; *Bolden* v. *City of Mobile*, 423 F. Supp., at 397–398.

of the Negro vote a detriment, not a benefit, of the multimember systems, that they accorded minority citizens the same respect given to whites, and that they nevertheless decided to maintain the systems for legitimate reasons. Cf. *Mt. Healthy City Board of Ed.* v. *Doyle*, 429 U. S. 274, 287 (1977); *Arlington Heights* v. *Metropolitan Housing Dev. Corp., supra,* at 270–271, n. 21.

This approach recognizes that

> "[f]requently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds. This is particularly true in the case of governmental action which is frequently the product of compromise, of collective decisionmaking, and of mixed motivation." *Washington* v. *Davis, supra,* at 253 (STEVENS, J., concurring).

Furthermore, if proof of discriminatory purpose is to be required in these cases, this standard would comport with my view that the degree to which the government must justify a decision depends upon the importance of the interests infringed by it. See *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S., at 109–110 (MARSHALL, J., dissenting).[37]

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[37] MR. JUSTICE STEVENS acknowledges that both discriminatory intent and discriminatory effect are present in No. 77-1844. See *ante*, at 92–94. Nonetheless, he finds no constitutional violation, apparently because he believes that the electoral structure of Mobile conforms to a commonly used scheme, the discriminatory impact is in his view not extraordinary, and the structure is supported by sufficient noninvidious justifications so that it is neither wholly irrational nor entirely motivated by discriminatory animus. To him, racially motivated decisions in this setting are an inherent part of the political process and do not involve invidious discrimination.

The facts of the present cases, however, indicate that in Mobile considerations of race are far more powerful and pernicious than are considerations of other divisive aspects of the electorate. See *supra*, at 122–123. In Mobile, as elsewhere, "the experience of Negroes . . . has been different

The plurality also fails to recognize that the maintenance of multimember districts in the face of foreseeable discriminatory consequences strongly suggests that officials are blinded by "racially selective sympathy and indifference." [38] Like outright racial hostility, selective racial indifference reflects a belief that the concerns of the minority are not worthy of the same degree of attention paid to problems perceived by whites. When an interest as fundamental as voting is diminished along racial lines, a requirement that discriminatory purpose must be proved should be satisfied by a showing that official action was produced by this type of pervasive bias. In the present cases, the plaintiffs presented strong evidence of such bias: they showed that Mobile officials historically discriminated against Negroes, that there are pervasive present effects of this past discrimination, and that officials have not been responsive to the needs of the minority community. It takes only the smallest of inferential leaps to conclude that the decisions to maintain multimember districting having obvious discriminatory effects represent, at the very least, selective racial sympathy and indifference resulting in the frustration of minority desires, the stigmatization of the minority as second-class citizens, and the perpetuation of inhumanity.[39]

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in kind, not just in degree, from that of other ethnic groups." *University of California Regents* v. *Bakke*, 438 U. S. 265, 400 (1978) (opinion of MARSHALL, J.). An approach that accepts intentional discrimination against Negroes as merely an aspect of politics as usual strikes at the very hearts of the Fourteenth and Fifteenth Amendments.

[38] Brest, The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle, 90 Harv. L. Rev. 1, 7 (1976). See also Note, Racial Vote Dilution in Multimember Districts: The Constitutional Standard After *Washington* v. *Davis*, 76 Mich. L. Rev. 694, 716–719 (1978).

[39] The plurality, *ante*, at 74–75, n. 21, indicates that on remand the lower courts are to examine the evidence in these cases under the discriminatory-intent standard of *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256 (1979), and may conclude that this test is met by proof of the refusal of Mobile's state-legislative delegation to stimulate the passage

IV

The American approach to government is premised on the theory that, when citizens have the unfettered right to vote,

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of legislation changing Mobile's city government into a mayor-council system in which council members are elected from single-member districts. The plurality concludes, then, only that the District Court and the Court of Appeals in each of the present cases evaluated the evidence under an improper legal standard, and not that the evidence fails to support a claim under *Feeney, supra*. When the lower courts examine these cases under the *Feeney* standard, they should, of course, recognize the relevancy of the plaintiffs' evidence that vote dilution was a foreseeable and natural consequence of the maintenance of the challenged multimember districting, and that officials have apparently exhibited selective racial sympathy and indifference. Cf. *Dayton Board of Education* v. *Brinkman*, 443 U. S. 526 (1979); *Columbus Board of Education* v. *Penick*, 443 U. S. 449 (1979).

Finally, it is important not to confuse the differing views the plurality and I have on the elements of proving unconstitutional vote dilution. The plurality concludes that proof of intentional discrimination, as defined in *Feeney, supra*, is necessary to support such a claim. The plurality finds this requirement consistent with the statement in *White* v. *Regester*, 412 U. S., at 766, that unconstitutional vote dilution does not occur simply because a minority has not been able to elect representatives in proportion to its voting potential. The extra necessary element, according to the plurality, is a showing of discriminatory intent. In the plurality's view, the evidence presented in *White* going beyond mere proof of underrepresentation of the minority properly supported an inference that the multimember districting scheme in question was tainted with a discriminatory purpose.

The plurality's approach should be satisfied, then, by proof that an electoral scheme enacted with a discriminatory purpose effected a retrogression in the minority's voting power. Cf. *Beer* v. *United States*, 425 U. S. 130, 141 (1976). The standard should also be satisfied by proof that a scheme maintained for a discriminatory purpose has the effect of submerging minority electoral influence below the level it would have under a reasonable alternative scheme.

The plurality does not address the question whether proof of discriminatory effect is necessary to support a vote-dilution claim. It is clear from the above, however, that if the Court at some point creates such a requirement, it would be satisfied by proof of mere disproportionate impact. Such a requirement would be far less stringent than the burden of proof re-

public officials will make decisions by the democratic accommodation of competing beliefs, not by deference to the mandates of the powerful. The American approach to civil rights is premised on the complementary theory that the unfettered right to vote is preservative of all other rights. The theoretical foundations for these approaches are shattered where, as in the present cases, the right to vote is granted in form, but denied in substance.

It is time to realize that manipulating doctrines and drawing improper distinctions under the Fourteenth and Fifteenth Amendments, as well as under Congress' remedial legislation enforcing those Amendments, make this Court an accessory to the perpetuation of racial discrimination. The plurality's requirement of proof of *intentional discrimination*, so inappropriate in today's cases, may represent an attempt to bury the legitimate concerns of the minority beneath the soil of a doctrine almost as impermeable as it is specious. If so, the superficial tranquility created by such measures can be but short-lived. If this Court refuses to honor our long-recognized principle that the Constitution "nullifies sophisticated as well as simple-minded modes of discrimination," *Lane* v. *Wilson*, 307 U. S., at 275, it cannot expect the victims of discrimination to respect political channels of seeking redress. I dissent.

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quired under the rather rigid discriminatory-effects test I find in *White* v. *Regester*, *supra*. See n. 7, *supra*, and accompanying text.

WENGLER *v.* DRUGGISTS MUTUAL INSURANCE CO. ET AL.

APPEAL FROM THE SUPREME COURT OF MISSOURI

No. 79-381. Argued February 25, 1980—Decided April 22, 1980

Held: The provision of the Missouri workers' compensation laws denying a widower benefits on his wife's work-related death unless he either is mentally or physically incapacitated or proves dependence on his wife's earnings, but granting a widow death benefits without her having to prove dependence on her husband's earnings, violates the Equal Protection Clause of the Fourteenth Amendment. Pp. 147–152.

(a) The statute indisputably mandates gender-based discrimination and discriminates against both men and women. It discriminates against a woman since, in the case of her death, benefits are payable to her spouse only if he meets the incapacity or dependency tests, whereas death benefits are automatically paid to a widow because dependency on her husband is conclusively presumed, a female wage earner thus being provided with less protection for her spouse on her work-related death than is provided for the widow of a deceased male wage earner. And the statute discriminates against a man who survives his wife's dying in a work-related accident because to receive benefits he, in contrast to a widow, must prove incapacity or dependency. Pp. 147–149.

(b) To be justified, gender-based discriminations must serve important governmental objectives and the discriminatory means employed must be substantially related to the achievement of those objectives. Here, the claimed justification for not treating men and women alike—that women are generally dependent on male wage earners and that it is more efficient to presume dependency in the case of women than to engage in case-by-case determination, whereas individualized inquiries in the few cases in which men might be dependent are not prohibitively costly—is unsubstantiated and thus cannot save the gender-based discrimination in question. Pp. 150–152.

583 S. W. 2d 162, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, MARSHALL, BLACKMUN, and POWELL, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 154. REHNQUIST, J., filed a dissenting statement, *post*, p. 153.

John W. Reid II argued the cause and filed a brief for appellant.

Ralph C. Kleinschmidt argued the cause for appellees. With him on the brief was *Gerre S. Langton.**

MR. JUSTICE WHITE delivered the opinion of the Court.

This case challenges under the Equal Protection Clause of the Fourteenth Amendment a provision of the Missouri workers' compensation laws, Mo. Rev. Stat. § 287.240 (Supp. 1979), which is claimed to involve an invalid gender-based discrimination.

I

The facts are not in dispute. On February 11, 1977, Ruth Wengler, wife of appellant Paul J. Wengler, died in a work-related accident in the parking lot of her employer, appellee Dicus Prescription Drugs, Inc. Appellant filed a claim for death benefits under Mo. Rev. Stat. § 287.240 (Supp. 1979),[1]

**Ruth Bader Ginsburg* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging reversal.

Solicitor General McCree, Assistant Attorney General Days, Stuart A. Smith, Brian K. Landsberg, and *Mark L. Gross* filed a brief for the United States as *amicus curiae.*

[1] Missouri Rev. Stat. § 287.240 (Supp. 1979) provides in its entirety (emphasis added):

"If the injury causes death, either with or without disability, the compensation therefor shall be as provided in this section:

"(1) In all cases the employer shall pay direct to the persons furnishing the same the reasonable expense of the burial of the deceased employee not exceeding two thousand dollars. But no person shall be entitled to compensation for the burial expenses of a deceased employee unless he has furnished the same by authority of the widow or widower, the nearest relative of the deceased employee in the county of his death, his personal representative, or the employer, who shall have the right to give the authority in the order named. All fees and charges under this section shall be fair and reasonable, shall be subject to regulation by the division or the commission and shall be limited to such as are fair and reasonable for similar service to persons of a like standard of living. The division or

under which a widower is not entitled to death benefits unless he either is mentally or physically incapacitated from wage

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the commission shall also have jurisdiction to hear and determine all disputes as to the charges. If the deceased employee leaves no dependents the death benefit in this subdivision provided shall be the limit of the liability of the employer under this chapter on account of the death, except as herein provided for burial expenses and except as provided in section 287.140; provided, that in all cases when the employer admits or does not deny liability for the burial expense, it shall be paid within thirty days after written notice, that the service has been rendered, has been delivered to the employer. The notice may be sent by registered mail, return receipt requested, or may be made by personal delivery;

"(2) *The employer shall* also *pay to* the total *dependents of the employee a death benefit* on the basis of sixty-six and two-thirds percent of the employee's average weekly earnings during the year immediately preceding the injury as provided in section 287.250. Compensation shall be payable in installments in the same manner that compensation is required to be paid under this chapter, but in no case be less than at the rate of sixteen dollars per week nor more than one hundred twenty dollars per week or as provided in section 287.160. If there is a total dependent, no death benefit shall be payable to partial dependents or any other persons except as provided in subdivision (1);

"(3) If there are partial dependents, and no total dependents, a part of the death benefit herein provided in the case of total dependents, determined by the proportion of his contributions to all partial dependents by the employee at the time of the injury, shall be paid by the employer to each of the dependents proportionately;

"(4) *The word 'dependent' as used in this chapter shall be construed to mean a relative by blood or marriage of a deceased employee, who is actually dependent for support, in whole or in part, upon his wages at the time of the injury. The following persons shall be conclusively presumed to be totally dependent for support upon a deceased employee and any death benefit shall be payable to them to the exclusion of other total dependents:*

"(a) *A wife upon a husband legally liable for her support, and a husband mentally or physically incapacitated from wage earning upon a wife;* provided, that on the death or remarriage of a widow or widower, the death benefit shall cease unless there be other total dependents entitled to any death benefit under this chapter. In the event of remarriage, a lump sum payment equal in amount to the benefits due for a period of two

earning or proves actual dependence on his wife's earnings. In contrast, a widow qualifies for death benefits without hav-

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years shall be paid to the widow or widower. Thereupon the periodic death benefits shall cease unless there are other total dependents entitled to any death benefit under this chapter in which event the periodic benefits to which said widow or widower would have been entitled had he or she not died or remarried, shall be divided among such other total dependents and paid to them during their period of entitlement under this chapter;

"(b) A natural, posthumous, or adopted child or children, whether legitimate or illegitimate, under the age of eighteen years, or over that age if physically or mentally incapacitated from wage earning, upon the parent legally liable for the support or with whom he is living at the time of the death of the parent. In case there is a wife or a husband mentally or physically incapacitated from wage earning, dependent upon a wife, and a child or more than one child thus dependent, the death benefit shall be divided among them in such proportion as may be determined by the commission after considering their ages and other facts bearing on the dependency. In all other cases questions of total or partial dependency shall be determined in accordance with the facts at the time of the injury, and in such other cases if there is more than one person wholly dependent the death benefit shall be divided equally among them. The payment of death benefits to a child or other dependent as provided in this paragraph shall cease when the dependent dies, attains the age of eighteen years, or becomes physically and mentally capable of wage earning over that age, or until twenty-two years of age if the child of the deceased is in attendance and remains as a full-time student in any accredited educational institution, or if at eighteen years of age the dependent child is a member of the armed forces of the United States on active duty; provided, however, that such dependent child shall be entitled to compensation during four years of full-time attendance at a fully accredited educational institution to commence prior to twenty-three years of age and immediately upon cessation of his active duty in the armed forces, unless there are other total dependents entitled to the death benefit under this chapter;

"(5) The division or the commission may, in its discretion, order or award the share of compensation of any such child to be paid to the parent, grandparent, or other adult next of kin or legal guardian of the child for the latter's support, maintenance and education, which order or award upon notice to the parties may be modified from time to time by the commission in its discretion with respect to the person to whom shall

ing to prove actual dependence on her husband's earnings.[2]

Appellant stipulated that he was neither incapacitated nor dependent on his wife's earnings, but argued that, owing to its disparate treatment of similarly situated widows and widowers, § 287.240 violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The claim was administratively denied, but the Circuit Court of Madison County reversed, holding that § 287.240 violated the Equal Protection Clause because the statutory restriction on a widower's recovery of death benefits did not also apply to a surviving wife. Dicus and its insurer, appellee Druggists Mutual Insurance Co., were ordered to pay death benefits to appellant in the appropriate amount. App. to Juris. Statement A22–A25.

The Missouri Supreme Court, distinguishing certain cases in this Court, reversed the Circuit Court's decision. The equal protection challenge to § 287.240 failed because "the substantive difference in the economic standing of working men and women justifies the advantage that [§ 287.240] administratively gives to a widow." 583 S. W. 2d 162, 168 (1979).

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be paid the amount of the order or award remaining unpaid at the time of the modification;

"(6) The payments of compensation by the employer in accordance with the order or award of the division or the commission shall discharge the employer from all further obligations as to the compensation;

"(7) All death benefits in this chapter shall be paid in installments in the same manner as provided for disability compensation;

"(8) Every employer shall keep a record of the correct names and addresses of the dependents of each of his employees, and upon the death of an employee by accident arising out of and in the course of his employment shall so far as possible immediately furnish the division with said names and addresses."

[2] At the time of her death Mrs. Wengler's wages were $69 per week. Had appellant prevailed in his attempt to receive full death benefits under the statute, his compensation would have been $46 per week. App. to Juris. Statement A23; see Mo. Rev. Stat. § 287.240 (2) (Supp. 1979). These benefits would have continued until appellant's death or remarriage. § 287.240 (4)(a).

Because the decision of the Supreme Court of Missouri arguably conflicted with our precedents, we noted probable jurisdiction. 444 U. S. 924 (1979). We now reverse.[3]

II

The Missouri law indisputably mandates gender-based discrimination. Although the Missouri Supreme Court was of the view that the law favored, rather than disfavored, women, it is apparent that the statute discriminates against both men and women. The provision discriminates against a woman covered by the Missouri workers' compensation system since, in the case of her death, benefits are payable to her spouse only if he is mentally or physically incapacitated or was to some extent dependent upon her. Under these tests, Mrs. Wengler's spouse was entitled to no benefits. If Mr. Wengler had died, however, Mrs. Wengler would have been conclusively presumed to be dependent and would have been paid the statutory amount for life or until she remarried even though she may not in fact have been dependent on Mr. Wengler. The benefits, therefore, that the working woman can expect to be paid to her spouse in the case of her work-related death are less than those payable to the spouse of the deceased male wage earner.

It is this kind of discrimination against working women that our cases have identified and in the circumstances found unjustified. At issue in *Weinberger* v. *Wiesenfeld*, 420 U. S. 636 (1975), was a provision in the Social Security Act, 42 U. S. C. § 402 (g), that granted survivors' benefits based on

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[3] Recent decisions in three States have held unconstitutional workers' compensation statutes with presumptions of dependency identical to that at issue in this case. *Arp* v. *Workers' Compensation Appeals Board*, 19 Cal. 3d 395, 563 P. 2d 849 (1977); *Passante* v. *Walden Printing Co.*, 53 App. Div. 2d 8, 385 N. Y. S. 2d 178 (1976); *Tomarchio* v. *Township of Greenwich*, 75 N. J. 62, 379 A. 2d 848 (1977). The workers' compensation laws of the vast majority of States now make no distinction between the eligibility of widows and widowers for death benefits.

the earnings of a deceased husband and father covered by the Act both to his widow and to the couple's minor children in her care, but that granted benefits based on the earnings of a covered deceased wife and mother only to the minor children and not to the widower. In concluding that the provision violated the equal protection component of the Fifth Amendment, we noted that, "[o]bviously, the notion that men are more likely than women to be the primary supporters of their spouses and children is not entirely without empirical support." *Weinberger* v. *Wiesenfeld, supra,* at 645, citing *Kahn* v. *Shevin,* 416 U. S. 351, 354, n. 7 (1974).[4] But such a generalization could not itself justify the gender-based distinction found in the Act, for § 402 (g) "clearly operate[d] . . . to deprive women of protection for their families which men receive as a result of their employment." 420 U. S., at 645. The offensive assumption was "that male workers' earnings are vital to the support of their families, while the earnings of female wage earners do not significantly contribute to their families' support." *Id.,* at 643 (footnote omitted).

Similarly, in *Califano* v. *Goldfarb,* 430 U. S. 199 (1977), we dealt with a Social Security Act provision providing survivors' benefits to a widow regardless of dependency, but providing the same benefits to a widower only if he had been receiving at least half of his support from his deceased wife. 42 U. S. C. § 402 (f)(1)(D). MR. JUSTICE BRENNAN's plural-

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[4] In *Kahn* v. *Shevin,* the Court upheld a Florida annual $500 real estate tax exemption for all widows in the face of an equal protection challenge. The Court believed that statistics established a lower median income for women than men, a discrepancy that justified "a state tax law reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden." 416 U. S., at 355. As in *Kahn* we accept the importance of the state goal of helping needy spouses, see *infra,* at 151, but as described in text the Missouri law in our view is not "reasonably designed" to achieve this goal. Thus the holding in *Kahn* is in no way dispositive of the case at bar.

ity opinion pointed out that, under the challenged section, "female insureds received less protection for their spouses solely because of their sex" and that, as in *Wiesenfeld*, the provision disadvantaged women as compared to similarly situated men by providing the female wage earner with less protection for her family than it provided the family of the male wage earner even though the family needs might be identical. *Califano* v. *Goldfarb, supra,* at 208. The plurality opinion, in the circumstances there, found the discrimination violative of the Fifth Amendment's equal protection guarantee.

Frontiero v. *Richardson,* 411 U. S. 677 (1973), involved a similar discrimination. There, a serviceman could claim his wife as a dependent without regard to whether she was in fact dependent upon him and so obtain increased quarters allowances and medical and dental benefits. A servicewoman, on the other hand, could not claim her husband as a dependent for these purposes unless he was in fact dependent upon her for over one-half of his support. This discrimination, devaluing the service of the woman as compared with that of the man, was invalidated.

The Missouri law, as the Missouri courts recognized, also discriminates against men who survive their employed wives' dying in work-related accidents. To receive benefits, the surviving male spouse must prove his incapacity or dependency. The widow of a deceased wage earner, in contrast, is presumed dependent and is guaranteed a weekly benefit for life or until remarriage. It was this discrimination against the male survivor as compared with a similarly situated female that MR. JUSTICE STEVENS identified in *Califano* v. *Goldfarb, supra,* as resulting in a denial of equal protection.[5] 430 U. S., at 217–224 (opinion of STEVENS, J.).

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[5] As noted previously, see n. 3, *supra,* three state courts have recently held unconstitutional workers' compensation statutes with presumptions of dependency identical to that at issue in this case. In each of the three cases the court characterized the statute's discrimination as against both

III

However the discrimination is described in this case, our precedents require that gender-based discriminations must serve important governmental objectives and that the discriminatory means employed must be substantially related to the achievement of those objectives. *Califano* v. *Westcott*, 443 U. S. 76, 85 (1979); *Orr* v. *Orr*, 440 U. S. 268, 279 (1979); *Califano* v. *Webster*, 430 U. S. 313, 316–317 (1977); *Craig* v. *Boren*, 429 U. S. 190, 197 (1976).

Acknowledging that the discrimination involved here must satisfy the *Craig* v. *Boren* standard, 583 S. W. 2d, at 164–165, the Missouri Supreme Court stated that "the purpose of the [law] was to favor widows, not to disfavor them" and that when the law was passed in 1925 the legislature no doubt believed that "a widow was more in need of prompt payment of death benefits upon her husband's death without drawn-out proceedings to determine the amount of dependency than was a widower." *Id.*, at 168. Hence, the conclusive presumption of dependency satisfied "a perceived need widows generally had, which need was not common to men whose wives might be killed while working." *Ibid.* The survivor's "hardship was seen by the legislatur[e] as more immediate and pronounced on women than on men," and "the substantive difference in the economic standing of working men and women justifies the advantage that [the law] administratively gives to a widow." *Ibid.*

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working wives and surviving husbands. See *Arp* v. *Workers' Compensation Appeals Board*, 19 Cal. 3d, at 406, 563 P. 2d, at 855 ("[I]t is noteworthy that the conclusive presumption in favor of widows discriminates not only against the widower but against the employed *female* as well"); *Passante* v. *Walden Printing Co.*, 53 App. Div. 2d, at 12, 385 N. Y. S. 2d, at 181 (the statute "compels dissimilar treatment both for surviving husbands and working wives, respectively, vis-à-vis widows and working males"); *Tomarchio* v. *Township of Greenwich*, 75 N. J., at 75, 379 A. 2d, at 854 (statute unconstitutionally discriminates against both working women and surviving husbands).

Providing for needy spouses is surely an important governmental objective, *Orr* v. *Orr, supra*, at 280, and the Missouri statute effects that goal by paying benefits to all surviving female spouses and to all surviving male spouses who prove their dependency. But the question remains whether the discriminatory means employed—discrimination against women wage earners and surviving male spouses—itself substantially serves the statutory end. Surely the needs of surviving widows and widowers would be completely served either by paying benefits to all members of both classes or by paying benefits only to those members of either class who can demonstrate their need. Why, then, employ the discriminatory means of paying all surviving widows without requiring proof of dependency, but paying only those widowers who make the required demonstration? The only justification offered by the state court or appellees for not treating males and females alike, whether viewed as wage earners or survivors of wage earners, is the assertion that most women are dependent on male wage earners and that it is more efficient to presume dependency in the case of women than to engage in case-to-case determination, whereas individualized inquiries in the postulated few cases in which men might be dependent are not prohibitively costly.

The burden, however, is on those defending the discrimination to make out the claimed justification, and this burden is not carried simply by noting that in 1925 the state legislature thought widows to be more in need of prompt help than men or that today "the substantive difference in the economic standing of working men and women justifies the advantage" given to widows. 583 S. W. 2d, at 168. It may be that there is empirical support for the proposition that men are more likely to be the principal supporters of their spouses and families, *Weinberger* v. *Wiesenfeld*, 420 U. S., at 645, but the bare assertion of this argument falls far short of justifying gender-based discrimination on the grounds of administrative

convenience. Yet neither the court below nor appellees in this Court essay any persuasive demonstration as to what the economic consequences to the State or to the beneficiaries might be if, in one way or another, men and women, whether as wage earners or survivors, were treated equally under the workers' compensation law, thus eliminating the double-edged discrimination described in Part II of this opinion.

We think, then, that the claimed justification of administrative convenience fails, just as it has in our prior cases. In *Frontiero* v. *Richardson,* 411 U. S., at 689–690, the Government claimed that, as an empirical matter, wives are so frequently dependent upon their husbands and husbands so rarely dependent upon their wives that it was cheaper to presume wives to be dependent upon their husbands while requiring proof of dependency in the case of the male. The Court found the claimed justification insufficient to save the discrimination. And in *Reed* v. *Reed,* 404 U. S. 71, 76 (1971), the Court said "[t]o give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause. . . ." See also *Califano* v. *Goldfarb,* 430 U. S., at 219–220 (opinion of STEVENS, J.). It may be that there are levels of administrative convenience that will justify discriminations that are subject to heightened scrutiny under the Equal Protection Clause, but the requisite showing has not been made here by the mere claim that it would be inconvenient to individualize determinations about widows as well as widowers.

IV

Thus we conclude that the Supreme Court of Missouri erred in upholding the constitutional validity of § 287.240. We are left with the question whether the defect should be cured by extending the presumption of dependence to widowers or by eliminating it for widows. Because state legislation is at

issue, and because a remedial outcome consonant with the state legislature's overall purpose is preferable, we believe that state judges are better positioned to choose an appropriate method of remedying the constitutional violation. Accordingly, we reverse the decision of the Supreme Court of Missouri and remand the case to that court for further proceedings not inconsistent with this opinion.[6]

So ordered.

MR. JUSTICE REHNQUIST, continuing to believe that *Califano* v. *Goldfarb*, 430 U. S. 199 (1977), was wrongly decided, and that constitutional issues should be more readily reexamined under the doctrine of *stare decisis* than other issues,

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[6] Appellees attempt to draw support from the fact that *Goldfarb* and *Wiesenfeld* arose in the context of the Social Security program. First, they argue, the statute at issue here, unlike a social insurance system that provides blanket survivorship benefits, seeks to compensate for specific economic loss to the worker or his dependents, and appellant can claim no such loss. Relatedly, a widower who suffers and can prove any loss of support is entitled to a corresponding level of benefits under § 287.240, whereas Mr. Goldfarb, under the Social Security Act provision, had to show that he had received at least one-half of his support from his wife at the time of her death. These arguments rely on the fact that covered widowers suffering provable economic loss will receive benefits corresponding to that loss under § 287.240, but they ignore the statute's discriminatory effect on working women by providing them with less protection for their families than working men. Appellees also argue that, unlike the Social Security program, the workers' compensation system is not based on mandatory contributions from past wage earnings of the employee. Thus appellant's late wife was not deprived of a portion of her earnings to contribute to a fund out of which her husband would not benefit. But we have before rejected the proposition that "the Constitution is indifferent to a statute that conditions the availability of noncontributory welfare benefits on the basis of gender." *Califano* v. *Westcott*, 443 U. S. 76, 85 (1979), and we refuse to part ways with our earlier decisions by applying a different standard of review in this case simply because the system is funded by employer rather than employee contributions.

dissents and would affirm the judgment of the Supreme Court of Missouri.

MR. JUSTICE STEVENS, concurring in the judgment.

Nothing has happened since the decision in *Califano* v. *Goldfarb*, 430 U. S. 199, to persuade me that this kind of gender-based classification can simultaneously disfavor the male class and the female class.

To illustrate my difficulty with the analysis in Part II of the Court's opinion, it should be noted that there are three relevant kinds of marriages: (1) those in which the husband is dependent on the wife; (2) those in which the wife is dependent on the husband; and (3) those in which neither spouse is dependent on the other.

Under the Missouri statute, in either of the first two situations, if the dependent spouse survives, a death benefit will be paid regardless of whether the survivor is male or female; conversely, if the working spouse survives, no death benefit will be paid. The only difference in the two situations is that the surviving male, unlike the surviving female, must undergo the inconvenience of proving dependency. That surely is not a discrimination against females.

In the third situation, if one spouse dies, benefits are payable to a surviving female but not to a surviving male. In my view, that is a rather blatant discrimination against males. While both spouses remain alive, the prospect of receiving a potential death benefit upon the husband's demise reduces the wife's need for insurance on his life, whereas the prospect of *not* receiving a death benefit upon the wife's demise increases the husband's need for insurance on her life. That difference again places the husband at a disadvantage.*

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*There is no claim that the wage earner's take-home pay is affected by the Missouri statute. Whether the wage earner is single or married, and, if married, whether the other spouse is male or female, dependent or independent, the wage earner's pay is the same.

No matter how the statute is viewed, the class against which it discriminates is the male class. I therefore cannot join Part II of the Court's opinion. I do, however, agree that Missouri has failed to justify the disparate treatment of persons who have as strong a claim to equal treatment as do similarly situated surviving spouses, see *Califano* v. *Goldfarb*, *supra*, at 223 (STEVENS, J., concurring in judgment), and that its statute violates the Equal Protection Clause of the Fourteenth Amendment. For that reason I concur in the Court's judgment.

CITY OF ROME ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 78-1840. Argued October 10, 1979—Decided April 22, 1980

In 1966, appellant city of Rome, Ga., made certain changes in its electoral system, including provisions for majority rather than plurality vote for each of the nine members of the City Commission; for three numbered posts within each of the three (reduced from nine) wards; and for staggered terms for the commissioners and for members of the Board of Education from each ward; and a requirement that members of the Board reside in the wards from which they were elected. In addition, the city made 60 annexations between November 1, 1964, and February 10, 1975. Section 5 of the Voting Rights Act of 1965 (Act) requires preclearance by the Attorney General of the United States or the United States District Court for the District of Columbia of any change in a "standard, practice, or procedure with respect to voting" made after November 1, 1964, by jurisdictions that fall within the coverage formula set forth in § 4 (b) of the Act. Section 5 further provides that the Attorney General may clear a voting practice only if it "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." Georgia was designated a covered jurisdiction in 1965, and the municipalities of that State accordingly must comply with the preclearance procedure. Eventually, after at first having failed to do so, Rome submitted the annexations and the 1966 electoral changes for preclearance, but the Attorney General declined to preclear the above-enumerated electoral changes, concluding that in a city such as Rome, in which the population is predominately white and racial bloc voting has been common, such electoral changes would deprive Negro voters of the opportunity to elect a candidate of their choice. The Attorney General also refused to preclear 13 of the 60 annexations, finding that the city had not carried its burden of proving that the disapproved annexations would not dilute the Negro vote. Subsequently, however, in response to the city's motion for reconsideration, the Attorney General agreed to preclear the 13 annexations for Board of Education elections but still refused to preclear them for City Commission elections. The city and two of its officials then filed a declaratory judgment action in the United States District Court for the District of Columbia, seeking relief from the Act based on a variety

of claims. A three-judge court rejected the city's arguments and granted summary judgment for the defendants, finding that the disapproved electoral changes and annexations, while not made for any discriminatory purpose, did have a discriminatory effect. The court refused to allow the city to "bail out" of the Act's coverage pursuant to § 4 (a), which allows a covered jurisdiction to escape § 5's preclearance requirement by bringing a declaratory judgment action and proving that no "test or device" has been used in the jurisdiction during the 17 years preceding the filing of the action "for the purpose or with the effect of denying or abridging the right to vote on account of race or color."

Held:

1. The city may not use § 4 (a)'s "bailout" procedure. In § 4 (a)'s terms, the issue depends on whether the city is either a "State with respect to which the determinations have been made" under § 4 (b) or a "political subdivision with respect to which such determinations have been made as a separate unit," and here the city fails to meet the definition of either term, since § 4 (b)'s coverage formula has never been applied to it. The city comes within the Act only because it is part of a covered State, and, hence, any "bailout" action to exempt the city must be filed by the State. Moreover, the legislative history precludes any argument that § 4 (a)'s "bailout" procedure, made available to a covered "State," was also implicitly made available to political units in the State. Pp. 162–169.

2. The 60-day period under the Attorney General's regulation requiring requests for reconsideration of his refusal to preclear electoral changes to be decided within 60 days of their receipt, commences anew when the submitting jurisdiction deems its initial submission on a reconsideration motion to be inadequate and decides to supplement it. Thus, here, where the city, less than 60 days prior to the Attorney General's decision on the city's reconsideration motion, submitted, on its own accord, affidavits to supplement the motion, the Attorney General's response was timely. A contrary ruling that the 60-day period ran continuously from the date of the initial submission of the reconsideration motion would mean that the Attorney General would, in some cases, be unable to give adequate consideration to materials submitted in piecemeal fashion, and might be able to respond only by denying the reconsideration motion. Pp. 170–172.

3. By describing in § 5 the elements of discriminatory purpose and effect in the conjunctive, Congress plainly intended that a voting practice not be precleared unless *both* discriminatory purpose and effect are absent. Furthermore, Congress recognized this when, in 1975, it extended the Act for another seven years. Pp. 172–173.

4. The Act does not exceed Congress' power to enforce the Fifteenth Amendment. Under § 2 of that Amendment, Congress may prohibit practices that in and of themselves do not violate § 1 of the Amendment, so long as the prohibitions attacking racial discrimination in voting are "appropriate." Here, the Act's ban on electoral changes that are discriminatory in effect is an appropriate method of promoting the Fifteenth Amendment's purposes, even if it is assumed that § 1 prohibits only intentional discrimination in voting. *South Carolina* v. *Katzenbach*, 383 U. S. 301. Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create a risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact. Pp. 173–178.

5. The Act does not violate principles of federalism. Principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments "by appropriate legislation," *Fitzpatrick* v. *Bitzer*, 427 U. S. 445, such Amendments being specifically designed as an expansion of federal power and an intrusion on state sovereignty. Accordingly, Congress had the authority to regulate state and local voting through the provisions of the Act. Pp. 178–180.

6. There is no merit to appellants' contention that the Act and its preclearance requirement had outlived their usefulness by 1975, when Congress extended the Act for another seven years. In view of Congress' considered determination that at least another seven years of statutory remedies were necessary to counter the perpetuation of 95 years of pervasive voting discrimination, the extension of the Act was plainly a constitutional method of enforcing the Fifteenth Amendment. Pp. 180–182.

7. Nor is there any merit to the individual appellants' argument that, because no elections have been held in appellant city since 1974, their First, Fifth, Ninth, and Tenth Amendment rights as private citizens of the city have been abridged. Under circumstances where, upon the Attorney General's refusal to preclear the electoral changes, the city could have conducted elections under its prior electoral scheme, the city's failure to hold elections can only be attributed to its own officials, and not the operation of the Act. Pp. 182–183.

8. The District Court's findings that the city had failed to prove that the 1966 electoral changes and the annexations disapproved by the Attorney General did not have a discriminatory effect are not clearly erroneous. Pp. 183–187.

450 F. Supp. 378 and 472 F. Supp. 221, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, BLACKMUN, and STEVENS, JJ., joined. BLACKMUN, J., *post*, p. 187, and STEVENS, J., *post*, p. 190, filed concurring opinions. POWELL, J., filed a dissenting opinion, *post*, p. 193. REHNQUIST, J., filed a dissenting opinion, in which STEWART, J., joined, *post*, p. 206.

Robert M. Brinson argued the cause for appellants. With him on the briefs were *William E. Sumner* and *Joseph W. Dorn*.

Deputy Solicitor General Wallace argued the cause for appellees. With him on the brief were *Solicitor General McCree, Assistant Attorney General Days, Elinor Hadley Stillman, Brian K. Landsberg, Walter W. Barnett, Mildred M. Matesich*, and *Mark L. Gross*.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

At issue in this case is the constitutionality of the Voting Rights Act of 1965 and its applicability to electoral changes and annexations made by the city of Rome, Ga.

I

This is a declaratory judgment action brought by appellant city of Rome, a municipality in northwestern Georgia, under the Voting Rights Act of 1965, 79 Stat. 437, as amended, 42 U. S. C. § 1973 *et seq.* In 1970 the city had a population of 30,759, the racial composition of which was 76.6% white and 23.4% Negro. The voting-age population in 1970 was 79.4% white and 20.6% Negro.

The governmental structure of the city is established by a charter enacted in 1918 by the General Assembly of Georgia.

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*Briefs of *amici curiae* urging reversal were filed by *A. F. Summer*, Attorney General, and *Jerris Leonard* for the State of Mississippi; and by *Ronald A. Zumbrun, John H. Findley*, and *Raymond M. Momboisse* for the Pacific Legal Foundation.

Before the amendments at issue in this case, Rome's city charter provided for a nine-member City Commission and a five-member Board of Education to be elected concurrently on an at-large basis by a plurality of the vote. The city was divided into nine wards, with one city commissioner from each ward to be chosen in the citywide election. There was no residency requirement for Board of Education candidates.

In 1966, the General Assembly of Georgia passed several laws of local application that extensively amended the electoral provisions of the city's charter. These enactments altered the Rome electoral scheme in the following ways:

(1) the number of wards was reduced from nine to three;

(2) each of the nine commissioners would henceforth be elected at-large to one of three numbered posts established within each ward;

(3) each commissioner would be elected by majority rather than plurality vote, and if no candidate for a particular position received a majority, a runoff election would be held between the two candidates who had received the largest number of votes;

(4) the terms of the three commissioners from each ward would be staggered;

(5) the Board of Education was expanded from five to six members;

(6) each Board member would be elected at-large, by majority vote, for one of two numbered posts created in each of the three wards, with runoff procedures identical to those applicable to City Commission elections;

(7) Board members would be required to reside in the wards from which they were elected;

(8) the terms of the two members from each ward would be staggered.

Section 5 of the Voting Rights Act of 1965 requires preclearance by the Attorney General or the United States District Court for the District of Columbia of any change in a

"standard, practice, or procedure with respect to voting," 42 U. S. C. § 1973c, made after November 1, 1964, by jurisdictions that fall within the coverage formula set forth in § 4 (b) of the Act, 42 U. S. C. § 1973b (b). In 1965, the Attorney General designated Georgia a covered jurisdiction under the Act, 30 Fed. Reg. 9897, and the municipalities of that State must therefore comply with the preclearance procedure, *United States* v. *Board of Commissioners of Sheffield, Ala.*, 435 U. S. 110 (1978).

It is not disputed that the 1966 changes in Rome's electoral system were within the purview of the Act. *E. g., Allen* v. *State Board of Elections,* 393 U. S. 544 (1969). Nonetheless, the city failed to seek preclearance for them. In addition, the city did not seek preclearance for 60 annexations made between November 1, 1964, and February 10, 1975, even though required to do so because an annexation constitutes a change in a "standard, practice, or procedure with respect to voting" under the Act, *Perkins* v. *Matthews,* 400 U. S. 379 (1971).

In June 1974, the city did submit one annexation to the Attorney General for preclearance. The Attorney General discovered that other annexations had occurred, and, in response to his inquiries, the city submitted all the annexations and the 1966 electoral changes for preclearance. The Attorney General declined to preclear the provisions for majority vote, numbered posts, and staggered terms for City Commission and Board of Education elections, as well as the residency requirement for Board elections. He concluded that in a city such as Rome, in which the population is predominately white and racial bloc voting has been common, these electoral changes would deprive Negro voters of the opportunity to elect a candidate of their choice. The Attorney General also refused to preclear 13 of the 60 annexations in question. He found that the disapproved annexations either contained predominately white populations of significant size

or were near predominately white areas and were zoned for residential subdivision development. Considering these factors in light of Rome's at-large electoral scheme and history of racial bloc voting, he determined that the city had not carried its burden of proving that the annexations would not dilute the Negro vote.

In response to the city's motion for reconsideration, the Attorney General agreed to clear the 13 annexations for School Board elections. He reasoned that his disapproval of the 1966 voting changes had resurrected the pre-existing electoral scheme and that the revivified scheme passed muster under the Act. At the same time, he refused to clear the annexations for City Commission elections because, in his view, the residency requirement for City Commission contained in the pre-existing electoral procedures could have a discriminatory effect.

The city and two of its officials then filed this action, seeking relief from the Act based on a variety of claims. A three-judge court, convened pursuant to 42 U. S. C. §§ 1973b (a) and 1973c, rejected the city's arguments and granted summary judgment for the defendants. 472 F. Supp. 221 (DC 1979). We noted probable jurisdiction, 443 U. S. 914 (1979), and now affirm.

II

We must first address the appellants' assertion that, for two reasons, this Court may avoid reaching the merits of this action.

A

The appellants contend that the city may exempt itself from the coverage of the Act. To evaluate this argument, we must examine the provisions of the Act in some detail.

Section 5 of the Act requires that a covered jurisdiction that wishes to enact any "standard, practice, or procedure with respect to voting different from that in force or effect on

November 1, 1964," must seek preclearance from the Attorney General or the United States District Court for the District of Columbia. 79 Stat. 439, as amended, 42 U. S. C. § 1973c.[1]

[1] In its entirety, § 5, as set forth in 42 U. S. C. § 1973c, provides:

"Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b (a) of this title based upon determinations made under the first sentence of section 1973b (b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b (a) of this title based upon determinations made under the second sentence of section 1973b (b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b (a) of this title based upon determinations made under the third sentence of section 1973b (b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b (f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objec-

Section 4 (a) of the Act, 79 Stat. 438, as amended, 42 U. S. C. § 1973b (a),[2] provides that the preclearance requirement of

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tion will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to re-examine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 and any appeal shall lie to the Supreme Court."

[2] In its entirety, § 4 (a), as set forth in 42 U. S. C. § 1973b (a), provides:

"To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the first two sentences of subsection (b) of this section or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the seventeen years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color: *Provided*, That no such declaratory judgment shall issue with respect to any plaintiff for a period of seventeen years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under this section, whether entered prior to or after August 6, 1965, determining that denials or abridgments of the right to vote on account of race or color through the use of such tests or devices have occurred anywhere in the territory of such plaintiff. No citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the third sentence of subsection (b) of this section or in any political subdivision with respect to which such determinations have been made as a separate unit, unless

§ 5 is applicable to "any State" that the Attorney General has determined qualifies under the coverage formula of § 4 (b), 42

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the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the ten years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in subsection (f)(2) of this section: *Provided*, That no such declaratory judgment shall issue with respect to any plaintiff for a period of ten years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under this section, whether entered prior to or after the enactment of this paragraph, determining that denials or abridgments of the right to vote on account of race or color, or in contravention of the guarantees set forth in subsection (f)(2) of this section through the use of tests or devices have occurred anywhere in the territory of such plaintiff.

"An action pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 and any appeal shall lie to the Supreme Court. The court shall retain jurisdiction of any action pursuant to this subsection for five years after judgment and shall reopen the action upon motion of the Attorney General alleging that a test or device has been used for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in subsection (f)(2) of this section.

"If the Attorney General determines that he has no reason to believe that any such test or device has been used during the seventeen years preceding the filing of an action under the first sentence of this subsection for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in subsection (f)(2) of this section, he shall consent to the entry of such judgment.

"If the Attorney General determines that he has no reason to believe that any such test or device has been used during the ten years preceding the filing of an action under the second sentence of this subsection for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in subsection (f)(2) of this section, he shall consent to the entry of such judgment."

U. S. C. § 1973b (b),[3] and to "any political subdivision with respect to which such determinations have been made as a separate unit." As we have noted, the city of Rome comes within the preclearance requirement because it is a political unit in a covered jurisdiction, the State of Georgia. *United States* v. *Board of Commissioners of Sheffield, Ala.*, 435 U. S. 110 (1978).

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[3] In its entirety, § 4 (b), as set forth in 42 U. S. C. § 1973b (b), provides:

"The provisions of subsection (a) of this section shall apply in any State or in any political subdivision of a State which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964. On and after August 6, 1970, in addition to any State or political subdivision of a State determined to be subject to subsection (a) of this section pursuant to the previous sentence, the provisions of subsection (a) of this section shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1968, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1968, or that less than 50 per centum of such persons voted in the presidential election of November 1968. On and after August 6, 1975, in addition to any State or political subdivision of a State determined to be subject to subsection (a) of this section pursuant to the previous two sentences, the provisions of subsection (a) of this section shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1972, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the citizens of voting age were registered on November 1, 1972, or that less than 50 per centum of such persons voted in the Presidential election of November 1972.

"A determination or certification of the Attorney General or of the Director of the Census under this section or under section 1973d or 1973k of this title shall not be reviewable in any court and shall be effective upon publication in the Federal Register."

Section 4 (a) also provides, however, a procedure for exemption from the Act. This so-called "bailout" provision allows a covered jurisdiction to escape the preclearance requirement of § 5 by bringing a declaratory judgment action before a three-judge panel of the United States District Court for the District of Columbia and proving that no "test or device"[4] has been used in the jurisdiction "during the seventeen years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color." The District Court refused to allow the city to "bail out" of the Act's coverage, holding that the political units of a covered jurisdiction cannot independently bring a § 4 (a) bailout action. We agree.

In the terms of § 4 (a), the issue turns on whether the city is, for bailout purposes, either a "State with respect to which the determinations have been made under the third sentence of subsection (b) of this section" or a "political subdivision with respect to which such determinations have been made as a separate unit," the "determinations" in each instance being the Attorney General's decision whether the jurisdiction falls within the coverage formula of § 4 (b). On the face of the statute, the city fails to meet the definition for either term, since the coverage formula of § 4 (b) has never been applied to it. Rather, the city comes within the Act because it is part of a covered State. Under the plain language of the statute, then, it appears that any bailout action to exempt the city must be filed by, and seek to exempt all of, the State of Georgia.

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[4] Section 4 (c) of the Act, as set forth in 42 U. S. C. § 1973b (c), provides:

"The phrase 'test or device' shall mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class."

The appellants seek to avoid this conclusion by relying on our decision in *United States* v. *Board of Commissioners of Sheffield, Ala., supra.* That decision, however, did not even discuss the bailout process. In *Sheffield*, the Court held that when the Attorney General determines that a State falls within the coverage formula of § 4 (b), any political unit of the State must preclear new voting procedures under § 5 regardless of whether the unit registers voters and therefore would otherwise come within the Act as a "political subdivision." [5] In so holding, the Court necessarily determined that the scope of §§ 4 (a) and 5 is "geographic" or "territorial," 435 U. S., at 120, 126, and thus that, when an entire State is covered, it is irrelevant whether political units of it might otherwise come under § 5 as "political subdivisions." 435 U. S., at 126–129.

Sheffield, then, did not hold that cities such as Rome are "political subdivisions" under §§ 4 and 5. Thus, our decision in that case is in no way inconsistent with our conclusion that, under the express statutory language, the city is not a "political subdivision" for purposes of § 4 (a) "bailout."

Nor did *Sheffield* suggest that a municipality in a covered State is itself a "State" for purposes of the § 4 (a) exemption procedure. *Sheffield* held that, based on the structure and purposes of the Act, the legislative history, and the contemporaneous interpretation of the Attorney General, the ambiguities of §§ 4 (a) and 5 should be resolved by holding that § 5's preclearance requirement for electoral changes by a covered "State" reached all such changes made by political units in that State. See 435 U. S., at 117–118. By contrast, in this

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[5] Section 14 (c)(2) of the Act, as set forth in 42 U. S. C. § 1973*l* (c)(2), provides:

"The term 'political subdivision' shall mean any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting."

case the legislative history precludes any argument that § 4 (a)'s bailout procedure, made available to a covered "State," was also implicitly made available to political units in the State. The House Commitee Report stated:

> "This opportunity to obtain exemption is afforded only to those States or to those subdivisions as to which the formula has been determined to apply as a separate unit; subdivisions within a State which is covered by the formula are not afforded the opportunity for separate exemption." H. R. Rep. No. 439, 89th Cong., 1st Sess., 14 (1965).

The Senate Committee's majority Report is to the same effect:

> "We are also of the view that an entire State covered by the test and device prohibition of section 4 must be able to lift the prohibition if any part of it is to be relieved from the requirements of section 4." S. Rep. No. 162, 89th Cong., 1st Sess., pt. 3, p. 16 (1965).

See also *id.*, at 21. Bound by this unambiguous congressional intent, we hold that the city of Rome may not use the bailout procedure of § 4 (a).[6]

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[6] We also reject the appellants' argument that the majority vote, runoff election, and numbered posts provisions of the city's charter have already been precleared by the Attorney General because in 1968 the State of Georgia submitted, and the Attorney General precleared, a comprehensive Municipal Election Code that is now Title 34A of the Code of Georgia. Both the relevant regulation, 28 CFR § 51.10 (1979), and the decisions of this Court require that the jurisdiction "in some unambiguous and recordable manner submit any legislation or regulation in question directly to the Attorney General with a request for his consideration pursuant to the Act," *Allen* v. *State Board of Elections*, 393 U. S. 544, 571 (1969), and that the Attorney General be afforded an adequate opportunity to determine the purpose of the electoral changes and whether they will adversely affect minority voting in that jurisdiction, see *United States* v. *Board of Commissioners of Sheffield, Ala.*, 435 U. S. 110, 137–138 (1978). Under this standard, the State's 1968 submission cannot be viewed as a submission of the city's 1966 electoral changes, for, as the District

B

The appellants next argue that its electoral changes have been precleared because of allegedly tardy action by the Attorney General. On May 21, 1976, the city asked the Attorney General to reconsider his refusal to preclear the electoral changes and the 13 annexations. On July 13, 1976, upon its own accord, the city submitted two additional affidavits. The Attorney General denied the motion to reconsider on August 12, 1976.

Section 5 of the Act provides that the Attorney General must interpose objections to original submissions within 60 days of their filing.[7] If the Attorney General fails to make a timely objection, the voting practices submitted become fully enforceable. By regulation, the Attorney General has provided that requests for reconsideration shall also be decided within 60 days of their receipt. 28 CFR § 51.3 (d) (1979).[8] If in the present case the 60-day period for reconsideration is computed as running continuously from May 24, the date of the initial submission of the reconsideration motion, the period expired before the Attorney General made his August 12 response. In contrast, if the period is measured from July 14,

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Court noted, the State's submission informed the Attorney General only of "its decision to defer to local charters and ordinances regarding majority voting, runoff elections, and numbered posts," and "did not . . . submit in an 'unambiguous and recordable manner' all municipal charter provisions, as written in 1968 or as amended thereafter, regarding these issues." 472 F. Supp. 221, 233 (DC 1979).

[7] See n. 1, *supra*.

[8] This regulation provides:

"When the Attorney General objects to a submitted change affecting voting, and the submitting authority seeking reconsideration of the objection brings additional information to the attention of the Attorney General, the Attorney General shall decide within 60 days of receipt of a request for reconsideration (provided that he shall have at least 15 days following a conference held at the submitting authority's request) whether to withdraw or to continue his objection."

the date the city supplemented its request, the Attorney General's response was timely.

The timing provisions of both the Act and the regulations are silent on the effect of supplements to requests for reconsideration. We agree with the Attorney General that the purposes of the Act and its implementing regulations would be furthered if the 60-day period provided by 28 CFR § 51.3 (d) were interpreted to commence anew when additional information is supplied by the submitting jurisdiction on its own accord.

The logic of *Georgia* v. *United States,* 411 U. S. 526 (1973), indicates that the Government's approach fully comports with the Act and regulations. In that case, the Court examined a regulation of the Attorney General, 28 CFR § 51.18 (a), that provided that § 5's mandatory 60-day period for consideration of original submissions is tolled whenever the Attorney General finds it necessary to request additional information from the submitting jurisdiction. Under the regulation, the 60-day period commences anew when the jurisdiction in question furnishes the requested information to the Attorney General. The Court upheld the regulation, holding that it was "wholly reasonable and consistent with the Act." 411 U. S., at 541.

Georgia v. *United States* stands for the proposition that the purposes of the Act are furthered if, once *all* information relevant to a submission is placed before the Attorney General, the Attorney General is accorded the full 60-day period provided by law in which to make his "difficult and complex" decision, *id.,* at 540. It follows, then, that when the submitting jurisdiction deems its initial submission on a reconsideration motion to be inadequate and decides to supplement it, as the city of Rome did in the present case, the 60-day period under 28 CFR § 51.3 (d) is commenced anew. A contrary ruling would mean that the Attorney General would, in some cases, be unable to give adequate consideration to materials submitted in piecemeal fashion. In such circumstances, the

Attorney General might be able to respond only by denying the reconsideration motion. Such a result would run counter to the purposes of the Act and regulations, since it would penalize submitting jurisdictions that have legitimate reasons to file supplementary materials.[9]

III

The appellants raise five issues of law in support of their contention that the Act may not properly be applied to the electoral changes and annexations disapproved by the Attorney General.

A

The District Court found that the disapproved electoral changes and annexations had not been made for any discriminatory purpose, but did have a discriminatory effect. The appellants argue that § 5 of the Act may not be read as prohibiting voting practices that have only a discriminatory effect. The appellants do not dispute that the plain language of § 5 commands that the Attorney General may clear a practice only if it "does not have the purpose *and* will not have the effect of denying or abridging the right to vote on account of race or color." 42 U. S. C. § 1973c (emphasis added). By describing the elements of discriminatory purpose and effect in the conjunctive, Congress plainly intended that a voting practice not be precleared unless *both* discriminatory purpose and effect are absent. Our decisions have consistently interpreted § 5 in this fashion. *Beer* v. *United States*, 425 U. S. 130, 141 (1976); *City of Richmond* v. *United States*, 422 U. S. 358, 372 (1975); *Georgia* v. *United States*, *supra*, at 538; *Perkins* v. *Matthews*, 400 U. S. 379, 387, 388 (1971). Furthermore, Congress recognized that the Act prohibited both discriminatory purpose and effect when, in 1975, it extended

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[9] Because of our resolution of this issue, we need not address the Government's contention that the 60-day period provided by 28 CFR § 51.3 (d) is permissive rather than mandatory.

the Act for another seven years. S. Rep. No. 94–295, pp. 15–16 (1975) (hereinafter S. Rep.); H. R. Rep. No. 94–196, pp. 8–9 (1975) (hereinafter H. R. Rep.).

The appellants urge that we abandon this settled interpretation because in their view § 5, to the extent that it prohibits voting changes that have only a discriminatory effect, is unconstitutional. Because the statutory meaning and congressional intent are plain, however, we are required to reject the appellants' suggestion that we engage in a saving construction and avoid the constitutional issues they raise. See, *e. g.*, *NLRB* v. *Catholic Bishop of Chicago*, 440 U. S. 490, 499–501 (1979); *id.*, at 508–511 (BRENNAN, J., dissenting). Instead, we now turn to their constitutional contentions.

B

Congress passed the Act under the authority accorded it by the Fifteenth Amendment.[10] The appellants contend that the Act is unconstitutional because it exceeds Congress' power to enforce that Amendment. They claim that § 1 of the Amendment prohibits only purposeful racial discrimination in voting, and that in enforcing that provision pursuant to § 2, Congress may not prohibit voting practices lacking discriminatory intent even if they are discriminatory in effect. We hold that, even if § 1 of the Amendment prohibits only purposeful discrimination,[11] the prior decisions of this Court foreclose any argument that Congress may not, pursuant to § 2, outlaw voting practices that are discriminatory in effect.

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[10] The Amendment provides:

"Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

"Section 2. The Congress shall have power to enforce this article by appropriate legislation."

[11] For purposes of this case it is unnecessary to examine the various approaches expressed by the Members of the Court in *City of Mobile* v. *Bolden*, *ante*, p. 55, decided this day.

The appellants are asking us to do nothing less than overrule our decision in *South Carolina* v. *Katzenbach*, 383 U. S. 301 (1966), in which we upheld the constitutionality of the Act. The Court in that case observed that, after making an extensive investigation, Congress had determined that its earlier attempts to remedy the "insidious and pervasive evil" of racial discrimination in voting had failed because of "unremitting and ingenious defiance of the Constitution" in some parts of this country. *Id.*, at 309. Case-by-case adjudication had proved too ponderous a method to remedy voting discrimination, and, when it had produced favorable results, affected jurisdictions often "merely switched to discriminatory devices not covered by the federal decrees." *Id.*, at 314. In response to its determination that "sterner and more elaborate measures" were necessary, *id.*, at 309, Congress adopted the Act, a "complex scheme of stringent remedies aimed at areas where voting discrimination has been most flagrant," *id.*, at 315.

The Court then turned to the question whether the Fifteenth Amendment empowered Congress to impose the rigors of the Act upon the covered jurisdictions. The Court examined the interplay between the judicial remedy created by § 1 of the Amendment and the legislative authority conferred by § 2:

> "By adding this authorization [in § 2], the Framers indicated that Congress was to be chiefly responsible for implementing the rights created in § 1. 'It is the power of Congress which has been enlarged. Congress is authorized to *enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the [Civil War] amendments fully effective.' *Ex parte Virginia*, 100 U. S. 339, 345. Accordingly, in addition to the courts, Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting." 383 U. S., at 325–326 (emphasis in original).

Congress' authority under § 2 of the Fifteenth Amendment, we held, was no less broad than its authority under the Necessary and Proper Clause, see *McCulloch* v. *Maryland*, 4 Wheat. 316, 421 (1819). This authority, as applied by longstanding precedent to congressional enforcement of the Civil War Amendments, is defined in these terms:

> "'Whatever legislation is appropriate, that is, adapted to carry out the objects the [Civil War] amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.' *Ex parte Virginia*, 100 U. S. [339,] 345–346." *South Carolina* v. *Katzenbach*, *supra*, at 327.

Applying this standard, the Court held that the coverage formula of § 4 (b), the ban on the use of literacy tests and related devices, the requirement that new voting rules must be precleared and must lack both discriminatory purpose and effect, and the use of federal examiners were all appropriate methods for Congress to use to enforce the Fifteenth Amendment. 383 U. S., at 329–337.

The Court's treatment in *South Carolina* v. *Katzenbach* of the Act's ban on literacy tests demonstrates that, under the Fifteenth Amendment, Congress may prohibit voting practices that have only a discriminatory effect. The Court had earlier held in *Lassiter* v. *Northampton County Board of Elections*, 360 U. S. 45 (1959), that the use of a literacy test that was fair on its face and was not employed in a discriminatory fashion did not violate § 1 of the Fifteenth Amendment. In upholding the Act's *per se* ban on such tests in *South Carolina* v. *Katzenbach*, the Court found no reason to overrule *Lassiter*. Instead, the Court recognized that the prohibition was an appropriate method of enforcing the Fifteenth Amendment

because for many years most of the covered jurisdictions had imposed such tests to effect voting discrimination and the continued use of even nondiscriminatory, fairly administered literacy tests would "freeze the effect" of past discrimination by allowing white illiterates to remain on the voting rolls while excluding illiterate Negroes. *South Carolina* v. *Katzenbach*, 383 U. S., at 334. This holding makes clear that Congress may, under the authority of § 2 of the Fifteenth Amendment, prohibit state action that, though in itself not violative of § 1, perpetuates the effects of past discrimination.

Other decisions of this Court also recognize Congress' broad power to enforce the Civil War Amendments. In *Katzenbach* v. *Morgan*, 384 U. S. 641 (1966), the Court held that legislation enacted under authority of § 5 of the Fourteenth Amendment[12] would be upheld so long as the Court could find that the enactment " 'is plainly adapted to [the] end' " of enforcing the Equal Protection Clause and "is not prohibited by but is consistent with 'the letter and spirit of the constitution,' " regardless of whether the practices outlawed by Congress in themselves violated the Equal Protection Clause. 384 U. S., at 651 (quoting *McCulloch* v. *Maryland*, *supra*, at 421). The Court stated that, "[c]orrectly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." 384 U. S., at 651. Four years later, in *Oregon* v. *Mitchell*, 400 U. S. 112 (1970), the Court unanimously upheld a provision of the Voting Rights Act Amendments of 1970, Pub. L. 91–285, 84 Stat. 314, imposing a 5-year nationwide ban on literacy tests and similar requirements for registering to vote in state and federal elections. The Court concluded that Congress could rationally have

[12] Section 5 of the Fourteenth Amendment provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

determined that these provisions were appropriate methods of attacking the perpetuation of earlier, purposeful racial discrimination, regardless of whether the practices they prohibited were discriminatory only in effect. See 400 U. S., at 132–133 (opinion of Black, J.); *id.*, at 144–147 (opinion of Douglas, J.); *id.*, at 216–217 (opinion of Harlan, J.); *id.*, at 231–236 (opinion of BRENNAN, WHITE, and MARSHALL, JJ.); *id.*, at 282–284 (opinion of STEWART, J., joined by BURGER, C. J., and BLACKMUN, J.).[13]

It is clear, then, that under § 2 of the Fifteenth Amendment Congress may prohibit practices that in and of themselves do not violate § 1 of the Amendment, so long as the prohibitions attacking racial discrimination in voting are "appropriate," as that term is defined in *McCulloch* v. *Maryland* and *Ex parte Virginia*, 100 U. S. 339 (1880). In the present case, we hold that the Act's ban on electoral changes that are discriminatory in effect is an appropriate method of promoting the purposes of the Fifteenth Amendment, even if it is assumed that § 1 of the Amendment prohibits only intentional discrimination in voting. Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination,[14] it was proper to prohibit changes that have a discriminatory impact. See *South Carolina* v. *Katzenbach*, *supra*, at 335; *Oregon* v. *Mitchell*, *supra*,

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[13] There was no opinion for the Court in this case. Mr. Justice Douglas expressed the view that the legislation in question was authorized under § 5 of the Fourteenth Amendment. 400 U. S., at 144–147. The other eight Members of the Court believed that the Congress had permissibly acted within the authority provided it by § 2 of the Fifteenth Amendment. 400 U. S., at 132–133 (opinion of Black, J.); *id.*, at 216 (opinion of Harlan, J.); *id.*, at 232–234 (opinion of BRENNAN, WHITE, and MARSHALL, JJ.); *id.*, at 283 (opinion of STEWART, J., joined by BURGER, C. J., and BLACKMUN, J.).

[14] See *South Carolina* v. *Katzenbach*, 383 U. S. 301, 335, and n. 47 (1966) (citing H. R. Rep. No. 439, 89th Cong., 1st Sess., 10–11 (1965); S. Rep. No. 162, 89th Cong., 1st Sess., pt. 3, pp. 8, 12 (1965)).

at 216 (opinion of Harlan, J.). We find no reason, then, to disturb Congress' considered judgment that banning electoral changes that have a discriminatory impact is an effective method of preventing States from " 'undo[ing] or defeat[ing] the rights recently won' by Negroes." *Beer* v. *United States*, 425 U. S. 130, 140 (1976) (quoting H. R. Rep. No. 91–397, p. 8 (1969)).

C

The appellants next assert that, even if the Fifteenth Amendment authorized Congress to enact the Voting Rights Act, that legislation violates principles of federalism articulated in *National League of Cities* v. *Usery*, 426 U. S. 833 (1976). This contention necessarily supposes that *National League of Cities* signifies a retreat from our decision in *South Carolina* v. *Katzenbach, supra*, where we rejected the argument that the Act "exceed[s] the powers of Congress and encroach[es] on an area reserved to the States by the Constitution," 383 U. S., at 323, and determined that, "[a]s against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting," *id.*, at 324. To the contrary, we find no inconsistency between these decisions.

In *National League of Cities*, the Court held that federal legislation regulating minimum wages and hours could not constitutionally be extended to employees of state and local governments. The Court determined that the Commerce Clause did not provide Congress the authority to enact legislation "directly displac[ing] the States' freedom to structure integral operations in areas of traditional governmental functions," 426 U. S., at 852, which, it held, included employer-employee relationships in programs traditionally conducted by States, *id.*, at 851–852.

The decision in *National League of Cities* was based solely on an assessment of congressional power under the Commerce Clause, and we explicitly reserved the question "whether different results might obtain if Congress seeks to affect inte-

gral operations of state governments by exercising authority granted it under other sections of the Constitution such as . . . § 5 of the Fourteenth Amendment." *Id.*, at 852, n. 17. The answer to this question came four days later in *Fitzpatrick* v. *Bitzer*, 427 U. S. 445 (1976). That case presented the issue whether, in spite of the Eleventh Amendment, Congress had the authority to bring the States as employers within the coverage of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.*, and to provide that successful plaintiffs could recover retroactive monetary relief. The Court held that this extension of Title VII was an appropriate method of enforcing the Fourteenth Amendment:

> "[W]e think that the Eleventh Amendment, and the principle of state sovereignty which it embodies, . . . are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment. In that section Congress is expressly granted authority to enforce 'by appropriate legislation' the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority. When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority." *Fitzpatrick* v. *Bitzer, supra,* at 456.

We agree with the court below that *Fitzpatrick* stands for the proposition that principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments "by appropriate legislation." Those Amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty. Applying this principle, we hold that Congress had the authority to regulate state and local voting through the provisions of the Voting Rights

Act.[15] *National League of Cities*, then, provides no reason to depart from our decision in *South Carolina* v. *Katzenbach* that "the Fifteenth Amendment supersedes contrary exertions of state power," 383 U. S., at 325, and that the Act is "an appropriate means for carrying out Congress' constitutional responsibilities," *id.*, at 308.[16]

D

The appellants contend in the alternative that, even if the Act and its preclearance requirement were appropriate means of enforcing the Fifteenth Amendment in 1965, they had outlived their usefulness by 1975, when Congress extended the Act for another seven years. We decline this invitation to overrule Congress' judgment that the 1975 extension was warranted.

In considering the 1975 extension, Congress acknowledged that, largely as a result of the Act, Negro voter registration had improved dramatically since 1965. H. R. Rep., at 6; S. Rep., at 13. Congress determined, however, that "a bleaker side of the picture yet exists." H. R. Rep., at 7; S. Rep., at 13. Significant disparity persisted between the percentages of whites and Negroes registered in at least several of the covered jurisdictions. In addition, though the number of Negro elected officials had increased since 1965, most held only relatively minor positions, none held statewide office, and

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[15] Indeed, *Fitzpatrick* v. *Bitzer*, 427 U. S. 445 (1976), strongly suggested this result by citing *South Carolina* v. *Katzenbach*, 383 U. S. 301 (1966), as one of several cases sanctioning "intrusions by Congress, acting under the Civil War Amendments, into the judicial, executive, and legislative spheres of autonomy previously reserved to the States. The legislation considered in each case was grounded on the expansion of Congress' powers—with the corresponding diminution of state sovereignty—found to be intended by the Framers and made part of the Constitution upon the States' ratification of those Amendments, a phenomenon aptly described as a 'carv[ing] out' in *Ex parte Virginia*, [100 U. S. 339, 346 (1880)]." *Fitzpatrick* v. *Bitzer*, *supra*, at 455–456.

[16] See also *Katzenbach* v. *Morgan*, 384 U. S. 641, 646–647 (1966).

their number in the state legislatures fell far short of being representative of the number of Negroes residing in the covered jurisdictions. Congress concluded that, because minority political progress under the Act, though "undeniable," had been "modest and spotty," extension of the Act was warranted. H. R. Rep., at 7–11; S. Rep., at 11–19.

Congress gave careful consideration to the propriety of readopting § 5's preclearance requirement. It first noted that "[i]n recent years the importance of this provision has become widely recognized as a means of promoting and preserving minority political gains in covered jurisdictions." H. R. Rep., at 8; S. Rep., at 15. After examining information on the number and types of submissions made by covered jurisdictions and the number and nature of objections interposed by the Attorney General, Congress not only determined that § 5 should be extended for another seven years, it gave that provision this ringing endorsement:

> "The recent objections entered by the Attorney General . . . to Section 5 submissions clearly bespeak the continuing need for this preclearance mechanism. As registration and voting of minority citizens increases [*sic*], other measures may be resorted to which would dilute increasing minority voting strength.
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> . . . . .
>
> "The Committee is convinced that it is largely Section 5 which has contributed to the gains thus far achieved in minority political participation, and it is likewise Sect[i]on 5 which serves to insure that that progress not be destroyed through new procedures and techniques. Now is not the time to remove those preclearance protections from such limited and fragile success." H. R. Rep., at 10–11.

See also S. Rep., at 15–19.

It must not be forgotten that in 1965, *95 years* after ratification of the Fifteenth Amendment extended the right to vote

to all citizens regardless of race or color, Congress found that racial discrimination in voting was an "insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution." *South Carolina* v. *Katzenbach*, 383 U. S., at 309. In adopting the Voting Rights Act, Congress sought to remedy this century of obstruction by shifting "the advantage of time and inertia from the perpetrators of the evil to its victims." *Id.*, at 328. Ten years later, Congress found that a 7-year extension of the Act was necessary to preserve the "limited and fragile" achievements of the Act and to promote further amelioration of voting discrimination. When viewed in this light, Congress' considered determination that at least another 7 years of statutory remedies were necessary to counter the perpetuation of 95 years of pervasive voting discrimination is both unsurprising and unassailable. The extension of the Act, then, was plainly a constitutional method of enforcing the Fifteenth Amendment.

E

As their final constitutional challenge to the Act,[17] the individual appellants argue that, because no elections have been held in Rome since 1974, their First, Fifth, Ninth, and Tenth Amendment rights as private citizens of the city have been abridged. In blaming the Act for this result, these appellants identify the wrong culprit. The Act does not restrict private political expression or prevent a covered jurisdiction from holding elections; rather, it simply provides that elections may be held either under electoral rules in effect on November 1, 1964, or under rules adopted since that time that have been properly precleared. When the Attorney General refused to preclear the city's electoral changes, the city had the authority to conduct elections under its electoral scheme in effect on

[17] We do not reach the merits of the appellants' argument that the Act violates the Guarantee Clause, Art. IV, § 4, since that issue is not justiciable. See, *e. g.*, *Baker* v. *Carr*, 369 U. S. 186 (1962).

November 1, 1964. Indeed, the Attorney General offered to preclear any technical amendments to the city charter necessary to permit elections under the pre-existing scheme or a modification of that scheme consistent with the Act. In these circumstances, the city's failure to hold elections can only be attributed to its own officials, and not to the operation of the Act.

IV

Now that we have reaffirmed our holdings in *South Carolina* v. *Katzenbach* that the Act is "an appropriate means for carrying out Congress' constitutional responsibilities" and is "consonant with all . . . provisions of the Constitution," 383 U. S., at 308, we must address the appellants' contentions that the 1966 electoral changes and the annexations disapproved by the Attorney General do not, in fact, have a discriminatory effect. We are mindful that the District Court's findings of fact must be upheld unless they are clearly erroneous.

A

We conclude that the District Court did not clearly err in finding that the city had failed to prove that the 1966 electoral changes would not dilute the effectiveness of the Negro vote in Rome.[18] The District Court determined that racial bloc voting existed in Rome. It found that the electoral changes from plurality-win to majority-win elections, numbered posts, and staggered terms, when combined with the presence of racial bloc voting, Rome's majority white population, and at-large electoral system, would dilute Negro voting strength. The District Court recognized that, under the pre-existing plurality-win system, a Negro candidate would have a fair opportunity to be elected by a plurality of the vote if

[18] Under § 5, the city bears the burden of proving lack of discriminatory purpose and effect. *Beer* v. *United States*, 425 U. S. 130, 140–141 (1976); *Georgia* v. *United States*, 411 U. S. 526, 538 (1973); *South Carolina* v. *Katzenbach*, 383 U. S., at 335.

white citizens split their votes among several white candidates and Negroes engage in "single-shot voting" in his favor.[19] The 1966 change to the majority vote/runoff election scheme significantly decreased the opportunity for such a Negro candidate since, "even if he gained a plurality of votes in the general election, [he] would still have to face the runner-up white candidate in a head-to-head runoff election in which, given bloc voting by race and a white majority, [he] would be at a severe disadvantage." 472 F. Supp., at 244 (footnotes omitted).[20]

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[19] Single-shot voting has been described as follows:

"Consider [a] town of 600 whites and 400 blacks with an at-large election to choose four council members. Each voter is able to cast four votes. Suppose there are eight white candidates, with the votes of the whites split among them approximately equally, and one black candidate, with all the blacks voting for him and no one else. The result is that each white candidate receives about 300 votes and the black candidate receives 400 votes. The black has probably won a seat. This technique is called single-shot voting. Single-shot voting enables a minority group to win some at-large seats if it concentrates its vote behind a limited number of candidates and if the vote of the majority is divided among a number of candidates." U. S. Commission on Civil Rights, The Voting Rights Act: Ten Years After, pp. 206–207 (1975).

[20] The District Court found that Rome's Negro citizens believed that a Negro will never be elected as long as the city's present electoral system remains in effect. 472 F. Supp., at 226. Only four Negroes have ever sought elective office in Rome, and none of them was elected. The campaign of the Reverend Clyde Hill, who made the strongest showing of the four, indicates both the presence of racial bloc voting in the city and the dilutive effect of the majority vote/runoff election scheme adopted in 1966. The city's elections were operated under that scheme when Rev. Hill ran for the Board of Education in 1970. With strong support from the Negro community, Rev. Hill ran against three white opponents and received 921 votes in the general election, while his opponents received 909, 407, and 143 votes, respectively. Rev. Hill, then, would have been elected under the pre-1966 plurality-win voting scheme. Under the majority-win/runoff election provisions adopted in 1966, however, a runoff election was held, and the white candidate who was the runner-up in the general election defeated Rev. Hill by a vote of 1409–1142.

The District Court's further conclusion that the city had failed to prove that the numbered posts, staggered terms, and Board of Education residency provisions would not have the effect of forcing head-to-head contests between Negroes and whites and depriving Negroes of the opportunity to elect a candidate by single-shot voting, *id.*, at 245, is likewise not clearly erroneous.[21] The District Court's holdings regarding all of the 1966 electoral changes are consistent with our statement in *Beer* v. *United States,* 425 U. S., at 141, that "the purpose of § 5 has always been to insure that no voting procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral [process]."

B

The District Court also found that the city had failed to meet its burden of proving that the 13 disapproved annexations did not dilute the Negro vote in Rome. The

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[21] In so holding, the District Court relied on this analysis by the United States Commission on Civil Rights:

"'There are a number of voting rules which have the effect of frustrating single-shot voting. . . . [I]nstead of having one race for four positions, there could be four races, each for only one position. Thus for post no. 1 there might be one black candidate and one white, with the white winning. The situation would be the same for each post, or seat—a black candidate would always face a white in a head-to-head contest and would not be able to win. There would be no opportunity for single-shot voting. A black still might win if there were more than one white candidate for a post, but this possibility would be eliminated if there was also a majority requirement.

"'[Second,] each council member might be required to live in a separate district but with voting still at large. This—just like numbered posts—separates one contest into a number of individual contests.

"'[Third,] the terms of council members might be staggered. If each member has a 4-year term and one member is elected each year, then the opportunity for single-shot voting will never arise.'" 472 F. Supp., at 244, n. 95 (quoting U. S. Commission on Civil Rights, *supra* n. 19, at 207–208).

city's argument that this finding is clearly erroneous is severely undermined by the fact that it failed to present any evidence shedding meaningful light on how the annexations affected the vote of Rome's Negro community.

Because Rome's failure to preclear any of these annexations caused a delay in federal review and placed the annexations before the District Court as a group, the court was correct in concluding that the cumulative effect of the 13 annexations must be examined from the perspective of the most current available population data. Unfortunately, the population data offered by the city was quite uninformative. The city did not present evidence on the current general population and voting-age population of Rome, much less a breakdown of each population category by race.[22] Nor does the record reflect current information regarding the city's registered voters. The record does indicate the number of Negro and white registered voters in the city as of 1975, but it is unclear whether these figures included persons residing in the annexed areas in dispute.

Certain facts are clear, however. In February 1978, the most recent date for which any population data were compiled, 2,582 whites and only 52 Negroes resided in the disapproved annexed areas. Of these persons, 1,797 whites and only 24

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[22] In *City of Richmond* v. *United States*, 422 U. S. 358 (1975), and *City of Petersburg* v. *United States*, 354 F. Supp. 1021 (DC 1972), summarily aff'd, 410 U. S. 962 (1973), evidence of the racial composition of the general population was used to assess the impact of annexations on the importance of the Negro vote in the community. This information, when coupled with data on the racial composition of the community's voting-age population, provides more probative evidence in such cases than does voter registration data, which may perpetuate the effects of prior discrimination in the registration of voters, *Ely* v. *Klahr*, 403 U. S. 108, 115, n. 7 (1971); *Burns* v. *Richardson*, 384 U. S. 73, 92–93 (1966), or reflect a belief among the Negro population that it cannot elect a candidate of its choice, cf. n. 20, *supra*. Current voting-age population data are probative because they indicate the electoral potential of the minority community.

Negroes were of voting age, and 823 whites and only 9 Negroes were registered voters. We must assume that these persons moved to the annexed areas from outside the city, rather than from within the preannexation boundaries of the city, since the city, which bore the burden of proof, presented no evidence to the contrary.

The District Court properly concluded that these annexations must be scrutinized under the Voting Rights Act. See *Perkins* v. *Matthews*, 400 U. S., at 388–390. By substantially enlarging the city's number of white eligible voters without creating a corresponding increase in the number of Negroes, the annexations reduced the importance of the votes of Negro citizens who resided within the preannexation boundaries of the city. In these circumstances, the city bore the burden of proving that its electoral system "fairly reflects the strength of the Negro community as it exists after the annexation[s]." *City of Richmond* v. *United States*, 422 U. S., at 371. The District Court's determination that the city failed to meet this burden of proof for City Commission elections was based on the presence of three vote-dilutive factors: the at-large electoral system, the residency requirement for officeholders, and the high degree of racial bloc voting. Particularly in light of the inadequate evidence introduced by the city, this determination cannot be considered to be clearly erroneous.

The judgment of the District Court is affirmed.

It is so ordered.

MR. JUSTICE BLACKMUN, concurring.

I join the Court's opinion but write separately to state my understanding of the effect of the holding in Part IV–B. The Court there affirms, as not clearly erroneous, the District Court's determination that the city of Rome failed to meet its burden of disproving that the 13 disputed annexations had a discriminatory effect. That issue, for me, is close, but I accept the District Court's ruling. The holding, however,

does seem to have the anomalous result of leaving the voters residing in those annexed areas within the jurisdiction of Rome's Board of Education, but outside the jurisdiction of its City Commission.* As the appellees point out, however, Brief for Appellees 40–42, affirmance of the District Court's holding does not preclude the city from altering this anomaly.

It seems significant to me that the District Court adopted the remedial device of conditioning its approval of the annexations on Rome's abandonment of the residency requirement for City Commission elections. It thus denied the city's motion for approval of the annexations "without prejudice to renewal . . . upon the undertaking of suitable action consistent with the views expressed herein." 472 F. Supp. 221, 249 (DC 1979). This remedial device, conditioning the approval of annexations on the elimination of pre-existing discriminatory aspects of a city's electoral system, was developed in *City of Petersburg* v. *United States,* 354 F. Supp. 1021 (DC 1972), summarily aff'd, 410 U. S. 962 (1973), and expressly approved by this Court in *City of Richmond* v. *United States,* 422 U. S. 358, 369–371 (1975).

I entertain some doubt about the District Court's apparent conclusion that the residency requirement for Commission elections, standing alone, would render the postannexation electoral system of Rome one that did not "fairly recogniz[e] the minority's political potential," within the meaning of *City of Richmond. Id.*, at 378. The discriminatory effect of a residency requirement in an at-large election system results from its necessary separation of one contest into a number of individual contests, thereby frustrating minority efforts to utilize effectively single-shot voting. See *ante,* at 185, n. 21.

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*The Attorney General, in response to the city's motion for reconsideration of its submissions, agreed to preclear the 13 annexations for purposes of Board of Education elections. That decision was based solely on the fact that there was no residency requirement for Board of Education elections under Rome's pre-1966 electoral rules. See *ante,* at 160, 162.

And in a city the size of Rome, one might reasonably conclude that a requirement that one Commission member reside in each of nine wards would have such an effect. The District Court failed to analyze, however, the impact of the Attorney General's preclearance of Rome's reduction of the number of wards in the city from nine to three. The potential for effective single-shot voting would not be frustrated by a requirement that three commissioners be elected from each of three wards, so long as candidates were not required to run for a particular "numbered post" within each ward. Given the Attorney General's preclearance of the reduction of the number of wards from nine to three, the latter requirement is one that the District Court should have considered in determining whether the presence of a residency requirement would necessarily lead to the conclusion that Rome's postannexation electoral system is one that does not fairly recognize the minority's political potential.

I do not dissent from the affirmance of the District Court's holding with respect to the annexations, however, because the appellees have conceded that Rome need not abandon its residency requirement in order to keep the annexed areas within the jurisdiction of the City Commission. Appellees state:

> "If the City wished to retain both a residency requirement and at-large elections, . . . it could couple its pre-1966 procedures with its subsequent shift to a system of electing three commissioners from each of three wards. (The Attorney General had not objected to the change from nine wards to three larger wards.) When candidates are running concurrently for three unnumbered positions in each of the three wards, without a majority-vote requirement, there can be no head-to-head contest, and single-shot voting by black voters would give them a chance to elect the candidate they supported." Brief for Appellees 41–42.

Thus, on the understanding that the Attorney General would not object to the District Court's approval of the annexations insofar as they expand the jurisdiction of the City Commission, if the city either eliminates the residency requirement and returns to a nine ward system, or retains the residency requirement and the three ward system that has been in effect since 1966, I join in Part IV–B of the Court's opinion.

MR. JUSTICE STEVENS, concurring.

Although I join the Court's opinion, the dissenting opinions prompt me to emphasize two points that are crucial to my analysis of the case; both concern the statewide nature of the remedy Congress authorized when it enacted the Voting Rights Act of 1965. The critical questions are: (1) whether, as a statutory matter, Congress has prescribed a statewide remedy that denies local political units within a covered State the right to "bail out" separately; and (2) if so, whether, as a constitutional matter, such statewide relief exceeds the enforcement powers of Congress. If, as I believe, Congress could properly impose a statewide remedy and in fact did so in the Voting Rights Act, then the fact that the city of Rome has been innocent of any wrongdoing for the last 17 years is irrelevant; indeed, we may assume that there has never been any racial discrimination practiced in the city of Rome. If racially discriminatory voting practices elsewhere in the State of Georgia were sufficiently pervasive to justify the statewide remedy Congress prescribed, that remedy may be applied to each and every political unit within the State, including the city of Rome.

I

Section 5 of the Voting Rights Act imposes certain restrictions on covered States and their political subdivisions, as well as on political subdivisions in noncovered States that have been separately designated as covered by the Attorney General pursuant to § 4 (b) of the Act. Section 4 (a) of the Act

permits both States and separately designated political subdivisions in noncovered States to bail out of § 5's restrictions by demonstrating that they have not engaged in racially discriminatory voting practices for a period of 17 years. In *United States* v. *Board of Commissioners of Sheffield, Ala.*, 435 U. S. 110, the Court construed the word "State" as used in §§ 4 (a) and 5 to include all political units within a State even though they did not satisfy the statutory definition of a "political subdivision," [1] and even though that definition had been added to the statute for the express purpose of limiting coverage.[2]

My opinion that the *Sheffield* Court's construction of the Act was erroneous does not qualify the legal consequences of that holding. See *Dougherty County Board of Education* v. *White*, 439 U. S. 32, 47 (STEVENS, J., concurring).[3] Nor does it prevent me from joining the Court's holding today that a political unit within a covered State is not entitled to bail out under § 4 (a).[4] For both the plain language of the statute

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[1] Section 14 (c)(2) of the Act, as set forth in 42 U. S. C. § 1973*l* (c)(2), provides:

"The term 'political subdivision' shall mean any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting."

[2] See 435 U. S., at 142–143 (STEVENS, J., dissenting).

[3] In any event, the city of Rome may be subject to § 5 even under the reasoning of my dissent in *Sheffield*. As noted above, political subdivisions (*i. e.*, counties and other subdivisions that register voters) in covered States are clearly subject to the restrictions of § 5. In this case the city of Rome registered voters from 1964 to 1969, when the responsibility was transferred to Floyd County, see Stipulation No. 5, App. 58. Thus, from 1965 to 1969, the city was clearly covered by the Act. Because it did not preclear the transfer of voting registration to the county, *ibid.*, it at least arguably remains a "political subdivision" for purposes of both §§ 4 (a) and 5.

[4] It should be noted that there is some tension between the Court's language in *Sheffield* and its statement today that *Sheffield* did not "suggest that a municipality in a covered State is itself a 'State' for purposes of

and its legislative history unambiguously indicate that only covered States and separately designated political subdivisions in noncovered States are entitled to take advantage of that provision. See § 4 (a) and H. R. Rep. No. 439, 89th Cong., 1st Sess., 14 (1965), quoted *ante*, at 169. The political subdivisions of a covered State, while subject to § 5's preclearance requirements, are not entitled to bail out in a piecemeal fashion; rather, they can only be relieved of their preclearance obligations if the entire State meets the conditions for a bailout.

Given the Court's decision in *Sheffield* that all political units in a covered State are to be treated for § 5 purposes as though they were "political subdivisions" of that State, it follows that they should also be treated as such for purposes of § 4 (a)'s bailout provisions. Moreover, even without the *Sheffield* decision, it would be illogical to deny separate bailout relief to larger political units such as counties—which are clearly "political subdivisions" as that term is defined in § 14 (c)(2)—and to grant it to smaller units such as municipalities and school boards.

II

The second question is whether Congress has the power to prescribe a statewide remedy for discriminatory voting prac-

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the § 4 (a) exemption procedure." See *ante*, at 168. Compare the latter statement with, *e. g.*, 435 U. S., at 128, where the Court stated that it was ". . . wholly logical to interpret 'State . . . with respect to which' § 4 (a) is in effect as referring to all political units within it." See also *id.*, at 129, n. 17:

"Our Brother STEVENS' dissent misconceives the basis for the conclusion that § 5's terms are susceptible of an interpretation under which Sheffield is covered. We believe that the term 'State' can bear a meaning that includes all state actors within it and that, given the textual interrelationship between § 5 and § 4 (a) and the related purposes of the two provisions, such a reading is a natural one."

To the extent that the Court has disavowed the foregoing comments, I, of course, agree.

tices if it does not allow political units that can prove themselves innocent of discrimination to bail out of the statute's coverage. In Part III–B of its opinion, the Court explains why Congress, under the authority of § 2 of the Fifteenth Amendment, may prohibit voting practices that have a discriminatory effect in instances in which there is ample proof of a longstanding tradition of purposeful discrimination. I think it is equally clear that remedies for discriminatory practices that were widespread within a State may be applied to every governmental unit within the State even though some of those local units may have never engaged in purposeful discrimination themselves.[5] In short, Congress has the constitutional power to regulate voting practices in Rome, so long as it has the power to regulate such practices in the entire State of Georgia. Since there is no claim that the entire State is entitled to relief from the federal restrictions, Rome's separate claim must fail.

I therefore join the Court's opinion.

MR. JUSTICE POWELL, dissenting.

Two years ago this Court held that the term "State" in § 4 (a) of the Voting Rights Act includes all political subdivisions that control election processes, and that those sub-

[5] The same principle applies to a court's exercise of its remedial powers. Thus, in an antitrust action, a remedy may be appropriate even though it "curtail[s] the exercise of liberties that the [defendant] might otherwise enjoy." *National Society of Professional Engineers* v. *United States*, 435 U. S. 679, 697. Similarly, in constitutional cases, a court may impose a remedy that requires more of the defendant than the Constitution itself would require in the absence of any history of wrongdoing. See, *e. g.*, *Houchins* v. *KQED, Inc.*, 438 U. S. 1, 40 (STEVENS, J., dissenting). The Court has recently applied this principle to school desegregation cases, holding that a systemwide remedy—as opposed to a remedy concentrating on specific instances of discrimination—may be justified by a prior history of pervasive, systemwide discrimination. *Columbus Board of Education* v. *Penick*, 443 U. S. 449; *Dayton Board of Education* v. *Brinkman*, 443 U. S. 526.

divisions are subject to the requirement in § 5 of the Act that federal authorities preclear changes in voting procedures. *United States* v. *Board of Commissioners of Sheffield, Ala.*, 435 U. S. 110 (1978) (*Sheffield*). Today the Court concludes that those subdivisions are not within the term "State" when it comes to an action to "bail out" from the preclearance requirement. Because this decision not only conflicts with *Sheffield* but also raises grave questions as to the constitutionality of the Act, I dissent.

I

Although I dissent on statutory and constitutional grounds, the need to examine closely the Court's treatment of the Voting Rights Act is sharply illustrated by the facts of this case. In Rome, a city of about 30,000, approximately 15% of the registered voters are black. This case involves two types of local action affecting voting. First, in 1966 the Georgia Assembly established a majority vote requirement for the City Commission and the Board of Education, and reduced the number of election wards from nine to three. Under the new arrangement, three city commissioners and two members of the Board of Education are chosen from each ward for numbered posts.[1] Second, between 1964 and 1975 Rome completed 60 territorial annexations, 13 of which are at issue in this case. The annexations allegedly diluted the black vote in Rome by disproportionately adding white voters. But 9 of the 13 relevant tracts of land were completely unpopulated when they were taken over by the city. By 1978 the additional white voters in the annexed land had caused a net decline of 1% in the black share of Rome's electorate.[2]

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[1] As part of the package of revisions, the Assembly increased the Board of Education from five to six members, eased voter registration requirements, and shifted registration responsibility to the county. 472 F. Supp. 221, 224 (DC 1979).

[2] The statistics on this question are not altogether satisfactory, since the 1978 population of the annexed areas must be compared to 1975

There is substantial conflict between the ultimate ruling of the three-judge District Court in this case and its findings of fact. That court made a finding that Rome has not employed a "literacy test or other device . . . as a prerequisite to voter registration during the past seventeen years," and that "in recent years there have been no other direct barriers to black voting in Rome." 472 F. Supp. 221, 224, 225 (DC 1979). The court observed that white officials have encouraged blacks to run for office, that there was no evidence of obstacles to political candidacy by blacks, and that a recent black contender for the Board of Education narrowly lost a runoff with 45% of the vote (in a city where blacks make up only 15% of the voters). Although no black has been elected to the municipal government, the court stated that the "white elected officials of Rome . . . are responsive to the needs and interests of the black community," and actively seek black political support.[3] *Id.*, at 225. Indeed, the District Court concluded that in Rome "the black community, if it chooses to vote as a group, can probably determine the outcome of many if not most contests." *Ibid.*

Despite these findings, the District Court refused to approve the annexations or the changes in voting procedures. The court held that the city had not proved that the annexations and voting changes did not reduce the political influence of Rome's blacks. *Id.*, at 245, 247. I have many reservations about that conclusion. I note in particular that a black candidate running under the challenged election rules commanded

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voter registration totals. Given that 16.6% of the city's voters were black in 1975, that percentage drops only to 15.6% after adding the 823 white voters and 9 black voters who lived in the annexed areas in 1978. See Brief for Appellees 38, n. 26.

[3] The District Court also noted that the city has "made an effort to upgrade some black neighborhoods," has subsidized the transit system which has a predominantly black ridership, and has hired a number of blacks for skilled and supervisory positions in the municipal government. 472 F. Supp., at 225.

three times the share of votes that the black community holds. Moreover, nine of the annexations at issue were of vacant land and thus had no effect at all on voting when they occurred. Nevertheless, I need not consider whether the District Court's ruling on the evidence is clearly erroneous. Rather, I cite the apparent factual inconsistencies of the holding below because they highlight how far the courts, including this Court, have departed from the original understanding of the Act's purpose and meaning.[4] Against this background, I address the substantive questions posed by this case.

II

Under § 4 (a) of the Voting Rights Act a State or political subdivision can attempt to end its preclearance obligations through a declaratory judgment action (or "bailout") in the District Court for the District of Columbia. 42 U. S. C. § 1973b (a). Bailout must be granted if the District Court finds that in that jurisdiction no "test or device has been used during the seventeen years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color." *Ibid.* The District Court expressly found that the city of Rome meets this standard and that blacks participate actively in Rome's political life. See *supra*, at 195. These findings demonstrate that the city has satisfied both the letter and the spirit of the bailout provision. Nevertheless, the District Court held that as long as Georgia is covered by § 5 of the Act, the city of Rome may not alter any voting practice without the prior approval of federal authorities.[5]

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[4] The Court's opinion simply ignores the most relevant facts. In so doing, the Court averts its eyes from the central paradox of this case: Even though Rome has met every criterion established by the Voting Rights Act for protecting the political rights of minorities, the Court holds that the city must remain subject to preclearance.

[5] Section 5 permits two methods of preclearance. A local government may ask the District Court of the District of Columbia for a ruling that

The Court today affirms the decision of the District Court, and holds that no subdivision may bail out so long as its State remains subject to preclearance. This conclusion can be reached only by disregarding the terms of the statute as we have interpreted them before. Section 4 (a) makes bailout available to "such State or subdivision," language that refers back to the provision's ban on the use of literacy tests (i) "in any State" reached by § 4 (b) of the Act, or (ii) "in any political subdivision" which is covered "as a separate unit."[6] Because the entire State of Georgia is covered under § 4 (b), this case concerns the first category in that definition.[7] Thus the crucial language here, as in *Sheffield*, is § 4 (a)'s prohibition of tests or devices "in any State" covered under § 4 (b).

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the voting change is acceptable, or it may submit the change to the Attorney General for him to accept or reject within 60 days. 42 U. S. C. § 1973c. The administrative procedure is used almost exclusively, since it takes less time.

[6] Section 4 (a), as set forth in 42 U. S. C. § 1973b (a), provides in relevant part:

"To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device *in any State with respect to which the determinations have been made under the first two sentences of subsection (b) of this section or in any political subdivision with respect to which such determinations have been made as a separate unit*, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by *such State or subdivision* against the United States has determined that no such test or device has been used during the seventeen years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color. . . ." (Emphasis supplied.)

[7] Under § 4 (b), a State or political subdivision is subject to the Act if the Director of the Census finds that less than 50% of the eligible population voted in the last Presidential election, and the Attorney General determines that a discriminatory "test or device" was maintained in the jurisdiction in 1964. Those determinations, which are unreviewable, trigger the application of the preclearance requirement of § 5. 42 U. S. C. §§ 1973b (b), 1973c.

The *Sheffield* Court emphasized the territorial content of this key phrase. The Court reasoned that by referring to discriminatory practices "in" a State, Congress extended the ban on tests and devices to all political subdivisions with any control over voting. 435 U. S., at 120. Since the same language in § 4 (a) also defines the applicability of § 5, the Court continued, subdivisions must also be subject to preclearance. Consequently, federal authorities now must review all changes in local voting rules and regulations in States covered by the Act. 435 U. S., at 126–127.

The availability of a bailout action is defined by exactly the same phrase that the Court interpreted in *Sheffield.* In the bailout context, however, the Court today finds that the language does not reach political subdivisions. The Court thus construes the identical words in § 4 (a) to have one meaning in one situation and a wholly different sense when applied in another context. Such a protean construction reduces the statute to irrationality.

This irrationality is evident in the contrast between the rights of localities like Rome that are in States covered by § 4 (b), and those of covered local governments that are located in States not covered by the Act. Twenty-eight subdivisions in the latter group have bailed out from the preclearance obligation in six separate actions.[8] Yet the only

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[8] *Counties of Choctaw and McCurtain, Okla.* v. *United States,* C. A. No. 76–1250 (DC May 12, 1978) (two counties); *New Mexico, Curry, McKinley and Otero Counties* v. *United States,* C. A. No. 76–0067 (DC July 30, 1976) (three counties); *Maine* v. *United States,* C. A. No. 75–2125 (DC Sept. 17, 1976) (13 municipalities and 5 "plantations"); *Wake County, N. C.* v. *United States,* C. A. No. 1198–66 (DC Jan. 23, 1967) (one county); *Elmore County, Idaho* v. *United States,* C. A. No. 320–66 (DC Sept. 22, 1966) (one county); *Apache, Navaho and Coconino Counties, Ariz.* v. *United States,* 256 F. Supp. 903 (DC 1966) (three counties). Three counties in New York City bailed out in 1972, *New York* v. *United States,* C. A. No. 2419–71 (DC Apr. 13, 1972), but the bailout order was rescinded two years later after a District Court found that the State had conducted elections in English only, thereby

difference between those governments and the city of Rome is that the State in which Rome is located is itself subject to the Voting Rights Act. There is no reasoned justification for allowing a subdivision in North Carolina to bail out but denying a similar privilege to a subdivision in Georgia when both have been found to be in full compliance with the bailout criteria.

The District Court acknowledged, and the Court today does not deny, the "abstract force" of this argument. The argument nevertheless fails, according to the Court's opinion, for two reasons: (i) *Sheffield* "did not hold that cities such as Rome are 'political subdivisions' " or "States," but merely subjected such entities to the preclearance requirement of § 5; and (ii) congressional Reports accompanying the Voting Rights Act of 1965 state that bailout should not be available to a subdivision located in a State covered by the Act. *Ante*, at 168–169. Neither reason supports the Court's decision. That *Sheffield* did not identify cities like Rome as "States" or "political subdivisions" as defined by the Act does not answer the point that the construction of "State" in *Sheffield* should control the availability of bailout. Both in terms of logic and of fairness, if Rome must preclear it must also be free to bail out. Second, it is elementary that where the language of a statute is clear and unambiguous, there is no occasion to look at its legislative history. We resort to legislative materials only when the congressional mandate is unclear on its face.

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violating the Act. *New York* v. *United States*, C. A. No. 2419–71 (DC Jan. 18, 1974), summarily aff'd, 419 U. S. 888 (1974) (referring to *Torres* v. *Sachs*, C. A. No. 73–3921 (CES) (SDNY Sept. 27, 1973)).

Bailout was denied in one action involving a local subdivision, *Gaston County, N. C.* v. *United States*, 395 U. S. 285 (1969), and three were dismissed by stipulation of the parties, *Board of Commissioners, El Paso County, Colo.* v. *United States*, C. A. No. 77–0185 (DC No. 8, 1977); *Yuba County, Cal.* v. *United States*, C. A. No. 75–2170 (DC May 25, 1976); *Nash County, N. C.* v. *United States*, C. A. No. 1702–66 (DC Sept. 26, 1969)).

Ex parte Collett, 337 U. S. 55, 61 (1949); *United States* v. *Oregon*, 366 U. S. 643, 648 (1961). Although "committee reports in particular are often a helpful guide to the meaning of ambiguous statutory language, even they must be disregarded if inconsistent with the plain language of the statute." *Gooding* v. *United States*, 416 U. S. 430, 468 (1974) (MARSHALL, J., dissenting).

After *Sheffield*, there can be little dispute over the meaning of "State" as used in § 4 (a): It includes all political subdivisions that exercise control over elections.[9] Accordingly, there is no basis for the Court's reliance on congressional statements that are inconsistent with the terms of the statute. If § 4 (a) imposes the burden of preclearance on Rome, the same section must also relieve that burden when the city can demonstrate its compliance with the Act's quite strict requirements for bailout.

III

There is, however, more involved here than incorrect construction of the statute. The Court's interpretation of § 4 (a) renders the Voting Rights Act unconstitutional as applied to the city of Rome. The preclearance requirement both intrudes on the prerogatives of state and local governments and abridges the voting rights of all citizens in States covered under the Act. Under § 2 of the Fifteenth Amendment, Congress may impose such constitutional deprivations only if it is acting to remedy violations of voting rights. See *South Carolina* v. *Katzenbach*, 383 U. S. 301, 327–328 (1966); *Katzenbach* v. *Morgan*, 384 U. S. 641, 667 (1966) (Harlan, J., dissenting). In view of the District Court finding that Rome has not denied or abridged the voting rights of blacks, the

[9] This construction applies to political subdivisions defined by § 14 (c)(2) of the Act, 42 U. S. C. § 1973*l* (c)(2), as well as to governments like Rome that do not fall within that statutory definition. Thus, under *Sheffield*'s statutory interpretation, all subdivisions in States covered by the Act should be entitled to bail out. The constitutional analysis of Part III, *infra*, reaches the same conclusion.

Fifteenth Amendment provides no authority for continuing those deprivations until the entire State of Georgia satisfies the bailout standards of § 4 (a).[10]

When this Court first sustained the Voting Rights Act of 1965, it conceded that the legislation was "an uncommon exercise of congressional power." *South Carolina* v. *Katzenbach, supra,* at 334. The Court recognized that preclearance under the Act implicates serious federalism concerns. 383 U. S., at 324–327. As MR. JUSTICE STEVENS noted in *Sheffield,* the statute's "encroachment on state sovereignty is significant and undeniable." 435 U. S., at 141 (dissenting opinion).[11] That encroachment is especially troubling because it destroys local control of the means of self-government, one of the central values of our polity.[12] Unless the federal structure pro-

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[10] In view of the narrower focus of my approach to the statutory and constitutional issues raised in this case, I do not reach the broad analysis offered by MR. JUSTICE REHNQUIST's dissent.

[11] Other Justices have expressed the same concern. *E. g., South Carolina* v. *Katzenbach,* 383 U. S. 301, 358 (1966) (Black, J., concurring and dissenting); *Allen* v. *State Board of Elections,* 393 U. S. 544, 586, and n. 4 (1969) (Harlan, J., concurring in part and dissenting in part); see also *Georgia* v. *United States,* 411 U. S. 526, 545 (1973) (POWELL, J., dissenting).

In *National League of Cities* v. *Usery,* 426 U. S. 833, 856, n. 20 (1976), the Court noted that because political subdivisions "derive their authority and power from their respective States," their integrity, like that of the States, is protected by the principles of federalism.

[12] The federal system allocates primary control over elections to state and local officials. *Oregon* v. *Mitchell,* 400 U. S. 112, 125 (1970) (opinion of Black, J.); *id.,* at 201 (opinion of Harlan, J.); *Lassiter* v. *Northampton County Board of Elections,* 360 U. S. 45, 50 (1959).

This Court has emphasized the importance in a democratic society of preserving local control of local matters. See *Milliken* v. *Bradley,* 418 U. S. 717, 744 (1974) (federal court control of local schools "would deprive the people of control of schools through their elected representatives"); *James* v. *Valtierra,* 402 U. S. 137, 143 (1971) (local referendum on public housing project "ensures that all the people of a community will have a voice in a decision which may lead to large expenditures . . . and to lower tax revenues"). Preservation of local control, naturally

vides some protection for a community's ordering of its own democratic procedures, the right of each community to determine its own course within the boundaries marked by the Constitution is at risk. Preclearance also operates at an individual level to diminish the voting rights of residents of covered areas. Federal review of local voting practices reduces the influence that citizens have over policies directly affecting them, and strips locally elected officials of their autonomy to chart policy.

The Court in *South Carolina* v. *Katzenbach, supra,* did not lightly approve these intrusions on federalism and individual rights. It upheld the imposition of preclearance as a prophylactic measure based on the remedial power of Congress to enforce the Fifteenth Amendment. But the Court emphasized that preclearance, like any remedial device, can be imposed only in response to some harm. When Congress approved the Act, the Court observed, there was "reliable evidence of actual voting discrimination in a great majority of the States and political subdivisions affected by the new remedies of the Act." 383 U. S., at 329. Since the coverage formula in § 4 (b) purported to identify accurately those jurisdictions that had engaged in voting discrimination, the imposition of preclearance was held to be justified "at least in the absence of proof that [the state or local government has] been free of substantial voting discrimination in recent years." 383 U. S., at 330.[13]

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enough, involves protecting the integrity of state and local governments. See *National League of Cities* v. *Usery, supra,* at 855; *Coyle* v. *Oklahoma,* 221 U. S. 559, 565 (1911).

[13] The Court found important confirmation of the rationality of the coverage formula in the fact that there was no evidence of "recent racial discrimination involving tests and devices" in States or subdivisions exempted from preclearance. 383 U. S., at 331.

This Court took a similar approach when it affirmed the temporary suspension of all literacy tests by Congress in 1970. *Oregon* v. *Mitchell, supra.* The entire Court agreed with Mr. Justice Black's view that

The Court in *South Carolina* v. *Katzenbach* emphasized, however, that a government subjected to preclearance could be relieved of federal oversight if voting discrimination in fact did not continue or materialize during the prescribed period.

> "Acknowledging the possibility of overbreadth, the Act provides for termination of special statutory coverage at the behest of States and political subdivisions in which the danger of substantial voting discrimination has not materialized during the preceding [statutorily defined period]." *Id.*, at 331.

Although this passage uses the term "overbreadth" in an unusual sense, the point is clear. As long as the bailout option is available, there is less cause for concern that the Voting Rights Act may overreach congressional powers by imposing preclearance on a nondiscriminating government. Without bailout, the problem of constitutional authority for preclearance becomes acute.

The Court today decrees that the citizens of Rome will not have direct control over their city's voting practices until the entire State of Georgia can free itself from the Act's restrictions. Under the current interpretation of the word "State" in § 4 (a), Georgia will have to establish not only that it has satisfied the standards in § 4 (a), but also that each and every one of its political subdivisions meets those criteria. This outcome makes every city and county in Georgia a hostage to the errors, or even the deliberate intransigence, of a single sub-

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the congressional action was justified by the "long history of the discriminatory use of literacy tests to disfranchise voters on account of their race." 400 U. S., at 132. See *id.*, at 146 (opinion of Douglas, J.); *id.*, at 216, and n. 94 (opinion of Harlan, J.); *id.*, at 234–235 (opinion of BRENNAN, WHITE, and MARSHALL, JJ.); *id.*, at 284 (opinion of STEWART, J.). That history supported temporary suspension of those few literacy tests still in use, see *id.*, at 147 (opinion of Douglas, J.), without providing any bailout-like option. In contrast, preclearance involves a broad restraint on all state and local voting practices, regardless of whether they have been, or even could be, used to discriminate.

division.[14] Since the statute was enacted, only one State has succeeded in bailing out—Alaska in 1966, and again in 1971.[15] That precedent holds out little or no hope for more populous States such as Georgia. Demonstrating a right to bailout in 1966 for Alaska's 272,000 people and 56 political subdivisions, or in 1971 for that State's 302,000 people and 60 subdivisions, is a far cry from seeking bailout now on behalf of Georgia's approximately 5 million people and 877 local governments.[16]

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[14] Tr. of Oral Arg. 38. The Court's position dictates this eccentric result by insisting that subdivisions in covered States can be relieved of preclearance only when their State bails out. In my view this also would cast serious doubt on the Act's constitutionality as applied to any State which could not bail out due to the failings of a single subdivision. A rational approach would treat the state and local governments independently for purposes of bailout. If subdivisions in Georgia were free to seek bailout on their own, then a bailout action by the State could properly focus on the State's voting policies. Then, if Georgia were entitled to bail out, preclearance would continue to apply to subdivisions that by their own noncompliance met the coverage criteria of § 4 (b). Of course, the situation would be different if the State had contributed, overtly or covertly, to the subdivision's failure to comply.

[15] *Alaska* v. *United States*, C. A. No. 101-66 (DC Aug. 17, 1966); *Alaska* v. *United States*, C. A. No. 2122-71 (DC Mar. 10, 1972). Alaska's 1971 suit was prompted by recoverage of the State under the Act in the 1970 extension. The 1975 extension of the Act also re-established coverage of Alaska, which filed but abandoned yet another bailout suit. *Alaska* v. *United States*, C. A. No. 78-0484 (DC May 10, 1979) (stipulated dismissal of action).

One other State—Virginia—has attempted to bail out under § 4 (a). *Virginia* v. *United States*, 386 F. Supp. 1319 (DC 1974), summarily aff'd, 420 U. S. 901 (1975). The court held that Virginia did not satisfy § 4 (a) because a state literacy test administered in some localities between 1963 and 1965 was discriminatory in the context of the inferior education offered to Virginia blacks in certain rural counties before that period.

[16] The Solicitor General states that Georgia has 159 counties, 530 municipalities, and 188 other subdivisions that now must preclear every voting change, no matter how irrelevant the change might be to discrimination in voting. App. to Brief for Appellees 1a.

Today's ruling therefore will seal off the constitutionally necessary safety valve in the Voting Rights Act.

The preclearance requirement enforces a presumption against voting changes by certain state and local governments. If that presumption is restricted to those governments meeting § 4 (b)'s coverage criteria, and if the presumption can be rebutted by a proper showing in a bailout suit, the Act may be seen, as the *South Carolina* v. *Katzenbach* Court saw it, as action by Congress at the limit of its authority under the Fifteenth Amendment. But if governments like the city of Rome may not bail out, the statute oversteps those limits. For these reasons, I would reverse the judgment of the District Court.[17]

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[17] On a practical level, the District Court argued that since more than 7,000 subdivisions currently are required to preclear voting changes, bailout suits by a small percentage of those subdivisions would swamp that court. 472 F. Supp., at 231–232. In view of the acknowledged difficulties that confront a local government in seeking bailout in the District of Columbia, it is by no means self-evident that the "floodgates" perceived by the court would ever open. Such suits, involving substantial expense as well as uncertainty, would not likely be initiated unless there were a substantial likelihood of success. Moreover, the court's argument ignores the procedures of a bailout suit. Section 4 (a) directs the Attorney General not to contest bailout if he finds that the state or local government has not used a discriminatory test or device over the preceding 17 years. 42 U. S. C. § 1973b (a). In fact, the Attorney General consented to bailout in the nine actions under § 4 (a) that have succeeded, while only three bailout suits have gone to trial. See nn. 8 and 15, *supra*. Thus the Department of Justice, not the courts, would shoulder much of the added burden that might arise from recognizing a bailout right for governments like the city of Rome. That burden could hardly be more onerous than the Attorney General's present responsibility for preclearing all voting changes in 7,000 subdivisions. In the first six months of 1979 over 3,200 such voting changes were submitted to the Attorney General, a rate of more than 25 per working day. Letter to Joseph W. Dorn from Drew S. Days III, Assistant Attorney General, Civil Rights Division, U. S. Department of Justice (Aug. 3, 1979), reprinted in App. to Brief for Appellants 1c.

These astonishing figures compare unfavorably with those cited by MR. JUSTICE STEVENS in his *Sheffield* dissent, where he questioned the efficacy of

IV

If there were reason to believe that today's decision would protect the voting rights of minorities in any way, perhaps this case could be viewed as one where the Court's ends justify dubious analytical means. But the District Court found, and no one denies, that for at least 17 years there has been no voting discrimination by the city of Rome. Despite this record, the Court today continues federal rule over the most local decisions made by this small city in Georgia. Such an outcome must vitiate the incentive for any local government in a State covered by the Act to meet diligently the Act's requirements. Neither the Framers of the Fifteenth Amendment nor the Congress that enacted the Voting Rights Act could have intended that result.

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE STEWART joins, dissenting.

We have only today held that the city of Mobile does not violate the Constitution by maintaining an at-large system of electing city officials unless voters can prove that system is a product of purposeful discrimination. *City of Mobile* v. *Bolden, ante,* p. 55. This result is reached even though the black residents of Mobile have demonstrated that racial "bloc" voting has prevented them from electing a black representative to the city government. The Court correctly concluded that a city has no obligation under the Constitution

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the Attorney General's review of preclearance requests that then were arriving at the rate of only four a day. *United States* v. *Board of Commissioners of Sheffield, Ala.*, 435 U. S. 110, 147–148, and nn. 8, 10 (1978). See *Berry* v. *Doles*, 438 U. S. 190, 200–201 (1978) (POWELL, J., concurring in judgment). It hardly need be added that no senior officer in the Justice Department—much less the Attorney General—could make a thoughtful, personal judgment on an average of *25* preclearance petitions per day. Thus, important decisions made on a democratic basis in covered subdivisions and States are finally judged by unidentifiable employees of the federal bureaucracy, usually without anything resembling an evidentiary hearing.

to structure its representative system in a manner that maximizes the black community's ability to elect a black representative. Yet in the instant case, the city of Rome is prevented from instituting precisely the type of structural changes which the Court says Mobile may maintain consistently with the Civil War Amendments, so long as their purpose be legitimate, because Congress has prohibited these changes under the Voting Rights Act as an exercise of its "enforcement" power conferred by those Amendments.

It is not necessary to hold that Congress is limited to merely providing a forum in which aggrieved plaintiffs may assert rights under the Civil War Amendments in order to disagree with the Court's decision permitting Congress to straitjacket the city of Rome in this manner. Under § 5 of the Fourteenth Amendment and § 2 of the Fifteenth Amendment, Congress is granted only the power to "enforce" by "appropriate" legislation the limitations on state action embodied in those Amendments. While the presumption of constitutionality is due to any act of a coordinate branch of the Federal Government or of one of the States, it is this Court which is ultimately responsible for deciding challenges to the exercise of power by those entities. *Marbury* v. *Madison*, 1 Cranch 137 (1803); *United States* v. *Nixon*, 418 U. S. 683 (1974). Today's decision is nothing less than a total abdication of that authority, rather than an exercise of the deference due to a coordinate branch of the government.

I

The facts of this case readily demonstrate the fallacy underlying the Court's determination that congressional prohibition of Rome's conduct can be characterized as enforcement of the Fourteenth or Fifteenth Amendment.[1] The

[1] The Voting Rights Act is generally viewed as an exercise of Fifteenth Amendment power. See *South Carolina* v. *Katzenbach*, 383 U. S. 301 (1966). Since vote "dilution" devices are in issue in this case, the rights

three-judge District Court entered extensive findings of fact—facts which are conspicuously absent from the Court's opinion. The lower court found that Rome has not employed any discriminatory barriers to black voter registration in the past 17 years. Nor has the city employed any other barriers to black voting or black candidacy. Indeed, the court found that white elected officials have encouraged blacks to run for elective posts in Rome, and are "responsive to the needs and interests of the black community." The city has not discriminated against blacks in the provision of services and has made efforts to upgrade black neighborhoods.

It was also established that although a black has never been elected to political office in Rome, a black was appointed to fill a vacancy in an elective post. White candidates vigorously pursue the support of black voters. Several commissioners testified that they spent proportionately more time campaigning in the black community because they "needed that vote to win." The court concluded that "blacks often hold the balance of power in Rome elections."

Despite this political climate, the Attorney General refused to approve a number of city annexations and various changes in the electoral process. The city sought to require majority vote for election to the City Commission and Board of Education; to create numbered posts and staggered terms for those elections; and to establish a ward residency requirement for Board of Education elections. In addition, during the years

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at stake are more properly viewed as Fourteenth Amendment rights. See *City of Mobile* v. *Bolden, ante,* p. 55. Nevertheless, this Court has upheld the constitutionality of the Act if it is applied to remedy violations of the Fourteenth Amendment. *Gaston County* v. *United States,* 395 U. S. 285, 290, n. 5 (1969). Moreover, the nature of the enforcement powers conferred by the Fourteenth and Fifteenth Amendments has always been treated as coextensive. See, *e. g., United States* v. *Guest,* 383 U. S. 745, 784 (1966) (opinion of BRENNAN, J.); *James* v. *Bowman,* 190 U. S. 127 (1903). For this reason, it is not necessary to differentiate between the Fourteenth and Fifteenth Amendment powers for the purposes of this opinion.

between 1964 and 1973, the city effected 60 annexations. Respondents concede that none of the annexations were sought for discriminatory purposes. All of the electoral changes and 13 of the annexations were opposed by the Attorney General on the grounds that their adoption would lessen the likelihood that blacks would be successful in electing a black city official, assuming racial-bloc voting on the part of both whites and blacks. Each of the changes was considered to be an impermissible "vote-dilution" device.

Rome sought judicial relief and the District Court found that the city had met its burden of proving that these electoral changes and annexations were *not* enacted with the purpose of discriminating against blacks. The changes were nevertheless prohibited because of their perceived disparate effect.[2]

II

The Court holds today that the city of Rome can constitutionally be compelled to seek congressional approval for most of its governmental changes even though it has not engaged in any discrimination against blacks for at least 17 years. Moreover, the Court also holds that federal approval can be constitutionally denied even after the city has proved that the changes are not purposefully discriminatory. While I agree with MR. JUSTICE POWELL's conclusion that requiring localities to *submit* to preclearance is a significant intrusion on local autonomy, it is an even greater intrusion on that autonomy to *deny* preclearance sought.

The facts of this case signal the necessity for this Court to carefully scrutinize the alleged source of congressional power to intrude so deeply in the governmental structure of the municipal corporations created by some of the 50 States. Section 2 of the Fifteenth Amendment and § 5 of the Four-

[2] I share MR. JUSTICE POWELL's observation that the factual conclusions respecting the discriminatory effect of the annexations are highly questionable. *Ante*, at 195–196. I rest my dissent, however, on somewhat broader grounds.

teenth provide that Congress shall have the power to "enforce" § 1 "by appropriate legislation." Congressional power to prohibit the electoral changes proposed by Rome is dependent upon the scope and nature of that power. There are three theories of congressional enforcement power relevant to this case. First, it is clear that if the proposed changes would violate the Constitution, Congress could certainly prohibit their implementation. It has never been seriously maintained, however, that Congress can do no more than the judiciary to enforce the Amendments' commands. Thus, if the electoral changes in issue do not violate the Constitution, as judicially interpreted, it must be determined whether Congress could nevertheless appropriately prohibit these changes under the other two theories of congressional power. Under the second theory, Congress can act remedially to enforce the judicially established substantive prohibitions of the Amendments. If not properly remedial, the exercise of this power could be sustained only if this Court accepts the premise of the third theory that Congress has the authority under its enforcement powers to determine, without more, that electoral changes with a disparate impact on race violate the Constitution, in which case Congress by a legislative Act could effectively amend the Constitution.

I think it is apparent that neither of the first two theories for sustaining the exercise of congressional power supports this application of the Voting Rights Act. After our decision in *City of Mobile* there is little doubt that Rome has not engaged in *constitutionally* prohibited conduct.[3] I also do not

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[3] At least four Members of the Court in *Mobile* held that purposeful discrimination would be prerequisite to establishing a constitutional violation in a case alleging vote dilution under the Fourteenth and Fifteenth Amendments. *Ante*, at 66–68 (opinion of STEWART, J.). While a majority of the Court might adopt this view, see *ante*, at 94 (opinion of WHITE, J.), the voting procedures adopted by Rome would appear to readily meet the standards of constitutionality established by MR. JUSTICE STEVENS. See *ante*, at 90.

believe that prohibition of these changes can genuinely be characterized as a remedial exercise of congressional enforcement powers. Thus, the result of the Court's holding is that Congress effectively has the power to determine for itself that this conduct violates the Constitution. This result violates previously well-established distinctions between the Judicial Branch and the Legislative or Executive Branches of the Federal Government. See *United States* v. *Nixon*, 418 U. S. 683 (1974); *Marbury* v. *Madison*, 1 Cranch 137 (1803).

A

If the enforcement power is construed as a "remedial" grant of authority, it is this Court's duty to ensure that a challenged congressional Act does no more than "enforce" the limitations on state power established in the Fourteenth and Fifteenth Amendments. *Marbury* v. *Madison*. The Court has not resolved the question of whether it is an appropriate exercise of remedial power for Congress to prohibit local governments from instituting structural changes in their government, which although not racially motivated, will have the effect of decreasing the ability of a black voting bloc to elect a black candidate.

This Court has found, as a matter of statutory interpretation, that Congress intended to prohibit governmental changes on the basis of no more than disparate impact under the Voting Rights Act. These cases, however, have never directly presented the constitutional questions implicated by the lower court finding in this case that the city has engaged in no purposeful discrimination in enacting these changes, or otherwise, for almost two decades. See *Beer* v. *United States*, 425 U. S. 130 (1976); *City of Richmond* v. *United States*, 422 U. S. 358 (1975); *Perkins* v. *Matthews*, 400 U. S. 379 (1971); *Fairley* v. *Patterson*, decided together with *Allen* v. *State Board of Elections*, 393 U. S. 544 (1969). In none of these cases was the Court squarely presented with a constitutional challenge to congressional power to prohibit state electoral

practices after the locality has *disproved* the existence of any purposeful discrimination.[4]

The cases in which this Court has actually examined the constitutional questions relating to congressional exercise of its powers to enforce the Fourteenth and Fifteenth Amendments also did not purport to resolve this issue.[5] But the principles which can be distilled from those precedents require the conclusion that the limitations on state power at issue cannot be sustained as a remedial exercise of power.

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[4] In *City of Petersburg* v. *United States*, 354 F. Supp. 1021 (DC 1972), summarily aff'd, 410 U. S. 962 (1973), the District Court did find that an annexation scheme could be prohibited solely on the basis of its disparate impact, without a finding of purposeful discrimination on the part of the local government. *Petersburg* cannot be considered dispositive of the question presented in this case, however. The court did not address any possible constitutional difficulties with its conclusion, and thus it is not clear that these arguments were raised by the parties. An unexplicated summary affirmance by this Court affirms only the judgment, not the reasoning, of the District Court. See *Hicks* v. *Miranda*, 422 U. S. 332 (1975).

[5] This issue was also not squarely presented or resolved in *United Jewish Organizations* v. *Carey*, 430 U. S. 144 (1977). In *UJO*, the issue was whether the State could constitutionally take racial criteria into account in drawing its district lines where such redistricting was not strictly necessary to eliminate the effects of past discriminatory districting or apportionment. The Court found that use of these criteria was proper, for differing reasons. In an opinion by MR. JUSTICE WHITE, joined by three other Members of the Court, it was suggested in part that the Voting Rights Act could constitutionally require this. The only question, however, was the constitutionality of state use of racial criteria, vis-à-vis other citizens, and not the constitutionality of congressional Acts which required state governments to use racial criteria against their will. In another part of the opinion, MR. JUSTICE WHITE reasoned that "the State is [not] powerless to minimize the consequences of racial discrimination by voters when it is regularly practiced at the polls." *Id.*, at 167. While States may be empowered to voluntarily use racial criteria in order to minimize the effects of racial-bloc voting, that conclusion does not determine the constitutional authority of Congress to require States to use racial criteria in structuring their governments.

While the Fourteenth and Fifteenth Amendments prohibit only purposeful discrimination, the decisions of this Court have recognized that in some circumstances, congressional prohibition of state or local action which is not purposefully discriminatory may nevertheless be appropriate remedial legislation under the Civil War Amendments. See *Oregon* v. *Mitchell,* 400 U. S. 112 (1970); *Gaston County* v. *United States,* 395 U. S. 285 (1969).

Those circumstances, however, are not without judicial limits. These decisions indicate that congressional prohibition of some conduct which may not itself violate the Constitution is "appropriate" legislation "to enforce" the Civil War Amendments if that prohibition is necessary to remedy prior constitutional violations by the governmental unit, or if necessary to effectively prevent purposeful discrimination by a governmental unit. In both circumstances, Congress would still be legislating in response to the incidence of state action violative of the Civil War Amendments. These precedents are carefully formulated around a historic tenet of the law that in order to invoke a remedy, there must be a wrong—and under a remedial construction of congressional power to enforce the Fourteenth and Fifteenth Amendments, that wrong must amount to a constitutional violation. Only when the wrong is identified can the appropriateness of the remedy be measured.

The Court today identifies the constitutional wrong which was the object of this congressional exercise of power as purposeful discrimination by local governments in structuring their political processes in an effort to reduce black voting strength. The Court goes on to hold that the prohibitions imposed in this case represent an "appropriate" means of preventing such constitutional violations. The Court does not rest this conclusion on any finding that this prohibition is necessary to remedy any prior discrimination by the locality. Rather, the Court reasons that prohibition of changes dis-

criminatory in effect prevent the incidence of changes which are discriminatory in purpose:

> "Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact." *Ante,* at 177.

What the Court explicitly ignores is that in this case the city has proved that these changes are not discriminatory in purpose. Neither reason nor precedent supports the conclusion that here it is "appropriate" for Congress to attempt to prevent purposeful discrimination by prohibiting conduct which a locality proves is *not* purposeful discrimination.

Congress had before it evidence that various governments were enacting electoral changes and annexing territory to prevent the participation of blacks in local government by measures other than outright denial of the franchise.[6] Congress could of course remedy and prevent such purposeful discrimination on the part of local governments. See *Gomillion* v. *Lightfoot,* 364 U. S. 339, 347 (1960). And given the difficulties of proving that an electoral change or annexation has been undertaken for the purpose of discriminating against blacks, Congress could properly conclude that as a remedial matter it was necessary to place the burden of proving lack of discriminatory purpose on the localities. See *South Carolina* v. *Katzenbach,* 383 U. S. 301 (1966). But all of this does not support the conclusion that Congress is acting remedially when it continues the presumption of purposeful discrimination even after the locality has disproved that presumption. Absent other circumstances, it would be a topsy-turvy judicial system which held that electoral changes

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[6] See the reference to the legislative history in *United Jewish Organizations* v. *Carey, supra,* at 158.

which have been affirmatively proved to be permissible under the Constitution nonetheless violate the Constitution.

The precedent on which the Court relies simply does not support its remedial characterization. Neither *Oregon* v. *Mitchell,* 400 U. S. 112 (1970), nor *South Carolina* v. *Katzenbach, supra,* legitimize the use of an irrebuttable presumption that "vote-diluting" changes are motivated by a discriminatory animus. The principal electoral practice in issue in those cases was the use of literacy tests. Yet, the Court simply fails to make any inquiry as to whether the particular electoral practices in issue here are encompassed by the "preventive" remedial rationale invoked in *South Carolina* and *Oregon.* The rationale does support congressional prohibition of some electoral practices, but simply has no logical application to the "vote-dilution" devices in issue.

In *Oregon,* the Court sustained a nationwide prohibition of literacy tests, thereby extending the more limited suspension approved in *South Carolina.* By upholding this congressional measure, the Court established that under some circumstances, a congressional remedy may be constitutionally overinclusive by prohibiting some state action which might not be purposefully discriminatory. That possibility does not justify the overinclusiveness countenanced by the Court in this case, however. *Oregon* by no means held that Congress could simply use discriminatory effect as a proxy for discriminatory purpose, as the Court seems to imply. Instead, the Court opinions identified the factors which rendered this prohibition properly remedial. The Court found the nationwide ban to be an appropriate means of effectively preventing purposeful discrimination in the application of the literacy tests as well as an appropriate means of remedying prior constitutional violations by state and local governments in the administration of education to minorities.

The presumption that the literacy tests were either being used to purposefully discriminate, or that the disparate effects of those tests were attributable to discrimination in state-

administered education was not very wide of the mark. Various opinions of the Court noted that at the time that Congress enacted the ban, few States were utilizing literacy tests, 400 U. S., at 147 (opinion of Douglas, J.), and the voter registration statistics available within those States suggested that a disparate effect was prevalent. *Id.*, at 132–133 (opinion of Black, J.). Even if not adopted with a discriminatory purpose, the tests could readily be applied in a discriminatory fashion. Thus a demonstration by the State that it sought to reinstate the tests for legitimate purposes did not eliminate the substantial risk of discrimination in application. Only a ban could effectively prevent the occurrence of purposeful discrimination.

The nationwide ban was also found necessary to effectively remedy past constitutional violations. Without the nationwide ban, a voter who was illiterate due to state discrimination in education could be denied the right to vote on the basis of his illiteracy when he moved into a jurisdiction retaining a literacy test for nondiscriminatory purposes. *Id.*, at 283–284. Finally, MR. JUSTICE STEWART found that a uniform prohibition had definite advantages for enforcement and federal relations: it reduced tensions with particular regions, and it relieved the Federal Government from the administrative burden implicated by selective state enforcement.

Presumptive prohibition of vote-diluting procedures is not similarly an "appropriate" means of exacting state compliance with the Civil War Amendments. First, these prohibitions are quite unlike the literacy ban, where the disparate effects were traceable to the discrimination of governmental bodies in education even if their present desire to use the tests was legitimate. See *Gaston County* v. *United States*, 395 U. S. 285 (1969). Any disparate impact associated with the nondiscriminatory electoral changes in issue here results from bloc voting—private rather than governmental discrimi-

nation. It is clear therefore that these prohibitions do not implicate congressional power to devise an effective remedy for prior constitutional violations by local governments. Nor does the Court invoke this aspect of congressional remedial powers.

It is also clear that while most States still utilizing literacy tests may have been doing so to discriminate, a similar generalization could not be made about all government structures which have some disparate impact on black voting strength. At the time Congress passed the Act, one study demonstrated that 60% of all cities nationwide had at-large elections for city officials, for example. This form of government was adopted by many cities throughout this century as a reform measure designed to overcome wide-scale corruption in the ward system of government. See Jewell, Local Systems of Representation: Political Consequences and Judicial Choices, 36 Geo. Wash. L. Rev. 790, 799 (1967). Obviously, annexations similarly cannot be presumed to be devoid of legitimate uses. Yet both of these practices are regularly prohibited by the Act in most covered cities.

Nor does the prohibition of all practices with a disparate impact enhance congressional prevention of purposeful discrimination. The changes in issues are not, like literacy tests, though fair on their face, subject to discriminatory application by local authorities. See *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886). They are either discriminatory from the outset or not.

Finally, the advantages supporting the imposition of a nationwide ban are simply not implicated in this case. No added administrative burdens are in issue since Congress has provided the mechanism for preclearance suits in any event, and the burden of proof for this issue is on the locality. And it is certain that the only constitutional wrong implicated—purposeful dilution—can be effectively remedied by prohibiting it where it occurs. For all these reasons, I do not think

that the present case is controlled by the result in *Oregon*. By prohibiting all electoral changes with a disparate impact, Congress has attempted to prevent disparate impacts—not purposeful discrimination.

Congress unquestionably has the power to prohibit and remedy state action which intentionally deprives citizens of Fourteenth and Fifteenth Amendment rights. But unless these powers are to be wholly uncanalized, it cannot be appropriate remedial legislation for Congress to prohibit Rome from structuring its government in the manner as its population sees fit absent a finding or unrebutted presumption that Rome has been, or is, intentionally discriminating against its black citizens. Rome has simply committed no constitutional violations, as this Court has defined them.

More is at stake than sophistry at its worst in the Court's conclusion that requiring the local government to structure its political system in a manner that most effectively enhances black political strength serves to remedy or prevent constitutional wrongs on the part of the local government. The need to prevent this disparate impact is premised on the assumption that white candidates will not represent black interests, and that States should devise a system encouraging blacks to vote in a bloc for black candidates. The findings in this case alone demonstrate the tenuous nature of these assumptions. The court below expressly found that white officials have ably represented the interests of the black community. Even blacks who testified admitted no dissatisfaction, but expressed only a preference to be represented by officials of their own race. The enforcement provisions of the Civil War Amendments were not premised on the notion that Congress could empower a later generation of blacks to "get even" for wrongs inflicted on their forebears. What is now at stake in the city of Rome is the preference of the black community to be represented by a black. This Court has never elevated such a notion, by no means confined to blacks, to the status of a constitutional right. See *Whitcomb* v. *Chavis*,

403 U. S. 124 (1971). This Court concluded in *Whitcomb* that

> "[t]he mere fact that one interest group or another concerned with the outcome of . . . elections has found itself outvoted and without legislative seats of its own provides no basis for invoking constitutional remedies where, as here, there is no indication that this segment of the population is being denied access to the political system." *Id.*, at 154–155.

The Constitution imposes no obligation on local governments to erect institutional safeguards to ensure the election of a black candidate. Nor do I believe that Congress can do so, absent a finding that this obligation would be necessary to remedy constitutional violations on the part of the local government.

It is appropriate to add that even if this Court could find a remedial relationship between the prohibition of all state action with a disparate impact on black voting strength and the incidence of purposeful discrimination, this Court should exercise caution in approving the remedy in issue here absent purposeful dilution. Political theorists can readily differ on the advantages inherent in different governmental structures. As Mr. Justice Harlan noted in his dissent in *Fairley* v. *Patterson*, decided together with *Allen* v. *State Board of Elections*, 393 U. S. 544 (1969): "[I]t is not clear to me how a court would go about deciding whether an at-large system is to be preferred over a district system. Under one system, Negroes have some influence in the election of all officers; under the other, minority groups have more influence in the selection of fewer officers." *Id.*, at 586 (emphasis deleted).

B

The result reached by the Court today can be sustained only upon the theory that Congress was empowered to determine that structural changes with a disparate impact on a minority group's ability to elect a candidate of their race

violates the Fourteenth or Fifteenth Amendment. This construction of the Fourteenth Amendment was rejected in the *Civil Rights Cases,* 109 U. S. 3 (1883). The Court emphasized that the power conferred was "remedial" only. The Court reasoned that the structure of the Amendment made it clear that it did not "authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws, and the action of State officers . . . , when these are subversive of the fundamental rights specified in the [A]mendment." *Id.,* at 11. This interpretation is consonant with the legislative history surrounding the enactment of the Amendment.[7]

This construction has never been refuted by a majority of the Members of this Court. Support for this construction in current years has emerged in *South Carolina* v. *Katzenbach,* and *Oregon* v. *Mitchell.*[8] See also opinion of POWELL, J., *ante,* at 200–201. In *South Carolina* v. *Katzenbach,* the Court observed that Congress could not attack evils not comprehended by the Fifteenth Amendment. 383 U. S., at 326. In *Oregon* v. *Mitchell,* 400 U. S. 112 (1970), five Members of the Court were unwilling to conclude that Congress had the power to determine that establishing the age limitation

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[7] See, *e. g.,* Burt, Miranda And Title II: A Morganatic Marriage, 1969 S. Ct. Rev. 81.

[8] Explicit support can also be derived from Mr. Justice Harlan's dissenting opinion, joined by MR. JUSTICE STEWART, in *Katzenbach* v. *Morgan,* 384 U. S. 641, 659 (1966). Mr. Justice Harlan clarified the need for the remedial construction of congressional powers. It is also unnecessary, however, to read the majority opinion as establishing the Court's rejection of the remedial construction of the *Civil Rights Cases.* While MR. JUSTICE BRENNAN's majority opinion did contain language suggesting a rejection of the "remedial" construction of the enforcement powers, the opinion also advanced a remedial rationale which supports the determination reached by the Court. Compare the rationales forwarded at 384 U. S., at 654 with the statements, *id.,* at 656. It would be particularly inappropriate to construe *Katzenbach* v. *Morgan* as a rejection of the remedial interpretation of congressional powers in view of this Court's subsequent decision in *Oregon* v. *Mitchell,* 400 U. S. 112 (1970).

for voting at 21 denied equal protection to those between the ages of 18 and 20.

The opinion of MR. JUSTICE STEWART in that case, joined by MR. CHIEF JUSTICE BURGER and MR. JUSTICE BLACKMUN, reaffirmed that Congress only has the power under the Fourteenth Amendment to "provide the means of eradicating situations that amount to a violation of the Equal Protection Clause" but not to "determine as a matter of substantive constitutional law what situations fall within the ambit of the clause." *Id.*, at 296. Mr. Justice Harlan, in a separate opinion, reiterated his belief that it is the duty of the Court, and not the Congress, to determine when States have exceeded constitutional limitations imposed upon their powers. *Id.*, at 204–207. Cf. *Oregon* v. *Hass*, 420 U. S. 714 (1975); *Cooper* v. *Aaron*, 358 U. S. 1, 18 (1958). Mr. Justice Black also was unwilling to accept the broad construction of enforcement powers formulated in the opinion of MR. JUSTICE BRENNAN, joined by JUSTICES WHITE and MARSHALL.[9]

The Court today fails to heed this prior precedent. To permit congressional power to prohibit the conduct challenged in this case requires state and local governments to cede far more of their powers to the Federal Government than the Civil War Amendments ever envisioned; and it requires the judiciary to cede far more of its power to interpret and enforce the Constitution than ever envisioned. The intrusion is all the more offensive to our constitutional system when it is recognized that the only values fostered are debatable assumptions about political theory which should properly be left to the local democratic process.

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[9] Since Mr. Justice Black found that congressional powers were more circumscribed when not acting to counter racial discrimination under the Fourteenth Amendment, he did not have to determine the precise nature of congressional powers when they were exercised in the field of racial relations. His analysis of the nationwide ban on literacy tests, also presented in *Oregon* v. *Mitchell*, however, is consistent with a remedial interpretation of those powers.

BALDASAR *v.* ILLINOIS

CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

No. 77-6219. Argued November 26, 1979—Decided April 22, 1980

Held: While an uncounseled misdemeanor conviction is constitutionally valid if the offender is not incarcerated, such a conviction may not be used under an enhanced penalty statute to convert a subsequent misdemeanor into a felony with a prison term. Thus, petitioner's uncounseled misdemeanor-theft conviction, even though it resulted only in a fine, cannot be used upon his later conviction for another misdemeanor theft to support a 1-to-3-year prison sentence under an Illinois statute authorizing such a sentence for a second misdemeanor-theft conviction.

52 Ill. App. 3d 305, 367 N. E. 2d 459, reversed and remanded.

Michael Mulder argued the cause for petitioner. With him on the briefs were *Mary Robinson, Ralph Ruebner,* and *Peter Nolte.*

Michael B. Weinstein, Assistant Attorney General of Illinois, argued the cause for respondent. With him on the brief were *William J. Scott,* Attorney General, and *Donald B. Mackay* and *Melbourne A. Noel, Jr.,* Assistant Attorneys General.*

PER CURIAM.

In *Scott* v. *Illinois,* 440 U. S. 367 (1979), the Court held that an uncounseled misdemeanor conviction is constitutionally valid if the offender is not incarcerated. This case presents the question whether such a conviction may be used under an enhanced penalty statute to convert a subsequent misdemeanor into a felony with a prison term.

**Solicitor General McCree, Assistant Attorney General Heymann,* and *Harriet S. Shapiro* filed a brief for the United States as *amicus curiae* urging affirmance.

Under Illinois law, theft "not from the person" of property worth less than $150 is a misdemeanor punishable by not more than a year of imprisonment and a fine of not more than $1,000. Ill. Rev. Stat., ch. 38, §§ 16–1 (e)(1), 1005–8–3 (a)(1), 1005–9–1 (a)(2) (1975). A second conviction for the same offense, however, may be treated as a felony with a prison term of one to three years. § 1005–8–1 (b)(5).

Thomas Baldasar, the petitioner, was convicted of misdemeanor theft in Cook County Circuit Court in May 1975. The record of that proceeding indicates that he was not represented by a lawyer and did not formally waive any right to counsel. Baldasar was fined $159 and sentenced to one year of probation. In November 1975 the State charged him with stealing a shower head worth $29 from a department store. The case was tried to a jury in Du Page County Circuit Court in August 1976. The prosecution introduced evidence of the prior conviction and asked that Baldasar be punished as a felon under the Illinois enhancement statute. Defense counsel objected to the admission of the 1975 conviction. She argued unsuccessfully that because Baldasar had not been represented by a lawyer at the first proceeding, the conviction was too unreliable to support enhancement of the second misdemeanor. App. 7–9. The jury returned a guilty verdict on the felony charge, and Baldasar was sentenced to prison for one to three years.

The Illinois Appellate Court affirmed by a divided vote. It emphasized that when the right to counsel in misdemeanor cases was recognized in *Argersinger* v. *Hamlin*, 407 U. S. 25 (1972), this Court confined that right to prosecutions that "'end up in the actual deprivation of a person's liberty.'" 52 Ill. App. 3d 305, 307, 367 N. E. 2d 459, 462 (1977), quoting *Argersinger, supra*, at 40. The Illinois court rejected petitioner's argument that the Sixth and Fourteenth Amendments prevented the imposition of the enhanced prison term. "The fact is," the court wrote, "that [Baldasar] was sentenced to imprisonment for his second theft conviction only and not, as

he suggests, sentenced again, and this time to imprisonment, for the first theft conviction." 52 Ill. App. 3d, at 310, 367 N. E. 2d, at 463. The Supreme Court of Illinois denied leave to appeal, and we granted certiorari. 440 U. S. 956 (1979).

For the reasons stated in the concurring opinions, the judgment is reversed, and the case is remanded to the Appellate Court of Illinois, Second District, for further proceedings.

It is so ordered.

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN and MR. JUSTICE STEVENS join, concurring.

In *Scott* v. *Illinois*, 440 U. S. 367, the Court held that "the Sixth and Fourteenth Amendments to the United States Constitution require . . . that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense." *Id.*, at 373–374.

In this case the indigent petitioner, after his conviction of petit larceny, was sentenced to an increased term of imprisonment *only* because he had been convicted in a previous prosecution in which he had *not* had the assistance of appointed counsel in his defense.

It seems clear to me that this prison sentence violated the constitutional rule of *Scott* v. *Illinois*, *supra*, and I, therefore, join the opinion and judgment of the Court.*

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN and MR. JUSTICE STEVENS join, concurring.

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the As-

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*It is noteworthy that the brief filed by the State of Illinois in *Scott* expressly anticipated the result in this case:

"When prosecuting an offense the prosecutor knows that by not requesting that counsel be appointed for defendant, *he will be precluded from*

sistance of Counsel for his defence." *Gideon* v. *Wainwright*, 372 U. S. 335, 342 (1963), held that the appointment of counsel for an indigent criminal defendant is "fundamental and essential to a fair trial." Therefore, the guarantee of counsel was made applicable to the States through the Fourteenth Amendment. *Gideon*, of course, involved a felony prosecution, but nothing in the opinion suggests that its reasoning was not, like the words of the Sixth Amendment itself, applicable to "all criminal prosecutions." In *Argersinger* v. *Hamlin*, 407 U. S. 25, 37 (1972), we rejected the suggestion that the right to counsel applied only to nonpetty offenses where the accused had a right to a jury trial, and held that "no person may be imprisoned for any offense . . . unless he was represented by counsel at his trial."

Seven years later, in *Scott* v. *Illinois*, 440 U. S. 367 (1979), we considered a question expressly reserved in *Argersinger*, whether counsel must be provided if imprisonment was an authorized punishment but had not actually been imposed. See *Argersinger* v. *Hamlin*, *supra*, at 37. The Court "conclude[d] . . . that *Argersinger* did indeed delimit the constitutional right to appointed counsel in state criminal proceedings" and "adopt[ed] . . . actual imprisonment as the line defining the constitutional right to appointment of counsel." *Scott* v. *Illinois*, *supra*, at 373. For the reasons stated in MR. JUSTICE BRENNAN's dissenting opinion in *Scott*, I remain convinced that that case was wrongly decided. Nevertheless, even if one accepts the line drawn in *Scott* as the constitutional rule applicable to this case, I think it plain

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enhancing subsequent offenses. To the degree that the charging of offenses involves a great deal of prosecutorial discretion and selection, the decision to pursue conviction with only limited use comes within proper scope of that discretion." Brief for Respondent in *Scott* v. *Illinois*, O. T. 1978, No. 77-1177, p. 20 (emphasis added).

MR. JUSTICE BRENNAN adheres to his dissent in *Scott* v. *Illinois*, 440 U. S. 367, 375.

that petitioner's prior uncounseled misdemeanor conviction could not be used collaterally to impose an increased term of imprisonment upon a subsequent conviction.

The court below held that petitioner's earlier conviction for shoplifting three packages of bacon was constitutionally valid under *Scott* since he received only a fine and probation, and therefore it could be used to elevate his subsequent conviction from a misdemeanor to a felony and to permit him to be sentenced to three years in prison rather than the one year maximum otherwise applicable. This logic is fallacious for the simple reason that petitioner's prior conviction was not valid for all purposes. Specifically, under the rule of *Scott* and *Argersinger*, it was invalid for the purpose of depriving petitioner of his liberty.

Scott, of course, did not purport to modify or restrict *Argersinger*. The question in *Scott* was simply one of "the proper application of our decision" in *Argersinger*. *Scott* v. *Illinois*, *supra*, at 368. The Court concluded that the precise holding in *Argersinger*, that counsel was required because Argersinger had been imprisoned as a result of the prosecution, expressed the limit of the right to counsel. Accordingly, the Court declined to extend *Argersinger* to all cases in which imprisonment was an authorized penalty. In the Court's view, *Argersinger* rested primarily on the conclusion "that incarceration was so severe a sanction that it should not be imposed as a result of a criminal trial unless an indigent defendant had been offered appointed counsel to assist in his defense," 440 U. S., at 372–373.

That petitioner has been deprived of his liberty "as a result of [the first] criminal trial" could not be clearer. If it had not been for the prior conviction, petitioner could not have been sentenced to more than one year for the present offense.[1]

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[1] The fact that petitioner could be sentenced to *some* period of incarceration as a result of his second conviction does not, of course, prevent

Solely because of the previous conviction the second offense was transformed from a misdemeanor into a felony, with all the serious collateral consequences that a felony conviction entails, and he received a sentence that may result in imprisonment for two years in excess of that 1-year maximum.

MR. JUSTICE POWELL's dissenting opinion, *post*, at 232, asserts that this result is constitutionally permissible because under the enhancement statute the increased punishment was imposed for the second offense rather than the first. I agree that the increased prison sentence in this case is not an enlargement of the sentence for the original offense. If it were, this would be a double jeopardy case. But under the recidivist clause of the Illinois statute, if the State proves a prior conviction for the same offense a completely different range of sentencing options, including a substantially longer term of imprisonment, becomes available. The sentence petitioner actually received would not have been authorized by statute but for the previous conviction. It was imposed as a direct consequence of that uncounseled conviction and is therefore forbidden under *Scott* and *Argersinger*.

We should not lose sight of the underlying rationale of *Argersinger*, that unless an accused has "the guiding hand of counsel at every step in the proceedings against him." *Powell* v. *Alabama*, 287 U. S. 45, 69 (1932), his conviction is not sufficiently reliable to support the severe sanction of imprisonment. *Argersinger* v. *Hamlin*, *supra*, at 31–36.[2] An uncoun-

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him from objecting to a further deprivation of liberty on the basis of an uncounseled conviction.

[2] I cannot agree with MR. JUSTICE POWELL's unsupported assertion, *post*, at 233–234, n. 2, that an uncounseled misdemeanor conviction is more likely to be reliable than an uncounseled felony conviction. I had thought that suggestion was squarely rejected in *Argersinger*. Mr. Justice Douglas' opinion for the Court emphasized the need for the assistance of counsel to assure reliability of misdemeanor convictions: "We are by no means convinced that legal and constitutional questions involved in a case

seled conviction does not become more reliable merely because the accused has been validly convicted of a subsequent offense. For this reason, a conviction which is invalid for purposes of imposing a sentence of imprisonment for the offense itself remains invalid for purposes of increasing a term of imprisonment for a subsequent conviction under a repeat-offender statute. It is therefore incorrect to say that our decision today creates a "new hybrid" of misdemeanor convictions. *Post*, at 232 (POWELL, J., dissenting). To the contrary, a rule that held a conviction invalid for imposing a prison term directly, but valid for imposing a prison term

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that actually leads to imprisonment even for a brief period are any less complex than when a person can be sent off for six months or more." *Argersinger* v. *Hamlin*, 407 U. S. 25, 33 (1972). THE CHIEF JUSTICE concurred in the result, stating: "The issues that must be dealt with in a trial for a petty offense or a misdemeanor may often be simpler than those involved in a felony trial and yet be beyond the capability of a layman. . . . There is little ground, therefore, to assume that a defendant, unaided by counsel, will be any more able adequately to defend himself against the lesser charges that may involve confinement than more serious charges." *Id.*, at 41. MR. JUSTICE POWELL observed: "Many petty offenses will also present complex legal and factual issues that may not be fairly tried if the defendant is not assisted by counsel. Even in relatively simple cases, some defendants, because of ignorance or some other handicap, will be incapable of defending themselves." *Id.*, at 47 (opinion concurring in result).

In fact, as the opinion for the Court recognized, misdemeanor convictions may actually be less reliable than felony convictions. "[T]he volume of misdemeanor cases . . . may create an obsession for speedy dispositions, regardless of the fairness of the result. . . . 'The misdemeanor trial is characterized by insufficient and frequently irresponsible preparation on the part of the defense, the prosecution, and the court. Everything is rush, rush.' . . . There is evidence of the prejudice which results to misdemeanor defendants from this 'assembly-line justice.'" *Id.*, at 34–36 (footnote and citations omitted). Moreover, if the case is tried to a jury, as was petitioner's first conviction, it is entirely possible that jurors may be less scrupulous about applying the reasonable-doubt standard if the offense charged is "only a misdemeanor."

collaterally, would be an illogical and unworkable deviation from our previous cases.[3]

MR. JUSTICE BLACKMUN, concurring.

In *Scott* v. *Illinois*, 440 U. S. 367 (1979), I stated in dissent:

> "Accordingly, I would hold that an indigent defendant in a state criminal case must be afforded appointed counsel whenever the defendant is prosecuted for a non-petty criminal offense, that is, one punishable by more than six months' imprisonment, see *Duncan* v. *Louisiana*, 391 U. S. 145 (1968); *Baldwin* v. *New York*, 399 U. S. 66 (1970), *or* whenever the defendant is convicted of an offense and is actually subjected to a term of imprisonment, *Argersinger* v. *Hamlin*, 407 U. S. 25 (1972).
>
> "This resolution, I feel, would provide the 'bright line'

[3] The dissent expresses concern that our decision will impose unacceptable economic burdens on state and local governments. *Post*, at 235. I do not share that view. Not all misdemeanor defendants, of course, are indigent. See *Scott* v. *Illinois*, 440 U. S. 367, 385, and n. 16 (1979) (BRENNAN, J., dissenting). Where the defendant is indigent, counsel will be provided in the first trial unless the prosecution does not seek a jail term. A great many States provide counsel in all cases where imprisonment is authorized, even though counsel is not constitutionally required. See *id.*, at 386–387, n. 18. Further, not all subsequent offenses are subject to enhancement, and not all previous offenses are predicate offenses for enhancement purposes. Thus the number of cases in which the State must decide whether to provide counsel solely to preserve its ability to enhance a subsequent offense will be only a fraction of the total. In many of those remaining cases, the judgment whether future misconduct is likely, and whether the first offense is serious enough to warrant its use for enhancement, will be a relatively easy exercise of prosecutorial discretion.

The economic effect of our decision today will be miniscule compared to that of *Powell* v. *Alabama*, 287 U. S. 45 (1932), *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), and *Argersinger* v. *Hamlin*, *supra*. But whatever that cost may be, it cannot outweigh the Sixth Amendment command that no one may be imprisoned as a result of a conviction in which he was denied the assistance of counsel.

> that defendants, prosecutors, and trial and appellate courts all deserve and, at the same time, would reconcile on a principled basis the important considerations that led to the decisions in *Duncan, Baldwin,* and *Argersinger.*" *Id.,* at 389–390.

I still am of the view that this "bright line" approach would best preserve constitutional values and do so with a measure of clarity for all concerned. Had the Court in *Scott* v. *Illinois* adopted that approach, the present litigation, in all probability, would not have reached us. Petitioner Baldasar was prosecuted for an offense punishable by more than six months' imprisonment, and, under my test, was entitled to counsel at the prior misdemeanor proceeding. Since he was not represented by an attorney, that conviction, in my view, is invalid and may not be used to support enhancement.

I therefore join the Court's *per curiam* opinion and its judgment.

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE, MR. JUSTICE WHITE, and MR. JUSTICE REHNQUIST join, dissenting.

Last Term in *Scott* v. *Illinois,* 440 U. S. 367 (1979), we rejected the claim that *Argersinger* v. *Hamlin,* 407 U. S. 25 (1972), requires the appointment of counsel for an indigent charged with a misdemeanor punishable by imprisonment, regardless of whether the defendant actually is sentenced to jail. We held explicitly that an uncounseled misdemeanor conviction is constitutionally valid if the offender is not jailed.

In 1975, the petitioner in this case was tried without the appointment of counsel and convicted of a misdemeanor theft. Although the statute authorized imprisonment, petitioner only was fined. The circumstances of that conviction, therefore, were precisely like those of the petitioner in *Scott* v. *Illinois,* and the conviction was constitutionally valid.

The question presented today is different from that decided

in *Scott*. This case concerns the enhanced sentence imposed on petitioner Baldasar for a subsequent conviction for misdemeanor theft. Petitioner, who was represented by counsel at the second trial, concedes that he could have been sentenced to one year in jail for the second offense. He challenges only the addition of two years to his sentence, an enhancement that was based on his record as a recidivist. The Court holds that, even though the first conviction was valid, the State cannot rely upon it for enhancement purposes following a subsequent valid conviction. This holding undermines the rationale of *Scott* and *Argersinger* and leaves no coherent rationale in its place. A constitutionally valid conviction is now constitutionally invalid if relied upon as the predicate for enhancing the sentence of a recidivist.

In my view, this result is logically indefensible. More seriously, the courts that try misdemeanor cases daily no longer have clear guidance from this Court. No court can predict with confidence whether a misdemeanor defendant is likely to become a recidivist. The option of not imposing a jail sentence on an uncounseled misdemeanant, expressly preserved by *Argersinger* and *Scott*, no longer exists unless the court is willing prospectively to preclude enhancement of future convictions. I dissent both because I believe that *Scott* dictates a contrary result, and because the courts of our Nation are entitled, at a minimum, to a clear rule on this important question.

I

Scott held that "actual imprisonment [is] the line defining the constitutional right to appointment of counsel." 440 U. S., at 373. Petitioner Baldasar concedes the validity under *Scott* of his uncounseled theft conviction in 1975. He argues, nevertheless, that the enhanced sentence imposed for the second offense included an element of imprisonment for the first conviction. Consequently, he continues, the enhancement violates the rule of *Scott* that a conviction may not lead

to imprisonment unless retained or appointed counsel is available to the defendant. Although MR. JUSTICE BLACKMUN applies his own "bright line" approach to the question, four Members of the Court agree with petitioner's contentions. See *ante*, p. 224 (STEWART, J., concurring); *ante*, p. 224 (MARSHALL, J., concurring).

This line of argument misapprehends the nature of enhancement statutes. These laws, commonplace in our criminal justice system, do not alter or enlarge a prior sentence. If, as in this case, a person with a prior conviction chooses to commit a subsequent crime, he *thereby* becomes subject to the increased penalty prescribed for the second crime. This Court consistently has sustained repeat-offender laws as penalizing only the last offense committed by the defendant. *E. g.*, *Moore* v. *Missouri*, 159 U. S. 673, 677 (1895); *Oyler* v. *Boles*, 368 U. S. 448, 451 (1962). Under Illinois law a second conviction for petty theft may be treated as a felony with a prison term. The sentence imposed upon petitioner was solely a penalty for the second theft.

Moreover, petitioner's argument ignores the significance of the constitutional validity of his first conviction. Petitioner questions neither the factual accuracy nor the legality of that conviction. In order to accept his argument, the Court creates a special class of uncounseled misdemeanor convictions. Those judgments are valid for the purposes of their own penalties as long as the defendant receives no prison term. But the Court holds that these convictions are invalid for the purpose of enhancing punishment upon a subsequent misdemeanor conviction.

By creating this new hybrid, the Court departs from the position it took after *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), established the right to counsel in felony cases. Following *Gideon*, the Court consistently held that because an uncounseled felony conviction was constitutionally invalid—and therefore void—it could not be put to other uses in court. In *Burgett* v. *Texas*, 389 U. S. 109, 115 (1967), the

Court stated that an uncounseled felony conviction could not be used in a later trial to enhance punishment under a recidivist statute. *Loper* v. *Beto*, 405 U. S. 473, 483 (1972), barred impeachment of a defendant with such a felony conviction, and *United States* v. *Tucker*, 404 U. S. 443 (1972), held that a sentencing judge cannot consider a prior uncounseled felony.

Misdemeanor convictions, however, have been treated differently. *Argersinger* held that in misdemeanor cases the right to counsel applies only if the prosecution may "end up in the actual deprivation of a person's liberty." 407 U. S., at 40. In a fully considered opinion last Term, the Court ruled in *Scott* that the Sixth Amendment does not bar an uncounseled misdemeanor conviction if the defendant is not imprisoned.[1]

Logically, just as a constitutionally *invalid* felony judgment could not be used for sentence enhancement in *Burgett*, the *valid* misdemeanor conviction in this case should be available to enhance petitioner's sentence. But the Court makes no effort to defend its ruling on the basis of logic, or even on the policy ground that an uncounseled misdemeanor conviction is too unreliable to support enhancement of a subsequent sentence.[2] Instead, four Members of the Court rely on what

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[1] Despite reservations, I joined the decision in *Scott* v. *Illinois* because it was consistent with *Argersinger* v. *Hamlin*, 407 U. S., at 44 (POWELL, J., concurring in result), and it "provide[d] clear guidance to the hundreds of courts across the country that confront this problem daily." 440 U. S., at 374 (POWELL, J., concurring).

[2] Although only the opinion of MR. JUSTICE MARSHALL mentions the issue, *ante*, at 227–228, n. 2, petitioner urges that an uncounseled misdemeanor conviction is too unreliable to support sentence enhancement for later offenses. Compared to a felony judgment, however, most uncounseled misdemeanor convictions are far more likely to be reliable. In my separate opinion in *Argersinger*, I expressed the view that counsel should be provided in certain misdemeanor cases *not* involving the possibility of a jail sentence. 407 U. S., at 47–50. That view was rejected by the Court. It cannot be denied, however, that the issues in the great majority of misdemeanor cases are not complicated and the facts often are

I view as the incorrect statement that sentence enhancement equals imprisonment for the earlier offense, while a fifth Member adheres to the assertion rejected in *Scott* that a "bright line" should require counsel for prosecutions that could result in imprisonment for six months or more. *Ante*, p. 229 (BLACKMUN, J., concurring).[3]

II

The Court's decision not only is analytically unsound, but also will create confusion in local courts and impose greater burdens on state and local governments. The Illinois Appellate Court pointed out that at least 11 Illinois laws, including the statute at issue here, impose enhanced penalties for repeat misdemeanants. 52 Ill. App. 3d 305, 308, and n. 1, 367 N. E. 2d 459, 462, and n. 1 (1977). Most state criminal codes have similar provisions. See, *e. g.*, Note, 35 Ohio St. L. J. 168, 182, n. 72 (1974) (citing Ohio statutes). And the Solicitor General, urging affirmance in this case, emphasized that this deci-

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not in dispute. In addition, most such cases are tried to a judge. But there is a more fundamental answer to petitioner's argument. Here, the uncounseled conviction is conceded to be valid and thus must be presumed reliable.

[3] Today's decision is all the more puzzling in view of the Court's recent ruling in *Lewis* v. *United States*, 445 U. S. 55 (1980). *Lewis* held that an uncounseled *felony* conviction is a proper predicate for imposing federal sanctions for possession of a firearm by a felon. Although I dissented on statutory grounds in *Lewis*, the opinion's constitutional holding squarely conflicts with today's decision. Unlike misdemeanors, all uncounseled felony judgments are constitutionally invalid. *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). Yet *Lewis* held that even though the federal firearm statute imposes a prison sentence solely because the defendant had an uncounseled—and thus void—felony conviction on his record, that procedure does not use the void conviction to "'support guilt or enhance punishment.'" 445 U. S., at 67, quoting *Burgett* v. *Texas*, 389 U. S. 109, 115 (1967). In this case, the Court refuses to permit sentence enhancement on the basis of a constitutionally valid misdemeanor conviction. The conflict between the two holdings could scarcely be more violent.

sion will hamper enforcement of important federal statutes long in effect.[4] Providing counsel for all defendants charged with enhanceable misdemeanors will exacerbate the delays that plague many state misdemeanor courts and will impose unnecessary costs on local governments. Those communities that cannot provide counsel for misdemeanor defendants will lose by default the possibility of enhancing future sentences if criminal conduct persists. The result will be frustration of state policies of deterring recidivism by imposing enhanced penalties.

In addition, as the Illinois Appellate Court predicted, today's ruling will incite further litigation claiming that uncounseled misdemeanor convictions cannot be used to impeach a defendant's testimony, or that judges should not consider such convictions in later sentencing determinations. 52 Ill. App. 3d, at 310, 367 N. E. 2d, at 463. Following today's pronouncement, there is no way to predict the outcome of any such claim.

But at least it is clear, regrettably, that the Court has frustrated its own effort in *Scott* to provide effective guidance to the local courts that try misdemeanor cases every day. I would affirm the decision of the Illinois Appellate Court that faithfully followed our decision in *Scott*.

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[4] Brief for United States as *Amicus Curiae* 2, citing 8 U. S. C. § 1325 (illegal entry into United States by alien); 2, n. 2, citing 15 U. S. C. § 1263 (shipment of misbranded or banned hazardous substances).

WILLIAMS ET AL. *v.* BROWN ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 78-357. Argued March 19, 1979—Reargued October 29, 1979—Decided April 22, 1980

575 F. 2d 298, vacated and remanded.

William H. Allen reargued the cause for appellants. With him on the briefs were *Donald Harrison, John Michael Clear,* and *Robert C. Campbell III.*

Eric Schnapper reargued the cause for appellees. With him on the briefs were *J. U. Blacksher, Larry Menefee,* and *Jack Greenberg.*

Deputy Assistant Attorney General Turner reargued the cause for the United States as *amicus curiae* urging affirmance. On the brief were *Solicitor General McCree, Assistant Attorney General Days, Deputy Solicitor General Wallace, Elinor Hadley Stillman, Brian K. Landsberg, Jessica Dunsay Silver, Dennis J. Dimsey,* and *Miriam R. Eisenstein.*

PER CURIAM.

The judgment of the Court of Appeals is vacated and the case is remanded to that court for further proceedings in light of the decision of the Court announced today in *City of Mobile* v. *Bolden, ante,* p. 55.

It is so ordered.

[For dissenting opinion of MR. JUSTICE BRENNAN, see *ante,* p. 94.]

[For dissenting opinion of MR. JUSTICE MARSHALL, see *ante,* p. 103.]

MR. JUSTICE BLACKMUN, concurring.

I, of course, must accept the Court's vacation of the judgment and its remand. If, however, we were to reach the

merits, then, in contrast to the result in *City of Mobile* v. *Bolden, ante,* p. 55, I would affirm the judgment of the Court of Appeals in this case.

MR. JUSTICE WHITE, dissenting.

Because the decision below in this case is based on findings of fact and conclusions of law virtually identical to those in *City of Mobile* v. *Bolden, ante,* p. 55, I dissent for the reasons stated in my opinion in that case, *ante,* p. 94.

MARSHALL, SECRETARY OF LABOR, ET AL. *v.* JERRICO, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 79-253. Argued March 19, 1980—Decided April 28, 1980

Under § 16 (e) of the Fair Labor Standards Act (Act), sums collected as civil penalties for the unlawful employment of child labor are returned to the Employment Standards Administration (ESA) of the Department of Labor in reimbursement for the costs of determining violations and assessing penalties. An Assistant Regional Administrator determined that violations of child labor provisions of the Act had occurred at restaurants managed by appellee and assessed a fine against appellee, including an amount for willful violation. After appellee filed exceptions to the Assistant Regional Administrator's determination and assessment, a hearing was held before an Administrative Law Judge, who accepted the Assistant Regional Administrator's contention that violations had occurred, but found that the violations were not willful and reduced the total assessment accordingly. Appellee then filed suit in Federal District Court, contending that § 16 (e) violated the Due Process Clause of the Fifth Amendment. The District Court granted summary judgment for appellee, holding that the reimbursement provision of § 16 (e) created an impermissible risk of bias on the part of the Assistant Regional Administrator because a regional office's greater effort in uncovering violations could lead to an increased amount of penalties and a greater share of reimbursements for that office, and thus § 16 (e) could distort the Assistant Regional Administrator's objectivity in assessing penalties.

Held: The reimbursement provision of § 16 (e) does not violate the Due Process Clause of the Fifth Amendment by creating an impermissible risk of bias in the Act's enforcement and administration. Pp. 242-252.

(a) Strict due process requirements as to the neutrality of officials performing judicial or quasi-judicial functions, cf. *Tumey* v. *Ohio*, 273 U. S. 510; *Ward* v. *Monroeville*, 409 U. S. 57, are not applicable to the determinations of the assistant regional administrator, whose functions resemble those of a prosecutor more closely than those of a judge. In an adversary system, prosecutors are permitted to be zealous in their

enforcement of the law. Although traditions of prosecutorial discretion do not immunize from judicial scrutiny enforcement decisions that are contrary to law, rigid standards of neutrality cannot be the same for administrative prosecutors as for judges. Pp. 242–250.

(b) It is unnecessary in this case to determine with precision what limits there may be on a financial or personal interest of one who performs a prosecutorial function, for here the influence alleged to impose bias is exceptionally remote. No governmental official stands to profit economically from vigorous enforcement of child labor provisions; there is no realistic possibility that the assistant regional administrator's judgment will be distorted by the prospect of institutional gain as a result of zealous enforcement efforts; and ESA's administration of the Act has minimized any potential for bias. On this record, the possibility that an assistant regional administrator might be tempted to devote an unusually large quantity of resources to enforcement efforts in the hope that he would ultimately obtain a higher total allocation of federal funds to his office is too remote to violate the constraints applicable to the financial or personal interest of officials charged with prosecutorial or plaintiff-like functions. Pp. 250–252.

Reversed and remanded.

MARSHALL, J., delivered the opinion for a unanimous Court.

Deputy Solicitor General Geller argued the cause for appellants. With him on the briefs was *Solicitor General McCree*.

Thomas W. Power argued the cause for appellee. With him on the brief were *William E. Anderson* and *Curtis L. Wilson*.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Under § 16 (e) of the Fair Labor Standards Act, 29 U. S. C. § 216 (e), sums collected as civil penalties for the unlawful employment of child labor are returned to the Employment Standards Administration (ESA) of the Department of Labor in reimbursement for the costs of determining violations and assessing penalties. The question for decision is whether this provision violates the Due Process Clause of the Fifth Amendment by creating an impermissible risk of bias in the Act's enforcement and administration.

I

The child labor provisions of federal law are primarily contained in § 12 of the Fair Labor Standards Act, 52 Stat. 1067, as amended, 29 U. S. C. § 212. The Secretary of Labor has designated the ESA as the agency responsible for enforcing these provisions, 36 Fed. Reg. 8755 (1971). The ESA in turn carries out its responsibilities through regional offices, and the assistant regional administrator of each office has been charged with the duty of determining violations and assessing penalties.

Appellee Jerrico, Inc., is a Delaware corporation that manages approximately 40 restaurants in Kentucky, Indiana, Tennessee, Georgia, and Florida. In a series of investigations from 1969 to 1975, the ESA uncovered over 150 violations of the child labor provisions at appellee's various establishments. After considering the factors designated by statute and regulations,[1] the ESA Assistant Regional Administrator in the Atlanta office assessed a total fine of $103,000 in civil penalties for the various violations. That figure included a supplemental assessment of $84,500 because of his conclusion that the violations were willful.

Appellee filed exceptions to the determination and assessment of the Assistant Regional Administrator, and pursuant to 29 U. S. C. § 216 (e), a hearing was held before an Administrative Law Judge. Witnesses included employees of appellee and representatives of the Department of Labor. The Administrative Law Judge accepted the Assistant Regional Adminis-

[1] Those factors include "any history of prior violations; any evidence of willfulness or failure to take reasonable precautions to avoid violations; the number of minors illegally employed; the age of the minors so employed and records of the required proof of age; the occupations in which the minors were so employed; exposure of such minors to hazards and any resultant injury to such minors; the duration of such illegal employment; and, as appropriate, the hours of the day in which it occurred and whether such employment was during or outside school hours." 29 CFR § 579.5 (c) (1979).

trator's contention that violations had occurred, concluding that the record showed "a course of violations" for which "[r]espondent's responsibility cannot be disputed." At the same time, he was persuaded by appellee's witnesses and by a review of the evidence that the violations were not willful. Accordingly, he reduced the total assessment to $18,500.

Appellee did not seek judicial review of the decision of the Administrative Law Judge. Instead, it brought suit in Federal District Court, challenging the civil penalty provisions of the Act on constitutional grounds and seeking declaratory and injunctive relief against their continued enforcement. Appellee accepted the determination of the Administrative Law Judge and alleged no unfairness in the proceedings before him. Nonetheless, it contended that § 16 (e) of the Act violated the Due Process Clause of the Fifth Amendment by providing that civil penalties must be returned to the ESA as reimbursement for enforcement expenses and by allowing the ESA to allocate such fines to its various regional offices. According to appellee, this provision created an impermissible risk and appearance of bias by encouraging the assistant regional administrator to make unduly numerous and large assessments of civil penalties.

After the parties engaged in discovery with respect to the administration of § 16 (e), appellee moved for summary judgment. The District Court granted the motion. It acknowledged that the Office of Administrative Law Judges was unaffected by the total amount of the civil penalties. At the same time, the court concluded that the reimbursement provision created an impermissible risk of bias on the part of the assistant regional administrator. Citing *Tumey* v. *Ohio*, 273 U. S. 510 (1927), and *Ward* v. *Village of Monroeville*, 409 U. S. 57 (1972), the court found that because a regional office's greater effort in uncovering violations could lead to an increased amount of penalties and a greater share of reimbursements for that office, § 16 (e) could distort the assistant regional administrator's objectivity in assessing penal-

ties for violations of the child labor provisions of the Act.

We noted probable jurisdiction, 444 U. S. 949 (1979), and now reverse.

II

A

The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process. See *Carey* v. *Piphus*, 435 U. S. 247, 259–262, 266–267 (1978). The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. See *Mathews* v. *Eldridge*, 424 U. S. 319, 344 (1976). At the same time, it preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done." *Joint Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123, 172 (1951) (Frankfurter, J., concurring), by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

The requirement of neutrality has been jealously guarded by this Court. In *Tumey* v. *Ohio*, *supra*, the Court reversed convictions rendered by the mayor of a town when the mayor's salary was paid in part by fees and costs levied by him acting in a judicial capacity. The Court stated that the Due Process Clause would not permit any "procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused." 273 U. S., at 532. *Tumey* was applied in *Ward* v. *Village of Monroeville*, *supra*,

to invalidate a procedure by which sums produced from a mayor's court accounted for a substantial portion of municipal revenues, even though the mayor's salary was not augmented by those sums. The forbidden "possible temptation," we concluded, is also present "when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court." 409 U. S., at 60. We have employed the same principle in a variety of settings, demonstrating the powerful and independent constitutional interest in fair adjudicative procedure.[2] Indeed, "justice must satisfy the appearance of justice," *Offutt* v. *United States*, 348 U. S. 11, 14 (1954), and this "stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties," *In re Murchison*, 349 U. S. 133, 136 (1955). See also *Taylor* v. *Hayes*, 418 U. S. 488 (1974).

Appellee contends that these principles compel the conclusion that the reimbursement provision of the Act violates the Due Process Clause. We conclude, however, that the strict requirements of *Tumey* and *Ward* are not applicable to the determinations of the assistant regional administrator, whose functions resemble those of a prosecutor more closely than those of a judge. The biasing influence that appellee discerns in § 16 (e) is, we believe, too remote and insubstantial to violate the constitutional constraints applicable to the deci-

[2] For example, we have invalidated a system in which justices of the peace were paid for issuance but not for nonissuance of search warrants, *Connally* v. *Georgia*, 429 U. S. 245 (1977) (*per curiam*); prohibited the trial of a defendant before a judge who has previously held the defendant in contempt, *Taylor* v. *Hayes*, 418 U. S. 488 (1974); *Mayberry* v. *Pennsylvania*, 400 U. S. 455 (1971); forbidden a state administrative board consisting of optometrists in private practice from hearing charges filed against licensed optometrists competing with board members, *Gibson* v. *Berryhill*, 411 U. S. 564, 578–579 (1973); and prohibited a parole officer from making the determination whether reasonable grounds exist for the revocation of parole, *Morrissey* v. *Brewer*, 408 U. S. 471, 485–486 (1972).

sions of an administrator performing prosecutorial functions. To explain our conclusion, we turn to the relevant sections of the Act.

As noted above, the major portions of the federal child labor provisions appear in 29 U. S. C. § 212, which outlaws the employment in interstate commerce of "oppressive child labor," as that term is defined in 29 U. S. C. § 203 (*l*) and implementing regulations. These provisions demonstrate a firm federal policy of "protect[ing] the safety, health, well-being, and opportunities for schooling of youthful workers." 29 CFR § 570.101 (1979). See also H. R. Rep. No. 1452, 75th Cong., 1st Sess., 6 (1937); S. Rep. No. 884, 75th Cong., 1st Sess., 2, 6 (1937).

Before 1974, the Secretary of Labor enforced the child labor provisions primarily through actions for injunctive relief, see 29 U. S. C. §§ 212 (b), 217, and for criminal sanctions, see 29 U. S. C. §§ 216 (a), 215 (a)(4). Having found such relief to be an inadequate or insufficiently flexible remedy for violations of the law, cf. H. R. Rep. No. 93-913, p. 15 (1974), Congress in 1974 authorized the Secretary to assess a civil penalty not to exceed $1,000 for each violation of § 212. 29 U. S. C. § 216 (e). Under this provision for the assessment of civil penalties, the Secretary's determination of the existence of a violation and of the amount of the penalty is not final if the person charged with a violation enters an exception within 15 days of receiving notice. In the event that such an exception is entered, the final determination is made in an administrative hearing conducted in accordance with the Administrative Procedure Act, 5 U. S. C. § 554. The administrative law judge "may affirm, in whole or in part, the determination by the Administrator of the occurrence of violations or . . . may find that no violations occurred, and shall order payment of a penalty in the amount originally assessed or in a lesser amount . . . or order that respondent pay no penalty, as appropriate." 29 CFR § 580.32 (a) (1979). He is directed to consider the same factors considered by the assistant re-

gional administrator[3] in making his original assessment. *Ibid.* Under the natural construction of this regulation, the administrative law judge is required to conduct a *de novo* review of all factual and legal issues.[4]

The provision whose constitutionality is at issue in this case is a part of 29 U. S. C. § 216 (e), the civil penalty section of the Act. That provision states that civil penalties collected for violations of the child labor law "shall be applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalties, in accordance with the provisions of section 9a of this title." Section 9a, 29 U. S. C. § 9a, added in 1934, provides in turn that all sums

> "received by the Department of Labor in payment of the cost of such work shall be deposited to the credit of the appropriation of that bureau, service, office, division, or other agency of the Department of Labor which supervised such work, and may be used, in the discretion of the Secretary of Labor, and notwithstanding any other provision of law, for the ordinary expenses of such agency and/or to secure the special services of persons who are neither officers nor employees of the United States."[5]

The record developed in the District Court permits a detailed description of the administration of the reimbursement provision in the years 1976, 1977, and 1978. It is plain that no official's salary is affected by the levels of the penalties. In all three years the sums collected as child labor penalties amounted to substantially less than 1% of ESA's budget.[6]

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[3] See n. 1, *supra*.

[4] See n. 9, *infra*, and accompanying text.

[5] The section was originally designed "[t]o authorize the Department of Labor to make special statistical studies upon payment of the cost thereof, and for other purposes." See 48 Stat. 582; S. Rep. No. 322, 73d Cong., 2d Sess. (1934).

[6] In 1976, ESA collected about $151,000 in child labor penalties; in 1977, $650,000; and in 1978, $592,000. By comparison, $87,407,000 was ap-

And in each of those years, ESA did not spend the full amount appropriated to it, and the sums that were not spent were returned to the Treasury. The amounts returned to the Treasury in that fashion substantially exceeded the sums collected under § 16 (e) in all three years.[7] The challenged provisions have not, therefore, resulted in any increase in the funds available to ESA over the amount appropriated by Congress.

Civil penalties for child labor violations are allocated by the national office of ESA, subject to the approval of the Secretary of Labor. In 1976, the sums collected were allocated to and retained by the ESA national office; in 1977, they were allocated to the national office, to the Office of the Solicitor of Labor, and to the various regional offices in proportion to the amounts expended on enforcement of the child labor provisions[8]; and in 1978, the penalties were held in the Treasury. Civil penalties have never been allotted to the regional offices on the basis of the total amount of penalties collected by particular offices.

The District Court concluded that in these circumstances the challenged provision violated the Due Process Clause under the principles set forth in *Tumey* and *Ward*. It noted that, as the 1977 practice demonstrated, the ESA has discretion to return sums collected as civil penalties to the regional offices in proportion to the amounts expended on enforcement efforts. Increased enforcement costs could thus lead to a

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propriated to ESA in 1976; $98,992,000 in 1977; and $119,632,000 in 1978. See Budget of the United States Government, Fiscal Year 1980—Appendix 652; Budget of the United States Government, Fiscal Year 1979—Appendix 623–624; Budget of the United States Government, Fiscal Year 1978—Appendix 510.

[7] The record indicates that, in 1976, ESA returned $981,000 to the Treasury; $870,000 was returned in 1977; and $4,600,000 in 1978.

[8] In that year a total of $559,800 was allotted, including $194,800 to the national office. The Chicago office received $44,300, the highest allotment of any regional office; the Denver office received the lowest, $4,900.

larger share of reimbursements. According to the court, an assistant regional administrator would therefore be inclined to maximize the total expenditures on enforcement of the child labor provisions of the Act, and those increased expenditures would result in an increase in the number and amount of penalties assessed. The court concluded that this possibility created an unconstitutional risk of bias in the assistant regional administrator's enforcement decisions. We disagree.

The assistant regional administrator simply cannot be equated with the kind of decisionmakers to which the principles of *Tumey* and *Ward* have been held applicable. He is not a judge. He performs no judicial or quasi-judicial functions. He hears no witnesses and rules on no disputed factual or legal questions. The function of assessing a violation is akin to that of a prosecutor or civil plaintiff. If the employer excepts to a penalty—as he has a statutory right to do—he is entitled to a *de novo* hearing before an administrative law judge.[9] In that hearing the assistant regional administrator acts as the complaining party and bears the burden of proof on contested issues. 29 CFR § 580.21 (a) (1979). Indeed,

[9] Appellee claims that the hearing before the administrative law judge is not truly *de novo* because the judge has the authority only to determine the existence of the violation, not to assess the reasonableness of the penalty. We are unable to discern any such limitation on the administrative law judge's authority. Under federal regulations, the administrative law judge is expressly empowered to review the amount of the penalty and is required to consider precisely those factors considered by the assistant regional administrator in making his assessment. See 29 CFR § 579.5 (1979). Indeed, in this very case the Administrative Law Judge carefully reviewed the Assistant Regional Administrator's assessment and reduced it by over 80%.

Appellee correctly points out that in *Ward* v. *Village of Monroeville*, 409 U. S. 57 (1972), we held that the availability of a trial *de novo* before an unbiased judge did not remove the constitutional infirmity in an original trial before one whose impartiality was impaired. A litigant, we said, "is entitled to a neutral and detached judge in the first instance." *Id.*, at 61–62. *Ward* does not aid appellee in this case, however, for the administrative law judge presides over the initial adjudication.

the Secretary's regulations state that the notice of penalty assessment and the employer's exception "shall, respectively, be given the effect of a complaint and answer thereto for purposes of the administrative proceeding." 29 CFR § 580.3 (b) (1979). It is the administrative law judge, not the assistant regional administrator, who performs the function of adjudicating child labor violations. As the District Court found, the reimbursement provision of § 16 (e) is inapplicable to the Office of Administrative Law Judges.[10]

The rigid requirements of *Tumey* and *Ward*, designed for officials performing judicial or quasi-judicial functions, are not applicable to those acting in a prosecutorial or plaintiff-like capacity. Our legal system has traditionally accorded wide discretion to criminal prosecutors in the enforcement process, see *Linda R. S.* v. *Richard D.*, 410 U. S. 614 (1973), and similar considerations have been found applicable to administrative prosecutors as well, see *Moog Industries, Inc.* v. *FTC*, 355 U. S. 411, 414 (1958); *Vaca* v. *Sipes*, 386 U. S. 171, 182 (1967). Prosecutors need not be entirely "neutral and detached," cf. *Ward* v. *Village of Monroeville*, 409 U. S., at 62. In an adversary system, they are necessarily permitted to be zealous in their enforcement of the law. The constitutional interests in accurate finding of facts and application of law, and in preserving a fair and open process for decision, are not to the same degree implicated if it is the prosecutor, and not the judge, who is offered an incentive for

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[10] Appellee errs in suggesting that the Office of Administrative Law Judges is also entitled to reimbursement under § 16 (e). When read in conjunction with 29 U. S. C. § 9 (a), that section allows reimbursement to offices that "supervised [the] work" of "determining the violations and assessing and collecting [the] penalties." The Office of Administrative Law Judges does not "supervise" that work. Indeed, the Administrative Procedure Act expressly forbids such supervision. 5 U. S. C. § 554 (d). The Office of Administrative Law Judges maintains an administrative section within the Department of Labor entirely separate from that of the supervising body, the ESA, and the Office has a separate budget.

securing civil penalties. The distinction between judicial and nonjudicial officers was explicitly made in *Tumey*, 273 U. S., at 535, where the Court noted that a state legislature "may, and often ought to, stimulate prosecutions for crime by offering to those who shall initiate and carry on such prosecutions rewards for thus acting in the interest of the State and the people." See also *Hortonville School Dist.* v. *Hortonville Ed. Assn.*, 426 U. S. 482, 495 (1976).

We do not suggest, and appellants do not contend, that the Due Process Clause imposes no limits on the partisanship of administrative prosecutors. Prosecutors are also public officials; they too must serve the public interest. *Berger* v. *United States*, 295 U. S. 78, 88 (1935). In appropriate circumstances the Court has made clear that traditions of prosecutorial discretion do not immunize from judicial scrutiny cases in which the enforcement decisions of an administrator were motivated by improper factors or were otherwise contrary to law. See *Dunlop* v. *Bachowski*, 421 U. S. 560, 567, n. 7, 568–574 (1975); *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125 (1939).[11] Moreover, the decision to enforce—or not to enforce—may itself result in significant burdens on a defendant or a statutory beneficiary, even if he is ultimately vindicated in an adjudication. Cf. 2 K. Davis, Administrative Law Treatise 215–256 (2d ed. 1979). A scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some

[11] Cf., *e. g.*, *Adams* v. *Richardson*, 156 U. S. App. D. C. 267, 480 F. 2d 1159 (1973); *Environmental Defense Fund, Inc.* v. *Ruckelshaus*, 142 U. S. App. D. C. 74, 439 F. 2d 584 (1971); *Medical Comm. for Human Rights* v. *SEC*, 139 U. S. App. D. C. 226, 432 F. 2d 659 (1970), vacated as moot, 404 U. S. 403 (1972); *Perez* v. *Boston Housing Authority*, — Mass. —, ——, ——, 400 N. E. 2d 1231, 1247, 1252–1253 (1980). See Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1667, 1752–1756 (1975); Jaffe, The Individual Right to Initiate Administrative Process, 25 Iowa L. Rev. 485 (1940).

contexts raise serious constitutional questions. See *Bordenkircher* v. *Hayes*, 434 U. S. 357, 365 (1978); cf. 28 U. S. C. § 528 (1976 ed., Supp. III) (disqualifying federal prosecutor from participating in litigation in which he has a personal interest). But the strict requirements of neutrality cannot be the same for administrative prosecutors as for judges, whose duty it is to make the final decision and whose impartiality serves as the ultimate guarantee of a fair and meaningful proceeding in our constitutional regime.

B

In this case, we need not say with precision what limits there may be on a financial or personal interest of one who performs a prosecutorial function,[12] for here the influence alleged to impose bias is exceptionally remote. No governmental official stands to profit economically from vigorous enforcement of the child labor provisions of the Act. The salary of the assistant regional administrator is fixed by law. 5 U. S. C. § 5332 (1976 ed. and Supp. III). The pressures relied on in such cases as *Tumey* v. *Ohio*, *supra*; *Gibson* v. *Berryhill*, 411 U. S. 564, 579 (1973); and *Connally* v. *Georgia*, 429 U. S. 245, 250 (1977) (*per curiam*), are entirely absent here.

Nor is there a realistic possibility that the assistant regional administrator's judgment will be distorted by the prospect of institutional gain as a result of zealous enforcement efforts. As we have noted, the civil penalties collected under § 16 (e) represent substantially less than 1% of the budget of the ESA.[13] In each of the relevant years, the amount of ESA's

[12] In particular, we need not say whether different considerations might be held to apply if the alleged biasing influence contributed to prosecutions against particular persons, rather than to a general zealousness in the enforcement process.

[13] Even if ESA received a considerable amount in civil penalties in a particular year, of course, it is possible that Congress would decide to appropriate a correspondingly lower amount from the Treasury.

budget that was returned to the Treasury was substantially greater than the amount collected as civil penalties. Unlike in *Ward* and *Tumey*, it is plain that the enforcing agent is in no sense financially dependent on the maintenance of a high level of penalties. Furthermore, since it is the national office of the ESA, and not any assistant regional administrator, that decides how to allocate civil penalties, such administrators have no assurance that the penalties they assess will be returned to their offices at all. See *Dugan* v. *Ohio*, 277 U. S. 61 (1928).

Moreover, the ESA's administration of the Act has minimized any potential for bias. In the only year in which the ESA elected to allocate part of the civil penalties to the regional offices, it did so in proportion to the expenses incurred in investigating and prosecuting child labor violations, not on the basis of the amounts of penalties collected. Thus, even if an assistant regional administrator were to act on the assumption that civil penalties would be returned to his office in any given year, his decision to assess an unjustifiably large penalty in a particular case would be of no benefit to his office, since that decision would not produce an increase in the level of expenses.

The District Court's conclusion that the reimbursement provision violated the Due Process Clause was evidently premised on its perception that an assistant regional administrator might be tempted to devote an unusually large quantity of resources to enforcement efforts in the hope that he would ultimately obtain a higher total allocation of federal funds to his office. This increase in enforcement effort, the court suggested, might incline the assistant regional administrator to assess an unjustified number of penalties, and to make those penalties unduly high. But in light of the factors discussed above, it is clear that this possibility is too remote to violate the constraints applicable to the financial or personal interest of officials charged with prosecutorial or plain-

tiff-like functions.[14] In order to produce the predicted result, the ESA would be required to decide to allocate civil penalties to regional offices; the sums allocated to the particular regional office would have to exceed any amount of that office's budget returned to the Treasury at the end of the fiscal year; the assistant regional administrator would have to receive authorization from his superiors to expend additional funds to increase his enforcement expenditures to the desired level; the increased expenditures would have to result in an increase in penalties; and the administrative law judge and reviewing courts would have to accept or ratify the assistant regional administrator's assessments. "[U]nder a realistic appraisal of psychological tendencies and human weakness," *Withrow* v. *Larkin*, 421 U. S. 35, 47 (1975), it is exceedingly improbable that the assistant regional administrator's enforcement decisions would be distorted by some expectation that all of these contingencies would simultaneously come to fruition. We are thus unable to accept appellee's contention that, on this record and as presently administered, the reimbursement provision violates standards of procedural fairness embodied in the Due Process Clause.

The judgment of the District Court is reversed, and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

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[14] We need not, of course, say whether the alleged biasing influence is too remote to raise constitutional objections even under the standards of *Ward* and *Tumey*.

UNITED STATES v. LOUISIANA

ON EXCEPTIONS TO SUPPLEMENTAL REPORT OF SPECIAL MASTER

No. 9, Orig. Argued March 18, 1980—Decided April 28, 1980

Held:

1. As the Special Master recommended, the United States is not obligated to account for and pay Louisiana either the value of the use of Louisiana's share of impounded funds that have been awarded and paid to the State under mineral leases on lands off its Gulf Coast, or interest upon that portion of those funds. The Interim Agreement that the parties entered into in response to this Court's ruling enjoining them from leasing wells in the disputed tidelands area except by agreement provided only that the payments made to the United States on each lease within the disputed area were to be impounded "in a separate fund in the Treasury of the United States" and, upon determination of the ownership of the lands, were to be taken from that fund and paid to the party entitled to them. The agreement contains no provision for the payment of interest or for the use of the funds or for investment, and there is nothing in the agreement's use of the word "impound," or in Louisiana's characterization of the arrangement as an escrow, to imply an obligation on the United States' part to pay interest or to pay for the use of the money. The impoundment of the funds having served its intended purpose, and all payments due Louisiana from the impounded funds having been made, the United States has fulfilled the obligations imposed upon it by the agreement. Pp. 261–266.

2. Contrary to the Special Master's recommendations, Louisiana is obligated to account to the United States for revenues derived by the State from mineral leases on areas within the zone contiguous to the coastline (Zone 1) adjudicated to the United States. The provision of the Outer Continental Shelf Lands Act authorizing the United States to make an agreement with a State as to existing mineral leases and the issuance of new leases "pending the settlement or adjudication" of a controversy as to ultimate ownership, and stating that payments made pursuant to such an agreement shall be considered as compliance with certain lease validation requirements of the Act, does not govern payments made by Louisiana's lessees in Zone 1 so as to foreclose any federal claim with respect to those payments. The provision means no more than that a lessee is not in default so long as the agreement remains in effect and he makes the required payments, and there is no

basis for reading into the provision a waiver by the United States of Louisiana's independent duty to account, or a waiver of any claim for money due the United States. The State's obligation does not derive from the Act, but was imposed by this Court's 1950 decree specifying that the United States was entitled to an accounting from Louisiana of all sums received by the State from lands adjudicated to the United States, was not waived by the Interim Agreement, and is not excused by the above provision of the Outer Continental Shelf Lands Act. Pp. 266–272.

3. The Court accepts, upon acquiescence of the parties, the Special Master's recommendations that Louisiana has no obligation to account for and pay to the United States money collected by the State as severance taxes on minerals removed from areas adjudicated to the United States. P. 272.

Exceptions to Special Master's supplemental report overruled in part and sustained in part, and case remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, and STEVENS, JJ., joined. POWELL, J., filed an opinion concurring in part and dissenting in part, in which STEWART and REHNQUIST, JJ., joined, *post*, p. 273. MARSHALL, J., took no part in the consideration or decision of the case.

Deputy Solicitor General Claiborne argued the cause for the United States. With him on the brief were *Solicitor General McCree, Assistant Attorney General Moorman, Bruce C. Rashkow, Michael W. Reed,* and *Margaret Strand.*

William J. Guste, Jr., Attorney General of Louisiana, and *Frederick W. Ellis,* Special Assistant Attorney General, argued the cause for defendants. With them on the briefs were *Oliver P. Stockwell* and *Booth Kellough,* Special Assistant Attorneys General, *Gary L. Keyser* and *C. H. Mandell,* Assistant Attorneys General, and *Nora K. Duncan.*

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

We are concerned here with certain features of what appears to be the final stage of the long-continuing and sometimes strained controversy between the United States and the State of Louisiana over the proceeds of mineral leases on lands off

Louisiana's Gulf Coast. Specifically at issue are the asserted obligation of the United States for interest on, or for the value of the use of, impounded funds that have been awarded and paid to Louisiana, and the asserted obligation of Louisiana to account to the United States for certain unimpounded lease revenues received by the State.

I

Litigation between the United States and the State of Louisiana over rights in lands submerged in the Gulf of Mexico off the Louisiana coast began over 30 years ago, in 1948, when the United States moved this Court, under its original jurisdiction, for leave to file a complaint. The Government prayed for a decree (a) declaring rights of the United States as against Louisiana over lands "underlying the Gulf of Mexico, lying seaward of the ordinary low-water mark on the coast of Louisiana and outside of the inland waters, extending seaward twenty-seven marine miles and bounded on the east and west, respectively, by the eastern and western boundaries of the State of Louisiana," and (b) requiring that Louisiana account to the United States for money received by the State after June 23, 1947, from the area so designated. Over opposition, the requested leave was granted. *United States* v. *Louisiana*, 337 U. S. 902 (1949). Louisiana was directed to answer. 337 U. S. 928 (1949). The State, however, filed a demurrer and motions to dismiss and for other relief. These were overruled and denied. 338 U. S. 806 (1949).

Louisiana then did answer, placing in issue the claims of the United States and asserting affirmative defenses. The plaintiff's responsive motion for judgment was set down for argument. The Court ruled that *United States* v. *California*, 332 U. S. 19 (1947), then recently decided, controlled the Louisiana litigation. In that case, the Court had held that California was not the owner of the marginal belt along its coast beyond the low-water mark, and that the Federal Govern-

ment had primary rights in and power over that belt. The rationale, it was said, was that "[n]ational rights must therefore be paramount in that area." 339 U. S. 699, 704 (1950). A decree was entered enunciating the United States' possession of "paramount rights" and Louisiana's lack of "title thereto or property interest therein"; enjoining Louisiana from carrying on activities in the area for the purpose of taking petroleum, gas, or other mineral products without authority first obtained from the United States; and stating that the United States was entitled to an accounting from Louisiana of sums derived by the State from the area since June 5, 1950 (the date of the Court's opinion). 340 U. S. 899 (1950). A like decree was entered in a companion case against Texas. *United States* v. *Texas*, 340 U. S. 900 (1950).

The Submerged Lands Act, 67 Stat. 29, 43 U. S. C. § 1301 *et seq.*, passed May 22, 1953, came in response to these rulings. By that statute, the United States released to the coastal States its rights in the submerged lands within stated limits and confirmed its own rights therein seaward of those limits. The Act was sustained as a constitutional exercise of Congress' power to dispose of federal property. *Alabama* v. *Texas*, 347 U. S. 272 (1954).

The passage of the Act, however, did not end the controversy. Opposing claims continued to be asserted, and Louisiana continued to conduct leasing activities with respect to submerged lands in the disputed area. Accordingly, in 1956, the United States sought and was granted leave to file a complaint in a new suit (the present litigation) against Louisiana. 350 U. S. 990. The Court forthwith enjoined Louisiana and the United States "from leasing or beginning the drilling of new wells in the disputed tidelands area . . . unless by agreement of the parties filed here." 351 U. S. 978 (1956). In response to this ruling, on October 12, 1956, the parties entered into an Interim Agreement designed to permit further development of the submerged lands in dispute. Interpretation of this agreement is the central task of this

opinion. The lawsuit continued, and in 1957 the other Gulf States in effect were requested to intervene. 354 U. S. 515.

In due course this Court held, among other things, that the Submerged Lands Act granted Louisiana ownership "to a distance no greater than three geographical miles from its coastlines, wherever those lines may ultimately be shown to be." 363 U. S. 1, 79 (1960). A "Final Decree" was entered accordingly. 364 U. S. 502 (1960). That decree, like the one of 1950 in the earlier litigation, confirmed in the United States as against Louisiana all the land, minerals, and other natural resources underlying the Gulf of Mexico more than three geographic miles seaward from the coastline; recited that Louisiana had no interest therein and was enjoined from interfering with the rights of the United States; stated that as against the United States Louisiana was entitled to all the lands, minerals, and other natural resources underlying the Gulf extending seaward from its coastline three geographic miles, and that the United States was not entitled to any interest therein (with a stated exception inapplicable here); and provided that whenever the location of the coastline of Louisiana should be agreed upon or determined, the State was to render the United States an appropriate accounting of all sums derived by it since June 5, 1950, "either by sale, leasing, licensing, exploitation or otherwise from or on account of any of the lands or resources [decreed to the United States] . . . provided, however, that as to the State of Louisiana the allocation, withdrawal and payment of any funds now impounded under the Interim Agreement between the United States and the State of Louisiana, dated October 12, 1956, shall, subject to the terms hereof, be made in accordance with the appropriate provisions of said Agreement." *Id.*, at 503.

On December 13, 1965, a supplemental decree was entered. 382 U. S. 288. It generally reconfirmed the respective rights of the United States and Louisiana as theretofore determined; released to the United States all sums held impounded by it

under the Interim Agreement and attributable to the lands confirmed in the United States; released to Louisiana all sums held impounded by it under that agreement and attributable to the lands confirmed in the State; directed, within 75 days, the payments required of the respective parties, and an accounting from each of sums attributable to lands confirmed in the other, *id.*, at 293; and retained jurisdiction particularly with respect "to the remainder of the disputed area," *id.*, at 295.

The determination of the exact location of the Louisiana coastline remained for resolution. In *United States* v. *California*, 381 U. S. 139 (1965), this Court held that Congress had left to the courts the task of defining "inland waters," and the Court adopted for purposes of the Submerged Lands Act the definitions contained in the international Convention on the Territorial Sea and the Contiguous Zone, ratified by the United States in 1961. [1964] 15 U. S. T. (pt. 2) 1607, T. I. A. S. No. 5639. In the present litigation, in March 1969, the Court held that that part of Louisiana's coastline which, under the Submerged Lands Act, consists of "the line marking the seaward limit of inland waters," see 43 U. S. C. § 1301 (c), is also to be drawn in accordance with the definitions of the Convention. It decided to refer to a Special Master particularized disputes over the precise boundary between the submerged lands belonging to the United States and those belonging to Louisiana. 394 U. S. 11. A Master was appointed. 395 U. S. 901 (1969).

A second supplemental decree was entered December 20, 1971. 404 U. S. 388. That decree, among other things, determined that the United States had exclusive rights to an area of the Continental Shelf lying more than one foot seaward of a line therein described; recited that sums held impounded by the United States under the Interim Agreement and derived from those lands were released to the United States, *id.*, at 389; and provided that leases of lands lying partly within that area and partly landward thereof were not affected

by the decree, so that revenues derived therefrom were to remain subject to impoundment, *id.*, at 402.

Still a third supplemental decree was entered October 16, 1972. 409 U. S. 17. By this decree, the Court ruled that, with a stated exception, Louisiana was entitled to all lands, minerals, and other natural resources lying more than one foot landward of a line therein described and seaward of the ordinary low-water mark on the Louisiana shore, *id.*, at 17–18; that leases of land partly within that area and partly seaward thereof were not affected by the decree, so that revenues derived therefrom were to remain subject to impoundment; and that all sums held impounded by Louisiana or the United States under the Interim Agreement derived from leases of lands wholly within areas allotted to Louisiana were released to that State, *id.*, at 31.

The Special Master thereafter filed his report dated July 31, 1974. Exceptions to that report made by the United States and by Louisiana, respectively, were overruled, the Special Master's recommendations were accepted, and the parties were directed to prepare and file a proposed decree establishing "a baseline along the entire coast of the State of Louisiana." 420 U. S. 529, 530 (1975). The parties were able to agree, and a fourth supplemental decree was entered June 16, 1975. 422 U. S. 13. Exclusive rights were affirmed in the respective parties in areas lying landward or seaward of a line three geographical miles seaward of the baseline, and impounded sums were released accordingly. *Id.*, at 13–14. Cross-payments within 90 days and cross-accountings within 60 days were ordered. *Id.*, at 15. The decree recited: "It is understood that the parties may be unable to agree on . . . whether interest may be due on funds impounded pursuant to the Interim Agreement of October 12, 1956." *Id.*, at 17. The required accountings were filed and referred to the Special Master. 423 U. S. 909 (1975).

The Master held hearings on the accountings and on the objections that were interposed. He now has filed his supple-

mental report dated August 27, 1979. Louisiana and the United States have each filed exceptions to that report.

II

As was observed at the beginning of this opinion, the parties and this Court should be near the end of this long-enduring litigation. The territorial dispute has been resolved. The boundary between federal and state submerged lands, except for the formal entry of yet another supplemental decree describing that boundary, has been fixed. And each party has been directed to account for revenues derived from areas adjudicated to the other sovereign.

The Special Master's supplemental report recites the filing of the several accountings by Louisiana and by the United States; the respective objections made to those accountings; the agreements reached by the parties; and the fact that three issues remain unresolved. As phrased by the Master, these issues are:

> First issue—Is the United States obligated to account for and pay to the State of Louisiana either the value of the use of Louisiana's share of the impounded funds or interest upon that portion of those funds?
>
> Second issue—Does Louisiana have the obligation to account for revenues received by it from mineral leases on areas lying within Zone 1?
>
> Third issue—Does Louisiana have the obligation to account for as unimpounded funds and to pay to the United States money collected by it as severance taxes on minerals removed from areas subsequently determined to belong to the United States?

The Master's ruling on each issue was in the negative. He has recommended that all exceptions to the accountings be overruled, and that the accountings be approved as filed.

Before this Court, Louisiana has filed exceptions only to the Special Master's recommendations as to the first stated

issue. The United States has filed exceptions only as to the second stated issue. The Master's recommendations as to the third stated issue, concerning money collected by Louisiana as severance taxes, thus are not the subject of any exceptions here.[1] In the absence of present controversy we accept the Special Master's recommendations on that issue. We consider the exceptions to the other issues in turn.

III

The First Stated Issue

The Interim Agreement of October 12, 1956, between the United States and Louisiana, referred to in this Court's Final Decree of December 12, 1960, see 364 U. S., at 503, came into being after the Court, on June 11, 1956, had provided:

> "IT IS FURTHER ORDERED that the State of Louisiana and the United States of America are enjoined from leasing or beginning the drilling of new wells in the disputed tidelands area pending further order of this Court unless by agreement of the parties filed here." 351 U. S. 978.

The Interim Agreement recites that the parties "desire to provide for the impoundment of . . . sums . . . payable under mineral leases in the disputed area, pending the final settlement or adjudication of the said controversy." App. to Reply Brief for Louisiana 9a. It divided the submerged lands off the Louisiana coast into four zones therein described. The zone contiguous to the coastline was designated as Zone 1, the next most seaward as Zone 2, the next as Zone 3, and the most

[1] The United States asserts:

"For a variety of reasons—including a reluctance to burden the Court with an esoteric and complex question of no recurring importance—we are not excepting to the Master's conclusion with respect to the State's obligation to pay over to the United States the severance taxes attributable to the extraction of minerals beyond State jurisdiction." Memorandum of United States in Support of Exception, p. 3.

seaward as Zone 4. *Id.*, at 10a–11a. It described the area comprising Zones 2 and 3 as the "disputed area," *id.*, at 11a, and it conferred upon the United States (with certain exceptions) the responsibility for collecting receipts from the disputed zones, *id.*, at 26a–27a. By ¶ 7 (a), the United States agreed (with exclusions not material here) "to impound in a separate fund in the Treasury of the United States a sum equal to all . . . payments heretofore or hereafter paid to it for and on account of each lease, or part thereof, in Zones 2 and 3." *Id.*, at 14a. Certain other payments were to be impounded by Louisiana. Paragraph 9 of the agreement then provides:

> "[T]he impounded funds provided for herein shall be held intact, in a separate account for each lease or portion thereof affected, by each party until title to the area affected is determined. Whereupon, except as otherwise herein provided:
>
> . . . . .
>
> "(b) Any funds derived from an area finally determined to be owned by the State of Louisiana [with an exception not here material] shall be taken from the separate and impounded fund in the Treasury of the United States provided for herein,"

and paid to the appropriate officer of Louisiana. *Id.*, at 18a–19a.

Pursuant to these provisions of the Interim Agreement, the United States collected and retained payments on mineral leases for operations within the designated disputed area. As a consequence of the first supplemental decree, entered December 13, 1965, see 382 U. S., at 293, the United States paid Louisiana some $34 million of impounded funds. Indeed, with an additional payment of some $136 million in 1975, pursuant to the supplemental decree of June 16, 1975, see 422 U. S., at 14–15, all payments due Louisiana from the funds impounded by the United States have been made. But

the United States has not paid Louisiana any interest on the funds so impounded, and has not made any payment for the use of those funds while they were held in the United States Treasury. Louisiana asserts a claim for such interest, apparently approximating $88 million, or for the value of the use of the money during the period of impoundment, and the United States resists these claims.

Louisiana's position is at least fourfold: (1) The impoundment provisions of the Interim Agreement implied a trust that imposed on the United States the fiduciary duty of a trustee in its handling of the impounded funds. It is said that an escrow arrangement in fact was established. The presence of a trust is evident from the conduct and relationship of the parties, from documentary evidence, and from admissions by federal officials. (2) The United States used Louisiana's money for its own purposes and without authority under the Interim Agreement. The funds were deposited in the general account of the Treasurer of the United States where they were available, and used, to meet cash needs of the Federal Government. (3) The United States had the duty to invest the impounded funds for the benefit of both parties. This duty is implied from the provisions of the agreement; is imposed upon the United States as a trustee as a matter of law; was breached by the refusal of the United States to honor a request by Louisiana to invest the funds; is supported by the provisions of 31 U. S. C. § 547a to the effect that "[a]ll funds held in trust by the United States . . . shall be invested" in interest-bearing securities; and is not limited by the supplemental decree of June 16, 1975. (4) Equitable remedies to prevent the unjust enrichment of the United States at the expense of Louisiana are appropriate.

We find no merit in any of Louisiana's contentions. The Interim Agreement provided only that the payments made to the United States on each lease within the disputed area were to be impounded "in a separate fund in the Treasury of the United States" and, upon determination of the owner-

ship of the land, were to be taken from that separate and impounded fund and paid to the party entitled to them. The agreement contains no express provision for the payment of interest or for the use of the funds or for investment. Neither do we find anything in the agreement's use of the word "impound" or, indeed, in Louisiana's characterization of the arrangement as an escrow (a word that does not appear in the agreement), that implies an obligation on the part of the United States to pay interest or to pay for the use of the money. The word "impound," in its application to funds, means to take or retain in "the custody of the law." Black's Law Dictionary 681 (5th ed., 1979); Bouvier's Law Dictionary 1515 (8th ed., 1914). That obligation, as is an escrow, is to hold and deliver property intact.

What actually happened here, of course, was that, as the funds were paid to the United States, the lessees' checks were cashed and the resulting cash was commingled with general funds of the Treasury and used in governmental operations. A separate account, No. 14X6709, nonetheless, was established on the books of the Treasury for these payments, and a credit entry covered every receipt from the disputed area. The United States did not stockpile that inflowing cash in a far corner of the Government vaults. But the special account was maintained and it accurately recorded the increasing potential liability of the United States to Louisiana. This was much more than a recordkeeping device. The receipts were never treated as governmental revenues. The recognition of a contingent liability, corresponding to the cash deposited, enabled the United States to make prompt payment to Louisiana without special congressional authorization or appropriation. There was no proof or even suggestion that at any time there were insufficient funds in the United States Treasury to pay any amount that might be determined to be due Louisiana from the impoundment.

Apart from constitutional requirements, in the absence of specific provision by contract or statute, or "express con-

sent . . . by Congress," interest does not run on a claim against the United States. *Smyth* v. *United States*, 302 U. S. 329, 353 (1937); *Albrecht* v. *United States*, 329 U. S. 599, 605 (1947); *United States* v. *N. Y. Rayon Importing Co.*, 329 U. S. 654, 658–659 (1947). See also 28 U. S. C. § 2516. It follows that the same is true as to any claim of duty to invest.

We are persuaded, also, that the omission, in the Interim Agreement, of any provision for interest was a conscious one. When the agreement was signed in 1956, almost $60 million in disputed revenues already had accumulated. The importance of any interest obligation was obvious. And pertinent here is the fact that two of Louisiana's negotiators candidly conceded that they did not insist on an interest clause because they knew the United States would not agree to one. Tr. 70, 95, 98, 99, 102, 103, 163. Nor does Louisiana's intimation that it was willing to pass the matter in silence because the agreement was expected to be short lived carry weight. The agreement itself specified no term, and, in its ¶ 13, it provided for operations after a year had elapsed.

We note, too, that Louisiana is not in a position to assert that it was unaware that the funds were not invested or that it did not know that the United States held itself not responsible for interest. The State received regular monthly reports of the amounts credited to the impounded account, as the agreement's ¶ 8 required. Those reports reflected no interest. Louisiana accepted the $34 million distribution, made pursuant to the 1965 decree, without complaint about the absence of interest. And communications flowed from officers of the State and its representatives in Congress, suggesting the deposit of some of the funds in Louisiana banks, presumably so that they might enjoy the free use of those funds. The Louisiana Legislature, it is true, on June 6, 1967, by House Concurrent Resolution No. 251, did call upon the United States "to take such steps as are necessary to effect a prudent and effective investment of the funds now and here-

after so impounded." See 1967 Louisiana Legislative Calendar 161–162. The quoted language, however, was only precatory and suggestive; it was not demanding. At most, it amounted to a request for a change of status. A Treasury official, pleading absence of authority, promptly returned a negative answer. In fact, Louisiana apparently never took the position that it was entitled to interest upon, or payment for the use of, its share of the impounded funds until 1975 when it filed its objections to the accounting. And Louisiana made no request for modification of the Interim Agreement. The State thus acquiesced for two decades.

We conclude that the United States fulfilled the obligations imposed upon it by the agreement; that the impoundment served its intended purpose; that there is no liability on the part of the United States for interest or for the use of the funds; and that the United States has no further obligation for payment beyond those it has performed.

IV

The Second Stated Issue

This issue concerns money paid to Louisiana by oil and gas lessees since 1950 in respect to Zone 1 areas now adjudicated to the United States. Louisiana asserts a right permanently to retain that money. The amount involved is some $19 million.[2]

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[2] Louisiana's total receipts attributable to the federal lands in Zone 1 since 1950 amount to some $23 million. This figure, however, includes the severance taxes (the Third Stated Issue) to which the United States no longer makes claim. The United States calculates that Louisiana will be indebted to it for some $19 million if its exception to the second stated issue is sustained. It concedes, however, that Louisiana would be entitled to an offset for unimpounded moneys, received by the United States from Louisiana's submerged lands, in excess of $5 million. Memorandum of United States in Support of Exception, pp. 40–41, n. 23. We recognize that Louisiana argues that its indebtedness will be much smaller even if the United States' position is sustained.

During the past three decades these federal lands have been administered by Louisiana. Before the Interim Agreement of 1956, Louisiana acted unilaterally in leasing those areas; after that date, it acted with the acquiescence of the United States given by the agreement.

The Special Master concluded that, by permitting Louisiana to administer Zone 1, the United States waived its rights to demand an accounting of, and payment with respect to, the revenues derived from its lands in the Zone. The Master did acknowledge that the very opposite result "would certainly be the case in the absence of any adjudication or agreement between the parties to the contrary." Supplemental Report 15. He found a waiver on the part of the United States, however, that centered in a provision of the Outer Continental Shelf Lands Act, 43 U. S. C. § 1336, which he read as foreclosing the federal claim to the money. He noted that the Interim Agreement contained no specific language regarding payments derived from leases on areas lying within Zone 1 or Zone 4, although it did with respect to revenues derived from leases on areas lying within Zones 2 and 3. He stressed ¶ 6 of the agreement, which provided that notwithstanding any adverse claim, Louisiana, as to any area in Zone 1 (and the United States, as to any area in Zone 4), "shall have exclusive supervision and administration, and may issue new leases and authorize the drilling of new wells and other operations without notice to or obtaining the consent of the other party." App. to Reply Brief for Louisiana 14a. Louisiana, in fact, collected rentals on mineral leases on areas in Zone 1. The United States did not question Louisiana's right to do so. The Master observed that Louisiana anticipated the possibility that some portions of Zone 1, upon which it granted leases, might ultimately be adjudged to belong to the United States, for it inserted in almost all the leases a provision to the effect that it was granting the right to extract minerals only from those parts of the leasehold areas owned by Louisiana. The conclusion the Master drew was that Louisiana was entitled to

keep all rentals derived prior to the entry of the supplemental decree of June 16, 1975, from leases upon areas lying within Zone 1, and that the United States had no right to recover them.

We are constrained to disagree with the Special Master on this issue. We accept the submission of the United States that the "ground rules" of the controversy were laid down in 1950. The Court's very first decree, issued December 11, 1950, specified, 340 U. S., at 900, that the United States was entitled to an accounting from Louisiana of all sums derived by the State from lands adjudicated to the United States. This was a principle laid down independently of the not-yet-enacted Submerged Lands Act and Outer Continental Shelf Lands Act. The principle had its roots in the Court's decision in *United States* v. *California*, 332 U. S. 19 (1947).

The Submerged Lands Act of 1953 did not change the ground rules. It released and "confirmed" a coastal belt to the coastal States, and the United States thereby "release[d] and relinquishe[d] all claims of the United States . . . for money . . . arising out of [past] operations" within the belt. 43 U. S. C. § 1311 (b)(1). For areas seaward of that belt, however, the States' obligation to account and pay remained unchanged. This Court's decision of May 31, 1960, in the second suit, was unambiguous on this matter, and the Court made plain the continued vitality of the original ground rules. 363 U. S., at 7, 83, and n. 140. The cited footnote stated flatly:

> "On June 5, 1950, the date of this Court's decision in the *Louisiana* and *Texas* cases, all coastal States were put on notice that the United States was possessed of paramount rights in submerged lands lying seaward of their respective coasts. . . . [T]he United States remains entitled to an accounting for all sums derived since June 5, 1950, from lands not so relinquished [by the Submerged Lands Act]."

The preceding Interim Agreement of October 1956 was forced into being by continuing conflict, by an injunction obtained by Louisiana in its courts, and by the injunction issued by this Court on June 11, 1956. See 351 U. S. 978. As we have noted, the agreement divided the submerged lands into the four zones hereinabove described. The first, nearest the shore, was to be administered by Louisiana. The others were to be administered by the United States, except for certain leases already granted by Louisiana in Zone 2 and the requirement of state concurrence for any new leasing in that zone. Receipts from Zones 2 and 3 were to be "impounded." No such impoundment obligation, however, was imposed on the United States with respect to Zone 4 or upon Louisiana with respect to Zone 1.

It turned out that the seaward boundary of Louisiana's submerged lands, as finally determined, does not coincide with the line that divided Zones 1 and 2. The final boundary meanders back and forth across the agreement's line between those two Zones producing bulges on each side. Louisiana has been successful in some of its claims to lands within Zone 2, and the United States has accounted for and paid over funds received from those areas. Yet Louisiana denies any corresponding obligation to account for and pay over revenues it received from those portions of Zone 1 that the United States has successfully claimed.

Louisiana asserts that the United States, by the Interim Agreement, waived and abandoned its right to revenues from Zone 1 during the life of the agreement. The agreement itself contains no express words of waiver. On the other hand, neither does it provide specifically for eventual repayment of any revenues from portions of Zone 1 ultimately adjudicated to the United States. But the agreement does recite: "nor shall any provision hereof be the basis for . . . waiving in any manner any right, interest, claim, or demand whatsoever of either party now pending in the proceedings above referred

to, or otherwise." App. to Reply Brief for Louisiana 9a. And it further recites that the baseline from which the several zones were measured had not been surveyed or finally fixed, and that no inference was to be drawn from the use of that baseline. *Id.*, at 10a. These provisions of the agreement persuade us that each party specifically was reserving any monetary claims it might have outside Zones 2 and 3.

It was to be expected, of course, that most of Zone 1 would ultimately be adjudicated to Louisiana. This fact accounts for the decision to permit the State to enjoy, for the interim, the revenues from that area.[3]

The Outer Continental Shelf Lands Act was the complement of the Submerged Lands Act, for it provided in detail for the administration of federal submerged lands lying beyond those granted to the coastal States. It authorized an agreement with a State "respecting operations under existing mineral leases" and the issuance of new leases "pending the settlement or adjudication" of a controversy as to ultimate ownership. 43 U. S. C. § 1336. This provision is referred to in the Interim Agreement, and it is the one on which the Special Master focused his attention. The Master placed particular stress on the following sentence in the statute:

> "Payments made pursuant to such agreement, or pursuant to any stipulation between the United States and a State, shall be considered as compliance with section 1335 (a)(4) of this title."

The Master viewed the payments made by Louisiana's lessees in Zone 1 as governed by this language and concluded

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[3] We see no substance in the fact that most, but not all of the leases granted by Louisiana in Zone 1 referred to lands owned by the State. Some of these antedated the Interim Agreement, and we read them all as merely repeating an established pattern. The recital hardly is acceptable as a device that is at once self-serving for Louisiana and capable of being detrimental to the lessees who surely thought they were getting, and paying for, full value.

that any federal claim with respect to those payments was foreclosed.

We do not so read that sentence. The provision, we feel, means no more than that a lessee is not in default so long as the agreement remains in effect and he makes the payments required by it. The Act protects the lessee. Whatever the lessee's ultimate obligation, if any, to the United States might turn out to be, there is no basis for reading into § 1336 a waiver by the United States of Louisiana's independent duty to account, or a waiver of any claim for money due the United States. The State's obligation does not derive from the Shelf Lands Act; it was imposed by this Court's 1950 decree, was not waived by the Interim Agreement, and is not excused by the quoted provision of the Shelf Lands Act.

This conclusion is buttressed by the fact that until 1975 the actions of the parties and the rulings of this Court consistently indicate that this was the common understanding. The 1960 decree was prepared by the parties at the invitation of the Court. 363 U. S., at 85. The decree itself recognized that once the coastline was determined, Louisiana was to account and to pay. 364 U. S., at 503. The decree of December 13, 1965, although distinguishing between impounded and nonimpounded funds, contained no waiver of any obligation relating to receipts that were not impounded. 382 U. S., at 294. This Court's decision of March 17, 1975, 420 U. S. 529, and the implementing decree of June 16, 1975, 422 U. S. 13, recognized that in some places the true limit of Louisiana's submerged lands was shoreward of the Zone 1 line. That decree, also, was proposed by the parties at the invitation of the Court. 420 U. S., at 530. It declared rights divided by a specified boundary line which, in many places, did not correspond with the seaward edge of Zone 1. It required each party to account for and to pay over impounded revenues attributable to lands adjudicated to the other. 422 U. S., at 15–16. We see no reason to conclude that those accounting provisions were included only for informational

purposes, rather than to spell out the parties' pecuniary obligations.[4]

V

In summary: We accept, upon acquiescence of the parties, the Special Master's recommendations that Louisiana has no obligation to account for and to pay to the United States money collected by it as severance taxes on minerals removed from areas adjudicated to the United States. We agree with and accept the Special Master's recommendations that the United States is not obligated to account for and pay Louisiana either the value of the use of Louisiana's share of the impounded funds or interest upon that portion of those funds. We therefore overrule Louisiana's exceptions to the supplemental report of the Special Master. We disagree with and do not accept the Special Master's recommendations with respect to Louisiana's obligation to account for revenues derived by it from mineral leases on areas within Zone 1 adjudicated to the United States. Instead, we sustain the exception of the United States and rule that Louisiana does have the obligation to account for such revenues received by it. Subject to this ruling, the respective accountings are approved as filed.

We leave to the Special Master and the parties the determination of the final amount due and owing, and of the

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[4] We note that the conclusion we reach should entail no pressing hardship for Louisiana. Apart from the fact that Louisiana will be disgorging United States funds it has enjoyed for many years and will be doing so in depreciated dollars without interest, the United States has represented to this Court that accumulated impounded receipts attributable to state lands from "split leases" exceed the sum now claimed from Louisiana. The accounting of the split lease revenues is not yet due. See 422 U. S., at 16–17. The United States asserts, however, that it is content to defer payment from Louisiana until the split lease impounded fund accounting is settled, and to waive the benefit of the absence of offset provisions if Louisiana does likewise. Memorandum of United States in Support of Exception, p. 40.

method of payment. The case is remanded to the Special Master for further proceedings.

It is so ordered.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

MR. JUSTICE POWELL, with whom MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST join, concurring in part and dissenting in part.

I concur in the Court's opinion except with respect to its disposition of the "second stated issue." *Ante*, at 266–272. As framed by the Special Master, the second issue is whether Louisiana has "the obligation to account for revenues received by it from mineral leases on areas lying within Zone 1. . . ." *Ante*, at 260. The Special Master found that the State had no such obligation. The United States filed an exception, and the Court sustains it.

I would accept the recommendations of the Master on all three issues, including his finding that Louisiana has no obligation to account for revenues derived from Zone 1. The latter finding certainly is not free from doubt, but the able Master has a more intimate familiarity with this "long-continuing and sometimes strained controversy," *ante*, at 254, than an appellate judge possibly can acquire by studying only the available record. Although we have the duty to make an independent judgment, I cannot conclude that the Master's finding on the second stated issue is erroneous. Accordingly, I dissent on this issue.

Reporter's Note

The next page is purposely numbered 901. The numbers between 273 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FROM APRIL 21 THROUGH APRIL 29, 1980

April 21, 1980

Appeals Dismissed

No. 78–5928. Waller *v.* United States. Appeal from Ct. App. D. C. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 389 A. 2d 801.

No. 79–1339. Childs *v.* Childs. Appeal from App. Div., Sup. Ct. N. Y., 2d Jud. Dept., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 69 App. Div. 2d 406, 419 N. Y. S. 2d 533.

No. 79–1145. Budget Marketing, Inc., et al. *v.* Kentucky. Appeal from Sup. Ct. Ky. dismissed for want of substantial federal question. Mr. Justice Stewart would note probable jurisdiction and set case for oral argument. Reported below: 587 S. W. 2d 245.

No. 79–1341. Bowman *v.* Maine State Employees Appeals Board et al. Appeal from Sup. Jud. Ct. Me. dismissed for want of substantial federal question. Reported below: 408 A. 2d 688.

No. 79–5946. Parkins et al. *v.* Illinois. Appeal from Sup. Ct. Ill. dismissed for want of substantial federal question. Reported below: 77 Ill. 2d 253, 396 N. E. 2d 22.

No. 79–6094. Cruz *v.* New York. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 48 N. Y. 2d 419, 399 N. E. 2d 513.

No. 79-6160. JACKSON *v.* WISCONSIN. Appeal from Ct. App. Wis. dismissed for want of substantial federal question. Reported below: 92 Wis. 2d 905, 287 N. W. 2d 853.

No. 79-6174. HIGGINS *v.* MISSOURI. Appeal from Sup. Ct. Mo. dismissed for want of substantial federal question. Reported below: 592 S. W. 2d 151.

No. 79-6050. CROSS *v.* CHURCH ET AL. Appeal from Small Claims Court, San Mateo County, Cal., dismissed for want of jurisdiction.

No. 79-6152. HAYES *v.* VALLEY BANK OF NEVADA; and HAYES *v.* GLADSTONE ET AL. Appeal from Sup. Ct. Nev. dismissed for want of properly presented federal question.

Vacated and Remanded on Appeal

No. 78-5422. GONZALEZ *v.* NEW YORK. Appeal from App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Judgment vacated and case remanded for further consideration in light of *Payton* v. *New York*, 445 U. S. 573 (1980). Reported below: 63 App. Div. 2d 686, 404 N. Y. S. 2d 933.

Certiorari Granted—Vacated and Remanded

No. 77-6769. BROWN *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Payton* v. *New York*, 445 U. S. 573 (1980). Reported below: 380 So. 2d 1048.

No. 78-5403. BUSH *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Payton* v. *New York*, 445 U. S. 573 (1980). Reported below: 355 So. 2d 488.

No. 78–5471. PYNES *v.* UNITED STATES. Ct. App. D. C. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Whalen* v. *United States*, 445 U. S. 684 (1980). Reported below: 385 A. 2d 772.

No. 78–6276. VIDAL *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Payton* v. *New York*, 445 U. S. 573 (1980). Reported below: 61 App. Div. 2d 825, 402 N. Y. S. 2d 61.

No. 78–6839. GORDON *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Payton* v. *New York*, 445 U. S. 573 (1980). Reported below: 67 App. Div. 2d 931, 413 N. Y. S. 2d 29.

No. 79–326. UNITED STATES *v.* DUNCAN ET AL. Ct. Cl. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Mitchell*, 445 U. S. 535 (1980). Reported below: — Ct. Cl. —, 597 F. 2d 1337.

No. 79–620. SALA *v.* COUNTY OF SUFFOLK. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Owen* v. *City of Independence*, 445 U. S. 622 (1980). Reported below: 604 F. 2d 207.

No. 79–711. ALABAMA *v.* DAVIS. C. A. 5th Cir. Certiorari granted, judgment of the Court of Appeals vacated, and that court is directed to remand the case to the United States District Court for the Northern District of Alabama with instructions to vacate the order denying the petition for

a writ of habeas corpus. See *United States* v. *Munsingwear*, 340 U. S. 36 (1950). Reported below: 596 F. 2d 1214.

MR. JUSTICE STEVENS, dissenting.

In *United States* v. *Munsingwear*, 340 U. S. 36, 39, the Court stated that

> "[t]he established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss."

But that need not be done in this case, first, because respondent Davis' petition for a writ of habeas corpus has already been dismissed by the District Court on motion by Davis after the State's petition for a writ of certiorari had been filed. See Supplement to Pet. for Cert. 6. And second, it should be noted that the judgment of the Court of Appeals did not order that Davis be released from custody, but merely held that his attorneys had failed to discharge their duty to their client, and therefore reversed and remanded the case for an evidentiary hearing to determine whether that failure had prejudiced him. 596 F. 2d 1214, 1223 (CA5 1979). If such a hearing should one day be held in accordance with the opinion of the Court of Appeals, and should Davis ultimately succeed in getting his conviction vacated, there will still be an opportunity for this Court to review any decision on the merits. In the meantime, it is difficult to see what harm would flow to the State if we were simply to let the judgment of the Court of Appeals stand. There is no realistic possibility that the judgment could "spaw[n] any legal consequences." *United States* v. *Munsingwear*, *supra*, at 41. Thus, there is no particular justification for this Court's intervention.

Accordingly, I would simply deny the petition for a writ of certiorari.

No. 79-1178. FAYMOR DEVELOPMENT CO., INC. *v.* KING ET AL. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Stryker's Bay Neighborhood Council* v. *Karlen*, 444 U. S. 223 (1980). MR. JUSTICE BLACKMUN and MR. JUSTICE STEVENS dissent. Reported below: 614 F. 2d 1288.

No. 79-1312. PENNSYLVANIA *v.* HENDERSON. Super. Ct. Pa. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Fare* v. *Michael C.*, 442 U. S. 707 (1979). MR. JUSTICE BRENNAN and MR. JUSTICE STEVENS dissent. Reported below: — Pa. Super. —, 405 A. 2d 940.

No 79-1329. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U. S. DEPARTMENT OF LABOR *v.* WALTER TANTZEN, INC., ET AL. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *P. C. Pfeiffer Co.* v. *Ford*, 444 U. S. 69 (1979). Reported below: 601 F. 2d 670.

No. 79-5438. GAYLE, AKA WAITERS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Payton* v. *New York*, 445 U. S. 573 (1980). Reported below: 70 App. Div. 2d 788, 416 N. Y. S. 2d 158.

No. 79-5853. DUNAGAN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Payton* v. *New York*, 445 U. S. 573 (1980). Reported below: 71 Ill. App. 3d 972, 389 N. E. 2d 1261.

Miscellaneous Orders

No. A–833. HOLLIDAY ET AL. *v.* HAUPTMAN, TRUSTEE. C. A. 2d Cir. Application for stay, addressed to MR. JUSTICE WHITE and referred to the Court, denied.

No. D–152. IN RE DISBARMENT OF WATERS. Disbarment entered. [For earlier order herein, see 439 U. S. 1042.]

No. D–157. IN RE DISBARMENT OF MITCHELL. Disbarment entered. [For earlier order herein, see 440 U. S. 933.]

No. D–176. IN RE DISBARMENT OF PRAVDA. Disbarment entered. [For earlier order herein, see 444 U. S. 895.]

No. D–179. IN RE DISBARMENT OF KYLE. Disbarment entered. [For earlier order herein, see 444 U. S. 912.]

No. D–185. IN RE DISBARMENT OF MITCHELL. It is ordered that Freeman D. Mitchell, of Atlanta, Ga., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 9, Orig. UNITED STATES *v.* LOUISIANA ET AL. Motion of the Special Master, Walter P. Armstrong, Jr., for allowance of additional compensation and reimbursement of expenses, as set forth in the motion, granted, and it is ordered that such costs be borne equally by the United States and Louisiana. The Court defers action at this time on the Special Master's suggestion for discharge with respect to the reference of October 25, 1975 [423 U. S. 909]. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion. [For earlier order herein, see, *e. g.*, 445 U. S. 923.]

No. 78–1881. CARPENTERS PENSION TRUST FUND FOR NORTHERN CALIFORNIA *v.* CAMPA ET AL., 444 U. S. 1028. Motion of appellees for attorney's fees denied.

No. 79-602. AGINS ET UX. *v.* CITY OF TIBURON. Sup. Ct. Cal. [Probable jurisdiction noted, 444 U. S. 1011.] Motion of New Jersey for leave to file a brief as *amicus curiae* denied.

No. 79-952. THOMAS *v.* REVIEW BOARD OF THE INDIANA EMPLOYMENT SECURITY DIVISION ET AL. Sup. Ct. Ind. [Certiorari granted, 444 U. S. 1070.] Motions of Jewish Peace Fellowship et al., American Jewish Congress, American Civil Liberties Union, and Americans United for Separation of Church and State Fund, Inc., for leave to file briefs as *amici curiae* granted.

No. 79-1268. HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* MCRAE ET AL. D. C. E. D. N. Y. [Probable jurisdiction noted, 444 U. S. 1069.] Motion for reconsideration of motion for appointment of Alan Ernest as counsel for children unborn and born alive denied.

Probable Jurisdiction Noted

No. 79-1260. CHANDLER ET AL. *v.* FLORIDA. Appeal from Sup. Ct. Fla. Probable jurisdiction noted. Reported below: 376 So. 2d 1157.

Certiorari Granted

No. 79-814. DELTA AIR LINES, INC. *v.* AUGUST. C. A. 7th Cir. Certiorari granted. Reported below: 600 F. 2d 699.

Certiorari Denied. (See also Nos. 78-5928 and 79-1339, *supra.*)

No. 78-6098. GAULTNEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 581 F. 2d 1137.

No. 78-6834. JONES *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 274 N. W. 2d 273.

No. 79-261. BARNES ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 604 F. 2d 121.

No. 79–851. CLAUSER *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 73 Ill. App. 3d 145, 391 N. E. 2d 793.

No. 79–1123. NEVILLE *v.* CAVANAUGH, STATE'S ATTORNEY, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 611 F. 2d 673.

No. 79–1130. THEVIS ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1293.

No. 79–1139. CITY OF NEW YORK ET AL. *v.* DEPIETRO. C. A. 2d Cir. Certiorari denied. Reported below: 607 F. 2d 995.

No. 79–1148. SPARKS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 79–1183. SIMA PRODUCTS CORP. ET AL. *v.* MCLUCAS, ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION. C. A. 7th Cir. Certiorari denied. Reported below: 612 F. 2d 309.

No. 79–1188. CLEMENTE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 608 F. 2d 76.

No. 79–1202. PARKER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 607 F. 2d 1008.

No. 79–1204. NOLICHUCKEY SAND CO., INC. *v.* MARSHALL, SECRETARY OF LABOR. C. A. 6th Cir. Certiorari denied. Reported below: 606 F. 2d 693.

No. 79–1205. WIREMAN *v.* DISCIPLINARY COMMISSION. Sup. Ct. Ind. Certiorari denied.

No. 79–1220. GARCIA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 622 F. 2d 576.

No. 79–1229. KLAUBER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 611 F. 2d 512.

No. 79-1230. COATS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 611 F. 2d 37.

No. 79-1277. TREPEL PETROLEUM CORP. *v.* CLEVEROCK ENERGY CORP. C. A. 10th Cir. Certiorari denied. Reported below: 609 F. 2d 1358.

No. 79-1327. NORMAN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 588 S. W. 2d 340.

No. 79-1328. BOROUGH OF DOYLESTOWN *v.* BRADSHAW ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 612 F. 2d 135.

No. 79-1330. CLIFFORD, COMMISSIONER, DEPARTMENT OF HEALTH OF NIAGARA COUNTY, NEW YORK *v.* SUSAN B. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 610 F. 2d 807.

No. 79-1335. ABRAMS, ATTORNEY GENERAL OF NEW YORK *v.* SALLA ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 48 N. Y. 2d 514, 399 N. E. 2d 909.

No. 79-1337. SINDONA *v.* TISCH ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 610 F. 2d 807.

No. 79-1338. SHUFFMAN, EXECUTRIX *v.* HARTFORD TEXTILE CORP. ET AL. C. A. 2d Cir. Certiorari denied.

No. 79-1347. SPENCER *v.* GREYHOUND LINES, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 609 F. 2d 510.

No. 79-1353. ROBERT BOSCH GMBH *v.* PAPENDICK. Sup. Ct. Del. Certiorari denied. Reported below: 410 A. 2d 148.

No. 79-1358. SLONE *v.* BLOCKSOM & CO. C. A. 4th Cir. Certiorari denied. Reported below: 599 F. 2d 1046.

No. 79–1437. GUST ET AL. *v.* COMMISSIONER OF TAXATION AND FINANCE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1287.

No. 79–1480. MCGUIRE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 608 F. 2d 1028.

No. 79–1484. SAITTA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 612 F. 2d 205.

No. 79–1488. HERNANDEZ ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 607 F. 2d 1145.

No. 79–1500. TEICHER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1293.

No. 79–1503. RODRIQUEZ-MARTINEZ ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 618 F. 2d 92.

No. 79–5477. JORDAN *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 79–5808. MITCHELL *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 603 F. 2d 858.

No. 79–5876. SEARLES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 612 F. 2d 575.

No. 79–5957. ALMON *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 151 Ga. App. 863, 261 S. E. 2d 772.

No. 79–5988. SPARROW *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 79–5991. ROYSDON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 612 F. 2d 582.

No. 79-6043. KIBERT *v.* BLANKENSHIP, CORRECTIONAL SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. Reported below: 611 F. 2d 520.

No. 79-6045. JOHNSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 610 F. 2d 194.

No. 79-6057. GRAY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 611 F. 2d 194.

No. 79-6082. THOMPSON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 198 U. S. App. D. C. 92, 612 F. 2d 587.

No. 79-6146. DOUGLAS, AKA JOHNSON *v.* MARYLAND. C. A. 4th Cir. Certiorari denied. Reported below: 610 F. 2d 810.

No. 79-6147. SMITH *v.* COLLINS, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 104.

No. 79-6155. AUSTIN *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 124 Ariz. 231, 603 P. 2d 502.

No. 79-6158. BOYKIN *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 298 N. C. 687, 259 S. E. 2d 883.

No. 79-6159. MARTIN *v.* BLACKBURN, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 606 F. 2d 92.

No. 79-6161. HOHENSEE *v.* SOUTHARD ET AL. Sup. Ct. Pa. Certiorari denied.

No. 79-6164. DUNCAN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 79-6166. THOMAS *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. Reported below: 406 Mich. 971.

No. 79-6178. BOALBEY *v.* KINDRED. Sup. Ct. Ill. Certiorari denied. Reported below: See 73 Ill. App. 3d 37, 391 N. E. 2d 236.

No. 79-6183. COOPER *v.* CITY OF COMMERCE CITY, COLORADO. Sup. Ct. Colo. Certiorari denied. Reported below: — Colo. —, 609 P. 2d 106.

No. 79-6214. GIST ET AL. *v.* JAMES H. THOMPSON & SON FUNERAL HOME. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 79-6225. TARKOWSKI *v.* CHADWELL, KAYSER, RUGGLES, MCGEE & HASTINGS ET AL. App. Ct. Ill., 2d Dist. Certiorari denied.

No. 79-6296. MILLER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 603 F. 2d 535.

No. 79-6299. KAIL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 612 F. 2d 443.

No. 79-6302. MALLETT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 614 F. 2d 778.

No. 79-6308. HACH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 615 F. 2d 1203.

No. 79-6312. COUCH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 616 F. 2d 954.

No. 78-1697. PENNSYLVANIA *v.* WILLIAMS. Sup. Ct. Pa. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 483 Pa. 293, 396 A. 2d 1177.

No. 79-1096. PEARSON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. MR. JUSTICE BRENNAN would grant certiorari. Reported below: 587 S. W. 2d 393.

No. 79-593. BLUM, COMMISSIONER OF NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES *v.* HOLLEY ET AL.; and

No. 79-594. RUSSO, COMMISSIONER OF MONROE COUNTY DEPARTMENT OF SOCIAL SERVICES *v.* HOLLEY ET AL. C. A. 2d Cir. Motions of respondent Holley for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 605 F. 2d 638.

No. 79-1331. DEPARTMENT OF SAFETY OF NEW HAMPSHIRE ET AL. *v.* CARLSON. C. A. 1st Cir. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 609 F. 2d 1024.

No. 79-1332. GOODMAN ET AL. *v.* MCDONNELL DOUGLAS CORP. C. A. 8th Cir. Motion of petitioners for leave to proceed as veterans granted. Certiorari denied. Reported below: 606 F. 2d 800.

No. 79-6148. RUTLEDGE *v.* FLORIDA. Sup. Ct. Fla.;

No. 79-6175. HOLMES *v.* FLORIDA. Sup. Ct. Fla.; and

No. 79-6241. DOBBS *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: No. 79-6148, 374 So. 2d 975; No. 79-6175, 374 So. 2d 944; No. 79-6241, 245 Ga. 208, 264 S. E. 2d 18.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 78-1453. UNITED STATES ET AL. *v.* EUGE, 444 U. S. 707;

No. 79-5663. WILLIAMS *v.* VIRGINIA, 445 U. S. 917; and

No. 79-6075. CONRAD *v.* GREENE, U. S. DISTRICT JUDGE, ET AL., 445 U. S. 921. Petitions for rehearing denied.

APRIL 25, 1980

Miscellaneous Order

No. A-904. WORLDWIDE CHURCH OF GOD, INC., ET AL. *v.* SUPERIOR COURT FOR THE COUNTY OF LOS ANGELES (CALIFORNIA, REAL PARTY IN INTEREST). Application for stay of judgment of the Superior Court of the State of California for the County of Los Angeles, entered December 31, 1979, presented to MR. CHIEF JUSTICE BURGER, and by him referred to the Court, denied. MR. JUSTICE STEWART took no part in the consideration or decision of this application.

APRIL 28, 1980

Appeal Dismissed

No. 79-6015. ROBERTSON *v.* TEXAS. Appeal from Ct. Crim. App. Tex. dismissed for want of substantial federal question. Reported below: 586 S. W. 2d 877.

Certiorari Granted—Vacated and Remanded

No. 79-1044. BUSH *v.* LUCAS. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Carlson* v. *Green, ante,* p. 14. Reported below: 598 F. 2d 958.

Miscellaneous Orders

No. A-8444. WALTON *v.* UNITED STATES. Application for bail, addressed to MR. JUSTICE STEVENS and referred to the Court, denied.

No. A-863. GREEN *v.* BARTHOLOMEW ET AL. C. A. 2d Cir. Application for stay of mandate, addressed to MR. JUSTICE STEWART and referred to the Court, denied.

No. A-892. MARCELLO *v.* UNITED STATES. Application for bail, addressed to MR. JUSTICE BRENNAN and referred to the Court, denied.

No. D–186. In re Disbarment of Cooper. It is ordered that David B. Cooper, of Bellaire, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–187. In re Disbarment of Wolk. It is ordered that Leon S. Wolk, of Woodcliff Lake, N. J., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–188. In re Disbarment of Kesler. It is ordered that John A. Kesler, of Terre Haute, Ind., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–189. In re Disbarment of Mann. It is ordered that Robert G. Mann, of Indianapolis, Ind., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–190. In re Disbarment of Fusciello. It is ordered that John P. Fusciello, of Colts Neck, N. J., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 78–1577. Sears, Roebuck & Co. *v.* County of Los Angeles et al. Ct. App. Cal., 2d App. Dist. [Certiorari granted, 444 U. S. 823.] Case restored to calendar for reargument. Mr. Justice Stewart took no part in the consideration or decision of this order.

No. 79–45. LEWIS, COMPTROLLER OF FLORIDA *v.* BT INVESTMENT MANAGERS, INC., ET AL. D. C. N. D. Fla. [Probable jurisdiction noted, 444 U. S. 822.] Motion of appellees for leave to file a supplemental brief after argument granted.

No. 79–770. ENVIRONMENTAL PROTECTION AGENCY *v.* NATIONAL CRUSHED STONE ASSN. ET AL.; and COSTLE, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY *v.* CONSOLIDATION COAL CO. ET AL. C. A. 4th Cir. [Certiorari granted, 444 U. S. 1069.] Motion of the Solicitor General to dispense with printing appendix granted.

No. 79–870. UNITED STATES RAILROAD RETIREMENT BOARD *v.* FRITZ. D. C. S. D. Ind. [Probable jurisdiction noted, 444 U. S. 1069.] Motion of the Solicitor General to dispense with printing appendix granted.

No. A–887 (79–1637). J. P. STEVENS & CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. Application for stay of judgment of the United States Court of Appeals for the Fourth Circuit, presented to MR. CHIEF JUSTICE BURGER, and by him referred to the Court, denied.

No. 79–5515. BROWN *v.* MITCHELL, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Motion to schedule the petition for writ of certiorari for consideration denied.

No. 79–5780. WEAVER *v.* GRAHAM, GOVERNOR OF FLORIDA. Sup. Ct. Fla. [Certiorari granted, 445 U. S. 927.] Motion of petitioner for appointment of counsel granted, and it is ordered that Thomas C. MacDonald, Jr., Esquire, of Tampa, Fla., be appointed to serve as counsel for petitioner in this case.

No. 79–1397. INTERNATIONAL BUSINESS MACHINES CORP. *v.* GREYHOUND COMPUTER CORP. Motion for leave to file a petition for writ of certiorari denied. MR. JUSTICE BLACKMUN and MR. JUSTICE STEVENS took no part in the consideration or decision of this motion.

Probable Jurisdiction Noted

No. 79-1388. KIRCHBERG *v.* FEENSTRA ET AL. Appeal from C. A. 5th Cir. Motion of appellee Feenstra for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 609 F. 2d 727.

Certiorari Granted

No. 79-700. WALTER FLEISHER CO., INC. *v.* COUNTY OF LOS ANGELES ET AL. Ct. App. Cal., 2d App. Dist. Certiorari granted.

No. 79-1266. STEADMAN *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 5th Cir. Certiorari granted. Reported below: 603 F. 2d 1126.

Certiorari Denied

No. 79-390. CITY OF ANNISTON, ALABAMA, ET AL. *v.* SCOTT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 597 F. 2d 897.

No. 79-915. DOMINGUEZ *v.* BEAME, MAYOR OF NEW YORK CITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 603 F. 2d 337.

No. 79-1141. MORA *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 368 So. 2d 1377.

No. 79-1179. BALISTRIERI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 606 F. 2d 216.

No. 79-1195. PENROD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 609 F. 2d 1092.

No. 79-1263. JAHODA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 109.

No. 79-1269. INTERNAL REVENUE SERVICE *v.* LONG ET VIR. C. A. 9th Cir. Certiorari denied. Reported below: 596 F. 2d 362.

No. 79–1309. SEIBERT *v.* BAPTIST, DISTRICT DIRECTOR OF INTERNAL REVENUE, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 594 F. 2d 423 and 599 F. 2d 743.

No. 79–1313. WARD *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 608 F. 2d 599.

No. 79–1349. SABATER *v.* KANSAS. Ct. App. Kan. Certiorari denied. Reported below: 3 Kan. App. 2d 692, 601 P. 2d 11.

No. 79–1350. RUBIN ET AL. *v.* U. N. INDUSTRIES, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 610 F. 2d 820.

No. 79–1355. GREENBERG, ADMINISTRATRIX *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 613 F. 2d 1213.

No. 79–1357. AMERICAN OIL CO. *v.* ARNOTT. C. A. 8th Cir. Certiorari denied. Reported below: 609 F. 2d 873.

No. 79–1366. ST. PAUL MERCURY INSURANCE CO. ET AL. *v.* EAST WEST TOWING, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 608 F. 2d 160.

No. 79–1367. COLE *v.* LOUISIANA. 22d Jud. Dist. Ct. La., St. Tammany Parish. Certiorari denied.

No. 79–1368. MOLLURA *v.* MILLER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 609 F. 2d 381.

No. 79–1369. AMERICAN MARINE CORP. ET AL. *v.* HIGHLANDS INSURANCE CO. C. A. 5th Cir. Certiorari denied. Reported below: 607 F. 2d 1101.

No. 79–1370. FETNER *v.* FEDERAL LAND BANK OF BALTIMORE. Super. Ct. Pa. Certiorari denied. Reported below: — Pa. Super. —, 410 A. 2d 344.

No. 79-1371. FOSTER, DBA SNO-WHITE DRIVE IN, INC., ET AL. *v.* LAWRENCE T. LASAGNA, INC. C. A. 9th Cir. Certorari denied. Reported below: 609 F. 2d 392.

No. 79-1372. ALDENS, INC. *v.* MILLER, ATTORNEY GENERAL OF IOWA. C. A. 8th Cir. Certiorari denied. Reported below: 610 F. 2d 538.

No. 79-1378. ROSARIO ET AL. *v.* AMALGAMATED LADIES' GARMENT CUTTERS' UNION, LOCAL 10, I.L.G.W.U., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 605 F. 2d 1228.

No. 79-1452. BILLINGSLEY ET UX. *v.* LAWSON, SUBSTITUTE TRUSTEE, ET AL. Ct. Sp. App. Md. Certiorari denied. Reported below: 43 Md. App. 713, 406 A. 2d 946.

No. 79-1468. SEYFARTH *v.* LOVRET. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 79-1504. LABUS ET AL. *v.* UNITED STATES; and
No. 79-1516. BRIEN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 617 F. 2d 299.

No. 79-1507. BASEY *v.* UNITED STATES; and
No. 79-1526. RAMSEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 613 F. 2d 198.

No. 79-1521. BREGER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 616 F. 2d 634.

No. 79-1529. AMEN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 622 F. 2d 576.

No. 79-5703. BRYANT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 612 F. 2d 799.

No. 79-5858. WALLS *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 71 Ill. App. 3d 68, 389 N. E. 2d 6.

No. 79-5886. BRYANT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 612 F. 2d 806.

No. 79-5958. SMITH *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 587 S. W. 2d 659.

No. 79-5966. HUNT *v.* MARSHALL, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 611 F. 2d 372.

No. 79-5974. PROCTOR *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 152 Ga. App. 11, 262 S. E. 2d 170.

No. 79-5992. WHITE *v.* WYRICK, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied.

No. 79-5993. FAIRRIS *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 79-5998. WOODS *v.* UNITED STATES; and

No. 79-6041. UNDERWOOD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 613 F. 2d 629.

No. 79-5999. ANDERSON *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 42 Ore. App. 29, 599 P. 2d 1225.

No. 79-6021. ROLDAN *v.* GOVERNMENT OF THE VIRGIN ISLANDS. C. A. 3d Cir. Certiorari denied. Reported below: 612 F. 2d 775.

No. 79-6026. JUSTICE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 615 F. 2d 1363.

No. 79-6039. SCOTT *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 93 Wash. 2d 7, 604 P. 2d 943.

No. 79-6139. TAYLOR *v.* ECONOMOPOULOS ET AL. Ct. App. D. C. Certiorari denied. Reported below: 407 A. 2d 585.

No. 79-6181. WILSON *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 44 Md. App. 1, 408 A. 2d 102.

No. 79-6184. JACKSON *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 79-6198. HARRIS *v.* BARBER, JUDGE. Sup. Ct. Ore. Certiorari denied.

No. 79-6201. CARVEY *v.* LEFEVRE, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 611 F. 2d 19.

No. 79-6202. TOWNES *v.* MITCHELL, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 79-6205. SPEED *v.* MARYLAND. C. A. 4th Cir. Certiorari denied. Reported below: 612 F. 2d 1310.

No. 79-6206. KICKASOLA *v.* JIM WALLACE OIL CO., INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 608 F. 2d 1371.

No. 79-6210. CHAMBERS *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 42 Md. App. 756.

No. 79-6212. JONES *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 591 S. W. 2d 542.

No. 79-6222. HEREFORD *v.* AJEMIAN. Ct. App. D. C. Certiorari denied.

No. 79-6223. WILLIAMS *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 285 N. W. 2d 248.

No. 79-6230. SCHMANSKI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 622 F. 2d 575.

No. 79-6239. WRIGHT ET AL. *v.* VALLEY CENTER MUNICIPAL WATER DISTRICT. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 79-6251. PODRAZIK ET AL. *v.* BLUM, COMMISSIONER, NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 622 F. 2d 575.

No. 79-6284. WARREN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 603 F. 2d 859.

No. 79-6311. RODES *v.* BROWN, JUDGE. Sup. Ct. Ark. Certiorari denied. Reported below: — Ark. —.

No. 79-6316. BRISCO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 615 F. 2d 1354.

No. 79-6320. GOODMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 618 F. 2d 117.

No. 79-6326. WARREN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 606 F. 2d 320.

No. 79-6335. FRANCISCO *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 614 F. 2d 617.

No. 79-6336. WILLIAMSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 106.

No. 79-6352. PALUMBO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 608 F. 2d 529.

No. 79-6355. VENABLE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 614 F. 2d 292.

No. 79–6361. COLLOM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 614 F. 2d 624.

No. 78–671. DELAWARE STATE BOARD OF EDUCATION *v.* EVANS ET AL.; and

No. 78–672. ALEXIS I. DU PONT SCHOOL DISTRICT ET AL. *v.* EVANS ET AL. C. A. 3d Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of these petitions. Reported below: 582 F. 2d 750.

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE STEWART and MR. JUSTICE POWELL join, dissenting.

In 1971, respondents in these cases instituted an action seeking the desegregation of the schools in the city of Wilmington, Del. The litigation has now culminated in a countywide remedy more Draconian than any ever approved by this Court. The order provides for the dissolution of the county's 11 independent school boards, most of which were locally elected. In their place, the District Court "created" a single countywide school system, to be run by court-appointed officials for five years. Within this judicial school district, which comprises in excess of 60% of all the public school students in the State of Delaware, every single student will be reassigned away from his or her local school for a period of no less than three years and for as long as nine years. The plan is designed to accomplish a racial balance in each and every school, in every grade, in all of the former 11 districts, mirroring the racial balance of the total area involved.

The three-judge District Court which initially found a desegregation remedy to be warranted, expressly found that 10 of the 11 county school districts had established fully unitary school systems after this Court's decision in *Brown* v. *Board of Education*, 347 U. S. 483 (1954). *Evans* v. *Buchanan*, 393 F. Supp. 428, 437, and n. 19 (Del.), summarily aff'd, 423 U. S. 963 (1975). Only the school district in the city of Wilmington was found to have engaged in discriminatory conduct—conduct which the court did not find to be

purposeful.* The court did find, however, that the acts of other governmental entities resulted in an interdistrict violation. I think this Court should grant certiorari to review the District Court's imposition of this remedy, even accepting as settled, the finding that there was an interdistrict violation warranting an interdistrict remedy.

One principle that has been continually emphasized in the desegregation opinions of this Court is that the "scope of the remedy" formulated by a district court must be tailored to fit "the nature and extent of the constitutional violation." *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1, 16 (1971). In order to effectively fulfill this mandate, we have made clear that district courts *must* "determine how much incremental segregative effect [the constitutional] violations had on the racial distribution of the . . . school population as . . . compared to what it would have been in the absence of such constitutional violations." *Dayton Board of Education* v. *Brinkman,* 433 U. S. 406, 420 (1977). Without such a finding, it would not be possible for a judge to fulfill the equitable limitations commanded by *Swann.*

In this case, however, the courts have ignored *Swann* and *Dayton,* and held that as a matter of law, no such findings were required. The District Court explicitly acknowledged that it did not apply this standard in adopting the remedy in

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*The three-judge court identified the Wilmington school board's adoption of voluntary attendance zones, which "although possibly designed to minimize the flight of white families with school-aged-children" to the suburbs, as possibly having the opposite effect. 393 F. Supp., at 435. Thus the court specifically recognized that the policy in question may well not have been purposefully discriminatory, even though it may have had a discriminatory effect. Even the discriminatory effect, however, was only speculative since the District Court only found that "to some extent, . . . discriminatory school policies in Wilmington *may have affected* the relative racial balance. . . ." *Id.,* at 436 (emphasis added). I am prepared to assume, *arguendo,* that this Court's summary affirmance settles the question of an interdistrict violation, however, and would review only the imposition of the remedy.

issue. The court stated that it was "fully cognizant" that the submitted plans "were formulated without exacting consideration of whether they returned the Northern New Castle County schools to the precise position they would have assumed 'but for' the found constitutional violations." 447 F. Supp. 982, 1009 (Del. 1978). The Court of Appeals on review again conceded that the District Court did not make the inquiry identified by *Dayton* but nevertheless found this omission excusable because Wilmington had previously been subject to *de jure* segregation.

This Court has never held that a remedy dismantling local education or devising a scheme of total racial balance is warranted simply upon a finding of *de jure* segregation, and in fact, *Swann* held precisely to the contrary. Whatever the nature of the constitutional violation, the standard articulated in *Dayton,* as well as in the predecessors to *Dayton,* requires the District Court to impose changes in local education only to the extent necessary to cure the violation. The Court of Appeals' express departure from the precedents of this Court certainly warrants review.

Our cases indicate that the need for specific findings is particularly compelling when the District Court seeks to impose a remedy curtailing local control of education. The District Court here has chosen such a remedy, actually *abolishing* the county's system of education and disenfranchising the voters who formerly retained popular control of education. This has been mandated even though no court has found that these local school boards have engaged in *any* purposeful discrimination since 1954. While on my assumption the absence of purpose does not negate the need for an interdistrict remedy in this case, the conduct of the Boards is still relevant to the formulation of that interdistrict remedy. When the "nature of the violation" does not include purposeful discrimination on the part of the school boards, I am not convinced that a truly "equitable" remedy would abolish those governmental entities that had not been found to purposefully participate in the

perpetration of the violations. I had throught that *Milliken* v. *Bradley*, 418 U. S. 717 (1974), would forcefully preclude district courts from imposing such a remedy without the most exhaustive comparison of the nature of the violation and the need for this form of disestablishment of local government.

In *Milliken*, this Court declined to permit the federal courts to impose a remedy of this nature without the most exacting showing of necessity. The Court emphasized that "local control over the educational process affords citizens an opportunity to participate in decisionmaking, permits the structuring of school programs to fit local needs, and encourages 'experimentation, innovation, and a healthy competition for educational excellence.'" *Id.*, at 742. The Court not only emphasized these important benefits of local control, but also recognized the inability of courts and judges to assume that role, noting that "[t]his is a task which few, if any, judges are qualified to perform. . . ." *Id.*, at 744. In *Dayton*, this Court reiterated that "local autonomy of school districts is a vital national tradition." 433 U. S., at 410. It was because of these considerations that *Dayton* insisted that "the case for displacement of the local authorities by a federal court in a school desegregation case must be satisfactorily established by factual proof and justified by a reasoned statement of legal principles." *Ibid.* Yet the District Court has here treated a series of independent school districts much as if they were a "railroad in reorganization," without any attempt to comply with the requirements of *Milliken* and *Dayton*. *Alexis I. du Pont School Dist.* v. *Evans*, 439 U. S. 1375, 1379 (1978) (REHNQUIST, J., in chambers). If we have any remaining commitment to this "vital national tradition," I think this Court should be certain, before it allows the dismantling of not 1 but 11 independent school boards, that the violations found warrant this total substitution of judicial for popular control of local education.

Thus I think the principal reason this case merits review is because there is substantial doubt that the abolition of these

11 school districts is an appropriate equitable remedy for the interdistrict violation found by the courts. In addition, I think the failure to apply *Dayton* may also have resulted in a pupil reassignment far more comprehensive and disruptive than that which the established violations warranted. My reading of the District Court opinion indicates that the court devised a remedy creating complete racial balance in every grade of every school throughout the county despite the existence of substantial residential segregation. This is a clear violation of the ruling in *Swann*. For the reasons expressed in my opinion dissenting from the denial of certiorari in *Cleveland Bd. of Ed.* v. *Reed*, 445 U. S. 935 (1980), and by MR. JUSTICE POWELL in his opinion dissenting from the dismissal of certiorari in *Estes* v. *Metropolitan Branch, Dallas NAACP*, 444 U. S. 437 (1980), I do not believe that such an assumption should go unreviewed by this Court. As in those cases, there is substantial record evidence here indicating that the classroom makeup achieved by the order would *not* exist "but for" the supposed constitutional violations. The District Court found that while 43.6% of the city of Wilmington's residents are black, only 4.5% of the county suburban residents are black. Specifically, the court found that since 1950 there had been extensive "white flight" from the city to the suburbs and that "the result of these demographic changes is that the black population of the County is heavily concentrated within the City of Wilmington." 393 F. Supp., at 432–433. The court concluded that "the residential demographic change of the past two decades has had a striking effect on the school attendance patterns in the County." *Id.*, at 433. The court did not find that these residential patterns were attributable solely (or even principally) to governmental discrimination. Therefore to devise a remedy on the assumption that absent the constitutional violations there would be precise racial parity in the county neighborhoods is impermissible under any traditional

notion of an equitable remedy to restore the situation as it would have existed prior to the assumed wrong.

This Court does a disservice to local government and the people of Delaware, and very likely in the long run to the Equal Protection Clause of the Fourteenth Amendment, by once again declining to review a case of such fundamental importance.

THE CHIEF JUSTICE agrees this case merits review here but only when a full Court is available to consider the important issues presented by the petition for certiorari.

No. 78–1260. MOFFITT, UNITED STATES MARSHAL, ET AL. *v.* LOE. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 582 F. 2d 1291.

No. 79–54. CITY OF LOS ANGELES ET AL. *v.* BLAKE ET AL. C. A. 9th Cir. Motion of Los Angeles Police Protective League for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 595 F. 2d 1367.

No. 79–1018. DELAY *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. MR. JUSTICE STEWART would grant certiorari. Reported below: 70 Ill. App. 3d 712, 388 N. E. 2d 1316.

No. 79–1247. BOARD OF TRADE OF CHICAGO *v.* COMMODITY FUTURES TRADING COMMISSION. C. A. 7th Cir. Motions of Mid-America Commodity Exchange et al., Coffee, Sugar & Cocoa Exchange, Inc., and Chicago Mercantile Exchange for leave to file briefs as *amici curiae* granted. Certiorari denied. MR. JUSTICE WHITE and MR. JUSTICE POWELL would grant certiorari. Reported below: 605 F. 2d 1016.

No. 79–1387. MINSON *v.* CHRYSLER CORP. C. A. 4th Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 612 F. 2d 1308.

No. 79–1382. SWITLIK ET AL. *v.* HARDWICKE CORP. ET AL. Super. Ct. N. J. Certiorari denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of this petition.

No. 79–1383. GANT ET AL. *v.* UNION BANK ET AL. C. A. 9th Cir. Motion of International Business Machines Corp. for leave to file a brief as *amicus curiae* granted. Certiorari denied. MR. JUSTICE BLACKMUN and MR. JUSTICE STEVENS took no part in the consideration or decision of this motion and petition. Reported below: 609 F. 2d 411.

No. 79–1396. INTERNATIONAL BUSINESS MACHINES CORP. *v.* GREYHOUND COMPUTER CORP. C. A. 9th Cir. Certiorari denied. MR. JUSTICE BLACKMUN and MR. JUSTICE STEVENS took no part in the consideration or decision of this petition.

No. 79–1636. WINPISINGER ET AL. *v.* WATSON ET AL. C. A. D. C. Cir. Motion of petitioners to expedite consideration of the petition for writ of certiorari granted. Certiorari denied. Reported below: — U. S. App. D. C. —, — F. 2d —.

No. 79–5987. JOLLY *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. MR. JUSTICE BRENNAN would grant certiorari. Reported below: 298 N. C. 573, 260 S. E. 2d 629.

No. 79–6229. HUETER *v.* LUTHERAN SOCIAL SERVICES OF CENTRAL OHIO ET AL. Ct. App. Ohio, Franklin County. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE WHITE would grant certiorari. Reported below: — Ohio App. 2d —, — N. E. 2d —.

Rehearing Denied

No. 79–1039. WILLIAM C. HAAS & CO., INC. *v.* CITY AND COUNTY OF SAN FRANCISCO, 445 U. S. 928;

No. 79–5626. SIMON *v.* TEXAS ET AL., 445 U. S. 938; and

No. 79–5863. GODWIN *v.* UNITED STATES, 445 U. S. 932. Petitions for rehearing denied.

No. 79-6014. HERNANDEZ *v.* ELIO M. ROSSY, INC., ET AL., 445 U. S. 933. Petition for rehearing denied.

APRIL 29, 1980

*Miscellaneous Order**

*For the Court's order prescribing amendments to the Federal Rules of Civil Procedure, see *post*, p. —.

Reporter's Note

The next page is purposely numbered 1301. The numbers between 930 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

HANRAHAN ET AL. *v.* HAMPTON ET AL.

ON MOTION TO RECUSE

No. 79-912. Decided April 30, 1980*

Motion to recuse MR. JUSTICE REHNQUIST is denied.

MR. JUSTICE REHNQUIST.

Plaintiffs-respondents and their counsel in this case have moved that I "be recused from the proceedings in this case" for the reasons stated in their 14-page motion and their five Appendices filed with the Clerk of this Court on April 3, 1980. The motion is opposed by the state-defendant petitioners in the action. Since generally the Court as an institution leaves such motions, even though they be addressed to it, to the decision of the individual Justices to whom they refer, see *Jewell Ridge Coal Corp.* v. *Mine Workers*, 325 U. S. 897 (1945) (denial of petition for rehearing) (Jackson, J., concurring), I shall treat the motion as addressed to me individually. I have considered the motion, the Appendices, the response of the state defendants, 28 U. S. C. § 455 (1976 ed. and Supp. III), and the current American Bar Association Code of Judicial Conduct, and the motion is accordingly

Denied.

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*Together with No. 79-914, *Johnson et al.* v. *Hampton et al.*

SUMNER, WARDEN *v.* MATA

ON APPLICATION FOR STAY

No. A-882 (79-1601). Decided May 1, 1980

An application for a stay, pending consideration of a petition for certiorari, of the Court of Appeals' mandate under which a writ of habeas corpus would issue unless California granted respondent a new trial on a murder charge, is granted. In holding that certain witnesses' in-court identifications of respondent at his state trial were tainted by pretrial identifications resulting from impermissibly suggestive photographic arrays, the Court of Appeals reasoned that photographic identification, as opposed to less suggestive procedures, was not necessary under the circumstances, and that there was a very substantial likelihood of misidentification due to the procedures employed. Given the tension between the Court of Appeals' analysis and this Court's decisions indicating that reliability, not necessity, is the linchpin in determining the admissibility of identification testimony, and given the apparent conflict between the Court of Appeals' decision and a decision of another Court of Appeals, it appears that four Members of this Court are likely to vote to grant certiorari in this case.

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicant seeks to stay the mandate of the United States Court of Appeals for the Ninth Circuit under which a writ of habeas corpus would issue unless the State of California grants respondent Robert Mata a new trial on the charge of murder. See *Mata* v. *Sumner*, 611 F. 2d 754 (1979). On April 15, 1980, I temporarily stayed that mandate pending consideration of a response to the application and further order, in order to see whether there was a conflict among the Courts of Appeals or a substantial doctrinal difference from cases decided by this Court that would distinguish this decision from the numerous mine-run decisions on the reliability of identification that could not possibly be individually reviewed by this Court.

In 1972 respondent, then a prisoner at a medium-security

prison in Tehachapi, Cal., was charged with the murder of another prisoner, Leonard Arias. While investigating the murder, prison officials showed two prisoners who had witnessed the killing a series of photographic arrays containing pictures of respondent and his two alleged accomplices. Without recounting the details of each display, see *id.*, at 755–757, it suffices to say that the two witnesses eventually selected respondent's photograph from the arrays and subsequently identified him at trial as one of the persons involved in the killing.

On direct appeal from his conviction, respondent challenged the pretrial identification procedures and claimed they tainted the subsequent in-court identifications. The California Court of Appeal rejected this challenge, finding that there had been "no showing of influence by the investigating officers; that the witnesses had an adequate opportunity to view the crime; and that their descriptions [were] accurate." App. to Pet. for Cert. C–4—C–5. The California courts also rejected respondent's petition for a writ of habeas corpus, which petition similarly challenged the identification procedures employed by prison officials.

On respondent's subsequent petition for a federal writ of habeas corpus, the District Court concluded that, although "irregularities occurred in the pre-trial photographic identification" of respondent, those irregularities "did not so taint the in-court identifications . . . as to establish a constitutional violation. . . ." *Id.*, at D–3.

A divided panel of the United States Court of Appeals for the Ninth Circuit reversed. In evaluating the admissibility of the in-court identifications, the majority of the Court of Appeals employed a "two-part approach." First, it considered whether photographic identification, as opposed to a lineup, was necessary under the circumstances. It answered this inquiry in the negative. Second, the majority inquired "whether there was a very substantial likelihood of irreparable

misidentification" due to the less-than-ideal procedures employed. It answered this inquiry in the affirmative. In summarizing this latter holding, the court clearly indicated that it considered the feasibility of a lineup a significant factor in its determination:

> "Based upon the lack of necessity [for a photographic array], the diversion of the witnesses' attention at the time the crime was committed, the hazy and very general description of the appellant [by one of the witnesses], and the inescapable focusing of attention upon the [respondent] by the investigating authorities, we are driven to the conclusion that the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." 611 F. 2d, at 759.

In his petition for a writ of certiorari, applicant contends that the majority of the Court of Appeals gave undue weight to the failure of the prison officials to employ a lineup as opposed to a photographic array in the present case. To the extent that the Court of Appeals did overturn respondent's conviction because it believed that "less suggestive" procedures were available, I believe that its decision ignores this Court's indication in *Manson* v. *Braithwaite*, 432 U. S. 98, 114 (1977), holding that reliability, not necessity, is the "linchpin in determining the admissibility of identification testmony . . . ," a conclusion in turn derived from our decision in *Neil* v. *Biggers*, 409 U. S. 188, 199–200 (1972). The decision of the majority of the Court of Appeals in this regard would also seem to conflict with *United States* v. *Gidley*, 527 F. 2d 1345 (CA5), cert. denied, 429 U. S. 841 (1976), where the United States Court of Appeals for the Fifth Circuit stated that the availability of less suggestive methods of identification is "not relevant" in determining whether a photographic display is impermissibly suggestive. 527 F. 2d, at 1350.

Two arguments offered by respondent merit brief mention. First, respondent asserts that the Court of Appeals' "two-part approach" incorporates the necessity of a challenged procedure only in determining whether that procedure, although suggestive, was nevertheless constitutionally permissible given the exigencies of the situation. A close reading of the appellate court's opinion, however, belies that interpretation, and demonstrates instead that the court considered the availability of less suggestive procedures an "important factor" in determining the reliability of the procedures actually employed. See 611 F. 2d, at 757, 759. Second, respondent suggests that this Court has declined on several prior occasions to review the two-part approach employed in the Ninth Circuit. See *United States* v. *Crawford*, 576 F. 2d 794 (CA9), cert. denied, 439 U. S. 851 (1978); *United States* v. *Pheaster*, 544 F. 2d 353 (CA9 1976), cert. denied, 429 U. S. 1099 (1977); *United States* v. *Calhoun*, 542 F. 2d 1094 (CA9 1976), 429 U. S. 1064 (1977); *United States* v. *Valdivia*, 492 F. 2d 199 (CA9 1973), cert. denied, 416 U. S. 940 (1974). In addition to the hazards of reading any meaning into this Court's denials of certiorari, I would also note that each of the aforecited cases came to this Court after the Court of Appeals had upheld the identification procedures there employed. We thus were not presented with opportunities to consider the relevance of the feasibility of less suggestive procedures to a determination that the procedure actually employed was unconstitutionally suggestive.

In this case the Court of Appeals rejected the uniform conclusion of several state courts and another federal court that the identification procedures employed here were not so suggestive as to taint the witnesses' in-court identification of respondent. Given the tension between the analysis employed by the majority of the Court of Appeals for the Ninth Circuit in this case and our decisions in *Manson*, *supra*, and *Neil*, *supra*, and given the apparent conflict between the de-

cision of the Court of Appeals for the Ninth Circuit in this case and the decision of the Court of Appeals for the Fifth Circuit in *Gidley, supra,* I have decided to grant applicant's request for an order staying the mandate in *Mata* v. *Sumner* (the present case), 611 F. 2d 754 (CA9 1979), cert. pending, No. 79–1601, because I am of the opinion that four Members of this Court are likely to vote to grant certiorari in that case when presented. As nearly as I can determine, that case should be considered by the Court on certiorari in the near future, and the stay which I am presently issuing shall expire without further action of the Court in the event that certiorari is denied. If certiorari is granted, the stay shall remain in effect until final disposition of the case or further order of the Court.

Accordingly, the application for the stay of mandate of the United States Court of Appeals in this case is

Granted.

PACILEO, SHERIFF v. WALKER

ON APPLICATION FOR STAY

No. A-894. Decided May 1, 1980

An application for a stay, pending consideration of a petition for certiorari, of a California Supreme Court order in connection with the extradition to Arkansas of respondent, who had escaped from an Arkansas prison, is granted. The order, *inter alia*, directed the California Superior Court to conduct hearings to determine if the Arkansas prison was presently operated in conformance with the Eighth Amendment and stayed execution of the Governor of California's warrant of extradition pending final determination of the proceeding. A stay of the order is warranted since the Governor of California had granted the request for extradition, which was in compliance with federal standards; the proper forum for respondent's challenge to Arkansas prison conditions was in the Arkansas courts; and the order was very much at odds with principles set forth in this Court's decisions governing judicial proceedings in extradition cases.

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicant Sheriff of El Dorado County, Cal., applies for a stay of an order of the Supreme Court of California issued April 9, 1980. The order was made in connection with a request for extradition of respondent Walker by the demanding State of Arkansas to the rendering State of California pursuant to the Executive Clause of the Constitution and federal statutes implementing it. The stay is requested pending consideration by this Court of a petition for certiorari to review the order, which is sufficiently short to permit its pertinent parts to be set forth *in haec verba*:

> "The Sheriff of the County of El Dorado is ordered to show cause before the Superior Court of El Dorado County with directions to that court to conduct hearings to determine if the penitentiary in which Arkansas seeks to confine petitioner is presently operated in conformance

with the Eighth Amendment of the United States Constitution and thereafter decide the petition on its merits.

"Pending final determination of this proceeding execution of the Governor's Warrant of Extradition is stayed, and the Sheriff of the County of El Dorado is directed not to release petitioner into the custody of any agent of the State of Arkansas."

Though there are numerous factual allegations in both the application and in the response for which I called, the only one which is verified was made to Governor Brown of California in urging him to refuse to issue an extradition warrant in this case. In that affidavit, a practicing attorney in Little Rock, Ark., stated: "I have no hesitation in stating that I fear if James Dean Walker is returned to the Arkansas penitentiary system that he faces grave danger to his physical well being."

Nonetheless, on February 18, 1980, the Governor of California honored the requisition for the arrest and rendition of respondent James Dean Walker, who was then within the State of California and who escaped from an Arkansas prison prior to completing a sentence imposed upon him in that State following his conviction for murder. The legal issues posed by the applicant's request for a stay can probably be best understood in the light of the legal proceedings which have ensued since Governor Brown issued the warrant of arrest and rendition.

Respondent Walker first challenged his extradition by filing a writ of habeas corpus in the Superior Court of El Dorado County, Cal., then in the California Court of Appeal, Third Appellate District, and then in the United States District Court for the Eastern District of California. Each of these efforts was unsuccessful.

It was only upon this final application to the Supreme Court of California that he obtained the relief which he sought, and the Sheriff of El Dorado County who is his

present custodian is now the applicant before me. Thus the executive aspect of extradition, and the legal obligation of the Governor of one State to surrender a fugitive found in that State to the Governor of a demanding State upon his request discussed in *Kentucky* v. *Dennison*, 24 How. 66 (1861), are not involved here. The Governor of California has already issued an extradition warrant in response to the request of the Governor of Arkansas, and the question is to what extent may the courts of the so-called "asylum" or "rendering" State inquire beyond the face of the extradition warrant and its conformity to state law.

This Court most recently considered that question in *Michigan* v. *Doran*, 439 U. S. 282 (1978), in which it stated that "[i]nterstate extradition was intended to be a summary and mandatory executive proceeding derived from the language of Art. IV, § 2, cl. 2, of the Constitution." *Id.*, at 288. We further stated in that case:

> "Once the governor has granted extradition, a court considering release on habeas corpus can do no more than decide (a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive. These are historic facts readily verifiable." *Id.*, at 289.

In an earlier decision, *Sweeney* v. *Woodall*, 344 U. S. 86 (1952), the Court stated:

> "The scheme of interstate rendition, as set forth in both the Constitution and the statutes which Congress has enacted to implement the Constitution, contemplates the prompt return of a fugitive from justice as soon as the state from which he fled demands him; these provisions do not contemplate an appearance by Alabama in respondent's asylum to defend against the claimed abuses of its prison system." *Id.*, at 89–90 (footnotes omitted).

In this case, the demanding State is Arkansas, whose prisons were the subject of our opinion in *Hutto* v. *Finney*, 437 U. S. 678 (1978). The asylum State is California, and the Superior Court of El Dorado County, Cal., has been ordered by the Supreme Court of that State "to conduct hearings to determine if the penitentiary in which Arkansas seeks to confine petitioner is presently operated in conformance with the Eighth Amendment of the United States Constitution and thereafter decide the petition on its merits."

The 1970 census conducted by the United States indicates that El Dorado County, Cal., has a population of 43,833 persons. Its county seat, Placerville, with a population indicated by the same census as being in the neighborhood of 5,000 persons, is located between Sacramento and the Nevada border on the south side of Lake Tahoe. While there is in terms no doctrine of "*forum non conveniens*," the doctrines of this Court in *Sweeney* v. *Woodall*, *supra*, and *Michigan* v. *Doran*, *supra*, indicate that the interstate rendition of fugitives has a federal constitutional and statutory basis, and cannot be decided solely in accordance with the principles of law enunciated by the courts of one State. Here the Governor of California has granted the request for extradition, which is in compliance with federal standards. And under *Sweeney* the proper forum for respondent's challenge to Arkansas prison conditions is in the Arkansas courts. It seems to me that the order issued by the Supreme Court of California is very much at odds with principles set forth in *Doran* and *Sweeney*, and I have therefore decided to grant the application of applicant Pacileo for a stay pending timely filing of a writ of certiorari in this Court to review the order of the Supreme Court of California. In the event that the petition is denied, the stay issued by me shall expire of its own force. In the event that the petition for certiorari is granted, the stay shall continue in force until final disposition of the case by this Court or further order of the Court.

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Official Records
of
The Supreme Court

May 12 Through May 22, 1980

Henry J. Lind
Reporter of Decisions

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, Chief Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM H. REHNQUIST, Associate Justice.
JOHN PAUL STEVENS, Associate Justice.

OFFICERS OF THE COURT

BENJAMIN R. CIVILETTI, Attorney General.
WADE H. McCREE, Jr., Solicitor General.
MICHAEL RODAK, Jr., Clerk.
HENRY C. LIND, Reporter of Decisions.
ALFRED WONG, Marshal.
ROGER F. JACOBS, Librarian.

SUPREME COURT OF THE UNITED STATES

Allotment of Justices

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, *viz.:*

For the District of Columbia Circuit, Warren E. Burger, Chief Justice.

For the First Circuit, William J. Brennan, Jr., Associate Justice.

For the Second Circuit, Thurgood Marshall, Associate Justice.

For the Third Circuit, William J. Brennan, Jr., Associate Justice.

For the Fourth Circuit, Warren E. Burger, Chief Justice.

For the Fifth Circuit, Lewis F. Powell, Jr., Associate Justice.

For the Sixth Circuit, Potter Stewart, Associate Justice.

For the Seventh Circuit, John Paul Stevens, Associate Justice.

For the Eighth Circuit, Harry A. Blackmun, Associate Justice.

For the Ninth Circuit, William H. Rehnquist, Associate Justice.

For the Tenth Circuit, Byron R. White, Associate Justice

December 19, 1975.

(For next previous allotment, see 404 U. S., p. v.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1979

AMERICAN EXPORT LINES, INC. *v.* ALVEZ ET AL.

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

No. 79-1. Argued February 26, 1980—Decided May 12, 1980

After filing suit in a New York state court against petitioner shipowner to recover damages, on grounds of negligence and unseaworthiness, for personal injuries sustained while working aboard petitioner's vessel in New York waters, respondent husband sought leave to amend his complaint to add his spouse as a plaintiff for loss of society. The trial court denied the motion to amend, but the Appellate Division of the New York Supreme Court reversed and granted the motion to amend, reasoning that the case was controlled by *Sea-Land Services, Inc.* v. *Gaudet*, 414 U. S. 573, which held that, under the nonstatutory maritime wrongful-death remedy, the widow of a longshoreman mortally injured aboard a vessel in state territorial waters could recover damages for the loss of her deceased husband's society. The New York Court of Appeals affirmed.

Held: The judgment is affirmed. Pp. 277–286; 286.

46 N. Y. 2d 634, 389 N. E. 2d 461, affirmed.

MR. JUSTICE BRENNAN, joined by MR. JUSTICE WHITE, MR. JUSTICE BLACKMUN, and MR. JUSTICE STEVENS, concluded:

1. The Court of Appeals' judgment upholding the legal tenability of the wife's claim for loss of society, although not "final" or within a categorical exception to strict finality when originally entered, will, as a practical matter, be treated as falling within such an exception, where, after certiorari was granted in this Court, the case, including the loss-of-society claim, was tried and respondent husband prevailed, the appeal from the trial verdict will not challenge the element thereof awarding damages for loss of society, and no federal issue other than whether the wife has a cause of action under general maritime law for loss of society remains. Pp. 277–279.

2. General maritime law authorizes the wife of a harbor worker injured nonfatally aboard a vessel in state territorial waters to maintain an action for damages for the loss of her husband's society. Although *Sea-Land Services, Inc.* v. *Gaudet, supra,* upheld a claim for loss of society in the context of a wrongful-death action, it provides the conclusive decisional recognition of a right to recover for such loss, there being no apparent reason to differentiate between fatal and nonfatal injuries in authorizing the recovery of damages for loss of society. Nor

is the reach of *Gaudet's* principle limited by the fact that no right to recover for loss of society due to maritime injury has been recognized by Congress under the Death on the High Seas Act or the Jones Act. Neither statute embodies an "established and inflexible" rule foreclosing recognition of a claim for loss of society by judicially crafted general maritime law. Pp. 279–286.

MR. JUSTICE POWELL, while believing that *Sea-Land Services, Inc.* v. *Gaudet, supra,* was decided wrongly, concurred in the judgment because he saw no rational basis for drawing a distinction between fatal and nonfatal injuries. P. 286.

BRENNAN, J., announced the judgment of the Court and delivered an opinion, in which WHITE, BLACKMUN, and STEVENS, JJ., joined. BURGER, C. J., concurred in the judgment. POWELL, J., filed an opinion concurring in the judgment, *post,* p. 286. MARSHALL, J., filed a dissenting opinion, in which STEWART and REHNQUIST, JJ., joined, *post,* p. 286.

Stephen K. Carr argued the cause and filed briefs for petitioner.

Paul C. Matthews argued the cause and filed a brief for respondent Alvez. *Peter M. Pryor* and *William M. Kimball* filed a brief for respondent Joseph Vinal Ship Maintenance, Inc.

MR. JUSTICE BRENNAN announced the judgment of the Court and delivered an opinion in which MR. JUSTICE WHITE, MR. JUSTICE BLACKMUN, and MR. JUSTICE STEVENS join.

Sea-Land Services, Inc. v. *Gaudet,* 414 U. S. 573 (1974), held that under the nonstatutory maritime wrongful-death action fashioned by *Moragne* v. *States Marine Lines,* 398 U. S. 375 (1970), the widow of a longshoreman *mortally* injured aboard a vessel in state territorial waters could recover damages for the loss of her deceased husband's "society." [1] The

[1] "The term 'society' embraces a broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention, companionship, comfort, and protection." *Sea-Land Services, Inc.* v. *Gaudet,* 414 U. S., at 585.

question in this case is whether general maritime law authorizes the wife of a harbor worker injured *nonfatally* aboard a vessel in state territorial waters to maintain an action for damages for the loss of her husband's society. We conclude that general maritime law does afford the wife such a cause of action.

I

Respondent Gilberto Alvez lost an eye while working as a lasher aboard petitioner's vessel SS *Export Builder* in New York waters. He commenced an action for damages against petitioner in the New York Supreme Court on grounds of negligence and unseaworthiness.[2] Leave to amend respondent's complaint to add his spouse as a plaintiff for loss of society was denied by the New York Supreme Court, Special Term, on the authority of *Igneri* v. *Cie. de Transports Oceaniques*, 323 F. 2d 257 (CA2 1963), cert. denied, 376 U. S. 949 (1964), in which the Court of Appeals for the Second Circuit ruled that an injured longshoreman's wife was not entitled to compensation for loss of her husband's society. App. to Pet. for Cert. A1. The Appellate Division of the New York Supreme Court reversed, and granted Alvez' motion to amend, reasoning that *Gaudet*, rather than *Igneri*, was controlling authority. 59 App. Div. 2d 883, 399 N. Y. S. 2d 673 (1st Dept. 1977). Upon certification (App. to Pet. for Cert. A6–A7), the New York Court of Appeals agreed that the vitality of *Igneri* had been sapped by *Gaudet* and by other developments in the law, and held that Mrs. Alvez should be permitted to maintain her claim for loss of society under maritime law. 46 N. Y. 2d 634, 389 N. E. 2d 461 (1979).[3] We granted certiorari. 444 U. S. 924 (1979). We affirm.

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[2] Alvez' injury was sustained before the effective date of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 901 *et seq.* Petitioner also impleaded Alvez' employer, Joseph Vinal Ship Maintenance, Inc., for indemnification.

[3] Since *Gaudet*, one Federal Court of Appeals has expressly aligned itself with the *Igneri* rule, *Christofferson* v. *Halliburton Co.*, 534 F. 2d 1147

II

At oral argument, the Court raised, *sua sponte*, the question whether this case fell within the Court's statutory jurisdiction to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had. . . ." 28 U. S. C. § 1257.

The question is a close one. The New York Court of Appeals order granting leave to amend the complaint was only the predicate to a decision on the merits of the claim for loss of society; that order, therefore, is not "final" in the strict sense of a decree that leaves nothing further to be addressed by the state courts. Nor does the Court of Appeals judgment, as originally entered, readily fit into any of the categorical exceptions to strict finality which the Court has developed in construing § 1257. See *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 476–487 (1975).[4] Thus, were the case in the posture in which it stood when the petition for certiorari was filed, we might well determine that the judgment lacked sufficient characteristics of finality to warrant an assertion of our appellate jurisdiction.

Since the writ of certiorari was granted, however, this case—including the claim for loss of society—has been tried, and respondent Alvez has prevailed. Tr. of Oral Arg. 7–8. Counsel for petitioner American Export Lines has informed the Court at oral argument that petitioner's appeal from the trial verdict against it will not challenge that element of the verdict which awarded damages for loss of society to Mrs.

(CA5), rehearing en banc denied, 542 F. 2d 1174 (1976), and a number of state and federal district courts have divided on the issue, compare, *e. g.*, *Pesce* v. *Summa Corp.*, 54 Cal. App. 3d 86, 126 Cal. Rptr. 451 (1975), and *Giglio* v. *Farrell Lines, Inc.*, 424 F. Supp. 927 (SDNY 1977), appeal denied, No. 77–8014 (CA2, Feb. 17, 1977), with *Davidson* v. *Schlussel Reederei KG*, 295 So. 2d 700 (Fla. App. 1974), and *Westcott* v. *McAllister Bros., Inc.*, 463 F. Supp. 1039 (SDNY 1978).

[4] See Note, The Finality Rule for Supreme Court Review of State Court Orders, 91 Harv. L. Rev. 1004 (1978).

Alvez. *Id.*, at 10, 41–42.[5] Furthermore, it is conceded that no federal question, except that which we are now asked to resolve, remains in the litigation. *Id.*, at 6.[6]

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[5] "Question: Mr. Carr [attorney for petitioner], what happens if the appellate division reverses?

"Mr. Carr: If the appellate division reverses, it would not reverse on the question of Juanita Alvez's claim for consortium. If the appellate division reverses, it would probably reverse on—

"Question: Correct.

"Mr. Carr: —instructions to the jury that may have been—

"Question: Then the appellate division leaves that intact, the $50,000, right?

"Mr. Carr: Yes, sir.

. . . . .

"Question: Could I ask you if the New York court system has finally disposed of this federal issue of the right of the wife?

"Mr. Carr: The New York state court system has finally disposed of the issue of the right of the wife.

"Question: You have lost at trial?

"Mr. Carr: Well, I don't like to put it that way.

"Question: Well, judgment has gone against you, your client?

"Mr. Carr: There is judgment against my client. . . .

"Question: Well, on the consortium issue the judgment has gone against your client?

"Mr Carr: Yes, indeed it has, Your Honor.

"Question: And that issue has not—if you want to appeal in the state court system, the right of the wife is not subject to relitigation, is it?

"Mr. Carr: The right of the wife is final as far as the New York state court system is concerned.

"Question: Except as to amount, I suppose.

"Mr. Carr: Except as to amount.

"Question: Conceivably a reviewing court might reduce it.

"Mr. Carr: With respect to excessiveness, that is so. But as far as the wife's right of consortium, that right is final in the state courts and cannot be relitigated in that forum.

. . . . .

"Mr. Carr: The appellate division would say this is res judicata, this has been decided by the New York state Court of Appeals and does not permit you to pursue the matter further."

[6] The dissent argues, *post*, at 287, n. 1, that petitioner's counsel's assertion that the New York courts would not reverse Mrs. Alvez' trial victory,

So far as respondent's wife's claim for loss of society is concerned, it thus appears that "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Cox Broadcasting, supra,* at 480; see *Radio Station WOW* v. *Johnson*, 326 U. S. 120, 123–127 (1945). As a practical matter, then, we conclude that the judgment below upholding the legal tenability of Mrs. Alvez' claim falls—at present—within a categorical exception to strict finality.[7] "[N]ow that the case is before us . . . the eventual costs, as all the parties recognize, will certainly be less if we now pass on the questions presented here rather than send the case back with those issues undecided." *Gillespie* v. *United States Steel Corp.*, 379 U. S. 148, 153 (1964).

III

In *Igneri* v. *Cie. de Transports Oceaniques,* the Court of Appeals for the Second Circuit rejected the loss-of-society claim of a longshoreman's wife in a maritime personal injury

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Tr. of Oral Arg. 10, is contradicted by statements of *respondents'* counsel indicating or implying that American Export Lines "might find some grounds for error in the record," *id.*, at 21; see *id.*, at 20. But *respondents'* counsel could have said nothing else: since he is not representing petitioner American Export Lines, respondents' attorney could hardly have conceded any element of petitioner's case in the state courts. What is relevant, then, is *petitioner's* counsel's answer to this Court that "the appellate division . . . would not reverse on the question of Juanita Alvez's claim for consortium. . . . [The New York courts] would leave it intact." *Id.*, at 10. Since American Export Lines' counsel was aware of this Court's concerns, it is fair to read this response as a concession by counsel—who was in a position to know his client's stategy in the state courts—that Mrs. Alvez' claim was no longer in jeopardy.

[7] Our ruling on finality only extends, of course, to Mrs. Alvez' claim for loss of society, since we do not understand counsel for petitioner to concede that the other claims tried are beyond challenge. The fact that these other claims are nonfinal, however, need not preclude us from considering the final determination as to Mrs. Alvez' claim. Cf. *Gillespie* v. *United States Steel Corp.*, 379 U. S. 148, 153 (1964).

action. The *Igneri* opinion was carefully constructed within the framework of then-applicable doctrines governing maritime remedies. At the time, there was no clear decisional authority sustaining a general maritime law right of recovery for loss of society. 323 F. 2d, at 265–266; compare *Savage* v. *New York, N. & H. S. S. Co.*, 185 F. 778, 781 (CA2 1911) (adopting opinion of Hough, District Judge) (dictum), with *New York & Long Branch Steamboat Co.* v. *Johnson*, 195 F. 740 (CA3 1912). It was also thought established, as *Igneri* stated, "that the damages recoverable by a *seaman's* widow suing for wrongful death under the Jones Act do not include recovery for loss of consortium," 323 F. 2d, at 266 (emphasis added); see *Michigan Central R. Co.* v. *Vreeland*, 227 U. S. 59 (1913). Too, it was far from evident that the rule of *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85 (1946), entitling a longshoreman to maintain an action for unseaworthiness, would extend to permit recovery for loss of society by his spouse. 323 F. 2d, at 267–268. Thus, the principles of maritime law prevalent in 1963 militated against, rather than supported, the creation of a right to recover for loss of society in *Igneri*.

Subsequent developments, however, have altered the legal setting within which we confront a claim for loss of society due to personal injury. In 1970, *Moragne* v. *States Marine Lines*, 398 U. S. 375, overruled *The Harrisburg*, 119 U. S. 199 (1886), and held that an action for wrongful death based upon unseaworthiness is maintainable under general federal maritime law. *Moragne* itself did not fully define the new, nonstatutory, cause of action, and its contours were further shaped some four years later by *Sea-Land Services, Inc.* v. *Gaudet*, 414 U. S. 573 (1974). *Gaudet* held, *inter alia*, that the maritime wrongful-death remedy created by *Moragne* encompassed the recovery of damages for loss of society by a decedent's widow. So, it is no longer correct to assume—as did *Igneri*—that the warranty of seaworthiness affords no relief to the spouse of a longshoreman. More importantly, *Gaudet* provides the conclusive decisional recognition of a

right to recover for loss of society that *Igneri* found lacking.

To be sure, *Gaudet* upheld a claim for loss of society in the context of a wrongful-death action. But general federal maritime law is a source of relief for a longshoreman's personal injury, *Pope & Talbot, Inc.* v. *Hawn,* 346 U. S. 406, 412–414 (1953), just as it is a source of remedy for wrongful death, *Moragne, supra.* Within this single body of judge-formulated law, there is no apparent reason to differentiate between fatal and nonfatal injuries in authorizing the recovery of damages for loss of society. The vitality of the longshoreman is logically irrelevant once we have accepted the principle that injury suffered by a longshoreman's spouse from loss of society should be compensable, when proved. Nothing intrinsic to the *Gaudet* rule, therefore, should cabin its application to wrongful death.[8]

Petitioner argues that the reach of *Gaudet*'s principle must be limited by the fact that no right to recover for loss of society due to maritime injury has been recognized by Congress under § 2 of the Death on the High Seas Act (DOHSA), 46 U. S. C. § 762; see *Mobil Oil Corp.* v. *Higginbotham,* 436 U. S. 618, 620 (1978), or the Jones Act, 46 U. S. C. § 688. But it is a settled canon of maritime jurisprudence that " 'it better becomes the humane and liberal character of proceedings in

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[8] *Gaudet*'s discussion of the issue of double liability did state:

"[D]ecedent's recovery did not include damages for the dependents' loss of services or of society, and funeral expenses. Indeed, these losses—unique to the decedent's dependents—could not accrue until the decedent's death." 414 U. S., at 591–592.

In *Christofferson* v. *Halliburton Co.,* 534 F. 2d, at 1150, the Court of Appeals for the Fifth Circuit inferred from that passage an intention to limit *Gaudet* to the wrongful-death context. But no such limitation is implicit. As a matter of logic, *Gaudet*'s statement that double liability is precluded in wrongful-death cases is not equivalent to the proposition that *only* wrongful-death cases preclude double liability. Moreover, the *Gaudet* opinion itself noted that damages may be assessed for loss of society in personal injury cases, 414 U. S., at 589–590; see *Christofferson, supra,* at 1153–1154 (Freeman, J., dissenting).

admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules.' " *Moragne* v. *States Marine Lines, supra,* at 387, quoting with approval, *The Sea Gull,* 21 F. Cas. 909, 910 (No. 12,578) (CC Md. 1865); accord, *Sea-Land Services, Inc.* v. *Gaudet, supra,* at 583. Plainly, neither statute embodies an "established and inflexible" rule here foreclosing recognition of a claim for loss of society by judicially crafted general maritime law.

DOHSA comprehends relief for *fatal* injuries incurred on the *high seas,* 46 U. S. C. § 761. To be sure, *Mobil Oil Corp.* v. *Higginbotham, supra,* construed DOHSA to forbid general maritime law supplementation of the elements of compensation for which the Act provides. But *Higginbotham* never intimated that the preclusive effect of DOHSA extends beyond the statute's ambit. To the contrary, while treating the statutory remedies for wrongful deaths on the high seas as exclusive, *Higginbotham* expressly reaffirmed that *Gaudet* governs recoveries for wrongful deaths on territorial waters. 436 U. S., at 623–625; see *Moragne, supra,* at 397–398. And if DOHSA does not pre-empt general maritime law where *fatalities* occur *within* territorial waters, it follows *a fortiori* that the Act does not exclude federal maritime law as a source of relief for *nonfatal* injuries upon the same waters.

Nor do we read the Jones Act as sweeping aside general maritime law remedies. Notwithstanding our sometime treatment of longshoremen as pseudo-seamen for certain Jones Act purposes, *International Stevedoring Co.* v. *Haverty,* 272 U. S. 50 (1926); cf. *Seas Shipping Co.* v. *Sieracki, supra,* at 100–102,[9] the Jones Act does not exhaustively or exclu-

[9] *Haverty* was largely, if not completely, superseded by the Longshoremen's and Harbor Workers' Compensation Act of 1927, 33 U. S. C. § 901 *et seq.* See *Swanson* v. *Marra Bros.,* 328 U. S. 1 (1946). But see G. Gilmore & C. Black, Jr., The Law of Admiralty 330, 454–455 (2d ed. 1975). *Sieracki* has been overtaken by the 1972 Amendments to the Longshoremen's Act. See Gilmore & Black, *supra,* at 449.

sively regulate longshoremen's remedies, see *Moragne, supra*, at 395–396, and n. 12; *Pope & Talbot, Inc.* v. *Hawn, supra*, at 413–414; *Igneri*, 323 F. 2d, at 266.[10] Furthermore, the Jones Act lacks such preclusive effect even with respect to true seamen; thus, we have held that federal maritime law permits the dependents of seamen killed within territorial seas to recover for violation of a duty of seaworthiness that entails a stricter standard of care than the Jones Act. *Moragne*, 398 U. S., at 396, n. 12; see Gilmore & Black, *supra* n. 9, at 367–368.

Apart from the question of statutory pre-emption, the liability schemes incorporated in DOHSA and the Jones Act should not be accorded overwhelming analogical weight in formulating remedies under general maritime law. The two statutes were enacted within days to address related problems—yet they are "hopelessly inconsistent with each other." Gilmore & Black, *supra*, at 359; see *id.*, at 360–367. The Jones Act itself was not the product of careful drafting or attentive legislative review, *id.*, at 277, 327; assuming that the statute bars damages for loss of society, it does so solely by virtue of judicial interpretation of the Federal Employers' Liability Act, 45 U. S. C. § 51 *et seq.*, which was incorporated into the Jones Act, see, *e. g.*, *Ivy* v. *Security Barge Lines, Inc.*, 606 F. 2d 524, 526 (CA5 1979) (en banc), cert. pending, No. 79–1228. Thus, a remedial omission in the Jones Act is not evidence of considered congressional policymaking that should command

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[10] Respondent Joseph Vinal Ship Maintenance, Inc., the interests of which parallel petitioner's, has advanced the argument that recovery for loss of society is barred by the Longshoremen's and Harbor Workers' Compensation Act as applicable at the time of the injury—*i. e.*, before the 1972 Amendments. It does not appear that this contention was raised below; in any event, it has no merit. Whatever the limitations on recovery against employers under the pre-1972 LHWCA, longshoremen retained additional rights based upon the warranty of seaworthiness. See *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85 (1946); cf. *Sea-Land Services, Inc.* v. *Gaudet, supra*.

our adherence in analogous contexts. And we have already indicated that "no intention appears that the [Death on the High Seas] Act have the effect of foreclosing any nonstatutory federal remedies that might be found appropriate to effectuate the policies of general maritime law." *Moragne, supra*, at 400; *Gaudet*, 414 U. S., at 588, n. 22.

Far more persuasive at the present juncture are currently prevailing views about compensation for loss of society. Cf. *Sea-Land Services, Inc.* v. *Gaudet, supra*, at 587–588. As the Court of Appeals observed in *Igneri:*

> "At least this much is true. If the common law recognized a wife's claim for loss of consortium, uniformly or nearly so, a United States admiralty court would approach the problem here by asking itself why it should not likewise do so. . . ." 323 F. 2d, at 260.

At the time *Igneri* was decided, governing law in the relevant jurisdictions was substantially divided over the wife's right to recover for loss of consortium. *Id.*, at 260–264. But the state of the law is very different today. Currently, a clear majority of States permit a wife to recover damages for loss of consortium from personal injury to her husband.[11] Fur-

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[11] Forty-one States and the District of Columbia allow recovery by a wife or couple: *Swartz* v. *United States Steel Corp.*, 293 Ala. 439, 304 So. 2d 881 (1974); *Schreiner* v. *Fruit*, 519 P. 2d 462 (Alaska 1974); *Glendale* v. *Bradshaw*, 108 Ariz. 582, 503 P. 2d 803 (1972); *Missouri Pacific Transp. Co.* v. *Miller*, 227 Ark. 351, 299 S. W. 2d 41 (1957); *Rodriguez* v. *Bethlehem Steel Corp.*, 12 Cal. 3d 382, 525 P. 2d 669 (1974); Colo. Rev. Stat. § 14–2–209 (1973); *Hopson* v. *St. Mary's Hospital*, 176 Conn. 485, 408 A. 2d 260 (1979); *Yonner* v. *Adams*, 53 Del. 229, 167 A. 2d 717 (1961); *Hitaffer* v. *Argonne Co.*, 87 U. S. App. D. C. 57, 183 F. 2d 811 (1950); *Gates* v. *Foley*, 247 So. 2d 40 (Fla. 1971); *Brown* v. *Georgia-Tennessee Coaches, Inc.*, 88 Ga. App. 519, 77 S. E. 2d 24 (1953); *Nishi* v. *Hartwell*, 52 Haw. 188, 473 P. 2d 116 (1970); *Nichols* v. *Sonneman*, 91 Idaho 199, 418 P. 2d 562 (1966); *Dini* v. *Naiditch*, 20 Ill. 2d 406, 170 N. E. 2d 881 (1960); *Troue* v. *Marker*, 253 Ind. 284, 252 N. E. 2d 800 (1969); *Acuff* v. *Schmit*, 248 Iowa 272, 78 N. W. 2d 480 (1956); Kan. Stat. Ann. § 23–205 (Cum. Supp. 1979); *Kotsiris* v. *Ling*, 451 S. W. 2d

thermore, even in *Igneri*'s day, the generally accepted rule allowed a *husband* to gain damages for loss of consortium with his tortiously injured *wife*, *id.*, at 260; so "clearly authorized" a common-law principle would have been translated into maritime law by the *Igneri* analysis, *id.*, at 260, 267. And if *Igneri* implies that a husband may collect compensation under maritime law for loss of consortium with his injured wife, it follows that the same relief is due the wife who suffers a comparable loss because of wounds suffered by her husband, see, *e. g.*, *Duncan* v. *General Motors Corp.*, 499 F. 2d 835 (CA10 1974); cf. *Orr* v. *Orr*, 440 U. S. 268 (1979).

Admiralty jurisprudence has always been inspirited with a "special solicitude for the welfare of those men who under[take] to venture upon hazardous and unpredictable sea voyages." *Moragne* v. *States Marine Lines*, *supra*, at 387. As in *Moragne* and *Gaudet*, "[o]ur approach to the

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411 (Ky. 1970); Me. Rev. Stat. Ann., Tit. 19, § 167–A (Supp. 1979); *Deems* v. *Western Maryland R. Co.*, 247 Md. 95, 231 A. 2d 514 (1967); *Diaz* v. *Eli Lilly & Co.*, 364 Mass. 153, 302 N. E. 2d 555 (1973); *Montgomery* v. *Stephan*, 359 Mich. 33, 101 N. W. 2d 227 (1960); *Thill* v. *Modern Erecting Co.*, 284 Minn. 508, 170 N. W. 2d 865 (1969); Miss. Code Ann. § 93–3–1 (1972); *Novak* v. *Kansas City Transit, Inc.*, 365 S. W. 2d 539 (Mo. 1963); *Duffy* v. *Lipsman-Fulkerson & Co.*, 200 F. Supp. 71 (Mont. 1961) (applying Montana law); *Luther* v. *Maple*, 250 F. 2d 916 (CA8 1958) (applying Nebraska law) (semble); *General Electric Co.* v. *Bush*, 88 Nev. 360, 498 P. 2d 366 (1972); N. H. Rev. Stat. Ann. § 507:8–a (1968); *Ekalo* v. *Constructive Serv. Corp.*, 46 N. J. 82, 215 A. 2d 1 (1965); *Millington* v. *Southeastern Elevator Co.*, 22 N. Y. 2d 498, 239 N. E. 2d 897 (1968); *Clouston* v. *Remlinger Oldsmobile Cadillac, Inc.*, 22 Ohio St. 2d 65, 258 N. E. 2d 230 (1970); Okla. Stat., Tit. 32, § 15 (Supp. 1979); Ore. Rev. Stat. § 108.010 (1975); *Hopkins* v. *Blanco*, 457 Pa. 90, 320 A. 2d 139 (1974); *Mariani* v. *Nanni*, 95 R. I. 153, 185 A. 2d 119 (1962); *Hoekstra* v. *Helgeland*, 78 S. D. 82, 98 N. W. 2d 669 (1959); Tenn. Code Ann. § 25–109 (Cum. Supp. 1979); *Whittlesey* v. *Miller*, 572 S. W. 2d 665 (Tex. 1978); Vt. Stat. Ann., Tit. 12, § 5431 (Supp. 1979); W. Va. Code § 48–3–19a (1976); *Moran* v. *Quality Aluminum Casting Co.*, 34 Wis. 2d 542, 150 N. W. 2d 137 (1967). See also *Sea-Land Services, Inc.* v. *Gaudet*, 414 U. S., at 587; see generally W. Prosser, Law of Torts 895–896 (4th ed. 1971).

resolution of the issue before us . . . [is] consistent with the extension of this 'special solicitude' to the dependents of [seafarers]. . . ." *Gaudet, supra,* at 577. The decision of the New York Court of Appeals is

Affirmed.

THE CHIEF JUSTICE concurs in the judgment.

MR. JUSTICE POWELL, concurring in the judgment.

I continue to believe that *Sea-Land Services, Inc.* v. *Gaudet,* 414 U. S. 573, 595 (1974) (POWELL, J., dissenting), was decided wrongly, but I recognize the utility of *stare decisis* in cases of this kind, *id.,* at 596. Since I see no rational basis for drawing a distinction between fatal and nonfatal injuries, I join in the judgment of the Court.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST join, dissenting.

After certiorari has been granted, and a case has been briefed and argued, there is an inevitable pressure to decide it, especially when the argument for a dismissal is based on the seemingly technical requirements of finality. In this case, however, it is plain to me that the decision below is not final, and that the Court is therefore without jurisdiction to review it under 28 U. S. C. § 1257.

Respondent Gilberto Alvez brought suit against petitioner in the New York Supreme Court for injuries incurred during the course of his employment on petitioner's vessel. He moved to amend the complaint to add his spouse, Juanita Alvez, as a plaintiff. His motion was denied. The Appellate Division of the New York Supreme Court reversed, and the New York Court of Appeals affirmed the decision of the Appellate Division. This Court granted certiorari to review the decision of the New York Court of Appeals.

After certiorari had been granted, and while the case was being briefed in this Court, the litigants proceeded to try the

case in the New York Supreme Court. Two weeks before the case was argued here, Gilberto Alvez received a jury verdict against petitioner in the sum of $500,000, and Juanita Alvez received $50,000. In oral argument before this Court, counsel for petitioner indicated that petitioner is appealing the judgment on grounds of improper jury instructions.[1] If petitioner's appeal is successful, it seems plain that both respondents' verdicts will be reversed.

In these circumstances, I am unable to accept the Court's conclusion that the decision below is final. Nothing in the record before us supports the suggestion that "'the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings.'" *Ante*, at 279, quoting *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 480 (1975). The federal issue may neither survive nor require decision if peti-

[1] In oral argument counsel for petitioner stated that the Appellate Division may "reverse on . . . instructions to the jury. . . ." Tr. of Oral Arg. 10. I see no basis for the suggestion that "petitioner's appeal from the trial verdict against it will not challenge that element of the verdict which awarded damages for loss of society to Mrs. Alvez." *Ante*, at 277–278. In context it seems plain that counsel's comments on the award to Juanita Alvez were designed to indicate that there was no *separate* appeal with respect to the award on her behalf. But there was no suggestion that petitioner is not challenging the determination of liability as to Mr. Alvez, from whose award his spouse's is wholly derivative. The assertion that Juanita Alvez' award is final is contradicted by the suggestion of counsel for respondents that "if there is a problem," the parties might "[w]aive any right to appeal as far as the decision, as far as the judgment for Juanita Alvez is concerned below." Tr. of Oral Arg. 20. Counsel conceded that, in the absence of such a waiver, "there is always the possibility that the defendant in this case might find some grounds for error in the record." *Id.*, at 21. The offer of a waiver of appellate rights and the concession that "some grounds for error" might be found are difficult to reconcile with the suggestion that further state-court proceedings cannot affect the award to Juanita Alvez. At the very least, the comments of counsel are highly ambiguous, and it seems odd for the plurality to indulge in very possibly incorrect speculations on the point when jurisdictional prerequisites are at stake.

tioner is successful in future state-court proceedings. Therefore, the finality requirement of § 1257 precludes us from deciding the case. Cf. *Southern Pacific Co.* v. *Gileo*, 351 U. S. 493 (1956); *Republic Natural Gas Co.* v. *Oklahoma*, 334 U. S. 62 (1948).

Even if I were to accept the unfounded premise that the federal issue will necessarily survive, I would not agree that the order of the New York Court of Appeals was rendered final by developments subsequent to the grant of certiorari. The plurality apparently concedes that when we granted certiorari, the New York Court of Appeals' order allowing leave to amend was not appealable. *Ante*, at 277. After that order was entered, the procedural posture of the case was the same as if the trial court had granted leave to amend in the first place. Such an order would not, of course, have been final; in the plurality's own words, it "was only the predicate to a decision on the merits of the claim for loss of society." *Ibid.* If this reasoning is correct, I do not believe that a subsequent trial—conducted *after we have granted certiorari*—can vest jurisdiction in this Court. I have been unable to find any case, and the plurality points to none, that supports the apparent adoption of a contrary rule. Indeed, our cases appear uniformly to assume that finality is determined as of the time that certiorari is sought. See *Department of Banking* v. *Pink*, 317 U. S. 264, 268 (1942).[2]

For three reasons, the plurality's conclusion to the contrary strikes me as fundamentally misguided. First, it sanctions the practice of granting certiorari to review nonfinal orders, and thus treats the finality requirement as merely a policy to be considered in deciding whether we should resolve a dis-

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[2] On occasion, of course, subsequent events can *deprive* the Court of jurisdiction over a case, as for example by rendering it moot. For reasons discussed in the text, however, I see no justification, either in precedent or in principle, for the view that subsequent events can justify a grant of certiorari to review a decision over which the Court had no jurisdiction in the first instance.

pute. The finality requirement, of course, is no such thing; it determines whether we have the power to render a decision. Jurisdictional prerequisites cannot be disregarded simply because it seems more economical for the Court to decide the case. Second, it encourages litigants to seek review of nonfinal judgments in the hope that subsequent events will render them final. Such a practice only retards the speedy resolution of disputes and multiplies the burdens of litigation. Finally, and most disturbing, today's decision encourages litigants and lower courts to proceed to try a case in which this Court has granted certiorari and which is simultaneously being briefed and argued in this Court. That result cannot easily coexist with one of the basic principles on which our judicial system is premised, that two courts cannot have jurisdiction over the same case at the same time. See 9 J. Moore, B. Ward, & J. Lucas, Moore's Federal Practice § 203.11 (1975), and cases cited. The necessity for adhering to that rule in these circumstances is plainly suggested by the waste of judicial resources that would result if the Court decided to reverse the Court of Appeals and thus to render the trial court proceedings with respect to Juanita Alvez a complete nullity.

It should always be remembered that the "considerations that determine finality . . . have reference to very real interests—not merely those of the immediate parties but, more particularly, those that pertain to the smooth functioning of our judicial system." *Republic Natural Gas Co.* v. *Oklahoma, supra,* at 69. Accordingly, the Court's salutary adoption of a "practical rather than a technical construction" of the finality requirement, *Cohen* v. *Beneficial Loan Corp.,* 337 U. S. 541, 546 (1949), is not a license for ignoring the requirement entirely, or for interpreting it without regard for its legitimate underlying purposes. The finality requirement "serves several ends: (1) it avoids piecemeal review of state court decisions; (2) it avoids giving advisory opinions in cases where there may be no real 'case' or 'controversy' in

the sense of Art. III; (3) it limits review of state court determinations of federal . . . issues to leave at a minimum federal intrusion in state affairs." *North Dakota Pharmacy Bd.* v. *Snyder's Stores*, 414 U. S. 156, 159 (1973). See also *Republic Natural Gas Co.* v. *Oklahoma, supra; Radio Station WOW* v. *Johnson*, 326 U. S. 120, 123–124 (1945). All of these purposes may be jeopardized by the decision today. We can have no assurance that there are not other federal issues in the case that will reach the Court at some point in the future. The decision the Court announces may be entirely advisory if the appellate courts in New York rule in favor of the petitioner. And principles of federalism counsel against reviewing the decision of the New York courts prematurely and without any necessity for doing so.

In my view, the proper disposition in these circumstances would be to dismiss the writ of certiorari as improvidently granted, and to permit the state courts to resolve the pending appeal. If the federal question still survives after the judgment of the highest state court becomes final, petitioner may again seek a writ of certiorari to review that judgment. I dissent.

RHODE ISLAND *v.* INNIS

CERTIORARI TO THE SUPREME COURT OF RHODE ISLAND

No. 78-1076. Argued October 30, 1979—Decided May 12, 1980

Shortly after a taxicab driver, who had been robbed by a man wielding a sawed-off shotgun, identified a picture of respondent as that of his assailant, a Providence, R. I., patrolman spotted respondent, who was unarmed, on the street, arrested him, and advised him of his rights under *Miranda* v. *Arizona*, 384 U. S. 436. When other police officers arrived at the arrest scene, respondent was twice again advised of his *Miranda* rights, and he stated that he understood his rights and wanted to speak with a lawyer. Respondent was then placed in a police car to be driven to the central station in the company of three officers, who were instructed not to question respondent or intimidate him in any way. While en route to the station, two of the officers engaged in a conversation between themselves concerning the missing shotgun. One of the officers stated that there were "a lot of handicapped children running around in this area" because a school for such children was located nearby, and "God forbid one of them might find a weapon with shells and they might hurt themselves." Respondent interrupted the conversation, stating that the officers should turn the car around so he could show them where the gun was located. Upon returning to the scene of the arrest where a search for the shotgun was in progress, respondent was again advised of his *Miranda* rights, replied that he understood those rights but that he "wanted to get the gun out of the way because of the kids in the area in the school," and then led the police to the shotgun. Before trial on charges of kidnaping, robbery, and murder of another taxicab driver, the trial court denied respondent's motion to suppress the shotgun and the statements he had made to the police regarding its discovery, ruling that respondent had waived his *Miranda* rights, and respondent was subsequently convicted. The Rhode Island Supreme Court set aside the conviction and held that respondent was entitled to a new trial, concluding that respondent had invoked his *Miranda* right to counsel and that, contrary to *Miranda's* mandate that, in the absence of counsel, all custodial interrogation then cease, the police officers in the vehicle had "interrogated" respondent without a valid waiver of his right to counsel.

Held: Respondent was not "interrogated" in violation of his right under *Miranda* to remain silent until he had consulted with a lawyer. Pp. 297-303.

(a) The *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. Pp. 298–302.

(b) Here, there was no express questioning of respondent; the conversation between the two officers was, at least in form, nothing more than a dialogue between them to which no response from respondent was invited. Moreover, respondent was not subjected to the "functional equivalent" of questioning, since it cannot be said that the officers should have known that their conversation was reasonably likely to elicit an incriminating response from respondent. There is nothing in the record to suggest that the officers were aware that respondent was peculiarly susceptible to an appeal to his conscience concerning the safety of handicapped children, or that the police knew that respondent was unusually disoriented or upset at the time of his arrest. Nor does the record indicate that, in the context of a brief conversation, the officers should have known that respondent would suddenly be moved to make a self-incriminating response. While it may be said that respondent was subjected to "subtle compulsion," it must also be established that a suspect's incriminating response was the product of words or actions on the part of the police that they should have known were reasonably likely to elicit an incriminating response, which was not established here. Pp. 302–303.

— R. I. —, 391 A. 2d 1158, vacated and remanded.

STEWART, J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. WHITE, J., filed a concurring opinion, *post*, p. 304. BURGER, C. J., filed an opinion concurring in the judgment, *post*, p. 304. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 305. STEVENS, J., filed a dissenting opinion, *post*, p. 307.

Dennis J. Roberts II, Attorney General of Rhode Island, argued the cause for petitioner. With him on the briefs were *Nancy Marks Rahmes* and *Stephen Lichatin III*, Special Assistant Attorneys General.

John A. MacFadyen III argued the cause for respondent. With him on the brief was *William F. Reilly.**

MR. JUSTICE STEWART delivered the opinion of the Court.

In *Miranda* v. *Arizona,* 384 U. S. 436, 474, the Court held that, once a defendant in custody asks to speak with a lawyer, all interrogation must cease until a lawyer is present. The issue in this case is whether the respondent was "interrogated" in violation of the standards promulgated in the *Miranda* opinion.

I

On the night of January 12, 1975, John Mulvaney, a Providence, R. I., taxicab driver, disappeared after being dispatched to pick up a customer. His body was discovered four days later buried in a shallow grave in Coventry, R. I. He had died from a shotgun blast aimed at the back of his head.

On January 17, 1975, shortly after midnight, the Providence police received a telephone call from Gerald Aubin, also a taxicab driver, who reported that he had just been robbed by a man wielding a sawed-off shotgun. Aubin further reported that he had dropped off his assailant near Rhode Island College in a section of Providence known as Mount Pleasant. While at the Providence police station waiting to give a statement, Aubin noticed a picture of his assailant on a bulletin board. Aubin so informed one of the police officers present. The officer prepared a photo array, and again Aubin identified a picture of the same person. That person was the respondent. Shortly thereafter, the Providence police began a search of the Mount Pleasant area.

At approximately 4:30 a. m. on the same date, Patrolman Lovell, while cruising the streets of Mount Pleasant in a pa-

*Briefs of *amici curiae* were filed by *George Deukmejian,* Attorney General, *Robert H. Philibosian,* Chief Assistant Attorney General, and *William E. James,* Senior Assistant Attorney General, for the State of California; and by *Fred Okrand* and *Mark D. Rosenbaum* for the ACLU Foundation of Southern California et al.

trol car, spotted the respondent standing in the street facing him. When Patrolman Lovell stopped his car, the respondent walked towards it. Patrolman Lovell then arrested the respondent, who was unarmed, and advised him of his so-called *Miranda* rights. While the two men waited in the patrol car for other police officers to arrive, Patrolman Lovell did not converse with the respondent other than to respond to the latter's request for a cigarette.

Within minutes, Sergeant Sears arrived at the scene of the arrest, and he also gave the respondent the *Miranda* warnings. Immediately thereafter, Captain Leyden and other police officers arrived. Captain Leyden advised the respondent of his *Miranda* rights. The respondent stated that he understood those rights and wanted to speak with a lawyer. Captain Leyden then directed that the respondent be placed in a "caged wagon," a four-door police car with a wire screen mesh between the front and rear seats, and be driven to the central police station. Three officers, Patrolmen Gleckman, Williams, and McKenna, were assigned to accompany the respondent to the central station. They placed the respondent in the vehicle and shut the doors. Captain Leyden then instructed the officers not to question the respondent or intimidate or coerce him in any way. The three officers then entered the vehicle, and it departed.

While en route to the central station, Patrolman Gleckman initiated a conversation with Patrolman McKenna concerning the missing shotgun.[1] As Patrolman Gleckman later testified:

> "A. At this point, I was talking back and forth with Patrolman McKenna stating that I frequent this area while on patrol and [that because a school for handicapped children is located nearby,] there's a lot of handicapped children running around in this area, and God

[1] Although there was conflicting testimony about the exact seating arrangements, it is clear that everyone in the vehicle heard the conversation.

> forbid one of them might find a weapon with shells and they might hurt themselves." App. 43–44.

Patrolman McKenna apparently shared his fellow officer's concern:

> "A. I more or less concurred with him [Gleckman] that it was a safety factor and that we should, you know, continue to search for the weapon and try to find it." *Id.*, at 53.

While Patrolman Williams said nothing, he overheard the conversation between the two officers:

> "A. He [Gleckman] said it would be too bad if the little—I believe he said a girl—would pick up the gun, maybe kill herself." *Id.*, at 59.

The respondent then interrupted the conversation, stating that the officers should turn the car around so he could show them where the gun was located. At this point, Patrolman McKenna radioed back to Captain Leyden that they were returning to the scene of the arrest, and that the respondent would inform them of the location of the gun. At the time the respondent indicated that the officers should turn back, they had traveled no more than a mile, a trip encompassing only a few minutes.

The police vehicle then returned to the scene of the arrest where a search for the shotgun was in progress. There, Captain Leyden again advised the respondent of his *Miranda* rights. The respondent replied that he understood those rights but that he "wanted to get the gun out of the way because of the kids in the area in the school." The respondent then led the police to a nearby field, where he pointed out the shotgun under some rocks by the side of the road.

On March 20, 1975, a grand jury returned an indictment charging the respondent with the kidnaping, robbery, and murder of John Mulvaney. Before trial, the respondent moved to suppress the shotgun and the statements he had

made to the police regarding it. After an evidentiary hearing at which the respondent elected not to testify, the trial judge found that the respondent had been "repeatedly and completely advised of his *Miranda* rights." He further found that it was "entirely understandable that [the officers in the police vehicle] would voice their concern [for the safety of the handicapped children] to each other." The judge then concluded that the respondent's decision to inform the police of the location of the shotgun was "a waiver, clearly, and on the basis of the evidence that I have heard, and [*sic*] intelligent waiver, of his [*Miranda*] right to remain silent." Thus, without passing on whether the police officers had in fact "interrogated" the respondent, the trial court sustained the admissibility of the shotgun and testimony related to its discovery. That evidence was later introduced at the respondent's trial, and the jury returned a verdict of guilty on all counts.

On appeal, the Rhode Island Supreme Court, in a 3–2 decision, set aside the respondent's conviction. — R. I. —, 391 A. 2d 1158. Relying at least in part on this Court's decision in *Brewer* v. *Williams*, 430 U. S. 387, the court concluded that the respondent had invoked his *Miranda* right to counsel and that, contrary to *Miranda*'s mandate that, in the absence of counsel, all custodial interrogation then cease, the police officers in the vehicle had "interrogated" the respondent without a valid waiver of his right to counsel. It was the view of the state appellate court that, even though the police officers may have been genuinely concerned about the public safety and even though the respondent had not been addressed personally by the police officers, the respondent nonetheless had been subjected to "subtle coercion" that was the equivalent of "interrogation" within the meaning of the *Miranda* opinion. Moreover, contrary to the holding of the trial court, the appellate court concluded that the evidence was insufficient to support a finding of waiver. Having

concluded that both the shotgun and testimony relating to its discovery were obtained in violation of the *Miranda* standards and therefore should not have been admitted into evidence, the Rhode Island Supreme Court held that the respondent was entitled to a new trial.

We granted certiorari to address for the first time the meaning of "interrogation" under *Miranda* v. *Arizona*. 440 U. S. 934.

II

In its *Miranda* opinion, the Court concluded that in the context of "custodial interrogation" certain procedural safeguards are necessary to protect a defendant's Fifth and Fourteenth Amendment privilege against compulsory self-incrimination. More specifically, the Court held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." 384 U. S., at 444. Those safeguards included the now familiar *Miranda* warnings—namely, that the defendant be informed "that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires,"—or their equivalent. *Id.*, at 479.

The Court in the *Miranda* opinion also outlined in some detail the consequences that would result if a defendant sought to invoke those procedural safeguards. With regard to the right to the presence of counsel, the Court noted:

> "Once warnings have been given, the subsequent procedure is clear. . . . If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to

have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent." *Id.*, at 473–474.

In the present case, the parties are in agreement that the respondent was fully informed of his *Miranda* rights and that he invoked his *Miranda* right to counsel when he told Captain Leyden that he wished to consult with a lawyer. It is also uncontested that the respondent was "in custody" while being transported to the police station.

The issue, therefore, is whether the respondent was "interrogated" by the police officers in violation of the respondent's undisputed right under *Miranda* to remain silent until he had consulted with a lawyer.[2] In resolving this issue, we first define the term "interrogation" under *Miranda* before turning to a consideration of the facts of this case.

A

The starting point for defining "interrogation" in this context is, of course, the Court's *Miranda* opinion. There the Court observed that "[b]y custodial interrogation, we mean *questioning* initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.*, at 444 (emphasis added). This passage and other references throughout the opinion to "questioning" might suggest that the *Miranda* rules were to apply only to those police interrogation practices that involve express questioning of a defendant while in custody.

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[2] Since we conclude that the respondent was not "interrogated" for *Miranda* purposes, we do not reach the question whether the respondent waived his right under *Miranda* to be free from interrogation until counsel was present.

We do not, however, construe the *Miranda* opinion so narrowly. The concern of the Court in *Miranda* was that the "interrogation environment" created by the interplay of interrogation and custody would "subjugate the individual to the will of his examiner" and thereby undermine the privilege against compulsory self-incrimination. *Id.*, at 457–458. The police practices that evoked this concern included several that did not involve express questioning. For example, one of the practices discussed in *Miranda* was the use of line-ups in which a coached witness would pick the defendant as the perpetrator. This was designed to establish that the defendant was in fact guilty as a predicate for further interrogation. *Id.*, at 453. A variation on this theme discussed in *Miranda* was the so-called "reverse line-up" in which a defendant would be identified by coached witnesses as the perpetrator of a fictitious crime, with the object of inducing him to confess to the actual crime of which he was suspected in order to escape the false prosecution. *Ibid.* The Court in *Miranda* also included in its survey of interrogation practices the use of psychological ploys, such as to "posi[t]" "the guilt of the subject," to "minimize the moral seriousness of the offense," and "to cast blame on the victim or on society." *Id.*, at 450. It is clear that these techniques of persuasion, no less than express questioning, were thought, in a custodial setting, to amount to interrogation.[3]

This is not to say, however, that all statements obtained by the police after a person has been taken into custody are to be considered the product of interrogation. As the Court in *Miranda* noted:

> "Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily with-

[3] To limit the ambit of *Miranda* to express questioning would "place a premium on the ingenuity of the police to devise methods of indirect interrogation, rather than to implement the plain mandate of *Miranda*." *Commonwealth* v. *Hamilton*, 445 Pa. 292, 297, 285 A. 2d 172, 175.

> out any compelling influences is, of course, admissible in evidence. *The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated.* . . . Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." *Id.*, at 478 (emphasis added).

It is clear therefore that the special procedural safeguards outlined in *Miranda* are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation. "Interrogation," as conceptualized in the *Miranda* opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself.[4]

We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express

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[4] There is language in the opinion of the Rhode Island Supreme Court in this case suggesting that the definition of "interrogation" under *Miranda* is informed by this Court's decision in *Brewer* v. *Williams*, 430 U. S. 387. — R. I. —, —, 391 A. 2d 1158, 1161–1162. This suggestion is erroneous. Our decision in *Brewer* rested solely on the Sixth and Fourteenth Amendment right to counsel. 430 U. S., at 397–399. That right, as we held in *Massiah* v. *United States*, 377 U. S. 201, 206, prohibits law enforcement officers from "deliberately elicit[ing]" incriminating information from a defendant in the absence of counsel after a formal charge against the defendant has been filed. Custody in such a case is not controlling; indeed, the petitioner in *Massiah* was not in custody. By contrast, the right to counsel at issue in the present case is based not on the Sixth and Fourteenth Amendments, but rather on the Fifth and Fourteenth Amendments as interpreted in the *Miranda* opinion. The definitions of "interrogation" under the Fifth and Sixth Amendments, if indeed the term "interrogation" is even apt in the Sixth Amendment context, are not necessarily interchangeable, since the policies underlying the two constitutional protections are quite distinct. See Kamisar, *Brewer* v. *Williams*, *Massiah*, and *Miranda:* What is "Interrogation"? When Does it Matter?, 67 Geo. L. J. 1, 41–55 (1978).

questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response [5] from the suspect.[6] The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation.[7] But, since the police surely

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[5] By "incriminating response" we refer to any response—whether inculpatory or exculpatory—that the *prosecution* may seek to introduce at trial. As the Court observed in *Miranda:*

"No distinction can be drawn between statements which are direct confessions and statements which amount to 'admissions' of part or all of an offense. The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination. Similarly, for precisely the same reason, no distinction may be drawn between inculpatory statements and statements alleged to be merely 'exculpatory.' If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution. In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement." 384 U. S., at 476–477.

[6] One of the dissenting opinions seems totally to misapprehend this definition in suggesting that it "will almost certainly exclude every statement [of the police] that is not punctuated with a question mark." *Post,* at 312.

[7] This is not to say that the intent of the police is irrelevant, for it

cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response.[8]

B

Turning to the facts of the present case, we conclude that the respondent was not "interrogated" within the meaning of *Miranda*. It is undisputed that the first prong of the definition of "interrogation" was not satisfied, for the conversation between Patrolmen Gleckman and McKenna included no express questioning of the respondent. Rather, that conversation was, at least in form, nothing more than a dialogue between the two officers to which no response from the respondent was invited.

Moreover, it cannot be fairly concluded that the respondent was subjected to the "functional equivalent" of questioning. It cannot be said, in short, that Patrolmen Gleckman and McKenna should have known that their conversation was reasonably likely to elicit an incriminating response from the respondent. There is nothing in the record to suggest that the officers were aware that the respondent was peculiarly susceptible to an appeal to his conscience concerning the safety of handicapped children. Nor is there anything in the

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may well have a bearing on whether the police should have known that their words or actions were reasonably likely to evoke an incriminating response. In particular, where a police practice is designed to elicit an incriminating response from the accused, it is unlikely that the practice will not also be one which the police should have known was reasonably likely to have that effect.

[8] Any knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion might be an important factor in determining whether the police should have known that their words or actions were reasonably likely to elicit an incriminating response from the suspect.

record to suggest that the police knew that the respondent was unusually disoriented or upset at the time of his arrest.[9]

The case thus boils down to whether, in the context of a brief conversation, the officers should have known that the respondent would suddenly be moved to make a self-incriminating response. Given the fact that the entire conversation appears to have consisted of no more than a few offhand remarks, we cannot say that the officers should have known that it was reasonably likely that Innis would so respond. This is not a case where the police carried on a lengthy harangue in the presence of the suspect. Nor does the record support the respondent's contention that, under the circumstances, the officers' comments were particularly "evocative." It is our view, therefore, that the respondent was not subjected by the police to words or actions that the police should have known were reasonably likely to elicit an incriminating response from him.

The Rhode Island Supreme Court erred, in short, in equating "subtle compulsion" with interrogation. That the officers' comments struck a responsive chord is readily apparent. Thus, it may be said, as the Rhode Island Supreme Court did say, that the respondent was subjected to "subtle compulsion." But that is not the end of the inquiry. It must also be established that a suspect's incriminating response was the product of words or actions on the part of the police that they should have known were reasonably likely to elicit an incriminating response.[10] This was not established in the present case.

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[9] The record in no way suggests that the officers' remarks were *designed* to elicit a response. See n. 7, *supra*. It is significant that the trial judge, after hearing the officers' testimony, concluded that it was "entirely understandable that [the officers] would voice their concern [for the safety of the handicapped children] to each other."

[10] By way of example, if the police had done no more than to drive past the site of the concealed weapon while taking the most direct route to the police station, and if the respondent, upon noticing for the first time

For the reasons stated, the judgment of the Supreme Court of Rhode Island is vacated, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE WHITE, concurring.

I would prefer to reverse the judgment for the reasons stated in my dissenting opinion in *Brewer* v. *Williams,* 430 U. S. 387 (1977); but given that judgment and the Court's opinion in *Brewer,* I join the opinion of the Court in the present case.

MR. CHIEF JUSTICE BURGER, concurring in the judgment.

Since the result is not inconsistent with *Miranda* v. *Arizona,* 384 U. S. 436 (1966), I concur in the judgment.

The meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures; I would neither overrule *Miranda,* disparage it, nor extend it at this late date. I fear, however, that the rationale in Part II, A and B, of the Court's opinion will not clarify the tension between this holding and *Brewer* v. *Williams,* 430 U. S. 387 (1977), and our other cases. It may introduce new elements of uncertainty; under the Court's test, a police officer in the brief time available, apparently must evaluate the suggestibility and susceptibility of an accused. See, *e. g., ante,* at 302, n. 8. Few, if any, police officers are competent to make the kind of evaluation seemingly contemplated; even a psychiatrist asked to express an expert opinion on these aspects of a suspect in custody would very likely employ extensive questioning and observation to make the judgment now charged to police officers.

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the proximity of the school for handicapped children, had blurted out that he would show the officers where the gun was located, it could not seriously be argued that this "subtle compulsion" would have constituted "interrogation" within the meaning of the *Miranda* opinion.

Trial judges have enough difficulty discerning the boundaries and nuances flowing from post-*Miranda* opinions, and we do not clarify that situation today.*

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

I am substantially in agreement with the Court's definition of "interrogation" within the meaning of *Miranda* v. *Arizona*, 384 U. S. 436 (1966). In my view, the *Miranda* safeguards apply whenever police conduct is intended or likely to produce a response from a suspect in custody. As I read the Court's opinion, its definition of "interrogation" for *Miranda* purposes is equivalent, for practical purposes, to my formulation, since it contemplates that "where a police practice is designed to elicit an incriminating response from the accused, it is unlikely that the practice will not also be one which the police should have known was reasonably likely to have that effect." *Ante*, at 302, n. 7. Thus, the Court requires an objective inquiry into the likely effect of police conduct on a typical individual, taking into account any special susceptibility of the suspect to certain kinds of pressure of which the police know or have reason to know.

I am utterly at a loss, however, to understand how this objective standard as applied to the facts before us can rationally lead to the conclusion that there was no interrogation. Innis was arrested at 4:30 a. m., handcuffed, searched, advised of his rights, and placed in the back seat of a patrol car. Within a short time he had been twice more advised of his rights and driven away in a four-door sedan with three police officers. Two officers sat in the front seat and one sat beside Innis in the back seat. Since the car traveled no more than a mile before Innis agreed to point out the location of

*That we may well be adding to the confusion is suggested by the problem dealt with in *California* v. *Braeseke*, 444 U. S. 1309 (1980) (REHNQUIST, J., in chambers) (difficulty of determining whether a defendant has waived his *Miranda* rights), and cases cited therein.

the murder weapon, Officer Gleckman must have begun almost immediately to talk about the search for the shotgun.

The Court attempts to characterize Gleckman's statements as "no more than a few offhand remarks" which could not reasonably have been expected to elicit a response. *Ante*, at 303. If the statements had been addressed to respondent, it would be impossible to draw such a conclusion. The simple message of the "talking back and forth" between Gleckman and McKenna was that they had to find the shotgun to avert a child's death.

One can scarcely imagine a stronger appeal to the conscience of a suspect—*any* suspect—than the assertion that if the weapon is not found an innocent person will be hurt or killed. And not just any innocent person, but an innocent child—a little girl—a helpless, handicapped little girl on her way to school. The notion that such an appeal could not be expected to have any effect unless the suspect were known to have some special interest in handicapped children verges on the ludicrous. As a matter of fact, the appeal to a suspect to confess for the sake of others, to "display some evidence of decency and honor," is a classic interrogation technique. See, *e. g.*, F. Inbau & J. Reid, Criminal Interrogation and Confessions 60–62 (2d ed. 1967).

Gleckman's remarks would obviously have constituted interrogation if they had been explicitly directed to respondent, and the result should not be different because they were nominally addressed to McKenna. This is not a case where police officers speaking among themselves are accidentally overheard by a suspect. These officers were "talking back and forth" in close quarters with the handcuffed suspect,* traveling past the very place where they believed the weapon was located. They knew respondent would hear and attend to their conversation, and they are chargeable with knowledge

*Gleckman may even have been sitting in the back seat beside respondent. See App. 50, 52, 56; but see *id.*, 39, 43, 47, 58.

of and responsibility for the pressures to speak which they created.

I firmly believe that this case is simply an aberration, and that in future cases the Court will apply the standard adopted today in accordance with its plain meaning.

MR. JUSTICE STEVENS, dissenting.

An original definition of an old term coupled with an original finding of fact on a cold record makes it possible for this Court to reverse the judgment of the Supreme Court of Rhode Island. That court, on the basis of the facts in the record before it, concluded that members of the Providence, R. I., police force had interrogated respondent, who was clearly in custody at the time, in the absence of counsel after he had requested counsel. In my opinion the state court's conclusion that there was interrogation rests on a proper interpretation of both the facts and the law; thus, its determination that the products of the interrogation were inadmissible at trial should be affirmed.

The undisputed facts can be briefly summarized. Based on information that respondent, armed with a sawed-off shotgun, had just robbed a cabdriver in the vicinity of Rhode Island College, a number of Providence police officers began a thorough search of the area in the early morning of January 17, 1975. One of them arrested respondent without any difficulty at about 4:30 a. m. Respondent did not then have the shotgun in his possession and presumably had abandoned it, or hidden it, shortly before he was arrested. Within a few minutes, at least a dozen officers were on the scene. App. 37. It is fair to infer that an immediate search for the missing weapon was a matter of primary importance.

When a police captain arrived, he repeated the *Miranda* warnings that a patrolman and a sergeant had already given to respondent, and respondent said he wanted an attorney. The captain then ordered two officers who were assigned to

a "caged wagon" to transport respondent to the central station, and ordered a third officer to ride in the back seat with respondent. While the wagon was en route to the station, one of the officers, Officer Gleckman, stated that there was a school for handicapped children in the vicinity and "God forbid" one of them should find the shotgun and hurt herself.[1] As a result of this statement, respondent told the officers that he was willing to show them where the gun was hidden.[2] The wagon returned to the scene and respondent helped the officers locate the gun.

After a suppression hearing, the trial court assumed, without deciding, that Officer Gleckman's statement constituted interrogation. He nevertheless allowed the shotgun and testimony concerning respondent's connection to it into evidence on the ground that respondent had waived his *Miranda* rights when he consented to help police locate the gun. On appeal from respondent's conviction for kidnaping, robbery and murder, the Rhode Island Supreme Court held that Officer Gleckman's statement constituted impermissible interrogation and rejected the trial court's waiver analysis. It therefore reversed respondent's conviction and remanded for a new trial. Today, the Court reverses the Rhode Island court's resolution of the interrogation issue, creating a new definition of that term and holding, as a matter of law, that the statement at issue in this case did not constitute interrogation.

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[1] Although the testimony is not entirely clear as to the exact wording of Officer Gleckman's statement, it appears that he talked about the possible danger being to a little girl. App. 59.

[2] After he returned to the scene, respondent told the police captain that he wanted to help them locate the shotgun because he "wanted to get the gun out of the way because of the kids in the area in the school." *Id.*, at 39. Given the timing of respondent's statement and the absence of any evidence that he knew about the school prior to Officer Gleckman's statement, it is clear that respondent's statement was the direct product of the conversation in the police wagon.

I

As the Court recognizes, *Miranda* v. *Arizona*, 384 U. S. 436, makes it clear that, once respondent requested an attorney, he had an absolute right to have any type of interrogation cease until an attorney was present.[3] As it also recognizes, *Miranda* requires that the term "interrogation" be broadly construed to include "either express questioning or its functional equivalent." *Ante*, at 300–301.[4] In my view any statement that would normally be understood by the average listener as calling for a response is the functional equivalent of a direct question, whether or not it is punctuated by a question mark. The Court, however, takes a much narrower view. It holds that police conduct is not the "functional equivalent" of direct questioning unless the police should have known that what they were saying or doing was likely to elicit an incriminating response from the suspect.[5] This holding represents a plain departure from the principles set forth in *Miranda*.

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[3] *Ante*, at 293, 297–298. In *Miranda* the Court explicitly stated: "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present." 384 U. S., at 474.

[4] As the Court points out, *ante*, at 299, the Court in *Miranda* was acutely aware of the fact that police interrogation techniques are not limited to direct questioning.

[5] "That is to say, the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Ante*, at 301.

In limiting its test to police statements "likely to elicit an incriminating response," the Court confuses the scope of the exclusionary rule with the definition of "interrogation." Of course, any incriminating statement as defined in *Miranda*, quoted *ante*, at 301, n. 5, must be excluded from evidence if it is the product of impermissible interrogation. But I fail to see how this rule helps in deciding whether a particular statement or tactic constitutes "interrogation." After all, *Miranda* protects a suspect in Innis' position not simply from interrogation that is likely to be successful, but from any interrogation at all.

In *Miranda* the Court required the now-familiar warnings to be given to suspects prior to custodial interrogation in order to dispel the atmosphere of coercion that necessarily accompanies such interrogations. In order to perform that function effectively, the warnings must be viewed by both the police and the suspect as a correct and binding statement of their respective rights.[6] Thus, if, after being told that he has a right to have an attorney present during interrogation, a suspect chooses to cut off questioning until counsel can be obtained, his choice must be "scrupulously honored" by the police. See *Michigan* v. *Mosley*, 423 U. S. 96, 104; *id.*, at 110, n. 2 (WHITE, J., concurring in result). At the least this must mean that the police are prohibited from making deliberate attempts to elicit statements from the suspect.[7] Yet the Court is unwilling to characterize all such attempts as "interrogation," noting only that "where a police practice is designed to elicit an incriminating response from the accused, it is unlikely that the practice will not also be one which the police

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[6] "We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored." 384 U. S., at 467.

[7] In *Brewer* v. *Williams*, 430 U. S. 387, 398–399, the Court applied the "deliberately elicited" standard in determining that statements were extracted from Williams in violation of his Sixth Amendment right to counsel. Although this case involves Fifth Amendment rights and the *Miranda* rules designed to safeguard those rights, respondent's invocation of his right to counsel makes the two cases indistinguishable. In both cases the police had an unqualified obligation to refrain from trying to elicit a response from the suspect in the absence of his attorney. See Kamisar, *Brewer v. Williams, Massiah*, and *Miranda:* What is "Interrogation"? When Does it Matter?, 67 Geo. L. J. 1, 73 (1978).

should have known was reasonably likely to have that effect." [8] *Ante*, at 302, n. 7.

From the suspect's point of view, the effectiveness of the warnings depends on whether it appears that the police are scrupulously honoring his rights. Apparent attempts to elicit information from a suspect after he has invoked his right to cut off questioning necessarily demean that right and tend to reinstate the imbalance between police and suspect that the *Miranda* warnings are designed to correct.[9] Thus, if the rationale for requiring those warnings in the first place is to be respected, any police conduct or statements that would appear to a reasonable person in the suspect's position to call for a response must be considered "interrogation." [10]

In short, in order to give full protection to a suspect's right to be free from any interrogation at all, the definition of "interrogation" must include any police statement or conduct that has the same purpose or effect as a direct question. Statements that appear to call for a response from the suspect, as well as those that are designed to do so, should be considered interrogation. By prohibiting only those relatively few statements or actions that a police officer should know are likely to elicit an incriminating response, the Court today accords a suspect

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[8] This factual assumption is extremely dubious. I would assume that police often interrogate suspects without any reason to believe that their efforts are likely to be successful in the hope that a statement will nevertheless be forthcoming.

[9] See White, Police Trickery in Inducing Confessions, 127 U. Pa. L. Rev. 581, 609–611 (1979). As MR. JUSTICE WHITE pointed out in his opinion concurring in the result in *Michigan* v. *Mosley*, 423 U. S. 96, when a suspect invokes his right to an attorney, he is expressing "his own view that he is not competent to deal with the authorities without legal advice." *Id.*, at 110, n. 2. Under these circumstances, continued interrogation is likely to produce the same type of coercive atmosphere that the *Miranda* warnings are supposed to dispel.

[10] I would use an objective standard both to avoid the difficulties of proof inherent in a subjective standard and to give police adequate guidance in their dealings with suspects who have requested counsel.

considerably less protection. Indeed, since I suppose most suspects are unlikely to incriminate themselves even when questioned directly, this new definition will almost certainly exclude every statement that is not punctuated with a question mark from the concept of "interrogation." [11]

The difference between the approach required by a faithful adherence to *Miranda* and the stinted test applied by the Court today can be illustrated by comparing three different ways in which Officer Gleckman could have communicated his fears about the possible dangers posed by the shotgun to handicapped children. He could have:

(1) directly asked Innis:

> Will you please tell me where the shotgun is so we can protect handicapped schoolchildren from danger?

(2) announced to the other officers in the wagon:

> If the man sitting in the back seat with me should decide to tell us where the gun is, we can protect handicapped children from danger.

or (3) stated to the other officers:

> It would be too bad if a little handicapped girl would pick up the gun that this man left in the area and maybe kill herself.

In my opinion, all three of these statements should be considered interrogation because all three appear to be designed to elicit a response from anyone who in fact knew where the gun was located.[12] Under the Court's test, on the other hand,

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[11] The Court's suggestion, *ante*, at 301, n. 6, that I totally misapprehend the import of its definition is belied by its application of the new standard to the facts of this case.

[12] See White, *Rhode Island v. Innis:* The Significance of a Suspect's Assertion of His Right to Counsel, 17 Am. Crim. L. Rev. 53, 68 (1979), where the author proposes the same test and applies it to the facts of this case, stating:

"Under the proposed objective standard, the result is obvious. Since the conversation indicates a strong desire to know the location of the

the form of the statements would be critical. The third statement would not be interrogation because in the Court's view there was no reason for Officer Gleckman to believe that Innis was susceptible to this type of an implied appeal, *ante*, at 302; therefore, the statement would not be reasonably likely to elicit an incriminating response. Assuming that this is true, see *infra*, at 314–315, then it seems to me that the first two statements, which would be just as unlikely to elicit such a response, should also not be considered interrogation. But, because the first statement is clearly an express question, it *would* be considered interrogation under the Court's test. The second statement, although just as clearly a deliberate appeal to Innis to reveal the location of the gun, would presumably not be interrogation because (a) it was not in form a direct question and (b) it does not fit within the "reasonably likely to elicit an incriminating response" category that applies to indirect interrogation.

As this example illustrates, the Court's test creates an incentive for police to ignore a suspect's invocation of his rights in order to make continued attempts to extract information from him. If a suspect does not appear to be susceptible to a particular type of psychological pressure,[13] the police are apparently free to exert that pressure on him despite his request for counsel, so long as they are careful not to punctuate their statements with question marks. And if, contrary to all reasonable expectations, the suspect makes an

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shotgun, any person with knowledge of the weapon's location would be likely to believe that the officers wanted him to disclose its location. Thus, a reasonable person in Innis's position would believe that the officers were seeking to solicit precisely the type of response that was given."

[13] As THE CHIEF JUSTICE points out in his concurring opinion, "[f]ew, if any, police officers are competent to make the kind of evaluation seemingly contemplated [by the Court's opinion]" except by close and careful observation. *Ante*, at 304. Under these circumstances, courts might well find themselves deferring to what appeared to be good-faith judgments on the part of the police.

incriminating statement, that statement can be used against him at trial. The Court thus turns *Miranda*'s unequivocal rule against any interrogation at all into a trap in which unwary suspects may be caught by police deception.

II

Even if the Court's new definition of the term "interrogation" provided a proper standard for deciding this case, I find it remarkable that the Court should undertake the initial task of applying its new standard to the facts of the present case. As noted above, the trial judge did not decide whether Officer Gleckman had interrogated respondent. Assuming, *arguendo*, that he had, the judge concluded that respondent had waived his request for counsel by offering to help find the gun. The Rhode Island Supreme Court disagreed on the waiver questions,[14] and expressly concluded that interrogation had occurred. Even if the Rhode Island court might have reached a different conclusion under the Court's new definition, I do not believe we should exclude it from participating in a review of the actions taken by the Providence police. Indeed, given the creation of a new standard of decision at this stage of the litigation, the proper procedure would be to remand to the trial court for findings on the basis of evidence directed at the new standard.

In any event, I think the Court is clearly wrong in holding, as a matter of law, that Officer Gleckman should not have realized that his statement was likely to elicit an incriminating

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[14] Like the Rhode Island Supreme Court, I think it takes more than a prisoner's answer to a question to waive his right not to have the question asked in the first place. See *Brewer* v. *Williams*, 430 U. S., at 404; *Michigan* v. *Mosley*, 423 U. S., at 110, n. 2 (WHITE, J., concurring in result) ("[T]he accused having expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism"). See also *People* v. *Cunningham*, 49 N. Y. 2d 203, 210, 400 N. E. 2d 360, 364–365 (1980).

response. The Court implicitly assumes that, at least in the absence of a lengthy harangue, a criminal suspect will not be likely to respond to indirect appeals to his humanitarian impulses. It then goes on to state that the officers in this case had no reason to believe that respondent would be unusually susceptible to such appeals. *Ante*, at 302. Finally, although the significance of the officer's intentions is not clear under its objective test, the Court states in a footnote that the record "in no way suggests" that Officer Gleckman's remarks were designed to elicit a response. *Ante*, at 303, n. 9.

The Court's assumption that criminal suspects are not susceptible to appeals to conscience is directly contrary to the teachings of police interrogation manuals, which recommend appealing to a suspect's sense of morality as a standard and often successful interrogation technique.[15] Surely the practical experience embodied in such manuals should not be ignored in a case such as this in which the record is devoid of any evidence—one way or the other—as to the susceptibility of suspects in general or of Innis in particular.

Moreover, there is evidence in the record to support the view that Officer Gleckman's statement was intended to elicit a response from Innis. Officer Gleckman, who was not regularly assigned to the caged wagon, was directed by a police captain to ride with respondent to the police station. Although there is a dispute in the testimony, it appears that Gleckman may well have been riding in the back seat with Innis.[16] The record does not explain why, notwithstanding

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[15] See, *e. g.*, F. Inbau & J. Reid, Criminal Interrogation and Confessions 60–61 (2d ed. 1967). Under the heading "Urge the Subject to Tell the Truth for the Sake of His Own Conscience, Mental Relief, or Moral Well-being, as Well as 'for the Sake of Everybody Concerned,' and Also Because It Is 'the Only Decent and Honorable Thing to Do,'" the authors advise interrogators to "challenge . . . the offender to display some evidence of decency and honor" by appealing to his religious or moral sensibilities.

[16] Officer Gleckman testified that he was riding in the front seat with the driver. App. 46. However, Officer McKenna, who had also ridden

the fact that respondent was handcuffed, unarmed, and had offered no resistance when arrested by an officer acting alone, the captain ordered Officer Gleckman to ride with respondent.[17] It is not inconceivable that two professionally trained police officers concluded that a few well-chosen remarks might induce respondent to disclose the whereabouts of the shotgun.[18] This conclusion becomes even more plausible in light of the emotionally charged words chosen by Officer Gleckman ("God forbid" that a "little girl" should find the gun and hurt herself).[19]

III

Under my view of the correct standard, the judgment of the Rhode Island Supreme Court should be affirmed because the

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in the wagon, and the police captain both testified that Gleckman rode in the back seat with the suspect. *Id.*, at 50–52, 55–56, 38–39. Thereafter, the third officer in the wagon corroborated Gleckman's testimony. *Id.*, at 58.

[17] This was apparently a somewhat unusual procedure. Officer McKenna testified:

"If I remember correctly, the vehicle—Innis was placed in it and the vehicle door was closed, and we were waiting for instructions from Captain Leyden. . . . At that point, Captain Leyden instructed Patrolman Gleckman to accompany us. There's usually two men assigned to the wagon, but in this particular case he wanted a third man to accompany us, and Gleckman got in the rear seat. In other words, the door was closed. Gleckman opened the door and got in the vehicle with the subject. Myself, I went over to the other side and got in the passenger's side in the front." *Id.*, 55–56.

[18] Although Officer Gleckman testified that the captain told him not to interrogate, intimidate or coerce respondent on the way back, *id.*, at 46, this does not rule out the possibility that either or both of them thought an indirect psychological ploy would be permissible.

[19] In his article quoted in n. 12, *supra*, Professor White also points out that the officers were probably aware that the chances of a handicapped child's finding the weapon at a time when police were not present were relatively slim. Thus, he concluded that it was unlikely that the true purpose of the conversation was to voice a genuine concern over the children's welfare. See 17 Am. Crim. L. Rev., at 68.

statements made within Innis' hearing were as likely to elicit a response as a direct question. However, even if I were to agree with the Court's much narrower standard, I would disagree with its disposition of this particular case because the Rhode Island courts should be given an opportunity to apply the new standard to the facts of this case.

GENERAL TELEPHONE COMPANY OF THE NORTHWEST, INC., ET AL. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 79–488. Argued March 25, 26, 1980—Decided May 12, 1980

Section 706 (a) of Title VII of the Civil Rights Act of 1964 empowers the Equal Employment Opportunity Commission (EEOC) "to prevent any person from engaging in any unlawful practice" as set forth in Title VII. Section 706 (f)(1) authorizes the EEOC, after unlawful employment practice charges against a private employer are filed with it and it is unable to secure a conciliation agreement, to bring a civil action against the employer. And § 706 (g), in addition to providing for injunctive relief, provides for reinstatement or hiring of aggrieved employees with or without backpay. On the basis of sex discrimination charges filed by four employees of petitioner employer, the EEOC brought suit in Federal District Court under § 706 (f)(1), alleging discrimination against female employees in four States and seeking injunctive relief and backpay for the women affected by the challenged practices. The EEOC did not seek class certification pursuant to Federal Rule of Civil Procedure 23, and petitioner employer moved to dismiss the class action aspects of the complaint. The District Court denied the motion and the Court of Appeals, on interlocutory appeal, affirmed.

Held: The EEOC may seek classwide relief under § 706 (f)(1) without being certified as the class representative under Rule 23. Pp. 323–334.

(a) The language of §§ 706 (a), (f)(1), and (g) clearly authorizes the procedure that the EEOC followed in this case. Pp. 323–325.

(b) This understanding of the statute is supported by the purpose of the 1972 amendments to Title VII of securing more effective enforcement of Title VII by adding § 706 (f)(1) to authorize a civil enforcement suit by the EEOC as a supplement to the pre-existing private action. Under § 706 (f)(1), Congress sought to implement the public interest as well as to bring about more effective enforcement of private rights. The private action rights under § 706 (f)(1) suggest that the EEOC is not merely a proxy for the victims of discrimination and that the EEOC's enforcement suits should not be considered representative actions subject to Rule 23. When the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination. Pp. 325–326.

(c) Prior to 1972, the only civil actions authorized other than private lawsuits were actions by the Attorney General upon reasonable cause to suspect "a pattern or practice" of discrimination, and such actions were brought in the name of the United States—not as a representative of the persons aggrieved—without obtaining certification under Rule 23 even though specific relief was awarded to individuals not parties to the suit. The 1972 amendments transferred the Attorney General's authority to bring "pattern or practice" suits to the EEOC, and Congress intended the EEOC to proceed in the same manner. Pp. 327–329.

(d) Forcing EEOC civil actions into the Rule 23 model would in many cases distort the Rule as it is commonly interpreted and in others foreclose enforcement actions not satisfying prevailing Rule 23 standards as to numerosity, commonality, typicality, and adequacy of representation but seemingly authorized by § 706 (f)(1). The undesirability of doing either supports the conclusion that the procedural requirements of the Rule do not apply. Pp. 329–331.

(e) Departure from the statutory design is not warranted on the theory that Rule 23 should be invoked in order to secure a judgment in the EEOC's suit that will be binding upon all individuals with similar grievances in the class or subclasses that might be certified. It would not be consistent with the remedial purpose of the statutes to bind all "class" members with discrimination grievances against an employer by the relief obtained under an EEOC judgment or settlement against the employer, especially in view of the possible differences between the public and private interests involved. However, the courts are not powerless to prevent undue hardship to the defendant, and where the EEOC has prevailed in its action, the court may reasonably require any individual who claims under its judgment to relinquish his right to bring a separate private action. Pp. 332–333.

599 F. 2d 322, affirmed.

WHITE, J., delivered the opinion of the Court, in which BRENNAN, STEWART, MARSHALL, and BLACKMUN, JJ., joined. BURGER, C. J., and POWELL, REHNQUIST, and STEVENS, JJ., filed a dissenting statement, *post*, p. 334.

James R. Dickens argued the cause for petitioners. With him on the briefs were *C. Lee Coulter* and *N. Huntley Holland*.

Deputy Solicitor General Wallace argued the cause for respondents. With him on the brief for the federal respond-

ent were *Solicitor General McCree, Leroy D. Clark,* and *Joseph T. Eddins. Herman L. Wacker* filed a memorandum for Local Union No. 89, International Brotherhood of Electrical Workers, respondent under this Court's Rule 21 (4).*

MR. JUSTICE WHITE delivered the opinion of the Court.

The issue in this case is whether the Equal Employment Opportunity Commission (EEOC) may seek classwide relief under § 706 (f)(1) of Title VII of the Civil Rights Act of 1964 (Title VII) without being certified as the class representative under Rule 23 of the Federal Rules of Civil Procedure. The Court of Appeals for the Ninth Circuit held that certification was not required. 599 F. 2d 322 (1979). Because this is a recurring issue on which the federal courts are divided,[1] we granted certiorari, 444 U. S. 989 (1979). We affirm the judgment.

I

Four employees of General Telephone Company of the Northwest, Inc. (General Telephone), filed charges with the EEOC complaining of sex discrimination in employment. After investigation, the EEOC found reasonable cause to suspect discrimination against women and in April 1977 brought suit in the United States District Court for the Western District of Washington under § 706 (f)(1) of Title VII, as amended, § 4, 86 Stat. 105, 42 U. S. C. § 2000e–5

**Avrum M. Goldberg, William R. Weissman, Robert E. Williams, Douglas S. McDowell,* and *Philip Elman* filed a brief for the Equal Employment Advisory Council as *amicus curiae* urging reversal.

Barry L. Goldstein and *Jack Greenberg* filed a brief for the N. A. A. C. P. Legal Defense and Educational Fund, Inc., as *amicus curiae* urging affirmance.

[1] The Fifth Circuit previously addressed this same issue and held that certification was required. *EEOC* v. *D. H. Holmes Co., Ltd.*, 556 F. 2d 787 (1977), cert. denied, 436 U. S. 962 (1978). The District Courts have decided the issue both ways.

(f)(1).[2] The EEOC named as defendants General Telephone and its subsidiary, West Coast Telephone Company of California, Inc. (hereinafter collectively referred to as General Telephone), as well as the certified bargaining agent, Local Union No. 89, International Brotherhood of Electrical Workers. The complaint alleged discrimination against female employees in General Telephone's facilities in the States of California, Idaho, Montana, and Oregon, in the form of restrictions on maternity leave, access to craft jobs, and promotion to managerial positions; it sought injunctive relief and backpay for the women affected by the challenged practices.

The complaint did not mention Federal Rule of Civil Procedure 23,[3] and the EEOC did not seek class certification pur-

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[2] Section 706 (f)(1) provides in pertinent part:

"If within thirty days after a charge is filed with the Commission . . . , the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. . . . The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission . . . . If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section . . . or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice."

[3] Rule 23 provides in pertinent part:

"(a) Prerequisites to a Class Action.

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact com-

suant to that Rule. In August 1977, the EEOC moved pursuant to Federal Rule of Civil Procedure 42 (b) "for an order bifurcating the issue of class liability from the issue of individual damages." The District Court referred the motion to a Magistrate, see Title VII, § 706 (f)(5), and General Telephone moved "for an order dismissing the class action aspects" of the complaint.[4]

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mon to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

"(b) Class Actions Maintainable.

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

"(1) the prosecution of separate actions by or against individual members of the class would create a risk of

"(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

"(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

"(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

"(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

[4] Local Union No. 89, International Brotherhood of Electrical Workers, did not join in this motion. Discussions were underway between the union and the EEOC to resolve the allegations in the complaint against the

The Magistrate concluded that the EEOC was not required to comply with Rule 23 and recommended that the motion be denied. The District Court adopted the recommendation, denied the motion to dismiss, and then certified the issue for interlocutory appeal to the Ninth Circuit. The Court of Appeals accepted the appeal, see 28 U. S. C. § 1292 (b), and affirmed the District Court's ruling.

II

We agree with the Court of Appeals that Rule 23 is not applicable to an enforcement action brought by the EEOC in its own name and pursuant to its authority under § 706 to prevent unlawful employment practices.[5] We rely on the language of Title VII, the legislative intent underlying the 1972 amendments to Title VII, and the enforcement procedures under Title VII prior to the amendments.

A

Title VII protects all employees of and applicants for employment with a covered employer, employment agency, labor organization, or training program against discrimination based on race, color, religion, sex, or national origin. Section 706 (a) empowers the EEOC "to prevent any person from engaging in any unlawful . . . practice" as set forth in the Title. Sec-

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union. The union also did not participate in the appeal to the Ninth Circuit following the denial of the motion to dismiss. On December 18, 1978, the District Court entered a consent decree against the union; General Telephone's cross-claim for judgment against the union if General Telephone is found liable on the sex discrimination claims is still pending.

The union also did not join in General Telephone's petition for certiorari and is, therefore, a respondent in this Court. See this Court's Rule 21 (4).

[5] Petitioners characterize this action as a "class action"; the EEOC characterizes it as an action "affecting a class of individuals." We need not choose between these characterizations. The issue is whether an action, however it is styled, brought by a Government agency to enforce the federal law with whose enforcement the agency is charged is subject to the requirements of Rule 23.

tion 706 (f)(1) specifically authorizes the EEOC to bring a civil action against any respondent not a governmental entity upon failure to secure an acceptable conciliation agreement,[6] the purpose of the action being to terminate unlawful practices and to secure appropriate relief, including "reinstatement or hiring . . . , with or without back pay," for the victims of the discrimination. See § 706 (g).

Title VII thus itself authorizes the procedure that the EEOC followed in this case. Upon finding reasonable cause to believe that General Telephone had discriminated against female employees, the EEOC filed suit seeking a permanent injunction against the discriminatory practices, remedial action to eradicate the effect of past discrimination, and "make whole" backpay, with interest, for persons adversely affected by the unlawful practices. Given the clear purpose of Title VII, the EEOC's jurisdiction over enforcement, and the remedies available, the EEOC need look no farther than § 706 for its authority to bring suit in its own name for the purpose, among others, of securing relief for a group of aggrieved individuals. Its authority to bring such actions is in no way dependent upon Rule 23, and the Rule has no application to a § 706 suit.

Of course, Title VII defendants do not welcome the prospect of backpay liability; but the law provides for such liability and the EEOC's authority to sue for it. Moreover, the EEOC here requested relief only on behalf of "those persons adversely affected" and "in an amount to be proved at trial." App. 11. There is no claim or suggestion of unjustified, windfall backpay awards. That backpay relief is authorized is no basis for imposing the Rule 23 framework in an EEOC enforcement action. We do no more than follow a straightforward reading of the statute, which seems to us to authorize the EEOC to sue in its own name to enforce federal law by

[6] The Attorney General is authorized to bring suit against a governmental entity.

obtaining appropriate relief for those persons injured by discriminatory practices forbidden by the Act.

B

This understanding of the statute is supported by the purpose of the 1972 amendments of providing the EEOC with enforcement authority. The purpose of the amendments, plainly enough, was to secure more effective enforcement of Title VII. As Title VII was originally enacted as part of the Civil Rights Act of 1964, the EEOC's role in eliminating unlawful employment practices was limited to "informal methods of conference, conciliation, and persuasion." Civil actions for enforcement upon the EEOC's inability to secure voluntary compliance could be filed only by the aggrieved person. § 706 (e), 78 Stat. 260. Congress became convinced, however, that the "failure to grant the EEOC meaningful enforcement powers has proven to be a major flaw in the operation of Title VII."[7] S. Rep. No. 92–415, p. 4 (1971). The 1972 amendments to § 706 accordingly expanded the EEOC's enforcement powers by authorizing the EEOC to bring a civil action in federal district court against private employers reasonably suspected of violating Title VII. In

[7] The Senate Report on the amendments notes:

"The most striking deficiency of the 1964 Act is that the EEOC does not have the authority to issue judicially enforceable orders to back up its findings of discrimination. . . .

"As a consequence, unless the Department of Justice concludes that a pattern or practice of resistance to Title VII is involved, the burden of obtaining enforceable relief rests upon each individual victim of discrimination, who must go into court as a private party, with the delay and expense that entails, in order to secure the rights promised him under the law." S. Rep. No. 92–415, p. 4 (1971).

The Senate Committee contemplated EEOC enforcement through an administrative proceeding followed by a cease-and-desist order with review in the appropriate United States Court of Appeals. Although a floor amendment changed the procedure to a civil suit in the district court, the policy remained the same.

so doing, Congress sought to implement the public interest as well as to bring about more effective enforcement of private rights. The amendments did not transfer all private enforcement to the EEOC and assign to that agency exclusively the task of protecting private interests. The EEOC's civil suit was intended to supplement, not replace, the private action. Cf. *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, 45 (1974). The EEOC was to bear the primary burden of litigation, but the private action previously available under § 706 was not superseded. Under § 706 (f)(1), the aggrieved person may bring his own action at the expiration of the 180-day period of exclusive EEOC administrative jurisdiction if the agency has failed to move the case along to the party's satisfaction, has reached a determination not to sue, or has reached a conciliation or settlement agreement with the respondent that the party finds unsatisfactory. The aggrieved person may also intervene in the EEOC's enforcement action. These private action rights suggest that the EEOC is not merely a proxy for the victims of discrimination and that the EEOC's enforcement suits should not be considered representative actions subject to Rule 23. Although the EEOC can secure specific relief, such as hiring or reinstatement, constructive seniority, or damages for backpay or benefits denied, on behalf of discrimination victims, the agency is guided by "the overriding public interest in equal employment opportunity . . . asserted through direct Federal enforcement." 118 Cong. Rec. 4941 (1972). When the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination.[8]

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[8] Cf. *Occidental Life Ins. Co.* v. *EEOC*, 432 U. S. 355, 368 (1977) ("[U]nder the procedural structure created by the 1972 amendments, the EEOC does not function simply as a vehicle for conducting litigation on behalf of private parties; it is a federal administrative agency charged with the responsibility of investigating claims of employment discrimina-

C

Prior to 1972, the only civil actions authorized other than private lawsuits were actions by the Attorney General upon reasonable cause to suspect "a pattern or practice" of discrimination. These actions did not depend upon the filing of a charge with the EEOC; nor were they designed merely to advance the personal interest of any particular aggrieved person. Prior to 1972, the Department of Justice filed numerous § 707 pattern or practice suits. 118 Cong. Rec. 4080 (1972) (remarks of Sen. Williams). In none was it ever suggested that the Attorney General sued in a representative capacity or that his enforcement suit must comply with the requirements of Rule 23;[9] and this was true even though specific relief was awarded to individuals not parties to the suit.[10]

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tion and settling disputes, if possible, in an informal, noncoercive fashion"). Cf. also *Porter* v. *Warner Holding Co.*, 328 U. S. 395, 397–398 (1946) (The Price Administrator "invoke[s] the jurisdiction of the District Court to enjoin acts and practices made illegal by the [Emergency Price Control Act of 1942] and to enforce compliance with the Act. . . . [S]ince the public interest is involved in a proceeding of this nature, [the District Court's] equitable powers assume an even broader and more flexible character than when only a private controversy is at stake").

[9] Nor has it been so suggested in § 707 suits brought since 1972. In fact, the only Court of Appeals to hold that the EEOC must comply with Rule 23 in its § 706 actions has intimated that the procedural requirements would not apply in a § 707 action. The Fifth Circuit, in *EEOC* v. *D. H. Holmes Co.*, although imposing the Rule 23 strictures on § 706 actions, noted "emphatically that this is *not* a situation in which application of procedural rules will thwart any substantive right whatsoever.

"*If*, for any reason, EEOC is not certified below but still believes a pattern or practice of discrimination exists in the Holmes Company, its recourse is to file a suit under § 707. . . ." 556 F. 2d, at 792, n. 8.

[10] See, *e. g.*, *United States* v. *Chesapeake & O. R. Co.*, 471 F. 2d 582, 589–590 (CA4 1972) (constructive seniority), cert. denied *sub nom. Railroad Trainmen* v. *United States*, 411 U. S. 939 (1973); *United States* v. *St. Louis-S. F. R. Co.*, 464 F. 2d 301, 309–311 (CA8 1972) (en banc) (preferential hiring and constructive seniority), cert. denied *sub nom. Transportation Union* v. *United States*, 409 U. S. 1107 (1973); *United*

The 1972 amendments, in addition to providing for a § 706 suit by the EEOC pursuant to a charge filed by a private party, transferred to the EEOC the Attorney General's authority to bring pattern-or-practice suits on his own motion. In discussing the transfer,[11] Senator Hruska described § 707 actions as "in the nature of class actions." 118 Cong. Rec. 4080 (1972). Senator Williams then noted that, upon the transfer, "[t]here will be no difference between the cases that the Attorney General can bring under section 707 as a 'pattern or practice' charge and those which the [EEOC] will be able to bring." *Id.*, at 4081. Senator Javits agreed with both Senators: "The EEOC . . . has the authority to institute exactly the same actions that the Department of Justice does under pattern or practice."[12] Senator Javits further noted

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States v. *Ironworkers Local 86*, 443 F. 2d 544, 548, 552–554 (CA9) (preferential hiring), cert. denied, 404 U. S. 984 (1971).

Since 1972, backpay has also been awarded in pattern-or-practice suits, and without suggestion that Rule 23 is implicated. *E. g., EEOC* v. *Detroit Edison Co.*, 515 F. 2d 301, 314–315 (CA6 1975); *United States* v. *Georgia Power Co.*, 474 F. 2d 906, 919–920 (CA5 1973); cf. *United States* v. *N. L. Industries, Inc.*, 479 F. 2d 354, 378–380 (CA8 1973). And we see nothing to indicate that prior to 1972, in cases where backpay was requested and denied, the result rested on the ground that the Government could not obtain individual relief in its enforcement action without compliance with Rule 23. See, *e. g., United States* v. *St. Louis-S. F. R. Co., supra*, at 311; *United States* v. *Hayes Int'l Corp.*, 456 F. 2d 112, 121 (CA5 1972).

[11] The legislative debate at this point focused on whether and when to make the transfer. The issue arose in the wake of the decision the day before to empower the EEOC to proceed by civil action and not cease-and-desist order. As finally agreed upon, the transfer was to occur two years after the effective date of the amendments.

[12] Senator Javits goes on here to note that "[t]hese are essentially class actions, and if they can sue for an individual claimant, then they can sue for a group of claimants." Given its juxtaposition between the discussion of the Department of Justice's pattern-or-practice actions and the EEOC's newly granted ability to sue, it is unclear whether the Senator's characterization here as "class actions" referred to § 707 or § 706.

that "if [the EEOC] proceeds by suit, then it can proceed by class suit. If it proceeds by class suit, it is in the position of doing exactly what the Department of Justice does in pattern and practice suits. . . . [T]he power to sue . . . fully qualifies the [EEOC] to take precisely the action now taken by the Department of Justice." *Id.*, at 4081–4082. As we have said, the Department of Justice brought its suits in the name of the United States and without obtaining certification under Rule 23—it did not sue as a representative of the persons aggrieved—and we must assume Congress' familiarity with the procedure. It is clear that with the 1972 amendments Congress intended the EEOC to proceed in the same manner; and thus, given the context, it is similarly clear that the references in debate to "class" suits referred to the availability of relief and not the procedure that would be applicable in such actions.[13]

III

It is also apparent that forcing EEOC civil actions into the Rule 23 model would in many cases distort the Rule as it is

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[13] Petitioners rely heavily on the statement by Senator Javits immediately following the quotation set out in n. 12, *supra*, that "this is provided for by the rules of civil procedure in the Federal courts." The Senator then elaborated:

"I have referred to the rules of civil procedure. I now refer specifically to rule 23 of those rules, which is entitled Class Actions and which give[s] the opportunity to engage in the Federal Court in class actions by properly suing parties. We ourselves have given permission to the EEOC to be a properly suing party." 118 Cong. Rec. 4082 (1972).

Again, given the context, the point that emerges most clearly is that the Senator's comments merely compare the effect of the amendments to § 706 with the Rule 23 procedure; the comments were not intended to impose the requirements of the Rule on the § 706 action. Indeed, the idea that the EEOC's enforcement suits were to be subject to the full range of Rule 23 requirements is completely inconsistent with the Senator's own comparisons, noted in text, between the EEOC's authority under § 706 as amended and the authority of the Department of Justice under the original version of § 707.

commonly interpreted and in others foreclose enforcement actions not satisfying prevailing Rule 23 standards but seemingly authorized by § 706 (f)(1). The undesirability of doing either supports our conclusion that the procedural requirements of the Rule do not apply.

A

Rule 23 (a), see n. 3, *supra*, imposes the prerequisites of numerosity, commonality, typicality, and adequacy of representation. When considered in the light of these requirements, it is clear that the Rule was not designed to apply to EEOC actions brought in its own name for the enforcement of federal law. Some of the obvious and more severe problems are worth noting.

The numerosity requirement requires examination of the specific facts of each case and imposes no absolute limitations. Title VII, however, applies to employers with as few as 15 employees. When judged by the size of the putative class in various cases in which certification has been denied, this minimum would be too small to meet the numerosity requirement.[14] In such cases, applying Rule 23 would require the EEOC to join all aggrieved parties despite its statutory authority to proceed solely in its own name.

The typicality requirement is said to limit the class claims to those fairly encompassed by the named plaintiff's claims. If Rule 23 were applicable to EEOC enforcement actions, it would

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[14] See, *e. g.*, *Monarch Asphalt Sales Co.* v. *Wilshire Oil Co. of Texas*, 511 F. 2d 1073, 1077 (CA10 1975) (37 class plaintiffs); *Peterson* v. *Albert M. Bender Co.*, 75 F. R. D. 661, 667 (ND Cal. 1977) (35–45); *Murray* v. *Norberg*, 423 F. Supp. 795, 798 (RI 1976) (fewer than 20); *Chmieleski* v. *City Products Corp.*, 71 F. R. D. 118, 150–151 (WD Mo. 1976) (22); *Lopez* v. *Jackson County Bd. of Supervisors*, 375 F. Supp. 1194, 1196–1197 (SD Miss. 1974) (16); *Moreland* v. *Rucker Pharmacal Co.*, 63 F. R. D. 611, 613–614 (WD La. 1974) (26); *Anderson* v. *Home Style Stores, Inc.*, 58 F. R. D. 125, 130–131 (ED Pa. 1972) (18).

seem that the Title VII counterpart to the Rule 23 named plaintiff would be the charging party, with the EEOC serving in the charging party's stead as the representative of the class. Yet the Courts of Appeals have held that EEOC enforcement actions are not limited to the claims presented by the charging parties. Any violations that the EEOC ascertains in the course of a reasonable investigation of the charging party's complaint are actionable. See, *e. g., EEOC* v. *General Electric Co.,* 532 F. 2d 359, 366 (CA4 1976); *EEOC* v. *McLean Trucking Co.,* 525 F. 2d 1007, 1010 (CA6 1975). The latter approach is far more consistent with the EEOC's role in the enforcement of Title VII than is imposing the strictures of Rule 23, which would limit the EEOC action to claims typified by those of the charging party.

We note finally that the adequate-representation requirement is typically construed to foreclose the class action where there is a conflict of interest between the named plaintiff and the members of the putative class. In employment discrimination litigation, conflicts might arise, for example, between employees and applicants who were denied employment and who will, if granted relief, compete with employees for fringe benefits or seniority. Under Rule 23, the same plaintiff could not represent these classes. But unlike the Rule 23 class representative, the EEOC is authorized to proceed in a unified action and to obtain the most satisfactory overall relief even though competing interests are involved and particular groups may appear to be disadvantaged. The individual victim is given his right to intervene for this very reason. The EEOC exists to advance the public interest in preventing and remedying employment discrimination, and it does so in part by making the hard choices where conflicts of interest exist. We are reluctant, absent clear congressional guidance, to subject § 706 (f)(1) actions to requirements that might disable the enforcement agency from advancing the public interest in the manner and to the extent contemplated by the statute.

B

We observe that General Telephone does not urge application of Rule 23 to EEOC enforcement actions in the expectation or hope that the agency could not comply and would be forced to drop its action against General Telephone. Indeed, petitioners urge that the EEOC, in proper cases, would be able to meet the Rule 23 requirements. Brief for Petitioners 16–22. As we understand, petitioners' objective in seeking to invoke Rule 23 is aimed at securing a judgment in the EEOC's suit that will be binding upon all individuals with similar grievances in the class or subclasses that might be certified. We are sensitive to the importance of the res judicata aspects of Rule 23 judgments, but we are not free to depart from what we believe the statutory design to be.

We have noted in a related context the interface between employment discrimination remedies under a collective-bargaining agreement and those under Title VII. *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36 (1974), held that the employee did not forfeit Title VII relief by invoking the grievance and arbitration procedures under the collective-bargaining contract. We noted that "federal courts have been assigned plenary powers to secure compliance with Title VII." *Id.*, at 45. Similarly, the courts retain remedial powers under Title VII despite a finding by the EEOC of no reasonable cause to believe that Title VII has been violated. *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 798–799 (1973). We have also stressed the strong congressional intent to provide "make whole" relief to Title VII claimants: " 'The provisions of this subsection are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. . . .' 118 Cong. Rec. 7168 (1972)." *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 421 (1975).

The 1972 amendments retained the private right of action as "an essential means of obtaining judicial enforcement of

Title VII," *Alexander* v. *Gardner-Denver Co.*, *supra*, at 45, while also giving the EEOC broad enforcement powers. In light of the "general intent to accord parallel or overlapping remedies against discrimination," 415 U. S., at 47, we are unconvinced that it would be consistent with the remedial purpose of the statutes to bind all "class" members with discrimination grievances against an employer by the relief obtained under an EEOC judgment or settlement against the employer. This is especially true given the possible differences between the public and private interests involved. Cf. *Occidental Life Ins. Co.* v. *EEOC*, 432 U. S. 355 (1977).

The courts, however, are not powerless to prevent undue hardship to the defendant and should perform accordingly. The employer may, by discovery and other pretrial proceedings, determine the nature and extent of the claims that the EEOC intends to pursue against it. Here, as we have noted, the EEOC moved to try initially the issue of liability, not to avoid proving individual claims, but merely to postpone such proof. It also goes without saying that the courts can and should preclude double recovery by an individual. Cf. *Alexander* v. *Gardner-Denver Co.*, *supra*, at 51, n. 14. Also, where the EEOC has prevailed in its action, the court may reasonably require any individual who claims under its judgment to relinquish his right to bring a separate private action.[15] The Title VII remedy is an equitable one; a court of equity should adjust the relief accordingly.

IV

We hold, therefore, that the EEOC may maintain its § 706 civil actions for the enforcement of Title VII and may seek specific relief for a group of aggrieved individuals without first obtaining class certification pursuant to Federal Rule

[15] An acceptance of the benefits under an EEOC-negotiated settlement could be drafted to provide for a similar relinquishment.

of Civil Procedure 23.[16] The judgment of the Ninth Circuit is accordingly

Affirmed.

THE CHIEF JUSTICE, MR. JUSTICE POWELL, MR. JUSTICE REHNQUIST, and MR. JUSTICE STEVENS, for the reasons that are well stated by the Court of Appeals for the Fifth Circuit in *EEOC* v. *D. H. Holmes Co., Ltd.*, 556 F. 2d 787 (1977), cert. denied, 436 U. S. 962 (1978), would reverse the judgment in this case.

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[16] We by no means suggest that the Federal Rules generally are inapplicable to the EEOC's §706 actions. Title VII itself refers to Rule 53, see § 706 (f) (5), and the Court itself has discussed Rule 54 (c). See *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 424 (1975). We hold only that the nature of the Government's enforcement action is such that it is not properly characterized as a "class action" subject to the procedural requirements of Rule 23.

CUYLER, CORRECTIONAL SUPERINTENDENT, ET AL. v. SULLIVAN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 78-1832. Argued February 20, 1980—Decided May 12, 1980

Two privately retained lawyers represented respondent and two others charged with the same murders. Respondent, who was tried first, made no objection to the multiple representation. The defense rested at the close of the prosecutor's case, and respondent was convicted. The two codefendants later were acquitted at separate trials. Respondent then sought collateral relief under Pennsylvania law, alleging that he had not received effective assistance of counsel because his lawyers represented conflicting interests. After a hearing at which both defense lawyers testified, the Pennsylvania Court of Common Pleas denied relief. The Pennsylvania Supreme Court affirmed, finding no multiple representation and concluding that the decision to rest the defense was a reasonable trial tactic. Respondent next sought habeas corpus relief in Federal District Court, but the court accepted the Pennsylvania Supreme Court's conclusion that respondent's lawyer did not represent the other defendants and further concluded that respondent had adduced no evidence of a conflict of interest. The Court of Appeals for the Third Circuit reversed. It held that the participation of the two lawyers in all three trials established as a matter of law that both lawyers represented all three defendants, and that the possibility of conflict among the interests represented by these lawyers established a violation of respondent's Sixth Amendment right to counsel.

Held:

1. The Court of Appeals did not exceed the proper scope of review when it rejected the Pennsylvania Supreme Court's conclusion that the two lawyers had not undertaken multiple representation. The Pennsylvania court's conclusion was a mixed determination of law and fact not covered by 28 U. S. C. § 2254 (d), which provides that a state court's determination after a hearing on the merits of a factual issue shall be presumed to be correct. Pp. 341-342.

2. A state criminal trial, a proceeding initiated and conducted by the State itself, is an action of the State within the meaning of the Fourteenth Amendment. If a defendant's retained counsel does not provide the adequate legal assistance guaranteed by the Sixth Amendment, a

serious risk of injustice infects the trial itself. When the State obtains a conviction through such a trial, it is the State that unconstitutionally deprives the defendant of his liberty. Thus, there is no merit to petitioners' claim that failings of retained counsel cannot provide the basis for federal habeas corpus relief. Pp. 342–345.

3. Respondent is not entitled to federal habeas corpus relief upon showing that the state trial court failed to inquire into the potential for conflicts of interest and that his lawyers had a possible conflict of interests. Pp. 345–350.

(a) The Sixth Amendment requires a state trial court to investigate timely objections to multiple representation. But unless the state trial court knows or reasonably should know that a particular conflict exists, the court itself need not initiate an inquiry into the propriety of multiple representation. Under the circumstances of this case, the Sixth Amendment imposed upon the trial court no affirmative duty to inquire. Pp. 345–348.

(b) Unless the trial court fails to afford a defendant who objects to multiple representation an opportunity to show that potential conflicts impermissibly imperil his right to a fair trial, a reviewing court cannot presume that the possibility for conflict resulted in ineffective assistance of counsel. In such a case, a defendant must demonstrate that an actual conflict of interest adversely affected the adequacy of his representation. Pp. 348–350.

(c) The possibility of a conflict of interest is insufficient to impugn a criminal conviction. In order to establish a violation of the Sixth Amendment, a defendant must show that an actual conflict of interest adversely affected his lawyer's performance. P. 350.

593 F. 2d 512, vacated and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., STEWART, WHITE, BLACKMUN, REHNQUIST, and STEVENS, JJ., joined, in Part III of which BRENNAN, J., joined, and in Parts I, II, and III of which MARSHALL, J., joined. BRENNAN, J., filed an opinion concurring in part and concurring in the result, *post*, p. 350. MARSHALL, J., filed an opinion concurring in part and dissenting in part, *post*, p. 354.

Steven H. Goldblatt argued the cause for petitioners. With him on the brief were *Michael F. Henry* and *Marianne E. Cox*.

Marilyn J. Gelb argued the cause and filed a brief for respondent.

MR. JUSTICE POWELL delivered the opinion of the Court.

The question presented is whether a state prisoner may obtain a federal writ of habeas corpus by showing that his retained defense counsel represented potentially conflicting interests.

I

Respondent John Sullivan was indicted with Gregory Carchidi and Anthony DiPasquale for the first-degree murders of John Gorey and Rita Janda. The victims, a labor official and his companion, were shot to death in Gorey's second-story office at the Philadelphia headquarters of Teamsters' Local 107. Francis McGrath, a janitor, saw the three defendants in the building just before the shooting. They appeared to be awaiting someone, and they encouraged McGrath to do his work on another day. McGrath ignored their suggestions. Shortly afterward, Gorey arrived and went to his office. McGrath then heard what sounded like firecrackers exploding in rapid succession. Carchidi, who was in the room where McGrath was working, abruptly directed McGrath to leave the building and to say nothing. McGrath hastily complied. When he returned to the building about 15 minutes later, the defendants were gone. The victims' bodies were discovered the next morning.

Two privately retained lawyers, G. Fred DiBona and A. Charles Peruto, represented all three defendants throughout the state proceedings that followed the indictment. Sullivan had different counsel at the medical examiner's inquest, but he thereafter accepted representation from the two lawyers retained by his codefendants because he could not afford to pay his own lawyer.[1] At no time did Sullivan or his lawyers

[1] DiBona and Peruto were paid in part with funds raised by friends of the three defendants. The record does not disclose the source of the balance of their fee, but no part of the money came from either Sullivan or his family. See *United States ex rel. Sullivan* v. *Cuyler*, 593 F. 2d 512, 518, and n. 7 (CA3 1979).

object to the multiple representation. Sullivan was the first defendant to come to trial. The evidence against him was entirely circumstantial, consisting primarily of McGrath's testimony. At the close of the Commonwealth's case, the defense rested without presenting any evidence. The jury found Sullivan guilty and fixed his penalty at life imprisonment. Sullivan's post-trial motions failed, and the Pennsylvania Supreme Court affirmed his conviction by an equally divided vote. *Commonwealth* v. *Sullivan*, 446 Pa. 419, 286 A. 2d 898 (1971).[2] Sullivan's codefendants, Carchidi and DiPasquale, were acquitted at separate trials.

Sullivan then petitioned for collateral relief under the Pennsylvania Post Conviction Hearing Act, Pa. Stat. Ann., Tit. 19, § 1180–1 *et seq.* (Purdon Supp. 1979–1980). He alleged, among other claims, that he had been denied effective assistance of counsel because his defense lawyers represented conflicting interests. In five days of hearings, the Court of Common Pleas heard evidence from Sullivan, Carchidi, Sullivan's lawyers, and the judge who presided at Sullivan's trial.

DiBona and Peruto had different recollections of their roles at the trials of the three defendants. DiBona testified that he and Peruto had been "associate counsel" at each trial. App. 32a Peruto recalled that he had been chief counsel for Carchidi and DePasquale, but that he merely had assisted DiBona in Sullivan's trial. DiBona and Peruto also gave conflicting accounts of the decision to rest Sullivan's defense. DiBona said he had encouraged Sullivan to testify even though the Commonwealth had presented a very weak case. Peruto remembered that he had not "want[ed] the defense to go on because I thought we would only be exposing

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[2] The Pennsylvania Supreme Court denied two petitions for reargument. See *Commonwealth* v. *Sullivan*, 472 Pa. 129, 180, 371 A. 2d 468, 492 (1977) (Pomeroy, J., concurring and dissenting). Meanwhile, Sullivan's *pro se* petitions for federal habeas corpus relief were dismissed for failure to exhaust state remedies. See *United States ex rel. Sullivan* v. *Cuyler, supra,* at 515, and n. 4.

the [defense] witnesses for the other two trials that were coming up." *Id.*, at 57a. Sullivan testified that he had deferred to his lawyers' decision not to present evidence for the defense. But other testimony suggested that Sullivan preferred not to take the stand because cross-examination might have disclosed an extramarital affair. Finally, Carchidi claimed he would have appeared at Sullivan's trial to rebut McGrath's testimony about Carchidi's statement at the time of the murders.

The Court of Common Pleas held that Sullivan could take a second direct appeal because counsel had not assisted him adequately in his first appeal. App. to Pet. for Cert. 5F. The court did not pass directly on the claim that defense counsel had a conflict of interest, but it found that counsel fully advised Sullivan about his decision not to testify. *Id.*, at 7F. All other claims for collateral relief were rejected or reserved for consideration in the new appeal.

The Pennsylvania Supreme Court affirmed both Sullivan's original conviction and the denial of collateral relief. *Commonwealth* v. *Sullivan*, 472 Pa. 129, 371 A. 2d 468 (1977). The court saw no basis for Sullivan's claim that he had been denied effective assistance of counsel at trial. It found that Peruto merely assisted DiBona in the Sullivan trial and that DiBona merely assisted Peruto in the trials of the other two defendants. Thus, the court concluded, there was "no dual representation in the true sense of the term." *Id.*, at 161, 371 A. 2d, at 483. The court also found that resting the defense was a reasonable tactic which had not denied Sullivan the effective assistance of counsel. *Id.*, at 162, 371 A. 2d, at 483–484.

Having exhausted his state remedies, Sullivan sought habeas corpus relief in the United States District Court for the Eastern District of Pennsylvania. The petition was referred to a Magistrate, who found that Sullivan's defense counsel had represented conflicting interests. The District Court, however, accepted the Pennsylvania Supreme Court's conclusion

that there had been no multiple representation. The court also found that, assuming there had been multiple representation, the evidence adduced in the state postconviction proceeding revealed no conflict of interest. App. to Pet. for Cert. 5C–8C.

The Court of Appeals for the Third Circuit reversed. *United States ex rel. Sullivan* v. *Cuyler*, 593 F. 2d 512 (1979). It first held that the participation by DiBona and Peruto in the trials of Sullivan and his codefendants established, as a matter of law, that both lawyers had represented all three defendants. The court recognized that multiple representation " 'is not tantamount to the denial of effective assistance of counsel. . . .' " But it held that a criminal defendant is entitled to reversal of his conviction whenever he makes " 'some showing of a possible conflict of interest or prejudice, however remote. . . .' " *Id.*, at 519, quoting *Walker* v. *United States*, 422 F. 2d 374, 375 (CA3) (*per curiam*), cert. denied, 399 U. S. 915 (1970). See also *United States ex rel. Hart* v. *Davenport*, 478 F. 2d 203, 210 (CA3 1973). The court acknowledged that resting at the close of the prosecutor's case "would have been a legitimate tactical decision if made by independent counsel." [3] Nevertheless, the court thought that action alone raised a possibility of conflict sufficient to prove a violation of Sullivan's Sixth Amendment rights. The court found support for its conclusion in Peruto's admission that concern for Sullivan's codefendants had affected his judgment that Sullivan should not present a defense. To give weight to DiBona's contrary testimony, the court held, "would be to . . . require a showing of actual prejudice." 593 F. 2d, at 522.[4]

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[3] Indeed, the Court of Appeals noted that the Pennsylvania Supreme Court at first divided evenly on whether the Commonwealth's evidence was sufficient to support a conviction. 593 F. 2d, at 521, n. 10.

[4] Judge Garth, with whom Judges Adams and Rosenn joined, filed an opinion dissenting from the denial of a petition for rehearing en banc. *Id.*, at 524.

We granted certiorari, 444 U. S. 823 (1979), to consider recurring issues left unresolved by *Holloway* v. *Arkansas*, 435 U. S. 475 (1978). We now vacate and remand.

II

At the outset, we must consider whether the Court of Appeals exceeded the proper scope of review when it rejected the Pennsylvania Supreme Court's conclusion that DiBona and Peruto had not undertaken multiple representation. Petitioners claim that this determination by the Pennsylvania Supreme Court was a factfinding entitled to a presumption of correctness under 28 U. S. C. § 2254 (d).

Section 2254 (d) provides that "a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction . . . [and] evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct" unless the applicant for a federal writ of habeas corpus can establish one of the enumerated causes for exception. The Pennsylvania Supreme Court's holding does not fall within this statute because it is a conclusion of law rather than a finding of fact.[5]

In *Townsend* v. *Sain*, 372 U. S. 293 (1963), the Court examined the distinction between law and fact as it applies on collateral review of a state conviction. The *Townsend* opinion, the precursor of § 2254 (d), noted that the phrase

[5] Petitioners must rely solely on the State Supreme Court's holding because the state court that heard evidence on Sullivan's petition for collateral relief did not decide whether defense counsel had represented conflicting interests. See *supra*, at 339. The State Supreme Court resolved that issue on the second direct appeal without the benefit of a trial court finding. Since we conclude that a determination on whether counsel undertook multiple representation is not a finding of fact, we need not decide whether the statements of an appellate court can be "determination[s] after a hearing on the merits of a factual issue" within the meaning of 28 U. S. C. § 2254 (d). Compare *Velleca* v. *Superintendent*, 523 F. 2d 1040, 1041–1042 (CA1 1975) (*per curiam*), with *Hill* v. *Nelson*, 466 F. 2d 1346, 1348 (CA9 1972) (*per curiam*).

"issues of fact" refers "to what are termed basic, primary, or historical facts: facts 'in the sense of a recital of external events and the credibility of their narrators. . . .'" 372 U. S., at 309, n. 6, quoting *Brown* v. *Allen*, 344 U. S. 443, 506 (1953) (opinion of Frankfurter, J.). Findings about the roles DiBona and Peruto played in the defenses of Sullivan and his codefendants are facts in this sense. But the holding that the lawyers who played those roles did not engage in multiple representation is a mixed determination of law and fact that requires the application of legal principles to the historical facts of this case. Cf. *Brewer* v. *Williams*, 430 U. S. 387, 403–404 (1977); *Neil* v. *Biggers*, 409 U. S. 188, 193, n. 3 (1972). That holding is open to review on collateral attack in a federal court.

The Court of Appeals carefully recited the facts from which it concluded that DiBona and Peruto represented both Sullivan and his codefendants. The court noted that both lawyers prepared the defense in consultation with all three defendants, that both advised Sullivan on whether he should rest his defense, and that both played important roles at all three trials. 593 F. 2d, at 518–519. In fact, the transcript of Sullivan's trial shows that Peruto rather than DiBona rested the defense. App 265a. We agree with the Court of Appeals that these facts establish the existence of multiple representation.

III

We turn next to the claim that the alleged failings of Sullivan's retained counsel cannot provide the basis for a writ of habeas corpus because the conduct of retained counsel does not involve state action.[6] A state prisoner can win a federal

[6] Although the petitioners did not present this state action argument to the Court of Appeals, both parties have briefed and argued it in this Court. Since resolution of this question of law is a "predicate to an intelligent resolution" of the question on which we granted certiorari, see *Vance* v. *Terrazas*, 444 U. S. 252, 258–259, n. 5 (1980), we must address it. See *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foun-*

writ of habeas corpus only upon a showing that the State participated in the denial of a fundamental right protected by the Fourteenth Amendment. The right to counsel guaranteed by the Sixth Amendment is a fundamental right. *Argersinger* v. *Hamlin*, 407 U. S. 25, 29–33 (1972). In this case, Sullivan retained his own lawyers, but he now claims that a conflict of interest hampered their advocacy. He does not allege that state officials knew or should have known that his lawyers had a conflict of interest. Thus, we must decide whether the failure of retained counsel to provide adequate representation can render a trial so fundamentally unfair as to violate the Fourteenth Amendment.

This Court's decisions establish that a state criminal trial, a proceeding initiated and conducted by the State itself, is an action of the State within the meaning of the Fourteenth Amendment. See *Lisenba* v. *California*, 314 U. S. 219, 236–237 (1941); *Moore* v. *Dempsey*, 261 U. S. 86, 90–91 (1923). The Court recognized as much in *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), when it held that a defendant who must face felony charges in state court without the assistance of counsel guaranteed by the Sixth Amendment has been denied due process of law. Unless a defendant charged with a serious offense has counsel able to invoke the procedural and substantive safeguards that distinguish our system of justice, a serious risk of injustice infects the trial itself. *Id.*, at 344; see *Johnson* v. *Zerbst*, 304 U. S. 458, 467–468 (1938). When a State obtains a criminal conviction through such a trial, it is the State that unconstitutionally deprives the defendant of his liberty. See *Argersinger* v. *Hamlin*, *supra*, at 29–33.[7]

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dation, 402 U. S. 313, 320, n. 6 (1971). See generally R. Stern & E. Gressman, Supreme Court Practice § 6.27, pp. 458–461 (5th ed. 1978).

[7] See generally *Fitzgerald* v. *Estelle*, 505 F. 2d 1334, 1345–1346 (CA5 1974) (en banc) (Godbold, J., concurring in part and dissenting in part), cert. denied, 422 U. S. 1011 (1975); *West* v. *Louisiana*, 478 F. 2d 1026, 1032–1034 (CA5 1973), vacated and remanded, 510 F. 2d 363 (1975) (en banc).

Our decisions make clear that inadequate assistance does not satisfy the Sixth Amendment right to counsel made applicable to the States through the Fourteenth Amendment. A guilty plea is open to attack on the ground that counsel did not provide the defendant with "reasonably competent advice." *McMann* v. *Richardson*, 397 U. S. 759, 770–771 (1970); see *Tollett* v. *Henderson*, 411 U. S. 258, 267 (1973). Furthermore, court procedures that restrict a lawyer's tactical decision to put the defendant on the stand unconstitutionally abridge the right to counsel. *Brooks* v. *Tennessee*, 406 U. S. 605, 612–613 (1972) (requiring defendant to be first defense witness); *Ferguson* v. *Georgia*, 365 U. S. 570, 593–596 (1961) (prohibiting direct examination of defendant). See also *Geders* v. *United States*, 425 U. S. 80 (1976); *Herring* v. *New York*, 422 U. S. 853 (1975). Thus, the Sixth Amendment does more than require the States to appoint counsel for indigent defendants. The right to counsel prevents the States from conducting trials at which persons who face incarceration must defend themselves without adequate legal assistance.

A proper respect for the Sixth Amendment disarms petitioner's contention that defendants who retain their own lawyers are entitled to less protection than defendants for whom the State appoints counsel. We may assume with confidence that most counsel, whether retained or appointed, will protect the rights of an accused. But experience teaches that, in some cases, retained counsel will not provide adequate representation. The vital guarantee of the Sixth Amendment would stand for little if the often uninformed decision to retain a particular lawyer could reduce or forfeit the defendant's entitlement to constitutional protection.[8] Since the State's conduct of a criminal trial itself implicates the State in the defendant's conviction, we see no basis for drawing a

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[8] See Polur, Retained Counsel, Assigned Counsel: Why the Dichotomy?, 55 A. B. A. J. 254, 255 (1969).

distinction between retained and appointed counsel that would deny equal justice to defendants who must choose their own lawyers.[9]

IV

We come at last to Sullivan's claim that he was denied the effective assistance of counsel guaranteed by the Sixth Amendment because his lawyers had a conflict of interest. The claim raises two issues expressly reserved in *Holloway* v. *Arkansas,* 435 U. S., at 483–484. The first is whether a state trial judge must inquire into the propriety of multiple representation even though no party lodges an objection. The second is whether the mere possibility of a conflict of interest warrants the conclusion that the defendant was deprived of his right to counsel.

A

In *Holloway,* a single public defender represented three defendants at the same trial. The trial court refused to consider the appointment of separate counsel despite the defense lawyer's timely and repeated assertions that the interests of his clients conflicted. This Court recognized that a lawyer forced to represent codefendants whose interests conflict cannot provide the adequate legal assistance required by the Sixth Amendment. *Id.,* at 481–482. Given the trial court's failure to respond to timely objections, however, the Court did not consider whether the alleged conflict actually existed. It simply held that the trial court's error unconstitutionally endangered the right to counsel. *Id.,* at 483–487.

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[9] As the Court of Appeals for the Third Circuit said in *United States ex rel. Hart* v. *Davenport,* 478 F. 2d 203, 211 (1973):

"A rule which would apply one fourteenth amendment test to assigned counsel and another to retained counsel would produce the anomaly that the nonindigent, who must retain an attorney if he can afford one, would be entitled to less protection. . . . The effect upon the defendant—confinement as a result of an unfair state trial—is the same whether the inadequate attorney was assigned or retained."

Holloway requires state trial courts to investigate timely objections to multiple representation. But nothing in our precedents suggests that the Sixth Amendment requires state courts themselves to initiate inquiries into the propriety of multiple representation in every case.[10] Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial.[11] Absent special circumstances,

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[10] In certain cases, proposed Federal Rule of Criminal Procedure 44 (c) provides that the federal district courts "shall promptly inquire with respect to . . . joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation." See also ABA Project on Standards for Criminal Justice, Function of the Trial Judge § 3.4 (b) (App. Draft 1972).

Several Courts of Appeals already invoke their supervisory power to require similar inquiries. See *United States* v. *Waldman*, 579 F. 2d 649, 651–652 (CA1 1978); *United States* v. *DeBerry*, 487 F. 2d 448, 452–454 (CA2 1973); *United States* v. *Cox*, 580 F. 2d 317, 321 (CA8 1978), cert. denied, 439 U. S. 1075 (1979); *United States* v. *Lawrie*, 568 F. 2d 98 (CA8 1977), cert. denied, 435 U. S. 969 (1978); cf. *Ford* v. *United States*, 126 U. S. App. D. C. 346, 348–349, 379 F. 2d 123, 125–126 (1967). As our promulgation of Rule 44 (c) suggests, we view such an exercise of the supervisory power as a desirable practice. See generally Schwarzer, Dealing with Incompetent Counsel—The Trial Judge's Role, 93 Harv. L. Rev. 633, 653–654 (1980).

Although some Circuits have said explicitly that the Sixth Amendment does not require an inquiry into the possibility of conflicts, *United States* v. *Steele*, 576 F. 2d 111 (CA6) (*per curiam*), cert. denied, 439 U. S. 928 (1978); *United States* v. *Mavrick*, 601 F. 2d 921, 929 (CA7 1979), a recent opinion in the Second Circuit held otherwise, *Colon* v. *Fogg*, 603 F. 2d 403, 407 (1979).

[11] ABA Code of Professional Responsibility, DR 5–105, EC 5–15 (1976); ABA Project on Standards for Criminal Justice, Defense Function § 3.5 (b) (App. Draft 1971).

Seventy percent of the public defender offices responding to a recent survey reported a strong policy against undertaking multiple representation in criminal cases. Forty-nine percent of the offices responding never undertake such representation. Lowenthal, Joint Representation in Criminal Cases: A Critical Appraisal, 64 Va. L. Rev. 939, 950, and n. 40 (1978). The private bar may be less alert to the importance of avoiding multiple

therefore, trial courts may assume either that multiple representation entails no conflict or that the lawyer and his clients knowingly accept such risk of conflict as may exist.[12] Indeed, as the Court noted in *Holloway, supra*, at 485–486, trial courts necessarily rely in large measure upon the good faith and good judgment of defense counsel. "An 'attorney representing two defendants in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial.'" 435 U. S., at 485, quoting *State* v. *Davis*, 110 Ariz. 29, 31, 514 P. 2d 1025, 1027 (1973). Unless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry.[13]

Nothing in the circumstances of this case indicates that the trial court had a duty to inquire whether there was a conflict of interest. The provision of separate trials for Sullivan and his codefendants significantly reduced the potential for a divergence in their interests. No participant in Sullivan's trial ever objected to the multiple representation. DiBona's opening argument for Sullivan outlined a defense compatible with the view that none of the defendants was connected with the murders. See Brief for Respondent 7. The opening argument also suggested that counsel was not afraid to call witnesses whose testimony might be needed at the trials of Sullivan's codefendants. See *id.*, at 8–9. Finally, as the Court of Appeals noted, counsel's critical decision to

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representation in criminal cases. See Geer, Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney, 62 Minn. L. Rev. 119, 152–157 (1978); Lowenthal, *supra*, at 961–963.

[12] See *United States* v. *Kidding*, 560 F. 2d 1303, 1310 (CA7), cert. denied, 434 U. S. 872 (1977); *United States* v. *Mandell*, 525 F. 2d 671, 675–677 (CA7 1975), cert. denied, 423 U. S. 1049 (1976); Geer, *supra* n. 11, at 145–146.

[13] Cf. *United States* v. *Medel*, 592 F. 2d 1305, 1312–1313 (CA5 1979); *Foxworth* v. *Wainwright*, 516 F. 2d 1072, 1076–1077 (CA5 1975).

rest Sullivan's defense was on its face a reasonable tactical response to the weakness of the circumstantial evidence presented by the prosecutor. 593 F. 2d, at 521, and n. 10. On these facts, we conclude that the Sixth Amendment imposed upon the trial court no affirmative duty to inquire into the propriety of multiple representation.

B

Holloway reaffirmed that multiple representation does not violate the Sixth Amendment unless it gives rise to a conflict of interest. See 435 U. S., at 482. Since a possible conflict inheres in almost every instance of multiple representation, a defendant who objects to multiple representation must have the opportunity to show that potential conflicts impermissibly imperil his right to a fair trial. But unless the trial court fails to afford such an opportunity, a reviewing court cannot presume that the possibility for conflict has resulted in ineffective assistance of counsel. Such a presumption would preclude multiple representation even in cases where "'[a] common defense . . . gives strength against a common attack.'" *Id.*, at 482–483, quoting *Glasser* v. *United States*, 315 U. S. 60, 92 (1942) (Frankfurter, J., dissenting).

In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance.[14] In *Glasser* v. *United States*, for

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[14] A substantial majority of the Courts of Appeals require defendants who contend that multiple representation violated their Sixth Amendment rights to identify an actual conflict of interest. See *United States* v. *Lovano*, 420 F. 2d 769, 773 (CA2), cert. denied, 397 U. S. 1071 (1970); *United States* v. *Atkinson*, 565 F. 2d 1283, 1284–1285 (CA4 1977), cert. denied, 436 U. S. 944 (1978); *Foxworth* v. *Wainwright*, *supra*, at 1077; *Thacker* v. *Bordenkircher*, 590 F. 2d 640, 642 (CA6), cert. denied, 442 U. S. 912 (1979); *United States* v. *Mandell*, *supra*, at 677–678; *United States* v. *Cox*, 580 F. 2d, at 321–323; *United States* v. *Kutas*, 542 F. 2d 527, 529 (CA9 1976), cert. denied, 429 U. S. 1073 (1977); cf. *United*

example, the record showed that defense counsel failed to cross-examine a prosecution witness whose testimony linked Glasser with the crime and failed to resist the presentation of arguably inadmissible evidence. *Id.*, at 72–75. The Court found that both omissions resulted from counsel's desire to diminish the jury's perception of a codefendant's guilt. Indeed, the evidence of counsel's "struggle to serve two masters [could not] seriously be doubted." *Id.*, at 75. Since this actual conflict of interest impaired Glasser's defense, the Court reversed his conviction.

Dukes v. *Warden*, 406 U. S. 250 (1972), presented a contrasting situation. Dukes pleaded guilty on the advice of two lawyers, one of whom also represented Dukes' codefendants on an unrelated charge. Dukes later learned that this lawyer had sought leniency for the codefendants by arguing that their cooperation with the police induced Dukes to plead guilty. Dukes argued in this Court that his lawyer's conflict of interest had infected his plea. We found " 'nothing in the record . . . which would indicate that the alleged conflict resulted in ineffective assistance of counsel and did in fact render the plea in question involuntary and unintelligent.' " *Id.*, at 256, quoting *Dukes* v. *Warden*, 161 Conn. 337, 344, 288 A. 2d 58, 62 (1971). Since Dukes did not identify an actual lapse in representation, we affirmed the denial of habeas corpus relief.

Glasser established that unconstitutional multiple representation is never harmless error. Once the Court concluded that Glasser's lawyer had an actual conflict of interest, it refused "to indulge in nice calculations as to the amount of prejudice" attributable to the conflict. The conflict itself demonstrated a denial of the "right to have the effective assistance of counsel." 315 U. S., at 76. Thus, a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prej-

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States v. *Carrigan*, 543 F. 2d 1053, 1056 (CA2 1976) (burden of proof shifts when trial court fails to inquire into possibility of conflict).

udice in order to obtain relief. See *Holloway, supra*, at 487–491. But until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance. See *Glasser, supra*, at 72–75.[15]

C

The Court of Appeals granted Sullivan relief because he had shown that the multiple representation in this case involved a possible conflict of interest. We hold that the possibility of conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance. Sullivan believes he should prevail even under this standard. He emphasizes Peruto's admission that the decision to rest Sullivan's defense reflected a reluctance to expose witnesses who later might have testified for the other defendants. The petitioner, on the other hand, points to DiBona's contrary testimony and to evidence that Sullivan himself wished to avoid taking the stand. Since the Court of Appeals did not weigh these conflicting contentions under the proper legal standard, its judgment is vacated and the case is remanded for further proceedings consistent with this opinion.

So ordered.

MR. JUSTICE BRENNAN, concurring in Part III of the opinion of the Court and in the result.

I agree with the Court, in Part III, *ante*, at 342–345, that the alleged failure of retained counsel to render effective assistance involves state action and thus provides the basis for a writ of habeas corpus. I cannot, however, join Part IV of the opinion.

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[15] See Comment, Conflict of Interests in Multiple Representation of Criminal Co-Defendants, 68 J. Crim. L. & C. 226, 231–232 (1977).

Holloway v. *Arkansas*, 435 U. S. 475 (1978), settled that the Sixth Amendment right to effective assistance of counsel encompasses the right to representation by an attorney who does not owe conflicting duties to other defendants. While *Holloway* also established that defendants usually have the right to share a lawyer if they so choose, that choice must always be knowing and intelligent. The trial judge, therefore, must play a positive role in ensuring that the choice was made intelligently. The court cannot delay until a defendant or an attorney raises a problem, for the Constitution also protects defendants whose attorneys fail to consider, or choose to ignore, potential conflict problems. "Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. . . . The trial court should protect the right of an accused to have the assistance of counsel." *Glasser* v. *United States*, 315 U. S. 60, 71 (1942). "While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record." *Johnson* v. *Zerbst*, 304 U. S. 458, 465 (1938). This principle is honored only if the accused has the active protection of the trial court in assuring that no potential for divergence in interests threatens the adequacy of counsel's representation.

It is no imposition on a trial court to require it to find out whether attorneys are representing "two or more defendants [who] have been jointly charged . . . or have been joined for trial . . . ," to use the language of proposed Federal Rule of Criminal Procedure 44 (c).[1] It is probable as a practical

[1] Proposed Rule 44 (c) provides:

"Whenever two or more defendants have been jointly charged pursuant to Rule 8 (b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally

matter that virtually all instances of joint representation will appear from the face of the charging papers and the appearances filed by attorneys. The American Bar Association's standards under the ABA Project on Standards for Criminal Justice, Function of the Trial Judge § 3.4 (b) (App. Draft 1972), are framed on the premise that judges will be readily able to ascertain instances of joint representation.

"[A] possible conflict inheres in almost every instance of multiple representation." *Ante,* at 348. Therefore, upon discovery of joint representation, the duty of the trial court is to ensure that the defendants have not unwittingly given up their constitutional right to effective counsel. This is necessary since it is usually the case that defendants will not know what their rights are or how to raise them. This is surely true of the defendant who may not be receiving the effective assistance of counsel as a result of conflicting duties owed to other defendants. Therefore, the trial court cannot safely assume that silence indicates a knowledgeable choice to proceed jointly. The court must at least affirmatively advise the defendants that joint representation creates potential hazards which the defendants should consider before proceeding with the representation.[2]

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advise each defendant of his right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel."

Congress has postponed the effectiveness of Rule 44 (c) until December 1, 1980, or until, and to the extent approved by, an Act of Congress, whichever is earlier. Pub. L. 92–42, 93 Stat. 326.

[2] Though proposed Rule 44 (c), n. 1, *supra,* provides a good model, the court's inquiry need not take any particular form. See also ABA Project on Standards for Criminal Justice, Function of the Trial Judge § 3.4 (b) (App. Draft 1972), which provides:

"Whenever two or more defendants who have been jointly charged, or whose cases have been consolidated, are represented by the same attorney,

Had the trial record in the present case shown that respondent made a knowing and intelligent choice of joint representation, I could accept the Court's standard for a postconviction determination as to whether respondent in fact was denied effective assistance. Where it is clear that a defendant has voluntarily chosen to proceed with joint representation, it is fair, if he later alleges ineffective assistance growing out of a conflict, to require that he demonstrate "that a conflict of interest actually affected the adequacy of his representation." *Ante*, at 349. Here, however, where there is no evidence that the court advised respondent about the potential for conflict or that respondent made a knowing and intelligent choice to forgo his right to separate counsel, I believe that respondent, who has shown a significant possibility of conflict,[2] is entitled to a presumption that his representation in fact suffered. Therefore, I would remand the case to allow the

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the trial judge should inquire into potential conflicts which may jeopardize the right of each defendant to the fidelity of his counsel."

Several Courts of Appeals have imposed some kind of duty of inquiry. See *ante*, at 346, n. 10. One, the First Circuit, has suggested that at least the duty, as opposed to any specific form of inquiry, may be constitutionally mandated. *United States* v. *Waldman*, 579 F. 2d 649, 653 (1978).

[2] The Court of Appeals held that respondent successfully carried the burden of demonstrating "a possibility of prejudice or conflict of interest and that independent counsel might well have chosen a different trial strategy." *United States ex rel. Sullivan* v. *Cuyler*, 593 F. 2d 512, 521 (1979). The court based its holding, in part, on the testimony of one of respondent's two trial attorneys. He testified that they chose not to present a defense in respondent's case partly because they did not want to expose their defense before the upcoming trials of respondent's codefendants. Also, they did not want to risk having any evidence come out which, while exculpating respondent, might inculpate one of the codefendants. *Ibid.* The court credited this testimony. *Id.*, at 522.

The facts of this case demonstrate that, contrary to the view of the Court, *ante*, at 347, the provision of separate trials does not always reduce the potential for conflict. Here, in fact, "the potential for a divergence in [the codefendants'] interest," *ibid.*, arose, in part, precisely because there were separate trials.

petitioners an opportunity to rebut this presumption by demonstrating that respondent's representation was not actually affected by the possibility of conflict.

MR. JUSTICE MARSHALL, concurring in part and dissenting in part.

I agree that the Court of Appeals properly concluded that respondent's lawyers had undertaken multiple representation, and that a conviction obtained when a defendant's retained counsel provided ineffective assistance involves state action that may provide the basis for a writ of habeas corpus. Accordingly, I join Parts I, II, and III of the Court's opinion.

I believe, however, that the potential for conflict of interest in representing multiple defendants is "so grave," see ABA Project on Standards for Criminal Justice, Defense Function, Standard 4–3.5 (b) (App. Draft, 2d ed. 1979), that whenever two or more defendants are represented by the same attorney the trial judge must make a preliminary determination that the joint representation is the product of the defendants' informed choice. I therefore agree with MR. JUSTICE BRENNAN that the trial court has a duty to inquire whether there is multiple representation, to warn defendants of the possible risks of such representation, and to ascertain that the representation is the result of the defendants' informed choice.[1]

I dissent from the Court's formulation of the proper stand-

[1] The determination that the defendant has made an informed choice of counsel would not, of course, establish a waiver that would prevent him from subsequently raising any claim of ineffective assistance of counsel based on a conflict of interest. The dangers of infringing the defendants' privilege against self-incrimination and their right to maintain the confidentiality of the defense strategy foreclose the type of detailed inquiry necessary to establish a knowing and intelligent waiver. Furthermore, the inquiry would take place at such an early stage of the proceedings that not all possible conflicts might be anticipated. See Geer, Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney, 62 Minn. L. Rev. 119, 145 (1978).

ard for determining whether multiple representation has violated the defendant's right to the effective assistance of counsel. The Court holds that in the absence of an objection at trial, the defendant must show "that an actual conflict of interest adversely affected his lawyer's performance." *Ante*, at 348. If the Court's holding would require a defendant to demonstrate that his attorney's trial performance differed from what it would have been if the defendant had been the attorney's only client, I believe it is inconsistent with our previous cases. Such a test is not only unduly harsh, but incurably speculative as well. The appropriate question under the Sixth Amendment is whether an actual, relevant conflict of interests existed during the proceedings. If it did, the conviction must be reversed. Since such a conflict was present in this case, I would affirm the judgment of the Court of Appeals.[2]

Our cases make clear that every defendant has a constitutional right to "the assistance of an attorney unhindered by a conflict of interests." *Holloway* v. *Arkansas*, 435 U. S. 475, 483, n. 5 (1978). "[T]he 'assistance of counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests." *Glasser* v. *United States*, 315 U. S. 60, 70 (1942). If "[t]he possibility of the inconsistent interests of [the clients] was brought home to the court" by means of an objection at trial, *id.*, at 71, the court may not require joint representation. But if no objection was made at trial, the appro-

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[2] The Court of Appeals cast its decision in terms of a "potential for conflict of interest," *United States ex rel. Sullivan* v. *Cuyler*, 593 F. 2d 512, 522 (1979), and made no explicit statement that an actual conflict of interest existed. The court's analysis was premised, however, on its conclusion that "[w]e have no basis on which to reject Peruto's sworn admission that he injected improper considerations into the attorney-client relationship." *Ibid.* This statement clearly demonstrates that the court found an actual, relevant conflict of interests.

priate inquiry is whether a conflict actually existed during the course of the representation.

Because it is the simultaneous representation of conflicting interests against which the Sixth Amendment protects a defendant, he need go no further than to show the existence of an actual conflict.[3] An actual conflict of interests negates the unimpaired loyalty a defendant is constitutionally entitled to expect and receive from his attorney.

Moreover, a showing that an actual conflict adversely af-

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[3] "Conflict of interests" is a term that is often used and seldom defined. The American Bar Association's usage, which has remained essentially unchanged since the promulgation of the Canons of Professional Ethics in 1908, is a fair statement of what is ordinarily meant by the term, and it is that meaning that I adopt here. The ABA Standards state that a lawyer should not undertake multiple representation "if the duty to one of the defendants may conflict with the duty to another." ABA Project on Standards for Criminal Justice, Defense Function, Standard 4-3.5 (b) (App. Draft, 2d ed. 1979). The Code of Professional Responsibility forbids multiple representation "if it would be likely to involve [the lawyer] in representing differing interests," unless the lawyer can adequately represent each client and obtains the informed consent of each. ABA Code of Professional Responsibility, Disciplinary Rule 5-105 (A)-(B) (1976). The Code of Professional Responsibility superseded the Canons of Professional Ethics (1937), which spoke of "conflicting interests" rather than "differing interests." The term was defined in Canon 6: "[A] lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose." The ABA materials do not, of course, define the constitutional standard. However, they are consistent with *Glasser's* emphasis on the interests of the defendants, and the corresponding duties owed by the attorney, rather than on the empirical question of the effect of the conflict on the attorney's performance. See Comment, Conflict of Interests in Multiple Representation of Criminal Co-defendants, 68 J. Crim. L. & C. 226 (1977).

There is a possibility of conflict, then, if the interests of the defendants may diverge at some point so as to place the attorney under inconsistent duties. There is an actual, relevant conflict of interests if, during the course of the representation, the defendants' interests do diverge with respect to a material factual or legal issue or to a course of action.

fected counsel's performance is not only unnecessary,[4] it is often an impossible task. As the Court emphasized in *Holloway*:

> "[I]n a case of joint representation of conflicting interests the evil—it bears repeating—is in what the advocate finds himself compelled to *refrain* from doing . . . . It may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with a record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. And to assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible." 435 U. S., at 490–491 (emphasis in original).

Accordingly, in *Holloway* we emphatically rejected the suggestion that a defendant must show prejudice in order to be entitled to relief. For the same reasons, it would usually be futile to attempt to determine how counsel's conduct would have been different if he had not been under conflicting duties.

In the present case Peruto's testimony, if credited by the court, would be sufficient to make out a case of inffective assistance by reason of a conflict of interests under even a

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[4] In *Glasser*, the defendant's objection at trial to joint representation was that, as his lawyer put it, "Mr. Glasser feels that if I would represent Mr. Kretske the jury would get an idea that they are together. . . ." 315 U. S., at 68. Whether the attorney's performance was in fact affected by the joint representation is, of course, irrelevant to the merits of such a claim. While the Court did discuss the possibility that the lawyer's failure to cross-examine prosecution witnesses fully or to object to the admission of certain evidence was the result of the joint representation, the possibility that the jury would assume that "birds of a feather flock to the same lawyer," Greer, *supra* n. 1, at 136, was the only objection raised at trial and the Court plainly considered it sufficient to require the appointment of separate counsel for Kretske.

restrictive reading of the Court's standard. In the usual case, however, we might expect the attorney to be unwilling to give such supportive testimony, thereby impugning his professional efforts. Moreover, in many cases the effects of the conflict on the attorney's performance will not be discernible from the record. It is plain to me, therefore, that in some instances the defendant will be able to show there was an actual, relevant conflict, but be unable to show that it changed his attorney's conduct.

It is possible that the standard articulated by the Court may not require a defendant to demonstrate that his attorney chose an action adverse to his interests because of a conflicting duty to another client. Arguably, if the attorney had to make decisions concerning his representation of the defendant under the constraint of inconsistent duties imposed by an actual conflict of interests, the adequacy of the representation was adversely affected. See *ante,* at 350 (defendant must show "that his counsel actively represented conflicting interests"). If that is the case, the Court's view and mine may not be so far apart after all.

NACHMAN CORP. v. PENSION BENEFIT GUARANTY CORPORATION ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 78-1557. Argued January 7, 1980—Decided May 12, 1980

As one of the means of protecting the interests of beneficiaries under private pension plans for employees, Title IV of the Employee Retirement Income Security Act of 1974 (ERISA) created a plan termination insurance program that became effective in four successive stages. Section 4022 (a) of Title IV provides that if benefits are "nonforfeitable" they are insured by respondent Pension Benefit Guaranty Corporation (PBGC), and under § 4062 (b) of that Title PBGC has a right to reimbursement from the employer for insurance paid to cover nonforfeitable benefits. Section 3 of Title I of ERISA provides that "[f]or purposes of this title [t]he term 'nonforfeitable' when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan." Petitioner employer, pursuant to a collective-bargaining agreement, established a pension plan covering employees represented by respondent union at one of petitioner's plants, and this plan contained a clause limiting benefits, upon termination of the plan, to the assets in the pension fund. Petitioner, upon closing such plant, terminated the pension plan the day before January 1, 1976, the date on which much of ERISA became effective, at which time the pension fund assets were sufficient to pay only about 35% of the vested benefits to those employees entitled thereto. Petitioner thereafter filed an action against the PBGC in Federal District Court seeking a declaration that it has no liability under ERISA for any failure of the pension plan to pay all of the vested benefits in full, and an order enjoining the PBGC from taking actions inconsistent with that declaration. Granting summary judgment for petitioner, the District Court held that the limitation of liability clause in the plan was valid on the date of termination and that such clause prevented the benefits at issue from being characterized as "nonforfeitable." The Court of Appeals reversed, concluding, in reliance on the Title I definition of "nonforfeitability," that the limitation of liability clause merely

affected the extent to which the benefits could be collected, without qualifying the employees' rights against the plan.

Held: The plan's limitation of liability clause does not prevent the vested benefits from being characterized as "nonforfeitable" and thus covered by the insurance program. Petitioner's argument that the Title I definition of "nonforfeitable" determines which benefits are insured under Title IV, that thus benefits are not insured unless they are "unconditional" and "legally enforceable against the plan," that because of the limitation of liability clause such elements of the definition are not satisfied, and that therefore the benefits are forfeitable and necessarily uninsurable, is without merit. Such argument is not supported by a literal reading of the definition on which it relies, and it is inconsistent with the clear language, structure, and purpose of Title IV. Pp. 370–386.

(a) To view the term "nonforfeitable" as describing the quality of the participant's right to a pension rather than a limit on the amount he may collect is consistent with the Title I definition of such term and accords with the interpretation of the term in Title IV adopted by the PBGC, the agency responsible for administering the Title IV insurance program. Pp. 370–374.

(b) There is no evidence that Congress intended to exclude otherwise vested benefits from the insurance program solely because the employer had disclaimed liability for any deficiency in the pension fund. To the contrary, § 4062 (b), the reimbursement provision, makes it clear that Congress was not only worried about plan terminations resulting from business failures but was also concerned about the termination of underfunded plans, such as the one here, by solvent employers. And the fact that the provision of § 4062 (b) limiting the amount of employer liability for reimbursement to 30% of the employer's net worth would be meaningless unless the employer has disclaimed direct liability demonstrates that Congress did not intend such a disclaimer to render otherwise vested benefits "forfeitable" within the meaning of § 4022. Pp. 374–382.

(c) Petitioner's proposed construction of the statute, whereby cost-free terminations of pension plans would be authorized prior to January 1, 1976, with full liability for all promised benefits thereafter, would distort the orderly phase-in of the statutory program designed by Congress. It appears that Congress intended to discourage unnecessary terminations even during the phase-in period and to place a reasonable ceiling on the potential cost of a termination during the principal life of ERISA—the period after January 1, 1976. Pp. 382–386.

592 F. 2d 947, affirmed.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, and BLACKMUN, JJ., joined. STEWART, J., filed a dissenting opinion, in which WHITE, POWELL, and REHNQUIST, JJ., joined, *post*, p. 386. POWELL, J., filed a dissenting opinion, *post*, p. 396.

Robert W. Gettleman argued the cause for petitioner. With him on the briefs were *Lawrence R. Levin, Joel D. Rubin,* and *H. Debra Levin.*

Henry Rose argued the cause for respondent Pension Benefit Guaranty Corporation. With him on the brief were *Mitchell L. Strickler* and *George Kaufmann. M. Jay Whitman* argued the cause for respondent International Union, United Automobile, Aerospace and Agricultural Implement Workers of America. With him on the brief was *John A. Fillion.**

MR. JUSTICE STEVENS delivered the opinion of the Court.

On September 2, 1974, following almost a decade of studying the Nation's private pension plans, Congress enacted the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829, 29 U. S. C. § 1001 *et seq.* As a predicate for this comprehensive and reticulated statute,[1] Congress made de-

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**Thomas C. Walsh* and *Juan D. Keller* filed a brief for Concord Control, Inc., as *amicus curiae* urging reversal.

George J. Pantos, Otis M. Smith, and *David M. Davis* filed a brief for General Motors Corp. as *amicus curiae* urging affirmance.

[1] Title I of ERISA § 2 *et seq.*, 29 U. S. C. § 1001 *et seq.*, requires administrators of all covered pension plans to file periodic reports with the Secretary of Labor, mandates minimum participation, vesting and funding schedules, establishes standards of fiduciary conduct for plan administrators, and provides for civil and criminal enforcement of the Act. Title II, ERISA § 1001 *et seq.*, amended various provisions of the Internal Revenue Code of 1954 pertaining to qualification of pension plans for special tax treatment, in order, among other things, to conform to the standards set forth in Title I. Title III, ERISA §§ 3001–3043, 29 U. S. C. § 1201 *et seq.*, contains provisions designed to coordinate enforcement efforts of different federal departments, and provides for further study of the field. And, most relevant in this case, Title IV, ERISA §§ 4001–4082, 29 U. S. C. § 1301 *et seq.*, created the Pension Benefit Guaranty Corporation (PBGC)

tailed findings which recited, in part, "that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; [and] that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits. . . ." ERISA § 2 (a), 29 U. S. C. § 1001 (a). As one of the means of protecting the interests of beneficiaries, Title IV of ERISA created a plan termination insurance program that became effective in successive stages. The question in this case is whether former employees of petitioner with vested interests in a plan that terminated the day before much of ERISA became fully effective are covered by the insurance program notwithstanding a provision in the plan limiting their benefits to the assets in the pension fund.

Stated in statutory terms, the question is whether a plan provision that limits otherwise defined, vested benefits to the amounts that can be provided by the assets of the fund prevents such benefits from being characterized as "nonforfeitable" within the meaning of § 4022 (a) of ERISA, 29 U. S. C. § 1322 (a).[2] If the benefits are "nonforfeitable," they are insured by the Pension Benefit Guaranty Corporation (PBGC) under Title IV.[3] And if insurance is payable to the

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and a termination insurance program to protect employees against the loss of "nonforfeitable" benefits upon termination of pension plans that lack sufficient funds to pay such benefits in full.

[2] That section provides, in part:

"Subject to the [dollar] limitations contained in subsection (b) [see n. 23, *infra*], the [PBGC] shall guarantee the payment of all nonforfeitable benefits (other than benefits becoming nonforfeitable solely on account of the termination of a plan) under the terms of a plan which terminates at a time when section 4021 applies to it." 88 Stat. 1016.

[3] Section 4002 (a), 88 Stat. 1004, 29 U. S. C. § 1302 (a), provides:

"There is established within the Department of Labor a body corporate to be known as the Pension Benefit Guaranty Corporation. In carrying out its functions under this title, the corporation shall be administered by the chairman of the board of directors in accordance with poli-

former employees, the PBGC has a statutory right under § 4062 (b) to reimbursement from the employer.[4] It was petitioner's interest in avoiding liability for such reimbursement that gave rise to this action for declaratory and injunctive relief.

The relevant facts are undisputed. In 1960, pursuant to a collective-bargaining agreement, petitioner established a pension plan covering employees represented by the respondent union at its Chicago plant. The plan, as amended from time to time, provided for the payment of monthly benefits computed on the basis of age and years of service at the time of retirement.[5] Benefits became "vested"—that is to say, the

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cies established by the board. The purposes of this title, which are to be carried out by the corporation, are—

"(1) to encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants,

"(2) to provide for the timely and uninterrupted payment of pension benefits to participants and beneficiaries under plans to which this title applies, and

"(3) to maintain premiums established by the corporation under section 4006 at the lowest level consistent with carrying out its obligations under this title."

[4] Section 4062 (b), 88 Stat. 1029, 29 U. S. C. § 1362 (b), provides in part:

"Any employer to which this section applies shall be liable to the corporation, in an amount equal to the lesser of—

"(1) the excess of—

"(A) the current value of the plan's benefits guaranteed under this title on the date of termination over

"(B) the current value of the plan's assets allocable to such benefits on the date of termination, or

"(2) 30 percent of the net worth of the employer. . . ."

In other words, the employer must reimburse the PBGC for payments made from PBGC funds to cover nonforfeitable benefits to the extent that the pension fund was unable to pay them, but in no event is the employer liable to the PBGC for more than 30% of its net worth.

[5] Like the plan described in *Alabama Power Co.* v. *Davis*, 431 U. S. 581, 593, n. 18, "[p]etitioner's plan is a 'defined benefit' plan, under which

employee's right to the benefit would survive a termination of his employment—after either 10 or 15 years of service. The 15-year vesting provisions would not have complied with the minimum vesting standards in Title I of ERISA that were to become effective on January 1, 1976,[6] the day after termination of the plan.

Petitioner agreed to, and did, make regular contributions sufficient to cover accruing liabilities, to pay administrative expenses, and to amortize past service liability over a 30-year period.[7] Consistent with the agreement and with accepted actuarial practice, it was anticipated that the plan would not be completely funded until 1990.

Petitioner retained the right to terminate the plan when the collective-bargaining agreement expired merely by giving 90 days' notice of intent to do so. The agreement specified that upon termination the available funds, after payment of expenses, would be distributed to beneficiaries, classified by age and seniority, but only to the extent that assets were

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the benefits to be received by employees are fixed and the employer's contribution is adjusted to whatever level is necessary to provide those benefits. The other basic type of pension is a 'defined contribution' plan, under which the employer's contribution is fixed and the employee receives whatever level of benefits the amount contributed on his behalf will provide." ERISA's termination insurance program does not apply to defined contribution plans, see § 4021 (b)(1), 29 U. S. C. § 1321 (b)(1), for the reason that under such plans, by definition, there can never be an insufficiency of funds in the plan to cover promised benefits.

[6] ERISA § 211 (b)(2), 29 U. S. C. § 1061 (b)(2). The provision for vesting of normal and early retirement rights after 10 years of service would have complied with the new standards unless, as petitioner argues, the clause disclaiming direct liability of the employer for benefits not sufficiently covered by the pension fund prevented the benefits from being "nonforfeitable" within the meaning of ERISA § 3 (19), 29 U. S. C. § 1002 (19). See discussion in n. 10, and Part III, *infra*, at 384–385.

[7] Persons employed by the company when the plan was created were entitled to credit for their prior years of employment in calculating both their eligibility for pensions and the amount of their benefits on retirement.

available. The critical provision of the agreement, Art. V, § 3, stated:

> "Benefits provided for herein shall be only such benefits as can be provided by the assets of the fund. In the event of termination of this Plan, there shall be no liability or obligation on the part of the Company to make any further contributions to the Trustee except such contributions, if any, as on the effective date of such termination, may then be accrued but unpaid." App. 24.[8]

In 1975 petitioner decided to close its Chicago plant. Its collective-bargaining agreement expired on October 31, 1975, and it terminated the pension plan covering the persons employed at that plant on December 31, 1975, the day before ERISA would have required significant changes in at least the vesting provisions of the plan. At that time 135 employees had accrued benefits with an average value of approximately $77 per month. Those benefits were concededly "vested in a contractual sense." [9] The assets in the fund were sufficient to pay only about 35% of the vested benefits.

In 1976 petitioner filed an action against the PBGC, seeking a declaration that it has no liability under ERISA for any failure of the plan to pay all of the vested benefits in full,

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[8] By quoting only the first of these two sentences, MR. JUSTICE STEWART's dissenting opinion creates the impression that this provision is part of the plan's definition of benefits. Reading the two sentences together, however, makes it clear that the provision is simply a typical disclaimer of employer liability for any deficiency in the assets of the fund.

MR. JUSTICE STEWART's dissenting opinion quotes at length from Art. X, § 3, the plan provision determining the order of distribution of fund assets upon termination. *Post*, at 389–390, n. 7. Again, that provision does not purport to be a part of the definition of benefits, but simply provides a schedule for the distribution of benefits upon termination. Moreover, the dissent is quite wrong in stating that this distribution provision may have become illegal after December 31, 1975, *post*, at 390, n. 8. If that provision has been superseded, it was by § 4044, 29 U. S. C. § 1344, see n. 32, *infra*, which became effective on September 2, 1974.

[9] Brief for Petitioner 28.

and an order enjoining the PBGC from taking actions inconsistent with that declaration. The District Court accepted petitioner's contentions that the limitation of liability clause in the plan was valid on the date of termination, that the clause prevented the benefits at issue from being characterized as "nonforfeitable," and that petitioner was therefore entitled to summary judgment. 436 F. Supp. 1334 (ND Ill. 1977).

The Court of Appeals for the Seventh Circuit reversed. 592 F. 2d 947 (1979). Relying on the definition of "nonforfeitable" in Title I of ERISA,[10] the court concluded that the limitation of liability clause merely affected the extent to which the benefits could be collected, without qualifying the employees' rights against the plan. This conclusion was buttressed

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[10] The definition section of Title I, § 3, 88 Stat. 833, 836, 29 U. S. C. § 1002, provides that "[f]or purposes of this title:

. . . . . .

"(19) The term 'nonforfeitable' when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan. For purposes of this paragraph, a right to an accrued benefit derived from employer contributions shall not be treated as forfeitable merely because the plan contains a provision described in section 203 (a)(3)."

Section 203 (a)(3), 29 U. S. C. § 1053 (a)(3), also part of Title I, provides that the right to accrued benefits shall not be treated as forfeitable merely because the plan provides that they are not payable under certain specified conditions, such as the death or temporary re-employment of the participant. None of the listed conditions relates to insufficient funding.

Section 203 (a) is a central provision in ERISA. It requires generally that a plan treat an employee's benefits, to the extent that they have vested by virtue of his having fulfilled age and length of service requirements no greater than those specified in § 203 (a)(2), as not subject to forfeiture. A provision in a plan which purports to sanction forfeiture of vested benefits for any reason, other than one listed in subsection (a)(3), would violate this section after January 1, 1976, its effective date. Thus, if we were to accept petitioner's argument, that the limitation of direct liability clause renders the vested benefits forfeitable within the meaning of the Title I definition, that clause would be invalid after January 1, 1976.

by a comprehensive review of the legislative history in which Judge Sprecher noted that the words "vested" and "nonforfeitable" had been used interchangeably throughout the congressional reports and debates, that the specific purpose of Title IV insurance was to protect employees from the kind of risk presented here (insufficient funds in the plan to cover vested benefits at termination), and that a contrary holding "would totally subvert the Congressional intent." [11]

Having construed the statute as it did, the Court of Appeals was required to confront petitioner's constitutional argument that the imposition of a retroactive liability for the payment of unfunded, vested benefits that was not assumed under the collective-bargaining agreement, violates the Due Process Clause of the Fifth Amendment. The Court of Appeals agreed that ERISA was not wholly prospective in that it applies to pension plans in existence before the effective date of the Act. It concluded, however, that Congress had adequately tempered the Act's burdens on employers and that those burdens were sufficiently justified by the public purposes supporting the legislation.[12]

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[11] 592 F. 2d, at 958.

[12] "Perhaps the most important facts distinguishing ERISA from the Minnesota statute in *Allied Structural Steel* [*Co.* v. *Spannaus*, 438 U. S. 234,] are those revealing the Congressional attempt to moderate the impact of the liability imposed. Title IV provisions represent a rational attempt to impose liability only to the extent necessary to achieve the legislative purpose. Congress concluded that it was necessary to insure unfunded vested benefits and established a federal corporation for that purpose. However, it was also determined that it would not be possible to maintain an effective insurance program without imposing some liability on employers. The abuses employer liability was designed to cure included terminations motivated by a desire to avoid the continued burden of funding. III Legislative History at 4741 (remarks of Sen. Williams); II Legislative History at 3382 (remarks of Rep. Gaydos). Congress was also concerned that without the risk of liability, employers might use promises of higher retirement benefits for bargaining leverage, knowing that the PBGC would be required to fulfill the promise. S. Rep. No. 93-383, I Legislative History at 1155. It was also believed that to impose liability

The petition for certiorari sought review of both the constitutional question and the question whether the statute had been properly construed to impose continuing liability on an employer that had lawfully terminated its plan prior to the effective date of the minimum vesting standards contained in Title I of ERISA. We granted certiorari, but limited our review to the statutory question. 442 U. S. 940.

Petitioner urges us to adopt a construction of the statute that would avoid the necessity of confronting constitutional questions,[13] and correctly points out that new rules applying

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would cause employers to assume a more responsible funding schedule. II Legislative History at 1873 (remarks of Sen. Griffin). These first two considerations would not have been relevant in the Minnesota scheme because no agency was established to assume primary responsibility for the payment of benefits.

"Acknowledging that employers on the verge of bankruptcy would be unlikely to terminate pension plans solely to take advantage of termination insurance, Congress provided net worth limitations on the amount of potential liability. 29 U. S. C. § 1362. Congress also devised other provisions to temper the burdens imposed. Employers will not necessarily be liable for the full amount of benefits promised in the plan, since Congress set a level on the amount of benefits guaranteed. 29 U. S. C. § 1322 (b)(3). In Section 1323 Congress required the PBGC to provide optional insurance to an employer who desires to protect against this contingent liability. Finally, Title IV grants the PBGC discretion to arrange reasonable terms for the payment of liability. 29 U. S. C. § 1367. Thus Title IV of ERISA, unlike the statutes invalidated under Due Process or the Contract Clause does have 'limitations as to time, amount, circumstances, [and] need.' *W. B. Worthen Co.* v. *Thomas*, 292 U. S. [426,] 434. . . .

"The record supporting the enactment of ERISA, wholly unlike that present in *Allied Structural Steel*, demonstrates that 'the presumption favoring "legislative judgment as to the necessity and reasonableness of a particular measure"' *must* be allowed to govern here. 438 U. S., at 247. . . . *Turner Elkhorn Mining*, 428 U. S., at 18, 19 . . . ; *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 488 . . . (1955). Title IV of ERISA satisfies Nachman's rights to Due Process." 592 F. 2d, at 962–963 (footnotes omitted).

[13] See, *e. g.*, *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 568–569.

to pension funds "should not be applied retroactively unless the legislature has plainly commanded that result." *Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U. S. 702, 721. But petitioner's argument for reversal relies primarily on the language of the statutory definition of "nonforfeitable" contained in Title I, see n. 10, *supra*. If the Title I definition determines which benefits are insured under Title IV, benefits are not insured unless they are "unconditional" and "legally enforceable against the plan." Since petitioner's plan expressly states that benefits "shall be only such benefits as can be provided by the assets of the fund," petitioner argues that those elements of the statutory definition are not satisfied. Therefore, the benefits are forfeitable and necessarily uninsurable. Thus, petitioner concludes, it is not liable to anyone under the statute for the fund's inability to cover all vested benefits. Petitioner submits that this result is consonant with Congress' decision to postpone the effective date of the minimum vesting and funding requirements of Title I until January 1, 1976. Petitioner interprets that postponement as having been intended, among other things, to allow employers the opportunity to avoid the harsh consequences of the statute's retroactive application by freely terminating their plans at any time prior to that date.

We must reject petitioner's argument. We first note that the plan provision on which petitioner relies, *supra*, at 365, read as a whole, merely disclaims direct employer liability and imposes no condition on the benefits. See n. 8, *supra*, and n. 17, *infra*. Thus, petitioner's argument is not supported by a purely literal reading of the definition on which it relies and is inconsistent with the clear language, structure and purpose of Title IV. Since we construe petitioner's plan as containing only an employer liability disclaimer clause, we cannot accept its statutory argument without virtually eviscerating Title IV as applied to plans terminating prior to January 1, 1976. Such a result not only would be contrary to the four-stage phase-in of the program of insurance and employer

liability designed by Congress, but also would impose an extraordinarily harsh and plainly unintended burden on employers by operation of Title I after that date. We first consider petitioner's textual argument divorced from the statute as a whole; we next examine the structure and history of Title IV; and we finally explain how petitioner's proposed construction would distort the orderly phase-in of the statutory program designed by Congress.

I

The statutory issue presented in the case is whether petitioner's employees' benefits are "nonforfeitable . . . under the terms of a plan" within the meaning of § 4022 (a) of the Act. See n. 2, *supra*. Petitioner concedes that its employees' benefits are "vested in a contractual sense." The question is whether such benefits were insured under Title IV when the plan was terminated even though the plan expressly provided that petitioner was not liable if the plan's assets were insufficient to cover them.

The key statutory term, "nonforfeitable benefits," is nowhere defined in Title IV. Petitioner relies on the definition of "nonforfeitable" in Title I, § 3 (19), see n. 10, *supra*. But definitions in that section are not necessarily applicable to Title IV, because they are limited by the introductory phrase, "For purposes of this title." [14] Nothing in the statute or its legislative history tells us why the Title I definition of "non-

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[14] The argument that the definition of "nonforfeitable" in § 3 is directly applicable only in Title I is reinforced by the fact that Title I definitions are occasionally expressly incorporated by reference in Title IV. See, *e. g.*, § 4021 (a)(1), 29 U. S. C. § 1321 (a)(1), which provides in part, "this section applies to any plan . . . which, for a plan year . . . is an employee pension benefit plan (as defined in paragraph (2) of section 3 of this Act). . . ." This specific incorporation suggests that Title I definitions do not apply elsewhere in the Act of their own force, though they may otherwise reflect the meaning of the terms defined as used in other Titles.

forfeitable" is not made expressly applicable to Title IV. The legislative history does disclose, however, that earlier versions of what finally emerged as the Title I definition would unquestionably have covered the benefits at stake in this litigation, and that those earlier versions applied to the entire Act including the termination insurance provisions.[15] If we assume that the original intent to have the definition apply to the entire statute survived the unexplained changes in the form of the definition, we should likewise assume that no change was intended in the substantive coverage of the insurance program. Indeed, as we shall demonstrate,[16] the latter assumption is supported by the legislative history. But even assuming, *arguendo*, that the Title I definition controls and even if the legislative history were less clear than it is, three aspects of the Title I definition itself refute petitioner's argument that the "nonforfeitable" character of a participant's rights should be determined by focusing on whether the employer is liable for any deficiency in the fund's assets.

First, the principal subject of the definition is the word "claim"; it is the claim to the benefit, rather than the benefit itself, that must be "unconditional" and "legally enforceable against the plan." It is self-evident that a claim may remain valid and legally enforceable even though, as a practical matter, it may not be collectible from the assets of the obligor.

Second, the statutory definition refers to enforceability against "the plan." The only practical significance of the contractual provision limiting liability is to provide protection

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[15] For example, the bill originally introduced in the House defined "nonforfeitable pension benefit" as "a legal claim obtained by a participant or his beneficiary to that part of an immediate or deferred pension benefit, which notwithstanding any conditions subsequent which could affect receipt of any benefit flowing from such right, arises from the participant's service and is no longer contingent on continued service." H. R. 2, 93d Cong., 1st Sess., § 3 (20) (1973), 1 Legislative History of the Employee Retirement Income Security Act of 1974, 94th Cong., 2d Sess., 12 (Comm. Print 1976) (hereinafter Leg. Hist.).

[16] See nn. 24–27, *infra*.

for the employer. With or without such a clause, the pension fund could pay no more than the amount of assets on hand. Giving the employer protection against liability does not qualify the beneficiary's rights against the plan itself.[17]

Third, the term "forfeiture" normally connotes a total loss in consequence of some event rather than a limit on the value of a person's rights. Each of the examples of a plan provision that is expressly described as not causing a forfeiture listed in § 203 (a)(3), see n. 10, *supra*, describes an event—such as

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[17] The dissenting opinions rely entirely on the form of the contractual provision protecting the employer against liability beyond its agreed contributions. Thus, if instead of stating that the benefits "shall be only such benefits as can be provided by the assets of the fund" the plan had said the benefits "shall only be recoverable from the assets of the fund," the dissenters would presumably agree that the benefits would be insured under Title IV. Nothing in the statute or its legislative history suggests that Congress intended the rights of the employees to hinge on any such purely formal difference between two plan provisions that would have precisely the same legal significance apart from the statute.

Indeed, under the dissenters' reading of the plan provision, insurance coverage would be unavailable regardless of the reason for the fund's inability to pay the vested benefits in full; whether the shortage resulted from insolvency of the employer, a defalcation by the trustees of the fund, or the unilateral termination before the plan was fully funded, Title IV insurance would be simply unavailable.

In the text, we explain at length why a clause limiting an employer's liability does not make otherwise vested benefits forfeitable within the meaning of the Act. The dissenters do not question the validity of any part of that explanation. Since what MR. JUSTICE STEWART describes as an "asset-sufficiency limitation," *post*, at 391, in the context of this case, is merely an example of such a clause, our explanation applies with full force to that formulation. Merely to assert that there is a "world of difference" between two forms of *employer* protection—without considering whether there is any reason to believe Congress intended such a difference to govern the availability of insurance protection for *employees*—is an unacceptable approach to the problem of statutory construction presented by this case. Understandably, the dissenting opinions do not suggest that there is anything in the legislative history of ERISA to support the view that the availability of insurance coverage should turn on the form of a plan provision disclaiming employer liability for unfunded benefits.

death or temporary re-employment—that might otherwise be construed as causing a forfeiture of the entire benefit. It is therefore surely consistent with the statutory definition of "nonforfeitable" to view it as describing the quality of the participant's right to a pension rather than a limit on the amount he may collect.

This reading of the Title I definition accords with the interpretation of the term "nonforfeitable" in Title IV adopted by the agency responsible for administering the Title IV insurance program. The PBGC has promulgated regulations containing a completely unambiguous definition of the term [18] and has been paying benefits to over 12,000 participants in terminated plans on the basis of this understanding of its statutory responsibilities.[19] We surely may not reject this

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[18] The definition promulgated by PBGC states that "a benefit payable with respect to a participant is considered to be nonforfeitable, if on the date of termination of the plan the participant (or beneficiary) has satisfied all of the conditions required of him under the provisions of the plan to establish entitlement to the benefit, except the submission of a formal application, retirement, [or] the completion of a required waiting period. . . ." 29 CFR § 2605.6 (a) (1979).

Petitioner all but concedes that it loses if this definition accurately reflects the meaning of "nonforfeitable" in Title IV. Petitioner argues, in a footnote in its brief, that the word, "payable," modifies "benefit" in such a way as to exclude the benefits under its plan since liability of the employer to pay them was expressly disclaimed. If that is what the PBGC intended when it promulgated its definition, it has certainly chosen a strangely vague manner of making that intent known.

[19] The Treasury Department's definition of "nonforfeitable," 26 CFR § 1.411 (a)–4 (a) (1979), provides in part:

"Rights which are conditioned upon a sufficiency of plan assets in the event of a termination or partial termination are considered to be forfeitable because of such condition. However, a plan does not violate the nonforfeitability requirements merely because in the event of a termination an employee does not have any recourse toward satisfaction of his nonforfeitable benefits from other than the plan assets or the Pension Benefit Guaranty Corporation."

Because we read petitioner's plan as containing only an employer liability disclaimer clause, this case is clearly governed only by the second quoted

contemporary construction of the statute by the PBGC[20] without a careful examination of Title IV and its underlying legislative history to see what benefits Congress intended to insure.

II

One of Congress' central purposes in enacting this complex legislation was to prevent the "great personal tragedy"[21] suffered by employees whose vested benefits are not paid when pension plans are terminated.[22] Congress found "that owing

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sentence of the regulation. Moreover, we assume this accords with the Treasury Department's views, since the PBGC's brief was approved by the Treasury Department. See also n. 36, *infra*. Of course, a provision in a plan which is construed as a condition, the failure of which would cause a forfeiture, would be invalid after January 1, 1976. See n. 10, *supra*.

[20] Cf., *e. g.*, *E. I. du Pont de Nemours & Co.* v. *Collins*, 432 U. S. 46, 55.

[21] The quotation is from a statement by Senator Bentsen, the member of the Senate Committee on Finance most active in sponsoring ERISA, reprinted in 3 Leg. Hist. 4793.

[22] See, *e. g.*, the following statement by Senator Williams, a sponsor of the Senate version of ERISA:

"Another reason why so many employees have found their pension expectations to be illusory is that the employer may shut down, and if there are insufficient funds to meet the vested claims of the participants, they have no recourse.

"A classic case, of course, is the shutdown of Studebaker operations in South Bend, Ind., in 1963, with the result that 4,500 workers lost 85 percent of their vested benefits because the plan had insufficient assets to pay its liabilities.

"While this was a spectacularly tragic instance, it was by no means unique. Last year, for example, P. Ballantine and Sons, a substantial contributor to a multiemployer plan, sold its operations and withdrew from the plan.

"Because the plan did not have sufficient assets to cover vested liabilities, several hundred employees, with as many as 30 years service, will lose a substantial portion of their vested benefits.

"These, of course, are by no means isolated cases. According to a recently-issued study by the Departments of Labor and Treasury, over 19,000 workers lost vested benefits last year because of the termination of insufficiently funded plans." 2 Leg. Hist. 1599–1600.

to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits." ERISA § 2 (a), 88 Stat. 832, 29 U. S. C. § 1001 (a). Congress wanted to correct this condition by making sure that if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—that he actually receive it. The termination insurance program is a major part of Congress' response to the problem. Congress provided for a minimum funding schedule and prescribed standards of conduct for plan administrators to make as certain as possible that pension fund assets would be adequate. But if a plan nonetheless terminates without sufficient assets to pay all vested benefits, the PBGC is required to pay them—within certain dollar limitations not applicable here—[23] from funds established by that corporation.

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[23] Section 4022 (b)(3), 88 Stat. 1017, 29 U. S. C. § 1322 (b)(3), provides:

"The amount of monthly benefits described in subsection (a) provided by a plan, which are guaranteed under this section with respect to a participant, shall not have an actuarial value which exceeds the actuarial value of a monthly benefit in the form of a life annuity commencing at age 65 equal to the lesser of—

"(A) his average monthly gross income from his employer during the 5 consecutive calendar year period (or, if less, during the number of calendar years in such period in which he actively participates in the plan) during which his gross income from the employer was greater than during any other such period with that employer determined by dividing $1/12$ of the sum of all such gross income by the number of such calendar years in which he had such gross income, or

"(B) $750 multiplied by a fraction, the numerator of which is the contribution and benefit base (determined under section 230 of the Social Security Act) in effect at the time the plan terminates and the denomina-

Throughout the entire legislative history, from the initial proposals to the Conference Report, the legislators consistently described the class of pension benefits to be insured as "vested benefits."[24] Petitioner recognizes, as it must, that the terms "vested" and "nonforfeitable" were used synonymously.[25]

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tor of which is such contribution and benefit base in effect in calendar year 1974.

"The provisions of this paragraph do not apply to non-basic benefits."

In other words, Title IV generally limits guaranteed benefits to a worker's average monthly wage over the worker's best five years with the employer or $750 per month (adjusted for cost of living), whichever is lower. The last quoted sentence reflects that the PBGC is authorized to guarantee the payment of greater benefits, but is not required to do so. See § 4022 (c), 29 U. S. C. § 1322 (c).

[24] See, *e. g.*, S. Rep. No. 93-127, pp. 2, 24 (1973), 1 Leg. Hist. 588, 610; H. R. Rep. No. 93-533, pp. 2, 14, 25 (1973), 2 Leg. Hist. 2349, 2361, 2372; Summary of Differences between the Senate and the House Version of H. R. 2, pp. 7-9 (1974), in 3 Leg. Hist. 5213-5215; H. R. Conf. Rep. No. 93-1280, p. 368 (1974), 3 Leg. Hist. 4635: "Under the conference substitute [which was adopted by both Houses], vested retirement benefits guaranteed by the plan (other than benefits vesting only because of the termination) are to be covered to the extent of the insurance limitations. . . ." MR. JUSTICE STEWART's dissent acknowledges this language from the Conference Report, *post*, at 393, but draws an unsupportable inference from it. He emphasizes that it is only " 'vested retirement benefits *guaranteed by the plan*' " that are insured. The emphasized language was used by the Conference Committee, however, not to describe the nature of vested benefits that were to be insured under Title IV, but to distinguish the rejected narrower House provision, under which only those benefits that Title I of ERISA required to be vested would be insured. H. R. Conf. Rep. No. 93-1280, *supra*, at 368, 3 Leg. Hist. 4635. See also 592 F. 2d, at 954, n. 9. Thus, the quoted language, which tracks the language of § 4022 verbatim—except that "vested" is used in place of "nonforfeitable"—merely underscores the intent to insure all vested benefits.

[25] Brief for Petitioner 28-29: "the Congressional history shows the use of the word 'vested' interchangeably with the word 'nonforfeitable'. . . ."

See also the definition contained in S. 4 as reported on April 18, 1973, § 3 (26), 1 Leg. Hist. 494-495, which, when proposed, applied to the

Since Title IV neither uses nor defines the term "vested,"[26] it is reasonable to infer that the term "nonforfeitable" was intended to describe benefits that were generally considered

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entire Act including the termination insurance provisions: "'Nonforfeitable right' or 'vested right' means a legal claim obtained to that part of an immediate or deferred life annuity which notwithstanding any conditions subsequent which could affect receipt of any benefit flowing from such right, arises from the participant's covered service under the plan, and is no longer contingent on the participant remaining covered by the plan."

In that same version of the bill, the predecessor of § 4022 stated that the "insurance program shall insure participants . . . against loss of benefits derived from vested rights. . . ." S. 4 § 402 (a), 1 Leg. Hist. 532.

There is no explanation in the legislative history for the substitution of "nonforfeitable" for "vested." Since it is clear from the remainder of the legislative history that "vested" benefits were to be insured, we view the substitution of "nonforfeitable" for "vested" as formal only. The Court of Appeals' explanation for the substitution is plausible: "The substitution of terms might be explained by reference to the testimony of members from the Department of Labor at the hearings. The Department testified in 1973 that 'there is a problem of defining the accrued benefit which will be insured. . . . [W]e probably need to get some consistency between accrued benefits definition for purposes of Internal Revenue as well as for purposes of termination insurance.' *Hearings before the Subcommittee on Private Pension Plans of the Senate Committee on Finance*, 93rd Cong., 1st Sess., Part I at 437. Senator Bentsen responded with some interest in consistent definitions, although emphasizing it was vested benefits Congress intended to insure. *Id.*, at 443. The Internal Revenue Code used the word 'nonforfeitable,' rather than 'vested,' in its regulation of plan terminations pre-ERISA. *See* Treas. Reg. § 1.401-6 (1963)." 592 F. 2d, at 955, n. 10.

[26] There is a Title I definition of "vested liabilities," which provides that, "[t]he term 'vested liabilities' means the present value of the immediate or deferred benefits available at normal retirement age for participants and their beneficiaries which are nonforfeitable." ERISA § 3 (25), 88 Stat. 837, 29 U. S. C. § 1002 (25). Although, as noted earlier, see n. 14, *supra*, Title I definitions are not directly applicable to Title IV, it suffices to say that the synonymous use of "vested" and "nonforfeitable" in this definition as well as throughout the legislative history does not make any easier petitioner's task of distinguishing the two terms for Title IV purposes.

"vested" prior to the statute. And it is clear that the normal usage in the pension field was that even if the actual realization of expected benefits might depend on the sufficiency of plan assets, they were nonetheless considered vested.[27]

There is no evidence that Congress intended to exclude otherwise vested benefits from the insurance program solely because the employer had disclaimed liability for any deficiency in the pension fund. Indeed, there is strong evidence to the contrary. Congress understood that pension plans ordinarily contained disclaimer provisions of the sort petitioner relies on here.[28] Given that understanding, the Title

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[27] "Under the pre-ERISA terminology, one author clarified that although benefit claims in fact were conditioned on the availability of funds in the trust, they were not to be considered conditional rights:

"'In a basic contradiction to the pure legal concept of vesting, the Benefit under a pension plan that is described as vested, is, in the usual case . . . contingent . . . upon survival . . . [and] upon the availability of assets in the plan. In principle, however, this is no different from some other types of vested property rights such as those embodied in bonds and promissory notes that may not be honored at maturity because of the financial condition of the promisor. In essence, therefore, the vesting of a pension benefit simply means that the realization of the benefit is no longer contingent upon the individual's remaining in the service of the employer to normal retirement age.'

"D. McGill, Preservation of Pension Benefit Rights, 6 (1972). See also Departments of Treasury and Labor, Study of Pension Plan Terminations 1972, 19 (1973)." 592 F. 2d, at 953–954.

[28] See S. Rep. No. 92–634, Interim Report of Activities of the Private Welfare and Pension Plan Study, 1971, Senate Committee on Labor and Public Welfare, p. 74 (1972): "Employers ordinarily have no financial responsibility for pension payments beyond the contributions they are committed to make."

See also remarks of Representative Erlenborn, 2 Leg. Hist. 3388:

"At the present time the legal foundation of pension plans is that the employer sets up a pension trust and promises to make periodic contributions into that trust. If there are sufficient assets, the employee will get the pension that has been described; if there are not, he does not get it; he gets something less. But the employer up until the present time gen-

IV insurance program would have been wholly inapplicable to most pension plans. Since only the few plans in which the employer had not disclaimed liability would have been covered, the only purpose in providing any insurance at all would be to protect employees against the risk of employer insolvency.[29]

But § 4062 (b)(2), 29 U. S. C. § 1362 (b)(2), see n. 4, *supra*—the reimbursement provision—demonstrates that insolvency was certainly not the only focus of Congress' concern. The very fact that § 4062 (b)(2) requires employers to reimburse the PBGC for the payment of insured benefits makes it clear that Congress was not only worried about plan terminations resulting from business failures but also was concerned about the termination of underfunded plans by solvent employers.[30] Of even greater significance is the pro-

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erally has not made a promise to pay the pension, only to make periodic contributions."

Cf. S. Rep. No. 93-127, p. 10 (1973), 1 Leg. Hist. 596, noting that some "critics have proposed that corporate assets be committed to guarantee any pension obligations which exist at termination," which implies that the problem was largely due to the absence of any direct guarantee by the employer. That proposal was not adopted. Congress opted instead for the insurance system run by the PBGC, with limited employer liability over to the PBGC.

Cf. also Affidavit of Joseph E. Ellinger, Director of the Office of Program Operations of the PBGC: "Since September 2, 1974, the PBGC has assumed liability for approximately 136 insufficient pension plans terminating on or before December 31, 1975. . . . Of these plans, approximately 78 have limitation-of-liability provisions like the pension plan involved in this lawsuit." App. 74.

[29] Under petitioner's view, unless the employer is directly liable, the benefits are uninsured. Accepting that view, it would only be in a case in which an employer is insolvent that the insurance program would make any practical difference, since otherwise the employee could sue the employer directly.

[30] See remarks of Senator Williams following the conference, 3 Leg. Hist. 4741–4742: "Since there would be a possibility of abuse by solvent employers who terminate a plan and shift the financial burden to the

vision limiting the amount of employer liability for reimbursement to 30% of the employer's net worth. The 30% limit plainly contemplates the situation in which the employer has disclaimed direct liability; for if the employer were directly liable to the employees for the full amount of any funding deficiency, the 30% limitation would serve no useful purpose.[31] That this 30% limit would be meaningless unless the employer has disclaimed direct liability surely demonstrates that Congress did not intend such a disclaimer to

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insurance program, notwithstanding their own financial ability to continue funding the plan, the conference bill imposes liability on employers whose plans terminate, to reimburse the program for benefits paid by the corporation. This liability extends to 30 percent of the employer's net worth."

Congress was not acting in a vacuum. The threat of terminations of underfunded plans by solvent employers was quite real. In a 1972 study of pension plan terminations, published in 1973 by the Departments of the Treasury and Labor, it was reported, p. 55, that "the great majority of claimants with losses, including high-priority claimants, are in plans of employers whose net worth substantially exceeds benefit losses." Indeed, "[o]ver-all, only 3 percent of claimants with losses were in plans where employer net worth was less than the value of benefits lost while 71 percent of the claimants with losses were in plans where employer net worth was at least 1,000 percent of claimant losses." *Id.*, at 61. This study was repeatedly relied on by Congress. See, *e. g.*, S. Rep. No. 93-127, p. 10 (1973), 1 Leg. Hist. 596; remarks of Senator Williams, n. 22, *supra;* remarks of Representative Thompson, one of the House conferees on the final bill, 3 Leg. Hist. 4665.

The 30% limitation reflects the fear expressed during the debates that if too great a burden is placed directly on employers, growth of pension plans would be discouraged. See remarks of Representative Erlenborn, 2 *id.*, at 3403.

[31] If the employer pays the unfunded portion of the benefits, there would be no need for insurance and, of course, no need for any reimbursement at all. On the other hand, if the employer is liable to the employees but has insufficient assets to pay the full benefits, there obviously would be insufficient funds to reimburse the PBGC and the 30% limit would therefore be irrelevant.

render otherwise vested benefits "forfeitable" within the meaning of § 4022.[32]

Petitioner's reading of the statute would limit any meaningful application of the insurance program prior to January 1, 1976, to only those cases involving insolvent employers that had not disclaimed direct liability. Since the legislative history clearly shows that Congress intended to cover terminations by solvent employers, and further shows that disclaimer clauses were widely used, petitioner is ultimately contending that Congress did not intend to create any significant employer reimbursement liability prior to January 1, 1976. This argument, however, is foreclosed by a consideration of the statutory provisions for successive increases in the burdens associated with plan terminations. Congress clearly did not offer employers an opportunity to make cost-free terminations at any time prior to January 1, 1976. Quite the contrary, one

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[32] Another indication that benefits are not forfeitable within the meaning of Title IV solely because the employer has disclaimed direct liability is § 4044, 29 U. S. C. § 1344, which establishes the priority scheme for allocation of assets upon termination. The fifth priority is "all other nonforfeitable benefits under the plan." That implies that the four prior categories all involve nonforfeitable benefits as well, as one might expect. Subsection (b)(2) states the rule that if the assets "are insufficient to satisfy in full the benefits of all individuals [in any of the first four categories], . . . the assets shall be allocated pro rata among such individuals on the basis of present value (as of the termination date) of their respective benefits. . . ." Since this section thus contemplates that there may be insufficient funds in the plan to pay nonforfeitable benefits, it must be that benefits are not to be classified as forfeitable solely because there are insufficient funds to pay them. And it would make no sense administratively to provide for automatic pro rata distribution, as this section does, unless no additional funds are expected directly from the employer. If the employer is directly liable, it would make more sense to make any pro rata distribution after adding to the assets of the fund whatever funds could be gleaned directly from the employer. Therefore, this section indicates that Congress thought that benefits may be nonforfeitable even if an employer has disclaimed direct liability.

of the express purposes of ERISA was to discourage plan terminations. See n. 3, *supra*.

III

We have previously noted the care with which Congress approached the problem of retroactivity in ERISA. See *Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U. S., at 721–722, n. 40. Congress provided that Title IV should have an increasingly severe yet carefully limited impact on employers during four successive periods of time for single-employer plans. During each of these periods, however, it extended the same insurance protection to those beneficiaries of terminated plans having vested benefits under the terms of the plans.

Title IV became effective as soon as ERISA was enacted on September 2, 1974, § 4082 (a), 29 U. S. C. § 1381 (a), and indeed was expressly made partially retroactive in order to provide insurance coverage to participants whose plans terminated after June 30, 1974, § 4082 (b), 29 U. S. C. § 1381 (b). The measure of coverage, at the outset, was the difference between the employee's vested benefits under the terms of the plan (subject to the dollar limitations in § 4022 (b)(3), see n. 23, *supra*) and the amount that could be paid from the terminated plan's assets. However, the employer liability provision, § 4062, was not made effective at all during this initial period—June 30 to September 2, 1974. The PBGC was thus given no right to recover any part of the insured deficiencies from employers that terminated their plans before the Act became effective.[33]

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[33] Since a disclaimer clause would protect an employer from liability to its employees, and since there was no contingent liability to the PBGC on account of terminations during this initial period in any event, it is difficult to identify a rational basis for conditioning the availability of plan termination insurance in this period on the absence of a disclaimer clause.

The second period lasted for 270 days after the enactment of ERISA, or until the end of May 1975. Again, the PBGC provided insurance coverage for most underfunded nonforfeitable benefits under the terms of a pension plan terminated during this period. But two important additional provisions became effective: § 4062 (b), the section creating employer liability to the PBGC, and § 4004 (f)(4), 88 Stat. 1009, 29 U. S. C. § 1304 (f)(4).[34] The latter authorized the PBGC to waive entirely, or to reduce, its right to recover insurance payments from any employer who could establish unreasonable hardship in situations in which the employer was not able, as a practical matter, to continue its plan in effect. Section 4004 (f)(4) unequivocally demonstrates that Congress had deliberately imposed a new liability upon an employer that terminated its plan during the first nine months of the operation of the Act. If the employer had a pre-existing contractual liability, there would have been no effective way for the PBGC to mitigate it in hardship cases, since the PBGC could not stop the employees from suing the employer directly. Moreover, there would have been no need for insurance except in cases of insolvency, and in such cases there would have been no practical reason for mitigation because recovery from the employer would have been impossible in any event. On the other hand, in the typical case in which the employer had protected itself from any contractual liability, the only possible source of employer liability was

[34] "(f) In addition to its other powers under this title, for only the first 270 days after the date of enactment of this Act the corporation may—

. . . . .

"(4) waive the application of the provisions of sections 4062, 4063, and 4064 to, or reduce the liability imposed under such sections on, any employer with respect to a plan terminating during that 270 day period if the corporation determines that such waiver or reduction is necessary to avoid unreasonable hardship in any case in which the employer was not able, as a practical matter, to continue the plan."

§ 4062's provision for the recovery by the PBGC of insurance payments made on account of unsatisfied nonforfeitable benefits. Petitioner's definition of nonforfeitable benefits as excluding from Title IV coverage all benefits for which the employer is not directly liable would have made § 4004 (f)(4) totally inapplicable in the only cases in which it could have possibly made any difference.

The third period lasted for about seven months until December 31, 1975, the termination date of petitioner's plan. Having terminated more than 270 days after the Act became effective, petitioner was not eligible for a hardship waiver. Its contingent liability, however, was smaller than it would have been had it terminated its plan in the fourth period. During the third period, the terms of the pension plan still measured the outer limits of the unfunded liability. Had petitioner waited another day to terminate, Title I's vesting standards would have become effective, thereby increasing the number of employees whose benefits would have become vested, see n. 6, *supra*, and therefore insurable under Title IV. Petitioner avoided this additional liability by terminating in the third period.

Under petitioner's reading of the statute, there was a much more dramatic difference between the third period and the fourth period than we have just described. The argument that an employer liability disclaimer clause renders a plan's benefits forfeitable has two draconian consequences: first, it makes the Title IV insurance program entirely inapplicable to most terminations before January 1, 1976; second, it makes such disclaimer clauses entirely invalid on and after that date. This latter conclusion flows directly from Title I's command that all covered pension plans provide nonforfeitable benefits on and after January 1, 1976. See n. 10, *supra*.

But Congress plainly did not intend to prevent employers from limiting their potential direct liability to their em-

ployees. There is not a word in the statute or its legislative history suggesting that Congress ever intended to outlaw the use of such clauses.[35] On the contrary, the inclusion of a limit on an employer's contingent reimbursement liability to the PBGC measured by 30% of its net worth would be inexplicable if Congress had intended to deny employers any right to place a contractual limit on their direct liability to their employees. We stress that petitioner's construction of the statute would therefore render meaningless § 4062 (b)'s 30% net worth limit on the employer's contingent liability to the PBGC for all terminations occurring after January 1, 1976. In light of the careful attention paid to when various provisions were to be effective, Congress surely would have made explicit any intent to limit this important provision to a mere transitionary role. It bears emphasis that Congress declined to adopt the suggestion that corporate assets be committed to guarantee any pension obligations which exist at termination.[36] The 30% provision was designed as a softer measure.[37]

In sum, petitioner reads the statute as authorizing cost-free terminations prior to January 1, 1976, and full liability for all promised benefits thereafter with neither dollar nor

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[35] Indeed, since their use has unquestionably contributed to the growth of private pension plans, their prohibition would be inconsistent with Congress' repeatedly expressed intent to encourage the maintenance of pension plans.

[36] See n. 28, *supra*. The Internal Revenue Service has included an employer liability disclaimer clause in a model pension plan issued for guidance in drafting post-1976 plans. See CCH 1977 Pension Plan Guide ¶ 30,782.96.

[37] Further, under the reading of the statute we adopt, in the usual case an employer could not be liable for underfunded benefits beyond the dollar limitations on PBGC insurance payments. See n. 23, *supra*. But if an employer liability disclaimer clause were to be deemed invalid after January 1, 1976, those limits would not be applicable to protect the employer in lawsuits by employees brought directly against it.

net worth limitations. We are convinced that Congress envisioned a quite different scheme. Congress intended to discourage unnecessary terminations even during the phase-in period, and to place a reasonable ceiling on the potential cost of terminations during the principal life of the Act—the period after January 1, 1976. Although the impact of our holding on petitioner and others who lawfully terminated plans during the second half of 1975 may seem harsh, we have no doubt as to what Congress intended. We cannot give the statute a special reading for that brief period without distorting it for the remainder of its statutory life.

Accordingly, the judgment is

Affirmed.

MR. JUSTICE STEWART, with whom MR. JUSTICE WHITE, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST join, dissenting.

Title IV of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U. S. C. § 1301 *et seq.*, establishes a system of insurance to cover the termination of private pension plans. Under that Title, the Pension Benefit Guaranty Corporation (PBGC) must "guarantee the payment of all nonforfeitable benefits . . . under the terms of a [covered] plan which terminates."[1] In turn, the PBGC may sue the company that maintained the plan for such part of the "guaranteed" payment as exceeded on the date of termination the value of the plan's assets.[2]

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[1] Title 29 U. S. C. § 1322 (a) more fully provides:

"[The PBGC] shall guarantee the payment of all nonforfeitable benefits (other than benefits becoming nonforfeitable solely on account of the termination of a plan) under the terms of a plan which terminates at a time when section 1321 of this title applies to it."

Section 1322 (b) limits the amounts which the PBGC must so guarantee in respects not at issue here.

[2] 29 U. S. C. § 1362 (b)(1):

"Any employer [who maintained a plan at the time it was termi-

The Nachman plan was terminated on December 31, 1975, several months after Title IV had become fully applicable to pension plans such as the one maintained by the petitioner.[3] The issue in this case is, therefore, a narrow one: Whether, "under the terms of [the Nachman] plan," the plan's participants were entitled on the date of termination to "nonforfeitable benefits" in excess of the value of the funds that were then held by the plan.[4]

ERISA defines a "nonforfeitable benefit" as follows: [5]

"The term 'nonforfeitable' when used with respect to a

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nated, see § 1362 (a) and the exceptions provided therein] shall be liable to the corporation, in an amount equal to . . . —

"(1) the excess of—

"(A) the current value of the plan's benefits guaranteed under this subchapter on the date of termination over

"(B) the current value of the plan's assets allocable to such benefits on the date of termination. . . ."

A company's liability under § 1362 (b)(1) may not, however, exceed "30 percent of the net worth of the employer determined as of a day, chosen by the [PBGC] but not more than 120 days prior to the date of termination, computed without regard to any liability under this section." § 1362 (b)(2).

[3] See 29 U. S. C. § 1381 (a) ("The provisions of this subchapter take effect on September 2, 1974").

[4] If the answer to this inquiry is no, then under Title IV of ERISA the petitioner owes nothing to the PBGC. On the other hand, if the answer is yes, then the petitioner must pay the PBGC the amount by which the plan's "nonforfeitable benefits" exceeded on the termination date the value of the plan's assets, subject, of course, to the 30%-of-net-worth limitation contained in 29 U. S. C. § 1362 (b)(2) and the limitations set out in § 1322 (b).

[5] 29 U. S. C. § 1002 (19).

As the Court notes, § 1002 states that the definitions set out therein are "[f]or purposes of [Title I]." That the § 1002 (19) definition of "nonforfeitable benefit" is not expressly made applicable to Title IV appears, however, to be attributable to nothing but inadvertence. In the bill that passed the House and was sent to the Conference Committee, the minimum vesting provisions and the termination insurance provisions were

pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan." [6]

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located under one Title. See H. R. 2, as passed by the House, 93d Cong., 2d Sess. (Table of Contents) (1974), 3 Leg. Hist. 3898–3899. The definition of "nonforfeitable" now contained in § 1002 (19) was made applicable to that entire Title. H. R. 2, § 3 (1974), 3 Leg. Hist. 3903. The Conference Committee split the minimum vesting provisions and the termination insurance provisions into two separate Titles. As the definitional section had always been situated at the front of the minimum vesting provisions, it naturally followed those provisions into Title I of the bill as enacted into law.

It would severely strain credulity to infer from these events that Congress decided to leave to pure chance the proper definition of "nonforfeitable" for purposes of Title IV. "Nonforfeitable" is used in Title I as a term of art. Congress used the same word in critical portions of Title IV. Had it intended "nonforfeitable" to carry one meaning in Title I and another in Title IV, Congress would presumably have said so, particularly since the two Titles were considered and enacted in tandem and were meant to function as an interrelated system of protection. Title IV, however, sets out no separate definition of "nonforfeitable," even though that Title does contain a few definitions of its own. Furthermore, the Act's legislative history reveals no suggestion that the word's import should differ as between Title I and Title IV.

It follows that, insofar as the PBGC's own definition of "nonforfeitable," see 29 CFR § 2605.6 (a) (1979), departs from § 1002 (19), it must be rejected. Nothing in the Act or its legislative history reflects a congressional intent to give the PBGC the authority to define the scope of its own entitlement to employer assets.

House and Senate bills and debates are reprinted, along with the House, Senate, and Conference Reports, in a three-volume Committee Print entitled Legislative History of the Employee Retirement Income Security Act of 1974, Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 94th Cong., 2d Sess. (1976) (cited *supra* and hereafter as Leg. Hist.).

[6] The Court asserts that the language contained in § 1002 (19)—"which arises from the participant's service, which is unconditional, and which

No contention is made in this case that the benefits at issue did not arise from services rendered by the plan's participants. Rather, the petitioner's argument is that, in the words of the statute, "under the terms of [the Nachman] plan," the contested benefits were both "[c]onditional" and/or "legally [un]enforceable against the plan."

For present purposes, only two provisions of the now-terminated Nachman plan need be considered. First, a sentence in Art. V, § 3, stated: "Benefits provided for herein shall be only such benefits as can be provided by the assets of the Fund." Second, Art. X, § 3, stated:

> "In the event of termination of the Plan, the assets then remaining in the Fund, after providing the accrued and anticipated expenses of the Plan and Fund . . . shall be allocated . . . *to the extent that they shall be sufficient*, for the purposes of paying retirement benefits. . . ." (Emphasis added.) [7]

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is legally enforceable against the plan"—modifies "claim" not "benefit." I disagree. The definition reads: "The term 'nonforfeitable' . . . means a claim . . . to *that part of a . . . benefit . . . which* arises from the participant's service, which is unconditional, and which is legally enforceable against the plan." (Emphasis supplied.) But whether the operative language modifies "claim" or "benefit" would seem irrelevant for present purposes, in any event.

[7] Article X, § 3, of the Plan more fully provided:

"In the event of termination of the Plan, the assets then remaining in the Fund, after providing the accrued and anticipated expenses of the Plan and Fund, (including without limitation, expenses of terminating the Plan), shall be allocated by the Board [of Administration] on the basis of present actuarial values to the extent that they shall be sufficient, for the purposes of paying retirement benefits (the amount of which shall be computed on the basis of Credited Service to the date of termination of the Plan) in the following order or precedence:

"(a) To provide their retirement benefits to persons who shall have been Retired Employees and entitled to current benefits under the Plan prior to its termination, without reference to the order of retirement;

"(b) To provide Normal Retirement Benefits to Employees aged 65 or

These two provisions, neither of which was void on the date of termination,[8] rendered "conditional" every defined benefit set out in the plan. On termination, a participant's right to any benefit defined in dollar terms was expressly hinged on the plan's ability to pay that amount. Like any condition a plan might specifically place on a participant's entitlement to

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over on the date of termination of the Plan, without reference to the order in which they shall have reached age 65;

"(c) . . . .

"(d) . . . .

"(e) . . . .

"(f) . . . .

"*If, after having made provision in the above order of precedence for some but not all of the above categories, the assets then remaining in the Fund are not sufficient to provide completely for the benefits for Employees in the next category, such benefits shall be provided for each such Employee on a pro-rata basis.*" (Emphasis added.)

Contrary to the Court's suggestion, nothing in 29 U. S. C. § 1344 (allocation of assets of terminated defined-benefit plans) operated in any way to void the asset-sufficiency language of this provision in the Nachman plan. Section 1344 simply changed the order in which the assets held by the Nachman plan had to be allocated on termination to the plan's participants.

[8] The provisions would have been illegal after December 31, 1975, to the extent that they conflicted with the "minimum vesting standards" that came into effect for plans like the Nachman plan on January 1, 1976. See 29 U. S. C. § 1061 (b)(2). Those standards mandate that covered pension plans provide their participants with specified levels of "nonforfeitable" benefits. See § 1053. All covered plans must, for instance, "provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age." In addition, a covered plan must provide employees who have participated in the plan for certain periods of time with specified minimum "nonforfeitable" percentages of their accrued benefits.

The Nachman plan—as a "defined benefit plan," see 29 U. S. C. §§ 1002 (23), (34), (35); *Alabama Power Co.* v. *Davis*, 431 U. S. 581, 593, n. 18—could not, after January 1, 1976, have continued to promise its fully vested participants a "nonforfeitable" right only to that part of their "accrued benefit" which could be funded by the plan. See 29 U. S. C. §§ 1002 (23), (34), (35), 1053, 1054.

a defined retirement benefit, this asset-sufficiency condition deprived the Nachman plan's defined benefits of "nonforfeitable" status to the extent that such benefits could not be defrayed by the plan's assets.[9] The Court does not explain why an asset-sufficiency limitation expressly set out in a pension plan is not a "condition" for purposes of determining the "nonforfeitability" of the plan's pension benefits.[10]

By reason of the cited sentences in Art. V, § 3, and Art. X, § 3, it must also be concluded that the only defined benefits of the plan which on termination were "legally enforceable against the plan" were those that were fully funded. Under contract law, a person is liable only for that which he has promised to pay. The Nachman plan promised each participant that upon termination he would receive, not a particular retirement benefit defined in dollar terms, but rather such a benefit only if it could be funded out of the plan's assets.

The Court notes that another sentence in Art. V, § 3, of the plan provided that, "[i]n the event of termination of this Plan, there shall be no liability or obligation on the part of the Company to make any further contributions to the Trustee except such contributions, if any, as on the effective date of such termination, may then be accrued but unpaid." But this sentence had an entirely different effect from that of the two provisions discussed above. Since it only purported to limit the *employer's* liability to the plan and not the *plan's* obligation to the plan's participants, the sentence in question neither

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[9] As the Chairman of the House Committee on Education and Labor explained with regard to an earlier bill's definition of "nonforfeitable" almost identical to that contained in 29 U. S. C. § 1002 (19) as finally enacted: "The definition of the term 'nonforfeitable' is intended to preclude *any* conditions to receipt of vested benefits other than those noted in the definition." 2 Leg. Hist. 3306 (statement of Rep. Perkins) (emphasis supplied).

[10] To the extent that PBGC's own self-serving definition in 29 CFR § 2605.6 (a) (1979) points in a different direction, it conflicts with the statute and can be accorded no weight. See n. 5, *supra*.

made the benefits provided by the plan "[c]onditional" nor rendered them "legally [un]enforceable against the plan." The Court is, therefore, quite correct in concluding that the sentence in question did not render "forfeitable" any of the retirement benefits provided by the Nachman plan.[11] What the Court misses is the world of difference between the employer disclaimer clause and the provisions in the plan that limited what the plan itself promised to provide its participants. Only the latter made the retirement benefits "forfeitable" for purposes of ERISA.[12]

Three aspects of ERISA's legislative history strongly support this interpretation of the statutory scheme. First, Congress discarded on its way to passing the Act a number of alternative definitions of the benefits to be insured, several of which if enacted would have read very much like the definition the PBGC has adopted and which the Court now holds embodies Congress' true intent.[13] Few principles of statu-

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[11] Correspondingly, I agree that the sentence did not affect in any way the petitioner's liability to the PBGC under 29 U. S. C. § 1362 (b). The sentence in question purported only to absolve the petitioner of liability to the plan's trustee for asset shortfalls. Had the sentence also attempted to protect the petitioner from its liability to the PBGC under § 1362 (b), it would presumably have been void to that extent.

[12] I also agree, however, with the Court's conclusion that nothing in ERISA *nullifies* clauses that protect employers from direct liability to plan participants for deficiencies in plan assets.

[13] For instance, the bill originally passed by the Senate insured retirement benefits that were "nonforfeitable" under the terms of the plan. H. R. 2, as passed by the Senate, 93d Cong., 2d Sess., § 422 (a) (1974), 3 Leg. Hist. 3702. Only one definition of "nonforfeitable" was contained in the bill. This provided that a "nonforfeitable benefit" was a benefit "which, notwithstanding any conditions subsequent which would affect receipt of any benefit flowing from such right, arises from the participant's covered service under the plan and is no longer contingent on the participant remaining covered by the plan." *Id.*, § 502 (a)(20), 3 Leg. Hist. 3745. See also S. 4, 93d Cong., 1st Sess., §§ 3 (26), 3 (35), 401 (b), 402 (a), 502 (a)(20) (1973) (bill as reported by Senate Committee on Labor and Public Welfare), 1 Leg. Hist. 494–495, 497, 532, 543; S. 4, 93d Cong., 1st

tory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language. See *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U. S. 186, 199–200.

Second, the Conference Report, in describing the bill that finally was enacted, stated that "vested retirement benefits *guaranteed by the plan* . . . are to be covered" by the Act's insurance scheme. H. R. Rep. No. 93–1280, p. 368 (1974), 3 Leg. Hist. 4635. (Emphasis added.) Only a benefit that is unconditionally promised by a plan is a benefit "guaranteed" by that plan.[14]

Third, Congress delayed the effective date of the Act's "minimum vesting standards" in order "to provide sufficient time for pension and profit-sharing retirement plans to adjust to the new vesting and funding standards, to make provision for additional costs which may be experienced, and to permit negotiated agreements to transpire. . . ." S. Rep. No. 93–127,

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Sess., §§ 3 (26), 3 (35), 401 (b), 402 (a), 502 (a)(20) (1973) (bill as originally introduced in Senate), 1 Leg. Hist. 103, 105, 137, 148.

Similarly, the bill reported to the House on October 2, 1973, by the House Committee on Education and Labor provided termination insurance for "vested liabilities." See H. R. 2, as amended, §§ 401 (b), 402 (a), 404 (b) (1973), 2 Leg. Hist. 2320, 2320–2321, 2325. Under the bill, "vested liabilities" were defined as "the present value of the immediate or deferred benefits available at regular retirement age for participants and their beneficiaries which are nonforfeitable and which are no longer contingent on continued service or any other obligation to the employer, sponsoring organization or other party in interest." H. R. 2, as amended, § 3 (25), 2 Leg. Hist. 2256. In turn, the bill defined "nonforfeitable benefit" as a benefit "which arises from the participant's service and is no longer contingent on continued service or any other obligation to the employer, sponsoring organization, or other party in interest." H. R. 2, as amended, § 3 (19), 2 Leg. Hist. 2251–2252.

[14] See also 3 Leg. Hist. 4668 (Rep. Dent) (Termination insurance "will provide a backup guarantee to every pension plan that, regardless of the economic fortunes of the companies sponsoring the plan, *its obligations* will be met." (Emphasis supplied.)).

p. 36 (1973), 1 Leg. Hist. 622. Disregarding this intent, the Court today effectively rewrites the Nachman plan to make it promise more than it actually did.

Nothing in the legislative history, on the other hand, truly supports the result reached by the Court. The Court relies on the fact that the terms "nonforfeitable" and "vested" were often used interchangeably in the legislative materials. This usage is said to be significant, because in the pension field a benefit is usually said to "vest" when a pension plan participant has fulfilled all the specified conditions for eligibility, such as age and length of service. The existence of other kinds of conditions, such as the sufficiency of the plan's assets, would not affect the determination of whether or not a benefit had "vested" in this traditional sense of the word.

But many of the statements in the legislative history relied upon by the Court were made in connection with proposed bills that were not enacted and whose express terms would have insured benefits "vested" in the traditional sense of the word. See n. 13, *supra*. These statements have no bearing on the present case, which concerns the construction of entirely different statutory language. Many of the other statements in the legislative history noted by the Court were made with respect to the bill that originally passed the House of Representatives, quite a different document from the bill that later emerged from the Conference Committee and was enacted into law as ERISA. The House bill provided that the insurance provision would cover only retirement benefits that were "nonforfeitable" by reason of the bill's minimum vesting standards. H. R. 2, as passed by the House, 93d Cong., 2d Sess., §§ 203, 409 (b)(1) (1974), 3 Leg. Hist. 3973–3979, 4024. See 2 *id.*, at 3293, 3347–3348 (explanation by Chairman of House Committee on Education and Labor). Under the legislation so proposed, there never would have been a time when the insurance scheme was in effect and a substantial portion of every plan's "vested" benefits were not also "nonforfeitable."

It was the Conference Committee that created the time gap

involved in this case (September 2, 1974 through December 31, 1975) during which pension plans were subject to the Act's insurance program but not to its minimum vesting standards. See H. R. Conf. Rep. No. 93–1280, pp. 48, 245 (1974), 3 Leg. Hist. 4323, 4515. In discussing the Conference Committee bill, certain Members of Congress also equated "vested" rights with "nonforfeitable" rights.[15] But there is no reason to suppose that these statements did not refer to the post-1975 operation of ERISA, when many benefits, "vested" in the traditional sense, also became "nonforfeitable" by reason of the Act's minimum vesting standards.[16]

Finally, contrary to the Court's assertion, the construction that I would give to the Act would not render meaningless the decision of Congress to make Title IV fully applicable as of September 2, 1974. That Title insured the following types of benefits provided by plans terminated between September 2, 1974 and December 31, 1975: (1) All benefits made ex-

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[15] See, *e. g.*, 3 Leg. Hist. 4734, 4735, 4741 (Sen. Williams); *id.*, at 4752, 4758 (Sen. Javits); *id.*, at 4800 (Sen. Nelson); *id.*, at 4678 (Rep. Ullman); *id.*, at 4694 (Rep. Brademas); *id.*, at 4702 (Rep. Tiernan).

[16] The Court's theory that the term "nonforfeitable" as used in ERISA means no more than "vested" in the traditional sense must fail on an additional account. According to the definition of "vested" cited by the Court, "the Benefit under a pension plan that is described as vested, is, in the usual case . . . contingent . . . upon survival . . . of the individual involved to the earliest date at which he can validly claim a pension. Thus, the right can be terminated by death. After retirement, each monthly payment is contingent upon survival of the individual. . . ." D. McGill, Preservation of Pension Benefit Rights 6 (1972). Under the Court's theory, therefore, a benefit that is contingent on survival is by definition "nonforfeitable." But were this the case, 29 U. S. C. § 1053 (a)(3)(A) would be wholly superfluous. That section provides that "[a] right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that it is not payable if the participant dies (except in the case of a survivor annuity which is payable as provided in section 1055 of this title)." The fact that Congress felt it necessary to include this provision in the Act must be given weight in determining the proper meaning of of "nonforfeitable."

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pressly "nonforfeitable" by the terms of plans in existence on January 1, 1974;[17] and (2) at least 20% of the benefits required by the Act's "minimum vesting standards" to be "nonforfeitable" under the terms of plans created after January 1, 1974.[18]

For all the reasons discussed, I respectfully dissent.

MR. JUSTICE POWELL, dissenting.

I join MR. JUSTICE STEWART's dissenting opinion and add only a brief word. The difference between the majority and dissenting opinions in this case turns almost entirely upon the construction of language in petitioner's pension plan. This plan is an agreement negotiated in good faith by the petitioner and the union representing employees covered by the plan. Everyone concedes that the plan is a valid contract enforceable according to its terms, except to the extent that ERISA provides otherwise. The petitioner lawfully terminated the plan on December 31, 1975.

It is perfectly clear, at least to me, that the plain language of the plan conditioned the employees' benefits in the event of termination upon the adequacy of the assets then remain-

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[17] For instance, had the Nachman plan simply not contained the provisions in Art. V, § 3, and Art. X, § 3, discussed above, it would have promised its participants a defined monthly benefit that was "nonforfeitable." The petitioner would then have been liable to the PBGC for whatever portion of those benefits were "guaranteed" by the PBGC pursuant to 29 U. S. C. § 1322 and exceeded the value of the plan's assets on termination. This liability would have been unaffected by the fact that a clause in the plan absolved the petitioner of any personal obligation to the plan's participants or to the plan's trustee.

[18] Title 29 U. S. C. § 1061 (a) provides that the "minimum vesting standards" of Title I of ERISA are applicable beginning September 2, 1974 to pension plans set up after January 1, 1974. Title 29 U. S. C. § 1322 (b)(8) states that "nonforfeitable" benefits provided by a plan that has been in effect for less than five years are "guaranteed" to the extent of 20% or $20 per month (whichever is greater) for each year of plan existence.

ing in the fund. If ERISA had not been enacted, the respondent Pension Benefit Guaranty Corporation acknowledges, the employees' benefits would have been limited by this condition. The respondent contends, however, that ERISA—and the respondent's own regulatory definition of "nonforfeitable"—require a construction of the plan that neither the petitioner nor its employees intended. I assume for present purposes that Congress could mandate this result. But in the absence of a clear expression of congressional intent, I would not conclude that Congress meant to alter contractual arrangements between private parties. For the reasons stated in the dissenting opinion, I find no such intent relevant to this case in either the ambiguous language of ERISA or its legislative history.

I add only that the decision today has little consequence beyond the resolution of this case. As I read the opinions, the decision affects only pension plans terminated on or before December 31, 1975, that contained language substantially identical to the language in petitioner's plan.

BUSIC *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 78-6020. Argued February 27, 1980—Decided May 19, 1980*

Upon their joint trial in Federal District Court, petitioners were convicted of, *inter alia*, armed assault on federal officers—petitioner LaRocca as the actual triggerman and petitioner Busic as an aider and abettor and thus derivatively a principal under 18 U. S. C. § 2—in violation of 18 U. S. C. § 111, which makes it unlawful to assault a federal officer and which provides for enhanced punishment when the assaulter "uses" a deadly weapon. In addition, LaRocca was convicted of using, and Busic of carrying, a firearm in the commission of the armed assault, in violation of 18 U. S. C. § 924 (c), which authorizes the imposition of enhanced penalties on a defendant who "uses" (§ 924 (c)(1)) or "carries" (§ 924 (c)(2)) a firearm while committing a federal felony. Each petitioner's sentence included 5 years on possession of firearms and the assault charges, and 20 years for the § 924 (c) violations. The Court of Appeals ultimately held that, while LaRocca's sentence could not be enhanced under both § 111 and § 924 (c)(1) for "using" a firearm, he could be sentenced under either at the Government's election, but that, since the § 924 (c) charge against Busic alleged not that he "used" a firearm but rather that he "carried" one, his sentence was valid.

Held: Section 924 (c) may not be applied to a defendant who uses a firearm in the course of a felony that is proscribed by a statute which itself authorizes enhancement if a dangerous weapon is used. The sentence received by such a defendant may be enhanced only under the enhancement provision in the statute defining the felony he committed. Pp. 403–411.

(a) This result is supported not only by *Simpson* v. *United States*, 435 U. S. 6, but also by the legislative history of § 924 (c) and the canons of statutory construction that ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity, and that a more specific statute (18 U. S. C. § 111 here) will be given precedence over a more general one (§ 924 (c)), even if, as here, the general provision was enacted later. To the extent that this construction may lead to irrational sentencing patterns in which some less severe crimes are punished

*Together with No. 78-6029, *LaRocca* v. *United States*, also on certiorari to the same court.

more than other more severe crimes, it is the Congress, not this Court, that must take corrective action. Pp. 403–410.

(b) This holding not only makes it clear that petitioner LaRocca may not be sentenced under § 924 (c) (1) for using his gun to assault federal officers, but also applies to petitioner Busic's case. Nor can Busic's sentence be sustained by arguing that a person who *carries* a gun in the commission of a § 111 violation may be sentenced under § 924 (c) (2) because the enhancement provision of § 111 does not apply to those who *carry* but do not *use* their weapons. The fact is that Busic is being punished for *using* a weapon. Through the combination of § 111 and 18 U. S. C. § 2, he was found guilty as a principal of using a firearm to assault federal agents. Pp. 410–411.

587 F. 2d 577, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, BLACKMUN, and POWELL, JJ., joined. BLACKMUN, J., filed a concurring opinion, in which BURGER, C. J., joined, *post*, p. 412. STEWART, J., filed a dissenting opinion, in which STEVENS, J., joined, *post*, p. 413. REHNQUIST, J., filed a dissenting opinion, *post*, p. 417.

Samuel J. Reich, by appointment of the Court, 444 U. S. 820, argued the cause and filed briefs for petitioner in No. 78–6020. *Gerald Goldman*, by appointment of the Court, 444 U. S. 1030, argued the cause and filed briefs for petitioner in No. 78–6029.

Mark I. Levy argued the cause for the United States in both cases. With him on the brief were *Solicitor General McCree*, *Assistant Attorney General Heymann*, and *Deputy Solicitor General Frey*.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Title 18 U. S. C. § 924 (c) authorizes the imposition of enhanced penalties on a defendant who uses or carries a firearm while committing a federal felony. The question for decision in these cases is whether that section may be applied to a defendant who uses a firearm in the course of a felony that is proscribed by a statute which itself authorizes enhancement if a dangerous weapon is used. We hold that the sentence received by such a defendant may be enhanced

only under the enhancement provision in the statute defining the felony he committed and that § 924 (c) does not apply in such a case.

I

Petitioners Anthony LaRocca, Jr., and Michael Busic were tried together on a multicount indictment charging drug, firearms, and assault offenses flowing from a narcotics conspiracy and an attempt to rob an undercover agent. The evidence showed that in May 1976 the two arranged a drug buy with an agent of the Drug Enforcement Administration who was to supply $30,000 in cash. When the agent arrived with the money, LaRocca attempted to rob him at gunpoint. The agent signalled for reinforcements, and as other officers began to close in LaRocca fired several shots at them. No one was hit and the agents succeeded in disarming and arresting LaRocca. Busic was also arrested and the officers seized a gun he was carrying in his belt but had not drawn. Additional weapons were found in the pair's automobile.[1]

A jury in the United States District Court for the Western District of Pennsylvania convicted petitioners of narcotics and possession-of-firearms counts,[2] and of two counts of armed assault on federal officers in violation of 18 U. S. C. § 111—LaRocca as the actual triggerman and Busic as an aider and abettor, and thus derivatively a principal under 18 U. S. C. § 2. In addition, LaRocca was convicted of using a firearm in the commission of a federal felony in violation of 18 U. S. C. § 924 (c)(1), and Busic was convicted of carrying a firearm in

[1] The facts are recited in the opinion of the United States Court of Appeals for the Third Circuit. 587 F. 2d 577, 579–580 (1978).

[2] The five narcotics counts alleged violations of 21 U. S. C. §§ 841 (a)(1), 843 (b), and 846. The firearms counts involving both petitioners charged violations of 26 U. S. C. §§ 5861 (c), 5861 (d), and 5871, and 18 U. S. C. §§ 922 (h) and 924 (a). LaRocca was named in six of these counts and Busic in five. In addition, Busic was convicted on three counts of unlawful firearms possession in violation of 18 U. S. C. App. § 1202 (a)(1). The indictment is reproduced at App. 5–15.

the commission of a federal felony in violation of 18 U. S. C. § 924 (c)(2).[3] Each petitioner was sentenced to a total of 30 years, of which 5 resulted from concurrent sentences on the narcotics charges, 5 were a product of concurrent terms on the firearms and assault charges, and 20 were imposed for the § 924 (c) violations.

The defendants appealed, contending, among other things, that they could not be sentenced consecutively for assaulting a federal officer with a dangerous weapon as defined in 18 U. S. C. § 111 [4] and for the use of a firearm in connection with that crime as provided in § 924 (c).[5] In an opinion announced

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[3] The § 924 (c) counts on which the two were convicted recited as predicate felonies both the narcotics violations and the assaults on federal officers. In the courts below the Government attempted to support the § 924 (c) convictions in part by arguing that whatever their validity when superimposed on the assault charges, they could validly be grounded on the drug counts. The Court of Appeals rejected this contention, concluding that the jury might have found the drug conspiracy to have come to an end before the robbery and assault. 587 F. 2d, at 584, n. 5, and 588, n. 3. The Government does not press this argument in this Court, and we accordingly treat the case as though the § 924 (c) charges recited only the assaults on federal officers as predicate felonies.

[4] Title 18 U. S. C. § 111 provides as follows:

"Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.

"Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

Among the persons designated in 18 U. S. C. § 1114 are officers or employees of the Drug Enforcement Administration.

[5] Title 18 U. S. C. § 924 (c) provides:

"Whoever—

"(1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, or

"(2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States[,]

"shall, in addition to the punishment provided for the commission of

before *Simpson* v. *United States*, 435 U. S. 6 (1978), was decided, the Court of Appeals for the Third Circuit concluded that the imposition in LaRocca's case of enhanced sentences under both § 924 (c) and § 111 for a single assault with a firearm violated the Double Jeopardy Clause of the Fifth Amendment because the two statutes required proof of identical elements. 587 F. 2d 577, 583–584 (1978). Accordingly, LaRocca's case was remanded to the District Court for resentencing under either § 111 or § 924 (c), at the Government's election. Since the § 924 (c) charge against Busic alleged not that he *used* a firearm (§ 924 (c)(1)), but rather that he *carried* one (§ 924 (c)(2)), the Court of Appeals held that no like infirmity invalidated his conviction and sentence. In its view, the § 111 and § 924 (c) charges against him did not require proof of the same elements and hence did not merge because the former could be established merely by showing that Busic had aided and abetted LaRocca's use of a gun to assault the federal officers, while the latter required proof of the additional fact that Busic had unlawfully carried a gun. 587 F. 2d, at 584.

Following this Court's decision in *Simpson* v. *United States*, *supra*, the Court of Appeals granted a petition for rehearing and vacated its double jeopardy holding with regard to LaRocca on grounds there was no reason to reach the constitutional question. 587 F. 2d, at 587–589. Thereafter, it proceeded as a matter of statutory construction to arrive at a nearly identical conclusion—namely, that LaRocca's sentence

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such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than two nor more than twenty-five years and, notwithstanding any other provision of law, the court shall not suspend the sentence in the case of a second or subsequent conviction of such person or give him a probationary sentence, nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the commission of such felony."

could not be enhanced under both § 111 and § 924 (c) but that he could be sentenced under either at the Government's election. The Court of Appeals did not alter its holding with regard to Busic. We granted certiorari, 442 U. S. 916 (1979), and now reverse the enhanced sentences that were imposed on both petitioners under § 924 (c).

II

We turn first to the case of petitioner LaRocca because it poses most directly the key question of legislative intent. Our starting point, like that of the parties, is *Simpson*, *supra*. There we considered the relationship between § 924 (c) and the federal bank robbery statute, 18 U. S. C. § 2113, which, like the assault provision at issue here, 18 U. S. C. § 111, predates § 924 (c) and provides by its own terms for enhanced punishment where the felony is committed with a dangerous weapon.[6] Relying upon the legislative history and applicable canons of statutory construction, *Simpson* held that the Congress cannot be understood to have intended that a defendant who has been convicted of robbing a bank with a firearm may be sentenced under both § 924 (c) and § 2113 (d). The parties to the instant case agree that *Simpson* clearly prohibits the imposition on these petitioners of similarly enhanced sentences under both § 924 (c) and § 111. But the Government contends that *Simpson* resolved only the double enhancement question—that the Court's holding and opinion should not be read to find § 924 (c) inapplicable where the prosecution proceeds under that provision *rather than* the enhancement provision of a predicate felony statute like § 111. Such a reading, the Government asserts, is supported by the facts presented in *Simpson*,[7] the language used to describe the

[6] For present purposes, §§ 2113 and 111 are fully analogous. Therefore, what *Simpson* held of the relationship between § 924 (c) and the one applies to that section's relationship with the other as well.

[7] Petitioners in *Simpson* had been sentenced under both enhancement provisions. 435 U. S., at 9.

actual "holding,"[8] the most likely inferences that may be drawn as to what Congress would have wanted had it focussed on the precise problem,[9] and the asserted irrationality of some of the consequences that would flow from a holding that § 924 (c) is inapplicable in cases like the present one.[10]

We disagree. In our view, *Simpson*'s language and reasoning support one conclusion alone—that prosecution and enhanced sentencing under § 924 (c) is simply not permissible where the predicate felony statute contains its own enhancement provision. This result is supported not only by the general principles underlying the doctrine of *stare decisis*—principles particularly apposite in cases of statutory construction—but also by the legislative history and relevant canons of statutory construction. The Government has not persuaded us that this result is irrational or depends upon implausible inferences as to congressional intent. And to the

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[8] *Simpson*'s final paragraph stated in part: "Accordingly, we hold that in a prosecution growing out of a single transaction of bank robbery with firearms, a defendant may not be sentenced under both § 2113 (d) and § 924 (c)." *Id.*, at 16.

[9] Section 924 (c) was enacted as part of the Gun Control Act of 1968 in the wake of the assassinations of Senator Robert F. Kennedy and Rev. Martin Luther King, Jr. It clearly was an attempt to take major steps to prevent firearm abuses. Thus, it is argued, it is unlikely that Congress would have wanted the severe penalties of § 924 (c) to be pre-empted by less stringent penalties provided in pre-existing enhancement provisions.

[10] For example, the Government notes that under such a holding a person who breaks into a Post Office in violation of 18 U. S. C. § 2115, which contains no enhancement provision, could receive an extra 10 years under § 924 (c) for using a gun to shoot the lock off. In contrast, the sentence of a person who draws a gun and fires a number of shots while robbing a bank could not be enhanced under that provision because the bank robbery statute's enhancement clause would take precedence. That clause, § 2113 (d), permits a sentence of up to 25 years, but even if he had not used a weapon this person could have received 20 years under § 2113 (a). Accordingly, the *incremental* penalty the bank robber can receive for using the firearm is only 5 years as opposed to 10 for the Post Office robber.

extent that cases can be hypothesized in which this holding may support curious or seemingly unreasonable comparative sentences, it suffices to say that the asserted unreasonableness flows not from *Simpson* and this decision, but rather from the statutes as Congress wrote them. If corrective action is needed, it is the Congress that must provide it. "It is not for us to speculate, much less act, on whether Congress would have altered its stance had the specific events of this case been anticipated." *TVA* v. *Hill*, 437 U. S. 153, 185 (1978).

Our reasoning has several strands. It begins, as indeed it must, with the text and legislative history of § 924 (c). By its terms, that provision tells us nothing about the way Congress intended to mesh the new enhancement scheme with analogous provisions in pre-existing statutes defining federal crimes. Moreover, as *Simpson* noted, 435 U. S., at 13, and n. 7, § 924 (c) was offered as an amendment on the House floor by Representative Poff, 114 Cong. Rec. 22231 (1968), and passed on the same day. *Id.*, at 22248. Accordingly, the committee reports and congressional hearings to which we normally turn for aid in these situations simply do not exist, and we are forced in consequence to search for clues to congressional intent in the sparse pages of floor debate that make up the relevant legislative history. The crucial material for present purposes is the following observation by Representative Poff:

> "For the sake of legislative history, it should be noted that my substitute is not intended to apply to title 18, sections 111, 112, or 113 which already define the penalties for the use of a firearm in assaulting officials, with sections 2113 or 2114 concerning armed robberies of the mail or banks, with section 2231 concerning armed assaults upon process servers or with chapter 44 which defines other firearm felonies." *Id.*, at 22232.

Simpson pointed out that "[t]his statement is clearly probative of a legislative judgment that the purpose of § 924 (c) is

already served whenever the substantive federal offense provides enhanced punishment for use of a dangerous weapon." 435 U. S., at 13. Moreover, Representative Poff's remarks were the only ones touching on the present question that were before the House when § 924 (c) was adopted, and it is therefore reasonable to assume that they represent the understanding of the Congressmen who voted for the proposal.[11]

Reliance on Representative Poff's statement of legislative intent is consistent with the position taken by the Department of Justice in 1971 when it advised prosecutors not to proceed under § 924 (c)(1) if the predicate felony statute provided for "'increased penalties where a firearm is used in the commission of the offense.'" *Simpson*, *supra*, at 16, quoting 19 U. S. Attys. Bull. No. 3, p. 63 (U. S. Dept. of Justice, 1971). Moreover, this view is fully consistent with two tools of statutory construction relied upon in *Simpson*. The first is the oft-cited rule that "'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" *United States* v. *Bass*, 404 U. S. 336, 347 (1971), quoting *Rewis* v. *United States*, 401 U. S. 808, 812 (1971). And the second is the principle that a more specific statute will be given precedence over a more general one, regardless of their temporal sequence. *Preiser* v. *Rodriguez*, 411 U. S. 475, 489–490 (1973). In *Simpson*, these principles counseled against double enhancement. They served as "an outgrowth of our reluctance to increase or multiply punishments absent

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[11] This interpretation receives additional support from the fact that the Conference Committee chose the Poff version over a Senate proposal which, according to its sponsor, 114 Cong. Rec. 27142 (1968), would have permitted enhancement for the use of a firearm even where the predicate offense contained its own enhancement clause. H. R. Conf. Rep. No. 1956, 90th Cong., 2d Sess., 31–32 (1968). We recognize, as the Government points out, that the Senate version differed in other respects as well; but insofar as it points in any direction this chain of events supports reliance on the Poff statement.

a clear and definite legislative directive." 435 U. S., at 15–16. Here they play a similar role, and thus help confirm the conclusion that § 924 (c) may not be applied at all in the present situation.

The Government seeks to minimize the force of these principles of statutory construction by urging (1) that there is no ambiguity in § 924 (c) and thus that the rule of lenity is not properly called into play and (2) that in fact it is § 924 (c) that is the more specific statute because it relates only to firearms while § 111 would permit enhancement for any dangerous weapon. We find each contention flawed. As to the first, the claim that there exists no ambiguity does not stand up. Plainly the text of the statute fails to address the issue pertinent to decision of this case—whether Congress intended (1) to provide for enhanced penalties only for crimes not containing their own enhancement provisions, (2) to provide an alternative enhancement provision applicable to all felonies, or (3) to provide a duplicative enhancement provision which would permit double enhancement where the underlying felony was proscribed by a statute like § 111. Our task here, as in *Simpson*, is to ascertain as best we can which approach Congress had in mind. The rule of lenity, like reference to appropriate legislative materials, is one of the tools we use to do so.

The Government's second contention—that § 924 (c) rather than § 111 should be viewed as the more specific statute—is both facially unpersuasive [12] and likely to lead to curious consequences. Indeed, were the Government correct we would be forced to conclude that with regard to firearms cases § 924 (c) impliedly repealed *all* pre-existing enhancement provisions. Yet there is not a shred of evidence to suggest that this is what Congress intended. Moreover, such a result

[12] Indeed, § 924 (c) is itself fairly broad. It refers to "firearms," a term defined in 18 U. S. C. §§ 921 (a)(3) and (4) to include bombs, grenades, rockets, mines, and similar devices in addition to guns.

would be inconsistent with *Simpson* [13] and in any event would not give the Government what it wants because it would not permit the prosecutor to choose between § 924 (c) and § 111.

In addition to contesting the rule of lenity and specific-versus-general arguments, the Government contends that our reading of the legislative materials is unreasonable because those who supported the Poff amendment—including Representative Poff himself—were clearly committed to meting out stiff penalties for use of a firearm in the course of a felony and would not have followed any course inconsistent with that commitment. The argument is overdrawn. In the first place, we do not think our construction is inconsistent with a congressional desire to deal severely with firearm abuses. As we understand it, the Government's argument is not that our construction reads Congress to have *diminished* the penalty for firearm use, but only that our construction fails to enhance that penalty to the hilt. Yet it is patently clear that Congress too has failed to enhance that penalty to the hilt—it set maximum sentences as well as a variety of other limits on the available punishment. Thus, while Congress had a general desire to deter firearm abuses, that desire was not unbounded. Our task here is to locate one of the boundaries, and the inquiry is not advanced by the assertion that Congress wanted no boundaries.

More specifically, *some* accommodation between § 924 (c) and statutes like § 111 is obviously necessary. And since some pre-existing statutes provided for sentences less severe than § 924 (c) and others for penalties more severe,[14] any rule

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[13] The disposition in *Simpson* was to remand for proceedings consistent with the opinion of the Court. On remand, the Court of Appeals vacated the § 924 (c) sentences and approved and affirmed those under § 2113 (d)—a disposition that would have been improper were the Government correct in its specificity argument.

[14] Section 924 (c) provides for maximum incremental penalties for use of a firearm of 10 years for a first offender and 25 years for a second offender. Under § 2113, the incremental penalty available for use of a dangerous weapon in the course of an otherwise forceful bank robbery is 5 years

of priority would lead in certain circumstances to a punishment less severe than might have been achieved under another rule of priority. The Government in effect argues that had Representative Poff and his colleagues foreseen this problem they would have eschewed any priority rule and instead rested complete discretion in the prosecutor. We do not dispute that a rule permitting prosecutors freedom of choice might give greater effect to a legislative desire to increase the penalties for firearm use, but the same could be said of any number of constructions of the statute, including the one rejected in *Simpson*. Indeed, by rejecting double enhancement *Simpson* exposes the stark and unidimensional quality of any calculus which attempts to construe the statute on the basis of an assumption that in enacting § 924 (c) Congress' sole objective was to increase the penalties for firearm use to the maximum extent possible.

The fact that the enhanced sentences authorized in some predicate felony statutes are greater than those set forth in § 924 (c) while those in others are less provides a partial response to the Government's contention that our construction would lead to irrational sentencing patterns in which some less severe crimes are punished more than other more severe ones.[15] The fact is that any interpretation might have led

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(25 years under § 2113 (d) less 20 years under § 2113 (a)), while the incremental penalty for using a weapon in the course of an otherwise nonviolent robbery is 15 years (25 years less 10 years under § 2113 (b)) if the goods taken are worth more than $100 and 24 years (25 years less 1 year) if the goods taken are worth less. And under 18 U. S. C. § 2114, another statute referred to by Representative Poff, the incremental cost to the defendant of using a gun to assault a person having custody of the mail or property of the United States is 15 years. Thus, a ruling making § 924 (c) pre-emptive would increase some incremental penalties while actually decreasing others. In contrast, the Poff rule merely leaves these penalties where they were set by Congress in the first place—it makes no existing firearm penalty smaller or larger.

[15] One of the Government's examples is described in n. 10, *supra*. The unlikeliness of the hypothetical and the fact that it compares only incre-

to differences in treatment that are not intuitively reasonable. In consequence, the presence of differences here fails to shake our confidence in our construction. More broadly, it is simply not for this Court to substitute its accommodation between old and new enhancement provisions for the one apparently chosen by Congress. On the contrary, "in our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with 'common sense and the public weal.'" *TVA* v. *Hill*, 437 U. S., at 195.

III

What we have said thus far disposes of LaRocca's case by making it clear that he may not be sentenced under § 924 (c) for using his gun to assault the federal officers. This holding also applies in Busic's case. But in that case the Government has a fallback position. Even if a person who *uses* a gun to violate § 111 may not be sentenced for doing so under § 924 (c)(1), the argument goes, a person who *carries* a gun in the commission of a § 111 violation may be sentenced under § 924 (c)(2) because the enhancement provision of § 111 does not apply to those who *carry* but do not *use* their weapons. Thus, the Government urges, whatever our holding with regard to LaRocca, Busic may be sentenced under § 924 (c)(2) for carrying his gun while committing the crime of aiding and abetting LaRocca's violation of § 111.

The central flaw in this argument as applied here is that Busic *is* being punished for using a weapon. Through the combination of § 111 and 18 U. S. C. § 2, he was found guilty as a principal of using a firearm to assault the undercover agents.[16] LaRocca's gun, in other words, became Busic's as

mental and not total penalties suggest that the possibility of genuinely troubling comparative sentences may be exaggerated.

[16] Title 18 U. S. C. § 2 provides in relevant part that "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

a matter of law. And the Government's argument thus amounts to the contention that had Busic shot one gun at the officers and carried another in his belt he could have been punished under § 111 for the one he fired and under § 924 (c)(2) for the one he did not fire. Similarly, this argument would suggest, Busic might be punished for carrying a gun in his belt and also for shooting that same gun. Yet such results are wholly implausible. They would stand both *Simpson* and our holding in Part II, *supra*, on their heads, impute to Congress the unlikely intention to punish each weapon as a separate offense, and create a situation in which aiders and abettors would often be more culpable and more severely punished than those whom they aid and abet.[17] We decline to read the statutes to produce such an ungainly result. It seems to us that our holding of Part II is equally applicable here—Busic's vicarious assault and use of a dangerous weapon are subject to prosecution and punishment under § 111 and he has been duly prosecuted and punished pursuant to that provision. In such a case, *Simpson*, the legislative history, and applicable canons of statutory construction make it clear that neither subsection of § 924 (c) is available.[18]

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[17] On these facts, for example, the Government's view would permit Busic—the aider and abettor—to be sentenced under *both* § 924 (c) and § 111—while LaRocca—the triggerman—could be sentenced only under the latter. That this is so is a product not of our holding in Part II, but of the Government's theory itself. This is quite clear if one assumes for purposes of argument that LaRocca could have been punished under § 924 (c)(1) for using his gun. Were that the case, Busic, too would have been guilty of that crime as an aider and abettor. And the Government's argument here would lead to the conclusion that he could also be guilty of violating § 924 (c)(2) by carrying his own gun. In short, while he neither shot nor drew his gun, he would have been subject to fully twice the penalties that would have faced his more culpable comrade.

[18] Our result with regard to Busic flows as much from the logic and language of 18 U. S. C. § 2 as from anything peculiar to § 924 (c). Section 2 makes Busic punishable "as a principal," and those words mean

These cases are reversed and remanded to the Court of Appeals for proceedings consistent with this opinion.[19]

So ordered.

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE joins, concurring.

I join the Court's opinion, holding that the decision in *Simpson* v. *United States*, 435 U. S. 6 (1978), leads to the conclusion that 18 U. S. C. § 924 (c) is inapplicable where a defendant is charged with committing a substantive federal offense violative of a statute that already provides for enhanced punishment for the use of a firearm.

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what they say. One consequence is that aiders and abettors may be held vicariously liable "regardless of the fact that they may be incapable of committing the specific violation which they are charged to have aided and abetted." S. Rep. No. 1020, 82d Cong., 1st Sess., 7 (1951). Another is that there will inevitably exist cases in which a decision to treat an aider and abettor as a principal may be inconsistent with prosecuting and punishing him as well for some of his individual acts of aiding and abetting. Phrased differently, once he has been treated as a principal some of his lesser acts in furtherance of the central violation may merge into it. On these facts, § 2 appears to require that we treat Busic as though he used LaRocca's gun to commit this assault. It would be incongruous to treat him at the same time as a separate individual punishable as though he had carried a different gun in the course of a different crime.

[19] The Government makes a conditional plea that should we find § 924 (c) to be inapplicable to these petitioners we vacate not only the § 924 (c) sentences, but also those imposed by the District Court under § 111. This, the Government urges, would permit that court to resentence petitioners under the enhancement provision of the latter statute. The argument is that the District Court intended to deal severely with the assaults in question and should not be prevented from doing so by its choice of the incorrect enhancement provision. The Court of Appeals has not considered this contention in this context and we are reluctant to do so without the benefit of that court's views. Accordingly, we express no opinion as to whether in the particular circumstances of this case such a disposition would be permissible.

It should be made clear, however, that the Court of Appeals' initial opinion in this case, discussed by the Court, *ante*, at 401–402, reflects the confusion that has existed among lower courts about the meaning of this Court's recent pronouncements respecting the multiple punishments aspect of the Double Jeopardy Clause. See *Whalen* v. *United States*, 445 U. S. 684, 697–698 (1980) (BLACKMUN, J., concurring in judgment). The Court of Appeals there rejected the view that Congress did not intend the enhancement provisions of § 924 (c) to apply when the substantive offense charged was 18 U. S. C. § 111. See 587 F. 2d 577, 581–582, and n. 3. The decision in *Simpson*, of course, revealed the error of that holding. But the Court of Appeals went on to hold that regardless of Congress' intent to provide for enhanced punishment in this context, the Double Jeopardy Clause prevented it from doing so, at least in certain cases. See *id.*, at 582–584. I do not subscribe to that view, and write separately only to state, once again, that it is my belief that when defendants are sentenced in a single proceeding, "the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed." *Whalen* v. *United States*, 445 U. S., at 698 (BLACKMUN, J., concurring in judgment).

MR. JUSTICE STEWART, with whom MR. JUSTICE STEVENS joins, dissenting.

Under 18 U. S. C. § 924 (c), "[w]hoever—(1) uses a firearm to commit any [federal] felony . . . , or (2) carries a firearm unlawfully during the commission of any [federal] felony," is subject to a term of imprisonment in addition to that provided for the felony in question. In *Simpson* v. *United States*, 435 U. S. 6, which involved both § 924 (c)(1) and a felony proscribed by a statute that itself authorizes an enhanced penalty if a dangerous weapon is used, the Court held that Congress did not intend to authorize the imposition

of enhanced punishments for a single criminal transaction under both § 924 (c)(1) and the enhancement provision for the predicate felony. The Court today concludes that Congress not only did not intend to authorize the imposition of double enhancement, but also did not intend § 924 (c)(1) to apply at all to a felony proscribed by a statute with its own enhancement provision. I disagree. It is my view that § 924 (c)(1) was intended to apply to all federal felonies, though subject to the limitation in *Simpson* against double enhancement.

Congress enacted § 924 (c) as part of the Gun Control Act of 1968, Pub. L. 90–618, 82 Stat. 1213. That legislation, enacted the year in which both Robert Kennedy and Martin Luther King, Jr., were assassinated, was addressed largely to the "increasing rate of crime and lawlessness and the growing use of firearms in violent crime." H. R. Rep. No. 1577, 90th Cong., 2d Sess., 7 (1968). A primary objective of § 924 (c), as explained by its sponsor, Representative Poff, was to "persuade the man who is tempted to commit a Federal felony to leave his gun at home." 114 Cong. Rec. 22231 (1968). Towards that end, § 924 (c) provides for a prison term, in addition to that provided for the underlying felony, of not less than 1 year nor more than 10 in the case of a first offender, and of not less than 2 years nor more than 25 in the case of a second or subsequent offender. It further provides that a sentence imposed under § 924 (c) is not to run concurrently with the sentence for the predicate felony and that, in cases of repeat offenders, the defendant cannot receive probation or a suspended sentence.

Before the enactment of § 924 (c), earlier Congresses had already authorized enhanced penalties for using a dangerous weapon in the commission of certain especially serious federal felonies, including assault on a federal officer, 18 U. S. C. § 111, and bank robbery, 18 U. S. C. §§ 2113 (a), (d). Those enhancement provisions authorize terms of imprisonment of

(1) not more than an additional seven years under § 111, and (2) not more than an additional five years under §§ 2113 (a), (d). Neither provision requires a mandatory minimum additional sentence or authorizes increased additional sentences for recidivists.

In *Simpson*, the Court held that Congress did not intend the imposition of enhanced punishments under both § 924 (c)(1) and the enhancement provision for a predicate felony. That conclusion found substantial support in the statement of Representative Poff on the House floor that "[f]or the sake of legislative history, it should be noted that my [bill] is not intended to apply to title 18, sections 111, 112, or 113 which already define the penalties for the use of a firearm in assaulting officials, with sections 2113 or 2114 concerning armed robberies of the mail or banks, with section 2231 concerning armed assaults upon process servers or with chapter 44 which defines other firearm felonies." 114 Cong. Rec. 22232 (1968).

The issue here is not that of double punishment, but instead whether the Government may obtain enhancement of punishment under § 924 (c)(1), rather than under the enhancement provision for the predicate felony. The Court today concludes that Congress did not intend § 924 (c)(1) to apply at all to a predicate felony proscribed by a statute with its own enhancement provision. It is thus the Court's view that the Government may obtain an enhanced sentence only under the enhancement provision for the underlying felony itself.

Although this conclusion finds support in certain passages in *Simpson* and in the literal terms of Representative Poff's statement on the House floor, it is not supported by the actual holding in *Simpson*, the language of the statute itself, or a fair appraisal of the intent of Congress in enacting § 924 (c). In *Simpson*, the Court decided only that "in a prosecution growing out of a single transaction of bank robbery with firearms, a defendant may not be sentenced [to enhanced punishments] under *both* § 2113 (d) and § 924 (c)." 435 U. S., at 16 (em-

phasis added). The Court did not decide whether § 924 (c)(1) is available as an *alternative* enhancement provision. On this latter question, the statutory language is unambiguous, for § 924 (c)(1) provides, by its terms, for an enhanced penalty for "[w]hoever . . . uses a firearm to commit *any* [federal] felony." (Emphasis added.)

To be sure, Representative Poff stated that his bill "[was] not intended to apply" to certain felonies proscribed by statutes that contain their own enhancement provisions. But that statement could as easily have been directed to the question in *Simpson*—whether § 924 (c)(1) can be invoked *in addition to* a previously enacted enhancement provision—as to the question in this case—whether § 924 (c)(1) can be invoked *in lieu of* such a provision.

I agree with the holding in *Simpson* that Congress did not intend to "pyramid" punishments for the use of a firearm in a single criminal transaction. Yet I find quite implausible the proposition that Congress, in enacting § 924 (c)(1), did not intend this general enhancement provision—with its stiff sanctions for first offenders and even stiffer sanctions for recidivists—to serve as an alternative source of enhanced punishment for those who commit felonies, such as bank robbery and assaulting a federal officer, that had been previously singled out by Congress as warranting special enhancement, but for which a lesser enhancement sanction than that imposed by § 924 (c) had been authorized. In the light of the expressed concerns of Congress in enacting the Gun Control Act of 1968 in general and § 924 (c)(1) in particular, it is far more reasonable to conclude that Congress intended § 924 (c)(1) to mean precisely what it says, namely, that it applies to any federal felony.

It is my view, in sum, that § 924 (c)(1) applies to all federal felonies, though subject to the limitation in *Simpson* against double punishment. Under this reading of the statute, the Government may obtain an enhanced sentence under either

§ 924 (c)(1) or the enhancement provision for the predicate felony, but not under both.

For the foregoing reasons, I dissent.*

MR. JUSTICE REHNQUIST, dissenting.

I dissented from this Court's decision in *Simpson* v. *United States*, 435 U. S. 6 (1978), and continue to believe that case was wrongly decided. Now, as then, I am quite amazed at this Court's ability to say that 18 U. S. C. § 924 (c) "tells us nothing about the way Congress intended to mesh the new enhancement scheme with analogous provisions in pre-existing statutes defining federal crimes," *ante*, at 405, even though that section provides quite clearly that the use of a firearm in the commission of "any felony" shall be punished by up to 10 years' imprisonment "in addition to the punishment provided for the commission of such felony. . . ." Nor do I find any more persuasive the Court's rehash of the legislative history of § 924 (c), including *Simpson*'s unwarranted reliance upon the remark of Representative Poff, a remark that the Court today labels "the Poff rule," see *ante*, at 409, n. 14, and that might more properly be labeled "the Poff amendment" (albeit not intended as such by its proponent).

Were *Simpson* demonstrably a case of statutory construction, I could acquiesce to the Court's reading of § 924 (c) in

*I do not agree with the Court of Appeals that Busic could be given enhanced punishments both for aiding and abetting LaRocca's armed assault on a federal officer, in violation of 18 U. S. C. §§ 2, 111, and for unlawfully carrying his own gun while doing so, in violation of 18 U. S. C. § 924 (c)(2). Since Busic was convicted of armed assault "as a principal" under the aiding and abetting statute, 18 U. S. C. § 2, he must be viewed as having used LaRocca's gun as well as carried his own in the course of committing the offense; and, like the Court, *ante*, at 410–411, I am unpersuaded that § 924 (c) authorizes cumulative punishments for the use of one gun and the unlawful carrying of another in a single criminal transaction. It is my view, therefore, that Busic could have been given an enhanced sentence under either § 924 (c)(2) or §§ 2, 111, but not under both.

the interest of *stare decisis*. *Simpson*, however, was based to an unstated degree on this Court's assumption that § 924 (c) raised "the prospect of double jeopardy" because it provided for additional punishment on "precisely the same factual showing" as would be necessary for conviction of the underlying felony involved in that case. See 435 U. S., at 11. In *Simpson* the Court treated the question of the constitutionality of § 924 (c) as if it were separate from the question whether Congress intended to allow cumulative punishment, insisting at one point that "[b]efore an examination is made to determine whether cumulative punishments for the two offenses are constitutionally permissible, it is necessary . . . to determine whether Congress intended to subject the defendant to multiple penalties for the single criminal transaction in which he engaged." 435 U. S., at 11–12. In dissent, I noted the constitutional undercurrents of the Court's opinion and suggested its concerns were "gauzy" and "metaphysic[al]." *Id.*, at 18.

Recently, this Court unanimously rejected *Simpson*'s constitutional premise. In *Whalen* v. *United States*, 445 U. S. 684 (1980), six Members of this Court held that Congress' intent to impose cumulative punishments at a single criminal proceeding completely controlled the question of double jeopardy. See *id.*, at 688–689; *id.*, at 697–698 (BLACKMUN, J., concurring in judgment). See also *ante*, at 413, (BLACKMUN, J., concurring). Three other Members of this Court, including myself, argued that the permissibility of cumulative punishments in the same criminal proceeding presented no double jeopardy question whatsoever. See *Whalen* v. *United States*, *supra*, at 696 (WHITE, J., concurring in part and concurring in judgment); at 701–707 (REHNQUIST, J., joined by BURGER, C. J., dissenting). I believe that this Court, having thus disposed of *Simpson*'s constitutional underpinnings, should reconsider its holding that § 924 (c) does not, in fact, apply to "any felony."

I know of no cases besides *Simpson* and the present decision where this Court has taken a criminal statute absolutely clear on its face, has looked to the legislative history to create an "ambiguity," and then has resolved that ambiguity in a manner totally at odds with the statute's plain wording. Because I believe *Simpson* was wrongly decided, and because this Court has now repudiated *Simpson*'s constitutional premise, I would overrule *Simpson*, vacate the judgments below, and remand for reconsideration by the Court of Appeals.

GODFREY *v.* GEORGIA

CERTIORARI TO THE SUPREME COURT OF GEORGIA

No. 78–6899. Argued February 20, 1980—Decided May 19, 1980

Under a provision of the Georgia Code, a person convicted of murder may be sentenced to death if it is found beyond a reasonable doubt that the offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." (This statutory aggravating circumstance was held not to be unconstitutional on its face in *Gregg* v. *Georgia*, 428 U. S. 153.) Upon a jury trial in a Georgia state court, petitioner was convicted of two counts of murder and one count of aggravated assault. The evidence showed that, after his wife, who was living with her mother, had rebuffed his efforts for a reconciliation, petitioner went to his mother-in-law's trailer; fired a shotgun through the window, killing his wife instantly; proceeded into the trailer, striking and injuring his fleeing daughter with the barrel of the gun; and then shot and instantly killed his mother-in-law. Petitioner then called the sheriff's office and, when officers arrived, acknowledged his responsibility, directed an officer to the murder weapon, and later told an officer, "I've done a hideous crime." At the sentencing phase of the trial, the judge quoted to the jury the statutory provision in question, and the jury imposed death sentences on both murder convictions, specifying that the aggravating circumstance as to each conviction was that the offense "was outrageously or wantonly vile, horrible and inhuman." The Georgia Supreme Court affirmed the trial court's judgments in all respects, rejecting petitioner's contention that the statutory provision was unconstitutionally vague and holding that the evidence supported the jury's finding of the statutory aggravating circumstance.

Held: The judgment is reversed insofar as it leaves standing the death sentences, and the case is remanded. Pp. 427–433; 433–442.

243 Ga. 302, 253 S. E. 2d 710, reversed and remanded.

MR. JUSTICE STEWART, joined by MR. JUSTICE BLACKMUN, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS, concluded that in affirming the death sentences in this case the Georgia Supreme Court adopted such a broad and vague construction of the statute in question as to violate the Eighth and Fourteenth Amendments. Pp. 427–433.

(a) If a State wishes to authorize capital punishment, it has a constitutional responsibility to tailor and apply its law in a manner that

avoids the arbitrary and capricious infliction of the death penalty, and thus it must define the crimes for which death may be imposed in a way that obviates standardless sentencing discretion. Cf. *Furman* v. *Georgia*, 408 U. S. 238; *Gregg* v. *Georgia*, *supra*. Pp. 427–428.

(b) In earlier decisions interpreting the statutory provision, the Georgia Supreme Court concluded that (i) the evidence that the offense was "outrageously or wantonly vile, horrible or inhuman" must demonstrate "torture, depravity of mind, or an aggravated battery to the victim," (ii) the phrase "depravity of mind" comprehended only the kind of mental state that led the murderer to torture or to commit an aggravated battery before killing his victim, and (iii) the word "torture" must be construed *in pari materia* with "aggravated battery" so as to require evidence of serious physical abuse of the victim before death. Pp. 429–432.

(c) However, the Georgia courts did not so limit the statute in the present case. Petitioner did not torture or commit an aggravated battery upon his victims, or cause either of them to suffer any physical injury preceding their deaths. Nor can the death sentences be upheld on the ground that the murders were "outrageously or wantonly vile, horrible or inhuman in that [they] involved . . . depravity of mind." Petitioner's crimes cannot be said to have reflected a consciousness materially more "depraved" than that of any person guilty of murder. Pp. 432–433.

Mr. Justice Marshall, joined by Mr. Justice Brennan, concurring in the judgment, expressed his continuing belief that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, and also agreed with the plurality that the Georgia Supreme Court's construction of the statutory provision at issue here was unconstitutionally vague under *Gregg* v. *Georgia*, *supra*. He further concluded that, even under the prevailing view that the death penalty may, in some circumstances, constitutionally be imposed, it is not enough for a reviewing court to apply a narrowing construction to otherwise ambiguous statutory language, it being necessary that the jury be instructed on the proper, narrow construction of the statute, and that developments since *Gregg* and its progeny strongly suggest that appellate courts are incapable of guaranteeing the kind of objectivity and evenhandedness that the Court contemplated in *Gregg*. Pp. 433–442.

Stewart, J., announced the judgment of the Court and delivered an opinion, in which Blackmun, Powell, and Stevens, JJ., joined. Marshall, J., filed an opinion concurring in the judgment, in which

BRENNAN, J., joined, *post*, p. 433. BURGER, C. J., filed a dissenting opinion, *post*, p. 442. WHITE, J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post*, p. 444.

J. Calloway Holmes, Jr., argued the cause for petitioner. With him on the brief was *Gerry E. Holmes.*

John W. Dunsmore, Jr., Assistant Attorney General of Georgia, argued the cause for respondent. With him on the brief were *Arthur K. Bolton*, Attorney General, *Robert S. Stubbs II*, Executive Assistant Attorney General, *Don A. Langham*, First Assistant Attorney General, and *John C. Walden*, Senior Assistant Attorney General.

MR. JUSTICE STEWART announced the judgment of the Court and delivered an opinion, in which MR. JUSTICE BLACKMUN, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS joined.

Under Georgia law, a person convicted of murder [1] may be sentenced to death if it is found beyond a reasonable doubt that the offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Ga. Code § 27-2534.1 (b)(7) (1978). In *Gregg* v. *Georgia*, 428 U. S. 153, the Court held that this statutory aggravating circumstance (§ (b)(7)) is not unconstitutional on its face. Responding to the argument that the language of the provision is "so broad that capi-

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[1] Georgia Code § 26-1101 (1978) defines "murder" as follows:

"(a) A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.

"(b) A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice."

tal punishment could be imposed in any murder case," the joint opinion said:

> "It is, of course, arguable that any murder involves depravity of mind or an aggravated battery. But this language need not be construed in this way, and there is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction." 428 U. S., at 201 (opinion of STEWART, POWELL, and STEVENS, JJ.).

Nearly four years have passed since the *Gregg* decision, and during that time many death sentences based in whole or in part on § (b)(7) have been affirmed by the Supreme Court of Georgia. The issue now before us is whether, in affirming the imposition of the sentences of death in the present case, the Georgia Supreme Court has adopted such a broad and vague construction of the § (b)(7) aggravating circumstance as to violate the Eighth and Fourteenth Amendments to the United States Constitution.[2]

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[2] The other statutory aggravating circumstances upon which a death sentence may be based after conviction of murder in Georgia are considerably more specific or objectively measurable than § (b)(7):

"(1) The offense of murder . . . was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

"(2) The offense of murder . . . was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

"(3) The offender by his act of murder . . . knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

"(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

"(5) The murder of a judicial officer, former judicial officer, district

I

On a day in early September in 1977, the petitioner and his wife of 28 years had a heated argument in their home. During the course of this altercation, the petitioner, who had consumed several cans of beer, threatened his wife with a knife and damaged some of her clothing. At this point, the petitioner's wife declared that she was going to leave him, and departed to stay with relatives.[3] That afternoon she went to a Justice of the Peace and secured a warrant charging the petitioner with aggravated assault. A few days later, while still living away from home, she filed suit for divorce. Summons was served on the petitioner, and a court hearing was set on a date some two weeks later. Before the date of the hearing, the petitioner on several occasions asked his wife to return to their home. Each time his efforts were rebuffed.

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attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

"(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

. . . . .

"(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

"(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

"(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another." Ga. Code § 27-2534.1 (b) (1978).

In *Arnold* v. *State*, 236 Ga. 534, 540, 224 S. E. 2d 386, 391 (1976), the Supreme Court of Georgia held unconstitutional the portion of the first statutory aggravating circumstances encompassing persons who have a "substantial history of serious assaultive criminal convictions" because it did not set "sufficiently 'clear and objective standards.'"

[3] According to the petitioner, this was not the first time that he and his wife had been separated as a result of his violent behavior. On two or more previous occasions the petitioner had been hospitalized because of his drinking problem.

At some point during this period, his wife moved in with her mother. The petitioner believed that his mother-in-law was actively instigating his wife's determination not to consider a possible reconciliation.

In the early evening of September 20, according to the petitioner, his wife telephoned him at home. Once again they argued. She asserted that reconciliation was impossible and allegedly demanded all the proceeds from the planned sale of their house. The conversation was terminated after she said that she would call back later. This she did in an hour or so. The ensuing conversation was, according to the petitioner's account, even more heated than the first. His wife reiterated her stand that reconciliation was out of the question, said that she still wanted all the proceeds from the sale of their house, and mentioned that her mother was supporting her position. Stating that she saw no further use in talking or arguing, she hung up.

At this juncture, the petitioner got out his shotgun and walked with it down the hill from his home to the trailer where his mother-in-law lived. Peering through a window, he observed his wife, his mother-in-law, and his 11-year-old daughter playing a card game. He pointed the shotgun at his wife through the window and pulled the trigger. The charge from the gun struck his wife in the forehead and killed her instantly. He proceeded into the trailer, striking and injuring his fleeing daughter with the barrel of the gun. He then fired the gun at his mother-in-law, striking her in the head and killing her instantly.

The petitioner then called the local sheriff's office, identified himself, said where he was, explained that he had just killed his wife and mother-in-law, and asked that the sheriff come and pick him up. Upon arriving at the trailer, the law enforcement officers found the petitioner seated on a chair in open view near the driveway. He told one of the officers that "they're dead, I killed them" and directed the officer to the place where he had put the murder weapon. Later the

petitioner told a police officer: "I've done a hideous crime, . . . but I have been thinking about it for eight years . . . I'd do it again."

The petitioner was subsequently indicted on two counts of murder and one count of aggravated assault. He pleaded not guilty and relied primarily on a defense of temporary insanity at his trial. The jury returned verdicts of guilty on all three counts.

The sentencing phase of the trial was held before the same jury. No further evidence was tendered, but counsel for each side made arguments to the jury. Three times during the course of his argument, the prosecutor stated that the case involved no allegation of "torture" or of an "aggravated battery." When counsel had completed their arguments, the trial judge instructed the jury orally and in writing on the standards that must guide them in imposing sentence. Both orally and in writing, the judge quoted to the jury the statutory language of the § (b)(7) aggravating circumstance in its entirety.

The jury imposed sentences of death on both of the murder convictions. As to each, the jury specified that the aggravating circumstance they had found beyond a reasonable doubt was "that the offense of murder was outrageously or wantonly vile, horrible and inhuman."

In accord with Georgia law in capital cases, the trial judge prepared a report in the form of answers to a questionnaire for use on appellate review. One question on the form asked whether or not the victim had been "physically harmed or tortured." The trial judge's response was "No, as to both victims, excluding the actual murdering of the two victims."[4]

The Georgia Supreme Court affirmed the judgments of the trial court in all respects. 243 Ga. 302, 253 S. E. 2d 710

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[4] Another question on the form asked the trial judge to list the mitigating circumstances that were in evidence. The judge noted that the petitioner had no significant history of prior criminal activity.

(1979). With regard to the imposition of the death sentence for each of the two murder convictions, the court rejected the petitioner's contention that § (b)(7) is unconstitutionally vague. The court noted that Georgia's death penalty legislation had been upheld in *Gregg* v. *Georgia*, 428 U. S. 153, and cited its prior decisions upholding § (b)(7) in the face of similar vagueness challenges. 243 Ga., at 308–309, 253 S. E. 2d, at 717. As to the petitioner's argument that the jury's phraseology was, as a matter of law, an inadequate statement of § (b)(7), the court responded by simply observing that the language "was not objectionable." 243 Ga., at 310, 253 S. E. 2d, at 718. The court found no evidence that the sentence had been "imposed under the influence of passion, prejudice, or any other arbitrary factor," held that the sentence was neither excessive nor disproportionate to the penalty imposed in similar cases, and stated that the evidence suported the jury's finding of the § (b)(7) statutory aggravating circumstance. 243 Ga., at 309–311, 253 S. E. 2d, at 717–718. Two justices dissented.

II

In *Furman* v. *Georgia*, 408 U. S. 238, the Court held that the penalty of death may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner. *Gregg* v. *Georgia, supra*, reaffirmed this holding:

> "[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." 428 U. S., at 189 (opinion of STEWART, POWELL, and STEVENS, JJ.).

A capital sentencing scheme must, in short, provide a "meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not."

Id., at 188, quoting *Furman* v. *Georgia*, *supra*, at 313 (WHITE, J., concurring).

This means that if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a State's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates "standardless [sentencing] discretion." *Gregg* v. *Georgia*, *supra*, at 196, n. 47. See also *Proffitt* v. *Florida*, 428 U. S. 242; *Jurek* v. *Texas*, 428 U. S. 262. It must channel the sentencer's discretion by "clear and objective standards"[5] that provide "specific and detailed guidance,"[6] and that "make rationally reviewable the process for imposing a sentence of death."[7] As was made clear in *Gregg*, a death penalty "system could have standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman* could occur." 428 U. S., at 195, n. 46.

In the case before us, the Georgia Supreme Court has affirmed a sentence of death based upon no more than a finding that the offense was "outrageously or wantonly vile, horrible and inhuman."[8] There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost

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[5] *Gregg* v. *Georgia*, 428 U. S., at 198, quoting *Coley* v. *State*, 231 Ga. 829, 834, 204 S. E. 2d 612, 615 (1974).

[6] *Proffitt* v. *Florida*, 428 U. S., at 253 (opinion of STEWART, POWELL, and STEVENS, JJ.).

[7] *Woodson* v. *North Carolina*, 428 U. S. 280, 303 (opinion of STEWART, POWELL, and STEVENS, JJ.).

[8] See also *Ruffin* v. *State*, 243 Ga. 95, 106–107, 252 S. E. 2d 472, 480 (1979); *Hill* v. *State*, 237 Ga. 794, 802, 229 S. E. 2d 727, 742–743 (1976). Cf. *Holton* v. *State*, 243 Ga. 312, 318, 253 S. E. 2d 736, 740 (1979).

every murder as "outrageously or wantonly vile, horrible and inhuman." Such a view may, in fact, have been one to which the members of the jury in this case subscribed. If so, their preconceptions were not dispelled by the trial judge's sentencing instructions. These gave the jury no guidance concerning the meaning of any of § (b)(7)'s terms. In fact, the jury's interpretation of § (b)(7) can only be the subject of sheer speculation.

The standardless and unchanneled imposition of death sentences in the uncontrolled discretion of a basically uninstructed jury in this case was in no way cured by the affirmance of those sentences by the Georgia Supreme Court. Under state law that court may not affirm a judgment of death until it has independently assessed the evidence of record and determined that such evidence supports the trial judge's or jury's finding of an aggravating circumstance. Ga. Code § 27-2537 (c)(2) (1978).

In past cases the State Supreme Court has apparently understood this obligation as carrying with it the responsibility to keep § (b)(7) within constitutional bounds. Recognizing that "there is a possibility of abuse of [the § (b)(7)] statutory aggravating circumstance," the court has emphasized that it will not permit the language of that subsection simply to become a "catchall" for cases which do not fit within any other statutory aggravating circumstance. *Harris* v. *State*, 237 Ga. 718, 732, 230 S. E. 2d 1, 10 (1976). Thus, in exercising its function of death sentence review, the court has said that it will restrict its "approval of the death penalty under this statutory aggravating circumstance to those cases that lie at the core." *Id.*, at 733, 230 S. E. 2d, at 11.

When *Gregg* was decided by this Court in 1976, the Georgia Supreme Court had affirmed two death sentences based wholly on § (b)(7). See *McCorquodale* v. *State*, 233 Ga. 369, 211 S. E. 2d 577 (1974); *House* v. *State*, 232 Ga. 140, 205 S. E. 2d 217 (1974). The homicide in *McCorquodale* was "a horrify-

ing torture-murder."[9] There, the victim had been beaten, burned, raped, and otherwise severely abused before her death by strangulation. The homicide in *House* was of a similar ilk. In that case, the convicted murderer had choked two 7-year-old boys to death after having forced each of them to submit to anal sodomy.

Following our decision in *Gregg*, the Georgia Supreme Court for the first time articulated some of the conclusions it had reached with respect to § (b)(7):

> "This aggravating circumstance involves both the effect on the victim, viz., torture, or an aggravated battery; and the offender, viz., depravity of mind. As to both parties the test is that the acts (the offense) were outrageously or wantonly vile, horrible or inhuman.
>
> . . . . .
>
> "We believe that each of [the cases decided to date that has relied exclusively on § (b)(7)[10]] establishes beyond any reasonable doubt a depravity of mind and either involved torture or an aggravated battery to the victim as illustrating the crimes were outrageously or wantonly vile, horrible or inhuman. Each of the cases is at the core and not the periphery. . . ." *Harris* v. *State*, 237 Ga., at 732–733, 230 S. E. 2d, at 10–11.

Subsequently, in *Blake* v. *State*, 239 Ga. 292, 236 S. E. 2d 637 (1977), the court elaborated on its understanding of § (b)(7). There, the contention was that a jury's finding of the aggravating circumstance could never be deemed unanimous without a polling of each member of the panel. The court said:

> "We find no significant dissimilarity between outrageously vile, wantonly vile, horrible or inhuman. Con-

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[9] *Gregg* v. *Georgia*, *supra*, at 201.

[10] *Banks* v. *State*, 237 Ga. 325, 227 S. E. 2d 380 (1976); *McCorquodale* v. *State*, 233 Ga. 369, 211 S. E. 2d 577 (1974); *House* v. *State*, 232 Ga. 140, 205 S. E. 2d 217 (1974).

sidering torture and aggravated battery on the one hand as substantially similar treatment of the victim and depravity of mind on the other hand as relating to the defendant, we find no room for nonunanimous verdicts for the reason that there is no prohibition upon measuring cause on the one hand by effect on the other hand. That is to say, the depravity of mind contemplated by the statute is that which results in torture or aggravated battery to the victim. . . ." 239 Ga., at 299, 236 S. E. 2d, at 643.[11]

The *Harris* and *Blake* opinions suggest that the Georgia Supreme Court had by 1977 reached three separate but consistent conclusions respecting the § (b)(7) aggravating circumstance. The first was that the evidence that the offense was "outrageously or wantonly vile, horrible or inhuman" had to demonstrate "torture, depravity of mind, or an aggravated battery to the victim."[12] The second was that the phrase, "depravity of mind," comprehended only the kind of mental state that led the murderer to torture or to commit an aggravated battery before killing his victim. The third, derived from *Blake* alone, was that the word, "torture," must be construed *in pari materia* with "aggravated battery" so as to require evidence of serious physical abuse of the victim before death.[13] Indeed, the circumstances proved in a num-

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[11] Since *Harris* and *Blake*, the court has summarily rejected all constitutional challenges to its construction of § (b)(7). See, *e. g.*, *Baker* v. *State*, 243 Ga. 710, 711–712, 257 S. E. 2d 192, 193–194 (1979); *Collins* v. *State*, 243 Ga. 291, 294, 253 S. E. 2d 729, 732 (1979); *Johnson* v. *State*, 242 Ga. 649, 651, 250 S. E. 2d 394, 397–398 (1978); *Lamb* v. *State*, 241 Ga. 10, 15, 243 S. E. 2d 59, 63 (1978).

[12] This construction of § (b)(7) finds strong support in the language and structure of the statutory provision.

[13] "Aggravated battery" is a term that is defined in Georgia's criminal statutes. Georgia Code § 26–1305 (1978) states: "A person commits aggravated battery when he maliciously causes bodily harm to another by depriving him of a member of his body, or by rendering a member of his

ber of the § (b)(7) death sentence cases affirmed by the Georgia Supreme Court have met all three of these criteria.[14]

The Georgia courts did not, however, so limit § (b)(7) in the present case. No claim was made, and nothing in the record before us suggests, that the petitioner committed an aggravated battery upon his wife or mother-in-law or, in fact, caused either of them to suffer any physical injury preceding their deaths. Moreover, in the trial court, the prosecutor repeatedly told the jury—and the trial judge wrote in his sentencing report—that the murders did not involve "torture." Nothing said on appeal by the Georgia Supreme Court indicates that it took a different view of the evidence. The circumstances of this case, therefore, do not satisfy the criteria laid out by the Georgia Supreme Court itself in the *Harris* and *Blake* cases. In holding that the evidence supported the jury's § (b)(7) finding, the State Supreme Court simply asserted that the verdict was "factually substantiated."

Thus, the validity of the petitioner's death sentences turns on whether, in light of the facts and circumstances of the murders that Godfrey was convicted of committing, the Georgia Supreme Court can be said to have applied a constitutional construction of the phrase "outrageously or wantonly vile, horrible or inhuman in that [they] involved . . . depravity of mind. . . ."[15] We conclude that the answer must be no.

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body useless, or by seriously disfiguring his body or a member thereof." It appears that this definition has on at least one occasion been treated by the state trial courts as controlling the meaning of the same words in § (b)(7). See, *e. g.*, *Holton* v. *State*, 243 Ga., at 317, n. 1, 253 S. E. 2d, at 740, n. 1.

We note, however, that the *Harris* case apparently did not involve "torture" in this sense.

[14] See, *e. g.*, *Thomas* v. *State*, 240 Ga. 393, 242 S. E. 2d 1 (1977); *Stanley* v. *State*, 240 Ga. 341, 241 S. E. 2d 173 (1977); *Dix* v. *State*, 238 Ga. 209, 232 S. E. 2d 47 (1977); *Birt* v. *State*, 236 Ga. 815, 225 S. E. 2d 248 (1976); *McCorquodale* v. *State*, *supra*.

[15] The sentences of death in this case rested exclusively on § (b)(7). Accordingly, we intimate no view as to whether or not the petitioner might

The petitioner's crimes cannot be said to have reflected a consciousness materially more "depraved" than that of any person guilty of murder. His victims were killed instantaneously.[16] They were members of his family who were causing him extreme emotional trauma. Shortly after the killings, he acknowledged his responsibility and the heinous nature of his crimes. These factors certainly did not remove the criminality from the petitioner's acts. But, as was said in *Gardner* v. *Florida*, 430 U. S. 349, 358, it "is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."

That cannot be said here. There is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not. Accordingly, the judgment of the Georgia Supreme Court insofar as it leaves standing the petitioner's death sentences is reversed, and the case is remanded to that court for further proceedings.

It is so ordered.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, concurring in the judgment.

I continue to believe that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. In addition, I agree with the plurality that the Georgia Supreme Court's construction of the provision at issue in this case is unconstitutionally vague under *Gregg* v. *Georgia*, 428 U. S. 153 (1976). I write

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constitutionally have received the same sentences on some other basis. Georgia does not, as do some States, make multiple murders an aggravating circumstance, as such.

[16] In light of this fact, it is constitutionally irrelevant that the petitioner used a shotgun instead of a rifle as the murder weapon, resulting in a gruesome spectacle in his mother-in-law's trailer. An interpretation of § (b)(7) so as to include all murders resulting in gruesome scenes would be totally irrational.

separately, first, to examine the Georgia Supreme Court's application of this provision, and second, to suggest why the enterprise on which the Court embarked in *Gregg* v. *Georgia*, *supra*, increasingly appears to be doomed to failure.

I

Under Georgia law, the death penalty may be imposed only when the jury both finds at least one statutory aggravating circumstance and recommends that the sentence of death should be imposed. Ga. Code § 26–3102 (1978). Under Ga. Code § 27–2534.1 (b)(7) (1978), it is a statutory aggravating circumstance to commit a murder that "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." In *Gregg* v. *Georgia*, *supra*, the Court rejected a facial challenge to the constitutionality of this aggravating circumstance. The joint opinion conceded that it is "arguable that any murder involves depravity of mind or an aggravated battery." 428 U. S., at 201 (opinion of STEWART, POWELL, and STEVENS, JJ.). Nonetheless, that opinion refused to invalidate the provision on its face, reasoning that the statutory "language need not be construed in this way, and there is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction." *Ibid.* In my view, life and death should not be determined by such niceties of language.

The Court's conclusion in *Gregg* was not unconditional; it was expressly based on the assumption that the Georgia Supreme Court would adopt a narrowing construction that would give some discernible content to § (b)(7). In the present case, no such narrowing construction was read to the jury or applied by the Georgia Supreme Court on appeal. As it has so many times in the past, that court upheld the jury's finding with a simple notation that it was supported by the evidence. The premise on which *Gregg* relied has thus proved demonstrably false.

For this reason, I readily agree with the plurality that, as applied in this case, § (b)(7) is unconstitutionally vague.[1] The record unequivocally establishes that the trial judge, the prosecutor, and the jury did not believe that the evidence showed that either victim was tortured. Nor was there aggravated battery to the victims.[2] I also agree that since the victims died instantaneously and within a few moments of each other, the fact that the murder weapon was one which caused extensive damage to the victim's body is constitutionally irrelevant. *Ante*, at 433, n. 16.

I am unwilling, however, to accept the plurality's characterization of the decision below as an aberrational lapse on the part of the Georgia Supreme Court from an ordinarily narrow construction of § (b)(7). Reasoning from two decisions rendered shortly after our decision in *Gregg*, *Blake* v. *State*, 239 Ga. 292, 236 S. E. 2d 637 (1977), and *Harris* v. *State*, 237 Ga. 718, 230 S. E. 2d 1 (1976), the plurality suggests that from 1977 onward it has been the law of Georgia that a statutory aggravating circumstance can be found under § (b)(7) only if the offense involved torture and aggravated battery, manifested by "evidence of serious physical abuse of

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[1] My Brother WHITE appears to mischaracterize today's holding in suggesting that a "majority of this Court disagrees" with the conclusion that the "facts supported the jury's finding of the existence of statutory aggravating circumstance § (b)(7)." *Post*, at 449. The question is not whether the facts support the jury's finding. As in any case raising issues of vagueness, the question is whether the court below has adopted so ambiguous a construction of the relevant provision that the universe of cases that it comprehends is impermissibly large, thus leaving undue discretion to the decisionmaker and creating intolerable dangers of arbitrariness and caprice.

[2] Georgia Code § 26-1305 (1978) provides, in pertinent part: "A person commits aggravated battery when he maliciously causes bodily harm to another by depriving him of a member of his body, or by rendering a member of his body useless, or by seriously disfiguring his body or a member thereof."

the victim before death." *Ante*, at 431.[3] But we cannot stop reading the Georgia Reports after those two cases. In *Ruffin* v. *State*, 243 Ga. 95, 252 S. E. 2d 472 (1979), the court upheld a jury finding of a § (b)(7) aggravating circumstance stated in the words, "we the jurors conclude that this act was both horrible and inhuman." The case involved a shotgun murder of a child: no torture or aggravated battery was present. See also *Holton* v. *State*, 243 Ga. 312, 253 S. E. 2d 736, cert. denied, 444 U. S. 925 (1979).[4] The Georgia court's cursory treatment of § (b)(7) in *Ruffin*, *Holton*, and the present case indicates either that it has abandoned its intention of reaching only "core" cases under § (b)(7) or that its understanding of the "core" has become remarkably inclusive.

In addition, I think it necessary to emphasize that even under the prevailing view that the death penalty may, in some circumstances, constitutionally be imposed, it is not enough for a reviewing court to apply a narrowing construction to

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[3] My Brother WHITE also assumes that § (b)(7) "applie[s] in its entirety," *post*, at 448, so that the aggravating circumstance cannot be found unless the jury finds torture, depravity of mind, or aggravated battery to the victim.

[4] In *Holton* v. *State*, the defendant murdered a husband and wife. Both victims died of gunshot wounds. The husband had sustained wounds to his ear and shoulder which were apparently caused by blows from a tomahawk. The wife had been stabbed in the back and her ear almost severed after she died. The jury was instructed in the language of § (b)(7), but the word "torture" was omitted since there was no evidence of torture before the deaths occurred. The court also instructed the jury on the statutory definition of aggravated battery, but informed them that they could not find an aggravated battery to the wife. The jury found as an aggravating circumstance the fact that the murder was committed "by reason of depravity of mind." The Georgia Supreme Court indicated in dictum that the omission of the words "outrageously or wantonly vile, horrible or inhuman," rendered the finding impermissibly vague, but did not comment on the instructions to the jury. Apparently, then, the court would have permitted the jury to find that the murder of the wife fell within § (b)(7) even though there was neither torture nor aggravated battery. See also n. 11, *infra*.

otherwise ambiguous statutory language. The jury must be instructed on the proper, narrow construction of the statute. The Court's cases make clear that it is the *sentencer's* discretion that must be channeled and guided by clear, objective, and specific standards. See *ante*, at 428. To give the jury an instruction in the form of the bare words of the statute—words that are hopelessly ambiguous and could be understood to apply to any murder, see *ante*, at 428–429; *Gregg* v. *Georgia*, 428 U. S., at 201—would effectively grant it unbridled discretion to impose the death penalty. Such a defect could not be cured by the *post hoc* narrowing construction of an appellate court. The reviewing court can determine only whether a rational jury might have imposed the death penalty if it had been properly instructed; it is impossible for it to say whether a particular jury would have so exercised its discretion if it had known the law.

For this reason, I believe that the vices of vagueness and intolerably broad discretion are present in any case in which an adequate narrowing construction of § (b)(7) was not read to the jury, and the Court's decision today cannot properly be restricted to cases in which the particular facts appear to be insufficiently heinous to fall within a construction of § (b)(7) that would be consistent with *Gregg*.

II

The preceding discussion leads me to what I regard as a more fundamental defect in the Court's approach to death penalty cases. In *Gregg*, the Court rejected the position, expressed by my Brother BRENNAN and myself, that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. Instead it was concluded that in "a matter so grave as the determination of whether a human life should be taken or spared," it would be both necessary and sufficient to insist on sentencing procedures that would minimize or eliminate the

"risk that [the death penalty] would be inflicted in an arbitrary and capricious manner." 428 U. S., at 189, 188 (opinion of STEWART, POWELL, and STEVENS, JJ.). Contrary to the statutes at issue in *Furman* v. *Georgia*, 408 U. S. 238 (1972), under which the death penalty was "infrequently imposed" upon "a capriciously selected random handful," *id.*, at 309–310 (STEWART, J., concurring), and "the threat of execution [was] too attenuated to be of substantial service to criminal justice," *id.*, at 311–313 (WHITE, J., concurring), it was anticipated that the Georgia scheme would produce an evenhanded, objective procedure rationally "'distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.'" *Gregg* v. *Georgia*, *supra*, at 198, quoting *Furman*, *supra*, at 313 (WHITE, J., concurring).

For reasons I expressed in *Furman* v. *Georgia*, *supra*, at 314–371 (concurring opinion), and *Gregg* v. *Georgia*, *supra*, at 231–241 (dissenting opinion), I believe that the death penalty may not constitutionally be imposed even if it were possible to do so in an evenhanded manner. But events since *Gregg* make that possibility seem increasingly remote. Nearly every week of every year, this Court is presented with at least one petition for certiorari raising troubling issues of noncompliance with the strictures of *Gregg* and its progeny. On numerous occasions since *Gregg*, the Court has reversed decisions of State Supreme Courts upholding the imposition of capital punishment,[5] frequently on the ground that the sentencing proceeding allowed undue discretion, causing dangers

[5] See, *e. g.*, *Green* v. *Georgia*, 442 U. S. 95 (1979); *Presnell* v. *Georgia*, 439 U. S. 14 (1978); *Bell* v. *Ohio*, 438 U. S. 637 (1978); *Lockett* v. *Ohio*, 438 U. S. 586 (1978); *Downs* v. *Ohio*, 438 U. S. 909 (1978); *Shelton* v. *Ohio*, 438 U. S. 909 (1978); *Woods* v. *Ohio*, 438 U. S. 910 (1978); *Roberts* v. *Ohio*, 438 U. S. 910 (1978); *Jordan* v. *Arizona*, 438 U. S. 911 (1978); *Coker* v. *Georgia*, 433 U. S. 584 (1977); *Eberheart* v. *Georgia*, 433 U. S. 917 (1977); *Hooks* v. *Georgia*, 433 U. S. 917 (1977); *Gardner* v. *Florida*, 430 U. S. 349 (1977); *Davis* v. *Georgia*, 429 U. S. 122 (1976).

of arbitrariness in violation of *Gregg* and its companion cases. These developments, coupled with other persuasive evidence,[6] strongly suggest that appellate courts are incapable of guaranteeing the kind of objectivity and evenhandedness that the Court contemplated and hoped for in *Gregg*. The disgraceful distorting effects of racial discrimination and poverty continue to be painfully visible in the imposition of death sentences.[7] And while hundreds have been placed on death row in the years since *Gregg*,[8] only three persons have been executed.[9] Two of them made no effort to challenge their sentence and were thus permitted to commit what I have elsewhere described as "state-administered suicide." *Lenhard*

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[6] See generally Dix, Appellate Review of the Decision To Impose Death, 68 Geo. L. J. 97 (1979). Professor Dix's meticulous study of the process of appellate review in Georgia, Florida, and Texas since 1976 demonstrates that "objective standards" for the imposition of the death penalty have not been achieved and probably are impossible to achieve, and concludes that *Gregg* and its companion cases "mandate pursuit of an impossible goal." 68 Geo. L. J., at 161.

[7] On April 20, 1980, for example, over 40% of the persons on death row were Negroes. See NAACP Legal Defense and Educational Fund, Death Row, U. S. A., 1 (Apr. 20, 1980). See also U. S. Department of Justice, Capital Punishment 1978, pp. 25–30 (1979); *Furman* v. *Georgia*, 408 U. S. 238, 249–257 (1972) (Douglas, J., concurring).

[8] See NAACP Legal Defense and Educational Fund, Death Row, U. S. A. (Apr. 20, 1980) (642 people on death row); U. S. Department of Justice, Capital Punishment 1978, p. 1 (1979) (445 people on death row as of December 31, 1978).

[9] In *Furman*, my Brothers STEWART and WHITE concurred in the judgment largely on the ground that the death penalty had been so infrequently imposed that it made no contribution to the goals of punishment. MR. JUSTICE STEWART stated that "the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed." *Furman* v. *Georgia*, 408 U. S., at 309–310. MR. JUSTICE WHITE relied on his conclusion that "the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice." *Id.*, at 313. These conclusions have proved to be equally valid under the sentencing schemes upheld in *Gregg*.

v. *Wolff*, 444 U. S. 807, 815 (1979) (dissenting opinion). See also *Gilmore* v. *Utah*, 429 U. S. 1012 (1976). The task of eliminating arbitrariness in the infliction of capital punishment is proving to be one which our criminal justice system—and perhaps any criminal justice system—is unable to perform.[10] In short, it is now apparent that the defects that led my Brothers Douglas, STEWART, and WHITE to concur in the judgment in *Furman* are present as well in the statutory schemes under which defendants are currently sentenced to death.

The issue presented in this case usefully illustrates the point. The Georgia Supreme Court has given no real content to § (b)(7) in by far the majority of the cases in which it has had an opportunity to do so. In the four years since *Gregg*, the Georgia court has *never* reversed a jury's finding of a § (b)(7) aggravating circumstance.[11] With considerable frequency the Georgia court has, as here, upheld the imposition of the death penalty on the basis of a simple conclusory statement that the evidence supported the jury's finding under § (b)(7).[12] Instances of a narrowing construction are difficult

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[10] See C. Black, Capital Punishment: The Inevitability of Caprice and Mistake (1974); Black, Due Process for Death: *Jurek v. Texas* and Companion Cases, 26 Cath. U. L. Rev. 1 (1976).

[11] In *Holton* v. *State*, 243 Ga. 312, 253 S. E. 2d 736, cert. denied, 444 U. S. 925 (1979), the court reversed a sentence of death on the grounds that the trial judge had given an inadequate charge on mitigating circumstances and that the jury had not been informed that it could recommend a life sentence even though it found a statutory aggravating circumstance. Although in dictum it indicated disapproval of a statutory circumstance based solely on depravity of mind, the court did not reverse the jury's finding under § (b)(7). See also n. 4, *supra*.

[12] See *Willis* v. *State*, 243 Ga. 185, 253 S. E. 2d 70, cert. denied, 444 U. S. 885 (1979); *Baker* v. *State*, 243 Ga. 710, 257 S. E. 2d 192 (1979); *Legare* v. *State*, 243 Ga. 744, 257 S. E. 2d 247, cert. denied, 444 U. S. 984 (1979); *Green* v. *State*, 242 Ga. 261, 249 S. E. 2d 1 (1978), rev'd on other grounds, 442 U. S. 95 (1979); *Young* v. *State*, 239 Ga. 53, 236 S. E. 2d 1, cert. denied, 434 U. S. 1002 (1977); *Gaddis* v. *State*, 239 Ga. 238, 236 S. E. 2d

to find, and those narrowing constructions that can be found have not been adhered to with any regularity. In no case has the Georgia court required a narrowing construction to be given to the jury—an indispensable method for avoiding the "standardless and unchanneled imposition of death sentences." *Ante*, at 429. Genuinely independent review has been exceedingly rare. In sum, I agree with the analysis of a recent commentator who, after a careful examination of the Georgia cases, concluded that the Georgia court has made no substantial effort to limit the scope of § (b)(7), but has instead defined the provision so broadly that practically every murder can fit within its reach. See Dix, Appellate Review of the Decision To Impose Death, 68 Geo. L. J. 97, 110–123 (1979).

The Georgia court's inability to administer its capital punishment statute in an evenhanded fashion is not necessarily attributable to any bad faith on its part; it is, I believe, symptomatic of a deeper problem that is proving to be genuinely intractable. Just five years before *Gregg*, Mr. Justice Harlan stated for the Court that the tasks of identifying "before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and [of] express[ing] these characteristics in language which can be

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594 (1977), cert. denied, 434 U. S. 1088 (1978); *Davis* v. *State*, 236 Ga. 804, 225 S. E. 2d 241, rev'd on other grounds, 429 U. S. 122 (1976); *Jarrell* v. *State*, 234 Ga. 410, 216 S. E. 2d 258 (1975), cert. denied, 428 U. S. 910 (1976); *Floyd* v. *State*, 233 Ga. 280, 210 S. E. 2d 810 (1974), cert. denied, 431 U. S. 949 (1977); *House* v. *State*, 232 Ga. 140, 205 S. E. 2d 217 (1974), cert. denied, 428 U. S. 910 (1976). The Georgia court has given an extraordinarily broad meaning to the word "torture." Under that court's view, "torture" may be present whenever the victim suffered pain or anticipated the prospect of death. See *Campbell* v. *State*, 240 Ga. 352, 240 S. E. 2d 828 (1977), cert. denied, 439 U. S. 882 (1978); *Blake* v. *State*, 239 Ga. 292, 236 S. E. 2d 637, cert. denied, 434 U. S. 960 (1977); *Banks* v. *State*, 237 Ga. 325, 227 S. E. 2d 380 (1976), cert. denied, 430 U. S. 975 (1977). That interpretation would of course enable a jury to find a § (b)(7) aggravating circumstance in most murder cases.

fairly understood and applied by the sentencing authority, appear to be . . . beyond present human ability." *McGautha* v. *California*, 402 U. S. 183, 204 (1971). From this premise, the Court in *McGautha* drew the conclusion that the effort to eliminate arbitrariness in the imposition of the death penalty need not be attempted at all. In *Furman*, the Court concluded that the arbitrary infliction of the death penalty was constitutionally intolerable. And in *Gregg*, the Court rejected the premise of *McGautha* and approved a statutory scheme under which, as the Court then perceived it, the death penalty would be imposed in an evenhanded manner.

There can be no doubt that the conclusion drawn in *McGautha* was properly repudiated in *Furman*, where the Court made clear that the arbitrary imposition of the death penalty is forbidden by the Eighth and Fourteenth Amendments. But I believe that the Court in *McGautha* was substantially correct in concluding that the task of selecting in some objective way those persons who should be condemned to die is one that remains beyond the capacities of the criminal justice system. For this reason, I remain hopeful that even if the Court is unwilling to accept the view that the death penalty is so barbaric that it is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, it may eventually conclude that the effort to eliminate arbitrariness in the infliction of that ultimate sanction is so plainly doomed to failure that it—and the death penalty—must be abandoned altogether.

MR. CHIEF JUSTICE BURGER, dissenting.

After murdering his wife and mother-in-law, petitioner informed the police that he had committed a "hideous" crime. The dictionary defines hideous as "morally offensive," "shocking," or "horrible." Thus, the very curious feature of this case is that petitioner himself characterized his crime in terms equivalent to those employed in the Georgia statute. For

my part, I prefer petitioner's characterization of his conduct to the plurality's effort to excuse and rationalize that conduct as just another killing. *Ante*, at 433. The jurors in this case, who heard all relevant mitigating evidence, see *Lockett* v. *Ohio*, 438 U. S. 586 (1978), obviously shared that preference; they concluded that this "hideous" crime was "outrageously or wantonly vile, horrible and inhuman" within the meaning of § (b)(7).

More troubling than the plurality's characterization of petitioner's crime is the new responsibility that it assumes with today's decision—the task of determining on a case-by-case basis whether a defendant's conduct is egregious enough to warrant a death sentence. In this new role, the plurality appears to require "evidence of serious physical abuse" before a death sentence can be imposed under § (b)(7). *Ante*, at 431. For me, this new requirement is arbitrary and unfounded and trivializes the Constitution. Consider, for example, the Georgia case of *Harris* v. *State*, 237 Ga. 718, 230 S. E. 2d 1 (1976), where the defendant killed a young woman for the thrill of it. As he later confessed, he "didn't want nothing [she] got except [her] life." *Id.*, at 720, 230 S. E. 2d, at 4. Does the plurality opinion mean to suggest that anything in the Constitution precludes a state from imposing a death sentence on such a merciless, gratuitous killer? The plurality's novel physical torture requirement may provide an "objective" criterion, but it hardly separates those for whom a state may prescribe the death sentence from those for whom it may not.

In short, I am convinced that the course the plurality embarks on today is sadly mistaken—indeed confused. It is this Court's function to insure that the rights of a defendant are scrupulously respected; and in capital cases we must see to it that the jury has rendered its decision with meticulous care. But it is emphatically not our province to second-guess the jury's judgment or to tell the states which of their "hide-

ous," intentional murderers may be given the ultimate penalty. Because the plurality does both, I dissent.

MR. JUSTICE WHITE, with whom MR. JUSTICE REHNQUIST joins, dissenting.

The sole question presented by this petition is whether, in affirming petitioner's death sentence, the Georgia Supreme Court adopted such a broad construction of Ga. Code § 27-2534.1 (b)(7) (1978) as to violate the Eighth and Fourteenth Amendments to the United States Constitution.

I

In early September 1977, Mrs. Godfrey, petitioner's wife, left him, moved in with her mother, and refused his entreaty to move back home. She also filed for divorce and charged petitioner with aggravated assault based on an incident in which he had cut some clothes off her body with a knife. On September 20, 1977, Mrs. Godfrey refused petitioner's request to halt divorce proceedings so that they could attempt a reconciliation. That same day petitioner carried his single-action shotgun to his mother-in-law's trailer home, where his wife, her mother, and the couple's 11-year-old daughter were playing a game around a table. Firing through a window, petitioner killed his wife with a shotgun blast to the head. As his daughter, running for help, attempted to rush past him, he struck her on the head with the barrel of the gun; she nonetheless was able to run on for help. Petitioner then reloaded his shotgun and, after entering the home, fired a fatal blast at his mother-in-law's head. After calling the police himself, petitioner was arrested, advised of his rights, and taken to the police station, where he told an officer that he had committed a "hideous crime" about which he had thought for eight years and that he would do it again.

Petitioner, over his defense of insanity, was convicted of the murders of his wife and his mother-in-law and of the

aggravated assault of his daughter. He was sentenced to death for each of the murders and to 10 years' imprisonment for the aggravated assault. Under the Georgia death penalty scheme, a person can be sentenced to death only if "the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed." Ga. Code § 26-3102 (1973). The statutory aggravating circumstance upon which petitioner's sentence was premised reads: "The offense of murder . . . was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated assault to the victim." § 27-2534.1 (b)(7) ("§ (b)(7)"). In petitioner's case, however, the jury, upon returning its recommendation of death, described the aggravating circumstance as follows: "[T]hat the offense of murder was outrageously or wantonly vile, horrible and inhuman." This attenuated statement of § (b)(7) in part forms the basis of petitioner's challenge to the Georgia Supreme Court's decision, for that court held that "[t]he evidence supports the jury's finding of statutory aggravating circumstances, and the jury's phraseology was not objectionable." 243 Ga. 302, 310, 253 S. E. 2d 710, 718.

II

In *Gregg* v. *Georgia*, 428 U. S. 153 (1976), we upheld the constitutionality of the capital-sentencing procedures in accordance with which the State of Georgia has sentenced petitioner to death. Two aspects of that scheme impressed us in particular as curing the constitutional defects in the system that was invalidated several years earlier in *Furman* v. *Georgia*, 408 U. S. 238 (1972). First, the sentencing system specifies statutory aggravating circumstances, one of which has to be found by the jury to exist beyond a reasonable doubt before a death sentence can ever be imposed. Ga. Code §§ 26-3102, 27-2534.1 (1978). Second, the scheme provides for automatic appeal of all death sentences to the

Georgia Supreme Court, which is required by statute to undertake a specific inquiry with respect to the soundness of the decision to impose the death penalty. § 27-2537.[1] "In short, Georgia's new sentencing procedures require as a prerequisite to the imposition of the death penalty, specific jury findings as to the circumstances of the crime or the character of the defendant. Moreover, . . . the Supreme Court of Georgia compares each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate." 428 U. S., at 198 (opinion of STEWART, POWELL, and STEVENS, JJ.); see *id.*, at 204-206; *id.*, at 223-224 (opinion of WHITE, J.). Petitioner maintains that, at least in his case, the Georgia Supreme Court has failed in its review function because, by construing § (b)(7) to authorize the imposition of the death penalty on him, the court has interpreted that provision in an unconstitutionally broad fashion.

The opinion announcing the judgment of the Court in *Gregg* recognized that § (b)(7), which would authorize imposition of the death penalty here if either of the murders was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim," presented some potential interpretative difficulty because "arguabl[y] . . . any murder involves depravity of mind or an aggravated battery." 428 U. S., at 201 (opinion of STEWART, POWELL, and STEVENS, JJ.). "But," the opinion continued, "this language need not be

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[1] According to the statute, the Georgia Supreme Court must determine:

"(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

"(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 27-2534.1 (b), and

"(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Ga. Code § 27-2537 (c) (1978).

construed in this way, and there is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction." *Ibid.* By concluding that the Supreme Court of Georgia has adopted "such an open-ended construction" in the present case, the Court has now turned a blind eye to the facts surrounding the murders of Mrs. Godfrey and her mother and to the constancy of the State Supreme Court in performance of its statutory review function.

III

This case presents a preliminary difficulty because the sentencing jury found merely that "the offense of murder was outrageously or wantonly vile, horrible and inhuman," and did not repeat in its finding the entire incantation of § (b)(7). The Georgia Supreme Court found the jury's phraseology unobjectionable; and because this judgment was rendered in the same sentence in which the court expressed its determination that sufficient evidence supported the jury's finding of § (b)(7), the court presumably believed that the jury's finding met all necessary terms of the provision notwithstanding the jury's abbreviated statement.

Petitioner argues, however, that the Georgia Supreme Court, by not deeming the jury's abbreviated statement as reversible error, has endorsed a view of § (b)(7) that allows for the provision's application upon a finding that a murder was "outrageously or wantonly vile, horrible or inhuman," even though the murder involved no "torture, depravity of mind, or . . . aggravated battery to the victim." Such a finding, petitioner contends, would be incomplete and indicative of an unconstitutionally broad construction of the provision, for the language "outrageously or wantonly vile, horrible or inhuman" cannot "objectively guide and channel jury discretion in the imposition of a death sentence in compliance with the command of the 8th and 14th Amendments. . . ." Brief for Petitioner 23. The plurality opinion seems to agree. *Ante*, at 428.

I find petitioner's argument unpersuasive, for it is apparent that both the jury and the Georgia Supreme Court understood and applied § (b)(7) in its entirety. The trial court instructed the jurors that they were authorized to fix petitioner's punishment for murder as death or imprisonment for life and that they could consider any evidence in mitigation. App. 79. They were also specifically instructed to determine whether there was a statutory aggravating circumstance present beyond a reasonable doubt and that the aggravating circumstance that they could consider was "[t]hat the offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." *Ibid.* That the jury's ultimate recitation of the aggravating circumstance was abbreviated reveals, in my view, no gap of constitutional magnitude in its understanding of its duty. It is perfectly evident, moreover, that, in exercising its review function, the Georgia Supreme Court understood that the provision applied in its entirety, just as in the past it has insisted that the provision be read as a whole and not be applied disjunctively. *Harris* v. *State*, 237 Ga. 718, 230 S. E. 2d 1 (1976), cert. denied, 431 U. S. 933 (1977); *Holton* v. *State*, 243 Ga. 312, 253 S. E. 2d 736 (a finding of "depravity of mind" is insufficient to support a death sentence), cert. denied, 444 U. S. 925 (1979). The court, after quoting the language of the jury's finding, cited § (b)(7) and, more tellingly, referred to the discrepancy between the two versions as a mere problem of "phraseology." As such, the jury's version, in the court's view, "was not objectionable." 243 Ga., at 310, 253 S. E. 2d, at 718.

Thus, while both sides to this litigation felt constrained to engage in elaborate structural arguments regarding § (b)(7)—focusing on grammar and syntax, nuance and implication—I ascribe no constitutional significance at all to the jury's attenuated statement of the provision, and thus regard the question whether certain language in the section is severable from the rest as immaterial to the decision of this case.

IV

The question remains whether the facts of this case bear sufficient relation to § (b)(7) to conclude that the Georgia Supreme Court responsibly and constitutionally discharged its review function. I believe that they do.

As described earlier, petitioner, in a coldblooded executioner's style, murdered his wife and his mother-in-law and, in passing, struck his young daughter on the head with the barrel of his gun. The weapon, a shotgun, is hardly known for the surgical precision with which it perforates its target. The murder scene, in consequence, can only be described in the most unpleasant terms. Petitioner's wife lay prone on the floor. Mrs. Godfrey's head had a hole described as "[a]pproximately the size of a silver dollar" on the side where the shot entered, and much less decipherable and more extensive damage on the side where the shot exited. Tr. 259. Pellets that had passed through Mrs. Godfrey's head were found embedded in the kitchen cabinet.

It will be remembered that after petitioner inflicted this much damage, he took out time not only to strike his daughter on the head, but also to reload his single-shot shotgun and to enter the house. Only then did he get around to shooting his mother-in-law, Mrs. Wilkerson, whose last several moments as a sentient being must have been as terrifying as the human mind can imagine. The police eventually found her face down on the floor with a substantial portion of her head missing and her brain, no longer cabined by her skull, protruding for some distance onto the floor. Blood not only covered the floor and table, but dripped from the ceiling as well.

The Georgia Supreme Court held that these facts supported the jury's finding of the existence of statutory aggravating circumstance § (b)(7). A majority of this Court disagrees. But this disagreement, founded as it is on the notion that the lower court's construction of the provision was overly broad, in fact reveals a conception of this Court's role in back-

stopping the Georgia Supreme Court that is itself overly broad. Our role is to correct genuine errors of constitutional significance resulting from the application of Georgia's capital sentencing procedures; our role is not to peer majestically over the lower court's shoulder so that we might second-guess its interpretation of facts that quite reasonably—perhaps even quite plainly—fit within the statutory language.[2]

Who is to say that the murders of Mrs. Godfrey and Mrs. Wilkerson were not "vile," or "inhuman," or "horrible"? In performing his murderous chore, petitioner employed a weapon known for its disfiguring effects on targets, human or other, and he succeeded in creating a scene so macabre and revolting that, if anything, "vile," "horrible," and "inhuman" are descriptively inadequate.

And who among us can honestly say that Mrs. Wilkerson did not feel "torture" in her last sentient moments. Her daughter, an instant ago a living being sitting across the table from Mrs. Wilkerson, lay prone on the floor, a bloodied and mutilated corpse. The seconds ticked by; enough time for her son-in-law to reload his gun, to enter the home, and to

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[2] The plurality opinion, *ante*, at 433, and n. 16, states that "[a]n interpretation of § (b)(7) so as to include all murders resulting in gruesome scenes would be totally irrational" and that the fact that both "victims were killed instantaneously" makes the gruesomeness of the scene irrelevant. This view ignores the indisputable truth that Mrs. Wilkerson did not die "instantaneously"; she had many moments to contemplate her impending death, assuming that the stark terror she must have felt permitted any contemplation. More importantly, it also ignores the obvious correlation between gruesomeness and "depravity of mind," between gruesomeness and "aggravated battery," between gruesomeness and "horrible," between gruesomeness and "vile," and between gruesomeness and "inhuman." Mere gruesomeness, to be sure, would not itself serve to establish the existence of § (b)(7). But it certainly fares sufficiently well as an indicator of this particular aggravating circumstance to signal to a reviewing court the distinct possibility that the terms of the provision, upon further investigation, might well be met in the circumstances of the case.

take a gratuitous swipe at his daughter. What terror must have run through her veins as she first witnessed her daughter's hideous demise and then came to terms with the imminence of her own. Was this not torture? And if this was not torture, can it honestly be said that petitioner did not exhibit a "depravity of mind" in carrying out this cruel drama to its mischievous and murderous conclusion? I should have thought, moreover, that the Georgia court could reasonably have deemed the scene awaiting the investigating policemen as involving "an aggravated battery to the victim[s]." Ga. Code § 27–2534.1 (b)(7) (1978).

The point is not that, in my view, petitioner's crimes were definitively vile, horrible, or inhuman, or that, as I assay the evidence, they beyond *any* doubt involved torture, depravity of mind, or an aggravated battery to the victims. Rather, the lesson is a much more elementary one, an instruction that, I should have thought, this Court would have taken to heart long ago. Our mandate does not extend to interfering with factfinders in state criminal proceedings or with state courts that are responsibly and consistently interpreting state law, unless that interference is predicated on a violation of the Constitution. No convincing showing of such a violation is made here, for, as MR. JUSTICE STEWART has written in another place, the issue here is not what *our* verdict would have been, but whether "any rational factfinder" could have found the existence of aggravating circumstance § (b)(7). *Jackson* v. *Virginia*, 443 U. S. 307, 313 (1979). Faithful adherence to this standard of review compels our affirmance of the judgment below.[3]

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[3] The plurality opinion notes that the prosecutor informed the jury that the case involved no torture or aggravated battery and suggests that this fact somehow undermines the belief that a properly complete understanding of § (b)(7) was applied in this case. *Ante*, at 426, 432. But as I observe in text, the trial court judge instructed the jurors to consider § (b)(7) in its entirety and thus did not impose a similarly circumscribed

V

Under the present statutory regime, adopted in response to *Furman*, the Georgia Supreme Court has responsibly and consistently performed its review function pursuant to the Georgia capital-sentencing procedures. The State reports that, at the time its brief was written, the Georgia Supreme Court had reviewed some 99 cases in which the death penalty has been imposed. Of these, 66 had been affirmed; 5 had been reversed for errors in the guilt phase; and 22 had been

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view of the case on the jurors. At any event, the prosecutor did argue to the jury that there was depravity of mind. App. 76.

The plurality also notes that in the sentencing report filled out by the trial judge, he wrote that the victims here had not been physically harmed or tortured beyond the fact of their murders. But any argument supportive of the plurality's position based on the judge's sentencing report is undermined by the plurality opinion itself. For that opinion makes clear that the Georgia Supreme Court, in the course of exercising its review function, has developed "criteria" to guide its application of § (b)(7), criteria of which this Court's plurality apparently approves. *Ante*, at 431–432. Surely a court capable of developing such criteria is also capable of keeping them in mind when deciding the latest case to involve the statutory provision that gave birth to the criteria in the first place. Yet the plurality does not recognize the seemingly inescapable conclusion that the Georgia Supreme Court, when affirming petitioner's convictions and sentences, matched the facts of this case to its understanding of the statute and, irrespective of the trial judge's comments, concluded that § (b)(7) properly formed the basis for the imposition of the death penalty. The plurality instead seems to adopt the curious notion that a trial judge is capable of binding an appellate court in the performance of its statutory duty to review trial court determinations.

The plurality opinion also is troubled by the fact that the trial judge gave no guidance to the jurors by way, presumably, of defining the terms in § (b)(7). *Ante*, at 429. Yet the opinion does not demonstrate that such definitions were provided in cases in which the plurality would agree that § (b)(7) was properly applied. Nor does the opinion demonstrate that such definitions obtain a constitutional significance apart from an independent showing—absent here—that juries and courts cannot rationally apply an unequivocal legislative mandate.

reversed for errors in the sentencing phase.[4] Brief for Respondent 13–14. This reversal rate of over 27% is not substantially lower than the historic reversal rate of state supreme courts. See Courting Reversal: The Supervisory Role of State Supreme Courts, 87 Yale L. J. 1191, 1198, 1209 (1978), where it is indicated that 16 state supreme courts over a 100-year period, in deciding 5,133 cases, had a reversal rate of 38.5%; for criminal cases, the reversal rate was 35.6%. To the extent that the reversal rate is lower than the historic level, it doubtless can be attributed to the great and admirable extent to which discretion and uncertainty have been removed from Georgia's capital-sentencing procedures since our decision in *Furman* and to the fact that review is mandatory. See 87 Yale L. J., at 1200–1201.

The Georgia Supreme Court has vacated a death sentence where it believed that the statutory sentencing procedures, as passed by the legislature, were defective, *Gregg* v. *State*, 233 Ga. 117, 210 S. E. 2d 659 (1974), aff'd, 428 U. S. 153 (1976) (holding, *inter alia*, that the death penalty for armed robbery was impermissible); it has held that jurors must be instructed that they can impose a life sentence even though they find the existence of a statutory aggravating circumstance, *Fleming* v. *State*, 240 Ga. 142, 240 S. E. 2d 37 (1977); it has reversed the imposition of the death penalty where the prose-

[4] This Court has reversed six of the cases owing to errors of law rising to constitutional significance. *Green* v. *Georgia*, 442 U. S. 95 (1979) (relevant evidence was improperly excluded from the sentencing hearing); *Presnell* v. *Georgia*, 439 U. S. 14 (1978) (Georgia Supreme Court erred by affirming a death sentence for murder based on an underlying rape charge of which the defendant was not properly tried and convicted); *Coker* v. *Georgia*, 433 U. S. 584 (1977) (under the Eighth and Fourteenth Amendments, death is an excessive penalty for a rapist who does not also commit murder); *Eberheart* v. *Georgia*, 433 U. S. 917 (1977) (same as *Coker*); *Hooks* v. *Georgia*, 433 U. S. 917 (1977) (same as *Coker*); *Davis* v. *Georgia*, 429 U. S. 122 (1976) (a prospective juror was excluded from jury service in violation of *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968)).

cutor made an improper comment during his argument to the jury in the sentencing phase, *Prevatte* v. *State*, 233 Ga. 929, 214 S. E 2d 365 (1975); *Jordan* v. *State*, 233 Ga. 929, 214 S. E. 2d 365 (1975); it has reversed a trial court's decision limiting the type of mitigating evidence that could be presented, *Brown* v. *State*, 235 Ga. 644, 220 S. E. 2d 922 (1975); it has set aside a death sentence when jurors failed to specify which aggravating circumstances they found to exist, *Sprouse* v. *State*, 242 Ga. 831, 252 S. E. 2d 173 (1979); it has reversed a death sentence imposed on a partial finding of an aggravating circumstance, *Holton* v. *State*, 243 Ga. 312, 253 S. E. 2d 736, cert. denied, 444 U. S. 925 (1979); it has disapproved a death penalty because of errors in admitting evidence, *Stack* v. *State*, 234 Ga. 19, 214 S. E. 2d 514 (1975); it has reversed a capital sentence where a codefendant received only a life sentence, *Hall* v. *State*, 241 Ga. 252, 244 S. E. 2d 833 (1978); and it has held a statutory aggravating circumstance to be unconstitutional, *Arnold* v. *State*, 236 Ga. 534, 224 S. E. 2d 386 (1976).

The Georgia Supreme Court has also been responsible and consistent in its construction of § (b)(7). The provision has been the exclusive or nonexclusive basis for imposition of the death penalty in over 30 cases. In one excursus on the provision's language, the court in effect held that the section is to be read as a whole, construing "depravity of mind," "torture," and "aggravated battery" to flesh out the meaning of "vile," "horrible," and "inhuman." *Harris* v. *State*, 237 Ga. 718, 230 S. E. 2d 1 (1976), cert. denied, 431 U. S. 933 (1977). I see no constitutional error resulting from this understanding of the provision. Indeed, the Georgia Supreme Court has expressly rejected an analysis that would apply the provision disjunctively, *Holton* v. *State*, *supra*, an analysis that, if adopted, would arguably be assailable on constitutional grounds. And the court has noted that it would apply the

provision only in "core" cases and would not permit § (b)(7) to become a "catchall." *Harris* v. *State*, *supra*.[5]

Nor do the facts of this case stand out as an aberration. A jury found § (b)(7) satisfied, for example, when a child was senselessly and ruthlessly executed by a murderer who, like petitioner, accomplished this end with a shotgun. The Georgia Supreme Court affirmed. *Ruffin* v. *State*, 243 Ga. 95, 252 S. E. 2d 472, cert. denied, 444 U. S. 995 (1979). See *Banks* v. *State*, 237 Ga. 325, 227 S. E. 2d 380 (1976), cert. denied, 430 U. S. 975 (1977). The court has also affirmed a jury's finding of § (b)(7) where, as here, there was substantial dis-

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[5] The cases in which a jury has found the existence of § (b)(7) as the sole basis for imposition of the death penalty include *Spraggins* v. *State*, 243 Ga. 73, 252 S. E. 2d 620 (1979) (affirming death sentence for a murder involving multiple stab wounds and partial disembowelment), cert. pending, No. 79-5032; *Holton* v. *State*, 243 Ga. 312, 253 S. E. 2d 736 (reversing death sentence because the jury's finding stated only "depravity of mind"), cert. denied, 444 U. S. 925 (1979); *Godfrey* v. *State*, 243 Ga. 302, 253 S. E. 2d 710 (1979) (case below) (affirming death penalty for shotgun shooting resulting in mutilation); *Johnson* v. *State*, 242 Ga. 649, 250 S. E. 2d 394 (1978) (affirming death sentence for rape and shooting of two women); *Morgan* v. *State*, 241 Ga. 485, 246 S. E. 2d 198 (1978) (affirming death sentence for shotgun shooting of blindfolded victim begging for his life), cert. denied, 441 U. S. 967 (1979); *Ward* v. *State*, 239 Ga. 205, 236 S. E. 2d 365 (1977) (reversing death sentence for stabbing murders because a previous trial had ended in a life sentence; thus death penalty here would be disproportionate); *Blake* v. *State*, 239 Ga. 292, 236 S. E. 2d 637 (affirming death sentence for murder of a child effected by her being thrown off a bridge), cert. denied, 434 U. S. 960 (1977); *Dix* v. *State*, 238 Ga. 209, 232 S. E. 2d 47 (1977) (affirming death sentence for murder accomplished by beating, strangling, and stabbing the victim); *Harris* v. *State*, 237 Ga. 718, 230 S. E. 2d 1 (1976) (affirming death sentence for shooting murder of victim who was forced to beg for her life), cert. denied, 431 U. S. 933 (1977); *Banks* v. *State*, 237 Ga. 325, 227 S. E. 2d 380 (1976) (affirming death sentence for shotgun murder of two victims), cert. denied, 430 U. S. 975 (1977); *Hooks* v. *State*, 233 Ga. 149, 210 S. E. 2d 668 (1974) (affirming death sentence solely for rape), sentence vacated, 433 U. S. 917 (1977).

figurement of the victim, *McCorquodale* v. *State*, 233 Ga. 369, 211 S. E. 2d 577 (1974), cert. denied, 428 U. S. 910 (1976), and where, as arguably with Mrs. Wilkerson, there was torture of the victim, *ibid.; Birt* v. *State*, 236 Ga. 815, 225 S. E. 2d 248, cert. denied, 429 U. S. 1029 (1976).

The majority's attempt to drive a wedge between this case and others in which § (b)(7) has been applied is thus unconvincing, as is any suggestion that the Georgia Supreme Court has somehow failed overall in performance of its review function.[6]

VI

In the circumstances of this case, the majority today endorses the argument that I thought we had rejected in *Gregg:* namely, "that no matter how effective the death penalty may be as a punishment, government, created and run as it must be by humans, is inevitably incompetent to administer it." 428 U. S., at 226 (opinion of WHITE, J.). The Georgia Supreme Court, faced with a seemingly endless train of macabre scenes, has endeavored in a responsible, rational, and consistent fashion to effectuate its statutory mandate as illuminated by our judgment in *Gregg*. Today, a majority of this Court, its arguments shredded by its own illogic, informs the Georgia Supreme Court that, to some extent, its efforts have been outside the Constitution. I reject this as an unwarranted invasion into the realm of state law, for, as in *Gregg*, "I decline to interfere with the manner in which Georgia has

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[6] The plurality opinion states that there is no indication that petitioner's mind was any more depraved than that of any other murderer. *Ante*, at 433. The Court thus assumes the role of a finely tuned calibrator of depravity, demarcating for a watching world the various gradations of dementia that lead men and women to kill their neighbors. I should have thought that, in light of our other duties, such a function would better be performed by the state court statutorily charged with the mission. And unless this Court is willing to supplant the Georgia Supreme Court in the statutory scheme, it would be well advised to reconsider its position.

chosen to enforce [its] laws" until a genuine error of constitutional magnitude surfaces. 428 U. S., at 226 (opinion of WHITE, J.).

I would affirm the judgment of the Supreme Court of Georgia.

NAVARRO SAVINGS ASSN. *v.* LEE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 79-465. Argued March 18, 1980—Decided May 19, 1980

Held: Respondents, as individual trustees of a business trust organized under Massachusetts law, may invoke the diversity jurisdiction of the federal courts on the basis of their own citizenship without regard to the citizenship of the trust beneficiaries. A federal court must rest jurisdiction only upon the citizenship of real parties to the controversy, and a trustee is a real party to the controversy for purposes of diversity jurisdiction when (as do respondents here) he possesses certain customary powers to hold, manage, and dispose of assets for the benefit of others. Cf. *Bullard* v. *Cisco,* 290 U. S. 179. Respondents are active trustees whose control over the assets held in their names is real and substantial. That the trust may depart from conventional forms in other respects has no bearing upon this determination. Nor does the trust's resemblance to a business enterprise alter the distinctive rights and duties of the trustees. Pp. 460-466.

597 F. 2d 421, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, MARSHALL, REHNQUIST, and STEVENS, JJ., joined. BLACKMUN, J., filed a dissenting opinion, *post,* p. 466.

Bernus Wm. Fischman argued the cause for petitioner. With him on the brief was *Lawrence S. Fischman.*

James A. Ellis, Jr., argued the cause and filed a brief for respondents.

MR. JUSTICE POWELL delivered the opinion of the Court.

The question is whether the trustees of a business trust may invoke the diversity jurisdiction of the federal courts on the basis of their own citizenship, rather than that of the trust's beneficial shareholders.

I

The respondents are eight individual trustees of Fidelity Mortgage Investors, a business trust organized under Massachusetts law.[1] They hold title to real estate investments in trust for the benefit of Fidelity's shareholders.[2] The declaration of trust gives the respondents exclusive authority over this property "free from any power and control of the Shareholders, to the same extent as if the Trustees were the sole owners of the Trust Estate in their own right. . . ."[3] The respondents have power to transact Fidelity's business, execute documents, and "sue and be sued in the name of the Trust or in their names as Trustees of the Trust."[4] They may invest the funds of the trust, lend money, and initiate or compromise lawsuits relating to the trust's affairs.[5]

In 1971, respondents lent $850,000 to a Texas firm in return for a promissory note payable to themselves as trustees. The note was secured in part by a commitment letter in which petitioner Navarro Savings Association agreed to lend the Texas firm $850,000 to cover its obligation to the respondents. In 1973, respondents called upon Navarro to make the "take-out" loan. Navarro refused, and this action followed. The amended complaint, filed in the United States District Court for the Northern District of Texas, sought approximately $175,000 in damages for breach of contract. Federal jurisdiction was premised upon diversity of citizenship. 28 U. S. C.

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[1] Fidelity merged into a Delaware corporation in 1978, but Federal Rule of Civil Procedure 25 (c) permits the original parties to continue the litigation. Jurisdiction turns on the facts existing at the time the suit commenced. *Louisville, N. A. & C. R. Co.* v. *Louisville Trust Co.*, 174 U. S. 552, 556 (1899).

[2] Fidelity Mortgage Investors Fifth Amended and Restated Declaration of Trust (hereinafter Fidelity Declaration of Trust), App. A44–A45.

[3] *Id.*, Art. 3.1, App. A49–A50.

[4] *Id.*, Art. 1.1, App. A45.

[5] *Id.*, Art. 3.2, App. A50–A55.

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§ 1332.[6] The complaint asserted—and the parties agree—that Navarro was a Texas citizen and that each respondent was a citizen of another State. The parties have stipulated, however, that some of Fidelity's beneficial shareholders were Texas residents.

The District Court dismissed the action for want of subject-matter jurisdiction. 416 F. Supp. 1186 (1976). Concluding that a business trust is a citizen of every State in which its shareholders reside, the court held that the parties lacked the complete diversity required by *Strawbridge* v. *Curtiss*, 3 Cranch 267 (1806). The Court of Appeals for the Fifth Circuit reversed. 597 F. 2d 421 (1979). It held that the respondent trustees were real parties in interest because they had full power to manage and control the trust and to sue on its behalf. Since complete diversity existed among the actual parties to the controversy, the Court of Appeals directed the District Court to proceed to trial on the merits. We granted certiorari, 444 U. S. 962 (1979), and we now affirm.

II

Federal courts have jurisdiction over controversies between "Citizens of different States" by virtue of 28 U. S. C. § 1332 (a)(1) and U. S. Const., Art. III, § 2. Early in its history, this Court established that the "citizens" upon whose diversity a plaintiff grounds jurisdiction must be real and substantial parties to the controversy. *McNutt* v. *Bland*, 2 How. 9, 15 (1844); see *Marshall* v. *Baltimore & Ohio R. Co.*, 16 How. 314, 328–329 (1854); *Coal Co.* v. *Blatchford*, 11

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[6] Section 1332 (a)(1) provides:

"The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between . . . citizens of different States. . . ."

In view of our disposition of the case, we need not consider respondents' alternative claim to jurisdiction under 28 U. S. C. § 1331 or their attempt to bring a class action under Federal Rule of Civil Procedure 23.2.

Wall. 172, 177 (1871). Thus, a federal court must disregard nominal or formal parties and rest jurisdiction only upon the citizenship of real parties to the controversy. *E. g., McNutt* v. *Bland, supra,* at 14; see 6 C. Wright & A. Miller, Federal Practice and Procedure § 1556, pp. 710–711 (1971).

The early cases held that only persons could be real parties to the controversy. Artificial or "invisible" legal creatures were not citizens of any State. *Bank of United States* v. *Deveaux,* 5 Cranch 61, 86–87, 91 (1809).[7] Although corporations suing in diversity long have been "deemed" citizens, see n. 7, *supra,* unincorporated associations remain mere collections of individuals. When the "persons composing such association" sue in their collective name, they are the parties whose citizenship determines the diversity jurisdiction of a federal court. *Great Southern Fire Proof Hotel Co.* v. *Jones,* 177 U. S. 449, 456 (1900) (limited partnership association); see *Steelworkers* v. *Bouligny, Inc.,* 382 U. S. 145 (1965) (labor union); *Chapman* v. *Barney,* 129 U. S. 677 (1889) (joint stock company).

Navarro contends that Fidelity's trust form masks an unincorporated association of individuals who make joint real estate investments. Navarro observes that certain features of the trust's operations also characterize the operations of an association: centralized management, continuity of enterprise, and unlimited duration. Arguing that this trust is in sub-

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[7] Although overruled in *Louisville, C., & C. R. Co.* v. *Letson,* 2 How. 497 (1844), *Deveaux* was resurrected by *Marshall* v. *Baltimore & Ohio R. Co.,* 16 How. 314 (1854). *Marshall* held that an artificial entity cannot be a citizen, but that the persons who "act under [corporate] faculties . . . and use [the] corporate name" are presumed to reside in the State of incorporation. *Id.,* at 328; see *St. Louis & S. F. R. Co.* v. *James,* 161 U. S. 545, 562 (1896). This view endured until 1958, when Congress amended the diversity statute to provide explicitly that "a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." Act of July 25, 1958, § 2, 72 Stat. 415 (codified at 28 U. S. C. § 1332 (c)).

stance an association, Navarro reasons that the real parties to the lawsuit are Fidelity's beneficial shareholders.

III

We need not reject the argument that Fidelity shares some attributes of an association. In certain respects, a business trust also resembles a corporation. But this case involves neither an association nor a corporation. Fidelity is an express trust, and the question is whether its trustees are real parties to this controversy for purposes of a federal court's diversity jurisdiction.[8]

As early as 1808, this Court stated that trustees of an express trust are entitled to bring diversity actions in their own names and upon the basis of their own citizenship. *Chappedelaine* v. *Dechenaux*, 4 Cranch 306, 308. Federal Rule of Civil Procedure 17 (a) now provides that such trustees are real parties in interest for procedural purposes.[9] Yet

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[8] The dissenting opinion, *post*, at 471–472, and n. 4, 476, n. 7, asserts that Massachusetts law would treat Fidelity as a trust for some purposes and as a partnership for others. Neither the parties nor the courts below addressed these questions of state law. Assuming that the dissent is correct, its observations cast no doubt on our conclusion that Fidelity is a form of express trust. It is black letter law that "[m]any of the rules applicable to trusts are applied to business trusts. . . ." Restatement (Second) of Trusts § 1, Comment *b*, p. 4 (1959). Many others are not. Our task is simply to determine, as a matter of federal law, whether the rules applicable to trustees who sue in diversity fall in the former or the latter category.

[9] There is a "rough symmetry" between the "real party in interest" standard of Rule 17 (a) and the rule that diversity jurisdiction depends upon the citizenship of real parties to the controversy. But the two rules serve different purposes and need not produce identical outcomes in all cases. Note, Diversity Jurisdiction over Unincorporated Business Entities: The Real Party in Interest as a Jurisdictional Rule, 56 Texas L. Rev. 243, 247–250 (1978); see 6 C. Wright & A. Miller, Federal Practice and Procedure § 1556, pp. 710–711 (1971). In appropriate circumstances, for example, a labor union may file suit in its own name as a real party in interest under Rule 17 (a). To establish diversity, however, the union

similar principles governed diversity jurisdiction long before the advent of uniform rules of procedure.[10] In 1870, the Court declared that jurisdiction properly founded upon the diverse citizenship of individual trustees "is not defeated by the fact that the parties whom they represent may be disqualified." *Coal Co.* v. *Blatchford*, 11 Wall., at 175 (mortgage contract). "[T]he residence of those who may have the equitable interest" is simply irrelevant. *Bonnafee* v. *Williams*, 3 How. 574, 577 (1845) (note held in trust for third party). The same rule applies when "the beneficiaries are many." *Dodge* v. *Tulleys*, 144 U. S. 451, 456 (1892) (dictum) (railroad trust deed).[11]

In *Bullard* v. *Cisco*, 290 U. S. 179, 189 (1933), the trust beneficiaries were "numerous and widely scattered" investors who had conveyed certain bonds to a committee formed by a protective agreement. The agreement did not use trust terminology. Nevertheless, the Court held that the "rights, powers and duties expressly assigned" to committee members

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must rely upon the citizenship of each of its members. *Steelworkers* v. *Bouligny, Inc.*, 382 U. S. 145 (1965).

[10] The Court never has analogized express trusts to business entities for purposes of diversity jurisdiction. Even when the Court espoused the view that a corporation lacked citizenship, *Bank of United States* v. *Deveaux*, 5 Cranch, at 91, Mr. Chief Justice Marshall explained that the doctrine had no bearing on the status of trustees.

"When [persons suing by a corporate name] are said to be substantially the parties to the controversy, the court does not mean to liken it to the case of a trustee. A trustee is a real person capable of being a citizen . . . , who has the whole legal estate in himself. At law, he is the real proprietor, and he represents himself, and sues in his own right."

[11] *Thomas* v. *Board of Trustees*, 195 U. S. 207 (1904), cited by Navarro, is not to the contrary. The Court there considered the Board of Trustees of a state university. Rejecting the contention that the Board was analogous to a corporation, the Court held that jurisdiction depended upon the citizenship of the individual trustees. *Id.*, at 215–217. The Court did not discuss the nature of the "trust" or the possible existence of beneficiaries.

"necessarily" made them trustees. *Ibid.* The agreement gave the committeemen "full title to the deposited bonds," and it defined "the control and power of disposal which the trustees were to have over them." *Ibid.* Refusing to analogize the committee to a collection agency, the Court concluded that "[t]he beneficiaries were not necessary parties and their citizenship was immaterial." *Id.*, at 190.[12]

Bullard reaffirms that a trustee is a real party to the controversy for purposes of diversity jurisdiction when he possesses certain customary powers to hold, manage, and dispose of assets for the benefit of others.[13] The trustees in this case have such powers. At all relevant times, Fidelity operated under a declaration of trust that authorized the trustees to take legal title to trust assets, to invest those assets for the benefit of the shareholders, and to sue and be sued in their capacity as trustees. Respondents filed this lawsuit in that capacity. They seek damages for breach of an obligation running to the holder of a promissory note held in their own names. Fidelity's 9,500 beneficial shareholders had no voice in the initial investment decision. They can neither

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[12] The actual issue in *Bullard* was not citizenship but amount in controversy. The claims of certain individual bondholders were too small to satisfy the $3,000 jurisdictional threshold then in effect. The trustees, on the other hand, held legal title to unpaid bonds and coupons worth about $350,000. 290 U. S., at 180–181.

[13] The relative simplicity of this established principle, see *post*, at 475, is one of its virtues. "It is of first importance to have a definition . . . [that] will not invite extensive threshold litigation over jurisdiction," although the resulting "differentiations of treatment . . . appear somewhat arbitrary." American Law Institute, Study of the Division of Jurisdiction between State and Federal Courts 128 (1969). "Jurisdiction should be as self-regulated as breathing; . . . litigation over whether the case is in the right court is essentially a waste of time and resources." Currie, The Federal Courts and the American Law Institute, Part I, 36 U. Chi. L. Rev. 1 (1968). The analysis proposed by the dissent, *post*, at 475–476, see *post*, at 467–472, and n. 4, could present serious difficulties for district courts called upon to determine questions of diversity jurisdiction.

control the disposition of this action nor intervene in the affairs of the trust except in the most extraordinary situations.[14]

We conclude that these respondents are active trustees whose control over the assets held in their names is real and substantial. That the trust may depart from conventional forms in other respects has no bearing upon this determination. Nor does Fidelity's resemblance to a business enterprise alter the distinctive rights and duties of the trustees.[15] There is no allegation of sham or collusion. See 28 U. S. C. § 1359; *Bullard* v. *Cisco, supra,* at 187–188, and n. 5. The respondents are not "naked trustees" who act as "mere conduits" for a remedy flowing to others. *McNutt* v. *Bland,* 2 How., at 13–14; see *Browne* v. *Strode,* 5 Cranch 303 (1809). They have legal title; they manage the assets; they control the litigation. In short, they are real parties to the controversy. For more than 150 years, the law has permitted trustees who meet this standard to sue in their own right,

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[14] The shareholders may elect and remove trustees; they may terminate the trust or amend the Declaration; and they must approve any disposition of more than half of the trust estate. Fidelity Declaration of Trust, Arts. 2.2, 6.7, 8.2, 8.3, App. A47, A67, A79–A80. No other shareholder action can bind the trustees. *Id.,* Arts. 3.1, 6.2, App. A49, A64.

The dissent believes that these limited powers of intervention establish a "pervasive measure of [shareholder] control . . . over the trustees' actions. . . ." *Post,* at 476. Therefore, the dissent would hold that Fidelity is a citizen of each State in which any of its 9,500 shareholders resides. But this form of "control" does not strip the trustees of the powers that make them real parties to the controversy for purposes of diversity jurisdiction. See *supra,* at 459, 463–465. Indeed, their authority over trust property—short of partial liquidation—is expressly made "free from any power and control of the Shareholders, to the same extent as if the Trustees were the sole owners of the Trust Estate in their own right. . . ." Fidelity Declaration of Trust, Art. 3.1, App. A49–A50.

[15] That business trusts may be treated as associations under the Internal Revenue Code, *Morrissey* v. *Commissioner,* 296 U. S. 344 (1935), is simply irrelevant.

without regard to the citizenship of the trust beneficiaries. We find no reason to forsake that principle today.

The judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE BLACKMUN, dissenting.

A reader of the Court's conclusory opinion might wonder why this heavily burdened tribunal chose to review this case. Most assuredly, we did not do so merely to reaffirm, *ante*, at 462, Mr. Chief Justice Marshall's ruling from the bench in *Chappedelaine* v. *Dechenaux*, 4 Cranch 306, 308 (1808), to the effect that aliens serving respectively as residuary legatee and representative of an estate, "although they sue as trustees," were entitled to bring a federal diversity action against a Georgia citizen. Rather, I had thought that we granted certiorari to resolve a significant conflict among the Courts of Appeals concerning the question whether the citizenship of a business trust, for purposes of establishing diversity jurisdiction, is determined by looking to the citizenship of its trustees or that of its beneficial shareholders.[1] I believe that the

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[1] Compare the decision below, 597 F. 2d 421 (CA5 1979), rev'g 416 F. Supp. 1186 (ND Tex. 1976), with *Belle View Apartments* v. *Realty ReFund Trust*, 602 F. 2d 668 (CA4 1979), and *Riverside Memorial Mausoleum, Inc.* v. *UMET Trust*, 581 F. 2d 62 (CA3 1978), aff'g 434 F. Supp. 58 (ED Pa. 1977). See also cases cited in n. 6, *infra*, dealing with an analogous question presented in the context of limited partnerships.

The Court of Appeals' decision in this case also conflicts with a substantial body of recent holdings of Federal District Courts that uniformly have looked to the citizenship of the beneficial shareholders, and not the trustees, in determining the existence of diversity in suits brought by or against common-law business trusts. See *National City Bank* v. *Fidelco Growth Investors*, 446 F. Supp. 124 (ED Pa. 1978); *Independence Mortgage Trust* v. *White*, 446 F. Supp. 120 (Ore. 1978); *Lincoln Associates* v. *Great American Mortgage Investors*, 415 F. Supp. 351 (ND Tex. 1976); *Heck* v. *A. P. Ross Enterprises, Inc.*, 414 F. Supp. 971 (ND Ill. 1976); *Carey* v. *U. S. Industries, Inc.*, 414 F. Supp. 794 (ND Ill. 1976); *Chase*

analysis applied by the Court of Appeals in resolving that question was correct, but in applying that same analysis I would reach a different result. I feel that neither the approach now used by this Court, nor the result it reaches, comports with the Massachusetts law of business trusts, or with the Court's precedents concerning diversity jurisdiction.

I

The Court recognizes that Fidelity Mortgage Investors, a Massachusetts business trust, "shares some attributes of an association," and that it "also resembles a corporation." *Ante*, at 462. The Court concludes, however, based on its reading of portions of Fidelity's Declaration of Trust, that it is an "express trust." Taken either as a proposition of the general common-law of trusts,[2] or as an interpretation of the Massachusetts law of business trusts, that conclusion is not nearly so automatic and evident as the Court's scant reasoning implies.

In *Hecht* v. *Malley*, 265 U. S. 144 (1924), this Court described the Massachusetts business trust in terms that have

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Manhattan Mortgage & Realty Trust v. *Pendley*, 405 F. Supp. 593 (ND Ga. 1975); *Jim Walter Investors* v. *Empire-Madison, Inc.*, 401 F. Supp. 425 (ND Ga. 1975); *Larwin Mortgage Investors* v. *Riverdrive Mall, Inc.*, 392 F. Supp. 97 (SD Tex. 1975); *Fox* v. *Prudent Resources Trust*, 382 F. Supp. 81 (ED Pa. 1974). An early decision that appears to be in accord with the Court's "express trust" rationale in the present case is *Simson* v. *Klipstein*, 262 F. 823 (NJ 1920).

[2] The leading reference works dealing with the subject of trusts do not include business trusts within their scope:

"Although many of the rules applicable to trusts are applied to business trusts, yet many of the rules are not applied, and there are other rules which are applicable only to business trusts. The business trust is a special kind of business association and can best be dealt with in connection with other business associations." Restatement (Second) of Trusts § 1, Comment *b*, p. 4 (1959).

See also 1 A. Scott, The Law of Trusts § 2.2 (3d ed. 1967).

come to be accepted as the classic definition, see 16A R. Eickhoff, Fletcher Cyclopedia of the Law of Private Corporations § 8228 (1979):

> "The 'Massachusetts Trust' is a form of business organization, common in that State, consisting essentially of an arrangement whereby property is conveyed to trustees, in accordance with the terms of an instrument of trust, to be held and managed for the benefit of such persons as may from time to time be the holders of transferable certificates issued by the trustees showing the shares into which the beneficial interest in the property is divided. These certificates, which resemble certificates for shares of stock in a corporation and are issued and transferred in like manner, entitle the holders to share ratably in the income of the property, and, upon termination of the trust, in the proceeds.
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> "Under the Massachusetts decisions these trust instruments are held to create either pure trusts or partnerships, according to the way in which the trustees are to conduct the affairs committed to their charge. If they are the principals and are free from the control of the certificate holders in the management of the property, a trust is created; but if the certificate holders are associated together in the control of the property as principals and the trustees are merely their managing agents, a partnership relation between the certificate holders is created. *Williams* v. *Milton*, 215 Mass. 1, 6; *Frost* v. *Thompson*, 219 Mass. 360, 365; *Dana* v. *Treasurer*, 227 Mass. 562, 565; *Priestley* v. *Treasurer*, 230 Mass. 452, 455.
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> "These trusts—whether pure trusts or partnerships—are unincorporated. They are not organized under any statute; and they derive no power, benefit or privilege from any statute. The Massachusetts statutes, however, recognize their existence and impose upon them, as

'associations,' certain obligations and liabilities." (Footnotes omitted.)[3] 265 U. S., at 146–147.

Based on its reading of Fidelity's Fifth Amended and Restated Declaration of Trust, App. A40, and seemingly unconcerned with considerations of state law, the Court determines that respondents "are active trustees whose control over the assets held in their names is real and substantial." *Ante*, at 465. That the trustees' control over the assets of Fidelity is substantial may be accepted without quarrel. The Court fails to recognize, however, that the Declaration of Trust lodges in the beneficial shareholders substantial control over the actions of these trustees. Article 2.1 of the Declaration provides that the trustees are to be elected at annual shareholder meetings by a majority of the shares voted. App. A47. Article 2.2 provides that trustees may be removed from office, with or without cause, by vote of the majority of the outstanding shares. *Ibid.* Article 6.7 vests in the shareholders two significant powers: the ability to call a special meeting upon the request of not less than 20% of the outstanding shares, and the requirement that any sale, lease, exchange, or other disposition of more than 50% of the trust assets is to be made only upon the affirmative approval of the holders of a majority of the shares. *Id.*, at A67. Most significantly, Art. 8.2 reserves to the holders of a majority of the shares the right to terminate the trust at any shareholder meeting, and Art. 8.3 gives them the power to amend the Declaration of Trust itself. *Id.*, at A79–A80.

The leading Massachusetts decision concerning the legal nature of a business trust is *Williams* v. *Inhabitants of Milton*, 215 Mass. 1, 102 N. E. 355 (1913). There the court inquired whether personal property held by the trustees of the Boston

[3] The current statutory requirements governing voluntary associations under a written instrument or declaration of trust are contained in Mass. Gen. Laws Ann., ch. 182, §§ 1–14 (West 1958 and Supp. 1980).

Personal Property Trust was to be taxed as partnership property or investment trust property. In concluding that the indenture of trust created a true trust, the court observed that the shareholders of the trust were not associated in any way, did not hold meetings, and could not force the trustees to amend or terminate the trust. *Id.*, at 10, 102 N. E., at 358. The court emphasized, however, that the parties' intent to create a trust, rather than a partnership, as evidenced in the declaration of trust, was not controlling. "It is what the parties did in making the trust indenture that is decisive." *Id.*, at 12, 102 N. E., at 359.

In *Frost* v. *Thompson*, 219 Mass. 360, 365, 106 N. E. 1009, 1010 (1914), the court distilled from *Williams* the following test:

> "A declaration of trust or other instrument providing for the holding of property by trustees for the benefit of the owners of assignable certificates representing the beneficial interest in the property may create a trust or it may create a partnership. Whether it is the one or the other depends upon the way in which the trustees are to conduct the affairs committed to their charge. If they act as principals and are free from the control of the certificate holders, a trust is created; but if they are subject to the control of the certificate holders, it is a partnership."

Guided by these principles, the *Frost* court concluded that the "Buena Vista Fruit Company" was a partnership rather than a trust. This conclusion followed from the fact that shareholders representing two-thirds of the outstanding shares had the power to remove any or all of the trustees at any time without cause, to appoint others to fill resulting vacancies, and to terminate the trust. Moreover, shareholders representing a majority of the shares had the power to amend the declaration of trust and bylaws. "These provisions demonstrate that this association is a partnership and not a trust." *Id.*, at 366, 106 N. E., at 1010. Thus, the court concluded

that the trustees could not be sued in an action on a note issued by the Buena Vista Fruit Company.

In a variety of contexts, the Supreme Judicial Court of Massachusetts has continued to observe the line, drawn in *Williams* and in *Frost*, that is based on the relative powers of shareholders and trustees in a business trust.[4] It appears to

[4] In *Priestley* v. *Treasurer & Receiver General*, 230 Mass. 452, 120 N. E. 100 (1918), a trust agreement was held to create a partnership relation among the shareholders because they were associated, had a fixed annual meeting, could call special meetings upon the request of the holders of 10% of the shares, were empowered to fill vacancies in the number of trustees, and could remove the trustees and elect others in their place. The shareholders also were given direct powers to control the trustees' management of the trust property. In *Howe* v. *Chmielinski*, 237 Mass. 532, 130 N. E. 56 (1921), a partnership was found to exist among the shareholders, and the trustees were deemed to be their managing agents, despite the fact that legal title to the property stood in the trustees' names. This result followed from the shareholders' reserved powers under the trust agreement to fill vacancies among the trustees, remove them, direct the sale of trust property, and alter or terminate the trust. And where the shareholders of an unincorporated loan company were given the power to elect the company's officers and directors, to remove them for cause, to fill vacancies, to hold annual and special meetings, and to amend or repeal the bylaws, the court concluded that the company's bylaws "left in the shareholders the ultimate power of control of its affairs with the result that the relationship of partnership and not that of a trust was created." *First National Bank of New Bedford* v. *Chartier*, 305 Mass. 316, 321, 25 N. E. 2d 733, 736 (1940). See also *Ryder's Case*, 341 Mass. 661, 664, 171 N. E. 2d 475, 476–477 (1961).

In *Bouchard* v. *First People's Trust*, 253 Mass. 351, 360, 148 N. E. 895, 899 (1925), the court found that an express trust had been created where the arrangement established by a declaration of trust "involve[d] a total want of legal power by the shareholders as to the trust." In that case the shareholders had no power to direct the management of the trust directly or indirectly, and they had no power to select the trustees or to control their conduct. The Federal District Court applied Massachusetts law in *Gutelius* v. *Stanbon*, 39 F. 2d 621 (Mass. 1930), and followed *Bouchard* in holding that a declaration of trust established a pure trust rather than a partnership. Although the trust agreement provided for shareholder meetings at which the trustees were elected, and permitted

me that the powers lodged in the beneficial shareholders of Fidelity—the powers to elect and remove trustees, to vote on major trust investments, to amend the terms of the trust, and to terminate it—clearly dictate that it falls on the partnership side of the line. And those same powers convert the relationship between Fidelity's trustees and shareholders from one of trusteeship to one of agency. Thus, in *Williams*, the court stated: "The person in whose name the partnership property stands in such a case is perhaps in a sense a trustee. But speaking with accuracy he is an agent who for the principal's convenience holds the legal title to the principal's property." 215 Mass., at 6, 102 N. E., at 356. See also *Howe* v. *Chmielinski*, 237 Mass. 532, 534, 130 N. E. 56, 56 (1921).

I do not suggest that this state-law analysis is fully dispositive of the federal jurisdictional question presented here, see n. 7, *infra*, but it certainly is relevant.[5] Moreover, I be-

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them to terminate the trust at any time, the court deemed it significant that they were not given the right to remove trustees or to amend the declaration of trust. *Id.*, at 625. One must note, however, that every one of the four powers mentioned in *Gutelius*, with two of them lacking in that case, are possessed by the shareholders of Fidelity Mortgage Investors.

The fact that a declaration of trust effectively creates a partnership relation rather than a pure trust has not led the Massachusetts courts to treat the entity as a partnership for all purposes. See *State Street Trust Co.* v. *Hall*, 311 Mass. 299, 41 N. E. 2d 30 (1942), in which it was held that the partnership nature of a real estate trust did not give minority shareholders the right to dissolve the trust at will.

[5] Typically, for example, lower courts faced with the question whether a particular entity is a "corporation" within the meaning of the federal diversity statute, 28 U. S. C. § 1332 (c), have turned to the pertinent provisions of the law of the State under which the entity was organized. See, *e. g.*, *Baer* v. *United Services Automobile Assn.*, 503 F. 2d 393, 394–395 (CA2 1974). In contrast, the Court today evidently has found in our past cases a federal common law of trusts that enables it to ignore state law when the issue presented concerns the threshold question of jurisdiction. Cf. *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 78–80 (1938).

State law is not of dispositive assistance in resolving the precise question presented in this case because Massachusetts statutory law recognizes an

lieve that it casts very substantial doubt on the Court's major premise, namely, that Fidelity is an "express trust."

II

Petitioner argues that this case is controlled by the confluence of principles emanating from two of this Court's past decisions, each of which the Court, in its present opinion, essentially relegates to a footnote. The first case, *Morrissey* v. *Commissioner*, 296 U. S. 344 (1935), like *Hecht* v. *Malley*, 265 U. S. 144 (1924), dealt with the tax treatment of a business trust. In holding that such an entity was not an "ordinary trust," the Court observed:

> "In what are called 'business trusts' the object is not to hold and conserve particular property, with incidental powers, as in the traditional type of trusts, but to provide a medium for the conduct of a business and sharing its gains. Thus a trust may be created as a convenient method by which persons become associated for dealings in real estate, the development of tracts of land, the construction of improvements, and the purchase, management and sale of properties; or for dealings in securities or other personal property; or for the production, or manufacture, and sale of commodities; or for commerce, or other sorts of business; where those who become beneficially interested, either by joining in the plan at the outset, or by later participation according to the terms of

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unincorporated business trust as an entity that may itself be sued in an action at law for the debts and obligations incurred by its trustees. Mass. Gen. Laws Ann., ch. 182, § 6 (West 1958); *State Street Trust Co.* v. *Hall*, 311 Mass., at 304, 41 N. E. 2d, at 34. The fact that a business trust has the capacity to sue under the laws of Massachusetts, does not, of course, give it the power to bring a suit on its own behalf in federal court. *Great Southern Fire Proof Hotel Co.* v. *Jones*, 177 U. S. 449, 455 (1900); see also 13 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure: Jurisdiction § 3630, pp. 840–841, and nn. 10 and 11 (1975).

the arrangement, seek to share the advantages of a union of their interests in the common enterprise." 296 U. S., at 357.

These distinctions, along with the similarities between a business trust and a corporation, led the Court to conclude that a business trust was an "association," taxable, along with corporations, joint stock companies, and insurance companies, under § 2 (a)(2) of the respective Revenue Acts of 1924 and 1926, ch 234, 43 Stat. 253, and ch. 27, 44 Stat. 9.

Concluding that *Morrissey* establishes that Fidelity is an unincorporated association, petitioner argues that it follows that this controversy is then controlled by the second case, *Steelworkers* v. *Bouligny, Inc.*, 382 U. S. 145 (1965). In *Bouligny*, a unanimous Court held that an unincorporated labor union's citizenship for diversity purposes could not be determined without regard to the citizenship of its members. Although the holding of *Bouligny* was limited to the diversity treatment of labor unions, the principles it enunciates are unmistakably broad. The Court rejected the invitation of other courts and commentators to eradicate the distinction between the "citizenship" of corporations, on the one hand, and that of labor unions and other unincorporated associations, on the other hand. See *id.*, at 149–150. The Court stated that it was "of the view that these arguments, however appealing, are addressed to an inappropriate forum, and that pleas for extension of the diversity jurisdiction to hitherto uncovered broad categories of litigants ought to be made to the Congress and not to the courts." *Id.*, at 150–151.

The Court of Appeals in this case recognized the pertinence of *Bouligny* to the problem presented here, but found that case distinguishable. It noted that *Bouligny* is directly applicable only to the situation in which an unincorporated association seeks to establish diversity jurisdiction as an entity. And it adopted the view, earlier suggested in law review com-

mentary,[6] that *Bouligny* did not decide *who* the relevant members are when a court determines the citizenship of an unincorporated association. The Court of Appeals concluded that when an organization has more one class of members, it is necessary to determine on a case-by-case basis which class comprises the real parties in interest. Focusing its attention on Fidelity's Declaration of Trust, the court held that the trustees were the real parties to this lawsuit because they were designated as having exclusive control of the trust's activities, with the capacity to sue on the trust's behalf and to be sued. See 597 F. 2d 421, 427 (CA5 1979).

I believe that the *approach* of the Court of Appeals in this case was consistent with this Court's prior decisions. And I much prefer it to the simplistic approach the Court now adopts. I am particularly troubled by the Court's intimation that business trusts are to be treated differently from other functionally analogous business associations—partnerships, limited partnerships, joint stock companies, and the like. I fear that, at bottom, the Court's distinction between business trusts and these other enterprises hinges on the locus of title

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[6] The Court of Appeals, 597 F. 2d, at 427, and n. 6, placed substantial reliance upon the student Comment, Limited Partnerships and Federal Diversity Jurisdiction, 45 U. Chi. L. Rev. 384 (1978). That Comment, in turn, credited the dissenting opinion of Judge James Hunter III, in *Carlsberg Resources Corp.* v. *Cambria Savings & Loan Assn.*, 554 F. 2d 1254, 1262–1266 (CA3 1977), for the development of the real-party-in-interest approach in determining which members count in establishing the citizenship of an unincorporated association. 45 U. Chi. L. Rev., at 402–404.

The *Carlsberg Resources* majority held that the citizenship of a limited partnership is determined according to the citizenship of all its partners. The Second Circuit has adopted the contrary view, that is, that the citizenship of the general partners alone is determinative. See *Colonial Realty Corp.* v. *Bache & Co.*, 358 F. 2d 178, cert. denied, 385 U. S. 817 (1966). I read the Court's opinion in this case as expressing no view on the diversity of citizenship issue that is presented when one of the parties is a limited partnership.

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to the trust assets, see *ante*, at 459, and 464–466, a formalistic criterion having little to do with a realistic assessment of the respective degrees of control over the trust's activities that may be exercised by shareholders and trustees.

While I prefer and accept the Court of Appeals' approach to this case, I am persuaded, on that approach, that one cannot ignore the pervasive measure of control that Fidelity's shareholders possess over the trustees' actions taken in their behalf. See Part I, *supra*.[7] That factor, in my view, is the principal distinction between the ongoing business entity at issue here and the trust relationship among certificate holders and the bondholders' committee that was at issue in *Bullard* v. *Cisco*, 290 U. S. 179 (1933), cited and relied upon by the Court, *ante*, at 463–464. Though the question is not free from all doubt, in the light of these circumstances I believe that the citizenship of Fidelity should be determined according to the citizenship of its beneficial shareholders, and that diversity jurisdiction does not exist in this case.[8] I therefore dissent from the Court's holding to the contrary.

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[7] The conclusion that the Massachusetts law under which the business trust was created would treat Fidelity as a partnership could lead one to hold that its citizenship is determined with respect to the citizenship of all its shareholder-partners. See *Great Southern Fire Proof Hotel Co.* v. *Jones*, 177 U. S., at 456. Nonetheless, because Fidelity is not a partnership for all purposes, see n. 4, *supra*, I hesitate to give such a characterization of its legal nature controlling weight. It seems preferable to me to treat Fidelity as a form of unincorporated business association, and determine its citizenship according to the real-party-in-interest test utilized by the Court of Appeals. One factor that would seem especially pertinent in applying that test is the conclusion that Massachusetts law would treat the relationship between Fidelity's trustees and shareholders as one of agent to principal. See Part I, *supra*.

[8] The author of the Comment cited in n. 6, *supra*, suggests that determining the real parties in interest in an action involving a business trust is complicated by the fact that no uniform statutory framework clearly defines the relative rights and responsibilities of the trustees and the shareholders. The author notes, however, that certain factors may be relevant to a determination that the shareholders, rather than the trustees, are

I would vacate the judgment of the Court of Appeals and remand this case for consideration of respondents' claimed alternative bases for federal jurisdiction that were rejected by the District Court, but not reached by the Court of Appeals.

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the controlling parties. These include: "(1) the right to remove the trustees, (2) the right to terminate the trust, (3) the right to modify the terms of the trust, (4) the right to elect trustees, and (5) the right to direct management decisions of the trustees." 45 U. Chi. L. Rev., at 416. The first four are present in this case; in addition, Fidelity's shareholders have the power to condition major dispositions of the trust assets on their affirmative approval.

BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK ET AL. *v.* TOMANIO

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 79–424. Argued February 26, 1980—Decided May 19, 1980

Pursuant to New York statutes requiring that chiropractic practitioners obtain a state license either by passing an examination or obtaining a waiver of the examination requirement from petitioner Board of Regents (Board), respondent practitioner applied to the Board for a waiver of the examination requirement. In November 1971, the Board notified respondent that her waiver application was denied, but respondent was not afforded an evidentiary hearing or given a statement of reasons for the denial. In January 1972, respondent commenced state-court proceedings, attacking the Board's decision as arbitrary and capricious but not raising any constitutional challenge to the decision. Ultimately, in November 1975, the New York Court of Appeals affirmed an order holding that the Board had not abused its discretion in denying respondent's waiver application. In June 1976, respondent instituted this action in Federal District Court under 42 U. S. C. § 1983, alleging that petitioners' refusal to grant her a license violated due process as guaranteed by the Fourteenth Amendment. Holding that the § 1983 action was not barred by the applicable 3-year New York statute of limitations even though respondent's claim arose in November 1971 when her waiver application was denied by the Board, the District Court concluded that it was appropriate to adopt a federal rule to toll the running of the statute of limitations during the pendency of respondent's state-court litigation. Under the New York tolling rule the time for filing an action is not tolled during the period in which a litigant pursues a related but independent cause of action. On the merits of the federal constitutional claim, the District Court held that respondent was entitled to a hearing before the Board on her eligibility for waiver of the examination requirement. The Court of Appeals affirmed as to both the statute of limitations issue and the merits.

Held: Respondent's action was barred by the New York statute of limitations. The federal courts were obligated not only to apply the analogous New York statute of limitations to respondent's federal constitutional claims, but also to apply the New York rule for tolling that statute of limitations. *Robertson* v. *Wegmann*, 436 U. S. 584; *Johnson* v. *Railway*

Express Agency, Inc., 421 U. S. 454; *Monroe* v. *Pape*, 365 U. S. 167. Pp. 483–492.

(a) Under 42 U. S. C. § 1988, federal courts are instructed to refer to state statutes when federal law provides no rule of decision for actions brought under § 1983, and § 1988 authorizes federal courts to disregard an otherwise applicable state rule of law only if the state law is "inconsistent with the Constitution and laws of the United States." Since Congress did not establish a statute of limitations or a body of tolling rules applicable to federal-court actions under § 1983, the analogous state statute of limitations and the coordinate tolling rules are binding rules of law in most cases. This "borrowing" of the state statute of limitations includes rules of tolling unless they are "inconsistent" with federal law. Pp. 483–486.

(b) New York's tolling rule is not "inconsistent" with the policies of deterrence and compensation underlying § 1983. Neither of these policies are significantly affected by New York's rule since plaintiffs can still readily enforce their claims, thereby recovering compensation and fostering deterrence, simply by commencing their actions within three years. And there is no need for nationwide uniformity so as to warrant displacement of state statutes of limitations for civil rights actions. Nor are policies of federalism undermined by adoption of the New York rule. When Congress establishes a remedy (such as § 1983) separate and independent from other remedies that might also be available, a state rule which does not allow a plaintiff to litigate such alternative claims in succession, without risk of a time bar, is not "inconsistent." Pp. 486–492.

603 F. 2d 255, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, and POWELL, JJ., joined. STEVENS, J., filed an opinion concurring in the result, *post*, p. 492. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 494.

Donald O. Meserve argued the cause for petitioners. With him on the brief was *Jean M. Coon*.

Vincent J. Mutari argued the cause and filed a brief for respondent.

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

We granted certiorari in this case to review a judgment of the Court of Appeals for the Second Circuit holding that peti-

tioners, the Board of Regents of the University of the State of New York and the Commissioner of Education, were required by the Fourteenth Amendment to the United States Constitution, to afford a hearing to respondent, Mary Tomanio, before denying her request for a waiver of professional licensing examination requirements. In so doing, the Court of Appeals rejected petitioners' claims that both the statute of limitations and the doctrine of estoppel by judgment barred respondent's maintenance of an action under 42 U. S. C. § 1983 in the federal courts. We find it necessary to consider only the defense based on the statute of limitations, since the resolution of that issue is virtually foreordained in favor of petitioners by our prior cases when the indisputably lengthy series of events which ultimately brought this case here is described.

I

Respondent has practiced chiropractic medicine in the State of New York since 1958. Prior to 1963, the State did not require chiropractic practitioners to be licensed. But in that year the State enacted a statute which required state licensing, and established three separate methods by which applicants could obtain a license to practice chiropractic in the State of New York. 1963 N. Y. Laws, ch. 780, codified as amended, N. Y. Educ. Law §§ 6506 (5), 6554, 6556 (McKinney 1972 and Supp. 1979–1980). First, the statute established education and examination requirements for applicants who had not previously engaged in chiropractic practice. An alternative qualifying examination was made available to individuals already engaged in practice in New York on the date that the licensing statute became effective. Finally, the Act established a third means for current practitioners to qualify without taking any state-administered examination. Under § 6506 (5), they could obtain a waiver of "education, experience and examination requirements for a professional license . . . provided the board of regents shall be satisfied

that the requirements of such article have been substantially met."[1]

Respondent has been unsuccessful in her efforts to obtain a license to practice in New York. On seven separate occasions between 1964 and 1971, she attempted to qualify by taking the special examinations designed for current practitioners. Respondent failed, by a narrow margin, to ever receive a passing score on the examinations.[2] After this series of failures, she applied to the Board of Regents for waiver of the examination requirements pursuant to § 6506 (5). This application was based upon her claim that she had failed the examinations by only a very narrow margin, that she was licensed in the States of Maine and New Hampshire, and that she had passed an examination given by the National Board of Chiropractic Examiners. On November 22, 1971, the Board notified respondent that they had voted to deny her application for a waiver at a meeting held on November 19. Respondent was not afforded an evidentiary hearing on the denial of the waiver or given a statement of reasons for it.

In January 1972, respondent commenced a proceeding in the New York state courts attacking the decision of the Board of Regents not to grant a waiver as arbitrary and capricious, and seeking an order directing the Board to license her. She did not raise any constitutional challenge to the Board's decision in this judicial proceeding. The trial court granted the requested relief, but its order was reversed by the Appellate Division. In November 1975, the New York State Court of Appeals affirmed the order of the Appellate Division holding that the Board of Regents had not abused their discretion in denying respondent's application for a waiver. *Tomanio* v. *Board of Regents*, 38 N. Y. 2d 724, 343 N. E. 2d 755 (1975).

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[1] This waiver section is available to all applicants for professional licenses and not just those seeking admission to the practice of chiropractic.

[2] In 1972, respondent also took, and failed, the examinations administered to applicants without prior experience in practice.

aff'g 43 App. Div. 2d 643, 349 N. Y. S. 2d 806 (3d Dept. 1973).

Seven months later, on June 25, 1976, respondent instituted this action in Federal District Court under 42 U. S. C. § 1983. Respondent alleged that the refusal of petitioners to grant her a license to practice violated due process as guaranteed by the Fourteenth Amendment. Petitioners invoked res judicata and the statute of limitations as affirmative defenses to respondent's action.

The District Court rejected these defenses. First, the court found that res judicata would not bar consideration of a § 1983 claim in federal court if the constitutional claim was not actually litigated and determined in the prior state-court proceeding. Since respondent had not raised any constitutional challenge to the Board's action in state court, the trial court ruled that res judicata did not preclude the federal action.

The District Court also found that the § 1983 action was not barred by the statute of limitations. Respondent's claim arose in November 1971 when her application for waiver was denied, more than three years prior to the date on which the suit in federal court was commenced. Although the District Court found that a 3-year New York statute of limitations was applicable to respondent's action, the court held that it was appropriate to toll the running of that statute during the pendency of her state-court litigation. Relying on *Mizell* v. *North Broward Hospital District*, 427 F. 2d 468 (CA5 1970), the judge concluded that a federal tolling rule was appropriate, reasoning that

> "[i]n my judgment, the present overburdening of the federal courts and the increased filings of civil rights complaints are factors that mitigate in favor of encouraging the utilization of effective and feasible administrative and judicial remedies, which exist under state law, in certain situations."

Since respondent had diligently pursued her state-court

remedy after the denial of waiver, and then diligently pursued her federal action after a final dismissal of her state-law claims in the New York State Court of Appeals, the judge found that "it cannot be said that plaintiff has slept on her rights." On the merits of the federal constitutional claim, the District Court found that respondent was entitled to a hearing before the Board, relief which was more limited than she had sought. The Court of Appeals for the Second Circuit affirmed the District Court in its rejection of estoppel by judgment and the statute of limitations defense, finding that the tolling of the statute was justified "in the interests of advancing the goals of federalism." The court also agreed with the ruling of the District Court that respondent was entitled, as a matter of federal constitutional law, to a hearing before the Board on her eligibility for waiver of the examination requirements.

In unraveling this tangle of federal and state claims, and federal- and state-court judgments, we have decided that the case is best disposed of by resolving the statute of limitations question, which we believe has been all but expressly resolved against the respondent by our decisions in *Robertson* v. *Wegmann*, 436 U. S. 584 (1978); *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454 (1975); and *Monroe* v. *Pape*, 365 U. S. 167 (1961). Under the reasoning of these decisions, the federal courts were obligated not only to apply the analogous New York statute of limitations to respondent's federal constitutional claims, but also to apply the New York rule for tolling that statute of limitations.

II

Congress did not estabish a statute of limitations or a body of tolling rules applicable to actions brought in federal court under § 1983—a void which is commonplace in federal statutory law. When such a void occurs, this Court has repeatedly "borrowed" the state law of limitations governing an analo-

gous cause of action.[3] Limitation borrowing was adopted for civil rights actions filed in federal court as early as 1914, in *O'Sullivan* v. *Felix*, 233 U. S. 318. Although the Court of Appeals found that respondent's action was governed by a 3-year New York statute of limitations,[4] the court did not apply the New York rules governing the circumstances under which that statute of limitations could be tolled.

In § 1983 actions, however, a state statute of limitations and the coordinate tolling rules are more than a technical obstacle to be circumvented if possible. In most cases, they are binding rules of law. In 42 U. S. C. § 1988, Congress "quite clearly instructs [federal courts] to refer to state statutes" when federal law provides no rule of decision for actions brought under § 1983.[5] *Robertson* v. *Wegmann*, 436 U. S.

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[3] See, *e. g.*, the authorities cited in *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454, 462 (1975).

[4] The Court of Appeals for the Second Circuit established a number of years ago that New York's 3-year time limitation for actions "to recover upon a liability, penalty or forfeiture created or imposed by statute," N. Y. Civ. Prac. Law § 214 (2) (McKinney Supp. 1979–1980), governs § 1983 actions brought in Federal District Court in New York. *Romer* v. *Leary*, 425 F. 2d 186 (1970); *Meyer* v. *Frank*, 550 F. 2d 726, cert. denied, 434 U. S. 830 (1977). While petitioners suggest that § 217 (McKinney 1972) of the New York statutes of limitations, requiring the commencement of proceedings to review administrative action within four months, more appropriately governs this action, we need only hold that the Court of Appeals erred by tolling the 3-year limitation. The respondent does not maintain that a limitation period longer than three years governs this action. Thus we may assume for the purposes of this opinion that the 3-year period was applicable since respondent is in any event barred.

[5] Section 1988 provides:

"The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this [Chapter and Title 18], for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses

584 (1978). See also *Carlson* v. *Green, ante*, at 22, n. 10. As we held in *Robertson*, by its terms, § 1988 authorizes federal courts to disregard an otherwise applicable state rule of law only if the state law is "inconsistent with the Constitution and laws of the United States."

In another action subject to § 1988, we held that the state statute of limitations and the state tolling rules governed federal actions brought under 42 U. S. C. § 1981 except when "inconsistent with the federal policy underlying the cause of action under consideration." *Johnson* v. *Railway Express Agency, Inc., supra*, at 465. We there restated the general principle that since there was no specifically stated or otherwise relevant federal statute of limitations for the federal substantive claim created by Congress in that case, "the controlling period would ordinarily be the most appropriate one provided by state law." 421 U. S., at 462, and cases cited therein. We went on to observe that this "borrowing" logically included rules of tolling:

> "Any period of limitation . . . is understood fully only in the context of the various circumstances that suspend it from running against a particular cause of action. Although any statute of limitations is necessarily arbitrary, the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones. In virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling,

against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty."

revival, and questions of application. In borrowing a state period of limitation for application to a federal cause of action, a federal court is relying on the State's wisdom in setting a limit, and exceptions thereto, on the prosecution of a closely analogous claim." *Id.*, at 463–464.

As *Robertson* and *Johnson* make clear, therefore, resolution of this case requires us to identify the New York rule of tolling and determine whether that rule is "inconsistent" with federal law.

III

New York has codified the limitations of actions and the circumstances under which those limitations can be tolled together. N. Y. Civ. Prac. Law §§ 201–218 (McKinney 1972 and Supp. 1979–1980). The general rule is set forth unambiguously in § 201 (McKinney 1972): "An action . . . must be commenced within the time specified in this article. . . . No court shall extend the time limited by law for the commencement of an action." The statute codifies a number of the tolling rules developed at common law.[6] No section of the law provides, however, that the time for filing a cause of action is tolled during the period in which a litigant pursues a related, but independent cause of action.[7] If a plaintiff wishes to pursue his claims in succession, rather than concurrently, the legislature has required the plaintiff either to obtain a

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[6] See, *e. g.*, § 207 (McKinney 1972) (tolling during defendant's absence from State or residence under false name); § 208 (McKinney Supp. 1979–1980) (tolling during period in which plaintiff is under a disability such as infancy, insanity, or imprisonment).

[7] Section 204 (b) does provide that if a plaintiff attempts to submit a claim for arbitration, but it is ultimately held that there is no obligation to arbitrate, the limitations period will not run during the time between the date of demand and the date of the judgment providing that arbitration is unavailable. This section does not provide for general tolling during arbitration, but only in situations where the plaintiff is unable to obtain an adjudication on the merits because the remedy is legally unavailable.

judicial stay of the time for commencing an action, or to litigate at risk. See § 204. The New York Legislature has apparently determined that the policies of repose underlying the statute of limitations should not be displaced by whatever advantages inure, whether to the plaintiff, or the system, in a scheme which encourages the litigation of one cause of action prior to another.

Respondent's failure to comply with the New York statute of limitations, therefore, precluded maintenance of this action unless New York's tolling rule is "inconsistent" with the policies underlying § 1983.[8] In order to gauge consistency, of course, the state and federal policies which the respective legislatures sought to foster must be identified and compared. On many prior occasions, we have emphasized the importance of the policies underlying state statutes of limitations. Statutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system. Making out the substantive elements of a claim for relief involves a process of pleading, discovery, and trial. The process of discovery and trial which result in the finding of ultimate facts for or against the plaintiff by the judge or jury is obviously more reliable if the witness or testimony in question is relatively fresh. Thus in the judgment of most legislatures and courts, there comes a point at which the delay of a plaintiff in asserting a claim is sufficiently likely either to impair the accuracy of the fact-finding process or to upset settled expectations that a substantive claim will be barred without respect to whether it is meritorious. By the same token, most courts and legislatures have recognized that there are factual circumstances which justify an exception to these strong policies of repose. For example, defendants may not, by tactics of evasion, prevent the plaintiff from litigating the merits of a claim, even though

[8] We note that respondent does not maintain that any provision of New York law operated to toll the statute of limitations.

on its face the claim is time-barred. These exceptions to the statute of limitations are generally referred to as "tolling" and, as more fully discussed in *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454 (1975), are an integral part of a complete limitations policy.

The importance of policies of repose in the federal, as well as in the state, system is attested to by the fact that when Congress has provided no statute of limitations for a substantive claim which is created, this Court has nonetheless "borrowed" what it considered to be the most analogous state statute of limitations to bar tardily commenced proceedings. *Supra*, at 483–484. This is obviously a judicial recognition of the fact that Congress, unless it has spoken to the contrary, did not intend by the mere creation of a "cause of action" or "claim for relief" that any plaintiff filing a complaint would automatically prevail if only the necessary elements of the federal substantive claim for relief could be established. Thus in general, state policies of repose cannot be said to be disfavored in federal law. Nonetheless, it is appropriate to determine whether Congress has departed from the general rule in § 1983.

In *Robertson* v. *Wegmann*, 436 U. S. 584 (1978), the Court first emphasized that "a state statute cannot be considered 'inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation. If success of the § 1983 action were the only benchmark, there would be no reason at all to look to state law, for the appropriate rule would then always be the one favoring the plaintiff, and its source would be essentially irrelevant." *Id.*, at 593. The Court went on to identify two of the principal policies embodied in § 1983 as deterrence and compensation. Neither of these policies is significantly affected by this rule of limitations since plaintiffs can still readily enforce their claims, thereby recovering compensation and fostering deterrence, simply by commencing their actions within three years.

Uniformity has also been cited as a federal policy which sometimes necessitates the displacement of an otherwise applicable state rule of law. *Carlson* v. *Green, ante*, p. 14; *Occidental Life Ins. Co. of California* v. *EEOC*, 432 U. S. 355, 362 (1977). The need for uniformity, while paramount under some federal statutory schemes, has not been held to warrant the displacement of state statutes of limitations for civil rights actions. *Johnson* v. *Railway Express Agency, Inc., supra*. In *Robertson* v. *Wegmann, supra*, we held:

> "[W]hatever the value of nationwide uniformity in areas of civil rights enforcement where Congress has not spoken, in the areas to which § 1988 is applicable Congress has provided direction, indicating that state law will often provide the content of the federal remedial rule. This statutory reliance on state law obviously means that there will not be nationwide uniformity on these issues." 436 U. S., at 594, n. 11.

The Court of Appeals and the District Court in this case apparently believed that policies of federalism would be undermined by the adoption of the New York tolling rule since litigants would not be encouraged to resort to state remedies prior to the maintenance of a federal civil rights action under § 1983. The conclusion of the lower courts that this result would be "inconsistent" with federal law is both at odds with the reasoning in our prior opinions in this field as well as at odds with federalism itself.

On several prior occasions, we have reasoned that when Congress intended to establish a remedy separate and independent from other remedies that might also be available, a state rule which does not allow a plaintiff to litigate such alternative claims in succession, without risk of a time bar, is not "inconsistent." In *Johnson* v. *Railway Express, supra*, the Court found that a state rule which did not toll the statute of limitations applicable to a claim under 42 U. S. C. § 1981 during the pendency of a charge under Title VII of the Civil

Rights Act of 1964 filed with the Equal Employment Opportunity Commission, was not inconsistent with § 1981 because Congress had "retained § 1981 as a remedy . . . separate from and independent of the . . . procedures of Title VII." 421 U. S., at 466. The Court premised its conclusion that Title VII and § 1981 were separate and independent on the fact that Congress had not required resort to Title VII as a prerequisite to an action under § 1981 and did not "expect that a § 1981 court action usually would be resorted to only upon a completion of Title VII procedures. . . ." 421 U. S., at 461. Adopting the same reasoning, we held in *Electrical Workers* v. *Robbins & Meyers, Inc.*, 429 U. S. 229 (1976), that it would not be inconsistent with Title VII to decline to toll the statute of limitations during labor grievance or arbitration procedures *because* "contractual rights under a collective-bargaining agreement and the statutory right provided by Congress under Title VII 'have legally independent origins and are equally available to the aggrieved employee.'" *Id.*, at 236, quoting *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, 52 (1974). Applying the converse of this reasoning, this Court found in *Occidental Life Ins. Co.* v. *EEOC*, *supra*, that it *would* be inconsistent with federal law to apply a state statute of limitations to actions instituted by the EEOC under Title VII since the EEOC was "required by law to refrain from commencing a civil action until it ha[d] discharged its administrative duties." 432 U. S., at 368.

The District Court's conclusion that state remedies should be utilized before resort to the federal courts may be an entirely sound and sensible observation, but in our opinion it does not square with what must be presumed to be congressional intent in creating an independent federal remedy. Unless that remedy is structured to require previous resort to state proceedings, so that the claim may not even be maintained in federal court unless such resort be had, see *Love* v. *Pullman Co.*, 404 U. S. 522 (1972), it cannot be assumed that Congress wishes to hold open the independent federal remedy

during any period of time necessary to pursue alternative state-court remedies. It is difficult to conclude that a state policy of repose which likewise does not encourage litigants to resort to other available remedies is inconsistent with such congressional intent. We find the congressional intent here to be virtually indistinguishable from that found in *Johnson* v. *Railway Express, supra,* and *Electrical Workers* v. *Robbins & Meyers, Inc., supra,* to be consistent with a rule prohibiting tolling.

As in those cases, there is no question that respondent's § 1983 action was "separate and independent" from the state judicial remedy pursued in state court.[9] This Court has not interpreted § 1983 to require a litigant to pursue state judicial remedies prior to commencing an action under this section. In *Monroe* v. *Pape,* 365 U. S., at 183, we held: "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." Thus the very independence of § 1983, reveals that the New York rule precluding tolling in the circumstances of this case is not "inconsistent" with the provisions of § 1983.

Finally, we do not believe that this construction of congressional intent is overridden, as the Court of Appeals found, "in the interests of advancing the goals of federalism." We believe that the application of the New York law of tolling is in fact more consistent with the policies of "federalism" invoked by the Court of Appeals, than a rule which displaces

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[9] The remedy pursued by plaintiff in state court was a state judicial remedy authorizing actions against administrative bodies to review "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion. . . ." N. Y. Civ. Prac. Law § 7803 (McKinney 1963). While the parties and the courts below were in agreement that a constitutional challenge to the agency action could have been brought under Art. 78, only the state-law claims were pursued by respondent in that proceeding.

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the state rule in favor of an ad hoc federal rule. The result reached by the District Court and Court of Appeals might encourage more plaintiffs with both state and federal constitutional claims to initially bring an action in the state courts. But it would just as surely frustrate the often complex combination of limitations and tolling provisions enacted by the State in question. While New York might have chosen a tolling rule designed to encourage prior resort to state-law remedies, it has not. Here New York has expressed by statute its disfavor of tolling its statute of limitations for one action while an independent action is being pursued. Considerations of federalism are quite appropriate in adjudicating federal suits based on 42 U. S. C. § 1983. See, *e. g.*, *Younger* v. *Harris*, 401 U. S. 37 (1971). But the Court of Appeals' rule allowing tolling can scarcely be deemed a triumph of federalism when it necessitates a rejection of the rule actually chosen by the New York Legislature.

Since we therefore hold that respondent's action was barred by the New York statute of limitations, we find it unnecessary to reach petitioners' other contentions. The judgment of the Court of Appeals is accordingly

Reversed.

MR. JUSTICE STEVENS, concurring in the result.

The federal claim asserted by respondent was that New York had deprived her of the right to practice her profession without the due process of law required by the Fourteenth Amendment to the United States Constitution.[1] The New York proceedings that ultimately determined that she had no such right as a matter of state law were not concluded until November 1975. Since her federal action was filed only seven months later, I believe it was timely, though for somewhat different reasons than those stated by the Court of Appeals.

[1] "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ." U. S. Const., Amdt. 14, § 1.

Having relied on developments in the state-court litigation to defend the merits of respondent's due process challenge,[2] I would not permit the State simultaneously to contend that all aspects of the federal controversy had crystalized before respondent sought review in the state court system. Cf. *Bonner* v. *Coughlin*, 517 F. 2d 1311, 1319 (CA7 1975), modified, 545 F. 2d 565 (1976) (en banc), cert. denied, 435 U. S. 932. As the Court notes, *ante*, at 491, a litigant is not required to exhaust state remedies before bringing a § 1983 action in federal court. *Monroe* v. *Pape*, 365 U. S. 167, 183. But I would not penalize a litigant who decides to bring suit in the state courts first; for such a decision gives the State an opportunity to correct, through construction of state law, a potential constitutional error, and may obviate entirely any need to present the claim to a federal court. It would also make no sense to me in terms of either federalism or judicial administration to require a litigant who files an action in state court to proceed simultaneously in federal court in order to avoid a time bar. I therefore disagree with the Court's holding that respondent's claim is barred by limitations.[3]

On the merits, however, I am not persuaded that New York's licensing procedure is unfair. Examinations are a permissible method of determining qualifications, and lines must be drawn somewhere. The fact that respondent was just short of the passing mark does not raise any federal question. Indeed, respondent does not claim that the examination itself denied her due process. And I agree with Judge Lumbard, who dissented in the Court of Appeals, that the fact that

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[2] Petitioners rely on the papers in the New York action as having provided respondent with an adequate statement of the reasons for the denial of a waiver. See Brief for Petitioners 4.

[3] Even if I agreed with the view that the federal claim was complete in November 1971 when respondent's application for a waiver was denied, I would remand to the Court of Appeals to determine the state-law tolling issue rather than have this Court decide that state-law question in the first instance.

New York has provided for a waiver in the discretion of the Board of Regents does not substantially change the State's licensing procedure. Respondent was given an adequate opportunity to advise the Board of the reasons why she should receive a waiver and she ultimately received an adequate explanation for the refusal. She does not allege that others who have failed the examination have obtained a waiver, or, indeed, any facts suggesting any arbitrariness in the New York procedure.

In short, I find no merit in respondent's constitutional challenge and would reverse for that reason.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

I cannot agree with the Court that respondent's federal action is time-barred. In my view, when applied to these facts the New York statute of limitations and tolling rules are "inconsistent with the Constitution and laws of the United States," and thus should not be "extended to . . . govern" respondent's suit. 42 U. S. C. § 1988.

While the precise content of New York's statute of limitations and tolling rules is not crucial to my analysis, I think it appropriate to note that the Court's conclusion that respondents action would be time-barred under state law is far from persuasive. The Court relies heavily upon the absence of any provision that expressly tolls the statute of limitations "during the period in which a litigant pursues a related, but independent cause of action," *ante*, at 486.[1] I would not attach controlling significance to the absence of particular statutory language. Nor would I conclude on the basis of that absence that New York had consciously determined "that the policies of repose underlying the statute of

[1] The Court also makes reference to respondent's failure to "maintain that any provision of New York law operated to toll the statute of limitations." *Ante*, at 487, n. 8.

limitations should not be displaced by whatever advantages inure, whether to the plaintiff, or the system, in a scheme which encourages the litigation of one cause of action prior to another." *Ante*, at 487. Legislative silence is simply not that communicative.[2] Indeed, there may be no New York rule that actually deals with the present situation. That State has a unitary court system, and in consequence its judges and legislators are unlikely to have focussed upon the filing in two different court systems of two different suits dealing with the same transaction or occurrence. Further, the situation upon which they probably have focussed—the filing in a single system of two consecutive suits—would not really be analogous because there would be no conceivable reason for separating the actions. Moreover, even in that case it is not clear that state lawmakers would expect to derail the second action by applying the statute of limitations. On the contrary, the doctrine of res judicata would seem a more probable reason for dismissal.[3] In sum, I think the precise content of state law when applied to a case such as the present one is sufficiently opaque to render any supposition as to what state policies are at stake extremely speculative.[4]

More broadly, I would not find respondent's § 1983 action time-barred even were I confident that application of the New York rules would produce that result. *Monroe* v. *Pape*, 365 U. S. 167, 183 (1961), settled that the plaintiff in a § 1983 case need not resort to state judicial remedies prior to filing a federal suit. There are, however, circumstances in

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[2] Cf. Powell, The Still Small Voice of the Commerce Clause, in 3 Selected Essays on Constitutional Law 931, 932 (1938).

[3] See *Winters* v. *Lavine*, 574 F. 2d 46, 56 (CA2 1978) (citing New York cases).

[4] If the Court is persuaded that state law should govern, I agree with MR. JUSTICE STEVENS that it would be appropriate to seek the advice of the Court of Appeals as to the precise content of the state rule as applied to facts such as these. *Ante*, at 493, n. 3.

which this Court has decided that a federal determination may be delayed pending resolution of certain state-law issues, see *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496 (1941). Beyond that, even in cases not technically within the abstention doctrine advantages may be realized from permitting the state courts to decide claims that state administrative determinations were arbitrary, capricious, or otherwise contrary to state law. Accordingly, I can conceive of situations in which a plaintiff in a case like the present one might resort initially to state courts either under the view that he would be required to do so by the abstention doctrine or because doing so, while not compulsory, would be a more efficacious way of resolving his claim. Either reason strikes me as entirely legitimate.[5] Abstention decisions are presumably there to be read by plaintiffs as well as district courts, and permitting plaintiffs to act upon them might spare the federal courts some unnecessary work. More generally, where the plaintiff voluntarily concludes that it is worth the time and money, resort to state judicial review under state law would not be inconsistent with *Monroe* v. *Pape*, *supra*, and could both reduce strains on federal-state relations and ease the task facing the district courts that must eventually resolve those cases not settled in state proceedings.

While I believe the foregoing benefits may be substantial, I think it vital to ensure that they are not obtained at the expense of the plaintiff's right ultimately to try his federal claims in a federal forum. Thus, while I recognize that a plaintiff may be bound by a deliberate choice to present both state and federal claims to the state court, I would not be too quick to find that such a choice has been made. In the present case, there is no indication that respondent had any intention of relinquishing her right to a federal forum, and I would eschew any course that in effect forces her to do so.

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[5] In this regard, too, I am in agreement with my Brother STEVENS. See *ante*, at 493.

In consequence, on these facts I would think it inconsistent with federal law and the Constitution to enforce state timing or res judicata rules that close the door of the federal courthouse.

In the abstention context, *England* v. *Louisiana State Board of Medical Examiners*, 375 U. S. 411 (1964), sets forth a procedure for preserving a plaintiff's right to a federal forum for his federal claims while giving effect to the concerns and policies underlying *Railroad Comm'n* v. *Pullman Co.*, *supra*. Under that procedure, a plaintiff remitted to state court may file a formal reservation in that court preserving his federal claims. If he does so, he can litigate those claims on his return to federal court. If he fails to do so, he risks being held to have submitted all his claims to the state court. It seems to me that the present case is in many respects simply a variation of the basic *England* situation. Accordingly, I believe that a similar reservation procedure would be appropriate here. Permitting a plaintiff to reserve his federal claims would make the choice to litigate state claims in state court a palatable one; and where that choice is exercised the parties and system alike may benefit. Further, requiring that plaintiffs who want to make such a reservation do so expressly would supply a relatively simple means of preventing the relitigation of claims submitted to and decided by state courts.[6]

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[6] Curiously, the Court's decision regarding the New York statute of limitations could have a broadly parallel effect. As I understand it, the Court would simply require plaintiffs either to lodge a federal complaint in federal court before the limitations period expires or to obtain an order from the state court tolling the running of that period. Either step would put the State on notice that a federal constitutional challenge loomed, cf. *Government Employees* v. *Windsor*, 353 U. S. 364 (1957), and, assuming that the Court would not give effect to the state res judicata rules, either would ultimately permit plaintiffs in future cases to raise their federal claims in federal forums. Thus, while I am not persuaded by the Court's reasoning, and while I think the result in this particular case anomalous, the overall effect of the Court's rule may be satisfactory.

While I would impose a reservation requirement on cases like this for the future, I would not be inclined to do so on the present facts for reasons akin to those that led us to make *England* itself prospective. 375 U. S., at 421–423. Specifically, there is no reason why respondent should have anticipated that she would be required to reserve her federal questions. On the contrary, I think she could reasonably have assumed that so long as her federal claims were not raised or decided in state court she could try them in a subsequent § 1983 action.[7] I would give effect to that assumption and make the reservation requirement wholly prospective.[8]

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[7] In 1970 the Court of Appeals for the Fifth Circuit concluded that a state statute of limitations would be tolled in such a situation. *Mizell* v. *North Broward Hospital District*, 427 F. 2d 468, 473–474. The Court of Appeals for the Second Circuit apparently had not ruled on this precise issue at the time of respondent's suit, although it had held that New York's res judicata and collateral estoppel rules would not bar a federal civil rights suit dealing with issues not actually litigated in a prior state-court suit, *Ornstein* v. *Regan*, 574 F. 2d 115 (1978); *Lombard* v. *Board of Education*, 502 F. 2d 631, 635–637 (1974).

[8] Even were the *England* requirement fully applicable, respondent's failure to make an express reservation might not be dispositive on these facts. Normally the reservation rule will serve two functions—it will force the plaintiff to declare his intentions, and thus keep him from getting two chances to litigate a single claim, and it will put the parties and the state court on notice that there lurks a constitutional issue. Here the first purpose is not implicated because respondent's federal claims were not litigated in state court. And while it may be appropriate to hold that a plaintiff who fails to reserve federal claims will be bound by a state court's actual determination of those claims, the proper result where a failure to reserve has led only to silence on the federal issue is less obvious. *Government Employees* v. *Windsor, supra*, for example, merely concluded that a state-law determination made without warning or discussion of related constitutional claims was inadequate and ordered a remand to give the state courts an opportunity to construe their statute in a different manner. 353 U. S., at 366. Neither party has requested such a disposition here, and I am not convinced that one would be appropriate. But it does seem that the consequence of failure to reserve in the present

Because I think the importation of either the state statute of limitations or its estoppel by judgment rule would be inconsistent with federal law and the Constitution, I would reach the merits. The courts below were of the view that the licensing scheme in general and the waiver provisions in particular conferred on respondent some minimal property right. I see no reason to second-guess that determination.[9] As a result, it is axiomatic that some procedural protections are required by the Due Process Clause. The extent of those protections is a difficult question, and I think the Court of Appeals may have gone too far when it ordered an adjudicative hearing. It does, however, seem quite clear that at minimum respondent was entitled to a statement of the reasons for her rejection. Further, I cannot agree with MR. JUSTICE STEVENS that this requirement was satisfied by the statement given by the Board in its answer to respondent's original complaint. Respondent's right was to receive a statement of reasons when a waiver was denied, not upon her resort to state judicial remedies.[10] As a result, I would affirm the Court of Appeals insofar as it held that respondent was entitled as a matter of federal constitutional law to some additional procedures, but would reverse insofar as that court held that she was entitled to a full adjudicative hearing. Accordingly, I dissent.

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context need not be a complete bar to pursuit of respondent's federal claims in federal court.

[9] In the wake of *Bishop* v. *Wood*, 426 U. S. 341, 347 (1976), it is clear that such second-guessing will rarely if ever be appropriate.

[10] Cf. *Home Telephone & Telegraph Co.* v. *Los Angeles*, 227 U. S. 278 (1913).

ANDRUS, SECRETARY OF THE INTERIOR *v.* UTAH

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 78-1522. Argued December 5, 1979—Decided May 19, 1980

Section 7 of the Taylor Grazing Act, as amended in 1936, authorizes the Secretary of the Interior (Secretary), in his discretion, to classify, as proper not only for homesteading but also for satisfaction of any outstanding "lieu" rights, both lands within federal grazing districts and any unappropriated and unreserved public lands withdrawn by Executive Order from "settlement, location, sale or entry" pending a determination of the best use of the lands, and to open all such lands to "selection." Section 7 further provides that such lands shall not be subject to disposition until they have been classified. Pursuant to § 7, the Secretary refused Utah's selection of extremely valuable oil shale lands located within federal grazing districts in lieu of and as indemnification for original school land grants of significantly lesser value that were frustrated by federal pre-emption or private entry prior to being surveyed. In so acting, the Secretary followed the policy that, in the exercise of his discretion under § 7, indemnity applications involving grossly disparate values would be refused. Utah filed suit in Federal District Court, which, upon stipulated facts, entered summary judgment for the State. The Court of Appeals affirmed, holding that § 7 gave the Secretary no authority to classify land as eligible for selection and that Utah had a right to select indemnity land of equal acreage without regard to the relative values of the original school land grants and the indemnity selections.

Held: Section 7 confers on the Secretary the authority, in his discretion, to classify lands within a federal grazing district as proper for school indemnity selection. His "grossly disparate value" policy is a lawful exercise of the broad discretion vested in him by § 7 and is a valid ground for refusing to accept Utah's selections. Such policy is wholly faithful to Congress' consistent purpose, in providing for indemnity selections, of giving the States a rough equivalent of the school land grants in place that were lost through pre-emption or private entry prior to survey. Pp. 506–520.

586 F. 2d 756, reversed.

STEVENS, J., delivered the opinion of the Court, in which BRENNAN, STEWART, WHITE, and MARSHALL, JJ., joined. POWELL, J., filed a dis-

senting opinion, in which BURGER, C. J., and BLACKMUN and REHNQUIST, JJ., joined, *post*, p. 520.

Peter Buscemi argued the cause for petitioner *pro hac vice*. With him on the briefs were *Solicitor General McCree*, *Assistant Attorney General Moorman*, *Deputy Solicitor General Claiborne*, and *Carl Strass*.

Richard L. Dewsnup, Assistant Attorney General of Utah, argued the cause for respondent. With him on the brief were *Robert B. Hansen*, Attorney General, and *Dallin W. Jensen*, *Michael M. Quealy*, and *Paul E. Reimann*, Assistant Attorneys General.*

MR. JUSTICE STEVENS delivered the opinion of the Court.

The State of Utah claims the right to select extremely valuable oil shale lands located within federal grazing districts in lieu of and as indemnification for original school land grants of significantly lesser value that were frustrated by federal pre-emption, or private entry, prior to survey. The question presented is whether the Secretary of the Interior is obliged to accept Utah's selections of substitute tracts of the

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*Briefs of *amici curiae* urging affirmance were filed by *George Deukmejian*, Attorney General of California, *N. Gregory Taylor* and *Jan S. Stevens*, Assistant Attorneys General, and *Stephen H. Mills*, Deputy Attorney General, *Robert K. Corbin*, Attorney General of Arizona, *J. D. MacFarlane*, Attorney General of Colorado, *John F. North*, Special Assistant Attorney General of Montana, *Richard H. Bryan*, Attorney General of Nevada, *Jeff Bingaman*, Attorney General of New Mexico, and *William O. Jordan*, Special Assistant Attorney General, *James A. Redden*, Attorney General of Oregon, and *Peter S. Herman*, *Slade Gorton*, Attorney General of Washington, and *Theodore O. Torve* and *J. Lawrence Coniff, Jr.*, Assistant Attorneys General, and *John D. Troughton*, Attorney General of Wyoming, for the State of California et al.; and by *David H. Leroy*, Attorney General of Idaho, and *W. Hugh O'Riordan*, Deputy Attorney General, for the State of Idaho.

Briefs of *amici curiae* were filed by *Richard C. Cahoon* for Justheim Petroleum Co.; and by *Stephen G. Boyden* and *Scott C. Pugsley* for the Ute Indian Tribe of the Uintah and Ouray Reservation.

same size as the originally designated sections even though there is a gross disparity between the value of the original grants and the selected substitutes. We hold that the Secretary's "grossly disparate value" policy is a lawful exercise of the broad discretion vested in him by § 7 of the Taylor Grazing Act of 1934, 48 Stat. 1272, as amended in 1936, 49 Stat. 1976, 43 U. S. C. § 315f, and is a valid ground for refusing to accept Utah's selections.

Utah became a State in 1896. In the Utah Enabling Act of 1894, Congress granted Utah, upon admission, four numbered sections in each township for the support of public schools. The statute provided that if the designated sections had already "been sold or otherwise disposed of" pursuant to another Act of Congress, "other lands equivalent thereto . . . are hereby granted." The substitute grants, denominated "indemnity lands" were "to be selected within [the] State in such manner as [its] legislature may provide with the approval of the Secretary of the Interior." [1]

Because much of the State was not surveyed until long after its admission to the Union, its indemnity or "in lieu" selections were not made promptly. On September 10, 1965,

[1] "That upon the admission of said State [Utah] into the Union, sections numbered two, sixteen, thirty-two, and thirty-six in every township of said proposed State, and where such sections or any parts thereof have been sold or otherwise disposed of by or under the authority of any Act of Congress other *lands equivalent thereto*, in legal subdivisions of not less than one quarter section and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said State for the support of common schools, such *indemnity lands* to be selected within said State in such manner as the legislature may provide, with the approval of the Secretary of the Interior: *Provided*, That the second, sixteenth, thirty-second, and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grants nor to the indemnity provisions of this Act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this Act until the reservation shall have been extinguished and such lands be restored to and become a part of the public domain." 28 Stat. 109 (emphasis added).

Utah filed the first of 194 selection lists with the Bureau of Land Management of the Department of the Interior covering the land in dispute in this litigation. The 194 indemnity selections include 157,255.90 acres in Uintah County, Utah, all of which are located within federal grazing districts created pursuant to the Taylor Grazing Act.

In January 1974, before Utah's selection lists had been approved or disapproved, the Governor of Utah agreed that the Secretary of the Interior could include two tracts comprising 10,240 acres of selected indemnity lands in an oil shale leasing program, on the understanding that the rental proceeds would ultimately be paid to the State if its selections were approved. The proceeds of the leases are of substantial value.[2]

In February 1974, the Secretary advised the Governor that he would not approve any indemnity applications that involved "grossly disparate values." [3] He wrote:

> "As you know, the Department of the Interior has not as yet acted upon the State's [indemnity] applications. The principal question presented by the applications is whether pursuant to Section 7 of the Taylor Grazing Act, 48 Stat. 1272 (1934), as amended, 43 U. S. C. § 315f (1972), the Department may refuse to convey applied-for lands to a State where the value of those lands greatly exceeds the value of the lost school lands for which the State seeks indemnity. In January 1967, the then Secre-

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[2] The District Court found that as of May 25, 1976, $48,291,840 had been accumulated. App. to Pet. for Cert. 62a. It should be noted that these proceeds were derived from only 10,240 acres out of the total area selected comprising over 157,000 acres.

[3] Suggested guidelines of the Department of the Interior provide that the policy will not be applied unless the estimated value of the selected lands exceeds that of the base lands by more than $100 per acre or 25% whichever is greater. If the values are grossly disparate using those criteria, the case will be submitted to the Washington office for evaluation of all the circumstances. App. 44–45.

tary of the Interior adopted the policy that in the exercise of his discretion under, *inter alia*, Section 7 of the Taylor Grazing Act, he would refuse to approve indemnity applications that involve grossly disparate values. That policy remains in effect.

"In the present case, although the land values are not precisely determined, it appears that the selections involve lands of grossly disparate values, within the meaning of the Department's policy. While the Department is not yet prepared to adjudicate the State's applications, I feel it is appropriate at this time to advise you that we will apply the above-mentioned policy in that adjudication." [4]

The State promptly filed this action in the United States District Court for the District of Utah. The facts were stipulated, and Judge Ritter entered summary judgment in favor of the State. He held that if Utah's selections satisfy all of the statutory criteria governing indemnity selections when filed,[5] the Secretary has no discretion to refuse them

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[4] Letter of February 14, 1974, from Rogers Morton, Secretary of the Interior, to Calvin Rampton, Governor of the State of Utah. App. 61.

[5] The statute provides, in part:

"§ 851. Deficiencies in grants to State by reason of settlements, etc., on designated sections generally

"Where settlements with a view to preemption or homestead have been, or shall hereafter be made, before the survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the claims of such settlers; and if such sections or either of them have been or shall be granted, reserved, or pledged for the use of schools or colleges in the State in which they lie, other lands of equal acreage are hereby appropriated and granted, and may be selected, in accordance with the provisions of section 852 of this title, by said State, in lieu of such as may be thus taken by preemption or homestead settlers. And other lands of equal acreage are also hereby appropriated and granted and may be selected, in accordance with the provisions of section 852 of this title, by said State where sections sixteen or thirty-six are, before title could pass to the State, included within any

pursuant to a "grossly disparate value" policy. The Court of Appeals for the Tenth Circuit affirmed, *Utah* v. *Kleppe*, 586 F. 2d 756 (1978), holding that § 7 of the Taylor Grazing

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Indian, military, or other reservation, or are, before title could pass to the State, otherwise disposed of by the United States: *Provided*, That the selection of any lands under this section in lieu of sections granted or reserved to a State shall be a waiver by the State of its right to the granted or reserved sections. And other lands of equal acreage are also appropriated and granted, and may be selected, in accordance with the provisions of section 852 of this title, by said State to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever. And it shall be the duty of the Secretary of the Interior, without awaiting the extension of the public surveys, to ascertain and determine, by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservations, and thereupon the State shall be entitled to select indemnity lands to the extent of section for section in lieu of sections therein which have been or shall be granted, reserved, or pledged; but such selections may not be made within the boundaries of said reservation: *Provided, however*, That nothing in this section contained shall prevent any State from awaiting the extinguishment of any such military, Indian, or other reservation and the restoration of the lands therein embraced to the public domain and then taking the sections sixteen and thirty-six in place therein." 43 U. S. C. § 851.

"§ 852. Selections to supply deficiencies of school lands

"(a) Restrictions

"The lands appropriated by section 851 of this title shall be selected from any unappropriated, surveyed or unsurveyed public lands within the State where such losses or deficiencies occur subject to the following restrictions:

"(1) No lands mineral in character may be selected by a State except to the extent that the selection is being made as indemnity for mineral lands lost to the State because of appropriation before title could pass to the State;

"(2) No lands on a known geologic structure of a producing oil or gas field may be selected except to the extent that the selection is being made as indemnity for lands on such a structure lost to the State because of appropriation before title could pass to the State; and

"(3) Land subject to a mineral lease or permit may be selected if none of the land subject to that lease or permit is in a producing or producible

Act gave the Secretary no authority to classify land as eligible for selection and that the State had a right to select indemnity land of equal acreage without regard to the relative values of the original grants and the indemnity selections.

Because the dispute between the parties involves a significant issue regarding the disposition of vast amounts of public lands,[6] we granted certiorari. 442 U. S. 928. We believe that the Court of Appeals and the District Court failed to give proper effect to the congressional policy underlying the provision for indemnity selection, and specifically misconstrued § 7 of the Taylor Grazing Act as amended in 1936. We therefore reverse.

I

The Enabling Act of each of the public-land States admitted into the Union since 1802 has included grants of designated sections of federal lands for the purpose of supporting public schools.[7] Whether the Enabling Act contained words of present

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status, subject, however, to the restrictions and conditions of the preceding and following paragraphs of this subsection." 43 U. S. C. § 852 (a).

Title 43 U. S. C. § 853 provides that in applying this statute to Utah, the words "sections sixteen and thirty-six" also include sections two and thirty-two.

[6] "Because the western states are the ones most recently admitted to the Union and because Utah and Arizona are two of the three states that received particularly large grants, the remaining indemnity selection rights are concentrated in seven western states. Utah and Arizona alone hold nearly 70% of the outstanding indemnity rights. The approximate number of acres still to be selected in each state (and thus the approximate number of acres potentially affected by this lawsuit) is as follows: Arizona, 170,000 acres; California, 108,000 acres; Colorado, 17,000 acres; Idaho, 27,000 acres; Montana, 22,900 acres; Utah, 225,000 acres; and Wyoming, 1,100 acres." Brief for Petitioner 4–5, n. 2.

[7] "The first enactment for the sale of public lands in the western territory provided for setting apart section sixteen of every township for the maintenance of public schools (Ordinance of 1785; *Cooper* v. *Roberts*, 18 How. 173, 177); and, in carrying out this policy, grants were made for common school purposes to each of the public-land States admitted to the Union. Between the years 1802 and 1846 the grants were

or future grant, title to the numbered sections did not vest in the State until completion of an official survey. Prior to survey, the Federal Government remained free to dispose of the designated lands "in any manner and for any purpose consistent with applicable federal statutes." [8] In recognition of the fact that the essentially random grants in place might therefore be unavailable at the time of survey for a variety of reasons,[9] Congress authorized grants of indemnity or "lieu" lands of equal acreage.

As Utah correctly emphasizes, the school land grant was a "solemn agreement" which in some ways may be analogized to a contract between private parties. The United States agreed to cede some of its land to the State in exchange for a commitment by the State to use the revenues derived from the land to educate the citizenry.

The State's right to select indemnity lands may be viewed as the remedy stipulated by the parties for the Federal Gov-

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of every section sixteen, and, thereafter, of sections sixteen and thirty-six. In some instances, additional sections have been granted." *United States* v. *Morrison*, 240 U. S. 192, 198 (footnotes omitted).

[8] "It has consistently been held that under the terms of the grants hitherto considered by this Court, title to unsurveyed sections of the public lands which have been designated as school lands does not pass to the State upon its admission into the Union, but remains in the Federal Government until the land is surveyed. Prior to survey, those sections are a part of the public lands of the United States and may be disposed of by the Government in any manner and for any purpose consistent with applicable federal statutes. If upon survey it is found that the Federal Government has made a previous disposition of the section, the State is then entitled to select lieu lands as indemnity in accordance with provisions incorporated into each of the school-land grants. The interest of the State vests at the date of its admission into the Union only as to those sections which are surveyed at that time and which previously have not been disposed of by the Federal Government." *United States* v. *Wyoming*, 331 U. S. 440, 443–444 (footnote omitted).

[9] These include the establishment of reservations for Indians or federal military purposes, and entries by individuals under the homestead laws. See, *e. g.*, *Wisconsin* v. *Lane*, 245 U. S. 427, 432–433.

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ernment's failure to perform entirely its promise to grant the specific numbered sections. The fact that the Utah Enabling Act used the phrase "lands equivalent thereto" and described the substituted lands as "indemnity lands" implies that the purpose of the substitute selections was to provide the State with roughly the same resources with which to support its schools as it would have had had it actually received all of the granted sections in place.[10] Thus, as is typical of private contract remedies, the purpose of the right to make indemnity selections was to give the State the benefit of the bargain.

The history of the general statutes relating to land grants for school purposes confirms this view. Thus, for example, in 1859, when confronted with the fact that many settlers had occupied unsurveyed lands that had been included in school grants, Congress confirmed the settlers' claims and granted to the States "other lands of like quantity." Ch. 58, 11 Stat. 385. The substitution of an equal quantity of land provided the States a rough measure of equal value.

The school land grants gave the States a random selection of public lands subject, however, to one important exception. The original school land grants in general, and Utah's in particular, did not include any numbered sections known to be mineral in character by the time of survey. *United States* v. *Sweet*, 245 U. S. 563. This Court so held even though the Utah Enabling Act "neither expressly includes mineral lands nor expressly excludes them." *Id.*, at 567. The Court's opinion stressed "the practice of Congress to make a distinction between mineral lands and other lands, to deal with them

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[10] See *Heydenfeldt* v. *Daney Gold & Silver Mining Co.*, 93 U. S. 634, 639–640: "Until the *status* of the lands was fixed by a survey, and they were capable of identification, Congress reserved absolute power over them; and if in exercising it the whole or any part of a 16th or 36th section had been disposed of, the State was to be compensated by other lands equal in quantity, and *as near as may be in quality*." (Emphasis added.)

along different lines, and to withhold mineral lands from disposal save under laws specially including them." *Ibid.* Mineral lands were thus excluded not only from the original grants in place but also from the indemnity selections.[11] Since mineral resources provide both the most significant potential source of value and the greatest potential for variation in value in the generally arid western lands, the total exclusion of mineral lands from the school land grants is consistent with an intent that the States' indemnity selections of equal acreage approximate the value of the numbered sections lost.

In 1927, some nine years after the decision in *United States* v. *Sweet, supra,* Congress changed its policy to allow grants of school lands to embrace numbered sections that were mineral in character.[12] But the 1927 statute did not expand the kinds of land available for indemnity selections.[13] Thus, after 1927 even if the lost school lands were mineral in character, a State was prohibited from selecting mineral lands as indemnity. It was not until 1958 that Congress gave the States the right to select mineral lands to replace lost school lands, and that right was expressly conditioned on a determination that the lost lands were also mineral in character. 72 Stat. 928, 43 U. S. C. § 852. See n. 5, *supra.* For 30 years, then, States

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[11] Under the 1891 general indemnity selection statute then in effect, selections were limited to "unappropriated, surveyed public lands, not mineral in character." 26 Stat. 796–797.

[12] The Act of January 25, 1927, 44 Stat. 1026–1027, provided that "the several grants to the States of numbered sections in place for the support or in aid of common or public schools be, and they are hereby, extended to embrace numbered school sections mineral in character." See 43 U. S. C. § 870.

[13] "[T]his Act shall not apply to indemnity or lieu selections or exchanges or the right hereafter to select indemnity for numbered school sections in place lost to the State under the provisions of this or other Acts, and all existing laws governing such grants and indemnity or lieu selections and exchanges are hereby continued in full force and effect." 44 Stat. 1027, 43 U. S. C. § 871.

were not even permitted to select lands roughly equivalent in value to replace lost mineral lands. The condition in the 1958 statute, that the lost lands be mineral in character before mineral lands could be selected as indemnity, rather clearly reflects an intention to restore the character of the indemnity selection as a substitute of roughly equal value.[14]

Throughout the history of congressional consideration of school land grants and related subjects—a history discussed at great length in the voluminous briefs submitted to us—we find no evidence whatever of any congressional desire to have the right to select indemnity lands do anything more than make the States whole for the loss of value resulting from the unavailability of the originally designated cross section of lands within the State. There is certainly no suggestion of a purpose at any time, including 1958, to allow the States to obtain substantially greater values through the process of selecting indemnity land.

Thus, viewing the program in this broad historical perspective, it is difficult to identify any sensible justification for Utah's position that it is entitled to select any mineral lands it chooses regardless of the value of the school sections lost. Nevertheless, Utah is quite correct in arguing that the Secretary has no power to reject its selections unless Congress has given it to him. We have no doubt that it has.

II

Prior to the 1930's, cases in this Court had made it perfectly clear that the Federal Government retained the power to appropriate public lands embraced within school grants for other

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[14] "Under present law the States are restricted to selecting non-mineral lands to replace forfeited school sections even when these sections are mineralized. There appears to be little equity in this situation." H. R. Rep. No. 2347, 85th Cong., 2d Sess., 2 (1958). "The objective of this legislation is merely to make whole the States which have pending in lieu selections of lands for preempted school sections." Remarks of Senator Watkins of Utah, 104 Cong. Rec. 11921 (1958).

purposes if it acted in a timely fashion. On the other hand, it was equally clear that the States' title to unappropriated land in designated sections could not be defeated after survey, and that their right to indemnity selections could not be rejected if they satisfied the statutory criteria when made, and if the selections were filed before the lands were appropriated for other purposes. The authority of the Secretary of the Interior was limited to determining whether the States' indemnity selections met the relevant statutory criteria. See *Wyoming* v. *United States,* 255 U. S. 489; *Payne* v. *New Mexico,* 255 U. S. 367, 371.

In the 1930's, however, dissatisfaction with the rather loose regime governing use and disposition of unappropriated federal lands, prompted mostly by the waste caused by unregulated stock grazing,[15] led to a series of congressional and executive actions that are critical to this case. By means of these actions, all unappropriated federal lands were withdrawn from every form of entry or selection. The withdrawal did not affect the original school land grants in place, whether or not surveyed, but did include all lands then available for school indemnity selections. The lands thus withdrawn were thereafter available for indemnity selections only as permitted by the Secretary of the Interior in the exercise of his discretion.

The sequence of events was as follows. In 1934, Congress enacted the Taylor Grazing Act "[t]o stop injury to the public grazing lands by preventing overgrazing and soil deterioration, to provide for their orderly use, improvement, and development, to stabilize the livestock industry dependent upon the public range, and for other purposes." 48 Stat. 1269. Section 1 authorized the Secretary of the Interior to establish grazing districts in up to 80 million acres of unappropriated federal lands; the establishment of such a district had the effect of withdrawing all lands within its boundaries "from all

[15] See H. R. Rep. No. 903, 73d Cong., 2d Sess. (1934); 78 Cong. Rec. 11139 (1934) (remarks of Sen. Adams of Colorado).

forms of entry of settlement."[16] That section also expressly provided that "Nothing in this Act shall be construed in any way . . . to affect any land heretofore or hereafter surveyed

[16] "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That in order to promote the highest use of the public lands pending its final disposal, the Secretary of the Interior is authorized, in his discretion, by order to establish grazing districts or additions thereto and/or to modify the boundaries thereof, not exceeding in the aggregate an area of eighty million acres of vacant, unappropriated, and unreserved lands from any part of the public domain of the United States (exclusive of Alaska), which are not in national forests, national parks and monuments, Indian reservations, revested Oregon and California Railroad grant lands, or revested Coos Bay Wagon Road grant lands, and which in his opinion are chiefly valuable for grazing and raising forage crops: *Provided*, That no lands withdrawn or reserved for any other purpose shall be included in any such district except with the approval of the head of the department having jurisdiction thereof. Nothing in this Act shall be construed in any way to diminish, restrict, or impair any right which has been heretofore or may be hereafter initiated under existing law validly affecting the public lands, and which is maintained pursuant to such law except as otherwise expressly provided in this Act, nor to affect any land heretofore or hereafter surveyed which, except for the provisions of this Act, would be a part of any grant to any State, nor as limiting or restricting the power or authority of any State as to matters within its jurisdiction. Whenever any grazing district is established pursuant to this Act, the Secretary shall grant to owners of land adjacent to such district, upon application of any such owner, such rights-of-way over the lands included in such district for stock-driving purposes as may be necessary for the convenient access by any such owner to marketing facilities or to lands not within such district owned by such person or upon which such person has stock-grazing rights. Neither this Act nor the Act of December 29, 1916 (39 Stat. 862; U. S. C., title 43, secs. 291 and following), commonly known as the 'Stock Raising Homestead Act', shall be construed as limiting the authority or policy of Congress or the President to include in national forests public lands of the character described in section 24 of the Act of March 3, 1891 (26 Stat. 1103; U. S. C., title 16, sec. 471), as amended, for the purposes set forth in the Act of June 4, 1897 (30 Stat. 35; U. S. C., title 16, sec. 475), or such other purposes as Congress may specify. Before grazing districts are created in any State as herein provided, a hearing shall be held in the State, after public notice thereof shall have been given,

which, except for the provisions of this Act, would be a part of any grant to any State. . . ." Thus, § 1 preserved the original school land grants, whether or not the designated sections had already been identified by survey, but the statute made no provision for school indemnity selections.[17]

Because the Taylor Grazing Act as originally passed in 1934 applied to less than half of the federal lands in need of more orderly regulation,[18] President Roosevelt promptly issued Ex-

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at such location convenient for the attendance of State officials, and the settlers, residents, and livestock owners of the vicinity, as may be determined by the Secretary of the Interior. No such district shall be established until the expiration of ninety days after such notice shall have been given, nor until twenty days after such hearing shall be held: *Provided, however*, That the publication of such notice shall have the effect of withdrawing all public lands within the exterior boundary of such proposed grazing districts from all forms of entry of settlement. Nothing in this Act shall be construed as in any way altering or restricting the right to hunt or fish within a grazing district in accordance with the laws of the United States or of any State, or as vesting in any permittee any right whatsoever to interfere with hunting or fishing within a grazing district." 48 Stat. 1269–1270.

[17] Section 7 of the Act authorized the Secretary

". . . in his discretion, to examine and classify any lands within such grazing districts which are more valuable and suitable for the production of agricultural crops than native grasses and forage plants, and to open such lands to homestead entry in tracts not exceeding three hundred and twenty acres in area. Such lands shall not be subject to settlement or occupation as homesteads until after same have been classified and opened to entry after notice to the permittee by the Secretary of the Interior, and the lands shall remain a part of the grazing district until patents are issued therefor, the homesteader to be, after his entry is allowed, entitled to the possession and use thereof: *Provided*, That upon the application of any person qualified to make homestead entry under the public-land laws, filed in the land office of the proper district, the Secretary of the Interior shall cause any tract not exceeding three hundred and twenty acres in any grazing district to be classified, and such application shall entitle the applicant to a preference right to enter such lands when opened to entry as herein provided." 48 Stat. 1272.

[18] The bill originally introduced by Congressman Taylor in 1934 (H. R. 6462, 73d Cong., 2d Sess.) purported to authorize the protection of 173

ecutive Order No. 6910[19] withdrawing all of the unappropriated and unreserved public lands in 12 western States, including Utah, from "settlement, location, sale or entry" pend-

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million acres of public range lands by including them within grazing districts. As enacted, however, the statute covered a maximum of 80 million acres. This figure was increased to 142 million acres in 1936, 49 Stat. 1976, and the acreage limitation was removed entirely in 1954. 68 Stat. 151.

[19] The Order, quoted in *Executive Withdrawal Order*, 55 I. D. 205, 206–207 (1935), reads as follows:

"WHEREAS, the act of June 28, 1934 (ch. 865, 48 Stat. 1269), provides, among other things, for the prevention of injury to the public grazing lands by overgrazing and soil deterioration; provides for the orderly use, improvement and development of such lands; and provides for the stabilization of the livestock industry dependent upon the public range; and

"WHEREAS, in furtherance of its purposes, said act provides for the creation of grazing districts to include an aggregate area of not more than eighty million acres of vacant, unreserved and unappropriated lands from any part of the public domain of the United States; provides for the exchange of State owned and privately owned lands for unreserved, surveyed public lands of the United States; provides for the sale of isolated or disconnected tracts of the public domain; and provides for the leasing for grazing purposes of isolated or disconnected tracts of vacant, unreserved and unappropriated lands of the public domain; and

"WHEREAS, said act provides that the President of the United States may order that unappropriated public lands be placed under national forest administration, if, in his opinion, the land be best adapted thereto; and

"WHEREAS, said act provides for the use of public land for the conservation or propagation of wild life; and

"WHEREAS, I find and declare that it is necessary to classify all of the vacant, unreserved and unappropriated lands of the public domain within certain States for the purpose of effective administration of the provisions of said act;

"NOW, THEREFORE, by virtue of and pursuant to the authority vested in me by the act of June 25, 1910 (ch. 421, 36 Stat. 847), as amended by the act of August 24, 1912 (ch. 369, 37 Stat. 497), and subject to the conditions therein expressed, it is ordered that all of the vacant, unreserved, and unappropriated public land in the States of Arizona,

ing a determination of the best use of the land. The withdrawal affected the land covered by the Taylor Grazing Act as well as land not covered by the statute. The President's authority to issue Executive Order No. 6910 was expressly conferred by the Pickett Act.[20]

California, Colorado, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, and Wyoming be, and it hereby is, temporarily withdrawn from settlement, location, sale or entry, and reserved for classification, and pending determination of the most useful purpose to which such land may be put in consideration of the provisions of said act of June 28, 1934, and for conservation and development of natural resources.

"The withdrawal hereby effected is subject to existing valid rights.

"This order shall continue in full force and effect unless and until revoked by the President or by act of Congress."

[20] In that Act, passed in 1910, Congress gave the President the authority to withdraw any public lands from "settlement, location, sale or entry": "[T]he President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States . . . and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress." Ch. 421, 36 Stat. 847.

Although the description of the withdrawal power does not specifically mention state indemnity selections, the power as described is so broad and general that it seems clear that had such an exception been intended, Congress would have made it express.

In *Wyoming* v. *United States*, 255 U. S. 489, this Court plainly indicated that an executive withdrawal of federal land under the Pickett Act would defeat a later attempt to select any part of such land as indemnity for lost school sections. The holding in the case was that an indemnity selection's validity should be tested as of the time made, and that a subsequent Pickett Act withdrawal could not defeat an earlier selection by the State that was otherwise valid. If a Pickett Act withdrawal could not preclude a school land indemnity selection, there would have been no need for the Court to reach the timeliness issue.

The Pickett Act was repealed by the Federal Land Policy and Management Act of 1976, § 704 (a), 90 Stat. 2792, but all previous withdrawals

Congress responded to Executive Order No. 6910 by amending the Taylor Grazing Act in 1936 in two respects that are relevant to this case. First, it expanded the acreage subject to the Act, see n. 18, *supra*. Second, it revised § 7 of the Act, see n. 17, *supra*, to give the Secretary the authority, in his discretion, to classify both lands within grazing districts and lands withdrawn by the recent Executive Order as proper not only for homesteading, but also, for the first time, for satisfaction of any outstanding "lieu" rights, and to open such lands to "selection." The section, thus amended, provided in pertinent part: [21]

"The Secretary of the Interior is authorized, in his dis-

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under the Pickett Act were expressly preserved unless and until modified. § 701 (c), 90 Stat. 2786.

In January 1936, President Roosevelt issued Executive Order No. 7274, which excluded from the operation of Executive Order No. 6910 lands which were then or which were thereafter placed within federal grazing districts. Once land was placed within a grazing district, the purpose of Order No. 6910 was, of course, satisfied.

[21] Section 7 of the Act, 48 Stat. 1272, as amended by the Act of June 26, 1936, § 2, 49 Stat. 1976, as set forth in 43 U. S. C. § 315f, reads in its entirety as follows:

"The Secretary of the Interior is authorized, in his discretion, to examine and classify any lands withdrawn or reserved by Executive order of November 26, 1934 (numbered 6910), and amendments thereto, and Executive order of February 5, 1935 (numbered 6964), or within a grazing district, which are more valuable or suitable for the production of agricultural crops than for the production of native grasses and forage plants, or more valuable or suitable for any other use than for the use provided for under this subchapter or proper for acquisition in satisfaction of any outstanding lieu, exchange or script rights or land grant, and to open such lands to entry, selection, or location for disposal in accordance with such classification under applicable public-land laws, except that homestead entries shall not be allowed for tracts exceeding three hundred and twenty acres in area. Such lands shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry: *Provided*, That locations and entries under the mining laws including the Act of February 25, 1920, as amended, may be made upon such withdrawn and reserved areas without regard to classification

cretion, to examine and classify any lands withdrawn or reserved by Executive order . . . or within a grazing district, which are . . . proper for acquisition in satisfaction of any outstanding lieu, exchange or script rights or land grant, and to open such lands to entry, selection, or location for disposal in accordance with such classification under applicable public-land laws. . . . *Such lands shall not be subject to disposition . . . until after the same have been classified. . . .*" (Emphasis added.)

The changes in this section were apparently prompted in part by the fact that while the Taylor Grazing Act withdrawal preserved the States' school grants in place, no provision had been made in the 1934 version for the States' indemnity selections from land within grazing districts even though the States had expressed the concern that "the establishment of a grazing district would restrict the State in its indemnity selections." [22] While this omission may not have been critical in 1934 when the Act was passed—since only about half of the unappropriated federal land was then affected—by 1936, as a consequence of Executive Order No. 6910, no land at all was available in the public domain for indemnity selections. It is therefore reasonable to infer that the amendments to § 7 were at least in part a response to the

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and without restrictions or limitation by any provision of this subchapter. Where such lands are located within grazing districts reasonable notice shall be given by the Secretary of the Interior to any grazing permittee of such lands. The applicant, after his entry, selection, or location is allowed, shall be entitled to the possession and use of such lands: *Provided*, That upon the application of any applicant qualified to make entry, selection, or location, under the public-land laws, filed in the land office of the proper district, the Secretary of the Interior shall cause any tract to be classified, and such application, if allowed by the Secretary of the Interior, shall entitle the applicant to a preference right to enter, select, or locate such lands if opened to entry as herein provided."

[22] Letter of Fred W. Johnson, Commissioner of the General Land Office, Department of the Interior, reprinted in H. R. Rep. No. 903, 73d Cong., 2d Sess., 9 (1934).

complaint expressed in congressional hearings in 1935, that there was no land available under current law for indemnity selections.[23]

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[23] See statement of John H. Page of Phoenix, Ariz.:

"[T]oo much thought in all of the hearings on the act was given to the grazing features, and very little attention was given to the mechanics and as to how it would affect all of the public-land laws that we have been functioning under. The result is that we are now tied up in just one general withdrawal of all public lands, and everything in the public-land structure and in all of the public-land laws and the contractual relations between the Government—and I refer to existing exchange acts and everything—they have all ceased to function.

"There is no land that can be acquired, there is no land that can be filed on for any purpose.

"I think all of you Senators will agree with me that there are other uses of the remaining public lands besides grazing. I term it generally to distinguish it from grazing, the use for industrial purposes; in other words, in Arizona a great many of our town sites or smelter sites and the like; those which have everything to do with industry, the title usually has been acquired by exchange selection, scrip, State selections. . . .

. . . . .

"When this bill was before Congress, I wrote our Senators and a great many of us did from Arizona, that we were all in sympathy with the grazing use, but that our fear was that they would get a little too enthusiastic about it and withdraw everything. In other words, I forecasted what has resulted, and I think in some measure that I was responsible for the 80,000,000-acre limitation that was put in. You remember that, Senator Hayden.

"That was just so that they would have to take the land that was suitable and not include everything. But then there was immediately, when it commenced to be administered, a general withdrawal of all remaining public lands." Hearing on S. 2539 before the Senate Committee on Public Lands and Surveys, 74th Cong., 1st Sess., 3 (1935).

That it was understood that no land was available for the States' school land indemnity selections was confirmed by Senator Hayden at the same hearings. In response to Mr. Page's observation that there was no land open to entry in Arizona for exercise of railroad-grant exchange rights, the Senator observed: "The same thing would be true of a grant made to a State for university purposes or an indemnity selection." *Id.*, at 15.

Further, it was the clear position of the Interior Department in 1935

The 1936 amendment to § 7 rectified that problem, but did not give the States a completely free choice in making indemnity selections.[24] Rather, Congress decided to route the States' selections through § 7, and thereby to condition their acceptance on the Secretary's discretion. That decision was consistent with the dominant purpose of both the Act and Executive Order No. 6910 to exert firm control over the Nation's land resources through the Department of the Interior. In sum, the Taylor Grazing Act, coupled with the withdrawals by Executive Order, "locked up" all of the federal lands in the western States pending further action by Congress or the President, except as otherwise permitted in the discretion of the Secretary of the Interior for the limited purposes specified in § 7.

This was Congress' understanding of the Taylor Grazing Act in 1958 when it amended the school land indemnity selection statute to permit selection of mineral lands. Both the House and Senate Reports specifically noted and adopted the Department of the Interior's assumption " 'that nothing in this bill is intended to affect the rights or duties of States under other laws' and, in particular, 'that no change is intended to be made in section 7 of the Taylor Grazing Act,

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that all of the land withdrawn under President Roosevelt's Executive Order No. 6910 was unavailable for school land indemnity selections. See *State of Arizona*, 55 I. D. 249, 253 (1935): "The law provides that indemnity lands may be taken for the school sections lost, but through the withdrawal of all public lands, there is no indemnity land to be obtained."

[24] Utah argues (see also dissenting opinion, *post*, at 529, n. 13) that the word "grant" in § 1 of the Taylor Grazing Act in the phrase, "[n]othing in this Act shall be construed in any way . . . to affect any land . . . which . . . [is] part of any grant to any State," includes not only grants in place but also the right to indemnity selections. If Utah's construction of the language were correct, there would have been no need to amend § 7 to authorize indemnity selections. Moreover, even if indemnity selections were contemplated by that phrase in § 1, the 1936 amendment to § 7 still requires that the lands selected first be reclassified by the Secretary in his discretion.

as amended (43 U. S. C., sec. 315f).' " H. R. Rep. No. 2347, 85th Cong., 2d Sess., 2 (1958).[25] Since Congress was specifically dealing with school indemnity selections, the Reports make it perfectly clear that Congress deemed school indemnity selections to be subject to § 7 of the Taylor Grazing Act. And since the congressional decision in 1958 to allow school land indemnity selections to embrace mineral lands was expressly conditioned on a determination that the lost school lands were also mineral in character, it is manifest that Congress did not intend to grant the States any windfall. It only intended to restore to the States a rough approximation of what was lost. See n. 14, *supra*.

We therefore hold that the 1936 amendment to the Taylor Grazing Act conferred on the Secretary the authority in his discretion to classify lands within a federal grazing district as proper for school indemnity selection. And we find no merit in the argument that the Secretary's "grossly disparate value" policy constitutes an abuse of the broad discretion thus conferred. On the contrary, that policy is wholly faithful to Congress' consistent purpose in providing for indemnity selections, to give the States a rough equivalent of the school land grants in place that were lost through pre-emption or private entry prior to survey. Accordingly, the judgment of the Court of Appeals is reversed.

It is so ordered.

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, and MR. JUSTICE REHNQUIST join, dissenting.

Since the early days of the Republic, the Federal Government's compact with each new State has granted the State land for the support of education and allowed the State to

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[25] S. Rep. No. 1735, 85th Cong., 2d Sess., 2 (1958): "Reports of the Secretary of the Interior on S. 2517 and H. R. 12117 [which contained the language just quoted from the House Report] are incorporated as a part of this report."

select land of equal acreage as indemnity for deficiencies in the original grant. Today, the Court holds that the Taylor Grazing Act abrogated those compacts by approving selection requirements completely at odds with the equal acreage principle. Nothing in the Court's opinion persuades me that Congress meant so lightly to breach compacts that it has respected and enforced throughout our Nation's history. I therefore dissent.

The Court's decision rests on three fundamental misconceptions. First, the Court reasons from the accepted proposition that indemnity lands compensate the States for gaps in the original grants to the mistaken conclusion that the States have no right to lands of equal acreage. *Ante*, at 507–510. This argument ignores the clear meaning of statutes spanning about two centuries in which Congress specifically adopted an equal acreage principle as the standard for making compensation. Second, the Court believes that the establishment of grazing districts under the Taylor Grazing Act has the same effect as a withdrawal of lands under the Pickett Act. *Ante*, at 513–519. This belief manifests a serious misunderstanding of both the history of federal land management and the language of the Taylor Grazing Act. Third, the Court assumes—without discussion—that the Taylor Grazing Act gives the Secretary of the Interior discretion to reject indemnity selections under standards inconsistent with the criteria set out in the statutes authorizing the selections. Every federal court that has considered the Secretary's authority under the Taylor Grazing Act has rejected this assumption.

A correct understanding of this case requires careful examination of a labyrinth of compacts and statutes dating back to the early years of our national history. Part I of this opinion reviews the unbroken succession of laws that undercut the Court's construction of the school indemnity selection statutes. Part II explains the development of the Taylor Grazing Act and its relationship to the executive orders withdrawing land under the Pickett Act. Finally, through a detailed con-

sideration of the Taylor Grazing Act's critical provisions, Part III demonstrates that the Act will not permit the construction that the Court has given it.

I

When the first 13 States formed the Union, each State had sovereign authority over the lands within its borders. These lands provided a tax base for the support of education and other governmental functions. When settlers sought to carve the State of Ohio from the Northwest Territory in 1802, they encountered a different situation. Vast tracts within the boundaries of the proposed State belonged to the Federal Government. Thus, the new State's potential revenue base would be restricted severely unless the Federal Government waived its immunity from taxation.[1] In order to place Ohio on an equal footing with the original States, Congress enacted a compromise drawn from the Land Ordinance of 1785[2] and the Northwest Ordinance of 1787.[3] The compromise set a pattern followed in the admission of virtually every other State.[4] Specific details varied from State to State, but the

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[1] Congress did not address this problem in 1796 when Tennessee was created from land that North Carolina had ceded to the Confederation. Consequently, Tennessee contested congressional control over all vacant land within the State. The controversy ended with a compromise that established a federal reservation exempt from state taxation. Act of Apr. 18, 1806, ch. 31, §§ 1, 2, 2 Stat. 381–382; see P. Gates, History of Public Land Law Development 287–288 (1968).

[2] The Land Ordinance of 1785 "reserved the lot No. 16, of every township, for the maintenance of public schools within the said township. . . ." 1 Laws of the United States 565 (1815).

[3] Article III of the Northwest Ordinance of 1787 declared: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." 1 Stat. 52. Article IV provided that legislatures established in the region could not "tax . . . the property of the United States" or interfere with the Federal Government's disposal of the public lands. *Ibid.*

[4] The pattern established by the Ohio enabling acts, Act of Mar. 3, 1803, 2 Stat. 225; Act of Apr. 30, 1802, § 7, 2 Stat. 175, was followed in

basic plan persisted. As consideration for each new State's pledge not to tax federal lands, Congress granted the State a fixed proportion of the lands within its borders for the support of public education. *E. g.*, Act of Apr. 30, 1802, § 7, 2 Stat. 175 (Ohio); Act of Jan. 29, 1861, § 3, 12 Stat. 127–128 (Kansas); Act of July 16, 1894, §§ 3, 6, 28 Stat. 108–109 (Utah); see *United States* v. *Morrison*, 240 U. S. 192, 201 (1916).[5]

These agreements were solemn bilateral compacts between each State and the Federal Government. See *ante*, at 507; *United States* v. *Morrison*, *supra*, at 201–202; *Cooper* v. *Roberts*, 18 How. 173, 177–179 (1856). For its part, the Government granted the State specific sections of land within each township laid out by federal survey. The granted sections were specified by number to ensure that the State would receive a random cross section of the public land. Title to the sections vested in the State upon approval of the survey. *United States* v. *Morrison*, *supra*, at 207, 212; *Beecher* v. *Wetherby*, 95 U. S. 517 (1877). Should these grants in place prove unavailable, the Federal Government promised to grant the State indemnity in other lands of equal acreage. In return, Congress required the State to memorialize its pledge not to tax federal lands "by ordinance irrevocable without the consent of the United States." *E. g.*, Act of July 16, 1894, § 3, 28 Stat. 108 (Utah). Congress also imposed upon the State a binding and perpetual obligation to use the granted lands for the support of public education. All revenue from the sale or lease of the school grants was impressed with a

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the acts organizing every State except Maine, Texas, West Virginia, and Hawaii. See P. Gates, *supra* n. 1, at 285–339.

[5] Until shortly after Congress stopped selling public land on credit, Act of Apr. 24, 1820, § 2, 3 Stat. 566, State enabling acts also exempted land sold by Congress from state taxation for a period of five years after the sale. The acts enabling the organization of Ohio and other States in the Northwest Territory contained only this proscription because the Northwest Ordinance of 1787 already banned state taxes on federal lands. See P. Gates, *supra* n. 1, at 288–296; n. 3, *supra*.

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trust in favor of the public schools. No State could divert school lands to other public uses without compensating the trust for the full market value of the interest taken. *Lassen* v. *Arizona ex rel. Arizona Highway Dept.*, 385 U. S. 458 (1967); see *Alamo Land & Cattle Co.* v. *Arizona*, 424 U. S. 295 (1976).

A long line of statutes dating from the early 1800's evidences Congress' consistent respect for the federal obligation to replace unavailable school sections with indemnity lands of equal acreage. See *United States* v. *Morrison, supra*, at 201–202. In 1826, the first general indemnity selection statute appropriated additional tracts to compensate the States for lands lost when fractional townships were found not to contain the numbered section originally granted. The statute directed the Secretary of the Treasury to select "out of any unappropriated public land" within the township where the section had been lost the "quantity" of land to which the State was entitled. Act of May 20, 1826, ch. 83, 4 Stat. 179. When private claims against unsurveyed public lands increased as the Nation moved west, Congress also acted to indemnify States for school sections occupied by settlers. The earliest statutes authorized officials in particular States or Territories to select "other lands to an equal amount . . . in lieu of [the] sections so occupied. . . ." *E. g.*, Act of Mar. 2, 1853, § 20, 10 Stat. 179 (Washington Territory).[6]

In 1859, a second statute of general applicability appropriated "other lands of like quantity" to replace school sections pre-empted by prior settlement, "fractional in quantity," missing from a township, or lost "from any natural cause whatever." Act of Feb. 26, 1859, ch. 58, 11 Stat. 385. Although the statute incorporated by reference the selection provisions of the 1826 Act, a more particular statute passed on the same day expressly empowered local officials in one western

[6] See Act of Mar. 3, 1853, § 7, 10 Stat. 247 (California); Act of Jan. 7, 1853, ch. 6, 10 Stat. 150 (Oregon).

county to make their own indemnity selection. Upon filing with the local federal register, the statute declared, "the land so selected shall . . . belong to the school fund . . . in all respects the same as other school lands. . . ." Act of Feb 26, 1859, ch. 59, 11 Stat. 385 (Sarpy County, Neb.).

The general statutes of 1826 and 1859, consolidated and codified as §§ 2275 and 2276 in the Revised Statutes of 1874, underwent extensive revision in 1891. The resulting law appropriated additional land to replace school sections lost because they were mineral in character, included within a federal reservation, or "otherwise disposed of by the United States." In lieu of unavailable school sections, each State was entitled to such "other lands of equal acreage . . . [as] may be selected by said State. . . ." Act of Feb. 28, 1891, ch. 384, 26 Stat. 796. The States could make their indemnity selections from "any unappropriated, surveyed public lands, not mineral in character, within the State. . . ." *Id.*, at 797.

The 1891 revision had at least four effects. First, it reaffirmed the States' unquestioned right to replace lost school sections with lands of equal acreage. Second, it removed the restriction that had limited indemnity selections to land within the township where the school section was unavailable. Third, it appeared to confirm this Court's earlier decision that school grants did not convey mineral lands to the States.[7] Fourth, it expressly conformed the general indemnity selection statutes to the mid-19th-century enactments that gave certain States the right to make their own indemnity selections. Even where the earlier statutes gave a State the power of selection, however, it had become accepted practice for the State to submit its selections for the approval of the Secretary of the Interior.[8] State enabling acts passed in 1889

[7] *Mining Co.* v. *Consolidated Mining Co.*, 102 U. S. 167 (1880); see *United States* v. *Sweet*, 245 U. S. 563, 570–572 (1918).

[8] See *Todd* v. *Washington*, 24 L. D. 106 (1897). The Secretary of the Interior assumed the Secretary of the Treasury's responsibility for the public lands in 1849. Act of Mar. 3, 1849, § 3, 9 Stat. 395.

and 1890 sanctioned the practice explicitly.[9] The 1891 revision of the general indemnity selection laws did not mention the need for federal approval, but the inclusion of an approval requirement in the Utah Enabling Act passed three years later suggests that the revision authorized no departure from the accepted practice. See Act of July 16, 1894, § 6, 28 Stat. 109.

By the end of the 19th century, the States' right to select land of equal acreage in lieu of lost school sections had been established for nearly 100 years. The only unsettled question was whether the Secretary of the Interior had discretion to disapprove the selections. In *Payne* v. *New Mexico*, 255 U. S. 367 (1921), this Court resolved that question in the States' favor. New Mexico had selected alternative land in exchange for school sections lying within a national forest. Before the Secretary approved the selection, the grants in place were restored to the public domain. The Secretary found that the restoration of the grants in place defeated the basis for the exchange selection. The Court held, however, that equitable title to properly selected land vested in the State when the selection was filed. If the selection satisfied the requirement of the general school grant statutes, the Secretary had no power to annul the State's title. *Id.*, at 370–371.

Three weeks later, the Court made the same point even more emphatically in *Wyoming* v. *United States*, 255 U. S. 489 (1921). In that case, the land selected by Wyoming in exchange for a school section lying within a national forest later was withdrawn by the Federal Government "as possible oil land." *Id.*, at 495. The Court again concluded that equitable title to the chosen land vested in the State on the date the selection was filed. It was not, the Court said,

"as if the selection was merely a proposal by the State

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[9] See Act of July 10, 1890, § 4, 26 Stat. 223 (Wyoming); Act of July 3, 1890, § 4, 26 Stat. 215 (Idaho); Act of Feb. 22, 1889, § 10, 25 Stat. 679 (North Dakota, South Dakota, Montana, Washington).

which the [federal] land officers could accept or reject. They had no such option to exercise. . . . The power confided to them was not that of granting or denying a privilege to the State, but of determining whether an existing privilege conferred by Congress had been lawfully exercised. . . ." *Id.*, at 496.

In the years after *Payne* and *Wyoming*, Congress further expanded the States' rights to land for the support of public education. A 1927 statute declared that school grants were "to embrace numbered school sections mineral in character. . ." Act of Jan. 25, 1927, § 1, 44 Stat., pt. 2, p. 1026. A 1958 amendment to the indemnity selection statutes, by then found in their present places as 43 U. S. C. §§ 851, 852, permitted States to select mineral lands as indemnity for lost school sections that were mineral in character. Act of Aug. 27, 1958, 72 Stat. 928. This provision reflected a congressional judgment that the ban on mineral land indemnity for lost mineral lands had denied the States the fair cross section of land values contemplated by the orginal numbered grants.[10] Congress also found that a rule which kept the States from replacing nonmineral land with mineral land "amply protected" the federal interest in preventing a windfall to the States. Congress therefore declined to depart from the fundamental equal acreage principle accepted since 1802. H. R. Rep. No. 2347, 85th Cong., 2d Sess., 2, 3–4 (1958). Indeed, Congress always has adhered to the equal acreage principle as its standard for just indemnification. As recently as 1966, when it amended 43 U. S. C. § 852 to allow indemnity selections from unsurveyed as well as surveyed public land, Congress rejected the Secretary of the Interior's proposal to import an "equal value concept" into the indemnity statutes.

[10] See 104 Cong. Rec. 11921 (1958) (remarks of Sen. Watkins of Utah, cosponsor of the bill).

See Act of June 24, 1966, Pub. L. 89–470, 80 Stat. 220; S. Rep. No. 1213, 89th Cong., 2d Sess., 2, 4–5 (1966).[11]

II

The Utah Enabling Act of 1894 grants to the State four numbered sections within each township for the support of public education. If those sections "have been sold or otherwise disposed of" by the Federal Government, the Act—like other statutes of its kind—directs school grant indemnity lands "to be selected within said State in such manner as the legislature may provide, with the approval of the Secretary of the Interior. . . ." Act of July 16, 1894, § 6, 28 Stat. 109. In accordance with this direction, Utah has selected 194 tracts of mineral land as indemnity for lost school sections said to be mineral in character. Utah alleges that the tracts selected are unappropriated public land equal in acreage to the unavailable sections. Thus, the tracts appear to satisfy the basic indemnity selection requirements of 43 U. S. C. §§ 851, 852.

The Secretary, however, has refused to determine whether the selections satisfy the indemnity statutes. Instead, he claims that the Taylor Grazing Act of 1934, as amended, 43 U. S. C. § 315 *et seq.*, gives him discretion to disapprove the selection of indemnity lands "where the value of those lands greatly exceeds the value of the lost school lands for which the State seeks indemnity." App. 61. The Court today agrees. In an unprecedented departure, the Court concludes that Congress intended the Taylor Grazing Act to abrogate the equal acreage principle that Congress has reaffirmed repeatedly since 1802. The conclusion is implausible on its face, and the Taylor Grazing Act belies it. A full review of the Act's history and structure shows that this land management legisla-

[11] The Court points to nothing in nearly two centuries of American history to support its statement that the Secretary's comparative value concept is "wholly faithful to Congress' consistent purpose in providing for indemnity selections, to give the States a rough equivalent of the school grants in place that were lost. . . ." *Ante*, at 520.

tion affects only the States' right to make land exchanges. Indeed, the language of the Act—analyzed more closely in Part III of this opinion—expressly protects the States' indemnity selection rights from any impairment whatever.

The Taylor Grazing Act was intended to protect the public lands from spoliation while providing for the orderly satisfaction of valid claims against them. By the mid-1930's, the public ranges in the Western States were seriously endangered. Overgrazing had destroyed the better grasses, erosion had bared the steep hillsides, and silt had filled the waterholes. Homesteading on the better watered grounds aggravated the situation by leaving other lands without access to water. Finally, the disastrous decline of livestock prices during the Great Depression drove stockmen to make even greater use of free grazing on the already depleted public domain.[12] It was against this background that Congress in 1934 enacted the Taylor Grazing Act "to promote the highest use of the public lands pending its final disposal. . . ." Taylor Grazing Act of 1934, § 1, 48 Stat. 1269.

Section 1 of the Act authorized the Secretary of the Interior "in his discretion, . . . to establish grazing districts . . . of vacant, unappropriated, and unreserved lands from any part of the public domain . . . , which in his opinion are chiefly valuable for grazing and raising forage crops. . . ." *Ibid.*[13] Land noticed for inclusion within a grazing district was withdrawn from "all forms of entry [or] settlement" until hearings could be conducted. *Id.*, at 1270. Congress carefully provided, however, that the Act was not to impede orderly disposition of the public lands. When some States objected

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[12] See generally P. Gates, *supra* n. 1, at 519–529, 607–613.

[13] The Taylor Grazing Act further provided that the land included within grazing districts could not aggregate more than 80 million acres. Taylor Grazing Act of 1934, § 1, 48 Stat. 1269. The acreage limitation rose to 142 million acres in 1936, Act of June 26, 1936, Title I, § 1, 49 Stat. 1976, and it disappeared entirely in 1954, Act of May 28, 1954, § 2, 68 Stat. 151.

to an earlier draft of the Act "upon the theory that the establishment of a grazing district would restrict [a] State in its indemnity selections," Congress recast § 1 to declare expressly that

> "[n]othing in this Act shall be construed in any way to diminish, restrict, or impair any right which has been heretofore or may be hereafter initiated under existing law validly affecting the public lands . . . except as otherwise expressly provided in this Act, nor to affect any land heretofore or hereafter surveyed which, except for the provisions of this Act, would be a part of any grant to any State. . . ." *Id.*, at 1269.[14]

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[14] The last part of the provision was added to the statute by the House Committee on the Public Lands. See Hearings on H. R. 2835 and H. R. 6462 before the House Committee on the Public Lands, 73d Cong., 1st Sess. and 2d Sess., 195 (1934). At the time the language was inserted, the Committee had before it a report from the Secretary of the Interior indicating that some States had objected to the bill "upon the theory that the establishment of a grazing district would restrict the State in its indemnity selections." *Id.*, at 5 (memorandum from General Land Office Commissioner Johnson to Secretary Ickes); see H. R. Rep. No. 903, 73d Cong., 2d Sess., 9 (1934); S. Rep. No. 1182, 73d Cong., 2d Sess., 7 (1934). The Senate further expanded the exemption. See 78 Cong. Rec. 11147 (1934); Hearings on H. R. 6462 before the Senate Committee on Public Lands and Surveys, 73d Cong., 2d Sess., 64 (1934). The House conferees acceded to the Senate amendment, after inserting the phrase "validly affecting the public lands" behind the words "existing law." See H. R. Conf. Rep. No. 2050, 73d Cong., 2d Sess., 1, 4 (1934).

The Court simply ignores this highly relevant sequence of events. It even cites the Secretary's report on the States' concern for the plainly erroneous proposition that the original Act made "no provision . . . for the States' indemnity selections from land within grazing districts. . . ." *Ante*, at 517. Perhaps the Court's confusion arises from its assumption that the broad saving provision covers only lands specifically granted, rather than all lands needed for satisfaction of a grant. *Ante*, at 519, n. 24. This assumption is logically untenable. Lands selected in lieu of deficiencies in a grant cannot be conveyed to the grantee unless they become "part of [the] grant." 48 Stat. 1269.

Section 7 also gave the Secretary discretion to reclassify land within a grazing district as "more valuable and suitable for the production of agricultural crops than native grasses and forage plants. . . ." *Id.*, at 1272. Upon reclassification, such land again became "subject to settlement or occupation as homesteads. . . ." *Ibid.*

The Act contained critically important provisions for land exchanges. Section 8 authorized the Secretary to accept private and state land within a grazing district in exchange for any surveyed public land of no more than "equal value." *Id.*, at 1272–1273. The section showed special solicitude for the States by directing the Secretary to proceed with state-initiated exchanges "at the earliest practicable date, and to cooperate fully with the State to that end. . . ." *Id.*, at 1273. The Western States, however, objected to the discretionary exchange provisions. The Governor of Wyoming, for example, opposed the Act because he feared that § 8 would impair the State's right to exchange school sections isolated inside a federal reservation or a grazing district for other, better situated acreage. In testimony before the Senate Committee, he argued that the Secretary might not allow enough exchanges to permit the removal of state land from inside federally administered areas. The Governor therefore urged that the Act's exchange provisions should be mandatory.[15] Testimony given by the Executive Secretary of the Utah Land Board expressed the same concerns.[16] The State Land Commissioner of Arizona also suggested that the Act would prevent private citizens from exercising their legitimate rights

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[15] Hearings on H. R. 6462 before the Senate Committee on Public Lands and Surveys, 73d Cong., 2d Sess., 195–209 (1934) (testimony of Gov. Miller of Wyo.).

[16] *Id.*, at 209–216 (testimony of George Fisher). Not until Congress amended the Taylor Grazing Act in 1936 was the Secretary of the Interior required to effect exchanges of state-owned lands. See *infra*, at 534.

against lands included in a grazing district.[17] Although the Secretary argues that these witnesses opposed the Act because it impaired the States' right to make indemnity selections, nothing in their testimony supports that conclusion. Indeed, the testimony of all three witnesses is most remarkable for its failure to suggest that they thought the Taylor Grazing Act would interfere with school grant indemnity selections by the Western States.

Five months after the Act went into effect, President Roosevelt issued Executive Order No. 6910 (1934). Invoking his authority under the Pickett Act of 1910,[18] the President withdrew all unreserved and unappropriated public lands in 12 Western States "from settlement, location, sale or entry . . . pending determination of the most useful purpose to which such land may be put. . . ." The effect of this Pickett Act withdrawal was far-reaching. Although homesteading and other activities continued under existing claims, new entries upon the public domain came to a halt. See 55 I. D. 205 (1935). The withdrawal also forestalled States and private citizens from exercising their exchange, scrip, or indemnity rights to appropriate public land. See *State of Arizona*, 55 I. D. 249, 253–254 (1935).[19]

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[17] Hearings on H. R. 6462, *supra*, at 161–174 (testimony of Howland J. Smith).

[18] The Pickett Act of 1910, ch. 421, 36 Stat. 847, authorized the President temporarily to "withdraw from settlement, location, sale, or entry any of the public lands of the United States . . . , and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes. . . ." The Act was repealed by the Federal Land Policy and Management Act of 1976, § 704 (a), 90 Stat. 2792.

[19] This Court later held that a Pickett Act withdrawal is a "previous disposition" of land by the Federal Government that prevents title to numbered school sections from vesting in the States upon completion of a survey. *United States* v. *Wyoming*, 331 U. S. 440, 443–444, 454 (1947). Executive Order No. 7599, 2 Fed. Reg. 633 (1937), however, expressly exempted numbered school sections from the operation of Executive Order No. 6910.

Only months after the Order issued, the Senators from Arizona began hearings on a proposal to undercut the withdrawal by broadening the Secretary's powers under §§ 7 and 8 of the Taylor Grazing Act.[20] The bill suffered a pocket veto, but an almost identical bill became law in 1936. Act of June 26, 1936, Title I, 49 Stat. 1976. In the meantime, Executive Order No. 7274 (1936) excluded from the operation of the earlier Order "all lands which are now, or may hereafter be, included within grazing districts. . . ." Thus, by the time the bill was enacted, the Pickett Act withdrawal had no further effect on lands administered under the Taylor Grazing Act.[21]

The 1936 enactment significantly amended §§ 7 and 8 of the Taylor Grazing Act. The amendment to § 7 authorized the Secretary of the Interior to classify lands withdrawn by Executive Order No. 6910 or "within a grazing district" as "more valuable or suitable" for uses other than grazing or as "proper for acquisition in satisfaction of any outstanding lieu, exchange or script [*sic*] rights or land grant. . . ." 49 Stat. 1976.[22] Such land would be open "to entry, selection, or

[20] See Hearings on S. 2539 before the Senate Committee on Public Lands and Surveys, 74th Cong., 1st Sess., 1–2 (1935). See also S. Rep. No. 1005, 74th Cong., 1st Sess., 2 (1935).

Five days after the hearings began, the President limited his earlier withdrawal by amending Executive Order No. 6910 to authorize exchanges of land under § 8 of the Taylor Grazing Act. Exec. Order No. 7048 (1935). Participants in the congressional hearings accurately observed, however, that Executive Order No. 6910 had left no land available for school grant indemnity selection. See *ante*, at 518–519, n. 23; *supra*, at 532.

[21] The Court scarcely mentions Executive Order No. 7274. It therefore fails to recognize that the land within a grazing district is "locked up" only to the extent that the Taylor Grazing Act affirmatively precludes otherwise legitimate claims against it. See *ante*, at 519. Any implication that the Pickett Act continues to affect lands within a grazing district is simply mistaken. See *ante*, at 515–516, n. 20; n. 24, *infra*.

[22] The Senate Report on this amendment says that it was intended "to provide a more practicable and satisfactory method of classification of

location" under the applicable public land laws. The statute directed the Secretary to respond to an application for entry by classifying the subject land, but no lands were to be appropriated "until after the same have been classified and opened to entry. . . ." *Ibid.*

The amendment to § 8 made mandatory the Taylor Grazing Act's provisions for the exchange of state-owned land.[23] Upon the receipt of any State's application for an exchange, the statute now provided, the Secretary "shall, and is hereby, directed to proceed with such exchange at the earliest practicable date and to cooperate fully with the State to that end. . . ." *Id.*, at 1977. Furthermore, the Secretary was authorized to make exceptions to the equal value requirement that remained applicable to exchanges of private land. The federal land exchanged for state land could be "either of equal value or of equal acreage." *Ibid.*

III

Two specific provisions of the Taylor Grazing Act are critical to the Court's resolution of this case. The Court first must demonstrate that § 1 of the Act, 43 U. S. C. § 315, does not exclude the State's school grant indemnity rights from the reach of the statute. The Court then must establish that § 7 of the Act, 43 U. S. C. § 315f, gives the Secretary of the Interior power to disapprove the selection of lands that satisfy

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lands within a grazing district and to make available for *private* entry lands which are more valuable for other purposes than grazing." S. Rep. No. 2371, 74th Cong., 2d Sess., 2 (1936) (emphasis added). The legislative history provides no support for the Court's inference that the amendment was a response to complaints about the effect of the Taylor Grazing Act—as distinguished from Executive Order No. 6910—upon *state* indemnity selections. See *ante*, at 517–518, 519, n. 24.

[23] See S. Rep. No. 2371, 74th Cong., 2d Sess., 2 (1936). Mandatory exchanges were critically important to the Western States. See *supra*, at 531–532.

all requirements of the school grant indemnity statutes, 43 U. S. C. §§ 851, 852. The Court fails to clear either hurdle because neither section of the Act permits the construction that the Court would give it. The plain language of § 1 protects school grant indemnity rights from the operation of the statute. And even if the Act applied to school grants, § 7 would not give the Secretary discretion to reject otherwise proper indemnity selections.

A

Section 1 of the Taylor Grazing Act provides that nothing in the statute shall "affect any land . . . which [otherwise] would be a part of any grant to any State. . . ." The exemption is transparently clear. All grants made by the compacts between the States and the Federal Government are completely unaffected by the Taylor Grazing Act. Thus, the establishment of a grazing district is not a federal "reservation" or "disposition" of land that can prevent title to numbered school sections from vesting in the States. See 43 U. S. C. § 851. Furthermore, designated grazing land remains "unappropriated" and available for the satisfaction of school grants under the terms of the indemnity statutes. See 43 U. S. C. §§ 852 (a) and (d). The purpose of the Act is simply to provide that unsurveyed or unselected school land, like other public land, can be included in grazing districts "[i]n order to promote [its] highest use . . . pending its final disposal." 43 U. S. C. § 315.

The Court gives the unqualified exemption in § 1 a construction that is inconsistent with its plain language and the stated purpose of the Act. The Court concedes that the inclusion of numbered school sections within a grazing district is not a federal disposition of the land that can defeat the grants in place. *Ante*, at 513.[24] It holds, however, that the

[24] Given the Court's concession on this point, its reliance on *United States* v. *Wyoming*, 331 U. S. 440 (1947), is misplaced. *Ante*, at 515, n. 20;

inclusion of other lands within a grazing district is a federal appropriation that can defeat a State's otherwise clear right to replace lost school sections with lands of equal acreage. *Ante*, at 519. Thus, the Court thinks the Taylor Grazing Act *does* "affect . . . land . . . which [otherwise] would be . . . part of" a grant to a State. Indeed, the Court concludes that the Act gives the Secretary of the Interior power to nullify an earlier congressional "disposal" of public land. This construction is wholly at odds with the express language and the clear history of the Act.

B

Even if I could agree with the Court that § 1 of the Taylor Grazing Act exempts only numbered school sections from the operation of the Act, I could not agree with the Court's unexplained conclusion that § 7 allows the Secretary of the Interior to review school grant indemnity selections under a comparative value standard. Section 7 of the Act, 43 U. S. C. § 315f, gives the Secretary discretion to reclassify designated grazing lands as

> "[i] more valuable or suitable for the production of agricultural crops than for the production of native grasses and forage plants, or [ii] more valuable or suitable for any other use than for [grazing], or [iii] proper

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see *supra*, at 533, and n. 21. In that case, the United States sought to quiet title to oil land lying within one of the State's numbered school sections. The land had been withdrawn under the Pickett Act of 1910, ch. 421, 36 Stat. 847, several months before survey identified it as a school section. The Court held that the Pickett Act withdrawal was a "previous disposition" by the Federal Government that prevented title to the school section from vesting in the State upon completion of the survey. 331 U. S., at 433–444, 454. Since the Taylor Grazing Act—unlike the Pickett Act—does not "dispose" of otherwise unreserved public lands, *United States* v. *Wyoming* provides no support for the notion that the Act withdrew grazing lands from indemnity selection under the provisions of the State enabling acts and the school indemnity statutes.

for acquisition in satisfaction of any outstanding lieu, exchange or script [*sic*] rights or land grant, and to open such lands to entry, selection, or location for disposal in accordance with such classification under applicable public-land laws. . . ."

The Courts of Appeals have concluded that this section gives the Secretary substantial discretion to conserve the public lands. Thus, the Secretary may reject private applications for land that he finds suitable for more efficient uses. See *Bleamaster* v. *Morton,* 448 F. 2d 1289 (CA9 1971); *Carl* v. *Udall,* 114 U. S. App. D. C. 33, 37–38, 309 F. 2d 653, 657–658 (1962). The courts also have upheld administrative determinations that certain land is not proper for private acquisition because the relevant land grant did not convey lands of that character. See *Pallin* v. *United States,* 496 F. 2d 27, 34–35 (CA9 1974); *Finch* v. *United States,* 387 F. 2d 13, 15–16 (CA10 1967), cert. denied, 390 U. S. 1012 (1968). But these federal courts agree that § 7 of the Taylor Grazing Act does not give the Secretary authority to review a land selection under standards fundamentally inconsistent with the terms of the relevant land grant statutes. See *Pallin* v. *United States, supra; Bronken* v. *Morton,* 473 F. 2d 790, 795–796 (CA9), cert. denied, 414 U. S. 828 (1973); *Finch* v. *United States, supra.* The word "proper" in the third clause of § 7 quoted above cannot mean proper under whatever criteria the Secretary sees fit to devise.

Nothing in this general provision, concerned with the satisfaction of private as well as state claims, suggests that Congress intended to authorize a comparative value standard at odds with the equal acreage principle found in every school grant indemnity statute since the beginning of the 19th century. When a specific statute grants fixed acreages, the Secretary cannot defeat the grant by applying a comparative value test based on the general provisions of § 7. *Bronken* v. *Morton, supra.* This rule should apply with special force where the

Federal Government has granted fixed quantities of land to a State as part of the bilateral compact under which the State was admitted to the Union. Even the exchange provisions in § 8 of the Taylor Grazing Act acknowledged the equal acreage principle. The section allowed the Secretary to accept private lands only in return for public lands of no more than "equal value," 43 U. S. C. § 315g (b) (1970 ed.), but it authorized him to take state-owned lands in exchange for "land either of equal value or of equal acreage," § 315g (c). Having expressly acknowledged the equal acreage principle in a section dealing with the exchange of lands to which the States already hold title, the Act could not silently have authorized departures from that principle in a section dealing with indemnity for deficiencies in the original land grants.

The Congress that passed the indemnity provision under which Utah has made its selections found that a law permitting the selection of mineral lands as indemnity for other mineral lands of equal acreage "amply protected" the federal interest. H. R. Rep. No. 2347, 85th Cong., 2d Sess., 2 (1958). The sponsors of the legislation and the Department of the Interior did not conclude—as the Court does—that such selections would allow the States to secure an unfair advantage. Instead, they agreed that the selection of mineral lands on an equal acreage basis was necessary to guarantee the public schools a "fair cross section of land values." *Id.*, at 4 (report of the Department of the Interior); 104 Cong. Rec. 11921 (1958) (remarks of Sen. Watkins); see *supra*, at 527. No later Congress has receded from this view, despite the Secretary's invitation to do so. See S. Rep. No. 1213, 89th Cong., 2d Sess., 2, 4 (1966); *supra*, at 527–528. For nearly 180 years, Congress has adhered to the equal acreage principle embodied in the specific statutes most relevant to this case. The Court has no basis for surmising that a general statute addressed to different issues has given the Secretary authority to adopt an inconsistent position.

IV

Utah has selected land in satisfaction of grants made to support the public education of its citizens. Those grants are part of the bilateral compact under which Utah was admitted to the Union. They guarantee the State a specific quantity of the public lands within its borders. *Payne* v. *New Mexico*, 255 U. S. 367 (1921), and *Wyoming* v. *United States*, 255 U. S. 489 (1921), require the Secretary of the Interior to approve Utah's indemnity selections if they designate tracts equal in acreage to the lands replaced and otherwise satisfy the requirements of 43 U. S. C. §§ 851, 852. Nothing in the Taylor Grazing Act empowers the Secretary to review Utah's selections under a comparative value standard explicitly at odds with principles consistently respected since the early days of our Republic.

For a decade or longer, however, the Secretary has refused to determine whether Utah's selections satisfy §§ 851 and 852. Indeed, he has refused to make any determination at all. Rather, the Secretary has claimed that the Taylor Grazing Act gives him discretion to disapprove the selection of indemnity lands more valuable than Utah's lost school sections. In the five years since Utah took issue with that claim, the registry of the District Court has swollen with the proceeds of oil shale leases on the selected land—proceeds which the Federal Government now claims on the ground that the Secretary has not approved the indemnity selections. The District Court brought this matter to a just conclusion. It ordered the Secretary to do his duty. The Court of Appeals affirmed, and I would affirm its judgment.

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TEXAS *v.* NEW MEXICO

ON EXCEPTIONS TO REPORT OF SPECIAL MASTER

No. 65, Orig. Argued March 24, 1980—Decided May 19, 1980

Exceptions to Special Master's report overruled.

Douglas G. Caroom, Assistant Attorney General of Texas, argued the cause for plaintiff. With him on the briefs were *Mark White*, Attorney General, *John W. Fainter, Jr.*, First Assistant Attorney General, and *Ted L. Hartley*, Executive Assistant Attorney General.

Richard A. Simms, Special Assistant Attorney General of New Mexico, argued the cause for defendant. With him on the briefs were *Jeff Bingaman*, Attorney General, and *G. Emlen Hall*, *Charles M. Tansey*, and *Jay F. Stein*, Special Assistant Attorneys General.

Solicitor General McCree filed a memorandum for the United States as intervenor.

PER CURIAM.

Upon consideration of the report filed October 15, 1979, by Senior Judge Jean S. Breitenstein, Special Master, and the exceptions thereto, and on consideration of briefs and oral argument thereon,

IT IS ADJUDGED, ORDERED, AND DECREED that all exceptions are overruled, the report is in all respects confirmed, and the ruling of the Special Master on the "1947 condition" as that term appears in Arts. II (g) and III (a) of the Pecos River Compact is approved.

MR. JUSTICE STEVENS, dissenting.

Under the Pecos River Compact of 1949, ch. 184, 63 Stat. 159, the State of New Mexico has a duty "not [to] deplete by man's activities the flow of the Pecos River at the New

Mexico-Texas state line below an amount which will give to Texas a quantity of water equivalent to that available to Texas under the 1947 condition."

Article VI (c) of the Compact provides that the "inflow-outflow" method is to be used to determine whether New Mexico is complying with this obligation.[1] Briefly stated, this method involves the development of a correlation between the inflow to a basin and the expected outflow so that, for any given inflow, engineers can estimate the amount of water that should flow through and should therefore be available for downstream (in this case Texas') use. In a river routing study made available to the Commissioners prior to the signing of the Compact, engineers attempted to develop such a correlation for the Pecos by calculating for each year from 1905 to 1946 what the outflow would have been at various points if the New Mexico water uses in place in 1947 had been in place in prior years as well. This study was then to be used as a baseline in comparing future inflow and outflow in order to determine whether New Mexico was using a larger share of the river water than it had in 1947, in violation of the Compact.

For years after the Compact was signed, there were disputes between the States over the proper application of the inflow-outflow method. Both sides recognized that the routing study contained some errors, and they attempted to correct those errors through negotiation. When negotiations ultimately failed, Texas brought this suit, alleging that New Mexico had breached its obligations under the Compact by using more water than it was entitled to use under the proper definition of the "1947 condition."

One of the main issues before the Special Master was the meaning of the term "1947 condition." The Master found

[1] This method is to be used "unless and until a more feasible method is devised." See Art. VI (c). In this proceeding the States agree that the inflow-outflow method continues to apply.

that the term referred only to depletions due to the New Mexico water uses that were in place in 1947, along with certain projected uses.[2] He therefore held that the errors in the old routing study had to be corrected before that study could be used in determining compliance. In its objections to the Master's report, Texas takes the position that the "1947 condition" refers not to actual physical conditions on the river, but rather to the baseline values developed through the 1947 routing study. It therefore argues that, in the absence of agreement, the parties must continue to use that study, despite its errors, in determining compliance.

The objections filed on behalf of the State of Texas persuade me that the Master's definition is not the one the two States agreed upon when they entered into the Compact. Article II (g) provides that, as used in the Compact:

> "The term '1947 condition' means that situation in the Pecos River Basin as described and defined in the Report of the Engineering Advisory Committee. In determining any question of fact hereafter arising as to such situation, reference shall be made to, and decisions shall be based on, such report."

The routing study that Texas relies upon was a part of the Report of the Engineering Advisory Committee as that term is defined in the Compact.[3] It therefore, in my opinion, be-

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[2] The Master defined the term as follows:

"The 1947 condition is that situation in the Pecos River Basin which produced in New Mexico the man-made depletions resulting from the stage of development existing at the beginning of the year 1947 and from the augmented Fort Sumner and Carlsbad acreage."

[3] The routing study was Appendix A to the Report. Article II (f) provides:

"The term 'Report of the Engineering Advisory Committee' means that certain report of the Engineering Advisory Committee dated January 1948, and all appendices thereto; including, basic data, processes, and analyses utilized in preparing that report, all of which were reviewed, approved, and adopted by the Commissioners signing this Compact at a meeting held

came a part of the Compact definition of the 1947 condition to which the parties agreed. Although this concededly makes the term "1947 condition" an "artificial" definition, rather than a description of actual conditions, the fact that the parties agreed to base their decisions on all questions of fact on that Report indicates that the parties also agreed to use the routing study as a basic frame of reference. Moreover, had the parties merely intended to describe the New Mexico water uses that existed in 1947, I believe they would have used language similar to that employed by the Master and would not have included the detailed reference to the Report of the Engineering Advisory Committee in both Arts. II (g) and II (f). Finally, the fact that the parties later recognized some errors in that study and attempted to rectify them through negotiation does not, in my judgment, change the meaning of the Compact itself. Accordingly, I would sustain the objections of the State of Texas.

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in Santa Fe, New Mexico, on December 3, 1948, and which are included in the Minutes of that meeting."

Reporter's Note

Orders commencing with May 12, 1980, begin with page 930. The preceding orders in 446 U. S., from April 21, through April 29, 1980, were reported in Part 1, at 901–930. These page numbers are the same as they will be in the bound volume, thus making the *permanent* citations available upon publication of the preliminary prints of the United States Reports.

No. 79-6014. HERNANDEZ *v.* ELIO M. ROSSY, INC., ET AL., 445 U. S. 933. Petition for rehearing denied.

APRIL 29, 1980

*Miscellaneous Order**

MAY 12, 1980

Appointment of Chief Deputy Clerk

It is ordered that Alexander L. Stevas be, and he is hereby, appointed Chief Deputy Clerk of this Court, effective Monday, June 9, 1980.

Affirmed on Appeal

No. 79-6108. ARMOUR ET AL. *v.* NIX ET AL. Affirmed on appeal from D. C. N. D. Ga. MR. JUSTICE BRENNAN, MR. JUSTICE BLACKMUN, and MR. JUSTICE STEVENS would dismiss the appeal for want of jurisdiction. MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

Appeals Dismissed

No. 79-492. FUNGAROLI *v.* FUNGAROLI. Ct. App. N. C. [Probable jurisdiction noted, 444 U. S. 1031.†] Appeal dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. MR. JUSTICE STEWART would grant certiorari. Reported below: 40 N. C. App. 397, 252 S. E. 2d 849.

No. 79-1233. STUCKEY'S STORES, INC. *v.* O'CHESKEY, CHIEF HIGHWAY ADMINISTRATOR OF NEW MEXICO. Appeal from Sup. Ct. N. M. dismissed for want of substantial federal question. Reported below: 93 N. M. 312, 600 P. 2d 258.

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*For the Court's order prescribing amendments to the Federal Rules of Civil Procedure, see *post*, p. 997.

†[REPORTER'S NOTE: The case was argued April 16, 1980. *John F. Morrow* argued the cause and filed a brief for appellant. *B. Ervin Brown II* argued the cause and filed a brief for appellee.]

No. 79-1453. BREWSTER *v.* CITY OF CARBONDALE. Appeal from Sup. Ct. Ill. dismissed for want of substantial federal question. Reported below: 78 Ill. 2d 111, 398 N. E. 2d 829.

No. 79-1474. AMERICAN AMUSEMENT CO., INC., ET AL. *v.* DEPARTMENT OF REVENUE OF MICHIGAN. Appeal from Ct. App. Mich. dismissed for want of substantial federal question. Reported below: 91 Mich. App. 573, 283 N. W. 2d 803.

No. 79-1495. SAPPINGTON *v.* BECKERT, JUDGE, ET AL. Appeal from Super. Ct. Pa. dismissed for want of substantial federal question.

No. 79-1497. ALFREE *v.* ALFREE. Appeal from Sup. Ct. Del. dismissed for want of substantial federal question. Reported below: 410 A. 2d 161.

No. 79-1325. CLARK *v.* INDIANA ET AL. Appeal from Sup. Ct. Ind. dismissed for want of substantial federal question. MR. JUSTICE BRENNAN and MR. JUSTICE BLACKMUN would note probable jurisdiction and set case for oral argument. Reported below: — Ind. —, 397 N. E. 2d 580.

No. 79-6237. RODRIGUES *v.* CITY OF SPARKS, NEVADA, ET AL. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 79-6261. JAFFER *v.* CITY OF MIAMI ET AL. Appeal from Sup. Ct. Fla. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 381 So. 2d 764.

Certiorari Granted—Vacated and Remanded

No. 77-6595. WILLIAMS *v.* NORTH CAROLINA. Sup. Ct. N. C. Motion of petitioner for leave to proceed *in forma pau-*

peris and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Baldasar* v. *Illinois, ante,* p. 222. Reported below: 294 N. C. 187, 241 S. E. 2d 73.

No. 79-1465. CALIFORNIA *v.* BRAESEKE. Sup. Ct. Cal. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded to consider whether its judgment is based on federal or state constitutional grounds, or both. *California* v. *Krivda,* 409 U. S. 33 (1972). Reported below: 25 Cal. 3d 691, 602 P. 2d 384.

No. 79-6149. SCHEER *v.* UNITED STATES. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of the position presently asserted by the Solicitor General in his memorandum filed April 15, 1980. THE CHIEF JUSTICE, MR. JUSTICE WHITE, and MR. JUSTICE REHNQUIST dissent. Reported below: 614 F. 2d 771.

No. 79-6182. GRAHAM *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Payton* v. *New York,* 445 U. S. 573 (1980). Reported below: 69 App. Div. 2d 544, 419 N. Y. S. 2d 290.

Miscellaneous Orders

No. A-886. MELECHINSKY *v.* UNITED STATES. Application for stay of execution of sentence, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. A-890. WALTHAL *v.* TEXAS. Application for stay of mandate of the Court of Criminal Appeals of Texas, addressed to MR. JUSTICE MARSHALL and referred to the Court, denied.

No. D-182. IN RE DISBARMENT OF BLONDES. Disbarment entered. [For earlier order herein, see 444 U. S. 977.]

No. D-191. IN RE DISBARMENT OF SCHILPP. It is ordered that Thomas F. Schilpp, of Lansdowne, Pa., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-192. IN RE DISBARMENT OF CRUMPACKER. It is ordered that Owen W. Crumpacker, of Valparaiso, Ind., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 78-1851. HARRIS *v.* H. SCHULDT REEDEREI, 444 U. S. 839. Respondent is invited to file a response to the petition for rehearing within 30 days.

No. 79-1362. AMERICAN FIDELITY LIFE INSURANCE CO. ET AL. *v.* ALABAMA FARM BUREAU MUTUAL CASUALTY INSURANCE CO., INC. C. A. 5th Cir.;

No. 79-1406. CITY OF LOS ANGELES *v.* GREATER WESTCHESTER HOMEOWNERS ASSN. ET AL. Sup. Ct. Cal.;

No. 79-1423. WESTERN & SOUTHERN LIFE INSURANCE CO. *v.* STATE BOARD OF EQUALIZATION OF CALIFORNIA. Appeal from Ct. App. Cal., 2d App. Dist.; and

No. 79-1469. COSE *v.* COSE. Sup. Ct. Alaska. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 79-5601. GOMEZ *v.* TOLEDO. C. A. 1st Cir. [Certiorari granted, 444 U. S. 1031.] Motion of petitioner for leave to file a supplemental brief after argument granted.

No. 79-5962. VINCENT *v.* TEXAS. Ct. Crim. App. Tex. [Probable jurisdiction postponed, 445 U. S. 960.] Motion for appointment of counsel granted, and it is ordered that Robert D. McCutcheon, Esquire, of Perryton, Tex., be appointed to serve as counsel for the appellant in this case.

No. 79-6278. PLUMLEE *v.* FIELDS, WARDEN;

No. 79-6417. TURNER *v.* GRAHAM, GOVERNOR OF FLORIDA, ET AL.; and

No. 79-6421. CLEVELAND *v.* WARDEN, MARYLAND PENITENTIARY. Motions for leave to file petitions for writs of habeas corpus denied.

Certiorari Granted

No. 79-512. SCINDIA STEAM NAVIGATION CO., LTD. *v.* SANTOS ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 598 F. 2d 480.

No. 79-1420. FIRESTONE TIRE & RUBBER CO. *v.* RISJORD. C. A. 8th Cir. Certiorari granted. Reported below: 612 F. 2d 377.

No. 79-1515. UNITED STATES *v.* SWANK ET AL. Ct. Cl. Certiorari granted. Reported below: — Ct. Cl. —, 602 F. 2d 348.

No. 79-1176. CITY OF MEMPHIS ET AL. *v.* GREENE ET AL. C. A. 6th Cir. Motion of Hein Park Civic Assn. for leave to file a brief as *amicus curiae* granted. Motion of respondents for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 610 F. 2d 395.

Certiorari Denied. (See also Nos. 79-492, 79-6237, and 79-6261, *supra.*)

No. 79-989. FREDERICK JOSEPH G. *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied. Reported below: 96 Cal. App. 3d 353, 157 Cal. Rptr. 769.

No. 79-1092. ABERCROMBIE *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 375 So. 2d 1170.

No. 79-1147. APPALACHIAN POWER CO. ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: — Ct. Cl. —, 607 F. 2d 935.

No. 79-1164. LICAVOLI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 604 F. 2d 613.

No. 79-1184. HOLLOWAY ET AL. *v.* UNITED STATES; and
No. 79-1194. SPIEGEL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 604 F. 2d 961.

No. 79-1187. FOX *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 612 F. 2d 575.

No. 79-1192. FOREST E. OLSON, INC., ET AL. *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE (CALIFORNIA, REAL PARTY IN INTEREST). Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 96 Cal. App. 3d 181, 157 Cal. Rptr. 628.

No. 79-1216. SYROVATKA ET UX. *v.* EHRLICH, DIRECTOR, DEPARTMENT OF PUBLIC WELFARE OF NEBRASKA, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 608 F. 2d 307.

No. 79-1221. GRZYWACZ ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 603 F. 2d 682.

No. 79-1235. NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, INC., DBA INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS *v.* CENTRAL BROADCASTING CORP. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: — Mass. —, 396 N. E. 2d 996.

No. 79-1238. BRIGGS *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 608 F. 2d 1374.

No. 79-1241. ASHLAND OIL, INC. *v.* PHILLIPS PETROLEUM CO. ET AL.; and

No. 79-1250. PHILLIPS PETROLEUM CO. *v.* ASHLAND OIL, INC., ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 607 F. 2d 335.

No. 79-1244. FALKOWSKI *v.* PERRY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 599 F. 2d 1051.

No. 79-1251. HARRIS, KERR, FORSTER & CO. *v.* SPECTRUM FINANCIAL COS. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 608 F. 2d 377.

No. 79-1282. PATRICK PETROLEUM CORPORATION OF MICHIGAN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 608 F. 2d 542.

No. 79-1296. COMO-FALCON COMMUNITY COALITION, INC. *v.* UNITED STATES DEPARTMENT OF LABOR ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 609 F. 2d 342.

No. 79-1297. VICTORSON ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 607 F. 2d 1010.

No. 79-1304. CITY OF NEW YORK *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1292.

No. 79-1305. LUTHERAN MUTUAL LIFE INSURANCE CO. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: — Ct. Cl. —, 602 F. 2d 328.

No. 79-1310. LARSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 612 F. 2d 1301.

No. 79-1311. CHUTE, ADMINISTRATOR, ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 610 F. 2d 7.

No. 79-1316. ESTELLE, CORRECTIONS DIRECTOR *v.* PASSMORE; and

No. 79-6138. PASSMORE *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 594 F. 2d 115 and 607 F. 2d 662.

No. 79-1321. JAIN *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d Cir. Certiorari denied. Reported below: 612 F. 2d 683.

No. 79-1323. QUINONES ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 613 F. 2d 47.

No. 79-1326. HESS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1292.

No. 79-1334. HAYDEN ET UX. *v.* NATIONAL SECURITY AGENCY/CENTRAL SECURITY SERVICE ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 197 U. S. App. D. C. 224, 608 F. 2d 1381.

No. 79-1365. DEPARTMENT OF ENERGY ET AL. *v.* MOBIL OIL CORP. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 610 F. 2d 796.

No. 79-1391. BAGNELL *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 79-1398. LERMAN *v.* INHABITANTS OF THE CITY OF PORTLAND. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 406 A. 2d 903.

No. 79-1402. YOUNG ET AL. *v.* DISTINCTIVE DEVICES, INC. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 70 App. Div. 2d 792, 415 N. Y. S. 2d 917.

No. 79-1403. PEREZ *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 590 S. W. 2d 474.

No. 79-1407. GRIFFIN *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 43 Md. App. 744.

No. 79–1409. LUETKEMEYER *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 74 Ill. App. 3d 708, 393 N. E. 2d 117.

No. 79–1411. BUSHONG *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: — Ark. —, 589 S. W. 2d 559.

No. 79–1412. CROSMAN *v.* LONG ISLAND UNIVERSITY. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 70 App. Div. 2d 650, 417 N. Y. S. 2d 207.

No. 79–1417. BARTHOLOMEW ET AL. *v.* VIRGINIA CHIROPRACTORS ASSN., INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 612 F. 2d 812.

No. 79–1418. GLOBE PAPER CO. *v.* LINDLEY, TAX COMMISSIONER OF OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied. Reported below: — Ohio App. 2d —, — N. E. 2d —.

No. 79–1421. DESIGN & MANUFACTURING CORP. *v.* INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 608 F. 2d 767.

No. 79–1440. ADAMIAN *v.* LOMBARDI ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 608 F. 2d 1224.

No. 79–1441. FORAKER *v.* OHIO. Ct. App. Ohio, Licking County. Certiorari denied.

No. 79–1449. KENTUCKY STATE BOARD FOR ELEMENTARY AND SECONDARY EDUCATION ET AL. *v.* RUDASILL ET AL. Sup. Ct. Ky. Certiorari denied. Reported below: 589 S. W. 2d 877.

No. 79–1461. MEYER *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 43 Md. App. 427, 406 A. 2d 427.

No. 79–1470. LEHMAN BROTHERS INC. *v.* LILLY ET AL.; and

No. 79–1471. STATE TEACHERS RETIREMENT SYSTEM OF OHIO PENSION FUND *v.* LILLY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 608 F. 2d 55.

No. 79–1472. CASHIN *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied.

No. 79–1475. HARRIGILL *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 381 So. 2d 619.

No. 79–1477. DIMAURO *v.* PAVIA ET AL., DBA PAVIA & HARCOURT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1286.

No. 79–1478. ELLIPSE CORP. *v.* FORD MOTOR CORP. C. A. 7th Cir. Certiorari denied. Reported below: 614 F. 2d 775.

No. 79–1518. DAVIS *v.* INTERNATIONAL UNION OF CHAUFFEURS, TEAMSTERS, WAREHOUSEMEN & HELPERS, LOCAL 135, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 624 F. 2d 1104.

No. 79–1520. FIELD ET AL. *v.* BROWN, SECRETARY OF DEFENSE, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 198 U. S. App. D. C. 39, 610 F. 2d 981.

No. 79–1531. LARKIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 605 F. 2d 1360 and 611 F. 2d 585.

No. 79–1536. ROMANO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 612 F. 2d 584.

No. 79–1546. LAYFIELD *v.* BILL HEARD CHEVROLET CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 607 F. 2d 1097.

No. 79–1564. KING *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 614 F. 2d 1164.

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No. 79-1579. BECK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 109.

No. 79-1582. COLEMAN, AKA COLEMAN-BEY, ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 609 F. 2d 511.

No. 79-1585. TENCH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 615 F. 2d 1358.

No. 79-1589. SANTOS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 613 F. 2d 1205.

No. 79-1603. PEIFER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 615 F. 2d 1354.

No. 79-5839. HINES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 609 F. 2d 503.

No. 79-5948. PRESTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 608 F. 2d 626.

No. 79-5953. SPICER *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 79 Ill. 2d 173, 402 N. E. 2d 169.

No. 79-5954. RUBIES ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 612 F. 2d 397.

No. 79-5969. CALLABRASS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 607 F. 2d 559.

No. 79-5980. YOUNG *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 407 A. 2d 517.

No. 79-5985. SALAAM *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 106.

No. 79-5996. PEERY *v.* SIELAFF, CORRECTIONS DIRECTOR, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 615 F. 2d 402.

No. 79-6002. PRADO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 609 F. 2d 603.

No. 79-6020. BROWN ET AL. *v.* SCHIFF ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 614 F. 2d 237.

No. 79-6033. WISCHNEWSKI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 609 F. 2d 1007.

No. 79-6037. ARMSTRONG *v.* MITCHELL, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 609 F. 2d 505.

No. 79-6049. REYNOLDS *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 298 N. C. 380, 259 S. E. 2d 843.

No. 79-6055. HEITMAN *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 589 S. W. 2d 249.

No. 79-6067. MCKETHAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 106.

No. 79-6073. GREEN *v.* SUMMERS. C. A. 4th Cir. Certiorari denied. Reported below: 610 F. 2d 810.

No. 79-6080. CHERRY *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 298 N. C. 86, 257 S. E. 2d 551.

No. 79-6093. RILEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 615 F. 2d 1363.

No. 79-6129. PAQUETTE *v.* HENDERSON, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 610 F. 2d 807.

No. 79-6142. PAUL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 614 F. 2d 115.

No. 79-6163. LEWIS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 79-6176. ENSMINGER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. Reported below: 610 F. 2d 189.

No. 79-6180. RAYSOR *v.* STERN, ADMINISTRATOR, NEW YORK STATE COMMISSION ON JUDICIAL CONDUCT, ET AL. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 68 App. Div. 2d 786, 418 N. Y. S. 2d 713.

No. 79-6191. BETANCOURT *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 590 S. W. 2d 487.

No. 79-6203. WERNERT *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 79-6228. WATERS *v.* NEW YORK; and
No. 79-6235. QUAMINA *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 49 N. Y. 2d 48, 399 N. E. 2d 1177.

No. 79-6232. SNYDER *v.* BLANKENSHIP, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 104.

No. 79-6240. ROSS *v.* JONES, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 79-6244. HENRYHAND *v.* SMITH, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 79-6247. FRENCH *v.* BUTTERWORTH, CORRECTIONAL SUPERINTENDENT. C. A. 1st Cir. Certiorari denied. Reported below: 614 F. 2d 23.

No. 79-6248. MA *v.* HAZELWOOD ET AL. Ct. App. Wis. Certiorari denied. Reported below: 90 Wis. 2d 864, 280 N. W. 2d 786.

No. 79-6249. HOOTEN *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 245 Ga. 250, 264 S. E. 2d 192.

No. 79-6257. TURNAGE *v.* MCCARTHY, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 610 F. 2d 822.

No. 79-6258. WILEY *v.* NATIONAL COLLEGIATE ATHLETIC ASSN. ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 612 F. 2d 473.

No. 79-6260. WALKER *v.* NEWPORT NEWS SHIPBUILDING & DRY DOCK CO. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 107.

No. 79-6262. JAFFER *v.* ONGIE, CLERK, CITY OF MIAMI. Sup. Ct. Fla. Certiorari denied. Reported below: 377 So. 2d 169.

No. 79-6264. CHRISTENSEN *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 10th Cir. Certiorari denied.

No. 79-6266. MORGAN *v.* DISTRICT OF COLUMBIA ET AL. C. A. D. C. Cir. Certiorari denied.

No. 79-6270. WILLIAMS *v.* DALSHEIM, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1293.

No. 79-6271. JENKINS *v.* BORDENKIRCHER, PENITENTIARY SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 611 F. 2d 162.

No. 79-6275. PRICE *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 60 Ohio St. 2d 136, 398 N. E. 2d 772.

No. 79-6280. FELTINGTON *v.* MOVING PICTURE MACHINE OPERATORS UNION LOCAL 306 OF I.A.T.S.E. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 605 F. 2d 1251.

No. 79-6282. MOORE *v.* NORTH DAKOTA. Sup. Ct. N. D. Certiorari denied. Reported below: 286 N. W. 2d 274.

No. 79-6287. PORTER *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied. Reported below: — Ohio App. 2d —, — N. E. 2d —.

No. 79-6288. CLARK *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: — Pa. Super. —, 411 A. 2d 800.

No. 79-6289. JACOBS *v.* REDMAN, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: 616 F. 2d 1251.

No. 79-6291. DEMARBIEX *v.* ARIZONA. Super. Ct. Ariz., County of Maricopa. Certiorari denied.

No. 79-6292. GUZMAN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 79-6293. LUCK *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 588 S. W. 2d 371.

No. 79-6294. MCDANIEL *v.* GUNN, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 614 F. 2d 777.

No. 79-6298. DIOQUINO *v.* WORKERS' COMPENSATION APPEALS BOARD ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 79-6303. TILLMAN *v.* FAUVER, CORRECTION COMMISSIONER, ET AL. C. A. 3d Cir. Certiorari denied.

No. 79-6310. PRENZLER *v.* PIKE ET AL. Sup. Ct. Cal. Certiorari denied.

No. 79-6315. CHEEK *v.* BATES. C. A. 1st Cir. Certiorari denied. Reported below: 615 F. 2d 559.

No. 79-6354. PICKING *v.* HUGHES, GOVERNOR OF MARYLAND, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 607 F. 2d 1002.

No. 79-6364. GUANAJUATO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 113.

No. 79-6368. WALKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 613 F. 2d 1349.

No. 79-6369. SAUNDERS-EL *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied.

No. 79-6371. GOSNELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 609 F. 2d 1007.

No. 79-6375. MALLOY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 79-6378. VARKONYI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 611 F. 2d 84.

No. 79-6388. DEJEAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 613 F. 2d 1356.

No. 79-6391. BROWN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 79-6397. CAMERON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 613 F. 2d 313.

No. 79-6398. BURRUS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 111.

No. 79-6406. JONES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 614 F. 2d 80.

No. 79-6411. MEARS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 614 F. 2d 1175.

No. 79-6418. PLEXICO *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 79-6424. BROWN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 618 F. 2d 117.

No. 79-6426. COLVIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 614 F. 2d 44.

No. 79-1200. OREGON *v.* HAYNES. Sup. Ct. Ore. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 288 Ore. 59, 602 P. 2d 272.

No. 79-1303. CHICAGO TRANSIT AUTHORITY *v.* GOLDSCHMIDT, SECRETARY OF TRANSPORTATION, ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 607 F. 2d 1284.

No. 79-1416. RANDALL *v.* COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSN. Sup. Ct. Iowa. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 285 N. W. 2d 161.

No. 79-6207. SPRADLIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 615 F. 2d 1358.

No. 79-1428. A. H. ROBINS CO., INC., ET AL. *v.* ROSS ET AL. C. A. 2d Cir. Motions of American Institute of Certified Public Accountants and Merrill Lynch, Pierce, Fenner & Smith, Inc., et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of these motions and this petition. Reported below: 607 F. 2d 545.

No. 79-1439. REICH ET AL. *v.* REED TOOL CO. Ct. Civ. App. Tex., 5th Sup. Jud. Dist. Petition for writ of certiorari denied as untimely filed. Reported below: 582 S. W. 2d 549.

No. 79-1450. CHAPMAN *v.* CITY OF TALLMADGE. Sup. Ct. Ohio. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL would grant certiorari and reverse the conviction.

No. 79-6029. THORNE *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE STEWART would grant certiorari.

No. 79-6188. MOORE *v.* ZANT, WARDEN. Super. Ct. Ga., Butts County. Certiorari denied.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

Rehearing Denied

No. 78-904. DEPOSIT GUARANTY NATIONAL BANK OF JACKSON, MISSISSIPPI *v.* ROPER ET AL., 445 U. S. 326;

No. 78-1472. COSTLE, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY *v.* PACIFIC LEGAL FOUNDATION ET AL., 445 U. S. 198;

No. 78-1588. VANCE ET AL. *v.* UNIVERSAL AMUSEMENT CO., INC., ET AL., 445 U. S. 308;

No. 79-812. OSMOSE WOOD PRESERVING CO. OF AMERICA, INC., ET AL. *v.* CITY OF LOS ANGELES, 445 U. S. 950;

No. 79-1031. SOUTHWEST TEXAS METHODIST HOSPITAL *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, 445 U. S. 928;

No. 79-1143. RINGLING BROS.-BARNUM & BAILEY COMBINED SHOWS, INC. *v.* MIKOS, PROPERTY APPRAISER OF SARASOTA COUNTY, FLORIDA, ET AL., 445 U. S. 939;

No. 79-1298. UNKNOWN NAMED CHILDREN UNBORN AND BORN ALIVE *v.* GREENE, U. S. DISTRICT JUDGE, 445 U. S. 941;

No. 79-5662. FEASTER *v.* MARYLAND, 445 U. S. 917;

No. 79-5820. KLOBUCHIR *v.* PENNSYLVANIA, 445 U. S. 952;

No. 79-6028. LOCKETT *v.* SOUTH CENTRAL BELL TELEPHONE CO., 445 U. S. 944; and

No. 79-6036. FROEMBGEN *v.* UNITED STATES, 445 U. S. 933. Petitions for rehearing denied.

No. 79-6088. PROSAK *v.* BOEING CO. ET AL., 445 U. S. 934; and

No. 79-6103. CAMPBELL *v.* UNITED STATES, 445 U. S. 945. Petitions for rehearing denied.

MAY 15, 1980

Dismissal Under Rule 60

No. 79-6307. JOHNSON *v.* WASHINGTON. Sup. Ct. Wash. Certiorari dismissed under this Court's Rule 60. Reported below: 92 Wash. 2d 671, 600 P. 2d 1249.

MAY 19, 1980

Appeals Dismissed

No. 79-1169. BERGER *v.* BERGER. Appeal from Ct. App. Ohio, Cuyahoga County, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 79-1508. BROWN *v.* UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, ET AL. Appeal from C. A. 7th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 614 F. 2d 774.

No. 79-6305. DI FALCO *v.* COMMISSIONER OF INTERNAL REVENUE. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 79-6328. PRENZLER *v.* PIKE ET AL. Appeal from Ct. App. Cal., 4th App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 79–1434. MANDEL ET AL. *v.* NEW YORK. Appeal from Ct. App. N. Y. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 48 N. Y. 2d 952, 401 N. E. 2d 185.

No. 79–1513. DENGLER *v.* ATTORNEY GENERAL OF MINNESOTA. Appeal from Sup. Ct. Minn. dismissed for want of substantial federal question. Reported below: 287 N. W. 2d 637.

Certiorari Granted—Vacated and Remanded

No. 79–1156. MILLER, SECRETARY OF THE TREASURY, ET AL. *v.* CASTLEWOOD INTERNATIONAL CORP. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97 (1980). Reported below: 596 F. 2d 638.

Miscellaneous Orders

No. A–969. ANDREWS *v.* MORRIS, WARDEN. Sup. Ct. Utah. Application for stay of execution of sentence of death, presented to MR. JUSTICE WHITE, and by him referred to the Court, granted pending the timely filing and disposition of a petition for writ of certiorari.

No. 79–1738. NIXON *v.* FITZGERALD. C. A. D. C. Cir. Motion of petitioner to expedite consideration of the petition for writ of certiorari denied. MR. JUSTICE REHNQUIST took no part in the consideration or decision of this motion.

No. A–947 (79–1752). ADAMS ET AL. *v.* UNITED STATES ET AL. Application for stay of judgment of the United States Court of Appeals for the Eighth Circuit, addressed to MR. JUSTICE REHNQUIST and referred to the Court, denied.

No. A-951 (79-1763). CHLORINE INSTITUTE, INC., ET AL. *v.* OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION ET AL. Application for stay of mandate of the United States Court of Appeals for the Fifth Circuit, presented to MR. JUSTICE POWELL, and by him referred to the Court, granted except as to the employers' obligation to provide respirators to employees exposed to chlorine concentrations in excess of 1 ppm, pending disposition of the petition for writ of certiorari.

No. 79-6353. SIMON *v.* UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT;

No. 79-6392. SIMON *v.* UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT;

No. 79-6399. DELESPINE *v.* UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT; and

No. 79-6465. PAUL *v.* HERMANSDORFER, U. S. DISTRICT JUDGE. Motions for leave to file petitions for writs of mandamus denied.

No. 79-1645. CANTER *v.* UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ET AL. (UNITED STATES, REAL PARTY IN INTEREST). Motion for leave to file petition for writ of mandamus and/or other relief denied.

Probable Jurisdiction Noted

No. 79-1320. KASSEL, DIRECTOR OF TRANSPORTATION, ET AL. *v.* CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE. Appeal from C. A. 8th Cir. Probable jurisdiction noted. Reported below: 612 F. 2d 1064.

Certiorari Granted

No. 79-5269. EDWARDS *v.* ARIZONA. Sup. Ct. Ariz. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1 presented by the petition. Reported below: 122 Ariz. 206, 594 P. 2d 72.

No. 79–880. KISSINGER ET AL. *v.* HALPERIN ET AL. C. A. D. C. Cir. Certiorari granted. MR. JUSTICE REHNQUIST took no part in the consideration or decision of this petition. Reported below: 196 U. S. App. D. C. 285, 606 F. 2d 1192.

No. 79–1336. CHICAGO & NORTH WESTERN TRANSPORTATION CO. *v.* KALO BRICK & TILE CO. Ct. App. Iowa. Certiorari granted. Reported below: 288 N. W. 2d 907.

No. 79–6027. WOOD ET AL. *v.* GEORGIA. Ct. App. Ga. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 150 Ga. App. 582, 258 S. E. 2d 171.

Certiorari Denied. (See also Nos. 79–1169, 79–1434, 79–1508, 79–6305, and 79–6328, *supra.*)

No. 78–492. NEVETT ET AL. *v.* SIDES, MAYOR OF FAIRFIELD, ALABAMA, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 571 F. 2d 209.

No. 79–1175. WM. T. BURNETT & CO., INC. *v.* GENERAL TIRE & RUBBER CO. C. A. 4th Cir. Certiorari denied. Reported below: — F. 2d —.

No. 79–1181. HERNANDEZ *v.* FLORIDA; and

No. 79–1210. EDER ET AL. *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 369 So. 2d 76.

No. 79–1193. ARANDA ET AL. *v.* VAN SICKLE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 600 F. 2d 1267.

No. 79–1217. UZZELL ET AL. *v.* FRIDAY ET AL. C. A. 4th Cir. Certiorari denied.

No. 79–1245. ACAVINO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 612 F. 2d 575.

No. 79–1253. OPERATING ENGINEERS PENSION TRUST *v.* LIONBERGER. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 97 Cal. App. 3d 56, 158 Cal. Rptr. 535.

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No. 79-1262. General Motors Corp. et al. *v.* Costle, Administrator, Environmental Protection Agency, et al. C. A. D. C. Cir. Certiorari denied. Reported below: — U. S. App. D. C. —, 627 F. 2d 1095.

No. 79-1276. Bucchino *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 606 F. 2d 590.

No. 79-1318. Liberti et ux. *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 616 F. 2d 34.

No. 79-1345. Korman *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 614 F. 2d 541.

No. 79-1346. Munoz *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 612 F. 2d 582.

No. 79-1359. West *v.* United States et al. C. A. 10th Cir. Certiorari denied. Reported below: 612 F. 2d 1224.

No. 79-1393. Courtwright et al. *v.* Equal Employment Opportunity Commission et al. C. A. 10th Cir. Certiorari denied. Reported below: 611 F. 2d 795.

No. 79-1473. Mendoza-Alvarez *v.* United States et al. C. A. 9th Cir. Certiorari denied. Reported below: — F. 2d —.

No. 79-1486. Hare *v.* Alabama. Ct. Crim. App. Ala. Certiorari denied. Reported below: 377 So. 2d 1143.

No. 79-1492. Moore *v.* Minnesota et al. C. A. 8th Cir. Certiorari denied. Reported below: 620 F. 2d 307.

No. 79-1505. Drebin et al. *v.* Russell, Trustee, et al. C. A. 9th Cir. Certiorari denied. Reported below: 612 F. 2d 1123.

No. 79-1506. Laguta et al. *v.* Ohio. Ct. App. Ohio, Summit County. Certiorari denied. Reported below: — Ohio App. 2d —, — N. E. 2d —.

No. 79–1510. TUCKER *v.* ANDERSON. C. A. 2d Cir. Certiorari denied.

No. 79–1511. ARCHER *v.* AIRLINE PILOTS ASSN., INTERNATIONAL. C. A. 9th Cir. Certiorari denied. Reported below: 609 F. 2d 934.

No. 79–1512. WESTOVER ET VIR *v.* TOLEDO. Sup. Ct. Fla. Certiorari denied. Reported below: 377 So. 2d 171.

No. 79–1533. W. R. GRACE & CO., INC. *v.* E-T INDUSTRIES, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 608 F. 2d 1214.

No. 79–1569. YANKTON SIOUX TRIBE *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: — Ct. Cl. —, 616 F. 2d 485.

No. 79–1573. BERGEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 612 F. 2d 443.

No. 79–1578. CALDWELL ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 611 F. 2d 881.

No. 79–1591. RODGERS *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 594 S. W. 2d 273.

No. 79–1609. HANIGAN ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 79–1632. PROVENZANO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 615 F. 2d 37.

No. 79–1633. MARINO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 622 F. 2d 576.

No. 79–1634. STARR ET AL *v.* NIXON, FORMER PRESIDENT OF THE UNITED STATES, ET AL. C. A. 10th Cir. Certiorari denied.

No. 79–1638. HOGBERG *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 114.

No. 79-1648. THOMAS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 114.

No. 79-1651. GARNER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 106.

No. 79-6016. JONES *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 244 Ga. 689, 261 S. E. 2d 629.

No. 79-6031. MOORE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 198 U. S. App. D. C. 296, 613 F. 2d 1029.

No. 79-6058. JOHNSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 612 F. 2d 1311.

No. 79-6123. KAMPILES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 609 F. 2d 1233.

No. 79-6193. ALMENDAREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 614 F. 2d 777.

No. 79-6204. QUATERMAIN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 613 F. 2d 38.

No. 79-6265. CHIODO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 620 F. 2d 286.

No. 79-6274. MOORMAN *v.* DAVIS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 605 F. 2d 1203.

No. 79-6318. MCMILLON *v.* PADGETT, JUDGE, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 613 F. 2d 313.

No. 79-6319. WILLIAMSON *v.* HINTON, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 107.

No. 79-6323. CAVER *v.* HILTON, PRISON SUPERINTENDENT, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 615 F. 2d 1352.

No. 79-6324. CEPEDA *v.* HENDERSON, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 79-6334. ATTWELL *v.* UNDERCOFLER, CHIEF JUSTICE, SUPREME COURT OF GEORGIA, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 608 F. 2d 228.

No. 79-6343. STOREY *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: — Mass. —, 391 N. E. 2d 898.

No. 79-6344. HEBERT *v.* SMITH, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 615 F. 2d 1360.

No. 79-6389. DUNN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 105.

No. 79-6415. IRVIN *v.* CATALANO, JUDGE, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 617 F. 2d 603.

No. 79-6427. DOBSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 609 F. 2d 840.

No. 79-6428. BROADWAY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 613 F. 2d 1349.

No. 79-6430. DECAMBRA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 615 F. 2d 1367.

No. 79-6433. LEIB *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 198 U. S. App. D. C. 92, 612 F. 2d 587.

No. 79-6435. HAWKINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 614 F. 2d 85.

No. 79-6437. COLEMAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 620 F. 2d 290.

No. 79-6450. YOUNG *v.* BALTIMORE COUNTY BOARD OF EDUCATION ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 610 F. 2d 815.

No. 79-6463. SHORT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 617 F. 2d 604.

No. 79-6469. WEATHERS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 618 F. 2d 663.

No. 79-907. INGRAM, SECRETARY, DEPARTMENT OF HUMAN SERVICES OF NEW MEXICO *v.* NOLAN. C. A. 10th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 603 F. 2d 810.

No. 79-1105. MOUNTAIN LAUREL RACING, INC., ET AL. *v.* FITZGERALD. C. A. 3d Cir. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 607 F. 2d 589.

No. 79-1222. AMERICAN GEMS, INC. *v.* MESSER, ADMINISTRATRIX. C. A. 4th Cir. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 612 F. 2d 1367.

No. 79-1228. IVY ET AL. *v.* SECURITY BARGE LINES, INC. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE WHITE would grant certiorari. Reported below: 606 F. 2d 524.

No. 79-1482. DOCARMO, ADMINISTRATOR *v.* F. V. PILGRIM I CORP. C. A. 1st Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE WHITE would grant certiorari. Reported below: 612 F. 2d 11.

No. 79-6217. WARREN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE WHITE would grant certiorari. Reported below: 578 F. 2d 1058 and 612 F. 2d 887.

No. 79-1476. STARLEY *v.* CITY OF BIRMINGHAM. Ct. Crim. App. Ala. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL would grant certiorari and reverse the conviction. Reported below: 377 So. 2d 1131.

No. 79–1258. CONFEDERATION OF IRANIAN STUDENTS *v.* CIVILETTI, ATTORNEY GENERAL; and

No. 79–1270. NARENJI ET AL. *v.* CIVILETTI, ATTORNEY GENERAL, ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE BRENNAN would grant certiorari. Reported below: — U. S. App. D. C. —, 617 F. 2d 745.

No. 79–1259. TORCH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL would grant certiorari and reverse the conviction. Reported below: 609 F. 2d 1088.

No. 79–1386. UNITED STATES POSTAL SERVICE *v.* UNITED PARCEL SERVICE, INC., ET AL. C. A. 3d Cir. Certiorari denied. MR. JUSTICE WHITE and MR. JUSTICE POWELL would grant certiorari. Reported below: 604 F. 2d 1370.

No. 79–1466. BLACKBURN, WARDEN *v.* MONROE. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. MR. JUSTICE WHITE and MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 607 F. 2d 148.

No. 79–1491. SEYMOUR ET AL., TRUSTEES *v.* COUGHLIN CO. C. A. 9th Cir. Motion of International Union of Operating Engineers, Local Union No. 12, for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 609 F. 2d 346.

No. 79–6177. RIVERA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 618 F. 2d 93.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

In December 1976 petitioner was indicted for possession with intent to distribute one kilogram of heroin, in violation of 21 U. S. C. § 841 (a)(1). He was tried, convicted, and sentenced to 12 years in prison and a 3-year special parole term. Subsequently, petitioner was indicted for con-

spiracy to distribute the same kilogram of heroin, in violation of 21 U. S. C. § 846. He pleaded guilty to the second charge and was sentenced to 14 years in prison and a 3-year special parole term to be served concurrently with the first sentence. Petitioner challenged the second conviction under 28 U. S. C. § 2255, alleging that it was barred by the Double Jeopardy Clause. The District Court denied relief, and the Court of Appeals affirmed.

Indictments for conspiracy and for the underlying substantive offense are indictments arising out of the same criminal transaction. *Dempsey* v. *United States*, 423 U. S. 1079 (1976) (BRENNAN, J., dissenting); *Ciuzio* v. *United States*, 416 U. S. 995 (1974) (BRENNAN, J., dissenting). Therefore, I would grant the petition for certiorari and remand with directions that the writ of habeas corpus be granted and the second conviction vacated. I adhere to my view that the Double Jeopardy Clause requires prosecution in one proceeding, except in extremely limited circumstances not present here, of "all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction." *Ashe* v. *Swenson*, 397 U. S. 436, 453–454 (1970) (BRENNAN, J., concurring). See *Thompson* v. *Oklahoma*, 429 U. S. 1053 (1977) (BRENNAN, J., dissenting), and cases collected therein.

No. 79–6242. JERNIGAN *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 377 So. 2d 1222.

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

The New Orleans, La., police received an anonymous telephone call informing them that a black male wearing a yellow shirt and blue pants and armed with a handgun could be found sitting in Sander's Bar. A radio dispatch went out, and Officer Williams proceeded to the bar. Of the 10 or 12 persons in the bar, petitioner was the only one wearing a yellow shirt and blue pants. Officer Williams approached petitioner, directed him to stand, and frisked him. The

officer detected a gun in petitioner's pants pocket; he removed a .38-caliber revolver and arrested petitioner who was charged with violation of Louisiana law by possession of a firearm after having been previously convicted of a felony.

In sustaining the trial court's denial of petitioner's motion to suppress the gun as illegally seized, the Louisiana Supreme Court noted that the Fourth Amendment would render the evidence inadmissible if the officer did not have sufficient knowledge of facts and circumstances to amount to reasonable cause for an investigatory detention. The court also noted that *Adams* v. *Williams,* 407 U. S. 143 (1972), recognized that an informer's tip can provide a police officer with reasonable cause to detain and question a suspect. But the court noted further the difference between this case and *Adams,* for the narrow issue presented here was whether an informer's tip could provide reasonable cause if the tip was anonymous. According to the court, if the information received from the anonymous tipster carried enough indicia of reliability, such as specificity of the information and corroboration by independent police work, the anonymous tip was sufficient. Moreover, prompt police action was justified where the information would indicate an immediate and real danger to the public.

We have not directly decided whether an anonymous tip may furnish reasonable suspicion for a stop and frisk. We have emphasized the specificity of the information provided, the independent corroboration by the police officer, and the danger to the public. See, *e. g., Adams, supra; Draper* v. *United States,* 358 U. S. 307 (1959). But in the decided cases, these factors were not the only indicia of reliability. The informers in *Adams* and *Draper* were known to the officer and were known to have provided reliable information in the past. The same cannot be said of an anonymous tipster.

Arguably, the decision of the Louisiana Supreme Court is inconsistent with our prior cases which require that reason-

able suspicion be based on a sufficiently reliable informer's tip. I would grant certiorari for this reason and also because the reliability of an anonymous or unidentified tipster is an issue that has divided the Federal Courts of Appeals. Compare *United States* v. *McLeroy*, 584 F. 2d 746 (CA5 1978), and *United States* v. *Robinson*, 536 F. 2d 1298 (CA9 1976) (no reasonable suspicion), with *United States* v. *Hernandez*, 486 F. 2d 614 (CA7 1973) (*per curiam*) (reasonable suspicion), cert. denied, 415 U. S. 959 (1974). See also *United States* v. *Gorin*, 564 F. 2d 159 (CA4 1977), cert. denied, 434 U. S. 1080 (1978), and *United States* v. *Unverzagt*, 424 F. 2d 396 (CA8 1970) (identity of informer known but no proof of his reliability; reasonable suspicion found). The state courts are similarly divided. Accordingly, I dissent from the denial of certiorari.

Rehearing Denied

No. 79-5940. TURNER *v.* MITCHELL, WARDEN, 445 U. S. 966;

No. 79-6057. GRAY *v.* UNITED STATES, *ante*, p. 911;

No. 79-6092. LILLIBRIDGE ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE, 445 U. S. 967;

No. 79-6171. ATTWELL ET AL. *v.* LASALLE NATIONAL BANK ET AL., 445 U. S. 954;

No. 79-6178. BOALBEY *v.* KINDRED, *ante*, p. 912; and

No. 79-6186. NOE *v.* CIVILETTI, ATTORNEY GENERAL, ET AL., 445 U. S. 969. Petitions for rehearing denied.

MAY 22, 1980

Dismissals Under Rule 60

No. 78-1653. NORTH CAROLINA WILDLIFE RESOURCES COMMISSION ET AL. *v.* EASTERN BAND OF CHEROKEE INDIANS. C. A. 4th Cir. Certiorari dismissed under this Court's Rule 60. Reported below: 588 F. 2d 75.

No. 79-1237. PHILLIPS *v.* TEXAS. Appeal from Ct. Crim. App. Tex. dismissed under this Court's Rule 60. Reported below: 588 S. W. 2d 378.

Reporter's Note

The next page is purposely numbered 1311. Preceding in-chambers opinions were reported in Part 1, at 1301–1310. These page numbers are the same as they will be in the bound volume, thus making the *permanent* citations available upon publication of the preliminary prints of the **United States Reports**.

BLUM, COMMISSIONER OF NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES v. CALDWELL ET AL.

ON APPLICATION FOR STAY

No. A-946. Decided May 6, 1980

Application by the Commissioner of the New York Department of Social Services to stay, pending the filing and disposition of a petition for certiorari, the Court of Appeals' mandate affirming the District Court's preliminary injunction against enforcement of a New York statute limiting eligibility for Medicaid assistance to those medically needy persons who have not made a voluntary transfer of property for the purpose of qualifying for such assistance within 18 months prior to applying for Medicaid, is denied. Applicant has not satisfied her burden of showing, with respect to the risk of irreparable harm, that the balance of equities favors her as against respondent aged, blind, and disabled persons who were denied Medicaid under New York's "no transfer" rule, nor has she met her burden of showing that four Members of this Court would vote to grant certiorari.

MR. JUSTICE MARSHALL, Circuit Justice.

Applicant Barbara Blum, the Commissioner of the New York State Department of Social Services, seeks a stay of the mandate of the United States Court of Appeals for the Second Circuit pending filing and disposition of her petition for a writ of certiorari. The mandate of the Court of Appeals will issue on May 7, 1980, and that court has denied a motion for a stay. This application for a stay was filed on May 5, 1980. Oral argument was heard in chambers. For the reasons that follow, I deny the application for a stay.

I

This case involves medical assistance to the needy pursuant to the Medicaid program. Subchapter XIX of the Social Security Act, 42 U. S. C. §§ 1396–1396k, establishes the fed-

eral statutory guidelines which govern plans for medical assistance if a State chooses to participate in the Medicaid program. Any State which participates in Medicaid must extend medical benefits to all persons receiving supplemental security income (SSI) benefits under Subchapter XVI (Supplemental Security Income for the Aged, Blind, and Disabled), see 42 U. S. C. § 1396a (a)(10)(A). Such persons are known as the "categorically needy." The State may also provide medical assistance under Medicaid for persons "who would, except for income and resources, be eligible . . . to have paid with respect to them supplemental security income benefits under subchapter XVI of this chapter, and who have insufficient (as determined in accordance with comparable standards) income and resources to meet the costs of necessary medical and remedial care and services," 42 U. S. C. § 1396a (a)(10)(C)(i). Such persons are known as the "medically needy."

New York opted to participate in the Medicaid program and to provide Medicaid payments to the medically needy as well as the categorically needy. The State has imposed an eligibility requirement for those persons seeking to qualify as medically needy. New York Soc. Serv. Law § 366.1 (e) (McKinney Supp. 1979) limits eligibility to those persons who have not made "a voluntary transfer of property (i) for the purpose of qualifying for such [medical] assistance, or (ii) for the purpose of defeating any current or future right to recovery of medical assistance paid, or for the purpose of qualifying for, continuing eligibility for or increasing need for medical assistance." A transfer of property within 18 months prior to application for Medicaid is presumed to have been for the purpose of qualifying for medical assistance. Any such transfer results in the denial of Medicaid benefits. See also 18 N. Y. C. R. R. § 360.8 (1979). No such "no-transfer" rule applies to the categorically needy, since an applicant is allowed

to transfer property in order to qualify for SSI benefits. See 42 U. S. C. § 1382b (b).

Respondents are aged, blind, or disabled persons who would be eligible for SSI benefits but for their income and resources and who have been denied medical assistance benefits for the medically needy because they voluntarily transferred property prior to application for such benefits or while receiving such benefits. They filed suit in the Federal District Court for the Northern District of New York pursuant to 42 U. S. C. § 1983 to challenge N. Y. Soc. Serv. Law § 366.1 (e) (McKinney Supp. 1979) and 18 N. Y. C. R. R. § 360.8 as violative of due process, equal protection, and the Supremacy Clause. The District Court found jurisdiction under 28 U. S. C. § 1343 (3). The suit was certified by the District Court as a class action on behalf of all aged, blind, or disabled persons who have been denied or will in the future be denied medical assistance benefits for the medically needy in New York State on the basis of a transfer of assets in violation of Soc. Serv. Law § 366.1 (e) and 18 N. Y. C. R. R. § 360.8.

The District Court granted respondents' motion for a preliminary injunction. The court concluded first that there had been a sufficient showing by respondents of likelihood of success on the merits. The Social Security Act provides that if the State chooses to provide benefits to the medically needy, the State must make such assistance available to all persons who would, except for income and resources, be eligible for SSI benefits "and who have insufficient (as determined in accordance with *comparable* standards) income and resources to meet the costs of necessary medical and remedial care and services." 42 U. S. C. § 1396a (a)(10)(C)(i) (emphasis supplied). The Department of Health, Education, and Welfare (HEW) in its accompanying regulation has provided that a state agency "must not use requirements for determining eligibility [for Medicaid benefits] for optional coverage groups [such as the medically needy] that are . . .

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(2) For aged, blind and disabled individuals, more restrictive than those used under SSI. . . ." 42 CFR § 435.401 (c) (1979). Since under SSI an applicant may transfer assets voluntarily in order to become eligible, the District Court concluded that the more restrictive no-transfer rule of New York for the medically needy was in "apparent" conflict with federal law. The court noted that HEW officials had notified New York that its no-transfer rule violated federal requirements. The court therefore found that the respondents' likelihood of success was "strong." The District Court also concluded that the balance of harms weighed in favor of granting the injunction, because "the very survival of these individuals and those class members in similar situations is threatened by a denial of medical assistance benefits during the pendency of these actions."

The preliminary injunction was entered by the District Court on December 3, 1979. Pursuant to a stipulation by the parties, the Court of Appeals entered a temporary stay of the injunction on January 3, 1980. On April 16, 1980, the Court of Appeals affirmed the grant of the preliminary injunction, "substantially for the reasons stated by Judge Munson." The Court of Appeals noted that the only other Court of Appeals to address this issue reached the same result, see *Fabula* v. *Buck*, 598 F. 2d 869 (CA4 1979) (Maryland no-transfer rule). The New York Supreme Court, Appellate Division, has also found that Soc. Serv. Law § 366.1 (e) conflicts with the Social Security Act and therefore violates the Supremacy Clause, see *Scarpuzza* v. *Blum*, 73 App. Div. 2d 237, 426 N. Y. S. 2d 505 (1980). The Court of Appeals also noted that Congress is considering legislation to authorize States to impose a no-transfer rule for Medicaid benefits, which suggests that such a rule is not presently allowed. The Court of Appeals agreed with the District Court that the "balance of hardships . . . would tip decidedly toward [respondents] if relief were denied." The court also vacated its stay.

On April 30, 1980, the Court of Appeals denied a motion for a stay of the mandate pending filing of a petition for writ of certiorari.

II

Applicant states in her motion papers that she will argue in her petition for certiorari that Congress has not expressed any intention to pre-empt state no-transfer rules. Applicant will also argue that HEW regulation 42 CFR § 435.401 (c) (1979), interpreting the Social Security Act to prohibit the New York no-transfer rule, is beyond the authority of the agency.

The criteria for determining whether to grant a stay pending the filing and disposition of a petition for writ of certiorari are well established. First, the Circuit Justice must balance the equities to determine on which side the risk of irreparable harm weighs most heavily. *Holtzman* v. *Schlesinger*, 414 U. S. 1304, 1308–1309 (1973) (MARSHALL, J., in chambers); *Beame* v. *Friends of the Earth*, 434 U. S. 1310, 1312 (1977) (MARSHALL, J., in chambers). Second, if the balance of equities favors the applicant, the Circuit Justice must determine whether it is likely that four Members of this Court would vote to grant a writ of certiorari. *Holtzman* v. *Schlesinger*, *supra*, at 1310; *Beame* v. *Friends of the Earth*, *supra*, at 1312. The burden of persuasion on both these issues is on the applicant, *ibid.* That burden is particularly heavy here since the Court of Appeals has vacated its original stay and denied the motion for a new stay. Cf. *ibid.* (stay denied by District Court and Court of Appeals).

The applicant has not satisfied her burden in this case. Blum contends that compliance with the preliminary injunction will cost the State of New York "millions" of dollars. At oral argument on this application counsel for applicant estimated that the State will have to expend an additional $150 million per year in Medicaid benefits as a result of the deci-

sion below, but the economic harm to be considered on this stay application is only the additional expenditure during the time in which the petition for certiorari is pending. Such harm must be considerably less than $150 million.* On the other side of the balance are the life and health of the members of this class: persons who are aged, blind, or disabled and unable to provide for necessary medical care because of lack of resources. The District Court noted that some of the members of the class have already died since this suit was filed, and the denial of necessary medical benefits during the months pending filing and disposition of a petition for writ of certiorari could well result in the death or serious medical injury of members of this class. The balance of equities therefore weighs in favor of the respondents.

In addition, Blum has failed to carry her burden of showing that four Members of this Court would be likely to vote to grant a writ of certiorari. There is no conflict in the courts of appeals, but rather uniformity of decision in the two Circuits which have addressed the issue. The intermediate appellate court in New York is also in agreement with the decision below. The terms of the Social Security Act support the judgment of the Court of Appeals, and the agency responsible for administering the Act is in complete accord

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*New York entered into an agreement with HEW in 1973 whereby the Secretary of HEW determines the eligibility for medical assistance benefits of persons who are also eligible for SSI benefits. This eliminates the need for a separate medical assistance application and eligibility determination by New York State. Blum has notified the Secretary of HEW that New York will terminate the agreement in 120 days, as provided by the agreement, because of HEW's determination that the New York no-transfer rule violates federal eligibility requirements. Applicant cites the added administrative costs to New York of having to establish an eligibility agency of its own as an additional harm to be weighed in the balance on this stay application. The cancellation of the agreement, however, is a voluntary act by Blum, and the added burdens of that voluntary act should not weigh in the balance of equities here.

with the decision below. Finally, Congress is presently considering legislation to amend the Act on this very issue. Under the circumstances, it is not sufficiently likely that four Members of this Court would vote to grant a writ of certiorari to warrant issuing a stay of the mandate.

The application for a stay is denied.

BARNSTONE *v.* UNIVERSITY OF HOUSTON ET AL.

ON APPLICATION TO VACATE ORDER

No. A-978. Decided May 12, 1980

Application to vacate the Court of Appeals' order vacating, on a specified condition, the District Court's order compelling respondents to broadcase a certain television program, is denied.

MR. JUSTICE POWELL, Circuit Justice.

On May 9, 1980, the District Court for the Southern District of Texas entered a temporary restraining order compelling respondents to broadcast "The Death of a Princess," a television program to be distributed by the Public Broadcasting Service, on May 12, 1980, at 8 p. m. Today, the Court of Appeals for the Fifth Circuit vacated the District Court order on condition that the respondents "tape and preserve the program in issue." Applicant seeks relief from the Court of Appeals order. The respondents oppose the application, and represent that "The Death of a Princess" will be preserved on videotape for later airing should the applicant obtain a permanent injunction. The Public Broadcasting Service has filed an *amicus* brief also asking that the application of the applicant be denied.

Although applicant requests that the Court grant certiorari and reverse the judgment of the Court of Appeals, in purpose and effect applicant is requesting that the order of that Court be vacated, thereby reinstating the temporary restraining order of the District Court. Such a request normally comes to me as Circuit Justice. Although I may have considered referring this to the entire Court, a quorum is not present. I therefore exercise my authority as Circuit Justice to rule on applicant's application.

Upon consideration of the papers, I deny the application.

I have consulted informally with each of my Brethren who was present at the Court when these papers arrived late this

afternoon. Although no other Justice has participated in the drafting of this order, I am authorized to state that each of the three whom I consulted would vote to deny this application. Of course, this action should not be taken as expressing a view on the merits of the questions raised in this case. See *Graves* v. *Barnes,* 405 U. S. 1201, 1204 (1972) (POWELL, J., in chambers).

MARTEN ET UX. *v.* THIES, DIRECTOR OF COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, ET AL.

ON APPLICATION FOR STAY

No. A-972. Decided May 16, 1980

Application to stay California Court of Appeal's order declining to continue applicants' right to visit their prospective adoptive child, pending review by this Court, is denied. It appears unlikely that four Members of this Court would vote to grant plenary review, and the record amply supports the Court of Appeal's finding that further legal obstacles to the child's placement in another adoptive home would be to the child's detriment.

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicants Kelly Marten and Kathy Marten have asked me to stay an order of the California Court of Appeal declining to continue their right to visit their prospective adoptive daughter, Sarah, pending disposition of applicants' appeal or petition for a writ of certiorari to this Court. The Court of Appeal earlier had rejected applicants' appeal from an order of the Superior Court upholding the decision of the respondent placement agency to terminate applicants' status as Sarah's prospective adoptive parents. Because I do not believe that four Members of this Court will vote to hear applicants' ultimate appeal or petition, and because the Court of Appeal specifically found that further legal obstacles to Sarah's placement in another adoptive home would be to the child's detriment, I will deny the requested stay.

The historical facts in this case are not in dispute and may be gleaned from the application and the opinion of the California Court of Appeal. In early 1976, applicants, who are husband and wife, qualified as prospective adoptive parents with respondent San Bernadino County Adoption Services (the Agency). On May 17, 1977, Sarah, then 15 weeks

old, was placed in applicants' home on a "quasi-adoptive" basis pending final adoption at some later date. At that time, applicants agreed to inform the Agency of any change in their domestic circumstances.

Unbeknownst to the Agency, applicants had been experiencing marital problems even before they took custody of Sarah. These problems finally culminated in a separation in January 1978, when Kelly Marten left his wife and Sarah and moved in with another woman. Contrary to their original agreement, however, applicants did not inform the Agency of this change in circumstances. Applicants apparently remain separated as of this date.

In April 1978 the Agency learned of applicants' separation through a third party. The Agency sent first one and then another social worker to Kathy Marten's home to interview Ms. Marten and to assess Sarah's environment. The first advised applicants that removal of Sarah from their custody was a possibility, but that she would have to consult her superiors. The second social worker concluded that Ms. Marten's psychological state was deteriorating and recommended that Sarah be removed from applicants' home. Upon receiving these reports, the Agency's acting chief of adoptions and its director agreed that Sarah should be removed from Ms. Marten's custody and that the removal should take place without notice to applicants. This latter determination was based on their belief that notice would place Sarah in "imminent danger" because of the perceived likelihood that Ms. Marten would flee from the State with the child. On August 21, 1978, Sarah was, in fact, removed from Ms. Marten's custody without prior notice and was placed in a foster home.

Pursuant to applicable California law, applicants sought administrative review of the Agency's decision to terminate their status as Sarah's prospective adoptive parents. After a hearing, the "Review Agent" issued a decision upholding the Agency. He found, *inter alia*, that there had been substan-

tial cause to believe that Sarah was a child whose health and safety had been in jeopardy, that she had been in imminent danger, and that the jeopardy would have been greatly increased if prior notice of the removal had been given to applicants.

On applicants' petition to Superior Court for a writ of mandate, that court found that the conclusions of the Review Agent were amply supported by the record and that return of Sarah to applicants " 'would not be in the best interest of the child, and in fact would be detrimental to the child.' " 99 Cal. App. 3d 161, 167, 160 Cal. Rptr. 57, 60 (1979).

The Court of Appeal affirmed, rejecting each of the contentions that applicants claim they will advance in their appeal or petition to this Court. First, the appellate court concluded that, while preremoval notice to custodial "parents" in applicants' position was a normal requisite of procedural due process, California law specifically permitted removal without notice where "[t]he agency director has reasonable cause to believe the child is in imminent danger. . . ." 22 Cal. Admin. Code § 30684 (d)(1)(A). Here, according to the Court of Appeal, substantial evidence supported a finding that Ms. Marten might flee if notified and that such flight would endanger the child. In particular, the Court of Appeal cited

> "(1) the husband and wife's concealment of their marital differences in order to obtain the adoptive placement; (2) their failure to report their separation as required by their agreement with the Agency; (3) the wife's previous conduct in taking the child to an unauthorized destination out of the state; (4) the wife's emotional instability and over-dependence on the child for her emotional needs; (5) insensitivity of both husband and wife to the child's emotional and developmental needs; and (6) the fact that the fear of losing the child had been the stated reason for their untruthfulness and subterfuge." 99 Cal. App. 3d, at 172, 160 Cal. Rptr., at 63.

Second, the Court of Appeal confronted applicants' contention that their marital separation should not disqualify them "*a fortiori*" from adopting Sarah. According to the court, however, applicants' separation was only one factor in the Agency's decision to terminate their status as prospective adoptive parents. Other important considerations included "emotional stability of the parents, parental sensitivity to the child's developmental needs, trustworthiness of the parents and their willingness to abide by the rules, maturity of the parents, motivation to correct deficiencies, and economic security." *Id.*, at 173, 160 Cal. Rptr., at 64. Looking to the record, the appellate court concluded that all these considerations supported the Agency's decision.

Finally, the Court of Appeal rejected applicants' claim, raised for the first time in their reply brief to that court, that the Review Agent should have appointed independent counsel to represent Sarah at the administrative hearing. Overlooking the belated nature of this argument, the court found no evidence of any divergence of interest between the Agency and Sarah, and therefore no need "to further encumber the . . . placement procedure" by requiring provision of independent counsel. *Id.*, at 174, 160 Cal. Rptr., at 64.

Prior to their appeal to the Court of Appeal, applicants had been visiting Sarah twice a week at her foster home pursuant to an agreement reached with the Agency. During its consideration of applicants' case, the Court of Appeal entered an order permitting applicants to continue their visits. When that court entered its judgment, however, it specifically vacated that order, noting that applicants had "already delayed the child's placement in a proper adoptive home by several months, to the child's detriment," and that "[f]urther legal maneuvers to perpetuate a relationship initiated by their own wrongful act should not be tolerated." *Id.*, at 175, 160 Cal. Rptr., at 64. After the Supreme Court of California declined to hear applicants' appeal, the Court of Appeal denied applicants' motion to recall its mandate and to

grant them continued visitation rights pending appeal or petition to this Court. It is this last order that applicants would have me stay so as to grant them the visitation rights terminated by the court below.

Applicants state that in their ultimate appeal or petition to this Court they will raise each of the three aforementioned contentions rejected by the Court of Appeal. I find it highly unlikely that four Members of this Court would vote to grant plenary review on any of these issues.

In regard to applicants' claim that they were entitled as a matter of procedural due process to preremoval notice, I would note initially that such a claim depends entirely upon their ability to show that they have been deprived of some protected interest in life, liberty, or property. As I read this Court's opinion in *Smith* v. *Organization of Foster Families*, 431 U. S. 816, 842–847 (1977), their success on this threshold issue is far from certain. See also *id.*, at 856–863 (STEWART, J., concurring in judgment). Even assuming such success, however, applicants candidly, and somewhat cryptically, pose the primary issue presented to this Court as whether authorities can dispense with preremoval notice on a finding of "'prospective' imminent danger" to the child as opposed to "actual imminent danger." Statement of Points and Authorities 7. Like the court below, I find this distinction somewhat elusive. In any event, I am reasonably certain that, given the uniform conclusion of the agencies and courts below that there was indeed an imminent danger to Sarah, four of my colleagues would not vote to examine that conclusion.

As for applicants' contention that they were disqualified as prospective adoptive parents "merely" because they had separated, I note only that this contention finds no support in the decision of the Court of Appeal or in any of the documents filed in support of the application.

Finally, applicants reassert their contention that Sarah was entitled to independent counsel in the administrative proceeding. Absent a showing of actual conflict or other

prejudice to Sarah, however, I see little chance that this argument will receive plenary review.

Applicants argue doggedly that the equities in this case favor continuation of their visitation privileges pending disposition of their case by this Court. They rely in particular upon affidavits by various child psychologists indicating that such visits would not harm Sarah and actually would assist her in overcoming the trauma of removal from applicants' home. The Court of Appeal also was presented with these affidavits, however, and concluded on the basis of all the evidence that further visitation would not be in Sarah's best interest. In a passage I consider quite telling, that court stated:

> "The concealment of [applicants'] marital difficulties and [their] failure to report their separation suggests that the initial placement may have been sought in an effort to salvage a failing marriage. It is unfortunate when natural parents resort to such practices; to permit adoption to be used for such purpose would be a serious breach of duty on the part of the Agency." 99 Cal. App. 3d, at 173, 160 Cal. Rptr., at 64.

Removed as I am from the actual events at issue by nearly 3,000 miles and by several layers of judicial proceedings, I decline to make my own assessment of Sarah's best interests and instead defer to the amply supported conclusions of the courts below.

The application is accordingly

Denied.

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of
The Supreme Court

May 27 Through June 5, 1980

End of Volume

Henry J. Lind
Reporter of Decisions

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, Chief Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM H. REHNQUIST, Associate Justice.
JOHN PAUL STEVENS, Associate Justice.

OFFICERS OF THE COURT

BENJAMIN R. CIVILETTI, Attorney General.
WADE H. McCREE, Jr., Solicitor General.
MICHAEL RODAK, Jr., Clerk.
HENRY C. LIND, Reporter of Decisions.
ALFRED WONG, Marshal.
ROGER F. JACOBS, Librarian.

SUPREME COURT OF THE UNITED STATES

Allotment of Justices

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, *viz.:*

For the District of Columbia Circuit, Warren E. Burger, Chief Justice.

For the First Circuit, William J. Brennan, Jr., Associate Justice.

For the Second Circuit, Thurgood Marshall, Associate Justice.

For the Third Circuit, William J. Brennan, Jr., Associate Justice.

For the Fourth Circuit, Warren E. Burger, Chief Justice.

For the Fifth Circuit, Lewis F. Powell, Jr., Associate Justice.

For the Sixth Circuit, Potter Stewart, Associate Justice.

For the Seventh Circuit, John Paul Stevens, Associate Justice.

For the Eighth Circuit, Harry A. Blackmun, Associate Justice.

For the Ninth Circuit, William H. Rehnquist, Associate Justice.

For the Tenth Circuit, Byron R. White, Associate Justice

December 19, 1975.

(For next previous allotment, see 404 U. S., p. v.)

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4. *"Otherwise authorized by law."* § 302 (c)(15), Federal Property and Administrative Services Act of 1949, 41 U. S. C. § 252 (c)(15). Andrus v. Glover Construction Co., p. 608.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1979

322-220 O - 81 - 4

UNITED STATES *v.* MENDENHALL

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 78-1821. Argued February 19, 1980—Decided May 27, 1980

Respondent, prior to trial in Federal District Court on a charge of possessing heroin with intent to distribute it, moved to suppress the introduction in evidence of the heroin on the ground that it had been acquired through an unconstitutional search and seizure by Drug Enforcement Administration (DEA) agents. At the hearing on the motion, it was established that when respondent arrived at the Detroit Metropolitan Airport on a flight from Los Angeles, two DEA agents, observing that her conduct appeared to be characteristic of persons unlawfully carrying narcotics, approached her as she was walking through the concourse, identified themselves as federal agents, and asked to see her identification and airline ticket. After respondent produced her driver's license, which was in her name, and her ticket, which was issued in another name, the agents questioned her briefly as to the discrepancy and as to how long she had been in California. After returning the ticket and driver's license to her, one of the agents asked respondent if she would accompany him to the airport DEA office for further questions, and respondent did so. At the office the agent asked respondent if she would allow a search of her person and handbag and told her that she had the right to decline the search if she desired. She responded: "Go ahead," and handed her purse to the agent. A female police officer, who arrived to conduct the search of respondent's person, also asked respondent if she consented to the search, and respondent replied that she did. When the policewoman explained that respondent would have to remove her clothing, respondent stated that she had a plane to catch and was assured that if she was carrying no narcotics there would be no problem. Respondent began to disrobe without further comment and took from her undergarments two packages, one of which appeared to contain heroin, and handed them to the policewoman. Respondent was then arrested for possessing heroin. The District Court denied the motion to suppress, concluding that the agents' conduct in initially approaching the respondent and asking to see her ticket and identification was a permissible investigative stop, based on facts justifying a suspicion of criminal activity, that respondent had accompanied the agents to the DEA office voluntarily, and that respondent voluntarily consented to the

search in the DEA office. Respondent was convicted after trial, but the Court of Appeals reversed, finding that respondent had not validly consented to the search.

Held: The judgment is reversed, and the case is remanded. Pp. 550–560; 560–566.

596 F. 2d 706, reversed and remanded.

MR. JUSTICE STEWART delivered the opinion of the Court with respect to parts I, II–B, II–C, and III, concluding:

1. Respondent's Fourth Amendment rights were not violated when she went with the agents from the concourse to the DEA office. Whether her consent to accompany the agents was in fact voluntary or was the product of duress or coercion is to be determined by the totality of all the circumstances. Under this test, the evidence—including evidence that respondent was not told that she had to go to the office, but was simply asked if she would accompany the officers, and that there were neither threats nor any show of force—was plainly adequate to support the District Court's finding that respondent voluntarily consented to accompany the officers. The facts that the respondent was 22 years old, had not been graduated from high school, and was a Negro accosted by white officers, while not irrelevant, were not decisive. Cf. *Schneckloth* v. *Bustamonte*, 412 U. S. 218. Pp. 557–558.

2. The evidence also clearly supported the District Court's view that respondent's consent to the search of her person at the DEA office was freely and voluntarily given. She was plainly capable of a knowing consent, and she was twice expressly told by the officers that she was free to withhold consent and only thereafter explicitly consented to the search. The trial court was entitled to view her statement, made when she was told that the search would require the removal of her clothing, that "she had a plane to catch," as simply an expression of concern that the search be conducted quickly, not as indicating resistance to the search. Pp. 558–559.

MR. JUSTICE STEWART, joined by MR. JUSTICE REHNQUIST, concluded in Part II–A, that no "seizure" of respondent, requiring objective justification, occurred when the agents approached her on the concourse and asked questions of her. A person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave, and as long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would require some particularized and objective justification. Nothing in the record suggests that respondent had any objective reason to believe that

she was not free to end the conversation in the concourse and proceed on her way. Pp. 551–557.

MR. JUSTICE POWELL, joined by THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN, concluded that the question whether the DEA agents "seized" respondent within the meaning of the Fourth Amendment should not be reached because neither of the courts below considered the question; and that, assuming that the stop did constitute a seizure, the federal agents, in light of all the circumstances, had reasonable suspicion that respondent was engaging in criminal activity and, therefore, did not violate the Fourth Amendment by stopping her for routine questioning. Pp. 560–566.

STEWART, J., announced the Court's judgment and delivered an opinion of the Court with respect to Parts I, II–B, II–C, and III, in which BURGER, C. J., and BLACKMUN, POWELL, and REHNQUIST, JJ., joined, and an opinion with respect to Part II–A, in which REHNQUIST, J., joined. POWELL, J., filed an opinion concurring in part and concurring in the judgment, in which BURGER, C. J., and BLACKMUN, J., joined, *post*, p. 560. WHITE, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined, *post*, p. 566.

Deputy Solicitor General Frey argued the cause for the United States. With him on the briefs were *Solicitor General McCree* and *Assistant Attorney General Heymann*.

F. Randall Karfonta argued the cause and filed a brief for respondent.*

MR. JUSTICE STEWART announced the judgment of the Court and delivered an opinion in which MR. JUSTICE REHNQUIST joined.†

The respondent was brought to trial in the United States District Court for the Eastern District of Michigan on a

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**Fred E. Inbau, Wayne W. Schmidt, Frank G. Carrington, Jr.*, and *James P. Manak* filed a brief for Americans for Effective Law Enforcement, Inc., as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Bruce J. Ennis, Jr.*, for the American Civil Liberties Union; and by *Terence F. MacCarthy* and *Carol A. Brook* for the National Legal Aid and Defender Assn.

†THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, and MR. JUSTICE POWELL also join all but Part II–A of this opinion.

charge of possessing heroin with intent to distribute it. She moved to suppress the introduction at trial of the heroin as evidence against her on the ground that it had been acquired from her through an unconstitutional search and seizure by agents of the Drug Enforcement Administration (DEA). The District Court denied the respondent's motion, and she was convicted after a trial upon stipulated facts. The Court of Appeals reversed, finding the search of the respondent's person to have been unlawful. We granted certiorari to consider whether any right of the respondent guaranteed by the Fourth Amendment was violated in the circumstances presented by this case. 444 U. S. 822.

I

At the hearing in the trial court on the respondent's motion to suppress, it was established how the heroin she was charged with possessing had been obtained from her. The respondent arrived at the Detroit Metropolitan Airport on a commercial airline flight from Los Angeles early on the morning of February 10, 1976. As she disembarked from the airplane, she was observed by two agents of the DEA, who were present at the airport for the purpose of detecting unlawful traffic in narcotics. After observing the respondent's conduct, which appeared to the agents to be characteristic of persons unlawfully carrying narcotics,[1] the agents approached her as she was walking through the concourse, identified themselves as federal

[1] The agent testified that the respondent's behavior fit the so-called "drug courier profile"—an informally compiled abstract of characteristics thought typical of persons carrying illicit drugs. In this case the agents thought it relevant that (1) the respondent was arriving on a flight from Los Angeles, a city believed by the agents to be the place of origin for much of the heroin brought to Detroit; (2) the respondent was the last person to leave the plane, "appeared to be very nervous," and "completely scanned the whole area where [the agents] were standing"; (3) after leaving the plane the respondent proceeded past the baggage area without claiming any luggage; and (4) the respondent changed airlines for her flight out of Detroit.

agents, and asked to see her identification and airline ticket. The respondent produced her driver's license, which was in the name of Sylvia Mendenhall, and, in answer to a question of one of the agents, stated that she resided at the address appearing on the license. The airline ticket was issued in the name of "Annette Ford." When asked why the ticket bore a name different from her own, the respondent stated that she "just felt like using that name." In response to a further question, the respondent indicated that she had been in California only two days. Agent Anderson then specifically identified himself as a federal narcotics agent and, according to his testimony, the respondent "became quite shaken, extremely nervous. She had a hard time speaking."

After returning the airline ticket and driver's license to her, Agent Anderson asked the respondent if she would accompany him to the airport DEA office for further questions. She did so, although the record does not indicate a verbal response to the request. The office, which was located up one flight of stairs about 50 feet from where the respondent had first been approached, consisted of a reception area adjoined by three other rooms. At the office the agent asked the respondent if she would allow a search of her person and handbag and told her that she had the right to decline the search if she desired. She responded: "Go ahead." She then handed Agent Anderson her purse, which contained a receipt for an airline ticket that had been issued to "F. Bush" three days earlier for a flight from Pittsburgh through Chicago to Los Angeles. The agent asked whether this was the ticket that she had used for her flight to California, and the respondent stated that it was.

A female police officer then arrived to conduct the search of the respondent's person. She asked the agents if the respondent had consented to be searched. The agents said that she had, and the respondent followed the policewoman into a private room. There the policewoman again asked the respondent if she consented to the search, and the respondent

replied that she did. The policewoman explained that the search would require that the respondent remove her clothing. The respondent stated that she had a plane to catch and was assured by the policewoman that if she were carrying no narcotics, there would be no problem. The respondent then began to disrobe without further comment. As the respondent removed her clothing, she took from her undergarments two small packages, one of which appeared to contain heroin, and handed both to the policewoman. The agents then arrested the respondent for possessing heroin.

It was on the basis of this evidence that the District Court denied the respondent's motion to suppress. The court concluded that the agents' conduct in initially approaching the respondent and asking to see her ticket and identification was a permissible investigative stop under the standards of *Terry* v. *Ohio,* 392 U. S. 1, and *United States* v. *Brignoni-Ponce,* 422 U. S. 873, finding that this conduct was based on specific and articulable facts that justified a suspicion of criminal activity. The court also found that the respondent had not been placed under arrest or otherwise detained when she was asked to accompany the agents to the DEA office, but had accompanied the agents "'voluntarily in a spirit of apparent cooperation.'" It was the court's view that no arrest occurred until after the heroin had been found. Finally, the trial court found that the respondent "gave her consent to the search [in the DEA office] and . . . such consent was freely and voluntarily given."

The Court of Appeals reversed the respondent's subsequent conviction, stating only that "the court concludes that this case is indistinguishable from *United States* v. *McCaleb,*" 552 F. 2d 717 (CA6 1977).[2] In *McCaleb* the Court of Appeals had suppressed heroin seized by DEA agents at the Detroit Airport in circumstances substantially similar to those in the

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[2] The opinion of the Court of Appeals and the opinion of the District Court are both unreported.

present case.[3] The Court of Appeals there disapproved the Government's reliance on the so-called "drug courier profile," and held that the agents could not reasonably have suspected criminal activity in that case, for the reason that "the activities of the [persons] observed by DEA agents, were consistent with innocent behavior," *id.*, at 720. The Court of Appeals further concluded in *McCaleb* that, even if the initial approach had been permissible, asking the suspects to accompany the agents to a private room for further questioning constituted an arrest requiring probable cause. Finally, the court in *McCaleb* held that the consent to the search in that case had not been voluntarily given, principally because it was the fruit of what the court believed to have been an unconstitutional detention.

On rehearing en banc of the present case, the Court of Appeals reaffirmed its original decision, stating simply that the respondent had not validly consented to the search "within the meaning of [*McCaleb*]." 596 F. 2d 706, 707.

II

The Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." There is no question in this case that the respondent possessed this constitutional right of personal security as she walked through the Detroit Airport, for "the Fourth Amendment protects people, not places." *Katz* v. *United States*, 389 U. S. 347, 351. Here the Government concedes that its agents had neither a warrant nor probable cause to believe that the respondent was carrying narcotics when

[3] The *McCaleb* case, however, involved a circumstance not present here. Although the persons searched in that case were advised of their right to decline to give consent to the search of their luggage, they were also informed that if they refused they would be detained while the agents sought a search warrant. 552 F. 2d, at 719. The Court of Appeals in this case evidently considered the distinction irrelevant.

the agents conducted a search of the respondent's person. It is the Government's position, however, that the search was conducted pursuant to the respondent's consent,[4] and thus was excepted from the requirements of both a warrant and probable cause. See *Schneckloth* v. *Bustamonte*, 412 U. S. 218. Evidently, the Court of Appeals concluded that the respondent's apparent consent to the search was in fact not voluntarily given and was in any event the product of earlier official conduct violative of the Fourth Amendment. We must first consider, therefore, whether such conduct occurred, either on the concourse or in the DEA office at the airport.

A

The Fourth Amendment's requirement that searches and seizures be founded upon an objective justification, governs all seizures of the person, "including seizures that involve only a brief detention short of traditional arrest. *Davis* v. *Mississippi*, 394 U. S. 721 (1969); *Terry* v. *Ohio*, 392 U. S. 1, 16–19 (1968)." *United States* v. *Brignoni-Ponce*, 422 U. S., at 878.[5] Accordingly, if the respondent was "seized" when the

[4] The Government has made several alternative arguments in this case.

[5] In the District Court and the Court of Appeals, the parties evidently assumed that the respondent was seized when she was approached on the airport concourse and was asked if she would show her identification and airline ticket. In its brief on the merits and oral argument in this Court, however, the Government has argued that no seizure occurred, and the respondent has joined the argument. While the Court ordinarily does not consider matters neither raised before nor decided by the courts below, see *Adickes* v. *Kress & Co.*, 398 U. S. 144, 147, n. 2, it has done so in exceptional circumstances. See *Youakim* v. *Miller*, 425 U. S. 231, 234; *Duignan* v. *United States*, 274 U. S. 195, 200. We consider the Government's contention that there was no seizure of the respondent in this case, because the contrary assumption, embraced by the trial court and the Court of Appeals, rests on a serious misapprehension of federal constitutional law. And because the determination of the question is essential to the correct disposition of the other issues in the case, we shall treat it as "fairly comprised" by the questions presented in the petition for certiorari. This Court's Rule 23 (1)(c). See *Procunier* v. *Navarette*, 434

DEA agents approached her on the concourse and asked questions of her, the agents' conduct in doing so was constitutional only if they reasonably suspected the respondent of wrongdoing. But "[o]bviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Terry* v. *Ohio*, 392 U. S., at 19, n. 16.

The distinction between an intrusion amounting to a "seizure" of the person and an encounter that intrudes upon no constitutionally protected interest is illustrated by the facts of *Terry* v. *Ohio*, which the Court recounted as follows: "Officer McFadden approached the three men, identified himself as a police officer and asked for their names. . . . When the men 'mumbled something' in response to his inquiries, Officer McFadden grabbed petitioner Terry, spun him around so that they were facing the other two, with Terry between McFadden and the others, and patted down the outside of his clothing." *Id.*, at 6–7. Obviously the officer "seized" Terry and subjected him to a "search" when he took hold of him, spun him around, and patted down the outer surfaces of his clothing, *id.*, at 19. What was not determined in that case, however, was that a seizure had taken place before the officer physically restrained Terry for purposes of searching his per-

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U. S. 555, 559–560, n. 6; *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U. S. 313, 320–321, n. 6.

The evidentiary record in the trial court is adequate to permit consideration of the contention. The material facts are not disputed. A major question throughout the controversy has been whether the respondent was at any time detained by the DEA agents. Counsel for the respondent has argued that she was arrested while proceeding through the concourse. The trial court and the Court of Appeals characterized the incident as an "investigatory stop." But the correctness of the legal characterization of the facts appearing in the record is a matter for this Court to determine. See *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 226; *Bumper* v. *North Carolina*, 391 U. S. 543, 548–550.

son for weapons. The Court "assume[d] that up to that point no intrusion upon constitutionally protected rights had occurred." *Id.*, at 19, n. 16. The Court's assumption appears entirely correct in view of the fact, noted in the concurring opinion of MR. JUSTICE WHITE, that "[t]here is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets," *id.*, at 34. Police officers enjoy "the liberty (again, possessed by every citizen) to address questions to other persons," *id.*, at 31, 32–33 (Harlan, J., concurring), although "ordinarily the person addressed has an equal right to ignore his interrogator and walk away." *Ibid.*

Similarly, the Court in *Sibron* v. *New York*, 392 U. S. 40, a case decided the same day as *Terry* v. *Ohio*, indicated that not every encounter between a police officer and a citizen is an intrusion requiring an objective justification. In that case, a police officer, before conducting what was later found to have been an unlawful search, approached Sibron in a restaurant and told him to come outside, which Sibron did. The Court had no occasion to decide whether there was a "seizure" of Sibron inside the restaurant antecedent to the seizure that accompanied the search. The record was "barren of any indication whether Sibron accompanied [the officer] outside in submission to a show of force or authority which left him no choice, or *whether he went voluntarily in a spirit of apparent cooperation* with the officer's investigation." 392 U. S., at 63 (emphasis added). Plainly, in the latter event, there was no seizure until the police officer in some way demonstrably curtailed Sibron's liberty.

We adhere to the view that a person is "seized" only when, by means of physical force or a show of authority, his freedom of movement is restrained. Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards. The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but "to prevent arbitrary and oppressive inter-

ference by enforcement officials with the privacy and personal security of individuals." *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 554. As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification.

Moreover, characterizing every street encounter between a citizen and the police as a "seizure," while not enhancing any interest secured by the Fourth Amendment, would impose wholly unrealistic restrictions upon a wide variety of legitimate law enforcement practices. The Court has on other occasions referred to the acknowledged need for police questioning as a tool in the effective enforcement of the criminal laws. "Without such investigation, those who were innocent might be falsely accused, those who were guilty might wholly escape prosecution, and many crimes would go unsolved. In short, the security of all would be diminished. *Haynes* v. *Washington*, 373 U. S. 503, 515." *Schneckloth* v. *Bustamonte*, 412 U. S., at 225.

We conclude that a person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.[6] Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. See *Terry* v. *Ohio*, *supra*, at 19, n. 16; *Dunaway* v.

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[6] We agree with the District Court that the subjective intention of the DEA agent in this case to detain the respondent, had she attempted to leave, is irrelevant except insofar as that may have been conveyed to the respondent.

New York, 442 U. S. 200, 207, and n. 6; 3 W. LaFave, Search and Seizure 53–55 (1978). In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.

On the facts of this case, no "seizure" of the respondent occurred. The events took place in the public concourse. The agents wore no uniforms and displayed no weapons. They did not summon the respondent to their presence, but instead approached her and identified themselves as federal agents. They requested, but did not demand to see the respondent's identification and ticket. Such conduct, without more, did not amount to an intrusion upon any constitutionally protected interest. The respondent was not seized simply by reason of the fact that the agents approached her, asked her if she would show them her ticket and identification, and posed to her a few questions. Nor was it enough to establish a seizure that the person asking the questions was a law enforcement official. See *Terry* v. *Ohio*, 392 U. S., at 31, 32–33 (Harlan, J., concurring). See also ALI, Model Code of Pre-Arraignment Procedure § 110.1 (1) and commentary, at 257–261 (1975). In short, nothing in the record suggests that the respondent had any objective reason to believe that she was not free to end the conversation in the concourse and proceed on her way, and for that reason we conclude that the agents' initial approach to her was not a seizure.

Our conclusion that no seizure occurred is not affected by the fact that the respondent was not expressly told by the agents that she was free to decline to cooperate with their inquiry, for the voluntariness of her responses does not depend upon her having been so informed. See *Schneckloth* v. *Bustamonte*, *supra*. We also reject the argument that the only inference to be drawn from the fact that the respondent acted in a manner so contrary to her self-interest is that she was compelled to answer the agents' questions. It may happen that a person makes statements to law enforcement

officials that he later regrets, but the issue in such cases is not whether the statement was self-protective, but rather whether it was made voluntarily.

The Court's decision last Term in *Brown* v. *Texas*, 443 U. S. 47, on which the respondent relies, is not apposite. It could not have been plainer under the circumstances there presented that Brown was forcibly detained by the officers. In that case, two police officers approached Brown in an alley, and asked him to identify himself and to explain his reason for being there. Brown "refused to identify himself and angrily asserted that the officers had no right to stop him," *id.*, at 49. Up to this point there was no seizure. But after continuing to protest the officers' power to interrogate him, Brown was first frisked, and then arrested for violation of a state statute making it a criminal offense for a person to refuse to give his name and address to an officer "who has lawfully stopped him and requested the information." The Court simply held in that case that because the officers had no reason to suspect Brown of wrongdoing, there was no basis for detaining him, and therefore no permissible foundation for applying the state statute in the circumstances there presented. *Id.*, at 52–53.

The Court's decisions involving investigatory stops of automobiles do not point in any different direction. In *United States* v. *Brignoni-Ponce*, 422 U. S. 873, the Court held that a roving patrol of law enforcement officers could stop motorists in the general area of an international border for brief inquiry into their residence status only if the officers reasonably suspected that the vehicle might contain aliens who were illegally in the country. *Id.*, at 881–882. The Government did not contend in that case that the persons whose automobiles were detained were not seized. Indeed, the Government acknowledged that the occupants of a detained vehicle were required to respond to the officers' questions and on some occasions to produce documents evidencing their eligibility to be in the United States. *Id.*, at 880. Moreover, stopping or diverting an automobile in transit, with the attendant opportunity for

a visual inspection of areas of the passenger compartment not otherwise observable, is materially more intrusive than a question put to a passing pedestrian, and the fact that the former amounts to a seizure tells very little about the constitutional status of the latter. See also *Delaware* v. *Prouse*, 440 U. S. 648; *United States* v. *Martinez-Fuerte*, 428 U. S., at 556–559.

B

Although we have concluded that the initial encounter between the DEA agents and the respondent on the concourse at the Detroit Airport did not constitute an unlawful seizure, it is still arguable that the respondent's Fourth Amendment protections were violated when she went from the concourse to the DEA office. Such a violation might in turn infect the subsequent search of the respondent's person.

The District Court specifically found that the respondent accompanied the agents to the office " 'voluntarily in a spirit of apparent cooperation,' " quoting *Sibron* v. *New York*, 392 U. S., at 63. Notwithstanding this determination by the trial court, the Court of Appeals evidently concluded that the agents' request that the respondent accompany them converted the situation into an arrest requiring probable cause in order to be found lawful. But because the trial court's finding was sustained by the record, the Court of Appeals was mistaken in substituting for that finding its view of the evidence. See *Jackson* v. *United States*, 122 U. S. App. D. C. 324, 353 F. 2d 862 (1965).

The question whether the respondent's consent to accompany the agents was in fact voluntary or was the product of duress or coercion, express or implied, is to be determined by the totality of all the circumstances, *Schneckloth* v. *Bustamonte*, 412 U. S., at 227, and is a matter which the Government has the burden of proving. *Id.*, at 222, citing *Bumper* v. *North Carolina*, 391 U. S. 543, 548. The respondent herself did not testify at the hearing. The Government's evidence showed that the respondent was not told that she

had to go to the office, but was simply asked if she would accompany the officers. There were neither threats nor any show of force. The respondent had been questioned only briefly, and her ticket and identification were returned to her before she was asked to accompany the officers.

On the other hand, it is argued that the incident would reasonably have appeared coercive to the respondent, who was 22 years old and had not been graduated from high school. It is additionally suggested that the respondent, a female and a Negro, may have felt unusually threatened by the officers, who were white males. While these factors were not irrelevant, see *Schneckloth* v. *Bustamonte*, *supra*, at 226, neither were they decisive, and the totality of the evidence in this case was plainly adequate to support the District Court's finding that the respondent voluntarily consented to accompany the officers to the DEA office.

C

Because the search of the respondent's person was not preceded by an impermissible seizure of her person, it cannot be contended that her apparent consent to the subsequent search was infected by an unlawful detention. There remains to be considered whether the respondent's consent to the search was for any other reason invalid. The District Court explicitly credited the officers' testimony and found that the "consent was freely and voluntarily given," citing *Schneckloth* v. *Bustamonte*, *supra*. There was more than enough evidence in this case to sustain that view. First, we note that the respondent, who was 22 years old and had an 11th-grade education, was plainly capable of a knowing consent. Second, it is especially significant that the respondent was twice expressly told that she was free to decline to consent to the search, and only thereafter explicitly consented to it. Although the Constitution does not require "proof of knowledge of a right to refuse as the *sine qua non* of an effective consent to a search," *id.*, at 234 (footnote omitted), such knowledge

was highly relevant to the determination that there had been consent. And, perhaps more important for present purposes, the fact that the officers themselves informed the respondent that she was free to withhold her consent substantially lessened the probability that their conduct could reasonably have appeared to her to be coercive.

Counsel for the respondent has argued that she did in fact resist the search, relying principally on the testimony that when she was told that the search would require the removal of her clothing, she stated to the female police officer that "she had a plane to catch." But the trial court was entitled to view the statement as simply an expression of concern that the search be conducted quickly. The respondent had twice unequivocally indicated her consent to the search, and when assured by the police officer that there would be no problem if nothing were turned up by the search, she began to undress without further comment.

Counsel for the respondent has also argued that because she was within the DEA office when she consented to the search, her consent may have resulted from the inherently coercive nature of those surroundings. But in view of the District Court's finding that the respondent's presence in the office was voluntary, the fact that she was there is little or no evidence that she was in any way coerced. And in response to the argument that the respondent would not voluntarily have consented to a search that was likely to disclose the narcotics that she carried, we repeat that the question is not whether the respondent acted in her ultimate self-interest, but whether she acted voluntarily.[7]

III

We conclude that the District Court's determination that the respondent consented to the search of her person "freely

[7] It is arguable that the respondent may have thought she was acting in her self-interest, by voluntarily cooperating with the officers in the hope of receiving more lenient treatment.

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and voluntarily" was sustained by the evidence and that the Court of Appeals was, therefore, in error in setting it aside. Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded to that court for further proceedings.

It is so ordered.

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN join, concurring in part and concurring in the judgment.

I join Parts I, II-B, II-C, and III of the Court's opinion. Because neither of the courts below considered the question, I do not reach the Government's contention that the agents did not "seize" the respondent within the meaning of the Fourth Amendment. In my view, we may assume for present purposes that the stop did constitute a seizure.[1] I would hold—as did the District Court—that the federal agents had reasonable suspicion that the respondent was engaging in criminal activity, and, therefore, that they did not violate the Fourth Amendment by stopping the respondent for routine questioning.

I

The relevant facts may be stated briefly. The respondent arrived at the Detroit Metropolitan Airport on a flight from Los Angeles. She was the last passenger to leave the aircraft.

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[1] MR. JUSTICE STEWART concludes in Part II-A that there was no "seizure" within the meaning of the Fourth Amendment. He reasons that such a seizure occurs "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Ante*, at 554. MR. JUSTICE STEWART also notes that "'[t]here is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets.'" *Ante*, at 553, quoting *Terry* v. *Ohio*, 392 U. S. 1, 34 (1968) (WHITE, J., concurring). I do not necessarily disagree with the views expressed in Part II-A. For me, the question whether the respondent in this case reasonably could have thought she was free to "walk away" when asked by two Government agents for her driver's license and ticket is extremely close.

Two agents of the Drug Enforcement Administration watched the respondent enter the terminal, walk to the baggage area, then change directions and proceed to an Eastern Airlines ticket counter. After the respondent accepted a boarding pass for a flight to Pittsburgh, the two agents approached her. They identified themselves as federal officers, and requested some identification. The respondent gave them her driver's license and airline ticket. The agents asked the respondent several brief questions. The respondent accompanied the agents to an airport office where a body search conducted by a female police officer revealed two plastic bags of heroin.

II

Terry v. *Ohio*, 392 U. S. 1 (1968), establishes that a reasonable investigative stop does not offend the Fourth Amendment.[2] The reasonableness of a stop turns on the facts and circumstances of each case. In particular, the Court has emphasized (i) the public interest served by the seizure, (ii) the nature and scope of the intrusion, and (iii) the objective facts upon which the law enforcement officer relied in light of his knowledge and expertise. See *Brown* v. *Texas*, 443 U. S. 47, 50–51 (1979); *Delaware* v. *Prouse*, 440 U. S. 648, 654–655 (1979); *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 879–883 (1975); *Terry* v. *Ohio*, *supra*, at 20–22.

A

The public has a compelling interest in detecting those who would traffic in deadly drugs for personal profit. Few problems affecting the health and welfare of our population, particularly our young, cause greater concern than the escalating use of controlled substances. Much of the drug traffic

[2] The *Terry* Court held that the Warrant Clause of the Fourth Amendment does not apply to a "stop." This category of police conduct must survive only the Fourth Amendment's prohibition of "unreasonable searches and seizures." 392 U. S., at 20.

is highly organized and conducted by sophisticated criminal syndicates. The profits are enormous. And many drugs, including heroin, may be easily concealed. As a result, the obstacles to detection of illegal conduct may be unmatched in any other area of law enforcement.

To meet this pressing concern, the Drug Enforcement Administration since 1974 has assigned highly skilled agents to the Detroit Airport as part of a nationwide program to intercept drug couriers transporting narcotics between major drug sources and distribution centers in the United States. Federal agents have developed "drug courier profiles," that describe the characteristics generally associated with narcotics traffickers. For example, because the Drug Enforcement Administration believes that most drugs enter Detroit from one of four "source" cities (Los Angeles, San Diego, Miami, or New York), agents pay particular attention to passengers who arrive from those places. See *United States* v. *Van Lewis*, 409 F. Supp. 535, 538 (ED Mich. 1976), aff'd, 556 F. 2d 385 (CA6 1977). During the first 18 months of the program, agents watching the Detroit Airport searched 141 persons in 96 encounters. They found controlled substances in 77 of the encounters and arrested 122 persons. 409 F. Supp., at 539. When two of these agents stopped the respondent in February 1976, they were carrying out a highly specialized law enforcement operation designed to combat the serious societal threat posed by narcotics distribution.

B

Our cases demonstrate that "the scope of [a] particular intrusion, in light of all the exigencies of the case, [is] a central element in the analysis of reasonableness." *Terry* v. *Ohio*, *supra*, at 18, n. 15.[3] The intrusion in this case was quite

[3] For example, in *Delaware* v. *Prouse*, 440 U. S. 648 (1979), we considered the justification necessary for a random stop of a moving vehicle. Such stops, which may take place at night or on infrequently traveled

modest. Two plainclothes agents approached the respondent as she walked through a public area. The respondent was near airline employees from whom she could have sought aid had she been accosted by strangers. The agents identified themselves and asked to see some identification. One officer asked respondent why her airline ticket and her driver's license bore different names. The agent also inquired how long the respondent had been in California. Unlike the petitioner in *Terry, supra,* at 7, the respondent was not physically restrained. The agents did not display weapons. The questioning was brief. In these circumstances, the respondent could not reasonably have felt frightened or isolated from assistance.

C

In reviewing the factors that led the agents to stop and question the respondent, it is important to recall that a trained law enforcement agent may be "able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer." *Brown* v. *Texas, supra,* at 52, n. 2. Among the circumstances that can give rise to reasonable suspicion are the agent's knowledge of the methods used in recent criminal activity and the characteristics of persons engaged in such illegal practices. Law enforcement officers may rely on the "characteristics of the

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roads, interfere with freedom of movement, are inconvenient, and may be frightening. *Id.*, at 657. Thus, we held that police may not stop a moving vehicle without articulable and reasonable suspicion of unlawful activity. We explicitly distinguished our earlier decision in *United States* v. *Martinez-Fuerte,* 428 U. S. 543 (1976), which did not require individualized suspicion for the stop of a motor vehicle at a fixed checkpoint, because a checkpoint stop constitutes a "lesser intrusion" than a random stop. 440 U. S., at 656. The motorist halted at a permanent checkpoint has less reason for anxiety because he " 'can see that other vehicles are being stopped [and] can see visible signs of the officers' authority. . . .' " *United States* v. *Martinez-Fuerte, supra,* at 558, quoting *United States* v. *Ortiz,* 422 U. S. 891, 895 (1975).

area," and the behavior of a suspect who appears to be evading police contact. *United States* v. *Brignoni-Ponce*, 422 U. S., at 884–885. "In all situations the officer is entitled to assess the facts in light of his experience." *Id.*, at 885.

The two officers who stopped the respondent were federal agents assigned to the Drug Enforcement Administration. Agent Anderson, who initiated the stop and questioned the respondent, had 10 years of experience and special training in drug enforcement. He had been assigned to the Detroit Airport, known to be a crossroads for illicit narcotics traffic,[4] for over a year and he had been involved in approximately 100 drug-related arrests. App. 7–8.

The agents observed respondent as she arrived in Detroit from Los Angeles. The respondent, who appeared very nervous, engaged in behavior that the agents believed was designed to evade detection. She deplaned only after all other passengers had left the aircraft. Agent Anderson testified that drug couriers often disembark last in order to have a clear view of the terminal so that they more easily can detect government agents. *Id.*, at 9. Once inside the terminal respondent scanned the entire gate area and walked "very, very slowly" toward the baggage area. *Id.*, at 10 (testimony of Agent Anderson). When she arrived there, she claimed no baggage. Instead, she asked a skycap for directions to the Eastern Airlines ticket counter located in a different terminal. Agent Anderson stood in line immediately behind the respondent at the ticket counter. Although she carried an American Airlines ticket for a flight from Detroit to Pittsburgh, she asked for an Eastern Airlines ticket. An airline employee gave her an Eastern Airlines boarding pass. *Id.*, at 10–11. Agent Anderson testified that drug couriers frequently travel with-

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[4] From 1975 through 1978, more than 135 pounds of heroin and 22 pounds of cocaine were seized at the Detroit Airport. In 1978, 1,536 dosage units of other dangerous drugs were discovered there. See 596 F. 2d 706, 708, n. 1 (CA6 1979) (Weick, J., dissenting).

out baggage and change flights en route to avoid surveillance. *Ibid.* On the basis of these observations, the agents stopped and questioned the respondent.

III

The District Court, which had an opportunity to hear Agent Anderson's testimony and judge his credibility, concluded that the decision to stop the respondent was reasonable.[5] I agree. The public interest in preventing drug traffic is great, and the intrusion upon respondent's privacy was minimal. The specially trained agents acted pursuant to a well-planned, and effective, federal law enforcement program. They observed respondent engaging in conduct that they reasonably associated with criminal activity. Furthermore, the events occurred in an airport known to be frequented by drug couriers.[6] In light of all of the circumstances, I would hold that the agents possessed reasonable and articulable suspicion of criminal activity when they stopped the respondent in a public place and asked her for identification.

The jurisprudence of the Fourth Amendment demands consideration of the public's interest in effective law enforcement as well as each person's constitutionally secured right to be free from unreasonable searches and seizures. In applying

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[5] Although the Court of Appeals reversed the judgment of the District Court, it did not explicitly reject this conclusion of law. See *id.*, at 707. The dissenting judge noted that the Court of Appeals failed to take issue with the District Court's conclusion that the agents had reasonable suspicion to make the investigatory stop. *Id.*, at 709 (Weick, J.).

[6] The results of the Drug Enforcement Agency's efforts at the Detroit Airport, see *supra*, at 562, support the conclusion that considerable drug traffic flows through the Detroit Airport. Contrary to MR. JUSTICE WHITE's apparent impression, *post*, at 573–574, n. 11, I do not believe that these statistics establish by themselves the reasonableness of this search. Nor would reliance upon the "drug courier profile" necessarily demonstrate reasonable suspicion. Each case raising a Fourth Amendment issue must be judged on its own facts.

a test of "reasonableness," courts need not ignore the considerable expertise that law enforcement officials have gained from their special training and experience. The careful and commendable police work that led to the criminal conviction at issue in this case satisfies the requirements of the Fourth Amendment.

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE STEVENS join, dissenting.

The Court today concludes that agents of the Drug Enforcement Administration (DEA) acted lawfully in stopping a traveler changing planes in an airport terminal and escorting her to a DEA office for a strip search of her person. This result is particularly curious because a majority of the Members of the Court refuse to reject the conclusion that Ms. Mendenhall was "seized," while a separate majority decline to hold that there were reasonable grounds to justify a seizure. MR. JUSTICE STEWART concludes that the DEA agents acted lawfully, regardless of whether there were any reasonable grounds for suspecting Ms. Mendenhall of criminal activity, because he finds that Ms. Mendenhall was not "seized" by the DEA agents, even though throughout the proceedings below the Government never questioned the fact that a seizure had occurred necessitating a showing of antecedent reasonable suspicion. MR. JUSTICE POWELL's opinion concludes that even though Ms. Mendenhall may have been "seized," the seizure was lawful because her behavior while changing planes in the airport provided reasonable suspicion that she was engaging in criminal activity. The Court then concludes, based on the absence of evidence that Ms. Mendenhall resisted her detention, that she voluntarily consented to being taken to the DEA office, even though she in fact had no choice in the matter. This conclusion is inconsistent with our recognition that consent cannot be presumed from a

showing of acquiescence to authority, and it cannot be reconciled with our decision last Term in *Dunaway* v. *New York*, 442 U. S. 200 (1979).

I

Beginning with *Terry* v. *Ohio*, 392 U. S. 1, 16 (1968), the Court has recognized repeatedly that the Fourth Amendment's proscription of unreasonable "seizures" protects individuals during encounters with police that do not give rise to an arrest. *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 878 (1975); *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 556 (1976); *Delaware* v. *Prouse*, 440 U. S. 648, 653 (1979). In *Terry* we "emphatically reject[ed]" the notion that a "stop" "is outside the purview of the Fourth Amendment because . . . [it is not a] 'seizure' within the meaning of the Constitution." 392 U. S., at 16. We concluded that "the sounder course is to recognize that the Fourth Amendment governs all intrusions by agents of the public upon personal security, and to make the scope of the particular intrusion, in light of all the exigencies of the case, a central element in the analysis of reasonableness." *Id.*, at 18, n. 15. Applying this principle,

> "[w]e have recognized that in some circumstances an officer may detain a suspect briefly for questioning although he does not have 'probable cause' to believe that the suspect is involved in criminal activity, as is required for a traditional arrest. However, we have required the officers to have a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." *Brown* v. *Texas*, 443 U. S. 47, 51 (1979) (citations omitted).

Throughout the lower court proceedings in this case, the Government never questioned that the initial stop of Ms. Mendenhall was a "seizure" that required reasonable suspicion. Rather, the Government sought to justify the stop by arguing that Ms. Mendenhall's behavior had given rise to

reasonable suspicion because it was consistent with portions of the so-called "drug courier profile," an informal amalgam of characteristics thought to be associated with persons carrying illegal drugs.[1] Having failed to convince the Court of Appeals that the DEA agents had reasonable suspicion for the stop, the Government seeks reversal here by arguing for the first time that no "seizure" occurred, an argument that MR. JUSTICE STEWART now accepts, thereby pretermitting the question whether there was reasonable suspicion to stop Ms. Mendenhall. MR. JUSTICE STEWART's opinion not only is

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[1] On August 18, 1976, the Government argued in its answer to Ms. Mendenhall's suppression motion that the "investigatory stop" of Ms. Mendenhall was reasonable in light of the observations made by the DEA agents. At the suppression hearing on October 18, 1976, Agent Anderson's testimony focused on explanation of the "drug courier profile," description of Ms. Mendenhall's behavior prior to the stop, and discussion of why he thought it suspicious. The United States Attorney at the suppression hearing told the court that "it is the Government's contention here that we have a valid investigatory stop, followed by a consent to search." App. 28. Noting that "[u]nder *Terry* v. *Ohio*, in order for it to be a valid stop," there must be "a reasonable suspicion that there was a crime afoot," the Government argued that the observations and experience of the DEA agents warranted a finding that reasonable suspicion existed to justify the stop. *Id.*, at 28–30. The District Court denied the suppression motion, holding that Agent Anderson had reasonable suspicion to justify "a *Terry* type intrusion in order to determine defendant's identity and obtain more information. . . ." App. to Pet. for Cert. 15a.

There is no indication that the Government on appeal, before either the original panel of the Court of Appeals or the en banc court, ever questioned the understanding that the stop of Ms. Mendenhall constituted a "seizure" requiring reasonable suspicion. Neither the majority of the en banc court nor the dissenting judge questioned the District Court's acknowledgment that reasonable suspicion was required to justify the initial stop of Ms. Mendenhall. Even in its petition for certiorari, the Government did not ask this Court to review the question whether a "seizure" had occurred. In the course of arguing that the quantum of suspicion necessary to justify the stop was slight, the Government did note that it was "arguable" that Ms. Mendenhall had not been "seized," but it was content to assume that she had been. Pet. for Cert. 19.

inconsistent with our usual refusal to reverse judgments on grounds not raised below, but it also addresses a fact-bound question with a totality-of-circumstances assessment that is best left in the first instance to the trial court, particularly since the question was not litigated below and hence we cannot be sure is adequately addressed by the record before us.[2]

MR. JUSTICE STEWART believes that a "seizure" within the meaning of the Fourth Amendment occurs when an individual's freedom of movement is restrained by means of physical force or a show of authority. Although it is undisputed that Ms. Mendenhall was not free to leave after the DEA agents stopped her and inspected her identification, App. 19, MR. JUSTICE STEWART concludes that she was not "seized" because he finds that, under the totality of the circumstances,

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[2] MR. JUSTICE STEWART's suggestion that "exceptional circumstances" justify entertaining the Government's claim that no seizure occurred, even though it was not raised below, *ante*, at 551, n. 5, is as curious as his notion that the evidentiary record "is adequate to permit consideration of the contention." *Ante*, at 552, n. 5. The principal question throughout the controversy over the initial stop was not "whether the respondent was at any time detained by the DEA agents," *ibid.*, but rather whether there was reasonable suspicion to support the stop. See *ante*, at 547, n. 1. While there was no material factual dispute concerning what the DEA agents observed that allegedly gave rise to reasonable suspicion, once the Government raised the "seizure" question before this Court, there were substantial differences between the parties concerning the nature of the encounter between Ms. Mendenhall and the DEA agents. Thus the District Court's assumption that Ms. Mendenhall had been "seized" was not based on "a serious misapprehension of federal constitutional law," *ante*, at 551, n. 5, for it just as easily could have been based on a different understanding of what the facts would show were the "seizure" question addressed in the District Court. Equally deficient is the suggestion in MR. JUSTICE STEWART's opinion that "exceptional circumstances" exist because "determination of the ['seizure'] question is essential to the correct disposition of the other issues in the case." *Ibid.* While the assumption that a "seizure" occurred makes it necessary to reach the question whether there was reasonable suspicion for the stop, it would not affect the way in which that question would be decided when reached.

a reasonable person would have believed that she was free to leave. While basing this finding on an alleged absence from the record of objective evidence indicating that Ms. Mendenhall was not free to ignore the officer's inquiries and continue on her way, MR. JUSTICE STEWART's opinion brushes off the fact that this asserted evidentiary deficiency may be largely attributable to the fact that the "seizure" question was never raised below. In assessing what the record does reveal, the opinion discounts certain objective factors that would tend to support a "seizure" finding,[3] while relying on contrary factors inconclusive even under its own illustrations of how a "seizure" may be established.[4] Moreover, although MR. JUSTICE STEWART's opinion purports to make its "seizure" finding turn on objective factors known to the person accosted, in distinguishing prior decisions holding that investigatory stops constitute "seizures," it does not rely on differences in the extent to which persons accosted could reasonably believe that they were free to leave.[5] Even if one

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[3] Not the least of these factors is the fact that the DEA agents for a time took Ms. Mendenhall's plane ticket and driver's license from her. It is doubtful that any reasonable person about to board a plane would feel free to leave when law enforcement officers have her plane ticket.

[4] MR. JUSTICE STEWART notes, for example, that a "seizure" might be established even if the suspect did not attempt to leave, by the nature of the language or tone of voice used by the officers, factors that were never addressed at the suppression hearing, very likely because the "seizure" question was not raised.

[5] In *Brown* v. *Texas*, 443 U. S. 47, 51 (1979), and *United States* v. *Brignoni-Ponce*, 422 U. S. 873 (1975), the Government, as here, did not question whether the suspects who had been stopped had been "seized," given its concessions that the suspects would not have been permitted to leave without responding to the officers' requests for identification. In each case the Court recognized that a "seizure" had occurred without inquiring into whether a reasonable person would have believed that he was not free to leave. MR. JUSTICE STEWART's present attempt to distinguish the fact that stops of automobiles constitute "seizures," on the ground that it is more intrusive to visually inspect the passenger compartment of a car, confuses the question of the quantum of reasonable suspicion neces-

believes the Government should be permitted to raise the "seizure" question in this Court, the proper course would be to direct a remand to the District Court for an evidentiary hearing on the question, rather than to decide it in the first instance in this Court.[6]

II

Assuming, as we should, that Ms. Mendenhall was "seized" within the meaning of the Fourth Amendment when she was stopped by the DEA agents, the legality of that stop turns on whether there were reasonable grounds for suspecting her of criminal activity at the time of the stop. *Brown* v. *Texas*, 443 U. S., at 51. To establish that there was reasonable suspicion for the stop, it was necessary for the police at least to "be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry* v. *Ohio*, 392 U. S., at 21.

At the time they stopped Ms. Mendenhall, the DEA agents' suspicion that she was engaged in criminal activity was based solely on their brief observations of her conduct at the airport.[7] The officers had no advance information that Ms. Men-

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sary to justify such "seizures" with the question whether a "seizure" has occurred.

[6] We found that exceptional circumstances warranted consideration of a question not raised below in *Youakim* v. *Miller*, 425 U. S. 231, 234–235 (1976), which is cited in MR. JUSTICE STEWART's opinion, but there we vacated the judgment and remanded the case, holding that "the claim should be aired first in the District Court." *Id.*, at 236. Cf. *Rios* v. *United States*, 364 U. S. 253 (1960) (remanding to the trial court for determination of when an arrest occurred, after deciding probable-cause question).

[7] Officer Anderson, the DEA agent who testified at the suppression hearing, stated on cross-examination:

"Q. Did you have a tip in this case?

"A. No.

"Q. You were going strictly on what you saw in the airport, is that right?

denhall, or anyone on her flight, would be carrying drugs. What the agents observed Ms. Mendenhall do in the airport was not "unusual conduct" which would lead an experienced officer reasonably to conclude that criminal activity was afoot, *id.*, at 30, but rather the kind of behavior that could reasonably be expected of anyone changing planes in an airport terminal.

None of the aspects of Ms. Mendenhall's conduct, either alone or in combination, were sufficient to provide reasonable suspicion that she was engaged in criminal activity. The fact that Ms. Mendenhall was the last person to alight from a flight originating in Los Angeles was plainly insufficient to provide a basis for stopping her. Nor was the fact that her flight originated from a "major source city," for the mere proximity of a person to areas with a high incidence of drug activity or to persons known to be drug addicts, does not provide the necessary reasonable suspicion for an investigatory stop. *Ybarra* v. *Illinois*, 444 U. S. 85 (1979); *Brown* v. *Texas, supra; Sibron* v. *New York*, 392 U. S. 40, 62 (1968).[8]

"A. A number of things, what my observations, her response to statements.

"Q. I'm just asking—

"A. (Interposing) All right. Itinerary.

"Q. You're going on what happened on February 10 without any prior information?

"A. Correct.

"Q. You did not know that Sylvia Mendenhall was traveling to Detroit with narcotics, did you?

"A. No.

"Q. Nor any Negro female traveling from Los Angeles on that date carrying narcotics, did you?

"A. No." App 18.

[8] If "[t]he inference that persons who talk to narcotics addicts are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security," *Sibron* v. *New York*, 392 U. S., at 62, then the fact that a person is on a flight that originated from a major "source city" certainly is not.

Under the circumstances of this case, the DEA agents' observations that Ms. Mendenhall claimed no luggage and changed airlines were also insufficient to provide reasonable suspicion. Unlike the situation in *Terry* v. *Ohio*, 392 U. S., at 28, where "nothing in [the suspects'] conduct from the time [the officer] first noticed them until the time he confronted them and identified himself as a police officer gave him sufficient reason to negate [his] hypothesis" of criminal behavior, Ms. Mendenhall's subsequent conduct negated any reasonable inference that she was traveling a long distance without luggage or changing her ticket to a different airline to avoid detection. Agent Anderson testified that he heard the ticket agent tell Ms. Mendenhall that her ticket to Pittsburgh already was in order and that all she needed was a boarding pass for the flight.[9] Thus it should have been plain to an experienced observer that Ms. Mendenhall's failure to claim luggage was attributable to the fact that she was already ticketed through to Pittsburgh on a different airline.[10] Because Agent Anderson's suspicion that Ms. Mendenhall was transporting narcotics could be based only on "his inchoate and unparticularized suspicion or 'hunch,'" rather than "specific reasonable inferences which he is entitled to draw from the facts in light of his experience," *id.*, at 27, he was not justified in "seizing" Ms. Mendenhall.[11]

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[9] Agent Anderson testified on cross-examination at the suppression hearing that he believed Ms. Mendenhall's failure to pick up luggage was suspicious only before he learned that she was changing planes. App. 16.

[10] We recognized in *Brown* v. *Texas*, 443 U. S., at 52, n. 2, that "a trained, experienced police officer [may be] able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer." By the same token, Agent Anderson's experience on airport detail may be considered as negating any reasonable inference that Ms. Mendenhall's behavior was suspicious once he learned that she only needed a boarding pass for her flight to Pittsburgh.

[11] MR. JUSTICE POWELL's conclusion that there were reasonable grounds for suspecting Ms. Mendenhall of criminal activity relies heavily on the assertion that the DEA agents "acted pursuant to a well-planned, and

III

Whatever doubt there may be concerning whether Ms. Mendenhall's Fourth Amendment interests were implicated during the initial stages of her confrontation with the DEA agents, she undoubtedly was "seized" within the meaning of the Fourth Amendment, when the agents escorted her from the public area of the terminal to the DEA office for questioning and a strip search of her person. In *Dunaway* v. *New York*, 442 U. S. 200 (1979), we held that a person who accompanied police officers to a police station for purposes of interrogation undoubtedly "was 'seized' in the Fourth Amendment sense," even though "he was not told he was under arrest." *Id.*, at 207, 203. We found it significant that the suspect was taken to a police station, "was never informed that he was 'free to go,' " and "would have been physically restrained if he had refused to accompany the officers or had tried to escape their custody." *Id.*, at 212. Like the "seizure" in *Dunaway*, the nature of the intrusion to which Ms. Mendenhall was subjected when she was escorted by DEA agents to their office and detained there for questioning and a strip search was so great that it "was in important respects indistinguishable from a traditional arrest." *Id.*, at 212. Although Ms. Mendenhall was not told that she was under arrest, she in fact was not free to refuse to go to the DEA

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effective, federal law enforcement program." *Ante*, at 565. Yet there is no indication that the asserted successes of the "drug courier program" have been obtained by reliance on the kind of nearly random stop involved in this case. Indeed, the statistics MR. JUSTICE POWELL cites on the success of the program at the Detroit Airport, *ante*, at 562, refer to the results of searches following stops "based upon information acquired from the airline ticket agents, from [the agents'] independent police work," and occasional tips, as well as observations of behavior at the airport. *United States* v. *Van Lewis*, 409 F. Supp. 535, 538 (ED Mich. 1976), aff'd, 556 F. 2d 385 (CA6 1977). Here, however, it is undisputed that the DEA agents' suspicion that Ms. Mendenhall was engaged in criminal activity was based solely on their observations of her conduct in the airport terminal. *Supra*, at 571–572, n. 7.

office and was not told that she was.[12] Furthermore, once inside the office, Ms. Mendenhall would not have been permitted to leave without submitting to a strip search.[13] Thus, as in *Dunaway*,

> "[t]he mere facts that [the suspect] was not told he was under arrest, was not 'booked,' and would not have had an arrest record if the interrogation had proved fruitless, while not insignificant for all purposes, obviously do not make [the suspect's] seizure even roughly analogous to the narrowly defined intrusions involved in *Terry* and its progeny." *Id.*, at 212–213 (citation omitted).

Because the intrusion to which Ms. Mendenhall was subjected when she was escorted to the DEA office is of the same character as that involved in *Dunaway*, probable cause, which concededly was absent, was required to support the intrusion.

The Court's suggestion that no Fourth Amendment interest possessed by Ms. Mendenhall was implicated because she consented to go to the DEA office is inconsistent with *Dun-*

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[12] Agent Anderson testified on cross-examination at the suppression hearing:

"Q. All right. Now, when you asked her to accompany you to the DEA office for further questioning, if she had wanted to walk away, would you have stopped her?

"A. Once I asked her to accompany me?

"Q. Yes.

"A. Yes, I would have stopped her.

"Q. She was not free to leave, was she?

"A. Not at that point." App. 19.

[13] Agent Anderson testified:

"Q. Had she tried to leave that room when she was being accompanied by the female officer, would you have known?

"A. If she had attempted to leave the room?

"Q. Yes.

"A. Well yes, I could say that I would have known.

"Q. And if she had tried to leave prior to being searched by the female officer, would you have stopped her?

"A. Yes." *Id.*, at 21.

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away and unsupported in the record. There was no evidence in the record to support the District Court's speculation, made before *Dunaway* was decided, that Ms. Mendenhall accompanied "Agent Anderson to the airport DEA Office 'voluntarily in a spirit of apparent cooperation with the [agent's] investigation,' *Sibron* v. *New York*, 392 U. S. 40, 63 (1968)." App. to Pet. for Cert. 16a. Ms. Mendenhall did not testify at the suppression hearing and the officers presented no testimony concerning what she said, if anything, when informed that the officers wanted her to come with them to the DEA office. Indeed, the only testimony concerning what occurred between Agent Anderson's "request" and Ms. Mendenhall's arrival at the DEA office is the agent's testimony that if Ms. Mendenhall had wanted to leave at that point she would have been forcibly restrained. The evidence of consent here is even flimsier than that we rejected in *Dunaway* where it was claimed that the suspect made an affirmative response when asked if he would accompany the officers to the police station. *Dunaway* v. *New York*, *supra*, at 223 (REHNQUIST, J., dissenting). Also in *Sibron* v. *New York*, from which the District Court culled its description of Ms. Mendenhall's "consent," we described a record in a similar state as "totally barren of any indication whether Sibron accompanied Patrolman Martin outside in submission to a show of force or authority which left him no choice, or whether he went voluntarily in a spirit of apparent cooperation with the officer's investigation." 392 U. S., at 63.[14]

The Court recognizes that the Government has the burden of proving that Ms. Mendenhall consented to accompany the officers, but it nevertheless holds that the "totality of evidence was plainly adequate" to support a finding of consent.

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[14] In *Sibron* v. *New York*, 392 U. S., at 45, we noted that the record revealed only that "Sibron sat down and ordered pie and coffee, and, as he was eating, Patrolman Martin approached him and told him to come outside. Once outside, the officer said to Sibron, 'You know what I am after.'"

On the record before us, the Court's conclusion can only be based on the notion that consent can be assumed from the absence of proof that a suspect resisted police authority. This is a notion that we have squarely rejected. In *Bumper* v. *North Carolina*, 391 U. S. 543, 548–549 (1968), the Court held that the Government's "burden of proving that the consent was, in fact, freely and voluntarily given . . . cannot be discharged by showing no more than acquiescence to a claim of lawful authority." (Footnotes omitted.) *Johnson* v. *United States*, 333 U. S. 10 (1948); *Amos* v. *United States*, 255 U. S. 313 (1921). While the Government need not prove that Ms. Mendenhall knew that she had a right to refuse to accompany the officers, *Schneckloth* v. *Bustamonte*, 412 U. S. 218 (1973), it cannot rely solely on acquiescence to the officers' wishes to establish the requisite consent. The Court of Appeals properly understood this in rejecting the District Court's "findings" of consent.

Since the defendant was not present to testify at the suppression hearing, we can only speculate about her state of mind as her encounter with the DEA agents progressed from surveillance, to detention, to questioning, to seclusion in a private office, to the female officer's command to remove her clothing. Nevertheless, it is unbelievable[15] that this sequence of events involved no invasion of a citizen's constitutionally protected interest in privacy. The rule of law requires a different conclusion.

Because Ms. Mendenhall was being illegally detained at the time of the search of her person, her suppression motion should have been granted in the absence of evidence to dissipate the taint.

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[15] "Will you walk into my parlour?" said the spider to a fly;
(You may find you have consented, without ever knowing why.)

HARRISON, REGIONAL ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL. *v.* PPG INDUSTRIES, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 78-1918. Argued January 16, 1980—Decided May 27, 1980

As authorized by the Clean Air Act (Act), the Environmental Protection Agency (EPA) decided, on the basis of correspondence with respondents, that certain equipment at a power generating facility of respondent PPG Industries, Inc. (PPG), was subject to certain "new source" performance standards regarding air pollution that had been promulgated by the EPA Administrator. PPG then filed a petition in the Court of Appeals for review of the EPA's decision under § 307 (b)(1) of the Act, which provides for direct review in a federal court of appeals of certain locally and regionally applicable actions taken by the Administrator under specifically enumerated provisions of the Act, and of "*any other final action* of the Administrator under [the] Act . . . which is locally or regionally applicable." Because of its uncertainty as to the proper forum for judicial review, PPG also filed suit for injunctive relief against the Administrator in a Federal District Court, which suit was stayed pending the disposition of the present case. The Court of Appeals dismissed PPG's petition for lack of jurisdiction under § 307 (b)(1).

Held: The phrase "any other final action" in § 307 (b)(1) is to be construed in accordance with its literal meaning so as to reach *any* action of the Administrator that is final, not just final actions of the Administrator similar to actions under the specifically enumerated provisions that precede the catchall phrase in the statute. Pp. 586–594.

(a) The rule of *ejusdem generis* does not apply to § 307 (b)(1) so as to limit "any other final action" to actions similar to those under the specifically enumerated provisions on the theory that the latter actions (unlike the Administrator's informal decision here) must be based on administrative proceedings reflecting at least notice and opportunity for a hearing. At least one of the specifically enumerated provisions in § 307 (b)(1) does not require the Administrator to act only after notice and opportunity for a hearing, and thus even if the rule of *ejusdem generis* were applied, it would not significantly narrow the ambit of "any other final action" under § 307 (b)(1). Moreover,

the rule of *ejusdem generis* is only an instrumentality for ascertaining the correct meaning of words when there is uncertainty, and the phrase "*any* other final action" offers no indication whatever that Congress intended such a limiting construction of § 307 (b)(1). Pp. 587–589.

(b) Nothing in the legislative history supports a conclusion that the phrase "any other final action" in § 307 (b)(1) means anything other than what it says, or that Congress did not intend the phrase to enlarge the jurisdiction of the courts of appeals to include the review of cases based on an administrative record reflecting less than notice and an opportunity for a hearing. Pp. 589–592.

(c) The argument that, as a matter of policy, the basic purpose of § 307 (b)(1)—to provide prompt pre-enforcement review of EPA action—would be better served by providing in cases such as this for review in a district court rather than a court of appeals, is an argument to be addressed to Congress, not to this Court. Pp. 592–594.

587 F. 2d 237, reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, and POWELL, JJ., joined. POWELL, J., filed a concurring opinion, *post*, p. 594. BLACKMUN, J., filed an opinion concurring in the result, *post*, p. 595. REHNQUIST, J., *post*, p. 595, and STEVENS, J., *post*, p. 602, filed dissenting opinions.

Maryann Walsh argued the cause for petitioners. With her on the briefs were *Solicitor General McCree, Assistant Attorney General Moorman, William Alsup, Jacques B. Gelin,* and *Michele B. Corash.*

Charles F. Lettow argued the cause for respondents. With him on the brief were *V. Peter Wynne, Jr., Oliver P. Stockwell,* and *Gene W. Lafitte.*

MR. JUSTICE STEWART delivered the opinion of the Court.

Section 307 (b)(1) of the Clean Air Act (Act) provides for direct review in a federal court of appeals of certain locally and regionally applicable actions taken by the Administrator of the Environmental Protection Agency (EPA) under specifically enumerated provisions of the Act, and of "*any other final action* of the Administrator under [the] Act . . . which is locally or regionally applicable." (Emphasis

added.)[1] The issue in this case is whether the Court of Appeals for the Fifth Circuit was correct in concluding that it was without jurisdiction under § 307 (b)(1) to entertain a petition for review in which PPG Industries, Inc. (PPG),

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[1] Section 307 (b)(1) provides in full:

"A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 112, any standard of performance or requirement under section 111, any standard under section 202 (other than a standard required to be prescribed under section 202 (b)(1)), any determination under section 202 (b)(5), any control or prohibition under section 211, any standard under section 231, any rule issued under section 113, 119, or under section 120, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this Act may be filed only in the United States Court of Appeals for the District of Columbia. *A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 or section 111 (d), any order under section 111 (j), under section 112 (c), under section 113 (d), under section 119, or under section 120, or his action under section 119 (c)(2)(A), (B), or (C) (as in effect before the date of enactment of the Clean Air Act Amendments of 1977) or under regulations thereunder, or any other final action of the Administrator under this Act (including any denial or disapproval by the Administrator under title I) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit.* Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise." (Emphasis added.) § 307 (b)(1) of the Act, as added, 84 Stat. 1708, and amended by the Clean Air Act Amendments of 1977, Pub. L. 95–95, 91 Stat. 776, and the Clean Air Act Technical and Conforming Amendments, § 14 of Pub. L. 95–190, 91 Stat. 1404, 42 U. S. C. § 7607 (b)(1) (1976 ed., Supp. II).

and Conoco, Inc. (Conoco), the respondents here, challenged a decision of the Administrator concerning the applicability of EPA's "new source" performance standards to a power generating facility operated by PPG. More specifically, we must decide whether the Administrator's decision falls within the ambit of "any other final action" reviewable in a court of appeals under § 307 (b)(1).

I

The dispute underlying this jurisdictional question involves a decision of the Administrator under § 111 of the Act, 42 U. S. C. § 7411 (1976 ed., Supp. II). That provision requires the Administrator to publish, and from time to time to revise, a list of categories of any stationary source that he determines "causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare," § 111 (b)(1)(A), and to promulgate regulations establishing standards of performance for "new sources" within the list of those categories, § 111 (b)(1)(B). The Act defines a "new source" as "any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source." § 111 (a)(2).

In 1971, the Administrator included "fossil fuel-fired steam generators" in his list of stationary sources. 36 Fed. Reg. 5931. Later that year, pursuant to his mandate to promulgate "new source" performance standards, the Administrator established certain emission limits for any "fossil fuel-fired steam generating unit" of more than 250 million Btu's per hour heat input, the construction or modification of which was commenced after August 17, 1971, the date on which the standards were proposed. 40 CFR §§ 60.1–60.15, 60.40–60.46 (1979). These "new source" regulations define the term, "fossil fuel-fired steam generating unit," § 60.41 (a), and also create a procedure under which the Administrator, upon

request, will determine whether any action taken or planned by the owner or operator of a facility constitutes or will constitute "construction" or "modification" of the facility for purposes of triggering the applicability of the performance standards. § 60.5.

Sometime in 1970, the respondent PPG, a chemical manufacturing corporation, began the planning and preliminary construction of a new power generating facility at its plant in Lake Charles, La. That facility, designed to take advantage of fuel-efficient "cogeneration" technology, was to consist of two gas turbine generators, two "waste-heat" boilers, and a turbogenerator. The dispute between EPA and PPG concerns the applicability of the "new source" performance standards to the waste-heat boilers of this facility. This controversy first arose in 1975, when the respondent Conoco, PPG's fuel supplier, informed EPA that Conoco was switching the supply of fuel to the Lake Charles facility from natural gas to fuel oil. An exchange of correspondence ensued, initiated by EPA's request that PPG submit additional information bearing on whether the waste-heat boilers were covered by the "new source" standards. PPG's submissions revealed that although assembly of the waste-heat boilers had not begun until 1976, the new power facility itself, of which the boilers were an integral component, had been originally designed and partially ordered in 1970, a year before the proposed date of the "new source" performance standards.

On the basis of PPG's submissions, the Regional Director for Enforcement of the EPA notified PPG of his conclusion that the boilers were subject to the "new source" standards, since construction of the boilers themselves had not begun until long after January 14, 1971, the date on which the standards had been proposed. In response, PPG took the position that the boilers were part of an integrated unit, the construction of which had begun in 1970, before the proposed date of the standards. The Regional Director, nevertheless, reaffirmed his initial decision.

Pursuant to the procedure outlined in the "new source" regulations, 40 CFR § 60.5 (1979), PPG then submitted a formal request for an EPA determination that (1) the "new source" standards for "fossil fuel-fired steam generators" do not apply to the type of boilers in question, and (2) in any event, since construction of the facility of which the boilers were a part began before the date on which the standards were proposed, the boilers were not "new sources" and thus not subject to the performance standards. In the event that EPA determined that PPG's waste-heat boilers were subject to the standards, PPG also requested a clarification as to how those standards would apply.

Responding to PPG's request, the Regional Administrator notified PPG by letter that he had concluded that the waste-heat boilers were, indeed, subject to the "new source" standards for "fossil fuel-fired steam generators," and rejected PPG's argument that construction of the boilers had begun with the construction of other facets of the Lake Charles facility. Thus, the Regional Administrator affirmed the previous EPA determination that the waste-heat boilers were subject to the "new source" performance standards. With regard to the manner in which those standards were to apply to the waste-heat boilers, the Regional Administrator indicated that since PPG's gas turbine generators were not subject to the "new source" standards, PPG would be held accountable only for those emissions from the waste-heat boilers attributable to the combustion of fossil fuel, not those emissions attributable to waste heat from the gas turbine generators.[2]

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[2] In a request for clarification, PPG expressed its understanding that the "new source" standards would not be applicable during the normal course of operation of the boilers, but only during performance tests or other periods when the boilers were operating on 100% fossil fuel. EPA by letter confirmed PPG's understanding. This position, however, was inconsistent with both the Regional Administrator's earlier ruling and with EPA's position in similar cases. Accordingly, an EPA representative notified PPG by telephone that the letter was incorrect. In a subsequent

PPG then filed a petition in the Court of Appeals for the Fifth Circuit, seeking review of EPA's decision concerning the applicability of the "new source" standards to its waste-heat boilers. Because of its uncertainty regarding the proper forum for judicial review, PPG also filed a complaint for injunctive relief against the Administrator in the United States District Court for the Western District of Louisiana. That suit has been stayed pending the disposition of the present case.

PPG's uncertainty, and the issue in this case, stem from conflicting views as to the proper interpretation of § 307 (b)(1) of the Act, 42 U. S. C. § 7607 (b)(1) (1976 ed., Supp. II). Before 1977, § 307 (b)(1) provided for exclusive review in an appropriate court of appeals of certain locally or regionally applicable actions of the Administrator under several specifically enumerated provisions of the Act. Actions of the Administrator under provisions not specifically enumerated in § 307 (b)(1) were reviewable only in a district court under its federal-question jurisdiction, 28 U. S. C. § 1331. Congress expanded the ambit of § 307 (b)(1) in 1977. The Clean Air Act Amendments of 1977, Pub. L. 95–95, 91 Stat. 776, added to the list of locally or regionally applicable actions reviewable exclusively in the appropriate court of appeals both (1) actions of the Administrator under another specifically enumerated provision of the Act, and (2) *"any other final action* of the Administrator under [the] Act which is locally or

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letter, the Director of the Division of Stationary Source Enforcement of EPA reiterated that the "new source" standards would be applicable during the normal operation of the waste-heat boilers, but only to the extent that the boilers were operating on fossil fuel, rather than waste heat. The Director also indicated that, pursuant to the standards, PPG would be required to operate the boilers at all times with fuel containing less than a certain specified content of sulfur. He further noted that PPG would be required to install and operate opacity monitors in the stacks of the boilers and to perform alternative monitoring tests.

regionally applicable." (Emphasis added.) Later in 1977, in enacting the Clean Air Act Technical and Conforming Amendments, Pub. L. 95–190, 91 Stat. 1404, Congress added several more provisions to those listed in § 307 (b)(1) under which a locally or regionally applicable action of the Administrator is reviewable in the appropriate court of appeals.

It was under § 307 (b)(1), as amended, that PPG filed a petition for review in the Court of Appeals for the Fifth Circuit. Despite having filed its petition there, PPG, and Conoco as intervenor, argued that that court was without jurisdiction, since the Administrator's decision was not an action taken under one of the provisions specifically enumerated in § 307 (b)(1), and could not be properly characterized as "any other final action of the Administrator." The latter phrase, they argued, referred only to other locally or regionally applicable final actions under the provisions of the Act specifically enumerated in § 307 (b)(1). In response, EPA argued that the phrase, "any other final action," should be read literally to mean *any* final action of the Administrator.

The Court of Appeals concluded that the Administrator's decision did not fall within the meaning of "any other final action" under § 307 (b)(1). 587 F. 2d 237. It was the court's view that "[i]f Congress intended . . . to cast the entire responsibility for reviewing all EPA action under the Act into the courts of appeals, the numeration of specific sections would appear to be redundant." *Id.*, at 243. The "most revealing" aspect of the legislative history of § 307 (b)(1), the court thought, was the complete absence of any discussion of such a "massive shift" in jurisdiction. Moreover, the court found it unlikely that Congress could have intended a shift of jurisdiction that would require the courts of appeals to review decisions of the Administrator that simply applied or interpreted his regulations, as in this case. Such a decision, the court noted, is often based on a "skeletal record" that may leave the reviewing court unable to

perform meaningful judicial review. Since an appellate court is ill-suited to augment such a record, especially when compared to a trial court in which the tools of discovery are available, the court concluded that "[w]hatever addition to the jurisdiction of the courts of appeals Congress may have contemplated by adding the 'any other final action' language to § 307 (b)(1), we assume that section was drafted with the mechanical limitations of the courts of appeals in mind." 587 F. 2d, at 245. Accordingly, the Court of Appeals dismissed PPG's petition for lack of jurisdiction under § 307 (b)(1). We granted certiorari, 444 U. S. 823, because of the importance of determining the locus of judicial review of the actions of EPA.

II

It is undisputed that the Administrator's decision concerning the applicability of the "new source" performance standards to PPG's waste-heat boilers was locally applicable action under a provision of the Act not specifically enumerated in § 307 (b)(1). The question at issue is whether the Administrator's decision falls within the scope of the phrase, "any other final action of the Administrator," so as to make that decision reviewable in a federal court of appeals under § 307 (b)(1).

At the outset, we note that the parties are in agreement that the Administrator's decision was "final action" as that term is understood in the context of the Administrative Procedure Act and other provisions of federal law. It is undisputed that the Administrator's ruling represented EPA's final determination concerning the applicability of the "new source" standards to PPG's power facility. Short of an enforcement action, EPA has rendered its last word on the matter. The controversy thus is not about whether the Administrator's decision was "final," but rather about whether it was "*any other* final action" within the meaning of § 307 (b)(1), as amended in 1977.

A

The petitioners argue that the phrase, "any other final action," should be construed in accordance with its literal meaning so as to reach *any* action of the Administrator under the Act that is "final" and not taken under a specifically enumerated provision in § 307 (b)(1). The respondents argue that the statutory language should be construed more narrowly. Relying on the familiar doctrine of *ejusdem generis*, they assert that the phrase, "any other final action," should be read not to reach all final actions of the Administrator, but rather only those similar to the actions under the specifically enumerated provisions that precede that catchall phrase in the statute.[3] The similarity that the respondents discern among the actions under the specifically enumerated provisions in § 307 (b)(1) is that those actions must be based on what the respondents refer to as "a contemporaneously compiled administrative record," by which they mean a record "based on administrative proceedings reflecting at least notice and opportunity for hearing." Since the Administrator's informal decision in this case was not based on such a record, the respondents argue that his decision was not "other final action" within the meaning of § 307 (b)(1) and thus not within the jurisdiction of the Court of Appeals.[4]

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[3] The respondents have abandoned the construction of the statute they advanced in the Court of Appeals, namely, that the phrase, "any other final action," refers only to other final actions under those provisions specifically enumerated in § 307 (b)(1). That construction, as the Court of Appeals correctly noted, is inconsistent with the fact that the phrase, "any other final action," is modified not by "under these sections," but rather by "under this Act."

[4] It would appear that the respondents' construction of the statute is that adopted by the Court of Appeals, although the matter is not free from doubt. The doubt arises from the fact that the Court of Appeals' opinion can also be read as establishing a jurisdictional test that turns on a case-by-case inquiry into the adequacy of the administrative record. But, as the respondents themselves acknowledge, that reading of the opinion would create excessive uncertainty as to the proper forum for judicial review.

The respondents' reliance on the rule of *ejusdem generis* is, we think, misplaced in two respects. Under the rule of *ejusdem generis,* where general words follow an enumeration of specific items, the general words are read as applying only to other items akin to those specifically enumerated. Applying this rule to § 307 (b)(1), the respondents argue that "any other final action" must refer only to final actions based on an administrative record reflecting at least notice and opportunity for a hearing. The flaw in this argument is that at least one of the specifically enumerated provisions in § 307 (b)(1), namely, § 112 (c) of the Act, 42 U. S. C. § 7412 (c) (1976 ed., Supp. II), does not require the Administrator to act only after notice and opportunity for a hearing. In fact, the respondents themselves recognize that an action by the Administrator under § 112 (c) would be based on an administrative record not unlike that involved in this case.[5] Thus, even if the rule of *ejusdem generis* were applied, it would not significantly narrow the ambit of "any other final action" under § 307 (b)(1).

The second problem with the respondents' reliance on the rule of *ejusdem generis* is more fundamental. As we have often noted: "'The rule of *ejusdem generis,* while firmly established, is only an instrumentality for ascertaining the correct meaning of words when there is uncertainty.'" *United States* v. *Powell,* 423 U. S. 87, 91, quoting *Gooch* v. *United States,* 297 U. S. 124, 128. With regard to § 307 (b)(1), we discern no uncertainty in the meaning of the phrase, "any other final action." When Congress amended the pro-

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[5] The respondents argue that this exception should be ignored in applying the rule of *ejusdem generis,* since § 112 (c) governs the regulation of "hazardous air pollutants" for which Congress may have wanted "special review" in the courts of appeals, even in the absence of procedures requiring notice and opportunity for a hearing. It is our view, however, that if the rule of *ejusdem generis* is applicable, it must be applied to actions under *all* the specifically enumerated provisions in § 307 (b)(1), not simply those that fit the respondents' theory.

vision in 1977, it expanded its ambit to include not simply "other final action," but rather "*any* other final action." This expansive language offers no indication whatever that Congress intended the limiting construction of § 307 (b)(1) that the respondents now urge. Accordingly, we think it inappropriate to apply the rule of *ejusdem generis* in construing § 307 (b)(1). Rather, we agree with the petitioners that the phrase, "any other final action," in the absence of legislative history to the contrary, must be construed to mean exactly what it says, namely, *any other* final action.[6]

B

We have found nothing in the legislative history to support a conclusion that the phrase, "any other final action," in § 307 (b)(1) means anything other than what it says.

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[6] The respondents raise several objections to so literal a reading of § 307 (b)(1), none of which we find persuasive. First, the respondents assert that such a construction of § 307 (b)(1) is both internally inconsistent and inconsistent with another provision of the Act. The internal inconsistency is said to arise from the fact that if the phrase, "any other final action," were construed to include *any* final action of the Administrator, it would nullify the express exception from review in § 307 (b)(1) of any "standard required to be prescribed under section 202 (b)(1)." The inconsistency with another provision in the Act is said to arise from the fact that a literal reading of "any other final action" would effectively repeal another judicial review provision in the Act, § 206 (b)(2)(B), 42 U. S. C. § 7525 (b)(2)(B) (1976 ed., Supp. II). These objections fall far short of the mark, however, for the general language of the catchall phrase, "any other final action," must obviously give way to specific express provisions in the Act.

The respondents also argue that if Congress had intended the phrase, "any other final action," to refer to *all* final actions of the Administrator, it would have been unnecessary, in 1977, to add to the list in § 307 (b)(1) of specifically enumerated provisions under which actions of the Administrator are reviewable in the courts of appeals. This may be true, but the fact remains that even if Congress had intended the phrase, "any other final action," to be read, as the respondents urge, in accordance with the rule of *ejusdem generis*, there still would have been no necessity to add to the list of specifically enumerated provisions.

Congress added the language, "any other final action," to § 307 (b)(1) in the Clean Air Act Amendments of 1977. The phrase first appeared in H. R. 6161, 95th Cong., 1st Sess. (1977). That bill, as reported out of the House Committee on Interstate and Foreign Commerce, expanded the jurisdiction of the Court of Appeals for the District of Columbia Circuit to include review of not only certain EPA actions of nationwide consequences under specifically enumerated provisions of the Act, but also "any other nationally applicable regulations promulgated, or final action taken, by the Administrator under [the] Act." In parallel fashion, the bill expanded the jurisdiction of the regional courts of appeals to include review not only of certain local or regional actions under specifically enumerated provisions, but also of "*any other final action* of the Administrator under [the] Act which is locally or regionally applicable." (Emphasis added.)

The only extended discussion of this proposed amendment to § 307 (b)(1) was contained in the Committee Report accompanying H. R. 6161. H. R. Rep. No. 95–294, pp. 323–324 (1977). That discussion, however, focused not on the jurisdictional question at issue here, but rather on the proper venue as between the District of Columbia Circuit and the other Federal Circuits. The Committee Report described the proposed amendments as "intended to clarify some questions relating to venue for review of rules or orders under the [A]ct." *Id.*, at 323. In this regard, the Committee Report explained:

> "[The proposed addition to the first sentence of § 307 (b)(1)] makes it clear that any nationally applicable regulations promulgated by the Administrator under the Clean Air Act could be reviewed only in the U. S. Court of Appeals for the District of Columbia. . . .
>
> "[The proposed addition to the second sentence] provides for essentially locally, statewide, or regionally applicable rules or orders to be reviewed in the U. S. court

of appeals for the circuit in which such locality, State, or region is located. . . ." *Ibid.*

The Committee Report further stated that the proposed changes reflected the Committee's agreement with certain venue proposals of the Administrative Conference of the United States, but added the caveat that the adoption of these proposals was not to be taken as an endorsement of the remainder of the Administrative Conference's recommendations. *Id.*, at 324.

The respondents infer from this scant legislative history that Congress never intended the addition of the phrase, "any other final action," to § 307 (b)(1) to enlarge the jurisdiction of the courts of appeals to include the review of cases based on an administrative record reflecting less than notice and an opportunity for a hearing. But, insofar as the respondents rely on what the Committee said in its Report, we fail to see how the Committee's observations on venue have any bearing at all on the jurisdictional issue now before the Court.[7] Moreover, since the Administrative Conference had not proposed that the jurisdiction of the courts of appeals be expanded to include "any other final action," the fact that the Committee expressly disclaimed an endorsement of the recommendations of the Administrative Conference on matters other than venue would appear wholly irrelevant.

The respondents also rely on what the Committee and the

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[7] That the Committee intended the phrase, "any other final action," to result in at least some expansion of the jurisdiction of the courts of appeals is evident in the fact that the Committee Report expressly indicated that several types of nationwide actions under provisions not specifically enumerated in § 307 (b)(1) would be reviewable in the District of Columbia Circuit. See H. R. Rep. No. 95-294, pp. 323-324 (1977) (*e. g.*, regulations to carry out the nonattainment policy set out in § 117 of the Act). Thus, as even the respondents concede, the issue here is not whether Congress intended any expansion of the jurisdiction of the courts of appeals, but rather the extent to which Congress intended to expand that jurisdiction. As to that issue, the legislative history is silent.

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Congress did *not* say about the 1977 amendments to § 307 (b)(1). It is unlikely, the respondents assert, that Congress would have expanded so radically the jurisdiction of the courts of appeals, and divested the district courts of jurisdiction, without some consideration and discussion of the matter. We cannot accept this argument. First, although the number of actions comprehended by a literal interpretation of "any other final action" is no doubt substantial, the number would not appear so large as ineluctably to have provoked comment in Congress. Secondly, it would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute. In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark.[8]

C

The respondents finally argue that, as a matter of policy, the basic purpose of § 307 (b)(1)—to provide prompt pre-enforcement review of EPA action—would be better served by providing for judicial review of cases such as this in a district court rather than a court of appeals.[9] It is the respond-

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[8] Arthur Conan Doyle, The Silver Blaze, in The Complete Sherlock Holmes (1938).

[9] The respondents also argue that a literal construction of § 307 (b)(1) would violate due process of law. This argument turns on the interrelationship between § 307 (b)(1) and its companion provision, § 307 (b)(2), which provides that "[a]ction of the Administrator with respect to which review could have been obtained under [§ 307 (b)(1)] shall not be subject to judicial review in civil or criminal proceedings for enforcement." 42 U. S. C. § 7607 (b)(2) (1976 ed., Supp. II). To preclude a defendant in a civil or criminal enforcement proceeding from attacking the validity of informal action on the part of the Administrator would, in the respondents' view, violate the defendant's due process right to a "reasonable opportunity to be heard and present evidence." *Yakus* v. *United States*, 321 U. S. 414, 433. The short answer to the respondents' argument is that

ents' view that since agency action predicated on neither formal adjudication nor informal rulemaking is apt to be based on a record too scant to permit informed judicial review, the district court is the preferable forum, since the tools of discovery are there available to augment the record, whereas in a court of appeals a time-consuming remand to EPA might be required.

This is an argument to be addressed to Congress, not to this Court. It is not our task to determine which would be the ideal forum for judicial review of the Administrator's decision in this case. See, *e. g.*, Currie & Goodman, Judicial Review of Federal Administrative Action: Quest for the Optimum Forum, 75 Colum. L. Rev. 1 (1975). Rather, we must determine what Congress intended when it vested the courts of appeals with jurisdiction under § 307 (b)(1) to review "any other final action." The language of the statute clearly provides that a decision of the sort at issue here is reviewable in a court of appeals, and nothing in the legislative history points to any different conclusion.[10]

We add only that, as a matter of policy, this conferral of jurisdiction upon the courts of appeals is not wholly irrational. The most obvious advantage of direct review by a court of appeals is the time saved compared to review by a district court, followed by a second review on appeal. It may be seriously questioned whether the overall time lost by court of appeals remands to EPA of those cases in which the

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the validity of § 307 (b)(2) is not at issue here. The constitutional question raised by the respondents must, therefore, await another day.

[10] The dissenting opinions would modify the language of § 307 (b)(1) so as to read either (1) any other final action similar to that under the specifically enumerated provisions other than those added in the Clean Air Act Technical and Conforming Amendments, *post*, at 600–602, or (2) any other final action expressly, but not impliedly, authorized under the sections of the Act not specifically enumerated in § 307 (b)(1), *post*, at 607. But neither the language of the statute nor its legislative history supports either of these proposed readings of § 307 (b)(1).

records are inadequate would exceed the time saved by forgoing in every case initial review in a district court. But whatever the answer to this empirical question, an appellate court is not without recourse in the event it finds itself unable to exercise informed judicial review because of an inadequate administrative record. In such a situation, an appellate court may always remand a case to the agency for further consideration.[11]

For the reasons stated, we hold that the Court of Appeals erred in dismissing the petition for want of jurisdiction. Accordingly, the judgment is reversed, and the case is remanded to the Court of Appeals for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE POWELL, concurring.

I continue to have reservations about the constitutionality of the notice and review preclusion provisions of § 307 (b). *Adamo Wrecking Co.* v. *United States*, 434 U. S. 275, 289 (1978) (POWELL, J., concurring); see *ante*, at 592–593, n. 9. Congress has extended to 60 days the period within which a petition for review may be filed under § 307 (b)(1). But publication in the Federal Register still is unlikely to provide constitutionally adequate notice that a failure to seek immediate review will bar affected parties from challenging the noticed action in a subsequent criminal prosecution. An informal exchange of letters, like those involved in this case, often will provide no greater protection. Although these constitutional difficulties well may counsel a narrow construction of § 307 (b)(1), cf. *Chrysler Corp.* v. *EPA*, 195 U. S. App. D. C. 90, 98–100, 600 F. 2d 904, 912–914 (1979) (parallel provisions of Noise Control Act), no such construction is

[11] Whether the present administrative record in this case is adequate to permit informed judicial review is a question that the Court of Appeals must determine.

possible in this case. As the Court demonstrates, the intention of Congress is clear. Accordingly, I join the opinion of the Court.

MR. JUSTICE BLACKMUN, concurring in the result.

For the reasons stated in my Brother STEVENS' dissent, I accept the Court's conclusion that the Agency's determination in this case constituted "final" action. The opaque language of § 307 (b)(1) and the scant attention it received by Congress, however, leave me in doubt concerning Congress' true intention with respect to the scope of direct appellate review. Like my dissenting Brethren, I find it difficult to believe that Congress would undertake such a massive expansion in the number of Agency actions directly reviewable by the courts of appeals without some palpable indication that it had given thought to the consequences. Nonetheless, I agree with the Court that the dearth of evidence to the contrary makes its broad interpretation of the statute inescapable. On this legislative record, we must leave to Congress, should it be so inclined, the task of introducing some clear limitation on appellate jurisdiction over review of informal Agency determinations like the one now before us.

MR. JUSTICE REHNQUIST, dissenting.

The effort to determine congressional intent here might better be entrusted to a detective than to a judge. The Court rejects the application of the traditional canon of *ejusdem generis* to the phrase "any other final action" on the grounds that (1) there is no uncertainty as to the meaning of that phrase, *ante*, at 588, and (2) at least one of the provisions now included in § 307 (b)(1), 42 U. S. C. § 7607 (b)(1) (1976 ed., Supp. II)—*i. e.*, § 112 (c), 42 U. S. C. § 7412 (c) (1976 ed., Supp. II)—does not require the Administrator to act after notice and opportunity for comment or hearing, *ante*, at 588. While I agree with the Court that the phrase "any other final action" may not by itself be "ambiguous," I think that what

we know of the matter makes Congress' additions to § 307 (b)(1) in the Clean Air Act Technical and Conforming Amendments of 1977 no less curious than was the incident in the Silver Blaze of the dog that did nothing in the nighttime. If I am correct in this, we must look beyond the language of the phrase "any other final action" in ascertaining congressional intention. The Court did just that in *Chemehuevi Tribe of Indians* v. *FPC*, 420 U. S. 395 (1975).

Before 1977, § 307 (b)(1) granted exclusive jurisdiction to courts of appeals to review only a limited class of actions taken by the Administrator.[1] *District of Columbia* v. *Train*, 175 U. S. App. D. C. 115, 119, 533 F. 2d 1250, 1254 (1976); *Utah Power & Light Co.* v. *EPA*, 180 U. S. App. D. C. 70, 72, 553 F. 2d 215, 217 (1977). The EPA was required to provide for notice and an opportunity for hearing or comment with respect to all such actions. These procedural requirements generally result in the creation of an administrative record

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[1] The section originally provided:

"A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard under section 112, any standard of performance under section 111, any standard under section 202 (other than a standard required to be prescribed under section 202 (b)(1)), any determination under section 202 (b)(5), any control or prohibition under section 211, or any standard under section 231 may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 or section 111 (d) may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation or approval. . . ." Pub. L. 91-604, 84 Stat. 1708.

It was inserted by the Senate, S. 4358, 91st Cong., 2d Sess., § 308 (1970), to "specify forums for judicial review of certain actions of the [EPA] Secretary. . . ." H. R. Conf. Rep. No. 91-1783, p. 57 (1970). The House bill did not contain a comparable provision. *Ibid.* In 1974, §§ 119 (c)(2)(A), (B), and (C) and the phrase "regulations thereunder" were added to the list of actions reviewable under § 307 (b)(1). Pub. L. 93-319, 88 Stat. 259.

that is more susceptible of judicial review by courts of appeals than actions such as the one in this case in which no notice and opportunity for comment are required.[2] Indeed, it has been stated: "The requirements that interested persons have an opportunity at least for written comment and that the agency provide a general statement of reasons virtually assure that an appellate court will have a meaningful record to review. While it is true that in many instances informal adjudication also produces an administrative record, the nature and scope of the records vary widely from one type of action to another and cannot provide the same assurance that appellate review will be feasible." Currie & Goodman, Judicial Review of Federal Administrative Action: Quest for the Optimum Forum, 75 Colum. L. Rev. 1, 57 (1975). Thus the grant of exclusive jurisdiction to courts of appeals in pre-1977 § 307 (b)(1) actions fully comports with the traditional role of appellate courts in reviewing agency decisions that are based on development of factual issues by means of an administrative record.[3]

The revision of § 307 (b)(1) during the Clean Air Act Amendments of 1977, when Congress added the phrase "any other final action," does not in my view support the Court's

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[2] At the Senate debates on S. 4358, Senator Cooper stated that decisions of the EPA made after on the record development of "technical and other relevant information necessary to achieve a sound judgment . . . should be reviewable in the court of appeals so that the interests of all parties can be fully protected. With the record developed by the [EPA] Secretary, the court, as an unbiased, independent institution, is the appropriate forum for reviewing such decision and making a judgment as to its quality." 116 Cong. Rec. 33117 (1970).

[3] "Direct appellate review of *formal* administrative adjudications . . . has long been standard practice: because the agency's action is to be judged by the administrative record, there is no need for a trial, and thus no need for prior resort to a district court." Currie, Judicial Review Under Federal Pollution Laws, 62 Iowa L. Rev. 1221, 1232 (1977) (emphasis added). See also Currie & Goodman, Judicial Review of Federal Administrative Action: Quest for the Optimum Forum, 75 Colum. L. Rev. 1, 5–6 (1975).

construction of that phrase as a major expansion of Congress' original limited grant of exclusive jurisdiction to federal courts of appeals. The amendment added only § 120, 42 U. S. C. § 7420 (1976 ed., Supp. II), to the list of those specifically enumerated in § 307 (b)(1), and it also included the "any other final action" phrase. Pub. L. 95–95, 91 Stat. 776. Section 120 does not depart from the requirement of notice and opportunity for comment or hearing that existed prior to 1977 with respect to the other sections specifically enumerated in § 307 (b)(1). It directs the EPA to give notice and an opportunity for public hearing before adopting the authorized regulations. And in adding the phrase "any other final action" Congress gave no indication whatsoever that it intended to make reviewable in the courts of appeals actions that differed substantially in character from those authorized by § 120 and the other sections listed in § 307 (b)(1). Instead, the limited legislative history on the subject suggests that the amendment was aimed at resolving problems of venue under the section, not at effecting a major jurisdictional shift from the district courts to courts of appeals.[4]

If Congress had done nothing more than enact this amend-

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[4] The only discussion of the 1977 addition to the Clean Air Act, § 307 (b)(1), states that the amendment was "intended to clarify some questions relating to *venue* for review of rules or orders under the act." H. R. Rep. No. 95–294, p. 323 (1977) (emphasis added). The House Report noted that "in adopting this subsection, the committee was in large measure approving the portion of the Administrative Conference of the United States recommendation Section 305.76–4 (A) [41 Fed. Reg. 56768 (1976)], that deals with venue," and that the proposed amendment also "incorporates recommendation D2 of the Administrative Conference on extending the period for petitioning for judicial review in the court of appeals." *Id.*, at 324. It further stated that it did not endorse the remainder of the Administrative Conference's recommendations, *ibid.*, which include a recommendation that proposed expanding the jurisdiction of the courts of appeals by eliminating the exception to review in those courts for regulations adopted under § 202 (b)(1), 42 U. S. C. § 7521 (b)(1) (1976 ed., Supp. II).

ment, I doubt that the Court would find application of the rule of *ejusdem generis* problematic. See *infra*, at 601. The difficulty in ascertaining Congress' intention here arises from the so-called "technical amendments" enacted three months after Congress adopted the Clean Air Act Amendments in 1977. Clean Air Act Technical and Conforming Amendments of 1977, Pub. L. 95–140, 91 Stat. 1404. The amendments purportedly made no substantive changes in the earlier amendments.[5] They nonetheless altered § 307 (b)(1) by specifying four additional sections that would trigger the original jurisdiction of courts of appeals: § 111 (j), 42 U. S. C. § 7411 (j) (1976 ed., Supp. II); § 112 (c), 42 U. S. C. § 7412 (c) (1976 ed., Supp. II); § 113 (d), 42 U. S. C. § 7413 (d) (1976 ed., Supp. II); and § 119, 42 U. S. C. § 7419 (1976 ed., Supp. II). EPA maintains that these additions make no substantive changes because the "any other final action" phrase already included actions under these sections, and under the Court's interpretation of that phrase this would clearly be the case. This view, however, also leads to the conclusion that the technical amendments were a largely meaningless exercise of Congress' legislative authority. But, as previously noted, in presenting the technical amendments, Senator Muskie said they were "*necessary* to correct technical error or unclear phrases." 123 Cong. Rec. S18372 (Nov. 1, 1977) (emphasis added); n. 4, *supra*. Thus, the technical amendments, coupled with Senator Muskie's statement in introducing them, present this Court with a paradox in attempting to ascertain Congress' intention: under the Court's interpretation of the phrase "any other final action" the technical amendments, contrary to their advance billing, were entirely unnecessary because the phrase

[5] In a statement explaining the amendments, Senator Muskie stated that "[i]t is not the purpose of these amendments to re-open substantive issues in the Clean Air Act." 123 Cong. Rec. S18372 (Nov. 1, 1977). Rather, he continued, "[o]nly those amendments that are necessary to correct technical errors or unclear phrases have been retained in the package of amendments that is now before the Senate." *Ibid.*

clearly includes those sections. But if "any other final action" means anything less than the Court's interpretation, then the technical amendments, again contrary to their stated purpose, made important substantive changes to § 307 (b)(1).[6] The Court attempts, partially and unsuccessfully, to address the difficulty here in a footnote, when it acknowledges that under its interpretation the technical amendments were "unnecessary." That response, however, does not answer the question: It merely restates it. The Court adds only the additional observation that "[t]his may be true, but the fact remains that even if Congress had intended the phrase 'any other final action' to be read . . . in accordance with the rule of *ejusdem generis*, there still would have been no necessity to add to the list of specifically enumerated provisions." *Ante*, at 589, n. 6.

In my view, absent any clear indication to the contrary, the statute should not be construed as creating a broad expansion of the jurisdiction of the federal courts of appeals. Such an approach is quite appropriate in this case because the jurisdictional expansion wrought by the Court is thoroughly inconsistent with the traditional role of appellate courts. Indeed, I think it is difficult to believe that Congress would adopt a massive shift in jurisdiction from the district courts to the courts of appeals without any comment whatsoever. The sketchy legislative history here indicates that Congress considered the Administrative Conference's recommendations and that the principal purpose of the 1977 amendment was to effect the change in venue that was recommended by the Administrative Conference. The change would be far less sub-

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[6] Section 112 (c) does not make any provision for notice and comment or hearing. And, while §§ 111 (j) and 119 (a) generally provide for notice and hearing, they do not do so in every case. Under § 111 (j), an order *denying* a waiver apparently may be made by the Administrator without formal proceedings, and under § 119 (a), the Administrator apparently may *deny* an application for a primary nonferrous smelter order without providing for notice and hearing.

stantial than the jurisdictional shift that according to the Court Congress adopted *sub silentio*. And the remarks made at the time the technical amendments were adopted, coupled with the nature of the actions reviewable under § 307 (b)(1) prior to that time, are sufficiently perplexing that in my view the technical amendments do not shed any meaningful light on Congress' intention in adding the phrase "any other final action" to § 307 (b)(1). Accordingly, even though they be labeled "technical amendments" I think they are most accurately viewed as subsequent legislative history that is not controlling in interpreting a prior enactment. See *United Air Lines, Inc.* v. *McMann*, 434 U. S. 192, 200, n. 7 (1977). Indeed, to one not acquainted with the significance of the expansion of jurisdiction of courts of appeals urged by the EPA and adopted by the Court, the technical amendments most likely looked like minor additions to § 307 (b)(1). Thus, I think the most sensible way to interpret the phrase "any other final action" is to do so by reference to § 307 (b)(1) at the time that phrase was enacted, rather than at the subsequent time at which the technical amendments were added.

If the phrase "any other final action" is interpreted by reference to § 307 (b)(1) at the time the phrase was added, this case is clearly a proper one in which to apply the rule of *ejusdem generis*. The rule of *ejusdem generis* ordinarily "limits general terms which follow specific ones to matters similar to those specified." *Gooch* v. *United States*, 297 U. S. 124, 128 (1936). It rests on the notion that statutes should be construed so that the "sense of the words . . . best harmonizes with the context and the end in view." *Ibid.* At the time the general language "any other final action" was adopted, notice and opportunity for comments or hearing were required for the actions listed in the sections that preceded it—a requirement that distinguished those sections from the Administrator's action at issue here. Thus under the principle of *ejusdem generis*, the general phrase refers to similar types

of actions. This interpretation offers the most satisfactory explanation for Congress' curious failure to provide any indication that it intended to effect a major jurisdictional change in the manner of reviewing EPA actions such as the one before us, a change that is inconsistent with the traditional role of appellate courts. In a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night.

MR. JUSTICE STEVENS, dissenting.

From May 1976 through June 1977, respondent PPG Industries, Inc. (PPG), exchanged a series of letters with various officials of the Environmental Protection Agency concerning the applicability of certain federal performance standards to PPG's waste-heat boilers at its Lake Charles, La., plant. PPG took the position that its boilers were not required to meet these standards, first, because construction had begun on them prior to the effective date of the standards and, second, because waste-heat boilers are not within the category of sources to which the standards in question apply.[1]

In April 1977 PPG submitted a formal request, pursuant to 40 CFR § 60.5 (a), for a definitive determination on these issues. Although § 60.5 (a) provides for such determinations only with respect to the first issue raised by PPG,[2] EPA's Regional Administrator apparently rejected both arguments

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[1] PPG also had questions about compliance in the event that the standards were found to apply.

[2] Title 40 CFR § 60.5 (a) (1979) provides:

"When requested to do so by an owner or operator, the Administrator will make a determination of whether action taken or intended to be taken by such owner or operator constitutes construction (including reconstruction) or modification or the commencement thereof within the meaning of this part."

in her June 1977 response, unequivocally stating that PPG's boilers were subject to the standards in question.

After a few more "clarifying" letters were exchanged, PPG brought two separate petitions for review of EPA's determination, filing in both the District Court for the Western District of Louisiana and the Court of Appeals for the Fifth Circuit. The Fifth Circuit dismissed the petition on the ground that review was properly had, if at all, in the District Court.

There are two issues before us today: first, whether EPA's determination constitutes "final" agency action such that any review is appropriate and, second, if so, whether that review must be had in the Court of Appeals because the determination constituted "any other final action" within the meaning of § 307 (b)(1) of the Clean Air Act, 42 U. S. C. § 7607 (b)(1) (1976 ed., Supp. II). While I accept the Court's holding that the Agency's determination constituted "final" action as that term is ordinarily used under the Administrative Procedure Act, I am not persuaded that Congress intended exclusive review of this type of action in the courts of appeals.

In *Abbott Laboratories* v. *Gardner,* 387 U. S. 136, 149–156, this Court set out three tests that informal agency action must meet in order to be considered final agency action that is ripe for judicial review. First, the action must involve an issue that is appropriate for judicial review, such as a purely legal question. Second, it must be a definitive statement of the agency's position and not merely a tentative view or the opinion of a subordinate official. Finally, the party seeking review of the action must be faced with serious hardship if he is not allowed to obtain pre-enforcement review. In *Abbott Laboratories* itself the third requirement was satisfied by the fact that the affected companies either had to expend substantial amounts of money to comply with the regulation or not comply and risk serious criminal and civil penalties.

Although informal advice by agency personnel as to how the agency is likely to react to a particular set of circumstances

will not ordinarily be subject to judicial review under the *Abbott Laboratories* tests, this case would seem to be an exception. As EPA argues, the only issue to be decided is whether certain regulations apply under the facts submitted to the Agency by PPG. Second, the Regional Administrator of EPA herself signed the letter rejecting PPG's position; thus, it appears to be, as the Court suggests, the Agency's "last word" on the issue. *Ante*, at 586.[3] And finally, although the parties have not informed us of the magnitude of PPG's estimated compliance costs, it appears that PPG would have to risk sizeable penalties under 42 U. S. C. §§ 7413 (b), (c), and 7420 (1976 ed., Supp. II) in order to challenge EPA's determination in enforcement proceedings.[4]

Assuming that EPA's letter in this case would constitute "final agency action" under the APA, the second question is whether we are compelled by the language of § 307 (b)(1) to hold that the Court of Appeals had exclusive jurisdiction to

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[3] The Court relies exclusively on this factor, along with the fact that the parties agree that the action is "final." I would not place much reliance on the parties' agreement, however, since they share a common interest in having the threshold jurisdictional question resolved in the affirmative. Thus, it serves PPG's interests to treat EPA's letter as a final action because PPG wants judicial review as soon as possible. It also serves EPA's interests because broadening the category of agency actions that are final and reviewable only in the courts of appeals increases the number of agency actions that cannot be challenged in enforcement proceedings under the Act. See *infra*, at 605.

[4] See *National Automatic Laundry & Cleaning Council* v. *Shultz*, 143 U. S. App. D. C. 274, 281, 443 F. 2d 689, 696 (1971), in which the court held a letter signed by the Wage-Hour Administrator concerning a particular application of the Fair Labor Standards Act to be "final action" in light of the fact that noncompliance with the agency's policy could have led to criminal liability and actions for double damages by affected employees. But see *West Penn Power Co.* v. *Train*, 522 F. 2d 302, 310–311 (CA3 1975), cert. denied, 426 U. S. 947; 522 F. 2d, at 317–319 (Adams, J., dissenting), where the court refused to consider a notice of violation issued pursuant to the Clean Air Act to be final agency action despite the severe penalties that could have attached to future noncompliance.

review that action. As MR. JUSTICE REHNQUIST points out in his dissent, such a construction of the statute will greatly increase the burdens currently borne by the courts of appeals, both in terms of numbers of cases and difficulty of issues presented.[5] *Ante*, at 596–597, 600–601. In my view, it will also distort the concept of final agency action by giving EPA virtually unlimited discretion to transform its informal advice into final agency action subject to court of appeals review.

Under § 307 (b)(2) of the Clean Air Act, any agency action that was reviewable in the courts of appeals cannot be challenged in an enforcement proceeding, whether or not review was actually sought.[6] Under § 307 (b)(1), a petition for review must be filed within 60 days of the publication of the agency action in the Federal Register. Although EPA apparently did not publish letters like its letter to PPG in the Federal Register prior to the Clean Air Act Amendments of 1977, it is now embarking on a program to do so.[7] Because

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[5] Whether or not the record in this case was sufficiently developed for purposes of court of appeals' review (an issue on which the parties differ), it is clear that there will be many cases involving informal EPA action in which the "record" on which the Agency relied in making its determination will be minimal.

[6] Section 307 (b)(2) of the Clean Air Act provides:

"Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement."

[7] In EPA's brief in the Court of Appeals, it took the position that, by adding "any other final action" to § 307 (b)(1), Congress intended to require the agency to give notice in the Federal Register of each and every "final action" it takes, contrary to its prior practice. Although the Agency noted that it had not yet begun complying with this obligation, it stated that it intended to begin publication in the near future of all final agency actions taken since the 1977 amendments. Brief for Respondents in No. 77-2989 (CA5), pp. 27–29. EPA's interpretation of the Federal Register clause as a requirement that notice of final determinations be given seems backwards to me. I think a more plausible interpretation of the statute is that Congress intended the term "final agency action" to

publication may give the Agency the benefit of the preclusive effect of § 307 (b)(2), it has every incentive to notice a wide range of actions in the Federal Register.

Once notice of an action has been published in the Federal Register, it would be difficult to argue that it was not "final" agency action. Most of the determinations would, like this one, concern applications of particular regulations to undisputed fact situations. Second, the very fact that the Agency had published its position would indicate that it was a definitive statement of agency policy. And finally, the requirement that an aggrieved person show some hardship entitling him to pre-enforcement review would also seem to be satisfied by mere publication, since the failure to raise the issue might well foreclose future review entirely.[8]

I find it difficult to believe that Congress intended this highly undesirable result. Although I do not share MR. JUSTICE REHNQUIST's interpretation of the statute, I would construe it as drawing a line short of allowing EPA complete discretion to turn anything it chooses into final action reviewable only in the courts of appeals.

Section 307 (b)(1) mandates exclusive review in the courts of appeals of the Administrator's actions under certain specific subsections of the Act. Those subsections contain specific grants of authority to the Administrator to make certain determinations. Thus, §§ 110 and 111 (d), 42 U. S. C. §§ 7410 and 7411 (d) (1976 ed., Supp. II), empower the Administrator to approve state implementation plans; §§ 111 (j), 112 (c), 113 (d), and 119, 42 U. S. C. §§ 7411 (j), 7412 (c), 7413 (d),

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refer only to the types of actions that EPA was accustomed to publishing in the Federal Register prior to the 1977 amendments.

[8] The hardship determination, of course, becomes circular, since there is no preclusion unless there is "final" agency action and no finality unless there is some hardship in not according pre-enforcement review. Under these circumstances, the courts are likely to emulate the Court's approach in this case, ignoring the hardship component entirely and making reviewable any action that constitutes a definitive statement of the Agency's position.

and 7419 (1976 ed., Supp. II), empower the Administrator to grant (and by necessary implication to deny) waivers to companies that are unable to comply with the applicable standards; and § 120, 42 U. S. C. § 7420 (1976 ed., Supp. II), sets up a procedure through which the Administrator is to assess noncompliance penalties, after notice and hearing on the record. Each of these types of agency action has an immediate impact on the legal rights of the affected party.

By contrast, agency advice as to whether or not particular sources are subject to previously promulgated regulations does not, in itself, change any party's legal status; nor is there anything in the statute that specifically requires or permits the Administrator to give such advice. This does not mean that it is beyond the Administrator's power to do so or to set up his own procedures, as he has done in 40 CFR § 60.5 (a) (1979), for giving advice in a formalized manner. But I do not believe Congress intended the review provisions of the statute to cover this type of "agency action" as well as those types specifically contemplated by the statute. In making reviewable "any other final action of the Administrator under this chapter," Congress must have been thinking of actions it had specifically directed or authorized the Administrator to take under sections of the Act not specifically enumerated in § 307 (b)(1). This interpretation is consistent with both an *ejusdem generis* construction of the statute and its plain language. It is also supported by Congress' apparent belief that it was extending court of appeals review only to the types of actions that EPA had been accustomed to publishing in the Federal Register. See n. 7, *supra*.

Accordingly, I respectfully dissent.

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ANDRUS, SECRETARY OF THE INTERIOR, ET AL. *v.* GLOVER CONSTRUCTION CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 79-48. Argued March 24, 1980—Decided May 27, 1980

Held: The Buy Indian Act, which permits the Secretary of the Interior to purchase "the products of Indian industry . . . in open market," does not authorize the Department of the Interior's Bureau of Indian Affairs (BIA) to enter into road construction contracts with Indian-owned companies without first advertising for bids pursuant to Title III of the Federal Property and Administrative Services Act of 1949 (FPASA). There is no such authority even if the Buy Indian Act's language "the products of Indian industry" could be construed to embrace road construction, since, while negotiated procurements "otherwise authorized by law" are one of the specified exceptions to Title III's broad directive in 41 U. S. C. § 252 (c) that all procurement by the covered executive agencies (including the BIA) proceed through advertising, such exception is omitted from the list of the exceptions specified in § 252 (e) to the requirement that § 252 (c) not be construed to permit any road construction contract to be negotiated without advertising. From this omission only one inference can be drawn: Congress meant to bar the negotiation of road construction projects under the authority of laws like the Buy Indian Act. Pp. 612-619.

591 F. 2d 554, affirmed.

STEWART, J., delivered the opinion for a unanimous Court.

Andrew J. Levander argued the cause for petitioners *pro hac vice.* With him on the briefs were *Solicitor General McCree, Assistant Attorney General Moorman, Deputy Solicitor General Claiborne, Robert L. Klarquist,* and *Larry A. Boggs.*

D. D. Hayes argued the cause and filed a brief for respondent.*

**Reid Peyton Chambers, Arthur Lazarus, Jr.,* and *Richard A. Baenen* filed a brief for the Association on American Indian Affairs, Inc., et al. as *amici curiae* urging reversal.

MR. JUSTICE STEWART delivered the opinion of the Court.

The Buy Indian Act, 35 Stat. 71, as amended, 25 U. S. C. § 47, directs the Secretary of the Interior to employ Indian labor "[s]o far as may be practicable," and permits him to purchase "the products of Indian industry . . . in open market." [1] The question presented in this case is whether the Bureau of Indian Affairs (BIA) of the Department of the Interior [2] may, on the authority of this legislation, enter into road construction contracts with Indian-owned companies without first advertising for bids pursuant to Title III of the Federal Property and Administrative Services Act of 1949 (FPASA), 63 Stat. 393, as amended, 41 U. S. C. §§ 251–260.

I

In 1976, the BIA formally adopted the procurement policy that "all [BIA] purchases or contracts be made or entered into with qualified Indian contractors to the maximum practicable extent." [3] To effectuate this objective, the BIA announced that in every procurement situation it would consider dealing with non-Indian contractors only after it had determined that there were "no qualified Indian contractors within the normal competitive area that can fill or are interested in filling the procurement requirement." [4]

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[1] Title 25 U. S. C. § 47 provides in full:

"So far as may be practicable Indian labor shall be employed, and purchases of the products of Indian industry may be made in open market in the discretion of the Secretary of the Interior."

[2] The Secretary of the Interior has delegated his responsibilities and powers under the Act to the Commissioner of the BIA.

[3] 20 BIAM Bull. 1 (Mar. 3, 1976). See also 25 CFR § 162.5a (1978); 41 CFR § 14H-3.215-70 (1977). The Bulletin defined "Indian contractor" as a legal entity that is 100% Indian owned and controlled. An "Indian" was defined as a member of an Indian tribe or as a person otherwise considered to be an Indian by the tribe with which affiliation is claimed.

[4] The Bulletin admonished that, in all events, the contract price must be "fair and reasonable."

In early 1977, the BIA invited three Indian-owned construction companies to submit bids for the repair and improvement of a 5-mile segment of road in Pushmataha County, Okla. The road, commonly called the Honobia Road, is located within an area subject to BIA jurisdiction. The respondent, a non-Indian corporation engaged as a general contractor in roadbuilding and other forms of heavy construction, was not afforded an opportunity to bid.[5] On May 25, 1977, BIA awarded the contract to Indian Nations Construction Co., a corporation owned and controlled exclusively by Indians and the only Indian-owned company to have bid on the project. The final negotiated contract price amounted to approximately $1.2 million.[6]

The respondent then filed the present suit in the United States District Court for the Eastern District of Oklahoma, naming as defendants the Secretary of the Interior, the Department of the Interior, BIA, and the BIA contracting officer on the Honobia Road project (petitioners here). The respondent alleged that the petitioners were required by § 3709 of the Revised Statutes, 41 U. S. C. § 5, and Title III of the FPASA to advertise publicly for bids on the Honobia Road project. The respondent further claimed that the actions of the petitioners had denied it due process and equal protection in contravention of the Fifth Amendment of the United States Constitution. As relief, the respondent re-

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[5] At the time, the respondent was on the list of available contractors maintained by the BIA. Previously, the respondent had competitively bid on and been awarded the contract covering another five miles of the Honobia Road.

In procurement parlance, contracts for which bids are publicly invited in advance are said to be let pursuant to "advertising." See 41 U. S. C. § 253; 41 CFR §§ 1-2.101, 1-2.203-1, 1-2.203-2 (1979). All other contracts are "negotiated." See 41 U. S. C. §§ 252 (c), 254; 41 CFR § 1-1.301-3 (1979).

[6] The BIA's area road engineer had earlier estimated that the job would cost $963,117.48.

quested the District Court to set aside the Honobia Road contract and to enjoin the petitioners from engaging in the unadvertised negotiation of contracts on the purported authority of the Buy Indian Act.

After the completion of discovery, the District Court granted summary judgment to the respondent. 451 F. Supp. 1102. The court concluded that the procedure followed by the petitioners in awarding the Honobia Road project to the Indian Nations Construction Co. violated the advertising requirements of the FPASA, in particular 41 U. S. C. §§ 252 (e) and 253. 451 F. Supp., at 1106. The court rejected the Secretary's contrary administrative construction as inconsistent with the plain language of the FPASA. *Id.*, at 1106–1108. Deciding in favor of the respondent on these statutory grounds, the District Court found it unnecessary to reach the respondent's alternative arguments under the Constitution. *Id.*, at 1108. The court thereupon declared the road construction contract that had been entered into between the petitioners and the Indian Nations Construction Co. to be null and void, and permanently enjoined the petitioners from circumventing the advertising requirements of 41 U. S. C. § 253 in connection with the remainder of the Honobia Road project and future road construction projects. 451 F. Supp., at 1112.[7]

A divided panel of the Court of Appeals for the Tenth Circuit affirmed the judgment. 591 F. 2d 554. Relying in large part on the analysis of the District Court, the Court of Appeals held that, whatever might arguably be the breadth of the Buy Indian Act standing alone, it had been pre-empted by the advertising requirements of the FPASA with respect

[7] The court denied the respondent's request that Indian Nations Construction Co. be made to refund the amounts it had been paid for work already performed on the Honobia Road project before the court's entry of judgment. 451 F. Supp., at 1109, 1112. In this connection, the District Court noted that 9.7% of the construction contract had been completed and paid for at the time of its decision. *Id.*, at 1109.

to the procurement of road construction projects. *Id.*, at 557–559. Alternatively, the Court of Appeals observed that it would "require a considerable 'stretch of the imagination' to conclude that the Congress intended the Buy-Indian Act to apply to road construction projects." *Id.*, at 560. The appellate court believed, in short, that the Act's preference for Indian "products" could not easily be read to include the performance of a roadway construction contract by an Indian-owned firm. *Id.*, at 562. In response to the petitioners' contention that the Buy Indian Act should be construed liberally to effectuate its remedial purpose, the court observed that "a primary, significant remedial feature of the advertisement and competitive bidding requirements of the [FPASA] is to obtain the best and lowest bid for the benefit of the American taxpayers in 'high cost' construction categories." *Ibid.* (emphasis deleted). We granted certiorari, 444 U. S. 962, to decide a question of importance in the proper exercise by the BIA of its procurement responsibilities.

II

The Buy Indian Act was enacted in 1910 as part of legislation that subjected the purchase of Indian supplies by the Department of the Interior to the strictures of § 3709 of the Revised Statutes.[8] Section 3709, which had been in existence

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[8] The Act of June 25, 1910, ch. 431, § 23, 36 Stat. 861, provided:

"That hereafter the purchase of Indian supplies shall be made in conformity with the requirements of section thirty-seven hundred and nine of the Revised Statutes of the United States: *Provided*, That so far as may be practicable Indian labor shall be employed, and purchases of the products of Indian industry may be made in open market in the discretion of the Secretary of the Interior. All Acts and parts of Acts in conflict with the provisions of this section are hereby repealed."

The origins of this legislation lay in a series of Appropriations Acts concerning the Indian Department of the Department of the Interior. Each of these annual Acts contained a provision whose language was similar to that of the present Buy Indian Act. See, *e. g.*, Act of Apr. 30, 1908, ch. 153, 35 Stat. 70; Act of Mar. 1, 1907, ch. 2285, 34 Stat. 1015.

since 1861,[9] required agencies subject to its provisions to advertise for bids on all but a few Government procurements.[10] The purpose of the Buy Indian Act was clear. Purchases by the Department of the Interior of "the products of Indian industry" were to be exempt from any requirement of advertising for bids imposed by § 3709 of the Revised Statutes.[11]

The legislation of which the Buy Indian Act was a part was amended from time to time between 1910 and 1965, but none of these changes affected the substance of what had been enacted in 1910. The BIA, as was true of most other departments of the Government, continued to operate under a general mandate that contracts for supplies and services be let in conformity with § 3709 of the Revised Statutes.[12] Sec-

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[9] See Act of Mar. 2, 1861, ch. 84, § 10, 12 Stat. 220.

[10] In 1910, § 3709 of the Revised Statutes provided in pertinent part: "All purchases and contracts for supplies or services, in any of the Departments of the Government, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same, when the public exigencies do not require the immediate delivery of the articles, or performance of the service. When immediate delivery or performance is required by the public exigency, the articles or service required may be procured by open purchase or contract, at the places and in the manner in which such articles are usually bought and sold, or such services engaged, between individuals."

[11] The structure of § 23 of the Act of June 25, 1910, evidences this intent. See n. 8, *supra*. So does the Act's legislative history. The House Report explained that "[w]ith the exceptions noted in the proviso," *i. e.*, the Buy Indian Act, § 23 "will bring the Indian Service, like all other branches of the public service, under the provisions of section 3709 of the Revised Statutes. . . ." H. R. Rep. No. 1135, 61st Cong., 2d Sess., 12 (1910). See also 45 Cong. Rec. 6097 (1910) (Rep. Burke).

[12] In 1926, § 23 of the 1910 Act was split into two parts for codification purposes. The language that required the BIA to adhere to the advertising rules contained in § 3709 of the Revised Statutes was placed in 25 U. S. C. § 93. The proviso respecting the purchase of Indian goods was located in 25 U. S. C. § 47. No contemporaneous suggestion was made that this separation was intended to affect the substance of either segment of the original Act.

In 1940, a further change occurred. As part of an effort to eliminate

tion 3709, in turn, was recodified (41 U. S. C. § 5) and amended, but its basic mandate remained the same.[13] Government procurement was to proceed through advertising for bids unless excepted by § 3709 or "otherwise provided" by laws such as the Buy Indian Act.[14]

In 1965, the law affecting BIA procurement was substantially modified. The regime of detailed contracting requirements contained in Title III of the FPASA, theretofore applicable only to the General Services Administration and to certain special procurements,[15] was extended to cover the purchasing procedures of the BIA and most other executive

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redundant provisions respecting the operation of federal agencies, 25 U. S. C. § 93 was repealed and 41 U. S. C. § 6a (g) enacted in its place. See Act of Oct. 10, 1940, ch. 851, §§ 2 (g), 4 (a), 54 Stat. 1110, 1111, 1112. This rearrangement made "no changes in existing law." H. R. Rep. No. 2647, 76th Cong., 3d Sess., 1 (1940). See S. Rep. No. 2135, 76th Cong., 3d Sess., 2 (1940). Then, in 1951, 41 U. S. C. § 6a (g) was repealed. See Act of Oct. 31, 1951, ch. 654, § 1 (107), 65 Stat. 705. Obsolescence seems to have led to the demise of 25 U. S. C. § 93 and 41 U. S. C. § 6a (g). See H. R. Rep. No. 1105, 82d Cong., 1st Sess., 2–3 (1951). By 1951, § 3709 of the Revised Statutes had been amended to require advertising in all cases except where small purchases were involved, where a specific exemption in § 3709 applied, or where "otherwise provided in . . . other law." See 41 U. S. C. § 5 (1946 ed.).

[13] In 1964, 41 U. S. C. § 5 (1964 ed.) read in pertinent part:

"Unless otherwise provided in the appropriation concerned or other law, purchases and contracts for supplies or services for the Government may be made or entered into only after advertising a sufficient time previously for proposals, except (1) when the amount involved in any one case does not exceed $2,500, (2) when the public exigencies require the immediate delivery of the articles or performance of the service, (3) when only one source of supply is available and the Government purchasing or contracting officer shall so certify, or (4) when the services are required to be performed by the contractor in person and are (A) of a technical and professional nature or (B) under Government supervision and paid for on a time basis."

[14] Since its codification in 1926 in 25 U. S. C. § 47, the Buy Indian Act has undergone no change in phraseology.

[15] See 41 U. S. C. § 252 (a) (1964 ed.).

agencies.[16] See 41 U. S. C. § 252 (a); 40 U. S. C. §§ 472 (a), 474. For covered agencies, one consequence of this legislation was to substitute the advertising requirements set out in Title III of the FPASA for those contained in § 3709 of the Revised Statutes. See 41 U. S. C. § 260; S. Rep. No. 274, 89th Cong., 1st Sess., 1, 5 (1965); H. R. Rep. No. 1166, 89th Cong., 1st Sess., 7, 9 (1965); 111 Cong. Rec. 27198 (1965) (Rep. Brooks).

Under Title III of the FPASA, the BIA must now adhere to the broad statutory mandate that "[a]ll purchases and contracts for property and services shall be made by advertising. . . ." 41 U. S. C. § 252 (c). From this directive, the statute specifically excepts only 15 types of procurements, the 15th covering situations where negotiated procurements are "otherwise authorized by law. . . ." § 252 (c)(15) (subsection (c)(15)).

The Buy Indian Act is clearly a "law" within the contemplation of subsection (c)(15). As § 41 U. S. C. 260 expressly states: "Any provision of law which authorizes an executive agency . . . to procure any property or services without advertising or without regard to [§ 3709 of the Revised Statutes, 41 U. S. C. § 5] shall be construed to authorize the procurement of such property or services pursuant to section 252 (c)(15) of this title without regard to the advertising requirements of . . . this title." See also S. Rep. No. 274, *supra*, at 5; H. R. Rep. No. 1166, *supra*, at 8. As noted above, the Buy Indian Act has from its inception authorized the BIA to "purchas[e] the products of Indian industry" without regard to the advertising requirement of § 3709 of the Revised Statutes.

Relying on subsection (c)(15) and § 260, the petitioners argue that the BIA proceeded correctly in awarding the Honobia Road contract to the Indian Nations Construction Co. without prior public advertising for bids. They assert that

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[16] 79 Stat. 1303.

a road constructed or repaired by an Indian-owned corporation is a "product of Indian industry" within the meaning of the Buy Indian Act and, accordingly, that the Honobia Road project was exempt from the FPASA's advertising rules by operation of subsection (c)(15).

It is fairly debatable, we think, simply as a matter of language, whether a road constructed or repaired by an Indian-owned enterprise is a "product of Indian industry" within the meaning of the Buy Indian Act. But even if that Act could in isolation be construed to embrace road construction or repair, the petitioners' argument must still be rejected because of another provision of Title III of the FPASA expressly relating to contracts of the sort at issue here. Title 41 U. S. C. § 252 (e) (subsection (e)) states that § 252 (c) "shall not be construed to . . . permit any contract for the construction or repair of . . . roads . . . to be negotiated without advertising . . . , unless . . . negotiation of such contract is authorized by the provisions of paragraphs (1), (2), (3), (10), (11), (12), or (14) of subsection (c) of this section." [17] Not contained in this list of exceptions is paragraph (c)(15). From this omission only one inference can be drawn: Congress meant to bar the negotiation of road construction and repair projects under the authority of laws like the Buy Indian Act. Where Congress explicitly enumerates certain exceptions to a

[17] Title 41 U. S. C. § 252 (e) provides in full:

"This section shall not be construed to (A) authorize the erection, repair, or furnishing of any public building or public improvement, but such authorization shall be required in the same manner as heretofore, or (B) permit any contract for the construction or repair of buildings, roads, sidewalks, sewers, mains, or similar items to be negotiated without advertising as required by section 253 of this title, unless such contract is to be performed outside the continental United States or unless negotiation of such contract is authorized by the provisions of paragraphs (1), (2), (3), (10), (11), (12), or (14) of subsection (c) of this section."

No contention has been made that paragraphs (1), (2), (3), (11), (12), or (14) of subsection (c) authorized negotiation of the Honobia Road project. As to paragraph (10), see n. 20, *infra*.

general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent. See *Continental Casualty Co.* v. *United States*, 314 U. S. 527, 533.[18]

In an attempt to avoid the obvious import of subsection (e), the petitioners argue that the subsection does not apply at all to cases in which the Buy Indian Act is involved. The Government reasons that subsection (e) is concerned solely with procurement contracts whose negotiation is "permitted" by § 252, and that the negotiation authority afforded by the Buy Indian Act does not fit this description because that Act is a statute which of its own force operates independently of the FPASA.

We read the pertinent statutes differently. In the absence of subsection (c)(15), the Buy Indian Act could independently confer no authority on the BIA to avoid public advertising for competitive bids. Title 40 U. S. C. § 474 provides that "[t]he authority conferred by [the FPASA] shall be in addition and *paramount* to *any* authority conferred by any other law and shall not be subject to the provisions of *any* law inconsistent herewith. . . ." (Emphasis supplied.) In view of § 252's broad directive that all procurement proceed

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[18] Nothing in the legislative history of the 1965 amendments to the FPASA points in a different direction than does the plain language of the statute. The Government cites the following passage found in several of the congressional Committee Reports that accompanied the 1949 version of the FPASA:

"For clarity [subsection (e)] provides that [41 U. S. C. § 252] does not authorize or change the existing requirements for authorization for the erection or repair of buildings, roads, sidewalks, or similar items." H. R. Rep. No. 670, 81st Cong., 1st Sess., pt. 1, p. 23 (1949); S. Rep. No. 338, 81st Cong., 1st Sess., 20 (1949); S. Rep. No. 475, 81st Cong., 1st Sess., 25 (1949).

This statement, however, sheds no light on the proper disposition of the instant case. It referred to the provisions of the FPASA at a time when that legislation governed no more than the General Services Administration and a few special procurements.

through advertising, the Buy Indian Act's contrary mandate would not have survived the 1965 amendments to the FPASA had Title III of the FPASA not contained subsection (c)(15). In short, § 252 (c) "permits" negotiation pursuant to the Buy Indian Act and, therefore, such negotiation is limited by the special rule applicable to road construction contained in subsection (e).[19]

We are, nonetheless, urged to disregard the plain meaning of subsection (e) because of the axiom that repeals by implication of longstanding statutory provisions are not favored. See *Universal Interpretive Shuttle Corp.* v. *Washington Metropolitan Area Transit Comm'n*, 393 U. S. 186, 193. The maxim is said to be particularly compelling here because the older statute is "remedial" legislation for the benefit of Indians. See *Morton* v. *Mancari*, 417 U. S. 535, 549–551. The 1965 amendments to the FPASA did not, however, "repeal" the Buy Indian Act. With the exception of the limited class of contracts enumerated in subsection (e), the FPASA did not in any manner displace the provisions of the Buy Indian Act. Moreover, "[t]he courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a

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[19] Alternatively, the petitioners contend that subsection (e) does not govern here because of § 252 (a)(2). That provision states that §§ 251 through 260 of Title 41 "d[o] not apply . . . when [those sections are] made inapplicable pursuant to section 474 of title 40 or any other law. . . ." According to the petitioners, the Buy Indian Act is an "other law" within the intendment of § 252 (a)(2).

We disagree, reading subsection (a)(2) to refer exclusively to statutory provisions that—unlike the Buy Indian Act—in express terms exempt procurements from §§ 251 through 260 of Title 41 or from the FPASA in its entirety. Any broader reading of subsection (a)(2) would render subsection (c)(15) superfluous and would also substantially undermine Congress' desire that the requirements of § 254 apply "to contracts negotiated by executive agencies under *any* law, not only title III." S. Rep. No. 274, 89th Cong., 1st Sess., 2 (1965); H. R. Rep. No. 1166, 89th Cong., 1st Sess., 2 (1965). (Emphasis added.) See *id.*, at 2–3.

clearly expressed congressional intention to the contrary, to regard each as effective." *Morton* v. *Mancari, supra,* at 551. And, although the "rule by which legal ambiguities are resolved to the benefit of the Indians" is to be given "the broadest possible scope," "[a] canon of construction is not a license to disregard clear expressions of . . . congressional intent." *DeCoteau* v. *District County Court,* 420 U. S. 425, 447.

For the reasons stated, the judgment of the Court of Appeals is affirmed.[20]

It is so ordered.

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[20] The petitioners have requested that, if their basic arguments are rejected, this case, nonetheless, be remanded to the Court of Appeals for further consideration in light of 41 U S. C. § 252 (c)(10), which authorizes the negotiation of Government contracts "for property or services for which it is impracticable to secure competition." The petitioners, however, did not rely on this statutory provision in defending this lawsuit in the District Court, and the Court of Appeals did not consider it. Our affirmance of the judgment of the Court of Appeals does not preclude the petitioners from seeking relief from the outstanding injunction on this ground or any other. See *NLRB* v. *Sears, Roebuck & Co.,* 421 U. S. 132, 165, n. 30. See also Fed. Rule Civ. Proc. 60 (b).

UNITED STATES *v.* HAVENS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 79-305. Argued March 19, 1980—Decided May 27, 1980

After respondent and another man (McLeroth) arrived at the Miami Airport on a flight from Peru, a customs officer searched McLeroth and found cocaine sewed into makeshift pockets in a T-shirt he was wearing. When McLeroth implicated respondent, respondent was arrested and his luggage was searched without a warrant. A T-shirt from which pieces had been cut that matched the pieces sewn to McLeroth's T-shirt was found in the luggage and seized. The seized T-shirt was suppressed prior to respondent's trial on federal drug charges. At the trial, McLeroth, who had pleaded guilty, testified against respondent, asserting that respondent had supplied him with the altered T-shirt and had sewed the makeshift pockets shut. Respondent, taking the stand in his own defense, acknowledged, in his direct testimony, McLeroth's prior testimony that the cocaine was "taped or draped around his body" but denied that he had "ever engage[d] in that kind of activity" with McLeroth. On cross-examination, the Government called attention to these answers and then asked whether respondent had anything to do with sewing the makeshift pockets on McLeroth's T-shirt. Respondent denied that he had. And when the Government asked him whether he had a T-shirt with pieces missing in his luggage and whether the seized T-shirt was in his luggage, respondent replied to both questions: "Not to my knowledge." After rebuttal testimony for the Government, the seized T-shirt was admitted into evidence over objection, the jury being instructed that the rebuttal evidence was to be considered only for impeaching respondent's credibility. Respondent's conviction was reversed by the Court of Appeals, which held that illegally seized evidence may be used for impeachment only if the evidence contradicts a particular statement made by a defendant in the course of his direct examination.

Held: A defendant's statements made in response to proper cross-examination reasonably suggested by the defendant's direct examination are subject to otherwise proper impeachment by the Government, albeit by evidence that has been illegally obtained and is inadmissible as substantive evidence of guilt. Cf. *Harris* v. *New York*, 401 U. S. 222; *Oregon* v. *Hass*, 420 U. S. 714. Here, respondent's testimony on direct examination could easily be understood as a denial of any connection with

McLeroth's T-shirt and as a contradiction of McLeroth's testimony, and the Government on cross-examination reasonably called attention to respondent's answers on direct and then asked whether he had anything to do with sewing the pockets on McLeroth's T-shirt. This was cross-examination growing out of respondent's direct testimony, and the ensuing impeachment did not violate his constitutional rights. Pp. 624–628.

592 F. 2d 848, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, and in Part I of which STEWART and STEVENS, JJ., joined, *post*, p. 629.

Deputy Solicitor General Frey argued the cause for the United States. With him on the briefs were *Solicitor General McCree* and *Assistant Attorney General Heymann*.

William C. Lee argued the cause and filed a brief for respondent.

MR. JUSTICE WHITE delivered the opinion of the Court.

The petition for certiorari filed by the United States in this criminal case presented a single question: whether evidence suppressed as the fruit of an unlawful search and seizure may nevertheless be used to impeach a defendant's false trial testimony, given in response to proper cross-examination, where the evidence does not squarely contradict the defendant's testimony on direct examination. We issued the writ, 444 U. S. 962 (1979).

I

Respondent was convicted of importing, conspiring to import, and intentionally possessing a controlled substance, cocaine. According to the evidence at his trial, Havens and John McLeroth, both attorneys from Ft. Wayne, Ind., boarded a flight from Lima, Peru, to Miami, Fla. In Miami, a customs officer searched McLeroth and found cocaine sewed into makeshift pockets in a T-shirt he was wearing under his outer

clothing. McLeroth implicated respondent, who had previously cleared customs and who was then arrested. His luggage was seized and searched without a warrant. The officers found no drugs but seized a T-shirt from which pieces had been cut that matched the pieces that had been sewn to McLeroth's T-shirt. The T-shirt and other evidence seized in the course of the search were suppressed on motion prior to trial.

Both men were charged in a three-count indictment, but McLeroth pleaded guilty to one count and testified against Havens. Among other things, he asserted that Havens had supplied him with the altered T-shirt and had sewed the makeshift pockets shut. Havens took the stand in his own defense and denied involvement in smuggling cocaine. His direct testimony included the following:

> "Q. And you heard Mr. McLeroth testify earlier as to something to the effect that this material was taped or draped around his body and so on, you heard that testimony?
>
> "A. Yes, I did.
>
> "Q. Did you ever engage in that kind of activity with Mr. McLeroth and Augusto or Mr. McLeroth and anyone else on that fourth visit to Lima, Peru?
>
> "A. I did not." App. 34.

On cross-examination, Havens testified as follows:

> "Q. Now, on direct examination, sir, you testified that on the fourth trip you had absolutely nothing to do with the wrapping of any bandages or tee shirts or anything involving Mr. McLeroth; is that correct?
>
> "A. I don't—I said I had nothing to do with any wrapping or bandages or anything, yes. I had nothing to do with anything with McLeroth in connection with this cocaine matter.
>
> . . . .
>
> "Q. And your testimony is that you had nothing to

do with the sewing of the cotton swatches to make pockets on that tee shirt?

"A. Absolutely not.

"Q. Sir, when you came through Customs, the Miami International Airport, on October 2, 1977, did you have in your suitcase Size 38–40 medium tee shirts?" *Id.*, at 35.

An objection to the latter question was overruled and questioning continued:

"Q. On that day, sir, did you have in your luggage a Size 38–40 medium man's tee shirt with swatches of clothing missing from the tail of that tee shirt?

"A. Not to my knowledge.

. . . . .

"Q. Mr. Havens, I'm going to hand you what is Government's Exhibit 9 for identification and ask you if this tee shirt was in your luggage on October 2nd, 1975 [*sic*]?

"A. Not to my knowledge. No." *Id.*, at 46.

Respondent Havens also denied having told a Government agent that the T-shirts found in his luggage belonged to McLeroth.

On rebuttal, a Government agent testified that Exhibit 9 had been found in respondent's suitcase and that Havens claimed the T-shirts found in his bag, including Exhibit 9, belonged to McLeroth. Over objection, the T-shirt was then admitted into evidence, the jury being instructed that the rebuttal evidence should be considered only for impeaching Havens' credibility.

The Court of Appeals reversed, relying on *Agnello* v. *United States*, 269 U. S. 20 (1925), and *Walder* v. *United States*, 347 U. S. 62 (1954). The court held that illegally seized evidence may be used for impeachment only if the evidence contradicts a particular statement made by a defendant in the course of his direct examination. 592 F. 2d 848 (CA5 1979). We reverse.

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II

In *Agnello* v. *United States, supra*, a defendant charged with conspiracy to sell a package of cocaine testified on direct examination that he had possessed the packages involved but did not know what was in them. On cross-examination, he denied ever having seen narcotics and ever having seen a can of cocaine which was exhibited to him and which had been illegally seized from his apartment. The can of cocaine was permitted into evidence on rebuttal. Agnello was convicted and his conviction was affirmed by the Court of Appeals. This Court reversed, holding that the Fourth Amendment required exclusion of the evidence. The Court pointed out that "[i]n his direct examination, Agnello was not asked and did not testify concerning the can of cocaine" and "did nothing to waive his constitutional protection or to justify cross-examination in respect of the evidence claimed to have been obtained by the search." 269 U. S., at 35. The Court also said, quoting from *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 392 (1920), that the exclusionary rule not only commands that illegally seized evidence "shall not be used before the Court but that it shall not be used at all." 269 U. S., at 35.

The latter statement has been rejected in our later cases, however, and *Agnello* otherwise limited. In *Walder* v. *United States, supra*, the use of evidence obtained in an illegal search and inadmissible in the Government's case in chief was admitted to impeach the direct testimony of the defendant. This Court approved, saying that it would pervert the rule of *Weeks* v. *United States*, 232 U. S. 383 (1914), to hold otherwise. Similarly, in *Harris* v. *New York*, 401 U. S. 222 (1971), and *Oregon* v. *Hass*, 420 U. S. 714 (1975), statements taken in violation of *Miranda* v. *Arizona*, 384 U. S. 436 (1966), and unusable by the prosecution as part of its own case, were held admissible to impeach statements made by the defendant in the course of his direct testimony. *Harris*

also made clear that the permitted impeachment by otherwise inadmissible evidence is not limited to collateral matters. 401 U. S., at 225.

These cases were understood by the Court of Appeals to hold that tainted evidence, inadmissible when offered as part of the Government's main case, may not be used as rebuttal evidence to impeach a defendant's credibility unless the evidence is offered to contradict a particular statement made by a defendant during his direct examination; a statement made for the first time on cross-examination may not be so impeached. This approach required the exclusion of the T-shirt taken from Havens' luggage because, as the Court of Appeals read the record, Havens was asked nothing on his direct testimony about the incriminating T-shirt or about the contents of his luggage; the testimony about the T-shirt, which the Government desired to impeach first appeared on cross-examination, not on direct.

It is true that *Agnello* involved the impeachment of testimony first brought out on cross-examination and that in *Walder*, *Harris*, and *Hass*, the testimony impeached was given by the defendant while testifying on direct examination. In our view, however, a flat rule permitting only statements on direct examination to be impeached misapprehends the underlying rationale of *Walder*, *Harris*, and *Hass*. These cases repudiated the statement in *Agnello* that no use at all may be made of illegally obtained evidence. Furthermore, in *Walder*, the Court said that in *Agnello*, the Government had "smuggled in" the impeaching opportunity in the course of cross-examination. The Court also relied on the statement in *Agnello*, 269 U. S., at 35, that Agnello had done nothing "to justify cross-examination in respect of the evidence claimed to have been obtained by the search." The implication of *Walder* is that *Agnello* was a case of cross-examination having too tenuous a connection with any subject opened upon direct examination to permit impeachment by tainted evidence.

In reversing the District Court in the case before us, the Court of Appeals did not stop to consider how closely the cross-examination about the T-shirt and the luggage was connected with matters gone into in direct examination. If these questions would have been suggested to a reasonably competent cross-examiner by Havens' direct testimony, they were not "smuggled in"; and forbidding the Government to impeach the answers to these questions by using contrary and reliable evidence in its possession fails to take account of our cases, particularly *Harris* and *Hass*. In both cases, the Court stressed the importance of arriving at the truth in criminal trials, as well as the defendant's obligation to speak the truth in response to proper questions. We rejected the notion that the defendant's constitutional shield against having illegally seized evidence used against him could be "perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." 401 U. S., at 226. See also *Oregon* v. *Hass*, *supra*, at 722, 723. Both cases also held that the deterrent function of the rules excluding unconstitutionally obtained evidence is sufficiently served by denying its use to the government on its direct case. It was only a "speculative possibility" that also making it unavailable to the government for otherwise proper impeachment would contribute substantially in this respect. *Harris* v. *New York*, *supra*, at 225. *Oregon* v. *Hass*, *supra*, at 723.

Neither *Harris* nor *Hass* involved the impeachment of assertedly false testimony first given on cross-examination, but the reasoning of those cases controls this one. There is no gainsaying that arriving at the truth is a fundamental goal of our legal system. *Oregon* v. *Hass*, *supra*, at 722. We have repeatedly insisted that when defendants testify, they must testify truthfully or suffer the consequences. This is true even though a defendant is compelled to testify against his will. *Bryson* v. *United States*, 396 U. S. 64, 72 (1969); *United States* v. *Knox*, 396 U. S. 77 (1969). It is essential,

therefore, to the proper functioning of the adversary system that when a defendant takes the stand, the government be permitted proper and effective cross-examination in an attempt to elicit the truth. The defendant's obligation to testify truthfully is fully binding on him when he is cross-examined. His privilege against self-incrimination does not shield him from proper questioning. *Brown* v. *United States*, 356 U. S. 148, 154–155 (1958). He would unquestionably be subject to a perjury prosecution if he knowingly lies on cross-examination. Cf. *United States* v. *Apfelbaum*, 445 U. S. 115 (1980); *Bryson* v. *United States, supra; United States* v. *Knox, supra; United States* v. *Wong*, 431 U. S. 174 (1977). In terms of impeaching a defendant's seemingly false statements with his prior inconsistent utterances or with other reliable evidence available to the government, we see no difference of constitutional magnitude between the defendant's statements on direct examination and his answers to questions put to him on cross-examination that are plainly within the scope of the defendant's direct examination. Without this opportunity, the normal function of cross-examination would be severely impeded.

We also think that the policies of the exclusionary rule no more bar impeachment here than they did in *Walder*, *Harris*, and *Hass*. In those cases, the ends of the exclusionary rules were thought adequately implemented by denying the government the use of the challenged evidence to make out its case in chief. The incremental furthering of those ends by forbidding impeachment of the defendant who testifies was deemed insufficient to permit or require that false testimony go unchallenged, with the resulting impairment of the integrity of the factfinding goals of the criminal trial. We reaffirm this assessment of the competing interests, and hold that a defendant's statements made in response to proper cross-examination reasonably suggested by the defendant's direct examination are subject to otherwise proper impeach-

ment by the government, albeit by evidence that has been illegally obtained that is inadmissible on the government's direct case, or otherwise, as substantive evidence of guilt.

In arriving at its judgment, the Court of Appeals noted that in response to defense counsel's objection to the impeaching evidence on the ground that the matter had not been "covered on direct," the trial court had remarked that "[i]t does not have to be covered on direct." The Court of Appeals thought this was error since in its view illegally seized evidence could be used only to impeach a statement made on direct examination. As we have indicated, we hold a contrary view; and we do not understand the District Court to have indicated that the Government's question, the answer to which is sought to be impeached, need not be proper cross-examination in the first instance. The Court of Appeals did not suggest that either the cross-examination or the impeachment of Havens would have been improper absent the use of illegally seized evidence, and we cannot accept respondent's suggestions that because of the illegal search and seizure, the Government's questions about the T-shirt were improper cross-examination. McLeroth testified that Havens had assisted him in preparing the T-shirt for smuggling. Havens, in his direct testimony, acknowledged McLeroth's prior testimony that the cocaine "was taped or draped around his body and so on" but denied that he had "ever engage[d] in that kind of activity with Mr. McLeroth. . . ." This testimony could easily be understood as a denial of any connection with McLeroth's T-shirt and as a contradiction of McLeroth's testimony. Quite reasonably, it seems to us, the Government on cross-examination called attention to his answers on direct and then asked whether he had anything to do with sewing the cotton swatches on McLeroth's T-shirt. This was cross-examination growing out of Havens' direct testimony; and, as we hold above, the ensuing impeachment did not violate Havens' constitutional rights.

We reverse the judgment of the Court of Appeals and remand the case to that court for further proceedings consistent with this opinion.

So ordered.

MR. JUSTICE BRENNAN, joined by MR. JUSTICE MARSHALL and joined in Part I by MR. JUSTICE STEWART and MR. JUSTICE STEVENS, dissenting.

The Court upholds the admission at trial of illegally seized evidence to impeach a defendant's testimony deliberately elicited *by the Government* under the cover of impeaching an accused who takes the stand in his own behalf. I dissent. Criminal defendants now told that prosecutors are licensed to insinuate otherwise inadmissible evidence under the guise of cross-examination no longer have the unfettered right to elect whether or not to testify in their own behalf. Not only is today's decision an unwarranted departure from prior controlling cases, but, regrettably, it is yet another element in the trend to depreciate the constitutional protections guaranteed the criminally accused.

I

The question before us is not of first impression. The identical issue was confronted in *Agnello* v. *United States*, 269 U. S. 20 (1925), which determined—contrary to the instant decision—that it was constitutionally impermissible to admit evidence obtained in violation of the Fourth Amendment to rebut a defendant's response to a matter first raised during the Government's cross-examination. Subsequently, *Walder* v. *United States*, 347 U. S. 62 (1954), affirmed the introduction of unlawfully acquired evidence to impeach an accused's false assertions about previous conduct that had been offered during *direct* testimony. But *Walder* took pains to draw the distinction between its own holding and *Agnello*, noting that "the defendant [Walder] went beyond a mere denial of complicity in the crimes of which he was charged and made the sweep-

ing [and untrue] claim that he had never dealt in or possessed any narcotics." 347 U. S., at 65. In "shar[p] contras[t]," in *Agnello*, "the Government . . . tried to smuggle [the tainted evidence] . . . in on cross-examination," and "elicit[ed] the expected denial. . . ." 347 U. S., at 66.

The Court's recent decisions have left *Agnello* undisturbed. *Harris* v. *New York*, 401 U. S. 222 (1971), allowed the government to use inadmissible uncounseled statements to impeach direct examination. So, too, *Oregon* v. *Hass*, 420 U. S. 714 (1975), reaffirmed *Harris* in the context of impeachment of the defendant's direct testimony. Significantly, neither decision intimated that *Agnello* had lost vitality, or that the distinction emphasized by *Walder* had been effaced.

The Court's opinion attempts to discredit *Agnello* by casting a strawman as its holding, and then demolishing the pitiful scarecrow of its own creation. Specifically, the Court cites *Agnello*'s quotation of language from *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 392 (1920), that "illegally seized evidence 'shall not . . . be used at all.'" *ante*, at 624, and then refers to the subsequent decisions that indeed permit limited use of that evidence for impeachment. But the actual principle of *Agnello*, as discerned by *Walder*, is that the Government may not employ its power of cross-examination to predicate the admission of illegal evidence. In other words, impeachment by cross-examination about—or introduction of—suppressible evidence must be warranted by defendant's statements upon direct questioning. That principle is not at all inconsistent with later cases holding that the defendant may not take advantage of evidentiary suppression to advance specific perjurious claims as part of his direct case.

Nor is it correct to read *Agnello* as turning upon the tenuity of the link between the cross-examination involved there and the subject matter of the direct examination. *Ante*, at 625. The cross-examination about Agnello's previous connection with cocaine was reasonably related to his direct testimony that he lacked knowledge that the commodity he was trans-

porting was cocaine. 269 U. S., at 29–30. For "[t]he possession by Frank Agnello of the can of cocaine which was seized tended to show guilty knowledge and criminal intent on his part. . . ." *Id.*, at 35. Thus, the constitutional flaw found in *Agnello* was that the introduction of the tainted evidence had been prompted by statements of the accused first elicited upon cross-examination. And the case was so read in *Walder* v. *United States.* That decision specifically stated that a defendant "must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case in chief." 347 U. S., at 65. Since as a matter of the law of evidence it would be perfectly permissible to cross-examine a defendant as to his denial of complicity in the crime, the quoted passage in *Walder* must be understood to impose a further condition before the prosecutor may refer to tainted evidence—that is, some particular direct testimony by the accused that relies upon "the Government's disability to challenge his credibility." *Ibid.*

In fact, the Court's current interpretation of *Agnello* and *Walder* simply trivializes those decisions by transforming their Fourth Amendment holdings into nothing more than a constitutional reflection of the common-law evidentiary rule of relevance.

Finally, the rationale of *Harris* v. *New York* and *Oregon* v. *Hass* does not impel the decision at hand. The exclusionary rule exception established by *Harris* and *Hass* may be fairly easily cabined by defense counsel's willingness to forgo certain areas of questioning. But the rule prescribed by the Court in this case passes control of the exception to the Government, since the prosecutor can lay the predicate for admitting otherwise suppressible evidence with his own questioning. To be sure, the Court requires that cross-examination be "proper"; however, traditional evidentiary principles accord parties fairly considerable latitude in cross-

examining opposing witnesses. See C. McCormick, Law of Evidence §§ 21–24 (2d ed. 1972).[1] In practical terms, therefore, today's holding allows even the moderately talented prosecutor to "work in . . . evidence on cross-examination [as it would] in its case in chief. . . ." *Walder* v. *United States*, 347 U. S., at 66. To avoid this consequence, a defendant will be compelled to forgo testifying on his own behalf.

"[T]he Constitution guarantees a defendant the fullest opportunity to meet the accusation against him." *Id.*, at 65; see *Harris* v. *New York*, *supra*, at 229–230 (BRENNAN, J., dissenting). Regrettably, surrender of that guarantee is the price the Court imposes for the defendant to claim his right not to be convicted on the basis of evidence obtained in violation of the Constitution.[2] I cannot agree that one constitutional privilege must be purchased at the expense of another.

II

The foregoing demonstration of its break with precedent provides a sufficient ground to condemn the present ruling—unleashing, as it does, a hitherto relatively confined exception to the exclusionary rule. But I have a more fundamental difference with the Court's holding here, which culminates

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[1] Federal Rule of Evidence 611 does provide for limitation of the scope of cross-examination "to the subject matter of the direct examination and matters affecting the credibility of the witness." But even these constraints need not be adopted by the States, which are generally free to fashion their own rules of evidence.

[2] Although evidence of prior inconsistent utterances or behavior may ostensibly be offered merely to attack a defendant's credibility by contradicting his trial testimony, such evidence can also serve to buttress the affirmative elements of the prosecution's case. Thus, almost anytime an accused takes the stand, the prosecution will have an opportunity to enhance its case in chief. And it is unrealistic to assume that limiting instructions will afford the defendant significant protection. Cf. *Bruton* v. *United States*, 391 U. S. 123 (1968).

the approach taken in *Harris* v. *New York* and *Oregon* v. *Hass*. For this sequence of decisions undercuts the constitutional canon that convictions cannot be procured by governmental lawbreaking. See *Harris* v. *New York*, 401 U. S., at 226–232 (BRENNAN, J., dissenting); *Oregon* v. *Hass*, 420 U. S., at 724–725 (BRENNAN, J., dissenting).

"'[I]t is monstrous that courts should aid or abet the lawbreaking police officer.'" *Id.*, at 724, quoting *Harris* v. *New York*, *supra*, at 232 (BRENNAN, J., dissenting). And what is especially troubling about these cases is the mode of analysis employed by the Court. In each, the judgment that tainted evidence may be admitted has been bottomed upon a determination that the "incremental furthering" of constitutional ends would not be sufficient to warrant exclusion of otherwise probative evidence. *Ante*, at 627; see *Oregon* v. *Hass*, *supra*, at 721; *Harris* v. *New York*, *supra*, at 225.

Of course, "[t]here is no gainsaying that arriving at the truth is a fundamental goal of our legal system." *Ante*, at 626. But it is also undeniable that promotion of that objective must be consonant with other ends, in particular those enshrined in our Constitution. I still hope that the Court would not be prepared to acquiesce in torture or other police conduct that "shocks the conscience" even if it demonstrably advanced the factfinding process. At any rate, what is important is that the Constitution does not countenance police misbehavior, even in the pursuit of truth. The processes of our judicial system may not be fueled by the illegalities of government authorities. See, *e. g.*, *Mapp* v. *Ohio*, 367 U. S. 643 (1961).

Nevertheless, the Court has undertaken to strike a "balance" between the "policies" it finds in the Bill of Rights and the "competing interes[t]" in accurate trial determinations. *Ante*, at 627. This balancing effort is completely freewheeling. Far from applying criteria intrinsic to the Fourth and Fifth Amendments, the Court resolves succeeding cases simply by declaring that so much exclusion is enough to deter

police misconduct. *Ante*, at 626, 627; see *Oregon* v. *Hass*, *supra*, at 721; *Harris* v. *New York*, *supra*, at 225; cf. *Stone* v. *Powell*, 428 U. S. 465, 486–489 (1976); *United States* v. *Calandra*, 414 U. S. 338, 350–352 (1974). That hardly conforms to the disciplined analytical method described as "legal reasoning," through which judges endeavor to formulate or derive principles of decision that can be applied consistently and predictably.

Ultimately, I fear, this ad hoc approach to the exclusionary rule obscures the difference between judicial decisionmaking and legislative or administrative policymaking. More disturbingly, by treating Fourth and Fifth Amendment privileges as mere incentive schemes, the Court denigrates their unique status as *constitutional* protections. Yet the efficacy of the Bill of Rights as the bulwark of our national liberty depends precisely upon public appreciation of the special character of constitutional prescriptions. The Court is charged with the responsibility to enforce constitutional guarantees; decisions such as today's patently disregard that obligation.

Accordingly, I dissent.

GOMEZ v. TOLEDO

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 79-5601. Argued April 16, 1980—Decided May 27, 1980

Held: In an action brought under 42 U. S. C. § 1983 against a public official whose position might entitle him to qualified immunity, the plaintiff is not required to allege that the defendant acted in bad faith in order to state a claim for relief, but the burden is on the defendant to plead good faith as an affirmative defense. By § 1983's plain terms, the plaintiff is required to make only two allegations in order to state a cause of action under the statute: (1) that some person deprived him of a federal right, and (2) that such person acted under color of state or territorial law. This allocation of the burden of pleading is supported by the nature of the qualified-immunity defense, since whether such immunity has been established depends on facts peculiarly within the defendant's knowledge and control, the applicable test focusing not only on whether he has an objectively reasonable basis for his belief that his conduct was lawful but also on whether he has a subjective belief. Pp. 638-641.

602 F. 2d 1018, reversed and remanded.

MARSHALL, J., delivered the opinion for a unanimous Court. REHNQUIST, J., filed a concurring statement, *post*, p. 642.

Michael Avery argued the cause for petitioner. With him on the brief was *David Rudovsky*.

Federico Cedo Alzamora argued the cause and filed a brief for respondent.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The question presented is whether, in an action brought under 42 U. S. C. § 1983 against a public official whose position might entitle him to qualified immunity, a plaintiff must

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**Leon Friedman* and *Bruce J. Ennis* filed a brief for the American Civil Liberties Union as *amicus curiae* urging reversal.

allege that the official has acted in bad faith in order to state a claim for relief or, alternatively, whether the defendant must plead good faith as an affirmative defense.

I

Petitioner Carlos Rivera Gomez brought this action against respondent, the Superintendent of the Police of the Commonwealth of Puerto Rico, contending that respondent had violated his right to procedural due process by discharging him from employment with the Police Department's Bureau of Criminal Investigation.[1] Basing jurisdiction on 28 U. S. C. § 1343 (3),[2] petitioner alleged the following facts in his complaint.[3] Petitioner had been employed as an agent with the Puerto Rican police since 1968. In April 1975, he submitted a sworn statement to his supervisor in which he asserted that two other agents had offered false evidence for use in a criminal case under their investigation. As a result of this statement, petitioner was immediately transferred from the Criminal Investigation Corps for the Southern Area to Police Headquarters in San Juan, and a few weeks later to the Police Academy in Gurabo, where he was given no investigative authority. In the meantime respondent ordered an investigation of petitioner's claims, and the Legal Division of

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[1] The complaint originally named the Commonwealth of Puerto Rico and the police of the Commonwealth of Puerto Rico as additional defendants, but petitioner consented to their dismissal from the action. See App. 14, n. 1.

[2] That section grants the federal district courts jurisdiction "[t]o redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

[3] At this stage of the proceedings, of course, all allegations of the complaint must be accepted as true.

the Police Department concluded that all of petitioner's factual allegations were true.

In April 1976, while still stationed at the Police Academy, petitioner was subpoenaed to give testimony in a criminal case arising out of the evidence that petitioner had alleged to be false. At the trial petitioner, appearing as a defense witness, testified that the evidence was in fact false. As a result of this testimony, criminal charges, filed on the basis of information furnished by respondent, were brought against petitioner for the allegedly unlawful wiretapping of the agents' telephones. Respondent suspended petitioner in May 1976 and discharged him without a hearing in July. In October, the District Court of Puerto Rico found no probable cause to believe that petitioner was guilty of the allegedly unlawful wiretapping and, upon appeal by the prosecution, the Superior Court affirmed. Petitioner in turn sought review of his discharge before the Investigation, Prosecution, and Appeals Commission of Puerto Rico, which, after a hearing, revoked the discharge order rendered by respondent and ordered that petitioner be reinstated with backpay.

Based on the foregoing factual allegations, petitioner brought this suit for damages, contending that his discharge violated his right to procedural due process, and that it had caused him anxiety, embarrassment, and injury to his reputation in the community. In his answer, respondent denied a number of petitioner's allegations of fact and asserted several affirmative defenses. Respondent then moved to dismiss the complaint for failure to state a cause of action, see Fed. Rule Civ. Proc. 12 (b)(6), and the District Court granted the motion. Observing that respondent was entitled to qualified immunity for acts done in good faith within the scope of his official duties, it concluded that petitioner was required to plead as part of his claim for relief that, in committing the actions alleged, respondent was motivated by bad faith. The absence of any such allegation, it held, required dismissal of

the complaint. The United States Court of Appeals for the First Circuit affirmed. 602 F. 2d 1018 (1979).[4]

We granted certiorari to resolve a conflict among the Courts of Appeals.[5] 444 U. S. 1031 (1980). We now reverse.

II

Section 1983 provides a cause of action for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" by any person acting "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory." 42 U. S. C. § 1983.[6] This statute, enacted to aid in "'the preservation of human liberty and human rights,'" *Owen* v. *City of Independence*, 445 U. S. 622, 636 (1980), quoting Cong. Globe, 42d Cong., 1st Sess., App. 68

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[4] This decision was in accord with earlier decisions in that Circuit. See, *e. g.*, *Gaffney* v. *Silk*, 488 F. 2d 1248 (1973); *Kostka* v. *Hogg*, 560 F. 2d 37 (1977); *Maiorana* v. *MacDonald*, 596 F. 2d 1072 (1979).

[5] Other Courts of Appeals have held that the burden of pleading a defense of good faith lies with the defendant. See *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 456 F. 2d 1339, 1348 (CA2 1972); *Skehan* v. *Board of Trustees of Bloomsburg State College*, 538 F. 2d 53, 61–62 (CA3) (en banc), cert. denied, 429 U. S. 979 (1976); *Bryan* v. *Jones*, 530 F. 2d 1210, 1213 (CA5) (en banc), cert. denied, 429 U. S. 865 (1976); *Jones* v. *Perrigan*, 459 F. 2d 81, 83 (CA6 1972); *Tritsis* v. *Backer*, 501 F. 2d 1021, 1022–1023 (CA7 1974); *Landrum* v. *Moats*, 576 F. 2d 1320, 1324–1325, 1329 (CA8), cert. denied, 439 U. S. 912 (1978); *Martin* v. *Duffie*, 463 F. 2d 464, 468 (CA10 1972); *Dellums* v. *Powell*, 184 U. S. App. D. C. 275, 284–285, 566 F. 2d 167, 175–176 (1977), cert. denied, 438 U. S. 916 (1978). Cf. *McCray* v. *Burrell*, 516 F. 2d 357, 370 (CA4 1975) (en banc), cert. dism'd, 426 U. S. 471 (1976) (burden of proof); *Gilker* v. *Baker*, 576 F. 2d 245 (CA9 1978) (same).

[6] Section 1983 provides in full: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

(1871) (Rep. Shellabarger), reflects a congressional judgment that a "damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees," 445 U. S., at 651. As remedial legislation, § 1983 is to be construed generously to further its primary purpose. See 445 U. S., at 636.

In certain limited circumstances, we have held that public officers are entitled to a qualified immunity from damages liability under § 1983. This conclusion has been based on an unwillingness to infer from legislative silence a congressional intention to abrogate immunities that were both "well established at common law" and "compatible with the purposes of the Civil Rights Act." 445 U. S., at 638. Findings of immunity have thus been "predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." *Imbler* v. *Pachtman*, 424 U. S. 409, 421 (1976). In *Pierson* v. *Ray*, 386 U. S. 547, 555 (1967), for example, we concluded that a police officer would be "excus[ed] from liability for acting under a statute that he reasonably believed to be valid but that was later held unconstitutional, on its face or as applied." And in other contexts we have held, on the basis of "[c]ommon-law tradition . . . and strong public-policy reasons," *Wood* v. *Strickland*, 420 U. S. 308, 318 (1975), that certain categories of executive officers should be allowed qualified immunity from liability for acts done on the basis of an objectively reasonable belief that those acts were lawful. See *Procunier* v. *Navarette*, 434 U. S. 555 (1978) (prison officials); *O'Connor* v. *Donaldson*, 422 U. S. 563 (1975) (superintendent of state hospital); *Wood* v. *Strickland*, *supra* (local school board members); *Scheuer* v. *Rhodes*, 416 U. S. 232 (1974) (state Governor and other executive officers). Cf. *Owen* v. *City of Independence*, *supra* (no qualified immunity for municipalities).

Nothing in the language or legislative history of § 1983,

however, suggests that in an action brought against a public official whose position might entitle him to immunity if he acted in good faith, a plaintiff must allege bad faith in order to state a claim for relief. By the plain terms of § 1983, two—and only two—allegations are required in order to state a cause of action under that statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law. See *Monroe* v. *Pape*, 365 U. S. 167, 171 (1961). Petitioner has made both of the required allegations. He alleged that his discharge by respondent violated his right to procedural due process, see *Board of Regents* v. *Roth*, 408 U. S. 564 (1972), and that respondent acted under color of Puerto Rican law. See *Monroe* v. *Pape*, *supra*, at 172–187.[7]

Moreover, this Court has never indicated that qualified immunity is relevant to the existence of the plaintiff's cause of action; instead we have described it as a defense available to the official in question. See *Procunier* v. *Navarette*, *supra*, at 562; *Pierson* v. *Ray*, *supra*, at 556, 557; *Butz* v. *Economou*, 438 U. S. 478, 508 (1978). Since qualified immunity is a defense, the burden of pleading it rests with the defendant. See Fed. Rule Civ. Proc. 8 (c) (defendant must plead any "matter constituting an avoidance or affirmative defense"); 5 C. Wright & A. Miller, Federal Practice and Procedure § 1271 (1969). It is for the official to claim that his conduct was justified by an objectively reasonable belief that it was lawful. We see no basis for imposing on the plaintiff an obligation to anticipate such a defense by stating in his complaint that the defendant acted in bad faith.

Our conclusion as to the allocation of the burden of pleading is supported by the nature of the qualified immunity

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[7] Actions under Puerto Rican law come within both § 1983 and its jurisdictional predicate, 28 U. S. C. § 1343 (3). *Examining Board* v. *Flores de Otero*, 426 U. S. 572 (1976).

defense. As our decisions make clear, whether such immunity has been established depends on facts peculiarly within the knowledge and control of the defendant. Thus we have stated that "[i]t is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct." *Scheuer* v. *Rhodes, supra,* at 247–248. The applicable test focuses not only on whether the official has an objectively reasonable basis for that belief, but also on whether "[t]he official himself [is] acting sincerely and with a belief that he is doing right," *Wood* v. *Strickland, supra,* at 321. There may be no way for a plaintiff to know in advance whether the official has such a belief or, indeed, whether he will even claim that he does. The existence of a subjective belief will frequently turn on factors which a plaintiff cannot reasonably be expected to know. For example, the official's belief may be based on state or local law, advice of counsel, administrative practice, or some other factor of which the official alone is aware. To impose the pleading burden on the plaintiff would ignore this elementary fact and be contrary to the established practice in analogous areas of the law.[8]

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[8] As then Dean Charles Clark stated over 40 years ago: "It seems to be considered only fair that certain types of things which in common law pleading were matters in confession and avoidance—*i. e.,* matters which seemed more or less to admit the general complaint and yet to suggest some other reason why there was no right—must be specifically pleaded in the answer, and that has been a general rule." ABA, Proceedings Institute at Washington and Symposium at New York City on the Federal Rules of Civil Procedure 49 (1939). See also 5 C. Wright & A. Miller, Federal Practice and Procedure §§ 1270–1271 (1969). Cf. *FTC* v. *A. E. Staley Mfg. Co.,* 324 U. S. 746, 759 (1945) (good-faith defense under Robinson-Patman Act); *Barcellona* v. *Tiffany English Pub. Inc.,* 597 F. 2d 464, 468 (CA5 1979); *Cohen* v. *Ayers,* 596 F. 2d 733, 739–740 (CA7 1979); *United States* v. *Kroll,* 547 F. 2d 393 (CA7 1977).

The decision of the Court of Appeals is reversed, and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE REHNQUIST joins the opinion of the Court, reading it as he does to leave open the issue of the burden of persuasion, as opposed to the burden of pleading, with respect to a defense of qualified immunity.

CATALANO, INC., ET AL. v. TARGET SALES, INC., ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 79-1101. Decided May 27, 1980

Held: An alleged agreement among respondent wholesalers to eliminate short term trade credit formerly granted to beer retailers and to require the retailers to make payment in cash, either in advance or upon delivery, is plainly anticompetitive as being tantamount to an agreement to eliminate discounts, and thus falls squarely within the traditional antitrust rule of *per se* illegality of price fixing, without further examination under the rule of reason.

Certiorari granted; 605 F. 2d 1097, reversed and remanded.

PER CURIAM.

Petitioners, a conditionally certified class of beer retailers in the Fresno, Cal., area, brought suit against respondent wholesalers alleging that they had conspired to eliminate short term trade credit formerly granted on beer purchases in violation of § 1 of the Sherman Act, ch. 647, 26 Stat. 209, as amended, 15 U. S. C. § 1. The District Court entered an interlocutory order, which among other things, denied petitioners' "motion to declare this a case of *per se* illegality," and then certified to the United States Court of Appeals for the Ninth Circuit, pursuant to 28 U. S. C. § 1292 (b),[1] the

[1] Title 28 U. S. C. § 1292 (b) provides:

"When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not

question whether the alleged agreement among competitors fixing credit terms, if proved, was unlawful on its face.[2] The Court of Appeals granted permission to appeal, and, with one judge dissenting, agreed with the District Court that a horizontal agreement among competitors to fix credit terms does not necessarily contravene the antitrust laws. 605 F. 2d 1097 (1979).[3] We grant the petition for certiorari and reverse the judgment of the Court of Appeals.

For purposes of decision we assume the following facts alleged in the amended complaint[4] to be true. Petitioners allege that, beginning in early 1967, respondent wholesalers secretly agreed, in order to eliminate competition among themselves, that as of December 1967 they would sell to retailers only if payment were made in advance or upon delivery. Prior to the agreement, the wholesalers had extended credit without interest up to the 30- and 42-day limits permitted by state law.[5] According to the petition, prior to the agreement wholesalers had competed with each other with respect

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stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

[2] In pertinent part, the District Judge's order read as follows:

"'In the opinion of the Court, this order involves a controlling question of law, whether an agreement among competitors to eliminate the extension of trade credit constitutes a *per se* violation of Section 1 of the Sherman Act (15 U. S. C. § 1), as to which there is substantial ground for difference of opinion, and that an immediate appeal from the order will materially advance the ultimate termination of the litigation since this issue is central to the conduct of discovery and trial of this case.'" App. D to Pet. for Cert.

[3] The District Court had also granted summary judgment against two plaintiffs for failure to establish injury in fact. Those plaintiffs appealed separately. The Court of Appeals consolidated their appeal with the appeal taken pursuant to § 1292 (b) and unanimously reversed that portion of the District Court's order. No review is sought in this Court of that ruling.

[4] See Record 152.

[5] Cal. Bus. & Prof. Code Ann. § 25509 (West Supp. 1980).

to trade credit, and the credit terms for individual retailers had varied substantially.[6] After entering into the agreement, respondents uniformly refused to extend any credit at all.

The Court of Appeals decided that the credit-fixing agreement should not be characterized as a form of price fixing. The court suggested that such an agreement might actually enhance competition in two ways: (1) "by removing a barrier perceived by some sellers to market entry," and (2) "by the increased visibility of price made possible by the agreement to eliminate credit." *Id.*, at 1099.

In dissent, Judge Blumenfeld[7] expressed the opinion that an agreement to eliminate credit was a form of price fixing. *Id.*, at 1104. He reasoned that the extension of interest-free credit is an indirect price reduction and that the elimination of such credit is therefore a method of raising prices:

> "The purchase of goods creates an obligation to pay for them. Credit is one component of the overall price paid for a product. The cost to a retailer of purchasing goods consists of (1) the amount he has to pay to obtain the goods, and (2) the date on which he has to make that payment. If there is a differential between a purchase for cash and one on time, that difference is not interest but part of the price. See *Hogg* v. *Ruffner*, 66 U. S. (1 Black) 115, 118–119 . . . (1861). Allowing a retailer interest-free short-term credit on beer purchases effectively reduces the price of beer, when compared to a requirement that the retailer pay the same amount immediately in cash; and, conversely, the elimination of free credit is the equivalent of a price increase." *Id.*, at 1103.

It followed, in his view, that the agreement was just as plainly anticompetitive as a direct agreement to raise prices. Con-

[6] Pet. for Cert. 4.

[7] Senior District Judge for the District of Connecticut, sitting by designation.

sequently, no further inquiry under the rule of reason, see *National Society of Professional Engineers* v. *United States*, 435 U. S. 679 (1978), was required in order to establish the agreement's unlawfulness.

Our cases fully support Judge Blumenfeld's analysis and foreclose both of the possible justifications on which the majority relied.[8] In *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U. S. 1, 7–8 (1979), we said:

> "In construing and applying the Sherman Act's ban against contracts, conspiracies, and combinations in restraint of trade, the Court has held that certain agreements or practices are so 'plainly anticompetitive,' *National Society of Professional Engineers* v. *United States*, 435 U. S. 679, 692 (1978); *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36, 50 (1977), and so often 'lack . . . any redeeming virtue,' *Northern Pac. R. Co.* v. *United States*, 356 U. S. 1, 5 (1958), that they are conclusively presumed illegal without further examination under the rule of reason generally applied in Sherman Act cases."[9]

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[8] Respondents nowhere suggest a procompetitive justification for a horizontal agreement to fix credit. Their argument is confined to disputing that settled case law establishes that such an agreement is unlawful on its face.

[9] The quotation from *Northern Pacific R. Co.* v. *United States*, 356 U. S. 1, 5 (1958), is drawn from the following passage: "[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation . . .—an inquiry so often wholly fruitless when undertaken. Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing. . . ."

A horizontal agreement to fix prices is the archetypal example of such a practice. It has long been settled that an agreement to fix prices is unlawful *per se*. It is no excuse that the prices fixed are themselves reasonable. See, *e. g.*, *United States* v. *Trenton Potteries Co.*, 273 U. S. 392, 397–398 (1927); *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 340–341 (1897). In *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940), we held that an agreement among competitors to engage in a program of buying surplus gasoline on the spot market in order to prevent prices from falling sharply was unlawful without any inquiry into the reasonableness of the program, even though there was no direct agreement on the actual prices to be maintained. In the course of the opinion, the Court made clear that

> "the machinery employed by a combination for price-fixing is immaterial.
>
> "Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*." *Id.*, at 223.

Thus, we have held agreements to be unlawful *per se* that had substantially less direct impact on price than the agreement alleged in this case. For example, in *Sugar Institute* v. *United States*, 297 U. S. 553, 601–602 (1936), the Court held unlawful an agreement to adhere to previously announced prices and terms of sale, even though advance price announcements are perfectly lawful and even though the particular prices and terms were not themselves fixed by private agreement. Similarly, an agreement among competing firms of professional engineers to refuse to discuss prices with potential customers until after negotiations have resulted in the initial selection of an engineer was held unlawful without requiring further inquiry. *National Society of Professional Engineers* v. *United States*, *supra*, at 692–693. Indeed, a horizontal agreement among competitors to use a

specific method of quoting prices may be unlawful. Cf. *FTC* v. *Cement Institute*, 333 U. S. 683, 690–693 (1948).[10]

It is virtually self-evident that extending interest-free credit for a period of time is equivalent to giving a discount equal to the value of the use of the purchase price for that period of time. Thus, credit terms must be characterized as an inseparable part of the price.[11] An agreement to terminate the practice of giving credit is thus tantamount to an agreement to eliminate discounts, and thus falls squarely within the traditional *per se* rule against price fixing.[12] While it

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[10] The Court there held that an agreement to use a multiple basing point pricing system was an unfair method of competition prohibited by § 5 of the Federal Trade Commission Act, 15 U. S. C. § 45, even though the same conduct would also violate § 1 of the Sherman Act.

[11] See *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U. S. 495, 507 (1969): "In the usual sale on credit the seller, a single individual or corporation, simply makes an agreement determining when and how much he will be paid for his product. In such a sale the credit may constitute such an inseparable part of the purchase price for the item that the entire transaction could be considered to involve only a single product."

See also G. Lamb & C. Shields, Trade Association Law and Practice 129 (rev. ed. 1971) ("Credit terms are increasingly viewed as elements of price, and any interference with the elements of price is regarded as illegal per se under the Sherman Act"). Cf. P. Areeda, Antitrust Analysis 878 (2d ed. 1974) ("To charge cash and credit customers the same price is, economically speaking, to discriminate against the former"); *Hogg* v. *Ruffner*, 1 Black 115, 118–119 (1861).

[12] Cf. *Cement Mfrs. Protective Assn.* v. *United States*, 268 U. S. 588, 600 (1925), in which the Court upheld an exchange of information concerning credit in order to prevent fraud on the members of the association, but also noted that "[t]he evidence falls far short of establishing any understanding on the basis of which credit was to be extended to customers or that any co-operation resulted from the distribution of this information, or that there were any consequences from it other than such as would naturally ensue from the exercise of the individual judgment of manufacturers in determining, on the basis of available information, whether to extend credit or to require cash or security from any given customer."

See also *Swift & Co.* v. *United States*, 196 U. S. 375, 392, 394 (1905);

may be that the elimination of a practice of giving variable discounts will ultimately lead in a competitive market to corresponding decreases in the invoice price, that is surely not necessarily to be anticipated. It is more realistic to view an agreement to eliminate credit sales as extinguishing one form of competition among the sellers. In any event, when a particular concerted activity entails an obvious risk of anticompetitive impact with no apparent potentially redeeming value, the fact that a practice may turn out to be harmless in a particular set of circumstances will not prevent its being declared unlawful *per se*.

The majority of the panel of the Court of Appeals suggested, however, that a horizontal agreement to eliminate credit sales may remove a barrier to other sellers who may wish to enter the market. But in any case in which competitors are able to increase the price level or to curtail production by agreement, it could be argued that the agreement has the effect of making the market more attractive to potential new entrants. If that potential justifies horizontal agreements among competitors imposing one kind of voluntary restraint or another on their competitive freedom, it would seem to follow that the more successful an agreement is in raising the price level, the safer it is from antitrust attack. Nothing could be more inconsistent with our cases.

Nor can the informing function of the agreement, the increased price visibility, justify its restraint on the individual wholesaler's freedom to select his own prices and terms of sale. For, again, it is obvious that any industrywide agreement on prices will result in a more accurate understanding of the terms offered by all parties to the agreement. As the *Sugar Institute* case demonstrates, however, there is a plain distinction between the lawful right to publish prices and terms of sale, on the one hand, and an agreement among competitiors

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Wall Products Co. v. *National Gypsum Co.*, 326 F. Supp. 295 (ND Cal. 1971).

limiting action with respect to the published prices, on the other.

Thus, under the reasoning of our cases, an agreement among competing wholesalers to refuse to sell unless the retailer makes payment in cash either in advance or upon delivery is "plainly anticompetitive." Since it is merely one form of price fixing, and since price-fixing agreements have been adjudged to lack any "redeeming virtue," it is conclusively presumed illegal without further examination under the rule of reason.

Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

HARRIS, SECRETARY OF HEALTH AND HUMAN SERVICES v. ROSARIO ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

No. 79-1294. Decided May 27, 1980

Held: The lower level of reimbursement provided to Puerto Rico under the Aid to Families with Dependent Children program does not violate the Fifth Amendment's equal protection guarantee. Congress, pursuant to its authority under the Territory Clause of the Constitution to make all needful rules and regulations respecting Territories, may treat Puerto Rico differently from States so long as there is a rational basis for its actions, as here. Cf. *Califano* v. *Torres*, 435 U. S. 1.

Reversed.

PER CURIAM.

The Aid to Families with Dependent Children program (AFDC), 49 Stat. 627, as amended, 42 U. S. C. § 601 *et seq.*, provides federal financial assistance to States and Territories to aid families with needy dependent children. Puerto Rico receives less assistance than do the States, 42 U. S. C. §§ 1308 (a)(1), 1396d (b) (1976 ed. and Supp. II). Appellees, AFDC recipients residing in Puerto Rico, filed this class action against the Secretary of Health, Education, and Welfare in March 1977 in the United States District Court for the District of Puerto Rico; they challenged the constitutionality of 42 U. S. C. §§ 1308 and 1396d (b), claiming successfully that the lower level of AFDC reimbursement provided to Puerto Rico violates the Fifth Amendment's equal protection guarantee.

We disagree. Congress, which is empowered under the Territory Clause of the Constitution, U. S. Const., Art. IV, § 3, cl. 2, to "make all needful Rules and Regulations respecting the Territory . . . belonging to the United States," may treat Puerto Rico differently from States so long as there is a

rational basis for its actions. In *Califano* v. *Torres*, 435 U. S. 1 (1978) (*per curiam*), we concluded that a similar statutory classification was rationally grounded on three factors: Puerto Rican residents do not contribute to the federal treasury; the cost of treating Puerto Rico as a State under the statute would be high; and greater benefits could disrupt the Puerto Rican economy. These same considerations are forwarded here in support of §§ 1308 and 1396d (b), Juris. Statement 12–14,* and we see no reason to depart from our conclusion in *Torres* that they suffice to form a rational basis for the challenged statutory classification.

We reverse.

So ordered.

MR. JUSTICE BRENNAN and MR. JUSTICE BLACKMUN, not now being persuaded that the Court's summary disposition in *Califano* v. *Torres*, 435 U. S. 1 (1978), so clearly controls this case, would note probable jurisdiction and set the case for oral argument.

MR. JUSTICE MARSHALL, dissenting.

The Court today rushes to resolve important legal issues without full briefing or oral argument. The sole authority cited for the majority's result is another summary decision by this Court. The need for such haste is unclear. The dangers of such decisionmaking are clear, however, as the Court's analysis is, in my view, ill-conceived in at least two respects.

The first question that merits plenary attention is whether Congress, acting pursuant to the Territory Clause of the Constitution, U. S. Const., Art. IV, § 3, cl. 2, "may treat Puerto

*For example, the Secretary estimates that the additional cost of treating Puerto Rico as a State for AFDC purposes alone would be approximately $30 million per year, and, if the decision below were to apply equally to various other reimbursement programs under the Social Security Act, the total annual cost could exceed $240 million. Juris. Statement 12, n. 13.

Rico differently from States so long as there is a rational basis for its actions." *Ante*, at 651–652. No authority is cited for this proposition. Our prior decisions do not support such a broad statement.

It is important to remember at the outset that Puerto Ricans are United States citizens, see 8 U. S. C. § 1402, and that different treatment to Puerto Rico under AFDC may well affect the benefits paid to these citizens.[1] While some early opinions of this Court suggested that various protections of the Constitution do not apply to Puerto Rico, see, *e. g.*, *Downes* v. *Bidwell*, 182 U. S. 244 (1901); *Balzac* v. *Porto Rico*, 258 U. S. 298 (1922), the present validity of those decisions is questionable. See *Torres* v. *Puerto Rico*, 442 U. S. 465, 475–476 (1979) (BRENNAN, J., concurring in judgment). We have already held that Puerto Rico is subject to the Due Process Clause of either the Fifth or Fourteenth Amendment, *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U. S. 663, 668–669, n. 5 (1974), and the equal protection guarantee of either the Fifth or the Fourteenth Amendment, *Examining Board* v. *Flores de Otero*, 426 U. S. 572, 599–601 (1976). The Fourth Amendment is also fully applicable to Puerto Rico, either directly or by operation of the Fourteenth Amendment, *Torres* v. *Puerto Rico*, *supra*, at 471. At least four Members of this Court are of the view that all provisions

[1] The District Court certified the plaintiff class as "all United States citizens residing in the Commonwealth of Puerto Rico, which [*sic*] are recipients of public assistance under the Aid to the Families with Dependent Children category and that have been, are and will be discriminated [against] solely on the basis of their residence." App. to Juris. Statement 2a.

It is unclear whether the Court's Territory Clause analysis is intended to apply only where the discrimination is against the Government of Puerto Rico and not against persons residing there. Such a distinction would lack substance in any event. The discrimination against Puerto Rico under the AFDC program must also operate as a discrimination against United States citizens residing in Puerto Rico who would benefit, one way or another, from such increased federal aid to Puerto Rico.

of the Bill of Rights apply to Puerto Rico. 442 U. S., at 475–476 (BRENNAN, J., concurring in judgment).

Despite these precedents, the Court suggests today, without benefit of briefing or argument, that Congress needs only a rational basis to support less beneficial treatment for Puerto Rico, and the citizens residing there, than is provided to the States and citizens residing in the States. Heightened scrutiny under the equal protection component of the Fifth Amendment, the Court concludes, is simply unavailable to protect Puerto Rico or the citizens who reside there from discriminatory legislation, as long as Congress acts pursuant to the Territory Clause. Such a proposition surely warrants the full attention of this Court before it is made part of our constitutional jurisprudence.

Califano v. *Torres*, 435 U. S. 1 (1978) (*per curiam*), the only authority upon which the majority relies, does not stand for the proposition the Court espouses today. In that decision, also reached through summary procedures and over the objections of two Members of the Court, see *id.*, at 5 (statement of BRENNAN, J.; statement of MARSHALL, J.), the Court held that the right to travel was not violated by a provision of the Social Security Act pursuant to which persons residing in the United States lost their supplemental security income benefits upon moving to Puerto Rico. While the plaintiffs in that case had also challenged the provision on equal protection grounds, the District Court relied entirely on the right to travel,[2] and therefore no equal protection

[2] The District Court concluded that "[w]e are not here concerned with the alleged power of Congress to establish disparate treatment towards the United States citizens who reside in Puerto Rico. Rather, the focus of our attention should be directed to determining whether a constitutional right of a citizen of the United States has been improperly penalized while he is within one of these States. We see this as the more relevant framing of the issues because although Plaintiff lost his benefits while physically in Puerto Rico, the statutory prohibitions that permitted this result came into play from the very moment when they exerted their force

question was before this Court.[3] The Court merely referred to the equal protection claim briefly in a footnote, *id.*, at 3, n. 4. Observing that Puerto Rico's relationship with the United States was unique, the Court simply noted that the District Court had "apparently acknowledged that Congress has the power to treat Puerto Rico differently, and that every federal program does not have to be extended to it." *Ibid.*[4] That Puerto Rico has an unparalleled relationship with the United States does not lead ineluctably to the legal principle asserted here. At most, reading more into that single footnote of dictum than it deserves, *Califano* v. *Torres* may suggest that under the equal protection component of the Due Process Clause of the Fifth Amendment, Puerto Rico may be treated differently from the States if there is a rational basis for the discrimination when Congress enacts a law providing for governmental payments of monetary benefits. See *id.*, at 5. That is a more limited view than is asserted in this case, but even that position should be reached only after oral argument and full briefing. *Ibid.* (statement of MARSHALL, J.).

I also object to the Court's reliance on the effect greater benefits could have on the Puerto Rican economy. *Ante*, at 652. See also *Califano* v. *Torres, supra*, at 5, n. 7. This rationale has troubling overtones. It suggests that programs designed to help the poor should be less fully applied in those areas where the need may be the greatest, simply because

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upon Plaintiff. From this standpoint, Plaintiff is in the same position now as if he would have remained in Connecticut and brought a declaratory judgment suit there. . . ." *Torres* v. *Mathews*, 426 F. Supp. 1106, 1110 (1977) (emphasis deleted).

[3] The question presented in *Califano* v. *Torres* was whether the sections of the Social Security Act excluding residents of Puerto Rico from the Supplemental Security Income program "deny due process to individuals who upon moving to Puerto Rico lose the benefits to which they were entitled while residing in the United States." Juris. Statement, O. T. 1977, No. 77-88, p. 2. See also *id.*, at 9-11.

[4] The accuracy of this assessment of the District Court's opinion is open to question. See n. 2, *supra*.

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otherwise the relative poverty of recipients compared to other persons in the same geographic area will somehow be upset. Similarly, reliance on the fear of disrupting the Puerto Rican economy implies that Congress intended to preserve or even strengthen the comparative economic position of the States vis-à-vis Puerto Rico. Under this theory, those geographic units of the country which have the strongest economies presumably would get the most financial aid from the Federal Government since those units would be the least likely to be "disrupted." Such an approach to a financial assistance program is not so clearly rational as the Court suggests, and there is no citation by the Court to any suggestion in the legislative history that Congress had these economic concerns in mind when it passed the portion of the AFDC program presently being challenged. Nor does appellant refer to any evidence in the record supporting the notion that such a speculative fear of economic disruption is warranted.[5] In my view it is by no means clear that the discrimination at issue here could survive scrutiny under even a deferential equal protection standard.

Ultimately this case raises the serious issue of the relationship of Puerto Rico, and the United States citizens who reside there, to the Constitution. An issue of this magnitude deserves far more careful attention than it has received in *Califano* v. *Torres* and in the present case. I would note probable jurisdiction and set the case for oral argument. Accordingly, I dissent from the Court's summary disposition.

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[5] Appellant's suggestion that increased federal reimbursements might not go to the class members at all but instead be used to provide other services or to lower taxes, see Juris. Statement 10, demonstrates the speculative nature of this fear of economic disruption.

ANDRUS, SECRETARY OF THE INTERIOR v. SHELL OIL CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 78-1815. Argued January 15, 1980—Decided June 2, 1980

The general mining law of 1872 permits citizens to explore the public domain and search for minerals and, if they discover "valuable mineral deposits," to obtain title to the land on which such deposits are located. The Mineral Leasing Act (Act), enacted in 1920, withdrew oil shale from the general mining law and provided that thereafter oil shale would be subject to disposition only through leases, except that a saving clause preserved valid claims existent at the date of passage of the Act. Upon complaints by the Department of the Interior (Department) alleging that respondents' claims for oil shale deposits located prior to the Act were invalid, a hearing examiner ruled the claims valid on the ground that the Department's 1927 decision in *Freeman* v. *Summers*, 52 L. D. 201, wherein it was held that "present marketability" is not a prerequisite to the patentability of oil shale deposits as "valuable mineral deposits," compelled the conclusion that oil shale is a valuable mineral subject to appropriation under the mining laws, despite substantial evidence that oil shale operations were commercially infeasible. The Board of Land Appeals reversed, holding that oil shale claims located prior to 1920 failed the test of value because at the time of location there did not appear as a present fact a reasonable prospect of success in developing an operating mine that would yield a reasonable profit. It rejected prior departmental precedent, particularly *Freeman* v. *Summers*, as being inconsistent with the general mining law and therefore unsound. On appeal, the District Court reversed and held the claims valid, finding that Congress had implicitly "ratified" the rule of *Freeman* v. *Summers*, and that in any event the Department was estopped from departing from the longstanding *Freeman* standard. The Court of Appeals affirmed.

Held: The oil shale deposits in question are "valuable mineral deposits" patentable under the Act's saving clause. The Act's history and the developments subsequent to its passage indicate that the Government should not be permitted to invalidate pre-1920 oil shale claims by imposing a present marketability requirement on such claims. The Department's original position, as set forth in Instructions, issued shortly after the Act became law, authorizing the General Land Office

to begin adjudicating applications for patents for pre-1920 oil shale claims, and later enunciated in *Freeman* v. *Summers*, is the correct view of the Act as it applies to the patentability of pre-1920 oil shale claims. Pp. 663–673.

591 F. 2d 597, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined. STEWART, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 673.

Deputy Solicitor General Wallace argued the cause for petitioner. On the briefs were *Solicitor General McCree, Assistant Attorney General Moorman, Deputy Solicitor General Clairborne, Mark I. Levy, Dirk D. Snel,* and *Robert L. Klarquist.*

Fowler Hamilton argued the cause for respondents. With him on the brief were *Richard W. Hulbert, Donald L. Morgan, H. Michael Spence, Claron C. Spencer,* and *Norma L. Comstock.*

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

The general mining law of 1872, 30 U. S. C. § 22 *et seq.*, provides that citizens may enter and explore the public domain, and search for minerals; if they discover "valuable mineral deposits," they may obtain title to the land on which such deposits are located.[1] In 1920 Congress altered this

[1] Discovery of a "valuable mineral" is not the only prerequisite of patentability. The mining law also provides that until a patent is issued a claimant must perform $100 worth of labor or make $100 of improvements on his claim during each year and that a patent may issue only on a showing that the claimant has expended a total of $500 on the claim. 30 U. S. C. §§ 28, 29. See *Hickel* v. *Oil Shale Corp.*, 400 U. S. 48 (1970). In addition, a claim "must be distinctly marked on the ground so that its boundaries can be readily traced." 30 U. S. C. § 28; *Kendall* v. *San Juan Silver Mining Co.*, 144 U. S. 658 (1892). If the requirements of the mining law are satisfied, the land may be patented for $2.50 per acre. 30 U. S. C.

program with the enactment of the Mineral Leasing Act. 41 Stat. 437, as amended, 30 U. S. C. § 181 *et seq.* The Act withdrew oil shale and several other minerals from the general mining law and provided that thereafter these minerals would be subject to disposition only through leases. A savings clause, however, preserved "valid claims existent at date of the passage of this Act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery." [2]

The question presented is whether oil shale deposits located prior to the 1920 Act are "valuable mineral deposits" patentable under the savings clause of the Act.

I

The action involves two groups of oil shale claims located by claimants on public lands in Garfield County, Colo., prior to the enactment of the Mineral Leasing Act.[3] The first group of claims, designated Mountain Boys Nos. 6 and 7, was located in 1918. In 1920, a business trust purchased the claims for $25,000, and in 1924 an application for patent was filed with

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§ 37. There is no deadline within which a locator must file for patent, though to satisfy the discovery requirement the claimant must show the existence of "valuable mineral deposits" both at the time of location and at the time of determination. *Barrows* v. *Hickel*, 447 F. 2d 80, 82 (CA9 1971).

[2] The savings clause is contained in § 37 of the Act, 41 Stat. 451, as amended, which, as set forth in 30 U. S. C. § 193, provides in full:

"The deposits of coal, phosphate, sodium, potassium, oil, oil shale, and gas, herein referred to, in lands valuable for such minerals, including lands and deposits in Lander, Wyoming, coal entries numbered 18 to 49, inclusive, shall be subject to disposition only in the form and manner provided in this chapter, except as to valid claims existent on February 25, 1920, and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery."

[3] Oil shale is a sedimentary rock containing an organic material called kerogen which, upon destructive distillation, produces a substantial amount of oil.

the Department of the Interior. Some 20 years later, after extended investigative and adjudicatory proceedings, the patent was rejected "without prejudice" on the ground that it was not then vigorously pursued. In 1958, Frank W. Winegar acquired the claims and filed a new patent application. In 1964, Winegar conveyed his interests in the claims to respondent Shell Oil Company.

The second group of claims, known as Harold Shoup Nos. 1–4, was located in 1917. In 1923, the claims were acquired by Karl C. Schuyler who in 1933 bequeathed them to his surviving spouse. In 1960, Mrs. Schuyler incorporated respondent D. A. Shale, Inc., and transferred title to the claims to the corporation. Three months later, the corporation filed patent applications.

In 1964, the Department issued administrative complaints alleging that the Mountain Boy claims and the Shoup claims were invalid. The complaints alleged, *inter alia*, that oil shale was not a "valuable mineral" prior to the enactment of the 1920 Mineral Leasing Act.

The complaints were consolidated and tried to a hearing examiner who in 1970 ruled the claims valid. The hearing examiner observed that under established case law the test for determining a "valuable mineral deposit" was whether the deposit was one justifying present expenditures with a reasonable prospect of developing a profitable mine See *United States* v. *Coleman*, 390 U. S. 599 (1968); *Castle* v. *Womble*, 19 L. D. 455 (1894).[4] He then reviewed the history

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[4] In *Chrisman* v. *Miller*, 197 U. S. 313 (1905), this Court approved the Department of the Interior's "prudent-man test" under which discovery of a "valuable mineral deposit" requires proof of a deposit of such character that "a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine." *Castle* v. *Womble*, 19 L. D., at 457. Accord, *Best* v. *Humboldt Placer Mining Co.*, 371 U. S. 334, 335–336 (1963); *Cameron* v. *United States*, 252 U. S. 450, 459 (1920). In *United States* v. *Coleman*, 390 U. S. 599 (1968), the Court approved the Depart-

of oil shale operations in this country and found that every attempted operation had failed to show profitable production. On the basis of this finding and other evidence showing commercial infeasibility, the hearing examiner reasoned that "[i]f this were a case of first impression," oil shale would fail the "valuable mineral deposit" test. However, he deemed himself bound by the Department's contrary decision in *Freeman* v. *Summers,* 52 L. D. 201 (1927). There, the Secretary had written:

> "While at the present time there has been no considerable production of oil from shales, due to the fact that abundant quantities of oil have been produced more cheaply from wells, *there is no possible doubt of its value and of the fact that it constitutes an enormously valuable resource for future use by the American people.*
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> "It is not necessary, in order to constitute a valid discovery under the general mining laws sufficient to support an application for patent, that the mineral *in its present situation* can be immediately disposed of at a profit." *Id.,* at 206. (Emphasis added.)

The hearing examiner ruled that *Freeman* v. *Summers* compelled the conclusion that oil shale is a valuable mineral subject to appropriation under the mining laws, and he upheld the Mountain Boy and Shoup claims as valid and patentable.

The Board of Land Appeals reversed. Adopting the findings of the hearing examiner, the Board concluded that oil shale claims located prior to 1920 failed the test of value because at the time of location there did not appear "as a *present* fact . . . a reasonable prospect of success in developing an operating mine that would yield a reasonable profit." (Emphasis in original.) The Board recognized that this conclusion was at odds with prior departmental precedent, and

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ment's marketability test—whether a mineral can be "extracted, removed and marketed at a profit"—deeming it a logical complement of the prudent-man standard.

particularly with *Freeman* v. *Summers;* but it rejected that precedent as inconsistent with the general mining law and therefore unsound. The Board then considered whether its newly enunciated interpretation should be given only prospective effect. It found that respondents' reliance on prior rulings was minimal and that the Department's responsibility as trustee of public lands required it to correct a plainly erroneous decision.[5] Accordingly, it ruled that its new interpretation applied to the Mountain Boy and Shoup claims, and that those claims were invalid.

Respondents appealed the Board's ruling to the United States District Court for the District of Colorado. The District Court agreed with the Board that by not requiring proof of "present marketability" the decision in *Freeman* v. *Summers* had liberalized the traditional valuable mineral test. But it found that Congress in 1931 and again in 1956 had considered the patentability of oil shale and had implicitly "ratified" that liberalized rule. Alternatively, the District Court concluded that the Department was estopped now from departing from the *Freeman* standard which investors had "relied upon . . . for the past half-century." *Shell Oil Co.* v. *Kleppe*, 426 F. Supp. 894, 907 (1977). On these grounds, it reversed the Board's ruling and held that the claims at issue were valid.

The Court of Appeals for the Tenth Circuit affirmed. 591 F. 2d 597 (1979). It agreed with the District Court that the "different treatment afforded all oil shale claims as to the 'valuable mineral deposit' element of a location became a part of the general mining laws by reason of its adoption and ap-

[5] The Board observed that "[a]lthough Shell . . . expended some $18,780 in perfecting title to and preparing patent application for the Mountain Boy claims before 1964, it did not purchase [the claims] from Frank Winegar for $30,000 [until] after initiation of the contest proceedings." And it found no evidence that D. A. Shale, Inc., or its predecessors had invested "more than a minimal amount" in the purchase of the Shoup claims in reliance on the *Freeman* decision.

proval by both Houses of Congress" in the years after 1920. *Id.*, at 604. And it held that the Department now must adhere to the *Freeman* rule. We granted certiorari because of the importance of the question to the management of the public lands. 444 U. S. 822 (1979). We affirm.

II

The legislative history of the 1920 Mineral Leasing Act shows that Congress did not consider "present marketability" a prerequisite to the patentability of oil shale.[6] In the extensive hearings and debates that preceded the passage of the 1920 Act, there is no intimation that Congress contemplated such a requirement; indeed, the contrary appears. During the 1919 floor debates in the House of Representatives, an amendment was proposed which would have substituted the phrase "deposits in paying quantities" for "valuable mineral." That amendment, however, was promptly withdrawn after Mr. Sinott, the House floor manager, voiced his objection to the change:

> "Mr. SINOTT. That language was put in with a great deal of consideration and we would not like to change from 'valuable' to 'paying.' *There is quite a distinction.* We are in line with the decisions of the courts as to what is a discovery, and I think it would be a very

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[6] Congress was aware that there was then no commercially feasible method for extracting oil from oil shale. The 1918 report of the House Committee on the Public Lands, for example, had emphasized that

"no commercial quantity or any appreciable amount of shale oil has ever been produced in this country, nor any standardized process of production has yet been evolved or recommended or agreed upon in this country by the Bureau of Mines or anyone else, and it has not yet been demonstrated that the oil-shale industry can be made commercially profitable. . . ." H. R. Rep. No. 563, 65th Cong., 2d Sess., 18 (1918).

See also 58 Cong. Rec. 4271, 4279 (1919) (remarks of Sen. Smoot); Hearings on H. R. 3232 and S. 2812 before the House Committee on the Public Lands, 65th Cong., 2d Sess., 811, 890, 1257 (1918) (hereafter Hearings).

dangerous matter to experiment with this language at this time." 58 Cong. Rec. 7537 (1919) (emphasis added).

An examination of the relevant decisions at the time underscores the point. Those decisions are clear in rejecting a requirement that a miner must "demonstrat[e] that the vein . . . would pay all the expenses of removing, extracting, crushing, and reducing the ore, and leave a profit to the owner," *Book* v. *Justice Mining Co.*, 58 F. 106, 124 (CC Nev. 1893), and in holding that "it is enough if the vein or deposit 'has a present *or prospective* commercial value.'" *Madison* v. *Octave Oil Co.*, 154 Cal. 768, 772, 99 P. 176, 178 (1908) (emphasis added). Accord, *Cascaden* v. *Bartolis*, 146 F. 739 (CA9 1906); *United States* v. *Ohio Oil Co.*, 240 F. 996, 998 (Wyo. 1916); *Montana Cent. R. Co.* v. *Migeon*, 68 F. 811, 814 (CC Mont. 1895); *East Tintic Consolidated Mining Co.*, 43 L. D. 79, 81 (1914); 2 C. Lindley, American Law Relating to Mines and Mineral Lands § 336, pp. 768–769 (3d ed. 1914). See generally Reeves, The Origin and Development of the Rules of Discovery, 8 Land & Water L. Rev. 1 (1973).

To be sure, prior to the passage of the 1920 Act, there existed considerable uncertainty as to whether oil shale was patentable.[7] That uncertainty, however, related to whether oil shale was a "mineral" under the mining law, and not to its "value." Similar doubts had arisen in the late 19th cen-

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[7] Mr. John Fry, one of the Committee witnesses who represented the oil shale interests before Congress, was candid on that point:

"Mr. TAYLOR. There is a large amount of this shale land that has been located and is now held under the placer law. But none of it has yet gone to patent.

"The Chairman. Has one acre of this land withdrawn in Colorado been patented?

"Mr. FRY. No.

"The Chairman. So you do not know what the holding of the department will be?

"Mr. FRY. We do not." Hearings, at 912.

See also *id.*, at 626, 873, 913, 918, 1240, 1256–1257.

tury in regard to petroleum. Indeed, in 1896 the Secretary of the Interior had held that petroleum claims were not subject to location under the mining laws, concluding that only lands "containing the more precious metals . . . gold, silver, cinnabar etc." were open to entry. *Union Oil Co.,* 23 L. D. 222, 227. The Secretary's decision was short-lived. In 1897, Congress enacted the Oil Placer Act authorizing entry under the mining laws to public lands "containing petroleum or other mineral oils." Ch. 216, 29 Stat. 526. This legislation put to rest any doubt about oil as a mineral. But because oil shale, strictly speaking, contained kerogen and not oil, see n. 3, *supra,* its status remained problematic. See Reidy, Do Unpatented Oil Shale Claims Exist?, 43 Denver L. J. 9, 12 (1966).

That this was the nature of the uncertainty surrounding the patentability of oil shale claims is evident from remarks made throughout the hearings and debates on the 1920 Act. In the 1918 hearings, Congressman Barnett, for example, explained:

> "Mr. BARNETT. . . . If the department should contend that shale lands come within the meaning of the term 'oil lands' they must perforce, by the same argument, admit that they are placer lands within the meaning of the act of 1897.
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> "The Chairman. And patentable?
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> "Mr. BARNETT. And patentable under that act." Hearings, at 918.

The enactment of the 1920 Mineral Leasing Act put an end to these doubts. By withdrawing "oil shale . . . in lands valuable for such minerals" from disposition under the general mining law, the Congress recognized—at least implicitly—that oil shale *had been* a locatable mineral. In effect, the 1920 Act did for oil shale what the 1897 Oil Placer Act had done for oil. And, as Congressman Barnett's ready answer demonstrates, once it was settled that oil shale was a mineral

subject to location, and once a savings clause was in place preserving pre-existing claims, it was fully expected that such claims would be patentable. The fact that oil shale then had no commercial value simply was not perceived as an obstacle to that end.

III

Our conclusion that Congress in enacting the 1920 Mineral Leasing Act contemplated that pre-existing oil shale claims could satisfy the discovery requirement of the mining law is confirmed by actions taken in subsequent years by the Interior Department and the Congress.[8]

A

On May 10, 1920, less than three months after the Mineral Leasing Act became law, the Interior Department issued "Instructions" to its General Land Office authorizing that Office to begin adjudicating applications for patents for pre-1920 oil shale claims. The Instructions advised as follows:

> "Oil shale having been thus recognized by the Department and *by Congress* as a *mineral* deposit and a source of petroleum . . . lands valuable on account thereof *must be held to have been subject to valid location and*

[8] This Court has observed that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States* v. *Price*, 361 U. S. 304, 313 (1960). This sound admonition has guided several of our recent decisions. See, *e. g.*, *TVA* v. *Hill*, 437 U. S. 153, 189–193 (1978); *SEC* v. *Sloan*, 436 U. S. 103, 119–122 (1978). Yet we cannot fail to note Mr. Chief Justice Marshall's dictum that "[w]here the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived." *United States* v. *Fisher*, 2 Cranch 358, 386 (1805). In consequence, while arguments predicated upon subsequent congressional actions must be weighed with extreme care, they should not be rejected out of hand as a source that a court may consider in the search for legislative intent. See, *e. g.*, *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U. S. 572, 596 (1980); *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 380–381 (1969); *NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267, 274–275 (1974).

> *appropriation under the placer mining laws,* to the same extent and subject to the same provisions and conditions as if valuable on account of oil or gas." 47 L. D. 548, 551 (1920) (emphasis added).

The first such patent was issued immediately thereafter. Five years later, the Department ruled that patentability was dependent upon the "character, extent, and mode of occurrence of the oil-shale deposits." *Dennis* v. *Utah,* 51 L. D. 229, 232 (1925). Present profitability was not mentioned as a relevant, let alone a critical, consideration.

In 1927, the Department decided *Freeman* v. *Summers,* 52 L. D. 201. The case arose out of a dispute between an oil shale claimant and an applicant for a homestead patent, and involved two distinct issues: (1) whether a finding of lean surface deposits warranted the geological inference that the claim contained rich "valuable" deposits below; and (2) whether present profitability was a prerequisite to patentability. Both issues were decided in favor of the oil shale claimant: the geological inference was deemed sound and the fact that there was "no possible doubt . . . that [oil shale] constitutes an enormously valuable resource for future use by the American people" was ruled sufficient proof of "value." *Id.,* at 206.

For the next 33 years, *Freeman* was applied without deviation.[9] It was said that its application ensured that "valid rights [would] be protected and permitted to be perfected." Secretary of Interior Ann. Rep. 30 (1927). In all, 523 patents for 2,326 claims covering 349,088 acres were issued under the *Freeman* rule. This administrative practice, begun immediately upon the passage of the 1920 Act, "has peculiar weight [because] it involves a contemporaneous con-

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[9] See, *e. g., John M. Debevoise,* 67 I. D. 177, 180 (1960); *United States* v. *Strauss,* 59 I. D. 129, 140–142 (1945); *Location of Oil Shale Placer Claims,* 52 L. D. 631 (1929); *Assessment Work on Oil-Shale Claims,* 52 L. D. 334 (1928); *Standard Shales Products Co.,* 52 L. D. 522 (1928); *James W. Bell,* 52 L. D. 197 (1927).

struction of [the] statute by the men charged with the responsibility of setting its machinery in motion," *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 315 (1933). Accord, *e. g.*, *United States* v. *National Assn. of Securities Dealers*, 422 U. S. 694, 719 (1975); *Udall* v. *Tallman*, 380 U. S. 1, 16 (1965). It provides strong support for the conclusion that Congress did not intend to impose a present marketability requirement on oil shale claims.

B

In 1930 and 1931, congressional committees revisited the 1920 Mineral Leasing Act and re-examined the patentability of oil shale claims. Congressional interest in the subject was sparked in large measure by a series of newspaper articles charging that oil shale lands had been "improvidently, erroneously, and unlawfully, if not corruptly, transferred to individuals and private corporations." 74 Cong. Rec. 1079 (1930) (S. Res. 379). The articles were based upon accusations leveled at the Interior Department by Ralph S. Kelly, then the General Land Office Division Inspector in Denver. Kelly's criticism centered on the *Freeman* v. *Summers* decision. Fearing another "Teapot Dome" scandal, the Senate authorized the Committee on Public Lands to "inquire into . . . the alienation of oil shale lands."

The Senate Committee held seven days of hearings focusing almost exclusively on "the so-called Freeman-Summers case." Hearings on S. Res. 379 before the Senate Committee on Public Lands and Surveys, 71st Cong., 3d Sess., 2 (1931). At the outset of the hearings, the Committee was advised by E. C. Finney, Solicitor, Dept. of Interior, that 124 oil shale patents had been issued covering 175,000 acres of land and that 63 more patent applications were pending. Finney's statement prompted this interchange:

> "Senator PITTMAN: Well, were the shales on those patented lands of commercial value?

"Mr. FINNEY: If you mean by that whether they could have been mined and disposed of at a profit at the time of the patent, or now, the answer is no.

. . . . .

"Senator PITTMAN: So the Government has disposed of 175,000 acres in patents on lands which in your opinion there was no valid claim to in the locator?

"Mr. FINNEY: No; that was not my opinion. I have never held in the world, that I know of, that you had to have an actual commercial discovery of any commodity that you could take out *and market at a profit.* On the contrary, the department has held that that is not the case. . . ." *Id.,* at 25 (emphasis added).

Later in the hearings Senator Walsh expressed his understanding of the impact of the *Freeman* decision:

"Senator WALSH: [It means] . . . that the prospector having found at the surface the layer containing any quantity of mineral, that is of oil-bearing shale or kerogen, that that would be a discovery in view of the beds down below of richer character.

"Mr. FINNEY: In this formation, yes sir; that is correct." *Id.,* at 138.

See also *id.,* at 22–23, 26, 163. The Senate Committee did not produce a report. But one month after the hearings were completed, Senator Nye, the Chairman of the Committee, wrote the Secretary of the Interior that he had " 'conferred with Senator Walsh and beg[ged] to advise that there is no reason why your Department should not proceed to final disposition of the pending application for patents to oil shale lands in conformity with the law.' " App. 103. The patenting of oil shale lands under the standards enunciated in *Freeman* was at once resumed.

At virtually the same time, the House of Representatives commenced its own investigation into problems relating to

oil shale patents. The House Committee, however, focused primarily on the question of assessment work—whether an oil shale claimant was required to perform $100 work per year or forfeit his claim—and not on discovery. But the impact of the *Freeman* rule was not lost on the Committee:

> "Mr. SWING. In furtherance of the policy of conservation, Mr. Secretary, in view of the fact that there has not been discovered, as I understand it, any practical economical method of extracting oil from the shale in competition with oil wells . . . would it not be proper public policy to withdraw all shale lands from private acquisition, since we are compelled to recognize, perforce, economic and fiscal conditions, that no one is going to make any beneficial use of the oil shale in the immediate future, but is simply putting it in cold storage as a speculative proposition?
>
> "Secretary WILBUR: As a matter of conservation, what you say is true, but what we have to meet here is the fact that in the leasing act there was a clause to the effect that valid existing claims were not included, and so we are dealing with claims that are thought to be valid, and the question—
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> "Mr. SWING (interposing). I realize that, and I understand the feeling of Congress, and I think generally the country, that in drawing the law we do not want to cut the ground from under the person who has initiated a right." Consolidated Hearings on Applications for Patent on Oil Shale Lands before the House Committee on the Public Lands, 71st Cong., 3d Sess., 100 (1931).[10]

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[10] At the conclusion of its hearings, the Committee recommended legislation placing a deadline on the filing of patent applications for oil shale claims and permitting an oil shale claimant to pay $100 a year to the Land Office in lieu of $100 in annual assessment work. Other aspects of the oil shale patentability—including the question of discovery—were

Congressman Swing's statement of the "feeling of Congress" comports with our reading of the 1920 statute and of congressional intent. To hold now that *Freeman* was wrongly decided would be wholly inconsistent with that intent. Moreover, it would require us to conclude that the Congress in 1930–1931 closed its eyes to a major perversion of the mining laws. We reject any such conclusion.

C

In 1956 Congress again turned its attention to the patentability of oil shale. That year it amended the mining laws by eliminating the requirement that locators must obtain and convey to the United States existing homestead surface-land patents in order to qualify for a mining patent on minerals withdrawn under the 1920 Mineral Leasing Act. See Pub. L. 743, 70 Stat. 592. Where a surface owner refused to cooperate with the mining claimant and sell his estate, this requirement prevented the mining claimant from patenting his claim. See *James W. Bell*, 52 L. D. 197 (1927). In hearings on the amendment, it was emphasized that oil shale claimants would be principal beneficiaries of the amendment:

> "Mr. ASPINALL. This [bill] does not have to do with any other minerals except the leaseable minerals to which no one can get a patent since 1920. . . . As far as I know, there are only just a few cases that are involved, and most of those cases are in the oil shale lands of eastern Utah and western Colorado. That is all this bill refers to." Hearings on H. R. 6501 before the House Committee on Interior and Insular Affairs 3–4 (May 1, 1956).

See also Hearings on H. R. 6501 before the Subcommittee on Mines and Mining of the House Committee on Interior and

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not addressed in the proposed legislation. H. R. Rep. No. 2537, 71st Cong., 3d Sess. (1931). The proposal was not enacted by the Congress.

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Insular Affairs 4, 13–14, 16 (April 23, 1956). The reports of both Houses also evince a clear understanding that oil shale claimants stood to gain by the amendment:

> "Under the Department of the Interior decision in the case of James W. Bell . . . the owner of a valid mining claim located before February 25, 1920, on lands covered by the 1914 act, in order to obtain a patent to the minerals, is required to acquire the outstanding interest of the surface owner and thereafter to execute a deed of reconveyance to the United States. . . . From 1946 to 1955, inclusive, 71 mining claims, *including 67 oil shale claims*, were issued under this procedure. The committee is informed that in a few cases mining claimants have been unable to obtain the cooperation of the owners of the surface estate and have been prevented thereby from obtaining patent to the mineral estate." S. Rep. No. 2524, 84th Cong., 2d Sess., 2 (1956); H. R. Rep. No. 2198, 84th Cong., 2d Sess., 2 (1956) (emphasis added).

The bill was enacted into law without floor debate. Were we to hold today that oil shale is a nonvaluable mineral we would virtually nullify this 1956 action of Congress.

IV

The position of the Government in this case is not without a certain irony. Its challenge to respondents' pre-1920 oil shale claims as a "nonvaluable" comes at a time when the value of such claims has increased sharply as the Nation searches for alternative energy sources to meet its pressing needs. If the Government were to succeed in invalidating old claims and in leasing the lands at public auction, the Treasury, no doubt, would be substantially enriched. However, the history of the 1920 Mineral Leasing Act and developments subsequent to that Act persuade us that the Government cannot achieve that end by imposing a present marketability

requirement on oil shale claims.[11] We conclude that the original position of the Department of the Interior, enunciated in the 1920 Instructions and in *Freeman* v. *Summers*, is the correct view of the Mineral Leasing Act as it applies to the patentability of those claims.[12]

The judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

Oil shale was patentable under the general mining law from

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[11] This history indicates only that a present marketability standard does not apply to oil shale. It does not affect our conclusion in *United States* v. *Coleman* that for other minerals the Interior Department's profitability test is a permissible interpretation of the "valuable mineral" requirement. See n. 4, *supra*.

[12] The dissent overlooks the abundant evidence that Congress since 1920 has consistently viewed oil shale as a "valuable mineral" under the general mining law. The dissent dismisses the 1931 hearings and the 1956 Act as irrelevancies: as for the 1931 hearings, the dissent states that "not a single remark by a Senator or Representative" approved the *Freeman* standard; as for the 1956 Act, we are informed that Congress "dealt with [a] totally unrelated problem." *Post*, at 676. Neither of these observations is correct. The 1931 Senate hearing was called specifically to review the *Freeman* case for fear that another "Teapot Dome" scandal was brewing. Rarely has an administrative law decision received such exhaustive congressional scrutiny. And following that scrutiny, no action was taken to disturb the settled administrative practice; rather Senator Nye advised the Interior Department to continue patenting oil shale claims. Similarly, to characterize the 1956 Act as "totally unrelated" is to blink reality. The patentability of oil shale land was an essential predicate to that legislation; if oil shale land was nonpatentable then Congress performed a useless act.

The dissent also overlooks that beginning in 1920 and continuing for four decades, the Interior Department treated oil shale as a "valuable mineral." In paying deference to the doctrine that a "contemporaneous [administrative] construction . . . is entitled to substantial weight," *post*, at 676, the dissent ignores this contemporaneous administrative practice. The best evidence of the 1920 standard of patentability is the 1920 In-

1872 until 1920.[1] In 1920, Congress enacted the Mineral Leasing Act, 30 U. S. C. § 181 *et seq.* That legislation withdrew oil shale and certain other minerals from the general mining law, but preserved "valid claims existent at date of the passage of this Act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery." Act of Feb. 25, 1920, ch. 85, § 37, 41 Stat. 451, as amended, 30 U. S. C. § 193.

The question presented in this case is whether oil shale claims brought under this saving clause of the Mineral Leasing Act must satisfy the usual standards of patentability, or instead may be patented through the use of a "discovery" standard different from that which generally applies. The Court's answer is that a different and more relaxed standard is applicable. I disagree. Since I believe that pre-1920 oil shale claims must fulfill the then firmly established requirements of patentability for all valuable minerals under the general mining law, I respectfully dissent from the opinion and judgment of the Court.

A

There is not one shred of evidence that Congress enacted the saving clause of the Mineral Leasing Act with the purpose of exempting oil shale claims from the usual requirements of patentability. On its face, the 1920 version of the

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terior Department practice on the matter. The suggestion of the dissent that "future events [such] as market changes" were not meaningful data under the *Castle* v. *Womble* test, *post*, at 678, is inaccurate. As a leading treatise has observed, "[t]he future value concept of *Freeman* v. *Summers* is nothing more than the 'reasonable prospect of success' of *Castle* v. *Womble*, and the reference to 'present facts' in *Castle* v. *Womble* . . . relates to the existence of a vein or lode and not to its value." 1 Rocky Mountain Mineral Law Foundation, The American Law of Mining § 4.76, p. 697, n. 2 (1979).

[1] Rev. Stat. § 2319, as amended, 30 U. S. C. § 22 *et seq.* See *Union Oil Co.* v. *Smith*, 249 U. S. 337, 345–346.

provision applied with identical effect to "coal, phosphate, sodium, oil, oil shale, and gas," and required that all outstanding valid claims to such minerals meet the existing standards of the mining law in order to be perfected.

Nothing in the Act's legislative history suggests anything to the contrary. Descriptions by legislators of the saving clause drew no distinction between oil shale and other covered claims. See, *e. g.*, 59 Cong. Rec. 2711–2712 (1920) (Rep. Taylor); 58 Cong. Rec. 7780–7781 (1919).[2] In the face of conflicting evidence on the subject, Congress may well have thought that many oil shale claims would meet the traditional criteria of patentability. But it did not accord such claims any special legislative treatment.

Equally unambiguous are the Instructions which the Secretary of the Interior published three months after passage of the Act. These expressly stated:

> "[L]ands valuable on account [of oil shale] must be held to have been subject to valid location and appropriation under the placer mining laws, *to the same extent and subject to the same provisions and conditions as if valuable on account of oil or gas.* Entries and applications for patent for oil shale placer claims will, therefore, be adjudicated . . . in accordance *with the same legal provisions and with reference to the same requirements and limitations as are applicable to oil and gas placers.*" 47 L. D. 548, 551 (1920) (emphasis added).

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[2] The Court's discussion of a 1919 attempt to substitute "deposits in paying quantities" for "valuable mineral" in a provision of the prospective Mineral Leasing Act, and Representative Sinott's response thereto, see *ante*, at 663–664, has absolutely nothing to do with the issue at hand. The attempted substitution concerned a provision of the prospective Act that set out the circumstances under which exploratory permits would be allowed for oil and gas deposits under the new leasing scheme. See 58 Cong. Rec. 7536–7537 (1919). Thus, the legislative discussion quoted by the Court did not involve oil shale, the requirements of the general mining law, or the Act's saving clause. See *id.*, at 7780–7781.

Such a contemporaneous construction of the statute by the agency charged with its application is entitled to substantial weight. See *United States* v. *National Assn. of Securities Dealers*, 422 U. S. 694, 719; *Udall* v. *Tallman*, 380 U. S. 1, 16.

B

The saving clause of the Mineral Leasing Act thus directs that the validity of all claims brought thereunder—including those relating to oil shale—must be judged according to the general criteria of patentability that were established in the mining law as of 1920. And I am convinced that nothing that Congress has done since 1920 can be read to have modified this mandate.

The Court points to congressional committee hearings that were held in 1931 on the Secretary's 1927 *Freeman* v. *Summers* decision, and notes that there resulted from this inquiry no legislative rejection of the Department's then prevailing generous treatment of oil shale claims. But of far greater significance, in my opinion, is the fact that not a single remark by a Senator or Representative, let alone by a congressional committee, can be found approving the liberal standard enunciated in *Freeman* v. *Summers*, 52 L. D. 201, even though such a statement could not, in any event, have overridden the plain meaning of the saving clause of the Mineral Leasing Act. See *TVA* v. *Hill*, 437 U. S. 153, 191–193; *SEC* v. *Sloan*, 436 U. S. 103, 121.

The Court purports to find support for its position in legislation enacted by Congress in 1956. But that legislation dealt with the totally unrelated problem of competing surface and mineral estates, and has nothing to do with the question at issue here. See Pub. L. 743, 70 Stat. 592; S. Rep. No. 2524, 84th Cong., 2d Sess. (1956); H. R. Rep. No. 2198, 84th Cong., 2d Sess. (1956).

The only reasonable inference that can be drawn from the events of 1931 and 1956 is that on those two occasions, as in 1920, Congress declined to assume that every pre-1920 oil

shale claim would turn out to be unpatentable. It seems to me wholly fallacious to interpret these indications of caution as a congressional intent to exempt oil shale claims from longstanding principles of patentability.

C

The respondents' patent applications were, I think, quite properly rejected at the administrative level for the simple reason that they failed to satisfy the requirements of the general mining law as of 1920. By 1920, the law was clear that a mineral land patent could issue only when the applicant had made a "discovery" of a "valuable mineral deposit." *Union Oil Co.* v. *Smith*, 249 U. S. 337, 346 (1919). Through departmental and judicial decisions, it had been further established that a "discovery" occurs only when minerals are found in such quantity and quality as to justify a prudent man to expend his labor and means with a reasonable prospect of success in developing a valuable mine. *Chrisman* v. *Miller*, 197 U. S. 313, 321–323 (1905); *H. H. Yard*, 38 L. D. 59, 70 (1909); *Castle* v. *Womble*, 19 L. D. 455, 457 (1894). See *Cameron* v. *United States*, 252 U. S. 450, 459 (1920); *Casey* v. *Northern Pacific R. Co.*, 15 L. D. 439, 440 (1892).

Of controlling significance here is the fact that, by 1920, two refinements of this "prudent man test" had occurred. First, it was clear that, although the patent applicant did not have to demonstrate that his mining efforts would definitely yield some profit,[3] he at least had to show that they probably would. *Cataract Gold Mining Co.*, 43 L. D. 248, 254 (1914). See *Cole* v. *Ralph*, 252 U. S. 286, 299 (1920); *Cameron* v. *United States*, *supra*, at 459; *United States* v. *Iron Silver Mining Co.*, 128 U. S. 673, 684 (1884).[4] Second,

[3] See *East Tintic Consolidated Mining Co.*, 43 L. D. 79, 81–82 (1914).

[4] See also *Royal K. Placer*, 13 L. D. 86, 89–90 (1891); *Tinkham* v. *McCaffrey*, 13 L. D. 517, 518 (1891). The authorities cited by the Court, *ante*, at 664, do not support a contrary rule. They state that an applicant

this required showing of probable profitability had to rest primarily on presently demonstrable, not speculative, fact. See *Davis's Administrator* v. *Weibbold*, 139 U. S. 507, 521–524 (1891); *Castle* v. *Womble, supra*, at 457 ("the requirement relating to discovery refers to present facts, and not to the probabilities of the future"); *Casey* v. *Northern Pacific R. Co., supra*, at 440; *Winters* v. *Bliss*, 14 L. D. 59, 62 (1892). Thus, the applicant could not satisfy the applicable standard by pointing to such highly uncertain future events as market changes or technological advances in an attempt to demonstrate a reasonable prospect of success.

Each of these principles had developed rather naturally out of the "prudent man" rule of *Castle* v. *Womble, supra*. For land to be deemed "valuable" for mining purposes, and for a prudent man to decide to expend his time and money in developing a mine upon that land, it was quite rational to require a showing of a reasonable prospect that the mine would yield a profit. See *Cataract Gold Mining Co., supra*, at 254. The Court is simply mistaken in suggesting that the general mining law was in any way otherwise in 1920.

D

With respect to the oil shale deposits at issue in this case, the Board of Land Appeals found that they "never have been a valuable mineral deposit within the meaning of the general

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for a mineral patent need not establish with certainty that a paying mine exists or can be developed on his land, but they do not in any way reject the rule of *Castle* v. *Womble*, 19 L. D. 455, 457 (1894), that the applicant must show that there exists a "reasonable prospect of success" in his developing a profitable mine. See *Cascaden* v. *Bartolis*, 146 F. 739, 741–742 (CA9 1906); *United States* v. *Ohio Oil Co.*, 240 F. 996, 998–1004 (Wyo. 1916); *Montana Cent. R. Co.* v. *Migeon*, 68 F. 811, 814–818 (CC Mont. 1895); *Book* v. *Justice Mining Co.*, 58 F. 106, 120, 123–125 (CC Nev. 1893); *Madison* v. *Octave Oil Co.*, 154 Cal. 768, 771–772, 99 P. 176, 178 (1908); 2 C. Lindley, American Law Relating to Mines and Mineral Lands § 336, pp. 768–773 (3d ed. 1914).

mining law." The Board based this conclusion on the following factual findings:

> "First, as a historical fact, the commercial production of oil from oil shale has never been competitive with the liquid petroleum industry. Second, the hypothetical studies [in the record] at best confirm that the commercial exploitation of oil shale would not be competitive with the liquid petroleum industry. Third, without exception, every oil shale operation that has been attempted in this country has failed to show profitable production. Fourth, [the respondents] have held these claims for half a century without attempting to exploit them.
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> "It is unlikely that any oil shale operation could have operated at a profit at the time these claims were located or at any time up to and including the time of these contest proceedings. . . .
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> . . . . .
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> "In order for a commercially profitable operation to come into being there must be either a dramatic improvement in the technology or an alteration of the economic forces which have always operated in this country to prevent the commercial production of oil shale."

The Court of Appeals seemed to acknowledge that these findings were supported by substantial evidence, 591 F. 2d 597, 598–599, but thought that a different standard of patentability is applicable to oil shale claims, and today this Court agrees with that view.

For the reasons stated, I do not agree. Accordingly, I would set aside the judgment of the Court of Appeals.

AARON *v.* SECURITIES AND EXCHANGE COMMISSION

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 79-66. Argued February 25, 1980—Decided June 2, 1980

Section 17 (a) of the Securities Act of 1933 (1933 Act) makes it unlawful for any person in the offer or sale of any security "(1) to employ any device, scheme, or artifice to defraud, or (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact . . . , or (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser." Section 10 (b) of the Securities Exchange Act of 1934 (1934 Act) makes it unlawful to use, in connection with the purchase or sale of any security, "any manipulative or deceptive device or contrivance" in violation of such regulations as the Securities and Exchange Commission (SEC) may prescribe, and Rule 10b-5 was promulgated to implement this section. Section 20 (b) of the 1933 Act and § 21 (d) of the 1934 Act authorize the SEC to seek injunctive relief against violations of the respective Acts and further provide that, "upon a proper showing," a district court shall grant the injunction. Pursuant to §§ 20 (b) and 21 (d), the SEC filed a complaint in a District Court against petitioner, a managerial employee of a broker-dealer, alleging that he had violated, and aided and abetted violations of, § 17 (a) of the 1933 Act, § 10 (b) of the 1934 Act, and SEC Rule 10b-5, in connection with his firm's sales campaign for certain securities. Concluding that there was scienter on petitioner's part, the District Court found that he had committed and aided and abetted the violations as alleged. The Court of Appeals affirmed, declining to decide whether petitioner's conduct would support a finding of scienter and holding instead that when the SEC is seeking injunctive relief, proof of negligence alone will suffice.

Held: The SEC is required to establish scienter as an element of a civil enforcement action to enjoin violations of § 10 (b) of the 1934 Act, Rule 10b-5, and § 17 (a)(1) of the 1933 Act, but need not establish scienter as an element of an action to enjoin violations of §§ 17 (a)(2) and 17 (a)(3) of the 1933 Act. Pp. 687-702.

(a) Scienter is an element of violations of § 10 (b) and Rule 10b-5, regardless of the identity of the plaintiff or the nature of the relief

sought. *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185. Section 10 (b)'s language, particularly the terms "manipulative," "device," and "contrivance," clearly refer to "knowing and intentional misconduct," and the section's legislative history also points toward a scienter requirement. *SEC* v. *Capital Gains Research Bureau*, 375 U. S. 180, distinguished. Pp. 689–695.

(b) Section 17 (a)(1)'s language, "to employ any device, scheme, or artifice to defraud," plainly evinces an intent on Congress' part to proscribe only knowing or intentional misconduct. By contrast, § 17 (a)(2)'s language, "by means of any untrue statement of a material fact or any omission to state a material fact," is devoid of any suggestion of a scienter requirement. And § 17 (a)(3)'s language, "to engage in any transaction, practice, or course of business which *operates* or *would operate* as a fraud or deceit," plainly focuses upon the *effect* of particular conduct on members of the investing public, rather than upon the culpability of the person responsible. Cf. *SEC* v. *Capital Gains Research Bureau, supra*. There is nothing in § 17 (a)'s legislative history to show a congressional intent contrary to the conclusion that scienter is thus required under § 17 (a)(1) but not under §§ 17 (a)(2) and 17 (a)(3). Pp. 695–700.

(c) The language and legislative history of §§ 20 (b) and 21 (d) both indicate that Congress intended neither to add to nor detract from the requisite showing of scienter under the substantive provisions at issue. Pp. 700–701.

605 F. 2d 612, vacated and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, REHNQUIST, and STEVENS, JJ., joined. BURGER, C. J., filed a concurring opinion, *post*, p. 702. BLACKMUN, J., filed an opinion concurring in part and dissenting in part, in which BRENNAN, and MARSHALL, JJ., joined, *post*, p. 703.

Barry M. Fallick argued the cause and filed briefs for petitioner.

Ralph C. Ferrara argued the cause for respondent. With him on the briefs were *Solicitor General McCree, Deputy Solicitor General Geller, Stephen M. Shapiro, Paul Gonson,* and *Jacob H. Stillman.**

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*Briefs of *amici curiae* urging reversal were filed by *John M. Cannon* for the Mid-America Legal Foundation; by *Kenneth J. Bialkin* and *Louis*

MR. JUSTICE STEWART delivered the opinion of the Court.

The issue in this case is whether the Securities and Exchange Commission (Commission) is required to establish scienter as an element of a civil enforcement action to enjoin violations of § 17 (a) of the Securities Act of 1933 (1933 Act), § 10 (b) of the Securities Exchange Act of 1934 (1934 Act), and Commission Rule 10b–5 promulgated under that section of the 1934 Act.

I

When the events giving rise to this enforcement proceeding occurred, the petitioner was a managerial employee at E. L. Aaron & Co. (the firm), a registered broker-dealer with its principal office in New York City. Among other responsibilities at the firm, the petitioner was charged with supervising the sales made by its registered representatives and maintaining the so-called "due diligence" files for those securities in which the firm served as a market maker. One such security was the common stock of Lawn-A-Mat Chemical & Equipment Corp. (Lawn-A-Mat), a company engaged in the business of selling lawn-care franchises and supplying its franchisees with products and equipment.

Between November 1974 and September 1975, two registered representatives of the firm, Norman Schreiber and Donald Jacobson, conducted a sales campaign in which they repeatedly made false and misleading statements in an effort to solicit orders for the purchase of Lawn-A-Mat common stock. During the course of this promotion, Schreiber and Jacobson informed prospective investors that Lawn-A-Mat was planning or in the process of manufacturing a new type of small car and tractor, and that the car would be marketed within six weeks. Lawn-A-Mat, however, had no such plans. The two registered representatives also made projections of

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A. Craco for the American Institute of Certified Public Accountants; and by *Milton V. Freeman*, *Werner Kronstein*, and *Richard O. Scribner* for the Securities Industry Assn.

substantial increases in the price of Lawn-A-Mat common stock and optimistic statements concerning the company's financial condition. These projections and statements were without basis in fact, since Lawn-A-Mat was losing money during the relevant period.

Upon receiving several complaints from prospective investors, an officer of Lawn-A-Mat informed Schreiber and Jacobson that their statements were false and misleading and requested them to cease making such statements. This request went unheeded.

Thereafter, Milton Kean, an attorney representing Lawn-A-Mat, communicated with the petitioner twice by telephone. In these conversations, Kean informed the petitioner that Schreiber and Jacobson were making false and misleading statements and described the substance of what they were saying. The petitioner, in addition to being so informed by Kean, had reason to know that the statements were false, since he knew that the reports in Lawn-A-Mat's due diligence file indicated a deteriorating financial condition and revealed no plans for manufacturing a new car and tractor. Although assuring Kean that the misrepresentations would cease, the petitioner took no affirmative steps to prevent their recurrence. The petitioner's only response to the telephone calls was to inform Jacobson of Kean's complaint and to direct him to communicate with Kean. Otherwise, the petitioner did nothing to prevent the two registered representatives under his direct supervision from continuing to make false and misleading statements in promoting Lawn-A-Mat common stock.

In February 1976, the Commission filed a complaint in the District Court for the Southern District of New York against the petitioner and seven other defendants in connection with the offer and sale of Lawn-A-Mat common stock. In seeking preliminary and final injunctive relief pursuant to § 20 (b) of the 1933 Act and § 21 (d) of the 1934 Act, the Commission alleged that the petitioner had violated and aided and abetted

violations of three provisions—§ 17 (a) of the 1933 Act, § 10 (b) of the 1934 Act, and Commission Rule 10b–5 promulgated under that section of the 1934 Act.[1] The gravamen of the charges against the petitioner was that he knew or had reason to know that the employees under his supervision were engaged in fraudulent practices, but failed to take adequate steps to prevent those practices from continuing. Before commencement of the trial, all the defendants except the petitioner consented to the entry of permanent injunctions against them.

Following a bench trial, the District Court found that the petitioner had violated and aided and abetted violations of § 17 (a), § 10 (b), and Rule 10b–5 during the Lawn-A-Mat sales campaign and enjoined him from future violations of these provisions.[2] The District Court's finding of past violations was based upon its factual finding that the petitioner had intentionally failed to discharge his supervisory responsibility to stop Schreiber and Jacobson from making statements to prospective investors that the petitioner knew to be false and misleading. Although noting that negligence alone might suffice to establish a violation of the relevant provisions in a Commission enforcement action, the District Court concluded that the fact that the petitioner "intentionally failed to terminate the false and misleading statements made by Schreiber and Jacobson, knowing them to be fraudulent, is sufficient to establish his scienter under the securities laws." As to the remedy, even though the firm had since gone bankrupt and the petitioner was no longer working for a broker-

[1] The Commission also charged the petitioner and three other defendants with violations of the registration provisions of §§ 5 (a), (c) of the 1933 Act, 15 U. S. C. §§ 77e (a), (c). The District Court found that the petitioner had violated these provisions and enjoined him from future violations. The Court of Appeals affirmed this holding, and the petitioner has not challenged this portion of the Court of Appeals' decision.

[2] The opinion of the District Court is reported in CCH Fed. Sec. L. Rep. ¶ 96,043 (1977).

dealer, the District Court reasoned that injunctive relief was warranted in light of "the nature and extent of the violations . . . , the [petitioner's] failure to recognize the wrongful nature of his conduct and the likelihood of the [petitioner's] repeating his violative conduct."

The Court of Appeals for the Second Circuit affirmed the judgment. 605 F. 2d 612. Declining to reach the question whether the petitioner's conduct would support a finding of scienter, the Court of Appeals held instead that when the Commission is seeking injunctive relief, "proof of negligence alone will suffice" to establish a violation of § 17 (a), § 10 (b), and Rule 10b–5. *Id.*, at 619. With regard to § 10 (b) and Rule 10b–5, the Court of Appeals noted that this Court's opinion in *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, which held that an allegation of scienter is necessary to state a private cause of action for damages under § 10 (b) and Rule 10b–5, had expressly reserved the question whether scienter must be alleged in a suit for injunctive relief brought by the Commission. *Id.*, at 194, n. 12. The conclusion of the Court of Appeals that the scienter requirement of *Hochfelder* does not apply to Commission enforcement proceedings was said to find support in the language of § 10 (b), the legislative history of the 1934 Act, the relationship between § 10 (b) and the overall enforcement scheme of the securities laws, and the "compelling distinctions between private damage actions and government injunction actions."[3] For its holding that sci-

[3] The Court of Appeals observed that its previous decisions had required scienter in private damages actions under § 10 (b) even before this Court's decision in the *Hochfelder* case, but also had "uniformly . . . held that the language and history of the section [did] not require a showing of scienter in an injunction enforcement action brought by the Commission." 605 F. 2d, at 620–621. This distinction had been premised on the fact that the two types of suits under § 10 (b) advance different goals: actions for damages are designed to provide compensation to individual investors, whereas suits for injunctive relief serve to provide maximum protection for the investing public. In the present case, the Court of Appeals, relying on its

enter is not a necessary element in a Commission injunctive action to enforce § 17 (a), the Court of Appeals relied on its earlier decision in *SEC* v. *Coven*, 581 F. 2d 1020. There that court had noted that the language of § 17 (a) contains nothing to suggest a requirement of intent and that, in enacting § 17 (a), Congress had considered a scienter requirement, but instead "opted for liability without willfulness, intent to defraud, or the like." *Id.*, at 1027–1028.[4] Finally, the Court of Appeals affirmed the District Court's holding that, under all the facts and circumstances of this case, the Commission was entitled to injunctive relief. 605 F. 2d, at 623–624.

We granted certiorari to resolve the conflict in the federal courts as to whether the Commission is required to establish scienter—an intent on the part of the defendant to deceive, manipulate, or defraud[5]—as an element of a Commission enforcement action to enjoin violations of § 17 (a),[6] § 10 (b), and Rule 10b–5.[7] 444 U. S. 914.

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reasoning in previous cases, concluded that "[i]n view of the policy considerations underlying the securities acts, . . . the increased effectiveness of government enforcement actions predicated on a showing of negligence alone outweigh[s] the danger of potential harm to those enjoined from violating the securities laws." *Id.*, at 621.

[4] Neither the District Court nor the Court of Appeals gave any indication of which subsection or subsections of § 17 (a) of the 1933 Act the petitioner had violated.

[5] The term "scienter" is used throughout this opinion, as it was in *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 194, n. 12, to refer to "a mental state embracing intent to deceive, manipulate, or defraud." We have no occasion here to address the question, reserved in *Hochfelder*, *ibid.*, whether, under some circumstances, scienter may also include reckless behavior.

[6] Compare, *e. g.*, the present case, and *SEC* v. *Coven*, 581 F. 2d 1020 (CA2 1978) (scienter not required in Commission enforcement action under §§ 17 (a)(1)–(3)), with *Steadman* v. *SEC*, 603 F. 2d 1126 (CA5 1979) (scienter required in Commission disciplinary action under § 17 (a)(1), but not under §§ 17 (a)(2)–(3)), and with *SEC* v. *Cenco Inc.*, 436

[*Footnote 7 is on p. 687*]

II

The two substantive statutory provisions at issue here are § 17 (a) of the 1933 Act, 48 Stat. 84, as amended, 15 U. S. C. § 77q (a), and § 10 (b) of the 1934 Act, 48 Stat. 891, 15 U. S. C. § 78j (b). Section 17 (a), which applies only to sellers, provides:

> "It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—
>
> "(1) to employ any device, scheme, or artifice to defraud, or
>
> "(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> "(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."

Section 10 (b), which applies to both buyers and sellers, makes it "unlawful for any person . . . [t]o use or employ, in connection with the purchase or sale of any security . . . , any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." Pursuant to its rulemaking

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F. Supp. 193 (ND Ill. 1977) (scienter required in Commission enforcement action under §§ 17 (a)(1)–(3)).

[7] Compare, *e. g.*, the present case, and *SEC* v. *World Radio Mission, Inc.*, 544 F. 2d 535 (CA1 1976) (scienter not required in Commission enforcement action under § 10 (b) and Rule 10b–5), with *SEC* v. *Blatt*, 583 F. 2d 1325 (CA5 1978) (scienter required in Commission enforcement action under § 10 (b) and Rule 10b–5).

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power under this section, the Commission promulgated Rule 10b–5, which now provides:

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> "(a) To employ any device, scheme, artifice to defraud,
>
> "(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> "(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security." 17 CFR § 240.10b–5 (1979).

The civil enforcement mechanism for these provisions consists of both express and implied remedies. One express remedy is a suit by the Commission for injunctive relief. Section 20 (b) of the 1933 Act, 48 Stat. 86, as amended, as set forth in 15 U. S. C. § 77t (b), provides:

> "Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this subchapter [*e. g.*, § 17 (a)], or of any rule or regulation prescribed under authority thereof, it may in its discretion, bring an action in any district court of the United States . . . to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond."

Similarly, § 21 (d) of the 1934 Act, 48 Stat. 900, as amended, 15 U. S. C. § 78u (d), authorizes the Commission to seek injunctive relief whenever it appears that a person "is engaged or is about to engage in acts or practices constituting"

a violation of the 1934 Act (*e. g.*, § 10 (b)), or regulations promulgated thereto (*e. g.*, Rule 10b–5), and requires a district court "upon a proper showing" to grant injunctive relief.

Another facet of civil enforcement is a private cause of action for money damages. This remedy, unlike the Commission injunctive action, is not expressly authorized by statute, but rather has been judicially implied. See *Ernst & Ernst* v. *Hochfelder*, 425 U. S., at 196–197. Although this Court has repeatedly assumed the existence of an implied cause of action under § 10 (b) and Rule 10b–5, see *Ernst & Ernst* v. *Hochfelder, supra; Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 730; *Affiliated Ute Citizens* v. *United States*, 406 U. S. 128, 150–154; *Superintendent of Insurance* v. *Bankers Life & Cas. Co.*, 404 U. S. 6, 13, n. 9, it has not had occasion to address the question whether a private cause of action exists under § 17 (a). See *Blue Chip Stamps* v. *Manor Drug Stores, supra*, at 733, n. 6.

The issue here is whether the Commission in seeking injunctive relief either under § 20 (b) for violations of § 17 (a), or under § 21 (d) for violations of § 10 (b) or Rule 10b–5, is required to establish scienter. Resolution of that issue could depend upon (1) the substantive provisions of § 17 (a), § 10 (b), and Rule 10b–5, or (2) the statutory provisions authorizing injunctive relief "upon a proper showing," § 20 (b) and § 21 (d). We turn to an examination of each to determine the extent to which they may require proof of scienter.

A

In determining whether scienter is a necessary element of a violation of § 10 (b) and Rule 10b–5, we do not write on a clean slate. Rather, the starting point for our inquiry is *Ernst & Ernst* v. *Hochfelder, supra*, a case in which the Court concluded that a private cause of action for damages will not lie under § 10 (b) and Rule 10b–5 in the absence of an allegation of scienter. Although the issue presented in the

present case was expressly reserved in *Hochfelder*, *supra*, at 193, n. 12, we nonetheless must be guided by the reasoning of that decision.

The conclusion in *Hochfelder* that allegations of simple negligence could not sustain a private cause of action for damages under § 10 (b) and Rule 10b–5 rested on several grounds. The most important was the plain meaning of the language of § 10 (b). It was the view of the Court that the terms "manipulative," "device," and "contrivance"—whether given their commonly accepted meaning or read as terms of art—quite clearly evinced a congressional intent to proscribe only "knowing or intentional misconduct." 425 U. S., at 197–199. This meaning, in fact, was thought to be so unambiguous as to suggest that "further inquiry may be unnecessary." *Id.*, at 201.

The Court in *Hochfelder* nonetheless found additional support for its holding in both the legislative history of § 10 (b) and the structure of the civil liability provisions in the 1933 and 1934 Acts. The legislative history, though "bereft of any explicit explanation of Congress' intent," contained "no indication . . . that § 10 (b) was intended to proscribe conduct not involving scienter." *Id.*, at 201–202. Rather, as the Court noted, a spokesman for the drafters of the predecessor of § 10 (b) described its function as a "catch-all clause to prevent manipulative devices." *Id.*, at 202. This description, as well as various passages in the Committee Reports concerning the evils to which the 1934 Act was directed, evidenced a purpose to proscribe only knowing or intentional misconduct. Moreover, with regard to the structure of the 1933 and 1934 Acts, the Court observed that in each instance in which Congress had expressly created civil liability, it had specified the standard of liability. To premise civil liability under § 10 (b) on merely negligent conduct, the Court concluded, would run counter to the fact that wherever Congress intended to accomplish that result, it said so expressly and subjected such actions to significant procedural restraints not applicable to § 10 (b).

Id., at 206–211. Finally, since the Commission's rulemaking power was necessarily limited by the ambit of its statutory authority, the Court reasoned that Rule 10b–5 must likewise be restricted to conduct involving scienter.[8]

In our view, the rationale of *Hochfelder* ineluctably leads to the conclusion that scienter is an element of a violation of § 10 (b) and Rule 10b–5, regardless of the identity of the plaintiff or the nature of the relief sought. Two of the three factors relied upon in *Hochfelder*—the language of § 10 (b) and its legislative history—are applicable whenever a violation of § 10 (b) or Rule 10b–5 is alleged, whether in a private cause of action for damages or in a Commission injunctive action under § 21 (d).[9] In fact, since *Hochfelder* involved an implied cause of action that was not within the contemplation of the Congress that enacted § 10 (b), *id.*, at 196, it would be quite anomalous in a case like the present one, involving as it does the express remedy Congress created for § 10 (b) violations, not to attach at least as much significance to the fact that the statutory language and its legislative history support a scienter requirement.

The Commission argues that *Hochfelder*, which involved a private cause of action for damages, is not a proper guide in construing § 10 (b) in the present context of a Commission enforcement action for injunctive relief. We are urged instead to look to *SEC* v. *Capital Gains Research Bureau*, 375 U. S.

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[8] The Court in *Hochfelder* also found support for its conclusion as to the scope of Rule 10b–5 in the fact that the administrative history revealed that "when the Commission adopted the Rule it was intended to apply only to activities that involved scienter." 425 U. S., at 212.

[9] The third factor—the structure of civil liability provisions in the 1933 and 1934 Acts—obviously has no applicability in a case involving injunctive relief. It is evident, however, that the third factor was not determinative in *Hochfelder*. Rather, the Court in *Hochfelder* clearly indicated that the language of the statute, which is applicable here, was sufficient, standing alone, to support the Court's conclusion that scienter is required in a private damages action under § 10 (b). 425 U. S., at 201.

180. That case involved a suit by the Commission for injunctive relief to enforce the prohibition in § 206 (2) of the Investment Advisers Act of 1940, 15 U. S. C. § 80b–6, against any act or practice of an investment adviser that "operates as a fraud or deceit upon any client or prospective client." The injunction sought in *Capital Gains* was to compel disclosure of a practice known as "scalping," whereby an investment adviser purchases shares of a given security for his own account shortly before recommending the security to investors as a long-term investment, and then promptly sells the shares at a profit upon the rise in their market value following the recommendation.

The issue in *Capital Gains* was whether in an action for injunctive relief for violations of § 206 (2) [10] the Commission must prove that the defendant acted with an intent to defraud. The Court held that a showing of intent was not required. This conclusion rested upon the fact that the legislative history revealed that the "Investment Advisers Act of 1940 . . . reflects a congressional recognition 'of the delicate fiduciary nature of an investment advisory relationship,' as well as a congressional intent to eliminate, or at least to expose, all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which

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[10] The statutory provision authorizing injunctive relief involved in the *Capital Gains* case was § 209 (e) of the Investment Advisors Act, 15 U. S. C. § 80b–9 (e), which provides in relevant part:

"Whenever it shall appear to the Commission that any person has engaged, is engaged, or is about to engage in any act or practice constituting a violation of any provision of this subchapter, or of any rule, regulation, or order hereunder, . . . it may in its discretion bring an action in the proper district court of the United States . . . to enjoin such acts or practices and to enforce compliance with this subchapter or any rule, regulation, or order hereunder. Upon a showing that such person has engaged, is engaged, or is about to engage in any such act or practice, . . . a permanent or temporary injunction or decree or restraining order shall be granted without bond."

was not disinterested." 375 U. S., at 191–192 (footnote omitted). To require proof of intent, the Court reasoned, would run counter to the expressed intent of Congress.

The Court added that its conclusion was "not in derogation of the common law of fraud." *Id.*, at 192. Although recognizing that intent to defraud was a necessary element at common law to recover money damages for fraud in an arm's-length transaction, the Court emphasized that the Commission's action was not a suit for damages, but rather a suit for an injunction in which the relief sought was the "mild prophylactic" of requiring a fiduciary to disclose his transactions in stocks he was recommending to his clients. *Id.*, at 193. The Court observed that it was not necessary in a suit for "equitable or prophylactic relief" to establish intent, for "[f]raud has a broader meaning in equity [than at law] and intention to defraud or to misrepresent is not a necessary element." *Ibid.*, quoting W. De Funiak, Handbook of Modern Equity 235 (2d ed. 1956). Moreover, it was not necessary, the Court said, in a suit against a fiduciary such as an investment adviser, to establish all the elements of fraud that would be required in a suit against a party to an arm's-length transaction. Finally, the Court took cognizance of a "growing recognition by common-law courts that the doctrines of fraud and deceit which developed around transactions involving land and other tangible items of wealth are ill-suited to the sale of such intangibles as advice and securities, and that, accordingly, the doctrines must be adapted to the merchandise in issue." 375 U. S., at 194. Unwilling to assume that Congress was unaware of these developments at common law, the Court concluded that they "reinforce[d]" its holding that Congress had not sought to require a showing of intent in actions to enjoin violations of § 206 (2). *Id.*, at 195.

The Commission argues that the emphasis in *Capital Gains* upon the distinction between fraud at law and in equity should guide a construction of § 10 (b) in this suit for injunctive

relief.[11] We cannot, however, draw such guidance from *Capital Gains* for several reasons. First, wholly apart from its discussion of the judicial treatment of "fraud" at law and in equity, the Court in *Capital Gains* found strong support in the legislative history for its conclusion that the Commission need not demonstrate intent to enjoin practices in violation of § 206 (2). By contrast, as the Court in *Hochfelder* noted, the legislative history of § 10 (b) points towards a scienter requirement. Second, it is quite clear that the language in question in *Capital Gains,* "any . . . practice . . . which *operates* as a fraud or deceit," (emphasis added) focuses not on the intent of the investment adviser, but rather on the effect of a particular practice. Again, by contrast, the Court in *Hochfelder* found that the language of § 10 (b)—particularly the terms "manipulative," "device," and "contrivance,"—clearly refers to "knowing or intentional misconduct." Finally, insofar as *Capital Gains* involved a statutory provision regulating the special fiduciary relationship between an investment adviser and his client, the Court there was dealing with a situation in which intent to defraud would not have been required even in a common-law action for money damages.[12]

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[11] The Commission finds further support for its interpretation of § 10 (b) as not requiring proof of scienter in injunctive proceedings in the fact that Congress was expressly informed of the Commission's interpretation on two occasions when significant amendments to the securities laws were enacted—the Securities Act Amendments of 1975, Pub. L. 94–29, 89 Stat. 97, and the Foreign Corrupt Practices Act of 1977, Pub. L. 95–213, 91 Stat. 1494—and on each occasion Congress left the administrative interpretation undisturbed. See S. Rep. No. 94–75, p. 76 (1975); H. R. Rep. No. 95–640, p. 10 (1977). But, since the legislative consideration of those statutes was addressed principally to matters other than that at issue here, it is our view that the failure of Congress to overturn the Commission's interpretation falls far short of providing a basis to support a construction of § 10 (b) so clearly at odds with its plain meaning and legislative history. See *SEC* v. *Sloan*, 436 U. S. 103, 119–121.

[12] The Court in *Capital Gains* concluded: "Thus, even if we were to agree with the courts below that Congress had intended, in effect, to

Section 10 (b), unlike the provision at issue in *Capital Gains*, applies with equal force to both fiduciary and nonfiduciary transactions in securities. It is our view, in sum, that the controlling precedent here is not *Capital Gains*, but rather *Hochfelder*. Accordingly, we conclude that scienter is a necessary element of a violation of § 10 (b) and Rule 10b–5.

B

In determining whether proof of scienter is a necessary element of a violation of § 17 (a), there is less precedential authority in this Court to guide us. But the controlling principles are well settled. Though cognizant that "Congress intended securities legislation enacted for the purpose of avoiding frauds to be construed 'not technically and restrictively, but flexibly to effectuate its remedial purposes,'" *Affiliated Ute Citizens* v. *United States*, 406 U. S., at 151, quoting, *SEC* v. *Capital Gains Research Bureau*, 375 U. S., at 195, the Court has also noted that "generalized references to the 'remedial purposes'" of the securities laws "will not justify reading a provision 'more broadly than its language and the statutory scheme reasonably permit.'" *Touche Ross & Co.* v. *Redington*, 442 U. S. 560, 578, quoting, *SEC* v. *Sloan*, 436 U. S. 103, 116. Thus, if the language of a provision of the securities laws is sufficiently clear in its context and not at odds with the legislative history, it is unnecessary "to examine the additional considerations of 'policy' . . . that may have influenced the lawmakers in their formulation of the statute." *Ernst & Ernst* v. *Hochfelder*, 425 U. S., at 214, n. 33.

The language of § 17 (a) strongly suggests that Congress contemplated a scienter requirement under § 17 (a)(1), but

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codify the common law of fraud in the Investment Advisers Act of 1940, it would be logical to conclude that Congress codified the common law 'remedially' *as the courts had adapted it to the prevention of fraudulent securities transactions by fiduciaries*, not 'technically' as it has traditionally been applied in damage suits between parties to arm's-length transactions involving land and ordinary chattels." 375 U. S., at 195 (emphasis added).

not under § 17 (a)(2) or § 17 (a)(3). The language of § 17 (a)(1), which makes it unlawful "to employ any device, scheme, or artifice to defraud," plainly evinces an intent on the part of Congress to proscribe only knowing or intentional misconduct. Even if it be assumed that the term "defraud" is ambiguous, given its varied meanings at law and in equity, the terms "device," "scheme," and "artifice" all connote knowing or intentional practices.[13] Indeed, the term "device," which also appears in § 10 (b), figured prominently in the Court's conclusion in *Hochfelder* that the plain meaning of § 10 (b) embraces a scienter requirement.[14] *Id.*, at 199.

By contrast, the language of § 17 (a)(2), which prohibits any person from obtaining money or property "by means of any untrue statement of a material fact or any omission to state a material fact," is devoid of any suggestion whatsoever of a scienter requirement. As a well-known commentator has noted, "[t]here is nothing on the face of Clause (2) itself which smacks of *scienter* or intent to defraud." 3 L. Loss, Securities Regulation 1442 (2d ed. 1961). In fact, this Court in *Hochfelder* pointed out that the similar language of Rule 10b–5 (b) "could be read as proscribing . . . any type of material misstatement or omission . . . that has the effect of defrauding investors, whether the wrongdoing was intentional or not." 425 U. S., at 212.

Finally, the language of § 17 (a)(3), under which it is

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[13] Webster's International Dictionary (2d ed. 1934) defines (1) "device" as "[t]hat which is devised, or formed by design; a contrivance; an invention; project; scheme; often, a scheme to deceive; a stratagem; an artifice," (2) "scheme" as "[a] plan or program of something to be done; an enterprise; a project; as, a business *scheme*[, or a] crafty, unethical project," and (3) "artifice" as a "[c]rafty device; trickery; also, an artful stratagem or trick; artfulness; ingeniousness."

[14] In addition, the Court in *Hochfelder* noted that the term "to employ," which appears in both § 10 (b) and § 17 (a)(1), is "supportive of the view that Congress did not intend § 10 (b) to embrace negligent conduct." 425 U. S., at 199, n. 20.

unlawful for any person "to engage in any transaction, practice, or course of business which *operates* or *would operate* as a fraud or deceit," (emphasis added) quite plainly focuses upon the *effect* of particular conduct on members of the investing public, rather than upon the culpability of the person responsible. This reading follows directly from *Capital Gains,* which attributed to a similarly worded provision in § 206 (2) of the Investment Advisers Act of 1940 a meaning that does not require a "showing [of] deliberate dishonesty as a condition precedent to protecting investors." 375 U. S., at 200.

It is our view, in sum, that the language of § 17 (a) requires scienter under § 17 (a)(1), but not under § 17 (a)(2) or § 17 (a)(3). Although the parties have urged the Court to adopt a uniform culpability requirement for the three subparagraphs of § 17 (a), the language of the section is simply not amenable to such an interpretation. This is not the first time that this Court has had occasion to emphasize the distinctions among the three subparagraphs of § 17 (a). In *United States* v. *Naftalin,* 441 U. S. 768, 774, the Court noted that each subparagraph of § 17 (a) "proscribes a distinct category of misconduct. Each succeeding prohibition is meant to cover additional kinds of illegalities—not to narrow the reach of the prior sections." (Footnote omitted.) Indeed, since Congress drafted § 17 (a) in such a manner as to compel the conclusion that scienter is required under one subparagraph but not under the other two, it would take a very clear expression in the legislative history of congressional intent to the contrary to justify the conclusion that the statute does not mean what it so plainly seems to say.

We find no such expression of congressional intent in the legislative history. The provisions ultimately enacted as § 17 (a) had their genesis in § 13 of identical bills introduced simultaneously in the House and Senate in 1933. H. R. 4314, 73d Cong., 1st Sess. (Mar. 29, 1933); S. 875, 73d Cong., 1st

Sess. (Mar. 29, 1933).[15] As originally drafted, § 13 would have made it unlawful for any person

> "willfully to employ any device, scheme, or artifice to defraud or to obtain money or property by means of any false pretense, representation, or promise, or to engage in any transaction, practice, or course of business . . . which operates or would operate as a fraud upon the purchaser."

Hearings on these bills were conducted by both the House Interstate and Foreign Commerce Committee and the Senate Banking and Currency Committee.

The House and Senate Committees reported out different versions of § 13. The Senate Committee expanded its ambit by including protection against the intentionally fraudulent practices of a "dummy," a person holding legal or nominal title but under a moral or legal obligation to act for someone else. As amended by the Senate Committee, § 13 made it unlawful for any person

> "willfully to employ any device, scheme, or artifice or to employ any 'dummy', or to act as any such 'dummy', with the intent to defraud or to obtain money or property by means of any false pretense, representation, or promise, or to engage in any transaction, practice, or course of business . . . which operates or would operate as a fraud upon the purchaser. . . ."

See S. 875, 73d Cong., 1st Sess. (Apr. 27, 1933); S. Rep. No. 47, 73d Cong., 1st Sess., 4–5 (1933). The House Committee retained the original version of § 13, except that the word "willfully" was deleted from the beginning of the provision.[16] See H. R. 5480, 73d Cong., 1st Sess., § 16 (a) (May 4,

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[15] During the House hearings, H. R. 5480 was substituted for H. R. 4314. See H. R. 5480, 73d Cong., 1st Sess. (May 4, 1933).

[16] The House Committee also renumbered § 13 as § 16 (a), divided the provision into three subparagraphs, and modified the language of the

1933). It also rejected a suggestion that the first clause, "to employ any device, scheme, or artifice," be modified by the phrase, "with intent to defraud." See *ibid.*; Federal Securities Act: Hearings on H. R. 4314 before the House Committee on Interstate and Foreign Commerce, 73d Cong., 1st Sess., 146 (1933). The House and Senate each adopted the version of the provision as reported out by its Committee. The Conference Committee then adopted the House version with a minor modification not relevant here, see H. R. Conf. Rep. No. 152, 73d Cong., 1st Sess., 12, 27 (1933), and it was later enacted into law as § 17 (a) of the 1933 Act.

The Commission argues that the deliberate elimination of the language of intent reveals that Congress considered and rejected a scienter requirement under all three clauses of § 17 (a). This argument, however, rests entirely on inference, for the Conference Report sheds no light on what the Conference Committee meant to do about the question of scienter under § 17 (a).[17] The legislative history thus gives rise to the equally plausible inference that the Conference Committee concluded that (1) in light of the plain meaning of § 17 (a)(1), the language of intent—"willfully" and "with intent to defraud"—was simply redundant, and (2) with regard to § 17 (a)(2) and § 17 (a)(3), a "willful[ness]" requirement was not to be included. It seems clear, therefore, that the

second subparagraph in a manner not relevant here. See H. R. 5480, 73d Cong., 1st Sess., § 16 (a) (May 4, 1933).

[17] Although explaining that the "dummy" provision in the Senate bill was deleted from § 13 because it was substituted in modified form elsewhere in the statute, H. R. Conf. Rep. No. 152, 73d Cong., 1st Sess., 27 (1933), the Conference Report contained no explanation of why the Conference Committee acquiesced in the decision of the House to delete the word "willfully" from § 13. That the Committee failed to explain why it followed the House bill in this regard is not in itself significant, since the Conference Report, by its own terms, purported to discuss only the "differences between the House bill and the substitute agreed upon by the conferees." *Id.*, at 24. The deletion of the word "willfully" was common to both the House bill and the Conference substitute.

legislative history, albeit ambiguous, may be read in a manner entirely consistent with the plain meaning of § 17 (a).[18] In the absence of a conflict between reasonably plain meaning and legislative history, the words of the statute must prevail.[19]

C

There remains to be determined whether the provisions authorizing injunctive relief, § 20 (b) of the 1933 Act and § 21 (d) of the 1934 Act, modify the substantive provisions at issue in this case so far as scienter is concerned.

The language and legislative history of § 20 (b) and § 21 (d) both indicate that Congress intended neither to add to nor to detract from the requisite showing of scienter under the substantive provisions at issue. Sections 20 (b) and 21 (d) provide that the Commission may seek injunctive relief whenever it appears that a person "is engaged or [is] about to engage in any acts or practices" constituting a violation of the 1933 or 1934 Acts or regulations promulgated thereunder and that, "upon a proper showing," a district court shall grant the injunction. The elements of "a proper showing" thus include, at a minimum, proof that a person is engaged in or is about

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[18] The Commission, in further support of its view that scienter is not required under any of the subparagraphs of § 17 (a), points out that § 17 (a) was patterned upon New York's Martin Act, N. Y. Gen. Bus. Law §§ 352–353 (Consol. 1921), and that the New York Court of Appeals had construed the Martin Act as not requiring a showing of scienter as a predicate for injunctive relief by the New York Attorney General. *People* v. *Federated Radio Corp.*, 244 N. Y. 33, 154 N. E. 655 (1926). But, in the absence of any indication that Congress was even aware of the *Federated Radio* decision, much less that it approved of that decision, it cannot fairly be inferred that Congress intended not only to adopt the language of the Martin Act, but also a state judicial interpretation of that statute at odds with the plain meaning of the language Congress enacted as § 17 (a)(1).

[19] Since the language and legislative history of § 17(a) are dispositive, we have no occasion to address the "policy" arguments advanced by the parties. See *Ernst & Ernst* v. *Hochfelder*, 425 U. S., at 214, n. 33.

to engage in a substantive violation of either one of the Acts or of the regulations promulgated thereunder. Accordingly, when scienter is an element of the substantive violation sought to be enjoined, it must be proved before an injunction may issue. But with respect to those provisions such as § 17 (a)(2) and § 17 (a)(3), which may be violated even in the absence of scienter, nothing on the face of § 20 (b) or § 21 (d) purports to impose an independent requirement of scienter. And there is nothing in the legislative history of either provision to suggest a contrary legislative intent.

This is not to say, however, that scienter has no bearing at all on whether a district court should enjoin a person violating or about to violate § 17 (a)(2) or § 17 (a)(3). In cases where the Commission is seeking to enjoin a person "*about* to engage in any acts or practices which . . . *will* constitute" a violation of those provisions, the Commission must establish a sufficient evidentiary predicate to show that such future violation may occur. See *SEC* v. *Commonwealth Chemical Securities, Inc.*, 574 F. 2d 90, 98–100 (CA2 1978) (Friendly, J.); 3 L. Loss, Securities Regulation, at 1976. An important factor in this regard is the degree of intentional wrongdoing evident in a defendant's past conduct. See *SEC* v. *Wills*, 472 F. Supp. 1250, 1273–1275 (DC 1978). Moreover, as the Commission recognizes, a district court may consider scienter or lack of it as one of the aggravating or mitigating factors to be taken into account in exercising its equitable discretion in deciding whether or not to grant injunctive relief. And the proper exercise of equitable discretion is necessary to ensure a "nice adjustment and reconciliation between the public interest and private needs." *Hecht Co.* v. *Bowles*, 321 U. S. 321, 329.

III

For the reasons stated in this opinion, we hold that the Commission is required to establish scienter as an element of a civil enforcement action to enjoin violations of § 17 (a)(1) of the 1933 Act, § 10 (b) of the 1934 Act, and Rule 10b–5

promulgated under that section of the 1934 Act. We further hold that the Commission need not establish scienter as an element of an action to enjoin violations of § 17 (a)(2) and § 17 (a)(3) of the 1933 Act. The Court of Appeals affirmed the issuance of the injunction in this case in the misapprehension that it was not necessary to find scienter in order to support an injunction under any of the provisions in question. Accordingly, the judgment of the Court of Appeals is vacated, and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

MR. CHIEF JUSTICE BURGER, concurring.

I join the opinion of the Court and write separately to make three points:

(1) No matter what mental state § 10 (b) and § 17 (a) were to require, it is clear that the District Court was correct here in entering an injunction against petitioner. Petitioner was informed by an attorney representing Lawn-A-Mat that two representatives of petitioner's firm were making grossly fraudulent statements to promote Lawn-A-Mat stock. Yet he took no steps to prevent such conduct from recurring. He neither discharged the salesmen nor rebuked them; he did nothing whatever to indicate that such salesmanship was unethical, illegal, and should stop. Hence, the District Court's findings (a) that petitioner "intentionally failed" to terminate the fraud and (b) that his conduct was reasonably likely to repeat itself find abundant support in the record. In my view, the Court of Appeals could well have affirmed on that ground alone.

(2) I agree that § 10 (b) and § 17 (a)(1) require scienter but that § 17 (a)(2) and § 17 (a)(3) do not. I recognize, of course, that this holding "drives a wedge between [sellers and buyers] and says that henceforth only the seller's negligent misrepresentations may be enjoined." *Post*, at 715 (BLACKMUN, J., dissenting). But it is not this Court that "drives a

wedge"; Congress has done that. The Court's holding is compelled in large measure by *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185 (1976), and gives effect to congressional intent as manifested in the language of the statutes and in their histories. If, as intimated, the result is "bad" public policy, that is the concern of Congress where changes can be made.

(3) It bears mention that this dispute, though pressed vigorously by both sides, may be much ado about nothing. This is so because of the requirement in injunctive proceedings of a showing that "there is a reasonable likelihood that the wrong will be repeated." *SEC* v. *Manor Nursing Centers, Inc.*, 458 F. 2d 1082, 1100 (CA2 1975). Accord, *SEC* v. *Keller Corp.*, 323 F. 2d 397, 402 (CA7 1963). To make such a showing, it will almost always be necessary for the Commission to demonstrate that the defendant's past sins have been the result of more than negligence. Because the Commission must show some likelihood of a future violation, defendants whose past actions have been in good faith are not likely to be enjoined. See opinion of the Court, *ante*, at 701. That is as it should be. An injunction is a drastic remedy, not a mild prophylactic, and should not be obtained against one acting in good faith.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, concurring in part and dissenting in part.

I concur in the Court's judgment that §§ 17 (a)(2) and (3) of the Securities Act of 1933, 15 U. S. C. §§ 77q (a)(2) and (3), do not require a showing of scienter for purposes of an action for injunctive relief brought by the Securities and Exchange Commission. I dissent from the remainder of the Court's reasoning and judgment. I am of the view that neither § 17 (a)(1) of the 1933 Act, 15 U. S. C. § 77q (a)(1), nor § 10 (b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78j (b), as elaborated by SEC Rule 10b–5, 17 CFR § 240.10b–5 (1979), requires the Commission to prove scienter

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before it can obtain equitable protection against deceptive practices in securities trading. Accordingly, I would affirm the judgment of the Court of Appeals in its entirety.

The issues before the Court in this case are important and critical. Sections 17 (a) and 10 (b) are the primary anti-fraud provisions of the federal securities laws. They are the chief means through which the Commission, by exercise of its authority to bring actions for injunctive relief, can seek protection against deception in the marketplace. See § 20 (b) of the 1933 Act, 15 U. S. C. § 77t (b); § 21 (d) of the 1934 Act, 15 U. S. C. § 78u (d). As a result, they are key weapons in the statutory arsenal for securing market integrity and investor confidence. See Douglas & Bates, The Federal Securities Act of 1933, 43 Yale L. J. 171, 182 (1933); Note, 57 Yale L. J. 1023 (1948). If the Commission is denied the ability effectively to nip in the bud the misrepresentations and deceptions that its investigations have revealed, honest investors will be the ones who suffer. Often they may find themselves stripped of their investments through reliance on information that the Commission knew was misleading but lacked the power to stop or contain.

Today's decision requires the Commission to prove scienter in many, if not most, situations before it is able to obtain an injunction. This holding unnecessarily undercuts the Commission's authority to police the marketplace. As I read the Court's opinion, it is little more than an extrapolation of the reasoning that was employed in *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185 (1976), in imposing a scienter requirement upon private actions for damages implied under § 10 (b) and Rule 10b-5. Whatever the authority of *Hochfelder* may be in its own context, I perceive little reason to regard it as governing precedent here. I believe that there are sound reasons for distinguishing between private damages actions and public enforcement actions under these statutes, and for applying a scienter standard, if one must be applied anywhere, only in the former class of cases.

I

In keeping with the reasoning of *Hochfelder*, the Court places much emphasis upon statutory language and its assertedly plain meaning. The words "device, scheme, or artifice to defraud" in § 17 (a)(1), and the words "manipulative or deceptive device or contrivance" in § 10 (b), are said to connote "knowing or intentional misconduct." *Ante*, at 690, 696. And this connotation, it is said, implicitly incorporates the requirement of scienter traditionally applicable in the common law of fraud. But there are at least two specific responses to this wooden analysis. First, it is quite unclear that the words themselves call for so restrictive a definition. Second, as the Court recognized in *SEC* v. *Capital Gains Research Bureau*, 375 U. S. 180 (1963), the common-law requirement of scienter generally observed in actions for fraud at law was often dispensed with in actions brought before chancery.

A

The words of a statute, particularly one with a remedial object, have a "'meaning imparted to them by the mischief to be remedied.'" *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U. S. 531, 545 (1978), quoting *Duparquet Co.* v. *Evans*, 297 U. S. 216, 221 (1936). Thus, antifraud provisions of securities legislation are to be construed "not technically and restrictively, but flexibly to effectuate [their] remedial purposes." *SEC* v. *Capital Gains Research Bureau*, 375 U. S., at 195; *Superintendent of Insurance* v. *Bankers Life & Cas. Co.*, 404 U. S. 6, 12 (1971); *Affiliated Ute Citizens* v. *United States*, 406 U. S. 128, 151 (1972). See also *SEC* v. *C. M. Joiner Leasing Corp.*, 320 U. S. 344, 350–351 (1943); *United Housing Foundation, Inc.* v. *Forman*, 421 U. S. 837, 849–851 (1975). I have no doubt that the "mischief" confronting Congress in 1933 and 1934 included a large measure of intentional deceit and misrepresentation. The concern, however, ran deeper still, and Congress sought to develop a regulatory

framework that would ensure a free flow of honest, reliable information in the securities markets. This Court has recognized that it was Congress' desire "to substitute a philosophy of full disclosure for the philosophy of *caveat emptor*," and to place upon those in control of information the responsibility for misrepresentation. *SEC* v. *Capital Gains Research Bureau*, 375 U. S., at 186; see, *e. g.*, H. R. Rep. No. 85, 73d Cong., 1st Sess., 1–5 (1933); Securities Act: Hearings on S. 875 before the Senate Committee on Banking and Currency, 73d Cong., 1st Sess., 71 (1933). This step was perceived as a fundamental prerequisite to restoration of investor confidence sorely needed after the market debacles that helped to plummet the Nation into a major economic depression. See *United States* v. *Naftalin*, 441 U. S. 768, 775 (1979).

Reading the language of § 17 (a)(1) and § 10 (b) with these purposes in mind, I am not at all certain—although the Court professes to be—that the language is incapable of being read to include misrepresentations that result from something less than willful behavior. The word "willfully," that Congress employed elsewhere in the securities laws when it wanted to specify a prerequisite of knowledge or intent, is conspicuously missing.[1] Instead, Congress employed a variety of

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[1] The word "willfully" was originally included in the draft of what was to become § 17 (a) of the 1933 Act, and both Houses of Congress considered the addition of the phrase "with intent to defraud" to the language of that provision. That phrase ultimately was inserted by the Senate, but the bill that emerged from conference lacked either of the references to a state-of-mind requirement. See H. R. 4314, § 13, 73d Cong., 1st Sess. (Mar. 29, 1933); S. 875, § 13, 73d Cong., 1st Sess. (Apr. 27, 1933); H. R. Conf. Rep. No. 152, 73d Cong., 1st Sess., 12, 26–27 (1933). The House bill, which as reported did not contain the words "willfully" and "intent to defraud," see H. R. 5480, § 16 (a), 73d Cong., 1st Sess. (May 4, 1933), was used by the conferees as their working draft. See Landis, The Legislative History of the Securities Act of 1933, 28 Geo. Wash. L. Rev. 29, 45 (1959).

The Court suggests that no meaning should be attributed to these events, because Congress never explained its reasons for deleting this

terms to describe the conduct that it authorized the Commission to prohibit. These operative terms are expressed in the disjunctive, and each should be given its separate meaning. Contrary to the Court's view, I would conclude that they identify a range of behavior, including but not limited to intentional misconduct, and that they admit an interpretation, in the context of Commission enforcement actions, that reaches deceptive practices whether the common-law condition of scienter is specifically present or not.

For example, the word "device" that is common to both statutes may have a far broader scope than the Court suggests. The legislative history of the 1934 Act used that term as a synonym for "practice," a word without any strong connotation of scienter, and it expressed a desire to confer upon the Commission authority under § 10 (b) to prohibit "any . . . manipulative or deceptive practices . . . detrimental to the interests of the investor." S. Rep. No. 792, 73d Cong., 2d Sess., 18 (1934). The term "device" also was used in § 15

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explicit state-of-mind language. *Ante*, at 699–700. But the Conference Report, which discussed differences between the House bill and the Conference substitute, noted that the conferees had adopted from the Senate bill several "minor and clarifying changes" that were intended "to make clear and effective the administrative procedure provided for and to remove uncertainties" concerning the powers of the Commission. H. R. Conf. Rep. No. 152, 73d Cong., 1st Sess., 24 (1933). If the Court were correct in its interpretation of § 17 (a)(1), retention of the Senate's explicit state-of-mind language undoubtedly would have added clarity to congressional intent. In light of the other changes to which the House acceded, it is thus difficult, on the Court's theory, to understand why this change would not have been adopted as well. Moreover, Congress was well aware of the significance that addition or deletion of these terms would have. See 77 Cong. Rec. 2994 (1933) (colloquy between Sens. Fess and Fletcher); *id.*, at 2919 (remarks of Rep. Rayburn). It is also noteworthy that, when the 1934 Act was under consideration, a proposal was placed before Congress to amend § 17 (a) to limit it to conduct that was undertaken "willfully and with intent to deceive." 78 Cong. Rec. 8703 (1934). The proposal was voted down. *Id.*, at 8708.

(c)(1) of the Securities Exchange Act, 15 U. S. C. § 78o (c)(1), where it has been interpreted with congressional approval to apply to negligent acts and practices. See SEC Rule 15c-1-2, 17 CFR § 240.15c1-2 (1979); H. R. Rep. No. 2307, 75th Cong., 3d Sess., 10 (1938). Moreover, "device" had been given broad definition in prior enactments. In *Armour Packing Co.* v. *United States*, 209 U. S. 56, 71 (1908), the Court rejected the contention that its meaning in the Elkins Act, 32 Stat. 847, should be limited to conduct involving resort to underhanded, dishonest, or fraudulent means.

In my view, this evidence provides a stronger indication of congressional understanding of the term "device" than the dictionary definition on which the Court relies. *Ante*, at 696, n. 13; cf. *Ernst & Ernst* v. *Hochfelder*, 425 U. S., at 199, n. 20.[2] At the very least, it fully counters the Court's bald assertion that the meaning of terms used in the antifraud provisions is sufficiently "plain" that statutory policy and administrative interpretation may be ignored in defining the scope of the legislation. See *ante*, at 695, 700, n. 19. Division in the lower courts over the issues before us is itself an indication that reasonable minds differ over the import of the terminology that Congress has used. I can agree with the Court that the language of the statutes is the starting point of analysis, but at least in present circumstances I strongly disagree with the conclusion that it is the ending point as well.

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[2] I perceive no reason why the misrepresentations concerning Lawn-A-Mat Chemical & Equipment Corp. spread by petitioner's brokerage house would not qualify as a "device . . . to defraud," within the meaning of § 17 (a)(1), or as a "deceptive device" in contravention of Rule 10b-5, within the meaning of § 10 (b). I do not regard the word "deceptive," which focuses more on effect than on purpose, as adding significant connotations of scienter to the word "device." In light of the Court's disposition of this case, I shall not consider whether the misrepresentations might be reached under § 17 (a)(2) or § 17 (a)(3) as well, or whether the facts of the case establish scienter, as the District Court found.

B

An additional and independent ground for disagreement with the Court's analysis is its utter failure to harmonize statutory construction with prevailing equity practice at the time the securities laws were enacted. On prior occasions, the Court has emphasized the relevance of common-law principles in the interpretation of the antifraud provisions of the securities laws. See, *e. g., Chiarella* v. *United States*, 445 U. S. 222, 227–229 (1980). See also *Lanza* v. *Drexel & Co.*, 479 F. 2d 1277, 1289–1291 (CA2 1973) (en banc). Yet in this case, the Court oddly finds those principles inapplicable. It specifically casts aside the fact that proof of scienter was not required in actions seeking equitable relief against fraudulent practices. This position stands in stark contrast with the Court's clear recognition of this separate equity tradition in *SEC* v. *Capital Gains Research Bureau*, 375 U. S. 180 (1963).

In *Capital Gains*, the Court was called upon to construe § 206 (2) of the Investment Advisers Act of 1940, 54 Stat. 847, as amended, 15 U. S. C. § 80b–6 (2). The statute is a general antifraud provision framed in language similar to that of § 17 (a)(3) of the 1933 Act. The Court of Appeals, sitting en banc, had decided by a close vote that the Commission could not obtain an injunction for violation of the statute unless it proved scienter. See *SEC* v. *Capital Gains Research Bureau*, 306 F. 2d 606 (CA2 1962). This Court, rejecting the view of the lower court that scienter was required in all cases involving fraud, reversed. It said:

> "The content of common-law fraud has not remained static as the courts below seem to have assumed. It has varied, for example, with the nature of the relief sought, the relationship between the parties, and the merchandise in issue. It is not necessary in a suit for equitable or prophylactic relief to establish all the elements required in a suit for monetary damages." 375 U. S., at 193.

In particular, the Court observed that proof of scienter was one element of an action for damages that the equity courts omitted. *Id.*, at 193–194. See also *Moore* v. *Crawford*, 130 U. S. 122, 128 (1889).

The Court does not now dispute the veracity of what it said in *Capital Gains*. Indeed, the different standards for fraud in law and at equity have been noted by commentators for more than a century. See, *e. g.*, 1 J. Story, Equity Jurisprudence §§ 186–187 (6th ed. 1853); G. Bower, The Law of Actionable Misrepresentation § 250 (1911); 2 J. Pomeroy, Equity Jurisprudence § 885 (4th ed. 1918); 3 S. Williston, The Law of Contracts § 1500 (1920); W. Walsh, Equity § 109, p. 509 (1930). See also Shulman, Civil Liability and the Securities Act, 43 Yale L. J. 227, 231 (1933). The difference originally may have been attributable more to historical accident than to any conscious policy. See Keeton, Actionable Misrepresentation: Legal Fault as a Requirement (Part I), 1 Okla. L. Rev. 21, 23 (1948). But as one commentator explained, it has survived because in equity "[i]t is not the *cause* but the *fact*, of injury, and the problem of its practical control through judicial action, which concern the court." 1 F. Lawrence, Substantive Law of Equity Jurisprudence § 13 (1929) (emphasis in original); see also *id.*, § 17. As a consequence of this different focus, common-law courts consistently have held that in an action for rescission or other equitable relief the fact of material misrepresentation is sufficient, and the knowledge or purpose of the wrongdoer need not be shown.

The Court purports to distinguish *Capital Gains* on the grounds that it involved a different statutory provision with somewhat different language, and that it stressed the confidential duties of investment advisers to their clients. *Ante*, at 693–695. These observations, in my view, do not weaken the relevance of the history on which the Court in *Capital Gains* relied. In fact, that history may be even more pertinent here. This case involves actual *dissemination* of material

false statements by a broker-dealer serving as market maker in the relevant security; *Capital Gains* involved an investment adviser's *omission* to state material facts. Because there was no affirmative misrepresentation in *Capital Gains*, the existence of a confidential duty arguably was necessary before the broker's silence could become the basis for a charge of fraud. Cf. *Chiarella* v. *United States*, 445 U. S., at 228. Here, in contrast, the fraudulent nature of the underlying conduct is clear, and the only issue is whether the Commission may obtain the desired prophylactic relief.

The significance of this common-law tradition, moreover, is buttressed by reference to state precursors of the federal securities laws. The problem of securities fraud was by no means new in 1933, and many States had attempted to deal with it by enactment of their own "blue-sky" statutes. When Congress turned to the problem, it explicitly drew from their experience. One variety of state statute, the so-called "fraud" laws of New York, New Jersey, Maryland, and Delaware, empowered the respective state attorneys general to bring actions for injunctive relief when fraudulent practices in the sale of securities were uncovered. See, *e. g.*, Federal Securities Act, Hearings on H. R. 4314 before the House Committee on Interstate and Foreign Commerce, 73d Cong., 1st Sess., 95 (1933). Of these statutes, the most prominent was the Martin Act of New York, 1921 N. Y. Laws, ch. 649, N. Y. Gen. Bus. Law §§ 352–353 (Consol. 1921), which had been fairly actively enforced. The drafters of the federal securities laws referred to these specific statutes as models for the power to seek injunctive relief that they requested for federal enforcement authorities. The experience of the State of New York, in particular, was repeatedly called to Congress' attention as an example for federal legislation to follow.[3]

[3] See, *e. g.*, Federal Securities Act, Hearings on H. R. 4314 before the House Committee on Interstate and Foreign Commerce, 73d Cong., 1st Sess., 11, 95, 109, 112 (1933); Securities Act: Hearings on S. 875 before the Senate Committee on Banking and Currency, 73d Cong., 1st Sess., 71,

In light of this legislative history, I find it far more significant than does the Court that proof of scienter was not a prerequisite to relief under the Martin Act and other similar "blue-sky" laws. In *People* v. *Federated Radio Corp.*, 244 N. Y. 33, 154 N. E. 655 (1926), the New York Court of Appeals held that lack of scienter was no defense to Martin Act liability. The court justified this decision by looking to the traditional equity practice to which I have referred. It held:

> "[I]ntentional misstatements, as in an action at law to recover damages for fraud and deceit . . . need not be alleged. Material misrepresentations intended to influence the bargain, on which an action might be maintained in equity to rescind a consummated transaction, are enough." *Id.*, at 40–41, 154 N. E., at 658.

This decision was in keeping with the general tenor of state laws governing equitable relief in the context of securities transactions. See Note, 40 Yale L. J. 987, 988 (1931).

The Court dismisses all this evidence with the observation, *ante*, at 700, n. 18, that the specific holdings of cases like *Federated Radio* were not explicitly placed before Congress. Yet these were not isolated holdings or novel twists of law. They were part of an established, longstanding equity tradition the significance of which the Court has chosen simply to ignore. I am convinced that Congress was aware of this tradition, see n. 3, *supra*, and that if it had intended to depart from it, it would have left more traces of that intention than the Court has been able to find. Cf. *Hecht Co.* v. *Bowles*, 321 U. S. 321, 329 (1944) ("We are dealing here with the requirements of equity practice with a background of several hundred years of history").

146–147, 156, 170, 245–246, 253 (1933); see also 78 Cong. Rec. 8096 (1934). For a general discussion of state precursors and their consideration by Congress, see 1 L. Loss, Securities Regulation 33–34, 35–43 (2d ed. 1961).

II

Although I disagree with the Court's textual exegesis and its assessment of history, I believe its most serious error may be a failure to appreciate the structural interrelationship among equitable remedies in the 1933 and 1934 Acts, and to accord that interrelationship proper weight in determining the substantive reach of the Commission's enforcement powers under § 17 (a) and § 10 (b).

The structural considerations that were advanced in support of the decision to require proof of scienter in a private action for damages, see *Ernst & Ernst* v. *Hochfelder*, 425 U. S., at 206–211, have no application in the present context. In *Hochfelder*, the Court noted that Congress had placed significant limitations on the private causes of action for negligence that were available under provisions of the 1934 Act other than § 10 (b). *Ibid.* It concluded that the effectiveness of these companion statutes might be undermined if private plaintiffs sustaining losses from negligent behavior also could sue for damages under § 10 (b). *Id.*, at 210. Obviously, no such danger is created by Commission-initiated actions for injunctive relief, and the Court admits as much. *Ante*, at 691, n. 9.[4]

In fact, the consistent pattern in both the 1933 Act and the 1934 Act is to grant the Commission broad authority to seek enforcement without regard to scienter, unless criminal punishments are contemplated. In both Acts, state of mind is treated with some precision. Congress used terms such as

[4] Nor is there any danger that actions for prophylactic relief brought by the Commission will result in the "'broadening of the class of plaintiff who may sue in this area of the law,'" that has been an animating concern of the Court's decisions limiting the scope of private damages actions under § 10 (b). *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 214, n. 33 (1976), quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 747–748 (1975). Compare *Ultramares Corp.* v. *Touche*, 255 N. Y. 170, 179–180, 174 N. E. 441, 444 (1931), with *People* v. *Federated Radio Corp.*, 244 N. Y. 33, 154 N. E 655 (1926).

"knowing," "willful," and "good faith," when it wished to impose a state-of-mind requirement. The omission of such terms in statutory provisions authorizing the Commission to sue for injunctive relief contrasts sharply with their inclusion in provisions authorizing criminal prosecution. Compare § 20 (b) of the 1933 Act, 15 U. S. C. § 77t (b), and § 21 (d) of the 1934 Act, 15 U. S. C. § 78u (d), with § 24 of the 1933 Act, 15 U. S. C. § 77x, and § 32 (a) of the 1934 Act, 15 U. S. C. § 78ff (a). Moreover, the Acts create other civil remedies that may be pursued by the Commission that do not include state-of-mind prerequisites.[5] This pattern comports with Congress' expressed intent to give the Commission maximum flexibility to deal with new or unanticipated problems, rather than to confine its enforcement efforts within a rigid statutory framework. See, *e. g.*, H. R. Rep. No. 1383, 73d Cong., 2d Sess., 6–7 (1934); S. Rep. No. 792, 73d Cong., 2d Sess., 5–6 (1934); 78 Cong. Rec. 8113 (1934).

The Court's decision deviates from this statutory scheme. That deviation, of course, is only partial. After today's decision, it still will be possible for the Commission to obtain relief against some negligent misrepresentations under § 17 (a) of the 1933 Act. Yet this halfway-house approach itself highlights the error of the Court's decision. Rule 10b–5 was promulgated to fill a gap in federal securities legislation, and

[5] The prohibition in § 5 of the 1933 Act, 15 U. S. C. § 77e, against selling securities without an effective registration statement has been interpreted to require no showing of scienter. See, *e. g.*, *SEC* v. *Spectrum, Ltd.*, 489 F. 2d 535, 541–542 (CA2 1973); *SEC* v. *North American Research & Development Corp.*, 424 F. 2d 63, 73–74 (CA2 1970). See also § 8 (b), 15 U. S. C. § 77h (b) (power to withhold registration effectiveness); § 8 (d), 15 U. S. C. § 77h (d) (power to issue "stop order" suspending registration effectiveness). The 1934 Act incorporated the culpability requirements for Commission remedies that the 1933 Act had established, although it did set a scienter standard for SEC remedies of criminal prosecution and administrative revocation of broker-dealer registrations. See Securities Exchange Act of 1934, Tit. II, § 210, 48 Stat. 908–909.

to apply to both purchasers and sellers under § 10 (b) the legal duties that § 17 (a) had applied to sellers alone. See *Ward La France Truck Corp.*, 13 S. E. C. 373, 381, n. 8 (1943); SEC Release No. 3230 (May 21, 1942). As the Commission thus recognized, the two statutes should operate in harmony. The Court now drives a wedge between them, and says that henceforth only the seller's negligent misrepresentations may be enjoined. I have searched in vain for any reason in policy or logic to support this division. Its only support, so far as I can tell, is to be found in the Court's technical linguistic analysis.

Many lower courts have refused to go so far. Both before and after *Hochfelder*, they have rejected the contention that the Commission must prove scienter under either § 17 (a) or § 10 (b) before it can obtain injunctive relief against deceptive practices.[6] Even those judges who anticipated *Hochfelder* by advocating a scienter requirement in private actions for money damages found no reason to place similar strictures on the Commission. See, *e. g.*, *SEC* v. *Texas Gulf Sulphur Co.*, 401 F. 2d 833, 866–868 (CA2 1968) (concurring opinion), cert. denied *sub nom. Coates* v. *SEC*, 394 U. S. 976 (1969), cited with approval in *Ernst & Ernst* v. *Hochfelder*, 425 U. S., at 197, 211, 213, 214.

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[6] For cases involving § 10 (b) see, *e. g.*, *SEC* v. *World Radio Mission*, 544 F. 2d 535, 541, n. 10 (CA1 1976); *SEC* v. *Management Dynamics, Inc.*, 515 F. 2d 801, 809 (CA2 1975); *SEC* v. *Manor Nursing Centers, Inc.*, 458 F. 2d 1082, 1096 (CA2 1972); *SEC* v. *Texas Gulf Sulphur Co.*, 401 F. 2d 833, 863 (CA2 1968), cert. denied *sub nom. Coates* v. *SEC*, 394 U. S. 976 (1969); *SEC* v. *Dolnick*, 501 F. 2d 1279, 1284 (CA7 1974); *SEC* v. *Geyser Minerals Corp.*, 452 F. 2d 876, 880–881 (CA10 1971). For cases involving § 17 (a) see, *e. g.*, *SEC* v. *World Radio Mission, supra; SEC* v. *Coven*, 581 F. 2d 1020, 1026 (CA2 1978), cert. denied, 440 U. S. 950 (1979); *SEC* v. *American Realty Trust*, 586 F. 2d 1001, 1006–1007 (CA4 1978); *SEC* v. *Van Horn*, 371 F. 2d 181, 185–186 (CA7 1966); *SEC* v. *Geyser Minerals Corp., supra*. Because several of the latter cases turn on interpretations of § 17 (a)(2) or § 17 (a)(3), they do not necessarily conflict in result with today's decision.

The reasons for this refusal to limit the Commission's authority are not difficult to fathom. As one court observed in the context of § 17 (a), "[i]mpressive policies" support the need for Commission authority to seek prophylactic relief against misrepresentations that are caused by negligence, as well as those that are caused by deliberate swindling. *SEC* v. *Coven*, 581 F. 2d 1020, 1027 (CA2 1978), cert. denied, 440 U. S. 950 (1979). False and misleading statements about securities "can be instruments for inflicting pecuniary loss more potent than the chisel or the crowbar." *United States* v. *Benjamin*, 328 F. 2d 854, 863 (CA2), cert. denied *sub nom. Howard* v. *United States*, 377 U. S. 953 (1964). And when misinformation causes loss, it is small comfort to the investor to know that he has been bilked by negligent mistake rather than by fraudulent design, particularly when recovery of his loss has been foreclosed by this Court's decisions.[7] As the reported cases illustrate, injunctions against negligent dissemination of misinformation play an essential role in preserving market integrity and preventing serious financial loss.

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[7] When questioned about civil liability, the drafters of the 1933 Act strongly defended the theory that it would be preferable to place liability for negligent misstatements on the shoulders of those responsible for their dissemination rather than to require innocent investors to suffer in silence. Judge Alexander Holtzoff, then Special Assistant to the Attorney General of the United States, put it this way:

"Criminal liability is based only on knowingly making a false statement. But civil liability exists even in the case of an innocent mistake. Let us assume that an innocent mistake is made and an investor loses money because of it. Now, who should suffer? The man who loses the money or the man who puts the mistake in circulation knowing that other people will rely upon that mistaken statement?" Securities Act, Hearings on S. 875 before the Senate Committee on Banking and Currency, 73d Cong., 1st Sess., 207 (1933).

See also Federal Securities Act, Hearings on H. R. 4314 before the House Committee on Interstate and Foreign Commerce, 73d Cong., 1st Sess., 124–125 (1933) (testimony of Ollie M. Butler, Foreign Service Division, Department of Commerce).

See, *e. g.*, *SEC* v. *World Radio Mission, Inc.*, 544 F. 2d 535, 540–541 (CA1 1976); *SEC* v. *Management Dynamics, Inc.*, 515 F. 2d 801, 809 (CA2 1975); *SEC* v. *Manor Nursing Centers, Inc.*, 458 F. 2d 1082, 1095–1097 (CA2 1972).[8]

III

I thus arrive at the conclusion that statutory language does not compel the judgment reached by the Court, while considerations of history, statutory structure, legislative purpose, and policy all strongly favor an interpretation of § 17 (a) and § 10 (b) that permits the Commission to seek injunctive relief without first having to prove scienter. In my view, this conclusion is fortified by the fact that Congress has approved it in a related context.[9] Because I find nothing

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[8] In recognition of the importance to the investing public of the Commission's authority to prevent negligent misstatements, the proposed Federal Securities Code drafted by the American Law Institute provides the Commission with power to obtain injunctions preventing deception and misrepresentation without proof of scienter. ALI, Federal Securities Code §§ 262 (d), 297 (a), 1602 (a), 1819 (a)(3), 1819 (a)(4) (Prop. Off. Draft 1978). The ALI Code has been approved by the American Bar Association, 65 A. B. A. J. 341 (1979).

[9] In 1975, Congress undertook relatively substantial revision of the securities laws. Securities Acts Amendments of 1975, Pub. L. 94–29, 89 Stat. 97; see Securities Acts Amendments of 1975: Hearings on S. 249 before the Subcommittee on Securities of the Senate Committee on Banking, Housing, and Urban Affairs, 94th Cong., 1st Sess., 1 (1975). In the course of its deliberations, Congress had occasion to consider the scope of Commission injunctive remedies. In reliance on the different purposes of Commission enforcement proceedings and private actions, Congress enacted § 21 (g) of the Act, 15 U. S. C. § 78u (g), which provides that, absent consent from the Commission, private actions may not be consolidated with Commission proceedings. The Senate Committee in charge of the legislation observed that Commission enforcement actions and private suits for damages, though both civil in nature, "are very different," and it explained that private suits involve complications that are not present when the Commission seeks injunctive relief:

"Private actions frequently will involve more parties and more issues than the Commission's enforcement action, thus greatly increasing the

whatever in either *Ernst & Ernst* v. *Hochfelder* or today's decision that compels a different result, I dissent.

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need for extensive pretrial discovery. In particular, issues related to . . . scienter, causation, and the extent of damages, are elements *not* required to be demonstrated in a Commission injunctive action." S. Rep. No. 94-75, p. 76 (1975) (emphasis in original).

In 1977, following the decision in *Ernst & Ernst* v. *Hochfelder*, Congress re-examined the Commission's enforcement authority, this time in connection with the Foreign Corrupt Practices Act of 1977, Pub. L. 95-213, 91 Stat. 1494. Case law was discussed in some detail, and express approval was given to judicial decisions holding that scienter was not required when the SEC sought injunctive relief under Rule 10b-5. The responsible Committee in the House of Representatives declared:

"In the context of an SEC action to enjoin future violations of the securities laws, a defendant's state of mind should make no difference. The harm to the public is the same regardless of whether or not the violative conduct involved scienter. Because an SEC enforcement action is designed to protect the public against the recurrence of violative conduct, and not to punish a state of mind, this Committee intends that scienter is not an element of any Commission enforcement proceeding." H. R. Rep. No. 95-640, p. 10 (1977).

As expressions of later Congresses, these statements, of course, do not control the meaning of provisions enacted in 1933 and 1934. Yet the views of a subsequent Congress are entitled to some weight, particularly when that Congress undertakes significant revision of the statute but leaves the disputed provision intact. Cf., *e. g.*, *Andrus* v. *Allard*, 444 U. S. 51, 59, n. 10 (1979); *United States* v. *Rutherford*, 442 U. S. 544, 553-554 (1979); *Board of Governors* v. *First Lincolnwood Corp.*, 439 U. S. 234, 248 (1978); *NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267, 274-275 (1974).

SUPREME COURT OF VIRGINIA ET AL. v. CONSUMERS UNION OF THE UNITED STATES, INC., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

No. 79-198. Argued February 19, 1980—Decided June 2, 1980

Appellant Virginia Supreme Court, which claims inherent authority to regulate and discipline attorneys, also has statutory authority to do so. Pursuant to these powers, the court promulgated the Virginia Code of Professional Responsibility (Code) and organized the Virginia State Bar to act as an administrative agency of the court to report and investigate violations of the Code. The statute reserves to the state courts the sole power to adjudicate alleged violations of the Code, and the Supreme Court and other state courts of record have independent authority on their own to initiate proceedings against attorneys. When one of the appellees sought to prepare a legal services directory, the attorneys who were canvassed refused to supply the requested information for fear of violating the Code's prohibition against attorney advertising (DR 2-102 (A)(6)). Appellees then brought an action in Federal District Court under 42 U. S. C. § 1983 against, *inter alios*, the Virginia Supreme Court and its chief justice (also an appellant) in both his individual and official capacities, seeking a declaration that the defendants had violated appellees' First and Fourteenth Amendment rights to gather, publish, and receive factual information concerning the attorneys involved, and a permanent injunction against the enforcement and operation of DR 2-102 (A)(6). Ultimately, after the Virginia Supreme Court declined to amend DR 2-102 (A)(6) despite the State Bar's recommendation to do so and despite the intervening decision in *Bates* v. *State Bar of Arizona*, 433 U. S. 350, holding that enforcement of a ban on attorney advertising would violate the First and Fourteenth Amendment rights of attorneys seeking to advertise fees charged for certain routine legal services, the District Court declared DR 2-102 (A)(6) unconstitutional on its face and permanently enjoined defendants from enforcing it. The court further held that the Civil Rights Attorney's Fees Awards Act of 1976, which provides that in any action to enforce 42 U. S. C. § 1983, *inter alia*, a district court, in its discretion, may award the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, authorized in proper circumstances

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the award of fees against the Virginia Supreme Court and the chief justice in his official capacity, and that here such an award was not unjust because the Supreme Court had denied the State Bar's petition to amend the Code and had also failed to amend it to conform to the holding in *Bates, supra.*

Held:

1. In promulgating the Code, the Virginia Supreme Court acts in a legislative capacity, and in that capacity the court and its members are immune from suit. Pp. 731–734.

2. But the court and its chief justice were properly held liable in their enforcement capacities. Since the state statute gives the court independent authority on its own to initiate proceedings against attorneys, the court and its members were proper defendants in a suit for declaratory and injunctive relief, just as other enforcement officers and agencies are. Pp. 734–737.

3. The District Court abused its discretion in awarding attorney's fees against the Virginia Supreme Court premised on acts or omissions for which appellants enjoy absolute legislative immunity. There is nothing in the legislative history of the Civil Rights Attorney's Fees Awards Act to suggest that Congress intended to permit an award of attorney's fees to be premised on acts for which defendants would enjoy absolute immunity. Pp. 737–739.

470 F. Supp. 1055, vacated and remanded.

WHITE, J., delivered the opinion of the Court, in which all other Members joined, except POWELL, J., who took no part in the consideration or decision of the case.

Marshall Coleman, Attorney General of Virginia, argued the cause for appellants. With him on the briefs were *Walter H. Ryland,* Chief Deputy Attorney General, and *Philip B. Kurland.*

Ellen Broadman argued the cause for appellees. With her on the brief were *Alan Mark Silbergeld, James W. Benton, Jr.,* and *Michael Pollet.**

**Burt Neuborne, Bruce J. Ennis, Jr.,* and *Stephen Bricker* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging affirmance.

MR. JUSTICE WHITE delivered the opinion of the Court.

This case raises questions of whether the Supreme Court of Virginia (Virginia Court) and its chief justice are officially immune from suit in an action brought under 42 U. S. C. § 1983 challenging the Virginia Court's disciplinary rules governing the conduct of attorneys and whether attorney's fees were properly awarded under the Civil Rights Attorney's Fees Awards Act of 1976 (Act), 42 U. S. C. § 1988, against the Virginia Court and its chief justice in his official capacity.

I

It will prove helpful at the outset to describe the role of the Virginia Court in regulating and disciplining attorneys. The Virginia Court has firmly held to the view that it has inherent authority to regulate and discipline attorneys. *Button* v. *Day,* 204 Va. 547, 552–555, 132 S. E. 2d 292, 295–298 (1963). It also has statutory authority to do so. Section 54–48 of the Code of Virginia (1978) authorizes the Virginia Court to "promulgate and amend rules and regulations . . . [p]rescribing a code of ethics governing the professional conduct of attorneys-at-law. . . ." [1]

Pursuant to these powers, the Virginia Court promulgated the Virginia Code of Professional Responsibility (State Bar Code, Bar Code, or Code), the provisions of which were sub-

[1] "§ 54–48. Rules and regulations defining practice of law and prescribing procedure for practice by law students, codes of ethics and disciplinary procedure.—The Supreme Court may, from time to time, prescribe, adopt, promulgate and amend rules and regulations:

"(a) Defining the practice of law.

"(a1) Prescribing procedure for limited practice of law by third-year law students.

"(b) Prescribing a code of ethics governing the professional conduct of attorneys-at-law including the practice of law or patent law through professional law corporations, professional associations and partnerships, and a code of judicial ethics.

"(c) Prescribing procedure for disciplining, suspending, and disbarring attorneys-at-law."

stantially identical to the American Bar Association's Code of Professional Responsibility. Section 54–48 provides no standards for the Virginia Court to follow in regulating attorneys; it is apparent that insofar as the substantive content of such a code is concerned, the State has vested in the court virtually its entire legislative or regulatory power over the legal profession.

Section 54–48 also authorizes the Virginia Court to prescribe "procedure for disciplining, suspending and disbarring attorneys-at-law"; and § 54–49 authorizes the court to promulgate rules and regulations "organizing and governing the association known as the Virginia State Bar, composed of the attorneys-at-law of this State, to act as an administrative agency of the Court for the purpose of investigating and reporting . . . violation[s]. . . ."[2] Acting under this authority, the Virginia State Bar (State Bar or Bar) has been organized and its enforcement role vested in an ethics committee and in various district committees. Section 54–51 reserves to the courts the sole power to adjudicate alleged violations of the Bar Code,[3] and hence the role of the State Bar is limited to the

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[2] "§ 54–49. Organization and government of Virginia State Bar.—The Supreme Court may, from time to time, prescribe, adopt, promulgate and amend rules and regulations organizing and governing the association known as the Virginia State Bar, composed of the attorneys-at-law of this State, to act as an administrative agency of the Court for the purpose of investigating and reporting the violation of such rules and regulations as are adopted by the Court under this article for such proceedings as may be necessary, and requiring all persons practicing law in this State to be members thereof in good standing."

[3] "§ 54–51. Restrictions as to rules and regulations.—Notwithstanding the foregoing provisions of this article, the Supreme Court shall not adopt or promulgate rules or regulations prescribing a code of ethics governing the professional conduct of attorneys-at-law, which shall be inconsistent with any statute; nor shall it adopt or promulgate any rule or regulation or method of procedure which shall eliminate the jurisdiction of the Courts to deal with the discipline of attorneys-at-law as provided by law; and in no case shall an attorney, who demands to be tried by a court of

investigation of violations and the filing of appropriate complaints in the proper courts. Under § 54–74, the enforcement procedure involves the filing of a complaint in a court of record, the issuance of a rule to show cause against the charged attorney, the prosecution of the case by the commonwealth attorney, and the hearing of the case by the judge issuing the rule together with two other judges designated by the chief justice of the Virginia Supreme Court.[4] Appeal lies to the Virginia Supreme Court.

The courts of Virginia, including the Supreme Court, thus

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competent jurisdiction for the violation of any rule or regulation adopted under this article be tried in any other manner."

[4] "§ 54–74. Procedure for suspension or revocation of license.—(1) *Issuance of rule.*—If the Supreme Court of Virginia, or any court of record of this State, observes, or if complaint, verified by affidavit, be made by any person to such court of any malpractice or of any unlawful or dishonest or unworthy or corrupt or unprofessional conduct on the part of any attorney, or that any person practicing law is not duly licensed to practice in this State, such court shall, if it deems the case a proper one for such action, issue a rule against such attorney or other person to show cause why his license to practice law shall not be revoked or suspended. If the complaint, verified by affidavit, be made by a District Committee of the Virginia State Bar, such court shall issue a rule against such attorney to show cause why his license to practice law shall not be revoked or suspended.

"(2) *Judges hearing case.*—At the time such rule is issued the court issuing the same shall certify the fact of such issuance and the time and place of the hearing thereon, to the chief justice of the Supreme Court of Virginia, who shall designate two judges, other than the judge of the court issuing the rule, of circuit courts or courts of record of cities of the first class to hear and decide the case in conjunction with the judge issuing the rule, which such two judges shall receive as compensation ten dollars per day and necessary expenses while actually engaged in the performance of their duties, to be paid out of the State treasury, from the appropriation for criminal charges.

"(3) *Duty of Commonwealth's attorney.*—It shall be the duty of the attorney for the Commonwealth for the county or city in which such case is pending to appear at the hearing and prosecute the case.

"(4) *Action of court.*—Upon the hearing, if the defendant be found guilty by the court, his license to practice law in this State shall be revoked,

play an adjudicative role in enforcing the Bar Code similar to their function in enforcing any statute adopted by the Virginia Legislature and similar or identical to the role they would play had the Bar Code been adopted by the state legislature.

The Virginia Court, however, has additional enforcement power. As we have said, it asserts inherent power to discipline attorneys. Also, § 54–74 expressly provides that if the Virginia Court or any other court of record observes any act of unprofessional conduct, it may itself, without any complaint being filed by the State Bar or by any third party, issue a rule to show cause against the offending attorney. Although once the rule issues, such cases would be prosecuted by the commonwealth attorney, it is apparent that the Virginia Court and other courts in Virginia have enforcement authority beyond that of adjudicating complaints filed by others and beyond the normal authority of the courts to punish attorneys for contempt.

II

This case arose when, in 1974, one of the appellees, Consumers Union of the United States, Inc. (Consumers Union), sought to prepare a legal services directory designed to assist consumers in making informed decisions concerning utilization of legal services. Consumers Union sought to canvass all

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or suspended for such time as the court may prescribe: provided, that the court, in lieu of revocation or suspension, may, in its discretion, reprimand such attorney.

"(5) *Appeal.*—The person or persons making the complaint or the defendant, may, as of right, appeal from the judgment of the court to the Supreme Court of Virginia, by petition based upon a true transcript of the record, which shall be made up and certified as in actions at law. In all such cases where a defendant's license to practice law has been revoked by the judgment of the court, his privilege to practice law shall be suspended pending appeal."

Effective July 1, 1981, the judge issuing the rule to show cause will not participate in disciplinary cases, which are to be heard by three judges designated by the chief justice from any circuit other than the one in which the case is pending.

attorneys practicing law in Arlington County, Va., asking for information concerning each attorney's education, legal activities, areas of specialization, office location, fee and billing practices, business and professional affiliations, and client relations. However, it encountered difficulty because lawyers declined to supply the requested information for fear of violating the Bar Code's strict prohibition against attorney advertising. Rule 2–102 (A)(6) of the Code prohibited lawyers from being included in legal directories listing the kind of legal information that Consumers Union sought to publish.[5]

On February 27, 1975, Consumers Union and the Virginia Citizens Consumer Council brought an action pursuant to 42 U. S. C. § 1983 against the Virginia Court, the Virginia State Bar, the American Bar Association, and, in both their individual and official capacities, the chief justice of the Virginia Court, the president of the State Bar, and the chairman

[5] At the time Consumers Union sought to canvass Virginia attorneys, Disciplinary Rule 2–102 (A) of the State Bar Code provided in pertinent part: "A lawyer or law firm shall not use professional cards, professional announcement cards, office signs, letterheads, telephone directory listings, law lists, legal directory listings, or similar professional notices or devices, except that the following may be used if they are in dignified form:

. . . . .

(6) A listing in a reputable law list or legal directory giving brief biographical and other informative data. . . . The published data may include only the following: name, including name of law firm and names of professional associates; addresses and telephone numbers; one or more fields of law in which the lawyer or law firm concentrates; a statement that practice is limited to one or more fields of law; a statement that the lawyer or law firm specializes in a particular field of law or law practice . . . ; date and place of birth; date and place of admission to the bar of state and federal courts; schools attended, with dates of graduation, degrees, and other scholastic distinctions; public or quasi-public offices; military service; posts of honor; legal authorships; legal teaching positions; memberships, offices, committee assignments, and section memberships in bar associations; memberships and offices in legal fraternities and legal societies; technical and professional associations and societies; foreign language ability; names and addresses of references, and, with their consent, names of clients regularly represented."

of the State Bar's Legal Ethics Committee. With respect to the Virginia Court, the complaint identified its chief justice and alleged only that the court had promulgated the Bar Code. The other defendants were alleged to have authority to enforce the Code. Plaintiffs sought a declaration that defendants had violated their First and Fourteenth Amendment rights to gather, publish, and receive factual information concerning attorneys practicing in Arlington County, and a permanent injunction against the enforcement and operation of DR 2–102 (A)(6).

A three-judge District Court was convened pursuant to 28 U. S. C. § 2281 (1970 ed.). Defendants moved for indefinite continuance of the trial on the grounds that the ABA and the State Bar were preparing amendments to relax the advertising prohibitions contained in DR 2–102 (A)(6). Over plaintiff-appellees' opposition, the District Court granted defendants a continuance until March 25, 1976.

On February 17, 1976, the ABA adopted amendments to its Code of Professional Responsibility which would permit attorneys to advertise office hours, initial consultation fees, and credit arrangements. Defendants then sought and obtained a further continuance to permit the Virginia Court and the State Bar to consider amending the State Bar Code to conform to the ABA amendments. Although the governing body of the State Bar recommended that the Virginia Court adopt the ABA amendments to DR 2–102, on April 20, 1976, the court declined to adopt the amendments on the ground that they would "not serve the best interests of the public or the legal profession."

The action then proceeded to trial on May 17, 1976, and was decided on December 17, 1976. *Consumers Union of United States, Inc.* v. *American Bar Assn.*, 427 F. Supp. 506 (ED Va. 1976). The three-judge District Court concluded that abstention would be inappropriate in light of defendants' failure to amend the State Bar Code despite continuances based on the speculation that DR 2–102 (A)(6) would be

relaxed. *Id.*, at 513–516. The court declared that DR 2–102 (A)(6) unconstitutionally restricted the right of plaintiff-appellees to receive and gather nonfee information and information concerning initial consultation fees. Defendants were permanently enjoined from enforcing DR 2–102 (A)(6) save for its prohibition against advertising fees for services other than the initial consultation fee. *Id.*, at 523.

Plaintiff-appellees appealed to this Court, challenging the District Court's refusal to enjoin enforcement of the prohibition of fee advertising. Defendants brought a cross-appeal, arguing that DR 2–102 (A)(6) should have been upheld in its entirety. While these appeals were pending, we decided *Bates* v. *State Bar of Arizona*, 433 U. S. 350 (1977), in which we held that enforcement of a ban on attorney advertising would violate the First and Fourteenth Amendment rights of attorneys seeking to advertise the fees they charged for certain routine legal services. In light of *Bates*, the judgment below was vacated and the case was remanded for further consideration. 433 U. S. 917 (1977).

On remand, defendants agreed that in light of *Bates* DR 2–102 (A)(6) could not constitutionally be enforced to prohibit attorneys from providing plaintiff-appellees with any of the information they sought to publish in their legal services directory. Defendants proposed that a permanent injunction be entered barring them from enforcing DR 2–102 (A)(6) against attorneys providing plaintiff-appellees with information. On May 8, 1979, the District Court declared DR 2–102 (A)(6) unconstitutional on its face and permanently enjoined defendants from enforcing it.[6]

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[6] The District Court's final order provided in pertinent part:

"1. The publication described in plaintiff's complaint, as amended, is declared valid and constitutionally protected;

"2. The Virginia Code of Professional Responsibility Disciplinary Rule 2–102 (A)(6) is declared unconstitutional on its face;

"3. The defendants, their successors in office, their agents and attorneys and all acting in concert therewith are permanently enjoined from enforce-

Plaintiff-appellees also moved for costs, including an award of attorney's fees pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, 42 U. S. C. § 1988.[7] The defendants objected to any fee award on various grounds, including judicial immunity. They did not object to their paying other costs. Although holding the individual defendants immune from attorney's fees liability in their individual capacities, the District Court held that the Act authorized in proper circumstances the award of fees against the State Bar, the Virginia Court and the individual defendants in their official capacities. *Consumers Union of United States, Inc.* v. *American Bar Assn.*, 470 F. Supp. 1055, 1059–1061 (ED Va. 1979).

The District Court went on to conclude that special circumstances made it unjust to award attorney's fees against the State Bar or against the State Bar officers in their official capacities because it was not these defendants but the Virginia Court that had the power to change the State Bar disciplinary rules and because the State Bar and its officers had unsuccessfully sought to persuade the court to amend the Code to conform to what they deemed to be constitutional standards. There were no similar circumstances making it unjust to award attorney's fees against the Virginia Court and its chief justice in his official capacity. This was because the court had denied the State Bar's petition to amend the Code to conform to what were deemed to be the requirements of *Bigelow* v. *Virginia*, 421 U. S. 809 (1975), and had also failed to amend the Code to conform to the holding in *Bates* v. *State Bar of Arizona*, *supra*. Hence, "[i]t would hardly be unjust to order the

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ment of Virginia Code of Professional Responsibility Disciplinary Rule 2-102 (A)(6)."

[7] The Civil Rights Attorney's Fees Awards Act, 42 U. S. C. § 1988, was enacted into law on October 19, 1976, five months after the trial in this action and two months before the District Court's initial decision. The Act is applicable in this case because Congress intended for the Act to apply to actions that were pending when the Act was passed. *Hutto* v. *Finney*, 437 U. S. 678, 694–695, n. 23 (1978).

Supreme Court of Virginia defendants to pay plaintiffs reasonable attorneys fees in light of their continued failure and apparent refusal to amend [the Code] to conform with constitutional requirements." 470 F. Supp., at 1063. The parties were directed to attempt to reach an agreement on a reasonable sum, failing which the court would determine the fee.[8]

On May 23, 1979, defendants filed a petition for rehearing, arguing for the first time, on judicial immunity grounds, that the Virginia Court and its chief justice were exempt from having declaratory and injunctive relief entered against them. It was also argued that in any event it was an abuse of discretion to enter the fee award against the Virginia Court and its chief justice.

Following denial of rehearing, the Virginia Court and its chief justice appealed, presenting the following questions:

1. Is the Supreme Court of Virginia immune from judgment under the doctrine of judicial immunity?
2. May the Civil Rights Attorney's Fees Awards Act of 1976 be construed to permit an award of attorneys' fees against the Supreme Court of Virginia for its judicial acts?
3. Does the doctrine of judicial immunity preclude the award of attorneys' fees for failure to correct a challenged judicial act which is the subject of litigation?
4. On the facts before it, did the District Court abuse its discretion in awarding fees against the Virginia Court?

Appellees moved to dismiss or affirm, the motion to dismiss urging that the claim of judicial immunity from declaratory or injunctive relief was not properly before the Court be-

[8] Judge Warriner dissented on the grounds that legislative immunity barred an award of attorney's fees and that it would be unjust to award attorney's fees against a state supreme court in the absence of a showing of bad faith. 470 F. Supp., at 1063.

cause it had not been timely raised in the District Court and had therefore been waived. We noted probable jurisdiction, 444 U. S. 914 (1979).

III

Title 42 U. S. C. § 1988, as amended by the Civil Rights Attorney's Fees Awards Act of 1976 (Act), 90 Stat. 2641, provides in pertinent part:

> "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

The District Court held that in light of the § 1983 judgment that had been entered in favor of appellees, the Act authorized an award of attorney's fees against appellants. Appellants urge that this was error. Their primary contention is that on the grounds of absolute legislative or judicial immunity they should have been excluded from the judgment below and also from liability for attorney's fees. Appellees on the other hand assert that neither judicial nor legislative immunity immunized these defendants from declaratory or injunctive relief as distinguished from a damages award; and in any event they insist that the judgment stand against these defendants because the Virginia Court itself shares direct enforcement authority with the State Bar and hence is subject to prospective judgments just as other enforcement officials are.[9]

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[9] As indicated in the text, the motion to dismiss the appeal rested on the failure of appellants to have raised the immunity issue at an earlier time. We noted probable jurisdiction, and appellees' brief on the merits has not again urged that the claim of immunity was not timely raised either with respect to the fee question alone or with respect to the entry of prospective relief against the Virginia Court and its chief justice. Their arguments, like those of appellants, are centered on the issues of judicial and legislative immunity.

A

Appellees sought declaratory and injunctive relief with respect to particular provisions of the State Bar Code propounded by the Virginia Court. Although it is clear that under Virginia law the issuance of the Bar Code was a proper function of the Virginia Court, propounding the Code was not an act of adjudication but one of rulemaking. The District Court below referred to the issuance of the Code as a judicial function, but this is not conclusive upon us for the purpose of deciding whether issuance of the Code is a judicial act entitled to immunity under § 1983. Judge Warriner, dissenting in the District Court, agreed with a prior District Court holding in *Hirschkop* v. *Virginia State Bar,* 421 F. Supp. 1137, 1156 (ED Va. 1976), rev'd in part on other grounds *sub nom. Hirschkop* v. *Snead,* 594 F. 2d 356 (CA4 1979), that in promulgating disciplinary rules the Virginia Supreme Court acted in a legislative capacity. Judge Warriner said:

> "Disciplinary rules are rules of general application and are statutory in character. They act not on parties litigant but on all those who practice law in Virginia. They do not arise out of a controversy which must be adjudicated, but instead out of a need to regulate conduct for the protection of all citizens. It is evident that, in enacting disciplinary rules, the Supreme Court of Virginia is constituted a legislature." 470 F. Supp., at 1064.

We agree with this analysis and hence must inquire whether the Virginia Court and its chief justice are immune from suit for acts performed in their legislative capacity.

We have already decided that the Speech or Debate Clause immunizes Congressmen from suits for either prospective relief or damages. *Eastland* v. *United States Servicemen's Fund,* 421 U. S. 491, 502–503 (1975). The purpose of this immunity is to insure that the legislative function may be performed independently without fear of outside interference. *Ibid.* To preserve legislative independence, we have concluded that

"legislators engaged 'in the sphere of legitimate legislative activity,' *Tenney* v. *Brandhove*, [341 U. S. 367, 376 (1951)], should be protected not only from the consequences of litigation's results but also from the burden of defending themselves." *Dombrowski* v. *Eastland*, 387 U. S. 82, 85 (1967).

We have also recognized that state legislators enjoy common-law immunity from liability for their legislative acts, an immunity that is similar in origin and rationale to that accorded Congressmen under the Speech or Debate Clause. *Tenney* v. *Brandhove*, 341 U. S. 367 (1951). In *Tenney* we concluded that Congress did not intend § 1983 to abrogate the common-law immunity of state legislators. Although *Tenney* involved an action for damages under § 1983, its holding is equally applicable to § 1983 actions seeking declaratory or injunctive relief.[10] In holding that § 1983 "does not create

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[10] This seems to be the view of the Court of Appeals for the Second Circuit in its recent holding in *Star Distributors, Ltd.* v. *Marino*, 613 F. 2d 4 (1980). That court held that the legislative immunity enjoyed by the members of a state legislative committee bars an action for declaratory and injunctive relief just as it bars an action for damages. Understanding that *Tenney* was based on the similarity between common-law immunity and the Speech or Debate Clause, the Second Circuit reasoned that legislative immunity should protect state legislators in a manner similar to the protection afforded Congressmen. The Courts of Appeals for the Fifth and Eighth Circuits have dismissed on immunity grounds suits seeking both damages and injunctive relief but without separately addressing the issue of immunity from prospective relief. *Safety Harbor* v. *Birchfield*, 529 F. 2d 1251 (CA5 1976); *Smith* v. *Klecker*, 554 F. 2d 848 (CA8 1977); *Green* v. *DeCamp*, 612 F. 2d 368 (CA8 1980). The Court of Appeals for the Fourth Circuit, however, takes the contrary view and rejects the notion that the legislative immunity enjoyed by state officials bars suits for prospective relief. *Jordan* v. *Hutcheson*, 323 F. 2d 597 (1963); *Eslinger* v. *Thomas*, 476 F. 2d 225, 230 (1973). Both opinions of the Court of Appeals for the Fourth Circuit, however, were rendered prior to this Court's decision in *Eastland* v. *United States Servicemen's Fund*, 421 U. S. 491 (1975). The Court of Appeals for the Ninth Circuit may have a similar view with respect to the immunity enjoyed by officials of a regional body exercising both legislative and executive powers. *Jacobson* v. *Tahoe Regional Planning Agency*, 566 F. 2d 1353 (1977).

civil liability" for acts unknown "in a field where legislators traditionally have power to act," *id.*, at 379, we did not distinguish between actions for damages and those for prospective relief. Indeed, we have recognized elsewhere that "a private civil action, whether for an injunction or damages, creates a distraction and forces [legislators] to divert their time, energy, and attention from their legislative tasks to defend the litigation." *Eastland* v. *United States Servicemen's Fund, supra,* at 503. Although the separation-of-powers doctrine justifies a broader privilege for Congressmen than for state legislators in criminal actions, *United States* v. *Gillock,* 445 U. S. 360 (1980), we generally have equated the legislative immunity to which state legislators are entitled under § 1983 to that accorded Congressmen under the Constitution. *Eastland* v. *United States Servicemen's Fund, supra,* at 502–503, 505, 506; *Dombrowski* v. *Eastland, supra,* at 84–85; *United States* v. *Johnson,* 383 U. S. 169, 180 (1966); *Tenney* v. *Brandhove, supra,* at 377–379.[11] Thus, there is little doubt that if the Virginia Legislature had enacted the State Bar Code and if suit had been brought against the legislature, its committees, or members for refusing to amend the Code in the wake of our cases indicating that the Code in some respects would be held invalid, the defendants in that suit could

[11] Contrary to appellees' suggestion, we do not view *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency,* 440 U. S. 391 (1979), as indicating our approval of injunctive relief against a regional legislative body or its officers. No injunctive relief had been awarded when *Lake Country Estates* reached this Court. Although it is not entirely clear, the Court of Appeals in that case seemed to believe that immunity would not bar a suit for equitable relief against officials of the Tahoe Regional Planning Agency (TRPA). The court did not specify whether equitable relief could be founded on acts for which the officials would otherwise enjoy legislative immunity, and this Court did not have occasion to express any view on this question because the TRPA never challenged this aspect of the Court of Appeals' decision. We simply affirmed the Court of Appeals' holding that TRPA officials could not be held liable in damages for their legislative acts.

successfully have sought dismissal on the grounds of absolute legislative immunity.[12]

Appellees submit that whatever may be true of state legislators, the Virginia Court and its members should not be accorded the same immunity where they are merely exercising a delegated power to make rules in the same manner that many executive and agency officials wield authority to make rules in a wide variety of circumstances. *All* of such officials, it is urged, are not absolutely immune from civil suit. As much could be conceded, but it would not follow that, as appellees would have it, in *no* circumstances do those who exercise delegated legislative power enjoy legislative immunity. In any event, in this case the Virginia Court claims inherent power to regulate the Bar, and as the dissenting judge below indicated, the Virginia Court is exercising the State's entire legislative power with respect to regulating the Bar, and its members are the State's legislators for the purpose of issuing the Bar Code. Thus the Virginia Court and its members are immune from suit when acting in their legislative capacity.

B

If the sole basis for appellees' § 1983 action against the Virginia Court and its chief justice were the issuance of, or failure to amend, the challenged rules, legislative immunity would foreclose suit against appellants. As has been pointed out, however, the Virginia Court performs more than a legislative role with respect to the State Bar Code. It also hears appeals from lower court decisions in disciplinary cases, a traditional adjudicative task; and in addition, it has independent enforcement authority of its own.

Adhering to the doctrine of *Bradley* v. *Fisher*, 13 Wall. 335 (1872), we have held that judges defending against § 1983

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[12] Of course, legislators sued for enacting a state bar code might also succeed in obtaining dismissals at the outset on grounds other than legislative immunity, such as the lack of a case or controversy.

actions enjoy absolute immunity from damages liability for acts performed in their judicial capacities. *Pierson* v. *Ray*, 386 U. S. 547 (1967); *Stump* v. *Sparkman*, 435 U. S. 349 (1978). However, we have never held that judicial immunity absolutely insulates judges from declaratory or injunctive relief with respect to their judicial acts. The Courts of Appeals appear to be divided on the question whether judicial immunity bars declaratory or injunctive relief; [13] we have not addressed the question.[14]

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[13] The Courts of Appeals for the Second, Fourth, and Seventh Circuits are of the view that judicial immunity does not extend to declaratory and injunctive relief. *Heimbach* v. *Village of Lyons*, 597 F. 2d 344, 347 (CA2 1979); *Timmerman* v. *Brown*, 528 F. 2d 811, 814 (CA4 1975); *Fowler* v. *Alexander*, 478 F. 2d 694, 696 (CA4 1973); *Harris* v. *Harvey*, 605 F. 2d 330, 335, n. 7 (CA7 1979); *Hansen* v. *Ahlgrimm*, 520 F. 2d 768, 769 (CA7 1975); *Jacobson* v. *Schaefer*, 441 F. 2d 127, 130 (CA7 1971). Three other Courts of Appeals, the Eighth, Ninth, and District of Columbia Circuits seem to agree. *Kelsey* v. *Fitzgerald*, 574 F. 2d 443, 444 (CA8 1978); *Williams* v. *Williams*, 532 F. 2d 120, 121–122 (CA8 1976); *Shipp* v. *Todd*, 568 F. 2d 133, 134 (CA9 1978); *Briggs* v. *Goodwin*, 186 U. S. App. D. C. 179, 184, n. 4, 569 F. 2d 10, 15, n. 4 (1977). It is rare, however, that any kind of relief has been entered against judges in actions brought under § 1983 and seeking to restrain or otherwise control or affect the future performance of their adjudicative role. Such suits have been recurringly dismissed for a variety of reasons other than immunity. Hence, the question of awarding attorney's fees against judges will not often arise.

[14] Although we did not address the issue, a state judge was among the defendants in *Mitchum* v. *Foster*, 407 U. S. 225 (1972), where the Court held that § 1983 served to pierce the shield of 28 U. S. C. § 2283 against a federal court enjoining state-court proceedings. The Court did say, quoting from *Ex parte Virginia*, 100 U. S. 339, 346 (1880), to this effect, that § 1983 was designed to enforce the provisions of the Fourteenth Amendment against all state action, whether that action be executive, legislative, or *judicial*. The Court also noted that the proponents of § 1983 at the time it was enacted insisted that state courts were being used to harass and injure citizens, perhaps because they were powerless to stop deprivations

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We need not decide whether judicial immunity would bar prospective relief, for we believe that the Virginia Court and its chief justice properly were held liable in their enforcement capacities. As already indicated, § 54–74 gives the Virginia Court independent authority of its own to initiate proceedings against attorneys. For this reason the Virginia Court and its members were proper defendants in a suit for declaratory and injunctive relief, just as other enforcement officers and agencies were.[15]

Prosecutors enjoy absolute immunity from damages liability, *Imbler* v. *Pachtman*, 424 U. S. 409 (1976), but they are natural targets for § 1983 injunctive suits since they are the state officers who are threatening to enforce and who are enforcing the law. *Gerstein* v. *Pugh*, 420 U. S. 103 (1975),

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or were in league with those who were bent upon abrogating federally protected rights. 407 U. S., at 242.

In *Boyle* v. *Landry*, 401 U. S. 77 (1971), and *O'Shea* v. *Littleton*, 414 U. S. 488 (1974), lower courts had entered injunctions against state officials including state-court judges. In each case, we reversed on the grounds that no case or controversy had been made out against any of the appellants in this Court; and in *O'Shea*, we concluded that even assuming that there was a case or controversy, insufficient grounds for equitable relief had been presented. We did not suggest, however, that judges were immune from suit in their judicial capacity.

Gerstein v. *Pugh*, 420 U. S. 103 (1975), involved a judgment against state-court judges and a prosecuting official declaring unconstitutional and enjoining the enforcement of certain state statutes. The prosecutor brought the case to this Court. We affirmed the declaration that the Florida procedures at issue were unconstitutional and held that *Younger* v. *Harris*, 401 U. S. 37 (1971), did not bar injunctive relief in the circumstances of the case. No issue of absolute immunity was raised or addressed.

[15] Of course, as *Boyle* v. *Landry*, *supra*, and *O'Shea* v. *Littleton*, *supra*, indicate, mere enforcement authority does not create a case or controversy with the enforcement official; but in the circumstances of this case, a sufficiently concrete dispute is as well made out against the Virginia Court as an enforcer as against the State Bar itself. See *Person* v. *Association of the Bar of New York*, 554 F. 2d 534, 536–537 (CA2 1977)

is only one of a myriad of such cases since *Ex parte Young*, 209 U. S. 123 (1908), decided that suits against state officials in federal courts are not barred by the Eleventh Amendment. If prosecutors and law enforcement personnel cannot be proceeded against for declaratory relief, putative plaintiffs would have to await the institution of state-court proceedings against them in order to assert their federal constitutional claims. This is not the way the law has developed, and, because of its own inherent and statutory enforcement powers, immunity does not shield the Virginia Court and its chief justice from suit in this case.[16]

IV

Because appellees properly prevailed in their § 1983 action, the Civil Rights Attorney's Fees Awards Act, 42 U. S. C. § 1988, authorized the District Court, "in its discretion," to award them "a reasonable attorney's fee," which may be recovered from state officials sued in their official capacities. *Hutto* v. *Finney*, 437 U. S. 678, 694 (1978). Applying the standard of *Newman* v. *Piggie Park Enterprises*, 390 U. S. 400, 402 (1968), the District Court indicated that attorney's fees should ordinarily be awarded " 'unless special circumstances would render such an award unjust.' " 470 F. Supp., at 1061.[17]

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[16] Although appellants argued below that the Virginia Court as an entity is not a "person" suable under § 1983, they have not raised this issue before this Court. In any event, prospective relief was properly awarded against the chief justice in his official capacity; and absent a valid claim of immunity, the question remains whether the District Court's award of attorney's fees was proper. Although we would not have appellate jurisdiction under 28 U. S. C. § 1253 to decide the attorney's fees question had it alone been appealed, because the case is properly here on the § 1983 issue we have jurisdiction to decide the attorney's fees issue. Cf. *Rosado* v. *Wyman*, 397 U. S. 397, 404–405 (1970).

[17] The District Court derived this standard from the Senate Committee Report on the Civil Rights Attorney's Fees Awards Act, which stated:

"It is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act. A party seeking to enforce the rights protected by the statutes covered by [the

Accordingly, enforcement authorities against whom § 1983 judgments have been entered would ordinarily be charged with attorney's fees. The District Court nevertheless considered it unjust to require the State Bar defendants to pay attorney's fees because they had recommended that the State Bar Code be amended to conform to what the Bar thought our cases required and because the Virginia Court declined or failed to adopt this proposal. No similar circumstances excused the Virginia Court, the court held, for it was the very authority that had propounded and failed to amend the challenged provisions of the Bar Code.

We are unable to agree that attorney's fees should have been awarded for the reasons relied on by the District Court. Although the Virginia Court and its chief justice were subject to suit in their direct enforcement role, they were immune in their legislative roles. Yet the District Court's award of attorney's fees in this case was premised on acts or omissions for which appellants enjoyed absolute legislative immunity. This was error.

We held in *Hutto* v. *Finney*, *supra*, that Congress intended to waive whatever Eleventh Amendment immunity would otherwise bar an award of attorney's fees against state officers, but our holding was based on express legislative history indicating that Congress intended the Act to abrogate Eleventh Amendment immunity. There is no similar indication in the legislative history of the Act to suggest that Congress intended to permit an award of attorney's fees to be premised on acts for which defendants would enjoy absolute legislative immunity. The House Committee Report on the Act indicates that Congress intended to permit attorney's fees awards in cases in which prospective relief was properly

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Act], if successful, 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.' *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U. S. 400, 402 (1968)." S. Rep. No. 94-1011, p. 4 (1976).

awarded against defendants who would be immune from damages awards, H. R. Rep. No. 94–1558, p. 9 (1976), but there is no indication that Congress intended to permit an award of attorney's fees to be premised on acts that themselves would be insulated from even prospective relief. Because the Virginia Court is immune from suit with respect to its legislative functions, it runs counter to that immunity for a district court's discretion in allowing fees to be guided by considerations centering on the exercise or nonexercise of the state court's legislative powers.

This is not to say that absent some special circumstances in addition to what is disclosed in this record, a fee award should not have been made in this case. We are not convinced that it would be unfair to award fees against the State Bar, which by statute is designated as an administrative agency to help enforce the State Bar Code. Fee awards against enforcement officials are run-of-the-mill occurrences, even though, on occasion, had a state legislature acted or reacted in a different or more timely manner, there would have been no need for a lawsuit or for an injunction. Nor would we disagree had the District Court awarded fees not only against the Bar but also against the Virginia Court because of its own direct enforcement role. However, we hold that it was an abuse of discretion to award fees because the Virginia Court failed to exercise its rulemaking authority in a manner that satisfied the District Court. We therefore vacate the award of attorney's fees and remand for further proceedings consistent with this opinion.

It is so ordered.

Mr. Justice Powell took no part in the consideration or decision of this case.

WALKER *v.* ARMCO STEEL CORP.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 78-1862. Argued January 8, 1980—Decided June 2, 1980

An Oklahoma statute provides that an action shall not be deemed to be "commenced" for purposes of the statute of limitations until service of summons on the defendant, but further provides (§ 97) that if the complaint is filed within the limitations period the action is deemed to have commenced from the date of that filing if the plaintiff serves the defendant within 60 days, even though such service occurs outside the limitations period. Federal Rule of Civil Procedure 3 provides that a civil action is commenced by filing a complaint. In this case, petitioner's personal injury action, based on diversity of citizenship, was brought against respondent in Federal District Court in Oklahoma, and, although the complaint was filed within Oklahoma's 2-year statute of limitations, service on respondent was not effectuated until after the 2-year limitation period and the 60-day service period specified in § 97 had expired. The District Court dismissed the complaint as barred by the Oklahoma statute of limitations, holding that § 97 was an integral part of such statute and that therefore under *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U. S. 530, state law, not Rule 3, applied. The Court of Appeals affirmed.

Held: The action is barred by the Oklahoma statute of limitations. *Ragan, supra.* Pp. 744–753.

(a) The scope of Rule 3 is not sufficiently broad to control the issue before the District Court. *Hanna* v. *Plumer*, 380 U. S. 460, distinguished. There is no indication that the Rule was intended to toll a state statute of limitations, much less that it purported to displace state tolling rules for purposes of state statutes of limitations. In diversity actions, Rule 3 governs the date from which various timing requirements of the Federal Rules begin to run, but does not affect state statutes of limitations. Pp. 748–751.

(b) In contrast to Rule 3, the Oklahoma statute is a statement of a substantive decision by that State that actual service on, and accordingly actual notice to, the defendant is an integral part of the policies (establishment of a deadline after which the defendant may legitimately have peace of mind, and recognition that after a certain period of time it is unfair to require the defendant to attempt to piece together his defense to an old claim) served by the statute of limitations. Rule 3

does not replace such policy determinations found in state law, and that Rule and § 97 can exist side by side, each controlling its own intended sphere of coverage without conflict. Pp. 751–752.

(c) Although in this case failure to apply the state service law might not create any problem of forum shopping, the result would be an inequitable administration of the law. There is no reason why, in the absence of a controlling federal rule, an action based on state law which concededly would be barred in the state courts by the state statute of limitations should proceed to judgment in federal court solely because of the fortuity that there is diversity of citizenship between the litigants. Pp. 752–753.

592 F. 2d 1133, affirmed.

MARSHALL, J., delivered the opinion for a unanimous Court.

Don Manners argued the cause and filed a brief for petitioner.

Jay M. Galt argued the cause and filed a brief for respondent.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This case presents the issue whether in a diversity action the federal court should follow state law or, alternatively, Rule 3 of the Federal Rules of Civil Procedure in determining when an action is commenced for the purpose of tolling the state statute of limitations.

I

According to the allegations of the complaint, petitioner, a carpenter, was injured on August 22, 1975, in Oklahoma City, Okla., while pounding a Sheffield nail into a cement wall. Respondent was the manufacturer of the nail. Petitioner claimed that the nail contained a defect which caused its head to shatter and strike him in the right eye, resulting in permanent injuries. The defect was allegedly caused by respondent's negligence in manufacture and design.

Petitioner is a resident of Oklahoma, and respondent is a foreign corporation having its principal place of business in a

State other than Oklahoma. Since there was diversity of citizenship, petitioner brought suit in the United States District Court for the Western District of Oklahoma. The complaint was filed on August 19, 1977. Although summons was issued that same day,[1] service of process was not made on respondent's authorized service agent until December 1, 1977.[2] On January 5, 1978, respondent filed a motion to dismiss the complaint on the ground that the action was barred by the applicable Oklahoma statute of limitations. Although the complaint had been filed within the 2-year statute of limitations, Okla. Stat., Tit. 12, § 95 (1971),[3] state law does not deem the action "commenced" for purposes of the statute of limitations until service of the summons on the defendant,

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[1] The Court of Appeals stated that summons was issued the following day, August 20. See 592 F. 2d 1133, 1134 (CA10 1979). However, the docket sheet in the District Court indicates that summons was issued August 19. See App. insert preceding p. A-1. Nothing turns on this difference.

[2] The record does not indicate why this delay occurred. The face of the process record shows that the United States Marshal acknowledged receipt of the summons on December 1, 1977, and that service was effectuated that same day. *Id.*, at A-5. At oral argument counsel for petitioner stated that the summons was found "in an unmarked folder in the filing cabinet" in counsel's office some 90 days after the complaint had been filed. Tr. of Oral Arg. 3. See also *id.*, at 6. Counsel conceded that the summons was not delivered to the Marshal until December 1. *Id.*, at 3-4. It is unclear why the summons was placed in the filing cabinet. See *id.*, at 17.

[3] Under Oklahoma law, a suit for products liability, whether based on a negligence theory or a breach of implied warranty theory, is governed by the 2-year statute of limitations period of Okla. Stat., Tit. 12, § 95 (1971). See *Hester* v. *Purex Corp.*, 534 P. 2d 1306, 1308 (Okla. 1975); *O'Neal* v. *Black & Decker Manufacturing Co.*, 523 P. 2d 614, 615 (Okla. 1974); *Kirkland* v. *General Motors Corp.*, 521 P. 2d 1353, 1361 (Okla. 1974). The period begins to run from the date of injury. *O'Neal* v. *Black & Decker Manufacturing Co., supra*, at 615; *Kirkland* v. *General Motors Corp., supra*, at 1361.

Okla. Stat., Tit. 12, § 97 (1971).[4] If the complaint is filed within the limitations period, however, the action is deemed to have commenced from that date of filing if the plaintiff serves the defendant within 60 days, even though that service may occur outside the limitations period. *Ibid.* In this case, service was not effectuated until long after this 60-day period had expired. Petitioner in his reply brief to the motion to dismiss admitted that his case would be foreclosed in state court, but he argued that Rule 3 of the Federal Rules of Civil Procedure governs the manner in which an action is commenced in federal court for all purposes, including the tolling of the state statute of limitations.[5]

The District Court dismissed the complaint as barred by the Oklahoma statute of limitations. 452 F. Supp. 243 (1978). The court concluded that Okla. Stat., Tit. 12, § 97 (1971) was "an integral part of the Oklahoma statute of limitations," 452 F. Supp., at 245, and therefore under *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U. S. 530 (1949), state law applied. The court rejected the argument that *Ragan* had been implicitly overruled in *Hanna* v. *Plumer*, 380 U. S. 460 (1965).

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[4] Oklahoma Stat., Tit. 12, § 97 (1971), provides in pertinent part: "An action shall be deemed commenced, within the meaning of this article [the statute of limitations], as to each defendant, at the date of the summons which is served on him, or on a codefendant, who is a joint contractor or otherwise united in interest with him. . . . An attempt to commence an action shall be deemed equivalent to the commencement thereof, within the meaning of this article, when the party faithfully, properly and diligently endeavors to procure a service; but such attempt must be followed by the first publication or service of the summons, . . . within sixty (60) days."

[5] Petitioner also argued in his reply brief to the motion to dismiss that respondent should have relied on Federal Rule of Civil Procedure 41—dismissal for failure to prosecute—rather than the state statute of limitations. Respondent in its response to the reply brief argued that a Rule 41 argument was implicit in its motion to dismiss. Neither the District Court nor the Court of Appeals addressed this issue.

The United States Court of Appeals for the Tenth Circuit affirmed. 592 F. 2d 1133 (1979). That court concluded that Okla. Stat., Tit. 12, § 97 (1971), was in "direct conflict" with Rule 3. 592 F. 2d, at 1135. However, the Oklahoma statute was "indistinguishable" from the statute involved in *Ragan*, and the court felt itself "constrained" to follow *Ragan*. 592 F. 2d, at 1136.

We granted certiorari, 444 U. S. 823 (1979), because of a conflict among the Courts of Appeals.[6] We now affirm.

II

The question whether state or federal law should apply on various issues arising in an action based on state law which has been brought in federal court under diversity of citizenship jurisdiction has troubled this Court for many years. In the landmark decision of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), we overturned the rule expressed in *Swift* v. *Tyson*, 16 Pet. 1 (1842), that federal courts exercising diversity jurisdiction need not, in matters of "general jurisprudence," apply the nonstatutory law of the State. The Court noted

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[6] Compare case below; *Rose* v. *K. K. Masutoku Toy Factory Co.*, 597 F. 2d 215 (CA10 1979); *Lindsey* v. *Dayton-Hudson Corp.*, 592 F. 2d 1118, 1121–1123 (CA10), cert. denied, 444 U. S. 856 (1979); *Witherow* v. *Firestone Tire & Rubber Co.*, 530 F. 2d 160, 163–166 (CA3 1976); *Anderson* v. *Papillion*, 445 F. 2d 841 (CA5 1971) (*per curiam*); *Groninger* v. *Davison*, 364 F. 2d 638 (CA8 1966); *Sylvester* v. *Messler*, 351 F. 2d 472 (CA6 1965) (*per curiam*), cert. denied, 382 U. S. 1011 (1966), all holding that state law controls, with *Smith* v. *Peters*, 482 F. 2d 799 (CA6 1973), cert. denied, 415 U. S. 989 (1974), and *Sylvestri* v. *Warner & Swasey Co.*, 398 F. 2d 598 (CA2 1968), holding that Rule 3 controls. See also *Ingram* v. *Kumar*, 585 F. 2d 566, 568 (CA2 1978), cert. denied, 440 U. S. 940 (1979) (reaffirming *Sylvestri*); *Prashar* v. *Volkswagen of America, Inc.*, 480 F. 2d 947 (CA8 1973), cert. denied *sub nom. Volkswagenwerk Aktiengesellschaft* v. *Prashar*, 415 U. S. 994 (1974) (distinguishing *Ragan*); *Chappell* v. *Rouch*, 448 F. 2d 446 (CA10 1971) (distinguishing *Ragan*). See generally *Walko Corp.* v. *Burger Chef Systems, Inc.*, 180 U. S. App. D. C. 306, 308–311, 554 F. 2d 1165, 1167–1170 (1977) (dicta).

that "[d]iversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the State." *Erie R. Co.* v. *Tompkins, supra,* at 74. The doctrine of *Swift* v. *Tyson* had led to the undesirable results of discrimination in favor of non-citizens, prevention of uniformity in the administration of state law, and forum shopping. 304 U. S., at 74–75. In response, we established the rule that "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any [diversity] case is the law of the State," *id.,* at 78.

In *Guaranty Trust Co.* v. *York,* 326 U. S. 99 (1945), we addressed ourselves to "the narrow question whether, when no recovery could be had in a State court because the action is barred by the statute of limitations, a federal court in equity can take cognizance of the suit because there is diversity of citizenship between the parties," *id.,* at 107. The Court held that the *Erie* doctrine applied to suits in equity as well as to actions at law. In construing *Erie* we noted that "[i]n essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." 326 U. S., at 109. We concluded that the state statute of limitations should be applied. "Plainly enough, a statute that would completely bar recovery in a suit if brought in a State court bears on a State-created right vitally and not merely formally or negligibly. As to consequences that so intimately affect recovery or non-recovery a federal court in a diversity case should follow State law." *Id.,* at 110.

The decision in *York* led logically to our holding in *Ragan* v. *Merchants Transfer & Warehouse Co., supra.* In *Ragan,* the plaintiff had filed his complaint in federal court on September 4, 1945, pursuant to Rule 3 of the Federal Rules of

Civil Procedure. The accident from which the claim arose had occurred on October 1, 1943. Service was made on the defendant on December 28, 1945. The applicable statute of limitations supplied by Kansas law was two years. Kansas had an additional statute which provided: "An action shall be deemed commenced within the meaning of [the statute of limitations], as to each defendant, at the date of the summons which is served on him. . . . An attempt to commence an action shall be deemed equivalent to the commencement thereof within the meaning of this article when the party faithfully, properly and diligently endeavors to procure a service; but such attempt must be followed by the first publication or service of the summons within sixty days." Kan. Gen. Stat. § 60–308 (1935). The defendant moved for summary judgment on the ground that the Kansas statute of limitations barred the action since service had not been made within either the 2-year period or the 60-day period. It was conceded that had the case been brought in Kansas state court it would have been barred. Nonetheless, the District Court held that the statute had been tolled by the filing of the complaint. The Court of Appeals reversed because "the requirement of service of summons within the statutory period was an integral part of that state's statute of limitations." *Ragan*, 337 U. S., at 532.

We affirmed, relying on *Erie* and *York*. "We cannot give [the cause of action] longer life in the federal court than it would have had in the state court without adding something to the cause of action. We may not do that consistently with *Erie R. Co.* v. *Tompkins*." 337 U. S., at 533–534. We rejected the argument that Rule 3 of the Federal Rules of Civil Procedure governed the manner in which an action was commenced in federal court for purposes of tolling the state statute of limitations. Instead, we held that the service of summons statute controlled because it was an integral part of the state statute of limitations, and under *York* that statute of limitations was part of the state-law cause of action.

Ragan was not our last pronouncement in this difficult area, however. In 1965 we decided *Hanna* v. *Plumer*, 380 U. S. 460, holding that in a civil action where federal jurisdiction was based upon diversity of citizenship, Rule 4 (d)(1) of the Federal Rules of Civil Procedure, rather than state law, governed the manner in which process was served. Massachusetts law required in-hand service on an executor or administrator of an estate, whereas Rule 4 permits service by leaving copies of the summons and complaint at the defendant's home with some person "of suitable age and discretion." The Court noted that in the absence of a conflicting state procedure, the Federal Rule would plainly control, 380 U. S., at 465. We stated that the "outcome-determination" test of *Erie* and *York* had to be read with reference to the "twin aims" of *Erie:* "discouragement of forum-shopping and avoidance of inequitable administration of the laws." 380 U. S., at 468. We determined that the choice between the state in-hand service rule and the Federal Rule "would be of scant, if any, relevance to the choice of a forum," for the plaintiff "was not presented with a situation where application of the state rule would wholly bar recovery; rather, adherence to the state rule would have resulted only in altering the way in which process was served." *Id.*, at 469 (footnote omitted). This factor served to distinguish that case from *York* and *Ragan*. See 380 U. S., at 469, n. 10.

The Court in *Hanna*, however, pointed out "a more fundamental flaw" in the defendant's argument in that case. *Id.*, at 469. The Court concluded that the *Erie* doctrine was simply not the appropriate test of the validity and applicability of one of the Federal Rules of Civil Procedure:

> "The *Erie* rule has never been invoked to void a Federal Rule. It is true that there have been cases where this Court had held applicable a state rule in the face of an argument that the situation was governed by one of the

> Federal Rules. But the holding of each such case was not that *Erie* commanded displacement of a Federal Rule by an inconsistent state rule, but rather that the scope of the Federal Rule was not as broad as the losing party urged, and therefore, there being no Federal Rule which covered the point in dispute, *Erie* commanded the enforcement of state law." 380 U. S., at 470.

The Court cited *Ragan* as one of the examples of this proposition, 380 U. S., at 470, n. 12.[7] The Court explained that where the Federal Rule was clearly applicable, as in *Hanna*, the test was whether the Rule was within the scope of the Rules Enabling Act, 28 U. S. C. § 2072, and if so, within a constitutional grant of power such as the Necessary and Proper Clause of Art. I. 380 U. S., at 470–472.

III

The present case is indistinguishable from *Ragan*. The statutes in both cases require service of process to toll the statute of limitations, and in fact the predecessor to the Oklahoma statute in this case was derived from the predecessor to the Kansas statute in *Ragan*. See *Dr. Koch Vegetable Tea Co.* v. *Davis*, 48 Okla. 14, 22, 145 P. 337, 340 (1914). Here, as in *Ragan*, the complaint was filed in federal court under diversity jurisdiction within the 2-year statute of limitations, but service of process did not occur until after the 2-year period and the 60-day service period had run. In both cases the suit would concededly have been barred in the applicable state court, and in both instances the state service statute was held to be an integral part of the statute of limitations by the lower court more familiar than we with state law. Accordingly, as the Court of Appeals held below,

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[7] The Court in *Hanna* noted that "this Court has never before been confronted with a case where the applicable Federal Rule is in direct collision with the law of the relevant State." 380 U. S., at 472.

the instant action is barred by the statute of limitations unless *Ragan* is no longer good law.

Petitioner argues that the analysis and holding of *Ragan* did not survive our decision in *Hanna.*[8] Petitioner's position is that Okla. Stat., Tit. 12, § 97 (1971), is in direct conflict with the Federal Rule. Under *Hanna,* petitioner contends, the appropriate question is whether Rule 3 is within the scope of the Rules Enabling Act and, if so, within the constitutional power of Congress. In petitioner's view, the Federal Rule is to be applied unless it violates one of those two restrictions. This argument ignores both the force of *stare decisis* and the specific limitations that we carefully placed on the *Hanna* analysis.

We note at the outset that the doctrine of *stare decisis* weighs heavily against petitioner in this case. Petitioner seeks to have us overrule our decision in *Ragan. Stare decisis* does not mandate that earlier decisions be enshrined forever, of course, but it does counsel that we use caution in rejecting established law. In this case, the reasons petitioner asserts for overruling *Ragan* are the same factors which we concluded in *Hanna* did not undermine the validity of *Ragan.* A litigant who in effect asks us to reconsider not one but two prior decisions bears a heavy burden of supporting such a change in our jurisprudence. Petitioner here has not met that burden.

This Court in *Hanna* distinguished *Ragan* rather than overruled it, and for good reason. Application of the *Hanna* analysis is premised on a "direct collision" between the Federal Rule and the state law. 380 U. S., at 472. In *Hanna* itself the "clash" between Rule 4 (d)(1) and the state in-hand service requirement was "unavoidable." 380 U. S., at 470. The first question must therefore be whether the scope of the Federal Rule in fact is sufficiently broad to control the issue before

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[8] Mr. Justice Harlan in his concurring opinion in *Hanna* concluded that *Ragan* was no longer good law. 380 U. S., at 474–478. See also *Sylvestri* v. *Warner & Swasey Co.,* 398 F. 2d 598 (CA2 1968).

the Court. It is only if that question is answered affirmatively that the *Hanna* analysis applies.[9]

As has already been noted, we recognized in *Hanna* that the present case is an instance where "the scope of the Federal Rule [is] not as broad as the losing party urge[s], and therefore, there being no Federal Rule which cover[s] the point in dispute, *Erie* command[s] the enforcement of state law." *Ibid.* Rule 3 simply states that "[a] civil action is commenced by filing a complaint with the court." There is no indication that the Rule was intended to toll a state statute of limitations,[10] much less that it purported to displace state

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[9] This is not to suggest that the Federal Rules of Civil Procedure are to be narrowly construed in order to avoid a "direct collision" with state law. The Federal Rules should be given their plain meaning. If a direct collision with state law arises from that plain meaning, then the analysis developed in *Hanna* v. *Plumer* applies.

[10] "Rule 3 simply provides that an action is commenced by filing the complaint and has as its primary purpose the measuring of time periods that begin running from the date of commencement; the rule does not state that filing tolls the statute of limitations." 4 C. Wright & A. Miller, Federal Practice and Procedure § 1057, p. 191 (1969) (footnote omitted).

The Note of the Advisory Committee on the Rules states:

"When a Federal or State statute of limitations is pleaded as a defense, a question may arise under this rule whether the mere filing of the complaint stops the running of the statute, or whether any further step is required, such as, service of the summons and complaint or their delivery to the marshal for service. The answer to this question may depend on whether it is competent for the Supreme Court, exercising the power to make rules of procedure without affecting substantive rights, to vary the operation of statutes of limitations. The requirement of Rule 4 (a) that the clerk shall forthwith issue the summons and deliver it to the marshal for service will reduce the chances of such a question arising." 28 U. S. C. App., pp. 394–395.

This Note establishes that the Advisory Committee predicted the problem which arose in *Ragan* and arises again in the instant case. It does not indicate, however, that Rule 3 was *intended* to serve as a tolling provision for statute of limitations purposes; it only suggests that the Advisory Committee thought the Rule *might* have that effect.

tolling rules for purposes of state statutes of limitations. In our view, in diversity actions [11] Rule 3 governs the date from which various timing requirements of the federal rules begin to run, but does not affect state statutes of limitations. Cf. 4 C. Wright & A. Miller, Federal Practice and Procedure § 1057, pp. 190–191 (1969); *id.*, § 1051, at 165–166.

In contrast to Rule 3, the Oklahoma statute is a statement of a substantive decision by that State that actual service on, and accordingly actual notice by, the defendant is an integral part of the several policies served by the statute of limitations. See *C & C Tile Co.* v. *Independent School District No. 7 of Tulsa County*, 503 P. 2d 554, 559 (Okla. 1972). The statute of limitations establishes a deadline after which the defendant may legitimately have peace of mind; it also recognizes that after a certain period of time it is unfair to require the defendant to attempt to piece together his defense to an old claim. A requirement of actual service promotes both of those functions of the statute. See generally *ibid.; Seitz* v. *Jones*, 370 P. 2d 300, 302 (Okla. 1961). See also Ely, The Irrepressible Myth of Erie, 87 Harv. L. Rev. 693, 730–731 (1974).[12] It is these policy aspects which make the service

[11] The Court suggested in *Ragan* that in suits to enforce rights under a federal statute Rule 3 means that filing of the complaint tolls the applicable statute of limitations. 337 U. S., at 533, distinguishing *Bomar* v. *Keyes*, 162 F. 2d 136, 140–141 (CA2), cert. denied, 332 U. S. 825 (1947). See Ely, The Irrepressible Myth of Erie, 87 Harv. L. Rev. 693, 729 (1974). See also *Walko Corp.* v. *Burger Chef Systems, Inc.*, 180 U. S. App. D. C., at 308, n. 19, 554 F. 2d, at 1167, n. 19; 4 Wright & Miller, *supra*, § 1056, and authorities collected therein. We do not here address the role of Rule 3 as a tolling provision for a statute of limitations, whether set by federal law or borrowed from state law, if the cause of action is based on federal law.

[12] The importance of actual service, with corresponding actual notice, to the statute of limitations scheme in Oklahoma is further demonstrated by the fact that under Okla. Stat., Tit. 12, § 97 (1971), the statute of limitations must be tolled as to each defendant through individual service, unless a codefendant who is served is "united in interest" with the unserved

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requirement an "integral" part of the statute of limitations both in this case and in *Ragan*. As such, the service rule must be considered part and parcel of the statute of limitations.[13] Rule 3 does not replace such policy determinations found in state law. Rule 3 and Okla. Stat., Tit. 12, § 97 (1971), can exist side by side, therefore, each controlling its own intended sphere of coverage without conflict.

Since there is no direct conflict between the Federal Rule and the state law, the *Hanna* analysis does not apply.[14] Instead, the policies behind *Erie* and *Ragan* control the issue whether, in the absence of a federal rule directly on point, state service requirements which are an integral part of the state statute of limitations should control in an action based on state law which is filed in federal court under diversity

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defendant. That requirement, like the service requirement itself, does nothing to promote the general policy behind all statutes of limitations of keeping stale claims out of court. Instead, the service requirement furthers a different but related policy decision: that each defendant has a legitimate right not to be surprised by notice of a lawsuit after the period of liability has run. If the defendant is "united in interest" with a codefendant who has been served, then presumably the defendant will receive actual notice of the lawsuit through the codefendant and will not have his peace of mind disturbed when he receives official service of process. Similarly, the defendant will know that he must begin gathering his evidence while that task is still deemed by the State to be feasible.

[13] The substantive link of § 97 to the statute of limitations is made clear as well by another provision of Oklahoma law. Under Okla. Stat., Tit. 12, § 151 (1971), "[a] civil action is deemed commenced by filing in the office of the court clerk of the proper court a petition and by the clerk's issuance of summons thereon." This is the state-law corollary to Rule 3. However, § 97, not § 151, controls the commencement of the lawsuit for statute of limitations purposes. See *Tyler* v. *Taylor*, 578 P. 2d 1214 (Okla. App. 1977). Just as § 97 and § 151 can both apply in state court for their separate purposes, so too § 97 and Rule 3 may both apply in federal court in a diversity action.

[14] Since we hold that Rule 3 does not apply, it is unnecessary for us to address the second question posed by the *Hanna* analysis: whether Rule 3, if it applied, would be outside the scope of the Rules Enabling Act or beyond the power of Congress under the Constitution.

jurisdiction. The reasons for the application of such a state service requirement in a diversity action in the absence of a conflicting federal rule are well explained in *Erie* and *Ragan*, see *supra*, at 744–746, and need not be repeated here. It is sufficient to note that although in this case failure to apply the state service law might not create any problem of forum shopping,[15] the result would be an "inequitable administration" of the law. *Hanna* v. *Plumer*, 380 U. S., at 468. There is simply no reason why, in the absence of a controlling federal rule, an action based on state law which concededly would be barred in the state courts by the state statute of limitations should proceed through litigation to judgment in federal court solely because of the fortuity that there is diversity of citizenship between the litigants. The policies underlying diversity jurisdiction do not support such a distinction between state and federal plaintiffs, and *Erie* and its progeny do not permit it.

The judgment of the Court of Appeals is

Affirmed.

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[15] There is no indication that when petitioner filed his suit in federal court he had any reason to believe that he would be unable to comply with the service requirements of Oklahoma law or that he chose to sue in federal court in an attempt to avoid those service requirements.

HANRAHAN ET AL. *v.* HAMPTON ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 79-912. Decided June 2, 1980*

The Civil Rights Attorney's Fees Awards Act of 1976 (Act) permits the award of a reasonable attorney's fee to the "prevailing party" as part of the taxable costs in a suit brought under any of several specified civil rights statutes. Respondents brought suit under certain of those statutes, alleging that their constitutional rights had been violated by petitioners, and seeking damages. The District Court directed verdicts for petitioners, but the Court of Appeals reversed and remanded for a new trial, and also awarded to respondents their costs on appeal, including attorney's fees which it believed to be authorized by the Act.

Held: Respondents were not "prevailing" parties in the sense intended by the Act. While Congress contemplated the award of fees *pendente lite* in some cases, it intended to permit such an interlocutory award only when a party has prevailed on the merits of at least some of his claims, either in the trial court or on appeal. Respondents have not prevailed on the merits of any of their claims, since the Court of Appeals held only that they were entitled to a trial of their cause. Nor may they fairly be said to have "prevailed" by reason of the Court of Appeals' other interlocutory dispositions that affected only the extent of discovery, since such determinations might affect the disposition on the merits, but were themselves not matters on which a party could "prevail" for purposes of shifting his counsel fees to the opposing party under the Act.

Certiorari granted in part; 600 F. 2d 600, reversed in part.

PER CURIAM.

In the Civil Rights Attorney's Fees Awards Act of 1976, Congress amended 42 U. S. C. § 1988 to permit the award of a reasonable attorney's fee to the "prevailing party" as part of the taxable costs in a suit brought under any of several specified civil rights statutes. The respondents brought suit

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*Together with No. 79-914, *Johnson et al.* v. *Hampton et al.*, also on certiorari to the same court.

under three of those statutes in the United States District Court for the Northern District of Illinois, alleging that their constitutional rights had been violated by the petitioners, and seeking money damages from them.[1] The District Court directed verdicts for the petitioners, but the Court of Appeals reversed and remanded the case to the District Court for a new trial, 600 F. 2d 600. The Court of Appeals also awarded to the respondents their costs on appeal, including attorney's fees which it believed to be authorized by § 1988. *Id.*, at 643–644.[2]

The final sentence of § 1988, as amended, provides as follows:

"In any action or proceeding to enforce a provision of

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[1] The controversy arose from the execution in 1969 of a judicial warrant to search for and seize illegal weapons within an apartment in Chicago occupied by nine members of the Black Panther Party. In the course of the search two of the apartment's occupants were killed by gunfire, and four others were wounded. The police seized various weapons and arrested the seven surviving occupants of the apartment. The survivors were indicted by a state grand jury on charges of attempted murder and aggravated battery, but the indictments ultimately were dismissed. Those seven persons and the legal representatives of the two persons killed are the respondents in these cases. Named as defendants in the respondents' suits were Cook County, the city of Chicago, and various state and local officials allegedly involved in the search or its aftermath. Those officials are the petitioners in No. 79–912. After proceedings in the District Court and the Court of Appeals resulted in the dismissal of the complaint against the city and the county, see *Hampton* v. *Chicago*, 339 F. Supp. 695 (ND Ill. 1972), aff'd in part and rev'd in part, 484 F. 2d 602 (CA7 1973), the respondents filed an amended complaint naming as additional defendants the three Federal Bureau of Investigation agents and an informant who are the petitioners in No. 79–914.

The respondents based their claims on 42 U. S. C. §§ 1983, 1985 (3) (1976 ed., Supp. II), and 1986, and on provisions of the Constitution. They also alleged various causes of action under state law.

[2] In an unpublished supplemental opinion issued on December 12, 1979 (as amended December 21, 1979), fixing the amount of the fee award, the Court of Appeals reiterated its conclusion that the respondents were "prevailing parties" within the meaning of 42 U. S. C. § 1988.

> sections 1981, 1982, 1983, 1985, and 1986 of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U. S. C. § 1988.

The statute by its terms thus permits the award of attorney's fees only to a "prevailing party." Accordingly, in the present cases, the Court of Appeals was authorized to award to the respondents the attorney's fees attributable to their appeal only if, by reason of obtaining a partial reversal of the trial court's judgment, they "prevailed" within the meaning of § 1988. The Court of Appeals believed that they had prevailed with respect to the appeal in this case,[3] resting its conclusion upon the following appellate rulings favorable to the respondents: (1) the reversal of the District Court's judgment directing verdicts against them, save with respect to certain of the defendants; (2) the reversal of the District Court's denial of their motion to discover the identity of an informant; and (3) the direction to the District Court on remand to consider allowing further discovery, and to conduct a hearing on the respondents' contention that the conduct of some of the petitioners in response to the trial court's discovery orders warranted the imposition of sanctions under Federal Rule of Civil Procedure 37 (b)(2). While the respondents did prevail on these matters in the sense that the Court of Appeals overturned several rulings against them by the District Court, they were not, we have concluded, "prevailing" parties in the sense intended by 42 U. S. C. § 1988, as amended.

The legislative history of the Civil Rights Attorney's Fees Awards Act of 1976 indicates that a person may in some circumstances be a "prevailing party" without having obtained a

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[3] The Court of Appeals recognized that the respondents had not "prevailed" in the District Court, and for that reason limited the award of counsel fees to those incurred by the respondents in the course of the appeal. 600 F. 2d 600, 643–644.

favorable "final judgment following a full trial on the merits," H. R. Rep. No. 94–1558, p. 7 (1976). See also S. Rep. No. 94–1011, p. 5 (1976). Thus, for example, "parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief," *ibid.* See also H. R. Rep. No. 94–1558, *supra,* at 7, and cases cited; *Dawson* v. *Pastrick,* 600 F. 2d 70, 78 (CA7 1979); *Nadeau* v. *Helgemoe,* 581 F. 2d 275, 279–281 (CA1 1978).

It is evident also that Congress contemplated the award of fees *pendente lite* in some cases. S. Rep. No. 94–1011, *supra,* at 5; H. R. Rep. No. 94–1558, *supra,* at 7–8. But it seems clearly to have been the intent of Congress to permit such an interlocutory award only to a party who has established his entitlement to some relief on the merits of his claims, either in the trial court or on appeal. The congressional Committee Reports described what were considered to be appropriate circumstances for such an award by reference to two cases—*Bradley* v. *Richmond School Board,* 416 U. S. 696 (1974), and *Mills* v. *Electric Auto-Lite Co.,* 396 U. S. 375 (1970). S. Rep. No. 94–1011, *supra,* at 5; H. R. Rep. No. 94–1558, *supra,* at 8. In each of those cases the party to whom fees were awarded had established the liability of the opposing party, although final remedial orders had not been entered. The House Committee Report, moreover, approved the standard suggested by this Court in *Bradley,* that " 'the entry of any order that determines substantial rights of the parties may be an appropriate occasion upon which to consider the propriety of an award of counsel fees . . . ,' " H. R. Rep. No. 94–1558, *supra,* at 8, quoting *Bradley* v. *Richmond School Board, supra,* at 723, n. 28. Similarly, the Senate Committee Report explained that the award of counsel fees *pendente lite* would be "especially appropriate where a party has prevailed on an important matter in the course of litigation, even when he ultimately does not prevail on *all* issues." S. Rep. No. 94–1011, *supra,* at 5 (emphasis added). It seems apparent from these pas-

sages that Congress intended to permit the interim award of counsel fees only when a party has prevailed on the merits of at least some of his claims. For only in that event has there been a determination of the "substantial rights of the parties," which Congress determined was a necessary foundation for departing from the usual rule in this country that each party is to bear the expense of his own attorney.[4]

The respondents have of course not prevailed on the merits of any of their claims. The Court of Appeals held only that the respondents were entitled to a trial of their cause.[5] As a practical matter they are in a position no different from that

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[4] The provision for counsel fees in § 1988 was patterned upon the attorney's fees provisions contained in Titles II and VII of the Civil Rights Act of 1964, 42 U. S. C. §§ 2000a–3 (b) and 2000e–5 (k), and § 402 of the Voting Rights Act Amendments of 1975, 42 U. S. C. § 1973*l* (e). S. Rep. No. 94–1011, p. 2 (1976); H. R. Rep. No. 94–1558, p. 5 (1976). Those provisions have been construed by the Courts of Appeals to permit the award of counsel fees only to a party who has prevailed on the merits of a claim. See *Bly* v. *McLeod*, 605 F. 2d 134, 137 (CA4 1979) (Voting Rights Act); *Chinese for Affirmative Action* v. *Leguennec*, 580 F. 2d 1006, 1009 (CA9 1978) (same); *Grubbs* v. *Butz*, 179 U. S. App. D. C. 18, 20–21, 548 F. 2d 973, 975–976 (1976) (Title VII); *Sperling* v. *United States*, 515 F. 2d 465, 485 (CA3 1975) (same). See also *Christiansburg Garment Co.* v. *EEOC*, 434 U. S. 412, 418 (1978) ("[W]hen a district court awards counsel fees [under the Civil Rights Act of 1964] to a prevailing plaintiff, it is awarding them against a violator of federal law"). But cf. *Van Hoomissen* v. *Xerox Corp.*, 503 F. 2d 1131, 1133 (CA9 1974).

In the cases cited by the Court of Appeals to justify the award of counsel fees in these cases, those to whom fees were awarded had prevailed on the merits of at least some of their claims. See *Davis* v. *Murphy*, 587 F. 2d 362, 363–364 (CA7 1978); *Nadeau* v. *Helgemoe*, 581 F. 2d 275, 279–281 (CA1 1978); *Wharton* v. *Knefel*, 562 F. 2d 550, 556 (CA8 1977).

[5] The Court of Appeals stated that, in reversing the directed verdicts, it was "not passing on the ultimate validity of [the respondents'] claims," 600 F. 2d, at 621, n. 20. Indeed, Chief Judge Fairchild emphasized in his concurring opinion that the court's use of the phrase "'prima facie' case" in referring to the evidence adduced by the respondents should not be taken to mean that at "any stage of this case . . . the evidence compelled a verdict for [the respondents] unless rebutted." *Id.*, at 648.

they would have occupied if they had simply defeated the defendants' motion for a directed verdict in the trial court. The jury may or may not decide some or all of the issues in favor of the respondents. If the jury should not do so on remand in these cases, it could not seriously be contended that the respondents had prevailed. See *Swietlowich* v. *Bucks County*, 620 F. 2d 33, 34 (CA3 1980). Nor may they fairly be said to have "prevailed" by reason of the Court of Appeals' other interlocutory dispositions, which affected only the extent of discovery. As is true of other procedural or evidentiary rulings, these determinations may affect the disposition on the merits, but were themselves not matters on which a party could "prevail" for purposes of shifting his counsel fees to the opposing party under § 1988. See *Bly* v. *McLeod*, 605 F. 2d 134, 137 (CA4 1979).

The motion of Fraternal Order of Police of the State of Illinois in case No. 79–912 for leave to file a brief, as *amicus curiae*, is granted.

The respondents' motions for leave to proceed *in forma pauperis* are granted, the petitions for certiorari are granted, limited to the question of the propriety of the award of attorney's fees by the Court of Appeals, and the judgment is reversed insofar as it awarded attorney's fees to the respondents. In all other respects, the petitions for certiorari are denied.

It is so ordered.

MR. JUSTICE STEVENS took no part in the consideration or decision of these cases.

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, concurring in part and dissenting in part.

I join the Court's opinion insofar as it reverses the award of attorney's fees entered by the Court of Appeals for the Seventh Circuit. As I would grant the petition filed by the

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federal defendants in its entirety, I dissent from the denial of certiorari in No. 79-914.[1]

I

This civil litigation arose in the aftermath of a 1969 police raid on a Chicago apartment occupied by nine members of the Black Panther Party, two of whom were killed. The surviving occupants of the apartment and the legal representatives of the deceased Black Panthers filed four actions for damages, now consolidated, against 28 state and federal law enforcement officials. The complaints allege numerous violations of constitutional rights. In particular, the plaintiffs claim that three agents assigned to the Federal Bureau of Investigation's Chicago office and an informant working with them (the federal defendants) conspired with state officers to carry out the operation, to conceal its allegedly sinister nature, and to harass the plaintiffs with unfounded prosecutions.

The jury trial lasted 18 months, generating a 37,000-page transcript and masses of documentary evidence. At the close of the plaintiffs' case, some 16 months after trial began, the District Court granted directed verdicts in favor of the federal and most of the state defendants. Trial continued as to the police officers who actually participated in the apartment incident. Ultimately, the jury deadlocked and the District Court entered a final judgment directing verdicts in favor of all of the defendants. A divided panel of the Court of Appeals vacated the judgment and ordered a new trial as to all but four of the defendants.

I have not reviewed the entire record of what is said to have been "the longest case tried to a jury in the history of the United States judiciary." Memorandum of District Court, App. to Pet. for Cert. in No. 79-914, p. 175a. I have, how-

[1] I confine this dissent to the federal defendants, although it is not clear that the Court of Appeals properly reversed the directed verdicts as to many of the other defendants. See 600 F. 2d 600, 649 (1979) (Pell, J., dissenting in part).

ever, read with care the three separate opinions filed in the Court of Appeals as well as the District Court's extensive memorandum. Each judge agreed that the case against the federal defendants turns upon the sufficiency of the evidence regarding the alleged conspiracy.

At the close of the plaintiffs' case in chief, the District Court "reviewed all of the evidence . . . with all reasonable inferences that could be drawn therefrom, in the light most favorable to the plaintiffs." *Id.*, at 186a. The court found the record "devoid of proof of . . . participation [by the federal defendants] in a conspiratorial plan among themselves or with the state defendants. Thus no liability on their part existed and their motions for directed verdicts were granted." *Id.*, at 193a–194a. More specifically, the court explained:

> "Each of the Federal defendants was called by plaintiffs as adverse witnesses. Each testified extensively and denied knowledge or, [*sic*] or participation in, a plan, or an agreement, or a conspiracy between themselves, or between them or any of them, and any and all of the State defendants to violate plaintiffs' constitutional and statutory rights through conduct of the search of the apartment, or prior thereto, or after the occurrence, or otherwise. Their denials were uncontradicted and unimpeached by any testimony whatsover." *Id.*, at 189a–190a.

Despite the explicit findings of the judge who presided over this 18-month trial, a majority of the Court of Appeals drew its own inferences and concluded that the evidence was sufficient to "warrant a jury determination of whether a conspiracy existed." 600 F. 2d 600, 621 (1979). The majority's lengthy opinion indicates that the court relied primarily, if not entirely, upon extensive testimony describing an FBI counterintelligence program directed against a number of organizations including the Black Panther Party.

There is no question that the FBI viewed that organization, which openly advocated armed resistance to authority and

had a documented record of violence,[2] as a serious threat to public safety and to the lives of law enforcement officers. But the issue at trial was not whether the FBI had a program designed to discredit the Black Panthers, or even whether the program had produced excesses. The only issue was whether these federal defendants conspired with state officers to conduct an unlawful search in which excessive force would be used or, subsequently, to harass the plaintiffs with malicious prosecutions. See *id.*, at 648–649 (Fairchild, C. J., concurring).

No one contends that any of the federal defendants took part in the raid itself. They did supply information to state officers about illegal firearms stored in the apartment. But each federal defendant testified that he did not know of and did not participate in any planning or joint activity regarding the operation at any time. This uncontradicted testimony was fully corroborated by the state defendants. In these circumstances, inferences drawn from a program not shown to have been related to the events in question are of dubious value. Judge Pell, dissenting in part in the Court of Appeals, viewed the matter as follows:

> "Going next to the . . . remaining state defendants and the federal defendants, I cannot agree that there was a basis for reasonable inferences that there was any kind of an agreement among them, express or implicit, to

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[2] Summarizing evidence of record, Judge Pell's dissent described the party as an "extremist, paramilitary, uniformed organization. . . . It was a violent, revolutionary organization, which by party edict required its members to own and know how to use weapons and to have access to more than one weapon." *Id.*, at 654.

Judge Pell also noted that "Black Panther publications called for killing policemen," that the party "published a 'Destruction Kit' which described how to make and use incendiary bombs and other similar devices," that children attending its highly praised breakfast program were instructed to "Kill the Pigs," and that Black Panthers had "boasted" that one of their members had killed two Chicago police officers less than a month before the events at issue in this case. *Id.*, at 654–655.

cause a raid to be made with the object of killing or wounding various Black Panther Party members. It is true that at the time in question, the federal authorities thought it would be in the public good to neutralize the Black Panther Party so that it could not carry out its avowed purpose, among others, of killing policemen. Indeed, the idea perhaps could have been entertained by some, if not all, of those defendants who were engaged in law enforcement work that the community would be a safer place for law-abiding citizens to live and work in if Fred Hampton and his cohorts were not on the scene. This human feeling is far removed from a basis for an inference that they deliberately set a course to accomplish that by violence.

"In our jurisprudence a person cannot be convicted of a traffic offense unless proven guilty beyond a reasonable doubt. Even though the present case is of the civil variety, I cannot believe that the law should permit a determination that any person has deliberately planned a homicide on nothing more than speculative conjecture or mere suspicion. The hard basic reasonable inference-creating facts just did not exist in this case." *Id.*, at 660–661.

In the absence of positive evidence or "reasonable inference-creating facts," there was no reason to include the federal defendants in the remand for a second trial.

II

This Court ordinarily leaves questions as to the sufficiency of evidence in a particular case to the courts below. But this is not ordinary litigation. Although it may appear on the surface to be an unexceptional civil rights suit for damages, the extraordinary magnitude of the litigation and the nature and scope of the evidence demonstrate that this lawsuit differs

from the civil damages actions to which our courts are accustomed.

Judge Pell observed that "this case has important overtones of unbridled denigrating attacks on governmental officials." *Id.*, at 666. The allegations of unconstitutional conduct by the state defendants are serious indeed, and I express no view on the merits of these claims. But the plaintiffs have a larger target: the Federal Bureau of Investigation. It is apparent that a basic trial strategy was to attack the FBI broadly. If there were sufficient relevant evidence to support the plaintiffs' claims, the law would require that they go to the jury regardless of underlying motive. Yet the presence of this collateral objective, related only tangentially if at all to the recovery of damages, imposed a special duty on the courts to bear in mind the admonition of *Butz* v. *Economou*, 438 U. S. 478, 508 (1978), that "federal officials [not be] harassed by frivolous lawsuits."

Butz rejected a claim that all highly placed federal officials should be absolutely immune from liability for civil rights violations. But federal officials, like state officials sued under 42 U. S. C. § 1983, have qualified immunity from suit. They therefore are liable only when they "discharge their duties in a way that is known to them to violate . . . a clearly established constitutional rule." 438 U. S., at 507. In *Butz*, we emphasized that absolute immunity is unnecessary to protect the public interest in "encouraging the vigorous exercise of official authority," *id.*, at 506, because qualified immunity shields officials from liability for good-faith mistakes. We predicted that such immunity would prove "workable," because "firm application of the Federal Rules of Civil Procedure" would permit "[i]nsubstantial lawsuits [to] be quickly terminated." In particular, "damages suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment. . . ." *Id.*, at 507–508. The District Court heeded this admonition.

In reversing that court, the Court of Appeals misappreciated the premises on which this Court rested its ruling in *Butz*. In *Butz*, we endeavored to accommodate two important societal objectives: to compensate persons injured by civil rights violations, and to do so without discouraging vigorous enforcement of the laws. The first objective impelled the Court to reject absolute in favor of qualified immunity for most officials. We recognized, however, that our decision would invite litigation in which constitutional claims easily are asserted. We therefore cautioned the judiciary to exercise their authority under the rules of procedure in order to protect official defendants from groundless claims. *Id.*, at 507.

Our concern in *Butz* was that extravagant charges might force officials to trial on claims that lacked a substantial basis in fact. In this case, there can be little speculation as to what evidence may be marshaled in support of the complaint. After 16 months of trial devoted exclusively to the plaintiffs' evidence, the trial court found the record wholly "devoid of proof of . . . participation" by the federal defendants in the conspiracy alleged. App. to Pet. for Cert. in No. 79–914, p. 193a. These defendants continue to assert that their conduct was a routine and good-faith effort at cooperative law enforcement. Neither the parties nor the courts below have identified concrete evidence to the contrary. If a new trial may be ordered in this case, similar allegations could survive properly supported motions for summary judgment on the basis of speculative inferences from unrelated evidence. The prospect of defending such lawsuits can hardly fail to "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Gregoire* v. *Biddle*, 177 F. 2d 579, 581 (CA2 1949).

III

The Court of Appeals' remand for a second trial as to the federal defendants in this case vitiates the protection we

sought to insure in *Butz*. The effect on legitimate law enforcement efforts could be serious. At the least, these officers' experience is likely to discourage other federal officials from cooperating with state law enforcement agencies over which they have no control. I would grant the petition for certiorari.

MR. JUSTICE MARSHALL, dissenting.

It is not clear to me that the award of attorney's fees in this case was in error because "respondents have of course not prevailed on the merits of any of their claims." *Ante*, at 758. The Court concedes that Congress in passing the Civil Rights Attorney's Fees Awards Act of 1976 contemplated the award of attorney's fees *pendente lite* in certain instances, and that a litigant may be a "prevailing party" for purposes of the Act without obtaining final judgment on the merits following a full trial. It is sufficient if there has been a determination of "'substantial rights of the parties,'" *ante*, at 757, quoting H. R. Rep. No. 94–1558, p. 8 (1976).

In the instant case, respondents have been successful in obtaining reversal on appeal of a directed verdict entered against them. While this "only" means that respondents are entitled to a trial of their cause, *ante*, at 758, that is a major accomplishment which determines "substantial rights of the parties." Had petitioners been successful in defending their directed verdict on appeal, there is no doubt that they would be considered to have prevailed on the merits; the lawsuit would have been finished. Obtaining an appellate order requiring that a new trial be held after an action to enforce civil rights has been prematurely terminated similarly is an achievement reflecting on the merits of the case. The decision of the Court of Appeals, establishing that respondents produced sufficient evidence to warrant sending their case to the jury, breathes new life into an otherwise dead lawsuit. Without full briefing and oral argument, I am unable to

say that this does not fall within the category of legal victories which determine "substantial rights of the parties" for purposes of the Act.

In my view, the attorney's fees issue is sufficiently difficult to warrant the plenary attention of this Court rather than summary reversal. Accordingly, I dissent.

Reporter's Note

Orders commencing with May 27, 1980, begin with page 961. The preceding orders in 446 U. S., from April 21 through May 22, 1980, were reported in Parts 1 and 2 at 901–961. These page numbers are the same as they will be in the bound volume, thus making the *permanent* citations available upon publication of the preliminary prints of the United States Reports.

No. 79–1237. PHILLIPS *v.* TEXAS. Appeal from Ct. Crim. App. Tex. dismissed under this Court's Rule 60. Reported below: 588 S. W. 2d 378.

MAY 27, 1980

Appeals Dismissed

No. 79–1340. HODGES TRANSFER CO., INC., ET AL. *v.* ALABAMA PUBLIC SERVICE COMMISSION ET AL. Appeal from Sup. Ct. Ala. dismissed for want of substantial federal question. Reported below: 376 So. 2d 680.

No. 79–1606. CARTER *v.* KANSAS CITY, MISSOURI. Appeal from Ct. App. Mo., Western District, dismissed for want of substantial federal question. Reported below: 591 S. W. 2d 132.

No. 79–1549. GEECK ET AL. *v.* CITY OF NEW ORLEANS ET AL. Appeal from Sup. Ct. La. dismissed for want of substantial federal question. MR. JUSTICE BLACKMUN and MR. JUSTICE POWELL would note probable jurisdiction and set case for oral argument. Reported below: 377 So. 2d 1206.

Certiorari Granted—Reversed and Remanded. (See No. 79–1101, *ante,* p. 643.)

Certiorari Granted—Vacated and Remanded

No. 78–6891. DAVIS *v.* GEORGIA;
No. 79–5032. SPRAGGINS *v.* GEORGIA;
No. 79–5188. COLLINS *v.* GEORGIA;
No. 79–5567. BAKER *v.* GEORGIA;
No. 79–5904. HAMILTON *v.* GEORGIA; and
No. 79–6330. BROOKS *v.* GEORGIA. Sup. Ct. Ga. Motions of petitioners for leave to proceed *in forma pauperis* and certiorari granted. Judgments vacated insofar as they leave undisturbed the death penalties imposed, and cases remanded for further consideration in light of *Godfrey* v. *Georgia, ante,*

p. 420. Reported below: No. 78-6891, 242 Ga. 901, 252 S. E. 2d 443; No. 79-5032, 243 Ga. 73, 252 S. E. 2d 620; No. 79-5188, 243 Ga. 291, 253 S. E. 2d 729; No. 79-5567, 243 Ga. 710, 257 S. E. 2d 192; No. 79-5904, 244 Ga. 145, 259 S. E. 2d 81; No. 79-6330, 244 Ga. 574, 261 S. E. 2d 379.

No. 79-1243. HARRIS, CORRECTIONAL SUPERINTENDENT, ET AL. *v.* BERMUDEZ ET AL. C. A. 2d Cir. Motions of respondents for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Cuyler* v. *Sullivan, ante,* p. 335. Reported below: 614 F. 2d 1285.

No. 79-1462. MCGUIRE, POLICE COMMISSIONER OF NEW YORK CITY *v.* LEIGH ET AL. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Board of Regents* v. *Tomanio, ante,* p. 478. Reported below: 613 F. 2d 380.

No. 79-1565. MISSOURI *v.* SOURS. Sup. Ct. Mo. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Whalen* v. *United States,* 445 U. S. 684 (1980). Reported below: 593 S. W. 2d 208.

No. 79-5790. BROWN *v.* UNITED STATES. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Cuyler* v. *Sullivan, ante,* p. 335. Reported below: 605 F. 2d 561.

No. 79-5995. SMITH *v.* BORDENKIRCHER, PENITENTIARY SUPERINTENDENT. C. A. 6th Cir. Motion of petitioners for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Cuyler* v. *Sullivan, ante,* p. 335. Reported below: 611 F. 2d 374.

No. 79-6376. BARNETT *v.* ALFORD, WARDEN, ET AL. C. A. 10th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Cuyler* v. *Sullivan, ante*, p. 335.

Miscellaneous Orders

No. A-941. EGBERT *v.* KANSAS. Application for stay of mandate of the Supreme Court of Kansas, addressed to MR. JUSTICE BRENNAN and referred to the Court, denied.

No. A-979. BOARD OF EDUCATION OF THE CITY OF DETROIT ET AL. *v.* MILLIKEN, GOVERNOR OF MICHIGAN, ET AL. Application for stay of mandate of the United States Court of Appeals for the Sixth Circuit, presented to MR. JUSTICE STEWART, and by him referred to the Court, denied. The order entered by MR. JUSTICE STEWART on May 14, 1980, is vacated.

No. D-193. IN RE DISBARMENT OF LEACH. It is ordered that Fred L. Leach, of Amarillo, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 79-816. POTOMAC ELECTRIC POWER CO. *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U. S. DEPARTMENT OF LABOR, ET AL. C. A. D. C. Cir. [Certiorari granted, 444 U. S. 1069.] Motion of petitioner to dispense with printing appendix granted.

No. 79-6370. ABLE ET UX. *v.* DELAWARE. Appeal from Sup. Ct. Del. Motion of appellants to seal the record granted.

No. 79-1451. PFISTER *v.* DELTA AIR LINES, INC., ET AL. Motion for leave to file petition for writ of certiorari and for other relief denied.

Probable Jurisdiction Noted

No. 79-1380. HARRIS, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* WILSON ET AL. Appeal from D. C. N. D. Ill. Probable jurisdiction noted. Reported below: 478 F. Supp. 1046.

Certiorari Denied

No. 79-646. PARTIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 601 F. 2d 1000.

No. 79-795. MEDINA-HERRERA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 606 F. 2d 770.

No. 79-1256. TURLOCK IRRIGATION DISTRICT ET AL. *v.* CITY AND COUNTY OF SAN FRANCISCO; and

No. 79-1479. UNITED AIR LINES, INC., ET AL. *v.* CITY AND COUNTY OF SAN FRANCISCO. C. A. 9th Cir. Certiorari denied. Reported below: 616 F. 2d 1063.

No. 79-1273. RUMAN *v.* DEPARTMENT OF REVENUE OF PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 612 F. 2d 574.

No. 79-1289. CHANEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 614 F. 2d 774.

No. 79-1299. FITZGERALD, PUBLIC ADMINISTRATOR OF THE COUNTY OF NEW YORK *v.* AMERICAN TRADING & PRODUCTION CORP. Ct. App. N. Y. Certiorari denied. Reported below: 48 N. Y. 2d 843, 400 N. E. 2d 366.

No. 79-1384. EXXON CORP. *v.* UNITED STATES;

No. 79-1394. SHELL OIL CO. *v.* UNITED STATES; and

No. 79-1395. MARATHON OIL CO. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: — U. S. App. D. C. —, 628 F. 2d 70.

No. 79-1401. OHIO COUNTY AND INDEPENDENT AGRICULTURE SOCIETIES, DELAWARE COUNTY FAIR *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Reported below: 610 F. 2d 448.

No. 79-1442. ASSOCIATED BUILDERS & CONTRACTORS, INC., BALTIMORE METROPOLITAN CHAPTER *v.* LUBBERS, GENERAL COUNSEL OF NATIONAL LABOR RELATIONS BOARD. C. A. 4th Cir. Certiorari denied. Reported below: 610 F. 2d 1221.

No. 79-1445. SCHMIDT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 615 F. 2d 1354.

No. 79-1456. FRUEHAUF CORP. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 10th Cir. Certiorari denied. Reported below: 609 F. 2d 434.

No. 79-1490. JACKSON ET VIR *v.* WHERRY ET AL. Ct. App. D. C. Certiorari denied.

No. 79-1528. SMITH ET AL. *v.* EQUITY NATIONAL INDUSTRIES, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 609 F. 2d 1007.

No. 79-1537. COWLEY, DBA COWLEY PUMP & SUPPLY, ET AL. *v.* BRADEN INDUSTRIES, INC. C. A. 9th Cir. Certiorari denied. Reported below: 613 F. 2d 751.

No. 79-1541. ROSS *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: — Ct. Cl. —, 618 F. 2d 122.

No. 79-1554. FERRELL *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: — S. C. —, 266 S. E. 2d 869.

No. 79-1556. CANRON, INC. *v.* PLASSER AMERICAN CORP. C. A. 4th Cir. Certiorari denied. Reported below: 609 F. 2d 1075.

No. 79-1559. BRAMBLETT *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

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No. 79–1566. IOWA STATE MEN'S REFORMATORY ET AL. *v.* GUNTHER. C. A. 8th Cir. Certiorari denied. Reported below: 612 F. 2d 1079.

No. 79–1568. DISTRICT OF COLUMBIA *v.* BISHOP ET AL. Ct. App. D. C. Certiorari denied. Reported below: 411 A. 2d 997.

No. 79–1590. NOLAN *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 43 Md. App. 747.

No. 79–1593. GULF OIL CORP. ET AL. *v.* PENNSYLVANIA POWER & LIGHT CO. Super. Ct. Pa. Certiorari denied. Reported below: — Pa. Super. —, 411 A. 2d 1203.

No. 79–1619. MOSSER *v.* WHITE-WELD & CO., INC. Ct. Civ. App. Tex., 5th Sup. Jud. Dist. Certiorari denied. Reported below: 587 S. W. 2d 485.

No. 79–1663. PEARSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 517 F. 2d 350.

No. 79–1684. MEDELLIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 614 F. 2d 1297.

No. 79–5700. HUNT *v.* GRASSO, GOVERNOR OF CONNECTICUT, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1287.

No. 79–5795. WEST *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 609 F. 2d 274.

No. 79–5841. BROWN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 602 F. 2d 909.

No. 79–5983. HUNT *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 73 Ill. App. 3d 1034, 392 N. E. 2d 793.

No. 79–6100. ASHCROFT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 607 F. 2d 1167.

No. 79-6101. VASIL *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 374 So. 2d 465.

No. 79-6106. PARROTT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 612 F. 2d 572.

No. 79-6117. DASKALAKIS *v.* EXECUTIVE COMMERCIAL SERVICES, LTD., ET AL. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 74 Ill. App. 3d 760, 393 N. E. 2d 1365.

No. 79-6120. ZUROSKY ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 614 F. 2d 779.

No. 79-6141. FORD *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 73 Ill. App. 3d 1111, 395 N. E. 2d 1249.

No. 79-6145. LEE *v.* GARRISON, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied.

No. 79-6157. BUCKLE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 613 F. 2d 361.

No. 79-6221. GINTER *v.* SOUTHERN ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 611 F. 2d 1226.

No. 79-6243. O'BRIEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 615 F. 2d 1361.

No. 79-6246. RODRIGUEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 613 F. 2d 28.

No. 79-6253. BROWN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 615 F. 2d 1020.

No. 79-6269. DYAS *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 265 Ark. xxii.

No. 79-6273. CHAPMAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 615 F. 2d 1294.

No. 79-6277. BUCK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 615 F. 2d 1362.

No. 79-6332. STEVENS *v.* NORTH CAROLINA. Super. Ct. N. C., Mecklenberg County. Certiorari denied.

No. 79-6333. BAINES *v.* HILTON, PRISON SUPERINTENDENT, ET AL. C. A. 3d Cir. Certiorari denied.

No. 79-6338. STREET *v.* WARDEN, MARYLAND PENITENTIARY. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 105.

No. 79-6342. LANE *v.* JEFFERSON HEALTH CARE, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 612 F. 2d 573.

No. 79-6347. GIORDANO *v.* MASSACHUSETTS. Ct. App. Mass. Certiorari denied. Reported below: — Mass. App. —, 395 N. E. 2d 896.

No. 79-6349. SCHULTZ *v.* ISRAEL, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 109.

No. 79-6351. GARRETT *v.* ARRINGTON, SHERIFF. Sup. Ct. Ga. Certiorari denied. Reported below: 245 Ga. 47, 262 S. E. 2d 808.

No. 79-6356. HOP-WAH, AKA GREEN *v.* HOPPER, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 613 F. 2d 312.

No. 79-6357. SHAW *v.* COLE, SHERIFF, ET AL. C. A. 5th Cir. Certiorari denied.

No. 79-6358. ANGEL *v.* CLARK. C. A. 5th Cir. Certiorari denied.

No. 79-6360. TAYLOR *v.* HAYES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 105.

No. 79-6363. DAWN *v.* WENZLER ET AL. C. A. 9th Cir. Certiorari denied.

No. 79-6367. BROOKS *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 620 F. 2d 308.

No. 79-6377. GRACEY *v.* MILLER. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 75 Ill. App. 3d 1104, 399 N. E. 2d 1390.

No. 79-6436. RAY *v.* SOWDERS, REFORMATORY SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 612 F. 2d 582.

No. 79-6461. SULLIVAN *v.* FORD ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 609 F. 2d 197.

No. 79-6468. KING *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 616 F. 2d 1034.

No. 79-6483. PAYTON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 615 F. 2d 922.

No. 79-6486. VENABLE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 106.

No. 79-6495. MELTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 79-6498. SANDERS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 614 F. 2d 292.

No. 79-6501. LABINIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 614 F. 2d 1207.

No. 79-6503. FERA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 616 F. 2d 590.

No. 79-6505. HAYWARD *v.* DAY. C. A. 8th Cir. Certiorari denied. Reported below: 619 F. 2d 716.

No. 79-1317. HUNT *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL would grant certiorari and reverse the conviction. Reported below: 601 P. 2d 464.

No. 79-6527. REED *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 618 F. 2d 118.

No. 79-1553. COLEMAN *v.* MONTANA. Sup. Ct. Mont.; and

No. 79-5975. BOWEN *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: No. 79-1553, — Mont. —, 605 P. 2d 1000; No. 79-5975, 244 Ga. 495, 260 S. E. 2d 855.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia,* 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 79-1190. LASALLE NATIONAL BANK, TRUSTEE, ET AL. *v.* PEOPLES GAS LIGHT & COKE CO., 445 U. S. 943. Petition for rehearing denied.

No. 79-6018. STEELE *v.* BARRETT ET AL., 445 U. S. 933. Motion for leave to file petition for rehearing denied.

JUNE 2, 1980

Appeals Dismissed

No. 79-1295. MCKEESPORT AREA SCHOOL DISTRICT *v.* PENNSYLVANIA DEPARTMENT OF EDUCATION. Appeal from Pa. Commw. Ct. dismissed for want of substantial federal question. MR. JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 38 Pa. Commw. 290, 392 A. 2d 912.

MR. JUSTICE WHITE, with whom MR. JUSTICE REHNQUIST joins, concurring.

Under Pennsylvania law, a public school district must provide nonpublic school children with transportation to and

from school and transportation for educational field trips if those services are provided to public school children. Pa. Stat. Ann., Tit. 24, § 13–1361 (Purdon Supp. 1979–1980). The present controversy centers on that portion of the statute dealing with transportation to and from school. MR. JUSTICE BLACKMUN's concurring opinion, however, *post*, at 978, states that it "is not automatically apparent from the jurisdictional statement and the motion to dismiss that have been filed with this Court, or from the summary opinion of the [Pennsylvania] Commonwealth Court," that the constitutionality of the field-trip provision is not before us. I write both to demonstrate that the absence of the field-trip issue is absolutely clear and to analyze the law that MR. JUSTICE BLACKMUN would apply to this case if the field-trip issue were present.

I

In *School District of Pittsburgh* v. *Pennslyvania Dept. of Education*, 443 U. S. 901 (1979), we dismissed for want of a substantial federal question an appeal challenging the constitutionality of the same statute challenged here. The question presented by the jurisdictional statement in *School District of Pittsburgh* reads as follows: "Whether Pennsylvania Act 372 of 1972 [Act of Dec. 29, 1972, P. L. 1726, No. 372, amending § 1361 of the Public School Code of 1949 (24 P. S. § 13–1361, as amended)] requiring school districts to transport resident nonpublic school pupils to and from schools located up to 10 miles beyond district boundaries violates the Establishment Clause of the First Amendment of the Constitution of the United States because of the Act's primary effect of advancing religion in addition to fostering excess entanglement of the state with religion." Juris. Statement, O. T. 1978, No. 78–1614, p. 3. The question presented by the jurisdictional statement in the instant case is identically phrased. Juris. Statement 4. Because a ruling of dismissal for want of a substantial federal question is a judgment on the merits, *Hicks* v.

Miranda, 422 U. S. 332, 344 (1975), and because this case presents the same challenge to the same statute that we rejected in *School District of Pittsburgh*, the same outcome properly follows here.

II

Nor can it be maintained that, although the identical statute and constitutional arguments are involved in both cases, *School District of Pittsburgh* involved a different application of the statute and thus that a different legal response is occasioned here. The instant litigation commenced with a show-cause order emanating from the Pennsylvania Department of Education, an order that placed in jeopardy under the statute appellant school district's public transportation reimbursement for the 1973–1974 school year. The order was premised not on any district action regarding field trips, but on the district's alleged refusal to transport students to five specified nonpublic schools beyond district boundaries in violation of the statute. Juris. Statement 7–8. Similarly, in *School District of Pittsburgh*, the litigation commenced with a show-cause order from the Department of Education threatening the appellant district's public transportation reimbursement for the 1973–1974 school year and relying on the district's alleged refusal to transport students to 20 specified institutions located beyond district boundaries. Juris. Statement, O. T. 1978, No. 78–1614, pp. 7–8.

In short, both cases involve controversies surrounding transportation to nonpublic schools outside the relevant district in accordance with a statute that also happens to provide for educational field trips for nonpublic school children. Neither case, however, involves any claim that the field-trip provision, as distinguished from the provision for transportation to and from nonpublic schools, is a forbidden establishment of religion.[1] In neither case did the state courts address such an

[1] Even a cursory glance at the statutory language, see *post*, at 977, n. *, confirms that the two provisions are distinct and severable. School

issue, and in neither was the field-trip provision expressly included in or subsumed by the question presented in the jurisdictional statement. Indeed, the Pennsylvania Supreme Court in *School District of Pittsburgh,* upon which case the Pennsylvania Commonwealth Court in the instant suit relied, App. to Juris. Statement 4a, expressly declared that the field-trip "portion of Act 372 is not before us" and that the court "need not consider the constitutionality of the field trip provision." *Springfield School Dist.* v. *Department of Ed.,* 483 Pa. 539, 553, n. 6, 397 A. 2d 1154, 1161, n. 6 (1979). It is apparent, therefore, that we have no jurisdiction to decide the validity of the part of the statute dealing with field trips. *Cardinale* v. *Louisiana,* 394 U. S. 437 (1969); *Crowell* v. *Randell,* 10 Pet. 368, 391 (1836). See R. Stern & E. Gressman, Supreme Court Practice § 3.27, p. 214 (5th ed. 1978) ("It has long been established that the Supreme Court is vested with no jurisdiction unless a federal question was raised and decided in the state court below").

III

Affirming this case thus would involve no inconsistency with *Wolman* v. *Walter,* 433 U. S. 229 (1977), where this Court saw lurking behind a routine exercise in local pedagogy, the educational field trip, the menacing hulk of an established state religion. Since MR. JUSTICE BLACKMUN's concurrence adverts to *Wolman* as authority in this area, however, that case merits further examination.

In *Wolman* the Ohio Legislature had enacted a multifaceted program designed to provide assistance to nonpublic schools, presumably in recognition of the central importance of these schools in fulfilling the Nation's educational mission. See *Committee for Public Education* v. *Nyquist,* 413 U. S. 756, 813–820 (1973) (WHITE, J., dissenting). The program in-

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district action that implicates one provision need not, and does not here, implicate the other.

cluded, *inter alia*, the loaning of secular textbooks to nonpublic school students or their parents; the supplying to nonpublic schools of standardized tests and scoring services; and the granting to nonpublic schools of field trips and transportation services such as are provided to public school students. The Court found certain aspects of the program acceptable under the Establishment Clause—*e. g.*, secular textbooks, standardized tests and scoring—but other aspects, including the field-trip provision, did not fare so well.

The Court believed that the field-trip provision had several troubling features. First, "the nonpublic school controls the timing of the trips and, within a certain range, their frequency and destinations," indicating that "the schools, rather than the children, truly are the recipients of the service. . . ." 433 U. S., at 253. Second, the Court observed that, "although a trip may be to a location that would be of interest to those in public schools, it is the individual teacher who makes a field trip meaningful," *ibid.*, and this poses "an unacceptable risk of fostering of religion [as] an inevitable byproduct." *Id.*, at 254. Finally, to ensure that nonpublic schools do not pursue sectarian ends on their field trips would entail supervision by public school authorities, which "would create excessive [governmental] entanglement" in the affairs of sectarian institutions. *Ibid.*

In the present case, as in *Wolman*, we are not faced with a legislative enactment evincing a sectarian purpose. *Id.*, at 236. Fortunately, all of us continue to regard the achievement of educational quality as a valid secular end that States may pursue. A secular legislative purpose, however, is only one of the Court's Establishment Clause indicia. To pass muster a statute must also have "a principle or primary effect that neither advances nor inhibits religion" and "must not foster an excessive government entanglement with religion." *Ibid.* See *Roemer* v. *Maryland Public Works Ed.*, 426 U. S. 736, 748 (1976); *Committee for Public Education* v. *Nyquist*,

supra, at 772–773; *Lemon* v. *Kurtzman*, 403 U. S. 602, 612–613 (1971). In *Wolman*, the Court concluded that the challenged statute fails the latter two tests by subsidizing field trips for nonpublic school students.

What is the "principal or primary effect" of such a provision? The most reasonable appraisal surely suggests that the principal or primary effect of field trips for nonpublic school students is that boys and girls whose parents have exercised their constitutional right to send their children to private schools, *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925), will expand their educational horizons, just as the public school children benefiting from the same experience will expand theirs. Is this a danger from which we must shield the American public? The Court in *Wolman* failed to explain why we should not consider the venerable institution of the field trip as firmly grounded in sound educational policy and the effect sought to be created by educators and legislators as pedagogical and not religious. In *Wolman*, the Court could do no more than voice insubstantial and baseless fears that field trips might be used for religious indoctrination.

And what of excessive entanglement? As I read the instant statute, the State of Pennsylvania has devised no mechanism for "policing" nonpublic schools. The Supreme Court of Pennsylvania has similarly concluded that the "Act before us does not in any manner require the state to engage in 'a comprehensive, discriminating and continuing' surveillance of the nonpublic school teachers." 483 Pa., at 566, 397 A. 2d, at 1168, quoting *Lemon* v. *Kurtzman*, *supra*, at 619. Nor had the State of Ohio in *Wolman* devised such a mechanism. Yet there the Court, without the benefit of any record facts showing actual entanglement, went on to conclude that, if the State of Ohio were ever to police nonpublic school field trips, excessive entanglement would result.

The precedential—or, for that matter, the persuasive—force of such *ex cathedra* wanderings is deservedly minimal. A decision that concedes a secular purpose, describes no actual

religious effect, and allows that there is no present excessive entanglement furnishes very little guidance for subsequent Establishment Clause inquiries. Insofar as field trips were concerned, *Wolman*, at bottom, was a decision predicated on fear of a series of unsubstantiated eventualities: What *if* the nonpublic school controls the timing, frequency, and destination of field trips so as to create a religious effect? 433 U. S., at 253. What *if* a nonpublic school teacher contrives, in making the field trip "meaningful," *ibid.*, to exalt religion? *Ibid.* What *if* the State were ever to police nonpublic schools to make sure the field trips remained secular in character? *Id.*, at 254.

Responding to such fears is a difficult, if not impossible, task. One can say "it isn't so" on the indisputable ground that "it isn't." This would be one way of declining to find in the record what is not there. Perhaps the best response, however, is to observe that we ought "not assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment," *Lemon* v. *Kurtzman*, *supra*, at 618, quoted in *Wolman* v. *Walter*, 433 U. S., at 254, and to remind the Court "that legislation having a secular purpose and extending governmental assistance to sectarian schools in the performance of their secular functions does not constitute 'law[s] respecting an establishment of religion' forbidden by the First Amendment merely because a secular program may incidentally benefit a church in fulfilling its religious mission." *Lemon* v. *Kurtzman*, *supra*, at 663–664 (WHITE, J., concurring in part and dissenting in part).[2]

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE BRENNAN joins, concurring.

Section 1361 of the Pennsylvania Public School Code of 1949 (Pa. Stat. Ann., Tit. 24, § 13–1361 (Purdon 1962)), as

[2] In this respect it is useful to bear in mind MR. JUSTICE BLACKMUN's

amended by 1972 Pa. Laws No. 372,* authorizes a public school district of the Commonwealth of Pennsylvania to provide free transportation for its kindergarten, elementary, and secondary school pupils, and also to provide free transportation to and from any point in the Commonwealth for educational field trips. The statute states, in addition, that when such transportation is provided for public school pupils, the district "shall also make identical provision," for pupils who attend nonprofit, nonpublic schools located within the district or outside the district at a distance not exceeding 10 miles.

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admonition in *Roemer* v. *Maryland Public Works Bd.*, 426 U. S. 736, 747 (1976) (footnote omitted), quoted in *Committee for Public Education* v. *Regan*, 444 U. S. 646, 658, n. 6 (1980):

"The Court has not been blind to the fact that in aiding a religious institution to perform a secular task, the State frees the institution's resources to be put to sectarian ends. If this were impermissible, however, a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair. The Court never has held that religious activities must be discriminated against in this way."

*"The board of school directors in any school district may, out of the funds of the district, provide for the free transportation of any resident pupil to and from the kindergarten, elementary school, or secondary school in which he is lawfully enrolled, provided that such school is not operated for profit and is located within the district boundaries or outside the district boundaries at a distance not exceeding ten miles by the nearest public highway, . . . and to and from any points in the Commonwealth in order to provide field trips for any purpose connected with the educational pursuits of the pupils. When provision is made by a board of school directors for the transportation of public school pupils to and from such schools or to and from any points in the Commonwealth in order to provide field trips as herein provided, the board of school directors shall also make identical provision for the free transportation of pupils who regularly attend nonpublic kindergarten, elementary and high schools not operated for profit to and from such schools or to and from any points in the Commonwealth in order to provide field trips as herein provided." Pa. Stat. Ann., Tit. 24, § 13–1361 (Purdon Supp. 1979–1980).

Appellant district challenged the Pennsylvania statute as violative of the Fourteenth Amendment's Equal Protection Clause and of the First Amendment's Establishment Clause. The Commonwealth Court of Pennsylvania upheld the statute against that challenge. 38 Pa. Commw. 290, 392 A. 2d 912 (1978). The Supreme Court of Pennsylvania denied a petition for allowance of an appeal.

I join the Court's dismissal of this case only on the specific assumption that the issue of the constitutionality of the field-trip provision of the Pennsylvania statute is not before us. The absence of that issue, for me at least, is not automatically apparent from the jurisdictional statement and the motion to dismiss that have been filed with this Court, or from the summary opinion of the Commonwealth Court. That opinion, however, states: "No issue of law or fact distinguishes this case from earlier cases decided by this Court and upholding the Secretary's interpretation of the Act and the Act's constitutionality as so interpreted." 38 Pa. Commw., at 291, 392 A. 2d, at 912. That court's "earlier cases" cited are *School Dist. of Pittsburgh* v. *Commwealth Dept. of Ed.*, 33 Pa. Commw. 535, 382 A. 2d 772 (1978); *Springfield School Dist.* v. *Commonwealth Dept. of Ed.*, 35 Pa. Commw. 71, 384 A. 2d 1049 (1978); and *Pequea Valley School Dist.* v. *Commonwealth Dept. of Ed.*, 36 Pa. Commw. 403, 387 A. 2d 1022 (1978).

On appeal to the Supreme Court of Pennsylvania, those three decisions of the Commonwealth Court were affirmed by a divided vote in a single opinion. *Springfield School Dist.* v. *Department of Ed.*, 483 Pa. 539, 397 A. 2d 1154 (1979). In its opinion, the Supreme Court of Pennsylvania construed the basic free-transportation provision of the Pennsylvania statute in such a way as to alleviate federal constitutional concern. It specifically noted, however, that the field-trip provision of the Act "is not before us in these appeals," and that

the constitutionality of the field-trip provision need not be considered. *Id.*, at 553, n. 6, 397 A. 2d, at 1161, n. 6. The court went on to observe, *ibid.*, that the Attorney General of Pennsylvania has ruled the field-trip provision of the Act unconstitutional in its application to sectarian nonpublic schools. 1977 Op. Atty. Gen. No. 15.

In the present case I therefore assume that when the Commonwealth Court observed that no issue of law or fact distinguished this case from its cited "earlier cases," it necessarily means that the constitutionality of the field-trip provision was not at issue. It is only on that assumption that I join the Court in its dismissal of the appeal, for in *Wolman* v. *Walter*, 433 U. S. 229, 252–255 (1977), the Court flatly ruled that field-trip reimbursements to parochial schools are violative of the First Amendment. The continuing vitality of *Wolman* as controlling precedent in this area was recognized in *Committee for Public Education* v. *Regan*, 444 U. S. 646, 654 (1980).

No. 79–1563. YAKIMA COUNTY DEPUTY SHERIFF'S ASSN. *v.* BOARD OF COMMISSIONERS FOR YAKIMA COUNTY, WASHINGTON, ET AL. Appeal from Sup. Ct. Wash. dismissed for want of substantial federal question. Reported below: 92 Wash. 2d 831, 601 P. 2d 936.

No. 79–1608. TAYLOR ET AL. *v.* WISCONSIN TAX APPEALS COMMISSION ET AL. Appeal from Sup. Ct. Wis. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 92 Wis. 2d 915, 289 N. W. 2d 306.

No. 79–6393. DOE *v.* SEARS. Appeal from Sup. Ct. Ga. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 245 Ga. 83, 263 S. E. 2d 119.

No. 79-6219. NELSON *v.* STATE ACCIDENT INSURANCE FUND. Appeal from Ct. App. Ore. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. MR. JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 43 Ore. App. 155, 602 P. 2d 341.

Certiorari Granted—Reversed and Remanded. (See Nos. 79-912 and 79-914, *ante*, p. 754.)

Certiorari Granted—Vacated and Remanded

No. 79-6290. DUPRIS *v.* UNITED STATES. C. A. 8th Cir. Motion of Cheyenne River Sioux Tribe of Cheyenne River Reservation for leave to file a brief as *amicus curiae* granted. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded to the United States District Court for the District of South Dakota (Central Division) to consider the question of mootness. Reported below: 612 F. 2d 319.

Miscellaneous Orders

No. A-946. BLUM, COMMISSIONER OF NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES *v.* CALDWELL ET AL. Application to stay injunction of the United States District Court for the Northern District of New York, entered December 3, 1979, addressed to MR. JUSTICE STEVENS and referred to the Court, denied.

No. 79-1457. INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, LOCAL 1969, ET AL. *v.* BISE ET AL. C. A. 9th Cir.; and

No. 79-1617. DEPARTMENT OF TRANSPORTATION OF OKLAHOMA *v.* PILE. Sup. Ct. Okla. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 79–1266. STEADMAN *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 5th Cir. [Certiorari granted, *ante*, p. 917.] Motion of petitioner to dispense with printing appendix granted.

No. A–995 (79–1791). FLYNT *v.* GEORGIA. Application for stay of execution and enforcement of mandate of the Court of Appeals of Georgia, presented to MR. JUSTICE POWELL, and by him referred to the Court, denied. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL would grant the application.

No. A–990 (79–1839). FAZIO ET AL. *v.* UNITED STATES. Application for stay of mandate of the United States Court of Appeals for the Fifth Circuit, addressed to MR. JUSTICE BRENNAN and referred to the Court, denied.

No. 79–6390. MATTHEWS *v.* UNITED STATES;

No. 79–6412. MUINA *v.* DEPARTMENT OF PROFESSIONAL LICENSING OF MONTANA ET AL.; and

No. 79–6446. JONES *v.* PORTER, U. S. DISTRICT JUDGE. Motions for leave to file petitions for writs of mandamus denied.

Certiorari Denied. (See also Nos. 79–912 and 79–914, *ante*, p. 754; and Nos. 79–1608, 79–6393, and 79–6219, *supra*.)

No. 79–1136. BROWN & ROOT, INC., ET AL. *v.* JOYNER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 607 F. 2d 1087.

No. 79–1280. FIRST INVESTMENT ANNUITY COMPANY OF AMERICA *v.* MILLER, SECRETARY OF THE TREASURY, ET AL.; and

No. 79–1281. INVESTMENT ANNUITY, INC. *v.* MILLER, SECRETARY OF THE TREASURY, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 197 U. S. App. D. C. 235, 609 F. 2d 1.

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No. 79-1315. DOYLE ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: — Ct. Cl. —, 599 F. 2d 984.

No. 79-1199. TEXAS *v.* BATTARBEE. 183d Jud. Dist. Ct. Tex., Harris County. Certiorari denied.

No. 79-1343. DIGGS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 198 U. S. App. D. C. 255, 613 F. 2d 988.

No. 79-1351. BABIC *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 614 F. 2d 777.

No. 79-1354. CLUB RECREATION & PLEASURE ET AL. *v.* OREGON EX REL. HAAS, DISTRICT ATTORNEY FOR MULTNOMAH COUNTY. Ct. App. Ore. Certiorari denied. Reported below: 41 Ore. App. 557, 599 P. 2d 1194.

No. 79-1361. BEATTIE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 613 F. 2d 762.

No. 79-1425. WILDERNESS PUBLIC RIGHTS FUND *v.* ANDRUS, SECRETARY OF THE INTERIOR, ET AL.; and

No. 79-1447. EISEMAN ET AL. *v.* ANDRUS, SECRETARY OF THE INTERIOR, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 608 F. 2d 1250.

No. 79-1432. SOUTHERN PACIFIC TRANSPORTATION CO. *v.* HECTOR MARTINEZ & CO. C. A. 5th Cir. Certiorari denied. Reported below: 606 F. 2d 106.

No. 79-1444. ZANGRILLO *v.* AMBACH, COMMISSIONER OF EDUCATION OF NEW YORK, ET AL. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 70 App. Div. 2d 790, 416 N. Y. S. 2d 159.

No. 79-1455. KULIK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 601 F. 2d 604.

No. 79–1458. MORGAN GUARANTY TRUST COMPANY OF NEW YORK *v.* RINIER, AGENT FOR CERTAIN EMPLOYEES OF BANKRUPT, ET AL.; and

No. 79–1459. RODMAN, TRUSTEE IN BANKRUPTCY *v.* RINIER, AGENT FOR CERTAIN EMPLOYEES OF BANKRUPT, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 620 F. 2d 319.

No. 79–1485. UNITED STEELWORKERS OF AMERICA, AFL–CIO–CLC *v.* DUNBAR ET AL. Sup. Ct. Idaho. Certiorari denied. Reported below: 100 Idaho 523, 602 P. 2d 21.

No. 79–1493. PELLON ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 620 F. 2d 286.

No. 79–1558. THEODOSOPOULOS *v.* NEW HAMPSHIRE. Sup. Ct. N. H. Certiorari denied. Reported below: — N. H. —, 409 A. 2d 1134.

No. 79–1562. BALDWIN ET AL. *v.* MILLS ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 377 So. 2d 971.

No. 79–1572. REVERE COPPER & BRASS INC. *v.* OVERSEAS PRIVATE INVESTMENT CORP. C. A. D. C. Cir. Certiorari denied. Reported below: — U. S. App. D. C. —, 628 F. 2d 81.

No. 79–1584. VANGO *v.* MITCHELL, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 106.

No. 79–1600. BOMBARDIER LTD. ET AL. *v.* ENGINE SPECIALTIES, INC. C. A. 1st Cir. Certiorari denied. Reported below: 605 F. 2d 1.

No. 79–1604. HALL *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 377 So. 2d 1123.

No. 79–1607. SHERARD *v.* SHELTON, DIRECTOR, DEPARTMENT OF SOCIAL SERVICES OF WAYNE COUNTY. Sup. Ct. Mich. Certiorari denied. Reported below: 407 Mich. 888.

No. 79–1620. LOMBARD, SHERIFF, ET AL. *v.* COOPER ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 49 N. Y. 2d 69, 399 N. E. 2d 1188.

No. 79–1627. GREEN *v.* COUNTY OF ALAMEDA ET AL. C. A. 9th Cir. Certiorari denied.

No. 79–1692. FAMOLARE, INC. *v.* EDISON BROTHERS STORES, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 111.

No. 79–1699. HAWAIIAN TELEPHONE CO. ET AL. *v.* DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS OF HAWAII ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 614 F. 2d 1197.

No. 79–1715. PARRISH ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 106.

No. 79–1745. SCAFIDI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 113.

No. 79–1758. ERICKSON ET UX. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 79–1773. ERICKSON ET UX. *v.* EUBANKS, U. S. DISTRICT JUDGE. C. A. 10th Cir. Certiorari denied.

No. 79–6035. GARCIA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 605 F. 2d 349.

No. 79–6134. CHRISTIAN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 592 S. W. 2d 625.

No. 79–6165. LUMSDEN *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 589 S. W. 2d 226.

No. 79–6172. SHARP *v.* RHODES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 615 F. 2d 1362.

No. 79–6179. CHAVEZ *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied. Reported below: 604 P. 2d 1341.

No. 79-6189. McCoy *v.* United States. C. A. 10th Cir. Certiorari denied.

No. 79-6196. Geromette *v.* General Motors Corp. C. A. 6th Cir. Certiorari denied. Reported below: 609 F. 2d 1200.

No. 79-6200. Thomas *v.* United States. Ct. App. D. C. Certiorari denied. Reported below: 411 A. 2d 618.

No. 79-6213. Beal *v.* Estelle, Corrections Director. C. A. 5th Cir. Certiorari denied.

No. 79-6226. Campbell *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 75 Ill. App. 3d 1101, 399 N. E. 2d 1388.

No. 79-6255. Quinones *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 615 F. 2d 1354.

No. 79-6283. Markt *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 612 F. 2d 584.

No. 79-6297. Wade *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 106.

No. 79-6304. Taylor *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 615 F. 2d 1354.

No. 79-6314. Irvin *v.* Nanni et al. Ct. App. Tenn. Certiorari denied.

No. 79-6339. Harbolt *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 79-6346. Honeycutt *v.* Ward, Corrections Commissioner. C. A. 2d Cir. Certiorari denied. Reported below: 612 F. 2d 36.

No. 79-6381. Short *v.* Washington. Ct. App. Wash. Certiorari denied. Reported below: 23 Wash. App. 1055.

No. 79-6382. SCOTT, ADMINISTRATRIX *v.* LANE. Sup. Ct. Va. Certiorari denied. Reported below: 220 Va. 578, 260 S. E. 2d 238.

No. 79-6401. RICE *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 79-6402. SHIRD *v.* WARDEN, MARYLAND CORRECTIONAL INSTITUTION. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 104.

No. 79-6405. DAVIS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 72 App. Div. 2d 669, 422 N. Y. S. 2d 271.

No. 79-6408. NUNN *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 79-6409. STEVENS *v.* NORTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 105.

No. 79-6414. HARRIS *v.* GARRISON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 612 F. 2d 1307.

No. 79-6416. DOE *v.* ANKER ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1286.

No. 79-6420. HENDERSON *v.* LANE, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 613 F. 2d 175.

No. 79-6464. BRISSETTE *v.* MACCHIAROLA, CHANCELLOR, NEW YORK CITY BOARD OF EDUCATION. C. A. 2d Cir. Certiorari denied. Reported below: 610 F. 2d 806.

No. 79-6480. BULLOCK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 112.

No. 79-6492. MORGAN *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 299 N. C. 191, 261 S. E. 2d 827.

No. 79-6497. GOODWIN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 612 F. 2d 1103.

No. 79-6508. FLANAGAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 79-6518. MOORE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 616 F. 2d 1030.

No. 79-6523. PEDEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 612 F. 2d 584.

No. 79-6528. GAUSE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 620 F. 2d 295.

No. 79-6538. NUNN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 111.

No. 79-6539. ROMAN *v.* LE FEVRE, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 2d Cir. Certiorari denied.

No. 79-6547. HOOD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 618 F. 2d 1319.

No. 79-6567. KEARNEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 620 F. 2d 305.

No. 79-6572. DUKAJGINI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 628 F. 2d 1346.

No. 79-1225. FIDELITY UNION LIFE INSURANCE CO *v.* PERRY. C. A. 5th Cir. Certiorari denied. MR. JUSTICE STEWART and MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 606 F. 2d 468.

No. 79-1348. WORLDWIDE CHURCH OF GOD, INC., ET AL. *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES (CALIFORNIA, REAL PARTY IN INTEREST); and HELGE ET AL. *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES (CALIFORNIA, REAL PARTY IN INTEREST). Ct. App. Cal., 2d App. Dist. Motions for leave to file briefs as *amici curiae* filed by the following were granted: National Council of Churches of Christ et al., American Civil Liberties Union of

Southern California et al., Holy Spirit Association for the Unification of World Christianity et al., Church of the Nazarene, and Catholic League for Religious and Civil Rights. Certiorari denied.

No. 79-6588. JONES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 106.

No. 79-1290. COMMUNITY LOAN CORPORATION OF RICHMOND COUNTY ET AL. *v.* CODY ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE STEWART and MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 606 F. 2d 499.

No. 79-1438. OTEY *v.* NEBRASKA. Sup. Ct. Neb.;
No. 79-5921. BLAKE *v.* GEORGIA. Sup. Ct. Ga.;
No. 79-6194. O'BRYAN *v.* TEXAS. Ct. Crim. App. Tex.;
No. 79-6250. GRAY *v.* MISSISSIPPI. Sup. Ct. Miss.; and
No. 79-6422. BURGER *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: No. 79-1438, 205 Neb. 90, 287 N. W. 2d 36; No. 79-5921, 244 Ga. 466, 260 S. E. 2d 876; No. 79-6194, 591 S. W. 2d 464; No. 79-6250, 375 So. 2d 994; No. 79-6422, 245 Ga. 458, 265 S. E. 2d 796.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, dissenting.

Adhering to our view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 79-1581. COCA-COLA BOTTLING COMPANY OF ARKANSAS *v.* CHAUFFEURS, TEAMSTERS & HELPERS LOCAL UNION NO. 878. C. A. 8th Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 613 F. 2d 716.

No. 79-1621. REYNOLDS METALS CO. *v.* ALUMINUM COMPANY OF AMERICA ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE POWELL would grant certiorari. Reported below: 609 F. 2d 1218.

No. 79-6121. HYMAN *v.* RICKMAN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 624 F. 2d 1104.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

Petitioner, an inmate at the Stateville Correctional Center in Joliet, Ill., filed *pro se* a civil rights action pursuant to 42 U. S. C. § 1983, alleging that the defendants he named (the warden and three officers of the prison guard) had deprived him of his constitutional rights by failing to afford him appropriate medical treatment for glaucoma, a sight-threatening eye condition. According to appointed counsel's statement of the case, petitioner's condition, while made known to the prison authorities at the beginning of his incarceration, did not receive the attention of an eye doctor during his first four months at Stateville, and he was denied the medication that eventually was prescribed for him until he was hospitalized some eight months after entering the prison. Pet. for Cert. 2. After being released from the hospital, petitioner continually had to prod the guards to give him his medicine, and they sometimes denied it to him. His eyes were permanently injured. *Ibid.*

The United States District Court for the Northern District of Illinois initially granted the defendants' motion for summary judgment on all of petitioner's claims. Although granting leave to proceed *in forma pauperis*, that court failed to act upon petitioner's motion, under 28 U. S. C. § 1915 (d), for the appointment of counsel.[1] The United States Court of Appeals for the Seventh Circuit, after appointing counsel

[1] Title 28 U. S. C. § 1915 (d) provides that in *in forma pauperis* cases, "[t]he court may request an attorney to represent any such person unable to employ counsel. . . ."

to represent petitioner on appeal, reversed the District Court's judgment in part, remanding the case for further proceedings on petitioner's claim that respondents intentionally had deprived him of medication.

On remand, petitioner again moved the District Court for the appointment of counsel, and, unlike the Court of Appeals, the District Court denied his motion. Petitioner presented his own case in a 4-day jury trial. At the conclusion of his presentation of evidence, the District Court granted directed verdicts in favor of the warden and two of the guards, who evidently had little responsibility for petitioner's treatment on a day-to-day basis. Petitioner based his case against the fourth defendant, Lt. James L. Rickman, on allegations that this officer had sometimes denied petitioner medication on weekends. The case was submitted to the jury but they were unable to reach a verdict. Following a second trial, during which petitioner again represented himself, the jury found for Rickman.

Petitioner appealed a second time, and the Court of Appeals again appointed counsel to represent him. Petitioner argued that the District Court's failure to appoint counsel to represent him at trial had been an abuse of discretion and reversible error because his claim in fact was colorable (as evidenced by the Court of Appeals' earlier reversal of the District Court's entry of summary judgment), because the trial issues were factually and legally complex, because the constitutional right at stake was serious, and because the presence of counsel would have substantially aided petitioner in presenting his case. The Court of Appeals rejected this argument, holding, in an unpublished opinion, that the decision to appoint counsel for a civil rights litigant proceeding *in forma pauperis* rests with the discretion of the trial court. It repeated the standard it had articulated in earlier cases, that "[o]nly when a 'denial [of counsel] would result in fundamental unfairness impinging on due process rights' . . . will an appeals court overturn a decision of the district court

not to appoint counsel." App. to Pet. for Cert. 3 (quoting *Heidelberg* v. *Hammer*, 577 F. 2d 429, 431 (CA7 1978)).[2]

The Court of Appeals found no abuse of discretion in this case because the record revealed that petitioner understood the issue that was remanded for trial and had introduced evidence on that issue. Even conceding that counsel may have amended petitioner's complaint after the first appeal to expand his claim concerning the denial of medical treatment, the court concluded that petitioner had received a fair opportunity to state his case.

Petitioner contends that if his motion for the appointment of counsel had been granted by the District Court, counsel no doubt would have amended petitioner's complaint to add as defendants the prison physicians who were most responsible for his inadequate medical treatment. Counsel, unlike petitioner, would not have focused the jury's attention on isolated instances in which a single guard failed to give petitioner his medication, but rather would have concentrated on the lengthy period during which petitioner received no treatment at all for his sight-threatening condition. Appointed counsel would have obtained expert testimony to testify that glaucoma, if not treated properly, progressively leads to total blindness and irreversible damage.

I believe that under the controlling standards governing the appointment of counsel in civil rights cases that have been

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[2] The standard of review articulated by the court in this case is derived from its earlier decision in *LaClair* v. *United States*, 374 F. 2d 486, 489 (CA7 1967). In *Chapman* v. *Kleindienst*, 507 F. 2d 1246, 1250, n. 6 (CA7 1974), the court refrained from deciding whether *LaClair's* standard should be replaced by that articulated in *Dreyer* v. *Jalet*, 349 F. Supp. 452, 486 (SD Tex. 1972), affirmance order, 479 F. 2d 1044 (CA5 1973): "[I]f a civil action brought by an indigent acting pro se, including prison inmates, has merit requiring an evidentiary hearing, then counsel should be appointed to properly present the claim." In *Heidelberg* v. *Hammer*, 577 F. 2d, at 431, the court stated: "We are not now disposed to overrule the holding of *LaClair*. . . ."

adopted by other Courts of Appeals, a district court would have granted petitioner's § 1915 (d) motion. See *Gordon* v. *Leeke*, 574 F 2d 1147, 1153 (CA4), cert. denied, 439 U. S. 970 (1978) ("If it is apparent to the district court that a *pro se* litigant has a colorable claim but lacks the capacity to present it, the district court should appoint counsel to assist him"); *Shields* v. *Jackson*, 570 F. 2d 284, 286 (CA8 1978) (where an indigent prisoner is in no position to investigate his case, his complaint states a cause of action, and the appointment of counsel will advance the administration of justice, the case will be remanded with directions to the district court to appoint counsel). See also *Chubbs* v. *City of New York*, 324 F. Supp. 1183, 1191 (EDNY 1971) ("If the case has merit and a trial is required counsel should be appointed. The prisoner himself can simply not prepare and try the case effectively"); and n. 2, *supra*.

Questions concerning the standards by which district courts are to exercise their discretion in appointing counsel under § 1915 (d), and the degree to which the exercise of that discretion is to be controlled, are of obvious importance to the administration of justice, and to the enforcement of federal civil rights, particularly in our Nation's penal institutions. Because I believe that petitioner's motion for the appointment of trial counsel would have been granted in other circuits, and that he may well have been prejudiced in presenting his case by the failure of the District Court to appoint counsel, I would grant certiorari and set the case for argument.

No. 79-6359. WHITE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BRENNAN would grant certiorari. Reported below: 611 F. 2d 531.

Rehearing Denied

No. 78-1756. UNITED STATES *v.* MITCHELL ET AL., 445 U. S. 535. Petition for rehearing denied.

No. 78-1779. OWEN *v.* CITY OF INDEPENDENCE, MISSOURI, ET AL., 445 U. S. 622;

No. 79-1265. CATERINA *v.* PENNSYLVANIA, 445 U. S. 963;

No. 79-1285. MASCHHOFF *v.* INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, ET AL., 445 U. S. 964;

No. 79-5993. FAIRRIS *v.* ESTELLE, CORRECTIONS DIRECTOR, *ante*, p 920;

No. 79-6040. BEEDE *v.* NEW HAMPSHIRE, 445 U. S. 967; and

No. 79-6043. KIBERT *v.* BLANKENSHIP, CORRECTIONAL SUPERINTENDENT, *ante*, p. 911. Petitions for rehearing denied.

JUNE 4, 1980

Dismissal Under Rule 60

No. 79-1805. MARYLAND *v.* WHITFIELD. Ct. App. Md. Certiorari dismissed under this Court's Rule 60. Reported below: 287 Md. 124, 411 A. 2d 415.

JUNE 5, 1980

Dismissal Under Rule 60

No. 79-1803. GRASSI ET AL. *v.* LOUISIANA. Sup. Ct. La. Certiorari dismissed as to petitioner Grassi under this Court's Rule 60. Reported below: 378 So. 2d 934.

AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE

The following amendments to the Federal Rules of Civil Procedure were prescribed by the Supreme Court of the United States on April 29, 1980, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 996. The Judicial Conference Reports referred to in that letter are not reproduced herein.

Note that under 28 U. S. C. § 2072, such amendments do not take effect until so reported to Congress and until the expiration of 90 days thereafter. Moreover, Congress may defer the effective date to a later date or until approved by Act of Congress, or may modify such amendments.

For earlier publication of the Federal Rules of Civil Procedure and amendments thereto, see 308 U. S. 645, 308 U. S. 642, 329 U. S. 839, 335 U. S. 919, 341 U. S. 959, 368 U. S. 1009, 374 U. S. 861, 383 U. S. 1029, 389 U. S. 1121, 398 U. S. 977, 401 U. S. 1017, and 419 U. S. 1133.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 29, 1980

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress amendments to the Federal Rules of Civil Procedure prescribed pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules is an excerpt from the Reports of the Judicial Conference of the United States containing the Advisory Committee notes which were submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Respectfully,

(Signed) WARREN E. BURGER,
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

TUESDAY, APRIL 29, 1980

ORDERED:

1. That the Federal Rules of Civil Procedure be, and they hereby are, amended by including therein amendments to Rules 4, 5, 26, 28, 30, 32, 33, 34, 37 and 45 as hereinafter set forth:

[See *infra*, pp. 1003–1011.]

2. That the foregoing amendments to the Federal Rules of Civil Procedure shall take effect on August 1, 1980, and shall govern all civil proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That subsection (e) of Rule 37 of the Federal Rules of Civil Procedure is hereby abrogated, effective August 1, 1980.

4. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Civil Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

MR. JUSTICE POWELL, with whom MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST join, filed a dissenting statement.

I dissent from the Court's adoption of the amendments to Federal Rules of Civil Procedure 26, 33, 34, and 37—the cluster of Rules authorizing and regulating discovery generally, interrogatories, production of documents, and sanctions for failure to make discovery. These amendments are not inherently objectionable. Indeed, they represent the culmination of several years' work by the Judicial Conference's distinguished and conscientious Standing Committee on Rules of Practice and Procedure and Advisory Committee on Civil Rules.[1] But the changes embodied in the amendments fall

[1] This Court's role in the rulemaking process is largely formalistic. Standing and advisory committees of the Judicial Conference make the

short of those needed to accomplish reforms in civil litigation that are long overdue.

The American Bar Association proposed significant and substantial reforms.[2] Although the Standing Committee initially favored most of these proposals, it ultimately rejected them in large part. The ABA now accedes to the Standing Committee's amendments because they make some improvements, but the most recent report of the ABA Section of Litigation makes clear that the "serious and widespread abuse of discovery" will remain largely uncontrolled.[3] There are wide differences of opinion within the profession as to the need for reform. The bench and the bar are familiar with the existing Rules, and it often is said that the bar has a vested interest in maintaining the status quo. I imply no criticism of the bar or the Standing Committee when I suggest that the present recommendations reflect a compromise as well as the difficulty of framing satisfactory discovery Rules. But whatever considerations may have prompted the Committee's final decision, I doubt that many judges or lawyers familiar with the proposed amendments believe they will have an appreciable effect on the acute problems associated with discovery. The Court's adoption of these inadequate changes could postpone effective reform for another decade.

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initial studies, invite comments on their drafts, and prepare the Rules. Both the Judicial Conference and this Court necessarily rely upon the careful work of these committees. Congress should bear in mind that our approval of proposed Rules is more a certification that they are the products of proper procedures than a considered judgment on the merits of the proposals themselves. See generally 409 U. S. 1132, 1133 (1972) (Douglas, J., dissenting from adoption of Federal Rules of Evidence); 383 U. S. 1032 (1966) (Black, J., dissenting from adoption of amendment to civil rules); 374 U. S. 865, 869–870 (1963) (statement of Black and Douglas, JJ., upon adoption of amendments to Federal Rules of Civil Procedure).

[2] American Bar Association, Report of the Section of Litigation Special Committee for the Study of Discovery Abuse (App. Draft 1977).

[3] ABA Section of Litigation, Second Report of the Special Committee for the Study of Discovery Abuse, 5 (1980).

When the Federal Rules first appeared in 1938, the discovery provisions properly were viewed as a constructive improvement. But experience under the discovery Rules demonstrates that "not infrequently [they have been] exploited to the disadvantage of justice." *Herbert* v. *Lando*, 441 U. S. 153, 179 (1979) (POWELL, J., concurring). Properly limited and controlled discovery is necessary in most civil litigation. The present Rules, however, invite discovery of such scope and duration that district judges often cannot keep the practice within reasonable bounds.[4] Even in a relatively simple case, discovery through depositions, interrogatories, and demands for documents may take weeks. In complex litigation, discovery can continue for years. One must doubt whether empirical evidence would demonstrate that untrammeled discovery actually contributes to the just resolution of disputes. If there is disagreement about that, there is none whatever about the effect of discovery practices upon the average citizen's ability to afford legal remedies.

Delay and excessive expense now characterize a large percentage of all civil litigation. The problems arise in significant part, as every judge and litigator knows, from abuse of the discovery procedures available under the Rules.[5] Indeed,

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[4] MR. JUSTICE WHITE, writing for the Court, recently reminded the federal courts that "the discovery provisions . . . are subject to the injunction of Rule 1 that they 'be construed to secure the just, *speedy*, and *inexpensive* determination of every action.'" *Herbert* v. *Lando*, 441 U. S. 153, 177 (1979).

In his most recent Annual Report on the State of the Judiciary, THE CHIEF JUSTICE declared that "[t]he responsibility for control [of pretrial processes] rests on both judges and lawyers. Where existing rules and statutes permit abuse, they must be changed. Where the power lies with judges to prevent or correct abuse and misuse of the system, judges must act." Address to American Bar Association Mid-Year Meeting, 6 (Feb. 3, 1980).

[5] Writing from his wide experience as a judge, practicing lawyer, and Attorney General, Griffin B. Bell advised the Standing Committee that "the scope of discovery is far too broad and that excessive discovery has significantly contributed to the delays, complexity and high cost of civil

the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, led by THE CHIEF JUSTICE,[6] identified "abuse in the use of discovery [as] a major concern" within our legal system.[7] Lawyers devote an enormous number of "chargeable hours" to the practice of discovery. We may assume that discovery usually is conducted in good faith. Yet all too often, discovery practices enable the party with greater financial resources to prevail by exhausting the resources of a weaker opponent. The mere threat of delay or unbearable expense denies justice to many actual or prospective litigants. Persons or businesses of comparatively limited means settle unjust claims and relinquish just claims simply because they cannot afford to litigate.[8] Litigation costs have become intolerable, and they cast a lengthening shadow over the basic fairness of our legal system.

I reiterate that I do not dissent because the modest amendments recommended by the Judicial Conference are undesirable. I simply believe that Congress' acceptance of these tinkering changes will delay for years the adoption of genuinely effective reforms. The process of change, as experience teaches, is tortuous and contentious. Favorable congressional action on these amendments will create complacency and encourage inertia. Meanwhile, the discovery Rules will continue

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litigation in the federal courts." Letter to The Honorable Roszel C. Thomsen, Chairman of the Committee on Rules of Practice and Procedure of the Judicial Conference, 1 (June 27, 1978).

[6] THE CHIEF JUSTICE's keynote address to this distinguished assembly, popularly known as the Pound Conference, recognized that discovery processes "are being misused and overused." See Burger, Agenda for 2000 A. D.—A Need for Systematic Anticipation, 70 F. R. D. 83, 95 (1976).

[7] See Erickson, The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-first Century, 76 F. R. D. 277, 288 (1978); ABA, Report of Pound Conference Follow-up Task Force, 74 F. R. D. 159, 171, 191–192 (1976).

[8] "The principal function of procedural rules," as Mr. Justice Black observed in another context, "should be to serve as useful guides to help, not hinder, persons who have a legal right to bring their problems before the courts." 346 U. S. 946 (1954) (separate statement upon adoption of revised Supreme Court Rules).

to deny justice to those least able to bear the burdens of delay, escalating legal fees, and rising court costs.

The amendments to Rules 26, 33, 34, and 37 recommended by the Judicial Conference should be rejected, and the Conference should be directed to initiate a thorough re-examination of the discovery Rules that have become so central to the conduct of modern civil litigation.

AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 4. Process.

(*a*) *Summons: Issuance.*—Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver it for service to the marshal or to any other person authorized by Rule 4 (c) to serve it. Upon request of the plaintiff separate or additional summons shall issue against any defendants.

. . . . .

(*c*) *By whom served.*—Service of process shall be made by a United States marshal, by his deputy, or by some person specially appointed by the court for that purpose, except that a subpoena may be served as provided in Rule 45. Special appointments to serve process shall be made freely. Service of process may also be made by a person authorized to serve process in an action brought in the courts of general jurisdiction of the state in which the district court is held or in which service is made.

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Rule 5. Service and filing of pleadings and other papers.

. . . . .

(*d*) *Filing.*—All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter, but the court may on motion of a party or on its own initiative order that depositions upon oral examination and interrogatories, requests for documents, requests for admission, and answers and responses thereto not be filed unless on order of the court or for use in the proceeding.

. . . . .

Rule 26. General provisions governing discovery.

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(*f*) *Discovery conference.*—At any time after commencement of an action the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon motion by the attorney for any party if the motion includes:

(1) A statement of the issues as they then appear;

(2) A proposed plan and schedule of discovery;

(3) Any limitations proposed to be placed on discovery;

(4) Any other proposed orders with respect to discovery; and

(5) A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion. Each party and his attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party. Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than 10 days after service of the motion.

Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any; and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.

Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a pretrial conference authorized by Rule 16.

Rule 28. Persons before whom depositions may be taken.

(*a*) *Within the United States.*—Within the United States or within a territory or insular possession subject to the juris-

diction of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, or before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony. The term officer as used in Rules 30, 31 and 32 includes a person appointed by the court or designated by the parties under Rule 29.

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Rule 30. Depositions upon oral examination.

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(*b*) *Notice of examination: General requirements; special notice; non-stenographic recording; production of documents and things; deposition of organization; deposition by telephone.*

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(4) The parties may stipulate in writing or the court may upon motion order that the testimony at a deposition be recorded by other than stenographic means. The stipulation or order shall designate the person before whom the deposition shall be taken, the manner of recording, preserving and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. A party may arrange to have a stenographic transcription made at his own expense. Any objections under subdivision (c), any changes made by the witness, his signature identifying the deposition as his own or the statement of the officer that is required if the witness does not sign, as provided in subdivision (e), and the certification of the officer required by subdivision (f) shall be set forth in a writing to accompany a deposition recorded by non-stenographic means.

. . . . .

(7) The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone. For the purposes of this rule and Rules 28 (a), 37 (a)(1), 37 (b)(1) and 45 (d), a deposition taken by telephone is

taken in the district and at the place where the deponent is to answer questions propounded to him.

. . . . .

(f) Certification and filing by officer; exhibits; copies; notice of filing.

(1) The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. Unless otherwise ordered by the court, he shall then securely seal the deposition in an envelope indorsed with the title of the action and marked "Deposition of [here insert name of witness]" and shall promptly file it with the court in which the action is pending or send it by registered or certified mail to the clerk thereof for filing.

Documents and things produced for inspection during the examination of the witness, shall, upon the request of a party, be marked for identification and annexed to the deposition and may be inspected and copied by any party, except that if the person producing the materials desires to retain them he may (A) offer copies to be marked for identification and annexed to the deposition and to serve thereafter as originals if he affords to all parties fair opportunity to verify the copies by comparison with the originals, or (B) offer the originals to be marked for identification, after giving to each party an opportunity to inspect and copy them, in which event the materials may then be used in the same manner as if annexed to the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

. . . . .

Rule 32. Use of depositions in court proceedings.

(a) Use of depositions.—At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or

represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness, or for any other purpose permitted by the Federal Rules of Evidence.

. . . . .

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

Substitution of parties pursuant to Rule 25 does not affect the right to use depositions previously taken; and when an action has been brought in any court of the United States or of any State and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor. A deposition previously taken may also be used as permitted by the Federal Rules of Evidence.

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Rule 33. Interrogatories to parties.

. . . . .

(*c*) *Option to produce business records.*—Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from

which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

Rule 34. Production of documents and things and entry upon land for inspection and other purposes.

. . . . .

(*b*) *Procedure.*—The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 37 (a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

A party who produces documents for inspection shall produce them as they are kept in the usual course of business or

shall organize and label them to correspond with the categories in the request.

. . . . .

Rule 37. Failure to make or cooperate in discovery: Sanctions.

. . . . .

(*b*) *Failure to comply with order.*

. . . . .

(2) *Sanctions by court in which action is pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30 (b)(6) or 31 (a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26 (f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35 (a) requiring him to produce another for

examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

. . . . .

[(*e*) *Subpoena of person in foreign country.*]
(Abrogated April 29, 1980, effective August 1, 1980.)

. . . . .

(*g*) *Failure to participate in the framing of a discovery plan.*—If a party or his attorney fails to participate in good faith in the framing of a discovery plan by agreement as is required by Rule 26 (f), the court may, after opportunity for hearing, require such party or his attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

Rule 45. Subpoena.

. . . . .

(*d*) *Subpoena for taking depositions; place of examination.*

(1) Proof of service of a notice to take a deposition as provided in Rules 30 (b) and 31 (a) constitutes a sufficient authorization for the issuance by the clerk of the district court for the district in which the deposition is to be taken of subpoenas for the persons named or described therein. Proof of service may be made by filing with the clerk of the district court for the district in which the deposition is to be taken a copy of the notice together with a statement of the date and manner of service and of the names of the persons served, certified by the person who made service. The subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated

books, papers, documents, or tangible things which constitute or contain matters within the scope of the examination permitted by Rule 26 (b), but in that event the subpoena will be subject to the provisions of Rule 26 (c) and subdivision (b) of this rule.

The person to whom the subpoena is directed may, within 10 days after the service thereof or on or before the time specified in the subpoena for compliance if such time is less than 10 days after service, serve upon the attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an order of the court from which the subpoena was issued. The party serving the subpoena may, if objection has been made, move upon notice to the deponent for an order at any time before or during the taking of the deposition.

. . . . .

(*e*) *Subpoena for a hearing or trial.*

(1) At the request of any party subpoenas for attendance at a hearing or trial shall be issued by the clerk of the district court for the district in which the hearing or trial is held. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the district, or at any place without the district that is within 100 miles of the place of the hearing or trial specified in the subpoena, or at a place within the state where a state statute or rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting in the place where the district court is held. When a statute of the United States provides therefor, the court upon proper application and cause shown may authorize the service of a subpoena at any other place.

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of
The Supreme Court

June 9 Through June 12, 1980

Henry J. Lind
Reporter of Decisions

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, Chief Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM H. REHNQUIST, Associate Justice.
JOHN PAUL STEVENS, Associate Justice.

OFFICERS OF THE COURT

BENJAMIN R. CIVILETTI, Attorney General.
WADE H. McCREE, Jr., Solicitor General.
MICHAEL RODAK, Jr., Clerk.
HENRY C. LIND, Reporter of Decisions.
ALFRED WONG, Marshal.
ROGER F. JACOBS, Librarian.

SUPREME COURT OF THE UNITED STATES

Allotment of Justices

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, *viz.:*

For the District of Columbia Circuit, Warren E. Burger, Chief Justice.

For the First Circuit, William J. Brennan, Jr., Associate Justice.

For the Second Circuit, Thurgood Marshall, Associate Justice.

For the Third Circuit, William J. Brennan, Jr., Associate Justice.

For the Fourth Circuit, Warren E. Burger, Chief Justice.

For the Fifth Circuit, Lewis F. Powell, Jr., Associate Justice.

For the Sixth Circuit, Potter Stewart, Associate Justice.

For the Seventh Circuit, John Paul Stevens, Associate Justice.

For the Eighth Circuit, Harry A. Blackmun, Associate Justice.

For the Ninth Circuit, William H. Rehnquist, Associate Justice.

For the Tenth Circuit, Byron R. White, Associate Justice.

December 19, 1975.

(For next previous allotment, see 404 U. S., p. v.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1979

UNITED STATES *v.* CALIFORNIA

ON EXCEPTION TO REPORT OF SPECIAL MASTER

No. 5, Orig. Argued March 17, 1980—Decided June 9, 1980

The issue presented at this stage of this original action is whether—for purposes of determining California's ownership under the Submerged Lands Act of submerged lands and natural resources lying within three geographical miles seaward of the California coastline—the coastline follows the mean lower low-water line along the natural shore, or whether it follows the seaward edge of 15 piers and the Rincon Island complex projecting into the sea from the shore. Rincon Island, a privately owned artificial "island" used to service offshore oil facilities, is erected upon foundations resting on the ocean floor, has a dock on the seaward side, and is connected to the mainland by a causeway structure under which water flows freely. Neither the causeway nor the island have had any noticeable effect on the shoreline, and the complex is not a coast protective work. The piers in question, some of which are privately owned and some of which are operated by the State as docking facilities or for recreational purposes, are all attached to the mainland; water flows freely underneath each; they have no effect on the shoreline and are not coast protective works. The Special Master concluded that the piers and the Rincon Island complex do not constitute extensions of the coast and that the coastline follows the natural coast in the vicinity of these structures. California filed an exception to the Master's report.

Held: The Special Master's conclusion is proper. Under the Convention on the Territorial Sea and the Contiguous Zone, which is used for guidance

in defining "coastline" for purposes of the Submerged Lands Act, the general rule expressed in Art. 3 therein is that the "normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State." Although the type of construction of the open piers involved here, being elevated above the ocean's surface on pilings, does not, without more, require a determination adverse to California, the absence of a "lower low-water line" deprives them of a "normal baseline," and precludes them from falling within the ambit of Art. 3. Moreover, Art. 8 of the Convention, whereby "the outermost permanent harbour works which form an integral part of the harbour system shall be regarded as forming part of the coast," does not encompass all structures erected on the shore. The structures in this case are not harbors and are not a part of outermost "harbour works," since they neither "protect," "enclose," nor "shelter," *Louisiana Boundary Case*, 394 U. S. 11, 37, n. 42, and thus they cannot constitute an integral part of a harbor system. Nor does the Longshoremen's and Harbor Workers' Compensation Act and decisions thereunder indicate that Congress has withdrawn from the courts the authority to define "coastline" for purposes of the Submerged Lands Act. Pp. 5–9.

Exception to Special Master's report overruled.

BURGER, C. J., delivered the opinion of the Court, in which all other Members joined, except MARSHALL, J., who took no part in the consideration or decision of the case.

John Briscoe, Deputy Attorney General of California, argued the cause for defendant. With him on the briefs were *George Deukmejian*, Attorney General, *N. Gregory Taylor*, Assistant Attorney General, and *Nancy A. Saggese*, Deputy Attorney General.

Stephen M. Shapiro argued the cause for the United States. On the brief were *Solicitor General McCree, Assistant Attorney General Moorman, Deputy Solicitor General Claiborne, Allan A. Ryan, Jr., Bruce C. Rashkow*, and *Michael W. Reed*.*

**Avrum M. Gross*, Attorney General, and *G. Thomas Koester*, Assistant Attorney General, filed an *amicus curiae* brief for the State of Alaska.

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

I

The United States began this original action against the State of California under Art. III, § 2, of the Constitution in 1945 to determine whether the right to exploit natural resources under the submerged lands off the California coast belongs to the United States or to California.

In 1947, this Court decreed that the United States owned all submerged lands extending seaward of the ordinary low-water mark on the California coast. *United States* v. *California*, 332 U. S. 804, 805. See also *United States* v. *California*, 332 U. S. 19 (1947). When Congress enacted the Submerged Lands Act of 1953, 67 Stat. 29, 43 U. S. C. § 1301 *et seq.*, the United States, in effect, quitclaimed to California whatever interest the Federal Government may have had in, and to, all lands and natural resources lying within three geographical miles seaward of the California coastline. § 3 (b)(1), 43 U. S. C. § 1311 (b)(1). Congress subsequently enacted the Outer Continental Shelf Lands Act of 1953, 67 Stat. 462, 43 U. S. C. § 1331 *et seq.*, which declared that the United States owned all submerged lands seaward of those granted to California by the Submerged Lands Act. §§ 1332, 1333.

In 1978, the parties filed cross-motions for entry of a supplemental decree. Although those motions proposed three issues for resolution, only one is presently before the Court.[1] That issue is whether the coastline follows the mean lower low-water line along the natural shore, or whether it follows the seaward edge of 15 piers and the Rincon Island complex projecting into the sea from the shore.

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[1] The other issues involve the location of the seaward limit of inland waters at the Port of San Pedro and at the mouth of San Diego Bay. The parties acquiesce in the Master's conclusion as to these issues and anticipate their resolution by agreement.

This Court appointed a Special Master who received evidence and submitted recommendations. The Master made the following findings of fact:

Rincon Island is a privately owned artificial "island" off the shore near Punta Gorda, Ventura County, which is used to service offshore oil facilities. It is built upon large concrete tetrapods[2] which rest on the ocean floor, and it has a surface consisting of rock and dirt fill. There are buildings and other structures on the island, all of which are related to an active oil well. On the seaward side of the island is a large dock equipped with hardware for the berthing of vessels.

The island is connected to the mainland by a structure commonly known and identified on maps as the Punta Gorda Causeway. Oil is pumped to shore by a pipeline running beneath and alongside the causeway structure. The wooden causeway deck surface rests on a steel frame supported by pilings filled with gravel and capped with concrete. Water flows freely underneath. Neither the structure nor the island has had any noticeable effect on the shoreline, and the complex is not a coast protective work.[3]

The 15 piers have asphalt, wood, or concrete deck surfaces mounted on precast concrete, steel, or wood pilings. They vary in length from 500 feet (at the Santa Barbara Biltmore Hotel) to 3,500 feet (at Ocean Beach). All are attached to the mainland, and water flows freely underneath each. The piers have no effect on the shoreline; they are not coast protective works. One pier is privately owned by a hotel; 3 others are privately owned and used to supply offshore oil rigs; the remaining 11 are operated by the California State

[2] These blocks resemble giant versions of a child's "jacks."

[3] As the Master correctly noted, "Rincon Island could not qualify as an 'island' for purposes of delimiting the territorial sea under the Geneva Convention because it is an artificial island." See Art. 10, Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, [1964] 15 U. S. T. 1606, T. I. A. S. No. 5369. For all intents and purposes, then, the island complex is treated the same as the piers at issue.

Department of Parks and Recreation as docking facilities or for recreational purposes.[4]

The Special Master concluded that neither the Rincon Island complex nor the piers constitute extensions of the coast.[5] The California coastline, he determined, follows the natural coast in the vicinity of these structures for purposes of measuring to the federal-state boundary under the Submerged Lands Act. California filed an exception to the Master's conclusion.

II

Since passage of the Submerged Lands Act granting California and other States ownership of submerged lands within three miles of their respective coasts, this Court has adverted to the Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, [1964] 15 U. S. T. 1606, T. I. A. S. No. 5369, for guidance in the definition of the term "coastline." See *Louisiana Boundary Case,* 394 U. S. 11 (1969); *United States* v. *California,* 381 U. S. 139, 165 (1965). The definitional contexts tend to be highly fact bound,[6] and the Convention provides no rule for automatic application. The Submerged Lands Act does not indicate whether the word "coast" was intended by Congress to encompass only the natural shore, or to include structures extending seaward from shore. Although we have recognized in earlier proceedings of this case that some kinds of structures may modify the

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[4] The piers are not unlike fishing piers found in many coastal areas.

[5] The Master noted that though some shipping is handled at some of the piers, it is insufficient to justify defining them as "ports." For example, one of them is fitted with a coin-operated davit for lowering small boats into the water. We agree with this conclusion. The island, as an island, was disqualified from serving as a base point for measuring the territorial sea because of its artificiality. See n. 3, *supra.*

[6] For other discussions on the significance of factual distinctions and their attendant implications among jetties, groins, breakwaters, and spoil banks, see *Texas* v. *Louisiana,* 426 U. S. 465, 469, and n. 3 (1976); *United States* v. *Louisiana,* 389 U. S. 155, 158 (1967).

California coastline, see the 1977 decree, 432 U. S. 40, this Court has never adopted a view that all structures erected on the coast may be considered extensions of the coast.

Open piers, such as those at issue here, are elevated above the surface of the ocean on pilings. Accordingly, they do not conform to the general rule for establishing a baseline from which to measure the extent of a coastal state's jurisdiction. That rule, contained in Art. 3 of the Convention, states:

> "[T]he normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State."

The type of construction of the piers does not, without more, require a determination adverse to California. See, *e. g.*, *United States* v. *California*, 381 U. S., at 176–177. But the absence of a "lower low-water line" deprives the piers of a "normal baseline," and precludes them from falling within the ambit of Art. 3.

The ultimate conclusion of the Special Master implicitly recognizes this proposition. He did not view the discontinuity of the waterline as dispositive, correctly noting that some breakwaters, for example, also have discontinuous waterlines, and have been held to be part of the coastline. But by considering and disposing of California's claim under Art. 8 of the Convention, in effect on exception to the general rule embodied in Art. 3, see discussion *infra*, he necessarily found the criteria of Art. 3 were not satisfied.

The fact that every National Ocean Survey chart of the California coast "officially recognized" by the United States displays a black line connoting the coastal low water mark following the configuration of the seaward edge of the 16 structures, as it does groins, breakwaters, and other structures that extend seaward, is likewise not dispositive. We agree with the Master's finding that the charts contain an aggregate of errors and in many places depict the territorial sea without

regard to the coastline. And each chart, as the Master found, includes a disclaimer to that effect.

California suggests that Art. 8 of the Convention also affords support for its position. Art. 8 provides:

> "For the purpose of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system shall be regarded as forming part of the coast."

Although in an earlier stage of this litigation we incorporated this text into the decree, 382 U. S. 448, 449 (1966), we did not construe the language as encompassing all structures erected on the shore.

The piers and the island complex involved in this case are not a part of outermost harbor works; nor do they form an integral part of a harbor system. We held in the *Louisiana Boundary Case, supra,* that the term "harbor works" refers to "[s]tructures erected along the seacoast at inlets or rivers for protective purposes, or for enclosing sea areas adjacent to the coast to provide anchorage and shelter." 394 U. S., at 37, n. 42.[7] These structures neither "protect," "enclose," nor "shelter";[8] they do not constitute harbor works within the meaning of Art. 8.

A "harbor" under Art. 8 is a body of water providing a haven for safe anchorage and shelter for vessels. See *Louisiana Boundary Case, supra,* at 37, n. 42, citing 1 A. Shalo-

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[7] In ruling in the *Boundary Case* that Louisiana's dredged channels were not "harbor works," we said:

". . . Article 8 applies only to raised structures. The discussions of the Article by the 1958 Geneva Conference and the International Law Commission reveal that the term 'harbor works' connoted 'structures' and 'installations' which were 'part of the land' *and which in some sense enclosed and sheltered the waters within.*" 394 U. S., at 36–37 (emphasis added).

[8] California's coastal engineering expert testified that these piers are designed to have no effect on the movement of the sea. By contrast, groins and jetties are intended to affect wave action.

witz, Shore and Sea Boundaries 60, n. 65 (1962). That the piers and the Rincon Island complex provide no protection has been noted; that they are not bodies of water states the obvious. It follows that since the structures are neither harbor works nor harbors, they cannot constitute an integral part of a harbor system.

The State seeks to import language from the International Law Commission's Commentary to the final draft of Art. 8, primarily Comment 2, Report of the International Law Commission to the General Assembly, U. N. Gen. Ass. Off. Rec., 11th Sess., Supp. No. 9, U. N. Doc. A/3159, p. 16 (1956), as support for its position that Art. 8 should be construed to cover these structures. Comment 2 states:

> "Permanent structures erected on the coast and jutting out to sea (such as jetties and coast protective works) are assimilated to harbour works."

Comment 2 has been held to envision erosion jetties, but we have highlighted the beach protection or harbor protection role they fulfill as well. *Louisiana Boundary Case, supra,* at 49–50, n. 64. A construction of the Comment as including these piers and the island complex which concededly do not fulfill such a role would unwarrantedly extend the most generous intimation of the Comment.[9]

Finally, the State relies upon decisions in which the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 U. S. C. § 901 *et seq.*, was applied to accidents which occurred on piers as evidence that Congress intended domestic rather than admiralty law to control judicial construction of

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[9] Even if we were to assume, as did the Master, that "jetties" means "piers," we would also agree with this conclusion, as we have, that these piers do not fall within Art. 8 because they are not part of a harbor or harbor system. But in light of our disposition it is unnecessary, and we decline, to join the dispute between the parties over the precise definition of "jetties" as contained in the English and French versions of the Convention.

the Submerged Lands Act. *E. g., Nacirema Co.* v. *Johnson,* 396 U. S. 212 (1969); *Travelers Insurance Co.* v. *Shea,* 382 F. 2d 344 (CA5 1967); *Michigan Mutual Liability* v. *Arrien,* 344 F. 2d 640 (CA2 1965); *East* v. *Oosting,* 245 F. Supp. 51 (ED Va. 1965); *Johnson* v. *Traynor,* 243 F. Supp. 184 (Md. 1965). It suggests this is at least an implicit congressional declaration that piers are land, and are thus part of the coastline. However, in an earlier incarnation of this case, we held to the contrary. *United States* v. *California,* 381 U. S., at 150–154; see also, *Louisiana Boundary Case, supra,* at 19. Nothing that has occurred since that ruling indicates that Congress has withdrawn from the courts the authority to define "coastline." We have looked to the Convention to give content to the Submerged Lands Act; no reason is advanced which persuades us to do otherwise today.

The exception of the State of California to the report of the Special Master is overruled. The Special Master shall prepare a proposed form of decree consistent with this opinion and present it to this Court for entry in due course.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

STANDEFER *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 79-383. Argued April 14, 1980—Decided June 9, 1980

Petitioner was indicted for, *inter alia*, aiding and abetting a named Internal Revenue Service agent in accepting unlawful compensation, in violation of 26 U. S. C. § 7214 (a)(2) and 18 U. S. C. § 2, which provides that whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal. Prior to the indictment, the IRS agent was acquitted of certain of the § 7214 (a)(2) violations which petitioner was accused of aiding and abetting. Petitioner moved to dismiss his indictment as to aiding and abetting these violations on the ground that since the agent had been acquitted of such violations, petitioner could not be convicted of aiding and abetting them. The District Court denied the motion, and after trial petitioner was convicted. The Court of Appeals affirmed.

Held: A defendant accused of aiding and abetting in the commission of a federal offense may properly be convicted despite the prior acquittal of the alleged actual perpetrator of the offense. Pp. 14–26.

(a) Read against its common-law background, 18 U. S. C. § 2 evinces a clear congressional intent to permit such a conviction. The section gives general effect to what had always been the common-law rule for second-degree principals (principals who were actually or constructively present at the scene of the crime and aided and abetted its commission) and for all misdemeanants. The legislative history of § 2 confirms this understanding. With the enactment of § 2, all participants in conduct violating a federal criminal statute are "principals," and as such they are punishable for their criminal conduct, the fate of other participants being irrelevant. Pp. 15–20.

(b) The Government is not barred, under the doctrine of nonmutual collateral estoppel, from relitigating the issue of whether the IRS agent accepted unlawful compensation. Application of that doctrine is not appropriate here. In a criminal case, the Government is often without the kind of "full and fair opportunity to litigate" that is a prerequisite of estoppel. The application of collateral estoppel in criminal cases is also complicated by rules of evidence and exclusion unique to criminal law. Finally, in this case the important federal interest in the enforce-

ment of the criminal law outweighs the economy concerns undergirding the collateral estoppel doctrine. Pp. 21–25.

610 F. 2d 1076, affirmed.

BURGER, C. J., delivered the opinion for a unanimous Court.

Harold Gondelman argued the cause and filed briefs for petitioner.

William Alsup argued the cause for the United States. With him on the brief were *Solicitor General McCree, Assistant Attorney General Heymann,* and *Deputy Solicitor General Frey.*

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari in this case to decide whether a defendant accused of aiding and abetting in the commission of a federal offense may be convicted after the named principal has been acquitted of that offense.

I

In June 1977, petitioner Standefer was indicted on four counts of making gifts to a public official, in violation of 18 U. S. C. § 201 (f), and on five counts of aiding and abetting a revenue official in accepting compensation in addition to that authorized by law, in violation of 26 U. S. C. § 7214 (a)(2) and 18 U. S. C. § 2.[1] The indictment charged that

[1] Title 18 U. S. C. § 201 (f) provides, in relevant part, as follows:

"Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official . . . for or because of any official act performed or to be performed by such public official . . . [is guilty of an offense]."

Title 26 U. S. C. § 7214 (a)(2) punishes:

"Any officer or employee of the United States acting in connection with any revenue law of the United States . . . who knowingly demands other or greater sums than are authorized by law, or receives any fee, compen-

petitioner, as head of Gulf Oil Corp.'s tax department, had authorized payments for five vacation trips to Cyril Niederberger, who then was the Internal Revenue Service agent in charge of the audits of Gulf's federal income tax returns.[2] Specifically, the indictment alleged that Gulf, on petitioner's authorization, had paid for vacations for Niederberger in Pompano Beach (July 1971), Miami (January 1973), Absecon (August–September 1973), Pebble Beach (April 1974), and Las Vegas (June 1974). The four counts under 18 U. S. C. § 201 (f) related to the Miami, Absecon, Pebble Beach, and Las Vegas vacations; the five counts under 26 U. S. C. § 7214 (a)(2) and 18 U. S. C. § 2 were one for each vacation.[3]

Prior to the filing of this indictment, Niederberger was separately charged in a 10-count indictment—two counts for each of the five vacations—with violating 18 U. S. C. § 201 (g)[4] and 26 U. S. C. § 7214 (a)(2). In February 1977, Niederberger was tried on these charges. He was convicted on four counts of violating § 201 (g) in connection with the vacations in Miami, Absecon, Pebble Beach, and Las Vegas and of

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sation, or reward, except as by law prescribed, for the performance of any duty."

Title 18 U. S. C. § 2 provides in relevant part:

"Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

[2] The indictment also named Gulf Oil Corp. and Joseph Fitzgerald, a manager in Gulf's tax department, as defendants. Gulf pleaded guilty and Fitzgerald *nolo contendere* to all nine counts.

[3] It appears that the statute of limitations had run on any violation of 18 U. S. C. § 201 (f) in connection with the Pompano Beach vacation.

[4] Title 18 U. S. C. § 201 (g) punishes:

"Whoever, being a public official . . . , otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him."

two counts of violating § 7214 (a)(2) for the Pebble Beach and Las Vegas trips. He was acquitted on the § 201 (g) count involving the Pompano Beach trip and on the three counts under § 7214 (a)(2) charging him with accepting payments from Gulf for trips to Pompano Beach, Miami, and Absecon.[5]

In July 1977, following Niederberger's trial and before the trial in his own case commenced, petitioner moved to dismiss the counts under § 7214 (a)(2) and 18 U. S. C. § 2 which charged him with aiding and abetting Niederberger in connection with the Pompano Beach, Miami, and Absecon vacations. Petitioner argued that because Niederberger, the only named principal, had been acquitted of accepting unlawful compensation as to those vacations, he could not be convicted of aiding and abetting in the commission of those offenses. The District Court denied the motion.

Petitioner's case then proceeded to trial on all nine counts. At trial, petitioner admitted authorizing payment for all five vacation trips, but testified that the trips were purely social and not designed to influence Niederberger in the performance of his official duties. The jury returned guilty verdicts on all nine counts.[6] Petitioner was sentenced to concurrent terms of six months' imprisonment followed by two years' probation; he was fined a total of $18,000—$2,000 on each count.

Petitioner appealed his convictions to the Court of Appeals for the Third Circuit claiming, *inter alia,* that he could not

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[5] Niederberger was sentenced to six months' imprisonment followed by a five-year period of probation, and he was fined $5,000. His convictions were affirmed by the Court of Appeals. *United States* v. *Niederberger,* 580 F. 2d 63 (CA3 1978).

[6] The jury was instructed that in order to render a guilty verdict on the § 7214 (a) counts it must determine (1) that Niederberger knowingly "received a fee, compensation or reward except as prescribed by law . . . for the performance . . . of any duty" and (2) that petitioner "willfully aided and abetted [him]." App. 53a–54a, 57a.

be convicted of aiding and abetting a principal, Niederberger, when that principal had been acquitted of the charged offense. By a divided vote, the Court of Appeals, sitting en banc, rejected that contention. 610 F. 2d 1076 (1979). It concluded that "the outcome of Niederberger's prosecution has no effect on [petitioner's] conviction." *Id.*, at 1078.

Because the question presented is one of importance to the administration of criminal justice on which the Courts of Appeals are in conflict, we granted certiorari.[7] 444 U. S. 1011. We affirm.

II

Petitioner makes two main arguments: first, that Congress in enacting 18 U. S. C. § 2 did not intend to authorize prosecution of an aider and abettor after the principal has been acquitted of the offense charged; second, that, even if § 2 permits such a prosecution, the Government should be barred from relitigating the issue of whether Niederberger accepted unlawful compensation in connection with the Pompano Beach, Miami, and Absecon vacations.[8] The first contention relies largely on the common law as it prevailed before the enactment of 18 U. S. C. § 2. The second rests on the contemporary doctrine of nonmutual collateral estoppel.

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[7] The Courts of Appeals for the Fifth Circuit, the Ninth Circuit, and the District of Columbia Circuit have reached the same conclusion as the Third Circuit. See *United States* v. *Musgrave*, 483 F. 2d 327, 331–332 (CA5 1973); *United States* v. *Azadian*, 436 F. 2d 81 (CA9 1971); *Perkins* v. *United States*, 315 F. 2d 120, 122 (CA9 1963); *Gray* v. *United States*, 104 U. S. App. D. C. 153, 260 F. 2d 483 (1958). The Court of Appeals for the Fourth Circuit has taken the contrary view that "where the only potential principal has been acquitted, no crime has been established and the conviction of an aider and abettor cannot be sustained." *United States* v. *Shuford*, 454 F. 2d 772, 779 (1971). Accord, *United States* v. *Prince*, 430 F. 2d 1324 (CA4 1970). See also n. 11, *infra*.

[8] Petitioner also challenges the instructions to the jury on criminal intent. We agree with the Court of Appeals that the instructions were correct.

A

At common law, the subject of principals and accessories was riddled with "intricate" distinctions. 2 J. Stephen, A History of the Criminal Law of England 231 (1883). In felony cases, parties to a crime were divided into four distinct categories: (1) principals in the first degree who actually perpetrated the offense; (2) principals in the second degree who were actually or constructively present at the scene of the crime and aided or abetted its commission; (3) accessories before the fact who aided or abetted the crime, but were not present at its commission; and (4) accessories after the fact who rendered assistance after the crime was complete. See W. LaFave & A. Scott, Criminal Law § 63 (1972); 4 W. Blackstone, Commentaries *33; Perkins, Parties to Crime, 89 U. Pa. L. Rev. 581 (1941). By contrast, misdemeanor cases "d[id] not admit of accessaries either before or after the fact," *United States* v. *Hartwell*, 26 F. Cas. 196, 199 (No. 15,318) (CC Mass. 1869); instead, all parties to a misdemeanor, whatever their roles, were principals. *United States* v. *Dotterweich*, 320 U. S. 277, 281 (1943); 1 C. Torcia, Wharton's Criminal Law § 33 (14th ed. 1978).

Because at early common law all parties to a felony received the death penalty, certain procedural rules developed tending to shield accessories from punishment. See LaFave & Scott, *supra* at 499. Among them was one of special relevance to this case: the rule that an accessory could not be convicted without the prior conviction of the principal offender. See 1 M. Hale, Pleas of the Crown *623–*624. Under this rule, the principal's flight, death, or acquittal barred prosecution of the accessory. And if the principal were pardoned or his conviction reversed on appeal, the accessory's conviction could not stand. In every way, "an accessory follow[ed], like a shadow, his principal." 1 J. Bishop, Criminal Law § 666 (8th ed. 1892).

This procedural bar applied only to the prosecution of ac-

cessories in felony cases. In misdemeanor cases, where all participants were deemed principals, a prior acquittal of the actual perpetrator did not prevent the subsequent conviction of a person who rendered assistance. *Queen* v. *Humphreys and Turner*, [1965] 3 All E. R. 689; *Queen* v. *Burton*, 13 Cox C. C. 71, 75 (Crim. App. 1875). And in felony cases a principal in the second degree could be convicted notwithstanding the prior acquittal of the first-degree principal. *King* v. *Taylor and Shaw*, 168 Eng. Rep. 283 (1785); *Queen* v. Wallis, 1 Salk. 334, 91 Eng. Rep. 294 (K. B. 1703); *Brown* v. *State*, 28 Ga. 199 (1859); *State* v. *Whitt*, 113 N. C. 716, 18 S. E. 715 (1893). Not surprisingly, considerable effort was expended in defining the categories—in determining, for instance, when a person was "constructively present" so as to be a second-degree principal. 4 Blackstone, *supra*, at *34. In the process, justice all too frequently was defeated.

To overcome these judge-made rules, statutes were enacted in England and in the United States. In 1848 the Parliament enacted a statute providing that an accessory before the fact could be "indicted, tried, convicted, and punished in all respects *like the Principal*." 11 & 12 Vic. ch. 46, § 1 (emphasis added). As interpreted, the statute permitted an accessory to be convicted "although the principal be acquitted." *Queen* v. *Hughes*, Bell 242, 248, 169 Eng. Rep. 1245, 1248 (1860). Several state legislatures followed suit.[9] In 1899,

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[9] By 1909, when § 2 was enacted, 13 States had enacted legislation providing that the acquittal of the actual perpetrator was not a bar to the conviction of one charged with giving him aid. See Cal. Stat., ch. 99, §§ 11, 12 (1850) (see *People* v. *Bearss*, 10 Cal. 68, 70 (1858)); Del. Rev. Stat., ch. 133, § 1 (1893); Iowa Rev. Code Ann. § 4314 (1885) (see *State* v. *Lee*, 91 Iowa 499, 501–502, 60 N. W. 119, 120 (1894)); Kan. Gen. Stat. § 5180 (1889) (see *State* v. *Bogue*, 52 Kan. 79, 86–87, 34 P. 410, 412 (1893)); Ky. Stat. § 1128 (1903) (see *Commonwealth* v. *Hicks*, 118 Ky. 637, 642, 82 S. W. 265, 266 (1904)); Miss. Code § 1026 (1906) (see *Fleming* v. *State*, 142 Miss. 872, 880–881, 108 So. 143, 144–145 (1926)); Mont. Penal Code Ann. § 1854 (1895); N. Y. Penal Code § 29 (1895)

Congress joined this growing reform movement with the enactment of a general penal code for Alaska which abrogated the common-law distinctions and provided that "all persons

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(see *People* v. *Kief*, 126 N. Y. 661, 663–664, 27 N. E. 556, 557 (1891)); N. D. Rev. Code Crim. Proc. § 8060 (1895); Okla. Stat. § 5523 (1890); S. D. Stat. Ann. § 8520 (1899); Utah Comp. Laws § 4752 (1907); Wash. Code of Proc. § 1189 (1891) (see *State* v. *Gifford*, 19 Wash. 464, 467–468, 53 P. 709, 710 (1898)).

Since then, at least 21 other States have enacted legislation with that effect. See 1977 Ala. Act No. 607, § 425; Ariz. Rev. Stat. Ann. § 13–304–1 (1978); Ark. Stat. Ann. § 41–304 (1977); Colo. Rev. Stat. § 18–1–605 (1973) (see *Roberts* v. *People*, 103 Colo. 250, 87 P. 2d 251 (1938)); Conn. Gen. Stat. § 53a–9 (1979); Fla. Stat. § 777.011 (1979) (see *Butts* v. *State*, 286 So. 2d 28 (1973)); Ga. Code § 26–802 (1978); Ill. Rev. Stat., ch. 38, § 5–3 (1979); Ind. Code § 35–41–2–4 (Supp. 1978); La. Rev. Stat. Ann. § 14.24 (West 1974) (see *State* v. *McAllister*, 366 So. 2d 1340 (1978)); Me. Rev. Stat. Ann., Tit. 17–A, § 57 (1979); Mich. Comp. Laws § 767.39 (1970) (*People* v. *Smith*, 271 Mich. 553, 260 N. W. 911 (1935)); Mo. Rev. Stat. § 562.046 (1978); Neb. Rev. Stat. § 28–206 (Supp. 1978) (*State* v. *Rice*, 188 Neb. 728, 199 N. W. 2d 480 (1972)); N. H. Rev. Stat. Ann. § 626.8 (1974); N. J. Stat. Ann. § 2C: 2–6 (West Spec. Pamph. 1979); N. M. Stat. Ann. § 30–1–13 (1978); Pa. Cons. Stat., Tit. 18, § 306 (Supp. 1979); S. C. Code § 16–1–50 (1976) (*State* v. *Massey*, 229 S. E. 2d 332 (1976)); Tex. Penal Code Ann. § 7.03 (Vernon 1974); Wis. Stat. § 939.05 (1977).

Eleven other States have enacted statutes that modify the common-law rule; these statutes have not been authoritatively construed on whether an accessory can be prosecuted after his principal's acquittal. See Haw. Rev. Stat. § 702–225 (1976); Idaho Code § 19–1431 (1979); Mass. Gen. Laws Ann., ch. 274, § 3 (West 1970); Minn. Stat. § 609.05 (1978); Nev. Rev. Stat. § 195.040 (1979); Ohio Rev. Code Ann. § 2923.03 (1979); Ore. Rev. Stat. § 161.160 (1979); Vt. Stat. Ann., Tit. 13, § 3 (1974); Va. Code § 18.2–21 (1975); W. Va. Code § 61–11–7 (1977); Wyo. Stat. § 6–1–114 (1977).

Only four States—Maryland, North Carolina, Rhode Island, and Tennessee—clearly retain the common-law bar. See *State* v. *Ward*, 284 Md. 189, 396 A. 2d 1041 (1978); *State* v. *Jones*, 101 N. C. 719, 8 S. E. 147 (1888) (interpreting N. C. Gen. Stat. § 14–5 (1969)); R. I. Gen. Laws § 11–1–3 (1970); *Pierce* v. *State*, 130 Tenn. 24, 168 S. W. 851 (1914).

The Model Penal Code provides that an accomplice may be convicted "though the person claimed to have committed the offense . . . has been

concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the crime or aid and abet in its commission, though not present, are principals, and to be tried and punished as such." Act of Mar. 3, 1899, § 186, 30 Stat. 1282. In 1901 Congress enacted a similar provision for the District of Columbia.[10]

The enactment of 18 U. S. C. § 2 in 1909 was part and parcel of this same reform movement. The language of the statute, as enacted, unmistakably demonstrates the point:

> "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, *is a principal.*" Act of Mar. 4, 1909, § 332, 35 Stat. 1152 (emphasis added).[11]

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acquitted." § 2.06 (7) (Tent. Draft No. 3, 1955), and see comments 38–39 (Tent. Draft No. 1, 1953).

[10] The provision is still in effect; it provides that all persons "aiding or abetting the principal offender, shall be charged as principals and not as accessories, the *intent of this section being that as to all accessories before the fact the law heretofore applicable in cases of misdemeanor only shall apply to all crimes. . . .*" Act of Mar. 3, 1901, § 908, 31 Stat. 1337; D. C. Code § 22–105 (1973) (emphasis added).

[11] In 1951 the words "is a principal" were altered to read "is punishable as a principal." That change was designed to eliminate all doubt that in the case of offenses whose prohibition is directed at members of specified classes (*e. g.*, federal employees) a person who is not himself a member of that class may nonetheless be punished as a principal if he induces a person in that class to violate the prohibition. See S. Rep. No. 1020, 82d Cong., 1st Sess., 7–8 (1951). The change was fully consistent with congressional intent to treat accessories before the fact as principals and to abolish the common-law procedural bar. Indeed, by the time of the 1951 re-enactment, the Circuit Courts that had addressed the question had concluded that § 2 authorizes conviction of an aider and abettor notwithstanding the prior acquittal of the perpetrator of the offense. See *United States* v. *Klass*, 166 F. 2d 373, 380 (CA3 1948); *Von Patzoll* v. *United States*, 163 F. 2d 216, 219 (CA10 1947); *Kelly* v. *United States*, 258 F. 392, 402 (CA6 1919); *Rooney* v. *United States*, 203 F. 928,

The statute "abolishe[d] the distinction between principals and accessories and [made] them all principals." *Hammer* v. *United States*, 271 U. S. 620, 628 (1926). Read against its common-law background, the provision evinces a clear intent to permit the conviction of accessories to federal criminal offenses despite the prior acquittal of the actual perpetrator of the offense. It gives general effect to what had always been the rule for second-degree principals and for all misdemeanants.

The legislative history of § 2 confirms this understanding. The provision was recommended by the Commission to Revise and Codify the Criminal and Penal Laws of the United States as "[i]n accordance with the policy of recent legislation" by which "those whose relations to a crime would be that of accessories before the fact according to the common law are made principals." 1 Final Report of the Commission to Revise and Codify the Laws of the United States 118–119 (1906). The Commission's recommendation was adopted without change. The House and Senate Committee Reports, in identical language, stated its intended effect:

> "The committee has deemed it wise to make those who are accessories before the fact at common law principal offenders, thereby permitting their indictment and conviction for a substantive offense.
>
> "At common law an accessory can not be tried without his consent before the conviction or outlawry of the principal except where the principal and accessory are tried together; if the principal could not be found or if he had been indicted and refused to plead, had been pardoned or died before conviction, the accessory could not be tried at all. This change of the existing law renders these obstacles to justice impossible." S. Rep. No. 10, 60th

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931–932 (CA9 1913). Congress manifested no intent to disturb this interpretation. See *Lorillard* v. *Pons*, 434 U. S. 575, 580 (1978).

Cong., 1st Sess., pt. 1, p. 13 (1908); H. R. Rep. No. 2, 60th Cong., 1st Sess., pt. 1, p. 13 (1908).[12]

And on the floor of the House of Representatives, Representative Moon, the Chairman of the Joint Select Committee, put the point simply: "We . . . have abolished the existing arbitrary distinction between felonies and misdemeanors." 42 Cong. Rec. 585 (1908).

This history plainly rebuts petitioner's contention that § 2 was not intended to authorize conviction of an aider and abettor after the principal had been acquitted of the offense charged.[13] With the enactment of that section, all participants in conduct violating a federal criminal statute are "principals." As such, they are punishable for their criminal conduct; the fate of other participants is irrelevant.[14]

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[12] Petitioner emphasizes the fact that the Committee Report fails to mention the common-law rule that the prior acquittal of a principal barred conviction of an accessory, and argues accordingly that Congress did not view that rule as an "obstacle to justice." The Court of Appeals correctly rejected this argument, being unwilling to "apply the canon of statutory interpretation . . . *expressio unius, exclusio alterius* . . . to the language employed in a *committee report*." 610 F. 2d 1076, 1084 (CA3 1979) (emphasis added). We agree. Petitioner's argument would permit an omission in the legislative history to nullify the plain meaning of a statute. The language of § 2 abolishes the common-law categories and treats all parties as principals. It is not necessary for Congress in its committee reports to identify all of the "weeds" which are being excised from the garden.

[13] It bears mention that even prior to 1909 petitioner would not have prevailed in his attempt to bar prosecution on the § 7214 (a)(2) counts. As the Government notes, the version of 26 U. S. C. § 7214 then in effect defined the offense to be a misdemeanor. See Rev. Stat. § 3169 (1878). Hence, the prior acquittal of his principal would not have barred petitioner's prosecution. And because petitioner accompanied Niederberger on four of five trips and therefore was "present" at the scene of the crime, see Tr. 1018–1020, 1024–1027, 1034–1036, 1096, he could have been convicted at common law for those crimes even if the offense had been designated a felony.

[14] Nothing in *Shuttlesworth* v. *Birmingham*, 373 U. S. 262 (1963), relied on by petitioner, is to the contrary. There, petitioner had been con-

B

The doctrine of nonmutual collateral estoppel was unknown to the common law and to the Congress when it enacted § 2 in 1909.[15] It emerged in a civil case in 1942, *Bernhard* v. *Bank of America Nat. Trust & Savings Assn.*, 19 Cal. 2d 807, 122 P. 2d 892. This Court first applied the doctrine in *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U. S. 313 (1971). There, we held that a determination of patent invalidity in a prior infringement action was entitled to preclusive effect against the patentee in subsequent litigation against a different defendant. Just this past Term we again applied the doctrine—this time "offensively"—to hold that a defendant who had had a "full and fair" opportunity to litigate issues of fact in a civil proceeding initiated by the Securities and Exchange Commission could be estopped from relitigating those issues in a subsequent action brought by a private plaintiff. *Parklane Hosiery Co.* v. *Shore*, 439 U. S. 322 (1979). In both cases, application of nonmutual estoppel promoted judicial economy and conserved private resources without unfairness to the litigant against whom estoppel was invoked.

Here, petitioner urges us to apply nonmutual estoppel against the Government; specifically he argues that the Gov-

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victed of aiding and abetting others to violate a city trespass ordinance which subsequently was declared constitutionally invalid. See *Gober* v. *Birmingham*, 373 U. S. 374 (1963). Shuttlesworth's case merely applied the rule that "there can be no conviction for aiding and abetting someone to do an innocent act." 373 U. S., at 265. Here, by contrast, the Government proved in petitioner's case that Niederberger had violated § 7214 (a)(2) in connection with each of the five trips. See n. 6, *supra*.

[15] In 1912, in *Bigelow* v. *Old Dominion Copper Co.*, 225 U. S. 111, 127, this Court stated that it was "a principle of general elementary law that the estoppel of a judgment must be mutual." See also *Stone* v. *Farmers Bank of Kentucky*, 174 U. S. 409 (1899); *Keokuk & Western R. Co.* v. *Missouri*, 152 U. S. 301, 317 (1894); *Litchfield* v. *Goodnow*, 123 U. S. 549, 552 (1887).

ernment should be barred from relitigating Niederberger's guilt under § 7214 (a)(2) in connection with the vacation trips to Pompano Beach, Miami, and Absecon. That issue, he notes, was an element of his offense which was determined adversely to the Government at Niederberger's trial.[16]

This, however, is a criminal case, presenting considerations different from those in *Blonder-Tongue* or *Parklane Hosiery*. First, in a criminal case, the Government is often without the kind of "full and fair opportunity to litigate" that is a prerequisite of estoppel. Several aspects of our criminal law make this so: the prosecution's discovery rights in criminal cases are limited, both by rules of court and constitutional privileges; it is prohibited from being granted a directed verdict or from obtaining a judgment notwithstanding the verdict no matter how clear the evidence in support of guilt, cf. Fed. Rule Civ. Proc. 50; it cannot secure a new trial on the ground that an acquittal was plainly contrary to the weight of the evidence, cf. Fed. Rule Civ. Proc. 59; and it cannot secure appellate review where a defendant has been acquitted. See *United States* v. *Ball*, 163 U. S. 662, 671 (1896).

The absence of these remedial procedures in criminal cases permits juries to acquit out of compassion or compromise or because of " 'their assumption of a power which they had no right to exercise, but to which they were disposed through lenity.' " *Dunn* v. *United States*, 284 U. S. 390, 393 (1932), quoting *Steckler* v. *United States*, 7 F. 2d 59, 60 (CA2 1925). See generally H. Kalven & H. Zeisel, The American Jury

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[16] Petitioner does not contend that the Constitution prevents the Government from prosecuting him on the three § 7214 (a)(2) counts as to which Niederberger was acquitted. Nothing in the Double Jeopardy Clause or the Due Process Clause forecloses putting petitioner on trial as an aider and abettor simply because another jury has determined that his principal was not guilty of the offenses charged. Cf. *Ashe* v. *Swenson*, 397 U. S. 436 (1970).

193–347 (ed. 1976).[17] It is of course true that verdicts induced by passion and prejudice are not unknown in civil suits. But in civil cases, post-trial motions and appellate review provide an aggrieved litigant a remedy; in a criminal case the Government has no similar avenue to correct errors. Under contemporary principles of collateral estoppel, this factor strongly militates against giving an acquittal preclusive effect. See Restatement (Second) of Judgments § 68.1 (Tent. Draft No. 3, 1976) (denying preclusive effect to an unreviewable judgment).[18]

The application of nonmutual estoppel in criminal cases is also complicated by the existence of rules of evidence and exclusion unique to our criminal law. It is frequently true in criminal cases that evidence inadmissible against one defendant is admissible against another. The exclusionary rule, for example, may bar the Government from introducing evidence against one defendant because that evidence was obtained in violation of his constitutional rights. And the suppression of that evidence may result in an acquittal.

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[17] Niederberger's case demonstrates the point. As to the Absecon and Miami vacations, the jury convicted Niederberger of receiving something of value "because of any official act performed . . . by him," 18 U. S. C. § 201 (g), but acquitted him of receiving "any fee, compensation, or reward . . . for the performance of any duty," 26 U. S. C. § 7214 (a) (2). No explanation has been offered for these seemingly irreconcilable determinations. This inconsistency is reason, in itself, for not giving preclusive effect to the acquittals on the Absecon and Miami counts. See Restatement (Second) of Judgments § 88 (4) (Tent. Draft No. 3, 1976). See also 610 F. 2d, at 1112 (Gibbons, J., concurring in part and dissenting in part); *Harary* v. *Blumenthal*, 555 F. 2d 1113, 1116–1117 (CA2 1977).

[18] This is not to suggest that the availability of appellate review is always an essential predicate of estoppel. See *Johnson Co.* v. *Wharton*, 152 U. S. 252 (1894); see generally 1B J. Moore & T. Currier, Moore's Federal Practice ¶ 0.416 [5] (2d ed. 1974). The estoppel doctrine, however, is premised upon an underlying confidence that the result achieved in the initial litigation was substantially correct. In the absence of appellate review, or of similar procedures, such confidence is often unwarranted.

The same evidence, however, may be admissible against other parties to the crime "whose rights were [not] violated." *Alderman* v. *United States*, 394 U. S. 165, 171–172 (1969). Accord, *Rakas* v. *Illinois*, 439 U. S. 128, 134 (1978). In such circumstances, where evidentiary rules prevent the Government from presenting all its proof in the first case, application of nonmutual estoppel would be plainly unwarranted.[19]

It is argued that this concern could be met on a case-by-case basis by conducting a pretrial hearing to determine whether any such evidentiary ruling had deprived the Government of an opportunity to present its case fully the first time around. That process, however, could prove protracted and burdensome. Under such a scheme, the Government presumably would be entitled to seek review of any adverse evidentiary ruling rendered in the first proceeding and of any aspect of the jury charge in that case that worked to its detriment. Nothing short of that would insure that its opportunity to litigate had been "full and fair." If so, the "pretrial hearing" would fast become a substitute for appellate review, and the very purpose of litigation economy that estoppel is designed to promote would be frustrated.

Finally, this case involves an ingredient not present in either *Blonder-Tongue* or *Parklane Hosiery*: the important federal interest in the enforcement of the criminal law. *Blonder-Tongue* and *Parklane Hosiery* were disputes over private rights between private litigants. In such cases, no significant harm flows from enforcing a rule that affords a litigant only one full and fair opportunity to litigate an issue, and there is no sound reason for burdening the courts with repetitive litigation.

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[19] Indeed, as the Court of Appeals observed, to give the first case preclusive effect would undermine the *Alderman* rule by affording a defendant whose rights were not violated the benefits of suppression. See 610 F. 2d, at 1094, n. 51.

That is not so here. The Court of Appeals opinion put the point well:

> "[T]he purpose of a criminal court is not to provide a forum for the ascertainment of private rights. Rather it is to vindicate the public interest in the enforcement of the criminal law while at the same time safeguarding the rights of the individual defendant. The public interest in the accuracy and justice of criminal results is greater than the concern for judicial economy professed in civil cases and we are thus inclined to reject, at least as a general matter, a rule that would spread the effect of an erroneous acquittal to all those who participated in a particular criminal transaction. To plead crowded dockets as an excuse for not trying criminal defendants is in our view neither in the best interests of the courts, nor the public." 610 F. 2d, at 1093.

In short, this criminal case involves "competing policy considerations" that outweigh the economy concerns that undergird the estoppel doctrine. See Restatement (Second) of Judgments § 68.1 (e) and comments thereto (Tent. Draft No. 3, 1976); cf. *Commissioner* v. *Sunnen*, 333 U. S. 591 (1948).

III

In denying preclusive effect to Niederberger's acquittal, we do not deviate from the sound teaching that "justice must satisfy the appearance of justice." *Offutt* v. *United States*, 348 U. S. 11, 14 (1954). This case does no more than manifest the simple, if discomforting, reality that "different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system." *Roth* v. *United States*, 354 U. S. 476, 492, n. 30 (1957). While symmetry of results may be intellectually satisfying, it is not required. See *Hamling* v. *United States*, 418 U. S. 87, 101 (1974).

Here, petitioner received a fair trial at which the Government bore the burden of proving beyond reasonable doubt that Niederberger violated 26 U. S. C. § 7214 (a)(2) and that petitioner aided and abetted him in that venture. He was entitled to no less—and to no more.

The judgment of the Court of Appeals is

Affirmed.

LEWIS, COMPTROLLER OF FLORIDA v. BT INVESTMENT MANAGERS, INC., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

No. 79-45. Argued January 15, 1980—Decided June 9, 1980

A Florida statute (§ 659.141 (1)) prohibits out-of-state banks, bank holding companies, and trust companies from owning or controlling a business within the State that sells investment advisory services. Another statute (§ 660.10) prohibits all corporations except state-chartered banks and trust companies and national banks located in Florida from performing certain trust and fiduciary functions. Appellee out-of-state bank holding company's proposal to operate appellee investment management subsidiary in Florida was rejected by the Board of Governors of the Federal Reserve System on the ground that it was prohibited by § 659.141 (1). Appellees then brought suit in Federal District Court for declaratory and injunctive relief, alleging, *inter alia*, that § 659.141 (1) violates the Commerce Clause and that the joint operation of that section with § 660.10 constitutes a similar violation since but for the existence of such statutes authority would be sought to establish a subsidiary trust company in Florida. The District Court held that the statutes violate the Commerce Clause, because in combination they discriminate against out-of-state bank holding companies and are "parochial legislation" that "must be deemed per se unconstitutional." The court also held that the federal Bank Holding Company Act of 1956 does not foster or permit the types of discrimination against out-of-state bank holding companies reflected in the Florida statutes. The court granted declaratory relief against both statutes but enjoined only the enforcement of § 659.141 (1).

Held:

1. Section 659.141 (1) directly burdens interstate commerce in a manner that contravenes the Commerce Clause's implicit limitation on state power. Pp. 37–49.

(a) While bank and related financial activities are of profound local concern, it does not follow that these same activities lack important interstate attributes that establish Congress' power to regulate commerce and that also support constitutional limitations on the powers of the States. Such limitations clearly apply in this case. Pp. 38–39.

(b) The District Court properly concluded that § 659.141 (1) is "parochial" in the sense that it overtly prevents foreign enterprises from competing in local markets. Under that section, discrimination against affected business organizations is *not* evenhanded because only banks, bank holding companies, and trust companies with principal operations *outside* Florida are prohibited from operating investment subsidiaries or giving investment advice within the State. It follows that § 659.141 (1) discriminates *among* affected business entities according to the extent of their contacts with the local economy. *Exxon Corp.* v. *Governor of Maryland*, 437 U. S. 117, distinguished. And the disparate treatment of out-of-state bank holding companies cannot be justified as an incidental burden necessitated by legitimate local concerns, such as discouraging economic concentration, protecting the citizenry against fraud, or by an asserted interest in promoting local control over financial institutions. Pp. 39–44.

(c) Neither § 3 (d) of the Bank Holding Company Act—which prohibits bank holding companies from acquiring banking subsidiaries in other States without local authorization—nor § 7 of that Act—which reserves to the States a general power to enact regulations applicable to bank holding companies—authorizes a State to prohibit out-of-state holding companies from acquiring local investment subsidiaries. The only authority § 3 (d) grants to the States is the authority to *permit* expansion of banking across state lines where it would be otherwise federally prohibited. Moreover, the Act's structure reveals that § 3 (d) applies only to holding company acquisitions of banks. Section 7 was intended to preserve existing state regulations of bank holding companies and to define the extent of the Act's pre-emptive effect on state law, and there is nothing in § 7's language or legislative history to indicate that it was also intended to extend to the States new powers to regulate banking that they would not have possessed absent federal legislation. Section 7 applies only to state legislation that operates within the boundaries marked by the Commerce Clause. Pp. 44–49.

2. Since the constitutionality of § 660.10 was neither fully placed in issue nor fully determined by the District Court's decision, the validity of that section's limitation on the types of corporations that may perform trust responsibilities is not properly before this Court at this stage of the proceedings; hence, the District Court's judgment with respect to § 660.10 is vacated and the case is remanded for further proceedings. Moreover, the amendment, in the interim, of § 3 (d) of the Bank Holding Company Act so as apparently to prohibit appellee bank holding company from establishing a Florida trust subsidiary raises new jurisdic-

tional and substantive questions that should be addressed in the first instance by the District Court. Pp. 50–53.

461 F. Supp. 1187, affirmed in part, vacated in part, and remanded.

BLACKMUN, J., delivered the opinion for a unanimous Court.

Erwin N. Griswold argued the cause for appellant. On the brief were *Eugene J. Cella* and *Franklyn J. Wollett.*

John L. Warden argued the cause for appellees. On the brief were *John E. Mathews, Jr., Stephen E. Day,* and *Vincent J. Rio III.**

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case concerns the constitutionality of two Florida statutes regulating the conduct of investment advisory and trust services within that State. A three-judge United States District Court, convened pursuant to 28 U. S. C. § 2281 (1970 ed.),[1] held that the statutes violate the Commerce Clause, U. S. Const., Art. 1, § 8, cl. 3, because in combination they discriminate against bank holding companies that operate principally outside Florida. It also held that such discrimination is not authorized by federal legislation regulating the interstate operations of bank holding companies. The case was brought here on direct appeal, see 28 U. S. C. § 1253, and we noted probable jurisdiction to resolve the substantial constitutional and statutory issues presented. 444 U. S. 822 (1979).

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*Briefs of *amici curiae* urging reversal were filed by *Erwin N. Griswold* and *James F. Bell* for the Conference of State Bank Supervisors; and by *J. Thomas Cardwell* and *Michael P. McMahon* for the Florida Bankers Association.

John L. Warden and *Robert D. Owen* filed a brief for the New York Clearing House Association as *amicus curiae* urging affirmance.

[1] This action was filed on October 24, 1973, and is therefore unaffected by the subsequent repeal of 28 U. S. C. § 2281, which by its terms was made inapplicable to any action commenced on or before August 12, 1976. See Pub. L. 94–381, § 7, 90 Stat. 1120.

I

Appellee Bankers Trust New York Corporation (Bankers Trust) is a corporation organized under the laws of the State of New York. It maintains its principal place of business in that State. It is a bank holding company within the meaning of § 2 (a) of the Bank Holding Company Act of 1956, 70 Stat. 133, as amended, 12 U. S. C. § 1841 (a) (1976 ed. and Supp. II) (Act). Accordingly, it is subject to federal restrictions on the kinds of subsidiaries it may own or control. Upon authorization from the Board of Governors of the Federal Reserve System, however, it is permitted to own or control shares of any company the business of which is "so closely related to banking or managing or controlling banks as to be a proper incident thereto." § 4 (c)(8) of the Act, 12 U. S. C. § 1843 (c)(8). By regulation, the Board has designated both the provision of investment or financial advice and the performance of certain trust functions as "closely related" business within the meaning of this statute. See 12 CFR §§ 225.4 (a)(4) and (5) (1979).

In 1972, the management of Bankers Trust decided to seek the Board's approval for an investment management subsidiary to operate in Florida. On October 3 of that year, Bankers Trust filed a formal proposal for such a subsidiary, which it planned to operate from offices in Palm Beach. Appellee BT Investment Managers, Inc. (BTIM), was Bankers Trust's intended vehicle for entry into the Florida market. It was incorporated under the laws of the State of Delaware as a wholly owned subsidiary on November 24, 1972. Three days later it qualified to do business in Florida. The application to the Board proposed that BTIM would provide "portfolio investment advice," as well as "general economic information and advice, general economic statistical forecasting services and industry studies" to persons other than banks. See Complaint ¶ 7, App. 9–10, and appellant's Answer ¶ 7, App. 19.

When Bankers Trust filed its application with the Board, certain Florida statutes restricted the ability of out-of-state bank holding companies to compete in the State's financial market. At that time Fla. Stat. § 659.141 (1), added by 1972 Fla. Laws, ch. 72-96, § 1, and effective March 28, 1972, prohibited Bankers Trust from owning or controlling a bank or trust company located within the State; the same statute also prohibited it from owning businesses furnishing investment advisory services to local banks or trust companies. In addition, Fla. Stat. § 660.10 prohibited any corporation, other than a state-chartered bank and trust company or a national banking association located in Florida, from performing certain trust and fiduciary functions. Neither statute, however, directly prohibited an out-of-state bank holding company from owning or controlling a business furnishing investment advisory services to the general public. Thus, at the time Bankers Trust filed its application with the Board, it appeared that ownership of BTIM would not violate Florida law, although BTIM would be restricted in the types of financial services it could perform and the customers it could serve.

The reaction of the Florida financial community to Bankers Trust's proposed investment subsidiary was decidedly negative. The State Comptroller, the Florida Bankers Association, and the Palm Beach County Bankers Association, Inc., all filed comments with the Board objecting to the Bankers Trust proposal. More importantly for present purposes, the state legislature was persuaded to take action. On November 30, 1972, shortly after BTIM had qualified to do business in the State, a special session of the legislature amended Fla. Stat. § 659.141 (1). That statute, which had been on the books only since March 28 of that year, was expanded to prohibit an out-of-state bank holding company from owning or controlling a business within the State that sells investment advisory services to any customer, rather than just to "trust companies or banks" in Florida, as the statute theretofore had

read.[2] This amendment took effect, without the Governor's approval, on December 21, 1972. There is evidence that the amendment was a direct response to Bankers Trust's pending application, and that it had the strong backing of the local financial community.

On April 26, 1973, the Board rejected Bankers Trust's proposal on the ground that it would conflict with state law. *Bankers Trust New York Corp.*, 59 Fed. Res. Bull. 364. The Board observed that the proposal contemplated *de novo* entry into the Florida investment management market rather than acquisition of an existing concern, and it noted that *de novo* entry ordinarily has a desirable procompetitive impact. Absent evidence of a contrary effect in this case, the Board intimated that it would have been favorably inclined toward the proposal. But it found that the December amendment to Fla. Stat. § 659.141 (1) "was intended to, and does, prohibit the performance of investment advisory services in Florida by non-Florida bank holding companies." 59 Fed. Res. Bull., at 365. In view of its obligation to respect the dictates of state law, the Board found itself constrained to reject the proposal. See 12 U. S. C. § 1846; *Whitney Nat. Bank* v. *Bank of New Orleans*, 379 U. S. 411, 424–425 (1965).

Within six months of the Board's decision, the two appellees

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[2] See 1972 Fla. Laws, ch. 72-726, §§ 1–7. As so amended, § 659.141 (1) reads in pertinent part:

". . . [N]o bank, trust company, or holding company, the operations of which are principally conducted outside this state, shall acquire, [or] retain, *or own*, directly or indirectly, all, or substantially all the assets of, or control over, any *bank or* trust company having a place of business in this state where the *business of banking or* trust business or functions are conducted, or acquire, [or] retain, *or own* all, or substantially all, of the assets of, or control over, any business organization having a place of business in this state where or from which it furnishes investment advisory services [to trust companies or banks] in this state."

The italicized words were added, and the bracketed words were deleted, by the December 1972 amendment.

filed this action seeking declaratory and injunctive relief.[3] Count I of their complaint alleged that Fla. Stat. § 659.141 (1) "is not designed to promote lawful regulatory objectives, but is intended to shelter those organizations presently conducting an investment advisory business in Florida from competition by [BTIM]." Complaint ¶ 11, App. 11. The complaint alleged violations of the due process and equal protection guarantees of the Fourteenth Amendment, as well as violation of the Commerce Clause. Count II alleged similar constitutional defects as the result of the joint operation of §§ 659.141 (1) and 660.10. Appellees alleged that "[b]ut for the existence of the challenged statutes," Bankers Trust would seek authority from the Board to establish "a subsidiary trust company having a national bank charter or a Florida state charter" that would engage exclusively in one or more of the functions regulated by § 660.10. Complaint ¶ 21, App. 14–15. A three-judge court was convened pursuant to 28 U. S. C. § 2281 (1970 ed.), and the case was submitted for summary judgment on a stipulated set of facts.

The District Court, by a divided vote, initially dismissed the complaint without prejudice on the ground that it should abstain from decision under either *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496 (1941), or *Burford* v. *Sun Oil Co.*, 319 U. S. 315 (1943). *BT Investment Managers, Inc.* v. *Dickinson*, 379 F. Supp. 792 (ND Fla. 1974). The United States Court of Appeals for the Fifth Circuit, however, reversed and remanded for consideration of the merits. 559 F. 2d 950 (1977).

On remand, the District Court held that the challenged portions of the two statutes violate the Commerce Clause. 461 F. Supp. 1187 (1978). Without reaching appellees' due process and equal protection arguments, it found that the

[3] Bankers Trust in November 1973 petitioned the United States Court of Appeals for the Second Circuit for review of the Board's order denying the proposal. That petition has been withdrawn, with leave to reinstate, pending the outcome of this suit.

statutes under attack discriminate against interstate commerce. The court reasoned that § 659.141 (1) "erects an insuperable barrier to the entry of foreign-based bank holding companies, through their subsidiaries, into the Florida investment advisory market," and that § 660.10 "similarly cordons off Florida trust companies from competition by out-of-state concerns." 461 F. Supp., at 1196. It ruled that the statutes are "parochial legislation" that "must be deemed per se unconstitutional." *Ibid.* Moreover, it held that the legislative purposes proffered by appellant, including a purported desire to curb anticompetitive abuses arising from agglomeration of financial power, failed to justify the discriminatory impact of the statutes.

Finally, the District Court held that the federal Bank Holding Company Act does not foster or permit the types of discrimination against out-of-state bank holding companies reflected in the Florida statutes. The court eschewed the argument that either § 3 (d) of the Act, 12 U. S. C. § 1842 (d), or § 7 of the Act, 12 U. S. C. § 1846, authorized the statutes in question. It recognized that § 3 (d) prohibits bank holding companies from acquiring banking subsidiaries in other States without local authorization. But it rejected the contention that this prohibition implicitly extends as well to related businesses, such as the providing of investment advice.

The court issued an order granting declaratory relief against both statutes but enjoining the enforcement of only § 659.141 (1) against appellees.[4]

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[4] Initially the court declared the entire first sentence of § 659.141 (1) unconstitutional. App. to Juris. Statement A1. It amended that order, however, to limit its declaration to that portion of the sentence dealing with investment advisory and trust services. See *id.*, at D1–D2. The court rendered no decision on the constitutionality of those portions of the statute that govern acquisition of Florida banks by out-of-state banks, bank holding companies, or trust companies. The court refused to grant injunctive relief against § 660.10 because appellees had yet to attempt establishment of a trust company in Florida; the court accordingly determined that

II

This appeal presents two distinct but related questions with respect to the validity of the challenged Florida statutes.[5] The first is whether the statutes, viewed independently of federal legislation regulating the banking industry, burden interstate commerce in a manner contrary to the Commerce Clause. The second is whether Congress, by its own legislation in this area, has created an area in which the States may regulate free from Commerce Clause restraints. Since there is no contention that federal legislation pre-empts the state laws in question, federal law becomes important only if it appears that the Florida statutes cannot survive without federal authorization. Thus, the second question becomes pertinent only if we reach an affirmative answer to the first.

These questions arise against a backdrop of familiar principles. The Commerce Clause grants to Congress the power "[t]o regulate Commerce . . . among the several States." U. S. Const., Art. 1, § 8, cl. 3. Although the Clause thus speaks in terms of powers bestowed upon Congress, the Court long has recognized that it also limits the power of the States to erect barriers against interstate trade. See, *e. g.*, *Hughes* v. *Oklahoma*, 441 U. S. 322, 326 (1979); *Philadelphia* v. *New Jersey*, 437 U. S. 617, 623 (1978); *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U. S. 525, 534–538 (1949); *Cooley* v. *Board of*

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injunctive relief against that statute would be premature. 461 F. Supp. 1187, 1201 (ND Fla. 1978).

[5] Because the District Court granted injunctive relief with respect to § 659.141 (1), we have jurisdiction, under 28 U. S. C. § 1253, over the appeal. See *White* v. *Regester*, 412 U. S. 755, 761 (1973). See, however, Part IV, *infra*.

While this case was pending in the District Court, the Florida Division of Securities, acting pursuant to a "grandfather" clause, Fla. Stat. § 659.141 (3), authorized Bankers Trust to conduct investment advisory services from a single Florida office. This authorization does not moot the controversy, because the District Court's injunction leaves Bankers Trust free to establish additional offices that § 659.141 (1) would otherwise prohibit.

Wardens, 12 How. 299 (1852). This limitation upon state power, of course, is by no means absolute. In the absence of conflicting federal legislation, the States retain authority under their general police powers to regulate matters of "legitimate local concern," even though interstate commerce may be affected. See, *e. g.*, *Raymond Motor Transportation, Inc.* v. *Rice*, 434 U. S. 429, 440 (1978); *Great A&P Tea Co.* v. *Cottrell*, 424 U. S. 366, 371 (1976). Where such legitimate local interests are implicated, defining the appropriate scope for state regulation is often a matter of "delicate adjustment." *Ibid.*, quoting *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U. S., at 553 (Black, J., dissenting). Yet even in regulating to protect local interests, the States generally must act in a manner consistent with the "ultimate . . . principle that one state in its dealings with another may not place itself in a position of economic isolation." *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511, 527 (1935). However important the state interest at hand, "it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently." *Philadelphia* v. *New Jersey*, 437 U. S., at 626–627.

Over the years, the Court has used a variety of formulations for the Commerce Clause limitation upon the States, but it consistently has distinguished between outright protectionism and more indirect burdens on the free flow of trade. The Court has observed that "where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected." *Id.*, at 624. In contrast, legislation that visits its effects equally upon both interstate and local business may survive constitutional scrutiny if it is narrowly drawn. The Court stated in *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137 (1970):

> "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld

> unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Id.*, at 142.

See also *Hughes* v. *Oklahoma*, 441 U. S., at 336; *Hunt* v. *Washington Apple Advertising Comm'n*, 432 U. S. 333, 353 (1977); *Great A&P Tea Co.* v. *Cottrell*, 424 U. S., at 371–372; *Huron Portland Cement Co.* v. *Detroit*, 362 U. S. 440, 443 (1960). The principal focus of inquiry must be the practical operation of the statute, since the validity of state laws must be judged chiefly in terms of their probable effects. See *Hughes* v. *Oklahoma*, 441 U. S., at 336; *Best & Co.* v. *Maxwell*, 311 U. S. 454, 455–456 (1940).

III

With these principles in mind, we first turn to § 659.141 (1). This statute has been the chief object of controversy, since it is the statute that prevents appellees from setting up their projected investment advisory business within Florida. The statute prohibits ownership of local investment or trust businesses by firms possessing two characteristics: a certain kind of business organization and purpose, whether it be as a bank, trust company, or a bank holding company; and location of principal operations outside Florida.

Appellant and the *amici* supporting his position argue that the District Court's analysis of § 659.141 (1) is flawed in three respects: First, the statute assertedly affects only matters of local character that have insufficient interstate attributes to bring federal constitutional limitations into play.[6] Second,

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[6] Appellant advanced this argument in the District Court but has substantially departed from it on appeal. Supporting *amici*, however, con-

the District Court erroneously labeled the statute protectionist legislation and thus incorrectly relied upon the "*per se* rule of invalidity" identified in *Philadelphia* v. *New Jersey*, 437 U. S., at 624. Appellant argues that the statute should be treated as neutral legislation subject to the less stringent standards of *Pike* v. *Bruce Church, Inc., supra,* and he argues that it meets this test. Third, the District Court failed to accord proper significance, in appellant's view, to the Bank Holding Company Act of 1956. Appellant argues that the Act grants authority to the States to prohibit out-of-state bank holding companies from owning local subsidiaries that provide bank-related services.

A

The first of these arguments needs only brief mention. We readily accept the submission that, both as a matter of history and as a matter of present commercial reality, banking and related financial activities are of profound local concern. As appellees freely concede, Brief for Appellees 17, n. 10, sound financial institutions and honest financial practices are essential to the health of any State's economy and to the well-being of its people. Thus, it is not surprising that ever since the early days of our Republic, the States have chartered banks and have actively regulated their activities.

Nonetheless, it does not follow that these same activities lack important interstate attributes. An impressive array of federal statutes regulating not only the provision of banking services but the formation of banking organizations, the rendering of investment advice, and the conduct of national investment markets, is substantial evidence to the contrary.[7]

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tinue to press the contention. See, *e. g.*, Brief for Conference of State Bank Supervisors as *Amicus Curiae* 8–12.

[7] Some of the leading examples of federal regulation of banking, trust, and investment businesses include the National Bank Act, 12 U. S. C. § 21 *et seq.;* the Securities Act of 1933, 48 Stat. 74, as amended, 15 U. S. C. § 77a *et seq.;* the Securities Exchange Act of 1934, 48 Stat. 881, as

We do not understand appellant to dispute the validity of these enactments, all of which rest primarily on Congress' powers under the Commerce Clause. Indeed, appellant's arguments under the Bank Holding Company Act assume the validity of federal regulation in this sphere. This Court has observed that the same interstate attributes that establish Congress' power to regulate commerce also support constitutional limitations on the powers of the States. *Philadelphia* v. *New Jersey*, 437 U. S., at 622–623. For present purposes, it is clear that those limitations apply.

B

The contentions that the District Court erred by applying too stringent a standard in defining the limits of Florida's regulatory authority, and that § 659.141 (1) is evenhanded local regulation, are more substantial. We nonetheless agree with the District Court's conclusion that this statute is "parochial" in the sense that it overtly prevents foreign enterprises from competing in local markets.

The statute makes the out-of-state location of a bank holding company's principal operations an explicit barrier to the presence of an investment subsidiary within the State. As Bankers Trust's application before the Board itself indicates, it thus prevents competition in local markets by out-of-state firms with the kinds of resources and business interests that make them likely to attempt *de novo* entry. Appellant virtually concedes this effect, Brief for Appellant 59, and the circumstances of enactment suggest that it was the legislature's principal objective.

Appellant argues, however, that the statute ought not to be

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amended, 15 U. S. C. § 78a *et seq.;* the Trust Indenture Act of 1939, 53 Stat. 1149, as amended, 15 U. S. C. § 77aaa *et seq.;* and the Investment Company Act of 1940, 54 Stat. 789, as amended, 15 U. S. C. § 80a–1 *et seq.* For an express finding on the effect of investment advisory activities on interstate commerce, see Investment Advisors Act of 1940, § 201, 54 Stat. 847, 15 U. S. C. § 80b–1.

declared *per se* invalid because it does not prevent all out-of-state investment enterprises from entering local markets. Investment enterprises that are *not* bank holding companies, banks, or trust companies either may own investment subsidiaries in Florida or may enter the state investment market directly by obtaining a license to do business. Furthermore, locally incorporated bank holding companies are subject to the same restrictions as their foreign counterparts if they maintain their principal operations elsewhere. Appellant thus analogizes § 659.141 (1) to the Maryland statute prohibiting local retail operations by vertically integrated petroleum companies that the Court upheld in *Exxon Corp.* v. *Governor of Maryland,* 437 U. S. 117 (1978). The statute, it is said, discriminates against a particular kind of corporate organizational structure more than it does against the origin or citizenship of a particular business enterprise.

The statute involved in *Exxon* flatly prohibited producers and refiners of petroleum products from opening or operating retail services within Maryland under a variety of corporate or contractual arrangements. *Id.*, at 120, n. 1. It was enacted in response to perceived inequities in the allocation of petroleum products to retail outlets during the fuel shortage of 1973. Various oil companies, all of which engaged in production and refining as well as in sale of petroleum products, challenged the statute on a number of grounds. Among other arguments, they claimed that the statute violated the Commerce Clause because it discriminated against producers and refiners, all of which were interstate concerns, in favor of independent retailers, most of which were local businesses.

The Court rejected this contention. After holding that the statute served the legitimate state purpose of "controlling the gasoline retail market," *id.*, at 125, the Court separately analyzed its effect on interstate commerce in the producing-refining and retailing ends of the petroleum industry. The Court concluded that the statute could not discriminate

against interstate petroleum producers and refiners in favor of locally based competitors because, as a matter of fact, there were no such local producers or refiners to be favored. *Ibid.* For the same reason, it concluded that the flow of petroleum products in interstate commerce would not be reduced. *Id.*, at 127. It also rejected a claim of discrimination at the retail level because the statute placed "no barriers whatsoever" on competition in local markets by "interstate independent dealers" that did not own production or refining facilities. *Id.*, at 126. Despite the fact that the number of stations operated by independent dealers was small relative to the number operated by producer-refiners, the Court concluded that neither the placing of a disparate burden on some interstate competitors nor the shifting of business from one part of the interstate market to another was enough, under the circumstances, to establish a Commerce Clause violation. *Id.*, at 126–127.

There are some points of similarity between *Exxon* and the present case. In the former, the statute in issue discriminated against vertical organization in the petroleum industry. Section 659.141 (1) similarly discriminates against a particular kind of conglomerate organization in the investment and financial industries. And the Maryland statute permitted some kinds of interstate competitors free entry into the local market, as does the Florida statute at issue here.[8]

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[8] Appellant also argues that the present statute, like the one in *Exxon Corp.* v. *Governor of Maryland*, 437 U. S. 117, 125 (1978), has no discernible impact on the flow of goods in interstate commerce. Locally owned investment businesses are as free to channel their clients' investments into interstate markets as their interstate competitors. The validity of this argument cannot be determined on this record. In the *Exxon* case, as we have noted, all petroleum products sold in the State were produced and refined elsewhere. In contrast, investments may be directed into local as well as interstate markets. Since it is at least conceivable that an investment subsidiary owned by a locally operating bank holding company would be more likely to recommend investments in local busi-

We disagree, however, with the suggestion that *Exxon* should be treated as controlling precedent for this case. Section 659.141 (1) engages in an additional form of discrimination that is highly significant for purposes of Commerce Clause analysis. Under the Florida statute, discrimination against affected business organizations is *not* evenhanded because only banks, bank holding companies, and trust companies with principal operations *outside* Florida are prohibited from operating investment subsidiaries or giving investment advice within the State. It follows that § 659.141 (1) discriminates *among* affected business entities according to the extent of their contacts with the local economy. The absence of a similar discrimination between interstate and local producer-refiners was a most critical factor in *Exxon*. Both on its face and in actual effect, § 659.141 (1) thus displays a local favoritism or protectionism that significantly alters its Commerce Clause status. See *Philadelphia* v. *New Jersey*, 437 U. S., at 626–627; *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S., at 527.[9]

We need not decide whether this difference is sufficient to render the Florida legislation *per se* invalid, for we are convinced that the disparate treatment of out-of-state bank holding companies cannot be justified as an incidental burden necessitated by legitimate local concerns. In the District Court and to some extent on this appeal, appellant and supporting *amici* have argued that the Florida legislation advances several important state policies. Among those that

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nesses, we decline to assign any weight to this argument in the absence of proof concerning the actual effect of the Florida statute.

[9] Appellant's argument that § 659.141 (1) could also apply to locally organized bank holding companies, if they maintained their principal operations outside the State, is significantly weakened by federal restrictions on interstate expansion of a bank holding company's banking activities discussed in Part III–C, *infra*. As a result of these statutes, it is unlikely that many local bank holding companies would have their principal operations elsewhere. In any event, discrimination based on the extent of local operations is itself enough to establish the kind of local protectionism we have identified.

have been specifically identified are an interest in discouraging undue economic concentration in the arena of high finance; an interest in regulating financial practices, presumably to protect local residents from fraud; and an interest in maximizing local control over locally based financial activities. We think that these alleged purposes fail to justify the extent of the burden placed upon out-of-state bank holding companies.

Discouraging economic concentration and protecting the citizenry against fraud are undoubtedly legitimate state interests. But we are not persuaded that these interests justify the heavily disproportionate burden this statute places on bank holding companies that operate principally outside the State. Appellant has demonstrated no basis for an inference that all out-of-state bank holding companies are likely to possess the evils of monopoly power, that they are more likely to do so than their homegrown counterparts, or that they are any more inclined to engage in sharp practices than bank holding companies that are locally based.[10] Nor is there any reason to conclude that outright prohibition of entry, rather than some intermediate form of regulation, is the only effective method of protecting against the presumed evils, particularly when other out-of-state businesses that may be just as large or far-flung are permitted to compete in the local market. We conclude that these asserted state interests simply do not suffice to eliminate § 659.141 (1)'s apparent constitutional defect. Cf. *Hunt* v. *Washington Apple Advertising Comm'n*, 432 U. S., at 353–354; *Great A&P Tea Co.* v. *Cottrell*, 424 U. S., at 375–376.

With regard to the asserted interest in promoting local control over financial institutions, we doubt that the interest itself is entirely clear of any tinge of local parochialism. In almost any Commerce Clause case it would be possible for a State to argue that it has an interest in bolstering local ownership, or

[10] Both in-state and out-of-state bank holding companies, of course, are subject to extensive regulation by the Federal Government designed to protect against these same evils.

wealth, or control of business enterprise. Yet these arguments are at odds with the general principle that the Commerce Clause prohibits a State from using its regulatory power to protect its own citizens from outside competition. See *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U. S., at 538; *Buck* v. *Kuykendall*, 267 U. S. 307, 315–316 (1925); cf. *Toomer* v. *Witsell*, 334 U. S. 385, 403–404 (1948). In any event, the interest is not well served by the present legislation. The statute, for example, does not restrict out-of-state ownership of local bank holding companies. Nor, as appellant concedes, does it prevent entry by out-of-state entities other than those having the prohibited organizational forms. There is thus no reason to believe that the State's interest in local control, to the extent it legitimately exists, has been significantly or evenhandedly advanced by the statutory means that have been employed.

For these reasons, we conclude that the District Court did not err in holding that § 659.141 (1) directly burdens interstate commerce in a manner that contravenes the Commerce Clause's implicit limitation on state power.

C

Ordinarily, at this point we would have reached the end of our inquiry. But in this instance appellant has another string to his bow: the contention that by Act of Congress the State has been given additional authority to regulate entry by bank holding companies into the local investment advisory market. Congress, of course, has power to regulate the flow of interstate commerce in ways that the States, acting independently, may not. And Congress, if it chooses, may exercise this power indirectly by conferring upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy. See *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U. S., at 542–543; *Prudential Insurance Co.* v. *Benjamin*, 328 U. S. 408, 423–424 (1946); *International Shoe Co.* v. *Washington*, 326 U. S. 310, 315 (1945). It is appellant's view

that the Bank Holding Company Act of 1956, as amended, is enabling legislation of this very kind, and that it authorizes the restrictions on bank holding companies embodied in § 659.141 (1).

This argument rests on two provisions in the federal legislation. Section 3 (d) of the Act, 12 U. S. C. § 1842 (d), prohibits the Board from approving an application by a bank holding company to acquire "any additional bank" located outside the State in which the holding company has its principal operations, unless that acquisition is specifically authorized by the statutory law of the State in which the proposed acquisition is located.[11] Section 7 of the Act, 12 U. S. C. § 1846, reserves to the States a continuing role in the regulation of bank holding companies.[12] Appellant argues that

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[11] Appellant relies on that part of § 3 (d) of the Bank Holding Company Act of 1956, 70 Stat. 135, as amended, 80 Stat. 238, 12 U. S. C. § 1842 (d), which provides:

"Notwithstanding any other provision of this section, no application shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the State in which the operations of such bank holding company's banking subsidiaries were principally conducted on the effective date of this amendment [July 1, 1966] or the date on which such company became a bank holding company, whichever is later, unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication. For the purposes of this section, the State in which the operations of a bank holding company's subsidiaries are principally conducted is that State in which total deposits of all such banking subsidiaries are largest."

A new subsection was added to this statute effective March 31, 1980. See Part IV, *infra*.

[12] Section 7 provides:

"The enactment by the Congress of the Bank Holding Company Act of 1956 shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with

either or both of these provisions authorize the State to prohibit out-of-state bank holding companies from acquiring local investment subsidiaries.

The Bank Holding Company Act of 1956 was enacted to accomplish two primary objectives. First, it was designed to prevent the concentration of banking resources in the hands of a few financial giants. Second, it was intended to implement a congressional policy against control of banking and nonbanking enterprises by a single business entity. See S. Rep. No. 1095, 84th Cong., 1st Sess., 2 (1955); *Board of Governors* v. *First Lincolnwood Corp.*, 439 U. S. 234, 242–243 (1978). Underlying both objectives was a desire to prevent anticompetitive tendencies in national credit markets. See S. Rep. No. 91–1084, pp. 2–3 (1970).

Congress sought to accomplish these twin goals through separate statutory provisions. Section 3 of the Act placed limitations on the creation of bank holding companies and their expansion within the banking field. Section 3 (a) required Board approval for such activities as formation of bank holding companies, acquisition of bank stock or assets by such holding companies or their subsidiaries, and merger of bank holding companies. Section 3 (c) specified criteria to be considered by the Board in determining whether to grant approval. Section 4 sharply curtailed acquisition of nonbanking enterprises. Section 4 (a) generally forbade future acquisition of nonbanking enterprises. What was then § 4 (c)(6), however, carved out an exception for companies "of a financial, fiduciary, or insurance nature" if the Board determined that they are "so closely related to the business of banking or of managing or controlling banks as to be a proper incident thereto." 70 Stat. 137.

When this legislation was first proposed to the Senate, neither § 3 nor § 4 contained explicit limitations on interstate

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respect to banks, bank holding companies, and subsidiaries thereof." 70 Stat. 138.

expansion by bank holding companies. See S. 2577, 84th Cong., 1st Sess., §§ 3, 4 (1955). But Senator Douglas introduced an amendment to § 3 prohibiting bank holding companies from expanding into banking across state lines. He argued that such an amendment was desirable in order to ensure that national banks would not use bank holding companies as mechanisms to evade state-law restrictions on branching of banks recognized and made applicable to national banks by the McFadden Act, 12 U. S. C. § 36. See 102 Cong. Rec. 6860 (1956) (remarks of Sen. Douglas). The Senate agreed to the amendment. A similar provision had been included in the companion bill introduced in the House of Representatives. See H. R. Rep. No. 609, 84th Cong., 1st Sess., 2–5, 15, 24 (1955). The "Douglas Amendment" emerged as § 3 (d) of the Act, the first of the two provisions on which appellant relies.

We conclude that § 3 (d) offers scant support for the portions of § 659.141 (1) subject to challenge in this proceeding. Preliminarily, it is doubtful that § 3 (d) authorizes state restrictions of any nature on bank holding company activities. The language of the statute establishes a general federal prohibition on the acquisition or expansion of banking subsidiaries across state lines. The only authority granted to the States is the authority to create exceptions to this general prohibition, that is, to *permit* expansion of banking across state lines where it otherwise would be federally prohibited. Furthermore, the structure of the Act reveals that § 3 (d) applies only to holding company acquisitions of banks. Nonbanking activities are regulated separately in § 4, which does not contain a parallel provision. Even if § 3 (d) could be interpreted to authorize additional state regulation, ordinary canons of interpretation thus would lead to the inference that restraints so authorized could apply only to a holding company's banking activities.[13]

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[13] Appellant attempts to answer the latter of these observations by arguing that the restrictions of § 3 (d) implicitly placed geographical

In contrast to § 3 (d), § 7 of the Act does reserve to the States a general power to enact regulations applicable to bank holding companies. This section was intended to preserve

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limitations on the expansion of nonbanking activities as well. Appellant asserts that the Board initially gave § 4 (c) a narrow interpretation that effectively prohibited holding companies from owning nonbanking subsidiaries unless they were closely related to an existing banking operation controlled by the parent company. See, *e. g.*, *Transamerica Corp.*, 43 Fed. Res. Bull. 1014, 1016–1017 (1957). Since such banking operations were geographically confined by virtue of § 3 (d), the Board's restrictive application of § 4 (c) assertedly applied the same limitation to nonbanking operations.

We agree with appellees that this argument has been significantly undercut by 1970 amendments to the Act that revised the language of § 4 (c). Although the principal purpose of those amendments was to extend the regulatory controls of the Act to one-bank holding companies that were formerly exempt, Congress also adopted changes designed to give the Board greater discretion in administering the Act. See S. Rep. No. 91–1084, pp. 12–13 (1970); H. R. Rep. No. 91–387, p. 14 (1969); see also Chase, The Emerging Financial Conglomerate: Liberalization of the Bank Holding Company Act, 60 Geo. L. J. 1225, 1236–1237 (1972). The Federal Reserve Board proposed several changes in § 4 (c) designed to liberalize the standards for expansion into "related" nonbanking enterprises. These proposals met with different receptions in the two Houses of Congress, and the final product was a compromise. A proposal to substitute the phrase "functionally related" for "closely related" was not adopted; but the phrase "financial, fiduciary, or insurance nature" was dropped from the statute, and "business of banking" was changed simply to "banking." Bank Holding Company Act Amendments of 1970, Pub. L. 91–607, § 103, 84 Stat. 1763; see Note, 39 Geo. Wash. L. Rev. 1200, 1219–1223 (1971).

There was substantial disagreement among House and Senate conferees over the exact import of these changes with respect to the breadth of nonbanking activities that the amendments would permit. Cf. H. R. Conf. Rep. No. 91–1747, p. 21 (1970), and 116 Cong. Rec. 41950–41952 (1970) (remarks of Rep. Patman), with *id.*, at 41953–41954 (remarks of Rep. Widnall); *id.*, at 42424 (remarks of Sen. Sparkman); *id.*, at 42435–42436 (remarks of Sen. Bennett). See also Note, 71 Mich. L. Rev. 1170, 1206–1207 (1973). We need not enter that debate at this juncture. For present purposes, it is sufficient to note that the change from "business of banking" to "banking" was explicitly proposed in order to free

existing state regulations of bank holding companies, even if they were more restrictive than federal law. See S. Rep. No. 1095, 84th Cong., 1st Sess., 22 (1955). But we find nothing in its language or legislative history to support the contention that it also was intended to extend to the States new powers to regulate banking that they would not have possessed absent the federal legislation. Rather, it appears that Congress' concern was to define the extent of the federal legislation's pre-emptive effect on state law. In response to criticisms of the provision on the ground that it might be interpreted to expand state authority, one Committee Report stated that it was intended "to preserve to the States those powers which they now have in our dual banking system," yet "to make it clear that a State could not enact legislation inconsistent with the [Act] and therefore nullify its effect." S. Rep. No. 1095, 84th Cong., 2d Sess., pt. 2, p. 5 (1956). Far from creating a new state power to discriminate between foreign and local bank holding companies, the legislative history evinces an intent to forestall such a broad interpretation. We therefore conclude that § 7 applies only to state legislation that operates within the boundaries marked by the Commerce Clause.

Since neither of these provisions authorizes state legislation of the variety contained in the challenged portions of § 659.141 (1), we agree with the District Court that appellant's reliance on the Bank Holding Company Act is misplaced. The effects of the Florida statute on interstate commerce have not been permitted by Congress, and its Commerce Clause defects have not been removed. Therefore, the District Court's injunction against enforcement of the statute must be sustained.

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the Board from its prior requirement of relationship to a bank holding company's existing banking enterprises. See S. Rep. No. 91-1084, p. 12 (1970); Letter dated November 23, 1970, from Arthur Burns, Federal Reserve Board Chairman, to Representative Patman, reprinted in 116 Cong. Rec. 41959 (1970); see also Note, 39 Geo. Wash. L. Rev., at 1220. Once that change was made, the implicit geographical limitation appellant infers from previous applications of the Act was removed along with the language from which it was derived.

IV

This brings us, finally, to § 660.10. That statute prohibits all corporations except state-chartered banks and national banks having their operations in Florida from performing specified fiduciary functions. It does not purport to regulate the ownership of such institutions by bank holding companies. For the reasons stated below, we conclude that its constitutionality has been neither fully placed in issue nor fully determined by the District Court's decision. We therefore vacate the judgment with respect to § 660.10 and remand for such further proceedings as may be necessary in light of this opinion.

As we have already noted, appellees' complaint challenged the constitutionality of § 660.10 only insofar as it operated in conjunction with § 659.141 (1). The District Court followed the same approach, and it granted declaratory relief against § 660.10 on that basis. Jointly, of course, the statutes not only limit the kinds of corporations that may perform fiduciary functions within Florida, but also prevent out-of-state bank holding companies from owning such corporations as their subsidiaries. It was this joint effect that led the District Court to find that § 660.10 "cordons off Florida trust companies from competition by out-of-state concerns." 461 F. Supp., at 1196. Having so found, the District Court did not address the constitutionality of § 660.10 standing alone. It did not consider, for example, which of the many functions regulated by § 660.10 were in issue, or whether any of the exceptions created by that statute might apply. Indeed, it refused to grant injunctive relief against that statute and ruled that any challenge to its enforcement was premature. 461 F. Supp., at 1201.

On this appeal the argument over the constitutionality of § 660.10 has focused not on the concatenation of the two statutes, but on the power of a State under the Commerce Clause to require local incorporation as a condition of doing busi-

ness in local markets. Cf. *Railway Express Co.* v. *Virginia*, 282 U. S. 440 (1931). Because of the approach taken in the District Court, however, there has been no definitive ruling on this issue. The court may have touched obliquely on the question when it declared, on a motion for clarification, that a State may not wholly exclude foreign corporations from doing business in the State. See App. to Juris. Statement E2. But it made no specific determination whether § 660.10 would have such an effect, and it refused to speculate about the impact that enforcement of the statute might have upon appellees.

Nor is it clear that there is a present case or controversy with respect to the validity of the separate requirements imposed by § 660.10. As we have noted, appellees' complaint does not expressly join battle on this issue. The facts of the case show, moreover, that it was § 659.141 (1) that prevented BTIM's entry into Florida. The application before the Board specified that BTIM would perform only investment advisory services that are outside the scope of § 660.10. Bankers Trust had not yet processed an application to the Board for permission to form a Florida trust subsidiary, and the Board had not yet determined whether such a subsidiary could be approved as a matter of federal law. The parties did stipulate that Bankers Trust would attempt to organize a Florida subsidiary having fiduciary powers were it not prohibited by state law from doing so. But we interpret this stipulation to mean that Bankers Trust was willing to comply with a local incorporation requirement, without contesting its validity, so long as it was not prohibited entirely from establishing a trust subsidiary in the State. Accordingly, the District Court may not have been in a position to decide the broad question the parties now ask us to resolve, even if that question had been clearly raised by the pleadings.

One further consideration counsels against our attempting to evaluate the validity of § 660.10 at this juncture. Since we noted probable jurisdiction of this appeal, Congress has

amended § 3 (d) of the Bank Holding Company Act to extend its restrictions on interstate expansion to fiduciary organizations of the kind Bankers Trust has stipulated it would attempt to organize in Florida. Depository Institutions Deregulation and Monetary Control Act of 1980, § 712 (b), Pub. L. 96–221, 94 Stat. 189 (Mar. 31, 1980).[14] It thus appears that Bankers Trust is presently prohibited by federal law from establishing a Florida trust subsidiary. This amendment is "repealed" by its own terms, § 712 (c), as of October 1, 1981, and there are indications in the legislative history that it was intended as a temporary moratorium on approval of trust company applications rather than as a prelude to more permanent restrictions. See 126 Cong. Rec. H2384 (Mar. 31, 1980) (remarks of Rep. St Germain). Nevertheless, we must review the judgment below in the light of both state and federal law as it now stands. See *Diffenderfer* v. *Central Baptist*

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[14] This statute provides:

"Section 3 (d) of the Bank Holding Company Act of 1956 (12 U. S. C. § 1842 (d)) is amended by inserting (1) after (d) and by adding at the end thereof the following:

"(2)(A) Except as provided in subparagraph (B), the restrictions contained in paragraph (1) regarding the acquisition of shares or assets of, or interests in, an additional bank shall apply to the acquisition of shares or assets of, or interests in, a trust company.

"(B) Subparagraph (A) shall not apply with respect to the acquisition of shares or assets of, or interests in, a trust company if such acquisition was approved by the Board on or before March 5, 1980, and if such trust company opened for business and was operating on or before March 5, 1980.

"(C) For the purpose of this paragraph, the term 'trust company' means any company whose powers are limited to the powers specified in subsection (a) of the first section of the Act entitled 'An Act to place authority over the trust powers of national banks in the Comptroller of the Currency,' approved September 28, 1962 (12 U. S. C. § 92a), for a national bank located in the same State in which such trust company is located.

"(c) The amendments made by this section are hereby repealed on October 1, 1981."

Church, 404 U. S. 412, 414 (1972). This enactment raises new questions, both jurisdictional and substantive, that should be addressed in the first instance by the District Court.

For these reasons, we determine that the constitutionality of § 660.10's limitation on the types of corporations that may perform trust responsibilities is not properly before us at this stage in the proceedings.

V

In summary, we affirm the judgment of the District Court insofar as it declares unconstitutional the challenged portions of § 659.141 (1) and enjoins their enforcement. We vacate that portion of the judgment that relates to the constitutionality of § 660.10, and we remand the case for such further proceedings as are appropriate and consistent with this opinion.[15]

It is so ordered.

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[15] Florida's Regulatory Reform Act of 1976, 1976 Fla. Laws, ch. 76–168, § 3 (2) (t), repeals, as of July 1, 1980, chs. 659 and 660 of the Florida Statutes "relating to banking." These chapters include §§ 659.141 (1) and 660.10. Section 2 of ch. 76–168 recites that it is "the intent of the Legislature . . . [t]o provide systematic legislative review of [licensing and regulation of businesses] . . . by a periodic review and termination, modification, or reestablishment of such programs and functions."

We are advised that pending in the Florida Legislature at the present time are S. B. 347 and a House substitute for S. B. 347; that both bills leave the substance of §§ 659.141 (1) and 660.10 intact for the express purpose of not mooting out pending litigation; and that action on these bills will be taken before the legislature adjourns. As of the date this opinion is filed, §§ 659.141 (1) and 660.10 remain in effect so the case has not become moot, whatever the ultimate disposition of the pending bills.

NEW YORK GASLIGHT CLUB, INC., ET AL. *v.* CAREY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 79-192. Argued February 19, 1980—Decided June 9, 1980

Section 706 (k) of Title VII of the Civil Rights Act of 1964 provides that in "any action or proceeding under this title" the court may allow attorney's fees to "the prevailing party," other than the Equal Employment Opportunity Commission (EEOC) or the United States. Alleging that petitioners had denied her employment because of her race, respondent filed an employment discrimination charge with the EEOC, which, as required by Title VII, forwarded the complaint to the appropriate New York administrative agency. Respondent was represented by counsel throughout administrative and judicial proceedings in the state system, which proceedings ultimately resulted in affirmance of the state agency's order directing petitioners to offer respondent employment and pay back wages but not awarding attorney's fees. Meanwhile, the EEOC reassumed jurisdiction and, under § 706 (f) of Title VII, issued a right-to-sue letter to respondent, who filed suit in Federal District Court, alleging a claim under Title VII, *inter alia*, and seeking appropriate relief, including attorney's fees. Petitioners having agreed to comply with the state agency's order, the District Court dismissed the federal action, except for respondent's request for attorney's fees, including fees for her attorney's services in the state proceedings. The court later denied the fee request, ruling that although the EEOC's issuance of a right-to-sue letter had forced respondent to preserve her rights by filing a complaint in federal court, the mere filing of a federal suit did not entitle an aggrieved party to attorney's fees, and that respondent had the option of pursuing her state administrative remedies without incurring any expenses for legal services, since state law provides that the case in support of the complaint is to be presented to the administrative hearing examiner by one of the state agency's attorneys. The Court of Appeals reversed.

Held: Sections 706 (f) and 706 (k) of Title VII authorize a federal-court action to recover an award of attorney's fees for work done by the prevailing complainant in state administrative and judicial proceedings to which the complainant was referred pursuant to the provisions of Title VII, and no special circumstances exist in this case that would justify denial of a fee award. Pp. 60-71.

(a) Congress' use of the broadly inclusive disjunctive phrase "any action or proceeding" in § 706 (k) indicates an intent to subject the losing party to an award of attorney's fees and costs that includes expenses incurred for administrative proceedings. Other provisions of the statute that interact with § 706 (k), the purpose of § 706 (k) to facilitate the bringing of discrimination complaints, the humanitarian remedial policies of Title VII, and the statute's structure of cooperation between federal and state enforcement authorities—calling for deferral to state proceedings, with proceedings before the EEOC and in federal courts being supplements to available state remedies—all point to the conclusion that fee awards are authorized for work done in state administrative or judicial proceedings as well as in federal proceedings. Since Congress intended to authorize fee awards for work done in administrative proceedings, § 706 (f)(1)'s authorization of a civil suit in federal court encompasses a suit solely to obtain an award of attorney's fees for legal work done in state or local proceedings. Pp. 60–66.

(b) Awarding fees for work done in state proceedings for which the State does not authorize fees does not infringe on the State's powers under the Tenth Amendment, since Congress' power under § 5 of the Fourteenth Amendment is broad and overrides any interest the State might have in not authorizing awards for fees. Nor is there any merit in the argument that Congress' intent to pre-empt the state law has not been clearly expressed. Section 706 (k) does not "pre-empt" state law, since § 706 (f)(1) merely provides a supplemental right to sue in federal court if satisfactory relief is not obtained in state forums, and one aspect of complete relief is an award of attorney's fees, which Congress considered necessary for the fulfillment of federal goals. And even if it can be said that § 706 (k) pre-empts the state rule, Congress' intent to achieve this result is manifest. Furthermore, the availability under New York law of an agency attorney to present the case in support of the complaint at the public hearing is not a "special circumstance" depriving a prevailing complainant of a fee award, since a private attorney is needed to assist the complainant during administrative procedures before and after the public-hearing stage, and even if an agency attorney appears at the public hearing, he does not represent the complainant's interests, but rather those of the State. Pp. 66–70.

598 F. 2d 1253, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, STEWART, MARSHALL, and POWELL, JJ., joined, and in all but n. 6 of which BURGER, C. J., joined. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 71. WHITE and REHNQUIST, JJ., filed a dissenting statement, *post*, p. 71.

Albert N. Proujansky argued the cause for petitioners. With him on the brief was *Marvin Luboff*.

James I. Meyerson argued the cause and filed a brief for respondent.

Harriet S. Shapiro argued the cause for the United States et al. as *amici curiae* urging affirmance. With her on the brief were *Solicitor General McCree, Assistant Attorney General Days, Leroy D. Clark, Joseph T. Eddins,* and *Lutz Alexander Prager.**

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the question whether, under Title VII of the Civil Rights Act of 1964, a federal court may allow the prevailing party attorney's fees for legal services performed in prosecuting an employment discrimination claim in *state* administrative and judicial proceedings that Title VII requires federal claimants to invoke.

I

Respondent Cidni Carey, in August 1974, applied for work as a cocktail waitress with petitioner New York Gaslight Club, Inc. After an interview, she was advised that no position was available.

The following January, respondent filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging that petitioners, the Club and its manager, had denied her a position because of her race. App. to Brief for Respondent a1–a3. As required by § 706 (c) of Title VII of the Civil

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*Briefs of *amici curiae* urging affirmance were filed by *Robert Abrams*, Attorney General, *pro se*, *Shirley Adelson Siegel*, Solicitor General, *Judith T. Kramer*, *Arnold Fleischer*, and *Barbara Levy*, Assistant Attorneys General, and *Ann Thacher Anderson* for the New York State Attorney General et al.; by *Jack Greenberg*, *James M. Nabrit III*, *Charles Stephen Ralston*, and *Bill Lann Lee* for the NAACP Legal Defense and Educational Fund, Inc.; and by *Charles C. Parlin, Jr.*, and *Peter Bienstock* for the Puerto Rican Legal Defense & Education Fund, Inc.

Rights Act of 1964, 78 Stat. 259, as redesignated, 86 Stat. 104, 42 U. S. C. § 2000e–5 (c), respondent's complaint was forwarded to the New York State Division of Human Rights (Division).

In May 1975, after an investigation during which respondent was represented by counsel,[1] the Division found probable cause to believe that petitioners had engaged in an unlawful discriminatory practice. Efforts at conciliation failed, and the Division, pursuant to N. Y. Exec. Law § 297 (4) (a) (McKinney Supp. 1979), recommended that a public hearing be held.

Counsel for respondent wrote to the EEOC on May 20, advising the Commission that respondent was proceeding in the Division. He asked that the Commission "reassume" jurisdiction over the claim so that, if necessary, respondent could obtain a right-to-sue letter at an appropriate time. On May 22, the EEOC responded, stating that an investigator would be assigned to respondent's matter as soon as possible.

The state administrative hearing was held on two separate days in late 1975 and early 1976. Both respondent and petitioners were represented by counsel. App. 68. No attorney for the State appeared. On August 13, 1976, the hearing examiner found that petitioners had discriminated against respondent because she is black. *Id.*, at 70. Petitioners were ordered to offer respondent employment as a cocktail waitress and to pay her back wages from August 1974. *Id.*, at 70–72. No attorney's fee was awarded.

Petitioners appealed to the New York State Human Rights Appeal Board, an agency established to hear appeals from orders of the Division. N. Y. Exec. Law § 297–a (McKinney 1972 and Supp. 1979). The Board held a hearing in December 1976 at which counsel for petitioners, respondent, and the Division appeared.

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[1] Respondent was represented by counsel employed by the NAACP Special Contribution Fund.

Meanwhile, EEOC proceedings had begun. Giving due weight to the state finding of probable cause, see § 706 (b), 42 U. S. C. § 2000e–5 (b), the EEOC determined that there was reasonable cause to believe petitioners had violated Title VII. The EEOC's attempts at conciliation also failed. The Commission's General Counsel chose not to sue, and, as required by § 706 (f)(1), § 2000e–5 (f)(1), the EEOC issued respondent a right-to-sue letter. This was issued on July 13, 1977; respondent, under § 706 (f)(1), then had 90 days to file a Title VII action in federal district court.

On August 26, the Appeal Board confirmed the Division's order. Petitioners immediately appealed the Board's decision to the New York Supreme Court. The Division cross-petitioned for enforcement of its order.

On September 30, respondent filed suit in the United States District Court for the Southern District of New York, asserting claims under the Civil Rights Act of 1866, 42 U. S. C. § 1981, Title VII, and the Thirteenth Amendment. App. 29. Respondent alleged that petitioners did not hire her because she is black, and that petitioner Club had employed only four blacks as waitresses during its 20-year existence. The complaint sought a declaratory judgment that petitioners' practices were unlawful under federal law, an order requiring petitioners to hire respondent, backpay with interest, retroactive employment-related benefits, attorney's fees, and other appropriate relief. Petitioners' answer denied virtually all the allegations in the complaint and cited the pendency of the state proceedings as an affirmative defense.

The Appellate Division of the New York Supreme Court on November 3 unanimously affirmed the Appeal Board's determination. *New York Gaslight Club, Inc.* v. *New York State Human Rights Appeal Board*, 59 App. Div. 2d 852, 399 N. Y. S. 2d 158 (1977). Petitioners unsuccessfully moved for reargument, and then filed a motion with the New York Court of Appeals for leave to appeal.

On February 3, 1978, while that motion was pending, the Federal District Court held a pretrial conference, after which petitioners agreed that if the state court denied their motion for leave to appeal, they would comply with the Division's order. App. 73. One week later the New York Court of Appeals denied petitioners' motion. 43 N. Y. 2d 951 (1978).

The parties thereafter apparently agreed that the federal action could be dismissed, except for respondent's request for attorney's fees. See App. 75–79. Respondent sought an award for 82 hours of attorney's time. Of that total, 9 hours were spent in preparing and filing the EEOC charge and the federal suit, 22 hours were spent in preparing and presenting the case before the hearing examiner, 29 hours were spent in defending the Division's order before the Appeal Board and the state courts, and 22 hours were spent seeking the fee award. App. to Pet. for Cert. A39–A40.

In July 1978, the District Court dismissed respondent's complaint, App. 35, but left pending the application for attorney's fees. After further briefing, the court denied the fee request. 458 F. Supp. 79 (SDNY 1978).

The District Court found the propriety of the EEOC's issuance of a right-to-sue letter while state proceedings were pending "very doubtful." *Id.*, at 80. Although the EEOC's action had given respondent no choice but to preserve her rights by filing a complaint in federal court, the District Court ruled that the mere filing of a federal suit does not entitle an aggrieved party to attorney's fees. The court reasoned that the fortuity of a need to file a protective federal suit should not make the defendants responsible for the costs of representing the plaintiff in the state forums. *Id.*, at 81.

The District Court also relied on its conclusion that respondent "had the option of pursuing her state administrative remedies without incurring any expenses at all for legal services," since state law, N. Y. Exec. Law § 297 (4)(a) (McKinney Supp. 1978), provides that the case in support of the complaint is to be presented to the hearing examiner by one

of the attorneys for the Division. 458 F. Supp., at 81. The decision in *Parker* v. *Califano*, 182 U. S. App. D. C. 322, 561 F. 2d 320 (1977), upholding an award of attorney's fees for prosecution of a federal employee's Title VII claim in mandatory preliminary proceedings within the employee's agency, was distinguished on the ground that the agency did not provide an independent attorney to prosecute the complaint. 458 F. Supp., at 81.

A divided panel of the United States Court of Appeals for the Second Circuit reversed. 598 F. 2d 1253 (1979). The court ruled: "A complaining party who is successful in state administrative proceedings after having her complaint under Title VII referred to a state agency in accordance with the statutory scheme of that Title is entitled to recover attorney's fees in the same manner as a party who prevails in federal court." *Id.*, at 1260. The court relied on several factors in reaching its decision. Among them were the significant role of state human rights agencies in the Title VII enforcement scheme; the statute's strong preference for administrative resolution of a discrimination complaint; the importance of providing an incentive for complete development of the administrative record; the language of the statute's fee provision; and the desirability of encouraging a complainant to retain private counsel notwithstanding participation of a Division attorney at certain points during the state proceedings.

We granted certiorari, 444 U. S. 897 (1979), to consider this question that is significant to the enforcement of the antidiscrimination provisions of Title VII.

II

Section 706 (k) of the Civil Rights Act of 1964, 78 Stat. 261, 42 U. S. C. § 2000e–5 (k), provides:

> "In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs."

The question presented is whether, in the words of the statute, respondent was the "prevailing party" in an "action or proceeding under this title." An examination of the language and history of the statute, the nature of the proceedings in which respondent participated, and the relationship of those proceedings to Title VII's enforcement mechanisms, together persuade us that Congress clearly intended to authorize awards of attorney's fees to persons in respondent's situation.

The words of § 706 (k) leave little doubt that fee awards are authorized for legal work done in "proceedings" other than court actions. Congress' use of the broadly inclusive disjunctive phrase "action or proceeding" indicates an intent to subject the losing party to an award of attorney's fees and costs that includes expenses incurred for administrative proceedings. This conclusion is supported by a comparison of § 706 (k) with another fee provision in the same Act, namely, § 204 (b) of Title II, 78 Stat. 244, 42 U. S. C. § 2000a–3 (b). The pertinent language of § 204 (b) is identical to that of § 706 (k) except that § 204 (b) permits an award only with respect to "any action commenced pursuant to this title." The two provisions were enacted contemporaneously as parts of the Civil Rights Act of 1964. The omission of the words "or proceeding" from § 204 (b) is understandable, since enforcement of Title II depends solely on court actions. See *Newman* v. *Piggie Park Enterprises*, 390 U. S. 400, 401 (1968). It is apparent, therefore, that the two fee provisions were carefully tailored to the enforcement scheme of each Title. It cannot be assumed that the words "or proceeding" in § 706 (k) are mere surplusage.

It might be argued that the words "or proceeding" authorize fee awards only for work done in federal administrative proceedings,[2] such as those before the EEOC, but not for

[2] In cases involving federal employees, all the Courts of Appeals that have considered the question have upheld fee awards under § 706 (k) for work done in federal administrative proceedings that must be exhausted

state administrative or state judicial proceedings. This reading at least would not render the words "or proceeding" a complete nullity. We find nothing in the statute, however, to suggest that Congress intended to draw this particular line. Rather, other provisions of the statute that interact with § 706 (k); the purpose of § 706 (k); the humanitarian remedial policies of Title VII; and the statute's structure of cooperation between federal and state enforcement authorities, all point to the opposite conclusion.

Section 706 (k) authorizes a fee award to the prevailing party in "*any* . . . proceeding under this title." (Emphasis added.) The same Title creates the system of deferral to state and local remedies. The statute uses the word "proceeding" to describe the state and local remedies to which complainants are required to resort. For example, § 706 (c), 86 Stat. 104, provides:

> "[N]o charge may be filed . . . before the expiration of sixty days after *proceedings* have been commenced under the State or local law, unless such *proceedings* have been earlier terminated. . . . If any requirement for the commencement of such *proceedings* is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the *proceeding* is based, the *proceeding* shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent. . . ." (Emphasis added).

Indeed, throughout Title VII the word "proceeding," or its plural form, is used to refer to all the different types of proceedings in which the statute is enforced, state and federal,

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as a condition to filing an action in federal court. *E. g., Brown* v. *Bathke*, 588 F. 2d 634, 638 (CA8 1978); *Fischer* v. *Adams*, 572 F. 2d 406 (CA1 1978); *Parker* v. *Califano*, 182 U. S. App. D. C. 322, 561 F. 2d 320 (1977); *Foster* v. *Boorstin*, 182 U. S. App. D. C. 342, 561 F. 2d 340 (1977); *Johnson* v. *United States*, 554 F. 2d 632 (CA4 1977).

administrative and judicial.[3] The conclusion that fees are authorized for work done at the state and local levels is inescapable.

This Court recently examined the legislative history and purpose of § 706 (k). In *Christiansburg Garment Co.* v. *EEOC,* 434 U. S. 412 (1978), it was noted that, although the legislative history of § 706 (k) is "sparse," 434 U. S., at 420, it is clear that one of Congress' primary purposes in enacting the section was to "make it easier for a plaintiff of limited means to bring a meritorious suit." *Ibid.,* quoting 110 Cong. Rec. 12724 (1964) (remarks of Sen. Humphrey). Because Congress has cast the Title VII plaintiff in the role of "a private attorney general," vindicating a policy "of the highest priority," a prevailing plaintiff "ordinarily is to be awarded attorney's fees in all but special circumstances." 434 U. S., at 416, 417. See also *Newman* v. *Piggie Park Enterprises,* 390 U. S., at 402. It is clear that Congress intended to facilitate the bringing of discrimination complaints. Permitting an attorney's fee award to one in respondent's situation furthers this goal, while a contrary rule would force the complainant to bear the costs of mandatory state and local proceedings and thereby would inhibit the enforcement of a meritorious discrimination claim.

Title VII establishes a comprehensive enforcement scheme in which state agencies are given "a limited opportunity to resolve problems of employment discrimination and thereby to make unnecessary, resort to federal relief by victims of the discrimination." *Oscar Mayer & Co.* v. *Evans,* 441 U. S. 750, 755 (1979). Congress envisioned that Title VII's procedures and remedies would "mes[h] nicely, logically, and coherently with the State and city legislation," and that remedying em-

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[3] See, *e. g.,* § 706 (f)(1), 78 Stat. 260, as redesignated, 86 Stat. 105, 42 U. S. C. § 2000e–5 (f)(1) (court may stay "further proceedings" pending the termination of "State or local proceedings"); § 706 (i), 78 Stat. 261, as amended, 86 Stat. 107, 42 U. S. C. § 2000e–5 (i) (Commission may commence "proceedings" to compel compliance with court order).

ployment discrimination would be an area in which "[t]he Federal Government and the State governments could cooperate effectively." 110 Cong. Rec. 7205 (1964) (remarks of Sen. Clark).

Pursuant to this policy of cooperation, Title VII provides that where the unlawful employment practice is alleged to have occurred in a State or locality which has a law prohibiting the practice and in which an agency has been established to enforce that law, "no charge may be filed [with the EEOC] by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated." § 706 (c). In practice, § 706 (c) has resulted in EEOC's development of a referral and deferral system, which the Court approved in *Love* v. *Pullman Co.*, 404 U. S. 522 (1972). When a charge is filed with the EEOC prior to exhaustion of state or local remedies, the Commission refers the complaint to the appropriate local agency. The EEOC then holds the complaint in "suspended animation." *Id.*, at 526. Upon termination of the state proceedings or expiration of the 60-day deferral period, whichever comes first, the EEOC automatically assumes concurrent jurisdiction of the complaint. *Ibid.*[4]

Of course, the "ultimate authority" to secure compliance with Title VII resides in the federal courts. *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, 44–45 (1974). The statute

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[4] Other provisions of Title VII also evidence the policy of promoting federal-state cooperation in enforcement. Section 706 (b), 78 Stat. 259, as redesignated, 86 Stat. 104, 42 U. S. C. § 2000e–5 (b), requires the EEOC to "accord substantial weight" to a state administrative determination, and § 709 (b), 78 Stat. 262, as amended, 86 Stat. 108, 42 U. S. C. § 2000e–8 (b), authorizes the EEOC to "cooperate with State and local agencies charged with the administration of State fair employment practices laws" in funding research and other mutually beneficial projects, and to enter into work-sharing agreements with those agencies to facilitate the processing of complaints.

authorizes civil enforcement actions by both the EEOC and the private plaintiff. After the deferral period, the EEOC assumes jurisdiction, and, "as promptly as possible" it determines whether there is probable cause to believe that the charge is true. § 706 (b). After an additional 30 days, the EEOC is authorized to bring an action, in which the complainant has an absolute right to intervene. § 706 (f). If the Commission does not file suit, or enter into a conciliation agreement to which the complainant is a party, within 180 days after it reassumes jurisdiction, it must issue a "right to sue" letter notifying the complainant of his right to bring an action within 90 days. *Ibid.*[5]

It is clear from this scheme of interrelated and complementary state and federal enforcement that Congress viewed proceedings before the EEOC and in federal court as supplements to available state remedies for employment discrimination. Initial resort to state and local remedies is mandated, and recourse to the federal forums is appropriate only when the State does not provide prompt or complete relief. See *Alexander* v. *Gardner-Denver Co.*, 415 U. S., at 48–50.

The construction of § 706 (k) that petitioners advocate clashes with this congressional design. Complainants unable to recover fees in state proceedings may be expected to wait out the 60-day deferral period, while focusing efforts on obtaining federal relief. See n. 6, *infra*. Only authorization of fee awards ensures incorporation of state procedures as a meaningful part of the Title VII enforcement scheme.

The District Court felt that granting a fee award to respondent would be a "windfall" based on the unforeseeable fortuity that filing a protective federal suit became necessary. 458 F. Supp., at 81. We agree with the District Court that the

[5] We thus disagree with the District Court that the propriety of EEOC's issuance of the right-to-sue letter in this case is "very doubtful." 458 F. Supp. 79, 80 (SDNY 1978). As we read the statute, the Commission was required to issue the letter after 180 days, regardless of the posture of any state proceedings.

availability of a federal fee award for work done in state proceedings following EEOC referral and deferral should not depend upon whether the complainant ultimately finds it necessary to sue in federal court to obtain relief other than attorney's fees. But our agreement with the District Court compels us to reject its conclusion. It would be anomalous to award fees to the complainant who is unsuccessful or only partially successful in obtaining state or local remedies, but to deny an award to the complainant who is successful in fulfilling Congress' plan that federal policies be vindicated at the state or local level. Since it is clear that Congress intended to authorize fee awards for work done in administrative proceedings, we must conclude that § 706 (f)(1)'s authorization of a civil suit in federal court encompasses a suit solely to obtain an award of attorney's fees for legal work done in state and local proceedings.[6]

III

Against the strong considerations favoring an award of fees, petitioners make three arguments. First, they contend that awarding fees for work done in state proceedings for

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[6] We note that if fees were authorized only when the complainant found an independent reason for suing in federal court under Title VII, such a ground almost always could be found. Section 706 (f)(1) requires the EEOC to give the complainant a "right to sue" letter if, after it assumes concurrent jurisdiction over the complaint, it does not sue within 180 days. Thus, after waiting 240 days (60 days deferral to the state or local agency and 180 days for the EEOC to act after deferral), the complainant appears to have an absolute right to resort to an action in federal court. The federal court may stay the action for a maximum of 60 more days, to permit completion of state proceedings. § 706 (f)(1). It took three years for the New York proceedings in this case finally to provide respondent all the relief she desired other than attorney's fees. It is doubtful that the systems of many States could provide complete relief within 240 days. The existence of an incentive to get into federal court, such as the availability of a fee award, would ensure that almost all Title VII complainants would abandon state proceedings as soon as possible. This, however, would undermine Congress' intent to encourage full use of state remedies.

which the State does not authorize fees[7] infringes on the State's powers under the Tenth Amendment. Second, they argue that Congress' intent to pre-empt the state law has not been clearly expressed. Third, they contend that even if § 706 (k) authorizes fees for work done in state proceedings in some instances, denial of an award here was within the District Court's discretion.

We must reject petitioners' Tenth Amendment argument. Congress' power under § 5 of the Fourteenth Amendment is broad, and overrides any interest the State might have in not authorizing awards for fees in connection with state proceedings. See *Hutto* v. *Finney*, 437 U. S. 678 (1978); *Fitzpatrick* v. *Bitzer*, 427 U. S. 445 (1976).

Petitioners cite *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132 (1963), *Schwartz* v. *Texas*, 344 U. S. 199 (1952), and *Florida* v. *United States*, 282 U. S. 194 (1931), in support of their argument that Congress' intent to pre-empt state regulation of the administration of state proceedings is not clearly expressed in § 706 (k) and should not be inferred. We find these cases inapposite. Section 706 (k) does not "pre-empt" state law. "Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination." *Alexander* v. *Gardner-Denver Co.*, 415 U. S., at 48–49. Title VII explicitly leaves the States free, and indeed encourages them, to exercise their regulatory power over discriminatory employment practices. Title VII merely provides a supplemental right to sue in federal court if satisfactory relief is not obtained in state forums. § 706 (f)(1). One aspect of complete relief is an

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[7] The Human Rights Law of the State of New York does not authorize an award of counsel fees for work done in either state administrative or judicial proceedings. See *State Commission for Human Rights* v. *Speer*, 35 App. Div. 2d 107, 111–112, 313 N. Y. S. 2d 28, 33 (1970), rev'd on other grounds, 29 N. Y. 2d 555, 272 N. E. 2d 884 (1971); *State Division of Human Rights* v. *Gorton*, 32 App. Div. 2d 933, 934, 302 N. Y. S. 2d 966, 968 (1969).

award of attorney's fees, which Congress considered necessary for the fulfillment of federal goals. Provision of a federal award of attorney's fees is not different from any other aspect of the ultimate authority of federal courts to enforce Title VII. For example, if state proceedings result in an injunction in favor of the complainant, but no award for backpay because state law does not authorize it, the complainant may proceed in federal court to "supplement" the state remedy. The state law which fails to authorize backpay has not been pre-empted. In any event, if it can be said that § 706 (k) pre-empts the state rule, we believe that Congress' intent to achieve this result is manifest.

We also find no merit in petitioners' suggestion that denial of a fee award was within the District Court's discretion. As noted earlier, the court's discretion to deny a fee award to a prevailing plaintiff is narrow. Absent "special circumstances," see *Newman* v. *Piggie Park Enterprises*, 390 U. S., at 402; *Christiansburg Garment Co.* v. *EEOC*, 434 U. S., at 416–417, fees should be awarded. Petitioners argue that the availability of a Division attorney to present the "case in support of the complaint" is a "special circumstance" which should deprive a prevailing complainant of a fee award. Clearly, however, an attorney is needed to assist the complainant during the state proceedings, and the Division employee does not take the place of private counsel.

The New York state procedure, to which respondent's charge was referred, provides for adversary quasi-judicial hearings leading to findings of fact, administrative appeals, and judicial review. The first stage of the state administrative action is the investigation; this results in either a finding of probable cause or a dismissal of the complaint. N. Y. Exec. Law § 297 (2) (McKinney Supp. 1979). A finding of probable cause after investigation is a necessary prelude to the public hearing. § 297 (4)(a). State law makes no provision for the participation of a Division attorney in the investigation, and a complainant is not represented by a Division attor-

ney at this preliminary stage. See Brief for New York State Attorney General and New York State Division of Human Rights as *Amici Curiae* 4–5.

Following the investigation, the Division attempts to conciliate the complainant's grievance with the employer. N. Y. Exec. Law §§ 297 (3)(a), (b), and (c) (McKinney 1972). No Division attorney participates in the conciliation efforts on behalf of the complainant, and the Division staff is even empowered to execute a settlement agreement with the employer over the complainant's objections. § 297 (3)(c).

If efforts at conciliation fail and a hearing is scheduled, state law provides:

> "The case in support of the complaint shall be presented by one of the attorneys or agents of the division and, at the option of the complainant, by his attorney. With the consent of the division, the case in support of the complainant may be presented solely by his attorney." § 297 (4)(a) (McKinney Supp. 1979).

At the time of the hearing on respondent's complaint, however, the practice of the Division was to involve one of its attorneys only if the complainant was not represented by private counsel. Brief for New York State Attorney General and New York State Division of Human Rights as *Amici Curiae* 5.[8] Complainants were "encouraged" to obtain private counsel due to a growing caseload and staff limitations. App. to Pet. for Cert. A58–A59.

At the appellate level, the Division attorney appears only to support and seek enforcement of orders issued by the Division and the Appeal Board. N. Y. Exec. Law § 298 (McKinney Supp. 1979). The Division attorney does not

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[8] On October 18, 1977, Division regulations were amended to provide for the presentation of the case in support of the complaint solely by the attorney for the complainant, upon consent of the Division. The regulation requires the Division attorney to submit a statement to the hearing examiner in lieu of appearance. 9 N. Y. C. R. R. § 465.11 (d)(2).

represent the complainant on an appeal from an order adverse to the claimant. In addition, the Division cannot appeal from an order of the Human Rights Appeal Board reversing a Division order. See Brief for New York State Attorney General and New York Division of Human Rights as *Amici Curiae* 5–6.

It is thus obvious that the assistance provided a complainant by the Division attorney is not fully adequate, and that the attorney has no obligation to the complainant as a client. In fact, at times the position of the Division may be detrimental to the interests of the complainant and to enforcement of federal rights. Representation by a private attorney thus assures development of a complete factual record at the investigative stage and at the administrative hearing. At both, settlement is possible and is encouraged. A Division employee cannot act as the complainant's attorney for purposes of advising him whether to accept a settlement. Retention of private counsel will help assure that federal rights are not compromised in the conciliation process.

If a Division attorney appears at the public hearing, he does not represent the interests of the complainant, but rather those of the State. *Id.*, at 5; App. to Pet. for Cert. A59–A60. He presents the "case in support of the complaint," not in support of the complainant. N. Y. Exec. Law § 297 (4)(a) (McKinney Supp. 1979). Upon appeal, the Division attorney is authorized only to support the order entered by the Division or the Appeal Board. Without doubt, the private attorney has an important role to play in preserving and protecting federal rights and interests during the state proceedings.[9]

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[9] We also reject petitioners' argument, not suggested in the petition for certiorari, that respondent's representation by a public interest group is a "special circumstance" that should result in denial of counsel fees. Federal Courts of Appeals' decisions are to the contrary. See, *e. g.*, *Reynolds* v. *Coomey*, 567 F. 2d 1166 (CA1 1978); *Torres* v. *Sachs*, 538 F. 2d 10, 13

In sum, we conclude that §§ 706 (f) and 706 (k) of Title VII authorize a federal-court action to recover an award of attorney's fees for work done by the prevailing complainant in state proceedings to which the complainant was referred pursuant to the provisions of Title VII. We also conclude that no special circumstances exist in this case that would justify denial of a fee award.

The judgment of the Court of Appeals is therefore affirmed.

It is so ordered.

THE CHIEF JUSTICE joins the Court's opinion except footnote 6 thereof; in his view, resolution of the issue dealt with in that footnote is not necessary.

MR. JUSTICE WHITE and MR. JUSTICE REHNQUIST would reverse the judgment essentially for the reasons given by Judge Mulligan in dissenting from the judgment of the Court of Appeals.

MR. JUSTICE STEVENS, concurring in the judgment.

While I agree with most of what is said in the Court's opinion, it is useful to emphasize that this federal litigation was commenced in order to obtain relief for respondent on the merits of her basic dispute with petitioners, and not simply to recover attorney's fees. Whether Congress intended to authorize a separate federal action solely to recover costs, including attorney's fees, incurred in obtaining administrative relief in either a deferral or a nondeferral State is not only doubtful but is a question that is plainly not presented by this record.

(CA2 1976). Congress endorsed such decisions allowing fees to public interest groups when it was considering, and passed, the Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641, 42 U. S. C. § 1988, which is legislation similar in purpose and design to Title VII's fee provision. See H. R. Rep. No. 94-1558, pp. 5 and 8, n. 16 (1976).

On July 13, 1977, when the EEOC issued respondent a letter notifying her that she had a right to file an action in federal court, and on September 30, 1977, when she commenced her federal-court action, state judicial review of the state administrative proceedings had not yet been completed. It was not until sometime in February 1978, after the federal judicial proceeding had been pending for several months, that all questions other than the fee issue were finally removed from the federal case. It is clear, therefore, that under the plain language of § 706 (k) of the Civil Rights Act of 1964, 78 Stat. 261, 42 U. S. C. § 2000e–5 (k),* the Federal District Court then had jurisdiction to allow the prevailing party to recover attorney's fees as a part of her costs.

A quite different question would be presented if, before any federal litigation were commenced, an aggrieved party had obtained complete relief in the administrative proceedings. It is by no means clear that the statute, which merely empowers a "court" to award fees, would authorize a fee allowance when there is no need for litigation in the federal court to resolve the merits of the underlying dispute. Indeed, it is not even clear that the EEOC has the authority to issue a "right to sue" letter, empowering the complainant to bring suit in federal court, after the complainant has obtained complete relief on the merits of his claim in administrative proceedings. See § 706 (f)(1) of the Civil Rights Act of 1964 as amended, 42 U. S. C. § 2000e-5 (f)(1). In any event, the facts of this case present no occasion for the Court's resolution of the issue, *ante*, at 66. All that needs to be decided is whether an allowance of fees may properly cover the work

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*That section provides in part:

"In any action or proceeding under this title the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs. . . ."

performed in the administrative proceedings that were a prerequisite to the court action. I agree with the Court's disposition of that issue, and would also observe that the same analysis would apply to work performed in appearing before the federal agency in a nondeferral State.

Accordingly, I concur in the judgment.

PRUNEYARD SHOPPING CENTER ET AL. *v.* ROBINS ET AL.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA

No. 79-289. Argued March 18, 1980—Decided June 9, 1980

Soon after appellees had begun soliciting in appellant privately owned shopping center's central courtyard for signatures from passersby for petitions in opposition to a United Nations resolution, a security guard informed appellees that they would have to leave because their activity violated shopping center regulations prohibiting any visitor or tenant from engaging in any publicly expressive activity that is not directly related to the center's commercial purposes. Appellees immediately left the premises and later filed suit in a California state court to enjoin the shopping center and its owner (also an appellant) from denying appellees access to the center for the purpose of circulating their petitions. The trial court held that appellees were not entitled under either the Federal or California Constitution to exercise their asserted rights on the shopping center property, and the California Court of Appeal affirmed. The California Supreme Court reversed, holding that the California Constitution protects speech and petitioning, reasonably exercised, in shopping centers even when the center is privately owned, and that such result does not infringe appellants' property rights protected by the Federal Constitution.

Held:

1. This case is properly before this Court as an appeal under 28 U. S. C. § 1257 (2). A state constitutional provision is a "statute" within the meaning of § 1257 (2), and in deciding that the State Constitution gave appellees the right to solicit signatures on appellants' property, the California Supreme Court rejected appellants' claim that recognition of such a right violated their "right to exclude others," a fundamental component of their federally protected property rights. Pp. 79-80.

2. State constitutional provisions, as construed to permit individuals reasonably to exercise free speech and petition rights on the property of a privately owned shopping center to which the public is invited, do not violate the shopping center owner's property rights under the Fifth and Fourteenth Amendments or his free speech rights under the First and Fourteenth Amendments. Pp. 80-88.

(a) The reasoning in *Lloyd Corp.* v. *Tanner,* 407 U. S. 551—which

held that the First Amendment does not prevent a private shopping center owner from prohibiting the distribution on center premises of handbills unrelated to the center's operations—does not *ex proprio vigore* limit a State's authority to exercise its police power or its sovereign right to adopt in its own constitution individual liberties more expansive than those conferred by the Federal Constitution. And a State, in the exercise of its police power, may adopt reasonable restrictions on private property so long as the restrictions do not amount to a taking without just compensation or contravene any other federal constitutional provision. Pp. 80–81.

(b) The requirement that appellants permit appellees to exercise state-protected rights of free expression and petition on shopping center property does not amount to an unconstitutional infringement of appellants' property rights under the Taking Clause of the Fifth Amendment, appellants having failed to demonstrate that the "right to exclude others" is so essential to the use or economic value of their property that the state-authorized limitation of it amounted to a "taking." *Kaiser Aetna* v. *United States*, 444 U. S. 164, distinguished. And there is no merit to appellants' argument that they have been denied property without due process of law, where they have failed to show that the due process test whereby the challenged law must not be unreasonable, arbitrary, or capricious and the means selected must have a real and substantial relation to the objective to be obtained, is not satisfied by the State's asserted interest in promoting more expansive rights of free speech and petition than conferred by the Federal Constitution. Pp. 82–85.

(c) Nor have appellants' First Amendment rights been infringed by the California Supreme Court's decision. The shopping center by choice of its owner is not limited to the personal use of appellants, and the views expressed by members of the public in passing out pamphlets or seeking signatures for a petition thus will not likely be identified with those of the owner. Furthermore, no specific message is dictated by the State to be displayed on appellants' property, and appellants are free to publicly dissociate themselves from the views of the speakers or handbillers. *Wooley* v. *Maynard*, 430 U. S. 705; *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624; and *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241, distinguished. Pp. 85–88.

23 Cal. 3d 899, 592 P. 2d 341, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, MARSHALL, and STEVENS, JJ., joined; in Parts I, II, III, and IV of which WHITE and POWELL, JJ., joined; and

in all but one sentence of which BLACKMUN, J., joined. MARSHALL, J., filed a concurring opinion, *post*, p. 89. WHITE, J., filed an opinion concurring in part and in the judgment, *post*, p. 95. POWELL, J., filed an opinion concurring in part and in the judgment, in which WHITE, J., joined, *post*, p. 96. BLACKMUN, J., filed a statement concurring in part, *post*, p. 88.

Max L. Gillam argued the cause for appellants. With him on the briefs were *James W. Daniels, William C. Kelly, Jr.*, and *Thomas P. O'Donnell.*

Philip L. Hammer argued the cause and filed a brief for appellees.

Elinor Hadley Stillman argued the cause for the United States as *amicus curiae* urging affirmance. With her on the brief were *Solicitor General McCree* and *Deputy Solicitor General Wallace.**

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

We postponed jurisdiction of this appeal from the Supreme Court of California to decide the important federal constitutional questions it presented. Those are whether state constitutional provisions, which permit individuals to exercise free speech and petition rights on the property of a privately owned shopping center to which the public is invited, violate the shopping center owner's property rights under the Fifth

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*Briefs of *amici curiae* urging reversal were filed by *Laurence M. Cohen* and *Charles H. May II* for Homart Development Co.; by *Dean L. Overman* and *Peter N. Kyros, Jr.*, for the International Council of Shopping Centers; and by *Joseph H. Moless, Jr.*, and *Philip B. Kurland* for Taubman Co., Inc., et al.

Briefs of *amici curiae* urging affirmance were filed by *Susan L. Paulus, Amitai Schwartz,* and *Burt Neuborne* for the American Civil Liberties Union of Northern California et al.; by *J. Albert Woll, Laurence Gold,* and *George Kaufmann* for the American Federation of Labor and Congress of Industrial Organizations; by *Nathan Z. Dershowitz* for the American Jewish Congress et al.; and by *Roger Jon Diamond* for People's Lobby, Inc.

and Fourteenth Amendments or his free speech rights under the First and Fourteenth Amendments.

I

Appellant PruneYard is a privately owned shopping center in the city of Campbell, Cal. It covers approximately 21 acres—5 devoted to parking and 16 occupied by walkways, plazas, sidewalks, and buildings that contain more than 65 specialty shops, 10 restaurants, and a movie theater. The PruneYard is open to the public for the purpose of encouraging the patronizing of its commercial establishments. It has a policy not to permit any visitor or tenant to engage in any publicly expressive activity, including the circulation of petitions, that is not directly related to its commercial purposes. This policy has been strictly enforced in a nondiscriminatory fashion. The PruneYard is owned by appellant Fred Sahadi.

Appellees are high school students who sought to solicit support for their opposition to a United Nations resolution against "Zionism." On a Saturday afternoon they set up a card table in a corner of PruneYard's central courtyard. They distributed pamphlets and asked passersby to sign petitions, which were to be sent to the President and Members of Congress. Their activity was peaceful and orderly and so far as the record indicates was not objected to by PruneYard's patrons.

Soon after appellees had begun soliciting signatures, a security guard informed them that they would have to leave because their activity violated PruneYard regulations. The guard suggested that they move to the public sidewalk at the PruneYard's perimeter. Appellees immediately left the premises and later filed this lawsuit in the California Superior Court of Santa Clara County. They sought to enjoin appellants from denying them access to the PruneYard for the purpose of circulating their petitions.

The Superior Court held that appellees were not entitled under either the Federal or California Constitution to exercise

their asserted rights on the shopping center property. App. to Juris. Statement A–2. It concluded that there were "adequate, effective channels of communication for [appellees] other than soliciting on the private property of the [PruneYard]." *Id.*, at A–3. The California Court of Appeal affirmed.

The California Supreme Court reversed, holding that the California Constitution protects "speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned." 23 Cal. 3d 899, 910, 592 P. 2d 341, 347 (1979). It concluded that appellees are entitled to conduct their activity on PruneYard property. In rejecting appellants' contention that such a result infringed property rights protected by the Federal Constitution, the California Supreme Court observed:

> " 'It bears repeated emphasis that we do not have under consideration the property or privacy rights of an individual homeowner or the proprietor of a modest retail establishment. As a result of advertising and the lure of a congenial environment, 25,000 persons are induced to congregate daily to take advantage of the numerous amenities offered by the [shopping center there]. A handful of additional orderly persons soliciting signatures and distributing handbills in connection therewith, under reasonable regulations adopted by defendant to assure that these activities do not interfere with normal business operations (see *Diamond* [v. *Bland*, 3 Cal. 3d 653, 665, 477 P. 2d 733, 741 (1970)]) would not markedly dilute defendant's property rights.' ([*Diamond* v. *Bland*, 11 Cal. 3d 331, 345, 521 P. 2d 460, 470 (1974)] (dis. opn. of Mosk, J.).)" *Id.*, at 910–911, 592 P. 2d, at 347–348.

The California Supreme Court thus expressly overruled its earlier decision in *Diamond* v. *Bland*, 11 Cal. 3d 331, 521 P. 2d 460 (*Diamond II*), cert. denied, 419 U. S. 885 (1974), which had reached an opposite conclusion. 23 Cal. 3d, at

910, 592 P. 2d, at 347.[1] Before this Court, appellants contend that their constitutionally established rights under the Fourteenth Amendment to exclude appellees from adverse use of appellants' private property cannot be denied by invocation of a state constitutional provision or by judicial reconstruction of a state's laws of private property. We postponed consideration of the question of jurisdiction until the hearing of the case on the merits. 444 U. S. 949. We now affirm.

II

We initially conclude that this case is properly before us as an appeal under 28 U. S. C. § 1257 (2). It has long been established that a state constitutional provision is a "statute" within the meaning of § 1257 (2). See, *e. g., Torcaso* v. *Watkins,* 367 U. S. 488, 489 (1961); *Adamson* v. *California,* 332 U. S. 46, 48, n. 2 (1947); *Railway Express Agency* v. *Virginia,* 282 U. S. 440 (1931). Here the California Supreme Court decided that Art. 1, §§ 2 and 3, of the California Constitution gave appellees the right to solicit signatures on appellants' property in exercising their state rights of free expression and petition.[2] In so doing, the California Supreme Court

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[1] The California Supreme Court in *Diamond II* had reasoned:

"In this case, as in *Lloyd* [*Corp.* v. *Tanner,* 407 U. S. 551 (1972)], plaintiffs have alternative, effective channels of communication, for the customers and employees of the center may be solicited on any public sidewalks, parks and streets adjacent to the Center and in the communities in which such persons reside. Unlike the situation in *Marsh* [v. *Alabama,* 326 U. S. 501 (1946)] and [*Food Employees* v. *Logan Valley Plaza,* 391 U. S. 308 (1968)], no reason appears why such alternative means of communication would be ineffective, and plaintiffs concede that, unlike *Logan,* their initiative petition bears no particular relation to the shopping center, its individual stores or patrons." 11 Cal. 3d, at 335, 521 P. 2d, at 463.

Diamond II thus held that the shopping center owner's property rights outweighed the rights of free expression and petition asserted by the plaintiffs. *Ibid.*

[2] Article 1, § 2, of the California Constitution provides:

"Every person may freely speak, write and publish his or her sentiments

rejected appellants' claim that recognition of such a right violated appellants' "right to exclude others," which is a fundamental component of their federally protected property rights. Appeal is thus the proper method of review.

III

Appellants first contend that *Lloyd Corp.* v. *Tanner,* 407 U. S. 551 (1972), prevents the State from requiring a private shopping center owner to provide access to persons exercising their state constitutional rights of free speech and petition when adequate alternative avenues of communication are available. *Lloyd* dealt with the question whether under the Federal Constitution a privately owned shopping center may prohibit the distribution of handbills on its property when the handbilling is unrelated to the shopping center's operations. *Id.*, at 552. The shopping center had adopted a strict policy against the distribution of handbills within the building complex and its malls, and it made no exceptions to this rule. *Id.*, at 555.[3] Respondents in *Lloyd* argued that because the shopping center was open to the public, the First Amendment prevents the private owner from enforcing the handbilling restriction on shopping center premises. *Id.*, at 564.[4]

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on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."

Article 1, § 3, of the California Constitution provides:

"[P]eople have the right to . . . petition government for redress of grievances."

[3] The center had banned handbilling because it "was considered likely to annoy customers, to create litter, potentially to create disorders, and generally to be incompatible with the purpose of the Center and the atmosphere sought to be preserved." 407 U. S., at 555–556.

[4] Respondents relied on *Marsh* v. *Alabama,* 326 U. S. 501 (1946), and *Food Employees* v. *Logan Valley Plaza,* 391 U. S. 308 (1968), in support of their claim that the shopping center's permission to the public to enter its property for the purpose of shopping caused its property to lose its private character, thereby permitting members of the public to exercise

In rejecting this claim we substantially repudiated the rationale of *Food Employees* v. *Logan Valley Plaza*, 391 U. S. 308 (1968), which was later overruled in *Hudgens* v. *NLRB*, 424 U. S. 507 (1976). We stated that property does not "lose its private character merely because the public is generally invited to use it for designated purposes," and that "[t]he essentially private character of a store and its privately owned abutting property does not change by virtue of being large or clustered with other stores in a modern shopping center." 407 U. S., at 569.

Our reasoning in *Lloyd*, however, does not *ex proprio vigore* limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution. *Cooper* v. *California*, 386 U. S. 58, 62 (1967). See also 407 U. S., at 569–570. In *Lloyd*, *supra*, there was no state constitutional or statutory provision that had been construed to create rights to the use of private property by strangers, comparable to those found to exist by the California Supreme Court here. It is, of course, well established that a State in the exercise of its police power may adopt reasonable restrictions on private property so long as the restrictions do not amount to a taking without just compensation or contravene any other federal constitutional provision. See, *e. g.*, *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365 (1926); *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50 (1976). *Lloyd* held that when a shopping center owner opens his private property to the public for the purpose of shopping, the First Amendment to the United States Constitution does not thereby create individual rights in expression beyond those already existing under applicable law. See also *Hudgens* v. *NLRB*, *supra*, at 517–521.

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the same free speech rights as they would have on similar public facilities or the streets of a city or town. Both of those cases, however, involved no state law authorizing the conduct of the solicitors or handbillers.

IV

Appellants next contend that a right to exclude others underlies the Fifth Amendment guarantee against the taking of property without just compensation and the Fourteenth Amendment guarantee against the deprivation of property without due process of law.[5]

It is true that one of the essential sticks in the bundle of property rights is the right to exclude others. *Kaiser Aetna* v. *United States*, 444 U. S. 164, 179–180 (1979). And here there has literally been a "taking" of that right to the extent that the California Supreme Court has interpreted the State Constitution to entitle its citizens to exercise free expression and petition rights on shopping center property.[6] But it is well established that "not every destruction or injury to property by governmental action has been held to be a 'taking' in the constitutional sense." *Armstrong* v. *United States*, 364 U. S. 40, 48 (1960). Rather, the determination whether a state law unlawfully infringes a landowner's property in

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[5] Appellants do not maintain that this is a condemnation case. Reply Brief for Appellants 2. Rather, they argue that "[t]he rights of a property owner . . . are rooted in the Fifth Amendment guarantee against the taking of property without just compensation and are incorporated in the Fourteenth Amendment guarantee against the deprivation of property without due process of law." Brief for Appellants 10. Here, of course, if the law required the conclusion that there was a "taking," there was concededly no compensation, just or otherwise, paid to appellants. This argument falls within appellants' contention that *Lloyd* is controlling, see 407 U. S., at 567, and was adequately presented below. See *New York ex rel. Bryant* v. *Zimmerman*, 278 U. S. 63, 67 (1928).

[6] The term "property" as used in the Taking Clause includes the entire "group of rights inhering in the citizen's [ownership]." *United States* v. *General Motors Corp.*, 323 U. S. 373 (1945). It is not used in the "vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. [Instead, it] . . . denote[s] the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. . . . The constitutional provision is addressed to every sort of interest the citizen may possess." *Id.*, at 377–378.

violation of the Taking Clause requires an examination of whether the restriction on private property "forc[es] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Id.*, at 49.[7] This examination entails inquiry into such factors as the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations. *Kaiser Aetna* v. *United States, supra,* at 175. When "regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393, 415 (1922).

Here the requirement that appellants permit appellees to exercise state-protected rights of free expression and petition on shopping center property clearly does not amount to an unconstitutional infringement of appellants' property rights under the Taking Clause. There is nothing to suggest that preventing appellants from prohibiting this sort of activity will unreasonably impair the value or use of their property as a shopping center. The PruneYard is a large commercial complex that covers several city blocks, contains numerous separate business establishments, and is open to the public at large. The decision of the California Supreme Court makes it clear that the PruneYard may restrict expressive activity by adopting time, place, and manner regulations that will minimize any interference with its commercial functions. Appellees were orderly, and they limited their activity to the

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[7] Thus, as this Court stated in *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 325 (1893), a case which has since been characterized as resting primarily on "estoppel," see, *e. g., United States* v. *Rands,* 389 U. S. 121, 126 (1967), the Fifth Amendment "prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him." See also *Penn Central Transportation Co.* v. *New York City,* 438 U. S. 104, 123–125 (1978); *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393, 416 (1922).

common areas of the shopping center. In these circumstances, the fact that they may have "physically invaded" appellants' property cannot be viewed as determinative.

This case is quite different from *Kaiser Aetna* v. *United States, supra.* *Kaiser Aetna* was a case in which the owners of a private pond had invested substantial amounts of money in dredging the pond, developing it into an exclusive marina, and building a surrounding marina community. The marina was open only to fee-paying members, and the fees were paid in part to "maintain the privacy and security of the pond." *Id.*, at 168. The Federal Government sought to compel free public use of the private marina on the ground that the marina became subject to the federal navigational servitude because the owners had dredged a channel connecting it to "navigable water."

The Government's attempt to create a public right of access to the improved pond interfered with Kaiser Aetna's "reasonable investment backed expectations." We held that it went "so far beyond ordinary regulation or improvement for navigation as to amount to a taking. . . ." *Id.*, at 178. Nor as a general proposition is the United States, as opposed to the several States, possessed of residual authority that enables it to define "property" in the first instance. A State is, of course, bound by the Just Compensation Clause of the Fifth Amendment, *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 233, 236–237 (1897), but here appellants have failed to demonstrate that the "right to exclude others" is so essential to the use or economic value of their property that the state-authorized limitation of it amounted to a "taking."

There is also little merit to appellants' argument that they have been denied their property without due process of law. In *Nebbia* v. *New York*, 291 U. S. 502 (1934), this Court stated:

> "[N]either property rights nor contract rights are absolute. . . . Equally fundamental with the private right

is that of the public to regulate it in the common interest. . . .

. . . . .

". . . [T]he guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the objective sought to be attained." *Id.*, at 523, 525.

See also *Railway Express Agency* v. *New York*, 336 U. S. 106 (1949); *Exxon Corp.* v. *Governor of Maryland*, 437 U. S. 117, 124–125 (1978). Appellants have failed to provide sufficient justification for concluding that this test is not satisfied by the State's asserted interest in promoting more expansive rights of free speech and petition than conferred by the Federal Constitution.[8]

V

Appellants finally contend that a private property owner has a First Amendment right not to be forced by the State to use his property as a forum for the speech of others.[9] They

[8] Although appellants contend there are adequate alternative avenues of communication available for appellees, it does not violate the United States Constitution for the State Supreme Court to conclude that access to appellants' property in the manner required here is necessary to the promotion of state-protected rights of free speech and petition.

[9] Appellees contend that this issue is not properly before us because appellants have not met their burden of showing that it was raised in the state courts. It is well settled that in challenging the validity of a state law on the ground that it is repugnant to the Constitution of the United States, "[n]o particular form of words or phrases is essential, but only that the claim of invalidity on the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented." *New York ex rel. Bryant* v. *Zimmerman*, 278 U. S., at 67.

Before the Supreme Court of California, appellants argued:

"The constitutional right to exclude potential communicants from private property is inextricably intertwined with the right of the property owner

state that in *Wooley* v. *Maynard*, 430 U. S. 705 (1977), this Court concluded that a State may not constitutionally require an individual to participate in the dissemination of an ideologi-

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to select the way he wishes to use his property. . . . The right, which has been recognized as deriving from the owner's status as owner, also derives from the owner's status as himself a potential communicant. Defendant urges that his constitutional right to free speech would be infringed if he were required to make his property available to others for the purpose of their expressive activity." Brief in Response to *Amici Curiae* Briefs in No. S. F. 23812, p. 39 (Sup. Ct. Cal.).

In making this argument appellants explicitly relied on *Wooley* v. *Maynard*, 430 U. S. 705 (1977), and *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943). Brief in Response to *Amici Curiae* Briefs, *supra*, at 40–42. Before this Court appellants contend that "[t]he constitutional rights of private property owners also have their origins in the First Amendment right of the property owner not to be forced by the state to use his property as a forum for the speech of others." Brief for Appellants 12. See also Juris. Statement 12. And appellants throughout this litigation have been asserting their federal constitutional right to prohibit public expressive activity on their property that is not directly related to PruneYard's commercial purposes.

In addition, this Court has held federal claims to have been adequately presented even though not raised in lower state courts when the highest state court renders an unexpected interpretation of state law or reverses its prior interpretation. *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673, 677–678 (1930); *Missouri ex rel. Missouri Ins. Co.* v. *Gehner*, 281 U. S. 313, 320 (1930); *Saunders* v. *Shaw*, 244 U. S. 317, 320 (1917). Here prior to its decision below, the California Supreme Court had expressly decided to follow *Lloyd Corp.* v. *Tanner*, 407 U. S. 551 (1972), in defining the scope of state constitutional rights of free speech and petition. *Diamond II*, 11 Cal. 3d, at 335, 521 P. 2d, at 463. It was not until the instant case that the California Supreme Court overruled *Diamond II*, *supra*, and held that the California Constitution can and does require shopping center owners to grant access to individuals exercising their state rights of free expression and petition.

Prior to reaching the California Supreme Court, appellants argued that the *Diamond II* decision bound the California Superior Court and Court of Appeal to rule in appellants' favor. Appellants prevailed in these courts, and *Diamond II* was held to be controlling. Once before the California Supreme Court, as noted above, appellants explicitly presented

cal message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public. This rationale applies here, they argue, because the message of *Wooley* is that the State may not force an individual to display any message at all.

Wooley, however, was a case in which the government itself prescribed the message, required it to be displayed openly on appellee's personal property that was used "as part of his daily life," and refused to permit him to take any measures to cover up the motto even though the Court found that the display of the motto served no important state interest. Here, by contrast, there are a number of distinguishing factors. Most important, the shopping center by choice of its owner is not limited to the personal use of appellants. It is instead a business establishment that is open to the public to come and go as they please. The views expressed by members of the public in passing out pamphlets or seeking signatures for a petition thus will not likely be identified with those of the owner. Second, no specific message is dictated by the State to be displayed on appellants' property. There consequently is no danger of governmental discrimination for or against a particular message. Finally, as far as appears here appellants can expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand. Such signs, for example, could disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law.

Appellants also argue that their First Amendment rights have been infringed in light of *West Virginia State Board of*

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their federal constitutional right to prohibit public expression on their property in terms of *Wooley* and *Barnette*. It was not until that time that they could have reasonably expected that the validity of the earlier *Diamond II* decision would be questioned. In these circumstances we conclude that appellants have adequately raised the federal question.

Education v. *Barnette*, 319 U. S. 624 (1943), and *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974). *Barnette* is inapposite because it involved the compelled recitation of a message containing an affirmation of belief. This Court held such compulsion unconstitutional because it "require[d] the individual to communicate by word and sign his acceptance" of government-dictated political ideas, whether or not he subscribed to them. 319 U. S., at 633. Appellants are not similarly being compelled to affirm their belief in any governmentally prescribed position or view, and they are free to publicly dissociate themselves from the views of the speakers or handbillers.

Tornillo struck down a Florida statute requiring a newspaper to publish a political candidate's reply to criticism previously published in that newspaper. It rests on the principle that the State cannot tell a newspaper what it must print. The Florida statute contravened this principle in that it "exact[ed] a penalty on the basis of the content of a newspaper." 418 U. S., at 256. There also was a danger in *Tornillo* that the statute would "dampe[n] the vigor and limi[t] the variety of public debate" by deterring editors from publishing controversial political statements that might trigger the application of the statute. *Id.*, at 257. Thus, the statute was found to be an "intrusion into the function of editors." *Id.*, at 258. These concerns obviously are not present here.

We conclude that neither appellants' federally recognized property rights nor their First Amendment rights have been infringed by the California Supreme Court's decision recognizing a right of appellees to exercise state-protected rights of expression and petition on appellants' property. The judgment of the Supreme Court of California is therefore

Affirmed.

MR. JUSTICE BLACKMUN joins the opinion of the Court except that sentence thereof, *ante*, at 84, which reads: "Nor

as a general proposition is the United States, as opposed to the several States, possessed of residual authority that enables it to define 'property' in the first instance."

MR. JUSTICE MARSHALL, concurring.

I join the opinion of the Court, but write separately to make a few additional points.

I

In *Food Employees* v. *Logan Valley Plaza,* 391 U. S. 308 (1968), this Court held that the First and Fourteenth Amendments prevented a state court from relying on its law of trespass to enjoin the peaceful picketing of a business enterprise located within a shopping center. The Court concluded that because the shopping center "serves as the community business block" and is open to the general public, "the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises." *Id.,* at 319. The Court rejected the suggestion that such an abrogation of the state law of trespass would intrude on the constitutionally protected property rights of shopping center owners. And it emphasized that the shopping center was open to the public and that reasonable restrictions on the exercise of communicative activity would be permitted. "[N]o meaningful claim to protection of a right of privacy can be advanced by respondents here. Nor on the facts of the case can any significant claim to protection of the normal business operation of the property be raised. Naked title is essentially all that is at issue." *Id.,* at 324.

The Court in *Logan Valley* emphasized that if the property rights of shopping center owners were permitted to overcome the First Amendment rights of prospective petitioners, a significant intrusion on communicative activity would result. Because "[t]he large-scale movement of this country's population from the cities to the suburbs has been accompanied

by the advent of the suburban shopping center," a contrary decision would have "substantial consequences for workers seeking to challenge substandard working conditions, consumers protesting shoddy or overpriced merchandise, and minority groups seeking nondiscriminatory hiring policies." *Ibid.* In light of these realities, we concluded that the First and Fourteenth Amendments prohibited the State from using its trespass laws to prevent the exercise of expressive activities on privately owned shopping centers, at least when those activities were related to the operations of the store at which they were directed.

In *Lloyd Corp.* v. *Tanner*, 407 U. S. 551 (1972), the Court confined *Logan Valley* to its facts, holding that the First and Fourteenth Amendments were not violated when a State prohibited petitioning that was not designed to convey information with respect to the operation of the store that was being picketed. The Court indicated that a contrary result would constitute "an unwarranted infringement of property rights." 407 U. S., at 567. And in *Hudgens* v. *NLRB*, 424 U. S. 507 (1976), the Court concluded that *Lloyd* had in fact overruled *Logan Valley*.

I continue to believe that *Logan Valley* was rightly decided, and that both *Lloyd* and *Hudgens* were incorrect interpretations of the First and Fourteenth Amendments. State action was present in all three cases. In all of them the shopping center owners had opened their centers to the public at large, effectively replacing the State with respect to such traditional First Amendment forums as streets, sidewalks, and parks. The State had in turn made its laws of trespass available to shopping center owners, enabling them to exclude those who wished to engage in expressive activity on their premises.[1]

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[1] In this respect the cases resembled *Shelley* v. *Kraemer*, 334 U. S. 1 (1948), and *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), in which the common-law rules of contract and tort were held to constitute state action for Fourteenth Amendment purposes.

Rights of free expression become illusory when a State has operated in such a way as to shut off effective channels of communication. I continue to believe, then, that "the Court's rejection of any role for the First Amendment in the privately owned shopping center complex stems . . . from an overly formalistic view of the relationship between the institution of private ownership of property and the First Amendment's guarantee of freedom of speech." *Hudgens* v. *NLRB*, *supra*, at 542 (dissenting opinion).

II

In the litigation now before the Court, the Supreme Court of California construed the California Constitution to protect precisely those rights of communication and expression that were at stake in *Logan Valley*, *Lloyd*, and *Hudgens*. The California court concluded that its state "[c]onstitution broadly proclaims speech and petition rights. Shopping centers to which the public is invited can provide an essential and invaluable forum for exercising those rights." 23 Cal. 3d 899, 910, 592 P. 2d 341, 347 (1979). Like the Court in *Logan Valley*, the California court found that access to shopping centers was crucial to the exercise of rights of free expression. And like the Court in *Logan Valley*, the California court rejected the suggestion that the Fourteenth Amendment barred the intrusion on the property rights of the shopping center owners. I applaud the court's decision, which is a part of a very healthy trend of affording state constitutional provisions a more expansive interpretation than this Court has given to the Federal Constitution. See Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489 (1977).

Appellants, of course, take a different view. They contend that the decision below amounts to a constitutional "taking" or a deprivation of their property without due process of law. *Lloyd*, they claim, did not merely overrule *Logan*

Valley's First Amendment holding; it overruled its due process ruling as well, recognizing a federally protected right on the part of shopping center owners to enforce the pre-existing state law of trespass by excluding those who engage in communicative activity on their property. In my view, the issue appellants present is largely a restatement of the question of whether and to what extent a State may abrogate or modify common-law rights. Although the cases in this Court do not definitively resolve the question, they demonstrate that appellants' claim has no merit.

Earlier this Term, in *Martinez* v. *California*, 444 U. S. 277 (1980), the Court was also confronted with a claim that the abolition of a cause of action previously conferred by state law was an impermissible taking of "property." We responded that even if a pre-existing state-law remedy "is a species of 'property' protected by the Due Process Clause . . . , it would remain true that the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational." *Id.*, at 281–282. Similarly, in the context of a claim that a guest statute impermissibly abrogated common-law rights of tort, the Court observed that the Due Process Clause does not forbid the "creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object." *Silver* v. *Silver*, 280 U. S. 117, 122 (1929). And in *Munn* v. *Illinois*, 94 U. S. 113 (1877), the Court upheld a statute limiting the permissible rate for the warehousing of grain. "A person has no property, no vested interest, in any rule of the common law. . . . Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will . . . of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the

common law as they are developed, and to adapt it to the changes of time and circumstances." *Id.*, at 134. See also *Second Employers' Liability Cases*, 223 U. S. 1, 50 (1912); *Crowell* v. *Benson*, 285 U. S. 22, 41 (1932).

Appellants' claim in this case amounts to no less than a suggestion that the common law of trespass is not subject to revision by the State, notwithstanding the California Supreme Court's finding that state-created rights of expressive activity would be severely hindered if shopping centers were closed to expressive activities by members of the public. If accepted, that claim would represent a return to the era of *Lochner* v. *New York*, 198 U. S. 45 (1905), when common-law rights were also found immune from revision by State or Federal Government. Such an approach would freeze the common law as it has been constructed by the courts, perhaps at its 19th-century state of development. It would allow no room for change in response to changes in circumstance. The Due Process Clause does not require such a result.

On the other hand, I do not understand the Court to suggest that rights of property are to be defined solely by state law, or that there is no federal constitutional barrier to the abrogation of common-law rights by Congress or a state government. The constitutional terms "life, liberty, and property" do not derive their meaning solely from the provisions of positive law. They have a normative dimension as well, establishing a sphere of private autonomy which government is bound to respect.[2] Quite serious constitutional questions might be raised if a legislature attempted to abolish certain

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[2] This understanding is embodied in cases in the procedural due process area holding that at least some "grievous losses" amount to deprivation of "liberty" or "property" within the meaning of the Due Process Clause, even if those losses are not protected by statutory or common law. See *Vitek* v. *Jones*, 445 U. S. 480, 488–489 (1980), and cases cited; *Mathews* v. *Eldridge*, 424 U. S. 319, 333 (1976). See also *Meachum* v. *Fano*, 427 U. S. 215, 229 (1976) (STEVENS, J., dissenting).

categories of common-law rights in some general way. Indeed, our cases demonstrate that there are limits on governmental authority to abolish "core" common-law rights, including rights against trespass, at least without a compelling showing of necessity or a provision for a reasonable alternative remedy.[3]

That "core" has not been approached in this case. The California Supreme Court's decision is limited to shopping centers, which are already open to the general public. The owners are permitted to impose reasonable restrictions on expressive activity. There has been no showing of interference with appellants' normal business operations. The California court has not permitted an invasion of any personal sanctuary. Cf. *Stanley* v. *Georgia*, 394 U. S. 557 (1969). No rights of privacy are implicated. In these circumstances

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[3] For example, in *Ingraham* v. *Wright*, 430 U. S. 651 (1977), the Court found a constitutional liberty interest in freedom from corporal punishment, in large part on the ground that that interest was protected at common law. The Court stated that the "Due Process Clause . . . was intended to give Americans at least the protection against governmental power that they had enjoyed as Englishmen against the power of the Crown. The liberty preserved from deprivation without due process included the right 'generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.'" *Id.*, at 672–673 (citation omitted). In *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U. S. 59, 88 (1978), the Court reserved the question whether in creating a compensation scheme for victims of nuclear accidents, Congress was constitutionally obliged to "provide a reasonable substitute remedy" for the abrogation of common-law rights of tort. Similarly, in *New York Central R. Co.* v. *White*, 243 U. S. 188, 201 (1917), the Court expressed uncertainty as to whether "a State might, without violence to the constitutional guaranty of 'due process of law,' suddenly set aside all common-law rules respecting liability as between employer and employee, without providing a reasonably just substitute," and "doubted whether the State could abolish all rights of action on the one hand, or all defenses on the other, without setting up something adequate in their stead."

there is no basis for strictly scrutinizing the intrusion authorized by the California Supreme Court.

I join the opinion of the Court.

MR. JUSTICE WHITE, concurring in part and concurring in the judgment.

I join MR. JUSTICE POWELL's concurring opinion but with these additional remarks.

The question here is whether the Federal Constitution forbids a State to implement its own free-speech guarantee by requiring owners of shopping centers to permit entry on their property for the purpose of communicating with the public about subjects having no connection with the shopping centers' business. The Supreme Court of California held that in the circumstances of this case the federally protected property rights of appellants were not infringed. The state court recognized, however, that reasonable time and place limitations could be imposed and that it was dealing with the public or common areas in a large shopping center and not with an individual retail establishment within or without the shopping center or with the property or privacy rights of a homeowner. On the facts before it, "[a] handful of additional orderly persons soliciting signatures and distributing handbills . . . would not markedly dilute defendant's property rights." 23 Cal. 3d 899, 911, 592 P. 2d 341, 347–348 (1979).

I agree that on the record before us there was not an unconstitutional infringement of appellants' property rights. But it bears pointing out that the Federal Constitution does not require that a shopping center permit distributions or solicitations on its property. Indeed, *Hudgens* v. *NLRB*, 424 U. S. 507 (1976), and *Lloyd Corp.* v. *Tanner*, 407 U. S. 551 (1972), hold that the First and Fourteenth Amendments do not prevent the property owner from excluding those who would demonstrate or communicate on his property. Insofar as the Federal Constitution is concerned, therefore, a State may

decline to construe its own constitution so as to limit the property rights of the shopping center owner.

The Court also affirms the California Supreme Court's implicit holding that appellants' own free-speech rights under the First and Fourteenth Amendments were not infringed by requiring them to provide a forum for appellees to communicate with the public on shopping center property. I concur in this judgment, but I agree with MR. JUSTICE POWELL that there are other circumstances that would present a far different First Amendment issue. May a State require the owner of a shopping center to subsidize any and all political, religious, or social-action groups by furnishing a convenient place for them to urge their views on the public and to solicit funds from likely prospects? Surely there are some limits on state authority to impose such requirements; and in this respect, I am not in entire accord with Part V of the Court's opinion.

MR. JUSTICE POWELL, with whom MR. JUSTICE WHITE joins, concurring in part and in the judgment.

Although I join the judgment, I do not agree with all of the reasoning in Part V of the Court's opinion. I join Parts I–IV on the understanding that our decision is limited to the type of shopping center involved in this case. Significantly different questions would be presented if a State authorized strangers to picket or distribute leaflets in privately owned, freestanding stores and commercial premises. Nor does our decision today apply to all "shopping centers." This generic term may include retail establishments that vary widely in size, location, and other relevant characteristics. Even large establishments may be able to show that the number or type of persons wishing to speak on their premises would create a substantial annoyance to customers that could be eliminated only by elaborate, expensive, and possibly unenforceable time, place, and manner restrictions. As the Court observes, state power to regulate private property is limited to the adoption of reasonable restrictions that "do not amount to a taking without

just compensation or contravene any other federal constitutional provision." *Ante*, at 81.

I

Restrictions on property use, like other state laws, are invalid if they infringe the freedom of expression and belief protected by the First and Fourteenth Amendments. In Part V of today's opinion, the Court rejects appellants' contention that "a private property owner has a First Amendment right not to be forced by the State to use his property as a forum for the speech of others." *Ante*, at 85. I agree that the owner of this shopping center has failed to establish a cognizable First Amendment claim in this case. But some of the language in the Court's opinion is unnecessarily and perhaps confusingly broad. In my view, state action that transforms privately owned property into a forum for the expression of the public's views could raise serious First Amendment questions.

The State may not compel a person to affirm a belief he does not hold. See *Wooley* v. *Maynard*, 430 U. S. 705 (1977); *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943). Whatever the full sweep of this principle, I do not believe that the result in *Wooley* v. *Maynard*, *supra*, would have changed had the State of New Hampshire directed its citizens to place the slogan "Live Free or Die" in their shop windows rather than on their automobiles. In that case, we said that "[a] system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts." 430 U. S., at 714. This principle on its face protects a person who refuses to allow use of his property as a marketplace for the ideas of others. And I can find no reason to exclude the owner whose property is "not limited to [his] personal use. . . ." *Ante*, at 87. A person who has merely invited the public onto his property for commercial purposes cannot fairly be said to have relinquished his right to decline "to be

an instrument for fostering public adherence to an ideological point of view he finds unacceptable." *Wooley* v. *Maynard*, *supra*, at 715.[1]

As the Court observes, this case involves only a state-created right of limited access to a specialized type of property. *Ante*, at 87, 87–88. But even when no particular message is mandated by the State, First Amendment interests are affected by state action that forces a property owner to admit third-party speakers. In many situations, a right of access is no less intrusive than speech compelled by the State itself. For example, a law requiring that a newspaper permit others to use its columns imposes an unacceptable burden upon the newspaper's First Amendment right to select material for publication. *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974). See also *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U. S. 94, 117 (1973) (plurality opinion). Such a right of access burdens the newspaper's "fundamental right to decide what to print or omit." *Wooley* v. *Maynard*, *supra*, at 714; see *Miami Herald Publishing Co.* v. *Tornillo*, *supra*, at 257. As such, it is tantamount to compelled affirmation and, thus, presumptively unconstitutional.[2]

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[1] Cf. *Lloyd Corp.* v. *Tanner*, 407 U. S. 551, 569 (1972) ("property [does not] lose its private character merely because the public is generally invited to use it for designated purposes. . . .").

[2] Even if a person's own speech is not affected by a right of access to his property, a requirement that he lend support to the expression of a third party's views may burden impermissibly the freedoms of association and belief protected by the First and Fourteenth Amendments. In *Abood* v. *Detroit Board of Education*, 431 U. S. 209, 235 (1977), we held that a State may not require a person "to contribute to the support of an ideological cause he may oppose. . . ." To require a landowner to supply a forum for causes he finds objectionable also might be an unacceptable "compelled subsidization" in some circumstances. *Id.*, at 237; cf. *Central Hardware Co.* v. *NLRB*, 407 U. S. 539, 543–545 (1972) ("property rights" may permit exclusion of union organizers); *NLRB* v. *Babcock & Wilcox Co.*, 351 U. S. 105, 112 (1956) (same). See generally *Eastex, Inc.* v. *NLRB*, 437 U. S. 556, 571–576 (1978); *Hudgens* v. *NLRB*,

The selection of material for publication is not generally a concern of shopping centers. But similar speech interests are affected when listeners are likely to identify opinions expressed by members of the public on commercial property as the views of the owner. If a state law mandated public access to the bulletin board of a freestanding store, hotel, office, or small shopping center, customers might well conclude that the messages reflect the view of the proprietor. The same would be true if the public were allowed to solicit or pamphleteer in the entrance area of a store or in the lobby of a private building. The property owner or proprietor would be faced with a choice: he either could permit his customers to receive a mistaken impression or he could disavow the messages. Should he take the first course, he effectively has been compelled to affirm someone else's belief. Should he choose the second, he has been forced to speak when he would prefer to remain silent. In short, he has lost control over his freedom to speak or not to speak on certain issues. The mere fact that he is free to dissociate himself from the views expressed on his property, see *ante*, at 87, cannot restore his "right to refrain from speaking at all." *Wooley* v. *Maynard*, *supra*, at 714.

A property owner also may be faced with speakers who wish to use his premises as a platform for views that he finds morally repugnant. Numerous examples come to mind. A minority-owned business confronted with leafleteers from the American Nazi Party or the Ku Klux Klan, a church-operated enterprise asked to host demonstrations in favor of abortion, or a union compelled to supply a forum to right-to-work advocates could be placed in an intolerable position if state law requires it to make its private property available to anyone who wishes to speak. The strong emotions evoked by speech

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424 U. S. 507, 521–522 (1976). The appellants do not argue, however, that *Abood* supports the claimed right to exclude speakers from their property. Nor have they alleged that they disagree with the messages at issue in this case. See *infra*, at 101.

in such situations may virtually compel the proprietor to respond.

The pressure to respond is particularly apparent when the owner has taken a position opposed to the view being expressed on his property. But an owner who strongly objects to some of the causes to which the state-imposed right of access would extend may oppose ideological activities "of *any* sort" that are not related to the purposes for which he has invited the public onto his property. See *Abood* v. *Detroit Board of Education*, 431 U. S. 209, 213, 241 (1977). To require the owner to specify the particular ideas he finds objectionable enough to compel a response would force him to relinquish his "freedom to maintain his own beliefs without public disclosure." *Ibid.*[3] Thus, the right to control one's own speech may be burdened impermissibly even when listeners will not assume that the messages expressed on private property are those of the owner.[4]

II

One easily can identify other circumstances in which a right of access to commercial property would burden the owner's First and Fourteenth Amendment right to refrain from

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[3] The problem is compounded where, as in shopping centers or in the lobby areas of hotels and office buildings, stores are leased to different proprietors with divergent views.

[4] In a proper case, the property owner also may be protected by the principle that "a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch." *Stanley* v. *Georgia*, 394 U. S. 557, 565 (1969). Observing that a State has no interest in controlling the moral content of a person's thoughts, *ibid.*, the Court in *Stanley* invalidated a law imposing criminal penalties for the private possession of obscenity. *Stanley* prevents a State from removing from the home expressive materials that a person may wish to peruse privately. The same principle may extend to state action that forces individual exposure to third-party messages. Thus, a law that required homeowners to permit speakers to congregate on their front lawns would be a massive and possibly unconstitutional intrusion into personal privacy and freedom of belief. No such problem arises in this case.

speaking. But appellants have identified no such circumstance. Nor did appellants introduce evidence that would support a holding in their favor under either of the legal theories outlined above.

On the record before us, I cannot say that customers of this vast center would be likely to assume that appellees' limited speech activity expressed the views of the PruneYard or of its owner. The shopping center occupies several city blocks. It contains more than 65 shops, 10 restaurants, and a theater. Interspersed among these establishments are common walkways and plazas designed to attract the public. See *ante*, at 77, 83. Appellees are high school students who set up their card table in one corner of a central courtyard known as the "Grand Plaza." App. to Juris. Statement B–2. They showed passersby several petitions and solicited signatures. Persons solicited could not reasonably have believed that the petitions embodied the views of the shopping center merely because it owned the ground on which they stood.

Appellants have not alleged that they object to the ideas contained in the appellees' petitions. Nor do they assert that some groups who reasonably might be expected to speak at the PruneYard will express views that are so objectionable as to require a response even when listeners will not mistake their source. The record contains no evidence concerning the numbers or types of interest groups that may seek access to this shopping center, and no testimony showing that the appellants strongly disagree with any of them.

Because appellants have not shown that the limited right of access held to be afforded by the California Constitution burdened their First and Fourteenth Amendment rights in the circumstances presented, I join the judgment of the Court. I do not interpret our decision today as a blanket approval for state efforts to transform privately owned commercial property into public forums. Any such state action would raise substantial federal constitutional questions not present in this case.

CONSUMER PRODUCT SAFETY COMMISSION ET AL. *v.* GTE SYLVANIA, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 79-521. Argued April 14, 1980—Decided June 9, 1980

Section 6 (b)(1) of the Consumer Product Safety Act (CPSA) requires that, at least 30 days prior to the "public disclosure of any information" pertaining to a consumer product obtained by the Consumer Product Safety Commission (Commission) pursuant to its information-gathering authority, the Commission must notify the manufacturer and provide it with a summary of the information to be disclosed, if the product is to be designated or described in such a way as to permit the public to ascertain readily the manufacturer's identity; that the manufacturer be given a reasonable opportunity to submit comments regarding the information; and that the Commission "take reasonable steps to assure" that such information is "accurate" and that disclosure is "fair in the circumstances and reasonably related to effectuating the purposes" of the CPSA. In the instant case, the Commission, upon receiving Freedom of Information Act (FOIA) requests and without complying with § 6 (b)(1), decided to release certain accident reports that it had obtained from respondent manufacturers and that were accompanied, for the most part, by claims of confidentiality. The District Court permanently enjoined the Commission from disclosing the materials, rejecting its contention that § 6 (b)(1) applies only when the Commission affirmatively undertakes to disclose information to the public but not when it merely complies with a request for information under the FOIA. The Court of Appeals affirmed.

Held: Section 6 (b)(1) governs the disclosure of records by the Commission pursuant to a request under the FOIA. Pp. 108–124.

(a) Nothing in § 6 (b)(1)'s language, or in any other provision of the CPSA, supports the claim that § 6 (b)(1) is limited to disclosures initiated by the Commission, a disclosure pursuant to the FOIA being accurately characterized as a "public disclosure" within the plain meaning of § 6 (b)(1). Moreover, § 6 (b)(2), which contains specific exceptions to § 6 (b)(1)'s requirements, does not include the disclosure of information in response to an FOIA request. And § 25 (c) of the CPSA—designating certain reports as "public information" notwithstanding that they might be exempted from disclosure under the FOIA

and thus within the scope of § 6 (a)(1), which incorporates by reference the exemptions of the FOIA—specifically makes the disclosure of the information subject to the limitations of § 6 (b) whether it be "affirmatively" released by the Commission or released pursuant to an FOIA request. Pp. 108–110.

(b) Neither the legislative history of the CPSA prior to its enactment nor subsequent legislative and administrative interpretations of § 6 (b)(1) warrant construing § 6 (b)(1) as being limited to the Commission's "affirmative" disclosures. Pp. 110–120.

(c) Applicability of § 6 (b)(1) to FOIA requests is not precluded on the alleged ground that the Commission would be unable to comply with FOIA time requirements for handling disclosure requests and administrative appeals from refusals to disclose. Such an argument assumes that the Commission must comply with FOIA time limitations, but its Exemption 3 states that the FOIA does not apply to matters that are specifically exempted from disclosure by another statute which requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or which establishes particular criteria for withholding or refers to particular types of matters to be withheld. Here, § 6 (b)(1) sets forth sufficiently definite standards to fall within the scope of Exemption 3. Pp. 121–123.

(d) The argument that requiring the Commission to comply with § 6 (b)(1) in meeting FOIA requests will impose insurmountable burdens on the agency is entirely speculative. Moreover, any increased burdens imposed on the Commission were intended by Congress in striking an appropriate balance between the interests of consumers and the need for fairness and accuracy with respect to information disclosed by the Commission and thus the claim of undue burdens is properly addressed to Congress, not this Court. Pp. 123–124.

598 F. 2d 790, affirmed.

REHNQUIST, J., delivered the opinion for a unanimous Court.

Peter Buscemi argued the cause *pro hac vice* for petitioners. With him on the briefs were *Solicitor General McCree, Assistant Attorney General Daniel, Deputy Solicitor General Geller, Leonard Schaitman, Mark N. Mutterperl,* and *Andrew S. Krulwich.*

Bernard G. Segal argued the cause for respondents. With him on the brief were *Charles C. Hileman III, Ira P. Tiger,*

Deena Jo Schneider, Robert W. Steele, Alan M. Grimaldi, Harry L. Shniderman, H. James Conaway, Jr., Januar D. Bove, Jr., Stephen B. Clarkson, Charles S. Crompton, Jr., Ira M. Millstein, Peter Gartland, David Fleischer, Burton Y. Weitzenfeld, Michael A. Stiegel, William F. Patten, and *H. Woodruff Turner.**

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

The question presented is whether § 6 (b)(1) of the Consumer Product Safety Act, 15 U. S. C. § 2055 (b)(1), governs the disclosure of records by the Consumer Product Safety Commission pursuant to a request under the Freedom of Information Act. We granted certiorari to review a judgment of the Court of Appeals for the Third Circuit because of the importance of the question and because of a conflict in the Circuits.[1] 444 U. S. 979.

I

In 1972, Congress enacted the Consumer Product Safety Act (CPSA), 86 Stat. 1207, 15 U. S. C. § 2051 *et seq.*, in order, *inter alia,* "to protect the public against unreasonable risks of injury associated with consumer products" and "to assist consumers in evaluating the comparative safety of consumer products." 15 U. S. C. §§ 2051 (b)(1) and (2). The CPSA created the Consumer Product Safety Commission (Commission) to carry out the statutory purposes. 15 U. S. C. § 2053. The Commission's powers include the authority to collect and disseminate product safety information, 15 U. S. C. § 2054 (a)(1), to conduct research and tests on consumer products, 15 U. S. C. §§ 2054 (b)(1) and (2), to promulgate safety standards, 15 U. S. C. § 2056, and to ban hazardous products, 15 U. S. C. § 2057.

**Richard A. Lowe* filed a brief for the Consumer Federation of America as *amicus curiae* urging reversal.

[1] The decision below, 598 F. 2d 790 (1979), is in direct conflict with *Pierce & Stevens Chemical Corp.* v. *U. S. Consumer Product Safety Comm'n,* 585 F. 2d 1382 (CA2 1978).

Section 6 of the CPSA, 86 Stat. 1212, 15 U. S. C. § 2055, regulates the "public disclosure" of information by the Commission. Section 6 (b)(1), with which we deal here, requires the Commission, at least 30 days before the public disclosure of information pertaining to a consumer product, to notify the manufacturer and to provide it with a summary of the information to be disclosed, if the product is to be designated or described in such a way as to permit the public to ascertain readily the manufacturer's identity. The manufacturer must be given a reasonable opportunity to submit comments regarding the information. And the Commission must take reasonable steps to assure that such information is accurate and that disclosure is "fair in the circumstances and reasonably related to effectuating the purposes" of the CPSA. If the Commission subsequently finds that it has made public disclosure of inaccurate or misleading information that adversely reflects on a manufacturer's products or practices, the Commission must "publish a retraction" in a manner "similar to that in which such disclosure was made. . . ." [2]

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[2] In its entirety, § 6 states:

"(a)(1) Nothing contained in this Act shall be deemed to require the release of any information described by subsection (b) of section 552, title 5, United States Code, or which is otherwise protected by law from disclosure to the public.

"(2) All information reported to or otherwise obtained by the Commission or its representative under this Act which information contains or relates to a trade secret or other matter referred to in section 1905 of title 18, United States Code, shall be considered confidential and shall not be disclosed, except that such information may be disclosed to other officers or employees concerned with carrying out this Act or when relevant in any proceeding under this Act. Nothing in this Act shall authorize the withholding of information by the Commission or any officer or employee under its control from the duly authorized committees of the Congress.

"(b)(1) Except as provided by paragraph (2) of this subsection, not less than 30 days prior to its public disclosure of any information obtained under this Act, or to be disclosed to the public in connection therewith (unless the Commission finds out that the public health and safety requires a lesser period of notice), the Commission shall, to the extent practicable,

The relevant facts are set forth in a case decided by this Court earlier this Term, *GTE Sylvania, Inc.* v. *Consumers Union*, 445 U. S. 375 (1980), and need not be restated in detail. Briefly, the Commission obtained from respondents various accident reports, most of which were accompanied by claims of confidentiality. The Commission subsequently decided, after receiving Freedom of Information Act (FOIA) requests from the Consumers Union of the United States, Inc., and the Public Citizen's Health Research Group (the requesters), to release even those accident reports that were claimed to be confidential. Not surprisingly, lawsuits were soon filed in several Federal District Courts. See *GTE Sylvania, Inc.* v. *Consumers Union, supra*, at 378, n. 1.

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notify, and provide a summary of the information to, each manufacturer or private labeler of any consumer product to which such information pertains, if the manner in which such consumer product is to be designated or described in such information will permit the public to ascertain readily the identity of such manufacturer or private labeler, and shall provide such manufacturer or private labeler with a reasonable opportunity to submit comments to the Commission in regard to such information. The Commission shall take reasonable steps to assure, prior to its public disclosure thereof, that information from which the identity of such manufacturer or private labeler may be readily ascertained is accurate, and that such disclosure is fair in the circumstances and reasonably related to effectuating the purposes of this Act. If the Commission finds that, in the administration of this Act, it has made public disclosure of inaccurate or misleading information which reflects adversely upon the safety of any consumer product, or the practices of any manufacturer, private labeler, distributor, or retailer of consumer products, it shall, in a manner similar to that in which such disclosure was made, publish a retraction of such inaccurate or misleading information.

"(2) Paragraph (1) (except for the last sentence thereof) shall not apply to the public disclosure of (A) information about any consumer product with respect to which product the Commission has filed an action under section 12 (relating to imminently hazardous products), or which the Commission has reasonable cause to believe is in violation of section 19 (relating to prohibited acts), or (B) information in the course of or concerning any administrative or judicial proceeding under this Act." 86 Stat. 1212, 15 U. S. C. § 2055.

The District Court for the District of Delaware ultimately granted respondents' motion for summary judgment and permanently enjoined the Commission from disclosing the submitted accident reports, as well as data compiled on a computer printout from those reports. 443 F. Supp. 1152 (1977).[3] The District Court rejected the Commission's contention that § 6 (b)(1) applies only when the Commission affirmatively undertakes to disclose information to the public, but not when it merely complies with a request for information under the FOIA. It held that § 6 (b)(1) is applicable to disclosures in response to FOIA requests and that it establishes particular criteria for withholding information, thereby falling within the scope of Exemption 3 of the FOIA, 5 U. S. C. § 552 (b)(3). It also found that the Commission failed to comply with § 6 (b)(1) procedures in this case. Thus, it concluded that the release of the accident reports would be contrary to the CPSA. 443 F. Supp., at 1162.

The Court of Appeals for the Third Circuit affirmed. 598 F. 2d 790 (1979). After thoroughly examining the language and legislative history of § 6 (b)(1), it concluded that "Congress did not intend that provision to apply only to Commission press releases, news conferences, publication of reports and other forms of 'affirmative disclosure' of information obtained under the Act." 598 F. 2d, at 811. Rather, "the information disclosure requirements of the CPSA were meant to protect manufacturers from the harmful effects of inaccurate or misleading public disclosure by the Commission, through any means, of material obtained pursuant to its broad information-gathering powers. The policies designed to be served by section 6 (b)(1) would be severely undermined, if not eviscerated, were the Commission's interpretation to prevail." *Id.*, at 811–812.

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[3] Earlier decisions of the District Court are reported at 438 F. Supp. 208 (1977) and 404 F. Supp. 352 (1975). These decisions are discussed in *GTE Sylvania, Inc.* v. *Consumers Union*, 445 U. S., at 377–378, and n. 1.

Petitioners repeat their contention here that § 6 (b)(1) was intended to provide safeguards for the release of information by the Commission only when the Commission makes public disclosures of information on its own initiative in carrying out its responsibilities under the CPSA. When information is released in this fashion, they argue, the Commission explicitly or implicitly represents that it believes the disclosed information to be true and that the public should rely on it. Brief for Petitioners 10. When the Commission merely releases information in response to an FOIA request, by contrast, they claim the Commission is obliged to release whatever materials it possesses and need not comply with § 6 (b)(1), because it has not made any express or implied statement regarding the documents released or the extent to wh h those documents reflect agency policy. Brief for Petitioners 11. Although there is some support for petitioners' interpretation of § 6 (b)(1) in legislative history contained in a Conference Report four years after the enactment of that section, see Part IV, *infra*, we agree with the Court of Appeals' determination that "legislative history" of this sort cannot be viewed as controlling.

II

We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.

Section 6 (b)(1) by its terms applies to the "public disclosure of *any* information" obtained by the Commission pursuant to its authority under the CPSA, and to any information "to be disclosed to the public in connection therewith." (Emphasis added.) Nothing in the language of that section, or in any other provision of the CPSA, supports petitioners' claim that § 6 (b)(1) is limited to disclosures initiated by the Commission. And as a matter of common usage the term

"public" is properly understood as including persons who are FOIA requesters. A disclosure pursuant to the FOIA would thus seem to be most accurately characterized as a "public disclosure" within the plain meaning of § 6 (b)(1).[4]

Section 6 (b)(2) of the CPSA, 15 U. S. C. § 2055 (b)(2), contains specific exceptions to the requirements of § 6 (b)(1).[5] But the list of exceptions does not include the disclosure of information in response to an FOIA request. If Congress had intended to exclude FOIA disclosures from § 6 (b)(1) it could easily have done so explicitly in this section as it did with respect to the other listed exceptions. That Congress was aware of the relationship between § 6 and the FOIA when it enacted the CPSA is exhibited by the fact that Congress in § 6 (a)(1) specifically incorporated by reference the nine exemptions of the FOIA, 5 U. S. C. § 552 (b). We are consequently reluctant to conclude that Congress' failure to include FOIA requests within the exceptions to § 6 (b)(1) listed in § 6 (b)(2) was unintentional.

Finally, § 25 (c) of the CPSA, 15 U. S. C. § 2074 (c), further supports the conclusion that § 6 (b)(1) was not intended to distinguish between information disclosed to the public

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[4] Petitioners argue that the exception to the 30-day notice requirement where "the Commission finds out that the public health and safety requires a lesser period of notice" suggests that the term "public disclosure" in § 6 (b)(1) should be read to encompass only affirmative disclosures by the Commission. The exception, they claim, makes little sense as applied to FOIA disclosures in that such disclosures are the result of the Commission's statutory obligation to comply with an FOIA request rather than a Commission-initiated decision to assist the public. The language of § 6 (b)(1), however, does not limit the scope of that section to disclosures of information intended "to assist the public." Rather, it refers broadly to any "public disclosure." And, as discussed in Part III, *infra*, the legislative history indicates that the concerns underlying § 6 (b)(1) were not limited to information affirmatively disclosed by the Commission.

[5] These exceptions, for example, include the disclosure of information concerning an imminently hazardous product and disclosures in the course of an administrative or judicial proceeding under the CPSA.

pursuant to FOIA requests and information disclosed at the initiative of the Commission.[6] Section 25 (c) designates accident and investigation reports that do not identify injured parties and their physicians, and reports on research and demonstration projects as "public information" notwithstanding the fact that they might be exempted from disclosure under the FOIA and thus within the scope of § 6 (a)(1). Section 25 (c), however, specifically makes the disclosure of this information subject to the limitations of §§ 6 (a)(2) and 6 (b), whether it be "affirmatively" released by the Commission or released pursuant to an FOIA request. The language of the CPSA thus provides little basis for accepting petitioners' claim that § 6 (b)(1) does not apply to information released by the Commission in response to FOIA requests.

III

Petitioners next argue that the legislative history of the CPSA requires the conclusion that § 6 (b)(1) is inapplicable to FOIA requests despite the language of the statute. In making their argument, petitioners concede that "the pre-enactment history of this legislation does not directly address the precise issue of statutory construction involved in this case." Brief for Petitioners 33. They nonetheless maintain that the principal concern underlying the adoption of the section was the danger that the Commission might on its own initiative disseminate findings, reports, and other product information harmful to manufacturers without first assuring

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[6] Section 25 (c), as set forth in 15 U. S .C. § 2074 (c), states:

"Subject to sections 2055 (a)(2) and 2055 (b) of this title but notwithstanding section 2055 (a)(1) of this title, (1) any accident or investigation report made under this chapter by an officer or employee of the Commission shall be made available to the public in a manner which will not identify any injured person or any person treating him, without the consent of the person so identified, and (2) all reports on research projects demonstration projects, and other related activities shall be public information."

the fairness and accuracy of the disclosure. We agree with petitioners that industry representatives were concerned about the harms resulting from information affirmatively disclosed by an agency. But petitioners have failed to establish that industry concerns were limited to information disclosed in this fashion.[7] More importantly, a full examination of the legislative history of the CPSA prior to its enactment indicates that for purposes of § 6 (b)(1) no distinction was made between information affirmatively disclosed by the Commission and information released pursuant to the FOIA.

The CPSA gave the Commission broad powers to gather, analyze, and disseminate vast amounts of private information. In granting the Commission such authority, Congress adopted safeguards specifically designed to protect manufacturers' reputations from damage arising from improper disclosure of

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[7] Thus, although as petitioners point out, a vice president of General Electric Co., James F. Young, cautioned against the dangers of information "[i]ssued under the dignity and with the apparent imprimatur of the U. S. Government," Consumer Product Safety Act: Hearings before the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce, 92d Cong., 1st and 2d Sess., pt. 3, p. 1065 (1971–1972) (hereinafter Subcommittee Hearings), other statements by industry representatives expressed more general concerns about the disclosure by the Commission of information relating to product safety. For example, Bernard H. Falk, president of the National Electrical Manufacturers Association, stated that "[n]o information should be disclosed which is inaccurate, misleading or incomplete." *Id.*, at 1197. And in a prepared statement George P. Lamb, general counsel of the Association of Home Appliance Manufacturers, voiced the following concern:

"Authority to collect and disseminate information carries with it a responsibility not to disclose data that may injure a company or reveal confidential information. A statute establishing a standards-setting agency should state explicitly, as do many other federal statutes, that confidential data are not to be disseminated. A statute should also assure that *any* information to be made public is accurate, and that if it is derogatory the company it identifies has had an opportunity to refute it. H. R. 8110 contains provisions in § 4 (c) that would accomplish this." *Id.*, at 1237 (emphasis added).

information gathered and received by the Commission. The House Report on the CPSA states:

> "If the Commission is to act responsibly and with adequate basis, it must have complete and full access to information relevant to its statutory responsibilities. Accordingly, the committee has built into this bill broad information-gathering powers. It recognizes that in so doing it has recommended giving the Commission the means of gaining access to a great deal of information which would not otherwise be available to the public or to Government. Much of this relates to trade secrets or other sensitive cost and competitive information. Accordingly, the committee has written into section 6 of the bill detailed requirements and limitations relating to the Commission's authority to disclose information which it acquires in the conduct of its responsibilities under this act." H. R. Rep. No. 92–1153, p. 31 (1972).[8]

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[8] The provisions of § 6 of the CPSA, as finally enacted, can be traced to H. R. 8110, 92d Cong., 1st Sess. (1971), a bill introduced in the House on behalf of the administration. Section 4 (c) of this bill, which was also introduced in the Senate, contained information disclosure limitations that were virtually identical to those ultimately enacted in § 6 (b)(1) of the CPSA. It provided:

"(1) Nothing contained in this Act shall be deemed to require the release of any information described by subsection (b) of section 552, title 5, United States Code, or which is otherwise protected by law from disclosure to the public. The Secretary shall not make public information obtained by him under this Act which would disclose trade secrets, formulas, processes, costs, methods of doing business, or other competitive information not otherwise available to the general public; or the names or other means of identification of ill or injured persons without their express written consent.

"(2)(A) Except as provided by subparagraph (B) of this paragraph, not less than thirty days prior to his public disclosure of any information obtained under this Act, or to be disclosed to the public in connection therewith, the Secretary shall provide such information to each manufacturer of any consumer product to which such information pertains, if

The House Report does not provide any indication that the safeguards for the release of CPSA information are inapplicable when the Commission discloses information in response to an FOIA request. And in its explanatory comments on § 6 (b)(1) the Report makes no distinction whatsoever between information released at the initiative of the Commission

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the manner in which such consumer product is to be designated or described in such information will permit the public to ascertain readily the identity of such manufacturer, and shall provide such manufacturer with a reasonable opportunity to submit comments to the Secretary in regard to such information. Upon the request of such manufacturer, the Secretary shall publish such comments or a fair summary thereof, or a statement of the manufacturer of reasonable length in lieu thereof, concurrently and in association with the disclosure of the information to which such comments or statement appertain. The Secretary shall take reasonable steps to assure, prior to his public disclosure thereof, that information from which the identity of such manufacturer may be readily ascertained is accurate, and that such disclosure is fair in the circumstances and reasonably related to effectuating the purposes of this Act. If the Secretary finds that, in the administration of this Act, he has made public disclosure of inaccurate or misleading information which reflects adversely upon the safety of any consumer product, or the practices of any manufacturer of, distributor of, importer of, or dealer in consumer products, he shall, in a manner similar to that in which such disclosure was made, publish a retraction of such inaccurate or misleading information.

"(B) Subparagraph (A) (except for the last sentence thereof) shall not apply to the public disclosure of (i) information about any consumer product with respect to which product the Attorney General has filed an action (or an action against a manufacturer thereof with respect to such product) under section 12, or which the Secretary has reasonable cause to believe is in violation of section 15, or (ii) information about any administrative or judicial proceeding under this Act."

Although the bill passed by the Senate omitted these safeguards, see S. Rep. No. 92–749, pp. 49, 51 (1972), the bill passed by the House, H. R. 1503, incorporated the administration's proposal in this regard. See H. R. Rep. No. 92–1153, pp. 5, 24 (1972). The information disclosure limitations contained in H. R. 15003 were accepted by the Conference Committee and ultimately became law. See H. R. Conf. Rep. No. 92–1593, p. 7 (1972).

and information disclosed pursuant to an FOIA request. Rather, it states:

> "Before disseminating *any* information which identifies the manufacturer or private labeler of a product, the Commission is directed to give the manufacturer or private labeler 30 days in which to comment on the proposed disclosure of information. This procedure is intended to permit the manufacturer or private labeler an opportunity to come forward with explanatory data or other relevant information for the Commission's consideration." H. R. Rep. No. 92–1153, *supra,* at 32 (emphasis added).

Nor does the Conference Report contain any suggestion that § 6 (b)(1) does not apply to FOIA requests. As observed by the Court of Appeals, the "conferees' description of section 6 (b)(1) is instructive in that the accuracy and fairness requirements for 'publicly disclosed information' are mentioned in almost the same breath as the description of section 6 (a)(1), stating that no information need be 'publicly disclosed' by the Commission if it is exempt from disclosure under the FOIA." 598 F. 2d, at 809.[9]

Further support for this construction of § 6 (b)(1) can be found in examining comments made with respect to earlier versions of the House bill.[10] In commenting on the disclosure

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[9] The Conference Report stated:

"The Commission was directed to take steps to assure that publicly disclosed information from which specific manufacturers or distributors could be identified was accurate and that the disclosure was fair in the circumstances and reasonably related to carrying out its duties. No information would be required to be publicly disclosed if it is information described in section 552 (b), title 5, United States Code (relating to information which is entitled to be protected from public access under the Freedom of Information Act), or which is otherwise protected by law from disclosure to the public." *Id.,* at 41.

[10] The conclusion that § 6 (b)(1) applies to FOIA requests is also supported by a statement of Representative James Broyhill, a member of the

provisions of the administration bill, H. R. 8110, Representative Moss, chairman of the Subcommittee on Commerce and Finance, which was considering the House bills, stated: "I am sure the subcommittee will want to examine carefully this proposed change in the Freedom of Information Act." Subcommittee Hearings, pt. 2, p. 300.[11] The operative information-disclosure requirements contained in § 4 (c) of H. R. 8110, absent a requirement that the Commission publish manufacturers' comments, were nonetheless enacted into law in § 6 (b). See n. 8, *supra*.

Section 4 (c) and the provision that was finally enacted as § 6 (b) by their terms include both affirmative disclosures by the Commission and information released pursuant to the FOIA. And the Department of Health, Education, and Welfare, the agency that drafted H. R. 8110, stated in its section-by-section analysis of the bill:

> "*Section 4 (c)* would protect the Secretary's refusal to disclose information not required to be released by the [FOIA], and would expressly prohibit his disclosure of commercial secrets, or of illness or injury data revealing [the] identity of the victim.
>
> "It would also require the provision of thirty days notice to the manufacturer of any consumer product prior to the Secretary's public disclosure of information respecting that product, if such information would reveal the manufacturer's identity." Subcommittee Hearings, pt. 1, p. 188.

Conference Committee on the CPSA. In the House debates on the CPSA, Representative Broyhill stated that the proposed legislation, H. R. 15003, "requires the Commission to notify each manufacturer of its intent to release *any* information at least 30 days prior to disclosure and offer an opportunity for comment. This provision is not found in any other safety legislation." 118 Cong. Rec. 31381 (1972) (emphasis added).

[11] The statement was made following his observation that the administration bill, H. R. 8110, contained more restrictive disclosure provisions than his own bill, H. R. 8157. Subcommittee Hearings, pt. 2, p. 300.

These comments clearly do not support petitioners' reading of the present disclosure requirements of the CPSA. And the General Counsel of the Department of Commerce, in opposing the Senate's less restrictive proposal for the disclosure of information by the Commission, wrote:

> "[W]e believe that in the interest of fairness the disclosure of *any* information should be attendant with safeguards. These include prior notice to manufacturers, the right of the manufacturer to rebut false information, and a requirement that the information be fair and accurate." S. Rep. No. 92-749, p. 100 (1972) (emphasis added).

The legislative history of § 6 (b)(1) thus fails to establish that petitioners' proposed distinction should be read into the section.

IV

Petitioners also contend that legislative interpretations of § 6 (b)(1) made after the section was enacted and the Commission's administrative interpretation of that section support their proposed construction. Petitioners first rely on a statement by Representative Moss, one of the sponsors of the House bill. In testimony before a congressional Oversight Subcommittee, then Commission Chairman Richard O. Simpson explained that the Commission interpreted § 6 (b)(1) to be inapplicable to FOIA requests. Representative Moss then remarked: "As the primary author of both acts, I am inclined to agree with you." Regulatory Reform: Hearings before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 94th Cong., 2d Sess., Vol. IV, pp. 7-8 (1976). Petitioners also note that when Congress added § 29 (e), 15 U. S. C. § 2078 (e), to the CPSA in the Consumer Product Safety Commission Improvements Act of 1976, the Conference Committee explained the joint operation of the new section and § 6 (b) as follows:

> "The requirement that the Commission comply with section 6 (b) prior to another Federal agency's public

disclosure of information obtained under the Act is not intended by the conferees to supersede or conflict with the requirements of the Freedom of Information Act (5 U. S. C. § 552 (a)(3) and (a)(6)). *The former relates to public disclosure initiated by the Federal agency while the latter relates to disclosure initiated by a specific request from a member of the public under the Freedom of Information Act.*" H. R. Conf. Rep. No. 94–1022, p. 27 (1976) (emphasis added).[12]

In evaluating the weight to be attached to these statements, we begin with the oft-repeated warning that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States* v. *Price*, 361 U. S.

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[12] Section 29 (e) was added to the CPSA to "prescrib[e] conditions under which the Commission may provide accident and investigation reports to other Federal agencies or State or local authorities engaged in activities relating to health, safety, or consumer protection." H. R. Conf. Rep. No. 94–1022, at 26. Section 29 (e), 90 Stat. 510, provides:

"The Commission may provide to another Federal agency or a State or local agency or authority engaged in activities relating to health, safety, or consumer protection, copies of any accident or investigation report made under this Act by any officer, employee, or agent of the Commission only if (1) information which under section 6 (a)(2) is to be considered confidential is not included in any copy of such report which is provided under this subsection; and (2) each Federal agency and State and local agency and authority which is to receive under this subsection a copy of such report provides assurances satisfactory to the Commission that the identity of any injured person and any person who treated an injured person will not, without the consent of the person identified, be included in—

"(A) any copy of any such report, or

"(B) any information contained in any such report,

which the agency or authority makes available to any member of the public. No Federal agency or State or local agency or authority may disclose to the public any information contained in a report received by the agency or authority under this subsection unless with respect to such information the Commission has complied with the applicable requirements of section 6 (b)."

304, 313 (1960), quoted in *United States* v. *Philadelphia National Bank*, 374 U. S. 321, 348–349 (1963).[13] And ordinarily even the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history. *Chrysler Corp.* v. *Brown*, 441 U. S. 281, 311 (1979). We do not think that either Representative Moss' isolated remark or the *post hoc* statement of the Conference Committee with respect to § 6 (b) is entitled to much weight here.

While Representative Moss claimed sponsorship of the CPSA generally, he was not a sponsor of the original bill that ultimately provided that legislation with its provisions governing information disclosure. Rather he authored another bill, H. R. 8157, that contained much less restrictive disclosure requirements than those ultimately adopted.[14] His state-

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[13] Petitioners invoke the maxim that states: "Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction." *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 380–381 (1969) (footnote omitted). With respect to subsequent *legislation*, however, Congress has proceeded formally through the legislative process. A mere statement in a conference report of such legislation as to what the Committee believes an earlier statute meant is obviously less weighty.

The less formal types of subsequent legislative history provide an extremely hazardous basis for inferring the meaning of a congressional enactment. While such history is sometimes considered relevant, this is because, as Mr. Chief Justice Marshall stated in *United States* v. *Fisher*, 2 Cranch 358, 386 (1805): "Where the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived." See *Andrus* v. *Shell Oil Co.*, 446 U. S. 657, 666, n. 8 (1980). Such history does not bear strong indicia of reliability, however, because as time passes memories fade and a person's perception of his earlier intention may change. Thus, even when it would otherwise be useful, subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment.

[14] Section 19 (d) of H. R. 8175, 92d Cong., 1st Sess. (1971), provided: "When the Commission finds that publication of any information obtained by it is in the public interest and would not give an unfair competitive advantage to any person, it is authorized to publish such informa-

ment is thus not one that provides a reliable indication as to congressional intention.[15]

An examination of the statement of the Conference Committee, as the Court of Appeals concluded, reveals that it also is not persuasive authority in support of petitioners' position. Section 29 (e) by its terms does not purport to interpret the scope of § 6 (b). Rather, it deals solely with the release of accident and investigation reports by the Commission to other agencies. See n. 12, *supra*. And as the Court of Appeals stated:

> "[T]he conference committee statement was made in the context of approving legislation that contained numerous and extensive amendments to the Consumer Product Safety Act; yet the problem before us here was not otherwise addressed by Congress in enacting the Improvements Act. The interpretation of section 6 (b) espoused by the conferees was not mentioned by the House committee that drafted the Improvements Act. *See* H. R. Rep. No. 94–325, 94th Cong., 1st Sess. 18 (1975). The Senate version of the Improvements Act did not contain a provision amending section 29. [H. R. Conf. Rep. No. 94–1022, p. 26.] In the debates in the House the amendment to section 29, and the relationship between section 6 (b) and the FOIA, were not

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tion in the form and manner deemed best adapted for public use, except that data and information which relates to a trade secret, shall be held confidential and shall not be disclosed, unless the Commission determines that it is necessary to carry out the purposes of this Act." Subcommittee Hearings, pt. 1, p. 68–69.

[15] In addition, Chairman Simpson submitted to the Oversight Subcommittee a proposed amendment to § 6 (b)(2) that would have added the release of information by the Commission under the FOIA to the list of exceptions from the requirements of § 6 (b)(1). Regulatory Reform: Hearings before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 94th Cong., 2d Sess., Vol. IV, p. 8 (1976). That proposed amendment was never reported out of Committee.

mentioned. Nor was the conferees' interpretation of section 6 (b) mentioned in either House when the conference report was debated. See 122 Cong. Rec. 10,811 (House approval of the conference report); *id.*, 11,585 (Senate approval) (1976)." 598 F. 2d, at 810–811.

In light of this background, the statement of the Conference Committee is far from authoritative as an expression of congressional will under the oft-quoted factors enunciated in *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944).[16] For the same reasons, we reject petitioners' contention that the Commission's 1977 administrative interpretation should be afforded the degree of deference necessary for it to prevail here. See 42 Fed. Reg. 54304 *et seq.* (1977). This case presents a narrow legal issue that is readily susceptible of judicial resolution. Nor are we presented here with a situation in which there has been a longstanding contemporaneous administrative construction upon which those subject to the jurisdiction of the agency would have been likely to rely.[17]

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[16] Petitioners also assert that under § 29 (e) agencies that receive accident and investigation reports from the Commission would not have to comply with § 6 (b)(1) when FOIA requests are made for information in such reports, and thus there would be an inconsistency in the statutory scheme if the Commission were required to comply with § 6 (b)(1) before releasing such information. Although the other agencies themselves may not be required to comply with § 6 (b)(1), the inconsistency is nonetheless not readily apparent in that § 29 (e) states that "[n]o Federal agency or State or local agency or authority may disclose to the public any information contained in a report received by the agency or authority under this subsection unless with respect to such information the Commission has complied with the applicable requirements of section 6 (b)." In any event, we need not address the scope of § 29 (e) here.

[17] The Commission did not reach its present interpretation of the statute until it met in executive session on October 6, 1975, 443 F. Supp. 1152, 1155, n. 6 (1977)—over six months after it had decided to release the information involved in this case and more than two months after the manufacturers' motions for preliminary injunction had been fully briefed and argued before the District Court. And it was not until October 5, 1977—two days before the Commission filed its brief opposing the manu-

V

Petitioners next argue that the interpretation of § 6 (b)(1) by the Court of Appeals is inconsistent with the FOIA time requirements for the release of information. The FOIA requires an agency to "determine within ten days . . . whether to comply with [an FOIA] request" and to notify the requester "immediately" of the agency's determination. 5 U. S. C. § 552 (a)(6)(A)(i). The FOIA also requires an agency to resolve any administrative appeal of a refusal to disclose within 20 days after the filing of the appeal. § 522 (a)(6)(A)(ii). Petitioners claim that if § 6 (b)(1) applies to FOIA requests the Commission will be unable to comply with FOIA time requirements.

Petitioners' argument assumes that despite the specific procedural safeguards set forth in § 6 (b)(1) the Commission must comply with FOIA time limitations. Federal agencies, however, are granted discretion to refuse FOIA requests when the requested material falls within one of the nine statutory exemptions set forth in 5 U. S. C. § 552 (b). Exemption 3 of the FOIA, 5 U. S. C. § 552 (b)(3), states that the FOIA does not apply to matters that are

> "specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." [18]

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facturers' motions for summary judgment (App. 7) and two years after the District Court concluded that the Commission must comply with § 6 (b)(1) in responding to FOIA requests, 404 F. Supp., at 370—that the Commission's proposed rules were published. See 42 Fed. Reg. 54, 304 (1977). It is thus arguable that the Commission's interpretation here is primarily litigation inspired. Cf. *Davies Warehouse Co.* v. *Bowles*, 321 U. S. 144, 156 (1944).

[18] This exemption was amended in 1976 by § 5 (b) of the Government in the Sunshine Act, Pub. L. 94–409, 90 Stat. 1247. The amendment

Here § 6 (b)(1) sets forth sufficiently definite standards to fall within the scope of Exemption 3. It does not grant the Commission broad discretion to refuse to comply with FOIA requests. Rather, it requires that the Commission "take reasonable steps to assure" (1) that the information is "accurate," (2) that disclosure will be "fair in the circumstances," and (3) that disclosure will be "reasonably related to effectuating the purposes of [the CPSA]." [19] We therefore do not

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was to further define those statutes that "specifically exempt" material from disclosure. The Conference Report to the Sunshine Act states that the amendment was designed "to overrule the decision of the Supreme Court in *Administrator, FAA* v. *Robertson*, 422 U. S. 255 (1975), which dealt with section 1104 of the Federal Aviation Act of 1958 (49 U. S. C. 1504)." H. R. Conf. Rep. No. 94–1441, p. 25 (1976). *Robertson* held that § 1104, which vested broad discretion in the Federal Aviation Administration to withhold information from the public, fell within the scope of Exemption 3. The amendment was designed to eliminate from Exemption 3 those statutes that granted administrative agencies such discretion with respect to the disclosure or nondisclosure of material within their possession. As stated in the Report of the House Committee on Government Operations on the Sunshine Act, which recommended the amendment:

"Believing that the decision misconceives the intent of exemption (3), the committee recommends that the exemption be amended to exempt only material required to be withheld from the public by any statute establishing particular criteria or referring to particular types of information. The committee is of the opinion that this change would eliminate the gap created in the Freedom of Information Act by the *Robertson* case without in any way endangering statutes such as the Atomic Energy Act of 1954, 42 U. S. C. §§ 2161–2166, which provides explicitly for the protection of certain nuclear data.

"Under the amendment, the provision of the Federal Aviation Act of 1958 that was the subject of *Robertson*, and which affords the FAA Administrator *cart blanche* [*sic*] to withhold any information he pleases, would not come within exemption 3. . . ." H. R. Rep. No. 94–880, pt. 1, p. 23 (1976).

[19] The statute in *Robertson*, by contrast, provided:

"Any person may make written objection to the public disclosure of information contained in any application, report, or document filed pursuant to the provisions of this Act or of information obtained by the Board or the Administrator, pursuant to the provisions of this Act,

believe there is any insoluble conflict between § 6 (b)(1) and the FOIA.[20]

VI

Finally, petitioners argue that requiring the Commission to comply with § 6 (b)(1) in meeting FOIA requests will impose insurmountable burdens on the agency. In making this claim, petitioners state that the Commission receives nearly 8,000 FOIA requests annually. The extent to which these requests will present problems of fairness and accuracy with respect to the information released by the Commission is entirely speculative. And in light of the fact that Exemption 3 is applicable to the disclosure of information controlled by § 6 (b)(1), we do not think these burdens will prove to be unbearable. Most importantly, our interpretation of the language and legislative history of § 6 (b)(1) reveals that any increased burdens imposed on the Commission as a result of its compliance with § 6 (b)(1) were intended by Congress in striking an appropriate balance between the interests of

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stating the grounds for such objection. Whenever such objection is made, the Board or Administrator shall order such information withheld from public disclosure when, in their judgment, a disclosure of such information would adversely affect the interests of such person and is not required in the interest of the public. The Board or Administrator shall be responsible for classified information in accordance with appropriate law: *Provided*, That nothing in this section shall authorize the withholding of information by the Board or Administrator from the duly authorized committees of the Congress." § 1104, 72 Stat. 797, 49 U. S. C. § 1504.

[20] In addition, when Congress enacted the CPSA in 1972, the FOIA required only that an agency make records "promptly available" to any person requesting them. Pub. L. 90–23, 81 Stat. 55. It was not until 1974, when Congress amended the FOIA, that the time requirements that petitioners argue conflict with § 6 (b)(1) were adopted. Pub. L. 93–502, § 1 (c), 88 Stat. 1562, 5 U. S. C. § 552 (a)(6). Because § 6 (b)(1) has not been amended since 1972, these requirements also do not provide a sound basis for inferring a congressional intent to limit the application of § 6 (b)(1) to disclosures initiated by the Commission.

consumers and the need for fairness and accuracy with respect to information disclosed by the Commission. Thus, petitioners' claim that the Commission's compliance with the requirements of § 6 (b)(1) will impose undue burdens on the Commission is properly addressed to Congress, not to this Court.

For the foregoing reasons, the judgment of the Court of Appeals for the Third Circuit is

Affirmed.

CALIFORNIA *v.* NEVADA

ON EXCEPTIONS TO REPORT OF SPECIAL MASTER

No. 73, Orig. Argued April 14, 1980—Decided June 10, 1980

Held:

1. The Special Master was fully justified in invoking the doctrine of acquiescence in concluding that the true boundary between California and Nevada is that located by two surveys, funded by congressional appropriations in 1872 and 1892, since both States have acquiesced in those boundary lines from the time they were drawn. The issue of whether Congress had power to determine the lines even though an 1863 joint survey had been commissioned by the States, which both adopted the results thereof by statute, need not be decided, since it is not necessary that there be a particular relationship between the *origins* of a boundary and the legal *consequences* of acquiescence in that boundary. Longstanding acquiescence by the States can give the boundary lines the force of law whether or not federal authorities had the power to draw them. Pp. 130–132.

2. However, the Special Master's reference will not be expanded to authorize him to determine whether the United States should be made a party to the case and to make recommendations as to the quieting of title on various disputed borderlands. The ownership and title questions that remain typically will involve only one or the other State and the United States, or perhaps various citizens of those States, not disputes between the States. Thus, even if some of those questions do fall within this Court's original jurisdiction, they will not fall within its exclusive jurisdiction, and litigation in other forums is an appropriate means of resolving those questions. Pp. 132–133.

Exceptions to Special Master's report overruled, and report adopted in part.

BRENNAN, J., delivered the opinion for a unanimous Court.

James H. Thompson, Special Deputy Attorney General of Nevada, argued the cause for defendant. With him on the brief were *Richard H. Bryan*, Attorney General, *Larry D. Struve*, Chief Deputy Attorney General, and *Harry W. Swainston*, Deputy Attorney General.

Jan S. Stevens, Assistant Attorney General of California, argued the cause for plaintiff. With him on the briefs were *George Deukmejian*, Attorney General, and *N. Gregory Taylor*, Assistant Attorney General.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The report of the Special Master tenders for the Court's approval his determination of the true boundary between the States of California and Nevada. That boundary was the subject of numerous surveys in the latter half of the 19th century, and the central question presented in this original action is which, if any, of the lines which resulted properly marks the rugged border between the two States.[1] The Special Master combed the voluminous record and concluded that in combination the two most recent surveys had fixed a boundary to which both States have acquiesced for the better part of a century. Applying the doctrine of prescription and acquiescence, he concluded that the boundary so fixed was the proper one. Nevada takes exception to that determination on several grounds. We overrule those exceptions and, with the qualifications hereinafter noted, approve and adopt the Special Master's report.

**Solicitor General McCree* and *Deputy Solicitor General Claiborne* filed a memorandum for the United States as *amicus curiae*.

[1] California instituted this original action on April 22, 1977, when it filed its motion for leave to file complaint and complaint. On June 29, 1977, we granted that motion and appointed the Special Master. Basically, California sought a declaration that the currently recognized line dividing the two States was in fact the lawful boundary. As counsel for the State characterized it at oral argument, the suit was in the nature of a quiet title action and was precipitated by growing doubts about the geographic accuracy of the existing line as well as concerns regarding the validity of certain titles which depended upon the location of the border. The Special Master's report was filed in this Court on October 29, 1979, 444 U. S. 922, and we set Nevada's exceptions and related matters for oral argument. 444 U. S. 1065 (1980).

I

The two straight-line segments that make up the boundary between California and Nevada were initially defined in California's Constitution of 1849. The first, the "north-south" segment, commences on the Oregon border at the intersection of the 42d parallel and the 120th meridian and runs south along that meridian to the 39th parallel. And the second, the "oblique" segment, begins at that parallel and runs in a southeasterly direction to the point where the Colorado River crosses the 35th parallel. Cal. Const., Art. XII (1849). In 1850, when California was admitted to the Union, Congress approved the 1849 Constitution, and with it California's eastern boundary. Act of Sept. 9, 1850, 9 Stat. 452.

On the same day that it admitted California, Congress established a territorial government in the area immediately to the east. The organic Act for that new territory—which was then called Utah—stated that it was to be "bounded on the west by the State of California." Act of Sept. 9, 1850, 9 Stat. 453. Eleven years later, the Territory of Nevada was created out of Utah. Congress indicated in the organic Act that Nevada might include portions of what was then California, but with the proviso that "so much of the Territory within the present limits of the State of California shall not be included within this Territory until the State of California shall assent to the same by an act irrevocable without the consent of the United States. . . ." Act of Mar. 2, 1861, 12 Stat. 210. No assent was ever given by California. Accordingly, when Nevada was admitted as a State in 1864 its western boundary and California's eastern one remained congruent.[2]

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[2] Nevada's Constitution stated that its boundary would proceed "in a North Westerly direction along [the oblique section of the] Eastern boundary line of the State of California to the forty third degree of Longitude West from Washington [and then] North along said forty third degree of West Longitude, and said Eastern boundary line of the State of California

Notwithstanding brief and incomplete surveying efforts in the decade after California was admitted, the actual location on the ground of that State's eastern boundary remained highly uncertain—so much so that fighting broke out over the precise whereabouts of a small valley on the north-south line above Lake Tahoe, and a border town along the oblique line found itself claimed as the seat of both a Nevada and a California county.[3] These difficulties led California and Nevada to commission a joint survey of their border. Conducted in 1863, that survey located what is known as the Houghton-Ives line from the Oregon border south along the 120th meridian to a point in Lake Tahoe and then southeast for about 103 miles along the oblique line in the direction of the relevant point on the Colorado River. The remaining 300-plus miles of the oblique border were not surveyed.[4]

Both California and Nevada adopted the Houghton-Ives line by statute, but its significance was to be short-lived. In 1867–1868 Daniel G. Major surveyed the Oregon-California boundary for the General Land Office. One step in his work was to locate the intersection of that boundary and the 120th meridian. This he did, at a point more than two miles west

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to the forty second degree of North Latitude. . . ." Nev. Const., Art. XIV, § 1 (1864). Although it turns out that the 43d degree of longitude west from Washington does not exactly coincide with the 120th meridian west of Greenwich—which was the north-south reference in the California Constitution—the Special Master concluded that the Congress that approved Nevada's Constitution was of the view that the two lines were identical. Certainly the language of the Nevada Constitution supports this conclusion by seeming to equate the 43d degree of longitude west of Washington with the eastern boundary of California. In any event, we need not explore the matter further since it would be relevant only were we to require a new survey of one or the other longitudinal line, and we do not find such a new survey necessary.

[3] Indeed, the town—Aurora—elected representatives to both the California and Nevada Legislatures in 1862, and those representatives apparently became speakers of their respective legislatures.

[4] Two years later one James S. Lawson extended the oblique portion of the Houghton-Ives line another 73 miles.

of that meridian as marked by Houghton-Ives. This discrepancy [5] eventually led the Commissioner of the General Land Office to recommend that Congress appropriate money for a full survey of the eastern boundary of California. His recommendation was followed in 1872.

The new survey was conducted by Allexey W. Von Schmidt. While originally instructed to commence his north-south line at the point located by Daniel G. Major, Von Schmidt concluded that the actual 120th meridian lay not only east of "Major's corner," but six-tenths of a mile east of the Houghton-Ives line as well. Accordingly, Von Schmidt marked a new north-south line starting at this location. His survey of the oblique boundary also had its surprises. From the intersection of his north-south segment and the 39th parallel he set off in what he thought was the direction of the intersection of the Colorado River and the 35th parallel. Unfortunately, the Colorado River had shifted since the point for which he was aiming had been marked, and rather than end at the wrong place he attempted to correct the line he was marking. It later turned out that his corrections were not complete and his line not entirely straight. But linear or not, his work did generate a boundary. And, although neither State adopted it by statute, the Von Schmidt survey won gradual acceptance in both California and Nevada.

In the 1880's, however, substantial doubts about the accuracy of the oblique segment of the Von Schmidt line were voiced in Washington. As a result, Congress appropriated funds in 1892 for a new survey of that segment. The survey was undertaken by personnel of the United States Coast and Geodetic Survey and conducted over a period of several years. It yielded a new oblique line and determined that the one charted by Von Schmidt had been neither straight nor accu-

[5] A third survey, conducted in the summer of 1872 near the Oregon border, contributed to the confusion by concluding that the 120th meridian lay to the east of the locations pinpointed by both Major and Houghton-Ives.

rate. Both States adopted the United States Coast and Geodetic Survey line by statute—California in 1901 and Nevada in 1903.[6]

The Special Master concluded that the Von Schmidt survey of the north-south line and the United States Coast and Geodetic Survey one of the oblique line were the most recent and accurate surveys available. While noting that Von Schmidt had not been entirely accurate, the Master found that the north-south line that resulted from his survey had been consistently and routinely recognized and accepted by agencies and departments of the State of Nevada for more than a century. That the Houghton-Ives line was the first north-south boundary marked and the only one approved by statute was, he found, beside the point because as a practical matter that boundary had been superseded a decade after it was established and neither State had objected.[7] As for the oblique boundary, the Master found that the United States Coast and Geodetic Survey line had not only been adopted by statute, but accepted and used by the two States for nearly 80 years. Since both States had treated these lines as the boundary from the time they were drawn, the Master invoked the doctrine of acquiescence to determine that together they in fact constitute the true and correct interstate boundary.

II

The State of Nevada's primary contention is that the Special Master's reliance upon the doctrine of acquiescence was

[6] Nevada's statute was in effect when the present litigation was commenced, although it has subsequently been repealed.

[7] California notes that Nevada welcomed the Von Schmidt survey at the time it was conducted. Indeed, the Surveyor General of that State remarked that "within a year the State will be inclosed by an actual surveyed line and monuments, and the troubles heretofore existing, to State and county officials, in dealing with an imaginary line, will be entirely and forever obviated." Report of the Surveyor General and State Land Register of the State of Nevada for the years 1871 and 1872, p. 8.

in error. Basically, the argument is that once Nevada and California had conducted the 1863 joint survey which produced the Houghton-Ives line the Federal Government had no constitutional authority to mark a different line which had the effect of removing territory from one State and granting it to the other. Since the Congress was without power to determine the Von Schmidt and United States Coast and Geodetic Survey lines, the argument continues, they are without legal effect. And because States may not confer upon the Federal Government a power which the Constitution does not vest in it, acquiescence in those lines cannot make them lawful. Thus, Nevada concludes, either (1) Congress is constitutionally empowered to redraw the boundaries of the several States, in which case the Von Schmidt and Geodetic Survey lines may be upheld regardless of acquiescence, or (2) Congress is constitutionally powerless to alter those boundaries, in which case no mere century of acquiescence can convert a usurpation into law.

The flaw in this argument is that it assumes that there must be a particular relationship between the *origins* of a boundary and the legal *consequences* of acquiescence in that boundary. In fact, however, no such relationship need exist. Longstanding acquiescence by California and Nevada can give the Von Schmidt and Geodetic Survey lines the force of law whether or not federal authorities had the power to draw them. And the determination that the two States' conduct has had precisely this effect, therefore, does not place any sort of constitutional imprimatur upon the federal actions involved. See *Ohio* v. *Kentucky*, 410 U. S. 641, 648–651 (1973); *Indiana* v. *Kentucky*, 136 U. S. 479, 509–510 (1890). Accordingly, we need not address the issue of federal power to which Nevada adverts. It is enough that California claims and has always claimed all territory up to a specifically described boundary—the 120th meridan and the oblique line with which it connects—and that both States have long ac-

quiesced in particular lines marking that boundary.[8] If Nevada felt that those lines were inaccurate and operated to deprive it of territory lawfully within its jurisdiction the time to object was when the surveys were conducted, not a century later. *Ohio* v. *Kentucky*, *supra*, at 649. In consequence, we hold that in these circumstances the Special Master was fully justified in invoking the doctrine of acquiescence.[9]

III

Having determined that the Special Master's resolution of the boundary dispute was proper, we turn to his recommendations regarding the quite separate issue of ownership of various

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[8] Nor is Nevada's position saved by the contention that California could not profit by the doctrine of acquiescence because its claim to the lands up to the Von Schmidt and United States Coast and Geodetic Survey lands was not made under color of title or claim of right. The fact is that California's claim has always been for all lands on its side of the boundary described rather specifically in its Constitution. So long as its claims were made under a survey that purported to reflect that boundary, it had colorable title and a claim of right.

[9] Several subsidiary issues relating to the California-Nevada border are considered in the Special Master's recommendations. First, it turns out that Von Schmidt's north-south line and the United States Coast and Geodetic Survey oblique line do not intersect at precisely the 39th parallel, as in theory they should. The Special Master suggests that the two States be given the opportunity to determine by agreement the point in Lake Tahoe where the two lines meet. Failing such an accord, he indicates that he would recommend a solution; but this probably will not be necessary since the parties are apparently in agreement that if the balance of the Master's report is accepted the best course is to extend the oblique line in a northwesterly direction to the point where it crosses the north-south line. This solution to the problem is entirely permissible. Cf. *New Hampshire* v. *Maine*, 426 U. S. 363 (1976). Second, the Master recommends that he be authorized to arrange for surveys, at the parties' expense, if necessary to resolve disputes over the precise location of portions of either of the lines we approve today. That, too, seems appropriate. And third, he states that we should reserve the taxing of costs until after a further report—a suggestion which we will follow since the possibility of partial surveys would make an assessment at this time premature.

disputed borderlands. This matter is here on California's motion to file a second amended complaint and bifurcate issues, which seeks further proceedings before the Special Master after the boundary questions are determined. Specifically, the United States has apparently confirmed or "clear-listed" to California and Nevada certain parcels that turn out to be on the "wrong" side of the boundary between those States. The Special Master was of the view that California's motion should be allowed and that he should be authorized (1) to determine whether the United States should be made a party to this case and (2) to make recommendations as to the quieting of title on various borderlands.

We decline at this point to expand the Special Master's reference. The ownership and title questions that remain typically will involve only one or the other State and the United States, or perhaps various citizens of those States. Disputes between California and Nevada are not in the offing.[10] In consequence, even if some of the ownership questions to come do fall within our original jurisdiction, they will not fall within our exclusive jurisdiction. 28 U. S. C. § 1251 (1976 ed., Supp. II). Under these circumstances we see no reason to refer the matter to the Special Master. On the contrary, litigation in other forums seems an entirely appropriate means of resolving whatever questions remain.

In sum, we overrule Nevada's exceptions and approve and adopt the Special Master's report and recommendations except insofar as those recommendations would allow California's second amended complaint and permit proceedings relating to the ownership of disputed lands on the California-Nevada boundary.

So ordered.

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[10] At oral argument, counsel for the State of California conceded that he knew of no instance in which both States claimed the same parcel.

WASHINGTON ET AL. *v.* CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

No. 78-630. Argued October 9, 1979—Decided June 10, 1980*

These cases concern challenges of several Indian Tribes to efforts by the State of Washington to apply various state taxes and other laws to transactions and activities occurring on Indian reservations. Washington imposes a cigarette excise tax on the "sale, use, consumption, handling, possession or distribution" of cigarettes within the State. It also imposes a general retail sales tax on sales of personal property, including cigarettes. The State sought to compel Indian retailers to collect both taxes with respect to sales of cigarettes to non-Indians and the latter tax with respect to sales of other goods as well. In addition, the State sought to apply its motor vehicle excise tax and mobile home, camper, and trailer taxes—which are imposed for the privilege of using the covered vehicles in the State—to vehicles owned by the Tribes or their members and used both on and off the reservation. Finally, the State took steps to assume civil and criminal jurisdiction over the affected reservations. The Indian Tribes involved in this litigation have each adopted ordinances imposing their own taxes upon on-reservation sales of cigarettes. In actions brought in Federal District Court, they sought declaratory and injunctive relief against enforcement of the state sales and cigarette taxes, and in particular against the State's seizure of untaxed cigarettes destined for delivery to the reservations, contending that those taxes could not lawfully be applied to tribal cigarette sales. In addition, the Tribes challenged the State's efforts to apply its vehicle excise taxes to Indian-owned vehicles and asserted that the State's assumption of jurisdiction was invalid. The complaints alleged, *inter alia*, that the challenged taxes were contrary to the Indian Commerce Clause. Because injunctive relief against enforcement of state statutes was sought, a three-judge District Court was convened pursuant to the then applicable requirement of 28 U. S. C. § 2281 (1970 ed.) that an injunction restraining the enforcement of any state statute shall not be granted

*Together with *Washington* v. *United States et al.*, also on appeal from the same court, and No. 78-60, *Confederated Tribes of the Colville Indian Reservation et al.* v. *Washington*, also on appeal from the same court but not argued. See n. 32, *infra*.

by any district court upon the ground of the statute's unconstitutionality unless the application therefor is heard and determined by a three-judge court. After a consolidated proceeding, the District Court held that (1) it had jurisdiction as a three-judge court; (2) the cigarette tax could not be applied to on-reservation transactions because it was preempted by the tribal taxing ordinance and constituted an impermissible interference with tribal self-government; (3) the retail sales tax could not be applied to tribal cigarette sales; (4) the State could not impose certain recordkeeping requirements on the Tribes in connection with various tax-exempt sales; (5) the vehicle excise taxes could not be imposed on vehicles owned by the Tribes and their members; and (6) the State's assumption of civil and criminal jurisdiction over certain of the Tribes was unconstitutional. The court enjoined enforcement of the statutes it had invalidated, and the State moved unsuccessfully for a new trial.

Held:

1. The Tribes' Commerce Clause claims are not "insubstantial" and are not rendered inescapably frivolous by the decisions in *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145, and *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164, so as to defeat application of § 2281. In addition, the Tribes' attack on the official seizure of cigarettes bound for the reservations also triggers the three-judge requirement of § 2281. Accordingly, this Court has jurisdiction over the appeals under 28 U. S. C. § 1253, which authorizes a direct appeal to this Court from an order granting an injunction in a suit "required by any Act of Congress to be heard and determined by a district court of three judges." Pp. 145–149.

2. The State's motion for a new trial on issues other than the motor-vehicle-tax and assumption-of-jurisdiction issues rendered nonfinal the disposition of all issues between the parties, and thus the State's appeal from the District Court's resolution of those two issues was timely under 28 U. S. C. § 2101 (b), where it was filed within 60 days of the denial of the motion for a partial new trial but more than 60 days after the District Court's decision on those two issues. Accordingly, the appeal from such decision is properly before this Court. Pp. 149–150.

3. The imposition of Washington's cigarette and sales taxes on on-reservation purchases by nonmembers of the Tribes is valid. Pp. 150–162.

(a) The Tribes have the power to impose their cigarette taxes on nontribal purchases, since the power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested

of it by federal law or necessary implication of their dependent status. Here, there is no federal statute showing any congressional departure from the view that tribes have such power, and tribal powers are not implicitly divested by virtue of the tribes' dependent status. Pp. 152–154.

(b) But the Tribes' involvement in the operation and taxation of cigarette marketing on the reservation does not oust the State from any power to exact its sales and cigarette taxes from nonmembers purchasing cigarettes at tribal smokeshops. Principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, do not authorize Indian tribes to market an exemption from state taxation to persons who would normally do their business elsewhere. Federal statutes, such as the Indian Reorganization Act of 1934, the Indian Financing Act of 1974, and the Indian Self-Determination and Education Assistance Act of 1975, while evidencing a congressional concern with fostering tribal self-government and economic development, do not go so far as to grant tribal enterprises selling goods to nonmembers an artificial competitive advantage over all other businesses in a State. Washington does not infringe the right of reservation Indians to make their own laws and be ruled by them, merely because the result of imposing taxes will be to deprive the Tribes of revenues which they currently are receiving. Pp. 154–157.

(c) The Indian Commerce Clause does not, of its own force, automatically bar all state taxation of matters significantly touching the political and economic interests of the Tribes. That Clause may have a more limited role to play in preventing undue discrimination against, or burdens on, Indian commerce, but Washington's taxes are applied in a nondiscriminatory manner to all transactions within the State and do not burden commerce that would exist on the reservations without respect to the tax exemption. Although the result of these taxes will be to lessen or eliminate tribal commerce with nonmembers, that market existed in the first place only because of a claimed exemption for these very taxes. Such taxes do not burden commerce that would exist on the reservations without respect to the tax exemption. P. 157.

(d) The Tribes failed to show that business at the smokeshops would be significantly reduced by a state tax without a credit as compared to a state tax with a credit. Pp. 157–158.

(e) There is no direct conflict between the state taxes and the Tribes' cigarette ordinances so as to warrant invalidation of the state taxes on grounds of pre-emption or violation of the principle of tribal self-government. Pp. 158–159.

(f) The State may validly require, as a minimal burden, the tribal smokeshops to affix tax stamps purchased from the State to individual

packages of cigarettes prior to the time of sale to nonmembers of the Tribe. Cf. *Moe* v. *Salish & Kootenai Tribes*, 425 U. S. 463. P. 159.

(g) The State's recordkeeping requirements are valid *in toto*. The Tribes failed to demonstrate that such requirements for exempt sales are not reasonably necessary as a means of preventing fraudulent transactions. Pp. 159–160.

(h) The State's interest in taxing nontribal purchasers outweighs any tribal interest that may exist in preventing the State from imposing its taxes. Pp. 160–161.

(i) The State's interest in enforcing its taxes is sufficient to justify its seizure of unstamped cigarettes as contraband if the Tribes do not cooperate in collecting the taxes. Pp. 161–162.

4. The motor vehicle and mobile home, camper, and trailer taxes cannot properly be imposed upon vehicles owned by the Tribes or their members and used both on and off the reservations. *Moe, supra*. Pp. 162–164.

5. The District Court erred in holding that the State's assumption of civil and criminal jurisdiction over the Makah and Lummi Reservations was unlawful. *Washington* v. *Yakima Indian Nation*, 439 U. S. 463, controlling. P. 164.

446 F. Supp. 1339, affirmed in part and reversed in part.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, and STEVENS, JJ., joined; in Parts I, II, III, IV–B (1), IV–D, V, and VI of which BRENNAN and MARSHALL, JJ., joined; in Parts I, II, III, IV (except IV–B (2)), and VI of which STEWART, J., joined; and in Parts I, II, III, IV–C, IV–E, and VI of which REHNQUIST, J., joined. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL, J., joined, *post*, p. 164. STEWART, J., filed an opinion concurring in part and dissenting in part, *post*, p. 174. REHNQUIST, J., filed an opinion concurring in part, concurring in the result in part, and dissenting in part, *post*, p. 176.

Slade Gorton, Attorney General of Washington, argued the cause for appellants. With him on the briefs were *Philip H. Austin*, Deputy Attorney General, *Richard H. Holmquist*, Senior Assistant Attorney General, and *Timothy R. Malone*, *Larry R. Schreiter*, and *Matthew J. Coyle*, Assistant Attorneys General.

Steven S. Anderson argued the cause for appellees Confederated Tribes of the Colville Indian Reservation et al. With

him on the brief were *Robert L. Pirtle* and *Alvin J. Ziontz*. *James B. Hovis* argued the cause and filed a brief for appellee Confederated Tribes and Bands of the Yakima Indian Nation. *Deputy Solicitor General Claiborne* argued the cause for the United States. With him on the brief were *Solicitor General McCree, Assistant Attorney General Moorman, Edward J. Shawaker*, and *Anne S. Almy*.†

MR. JUSTICE WHITE delivered the opinion of the Court.

In recent Terms we have more than once addressed the intricate problem of state taxation of matters involving Indian tribes and their members. *Moe* v. *Salish & Kootenai Tribes*, 425 U. S. 463 (1976); *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164 (1973); *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145 (1973). We return to that vexing area in the present cases. Although a variety of questions are presented, perhaps the most significant is whether an Indian tribe ousts a State from any power to tax on-reservation purchases by nonmembers of the tribe by imposing its own tax on the transaction or by otherwise earning revenues from the tribal business. A three-judge District Court held for the Tribes. We affirm in part and reverse in part.

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†Briefs of *amici curiae* urging reversal were filed by *Helena S. Maclay, Deirdre Boggs*, and *Keith C. Rennie*, Special Assistant Attorneys General, for the State of Montana; and by *Frederick J. Martone* for the Salt River Project Agricultural Improvement and Power District et al.

Briefs of *amici curiae* urging affirmance were filed by *L. Lamar Parrish* for the All Indian Pueblo Council, Inc.; by *Reid Peyton Chambers* and *Harry R. Sachse* for the Assiniboine and Sioux Tribes of the Fort Peck Reservation et al.; and by *Charles A. Hobbs, Stephen H. Whilden*, and *Bertram E. Hirsch* for the National Congress of American Indians, Inc., et al.

Michael Taylor, John H. Clinebell, Jeffrey S. Schuster, Russell W. Busch, and *Robert D. Dellwo* filed a brief for the Quinalt Indian Nation et al. as *amici curiae*.

I

These cases are here on the State of Washington's appeal from declaratory judgments and permanent injunctions entered by the District Court at the close of consolidated proceedings in two separate cases that raised related issues. 446 F. Supp. 1339 (ED Wash. 1978). The first case, *Confederated Tribes of the Colville Indian Reservation* v. *State of Washington*, Civ. No. 3868, was filed on May 17, 1973, by the Confederated Tribes of the Colville Reservation (Colville), Makah, and Lummi Tribes. The second, *United States of America and Confederated Bands and Tribes of the Yakima Indian Nation* v. *State of Washington*, Civ. No. 3909, was commenced on July 18, 1973, by the United States on behalf of the Confederated Bands and Tribes of the Yakima Indian Nation (Yakima Tribe).[1] In each action, the complainants contended that the State's cigarette and tobacco products taxes [2] could not lawfully be applied to sales by on-reservation tobacco outlets. They sought declaratory judgments to that effect, as well as injunctions barring the State from taking any measures to enforce the challenged taxes. In particular, the plaintiffs sought to enjoin the State from seizing as contraband untaxed cigarettes destined for delivery to their reservations.[3] In the *Colville* case, the Tribes also chal-

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[1] On April 24, 1974, the Yakima Tribe intervened as a plaintiff in the United States' case. Its complaint appears at App. 149.

[2] The state tobacco products tax, which is imposed on cigars and pipe tobacco pursuant to Wash. Rev. Code, ch. 82.26 (1976), is not before us. The District Court concluded that that tax fell upon the Indian sellers and not upon the non-Indian purchasers. 446 F. Supp. 1339, 1355, n. 15 (ED Wash. 1978). The State did not appeal from this holding, Brief for Appellants in No. 78-630, p. 55, n. 40, and all parties agree that in consequence the tobacco products tax may not be imposed on sales by tribal dealers.

[3] The Tribes also sought damages for interference with their cigarette businesses. The damages issues in both cases were remanded by the three-judge court to a single District Judge. 446 F. Supp., at 1367, 1373.

lenged the State's assumption of civil and criminal jurisdiction over their reservations and, by amended pleadings, attacked the application of the State's vehicle excise taxes to Indian-owned vehicles. The *Yakima* case did not present these latter issues, but it did make a broad attack on the application of the State's general retail sales tax to on-reservation transactions.

From the time of filing, the two cases pursued closely parallel courses. On November 5, 1973, a temporary restraining order against the State's enforcement of the taxing statutes was issued in each. App. 13, 147. Thereafter, because the complaints sought injunctive relief against the enforcement of state statutes, a three-judge District Court was convened pursuant to the then applicable requirement of 28 U. S. C. § 2281 (1970 ed.).[4] On September 6, 1974, the three-judge court issued preliminary injunctions restraining the State from enforcing the challenged taxes against the Tribes. App. 15, 156. There followed extensive discovery,[5] after which the parties to each case reached agreement on pretrial orders setting forth facts and clarifying the issues.

Trial was held in both cases on March 28, 1977, and the three-judge court entered its consolidated decision on February 22, 1978. The court concluded (1) that it had jurisdiction as a three-judge court to consider the issues presented; (2) that the state cigarette tax could not be applied to on-reservation transactions because it was pre-empted by the tribal taxing ordinances and constituted an impermissible interference with tribal self-government; (3) that the state

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[4] Although § 2281 was subsequently repealed, Act of Aug. 12, 1976, § 1, 90 Stat. 1119, it was expressly left in place for cases which, like those before us, were pending on the date of repeal. § 7, 90 Stat. 1120. We consider issues concerning the applicability of the former § 2281 to these cases in Part III, *infra*.

[5] Proceedings in both cases were stayed for several months, however, pending this Court's decisions in *Moe* v. *Salish & Kootenai Tribes*, 425 U. S. 463 (1976), and *Bryan* v. *Itasca County*, 426 U. S. 373 (1976).

retail sales tax could not be applied to tribal cigarette sales, but could be applied to sales of other goods to non-Indians; (4) that the State could not impose certain recordkeeping requirements in connection with various tax-exempt sales; (5) that the State could not impose its vehicle excise taxes upon vehicles owned by the Tribes and their members; and (6) that the State's assumption of civil and criminal jurisdiction over the Makah and Lummi Tribes was unconstitutional. The court enjoined enforcement of the statutes it had struck down, and the State moved unsuccessfully for a new trial. This appeal followed. We postponed consideration of certain jurisdictional questions to the merits. 440 U. S. 905 (1979).

We begin by sketching the relevant factual background, which is not seriously in dispute.[6] Thereafter, we explore the jurisdictional questions previously postponed and then turn to the merits.

II

The State of Washington levies a cigarette excise tax of $1.60 per carton,[7] on the "sale, use, consumption, handling, possession or distribution" of cigarettes within the State. Wash. Rev. Code § 82.24.020 (1976). The tax is enforced with tax stamps; and dealers are required to sell only cigarettes to which such stamps have been affixed. § 82.24.030. Indian tribes are permitted to possess unstamped cigarettes for purposes of resale to members of the tribe, but are required by regulation to collect the tax with respect to sales to nonmembers. § 82.24.260; Wash. Admin. Code § 458-20-192

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[6] Our statement of the factual background is drawn in large measure from the opinion of the District Court, 446 F. Supp., at 1345–1349, 1368–1370.

[7] The cigarette excise tax is imposed pursuant to Wash. Rev. Code § 82.24.020 (1976). That provision authorizes a levy of 6.5 mills per cigarette. The tax is brought up to its full amount by Wash. Rev. Code §§ 28A.47.440 and 73.32.130 (1976), which add 0.5 mill and 1 mill respectively.

(1977).[8] The District Court found, on the basis of its examination of state authorities, that the legal incidence of the tax is on the purchaser in transactions between an Indian seller and a non-Indian buyer.[9]

The State has sought to enforce its cigarette tax by seizing as contraband unstamped cigarettes bound for various tribal reservations. It claims that it is entitled to make such seizures whenever the cigarettes are destined to be sold to non-Indians without affixation of stamps or collection of the tax.

Washington also imposes a sales tax on sales of personal property, including cigarettes. Wash. Rev. Code § 82.08.020 (1976). This tax, which was 5% during the relevant period, is collected from the purchaser by the retailer. § 82.08.050. It does not apply to on-reservation sales to reservation Indians. Wash. Admin. Code § 458–20–192 (1977).

The state motor vehicle excise tax is imposed on "the privilege of using in the state any motor vehicle." Wash. Rev. Code § 82.44.020 (Supp. 1977). The tax is assessed annually, and during the relevant period the amount was 2%

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[8] Initially the State asserted that it could tax all tribal cigarette sales, regardless of whether the buyer was Indian or non-Indian. Its theory was that Pub. L. 280, 67 Stat. 588, granted it general authority to tax reservation Indians. After this theory was rejected in *Bryan* v. *Itasca County*, *supra*, the State abandoned any claim of authority to tax sales to tribal members. See 446 F. Supp., at 1346, n. 4.

[9] *Id.*, at 1352–1355. Essentially, the court accepted the State's contention that the tax falls upon the first event which may constitutionally be subjected to it. In the case of sales by non-Indians to non-Indians, this means the incidence of the tax is on the seller, or perhaps on someone even further up the chain of distribution, because that person is the one who first sells, uses, consumes, handles, possesses, or distributes the products. But where the wholesaler or retailer is an Indian on whom the tax cannot be imposed under *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164 (1973), the first taxable event is the use, consumption, or possession by the non-Indian purchaser. Hence, the District Court concluded, the tax falls on that purchaser. We accept this conclusion.

of the fair market value of the vehicle in question. In addition, the State imposes an annual tax in the amount of 1% of fair market value on the privilege of using campers and trailers in the State. § 82.50.400 (1976).[10]

Each of the Tribes involved in this litigation is recognized by the United States as a sovereign Indian tribe. Each is governed by a business or tribal council approved by the Secretary of the Interior.[11] The Colville Tribe has some 5,800 members, of whom about 3,200 live on the Colville Indian Reservation.[12] Enrolled members of the Tribe constitute just under half of the reservation's population. The Lummi Tribe has approximately 2,000 members. Roughly 1,250 of them live on the reservation.[13] The Makah Tribe has about 1,000 members. Some 900 live on the reservation.[14] The Colville, Lummi, and Makah Reservations are isolated and underdeveloped. Many members reside in mobile homes. Most own at least one automobile which is used both on and off the reservation.

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[10] The same chapter provided for an excise tax on mobile homes. Initially, the State sought to apply this tax to Indians as well; but after *Bryan* v. *Itasca County*, 426 U. S. 373 (1976), and *Moe* v. *Salish & Kootenai Tribes*, 425 U. S. 463 (1976), it no longer attempts to do so. 446 F. Supp., at 1365.

[11] The Makah Tribe is organized under the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U. S. C. § 461 *et seq.* While the Lummi and Colville Tribes do have federally-approved constitutions, they voted in 1935 not to come under that Act. 446 F. Supp., at 1345, n. 2.

[12] The Colville Reservation encompasses 1.3 million acres in the northeastern section of Washington. It was established by Executive Order on July 2, 1872. 1 C. Kappler, Indian Affairs, Laws and Treaties 916 (2d ed. 1904).

[13] The Lummi Reservation encompasses 7,319 acres, most of them on a peninsula near Bellingham, Wash. It was established by the Treaty of Point Elliott in 1855. 12 Stat. 927.

[14] The Makah Reservation encompasses 28,000 acres at the northwest tip of the Olympic Peninsula. It too was established by treaty in 1855. Treaty with the Makah Tribe, 12 Stat. 939. Roughly 63% of its inhabitants are enrolled members of the Tribe.

The Yakima Tribe has more than 6,000 members, of whom about 5,000 live on the reservation.[15] Enrolled members, however, constitute less than one-fifth of the reservation's population. The balance is made up of approximately 1,500 Indians who are not members of the Tribes and more than 20,000 non-Indians.

The Colville, Lummi, and Makah Tribes have nearly identical cigarette sales and taxing schemes. Each Tribe has enacted ordinances pursuant to which it has authorized one or more on-reservation tobacco outlets.[16] These ordinances have been approved by the Secretary of the Interior; and the dealer at each tobacco outlet is a federally licensed Indian trader. All three Tribes use federally restricted tribal funds [17] to purchase cigarettes from out-of-state dealers.[18] The Tribes distribute the cigarettes to the tobacco outlets and collect from the operators of those outlets both the wholesale distribution price and a tax of 40 to 50 cents per carton. The cigarettes remain the property of the Tribe until sale. The taxing ordinances specify that the tax is to be passed on to the ultimate consumer of the cigarettes. From 1972 through 1976, the Colville Tribe realized approximately $266,000 from its cigarette tax; the Lummi Tribe realized $54,000 and the Makah Tribe realized $13,000.

While the Colville, Lummi, and Makah Tribes function as retailers, retaining possession of the cigarettes until their sale to consumers, the Yakima Tribe acts as a wholesaler. It pur-

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[15] The Yakima Indian Reservation was set aside for the Tribe by treaty ratified March 8, 1859. Treaty with the Yakimas, 12 Stat. 951. It encompasses about 1.4 million acres in south-central Washington.

[16] The tribal ordinances regulating the sale, distribution, and taxing of cigarettes are set forth at App. 104, 118, and 111.

[17] The funds are maintained in individual accounts in the Bureau of Indian Affairs agency serving the reservation pursuant to 25 CFR Part 104 (1978). App. 32–34.

[18] These out-of-state wholesalers are also federally licensed Indian traders.

chases cigarettes from out-of-state dealers and then sells them to its licensed retailers. The Tribe receives a markup over the wholesale price from those retailers as well as a tax of 22.5 cents per carton. There is no requirement that this tax be added to the selling price. In 1975, the Yakima Tribe derived $278,000 from its cigarette business.

Indian tobacco dealers make a large majority of their sales to non-Indians—residents of nearby communities who journey to the reservation especially to take advantage of the claimed tribal exemption from the state cigarette and sales taxes. The purchaser saves more than a dollar on each carton, and that makes the trip worthwhile. All parties agree that if the State were able to tax sales by Indian smokeshops and eliminate that $1 saving, the stream of non-Indian bargain hunters would dry up. In short, the Indian retailer's business is to a substantial degree dependent upon his tax-exempt status, and if he loses that status his sales will fall off sharply.

III

We first address our jurisdiction to hear the State's appeal. Two attacks are made upon that jurisdiction, one grounded in the intricacies of the now-repealed statute governing three-judge district courts and the other having to do with the timing of the State's appeal.

Under 28 U. S. C. § 1253, a direct appeal lies to this Court from an order granting or denying an injunction in a suit "required by any Act of Congress to be heard and determined by a district court of three judges." At the time the *Yakima* and *Colville* cases were filed, 28 U. S. C. § 2281 (1970 ed.) provided that:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute . . . shall not be granted by any district court or judge thereof

> upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges. . . ." [19]

After the State filed its jurisdictional statement in this appeal, the United States moved to dismiss the *Yakima* case on the ground that it was not one required by § 2281 to be heard by a court of three judges and thus did not fall within the grant of appellate jurisdiction in § 1253. Although directed only to the *Yakima* case because that is the only one to which the Government is a party, this challenge is quite clearly germane to the *Colville* case as well.

Section 2281 does not require a three-judge court where a constitutional challenge to a state statute is grounded only in the Supremacy Clause. *Swift & Co.* v. *Wickham*, 382 U. S. 111, 128–129 (1965). In addition, § 2281 is not brought into play by constitutional claims that are "insubstantial," *Goosby* v. *Osser*, 409 U. S. 512, 518 (1973). The United States argues that the substantive tax claims raised by these cases fall into one or the other category, and thus failed to trigger § 2281.[20] Further, the Government continues, the attacks on the State's seizure of cigarettes, while perhaps raising genuine Commerce Clause issues, are not properly characterized as challenges to the constitutionality *of a state statute*. Rather, the Government asserts, they go to the constitutionality of the *result* obtained by the *use* of the statute. We find neither contention persuasive.

The original complaints in these actions contended that the state taxes were unconstitutional under the Indian Com-

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[19] The repeal of this provision in 1976 does not affect its application to these cases. See n. 4, *supra*.

[20] As the Government recognizes, its position in this regard is somewhat anomalous since it was the United States which initially requested a three-judge court in the *Yakima* case. App. 145. At that time the Government seemed to have no doubt that it sought to enjoin the enforcement of a state statute on grounds of its unconstitutionality within the meaning of § 2281.

merce Clause as well as the Supremacy Clause. Relying primarily upon language in footnote 17 in *Moe* v. *Salish & Kootenai Tribes,* 425 U. S., at 481, n. 17, the United States asserts that the Tribes' Commerce Clause claims were insubstantial.[21] But *Moe* was decided in 1976—long after a three-judge court was convened to hear these cases—and it is thus apparent that footnote 17 alone cannot be dispositive, whatever its precise thrust. There is language in that footnote, however, which suggests that the insubstantiality of Commerce Clause claims such as those before us flows from *Mescalero Apache Tribe* v. *Jones,* 411 U. S. 145 (1973), and *McClanahan* v. *Arizona State Tax Comm'n,* 411 U. S. 164 (1973)—both of which were decided before the present suits were filed.[22] We think the United States reads too much into this language. *Goosby* v. *Osser, supra,* made it clear that constitutional claims will not lightly be found insubstantial for

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[21] The District Court seems to have found this contention persuasive, 446 F. Supp., at 1350, although it addressed it only briefly. Presumably it saw no need to explore the matter more fully since it was confident that the three-judge requirement had in any event been satisfied by the Tribes' challenges to the State's enforcement measures. *Id.,* at 1350–1351.

[22] Footnote 17 in its entirety reads as follows:

"It is thus clear that the basis for the invalidity of these taxing measures, which we have found to be inconsistent with existing federal statutes, is the Supremacy Clause, U. S. Const., Art. VI, cl. 2, and not any automatic exemptions 'as a matter of constitutional law' either under the Commerce Clause or the intergovernmental-immunity doctrine as laid down originally in *M'Culloch* v. *Maryland,* 4 Wheat. 316 (1819). If so, then the basis for convening a three-judge court in this type of case has effectively disappeared, for this Court has expressly held that attacks on state statutes raising only Supremacy Clause invalidity do not fall within the scope of 28 U. S. C. § 2281. *Swift & Co.* v. *Wickham,* 382 U. S. 111 (1965). Here, however, the District Court properly convened a § 2281 court, because at the outset the Tribe's attack asserted unconstitutionality of these statutes under the Commerce Clause, a not insubstantial claim since *Mescalero* and *McClanahan* had not yet been decided. See *Goosby* v. *Osser,* 409 U. S. 512 (1973)." 425 U. S., at 481, n. 17.

purposes of § 2281. Indeed, *Goosby* explicitly states that prior decisions are not sufficient to support a conclusion that certain claims are insubstantial unless those prior decisions "inescapably render the claims frivolous." 409 U. S., at 518. We cannot say here that the *Goosby* test has been met. Neither *Mescalero* nor *McClanahan* "inescapably render[s] the [Tribes' Commerce Clause] claims frivolous" because neither holds that that Clause is wholly without force in situations like the present. And even footnote 17 merely rejects the stark and rather unhelpful notion that the Commerce Clause provides an "*automatic* exemptio[n] 'as a matter of constitutional law'" in such cases. (Emphasis added.) It does not take that Clause entirely out of play in the field of state regulation of Indian affairs.

In addition, it seems quite clear that the Tribes' attack on the official seizure of cigarettes bound for the reservations also triggers the three-judge requirement of § 2281. The United States concedes that that attack raised Commerce Clause issues, but maintains that the Tribes' target was not really the state enforcement statutes themselves, but rather the discretionary official conduct undertaken pursuant to those statutes. We have no quarrel with the proposition that the mere fact that executives seek shelter under various state statutes will not necessarily convert a suit to restrain their lawless behavior into a § 2281 case, *Phillips* v. *United States*, 312 U. S. 246, 248–253 (1941). But this is not a situation in which the only connection with state statutes arises when officials accused of taking various ultra vires actions seek to trace their conduct back to vague statutes granting them broad executive discretion. Here the state officials involved were attempting to enforce the state tax laws by using the tools authorized for such enforcement by the state legislature. They manifested an intention to continue to use those tools for that purpose. And it is those tools, as applied to cigarettes in Indian commerce, which the Tribes chal-

lenged.[23] We hold that this suffices to bring these cases within § 2281.

The other jurisdictional question postponed in 1979 is relevant only to the *Colville* case. It concerns the timeliness under 28 U. S. C. § 2101 (b) of the State's appeal from the District Court's resolution of the motor-vehicle-tax and assumption-of-jurisdiction issues. Basically, the problem is this: the notice of appeal on these two issues was filed more than 60 days after the District Court's decision, but within 60 days of the denial of a state motion for partial new trial—a motion that was not addressed to the motor-vehicle-tax and assumption-of-jurisdiction issues. The question is whether a motion for partial new trial renders nonfinal the District Court's holding on *all* issues between the parties, or merely renders nonfinal the disposition of those issues actually raised in the new trial motion. If the former, the State's notice of appeal on the vehicle-taxes and assumption-of-jurisdiction issues was timely. If the latter, that notice was filed out of time and to that extent the appeal is jurisdictionally time-barred.[24]

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[23] See *Turner* v. *Fouche*, 396 U. S. 346, 354, n. 10 (1970). See also *Department of Employment* v. *United States*, 385 U. S. 355 (1966); *Query* v. *United States*, 316 U. S. 486, 490 (1942).

[24] The actual chronology was as follows: On May 10, 1978, the District Court entered its final order. On May 22, the State filed a motion for partial new trial on the cigarette and sales tax issues. On July 12, while that motion was pending, the State filed a notice of appeal raising the motor-vehicle-excise-tax and assumption-of-jurisdiction issues. On July 17, the motion for partial new trial was denied; and on August 14, the State filed a notice of appeal on the sales and cigarette tax issues. On September 8, the State filed an amended notice of appeal raising all relevant issues. The July 12 notice of appeal was filed more than 60 days after the original District Court order. Accordingly, under 28 U. S. C. § 2101 (b), it was out of time. The notice of August 14 and the amended notice of September 8, however, were filed within 60 days of the District Court's denial of the motion for partial new trial. It seems clear that the filing of that motion rendered nonfinal the disposition of all covered

We think that the filing of a motion for partial new trial in these circumstances must have rendered nonfinal the disposition of all issues between the parties. A contrary conclusion would serve no useful purpose. At best it would make little difference save to force future appellants to include in what might otherwise have been narrow motions for partial new trials a blanket request for reconsideration of all issues. And at worst it would be a procedural pitfall, devoid of any sound supporting rationale but capable of occasionally tripping those who failed to insert a line of boilerplate or file a redundant slip of paper. Accordingly, we hold that the appeal of the District Court's vehicle-tax and assumption-of-jurisdiction holdings is properly before us, and we turn to the merits.

IV

A

In *Moe* v. *Salish & Kootenai Tribes*, 425 U. S. 463 (1976), we considered a state taxing scheme remarkably similar to the cigarette and sales [25] taxes at issue in the present cases. Montana there sought to impose a cigarette tax on sales by smokeshops operated by tribal members and located on leased trust lands within the reservation, and sought to require the smokeshop operators to collect the tax. We upheld the tax, insofar

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issues—if not, one seeking a partial new trial would have to jeopardize his right to appeal. *Communist Party of Indiana* v. *Whitcomb*, 414 U. S. 441, 445–446 (1974); *Department of Banking* v. *Pink*, 317 U. S. 264, 266 (1942). Thus, the only remaining question is whether the motion for partial new trial also suspended the finality of the District Court's disposition of issues not covered by that motion.

[25] We are here generally concerned only with the application of Washington's retail sales tax to *cigarette* sales. The District Court upheld the sales tax as applied to sales of other goods to non-Indians, and the Tribes do not contest that holding. We do, however, consider the question of noncigarette sales when we discuss (1) whether Washington can tax purchases by Indians not members of the governing Tribe, and (2) whether Washington's recordkeeping requirements are valid.

as sales to non-Indians were concerned,[26] because its legal incidence fell on the non-Indian purchaser. Hence, "the competitive advantage which the Indian seller doing business on tribal land enjoys over all other cigarette retailers, within and without the reservation, is dependent on the extent to which the non-Indian purchaser is willing to flout *his* legal obligation to pay the tax." *Id.,* at 482 (emphasis in original). We upheld the collection requirement, as applied to purchases by non-Indians, on the ground that it was a "minimal burden" designed to aid the State in collecting an otherwise valid tax. *Id.,* at 483.

Moe establishes several principles relevant to the present cases. The State may sometimes impose a nondiscriminatory tax on non-Indian customers of Indian retailers doing business on the reservation. Such a tax may be valid even if it seriously disadvantages or eliminates the Indian retailer's business with non-Indians.[27] And the State may impose at least "minimal" burdens on the Indian retailer to aid in enforcing and collecting the tax. There is no automatic bar, therefore, to Washington's extending its tax and collection and record-keeping requirements onto the reservation in the present cases.

Although it narrows the issues in the present cases, *Moe* does not definitively resolve several important questions. First, unlike in *Moe,* each of the Tribes imposes its own tax on cigarette sales, and obtains further revenues by participating in the cigarette enterprise at the wholesale or retail level. Second, Washington requires the Indian retailer to keep detailed records of exempt and nonexempt sales in addition to simply precollecting the tax. *Moe* expressed no opinion

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[26] We struck down the tax as applied to sales to Indians. 425 U. S., at 475–481.

[27] The United States reads *Moe* too parsimoniously in asserting its inapplicability to cases, such as the present ones, in which the economic impact on tribal retailers is particularly severe. *Moe* makes clear that the Tribes have no vested right to a certain volume of sales to non-Indians, or indeed to any such sales at all.

regarding the "complicated problems" of enforcement that distinctions between exempt and nonexempt purchasers might entail. *Id.*, at 468, n. 6. Third, *Moe* left unresolved the question of whether a State can tax purchases by on-reservation Indians not members of the governing tribe, as Washington seeks to do in the present cases. *Id.*, at 480–481, n. 16. Finally, unlike in *Moe*, Washington has seized, and threatens to continue seizing, shipments of unstamped cigarettes en route to the reservations from wholesalers outside the State. We address each of these questions.

B

(1)

At the outset, the State argues that the Colville, Makah, and Lummi Tribes have no power to impose their cigarette taxes on nontribal purchasers.[28] We disagree. The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status. Cf. *United States* v. *Wheeler*, 435 U. S. 313 (1978).

The widely held understanding within the Federal Government has always been that federal law to date has not worked a divestiture of Indian taxing power. Executive Branch officials have consistently recognized that Indian tribes possess a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest. 17 Op. Atty. Gen. 134 (1881); 7 Op.

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[28] The incidence of the Colville, Lummi, and Makah taxes falls on the cigarette purchaser, since the tribal ordinances specify that the tax is to be passed on to the ultimate consumer. The Yakima ordinance, in contrast, does not require that the tax be added to the selling price, and the incidence of the Yakima tax therefore does not fall on the purchaser. The State's challenge is directed only at the Colville, Lummi, and Makah taxes.

Atty. Gen. 174 (1855), including jurisdiction to tax, 23 Op. Atty. Gen. 214 (1900); *Powers of Indian Tribes,* 55 I. D. 14, 46 (1934). According to the Solicitor of the Department of the Interior:

> "Chief among the powers of sovereignty recognized as pertaining to an Indian tribe is the power of taxation. Except where Congress has provided otherwise, this power may be exercised over members of the tribe *and over nonmembers,* so far as such nonmembers may accept privileges of trade, residence, etc., to which taxes may be attached as conditions." *Ibid.* (emphasis added).

Federal courts also have acknowledged tribal power to tax non-Indians entering the reservation to engage in economic activity. *Buster* v. *Wright,* 135 F. 947, 950 (CA8 1905), appeal dism'd, 203 U. S. 599 (1906); *Iron Crow* v. *Oglala Sioux Tribe,* 231 F. 2d 89 (CA8 1956); cf. *Morris* v. *Hitchcock,* 194 U. S. 384, 393 (1904). No federal statute cited to us shows any congressional departure from this view. To the contrary, authority to tax the activities or property of non-Indians taking place or situated on Indian lands, in cases where the tribe has a significant interest in the subject matter, was very probably one of the tribal powers under "existing law" confirmed by § 16 of the Indian Reorganization Act of 1934, 48 Stat. 987, 25 U. S. C. § 476. In these respects the present cases differ sharply from *Oliphant* v. *Suquamish Indian Tribe,* 435 U. S. 191 (1978), in which we stressed the shared assumptions of the Executive, Judicial, and Legislative Departments that Indian tribes could not exercise criminal jurisdiction over non-Indians.

Tribal powers are not implicitly divested by virtue of the tribes' dependent status. This Court has found such a divestiture in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government, as when the tribes seek to engage in foreign relations, alienate their lands to non-Indians without federal

consent, or prosecute non-Indians in tribal courts which do not accord the full protections of the Bill of Rights. See *id.*, at 208–210; *United States* v. *Wheeler*, *supra*, at 326. In the present cases, we can see no overriding federal interest that would necessarily be frustrated by tribal taxation. And even if the State's interests were implicated by the tribal taxes, a question we need not decide, it must be remembered that tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States.

(2)

The Tribes contend that their involvement in the operation and taxation of cigarette marketing on the reservation ousts the State from any power to exact its sales and cigarette taxes from nonmembers purchasing cigarettes at tribal smokeshops. The primary argument is economic. It is asserted that smokeshop cigarette sales generate substantial revenues for the Tribes which they expend for essential governmental services, including programs to combat severe poverty and underdevelopment at the reservations. Most cigarette purchasers are outsiders attracted onto the reservations by the bargain prices the smokeshops charge by virtue of their claimed exemption from state taxation. If the State is permitted to impose its taxes, the Tribes will no longer enjoy any competitive advantage vis-à-vis businesses in surrounding areas. Indeed, because the Tribes themselves impose a tax on the transaction, if the state tax is also collected the price charged will necessarily be higher and the Tribes will be placed at a competitive *disadvantage* as compared to businesses elsewhere. Tribal smokeshops will lose a large percentage of their cigarette sales and the Tribes will forfeit substantial revenues. Because of this economic impact, it is argued, the state taxes are (1) pre-empted by federal statutes regulating Indian affairs; (2) inconsistent with the principle of tribal self-government; and (3) invalid under "negative implications" of the Indian Commerce Clause.

It is painfully apparent that the value marketed by the smokeshops to persons coming from outside is not generated on the reservations by activities in which the Tribes have a significant interest. Cf. *Moe* v. *Salish & Kootenai Tribes*, 425 U. S., at 475–481; *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164 (1973). What the smokeshops offer these customers, and what is not available elsewhere, is solely an exemption from state taxation. The Tribes assert the power to create such exemptions by imposing their own taxes or otherwise earning revenues by participating in the reservation enterprises. If this assertion were accepted, the Tribes could impose a nominal tax and open chains of discount stores at reservation borders, selling goods of all descriptions at deep discounts and drawing custom from surrounding areas. We do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere.

The federal statutes cited to us, even when given the broadest reading to which they are fairly susceptible, cannot be said to pre-empt Washington's sales and cigarette taxes. The Indian Reorganization Act of 1934, 48 Stat. 984, 25 U. S. C. § 461 *et seq.*, the Indian Financing Act of 1974, 88 Stat. 77, 25 U. S. C. § 1451 *et seq.*, and the Indian Self-Determination and Education Assistance Act of 1975, 88 Stat. 2203, 25 U. S. C. § 450 *et seq.*, evidence to varying degrees a congressional concern with fostering tribal self-government and economic development, but none goes so far as to grant tribal enterprises selling goods to nonmembers an artificial competitive advantage over all other businesses in a State. The Indian traders statutes, 25 U. S. C. § 261 *et seq.*, incorporate a congressional desire comprehensively to regulate businesses selling goods to reservation Indians for cash or exchange, see *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U. S. 685 (1965), but no similar intent is evident

with respect to sales by Indians to nonmembers of the Tribe. The Washington Enabling Act, 25 Stat. 676, reflects an intent that the State not tax reservation lands or income derived therefrom, but the present taxes are assessed against nonmembers of the Tribes and concern transactions in personalty with no substantial connection to reservation lands. The relevant treaties, Treaty of Point Elliott, 12 Stat. 927 (1855) (Lummi Tribe); Treaty with the Makah Tribe, 12 Stat. 939 (1855); Treaty with the Yakimas, 12 Stat. 951 (1855), can be read to recognize inherent tribal power to exclude non-Indians or impose conditions on those permitted to enter; but purchasers entering the reservation are not the State's agents and any agreements which they might make cannot bind it. Finally, although the Tribes themselves could perhaps pre-empt state taxation through the exercise of properly delegated federal power to do so, cf. *Fisher* v. *District Court*, 424 U. S. 382, 390 (1976) (*per curiam*); *United States* v. *Mazurie*, 419 U. S. 544 (1975), we do not infer from the mere fact of federal approval of the Indian taxing ordinances, or from the fact that the Tribes exercise congressionally sanctioned powers of self-government, that Congress has delegated the far-reaching authority to pre-empt valid state sales and cigarette taxes otherwise collectible from nonmembers of the Tribe.

Washington does not infringe the right of reservation Indians to "make their own laws and be ruled by them," *Williams* v. *Lee*, 358 U. S. 217, 220 (1959), merely because the result of imposing its taxes will be to deprive the Tribes of revenues which they currently are receiving. The principle of tribal self-government, grounded in notions of inherent sovereignty and in congressional policies, seeks an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other. *McClanahan* v. *Arizona State Tax Comm'n*, *supra*, at 179. While the Tribes do have an interest in raising revenues for essential governmental programs, that interest is strongest when the revenues are derived from value gen-

erated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services. The State also has a legitimate governmental interest in raising revenues, and that interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services. As we have already noted, Washington's taxes are reasonably designed to prevent the Tribes from marketing their tax exemption to nonmembers who do not receive significant tribal services and who would otherwise purchase their cigarettes outside the reservations.

It can no longer be seriously argued that the Indian Commerce Clause, of its own force, automatically bars all state taxation of matters significantly touching the political and economic interests of the Tribes. See *Moe* v. *Salish & Kootenai Tribes, supra,* at 481, n. 17. That Clause may have a more limited role to play in preventing undue discrimination against, or burdens on, Indian commerce. But Washington's taxes are applied in a nondiscriminatory manner to all transactions within the State. And although the result of these taxes will be to lessen or eliminate tribal commerce with nonmembers, that market existed in the first place only because of a claimed exemption from these very taxes. The taxes under consideration do not burden commerce that would exist on the reservations without respect to the tax exemption.

We cannot fault the State for not giving credit on the amount of tribal taxes paid. It is argued that if a credit is not given, the tribal retailers will actually be placed at a competitive disadvantage, as compared to retailers elsewhere, due to the overlapping impact of tribal and state taxation. While this argument is not without force, we find that the Tribes have failed to demonstrate that business at the smokeshops would be significantly reduced by a state tax without a credit as compared to a state tax with a credit. With a credit, prices at the smokeshops would presumably be roughly the same as those off the reservation, assuming that the Indian enterprises are operated at an efficiency similar to that of businesses

elsewhere; without a credit, prices at smokeshops would exceed those off the reservation by the amount of the tribal taxes, about 40 to 50 cents per carton for the Lummi, Makah, and Colville Tribes, and 22.5 cents per carton for the Yakima Tribe. It is evident that even if credit were given, the bulk of the smokeshops' present business would still be eliminated, since nonresidents of the reservation could purchase cigarettes at the same price and with greater convenience nearer their homes and would have no incentive to travel to the smokeshops for bargain purchases as they do now. Members of the Tribes, of course, would be indifferent to whether a credit were given because under *Moe* they are immune from any state tax, whether credited or not. Some nonmembers of the Tribes living on the reservations would possibly travel elsewhere to purchase cigarettes if a state credit were not given, and smokeshop business would to this extent be decreased as compared to the situation under a credited tax. But the Tribes have not shown whether or to what extent this would be the case, and we cannot infer on the present record that by failing to give a credit Washington impermissibly taxes reservation value by deterring sales that, if credit were given, would occur on the reservation because of its location and because of the efforts of the Tribes in importing and marketing the cigarettes.

A second asserted ground for the invalidity of the state taxes is that they somehow conflict with the Tribes' cigarette ordinances and thereby are subject to pre-emption or contravene the principle of tribal self-government. This argument need not detain us. There is no direct conflict between the state and tribal schemes, since each government is free to impose its taxes without ousting the other. Although taxes can be used for distributive or regulatory purposes, as well as for raising revenue, we see no nonrevenue purposes to the tribal taxes at issue in these cases, and, as already noted, we perceive no intent on the part of Congress to authorize the Tribes to pre-empt otherwise valid state taxes. Other provi-

sions of the tribal ordinances do comprehensively regulate the marketing of cigarettes by the tribal enterprises; but the State does not interfere with the Tribes' power to regulate tribal enterprises when it simply imposes its tax on sales to nonmembers. Hence, we perceive no conflict between state and tribal law warranting invalidation of the State's taxes.

C

We recognized in *Moe* that if a State's tax is valid, the State may impose at least minimal burdens on Indian businesses to aid in collecting and enforcing that tax. The simple collection burden imposed by Washington's cigarette tax on tribal smokeshops is legally indistinguishable from the collection burden upheld in *Moe,* and we therefore hold that the State may validly require the tribal smokeshops to affix tax stamps purchased from the State to individual packages of cigarettes prior to the time of sale to nonmembers of the Tribe.

The state sales tax scheme requires smokeshop operators to keep detailed records of both taxable and nontaxable transactions. The operator must record the number and dollar volume of taxable sales to nonmembers of the Tribe. With respect to nontaxable sales, the operator must record and retain for state inspection the names of all Indian purchasers, their tribal affiliations, the Indian reservations within which sales are made, and the dollar amount and dates of sales. In addition, unless the Indian purchaser is personally known to the operator he must present a tribal identification card.

The District Court struck down all recordkeeping requirements with respect to cigarette sales, because it found that no cigarette sales were taxable. With respect to sales of items other than cigarettes, the District Court found no record evidence "as to whether the record keeping requirements, as promulgated, are or are not reasonably necessary to ensure payment of lawful taxes." 446 F. Supp., at 1373. The District Court upheld the requirements insofar as they pertained to taxable sales, but struck them down with respect to non-

taxable sales on the ground that the State had not met its burden of showing that the regulation was reasonably necessary to ensure payment of taxes which it had power to impose.

Contrary to the District Court, we find the State's recordkeeping requirements valid *in toto*. The Tribes, and not the State as the District Court supposed, bear the burden of showing that the recordkeeping requirements which they are challenging are invalid. The District Court made the factual finding, which we accept, that there was no evidence of record on this question. Applying the correct burden of proof to the District Court's finding, we hold that the Tribes have failed to demonstrate that the State's recordkeeping requirements for exempt sales are not reasonably necessary as a means of preventing fraudulent transactions.

D

The State asserts the power to apply its sales and cigarette taxes to Indians resident on the reservation but not enrolled in the governing Tribe. The issue arose in the *Yakima* case in the wake of the District Court's determination that the state retail sales tax could be applied to the purchase by non-Indians of goods other than cigarettes. It was, of course, quite clear after *Moe* and *McClanahan* that the sales tax could not be applied to similar purchases by tribal members, but the State argued that this exemption should not extend to nonmembers of the Tribe. Relying in part on the lower court opinion in *Moe*, *Confederated Salish & Kootenai Tribes* v. *Moe*, 392 F. Supp. 1297, 1312 (Mont. 1975) (three-judge court), the District Court rejected the contention. 446 F. Supp., at 1371–1372. This Court did not reach the question in *Moe* because Montana failed to raise it on appeal. We do reach it now, and we reverse.

Federal statutes, even given the broadest reading to which they are reasonably susceptible, cannot be said to pre-empt Washington's power to impose its taxes on Indians not members of the Tribe. We do not so read the Major Crimes Act,

18 U. S. C. § 1153, which at most provides for federal-court jurisdiction over crimes committed by Indians on another Tribe's reservation. Cf. *United States* v. *Antelope,* 430 U. S. 641, 646–647, n. 7 (1977). Similarly, the mere fact that nonmembers resident on the reservation come within the definition of "Indian" for purposes of the Indian Reorganization Act of 1934, 48 Stat. 988, 25 U. S. C. § 479, does not demonstrate a congressional intent to exempt such Indians from state taxation.

Nor would the imposition of Washington's tax on these purchasers contravene the principle of tribal self-government, for the simple reason that nonmembers are not constituents of the governing Tribe. For most practical purposes those Indians stand on the same footing as non-Indians resident on the reservation. There is no evidence that nonmembers have a say in tribal affairs or significantly share in tribal disbursements. We find, therefore, that the State's interest in taxing these purchasers outweighs any tribal interest that may exist in preventing the State from imposing its taxes.

E

Finally, the State contends that it has the power to seize unstamped cigarettes as contraband if the Tribes do not cooperate in collecting the State's taxes. The State in fact seized shipments traveling to the reservations from out-of-state wholesalers before being enjoined from doing so by the District Court, and it has declared its intention to continue such seizures if successful in this litigation. The Tribes contest this power, noting that because sales by wholesalers to the tribal businesses are concededly exempt from state taxation, no state tax is due while the cigarettes are in transit.

We find that Washington's interest in enforcing its valid taxes is sufficient to justify these seizures. Although the cigarettes in transit are as yet exempt from state taxation, they are not immune from seizure when the Tribes, as here, have refused to fulfill collection and remittance obligations which

the State has validly imposed. It is significant that these seizures take place outside the reservation, in locations where state power over Indian affairs is considerably more expansive than it is within reservation boundaries. Cf. *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145 (1973). By seizing cigarettes en route to the reservation, the State polices against wholesale evasion of its own valid taxes without unnecessarily intruding on core tribal interests.

Washington further contends that it may enter onto the reservations, seize stocks of cigarettes which are intended for sale to nonmembers, and sell these stocks in order to obtain payment of the taxes due. However, this question, which obviously is considerably different from the preceding one, is not properly before us. The record does not disclose that the State has ever entered the reservations to seize cigarettes because of the Tribes' failure to collect the taxes due on sales to nonmembers, or ever threatened to do so except in papers filed in this litigation. Indeed, the State itself concedes that "it may very well be that this Court will find it unnecessary to rule on this aspect of the appeal." Brief for Appellants in No. 78-630, p. 110. We therefore express no opinion on the matter.

V

The next issue concerns the challenge in the *Colville* case to the Washington motor vehicle and mobile home, camper and travel trailer taxes. Although not identical, these taxes are quite similar. Each is denominated an excise tax for the "privilege" of using the covered vehicle in the State, each is assessed annually at a certain percentage of fair market value, and each is sought to be imposed upon vehicles owned by the Tribe or its members and used both on and off the reservation.[29]

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[29] In the wake of *McClanahan* v. *Arizona Tax Comm'n* and *Moe*, the State does not claim that it can impose these taxes upon vehicles used wholly within the reservation. Brief for Appellants in No. 78-630, p. 111, and n. 77.

Once again, our departure point is *Moe*. There we held that Montana's personal property tax could not validly be applied to motor vehicles owned by tribal members who resided on the reservation. 425 U. S., at 480–481. The vehicles Montana attempted to tax were apparently used both on and off the reservation,[30] and the tax was assessed annually at a percentage of market value of the vehicles in question. Thus, the only difference between the taxes now before us and the one struck down in *Moe* is that these are called excise taxes and imposed for the privilege of using the vehicle in the State, while the Montana tax was labeled a personal property tax. The State asserts that this difference mandates a different result. In *Moe*, it argues, the District Court concluded that the taxable event was "the ownership of a motor vehicle as of January 1 of each year," [31] and that event took place on the reservation. Accordingly, under *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164 (1973), Montana was without authority to impose its tax. In the present case, the State continues, the taxable event is the use *within the State* of the vehicle in question. Thus, we are told, the *McClanahan* principle is inapplicable and the tax should be upheld under *Mescalero Apache Tribe* v. *Jones, supra.*

We do not think *Moe* and *McClanahan* can be this easily circumvented. While Washington may well be free to levy a tax on the use outside the reservation of Indian-owned vehicles, it may not under that rubric accomplish what *Moe* held was prohibited. Had Washington tailored its tax to the amount of actual off-reservation use, or otherwise varied some-

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[30] *Moe* did not focus upon vehicle use at all. The District Court opinion in that case, however, indicates that some of the vehicles to which Montana sought to apply its tax were used both on and off the reservation. *Confederated Salish and Kootenai Tribes* v. *Montana*, 392 F. Supp. 1325, 1328–1329 (Mont. 1975) (three-judge court) (Smith, J., concurring in part and dissenting in part).

[31] *Id.*, at 1327, citing the Montana statute, Mont. Rev. Codes Ann. § 84–406 (2) (Supp. 1974).

thing more than mere nomenclature, this might be a different case. But it has not done so, and we decline to treat the case as if it had.

VI

Finally, we come to the challenge by the Colville, Lummi, and Makah Tribes to the State's assumption of civil and criminal jurisdiction over them. The District Court found that assumption unlawful as regards the Makah and Lummi Reservations and lawful as regards the Colville Reservation. 446 F. Supp., at 1366–1367. The State challenges the former findings.

All parties apparently recognize that this issue is controlled by the intervening decision in the State's favor in *Washington* v. *Yakima Indian Nation*, 439 U. S. 463 (1979). There a pattern of jurisdiction identical to those created on the Makah and Lummi Reservations was upheld, and the holding of the Court of Appeals for the Ninth Circuit on which the District Court in the present case relied for its conclusion that such patterns are unconstitutional was reversed. We therefore uphold the State's assumption of jurisdiction over the Makah and Lummi Reservations.[32] Accordingly, the judgments of the District Court are

Reversed in part and affirmed in part.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, concurring in part and dissenting in part.

I agree with the Court's analysis of the jurisdictional questions posed in these cases, as well as with its treatment of the

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[32] In No. 78–60, *Confederated Tribes of the Colville Indian Reservation et al.* v. *Washington et al.*, which is pending on appeal, the Colville Tribe appeals from so much of the District Court's judgment as reflects the holding that Washington's assumption of total jurisdiction over that Tribe's reservation was lawful. See 446 F. Supp., at 1366–1367. The Colville Tribe challenges that holding on grounds (1) that Washington could not assume jurisdiction without amending its Constitution and (2) that the assumption of total jurisdiction over only selected reservations violates the

Washington motor vehicle, mobile home, camper and travel trailer taxes and its disposition of the assumption-of-jurisdiction issue. Accordingly, I join in their entirety Parts I, II, III, V, and VI of the Court's opinion. I also agree with Part IV insofar as it holds that the Colville, Makah, and Lummi Tribes have the power to impose their cigarette taxes on nontribal purchasers (Part IV–B (1)). As the Court points out, the power to tax on-reservation transactions that involve a tribe or its members is a "fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication." *Ante,* at 152. Recognition of that fundamental attribute, however, leads me to disagree with much of the balance of the Court's Part IV. In my view, the State of Washington's cigarette taxing scheme should be invalidated both because it undermines the Tribes' sovereign authority to regulate and tax the distribution of cigarettes on trust lands and because it conflicts with tribal activities and functions that have been expressly approved by the Federal Government.

I

I begin with a somewhat general overview. While they are sovereign for some purposes, it is now clear that Indian reservations do not partake of the full territorial sovereignty of States or foreign countries.[1] The result has been to blur the

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Equal Protection Clause. *Washington* v. *Yakima Indian Nation,* 439 U. S. 463 (1979), disposes of the first contention, *id.,* at 493, and makes clear that the second must fail if the assumption of jurisdiction is rationally related to some valid state purpose, *id.,* at 500–502. We find the pattern of jurisdiction in the present case rational: The Colville Tribe consented in 1965 to the State's assumption of jurisdiction over it, and the State has assumed total jurisdiction only over tribes that have so consented. The presence or absence of tribal consent is a rational basis for distinguishing among reservations, and there is thus no constitutional infirmity. Accordingly, the judgment is in this respect affirmed.

[1] The starkest territorial conception of Indian sovereignty was sketched by Mr. Chief Justice Marshall in *Worcester* v. *Georgia,* 6 Pet. 515,

boundary between state and tribal authority. A few guideposts do exist, however. First, in the absence of tribal consent state law does not reach on-reservation conduct involving only Indians. Thus we have held that tribal courts have exclusive jurisdiction over adoption proceedings involving the on-reservation conduct of tribal members, *Fisher* v. *District Court*, 424 U. S. 382 (1976); that States cannot apply their income taxes to the receipts derived by reservation Indians from reservation sources, *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164 (1973); and that States may not levy cigarette taxes on on-reservation sales to reservation Indians or impose personal property taxes on property owned by such Indians, *Moe* v. *Salish & Kootenai Tribes*, 425 U. S. 463, 480–481 (1976).

Second, there is a significant territorial component to tribal power. Thus state taxes on the off-reservation activities of Indians are permissible, *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145 (1973), and tribal laws will often govern the on-reservation conduct of non-Indians. *Williams* v. *Lee*, 358

557–561 (1832). An Indian reservation, he stated, was "a distinct community, occupying its own territory . . . in which the laws of Georgia can have no force . . . ." See F. Cohen, Handbook of Federal Indian Law 122 (1942). *Williams* v. *Lee*, 358 U. S. 217, 219 (1959), noted that this view had been "modified . . . in cases where essential tribal relations were not involved." *Kake Village* v. *Egan*, 369 U. S. 60, 71–75 (1962), noted a shift as well. And *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164, 172 (1973), observed that "the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction." Rather, *McClanahan* concluded, sovereignty is better seen as a "backdrop against which the applicable treaties and federal statutes must be read." *Ibid.* In a similar vein, *Oliphant* v. *Suquamish Indian Tribe*, 435 U. S. 191, 208 (1978), recognized that Indian tribes are "prohibited from exercising both those powers of autonomous States that are expressly terminated by Congress and those powers 'inconsistent with their status.'" (Emphasis and citations omitted.) Still, *United States* v. *Wheeler*, 435 U. S. 313, 322–326 (1978), emphasized the sovereign nature of tribal authority over Indians. See also *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145, 148 (1973); *Antoine* v. *Washington*, 420 U. S. 194, 201–203 (1975).

U. S. 217 (1959). See also *United States* v. *Mazurie,* 419 U. S. 544, 557–558 (1975).[2]

Third, where it is necessary to resolve a conflict between state and tribal authority over on-reservation conduct involving Indians and non-Indians, a relatively particularistic look at the interests of State and tribe and the federal policies that govern relations with Indian tribes is appropriate. We have concluded, for example, that a tribe lacks jurisdiction to try a non-Indian for a crime, *Oliphant* v. *Suquamish Indian Tribe,* 435 U. S. 191, 208 (1978), but that a State may not resolve a dispute arising out of on-reservation transactions between an Indian purchaser and a non-Indian seller, *Williams* v. *Lee, supra,* at 219, or tax the gross receipts of a federally licensed retail trading post that deals on the reservation with reservation Indians, *Warren Trading Post Co.* v. *Arizona State Tax Comm'n,* 380 U. S. 685 (1965).

And fourth, the preceding results flow from an intricate web of sources including federal treaties and statutes, the broad policies that underlie those federal enactments, and a presumption of sovereignty or autonomy that has roots deep in aboriginal independence. The prevalent mode of analysis is one of pre-emption. It takes as its starting point the exclusive power of the Federal Government to regulate Indian tribes and proceeds to bound state power where necessary to give vitality to the federal concerns at stake. *Bryan* v.

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[2] This territorial component is also suggested by recent statutes like the Clean Air Act Amendments of 1977, 91 Stat. 685, 735, which provide that "[l]ands within the exterior boundaries of reservations of federally recognized Indian tribes" may be redesignated for air quality purposes "only by the appropriate Indian governing body." A similar note is sounded in the Surface Mining Control and Reclamation Act of 1977, 91 Stat. 445, 523. In addition, a geographical or territorial source for Indian authority may be found in the Washington Enabling Act, 25 Stat. 676, § 4, by which the State was required to disclaim "all right and title" to lands "owned or held by any Indian or Indian tribes" and to agree that such lands "shall remain under the absolute jurisdiction and control of the Congress. . . ."

Itasca County, 426 U. S. 373, 376, n. 2 (1976). Only rarely does the talismanic invocation of constitutional language or rigid conceptions of state and tribal sovereignty shed light on difficult problems. *Moe, supra*, at 481, n. 17; *McClanahan* v. *Arizona State Tax Comm'n, supra*, at 172.

For present purposes, two federal concerns seem especially important. One is the strong and oft-cited policy of encouraging tribal self-government. *United States* v. *Wheeler*, 435 U. S. 313, 322–326 (1978); *Fisher* v. *District Court, supra*, at 386–388; *McClanahan* v. *Arizona State Tax Comm'n, supra*, at 179; *Williams* v. *Lee, supra*, at 219–220. And the other is a complementary interest in stimulating Indian economic and commercial development. Both found expression in the Indian Reorganization Act of 1934, 25 U. S. C. § 461 *et seq.*,[3] and are manifest in more recent statutes as well.[4] They are,

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[3] See *Mescalero Apache Tribe* v. *Jones*, 411 U. S., at 151–152. There we noted that the "intent and purpose of the Reorganization Act was 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.'" *Id.*, at 152, quoting H. R. Rep. No. 1804, 73d Cong., 2d Sess., 6 (1934). The Reorganization Act itself contains a number of provisions that demonstrate Congress' concern with encouraging Indian economic development. See 25 U. S. C. §§ 469, 470, and 477. See also *Santa Clara Pueblo* v. *Martinez*, 436 U. S. 49, 59–60 (1978).

[4] See the Indian Self-Determination and Education Assistance Act of 1975, 25 U. S. C. § 450 *et seq.*, and the Indian Financing Act of 1974, 25 U. S. C. § 1451 *et seq.* Section 2 of the latter statute states as follows:

"It is hereby declared to be the policy of Congress to provide capital . . . to help develop and utilize Indian resources, both physical and human, to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources and where they will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities." 88 Stat. 77.

Adherence to the policies underlying the Reorganization Act has not been without some interruption. The Termination Acts of the 1950's, see, *e. g.*, 25 U. S. C. §§ 564, 721–728, 741–760, and 891–901 (1958 ed.) seem to have signalled a congressional urge to pursue an assimilationist policy somewhat

I believe, of central importance in analyzing any conflict of state and tribal law.

II

With this as background, I turn to the particular problem at hand. Like the Court, I begin with *Moe, supra*, which considered a state cigarette tax similar to the one at issue here. There we started with the observation that the tax itself was "concededly lawful"—it neither fell upon tribal members nor impinged on tribal functions. 425 U. S., at 483. The key problem, as we saw it, was one of enforcement: Could the State of Montana require the Indian seller to collect a tax validly imposed on the non-Indian purchaser? We determined that the burden of collection was minimal and noted that it would in no sense "frustrat[e] tribal self-government."[5] Accordingly, we held that it could be imposed to prevent wholesale tax avoidance by non-Indian purchasers.

As the Court points out, *Moe* does suggest a number of limits upon Indian sovereignty in general and the federal interests in tribal self-government and economic growth in particular: It permits state law to come on the reservation in the form of a tax and collection requirement, and it upholds the imposition of a tax that will undoubtedly hurt Indian retailing activities by depriving tribal smokeshops of a competitive edge.

But while in *Moe* the cigarette business was largely a private operation, the Tribes involved in these cases have adopted comprehensive ordinances regulating and taxing the distribution of cigarettes by on-reservation shops. Phrased differently, these Tribes are acting in federally sanctioned and

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akin to the approach that was dominant prior to the Reorganization Act. See generally *Menominee Tribe* v. *United States*, 391 U. S. 404 (1968). But present policy "appears to be returning to a focus upon strengthening tribal self-government." *Bryan* v. *Itasca County*, 426 U. S. 373, 389, n. 14 (1976).

[5] *Moe*, 425 U. S., at 483, citing *Williams* v. *Lee*, 358 U. S., at 219–220.

encouraged ways—they are raising governmental revenues, establishing commercial enterprises, and struggling to escape from "'a century of oppression and paternalism.'" *Mescalero Apache Tribe* v. *Jones*, 411 U. S., at 152, quoting H. R. Rep. No. 1804, 73d Cong., 2d Sess., 6 (1934). As I see it, that difference has three important consequences. First, it means that in this case the sharp drop in cigarette sales that would result from imposition of the state tax will reduce revenues not only of individual Indian retailers, but of the Tribes themselves as governmental units. Second, it means that a decision permitting application of the state tax would place Indian goods at an actual competitive *disadvantage* as compared to non-Indian ones because the former would have to bear two tax burdens while the latter bore but one. And third, it leads to an actual conflict of jurisdiction and sovereignty because imposition of the Washington tax would inject state law into an on-reservation transaction which the Indians have chosen to subject to their own laws.

The Court in effect concludes that these consequences are insignificant. The first, it suggests, is undercut by *Moe*, which made clear that Indian retailers have no absolute right to market their tax-exempt status. The second is too speculative—"the Tribes have failed to demonstrate that business at the smokeshops would be significantly reduced by a state tax without a credit as compared to a state tax with a credit." *Ante*, at 157. And the third "need not detain us" because "[t]here is no direct conflict between the state and tribal schemes. . . ." *Ante*, at 158.

I do not agree. Whatever their individual force, I think that in combination these three consequences bring the Washington taxes into sharp conflict with important federal policies. Perhaps most striking is the fact that a rule permitting imposition of the state taxes would have the curious effect of making the federal concerns with tribal self-government and commercial development inconsistent with one another. In essence, tribes are put to an unsatisfactory choice. They are

free to tax sales to non-Indians, but doing so will place a burden upon such sales which may well make it profitable for non-Indian buyers who are located on the reservation to journey to surrounding communities to purchase cigarettes.[6] Or they can decide to remain competitive by not taxing such sales, and in the process forgo revenues urgently needed to fill governmental coffers. Commercial growth, in short, can be had only at the expense of tax dollars. And having to make that choice seriously intrudes on the Indians' right "to make their own laws and be ruled by them," *Williams* v. *Lee*, 358 U. S., at 219–220.[7]

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[6] This problem was entirely absent in *Moe*. Nothing in the result there disfavored the purchase of Indian goods. Rather, imposition of the state tax on non-Indians simply created a situation in which persons were encouraged to buy cigarettes on the basis of factors other than tax benefits and avoidance—factors like geographical location and convenience. In the present situation, the state tax actually tips the balance against the Indians.

[7] It might be argued that the choice I describe is entirely commonplace—that in making its taxing decisions every governmental unit is required to balance its revenue needs against the economic impact of the taxes it considers. In one sense, this is quite true: If one State has a very low sales tax, a neighboring State's ability to impose a higher one may as a practical matter be impaired. In some circumstances, it can cope with this situation by imposing a complementary tax on the in-state use of goods purchased elsewhere. *National Geographic Society* v. *California Bd. of Equalization*, 430 U. S. 551, 555 (1977). And in others there will exist no efficacious way of collecting such a tax. Whatever the case, however, the two States will face each other across their common border with equal arsenals.

I think the present situation is readily distinguishable for the simple reason that Indian reservations are not States. This has two sorts of consequences. First, it means the equality noted in the preceding paragraph is absent. *Moe* holds that sellers on an Indian reservation may be required to collect state taxes on sales to non-Indians that occur entirely on the reservation. Yet it is highly unlikely that the Tribes in these cases could require sellers elsewhere in Washington to collect tribal taxes. And second, Indian Tribes, while less autonomous than States in important respects, are the special beneficiaries of certain federal concerns and policies. As a result,

The Court provides no satisfactory explanation of why the State is free to put the Tribes to such a choice. Rather, it characterizes the tribal business as an effort to market a tax exemption and proceeds to label that effort illegitimate and beyond the reasonable bounds of any federally protected tribal right. Yet that line of argument could at most justify a state tax which through some sort of credit mechanism ensures that the location of cigarette purchases is independent of state and tribal taxing schemes—it does not support a rule that the State may tax all on-reservation sales to non-Indians regardless of tribal taxes.[8] Nor is the Court's argument saved by the contention that the Tribes have failed to prove that the combination of these particular tribal and state taxes will cause Indian smokeshops to lose volume that would otherwise be theirs. The fact is that the Court today permits the State to enact a tax without risking any attendant loss of business for its retailers while the Tribes must court economic harms when they enact taxes of their own. That result erodes the Tribes' sovereign authority and stands the special federal solicitude for Indian commerce and governmental autonomy on its head.

The conflict with federal law is particularly evident on the present facts because the Secretary of the Interior—acting pursuant to lawful regulations—has approved the tribal taxing and regulatory schemes at issue here. That approval, and the federal policies which underlie it, both enhances tribal authority and ousts inconsistent state law. Compare *Fisher*

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the tradeoffs and frictions that may be inevitable in the state-state context demand special scrutiny in the state-reservation context. Tribes may lack the tools needed to protect themselves, and protecting them is an important federal concern. Cf. *Morton* v. *Mancari*, 417 U. S. 535, 551–555 (1974).

[8] See *Mescalero Apache Tribe* v. *Jones*, 411 U. S., at 152 (quoting legislative history to the effect that Indians should be able to "enter the white world on a footing of equal competition").

v. *District Court*, 424 U. S. 382 (1976); *United States* v. *Mazurie*, 419 U. S. 544 (1975).

The Court draws support for its result from the suggestion that a decision invalidating these taxes would give the Tribes *carte blanche* to establish vast tax-exempt shopping centers dealing in every imaginable good. I think these fears are substantially overdrawn. *Moe* made clear that Indians do not have an absolute entitlement to achieve some particular sales volume by passing their tax-exempt status to non-Indian customers, and I do not question that conclusion today. I would simply hold that the State may not impose a tax that forces the Tribes to choose between federally sanctioned goals and places their goods at an actual competitive disadvantage. Nothing in such a holding would emasculate state taxing authority or bring the specter of enormous tribal tax havens closer to reality. On the contrary, I am confident that the State could devise a taxing scheme without the flaws which mar the present one.

In sum, I would hold these taxes impermissible and save for another day the question of what sorts of less intrusive measures a State may take to protect its tax base and avoid the parade of horribles alluded to by the Court.

III

Because I would hold the state cigarette taxes invalid, I would not reach the bulk of the recordkeeping and enforcement issues addressed by the Court in Parts IV–C and IV–E of its opinion. Indeed, since the District Court failed to discuss most of those issues, I am startled that the majority proceeds to address and decide them rather than remanding for the views of that court. In my judgment, only one relatively narrow recordkeeping issue ought be addressed at this time, and that concerns the District Court's holding that the State could not require the Tribes to keep records of exempt sales to facilitate collection of valid taxes on nonexempt sales. 446 F. Supp. 1339, 1358–1359, 1373. The District Court

found the record in this case inadequate to show any need for such documentation. The Court, however, sees this as no obstacle to upholding the requirement. I disagree. The State has no direct power over exempt sales, and I see no reason why it should be permitted to require Indians to keep records of such sales absent some showing of necessity or utility. In consequence, I would either affirm the District Court in this regard or remand so that the record may be supplemented.

For the foregoing reason, I dissent as to Parts IV–B (2), IV–C, and IV–E.

MR. JUSTICE STEWART, concurring in part and dissenting in part.

I join all but Part IV–B (2) and Part V of the Court's opinion. My disagreement with Part V is for the reasons stated in Part III of MR. JUSTICE REHNQUIST's separate opinion. My disagreement with Part IV–B (2) stems from the belief that the State of Washington cannot impose the full combined measure of its cigarette and sales taxes on purchases by nontribal members of cigarettes from tobacco outlets on the Colville, Lummi, and Makah Reservations.

In *Moe* v. *Salish & Kootenai Tribes*, 425 U. S. 463, 481–483, the Court held that a State has the power to tax sales of cigarettes to non-Indians by Indian tobacco outlets, despite the exemptions from state taxes possessed by an Indian tribe and its members themselves. The State may exert this power, according to *Moe*, even if it thereby deprives the tribe or the enterprises the tribe operates of substantial revenues. Cf., *Thomas* v. *Gay*, 169 U. S. 264. The cigarette and sales tax aspects of this case would, therefore, be wholly controlled by the *Moe* decision, but for the fact that all of the respondent Tribes levy their own cigarette excise taxes on the on-reservation distribution of cigarettes to non-Indians.

It seems clear to me that the respondent Tribes enjoy a power at least equal to that of the State to tax the on-reserva-

tion sales of cigarettes to nontribal members. Those sales are entered into and consummated in places and circumstances subject to the Tribes' protection and control. Furthermore, the taxation of such transactions effectuates recognized federal policies by providing funds for the maintenance and operation of tribal self-government. See generally Indian Reorganization Act of 1934, 25 U. S. C. § 461 *et seq; McClanahan* v. *Arizona State Tax Comm'n,* 411 U. S. 164, 179–181; *Williams* v. *Lee,* 358 U. S. 217.

Consequently, when a State and an Indian tribe tax in a functionally identical manner the same on-reservation sales to nontribal members, it is my view that congressional policy conjoined with the Indian Commerce Clause requires the State to credit against its own tax the amount of the tribe's tax. This solution fully effectuates the State's goal of assuring that its citizens who are not tribal members do not cash in on the exemption from state taxation that the tribe and its members enjoy. On the other hand, it permits the tribe to share with the State in the tax revenues from cigarette sales, without at the same time placing the tribe's federally encouraged enterprises at a competitive disadvantage compared to similarly situated off-reservation businesses.

Turning to the case at hand, the approach I have outlined leads me to one conclusion with respect to sales on the Colville, Lummi, and Makah Reservations, and another with respect to sales on the Yakima Reservation. The Colville, Lummi, and Makah Tribes each collect from the operators of on-reservation tobacco outlets a tax of 40 to 50 cents per carton. Although in each case the tax is imposed at the time the cigarettes are distributed by the Tribe to the retail outlets, the pertinent taxing ordinance requires that the tax be passed on to the ultimate consumer. Thus, the actual event taxed, as with the State's cigarette excise tax and general sales tax, is the sale to the nontribal purchaser. Since the Tribe's cigarette tax operates in functionally the same way as do the State's cigarette excise and general sales taxes, I would hold that the

State must credit the tribal tax against the combination of its cigarette excise tax and general sales tax.

The tax imposed by the Yakima Tribe operates differently. The Tribe purchases cigarettes from out-of-state dealers and sells them to its licensed retailers. In connection with this transaction, the Tribe receives from its licensed retailers a tax of 22.5 cents per cigarette carton. Unlike the situation with the Colville, Lummi, and Makah taxes, however, there is no requirement that the tax then be added to the ultimate retail selling price. As a consequence, the event taxed is not the sale to the ultimate cigarette purchaser, and for this reason I believe that the State has no obligation to credit the Indian tax against the combination of its cigarette excise and general sales taxes.

Accordingly, I would vacate the judgment of the District Court insofar as it invalidates *in toto* the imposition of the State's cigarette excise and general sales taxes upon cigarette sales on the Colville, Lummi, and Makah Reservations, and remand the case for further proceedings. I would reverse the judgment of the District Court insofar as it bars the imposition of the State's taxes upon sales of cigarettes on the Yakima Reservation.

MR. JUSTICE REHNQUIST, concurring and dissenting.

Since early in the last century, this Court has been struggling to develop a coherent doctrine by which to measure with some predictability the scope of Indian immunity from state taxation.[1] In recent years, it appeared such a doctrine was well on its way to being established. I write separately to underscore what I think the contours of that doctrine are because I am convinced that a well-defined body of principles is essential in order to end the need for case-by-case litigation which has plagued this area of the law for a number of years.

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[1] Much of that developmental history is recounted in *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164, 168–172 (1973).

That doctrine, I had thought, was at bottom a pre-emption analysis based on the principle that Indian immunities are dependent upon congressional intent. *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164 (1973); *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145 (1973); *Moe* v. *Salish & Kootenai Tribes*, 425 U. S 463 (1976); *Bryan* v. *Itasca County*, 426 U. S. 373 (1976), at least absent discriminatory state action prohibited by the Indian Commerce Clause. I see no need for this Court to balance the state and tribal interests in enacting particular forms of taxation in order to determine their validity. *Ante*, at 156–157. Absent discrimination, the question is only one of congressional intent. Either Congress intended to pre-empt the state taxing authority or it did not. Balancing of interests is not the appropriate gauge for determining validity since it is that very balancing which we have reserved to Congress. I concur in the Court's conclusion, however, that the cigarette tax is valid because Congress has not pre-empted state authority to impose the tax.

I

The principles necessary for the resolution of this case are readily derived from our opinions in *McClanahan* and *Mescalero*. *McClanahan* confirmed the trend which had been developing in recent decades towards a reliance on a federal pre-emption analysis. Congress has for many years legislated extensively in the field of Indian affairs. *McClanahan* therefore recognized that the answer to most claims of Indian immunity from state power could be resolved by looking "to the applicable treaties and statutes which define the limits of state power." 411 U. S., at 172.[2]

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[2] The Court in *McClanahan* did not resolve to what extent residual Indian sovereignty in the total absence of federal treaty obligations or legislation still would be recognized. The Court found that "[t]he question is generally of little more than theoretical importance, . . . since in almost all cases federal treaties and statutes define the boundaries of federal and

Despite the expanse of congressional statutes regulating Indian affairs over the years, *McClanahan* foresaw that congressional intent would not always be readily apparent. As a guide to ascertaining that intent in such cases, the Court invoked the tradition of Indian sovereignty as reflected by the earlier decisions of this Court: "The Indian sovereignty doctrine is relevant, . . . not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read." *Ibid.*

McClanahan readily illustrates application of the analysis. The question presented in that case was whether the State of Arizona had jurisdiction to impose a tax on a reservation Indian's income derived solely from reservation sources. The Court first reviewed the "tradition of sovereignty" relevant to this "narrow question." *Id.*, at 168.[3] Historically this Court had found Indians to be exempt from taxes on Indian ownership and activity confined to the reservation and not involving non-Indians.[4] *The Kansas Indians*, 5 Wall. 737 (1867). With this tradition placing reservation-ownership beyond the jurisdiction of the States, the Court undertook a review of the relevant treaties and statutes to determine

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state jurisdiction." 411 U. S., at 172, n. 8. I am convinced that this "residue" of sovereignty is no greater than the freedom from nondiscriminatory taxation held sufficient to protect sovereignty in other areas of constitutionally derived immunities. See n. 9, *infra*. Our opinions have recognized that Indian sovereignty is dependent upon congressional preservation, see *United States* v. *Wheeler*, 435 U. S. 313, 323 (1978), and I decline to use our adjudicatory powers to assume a role properly reserved to Congress.

[3] The Court emphasized that its review of Indian sovereignty was relevant only to this narrow category, *i. e.*, the reservation-derived income of a reservation Indian, and that the Court was expressly not reviewing any situation in which the State attempted to exert its sovereignty over non-Indians undertaking activity on Indian reservations. 411 U. S., at 168.

[4] I use "Indians" throughout this discussion of sovereign immunity to refer to members of a reservation tribe. See *infra*, at 186–187.

whether this tradition of immunity had been altered by Congress.[5] Although no legislation directly provided that Indians were to be immune from state taxation under these circumstances, the enactments reviewed were certainly suggestive of that interpretation. See Arizona Enabling Act, § 20, 36 Stat. 569; the Buck Act, 4 U. S. C. § 105. The Court therefore declined to infer a congressional departure from the prior tradition of Indian immunity absent an express provision otherwise. Thus, as this Court's opinion in *Bryan* v. *Itasca County, supra,* later characterized it, *McClanahan* established a rule against finding that "ambiguous statutes abolish by implication Indian tax immunities." 426 U. S., at 392.

The companion case to *McClanahan, Mescalero Apache Tribe* v. *Jones, supra,* established the corollary principle: When tradition did not recognize a sovereign immunity in favor of the Indians, this Court would recognize one only if Congress *expressly* conferred one. In *Mescalero,* the State of New Mexico asserted the right to impose a tax on the gross receipts of a ski resort owned and operated by an Indian tribe. The resort was located on federal land adjacent to the Indian reservation, was developed under the auspices of the Indian Reorganization Act of 1934, 25 U. S. C. § 461 *et seq.*, and was funded with federal money.

The Court in *Mescalero* applied precisely the analysis *McClanahan* adopted. First, the Court reviewed the tradition of sovereignty and found that no immunity for off-reservation activities had traditionally been recognized. See *Shaw* v. *Gibson-Zahniser Oil Corp.*, 276 U. S. 575 (1928); *Ward* v. *Race Horse,* 163 U. S. 504 (1896). With that tradition as its backdrop, the Court reviewed the particular statutes relevant to the question of whether or not Congress intended

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[5] The Court has explicitly held that attributes of Indian sovereignty are subject to complete defeasance by Congress. *United States* v. *Wheeler, supra,* at 323.

to immunize the Indian enterprise from the state gross receipts tax. The principal Act relevant to the inquiry was the Indian Reorganization Act, since it was the Act under which the tribal enterprise was being conducted. Section 5 of that Act, 25 U. S. C. § 465, provides that the lands acquired under authority of the Act are exempt from state and local taxation. The Court nevertheless refused to read § 465 as broadly conferring an immunity from income as well as property taxes. The Court invoked the well-established rule that " 'tax exemptions are not granted by implication,' " that such exemptions may not rest on " 'dubious inferences,' " but that they must be provided in " 'plain words.' " 411 U. S., at 156, quoting *Oklahoma Tax Comm'n* v. *United States*, 319 U. S. 598, 606–607 (1943). Despite the clear federal purpose of promoting this tribal economic enterprise, the Court found that no judicial immunities could appropriately be implied.[6]

The subsequent Indian tax immunity cases have been unanimously resolved through application of the corollary principles of construction established in *McClanahan* and *Mescalero*. In *Moe* v. *Salish & Kootenai Tribes*, the Court invalidated attempted state taxation of Indian conduct and property confined to the reservation. The Court found, however, that imposition of a state tax on its non-Indian residents' purchases of cigarettes from Indian sellers on a reservation could not be found to "ru[n] afoul of any congressional enactment dealing with the affairs of reservation Indians." 425 U. S., at 483. In *Bryan* v. *Itasca County*, *supra*, the question was whether the congressional grant of civil jurisdiction to the States conferred by 28 U. S. C. § 1360 was a general grant of power to tax reservation Indians. The tradition, of course, was otherwise and the statute did not specifically state that

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[6] In addition, the Court expressed the opinion that congressional policy was not at odds with state taxation since Congress intended that the Indians be prepared to "enter the white world on a footing of equal competition." 411 U. S., at 157.

a repeal of those immunities was intended. Consistent with the principles enunciated in *McClanahan*, the Court reasoned that

> "[t]his omission has significance in the application of the canons of construction applicable to statutes affecting Indian immunities, as some mention would normally be expected if such a sweeping change in the status of tribal government and reservation Indians had been contemplated by Congress." 426 U. S., at 381.

Adherence to these principles of construction maximizes the ability of States and tribes to determine the scope of their respective authority without resort to adjudication, and maximizes judicial deference to the legislative forum.

II

Application of these principles readily resolves the validity of the cigarette tax levied by the State. The tax represents a permissible nondiscriminatory exercise of state sovereign authority which has not been pre-empted by Congress. These principles also dispose of the claim of nontribal Indians to an immunity.

A

At issue here is not only Indian sovereignty, but necessarily state sovereignty as well. As a general rule, of course, States are given wide latitude in the exercise of their sovereign powers to tax. In *Michelin Tire Corp.* v. *Wages*, 423 U. S. 276, 293 (1976), this Court cautioned against invalidating any state taxation absent "the clearest . . . mandate." Here the State attempts to tax its citizens' use of cigarettes purchased in a territory subject to the control of another sovereign.[7] As a general matter, we have repeatedly held that such an exercise of state taxing power is permissible. Here there is no ques-

[7] Indian reservations are not of course subject to the exclusive control of the tribe. The Federal Government and the States also have jurisdiction for some purposes.

tion that the State, by taxing its own non-Indian residents, has "exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred," and "[t]he fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a state for which the tax is an exaction." *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 444–445 (1940). Use tax schemes applicable to purchases in other States, precisely comparable to that in issue here, have long been upheld as a permissible exercise of state taxing power. *Henneford* v. *Silas Mason Co.*, 300 U. S. 577 (1937); *National Geographic Society* v. *California Board of Equalization*, 430 U. S. 551 (1977). Of course in order to collect the tax from the merchant located beyond the territorial jurisdiction of the taxing State, there must also be a relationship between the State and the burdened merchant sufficient to satisfy principles of due process. *National Geographic Society, supra.* After *Moe*, however, the retailers on the tribal reservation cannot gain invalidation of the tax on this basis. 425 U. S., at 482–483. Thus the State has exercised its taxing authority consistent with its sovereign powers and constitutional due process.

An otherwise legitimate exercise of state taxing authority will be illegitimate, of course, if it is sought to be applied in contravention of a constitutional or federal statutory immunity. Indian sovereign immunity from nondiscriminatory taxation is a question of congressional pre-emption. As outlined, we must first identify the backdrop of sovereignity in order to interpret congressional intent in the field. As *McClanahan* implicitly recognized through its citation of authorities, the traditional cases clearly did not find that Indian sovereign immunity was contravened by subjecting tribes to the burdens inherent in state taxation of the reservation activities of non-Indians. *Surplus Trading Co.* v. *Cook*, 281 U. S. 647 (1930); *Utah & Northern R. Co.* v. *Fisher*, 116 U. S. 28 (1885); *Thomas* v. *Gay*, 169 U. S. 264 (1898).

Thomas v. *Gay* perhaps best illustrates the "backdrop" relevant to the State's cigarette tax in issue. In *Thomas*, the State attempted to tax the cattle grazing on reservation lands leased, pursuant to congressional authorization, by Indians to non-Indians. The Court found that the Indians' sovereign immunity did not operate to curtail state authority to impose this tax. The case is particularly significant because of the arguments which it expressly rejects. The tribe complained that the tax had to be invalidated because the revenues which it received as lessor would be directly reduced as a result of the state tax since lessees would be unwilling to pay the same price for tax-exempt grazing lands as for taxable grazing lands. The Court stated that it is urged that

> "[T]he money contracted to be paid for the privilege of grazing is paid to the Indians as a tribe, and is used and expended by them for their own purposes, and that if, by reason of this taxation, the conditions existing at the time the leases were executed were changed, or could be changed by the legislature of Oklahoma at its pleasure, the value of the lands for such purposes would fluctuate or be destroyed altogether according to such conditions." *Id.*, at 273.

Thomas v. *Gay* is a part of the "backdrop" which supports Washington's power to impose the tax in issue.[8] The ap-

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[8] It should be noted that the principles in *Thomas* v. *Gay* were not always those used to determine Indian immunities. A series of decisions, as noted in *McClanahan*, treated Indian immunities as derivative from the Federal Government's immunity from state taxation. During the reign of the treatment of Indian reservations as federal instrumentalities for purposes of state taxation, this Court did prohibit States from taxing the net income derived by the lessees of Indian lands. *Gillespie* v. *Oklahoma*, 257 U. S. 501 (1922). See also *Choctaw, O. & G. R. Co.* v. *Harrison*, 235 U. S. 292 (1914); *Indian Territory Illuminating Oil Co.* v. *Oklahoma*, 240 U. S. 522 (1916). While *Thomas* v. *Gay* was never explicitly overruled, these decisions were clearly inconsistent. Nevertheless, it was the line of

pellee tribes maintain that the tax in issue is impermissible, though permissible in *Moe*, because here the tribes are raising governmental revenues and establishing commercial enterprises. The effect of the state tax then would be to reduce the tribe's governmental revenues and force the tribe to choose between losing those revenues by forgoing its tax or subjecting reservation retailers to a competitive disadvantage compared to those retailers outside the reservation not subject to the tribal tax. These may be the facts, but they are facts which *Thomas* v. *Gay* held to be irrelevant to the recognition of a sovereign tribal immunity. In *Thomas*, the tribe's involvement was far more direct than that in issue here since it was a tribal leasing enterprise. There, the State's exercise of jurisdiction clearly required the tribe, as lessor, to forgo some portion of rent which could have been charged, and used the same as tax revenues, had the State not asserted its taxing authority. The tribe could recover the full rent (part of which may readily be considered the equivalent of a tax and another part perhaps proprietary profit) only at the risk of discouraging the economic enterprise. It is apparent therefore that the backdrop relevant to this action is one of no sovereign immunity.[9]

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analysis employed in *Gillespie* that was later overruled in *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376 (1938). *Thomas* v. *Gay* stands as the traditional analysis of Indian sovereign immunity held to be relevant in *McClanahan*.

[9] This conclusion derives support not only from *Thomas* v. *Gay* but analogous applications of sovereign tax immunities. When two sovereigns have legitimate authority to tax the same transaction, exercise of that authority by one sovereign does not oust the jurisdiction of the other. If it were otherwise, we would not be obligated to pay federal as well as state taxes on our income or gasoline purchases. Economic burdens on the competing sovereign also do not alter the concurrent nature of the taxing authority. Decisions of this Court unequivocally recognize that a state tax comparable to that in issue, imposed on its residents' transactions in another State, or on a federal enclave, will not be barred by force of the respective immunities of that State or the Federal Government. In

Congress could of course countermand this "tradition" of no immunity. But it has not done so. Under *Mescalero*, it is dispositive of this case that no express immunity has been granted by Congress since the tradition of sovereignty counsels against the immunity. Even going beyond the *Mescalero* rule against implying an immunity from taxation, I agree with the Court that a review of the statutes does not suggest, even remotely, that Congress intended either by its laws or the policies underlying them to prevent the States from taxing these transactions.[10] In all areas of tax immunity, this Court has staunchly refused to consider the permissibility of a tax by

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Henneford v. *Silas Mason Co.*, 300 U. S. 577 (1937), this Court upheld a state tax on one of its resident's use of goods purchased in another State without regard to the fact that the other State's competitive ability to tax the same transaction was obviously reduced. The Court observed that such a tax was permissible even if no credit for the other state tax be allowed. *Id.*, at 581. See also *National Geographic Society* v. *California Board of Equalization*, 430 U. S. 551 (1977). Even the sovereign immunity of the Federal Government would not prevent the effects of a tax comparable to those in issue. In *United States* v. *County of Fresno*, 429 U. S. 452 (1977), the State sought to impose a possessory use tax on federal employees occupying federal housing located in federal enclaves within the State of California. This Court upheld the tax even though it accepted the Federal Government's argument that in order to remain competitive as an employer or landlord, it would have to reimburse the employees for the payment of the added cost. *Id.*, at 464, and n. 12. See also *United States* v. *Detroit*, 355 U. S. 466, 472 (1958); *Alabama* v. *King & Boozer*, 314 U. S. 1, 12 (1941). Thus the State, through its exercise of taxing authority, can effectively require the Federal Government to forgo revenues which would otherwise be available to it in order to remain competitive as an enterprise.

[10] The total absence of any suggestion that Congress intended to confer the immunity sought in this action should not be surprising. As this Court has found, other statutes are premised on congressional "recognition of the imperative need of a State to administer its own fiscal operations," free from federal interference. *Tully* v. *Griffin, Inc.*, 429 U. S. 68, 73 (1976). In *Tully*, this congressional policy was not found to be diminished even though the State sought to assert its taxing authority over nonresidents.

reference to the economic burdens which it imposes if those burdens are nondiscriminatory and satisfy due process. See *United States* v. *County of Fresno*, 429 U. S. 452 (1977) (state taxation of the Federal Government); *New York* v. *United States*, 326 U. S. 572 (1946) (federal taxation of the state government); *Michelin Tire Corp.* v. *Wages*, 423 U. S. 276 (1976) (state taxation of imports and exports). If Indians are to function as quasi co-sovereigns with the States, they like the States, must adjust to the economic realities of that status as every other sovereign competing for tax revenues, absent express intervention by Congress.[11]

B

Relying on the same pre-emption analysis, I also concur in the Court's conclusion that Indians not members of the governing tribe are not immune from taxation. *McClanahan/Mescalero* are once again dispositive. As *McClanahan* explained, the doctrine of sovereign immunity traditionally

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[11] These considerations, determinative in other areas of tax immunity law, are equally appropriate when one of the taxing jurisdictions is an Indian tribe. While Indian tribes are not States, the tribes are also not helpless hostages of the State absent judicial intervention. Two substantial sources of protection are available to them. First, the Indians could not be subjected to the burdens of discriminatory taxation, *e. g.*, a state tax on only cigarette purchases on a reservation with no corresponding off-reservation tax. The prohibition of discriminatory taxation has been recognized by this Court as a substantial safeguard against the potential for any abusive taxation since only those taxes which the general population are willing to withstand can be imposed. See *County of Fresno*, *supra*, at 463, n. 11; *Alabama* v. *King & Boozer*, 314 U. S. 1 (1941) (federal immunity); *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274 (1977) (state taxation of interstate commerce). Second, Indian tribes are always subject to protection by Congress. This source of protection is more than adequate to preclude any unwarranted interference with tribal self-government. Congress, and not the judiciary, is the forum charged with the responsibility of extending the necessary level of protection beyond that inherent in prohibiting nondiscriminatory taxation.

recognized by this Court derived from the sovereign relationship between a tribe and its members, and a recognition that state jurisdiction should not be asserted in a manner which "frustrates tribal self-government." *Williams* v. *Lee*, 358 U. S. 217, 219–220 (1959); *McClanahan*, 411 U. S., at 170; *Moe*, 425 U. S., at 483. Immunities which have formed the backdrop for this Court's pre-emption analysis have been those derived from these precepts. This form of immunity, and the principles which underlie it, are simply inapplicable to the recognition of a tax immunity for an individual who resides on a reservation, but is not a member of the tribe. The holding in *Moe* that non-Indians, even those resident on a reservation, could be subject to cigarette taxes for on-reservation purchases, was a reflection of this principle. The fact that the nonmember resident happens to be an Indian by race provides no basis for distinction. The traditional immunity is not based on race, but accouterments of self-government in which a nonmember does not share.

Congress of course has gone beyond protection of merely Indian self-government, extending its regulatory authority to Indians not residing on the reservation of their own tribe, or, in fact, not residing on any reservation. See 25 U. S. C. § 13 (1970 ed.), as construed in *Morton* v. *Ruiz*, 415 U. S. 199 (1974). See also the definition of "Indian" in the Indian Reorganization Act, 25 U. S. C. § 479. Congress, however, has certainly provided no express immunity from the type of taxation in issue for Indians not members of the tribe, and under the *Mescalero* principles of construction, the backdrop of sovereignty makes it clear that it is not this Court's province to imply such an immunity. These Indians residing on the reservation are citizens of the State, just the same as their non-Indian neighbors, and I am unwilling to conclude that their Indian status entitles them to an implied immunity from taxes which their non-Indian neighbors are required to pay.

III

I cannot concur in the Court's disposition of the challenge to the state vehicle excise tax. Wash. Rev. Code, chs. 82.44 and 82.50 (1976 and Supp. 1977). The lower court did not conduct a very extensive inquiry into the mechanics or state interpretation of this excise taxing scheme, believing that the tax was clearly invalid under our prior decision in *Moe*. In *Moe*, this Court refused to uphold a State's authority to impose a property tax on motor vehicles owned by tribal members residing on the reservation. The lower court here found that *Moe* was controlling because in both cases the vehicles which the State seeks to tax are used both on and off the reservation, and the tax is assessed annually at a percentage of the market value of the vehicle. Thus the lower court, and this Court, have concluded that the only difference between the taxes is one of label, a difference insufficient to warrant a difference in outcome. *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274 (1977). The Court therefore looked no further to the operation of the taxing scheme in question.

I do not find the issue clearly disposed of by *Moe* without a dispositive construction of the actual operation of this state taxing scheme. There is of course no question that this Court has discarded the controlling significance of the label a State attaches to its taxes. A tax instead must be judged by its "practical operation." *Detroit* v. *Murray Corp.*, 355 U. S. 489 (1958). But only if the practical operation of this excise taxing scheme is the same as the property taxing scheme addressed in *Moe* would the tax be invalid on the basis of that decision. In *Moe*, the tax was assessed on the basis of ownership, and, therefore, an Indian was required to pay the tax regardless of whether the vehicle was ever used off the reservation. If the state taxing scheme in question here, however, exacts a tax only in the event that the vehicle is used off the reservation, then the practical operation of

the taxes would be totally different. In *Moe,* the Indian purchaser could not avoid assessment of the tax once the vehicle was purchased. It is possible, however, that under an excise taxing scheme no tax would be assessed if the vehicle were used only on the reservation.

What is dispositive for me then is whether Washington has structured or will construe its overall tax and exemption scheme so as to avoid exaction of the tax in the event the vehicle is never used off the reservation. No decision of this Court would preclude the State from taxing Indians for the use of off-reservation highways. The lower court did not appreciate the significance of this distinction and accordingly did not focus on the manner in which the state taxing scheme would be applied to Indians limiting their vehicle use to the reservation. Judge Kilkenny, in a dissenting opinion, found the record inadequate to resolve the question of validity. I agree with Judge Kilkenny that federal courts cannot invalidate state taxes without a thorough review of state law and precedents necessary to determine whether the scheme in fact contravenes federal law. It may well be that the excise tax is applicable without exception to even those Indians using their vehicles exclusively on the reservation, but I would remand the question to the lower court to clarify that this is the controlling question so that it might examine the state taxing scheme under a corrected view of what federal law requires. Cf. *Perkins* v. *Benguet Consolidated Mining Co.,* 342 U. S. 437 (1952); *Zacchini* v. *Scripps-Howard Broadcasting Co.,* 433 U. S. 562, 578–579 (1977).

Assuming a construction which excludes reservation use, *arguendo,* I do not find it significant that Washington has not tailored this tax to the "amount of actual off-reservation use," in which case the Court suggests this tax might be permissible. A non-Indian resident of the State of Washington pays the same tax on his use of the public highways whether he drives his car once a year or every day. We have certainly never held that a State is under an obligation to apportion

its use taxes in such a way that reflects actual use. I am aware of no principle for making a different rule to cover the case of Indians using the public highways. If they choose to avoid the use tax, they need only limit their driving to reservation boundaries. But once they venture onto highways off the reservation, nothing in the United States Constitution, or in the federal statutes, prevents them from being subject to use taxes in common with other state residents.

I would therefore reverse the judgment of the District Court on the issue of the permissibility of the State's assessment of its cigarette tax on purchases made by non-Indians, and by Indians not members of the governing tribe. I would remand the case to that court for a determination of the construction and effect of the state excise tax.

COFFY v. REPUBLIC STEEL CORP.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 79-81. Argued February 27, 1980—Decided June 10, 1980

The Vietnam Era Veterans' Readjustment Assistance Act of 1974 (Act) provides that any person who leaves a permanent job to enter the military, satisfactorily completes military service, and applies for re-employment within 90 days of being discharged from the military must be reinstated to the former job "without loss of seniority," 38 U. S. C. § 2021 (b)(1). Upon being honorably discharged from military service, petitioner made timely application for reinstatement with respondent, his former employer. Because respondent was then in the process of laying off employees, petitioner was reinstated in layoff status. While laid off, he received weekly payments under the supplemental unemployment benefits (SUB) plan created by the applicable steel industry collective-bargaining agreement. Under the plan, an employee is entitled to receive SUB payments only if he has completed two years of continuous service prior to being laid off, and the amount of the weekly benefit is determined by his hourly wage rate, the number of his dependents, the amount of state unemployment compensation he is receiving, and the level of funding remaining in the plan. The length of time during which an employee receives SUB payments is determined by the number of credit units he has accumulated before being laid off, with one-half credit being accrued for each week in which he worked "any" hours, or was paid for "any" hours not worked (such as for vacation or jury duty), or lost "any" hours because he was performing certain union duties or was on disability leave. The plan also provides that if an employee enters the Armed Services, only the credit units credited to him at the time of his entry into the service shall be credited to him upon reinstatement as an employee with unbroken continuous service, except as may otherwise be required by law. Petitioner received SUB payments for only 25 weeks, whereas if he had been employed by respondent during his period of military service, he would have been entitled to 52 weeks of payments. Alleging that respondent violated his statutory re-employment rights by refusing to consider his military service time in computing the amount of SUB payments to which he was entitled, petitioner, represented by the Department of Justice pursuant to the Act, filed an action

in Federal District Court, which ultimately held that SUB payments were not a perquisite of seniority entitled to statutory protection. The Court of Appeals affirmed.

Held: SUB payments provided pursuant to the steel industry collective-bargaining agreement are perquisites of seniority to which a returning veteran is entitled under the Act. Pp. 195–206.

(a) Under the Act, which is to be liberally construed for the returning veteran's benefit, the veteran steps back on the seniority escalator at the precise point he would have occupied had he kept his position with his employer continuously during the period of military service. Cf. *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275. In determining whether a particular benefit qualifies as a perquisite of seniority under the Act, first, there must be a reasonable certainty that the benefit would have accrued if the employee had not gone into the military service, and, second, the "real nature" of the benefit must be "a reward for length of service," rather than "a form of short-term compensation for services rendered." *Alabama Power Co.* v. *Davis*, 431 U. S. 581, 589. Pp. 195–198.

(b) The SUB plan satisfies the reasonable-certainty prong of the *Alabama Power* test, since if petitioner had remained continuously employed by respondent instead of entering the military, he would have accumulated credits from the date he was hired until the date he was laid off. The plan also satisfies the second prong of the test, because supplemental unemployment benefits are not a form of deferred short-term compensation, but are a reward for length of service closely analogous to traditional forms of seniority. The purpose and function of SUB plans is to provide economic security during periods of layoff to employees who have been in the service of the employer for a significant period, and the specific provisions of the steel industry SUB plan support this general purpose of SUB programs. Pp. 199–206.

590 F. 2d 334, reversed and remanded.

MARSHALL, J., delivered the opinion for a unanimous Court.

Alan I. Horowitz argued the cause *pro hac vice* for petitioner. With him on the brief were *Solicitor General McCree*, *Beate Bloch*, and *William H. Berger*.

Michael A. Nims argued the cause for respondent. With him on the brief was *Victor E. DeMarco*.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U. S. C. § 2021 *et seq.*, provides that any person who leaves a permanent job to enter the military, satisfactorily completes military service, and applies for re-employment within 90 days of being discharged from the military must be reinstated to the former job without loss of seniority. This case presents the question whether supplemental unemployment benefits provided pursuant to the steel industry collective-bargaining agreement are perquisites of seniority to which a returning veteran is entitled under the statute.

I

Petitioner Thomas Coffy was employed by respondent Republic Steel Corp. (Republic) from April 30, 1968, until September 17, 1968, and again from January 24, 1969, until September 9, 1969, when he entered military service. He served in the military until he was honorably discharged on August 16, 1971. He made timely application for reinstatement on September 14, 1971. Because Republic was then in the process of laying off employees and Coffy would already have been laid off if he had remained continuously employed during his period of military service, he was reinstated in layoff status. Coffy was recalled to work on July 1, 1972.

While Coffy was laid off, he received weekly payments under the supplemental unemployment benefits (SUB) plan created by the collective-bargaining agreement between the major steel companies, including Republic, and the United Steelworkers of America (Steelworkers). Coffy received SUB payments for 25 weeks.[1] If he had been employed by Republic during his period of military service, he would have been

[1] Republic erroneously credited Coffy with approximately nine SUB credits for his 1968 employment. The plan provides that accumulated SUB credits are canceled if an employee quits work voluntarily, as petitioner did after his layoff in 1968. The overpayment was recovered through deductions from petitioner's paycheck after he returned to work.

entitled to 52 weeks of SUB payments. Coffy, represented by the Department of Justice pursuant to 38 U. S. C. § 2022, filed this action in the United States District Court for the Northern District of Ohio, alleging that Republic violated his statutory re-employment rights by refusing to consider his military service time in computing the amount of SUB payments to which he was entitled.[2]

The District Court, relying on *Foster* v. *Dravo Corp.*, 420 U. S. 92 (1975), entered judgment for respondent. The court held that the plan was "a bona fide effort to relate qualification for weekly benefits . . . to work actually performed," App. to Pet. for Cert. 24a, and therefore the benefits were not a perquisite of seniority. While the case was pending on petitioner's appeal to the United States Court of Appeals for the Sixth Circuit, we held in *Alabama Power Co.* v. *Davis*, 431 U. S. 581 (1977), that pension benefits are perquisites of seniority protected under the statute. The Court of Appeals *sua sponte* vacated the District Court's judgment and remanded for reconsideration in light of *Alabama Power*.

On remand, the District Court adhered to its decision that SUB credits are not seniority rights entitled to statutory protection. 461 F. Supp. 344 (1978). The Court of Appeals affirmed on the opinion of the District Court. 590 F. 2d 334 (1978). We granted certiorari, 444 U. S. 924 (1979), to resolve a conflict among the Circuits concerning this important question in the interpretation of the statute.[3] We now reverse.

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[2] The complaint alleged a violation of § 9 of the Military Selective Service Act of 1967, 50 U. S. C. App. § 459 (1970 ed.). The provisions of that statute relating to veterans' re-employment rights were re-enacted without substantive change in Title IV of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U. S. C. § 2021 *et seq.*

[3] The Third and Seventh Circuits have held that SUB payments are perquisites of seniority to which a returning veteran is entitled under the Act. *Akers* v. *General Motors Corp.*, 501 F. 2d 1042 (CA7 1974); *Hoffman* v. *Bethlehem Steel Corp.*, 477 F. 2d 860 (CA3 1973). Approximately

II

The Vietnam Era Veterans' Readjustment Assistance Act of 1974 (Act), 38 U. S. C. § 2021 *et seq.*, requires that returning veterans be reinstated to the jobs they left for military service "or to a position of like seniority, status, and pay." § 2021 (a)(B)(i).[4] The Act further provides that the veteran

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1,947,400 workers are covered by collective-bargaining agreements that provide supplemental unemployment benefits. See U. S. Dept. of Labor, Bureau of Labor Statistics, Bull. No. 2065, Characteristics of Major Collective Bargaining Agreements 101 (1980).

[4] Title 38 U. S. C. § 2021 provides in relevant part:

"(a) In the case of any person who is inducted into the Armed Forces of the United States . . . and who leaves a position (other than a temporary position) in the employ of any employer in order to perform such training and service, and (1) receives a certificate described in section 9 (a) of the Military Selective Service Act (relating to the satisfactory completion of military service), and (2) makes application for reemployment within ninety days after such person is relieved from such training and service . . . —

. . . . .

"(B) if such position was in the employ of a . . . private employer, such person shall—

"(i) if still qualified to perform the duties of such position, be restored by such employer . . . to such position or to a position of like seniority, status, and pay[,]

. . . . .

"unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so. . . .

"(b)(1) Any person who is restored to or employed in a position in accordance with the provisions of . . . this section shall be considered as having been on furlough or leave of absence during such person's period of training and service in the Armed Forces, shall be so restored or reemployed without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration or reemployment.

"(2) It is hereby declared to be the sense of the Congress that any person who is restored to or employed in a position in accordance with . . .

be reinstated "without loss of seniority." § 2021 (b)(1). We interpreted the predecessor of § 2021 [5] to mean that the returning veteran "does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war." *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275, 284–285 (1946). Congress incorporated this principle into the present statute by providing that any person reinstated under the Act should be given "such status in the person's employment as the person would have enjoyed if such person had continued in such employment continuously" during the period of military service. § 2021 (b)(2). The statute is to be liberally construed for the benefit of the returning veteran. *Fishgold* v. *Sullivan Drydock & Repair Corp.*, *supra*, at 285.

We have several times had occasion to consider whether a particular type of benefit is a perquisite of seniority. *Accardi* v. *Pennsylvania R. Co.*, 383 U. S. 225 (1966), involved a claim for severance pay. The amount of the payment depended on the employee's length of "compensated service." *Id.*, at 228. We rejected the employer's argument that the payment was not based on seniority, but on total service to the company. Rather, we held, the "real nature" of the payments was compensation for the loss of the job. *Id.*, at 230. Because "the cost to an employee of losing his job is not measured by how much work he did in the past . . . but by the rights and benefits he forfeits by giving up his job"—rights and benefits that

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this section should be so restored or reemployed in such manner as to give such person such status in the person's employment as the person would have enjoyed if such person had continued in such employment continuously from the time of such person's entering the Armed Forces until the time of such person's restoration to such employment, or reemployment."

[5] The Selective Training and Service Act of 1940, ch. 720, § 8 (b), 54 Stat. 890, later re-enacted as the Military Selective Service Act of 1967, 50 U. S. C. App. § 459 (1970 ed.), and subsequently re-enacted as 38 U. S. C. § 2021 *et seq.* See n. 2, *supra*.

are largely determined by seniority—the severance payment was "just as much a perquisite of seniority as the more traditional benefits such as work preference and order of lay-off and recall." *Ibid.*

We reached a different result in evaluating a claim for vacation benefits in *Foster* v. *Dravo Corp.*, 420 U. S. 92 (1975). The real nature of that benefit, we observed, was reflected in "the common conception of a vacation as a reward for and respite from a lengthy period of labor," *id.*, at 101. The contractual provisions for additional vacation credits and higher benefits for overtime work and for pro rata vacations for employees laid off before achieving the necessary number of weeks worked supported that conception. Accordingly, we held that vacation pay was intended as a form of deferred short-term compensation for work actually performed and was not, therefore, a seniority right protected by the statute.

Most recently, in *Alabama Power Co.* v. *Davis*, 431 U. S. 581 (1977), we held that pension benefits were perquisites of seniority for purposes of the Act. Although the amount of the payment was directly dependent on the years of accredited service, the true nature of the benefits was "a reward for length of service," *id.*, at 593. The lengthy period required for vesting, the use of payment formulas based on earnings at the time of retirement, and "the function of pension plans in the employment system"—namely, to provide financial security to employees, assure a stable work force, and increase efficiency—all led to the conclusion that pension payments "are predominantly rewards for continuous employment with the same employer." *Id.*, at 594. In *Alabama Power*, we summarized the principles that have emerged from the cases and concluded that they establish a two-pronged test for determining whether a benefit is a perquisite of seniority under the Act. First, there must be a reasonable certainty that the benefit would have accrued if the employee had not gone into the military service. *Id.*, at 589. Second, the nature of the benefit must be "a reward for length of service," rather

than a form of "short-term compensation for services rendered." *Ibid.*

Our task, then, is to evaluate the SUB plan at issue in this case in light of these principles.

III

A

The first SUB plan for the steel industry was established through collective bargaining in 1956. The revised plan which is the subject of this action became effective January 1, 1969. The plan provides three types of benefits: a "weekly benefit," a "short week benefit,"[6] and a relocation allowance. Petitioner's claim involves weekly benefits, which are provided to employees laid off from work as a supplement to unemployment compensation benefits provided under state law. The amount of an employee's weekly SUB payment is determined by his hourly wage rate, the number of his dependents, the amount of state unemployment compensation he is receiving, and the level of funding remaining in the plan. The length of time during which the employee receives SUB payments is determined by the number of credit units he has accumulated before being laid off.

Section 2.0 of the plan provides that an employee accrues one-half credit for each week in which he worked any hours, or was paid for any hours not worked (such as for vacation or jury duty), or lost any hours because he was performing certain union duties or was on disability leave.[7] A maximum of 52 credit units may be accrued by an employee at any one time. An employee is entitled to receive SUB payments only if he has completed two years of continuous service prior to

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[6] An employee having two years of continuous service is eligible for a "short week benefit" for any week in which some, but fewer than 32, hours are worked.

[7] Certain categories of employees accrue and exhaust credits at a slightly different rate, see §§ 2.1 and 4.10 of the plan, App. 20, 27, but that distinction is not significant for purposes of this analysis.

being laid off. An employee who meets this threshold requirement may receive one week of supplemental unemployment benefits for each credit unit he has accumulated.

The plan also provides, in § 7.2:

> "If an employee enters the armed services directly from the employment of the Company, he shall, while in service, be deemed for the purposes of the Plan to be on leave of absence and shall not be entitled to any Benefit. Only the credit units credited to him at the time of his entry into such service shall be credited to him upon his reinstatement as an employee of the Company with unbroken continuous service, except as may otherwise be required by law."

Under this provision Republic declined to credit petitioner for his military service time in calculating the number of SUB payments to which he was entitled.[8] We must determine whether the provision is in conflict with the Act.

B

The SUB plan satisfies the reasonable-certainty prong of the *Alabama Power* test, since if Coffy had remained continuously employed by Republic instead of entering the military, he would have accumulated credits from the date he was hired until the date he was laid off. We conclude that the plan also satisfies the second prong of the test, because supplemental unemployment benefits are not a form of deferred short-term compensation, but are a reward for length of service closely analogous to traditional forms of seniority.

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[8] Coffy received credit for his time in the military in computing his period of continuous service to determine his eligibility to receive benefits. We find no inconsistency in the company's action in counting his military service time toward eligibility to receive benefits, but not toward the number of credits he had accumulated. The plain intent of § 7.2 is that during their period of military service, employees shall neither receive benefits nor accrue credits, but that military service shall not be considered a break in continuous service.

The concept of supplemental unemployment benefits evolved from the demand by organized labor for a guaranteed annual wage. When it became evident that a guaranteed annual wage was impractical in their industries, unions such as the Steelworkers and the United Auto Workers transformed their guaranteed annual wage demands into proposals to supplement existing unemployment compensation programs. These proposals ultimately were adopted in several industries in the form of SUB plans. See J. Becker, Guaranteed Income for the Unemployed: The Story of SUB 9–20 (1968); A. Freedman, Security Bargains Reconsidered: SUB, Severance Pay, Guaranteed Work 4–5 (The Conference Board 1978). From the beginning, then, the purpose of SUB plans was to provide employment security regardless of the hours worked rather than to afford additional compensation for work actually performed. From the employer's standpoint SUB's, like pension benefits, help to assure a stable work force through periods of short-term layoffs and, like severance payments, may increase management flexibility in implementing technological advances. See Becker, *supra*, at 55–57, 248.

The essential function of SUB plans is to provide economic security for regular employees in the event they are laid off. Protection against layoff is, of course, one of the traditional attributes of seniority. SUB payments provide a second-level protection against layoff. If an employee does not have sufficient seniority to avoid being laid off, he may still have achieved the minimum level of seniority necessary to receive SUB payments during his layoff. Unlike vacations, SUB's cannot be compensation for work performed, a "reward for and respite from a lengthy period of labor," *Foster* v. *Dravo Corp.*, 420 U. S., at 101, for they are contingent on the employee's being thrown out of work; unless the employee is laid off he will never receive SUB payments. In this sense, SUB's are analogous to severance payments: they are "compensation for loss of jobs." *Accardi*, 383 U. S., at 230. See Freedman, *supra*, at 2.

We turn now to the specific provisions of the steel industry SUB plan to determine whether they support or contradict our understanding of the general purpose of SUB programs. The District Court held that the availability of SUB payments was so closely related to hours actually worked as to demonstrate that the plan was a " 'bona fide effort to compensate for work actually performed.' " 461 F. Supp., at 346. That conclusion is at odds with the literal terms of the plan, which provide that SUB credits are earned for all weeks in which an employee has *any* hours in one of the three categories specified in § 2.0. This provision was the result of a 1962 modification of the original 1956 plan, which had directly correlated hours worked with credits earned by providing that $1/10$ credit would be earned for every eight hours worked, up to a maximum of $1/2$ unit per week. The District Court recognized that the present plan did not expressly relate entitlement to benefits to hours worked, but found this fact to be of no significance because " '[c]ircumstances existing in the steel industry, as revealed by the uncontradicted evidence in this case, demonstrate that, in practice, the minimum workweek is 32 hours. . . . The plan must be construed in light of actual conditions in the steel industry. The possibility of an employee working only one hour during any week does not exist.' " *Id.*, at 347.[9]

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[9] The District Court's view that the benefits were intended to be correlated to work actually performed is supported by the testimony of James Carney, an attorney for United States Steel Corp. He stated that the reason for the 1962 change was that there was no need to keep track of the actual hours worked since it was rare for anyone to work fewer than 32 hours a week. This testimony was contradicted, to some extent, by that of Joseph Senturia, a consultant to the Steelworkers. He testified that the change was adopted to liberalize the accrual of credit units and as part of a general simplification of SUB plans in use in the steel industry. In fact, by 1962 SUB plans in all industries provided for accumulation of credit in any week in which any work was performed or any pay received. See J. Becker, Guaranteed Income for the Unemployed: The Story of SUB 125 (1968).

We of course accept the District Court's factual findings concerning the practice in the industry. We do not agree, however, that a *de facto* 32-hour minimum workweek means that SUB's are intended as deferred compensation for work performed. Credits are also earned for weeks in which the employee is paid for any hours not worked, as for jury duty, or in which any hours are lost because the employee is disabled or performing certain union duties. These hours, even if considered similar to hours worked because the employee receives "wage substitutes" for them, are not subject to the 32-hour industry custom.

We observe also that the normal workweek in the industry, as provided by Art. 6, § 1, of the collective-bargaining agreement, is 40 hours, not 32. The SUB plan makes no provision for accrual of additional credits for hours worked over 32 per week, or for overtime work. This omission is not suggestive of a desire to compensate work actually performed.

Further, a major reason that it is rare for an employee who works at all to work fewer than 32 hours in a week is the "short week benefit" provided under the SUB plan.[10] Quali-

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[10] Employees having two years of continuous service are eligible for a "short week benefit" for any week in which they work some, but fewer than 32, hours. Roughly speaking, the employee is paid at his regular hourly rate for the difference between 32 hours and the number of hours worked. The amount of the benefit is computed by taking the amount by which 32 hours exceeds the sum of the hours worked, paid, not worked for reasons other than lack of work, lost because of labor problems involving the company or transportation or utility companies, or not worked because the employee quit or was suspended or discharged, and multiplying that number by the employee's regular hourly wage rate. One-half credit unit is canceled for every week in which the employee receives short-week benefits. Since the employee also receives one-half credit because he worked some hours in the week, the net effect is that his accumulated credits remain the same.

The other reasons for the 32-hour custom which were cited in the testimony included the nature of steel manufacturing operations, which must

fied employees who work some hours, but fewer than 32, receive benefits under the short-week provisions of the plan; those who do not work at all receive weekly benefits. The union's success in effectively achieving a guaranteed 32-hour week through the mechanism of the short-week benefit does not logically alter the nature of the weekly benefit negotiated as part of the same plan.

Even if eligibility for SUB payments were closely related to hours worked, that fact would not, by itself, render them compensation rather than seniority rights. We emphasized in *Alabama Power* that it is the nature of the benefit, not the formula by which it is calculated, that is the crucial factor, for "[e]ven the most traditional kinds of seniority privileges could be as easily tied to a work requirement as to the more usual criterion of time as an employee." 431 U. S., at 592. As we have explained, the specific provisions of the steel industry plan support, rather than contradict, our conclusion that SUB payments are in the nature of a reward for length of service.

The District Court concluded that SUB payments could not be perquisites of seniority for the further reason that the benefits are not proportionate to the length of service. Under the plan, an employee must have a minimum of two years' seniority to be eligible for SUB payments, no employee may accumulate more than 52 units of SUB credits, and the amount of the benefit does not increase with the length of service as would a pension benefit. Thus an employee who has worked continuously for two years will have met the threshold requirement and will also have accumulated 52 units

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be conducted on a 24-hour basis; Art. 6, § 6, of the collective-bargaining agreement, which provides that any employee who reports for work must be given at least 4 hours' work; and Art. 10, § 7, of the agreement, which requires management to consult with the union on the distribution of work if a decrease in the amount of work available results in an average workweek of 32 hours or fewer.

of credit;[11] he is eligible for benefits for the same length of time, and computed according to the same formula, as an employee with 20 years' seniority.[12] According to the District Court, the facts that no benefits are available to employees whose seniority is less than two years and that after 52 credits have been accumulated additional seniority does not lead to increased benefits were evidence that the benefit is not a reward for longevity of service.[13]

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[11] The 2-year continuous service requirement and the 52-credit maximum accumulation are not coextensive. For example, an employee who is laid off before he has been with the company for two years continues to compute his period of continuous service from his original hire date, but does not accumulate credit units during the time he is laid off. Similarly, § 2.4 of the plan permits the employer to cancel the credit units of an employee who willfully falsifies or withholds information on which his weekly benefit is based; such cancellation would not affect the length of the employee's continuous service.

[12] Of course, since a more senior employee's wage rate is likely to reflect his longer service with the company, a senior employee often will receive a higher SUB payment than will a junior employee.

Modifications to the steel industry SUB program adopted in 1977 have increased the differentiation between less senior employees and those with greater seniority. Benefit payments for employees with 20 or more years of service will no longer be reduced because of the financial position of the fund, and the maximum number of credits that may be accumulated has been doubled, to 104. See A. Freedman, Security Bargains Reconsidered: SUB, Severance Pay, Guaranteed Work 22 (The Conference Board 1978).

[13] Respondent argues that in fact the SUB plan provides benefits in an inverse relationship to seniority. Respondent observes that, because seniority protects against layoff, the most senior employees are the least likely to receive SUB's, and by the time very senior employees are laid off their benefit payments may be reduced in amount pursuant to § 1.5 of the plan because the fund has been depleted by prior payments to less senior employees. This argument ignores that particular components of a seniority program need not invariably provide greater benefits to more senior workers. "Bumping" provisions, for example, may seldom be used by very senior employees, and yet they are unquestionably rights of seniority. In any event, the record contains no evidence of the funding history of the steel industry SUB program that would permit us to draw any conclusion as to the probability of benefit payments being reduced pursuant to § 1.5.

A benefit need not be meticulously proportioned to longevity of service to constitute a perquisite of seniority, however, as long as it performs a function akin to traditional forms of seniority. In fact, the very factors the District Court cited to show that SUB's are not forms of seniority benefits are equally relevant to demonstrate that they are not compensation for services rendered. An employee receives no benefits if he has worked for fewer than two years when he is laid off or if he voluntarily terminates his employment. Such a threshold requirement is more characteristic of seniority provisions than of compensation; in fact, other seniority benefits of the collective-bargaining agreement between Republic and the Steelworkers are also available only to employees with two years' seniority.[14] Similarly, an employee cannot accumulate more than 52 credits at a time; any work performed after that ceiling is reached goes "uncompensated." Moreover, the amount of the benefit payment is determined by four factors, none of which appears designed to compensate for hours actually worked: the wage rate at the time of layoff (not at the time the credits were earned); the number of dependents of the employee; the amount of state unemployment compensation received; and the financial position of the benefit fund.

IV

We conclude that the purpose and function of the steel industry SUB plan is to provide economic security during periods of layoff to employees who have been in the service of the employer for a significant period. Thus the benefits are in the nature of a reward for length of service, and do not represent deferred short-term compensation for services actually rendered. Accordingly, SUB payments are perquisites

[14] For example, an employee with two years' seniority who is laid off may exercise "bumping" rights over less senior employees in the seniority pool, or may transfer to another plant with priority over other applicants, including recently hired employees of the other plant.

of seniority to which returning veterans are entitled under the Act. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

EXXON CORP. v. DEPARTMENT OF REVENUE OF WISCONSIN

APPEAL FROM THE SUPREME COURT OF WISCONSIN

No. 79-509. Argued March 18, 1980—Decided June 10, 1980

Appellant, a vertically integrated petroleum company doing business in several States, was organized, during the years in question in this case, into three levels of management, one of which was responsible for directing the operating activities of the company's functional departments. Transfers of products and supplies among the three major functional departments—Exploration and Production, Refining, and Marketing—were theoretically based on competitive wholesale prices. Appellant had no exploration and production or refining operations in Wisconsin and carried out only marketing in that State. During the years in question, appellant filed income tax returns in Wisconsin using a separate geographical system of accounting which reflected only the Wisconsin marketing operations and showed a loss for each year, thus resulting in no taxes being due, but appellee Wisconsin Department of Revenue, upon auditing the returns, assessed taxes, based on appellant's total income, pursuant to Wisconsin's tax apportionment statute. Ultimately, after appellant's application for abatement had proceeded through administrative and judicial review, the Wisconsin Supreme Court held that appellant's Wisconsin marketing operations were an integral part of one unitary business and that therefore its total corporate income was subject to the statutory apportionment formula. The court further held that situs income derived from crude oil produced by appellant outside Wisconsin and transferred to its own refineries and thus part of the unitary stream of income was apportionable under the Wisconsin statute despite appellant's separate functional accounting system, and that taxation of such situs income did not impermissibly burden interstate commerce.

Held:

1. The Due Process Clause of the Fourteenth Amendment did not prevent Wisconsin from applying its statutory apportionment formula to appellant's total income. Pp. 219–225.

(a) The Due Process Clause imposes two requirements for state taxation of the income of a corporation operating in interstate commerce: a "minimal connection" or "nexus" between the corporation's interstate activities and the taxing State, and "a rational relationship between the

income attributed to the State and the intrastate values of the enterprise." *Mobil Oil Corp.* v. *Commissioner of Taxes*, 445 U. S. 425, 436–437. Such a nexus is established if the corporation "avails itself of the 'substantial privilege of carrying on business' within the State." *Id.*, at 437. Here, appellant concededly avails itself of that privilege through its marketing operations within Wisconsin. Pp. 219–220.

(b) Appellant's use of separate functional accounting by which it shows what portion of its income is derived from exploration and production and from refining—functions occurring outside Wisconsin—does not demonstrate that application of the Wisconsin apportionment statute violated the Due Process Clause. A company's internal accounting techniques are not binding on a State for tax purposes and are not required to be accepted as a matter of constitutional law for such purposes. Pp. 220–223.

(c) The "linchpin of apportionability" for state income taxation of an interstate enterprise is the "unitary-business principle." *Mobil Oil Corp.* v. *Commissioner of Taxes, supra,* at 439. If a company is a unitary business, then a State may apply an apportionment formula to the taxpayer's total income in order to obtain a "rough approximation" of the corporate income that is "reasonably related to the activities conducted within the taxing State." *Moorman Mfg. Co.* v. *Bair*, 437 U. S. 267, 273. Here, the evidence fully supports the conclusion that appellant's marketing operations in Wisconsin were an integral part of such a unitary business. And appellant's use of separate functional accounting, and its decision for purposes of corporate accountability to assign wholesale market values to interdepartmental transfers of products and supplies, do not defeat the clear and sufficient nexus between appellant's interstate activities and the taxing State. Pp. 223–225.

2. Similarly, the Due Process Clause did not preclude Wisconsin from subjecting to taxation under its statutory apportionment formula appellant's income derived from extraction of oil and gas located outside the State which was used by the Refining Department, and the State was not required to allocate such income to the situs State. There was a unitary stream of income, of which the income derived from internal transfers of raw materials from exploration and production to refining was a part. This was a sufficient nexus to satisfy the Due Process Clause, and there was also the necessary "rational relationship" between the income attributed to the State by the apportionment formula and the intrastate value of the business. Pp. 225–227.

3. The Commerce Clause did not require Wisconsin to allocate all income derived from appellant's exploration and production function to the situs State rather than include such income in the apportionment

formula. The Wisconsin taxing statute, as applied, did not subject interstate business to an unfair burden of multiple taxation. *Mobil Oil Corp.* v. *Commissioner of Taxes, supra.* The State sought to tax income, not property ownership, and it was the *risk* of multiple taxation that was being asserted, actual multiple taxation not having been shown. The Commerce Clause did not require that any income which appellant was able to separate through accounting methods and attribute to exploration and production of crude oil and gas be allocated to the States in which those production centers were located. The geographic location of such raw materials did not alter the fact that such income was part of the unitary business of appellant's interstate enterprise and was subject to fair apportionment among all States to which there was a sufficient nexus with the interstate activities. Pp. 227–230.

90 Wis. 2d 700, 281 N. W. 2d 94, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which all other Members joined except STEWART, J., who took no part in the consideration or decision of the case.

Thomas G. Ragatz argued the cause for appellant. With him on the briefs were *Leonard S. Sosnowski, Lloyd M. McBride,* and *Paul D. Frenz.*

Gerald S. Wilcox, Assistant Attorney General of Wisconsin, argued the cause for appellee. With him on the brief was *Bronson C. La Follette,* Attorney General.*

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*Briefs of *amici curiae* urging affirmance were filed by *William D. Dexter, Charles A. Groddick,* Attorney General of Alabama, *George Deukmejian,* Attorney General of California, *J. D. MacFarlane,* Attorney General of Colorado, *Richard Gebelein,* Attorney General of Delaware, *David H. Leroy,* Attorney General of Idaho, *Theodore L. Sendak,* Attorney General of Indiana, *Steven Sachs,* Attorney General of Maryland, *Frank J. Kelly,* Attorney General of Michigan, *Warren R. Spannaus,* Attorney General of Minnesota, *Mike Greely,* Attorney General of Montana, *Paul L. Douglas,* Attorney General of Nebraska, *Thomas D. Roth,* Attorney General of New Hampshire, *Jeff Bingaman,* Attorney General of New Mexico, *Rufus L. Edmisten,* Attorney General of North Carolina, *Albert R. Hausauer,* Special Assistant Attorney General of North Dakota, *James Redden,* Attorney General of Oregon, *Robert B. Hanen,* Attorney General of Utah, and *James R. Eads* for the Multistate Tax Commission et al.; and by *William J. Scott,* Attorney General of Illinois, and *Fred H. Montgomery* and *John*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This case raises three important questions regarding state taxation of the income of a vertically integrated corporation doing business in several States. The first issue is whether the Due Process Clause of the Fourteenth Amendment prevents a State from applying its statutory apportionment formula to the total corporate income of the taxpayer when the taxpayer's functional accounting separates its income into the three distinct categories of marketing, exploration and production, and refining, and when the taxpayer performs only marketing operations within the State. The second issue is whether the Due Process Clause permits a State to subject to taxation under its statutory apportionment formula income derived from the extraction of oil and gas located outside the State which is used by the refining department of the taxpayer, or whether the State is required to allocate such income to the situs State. The third issue is whether the Commerce Clause requires such an allocation to the situs State.

I

A

Appellant Exxon Corp.,[1] a vertically integrated petroleum company, is organized under the laws of Delaware with its

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D. WhiteNack, Special Assistant Attorneys General, *Carl R. Ajello*, Attorney General of Connecticut, *Francis X. Bellotti*, Attorney General of Massachusetts, and *Warren R. Spannaus*, Attorney General of Minnesota, for the State of Illinois et al.

Briefs of *amici curiae* were filed by *Theodore J. Carlson*, *Davison W. Grant*, *Joseph J. Schumm, Jr.*, and *Thomas C. Hutton* for Associated Dry Goods Corp.; and by *Frank M. Keesling, pro se*.

[1] The original taxpayer during the years in question was Humble Oil and Refining Co., a wholly owned subsidiary of Standard Oil Co. of New Jersey. In 1956, Standard Oil Co. of New Jersey organized as a wholly owned subsidiary Pate Oil Co., a Delaware corporation. Pate acquired all of the assets and liabilities of Saxon Corp., a Wisconsin company which marketed petroleum products and accessory products in that State. Pate

general offices located in Houston, Tex. During the years in question here, 1965 through 1968, appellant's corporate organization structure consisted of three parts: Corporate Management, Coordination and Services Management, and Operations Management.

Corporate Management, which was the highest order of management for the entire corporation, consisted of the board of directors, the executive committee, the chairman of the board (who was also the chief executive officer), the president, and various directors-in-charge who were members of the board of directors. Coordination and Services Management was composed of corporate staff departments which provided specialized corporate services. These services included long-range planning for the company, maximization of overall company operations, development of financial policy and procedures, financing of corporate activities, maintenance of the accounting system, legal advice, public relations, labor relations, purchase and sale of raw crude oil and raw materials, and coordination between the refining and other operating functions "so as to obtain an optimum short range operating program." App. 189; *id.*, at 187–192.[2]

The third level of management within the corporation was

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continued those marketing operations. In 1960, Pate was merged into Humble Oil and Refining Co., and the Wisconsin marketing operations were continued by that company under the brand name "Enco." In early 1973, Humble was merged into Standard Oil Co. of New Jersey, and the corporate name was changed to Exxon Corp. Exxon is the legal successor to Humble Oil and Refining Co. The taxpayer will be referred to throughout this opinion by its present name, Exxon.

[2] The corporate staff departments which were part of Coordination and Services Management, and which were not considered profit centers for accounting purposes by appellant, included: Corporate Planning Department, Secretary's Department, Supply Department, Treasury Department, Comptroller's Department, Tax Department, Law Department, Public Relations Department, Government Relations Department, Employee Relations Department, General Services Department, Medical Department, and Aviation Department. App. 189–192.

Operations Management, which was responsible for directing the operating activities of the functional departments of the company. These functional departments were Exploration and Production, Refining, Marketing, Marine, Coal and Shale Oil, Minerals, and Land Management. Each functional department was organized as a separate unit operating independently of the other operating segments, and each department had its own separate management responsible for the proper conduct of the operation. These departments were treated as separate investment centers by the company, and a profit was determined for each functional department.

At all relevant times each operating department was independently responsible for its performance. This arrangement permitted centralized management to evaluate each operation separately. Each department was therefore required to compete with the other departments for available investment funds, and with other members of the industry performing the same function for the company's raw materials and refined products. There was no requirement that appellant's crude oil go to its own refineries or that the refined products sold through marketing be produced from appellant's crude oil.

Transfers of products and raw materials among the three major functional departments—Exploration and Production, Refining, and Marketing—were theoretically based on competitive wholesale market prices. For purposes of separate functional accounting, transfers of crude oil from Exploration and Production to Refining were treated as sales at posted industry prices; transfers of products from Refining to Marketing were also based on wholesale market prices. If no readily available wholesale market value existed for a product, then representatives of the two departments involved would negotiate as to the appropriate internal transfer value.

Appellant had no exploration and production operations or refining operations in Wisconsin; the only activity carried out

in that State was marketing. The Wisconsin marketing district reported administratively to the central region office in Chicago, which in turn was responsible to the Marketing Department headquarters in Houston. App. 217. The motor oils, greases, and other packaged materials sold by appellant in Wisconsin during this period were manufactured outside the State and then shipped into that State from central warehouse facilities in Chicago. Tires, batteries, and accessories were centrally purchased through the Houston office and then shipped into Wisconsin for resale. The gasoline sold in Wisconsin was not produced by Exxon but rather was obtained from Pure Oil Co. in Illinois under an exchange agreement, permitting Exxon to reduce the cost of transporting the gasoline from its source to the retail outlets. This exchange agreement was negotiated by the Supply and Refining Departments. Additives were put into the Pure Oil gasoline in order to make the final product conform to uniform Exxon standards.

Exxon used a nationwide uniform credit card system, which was administered out of the national headquarters in Houston. Uniform packaging and brand names were used, and the overall plan for distribution of products was developed in Houston. Promotional display equipment was designed by the engineering staff at the marketing headquarters.

B

Because appellant marketed its products in Wisconsin during the calendar years 1965 through 1968, it was required to file corporate income and franchise tax returns in that State for those years. Exxon prepared the returns based on separate state accounting methods, reflecting only the Wisconsin marketing operation. The returns showed losses in the amounts of $821,320 for 1965, $1,159,830 for 1966, $1,026,224 for 1967, and $919,575 for 1968. Accordingly, no tax was shown as being due for any of those years.

Appellee Wisconsin Department of Revenue audited Exxon for the years in question, and on June 25, 1971, the Department sent the taxpayer a notice of assessment of additional income and franchise tax. The Department concluded that pursuant to Wis. Stat. § 71.07 (2) (1967)[3] the Wisconsin marketing operation was "an integral part of a unitary business," and therefore Exxon's taxable income in Wisconsin must be determined by application of the State's apportionment formula to the taxpayer's total income. The Department's calculation revealed an additional taxable income of $4,532,155 for the period 1965 through 1968. Additional

[3] Wisconsin Stat. § 71.07 (2) (1967) during this period provided in relevant part:

"Persons engaged in business within and without the state shall be taxed only on such income as is derived from business transacted and property located within the state. The amount of such income attributable to Wisconsin may be determined by an allocation and separate accounting thereof, when the business of such person within the state is not an integral part of a unitary business, provided, however, that the department of taxation may permit an allocation and separate accounting in any case in which it is satisfied that the use of such method will properly reflect the income taxable by this state. In all cases in which allocation and separate accounting is not permissible, the determination shall be made in the following manner: There shall first be deducted from the total net income of the taxpayer such part thereof (less related expenses, if any) as follows the situs of the property. . . . The remaining net income shall be apportioned to Wisconsin on the basis of the ratio obtained by taking the arithmetical average of the following 3 ratios:

"(a) The ratio of the tangible property, real, personal and mixed, owned and used by the taxpayer in Wisconsin in connection with his trade or business during the income year to the total of such property of the taxpayer owned and used by him in connection with his trade or business everywhere. . . .

"(b) . . . the ratio of the total cost of manufacturing, collecting, assembling or processing within this state to the total cost of manufacturing, or assembling or processing everywhere. . . .

"(c) . . . the ratio of the total sales made through or by offices, agencies or branches located in Wisconsin during the income year to the total net sales made everywhere during said income year."

taxes in the amount of $316,470.85 were assessed against appellant.[4]

Exxon filed an application for abatement in July 1971, which the Department denied on November 30, 1971. Appellant then filed a petition for review with the Wisconsin Tax Appeals Commission. The Commission agreed with the Department that Exxon's separate geographical accounting did not accurately reflect its Wisconsin income for tax purposes. CCH Wis. Tax Rep. ¶ 201-223, p. 10,410 (1976). However, the Commission concluded that appellant's three main functional operating departments—Exploration and Production, Refining, and Marketing—were separate unitary businesses. *Id.*, at 10,409. According to the Commission, Exxon's marketing operation in Wisconsin was an integral part of its overall marketing function, but was not an integral part of its exploration and production function nor its refining function. *Id.*, at 10,411. The Commission found that the statutory apportionment formula as applied by the Department "had the effect of imposing a tax on the [appellant's] exploration and on its refining net income, all of which was derived solely from operations outside the State of Wisconsin and which had no integral relationship to the [appellant's] marketing operations within Wisconsin." *Id.*, at 10,410. The Commission also found that taxation by Wisconsin of Exxon's net income from its exploration and production function and its refining function would subject

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[4] The additional net income was determined to be:

1965	$759,371
1966	$1,043,395
1967	$1,264,946
1968	$1,464,443

The additional tax owed was determined to be:

1965	$52,960.97
1966	$72,842.65
1967	$88,351.22
1968	$102,316.01

appellant "to multiple-state taxation as to such income." *Ibid.* The Commission therefore concluded that the Department had erred in its application of the apportionment formula since it had included "extraterritorial income," but that "apportioning income earned by the [appellant] from its marketing function within and without the State of Wisconsin, would be proper. . . ." *Id.*, at 10,411.

The Circuit Court for Dane County set aside some of the factual findings and conclusions of law of the Tax Appeals Commission. CCH Wis. Tax Rep. ¶ 201–373, pp. 10,501–10,504 (1977). In particular, the Circuit Court held that the Commission's finding that Exxon's three main functional operating departments were separate unitary businesses was an erroneous conclusion of law. *Id.*, at 10,502. Similarly, the court set aside the findings that there was no economic dependence between the Wisconsin marketing operations and Exxon's exploration and production function or its refining function. *Ibid.* Instead the court held that "[t]he Wisconsin operation contributed sales to [Exxon's] business of producing, refining and marketing petroleum products. This contribution was sufficient alone in the opinion of this Court to make [Exxon's] business a unitary one." *Ibid.* Accordingly, appellant's business during the relevant years "considered as a whole both within and without Wisconsin constituted a unitary business" within the meaning of the apportionment statute. *Ibid.*

The Circuit Court concluded, however, that another statute, Wis. Stat. § 71.07 (1) (1967),[5] excluded from income subject to the apportionment formula all situs income derived

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[5] Wisconsin Stat. § 71.07 (1) (1967) during this period provided in relevant part:

"For the purposes of taxation income or loss from business, not requiring apportionment under sub. (2), . . . shall follow the situs of the business from which derived. Income or loss derived from . . . the operation of any . . . mine . . . shall follow the situs of the property from which derived."

from appellant's oil and gas wells. CCH Wis. Tax Rep. ¶ 201-373, at 10,502–10,504. The Department had used a so-called "barrel formula" to separate two sets of income figures: income derived from the sale of crude oil to third parties, and income derived from crude oil produced by Exxon and transferred to its own refineries. The former was allocated to the situs State and excluded from Wisconsin taxable income, and the latter was included in the apportionment formula. A similar division was made of the income derived from appellant's gas production. The Circuit Court held that both sets of income were derived from the oil and gas wells and should be allocated to the situs State under the statute. The court noted that "there is no question but that the department's inclusion of [Exxon's] income derived from crude oil and gas produced and not sold to third parties by [Exxon's] production department resulted in double taxation of such income." [6] *Id.*, at 10,503.

The Wisconsin Supreme Court affirmed in part and reversed in part. 90 Wis. 2d 700, 281 N. W. 2d 94 (1979). That court concluded that the test for what constituted a unitary business was " 'whether or not the operation of the portion of the business within the state is dependent upon or contributory to the operation of the business outside the state. If there is such a relationship the business is unitary.' " *Id.*, at 711, 281 N. W. 2d, at 100, quoting G. Altman

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[6] The Circuit Court also held that on remand the Tax Appeals Commission should determine whether the Department had properly weighted the apportionment formula. The apportionment formula uses three factors: sales, property, and manufacturing costs. See n. 3, *supra*. The Department adjusted the formula as to manufacturing costs because not all of the products sold through Exxon's Marketing Department were manufactured by Exxon; the Department divided by 2.6 rather than the statutory 3. The Wisconsin Supreme Court agreed that it was an issue for the Tax Appeals Commission on remand. 90 Wis. 2d 700, 731–735, 281 N. W. 2d 94, 111–113 (1979). That particular question is not before this Court.

& F. Keesling, Allocation of Income in State Taxation 101 (2d ed. 1950). Reviewing the organizational structure and business operations of Exxon, the court reasoned that Exxon's production and refining functions were dependent on its marketing operation to provide an outlet for its products, and Wisconsin was a part of that marketing system. In a high capital investment industry such as the petroleum industry, the court found, the existence of a stable marketing system was important for the full utilization of refining capacity. 90 Wis. 2d, at 718, 281 N. W. 2d, at 104. Accordingly, the court concluded that Exxon's Wisconsin marketing operations were an integral part of one unitary business and therefore its total corporate income was subject to the statutory apportionment formula. *Id.*, at 721–722, 281 N. W. 2d, at 105–106.

The Wisconsin Supreme Court disagreed with the Circuit Court on the issue of situs income. While the extraction and production of oil and gas constituted "mining" within the meaning of Wis. Stat. § 71.07 (1) (1967), 90 Wis. 2d, at 723, 281 N. W. 2d, at 106, the court agreed with the Department that situs income which is part of the unitary stream of income is nonetheless apportionable under the statute, while situs income which does not enter the unitary stream of income is nonapportionable and must be excluded from the formula. *Id.*, at 723–724, 281 N. W. 2d, at 106–107. The Wisconsin Supreme Court rejected appellant's contention that its separate functional accounting proved that its exploration and production income was earned totally outside Wisconsin, noting that "the idea of separate functional accounting seems to be incompatible with the 'very essence of formulary apportionment, namely, that where there are integrated, interdependent steps in the economic process carried on by a business enterprise, there is no logical or viable method for accurately separating out the profit attributable to one step in the economic process from other steps.'" *Id.*, at 726, 281 N. W. 2d, at 109, quoting J. Hellerstein, State and Local Taxation 400 (3d ed. 1969). The court concluded that the

State was acting within constitutional limitations despite appellant's evidence based on separate functional accounting.

The court also rejected Exxon's argument that the sources of income derived from exploration and production were all outside of Wisconsin and therefore could not be taxed in that State without impermissibly burdening interstate commerce. According to the court, Wisconsin was taxing only its "fair share" of appellant's income, there was a substantial nexus between appellant and the State, the tax was not claimed to discriminate between interstate and intrastate commerce, and the tax was fairly related to services provided by Wisconsin. 90 Wis. 2d, at 729–731, 281 N. W. 2d, at 110–111.

Because of the importance of the issues raised, we noted probable jurisdiction, 444 U. S. 961 (1979). We now affirm.

II

We recently set forth at some length the basic principles for state taxation of the income of a business operating in interstate commerce, see *Mobil Oil Corp.* v. *Commissioner of Taxes*, 445 U. S. 425, 436–442 (1980), and need not repeat them here in great detail. It has long been settled that "the entire net income of a corporation, generated by interstate as well as intrastate activities, may be fairly apportioned among the States for tax purposes by formulas utilizing in-state aspects of interstate affairs." *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U. S. 450, 460 (1959); *Mobil Oil Corp.* v. *Commissioner of Taxes*, *supra*, at 436. See generally *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113 (1920); *Hans Rees' Sons* v. *North Carolina ex rel. Maxwell*, 283 U. S. 123 (1931); *Butler Bros.* v. *McColgan*, 315 U. S. 501 (1942); *Moorman Mfg. Co.* v. *Bair*, 437 U. S. 267 (1978). See also *Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Comm'n*, 266 U. S. 271 (1924). The Due Process Clause of the Fourteenth Amendment imposes two requirements for such state taxation: a "minimal connection" or "nexus" between the interstate activities and the taxing State, and "a

rational relationship between the income attributed to the State and the intrastate values of the enterprise." *Mobil Oil Corp.* v. *Commissioner of Taxes, supra*, at 436, 437. See *Moorman Mfg. Co.* v. *Bair, supra*, at 272–273; *National Bellas Hess, Inc.* v. *Department of Revenue*, 386 U. S. 753, 756 (1967); *Norfolk & Western R. Co.* v. *State Tax Comm'n*, 390 U. S. 317, 325 (1968). The tax cannot be "out of all appropriate proportion to the business transacted by the appellant in that State." *Hans Rees' Sons* v. *North Carolina ex rel. Maxwell, supra*, at 135.

The nexus is established if the corporation "avails itself of the 'substantial privilege of carrying on business' within the State." *Mobil Oil Corp.* v. *Commissioner of Taxes, supra*, at 437, quoting *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 444–445 (1940). In the present case, Exxon does not dispute that it avails itself of that privilege through its marketing operations within Wisconsin. Appellant contends, however, that this nexus is insufficient to permit inclusion of all of Exxon's corporate income within the apportionment formula. While appellant appears to concede that Wisconsin may properly apply its apportionment statute to Exxon's Marketing Department income as established by its separate functional accounting, see Brief for Appellant 18, 29, 33; Reply Brief for Appellant 2–3, it argues that it has demonstrated through its accounting method what portion of its income is derived from exploration and production and from refining—functions which do not occur in Wisconsin and of which the marketing operation in that State is not an integral part.

Appellant relies heavily on *Moorman Mfg. Co.* v. *Bair, supra*. The principal issue in that case was whether the single-factor sales formula used by Iowa to apportion for income tax purposes the income of an interstate business was prohibited by either the Due Process Clause or the Commerce Clause. In the course of that decision we noted that "[a]ppellant does not suggest that it has shown that a significant portion of the income attributed to Iowa in fact was gen-

erated by its Illinois operations; the record does not contain any separate accounting analysis showing what portion of appellant's profits was attributable to sales, to manufacturing, or to any other phase of the company's operations." 437 U. S., at 272. See also *id.*, at 275, n. 9. Exxon contends that *Moorman* sanctions the use of separate functional accounting in order to prove the extraterritorial reach of a state tax statute, and that its accounting in this case demonstrates that the Wisconsin Supreme Court's application of the state apportionment statute violates the Due Process Clause.

We cannot agree. As this Court has on several occasions recognized, a company's internal accounting techniques are not binding on a State for tax purposes. For example, in *Butler Bros.* v. *McColgan, supra,* an interstate business challenged the application of the California apportionment statute. The company was engaged in the wholesale dry goods and general merchandise business as a middleman, and it had distributing houses in seven States, including one in California. Each house maintained stocks of goods, had a cognizable territory, had its own sales force, did its own solicitation of sales, made its own credit and collection arrangements, and kept its own books. There was, however, a central buying division that was able to purchase goods for resale at a lower price. The company used "recognized accounting principles," 315 U. S., at 505, to allocate all costs and charges to each house, with certain centralized expenses allocated among the houses. Based on that "separate accounting system," *id.*, at 507, the business asserted there was no net income in California.

We concluded that California could constitutionally apply its apportionment formula to the company's total net income to establish taxable income, rather than being limited to the income shown by the taxpayer's accounting methods to be attributable to the one house in that State. The company had the "distinct burden of showing by 'clear and cogent evidence' that it results in extraterritorial values being taxed,"

ibid., quoting *Norfolk & Western R. Co.* v. *North Carolina ex rel. Maxwell*, 297 U. S. 682, 688 (1936), and the taxpayer's accounting evidence was insufficient to meet that burden.

> "[W]e need not impeach the integrity of that accounting system to say that it does not prove appellant's assertion that extraterritorial values are being taxed. Accounting practices for income statements may vary considerably according to the problem at hand. . . . A particular accounting system, though useful or necessary as a business aid, may not fit the different requirements when a State seeks to tax values created by business within its borders. . . . That may be due to the fact, as stated by Mr. Justice Brandeis in *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113, 121, that a State in attempting to place upon a business extending into several States 'its fair share of the burden of taxation' is 'faced with the impossibility of allocating specifically the profits earned by the processes conducted within its borders.' Furthermore, the particular system used may not reveal the facts basic to the State's determination. *Bass, Ratcliff & Gretton, Ltd.* v. *Tax Commission, supra*, p. 283. In either aspect of the matter, the results of the accounting system employed by appellant do not impeach the validity or propriety of the formula which California has applied here." 315 U. S., at 507–508.

Similarly, in *Mobil Oil Corp.* v. *Commissioner of Taxes*, we noted that "separate accounting, while it purports to isolate portions of income received in various States, may fail to account for contributions to income resulting from functional integration, centralization of management, and economies of scale." 445 U. S., at 438. Since such factors arise "from the operation of the business as a whole, it becomes misleading to characterize the income of the business as having a single identifiable 'source.' Although separate geographical

accounting may be useful for internal auditing, for purposes of state taxation it is not constitutionally required." *Ibid.*[7]

The dicta in *Moorman* upon which appellant relies are not incompatible with these principles. In *Moorman* we simply noted that the taxpayer had made no showing that its Illinois operations were responsible for profits from sales in Iowa. This hardly leads to the conclusion, urged by Exxon here, that a taxpayer's separate functional accounting, if it purports to separate out income from various aspects of the business, must be accepted as a matter of constitutional law for state tax purposes. Such evidence may be helpful, but *Moorman* in no sense renders such accounting conclusive.[8]

The "linchpin of apportionability" for state income taxation of an interstate enterprise is the "unitary-business principle." *Mobil Oil Corp.* v. *Commissioner of Taxes, supra,* at 439. If a company is a unitary business, then a State may apply an apportionment formula to the taxpayer's total income in order to obtain a "rough approximation" of the corporate income that is "reasonably related to the activities conducted within the taxing State." *Moorman Mfg. Co.* v. *Bair,* 437 U. S., at 273. See also *Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S., at 120. In order to exclude certain income from the apportionment formula, the company must prove that "the income was earned in the course of activities unrelated to the sale of petroleum products in that State." *Mobil Oil Corp.* v. *Commissioner of Taxes, supra,* at 439. The court looks to the "underlying economic realities of a

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[7] The fact that Exxon in the present case relies on its own separate *functional* accounting rather than separate *geographic* accounting, which it had used initially in preparing its Wisconsin income tax returns, does not make the principles expressed in *Mobil Oil Corp.* v. *Commissioner of Taxes* any less applicable.

[8] In reaching this conclusion we need not challenge the integrity of Exxon's separate functional accounting for its own internal purposes. See *Butler Bros* v. *McColgan,* 315 U. S. 501, 507 (1942).

unitary business," and the income must derive from "unrelated business activity" which constitutes a "discrete business enterprise." 445 U. S., at 441, 442, 439.

We agree with the Wisconsin Supreme Court that Exxon is such a unitary business and that Exxon has not carried its burden of showing that its functional departments are "discrete business enterprises" whose income is beyond the apportionment statute of the State. While Exxon may treat its operational departments as independent profit centers, it is nonetheless true that this case involves a highly integrated business which benefits from an umbrella of centralized management and controlled interaction.

As has already been noted, Exxon's Coordination and Services Management provided many essential corporate services for the entire company, including the coordination of the refining and other operational functions "to obtain an optimum short range operating program." App. 189. Many of the items sold by appellant in Wisconsin were obtained through a centralized purchasing office in Houston whose obvious purpose was to increase overall corporate profits through bulk purchases and efficient allocation of supplies among retailers. Cf. *Butler Bros.* v. *McColgan*, 315 U. S., at 508 ("the operation of the central buying division alone demonstrates that functionally the various branches are closely integrated"). Even the gasoline sold in Wisconsin was available only because of an exchange agreement with another company arranged by the Supply Department, part of the Coordination and Services Management, and the Refining Department. Similarly, sales were facilitated through the use of a uniform credit card system, uniform packaging, brand names, and promotional displays, all run from the national headquarters.

The important link among the three main operating departments of appellant was stated most clearly in the

testimony of an Exxon senior vice president. This official testified:

> "[I]n any industry which is highly capital intensive, such as the petroleum industry, the fixed operating costs are highly relative to total operating costs, and for this reason the profitability of such an industry is very sensitive and directly related to the full utilization of the capacity of the facilities.
>
> "So, in the case of the petroleum industry it is—where you have high capital investments in refineries, the existence of an assured supply of raw materials and crude is important and the assured and stable outlet for products is important, and therefore when there are—when these segments are under a single corporate entity, it provides for some assurance that the risk of disruptions in refining operations are minimized due to supply and demand imbalances that may occur from time to time.
>
> . . . . .
>
> "[T]he placing individual segments under one corporate entity does provide greater profits stability for the reason that . . . nonparallel and nonmutual economic factors which may affect one department may be offset by the factors existing in another department." App. 224–225.

The evidence fully supports the conclusion of the court below that appellant's marketing operation in Wisconsin is an integral part of a unitary business. Exxon's use of separate functional accounting, and its decision for purposes of corporate accountability to assign wholesale market values to interdepartmental transfers of products and supplies, does not defeat the clear and sufficient nexus between appellant's interstate activities and the taxing State.

The same analysis disposes of the other prong of Exxon's Due Process Clause attack on the Wisconsin statute. Appellant contends that at least the income derived from explora-

tion and production must be treated as situs income and allocated to the situs State rather than included in the apportionment statute.[9] Appellee did in fact exclude that income derived from the sale of crude oil and gas at the wellhead to third parties. However, the Department of Revenue concluded that the income characterized through appellant's separate functional accounting as income derived from intercorporate transfer of crude oil and gas for refining was part of the "unitary stream" of Exxon's income and apportionable.

We agree with appellee. As previously noted, appellant's internal accounting system is not binding on the State for tax purposes. The decision to assign wholesale market values to internal transfers of raw materials for corporate accountability does not change the unitary nature of appellant's business. An effective marketing operation is important to assure full or nearly full use of the refining capacities. Obviously the quality of the refined product affects the marketing operation. And the success of the Exploration and Production Department helps to keep the refineries operating at a capacity which is cost-efficient. There is indeed a unitary stream of income, of which the income derived from internal transfers of raw materials from exploration and production to refining is a part.[10] There is a sufficient nexus to satisfy the Due Process Clause.

There is also the necessary "rational relationship" between the income attributed to the State by the apportionment for-

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[9] Exxon also appears to suggest that the state statute requires allocation to the situs State of such income rather than apportionment. See Brief for Appellant 31–32, 40–41. That, of course, is a matter of state statutory construction which the Wisconsin Supreme Court, as the final arbiter of that State's law, has decided against appellant.

[10] Since appellee determined that income derived from the sale of crude oil and gas at the wellhead to third parties must, under the state statute, be allocated to the situs State and excluded from the reach of the apportionment statute, we need not address the issue of whether the Due Process Clause would require such allocation rather than apportionment.

mula and the intrastate value of the business. Exxon had a total of $60,073,293 in sales income from its Wisconsin operation in the years 1965 through 1968. App. 799. The Wisconsin assessed taxable income for the four years in question represented 0.22 percent of total company net income adjusted to the Wisconsin basis, and Exxon's Wisconsin sales for those years represented 0.41 percent of total company sales. 90 Wis. 2d, at 729, 281 N. W. 2d, at 110. This is hardly a case where the State has used its formula to attribute income "out of all appropriate proportion to the business transacted . . . in that State," *Hans Rees' Sons* v. *North Carolina ex rel. Maxwell*, 283 U. S., at 135, and application of the formula has not "led to a grossly distorted result," *Norfolk & Western R. Co.* v. *State Tax Comm'n*, 390 U. S., at 326. See also *Moorman Mfg. Co.* v. *Bair*, 437 U. S., at 274. That Exxon's Wisconsin marketing operation, through the use of separate geographic accounting, failed to show a net profit for the years in question does not change this rational relationship. *Butler Bros.* v. *McColgan*, 315 U. S., at 507–508; *Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Comm'n*, 266 U. S., at 284. Cf. *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S., at 120. The Wisconsin Supreme Court's application of Wis. Stat. §§ 71.07 (1) and (2) (1967) in this case does not violate the Due Process Clause of the Fourteenth Amendment.

III

Appellant also contends that the Commerce Clause requires allocation of all income derived from its exploration and production function to the situs State rather than inclusion of such income in the apportionment formula.[11] The Court must therefore examine the "practical effect" of the tax to

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[11] Because of appellee's construction of the state statute involved, we do not here address the issue of whether the Commerce Clause requires allocation of income derived from the sale of crude oil and gas at the wellhead to third parties to the situs State rather than apportionment.

determine whether it "'is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State.'" *Mobil Oil Corp.* v. *Commissioner of Taxes*, 445 U. S., at 443, quoting *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274, 279 (1977). See also *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U. S. 434, 444–445 (1979); *Washington Revenue Dept.* v. *Stevedoring Assn.*, 435 U. S. 734, 750 (1978).

It has already been demonstrated that the necessary nexus is present and that the tax is fairly apportioned. Similarly, appellant does not contest the conclusion that the tax is fairly related to the services rendered by Wisconsin, which include police and fire protection, the benefit of a trained work force, and "the advantages of a civilized society." *Japan Line, Ltd.* v. *County of Los Angeles, supra*, at 445. Exxon asserts, however, that Wisconsin's taxing statute, as applied, subjects interstate business to an unfair burden of multiple taxation.

We were faced with a very similar argument in *Mobil Oil Corp.* v. *Commissioner of Taxes, supra*, and we reject it now for the same reasons we rejected it in that case. Here, as in that prior case, the State seeks to tax income, not property ownership. Similarly, it is the *risk* of multiple taxation that is being asserted; actual multiple taxation has not been shown.[12] While of course "the constitutionality of a [Wiscon-

[12] Appellant presses the argument here that the *risk* of multiple taxation of income violates the Commerce Clause. Brief for Appellant 46–48; Reply Brief for Appellant 15–18; Supplemental Brief for Appellant 8. There was testimony by one witness before the Tax Appeals Commission that some States imposed "severance taxes" on oil and gas production. App. 432. Based on this brief testimony, the Tax Appeals Commission concluded that application of the state apportionment formula to Exxon's net income from its exploration, production, and refining functions subjected that income to multiple taxation, CCH Wis. Tax Rep. ¶ 201–223, p. 10,410 (1976), and the Circuit Court for Dane County reached a similar result solely as to the exploration and production income, CCH Wis. Tax Rep. ¶ 201–373, p. 10,503 (1977). Severance taxes, however, are directed

sin] tax should not depend on the vagaries of [another State's] tax policy," nonetheless "the absence of any existing duplicative tax does alter the nature of appellant's claim." *Id.*, at 444. Exxon asserts, in essence, that the Commerce Clause requires allocation of exploration and production income to the situs State rather than apportionment among the States, regardless of the situs State's actual tax policy. Cf. *ibid.* (dividend income).

We do not agree. As was the case with income from intangibles, there is nothing "talismanic" about the concept of situs for income from exploration and production of crude oil and gas. *Id.*, at 445. Presumably, the States in which appellant's crude oil and gas production is located are permitted to tax in some manner the income derived from that production, there being an obvious nexus between the taxpayer and those States. However, "there is no reason in theory why that power should be exclusive when the [exploration and production income as distinguished through separate functional accounting] reflect[s] income from a unitary business, part of which is conducted in other States. In that situation, the income bears relation to benefits and privileges conferred by several States. These are the circumstances in which apportionment is ordinarily the accepted method." *Id.*, at 445–446.

In short, the Commerce Clause does not require that any income which a taxpayer is able to separate through account-

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at the gross value of the mineral extracted or the quantity of production rather than the net income derived from the production activities. See R. Sullivan, Handbook of Oil and Gas Law § 238, p. 490 (1955); 4 W. Summers, The Law of Oil and Gas § 801 (1938). See, *e. g.*, La. Rev. Stat. Ann. §§ 47:633 (7) and (9) (West Supp. 1980). The Wisconsin Supreme Court therefore properly concluded that "[t]he fact that the producing states may impose . . . severance taxes which have been held to be occupation taxes or property taxes does not render unfair or unconstitutional Wisconsin's efforts to reach a proportionate share of the taxpayer's income." 90 Wis. 2d, at 731, 281 N. W. 2d, at 110–111 (footnotes omitted).

ing methods and attribute to exploration and production of crude oil and gas be allocated to the States in which those production centers are located. The geographic location of such raw materials does not alter the fact that such income is part of the unitary business of the interstate enterprise and is subject to fair apportionment among all States to which there is a sufficient nexus with the interstate activities of the business.

The judgment of the Supreme Court of Wisconsin is

Affirmed.

Mr. Justice Stewart took no part in the consideration or decision of this case.

JENKINS v. ANDERSON, WARDEN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 78-6809. Argued January 8, 1980—Decided June 10, 1980

At his trial in a Michigan state court for first-degree murder, petitioner testified that he acted in self-defense. On cross-examination, the prosecutor questioned petitioner about the fact that he was not apprehended until he surrendered to governmental authorities about two weeks after the killing, and in closing argument again referred to petitioner's prearrest silence, thereby attempting to impeach petitioner's credibility by suggesting that he would have spoken out if he had killed in self-defense. Petitioner was convicted of manslaughter, and after his conviction was affirmed in the state courts he sought habeas corpus relief in Federal District Court, contending that his constitutional rights were violated when the prosecutor questioned him concerning prearrest silence. The District Court denied relief, and the Court of Appeals affirmed.

Held:

1. The Fifth Amendment, as applied to the States through the Fourteenth Amendment, is not violated by the use of prearrest silence to impeach a criminal defendant's credibility. While the Fifth Amendment prevents the prosecution from commenting on the silence of a defendant who asserts the right to remain silent during his criminal trial, it is not violated when a defendant who testifies in his own defense is impeached with his prior silence. Impeachment follows the defendant's own decision to cast aside his cloak of silence and advances the truthfinding function of the criminal trial. Cf. *Raffel* v. *United States*, 271 U. S. 494; *Harris* v. *New York*, 401 U. S. 222; *Brown* v. *United States*, 356 U. S. 148. Pp. 235–238.

2. Nor does the use of prearrest silence to impeach a defendant's credibility deny him the fundamental fairness guaranteed by the Fourteenth Amendment. Common law traditionally has allowed witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted. And each jurisdiction may formulate its own rules of evidence to determine when prior silence is so inconsistent with present statements that impeachment by reference to such silence is probative. In this case, in which no governmental action induced petitioner to remain silent before arrest, *Doyle* v. *Ohio*, 426 U. S. 610, is inapplicable. Pp. 238–240.

3. A state court is not required to allow impeachment through the use of prearrest silence. Each jurisdiction is free to formulate evidentiary rules defining the situations in which silence is viewed as more probative than prejudicial. Pp. 240–241.

599 F. 2d 1055, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and REHNQUIST, JJ., joined; and in all but Part II of which STEWART, J., joined. STEWART, J., filed a statement concurring in part, *post*, p. 241. STEVENS, J., filed an opinion concurring in the judgment, in Part I of which STEWART, J., joined, *post*, p. 241. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 245.

Carl Ziemba, by appointment of the Court, 444 U. S. 914, argued the cause and filed a brief for petitioner.

Robert A. Derengoski, Solicitor General of Michigan, argued the cause for respondent. With him on the brief were *Frank J. Kelley*, Attorney General, and *Thomas L. Casey*, Assistant Attorney General.

MR. JUSTICE POWELL delivered the opinion of the Court.

The question in this case is whether the use of prearrest silence to impeach a defendant's credibility violates either the Fifth or the Fourteenth Amendment to the Constitution.

I

On August 13, 1974, the petitioner stabbed and killed Doyle Redding. The petitioner was not apprehended until he turned himself in to governmental authorities about two weeks later. At his state trial for first-degree murder, the petitioner contended that the killing was in self-defense.

The petitioner testified that his sister and her boyfriend were robbed by Redding and another man during the evening of August 12, 1974. The petitioner, who was nearby when the robbery occurred, followed the thieves a short distance and reported their whereabouts to the police. According to the petitioner's testimony, the next day he encountered Red-

ding, who accused him of informing the police of the robbery. The petitioner stated that Redding attacked him with a knife, that the two men struggled briefly, and that the petitioner broke away. On cross-examination, the petitioner admitted that during the struggle he had tried "[t]o push that knife in [Redding] as far as [I] could," App. 36, but maintained that he had acted solely in self-defense.

During the cross-examination, the prosecutor questioned the petitioner about his actions after the stabbing:

> "Q. And I suppose you waited for the Police to tell them what happened?
>
> "A. No, I didn't.
>
> "Q. You didn't?
>
> "A. No.
>
> "Q. I see.
>
> "And how long was it after this day that you were arrested, or that you were taken into custody?" *Id.*, at 33.

After some discussion of the date on which petitioner surrendered, the prosecutor continued:

> "Q. When was the first time that you reported the things that you have told us in Court today to anybody?
>
> "A. Two days after it happened.
>
> "Q. And who did you report it to?
>
> "A. To my probation officer.
>
> "Q. Well, apart from him?
>
> "A. No one.
>
> "Q. Who?
>
> "A. No one but my—
>
> "Q. (Interposing) Did you ever go to a Police Officer or to anyone else?
>
> "A. No, I didn't.
>
> "Q. As a matter of fact, it was two weeks later, wasn't it?
>
> "A. Yes." *Id.*, at 34.

In closing argument to the jury, the prosecutor again referred to the petitioner's prearrest silence The prosecutor noted that petitioner had "waited two weeks, according to the testimony—at least two weeks before he did anything about surrendering himself or reporting [the stabbing] to anybody." *Id., at* 43. The prosecutor contended that the petitioner had committed murder in retaliation for the robbery the night before.

The petitioner was convicted of manslaughter and sentenced to 10 to 15 years' imprisonment in state prison. The Michigan Court of Appeals affirmed the conviction, and the Michigan Supreme Court denied leave to appeal. The petitioner then sought a writ of habeas corpus from the Federal District Court for the Eastern District of Michigan, contending that his constitutional rights were violated when the prosecutor questioned him concerning prearrest silence. A Federal Magistrate concluded that the petition for habeas corpus relief should be denied. The District Court adopted the Magistrate's recommendation. The United States Court of Appeals for the Sixth Circuit affirmed. 599 F. 2d 1055. This Court granted a writ of certiorari. 444 U. S. 824 (1979). We now affirm.[1]

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[1] The petitioner did not raise his constitutional claims during his state-court trial. Thus, the respondent argues that the rule of *Wainwright* v. *Sykes*, 433 U. S. 72 (1977), bars consideration of the petitioner's habeas petition. But the respondent failed to raise the *Sykes* question in either the District Court or the Court of Appeals. Ordinarily, we will not consider a claim that was not presented to the courts below. See *Dorszynski* v. *United States*, 418 U. S. 424, 431, n. 7 (1974). Considerations of judicial efficiency demand that a *Sykes* claim be presented before a case reaches this Court. The applicability of the *Sykes* "cause"-and-"prejudice" test may turn on an interpretation of state law. See *Rummel* v. *Estelle*, 445 U. S. 263, 267, n. 7 (1980). This Court's resolution of such a state-law question would be aided significantly by the views of other federal courts that may possess greater familiarity with Michigan law. Furthermore, application of the "cause"-and-"prejudice" standard may

II

At trial the prosecutor attempted to impeach the petitioner's credibility by suggesting that the petitioner would have spoken out if he had killed in self-defense. The petitioner contends that the prosecutor's actions violated the Fifth Amendment as applied to the States through the Fourteenth Amendment. The Fifth Amendment guarantees an accused the right to remain silent during his criminal trial, and prevents the prosecution from commenting on the silence of a defendant who asserts the right. *Griffin* v. *California*, 380 U. S. 609, 614 (1965). In this case, of course, the petitioner did not remain silent throughout the criminal proceedings. Instead, he voluntarily took the witness stand in his own defense.

This Court's decision in *Raffel* v. *United States*, 271 U. S. 494 (1926), recognized that the Fifth Amendment is not violated when a defendant who testifies in his own defense is impeached with his prior silence. The defendant in *Raffel* was tried twice. At the first trial, a Government agent testified that Raffel earlier had made an inculpatory statement. The defendant did not testify. After the first trial ended in deadlock the agent repeated his testimony at the second trial, and Raffel took the stand to deny making such a statement. Cross-examination revealed that Raffel had not testified at the first trial. *Id.*, at 495, n. The Court held that inquiry into prior silence was proper because "[t]he immunity from giving testimony is one which the defendant may waive by offering himself as a witness. . . . When he takes the stand in his own behalf, he does so as any other witness, and within the limits of the appropriate rules he may be cross-examined. . . ." *Id.*, at 496–497. Thus, the *Raffel* Court concluded that the defendant was "subject to cross-examina-

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turn on factual findings that should be made by a district court. Accordingly, we do not consider the *Sykes* issue in this case.

tion impeaching his credibility just like any other witness." *Grunewald* v. *United States*, 353 U. S. 391, 420 (1957).[2]

It can be argued that a person facing arrest will not remain silent if his failure to speak later can be used to impeach him. But the Constitution does not forbid "every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights." *Chaffin* v. *Stynchcombe*, 412 U. S. 17, 30 (1973). See *Corbitt* v. *New Jersey*, 439 U. S. 212, 218, and n. 8 (1978). The "'threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved.'" *Chaffin* v. *Stynchcombe*, *supra*, at 32, quoting *Crampton* v. *Ohio*, decided with *McGautha* v. *California*, 402 U. S. 183, 213 (1971).[3] The *Raffel* Court ex-

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[2] In *Raffel*, the defendant's decision not to testify at his first trial was an invocation of his right to remain silent protected by the Fifth Amendment. In this case, the petitioner remained silent before arrest, but chose to testify at his trial. Our decision today does not consider whether or under what circumstances prearrest silence may be protected by the Fifth Amendment. We simply do not reach that issue because the rule of *Raffel* clearly permits impeachment even if the prearrest silence were held to be an invocation of the Fifth Amendment right to remain silent.

[3] In *Crampton* v. *Ohio*, the Court considered a claim that a murder defendant's right to remain silent was burdened unconstitutionally because he could not argue for mitigation of punishment without risking incrimination on the question of guilt. The Court recognized that a defendant who speaks in his own defense cannot avoid testifying fully.

"It has long been held that a defendant who takes the stand in his own behalf cannot then claim the privilege against cross-examination on matters reasonably related to the subject matter of his direct examination. See, *e. g.*, *Brown* v. *Walker*, 161 U. S. 591, 597–598 (1896); *Fitzpatrick* v. *United States*, 178 U. S. 304, 314–316 (1900); *Brown* v. *United States*, 356 U. S. 148 (1958). It is not thought overly harsh in such situations to require that the determination whether to waive the privilege take into account the matters which may be brought out on cross-examination. It is also generally recognized that a defendant who takes the stand in his own behalf may be impeached by proof of prior convictions or the like. See *Spencer* v. *Texas*, 385 U. S. [554, 561 (1967)]; cf. *Michelson* v. *United States*, 335 U. S. 469 (1948); but cf. *Luck* v. *United States*, 121 U. S.

plicitly rejected the contention that the possibility of impeachment by prior silence is an impermissible burden upon the exercise of Fifth Amendment rights. "We are unable to see that the rule that [an accused who] testifies . . . must testify fully, adds in any substantial manner to the inescapable embarrassment which the accused must experience in determining whether he shall testify or not." 271 U. S., at 499.[4]

This Court similarly defined the scope of the Fifth Amendment protection in *Harris* v. *New York*, 401 U. S. 222 (1971). There the Court held that a statement taken in violation of *Miranda* v. *Arizona*, 384 U. S. 436 (1966), may be used to impeach a defendant's credibility. Rejecting the contention that such impeachment violates the Fifth Amendment, the Court said:

> "Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege

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App. D. C. 151, 348 F. 2d 763 (1965); *United States* v. *Palumbo*, 401 F. 2d 270 (CA2 1968)." 402 U. S., at 215.

The Court concluded that "the policies of the privilege against compelled self-incrimination are not offended when a defendant in a capital case yields to the pressure to testify on the issue of punishment at the risk of damaging his case on guilt." *Id.*, at 217. Subsequently, a petition for rehearing in *Crampton* was granted and the underlying state-court decision was vacated on Eighth Amendment grounds. 408 U. S. 941 (1972).

[4] Both MR. JUSTICE STEVENS, *post*, at 241–242, n. 2, and MR. JUSTICE MARSHALL, *post*, at 252, suggest that the constitutional rule of *Raffel* was limited by later decisions of the Court. In fact, no Court opinion decided since *Raffel* has challenged its holding that the Fifth Amendment is not violated when a defendant is impeached on the basis of his prior silence. In *United States* v. *Hale*, 422 U. S. 171, 175, n. 4 (1975), the Court expressly declined to consider the constitutional question. The decision in *Stewart* v. *United States*, 366 U. S. 1 (1961), was based on federal evidentiary grounds, not on the Fifth Amendment. The Court in *Grunewald* v. *United States*, 353 U. S. 391, 421 (1957), stated that it was not required to re-examine *Raffel*. In all three cases, the Court merely considered the question whether, as a matter of federal evidentiary law, prior silence was sufficiently inconsistent with present statements as to be admissible. See also n. 6, *infra*.

> cannot be construed to include the right to commit perjury. . . . Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process." 401 U. S., at 225.

See also *Oregon* v. *Hass*, 420 U. S. 714, 721–723 (1975); *Walder* v. *United States*, 347 U. S. 62, 65 (1954).

In determining whether a constitutional right has been burdened impermissibly, it also is appropriate to consider the legitimacy of the challenged governmental practice. See *Chaffin* v. *Stynchcombe, supra*, at 32, and n. 20. Attempted impeachment on cross-examination of a defendant, the practice at issue here, may enhance the reliability of the criminal process. Use of such impeachment on cross-examination allows prosecutors to test the credibility of witnesses by asking them to explain prior inconsistent statements and acts. A defendant may decide not to take the witness stand because of the risk of cross-examination. But this is a choice of litigation tactics. Once a defendant decides to testify, "[t]he interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination." *Brown* v. *United States*, 356 U. S. 148, 156 (1958).

Thus, impeachment follows the defendant's own decision to cast aside his cloak of silence and advances the truth-finding function of the criminal trial. We conclude that the Fifth Amendment is not violated by the use of prearrest silence to impeach a criminal defendant's credibility.

III

The petitioner also contends that use of prearrest silence to impeach his credibility denied him the fundamental fairness guaranteed by the Fourteenth Amendment. We do not

agree. Common law traditionally has allowed witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted. 3A J. Wigmore, Evidence § 1042, p. 1056 (Chadbourn rev. 1970). Each jurisdiction may formulate its own rules of evidence to determine when prior silence is so inconsistent with present statements that impeachment by reference to such silence is probative. For example, this Court has exercised its supervisory powers over federal courts to hold that prior silence cannot be used for impeachment where silence is not probative of a defendant's credibility and where prejudice to the defendant might result. See *United States* v. *Hale*, 422 U. S. 171, 180–181 (1975); *Stewart* v. *United States*, 366 U. S. 1, 5 (1961); *Grunewald* v. *United States*, 353 U. S., at 424.[5]

Only in *Doyle* v. *Ohio*, 426 U. S. 610 (1976), did we find that impeachment by silence violated the Constitution. In that case, a defendant received the warnings required by *Miranda* v. *Arizona*, *supra*, at 467–473, when he was arrested for selling marihuana. At that time, he made no statements to the police. During his subsequent trial, the defendant testified that he had been framed. The prosecutor impeached the defendant's credibility on cross-examination by revealing that the defendant remained silent after his arrest. The State argued that the prosecutor's actions were permissible, but we concluded that "the *Miranda* decision compels rejection of the State's position." 426 U. S., at 617. *Miranda*

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[5] MR. JUSTICE MARSHALL contends that the petitioner's prearrest silence is not probative of his credibility. *Post*, at 248–250. In this case, that is a question of state evidentiary law. In a federal criminal proceeding the relevance of such silence, of course, would be a matter of federal law. See *United States* v. *Hale*, *supra*, at 181. MR. JUSTICE MARSHALL's further conclusion that introduction of the evidence in this trial violated due process relies upon the Court's reasoning in *Doyle* v. *Ohio*, 426 U. S. 610 (1976), and *United States* v. *Hale*. *Post*, at 246–250. But the Court's decision in *Hale* rested upon nonconstitutional grounds, see n. 4, *supra*, and *Doyle* is otherwise distinguishable, see *infra*, at 240.

warnings inform a person that he has the right to remain silent and assure him, at least implicitly, that his subsequent decision to remain silent cannot be used against him. Accordingly, " 'it does not comport with due process to permit the prosecution during the trial to call attention to his silence at the time of arrest and to insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony.' " *Id.*, at 619, quoting *United States* v. *Hale, supra,* at 182–183 (WHITE, J., concurring in judgment).[6]

In this case, no governmental action induced petitioner to remain silent before arrest. The failure to speak occurred before the petitioner was taken into custody and given *Miranda* warnings. Consequently, the fundamental unfairness present in *Doyle* is not present in this case. We hold that impeachment by use of prearrest silence does not violate the Fourteenth Amendment.

IV

Our decision today does not force any state court to allow impeachment through the use of prearrest silence. Each jurisdiction remains free to formulate evidentiary rules defining the situations in which silence is viewed as more probative than prejudicial. We merely conclude that the use of prearrest silence to impeach a defendant's credibility does not

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[6] The Court reached a similar result in *Johnson* v. *United States,* 318 U. S. 189 (1943). A trial judge mistakenly told a defendant that he could claim the privilege against self-incrimination. After the defendant invoked the privilege, the prosecutor commented on the defendant's refusal to speak. Under its supervisory power, this Court held that the prosecutor's comments constituted error because the trial court had assured the defendant that he might claim the protections of the Fifth Amendment. The Court stated that "[e]lementary fairness requires that an accused should not be misled on that score." *Id.*, at 197; see *Doyle* v. *Ohio, supra,* at 618, n. 9. See also *Raley* v. *Ohio,* 360 U. S. 423, 437–438 (1959).

violate the Constitution. The judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE STEWART concurs in the judgment, agreeing with all but Part II of the opinion of the Court, and with Part I of the opinion of MR. JUSTICE STEVENS concurring in the judgment.

MR. JUSTICE STEVENS, concurring in the judgment.

My approach to both of petitioner's constitutional claims differs from the Court's. I would reject his Fifth Amendment claim because the privilege against compulsory self-incrimination [1] is simply irrelevant to a citizen's decision to remain silent when he is under no official compulsion to speak. I would reject his due process claim for the reasons stated in my dissenting opinion in *Doyle* v. *Ohio,* 426 U. S. 610, 620.

I

The Court holds that a defendant who elects to testify in his own behalf waives any Fifth Amendment objection to the use of his prior silence for the purpose of impeachment. As the Court correctly points out, this holding is squarely supported by *Raffel* v. *United States,* 271 U. S. 494, in which the Court upheld the use of a defendant's failure to take the stand at his first trial to impeach his testimony on retrial. Nevertheless, I would not rely on *Raffel* because such reliance incorrectly implies that a defendant's decision not to testify at his own trial is constitutionally indistinguishable from his silence in a precustody context.[2] But the two situations are fundamentally different.

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[1] The Fifth Amendment provides in pertinent part:

"No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

[2] Moreover, there is a serious question about the continuing vitality of *Raffel.* In *Johnson* v. *United States,* 318 U. S. 189, 199, the Court stated that when a trial judge "grants the claim of privilege but allows

In the trial context it is appropriate to presume that a defendant's silence is an exercise of his constitutional privilege and to prohibit any official comment that might deter him from exercising that privilege.[3] For the central purpose of the Fifth Amendment privilege is to protect the defendant from being compelled to testify against himself at his own trial.[4] Moreover, since a defendant's decision whether to tes-

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it to be used against the accused to his prejudice, we cannot disregard the matter. That procedure has such potentialities of oppressive use that we will not sanction its use in the federal courts over which we have supervisory powers."

In *Grunewald* v. *United States*, 353 U. S. 391, 415–424, the Court held that it was error to permit the prosecutor, when cross-examining the defendant at trial, to use his assertion of the Fifth Amendment privilege while a witness before the grand jury for impeachment. In effect, the Court limited *Raffel* to cases in which the probative value of the cross-examination outweighed its possible impermissible effect on the jury; see 353 U. S., at 420–421. Because the Court held the probative value of the assertion of privilege to be negligible on the issue of the defendant's credibility, it was "not faced with the necessity of deciding whether *Raffel* has been stripped of vitality by the later *Johnson* case, *supra*, or of otherwise re-examining *Raffel*." *Id.*, at 421. Mr. Justice Black, writing for four Justices, would have expressly overruled *Raffel*. He could "think of no special circumstances that would justify use of a constitutional privilege to discredit or convict a person who asserts it. The value of constitutional privileges is largely destroyed if persons can be penalized for relying on them." 353 U. S., at 425.

See also *Stewart* v. *United States*, 366 U. S. 1, 5–7; *United States* v. *Hale*, 422 U. S. 171, 175, n. 4.

[3] "For comment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice,' *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52, 55, which the Fifth Amendment outlaws. It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." *Griffin* v. *California*, 380 U. S. 609, 614 (footnote omitted).

[4] "The Fifth Amendment protects the individual's right to remain silent. The central purpose of the privilege against compulsory self-incrimination is to avoid unfair criminal trials. It is an expression of our conviction that the defendant in a criminal case must be presumed innocent, and that the State has the burden of proving guilt without resorting to an

tify is typically based on the advice of his counsel, it often could not be explained without revealing privileged communications between attorney and client.

These reasons have no application in a prearrest context. The fact that a citizen has a constitutional right to remain silent when he is questioned has no bearing on the probative significance of his silence before he has any contact with the police. We need not hold that every citizen has a duty to report every infraction of law that he witnesses in order to justify the drawing of a reasonable inference from silence in a situation in which the ordinary citizen would normally speak out.[5] When a citizen is under no official compulsion what-

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inquisition of the accused." *Lefkowitz* v. *Cunningham*, 431 U. S. 801, 810 (STEVENS, J., dissenting) (footnote omitted).

"The Fifth Amendment itself is predicated on the assumption that there are innocent persons who might be found guilty if they could be compelled to testify at their own trials. Every trial lawyer knows that some truthful denials of guilt may be considered incredible by a jury—either because of their inherent improbability or because their explanation, under cross-examination, will reveal unfavorable facts about the witness or his associates. The Constitution therefore gives the defendant and his lawyer the absolute right to decide that the accused shall not become a witness against himself." *Lakeside* v. *Oregon*, 435 U. S. 333, 343 (STEVENS, J., dissenting) (footnote omitted).

[5] There is, of course, no reason why we should encourage the citizen to conceal criminal activity of which he has knowledge. In *Roberts* v. *United States*, 445 U. S. 552, 557–558, we pointed out:

"Concealment of crime has been condemned throughout our history. The citizen's duty to 'raise the "hue and cry" and report felonies to the authorities,' *Branzburg* v. *Hayes*, 408 U. S. 665, 696 (1972), was an established tenet of Anglo-Saxon law at least as early as the 13th century. 2 W. Holdsworth, History of English Law 101–102 (3d ed. 1927); 4 *id.*, at 521–522; see Statute of Westminster First, 3 Edw. 1, ch. 9, p. 43 (1275); Statute of Westminster Second, 13 Edw. 1, chs. 1, 4, and 6, pp. 112–115 (1285). The first Congress of the United States enacted a statute imposing criminal penalties upon anyone who, 'having knowledge of the actual commission of [certain felonies,] shall conceal, and not as soon as may be disclose and make known the same to [the appropriate] authority. . . .' Act of Apr. 30, 1790, § 6, 1 Stat. 113. Although the term 'misprision

ever, either to speak or to remain silent, I see no reason why his voluntary decision to do one or the other should raise any issue under the Fifth Amendment.[6] For in determining whether the privilege is applicable, the question is whether petitioner was in a position to have his testimony compelled and then asserted his privilege, not simply whether he was silent. A different view ignores the clear words of the Fifth Amendment. See n. 1, *supra*. Consequently, I would simply hold that the admissibility of petitioner's failure to come forward with the excuse of self-defense shortly after the stabbing raised a routine evidentiary question that turns on the probative significance of that evidence and presented no issue under the Federal Constitution.[7]

II

For the reasons stated in Part I of my dissenting opinion in *Doyle* v. *Ohio*, 426 U. S., at 620–626, I do not agree with the Court's view that the warnings required by *Miranda* v. *Arizona*, 384 U. S. 436, 479, contain an implicit assurance that subsequent silence may not be used against the defendant.

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of felony' now has an archaic ring, gross indifference to the duty to report known criminal behavior remains a badge of irresponsible citizenship.

"This deeply rooted social obligation is not diminished when the witness to crime is involved in illicit activities himself. Unless his silence is protected by the privilege against self-incrimination, . . . the criminal defendant no less than any other citizen is obliged to assist the authorities." (Footnote omitted.)

[6] "Petitioner insists that he had a constitutional right to remain silent and that no adverse inferences can be drawn from the exercise of that right. We find this argument singularly unpersuasive. The Fifth Amendment privilege against compelled self-incrimination is not self-executing. At least where the Government has no substantial reason to believe that the requested disclosures are likely to be incriminating, the privilege may not be relied upon unless it is invoked in a timely fashion." *Roberts* v. *United States*, *supra*, at 559.

[7] Under my approach, assuming relevance, the evidence could have been used not only for impeachment but also in rebuttal even had petitioner not taken the stand.

See *ante*, at 239–240. As the Court actually acknowledged in *Doyle* itself, see 426 U. S., at 619–620, n. 11, any such implicit assurance is far from being unqualified.[8] Moreover, I continue to disagree with the Court's view, repeated today, *ante*, at 240, that there was "fundamental unfairness present in *Doyle*." In my judgment the fairness or unfairness of using a defendant's postarrest silence for impeachment purposes does not simply depend on whether or not he received *Miranda* warnings. Rather, it primarily depends on whether it is fair to infer that the defendant was silent because he was asserting his constitutional privilege.[9]

In any event, since I was unpersuaded by the due process rationale of *Doyle*,[10] I readily concur in the Court's rejection of a similar argument in this case.

MR. JUSTICE STEWART concurs in Part I of this opinion.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

Today the Court holds that a criminal defendant's testimony in his own behalf may be impeached by the fact that

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[8] It is interesting to note that MR. JUSTICE MARSHALL and MR. JUSTICE BRENNAN share my view that the *Miranda* warnings in *Doyle* did not create the right to remain silent or create an otherwise unavailable objection to the use of the defendants' silence for impeachment purposes. See *post*, at 247–248, n. 1. I do not, however, agree with their assumption that a holding that evidence of silence is admissible necessarily rests on the premise that a quiet person has any duty to speak. See *post*, at 250–251, n. 4. A dog's failure to bark may be probative whether or not he has been trained as a watchdog. Cf. A. Conan Doyle, Silver Blaze, in The Complete Sherlock Holmes (1938).

[9] Generally, in the absence of an express assertion of the privilege, the presumption is that the privilege was not exercised. See *Roberts* v. *United States*, *supra*, at 559.

[10] It strikes me as anomalous that, assuming *Raffel* v. *United States*, 271 U. S. 494, has survived *Doyle*, a defendant who takes the stand is deemed to waive his Fifth Amendment objection to the use of his pretrial silence,

he did not go to the authorities before his arrest and confess his part in the offense. The decision thus strikes a blow at two of the foundation stones of our constitutional system: the privilege against self-incrimination and the right to present a defense.

I

The Court's decision today is extraordinarily broad. It goes far beyond a simple holding that the common-law rule permitting introduction of evidence of silence in the face of accusation or in circumstances calling for a response does not violate the privilege against self-incrimination. For in this case the prosecution was allowed to cast doubt on an accused's testimony that he acted in self-defense by forcing him to testify that he did not go to the police of his own volition, before he had been indicted, charged, or even accused of any offense, and volunteer his version of the events.

The Court's holding that a criminal defendant's testimony may be impeached by his prearrest silence has three patent—and, in my view, fatal—defects. First, the mere fact of prearrest silence is so unlikely to be probative of the falsity of the defendant's trial testimony that its use for impeachment purposes is contrary to the Due Process Clause of the Fourteenth Amendment. Second, the drawing of an adverse inference from the failure to volunteer incriminating statements impermissibly infringes the privilege against self-incrimination. Third, the availability of the inference for impeachment purposes impermissibly burdens the decision to exercise the constitutional right to testify in one's own defense.

A

The use of prior silence for impeachment purposes depends, as the majority recognizes, *ante*, at 238, on the reasonableness

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but not to waive what I regard as a much less focussed, and hence weaker, due process objection. Perhaps the Court's opinion can best be understood by assuming that *Raffel* is not good law on its facts under the *Doyle* rationale.

of an inference that it is inconsistent with the statements that are to be impeached. If the defendant's prior silence does not make it more likely that his trial testimony was false, the evidence is simply irrelevant. Such an inference cannot fairly be drawn from petitioner's failure to go to the police before any charges were brought, admit that he had committed a homicide, and offer an exculpatory explanation.

In order for petitioner to offer his explanation of self-defense, he would necessarily have had to admit that it was he who fatally stabbed the victim, thereby supplying against himself the strongest possible proof of an essential element of criminal homicide. It is hard to imagine a purer case of self-incrimination. Since we cannot assume that in the absence of official warnings individuals are ignorant of or oblivious to their constitutional rights, we must recognize that petitioner may have acted in reliance on the constitutional guarantee. In fact, petitioner had most likely been informed previously of his privilege against self-incrimination, since he had two prior felony convictions. App. 28. One who has at least twice before been given the *Miranda* warnings, which carry the implied promise that silence will not be penalized by use for impeachment purposes, *Doyle* v. *Ohio*, 426 U. S. 610 (1976), may well remember the rights of which he has been informed, and believe that the promise is still in force. Accordingly, the inference that petitioner's conduct was inconsistent with his exculpatory trial testimony is precluded. See *Doyle* v. *Ohio, supra; United States* v. *Hale*, 422 U. S. 171, 176–177 (1975).[1]

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[1] See also E. Cleary, McCormick on Evidence § 161, pp. 355–356 (2d ed. 1972). For this reason I would not reach a different result from that of *Doyle* v. *Ohio* simply because in *Doyle* the defendant had received the *Miranda* warnings. The furnishing of the *Miranda* warnings does not create the right to remain silent; that right is conferred by the Constitution. I have no doubt that if an accused were interrogated in police custody without receiving the *Miranda* warnings and remained silent, that silence would be inadmissible despite the lack of warnings. In that situa-

Moreover, other possible explanations for silence spring readily to mind. It is conceivable that a person who had acted in self-defense might believe that he had committed no crime and therefore had no call to explain himself to the police. Indeed, all the witnesses agreed that after the stabbing the victim ran across the street and climbed a flight of stairs before collapsing. Initially, at least, then, petitioner might not have known that there was a homicide to explain. Moreover, petitioner testified that he feared retaliation if he went to the police. One need not be persuaded that any of these possible explanations represents the true reason for petitioner's conduct to recognize that the availability of other plausible hypotheses vitiates the inference on which the admissibility of the evidence depends. See *United States* v. *Hale, supra,* at 176–177, 180.

The Court implies that its decision is consistent with the practice at common law; but at common law silence is admissible to contradict subsequent statements only if the circumstances would naturally have called for a response. For example, silence was traditionally considered a tacit admission

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tion, no less than under the facts of *Doyle*, silence is "insolubly ambiguous." 426 U. S., at 617. Thus, properly considered, the use in *Doyle* of post-arrest silence for impeachment purposes was fundamentally unfair not because it broke an implied promise by a single narcotics agent, but because it broke a promise made by the United States Constitution. Similarly, persons who are not taken into police custody may rely on their privilege not to incriminate themselves in failing to report their conduct to the police. Such silence is also "insolubly ambiguous."

I do not regard the facts of *Doyle* and this case as analytically indistinguishable, however, for in *Doyle* the possibility that the defendant may have known his constitutional rights became a certainty when he was informed of those rights by the police. I simply believe that in both cases, the existence of the privilege against self-incrimination renders the probative value of the accused's silence so negligible that, in view of its plainly prejudicial effect, the use of that silence for impeachment purposes violates the defendant's federal right to due process. That is why I disagree with the Court's statement that the lack of probativeness of the evidence was merely "a question of state evidentiary law." *Ante,* at 239, n. 5.

if a statement made in the party's presence was heard and understood by the party, who was at liberty to respond, in circumstances naturally calling for a response, and the party failed to respond.[2] Silence was not considered an admission if any of the prerequisites were absent, for in such a case the failure to speak could be explained other than as assent. Similarly, failure to assert a fact could be used for impeachment if it would have been natural, under the circumstances, to assert the fact. But the authority cited by the majority in support of this proposition, *ante*, at 239, makes it clear that the rule cannot be invoked unless the facts affirmatively show that the witness was called on to speak, circumstances which are not present in this case.[3] As we have previously observed, "[i]n most circumstances silence is so ambiguous that it is of little probative force." *United States* v. *Hale, supra,* at 176.

Since petitioner's failure to report and explain his actions prior to his arrest was not probative of the falsity of his testimony at trial, it was fundamentally unfair and a deprivation

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[2] See, *e. g.*, McCormick, *supra* n. 1, §§ 161, 270; 4 J. Wigmore, Evidence §§ 1071, 1072 (J. Chadbourn rev. 1970); Gamble, The Tacit Admission Rule: Unreliable and Unconstitutional—A Doctrine Ripe for Abandonment, 14 Ga. L. Rev. 27 (1979); Brody, Admissions Implied from Silence, Evasion and Equivocation in Massachusetts Criminal Cases, 42 B. U. L. Rev. 46 (1962); Heller, Admissions by Acquiescence, 15 U. Miami L. Rev. 161 (1960); Note, Tacit Criminal Admissions, 112 U. Pa. L. Rev. 210 (1963).

[3] The Wigmore treatise lists three categories of cases in which silence may be used for impeachment:

"(1) Omissions *in legal proceedings* to assert what would naturally have been asserted under the circumstances.

"(2) Omissions to assert anything . . . *when formerly narrating,* on the stand or elsewhere, the matter now dealt with.

"(3) *Failure to take the stand* at all. . . ." 3A Wigmore, *supra,* § 1042, pp. 1056–1058 (footnotes omitted, emphasis in original).

Plainly, the omission to seek out an opportunity to speak is not included within these categories. Of all the cases cited by Wigmore involving silence by a criminal defendant, not one involves prearrest silence by a suspect not in the presence of law enforcement officers.

of due process to allow the jury to draw from that silence an inference that his trial testimony was false. *Doyle* v. *Ohio*, *supra*.

B

The use of prearrest silence for impeachment purposes also violates the privilege against self-incrimination secured by the Fifth and Fourteenth Amendments. The privilege prohibits the government from imposing upon citizens any duty to present themselves to the authorities and report their own wrongdoing. See, *e. g.*, *Marchetti* v. *United States*, 390 U. S. 39 (1968); *Grosso* v. *United States*, 390 U. S. 62 (1968); *Haynes* v. *United States*, 390 U. S. 85 (1968); *Albertson* v. *SACB*, 382 U. S. 70 (1965). As I have explained, in order to offer his exculpatory explanation petitioner would inevitably have had to incriminate himself as to facts that would be crucial in any subsequent prosecution. To penalize him for failing to relinquish his privilege against self-incrimination by permitting the jury to draw an adverse inference from his silence is to place an impermissible burden on his exercise of the privilege. See *Griffin* v. *California*, 380 U. S. 609 (1965). In practical effect, it replaces the privilege against self-incrimination with a duty to incriminate oneself. The Court attempts to avoid this conclusion by asserting that the burden does not threaten the purposes underlying the Fifth Amendment. See *ante*, at 236. But it is hard to see how the burden could be more substantial or direct.[4]

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[4] I confess I find MR. JUSTICE STEVENS' view of the Fifth Amendment incomprehensible. Apparently, under that view, a person's right not to incriminate himself exists only if the government has already attempted to compel him to do so. See *ante*, at 243–244 (opinion concurring in judgment). If no officials have tried to get the person to speak, he evidently has a duty to incriminate himself, because the reporting of crime is a civic duty and the Fifth Amendment is not applicable since the decision to speak or remain silent is, at that time, "voluntary." See *ante*, at 244.

But the prohibition against compelled self-incrimination is another way of expressing the right not to incriminate oneself. See, *e. g.*, *United States* v. *Burr*, 25 F. Cas. 38, 39 (No. 14,692e) (CC Va. 1807) ("It is a

It is sophistry to assert that the use of prearrest silence for impeachment does not infringe the privilege against self-incrimination because the fact of the silence will not come out unless petitioner chooses to testify, see *ante*, at 238. An accused has the absolute right to testify in his own defense, as well as the absolute right to refuse to incriminate himself prior to trial. He may not be forced to choose between those fundamental guarantees. We may not ignore the commands of the Constitution by asserting that the defendant brought his difficulties on himself by exercising the precious right to present a defense. Nor should we piously proclaim the protection of individual liberties but extend that protection only to the prosecution's case in chief while ensuring that the evidence can come before the jury by the back door. See *Harris* v.

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settled maxim of law that no man is bound to criminate himself"). After all, the only means of compelling a person to incriminate himself is to penalize him if he does not. Of course the voluntary decision to remain silent in the absence of any official compulsion does not "raise any issue under the Fifth Amendment," *ante*, at 244 (STEVENS, J., concurring in judgment), since there has been no self-incrimination at all. A voluntary decision to speak also does not implicate the Fifth Amendment because the self-incrimination was not compelled. But to impose a duty to report one's own crime before an official accusation has been made would itself be to compel self-incrimination, thus bringing the Fifth Amendment into play. And, as *Griffin* v. *California*, 380 U. S. 609 (1965), makes plain, the Constitution also prohibits the government from burdening the right not to incriminate oneself by penalizing silence. In the present case the violation of the Fifth Amendment occurred not when the defendant remained silent, but when that silence was later used against him at his criminal trial.

MR. JUSTICE STEVENS relies heavily on *Roberts* v. *United States*, 445 U. S. 552 (1980). That case held that a more severe sentence could be imposed on a defendant as a result of his refusal to provide information about criminal activities of *other* persons. The Court rejected Roberts' Fifth Amendment claim on grounds plainly inapplicable to this case: "At least where the Government has no substantial reason to believe that the requested disclosures are likely to be incriminating, the privilege may not be relied upon unless it is invoked in a timely fashion." *Id.*, at 559; but see *id.*, at 565–566 (MARSHALL, J., dissenting).

New York, 401 U. S. 222, 226–232 (1971) (BRENNAN, J., dissenting).

The Court's reasoning is not saved by its reliance on *Raffel* v. *United States*, 271 U. S. 494 (1926). *Raffel* held that a defendant could be required, upon testifying at a retrial, to disclose his failure to testify at the earlier trial. In my view, *Raffel* was wrongly decided; our subsequent cases, without expressly overruling it, limited it so severely as to appear to rob it of any continued vitality until its resurrection today. In *Grunewald* v. *United States*, 353 U. S. 391 (1957), the Court read *Raffel* as holding simply that a defendant who testifies at a second trial cannot continue to take advantage of the privilege asserted at the first trial. Instead, by taking the stand the defendant "becomes subject to cross-examination impeaching his credibility just like any other witness." 353 U. S., at 420. But *Grunewald* carefully pointed out that "[t]he Court, in *Raffel*, did not focus on the question whether the cross-examination there involved was in fact probative in impeaching the defendant's credibility." *Ibid.* The logical underpinnings of *Raffel* were cut away almost completely by *Griffin* v. *California*, 380 U. S. 609 (1965).[5] Thus the majority's statement that *Raffel* holds that "the Fifth Amendment is not violated when a defendant who testifies in his own defense is impeached with his prior silence," *ante*, at 235, is both simplistic and overbroad.

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[5] Mr. Justice Black's concurring opinion for four Members of the Court in *Grunewald*, which he would have decided on constitutional grounds rather than under the Court's supervisory powers, eloquently foreshadowed the reasoning of *Griffin*:

"I can think of no special circumstances that would justify use of a constitutional privilege to discredit or convict a person who asserts it. The value of constitutional privileges is largely destroyed if persons can be penalized for relying on them. It seems peculiarly incongruous and indefensible for courts which exist and act only under the Constitution to draw inferences of lack of honesty from invocation of a privilege deemed worthy of enshrinement in the Constitution." *Grunewald* v. *United States*, 353 U. S. 391, 425–426 (1957).

Further, the Court implies most unfairly that to exclude evidence of petitioner's prior silence would be to countenance perjury. See *ante*, at 237–238. The Court quotes from *Harris* v. *New York*, *supra;* but in that case the defendant made two contradictory statements at different times. It was logical to infer, absent an explanation to the contrary, that the defendant was lying on one occasion or the other. See also *Walder* v. *United States*, 347 U. S. 62 (1954). Here there is only one statement, and a silence which is not necessarily inconsistent with the statement. There is no basis on which to conjure up the specter of perjury.

C

Finally, impeachment by prearrest silence impermissibly burdens the constitutionally protected decision to testify in one's own defense.

Under today's decision a defendant who did not report his conduct to the police at the first possible moment must, in deciding whether to testify in his own defense, take into account the possibility that if he does testify the jury may be permitted to add that omission to the reasons for disbelieving his defense. This means that a person who thinks he may have done something wrong must immediately decide, most likely without the assistance of counsel, whether, if he is ever charged with an offense and brought to trial, he may wish to take the stand. For if he may later want to take the stand, he had better go to the police station right away to preserve his exculpatory explanation of the events—even though in so doing he must incriminate himself and provide evidence which may be crucial to his eventual conviction. But if he decides not to incriminate himself, he may anticipate that his right to testify in his own defense will be undermined by the argument that his story is probably untrue because he did not volunteer it to the police at the earliest opportunity. All of these strategic decisions must be made before the individual even

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knows if he will be charged and of what offense he will be accused.

To force persons to make this kind of choice between two fundamental rights places an intolerable burden on the exercise of those rights. "It cuts down on the privilege [of testifying in one's own defense] by making its assertion costly," *Griffin* v. *California, supra,* at 614, and is therefore forbidden.

II

I have explained why I believe the use for impeachment purposes of a defendant's prearrest failure to volunteer his version of events to the authorities is constitutionally impermissible. I disagree not only with the Court's holding in this case, but as well with its emerging conception of the individual's duty to assist the State in obtaining convictions, including his own—a conception which, I believe, is fundamentally at odds with our constitutional system. See, *e. g.*, *Roberts* v. *United States,* 445 U. S. 552, 569–572 (1980) (MARSHALL, J., dissenting). This conception disparages not only individual freedoms, but also the social interest in preserving those liberties and in the integrity of the criminal justice system. There is no doubt an important social interest in enabling police and prosecutors to obtain convictions. But the Court does not serve the Nation well by subordinating to that interest the safeguards that the Constitution guarantees to the criminal defendant.

Syllabus

AGINS ET UX. v. CITY OF TIBURON

APPEAL FROM THE SUPREME COURT OF CALIFORNIA

No. 79-602. Argued April 15, 1980—Decided June 10, 1980

After appellants had acquired five acres of unimproved land in appellee city for residential development, the city was required by California law to prepare a general plan governing land use and the development of open-space land. In response, the city adopted zoning ordinances that placed appellants' property in a zone in which property may be devoted to one-family dwellings, accessory buildings, and open-space uses, with density restrictions permitting appellants to build between one and five single-family residences on their tract. Without having sought approval for development of their tract under the ordinances, appellants brought suit against the city in state court, alleging that the city had taken their property without just compensation in violation of the Fifth and Fourteenth Amendments, and seeking, *inter alia*, a declaration that the zoning ordinances were facially unconstitutional. The city's demurrer claiming that the complaint failed to state a cause of action was sustained by the trial court, and the California Supreme Court affirmed.

Held: The zoning ordinances on their face do not take appellants' property without just compensation. Pp. 260–263.

(a) The ordinances substantially advance the legitimate governmental goal of discouraging premature and unnecessary conversion of open-space land to urban uses and are proper exercises of the city's police power to protect its residents from the ill effects of urbanization. Pp. 261–262.

(b) Appellants will share with other owners the benefits and burdens of the city's exercise of such police power, and in assessing the fairness of the ordinances these benefits must be considered along with any diminution in market value that appellants might suffer. P. 262.

(c) Although the ordinances limit development, they neither prevent the best use of appellants' land nor extinguish a fundamental attribute of ownership. Since at this juncture appellants are free to pursue their reasonable investment expectations by submitting a development plan to the city, it cannot be said that the impact of the ordinances has denied them the "justice and fairness" guaranteed by the Fifth and Fourteenth Amendments. Pp. 262–263.

24 Cal. 3d 266, 598 P. 2d 25, affirmed.

POWELL, J., delivered the opinion for a unanimous Court.

Gideon Kanner argued the cause for appellants. With him on the briefs were *John P. Pollock* and *Reginald G. Hearn.*

E. Clement Shute, Jr., argued the cause *pro hac vice* for appellee. With him on the brief were *Robert I. Conn* and *Gary T. Ragghianti.**

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*Briefs of *amici curiae* urging reversal were filed by *Robert A. Ferris* for the California Forest Protective Association; by *Les J. Weinstein* and *Aaron M. Peck* for the Glendale Federal Savings and Loan Association; by *Howard N. Ellman, Kenneth N. Burns*, and *Michael J. Burke* for Half Moon Bay Properties, Inc.; by *Gus Bauman* for the National Association of Home Builders et al.; by *Ronald A. Zumbrun* and *Thomas E. Hookano* for the Pacific Legal Foundation; and, *pro se*, by *Burton J. Goldstein, M. Reed Hunter, Jess S. Jackson, Jr., Jerrold A. Fadem, Michael M. Berger, Roger M. Sullivan, Richard F. Desmond, Stephen J. Wagner, Gerald B. Hansen*, and *Alfred P. Chasuk* for Mr. Goldstein et al.

Briefs of *amici curiae* urging affirmance were filed by *Solicitor General McCree, Assistant Attorney General Moorman, Deputy Solicitor General Claiborne, Elinor Hadley Stillman*, and *Jacques B. Gelin* for the United States; by *George Deukmejian*, Attorney General, *N. Gregory Taylor*, Assistant Attorney General, and *Richard C. Jacobs*, Deputy Attorney General, for the State of California; by the Attorneys General and other officials of their respective jurisdictions as follows: *J. D. MacFarlane*, Attorney General of Colorado; *Richard S. Gebelein*, Attorney General of Delaware, and *Regina M. Small*, State Solicitor; *Jim Smith*, Attorney General of Florida, and *Richard Hixson*, Assistant Attorney General; *Wayne Minami*, Attorney General of Hawaii; *William J. Scott*, Attorney General of Illinois, and *George Wolff*, Assistant Attorney General; *William J. Guste, Jr.*, Attorney General of Louisiana, and *Kendall Vick*, Assistant Attorney General; *Richard S. Cohen*, Attorney General of Maine, and *Cabanne Howard*, Assistant Attorney General; *Stephen H. Sachs*, Attorney General of Maryland, and *Paul F. Strain* and *Thomas A. Deming*, Deputy Attorneys General; *Francis X. Bellotti*, Attorney General of Massachusetts, and *Stephen M. Leonard*, Assistant Attorney General; *Robert Abrams*, Attorney General of New York; *William J. Brown*, Attorney General of Ohio, and *Colleen Nissl*, Assistant Attorney General; *James A. Redden*, Attorney General of Oregon, and *Peter S. Herman* and *Mary J. Deits*, Deputy Attorneys General; *M. Jerome Diamond*, Attorney General of Vermont, and *Bensen D. Scotch*, Assistant Attorney General; *Slade Gorton*, Attorney General of Washington, and *Charles B. Roe, Jr.*, Senior

MR. JUSTICE POWELL delivered the opinion of the Court.

The question in this case is whether a municipal zoning ordinance took appellants' property without just compensation in violation of the Fifth and Fourteenth Amendments.

I

After the appellants acquired five acres of unimproved land in the city of Tiburon, Cal., for residential development, the city was required by state law to prepare a general plan governing both land use and the development of open-space land. Cal. Govt. Code Ann. §§ 65302 (a) and (e) (West Supp. 1979); see § 65563. In response, the city adopted two ordinances that modified existing zoning requirements. Tiburon, Cal., Ordinances Nos. 123 N. S. and 124 N. S. (June 28, 1973). The zoning ordinances placed the appellants' property in "RPD–1," a Residential Planned Development and Open Space Zone. RPD–1 property may be devoted to one-family dwellings, accessory buildings, and open-space uses. Density restrictions permit the appellants to build between one and five single-family residences on their 5-acre tract. The appellants never have sought approval for development of their land under the zoning ordinances.[1]

Assistant Attorney General; and *Bronson C. La Follette,* Attorney General of Wisconsin, for the State of Colorado et al.; by *John H. Larson* and *Paul T. Hanson* for the County of Los Angeles; by *Robert J. Logan* and *Jeffrey P. Widman* for the City of San Jose et al.; by *Daniel Riesel, Nicholas A. Robinson, Joel H. Sachs, Ross Sandler,* and *Philip Weinberg* for the Committee on Environmental Law of the Association of the Bar of the City of New York; by *David Bonderman* for the Conservation Foundation et al.; and by *Elliott E. Blinderman* for the Federation of Hillside and Canyon Associations, Inc., et al.

Briefs of *amici curiae* were filed by *Timothy B. Flynn* and *A. Thomas Hunt* for the American Planning Association et al.; by *Frank Schnidman* for the National Association of Manufacturers; and by *Louis E. Goebel* and *Guenter S. Cohn* for San Diego Gas & Electric Co.

[1] Shortly after it enacted the ordinances, the city began eminent domain proceedings against the appellants' land. The following year, however, the

The appellants filed a two-part complaint against the city in State Superior Court. The first cause of action sought $2 million in damages for inverse condemnation.[2] The second cause of action requested a declaration that the zoning ordinances were facially unconstitutional. The gravamen of both claims was the appellants' assertion that the city had taken their property without just compensation in violation of the Fifth and Fourteenth Amendments. The complaint alleged that land in Tiburon has greater value than any other suburban property in the State of California. App. 3. The ridgelands that appellants own "possess magnificent views of San Francisco Bay and the scenic surrounding areas [and] have the highest market values of all lands" in Tiburon. *Id.*, at 4. Rezoning of the land "forever prevented [its] development for residential use. . . ." *Id.*, at 5. Therefore, the appellants contended, the city had "completely destroyed the value of [appellants'] property for any purpose or use whatsoever. . . ." *Id.*, at 7.[3]

The city demurred, claiming that the complaint failed to state a cause of action. The Superior Court sustained the demurrer,[4] and the California Supreme Court affirmed. 24 Cal. 3d 266, 598 P. 2d 25 (1979). The State Supreme Court

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city abandoned those proceedings, and its complaint was dismissed. The appellants were reimbursed for costs incurred in connection with the action.

[2] Inverse condemnation should be distinguished from eminent domain. Eminent domain refers to a legal proceeding in which a government asserts its authority to condemn property. *United States* v. *Clarke*, 445 U. S. 253, 255–258 (1980). Inverse condemnation is "a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted." *Id.*, at 257.

[3] The appellants also contended that the city's aborted attempt to acquire the land through eminent domain had destroyed the use of the land during the pendency of the condemnation proceedings. App. 10.

[4] The State Superior Court granted the appellants leave to amend the cause of action seeking a declaratory judgment, but the appellants did not avail themselves of that opportunity.

first considered the inverse condemnation claim. It held that a landowner who challenges the constitutionality of a zoning ordinance may not "sue in inverse condemnation and thereby transmute an excessive use of the police power into a lawful taking for which compensation in eminent domain must be paid." *Id.*, at 273, 598 P. 2d, at 28. The sole remedies for such a taking, the court concluded, are mandamus and declaratory judgment. Turning therefore to the appellants' claim for declaratory relief, the California Supreme Court held that the zoning ordinances had not deprived the appellants of their property without compensation in violation of the Fifth Amendment.[5]

We noted probable jurisdiction. 444 U. S. 1011 (1980). We now affirm the holding that the zoning ordinance on its face does not take the appellants' property without just compensation.[6]

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[5] The California Supreme Court also rejected appellants' argument that the institution and abandonment of eminent domain proceedings themselves constituted a taking. The court found that the city had acted reasonably and that general municipal planning decisions do not violate the Fifth Amendment.

[6] The appellants also contend that the state courts erred by sustaining the demurrer despite their uncontroverted allegations that the zoning ordinance would "forever preven[t] . . . development for residential use," *id.*, at 5, and "completely destro[y] the value of [appellant's] property for any purpose or use whatsoever . . . ," *id.*, at 7. The California Supreme Court compared the express terms of the zoning ordinances with the factual allegations of the complaint. The terms of the ordinances permit construction of one to five residences on the appellants' 5-acre tract. The court therefore rejected the contention that the ordinances prevented all use of the land. Under California practice, allegations in a complaint are taken to be true unless "contrary to law or to a fact of which a court may take judicial notice." *Dale* v. *City of Mountain View*, 55 Cal. App. 3d 101, 105, 127 Cal. Rptr. 520, 522 (1976); see *Martinez* v. *Socoma Cos.*, 11 Cal. 3d 394, 399–400, 521 P. 2d 841, 844 (1974). California courts may take judicial notice of municipal ordinances. Cal. Evid. Code Ann. § 452 (b) (West 1966). In this case, the State Supreme Court merely rejected allegations inconsistent with the explicit terms of the ordinance under

II

The Fifth Amendment guarantees that private property shall not "be taken for public use, without just compensation." The appellants' complaint framed the question as whether a zoning ordinance that prohibits all development of their land effects a taking under the Fifth and Fourteenth Amendments. The California Supreme Court rejected the appellants' characterization of the issue by holding, as a matter of state law, that the terms of the challenged ordinance allow the appellants to construct between one and five residences on their property. The court did not consider whether the zoning ordinance would be unconstitutional if applied to prevent appellants from building five homes. Because the appellants have not submitted a plan for development of their property as the ordinances permit, there is as yet no concrete controversy regarding the application of the specific zoning provisions. See *Socialist Labor Party* v. *Gilligan*, 406 U. S. 583, 588 (1972). See also *Goldwater* v. *Carter*, 444 U. S. 996, 997 (1979) (POWELL, J., concurring). Thus, the only question properly before us is whether the mere enactment of the zoning ordinances constitutes a taking.

The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, see *Nectow* v. *Cambridge*, 277 U. S. 183, 188 (1928), or denies an owner economically viable use of his land, see *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104, 138, n. 36 (1978). The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest. Although no precise rule de-

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review. The appellants' objection to the State Supreme Court's application of state law does not raise a federal question appropriate for review by this Court. See *Patterson* v. *Colorado ex rel. Attorney General*, 205 U. S. 454, 461 (1907).

termines when property has been taken, see *Kaiser Aetna* v. *United States*, 444 U. S. 164 (1979), the question necessarily requires a weighing of private and public interests. The seminal decision in *Euclid* v. *Ambler Co.*, 272 U. S. 365 (1926), is illustrative. In that case, the landowner challenged the constitutionality of a municipal ordinance that restricted commercial development of his property. Despite alleged diminution in value of the owner's land, the Court held that the zoning laws were facially constitutional. They bore a substantial relationship to the public welfare, and their enactment inflicted no irreparable injury upon the landowner. *Id.*, at 395–397.

In this case, the zoning ordinances substantially advance legitimate governmental goals. The State of California has determined that the development of local open-space plans will discourage the "premature and unnecessary conversion of open-space land to urban uses." Cal. Govt. Code Ann. § 65561 (b) (West. Supp. 1979).[7] The specific zoning regulations at issue are exercises of the city's police power to protect the residents of Tiburon from the ill effects of urbanization.[8] Such governmental purposes long have been recognized as legitimate. See *Penn Central Transp. Co.* v. *New York City, supra*, at 129; *Village of Belle Terre* v.

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[7] The State also recognizes that the preservation of open space is necessary "for the assurance of the continued availability of land for the production of food and fiber, for the enjoyment of scenic beauty, for recreation and for the use of natural resources." Cal. Govt. Code Ann. § 65561 (a) (West. Supp. 1979); see Tiburon, Cal., Ordinance No. 124 N. S. §§ 1 (f) and (h).

[8] The City Council of Tiburon found that

"[i]t is in the public interest to avoid unnecessary conversion of open space land to strictly urban uses, thereby protecting against the resultant adverse impacts, such as air, noise and water pollution, traffic congestion, destruction of scenic beauty, disturbance of the ecology and environment, hazards related to geology, fire and flood, and other demonstrated consequences of urban sprawl." Ordinance No. 124 N. S. § 1 (c).

Boraas, 416 U. S. 1, 9 (1974); *Euclid* v. *Ambler Co.*, *supra*, at 394–395.

The ordinances place appellants' land in a zone limited to single-family dwellings, accessory buildings, and open-space uses. Construction is not permitted until the builder submits a plan compatible with "adjoining patterns of development and open space." Tiburon, Cal., Ordinance No. 123 N. S. § 2 (F). In passing upon a plan, the city also will consider how well the proposed development would preserve the surrounding environment and whether the density of new construction will be offset by adjoining open spaces. *Ibid.* The zoning ordinances benefit the appellants as well as the public by serving the city's interest in assuring careful and orderly development of residential property with provision for open-space areas. There is no indication that the appellants' 5-acre tract is the only property affected by the ordinances. Appellants therefore will share with other owners the benefits and burdens of the city's exercise of its police power. In assessing the fairness of the zoning ordinance, these benefits must be considered along with any diminution in market value that the appellants might suffer.

Although the ordinances limit development, they neither prevent the best use of appellants' land, see *United States* v. *Causby*, 328 U. S. 256, 262, and n. 7 (1946), nor extinguish a fundamental attribute of ownership, see *Kaiser Aetna* v. *United States*, *supra*, at 179–180. The appellants have alleged that they wish to develop the land for residential purposes, that the land is the most expensive suburban property in the State, and that the best possible use of the land is residential. App. 3–4. The California Supreme Court has decided, as a matter of state law, that appellants may be permitted to build as many as five houses on their five acres of prime residential property. At this juncture, the appellants are free to pursue their reasonable investment expectations by submitting a development plan to local officials. Thus, it cannot be said that the impact of general land-use regulations has denied

appellants the "justice and fairness" guaranteed by the Fifth and Fourteenth Amendments. See *Penn Central Transp. Co.* v. *New York City*, 438 U. S., at 124.[9]

III

The State Supreme Court determined that the appellants could not recover damages for inverse condemnation even if the zoning ordinances constituted a taking. The court stated that only mandamus and declaratory judgment are remedies available to such a landowner. Because no taking has occurred, we need not consider whether a State may limit the remedies available to a person whose land has been taken without just compensation.

The judgment of the Supreme Court of California is

Affirmed.

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[9] Appellants also claim that the city's precondemnation activities constitute a taking. See nn. 1, 3, and 5, *supra*. The State Supreme Court correctly rejected the contention that the municipality's good-faith planning activities, which did not result in successful prosecution of an eminent domain claim, so burdened the appellants' enjoyment of their property as to constitute a taking. See also *City of Walnut Creek* v. *Leadership Housing Systems, Inc.*, 73 Cal. App. 3d 611, 620–624, 140 Cal. Rptr. 690, 695–697 (1977). Even if the appellants' ability to sell their property was limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when the proceedings ended. Mere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are "incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense." *Danforth* v. *United States*, 308 U. S. 271, 285 (1939). See *Thomas W. Garland, Inc.* v. *City of St. Louis*, 596 F. 2d 784, 787 (CA8), cert. denied, 444 U. S. 899 (1979); *Reservation Eleven Associates* v. *District of Columbia*, 136 U. S. App. D. C. 311, 315–316, 420 F. 2d 153, 157–158 (1969); *Virgin Islands* v. *50.05 Acres of Land*, 185 F. Supp. 495, 498 (V. I. 1960); 2 J. Sackman & P. Rohan, Nichols' Law of Eminent Domain § 6.13 [3] (3d ed. 1979).

Reporter's Note

The next page is purposely numbered 901. The numbers between 263 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FROM JUNE 9 THROUGH JUNE 12, 1980

JUNE 9, 1980

Appeals Dismissed

No. 79-1597. KEYHEA *v.* ENOMOTO, CORRECTIONS DIRECTOR, ET AL. Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 79-6443. PROFIT *v.* CITY OF NIAGARA FALLS, NEW YORK, ET AL. Appeal from C. A. 2d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 610 F. 2d 807.

No. 79-6496. PETREA *v.* PETREA. Appeal from Sup. Ct. Del. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 414 A. 2d 820.

Vacated and Remanded on Appeal

No. 79-185. CONSUMERS UNION OF UNITED STATES, INC., ET AL. *v.* VIRGINIA STATE BAR ET AL. Appeal from D. C. E. D. Va. Judgment vacated and case remanded for further consideration in light of *Supreme Court of Va.* v. *Consumers Union of United States, Inc.*, 446 U. S. 719 (1980). MR. JUSTICE POWELL took no part in the consideration or decision of this case. Reported below: 470 F. Supp. 1055.

Certiorari Granted—Vacated and Remanded

No. 79-5518. MCSHAN *v.* GEORGIA. Ct. App. Ga. Motion of petitioner for leave to proceed *in forma pauperis* and

certiorari granted. Judgment vacated and case remanded for further consideration in light of *United States* v. *Mendenhall*, 446 U. S. 544 (1980). Reported below: 150 Ga. App. 232, 257 S. E. 2d 202.

Miscellaneous Orders

No. A-953. NOE *v.* UNITED STATES. Application for bail, addressed to MR. JUSTICE MARSHALL and referred to the Court, denied.

No. A-981. BUZZANCA *v.* UNITED STATES. Application for bail, addressed to MR. JUSTICE BRENNAN and referred to the Court, denied.

No. A-1013. WALNUT PROPERTIES, INC. *v.* LONG BEACH CITY COUNCIL. Application to stay execution of the decision of the Long Beach City Council, dated March 9, 1978, addressed to MR. JUSTICE STEWART and referred to the Court, denied.

No. D-194. IN RE DISBARMENT OF AMOS. It is ordered that Howard W. Amos, of Worthington, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 83, Orig. MARYLAND ET AL. *v.* LOUISIANA. Motion of the United States for leave to intervene referred to the Special Master. Report of the Special Master received and ordered filed. Exceptions, if any, with supporting briefs to the Report of the Special Master may be filed by the parties within 30 days. Reply briefs, if any, to such exceptions may be filed within 30 days. [For earlier order herein, see, *e. g.*, 445 U. S. 913.]

No. 79–770. ENVIRONMENTAL PROTECTION AGENCY *v.* NATIONAL CRUSHED STONE ASSN. ET AL.; and COSTLE, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY *v.* CONSOLIDATION COAL CO. ET AL. C. A. 4th Cir. [Certiorari granted, 444 U. S. 1069.] Motion of respondents for divided argument granted.

No. 79–816. POTOMAC ELECTRIC POWER CO. *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U. S. DEPARTMENT OF LABOR, ET AL. C. A. D. C. Cir. [Certiorari granted, 444 U. S. 1069.] Motion of the Solicitor General for divided argument granted.

No. 79–1128. MONTANA ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. [Certiorari granted, 445 U. S. 960.] Motion of respondents for additional time for oral argument granted, and 15 additional minutes allotted for that purpose. Motion of petitioners for additional time for oral argument granted, and 15 additional minutes allotted for that purpose.

No. 79–1388. KIRCHBERG *v.* FEENSTRA ET AL. C. A. 5th Cir. [Probable jurisdiction noted, 446 U. S. 917.] Motion of Rudolph R. Schoemann, Esquire, to permit Alan F. Schoenberger, Esquire, of New Orleans, La., to present oral argument *pro hac vice* granted.

No. 79–5269. EDWARDS *v.* ARIZONA. Sup. Ct. Ariz. [Certiorari granted, 446 U. S. 950.] Motion for appointment of counsel granted, and it is ordered that Michael J. Meehan, Esquire, of Tucson, Ariz., be appointed to serve as counsel for petitioner in this case.

No. 79–6558. PAUL *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA; and

No. 79–6576. RHEUARK *v.* TEXAS ET AL. Motions for leave to file petitions for writs of mandamus denied.

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Certiorari Granted

No. 79-404. UNITED STATES *v.* CORTEZ ET AL. C. A. 9th Cir. Motion of respondents for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 595 F. 2d 505.

No. 79-1344. MICHAEL M. *v.* SUPERIOR COURT OF SONOMA COUNTY (CALIFORNIA, REAL PARTY IN INTEREST). Sup. Ct. Cal. Certiorari granted. Reported below: 25 Cal. 3d 608, 601 P. 2d 572.

No. 79-1404. PENNHURST STATE SCHOOL AND HOSPITAL ET AL. *v.* HALDERMAN ET AL.;

No. 79-1408. MAYOR OF PHILADELPHIA ET AL. *v.* HALDERMAN ET AL.;

No. 79-1414. PENNSYLVANIA ASSOCIATION FOR RETARDED CITIZENS ET AL. *v.* PENNHURST STATE SCHOOL AND HOSPITAL ET AL.;

No. 79-1415. COMMISSIONERS AND MENTAL HEALTH/MENTAL RETARDATION ADMINISTRATOR FOR BUCKS COUNTY ET AL. *v.* HALDERMAN ET AL.; and

No. 79-1489. PENNHURST PARENTS-STAFF ASSN. *v.* HALDERMAN ET AL. C. A. 3d Cir. Certiorari granted except as to Question 3, presented in petitions Nos. 79-1404 and 79-1489. Counsel are also requested to brief and argue the following question: Does 42 U. S. C. § 1983 provide a private remedy to enforce the provisions of the Developmentally Disabled Assistance and Bill of Rights Act, 42 U. S. C. § 6000 *et seq.*? Cases consolidated and a total of two hours allotted for oral argument. Reported below: 612 F. 2d 84.

Certiorari Denied. (See also Nos. 79-1597, 79-6443, and 79-6496, *supra.*)

No. 79-1062. MARKHAM *v.* PITCHESS, SHERIFF, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 605 F. 2d 436.

No. 79-1314. 1776 K STREET ASSOCIATES ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: — Ct. Cl. —, 602 F. 2d 354.

No. 79-1342. KLEIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1292.

No. 79-1400. TOUGHILL ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 612 F. 2d 449.

No. 79-1427. PETERSEN ET AL. *v.* UNITED STATES;
No. 79-1443. MITCHELL ET AL. *v.* UNITED STATES;
No. 79-6071. CARLSON *v.* UNITED STATES;
No. 79-6234. DIXON *v.* UNITED STATES;
No. 79-6245. LEONHARDT *v.* UNITED STATES;
No. 79-6254. IGO *v.* UNITED STATES; and
No. 79-6301. MILLER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 611 F. 2d 1313.

No. 79-1498. VEN-FUEL, INC. *v.* DUNCAN, SECRETARY OF ENERGY, ET AL. C. A. 5th Cir. Certiorari denied.

No. 79-1499. WEINTRAUB *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 613 F. 2d 612.

No. 79-1519. LEVEY ET AL. *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 616 F. 2d 668.

No. 79-1539. METRO TRUCK BODY, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 613 F. 2d 746.

No. 79-1540. SADLOWSKI ET AL. *v.* MARSHALL, SECRETARY OF LABOR, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 79-1598. M. J. KELLEY CO. *v.* WOODS, COMMISSIONER OF REVENUE OF TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 592 S. W. 2d 567.

No. 79-1613. HUFFNAGLE *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 79-1616. ANGLIN *v.* INDIANA. Ct. App. Ind. Certiorari denied.

No. 79-1622. PREVETTE ET AL. *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 43 N. C. App. 450, 259 S. E. 2d 595.

No. 79-1624. LOCAL 450, UNITED FURNITURE WORKERS OF AMERICA, AFL-CIO *v.* DONN PRODUCTS, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 613 F. 2d 162.

No. 79-1626. LAS VEGAS SUN, INC. *v.* SUMMA CORP., DBA CASTAWAYS CASINO, FRONTIER HOTEL, AND DESERT INN HOTEL, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 610 F. 2d 614.

No. 79-1639. BEVERLY BANK ET AL. *v.* ILLINOIS SAVINGS & LOAN ASSN. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 75 Ill. App. 3d 1101, 399 N. E. 2d 1388.

No. 79-1644. CANFIELD ET UX. *v.* NEW YORK CITY; and
No. 79-1668. BADGLEY ET AL. *v.* NEW YORK CITY. C. A. 2d Cir. Certiorari denied. Reported below: 606 F. 2d 358.

No. 79-1650. SUPREME EQUIPMENT & SYSTEMS CORP. *v.* WALTER M. BALLARD CO. C. A. D. C. Cir. Certiorari denied. Reported below: 198 U. S. App. D. C. 59, 610 F. 2d 1001.

No. 79-1657. BOWE *v.* FIRST OF DENVER MORTGAGE INVESTORS ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 613 F. 2d 798.

No. 79-1662. BLACKBURN ET AL., DBA TINY BLACKBURN AGENCY *v.* CRUM & FORSTER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 611 F. 2d 102.

No. 79–1669. First Bank of Oak Park *v.* United California Bank. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 98 Cal. App. 3d 439, 159 Cal. Rptr. 607.

No. 79–1674. Kondrat *v.* Mitrovich et al. Ct. App. Ohio, Lake County. Certiorari denied.

No. 79–1693. Terry Tuck, Inc. *v.* Consolidated Freightways Corporation of Delaware. C. A. 9th Cir. Certiorari denied. Reported below: 612 F. 2d 465.

No. 79–1694. Hamilton *v.* General Motors Corp. C. A. 5th Cir. Certiorari denied. Reported below: 606 F. 2d 576.

No. 79–1700. Brummitt *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 613 F. 2d 62.

No. 79–1757. Artarian *v.* Artar et al. C. A. 4th Cir. Certiorari denied. Reported below: 610 F. 2d 809.

No. 79–1766. Shuffman, Executrix *v.* Hartford Textile Corp. et al. C. A. 2d Cir. Certiorari denied. Reported below: 613 F. 2d 388.

No. 79–1784. Bella et al., dba Dave Streiffer Co. *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 610 F. 2d 1272.

No. 79–1814. Downs *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 615 F. 2d 677.

No. 79–5873. Vasquez *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 612 F. 2d 1338.

No. 79–6077. Cobb *v.* Wainwright, Secretary, Department of Offender Rehabilitation of Florida. C. A. 5th Cir. Certiorari denied. Reported below: 609 F. 2d 754.

No. 79–6143. Gristeau *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 611 F. 2d 181.

No. 79–6211. FARIAS-CONTRERAS *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 605 F. 2d 561.

No. 79–6224. GRECO *v.* WORKMAN, PRE-RELEASE CENTER SUPERINTENDENT. C. A. 1st Cir. Certiorari denied.

No. 79–6300. GINDI *v.* DUNHAM, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 79–6306. ANTONELLI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 624 F. 2d 1104.

No. 79–6327. TATASCIORE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 620 F. 2d 291.

No. 79–6337. COX *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 616 F. 2d 413.

No. 79–6379. TROLLEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 109.

No. 79–6386. JENKINS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 72 App. Div. 2d 974, 421 N. Y. S. 2d 751.

No. 79–6395. ALSTON *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied.

No. 79–6400. PFEIFER *v.* UNITED STATES BUREAU OF PRISONS. C. A. 9th Cir. Certiorari denied. Reported below: 615 F. 2d 873.

No. 79–6404. CROOKER *v.* U. S. DEPARTMENT OF JUSTICE. C. A. 2d Cir. Certiorari denied. Reported below: 622 F. 2d 573.

No. 79–6429. TAYLOR *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 79-6438. HARRISON *v.* GALLIA COUNTY CHILDREN'S SERVICES BOARD. Ct. App. Ohio, Gallia County. Certiorari denied. Reported below: — Ohio App. 2d —, — N. E. 2d —.

No. 79-6439. MADDOX *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 591 S. W. 2d 898.

No. 79-6440. PITTS *v.* REDMAN, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 79-6441. GALLIMORE *v.* GARRISON. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 98.

No. 79-6444. WILLIAMS ET AL. *v.* AIR TRANSPORT UNION LOCAL NO. 504 ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 622 F. 2d 577.

No. 79-6445. MASON *v.* WOLFE. C. A. 4th Cir. Certiorari denied. Reported below: 610 F. 2d 812.

No. 79-6451. YOUNG *v.* SHARP, U. S. DISTRICT JUDGE, ET AL. C. A. 7th Cir. Certiorari denied.

No. 79-6452. HERRINGTON *v.* GRIGGS, SUPERINTENDENT, CALIFORNIA INSTITUTION FOR MEN. C. A. 9th Cir. Certiorari denied. Reported below: 618 F. 2d 116.

No. 79-6455. WILLIAMS *v.* LOUISIANA. C. A. 5th Cir. Certiorari denied. Reported below: 611 F. 2d 881.

No. 79-6457. JOHNSON *v.* CARTER, PRESIDENT OF THE UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 612 F. 2d 581.

No. 79-6459. HOWELL *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 79-6462. SIMPSON *v.* MINICK, SHERIFF. C. A. 6th Cir. Certiorari denied.

No. 79-6466. EVANS *v.* CANNON ET AL. Sup. Ct. Ohio. Certiorari denied.

No. 79-6473. HOWZE *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 79-6494. GINSBURG *v.* TIGHE. Sup. Ct. N. J. Certiorari denied.

No. 79-6513. BUTLER *v.* ALEXANDER, SECRETARY OF THE ARMY, ET AL. C. A. D. C. Certiorari denied.

No. 79-6540. PROFFITT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 620 F. 2d 295.

No. 79-6551. SMILEY *v.* CORCORAN, LOS ANGELES COUNTY CLERK, ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 79-6581. ELORDUY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 612 F. 2d 986.

No. 79-6594. RUCKER *v.* CITY OF SAINT LOUIS ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 612 F. 2d 1102.

No. 79-6598. MIZELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 615 F. 2d 1367.

No. 79-6599. CAMPBELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 616 F. 2d 1151.

No. 79-6602. COUCH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 616 F. 2d 954.

No. 78-6884. ELMORE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 595 F. 2d 1036.

No. 79-333. BOERCKEL *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. MR. JUSTICE MARSHALL would grant certiorari. Reported below: 68 Ill. App. 3d 103, 385 N. E. 2d 815.

No. 79-5197. VASQUEZ-SANTIAGO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE MARSHALL would grant certiorari. Reported below: 602 F. 2d 1069.

No. 79-5926. THORSON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. MR. JUSTICE MARSHALL would grant certiorari.

No. 79-6170. FLORES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE MARSHALL would grant certiorari. Reported below: 620 F. 2d 286.

No. 79-725. MAINE PUBLIC UTILITIES COMMISSION *v.* CENTRAL MAINE POWER CO. Sup. Jud. Ct. Me. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 405 A. 2d 153.

No. 79-1454. HARRIS, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* WRIGHT ET AL. C. A. 7th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 603 F. 2d 666.

No. 79-1629. BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS ET AL. *v.* NORTHCROSS ET AL.; and

No. 79-1630. CITY OF MEMPHIS ET AL. *v.* NORTHCROSS ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE WHITE would grant certiorari. Reported below: 611 F. 2d 624.

No. 79-6017. NASTU *v.* TEXAS. Ct. Crim. App. Tex. Motion of petitioner to strike the supplement to the petition and certiorari denied. Reported below: 589 S. W. 2d 434.

No. 79-6362. DOBBERT *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 375 So. 2d 1069.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 79-6383. BRIGGS *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: — Conn. —, — A. 2d —.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

The Due Process Clause of the Fourteenth Amendment forbids the use for impeachment purposes of evidence that a defendant remained silent after receiving the *Miranda* warnings at the time of his arrest. *Doyle* v. *Ohio*, 426 U. S. 610 (1976). At petitioner's criminal trial, the prosecutor repeatedly brought before the jury the fact that petitioner had not furnished police officers with his alibi at the time of his arrest. Respondent concedes, and the Supreme Court of Connecticut agreed, that such use of petitioner's postarrest silence violated petitioner's constitutional rights. Nevertheless, the court sustained the conviction, over Justice Bogdanski's dissent, on the ground that the error was harmless beyond a reasonable doubt. I share Justice Bogdanski's "unreasonable" belief that the violation of petitioner's rights was not constitutionally harmless. A finding of harmless error on this record, in my view, can be nothing other than a means of avoiding the requirements of the Constitution in order to sustain the conviction of a defendant the court believed was factually guilty.

Petitioner's defense was that he was in the company of his wife and was nowhere near the scene of the alleged crimes at the time they were committed. Petitioner's wife testified to that effect, and petitioner's testimony corroborated hers. On cross-examination, the prosecutor repeatedly forced petitioner to admit that he had not given his story to the police after receiving *Miranda* warnings. The cross-examination which the Connecticut Supreme Court held to be harmless beyond a reasonable doubt was as follows:

> "Q. Did you ever recall telling the police officer that you had gone to court in Stamford on June 8th [the date of the alleged offense]?
>
> "A. Yes.
>
> . . . . .
>
> "Q. Did you ever tell the police officer on June 15th [the date petitioner was arrested] that you were home from 6:45 to 8:55 in the morning?
>
> "[Defense counsel's objection was overruled.]
>
> "A. No, I never told them nothing. Not anything.
>
> "Q. Did you tell them that you were wearing red pants, red T-shirt and blue jacket, white, red and blue sneakers, at 6:15 on June—
>
> "A. I did not tell the police officer nothing.
>
> "Q. Did you ever tell them that you went to court with your wife and Kareen?
>
> "A. Pardon me?
>
> "Q. Did you ever tell them that you went to court with your wife and Kareen—the boy?
>
> "A. Well, I started—I almost started a conversation but I cut it.
>
> "Q. Did you ever tell the police officer what time you arrived at the court in Stamford?
>
> "A. I did not tell the police officer nothing." — Conn. —, —, — A. 2d —, — (1979).

As if this colloquy did not sufficiently prejudice petitioner before the jury, the prosecutor called a police officer in rebuttal, who testified as follows:

> "Q. And after you advised him of his rights, did he give any information with respect to his whereabouts on June 8th of 1977?
>
> "A. The only information he would tell us was that he was in court on June 8th.
>
> "Q. Did he tell you what time he was in court?
>
> "A. No, he didn't.
>
> "Q. Did he tell you what judge—
>
> "[Defense counsel's objection was overruled.]
>
> "Q. [by the Court] What time did he said [*sic*] he arrived in court?
>
> "A. He didn't tell me.
>
> "Q. [by the prosecutor] Did you ask him?
>
> "A. Yes.
>
> . . . . .
>
> "Q. Is there anything in your report with respect to the conversation you had with her or with Mr. Briggs?
>
> "A. Yes, there is.
>
> "Q. And may I see that, please?
>
> "A. This is the accused, and what he said. Refused to give a statement." *Id.*, at —, — A. 2d, at —.

The repeated, cumulative impermissible references to petitioner's constitutionally protected silence were obviously designed to imply that his defense was fabricated. The prosecutor knew very well that the defendant had remained silent after receiving *Miranda* warnings, and his questions were designed to hammer that fact home to the jury.

In holding that these repeated constitutional violations were harmless error, the Connecticut Supreme Court purported to apply a standard that has been adopted by several federal courts, namely, "'[w]hen there is but a single reference at trial to the fact of defendant's silence, the reference is neither

repeated nor linked with defendant's exculpatory story, and the exculpatory story is transparently frivolous and evidence of guilt is otherwise overwhelming, the reference to defendant's silence constitutes harmless error.' " *Id.*, at —, — A. 2d, at —, quoting *State* v. *Zeko*, — Conn. —, —, — A. 2d —, — (1979). Accord, *Chapman* v. *United States*, 547 F. 2d 1240, 1250 (CA5), cert. denied, 431 U. S. 908 (1977); *Leake* v. *Cox*, 432 F. 2d 982, 984 (CA4 1970). Even on the assumption that this was the appropriate standard, it is plain that the violations in this case were not harmless error. There were multiple references to petitioner's silence; the references were linked—in detail—with petitioner's exculpatory story; and petitioner's alibi defense was not transparently frivolous.* Nevertheless, the court concluded that "the defendant's silence was not so 'highlighted' by the prosecutor as to constitute prejudicial error" and that the comments had not " 'struck at the jugular' of the defendant's defense." — Conn., at —, — A. 2d, at —.

This case exemplifies a disturbing and increasingly widespread trend among some courts to sanction egregious violations of the constitutional rights of criminal defendants by blandly reciting the formula "harmless error" whenever it appears that the accused was factually guilty. Our limited ability to exercise our certiorari jurisdiction prevents us from effectively policing the nullification of constitutional requirements through the abuse of the harmless error doctrine; nor is it our role to correct such factual errors. Our judicial system relies on conscientious trial and appellate courts to assure that all persons accused of criminal offenses receive the full protections guaranteed them by the Constitution. Because this case exemplifies a serious failure to accept that weighty responsibility, I would grant the petition.

---

*Petitioner's wife and another witness testified to his whereabouts; the fact that the State presented three witnesses who controverted petitioner's alibi defense does not necessarily mean the defense was frivolous.

Rehearing Denied

No. 78–1840. CITY OF ROME ET AL. *v.* UNITED STATES ET AL., 446 U. S. 156;

No. 78–5928. WALLER *v.* UNITED STATES, 446 U. S. 901;

No. 79–1096. PEARSON *v.* TEXAS, 446 U. S. 912;

No. 79–1148. SPARKS *v.* UNITED STATES, 446 U. S. 908;

No. 79–6161. HOHENSEE *v.* SOUTHARD ET AL., 446 U. S. 911;

No. 79–6183. COOPER *v.* CITY OF COMMERCE CITY, COLORADO, 446 U. S. 912; and

No. 79–6206. KICKASOLA *v.* JIM WALLACE OIL CO., INC., ET AL., 446 U. S. 921. Petitions for rehearing denied.

No. 78–671. DELAWARE STATE BOARD OF EDUCATION *v.* EVANS ET AL., 446 U. S. 923; and

No. 78–672. ALEXIS I. DU PONT SCHOOL DISTRICT ET AL. *v.* EVANS ET AL., 446 U. S. 923. Petitions for rehearing denied. MR. JUSTICE STEVENS took no part in the consideration or decision of these petitions.

JUNE 10, 1980

Affirmed on Appeal. (See No. 78–60, *ante,* at 164–165, n. 32.)

JUNE 12, 1980

Miscellaneous Order

No. A–1080. DEVINGO ET AL. *v.* NEW JERSEY. Application for stay of trial court proceedings, presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied.

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Henry J. Lind
Reporter of Decisions

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, Chief Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM H. REHNQUIST, Associate Justice.
JOHN PAUL STEVENS, Associate Justice.

OFFICERS OF THE COURT

BENJAMIN R. CIVILETTI, Attorney General.
WADE H. McCREE, Jr., Solicitor General.
MICHAEL RODAK, Jr., Clerk.
HENRY C. LIND, Reporter of Decisions.
ALFRED WONG, Marshal.
ROGER F. JACOBS, Librarian.

SUPREME COURT OF THE UNITED STATES

Allotment of Justices

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, *viz.:*

For the District of Columbia Circuit, Warren E. Burger, Chief Justice.

For the First Circuit, William J. Brennan, Jr., Associate Justice.

For the Second Circuit, Thurgood Marshall, Associate Justice.

For the Third Circuit, William J. Brennan, Jr., Associate Justice.

For the Fourth Circuit, Warren E. Burger, Chief Justice.

For the Fifth Circuit, Lewis F. Powell, Jr., Associate Justice.

For the Sixth Circuit, Potter Stewart, Associate Justice.

For the Seventh Circuit, John Paul Stevens, Associate Justice.

For the Eighth Circuit, Harry A. Blackmun, Associate Justice.

For the Ninth Circuit, William H. Rehnquist, Associate Justice.

For the Tenth Circuit, Byron R. White, Associate Justice.

December 19, 1975.

(For next previous allotment, see 404 U. S., p. v.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1979

UNITED STATES *v.* HENRY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 79-121. Argued January 16, 1980—Decided June 16, 1980

After respondent was indicted for armed robbery of a bank, and while he was in jail pending trial, Government agents contacted an informant who was then an inmate confined in the same cellblock as respondent. An agent instructed the informant to be alert to any statements made by federal prisoners but not to initiate conversations with or question respondent regarding the charges against him. After the informant had been released from jail, he reported to the agent that he and respondent had engaged in conversation and that respondent made incriminating statements about the robbery. The informant was paid for furnishing the information. At respondent's trial, which resulted in a conviction, the informant testified about the incriminating statements that respondent had made to him. Respondent moved to vacate his sentence on the ground that the introduction of the informant's testimony interfered with and violated his Sixth Amendment right to the assistance of counsel. The District Court denied the motion, but the Court of Appeals reversed, holding that the Government's actions impaired respondent's Sixth Amendment rights under *Massiah* v. *United States*, 377 U. S. 201.

Held: Respondent's statements to the informant should not have been admitted at trial. By intentionally creating a situation likely to induce respondent to make incriminating statements without the assistance of counsel, the Government violated respondent's Sixth Amendment right to counsel. Under the facts—particularly the facts that the informant was acting under instructions as a paid informant for the Government while ostensibly no more than a fellow inmate, and that respondent was in custody and under indictment at the time—incriminating statements were "deliberately elicited" from respondent within the meaning of *Massiah*. Since respondent was unaware that the informant was acting for the Government, he cannot be held to have waived his right to the assistance of counsel. Pp. 269–275.

590 F. 2d 544, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which BRENNAN, STEWART, MARSHALL, POWELL, and STEVENS, JJ., joined. POWELL, J., filed a concurring opinion, *post*, p. 275. BLACKMUN, J., filed a dissenting

opinion, in which WHITE, J., joined, *post*, p. 277. REHNQUIST, J., filed a dissenting opinion, *post*, p. 289.

Deputy Solicitor General Frey argued the cause for the United States. With him on the brief were *Solicitor General McCree, Assistant Attorney General Heymann*, and *Edwin S. Kneedler*.

Michael E. Geltner argued the cause for respondent. With him on the brief were *Larry J. Ritchie* and *William W. Greenhalgh*.

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to consider whether respondent's Sixth Amendment right to the assistance of counsel was violated by the admission at trial of incriminating statements made by respondent to his cellmate, an undisclosed Government informant, after indictment and while in custody. 444 U. S. 824 (1979).

I

The Janaf Branch of the United Virginia Bank/Seaboard National in Norfolk, Va., was robbed in August 1972. Witnesses saw two men wearing masks and carrying guns enter the bank while a third man waited in the car. No witnesses were able to identify respondent Henry as one of the participants. About an hour after the robbery, the getaway car was discovered. Inside was found a rent receipt signed by one "Allen R. Norris" and a lease, also signed by Norris, for a house in Norfolk. Two men, who were subsequently convicted of participating in the robbery, were arrested at the rented house. Discovered with them were the proceeds of the robbery and the guns and masks used by the gunmen.

Government agents traced the rent receipt to Henry; on the basis of this information, Henry was arrested in Atlanta, Ga., in November 1972. Two weeks later he was indicted for

armed robbery under 18 U. S. C. §§ 2113 (a) and (d). He was held pending trial in the Norfolk city jail. Counsel was appointed on November 27.

On November 21, 1972, shortly after Henry was incarcerated, Government agents working on the Janaf robbery contacted one Nichols, an inmate at the Norfolk city jail, who for some time prior to this meeting had been engaged to provide confidential information to the Federal Bureau of Investigation as a paid informant. Nichols was then serving a sentence on local forgery charges. The record does not disclose whether the agent contacted Nichols specifically to acquire information about Henry or the Janaf robbery.[1]

Nichols informed the agent that he was housed in the same cellblock with several federal prisoners awaiting trial, including Henry. The agent told him to be alert to any statements made by the federal prisoners, but not to initiate any conversation with or question Henry regarding the bank robbery. In early December, after Nichols had been released from jail, the agent again contacted Nichols, who reported that he and Henry had engaged in conversation and that Henry had told him about the robbery of the Janaf bank.[2] Nichols was paid for furnishing the information.

When Henry was tried in March 1973, an agent of the

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[1] The record does disclose that on November 21, 1972, the same day the agent contacted Nichols, the agent's supervisor interrogated Henry at the jail. After denying participation in the robbery, Henry exercised his right to terminate the interview.

[2] Henry also asked Nichols if he would help him once Nichols was released. Henry requested Nichols to go to Virginia Beach and contact a woman there. He prepared instructions on how to find the woman and wanted Nichols to tell her to visit Henry in the Norfolk jail. He explained that he wanted to ask the woman to carry a message to his partner, who was incarcerated in the Portsmouth city jail. Henry also gave Nichols a telephone number and asked him to contact an individual named "Junior" or "Nail." In addition Henry asked Nichols to provide him with a floor plan of the United States Marshals' office and a handcuff key because Henry intended to attempt an escape.

Federal Bureau of Investigation testified concerning the events surrounding the discovery of the rental slip and the evidence uncovered at the rented house. Other witnesses also connected Henry to the rented house, including the rental agent who positively identified Henry as the "Allen R. Norris" who had rented the house and had taken the rental receipt described earlier. A neighbor testified that prior to the robbery she saw Henry at the rented house with John Luck, one of the two men who had by the time of Henry's trial been convicted for the robbery. In addition, palm prints found on the lease agreement matched those of Henry.

Nichols testified at trial that he had "an opportunity to have some conversations with Mr. Henry while he was in the jail," and that Henry told him that on several occasions he had gone to the Janaf Branch to see which employees opened the vault. Nichols also testified that Henry described to him the details of the robbery and stated that the only evidence connecting him to the robbery was the rental receipt. The jury was not informed that Nichols was a paid Government informant.

On the basis of this testimony,[3] Henry was convicted of bank robbery and sentenced to a term of imprisonment of 25 years. On appeal, he raised no Sixth Amendment claims. His conviction was affirmed, judgt. order reported at 483 F. 2d 1401 (CA4 1973), and his petition to this Court for a writ of certiorari was denied. 421 U. S. 915 (1975).

On August 28, 1975, Henry moved to vacate his sentence pursuant to 28 U. S. C. § 2255.[4] At this stage, he stated that

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[3] Joseph Sadler, another of Henry's cellmates, also testified at trial. He stated that Henry had told him that Henry had robbed a bank with a man named "Lucky" or "Luck." Sadler testified that on advice of counsel he informed Government agents of the conversation with Henry. Sadler was not a paid informant and had no arrangement to monitor or report on conversations with Henry.

[4] In his § 2255 petition, Henry also alleged that Sadler's testimony was perjurious; that the Government failed to disclose *Brady* material, see

he had just learned that Nichols was a paid Government informant and alleged that he had been intentionally placed in the same cell with Nichols so that Nichols could secure information about the robbery. Thus, Henry contended that the introduction of Nichols' testimony violated his Sixth Amendment right to the assistance of counsel. The District Court denied the motion without a hearing. The Court of Appeals, however, reversed and remanded for an evidentiary inquiry into "whether the witness [Nichols] was acting as a government agent during his interviews with Henry."

On remand, the District Court requested affidavits from the Government agents. An affidavit was submitted describing the agent's relationship with Nichols and relating the following conversation:

> "I recall telling Nichols at this time to be alert to any statements made by these individuals [the federal prisoners] regarding the charges against them. I specifically recall telling Nichols that he was not to question Henry or these individuals about the charges against them, however, if they engaged him in conversation or talked in front of him, he was requested to pay attention to their statements. I recall telling Nichols not to initiate any conversations with Henry regarding the bank robbery charges against Henry, but that if Henry initiated the conversations with Nichols, I requested Nichols to pay attention to the information furnished by Henry."

The agent's affidavit also stated that he never requested anyone affiliated with the Norfolk city jail to place Nichols in the same cell with Henry.

The District Court again denied Henry's § 2255 motion, concluding that Nichols' testimony at trial did not violate Henry's

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Brady v. *Maryland*, 373 U. S. 83 (1963); that the United States Attorney's argument to the jury was impermissibly prejudicial; and that his trial counsel was incompetent. The District Court rejected each of these grounds, and none of these issues is before this Court.

Sixth Amendment right to counsel. The Court of Appeals reversed and remanded, holding that the actions of the Government impaired the Sixth Amendment rights of the defendant under *Massiah* v. *United States*, 377 U. S. 201 (1964). The court noted that Nichols had engaged in conversation with Henry and concluded that if by association, by general conversation, or both, Nichols had developed a relationship of trust and confidence with Henry such that Henry revealed incriminating information, this constituted interference with the right to the assistance of counsel under the Sixth Amendment.[5] 590 F. 2d 544 (1978).

II

This Court has scrutinized postindictment confrontations between Government agents and the accused to determine whether they are "critical stages" of the prosecution at which the Sixth Amendment right to the assistance of counsel attaches. See, *e. g.*, *United States* v. *Ash*, 413 U. S. 300 (1973); *United States* v. *Wade*, 388 U. S. 218 (1967). The present case involves incriminating statements made by the accused to an undisclosed and undercover Government informant while in custody and after indictment. The Government characterizes Henry's incriminating statements as voluntary and not the result of any affirmative conduct on the part of Government agents to elicit evidence. From this, the Government argues that Henry's rights were not violated, even assuming the Sixth Amendment applies to such surreptitious confrontations; in short, it is contended that the Government has not interfered with Henry's right to counsel.[6]

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[5] The Court of Appeals acknowledged that the testimony of Sadler, another cellmate of Henry, supported the conviction but was not willing to conclude beyond a reasonable doubt that Nichols' testimony did not influence the jury. *Chapman* v. *California*, 386 U. S. 18, 24 (1967).

[6] Although both the Government, and MR. JUSTICE REHNQUIST in dissent, question the continuing vitality of the *Massiah* branch of the Sixth Amendment, we reject their invitation to reconsider it.

This Court first applied the Sixth Amendment to postindictment communications between the accused and agents of the Government in *Massiah* v. *United States, supra.* There, after the accused had been charged, he made incriminating statements to his codefendant, who was acting as an agent of the Government. In reversing the conviction, the Court held that the accused was denied "the basic protections of [the Sixth Amendment] when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicted from him." *Id.*, at 206. The *Massiah* holding rests squarely on interference with his right to counsel.

The question here is whether under the facts of this case, a Government agent "deliberately elicited" incriminating statements from Henry within the meaning of *Massiah.* Three factors are important. First, Nichols was acting under instructions as a paid informant for the Government; second, Nichols was ostensibly no more than a fellow inmate of Henry; and third, Henry was in custody and under indictment at the time he was engaged in conversation by Nichols.

The Court of Appeals viewed the record as showing that Nichols deliberately used his position to secure incriminating information from Henry when counsel was not present and held that conduct attributable to the Government. Nichols had been a paid Government informant for more than a year; moreover, the FBI agent was aware that Nichols had access to Henry and would be able to engage him in conversations without arousing Henry's suspicion. The arrangement between Nichols and the agent was on a contingent-fee basis; Nichols was to be paid only if he produced useful information.[7]

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[7] The affidavit of the agent discloses that "Nichols had been paid by the FBI for expenses and services in connection with information he had provided" as an informant for at least a year. The only reasonable inference from this statement is that Nichols was paid when he produced information, not that Nichols was continuously on the payroll of the FBI. Here, the service requested of Nichols was that he obtain incriminating

This combination of circumstances is sufficient to support the Court of Appeals' determination. Even if the agent's statement that he did not intend that Nichols would take affirmative steps to secure incriminating information is accepted, he must have known that such propinquity likely would lead to that result.

The Government argues that the federal agents instructed Nichols not to question Henry about the robbery.[8] Yet according to his own testimony, Nichols was not a passive listener; rather, he had "some conversations with Mr. Henry" while he was in jail and Henry's incriminatory statements were "the product of this conversation." While affirmative interrogation, absent waiver, would certainly satisfy *Massiah*, we are not persuaded, as the Government contends, that *Brewer* v. *Williams*, 430 U. S. 387 (1977), modified *Massiah*'s "deliberately elicited" test. See *Rhode Island* v. *Innis*, 446 U. S. 291, 300, n. 4 (1980).[9] In *Massiah*, no inquiry was

information from Henry; there is no indication that Nichols would have been paid if he had not performed the requested service.

[8] Two aspects of the agent's affidavit are particularly significant. First, it is clear that the agent in his discussions with Nichols singled out Henry as the inmate in whom the agent had a special interest. Thus, the affidavit relates that "I specifically recall telling Nichols that he was not to question *Henry* or these individuals" and "I recall telling Nichols not to initiate any conversations *with Henry* regarding the bank robbery charges," but to "pay attention to the information furnished *by Henry*." (Emphasis added.) Second, the agent only instructed Nichols not to question Henry or to initiate conversations regarding the bank robbery charges. Under these instructions, Nichols remained free to discharge his task of eliciting the statements in myriad less direct ways.

[9] The situation where the "listening post" is an inanimate electronic device differs; such a device has no capability of leading the conversation into any particular subject or prompting any particular replies. See, *e. g.*, *United States* v. *Hearst*, 563 F. 2d 1331, 1347–1348 (CA9 1977), cert. denied, 435 U. S. 1000 (1978). However, that situation is not presented in this case, and there is no occasion to treat it; nor are we called upon to pass on the situation where an informant is placed in close proximity but makes no effort to stimulate conversations about the crime charged.

made as to whether Massiah or his codefendant first raised the subject of the crime under investigation.[10]

It is quite a different matter when the Government uses undercover agents to obtain incriminating statements from persons not in custody but suspected of criminal activity prior to the time charges are filed. In *Hoffa* v. *United States*, 385 U. S. 293, 302 (1966), for example, this Court held that "no interest legitimately protected by the Fourth Amendment is involved" because "the Fourth Amendment [does not protect] a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." See also *United States* v. *White*, 401 U. S. 745 (1971). Similarly, the Fifth Amendment has been held not to be implicated by the use of undercover Government agents before charges are filed because of the absence of the potential for compulsion. See *Hoffa* v. *United States*, *supra*, at 303–304. But the Fourth and Fifth Amendment claims made in those cases are not relevant to the inquiry under the Sixth Amendment here—whether the Government has interfered with the right to counsel of the accused by "deliberately eliciting" incriminating statements. Our holding today does not modify *White* or *Hoffa*.

It is undisputed that Henry was unaware of Nichols' role as a Government informant. The Government argues that this Court should apply a less rigorous standard under the

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[10] No doubt the role of the agent at the time of the conversations between Massiah and his codefendant was more active than that of the federal agents here. Yet the additional fact in *Massiah* that the agent was monitoring the conversations is hardly determinative. In both *Massiah* and this case, the informant was charged with the task of obtaining information from an accused. Whether Massiah's codefendant questioned Massiah about the crime or merely engaged in general conversation about it was a matter of no concern to the *Massiah* Court. Moreover, we deem it irrelevant that in *Massiah* the agent had to arrange the meeting between Massiah and his codefendant while here the agents were fortunate enough to have an undercover informant already in close proximity to the accused.

Sixth Amendment where the accused is prompted by an undisclosed undercover informant than where the accused is speaking in the hearing of persons he knows to be Government officers. That line of argument, however, seeks to infuse Fifth Amendment concerns against compelled self-incrimination into the Sixth Amendment protection of the right to the assistance of counsel. An accused speaking to a known Government agent is typically aware that his statements may be used against him. The adversary positions at that stage are well established; the parties are then "arm's-length" adversaries.

When the accused is in the company of a fellow inmate who is acting by prearrangement as a Government agent, the same cannot be said. Conversation stimulated in such circumstances may elicit information that an accused would not intentionally reveal to persons known to be Government agents. Indeed, the *Massiah* Court noted that if the Sixth Amendment "is to have any efficacy it must apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse." The Court pointedly observed that Massiah was more seriously imposed upon because he did not know that his codefendant was a Government agent. 377 U. S., at 206.

Moreover, the concept of a knowing and voluntary waiver of Sixth Amendment rights does not apply in the context of communications with an undisclosed undercover informant acting for the Government. See *Johnson* v. *Zerbst*, 304 U. S. 458 (1938). In that setting, Henry, being unaware that Nichols was a Government agent expressly commissioned to secure evidence, cannot be held to have waived his right to the assistance of counsel.

Finally, Henry's incarceration at the time he was engaged in conversation by Nichols is also a relevant factor.[11] As a ground

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[11] This is not to read a "custody" requirement, which is a prerequisite to the attachment of *Miranda* rights, into this branch of the Sixth Amend-

for imposing the prophylactic requirements in *Miranda* v. *Arizona*, 384 U. S. 436, 467 (1966), this Court noted the powerful psychological inducements to reach for aid when a person is in confinement. See also *id.*, at 448–454. While the concern in *Miranda* was limited to custodial police interrogation, the mere fact of custody imposes pressures on the accused; confinement may bring into play subtle influences that will make him particularly susceptible to the ploys of undercover Government agents. The Court of Appeals determined that on this record the incriminating conversations between Henry and Nichols were facilitated by Nichols' conduct and apparent status as a person sharing a common plight. That Nichols had managed to gain the confidence of Henry, as the Court of Appeals determined, is confirmed by Henry's request that Nichols assist him in his escape plans when Nichols was released from confinement.[12]

Under the strictures of the Court's holdings on the exclusion of evidence, we conclude that the Court of Appeals did not err in holding that Henry's statements to Nichols should not have been admitted at trial. By intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel, the Government violated Henry's Sixth Amendment right to counsel.[13] This is

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ment. Massiah was in no sense in custody at the time of his conversation with his codefendant. Rather, we believe the fact of custody bears on whether the Government "deliberately elicited" the incriminating statements from Henry.

[12] This is admittedly not a case such as *Massiah* where the informant and the accused had a prior longstanding relationship. Nevertheless, there is ample evidence in the record which discloses that Nichols had managed to become more than a casual jailhouse acquaintance. That Henry could be induced to discuss his past crime is hardly surprising in view of the fact that Nichols had so ingratiated himself that Henry actively solicited his aid in executing his next crime—his planned attempt to escape from the jail.

[13] The holding of the Court of Appeals that this was not harmless error is on less firm grounds in view of the strong evidence against Henry, in-

not a case where, in Justice Cardozo's words, "the constable . . . blundered," *People* v. *DeFore*, 242 N. Y. 13, 21, 150 N. E. 585, 587 (1926); rather, it is one where the "constable" planned an impermissible interference with the right to the assistance of counsel.[14]

The judgment of the Court of Appeals for the Fourth Circuit is

Affirmed.

MR. JUSTICE POWELL, concurring.

The question in this case is whether the Government deliberately elicited information from respondent in violation of the rule of *Massiah* v. *United States*, 377 U. S. 201 (1964), and *Brewer* v. *Williams*, 430 U. S. 387 (1977). I join the opinion of the Court, but write separately to state my understanding of the Court's holding.

I

In *Massiah* v. *United States*, this Court held that the Government violated the Sixth Amendment when it deliberately elicited incriminating information from an indicted defendant who was entitled to assistance of counsel. 377 U. S., at

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cluding the testimony of a neutral fellow inmate, Henry's rental of the hideaway house, and his presence there with the other participants in the robbery before the crime. The Government, however, has not argued that the error was harmless, and on balance, we are not inclined to disturb the determination of the Court of Appeals.

[14] Although it does not bear on the constitutional question in this case, we note that Disciplinary Rule 7-104 (A)(1) of the Code of Professional Responsibility provides:

"(A) During the course of his representation of a client a lawyer shall not:

"(1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so."

See also Ethical Consideration 7-18.

206. Government agents outfitted an informant's automobile with radio transmitting equipment and instructed the informant to engage the defendant in conversation relating to the crimes. *United States* v. *Massiah*, 307 F. 2d 62, 72 (CA2 1962) (Hays, J., dissenting). In suppressing statements overheard during the resulting conversation, the Court emphasized that the Sixth Amendment must "'apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse. . . .'" 377 U. S., at 206, quoting 307 F. 2d, at 72 (Hays, J., dissenting). Similarly, in *Brewer* v. *Williams*, *supra*, we applied *Massiah* to a situation in which a police detective purposefully isolated a suspect from his lawyers and, during a long ride in a police car, elicited incriminating remarks from the defendant through skillful interrogation. We suppressed the statement because the government "deliberately and designedly set out to elicit" information from a suspect. 430 U. S., at 399; see *id.*, at 407 (MARSHALL, J., concurring); *id.*, at 412 (POWELL, J., concurring).

The rule of *Massiah* serves the salutary purpose of preventing police interference with the relationship between a suspect and his counsel once formal proceedings have been initiated. But *Massiah* does not prohibit the introduction of spontaneous statements that are not elicited by governmental action. Thus, the Sixth Amendment is not violated when a passive listening device collects, but does not induce, incriminating comments. See *United States* v. *Hearst*, 563 F. 2d 1331, 1347–1348 (CA9 1977), cert. denied, 435 U. S. 1000 (1978). Similarly, the mere presence of a jailhouse informant who had been instructed to overhear conversations and to engage a criminal defendant in some conversations would not necessarily be unconstitutional. In such a case, the question would be whether the informant's actions constituted deliberate and "surreptitious interrogatio[n]" of the defendant. If they did not, then there would be no interference with the relationship between client and counsel.

II

I view this as a close and difficult case on its facts because no evidentiary hearing has been held on the *Massiah* claim. Normally, such a hearing is helpful to a reviewing court and should be conducted. On balance, however, I accept the view of the Court of Appeals and of the Court that the record adequately demonstrates the existence of a *Massiah* violation. I could not join the Court's opinion if it held that the mere presence or incidental conversation of an informant in a jail cell would violate *Massiah*.* To demonstrate an infringement of the Sixth Amendment, a defendant must show that the government engaged in conduct that, considering all of the circumstances, is the functional equivalent of interrogation. See *Brewer* v. *Williams*, 430 U. S., at 399; *id.*, at 411, 412 (POWELL, J., concurring). See also *Rhode Island* v. *Innis*, 446 U. S. 291 (1980).

Because I understand that the decision today rests on a conclusion that this informant deliberately elicited incriminating information by such conduct, I join the opinion of the Court.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE WHITE joins, dissenting.

In this case the Court, I fear, cuts loose from the moorings of *Massiah* v. *United States*, 377 U. S. 201 (1964),[1] and overlooks or misapplies significant facts to reach a result that is not required by the Sixth Amendment, by established precedent, or by sound policy.

The Court of Appeals resolved this case by a divided vote, with all three judges writing separately. Three of the seven

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*By reserving the question whether the mere presence of an informant in a jail cell violates *Massiah*, the Court demonstrates that its holding is not premised upon such a theory. *Ante*, at 269, n. 6.

[1] For purposes of this case, I see no need to abandon *Massiah* v. *United States*, as MR. JUSTICE REHNQUIST does.

judges then on that court dissented from the denial of rehearing en banc. And MR. JUSTICE POWELL, in his separate concurring opinion, obviously is less than comfortable, finds the case "close and difficult," *ante*, at 277, and writes to assure that his concurring vote preserves his contrary posture when the Court will be confronted with only "the mere presence or incidental conversation of an informant in a jail cell." *Ibid.* This division of opinion about this case attests to the importance of correct factual analysis here.

Because I view the principles of *Massiah* and the facts of this case differently than the Court does, I dissent.

I

Massiah mandates exclusion only if a federal agent "deliberately elicited" statements from the accused in the absence of counsel. 377 U. S., at 206. The word "deliberately" denotes intent. *Massiah* ties this intent to the act of elicitation, that is, to conduct that draws forth a response. Thus *Massiah*, by its own terms, covers only action undertaken with the specific intent to evoke an inculpatory disclosure.

Faced with agent Coughlin's unequivocal expression of an intent *not* to elicit statements from respondent Henry, but merely passively to receive them, *ante*, at 268; App. to Pet. for Cert. 58a, the Court, in its decision to affirm the judgment of the Court of Appeals, has no choice but to depart from the natural meaning of the *Massiah* formulation. The Court deems it critical that informant Nichols had been a paid informant; that Agent Coughlin was aware that Nichols "had access" to Henry and "would be able to engage him in conversations without arousing Henry's suspicion"; and that payment to Nichols was on a contingent-fee basis. *Ante*, at 270. Thus, it is said, even if Coughlin's "statement is accepted . . . he must have known that such propinquity likely would lead to that result" (that is, that Nichols would take "affirmative steps to secure incriminating information"). *Ante*, at 271. Later, the Court goes even further, characterizing this as a

case of "intentionally creating a situation *likely to induce* Henry to make incriminating statements." *Ante*, at 274. (Emphasis added.) This determination, coupled with the statement that Nichols "prompted" respondent Henry's remarks, *ante*, at 273, and see *ante*, at 271, n. 9, leads the Court to find a *Massiah* violation.

Thus, while claiming to retain the "deliberately elicited" test, the Court really forges a new test that saps the word "deliberately" of all significance. The Court's extension of *Massiah* would cover even a "negligent" triggering of events resulting in reception of disclosures. This approach, in my view, is unsupported and unwise.

A. *Authority.* The Court's precedents appear to me to be contrary to this new objective approach. *Spano* v. *New York*, 360 U. S. 315 (1959), whose concurring opinions presaged *Massiah*, see 377 U. S., at 204, concerned an "all-night inquisition" during which the defendant "repeatedly asked to be allowed to send for his lawyer." 360 U. S., at 327 (concurring opinion). Obviously, that case involved deliberate efforts to extract information in the absence of counsel. In *Massiah* itself, the agent engineered a pretrial meeting between the accused and a turncoat codefendant. The agent instructed the latter to talk to the defendant about the crime, see *United States* v. *Massiah*, 307 F. 2d 62, 66 (CA2 1962); *id.*, at 72 (dissenting opinion), and he bugged the meeting place so he could listen in.[2] *United States* v. *Ash*, 413 U. S. 300 (1973), by emphasizing that *Massiah* involved a "ruse" and that *Massiah*'s purpose was to neutralize "the overreaching of the prosecution," *id.*, at 312, reinforced the view that deliberate elicitation entails purposeful police action.

If any question could possibly have remained about the subjective nature of the *Massiah* inquiry, it was dispelled by

[2] The planted bug, of course, not only underscored the agent's deliberate design to obtain incriminating information. By permitting the agent to monitor whether the codefendant informant abided by his agreement, it all but ensured that affirmative elicitation in fact would occur.

Brewer v. *Williams*, 430 U. S. 387 (1977). There the Court closely examined testimony regarding the agent's intentions. In the face of vigorous dissents, it found a Sixth Amendment violation only because "[t]here can be no serious doubt . . . that Detective Leaming *deliberately and designedly* set out to elicit information from Williams," and because in giving his "Christian burial speech," Leaming "purposely sought . . . to obtain as much incriminating information as possible." *Id.*, at 399 (emphasis added). See also *Rhode Island* v. *Innis*, 446 U. S. 291, 300, n. 4 (1980) (reaffirming the "deliberately elicited" criterion); Kamisar, *Brewer v. Williams, Massiah*, and *Miranda*: What is "Interrogation"? When Does it Matter?, 67 Geo. L. J. 1, 42 (1978) ("The use of the term 'deliberately elicited' seems to be quite intentional").[3]

The unifying theme of *Massiah* cases, then, is the presence of deliberate, designed, and purposeful tactics, that is, the agent's use of an investigatory tool with the specific intent of extracting information in the absence of counsel. Thus, the Court's "likely to induce" test fundamentally restructures *Massiah*. Even if the agent engages in no "overreaching," and believes his actions to be wholly innocent and passive, evidence he comes by must be excluded if a court, with the convenient benefit of 20/20 hindsight, finds it likely that the agent's actions would induce the statements.

B. *Policy*. For several reasons, I believe that the Court's revamping of *Massiah* abrogates sound judicial policy. First, its test will significantly broaden Sixth Amendment exclusion; yet, as THE CHIEF JUSTICE has stressed before, the "high price society pays for such a drastic remedy" as exclusion of indisputably reliable evidence in criminal trials cannot be denied. See, *e. g.*, *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U. S. 388, 413 (1971) (dissenting opinion). Second, I think the Court's approach fails to appre-

[3] It is noteworthy that the phrase "deliberately elicited" appears at least three times in the *Massiah* opinion. See 377 U. S., at 204, 206.

ciate fully and to accommodate adequately the "value" and the "unfortunate necessity of undercover work." *Weatherford* v. *Bursey*, 429 U. S. 545, 557 (1977). Third, I find it significant that the proffered statements are unquestionably voluntary. See *United States* v. *Washington*, 431 U. S. 181, 187 (1977) ("Indeed, far from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable"). Fourth, the Court condemns and punishes police conduct that I do not find culpable. See *Wilson* v. *Henderson*, 584 F. 2d 1185, 1191 (CA2 1978), cert. denied, 442 U. S. 945 (1979) (investigating officer's "directions, 'Don't ask questions, just keep your ears open,' suggest familiarity and attempted compliance with, not circumvention of, the principle of *Massiah*"). Fifth, at least absent an active, orchestrated ruse, I have great difficulty perceiving how canons of fairness are violated when the Government uses statements flowing from a "wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." *Hoffa* v. *United States*, 385 U. S. 293, 302 (1966).[4]

Finally, I note the limits, placed in other Sixth Amendment cases, of providing counsel to counterbalance prosecutorial expertise and to aid defendants faced with complex and unfamiliar proceedings. See MR. JUSTICE REHNQUIST's dissenting opinion, *post*, at 290–298.[5] While not out of line with the

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[4] The Court's "likely to induce" analysis might also be subjected to the following criticism:

"Few, if any, police officers are competent to make the kind of evaluation seemingly contemplated; even a psychiatrist asked to express an expert opinion on these aspects of a suspect in custody would very likely employ extensive questioning and observation to make the judgment now charged to police officers." *Rhode Island* v. *Innis*, 446 U. S. 291, 304 (1980) (opinion concurring in judgment).

[5] MR. JUSTICE POWELL observes, *ante*, at 276, that "*Massiah* serves the salutary purpose of preventing police interference with the relationship between a suspect and his counsel once formal proceedings have been

Court's prior right-to-counsel cases, *Massiah* certainly is the decision in which Sixth Amendment protections have been extended to their outermost point. I simply do not perceive any good reason to give *Massiah* the expansion it receives in this case.[6]

II

In my view, the Court not only missteps in forging a new *Massiah* test; it proceeds to misapply the very test it has created. The new test requires a showing that the agent cre-

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initiated." I fail to see any greater "interference" on the facts of this case than in a case where an inmate is permitted to have a conversation with a trusted visitor, but with an electronic listening device in place, a practice MR. JUSTICE POWELL finds unobjectionable. *Ibid.* Indeed, bugging might be said to present an even stronger case for finding "deliberate elicitation." There is, after all, a likelihood that the inmate will place added confidence in a relative or longtime friend who visits him. Nichols, in contrast, had not known Henry previously. Moreover, with bugging, a defendant cannot know what he is dealing with. He lacks the ability intelligently to gauge the probability that his confidences will be "reported" back to government agents. See *Wilson* v. *Henderson*, 584 F. 2d 1185, 1191 (CA2 1978), cert. denied, 442 U. S. 945 (1979).

[6] Rejection of an objective test in this context is not inconsistent with *Rhode Island* v. *Innis*, *supra*, since "the policies underlying the two constitutional protections [Fifth and Sixth Amendments] are quite distinct." 446 U. S., at 300, n. 4. *Miranda*'s "prophylactic rule," see *Michigan* v. *Payne*, 412 U. S. 47, 53 (1973), seeks to protect a suspect's privilege against self-incrimination from "the compulsion inherent in custodial surroundings" when "interrogation" occurs. *Miranda* v. *Arizona*, 384 U. S. 436, 458 (1966). Thus, in *Miranda* cases, the degree of compulsion is critical. Beyond an objectively defined "pressure point," statements will be deemed presumedly compelled and therefore properly excluded, absent the countercoercive effect of *Miranda* warnings. See *id.*, at 467. *Massiah*, in contrast to *Miranda*, is not rooted in the Fifth Amendment privilege against self-incrimination. Rather, it is expressly designed to counter "deliberat[e]" interference with an indicted suspect's right to counsel. By focusing on deliberateness, *Massiah* imposes the exclusionary sanction on that conduct that is most culpable, most likely to frustrate the purpose of having counsel, and most susceptible to being checked by a deterrent. Cf. *Brown* v. *Illinois*, 422 U. S. 590, 604 (1975).

ated a situation "likely to induce" the production of incriminatory remarks, and that the informant in fact "prompted" the defendant. Even accepting the most capacious reading of both this language and the facts, I believe that neither prong of the Court's test is satisfied.

A. *"Likely to Induce."* In holding that Coughlin's actions were likely to induce Henry's statements, the Court relies on three facts: a contingent-fee arrangement; Henry's assumption that Nichols was just a cellmate; and Henry's incarceration.[7]

The Court states: "The arrangement between Nichols and the agent was on a contingent-fee basis; Nichols was to be paid only if he produced useful information." *Ante*, at 270. The District Court, however, made no such finding, and I am unconvinced that the evidence of record establishes such an understanding.[8] In any event, I question whether the existence of a contingent-fee arrangement is at all significant. The reasonable conclusion of an informant like Nichols would be that, whatever the arrangement, he would *not* be remu-

[7] The Court also notes that Henry, being located in the same cellblock as Nichols, was accessible to the informant. It nonetheless totally ignores the fact that the investigating agent had nothing to do with placing Henry and Nichols in the same cellblock. Indeed, the record shows that Coughlin did not confer with Nichols initially with the purpose of obtaining evidence about Henry; rather, the agent's affidavit indicates that he was unaware that Nichols and Henry were in the same cellblock until Nichols informed him. App. to Pet. for Cert. 57a–58a.

[8] The record shows that Nichols "had been paid by the FBI for expenses and services in connection with information he had provided on . . . previous occasions," *id.*, at 57a, and that "Nichols was paid by the FBI for expenses and services in connection with the [investigation] of Henry." *Id.*, at 59a. These facts establish at most an amorphous course of dealing, emanating from an unspecified number of previous investigations. They do not show that Nichols previously was paid only when he produced information. There can be no assurance that Nichols would *not* have been paid had he failed to come up with evidence implicating Henry or other federal defendants. Nor is there anything to indicate that Nichols acted on this assumption.

nerated if he breached his promise; yet the Court asks us to infer that Coughlin's conversation with Nichols "likely would lead" Nichols to engage in the very conduct which Coughlin told him to avoid. *Ante*, at 271.

The Court also emphasizes that Henry was "unaware that Nichols was a Government agent." *Ante*, at 273. One might properly assign this factor some importance, were it not for *Brewer* v. *Williams*. In that case, the Court explicitly held that the fact "[t]hat the incriminating statements were elicited surreptitiously in the *Massiah* case, and otherwise here, is *constitutionally irrelevant*." 430 U. S., at 400. (Emphasis added.) The Court's teeter-tottering with this factor in *Massiah* analysis can only induce confusion.

It merits emphasis that the Court's resurrection of the unawareness factor is indispensable to its holding. For, in *Brewer*, substantial contact and conversation with a confined defendant preceded delivery of the "Christian burial speech." Yet the Court clearly deemed the speech critical in finding a *Massiah* violation; it thus made clear that mere "association" and "general conversation" did not suffice to bring *Massiah* into play. Since nothing more transpired here, principled application of *Brewer* mandates reversal of the judgment in this case.

Finally, the Court notes that Henry was incarcerated when he made his statements to Nichols. The Court's emphasis of the "subtle influences" exerted by custody, however, is itself too subtle for me. This is not a case of a custodial encounter with police, in which the Government's display of power might overcome the free will of the accused. The relationship here was "social" and relaxed. Henry did not suspect that Nichols was connected with the FBI. Moreover, even assuming that "subtle influences" might encourage a detainee to talk about his crime, there are certainly counterbalances of at least equal weight. Since, in jail, "official surveillance has traditionally been the order of the day,"

Lanza v. *New York*, 370 U. S. 139, 143 (1962), and a jailmate has obvious incentives to assist authorities, one may expect a detainee to act with corresponding circumspection. Cf. *Rhode Island* v. *Innis*, 446 U. S., at 300, n. 4 ("Custody in . . . a [*Massiah*] case is not controlling; indeed, the petitioner in *Massiah* was not in custody").

The Court does more than rely on dubious factors in finding that Coughlin's actions were "likely to induce" Nichols' successful prompting of Henry; it fails to focus on facts that cut strongly against that conclusion. The Court ignores Coughlin's specific instruction to Nichols that he was not to question Henry or to initiate conversation with him about the robbery. Nor does it note Nichols' likely assumption that he would not be remunerated, but reprimanded and possibly penalized, if he violated Coughlin's orders. In addition, the record shows that Nichols had worked as an FBI informant for four years and that Coughlin and Nichols had worked together for about a year on several matters. It makes sense, given Nichols' experience and Coughlin's willingness to renew their working relationship, to conclude that Nichols would follow Coughlin's instruction. Finally, it is worth noting that Henry was only one of several federal detainees to whom Nichols was to pay attention; [9] this is not a case in

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[9] The Court's suggestion to the contrary, see *ante*, at 271, n. 8, based on three isolated segments of Coughlin's affidavit, exemplifies its treatment of the record. The relevant portion of Coughlin's affidavit reads in full:

"Nichols advised that he was in the same cellblock as Billy Gale Henry as well as with *other prisoners* who had Federal charges against *them*. I recall telling Nichols at this time to be alert to any statements made by *these individuals* regarding the charges against *them*. I specifically recall telling Nichols that he was not to question Henry or *these individuals* about the charges against *them*, however, if *they* engaged him in conversation or talked in front of him, he was requested to pay attention to *their* statements. I recall telling Nichols not to initiate any conversations with Henry regarding the bank robbery charges against Henry, but that if Henry initiated the conversations with Nichols, I requested Nichols to pay

which officers singled out a specific target. On these facts, I cannot agree that Coughlin "must have known that [it was] likely" that Nichols would seek to elicit information from Henry.

Under the Court's analysis, it is not enough that Coughlin should have anticipated disobedience by Nichols; it must also be shown that his actions were "likely to induce" Henry to talk. In my view, however, there was little reason to believe that even the most aggressive efforts by Nichols would lead to disclosures by Henry. Nothing in the record suggests that Henry and Nichols knew each other, far less that they had the type of relationship that would lead Henry to discuss freely a crime for which he had not yet been tried. In this respect, the case stands in stark contrast to *Massiah*, where the informant had collaborated with Massiah in a drug smuggling operation and was a codefendant in the resulting and pending prosecution. Moreover, "[t]here is nothing in the record to suggest that . . . the [defendant] was peculiarly susceptible [to approaches by cellmates or that he] . . . was unusually disoriented or upset." *Rhode Island* v. *Innis*, 446 U. S., at 302–303. On these facts, it seems to me extremely *un*likely that Coughlin's actions would lead to Henry's statements.

Even though the test forged by the Court has no precedent, we are not without some assistance in judging its application. Just a few weeks ago, in *Rhode Island* v. *Innis*, the Court held that *Miranda* was implicated only by "words or actions on the part of police officers that they should have known were *reasonably likely* to elicit an incriminating response."

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attention to the information furnished by Henry." App. to Pet. for Cert. 58a (emphases added).

Since the affidavit containing this statement was submitted in Henry's case, it is neither surprising nor significant that it occasionally refers to Henry by name, while not referring specifically to remarks Coughlin might have made about other detainees. The Court's reading of this passage as establishing that "the agent . . . singled out Henry as the inmate in whom the agent had a special interest" seems to me extraordinary.

446 U. S., at 302 (emphasis deleted and added). Here, the Court asks whether agents "creat[ed] a situation likely to induce Henry to make incriminating statements." *Ante*, at 274. Although the Court in *Innis* emphasized that the *Massiah* and *Miranda* rules are distinct, 446 U. S., at 300, n. 4, I have some difficulty in identifying a material difference between these formulations. Since the Court found its test not satisfied in *Innis*, it should follow that Henry's statements may be excluded only if there was greater reason in this case than in *Innis* to expect incriminatory disclosures. The case for finding that disclosures were "likely," however, was clearly stronger in *Innis*. There the defendant had just been arrested at 4:30 a. m.; he was handcuffed and confined in a "caged wagon"; and the three police officers accompanying him triggered his confession by conversing about the danger that a "little girl" attending a nearby school for the handicapped would "maybe kill herself" upon finding a gun he supposedly had hidden. *Id.*, at 293–295. Against the backdrop of *Innis*, I cannot fathom how the Court can conclude that Coughlin's actions rendered Henry's disclosures "likely."

B. *"Prompting."* All Members of the Court agree that Henry's statements were properly admitted if Nichols did not "prompt" him. *Ante*, at 273, and see *ante*, at 271, n. 9; *ante*, at 276 (concurring opinion); *post*, at 302 (dissenting opinion). The record, however, gives no indication that Nichols "stimulated" Henry's remarks, *ante*, at 273, with "affirmative steps to secure incriminating information." *Ante*, at 271. Certainly the known facts reveal nothing more than "a jailhouse informant who had been instructed to overhear conversations and to engage a criminal defendant in some conversations." *Ante*, at 276 (concurring opinion).[10] The scant record demonstrates only that Nichols "had 'an opportunity to have some

[10] Indeed, here, unlike the scenario sketched by MR. JUSTICE POWELL, there was no instruction "to engage . . . in some conversations." It would seem that, *a fortiori*, Henry's statements should not be excluded.

conversations with Mr. Henry while he was in the jail.'" *Ante*, at 267. "Henry had engaged [Nichols] in conversation," "had requested Nichols' assistance," and "had talked to Nichols about the bank robbery charges against him." App. to Pet. for Cert. 58a. Thus, we know only that Nichols and Henry had conversations, hardly a startling development, given their location in the same cellblock in a city jail. We know nothing about the nature of these conversations, particularly whether Nichols subtly or otherwise focused attention on the bank robberies. Indeed, to the extent the record says anything at all, it supports the inference that it was Henry, not Nichols, who "engaged" the other "in some conversations," and who was the moving force behind any mention of the crime. I cannot believe that *Massiah* requires exclusion when a cellmate previously unknown to the defendant and asked only to keep his ears open says: "It's a nice day," and the defendant responds: "It would be nicer if I hadn't robbed that bank." The Court of Appeals, however, found it necessary to swallow that bitter pill in order to decide this case the way it did, and this Court does not show that anything more transpired.

Conceivably, the amount of information purveyed by Henry to Nichols could support an inference that some fishing for detail occurred. The Court does not invoke this reasoning, however, and even if the record is stretched to produce such a finding, it clearly discloses nothing about the *timing* of Henry's disclosures. It may well be that Henry first "let the cat out of the bag," either by volunteering statements or by inadvertently discussing the crime with someone else within earshot of Nichols. These possibilities are not far-fetched. In addition to revealing Coughlin's instructions, which we may infer were followed, the record specifically indicates that Henry "volunteered" information about the robbery to a cellmate other than Nichols. App. 85. Moreover, the record discloses Henry's eagerness to make contact with a potential collaborator outside the jail; Nichols, who was soon

to be released, was a logical choice to serve as a go-between. The Court, however, seems unconcerned that some of Henry's statements were "spontaneously given." 590 F. 2d 544, 549 (CA4 1978) (dissenting opinion). It emphasizes that "[i]n *Massiah*, no inquiry was made as to whether Massiah or his codefendant first raised the subject of the crime under investigation." *Ante*, at 271–272. This observation trivializes the central facts of *Massiah*, in which an agent arranged a bugged meeting between codefendants who shared a natural interest in their pending prosecution, and in which the informant was instructed to, and did, converse about the pair's misdeeds.

III

In sum, I think this is an unfortunate decision, which disregards precedent and stretches to the breaking point a virtually silent record. Whatever the bounds of *Massiah*, that case does not justify exclusion of the proof challenged here.

MR. JUSTICE REHNQUIST, dissenting.

The Court today concludes that the Government through the use of an informant "deliberately elicited" information from respondent after formal criminal proceedings had begun, and thus the statements made by respondent to the informant are inadmissible because counsel was not present. The exclusion of respondent's statements has no relationship whatsoever to the reliability of the evidence, and it rests on a prophylactic application of the Sixth Amendment right to counsel that in my view entirely ignores the doctrinal foundation of that right. The Court's ruling is based on *Massiah* v. *United States*, 377 U. S. 201 (1964), which held that a postindictment confrontation between the accused and his accomplice, who had turned State's evidence and was acting under the direction of the Government, was a "critical" stage of the criminal proceedings at which the Sixth Amendment right to counsel attached. While the decision today sets forth the factors that are "important" in determining whether there

has been a *Massiah* violation, *ante*, at 270, I think that *Massiah* constitutes such a substantial departure from the traditional concerns that underlie the Sixth Amendment guarantee that its langauge, if not its actual holding, should be re-examined.

I

The doctrinal underpinnings of *Massiah* have been largely left unexplained, and the result in this case, as in *Massiah*, is difficult to reconcile with the traditional notions of the role of an attorney. Here, as in *Massiah*, the accused was not prevented from consulting with his counsel as often as he wished. No meetings between the accused and his counsel were disturbed or spied upon. And preparation for trial was not obstructed. See 377 U. S., at 209 (WHITE, J., dissenting). In short, as MR. JUSTICE WHITE aptly observed in *Massiah:*

> "It is only a sterile syllogism—an unsound one, besides—to say that because [the accused] had a right to counsel's aid before and during the trial, his out-of-court conversations and admissions must be excluded if obtained without counsel's consent or presence. The right to counsel has never meant as much before, *Cicenia* v. *Lagay*, 357 U. S. 504; *Crooker* v. *California*, 357 U. S. 433, and its extension in this case requires some further explanation, so far unarticulated by the Court." *Ibid.*

A

Our decisions recognize that after formal proceedings have commenced an accused has a Sixth Amendment right to counsel at "critical stages" of the criminal proceedings. See, *e. g.*, *ante*, at 269. This principle derives from *Powell* v. *Alabama*, 287 U. S. 45 (1932), which held that a trial court's failure to appoint counsel until the trial began violated the Due Process Clause of the Fourteenth Amendment. *Id.*, at 68–71. *Powell* referred to the "critical period" as being "from the time of [the defendants'] arraignment until the beginning of

their trial, when consultation, thoroughgoing investigation and preparation were vitally important." *Id.*, at 57. During that period, the defendants in *Powell* "did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself." *Ibid.* They thus were deprived of the opportunity to consult with an attorney, and to have him investigate their case and prepare a defense for trial. After observing that the duty to assign counsel "is not discharged by an assignment at such time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case," *id.*, at 71, this Court held that the defendants had been unconstitutionally denied effective assistance of counsel.[1]

Powell was based on the rationale that an unaided layman, who has little or no familiarity with the law, requires assistance in the preparation and presentation of his case and in coping with procedural complexities in order to assure a fair trial. The Court in *Powell* stated:

> "Historically and in practice, in our country at least, [a hearing] has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be

[1] The Court observed: "It is not enough to assume that counsel . . . precipitated into the case [on the morning of the trial] thought there was no defense, and exercised their best judgment in proceeding to trial without preparation. Neither they nor the court could say what a prompt and thoroughgoing investigation might disclose as to the facts. No attempt was made to investigate. No opportunity to do so was given. Defendants were immediately hurried to trial. Chief Justice Anderson, after disclaiming any intention to criticize harshly counsel who attempted to represent defendants at the trials, said: '. . . The record indicates that the appearance was rather *pro forma* than zealous and active. . . .' Under the circumstances disclosed, we hold that defendants were not accorded the right of counsel in any substantial sense. To decide otherwise, would simply be to ignore actualities." 287 U. S., at 58.

heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect." *Id.*, at 68–69.[2]

More recently this Court has again observed that the concerns underlying the Sixth Amendment right to counsel are to provide aid to the layman in arguing the law and in coping with intricate legal procedure, *United States* v. *Ash*, 413 U. S. 300, 307–308 (1973), and to minimize the imbalance in the adversary system that otherwise resulted with the creation of the

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[2] This rationale has also been applied to the arraignment, where "[a]vailable defenses may be as irretrievably lost, if not then and there asserted, as they are when an accused represented by counsel waives a right for strategic purposes." *Hamilton* v. *Alabama*, 368 U. S. 52, 54 (1961), and to a preliminary hearing, where such defenses may similarly be lost when the accused enters his plea. *White* v. *Maryland*, 373 U. S. 59 (1963). See also *United States* v. *Wade*, 388 U. S. 218 (1967) (lineup); *Mempa* v. *Rhay*, 389 U. S. 128 (1967) (combination probation-revocation and sentencing hearing); *Coleman* v. *Alabama*, 399 U. S. 1 (1970) (preliminary examination); *Moore* v. *Illinois*, 434 U. S. 220 (1977) (one-person showup at a hearing, which combined the functions of a preliminary arraignment and preliminary examination, that was adversary in nature and at which the accused was entitled to move for suppression of evidence and dismissal of charges).

professional prosecuting official. *Id.*, at 308–309.[3] Thus, in examining whether a stage of the proceedings is a "critical" one at which the accused is entitled to legal representation, it is important to recognize that the theoretical foundation of the Sixth Amendment right to counsel is based on the traditional role of an attorney as a legal expert and strategist.[4]

"Deliberate elicitation" after formal proceedings have begun is thus not by itself determinative. *Ash* held that an accused has no right to be present at a photo display because there is no possibility that he "might be misled by his lack of familiarity with the law or overpowered by his professional adversary." *Id.*, at 317. See also *Gilbert* v. *California*, 388 U. S. 263, 267 (1967) (taking of handwriting exemplars is not a "critical" stage of the proceedings because "there is a minimal risk that the absence of counsel might derogate from his right to a fair trial"). If the event is not one that requires knowledge of legal procedure, involves a communication between the accused and his attorney concerning investigation of the case or the preparation of a defense, or otherwise interferes with the attorney-client relationship, there is in my view simply no constitutional prohibition against the use of incriminating

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[3] As this Court stated in *Ash*, the "historical background suggests that the core purpose of the counsel guarantee was to assure 'Assistance' at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." 413 U. S., at 309. The English common-law rule, which severely limited the right of a person accused of a felony to consult with counsel, was apparently rejected by the Framers' as inherently irrational. *Id.*, at 306–307.

[4] Any dealings that an accused may have with his attorney are of course confidential, and anything the accused says to his attorney is beyond the reach of the prosecution. But this Court has never held, nor does it hold today, that a confrontation or stage of the proceedings is critical because it may lead to the accused's conviction. Rather, the test under the Sixth Amendment as recognized in *Ash* "call[s] for examination of the event in order to determine whether the accused required aid in coping with legal problems or assistance in meeting his adversary." *Id.*, at 313.

information voluntarily obtained from an accused despite the fact that his counsel may not be present. In such circumstances, the accused at the least has been informed of his rights as required by *Miranda* v. *Arizona*, 384 U. S. 436 (1966), and often will have received advice from his counsel not to disclose any information relating to his case, see, *e. g.*, *Brewer* v. *Williams*, 430 U. S. 387 (1977).

Once the accused has been made aware of his rights, it is his responsibility to decide whether or not to exercise them. If he voluntarily relinquishes his rights by talking to authorities, or if he decides to disclose incriminating information to someone whom he mistakenly believes will not report it to the authorities, cf. *Hoffa* v. *United States*, 385 U. S. 293 (1966), he is normally accountable for his actions and must bear any adverse consequences that result. Such information has not in any sense been obtained because the accused's will has been overborne, nor does it result from any "unfair advantage" that the State has over the accused: the accused is free to keep quiet and to consult with his attorney if he so chooses. In this sense, the decision today and the result in *Massiah* are fundamentally inconsistent with traditional notions of the role of the attorney that underlie the Sixth Amendment right to counsel.

To the extent that *Massiah* relies on *Powell* v. *Alabama*, 287 U. S. 45 (1932), in concluding that the confrontation in that case was a "critical" stage of the proceedings, 377 U. S., at 205, *Massiah* reads the language of *Powell* out of context. In *Powell*, the period between arraignment and trial was critical because the defendants had no opportunity whatsoever to consult with an attorney during that time, and thus they were altogether deprived of legal assistance in the investigation of their case and the preparation of a defense. The Court today similarly takes an overly broad view of the stages after the commencement of formal criminal proceedings that should be viewed as "critical" for purposes of the Sixth Amendment. And it is not amiss to point out that *Powell* was decided solely

on the basis of the Due Process Clause of the Fourteenth Amendment long before the Court selected the Sixth Amendment as one that the Fourteenth Amendment "incorporated" and made applicable against the States as well as the United States. See *Gideon* v. *Wainwright*, 372 U. S. 335 (1963).

B

Massiah also relied heavily on a concurring opinion of its author in *Spano* v. *New York*, 360 U. S. 315 (1959), which expressed the notion that the adversary system commences with indictment, and should be followed by arraignment and trial. *Id.*, at 327 (STEWART, J., concurring). *Spano*, however, was a coerced confession case in which the accused was interrogated for eight hours after he had been indicted until he confessed. While it is true that both the Fifth and Sixth Amendments reflect the Framers' intent to establish essentially an accusatory rather than an inquisitorial system of justice, neither suggests by its terms a rigid dichotomy between the types of police activities that are permissible before commencement of formal criminal proceedings and those that are subsequently permissible. More specifically, there is nothing in the Sixth Amendment to suggest, nor does it follow from the general accusatory nature of our criminal scheme, that once the adversary process formally begins the government may not make any effort to obtain incriminating evidence from the accused when counsel is not present. The role of counsel in an adversary system is to offer advice and assistance in the preparation of a defense and to serve as a spokesman for the accused in technical legal proceedings. And the Sixth Amendment, of course, protects the confidentiality of communications between the accused and his attorney. But there is no constitutional or historical support for concluding that an accused has a right to have his attorney serve as a sort of guru who must be present whenever an accused has an inclination to reveal incriminating information to anyone who acts to elicit such information at the

behest of the prosecution. To the extent the accused is protected from revealing evidence that may be incriminatory, the focus must be on the Fifth Amendment privilege against compulsory self-incrimination. See, *e. g.*, *Spano* v. *New York*, *supra*; *Brown* v. *Mississippi*, 297 U. S. 278 (1936); *Ashcraft* v. *Tennessee*, 322 U. S. 143 (1944).[5]

C

The objectives that underlie the exclusionary rule also suggest that the results reached in *Massiah* and the decision today are incorrect. Although the exclusion of reliable, probative evidence imposes tremendous costs on the judicial process and on society, see, *e. g.*, *Stone* v. *Powell*, 428 U. S. 465 (1976), this Court has nonetheless imposed a rule for the exclusion of such evidence in some contexts in order to deter unlawful police activity. See, *e. g.*, *Weeks* v. *United States*, 232 U. S. 383 (1914); *Mapp* v. *Ohio*, 367 U. S. 643 (1961). In cases in which incriminating statements made by the accused are entirely voluntary, however, and the government has merely encouraged a third party to talk to the accused and report any incriminating information that the accused might reveal, there is in my view no valid justification for the exclusion of such evidence from trial.[6]

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[5] Whatever may be the appropriate role of counsel in protecting the accused's privilege against *compulsory* self-incrimination, see, *e. g.*, *Fare* v. *Michael C.*, 442 U. S. 707, 719 (1979), when, as in this case, the accused merely engages in conversation with someone whom he does not know to be a governmental agent, the hazards of coercion and governmental overreaching are entirely absent.

[6] As stated by MR. CHIEF JUSTICE BURGER in his dissenting opinion in *Brewer* v. *Williams*, 430 U. S. 387, 421–422 (1977):

"[U]nlawfully obtained evidence is not automatically excluded from the factfinding process in all circumstances. In a variety of contexts we inquire whether application of the rule will promote its objectives sufficiently to justify the enormous cost it imposes on society. 'As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served.' *United*

Ordinary citizens are expected to report any criminal activity they might observe, and they are often required under pain of compulsory process to reveal information that may incriminate others, even their friends and relatives. It generally does not matter that the information was obtained as a result of trust or confidence that develops from friendship or family ties. The incriminating information may still be obtained through use of the subpoena power, and in many instances of course it will be voluntarily revealed by the citizen interested in the enforcement of the laws.

In cases such as this one and *Massiah*, the effect of the governmental action is to encourage an informant to reveal information to the authorities that the ordinary citizen most likely would reveal voluntarily. While it is true that the informants here and in *Massiah* were encouraged to "elicit" the information from the accused, I doubt that most people would find this type of elicitation reprehensible. It involves merely engaging the accused in conversation about his criminal activity and thereby encouraging him voluntarily to make incriminating remarks. There is absolutely no element of coercion, nor is there any interference whatsoever with the attorney-client relationship. Anything the accused might reveal to the informant should, as with revelations he might make to the ordinary citizen, be available for use at trial. This Court has never held that an accused is constitutionally protected from his inability to keep quiet, whether or not he has been encouraged by third-party citizens to voluntarily make incriminating remarks. I do not think the result should be different merely because the government has encouraged a third-party informant to report remarks obtained in this fashion. When an accused voluntarily chooses to make an incriminatory re-

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States v. *Calandra*, [414 U. S. 338, 348 (1974)]; accord, *Stone* v. *Powell*, *supra*, at 486–491; *United States* v. *Janis*, [428 U. S. 433 (1976)]; *Brown* v. *Illinois*, 422 U. S. 590, 606–608–609 (1975) (POWELL, J., concurring in part); *United States* v. *Peltier*, [422 U. S. 531, 538–539 (1975)]." (Footnote omitted.)

mark in these circumstances, he knowingly assumes the risk that his confidant may be untrustworthy.[7]

II

In holding that the Government has "deliberately elicited" information from the accused here, the Court considers the following factors to be relevant:

> "First, Nichols was acting under instructions as a paid informant for the Government; second, Nichols was ostensibly no more than a fellow inmate of Henry; and third, Henry was in custody and under indictment at the time he was engaged in conversation by Nichols." *Ante*, at 270.

I disagree with the Court's evaluation of these factors, and would conclude that no deliberate elicitation has taken place.

A

The Court acknowledges that the use of undercover policework is an important and constitutionally permissible method of law enforcement. *Ante*, at 272. As the Court observes, *Hoffa* v. *United States*, 385 U. S., at 302, for example, recognizes that the Constitution affords no protection to "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it," even if that person is an undisclosed informer. And in *Weatherford* v. *Bursey*, 429 U. S. 545, 557 (1977), we acknowledged the "necessity of undercover work" and "the value it often is to effective law enforcement." See also, *e. g.*, *United States* v. *Russell*, 411 U. S. 423, 432 (1973); *United States* v. *White*, 401 U. S. 745, 752 (1971).

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[7] Cf. *United States* v. *White*, 401 U. S. 745, 752 (1971), where this Court stated:

"Inescapably, one contemplating illegal activities must realize and risk that his companions may be reporting to the police. If he sufficiently doubts their trustworthiness, the association will very probably end or never materialize. But if he has no doubts, or allays them, or risks what doubt he has, the risk is his."

The Court nonetheless holds that once formal criminal proceedings have commenced, such undercover activity in some circumstances may not be constitutionally permissible even though it leads to incriminating statements by an accused that are entirely voluntary and inherently reliable. The reason for this conclusion is not readily apparent from the Court's opinion.

The fact that police carry on undercover activities should not automatically be transmuted because formal criminal proceedings have begun. It is true that once such proceedings have commenced, there is an "adversary" relationship between the government and the accused. But an adversary relationship may very well exist prior to the commencement of formal proceedings. And, as this Court has previously recognized, many events, while perhaps "adversarial," are not of such a nature that an attorney can provide any special knowledge or assistance to the accused as a result of his legal expertise. See, *e. g., United States* v. *Ash*, 413 U. S. 300 (1973) (no right to an attorney at pretrial photographic identifications at which the accused is not present); *Gilbert* v. *California*, 388 U. S., at 267 (no right to an attorney at taking of handwriting exemplars). When an attorney has no such special knowledge or skill, the Sixth Amendment does not give the accused a right to have an attorney present.

In addition, the mere bringing of formal proceedings does not necessarily mean that an undercover investigation or the need for it has terminated. A person may be arrested on the basis of probable cause arising in the immediate aftermath of an offense and during early stages of investigation, but before the authorities have had an opportunity to investigate fully his connection with the crime. And for the criminal, there is no rigid dichotomy between the time before commencement of formal criminal proceedings and the time after such proceedings have begun. Once out on bail the accused remains free to continue his criminal activity, and very well may decide to do so. See, *e. g., Rogers* v. *United States*, 325

F. 2d 485 (CA10 1963), cited in *Massiah* v. *United States*, 377 U. S., at 212 (WHITE, J., dissenting). Indeed, in *Massiah* itself there was evidence that after indictment one of the defendants attempted to persuade a Government agent to go into the narcotics business with him. *Id.*, at 212–213 (WHITE, J., dissenting). As the Court stated in *Massiah*: "We do not question that in this case, as in many cases, it was entirely proper to continue an investigation of the suspected criminal activities of the defendant and his alleged confederates, even though the defendant had already been indicted." *Id.*, at 207. I would hold that the Government's activity here is merely a continuation of its lawful authority to use covert operations in investigating a criminal case after formal proceedings have commenced.[8]

B

The Court secondly states that here the informant ostensibly was no more than a fellow inmate, and thus the conversation "stimulated" by him may lead the accused to communicate information that he would not intentionally reveal to persons known to be government agents, who are "arm's-length" adversaries. While the Court deems relevant the question whether the informant took active steps as a result of a prearranged deal with the Government to elicit incriminating information from the accused, *ante*, at 273,[9] I do not think this

[8] I also disagree with the Court that the fact that Nichols was a paid informant and on a contingency fee is relevant in making this determination. See *ante*, at 270.

[9] It bears emphasis that even under the Court's holding today affirmative steps to induce the accused to reveal incriminating information are required before there can be a "deliberate" elicitation in violation of the Sixth Amendment. As noted by MR. JUSTICE POWELL in his concurring opinion:

"*Massiah* does not prohibit the introduction of spontaneous statements that are not elicited by governmental action. Thus, the Sixth Amendment is not violated when a passive listening device collects, but does not induce, incriminating comments. See *United States* v. *Hearst*, 563 F. 2d 1331, 1347–1348 (CA9 1977), cert. denied, 435 U. S. 1000 (1978). Similarly, the

type of encounter is one that is properly viewed as a critical stage at which counsel is necessary to provide guidance or protection to the accused to enable him to cope with unfamiliar legal proceedings, or to counterbalance the expertise of a professional prosecutor. Rather, as previously discussed, when the accused voluntarily reveals incriminating information to a third party in this context, I do not think there is any justification for excluding his admissions from trial, whether or not the third party was acting at the behest of the prosecution.

C

Finally, the Court considers relevant the fact that because the accused is confined and in custody, "subtle influences" are present "that will make him particularly susceptible to the ploys of undercover agents." *Ante*, at 274. An appeal to an accused's conscience or willingness to talk, however, does not in my view have a sufficiently overbearing impact on the accused's will to warrant special constitutional protection.

In the instant case, for example, if the informant had been in the cell next to respondent and overheard him make incriminating statements to his cellmate, no Sixth Amendment violation would have occurred. See, *e. g.*, *United States* v. *Hearst*, 563 F. 2d 1331, 1347–1348 (CA9 1977), cert. denied, 435 U. S. 1000 (1978). In such circumstances it would be clear that the Government had engaged in no affirmative conduct spe-

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mere presence of a jailhouse informant who had been instructed to overhear conversations and to engage a criminal defendant in some conversations would not necessarily be unconstitutional. In such a case, the question would be whether the informant's actions constituted deliberate and 'surreptitious interrogatio[n]' of the defendant. If they did not, there would be no interference with the relationship between client and counsel." *Ante*, at 276.

Deliberate elicitation does not and cannot depend on the subjective intention of the government or its informant to obtain incriminatory evidence from the accused within the limits of the law. Such an intention of course is the essence of conscientious policework.

cifically designed to extract incriminating statements from the accused. The same would be true if the accused made a statement that a prison guard happened to overhear. See, *e. g.*, *United States* v. *Barfield*, 461 F. 2d 661 (CA5 1972). I think there likewise is no Sixth Amendment violation when the accused's cellmate initiates conversation with him, and the accused makes incriminatory admissions. The fact that the cellmate is an informant has no impact on the accused, because the informant appears to him to be an ordinary cellmate. Whether the accused makes any statements is therefore dependent on his own disposition to do so, despite the fact that he is confined in a cell.

III

Finally, I disagree with the Court's reading of the facts, though that reading obviously narrows the scope of its holding. Here the District Court found that the Government did not employ Nichols to question respondent or to seek information from him, but merely to report what he heard. The Government had no part in having Nichols placed in the jail cell with respondent. App. to Pet. for Cert. 39a. And the record in my view fails to support the conclusion that Nichols engaged in any affirmative conduct to elicit information from respondent. The Court of Appeals did not either explicitly or implicitly find to the contrary. Thus, this Court's factual conclusions are not supported by the findings of the District Court. I consequently would conclude, as did the District Court, that here respondent has not been denied his Sixth Amendment right to counsel.

For the foregoing reasons, I would reverse the judgment of the Court of Appeals.

DIAMOND, COMMISSIONER OF PATENTS AND TRADEMARKS v. CHAKRABARTY

CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

No. 79-136. Argued March 17, 1980—Decided June 16, 1980

Title 35 U. S. C. § 101 provides for the issuance of a patent to a person who invents or discovers "any" new and useful "manufacture" or "composition of matter." Respondent filed a patent application relating to his invention of a human-made, genetically engineered bacterium capable of breaking down crude oil, a property which is possessed by no naturally occurring bacteria. A patent examiner's rejection of the patent application's claims for the new bacteria was affirmed by the Patent Office Board of Appeals on the ground that living things are not patentable subject matter under § 101. The Court of Customs and Patent Appeals reversed, concluding that the fact that micro-organisms are alive is without legal significance for purposes of the patent law.

Held: A live, human-made micro-organism is patentable subject matter under § 101. Respondent's micro-organism constitutes a "manufacture" or "composition of matter" within that statute. Pp. 308-318.

(a) In choosing such expansive terms as "manufacture" and "composition of matter," modified by the comprehensive "any," Congress contemplated that the patent laws should be given wide scope, and the relevant legislative history also supports a broad construction. While laws of nature, physical phenomena, and abstract ideas are not patentable, respondent's claim is not to a hitherto unknown natural phenomenon, but to a nonnaturally occurring manufacture or composition of matter—a product of human ingenuity "having a distinctive name, character [and] use." *Hartranft* v. *Wiegmann,* 121 U. S. 609, 615. *Funk Brothers Seed Co.* v. *Kalo Inoculant Co.,* 333 U. S. 127, distinguished. Pp. 308-310.

(b) The passage of the 1930 Plant Patent Act, which afforded patent protection to certain asexually reproduced plants, and the 1970 Plant Variety Protection Act, which authorized protection for certain sexually reproduced plants but excluded bacteria from its protection, does not evidence congressional understanding that the terms "manufacture" or "composition of matter" in § 101 do not include living things. Pp. 310-314.

(c) Nor does the fact that genetic technology was unforeseen when Congress enacted § 101 require the conclusion that micro-organisms cannot qualify as patentable subject matter until Congress expressly authorizes such protection. The unambiguous language of § 101 fairly embraces respondent's invention. Arguments against patentability under § 101, based on potential hazards that may be generated by genetic research, should be addressed to the Congress and the Executive, not to the Judiciary. Pp. 314–318.

596 F. 2d 952, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which STEWART, BLACKMUN, REHNQUIST, and STEVENS, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which WHITE, MARSHALL, and POWELL, JJ., joined, *post*, p. 318.

Deputy Solicitor General Wallace argued the cause for petitioner. With him on the briefs were *Solicitor General McCree, Assistant Attorney General Shenefield, Harriet S. Shapiro, Robert B. Nicholson, Frederic Freilicher,* and *Joseph F. Nakamura.*

Edward F. McKie, Jr., argued the cause for respondent. With him on the brief were *Leo I. MaLossi, William E. Schuyler, Jr.,* and *Dale H. Hoscheit.**

**Leonard S. Rubenstein* filed a brief for the Peoples Business Commission as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *George W. Whitney, Bruce M. Collins,* and *Karl F. Jorda* for the American Patent Law Association, Inc.; by *Thomas D. Kiley* for Genentech, Inc.; by *Jerome G. Lee, William F. Dudine, Jr.,* and *Paul H. Heller* for the New York Patent Law Association, Inc.; by *Peter R. Taft, Joseph A. Keyes, Jr.,* and *Sheldon Elloit Steinbach* for Dr. Leroy E. Hood et al.; and by *Lorance L. Greenlee* for Dr. George Pieczenik.

Briefs of *amici curiae* were filed by *William I. Althen* for the American Society for Microbiology; by *Donald R. Dunner* for the Pharmaceutical Manufacturers Association; by *Edward S. Irons, Mary Helen Sears,* and *Donald Reidhaar* for the Regents of the University of California; and by *Cornell D. Cornish, pro se.*

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to determine whether a live, human-made micro-organism is patentable subject matter under 35 U. S. C. § 101.

I

In 1972, respondent Chakrabarty, a microbiologist, filed a patent application, assigned to the General Electric Co. The application asserted 36 claims related to Chakrabarty's invention of "a bacterium from the genus *Pseudomonas* containing therein at least two stable energy-generating plasmids, each of said plasmids providing a separate hydrocarbon degradative pathway." [1] This human-made, genetically engineered bacterium is capable of breaking down multiple components of crude oil. Because of this property, which is possessed by no naturally occurring bacteria, Chakrabarty's invention is believed to have significant value for the treatment of oil spills.[2]

Chakrabarty's patent claims were of three types: first, process claims for the method of producing the bacteria;

[1] Plasmids are hereditary units physically separate from the chromosomes of the cell. In prior research, Chakrabarty and an associate discovered that plasmids control the oil degradation abilities of certain bacteria. In particular, the two researchers discovered plasmids capable of degrading camphor and octane, two components of crude oil. In the work represented by the patent application at issue here, Chakrabarty discovered a process by which four different plasmids, capable of degrading four different oil components, could be transferred to and maintained stably in a single *Pseudomonas* bacterum, which itself has no capacity for degrading oil.

[2] At present, biological control of oil spills requires the use of a mixture of naturally occurring bacteria, each capable of degrading one component of the oil complex. In this way, oil is decomposed into simpler substances which can serve as food for aquatic life. However, for various reasons, only a portion of any such mixed culture survives to attack the oil spill. By breaking down multiple components of oil, Chakrabarty's micro-organism promises more efficient and rapid oil-spill control.

second, claims for an inoculum comprised of a carrier material floating on water, such as straw, and the new bacteria; and third, claims to the bacteria themselves. The patent examiner allowed the claims falling into the first two categories, but rejected claims for the bacteria. His decision rested on two grounds: (1) that micro-organisms are "products of nature," and (2) that as living things they are not patentable subject matter under 35 U. S. C. § 101.

Chakrabarty appealed the rejection of these claims to the Patent Office Board of Appeals, and the Board affirmed the examiner on the second ground.[3] Relying on the legislative history of the 1930 Plant Patent Act, in which Congress extended patent protection to certain asexually reproduced plants, the Board concluded that § 101 was not intended to cover living things such as these laboratory created micro-organisms.

The Court of Customs and Patent Appeals, by a divided vote, reversed on the authority of its prior decision in *In re Bergy*, 563 F. 2d 1031, 1038 (1977), which held that "the fact that microorganisms . . . are alive . . . [is] without legal significance" for purposes of the patent law.[4] Subsequently, we granted the Acting Commissioner of Patents and Trademarks' petition for certiorari in *Bergy*, vacated the judgment, and remanded the case "for further consideration in light of *Parker* v. *Flook*, 437 U. S. 584 (1978)." 438 U. S. 902 (1978). The Court of Customs and Patent Appeals then vacated its judgment in *Chakrabarty* and consolidated the case with *Bergy* for reconsideration. After re-examining both cases in the light of our holding in *Flook*, that court, with one dissent, reaffirmed its earlier judgments. 596 F. 2d 952 (1979).

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[3] The Board concluded that the new bacteria were not "products of nature," because *Pseudomonas* bacteria containing two or more different energy-generating plasmids are not naturally occurring.

[4] *Bergy* involved a patent application for a pure culture of the microorganism *Streptomyces vellosus* found to be useful in the production of lincomycin, an antibiotic.

The Commissioner of Patents and Trademarks again sought certiorari, and we granted the writ as to both *Bergy* and *Chakrabarty*. 444 U. S. 924 (1979). Since then, *Bergy* has been dismissed as moot, 444 U. S. 1028 (1980), leaving only *Chakrabarty* for decision.

II

The Constitution grants Congress broad power to legislate to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Art. I, § 8, cl. 8. The patent laws promote this progress by offering inventors exclusive rights for a limited period as an incentive for their inventiveness and research efforts. *Kewanee Oil Co.* v. *Bicron Corp.*, 416 U. S. 470, 480–481 (1974); *Universal Oil Co.* v. *Globe Co.*, 322 U. S. 471, 484 (1944). The authority of Congress is exercised in the hope that "[t]he productive effort thereby fostered will have a positive effect on society through the introduction of new products and processes of manufacture into the economy, and the emanations by way of increased employment and better lives for our citizens." *Kewanee*, *supra*, at 480.

The question before us in this case is a narrow one of statutory interpretation requiring us to construe 35 U. S. C. § 101, which provides:

> "Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title."

Specifically, we must determine whether respondent's microorganism constitutes a "manufacture" or "composition of matter" within the meaning of the statute.[5]

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[5] This case does not involve the other "conditions and requirements" of the patent laws, such as novelty and nonobviousness. 35 U. S. C. §§ 102, 103.

III

In cases of statutory construction we begin, of course, with the language of the statute. *Southeastern Community College* v. *Davis*, 442 U. S. 397, 405 (1979). And "unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin* v. *United States*, 444 U. S. 37, 42 (1979). We have also cautioned that courts "should not read into the patent laws limitations and conditions which the legislature has not expressed." *United States* v. *Dubilier Condenser Corp.*, 289 U. S. 178, 199 (1933).

Guided by these canons of construction, this Court has read the term "manufacture" in § 101 in accordance with its dictionary definition to mean "the production of articles for use from raw or prepared materials by giving to these materials new forms, qualities, properties, or combinations, whether by hand-labor or by machinery." *American Fruit Growers, Inc.* v. *Brogdex Co.*, 283 U. S. 1, 11 (1931). Similarly, "composition of matter" has been construed consistent with its common usage to include "all compositions of two or more substances and . . . all composite articles, whether they be the results of chemical union, or of mechanical mixture, or whether they be gases, fluids, powders or solids." *Shell Development Co.* v. *Watson*, 149 F. Supp. 279, 280 (DC 1957) (citing 1 A. Deller, Walker on Patents § 14, p. 55 (1st ed. 1937)). In choosing such expansive terms as "manufacture" and "composition of matter," modified by the comprehensive "any," Congress plainly contemplated that the patent laws would be given wide scope.

The relevant legislative history also supports a broad construction. The Patent Act of 1793, authored by Thomas Jefferson, defined statutory subject matter as "any new and useful art, machine, manufacture, or composition of matter, or any new or useful improvement [thereof]." Act of Feb. 21, 1793, § 1, 1 Stat. 319. The Act embodied Jefferson's philosophy that "ingenuity should receive a liberal encouragement."

5 Writings of Thomas Jefferson 75–76 (Washington ed. 1871). See *Graham* v. *John Deere Co.*, 383 U. S. 1, 7–10 (1966). Subsequent patent statutes in 1836, 1870, and 1874 employed this same broad language. In 1952, when the patent laws were recodified, Congress replaced the word "art" with "process," but otherwise left Jefferson's language intact. The Committee Reports accompanying the 1952 Act inform us that Congress intended statutory subject matter to "include anything under the sun that is made by man." S. Rep. No. 1979, 82d Cong., 2d Sess., 5 (1952); H. R. Rep. No. 1923, 82d Cong., 2d Sess., 6 (1952).[6]

This is not to suggest that § 101 has no limits or that it embraces every discovery. The laws of nature, physical phenomena, and abstract ideas have been held not patentable. See *Parker* v. *Flook*, 437 U. S. 584 (1978); *Gottschalk* v. *Benson*, 409 U. S. 63, 67 (1972); *Funk Brothers Seed Co.* v. *Kalo Inoculant Co.*, 333 U. S. 127, 130 (1948); *O'Reilly* v. *Morse*, 15 How. 62, 112–121 (1854); *Le Roy* v. *Tatham*, 14 How. 156, 175 (1853). Thus, a new mineral discovered in the earth or a new plant found in the wild is not patentable subject matter. Likewise, Einstein could not patent his celebrated law that $E=mc^2$; nor could Newton have patented the law of gravity. Such discoveries are "manifestations of . . . nature, free to all men and reserved exclusively to none." *Funk, supra*, at 130.

Judged in this light, respondent's micro-organism plainly qualifies as patentable subject matter. His claim is not to a hitherto unknown natural phenomenon, but to a nonnaturally occurring manufacture or composition of matter—a product of human ingenuity "having a distinctive name, character [and]

[6] This same language was employed by P. J. Federico, a principal draftsman of the 1952 recodification, in his testimony regarding that legislation: "[U]nder section 101 a person may have invented a machine or a manufacture, which may include anything under the sun that is made by man. . . ." Hearings on H. R. 3760 before Subcommittee No. 3 of the House Committee on the Judiciary, 82d Cong., 1st Sess., 37 (1951).

use." *Hartranft* v. *Wiegmann*, 121 U. S. 609, 615 (1887). The point is underscored dramatically by comparison of the invention here with that in *Funk*. There, the patentee had discovered that there existed in nature certain species of root-nodule bacteria which did not exert a mutually inhibitive effect on each other. He used that discovery to produce a mixed culture capable of inoculating the seeds of leguminous plants. Concluding that the patentee had discovered "only some of the handiwork of nature," the Court ruled the product nonpatentable:

> "Each of the species of root-nodule bacteria contained in the package infects the same group of leguminous plants which it always infected. No species acquires a different use. The combination of species produces no new bacteria, no change in the six species of bacteria, and no enlargement of the range of their utility. Each species has the same effect it always had. The bacteria perform in their natural way. Their use in combination does not improve in any way their natural functioning. They serve the ends nature originally provided and act quite independently of any effort of the patentee." 333 U. S., at 131.

Here, by contrast, the patentee has produced a new bacterium with markedly different characteristics from any found in nature and one having the potential for significant utility. His discovery is not nature's handiwork, but his own; accordingly it is patentable subject matter under § 101.

IV

Two contrary arguments are advanced, neither of which we find persuasive.

(A)

The petitioner's first argument rests on the enactment of the 1930 Plant Patent Act, which afforded patent protection to certain asexually reproduced plants, and the 1970 Plant

Variety Protection Act, which authorized protection for certain sexually reproduced plants but excluded bacteria from its protection.[7] In the petitioner's view, the passage of these Acts evidences congressional understanding that the terms "manufacture" or "composition of matter" do not include living things; if they did, the petitioner argues, neither Act would have been necessary.

We reject this argument. Prior to 1930, two factors were thought to remove plants from patent protection. The first was the belief that plants, even those artificially bred, were products of nature for purposes of the patent law. This position appears to have derived from the decision of the Patent Office in *Ex parte Latimer*, 1889 Dec. Com. Pat. 123, in which a patent claim for fiber found in the needle of the *Pinus australis* was rejected. The Commissioner reasoned that a contrary result would permit "patents [to] be obtained upon the trees of the forest and the plants of the earth, which of course would be unreasonable and impossible." *Id.*, at 126. The *Latimer* case, it seems, came to "se[t] forth the general stand taken in these matters" that plants were natural products not subject to patent protection. Thorne, Relation of Patent Law to Natural Products, 6 J. Pat. Off. Soc. 23, 24

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[7] The Plant Patent Act of 1930, 35 U. S. C. § 161, provides in relevant part:

"Whoever invents or discovers and asexually reproduces any distinct and new variety of plant, including cultivated sports, mutants, hybrids, and newly found seedlings, other than a tuber propogated plant or a plant found in an uncultivated state, may obtain a patent therefor. . . ."

The Plant Variety Protection Act of 1970, provides in relevant part:

"The breeder of any novel variety of sexually reproduced plant (other than fungi, bacteria, or first generation hybrids) who has so reproduced the variety, or his successor in interest, shall be entitled to plant variety protection therefor. . . ." 84 Stat. 1547, 7 U. S. C. § 2402 (a).

See generally, 3 A. Deller, Walker on Patents, ch. IX (2d ed. 1964); R. Allyn, The First Plant Patents (1934).

(1923).[8] The second obstacle to patent protection for plants was the fact that plants were thought not amenable to the "written description" requirement of the patent law. See 35 U. S. C. § 112. Because new plants may differ from old only in color or perfume, differentiation by written description was often impossible. See Hearings on H. R. 11372 before the House Committee on Patents, 71st Cong., 2d Sess., 7 (1930) (memorandum of Patent Commissioner Robertson).

In enacting the Plant Patent Act, Congress addressed both of these concerns. It explained at length its belief that the work of the plant breeder "in aid of nature" was patentable invention. S. Rep. No. 315, 71st Cong., 2d Sess., 6–8 (1930); H. R. Rep. No. 1129, 71st Cong., 2d Sess., 7–9 (1930). And it relaxed the written description requirement in favor of "a description . . . as complete as is reasonably possible." 35 U. S. C. § 162. No Committee or Member of Congress, however, expressed the broader view, now urged by the petitioner, that the terms "manufacture" or "composition of matter" exclude living things. The sole support for that position in the legislative history of the 1930 Act is found in the conclusory statement of Secretary of Agriculture Hyde, in a letter to the Chairmen of the House and Senate Committees considering the 1930 Act, that "the patent laws . . . at the present time are understood to cover only inventions or discoveries in the field of inanimate nature." See S. Rep. No. 315, *supra*, at Appendix A; H. R. Rep. No. 1129, *supra*, at Appendix A. Secretary Hyde's opinion, however, is not entitled to controlling weight. His views were solicited on the administration of the new law and not on the scope of patent-

[8] Writing three years after the passage of the 1930 Act, R. Cook, Editor of the Journal of Heredity, commented: "It is a little hard for plant men to understand why [Art. I, § 8] of the Constitution should not have been earlier construed to include the promotion of the art of plant breeding. The reason for this is probably to be found in the principle that natural products are not patentable." Florists Exchange and Horticultural Trade World, July 15, 1933, p. 9.

able subject matter—an area beyond his competence. Moreover, there is language in the House and Senate Committee Reports suggesting that to the extent Congress considered the matter it found the Secretary's dichotomy unpersuasive. The Reports observe:

> "There is a clear and logical distinction *between the discovery of a new variety of plant and of certain inanimate things*, such, for example, as a new and useful natural mineral. The mineral is created wholly by nature unassisted by man. . . . On the other hand, a plant discovery resulting from cultivation is unique, isolated, and is not repeated by nature, nor can it be reproduced by nature unaided by man. . . ." S. Rep. No. 315, *supra*, at 6; H. R. Rep. No. 1129, *supra*, at 7 (emphasis added).

Congress thus recognized that the relevant distinction was not between living and inanimate things, but between products of nature, whether living or not, and human-made inventions. Here, respondent's micro-organism is the result of human ingenuity and research. Hence, the passage of the Plant Patent Act affords the Government no support.

Nor does the passage of the 1970 Plant Variety Protection Act support the Government's position. As the Government acknowledges, sexually reproduced plants were not included under the 1930 Act because new varieties could not be reproduced true-to-type through seedlings. Brief for Petitioner 27, n. 31. By 1970, however, it was generally recognized that true-to-type reproduction was possible and that plant patent protection was therefore appropriate. The 1970 Act extended that protection. There is nothing in its language or history to suggest that it was enacted because § 101 did not include living things.

In particular, we find nothing in the exclusion of bacteria from plant variety protection to support the petitioner's position. See n. 7, *supra*. The legislative history gives no reason for this exclusion. As the Court of Customs and

Patent Appeals suggested, it may simply reflect congressional agreement with the result reached by that court in deciding *In re Arzberger*, 27 C. C. P. A. (Pat.) 1315, 112 F. 2d 834 (1940), which held that bacteria were not plants for the purposes of the 1930 Act. Or it may reflect the fact that prior to 1970 the Patent Office had issued patents for bacteria under § 101.[9] In any event, absent some clear indication that Congress "focused on [the] issues . . . directly related to the one presently before the Court," *SEC* v. *Sloan*, 436 U. S. 103, 120–121 (1978), there is no basis for reading into its actions an intent to modify the plain meaning of the words found in § 101. See *TVA* v. *Hill*, 437 U. S. 153, 189–193 (1978); *United States* v. *Price*, 361 U. S. 304, 313 (1960).

(B)

The petitioner's second argument is that micro-organisms cannot qualify as patentable subject matter until Congress expressly authorizes such protection. Its position rests on the fact that genetic technology was unforeseen when Congress enacted § 101. From this it is argued that resolution of the patentability of inventions such as respondent's should be left to Congress. The legislative process, the petitioner argues, is best equipped to weigh the competing economic, social, and scientific considerations involved, and to determine whether living organisms produced by genetic engineering should receive patent protection. In support of this position, the petitioner relies on our recent holding in *Parker* v. *Flook*, 437 U. S. 584 (1978), and the statement that the judiciary "must proceed cautiously when . . . asked to extend

[9] In 1873, the Patent Office granted Louis Pasteur a patent on "yeast, free from organic germs of disease, as an article of manufacture." And in 1967 and 1968, immediately prior to the passage of the Plant Variety Protection Act, that Office granted two patents which, as the Government concedes, state claims for living micro-organisms. See Reply Brief for Petitioner 3, and n. 2.

patent rights into areas wholly unforeseen by Congress." *Id.*, at 596.

It is, of course, correct that Congress, not the courts, must define the limits of patentability; but it is equally true that once Congress has spoken it is "the province and duty of the judicial department to say what the law is." *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803). Congress has performed its constitutional role in defining patentable subject matter in § 101; we perform ours in construing the language Congress has employed. In so doing, our obligation is to take statutes as we find them, guided, if ambiguity appears, by the legislative history and statutory purpose. Here, we perceive no ambiguity. The subject-matter provisions of the patent law have been cast in broad terms to fulfill the constitutional and statutory goal of promoting "the Progress of Science and the useful Arts" with all that means for the social and economic benefits envisioned by Jefferson. Broad general language is not necessarily ambiguous when congressional objectives require broad terms.

Nothing in *Flook* is to the contrary. That case applied our prior precedents to determine that a "claim for an improved method of calculation, even when tied to a specific end use, is unpatentable subject matter under § 101." 437 U. S., at 595, n. 18. The Court carefully scrutinized the claim at issue to determine whether it was precluded from patent protection under "the principles underlying the prohibition against patents for 'ideas' or phenomena of nature." *Id.*, at 593. We have done that here. *Flook* did not announce a new principle that inventions in areas not contemplated by Congress when the patent laws were enacted are unpatentable *per se*.

To read that concept into *Flook* would frustrate the purposes of the patent law. This Court frequently has observed that a statute is not to be confined to the "particular application[s] . . . contemplated by the legislators." *Barr* v. *United States*, 324 U. S. 83, 90 (1945). Accord, *Browder* v. *United States*, 312 U. S. 335, 339 (1941); *Puerto Rico* v. *Shell Co.*,

302 U. S. 253, 257 (1937). This is especially true in the field of patent law. A rule that unanticipated inventions are without protection would conflict with the core concept of the patent law that anticipation undermines patentability. See *Graham* v. *John Deere Co.*, 383 U. S., at 12–17. Mr. Justice Douglas reminded that the inventions most benefiting mankind are those that "push back the frontiers of chemistry, physics, and the like." *Great A. & P. Tea Co.* v. *Supermarket Corp.*, 340 U. S. 147, 154 (1950) (concurring opinion). Congress employed broad general language in drafting § 101 precisely because such inventions are often unforeseeable.[10]

To buttress its argument, the petitioner, with the support of *amicus*, points to grave risks that may be generated by research endeavors such as respondent's. The briefs present a gruesome parade of horribles. Scientists, among them Nobel laureates, are quoted suggesting that genetic research may pose a serious threat to the human race, or, at the very least, that the dangers are far too substantial to permit such research to proceed apace at this time. We are told that genetic research and related technological developments may spread pollution and disease, that it may result in a loss of genetic diversity, and that its practice may tend to depreciate the value of human life. These arguments are forcefully, even passionately presented; they remind us that, at times, human ingenuity seems unable to control fully the forces it creates—that, with Hamlet, it is sometimes better "to bear those ills we have than fly to others that we know not of."

It is argued that this Court should weigh these potential hazards in considering whether respondent's invention is

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[10] Even an abbreviated list of patented inventions underscores the point: telegraph (Morse, No. 1,647); telephone (Bell, No. 174,465); electric lamp (Edison, No. 223,898); airplane (the Wrights, No. 821,393); transistor (Bardeen & Brattain, No. 2,524,035); neutronic reactor (Fermi & Szilard, No. 2,708,656); laser (Schawlow & Townes, No. 2,929,922). See generally Revolutionary Ideas, Patents & Progress in America, United States Patent and Trademark Office (1976).

patentable subject matter under § 101. We disagree. The grant or denial of patents on micro-organisms is not likely to put an end to genetic research or to its attendant risks. The large amount of research that has already occurred when no researcher had sure knowledge that patent protection would be available suggests that legislative or judicial fiat as to patentability will not deter the scientific mind from probing into the unknown any more than Canute could command the tides. Whether respondent's claims are patentable may determine whether research efforts are accelerated by the hope of reward or slowed by want of incentives, but that is all.

What is more important is that we are without competence to entertain these arguments—either to brush them aside as fantasies generated by fear of the unknown, or to act on them. The choice we are urged to make is a matter of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot. That process involves the balancing of competing values and interests, which in our democratic system is the business of elected representatives. Whatever their validity, the contentions now pressed on us should be addressed to the political branches of the Government, the Congress and the Executive, and not to the courts.[11]

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[11] We are not to be understood as suggesting that the political branches have been laggard in the consideration of the problems related to genetic research and technology. They have already taken action. In 1976, for example, the National Institutes of Health released guidelines for NIH-sponsored genetic research which established conditions under which such research could be performed. 41 Fed. Reg. 27902. In 1978 those guidelines were revised and relaxed. 43 Fed. Reg. 60080, 60108, 60134. And Committees of the Congress have held extensive hearings on these matters. See, *e. g.*, Hearings on Genetic Engineering before the Subcommittee on Health of the Senate Committee on Labor and Public Welfare, 94th Cong., 1st Sess. (1975); Hearings before the Subcommittee on Science, Technology, and Space of the Senate Committee on Commerce, Science, and Transportation, 95th Cong., 1st Sess. (1977); Hearings on H. R. 4759 et al. before the Subcommittee on Health and the Environment of the

We have emphasized in the recent past that "[o]ur individual appraisal of the wisdom or unwisdom of a particular [legislative] course . . . is to be put aside in the process of interpreting a statute." *TVA* v. *Hill*, 437 U. S., at 194. Our task, rather, is the narrow one of determining what Congress meant by the words it used in the statute; once that is done our powers are exhausted. Congress is free to amend § 101 so as to exclude from patent protection organisms produced by genetic engineering. Cf. 42 U. S. C. § 2181 (a), exempting from patent protection inventions "useful solely in the utilization of special nuclear material or atomic energy in an atomic weapon." Or it may choose to craft a statute specifically designed for such living things. But, until Congress takes such action, this Court must construe the language of § 101 as it is. The language of that section fairly embraces respondent's invention.

Accordingly, the judgment of the Court of Customs and Patent Appeals is

Affirmed.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE POWELL join, dissenting.

I agree with the Court that the question before us is a narrow one. Neither the future of scientific research, nor even the ability of respondent Chakrabarty to reap some monopoly profits from his pioneering work, is at stake. Patents on the processes by which he has produced and employed the new living organism are not contested. The only question we need decide is whether Congress, exercising its authority under Art. I, § 8, of the Constitution, intended that he be able to secure a monopoly on the living organism itself, no matter how produced or how used. Because I believe the Court has misread the applicable legislation, I dissent.

House Committee on Interstate and Foreign Commerce, 95th Cong., 1st Sess. (1977).

The patent laws attempt to reconcile this Nation's deep-seated antipathy to monopolies with the need to encourage progress. *Deepsouth Packing Co.* v. *Laitram Corp.*, 406 U. S. 518, 530–531 (1972); *Graham* v. *John Deere Co.*, 383 U. S. 1, 7–10 (1966). Given the complexity and legislative nature of this delicate task, we must be careful to extend patent protection no further than Congress has provided. In particular, were there an absence of legislative direction, the courts should leave to Congress the decisions whether and how far to extend the patent privilege into areas where the common understanding has been that patents are not available.[1] Cf. *Deepsouth Packing Co.* v. *Laitram Corp.*, *supra*.

In this case, however, we do not confront a complete legislative vacuum. The sweeping language of the Patent Act of 1793, as re-enacted in 1952, is not the last pronouncement Congress has made in this area. In 1930 Congress enacted the Plant Patent Act affording patent protection to developers of certain asexually reproduced plants. In 1970 Congress enacted the Plant Variety Protection Act to extend protection to certain new plant varieties capable of sexual reproduction. Thus, we are not dealing—as the Court would have it—with the routine problem of "unanticipated inventions." *Ante*, at 316. In these two Acts Congress has addressed the general problem of patenting animate inventions and has chosen carefully limited language granting protection to some kinds of discoveries, but specifically excluding others. These Acts strongly evidence a congressional limitation that excludes bacteria from patentability.[2]

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[1] I read the Court to admit that the popular conception, even among advocates of agricultural patents, was that living organisms were unpatentable. See *ante*, at 311–312, and n. 8.

[2] But even if I agreed with the Court that the 1930 and 1970 Acts were not dispositive, I would dissent. This case presents even more cogent reasons than *Deepsouth Packing Co.* not to extend the patent monopoly in the face of uncertainty. At the very least, these Acts are signs of legislative attention to the problems of patenting living organisms, but they give

First, the Acts evidence Congress' understanding, at least since 1930, that § 101 does not include living organisms. If newly developed living organisms not naturally occurring had been patentable under § 101, the plants included in the scope of the 1930 and 1970 Acts could have been patented without new legislation. Those plants, like the bacteria involved in this case, were new varieties not naturally occurring.[3] Although the Court, *ante*, at 311, rejects this line of argument, it does not explain why the Acts were necessary unless to correct a pre-existing situation.[4] I cannot share the Court's implicit assumption that Congress was engaged in either idle exercises or mere correction of the public record when it enacted the 1930 and 1970 Acts. And Congress certainly thought it was doing something significant. The Committee Reports contain expansive prose about the previously unavailable benefits to be derived from extending patent protection to plants.[5] H. R.

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no affirmative indication of congressional intent that bacteria be patentable. The caveat of *Parker* v. *Flook*, 437 U. S. 584, 596 (1978), an admonition to "proceed cautiously when we are asked to extend patent rights into areas wholly unforeseen by Congress," therefore becomes pertinent. I should think the necessity for caution is that much greater when we are asked to extend patent rights into areas Congress has foreseen and considered but has not resolved.

[3] The Court refers to the logic employed by Congress in choosing not to perpetuate the "dichotomy" suggested by Secretary Hyde. *Ante*, at 313. But by this logic the bacteria at issue here are distinguishable from a "mineral . . . created wholly by nature" in exactly the same way as were the new varieties of plants. If a new Act was needed to provide patent protection for the plants, it was equally necessary for bacteria. Yet Congress provided for patents on plants but not on these bacteria. In short, Congress decided to make only a subset of animate "human-made inventions," *ibid.*, patentable.

[4] If the 1930 Act's only purpose were to solve the technical problem of description referred to by the Court, *ante*, at 312, most of the Act, and in particular its limitation to asexually reproduced plants, would have been totally unnecessary.

[5] Secretary Hyde's letter was not the only explicit indication in the legislative history of these Acts that Congress was acting on the assumption

Rep. No. 91-1605, pp. 1-3 (1970); S. Rep. No. 315, 71st Cong., 2d Sess., 1-3 (1930). Because Congress thought it had to legislate in order to make agricultural "human-made inventions" patentable and because the legislation Congress enacted is limited, it follows that Congress never meant to make items outside the scope of the legislation patentable.

Second, the 1970 Act clearly indicates that Congress has included bacteria within the focus of its legislative concern, but not within the scope of patent protection. Congress specifically excluded bacteria from the coverage of the 1970 Act. 7 U. S. C. § 2402 (a). The Court's attempts to supply explanations for this explicit exclusion ring hollow. It is true that there is no mention in the legislative history of the exclusion, but that does not give us license to invent reasons. The fact is that Congress, assuming that animate objects as to which it had not specifically legislated could not be patented, excluded bacteria from the set of patentable organisms.

The Court protests that its holding today is dictated by the broad language of § 101, which cannot "be confined to the 'particular application[s] . . . contemplated by the legislators.'" *Ante*, at 315, quoting *Barr* v. *United States*, 324 U. S. 83, 90 (1945). But as I have shown, the Court's decision does not follow the unavoidable implications of the statute. Rather, it extends the patent system to cover living material

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that legislation was necessary to make living organisms patentable. The Senate Judiciary Committee Report on the 1970 Act states the Committee's understanding that patent protection extended no further than the explicit provisions of these Acts:

"Under the patent law, patent protection is limited to those varieties of plants which reproduce asexually, that is, by such methods as grafting or budding. No protection is available to those varieties of plants which reproduce sexually, that is, generally by seeds." S. Rep. No. 91-1246, p. 3 (1970).

Similarly, Representative Poage, speaking for the 1970 Act, after noting the protection accorded asexually developed plants, stated that "for plants produced from seed, there has been no such protection." 116 Cong. Rec. 40295 (1970).

even though Congress plainly has legislated in the belief that § 101 does not encompass living organisms. It is the role of Congress, not this Court, to broaden or narrow the reach of the patent laws. This is especially true where, as here, the composition sought to be patented uniquely implicates matters of public concern.

BROWN *v.* LOUISIANA

CERTIORARI TO THE SUPREME COURT OF LOUISIANA

No. 79-5364. Argued March 25, 1980—Decided June 16, 1980

While petitioner's appeal from his felony conviction—based on a nonunanimous six-person jury verdict—was pending in the Louisiana Supreme Court, *Burch* v. *Louisiana*, 441 U. S. 130, was decided, holding unconstitutional those provisions of the Louisiana Constitution and Code of Criminal Procedure that sanctioned conviction of a nonpetty offense by a nonunanimous jury of six. The Louisiana Supreme Court thereafter affirmed petitioner's conviction, holding that the rule of *Burch* v. *Louisiana*, *supra*, should not be applied retroactively to cases tried by juries empaneled prior to the date of that decision.

Held: The judgment is reversed, and the case is remanded. Pp. 327–337; 337.

371 So. 2d 746, reversed and remanded.

MR. JUSTICE BRENNAN, joined by MR. JUSTICE STEWART, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN, concluded that the constitutional principle announced in *Burch* v. *Louisiana*, *supra*, that conviction of a nonpetty criminal offense in a state court by a nonunanimous six-person jury violates the accused's right to trial by jury guaranteed by the Sixth Amendment as applied to the States through the Fourteenth Amendment, should be given retroactive application. Pp. 327–337.

(a) The test for deciding whether a new constitutional doctrine should be applied retroactively contemplates the consideration of (i) the purpose to be served by the new doctrine; (ii) the extent of the reliance by law enforcement authorities on the old standards; and (iii) the impact on the administration of justice of a retroactive application of the new standards. Foremost among these factors is the first, and controlling significance will be given to factors (ii) and (iii) only when factor (i) does not clearly favor retroactivity or prospectivity. Pp. 327–329.

(b) *Burch* established that the concurrence of six jurors was constitutionally required to preserve the substance of the jury trial right and assure the reliability of the jury's verdict. The *Burch* rule's purpose to eliminate a practice that threatened the jury's ability properly to perform its function of determining the truth in serious criminal cases clearly requires retroactive application. Pp. 330–334.

(c) Due regard for the State's good-faith reliance on the old standards and the impact of retroactivity on the administration of justice does not

counsel a contrary result. Here, the element of justifiable reliance on pre-*Burch* standards is minimal, since unlike other cases that have been accorded prospective effect only, *Burch* did not overrule any prior decisions of this Court or invalidate a practice of heretofore unquestioned legitimacy. Similarly, retroactive application of the *Burch* rule here will not have a devastating impact on the administration of criminal law, since it appears that by 1979 only two States permitted conviction of nonpetty offenses by a nonunanimous six-member jury, and that one of them—Louisiana—did not institute its scheme until 1975. Moreover, the decision in this case will not affect the validity of all convictions obtained under Louisiana's unconstitutional jury practice during that 4-year period but only those in which it can be shown that the verdict was less than unanimous. Pp. 335–337.

MR. JUSTICE POWELL, joined by MR. JUSTICE STEVENS, being of the view that new constitutional rules should apply retroactively in cases still pending on direct review, such as the instant case, concurred in the judgment. P. 337.

BRENNAN, J., announced the judgment of the Court and delivered an opinion, in which STEWART, MARSHALL, and BLACKMUN, JJ., joined. POWELL, J., filed an opinion concurring in the judgment, in which STEVENS, J., joined, *post*, p. 337. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and WHITE, J., joined, *post*, p. 337.

John Lawrence argued the cause and filed a brief for petitioner.

Thomas Chester argued the cause *pro hac vice* for respondent. With him on the brief were *William J. Guste, Jr.*, Attorney General of Louisiana, *Harry F. Connick*, and *Louise Korns*.

MR. JUSTICE BRENNAN announced the judgment of the Court and delivered an opinion, in which MR. JUSTICE STEWART, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN joined.

Burch v. *Louisiana*, 441 U. S. 130 (1979), held that conviction of a nonpetty criminal offense by a nonunanimous six-person jury violates the accused's right to trial by jury guaranteed by the Sixth and Fourteenth Amendments. The issue

in this case is whether the constitutional principle announced in *Burch* is to be given retroactive application.

I

On July 31, 1978, petitioner Darnell Brown was charged by bill of information in Orleans Parish with simple burglary, a felony punishable by confinement in the parish prison or state penitentiary for a maximum term of 12 years. La. Rev. Stat. Ann. § 14:62 (West Supp. 1979). At the time, the Louisiana Constitution and Code of Criminal Procedure provided that such crimes should be tried by a jury of six persons, five of whom must concur to render a verdict.[1] Before trial, petitioner filed a motion to quash pursuant to Art. 532 (9) of the Louisiana Code of Criminal Procedure, arguing that his "due

[1] Article 1, § 17, of the Louisiana Constitution of 1974 provides:

"A criminal case in which the punishment may be capital shall be tried before a jury of twelve persons, all of whom must concur to render a verdict. A case in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, ten of whom must concur to render a verdict. *A case in which the punishment may be confinement at hard labor or confinement without hard labor for more than six months shall be tried before a jury of six persons, five of whom must concur to render a verdict.* The accused shall have the right to full voir dire examination of prospective jurors and to challenge jurors peremptorily. The number of challenges shall be fixed by law. Except in capital cases, a defendant may knowingly and intelligently waive his right to a trial by jury." (Emphasis added.)

At the time of petitioner's trial, Art. 782 (A), La. Code Crim. Proc. Ann. (West Supp. 1978), provided:

"Cases in which punishment may be capital shall be tried by a jury of twelve jurors, all of whom must concur to render a verdict. Cases in which punishment is necessarily confinement at hard labor shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict. *Cases in which the punishment may be confinement at hard labor shall be tried by a jury composed of six jurors, five of whom must concur to render a verdict.*" (Emphasis added.)

Following our decision in *Burch* v. *Louisiana*, 441 U. S. 130 (1979), this statutory provision was amended to require a unanimous verdict of six-person juries. 1979 La. Acts, No. 56, § 2.

process rights under the Sixth and the Fourteenth Amendments to the United States Constitution as enunciated in *Ballew* v. *Georgia*, [435 U. S. 223 (1978),] will be violated by a less than unanimous vote by a six person jury." App. 5. Petitioner therefore requested the trial judge to order a jury of 12 or, in the alternative, to require a unanimous verdict of the jury of 6.

Petitioner's motion was denied, and on August 23, his trial commenced before a six-member jury. That same afternoon, after deliberating for approximately one hour, the jury returned a verdict of guilty. At petitioner's request, the court polled the jurors and ascertained that their vote was 5 to 1 to convict. Sentencing was set for August 30, at which time petitioner renewed his objection to the nonunanimous six-person verdict by a motion for new trial. The trial judge again denied the motion and sentenced petitioner to a term of 22 years' imprisonment at hard labor.[2]

Petitioner appealed his conviction to the Louisiana Supreme Court, assigning as principal error the trial judge's refusal to grant the motion to quash. On April 17, 1979, while petitioner's case was still pending on direct review in the Louisiana courts, *Burch* v. *Louisiana*, *supra*, was decided, holding unconstitutional those provisions of the Louisiana Constitution and Code of Criminal Procedure that sanctioned conviction of a nonpetty offense by a nonunanimous jury of six. Some five weeks later, on May 21, 1979, the Louisiana Supreme Court affirmed petitioner's conviction. Although it implicitly acknowledged that *Burch* requires unanimous verdicts by six-person juries in all future prosecutions of simple burglary,[3] the court nonetheless concluded, without elabora-

[2] Because petitioner had two prior convictions, he was charged and sentenced as a habitual offender under La. Rev. Stat. Ann. § 15:529.1 (West Supp. 1979).

[3] Cf. *State* v. *Jackson*, 370 So. 2d 570, decided April 19, 1979, in which the Louisiana Supreme Court held that *Burch* applies to all trials commenced after that date.

tion, that "the rule of *Burch*, *supra*, should *not* be applied retroactively to juries empaneled prior to the date of the *Burch* decision." 371 So. 2d 746, 748 (1979) (emphasis in original). We granted certiorari. 444 U. S. 990 (1979). We reverse.

II

Linkletter v. *Walker*, 381 U. S. 618 (1965), was the first instance in which the Court declined to apply a new doctrine respecting one of the provisions of the Bill of Rights retroactively for the benefit of a previously convicted defendant. In the intervening 15 years, we have often considered the question of the retroactivity of decisions expounding new constitutional rules of criminal procedure, and have endeavored to elaborate appropriate standards for determining which rules are to be accorded retrospective and which only prospective effect. From the welter of case law that has developed in this area, several unequivocal principles emerge to guide our analysis in the present case.

It is by now uncontroverted that "the Constitution neither prohibits nor requires retrospective effect." *Id.*, at 629. Thus, although before *Linkletter* new constitutional rules had been applied to cases that had become final before promulgation of the rule, see *id.*, at 628, and n. 13, that decision firmly settled that "in appropriate cases the Court may in the interest of justice make the rule prospective . . . where the exigencies of the situation require such an application." *Id.*, at 628; *Johnson* v. *New Jersey*, 384 U. S. 719, 726–727 (1966).

Similarly, it is clear that resolution of the question of retroactivity does not automatically turn on the particular provision of the Constitution on which the new prescription is based. "Each constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice, and the way in which these factors combine must inevitably vary with the dictate involved." *Id.*, at 728. Accordingly, the test con-

sistently employed by the Court to decide whether a new constitutional doctrine should be applied retroactively contemplates the consideration of three criteria: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." *Stovall* v. *Denno*, 388 U. S. 293, 297 (1967).

Moreover, our decisions establish that "[f]oremost among these factors is the purpose to be served by the new constitutional rule," *Desist* v. *United States*, 394 U. S. 244, 249 (1969), and that we will give controlling significance to the measure of reliance and the impact on the administration of justice "only when the purpose of the rule in question [does] not clearly favor either retroactivity or prospectivity." *Id.*, at 251; *Michigan* v. *Payne*, 412 U. S. 47, 55 (1973); see also *Hankerson* v. *North Carolina*, 432 U. S. 233, 242–244 (1977); *Adams* v. *Illinois*, 405 U. S. 278, 280 (1972) (plurality opinion of BRENNAN, J.). "Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect. Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances." *Williams* v. *United States*, 401 U. S. 646, 653 (1971) (plurality opinion of WHITE, J.). Accord, *Hankerson* v. *North Carolina*, *supra*, at 243; *Gosa* v. *Mayden*, 413 U. S. 665, 679 (1973) (plurality opinion of BLACKMUN, J.); *Ivan V.* v. *City of New York*, 407 U. S. 203, 204 (1972).

Finally, we have recognized that the extent to which the purpose of a new constitutional rule requires its retroactive application "is necessarily a matter of degree." *Johnson* v. *New Jersey*, *supra*, at 729. Constitutional protections are

frequently fashioned to serve multiple ends; while a new standard may marginally implicate the reliability and integrity of the factfinding process, it may have been designed primarily to foster other, equally fundamental values in our system of jurisprudence.[4] Not every rule that "tends incidentally" to avoid unfairness at trial must be accorded retroactive effect. *Gosa* v. *Mayden, supra,* at 680 (plurality opinion of BLACKMUN, J.). So, too, additional safeguards may already exist that minimize the likelihood of past injustices.[5] In short, "[t]he extent to which a condemned practice infects the integrity of the truth-determining process at trial is a 'question of probabilities.'" *Stovall* v. *Denno, supra,* at 298 (quoting *Johnson* v. *New Jersey, supra,* at 729). And only when an assessment of those probabilities indicates that the condemned practice casts doubt upon the reliability of the determinations of guilt in past criminal cases must the new procedural rule be applied retroactively.[6]

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[4] See, *e. g., Tehan* v. *United States ex rel. Shott,* 382 U. S. 406, 415 (1966); *Johnson* v. *New Jersey,* 384 U. S. 719, 729–730 (1966); *Gosa* v. *Mayden,* 413 U. S. 665, 681–682 (1973) (plurality opinion of BLACKMUN, J.).

[5] See, *e. g., Johnson* v. *New Jersey, supra,* at 730; *Stovall* v. *Denno,* 388 U. S. 293, 299 (1967); *Michigan* v. *Payne,* 412 U. S. 47, 54 (1973).

[6] The distinguishing characteristic of those new constitutional doctrines that are to be given retroactive effect has been described in myriad formulations. See, *e. g., Johnson* v. *New Jersey, supra,* at 727–728 ("the rule affected 'the very integrity of the fact-finding process' and averted 'the clear danger of convicting the innocent'"); *Stovall* v. *Denno, supra,* at 298 ("rules of criminal procedure fashioned to correct serious flaws in the fact-finding process at trial"); *Roberts* v. *Russell,* 392 U. S. 293, 295 (1968) ("the constitutional error presents a serious risk that the issue of guilt or innocence may not have been reliably determined"); *Williams* v. *United States,* 401 U. S. 646, 653 (1971) (opinion of WHITE, J.) ("the purpose of the new constitutional standard [is] to minimize or avoid arbitrary or unreliable results"); *id.,* at 655, n. 7 ("the use of such a 'condemned practice' in past criminal trials presents substantial likelihood that the results of a number of those trials were factually incorrect"); *United States* v. *U. S. Coin & Currency,* 401 U. S. 715, 723 (1971) ("a procedural rule which . . . undermine[s] the basic accuracy of the factfinding

III

With these principles in mind, then, we turn to consideration of the issue presented by this case: whether the rule of *Burch* v. *Louisiana* must be given retroactive effect. We conclude that it must.

A

The right to jury trial guaranteed by the Sixth and Fourteenth Amendments "is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants." *Duncan* v. *Louisiana*, 391 U. S. 145, 158 (1968). Trial by jury in serious criminal cases has long been regarded as an indispensable protection against the possibility of governmental oppression; the history of the jury's development demonstrates "a long tradition attaching great importance to the concept of relying on a body of one's peers to determine guilt or innocence as a safeguard against arbitrary law enforcement." *Williams* v. *Florida*, 399 U. S. 78, 87 (1970). "Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence." *Id.*, at 100.

Although we have held that the constitutional guarantee of trial by jury prescribes neither the precise number that can constitute a jury, *Williams* v. *Florida*, *supra* (six-person jury does not violate Sixth and Fourteenth Amendments), nor

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process at trial"); *id.*, at 724 ("the failure to employ such rules at trial meant there was a significant chance that innocent men had been wrongfully punished in the past"); *Michigan* v. *Payne*, *supra*, at 61–62 (MARSHALL, J., dissenting) ("a rule that was central to the process of determining guilt or innocence, and whose application might well have led to the acquittal of the defendant"). While the precise verbalisms may vary, all encompass the notion that any rule which raises substantial doubts about the reliability of the jury's verdict should be applied retroactively.

the exact proportion of the jury that must concur in the verdict, *Apodaca* v. *Oregon*, 406 U. S. 404 (1972) (10-to-2 vote in state trial does not violate the Constitution), we have also declared that there do exist size and unanimity limits that cannot be transgressed if the essence of the jury trial right is to be maintained. Thus *Ballew* v. *Georgia*, 435 U. S. 223 (1978), held that a reduction in the size of a jury to below six persons in nonpetty criminal cases raises such substantial doubts as to the fairness of the proceeding and the jury's ability to represent the true sense of the community that it deprives the accused of his right to trial by jury. For "much the same reasons," we concluded in *Burch* that "conviction for a nonpetty offense by only five members of a six-person jury presents a similar threat to preservation of the substance of the jury trial guarantee" and hence violates the Sixth Amendment as applied to the States through the Fourteenth. 441 U. S., at 138. Though the line separating the permissible jury practice from the impermissible may not be the brightest, cf. *Burch* v. *Louisiana*, *supra*, at 137; *Ballew* v. *Georgia*, 435 U. S., at 231–232 (opinion of BLACKMUN, J.); *id.*, at 245–246 (opinion of POWELL, J.), a line must be drawn somewhere, and the constitutional inviolability of that border must be scrupulously respected lest the purpose and functioning of the jury be seriously impaired.

We think it apparent that the rationale behind the constitutional rule announced in *Burch* mandates its retroactive application. MR. JUSTICE BLACKMUN's opinion in *Ballew* [7]

[7] MR. JUSTICE BLACKMUN announced the judgment of the Court and delivered an opinion in which MR. JUSTICE STEVENS joined. 435 U. S., at 224. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL joined MR. JUSTICE BLACKMUN's opinion insofar as it held that the Sixth and Fourteenth Amendments require juries in criminal trials to contain more than five persons, but were of the view that the statute upon which the criminal prosecution was predicated was overbroad and therefore facially unconstitutional. *Id.*, at 246. MR. JUSTICE WHITE filed a statement concurring in the judgment, *id.*, at 245, and MR. JUSTICE POWELL, joined by THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST, filed a separate opinion concurring in the judgment. *Ibid.*

cataloged the several considerations that led the Court to conclude that the operation of the jury was inhibited to a constitutionally significant degree by reducing its size to five members. Prominent among these concerns was the recognition, supported by a number of empirical studies,[8] that a decline in jury size leads to less accurate factfinding and a greater risk of convicting an innocent person. *Id.*, at 232–235.[9] In addition, statistical and empirical data established that because of a concomitant decrease in the number of hung juries, a reduction in the size of the jury panel in criminal cases unfairly disadvantages one side—the defense. *Id.*, at 236.[10] Lastly, the opinion noted that the opportunity for meaningful and appropriate minority representation diminishes with the size of the jury. *Id.*, at 236–237.[11]

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[8] Almost all of the empirical research cited in MR. JUSTICE BLACKMUN's opinion, see 435 U. S., at 231–232, n. 10, had been prompted by *Williams v. Florida*, 399 U. S. 78 (1970). In comparing 12- and 6-member juries, the Court there observed: "What few experiments have occurred—usually in the civil area—indicate that there is no discernible difference between the results reached by the two different-sized juries." *Id.*, at 101.

[9] The data also showed that jury verdicts become less consistent as panel size decreases, a result that not only reduces the likelihood that a given jury will reach a "correct" result—that is, one that truly represents the consensus of the community—but also produces a greater proportion of aberrant compromise verdicts. See 435 U. S., at 234–235.

[10] There are three reasons why this is so. First, because as a practical matter the State will decline to reprosecute a given proportion of cases that have produced hung juries in a prior trial, a hung jury may effectively serve as an acquittal. Second, the effects of time on witnesses' memories and the benefits of exposure to the State's case will generally aid the defendant in any retrial. Lastly, because studies show that jurors are more prone to convict than acquit, see *id.*, at 235, and n. 19, a reduction in the number of hung juries will lead to a comparatively greater increase in the number of convictions than acquittals, thus operating to the defendant's disadvantage.

[11] On the basis of these considerations, MR. JUSTICE BLACKMUN's opinion concluded:

"[t]he assembled data raise substantial doubt about the reliability and appropriate representation of panels smaller than six. Because of the fun-

Identical considerations underlay our decision in *Burch*. The threat which conviction by a 5-to-0 verdict poses to the fairness of the proceeding and the proper role of the jury is not significantly alleviated when conviction is instead obtained by the addition of a sixth, but dissenting, ballot. When the requirement of unanimity is abandoned, the vote of this "additional" juror is essentially superfluous. The prosecution's demonstrated inability to convince all the jurors of the accused's guilt certainly does nothing to allay our concern about the reliability and accuracy of the jury's verdict. And while the addition of another juror to the five-person panel may statistically increase the representativeness of that body, relinquishment of the unanimity requirement removes any guarantee that the minority voices will actually be heard.[12]

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damental importance of the jury trial to the American system of criminal justice, any further reduction that promotes inaccurate and possibly biased decisionmaking, that causes untoward differences in verdicts, and that prevents juries from truly representing their communities, attains constitutional significance." *Id.*, at 239.

[12] A procedure that permits conviction by the nonunanimous verdict of a six-member jury significantly decreases the likelihood that the views of a minority faction will produce a hung jury, thus creating a further imbalance to the detriment of the defense. See n. 10, *supra*. If a minority viewpoint is shared by 10% of the community, a 12-member jury may be expected to include at least 1 minority representative 72% of the time, a 6-member jury would contain 1 such person 47% of the time, and a 5-member jury only 41% of the time. More important for our purposes, however, a six-member jury may be expected to include *two or more* minority voices in only 11% of the cases. As one acknowledged authority on jury research has explained:

"The important element to observe is that the abandonment of the unanimity rule is but another way of reducing the size of the jury. But it is reduction with a vengeance, for a majority verdict requirement is far more effective in nullifying the potency of minority viewpoints than is the outright reduction of a jury to a size equivalent to the majority that is allowed to agree on a verdict." Zeisel, . . . And Then There Were None: The Diminution of the Federal Jury, 38 U. Chi. L. Rev. 710, 722 (1971). See also M. Saks, Jury Verdicts 99 (1977).

In sum, *Burch* established that the concurrence of six jurors was constitutionally required to preserve the substance of the jury trial right and assure the reliability of its verdict. It is difficult to envision a constitutional rule that more fundamentally implicates "the fairness of the trial—the very integrity of the fact-finding process." *Linkletter* v. *Walker*, 381 U. S., at 639. "The basic purpose of a trial is the determination of truth," *Tehan* v. *United States ex rel. Shott*, 382 U. S. 406, 416 (1966), and it is the jury to whom we have entrusted the responsibility for making this determination in serious criminal cases. Any practice that threatens the jury's ability properly to perform that function poses a similar threat to the truth-determining process itself. The rule in *Burch* was directed toward elimination of just such a practice. Its purpose, therefore, clearly requires retroactive application.[13]

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[13] Nonetheless, respondent contends that the question of the retroactive application of *Burch* is controlled by *DeStefano* v. *Woods*, 392 U. S. 631 (1968), in which the Court refused to give retroactive effect to the extension in *Duncan* v. *Louisiana*, 391 U. S. 145 (1968), to state criminal defendants of the right to jury trial in serious cases. Respondent argues that if the complete absence of a jury does not impair the factfinding process so substantially as to require retroactivity, then surely the mere presence of a single dissenting juror ought not to compel retroactive application.

It bears repeating, however, that "the retroactivity or nonretroactivity of a rule is not automatically determined by the provision of the Constitution on which the dictate is based." *Johnson* v. *New Jersey*, 384 U. S., at 728. Thus our decision not to grant new trials, with juries, to all those who had been convicted of serious criminal offenses in trials without juries does not necessarily mean that a constitutional rule directed toward ensuring the proper functioning of the jury in those cases in which it *has been provided* must also be given only prospective effect. Cf. *Witherspoon* v. *Illinois*, 391 U. S. 510, 523, n. 22 (1968) (newly announced standards for selecting juries in capital cases must be applied retroactively). Rather, "we must determine retroactivity 'in each case' by looking to the peculiar traits of the specific 'rule in question.'" *Johnson* v. *New Jersey*, *supra*, at 728.

Once this principle is realized, it should be clear that today's holding is in no way inconsistent with *DeStefano*. While the Court there acknowl-

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Due regard for countervailing considerations—the State's good-faith reliance on the old standards and the impact of retroactivity on the administration of justice—does not counsel a contrary result. The element of justifiable reliance on pre-*Burch* standards is minimal here. Unlike other cases that have been accorded prospective effect only, *Burch* did not overrule any prior decisions of this Court or invalidate a practice of heretofore unquestioned legitimacy. See, *e. g.*, *Desist* v. *United States*, 394 U. S., at 250–251; *Stovall* v. *Denno*, 388 U. S., at 300; *Tehan* v. *United States ex rel. Shott*, *supra*, at 417. "Therefore, to build a case for good-faith reliance the State must wring from our decision[s] the negative implication" that conviction by a nonunanimous six-person jury does not offend the Sixth Amendment's guarantee. See *Adams* v. *Illinois*, 405 U. S., at 293 (Douglas, J., dissenting). Yet if any implication is to be drawn from our opinions prior to *Burch*, it could only be that such a procedure was of doubtful constitutionality. *Williams* v. *Florida*, 399 U. S. 78 (1970), for example, highlighted the fact that the

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edged that the right to jury trial generally tends to prevent arbitrariness and repression, 392 U. S., at 633, it also recognized that the decision in *Duncan* did not rest on the premise "'that every criminal trial—or any particular trial—held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury.'" 392 U. S., at 633–634. See also *Daniel* v. *Louisiana*, 420 U. S. 31 (1975); *Gosa* v. *Mayden*, 413 U. S., at 680–681. Because other safeguards existed to ensure the integrity of the factfinding process, and in light of both the State's justifiable reliance on past opinions of this Court and the devastating impact on the administration of justice that retroactivity would entail, *Duncan* was applied prospectively only.

The instant case simply does not fit within *DeStefano*'s mold. As we have discussed in the text, the failure to provide petitioner with the constitutional guarantees announced in *Burch* raises serious doubts about the fairness of his trial and the reliability of the factfinding process. And as we explain below, retroactive application of *Burch* should not produce a significant disruption in the State's administration of its criminal laws.

six-member jury approved in that case was required to render a unanimous verdict. *Id.*, at 100, and n. 46. And *Burch's* rule was distinctly foreshadowed by our decision in *Ballew*, which was handed down more than five months before petitioner's trial and which was specifically cited to the trial court as mandating unanimity in the verdict of a six-member jury. See *supra*, at 325–326. Cf. *Berger* v. *California*, 393 U. S. 314, 315 (1969).

Similarly, we are confident that retroactive application of the *Burch* rule will not have a devastating impact on the administration of the criminal law. It appears that by 1979 only two States—Louisiana and Oklahoma—permitted conviction of nonpetty offenses by a nonunanimous six-member jury, see *Burch* v. *Louisiana*, 441 U. S., at 138, and n. 12, and Louisiana, at least, did not institute its scheme until 1975.[14] Furthermore, today's decision will not affect the validity of all convictions obtained under Louisiana's unconstitutional jury practice during that 4-year period, but only those in which it can be shown that the vote was in fact less than unanimous. Thus the number of persons who would have to

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[14] In Louisiana prior to 1968, cases in which the defendant could not be sentenced to confinement at hard labor were tried by the judge without a jury; cases in which punishment at hard labor was optional, but not mandatory, were tried by a unanimous jury of 5; all other felonies were tried by a jury of 12. Following our decision in *Duncan* v. *Louisiana*, *supra*, the Louisiana Legislature amended its criminal code to require jury trials for all nonpetty offenses. See generally Comment, Jury Trial in Louisiana—Implications of Duncan, 29 La. L. Rev. 118 (1968). In 1974, the Louisiana Legislature, through revision of the State Constitution and Code of Criminal Procedure, again amended its jury trial provisions to allow for conviction by nonunanimous six-member juries in cases in which punishment may be imprisonment at hard labor. 1974 La. Acts, Ex. Sess., Nos. 23 and 25. See n. 1, *supra*. These alterations were effective January 1, 1975.

Oklahoma appears to have permitted nonunanimous six-member jury verdicts only in trials for misdemeanors and in proceedings for the violation of ordinances or regulations of cities and towns. See Okla. Const., Art. 2, § 19.

be retried or released does not approach the magnitude involved in some of our previous cases. See, *e. g.*, *Linkletter* v. *Walker*, 381 U. S., at 637 (retroactive application would "tax the administration of justice to the utmost"); *Tehan* v. *United States ex rel. Shott*, 382 U. S., at 419 ("an impact upon the administration of their criminal law so devastating as to need no elaboration"); *DeStefano* v. *Woods*, 392 U. S. 631, 634 (1968). What little disruption to the administration of justice results from retroactive application of *Burch* "must be considered part of the price we pay for former failures to provide fair procedures." *Adams* v. *Illinois*, *supra*, at 297 (Douglas, J., dissenting).

Accordingly, the judgment of the Supreme Court of Louisiana is reversed. The case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE POWELL, with whom MR. JUSTICE STEVENS joins, concurring in the judgment.

This Court announced its decision in *Burch* v. *Louisiana*, 441 U. S. 130 (1979), while the petitioner's objection to the nonunanimous verdict was pending on direct appeal. *Ante*, at 326. Since I believe that new constitutional rules should apply retroactively "in cases still pending on direct review," *Hankerson* v. *North Carolina*, 432 U. S. 233, 248 (1977) (POWELL, J., concurring in judgment), I concur in the judgment reversing the petitioner's conviction.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE WHITE join, dissenting.

I am in agreement with the Court on the content of the applicable standards for gauging the need for retroactivity, but I cannot concur in the Court's application of those standards in this case. The most important question here is whether it is probable that the Louisiana juries convicting on a vote of 5 to 1 convicted innocent persons. As the Court

states, "only when an assessment of those probabilities indicates that the condemned practice casts doubt upon the reliability of the determinations of guilt in past criminal cases must the new procedural rule be applied retroactively." *Ante*, at 329. Neither our precedents nor common experience supports the Court's conclusion that the 5-to-1 vote is inherently unreliable. Just as I think the Court has overstated the probabilities of jury error, I think it has unfairly understated the State's reliance on our prior law and the burdens on the administration of the Louisiana justice system which will be associated with today's ruling.

A

In *Williams* v. *United States*, 401 U. S. 646, 655, n. 7 (1971), we held that retroactivity is only appropriate where the former practice "presents substantial likelihood that the results of a number of those trials were factually incorrect." In *Hankerson* v. *North Carolina*, 432 U. S. 233, 243 (1977), we similarly concluded that the "major purpose" of the new rule must be to correct a process which "substantially impairs its truth-finding function" raising "serious questions about the accuracy of guilty verdicts in past trials" before a rule should be retroactively imposed. Quite simply, when five-sixths of the deliberating juors reach a finding of guilt, I do not think that there is a substantial probability that their decision was wrong.

The Court stresses the part of MR. JUSTICE BLACKMUN's opinion in *Ballew* v. *Georgia*, 435 U. S. 223 (1978), suggesting that some studies had indicated that the reliability of the truth-finding process declines when the jury size is reduced. But I do not think that those citations can be used here to support the conclusion that the jury verdicts in issue were probably inaccurate. First, the opinion in *Ballew* relies heavily on the conclusions that a jury of only five is too small in number to ensure effective deliberation and to ensure that someone among the group will have memory abilities suffi-

cient to aid the jury in those deliberations. *Id.*, at 241. These concerns are satisfied when the jury is composed of six members, even if one of those members is in the dissent. In fact, as indicated by *Johnson* v. *Louisiana*, 406 U. S. 356, 361 (1972), the presence of a dissenting juror strongly supports the inference that the jury has engaged in meaningful deliberation:

> "We have no grounds for believing that majority jurors, aware of their responsibility and power over the liberty of the defendant, would simply refuse to listen to arguments presented to them in favor of acquittal, terminate discussion, and render a verdict. On the contrary it is far more likely that a juror presenting reasoned argument in favor of acquittal would either have his arguments answered or would carry enough other jurors with him to prevent conviction. A majority will cease discussion and outvote a minority only after reasoned discussion has ceased to have persuasive effect or to serve any other purpose—when a minority, that is, continues to insist upon acquittal without having persuasive reasons in support of its position. At that juncture there is no basis for denigrating the vote of so large a majority of the jury or for refusing to accept their decision as being, at least in their minds, beyond a reasonable doubt."

Thus the jury that convicted petitioner satisfied the requirements of jury deliberation that the Court in *Ballew* found so critical. Further, our cases have indicated quite clearly that the degree of persuasion evidenced by a 5-to-1 vote is sufficient to meet the requirement that guilt be proved beyond a reasonable doubt. In *Johnson*, *supra*, this Court held that a 9-to-3 verdict could satisfy due process, or in other words, satisfy the requirement that guilt be proved beyond a reasonable doubt. The degree of persuasion found acceptable there was far less impressive than that demonstrated by the jury which convicted petitioner. And yet we said that guilt was

proved beyond a reasonable doubt in *Johnson*. I think here, too, we must then conclude that guilt was proved beyond a reasonable doubt. Since that is true, there has been no constitutionally unacceptable risk of erroneous convictions and *Burch* need not be applied retroactively.

There is a further weakness in the Court's estimation of the probabilities. We simply have no way of knowing whether the person voting to acquit would have held firm with further pressure by his fellow jurors. The Court's speculation about what would have happened had unanimity been required of Louisiana's six-man juries amounts to just that: speculation. As long as this Court has approved "*Allen* charges" in federal cases over which it may exercise its supervisory authority, it is difficult to say that a holdout juror might not ultimately have been persuaded by the five-member majority.

The Court's ruling is also at odds with our decisions in *Gosa* v. *Mayden*, 413 U. S. 665 (1973), and *DeStefano* v. *Woods*, 392 U. S. 631 (1968). In both of those cases, the Court declined to give retroactive effect to rulings that the right to jury trial had been totally denied under circumstances where our system of fairness required that it be afforded. Nevertheless, as we stated in *DeStefano*, the "values implemented by the right to jury trial would not measurably be served by requiring retrial of all persons convicted in the past by procedures not consistent with the Sixth Amendment right to jury trial." *Id.*, at 634. The deprivations addressed in those cases were no less based on procedural reliability than was the decision in *Burch* v. *Louisiana*, 441 U. S. 130 (1979).

B

I also think that the Court has unduly minimized Louisiana's reliance on pre-*Burch* standards, and greatly underestimated the impact its ruling will have on the Louisiana judicial system. We have every reason to credit Louisiana with the presumption that its law was enacted in good faith. Prior to 1974, the Louisiana Constitution allowed for conviction by

unanimous five-person juries for certain offenses. La. Const., Art. 7, § 41 (1921). In 1974 this constitutional provision was replaced with the nonunanimous six-person jury provision. The coordinator of legal research for the Constitutional Convention explained in 1974 that he believed this provision satisfied the Federal Constitution, reasoning:

> "A six-man jury was upheld in *Williams* v. *Florida*, 399 U. S. 78 (1970). If 75 per cent concurrence (9/12) was enough for a verdict as determined in *Johnson* v. *Louisiana*, 406 U. S. 356 (1972), then requiring 83 per cent concurrence (5/6) ought to be within the permissible limits of *Johnson*." Hargrave, The Declaration of Rights of the Louisiana Constitution of 1974, 35 La. L. Rev. 1, 56, n. 300 (1974).

The record similarly suggests that the administrative impact is substantial. In the first four months of 1979 in just Orleans Parish alone, 39 defendants were tried by six-person juries. Brief for Respondent 24, n. 43. The various courts in Louisiana apparently do not necessarily keep a record of the jury vote. *Id.*, at 28, n. 49. With this large number of six-person jury trials, the potential for disruption is substantial. And although the Court states that the decision will only have an impact where the defendant was "in fact" convicted by less than six, how is it to be established what "in fact" occurred without clear records? *Ante*, at 336. As stated in the opinion of MR. JUSTICE BLACKMUN in *Gosa, supra:*

> "Wholesale invalidation of convictions rendered years ago could well mean that convicted persons would be freed without retrial, for witnesses . . . no longer may be readily available, memories may have faded, records may be incomplete or missing, and physical evidence may have disappeared. Society must not be made to tolerate a result of that kind when there is no significant question concerning the accuracy of the process by which judgment

was rendered or, in other words, when essential justice is not involved." 413 U. S., at 685.

Since *Burch* and *Ballew* held little more than that "lines must be drawn somewhere" 441 U. S., at 137; 435 U. S., at 239, Louisiana should not be required to retry defendants found guilty by reliable factfinders.

HICKS v. OKLAHOMA

CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF OKLAHOMA

No. 78-6885. Argued March 26, 1980—Decided June 16, 1980

Upon the conviction of petitioner, a twice previously convicted felon, in an Oklahoma trial court, the jury imposed a 40-year sentence pursuant to instructions to do so under a provision of the state habitual offender statute mandating such a sentence. Thereafter, this provision was declared unconstitutional by the Oklahoma Court of Criminal Appeals in another case, but that court nevertheless affirmed petitioner's conviction and sentence, holding that he was not prejudiced by the impact of the invalid statute because his sentence was within the range of punishment that could have been imposed in any event.

Held: The State deprived petitioner of due process of law guaranteed by the Fourteenth Amendment. Under Oklahoma statutes, a convicted defendant is entitled to have his punishment fixed by the jury, and the jury, if it had been correctly instructed, could have imposed any sentence of not less than 10 years. Thus, the possibility that the jury would have returned a sentence of less than 40 years is substantial, and it is incorrect to say that petitioner could not have been prejudiced by the instruction requiring imposition of a 40-year prison sentence. Petitioner's interest in the exercise of the jury's discretion in imposing punishment is not merely a matter of state procedural law, but is a liberty interest that the Fourteenth Amendment preserves against arbitrary deprivation by the State. And the argument that, in view of the Court of Criminal Appeals' statutory authority to revise judgments on appeal, petitioner had no absolute right to a sentence imposed by a jury, is unpersuasive. Pp. 345–347.

Vacated and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. REHNQUIST, J., filed a dissenting opinion, *post*, p. 347.

David M. Ebel, by appointment of the Court, 444 U. S. 988, argued the cause for petitioner. With him on the briefs was *Richard A. Sonntag*.

Janet L. Cox, Assistant Attorney General of Oklahoma,

argued the cause *pro hac vice* for respondent. With her on the brief was *Jan Eric Cartwright*, Attorney General.

MR. JUSTICE STEWART delivered the opinion of the Court.

The petitioner was brought to trial in an Oklahoma court on a charge of unlawfully distributing heroin. Since he had been convicted of felony offenses twice within the preceding 10 years, the members of the jury were instructed, in accordance with the habitual offender statute then in effect in Oklahoma,[1]

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[1] See 1976 Okla. Sess. Laws, ch. 94, § 1, codified as Okla. Stat., Tit. 21, § 51 (B) (Supp. 1977). The text of § 51 provided:

"(A) Every person who, having been convicted of any offense punishable by imprisonment in the penitentiary, commits any crime after such conviction is punishable therefor as follows:

"1. If the offense of which such person is subsequently convicted is such that upon a first conviction an offender would be punishable by imprisonment in the penitentiary for any term exceeding five (5) years, such person is punishable by imprisonment in the penitentiary for a term not less than ten (10) years.

"2. If such subsequent offense is such that upon a first conviction the offender would be punishable by imprisonment in the penitentiary for five (5) years, or any less term, then the person convicted of such subsequent offense is punishable by imprisonment in the penitentiary for a term not exceeding ten (10) years.

"3. If such subsequent conviction is for petit larceny, or for any attempt to commit an offense which, if committed, would be punishable by imprisonment in the penitentiary, then the person convicted of such subsequent offense is punishable by imprisonment in the penitentiary for a term not exceeding five (5) years.

"(B) Every person who, having been twice convicted of felony offenses, commits a third, or thereafter, felony offenses within ten (10) years of the date following the completion of the execution of the sentence, shall be punished by imprisonment in the State Penitentiary for a term of twenty (20) years plus the longest imprisonment for which the said third or subsequent conviction was punishable, had it been a first offense; provided, that felony offenses relied upon shall not have arisen out of the same transaction or occurrence or series of events closely related in time or location; provided, further, that nothing in this section shall abrogate or affect

that, if they found the petitioner guilty, they "shall assess [the] punishment at forty (40) years imprisonment." The jury returned a verdict of guilt and imposed the mandatory 40-year prison term.

Subsequent to the petitioner's conviction, the provision of the habitual offender statute under which the mandatory 40-year prison term had been imposed was in another case declared unconstitutional by the Oklahoma Court of Criminal Appeals. *Thigpen* v. *State,* 571 P. 2d 467, 471 (1977). On his appeal, the petitioner sought to have his 40-year sentence set aside in view of the unconstitutionality of this statutory provision. The Court of Criminal Appeals acknowledged that the provision was unconstitutional, but nonetheless affirmed the petitioner's conviction and sentence, reasoning that the petitioner was not prejudiced by the impact of the invalid statute, since his sentence was within the range of punishment that could have been imposed in any event.[2] We granted certiorari to consider the petitioner's contention that the State deprived him of due process of law guaranteed to him by the Fourteenth Amendment. 444 U. S. 963.

By statute in Oklahoma, a convicted defendant is entitled to have his punishment fixed by the jury. Okla. Stat., Tit. 22,

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the punishment by death in all crimes now or hereafter made punishable by death."

The Oklahoma Legislature has since amended § 51 (B). See 1978 Okla. Sess. Laws, ch. 281, § 1, Okla. Stat., Tit. 21, § 51 (B) (Supp. 1979).

[2] "Defendant asserts in his fourth assignment of error that [Okla. Stat., Tit. 21,] § 51 (B), under which he was sentenced, is unconstitutional. We agree. This question was laid to rest by this Court in *Thigpen* v. *State,* Okla. Cr., 571 P. 2d 467 (1977). We must find however, that the defendant was not prejudiced by the use of this statute in that the sentence imposed is within the range of punishment authorized by the provisions of [Okla. Stat., Tit. 21,] § 51 (A)." *Hicks* v. *State,* No. F-77-751 (Mar. 8, 1979).

The decision of the Oklahoma Court of Criminal Appeals is unreported. A petition for rehearing was denied April 6, 1979.

§ 926 (1971).[3] Had the members of the jury been correctly instructed in this case, they could have imposed any sentence of "not less than ten . . . years." Okla. Stat., Tit. 21, § 51 (A)(1) (1971). The possibility that the jury would have returned a sentence of less than 40 years is thus substantial. It is, therefore, wholly incorrect to say that the petitioner could not have been prejudiced by the instruction requiring the jury to impose a 40-year prison sentence.

It is argued that all that is involved in this case is the denial of a procedural right of exclusively state concern. Where, however, a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion, cf. *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1, and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State. See *Vitek* v. *Jones*, 445 U. S. 480, 488–489, citing *Wolff* v. *McDonnell*, 418 U. S. 539; *Greenholtz* v. *Nebraska Penal Inmates, supra; Morrissey* v. *Brewer*, 408 U. S. 471. In this case Oklahoma denied the petitioner the jury sentence to which he was entitled under state law, simply on the frail conjecture that a jury *might* have imposed a sentence equally as harsh as that mandated by the invalid habitual offender provision. Such an arbitrary disregard of the petitioner's right to liberty is a denial of due process of law.[4]

The State argues, however, that, in view of the revisory authority of the Oklahoma Court of Criminal Appeals, the petitioner had no absolute right to a sentence imposed by a

[3] Only if the jury fails to do so may the trial court impose sentence. Okla. Stat., Tit. 22, § 927 (1971).

[4] Because of our disposition of the case, we do not reach the petitioner's several other contentions.

jury. See Okla. Stat., Tit. 22, § 1066 (1971) ("The Appellate Court may reverse, affirm or modify the judgment appealed from. . ."). The argument is unpersuasive. The State concedes that the petitioner had a statutory right to have a jury fix his punishment in the first instance, and this is the right that was denied. Moreover, it is a right that substantially affects the punishment imposed. No case has been cited to us in which the Court of Criminal Appeals has increased a sentence on appeal, and the State's Assistant Attorney General indicated at oral argument that it was doubtful whether the appellate court had power to do so. In consequence, it appears that the right to have a jury fix the sentence in the first instance is determinative, at least as a practical matter, of the maximum sentence that a defendant will receive. Nor did the appellate court purport to cure the deprivation by itself reconsidering the appropriateness of the petitioner's 40-year sentence.[5] Rather, it simply affirmed the sentence imposed by the jury under the invalid mandatory statute. In doing so, the State deprived the petitioner of his liberty without due process of law.

Accordingly, the judgment is vacated, and the case is remanded to the Oklahoma Court of Criminal Appeals for further proceedings not inconsistent with this opinion.

So ordered.

MR. JUSTICE REHNQUIST, dissenting.

The Court concludes that the Oklahoma Court of Criminal Appeals denied petitioner due process of law by refusing to vacate the sentence imposed at his trial for unlawful dis-

[5] Because the appellate court did not purport to resentence the petitioner, we have no occasion to consider his contention that due process of law requires that the State provide him with notice and a hearing, including the opportunity to present mitigating evidence, before appellate sentencing. See *McGautha* v. *California*, 402 U. S. 183, 218–220; *Specht* v. *Patterson*, 386 U. S. 605, 606. See also *Mempa* v. *Rhay*, 389 U. S. 128.

tribution of heroin. That conclusion, in turn, depends on the Court's assertion that petitioner was impermissibly denied his state-created right to be sentenced by a jury. Because I believe that the Court either mischaracterizes the right conferred by state law or erroneously assumes a deprivation of that right, I dissent.

The Court is undoubtedly correct that Oklahoma law does confer a right to have a sentence imposed by a jury. Okla. Stat., Tit. 22, § 926 (1971). But it is equally true that petitioner was sentenced by a jury. The question is whether that sentence was validly imposed, either as a matter of state or federal law. For if the petitioner was constitutionally sentenced by his jury in the first instance, he has been afforded the process the State guaranteed him. The Oklahoma court found that petitioner was not properly sentenced. If this conclusion rested on an interpretation of state law, or a *correct* interpretation of federal law, then I would have less difficulty agreeing with the Court that petitioner was entitled to a new jury sentencing under principles of due process. But the Court fails to inquire into the basis of the Oklahoma court's conclusion that petitioner was improperly sentenced in the first instance. That question is central to the resolution of the due process issue presented by the case. The Court simply assumes that the Oklahoma court found that petitioner had not been sentenced in conformity with *state* law. This is an assumption, however, that cannot be divined from the available state cases. Those cases in fact strongly indicate that the decision of the state court here rested on an *erroneous* interpretation of *federal* law, not state law. If so, the Oklahoma court decision refusing to afford petitioner an opportunity to be resentenced by a jury would be correct, albeit for the wrong reason.

The issue in this case, then, is whether petitioner's original sentence denied him equal protection. The Oklahoma sentencing statute in effect at the time of petitioner's trial was designed to provide for increased sentences to multiple offend-

ers of the criminal laws.* Under Okla. Stat., Tit. 21, § 51 (A) (Supp. 1977) a defendant who is found guilty of an offense punishable by a term of imprisonment in excess of five years, after having been convicted of *one* offense punishable by imprisonment, is subject to sentence, fixed by the jury, ranging from 10 years to apparent infinity. (Oklahoma juries have apparently exercised this discretion with great relish, imposing sentences as long as 1500 years in prison for second-time offenders. See *Callins* v. *State*, 500 P. 2d 1333 (Crim. App. 1972)). Defendants convicted of more than one

*The text of Okla. Stat., Tit. 21, § 51 (Supp. 1977), provides:

"(A) Every person who, having been convicted of any offense punishable by imprisonment in the penitentiary, commits any crime after such conviction is punishable therefor as follows:

"1. If the offense of which such person is subsequently convicted is such that upon a first conviction an offender would be punishable by imprisonment in the penitentiary for any term exceeding five (5) years, such person is punishable by imprisonment in the penitentiary for a term not less than ten (10) years.

"2. If such subsequent offense is such that upon a first conviction the offender would be punishable by imprisonment in the penitentiary for five (5) years, or any less term, then the person convicted of such subsequent offense is punishable by imprisonment in the penitentiary for a term not exceeding ten (10) years.

"3. If such subsequent conviction is for petit larceny, or for any attempt to commit an offense which, if committed, would be punishable by imprisonment in the penitentiary, then the person convicted of such subsequent offense is punishable by imprisonment in the penitentiary for a term not exceeding five (5) years.

"(B) Every person who, having been twice convicted of felony offenses, commits a third, or thereafter, felony offenses within ten (10) years of the date following the completion of the execution of the sentence, shall be punished by imprisonment in the State Penitentiary for a term of twenty (20) years plus the longest imprisonment for which the said third or subsequent conviction was punishable, had it been a first offense; provided, that felony offenses relied upon shall not have arisen out of the same transaction or occurrence or series of events closely related in time or location; provided, further, that nothing in this section shall abrogate or affect the punishment by death in all crimes now or hereafter made punishable by death."

prior offense were subject to sentencing under § 51 (B). Section 51 (B) did not invest the jury with discretion to determine the length of the term of imprisonment. Instead the section provided a formula for determining the length of the mandatory sentence to be imposed by a jury pursuant to instruction. This statutory scheme permitted the jury to impose sentences on defendants with only one prior conviction far in excess of those which were specified for defendants with two or more prior convictions. In *Thigpen* v. *State*, 571 P. 2d 467 (Okla. Crim. App. 1977), decided after petitioner's mandatory sentence was imposed by the jury, a defendant with only one prior conviction challenged the constitutionality of the statute. The court concluded that this potential for disparate sentences rendered § 51 (B) "unconstitutional," and struck that section.

The *Thigpen* opinion does not indicate whether this conclusion is based on an interpretation of the State or Federal Constitution. The opinion does indicate, however, that in determining the constitutionality of the Act, the court had relied on an advisory opinion submitted by an Oklahoma state district judge. 571 P. 2d, at 471, n. 3. That advisory opinion is attached as an appendix to the court opinion. The position advocated in the advisory opinion is that the Oklahoma sentencing statute violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because of the potential for longer terms of imprisonment to those convicted of only one prior offense. The author of the advisory opinion relies exclusively on federal law in reaching this determination.

In this case, the Oklahoma court thought the federal equal protection holding in *Thigpen* applied to petitioner's sentencing as well. I cannot agree. Petitioner was a third-time offender who was given the benefit of the more lenient mandatory sentencing provisions before the decision in *Thigpen*. Thus he was not within the class of one-time offenders subject to more burdensome treatment under the statute. Since

petitioner was a member of the favored class, I cannot agree that petitioner's sentencing denied *him* equal protection or any other rights guaranteed under the Federal Constitution, I am unable to agree that due process required the State to afford him any additional opportunity to be sentenced by another jury, and would therefore affirm the judgment of the Court of Criminal Appeals of Oklahoma.

BRYANT ET AL. *v.* YELLEN ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 79–421. Argued March 25, 1980—Decided June 16, 1980*

The principal question in this action is whether the general rule under federal reclamation laws limiting irrigation water deliveries from reclamation projects to 160 acres under single ownership applies to certain private lands in Imperial Valley, Cal., being irrigated with Colorado River water through the irrigation system constructed pursuant to the Boulder Canyon Project Act (Project Act). When the Project Act became effective in 1929, a large acreage was already being irrigated by water delivered by the Imperial Irrigation District (District) through a privately owned irrigation system. Under the Project Act and a 1932 implementing contract, the United States constructed and the District agreed to pay for a new irrigation system. The Project Act, which implemented and ratified the seven-State Colorado River Compact (Compact) allocating the river's waters, provides in § 6 that project works shall be used for "irrigation and domestic uses and satisfaction of present perfected rights in pursuance of" the Compact, and in § 14 provides that the reclamation law "shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided." Section 46 of the Omnibus Adjustment Act of 1926 (1926 Act), a reclamation law, forbids delivery of reclamation project water to any irrigable land held in private ownership by one owner in excess of 160 acres. In contracting with the District for the building of the new irrigation system, the United States represented that the Project Act did not impose acreage limitations on lands that already had vested or present rights to Colorado River waters, and the United States officially adhered to that position until repudiating it in 1964. When the District refused to accept the Government's new position, the United States, in 1967, instituted the instant District Court proceedings for a declaratory judgment that the excess-acreage limitation of § 46 of the 1926 Act applies to all private lands in the District, whether or not they had been irrigated in 1929. Meanwhile, in original proceedings involving the determination of how the state-allocated waters under the

*Together with No. 79–425, *California et al.* v. *Yellen et al.*, and No. 79–435, *Imperial Irrigation District et al.* v. *Yellen et al.*, also on certiorari to the same court.

Compact and the Project Act should be divided, this Court recognized that a significant limitation on the power of the Secretary of the Interior (Secretary) under the Project Act was the requirement that he satisfy present perfected rights, and defined such rights under § 6 as those that had been acquired in accordance with state law and that had been perfected as of 1929 by the actual diversion of a specific quantity of water and its application to a defined area of land. *Arizona* v. *California*, 373 U. S. 546; 376 U. S. 340. And by a supplemental decree, 439 U. S. 419, this Court adjudged the District to have a present perfected right to a specified quantity of diversions from the mainstream or the quantity of water necessary to irrigate a specified number of acres, whichever was less. The District Court ruled against the Government in the instant action and, when the Government chose not to appeal, denied a motion to intervene for purpose of appeal that had been filed by respondents, a group of Imperial Valley residents who desired to purchase the excess lands that might become available at prices below the market value for irrigated land if § 46 were held applicable. The Court of Appeals reversed, holding that the appealing intervenors had standing under Art. III and that the 160-acre limitation of § 46 of the 1926 Act applied to Imperial Valley.

Held:

1. Since it is unlikely that any of the owners of excess lands would sell land at below current market prices absent the applicability of § 46, whereas it is likely that such lands would become available at less than market prices if § 46 were applied, the Court of Appeals properly concluded that respondents had a sufficient stake in the outcome of the controversy to afford them standing to appeal the District Court's decision, even though they could not with certainty establish that they would be able to purchase excess lands if § 46 were held applicable. Pp. 366–368.

2. Contrary to the Court of Appeals' conclusion, § 6 of the Project Act precludes application of the 160-acre limitation of § 46 of the 1926 Act to the lands under irrigation in Imperial Valley in 1929. Section 46 cannot be applied consistently with § 6 on the alleged ground that the perfected rights in Imperial Valley were owned by the District, not individual landowners, who were merely members of a class for whose benefit the water rights had been acquired and held in trust, and who had no right under the law to a particular proportion of the District's water. Such theory fails to take adequate account of § 6 and its implementation in this Court's opinion and decrees in *Arizona* v. *California*, which recognized that § 6 was an unavoidable limitation on the Secretary's power and that in satisfying "present perfected rights" the Secre-

tary must take account of state law. Prior to 1929 and ever since, the District, in exercising its rights as trustee, delivered water to individual farmer beneficiaries without regard to the amount of land under single ownership, and, as a matter of state law, not only did the District's water right entitle it to deliver water to the farms in the District regardless of size, but also the right was equitably owned by the beneficiaries to whom the District was obligated to deliver water. Pp. 368–374.

3. There is nothing in the Project Act's legislative history to cast doubt on the foregoing construction of the Act or to suggest that Congress intended § 14, by bringing the 1926 Act into play, to interfere with the delivery of water to those lands already under irrigation in Imperial Valley and having presently perfected rights that the Secretary was bound to recognize. Moreover, the contemporary construction of the Project Act by the parties to the 1932 contract was that the acreage limitation did not apply to lands in the District presently being irrigated, and this contemporaneous view of the Act, which supports the foregoing construction of the legislation, was not officially repudiated by the Secretary until 1964. Pp. 374–378.

4. Further questions involving the applicability of acreage limitations to approximately 14,000 acres in addition to those that were under irrigation in 1929, and the determination whether a live dispute remains in light of the foregoing "perfected rights" holding, should be considered initially by the courts below. Pp. 378–379.

559 F. 2d 509; and 595 F. 2d 524 and 525, reversed in part, vacated in part, and remanded.

WHITE, J., delivered the opinion for a unanimous Court.

Northcutt Ely and *Charles W. Bender* argued the cause for petitioners in all cases. With Mr. Ely on the briefs for petitioner Imperial Irrigation District in No. 79–435 were *Reginald L. Knox, Jr., Frederick H. Ritts, Robert F. Pietrowski, Jr., Ralph J. Gillis,* and *Charles E. Corker.* With Mr. Bender on the briefs for petitioners Bryant et al. in No. 79–421 were *Patrick Lynch, James V. Selna,* and *John F. Daum. George Deukmejian,* Attorney General, *R. H. Connett,* Assistant Attorney General, and *Douglas B. Noble,* Deputy Attorney General, filed a brief for the State of California, petitioner in all cases.

Arthur Brunwasser argued the cause and filed a brief for

respondents in all cases. *Solicitor General McCree* argued the cause for the United States in all cases. With him on the brief were *Assistant Attorney General Moorman, Deputy Solicitor General Claiborne, Mark I. Levy, Peter R. Steenland, Jr., Raymond N. Zagone,* and *Dirk D. Snel.*†

MR. JUSTICE WHITE delivered the opinion of the Court.

When the Boulder Canyon Project Act, 45 Stat. 1057, 43 U. S. C. § 617 *et seq.* (Project Act) became effective in 1929, a large area in Imperial Valley, Cal., was already being irrigated by Colorado River water brought to the Valley by a privately owned delivery and distribution system. Pursuant to the Project Act, the United States constructed and the Imperial Irrigation District (District) agreed to pay for a new diversion dam and a new canal connecting the dam with the District. The Project Act was supplemental to the reclamation laws, which as a general rule limited water deliveries from reclamation projects to 160 acres under single ownership. The Project Act, however, required that the Secretary of the Interior (Secretary) observe rights to Colorado River water that had been perfected under state law at the time the Act became effective. In the course of contracting with the District for the building of the new dam and canal and for the delivery of water to the District, the United States represented that the Project Act did not impose acreage limitations on lands that already had vested or present rights to Colorado River water. The United States officially adhered to that position until 1964 when it repudiated its prior construction of the Project Act and sued the District, claiming that the 160-acre limitation contained in the reclamation law applies to all privately owned lands in the District, whether or not they had been irrigated in 1929. The District Court found for the District and its landowners, 322 F. Supp. 11 (SD Cal.

†*Robert Marvin Teets, Jr., Christopher E. Hamilton, Ralph Santiago Abascal, Ellen Josephson,* and *Sidney M. Wolinsky* filed a brief for Pedro Duarte et al. as *amici curiae* urging affirmance in all cases.

1971), but the Court of Appeals reversed and sustained the Government's position, 559 F. 2d 509 (CA9 1977). We now reverse the Court of Appeals with respect to those lands that were irrigated in 1929 and with respect to which the District has been adjudicated to have a perfected water right as of that date, a water right which, until 1964, the United States Department of the Interior officially represented foreclosed the application of acreage limitations. The judgment is otherwise vacated.

I

Imperial Valley is an area located south of the Salton Sea in southeastern California. It lies below sea level, and is an arid desert in its natural state. In 1901, however, irrigation began in the Valley, using water diverted from the Colorado River, which in that area marks the border between California and Arizona. Until at least 1940, irrigation water was brought to the Valley by means of a canal and distribution system that were completely privately financed. On June 25, 1929, when the Project Act became effective, the District [1] was diverting, transporting, and delivering water to 424,145 acres of privately owned and very productive farmland in Imperial Valley.[2] Under neither state law nor private irrigation arrangements in existence in Imperial Valley prior to 1929 was there any restriction on the number of acres that a single landholder could own and irrigate.

Prior to 1929 and for several years thereafter, the water diverted from the Colorado River was carried to the Valley through the Alamo Canal, which left the river north of the

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[1] Under California law, an irrigation district is a public corporation governed by a board of directors, usually elected by voters in the district. It is empowered to distribute and otherwise administer water for the beneficial use of its inhabitants and to levy assessments upon the lands served for the payment of its expenses.

[2] The parties stipulated that the value of agricultural products in the Valley, overall, increased from some $4 million in 1909 to approximately $200 million in 1965.

border with Mexico but then traversed Mexican territory for some 50 miles before turning northward into Imperial Valley. This distribution system, entirely privately financed and owned, comprised approximately 1,700 miles of main and lateral canals, all serving to divert and deliver the necessary waters to the lands in Imperial Valley.

The Project Act was the culmination of the efforts of the seven States in the Colorado River Basin to control flooding, regulate water supplies on a predictable basis, allocate waters among the Upper and Lower Basin States and among the States in each basin, and connect the river to the Imperial Valley by a canal that did not pass through Mexico.[3] In 1922, the seven States executed the Colorado River Compact (Compact) allocating the waters of the river between the Upper and Lower Basins, and among other things providing in Art. VIII that "[p]resent perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact."[4] The Project Act, passed in

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[3] The Colorado River was subject to flooding. In 1905, the river broke through its banks and flooded the Alamo Canal and Imperial Valley. The California Development Co., then the major force in Imperial Valley, sought financial assistance from the Southern Pacific Co. whose tracks were threatened by the floodwaters. The railroad, taking as security a controlling interest in the California Development Co., returned the river to its channel and ultimately foreclosed on its security, transferring these interests to the District. The District acquired certain mutual water companies in 1922–1923 and has been solely responsible since that time for the diversion, transportation, and distribution of water from the Colorado River to the Imperial Valley.

Difficulties also arose because the Alamo Canal passed through Mexican territory and hence was partly subject to Mexican sovereignty. As a Senate Committee remarked, a new canal would "end an intolerable situation, under which the Imperial Valley now secures its sole water supply from a canal running for many miles through Mexico. . . ." S. Rep. No. 592, 70th Cong., 1st Sess., 8 (1928).

[4] The provision apparently resulted from the concern of the farmers of Imperial Valley that after two decades of productive reliance on the

1928 and effective in 1929, implemented and ratified the Compact; contained its own formula for allocating Lower Basin water among California, Arizona, and Nevada, *Arizona* v. *California*, 373 U. S. 546 (1963); and authorized the construction of the works required for the harnessing and more efficient utilization of the unruly river. The principal works of the Project, consisting of the Hoover Dam at Black Canyon and the storage facilities behind it, served to implement the division of the Compact. The dam was completed and storage began in 1935.[5]

Section 1 of the Project Act, which provided for the dam at Black Canyon, also authorized the construction of a new canal, the All-American Canal, which would replace the Alamo Canal and would traverse only territory located in the United States. A new diversion dam for Imperial Valley water was also authorized. Section 1 went on to provide that no charge should be made for the storage or delivery of irrigation or potable water to Imperial or Coachella Valley.[6]

Alamo Canal Project, their existing water rights might be impaired by the Compact allocation. Delph Carpenter, one of the draftsmen of the Compact, testified in hearings on a precursor of the Project Act as follows:

"During the deliberations of the Colorado River Commission at Santa Fe, and after 10 days' work, a sketch or outline of the progress was released to the press, stating what had happened and the proposed terms of a treaty. . . . The Imperial Valley representatives were immediately responsive. They came before the Commission and presented their claims with great vigor. . . .

"In view of that claim, coming as it did from people who cultivated upward of half a million acres of very valuable land, . . . Article VIII of the compact was drawn at the last session of the proceedings." Hearings Pursuant to S. Res. 320 before the Senate Committee on Irrigation and Reclamation, 68th Cong., 2d Sess., pt. 1, p. 678 (1925).

[5] The genesis of the Project Act and of the Colorado River Compact is described at greater length in *Arizona* v. *California*, 373 U. S. 546, 552–562 (1963).

[6] Coachella Valley is an area lying north of Imperial Valley across the Salton Sea. Unlike Imperial Valley, it was not being irrigated with

Section 4 (a) of the Project Act conditioned the effectiveness of the Act on the ratification of the Compact by the signatory States.[7] Section 4 (b), as well as requiring contractual provision for the repayment of specified costs with respect to the Hoover Dam, required that before any money was appropriated for the Imperial Valley works, the Secretary was to make provision for revenues "by contract or otherwise" to insure payment of all "expenses of construction, operation, and maintenance of said main canal and appurtenant structures in the manner provided in the reclamation law." Section 5 authorized the Secretary to contract for the storage of water and for its delivery at such points on the river and the canal as were agreed upon. Contracts were to be for permanent service and were required before any person would be entitled to stored water.

Section 6 of the Project Act, of critical importance in these cases, mandated that the works authorized by § 1 were to be used: "First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River compact; and third, for power." Section 9 authorized the opening to entry of the public lands that would become irrigable by the Project but in tracts not greater than 160 acres in size in accordance with the provisions of the reclamation law.

Section 14 provided that the Project Act should be deemed supplemental to the reclamation law, "which said reclamation law shall govern the construction, operation, and management

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Colorado River water in 1929. Coachella Valley is not involved in these cases.

[7] Section 4 (a) also contained provisions which, together with the Secretary's power under § 5 to contract for storage and delivery of water with particular water users and with § 8's tying the Project Act and the Compact together, provided the basis for the Court's holding in *Arizona* v. *California* that the Project Act itself sufficiently revealed the intent of Congress with respect to the division of the project water among the Lower Basin States.

of the works herein authorized, except as otherwise herein provided." The "reclamation law" referred to was defined in § 12 as the Act of June 17, 1902 (Reclamation Act), 32 Stat. 388, and Acts amendatory thereof and supplemental thereto. One of the statutes amendatory of or supplemental to the Reclamation Act was the Omnibus Adjustment Act of 1926 (1926 Act), § 46 of which, 44 Stat. (part 2) 649, 43 U. S. C. § 423e, forbade delivery of reclamation project water to any irrigable land held in private ownership by one owner in excess of 160 acres,[8] and required owners to execute recordable contracts for the sale of excess lands before such lands could receive project water.

Pursuant to the Project Act, the United States and the District entered into a contract on December 1, 1932, providing for the construction of the Imperial Dam and the All-American Canal. The District undertook to pay the cost of the works, and to include within itself certain public lands of the United States and other specified lands.[9] The United States undertook to deliver to the Imperial Dam the water which would be carried by the new canal to the various lands to be served by it. The contract contained no acreage limitation provision. Pursuant to this contract, the United States constructed the Imperial Dam in the Colorado River—some

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[8] Section 46 provides in relevant part:

"No water shall be delivered upon the completion of any new project or new division of a project until a contract or contracts in form approved by the Secretary of the Interior shall have been made with an irrigation district or irrigation districts organized under State law providing for payment by the district or districts of the cost of constructing, operating, and maintaining the works during the time they are in control of the United States, such cost of constructing to be repaid within such terms of years as the Secretary may find to be necessary, in any event not more than forty years from the date of public notice hereinafter referred to, and the execution of said contract or contracts shall have been confirmed by a decree of a court of competent jurisdiction."

[9] In 1942, pursuant to this provision, the District expanded its boundaries to include 271,588 acres of the unpatented public lands.

distance below Black Canyon but upriver from the existing point of diversion—and the All-American Canal connecting the dam and Imperial Valley. Use of the canal began in 1940, and by 1942 it carried all Colorado River water used by Imperial Valley.[10]

Article 31 of the contract between the District and the United States provided that the United States would not be bound by the contract until and unless court proceedings had been instituted by the District and a final judgment obtained confirming the authorization and the validity of the contract.[11] Such an action, entitled *Hewes* v. *All Persons*, No. 15460, Superior Court, Imperial County, was instituted and final

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[10] The All-American Canal system was not declared completed until 1952. By that time, pursuant to the 1932 contract, the care, operation, and maintenance of the system, with specified exceptions, had been transferred to the District, although title to the Imperial Dam and the canal remained in the United States. Repayment of construction charges commenced on March 1, 1955. The District's financial obligation was determined to be approximately $25 million, repayable in 40 annual installments, without interest. All payments to date have been made from net power revenues derived from the sale of electrical energy generated by hydroelectrical facilities of the All-American Canal, facilities which cost the District approximately $15 million.

[11] The Act of May 15, 1922, ch. 190, § 1, 42 Stat. 541, 43 U. S. C. § 511, authorized the Secretary to contract with irrigation districts but provided that no contract under the section "shall be binding on the United States until the proceedings on the part of the district for the authorization of the execution of the contract with the United States shall have been confirmed by decree of a court of competent jurisdiction, or pending appellate action if ground for appeal be laid." The 1926 Act also required that the "execution" of the contracts referred to in the section be judicially confirmed.

In addition, the law of California specified preconditions to the effectiveness of water district contracts. Approval by the governing body was required as well as by district members voting in an election for that purpose. A district was also permitted to submit the contract to Superior Court for validation proceedings. The decree in *Hewes* v. *All Persons*, discussed in the text, concluded that California law had been satisfied in all respects.

judgment was entered on July 1, 1933, confirming the validity of the contract in all respects. App. to Pet. for Cert. in No. 79–435, pp. 120a–154a. In connection with these proceedings, the then Secretary, Ray Lyman Wilbur, on February 24, 1933, submitted a letter to the District dealing with the question whether the 160-acre limitation of the reclamation law was applicable in Imperial Valley. Among other things, the letter stated:

> "Upon careful consideration the view was reached that this limitation does not apply to lands now cultivated and having a present water right. These lands, having already a water right, are entitled to have such vested right recognized without regard to the acreage limitation mentioned. Congress evidently recognized that these lands had a vested right when the provision was inserted that no charge shall be made for the storage, use, or delivery of water to be furnished these areas." [12]

The trial court in the *Hewes* case expressly found and concluded that eligibility for project water was not limited to 160-acre tracts in single ownership.[13] An appeal in the case was dismissed before judgment. The United States was not a party to the action.

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[12] App. 177a, 71 I. D. 496, 530 (1964). Secretary Wilbur's letter referred specifically only to the applicability of § 5 of the Reclamation Act to the privately owned district lands. Five days later, the Assistant Commissioner and Chief Counsel of the Bureau of Reclamation, Porter W. Dent, issued a letter confirming that the Department's interpretation likewise applied to § 46 of the 1926 Act. App. 179a, 71 I. D., at 531.

[13] Finding of Fact No. 35 in pertinent part said that under the 1932 contract, "the delivery of water will not be limited to 160 acres in a single ownership . . . and that water service to lands regardless of the size of ownership will not be in any manner affected by said contract, so far as the size of individual ownership is concerned." App. to Pet. for Cert. in No. 79–435, p. 144a. Conclusion of Law No. XI stated that "neither the United States nor Imperial Irrigation District is limited by the terms of said contract or by any law applicable thereto in the delivery of water to any maximum acreage of land held in a single ownership." *Id.*, at 149a.

The Wilbur letter expressing the view that lands under irrigation at the time the Project Act was passed and having a present water right were not subject to the 160-acre limitation remained the official view of the Department of the Interior until 1964 [14] when the Department adopted the view

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[14] As the District Court pointed out, there was no suggestion by anyone during the construction of the All-American Canal that acreage limitations would be applicable to lands under cultivation in 1929. And based on its own "thorough review of Departmental policy," the District Court also concluded that the Wilbur interpretation of the Project Act remained the official view of the United States "during the incumbencies of six successor Secretaries and four Presidential administrations." 322 F. Supp. 11, 26 (SD Cal. 1971).

In 1942, in response to inquiry from the Federal Land Bank as to the applicability of the 160-acre limitation in Imperial Valley, the Commissioner of the Bureau of Reclamation replied in the negative. In 1944, Assistant Commissioner of Reclamation Warne testified before a Senate Subcommittee that "the limitation was never applied under the law to the Imperial Valley, except as a matter of new lands . . . ," and went on to make the Wilbur letter part of the Subcommittee's record. Hearings on H. R. 3961 before a Subcommittee of the Senate Committee on Commerce, 78th Cong., 2d Sess., pt. 4, pp. 599, 764–765 (1944).

In 1945, the Solicitor of the Interior Department ruled that the 160-acre limitation was applicable to Coachella Valley. 71 I. D., at 533. In the course of the opinion, he also disagreed with the Wilbur letter with respect to Imperial Valley, but did not purport to overrule it. In 1948, Secretary Krug, in response to an inquiry from a veterans' organization, issued a letter affirming the Department's adherence to the Wilbur ruling. App. 253a–254a.

In 1952, after several years of negotiations, changes were effected in the 1932 contract between the District and the United States, but the Department did not insist that an acreage limitation be included or that the Wilbur position be abandoned.

In response to inquiry from the Solicitor General in 1958, the then Solicitor of the Department of the Interior reaffirmed the Department's position with respect to the Wilbur letter. *Id.*, at 255a–260a. The Solicitor General, however, without the concurrence of the Department, answered the inquiry of the Special Master in *Arizona* v. *California*, suggesting that the question of acreage limitations was irrelevant to the proceedings before the Master but also indicating in a footnote his disagree-

of its then Solicitor that the limitation should have applied to all Imperial Valley lands in private ownership.

Meanwhile, it having become apparent that neither the Compact nor the Project Act settled to the satisfaction of the Lower Basin States how the water allocated to them should be divided, an original action was begun in this Court in 1952 to settle this fundamental question and related issues, including the ascertainment of present perfected rights the unimpaired preservation of which was required by both the Compact and the Project Act. After more than 10 years of litigation, the opinion in *Arizona* v. *California* was handed down on June 3, 1963. 373 U. S. 546 Although the dispute among the Lower Basin States was at the heart of the controversy, for present purposes the primary aspect of the case was the recognition given to present perfected rights in the opinion and the ensuing decrees.

The opinion recognized that under § 14 of the Project Act, the construction, operation, and management of the works were to be subject to the provisions of the reclamation law, except as the Act otherwise provided, and that one of the most significant limitations in the Project Act on the Secretary's authority to contract for the delivery of water is the requirement to satisfy present perfected rights, "a matter of intense importance to those who had reduced their water rights to actual beneficial use at the time the Act became effective." 373 U. S., at 584. The decree, which was entered on March 9, 1964, 376 U. S. 340, defined a perfected right as:

> "[A] water right acquired in accordance with state law, which right has been exercised by the actual diversion of a specific quantity of water that has been applied to a

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ment with the Wilbur letter and the Department's position. App. 260a–263a. Also in 1958, the Solicitor General expressed the same opinion in the *Ivanhoe* litigation. Brief for United States as *Amicus Curiae* in *Ivanhoe Irrig. Dist.* v. *McCracken*, O. T. 1957, Nos. 122 *et al.*, p. 37, n. 9. It was not until 1964 that the Secretary repudiated the Department's prior position. 71 I. D. 496.

> defined areas of land or to definite municipal or industrial works. . . ." *Id.*, at 341.

Present perfected rights were defined as those perfected rights "existing as of June 25, 1929, the effective date of the Boulder Canyon Project Act." *Ibid.* The decree also provided for the future determination of the specific present perfected rights in each of the Lower Basin States. A supplemental decree was eventually forthcoming, 439 U. S. 419 (1979), and in that decree the Imperial Irrigation District was adjudged to have a present perfected right

> "in annual quantities not to exceed (i) 2,600,000 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 424,145 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of 1901." *Id.*, at 429.

As already indicated, the Department of the Interior repudiated the Wilbur interpretation of the Project Act in 1964. It then sought to include its revised position in a renegotiated contract with the District. When the District refused to accept the Department's position, the United States sued the District in 1967 for a declaratory judgment that the excess-acreage limitation of § 46 applied to all private lands in the Valley. The District Court permitted several Imperial Valley landowners to intervene as defendants representing the certified class of all landowners owning more than 160 acres.[15] It then ruled against the Government, holding for several reasons that "the land limitation provisions of reclamation law have no application to privately owned lands lying within the Imperial Irrigation District" and that the District is not bound to observe such limitations. 322 F. Supp., at 27. The Department of the Interior recommended and the Solicitor

[15] The District Court found that there were some 800 owners in the District owning in the aggregate approximately 233,000 acres of excess land. 322 F. Supp., at 12.

General decided, after reviewing the case, that an appeal not be prosecuted on behalf of the United States.[16] In consequence, respondents, a group of Imperial Valley residents, who had been given leave to participate as *amici* in the District Court and who desired to purchase the excess lands that might become available if § 46 were held applicable, attempted to intervene for purpose of appeal, but the District Court denied the motion. The Court of Appeals reversed the denial, 559 F. 2d 509, 543–544 (CA9 1977), and proceeded to hold that the appealing intervenors had standing under Art. III of the Constitution; that *Hewes* v. *All Persons* was not conclusive with respect to acreage limitation; that the clear import of § 46 and the Project Act was that the 160-acre limitation is applicable to the Imperial Valley; and that the Department's administrative practice over the years did not bar application of the limitation to the Valley.

Because of the importance of these cases, we granted the petitions for writs of certiorari filed by the District, the landowners, and the State of California. 444 U. S. 978 (1979).

II

As a preliminary matter, we agree with the Court of Appeals that the respondents who sought to enter the suit when the United States forwent an appeal from the District Court's adverse decision had standing to intervene and press the appeal on their own behalf. Respondents, most of whom are farmworkers, reside in Imperial Valley. The essence of their claim was that they desired to purchase farmlands in Im-

[16] As indicated in a memorandum for the file prepared by the Solicitor General, the essence of the case for him was that an official construction of the Project Act had been made by the Department and followed for 38 years. To overturn such a longstanding administrative decision did "not strike [the Solicitor General] as good administration, or good government." 126 Cong. Rec. S1633 (Feb. 20, 1980). He concluded that an appeal to the Court of Appeals should not be taken because it would not, and, in his view, should not be successful. His second reason was prophetic.

perial Valley and that if § 46 were applied as they believed it should be, there would be excess lands available for purchase at prices below the market value for irrigated land.[17] The Court of Appeals, although recognizing that no owner of excess lands would be required to sell, concluded that it would be highly improbable that all owners of excess lands would prefer to withdraw their irrigable lands from agriculture in order to avoid § 46. In these circumstances, the Court of Appeals ruled that under *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252 (1977), and other cases, respondents had standing even though they could not with certainty establish that they would be able to purchase excess lands if § 46 were held applicable.[18]

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[17] Excess land offered for sale pursuant to § 46 must be sold at a price fixed by the Secretary of the Interior "on the basis of its actual bona fide value at the date of appraisal without reference to the proposed construction of the irrigation works. . . ." The Secretary may "cancel the water right attaching to the land" if it is sold for a different price. Because the federal reclamation project has added substantially to the value of land in the District, excess lands would be sold at prices far below their current fair market values. Since purchasers of such land would stand to reap significant gains on resale, the absence of detailed information about respondents' financial resources does not defeat respondents' claim of standing. Even if improvements to the land, such as installation of drainage systems, have enhanced its value, the potential windfall would remain and petitioners would possess a further incentive for offering excess lands for sale—to recoup the value of improvements—rather than withdrawing them from agricultural uses.

While the prospect of windfall profits could attract a large number of potential purchasers of the excess lands, respondents' interest is not "shared in substantially equal measure by all or a large class of citizens," *Warth* v. *Seldin*, 422 U. S. 490, 499 (1975), because respondents are residents of the Imperial Valley who desire to purchase the excess land for purposes of farming.

[18] In a subsequent opinion denying rehearing, the Court of Appeals reaffirmed that respondents had standing. 595 F. 2d 525 (1979). The court rejected the argument that because the District had repaid more than one-half of the construction costs of the irrigation project the Secretary no longer had the authority to fix sale prices for excess land. Section

This was a proper application of our cases. It being unlikely that any of the 800 owners of excess lands would sell land at below current market prices absent the applicability of § 46 and it being likely that excess lands would become available at less than market prices if § 46 were applied, the Court of Appeals properly concluded that respondents had a sufficient stake in the outcome of the controversy to afford them standing to appeal the District Court's decision.

III

We are unable, however, to agree with the Court of Appeals that Congress intended that the 160-acre limitation of the 1926 Act would apply to the lands under irrigation in Imperial Valley in 1929.[19] Under § 14 of the Project Act, the construction, operation, and management of the project works were to be governed by the reclamation law, but only if not otherwise provided for in the Project Act. Section 46 of the 1926 Act is one of the reclamation laws; and its acreage limita-

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46 provides in pertinent part that "until one-half the construction charges against said lands shall have been fully paid no sale of any such lands shall carry the right to receive water unless and until the purchase price involved in such sale is approved by the Secretary of the Interior. . . ." The Court of Appeals concluded that this portion of § 46 did not apply with respect to the initial breakup of excess lands for which the Secretary must fix the sale price "on the basis of its actual bona fide value at the date of appraisal without reference to the proposed construction of the irrigation works."

[19] Ever since its enactment in 1902, the reclamation law has generally limited to 160 acres the amount of private land in single ownership eligible to receive water from a reclamation project. This limitation helps open project lands to settlement by farmers of modest means, insures wide distribution of the benefits of federal projects, and guards against the possibility that speculators will earn windfall profits from the increase in value of their lands resulting from the federal project. See also *Ivanhoe Irrig. Dist.* v. *McCracken*, 357 U. S. 275, 292 (1958). The excess-acreage limitation has been retained in successive statutes culminating in § 46 of the 1926 Act.

tion, which expressly applies to contracts for "constructing, operating, and maintaining" project works, would appear to govern the delivery of project water unless its applicability is foreclosed by some other provision of the Project Act. The Court of Appeals, erroneously we think, found no such preclusion in § 6 of the Act.

Concededly, nothing in § 14, in § 46, or in the reclamation law in general would excuse the Secretary from recognizing his obligation to satisfy present perfected rights in Imperial Valley that were provided for by Art. VIII of the Compact and § 6 of the Project Act and adjudicated by this Court in *Arizona* v. *California*, 373 U. S. 546 (1963). The Court of Appeals neverthless held that § 46 could be applied consistently with § 6 because the perfected rights in Imperial Valley were owned by and would be adjudicated to the District, not to individual landowners, who were merely members of a class for whose benefit the water rights had been acquired and held in trust. Individual farmers, the Court of Appeals said, had no right under the law to a particular proportion of the District's water. Applying § 46 and denying water to excess lands not sold would merely require reallocation of the water among those eligible to receive it and would not reduce the water to which the District was entitled to have delivered in accordance with its perfected rights.

We find this disposition of the § 6 defense to the application of the 1926 Act's acreage limitation to be unpersuasive. *Arizona* v. *California*, *supra*, at 584, recognized that "one of the most significant limitations" on the Secretary's power under the Project Act was the requirement that he satisfy present perfected rights, a matter of great significance to those who had reduced their water rights to beneficial use prior to 1929. Accordingly, in our initial decree, the perfected right protected by § 6 was defined with some care: a right that had been acquired in accordance with state law and that had been exercised by the actual diversion of a specific quantity of water

and its application to a defined area of land.[20] In our supplemental decree, entered prior to the opinion of the Court of Appeals denying rehearing and rehearing en banc, there was decreed to the District a present perfected water right of 2.6 million acre feet of diversions from the mainstream or the quantity of water necessary to supply the consumptive use required to irrigate 424,145 acres and related uses, whichever was less, with a priority date of 1901. 439 U. S., at 429. We thus determined that, as of 1929, the District had perfected its rights under state law to divert the specified amount of water and had actually diverted that water to irrigate the defined quantity and area of land. As we see it, the Court of Appeals failed to take adequate account of § 6 of the Project Act and its implementation in our opinion and decrees filed in the *Arizona* v. *California* litigation.

In the first place, it bears emphasizing that the § 6 perfected right is a water right originating under state law. In *Arizona* v. *California*, we held that the Project Act vested in the Secretary the power to contract for project water deliveries independent of the direction of § 8 of the Reclamation Act to proceed in accordance with state law and of the admonition of § 18 of the Project Act not to interfere with state law. 373 U. S., at 586–588.[21] We nevertheless clearly recognized that § 6 of the Project Act, requiring satisfaction of present perfected rights, was an unavoidable limitation on the Secretary's power and that in providing for these rights the Secretary

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[20] This was the Special Master's recommended definition. We accepted it over the objection of California. In requiring actual diversion of water and its application to a defined area of land, the definition did not reach all appropriative water rights under state law. See Report of Special Master, *Arizona* v. *California*, O. T. 1960, No. 8 Orig., pp. 307–309 (hereinafter Special Master Report).

[21] In terms of reclamation law generally, the import of the Court's opinion in this respect was considerably narrowed in *California* v. *United States*, 438 U. S. 645 (1978), but the latter case did not question the description of the Secretary's power under the Project Act itself.

must take account of state law. In this respect, state law was not displaced by the Project Act and must be consulted in determining the content and characteristics of the water right that was adjudicated to the District by our decree.[22]

It may be true, as the Court of Appeals said, that no individual farm in the District has a permanent right to any specific proportion of the water held in trust by the District. But there is no doubt that prior to 1929 the District, in exercising its rights as trustee, delivered water to individual farmer beneficiaries without regard to the amount of land under single ownership. It has been doing so ever since. There is no suggestion, by the Court of Appeals or otherwise, that as a matter of state law and absent the interposition of some federal duty, the District did not have the right and privilege to exercise and use its water right in this manner. Nor has it been suggested that the District, absent some duty or disability imposed by federal law, could have rightfully denied water to individual farmers owning more than 160 acres. Indeed, as a matter of state law, not only did the District's water right entitle it to deliver water to the farms in the District regardless of size, but also the right was equitably owned by the beneficiaries to whom the District was obligated to deliver water.[23]

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[22] While the source of present perfected rights is to be found in state law, the question of whether rights provided by state law amount to present perfected rights within the meaning of § 6 is obviously one of federal law. See *Ivanhoe Irrig. Dist.* v. *McCracken, supra,* at 289; *California* v. *United States, supra,* at 668–669, n. 21, 671–673, 678, n. 31.

[23] *Ivanhoe Irrig. Dist.* v. *All Parties and Persons,* 47 Cal. 2d 597, 624–625, 306 P. 2d 824, 840 (1957), rev'd *sub nom. Ivanhoe Irrig. Dist.* v. *McCracken,* 357 U. S. 275 (1958). As beneficiaries of the trust, the landowners have a legally enforceable right, appurtenant to their lands, to continued service by the District. *Erwin* v. *Gage Canal Co.,* 226 Cal. App. 2d 189, 194–195, 37 Cal. Rptr. 901, 903–904 (1964); *South Pasadena* v. *Pasadena Land & Water Co.,* 152 Cal. 579, 588, 93 P. 490, 494 (1908). The District is obligated not only to continue delivery, but also to apportion water distributed for irrigation purposes rat ɔly to each landowner in

These were important characteristics of the District's water right as of the effective date of the Project Act, and the question is whether Congress intended to effect serious changes in the nature of the water right by doing away with the District's privilege and duty to service farms regardless of their size. We are quite sure that Congress did not so intend and that to hold otherwise is to misunderstand the Project Act and the substantive meaning of "present perfected rights" as defined by this Court's decree.

The Court of Appeals said it would not be a breach of trust by a water district to obey the dictates of § 46, relying on *Ivanhoe Irrig. Dist.* v. *All Parties and Persons*, 53 Cal. 2d 692, 712, 350 P. 2d 69, 81 (1960). But the issue here is whether § 46 applies to lands already being irrigated in 1929. In the *Ivanhoe* proceedings, the courts were not dealing with perfected rights to water that the project there involved would furnish, nor with a Project Act that specifically required present perfected rights to be satisfied. Here, we are dealing with perfected rights protected by the Project Act; and because its water rights are to be interpreted in the light of state law, the District should now be as free of land limitations with respect to the land it was irrigating in 1929 as it was

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accordance with his share of the total assessments in the District. Cal. Water Code Ann. § 22250 (West 1956).

In the *Ivanhoe* litigation, the California Supreme Court originally determined that to deny water to farms in excess of 160 acres in single ownership would contravene § 22250, and would work a denial of due process and equal protection of the laws. Following this Court's decision that the 160-acre limitations contained in irrigation contracts for the Central Valley Project were mandated by federal reclamation law, the California Supreme Court, on remand, held that in light of this Court's opinion, water could be denied to farms exceeding the acreage limitation without violating state law. *Ivanhoe Irrig. Dist.* v. *All Parties and Persons*, 53 Cal. 2d 692, 350 P. 2d 69 (1960). However, the court's decision made clear that absent an overriding provision of federal law imposing an acreage limitation, state law debars an irrigation district from denying water to farms on the basis of size.

prior to the passage of the Project Act. To apply § 46 would go far toward emasculating the substance, under state law, of the water right decreed to the District, as well as substantially limiting its duties to, and the rights of, the farmer-beneficiaries in the District.[24]

It should also be recalled that we defined a present perfected right as one that had not only been acquired pursuant to state law but as one that had been exercised by the diversion of water and its actual application to a specific area of land. We did not intend to decree a water right to the District under this definition, conditioned upon proof of actual diversion and use, but nevertheless to require the District to terminate service to the lands on the basis of which the right was decreed. The District has itself no power to require that excess lands be sold, and it is a contradiction in terms to say, as the Court of Appeals did, that the District has present perfected rights but that § 46 requires it to terminate deliveries to all persons with excess lands who refuse to sell.[25] We consequently hold that the perfected water right decreed to the District may be exercised by it without regard to the

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[24] In *Ivanhoe Irrig. Dist.* v. *McCracken, supra,* at 292, the Court remarked that where a particular project has been exempted from the acreage limitation because of its peculiar circumstances, "the Congress has always made such exemption by express enactment." As we have explained, we have little trouble in concluding that the Project Act's provision for the satisfaction of perfected rights acquired under state law is an effective expression that the acreage limitation would be inapplicable to the lands served under such rights. As the Special Master observed in *Arizona* v. *California,* "the congressional intention was to insure that persons actually applying water to beneficial use would not have their uses disturbed by the erection of the dam and the storage of water in the reservoir." Special Master Report 309.

[25] Indeed, the Department of the Interior observed in 1946 that the administrative practice under § 46 had usually been "to refuse to deliver water to any lands, excess or nonexcess, until the owner of excess land has executed the recordable contract agreeing to dispose of the excess." Department of Interior, Landownership Survey on Federal Reclamation Projects 47 (1946).

land limitation provisions of § 46 of the 1926 Act or to any similar provisions of the reclamation laws.[26]

IV

The legislative history of the Project Act, which spans several years, raises no doubt in our minds about the foregoing construction of the Act.[27] Our attention has been called to nothing in the relevant materials indicating that although Congress was careful to preserve presently perfected rights in § 6, other provisions of the Project Act were nevertheless intended to invoke acreage limitation with respect to lands already being irrigated in Imperial Valley by means of water diverted from the Colorado River and delivered to the Valley by the District's own works. Indeed, the version of the Project Act passed in the House contained an express acreage limitation applicable to all privately owned lands; but the Senate substituted the provisions of its own bill, which did not contain an acreage limitation expressly applicable to lands then being irrigated, and it was this version which became the Project Act despite objections in the Senate that the bill should be amended to limit water deliveries to 160 acres under single ownership. There is nothing in this chain of events to suggest that Congress intended § 14, by bringing the 1926 Act into play, to interfere with the delivery of water to those lands already under irrigation in Imperial Valley and having presently perfected rights that the Secretary was bound to

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[26] The United States urges that § 6 merely specifies priorities among those entitled to water from the Project and is irrelevant in determining entitlement itself. The argument has no merit.

[27] The Project Act was the result of the fourth attempt by Congressman Swing and Senator Johnson of California to cause the Federal Government to move forward with such an undertaking. Their first bills were introduced in 1922, in the 67th Congress. The fourth set of bills, which were successful, were introduced in 1927, in the 70th Congress. Congressional action was completed on December 18, 1928, and the President's signature followed on December 21 of that year.

recognize.[28] If anything, the inference from the legislative history is to the contrary. This is not to say that we rely strongly on legislative materials in construing the Project

[28] Respondents point out that although the District was to repay the cost of the All-American Canal and the Imperial Dam, the repayment obligation carried no interest. We should not hold, it is urged, that Congress intended this permanent subsidy to large landholders. Rather, we should find that the benefits of the Project to the District justify the application of § 46 and the requirement that excess landholdings be sold. We think, however, that Congress struck the balance between public and private rights and determined to respect those rights to Colorado River water that had been put to use as of 1929. The Project Act recited its purposes as "controlling the floods, improving navigation and regulating the flow of the Colorado River, providing for storage and for the delivery of the stored waters thereof for reclamation of public lands and other beneficial uses exclusively within the United States. . . ." Section 1 of the Act, 45 Stat. 1057, 43 U. S. C. § 617. The 1932 contract between the District and the United States contained nearly identical recitals as to the purposes of the Project. It also recited that there were public lands already within the District and required that substantial additional acreages of public and private lands be included within the District. The District Court found that certain national interests were advanced by the Project:

"1) The inclusion within the District by annexation, pursuant to Article 34 of the contract between the Government and the District dated December 1, 1932, of some 250,000 acres of Government lands.

"2) Added capacity in the Canal for the servicing of such lands and some 11,000 acres of Indian land.

"3) Flood control for the purpose of preserving the Laguna Dam and protecting the Yuma Reclamation Project as well as protecting the public lands and private interests in Imperial Valley.

"4) The control of silt because of the federal government's problem in handling silt in the Yuma Project.

"5) The need to build a canal on All-American soil to put the United States in a position to bargain with the Mexican Government over the use of the water of the Colorado River.

"6) It enabled the United States Government to reclaim and put to use large tracts of public and Indian lands of the United States in Coachella Valley." 322 F. Supp., at 19.

The District Court concluded that Congress was aware of the water rights held in Imperial Valley and determined to exempt them from the acreage limitations "in recognition of the fact that the All-American Canal Project

Act. Statements by the opponents of a bill and failure to enact suggested amendments, although they have some weight, are not the most reliable indications of congressional intention. *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 204, n. 24 (1976); *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 381–382, n. 11 (1969). But we do say that the respondents have not called our attention to anything in the hearings, Committee Reports or floor debates suggesting in any substantial way that our construction of the Project Act is in error.

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was not merely an arid lands reclamation project, but was a special purpose program designed for national purposes, including water negotiations with Mexico, as well as for regional agricultural development." *Id.*, at 22.

The Senate Report on S. 728, S. Rep. No. 592, 70th Cong., 1st Sess. (1928), stated several purposes of the Project, one of which was that it would "end an intolerable situation, under which the Imperial Valley now secures its sole water supply from a canal running for many miles through Mexico, as well as make possible the reclamation of public lands lying around the rim of the present cultivated section of the valley." *Id.*, at 8. The Report also stated as follows:

"The all-American canal will carry a portion of the conserved waters to where they can be used for irrigation and domestic purposes. Looked at in a somewhat narrow way, it represents a cooperative enterprise between Imperial irrigation district, which serves the present irrigated area in Imperial Valley, the Coachella County water district, a public district embracing in its limits the Coachella Valley, and the United States as owner of approximately 200,000 acres of public land about the rim of Imperial Valley, and about 11,000 acres of Indian lands now without water but possessing the same possibilities of development with water as the fertile lands in the valley. Neither Imperial irrigation district, the Coachella district, nor the United States could afford alone to build a canal from the river. Acting in conjunction, the canal is entirely feasible." *Id.*, at 21.

The House Report on H. R. 5773, H. R. Rep. No. 918, 70th Cong., 1st Sess., 6 (1928), also identified one of the purposes of the Project as ending the "intolerable situation" which existed in Imperial Valley:

"This valley now secures its sole water supply by a canal which runs for some 60 miles through Mexico. The all-American canal will furnish a substitute for this and at the same time carry the water at an elevation sufficient to make possible, at some future date, the irrigation of additional land, mostly public, lying about the rim of the cultivated area."

There can be little question that the contemporary construction of the Project Act by the parties to the 1932 contract was that the acreage limitation did not apply to lands in the District presently being irrigated. Secretary Wilbur, in his letter of February 24, 1933, stated that early in the negotiations on the All-American Canal contract, the question was raised as to the 160-acre limitation, and the view was reached that the limitation did not apply to lands that were under cultivation and having a present water right.[29] There is no reason to doubt that the parties went forward on this basis, especially since language in early drafts of the contract which might have indicated an acreage limitation was eliminated in the course of the negotiations. The Imperial Valley system was a going concern at the time, and the Alamo Canal continued to supply the water to the Valley for another 10 years. It is thus a fair inference that both the Imperial Valley landowners and the United States proceeded on the assumption that the 160-acre limit was of no concern to those who were receiving water from the Alamo Canal. This contemporaneous view of the Project Act, which supports our own construction of the legislation, was not officially repudiated by the Secretary until 1964. It is also a matter of unquestioned fact that in the ensuing years the Secretary has delivered water to the District pursuant to its contract and that the 160-acre

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[29] The matter had been called to the Secretary's attention by a memorandum of February 7 from Porter W. Dent, the Assistant Commissioner and General Counsel of the Bureau of Reclamation. His memorandum contained almost identical language to that in the Secretary's later letter. Mr. Dent said:

"Early in the negotiations connected with the All-American Canal contract the question was raised regarding whether and to what extent the 160-acre limitation is applicable to lands to be irrigated from this proposed canal. So far as I am advised, all who have given this matter consideration agree that this limitation does not apply to lands now cultivated and having a present water right. The view has been, and is, I believe, that these lands having already a water right, are entitled to have such right recognized without regard to the acreage limitation mentioned." App. 220a.

provision of the reclamation laws has to this date never been an operative limitation with respect to lands under irrigation in 1929.[30]

V

There remains a further consideration. The parties stipulated and the District Court found that at the outset of this litigation, the District was irrigating approximately 14,000 more acres than the 424,145 acres under irrigation in 1929. If, in light of our perfected rights holding, an Art. III case or controversy remains with respect to the applicability of

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[30] This was the case despite the fact that in 1945 in the course of concluding that the lands in Coachella Valley were subject to the acreage limitation, the Department's Solicitor also took exception to the Wilbur view with respect to Imperial Valley. The Solicitor's opinion, however, totally ignored the existence of present perfected rights in Imperial Valley and their absence in Coachella. His view as to Imperial Valley did not prevail, in any event, for in 1948, Secretary Krug expressly declined to depart from the Department's consistent adherence to the Wilbur view that the Project Act did not require limiting water deliveries in Imperial Valley to 160 acres under single ownership. Furthermore, in 1952, when the District and the Department negotiated a revision of the 1932 contract in some respects, there was no effort made by the Department to insist on a limitation provision.

The Department's repudiation of its prior position in 1964 was based on its Solicitor's view that § 46 of the 1926 Act applied to Imperial Valley by virtue of § 14 of the Project Act and that under that section no farmer in Imperial Valley could have project water for more than 160 acres of land. Excess lands must either be sold or the District must deny water to them. The Solicitor's opinion, however, gave only cursory attention to § 6. After stating that the proper rule of construction in cases such as he was considering was that "rights, privileges and immunities not expressly granted are reserved," the opinion went on to conclude:

"For the same reason the requirement in section 6 for 'satisfaction of present perfected rights' cannot be read as insulating the District lands from acreage limitation. It is not in plain terms an exemption from the limitations of reclamation law in connection with the obligation to repay the cost of Imperial Dam and the All-American Canal." 71 I. D., at 511.

We agree with the District Court's conclusion that this is a totally inadequate conception of perfected rights.

acreage limitations to this additional 14,000 acres, there would remain to be disposed of those arguments of petitioners for reversing the Court of Appeals which we have not addressed and which, if sustained, would exempt from acreage limitations all privately owned lands in Imperial Valley, a result which the District Court seemingly embraced.[31] The parties, however, have not separately addressed the status of this additional 14,000 acres; nor does the record invite us to deal further with this case without additional proceedings in the lower court. We do not know, for example, whether the District is still irrigating the additional 14,000 acres, whether any of the 14,000 acres consists of lands held in excess of 160 acres, or whether for some other reason of fact or law there is not now a controversy that requires further adjudication. Even if a live dispute remains, it would be helpful to have the Court of Appeals, or the District Court in the first instance if the Court of Appeals deems it advisable, adjudicate the status of the 14,000 acres, freed of any misapprehensions about the applicability of the 160-acre limitation to lands under irrigation in 1929.

Accordingly, the judgment of the Court of Appeals is reversed with respect to those lands that were irrigated on June 25, 1929, and with respect to which the District has been

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[31] Petitioners contend that contrary to 28 U. S. C. § 1738, the Court of Appeals failed to give the same full faith and credit to the *Hewes* decision as that decision would have by law or usage in the courts of California. They urge that the United States embraced and consistently adhered to a construction of the Project Act that would exempt from acreage limitations all privately owned lands in the District, a position which the Government should not now be permitted to repudiate. They also argue that quite apart from § 6, the structure and other provisions of the Project Act negate the applicability of acreage limitations to privately owned lands in Imperial Valley. Finally, they present a view of the legislative history of the Project Act that they claim supports the inference that Congress intended to exempt from acreage limitations any and all lands that the District might subsequently take into itself and irrigate with project water.

adjudicated to have a perfected water right as of that date. The judgment is otherwise vacated and the case is remanded to that court for further proceedings consistent with this opinion.[32]

So ordered.

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[32] We note, further, that there has passed the Senate and is pending in the House a measure that would exempt lands in the District from the reach of acreage limitations in the reclamation law.

BIFULCO v. UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 79-5010. Argued February 27, 1980—Decided June 16, 1980

Section 406 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (Act) provides that "[a]ny person who attempts or conspires to commit any offense defined in this title is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy" (the "target offense"). Petitioner and others were convicted of violating § 406 by conspiring to violate § 401 (a)(1) of the Act by knowingly manufacturing, distributing, and possessing a controlled substance. In accordance with the provisions of § 401 (b)(1)(B) prescribing penalties for violations of § 401 (a)(1), petitioner was sentenced to a term of imprisonment, a fine, and a 5-year special parole term to be served upon completion of the term of imprisonment. The Court of Appeals affirmed petitioner's conviction, and thereafter he filed an action under 28 U. S. C. § 2255 to vacate his sentence, claiming that the sentence was unlawful because § 406 does not authorize the imposition of a special parole term. The District Court held that petitioner had been properly sentenced, and the Court of Appeals affirmed.

Held: Section 406 of the Act does not authorize the imposition of a special parole term even though that sanction is included within the penalty provision of the target offense. Pp. 387–401.

(a) A "plain meaning" interpretation of the term "imprisonment" in § 406 does not support the position that the term means a term of incarceration plus special parole made applicable by the target offense's penalty provisions. Moreover, the structure of the Act read as a whole supports the conclusion that § 406 defines the types of punishment authorized for conspirators—imprisonment, fine, or both—and sets maximum limits on those sanctions through reference to the penalty provisions of the target offense, but does not incorporate by reference any provisions for special parole. Pp. 388–390.

(b) Nor does the Act's legislative history demonstrate that Congress intended that the penalties authorized for substantive offenses, and those for conspiracies to commit them, were to be identical, thus authorizing

special parole terms for conspiracy convictions. Instead, the history supports the view that § 406 authorizes two types of sanctions—fines and imprisonment—and fixes the maximum amount of each that may be imposed by reference to the target offense's penalty provisions. Pp. 391–398.

(c) A reading of § 406 to include the special parole provisions of target offenses cannot be supported on the ground that Congress' principal objective in enacting the Act's penalty provisions—to deter professional criminals from engaging in drug trafficking for profit—renders it unreasonable to ascribe to Congress the intent to authorize special parole for isolated substantive offenses while withholding this sentencing tool for conspiracies. A comparison of those drug offenses for which Congress clearly authorized special parole terms with those for which it clearly did not, does not reveal a coherent pattern based on the asserted justification for escalated sanctions. Moreover, since § 406 deals with both conspiracies and attempts, and prescribes an identical range of punishment for both, it is not surprising that Congress would provide for less stringent sanctions to be imposed for violations of § 406 than for a completed substantive offense. Pp. 398–399.

600 F. 2d 407, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, MARSHALL, and POWELL, JJ., joined. BURGER, C. J., filed a concurring opinion, *post*, p. 401. STEVENS, J., filed a dissenting opinion, in which WHITE and REHNQUIST, JJ., joined, *post*, p. 402.

Steven Lloyd Barrett, by appointment of the Court, 444 U. S. 939, argued the cause for petitioner. With him on the briefs were *William E. Hellerstein* and *Phylis Skloot Bamberger*.

Harlon L. Dalton argued the cause for the United States. With him on the brief were *Solicitor General McCree*, *Assistant Attorney General Heymann*, and *Deputy Solicitor General Frey*.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

The issue presented in this case is whether § 406 of the Comprehensive Drug Abuse Prevention and Control Act of

1970 (Act), 84 Stat. 1265, 21 U. S. C. § 846,[1] authorizes a sentencing court to impose a term of special parole upon a defendant who is convicted of conspiracy to manufacture or distribute a controlled substance.

I

Section 406 provides:

> "Any person who attempts or conspires to commit any offense defined in this title is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

The object of the conspiracy at issue in this case was the commission of the substantive offense defined in § 401 (a) of the Act, 21 U. S. C. § 841 (a). That subsection reads:

> "Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally—
>
> "(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
>
> "(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance."

The penalties for violations of § 401 (a) are set forth in § 401 (b). That subsection authorizes the imposition of terms of imprisonment, fines, and, in some instances, mandatory minimum terms of special parole. The range of permissible punishments varies depending on the nature of the controlled substance involved, and on whether the defendant has been convicted previously of a drug offense. The penalty provision at issue is § 401 (b)(1)(B).[2] It states:

> "Except as otherwise provided in section 405 [which

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[1] The Act, Pub. L. 91–513, is set forth at 84 Stat. 1236–1296. For the sake of simplicity, further otherwise appropriate citations to the Statutes at Large will be omitted.

[2] This provision was amended in 1978, but the amendment is not perti-

deals with distribution to minors], any person who violates subsection (a) of this section shall be sentenced as follows:

* * * * *

"In the case of a controlled substance in schedule I or II which is not a narcotic drug or in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine or not more than $15,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $30,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment."

Section 401 (c) describes the operation of the special parole term provisions in greater detail. It states:

"A special parole term imposed under this section or section 405 may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole

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nent to the issue presented here. See Pub. L. 95-633, § 201, 92 Stat. 3774, 21 U. S. C. § 841 (b)(1)(B) (1976 ed., Supp. II).

term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. A special parole term provided for in this section or section 405 shall be in addition to, and not in lieu of, any other parole provided for by law."

The narrow, but important, question presented in this case is whether § 406, which states the penalty for conspiracy as "imprisonment or fine or both," but limits maximum punishment by reference to the penalty provisions of the substantive target offense, authorizes the imposition of a special parole term where that sanction is included within the penalty provisions of the target offense.

II

In an indictment filed in December 1976 with the United States District Court for the Eastern District of New York, petitioner Alphonse Bifulco and others were charged with a single count of conspiring to violate § 401 (a)(1) by knowingly and intentionally manufacturing, distributing, and possessing substantial quantities of phencyclidine, a schedule III controlled substance. This conspiracy was charged as a violation of § 406. A jury found petitioner and several codefendants guilty of the offense charged, and petitioner was sentenced to a 4-year term of imprisonment, a fine of $1,000, and a 5-year special parole term.[3] The United States Court of Appeals for the Second Circuit subsequently affirmed petitioner's conviction in an unpublished order.

In January 1979, petitioner, pursuant to 28 U. S. C. § 2255, filed *pro se* a motion to vacate his sentence. He claimed that

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[3] The Court of Appeals stated that petitioner was charged with two substantive violations of § 401 (a)(1), in addition to the conspiracy count, and that he was acquitted of the substantive charges. 600 F. 2d 407, 408 (CA2 1979). The parties agree, however, that this is error and that petitioner was charged with, and convicted on, a single conspiracy count. Brief for Petitioner 4, n. 2; Brief for United States 4, n. 2.

the sentence was unlawful because § 406 does not authorize the imposition of a special parole term to be served upon completion of a term of imprisonment. The District Court held that petitioner had been properly sentenced, and dismissed his complaint. App. 7.

On appeal, the Second Circuit affirmed. 600 F. 2d 407 (1979). In a *per curiam* opinion, that court followed two other Courts of Appeals that had held that § 406 authorizes the imposition of a special parole term. See *United States* v. *Burman*, 584 F. 2d 1354, 1356–1358 (CA4 1978), cert. denied, 439 U. S. 1118 (1979), and *United States* v. *Jacobson*, 578 F. 2d 863, 867–868 (CA10), cert. denied, 439 U. S. 932 (1978). It also relied on the decision in *United States* v. *Dankert*, 507 F. 2d 190 (CA5 1975), which reached a similar result with respect to the closely analogous sentencing provisions of § 1013 of the Act, 21 U. S. C. § 963 (proscribing any conspiracy to import a controlled substance).

Shortly after the Second Circuit's decision in this case, the United States Court of Appeals for the Third Circuit reached the opposite conclusion on the issue and held that a special parole term may not be imposed under § 406. *United States* v. *Mearns*, 599 F. 2d 1296 (1979), aff'g 461 F. Supp. 641 (Del. 1978), cert. pending, No. 79–415. We granted certiorari, 444 U. S. 897 (1979), to resolve this conflict among the Courts of Appeals.[4]

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[4] Two Courts of Appeals, in addition to those followed by the Second Circuit in this case, have joined in the conclusion that § 406 authorizes the imposition of a special parole term where such a term is included in the penalty provisions of the target offense. See *United States* v. *Sellers*, 603 F. 2d 53, 58 (CA8 1979), and *Cantu* v. *United States*, 598 F. 2d 471, 472 (CA5 1979). In addition, in a number of cases appellate courts have affirmed the convictions of defendants sentenced to special parole terms under § 406 without considering the question whether special parole was authorized. For example, the question presented here may have lingered beneath the surface in *United States* v. *Timmreck*, 441 U. S. 780 (1979).

In *Mearns*, the Third Circuit followed the lead of two District Court opinions (in addition to the opinion there under review) holding that special

III

The Government recognizes, Brief for United States 31, n. 26, that our examination of the meaning of § 406 must be informed by the policy that the Court has expressed as "the rule of lenity." In past cases the Court has made it clear that this principle of statutory construction applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose. See, *e. g.*, *United States* v. *Batchelder*, 442 U. S. 114, 121 (1979); *Simpson* v. *United States*, 435 U. S. 6, 14–15 (1978). The Court's opinion in *Ladner* v. *United States*, 358, U. S. 169, 178 (1958), states the rule: "This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." See *Whalen* v. *United States*, 445 U. S. 684, 695, n. 10 (1980); *Simpson* v. *United States*, 435 U. S., at 15.

The Court has emphasized that the "touchstone" of the rule of lenity "is statutory ambiguity." See, *e. g.*, *Lewis* v. *United States*, 445 U. S. 55, 65 (1980). Where Congress has manifested its intention, we may not manufacture ambiguity in order to defeat that intent. The Government argues here that there can be no uncertainty about Congress' intent to authorize a special parole term as a penalty for a conspiracy offense, whenever that penalty is authorized for the offense that was the target of the conspiracy. In advancing this argument, it focuses on the language and structure, legislative history, and motivating policies of the Act. We examine these three factors in turn.

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parole is not a penalty authorized by § 406. See *United States* v. *Jacquinto*, 464 F. Supp. 728 (ED Pa. 1979), and *Fassette* v. *United States*, 444 F. Supp. 1245 (CD Cal. 1978). Cf. *United States* v. *Wells*, 470 F. Supp. 216 (SD Iowa 1979) (adopting the *Mearns* rationale in sentencing, pursuant to 18 U. S. C. § 3, accessories after the fact to a drug conspiracy).

A

Language and structure of the Act. Several reviewing courts have adopted the view that the special parole term specified in § 401 (b)(1)(B) is necessarily included within the "term of imprisonment" to which it is appended. See, *e. g.*, *United States* v. *Jacobson*, 578 F. 2d, at 868. Thus, when Congress stated in § 406 that a person guilty of attempt or conspiracy "is punishable by imprisonment," it meant to include within the term "imprisonment" any special parole term made applicable by the penalty provisions of the substantive offense. This argument is not too persuasive, however, because special parole is not authorized for all substantive offenses to which § 406 refers. Therefore, "imprisonment" within the meaning of § 406 does not always include special parole. As a period of supervision served upon completion of a prison term, special parole is also functionally distinct from incarceration. Finally, the penalty provisions of those substantive offenses that authorize special parole terms reflect this functional dichotomy. Section 401 (b)(1)(B), for example, twice provides that a special parole term of years is to be imposed "*in addition to* such term of imprisonment." (Emphasis added.) We agree, therefore, with the conclusion of those courts that have rejected the argument that "imprisonment" in § 406 plainly means a term of incarceration plus special parole. See, *e. g.*, *United States* v. *Jacquinto*, 464 F. Supp. 728, 729–730 (ED Pa. 1979).

Faced with these obstacles, the Government cannot rely solely on a "plain meaning" interpretation of the term "imprisonment." Thus, in its principal argument, the Government asks this Court to take a broader view of the relationship between § 406 and the penalty provisions for substantive offenses and to conclude that the structure of the Act, viewed as a whole, creates an inference that § 406 incorporates by reference those substantive penalty provisions. The Government contends that the language of the statute supports this

reading because § 406 authorizes penalties "which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy." While this argument is not wholly without force, it ignores the immediately preceding words of § 406, which state that "[a]ny person who attempts or conspires to commit any offense defined in this title is punishable *by imprisonment or fine or both.*" (Emphasis added.) [5] Petitioner argues that § 406 defines the types of punishment authorized for conspirators—imprisonment, fine, or both—and sets maximum limits on those sanctions through reference to the penalty provisions of the target offense. Petitioner's reading of the language of § 406, and the sentencing scheme that it proposes, is no less plausible than the Government's. Moreover, it is petitioner's reading that finds further support in the structure of the Act read as a whole.

Section 406 is not the only provision of the Act that defines sentences by reference to the penalty provisions of other offenses. Section 405 (a) of the Act, 21 U. S. C. § 845 (a), which enhances punishment for one convicted of distributing a controlled substance to a minor, provides:

> "Any person at least eighteen years of age who violates section 401 (a)(1) by distributing a controlled substance to a person under twenty-one years of age is . . . punishable by (1) a term of imprisonment, or a fine, or both, up to twice that authorized by section 401 (b), *and (2) at least twice any special parole term authorized by section 401 (b)*, for a first offense involving the same controlled substance and schedule." (Emphasis supplied.) [6]

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[5] The dissent's "ordinary reading of § 406," *post*, at 402, appears to be based on this same incomplete reading of the words of the conspiracy provision.

[6] Section 405 (b) likewise provides for treble enhancement of the fine, the term of imprisonment, *and the minimum length of any special parole term*, for one who is convicted a second or subsequent time for distributing a controlled substance to a minor.

At the least, Congress' separate enumeration of intended penalties in § 405 confirms its design to adhere to the functional distinction between "imprisonment, or a fine, or both" and the unique and novel concept of special parole. That no reference is made to special parole in § 406 thus supports petitioner's view that Congress did not intend it to constitute an element of the sentence imposed upon one convicted of conspiracy or attempt.[7]

Further proof that Congress intended special parole to be imposed only for certain substantive offenses defined in § 401 and § 405, and not for other offenses under the Act, is found in § 401 (c), which defines the workings of special parole. That subsection states: "A special parole term *imposed under this section or section 405* may be revoked if its terms and conditions are violated." (Emphasis supplied.) One convicted and sentenced for conspiracy under § 406 cannot be said to have had his sentence "imposed under" § 401 or § 405.[8]

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[7] The Government argues that the express reference to special parole in § 405 does not detract from the view that § 406 incorporates special parole by implication. It contends that it was necessary for Congress to deal with special parole explicitly in § 405 because it chose to mandate a minimum special parole term of *at least* twice the length of the term authorized under § 401 (b), whereas § 405 imposes a fine or imprisonment of *up to* twice that otherwise authorized. The Government's argument does not dispel the fact, however, that Congress specifically accommodated the concept of special parole in one general provision imposing sentence by reference to other offenses, but did not do so with respect to an adjacent provision, § 406.

[8] The Government would explain the specificity of § 401 (c) as an instance where the drafters of that provision "simply looked to see what sections of the proposed bill used the term special parole, and inserted those section numbers into [the forerunner of § 401 (c)]." Brief for United States 26–27, n. 22. It argues, of course, that although § 406 did not refer to special parole in so many words, it did incorporate the sentencing provisions of § 401. We reject the Government's argument for reasons stated in the text. Moreover, its "explanation" assumes a carelessness in draftsmanship that probably is unwarranted; see the following subparts B and C.

B

Legislative history. Conceding that Congress' draftsmanship when it enacted § 406 may have been less than "explicit," Brief for United States 17, and n. 10, the Government asks this Court to look beyond the ambiguous language of the statute, and to give its words "their fair meaning in accord with the manifest intent of the lawmakers." *United States* v. *Brown*, 333 U. S. 18, 26 (1948). The Government argues that the legislative history of the Act demonstrates that Congress intended that the penalties authorized for substantive offenses, and those for conspiracies to commit them, were to be identical.

It is true that prior to the Act federal narcotics legislation provided for a congruence between sentences authorized for substantive violations and sentences authorized for conspiracies.[9] A similar congruence was a feature of the several bills introduced in Congress in 1969 that were the forerunners of the Act. But a special parole term, a sanction previously unknown in the administration of our system of criminal justice, was not authorized as a penalty for any offense in those initial proposals.[10]

The special parole concept first was presented to Congress by John Ingersoll, Director of the Bureau of Narcotics and Dangerous Drugs, in testimony before a Senate Subcommittee

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[9] See 21 U. S. C. §§ 174, 176a, 176b (1964 ed.); and 26 U. S. C. §§ 7237 (a) and (b) (1964 ed.).

[10] See S. 1895, 91st Cong., 1st Sess., §§ 701–708 (1969), and S. 2637, 91st Cong., 1st Sess., §§ 501–508 (1969), reprinted in Narcotics Legislation: Hearings on S. 1895 et al. before the Subcommittee to Investigate Juvenile Delinquency of the Senate Committee on the Judiciary, 91st Cong., 1st Sess., 69–77, 160–170 (1969). See also H. R. 13743 and H. R. 14774, 91st Cong., 1st Sess., §§ 501–508 (1969), reprinted in Part 1, Drug Abuse Control Amendments—1970: Hearings on H. R. 11701 and H. R. 13743 before the Subcommittee on Public Health and Welfare of the House Committee on Interstate and Foreign Commerce, 91st Cong., 2d Sess., 17–20 (1970).

on October 20, 1969. See Narcotics Legislation: Hearings on S. 1895 et al. before the Subcommittee to Investigate Juvenile Delinquency of the Senate Committee on the Judiciary, 91st Cong., 1st Sess., 663, 676 (1969). The Attorney General earlier had sought Subcommittee approval for further input from the Justice Department on the penalty structures in the pending legislation, *id.*, at 255, and Mr. Ingersoll presented several alternative penalty schemes for the Subcommittee's consideration.[11] His comments to the Subcommittee concerning the special parole provisions were, in their entirety, as follows:

> "Another requirement that has been included in the alternative penalty schemes is a special parole term that is a part of the illicit trafficking sentence structure. Just as incarceration is not always a meaningful answer to effective rehabilitation, certainly incarceration without an adequate supervisory followup after release is not in the best interest of society.
>
> "Therefore, we have required a special parole term so that persons sentenced for trafficking violations would be placed under supervision for a period of time regardless of whether they are incarcerated or their sentence probated or suspended. The intent here is to give the judges another tool for sentencing and another means of protecting society when dealing with the drug violator." *Id.*, at 676.

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[11] A chart setting out the alternative penalty schemes proposed by the Justice Department is included in the record of hearings held before the Subcommittee on Public Health and Welfare of the House Committee on Interstate and Foreign Commerce. *Id.*, at 90–92. This chart describes the penalty provisions favored by the Department for attempt and conspiracy as providing "that any person who attempts or conspires to commit any offense under the Act may be punished by imprisonment and/or fine, which may not exceed the maximum punishment proscribed for committing the offense." *Id.*, at 92. No mention is made of special parole terms in the conspiracy context. It seems, therefore, that the inexact draftsmanship that the Government would find in the legislative history of § 406 is not to be attributed solely to Congress.

Mr. Ingersoll did not specify whether special parole terms were to be authorized for conspiracies to commit trafficking offenses, see n. 11, *supra*, and the bill that eventually was approved by the full Senate Committee on the Judiciary was no less ambiguous. See S. Rep. No. 91–613, pp. 116–118 (1969). That bill, S. 3246, 91st Cong., 2d Sess. (1970), in its §§ 501 (c)(1) and (2), mandated the imposition of a special parole term whenever a prison sentence was imposed under the forerunners to §§ 401 (b)(1)(A) and (B).[12] But § 504 of the bill, the forerunner to § 406, included no reference to special parole.[13]

The Judiciary Committee's section-by-section analysis of S. 3246 noted that special parole terms were to be imposed for certain substantive offenses, S. Rep. No. 91–613, at 25, but with respect to the "endeavor and conspiracy" provision stated only: "Section 504 provides that any person who endeavors or conspires to commit any offense defined in this title may be punished by imprisonment and/or a fine, which may not exceed the maximum punishment prescribed for the offense." *Id.*, at 26. The Government argues that the Subcommittee meant to include a specific reference to special parole in § 504 when it amended the substantive offense sections in response to Mr. Ingersoll's testimony. For unexplained reasons, however, the Subcommittee neglected to make the conforming

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[12] The forerunner to § 401 (b)(1)(B) was § 501 (c)(2) of S. 3246. It provided an identical penalty scheme for first offenders as does the current substantive offense—a term of imprisonment of not more than five years, a fine of not more than $15,000, or both, and a 2-year minimum special parole term in addition to any term of imprisonment. See S. Rep. No. 91–613, p. 116.

[13] Section 504 of S. 3246, which differed from § 406 only in its use of the term "endeavor" rather than "attempt," provided:

"Any person who endeavors or conspires to commit any offense defined in this title is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the endeavor or conspiracy." S. Rep. No. 91–613, at 118.

change in the conspiracy section. Brief for United States 22. The wording of the Judiciary Committee's section-by-section analysis, however, would seem to indicate its awareness that § 504, unlike the subsections of § 501 that had been amended to incorporate the concept of special parole, authorized punishments consisting only of "imprisonment and/or a fine."

Further support for the view that the Judiciary Committee knew what it was doing when it approved § 504 of S. 3246 may be found in those provisions of the bill that dealt with a second or subsequent offense. Under the Act, doubly enhanced penalties for second offenders are included within the provisions defining the sentences for individual substantive offenses. See, *e. g.*, § 401 (b)(1)(B), quoted *supra*, at 383–384. S. 3246, however, contained a separate provision, § 508 (a), that set out the penalties for repeat offenders. It stated:

> "Any person convicted of any offense under this Act is, if the offense is a second or subsequent offense, punishable by a term of imprisonment twice that authorized, by twice the fine otherwise authorized, or by both. If the conviction is for an offense punishable under subsection 501 (c)(1) or subsection 501 (c)(2) of this Act [the forerunners to §§ 401 (b)(1)(A) and (B)], and if it is the offender's second or subsequent offense, the court shall impose, in addition to any terms of imprisonment and fine, twice the special parole term otherwise authorized." S. Rep. No. 91-613, at 119–120.[14]

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[14] An identical provision was contained in H. R. 17463, 91st Cong., 2d Sess., § 508 (a) (1970), a forerunner of the Act approved by one of the two House Committees to conduct hearings on the proposed narcotics legislation. See Controlled Dangerous Substances, Narcotics and Drug Control Laws: Hearings on H. R. 17463 before the House Committee on Ways and Means, 91st Cong., 2d Sess., 69 (1970) (hereinafter Ways and Means Hearings). The bill eventually passed by the House, H. R. 18583, 91st Cong., 2d Sess. (1970), incorporated enhanced penalties for repeat offenders within the individual substantive offenses. See 116 Cong. Rec. 33625 (1970). The House bills are discussed further below.

We think this section of the Senate bill makes it fairly evident that the Committee recognized that it had provided for the imposition of special parole terms under various subsections of § 501, but that it had not done so generally.[15] Thus, § 508 (a) of S. 3246, like § 405 of the Act, reveals that Congress' failure explicitly to incorporate the concept of special parole into the Act's conspiracy provision, alleged by the Government to have been inadvertent, in fact may have been intentional.

The only reference made to the special parole provisions during the Senate debates on S. 3246 tends to confirm this conclusion. Senator Dodd, the Subcommittee chairman, summarized the sentencing provisions of §§ 501 (c)(1) and (2) as follows:

> "Those selling schedule I and II narcotics such as heroin and opium can draw a sentence of up to 12 years and a possible fine of $25,000. For schedules I, II, and III sales of non-narcotics such as marihuana, 'pep pills' and the like, the sentence is up to 5 years and a possible fine not exceeding $15,000. A [minimum] special parole term of from 2 to 3 years is required for each of the above offenses." 116 Cong. Rec. 996 (1970).

Senator Dodd did not mention the special parole concept in the context of any other sentencing provisions; § 504, the conspiracy provision of S. 3246, was not mentioned at all during the Senate debates.

Given the scant support in the legislative history of the Senate bill for the Government's position, it is not surprising that the Government must place greater reliance on events that transpired during the House's consideration of proposed narcotics legislation similar to S. 3246. H. R. 17463, the subject of hearings before the House Committee on Ways and

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[15] The Government makes the same argument with respect to the repeat offender provisions of S. 3246 and H. R. 17463 that it makes with respect to § 405, see n. 7, *supra*. The argument is no more persuasive here.

Means in July 1970, contained penalty provisions that were substantially identical to those in S. 3246. See H. R. 17463, 91st Cong., 2d Sess., §§ 501 (c)(1), (c)(2), and 504 (1970), reprinted in Ways and Means Hearings 61, 66.

Mr. Ingersoll appeared before the Committee on Ways and Means, testified as to the Department of Justice's firm support for H. R. 17463, and submitted a section-by-section analysis of the bill which highlighted the differences between its provisions and existing federal narcotics legislation. Ways and Means Hearings 210–211. That analysis described the operation of the special parole terms applicable to § 501 (c), and noted: "This special parole term is a new program, and there are no comparable laws now in force for narcotic drug law convictions." Ways and Means Hearings 222. With respect to the bill's conspiracy provision, § 504, Mr. Ingersoll's section-by-section analysis stated:

> "This section provides that a person may be punished for endeavoring or conspiring to commit an offense under this Act. Upon conviction, his sentence may not exceed the punishment prescribed for the offense which was the object of the attempt or the conspiracy." *Id.*, at 223.

The Government would read the second sentence of this passage as explaining "that the sentencing scheme contemplated that conspiracy was to be punished to the same extent as object offenses, without exception." Brief for United States 24. But the Ingersoll statement, like the language enacted in § 406, explains merely that the punishment imposed for conspiracy may not exceed the punishment authorized for the pertinent target offense. It does not define the punishment authorized under the conspiracy provision to include special parole, and it does not disavow petitioner's theory that § 406 defines the types of punishment authorized for conspiracy, while the penalty provisions of the target offense set the maximum amounts of those types of punishment that properly may be imposed. Moreover, a chart sub-

mitted to the Committee by the Justice Department, and appended to Mr. Ingersoll's section-by-section analysis, specifically noted that H. R. 17463 authorized the imposition of special parole terms for certain substantive offenses. Ways and Means Hearings 229. With respect to the conspiracy section of the bill, however, the chart contained a footnote that merely reads: "H. R. 17463 provides that any person who endeavors or conspires to commit any offense under the act may be punished *by imprisonment and/or fine*, which may not exceed the maximum punishment proscribed [*sic*] for committing the offense." *Id.*, at 230, n. 6. (Emphasis supplied.) In sum, we find no persuasive support for the Government's argument in the report of the hearings before the House Committee on Ways and Means.

The hearings before the Committee on Ways and Means followed earlier hearings conducted by the House Committee on Interstate and Foreign Commerce. The latter Committee issued the House Report on H. R. 18583, 91st Cong., 2d Sess. (1970), which contained additions and revisions to H. R. 17463 not pertinent to the sentencing provisions at issue here. H. R. Rep. No. 91–1444, pt. 1 (1970). Like the Senate Report, the House Report appears plainly to recognize the distinction between the penalties for specific substantive offenses, authorizing special parole terms, and the conspiracy offense, authorizing only terms of imprisonment and fines. Thus, with respect to § 406 of H. R. 18583, the direct ancestor of the present § 406, the House Report's section-by-section analysis states:

> "Section 406 provides that any person who attempts or conspires to commit any offense defined in this title may be punished *by imprisonment and/or fine which may not exceed the maximum amount set for the offense*, the commission of which was the object of the attempt or conspiracy." H. R. Rep. No. 91–1444, at 50. (Emphasis supplied.)

The grammatical structure of this sentence lends obvious support to petitioner's theory that § 406 authorizes two types of sanctions—fines and imprisonment—and fixes the maximum amount of each that may be imposed by reference to the penalty provisions of the target offense.

In conclusion, we believe that, rather than supporting the Government's argument that Congress manifested an intention to authorize special parole terms for conspiracy convictions, the Act's legislative history supports the opposite view. In hearings, debates, and legislative reports, to the extent that Congress' attention was drawn to the matter, members of both Houses explicitly recognized that the penalty provisions of some substantive offenses attached a mandatory minimum term of special parole to any term of imprisonment. On the other hand, every reference to one of the forerunners of § 406 stated that it authorized penalties consisting of imprisonment and/or fine, and failed to mention special parole.

C

Motivating policy. The Government strongly argues, finally, that Congress' principal objective in enacting the penalty provisions of the Act—to deter professional criminals from engaging in drug trafficking for profit—"render[s] it unreasonable to ascribe to [Congress] the intent to authorize special parole for isolated substantive offenses while withholding this major sentencing tool for conspiracy offenses." Brief for United States 28. This contention is unpersuasive for two reasons.

First, as petitioner points out, Brief for Petitioner 14–23; Reply Brief for Petitioner 1–3, a comparison of those drug offenses for which Congress clearly authorized the imposition of special parole terms with those for which it clearly did not, does not reveal a coherent pattern based on the asserted justification for escalated sanctions. For some of the most serious offenses, as measured by the length of the term of imprisonment and severity of the fine they authorize, special

parole is not included among the available sanctions. *E. g.*, § 408 of the Act, 21 U. S. C. § 848 (continuing criminal enterprise); § 403 of the Act, 21 U. S. C. § 843 (registrants); and the new § 401 (d) of this Act, 21 U. S. C. § 841 (d) (1976 ed., Supp. II) (piperidine offenses). Thus, the Government's argument based on Congress' sentencing objectives would prove too much.

Second, the thrust of the Government's argument is that the conspiracy to engage in drug trafficking presents at least as great a threat, if not a greater one, to the community as does an isolated act of distribution. In other contexts, we have recognized the logic of that view. See, *e. g.*, *Iannelli* v. *United States*, 420 U. S. 770, 778 (1975). From this premise, the Government contends that Congress must have desired the harsh sanctions incorporated within the concept of special parole—the unlimited maximum length of its term and the grave consequences attending its revocation, see § 401 (c)—to be available to the judge sentencing a drug conspirator.

What the Government does not mention, however, is that § 406 sets identical penalties for conspiracies and for attempts. Congress dealt with both these forms of inchoate crime in a single provision, and prescribed an identical range of punishment for a person convicted of participation in a major trafficking conspiracy, and for another person convicted of an unsuccessful attempt to manufacture or distribute a small amount of a controlled substance. When one focuses on the fact that § 406 penalizes attempts as well as conspiracies, it is not surprising that Congress would provide for less stringent sanctions to be imposed for violations of that provision than for a completed substantive offense. Indeed, as Mr. Ingersoll pointed out in his section-by-section analysis of H. R. 17463, prior to the passage of this Act an attempt to commit a substantive drug offense was not punishable at all under the federal narcotics laws. Ways and Means Hearings 223.[16]

[16] The dissent takes us to task for failing to recognize that it is unlikely that Congress would intend that "the directors of a narcotics distribution

IV

This investigation into the meaning of § 406, as informed by an examination of its language and structure, its history, and relevant policy considerations, yields the likely conclusion that Congress' failure specifically to authorize the imposition of special parole terms as punishment for those convicted of conspiracy was not a slip of the legislative pen, nor the result of inartful draftsmanship, but was a conscious and not irrational legislative choice. Our analysis reveals, at the least, a complete absence of an unambiguous legislative decision to authorize special parole terms as punishment for those convicted of drug conspiracies. Of course, to the extent that doubts remain, they must be resolved in accord with the rule of lenity.[17] If our construction of Congress' intent, as evi-

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business be punished less severely than their subordinates who merely peddle the poison." *Post*, at 402. But even a cursory reading of the Act should make it clear that our opinion today will not result in the sentencing disparity the dissent fears. Section 406's punishment provisions are not the sole sanctions Congress enacted for apprehended directors of organized drug trafficking operations. First, nothing prevents the Government from prosecuting the operators of a distribution network, either as principals or as aiders and abettors, for substantive manufacturing, distribution, and possession offenses, pursuant to § 401 of the Act, 21 U. S. C. § 841. Second, and more significantly, Congress enacted two special provisions with the directors of large trafficking operations particularly in mind. The sanctions available under those provisions are especially severe. See § 408 of the Act, 21 U. S. C. § 848 (continuing criminal enterprise); §§ 409 (e)(2) and (3) of the Act, 21 U. S. C. §§ 849 (e)(2) and (3) (defining a special drug offender).

[17] One might quarrel with our conclusion that Congress was aware of the distinction between the penalty provisions of § 401 (b)(1)(B) and § 406, and chose not to include special parole terms among the sanctions authorized for attempts and conspiracies. That it would be extremely difficult to accept the Government's argument that Congress *unambiguously intended* a contrary result, however, perhaps is best evidenced by the fact that the rule of lenity is not mentioned, let alone applied, in any of the lower court opinions that have accepted the Government's position. See cases cited in n. 4, *supra*, and accompanying text. The dissenting opinion would appear to fare little better on that score.

denced by the scant record it left behind, clashes with present legislative expectations, there is a simple remedy—the insertion of a brief appropriate phrase, by amendment, into the present language of § 406. But it is for Congress, and not this Court, to enact the words that will produce the result the Government seeks in this case.

The judgment of the Court of Appeals is reversed, and the case is remanded to that court with instructions to vacate the special parole term that was imposed upon petitioner.

It is so ordered.

MR. CHIEF JUSTICE BURGER, concurring.

If the question presented by this case were as simple and easy as the dissent formulates it—whether "the directors of a narcotics distribution business [should] be punished less severely than their subordinates who merely peddle the poison"—none of us would have any difficulty with the decision. But that is not really the issue. Rather, the question before the Court is substantially more limited: What do the words of the statute mean? Of course, we must try to discern the intent of Congress. But we perform that task by beginning with the ordinary meaning of the language of the statute. Our compass is not to read a statute to reach what we perceive—or even what we think a reasonable person should perceive—is a "sensible result"; Congress must be taken at its word unless we are to assume the role of statute revisers. *Aaron* v. *SEC*, 446 U. S. 680 (1980); *TVA* v. *Hill*, 437 U. S. 153, 173 (1978).

Particularly in the administration of criminal justice, a badly drawn statute places strains on judges. See, *e. g.*, *Busic* v. *United States*, 446 U. S. 398 (1980); *LaRocca* v. *United States* (decided with *Busic, supra*). The temptation to exceed our limited judicial role and do what we regard as the more sensible thing is great, but it takes us on a slippery

slope. Our duty, to paraphrase Mr. Justice Holmes in a conversation with Judge Learned Hand, is not to do justice but to apply the law and hope that justice is done. The Spirit of Liberty: Papers and Addresses of Learned Hand 306–307 (Dilliard ed. 1960).

Not without the same reluctance that in my view underlies the Court's opinion, I join the opinion.

MR. JUSTICE STEVENS, with whom MR. JUSTICE WHITE and MR. JUSTICE REHNQUIST join, dissenting.

Should the directors of a narcotics distribution business be punished less severely than their subordinates who merely peddle the poison? It is unlikely that Congress so intended. See *Callanan* v. *United States*, 364 U. S. 587, 593–594.

Since an ordinary reading of § 406[1] of the Comprehensive Drug Abuse Prevention and Control Act of 1970 implies that a conspirator may be punished just as severely as a substantive offender, I would so construe the statute. This construction is fortified by the total absence of any statement by any legislator suggesting any purpose to treat conspirators in the drug trade with any greater lenity than substantive offenders.[2] This is particularly important in view of the fact that prior to the 1970 Act, Congress had authorized

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[1] "Any person who attempts or conspires to commit any offense defined in this title is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy." 84 Stat. 1265, 21 U. S. C. § 846.

[2] Surely the Court's reference *ante*, at 399, to the offense of attempt cuts the other way, for it is common for legislation to authorize the same range of punishments for attempts as for substantive offenses. See, *e. g.*, American Law Institute, Model Penal Code § 5.05 (1) (Prop. Off. Draft 1962), which provides in part: "Except as otherwise provided in this Section, attempt, solicitation and conspiracy are crimes of the same grade and degree as the most serious offense which is attempted or solicited or is an object of the conspiracy."

identical penalties for conspiracies and completed offenses. See *ante*, at 391.

Because the statutory language conveys quite a different meaning to me, and because the Court has not paused to consider the narrow issue presented by this case in the context of the larger objectives Congress was seeking, I respectfully dissent.

ANDERSON, WARDEN *v.* CHARLES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 79-1377. Decided June 16, 1980

At respondent's murder trial in a Michigan court resulting in his conviction, he was asked on cross-examination why he told the jury on direct examination a different story about stealing the murder victim's car than he had told the police officers following his arrest after being given *Miranda* warnings. After his conviction was affirmed on appeal, respondent unsuccessfully sought a writ of habeas corpus in Federal District Court, but the Court of Appeals reversed, holding that the cross-examination violated due process under the rule of *Doyle* v. *Ohio*, 426 U. S. 610.

Held: The cross-examination did not violate due process. *Doyle*, which held that the Due Process Clause of the Fourteenth Amendment prohibits impeachment on the basis of a defendant's silence following *Miranda* warnings, does not apply to cross-examination, such as occurred here, that merely inquires into prior inconsistent statements. Such questioning makes no unfair use of silence, because a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent.

Certiorari granted; 610 F. 2d 417, reversed.

PER CURIAM.

Respondent Glenn Charles was arrested in Grand Rapids, Mich., while driving a stolen car. The car belonged to Theodore Ziefle, who had been strangled to death in his Ann Arbor home less than a week earlier. The respondent was charged with first-degree murder. At his trial in the Circuit Court of Washtenaw County, Mich., the State presented circumstantial evidence linking the respondent with the crime. The respondent was found with Ziefle's car and some of his other personal property. The respondent also owned clothing like that worn by the man last seen with the victim, and he boasted to witnesses that he had killed a man and stolen

his car. Police Detective Robert LeVanseler testified that he interviewed the respondent shortly after his arrest. After giving the respondent *Miranda* warnings, LeVanseler asked him about the stolen automobile. According to LeVanseler, the respondent said that he stole the car in Ann Arbor from the vicinity of Washtenaw and Hill Streets, about two miles from the local bus station.

The respondent testified in his own behalf. On direct examination, he stated that he took Ziefle's unattended automobile from the parking lot of Kelly's Tire Co. in Ann Arbor. On cross-examination, the following colloquy occurred:

"Q. Now, this Kelly's Tire Company, that's right next to the bus station, isn't it?

"A. That's correct.

"Q. And, the bus station and Kelly's Tire are right next to the Washtenaw County Jail are they not?

"A. They are.

"Q. And, when you're standing in the Washtenaw County Jail looking out the window you can look right out and see the bus station and Kelly's Tire, can you not?

"A. That's correct.

"Q. So, you've had plenty of opportunity from—well, first you spent some time in the Washtenaw County Jail, haven't you?

"A. Quite a bit.

"Q. And, you have had plenty of opportunity to look out that window and see the bus station and Kelly's Tire?

"A. That's right.

"Q. And, you've seen cars being parked there, isn't that right?

"A. That's correct.

"Q. Is this where you got the idea to come up with the story that you took a car from that location?

"A. No, the reason I came up with that is because it's the truth.

"Q. It's the truth?

"A. That's right.

"Q. Don't you think it's rather odd that if it were the truth that you didn't come forward and tell anybody at the time you were arrested, where you got that car?

"A. No, I don't.

"Q. You don't think that's odd?

"A. I wasn't charged with auto theft, I was charged with murder.

"Q. Didn't you think at the time you were arrested that possibly the car would have something to do with the charge of murder?

"A. When I tried to talk to my attorney they wouldn't let me see him and after that he just said to keep quiet.

"Q. This is a rather recent fabrication of yours isn't [*sic*] it not?

"A. No it isn't.

"Q. Well, you told Detective LeVanseler back when you were first arrested, you stole the car back on Washtenaw and Hill Street?

"A. Never spoke with Detective LeVanseler.

"Q. Never did?

"A. Right, except when Detective Hall and Price were there and then it was on tape." Trial Transcript 302–304.

The jury convicted the respondent of first-degree murder. The Michigan Court of Appeals affirmed, *People* v. *Charles*, 58 Mich. App. 371, 227 N. W. 2d 348 (1975), and the Michigan Supreme Court denied leave to appeal, 397 Mich. 815 (1976). The respondent then sought a writ of habeas corpus in the United States District Court for the Eastern District of Michigan. The District Court withheld the writ, but a divided panel of the Court of Appeals for the Sixth Circuit

reversed. The Court of Appeals held that "the prosecutor's questions about [respondent's] post-arrest failure to tell officers the same story he told the jury violated due process" under the rule of *Doyle* v. *Ohio*, 426 U. S. 610 (1976). 610 F. 2d 417, 422 (1979).[1] The prison warden now petitions for a writ of certiorari. We grant the petition, grant the respondent leave to proceed *in forma pauperis*, and reverse the judgment of the Court of Appeals.

In *Doyle*, we held that the Due Process Clause of the Fourteenth Amendment prohibits impeachment on the basis of a defendant's silence following *Miranda* warnings. The case involved two defendants who made no postarrest statements about their involvement in the crime.[2] Each testified at trial that he had been framed. On cross-examination, the prosecutor asked the defendants why they had not told the frameup story to the police upon arrest. We concluded that such impeachment was fundamentally unfair because *Miranda* warnings inform a person of his right to remain silent and

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[1] Neither the Court of Appeals nor the state courts addressed the question whether *Doyle* should be applied retroactively. Although the petitioner now claims that *Doyle* should be limited to prospective application, see *Stovall* v. *Denno*, 388 U. S. 293 (1967), there is no indication that this claim was raised in the courts below. Moreover, the respondent asserts that *Doyle's* prohibition against use of postarrest silence was the law of the Sixth Circuit and of the State of Michigan long before his arrest. In view of our disposition of the merits of this controversy, we express no view on the retroactivity question.

[2] One defendant said nothing at all. The other asked arresting officers, "[W]hat's this all about?" 426 U. S., at 615, n. 5. When told the reason for his arrest, he exclaimed "you got to be crazy," or "I don't know what you are talking about." *Id.*, at 622–623, n. 4 (STEVENS, J., dissenting). Both the Court and the dissent in *Doyle* analyzed the due process question as if both defendants had remained silent. The issue was said to involve cross-examination of a person who "does remain silent" after police inform him that he is legally entitled to do so. *Id.*, at 620 (STEVENS, J., dissenting); see *id.*, at 616–619; *id.*, at 621, 622, 626 (STEVENS, J., dissenting). In any event, neither the inquiry nor the exclamation quoted above contradicted the defendant's later trial testimony.

assure him, at least implicitly, that his silence will not be used against him. 426 U. S., at 618–619; see *Jenkins* v. *Anderson*, *ante*, at 239–240.

Doyle bars the use against a criminal defendant of silence maintained after receipt of governmental assurances. But *Doyle* does not apply to cross-examination that merely inquires into prior inconsistent statements. Such questioning makes no unfair use of silence, because a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent. As to the subject matter of his statements, the defendant has not remained silent at all. See *United States* v. *Agee*, 597 F. 2d 350, 354–356 (CA3) (en banc), cert. denied, 442 U. S. 944 (1979); *United States* v. *Mireles*, 570 F. 2d 1287, 1291–1293 (CA5 1978); *United States* v. *Goldman*, 563 F. 2d 501, 503–504 (CA1 1977), cert. denied, 434 U. S. 1067 (1978).

In this case, the Court of Appeals recognized that the respondent could be questioned about prior statements inconsistent with his trial testimony. The court therefore approved the "latter portion of the above quoted cross-examination. . . ." 610 F. 2d, at 421. But the Court of Appeals found that "the earlier portion of the exchange" concerned the "separate issu[e]" of the respondent's "failure to tell arresting officers the same story he told the jury." *Ibid.* In the court's view, these questions were unconstitutional inquiries about postarrest silence. Thus, the Court of Appeals divided the cross-examination into two parts. It then applied *Doyle* to bar questions that concerned the respondent's failure to tell the police the story he recounted at trial.

We do not believe that the cross-examination in this case can be bifurcated so neatly. The quoted colloquy, taken as a whole, does "not refe[r] to the [respondent's] exercise of his right to remain silent; rather [it asks] the [respondent] why, if [his trial testimony] were true, he didn't tell the officer that he stole the decedent's car from the tire store parking lot instead of telling him that he took it from the

street." 58 Mich. App., at 381, 227 N. W. 2d, at 354. Any ambiguity in the prosecutor's initial questioning was quickly resolved by explicit reference to Detective LeVanseler's testimony, which the jury had heard only a few hours before. The questions were not designed to draw meaning from silence, but to elicit an explanation for a prior inconsistent statement.

We conclude that *Doyle* does not apply to the facts of this case. Each of two inconsistent descriptions of events may be said to involve "silence" insofar as it omits facts included in the other version. But *Doyle* does not require any such formalistic understanding of "silence," and we find no reason to adopt such a view in this case.

The judgment of the Court of Appeals is

Reversed.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissents and would affirm the judgment of the Court of Appeals for the reasons stated in its opinion.

ILLINOIS *v.* VITALE

CERTIORARI TO THE SUPREME COURT OF ILLINOIS

No. 78–1845. Argued January 8, 1980—Decided June 19, 1980

As the result of an accident in which an automobile driven by respondent struck and killed two children, respondent was convicted for failing to reduce speed to avoid the accident in violation of an Illinois statute. Subsequently, based on the same accident, respondent was charged with involuntary manslaughter under another Illinois statute. Ultimately, after the Illinois trial and intermediate appellate courts had held that the manslaughter prosecution was barred on statutory grounds, the Illinois Supreme Court held that it was barred by the Double Jeopardy Clause of the Fifth Amendment, as applied to the States through the Due Process Clause of the Fourteenth Amendment, the court reasoning that because the lesser offense required no proof beyond that necessary for a conviction of the greater offense of involuntary manslaughter, the greater offense was the "same" as the lesser-included offense.

Held: The Double Jeopardy Clause does not prohibit Illinois from prosecuting respondent for involuntary manslaughter. Pp. 415–421.

(a) Whether the offense of failing to reduce speed to avoid an accident is the "same offense" for double jeopardy purposes as the manslaughter charges, depends on whether each statute in question requires proof of a fact which the other does not. *Blockburger* v. *United States*, 284 U. S. 299. Pp. 415–416.

(b) Thus, if manslaughter by automobile does not always entail proof of a failure to reduce speed, then the two offenses are not the "same" under the *Blockburger* test. And the mere possibility that the State will seek to rely on all of the ingredients necessarily included in the traffic offense to establish an element of its manslaughter case would not be sufficient to bar the latter prosecution. Pp. 416–419.

(c) But, if as a matter of Illinois law, a careless failure to reduce speed is always a necessary element of manslaughter by automobile, then the two offenses are the "same" under *Blockburger* and respondent's trial on the latter charge would constitute double jeopardy. *Brown* v. *Ohio*, 432 U. S. 161. In any event, if in the pending manslaughter prosecution Illinois relies on and proves a failure to reduce speed to avoid an accident as the reckless act necessary to prove manslaughter, respondent would have a substantial claim of double jeopardy. Pp. 419–421.

(d) Because the relationship under Illinois law between the crimes of involuntary manslaughter and a careless failure to reduce speed to avoid an accident is unclear, and because the reckless act or acts the State will rely on to prove manslaughter are still unknown, the Illinois Supreme Court's judgment is vacated and the case is remanded to that court for further proceedings. P. 421.

71 Ill. 2d 229, 375 N. E. 2d 87, vacated and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, and REHNQUIST, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BRENNAN, STEWART, and MARSHALL, JJ., joined, *post*, p. 421.

James S. Veldman argued the cause for petitioner. With him on the briefs were *William J. Scott*, Attorney General of Illinois, *Donald B. MacKay* and *Melbourne A. Noel, Jr.*, Assistant Attorneys General, *Bernard Carey*, and *Marcia B. Orr*.

Lawrence G. Dirksen argued the cause and filed a brief for respondent.

MR. JUSTICE WHITE delivered the opinion of the Court.

The question in this case is whether the Double Jeopardy Clause of the Fifth Amendment prohibits the State of Illinois (State) from prosecuting for involuntary manslaughter the driver of an automobile involved in a fatal accident, who previously has been convicted for failing to reduce speed to avoid the collision.

I

On November 24, 1974, an automobile driven by respondent John Vitale, a juvenile, struck two small children. One of the children died almost immediately; the other died the following day. A police officer at the scene of the accident issued a traffic citation charging Vitale with failing to reduce speed to avoid an accident in violation of § 11–601 (a) of the Illinois Vehicle Code. Ill. Rev. Stat., ch. 95½, § 11–601 (a) (1979). This statute provides in part that "[s]peed must be

decreased as may be necessary to avoid colliding with any person or vehicle on or entering the highway in compliance with legal requirements and the duty of all persons to use due care." [1]

On December 23, 1974, Vitale appeared in the Circuit Court of Cook County, Ill., and entered a plea of not guilty to the charge of failing to reduce speed.[2] After a trial without a jury, Vitale was convicted and sentenced to pay a fine of $15.[3]

On the following day, December 24, 1974, a petition for adjudication of wardship was filed in the juvenile division of

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[1] Section 11-601 (a) of the Illinois Vehicle Code, Ill. Rev. Stat., ch. 95½, § 11-601 (a) (1979), provides:

"No vehicle may be driven upon any highway of this State at a speed which is greater than is reasonable and proper with regard to traffic conditions and the use of the highway, or endangers the safety of any person or property. The fact that the speed of a vehicle does not exceed the applicable maximum speed limit does not relieve the driver from the duty to decrease speed when approaching and crossing an intersection, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway, or when special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions. Speed must be decreased as may be necessary to avoid colliding with any person or vehicle on or entering the highway in compliance with legal requirements and the duty of all persons to use due care."

[2] With respect to the traffic offense, the record contains a copy of the complaint, which charged that respondent on "Wednesday, November 20, 1974, 12:29 p. m., did then and there operate a certain motor vehicle upon a public highway of this State, to wit 170th and Ingleside in Thornton, situated in Cook County, Illinois, and did then and there violate section 11-601 (a) of the Illinois Vehicle Code by failure to reduce speed to avoid an accident." (Record 66-67). Notations on the back of the complaint indicate that Vitale pleaded not guilty, waived a jury trial, was found guilty, and fined.

[3] Failing to reduce speed to avoid an accident is punishable by no more than 30 days in jail or by a fine of no more than $500. Ill. Rev. Stat., ch. 95½, § 16-104 (a) (1975), and ch. 38, §§ 1005-9-1 and 1005-8-3 (1979).

the Circuit Court of Cook County, charging Vitale with two counts of involuntary manslaughter.[4] The petition, which was signed by the police officer who issued the traffic citation, alleged that Vitale "without lawful justification while recklessly driving a motor vehicle caused the death of" the two children killed in the November 20, 1974, accident. App. 2–4.

Vitale's counsel filed a motion to dismiss on the grounds, among others, that the manslaughter prosecution was "violative of statutory and/or constitutional double jeopardy," *id.*, at 7, because of Vitale's previous conviction for failing to reduce speed to avoid the accident. The juvenile court found it unnecessary to reach a constitutional question because it held that the manslaughter prosecution was barred by Illinois statutes requiring, with certain nonpertinent exceptions, that all offenses based on the same conduct be prosecuted in a single prosecution. Ill. Rev. Stat., ch. 38, §§ 3–3 and 3–4 (b)(1) (1979).[5] The juvenile court dismissed the petition for

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[4] At the time Vitale was prosecuted, § 9–3 of the Illinois Criminal Code, Ill. Rev. Stat., ch. 38, § 9–3 (1973), provided:

"(a) A person who kills an individual without lawful justification commits involuntary manslaughter if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual, and he performs them recklessly. (b) If the acts which cause the death consist of the driving of a motor vehicle, the person may be prosecuted for reckless homicide or if he is prosecuted for involuntary manslaughter, he may be found guilty of the included offense of reckless homicide."

[5] Section 3–3 of the Illinois Criminal Code, Ill. Rev. Stat., ch. 38, § 3–3 (1979), provides:

"(a) When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense. (b) If the several offenses are known to the proper prosecuting officer at the time of commencing the prosecution and are within the jurisdiction of a single court, they must be prosecuted in a single prosecution, except as provided in Subsection (c), if they are based on the same act. (c) When 2 or more offenses are charged as required by Subsec-

adjudication of wardship and the State appealed. The Appellate Court of Illinois, First District, *In re Vitale*, 44 Ill. App. 3d 1030, 358 N. E. 2d 1288 (1976), affirmed the holding that the manslaughter prosecution was barred by the state compulsory joinder statutes. Ill. Rev. Stat., ch. 38, §§ 3–3 and 3–4 (b)(1) (1979).

The Supreme Court of Illinois, with two justices dissenting, affirmed on other grounds. *In re Vitale*, 71 Ill. 2d 229, 375 N. E. 2d 87 (1978). The court did not reach the state statutory question for it found "a more compelling reason why respondent cannot be prosecuted for the offense of involuntary manslaughter[:]" the Double Jeopardy Clause of the Fifth Amendment, as applied to the States through the Due Process Clause of the Fourteenth Amendment. After analyzing the elements of each offense, the court held that because "the lesser offense, failing to reduce speed, requires no proof beyond that which is necessary for conviction of the greater, involuntary manslaughter, . . . for purposes of the double jeopardy clause, the greater offense is by definition the 'same' as the lesser offense included within it." *Id.*, at 239, 375 N. E. 2d, at 91. Thus the court concluded that the man-

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tion (b), the court in the interest of justice may order that one or more of such charges be tried separately."

Section 3–4 (b) of the Illinois Criminal Code, Ill. Rev. Stat., ch. 38, § 3–4 (b) (1979), provides in pertinent part:

"A prosecution is barred if the defendant was formerly prosecuted for a different offense, . . . if such former prosecution: (1) Resulted in either a conviction or an acquittal, and the subsequent prosecution . . . was for an offense with which the defendant should have been charged on the former prosecution, as provided in Section 3–3 of this Code (unless the court ordered a separate trial of such charge). . . ."

The juvenile court held that because the prosecution knew at the time the traffic offense was prosecuted that the automobile accident had resulted in the deaths that were the basis of the manslaughter charges, § 3–3 required that the traffic offense and the manslaughter charges be prosecuted in a single prosecution. The court therefore concluded that the manslaughter prosecution was barred by § 3–4 (b)(1).

slaughter prosecution was barred by the Double Jeopardy Clause.

The dissenting justices argued that the manslaughter prosecution was not barred by the Double Jeopardy Clause because the homicide charge could be proved by showing one or more reckless acts other than the failure to reduce speed. *Id.*, at 242, 251–253, 375 N. E. 2d, at 93, 96–97 (Underwood, J., joined by Ryan, J., dissenting).

On November 27, 1978, we granted the State's petition for certiorari, vacated the judgment, and remanded the case to the Supreme Court of Illinois to consider whether its judgment was based upon federal or state constitutional grounds. 439 U. S. 974 (1978). After the Supreme Court of Illinois, on remand, certified that its judgment is based upon federal constitutional grounds, we again granted a writ of certiorari. 444 U. S. 823 (1979).

II

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." This constitutional guarantee is applicable to the States through the Due Process Clause of the Fourteenth Amendment, *Benton* v. *Maryland*, 395 U. S. 784 (1969), and it applies not only in traditional criminal proceedings but also in the kind of juvenile proceedings Vitale faced. *Breed* v. *Jones*, 421 U. S. 519 (1975).

The constitutional prohibition of double jeopardy has been held to consist of three separate guarantees: (1) "It protects against a second prosecution for the same offense after acquittal. [(2) I]t protects against a second prosecution for the same offense after conviction. [(3)] And it protects against multiple punishments for the same offense." *North Carolina* v. *Pearce*, 395 U. S. 711, 717 (1969) (footnotes omitted). Because Vitale asserts that his former conviction for failing to reduce speed bars his manslaughter prosecution, we are concerned with only the second of these three guarantees in the instant case. The sole question before us is whether the

offense of failing to reduce speed to avoid an accident is the "same offense" for double jeopardy purposes as the manslaughter charges brought against Vitale.

In *Brown* v. *Ohio*, 432 U. S. 161 (1977), we stated the principal test for determining whether two offenses are the same for purposes of barring successsive prosecutions. Quoting from *Blockburger* v. *United States*, 284 U. S. 299, 304 (1932), which in turn relied on *Gavieres* v. *United States*, 220 U. S. 338, 342–343 (1911), we held that

> "'[t]he applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.'" 432 U. S., at 166.

We recognized that the *Blockburger* test focuses on the proof necessary to prove the statutory elements of each offense, rather than on the actual evidence to be presented at trial. Thus we stated that if "'each *statute* requires proof of an additional fact which the other does not,' *Morey* v. *Commonwealth*, 108 Mass. 433, 434 (1871)," the offenses are not the same under the *Blockburger* test. 432 U. S., at 166 (emphasis supplied); *Iannelli* v. *United States*, 420 U. S. 770, 785, n. 17 (1975).[6]

III

We accept, as we must, the Supreme Court of Illinois' identification of the elements of the offenses involved here. Under Illinois law, involuntary manslaughter with a motor vehicle involves a homicide by the "reckless operation of a motor vehicle in a manner likely to cause death or great bodily

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[6] In *Iannelli* v. *United States*, 420 U. S., at 785, n. 17, we stated: "[T]he Court's application of the test focuses on the statutory elements of the offense. If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes."

harm." *In re Vitale*, 71 Ill. 2d, at 239, 375 N. E. 2d, at 91. The charge of failing to reduce speed on which respondent was convicted requires proof "that the defendant drove carelessly and failed to reduce speed to avoid colliding with a person." *Id.*, at 238, 375 N. E. 2d, at 91. The Illinois court, after specifying these elements, then stated that "the lesser offense, failing to reduce speed, requires no proof beyond that which is necessary for conviction of the greater, involuntary manslaughter" and concluded, as a matter of federal law, that "the greater offense is by definition the 'same' as the lesser offense included within it." *Id.*, at 239, 375 N. E. 2d, at 91.

The Illinois court relied upon our holding in *Brown* v. *Ohio*, *supra*, that a conviction for a lesser-included offense precludes later prosecution for the greater offense. There, Brown was first convicted of joyriding in violation of an Ohio statute under which it was a crime to "take, operate, or keep any motor vehicle without the consent of its owner." He was then convicted under another statute of stealing the same motor vehicle. The Ohio courts had held that every element of the joyriding "is also an element of the crime of auto theft," and that to prove auto theft one need prove in addition to joyriding only the intent permanently to deprive the owner of possession. Holding that the second prosecution was barred, by the Double Jeopardy Clause and the Fourteenth Amendment, we observed that "the prosecutor who has established joyriding need only prove the requisite intent in order to establish auto theft." *Id.*, at 167. But we also noted that "the prosecutor who has established auto theft necessarily has established joyriding as well." *Id.*, at 168.

Both observations were essential to the *Brown* holding. Had the State been able to prove auto theft, without also proving that the defendant took, operated, or kept the auto without the consent of the owner—if proof of the auto theft had not necessarily involved proof of joyriding—the successive prosecutions would not have been for the "same offense" within the meaning of the Double Jeopardy Clause.

Vitale does not dispute this proposition, but insists that the Illinois court fully satisfied *Brown* when it held that the lesser offense of failure to reduce speed "requires no proof beyond that which is necessary for a conviction of the greater, involuntary manslaughter." It is clear enough from the opinion below that manslaughter by motor vehicle could be proved against Vitale by showing a death caused by his recklessly failing to slow his vehicle to avoid a collision with the victim. Proving manslaughter in this way would also prove careless failure to slow; nothing more would be needed to prove the latter offense, an offense for which Vitale has already been convicted.

The State, however, does not concede that its manslaughter charge will or must rest on proof of a reckless failure to slow; it insists that manslaughter by automobile need not involve any element of failing to reduce speed. The petition for wardship charging manslaughter alleged only that Vitale "without lawful justification, while recklessly driving a motor vehicle, caused [two] death[s]" in violation of the manslaughter statute. Further, the dissenting justices relied upon the absence of any showing that the manslaughter charge on which respondent had not been tried, would rest upon his reckless failure to reduce speed. Nor could it be known, in their view, what particular reckless acts might be relied upon to prove up the homicide charge.[7] The State agrees, and sub-

[7] "The petition for wardship may have been based on Vitale's acts in permitting his attention to be diverted while driving at a high rate of speed, failing to appropriately maintain the vehicle's braking system, failing to note the seven school zone and speed warning signs, initially raising the speed of his auto to a dangerous level, or by disobeying the commands of the crossing guard. While we do not now know which of that series of acts the State intended to rely on at trial, one certainly cannot now say that it would rely solely upon Vitale's failure to reduce speed to the exclusion of his other misconduct." *In re Vitale*, 71 Ill. 2d 229, 251, 375 N. E. 2d 87, 97 (1978) (Underwood, J., dissenting).

The police report concerning Vitale's accident noted that the brakes on the automobile were defective and that there had been a school crossing

mits that because it is not necessary to prove a failure to slow to establish manslaughter, the rule of *Brown* v. *Ohio* does not bar its homicide case against Vitale.

The Illinois Supreme Court did not expressly address the contentions that manslaughter by automobile could be proved without also proving a careless failure to reduce speed, and we are reluctant to accept its rather cryptic remarks about the relationship between the two offenses involved here as an authoritative holding that under Illinois law proof of manslaughter by automobile would always involve a careless failure to reduce speed to avoid a collision.

Of course, any collision between two automobiles or between an automobile and a person involves a *moving* automobile and in that sense a "failure" to slow sufficiently to avoid the accident. But such a "failure" may not be reckless or even careless, if, when the danger arose, slowing as much as reasonably possible would not alone have avoided the accident. Yet, reckless driving causing death might still be proved if, for example, a driver who had not been paying attention could have avoided the accident at the last second, had he been paying attention, by simply swerving his car. The point is that if manslaughter by automobile does not always entail proof of a failure to slow, then the two offenses are not the "same" under the *Blockburger* test. The mere possibility that the State will seek to rely on all of the ingredients necessarily included in the traffic offense to establish an element of its manslaughter case would not be sufficient to bar the latter prosecution.

IV

If, as a matter of Illinois law, a careless failure to slow is always a necessary element of manslaughter by automobile, then the two offenses are the "same" under *Blockburger* and

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guard and a stop sign at the intersection where the accident occurred. (Record 29, 30.)

Vitale's trial on the latter charge would constitute double jeopardy under *Brown* v. *Ohio*.[8] In any event, it may be that to sustain its manslaughter case the State may find it necessary to prove a failure to slow or to rely on conduct necessarily involving such failure; it may concede as much prior to trial. In that case, because Vitale has already been convicted for conduct that is a necessary element of the more serious crime for which he has been charged, his claim of double jeopardy would be substantial under *Brown* and our later decision in *Harris* v. *Oklahoma*, 433 U. S. 682 (1977).

In *Harris*, we held, without dissent, that a defendant's conviction for felony murder based on a killing in the course of an armed robbery barred a subsequent prosecution against the same defendant for the robbery. The Oklahoma felony-murder statute on its face did not require proof of a robbery to establish felony murder; other felonies could underlie a felony-murder prosecution.[9] But for the purposes of the Double Jeopardy Clause, we did not consider the crime generally described as felony murder as a separate offense distinct from its various elements. Rather, we treated a killing in the course of a robbery as itself a separate statutory offense, and the robbery as a species of lesser-included offense. The State conceded that the robbery for which petitioner had been indicted was in fact the underlying felony, all elements of

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[8] We recognized in *Brown* v. *Ohio*, 432 U. S., at 169, n. 7 that "[a]n exception may exist where the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence." This exception is not applicable here because the trial court found that the prosecution was aware that Vitale's accident had resulted in two deaths at the time he was prosecuted for failing to reduce speed.

[9] The Oklahoma felony-murder statute under which Harris was convicted, Okla. Stat., Tit. 21, § 701 (3) (1971), provided that homicide is murder "[w]hen perpetrated without any design to effect death by a person engaged in the commission of any felony."

which had been proved in the murder prosecution. We held the subsequent robbery prosecution barred under the Double Jeopardy Clause, since under *In re Nielsen*, 131 U. S. 176 (1889), a person who has been convicted of a crime having several elements included in it may not subsequently be tried for a lesser-included offense—an offense consisting solely of one or more of the elements of the crime for which he has already been convicted. Under *Brown*, the reverse is also true; a conviction on a lesser-included offense bars subsequent trial on the greater offense.

By analogy, if in the pending manslaughter prosecution Illinois relies on and proves a failure to slow to avoid an accident as the reckless act necessary to prove manslaughter, Vitale would have a substantial claim of double jeopardy under the Fifth and Fourteenth Amendments of the United States Constitution.

V

Because of our doubts about the relationship under Illinois law between the crimes of manslaughter and a careless failure to reduce speed to avoid an accident, and because the reckless act or acts the State will rely on to prove manslaughter are still unknown, we vacate the judgment of the Illinois Supreme Court and remand the case to that court for further proceedings not inconsistent with this opinion.[10]

So ordered.

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL join, dissenting.

The controlling issue in this case is whether respondent's failure to reduce speed to avoid a collision, in violation of

[10] We note also that the Illinois Supreme Court did not reach the question whether the lower Illinois courts were correct in dismissing the manslaughter case under the State's compulsory joinder statute.

§ 11-601 (a) of the Illinois Motor Vehicle Code,[1] was a lesser offense included within the greater offense of killing a person by the reckless "driving of a motor vehicle," in violation of § 9-3 (b) of the Illinois Criminal Code.[2] The Illinois Supreme Court held that it was and that, because respondent had already been convicted on the lesser charge, the State was barred by the Double Jeopardy Clause of the Fifth Amendment, as applied to the States through the Fourteenth Amendment, from prosecuting him on the greater charge.

There are two separate reasons, each of which is sufficient in itself, for affirming the judgment of the Illinois Supreme Court. First, after applying the test set forth in *Brown* v. *Ohio*, 432 U. S. 161, the Illinois Supreme Court made a finding that failing to reduce speed to avoid a collision is a lesser-included offense of reckless homicide as a matter of state law. This Court clearly has a duty to respect that finding. Second, even if the dissenting members of the Illinois Supreme Court were correct in their view that, as a matter of state law, the traffic offense is not necessarily a lesser-included

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[1] Illinois Rev. Stat., ch. 95½, § 11-601 (a) (1979), provides:

"No vehicle may be driven upon any highway of this State at a speed which is greater than is reasonable and proper with regard to traffic conditions and the use of the highway, or endangers the safety of any person or property. The fact that the speed of a vehicle does not exceed the applicable maximum speed limit does not relieve the driver from the duty to decrease speed when approaching and crossing an intersection, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway, or when special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions. *Speed must be decreased as may be necessary to avoid colliding with any person or vehicle on or entering the highway in compliance with legal requirements and the duty of all persons to use due care.*" (Emphasis supplied.)

[2] "If the acts which cause the death consist of the driving of a motor vehicle, the person may be prosecuted for reckless homicide or if he is prosecuted for involuntary manslaughter, he may be found guilty of the included offense of reckless homicide." Ill. Rev. Stat., ch. 38, § 9-3 (b) (1973).

offense in every reckless homicide prosecution, the Double Jeopardy Clause bars the homicide prosecution under the particular facts of this case. For, even if the State intended to rely on evidence other than respondent's failure to reduce speed to establish the element of reckless driving necessary for a homicide conviction, the prosecutor's failure to apprise the respondent and the court of such a theory at some point in the lengthy proceedings on the double jeopardy issue should bar the second trial in this case.

I

Relying on *Blockburger* v. *United States*, 284 U. S. 299, the Court holds that the question the Illinois Supreme Court should have addressed in this case was whether proof of reckless homicide by vehicle will always, in each and every case, establish the defendant's guilt of the traffic offense as well. If not, the Court states that the traffic offense is not necessarily the "same offense" for double jeopardy purposes and therefore the second prosecution may not be barred by the Double Jeopardy Clause.[3] *Ante*, at 419. The Court then goes on to discuss the position of the dissenting justices in the Illinois Supreme Court that it is theoretically possible for an Illinois prosecutor to prove a charge of reckless homicide by vehicle without proving a failure to reduce speed in order to avoid a collision. Because it finds the majority's response to this argument "cryptic," the Court refuses to accept the Illinois court's clear determination that the traffic offense is a lesser-included offense of reckless homicide; instead, it reverses and remands for a new determination as to whether "under Illinois law proof of manslaughter by automobile would always involve a careless failure to reduce speed to avoid a collision."[4]

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[3] See the discussion of Part IV of the Court's opinion, *infra*, at 426.

[4] "The Illinois Supreme Court did not expressly address the contentions that manslaughter by automobile could be proved without also proving a

I cannot agree that this is an appropriate disposition. As the Court itself recognizes, it is not the province of this or any other federal court to tell the State of Illinois what is or is not a lesser-included offense under state law.[5] To the extent that this Court has any role at all, it is to ensure that the States apply the proper analytic framework insofar as they rely on the Double Jeopardy Clause of the Federal Constitution. Unlike the Court, I have no doubt that in this case the Illinois Supreme Court did apply the proper test.

As the dissenting justices in the Illinois Supreme Court pointed out at some length, the Illinois courts are hardly unfamiliar with the *Blockburger* test, having consistently applied it for many years in determining whether two offenses are the same for purposes of either the Double Jeopardy Clause or the State's own compulsory joinder statute. *In re Vitale*, 71 Ill. 2d 229, 244–245, 375 N. E. 2d 87, 93–94 (1978). In this case the majority of the Illinois court did not purport

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careless failure to reduce speed, and we are reluctant to accept its rather cryptic remarks about the relationship between the two offenses involved here as an authoritative holding that under Illinois law proof of manslaughter by automobile would always involve a careless failure to reduce speed to avoid a collision." *Ante*, at 419.

[5] Despite its apparent agreement with the dissenters' reading of the Illinois statutes, see *ibid.*, the Court does not hold that the Illinois Supreme Court is foreclosed from concluding on remand that failure to reduce speed is a lesser-included offense of reckless homicide by vehicle. On the contrary, the Court states:

"If, as a matter of Illinois law, a careless failure to slow is always a necessary element of manslaughter by automobile, then the two offenses are the 'same' under *Blockburger* and Vitale's trial on the latter charge would constitute double jeopardy under *Brown* v. *Ohio*." *Ante*, at 419–420.

See also *Brown* v. *Ohio*, 432 U. S. 161, 167, where the Court reiterated that state courts "have the final authority to interpret . . . their State's legislation." *Garner* v. *Louisiana*, 368 U. S. 157, 169 (1961)," and thus accepted as "authoritative" the Ohio courts' definition of the elements of the two offenses.

to deviate from that test. On the contrary, it relied heavily on this Court's opinion in *Brown* v. *Ohio, supra,* which in turn relied upon *Blockburger.*

Thus, after examining the statutory definitions of the two crimes at issue in this case, without reference to the particular facts of this case, the Illinois Supreme Court concluded:

> "As is usually the situation between greater and lesser included offenses, the lesser offense, failing to reduce speed, requires no proof beyond that which is necessary for conviction of the greater, involuntary manslaughter. Accordingly, for purposes of the double jeopardy clause, the greater offense is by definition the 'same' as the lesser offense included within it." 71 Ill. 2d, at 239, 375 N. E. 2d, at 91.

In so holding, the court made the same finding as this Court did in *Brown* v. *Ohio*:

> "Applying the *Blockburger* test, we agree with the Ohio Court of Appeals that joyriding and auto theft, as defined by that court, constitute 'the same statutory offense' within the meaning of the Double Jeopardy Clause. App. 23. For it is clearly *not* the case that 'each [statute] requires proof of a fact which the other does not.' 284 U. S., at 304. As is invariably true of a greater and lesser included offense, the lesser offense—joyriding—requires no proof beyond that which is required for conviction of the greater—auto theft. The greater offense is therefore by definition the 'same' for purposes of double jeopardy as any lesser offense included in it." 432 U. S., at 168.

Having made the finding required by *Brown* v. *Ohio,* based on its interpretation of its own law, the Illinois Supreme Court should not now be required to go through the process all over again simply to assure this Court that it really meant what it plainly said.

II

In Part IV of its opinion the Court states that, even if the Illinois Supreme Court should hold on remand that failure to reduce speed is not always a lesser-included offense as a matter of state law, respondent will still have a "substantial" double jeopardy claim if the State finds it necessary to rely on his failure to reduce speed in order to sustain its manslaughter case. In my opinion such a claim would not merely be "substantial"; it would be dispositive.

In *Harris* v. *Oklahoma*, 433 U. S. 682, we held that a conviction on a felony-murder charge barred a subsequent prosecution for robbery, where the robbery had been used to establish the requisite intent on the murder charge. Cf. *Whalen* v. *United States*, 445 U. S. 684. Since it was theoretically possible that a different felony could have supported the murder charge, such a result may not have been required by a literal application of the *Blockburger* test, see *Whalen* v. *United States*, *supra*, at 708–711 (REHNQUIST, J., dissenting). However, the entire Court agreed that it was required by the Double Jeopardy Clause. In this case, it is equally clear that the State could not use respondent's failure to reduce speed to avoid a collision as the reckless act necessary to establish reckless homicide by vehicle, even if theoretically his recklessness could be proved in some other way.

Throughout the five years that this case has been in litigation, the State has apparently not seen fit to reveal the basis of its homicide prosecution. The Court does not view this omission as an important one. On the contrary, its opinion implies that the State may proceed to trial before a determination is made on respondent's double jeopardy claim. But surely such a procedure is inconsistent with the Double Jeopardy Clause, which was specifically designed to protect the citizen from multiple trials. The vital interest in avoiding an unlawful second trial led the Court in *Abney* v. *United States*, 431 U. S. 651, to allow an appeal in advance of trial

in order to assure the defendant that the substance of his constitutional right to be protected against double jeopardy would not be lost before his plea could be vindicated. In that case the Court emphasized that "the Double Jeopardy Clause protects an individual against more than being subjected to double punishments. It is a guarantee against being twice put to *trial* for the same offense." *Id.*, at 660–661 (emphasis in original). Continuing, the Court stated:

> "Because of this focus on the 'risk' of conviction, the guarantee against double jeopardy assures an individual that, among other things, he will not be forced, with certain exceptions, to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense. It thus protects interests wholly unrelated to the propriety of any subsequent conviction. Mr. Justice Black aptly described the purpose of the Clause:
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> " 'The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.' *Green* [v. *United States*, 355 U. S. 184,] 187–188.
>
> ". . . [I]f a criminal defendant is to avoid *exposure* to double jeopardy and thereby enjoy the full protection of the Clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs." *Id.*, at 661–662. (Emphasis in original.)

If a defendant is entitled to have an appellate court rule on his double jeopardy claim in advance of trial, he is surely entitled to a definitive ruling by the trial court in advance

of trial. Since the State has not provided the respondent with notice of any basis for the prosecution that does not depend upon proving, for the second time, a careless failure to reduce speed, I would not require this respondent to stand trial again.

I respectfully dissent.

REEVES, INC. v. STAKE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 79–677. Argued April 16, 1980—Decided June 19, 1980

For more than 50 years, South Dakota has operated a cement plant that produced cement for both state residents and out-of-state buyers. In 1978, because of a cement shortage, the State Cement Commission announced a policy to confine the sale of cement by the state plant to residents of the State. This policy forced petitioner ready-mix concrete distributor, one of the out-of-state buyers, to cut its production severely. Petitioner then brought suit in Federal District Court, challenging the policy. The court granted injunctive relief on the ground that the policy violated the Commerce Clause. The Court of Appeals reversed on the ground that the State had simply acted in a proprietary capacity.

Held: South Dakota's resident-preference program for the sale of cement does not violate the Commerce Clause. Pp. 434–447.

(a) "Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." *Hughes* v. *Alexandria Scrap Corp.*, 426 U. S. 794, 810. Pp. 434–436.

(b) The Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace, and there is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market. Restraint in this area is also counseled by considerations of state sovereignty, each State's role as guardian and trustee for its people, and the recognized right of a trader to exercise discretion as to the parties with whom he will deal. Moreover, state proprietary activities often are burdened with the same restrictions as private market participants. And, as this case illustrates, the competing considerations in cases involving state proprietary action often will be subtle, complex, politically charged, and difficult to assess under traditional Commerce Clause analysis. Given these factors, the adjustment of interests in this context is, as a rule, better suited for Congress than this Court. Pp. 436–439.

(c) The arguments for invalidating South Dakota's resident-preference program—that the State, having long exploited the interstate market for cement, should not be permitted to withdraw from it when a shortage

arises; that the program responds solely to the nongovernmental objective of protectionism; that hoarding may have undesirable consequences; that the program places South Dakota suppliers of ready-mix concrete at a competitive advantage in the out-of-state market; and that if South Dakota had not acted, free market forces would have generated an appropriate level of supply at free market prices for all buyers in the region—are weak at best. Whatever residual force inheres in them is more than offset by countervailing considerations of policy and fairness. To invalidate the program would discourage similar state projects and rob South Dakota of the intended benefit of its foresight, risk, and industry. Pp. 440–447.

603 F. 2d 736, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, MARSHALL, and REHNQUIST, JJ., joined. POWELL, J., filed a dissenting opinion, in which BRENNAN, WHITE, and STEVENS, JJ., joined, *post*, p. 447.

Dennis M. Kirven argued the cause and filed a brief for petitioner.

William J. Janklow argued the cause for respondents. On the brief were *Michael B. DeMersseman* and *Curtis S. Jensen*.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

The issue in this case is whether, consistent with the Commerce Clause, U. S. Const., Art. I, § 8, cl. 3, the State of South Dakota, in a time of shortage, may confine the sale of the cement it produces solely to its residents.

I

In 1919, South Dakota undertook plans to build a cement plant. The project, a product of the State's then prevailing Progressive political movement, was initiated in response to recent regional cement shortages that "interfered with and delayed both public and private enterprises," and that were "threatening the people of this state." *Eakin v. South Dakota State Cement Commn.*, 44 S. D. 268, 272, 183 N. W. 651, 652

(1921).[1] In 1920, the South Dakota Cement Commission anticipated "[t]hat there would be a ready market for the entire output of the plant within the state." Report of State

[1] It was said that the plant was built because the only cement plant in the State "had been operating successfully for a number of years until it had been bought by the so-called trust and closed down." Report of South Dakota State Cement Commission 6 (1920). In its report advocating creation of a cement plant, the Commission noted both the substantial profits being made by private producers in the prevailing market, and the fact that producers outside the State were "now supplying all the cement used in" South Dakota. Under the circumstances, the Commission reasoned, it would not be to the "capitalists['] . . . advantage to build a new plant within the state." *Id.*, at 8. This skepticism regarding private industry's ability to serve public needs was a hallmark of Progressivism. See, *e. g.*, R. Hofstadter, The Age of Reform 227 (1955) ("In the Progressive era the entire structure of business . . . became the object of a widespread hostility"). South Dakota, earlier a bastion of Populism, *id.*, at 50, became a leading Progressivist State. See R. Nye, Midwestern Progressive Politics 217–218 (1959); G. Mowry, Theodore Roosevelt and the Progressive Movement 155, and n. 125 (1946). Roosevelt carried South Dakota in the election of 1912, *id.*, at 281, n. 69, and Robert LaFollette—on a platform calling for public ownership of railroads and waterpower, see K. MacKay, The Progressive Movement of 1924, pp. 270–271 (app. 4) (1966)—ran strongly (36.9%) in the State in 1924. Congressional Quarterly's Guide to U. S. Elections 287 (1975).

The backdrop against which the South Dakota cement project was initiated is described in H. Schell, History of South Dakota 268–269 (3d ed. 1975):

"Although a majority of the voters [in 1918] had seemingly subscribed to a state-ownership philosophy, it was a question how far the Republican administration at Pierre would go in fulfilling campaign promises. As [Governor] Norbeck entered upon his second term, he again urged a state hail insurance law and advocated steps toward a state-owned coal mine, cement plant, and state-owned stockyards. He also recommended an appropriation for surveying dam sites for hydroelectric development. The lawmakers readily enacted these recommendations into law, except for the stockyards proposal. . . .

". . . In retrospect, [Norbeck's] program must be viewed as a part of the Progressives' campaign against monopolistic prices. There was, moreover, the fervent desire to make the services of the state government

Cement Commission 9 (1920). The plant, however, located at Rapid City, soon produced more cement than South Dakotans could use. Over the years, buyers in no less than nine nearby States purchased cement from the State's plant. App. 26. Between 1970 and 1977, some 40% of the plant's output went outside the State.

The plant's list of out-of-state cement buyers included petitioner Reeves, Inc. Reeves is a ready-mix concrete [2] distributor organized under Wyoming law and with facilities in Buffalo, Gillette, and Sheridan, Wyo. *Id.*, at 15. From the beginning of its operations in 1958, and until 1978, Reeves purchased about 95% of its cement from the South Dakota plant. *Id.*, at 15 and 22. In 1977, its purchases were $1,172,000. *Id.*, at 17. In turn, Reeves has supplied three northwestern Wyoming counties with more than half their ready-mix concrete needs. *Id.*, at 15. For 20 years the relationship between Reeves and the South Dakota cement plant was amicable, uninterrupted, and mutually profitable.

As the 1978 construction season approached, difficulties at the plant slowed production. Meanwhile, a booming construction industry spurred demand for cement both regionally and nationally. *Id.*, at 13. The plant found itself unable to meet all orders. Faced with the same type of "serious cement shortage" that inspired the plant's construction, the Commission "reaffirmed its policy of supplying all South Dakota customers first and to honor all contract commit-

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available to agriculture. . . . These were basic tenets of the Progressive philosophy of government."

[2] "[C]ement is a finely ground manufactured mineral product, usually gray in color. It is mixed with water and sand, gravel, crushed stone, or other aggregates to form concrete, the rock-like substance that is the most widely used construction material in the world." Portland Cement Association, The U. S. Cement Industry, an Economic Report 5 (2d ed. 1978). "Ready-mixed concrete is the term applied to ordinary concrete that is mixed at a central depot instead of on the construction site, and is distributed in special trucks." 4 Encyclopedia Britannica 1077 (1974).

ments, with the remaining volume allocated on a first come, first served basis." *Ibid.*[3]

Reeves, which had no pre-existing long-term supply contract, was hit hard and quickly by this development. On June 30, 1978, the plant informed Reeves that it could not continue to fill Reeves' orders, and on July 5, it turned away a Reeves truck. *Id.*, at 17–18. Unable to find another supplier, *id.*, at 21, Reeves was forced to cut production by 76% in mid-July. *Id.*, at 20.

On July 19, Reeves brought this suit against the Commission, challenging the plant's policy of preferring South Dakota buyers, and seeking injunctive relief. *Id.*, at 3–10. After conducting a hearing and receiving briefs and affidavits, the District Court found no substantial issue of material fact and permanently enjoined the Commission's practice. The court reasoned that South Dakota's "hoarding" was inimical to the national free market envisioned by the Commerce Clause. *Id.*, at 27–30.

The United States Court of Appeals for the Eighth Circuit reversed. *Reeves, Inc.* v. *Kelley*, 586 F. 2d 1230, 1232 (1978). It concluded that the State had "simply acted in a proprietary capacity," as permitted by *Hughes* v. *Alexandria Scrap Corp.*, 426 U. S. 794 (1976). Petitioner sought certiorari. This Court granted the petition, vacated the judgment, and remanded the case for further consideration in light of *Hughes* v. *Oklahoma*, 441 U. S. 322 (1979). *Reeves, Inc.* v. *Kelley*, 441 U. S. 939 (1979). On remand, the Court of Appeals distinguished that case.[4] Again relying on *Alexandria*

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[3] It is not clear when the State initiated its policy preferring South Dakota customers. The record, however, shows that the policy was in place at least by 1974. App. 24.

[4] We now agree with the Court of Appeals that *Hughes* v. *Oklahoma* does not bear on analysis here. That case involved a State's attempt " 'to prevent privately owned articles of trade from being shipped and sold in interstate commerce.' " *Philadelphia* v. *New Jersey*, 437 U. S. 617, 627 (1978), quoting *Foster-Fountain Packing Co.* v. *Haydel*, 278 U. S. 1, 10

Scrap, the court abided by its previous holding. *Reeves, Inc.* v. *Kelley*, 603 F. 2d 736 (1979). We granted Reeves' petition for certiorari to consider once again the impact of the Commerce Clause on state proprietary activity. 444 U. S. 1031 (1980).[5]

II

A

Alexandria Scrap concerned a Maryland program designed to remove abandoned automobiles from the State's roadways and junkyards. To encourage recycling, a "bounty" was offered for every Maryland-titled junk car converted into scrap. Processors located both in and outside Maryland were eligible to collect these subsidies. The legislation, as initially enacted in 1969, required a processor seeking a bounty to present documentation evidencing ownership of the wrecked car. This requirement however, did not apply to "hulks," inoperable automobiles over eight years old. In 1974, the statute was amended to extend documentation requirements to hulks, which comprised a large majority of the junk cars being processed. Departing from prior practice, the new law imposed more exacting documentation requirements on out-of-state than in-state processors By making it less remunerative for suppliers to transfer vehicles outside Maryland, the

(1928). Thus, it involved precisely the type of activity distinguished by the Court in *Alexandria Scrap*. See 426 U. S., at 805–806.

[5] During the pendency of this litigation, economic conditions have permitted South Dakota to discontinue enforcement of its resident-preference policy. We agree with the parties, however, that the case has not become moot. During at least three construction seasons within as many decades the cement plant has been unable, or nearly unable, to satisfy demand. See, *e. g.*, Twelfth Biennial Report of the South Dakota State Cement Commission (1948); App. 23 (affidavit of C. A. Reeves). Under these circumstances, "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again." *Weinstein* v. *Bradford*, 423 U. S. 147, 149 (1975).

reform triggered a "precipitate decline in the number of bounty-eligible hulks supplied to appellee's [Virginia] plant from Maryland sources." 426 U. S., at 801. Indeed, "[t]he practical effect was substantially the same as if Maryland had withdrawn altogether the availability of bounties on hulks delivered by unlicensed suppliers to licensed non-Maryland processors." *Id.*, at 803, n. 13; see *id.*, at 819 (dissenting opinion).

Invoking the Commerce Clause, a three-judge District Court struck down the legislation. 391 F. Supp. 46 (Md. 1975). It observed that the amendment imposed "substantial burdens upon the free flow of interstate commerce," *id.*, at 62, and reasoned that the discriminatory program was not the least disruptive means of achieving the State's articulated objective. *Id.*, at 63. See generally *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 142 (1970).[6]

This Court reversed. It recognized the persuasiveness of the lower court's analysis if the inherent restrictions of the Commerce Clause were deemed applicable. In the Court's view, however, *Alexandria Scrap* did not involve "the kind of action with which the Commerce Clause is concerned." 426 U. S., at 805. Unlike prior cases voiding state laws inhibiting interstate trade, "Maryland has not sought to prohibit the flow of hulks, or to regulate the conditions under which it may occur. Instead, it has entered into the market itself to bid up their price," *id.*, at 806, "as a purchaser, in effect, of a potential article of interstate commerce," and has restricted "its trade to its own citizens or businesses within the State." *Id.*, at 808.[7]

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[6] Maryland sought to justify its reform as an effort to reduce bounties paid to out-of-state processors on Maryland-titled cars abandoned outside Maryland. The District Court concluded that Maryland could achieve this goal more satisfactorily by simply restricting the payment of bounties to only those cars abandoned in Maryland.

[7] The Court invoked this rationale after explicitly reiterating the District Court's finding that the Maryland program imposed " 'substantial

Having characterized Maryland as a market participant, rather than as a market regulator, the Court found no reason to "believe the Commerce Clause was intended to require independent justification for [the State's] action." *Id.*, at 809. The Court couched its holding in unmistakably broad terms. "Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." *Id.*, at 810 (footnote omitted).[8]

B

The basic distinction drawn in *Alexandria Scrap* between States as market participants and States as market regulators makes good sense and sound law. As that case explains, the

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burdens upon the free flow of interstate commerce.'" 426 U. S., at 804. Moreover, the Court was willing to accept the Virginia processor's characterization of the Maryland program as "reducing in some manner the flow of goods in interstate commerce." *Id.*, at 805. Given this concession, we are unable to accept the dissent's description of *Alexandria Scrap* as a case in which "we found no burden on commerce," *post*, at 451, "concluded that the subsidies . . . erected no barriers to trade," *post*, at 452, and determined that the Maryland program did not "cut off," *ibid.*, or "impede the flow of interstate commerce," *post*, at 450. Indeed, even the dissent in the present case recognizes that the Maryland subsidy program "divert[ed] Maryland 'hulks' to in-state processors." *Post*, at 451. To be sure, *Alexandria Scrap* rejected the argument that "the bounty program constituted an *impermissible* burden on interstate commerce." *Ibid.* (emphasis added). It did so, however, solely because Maryland had "entered into the market itself." 426 U. S., at 806. Thus, the two-step analysis distilled by the dissent from *Alexandria Scrap*, see *post*, at 451–453, collapses into a single inquiry: whether the challenged "program constituted direct state participation in the market." *Post*, at 451. The dissent agrees that that question is to be answered in the affirmative here. *Ibid.*

[8] The dissent's central criticisms of the result reached here seem to be that the South Dakota policy does not emanate from "the power of governments to supply their own needs," and that it threatens "'the natural functioning of the interstate market.'" *Post*, at 450. The same observations, however, apply with equal force to the subsidy program challenged in *Alexandria Scrap*.

Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace. *Id.*, at 807–808, citing *H. P. Hood & Sons* v. *Du Mond*, 336 U. S. 525, 539 (1949) (referring to "home embargoes," "customs duties," and "regulations" excluding imports). There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market. See L. Tribe, American Constitutional Law 336 (1978) ("the commerce clause was directed, as an historical matter, only at regulatory and taxing actions taken by states in their sovereign capacity"). The precedents comport with this distinction.[9]

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[9] *Alexandria Scrap* does not stand alone. In *American Yearbook Co.* v. *Askew*, 339 F. Supp. 719 (MD Fla. 1972), a three-judge District Court upheld a Florida statute requiring the State to obtain needed printing services from in-state shops. It reasoned that "state proprietary functions" are exempt from Commerce Clause scrutiny. *Id.*, at 725. This Court affirmed summarily. 409 U. S. 904 (1972). Numerous courts have rebuffed Commerce Clause challenges directed at similar preferences that exist in "a substantial majority of the states." Note, 58 Iowa L. Rev. 576 (1973). *City of Phoenix* v. *Superior Court*, 109 Ariz. 533, 535, 514 P. 2d 454, 456 (1973) (citing *American Yearbook* to reaffirm *Schrey* v. *Allison Steel Mfg. Co.*, 75 Ariz. 282, 255 P. 2d 604 (1953)); *Denver* v. *Bossie*, 83 Colo. 329, 266 P. 214 (1928); *In re Gemmill*, 20 Idaho 732, 119 P. 298 (1911); *People ex rel. Holland* v. *Bleigh Constr. Co.*, 61 Ill. 2d 258, 274–275, 335 N. E. 2d 469, 479 (1975) (citing *American Yearbook*); *State ex rel. Collins* v. *Senatobia Blank Book & Stationery Co.*, 115 Miss. 254, 76 So. 258 (1917); *Allen* v. *Labsap*, 188 Mo. 692, 87 S. W. 926 (1905); *Hersey* v. *Neilson*, 47 Mont. 132, 131 P. 30 (1913); *Tribune Printing & Binding Co.* v. *Barnes*, 7 N. D. 591, 75 N. W. 904 (1898). See also *Dixon-Paul Printing Co.* v. *Board of Public Contracts*, 117 Miss. 83, 77 So. 908 (1918); *Luboil Heat & Power Corp.* v. *Pleydell*, 178 Misc. 562, 564, 34 N. Y. S. 2d 587, 591 (Sup. 1942). The only clear departure from this pattern, *People ex rel. Treat* v. *Coler*, 166 N. Y. 144, 59 N. E. 776 (1901), drew a strong dissent, and has been uniformly criticized in later decisions. See, *e. g.*, *State ex rel. Collins* v. *Senatobia Blank Book & Stationery Co.*, *supra*; *Allen* v. *Labsap*, *supra*.

One other case merits comment. In *Bethlehem Steel Corp.* v. *Board of Commissioners*, 276 Cal. App. 2d 221, 80 Cal. Rptr. 800 (1969), the court

Restraint in this area is also counseled by considerations of state sovereignty,[10] the role of each State "'as guardian and trustee for its people,'" *Heim* v. *McCall*, 239 U. S. 175, 191 (1915), quoting *Atkin* v. *Kansas*, 191 U. S. 207, 222–223 (1903),[11] and "the long recognized right of trader or manu-

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struck down a California statute requiring the State to contract only with persons who promised to use or supply materials produced in the United States. In Opinion No. 69–253, 53 Op. Atty. Gen. Cal. 72 (1970), the State's Attorney General reasoned that *Bethlehem Steel* similarly prohibited, under the "foreign commerce" Clause, statutes giving a preference to California-produced goods. We have no occasion to explore the limits imposed on state proprietary actions by the "foreign commerce" Clause or the constitutionality of "Buy American" legislation. Compare *Bethlehem Steel Corp., supra*, with *K. S. B. Technical Sales Corp.* v. *North Jersey Dist. Water Supply Comm'n*, 75 N. J. 272, 381 A. 2d 774 (1977). We note, however, that Commerce Clause scrutiny may well be more rigorous when a restraint on foreign commerce is alleged. See *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U. S. 434 (1979).

[10] See *American Yearbook Co.* v. *Askew*, 339 F. Supp., at 725 ("ad hoc" inquiry into burdening of interstate commerce "would unduly interfere with state proprietary functions if not bring them to a standstill"). Considerations of sovereignty independently dictate that marketplace actions involving "integral operations in areas of traditional governmental functions"—such as the employment of certain state workers—may not be subject even to congressional regulation pursuant to the commerce power. *National League of Cities* v. *Usery*, 426 U. S. 833, 852 (1976). It follows easily that the intrinsic limits of the Commerce Clause do not prohibit state marketplace conduct that falls within this sphere. Even where "integral operations" are not implicated, States may fairly claim some measure of a sovereign interest in retaining freedom to decide how, with whom, and for whose benefit to deal. The Supreme Court, 1975 Term, 90 Harv. L. Rev. 1, 56, 63 (1976).

[11] See *Foster-Fountain Packing Co.* v. *Haydel*, 278 U. S., at 13 ("As the representative of its people, the State might have retained the shrimp for consumption and use therein"); *Toomer* v. *Witsell*, 334 U. S. 385, 409 (1948) (concurring opinion) (state power to provide for own citizens by developing food supply distinguished from interference with private transactions in food products); *Helvering* v. *Gerhardt*, 304 U. S. 405, 427 (1938) (concurring opinion) ("The genius of our government provides that, within the sphere of constitutional action, the people . . .

facturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *United States* v. *Colgate & Co.*, 250 U. S. 300, 307 (1919).[12] Moreover, state proprietary activities may be, and often are, burdened with the same restrictions imposed on private market participants.[13] Evenhandedness suggests that, when acting as proprietors, States should similarly share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause. See *State ex rel. Collins* v. *Senatobia Blank Book & Stationery Co.*, 115 Miss. 254, 260, 76 So. 258, 260 (1917); *Tribune Printing & Binding Co.* v. *Barnes*, 7 N. D. 591, 597, 75 N. W. 904, 906 (1898). Finally, as this case illustrates, the competing considerations in cases involving state proprietary action often will be subtle, complex, politically charged, and difficult to assess under traditional Commerce Clause analysis. Given these factors, *Alexandria Scrap* wisely recognizes that, as a rule, the adjustment of interests in this context is a task better suited for Congress than this Court.

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have the power to determine as conditions demand, what services and functions the public welfare requires").

[12] When a State buys or sells, it has the attributes of both a political entity and a private business. Nonetheless, the dissent would dismiss altogether the "private business" element of such activity and focus solely on the State's political character. *Post*, at 450. The Court, however, heretofore has recognized that "[*l*]*ike private individuals and businesses*, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases." *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 127 (1940) (emphasis added). While acknowledging that there may be limits on this sweepingly phrased principle, we cannot ignore the similarities of private businesses and public entities when they function in the marketplace.

[13] See, *e. g.*, *National League of Cities* v. *Usery*, 426 U. S., at 854, n. 18; *New York* v. *United States*, 326 U. S. 572 (1946); *United States* v. *California*, 297 U. S. 175 (1936). See also *LaFayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389 (1978).

III

South Dakota, as a seller of cement, unquestionably fits the "market participant" label more comfortably than a State acting to subsidize local scrap processors. Thus, the general rule of *Alexandria Scrap* plainly applies here.[14] Petitioner argues, however, that the exemption for marketplace participation necessarily admits of exceptions. While conceding that possibility, we perceive in this case no sufficient reason to depart from the general rule.

A

In finding a Commerce Clause violation, the District Court emphasized "that the Commission . . . made an election to become part of the interstate commerce system." App. 28. The gist of this reasoning, repeated by petitioner here, is that one good turn deserves another. Having long exploited the interstate market, South Dakota should not be permitted to withdraw from it when a shortage arises. This argument is not persuasive. It is somewhat self-serving to say that South Dakota has "exploited" the interstate market. An equally fair characterization is that neighboring States long have benefited from South Dakota's foresight and industry. Viewed in this light, it is not surprising that *Alexandria Scrap* rejected an argument that the 1974 Maryland legislation challenged there was invalid because cars abandoned in Maryland had been processed in neighboring States for five years. As in *Alexandria Scrap*, we must conclude that "this chronology does not distinguish the case, for Commerce Clause purposes,

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[14] The criticism received by *Alexandria Scrap* in part has been directed at its application of the proprietary immunity to state subsidy programs. See Note, 18 B. C. Ind. & Com. L. Rev. 893, 924–925 (1977). But see The Supreme Court, 1975 Term, 90 Harv. L. Rev. 1, 60–61 (1976). We have no occasion here to inquire whether subsidy programs unlike that involved in *Alexandria Scrap* warrant characterization as proprietary, rather than regulatory, activity. Cf. 18 B. C. Ind. & Com. L. Rev., at 913–915.

from one in which a State offered [cement] only to domestic [buyers] from the start." 426 U. S., at 809.[15]

Our rejection of petitioner's market-exploitation theory fundamentally refocuses analysis. It means that to reverse we would have to void a South Dakota "residents only" policy even if it had been enforced from the plant's very first days. Such a holding, however, would interfere significantly with a State's ability to structure relations exclusively with its own citizens. It would also threaten the future fashioning of effective and creative programs for solving local problems and distributing government largesse. See n. 1, *supra*. A healthy regard for federalism and good government renders us reluctant to risk these results.

> "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting).

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[15] *Alexandria Scrap* explained:

"It is true that the state money initially was made available to licensed out-of-state processors as well as those located within Maryland, and not until the 1974 amendment was the financial benefit channeled, in practical effect, to domestic processors. But this chronology does not distinguish the case, for Commerce Clause purposes, from one in which a State offered bounties only to domestic processors from the start. Regardless of when the State's largesse is first confined to domestic processors, the effect upon the flow of hulks resting within the State is the same: they will tend to be processed inside the State rather than flowing to foreign processors. But no trade barrier of the type forbidden by the Commerce Clause, and involved in previous cases, impedes their movement out of State. They remain within Maryland in response to market forces, including that exerted by money from the State." 426 U. S., at 809–810. (Footnote omitted.)

B

Undaunted by these considerations, petitioner advances four more arguments for reversal:

First, petitioner protests that South Dakota's preference for its residents responds solely to the "non-governmental objective[s]" of protectionism. Brief for Petitioner 25. Therefore, petitioner argues, the policy is *per se* invalid. See *Philadelphia* v. *New Jersey*, 437 U. S. 617, 624 (1978).

We find the label "protectionism" of little help in this context. The State's refusal to sell to buyers other than South Dakotans is "protectionist" only in the sense that it limits benefits generated by a state program to those who fund the state treasury and whom the State was created to serve. Petitioner's argument apparently also would characterize as "protectionist" rules restricting to state residents the enjoyment of state educational institutions, energy generated by a state-run plant, police and fire protection, and agricultural improvement and business development programs. Such policies, while perhaps "protectionist" in a loose sense, reflect the essential and patently unobjectionable purpose of state government—to serve the citizens of the State.[18]

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[18] Petitioner would distinguish *Alexandria Scrap* as involving state legislation designed to advance the nonprotectionist goal of environmentalism. This characterization is an oversimplification. The challenged feature of the Maryland program—the discriminatory documentation requirement—was not aimed at improving the environment; indeed by decreasing the profit margin a hulk supplier could expect to receive if he delivered to the most accessible recycling plant, it is likely that the amendment somewhat set back the goal of encouraging hulk processing. The stated justification for the discriminatory regulation—reducing payments to out-of-state processors for recycling of hulks abandoned outside Maryland—was not even mentioned by the Court in rebuffing the Virginia processor's Commerce Clause challenge. Indeed, the central point of the Court's analysis was that demonstration of an "independent justification" was unnecessary to sustain the State's program. See *Note*, 18 B. C. Ind. &

439 Opinion of the Court

Second, petitioner echoes the District Court's warning:

> "If a state in this union were allowed to hoard its commodities or resources for the use of their own residents only, a drastic situation might evolve. For example, Pennsylvania or Wyoming might keep their coal, the northwest its timber, and the mining states their minerals. The result being that embargo may be retaliated by embargo and commerce would be halted at state lines." App. 20.

See, e. g., *Baldwin* v. *Montana Fish & Game Comm'n*, 436 U. S. 371, 385–386 (1978). This argument, although rooted in the core purpose of the Commerce Clause, does not fit the present facts. Cement is not a natural resource, like coal, timber, wild game, or minerals. Cf. *Hughes* v. *Oklahoma*, 441 U. S. 322 (1979) (minnows); *Philadelphia* v. *New Jersey*, supra (landfill sites); *Pennsylvania* v. *West Virginia*, 262 U. S. 553 (1923) (natural gas); *West* v. *Kansas Natural Gas*

Com. L. Rev. 893, 927–928 (1977). At bottom, the discrimination challenged in *Alexandria Scrap* was motivated by the same concern underlying South Dakota's resident-preference policy—a desire to channel state benefits to the residents of the State supplying them. If some underlying "commendable as well as legitimate" purpose, 426 U. S. at 800, is also required, it is certainly present here. In establishing the plant, South Dakota sought the most unstarting governmental goal: improvement of the quality of life in that State by generating a supply of a previously scarce product needed for local construction and governmental improvements. A cement program, to be sure, may be a somewhat unusual or unorthodox way in which to utilize state funds to improve the quality of residents' lives. But "[a] State's project is as much a legitimate governmental activity whether it is traditional, or akin to private enterprise, or conducted for profit. . . . A State may deem it as essential to its economy that it own and operate a railroad, a mill, or an irrigation system as it does to own and operate bridges, street lights, or a sewage disposal plant. What might have been viewed in an earlier day as an improvident or even dangerous extension of state activities may today be deemed indispensable." *New York* v. *United States*, 326 U. S. 572, 591 (1946) (dissenting opinion).

Co., 221 U. S. 229 (1911) (same); Note, 32 Rutgers L. Rev. 741 (1979). It is the end product of a complex process whereby a costly physical plant and human labor act on raw materials. South Dakota has not sought to limit access to the State's limestone or other materials used to make cement. Nor has it restricted the ability of private firms or sister States to set up plants within its borders. Tr. of Oral Arg. 4. Moreover, petitioner has not suggested that South Dakota possesses unique access to the materials needed to produce cement.[7] Whatever limits might exist on a State's ability to invoke the *Alexandria Scrap* exemption to hoard resources which by happenstance are found there, those limits do not apply here.

Third, it is suggested that the South Dakota program is infirm because it places South Dakota suppliers of ready-mix concrete at a competitive advantage in the out-of-state market; Wyoming suppliers, such as petitioner, have little chance against South Dakota suppliers who can purchase cement from the State's plant and freely sell beyond South Dakota's borders.

The force of this argument is seriously diminished, if not eliminated, by several considerations. The argument neces-

[7] Nor has South Dakota cut off access to its own cement altogether, for the policy does not bar resale of South Dakota cement to out-of-state purchasers. Although the out-of-state buyer in the secondary market will undoubtedly have to pay a markup not borne by South Dakota competitors, this result is not wholly unjust. There should be little question that South Dakota at least could exact a premium on out-of-state purchases to compensate it for the State's investment and risk in the plan. If one views the added markup paid by out-of-state buyers to South Dakota middlemen as the rough equivalent of this "premium," the challenged program equates with a permissible result. The "bottom line" of the scheme closely parallels the result in *Alexandria Scrap*: out-of-state concrete suppliers are not removed from the market altogether; to compete successfully with in-state competitors, however, they must achieve additional efficiencies or exploit natural advantages such as their location to offset the incremental advantage channeled by the State's own market behavior to in-state concrete suppliers.

sarily implies that the South Dakota scheme would be unobjectionable if sales in other States were totally barred. It therefore proves too much, for it would tolerate even a greater measure of protectionism and stifling of interstate commerce than the challenged system allows. See *K. S. B. Technical Sales Corp.* v. *North Jersey Dist. Water Supply Comm'n*, 75 N. J. 272, 298, 381 A. 2d 774, 787 (1977) ("It would be odd indeed to find that when a state becomes less parochial . . . its purpose becomes suspect under the Commerce Clause"). Cf. *Pike* v. *Bruce Church, Inc.*, 397 U. S., at 142 ("And the extent of the burden that will be tolerated will of course depend . . . on whether [the state interest] could be promoted as well with a lesser impact on interstate activities"). Nor is it to be forgotten that *Alexandria Scrap* approved a state program that "not only . . . effectively protect[ed] scrap processors with existing plants in Maryland from the pressures of competitors with nearby out-of-state plants, but [that] implicitly offer[ed] to extend similar protection to any competitor . . . willing to erect a scrap processing facility within Maryland's boundaries." 391 F. Supp., at 63. Finally, the competitive plight of out-of-state ready-mix suppliers cannot be laid solely at the feet of South Dakota. It is attributable as well to their own States' not providing or attracting alternative sources of supply and to the suppliers' own failure to guard against shortages by executing long-term supply contracts with the South Dakota plant.

In its last argument, petitioner urges that, had South Dakota not acted, free market forces would have generated an appropriate level of supply at free market prices for all buyers in the region. Having replaced free market forces, South Dakota should be forced to replicate how the free market would have operated under prevailing conditions.

This argument appears to us to be simplistic and speculative. The very reason South Dakota built its plant was because the free market had failed adequately to supply the

region with cement. See n. 1, *supra*. There is no indication, and no way to know, that private industry would have moved into petitioner's market area, and would have ensured a supply of cement to petitioner either prior to or during the 1978 construction season. Indeed, it is quite possible that petitioner would never have existed—far less operated successfully for 20 years—had it not been for South Dakota cement.[18]

C

We conclude, then, that the arguments for invalidating South Dakota's resident-preference program are weak at best. Whatever residual force inheres in them is more than offset by countervailing considerations of policy and fairness. Reversal would discourage similar state projects, even though this project demonstrably has served the needs of state residents and has helped the entire region for more than a half century. Reversal also would rob South Dakota of the intended benefit of its foresight, risk, and industry.[19] Under

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[18] Petitioner also seeks to distinguish *Alexandria Scrap* on the ground that there, unlike here, the State "created" the relevant market. See 426 U. S., at 814–817 (concurring opinion). It is clear, however, that *Alexandria Scrap* could not, and did not, rest on the notion that Maryland had created the interstate market in hulks. *Id.*, at 809, n. 18. See *id.*, at 824–826, n. 6 (dissenting opinion); Note, 18 B. C. Ind. & Com. L. Rev., at 927; The Supreme Court, 1975 Term, 90 Harv. L. Rev., at 62, n. 27; Note, 34 Wash. & Lee L. Rev. 979, 995 (1977).

[19] The risk borne by South Dakota in establishing the cement plant is not to be underestimated. As explained in n. 1, *supra*, the cement plant was one of several projects through which the Progressive state government sought to deal with local problems. The fate of other similar projects illustrates the risk borne by South Dakota taxpayers in setting up the cement plant at a cost of some $2 million. Thus, "[t]he coal mine was sold in early 1934 for $5,500 with an estimated loss of nearly $175,000 for its fourteen years of operation. The 1933 Legislature also liquidated the state bonding department and the state hail insurance project. The total loss to the taxpayers from the latter venture was approximately $265,000." H. Schell, History of South Dakota 286 (3d ed. 1975).

these circumstances, there is no reason to depart from the general rule of *Alexandria Scrap*.

The judgment of the United States Court of Appeals is affirmed.

It is so ordered.

MR. JUSTICE POWELL, with whom MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE STEVENS join, dissenting.

The South Dakota Cement Commission has ordered that in times of shortage the state cement plant must turn away out-of-state customers until all orders from South Dakotans are filled. This policy represents precisely the kind of economic protectionism that the Commerce Clause was intended to prevent.[1] The Court, however, finds no violation of the Commerce Clause, solely because the State produces the cement. I agree with the Court that the State of South Dakota may provide cement for its public needs without violating the Commerce Clause. But I cannot agree that South Dakota may withhold its cement from interstate commerce in order to benefit private citizens and businesses within the State.

I

The need to ensure unrestricted trade among the States created a major impetus for the drafting of the Constitution. "The power over commerce . . . was one of the primary objects for which the people of America adopted their government. . . ." *Gibbons* v. *Ogden*, 9 Wheat. 1, 190 (1824). Indeed, the Constitutional Convention was called after an earlier convention on trade and commercial problems proved inconclusive. C. Beard, An Economic Interpretation of the

[1] By "protectionism," I refer to state policies designed to protect private economic interests within the State from the forces of the interstate market. I would exclude from this term policies relating to traditional governmental functions, such as education, and subsidy programs like the one at issue in *Hughes* v. *Alexandria Scrap Corp.*, 426 U. S. 794 (1976). See *infra*, at 451–453.

Constitution 61–63 (1935); S. Bloom, History of the Formation of the Union Under the Constitution 14–15 (1940). In the subsequent debate over ratification, Alexander Hamilton emphasized the importance of unrestricted interstate commerce:

> "An unrestrained intercourse between the States themselves will advance the trade of each, by an interchange of their respective productions. . . . Commercial enterprise will have much greater scope, from the diversity in the productions of different States. When the staple of one fails . . . it can call to its aid the staple of another." The Federalist, No. 11, p. 71 (J. Cooke ed., 1961) (A. Hamilton); see *id.*, No. 42, p. 283 (J. Madison).

The Commerce Clause has proved an effective weapon against protectionism. The Court has used it to strike down limitations on access to local goods, be they animal, *Hughes* v. *Oklahoma*, 441 U. S. 322 (1979) (minnows); vegetable, *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137 (1970) (cantaloupes); or mineral, *Pennsylvania* v. *West Virginia*, 262 U. S. 553 (1923) (natural gas). Only this Term, the Court held unconstitutional a Florida statute designed to exclude out-of-state investment advisers. *Lewis* v. *BT Investment Managers, Inc.*, *ante*, p. 27. As we observed in *Hughes* v. *Alexandria Scrap Corp.*, 426 U. S. 794, 803 (1976), "this Nation is a common market in which state lines cannot be made barriers to the free flow of both raw materials and finished goods in response to the economic laws of supply and demand."

This case presents a novel constitutional question. The Commerce Clause would bar legislation imposing on private parties the type of restraint on commerce adopted by South Dakota. See *Pennsylvania* v. *West Virginia*, *supra*; cf. *Great A&P Tea Co.* v. *Cottrell*, 424 U. S. 366 (1976); *Foster-Fountain Packing Co.* v. *Haydel*, 278 U. S. 1 (1928).[2] Conversely,

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[2] The Court attempts to distinguish prior decisions that address the Commerce Clause limitations on a State's regulation of natural resource

a private business constitutionally could adopt a marketing policy that excluded customers who come from another State. This case falls between those polar situations. The State, through its Commission, engages in a commercial enterprise and restricts its own interstate distribution. The question is whether the Commission's policy should be treated like state regulation of private parties or like the marketing policy of a private business.

The application of the Commerce Clause to this case should turn on the nature of the governmental activity involved. If a public enterprise undertakes an "integral operatio[n] in areas of traditional governmental functions," *National League of Cities* v. *Usery*, 426 U. S. 833, 852 (1976), the Commerce Clause is not directly relevant. If, however, the State enters

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exploitation. *E. g., Hughes* v. *Oklahoma*, 441 U. S. 322 (1979); *Pennsylvania* v. *West Virginia*, 262 U. S. 553 (1923). The Court contends that cement production, unlike the activities involved in those cases, "is the end product of a complex process whereby a costly physical plant and human labor act on raw materials." *Ante*, at 444. The Court's distinction fails in two respects. First, the principles articulated in the natural resources cases also have been applied in decisions involving agricultural production, notably milk processing. *E. g., H. P. Hood & Sons* v. *Du Mond*, 336 U. S. 525 (1949); *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137 (1970). More fundamentally, the Court's definition of cement production describes all sophisticated economic activity, including the exploitation of natural resources. The extraction of natural gas, for example, could hardly occur except through a "complex process whereby a costly physical plant and human labor act on raw materials."

The Court also suggests that the Commerce Clause has no application to this case because South Dakota does not "possess unique access to the materials needed to produce cement." *Ante*, at 444. But in its regional market, South Dakota has unique access to *cement*. A cutoff in cement sales has the same economic impact as a refusal to sell resources like natural gas. Customers can seek other sources of supply, or find a substitute product, or do without. Regardless of the nature of the product the State hoards, the consumer has been denied the guarantee of the Commerce Clause that he "may look to . . . free competition from every producing area in the Nation to protect him from exploitation by any." *H. P. Hood & Sons* v. *Du Mond, supra*, at 539.

the private market and operates a commercial enterprise for the advantage of its private citizens, it may not evade the constitutional policy against economic Balkanization.

This distinction derives from the power of governments to supply their own needs, see *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 127 (1940); *Atkin* v. *Kansas*, 191 U. S. 207 (1903), and from the purpose of the Commerce Clause itself, which is designed to protect "the natural functioning of the interstate market," *Hughes* v. *Alexandria Scrap Corp.*, *supra*, at 806. In procuring goods and services for the operation of government, a State may act without regard to the private marketplace and remove itself from the reach of the Commerce Clause. See *American Yearbook Co.* v. *Askew*, 339 F. Supp. 719 (MD Fla.), summarily aff'd, 409 U. S. 904 (1972). But when a State itself becomes a participant in the private market for other purposes, the Constitution forbids actions that would impede the flow of interstate commerce. These categories recognize no more than the "constitutional line between the State as government and the State as trader." *New York* v. *United States*, 326 U. S. 572, 579 (1946); see *United States* v. *California*, 297 U. S. 175 (1936); *Ohio* v. *Helvering*, 292 U. S. 360 (1934); *South Carolina* v. *United States*, 199 U. S. 437 (1905).

The Court holds that South Dakota, like a private business, should not be governed by the Commerce Clause when it enters the private market. But precisely because South Dakota is a State, it cannot be presumed to behave like an enterprise " 'engaged in an entirely private business.' " See *ante*, at 439, quoting *United States* v. *Colgate & Co.*, 250 U. S. 300, 307 (1919). A State frequently will respond to market conditions on the basis of political rather than economic concerns. To use the Court's terms, a State may attempt to act as a "market regulator" rather than a "market participant." See *ante*, at 436. In that situation, it is a pretense to equate the State with a private economic actor. State action burdening interstate trade is no less state action because it is

accomplished by a public agency authorized to participate in the private market.

II

The threshold issue is whether South Dakota has undertaken integral government operations in an area of traditional governmental functions, or whether it has participated in the marketplace as a private firm. If the latter characterization applies, we also must determine whether the State Commission's marketing policy burdens the flow of interstate trade. This analysis highlights the differences between the state action here and that before the Court in *Hughes* v. *Alexandria Scrap Corp.*

A

In *Alexandria Scrap*, a Virginia scrap processor challenged a Maryland program to pay bounties for every junk car registered in Maryland that was converted into scrap. The program imposed more onerous documentation standards on non-Maryland processors, thereby diverting Maryland "hulks" to in-state processors. The Virginia plaintiff argued that this diversion burdened interstate commerce.

As the Court today notes, *Alexandria Scrap* determined that Maryland's bounty program constituted direct state participation in the market for automobile hulks. *Ante*, at 435. But the critical question—the second step in the opinion's analysis—was whether the bounty program constituted an impermissible burden on interstate commerce. Recognizing that the case did not fit neatly into conventional Commerce Clause theory, 426 U. S., at 807, we found no burden on commerce.

The Court first observed:

> "Maryland has not sought to prohibit the flow of hulks, or to regulate the conditions under which it may occur. Instead, it has entered into the market itself to bid up their price. There has been an impact upon the interstate flow of hulks only because . . . Maryland effectively

has made it more lucrative for unlicensed suppliers to dispose of their hulks in Maryland. . . ." *Id.*, at 806.

We further stated "that the novelty of this case is not its presentation of a new form of 'burden' upon commerce, but that appellee should characterize Maryland's action as a burden which the Commerce Clause was intended to make suspect." *Id.*, at 807. The opinion then emphasized that "no trade barrier of the type forbidden by the Commerce Clause, and involved in previous cases, impedes th[e] movement [of hulks] out of State." *Id.*, at 809–810. Rather, the hulks "remain within Maryland in response to market forces, including that exerted by money from the State." *Id.*, at 810. The Court concluded that the subsidies provided under the Maryland program erected no barriers to trade. Consequently, the Commerce Clause did not forbid the Maryland program.

B

Unlike the market subsidies at issue in *Alexandria Scrap*, the marketing policy of the South Dakota Cement Commission has cut off interstate trade.[3] The State can raise such a bar when it enters the market to supply its own needs. In order to ensure an adequate supply of cement for public uses, the State can withhold from interstate commerce the cement needed for public projects. Cf. *National League of Cities* v. *Usery*, *supra*.

The State, however, has no parallel justification for favoring private, in-state customers over out-of-state customers.[4]

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[3] One distinction between a private and a governmental function is whether the activity is supported with general tax funds, as was the case for the reprocessing program in *Alexandria Scrap*, or whether it is financed by the revenues it generates. In this case, South Dakota's cement plant has supported itself for many years. See Tr. of Oral Arg. 27. There is thus no need to consider the question whether a state-subsidized business could confine its sales to local residents.

[4] The consequences of South Dakota's "residents-first" policy were devastating to petitioner Reeves, Inc., a Wyoming firm. For 20 years,

In response to political concerns that likely would be inconsequential to a private cement producer, South Dakota has shut off its cement sales to customers beyond its borders. That discrimination constitutes a direct barrier to trade "of the type forbidden by the Commerce Clause, and involved in previous cases. . . ." *Alexandria Scrap*, 426 U. S., at 810. The effect on interstate trade is the same as if the state legislature had imposed the policy on private cement producers. The Commerce Clause prohibits this severe restraint on commerce.

III

I share the Court's desire to preserve state sovereignty. But the Commerce Clause long has been recognized as a limitation on that sovereignty, consciously designed to maintain a national market and defeat economic provincialism. The Court today approves protectionist state policies. In the absence of contrary congressional action,[5] those policies now can be implemented as long as the State itself directly participates in the market.[6]

By enforcing the Commerce Clause in this case, the Court would work no unfairness on the people of South Dakota. They still could reserve cement for public projects and share in whatever return the plant generated. They could not, how-

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Reeves had purchased about 95% of its cement from the South Dakota plant. When the State imposed its preference for South Dakota residents in 1978, Reeves had to reduce its production by over 75%. *Ante*, at 432–433. As a result, its South Dakota competitors were in a vastly superior position to compete for work in the region.

[5] The Court explicitly does not exclude the possibility that, under the Commerce Clause, Congress might legislate against protectionist state policies. See *ante*, at 435–436.

[6] Since the Court's decision contains no limiting principles, a State will be able to manufacture any commercial product and withhold it from citizens of other States. This prerogative could extend, for example, to pharmaceutical goods, food products, or even synthetic or processed energy sources.

ever, use the power of the State to furnish themselves with cement forbidden to the people of neighboring States.

The creation of a free national economy was a major goal of the States when they resolved to unite under the Federal Constitution. The decision today cannot be reconciled with that purpose.

CAREY, STATE'S ATTORNEY OF COOK COUNTY v. BROWN ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 79-703. Argued April 15, 1980—Decided June 20, 1980

An Illinois statute prohibits picketing of residences or dwellings, but exempts from its prohibition peaceful picketing of a place of employment involved in a labor dispute. Appellees were convicted in state court of violating this statute when they picketed the Mayor of Chicago's home in protest against his alleged failure to support the busing of schoolchildren to achieve racial integration. Thereafter, appellees brought suit in Federal District Court, seeking a declaratory judgment that the statute is unconstitutional on its face and as applied, and an injunction prohibiting appellant and other state and local officials from enforcing the statute. The District Court denied all relief, but the Court of Appeals reversed, holding that the statute, both on its face and as applied to appellees, violated the Equal Protection Clause of the Fourteenth Amendment.

Held: The Illinois statute is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment since it makes an impermissible distinction between peaceful labor picketing and other peaceful picketing. *Police Department of Chicago* v. *Mosley*, 408 U. S. 92. Pp. 459–471.

(a) In prohibiting peaceful picketing on the public streets and sidewalks in residential neighborhoods, the statute regulates expressive conduct that falls within the First Amendment's preserve, and, in exempting peaceful labor picketing from its general prohibition, the statute discriminates between lawful and unlawful conduct based upon the content of the demonstrator's communication. On its face, the statute accords preferential treatment to the expression of views on one particular subject; information about labor disputes may be freely disseminated but discussion of all other issues is restricted. The permissibility of residential picketing is thus dependent solely on the nature of the message being conveyed. Pp. 459–463.

(b) Standing alone, the State's asserted interest in promoting the privacy of the home is not sufficient to save the statute. The statute makes no attempt to distinguish among various sorts of nonlabor picketing on the basis of the harms they would inflict on the privacy interest. More fundamentally, the exclusion of labor picketing cannot be upheld as a means of protecting residential privacy for the simple reason that

nothing in the content-based labor-nonlabor distinction has any bearing on privacy. Pp. 464–465.

(c) Similarly, the State's interest in providing special protection for labor protests cannot, without more, justify the labor picketing exemption. Labor picketing is no more deserving of First Amendment protection than are public protests over other issues, particularly the important economic, social, and political subjects about which appellees wished to demonstrate. Pp. 466–467.

(d) Nor can the statute be justified as an attempt to accommodate the competing rights of the homeowner to enjoy his privacy and the employee to demonstrate over labor disputes, since such an attempt hinges on the validity of both of these goals, the latter of which—the desire to favor one form of speech over all others—is illegitimate. Likewise, the statute cannot be justified as an attempt to prohibit picketing that would impinge on residential privacy while permitting picketing that would not. Numerous types of peaceful picketing other than labor picketing would have but a negligible impact on privacy interests, and numerous other actions of a homeowner might constitute "nonresidential" uses of his property and would thus serve to vitiate the right to residential privacy. Pp. 467–469.

(e) While the State's interest in protecting the well-being, tranquility, and privacy of the home is of the highest order, the crucial question is whether the statute advances that objective in a manner consistent with the Equal Protection Clause. Because the statute discriminates among pickets based on the subject matter of their expression, the answer to that question must be "no." Pp. 470–471.

602 F. 2d 791, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which STEWART, WHITE, MARSHALL, POWELL, and STEVENS, JJ., joined. STEWART, J., filed a concurring opinion, *post*, p. 471. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and BLACKMUN, J., joined, *post*, p. 472.

Ellen G. Robinson argued the cause *pro hac vice* for appellant. With her on the briefs were *Bernard Carey, pro se*, and *Paul P. Biebel, Jr.*

Edward Burke Arnolds argued the cause for appellees. With him on the brief was *Michael P. Seng.**

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*Briefs of *amici curiae* urging reversal were filed by *William W. Becker*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

At issue in this case is the constitutionality under the First and Fourteenth Amendments of a state statute that bars all picketing of residences or dwellings, but exempts from its prohibition "the peaceful picketing of a place of employment involved in a labor dispute."

I

On September 6, 1977, several of the appellees, all of whom are members of a civil rights organization entitled the Committee Against Racism, participated in a peaceful demonstration on the public sidewalk in front of the home of Michael Bilandic, then Mayor of Chicago, protesting his alleged failure to support the busing of schoolchildren to achieve racial integration. They were arrested and charged with unlawful residential picketing in violation of Ill. Rev. Stat., ch. 38, § 21.1-2 (1977), which provides:

> "It is unlawful to picket before or about the residence or dwelling of any person, except when the residence or dwelling is used as a place of business. However, this Article does not apply to a person peacefully picketing his own residence or dwelling and does not prohibit the peaceful picketing of a place of employment involved in a labor dispute or the place of holding a meeting or assembly on premises commonly used to discuss subjects of general public interest." [1]

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for the New England Legal Foundation; and by *Ronald A. Zumbrun*, *Robert K. Best*, and *Robin L. Rivett* for the Pacific Legal Foundation et al.

Howard Eglit and *David Goldberger* filed a brief for the Roger Baldwin Foundation of ACLU, Inc., as *amicus curiae* urging affirmance.

[1] A violation of § 21.1-2 is a "Class B" misdemeanor punishable by a fine of up to $500 and imprisonment for not more than 6 months. See Ill. Rev. Stat., ch. 38, §§ 21.1-3, 1005-8-3, 1005-9-1 (1977).

At least four other States have enacted antiresidential picketing laws similar in form to this statute. See Ark. Stat. Ann. §§ 41-2966 to 41-2968 (1977); Conn. Gen. Stat. § 31-120 (1979); Haw. Rev. Stat. § 379A-1 (1976); Md. Ann. Code, Art. 27, § 580A (1976). Connecticut's law has

Appellees pleaded guilty to the charge and were sentenced to periods of supervision ranging from six months to a year.

In April 1978, appellees commenced this lawsuit in the United States District Court for the Northern District of Illinois, seeking a declaratory judgment that the Illinois residential picketing statute is unconstitutional on its face and as applied, and an injunction prohibiting defendants—various state, county, and city officials—from enforcing the statute. Appellees did not attempt to attack collaterally their earlier state-court convictions, but requested only prospective relief. Alleging that they wished to renew their picketing in residential neighborhoods but were inhibited from doing so by the threat of criminal prosecution under the residential picketing statute, appellees challenged the Act under the First and Fourteenth Amendments as an overbroad, vague, and, in light of the exception for labor picketing, impermissible content-based restriction on protected expression. The District Court, ruling on cross-motions for summary judgment, denied all relief. *Brown* v. *Scott*, 462 F. Supp. 518 (1978).

The Court of Appeals for the Seventh Circuit reversed. *Brown* v. *Scott*, 602 F. 2d 791 (1979). Discerning "no principled basis" for distinguishing the Illinois statute from a similar picketing prohibition invalidated in *Police Department of Chicago* v. *Mosley*, 408 U. S. 92 (1972), the court concluded that the Act's differential treatment of labor and nonlabor picketing could not be justified either by the important state

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been construed to permit all picketing in a residential area except for labor picketing that is not conducted at the situs of a labor dispute. *State* v. *Anonymous*, 6 Conn. Cir. 372, 274 A. 2d 897 (App. Div. 1970); *DeGregory* v. *Giesing*, 427 F. Supp. 910 (Conn. 1977) (three-judge court). The Maryland statute was declared unconstitutional by the Maryland Court of Appeals in *State* v. *Schuller*, 280 Md. 305, 372 A. 2d 1076 (1977). See also *People Acting Through Community Effort* v. *Doorley*, 468 F. 2d 1143 (CA1 1972) (invalidating municipal ordinance virtually identical to the Illinois residential picketing statute); but see *Wauwatosa* v. *King*, 49 Wis. 2d 398, 182 N. W. 2d 530 (1971) (upholding validity of similar ordinance).

interest in protecting the peace and privacy of the home or by the special character of a residence that is also used as a "place of employment." Accordingly, the court held that the statute, both on its face and as applied to appellees, violated the Equal Protection Clause of the Fourteenth Amendment.[2] We noted probable jurisdiction. 444 U. S. 1011 (1980). We affirm.

II

As the Court of Appeals observed, this is not the first instance in which this Court has had occasion to consider the constitutionality of an enactment selectively proscribing peaceful picketing on the basis of the placard's message. *Police Department of Chicago* v. *Mosley, supra,* arose out of a challenge to a Chicago ordinance that prohibited picketing in front of any school other than one "involved in a labor dispute."[3] We held that the ordinance violated the Equal Protection Clause because it impermissibly distinguished between labor picketing and all other peaceful picketing with-

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[2] Because the Court of Appeals concluded that the labor dispute exception was not severable from the remainder of the statute, it invalidated the enactment in its entirety. Cf. *State* v. *Schuller, supra,* at 318–321, 372 A. 2d, at 1083–1084. The court therefore found it unnecessary to consider the constitutionality under the First Amendment of a statute that prohibited all residential picketing. *Brown* v. *Scott,* 602 F. 2d 791, 795, n. 6 (1979). Because we find the present statute defective on equal protection principles, we likewise do not consider whether a statute barring all residential picketing regardless of its subject matter would violate the First and Fourteenth Amendments.

[3] Chicago Municipal Code, ch. 193–1 (i) (1968), provided:

"A person commits disorderly conduct when he knowingly:

. . . . .

"(i) Pickets or demonstrates on a public way within 150 feet of any primary or secondary school building while the school is in session and one-half hour before the school is in session and one-half hour after the school session has been concluded, *provided that this subsection does not prohibit the peaceful picketing of any school involved in a labor dispute. . . .*" (Emphasis supplied.)

out any showing that the latter was "clearly more disruptive" than the former. 408 U. S., at 100. Like the Court of Appeals, we find the Illinois residential picketing statute at issue in the present case constitutionally indistinguishable from the ordinance invalidated in *Mosley*.

There can be no doubt that in prohibiting peaceful picketing on the public streets and sidewalks in residential neighborhoods, the Illinois statute regulates expressive conduct that falls within the First Amendment's preserve. See, *e. g.*, *Thornhill* v. *Alabama*, 310 U. S. 88 (1940); *Gregory* v. *Chicago*, 394 U. S. 111, 112 (1969); *Shuttlesworth* v. *Birmingham*, 394 U. S. 147, 152 (1969). "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague* v. *CIO*, 307 U. S. 496, 515 (1939) (opinion of Roberts, J.). " '[S]treets, sidewalks, parks, and other similar public places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely.' " *Hudgens* v. *NLRB*, 424 U. S. 507, 515 (1976) (quoting *Food Employees* v. *Logan Valley Plaza*, 391 U. S. 308, 315 (1968)).

Nor can it be seriously disputed that in exempting from its general prohibition only the "peaceful picketing of a place of employment involved in a labor dispute," the Illinois statute discriminates between lawful and unlawful conduct based upon the content of the demonstrator's communication.[4] On

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[4] The Illinois residential picketing statute apparently has not been construed by the state courts. Throughout this litigation, however, all parties and the courts below have interpreted the statutory exception for "peaceful picketing of a place of employment involved in a labor dispute" as embodying the additional requirement that the subject of the picketing be related to the ongoing labor dispute. *Police Department of Chicago* v.

its face, the Act accords preferential treatment to the expression of views on one particular subject; information about labor disputes may be freely disseminated, but discussion of all other issues is restricted. The permissibility of residential picketing under the Illinois statute is thus dependent solely on the nature of the message being conveyed.[5]

In these critical respects, then, the Illinois statute is identical to the ordinance in *Mosley*, and it suffers from the same constitutional infirmities. When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the jus-

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Mosley, 408 U. S. 92 (1972), was premised upon an identical construction. See *id.*, at 94, n. 2 (statutory exemption for "the peaceful picketing of any school involved in a labor dispute" applies only to *labor* picketing of a school involved in such a dispute).

[5] The District Court read the labor exception in this statute as creating two separate classifications: one between "places of employment" and all other "residences," and a second between "places of employment involved in a labor dispute" and "places of employment *not* involved in a labor dispute." The court held that the first classification was a permissible content-neutral regulation of the location of picketing. And although recognizing that the second distinction may well be based on the subject matter of the demonstration, see n. 4, *supra*, the court held that appellees lacked standing to challenge it because they were not seeking to picket "a place of employment," and thus would not have benefitted from a determination that the second classification was unconstitutional. *Brown* v. *Scott*, 462 F. Supp. 518, 534–535 (ND Ill. 1978).

The Court of Appeals, in reversing the District Court, refused to adopt the lower court's interpretation of the statute. Rather, it read the "place of employment" exception to divide "residences and dwellings" into but two categories—those at which picketing is lawful (*i. e.*, all places of employment involved in labor disputes) and those at which it is unlawful (*i. e.*, all other residences and dwellings). *Brown* v. *Scott*, 602 F. 2d, at 793–794. We accept the construction of the Court of Appeals. Appellees sought to picket at a residence and were denied permission to do so. They clearly have standing to attack the statutory classification on which that denial was premised. Indeed, appellant does not challenge the Court of Appeals' interpretation of the statute, Tr. of Oral Arg. 13, and he concedes that this restriction is content-based, *id.*, at 21.

tifications offered for any distinctions it draws must be carefully scrutinized. *Police Department of Chicago* v. *Mosley*, 408 U. S., at 98–99, 101; see *United States* v. *O'Brien*, 391 U. S. 367, 376–377 (1968); *Williams* v. *Rhodes*, 393 U. S. 23, 30–31 (1968); *Dunn* v. *Blumstein*, 405 U. S. 330, 342–343 (1972); *San Antonio School District* v. *Rodriguez*, 411 U. S. 1, 34, n. 75 (1973). As we explained in *Mosley:* "Chicago may not vindicate its interest in preventing disruption by the wholesale exclusion of picketing on all but one preferred subject. Given what Chicago tolerates from labor picketing, the excesses of some nonlabor picketing may not be controlled by a broad ordinance prohibiting both peaceful and violent picketing. Such excesses 'can be controlled by narrowly drawn statutes.' *Saia* v. *New York*, 334 U. S., at 562, focusing on the abuses and dealing evenhandedly with picketing regardless of subject matter." 408 U. S., at 101–102. Yet here, under the guise of preserving residential privacy, Illinois has flatly prohibited all nonlabor picketing even though it permits labor picketing that is equally likely to intrude on the tranquility of the home.

Moreover, it is the content of the speech that determines whether it is within or without the statute's blunt prohibition.[6] What we said in *Mosley* has equal force in the present case:

> "The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter. Peaceful picketing on the subject of a school's labor-management dispute is permitted, but all other peaceful picketing is prohibited. The operative distinction is the message on a picket sign. . . . Any restriction on expressive activity because of its content would completely undercut the 'profound national commitment to

[6] It is, of course, no answer to assert that the Illinois statute does not discriminate on the basis of the speaker's viewpoint, but only on the basis of the subject matter of his message. "The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Consolidated Edison Co.* v. *Public Service Comm'n, post,* at 537.

the principle that debate on public issues should be uninhibited, robust, and wide-open.' *New York Times Co.* v. *Sullivan*, [376 U. S. 254], 270.

"Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone." *Id.*, at 95–96 (citations and footnote omitted).[7]

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[7] *Mosley* was neither the Court's first nor its last pronouncement that the First and Fourteenth Amendments forbid discrimination in the regulation of expression on the basis of the content of that expression. See *Cox* v. *Louisiana*, 379 U. S. 536, 581 (1965) (Black, J., concurring):

"Standing, patrolling, or marching back and forth on streets is conduct, not speech, and as conduct can be regulated or prohibited. But by specifically permitting picketing for the publication of labor union views, Louisiana is attempting to pick and choose among the views it is willing to have discussed on its streets. It thus is trying to prescribe by law what matters of public interest people whom it allows to assemble on its streets may and may not discuss. This seems to me to be censorship in a most odious form, unconstitutional under the First and Fourteenth Amendments. And to deny this appellant and his group use of the streets because of their views against racial discrimination, while allowing other groups to use the streets to voice opinions on other subjects, also amounts, I think, to an invidious discrimination forbidden by the Equal Protection Clause of the Fourteenth Amendment."

See also *Erznoznik* v. *City of Jacksonville*, 422 U. S. 205, 209, 215 (1975); *Hudgens* v. *NLRB*, 424 U. S. 507, 520 (1976); *Madison Joint School*

III

Appellant nonetheless contends that this case is distinguishable from *Mosley*. He argues that the state interests here are especially compelling and particularly well served by a statute that accords differential treatment to labor and nonlabor picketing. We explore in turn each of these interests, and the manner in which they are said to be furthered by this statute.

A

Appellant explains that whereas the Chicago ordinance sought to prevent disruption of the schools, concededly a "substantial" and "legitimate" governmental concern, see *id.*, at 99, 100, the Illinois statute was enacted to ensure privacy in the home, a right which appellant views as paramount in our constitutional scheme.[8] For this reason, he contends that the same content-based distinctions held invalid in the *Mosley* context may be upheld in the present case.

We find it unnecessary, however, to consider whether the State's interest in residential privacy outranks its interest in quiet schools in the hierarchy of societal values. For even

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District No. 8 v. *Wisconsin Employment Relations Comm'n*, 429 U. S. 167, 175–176 (1976); *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 784–785 (1978); *Consolidated Edison Co.* v. *Public Service Comm'n*, *post*, at 536–538.

[8] The importance which the State attaches to the interest in maintaining residential privacy is reflected in the Illinois Legislature's finding accompanying the residential picketing statute:

"The Legislature finds and declares that men in a free society have the right to quiet enjoyment of their homes; that the stability of community and family life cannot be maintained unless the right to privacy and a sense of security and peace in the home are respected and encouraged; that residential picketing, however just the cause inspiring it, disrupts home, family and communal life; that residential picketing is inappropriate in our society, where the jealously guarded rights of free speech and assembly have always been associated with respect for the rights of others. For these reasons the Legislature finds and declares this Article to be necessary." Ill. Rev. Stat., ch. 38, § 21.1–1 (1977).

the most legitimate goal may not be advanced in a constitutionally impermissible manner. And though we might agree that certain state interests may be so compelling that where no adequate alternatives exist a content-based distinction—if narrowly drawn—would be a permissible way of furthering those objectives, cf. *Schenck* v. *United States*, 249 U. S. 47 (1919), this is not such a case.

First, the generalized classification which the statute draws suggests that Illinois itself has determined that residential privacy is not a transcendent objective: While broadly permitting all peaceful labor picketing notwithstanding the disturbances it would undoubtedly engender, the statute makes no attempt to distinguish among various sorts of nonlabor picketing on the basis of the harms they would inflict on the privacy interest. The apparent overinclusiveness and underinclusiveness of the statute's restriction would seem largely to undermine appellant's claim that the prohibition of all nonlabor picketing can be justified by reference to the State's interest in maintaining domestic tranquility.[9]

More fundamentally, the exclusion for labor picketing cannot be upheld as a means of protecting residential privacy for the simple reason that nothing in the content-based labor-nonlabor distinction has any bearing whatsoever on privacy. Appellant can point to nothing inherent in the nature of peaceful labor picketing that would make it any less disruptive of residential privacy than peaceful picketing on issues of broader social concern. Standing alone, then, the State's asserted interest in promoting the privacy of the home is not sufficient to save the statute.

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[9] Cf. Kalven, The Concept of the Public Forum: Cox v. Louisiana, 1965 Sup. Ct. Rev. 1, 29 (quoted in *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50, 67, n. 27 (1976) (opinion of STEVENS, J.)): "If some groups are exempted from a prohibition on parades and pickets, the rationale for regulation is fatally impeached." See also *Police Department of Chicago* v. *Mosley*, 408 U. S., at 100; *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U. S. 620, 638–639 (1980).

B

The second important objective advanced by appellant in support of the statute is the State's interest in providing special protection for labor protests. He maintains that federal [10] and state [11] law has long exhibited an unusual concern for such activities, and he contends that this solicitude may be furthered by a narrowly drawn exemption for labor picketing.

The central difficulty with this argument is that it forthrightly presupposes that labor picketing is more deserving of First Amendment protection than are public protests over other issues, particularly the important economic, social, and political subjects about which these appellees wish to demonstrate. We reject that proposition. Cf. T. Emerson, The System of Freedom of Expression 444–449 (1970) (suggesting that nonlabor picketing is more akin to pure expression than labor picketing and thus should be subject to fewer restrictions). Public issue picketing, "an exercise of . . . basic constitutional rights in their most pristine and classic form,"

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[10] See generally 29 U. S. C. § 141 *et seq.*; *Thornhill* v. *Alabama*, 310 U. S. 88 (1940); *AFL* v. *Swing*, 312 U. S. 321 (1941). Appellant does not go so far as to suggest that the National Labor Relations Act preempts the State from enacting a law prohibiting the picketing of residences involved in labor disputes. Such an argument has dubious merit. See *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U. S. 132, 136, and n. 2 (1976).

[11] See Ill. Rev. Stat., ch. 48, § 2a (1977), which provides:

"No restraining order or injunction shall be granted by any court of this State . . . in any case involving or growing out of a dispute concerning terms or conditions of employment, enjoining or restraining any person or persons, either singly or in concert, . . . from peaceably and without threats or intimidation being upon any public street, or thoroughfare or highway for the purpose of obtaining or communicating information, or to peaceably and without threats or intimidation persuade any person or persons to work or to abstain from working, or to employ or to peaceably and without threats or intimidation cease to employ any party to a labor dispute, or to recommend, advise, or persuade others so to do."

Edwards v. *South Carolina,* 372 U. S. 229, 235 (1963), has always rested on the highest rung of the hierarchy of First Amendment values: "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." *Stromberg* v. *California,* 283 U. S. 359, 369 (1931). See generally A. Meiklejohn, Free Speech and Its Relation to Self-Government (1948). While the State's motivation in protecting the First Amendment rights of employees involved in labor disputes is commendable, that factor, without more, cannot justify the labor picketing exemption.

C

Appellant's final contention is that the statute can be justified by some combination of the preceding objectives. This argument is fashioned on two different levels. In its elemental formulation, it posits simply that a distinction between labor and nonlabor picketing is uniquely suited to furthering the legislative judgment that residential privacy should be preserved to the greatest extent possible without also compromising the special protection owing to labor picketing. In short, the statute is viewed as a reasonable attempt to accommodate the competing rights of the homeowner to enjoy his privacy and the employee to demonstrate over labor disputes.[12]

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[12] We note that the statute's labor dispute exemption is overbroad in this respect, for it not only protects the rights of the employee to picket the residence of his employer, but it also permits third parties to picket both the employer and his employee, even when there is no dispute between those individuals. As appellant's counsel explained at oral argument: "[T]he labor dispute could exist even if the employee wasn't part of the dispute. For example, if you have a condominium that employs non-union janitors and the non-union janitor is perfectly happy to be there, conceivably union janitors could engage in picketing, very much like a traditional labor law case." Tr. of Oral Arg. 14.

But this attempt to justify the statute hinges on the validity of both of these goals, and we have already concluded that the latter—the desire to favor one form of speech over all others—is illegitimate.

The second and more complex formulation of appellant's position characterizes the statute as a carefully drafted attempt to prohibit that picketing which would impinge on residential privacy while permitting that picketing which would not. In essence, appellant asserts that the exception for labor picketing does not contravene the State's interest in preserving residential tranquility because of the unique character of a residence that is a "place of employment." By "inviting" a worker into his home and converting that dwelling into a place of employment, the argument goes, the resident has diluted his entitlement to total privacy. In other words, he has "waived" his right to be free from picketing with respect to disputes arising out of the employment relationship, thereby justifying the statute's narrow labor exception at those locations.[13]

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[13] An alternative justification for the statute—one not pressed by appellant—is that it is intended to protect privacy in the home, but only insofar as that objective can be accomplished without prohibiting those forms of speech that are peculiarly appropriate to residential neighborhoods *and cannot effectively be exercised elsewhere*. Since labor picketing arising out of disputes occurring in residential neighborhoods can only be carried out in those neighborhoods, the argument would continue, it is permitted under the statute while other forms of picketing, for which suitable alternative forums will generally exist, are barred.

Even assuming that a content-based distinction might in some cases be permissible on these grounds, but see *Schneider* v. *State*, 308 U. S. 147, 163 (1939) ("one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place"), this is not such a case because the Illinois statute is seriously underinclusive in this respect. It singles out for special protection only one of the many sorts of picketing which must be carried out in residential neighborhoods or not at all. Protests arising out of landlord-tenant relationships, zoning disputes, and historic preservation issues are just some

The flaw in this argument is that it proves too little. Numerous types of peaceful picketing other than labor picketing would have but a negligible impact on privacy interests,[14] and numerous other actions of a homeowner might constitute "nonresidential" uses of his property and would thus serve to vitiate the right to residential privacy. For example, the resident who prominently decorates his windows and front yard with posters promoting the qualifications of one candidate for political office might be said to "invite" a counter-demonstration from supporters of an opposing candidate. Similarly, a county chairman who uses his home to meet with his district captains and to discuss some controversial issue might well expect that those who are deeply concerned about the decision the chairman will ultimately reach would want to make their views known by demonstrating outside his home during the meeting. And, with particular regard to the facts of the instant case, it borders on the frivolous to suggest that a resident who invites a repairman into his home to fix his television set has "waived" his right to privacy with respect to a dispute between the repairman and the local union,[15] but that the official who has voluntarily chosen to enter the public arena has not likewise "waived" his right to privacy with respect to a challenge to his views on significant issues of social and economic policy.[16]

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of the many demonstrations that bear a direct relation to residential neighborhoods. See generally Comment, Picketers at the Doorstep, 9 Harv. Civ. Rights—Civ. Lib. L. Rev. 95, 101–102, 106 (1974). Indeed, appellees themselves assert that they want to engage in residential picketing because it is the only effective means they have of communicating their concern about the issue of busing to the desired neighborhood audience. Yet the Illinois statute bars all of these groups from picketing in residential areas while those wishing to picket at the site of a labor dispute are permitted to do so.

[14] See *supra*, at 461–462.

[15] See n. 12, *supra*.

[16] Cf. *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974).

IV

We therefore conclude that appellant has not successfully distinguished *Mosley*. We are not to be understood to imply, however, that residential picketing is beyond the reach of uniform and nondiscriminatory regulation. For the right to communicate is not limitless. *E. g., Cox* v. *Louisiana*, 379 U. S. 536, 554–555 (1965); *Cox* v. *Louisiana*, 379 U. S. 559, 563–564 (1965).[17] Even peaceful picketing may be prohibited when it interferes with the operation of vital governmental facilities, see, *e. g., ibid.* (picketing or parading prohibited near courthouses); *Adderley* v. *Florida*, 385 U. S. 39 (1966) (demonstrations prohibited on jailhouse grounds), or when it is directed toward an illegal purpose, see, *e. g., Teamsters* v. *Vogt, Inc.*, 354 U. S. 284 (1957) (prohibition of picketing directed toward achieving "union shop" in violation of state law).

Moreover, we have often declared that "[a] state or municipality may protect individual privacy by enacting reasonable time, place, and manner regulations applicable to all speech *irrespective of content.*" *Erznoznik* v. *City of Jacksonville*, 422 U. S. 205, 209 (1975) (emphasis supplied). See, *e. g., Cox* v. *New Hampshire*, 312 U. S. 569 (1941); *Kovacs* v. *Cooper*, 336 U. S. 77 (1949); *Poulos* v. *New Hampshire*, 345 U. S. 395 (1953); *Cox* v. *Louisiana, supra*, at 554; *Grayned* v. *City of Rockford*, 408 U. S. 104 (1972). In sum, "no mandate in our Constitution leaves States and governmental units powerless to pass laws to protect the public from the kind of boisterous and threatening conduct that disturbs the tranquility of spots selected by the people either for homes,

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[17] Mr. Justice Goldberg's opinion for the Court in *Cox* stated: "The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy." 379 U. S., at 554.

wherein they can escape the hurly-burly of the outside business and political world, or for public and other buildings that require peace and quiet to carry out their functions, such as courts, libraries, schools, and hospitals." *Gregory* v. *Chicago*, 394 U. S. 111, 118 (1969) (Black, J., concurring).

Preserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value. Our decisions reflect no lack of solicitude for the right of an individual "to be let alone" in the privacy of the home, "sometimes the last citadel of the tired, the weary, and the sick." *Id.*, at 125 (Black, J., concurring). See generally *Stanley* v. *Georgia*, 394 U. S. 557 (1969); *Rowan* v. *United States Post Office Dept.*, 397 U. S. 728 (1970); *FCC* v. *Pacifica Foundation*, 438 U. S. 726 (1978); *Payton* v. *New York*, 445 U. S. 573 (1980). The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society. " 'The crucial question, however, is whether [the Illinois' statute] advances that objective in a manner consistent with the command of the Equal Protection Clause.' *Reed* v. *Reed*, 404 U. S. [71], 76 [(1971)]." *Police Department of Chicago* v. *Mosley*, 408 U. S., at 99. And because the statute discriminates among pickets based on the subject matter of their expression, the answer must be "No."

The judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE STEWART, concurring.

The opinion of the Court in this case, as did the Court's opinion in *Police Department of Chicago* v. *Mosley*, 408 U. S. 92, invokes the Equal Protection Clause of the Fourteenth Amendment as the basis of decision. But what was actually at stake in *Mosley*, and is at stake here, is the basic meaning of the constitutional protection of free speech:

> "[W]hile a municipality may constitutionally impose reasonable time, place, and manner regulations on the

use of its streets and sidewalks for First Amendment purposes, and may even forbid altogether such use of some of its facilities; what a municipality may *not* do under the First and Fourteenth Amendments is to discriminate in the regulation of expression on the basis of the content of that expression." *Hudgens* v. *NLRB*, 424 U. S. 507, 520. (Citations omitted.)

It is upon this understanding that I join the opinion and judgment of the Court.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN join, dissenting.

I address the merits of the Court's constitutional decision first, although I also seriously question the appellees' standing to assert the grounds for invalidity on which the Court apparently relies.[1] One who reads the opinion of the Court is probably left with the impression that Illinois has enacted a residential picketing statute which reads: "All residential picketing, except for labor picketing, is prohibited." Such an

[1] The Court premises its finding that the appellees have standing to challenge the statute at least in part on the basis of the appellant's "concessions" at oral argument that the State was not persisting in its challenge to appellees' standing in this Court. See *ante*, at 461, n. 5. But we have said that "[w]e are loath to attach conclusive weight to the relatively spontaneous responses of counsel to equally spontaneous questioning from the Court during oral argument." *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163, 170 (1972). Moreover, while appellant may have chosen not to challenge appellees' standing to argue that they had been denied equal protection under the statute, appellant certainly did not concede that appellees had standing to argue that other individuals desiring to picket under circumstances dissimilar to appellees might be denied equal protection under the statute. In fact, counsel quite explicitly stated that the Court should only consider the constitutionality of prohibiting the appellees' conduct: "I would urge that the . . . First Amendment question only be as applied to the plaintiffs, to the conduct that the plaintiffs actually engaged in. . . ." Tr. of Oral Arg. 17. And this is the standing question that is implicated by the Court's opinion. See *infra*, at 486–489.

impression is entirely understandable; indeed, it is created by the Court's own phrasing throughout the opinion. The Court asserts that Illinois, "in exempting from its general prohibition *only* the 'peaceful picketing of a place of employment involved in a labor dispute,' . . . discriminates between lawful and unlawful conduct based upon . . . content. . . ." (Emphasis added.) *Ante*, at 460. It states that "information about labor disputes may be freely disseminated, but discussion of all other issues is restricted." *Ante*, at 461. The Court finds that the permissibility of residential picketing in Illinois is dependent "*solely* on the nature of the message being conveyed." *Ibid.* (Emphasis added.) And again the Court states that "Illinois has flatly prohibited all nonlabor picketing" while the statute is said to "broadly permi[t] all peaceful labor picketing." *Ante*, at 462, 465.

Dissenting opinions are more likely than not to quarrel with the Court's exposition of the law, but my initial quarrel is with the accuracy of the Court's paraphrasing and selective quotation from the Illinois statute. The complete language of the statute, set out accurately in the text of the Court's opinion, reveals a legislative scheme quite different from that described by the Court in its narrative paraphrasing of the enactment.[2]

The statute provides that residential picketing is prohibited, but goes on to exempt four categories of residences from this general ban. *First*, if the residence is used as a "place

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[2] The simplistic construction of the statute reflected in the Court's opinion apparently is also justified by supposed "concessions" of appellant's counsel at oral argument. *Ante*, at 461, n. 5. Appellant, however, has never suggested that the statute regulates picketing solely by permitting labor, but not nonlabor, issues to be aired through residential picketing. While admitting the use of some content differentiation, the appellant asserts throughout his argument that the statute is a "place" regulation; it allows picketing at homes used for nonresidential purposes but not at those homes used exclusively for residential purposes. See, *e. g.*, the question presented for review in the Juris. Statement 4.

of business" *all* peaceful picketing is allowed. *Second,* if the residence is being used to "hol[d] a meeting or assembly on premises commonly used to discuss subjects of general public interest" *all* peaceful picketing is allowed. *Third,* if the residence is also used as a "place of employment" which is involved in a labor dispute, labor-related picketing is allowed. *Finally,* the statute provides that a resident is entitled to picket his own home. Thus it is clear that information about labor disputes may *not* be "freely disseminated" since labor picketing is restricted to a narrow category of residences. And Illinois has *not* "flatly prohibited all nonlabor picketing" since it allows nonlabor picketing at residences used as a place of business, residences used as public meeting places, and at an individual's own residence.

Only through this mischaracterization of the Illinois statute may the Court attempt to fit this case into the *Mosley* rule prohibiting regulation on the basis of *"content alone."* (Emphasis added.) *Police Department of Chicago* v. *Mosley,* 408 U. S. 92, 96 (1972). For in *Mosley,* the sole determinant of an individual's right to picket near a school was the content of the speech. As the Court today aptly observes, such a regulation warrants exacting scrutiny. In contrast, the principal determinant of a person's right to picket a residence in Illinois is not content, as the Court suggests, but rather the character of the residence sought to be picketed. Content is relevant only in one of the categories established by the legislature.

The cases appropriate to the analysis therefore are those establishing the limits on a State's authority to impose time, place, and manner restrictions on speech activities. Under this rubric, even taking into account the limited content distinction made by the statute, Illinois has readily satisfied its constitutional obligation to draft statutes in conformity with First Amendment and equal protection principles. In fact, the very statute which the Court today cavalierly invalidates has been hailed by commentators as "an excellent model" of

legislation achieving a delicate balance among rights to privacy, free expression, and equal protection. See Kamin, Residential Picketing and the First Amendment, 61 Nw. U. L. Rev. 177, 207 (1966); Comment, 34 U. Chi. L. Rev. 106, 139 (1966). The state legislators of the Nation will undoubtedly greet today's decision with nothing less than exasperation and befuddlement. Time after time, the States have been assured that they may properly promote residential privacy even though free expression must be reduced. To be sure, our decisions have adopted a virtual laundry list of "Don'ts" that must be adhered to in the process. Heading up that list of course is the rule that legislatures must curtail free expression through the "least restrictive means" consistent with the accomplishment of their purpose, and they must avoid standards which are either vague or capable of discretionary application. But somewhere, the Court says in these cases (with a reassuring pat on the head to the legislatures), there *is* the constitutional pot of gold at the end of the rainbow of litigation.

Here, where Illinois has drafted such a statute, avoiding an outright ban on all residential picketing, avoiding reliance on any vague or discretionary standards, and permitting categories of permissible picketing activity at residences where the State has determined the resident's own actions have substantially reduced his interest in privacy, the Court in response confronts the State with the "Catch-22" that the less restrictive categories are constitutionally infirm under principles of equal protection. Under the Court's approach today, the State would fare better by adopting *more* restrictive means, a judicial incentive I had thought this Court would hesitate to afford. Either that, or uniform restrictions will be found invalid under the First Amendment and categorical exceptions found invalid under the Equal Protection Clause, with the result that speech and only speech will be entitled to protection. This can only mean that the hymns of praise in prior opinions celebrating carefully drawn statutes are no

more than sympathetic clucking, and in fact the State is damned if it does and damned if it doesn't.

Equally troublesome is the methodology by which these difficult questions of constitutional law have been reached. The Court today figuratively walked a country mile to find a potential unconstitutional application of this statute, and it is primarily on that potential which the total nullification of this statute rests. Just because it is a statute which is in issue does not relieve this Court of its duty to decide only the concrete controversy presented by the case. As discussed below, I think it quite clear that the statute does not prohibit the appellees in this action from engaging in conduct which must be protected under the First Amendment, the state interests would not be satisfied by a statute employing less restrictive means, the statute is not facially overbroad by prohibiting conduct which clearly must be permitted under the First Amendment, and the appellees have not themselves been denied equal protection because they do not seek to picket under circumstances which are indistinguishable from the circumstances where picketing is allowed. Only by speculating that there *might* be an individual or group that will be denied equal protection by the statute can the Court invalidate it. This is speculation this Court is not permitted to indulge in when nullifying the acts of a legislative branch.

I

The Illinois statute in issue simply does not contravene the First Amendment.

A

Repeatedly, this Court has upheld state authority to restrict the time, place, and manner of speech, if those regulations "protect a substantial governmental interest unrelated to the suppression of free expression" and are narrowly tailored, limiting the restrictions to those reasonably necessary to protect the substantial government interest. *Brown* v. *Glines*,

444 U. S. 348, 354 (1980); *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U. S. 620 (1980). This standard of measuring permissible state regulation, often echoed in this Court's opinions, is readily satisfied in this case.

The interest which the State here seeks to protect is residential privacy, as clearly demonstrated by the legislature's statement of purpose. *Ante*, at 464, n. 8. When a residence is used for exclusively residential purposes, the State recognizes no exception to the ban on picketing. As in this case, it has not been asserted that Mayor Bilandic's home fell into any category other than a residence used solely for residential purposes. The appellees nevertheless assert that their interest in publicizing their opinions on the issue of school integration outweigh the State's asserted interest in protecting residential privacy.

Our cases simply do not support such a construction of the First Amendment. In *Kovacs* v. *Cooper*, 336 U. S. 77, 81 (1949), the state interest in preventing interference with the "social activities in which [appellees] are engaged or the quiet that they would like to enjoy" warranted the prohibition of sound trucks on residential streets. In *Rowan* v. *United States Post Office Dept.*, 397 U. S. 728, 736 (1970), this Court held that "[t]he right of every person 'to be let alone' must be placed in the scales with the right of others to communicate." The Court recognized a "very basic right to be free from sights, sounds, and tangible matter we do not want" in the home. *Ibid.* These interests were sufficient to justify a resident's ability to absolutely preclude delivery of unwanted mail to his address. Similarly, in *FCC* v. *Pacifica Foundation*, 438 U. S 726, 748 (1978), the Court found that an offensive broadcast could be absolutely banned from the airwaves because it "confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." Under these authorities, the ap-

pellees have no fundamental First Amendment right to picket in front of a residence.

B

Nor can it be said that the state interest could be fully protected by a less restrictive statute. An absolute ban on picketing at residences used solely for residential purposes permissibly furthers the state interest in protecting residential privacy. The State could certainly conclude that the presence of even a solitary picket in front of a residence is an intolerable intrusion on residential privacy. The Court today suggests that some picketing activities would have but a "negligible impact on privacy interests," intimating that Illinois could satisfy its interests through more limited restrictions on picketing, such as regulating the hours and numbers of pickets. *Ante,* at 469. But I find nothing in the cases of this Court to suggest that a State may not permissibly conclude that even one individual camped in front of the home is unacceptable. It is the State, and not this Court, which legislates to prohibit evils which its citizens find unescapable, subject only to the limitations of the United States Constitution. Unlike sound trucks, it is not just the distraction of the noise which is in issue—it is the very presence of an unwelcome visitor at the home. As a Wisconsin court described in *Wauwatosa* v. *King,* 49 Wis. 2d 398, 411–412, 182 N. W. 2d 530, 537 (1971):

> "To those inside . . . the home becomes something less than a home when and while the picketing . . . continue[s]. . . . [The] tensions and pressures may be psychological, not physical, but they are not, for that reason, less inimical to family privacy and truly domestic tranquility."

Whether noisy or silent, alone or accompanied by others, whether on the streets or on the sidewalk, I think that there are few of us that would feel comfortable knowing that a

stranger lurks outside our home. The State's prohibition of this conduct is even easier to justify than regulations previously upheld by this Court limiting mailings and broadcasts into the home. In *Rowan,* as in *Pacifica,* the resident at least could have short-circuited the annoyance by throwing away the mail or turning off the radio. Even that alternative redress, however, was held not sufficient to preclude the legislative authorities from prohibiting the initial intrusion. Where, as here, the resident has no recourse of escape whatsoever, the State may quite justifiably conclude that the protection afforded by a statute such as this seems even more necessary.

C

Thus the appellees cannot secure the invalidation of this statute by urging that they seek to engage in expression which must be protected by the First Amendment or by demonstrating that a statute less restrictive of picketing would satisfy the state interest. On occasion this Court has, of course, permitted invalidation of a statute even though the plaintiff's conduct was not protected if the statute clearly "sweeps within its prohibitions what may not be punished under the First . . . Amendmen[t]." *Grayned* v. *City of Rockford,* 408 U. S. 104, 114–115 (1972).

But this statute satisfies even the overbreadth challenge. It is arguable that when a resident has voluntarily used his home for nonresidential uses in a way which reduces the resident's privacy interest, and the person seeking to picket the home has no alternative forum for effectively airing the grievance because it relates to this nonresidential use of the home, some form of residential picketing might be protected under the First Amendment. The courts which have found general prohibitions on residential picketing to be permissible under the First Amendment have considered the question more difficult under such circumstances. For example, in *Walinsky* v. *Kennedy,* 94 Misc. 2d 121, 404 N. Y. S. 2d 491 (1977), the

New York court enjoined all residential picketing but concluded that,

> "A more difficult question would be raised if the [resident's] office were in his home and there was thus no other suitable forum wherein he could be confronted or the picket's viewpoints could be heard." *Id.*, at 132, n. 15, 404 N. Y. S. 2d, at 498, n. 15.

Similarly, in *Hibbs* v. *Neighborhood Organization to Rejuvenate Tenant Housing*, 433 Pa. 578, 580, 252 A. 2d 622, 623–624 (1969), the Court found that a slumlord could be picketed at his home, but only because he effectively operated his business out of his residence and no other alternative situs was available to air the dispute. This Court has intimated a similar concern in dicta in *Senn* v. *Tile Layers*, 301 U. S. 468 (1937). There the right of laborers under a state statute to picket the residence of an employer who operated his business in his home was upheld, and the Court went on to say that "[m]embers of a union might, without special statutory authorization by a state, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution." *Id.*, at 478.

I would by no means say without more that the State would have to permit such residential picketing, but such circumstances would, as the courts have found, present the greatest potential for a complaint of overbreadth. The State in the present case has forestalled any such challenge, however, by exempting such groups from the ban on residential picketing. Whether *required* by the Constitution or not, such exemptions are the concern of this Court only if they *violate* the Constitution. This Court in fact upheld enforcement of a statute permitting similar residential picketing in *Senn* v. *Tile Layers, supra*. Since the State has a legitimate interest in protecting speech activity and in particular, providing a forum where no other is reasonably available, excluding residences used for nonresidential purposes from the general

prohibition on residential picketing is an entirely rational legislative policy, even if not mandated by the First Amendment. Thus no overbreadth challenge should succeed here.

II

Even though the statute does not prohibit conduct which is protected, the statute must also survive the hurdle of the Equal Protection Clause of the Fourteenth Amendment. By choosing a less restrictive means approach and excluding pickets at residences used for nonresidential purposes from the general prohibition, the Court concludes the State has violated equal protection. I do not think this result can be sustained because the appellees have not been denied equal protection and that is the only question this Court may properly review.

A

Police Department of Chicago v. *Mosley*, 408 U. S. 92 (1972), states a standard by which equal protection requirements in the First Amendment context must be measured. The Court in that case identified the "crucial question" as "whether there is an appropriate governmental interest suitably furthered by the differential treatment" of the appellees' picketing. *Id.*, at 95. The interest asserted by the city was the prevention of disruption in the schools. Thus the statute, to satisfy *Mosley*, should have prohibited all picketing which could reasonably be categorized as disruptive. Yet the ordinance permitted labor picketing while prohibiting picketing relating to race discrimination (and all other nonlabor topics), even though both forms of picketing were equally disruptive.

Thus the question is whether the State has a substantial interest in differentiating between the picketing which appellees seek to conduct and the picketing which is permitted under the statute. For equal protection does not require that "things which are different in fact . . . be treated in law

as though they were the same." *Tigner* v. *Texas*, 310 U. S. 141, 147 (1940). Appellees seek to picket a residence to voice their views on school integration. There has been no showing that the resident has used his home for nonresidential purposes, or that no other forum is available where appellees may publicize their dispute.[3] All pickets who fall within this category, no matter what the content of their expression may be, are prohibited from residential picketing. School integration, public housing, labor disputes, and the recognition of Red China are treated alike in this respect. The State has differentiated only when the residence has been used as a place of business, a place for public meetings, a place of employment or is occupied by the picket himself. In each of these categories, the State has determined that the resident has waived some measure of privacy through voluntary use of his home for these purposes.

Our cases clearly support a State's authority to design the permissibility of picketing in relation to the use to which a particular building is put. As stated in *Grayned* v. *City of Rockford*, 408 U. S., at 116: "The nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable.' . . . The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." The fact that all areas could be classified as school grounds, however, would not mean that all school grounds had to be subject to the same restrictions. As the Court in *Grayned* noted: "Different considerations, of course, apply in different circumstances For example, re-

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[3] If it is the Mayor the appellees seek to reach, they have not shown they cannot do so at city hall. If it is the neighborhoods they seek to reach, they have not shown that they cannot do so in neighborhood parks. I think it is now clear that when speech interests are countered by other substantial governmental interests, the availability of another forum is a highly relevant factor in determining the appropriate balance. See *Pell* v. *Procunier*, 417 U. S. 817, 823–824 (1974).

strictions appropriate to a single-building high school during class hours would be inappropriate in many open areas on a college campus. . . ." *Id.*, at 120, n. 45. And just as surely the State may differentiate between residences used exclusively for residential purposes and those which are not. It is far from nonsensical or arbitrary for a legislature to conclude that privacy interests are reduced when the residence is used for these other purposes. In another First Amendment case in *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 61 (1973), we stated: "From the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions. Such assumptions underlie much lawful state regulation of commercial and business affairs."

Despite the state interest in treating residences which are used for nonresidential purposes differently from residences which are not, the Court finds that the categories are improper because there is an element of content regulation in the statutory scheme. While content is clearly not the principal focus of the statutory categories, since content is only relevant in the one subcategory of "places of employment," the content restriction is quite clearly related to a legitimate state purpose. When an individual hires an employee to perform services in his home, it would not seem reasonable to conclude that the resident had so greatly compromised his residential status so as to permit picketing on any subject. The State may quite properly decide that the balance is better struck by the rule embodied in this statute which recognizes a more limited waiver of privacy interests by allowing only picketing relating to any labor dispute involving the resident *as employer* which has arisen out of the resident's choice of using his residence as a place of employment.

Content regulation, when closely related to a permissible state purpose, is clearly permitted. Surely the Court would not prohibit a city from preventing an individual from interrupting an orderly city council discussion of public housing to orate on the vices or virtues of nuclear power. Yet this is

content regulation. More accurately, it is restriction of topics to those appropriate to the forum. In this case, the forum is a confined one—residences used as a place of employment—and clearly labor picketing in that forum is the relevant topic.

This differentiation is supported by *Cox* v. *Louisiana*, 379 U. S. 559 (1965). There the Court upheld a state prohibition on picketing in front of a government building which was used as a courthouse if the content of the picketing could be presumed to demonstrate an intent to influence the judiciary. In *Cox* then, because of the nature of the state interest invoked, both the content of the picketing as well as the use of the building were considered determinative. The Court noted that if a mayor had an office in the courthouse and individuals were picketing on a topic relevant to the mayor, rather than the judiciary, then the speech would be permissible. Thus use and content, or as MR. JUSTICE STEVENS stated for the plurality in *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50 (1976), "content and context" are important determinants. As in *Cox*, a State need not treat residences which are used for different purposes in the same fashion, and when reasonably related to the state purpose, distinctions in content are permissible. See also *FCC* v. *Pacifica Foundation*, 438 U. S. 726 (1978); *Erznoznik* v. *City of Jacksonville*, 422 U. S. 205 (1975); *Young* v. *American Mini Theatres*, *supra*.

The question, therefore, is not whether there is some differentiation on the basis of content, but whether the appellees' prohibited conduct can be said to share the same characteristics of the conduct which is permitted. The Court devotes less than one page to what purports to be an equal protection analysis of this determinative question. In fact, only one sentence relates to the differences between the litigants in this case and the permitted picketing:

> "And, with particular regard to the facts of the instant case, it borders on the frivolous to suggest that a resi-

dent who invites a repairman into his home to fix his television set has 'waived' his right to privacy with respect to a dispute between the repairman and the local union, but that the official who has voluntarily chosen to enter the public arena has not likewise 'waived' his right to privacy with respect to a challenge to his views on significant issues of social and economic policy." *Ante,* at 469.

First, it is unclear whether the Illinois statute would be construed to permit the type of labor picketing described in the Court's example where the dispute is not between the employer and the employee.[4] Second, the fact that an official has chosen to enter the public arena has no bearing on the question of how he uses his residence—the only question of relevance to the Illinois Legislature. Further, just as the State had an interest in *Cox* in preventing picketing which might tend to improperly influence the judicial process, the State certainly has an equal interest in preventing residential picketing of their officials where the result might be influence through the harassment of the official's family. This is not the type of influence that a democratic society has traditionally held high as a part of the Bill of Rights. Finally, at least in the case of the repairman, the home in fact is the situs of the publicized dispute, while the Mayor's home is not. The appellees do not seek to picket the situs of the dispute; they do not seek to picket the home of an individual who has used his residence for nonresidential purposes relevant to that dispute; they have not established the unavailability of any alternative forum. These are the characteristics of residen-

[4] If given an opportunity, the Illinois courts might determine that many repairmen are not "employees" under the statute. Further, it is also possible that the state courts would limit the disputes covered by the exception to those between the resident and his employee. More importantly, these are questions with which this court should not be concerned until the state courts have had an opportunity to address them. See *infra,* at 488.

tial picketing which the State has allowed. The appellees have thereby failed to establish that they seek to picket under circumstances rationally indistinguishable from the circumstances under which the State has permitted picketing. They have therefore not been denied equal protection.

B

The Court makes little effort to establish that the appellees seek to picket under circumstances which are indistinguishable from the picketing permitted under the statute. Instead, it places the fulcrum of its equal protection argument on the fact that there might well be other actions of a homeowner which would constitute a "nonresidential" use of his property, warranting additional statutory exceptions. While I am not persuaded that the Court has identified an example of another picket who should likewise be permitted to picket under the justification forwarded by the State,[5] the flaws in

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[5] The Court identifies several examples of picketing which the State would allegedly have to allow in order to avoid a successful equal protection attack. The Court indicates that there is no ground for differentiating between the picketing which is permitted and picketing relating to landlord-tenant disputes, zoning disputes, and historic preservation issues. *Ante*, at 468–469, n. 13. The first of these examples seems particularly inappropriate since picketing in relation to landlord-tenant disputes would most likely be permissible under the statute just as written. The statute exempts picketing by an individual at his residence, so it would certainly appear that a tenant could picket in front of his own dwelling (which also happens to be the situs of the dispute). If the landlord operates his business out of his home, the tenants would also be able to picket there under the statute. Thus there is no reason to believe that the picketing opportunities of tenants have been substantially limited by the statutory classifications, and in fact would appear to be at least as broad as those afforded to employees with labor disputes. Zoning disputes and historic preservation issues are distinguishable in several respects. First, those issues have no relationship to the use of an individual's residence (other than their own, which of course they may picket) and the individual resident would not have waived any privacy interests.

the analysis are more fundamental. First, the fact that there may be someone other than the appellees who has a right to be treated similarly to those permitted to picket is irrelevant to the question of constitutional validity in this case. The Court apparently believes it has a license to import the more relaxed standing requirements of First Amendment overbreadth into equal protection challenges. This, however, is not and should not be the law. Precedent supports no such approach and the rationale underlying the expanded standing principles in the overbreadth context are inapposite in the equal protection realm.

As we stated in *Grayned*, standing to challenge an ordinance which has been constitutionally applied to the plaintiff is permitted because otherwise the statute, if allowed to stand until a later challenge, will "deter privileged activity." 408 U. S., at 114. In the equal protection context, however, we are not concerned that conduct which *must* be permitted under the First Amendment will be prohibited, but only that conduct which could be and is properly prohibited be permitted if indistinguishable from other permitted conduct. The impact on speech is therefore a minimal one, while the jurisprudential considerations for declining to consider alternative applications loom large.

In *Barrows* v. *Jackson*, 346 U. S. 249, 256 (1953), an equal protection case, the Court identified the ordinary rule that, "even though a party will suffer a direct substantial injury

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Second, alternative forums would theoretically include residential parks as well as the office of the authorities responsible for the relevant decisions.

The Court's citation of lawn decorations as a waiver of residential privacy seems odd since that act does not involve the voluntary admission of strangers into the home for some nonresidential purposes—a characteristic shared by each of the other exceptions. *Ante*, at 469. The Court's citation of a political party meeting is also distinguishable since this example does not share the commercial attributes of the other exemptions—where "nonresidential use" seems most readily found. An alternative forum would also not seem difficult to obtain in those circumstances.

from application of a statute, he cannot challenge its constitutionality unless he can show that he is within the class whose constitutional rights are allegedly infringed." The Court justified the rule stating:

> "One reason for this ruling is that the state court, when actually faced with the question, might narrowly construe the statute to obliterate the objectionable feature, or it might declare the unconstitutional provision separable. *New York ex rel. Hatch* v. *Reardon*, [204 U. S.], at 160–161. . . . It would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation. Nor are we so ready to frustrate the expressed will of Congress or that of the state legislatures. Cf. *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167, 172." *Id.*, at 256–257.

More recently in *Craig* v. *Boren*, 429 U. S. 190, 193 (1976), we emphasized that standing is "designed to minimize unwarranted intervention into controversies where the applicable constitutional questions are ill-defined and speculative." Sound principles of standing simply do not permit this Court to entertain any claim by the appellees in this action that someone other than themselves *might* be denied equal protection by the operation of the statute. See also *Young* v. *American Mini Theatres, Inc.*, 427 U. S., at 58–59, 60; *Broadrick* v. *Oklahoma*, 413 U. S. 601 (1973). This consideration is particularly compelling in this case since the appellees had an opportunity to seek a limiting construction of the statute by the Illinois courts when originally prosecuted for their picketing, but chose to plead guilty instead, thereby denying the one court system that could authoritatively limit the statute the opportunity to do so.

Even if this Court could properly take cognizance of the fact that some identifiable person not clearly encompassed in the statutory categories permitting picketing should also be

allowed to picket, under equal protection standards, that fact alone would not justify wholesale invalidation of the entire statutory framework. In *Califano* v. *Jobst*, 434 U. S. 47, 53–55 (1977), this Court emphasized that sound equal protection analysis must uphold general rules "even though such rules inevitably produce seemingly arbitrary consequences in some individual cases," and that "the broad legislative classification must be judged by reference to characteristics typical of the affected classes rather than by focusing on selected, atypical examples." Any other standard of review, such as that employed by the Court today, will inevitably lead to invalidation, for this or any other court will always be able to conceive of a hypothetical not properly accounted for by the statutory categories. The state courts, if given an opportunity, have the tools to correct such minor deficiencies. This Court has soundly permitted state legislatures far more room for error in the drafting of its categories than what the Court today allows. As it stated in *Ginsberg* v. *New York*, 390 U. S. 629, 642–643 (1968), "[w]e do not demand of legislatures 'scientifically certain criteria of legislation,' *Noble State Bank* v. *Haskell*, 219 U. S. 104, 110." And more recently, we recognized a compelling need to allow to local government "a reasonable opportunity to experiment with solutions to admittedly serious problems." *Young* v. *American Mini Theatres, supra*, at 71.

I can conclude this dissent with no more apt words than those of Mr. Justice Frankfurter in his concurring opinion in *Kovacs* v. *Cooper*, 336 U. S., at 97: "[I]t is not for us to supervise the limits the legislature may impose in safeguarding the steadily narrowing opportunities for serenity and reflection."

NATIONAL LABOR RELATIONS BOARD *v.* INTERNATIONAL LONGSHOREMEN'S ASSN., AFL–CIO, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79–1082. Argued April 22, 1980—Decided June 20, 1980

This case presents the question whether Rules on Containers (Rules) in a collective-bargaining agreement between the International Longshoremen's Association (ILA) and employer organizations in the shipping industry which were adopted in response to the technological innovation of containerized shipping are a lawful work preservation agreement. The new technology involves the use on specially designed ships of large, reusable metal receptacles which can be moved on and off the vessel unopened and which can be attached to a truck chassis and transported intact to and from the pier, saving costs and time in loading and unloading ships and in warehousing cargo, as compared with the amount of on-pier work involved in handling loose cargo for conventional ships. The amount of work available for longshoremen has been further reduced by the shipping companies' practice of making their containers available for loading (stuffing) and unloading (stripping) away from the pier by shippers and by freight consolidators who combine the goods of various shippers into a single shipment. The Rules permit the great majority of containers to pass over the piers intact, reserving to the ILA the right to stuff and strip at the pier only those containers that would otherwise be stuffed or stripped "locally" (within a 50-mile radius of the port) by anyone except employees of the beneficial owner of the cargo, the shipping company being liable for specified liquidated damages for any container handled in violation of the Rules. Separate unfair labor practice proceedings were brought before the National Labor Relations Board (Board) by truckers and consolidators who, because of the operation against shipping companies of the Rules' liquidated-damages provisions, could no longer perform local stuffing and stripping services. The Board concluded that the Rules were not valid work preservation clauses because the work of stuffing and stripping containers away from the pier had not traditionally been done by ILA members, but had instead been performed by employees of consolidators and truckers. It therefore held that the Rules violated § 8 (e) of the National Labor Relations Act, which makes unlawful those collective-bargaining agreements whereby the employer agrees to cease doing business with any other person, and that union action to enforce

the Rules violated § 8 (b) (4) (B), which prohibits unions from engaging in secondary activities whose object is to force one employer to cease doing business with another. The Court of Appeals, consolidating the cases and holding that the Board had erred as a matter of law in defining the work in controversy, vacated the Board's decisions, denied its applications for enforcement, and remanded the cases.

Held: The Board's definition of the work in controversy in this dispute was erroneous as a matter of law. Pp. 503–513.

(a) To constitute a lawful work preservation agreement, the agreement must have as its objective the preservation of work traditionally performed by employees represented by the union, and the contracting employer must have the power to give the employees the work in question. The first and most basic question is: What is the "work" that the agreement allegedly seeks to preserve? Cf. *NLRB* v. *Pipefitters*, 429 U. S. 507; *National Woodwork Manufacturers Assn.* v. *NLRB*, 386 U. S. 612. Pp. 504–505.

(b) Identification of the work at issue in a complex case of technological displacement requires a careful analysis of the traditional work patterns that the parties are allegedly seeking to preserve, and of how the agreement seeks to accomplish that result under the changed circumstances created by the technological advance. The inquiry must focus on the bargaining unit employees' work, not on the work of other employees who may be doing the same or similar work, and must examine the relationship between the work as it existed before the innovation and as the agreement proposes to preserve it. P. 507.

(c) The Board's conclusion that the "work in controversy" was the off-pier stuffing and stripping of containers erroneously focused on the work done by the employees of truckers and consolidators after the introduction of containerized shipping. That approach foreclosed, by definition, any possibility that the longshoremen could negotiate an agreement to permit them to play any part in the loading and unloading of containerized cargo. The Board's determination that the traditional work of ILA members was to load and unload ships should have been only the beginning of the analysis. The next step is to look at how the contracting parties sought to preserve that work, to the extent possible, in the face of a massive technological change that largely eliminated the need for cargo handling at intermediate stages of the intermodal transportation of goods, and to evaluate the relationship between traditional longshore work and the work which the Rules attempt to assign to ILA members. Pp. 507–510.

(d) Viewing the work allegedly to be preserved by the Rules from the proper perspective, the Board on remand will be free to determine

whether the Rules represent a lawful attempt to preserve traditional longshore work, or whether, instead, they are tactically calculated to satisfy union goals elsewhere. This determination must be informed by an awareness of the congressional preference for collective bargaining as the method for resolving disputes over dislocations caused by the introduction of technological innovations in the workplace, the question being not whether the Rules represent the most rational or efficient response to innovation, but whether they are a legally permissible effort to preserve jobs. If the Board finds that the Rules have a lawful work preservation objective, it must then consider the charging parties' contention that members of the employer organization did not have the right to control the stuffing and stripping of containers. Pp. 510–512.

198 U. S. App. D. C. 157, 613 F. 2d 890, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BRENNAN, WHITE, BLACKMUN, and POWELL, JJ., joined. BURGER, C. J., filed a dissenting opinion, in which STEWART, REHNQUIST, and STEVENS, JJ., joined, *post*, p. 522.

Deputy Solicitor General Wallace argued the cause for petitioner. With him on the briefs were *Solicitor General McCree, Stephen M. Shapiro, Robert E. Allen, Norton J. Come, Linda Sher,* and *Howard E. Perlstein. J. Alan Lips* argued the cause for Tidewater Motor Truck Association, respondent under this Court's Rule 21 (4), in support of petitioner. With him on the briefs was *Marshall T. Bohannon, Jr.*

Thomas W. Gleason argued the cause for respondent International Longshoremen's Association, AFL–CIO. With him on the brief were *Ernest L. Mathews, Jr.,* and *Andre Mazzola Mardon. Constantine P. Lambos* argued the cause for respondents New York Shipping Association, Inc., et al. With him on the brief were *Francis A. Scanlan, Alfred A. Giardino,* and *Donato Caruso. Carl W. Schwarz* and *Stephen P. Murphy* filed a brief for respondent Dolphin Forwarding, Inc. *Whiteford S. Blakeney* and *William L. Auten* filed a brief for respondent Houff Transfer, Inc.*

*Briefs of *amici curiae* urging reversal were filed by *Kenneth C. McGuiness, Robert E. Williams,* and *Daniel R. Levinson* for the Air Condi-

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This case presents the question whether provisions of the collective-bargaining agreement between the International Longshoremen's Association (ILA) and employer organizations in the shipping industry which were adopted in response to the technological innovation of containerized shipping are a lawful work preservation agreement. The National Labor Relations Board held that the provisions did not preserve traditional work opportunities for employees represented by the union, but sought instead to acquire work they had not previously performed; therefore, it concluded that the provisions violated § 8 (e) of the National Labor Relations Act, 29 U. S. C. § 158 (e), and union action to enforce them violated § 8 (b)(4)(B) of the Act, 29 U. S. C. § 158 (b)(4)(B). *International Longshoremen's Assn. (Dolphin Forwarding, Inc.)*, 236 N. L. R. B. 525 (1978); *International Longshoremen's Assn. (Associated Transport, Inc.)*, 231 N. L. R. B. 351 (1977). A divided panel of the United States Court of Appeals for the District of Columbia Circuit declined to enforce the Board's orders. 198 U. S. App. D. C. 157, 613 F. 2d 890 (1979). We granted certiorari, 444 U. S. 1042 (1980), to resolve a conflict among the Circuits on this important question of federal labor law.[1]

I

This controversy arises out of the collective-bargaining response of the ILA and the east coast shipping industry to

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tioning & Refrigeration Institute et al.; by *Nelson J. Conney, Kenneth E. Siegel, Robert A. Hirsch,* and *Alan J. Thiemann* for the American Trucking Associations, Inc.; and by *Raymond P. de Member* for the International Association of NVOCCS.

[1] A contrary result was reached in *International Longshoremen's Assn., Local 1575* v. *NLRB*, 560 F. 2d 439 (CA1 1977), and in *International Longshoremen's Assn.* v. *NLRB*, 537 F. 2d 706 (CA2 1976), cert. denied, 429 U. S. 1041 (1977). Cf. *Humphrey* v. *International Longshoremen's Assn.*, 548 F. 2d 494 (CA4 1977).

containerization, a technological innovation which has had such a profound effect on that industry that it has frequently been termed "the container revolution." [2] In the words of one observer, "containerization may be said to constitute the single most important innovation in ocean transport since the steamship displaced the schooner." [3]

A

Containers are large, reusable metal receptacles, ranging in length from 20 to 40 feet and capable of carrying upwards of 30,000 pounds of freight, which can be moved on and off an ocean vessel unopened. Container ships are specially designed and constructed to carry the containers, which are affixed to the hold. A container can also be attached to a truck chassis and transported intact to and from the pier like a conventional trailer.

The use of containers is substantially more economical than traditional methods of handling ocean-borne cargo.[4] Because cargo does not have to be handled and repacked as it moves from the warehouse by truck to the dock, into the vessel, then from the vessel to the dock and by truck or rail to its destination, the costs of handling are significantly reduced. Expenses of separate export packaging, storage, losses from pilferage and breakage, and costs of insurance and processing cargo documents may also be decreased. Perhaps most sig-

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[2] See, *e. g.*, Ullman, The Role of the American Ocean Freight Forwarder in Intermodal, Containerized Transportation, 2 J. Mar. L. & Comm. 625, 627 (1971); Schmeltzer & Peavy, Prospects and Problems of the Container Revolution, 1 J. Mar. L. & Comm. 203 (1970); Note, Containerization and Intermodal Service in Ocean Shipping, 21 Stan. L. Rev. 1077, 1078 (1969).

[3] Ross, Waterfront Labor Response to Technological Change: A Tale of Two Unions, 21 Lab. L. J. 397, 398 (1970).

[4] See Ross, *supra* n. 3, at 399–400; Schmeltzer & Peavy, *supra* n. 2, at 206–210; Note, *supra* n. 2, at 1087–1092.

nificantly, a container ship can be loaded or unloaded in a fraction of the time required for a conventional ship.[5] As a result, the unprofitable in-port time of each ship is reduced, and a smaller number of ships are needed to carry a given volume of cargo.[6]

Before the introduction of container ships, and as is still the case with conventional vessels, trucks delivered loose, or break-bulk, cargo to the head of the pier. The cargo was then transferred piece by piece from the truck's tailgate to the ship by longshoremen employed by steamship or stevedoring companies. The longshoremen checked the cargo, sorted it, placed it on pallets and moved it by forklift to the side of the ship, and lifted it by means of a sling or hook into the ship's hold.[7] The process was reversed for cargo taken off incoming ships. With the advent of containers, the amount of on-pier work involved in cargo handling has been drastically reduced, since the cargo need not be loaded and unloaded piece by piece. The amount of work available for longshoremen has been further reduced by the shipping companies' practice of making their containers available to ship-

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[5] See Ross, *supra* n. 3, at 399 (36-48 hours, compared to 7 or 8 days for conventional vessel); Schmeltzer & Peavy, *supra* n. 2, at 208 (8 hours compared to 3 days).

[6] See Note, *supra* n. 2, at 1088 (container ship spends 25% of its time in port, compared to 60% for conventional vessel).

[7] The longshore unit in the Port of New York was certified by the National Labor Relations Board as

"[a]ll longshore employees engaged in work pertaining to the rigging of ships, coaling of same, loading and unloading of cargoes, including mail, ships' stores and baggage, handling lines in connection with the docking and undocking of ships, including hatch bosses; cargo repairmen, checkers, clerks and timekeepers and their assistants, including head receiving and delivery clerks; general maintenance, mechanical and miscellaneous workers; horse and cattle fitters, grain ceilers, and marine carpenters, in the Port of Greater New York and vicinity. . . ." *Matter of New York Shipping Assn.*, 116 N. L. R. B. 1183, 1188 (1956) (footnote omitted).

pers and consolidators[8] for loading and unloading away from the pier.

Containerization, then, was a technological advance of great importance to the shipping industry which at the same time threatened the jobs of longshoremen by dramatically increasing their productivity.[9] As one might expect, the subject has been a hotly disputed topic of collective bargaining between the union and the employers.[10] We are concerned with the results of that collective-bargaining process as it affects the shipping industry in the Ports of New York, Baltimore, and Hampton Roads, Va.

B

It is necessary, in discussing the collective-bargaining agreements here at issue, to define certain industry terms of art

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[8] A freight consolidator combines the goods of various shippers into a single shipment at its own off-pier terminal and delivers the shipment to the pier. Ordinarily, consolidators operate no transportation of their own except for pickup and delivery equipment. They contract with carriers, such as truckers and steamship lines, for the actual transportation of the goods. See Comment, Intermodal Transportation and the Freight Forwarder, 76 Yale L. J. 1360, 1362 (1967). A consolidator who acts as a carrier by arranging for the transportation of goods from port to port is called a nonvessel operating common carrier by water (NVOCC), and is regulated by the Federal Maritime Commission. See Federal Maritime Commission, Preliminary Staff Report on Non-Vessel Operating Common Carriers by Water (Dec. 8, 1970); see generally Ullman, *supra* n. 2.

[9] See, *e. g.*, 198 U. S. App. D. C., at 159, 613 F. 2d, at 892; Ross, *supra* n. 3, at 400.

[10] The longshoremen involved in this dispute are represented by the ILA. Their employers, shipowners and stevedoring companies operating in the Ports of New York, Baltimore, and Hampton Roads, belong to several employers' organizations. These include the New York Shipping Association (NYSA), the Steamship Trade Association of Baltimore (STAB), and the Hampton Roads Shipping Association (HRSA). Since 1970, the Council of North Atlantic Shipping Associations (CONASA), a multiemployer bargaining association representing shipping associations including NYSA, STAB, and HRSA, has bargained with ILA on a master-contract basis.

pertaining to containerized cargo. Loading cargo into a container is called "stuffing"; unloading cargo from a container is called "stripping." Containers holding goods beneficially owned by one shipper or consignee are called full shippers' loads (FSL). Containers holding goods belonging to more than one shipper or consignee are called consolidated container loads. Such cargo is also called "less than trailer load" (LTL) or "less than container load" (LCL) cargo.

The first collective-bargaining agreement to contain a provision dealing with containerized shipping was the 1959 agreement between ILA and the New York Shipping Association (NYSA). At that time, containerization was in its infancy.[11] The provision in the 1959 agreement was prompted by a dispute over the use of Dravo containers, boxes eight cubic feet in size. See *International Longshoremen's Assn. (Consolidated Express, Inc.)*, 221 N. L. R. B. 956, 957 (1975), enf'd, 537 F. 2d 706 (CA2 1976), cert. denied, 429 U. S. 1041 (1977). The agreement recognized the right of NYSA members "to use any and all type [*sic*] of containers without restriction or stripping by the union." 221 N. L. R. B., at 957. In return, NYSA agreed to contribute royalty payments on "containers which are loaded or unloaded away from the pier by non-ILA labor." *Ibid.* The agreement also provided:

> "Any work performed in connection with the loading and discharging of containers for employer members of NYSA which is performed in the Port of Greater New York whether on piers or terminals controlled by them,

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[11] The first specially fitted container ship began operating in the late 1950's between New York and Puerto Rico. See App. 117. As late as 1966, the percentage of general cargo moved by containers in the Port of New York was only 3%. See Ross, *supra* n. 3, at 398. The first container ships did not appear in the Ports of Baltimore and Hampton Roads until 1965 and 1966. See 198 U. S. App. D. C., at 161, 613 F. 2d, at 894; *International Longshoremen's Assn. (Associated Transport, Inc.)*, 231 N. L. R. B. 351, 359 (1977).

or whether through direct contracting out, shall be performed by ILA labor at longshore rates." *Ibid.*

After the 1959 agreement was reached, the development of container shipping accelerated. In 1967, ILA demanded in collective-bargaining negotiations that longshoremen stuff and strip all containers crossing the piers. Following a lengthy strike, ILA and NYSA in 1969 adopted, as part of their 1968–1971 collective-bargaining agreement, the Rules on Containers (Rules). The terms of that master agreement were adopted by other ports on the North Atlantic coast, including Hampton Roads and Baltimore. The Rules were slightly modified in 1971, after another long strike. In 1973 ILA and the Council of North Atlantic Shipping Associations (CONASA) executed the "Dublin Supplement" as an "interpretive bulletin" to the Rules. The substance of the Dublin Supplement was incorporated in the version of the Rules contained in the 1974–1977 collective-bargaining agreement [12]

In essence, the Rules contained in the 1968 and 1971 agreements provided that if containers owned or leased by the shipping companies and carrying LTL or consolidated container loads were to be stuffed or stripped within the local port area (that is, within a geographical radius of 50 miles of the port) by anyone other than the employees of the beneficial owner of the cargo, that work must be done at the piers by ILA labor. The shipping companies were required to pay a royalty on containers that passed over the piers intact, as well as liquidated damages, presently set at $1,000 per container, for any container handled in violation of the Rules. The Dublin Supplement declared that the Rules applied to all containers, including those designated as FSL containers, which were stuffed or stripped in the local area by other than the beneficial owner's own employees. The Supplement also noted an exception for FSL containers warehoused locally for at least 30 days, and, as a method of enforcing the Rules,

[12] The 1974 Rules are reproduced in the appendix to this opinion.

prohibited the employers from releasing any of their containers to known consolidators with facilities located within 50 miles of the port.

Thus, under the final version of the Rules incorporated in the 1974 agreement, if containers owned or leased[13] by the shipping companies are to be stuffed or stripped locally by anyone other than the employees of the beneficial owner of the cargo, that work must be done at the piers by ILA labor. FSL containers that are transported intact to or from the beneficial owner or that are warehoused locally for 30 days, and consolidated containers coming from or bound for points outside the local area, do not have to be stuffed and stripped by ILA members. The practical effect of the Rules is that some 80% of containers pass over the piers intact. App. 612. The remaining 20% are stuffed and stripped by longshoremen, regardless of whether that work duplicates work done by non-ILA employees off-pier.

C

This case involves two proceedings before the National Labor Relations Board (Board) on charges that the Rules are illegal secondary activity in violation of federal labor law. The cases were consolidated on appeal. The *Dolphin* proceeding, 236 N. L. R. B. 525 (1978), concerns the application

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[13] The 1968 and 1971 versions of the Rules referred only to containers "owned or leased" by the employers, see App. 237, 238, 247, 272, 273. The 1974 agreement refers to containers "owned, leased or used by carriers." See *id.*, at 255, 279. There is nothing in the record to indicate that the fines which led to the unfair labor practice charges before us were imposed for infractions relating to containers which were not owned or leased by CONASA members. Therefore we, like the Board and the Court of Appeals, assume that the Rules have application only to containers that belong to the contracting employers. See 198 U. S. App. D. C., at 179, 613 F. 2d, at 912; 236 N. L. R. B., at 526; 231 N. L. R. B., at 359; *International Longshoremen's Assn.* (*Consolidated Express, Inc.*), 221 N. L. R. B. 956, 958, 959 (1975); but see 231 N. L. R. B., at 353, n. 3 (Fanning, Chairman, dissenting).

of the provisions on LCL cargo to containers used by consolidators operating within 50 miles of the Port of New York. The *Associated Transport* proceeding, 231 N. L. R. B. 351 (1977), concerns the application of the Rules to FSL containers whose cargo was transferred by truckers to their own trucks within 50 miles of the Ports of Baltimore and Hampton Roads. The affected truckers and consolidators filed unfair labor practice charges with the Board, alleging that the Rules constituted a "hot cargo" agreement in violation of § 8 (e) of the National Labor Relations Act (Act) and that the activities of the parties to the agreement in enforcing its terms were an illegal secondary boycott prohibited by § 8 (b)(4)(B) of the Act.

The facts underlying the charges may be briefly stated. Dolphin Forwarding, Inc. (Dolphin), and San Juan Freight Forwarding, Inc. (San Juan), were NVOCC consolidators, see n. 8, *supra*, soliciting business from shippers throughout the United States who wished to transport LCL cargo between New York and Puerto Rico.[14] Dolphin and San Juan received their customers' goods at their off-pier facilities, located within 50 miles of the Port of New York. Using subcontracted non-ILA labor, they consolidated the goods of two or more shippers, stuffed them into containers provided by members of NYSA, and had the filled containers trucked to the pier to be loaded onto ships by longshoremen.[15] As a result of these practices, the NYSA members who had supplied their containers to the consolidators were assessed liquidated damages of approximately $47,000. Those carriers then

[14] Dolphin has since ceased doing business in New York.

[15] Dolphin began such operations several years before the adoption of the Rules. The NYSA members contended that they supplied containers to Dolphin only because it listed Massachusetts as the point of origin for the containers rather than the actual facility within the port area. San Juan was established in 1972, several years after the Rules were first adopted. It apparently listed Chicago as the point of origin of containers it shipped. 198 U. S. App. D. C., at 166, 613 F. 2d, at 899.

informed Dolphin and San Juan that they would no longer furnish them with containers. Thereupon, Dolphin and San Juan filed unfair labor practice charges with the Board.

Houff Transport, Inc. (Houff), and Associated Transport, Inc. (Associated),[16] were Interstate Commerce Commission-licensed common carriers who operated motor freight terminals within 50 miles of the Ports of Baltimore and Hampton Roads. Since the advent of containerization, they had transported FSL container loads to consignees both within and beyond the 50-mile radius, and routinely stripped such FSL containers and restuffed the cargo into their own vehicles for reasons of economy, safety, or state highway or bridge regulations.

The practice of using non-ILA labor to strip and restuff FSL cargo within the 50-mile radius is known as shortstopping. Although the Rules, prior to the Dublin Supplement, did not expressly discuss FSL cargo, see App. 235–250, 270–276, the ILA and the shipping companies apparently regarded shortstopping as an infraction, see 198 U. S. App. D. C., at 162, 613 F. 2d, at 895; 231 N. L. R. B., at 355 (Fanning, Chairman, dissenting). The Dublin Supplement, and subsequent versions of the Rules, provided that ILA labor must handle all FSL containers that otherwise would be handled within the local area by other than the consignee's own employees, except for FSL cargo consigned to the beneficial owner's place of business or warehoused for 30 days within the port area.

After the new Rules became effective, Houff and Associated shortstopped containers picked up from CONASA members. The shipping companies were assessed liquidated damages for each such container. When Houff and Associated refused to indemnify them for the fines, the shipping companies canceled their interchange agreements. Houff, Associated, and the Tidewater Motor Truck Association (TMTA), an asso-

[16] Associated is no longer in business.

ciation of which Associated was a member, filed unfair labor practice charges.

In holding that the charges were substantiated in both the *Dolphin* and *Associated Transport* proceedings, the Board relied on its previous decision in *International Longshoremen's Assn. (Consolidated Express, Inc.)*, 221 N. L. R. B. 956 (1975), enf'd, 537 F. 2d 706 (CA2 1976), cert. denied, 429 U. S. 1041 (1977) (hereinafter *Conex*).[17] In *Conex*, the Board held that the traditional work of longshoremen has been to load and unload ships at the pier. As the Board explained in the *Dolphin* proceeding, *Conex*

> "held that the Rules were not valid work-preservation clauses in that traditionally the off-pier stuffing and stripping of containers was performed by consolidating companies and not longshoremen. Since the work was not traditional longshore work and had never been performed by longshoremen, the Rules which required the shipping companies to stop doing business with consolidators did not have a lawful work-preservation object." 236 N. L. R. B., at 526.

Similarly, in the *Associated Transport* proceeding the Board affirmed the Administrative Law Judge's (ALJ) finding of an unfair labor practice because longshoremen "had *not* historically done the work" of stripping FSL containers away from the pier. 231 N. L. R. B., at 353 (emphasis in original).

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[17] The Rules were first litigated in 1970 when the United States Court of Appeals for the Second Circuit rejected a claim that their enforcement violated the antitrust laws. The Court of Appeals held that the Rules came under the labor exemption. *Intercontinental Container Transport Corp.* v. *New York Shipping Assn.*, 426 F. 2d 884 (1970). The plaintiff in the antitrust proceeding also initiated related unfair labor practice proceedings before the Board by filing unfair labor practice charges alleging violations of §§ 8 (e) and 8 (b)(4)(B). The Regional Director's dismissal of the charges, on the ground that the Rules were a valid work preservation agreement, was affirmed on appeal by the Board's General Counsel. App. 621.

In short, in the Board's view the Rules sought to acquire for ILA members work that had historically been performed not by longshoremen but by employees of consolidators and truckers. Therefore the Rules had a secondary objective forbidden by the Act.

ILA and CONASA appealed to the Court of Appeals, and the Board cross-applied for enforcement of its orders.[18] The cases were consolidated. A divided panel of the Court of Appeals refused enforcement, holding that the Board had erred as a matter of law in defining the work in controversy. It therefore vacated the Board's decisions, denied its applications for enforcement, and remanded the cases for further proceedings. We affirm.

II

Section 8 (b)(4)(B) of the Act[19] prohibits unions and their agents from engaging in secondary activities whose object is to force one employer to cease doing business with another. Section 8 (e)[20] makes unlawful those collective-

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[18] Houff intervened on appeal, and TMTA and Dolphin were permitted to intervene after the Court of Appeals issued its decision.

[19] Section 8 (b), as set forth in 29 U. S. C. § 158 (b), provides in pertinent part:

"It shall be an unfair labor practice for a labor organization or its agents—

. . . . .

"(4) (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where . . . an object thereof is—

. . . . .

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful . . . any primary strike or primary picketing. . . ."

[20] Section 8 (e), as set forth in 29 U. S. C. § 158 (e), provides in pertinent part:

"It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied,

bargaining agreements in which the employer agrees to cease doing business with any other person. Although § 8 (e) does not in terms distinguish between primary and secondary activity, we have held that, as in § 8 (b)(4)(B), Congress intended to reach only agreements with secondary objectives. See *NLRB* v. *Pipefitters*, 429 U. S. 507, 517 (1977) (hereinafter *Pipefitters*); *National Woodwork Manufacturers Assn.* v. *NLRB*, 386 U. S. 612, 620, 635 (1967) (hereinafter *National Woodwork*).

Among the primary purposes protected by the Act is "the purpose of preserving for the contracting employees themselves work traditionally done by them." *Pipefitters, supra,* at 517. Whether an agreement is a lawful work preservation agreement depends on "whether, under all the surrounding circumstances, the Union's objective was preservation of work for [bargaining unit] employees, or whether the [agreement was] tactically calculated to satisfy union objectives elsewhere. . . . The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-à-vis* his own employees." *National Woodwork, supra,* at 644–645 (footnotes omitted). Under this approach, a lawful work preservation agreement must pass two tests: First, it must have as its objective the preservation of work traditionally performed by employees represented by the union. Second, the contracting employer must have the power to give the employees the work in question—the so-called "right of control" test of *Pipefitters, supra.* The rationale of the second test is that if the contracting employer has no power to assign the work, it is reasonable to infer that the agreement has a secondary objec-

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whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void. . . ."

tive, that is, to influence whoever does have such power over the work. "Were the latter the case, [the contracting employer] would be a neutral bystander, and the agreement or boycott would, within the intent of Congress, become secondary." *National Woodwork, supra,* at 644–645.

In applying the work preservation doctrine, the first and most basic question is: What is the "work" that the agreement allegedly seeks to preserve? Sometimes the process of identifying the work at issue will require no subtle analysis. In *National Woodwork,* for example, the agreement preserved for the carpenters employed by a general contractor the work of fitting all doors installed on the jobsite. This was work they had always done, and the method the parties chose to preserve the carpenters' right to that work was simply to prohibit the employer from purchasing any doors that had been prefitted by any other employees. That the provision incidentally required the employer to boycott all prefitted doors was of no consequence to the validity of the agreement. See *Pipefitters, supra,* at 510, 526.

But in many cases it is not so easy to find the starting point of the analysis. Work preservation agreements typically come into being when employees' traditional work is displaced, or threatened with displacement, by technological innovation. The national labor policy expresses a preference for addressing "the threats to workers posed by increased technology and automation" by means of "labor-management agreements to ease these effects through collective bargaining on this most vital problem created by advanced technology." *National Woodwork, supra,* at 641, 642. In many instances, technological innovation may change the method of doing the work, instead of merely shifting the same work to a different location. One way to preserve the work of the employees represented by the union in the face of such a change is simply to insist that the innovation not be adopted and that the work continue to be done in the traditional way.

The union in *National Woodwork* followed this tactic and negotiated an agreement in which the employer agreed not to use prefabricated materials. We held that agreement was lawful under §§ 8 (e) and 8 (b)(4)(B). But the protection Congress afforded to work preservation agreements cannot be limited solely to employees who respond to change with intransigence. Congress, in enacting § 8 (e), did not intend to protect only certain kinds of work preservation agreements; rather, it "had no thought of prohibiting agreements directed to work preservation," *National Woodwork, supra,* at 640. The work preservation doctrine, then, must also apply to situations where unions attempt to accommodate change while preserving as much of their traditional work patterns as possible.[21] When this is the case the inquiry must be more refined and the analysis more discriminating.

The Board held that " '[t]he traditional work of the longshoremen represented by ILA has been to load and unload ships. When necessary to perform their loading and unloading work, longshoremen have been required to stuff and strip containers on the piers.' " 231 N. L R. B., at 364 (decision of ALJ, adopted by the Board), quoting 221 N. L. R. B., at 959 (*Conex*); see 236 N. L. R. B., at 526. The Board then determined that the work in controversy was "the off-pier stuffing and stripping of containers," *ibid.;* see 231 N. L. R. B., at 364–365. Similarly, in *Conex* the Board stated: "It is clear from the record that the work in controversy here is the LCL and LTL container work performed by [the charging parties] at their own off-pier premises." 221 N. L. R. B., at 959. Because ILA members had never performed such work, the Board concluded that the Rules were an illegal attempt to reach out and acquire work that was not within the union's traditional work jurisdiction and which its members had never performed. We agree with the Court of Appeals that this

[21] See Comment, Work Recapture Agreements and Secondary Boycotts: *ILA* v. *NLRB* (*Consolidated Express, Inc.*), 90 Harv. L. Rev. 815 (1977).

approach to defining the work at issue was incorrect as a matter of law.

The Board's approach reflects a fundamental misconception of the work preservation doctrine as it has been applied in our previous cases. Identification of the work at issue in a complex case of technological displacement requires a careful analysis of the traditional work patterns that the parties are allegedly seeking to preserve, and of how the agreement seeks to accomplish that result under the changed circumstances created by the technological advance. The analysis must take into account "all the surrounding circumstances," *National Woodwork*, 386 U. S., at 644, including the nature of the work both before and after the innovation. In a relatively simple case, such as *National Woodwork* or *Pipefitters*, the inquiry may be of rather limited scope. Other, more complex cases will require a broader view, taking into account the transformation of several interrelated industries or types of work; this is such a case. Whatever its scope, however, the inquiry must be carefully focused: to determine whether an agreement seeks no more than to preserve the work of bargaining unit members, the Board must focus on the work of the bargaining unit employees, not on the work of other employees who may be doing the same or similar work,[22] and examine the relationship between the work as it existed before the innovation and as the agreement proposes to preserve it.

The Board, by contrast, focused on the work done by the employees of the charging parties, the truckers and consolidators, after the introduction of containerized shipping. It found that work was similar to work those employees had done before the innovation, and concluded that ILA was

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[22] The effect of work preservation agreements on the employment opportunities of employees not represented by the union, no matter how severe, is of course irrelevant to the validity of the agreement so long as the union had no forbidden secondary purpose to affect the employment relations of the neutral employer. See *Pipefitters*, 429 U. S., at 510, 526.

trying to acquire the traditional work of those employees. That conclusion ignores the fact that the impact of containerization occurred at the interface between ocean and motor transport; not surprisingly, the work of stuffing and stripping containers is similar to work previously done by both longshoremen and truckers. The Board's approach would have been entirely appropriate in considering an agreement to preserve the work of truckers' employees, but it misses the point when applied to judge this contract between the ILA and the shipowner employers.

By focusing on the work as performed after the innovation took place, by the employees who allegedly have displaced the longshoremen's work, the Board foreclosed—by definition—any possibility that the longshoremen could negotiate an agreement to permit them to continue to play any part in the loading or unloading of containerized cargo. For the very reason the Rules were negotiated was that longshoremen do not perform that work away from the pier, and never have. Thus it is apparent that under the Board's approach, in the words of the Court of Appeals, the "work preservation doctrine is sapped of all life." 198 U. S. App. D. C., at 176, 613 F. 2d, at 909.

That this is so is vividly demonstrated by considering how different would have been the results in *National Woodwork* and *Pipefitters* if we had adopted the approach now chosen by the Board. In *National Woodwork* we held that carpenters could seek to preserve their traditional work of finishing blank doors at the construction jobsite by prohibiting the employer, a general contractor, from purchasing prefinished doors from the factory. If we had followed the Board's current approach in analyzing the agreement, we would have defined the work in controversy as "the finishing of blank doors away from the construction site." That work, of course, had never been done by the carpenters employed by the general contractor, but had been performed by the employees of

the door manufacturers since before the adoption of the agreement. We would perforce have determined that the object of the agreement was work acquisition, not work preservation.

Similarly, *Pipefitters* involved an agreement between a subcontractor and a pipefitters' union that pipe threading and cutting were to be performed on the jobsite. Relying on the agreement, the union refused to install climate-control units whose internal piping had been cut, threaded, and installed at the factory. The Board held that the provision was a lawful work preservation agreement, but that the refusal to handle the prepiped units was an unfair labor practice because the units had been specified by the general contractor and the subcontractor had no power to assign the employees the work they sought. Neither the Court of Appeals nor this Court questioned the validity of the work preservation clause but for the fact that it was enforced against an employer who could not control the work. Under the Board's current approach, however, the "work" would have been "cutting, threading, and installing pipe in climate-control units at the factory." Since the bargaining unit employees had never performed that work, there would have been no reason to reach the "right of control" issue.

Thus the Board's determination that the work of longshoremen has historically been the loading and unloading of ships should be only the beginning of the analysis. The next step is to look at how the contracting parties sought to preserve that work, to the extent possible, in the face of a massive technological change that largely eliminated the need for cargo handling at intermediate stages of the intermodal transportation of goods, and to evaluate the relationship between traditional longshore work and the work which the Rules attempt to assign to ILA members.[23] This case pre-

[23] We need hardly add that the analysis is not, as the parties have sometimes seemed to suggest, simply a matter of deciding whether a con-

sents a much more difficult problem than either *National Woodwork* or *Pipefitters* because the union did not simply insist on doing the work as it had always been done and try to prevent the employers from using container ships at all—though such an approach would have been consistent with *National Woodwork* and *Pipefitters*. Instead, ILA permitted the great majority of containers to pass over the piers intact, reserving the right to stuff and strip only those containers that would otherwise have been stuffed or stripped locally by anyone except the beneficial owner's employees. The legality of the agreement turns, as an initial matter, on whether the historical and functional relationship between this retained work and traditional longshore work can support the conclusion that the objective of the agreement was work preservation rather than the satisfaction of union goals elsewhere.[24]

Respondents assert that the stuffing and stripping reserved for the ILA by the Rules is functionally equivalent to their former work of handling break-bulk cargo at the pier.[25] Petitioners-intervenors, on the other hand, argue that containerization has worked such fundamental changes in the industry that the work formerly done at the pier by both longshore-

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tainer is more like the hold of a ship or more like a big box. The usefulness of a container lies precisely in the fact that it may function as an integral part of the hold while it is aboard a vessel, as a trailer when it is transported by truck, and as part of a railroad car when it is carried by rail.

[24] Obviously, the result will depend on how closely the parties have tailored their agreement to the objective of preserving the essence of the traditional work patterns. Thus the claim that if the Rules are upheld the union would be able to follow containers around the country and assert the right to stuff and strip them far inland is groundless. That work would bear an entirely different relation to traditional longshore work, and would require a wholly different analysis.

[25] They contend that there is no significant economic advantage to be gained from containerization over break-bulk handling at the pier when the stuffing and stripping is to be done locally.

men and employees of motor carriers has been completely eliminated.

These questions are not appropriate for initial consideration by reviewing courts. They are properly raised before the Board, whose determinations are, of course, entitled to deference. Since the Board has not had an opportunity to consider these questions in relation to a proper understanding of the work at issue, we will not address them here. We emphasize that neither our decision nor that of the Court of Appeals implies that the result of the Board's reconsideration of this case is foreordained.[26] Viewing the work allegedly to be preserved by the Rules from the proper perspective, the Board will be free to determine whether the Rules represent a lawful attempt to preserve traditional longshore work, or whether, instead, they are "tactically calculated to satisfy union objectives elsewhere," *National Woodwork*, 386 U. S., at 644. This determination will, of course, be informed by an awareness of the congressional preference for collective bargaining as the method for resolving disputes over dislocations caused by the introduction of technological innovations in the workplace, see *id.*, at 641–642. Thus, in judging the legality of a thoroughly bargained and apparently reasonable accommodation to technological change, the question is not whether the Rules represent the most rational or efficient response to innovation, but whether they are a legally permissible effort to preserve jobs.

If the Board finds, on remand, that the Rules have a lawful work preservation objective, it will then, of course, be obliged

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[26] The dissenting opinion of THE CHIEF JUSTICE proceeds on the assumption that we decide today the proper definition of the work in controversy, see *post*, at 528, and hold that the Rules are a lawful work preservation agreement, see *post*, at 525, 528–529. Our holding, we repeat, is that the Board's definition of the work in controversy was erroneous as a matter of law. The question whether the Rules may be sustained under a proper understanding of the work preservation doctrine must be answered first by the Board on remand.

to consider the charging parties' contention that CONASA members did not have the right to control the stuffing and stripping of containers. Because the Board held that the agreement was directed at work acquisition, rather than work preservation, it did not decide the right-to-control issue in this case. That issue remains open on remand. Therefore, and because the arguments of the parties were necessarily addressed to an erroneous conception of the work whose control was disputed,[27] any discussion of that issue here would be premature. Respondents have also argued that the employers, as common carriers who are subject to Government regulation and to the provisions of their own tariffs, shippers' bills of lading, and intermodal interchange agreements with motor carriers, have no legal right to withhold containers or container services from their customers on a selective basis, to condition access to the containers on compliance with the Rules, to seek indemnification from their customers for fines imposed under the Rules, or to enforce the Rules after the containers have been released to motor carriers. See, *e. g.*, Shipping Act, 1916, 46 U. S. C. § 801 *et seq.*; Intercoastal Shipping Act, 1933, 46 U. S. C. § 843 *et seq.*; *Sea-Land Service, Inc.—Proposed ILA Rules on Containers*, 20 F. M. C. 788 (1978), review pending, No. 78–1776 (CADC). These contentions present difficult and complex problems which are not properly before us.

We conclude that the Court of Appeals correctly held that the Board's definition of the work in controversy in this dispute was erroneous as a matter of law, and we therefore affirm the Court of Appeals' judgment vacating the Board's decisions.

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[27] It is plain that the outcome of the right-to-control test will be significantly affected by whether the work in controversy is viewed as the stuffing and stripping done at the off-pier facilities of truckers and consolidators by their own employees or as, for example, the stuffing and stripping of certain types of cargo from containers owned or leased by and in the possession and control of the shipping companies.

denying the applications for enforcement, and remanding to the Board for further proceedings.

It is so ordered.

APPENDIX TO OPINION OF THE COURT

1974 Rules on Containers

CONASA–ILA RULES ON CONTAINERS

PREAMBLE

This Agreement made and entered into by and between the carrier and direct employer members of the CONASA Port Associations (hereinafter referred to collectively as "CONASA") and the International Longshoremen's Association, AFL–CIO ("ILA"), its Atlantic Coast District ("ACD") and its affiliated local unions in each CONASA port ("locals") covers all container work at a waterfront facility which includes but is not limited to the receiving and delivery of cargo, the loading and discharging of said cargo into and out of containers, the maintenance of containers, and the loading and discharging of containers on and off ships.

CONASA agrees that it will not directly perform work done on a container waterfront facility (as hereinafter defined) or contract out such work which historically and regularly has been and currently is performed by employees covered by CONASA–ILA Agreements, including CONASA–ILA craft agreements, unless such work on such container waterfront facility is performed by employees covered by CONASA–ILA Agreements.

RULES

The following provisions are intended to protect and preserve the work jurisdiction of longshoremen and all other ILA crafts which was performed at deepsea waterfront facilities. These rules do not have any effect on work which historically was not performed at a waterfront facility by deepsea ILA labor. To assure compliance with the collec-

tive bargaining provisions, the following rules and regulations shall be applied uniformly in all CONASA Ports to all imports or export cargo in containers:

Definitions

(a) Loading a Container—means the act of placing cargo into a container.

(b) Discharging a Container—means the act of removing cargo from a container.

(c) Loading Containers on a vessel—means the act of placing containers aboard a vessel.

(d) Discharging Containers from a vessel—means the act of removing containers from a vessel.

(e) Waterfront facility—means a pier or dock where vessels are normally worked including a container compound operated by a carrier or direct employer.

(f) Qualified Shipper—means the manufacturer or seller having a proprietary financial interest (other than in the transportation or physical consolidation or deconsolidation) in the export cargo being transported and who is named in the dock/cargo receipt.

(g) Qualified Consignee—means the purchaser or one who otherwise has a proprietary financial interest (other than in the transportation or physical consolidation or deconsolidation) in the import cargo being transported and who is named in the delivery order.

(h) Consolidated Container Load—means a container load of cargo where such cargo belongs to more than one shipper on export cargo or one consignee on import cargo.

Rule 1—Containers To Be Loaded or Discharged by Deepsea ILA Labor

(a) Cargo in containers referred to below shall be loaded into or discharged out of containers only at a waterfront facility by deepsea ILA labor:

(1) Containers owned, leased or used by carriers (including containers on wheels and trailers), hereinafter

"containers", which contain consolidated container loads, which come from or go to any point within a geographic area of any CONASA port described by a 50-mile circle with its radius extending out from the center of each port (hereinafter "geographic area") or

(2) Containers which come from a single shipper which is not the manufacturer ("manufacturer's label") into which the cargo has been loaded (consolidated) by other than its own employees and such containers come from any point within the "geographical area," or

(3) Containers designated for a single consignee from which the cargo is discharged (deconsolidated) by other than its own employees within the "geographic area" and which is not warehoused in accordance with Rule 2 (b).

(b) Such ILA labor shall be paid and employed at deep-sea longshore rates under the terms and conditions of the deep-sea ILA labor agreement in each CONASA port, including the provisions for all fringe benefits and any and all other benefits receivable by deep-sea ILA craft workers in each such Port. No cargo shall be loaded into or discharged out of any container by ILA deep-sea labor more than once.

(c) All export consolidated cargo, described in 1 (a)(1) and (2) above, shall be received at the waterfront facility by deep-sea ILA labor and such cargo shall be loaded into a container at the waterfront facility for loading aboard ship.

(d) All import consolidated cargo, described in 1 (a)(1) and (3) above, shall be discharged from the container and the cargo placed on the waterfront facility where it will be delivered and picked up by each consignee.

(e) No carrier or direct employee shall supply its containers to any consolidator or de-consolidator. No carrier or direct employer shall operate a facility in violation of the Rules on Containers which specifically require that all Rule 1 Containers be loaded or discharged at a waterfront facility.

Rule 2—Containers Not to be Loaded or Discharged by ILA Labor

Cargo in containers referred to below shall not be loaded or discharged by ILA labor:

A. Export Cargo:

(1) All cargo loaded in containers outside the "geographic area".

(2) Containers loaded with cargo at a qualified shipper's facility with its own employees.

(3) Containers loaded with the cargo of a single manufacturer (manufacturer's label).

(4) Consolidated container loads of mail, household effects of a person who is relocating his place of residence, with no other type of cargo in the container, or personal effects of military personnel.

B. Import Cargo:

(1) All cargo discharged from containers outside the "geographic area".

(2) Containers discharged at a qualified consignee's facility by its own employees.

(3) Consolidated container loads of mail, household effects of a person who is relocating his place of business, with no other type of cargo in the container, or personal effects of military personnel.

(4) Containers of a qualified consignee discharged at a bona fide public warehouse within the "geographic area" which comply with all of the following conditions.

1. The container cargo is warehoused at a bona fide public warehouse.

2. The qualified consignee pays the normal labor charges in and out; and the normal warehouse storage fees for a minimum period of thirty or more days, and;

3. The cargo being warehoused (a) in the normal course of the business of the qualified consignee; (b) title to

such goods has not been transferred from the qualified consignee to another.

The carrier on request will furnish all documentation and other information which permits the Container Committee in the port to determine whether conditions 1, 2 and 3 have been met. This exception shall not apply where cargo is warehoused for the purpose of avoidance or evasion of Rule 1. It is limited to containers warehoused as provided in the above conditions and any warehouse which does not conform to such conditions shall be deemed a consolidator or deconsolidator.

Rule 3—Batching

When an employer-member or carrier uses a trucker to remove or deliver containers in batches, or in substantial number, from or to a terminal to another place of rest (outside of its terminal) where containers are stored pending their delivery to a consignee (or after being received from a shipper and while waiting the arrival of a ship), for the purpose of reducing the work jurisdiction of the ILA or any of its crafts, such use is deemed to be batching and an evasion of these Rules in violation of the CONASA–ILA contract.

Rule 4—Headload

Where a single qualified shipper sends an export container which contains all of his own cargo to a waterfront facility and such container is not full, the carrier or direct employer may load this container with additional cargo at the waterfront facility. On import cargo, the carrier or direct employer may discharge any such additional cargo and send the remaining cargo in the container to the qualified consignee. The loading or discharging of cargo at ILA ports shall be performed at a waterfront facility by deepsea ILA labor.

Rule 5—Overland Movement of Containers from CONASA Port to Non-CONASA Port

If a carrier moves containers from a CONASA Port to a non-CONASA Port for the purpose of evading the Rules on Containers, the carrier is in violation of the CONASA–ILA Agreement. If the cargo is being moved to a non-CONASA–ILA Port in the normal course of business, and not for the purpose of evasion, then such movement is not a violation.

Rule 6—Importers Advertising Evasion of Rules

The circulation, in writing, by importers of methods developed by them to evade the Rules on Containers by issuing single bills of lading on what are in fact consolidated container loads shall be deemed a violation and all CONASA–ILA Container Committees shall be advised to stop such evasion at the waterfront facilities.

Rule 7—No Avoidance or Evasion

The above rules are intended to be fairly and reasonably applied by the parties. To obtain non-discriminatory and fair implementation of the above, the following principles shall apply:

(a) Geographic Area—Agreement in the Port to the geographic area as provided in Rule 1 is based on present consolidated movement patterns in the port. Should any person, firm or corporation for the purpose of evading the provisions of the Rules on Containers, seek to change such pattern by shifting its operations to, or commencing new operations at, a point outside said agreed upon geographic area, then either party may raise the question whether said point should be included within the said geographic area, and upon agreement that the purpose of the shift in its operations was to evade the provisions of the Rules on Containers, then said point shall be deemed to be within the said geographic area for the purpose of these rules.

(b) Containers Owned, Leased or Used—Containers owned, leased or used by companies which are affiliated either directly or through a holding company with a carrier or a direct employer shall be deemed to be containers owned, leased or used by a carrier or direct employer. Affiliation shall include subsidiaries and/or affiliates which are effectively controlled by the carrier or direct employer, its parent, or stockholders of either of them.

(c) Liquidated Damages—Failure to load or discharge a container as required under these rules will be considered a violation of the contract between the parties. Use of improper, fictitious or incorrect documentation to evade the provisions of Rule 1 and Rule 2 shall also be considered a violation of the contract. If for any reason a container is no longer at the waterfront facility at which it should have been loaded or discharged under the Rules, then the carrier or its agent or direct employer shall pay, to the joint Container Royalty Fund, liquidated damages of $1,000 per container which should have been loaded or discharged. If any carrier does not pay liquidated damages within 30 days after exhausting its right to appeal the imposition of liquidated damages to the Committee provided in Rule 9 (a) below, the ILA shall have the right to stop working such carrier's containers until such damages are paid.

(d) Any facility operated in violation of the Container Rules will not have service supplied to it by any direct employer and the ILA will not supply labor to such facility.

Rule 8—Renegotiation and Cancellation—No Arbitration

These Rules shall be in effect for the term of the CONASA–ILA Agreement, provided, however, that either party shall have the right to cancel the Rules on Containers at any time on or after December 1, 1974, on thirty (30) days written

notice of a desire to renegotiate the provisions of these Rules. Negotiations shall be held during such thirty (30) day period and if the parties are unable to agree by the end of such period, these Rules shall be deemed cancelled Thereafter, the ILA shall have the right to refuse to handle containers and CONASA shall have the right to refuse to hire employees under the said Rules. The negotiations referred to above shall, under no condition, be subject to the grievance or arbitration provisions of any CONASA–ILA Agreement.

Rule 9—Enforcement of the Rules on Containers

To assure effective, fair and non-discriminatory enforcement of the above Rules, the following regulations shall apply:

(a) A Committee in each CONASA port represented equally by management and union shall be formed and shall have the responsibility and power to hear and pass judgment on any violations of these Rules. Any inability to agree shall be processed as a grievance under the applicable contract except as limited by Rule 8 hereof. A joint committee, known as the CONASA–ILA Container Committee, represented equally by management and labor and made up of representatives (to be mutually agreed upon) from each CONASA Port, namely, Boston, Rhode Island, New York, Philadelphia, Baltimore and Hampton Roads shall meet at least quarterly each year for the purpose of insuring uniformity in the interpretation of these Rules.

(b) A Committee of carriers, together with CONASA–ILA Container Committee will develop uniform documentation which shall be required to be prepared and maintained by all carriers in order to readily identify all Rule 1 containers which are subject to loading or discharging by deepsea ILA labor. It shall be the obligation of employer-members to clearly mark each con-

tainer's documentation as to whether or not it is a Rule 1 container, which shall be loaded or discharged. If a container's documentation is not clearly marked, it shall be deemed a Rule 1 container and it shall be loaded or discharged by deepsea ILA labor at the waterfront facility. With respect to all containers received at or delivered from the waterfront facility, a record of the same shall be made by ILA Checkers or Clerks. All carriers will distribute to all other carriers any and all information and devices which are being used by any person to circumvent the Rules on Containers. Any carrier whose attention is brought to a violation of the Rules shall immediately cease such violation and report the matter to the appropriate CONASA–ILA Container Committee and to the policing agency provided in (e) below in its port.

(c) Every import container destined to a point within 50-miles of a CONASA Port shall be delivered only on a delivery order. Every export container coming from a point within 50-miles of a CONASA Port shall be received only on a dock/cargo receipt. Such delivery orders and dock/cargo receipts shall certify the place of delivery and origin of the container, the name or names of the person to whom the cargo is being delivered and from which it is shipped, the identity of the owner of the cargo, weight of the cargo, identity of the cargo and the origin and final destination of the container. Copies of such delivery orders and dock/cargo receipts shall be available to the local port Container Committee and the policing agency provided for in (e) below.

(d) The Container Committee in each CONASA Port shall promulgate to all carriers and direct employers, and to the Container Committees in each CONASA Port, any and all interpretations of the Rules on Containers as and when they are made. This will include uni-

form interpretations as and when they are issued. The CONASA–ILA Container Committee shall also promulgate uniform interpretations to local port Container Committees, as and when they are issued.

(e) Policing Agency—Each CONASA Port shall establish a method of policing and enforcing these Rules on a uniform and non-discriminatory basis. No such method shall be implemented until presented to and approved by the joint CONASA–ILA Container Committee.

Rule 10—Container Royalty Payments

The two Container Royalty payments required by the CONASA–ILA collective bargaining agreements shall be payable only once in the Continental United States. They shall be paid in that ILA Port where the container is first handled by ILA longshore labor at longshore rates. The second container royalty payment (provided by paragraph 6 of the 1971–1974 CONASA–ILA Memorandum of Agreement) shall be continued and shall be used for fringe benefit purposes only, other than supplemental cash benefits, which purposes are to be determined locally on a port by port basis. Containers originating at a foreign port which are transshipped at a United States port for ultimate destination to another foreign port ("foreign sea-to-foreign-sea containers") are exempt from the payment of container royalties.

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE STEWART, MR. JUSTICE REHNQUIST, and MR. JUSTICE STEVENS join, dissenting.

This case turns on the definition of the work in controversy. If viewed exclusively from the perspective of the ILA, without regard to other aspects of the transportation industry or to the evolutionary changes in methods of doing business, the work can be characterized broadly as the loading and unloading of vessels; that gives the contract Rules on Containers a plausible work preservation objective sufficient to escape what

would otherwise be a violation of § 8 (e) of the National Labor Relations Act. If viewed from the perspective of the consolidators and motor carriers—many of whose employees are also union members—the objective is not preservation of traditional longshoremen's work but a claim to work historically and traditionally performed by teamsters, truckers, and similar inland laborers. Which of these perspectives is chosen in turn depends on the view taken of the nature and function of a "container."

This is where the Court's analysis runs astray. To the Court, the work-in-controversy problem in the instant case is simply analogous to that involved in *National Woodwork Manufacturers Assn.* v. *NLRB*, 386 U. S. 612 (1967), or *NLRB* v. *Pipefitters*, 429 U. S. 507 (1977), although the Court disclaims this. Compare *ante*, 508–509 with 509–510. But viewing the work in controversy, as we should, "under all the surrounding circumstances," *National Woodwork, supra*, at 644, the Court's analysis simply will not "wash." A door may be a door in the carpenter's world, and a pipe may be a pipe to the plumber, but a "container" can be seen as sometimes like the hold of a ship, sometimes like the trailer of a truck—and sometimes an independent component.

Because of the many functions of a container, it affects both sea and land transportation systems. The Court apparently recognizes the complexities involved, see *ante*, at 509–510, n. 23, but does not seem to respond to the logical inferences as did the Board, which has a vast reservoir of experience with day-to-day industrial operations. We cannot blink the reality of this technological innovation, nor can we, as the Court does, focus merely on one aspect of the work it has affected. The Board understood the complexities involved here; consequently, it invalidated only that part of the Rules on Containers whose primary effect was to influence the loading and unloading of containers functioning away from the pier as truck trailers. See 231 N. L. R. B. 351 (1977) and 236 N. L. R. B. 525 (1978). The Court's failure to appreciate

this distinction and unwillingness to concede its significance underscores the reason why reviewing courts must give weight to the Board's long and intimate experience with the workings of the industries implicated. See, *e. g.*, *Pipefitters*, *supra*, at 531–532. Calling the issue one of law does not make it so.

The ILA argues that a container should be viewed as the functional equivalent of the hold of a ship. See, *e. g.*, Brief for Respondent ILA 4. Superficially it can be made to appear that this Court has acquiesced in such an approach, but only in the context of discussing questions arising under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA). See *Northeast Marine Terminal Co.* v. *Caputo*, 432 U. S. 249, 270–271 (1977); *P. C. Pfeiffer Co.* v. *Ford*, 444 U. S. 69 (1979). Even in that narrow context, a careful reading of the Court's statements shows that what the Court characterized as "maritime employment" within the meaning of the LHWCA was the work of one who "moves cargo between ship and land transportation." *Pfeiffer*, *supra*, at 84. This characterization points toward the key to the proper view in this case—that the function of a container changes as it moves through the transportation system.

Prior to containerization, both consolidators and truckers functioned as part of the transportation industry. Teamsters and others loaded the vehicles used by the truckers and consolidators. When these vehicles reached the pier, longshoremen took over the task of moving the cargo onto the pier or into the ship's hold. Longshoremen also handled inbound cargo from the hold of the ship to the pier and until placed on a land-based truck. After that, any handling of the contents of the truck away from the pier was the work of others than longshoremen. See *International Longshoremen's Assn. (Consolidated Express, Inc.)*, 221 N. L. R. B. 956, 959 (1975), enf'd, 537 F. 2d 706 (CA2 1976), cert. denied 429 U. S. 1041 (1977); 231 N. L. R. B., at 359, 365.

After the advent of containerization, truckers and consolidators still perform their traditional functions. 221

N. L. R. B., at 959; 231 N. L. R. B., at 365. Their employees still load and unload the vehicles they use, 221 N. L. R. B., at 960, but with containerization the cargo-carrying part of those vehicles is the removable container. When such a vehicle with outbound cargo reaches the pier, there is no need whatever for anyone to "unpack" it; the container may itself be lifted and placed in the hold of the waiting ship, which is designed so that the container fits it as it did the prefitted bed of the truck chassis. Similarly, a container carrying inbound freight is hoisted from the hold of the ship and placed on a truck chassis hooked up to a tractor; the tractor-trailer is driven away from the pier, and the container is then part of land transportation.

To me, the work in controversy has two aspects—loading and unloading ships and loading and unloading trucks. Under this view, the Rules on Containers at issue would be valid insofar as they regulate what happens to containers—as distinguished from their contents—while they are on the pier; but those Rules are invalid insofar as they attempt, through fines placed on the shipowner/employers, to regulate what happens to containers once they have left the pier for overland transportation.

The Court finds it sufficient to say that the main object of the Rules on Containers is to preserve the traditional longshore work of moving cargo between ship and land transportation. That is too simplistic a view; it closes the eyes to the other aspects of the transportation industry and to the evolution of methods of handling freight. For our purposes, the relevant work in controversy is that involved in the part of the Rules affected by the Board's orders and now here for review. It seems clear to me—as the Board saw—that the work which these Rules seek to control is the work of loading and unloading land-based transportation—the containers functioning as truck trailers—away from the pier; the record supports the Board's conclusion that such work has never been performed by longshoremen. See, *e. g.*, 231 N. L. R. B.,

at 365. Through this aspect of the Rules, the ILA turns reality on its head and seeks to take work from those who have traditionally performed it.[1] This is prohibited by § 8 (e).

The ILA complains that the loading and unloading of land transportation which takes place away from the pier could be done by them on the pier with equal efficiency. See Tr. of Oral Arg. 49, 51. But everyone except the ILA has found, from experience, that this is not true, and in any event this assertion shows that the ILA is trying to acquire the work of others. Because the modern, efficient mechanism of containerization has affected their work at the pier, the ILA is using the Rules to reach out and bring to the pier work which employees of land-based transporters have always performed. Under the work preservation doctrine, the longshoremen may seek to mitigate the effect on them of this new technology, but they may not lawfully do so by reaching out for work which they have not traditionally performed. It is a gross perversion of the work preservation doctrine to permit such conduct; that doctrine, as applied here, ceases to be a shield to protect work and becomes a sword to cut work away from those who have traditionally performed it.

When a prepacked container which "violates" the Rules is taken off its trailer at the pier, the ILA demands that its members be paid for the utterly useless task of removing the contents and then repacking them, or alternatively that a fine be imposed on the shipping company which owns or leased the container.[2] This is nothing less than an invidious

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[1] This is thus far from a classic case of "labor" versus "management." Here, one segment of labor seeks to take work away from another segment, and to impose a "featherbedding" fine on employers as an enforcement device.

[2] It is natural, of course, for individuals—and unions—to want to "preserve" work which by long practice has been "theirs." But there must be a balancing of this urge with the need for innovation and change in methods that spell progress and reduce consumer cost. In the complaints of the ILA, one hears the echoes of the complaints of stablekeepers and

form of "featherbedding" to block full implementation of modern technological progress. Allowing compromises in the interest of those whose jobs are affected is one thing; but what the Court sanctions today is quite another—taking work from non-ILA members to provide economically useless work for ILA members.

The Court of Appeals was obviously ill at ease with its decision and sought comfort by trying to restrict its scope through the intimation that its holding was limited to the presently claimed 50-mile limit.[3] That court deceived itself, and the Court today puts on the same blinders in asserting that it is "groundless" to claim that the logic of its decision would allow the union "to follow containers around the country and assert the right to stuff and strip them far inland. . . ." *Ante*, at 510, n. 24. Should this occur, the Court states, "[t]hat work would bear an entirely different relation to traditional longshore work, and would require a wholly different analysis." *Ibid.*

It does not "reduce to absurdity," see n. 3, *supra*, to ask why 51 or 100 miles "would require a wholly different analysis." Following the Court's own strained reasoning, the work in controversy would still be the same—the longshoremen's

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harness manufacturers when the automobile first gained wide acceptance. With practices such as those held permissible in this case, innovation and change in the utilization of modern machinery, methods, and labor will be retarded. Obsolete machinery and obsolete methods will tend to be used because industry will not be anxious to risk investment capital on labor-saving, cost-reducing methods and mechanisms if, by doing so, it must pay in tribute for the privilege a penalty that offsets the savings.

[3] That court's opinion recites: "It is not difficult to imagine a party unhappy with this court's decision today subjecting that decision to the following exercise in *reductio ad absurdum:* Under the court's ruling, cannot longshoremen literally chase containers around the country, demanding the right to stuff and strip them? There is a short answer: No. Our decision does not radiate beyond the Rules on Containers, which are restricted in terms to a 50-mile area around each port." 198 U. S. App. D. C. 157, 177, n. 177, 613 F. 2d 890, 910, n. 177 (1979).

work on the pier. Since they have never worked off the pier, the contested work could be nothing else. And, under the Court's analysis, "[t]he effect of work preservation agreements on the employment opportunities of employees not represented by the union, no matter how severe, is of course irrelevant to the validity of the agreement so long as the union had no forbidden secondary purpose to affect the employment relations of the neutral employer." *Ante*, at 507, n. 22.

By implying that the relevant work in controversy would suddenly shift from the pier to land if it occurred beyond the arbitrary 50-mile limit, the Court's opinion exposes its own error, much as the Court of Appeals comforted itself that the 50-mile point was the limit.[4] Since longshoremen's work is and has always been confined to work "on the pier," the actual work in controversy here bears the same relation to traditional longshore work as it would if it were performed 500 miles away. It simply is *not* traditional longshore work. By looking only at one aspect of the problem and refusing to look at the whole, as the Board did, the Court's holding recalls the blind person who, holding an elephant's tail, concludes it is a snake. The Court fails, as did the Court of Appeals, to explain why a 50-mile limit is acceptable while 50-plus would not be so, and hence sanctions a widening of the work preservation exception that completely swallows the rules of §§ 8 (e) and 8 (b)(4)(B).

It is argued that the current Rules represent a collectively bargained compromise as to the ILA's asserted right to strip and stuff all containers (or at least all owned or leased by the shipping companies) at the pier, but the fact that an agree-

[4] Even under the current Rules, the 50-mile point is not strictly the limit. If a consolidator or trucker operating within the 50-mile limit relocates or opens new operations outside the limit, the parties to the Rules may decide nonetheless that the sanctions of the Rules are to apply. See Rule 7 of the 1974 Rules on Containers, reprinted in the Court's appendix, *ante*, at 518.

ment was collectively bargained cannot save it if its object is to violate the law. As the Board decreed, that part of the Rules which attempts to regulate, through the economic pressure of fines on the shipping companies, the loading and unloading of land transportation away from the pier is invalid under §§ 8 (e) and 8 (b)(4)(B) of the NLRA.

The Board's findings are supported by substantial evidence on the record considered as a whole, cf. *Pipefitters*, 429 U. S., at 531, and accordingly I would reverse the judgment of the Court of Appeals and remand with directions to enforce the Board's orders.

Reporter's Note

Orders for June 16, 1980, begin with page 916. The preceding orders in 447 U. S., from June 9 through June 12, 1980, were reported in Part 1, at 901–916. These page numbers are the same as they will be in the bound volume, thus making the *permanent* citations available upon publication of the preliminary prints of the United States Reports.

Rehearing Denied

No. 78–1840. CITY OF ROME ET AL. *v.* UNITED STATES ET AL., 446 U. S. 156;

No. 78–5928. WALLER *v.* UNITED STATES, 446 U. S. 901;

No. 79–1096. PEARSON *v.* TEXAS, 446 U. S. 912;

No. 79–1148. SPARKS *v.* UNITED STATES, 446 U. S. 908;

No. 79–6161. HOHENSEE *v.* SOUTHARD ET AL., 446 U. S. 911;

No. 79–6183. COOPER *v.* CITY OF COMMERCE CITY, COLORADO, 446 U. S. 912; and

No. 79–6206. KICKASOLA *v.* JIM WALLACE OIL CO., INC., ET AL., 446 U. S. 921. Petitions for rehearing denied.

No. 78–671. DELAWARE STATE BOARD OF EDUCATION *v.* EVANS ET AL., 446 U. S. 923; and

No. 78–672. ALEXIS I. DU PONT SCHOOL DISTRICT ET AL. *v.* EVANS ET AL., 446 U. S. 923. Petitions for rehearing denied. MR. JUSTICE STEVENS took no part in the consideration or decision of these petitions.

JUNE 10, 1980

Affirmed on Appeal. (See No. 78–60, *ante*, at 164–165, n. 32.)

JUNE 12, 1980

Miscellaneous Order

No. A–1080. DEVINGO ET AL. *v.* NEW JERSEY. Application for stay of trial court proceedings, presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied.

JUNE 16, 1980

Appeals Dismissed

No. 79–1588. FEDERATION FOR AMERICAN IMMIGRATION REFORM ET AL. *v.* KLUTZNICK, SECRETARY OF COMMERCE, ET AL. Appeal from D. C. D. C. dismissed for want of jurisdiction. Reported below: 486 F. Supp. 564.

No. 79-843. EXXON CORP. *v.* SOUTH CAROLINA TAX COMMISSION. Appeal from Sup. Ct. S. C. dismissed for want of substantial federal question. MR. JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. MR. JUSTICE STEWART took no part in the consideration or decision of this case. Reported below: 273 S. C. 594, 258 S. E. 2d 93.

No. 79-1615. HALL *v.* CALIFORNIA ET AL. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 614 F. 2d 776.

No. 79-1678. BRIGGS *v.* CALIFORNIA EX REL. DEPARTMENT OF PARKS AND RECREATION. Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 98 Cal. App. 3d 190, 159 Cal. Rptr. 390.

No. 79-6489. LINDEN *v.* NEW YORK. Appeal from C. A. 2d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 622 F. 2d 574.

No. 79-1670. AVIS RENT-A-CAR SYSTEMS, INC. *v.* VINING ET UX. Appeal from Sup. Ct. Fla. dismissed for want of substantial federal question. Reported below: 378 So. 2d 280.

Certiorari Granted—Reversed. (See No. 79-1377, *ante,* p. 404.)

Certiorari Granted—Vacated and Remanded

No. 78-1531. FRANZEN, CORRECTIONAL SUPERINTENDENT, ET AL. *v.* ALLEN. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted.

Judgment vacated and case remanded for further consideration in light of *Jenkins* v. *Anderson, ante,* p. 231. Reported below: 591 F. 2d 391.

No. 79–1435. MAHONING WOMEN'S CENTER *v.* HUNTER, MAYOR OF YOUNGSTOWN, ET AL. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *New York Gaslight Club, Inc.* v. *Carey, ante,* p. 54, and *Supreme Court of Virginia* v. *Consumers Union,* 446 U. S. 719 (1980). MR. JUSTICE STEWART, MR. JUSTICE WHITE, MR. JUSTICE REHNQUIST, and MR. JUSTICE STEVENS dissent. Reported below: 610 F. 2d 456.

Miscellaneous Orders

No. A–994. MACHINISTS NON-PARTISAN POLITICAL LEAGUE *v.* FEDERAL ELECTION COMMISSION. Application for stay of execution and enforcement of the order of the United States District Court for the District of Columbia, entered January 30, 1980, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. The order entered by THE CHIEF JUSTICE on May 23, 1980, is vacated.

No. A–1053. BURLINGTON NORTHERN, INC., ET AL. *v.* MISSOURI-KANSAS-TEXAS RAILROAD CO. ET AL. Application for an order to vacate the stay entered by the United States Court of Appeals for the Fifth Circuit on May 30, 1980, presented to MR. JUSTICE POWELL, and by him referred to the Court, denied.

No. 79–1690. STANTON, ADMINISTRATOR, INDIANA DEPARTMENT OF PUBLIC WELFARE *v.* BROWN ET AL. C. A. 7th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. A–1019 (79–1909). CALIFORNIA *v.* MUSANTE. Ct. App. Cal., 4th App. Dist. Application for stay, addressed to MR. JUSTICE WHITE and referred to the Court, denied.

No. 79–5903. H. L. *v.* MATHESON, GOVERNOR OF UTAH, ET AL. Sup. Ct. Utah. [Probable jurisdiction noted, 445 U. S. 903.] Motion for reconsideration of motion for appointment of Alan Ernest as counsel for children unborn and born alive denied.

No. 79–6639. HARRIS *v.* HAMBRICK, WARDEN; and

No. 79–6669. BATTLE *v.* CHRISTENSEN, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 79–6546. THERIAULT *v.* SILBER ET AL. Motion for leave to file petition for writ of mandamus denied.

Probable Jurisdiction Postponed

No. 79–678. SAN DIEGO GAS & ELECTRIC CO. *v.* CITY OF SAN DIEGO ET AL. Appeal from Ct. App. Cal., 4th App. Dist. Further consideration of question of jurisdiction postponed to hearing of case on the merits.

No. 79–1689. UNITED STATES *v.* WILL ET AL. Appeal from D. C. N. D. Ill. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Motion of the Solicitor General to consolidate this case with No. 79–983, *United States* v. *Will et al.* [probable jurisdiction noted, 444 U. S. 1068], for briefing and oral argument granted. A total of one and one-half hours allotted for oral argument. Reported below: —— F. Supp. ——.

Certiorari Granted

No. 79–972. WESTVACO CORP. ET AL. *v.* ADAMS EXTRACT CO. ET AL. C. A. 5th Cir. Certiorari granted and case set for oral argument in tandem with No. 79–1056, *Northwest Airlines, Inc.* v. *Transport Workers Union of America, AFL–CIO, et al.*, immediately *infra*. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 606 F. 2d 319.

No. 79–1056. NORTHWEST AIRLINES, INC. *v.* TRANSPORT WORKERS UNION OF AMERICA, AFL–CIO, ET AL. C. A. D. C. Cir. Motion of Chamber of Commerce of the United States for leave to file a brief as *amicus curiae* granted. Certiorari granted and case set for oral argument in tandem with No. 79–972, *Westvaco Corp. et al.* v. *Adams Extract Co. et al.*, immediately *supra*. MR. JUSTICE BLACKMUN took no part in the consideration or decision of the motion and petition. Reported below: 196 U. S. App. D. C. 443, 606 F. 2d 1350.

No. 79–1203. LUCKY MC URANIUM CORP. *v.* GEOMET EXPLORATION, LTD. Sup. Ct. Ariz. Motion of Arizona Mining Association for leave to file a brief as *amicus curiae* granted. Certiorari granted. Reported below: 124 Ariz. 55, 601 P. 2d 1339.

No. 79–1236. CARSON ET AL. *v.* AMERICAN BRANDS, INC., T/A AMERICAN TOBACCO CO., ET AL. C. A. 4th Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 606 F. 2d 420.

No. 79–1764. TEXAS DEPARTMENT OF COMMUNITY AFFAIRS *v.* BURDINE. C. A. 5th Cir. Certiorari granted. Reported below: 608 F. 2d 563.

Certiorari Denied. (See also Nos. 79–1615, 79–1678, and 79–6489, *supra*.)

No. 79–1333. RADO *v.* CONNECTICUT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 607 F. 2d 572.

No. 79–1392. GOTTSCHALK *v.* ALASKA. Sup. Ct. Alaska. Certiorari denied. Reported below: 602 P. 2d 448.

No. 79–1422. AZZARELLI CONSTRUCTION CO. ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 612 F. 2d 292.

No. 79–1424. CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA *v.* LEGAL AID SOCIETY OF ALAMEDA COUNTY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 608 F. 2d 1319.

No. 79–1433. MASKENY ET AL. *v.* UNITED STATES; and
No. 79–1532. DARWIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 609 F. 2d 183.

No. 79–1448. NAGATA BROTHERS FARMS *v.* AGRICULTURAL LABOR RELATIONS BOARD OF CALIFORNIA (UNITED FARM WORKERS OF AMERICA, AFL–CIO, REAL PARTY IN INTEREST). Sup. Ct. Cal. Certiorari denied.

No. 79–1463. KLINE ET AL. *v.* BLAKE. C. A. 3d Cir. Certiorari denied. Reported below: 612 F. 2d 718.

No. 79–1464. WILLIS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 79–1467. STEVENS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 612 F. 2d 1226.

No. 79–1487. ASHWORTH *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied.

No. 79–1496. ASSOCIATION OF NATIONAL ADVERTISERS, INC., ET AL. *v.* FEDERAL TRADE COMMISSION ET AL.; and
No. 79–1501. KELLOGG CO. *v.* FEDERAL TRADE COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: — U. S. App. D. C. —, 627 F. 2d 1151.

No. 79–1509. COMMITTEE TO PROTECT THE FIRST AMENDMENT RIGHTS OF EMPLOYEES OF THE DEPARTMENT OF AGRICULTURE *v.* BERGLAND, SECRETARY OF AGRICULTURE. C. A. D. C. Cir. Certiorari denied. Reported below: — U. S. App. D. C. —, 626 F. 2d 875.

No. 79–1514. BALTIMORE REBUILDERS, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 611 F. 2d 1372.

No. 79–1523. TRANSCONTINENTAL GAS PIPE LINE CORP. *v.* FEDERAL ENERGY REGULATORY COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: 196 U. S. App. D. C. 187, 606 F. 2d 1094.

No. 79–1542. ANDRULIS ET AL. *v.* UNITED STATES ET AL; and

No. 79–1543. NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE ET AL. *v.* CIVILETTI, ATTORNEY GENERAL, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 197 U. S. App. D. C. 259, 609 F. 2d 514.

No. 79–1547. SHAUFLER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 111.

No. 79–1548. HAYES ET AL. *v.* ROGERS. Sup. Ct. Fla. Certiorari denied. Reported below: 378 So. 2d 1212.

No. 79–1550. LANE PROCESSING, INC. *v.* MARSHALL, SECRETARY OF LABOR. C. A. 8th Cir. Certiorari denied. Reported below: 606 F. 2d 518.

No. 79–1551. SIX NATIONS CONFEDERACY *v.* ANDRUS, SECRETARY OF THE INTERIOR, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 198 U. S. App. D. C. 54, 610 F. 2d 996.

No. 79–1561. CARPENTER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 611 F. 2d 113.

No. 79–1575. DEMILIA ET AL. *v.* NEW YORK ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 72 App. Div. 2d 536, 421 N. Y. S. 2d 70.

No. 79–1577. HEILMAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 614 F. 2d 1133.

No. 79-1614. RILEY, ADMINISTRATRIX, ET AL. *v.* GOLDSCHMIDT, SECRETARY OF TRANSPORTATION, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 110.

No. 79-1623. INDIANA & MICHIGAN ELECTRIC CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 4th Cir. Certiorari denied. Reported below: 610 F. 2d 811.

No. 79-1642. PATTERSON *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: — Ark. —, 591 S. W. 2d 356.

No. 79-1649. MURRAY ET AL. *v.* ALEXANDER TITLE AGENCY, INC., ET AL. Ct. App. D. C. Certiorari denied.

No. 79-1658. IN RE WALKER. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 411 A. 2d 1024.

No. 79-1659. DESERT OUTDOOR ADVERTISING, INC. *v.* DEPARTMENT OF TRANSPORTATION OF CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 79-1660. KLEVE *v.* KLEVE. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 79-1664. RENNERT *v.* DUCKWORTH, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 111.

No. 79-1666. FLETCHER *v.* CALIFORNIA PORTLAND CEMENT CO., INC. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 99 Cal. App. 3d 97, 159 Cal. Rptr. 915.

No. 79-1671. WARNER ET AL. *v.* SOVEREIGN NEWS CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 610 F. 2d 428.

No. 79-1676. WHITE *v.* ARLEN REALTY & DEVELOPMENT CORP. C. A. 4th Cir. Certiorari denied. Reported below: 614 F. 2d 387.

No. 79–1680. GARDNER BENDER, INC. *v.* IDEAL INDUSTRIES, INC. C. A. 7th Cir. Certiorari denied. Reported below: 612 F. 2d 1018.

No. 79–1681. KAPLAN, TRUSTEE IN BANKRUPTCY *v.* BURROUGHS CORP. C. A. 9th Cir. Certiorari denied. Reported below: 611 F. 2d 286.

No. 79–1682. ZECCOLA *v.* EZZO ET AL. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 370 So. 2d 38.

No. 79–1683. FIRST BEVERAGES, INC. OF LAS VEGAS, ET AL. *v.* ROYAL CROWN COLA CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 612 F. 2d 1164.

No. 79–1695. ELECTRI-FLEX CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. Reported below: 624 F. 2d 1103.

No. 79–1698. MATSIS *v.* MATSIS. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 73 App. Div. 2d 849, 422 N. Y. S. 2d 550.

No. 79–1701. HAMILTON *v.* MONTANA. Sup. Ct. Mont. Certiorari denied. Reported below: — Mont. —, 605 P. 2d 1121.

No. 79–1702. CARTER *v.* CROWN HOSIERY MILLS, INC. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 96.

No. 79–1714. ALEXANDER *v.* LOS ANGELES COUNTY CIVIL SERVICE COMMISSION ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 79–1749. UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING & PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL NO. 68 *v.* BEXAR PLUMBING CO., INC. C. A. 5th Cir. Certiorari denied. Reported below: 610 F. 2d 816.

No. 79–1780. FELS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 620 F. 2d 290.

No. 79–1800. LAUGHMAN ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 1067.

No. 79–1812. LIGGETT *v.* HARRIS, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 9th Cir. Certiorari denied. Reported below: 614 F. 2d 777.

No. 72–1822. NEFF *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 615 F. 2d 1235.

No. 79–1826. CARCAISE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 613 F. 2d 1321.

No. 79–1827. FARESE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 612 F. 2d 1376.

No. 79–1832. GROSS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 614 F. 2d 365.

No. 79–6192. ADDERLEY *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 612 F. 2d 577.

No. 79–6199. PANZA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 612 F. 2d 432.

No. 79–6208. KIRK *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 76 Ill. App. 3d 459, 394 N. E. 2d 1212.

No. 79–6209. STANLEY ET AL. *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 604 F. 2d 379.

No. 79–6216. LANE *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied.

No. 79–6218. CARROLL *v.* DUCKWORTH, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 614 F. 2d 774.

No. 79-6220. TATES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 612 F. 2d 432.

No. 79-6231. MILLER *v.* UNITED STATES; and
No. 79-6238. MILLER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 608 F. 2d 1089.

No. 79-6263. RODRIGUEZ *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 79-6272. MAMBRETTI *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 79-6279. STANLEY *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 43 Md. App. 651, 406 A. 2d 693.

No. 78-6286. LAWSON, AKA CARR *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 79-6295. RIGGS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 609 F. 2d 1007.

No. 79-6313. GARRIS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 616 F. 2d 626.

No. 79-6317. ARMSTRONG *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 77 Ill. App. 3d 916, 396 N. E. 2d 845.

No. 79-6329. BAUMANN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 614 F. 2d 634.

No. 79-6340. DUNBAR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 611 F. 2d 985 and 614 F. 2d 39.

No. 79-6374. ANTONELLI *v.* TRIBUNE NEWSPAPER ET AL. C. A. 7th Cir. Certiorari denied.

No. 79-6394. JONES *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 74 App. Div. 2d 613, 424 N. Y. S. 2d 497.

No. 79-6413. KORTE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 79-6419. BROWN *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: — U. S. App. D. C. —, 615 F. 2d 1368.

No. 79-6425. EL FUNDI ET UX. *v.* DEROCHE ET AL. C. A. 8th Cir. Certiorari denied.

No. 79-6432. DUFFIN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 620 F. 2d 290.

No. 79-6442. PULLIAM *v.* BALKCOM, WARDEN. Sup. Ct. Ga. Certiorari denied. Reported below: 245 Ga. 99, 263 S. E. 2d 123.

No. 79-6471. MCMILLAN *v.* MAHONEY, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 615 F. 2d 1357.

No. 79-6476. ROBERTS *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 75 Ill. App. 3d 1104, 399 N. E. 2d 1390.

No. 79-6478. HARDY *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 77 Ill. App. 3d 37, 395 N. E. 2d 743.

No. 79-6479. BUTLER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 618 F. 2d 411.

No. 79-6485. ROSENTHAL *v.* CARR. C. A. 9th Cir. Certiorari denied. Reported below: 614 F. 2d 1219.

No. 79-6387. CRISAFI *v.* WIETHE. C. A. 3d Cir. Certiorari denied.

No. 79-6488. WOODARD *v.* WACHOVIA BANK & TRUST CO. ET AL. C. A. 4th Cir. Certiorari denied.

No. 79-6490. ROBINSON *v.* PARRATT, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 620 F. 2d 307.

No. 79-6491. COLLINS *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 378 So. 2d 928.

No. 79-6493. GRIFFITH ET AL. *v.* BELL-WHITLEY COMMUNITY ACTION AGENCY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 614 F. 2d 1102.

No. 79-6502. KINES *v.* BUTTERWORTH. C. A. 1st Cir. Certiorari denied. Reported below: 618 F. 2d 93.

No. 79-6504. IN RE R. R. *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 75 Ill. App. 3d 494, 394 N. E. 2d 75.

No. 79-6509. SNELL *v.* NATIONAL RAILROAD PASSENGER CORP. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 612 F. 2d 574.

No. 79-6510. TAYLOR *v.* MARYLAND. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 105.

No. 79-6511. SCHMOLL *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 77 Ill. App. 3d 762, 396 N. E. 2d 634.

No. 79-6532. BOHONUS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 628 F. 2d 1167.

No. 79-6537. WILSON *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 592 S. W. 2d 465.

No. 79-6587. WILLIAMS *v.* AMERICAN AIRLINES. C. A. 5th Cir. Certiorari denied. Reported below: 609 F. 2d 1007.

No. 79-6596. LEONARDI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 623 F. 2d 746.

No. 79-6604. CAMPOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 620 F. 2d 311.

No. 79-6605. WESTOVER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 605 F. 2d 565.

No. 79-6611. PEREZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 620 F. 2d 306.

No. 79-6612. GRAY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 620 F. 2d 290.

No. 79-6618. HUGULEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 617 F. 2d 187.

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No. 79-6629. CARNES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 618 F. 2d 68.

No. 79-6637. LENZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 616 F. 2d 960.

No. 79-1352. HART BOOK STORES, INC., ET AL. *v.* EDMISTEN, ATTORNEY GENERAL OF NORTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant the petition for certiorari, reverse the judgment of the Court of Appeals, and reinstate the judgments of July 21, 1978, entered in the United States District Court for the Western District of North Carolina and of April 21, 1978, entered in the United States District Court for the Eastern District of North Carolina declaring unconstitutional N. C. Gen. Stat. §§ 14-202.10 to 14-202.12. Reported below: 612 F. 2d 821.

No. 79-1605. MOODY, ASSISTANT CORRECTIONAL SUPERINTENDENT *v.* MCNAMARA. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 606 F. 2d 621.

No. 79-1723. SUTKER, DBA ALL-STATE DENTAL LABORATORY *v.* ILLINOIS STATE DENTAL SOCIETY ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 76 Ill. App. 3d 240, 395 N. E. 2d 14.

No. 79-6276. FISHER *v.* REISER, CHAIRMAN OF NEVADA INDUSTRIAL COMMISSION, ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE POWELL would grant certiorari. Reported below: 610 F. 2d 629.

No. 79-6470. FRANKLIN *v.* GEORGIA. Sup. Ct. Ga.; and

No. 79-6614. DOBBS *v.* HOPPER, WARDEN. Super. Ct. Ga., Tattnall County. Certiorari denied. Reported below: No. 79-6470, 245 Ga. 141, 263 S. E. 2d 666.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia,* 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

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No. 9, Orig. UNITED STATES *v.* LOUISIANA ET AL. Petition for rehearing of the order of the Court entered April 28, 1980 [446 U. S. 253], denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

No. 77-6219. BALDASAR *v.* ILLINOIS, 446 U. S. 222;

No. 79-1141. MORA *v.* FLORIDA, 446 U. S. 917;

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No. 79-6264. CHRISTENSEN *v.* COMMISSIONER OF INTERNAL REVENUE, 446 U. S. 943; and

No. 79-6417. TURNER *v.* GRAHAM, GOVERNOR OF FLORIDA, ET AL., 446 U. S. 934. Petitions for rehearing denied.

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Official Records
of
The Supreme Court

June 20 (concluded) Through June 23, 1980

End of Volume

Henry J. Lind
Reporter of Decisions

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, Chief Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM H. REHNQUIST, Associate Justice.
JOHN PAUL STEVENS, Associate Justice.

OFFICERS OF THE COURT

BENJAMIN R. CIVILETTI, Attorney General.
WADE H. McCREE, Jr., Solicitor General.
MICHAEL RODAK, Jr., Clerk.
HENRY C. LIND, Reporter of Decisions.
ALFRED WONG, Marshal.
ROGER F. JACOBS, Librarian.

SUPREME COURT OF THE UNITED STATES

Allotment of Justices

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, *viz.:*

For the District of Columbia Circuit, Warren E. Burger, Chief Justice.

For the First Circuit, William J. Brennan, Jr., Associate Justice.

For the Second Circuit, Thurgood Marshall, Associate Justice.

For the Third Circuit, William J. Brennan, Jr., Associate Justice.

For the Fourth Circuit, Warren E. Burger, Chief Justice.

For the Fifth Circuit, Lewis F. Powell, Jr., Associate Justice.

For the Sixth Circuit, Potter Stewart, Associate Justice.

For the Seventh Circuit, John Paul Stevens, Associate Justice.

For the Eighth Circuit, Harry A. Blackmun, Associate Justice.

For the Ninth Circuit, William H. Rehnquist, Associate Justice.

For the Tenth Circuit, Byron R. White, Associate Justice.

December 19, 1975.

(For next previous allotment, see 404 U. S., p. v.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1979

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. *v.* PUBLIC SERVICE COMMISSION OF NEW YORK

APPEAL FROM THE COURT OF APPEALS OF NEW YORK

No. 79-134. Argued March 17, 1980—Decided June 20, 1980

Held: An order of appellee New York Public Service Commission that prohibits the inclusion by appellant (and other public utility companies) in monthly bills of inserts discussing controversial issues of public policy directly infringes the freedom of speech protected by the First and Fourteenth Amendments and thus is invalid. Cf. *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765. Pp. 533–544.

(a) The restriction on bill inserts cannot be upheld on the ground that appellant, as a corporation, is not entitled to freedom of speech. "The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." *First National Bank of Boston* v *Bellotti, supra*, at 777. Pp. 533–535.

(b) Nor is the state action here a valid time, place, or manner restriction. While the validity of reasonable time, place, or manner regulations that serve a significant governmental interest and leave ample alternative channels for communication has been recognized, such regulations may not be based upon either the content or subject matter of speech. Appellee here does not pretend that its action is unrelated to the content of bill inserts, inserts that present information to consumers on certain subjects, such as energy conservation measures, being allowed but inserts that discuss public controversies being forbidden. Pp. 535–537.

(c) The prohibition against inserts is not a permissible subject-matter regulation merely because it applies to all discussion of political controversies, whether pro or con. The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic, and the regulation at issue here does not fall within the narrow exceptions to the general prohibition against subject-matter distinctions. *Greer* v. *Spock*, 424 U. S. 828, and *Lehman* v. *Shaker Heights*, 418 U. S. 298, distinguished. Pp. 537–540.

(d) Furthermore, the state action here is not valid as a narrowly drawn prohibition serving a compelling state interest. The prohibition

cannot be justified as being necessary to avoid forcing appellant's views on a captive audience, since customers may escape exposure to objectionable material simply by throwing the bill insert into a wastebasket. Nor is the prohibition warranted as being necessary to allocate, in the public interest, the limited space in the billing envelope, there being nothing in the record to show that the bill inserts at issue would preclude the inclusion of other inserts that appellant might be ordered lawfully to include in the billing envelope. *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, distinguished. And the prohibition cannot be justified as being necessary to ensure that ratepayers do not subsidize the cost of the bill inserts, since there is no basis on the record to assume that appellee could not exclude the cost of the inserts from the utility's rate base. Pp. 540–543.

47 N. Y. 2d 94, 390 N. E. 2d 749, reversed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, and MARSHALL, JJ., joined. MARSHALL, J., filed a concurring opinion, *post*, p. 544. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 544. BLACKMUN, J., filed a dissenting opinion, in Parts I and II of which REHNQUIST, J., joined, *post*, p. 548.

Joseph D. Block argued the cause for appellant. With him on the briefs was *Peter P. Garam*.

Peter H. Schiff argued the cause for appellee. With him on the brief was *Howard J. Read*.*

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*Briefs of *amici curiae* urging reversal were filed by *Walter L. Stratton* for the American Association of Advertising Agencies, Inc.; by *Stanley T. Kaleczyc* for the Chamber of Commerce of the United States of America; by *Burt Neuborne* for Long Island Lighting Co.; by *Edward H. Dowd, Myrna P. Field*, and *John Cannon* for the Mid-Atlantic Legal Foundation et al.; by *Edwin P. Rome* and *William H. Roberts* for Mobil Corp.; by *Malcolm H. Furbush, Joseph I. Kelly, Robert L. Harris, Gordon Pearce, Guenter S. Cohn, Timothy W. Tower, John Bury*, and *Leslie Christian Hauck* for Pacific Gas and Electric Co. et al.; and by *Daniel J. Popeo* for the Washington Legal Foundation.

Briefs of *amici curiae* urging affirmance were filed by *Kristin Booth Glen* and *Melvin L. Wulf* for the Natural Resources Defense Council et al.; and by *Harold I. Abramson* and *John C. Esposito* for the New York State Consumer Protection Board et al.

Briefs of *amici curiae* were filed by *Cameron F. MacRae* for the Edison

MR. JUSTICE POWELL delivered the opinion of the Court.

The question in this case is whether the First Amendment, as incorporated by the Fourteenth Amendment, is violated by an order of the Public Service Commission of the State of New York that prohibits the inclusion in monthly electric bills of inserts discussing controversial issues of public policy.

I

The Consolidated Edison Company of New York, appellant in this case, placed written material entitled "Independence Is Still a Goal, and Nuclear Power Is Needed To Win the Battle" in its January 1976 billing envelope. The bill insert stated Consolidated Edison's views on "the benefits of nuclear power," saying that they "far outweigh any potential risk" and that nuclear power plants are safe, economical, and clean. App. 35. The utility also contended that increased use of nuclear energy would further this country's independence from foreign energy sources.

In March 1976, the Natural Resources Defense Council, Inc. (NRDC), requested Consolidated Edison to enclose a rebuttal prepared by NRDC in its next billing envelope. *Id.*, at 45–46. When Consolidated Edison refused, NRDC asked the Public Service Commission of the State of New York to open Consolidated Edison's billing envelopes to contrasting views on controversial issues of public importance. *Id.*, at 32–33.

On February 17, 1977, the Commission, appellee here, denied NRDC's request, but prohibited "utilities from using bill inserts to discuss political matters, including the desirability of future development of nuclear power." *Id.*, at 50. The Commission explained its decision in a Statement of Policy on Advertising and Promotional Practices of Public Utilities issued on February 25, 1977. The Commission concluded

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Electric Institute; and by *William W. Becker* for the New England Legal Foundation.

that Consolidated Edison customers who receive bills containing inserts are a captive audience of diverse views who should not be subjected to the utility's beliefs. Accordingly, the Commission barred utility companies from including bill inserts that express "their opinions or viewpoints on controversial issues of public policy." App. to Juris. Statement 43a. The Commission did not, however, bar utilities from sending bill inserts discussing topics that are not "controversial issues of public policy." The Commission later denied petitions for rehearing filed by Consolidated Edison and other utilities. *Id.*, at 59a.

Consolidated Edison sought review of the Commission's order in the New York state courts. The State Supreme Court, Special Term, held the order unconstitutional. 93 Misc. 2d 313, 402 N. Y. S. 2d 551 (1978). But the State Supreme Court, Appellate Division, reversed, 63 App. Div. 2d 364, 407 N. Y. S. 2d 735 (1978), and the New York Court of Appeals affirmed that judgment. 47 N. Y. 2d 94, 390 N. E. 2d 749 (1979). The Court of Appeals held that the order did not violate the Constitution because it was a valid time, place, and manner regulation designed to protect the privacy of Consolidated Edison's customers. *Id.*, at 106–107, 390 N. E. 2d, at 755. We noted probable jurisdiction, 444 U. S. 822 (1979). We reverse.

II

The restriction on bill inserts cannot be upheld on the ground that Consolidated Edison is not entitled to freedom of speech. In *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765 (1978), we rejected the contention that a State may confine corporate speech to specified issues. That decision recognized that "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." *Id.*, at 777. Because the state action limited protected speech, we concluded that the

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regulation could not stand absent a showing of a compelling state interest. *Id.*, at 786.[1]

The First and Fourteenth Amendments guarantee that no State shall "abridg[e] the freedom of speech." See *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 500–501 (1952). Freedom of speech is "indispensable to the discovery and spread of political truth," *Whitney* v. *California*, 274 U. S. 357, 375 (1927) (Brandeis, J., concurring), and "the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . ." *Abrams* v. *United States*, 250 U. S. 616, 630 (1919) (Holmes, J., dissenting).[2] The First and Fourteenth Amendments remove "governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity. . . ." *Cohen* v. *California*, 403 U. S. 15, 24 (1971).[3]

This Court has emphasized that the First Amendment "embraces at the least the liberty to discuss publicly and truthfully all matters of public concern. . . ." *Thornhill* v.

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[1] Nor does Consolidated Edison's status as a privately owned but government regulated monopoly preclude its assertion of First Amendment rights. See *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, *post*, at 566–568. We have recognized that the speech of heavily regulated businesses may enjoy constitutional protection. See, *e. g.*, *Friedman* v. *Rogers*, 440 U. S. 1 (1979); *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, 425 U. S. 748, 763–765 (1976). Consolidated Edison's position as a regulated monopoly does not decrease the informative value of its opinions on critical public matters. See generally *Public Media Center* v. *FCC*, 190 U. S. App. D. C. 425, 428, 429, 587 F. 2d 1322, 1325, 1326 (1978); *Pacific Gas & Electric Co.* v. *City of Berkeley*, 60 Cal. App. 3d 123, 127–129, 131 Cal. Rptr. 350, 352–353 (1976).

[2] Freedom of speech also protects the individual's interest in self-expression. *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 777, n. 12 (1978); see T. Emerson, The System of Freedom of Expression 6 (1970).

[3] See also A. Meiklejohn, Political Freedom 35–36 (1965).

Alabama, 310 U. S. 88, 101–102 (1940); see *Mills* v. *Alabama,* 384 U. S. 214, 218 (1966). In the mailing that triggered the regulation at issue, Consolidated Edison advocated the use of nuclear power. The Commission has limited the means by which Consolidated Edison may participate in the public debate on this question and other controversial issues of national interest and importance. Thus, the Commission's prohibition of discussion of controversial issues strikes at the heart of the freedom to speak.

III

The Commission's ban on bill inserts is not, of course, invalid merely because it imposes a limitation upon speech. See *First National Bank of Boston* v. *Bellotti, supra,* at 786. We must consider whether the State can demonstrate that its regulation is constitutionally permissible. The Commission's arguments require us to consider three theories that might justify the state action. We must determine whether the prohibition is (i) a reasonable time, place, or manner restriction, (ii) a permissible subject-matter regulation, or (iii) a narrowly tailored means of serving a compelling state interest.

A

This Court has recognized the validity of reasonable time, place, or manner regulations that serve a significant governmental interest and leave ample alternative channels for communication. See *Linmark Associates, Inc.* v. *Willingboro,* 431 U. S. 85, 93 (1977); *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council,* 425 U. S. 748, 771 (1976). See also *Kovacs* v. *Cooper,* 336 U. S. 77, 104 (1949) (Black, J., dissenting). In *Cox* v. *New Hampshire,* 312 U. S. 569 (1941), this Court upheld a licensing requirement for parades through city streets. The Court recognized that the regulation, which was based on time, place, or manner criteria, served the municipality's legitimate interests in regulating traffic, securing public order, and insuring that simultaneous parades did not pre-

vent all speakers from being heard. *Id.*, at 576. Similarly, in *Grayned* v. *City of Rockford*, 408 U. S. 104 (1972), we upheld an antinoise regulation prohibiting demonstrations that would disturb the good order of an educational facility. The narrowly drawn restriction constitutionally advanced the city's interest "in having an undisrupted school session conducive to the students' learning. . . ." *Id.*, at 119. Thus, the essence of time, place, or manner regulation lies in the recognition that various methods of speech, regardless of their content, may frustrate legitimate governmental goals. No matter what its message, a roving sound truck that blares at 2 a. m. disturbs neighborhood tranquility.

A restriction that regulates only the time, place, or manner of speech may be imposed so long as it is reasonable. But when regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited "merely because public officials disapprove the speaker's views." *Niemotko* v. *Maryland*, 340 U. S. 268, 282 (1951) (Frankfurter, J., concurring in result). As a consequence, we have emphasized that time, place, and manner regulations must be "applicable to all speech irrespective of content." *Erznoznik* v. *City of Jacksonville*, 422 U. S. 205, 209 (1975); see *Carey* v. *Brown*, *ante*, at 470. Governmental action that regulates speech on the basis of its subject matter " 'slip[s] from the neutrality of time, place, and circumstance into a concern about content.' " *Police Department of Chicago* v. *Mosley*, 408 U. S. 92, 99 (1972), quoting Kalven, The Concept of the Public Forum: Cox v. Louisiana, 1965 Sup. Ct. Rev. 1, 29. Therefore, a constitutionally permissible time, place, or manner restriction may not be based upon either the content or subject matter of speech.[4]

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[4] See also *Linmark Associates, Inc.* v. *Willingboro*, 431 U. S. 85, 93–94 (1977); *Papish* v. *University of Missouri Curators*, 410 U. S. 667, 670 (1973) (*per curiam*).

The Commission does not pretend that its action is unrelated to the content or subject matter of bill inserts. Indeed, it has undertaken to suppress certain bill inserts precisely because they address controversial issues of public policy. The Commission allows inserts that present information to consumers on certain subjects, such as energy conservation measures, but it forbids the use of inserts that discuss public controversies. The Commission, with commendable candor, justifies its ban on the ground that consumers will benefit from receiving "useful" information, but not from the prohibited information. See App. to Juris. Statement 66a–67a. The Commission's own rationale demonstrates that its action cannot be upheld as a content-neutral time, place, or manner regulation.

B

The Commission next argues that its order is acceptable because it applies to all discussion of nuclear power, whether pro or con, in bill inserts. The prohibition, the Commission contends, is related to subject matter rather than to the views of a particular speaker. Because the regulation does not favor either side of a political controversy, the Commission asserts that it does not unconstitutionally suppress freedom of speech.

The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic. As a general matter, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of Chicago* v. *Mosley, supra,* at 95; see *Cox* v. *Louisiana,* 379 U. S. 536, 580–581 (1965) (opinion of Black, J.). In *Mosley,* we held that a municipality could not exempt labor picketing from a general prohibition on picketing at a school even though the ban would have reached both pro- and anti-union demonstrations. If the marketplace

of ideas is to remain free and open, governments must not be allowed to choose "which issues are worth discussing or debating. . . ." 408 U. S., at 96. See also *Erznoznik* v. *City of Jacksonville, supra,* at 214–215; *Tinker* v. *Des Moines School District,* 393 U. S. 503, 510–511 (1969). To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth.

Nevertheless, governmental regulation based on subject matter has been approved in narrow circumstances.[5] The court below relied upon two cases in which this Court has recognized that the government may bar from its facilities certain speech that would disrupt the legitimate governmental purpose for which the property has been dedicated. 47 N. Y. 2d, at 107, 390 N. E. 2d, at 755. In *Greer* v. *Spock,* 424 U. S. 828 (1976), we held that the Federal Government could prohibit partisan political speech on a military base even though civilian speakers had been allowed to lecture on other subjects. See *id.,* at 838, n. 10.[6] In *Lehman* v. *Shaker*

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[5] For example, when courts are asked to determine whether a species of speech is covered by the First Amendment, they must look to the content of the expression. See *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n, post,* at 561–563 (commercial speech); *Gertz* v. *Robert Welch, Inc.,* 418 U. S. 323, 340 (1974) (libel); *Miller* v. *California,* 413 U. S. 15 (1973) (obscenity); *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 572–573 (1942) (fighting words). Compare *FCC* v. *Pacifica Foundation,* 438 U. S. 726, 746–747 (1978) (opinion of STEVENS, J.), and *Young* v. *American Mini Theatres, Inc.,* 427 U. S. 50, 70–71 (1976) (opinion of STEVENS, J.), with *FCC* v. *Pacifica Foundation, supra,* at 761 (opinion of POWELL, J.), *id.,* at 762–763 (BRENNAN, J., dissenting), and *Young* v. *American Mini Theatres, Inc., supra,* at 87 (STEWART, J., dissenting) (indecent speech).

[6] The necessity for excluding partisan speech was based upon the traditional policy "of keeping official military activities . . . wholly free of entanglement with partisan political campaigns of any kind." 424 U. S., at 839. Thus, the Court's decision construed the public right of access in light of "the unique character of the Government property upon which the expression is to take place." *Id.,* at 842 (POWELL, J., concurring).

Heights, 418 U. S. 298 (1974) (opinion of BLACKMUN, J.), a plurality of the Court similarly concluded that a city transit system that rented space in its vehicles for commercial advertising did not have to accept partisan political advertising. The municipality's refusal to accept political advertising was based upon fears that partisan advertisements might jeopardize long-term commercial revenue, that commuters would be subjected to political propaganda, and that acceptance of particular political advertisements might lead to charges of favoritism. *Id.*, at 302, 304.[7]

Greer and *Lehman* properly are viewed as narrow exceptions to the general prohibition against subject-matter distinctions. In both cases, the Court was asked to decide whether a public facility was open to all speakers.[8] The plurality in *Lehman* and the Court in *Greer* concluded that partisan political speech would disrupt the operation of governmental facilities even though other forms of speech posed no such danger.

The analysis of *Greer* and *Lehman* is not applicable to the Commission's regulation of bill inserts. In both cases, a private party asserted a right of access to public facilities. Consolidated Edison has not asked to use the offices of the

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[7] Mr. Justice Douglas, who concurred in the judgment in *Lehman*, did not view "the content of the message as relevant either to petitioner's right to express it or to the commuters' right to be free from it." 418 U. S., at 308. Rather, Mr. Justice Douglas upheld the municipality's actions because commuters were a captive audience. *Id.*, at 306–308. The Consolidated Edison customers who receive bill inserts are not a captive audience. See *infra*, at 541–542. Four Justices dissented in *Lehman* on the ground that the municipality could not discriminate among advertisers. 418 U. S., at 308, 309 (BRENNAN, J., joined by STEWART, MARSHALL, and POWELL, JJ., dissenting).

[8] *Lehman* and *Greer* represent only one category of this Court's cases dealing with rights of access to governmental property. Compare *Tinker* v. *Des Moines School District*, 393 U. S. 503, 512–513 (1969), and *Hague* v. *CIO*, 307 U. S. 496, 515–516 (1939) (opinion of Roberts, J.), with *Adderley* v. *Florida*, 385 U. S. 39 (1966).

Commission as a forum from which to promulgate its views. Rather, it seeks merely to utilize its own billing envelopes to promulgate its views on controversial issues of public policy. The Commission asserts that the billing envelope, as a necessary adjunct to the operations of a public utility, is subject to the State's plenary control. To be sure, the State has a legitimate regulatory interest in controlling Consolidated Edison's activities, just as local governments always have been able to use their police powers in the public interest to regulate private behavior. See *New Orleans* v. *Dukes*, 427 U. S. 297, 303 (1976) (*per curiam*). But the Commission's attempt to restrict the free expression of a private party cannot be upheld by reliance upon precedent that rests on the special interests of a government in overseeing the use of its property.

C

Where a government restricts the speech of a private person, the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest. See *First National Bank of Boston* v. *Bellotti*, 435 U. S., at 786; *Buckley* v. *Valeo*, 424 U. S. 1, 25 (1976) (*per curiam*). See also *Bates* v. *Little Rock*, 361 U. S. 516, 524 (1960).[9] The Commission argues finally that its prohibition is necessary (i) to avoid forcing Consolidated Edison's views on a captive audience, (ii) to allocate limited resources in the public interest, and (iii) to en-

[9] The Commission contends that its order should be judged under the standard of *United States* v. *O'Brien*, 391 U. S. 367, 377 (1968), because the order "is only secondarily concerned with the subject matter of Consolidated Edison communications. . . ." Brief for Appellee 9, n. 3. The *O'Brien* test applies to regulations that incidentally limit speech where "the governmental interest is unrelated to the suppression of free expression. . . ." 391 U. S., at 377. The bill insert prohibition does not further a governmental interest unrelated to the suppression of speech. Indeed, the court below justified the ban expressly on the basis that the speech might be harmful to consumers. 47 N. Y. 2d 94, 106–107, 390 N. E. 2d 749, 755 (1979).

sure that ratepayers do not subsidize the cost of the bill inserts.

The State Court of Appeals largely based its approval of the prohibition upon its conclusion that the bill inserts intruded upon individual privacy.[10] The court stated that the Commission could act to protect the privacy of the utility's customers because they have no choice whether to receive the insert and the views expressed in the insert may inflame their sensibilities. 47 N. Y. 2d, at 106–107, 390 N. E. 2d, at 755. But the Court of Appeals erred in its assessment of the seriousness of the intrusion.

Even if a short exposure to Consolidated Edison's views may offend the sensibilities of some consumers, the ability of government "to shut off discourse solely to protect others from hearing it [is] dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." *Cohen* v. *California*, 403 U. S., at 21. A less stringent analysis would permit a government to slight the First Amendment's role "in affording the public access to discussion, debate, and the dissemination of information and ideas." *First National Bank of Boston* v. *Bellotti*, *supra*, at 783; see *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 390 (1969); *Lamont* v. *Postmaster General*, 381 U. S. 301, 308 (1965) (BRENNAN, J., concurring). Where a single speaker communicates to many listeners, the First Amend-

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[10] The State Court of Appeals also referred to the alternative means by which Consolidated Edison might promulgate its views on controversial issues of public policy. Although a time, place, and manner restriction cannot be upheld without examination of alternative avenues of communication open to potential speakers, see *Linmark Associates, Inc.* v. *Willingboro*, 431 U. S., at 93, we have consistently rejected the suggestion that a government may justify a content-based prohibition by showing that speakers have alternative means of expression. See *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, 425 U. S., at 757, n. 15; *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546, 556 (1975); *Spence* v. *Washington*, 418 U. S. 405, 411, n. 4 (1974) (*per curiam*).

ment does not permit the government to prohibit speech as intrusive unless the "captive" audience cannot avoid objectionable speech.

Passengers on public transportation, see *Lehman* v. *Shaker Heights*, 418 U. S., at 307–308 (Douglas, J., concurring in judgment), or residents of a neighborhood disturbed by the raucous broadcasts from a passing sound truck, cf. *Kovacs* v. *Cooper*, 336 U. S. 77 (1949), may well be unable to escape an unwanted message. But customers who encounter an objectionable billing insert may "effectively avoid further bombardment of their sensibilities simply by averting their eyes." *Cohen* v. *California*, *supra*, at 21. See *Spence* v. *Washington*, 418 U. S. 405, 412 (1974) (*per curiam*). The customer of Consolidated Edison may escape exposure to objectionable material simply by transferring the bill insert from envelope to wastebasket.[11]

The Commission contends that because a billing envelope can accommodate only a limited amount of information, political messages should not be allowed to take the place of inserts that promote energy conservation or safety, or that remind consumers of their legal rights. The Commission relies upon *Red Lion Broadcasting Co.* v. *FCC*, *supra*, in which the Court held that the regulation of radio and television broadcast frequencies permits the Federal Government to exercise unusual authority over speech. But billing en-

[11] Although this Court has recognized the special privacy interests that attach to persons who seek seclusion within their own homes, see *Rowan* v. *Post Office Department*, 397 U. S. 728, 737 (1970), the arrival of a billing envelope is hardly as intrusive as the visit of a door-to-door solicitor. Yet the Court has rejected the contention that a municipality may ban door-to-door solicitors because they may invade the privacy of households. *Martin* v. *City of Struthers*, 319 U. S. 141, 146–147 (1943). Even if there were a compelling state interest in protecting consumers against overly intrusive bill inserts, it is possible that the State could achieve its goal simply by requiring Consolidated Edison to stop sending bill inserts to the homes of objecting customers. See *Rowan* v. *Post Office Department*, *supra*.

velopes differ from broadcast frequencies in two ways. First, a broadcaster communicates through use of a scarce, publicly owned resource. No person can broadcast without a license, whereas all persons are free to send correspondence to private homes through the mails. Thus, it cannot be said that billing envelopes are a limited resource comparable to the broadcast spectrum. Second, the Commission has not shown on the record before us that the presence of the bill inserts at issue would preclude the inclusion of other inserts that Consolidated Edison might be ordered lawfully to include in the billing envelope. Unlike radio or television stations broadcasting on a single frequency, multiple bill inserts will not result in a "cacophony of competing voices." *Id.*, at 376.

Finally, the Commission urges that its prohibition would prevent ratepayers from subsidizing the costs of policy-oriented bill inserts. But the Commission did not base its order on an inability to allocate costs between the shareholders of Consolidated Edison and the ratepayers. Rather, the Commission stated that "using bill inserts to proclaim a utility's viewpoint on controversial issues (*even when the stockholder pays for it in full*) is tantamount to taking advantage of a captive audience. . . ." App. to Juris. Statement 43a (emphasis added). Accordingly, there is no basis on this record to assume that the Commission could not exclude the cost of these bill inserts from the utility's rate base.[12] Mere speculation of harm does not constitute a compelling state interest. See *Mine Workers* v. *Illinois Bar Assn.*, 389 U. S. 217, 222–223 (1967).[13]

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[12] In its denial of petitions for rehearing, the Commission re-emphasized that it would impose the ban without regard to allocation of costs between shareholders and ratepayers. App. to Juris. Statement 67a, n. 1.

[13] The Commission also contends that ratepayers cannot be forced to support the costs of Consolidated Edison's bill inserts. Because the Commission has failed to demonstrate that such costs could not be allocated between shareholders and ratepayers, we have no occasion to decide whether the rule of *Abood* v. *Detroit Board of Education*, 431 U. S. 209

IV

The Commission's suppression of bill inserts that discuss controversial issues of public policy directly infringes the freedom of speech protected by the First and Fourteenth Amendments. The state action is neither a valid time, place, or manner restriction, nor a permissible subject-matter regulation, nor a narrowly drawn prohibition justified by a compelling state interest. Accordingly, the regulation is invalid. *First National Bank of Boston* v. *Bellotti*, 435 U. S., at 795.

The decision of the New York Court of Appeals is

Reversed.

MR. JUSTICE MARSHALL, concurring.

I join the Court's opinion. I write separately to emphasize that our decision today in no way addresses the question whether the Commission may exclude the costs of bill inserts from the rate base, nor does it intimate any view on the appropriateness of any allocation of such costs the Commission might choose to make. *Ante*, at 543. The Commission did not rely on the argument that the use of bill inserts required ratepayers to subsidize the dissemination of management's view in issuing its order, and we therefore are precluded from sustaining the order on that ground. Cf. *SEC* v. *Chenery Corp.*, 318 U. S. 80, 95 (1943) ("[A]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained"); *FPC* v. *Texaco Inc.*, 417 U. S. 380, 397 (1974); *FTC* v. *Sperry & Hutchinson Co.*, 405 U. S. 233, 249 (1972).

MR. JUSTICE STEVENS, concurring in the judgment.

Any student of history who has been reprimanded for talking about the World Series during a class discussion of the

(1977), would prevent Consolidated Edison from passing on to ratepayers the costs of bill inserts that discuss controversial issues of public policy.

First Amendment knows that it is incorrect to state that a "time, place, or manner restriction may not be based upon either the content or subject matter of speech." *Ante*, at 536. And every lawyer who has read our Rules,[1] or our cases upholding various restrictions on speech with specific reference to subject matter[2] must recognize the hyperbole in the dictum, "But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of Chicago* v. *Mosley*, 408 U. S. 92, 95, quoted in part, *ante*, at 537. Indeed, if that were the law, there would be no need for the Court's detailed rejection of the justifications put forward by the State for the restriction involved in this case. See *ante*, Part III–C.

There are, in fact, many situations in which the subject matter, or, indeed, even the point of view of the speaker, may provide a justification for a time, place, and manner regulation. Perhaps the most obvious example is the regulation of oral argument in this Court; the appellant's lawyer precedes his

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[1] This Court's Rules 15, 16, 21, 22, 33, 34, 36 (effective June 30, 1980).

[2] See, *e. g.*, *NLRB* v. *Retail Store Employees*, *post*, p. 607 (labor picketing at site of neutral third parties in labor dispute); *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447 (in-person solicitation of legal business, distinguished from other forms of legal advertising); *FCC* v. *Pacifica Foundation*, 438 U. S. 726 (indecent language in early afternoon radio broadcast); *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50 (zoning of "adult" movie theaters); *Greer* v. *Spock*, 424 U. S. 828 (partisan political speeches on military base); *Lehman* v. *Shaker Heights*, 418 U. S. 298 (political advertising on municipal transit system); *Schenck* v. *United States*, 249 U. S. 47, 52 (Holmes, J.): "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." See also cases cited in *American Mini Theatres*, *supra*, at 67–71.

See generally Farber, Content Regulation and the First Amendment: A Revisionist View, 68 Geo. L. J. 727 (1980); Note, *Pacifica Foundation v. FCC*: "Filthy Words," the First Amendment and the Broadcast Media, 78 Colum. L. Rev. 164 (1978).

adversary solely because he seeks reversal of a judgment.[3] As is true of many other aspects of liberty, some forms of orderly regulation actually promote freedom more than would a state of total anarchy.[4]

Instead of trying to justify our conclusion by reasoning from honeycombed premises, I prefer to identify the basis of decision in more simple terms. See *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50, 65–66. A regulation of speech that is motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues of general interest is the purest example of a "law . . . abridging the freedom of speech, or of the press." [5] A regulation that denies one group of persons the right to address a selected audience on "controversial issues of public policy" is plainly such a regulation.

The only justification for the regulation relied on by the New York Court of Appeals is that the utilities' bill inserts may be "offensive" to some of their customers.[6] But a com-

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[3] This Court's Rule 38.2. For the same reason, the color of his brief must be blue rather than red. Rule 33.2 (b) (3).

[4] "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses." *Cox* v. *New Hampshire*, 312 U. S. 569, 574.

Cf. *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 375; *Cox* v. *Louisiana*, 379 U. S. 536, 554.

[5] The First Amendment provides:

"Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

In a series of decisions beginning with *Gitlow* v. *New York*, 268 U. S. 652, this Court held that the liberty of speech and of the press which the First Amendment guarantees against abridgment by the Federal Government is within the liberty safeguarded by the Due Process Clause of the Fourteenth Amendment from invasion by state action. See *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 500, n. 8.

[6] "When the insert espouses the utility's viewpoint on a controversial question, it is as likely to offend the sensibilities of the recipient as it is to elicit agreement. Government need not stand idly by and deny assistance

munication may be offensive in two different ways. Independently of the message the speaker intends to convey, the form of his communication may be offensive—perhaps because it is too loud[7] or too ugly in a particular setting.[8] Other

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to those who are inflamed by having a particular opinion foisted upon them." 47 N. Y. 2d 94, 106, 390 N. E. 2d 749, 755 (1979).

[7] *Kovacs* v. *Cooper,* 336 U. S. 77. See *id.,* at 97 (Frankfurter, J., concurring):

"So long as a legislature does not prescribe what ideas may be noisily expressed and what may not be, nor discriminate among those who would make inroads upon the public peace, it is not for us to supervise the limits the legislature may impose in safeguarding the steadily narrowing opportunities for serenity and reflection. Without such opportunities freedom of thought becomes a mocking phrase, and without freedom of thought there can be no free society."

In his dissenting opinion, Mr. Justice Rutledge, referring to sound trucks in public places stated that he had "no doubt of state power to regulate their abuse in reasonable accommodation, by narrowly drawn statutes, to other interests concerned in use of the streets and in freedom from public nuisance." *Id.,* at 105.

[8] See *FCC* v. *Pacifica Foundation,* 438 U. S., at 745–746 (opinion of STEVENS, J.):

"The question in this case is whether a broadcast of patently offensive words dealing with sex and excretion may be regulated because of its content. Obscene materials have been denied the protection of the First Amendment because their content is so offensive to contemporary moral standards. *Roth* v. *United States,* 354 U. S. 476. But the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas. If there were any reason to believe that the Commission's characterization of the Carlin monologue as offensive could be traced to its political content—or even to the fact that it satirized contemporary attitudes about four-letter words—First Amendment protection might be required. But that is simply not this case. These words offend for the same reasons that obscenity offends. Their place in the hierarchy of First Amendment values was aptly sketched by Mr. Justice Murphy when he said: '[S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step

speeches, even though elegantly phrased in dulcet tones, are offensive simply because the listener disagrees with the speaker's message. The fact that the offensive form of some communication may subject it to appropriate regulation surely does not support the conclusion that the offensive character of an idea can justify an attempt to censor its expression. Since the Public Service Commission has candidly put forward this impermissible justification for its censorial regulation, it plainly violates the First Amendment.[9]

Accordingly, I concur in the judgment of the Court.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE REHNQUIST as to Parts I and II joins, dissenting.

My dissent in this case in no way indicates any disapprobation on my part of the precious rights of free speech (so

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to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.' *Chaplinsky* v. *New Hampshire*, 315 U. S., at 572." (Footnotes omitted.)

See also *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 84 (BRENNAN, J., dissenting): "[T]he obscenity of any particular item may depend upon nuances of presentation and the context of its dissemination. . . . *Redrup* [v. *New York*, 386 U. S. 767] itself suggested that obtrusive exposure to unwilling individuals, distribution to juveniles, and 'pandering' may also bear upon the determination of obscenity."

[9] I recognize that in this Court the Commission has also tried to defend its regulation on the ground that it is entitled to allocate limited resources in the public interest and to guarantee that ratepayers do not subsidize these communicative activities. I agree with the Court's explanation of why there is no merit to either of these suggestions. See *ante*, at 542–543.

Even viewing the restriction as merely a neutral subject-matter regulation (controversial issues generally) as may have been intended initially by the Commission, rather than a restriction of a particular viewpoint (the utilities' opinions on those issues), I still believe it to be unconstitutional. For the use of the "controversial" nature of speech as the touchstone for its regulation threatens a value at the very core of the First Amendment, the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." See *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270.

carefully cataloged by the Court in its opinion) that are protected by the First and Fourteenth Amendments against repression by the State. My prior writings for the Court in the speech area prove conclusively my sensitivity about these rights and my concern for them. See, *e. g.*, *Bigelow* v. *Virginia*, 421 U. S. 809 (1975); *Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U. S. 748 (1976); *Bates* v. *State Bar of Arizona*, 433 U. S. 350 (1977). See also *Central Hudson Gas & Elec. Corp.* v. *Public Service Comm'n*, *post*, p. 573 (concurring opinion).

But I cannot agree with the Court that the New York Public Service Commission's ban on the utility bill insert somehow deprives the utility of its First and Fourteenth Amendment rights. Because of Consolidated Edison's monopoly status and its rate structure, the use of the insert amounts to an exaction from the utility's customers by way of forced aid for the utility's speech. And, contrary to the Court's suggestion, an allocation of the insert's cost between the utility's shareholders and the ratepayers would not eliminate this coerced subsidy.

I

A public utility is a state-created monopoly. See, *e. g.*, N. Y. Pub. Serv. Law § 68 (McKinney 1955); Jones, Origins of the Certificate of Public Convenience and Necessity; Developments in the States 1870–1920, 79 Colum. L. Rev. 426, 458–461 (1979); Comment, Utility Rates, Consumers, and the New York State Public Service Commission, 39 Albany L. Rev. 707, 709–714 (1975). Although monopolies generally are against the public policies of the United States and of the State of New York, see, *e. g.*, N. Y. Gen. Bus. Law § 340 (McKinney 1968 and Supp. 1979–1980), Consolidated Edison and other utilities are permitted to operate as monopolies because of a determination by the State that the public interest is better served by protecting them from competition. See 2 A. Kahn, The Economics of Regulation 113–171 (1971).

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This exceptional grant of power to private enterprises justifies extensive oversight on the part of the State to protect the ratepayers from exploitation of the monopoly power through excessive rates and other forms of overreaching. For this reason, the State regulates the rates that utilities may charge. See N. Y. Pub. Serv. Law § 66 (12) (McKinney Supp. 1979–1980). In addition, New York law gives its Public Service Commission plenary supervisory powers over all property, real and personal, "used or to be used for or in connection with or to facilitate the . . . sale or furnishing of electricity for light, heat or power." N. Y. Pub. Serv. Law §§ 2 (12) and 66 (1) (McKinney 1955). State law explicitly gives the Commission control over the format of the utility bill and any material included in the envelope with the bill. § 66 (12-a) (McKinney Supp. 1979–1980).

The rates authorized by the Public Service Commission may reflect only the costs of providing necessary services to customers plus a reasonable rate of return to the utility's shareholders. See, *e. g.*, Comment, 39 Albany L. Rev., at 719–723. The entire bill payment system—meters, meter-reading, bill mailings, and bill inserts—are paid for by the customers under Commission rules permitting recovery of necessary operating expenses. Uniform System of Accounts—Expense Accounts—Customer Account Expenses, 16 N. Y. C. R. R. §§ 901–906 (1974). Under the laws of New York and other States, however, a public utility cannot include in the rate base the costs of political advertising and lobbying. See, *e. g.*, Uniform System of Accounts, Account 426.4, Expenditures for Certain Civic, Political and Related Activities, 16 N. Y. C. R. R., ch. II, subch. F (1976); *Southern Bell Tel. & Tel. Co.* v. *Louisiana Pub. Serv. Comm'n*, 239 La. 175, 207–209, 118 So. 2d 372, 384 (1960); *Southwestern Bell Tel. Co.*, 19 P. U. R. 4th 1, 28–29 (Kan. Corp. Comm'n 1977); *Boushey* v. *Pacific Gas & Elec. Co.*, 10 P. U. R. 4th 23 (Cal. Pub. Util. Comm'n 1975) (banning controversial bill inserts); *Cascade Natural Gas Corp.*, 8 P. U. R. 4th

19, 27 (Ore. Pub. Util. Comm'n 1974); *Pacific Power & Light Co.*, 34 P. U. R. 3d 36, 46–47 (Ore. Pub. Util. Comm'n 1960); *Southwestern Bell Tel. Co.*, 77 P. U. R. (n. s.) 33, 42 (Mo. Pub. Serv. Comm'n 1949); *In re Investigation into the Advertising and Promotional Practices of Regulated Iowa Pub. Utils.*, No. U–463 (Iowa State Commerce Comm'n Jan. 29, 1975). These costs cannot be passed on to consumers because ratepayers derive no service-related benefits from political advertisements. The purpose of such advertising and lobbying is to benefit the utility's shareholders, and its cost must be deducted from profits otherwise available for the shareholders. The Federal Energy Regulatory Commission, formerly the Federal Power Commission, has adopted this rule as well. *Alabama Power Co.*, 24 F. P. C. 278, 286–287 (1960), aff'd *sub nom. Southwestern Electric Power Co.* v. *Federal Power Comm'n*, 304 F. 2d 29 (CA5), cert. denied, 371 U. S. 924 (1962); Federal Energy Regulatory Commission, Uniform System of Accounts, Account 426.4, 18 CFR Part 101, p. 383 (1979).

II

The Commission concluded, properly in my view, that use of the billing envelope to distribute management's pamphlets amounts to a forced subsidy of the utility's speech by the ratepayers.[1] Consolidated Edison would counter this argu-

[1] MR. JUSTICE MARSHALL, in his concurring opinion, states: "The Commission did not rely on the argument that the use of bill inserts required ratepayers to subsidize the dissemination of management's view in issuing its order, and we therefore are precluded from sustaining the order on that ground." *Ante*, at 544.

I cannot agree that the Commission did not rely on the "forced subsidy" justification. In its opinion denying petitions for rehearing, the Commission stated:

"We note also that where the ratepayer's bill is accompanied by political advertisement, the political material is, absent allocation, getting a free ride; the utility is deriving the economic benefit of postage, envelope, labor and overhead involved in the billing process. And even if an allocation of the expenses could be made, the actual cost of enclosing such material

ment by pointing out that it is willing to allocate to shareholders the *additional* costs attributable to the inserts. It maintains: "The fact that the utilities may incidentally save money by the use of bill inserts, at no expense to the ratepayers, is not detrimental to the ratepayers or the public." Brief for Appellant 21.

I do not accept appellant's argument that preventing a "free ride" for the utility's message, is not a substantial, legitimate state concern. Even though the free ride may cost the ratepayers nothing additional by way of specific dollars, it still qualifies as forced support of the utility's speech. See, *e. g., Boushey* v. *Pacific Gas & Elec. Co.*, 10 P. U. R. 4th, at 27; Note, Utility Companies and the First Amendment: Regulating the Use of Political Inserts in Utility Bills, 64 Va. L. Rev. 921, 926 (1978). If the State compelled an individual to help defray the utility's speech expenses, that compulsion surely would violate that person's First and Fourteenth Amendment rights. *Abood* v. *Detroit Board of Education*, 431 U. S. 209, 233–235 (1977); *id.*, at 256 (POWELL, J., concurring in judgment). The fact that providing such aid costs the individual nothing extra does not make the compulsion any less offensive. See *Wooley* v. *Maynard*, 430 U. S. 705, 714–715 (1977); *Buckley* v. *Valeo*, 424 U. S. 1, 22–23, 36 (1976) (recognizing that permitting a candidate to use real or personal property provides material financial assistance to the candidate); *id.*, at 91, n. 124.[2] For example, a state law re-

in the bill itself does not approach the one-sided benefit to the management of being able to use the unique billing process in presenting its side of the controversy. It is certainly questionable whether ratepayers should be compelled to support views with which they do not agree. See *Abood* v. *Detroit Board of Education*, [431 U. S. 209] (1977)." App. to Juris. Statement 67a, n. 1.

[2] *PruneYard Shopping Center* v. *Robins*, *ante*, p. 74, does not impinge upon this general principle. The decision there was based on the fact that the shopping center voluntarily chose to open its grounds to the public and therefore the State could require that the center permit the exercise of speech rights on the property.

quiring a person to permit the utility to include its insert in the envelope with that person's private letters clearly would infringe upon the letterwriter's First and Fourteenth Amendment rights.

Of course, a private business does not deprive an individual of his constitutional rights unless state action is involved. Although the State has given utilities their monopoly power and thus contributed to a situation in which coerced support of the utility's speech is possible, the state-action requirement of the Fourteenth Amendment may not be met in this situation. See *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345 (1974).

I do not find it necessary, however, to decide whether state action in the Fourteenth Amendment sense has occurred here. It is not necessary to decide whether the ratepayers' First and Fourteenth Amendment rights have been infringed in order to determine whether the State has the power to prevent the utility from exacting aid from the ratepayers in dissemination of a message with which they do not all agree. Even if the State is not so entwined in the activities of Consolidated Edison to meet the state-action requirement, the State has made a monopoly possible by preventing others from competing with the utility. Thus the State is legitimately concerned with preventing the utility from taking advantage of this monopoly power to force consumers to subsidize dissemination of its viewpoint on political issues.[3]

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[3] An example makes this point clear. States authorize the creation of trusts, and the costs of administering a trust are charged to the trust estate. If the trustee, for example a bank, finds it necessary to communicate with the beneficiaries of the trust by letter concerning investments, income distribution, and the like, the expenses of that mailing ordinarily are proper administrative costs to be borne by the trust. In the trust situation, it would seem to be entirely permissible for the State to prohibit the trustee from including in such a mailing its own political insert on a matter unrelated to the trust. Even though adding the bank's insert may cost the beneficiaries nothing, assuming that the bank pays for the printing and stuffing of the insert, the State has an interest in

In suggesting that the State's interest in eliminating forced subsidization of the utility's speech can be achieved by allocating the expenses of the inserts to the utility's shareholders, the Court has glossed over the difficult allocation issue underlying this controversy. It is not clear to me from the Court's opinion whether it believes that charging the shareholders with the marginal costs associated with the inserts, that is, the costs of printing and putting them into the envelope, will satisfy the State's interest, or whether the Court is suggesting some division of the fixed costs of the mailing, that is, the postage, the envelope, the creation and maintenance of the mailing list, and any other overhead expense. See *ante*, at 543.

The Commission maintains that no allocation short of charging all the fixed costs of mailing the bills to the utility's shareholders will eliminate the problem of forced subsidization of the utility's speech. The Commission is obviously correct that the utility will obtain a partial free ride for its message even if the shareholders are charged with part of the mailing costs in addition to the costs directly attributable to the inserts. Consumers would still be forced to aid in the dissemination of the utility's message by making the utility's distribution costs less than they otherwise would be.

Charging all the mailing costs to the shareholders is equivalent, as a practical matter, to the Commission's ban on political inserts. The utility wants to use the inserts only because they are less expensive than a separate mailing.[4] Thus, there

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assuring that the trustee does not derive personal benefit from its role as trustee. The trustee has no constitutional right to a free ride for its message. Here, the state interest in preventing a utility from obtaining a free ride is even stronger, since utility customers have no choice but to purchase electricity from Consolidated Edison, while trusts are voluntarily created and the trustee is chosen by the trustor.

[4] Due to the greater likelihood that a recipient would read an insert with the bill, the utility well might desire to place its insert with the bill even if the total cost of the mailing were charged to the shareholders. See *Long Island Lighting Co.* v. *New York State Public Service Comm'n*,

is no way for the State to achieve its important goal—protecting the ratepayers from forced support of ideas with which they disagree—that is less restrictive than a total ban.

Because ratepayers bear the cost of this medium of communication, the utility's claim to use the bill envelope for its own purposes is not analogous to that of a private letter-writer, or of a nonmonopolistic business, whose customers can turn elsewhere if they object to inserts in their bills that their sales dollars help to finance. Cf. *First National Bank of Boston* v. *Bellotti,* 435 U. S. 765, 794, n. 34 (1978). This, therefore, is not a typical prohibition of a speaker's attempt "merely to utilize its own [property] to promulgate its views." *Ante,* at 540. Rather, this is an attempt by the utility to appropriate and make convenient use of property, for which the public is compelled to pay, for the utility's sole benefit. The Commission's ban on bill inserts does not restrict the utility from using the shareholders' resources to finance communication of its viewpoints on any topic. Consolidated Edison is completely free to use the mails and any other medium of communication on the same basis as any other speaker. The order merely prevents the utility from relying on a forced subsidy from the ratepayers. This leads me to conclude that the State's attempt here to protect the ratepayers from unwillingly financing the utility's speech and to preserve the billing envelope for the sole benefit of the customers who pay for it does not infringe upon the First and Fourteenth Amendment rights of the utility.

III

I might observe, additionally, that I am hopeful that the Court's decision in this case has not completely tied a State's

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No. 77 C 972 (EDNY, Mar. 30, 1979), reproduced in App. to Brief for Long Island Lighting Company as *Amicus Curiae* 1a. This, however, is just another type of forced aid for the utility's message that cannot be eliminated except by a total ban on bill inserts.

hands in preventing this type of abuse of monopoly power. The Court's opinion appears to turn on the particular facts of this case, and slight differences in approach might permit a State to achieve its proper goals.

First, it appears that New York and other States might use their power to define property rights so that the billing envelope is the property of the ratepayers and not of the utility's shareholders. Cf. *PruneYard Shopping Center* v. *Robins, ante,* p. 74. Since it is the ratepayers who pay for the billing packet, I doubt that the Court would find a law establishing their ownership of the packet violative of either the Takings Clause or the First and Fourteenth Amendments. If, under state law, the envelope belongs to the customers, I do not see how restricting the utility from using it could possibly be held to deprive the utility of its rights.

Second, the opinion leaves open the issue of cost allocation. The Commission could charge the utility's shareholders all the costs of the envelopes and postage and of creating and maintaining the mailing list, and charge the consumers only the cost of printing and inserting the bill and the consumer service insert. See *Long Island Lighting Co.* v. *New York State Public Service Comm'n,* No. 77 C 972 (EDNY, Mar. 30, 1979), reproduced in App. to Brief for Long Island Lighting Company as *Amicus Curiae* 22a. There is no reason that the shareholders should be given a free ride for their pamphlets, rather than the customers be given a free ride for their bills. Such an allocation would eliminate the most offensive aspects of the forced subsidization of the utility's speech. But see n. 3, *supra.*

Because I agree with the Appellate Division of the New York Supreme Court, that "[i]n the battle of ideas, the utilities are not entitled to require the consumers to help defray their expenses," 63 App. Div. 2d 364, 368, 407 N. Y. S 2d 735, 737 (1978), I respectfully dissent.

CENTRAL HUDSON GAS & ELECTRIC CORP. *v.* PUBLIC SERVICE COMMISSION OF NEW YORK

APPEAL FROM THE COURT OF APPEALS OF NEW YORK

No. 79-565. Argued March 17, 1980—Decided June 20, 1980

Held: A regulation of appellee New York Public Service Commission which completely bans an electric utility from advertising to promote the use of electricity violates the First and Fourteenth Amendments. Pp. 561–572.

(a) Although the Constitution accords a lesser protection to commercial speech than to other constitutionally guaranteed expression, nevertheless the First Amendment protects commercial speech from unwarranted governmental regulation. For commercial speech to come within the First Amendment, it at least must concern lawful activity and not be misleading. Next, it must be determined whether the asserted governmental interest to be served by the restriction on commercial speech is substantial. If both inquiries yield positive answers, it must then be decided whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest. Pp. 561–566.

(b) In this case, it is not claimed that the expression at issue is either inaccurate or relates to unlawful activity. Nor is appellant electrical utility's promotional advertising unprotected commercial speech merely because appellant holds a monopoly over the sale of electricity in its service area. Since monopoly over the supply of a product provides no protection from competition with substitutes for that product, advertising by utilities is just as valuable to consumers as advertising by unregulated firms, and there is no indication that appellant's decision to advertise was not based on the belief that consumers were interested in the advertising. Pp. 566–568.

(c) The State's interest in energy conservation is clearly substantial and is directly advanced by appellee's regulations. The State's further interest in preventing inequities in appellant's rates—based on the assertion that successful promotion of consumption in "off-peak" periods would create extra costs that would, because of appellant's rate structure, be borne by all consumers through higher overall rates—is also substantial. The latter interest does not, however, provide a constitutionally adequate reason for restricting protected speech because the link between the advertising prohibition and appellant's rate structure is, at most, tenuous. Pp. 568–569.

(d) Appellee's regulation, which reaches all promotional advertising regardless of the impact of the touted service on overall energy use, is more extensive than necessary to further the State's interest in energy conservation which, as important as it is, cannot justify suppressing information about electric devices or services that would cause no net increase in total energy use. In addition, no showing has been made that a more limited restriction on the content of promotional advertising would not serve adequately the State's interests. Pp. 569–571.

47 N. Y. 2d 94, 390 N. E. 2d 749, reversed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, and MARSHALL, JJ., joined. BRENNAN, J., filed an opinion concurring in the judgment, *post*, p. 572. BLACKMUN, J., *post*, p. 573, and STEVENS, J., *post*, p. 579, filed opinions concurring in the judgment, in which BRENNAN, J., joined. REHNQUIST, J., filed a dissenting opinion, *post*, p. 583.

Telford Taylor argued the cause for appellant. With him on the briefs were *Walter A. Bossert, Jr.*, and *Davison W. Grant*.

Peter H. Schiff argued the cause for appellee. With him on the brief was *Howard J. Read*.*

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether a regulation of the Public Service Commission of the State of New York violates the First and Fourteenth Amendments because it completely bans promotional advertising by an electrical utility.

I

In December 1973, the Commission, appellee here, ordered electric utilities in New York State to cease all advertising that "promot[es] the use of electricity." App. to Juris.

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*Briefs of *amici curiae* urging reversal were filed by *Cameron F. MacRae* and *Robert L. Baum* for the Edison Electric Institute; by *Burt Neuborne* for Long Island Lighting Co.; by *Edward H. Dowd* and *Myrna P. Field* for the Mid-Atlantic Legal Foundation et al.; and by *Edwin P. Rome* and *William H. Roberts* for Mobil Corp.

Statement 31a. The order was based on the Commission's finding that "the interconnected utility system in New York State does not have sufficient fuel stocks or sources of supply to continue furnishing all customer demands for the 1973–1974 winter." *Id.*, at 26a.

Three years later, when the fuel shortage had eased, the Commission requested comments from the public on its proposal to continue the ban on promotional advertising. Central Hudson Gas & Electric Corp., the appellant in this case, opposed the ban on First Amendment grounds. App. A10. After reviewing the public comments, the Commission extended the prohibition in a Policy Statement issued on February 25, 1977.

The Policy Statement divided advertising expenses "into two broad categories: promotional—advertising intended to stimulate the purchase of utility services—and institutional and informational, a broad category inclusive of all advertising not clearly intended to promote sales." [1] App. to Juris. Statement 35a. The Commission declared all promotional advertising contrary to the national policy of conserving energy. It acknowledged that the ban is not a perfect vehicle for conserving energy. For example, the Commission's order prohibits promotional advertising to develop consumption during periods when demand for electricity is low. By limiting growth in "off-peak" consumption, the ban limits the "beneficial side effects" of such growth in terms of more efficient use of existing powerplants. *Id.*, at 37a. And since oil dealers are not under the Commission's jurisdiction and

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[1] The dissenting opinion attempts to construe the Policy Statement to authorize advertising that would result "in a net energy savings" even if the advertising encouraged consumption of additional electricity. *Post*, at 604–605. The attempted construction fails, however, since the Policy Statement is phrased only in terms of advertising that promotes "the purchase of utility services" and "sales" of electricity. Plainly, the Commission did not intend to permit advertising that would enhance net energy efficiency by increasing consumption of electrical services.

thus remain free to advertise, it was recognized that the ban can achieve only "piecemeal conservationism." Still, the Commission adopted the restriction because it was deemed likely to "result in some dampening of unnecessary growth" in energy consumption. *Ibid.*

The Commission's order explicitly permitted "informational" advertising designed to encourage "*shifts* of consumption" from peak demand times to periods of low electricity demand. *Ibid.* (emphasis in orginal). Informational advertising would not seek to increase aggregate consumption, but would invite a leveling of demand throughout any given 24-hour period. The agency offered to review "specific proposals by the companies for specifically described [advertising] programs that meet these criteria." *Id.*, at 38a.

When it rejected requests for rehearing on the Policy Statement, the Commission supplemented its rationale for the advertising ban. The agency observed that additional electricity probably would be more expensive to produce than existing output. Because electricity rates in New York were not then based on marginal cost,[2] the Commission feared that additional power would be priced below the actual cost of generation. The additional electricity would be subsidized by all consumers through generally higher rates. *Id.*, at 57a–58a. The state agency also thought that promotional advertising would give "misleading signals" to the public by appearing to encourage energy consumption at a time when conservation is needed. *Id.*, at 59a.

Appellant challenged the order in state court, arguing that the Commission had restrained commercial speech in violation of the First and Fourteenth Amendments.[3] The Commis-

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[2] "Marginal cost" has been defined as the "*extra* or incremental cost of producing an *extra* unit of output." P. Samuelson, Economics 463 (10th ed. 1976) (emphasis in original).

[3] Central Hudson also alleged that the Commission's order reaches beyond the agency's statutory powers. This argument was rejected by the

sion's order was upheld by the trial court and at the intermediate appellate level.[4] The New York Court of Appeals affirmed. It found little value to advertising in "the noncompetitive market in which electric corporations operate." *Consolidated Edison Co.* v. *Public Service Comm'n*, 47 N. Y. 2d 94, 110, 390 N. E. 2d 749, 757 (1979). Since consumers "have no choice regarding the source of their electric power," the court denied that "promotional advertising of electricity might contribute to society's interest in 'informed and reliable' economic decisionmaking." *Ibid.* The court also observed that by encouraging consumption, promotional advertising would only exacerbate the current energy situation. *Id.*, at 110, 390 N. E. 2d, at 758. The court concluded that the governmental interest in the prohibition outweighed the limited constitutional value of the commercial speech at issue. We noted probable jurisdiction, 444 U. S. 962 (1979), and now reverse.

II

The Commission's order restricts only commercial speech, that is, expression related solely to the economic interests of the speaker and its audience. *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, 425 U. S. 748, 762 (1976); *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 363–364 (1977); *Friedman* v. *Rogers*, 440 U. S. 1, 11 (1979). The First Amendment, as applied to the States through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation. *Virginia Pharmacy Board*, 425 U. S., at 761–762. Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible

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New York Court of Appeals, 47 N. Y. 2d 94, 102–104; 390 N. E. 2d 749, 752–754 (1979), and was not argued to this Court.

[4] *Consolidated Edison Co.* v. *Public Service Comm'n*, 63 App. Div. 2d 364, 407 N. Y. S. 2d 735 (1978); App. to Juris. Statement 22a (N. Y. Sup. Ct., Feb. 17, 1978).

dissemination of information. In applying the First Amendment to this area, we have rejected the "highly paternalistic" view that government has complete power to suppress or regulate commercial speech. "[P]eople will perceive their own best interests if only they are well enough informed, and . . . the best means to that end is to open the channels of communication, rather than to close them. . . ." *Id.*, at 770; see *Linmark Associates, Inc.* v. *Willingboro*, 431 U. S. 85, 92 (1977). Even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all. *Bates* v. *State Bar of Arizona, supra*, at 374.

Nevertheless, our decisions have recognized "the 'commonsense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 455–456 (1978); see *Bates* v. *State Bar of Arizona, supra*, at 381; see also Jackson & Jeffries, Commercial Speech: Economic Due Process and the First Amendment, 65 Va. L. Rev. 1, 38–39 (1979).[5] The

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[5] In an opinion concurring in the judgment, MR. JUSTICE STEVENS suggests that the Commission's order reaches beyond commercial speech to suppress expression that is entitled to the full protection of the First Amendment. See *post*, at 580–581. We find no support for this claim in the record of this case. The Commission's Policy Statement excluded "institutional and informational" messages from the advertising ban, which was restricted to all advertising "clearly intended to promote sales." App. to Juris. Statement 35a. The complaint alleged only that the "prohibition of promotional advertising by Petitioner is not reasonable regulation of Petitioner's commercial speech. . . ." *Id.*, at 70a. Moreover, the state-court opinions and the arguments of the parties before this Court also viewed this litigation as involving only commercial speech. Nevertheless, the concurring opinion of MR. JUSTICE STEVENS views the Commission's order as suppressing more than commercial speech because it would outlaw, for example, advertising that promoted electricity consumption by touting the environmental benefits of such uses. See *post*, at 581. Ap-

Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression. 436 U. S., at 456, 457. The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation.

The First Amendment's concern for commercial speech is based on the informational function of advertising. See *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 783 (1978). Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it, *Friedman* v. *Rogers*, *supra*, at 13, 15–16; *Ohralik* v. *Ohio State Bar Assn.*, *supra*, at 464–465, or

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parently the opinion would accord full First Amendment protection to all promotional advertising that includes claims "relating to . . . questions frequently discussed and debated by our political leaders." *Ibid.*

Although this approach responds to the serious issues surrounding our national energy policy as raised in this case, we think it would blur further the line the Court has sought to draw in commercial speech cases. It would grant broad constitutional protection to any advertising that links a product to a current public debate. But many, if not most, products may be tied to public concerns with the environment, energy, economic policy, or individual health and safety. We rule today in *Consolidated Edison Co.* v. *Public Service Comm'n*, *ante*, p. 530, that utilities enjoy the full panoply of First Amendment protections for their direct comments on public issues. There is no reason for providing similar constitutional protection when such statements are made only in the context of commercial transactions. In that context, for example, the State retains the power to "insur[e] that the stream of commercial information flow[s] cleanly as well as freely." *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, 425 U. S. 748, 772 (1975). This Court's decisions on commercial expression have rested on the premise that such speech, although meriting some protection, is of less constitutional moment than other forms of speech. As we stated in *Ohralik*, the failure to distinguish between commercial and noncommercial speech "could invite dilution, simply by a leveling process, of the force of the [First] Amendment's guarantee with respect to the latter kind of speech." 436 U. S., at 456.

commercial speech related to illegal activity, *Pittsburgh Press Co.* v. *Human Relations Comm'n*, 413 U. S. 376, 388 (1973).[6]

If the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed. The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the State's goal. Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.

Under the first criterion, the Court has declined to uphold regulations that only indirectly advance the state interest involved. In both *Bates* and *Virginia Pharmacy Board*, the Court concluded that an advertising ban could not be imposed to protect the ethical or performance standards of a profession. The Court noted in *Virginia Pharmacy Board* that "[t]he advertising ban does not directly affect professional standards one way or the other." 425 U. S., at 769. In *Bates*, the Court overturned an advertising prohibition that was designed to protect the "quality" of a lawyer's work.

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[6] In most other contexts, the First Amendment prohibits regulation based on the content of the message. *Consolidated Edison Co.* v. *Public Service Comm'n*, *ante*, at 537–540. Two features of commercial speech permit regulation of its content. First, commercial speakers have extensive knowledge of both the market and their products. Thus, they are well situated to evaluate the accuracy of their messages and the lawfulness of the underlying activity. *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 381 (1977). In addition, commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not "particularly susceptible to being crushed by overbroad regulation." *Ibid.*

"Restraints on advertising . . . are an ineffective way of deterring shoddy work." 433 U. S., at 378.[7]

The second criterion recognizes that the First Amendment mandates that speech restrictions be "narrowly drawn." *In re Primus*, 436 U. S. 412, 438 (1978).[8] The regulatory technique may extend only as far as the interest it serves. The State cannot regulate speech that poses no danger to the asserted state interest, see *First National Bank of Boston* v. *Bellotti, supra*, at 794–795, nor can it completely suppress information when narrower restrictions on expression would serve its interest as well. For example, in *Bates* the Court explicitly did not "foreclose the possibility that some limited supplementation, by way of warning or disclaimer or the like, might be required" in promotional materials. 433 U. S., at 384. See *Virginia Pharmacy Board, supra*, at 773. And in *Carey* v. *Population Services International*, 431 U. S. 678, 701–702 (1977), we held that the State's "arguments . . . do not justify the total suppression of advertising concerning contraceptives." This holding left open the possibility that

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[7] In *Linmark Associates, Inc.* v. *Willingboro*, 431 U. S. 85, 95–96 (1977), we observed that there was no definite connection between the township's goal of integrated housing and its ban on the use of "For Sale" signs in front of houses.

[8] This analysis is not an application of the "overbreadth" doctrine. The latter theory permits the invalidation of regulations on First Amendment grounds even when the litigant challenging the regulation has engaged in no constitutionally protected activity. *E. g., Kunz* v. *New York*, 340 U. S. 290 (1951). The overbreadth doctrine derives from the recognition that unconstitutional restriction of expression may deter protected speech by parties not before the court and thereby escape judicial review. *Broadrick* v. *Oklahoma*, 413 U. S. 601, 612–613 (1973); see Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 853–858 (1970). This restraint is less likely where the expression is linked to "commercial well-being" and therefore is not easily deterred by "overbroad regulation." *Bates* v. *State Bar of Arizona, supra*, at 381.

In this case, the Commission's prohibition acts directly against the promotional activities of Central Hudson, and to the extent the limitations are unnecessary to serve the State's interest, they are invalid.

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the State could implement more carefully drawn restrictions. See *id.*, at 712 (POWELL, J., concurring in part and in judgment); *id.*, at 716–717 (STEVENS, J., concurring in part and in judgment).[9]

In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

III

We now apply this four-step analysis for commercial speech to the Commission's arguments in support of its ban on promotional advertising.

A

The Commission does not claim that the expression at issue either is inaccurate or relates to unlawful activity. Yet the New York Court of Appeals questioned whether Central Hudson's advertising is protected commercial speech. Because appellant holds a monopoly over the sale of electricity in its service area, the state court suggested that the Commission's order restricts no commercial speech of any worth. The court stated that advertising in a "noncompetitive market"

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[9] We review with special care regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy. In those circumstances, a ban on speech could screen from public view the underlying governmental policy. See *Virginia Pharmacy Board*, 425 U. S., at 780, n. 8 (STEWART, J., concurring). Indeed, in recent years this Court has not approved a blanket ban on commercial speech unless the expression itself was flawed in some way, either because it was deceptive or related to unlawful activity.

could not improve the decisionmaking of consumers. 47 N. Y. 2d, at 110, 390 N. E. 2d, at 757. The court saw no constitutional problem with barring commercial speech that it viewed as conveying little useful information.

This reasoning falls short of establishing that appellant's advertising is not commercial speech protected by the First Amendment. Monopoly over the supply of a product provides no protection from competition with substitutes for that product. Electric utilities compete with suppliers of fuel oil and natural gas in several markets, such as those for home heating and industrial power. This Court noted the existence of interfuel competition 45 years ago, see *West Ohio Gas Co.* v. *Public Utilities Comm'n*, 294 U. S. 63, 72 (1935). Each energy source continues to offer peculiar advantages and disadvantages that may influence consumer choice. For consumers in those competitive markets, advertising by utilities is just as valuable as advertising by unregulated firms.[10]

Even in monopoly markets, the suppression of advertising reduces the information available for consumer decisions and thereby defeats the purpose of the First Amendment. The New York court's argument appears to assume that the providers of a monopoly service or product are willing to pay for wholly ineffective advertising. Most businesses—even regulated monopolies—are unlikely to underwrite promotional advertising that is of no interest or use to consumers. Indeed, a monopoly enterprise legitimately may wish to inform the public that it has developed new services or terms of doing business. A consumer may need information to aid his decision whether or not to use the monopoly service at all, or how much of the service he should purchase. In the absence of factors that would distort the decision to advertise, we

[10] Several commercial speech decisions have involved enterprises subject to extensive state regulation. *E. g.*, *Friedman* v. *Rogers*, 440 U. S. 1, 4–5 (1979) (optometrists); *Bates* v. *State Bar of Arizona*, 433 U. S. 350 (1977) (lawyers); *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, 425 U. S., at 750–752 (pharmacists).

may assume that the willingness of a business to promote its products reflects a belief that consumers are interested in the advertising.[11] Since no such extraordinary conditions have been identified in this case, appellant's monopoly position does not alter the First Amendment's protection for its commercial speech.

B

The Commission offers two state interests as justifications for the ban on promotional advertising. The first concerns energy conservation. Any increase in demand for electricity—during peak or off-peak periods—means greater consumption of energy. The Commission argues, and the New York court agreed, that the State's interest in conserving energy is sufficient to support suppression of advertising designed to increase consumption of electricity. In view of our country's dependence on energy resources beyond our control, no one can doubt the importance of energy conservation. Plainly, therefore, the state interest asserted is substantial.

The Commission also argues that promotional advertising will aggravate inequities caused by the failure to base the utilities' rates on marginal cost. The utilities argued to the Commission that if they could promote the use of electricity in periods of low demand, they would improve their utilization of generating capacity. The Commission responded that promotion of off-peak consumption also would increase consumption during peak periods. If peak demand were to rise, the absence of marginal cost rates would mean that the rates charged for the additional power would not reflect the true costs of expanding production. Instead, the extra costs would

[11] There may be a greater incentive for a utility to advertise if it can use promotional expenses in determining its rate of return, rather than pass those costs on solely to shareholders. That practice, however, hardly distorts the economic decision whether to advertise. Unregulated businesses pass on promotional costs to consumers, and this Court expressly approved the practice for utilities in *West Ohio Gas Co.* v. *Public Utilities Comm'n*, 294 U. S. 63, 72 (1935).

be borne by all consumers through higher overall rates. Without promotional advertising, the Commission stated, this inequitable turn of events would be less likely to occur. The choice among rate structures involves difficult and important questions of economic supply and distributional fairness.[12] The State's concern that rates be fair and efficient represents a clear and substantial governmental interest.

C

Next, we focus on the relationship between the State's interests and the advertising ban. Under this criterion, the Commission's laudable concern over the equity and efficiency of appellant's rates does not provide a constitutionally adequate reason for restricting protected speech. The link between the advertising prohibition and appellant's rate structure is, at most, tenuous. The impact of promotional advertising on the equity of appellant's rates is highly speculative. Advertising to increase off-peak usage would have to increase peak usage, while other factors that directly affect the fairness and efficiency of appellant's rates remained constant. Such conditional and remote eventualities simply cannot justify silencing appellant's promotional advertising.

In contrast, the State's interest in energy conservation is directly advanced by the Commission order at issue here. There is an immediate connection between advertising and demand for electricity. Central Hudson would not contest the advertising ban unless it believed that promotion would increase its sales. Thus, we find a direct link between the state interest in conservation and the Commission's order.

D

We come finally to the critical inquiry in this case: whether the Commission's complete suppression of speech ordinarily protected by the First Amendment is no more extensive than

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[12] See W. Jones, Regulated Industries 191–287 (2d ed. 1976).

necessary to further the State's interest in energy conservation. The Commission's order reaches all promotional advertising, regardless of the impact of the touted service on overall energy use. But the energy conservation rationale, as important as it is, cannot justify suppressing information about electric devices or services that would cause no net increase in total energy use. In addition, no showing has been made that a more limited restriction on the content of promotional advertising would not serve adequately the State's interests.

Appellant insists that but for the ban, it would advertise products and services that use energy efficiently. These include the "heat pump," which both parties acknowledge to be a major improvement in electric heating, and the use of electric heat as a "backup" to solar and other heat sources. Although the Commission has questioned the efficiency of electric heating before this Court, neither the Commission's Policy Statement nor its order denying rehearing made findings on this issue. In the absence of authoritative findings to the contrary, we must credit as within the realm of possibility the claim that electric heat can be an efficient alternative in some circumstances.

The Commission's order prevents appellant from promoting electric services that would reduce energy use by diverting demand from less efficient sources, or that would consume roughly the same amount of energy as do alternative sources. In neither situation would the utility's advertising endanger conservation or mislead the public. To the extent that the Commission's order suppresses speech that in no way impairs the State's interest in energy conservation, the Commission's order violates the First and Fourteenth Amendments and must be invalidated. See *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765 (1978).

The Commission also has not demonstrated that its interest in conservation cannot be protected adequately by more limited regulation of appellant's commercial expression. To fur-

ther its policy of conservation, the Commission could attempt to restrict the format and content of Central Hudson's advertising. It might, for example, require that the advertisements include information about the relative efficiency and expense of the offered service, both under current conditions and for the foreseeable future. Cf. *Banzhaf* v. *FCC*, 132 U. S. App. D. C. 14, 405 F. 2d 1082 (1968), cert. denied *sub nom. Tobacco Institute, Inc.* v. *FCC*, 396 U. S. 842 (1969).[13] In the absence of a showing that more limited speech regulation would be ineffective, we cannot approve the complete suppression of Central Hudson's advertising.[14]

IV

Our decision today in no way disparages the national interest in energy conservation. We accept without reservation the argument that conservation, as well as the development of alternative energy sources, is an imperative national goal. Administrative bodies empowered to regulate electric utilities have the authority—and indeed the duty—to take appropriate action to further this goal. When, however, such action in-

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[13] The Commission also might consider a system of previewing advertising campaigns to insure that they will not defeat conservation policy. It has instituted such a program for approving "informational" advertising under the Policy Statement challenged in this case. See *supra*, at 560. We have observed that commercial speech is such a sturdy brand of expression that traditional prior restraint doctrine may not apply to it. *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, 425 U. S., at 771–772, n. 24. And in other areas of speech regulation, such as obscenity, we have recognized that a prescreening arrangement can pass constitutional muster if it includes adequate procedural safeguards. *Freedman* v. *Maryland*, 380 U. S. 51 (1965).

[14] In view of our conclusion that the Commission's advertising policy violates the First and Fourteenth Amendments, we do not reach appellant's claims that the agency's order also violated the Equal Protection Clause of the Fourteenth Amendment, and that it is both overbroad and vague.

volves the suppression of speech, the First and Fourteenth Amendments require that the restriction be no more extensive than is necessary to serve the state interest. In this case, the record before us fails to show that the total ban on promotional advertising meets this requirement.[15]

Accordingly, the judgment of the New York Court of Appeals is

Reversed.

MR. JUSTICE BRENNAN, concurring in the judgment.

One of the major difficulties in this case is the proper characterization of the Commission's Policy Statement. I find it impossible to determine on the present record whether the Commission's ban on all "promotional" advertising, in contrast to "institutional and informational" advertising, see *ante*, at 559, is intended to encompass more than "commercial speech." I am inclined to think that MR. JUSTICE STEVENS is correct that the Commission's order prohibits more than mere proposals to engage in certain kinds of commercial transactions, and therefore I agree with his conclusion that the ban surely violates the First and Fourteenth Amendments. But even on the assumption that the Court is correct that the Commission's order reaches only commercial speech, I agree with MR. JUSTICE BLACKMUN that "[n]o differences between commercial speech and other protected speech justify suppression of commercial speech in order to influence public conduct through manipulation of the availability of information." *Post*, at 578.

Accordingly, with the qualifications implicit in the pre-

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[15] The Commission order at issue here was not promulgated in response to an emergency situation. Although the advertising ban initially was prompted by critical fuel shortage in 1973, the Commission makes no claim that an emergency now exists. We do not consider the powers that the State might have over utility advertising in emergency circumstances. See *State* v. *Oklahoma Gas & Electric Co.*, 536 P. 2d 887, 895–896 (Okla. 1975).

ceding paragraph, I join the opinions of MR. JUSTICE BLACKMUN and MR. JUSTICE STEVENS concurring in the judgment.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE BRENNAN joins, concurring in the judgment.

I agree with the Court that the Public Service Commission's ban on promotional advertising of electricity by public utilities is inconsistent with the First and Fourteenth Amendments. I concur only in the Court's judgment, however, because I believe the test now evolved and applied by the Court is not consistent with our prior cases and does not provide adequate protection for truthful, nonmisleading, noncoercive commercial speech.

The Court asserts, *ante*, at 566, that "a four-part analysis has developed" from our decisions concerning commercial speech. Under this four-part test a restraint on commercial "communication [that] is neither misleading nor related to unlawful activity" is subject to an intermediate level of scrutiny, and suppression is permitted whenever it "directly advances" a "substantial" governmental interest and is "not more extensive than is necessary to serve that interest." *Ante*, at 564 and 566. I agree with the Court that this level of intermediate scrutiny is appropriate for a restraint on commercial speech designed to protect consumers from misleading or coercive speech, or a regulation related to the time, place, or manner of commercial speech. I do not agree, however, that the Court's four-part test is the proper one to be applied when a State seeks to suppress information about a product in order to manipulate a private economic decision that the State cannot or has not regulated or outlawed directly.

Since the Court, without citing empirical data or other authority, finds a "direct link" between advertising and energy consumption, it leaves open the possibility that the State may suppress advertising of electricity in order to lessen demand for electricity. I, of course, agree with the Court that,

in today's world, energy conservation is a goal of paramount national and local importance. I disagree with the Court, however, when it says that suppression of speech may be a permissible means to achieve that goal. MR. JUSTICE STEVENS appropriately notes: "The justification for the regulation is nothing more than the expressed fear that the audience may find the utility's message persuasive. Without the aid of any coercion, deception, or misinformation, truthful communication may persuade some citizens to consume more electricity than they otherwise would." *Post,* at 581.

The Court recognizes that we have never held that commercial speech may be suppressed in order to further the State's interest in discouraging purchases of the underlying product that is advertised. *Ante,* at 566, n. 9. Permissible restraints on commercial speech have been limited to measures designed to protect consumers from fraudulent, misleading, or coercive sales techniques.[1] Those designed to deprive consumers of information about products or services that are legally offered for sale consistently have been invalidated.[2]

I seriously doubt whether suppression of information concerning the availability and price of a legally offered product is ever a permissible way for the State to "dampen" demand for or use of the product. Even though "commercial" speech is involved, such a regulatory measure strikes at the heart of the First Amendment. This is because it is a covert attempt

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[1] See *Friedman* v. *Rogers,* 440 U. S. 1, 10 (1979) (Court upheld a ban on practice of optometry under a trade name as a permissible requirement that commercial information "'appear in such a form . . . as [is] necessary to prevent its being deceptive,'" quoting from *Virginia Pharmacy Board* v. *Virginia Consumer Council,* 425 U. S. 748, 772, n. 24 (1976)); *Ohralik* v. *Ohio State Bar Assn.,* 436 U. S. 447 (1978).

[2] See *Bates* v. *State Bar of Arizona,* 433 U. S. 350 (1977); *Carey* v. *Population Services International,* 431 U. S. 678, 700–702 (1977); *Linmark Associates, Inc.* v. *Willingboro,* 431 U. S. 85 (1977); *Virginia Pharmacy Board* v. *Virginia Consumer Council,* 425 U. S. 748 (1976); *Bigelow* v. *Virginia,* 421 U. S. 809 (1975).

by the State to manipulate the choices of its citizens, not by persuasion or direct regulation, but by depriving the public of the information needed to make a free choice. As the Court recognizes, the State's policy choices are insulated from the visibility and scrutiny that direct regulation would entail and the conduct of citizens is molded by the information that government chooses to give them. *Ante*, at 566, n. 9 ("We review with special care regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy. In those circumstances, a ban on speech could screen from public view the underlying governmental policy"). See Rotunda, The Commercial Speech Doctrine in the Supreme Court, 1976 U. Ill. Law Forum 1080, 1080–1083.

If the First Amendment guarantee means anything, it means that, absent clear and present danger, government has no power to restrict expression because of the effect its message is likely to have on the public. See generally Comment, First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine, 44 U. Chi. L. Rev. 205, 243–251 (1976). Our cases indicate that this guarantee applies even to commercial speech. In *Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U. S. 748 (1976), we held that Virginia could not pursue its goal of encouraging the public to patronize the "professional pharmacist" (one who provided individual attention and a stable pharmacist-customer relationship) by "keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering." *Id.*, at 770. We noted that our decision left the State free to pursue its goal of maintaining high standards among its pharmacists by "requir[ing] whatever professional standards it wishes of its pharmacists." *Ibid.*

We went on in *Virginia Pharmacy Board* to discuss the types of regulation of commercial speech that, due to the "commonsense differences" between this form of speech and other forms, are or may be constitutionally permissible. We indicated that government may impose reasonable "time,

place, and manner" restrictions, and that it can deal with false, deceptive, and misleading commercial speech. We noted that the question of advertising of illegal transactions and the special problems of the electronic broadcast media were not presented.

Concluding with a restatement of the type of restraint that is not permitted, we said: "What is at issue is whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients. . . . [W]e conclude that the answer to this [question] is in the negative." *Id.*, at 773.

Virginia Pharmacy Board did not analyze the State's interests to determine whether they were "substantial." Obviously, preventing professional dereliction and low quality health care are "substantial," legitimate, and important state goals. Nor did the opinion analyze the ban on speech to determine whether it "directly advance[d]," *ante*, at 566, 569, these goals. We also did not inquire whether a "more limited regulation of . . . commercial expression," *ante*, at 570, would adequately serve the State's interests. Rather, we held that the State "may *not* [pursue its goals] by keeping the public in ignorance." 425 U. S., at 770. (Emphasis supplied.)

Until today, this principle has governed. In *Linmark Associates, Inc.* v. *Willingboro*, 431 U. S. 85 (1977), we considered whether a town could ban "For Sale" signs on residential property to further its goal of promoting stable, racially integrated housing. We did note that the record did not establish that the ordinance was necessary to enable the State to achieve its goal. The holding of *Linmark*, however, was much broader.[3] We stated:

"The constitutional defect in this ordinance, however,

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[3] In my view, the Court today misconstrues the holdings of both *Virginia Pharmacy Board* and *Linmark Associates* by implying that those decisions were based on the fact that the restraints were not closely enough

> is far more basic. The Township Council here, like the Virginia Assembly in *Virginia Pharmacy Bd.*, acted to prevent its residents from obtaining certain information . . . which pertains to sales activity in Willingboro. . . . The Council has sought to restrict the free flow of these data because it fears that otherwise homeowners will make decisions inimical to what the Council views as the homeowners' self-interest and the corporate interest of the township: they will choose to leave town. The Council's concern, then, was not with any commercial aspect of "For Sale" signs—with offerors communicating offers to offerees—but with the substance of the information communicated to Willingboro citizens." *Id.*, at 96.

The Court in *Linmark* resolved beyond all doubt that a strict standard of review applies to suppression of commercial information, where the purpose of the restaint is to influence behavior by depriving citizens of information. The Court followed the strong statement above with an explicit adoption of the standard advocated by Mr. Justice Brandeis in his concurring opinion in *Whitney* v. *California*, 274 U. S. 357, 377 (1927): "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression." 431 U. S., at 97.

Carey v. *Population Services International*, 431 U. S. 678, 700–702 (1977), also applied to content-based restraints on commercial speech the same standard of review we have applied to other varieties of speech. There the Court held that a ban on advertising of contraceptives could not be justified

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related to the governmental interests asserted. See *ante*, at 564–565, and n. 7. Although the Court noted the lack of substantial relationship between the restraint and the governmental interest in each of those cases, the holding of each clearly rested on a much broader principle.

by the State's interest in avoiding " 'legitimation' of illicit sexual behavior" because the advertisements could not be characterized as " 'directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action,' " *id.*, at 701, quoting *Brandenburg* v. *Ohio,* 395 U. S. 444, 447 (1969).

Our prior references to the " 'commonsense differences' " between commercial speech and other speech " 'suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired.' " *Linmark Associates,* 431 U. S., at 98, quoting *Virginia Pharmacy Board,* 425 U. S., at 771–772, n. 24. We have not suggested that the "commonsense differences" between commercial speech and other speech justify relaxed scrutiny of restraints that suppress truthful, nondeceptive, noncoercive commercial speech. The differences articulated by the Court, see *ante,* at 564, n. 6, justify a more permissive approach to regulation of the manner of commercial speech for the purpose of protecting consumers from deception or coercion, and these differences explain why doctrines designed to prevent "chilling" of protected speech are inapplicable to commercial speech. No differences between commercial speech and other protected speech justify suppression of commercial speech in order to influence public conduct through manipulation of the availability of information. The Court stated in *Carey* v. *Population Services International:*

> "Appellants suggest no distinction between commercial and noncommercial speech that would render these discredited arguments meritorious when offered to justify prohibitions on commercial speech. On the contrary, such arguments are clearly directed not at any commercial aspect of the prohibited advertising but at the ideas conveyed and form of expression—*the core of First Amendment values.*" 431 U. S., at 701, n. 28 (emphasis added).

It appears that the Court would permit the State to ban all direct advertising of air conditioning, assuming that a more limited restriction on such advertising would not effectively deter the public from cooling its homes. In my view, our cases do not support this type of suppression. If a governmental unit believes that use or overuse of air conditioning is a serious problem, it must attack that problem directly, by prohibiting air conditioning or regulating thermostat levels. Just as the Commonwealth of Virginia may promote professionalism of pharmacists directly, so too New York may *not* promote energy conservation "by keeping the public in ignorance." *Virginia Pharmacy Board,* 425 U. S., at 770.

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN joins, concurring in the judgment.

Because "commercial speech" is afforded less constitutional protection than other forms of speech,[1] it is important that the commercial speech concept not be defined too broadly lest speech deserving of greater constitutional protection be inadvertently suppressed. The issue in this case is whether New York's prohibition on the promotion of the use of electricity through advertising is a ban on nothing but commercial speech.

In my judgment one of the two definitions the Court uses in addressing that issue is too broad and the other may be somewhat too narrow. The Court first describes commercial speech as "expression related solely to the economic interests of the speaker and its audience." *Ante,* at 561. Although it is not entirely clear whether this definition uses the subject matter of the speech or the motivation of the speaker as the limiting factor, it seems clear to me that it encompasses speech that is entitled to the maximum protection afforded by the First Amendment. Neither a labor leader's exhortation to

[1] See *Ohralik* v. *Ohio State Bar Assn.,* 436 U. S. 447, 456, quoted *ante,* at 563, n. 5. Cf. *Smith* v. *United States,* 431 U. S. 291, 318 (STEVENS, J., dissenting).

strike, nor an economist's dissertation on the money supply, should receive any lesser protection because the subject matter concerns only the economic interests of the audience. Nor should the economic motivation of a speaker qualify his constitutional protection; even Shakespeare may have been motivated by the prospect of pecuniary reward. Thus, the Court's first definition of commercial speech is unquestionably too broad.[2]

The Court's second definition refers to " 'speech proposing a commercial transaction.' " *Ante*, at 562. A saleman's solicitation, a broker's offer, and a manufacturer's publication of a price list or the terms of his standard warranty would unquestionably fit within this concept.[3] Presumably, the definition is intended to encompass advertising that advises possible buyers of the availability of specific products at specific prices and describes the advantages of purchasing such items. Perhaps it also extends to other communications that do little more than make the name of a product or a service more familiar to the general public. Whatever the precise contours of the concept, and perhaps it is too early to enunciate an exact formulation, I am persuaded that it should not include the entire range of communication that is embraced within the term "promotional advertising."

This case involves a governmental regulation that completely bans promotional advertising by an electric utility. This ban encompasses a great deal more than mere proposals to engage in certain kinds of commercial transactions. It prohibits all advocacy of the immediate or future use of elec-

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[2] See Farber, Commercial Speech and First Amendment Theory, 74 Nw. U. L. Rev. 372, 382–383 (1979):

"Economic motivation could not be made a disqualifying factor [from maximum protection] without enormous damage to the first amendment. Little purpose would be served by a first amendment which failed to protect newspapers, paid public speakers, political candidates with partially economic motives and professional authors." (Footnotes omitted.)

[3] See *id.*, at 386–387.

tricity. It curtails expression by an informed and interested group of persons of their point of view on questions relating to the production and consumption of electrical energy—questions frequently discussed and debated by our political leaders. For example, an electric company's advocacy of the use of electric heat for environmental reasons, as opposed to wood-burning stoves, would seem to fall squarely within New York's promotional advertising ban and also within the bounds of maximum First Amendment protection. The breadth of the ban thus exceeds the boundaries of the commercial speech concept, however that concept may be defined.[4]

The justification for the regulation is nothing more than the expressed fear that the audience may find the utility's message persuasive. Without the aid of any coercion, deception, or misinformation, truthful communication may persuade some citizens to consume more electricity than they otherwise would. I assume that such a consequence would be undesirable and that government may therefore prohibit and punish the unnecessary or excessive use of electricity. But if the perceived harm associated with greater electrical usage is not sufficiently serious to justify direct regulation, surely it does not constitute the kind of clear and present danger that can justify the suppression of speech.

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[4] The utility's characterization of the Commission's ban in its complaint as involving commercial speech clearly does not bind this Court's consideration of the First Amendment issues in this new and evolving area of constitutional law.

Nor does the Commission's intention not to suppress "institutional and informational" speech insure that only "commercial speech" will be suppressed. The blurry line between the two categories of speech has the practical effect of requiring that the utilities either refrain from speech that is close to the line, or seek advice from the Public Service Commission. But the Commission does not possess the necessary expertise in dealing with these sensitive free speech questions; and in any event, ordinarily speech entitled to maximum First Amendment protection may not be subjected to a prior clearance procedure with a government agency.

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Although they were written in a different context, the words used by Mr. Justice Brandeis in his concurring opinion in *Whitney* v. *California*, 274 U. S. 357, 376–377, explain my reaction to the prohibition against advocacy involved in this case:

> "But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind. In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.
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> "Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution." (Footnote omitted.) [5]

[5] Mr. Justice Brandeis quoted Lord Justice Scrutton's comment in *King* v. *Secretary of State for Home Affairs ex parte O'Brien*, [1923] 2 K. B. 361, 382: "'You really believe in freedom of speech, if you are willing to

In sum, I concur in the result because I do not consider this to be a "commercial speech" case. Accordingly, I see no need to decide whether the Court's four-part analysis, *ante*, at 566, adequately protects commercial speech—as properly defined—in the face of a blanket ban of the sort involved in this case.

MR. JUSTICE REHNQUIST, dissenting.

The Court today invalidates an order issued by the New York Public Service Commission designed to promote a policy that has been declared to be of critical national concern. The order was issued by the Commission in 1973 in response to the Mideastern oil embargo crisis. It prohibits electric corporations "from *promoting* the use of electricity through the use of advertising, subsidy payments . . . , or employee incentives." State of New York Public Service Commission, Case No. 26532 (Dec. 5, 1973), App. to Juris. Statement 31a (emphasis added). Although the immediate crisis created by the oil embargo has subsided, the ban on promotional advertising remains in effect. The regulation was re-examined by the New York Public Service Commission in 1977. Its constitutionality was subsequently upheld by the New York Court of Appeals, which concluded that the paramount national interest in energy conservation justified its retention.[1]

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allow it to men whose opinions seem to you wrong and even dangerous. . . .'" 274 U. S., at 377, n. 4.

See also *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50, 63 (opinion of STEVENS, J.).

[1] The New York Court of Appeals stated:

"In light of current exigencies, one of the policies of any public service legislation must be the conservation of our vital and irreplaceable resources. The Legislature has but recently imposed upon the commission a duty 'to encourage all persons and corporations . . . to formulate and carry out long-range programs . . . [for] the preservation of environmental values and the conservation of natural resources' (Public Service Law, § 5, subd. 2). Implicit in this amendment is a legislative recognition of the serious situation which confronts our State and Nation. More important, conservation of resources has become an avowed legislative

The Court's asserted justification for invalidating the New York law is the public interest discerned by the Court to underlie the First Amendment in the free flow of commercial information. Prior to this Court's recent decision in *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, 425 U. S. 748 (1976), however, commercial speech was afforded no protection under the First Amendment whatsoever. See, *e. g.*, *Breard* v. *Alexandria*, 341 U. S. 622 (1951); *Valentine* v. *Chrestensen*, 316 U. S. 52 (1942). Given what seems to me full recognition of the holding of *Virginia Pharmacy Board* that commercial speech is entitled to some degree of First Amendment protection, I think the Court is nonetheless incorrect in invalidating the carefully considered state ban on promotional advertising in light of pressing national and state energy needs.

The Court's analysis in my view is wrong in several respects. Initially, I disagree with the Court's conclusion that the speech of a state-created monopoly, which is the subject of a comprehensive regulatory scheme, is entitled to protection under the First Amendment. I also think that the Court errs here in failing to recognize that the state law is most accurately viewed as an economic regulation and that the speech involved (if it falls within the scope of the First Amendment at all) occupies a significantly more subordinate position in the hierarchy of First Amendment values than the Court gives it today. Finally, the Court in reaching its decision improperly substitutes its own judgment for that of the State in deciding how a proper ban on promotional advertising should be drafted. With regard to this latter point, the Court adopts as its final part of a four-part test a "no more extensive than necessary" analysis that will unduly impair

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policy embodied in the commission's enabling act (see also, *Matter of New York State Council of Retail Merchants* v. *Public Serv. Comm. of State of N. Y.*, 45 N. Y. 2d 661, 673–674)." 47 N. Y. 2d 94, 102–103, 390 N. E. 2d 749, 753 (1979).

a state legislature's ability to adopt legislation reasonably designed to promote interests that have always been rightly thought to be of great importance to the State.

I

In concluding that appellant's promotional advertising constitutes protected speech, the Court reasons that speech by electric utilities is valuable to consumers who must decide whether to use the monopoly service or turn to an alternative energy source, and if they decide to use the service how much of it to purchase. *Ante*, at 567. The Court in so doing "assume[s] that the willingness of a business to promote its products reflects a belief that consumers are interested in the advertising." *Ante*, at 568. The Court's analysis ignores the fact that the monopoly here is entirely state-created and subject to an extensive state regulatory scheme from which it derives benefits as well as burdens.

While this Court has stated that the "capacity [of speech] for informing the public does not depend upon the identity of its source," *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 777 (1978), the source of the speech nevertheless may be relevant in determining whether a given message is protected under the First Amendment.[2] When the source of the speech is a state-created monopoly such as this, traditional First Amendment concerns, if they come into play at all, certainly do not justify the broad interventionist role adopted by the Court today. In *Consolidated Edison Co.* v.

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[2] In *Brown* v. *Glines*, 444 U. S. 348 (1980), for example, we recently upheld Air Force Regulations that imposed restrictions on the free speech and petition rights of Air Force personnel. See also, *e. g.*, *Parker* v. *Levy*, 417 U. S. 733 (1974) (commissioned officer may be prohibited from publicly urging enlisted personnel to disobey orders that might send them into combat); *Snepp* v. *United States*, 444 U. S. 507 (1980) (employees of intelligence agency may be required to submit publications relating to agency activity for prepublication review by the agency).

Public Service Comm'n, ante, at 549–550, MR. JUSTICE BLACKMUN observed:

> "A public utility is a state-created monopoly. See, *e. g.*, N. Y. Pub. Serv. Law § 68 (McKinney 1955); Jones, Origins of the Certificate of Public Convenience and Necessity; Developments in the States 1870–1920, 79 Colum. L. Rev. 426, 458–461 (1979); Comment, Utility Rates, Consumers, and the New York State Public Service Commission, 39 Albany L. Rev. 707, 709–714 (1975). Although monopolies generally are against the public policies of the United States and of the State of New York, see, *e. g.*, N. Y. Gen. Bus. Law § 340 (McKinney 1968 and Supp. 1979–1980), . . . utilities are permitted to operate as monopolies because of a determination by the State that the public interest is better served by protecting them from competition. See 2 A. Kahn, The Economics of Regulation 113–171 (1971).
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> "This exceptional grant of power to private enterprises justifies extensive oversight on the part of the State to protect the ratepayers from exploitation of the monopoly power through excessive rates and other forms of overreaching. . . . New York law gives its Public Service Commission plenary supervisory powers over all property, real and personal, 'used or to be used for or in connection with or to facilitate the . . . sale or furnishing of electricity for light, heat or power.' N. Y. Pub. Serv. Law §§ 2 (12) and 66 (1) (McKinney 1955)."

Thus, although *First National Bank of Boston* v. *Bellotti, supra,* holds that speech of a corporation is entitled to some First Amendment protection, it by no means follows that a utility with monopoly power conferred by a State is also entitled to such protection.

The state-created monopoly status of a utility arises from the unique characteristics of the services that a utility provides. As recognized in *Cantor* v. *Detroit Edison Co.*, 428 U. S. 579, 595–596 (1976), "public utility regulation typically

assumes that the private firm is a natural monopoly and that public controls are necessary to protect the consumer from exploitation." The consequences of this natural monopoly in my view justify much more wide-ranging supervision and control of a utility under the First Amendment than this Court held in *Bellotti* to be permissible with regard to ordinary corporations. Corporate status is generally conferred as a result of a State's determination that the corporate characteristics "enhance its efficiency as an economic entity." *First National Bank of Boston* v. *Bellotti*, *supra*, at 825–826 (REHNQUIST, J., dissenting). A utility, by contrast, fulfills a function that serves special public interests as a result of the natural monopoly of the service provided. Indeed, the extensive regulations governing decisionmaking by public utilities suggest that for purposes of First Amendment analysis, a utility is far closer to a state-controlled enterprise than is an ordinary corporation.[3] Accordingly, I think a State has broad discretion in determining the statements that a utility may make in that such statements emanate from the entity created by the State to provide important and unique public services. And a state regulatory body charged with the oversight of these types of services may reasonably decide to impose on the utility a special duty to conform its conduct to

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[3] In this regard the New York Court of Appeals stated:

"Public utilities, from the earliest days in this State, have been regulated and franchised to serve the commonweal. Our policy is 'to withdraw the unrestricted right of competition between corporations occupying . . . the public streets . . . and supplying the public with their products or utilities which are well nigh necessities' (*People ex rel. New York Edison Co.* v. *Willcox*, 207 N. Y. 86, 99; *Matter of New York Elec. Lines Co.*, 201 N. Y. 321). The realities of the situation all but dictate that a utility be granted monopoly status (see *People ex rel. New York Elec. Lines Co.* v. *Squire*, 107 N. Y. 593, 603–605). To protect against abuse of this superior economic position extensive governmental regulation has been deemed a necessary coordinate (see *People ex rel. New York Edison Co.* v. *Willcox*, *supra*, at pp. 93–94)." 47 N. Y. 2d, at 109–110, 390 N. E. 2d, at 757.

the agency's conception of the public interest. Thus I think it is constitutionally permissible for it to decide that promotional advertising is inconsistent with the public interest in energy conservation. I also think New York's ban on such advertising falls within the scope of permissible state regulation of an economic activity by an entity that could not exist in corporate form, say nothing of enjoy monopoly status, were it not for the laws of New York.[4]

II

This Court has previously recognized that although commercial speech may be entitled to First Amendment protection, that protection is not as extensive as that accorded to the advocacy of ideas. Thus, we stated in *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 455–456 (1978):

> "Expression concerning purely commercial transactions has come within the ambit of the Amendment's protec-

[4] The Commission's restrictions on promotional advertising are grounded in its concern that electric utilities fulfill their obligation under the New York Public Service Law to provide "adequate" service at "just and reasonable" rates. N. Y. Pub. Serv. Law § 65 (1) (McKinney 1955). The Commission, under state law, is required to set reasonable rates. N. Y. Pub. Serv. Law §§ 66 (2) and 72 (McKinney 1955); § 66 (12) (McKinney Supp. 1979). The Commission has also been authorized by the legislature to prescribe "such reasonable improvements [in electric utilities' practices] as will best promote the public interest. . . ." § 66 (2). And in the performance of its duties the Commission is required to "encourage all persons and corporations subject to its jurisdiction to formulate and carry out long-range programs, individually or cooperatively, for the performance of their public service responsibilities with economy, efficiency, and care for the public safety, the preservation of environmental values, and the conservation of natural resources." N. Y. Pub. Serv. Law § 5 (2) (McKinney Supp. 1979). Here I think it was quite reasonable for the State Public Service Commission to conclude that the ban on promotional advertising was necessary to prevent utilities from using their broad state-conferred monopoly power to promote their own economic well-being at the expense of the state interest in energy conservation—an interest that could reasonably be found to be inconsistent with the promotion of greater profits for utilities.

tion only recently. In rejecting the notion that such speech 'is wholly outside the protection of the First Amendment,' *Virginia Pharmacy, supra*, at 761, we were careful not to hold 'that it is wholly undifferentiable from other forms' of speech. 425 U. S., at 771, n. 24. We have not discarded the 'commonsense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. *Ibid.* To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression." (Footnote omitted.)

The Court's decision today fails to give due deference to this subordinate position of commercial speech. The Court in so doing returns to the bygone era of *Lochner* v. *New York*, 198 U. S. 45 (1905), in which it was common practice for this Court to strike down economic regulations adopted by a State based on the Court's own notions of the most appropriate means for the State to implement its considered policies.

I had thought by now it had become well established that a State has broad discretion in imposing economic regulations. As this Court stated in *Nebbia* v. *New York*, 291 U. S. 502, 537 (1934):

"[T]here can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects. . . .

> "So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio*. . . . [I]t does not lie with the courts to determine that the rule is unwise."

And Mr. Justice Black, writing for the Court, observed more recently in *Ferguson* v. *Skrupa*, 372 U. S. 726, 730 (1963):

> "The doctrine . . . that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws."

The State of New York has determined here that economic realities require the grant of monopoly status to public utilities in order to distribute efficiently the services they provide, and in granting utilities such status it has made them subject to an extensive regulatory scheme. When the State adopted this scheme and when its Public Service Commission issued its initial ban on promotional advertising in 1973, commercial speech had not been held to fall within the scope of the First Amendment at all. *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, 425 U. S. 748 (1976), however, subsequently accorded commercial speech a limited measure of First Amendment protection.

The Court today holds not only that commercial speech is entitled to First Amendment protection, but also that when it is protected a State may not regulate it unless its reason for doing so amounts to a "substantial" governmental interest, its regulation "directly advances" that interest, and its manner of regulation is "not more extensive than necessary" to serve the interest. *Ante*, at 566. The test adopted by the Court thus elevates the protection accorded commercial speech that falls within the scope of the First Amendment to a level that is virtually indistinguishable from that of noncommercial speech. I think the Court in so doing has effectively accomplished the "devitalization" of the First Amendment that it counseled against in *Ohralik*. I think it has also by labeling economic regulation of business conduct as a restraint on "free speech" gone far to resurrect the discredited doctrine of cases such as *Lochner* and *Tyson & Brother* v. *Banton*, 273 U. S. 418 (1927). New York's order here is in my view more akin to an economic regulation to which virtually complete deference should be accorded by this Court.

I doubt there would be any question as to the constitutionality of New York's conservation effort if the Public Service Commission had chosen to raise the price of electricity, see, *e. g.*, *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381 (1940); *Old Dearborn Distributing Co.* v. *Seagram-Distillers Corp.*, 299 U. S. 183 (1936), to condition its sale on specified terms, see, *e. g.*, *Nebbia* v. *New York*, *supra*, at 527–528, or to restrict its production, see, *e. g.*, *Wickard* v. *Filburn*, 317 U. S. 111 (1942). In terms of constitutional values, I think that such controls are virtually indistinguishable from the State's ban on promotional advertising.

An ostensible justification for striking down New York's ban on promotional advertising is that this Court has previously "rejected the 'highly paternalistic' view that government has complete power to suppress or regulate commercial speech. '[P]eople will perceive their own best interests if

only they are well enough informed and . . . the best means to that end is to open the channels of communication, rather than to close them. . . .' " *Ante*, at 562. Whatever the merits of this view, I think the Court has carried its logic too far here.

The view apparently derives from the Court's frequent reference to the "marketplace of ideas," which was deemed analogous to the commercial market in which a *laissez faire* policy would lead to optimum economic decisionmaking under the guidance of the "invisible hand." See, *e. g.*, Adam Smith, Wealth of Nations (1776). This notion was expressed by Mr. Justice Holmes in his dissenting opinion in *Abrams* v. *United States*, 250 U. S. 616, 630 (1919), wherein he stated that "the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . ." See also, *e. g.*, *Consolidated Edison* v. *Public Service Comm'n*, *ante*, at 534; J. Mill, On Liberty (1858); J. Milton, Areopagitica, A Speech for the Liberty of Unlicensed Printing (1644).

While it is true that an important objective of the First Amendment is to foster the free flow of information, identification of speech that falls within its protection is not aided by the metaphorical reference to a "marketplace of ideas." There is no reason for believing that the marketplace of ideas is free from market imperfections any more than there is to believe that the invisible hand will always lead to optimum economic decisions in the commercial market. See, *e. g.*, Baker, Scope of the First Amendment, Freedom of Speech, 25 UCLA L. Rev. 964, 967–981 (1978). Indeed, many types of speech have been held to fall outside the scope of the First Amendment, thereby subject to governmental regulation, despite this Court's references to a marketplace of ideas. See, *e. g.*, *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942) (fighting words); *Beauharnais* v. *Illinois*, 343 U. S. 250 (1952) (group libel); *Roth* v. *United States*, 354 U. S. 476 (1957) (obscenity). It also has been held that the government has

a greater interest in regulating some types of protected speech than others. See, *e. g.*, *FCC* v. *Pacifica Foundation*, 438 U. S. 726 (1978) (indecent speech); *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, *supra* (commercial speech). And as this Court stated in *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 344, n. 9 (1974), "Of course, an opportunity for rebuttal seldom suffices to undo [the] harm of a defamatory falsehood. Indeed the law of defamation is rooted in our experience that the truth rarely catches up with a lie." The Court similarly has recognized that false and misleading commercial speech is not entitled to any First Amendment protection. See, *e. g.*, *ante*, at 566.

The above examples illustrate that in a number of instances government may constitutionally decide that societal interests justify the imposition of restrictions on the free flow of information. When the question is whether a given commercial message is protected, I do not think this Court's determination that the information will "assist" consumers justifies judicial invalidation of a reasonably drafted state restriction on such speech when the restriction is designed to promote a concededly substantial state interest. I consequently disagree with the Court's conclusion that the societal interest in the dissemination of commercial information is sufficient to justify a restriction on the State's authority to regulate promotional advertising by utilities; indeed, in the case of a regulated monopoly, it is difficult for me to distinguish "society" from the state legislature and the Public Service Commission. Nor do I think there is any basis for concluding that individual citizens of the State will recognize the need for and act to promote energy conservation to the extent the government deems appropriate, if only the channels of communication are left open.[5] Thus, even if I were

[5] Although the Constitution attaches great importance to freedom of speech under the First Amendment so that individuals will be better informed and their thoughts and ideas will be uninhibited, it does not follow that "people will perceive their own best interests," or that if they do

to agree that commercial speech is entitled to some First Amendment protection, I would hold here that the State's decision to ban promotional advertising, in light of the substantial state interest at stake, is a constitutionally permissible exercise of its power to adopt regulations designed to promote the interests of its citizens.

The plethora of opinions filed in this case highlights the doctrinal difficulties that emerge from this Court's decisions granting First Amendment protection to commercial speech. My Brother STEVENS, quoting Mr. Justice Brandeis in *Whitney* v. *California*, 274 U. S. 357, 376–377 (1927), includes Mr. Justice Brandeis' statement that "[t]hose who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty." *Ante*, at 582. MR. JUSTICE BLACKMUN, in his separate opinion, joins only in the Court's judgment because he believes that the Court's opinion "does not provide adequate protection for truthful, nonmisleading, noncoercive commercial speech." *Ante*, at 573. Both MR. JUSTICE STEVENS, *ante*, at 582, and MR. JUSTICE BLACKMUN, *ante*, at 577, would apply the following formulation by Mr. Justice Brandeis of the clear and present danger test to the regulation of speech at issue in this case:

"If there be time to expose through discussion the false-

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they will act to promote them. With respect to governmental policies that do not offer immediate tangible benefits and the success of which depends on incremental contributions by all members of society, such as would seem to be the case with energy conservation, a strong argument can be made that while a policy may be in the longrun interest of all members of society, some rational individuals will perceive it to their own shortrun advantage to not act in accordance with that policy. When the regulation of commercial speech is at issue, I think this is a consideration that the government may properly take into account. As was observed in *Townsend* v. *Yeomans*, 301 U. S. 441, 451 (1937), "the legislature, acting within its sphere, is presumed to know the needs of the people of the State." This observation in my view is applicable to the determination of the State Public Service Commission here.

hood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression." *Whitney* v. *California, supra*, at 377 (concurring opinion).

Although the Court today does not go so far as to adopt this position, its reasons for invalidating New York's ban on promotional advertising make it quite difficult for a legislature to draft a statute regulating promotional advertising that will satisfy the First Amendment requirements established by the Court in this context. See Part III, *infra*.

Two ideas are here at war with one another, and their resolution, although it be on a judicial battlefield, will be a very difficult one. The sort of "advocacy" of which Mr. Justice Brandeis spoke was not the advocacy on the part of a utility to use more of its product. Nor do I think those who won our independence, while declining to "exalt order at the cost of liberty," would have viewed a merchant's unfettered freedom to advertise in hawking his wares as a "liberty" not subject to extensive regulation in light of the government's substantial interest in attaining "order" in the economic sphere.

While I agree that when the government attempts to regulate speech of those expressing views on public issues, the speech is protected by the First Amendment unless it presents "a clear and present danger" of a substantive evil that the government has a right to prohibit, see, *e. g.*, *Schenck* v. *United States*, 249 U. S. 47, 52 (1919), I think it is important to recognize that this test is appropriate in the political context in light of the central importance of such speech to our system of self-government. As observed in *Buckley* v. *Valeo*, 424 U. S. 1, 14 (1976):

"Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to

> such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' "

And in *Garrison* v. *Louisiana*, 379 U. S. 64, 74–75 (1964), this Court stated that "speech concerning public affairs is more than self-expression; it is the essence of self-government."

The First Amendment, however, does not always require a clear and present danger to be present before the government may regulate speech. Although First Amendment protection is not limited to the "exposition of ideas" on public issues, see, *e. g.*, *Winters* v. *New York*, 333 U. S. 507, 510 (1948)—both because the line between the informing and the entertaining is elusive and because art, literature, and the like may contribute to important First Amendment interests of the individual in freedom of speech—it is well established that the government may regulate obscenity even though its does not present a clear and present danger. Compare, *e. g.*, *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 57–58 (1973), with *Brandenburg* v. *Ohio*, 395 U. S. 444, 447 (1969). Indecent speech, at least when broadcast over the airwaves, also may be regulated absent a clear and present danger of the type described by Mr. Justice Brandeis and required by this Court in *Brandenburg*. *FCC* v. *Pacifica Foundation*, 438 U. S. 726 (1978). And in a slightly different context this Court declined to apply the clear-and-present-danger test to a conspiracy among members of the press in violation of the Sherman Act because to do so would "degrade" that doctrine. *Associated Press* v. *United States*, 326 U. S. 1, 7 (1945). Nor does the Court today apply the clear-and-present-danger test in invalidating New York's ban on promotional advertising. As noted above, in these and other contexts the Court has clearly rejected the notion that there must be a free "marketplace of ideas."

If the complaint of those who feel the Court's opinion does not go far enough is that the "only test of truth is its ability

to get itself accepted in the marketplace of ideas"—the test advocated by Thomas Jefferson in his first inaugural address, and by Mr. Justice Holmes in *Abrams* v. *United States*, 250 U. S. 616, 630 (1919) (dissenting opinion)—there is no reason whatsoever to limit the protection accorded commercial speech to "truthful, nonmisleading, noncoercive" speech. See *ante*, at 573 (BLACKMUN, J., concurring in judgment). If the "commercial speech" is in fact misleading, the "marketplace of ideas" will in time reveal that fact. It may not reveal it sufficiently soon to avoid harm to numerous people, but if the reasoning of Brandeis and Holmes is applied in this context, that was one of the risks we took in protecting free speech in a democratic society.

Unfortunately, although the "marketplace of ideas" has a historically and sensibly defined context in the world of political speech, it has virtually none in the realm of business transactions. Even so staunch a defender of the First Amendment as Mr. Justice Black, in his dissent in *Breard* v. *Alexandria*, 341 U. S., at 650, n., stated:

> "Of course I believe that the present ordinance could constitutionally be applied to a 'merchant' who goes from door to door 'selling pots.' "

And yet, with the change in solicitation and advertising techniques, the line between what Central Hudson did here and the peddler selling pots in Alexandria a generation ago is difficult, if not impossible to fix. Doubtless that was why Mr. Justice Black joined the unanimous opinion of the Court in *Valentine* v. *Chrestensen*, 316 U. S., at 54, in which the Court stated:

> "This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these pub-

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lic thoroughfares. *We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.* Whether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of user, are matters for legislative judgment." (Emphasis added.)

I remain of the view that the Court unlocked a Pandora's Box when it "elevated" commercial speech to the level of traditional political speech by according it First Amendment protection in *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, 425 U. S. 748 (1976). The line between "commercial speech," and the kind of speech that those who drafted the First Amendment had in mind, may not be a technically or intellectually easy one to draw, but it surely produced far fewer problems than has the development of judicial doctrine in this area since *Virginia Pharmacy Board*. For in the world of political advocacy and *its* marketplace of ideas, there is no such thing as a "fraudulent" idea: there may be useless proposals, totally unworkable schemes, as well as very sound proposals that will receive the imprimatur of the "marketplace of ideas" through our majoritarian system of election and representative government. The free flow of information is important in this context not because it will lead to the discovery of any objective "truth," but because it is essential to our system of self-government.

The notion that more speech is the remedy to expose falsehood and fallacies is wholly out of place in the commercial bazaar, where if applied logically the remedy of one who was defrauded would be merely a statement, available upon request, reciting the Latin maxim *"caveat emptor."* But since "fraudulent speech" in this area is to be remediable under *Virginia Pharmacy Board, supra*, the remedy of one defrauded is a lawsuit or an agency proceeding based on common-law notions of fraud that are separated by a world of difference

from the realm of politics and government. What time, legal decisions, and common sense have so widely severed, I declined to join in *Virginia Pharmacy Board,* and regret now to see the Court reaping the seeds that it there sowed. For in a democracy, the economic is subordinate to the political, a lesson that our ancestors learned long ago, and that our descendants will undoubtedly have to relearn many years hence.

III

The Court concedes that the state interest in energy conservation is plainly substantial, *ante,* at 568, as is the State's concern that its rates be fair and efficient. *Ante,* at 569. It also concedes that there is a direct link between the Commission's ban on promotional advertising and the State's interest in conservation. *Ibid.* The Court nonetheless strikes down the ban on promotional advertising because the Commission has failed to demonstrate, under the final part of the Court's four-part test, that its regulation is no more extensive than necessary to serve the State's interest. *Ante,* at 569–571. In reaching this conclusion, the Court conjures up potential advertisements that a utility might make that conceivably would result in net energy savings. The Court does not indicate that the New York Public Service Commission has in fact construed its ban on "promotional" advertising to preclude the dissemination of information that clearly would result in a net energy savings, nor does it even suggest that the Commission has been confronted with and rejected such an advertising proposal.[6] The final part of the Court's test

[6] Indeed appellee in its brief states:

"[N]either Central Hudson nor any other party made an attempt before the Commission to demonstrate or argue for a specific advertising strategy that would avoid the difficulties that the Commission found inherent in electric utility promotional advertising. The Commission, therefore, continued to enforce its ban on promotion which it had instituted in 1973." Brief for Appellee 15.

The Court makes no attempt to address this statement, or to explain why,

thus leaves room for so many hypothetical "better" ways that any ingenious lawyer will surely seize on one of them to secure the invalidation of what the state agency actually did. As MR. JUSTICE BLACKMUN observed in *Illinois Elections Bd.* v. *Socialist Workers Party*, 440 U. S. 173, 188–189 (1979) (concurring opinion):

> "*A judge would be unimaginative indeed if he could not* come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation, and thereby enable himself to vote to strike legislation down."

Here the Court concludes that the State's interest in energy conservation cannot justify a blanket ban on promotional advertising. In its statement of the facts, the Court observes that the Commission's ban on promotional advertising is not "a perfect vehicle for conserving energy." It states:

> "[T]he Commission's order prohibits promotional advertising to develop consumption during periods when demand for electricity is low. By limiting growth in 'off-peak' consumption, the ban limits the 'beneficial side effects' of such growth in terms of more efficient use of existing powerplants. [App. to Juris. Statement] 37a." *Ante*, at 559.

The Court's analysis in this regard is in my view fundamentally misguided because it fails to recognize that the beneficial side effects of "more efficient use" may be inconsistent with the goal of energy conservation. Indeed, the Commission explicitly found that the promotion of off-peak consumption would impair conservation efforts.[7] The Commission stated:

> "Increased off-peak generation, . . . while conferring

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when no state body has addressed the issue, the Court should nonetheless resolve it by invalidating the state regulation.

[7] In making this finding, the Commission distinguished "between promotional advertising designed to shift existing consumption from peak to off-peak hours and advertising designed to promote additional consump-

some beneficial side effects, also consumes valuable energy resources and, if it is the result of increased sales, necessarily creates incremental air pollution and thermal discharges to waterways. More important, any increase in off-peak generation from most of the major companies producing electricity in this State would not, at this time, be produced from coal or nuclear resources, but would require the use of oil-fired generating facilities. The increased requirement for fuel oil to serve the incremental off-peak load created by promotional advertising would aggravate the nation's already unacceptably high level of dependence on foreign sources of supply and would, in addition, frustrate rather than encourage conservation efforts." App. to Juris. Statement 37a.[8]

The Court also observes, as the Commission acknowledged, that the ban on promotional advertising can achieve only "piecemeal conservationism" because oil dealers are not under the Commission's jurisdiction, and they remain free to advertise. Until I have mastered electrical engineering and marketing, I am not prepared to contradict by virtue of my judicial office those who assume that the ban will be successful in making a substantial contribution to conservation efforts.

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tion during off-peak hours." App. to Juris. Statement 58a, n. 2. It proscribed only the latter. *Ibid.*

[8] And in denying appellant's petition for rehearing, the Commission again stated:

"While promotion of off-peak usage, particularly electric space heating, is touted by some as desirable because it might increase off-peak usage and thereby improve a summer-peaking company's load factor, we are convinced that off-peak promotion, especially in the context of imperfectly structured electric rates, is inconsistent with the public interest, even if it could be divorced in the public mind from promoting electric usage generally. As we pointed out in our Policy Statement, increases in generation, even off-peak generation, at this time, requires the burning of scarce oil resources. This increased requirement for fuel oil aggravates the nation's already high level of dependence on foreign sources of supply." *Id.*, at 58a (footnotes omitted).

And I doubt that any of this Court's First Amendment decisions justify striking down the Commission's order because more steps toward conservation could have been made This is especially true when, as here, the Commission lacks authority over oil dealers.

The Court concludes that the Commission's ban on promotional advertising must be struck down because it is more extensive than necessary: it may result in the suppression of advertising by utilities that promotes the use of electrical devices or services that cause no net increase in total energy use. The Court's reasoning in this regard, however, is highly speculative. The Court provides two examples that it claims support its conclusion. It first states that both parties acknowledge that the "heat pump" will be "a major improvement in electric heating," and that but for the ban the utilities would advertise this type of "energy efficien[t]" product.[9] The New York Public Service Commission, however, considered the merits of the heat pump and concluded that it would most likely result in an overall increase in electric energy consumption. The Commission stated:

> "[I]nstallation of a heat pump means also installation of central air-conditioning. To this extent, promotion of off-peak electric space heating involves promotion of on-peak summer air-conditioning as well as on-peak usage

[9] As previously discussed, however, it does not follow that because a product is "energy efficient" it is also consistent with the goal of energy conservation. Thus, with regard to the heat pump, counsel for appellees stated at oral argument that "Central Hudson says there are some [heat pumps] without air conditioning, but . . . they have never advised us of that." Tr. of Oral Arg. 32–33. The electric heat pump, he continued, "normally carr[ies] with it air conditioning in the summer, and the commission found that this would result in air conditioning that would not otherwise happen." *Id.*, at 33. This is but one example of the veritable Sargasso Sea of difficult nonlegal issues that we wade into by adopting a rule that requires judges to evaluate highly complex and often controversial questions arising in disciplines quite foreign to ours.

of electricity for water heating. And the price of electricity to most consumers in the State does not now fully reflect the much higher marginal costs of on-peak consumption in summer peaking markets. In these circumstances, there would be a subsidization of consumption on-peak, and consequently, higher rates for all consumers." App. to Juris. Statement 58a.

Subsidization of peak consumption not only may encourage the use of scarce energy resources during peak periods, but also may lead to larger reserve generating capacity requirements for the State.

The Court next asserts that electric heating as a backup to solar and other heat may be an efficient alternative energy source. *Ante*, at 570. The Court fails to establish, however, that an advertising proposal of this sort was properly presented to the Commission. Indeed, the Court's concession that the Commission did not make findings on this issue suggests that the Commission did not even consider it. Nor does the Court rely on any support for its assertion other than the assertion of appellant. Rather, it speculates that "[i]n the absence of authoritative findings to the contrary, we must credit as within the realm of possibility the claim that electric heat can be an efficient alternative in some circumstances." *Ibid.*[10]

Ordinarily it is the role of the State Public Service Commission to make factual determinations concerning whether a device or service will result in a net energy savings and, if so, whether and to what extent state law permits dissemination of information about the device or service. Otherwise,

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[10] Even assuming the Court's speculation is correct, it has shown too little. For the regulation to truly be "no more extensive than necessary," it must be established that a more efficient energy source will serve only as a means for saving energy, rather than as an inducement to consume more energy because the cost has decreased or because other energy using products will be used in conjunction with the more efficient one.

as here, this Court will have no factual basis for its assertions. And the State will never have an opportunity to consider the issue and thus to construe its law in a manner consistent with the Federal Constitution. As stated in *Barrows* v. *Jackson*, 346 U. S. 249, 256–257 (1953):

> "It would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation. Nor are we so ready to frustrate the expressed will of Congress or that of the state legislatures. Cf. *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167, 172."

I think the Court would do well to heed the admonition in *Barrows* here. The terms of the order of the New York Public Service Commission in my view indicate that advertising designed to promote net savings in energy use does not fall within the scope of the ban. The order prohibits electric corporations "from *promoting the use of electricity* through the use of advertising, subsidy payments . . . , or employee incentives." App. to Juris. Statement 31a (emphasis added). It is not clear to me that advertising that is likely to result in net savings of energy is advertising that "promot[es] the use of electricity," nor does the Court point to any language in the Commission order that suggests it has adopted this construction. Rather, it would seem more accurate to characterize such advertising as designed to "discourage" the use of electricity.[11] Indeed, I think it is quite likely that the Com-

[11] This characterization is supported by the reasoning of the New York Court of Appeals, which stated:

"[P]romotional advertising . . . seeks . . . to encourage the increased consumption of electricity, whether during peak hours or off-peak hours. Thus, not only does such communication lack any beneficial informative content, but it may be affirmatively detrimental to the society. . . . Conserving diminishing resources is a matter of vital State concern and increased use of electrical energy is inimical to our interests. Promotional advertising, if permitted, would only serve to exacerbate the crisis." 47 N. Y. 2d, at 110, 390 N. E. 2d, at 757–758.

mission would view advertising that would clearly result in a net savings in energy as consistent with the objectives of its order and therefore permissible.[12] The Commission, for example, has authorized the dissemination of information that would result in *shifts* in electrical energy demand, thereby reducing the demand for electricity during peak periods. *Id.*, at 37a.[13] It has also indicated a willingness to consider at least some other types of "specific proposals" submitted by utilities. *Id.*, at 37a–38a. And it clearly permits informational as opposed to promotional dissemination of information. *Id.*, at 43a–46a. Even if the Commission were ultimately to reject the view that its ban on promotional advertising does not include advertising that results in net energy savings, I think the Commission should at least be given an opportunity to consider it.

It is in my view inappropriate for the Court to invalidate the State's ban on commercial advertising here based on its speculation that in some cases the advertising may result in a net savings in electrical energy use, and in the cases in which it is clear a net energy savings would result from utility advertising, the Public Service Commission would apply its

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[12] At oral argument counsel for appellant conceded that the ban would not apply to utility advertising promoting the nonuse of electricity. Tr. of Oral Arg. 6. Indeed, counsel stated: "If the use reduces the amount of electricity used, it is not within the ban. The promotional ban is defined as anything which might be expected to increase the use of electricity." *Ibid.* And counsel for appellee stated that "the only thing that is involved here is the promotion by advertising of electric usage." *Id.*, at 30. "And if a showing can be made that promotion in fact is going to conserve energy," counsel for appellee continued, "which . . . has never been made to us, the commission's order says we are ready to relax our ban, we're not interested in banning for the sake of banning it. We think that is basically a bad idea, if we can avoid it. In gas, we have been relaxing it as more gas has become available." *Id.*, at 40.

[13] By contrast, as previously discussed, the Public Service Commission does not permit the promotion of off-peak consumption alone. *Supra*, at 600–601, and n. 8.

ban so as to proscribe such advertising. Even assuming that the Court's speculation is correct, I do not think it follows that facial invalidation of the ban is the appropriate course. As stated in *Parker* v. *Levy,* 417 U. S. 733, 760 (1974), "even if there are marginal applications in which a statute would infringe on First Amendment values, facial invalidation is inappropriate if the 'remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct. . . .' *CSC* v. *Letter Carriers,* 413 U. S. 548, 580–581 (1973)." This is clearly the case here.

For the foregoing reasons, I would affirm the judgment of the New York Court of Appeals.

Syllabus

NATIONAL LABOR RELATIONS BOARD v. RETAIL STORE EMPLOYEES UNION, LOCAL 1001, RETAIL CLERKS INTERNATIONAL ASSN., AFL-CIO

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-672. Argued April 15, 1980—Decided June 20, 1980

Safeco Title Insurance Co. does business with several title companies that derive over 90% of their gross incomes from the sale of Safeco insurance policies. When contract negotiations between Safeco and respondent Union, the bargaining representative for certain Safeco employees, reached an impasse, the employees went on strike. The Union picketed each of the title companies, urging customers to support the strike by canceling their Safeco policies. Safeco and one of the title companies filed complaints with the National Labor Relations Board, charging that the Union had engaged in an unfair labor practice by picketing in order to promote a secondary boycott against the title companies. The Board agreed and ordered the Union to cease picketing. The Board held that the Union's secondary picketing violated § 8 (b) (4) (ii) (B) of the National Labor Relations Act, which makes it an unfair labor practice for a union to coerce a person not party to a labor dispute with the object of "forcing or requiring [him] to cease . . . dealing in the [primary] produc[t] . . . or to cease doing business with" the primary employer. The Court of Appeals set aside the Board's order. Although the court held that the title companies were neutral parties entitled to the benefit of § 8 (b) (4) (ii) (B), it concluded that the Union's activity was lawful product picketing.

Held:

The judgment is reversed, and the case is remanded. Pp. 611-616; 616-618; 618-619.

194 U. S. App. D. C. 400, 600 F. 2d 280, and — U. S. App. D. C. —, 627 F. 2d 1133, reversed and remanded.

MR. JUSTICE POWELL delivered the opinion of the Court with respect to Parts I and II, concluding that respondent Union's secondary picketing violated § 8 (b) (4) (ii) (B). *NLRB* v. *Fruit Packers*, 377 U. S. 58, distinguished. Secondary product picketing, such as respondent Union conducted, that reasonably can be expected to threaten neutral parties with ruin or substantial loss does not square with § 8 (b) (4) (ii) (B)'s

language or purpose. Since successful secondary picketing would put the title companies to a choice between their survival and the severance of their ties with Safeco, the picketing plainly violated the statutory ban on the coercion of neutral parties with the object of forcing them to cease dealing in the primary product or to cease doing business with the primary employer. Pp. 611–615.

MR. JUSTICE POWELL, joined by THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE REHNQUIST, concluded in Part III that as applied to picketing that predictably encourages consumers to boycott a secondary business, § 8 (b) (4) (ii) (B) imposes no unconstitutional restrictions upon speech protected by the First Amendment. P. 616.

MR. JUSTICE BLACKMUN, concurring in the result, expressed a reluctance to hold unconstitutional Congress' striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife. Pp. 616–618.

MR. JUSTICE STEVENS concluded that the statute in question is consistent with the First Amendment because the restrictions on picketing it imposes are sufficiently justified by the purpose to avoid embroiling neutrals in a third party's labor dispute. Pp. 618–619.

POWELL, J., announced the Court's judgment and delivered an opinion of the Court with respect to Parts I and II, in which BURGER, C. J., and STEWART, BLACKMUN, REHNQUIST, and STEVENS, JJ., joined, and an opinion with respect to Part III, in which BURGER, C. J., and STEWART and REHNQUIST, JJ., joined. BLACKMUN, J., *post*, p. 616, and STEVENS, J., *post*, p. 618, filed opinions concurring in part and in the result. BRENNAN, J., filed a dissenting opinion, in which WHITE and MARSHALL, JJ., joined, *post*, p. 619.

Norton J. Come argued the cause for petitioner. With him on the briefs were *Solicitor General McCree* and *Linda Sher*. *Bruce Michael Cross* filed a brief for the Safeco Title Insurance Co., respondent under this Court's Rule 21 (4), in support of petitioner.

Laurence Gold argued the cause for respondent Retail Store Employees Union. With him on the brief were *James H. Webster*, *J. Albert Woll*, and *George Kaufmann*.*

**Andrew M. Kramer*, *Adin C. Goldberg*, and *Stephen A. Bokat* filed a

MR. JUSTICE POWELL delivered the opinion of the Court.

The question is whether § 8 (b)(4)(ii)(B) of the National Labor Relations Act, 29 U. S. C. § 158 (b)(4)(ii)(B), forbids secondary picketing against a struck product when such picketing predictably encourages consumers to boycott a neutral party's business.

I

Safeco Title Insurance Co. underwrites real estate title insurance in the State of Washington. It maintains close business relationships with five local title companies.[1] The companies search land titles, perform escrow services, and sell title insurance. Over 90% of their gross incomes derives from the sale of Safeco insurance. Safeco has substantial stockholdings in each title company, and at least one Safeco officer serves on each company's board of directors. Safeco, however, has no control over the companies' daily operations. It does not direct their personnel policies, and it never exchanges employees with them.

Local 1001 of the Retail Store Employees Union became the certified bargaining representative for certain Safeco employees in 1974. When contract negotiations between Safeco and the Union reached an impasse, the employees went on strike. The Union did not confine picketing to Safeco's office in Seattle. The Union also picketed each of the five local title companies. The pickets carried signs

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brief for the Chamber of Commerce of the United States of America as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Jack Greenberg* and *Eric Schnapper* for the NAACP Legal Defense and Educational Fund, Inc.; and by *David C. Vladeck* and *Alan B. Morrison* for Public Citizen et al.

[1] The title companies are Land Title Company of Clark County, Land Title Company of Cowlitz County, Land Title Company of Kitsap County, Land Title Company of Pierce County, and Land Title Company of Snohomish County.

declaring that Safeco had no contract with the Union,[2] and they distributed handbills asking consumers to support the strike by canceling their Safeco policies.[3]

Safeco and one of the title companies filed complaints with the National Labor Relations Board. They charged that the Union had engaged in an unfair labor practice by picketing in order to promote a secondary boycott against the title companies. The Board agreed. 226 N. L. R. B. 754 (1976).[4] It found the title companies to be neutral in the dispute between Safeco and the Union. *Id.*, at 756. The Board then concluded that the Union's picketing violated § 8 (b)(4)(ii)(B) of the National Labor Relations Act. The Union had directed its appeal against Safeco insurance policies. But since the sale of those policies accounted for substantially all of the title companies' business, the Board found that the Union's action was "reasonably calculated to induce customers not to patronize the neutral parties at all." 226 N. L R. B., at 757. The Board therefore rejected the Union's reliance upon *NLRB* v. *Fruit Packers*, 377 U. S. 58 (1964) (*Tree Fruits*), which held that § 8 (b)(4)(ii)(B) allows secondary picketing against a struck product. It ordered the Union to cease picketing and to take limited corrective action.

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[2] The picket signs read:

"SAFECO NONUNION
DOES NOT EMPLOY MEMBERS OF
OR HAVE CONTRACT WITH
RETAIL STORE EMPLOYEES LOCAL 1001."

[3] The distribution of handbills has not been an issue in this case. Section 8 (b)(4) of the National Labor Relations Act does not prohibit "publicity, other than picketing, for the purpose of truthfully advising the public . . . that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer. . . ." 61 Stat. 141, as amended, 73 Stat. 543, 29 U. S. C. § 158 (b)(4).

[4] The parties waived intermediate proceedings before an administrative law judge and submitted the stipulated facts directly to the Board. 226 N. L. R. B., at 754.

The United States Court of Appeals for the District of Columbia Circuit set aside the Board's order. 194 U. S. App. D. C. 400, 600 F. 2d 280 (1979) (en banc). The court agreed that the title companies were neutral parties entitled to the benefit of § 8 (b)(4)(ii)(B). — U. S. App. D. C. —, —, 627 F. 2d 1133, 1137 (1979). It held, however, that *Tree Fruits* leaves neutrals susceptible to whatever consequences may flow from secondary picketing against the consumption of products produced by an employer involved in a labor dispute. Even when product picketing predictably encourages consumers to boycott a neutral altogether, the court concluded, § 8 (b)(4)(ii)(B) provides no protection. — U. S. App. D. C., at —, 627 F. 2d, at 1145–1146.

We granted a writ of certiorari to consider whether the Court of Appeals correctly understood § 8 (b)(4)(ii)(B) as interpreted in *Tree Fruits*. 444 U. S. 1011 (1980).[5] Having concluded that the Court of Appeals misapplied the statute, we now reverse and remand for enforcement of the Board's order.

II

Section 8 (b)(4)(ii)(B) of the National Labor Relations Act makes it "an unfair labor practice for a labor organization . . . to threaten, coerce, or restrain" a person not party to a labor dispute "where . . . an object thereof is . . . forcing or requiring [him] to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer . . . or to cease doing business with any other person. . . ."[6]

In *Tree Fruits*, the Court held that § 8 (b)(4)(ii)(B) does not prohibit all peaceful picketing at secondary sites. There, a union striking certain Washington fruit packers picketed large supermarkets in order to persuade consumers not to buy

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[5] The Union has not challenged the Court of Appeals' determination that the title companies are neutral, secondary parties.

[6] 61 Stat. 141, as amended, 73 Stat. 542, 29 U. S. C. § 158 (b)(4)(ii)(B).

Washington apples. Concerned that a broad ban against such picketing might run afoul of the First Amendment, the Court found the statute directed to an " 'isolated evil.' " The evil was use of secondary picketing "to persuade the customers of the secondary employer to cease trading with him in order to force him to cease dealing with, or to put pressure upon, the primary employer." 377 U. S., at 63. Congress intended to protect secondary parties from pressures that might embroil them in the labor disputes of others, but not to shield them from business losses caused by a campaign that successfully persuades consumers "to boycott the primary employer's goods." *Ibid.* Thus, the Court drew a distinction between picketing "to shut off all trade with the secondary employer unless he aids the union in its dispute with the primary employer" and picketing that "only persuades his customers not to buy the struck product." *Id.*, at 70. The picketing in that case, which "merely follow[ed] the struck product," did not " 'threaten, coerce, or restrain' " the secondary party within the meaning of § 8 (b)(4)(ii)(B). 377 U. S., at 72.

Although *Tree Fruits* suggested that secondary picketing against a struck product and secondary picketing against a neutral party were "poles apart," *id.*, at 70, the courts soon discovered that product picketing could have the same effect as an illegal secondary boycott. In *Hoffman ex rel. NLRB* v. *Cement Masons Local 337*, 468 F. 2d 1187 (CA9 1972), cert. denied, 411 U. S. 986 (1973), for example, a union embroiled with a general contractor picketed the housing subdivision that he had constructed for a real estate developer. Pickets sought to persuade prospective purchasers not to buy the contractor's houses. The picketing was held illegal because purchasers "could reasonably expect that they were being asked not to transact any business whatsoever" with the neutral developer. 468 F. 2d, at 1192. "[W]hen a union's interest in picketing a primary employer at a 'one product' site [di-

rectly conflicts] with the need to protect . . . neutral employers from the labor disputes of others," Congress has determined that the neutrals' interests should prevail. *Id.*, at 1191.[7]

Cement Masons highlights the critical difference between the picketing in this case and the picketing at issue in *Tree Fruits*. The product picketed in *Tree Fruits* was but one item among the many that made up the retailer's trade. 377 U. S., at 60. If the appeal against such a product succeeds, the Court observed, it simply induces the neutral retailer to reduce his orders for the product or "to drop the item as a poor seller." *Id.*, at 73. The decline in sales attributable to consumer rejection of the struck product puts pressure upon the primary employer, and the marginal injury to the neutral retailer is purely incidental to the product boycott. The neutral therefore has little reason to become involved in the labor dispute. In this case, on the other hand, the title companies sell only the primary employer's product and perform the services associated with it. Secondary picketing against consumption of the primary product leaves responsive consumers no realistic option other than to boycott the title companies altogether. If the appeal succeeds, each company "stops buying the struck product, not because of a falling demand, but in response to pressure designed to inflict injury on [its] business generally." Thus, "the union does more than merely follow the struck product; it creates a separate dispute with the secondary employer." *Id.*, at 72. Such an expansion of

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[7] The so-called merged product cases also involve situations where an attempt to follow the struck product inevitably encourages an illegal boycott of the neutral party. See *K & K Construction Co.* v. *NLRB*, 592 F. 2d 1228, 1231–1234 (CA3 1979); *American Bread Co.* v. *NLRB*, 411 F. 2d 147, 154–155 (CA6 1969); *Honolulu Typographical Union No. 37* v. *NLRB*, 131 U. S. App. D. C. 1, 3–4, 401 F. 2d 952, 954–955 (1968); Note, Consumer Picketing and the Single-Product Secondary Employer, 47 U. Chi. L. Rev. 112, 132–136 (1979).

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labor discord was one of the evils that Congress intended § 8 (b)(4)(ii)(B) to prevent. 377 U. S., at 63–64.

As long as secondary picketing only discourages consumption of a struck product, incidental injury to the neutral is a natural consequence of an effective primary boycott. See *id.*, at 72–73. But the Union's secondary appeal against the central product sold by the title companies in this case is "reasonably calculated to induce customers not to patronize the neutral parties at all." 226 N. L. R. B., at 757.[8] The resulting injury to their businesses is distinctly different from the injury that the Court considered in *Tree Fruits*.[9] Product picketing that reasonably can be expected to threaten neutral parties with ruin or substantial loss simply does not square

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[8] See *Local 14055, United Steelworkers (Dow Chemical Co.)*, 211 N. L. R. B. 649, 651–652 (1974), enf. denied, 173 U. S. App. D. C. 299, 524 F. 2d 853 (1975), vacated and remanded, 429 U. S. 807 (1976), complaint dism'd, 229 N. L. R. B. 302 (1977).

We do not disagree with MR. JUSTICE BRENNAN's dissenting view that successful secondary product picketing may have no greater effect upon a neutral than a legal primary boycott. *Post*, at 623. But when the neutral's business depends upon the products of a particular primary employer, secondary product picketing can produce injury almost identical to the harm resulting from an illegal secondary boycott. See generally Duerr, Developing a Standard for Secondary Consumer Picketing, 26 Lab. L. J. 585 (1975). Congress intended § 8 (b)(4)(ii)(B) to protect neutrals from that type of coercion. MR. JUSTICE BRENNAN's view that the legality of secondary picketing should depend upon whether the pickets "urge only a boycott of the primary employer's product," *post*, at 622, would provide little or no protection. No well-advised union would allow secondary pickets to carry placards urging anything other than a product boycott. Section 8 (b)(4)(ii)(B) cannot bear a construction so inconsistent with the congressional intention to prevent neutrals from becoming innocent victims in contests between others.

[9] The Union is responsible for the "foreseeable consequences" of its conduct. *NLRB* v. *Operating Engineers*, 400 U. S. 297, 304–305 (1971); see *Radio Officers* v. *NLRB*, 347 U. S. 17, 45 (1954). See also *NLRB* v. *Denver Building Council*, 341 U. S. 675, 689 (1951).

with the language or the purpose of § 8 (b)(4)(ii)(B).[10] Since successful secondary picketing would put the title companies to a choice between their survival and the severance of their ties with Safeco, the picketing plainly violates the statutory ban on the coercion of neutrals with the object of "forcing or requiring [them] to cease . . . dealing in the [primary] produc[t] . . . or to cease doing business with" the primary employer. § 8 (b)(4)(ii)(B); see *Tree Fruits*, 377 U. S., at 68.[11]

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[10] Representative Griffin, a sponsor of the Landrum-Griffin amendments that brought § 8 (b)(4)(ii)(B) into law, emphasized to the Congress that the statute would outlaw secondary picketing likely to coerce the neutral party. "If the purpose of the picketing," he said, "is to coerce or to restrain the employer of that second establishment, to get him not to do business with the manufacturer—then such a boycott could be stopped." 105 Cong. Rec. 15673 (1959), reprinted in 2 National Labor Relations Board, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, p. 1615 (1959).

Senator McClellan, who offered a bill quite similar to the statute actually adopted, noted that secondary picketing is particularly likely to coerce neutrals who have based their businesses upon one manufacturer's products. He pointed out:

"[W]e have cases of merchants who for 20 years, 10 years, or for a long period of time, may have been handling a particular brand of product. A merchant may have built his business around the product, such as the John Deere plows or some kind of machinery from some other company. The merchant may have built up his trade entirely on that product." 105 Cong. Rec. 6667 (1959), reprinted in 2 Legislative History, *supra*, at 1194.

[11] The picketing in *Tree Fruits* and the picketing in this case are relatively extreme examples of the spectrum of conduct that the Board and the courts will encounter in complaints charging violations of § 8 (b)(4)(ii)(B). If secondary picketing were directed against a product representing a major portion of a neutral's business, but significantly less than that represented by a single dominant product, neither *Tree Fruits* nor today's decision necessarily would control. The critical question would be whether, by encouraging customers to reject the struck product, the secondary appeal is reasonably likely to threaten the neutral party with ruin

III

The Court of Appeals suggested that application of § 8 (b)(4)(ii)(B) to the picketing in this case might violate the First Amendment. — U. S. App. D. C., at —, 627 F. 2d, at 1147. We think not. Although the Court recognized in *Tree Fruits* that the Constitution might not permit "a broad ban against peaceful picketing," the Court left no doubt that Congress may prohibit secondary picketing calculated "to persuade the customers of the secondary employer to cease trading with him in order to force him to cease dealing with, or to put pressure upon, the primary employer." 377 U. S., at 63. Such picketing spreads labor discord by coercing a neutral party to join the fray. In *Electrical Workers* v. *NLRB*, 341 U. S. 694, 705 (1951), this Court expressly held that a prohibition on "picketing in furtherance of [such] unlawful objectives" did not offend the First Amendment. See *American Radio Assn.* v. *Mobile S.S. Assn.*, 419 U. S. 215, 229–231 (1974); *Teamsters* v. *Vogt, Inc.*, 354 U. S. 284 (1957). We perceive no reason to depart from that well-established understanding. As applied to picketing that predictably encourages consumers to boycott a secondary business, § 8 (b)(4)(ii)(B) imposes no impermissible restrictions upon constitutionally protected speech.

Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded with directions to enforce the National Labor Relations Board's order.

So ordered.

MR. JUSTICE BLACKMUN, concurring in part and concurring in the result.

I join Parts I and II of the Court's opinion, but not Part III. The Court's cursory discussion of what for me are difficult First Amendment issues presented by this case fails to

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or substantial loss. Resolution of the question in each case will be entrusted to the Board's expertise.

take account of the effect of this Court's decision in *Police Department of Chicago* v. *Mosley*, 408 U. S. 92 (1972), on the question whether the National Labor Relations Act's content-based ban on peaceful picketing of secondary employers is constitutional. The failure to take *Mosley* into account is particularly ironic given that the Court today reaffirms and extends the principles of that case in *Carey* v. *Brown*, *ante*, p. 455.

In *NLRB* v. *Fruit Packers*, 377 U. S. 58, 76 (1964), Mr. Justice Black wrote a concurring opinion in which he concluded that § 8 (b)(4)(ii)(B) of the National Labor Relations Act "abridges freedom of speech and press in violation of the First Amendment." He said:

> "In short, we have neither a case in which picketing is banned because the picketers are asking others to do something unlawful nor a case in which *all* picketing is, for reasons of public order, banned. Instead, we have a case in which picketing, otherwise lawful, is banned only when the picketers express particular views. The result is an abridgement of the freedom of these picketers to tell a part of the public their side of a labor controversy, a subject the free discussion of which is protected by the First Amendment." 377 U. S., at 79. (Emphasis in original.)

These views, central to Mr. Justice Black's vision of the First Amendment, were, one would have supposed until today, "accepted" by the Court in *Mosley*. See 408 U. S., at 98.

I have never been fully comfortable with *Mosley*'s equating all content selectivity in affording access to picketers with censorship. See *Mosley*, 408 U. S., at 102 (concurring statement). For this reason, I join today in MR. JUSTICE REHNQUIST's dissenting opinion in *Carey* v. *Brown*. I concur in the result in this case, however, only because I am reluctant to hold unconstitutional Congress' striking of the delicate balance between union freedom of expression and the ability

of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife. My vote should not be read as foreclosing an opposite conclusion where another statutory ban on peaceful picketing, unsupported by equally substantial governmental interests, is at issue.

MR. JUSTICE STEVENS, concurring in part and concurring in the result.

For the reasons stated by Mr. Justice Harlan and Mr. Justice Black in their separate opinions in *NLRB* v. *Fruit Packers*, 377 U. S. 58, 76, 80 (*Tree Fruits*), I am persuaded that Congress intended to prohibit this secondary picketing, and for the reasons stated by MR. JUSTICE POWELL, I agree that this case is not governed by *Tree Fruits*. I therefore join Parts I and II of the Court's opinion.

The constitutional issue, however, is not quite as easy as the Court would make it seem because, as Mr. Justice Black pointed out in *Tree Fruits*, "we have a case in which picketing, otherwise lawful, is banned only when the picketers express particular views." *Id.*, at 79. In other words, this is another situation in which regulation of the means of expression is predicated squarely on its content. See *Consolidated Edison Co.* v. *Public Service Comm'n*, *ante*, at 546 (STEVENS, J., concurring in judgment). I agree with the Court that this content-based restriction is permissible but not simply because it is in furtherance of objectives deemed unlawful by Congress. *Ante*, at 616. That a statute proscribes the otherwise lawful expression of views in a particular manner and at a particular location cannot in itself totally justify the restriction. Otherwise the First Amendment would place no limit on Congress' power. In my judgment, it is our responsibility to determine whether the method or manner of expression, considered in context, justifies the particular restriction.

I have little difficulty in concluding that the restriction at issue in this case is constitutional. Like so many other kinds

of expression, picketing is a mixture of conduct and communication. In the labor context, it is the conduct element rather than the particular idea being expressed that often provides the most persuasive deterrent to third persons about to enter a business establishment. In his concurring opinion in *Bakery Drivers* v. *Wohl,* 315 U. S. 769, 776–777, Mr. Justice Douglas stated:

> "Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence those aspects of picketing make it the subject of restrictive regulation."*

Indeed, no doubt the principal reason why handbills containing the same message are so much less effective than labor picketing is that the former depend entirely on the persuasive force of the idea.

The statutory ban in this case affects only that aspect of the union's efforts to communicate its views that calls for an automatic response to a signal, rather than a reasoned response to an idea. And the restriction on picketing is limited in geographical scope to sites of neutrals in the labor dispute. Because I believe that such restrictions on conduct are sufficiently justified by the purpose to avoid embroiling neutrals in a third party's labor dispute, I agree that the statute is consistent with the First Amendment.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE WHITE and MR. JUSTICE MARSHALL join, dissenting.

NLRB v. *Fruit Packers,* 377 U. S. 58 (1964) (*Tree Fruits*), held that it was permissible under § 8 (b)(4)(ii)(B) of the

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*See also *Teamsters* v. *Vogt, Inc.,* 354 U. S. 284, 289; *Hughes* v. *Superior Court,* 339 U. S. 460, 465–466, 468.

National Labor Relations Act (NLRA) [1] for a union involved in a labor dispute with a primary employer to conduct peaceful picketing at a secondary site with the object of persuading consumers to boycott the primary employer's product. Today's decision stunts *Tree Fruits* by declaring that secondary site picketing is illegal when the primary employer's product at which it is aimed happens to be the only product which the secondary retailer distributes. I dissent.

The NLRA does not place the secondary site off limits to all consumer picketing over the dispute with the primary employer. *Tree Fruits, supra,* at 63. The Act only prohibits a labor union from picketing to "coerce" a secondary firm into joining the union's struggle against the primary employer. § 8 (b)(4)(ii)(B). But inasmuch as the secondary retailer is, by definition, at least partially dependent upon the sale of the primary employer's goods, the secondary firm will necessarily feel the pressure of labor activity pointed at the primary enterprise. Thus, the pivotal problem in secondary site picketing cases is determining when the pressure imposed by consumer picketing is illegitimate, and therefore deemed to "coerce" the secondary retailer.

Tree Fruits addressed this problem by focusing upon whether picketing at the secondary site is directed at the primary employer's product, or whether it more broadly exhorts customers to withhold patronage from the full range of goods carried by the secondary retailer, *including those goods originating from nonprimary sources.* The *Tree Fruits* test reflects the distinction between economic damage sustained by the secondary firm solely by virtue of its dependence upon the primary employer's goods, and injuries inflicted upon interests of the secondary firm that are unrelated to the primary dispute—injuries that are calculated to influence the secondary retailer's conduct with respect to the primary dispute.

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[1] As amended by the Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act), § 704 (a), 73 Stat. 542–543, 29 U. S. C. § 158 (b)(4).

The former sort of harm is simply the result of union success in its conflict with the primary employer. The secondary firm is hurt only insofar as it entwines its economic fate with that of the primary employer by carrying the latter's goods. To be sure, the secondary site may be a battleground; but the secondary retailer, in its own right, is not enlisted as a combatant.

The latter kind of economic harm to the secondary firm, however, does not involve merely the necessary commercial fallout from the primary dispute. Appeals to boycott nonprimary goods sold by a secondary retailer place more at stake for the retailer than the risk it has assumed by handling the primary employer's product. Four considerations indicate that this broader pressure is highly undesirable from the standpoint of labor policy. First, nonprimary product boycotts distort the strength of consumer response to the primary dispute; the secondary retailer's decision to continue purchasing the primary employer's line becomes a function of consumer reaction to the primary conflict *amplified* by the impact of the boycott upon nonprimary goods. *Tree Fruits, supra,* at 72, and n. 20. Second, although it seems proper to compel the producer or retailer of an individual primary product to internalize the costs of labor conflict engendered in the course of the item's production, a nonprimary product boycott may unfairly impose multiple costs upon the secondary retailer who does not wish to terminate his relationship with the primary employer. Third, nonprimary product boycotts attack interests of the secondary firm that are not derivative of the interests of the primary enterprise; because the retailer thereby becomes an independent disputant, the primary labor controversy may be aggravated and complicated. Finally, by affecting the sales of nonprimary goods handled by the secondary firm, the disruptive effect of the primary dispute is felt even by those businesses that manufacture and sell nonprimary products to the secondary retailer.

These sound reasons support *Tree Fruits'* conclusion that the legality of secondary site picketing should turn upon

whether the union pickets urge only a boycott of the primary employer's product. 377 U. S., at 63–64, 71–72.[2] Concomitantly, *Tree Fruits* expressly rejected the notion that the coerciveness of picketing should depend upon the extent of loss suffered by the secondary firm through diminished purchases of the primary product. *Id.*, at 72–73. Nevertheless, the Court has now apparently abandoned the *Tree Fruits* approach, choosing instead to identify coerciveness with the percentage of the secondary firm's business made up by the primary product.

The conceptual underpinnings of this new standard are seriously flawed. The type of economic pressure exerted upon the secondary retailer by a primary product boycott is the same whatever the percentage of its business the primary product composes—in each case, a decline in sales at the secondary outlet may well lead either to a decrease in purchases from the primary employer or to product substitution. To be sure, the damaging effect of this pressure upon individual secondary firms will vary, but it is far from clear that the harmfulness of a primary product boycott is necessarily correlated with the percentage of the secondary firm's business the product constitutes. For example, a marginally profitable large retailer may handle a multiplicity of products, yet find the decrease in sales of a single, very profitable, primary product ruinous. A small healthy single product secondary retailer, on the other hand, might be able to sustain losses during a boycott, or substitute a comparable product.

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[2] Because a "merged product" consists in part of nonprimary products, the prohibition of "merged product" boycotts follows as a matter of logic and of policy from *Tree Fruits'* primary product boycott test. Thus, "merged product" cases, see, *e. g.*, *American Bread Co.* v. *NLRB*, 411 F. 2d 147, 154 (CA6 1969), do not support the Court's view that certain purely primary product boycotts are proscribed by the National Labor Relations Act. In fact, "merged product" boycotts are wholly different than primary product boycotts against single product retailers. "Merged product" boycotts need not entail a total withholding of patronage from the secondary retailer, which may carry other, nonmerged, products.

Moreover, it is odd to treat the NLRA's prohibition against coercion of neutral secondary parties as a means of protecting single product secondary firms from the effects of a successful primary product boycott. A single product retailer will always suffer a degree of harm incident to a successful primary product boycott, whether or not the retailer becomes the focus of union activity. Thus, a ban on coercion of neutral businesses is mismatched to the goal of averting that harm. Far more sensible would be to read the statutory ban on coercion of neutral parties as shielding secondary firms from the injuries that ensue precisely because of union conduct aimed at them. Nonprimary product boycotts fall within this category because they are specifically targeted at the secondary retailer.

Unlike the *Tree Fruits* rule, the test formulated by the Court in this case is not rooted in the policy of maintaining secondary firm neutrality with respect to the primary dispute. There is no ground to believe that a single product secondary retailer is more prone than a multiproduct retailer to react to a primary product boycott by joining the union in its struggle against the primary employer. On the contrary, the single product secondary firm is likely to be the primary employer's strongest ally because of the alignment of their respective economic interests. Nor is it especially unfair to subject the single product retailer to a primary product boycott. Whatever the percentage of a retailer's business that is constituted by a given item, the retailer necessarily assumes the risks of interrupted supply or declining sales that follow when labor conflict embroils the manufacturer of the item.

By shifting its focus from the nature of the product boycotted to the composition of the secondary firm's business, today's decision substitutes a confusing and unsteady standard for *Tree Fruits'* clear approach to secondary site picketing. Labor unions will no longer be able to assure that their secondary site picketing is lawful by restricting advocacy of a boycott to the primary product, as ordained by *Tree Fruits*.

Instead, picketers will be compelled to guess whether the primary product makes up a sufficient proportion of the retailer's business to trigger the displeasure of the courts or the Labor Relations Board. Indeed, the Court's general disapproval of "[p]roduct picketing that reasonably can be expected to threaten neutral parties with ruin or substantial loss . . . ," *ante*, at 614, leaves one wondering whether unions will also have to inspect balance sheets to determine whether the primary product they wish to picket is too profitable for the secondary firm.

I continue to "disagree . . . that the test of 'to threaten, coerce, or restrain' . . . is whether [the secondary retailer] suffered or was likely to suffer economic loss." *Tree Fruits, supra*, at 72.[3] I would adhere to the primary product test. Accordingly, I dissent.

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[3] The only fragment of legislative history the Court musters in support of its holding forbidding picketing of single product secondary firms is Senator McClellan's expression of concern that some secondary firms may have developed their business entirely on the basis of " 'a particular brand of product.' " *Ante*, at 615, n. 10, quoting 105 Cong. Rec. 6667 (1959), reprinted in 2 National Labor Relations Board, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, p. 1194 (1959). But that remark was offered in support of a proposed amendment restricting secondary boycotts that was rejected by the Senate. 2 Legislative History, *supra*, at IX. Section 8(b)(4) as finally enacted was narrower than Senator McClellan's proposed amendment. See Comment, 32 Stan. L. Rev. 631, 641–642, n. 61 (1980).

BECK v. ALABAMA

CERTIORARI TO THE SUPREME COURT OF ALABAMA

No. 78-6621. Argued February 20, 1980—Decided June 20, 1980

Under Alabama law felony murder is a lesser included offense of the capital crime of robbery-intentional killing. Under the Alabama death penalty statute the trial judge is prohibited from giving the jury the option of convicting the defendant of the lesser included offense; instead, the jury must either convict the defendant of the capital crime, in which case it must impose the death penalty, or acquit him. If the defendant is convicted, the trial judge must hold a hearing to consider aggravating and mitigating circumstances, and may then refuse to impose the death sentence and instead sentence the defendant to life imprisonment. Petitioner was convicted of robbery-intentional killing, and the jury accordingly imposed the death sentence, which the Alabama trial court refused to overturn. At petitioner's trial, his own testimony established his participation in the robbery, but he denied killing, or any intent to kill, the victim. Because of the statutory prohibition, the trial court did not instruct the jury as to the lesser included offense of felony murder. The Alabama appellate courts upheld the conviction and death sentence, rejecting petitioner's constitutional attack on the statutory prohibition on lesser included offense instructions.

Held: The death sentence may not constitutionally be imposed after a jury verdict of guilt of a capital offense where the jury was not permitted to consider a verdict of guilt of a lesser included offense. Pp. 633–646.

(a) Providing the jury with the "third option" of convicting on a lesser included offense ensures that the jury will accord the defendant the full benefit of the reasonable-doubt standard. This procedural safeguard is especially important in cases such as this one. For when the evidence establishes that the defendant is guilty of a serious, violent offense but leaves some doubt as to an element justifying conviction of a capital offense, the failure to give the jury such a "third option" inevitably enhances the risk of an unwarranted conviction. Such a risk cannot be tolerated in a case in which the defendant's life is at stake. Pp. 633–638.

(b) Alabama's argument that, in the context of an apparently mandatory death penalty statute, the preclusion of lesser included offense instructions heightens, rather than diminishes, the reliability of the guilt determination, must be rejected. The unavailability of lesser included

offense instructions and the apparently mandatory nature of the death penalty both interject irrelevant considerations into the factfinding process, diverting the jury's attention from the central issue of whether the State has satisfied its burden of proving beyond a reasonable doubt that the defendant is guilty of a capital crime. Thus, on the one hand, the unavailability of the "third option" may encourage the jury to convict for an impermissible reason—its belief that the defendant is guilty of some serious crime and should be punished. On the other hand, the apparently mandatory nature of the death penalty may encourage the jury to acquit for an equally impermissible reason—that, whatever his crime, the defendant does not deserve death. While in any particular case these two extraneous factors may favor the defendant or the prosecution or may cancel each other out, in every case they introduce a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case. Pp. 638–643.

(c) The jury's "option" of refusing to return any verdict at all, thus causing a mistrial, is not an adequate substitute for proper instructions on lesser included offenses. Nor does the fact that the trial judge has the ultimate sentencing power compensate for the risk that the jury may return an improper verdict because of the unavailability of the "third option." If the jury finds the defendant guilty only of a lesser included offense, the judge would not have the opportunity to impose the death sentence. Moreover, the jury's verdict must have a tendency to motivate the judge to impose the same sentence that the jury did. Under these circumstances, it cannot be presumed that a post-trial hearing will always correct whatever mistakes occurred in the performance of the jury's factfinding function. Pp. 643–646.

365 So. 2d 1006, reversed.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, BLACKMUN, and POWELL, JJ., joined. BRENNAN, J., filed a concurring opinion, *post*, p. 646. MARSHALL, J., filed an opinion concurring in the judgment, *post*, p. 646. REHNQUIST, J., filed a dissenting opinion, in which WHITE, J., joined, *post*, p. 646.

David Klingsberg argued the cause for petitioner. With him on the briefs were *John A. Herfort*, *Jay Wishingrad*, and *John L. Carroll*.

Edward E. Carnes, Assistant Attorney General of Alabama, argued the cause for respondent. With him on the brief was *Charles A. Graddick*, Attorney General.

MR. JUSTICE STEVENS delivered the opinion of the Court.

We granted certiorari to decide the following question:

> "May a sentence of death constitutionally be imposed after a jury verdict of guilt of a capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, and when the evidence would have supported such a verdict?" 444 U. S. 897.

We now hold that the death penalty may not be imposed under these circumstances.

Petitioner was tried for the capital offense of "[r]obbery or attempts thereof when the victim is intentionally killed by the defendant." [1] Under the Alabama death penalty statute

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[1] There are 14 capital offenses under the Alabama statute, Ala. Code § 13-11-2 (a)(1)-(14) (1975):

"(1) Kidnapping for ransom or attempts thereof, when the victim is intentionally killed by the defendant;

"(2) Robbery or attempts thereof when the victim is intentionally killed by the defendant;

"(3) Rape when the victim is intentionally killed by the defendant; carnal knowledge of a girl under 12 years of age, or abuse of such girl in an attempt to have carnal knowledge, when the victim is intentionally killed by the defendant;

"(4) Nighttime burglary of an occupied dwelling when any of the occupants is intentionally killed by the defendant;

"(5) The murder of any police officer, sheriff, deputy, state trooper or peace officer of any kind, or prison or jail guard while such prison or jail guard is on duty or because of some official or job-related act or performance of such officer or guard;

"(6) Any murder committed while the defendant is under sentence of life imprisonment;

"(7) Murder in the first degree when the killing was done for a pecuniary or other valuable consideration or pursuant to a contract or for hire;

"(8) Indecent molestation of, or an attempt to indecently molest, a child under the age of 16 years, when the child victim is intentionally killed by the defendant;

"(9) Willful setting off or exploding dynamite or other explosive under

the requisite intent to kill may not be supplied by the felony-murder doctrine.[2] Felony murder is thus a lesser included offense of the capital crime of robbery-intentional killing. However, under the statute the judge is specifically prohibited from giving the jury the option of convicting the defendant of a lesser included offense.[3] Instead, the jury is given the

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circumstances now punishable by section 13–2–60 or 13–2–61, when a person is intentionally killed by the defendant because of said explosion;

"(10) Murder in the first degree wherein two or more human beings are intentionally killed by the defendant by one or a series of acts;

"(11) Murder in the first degree where the victim is a public official or public figure and the murder stems from or is caused by or related to his official position, acts or capacity;

"(12) Murder in the first degree committed while the defendant is engaged or participating in the act of unlawfully assuming control of any aircraft by use of threats or force with intent to obtain any valuable consideration for the release of said aircraft or any passenger or crewman thereon, or to direct the route or movement of said aircraft, or otherwise exert control over said aircraft;

"(13) Any murder committed by a defendant who has been convicted of murder in the first or second degree in the 20 years preceding the crime; or

"(14) Murder when perpetrated against any witness subpoenaed to testify at any preliminary hearing, trial or grand jury proceeding against the defendant who kills or procures the killing of witness, or when perpetrated against any human being while intending to kill such witness."

[2] Alabama Code § 13–11–2 (b) (1975) states that "[e]vidence of intent under this section shall not be supplied by the felony-murder doctrine." In *Ritter* v. *State*, 375 So. 2d 270, 275 (1979), cert. pending, No. 79–5741, the Alabama Supreme Court held that the State could not satisfy its burden of proof under the new death penalty statute simply by showing that the defendant intended to commit robbery or even by showing that he should have known that there was a substantial possibility that someone would be killed. Although the State is not required to prove that the defendant was the actual triggerman, it must show that he had a "particularized intent" to kill the victim or that he "sanctioned and facilitated the crime [of intentional killing] so that his culpability is comparable to that of" the actual killer.

[3] Alabama Code § 13–11–2 (a) (1975) provides:

"If the jury finds the defendant guilty, it shall fix the punishment at death when the defendant is charged by indictment with any of the

choice of either convicting the defendant of the capital crime, in which case it is required to impose the death penalty, or acquitting him, thus allowing him to escape all penalties for his alleged participation in the crime. If the defendant is convicted and the death penalty imposed, the trial judge must then hold a hearing with respect to aggravating and mitigating circumstances; after hearing the evidence, the judge may refuse to impose the death penalty, sentencing the defendant to life imprisonment without possibility of parole.[4]

In this case petitioner's own testimony established his participation in the robbery of an 80-year-old man named Roy Malone. Petitioner consistently denied, however, that he killed the man or that he intended his death. Under petitioner's version of the events, he and an accomplice entered

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following offenses and with aggravation, which must also be averred in the indictment, and which offenses so charged with said aggravation shall not include any lesser offenses."

The last phrase of this subsection has been consistently construed to preclude any lesser included offense instructions in capital cases. See *Jacobs* v. *State*, 361 So. 2d 640, 646 (Ala. 1978) (Torbert, C. J., concurring in part and dissenting in part), cert. denied, 439 U. S. 1122; *Evans* v. *Birtton*, 472 F. Supp. 707, 714 (SD Ala. 1979).

[4] Alabama Code § 13-11-3 (1975) provides:

"If the jury finds the defendant guilty of one of the aggravated offenses listed in section 13-11-2 and fixes the punishment at death, the court shall thereupon hold a hearing to aid the court to determine whether or not the court will sentence the defendant to death or to life imprisonment without parole. In the hearing, evidence may be presented as to any matter that the court deems relevant to sentence and shall include any matters relating to any of the aggravating or mitigating circumstances enumerated in sections 13-11-6 and 13-11-7. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements; provided further, that this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the state of Alabama. The state and the defendant, or his counsel, shall be permitted to present argument for or against the sentence of death."

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their victim's home in the afternoon, and, after petitioner had seized the man intending to bind him with a rope, his accomplice unexpectedly struck and killed him. As the State has conceded, absent the statutory prohibition on such instructions, this testimony would have entitled petitioner to a lesser included offense instruction on felony murder as a matter of state law.[5]

Because of the statutory prohibition, the court did not instruct the jury as to the lesser included offense of felony murder. Instead, the jury was told that if petitioner was acquitted of the capital crime of intentional killing in the course of a robbery, he "must be discharged" and "he can never be tried for anything that he ever did to Roy Malone." Record 743. The jury subsequently convicted petitioner and imposed the death penalty; after holding a hearing with respect to aggravating and mitigating factors, the trial court refused to overturn that penalty.

In the courts below petitioner attacked the prohibition on lesser included offense instructions in capital cases, arguing that the Alabama statute was constitutionally indistinguishable from the mandatory death penalty statutes struck down in *Woodson* v. *North Carolina*, 428 U. S. 280, and *Roberts* v. *Louisiana*, 428 U. S. 325.[6] The Alabama Court of Criminal

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[5] The Alabama rule in cases other than capital cases is that the defendant is entitled to a lesser included offense instruction if "there is any reasonable theory from the evidence which would support the position." *Fulghum* v. *State*, 291 Ala. 71, 75, 277 So. 2d 886, 890 (1973). The State concedes that under this standard petitioner would have been entitled to instructions on first-degree (felony) murder and robbery. Brief for Respondent 78–79; Tr. of Oral Arg. 23. The parties disagree as to whether petitioner also would have been entitled to an instruction on second-degree murder under state law. We, of course, have no occasion to pass on this issue.

[6] In the trial court petitioner's counsel argued that telling the jury that "you have got a choice of two things, either you can sentence him to die or you can acquit him" unconstitutionally interfered with its fact-finding role and made the statute an unconstitutional mandatory death

Appeals rejected this argument on the ground that the jury's only function under the Alabama statute is to determine guilt or innocence and that the death sentence it is required

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penalty. Record 40. In the Alabama Court of Criminal Appeals the court described petitioner's argument with respect to the constitutionality of the Alabama death penalty statute as follows:

"The trial jury cannot be instructed on lesser included offenses.

"In the absence of such a provision, the appellant insists that the only choice that a petit jury has is imposing death or acquitting the defendant. He states that because only those two choices are presented to the jury, the statute can only be interpreted as having a mandatory death provision." 365 So. 2d 985, 999 (1978).

In his petition for certiorari to the Alabama Supreme Court petitioner specifically stated that he was challenging the Alabama statute as being in violation of the Eighth, Sixth, and Fourteenth Amendments to the United States Constitution and argued that it is "in fact a mandatory death sentence." However, petitioner did not explore these issues more fully in his brief to the Alabama Supreme Court, Tr. of Oral Arg. 5, and, in its one-paragraph opinion affirming the judgment of the Alabama Court of Criminal Appeals, the Supreme Court adverted only to the state constitutional issues petitioner had raised.

In his dissenting opinion Mr. Justice Rehnquist takes the position that we are required to construe the Alabama Supreme Court's failure to address petitioner's federal constitutional claims as a determination that petitioner had waived those claims. We disagree. It is clear that petitioner did present his federal claims in some fashion to the Alabama Supreme Court. The State has never argued that this presentation was insufficient, as a matter of state law, to preserve the issue. On the contrary, in its brief in opposition to the petition for certiorari, the State argued that "the Alabama Appellate Courts have reviewed these matters raised in the petition, fully considered them and correctly decided the issues." Similarly, after certiorari was granted, the State again did not argue that petitioner's due process and Eighth Amendment claims were not properly raised or preserved below.

While the parties of course cannot confer jurisdiction on this Court by agreement, we should not simply brush aside the Alabama Attorney General's view of his own State's law. Cf. *Chambers* v. *Mississippi*, 410 U. S. 284, 290, n. 3. That is especially true in a case such as this, where the death penalty was imposed in a plainly unconstitutional manner. Cf. *Vachon* v. *New Hampshire*, 414 U. S. 478.

to impose after a finding of guilt is merely advisory.[7] In a brief opinion denying review, the Alabama Supreme Court also rejected petitioner's arguments, citing *Jacobs* v. *State*, 361 So. 2d 640 (Ala. 1978), cert. denied, 439 U. S. 1122, in which it had upheld the constitutionality of the Alabama death penalty statute against a similar challenge. 365 So. 2d 1006, 1007 (1978).

In this Court petitioner contends that the prohibition on giving lesser included offense instructions in capital cases violates both the Eighth Amendment as made applicable to the States by the Fourteenth Amendment and the Due Process Clause of the Fourteenth Amendment by substantially increasing the risk of error in the factfinding process. Petitioner argues that, in a case in which the evidence clearly establishes the defendant's guilt of a serious noncapital crime such as felony murder, forcing the jury to choose between conviction on the capital offense and acquittal creates a danger that it will resolve any doubts in favor of conviction.[8]

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[7] 365 So. 2d, at 1000. The Alabama Court of Criminal Appeals relied on *Jacobs* v. *State*, 361 So. 2d 640 (Ala. 1978), cert. denied, 439 U. S. 1122, for this proposition. The majority in *Jacobs* did not specifically discuss the validity of the prohibition on lesser included offense instructions. However, in an opinion concurring in part and dissenting in part, Chief Justice Torbert stated that, far from being suspect, the prohibition helped to save the statute from being an unconstitutional mandatory death penalty. He noted that in *Roberts* v. *Louisiana*, 428 U. S. 325, this Court had struck down a mandatory death penalty statute which required the judge to give the jury the option of convicting on lesser included offenses whether or not such instructions were warranted by the evidence, on the ground that such a statute gave the jury *de facto*, standardless sentencing discretion. Because Alabama's statute withdraws from the jury the discretion to control the imposition of the death penalty by convicting the defendant on a lesser included offense and because it is the judge and not the jury who does the actual sentencing, the chief justice concluded that the statute was acceptable as a matter of federal constitutional law.

[8] Petitioner also argues that, because Alabama law requires a trial judge to give lesser included offense instructions where appropriate in noncapital cases, the total prohibition on such instructions in capital cases con-

In response, Alabama argues that the preclusion of lesser included offense instructions does not impair the reliability of the factfinding process or prejudice the defendant in any way. Rather, it argues that the apparently mandatory death penalty will make the jury more prone to acquit in a doubtful case and that the jury's ability to force a mistrial by refusing to return a verdict acts as a viable third option in a case in which the jury has doubts but is nevertheless unwilling to acquit. The State also contends that prohibiting lesser included offense instructions is a reasonable way of assuring that the death penalty is not imposed arbitrarily and capriciously as a result of compromise verdicts. Finally, it argues that any error in the imposition of the death penalty by the jury can be cured by the judge after a hearing on aggravating and mitigating circumstances.

I

At common law the jury was permitted to find the defendant guilty of any lesser offense necessarily included in the offense charged.[9] This rule originally developed as an aid to the prosecution in cases in which the proof failed to establish some element of the crime charged. See 2 C. Wright, Federal Practice and Procedure § 515, n. 54 (1969). But it has long been recognized that it can also be beneficial to the defendant because it affords the jury a less drastic alternative than the choice between conviction of the offense charged and acquittal. As MR. JUSTICE BRENNAN explained in his opinion

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stitutes an irrational discrimination violative of the Equal Protection Clause of the Fourteenth Amendment. In view of our disposition of the case, it is not necessary to consider this issue. Moreover, petitioner failed to raise this claim in the courts below.

[9] 2 M. Hale, Pleas of the Crown 301–302 (1736); 2 W. Hawkins, Pleas of the Crown 623 (6th ed. 1787); 1 J. Chitty, Criminal Law 250 (5th Am. ed. 1847); T. Starkie, Treatise on Criminal Pleading 351–352 (2d ed. 1822).

for the Court in *Keeble* v. *United States*, 412 U. S 205, 208, providing the jury with the "third option" of convicting on a lesser included offense ensures that the jury will accord the defendant the full benefit of the reasonable-doubt standard:

> "Moreover, it is no answer to petitioner's demand for a jury instruction on a lesser offense to argue that a defendant may be better off without such an instruction. True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction—in this context or any other—precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction. In the case before us, for example, an intent to commit serious bodily injury is a necessary element of the crime with which petitioner was charged, but not of the crime of simple assault. Since the nature of petitioner's intent was very much in dispute at trial, the jury could rationally have convicted him of simple assault if that option had been presented. But the jury was presented with only two options: convicting the defendant of assault with intent to commit great bodily injury, or acquitting him outright. We cannot say that the availability of a third option—convicting the defendant of simple assault—could not have resulted in a different verdict. Indeed, while we have never explicitly held that the Due Process Clause of the Fifth Amendment guarantees the right of a defendant to have the jury instructed on a lesser included offense, it is nevertheless clear that a construction of the Major Crimes Act to preclude such an

instruction would raise difficult constitutional questions." *Id.*, at 212–213 (emphasis in original).

Alabama's failure to afford capital defendants the protection provided by lesser included offense instructions is unique in American criminal law.[10] In the federal courts, it has long been "beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater." *Keeble* v. *United States*, *supra*, at 208.[11] Similarly, the state courts that have ad-

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[10] Mississippi's post-*Furman* death penalty statute also contained a prohibition on charging lesser included offenses. In *Jackson* v. *State*, 337 So. 2d 1242, 1255 (1976), the Mississippi Supreme Court struck down this part of the statute on the ground that it "constitutes an impediment to full and complete administration of justice in the trial of capital cases and is therefore not binding on the courts. . . ." While warning that lesser included offense instructions should not be given "indiscriminately or automatically," the court held that they should continue to be given when "warranted by the evidence."

[11] This principle was first announced in *Stevenson* v. *United States*, 162 U. S. 313, 323:

"A judge may be entirely satisfied from the whole evidence in the case that the person doing the killing was actuated by malice; that he was not in any such passion as to lower the grade of the crime from murder to manslaughter by reason of any absence of malice; and yet if there be any evidence fairly tending to bear upon the issue of manslaughter, it is the province of the jury to determine from all the evidence what the condition of mind was, and to say whether the crime was murder or manslaughter."

See also *Berra* v. *United States*, 351 U. S. 131, 134, where Mr. Justice Harlan indicated that the defendant's entitlement to such an instruction could not be doubted:

"In a case where some of the elements of the crime charged themselves constitute a lesser crime, the defendant, if the evidence justified it, would no doubt be entitled to an instruction which would permit a finding of guilt of the lesser offense. See *Stevenson* v. *United States*, 162 U. S. 313."

Rule 31 (c) of the Federal Rules of Criminal Procedure provides that "[t]he defendant may be found guilty of an offense necessarily included

dressed the issue have unanimously held that a defendant is entitled to a lesser included offense instruction where the evidence warrants it.[12] Indeed, for all noncapital crimes

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in the offense charged. . . ." Although the Rule is permissively phrased, it has been universally interpreted as granting a defendant a right to a requested lesser included offense instruction if the evidence warrants it. See, *e. g., United States* v. *Scharf*, 558 F. 2d 498, 502 (CA8 1977); *United States* v. *Crutchfield*, 547 F. 2d 496, 500 (CA9 1977); *Government of Virgin Islands* v. *Carmona*, 422 F. 2d 95, 100 (CA3 1970); 2 C. Wright, Federal Practice and Procedure § 515, n. 57 (1969).

[12] Although the States vary in their descriptions of the quantum of proof necessary to give rise to a right to a lesser included offense instruction, they agree that it must be given when supported by the evidence. See, *e. g., Christie* v. *State*, 580 P. 2d 310 (Alaska 1978); *State* v. *Valencia*, 121 Ariz. 191, 589 P. 2d 434 (1979); *Westbrook* v. *State*, 265 Ark. 736, 580 S. W. 2d 702 (1979); *People* v. *Preston*, 9 Cal. 3d 308, 508 P. 2d 300 (1973); *People* v. *White*, 191 Colo. 353, 553 P. 2d 68 (1976); *State* v. *Brown*, 173 Conn. 254, 377 A. 2d 268 (1977); *Matthews* v. *State*, 310 A. 2d 645 (Del. 1973); *State* v *Terry*, 336 So. 2d 65 (Fla 1976); *Loury* v. *State*, 147 Ga. App. 152, 248 S. E. 2d 291 (1978); *State* v. *Travis*, 45 Haw. 435, 368 P. 2d 883 (1962); *State* v. *Beason*, 95 Idaho 267, 506 P. 2d 1340 (1973); *People* v. *Simpson*, 57 Ill. App. 3d 442, 373 N. E. 2d 809 (1978); *Pruitt* v. *State*, 269 Ind. 559, 382 N. E. 2d 150 (1978); *State* v. *Millspaugh*, 257 N. W. 2d 513 (Iowa 1977); *State* v. *White*, 225 Kan. 87, 587 P. 2d 1259 (1978); *Martin* v. *Commonwealth*, 571 S. W. 2d 613 (Ky. 1978); *State* v. *Carmichael*, 405 A. 2d 732 (Me. 1979); *Blackwell* v. *State*, 278 Md. 466, 365 A. 2d 545 (1976), cert. denied, 431 U. S. 918; *Commonwealth* v. *Santo*, — Mass. —, 376 N. E. 2d 866 (1978); *People* v. *Jones*, 395 Mich. 379, 236 N. W. 2d 461 (1975); *State* v. *Merrill*, 274 N. W. 2d 99 (Minn. 1978); *Jackson* v. *State*, 337 So. 2d 1242 (Miss. 1976); *State* v. *Stone*, 571 S. W. 2d 486 (Mo. App. 1978); *State* v. *Ostwald*, — Mont. —, 591 P. 2d 646 (1979); *State* v. *Hegwood*, 202 Neb. 379, 275 N. W. 2d 605 (1979); *Colle* v. *State*, 85 Nev. 289, 454 P. 2d 21 (1969); *State* v. *Boone*, 119 N. H. 594, 406 A. 2d 113 (1979); *State* v. *Saulnier*, 63 N. J. 199, 306 A. 2d 67 (1973); *State* v. *Aubrey*, 91 N. M. 1, 569 P. 2d 411 (1977); *People* v. *Henderson*, 41 N. Y. 2d 233, 359 N. E. 2d 1357 (1976); *State* v. *Drumgold*, 297 N. C. 267, 254 S. E. 2d 531 (1979); *State* v. *Piper*, 261 N. W 2d 650 (N. D. 1977); *State* v. *Kilby*, 50 Ohio St. 2d 21, 361 N. W. 2d 1336 (1977); *Gilbreath* v. *State*, 555 P. 2d 69 (Okla. Crim. App. 1976); *State* v. *Thayer*, 32 Ore. App. 193, 573 P. 2d 758 (1978); *Commonwealth* v *Terrell*, 482 Pa.

Alabama itself gives the defendant a right to such instructions under appropriate circumstances. See n. 5, *supra*.

While we have never held that a defendant is entitled to a lesser included offense instruction as a matter of due process, the nearly universal acceptance of the rule in both state and federal courts establishes the value to the defendant of this procedural safeguard. That safeguard would seem to be especially important in a case such as this. For when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense—but leaves some doubt with respect to an element that would justify conviction of a capital offense—the failure to give the jury the "third option" of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction.

Such a risk cannot be tolerated in a case in which the defendant's life is at stake. As we have often stated, there is a significant constitutional difference between the death penalty and lesser punishments:

> "[D]eath is a different kind of punishment from any other which may be imposed in this country. . . . From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on

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303, 393 A. 2d 1117 (1978); *State* v. *Funchess*, 267 S. C. 427, 229 S. E. 2d 331 (1976); *State* v. *Grimes*, 90 S. D. 43, 237 N. W. 2d 900 (1976); *Howard* v. *State*, 578 S. W. 2d 83 (Tenn. 1979); *Day* v. *State*, 532 S. W. 2d 302 (Tex. Crim. App. 1975); *State* v. *Gillian*, 23 Utah 2d 372, 463 P. 2d 811 (1970); *Painter* v. *Commonwealth*, 210 Va. 360, 171 S. E. 2d 166 (1969); *State* v. *Workman*, 90 Wash. 2d 443, 584 P. 2d 382 (1978); *State* v. *Wayne*, — W. Va. —, 245 S. E. 2d 838 (1978); *Leach* v. *State*, 83 Wis. 2d 199, 265 N. W. 2d 495 (1978); *Jones* v. *State*, 580 P. 2d 1150 (Wyo. 1978).

reason rather than caprice or emotion." *Gardner* v. *Florida*, 430 U. S. 349, 357–358 (opinion of STEVENS, J.).

To insure that the death penalty is indeed imposed on the basis of "reason rather than caprice or emotion," we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination.[13] The same reasoning must apply to rules that diminish the reliability of the guilt determination. Thus, if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, Alabama is constitutionally prohibited from withdrawing that option from the jury in a capital case.[14]

II

Alabama argues, however, that petitioner's factual premise is wrong and that, in the context of an apparently mandatory

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[13] See *Gardner* v. *Florida*, 430 U. S. 349 (opinion of STEVENS, J.); *Lockett* v. *Ohio*, 438 U. S. 586. In *Lockett* THE CHIEF JUSTICE explained the rationale for requiring more reliable procedures in capital sentencing determinations:

"There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Id.*, at 605.

See also *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (opinion of STEWART, POWELL, and STEVENS, JJ.):

"Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."

[14] We need not and do not decide whether the Due Process Clause would require the giving of such instructions in a noncapital case.

death penalty statute, the preclusion of lesser included offense instructions heightens, rather than diminishes, the reliability of the guilt determination. The State argues that, because the jury is led to believe that a death sentence will automatically follow a finding of guilt,[15] it will be more likely to acquit than to convict whenever it has anything approaching a reasonable doubt. In support of this theory the State relies on the historical data described in *Woodson* v. *North Carolina,* 428 U. S., at 293 (opinion of STEWART, POWELL, and STEVENS, JJ.), which indicated that American juries have traditionally been so reluctant to impose the death penalty that they have "with some regularity, disregarded their oaths and refused to convict defendants where a death sentence was the automatic consequence of a guilty verdict."

The State's argument is based on a misreading of our cases striking down mandatory death penalties. In *Furman* v. *Georgia,* 408 U. S. 238, the Court held unconstitutional a Georgia statute that vested the jury with complete and unguided discretion to impose the death penalty or not as it saw fit, on the ground that such a procedure led to the "wanton" and "freakish" imposition of the penalty. *Id.,* at 310 (STEWART, J., concurring). In response to *Furman* several States enacted statutes that purported to withdraw any and all discretion from the jury with respect to the punishment decision by making the death penalty automatic on a finding of guilt. But, as the prevailing opinion noted in *Woodson* v. *North Carolina,* in so doing the States "simply papered over the problem of unguided and unchecked jury discretion." 428 U. S., at 302 (opinion of STEWART, POWELL, and STEVENS, JJ.). For, as historical evidence indicated, juries faced with a mandatory death penalty statute often

[15] The jury is not told that the judge is the final sentencing authority. Rather, the jury is instructed that it must impose the death sentence if it finds the defendant guilty and is led to believe, by implication, that its sentence will be final.

created their own sentencing discretion by distorting the fact-finding process, acquitting even a clearly guilty defendant if they felt he did not deserve to die for his crime. Because the jury was given no guidance whatsoever for determining when it should exercise this *de facto* sentencing power, the mandatory death statutes raised the same possibility that the death penalty would be imposed in an arbitrary and capricious manner as the statute held invalid in *Furman*.[16]

The Alabama statute, which was enacted after *Furman* but before *Woodson*, has many of the same flaws that made the North Carolina statute unconstitutional. Thus, the Alabama statute makes the guilt determination depend, at least in part, on the jury's feelings as to whether or not the defendant deserves the death penalty, without giving the jury any standards to guide its decision on this issue.

In *Jacobs* v. *State*, 361 So. 2d 640 (Ala. 1978), cert. denied, 439 U. S. 1122, Chief Justice Torbert attempted to distinguish the Alabama death statute from the North Carolina and Louisiana statutes on the ground that the unavailability of lesser included offense instructions substantially reduces the risk of jury nullification. Thus, because of their reluctance to acquit a defendant who is obviously guilty of some serious crime, juries will be unlikely to disregard their oaths and acquit a defendant who is guilty of a capital crime simply because of their abhorrence of the death penalty.

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[16] The same analysis led to the conclusion that Louisiana's death penalty statute was unconstitutional. *Roberts* v. *Louisiana*, 428 U. S. 325 (opinion of STEWART, POWELL, and STEVENS, JJ.). That case involved a mandatory death penalty statute that required the judge to give a lesser included offense instruction whether or not it was justified by the evidence. Because such a procedure "invites the jurors to disregard their oaths and choose a verdict for a lesser offense whenever they feel the death penalty is inappropriate," it was the equivalent of a discretionary death statute in which the jury was given complete and unreviewable discretion, unguided by any standards as to when the death penalty was appropriate. *Id.*, at 335.

However, because the death penalty is mandatory, the State argues that the jury will be especially careful to accord the defendant the full benefit of the reasonable-doubt standard. In the State's view the end result is a perfect balance between competing emotional pressures that ensures the defendant a reliable procedure, while at the same time reducing the possibility of arbitrary and capricious guilt determinations.[17]

The State's theory, however, is supported by nothing more than speculation. The 96% conviction rate achieved by prosecutors under the Alabama statute hardly supports the notion that the statute creates such a perfect equipoise.[18]

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[17] In *Gregg* v. *Georgia*, 428 U. S. 153, 199 (opinion of STEWART, POWELL, and STEVENS, JJ.), the prevailing opinion specifically rejected the argument that the new Georgia statute was unconstitutional because the availability of lesser included offense instructions made it possible that a jury might erroneously remove a defendant from consideration as a candidate for the death penalty. Under a statute like Georgia's, where guilt is determined separately from punishment, there is little risk that the jury will use its power to decide guilt to make a *de facto* punishment decision. Thus, eliminating lesser included offense instructions would not have the effect of reducing the risk of arbitrariness in the imposition of the death penalty. On the contrary, as was stated in a footnote in *Gregg*, eliminating this and other procedural safeguards that have long been accorded criminal defendants would raise serious constitutional questions. *Id.*, at 199, n. 50.

Thus, it is only in cases like this in which the preclusion of lesser included offenses is linked to a mandatory death penalty that the State could even raise the possibility that the elimination of this procedural safeguard was a permissible way to reduce the arbitrary and capricious infliction of the death penalty.

[18] Forty-eight out of the first 50 defendants tried under the Alabama statute were convicted. See Brief in Opposition in *Jacobs* v. *Alabama*, O. T. 1978, No. 78-5696, pp. 10, 35. In this case the State has argued that the reason for the high conviction rate is that prosecutors rarely indict for capital offenses except in the clearest of cases because of the risk that a failure of proof on an essential element of the crime might lead to an acquittal. Assuming that this is the reason for the high conviction rate, the statistics still do not support the hypothesis that juries will be more likely to acquit than convict in a doubtful case.

Moreover, it seems unlikely that many jurors would react in the theoretically perfect way the State suggests. As Justice Shores stated in dissent in *Jacobs* v. *State, supra,* at 651–652:

> "The Supreme Court of the United States did remark in *Furman, infra,* and again in *Woodson, supra,* that this nation abhorred the mandatory death sentence. . . . I suggest that, although there is no historical data to support it, most, if not all, jurors at this point in our history perhaps equally abhor setting free a defendant where the evidence establishes his guilt of a serious crime. We have no way of knowing what influence either of these factors have on a jury's deliberation, and which of these unappealing alternatives a jury opts for in a particular case is a matter of purest conjecture. We cannot know that one outweighs the other. Jurors are not expected to come into the jury box and leave behind all that their human experience has taught them. The increasing crime rate in this country is a source of concern to all Americans. To expect a jury to ignore this reality and to find a defendant innocent and thereby set him free when the evidence establishes beyond doubt that he is guilty of some violent crime requires of our juries clinical detachment from the reality of human experience. . . ."

In the final analysis the difficulty with the Alabama statute is that it interjects irrelevant considerations into the factfinding process, diverting the jury's attention from the central issue of whether the State has satisfied its burden of proving beyond a reasonable doubt that the defendant is guilty of a capital crime. Thus, on the one hand, the unavailability of the third option of convicting on a lesser included offense may encourage the jury to convict for an impermissible reason—its belief that the defendant is guilty of some serious crime and should be punished. On the other hand, the apparently mandatory nature of the death penalty may encourage it to

acquit for an equally impermissible reason—that, whatever his crime, the defendant does not deserve death.[19] In any particular case these two extraneous factors may favor the defendant or the prosecution or they may cancel each other out. But in every case they introduce a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case.

III

The State also argues that, whatever the effect of precluding lesser included offense instructions might otherwise be, there is no possibility of harm under the Alabama statute because of two additional safeguards. First, although the jury may not convict the defendant of a lesser included offense, the State argues that it may refuse to return any verdict at all in a doubtful case, thus creating a mistrial. After a mistrial, the State may reindict on the capital offense or on lesser included offenses.[20] In this case the jury was in-

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[19] The closing arguments in this case indicate that under the Alabama statute the issue of whether or not the defendant deserves the death penalty will often seem more important than the issue of whether the State has proved each and every element of the capital crime beyond a reasonable doubt. Thus, in this case both the prosecutors and defense attorneys spent a great deal of argument time on the desirability of the death penalty in general and its application to the petitioner in particular, rather than focusing on the crucial issue of whether the evidence showed that petitioner had possessed the intent necessary to convict on the capital charge.

[20] Alabama Code § 13-11-2 (c) (1975) provides:

"[I]f the jury finds the defendant not guilty, the defendant must be discharged. The court may enter a judgment of mistrial upon failure of the jury to agree on a verdict of guilty or not guilty or on the fixing of the penalty of death. After entry of a judgment of mistrial, the defendant may be tried again for the aggravated offense, or he may be reindicted for an offense wherein the indictment does not allege an aggravated circumstance. If the defendant is reindicted for an offense wherein the indictment does not allege an aggravated circumstance, the punishment upon conviction shall be as heretofore or hereafter provided

structed that a mistrial would be declared if they were unable to agree on a verdict or if they were unable to agree on fixing the death penalty; they were also told that, in the event of a mistrial, the defendant could be tried again. Record 743.

We are not persuaded by the State's argument that the mistrial "option" is an adequate substitute for proper instructions on lesser included offenses. It is extremely doubtful that juries will understand the full implications of a mistrial [21] or will have any confidence that their choice of the mistrial option will ultimately lead to the right result Thus, they could have no assurance that a second trial would end in the conviction of the defendant on a lesser included offense. Moreover, invoking the mistrial option in a case in which the jury agrees that the defendant is guilty of *some* offense, though not the offense charged, would require the jurors to violate their oaths to acquit in a proper case—contrary to the State's assertions that juries should not be expected to make such lawless choices. Finally, the fact that lesser included offense instructions have traditionally been given in noncapital cases despite the availability of the mistrial "option"

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by law; however, the punishment shall not be death or life imprisonment without parole."

[21] The jury in this case could hardly have been sure of the effect of a mistrial. In his closing argument one of petitioner's attorneys told the jury that "if I can have any opportunity under any reindictment or any other way to take him [petitioner] before this bar of justice and enter a plea of guilty of murder, robbery, either one, life in prison, I'll take him." Record 689. At another point, however, petitioner's other attorney indicated that petitioner could still be punished even if he were acquitted, stating: "I submit to you if you acquit him he's still in the Etowah County Jail. I submit to you if you acquit him that he can receive his due punishment, but I say to you his due punishment is not death." *Id.*, at 709.

In his instructions to the jury the trial judge stated that, if acquitted, petitioner could not be tried "for anything he ever did to Roy Malone." And, although he explained that petitioner could be retried in the event of a mistrial, he did not elaborate on what that retrial would entail. *Id.*, at 743.

indicates that such instructions provide a necessary additional measure of protection for the defendant.

The State's second argument is that, even if a defendant is erroneously convicted, the fact that the judge has the ultimate sentencing power will ensure that he is not improperly sentenced to death. Again, we are not persuaded that sentencing by the judge compensates for the risk that the jury may return an improper verdict because of the unavailability of a "third option."

If a fully instructed jury would find the defendant guilty only of a lesser, noncapital offense, the judge would not have the opportunity to impose the death sentence. Moreover, it is manifest that the jury's verdict must have a tendency to motivate the judge to impose the same sentence that the jury did. Indeed, according to statistics submitted by the State's Attorney General, it is fair to infer that the jury verdict will ordinarily be followed by the judge even though he must hold a separate hearing in aggravation and mitigation before he imposes sentence.[22] Under these circumstances, we are unwilling to presume that a post-trial hearing will always cor-

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[22] The State's brief in opposition to the petition for certiorari in *Jacobs* v. *Alabama*, O. T. 1978, No. 78-5696, states that of the first 45 defendants sentenced after conviction by a jury of capital offenses, 37 received the death penalty from the trial judge. See pp. 10, 35 of that brief. In his dissent in *Jacobs* v. *State*, 361 So. 2d, at 650–651, Justice Jones pointed out the practical obstacles to treating the jury's imposition of the death penalty as being purely advisory:

"[T]o leave sentence reduction in the prerogative of the trial court is to place undue pressures upon this office. Again, admittedly, a trial judge must often be the bulwark of the legal system when presented with unpopular causes and adverse public opinion. This State's recent history, however, reflects the outcry of unjustified criticism attendant with a trial judge's reduction of a sentence to life imprisonment without possibility of parole, after a jury has returned a sentence of death. Clearly, this pressure constitutes an undue compulsion on the trial judge to conform the sentence which he imposes with that previously returned by the jury." (Footnote omitted.)

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rect whatever mistakes have occurred in the performance of the jury's factfinding function.

Accordingly, the judgment of the Alabama Supreme Court is *Reversed.*

MR. JUSTICE BRENNAN, concurring.

Although I join the Court's opinion, I continue to believe that the death penalty is, in all circumstances, contrary to the Eighth Amendment's prohibition against imposition of cruel and unusual punishments. *Gregg* v. *Georgia,* 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting).

MR. JUSTICE MARSHALL, concurring in the judgment.

I continue to believe that the death penalty is, under all circumstances, cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. *Furman* v. *Georgia,* 408 U. S. 238, 314–374 (1972) (MARSHALL, J., concurring); *Gregg* v. *Georgia,* 428 U. S. 153, 231–241 (1976) (MARSHALL, J., dissenting); *Godfrey* v. *Georgia,* 446 U. S. 420, 433–442 (1980) (MARSHALL, J., concurring in judgment). In addition, I agree with the Court that Alabama's prohibition on giving lesser included offense instructions in capital cases is unconstitutional because it substantially increases the risk of error in the factfinding process. I do not, however, join in the Court's assumption that the death penalty may ever be imposed without violating the command of the Eighth Amendment that no "cruel and unusual punishments" be imposed. *Lockett* v. *Ohio,* 438 U. S. 586, 621 (1978) (MARSHALL, J., concurring in judgment); *Bell* v. *Ohio,* 438 U. S. 637, 643–644 (1978) (MARSHALL, J., concurring in judgment). I join in the judgment of the Court.

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE WHITE joins, dissenting.

The opinion of the Court begins by stating that we granted certiorari to decide the question of whether a sentence of

death may be constitutionally imposed after a jury verdict of guilt of a capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included noncapital offense where the evidence would have supported such a verdict. I find the Court's treatment of this issue highly unusual, since although this question was raised in the Alabama trial court and the Alabama intermediate court of appeals, it was not preserved in the Supreme Court of Alabama. That court began its opinion with this language:

> "Petitioner Beck raises only one issue here:
>
> "'Whether the Alabama Court of Criminal Appeals erred in its finding that the Alabama Death Penalty Statute is not in violation of Article III, Section 43, Article V, Section 124 and Amendment 38, of the 1901 Constitution of Alabama.'" 365 So. 2d 1006, 1007.

Obviously, unless the Supreme Court of Alabama was wholly in error in deciding what issue petitioner had raised there, it was obviously not a question involving the United States Constitution.

I do not believe it suffices, under the jurisdiction granted to us by the Constitution and by Congress, to brush this matter off as the Court does in its footnote 6 on the grounds that petitioner presented his claim "in some fashion" to the Supreme Court of Alabama, and that "[t]he State has never argued that this presentation was insufficient, as a matter of state law, to preserve the issue."

This is not a matter that may be stipulated or waived by any of the parties to a case decided on its merits here. Title 28 U. S. C. § 1257 provides that our certiorari jurisdiction extends only to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had. . . ."

In *Hulbert* v. *Chicago*, 202 U. S. 275, 280 (1906), this Court said:

> "It is urged that in the writ of error and petition for citation it is stated that certain rights and privileges were

> claimed under the Constitution of the United States, and that the Supreme Court of the State of Illinois decided against such rights and privileges, and, it is further urged, that the chief justice of the court allow the writ of error. This is not sufficient."

More recently, in *Street* v. *New York,* 394 U. S. 576, 582 (1969), the Court has said:

> "Moreover, this Court has stated that when, as here, the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts *unless the aggrieved party in this Court can affirmatively show the contrary.*" (Emphasis supplied.)

Thus it is insufficient that the State "has never argued" that a judgment under review is not that of the highest court of the State in which a judgment could be had; it will be *assumed* that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can *affirmatively* show the contrary. Here I am not convinced that such a showing has been made.

Believing, therefore, because of the proceedings in the Supreme Court of Alabama, that we do not have jurisdiction under 28 U. S. C. § 1257 to decide the question which the Court purports to decide, I dissent.

Syllabus

WALTER v. UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 79-67. Argued February 26, 1980—Decided June 20, 1980*

When an interstate shipment of several securely sealed packages containing 8-millimeter films depicting homosexual activities was mistakenly delivered by a private carrier to a third party rather than to the consignee, employees of the third party opened each of the packages, finding individual film boxes, on one side of which were suggestive drawings, and on the other were explicit descriptions of the contents. One employee opened one or two of the boxes and attempted without success to view portions of the film by holding it up to the light. After the Federal Bureau of Investigation was notified and picked up the packages, agents viewed the films with a projector without first making any effort to obtain a warrant or to communicate with the consignor or the consignee of the shipment. Thereafter, petitioners were indicted on federal obscenity charges relating to the interstate transportation of certain of the films in the shipment, a motion to suppress and return the films was denied, and petitioners were convicted. The Court of Appeals affirmed, and rehearing was denied.

Held: The judgments are reversed. Pp. 653–660; 660–662.

Certiorari dismissed in part; 592 F. 2d 788 and 597 F. 2d 63, reversed.

MR. JUSTICE STEVENS, joined by MR. JUSTICE STEWART, concluded that even though the nature of the contents of the films was indicated by descriptive material on their individual containers, the Government's unauthorized screening of the films constituted an unreasonable invasion of their owner's constitutionally protected interest in privacy. It was a search; there was no warrant; the owner had not consented; and there were no exigent circumstances. Cf. *Stanley* v. *Georgia,* 394 U. S. 557, 569 (STEWART, J., concurring in result). Pp. 653–660.

(a) The fact that FBI agents were lawfully in possession of the boxes of film did not give them authority to search their contents. An officer's authority to possess a package is distinct from his authority to examine its contents, and when the contents of the package are books or other materials arguably protected by the First Amendment, and the basis

*Together with No. 79-148, *Sanders et al.* v. *United States,* also on certiorari to the same court.

for the seizure is disapproval of the message contained therein, it is especially important that the Fourth Amendment's warrant requirement be scrupulously observed. Pp. 654–655.

(b) Nor does the fact that the packages and one or more of the boxes had been opened by a private party before they were acquired by the FBI excuse the failure to obtain a search warrant. Even though some circumstances—for example, if the results of the private search are in plain view when materials are turned over to the Government—may justify the Government's re-examination of the materials, the Government may not exceed the scope of the private search unless it has the right to make an independent search. Here, the private party had not actually viewed the films, and prior to the Government screening one could only draw inferences about what was on the films. Thus, the projection of the films was a significant expansion of the previous search by a private party and therefore must be characterized as a separate search, which was not supported by any exigency or by a warrant even though one could have easily been obtained. Pp. 656–657.

(c) The fact that the cartons of film boxes, which cartons were securely wrapped and had no markings indicating the character of their contents, were unexpectedly opened by a third party before the shipment was delivered to its intended consignee, thus uncovering the descriptive labels on the film boxes, does not alter the consignor's legitimate expectation of privacy in the films. The private search merely frustrated that expectation in part and did not strip the remaining unfrustrated portion of that expectation of all Fourth Amendment protection. Pp. 658–659.

Mr. Justice White, joined by Mr. Justice Brennan, concurring in part and in the judgment, agreed that the Government's warrantless projection of the films constituted a search that infringed petitioners' Fourth Amendment interests even though the Government had acquired the films from a private party, but disagreed with the suggestion that it is an open question whether the Government's projection of the films would have infringed any Fourth Amendment interest if private parties had projected the films before turning them over to the Government. The notion that private searches insulate from Fourth Amendment scrutiny subsequent governmental searches of the same or lesser scope is inconsistent with traditional Fourth Amendment principles, and even if the private parties in this action had projected the films before turning them over to the Government, the Government still would have been required to obtain a warrant for its subsequent screening of them. Pp. 660–662.

Mr. Justice Marshall concurred in the judgment.

STEVENS, J., announced the judgment of the Court and delivered an opinion, in which STEWART, J., joined. WHITE, J., filed an opinion concurring in part and in the judgment, in which BRENNAN, J., joined, *post*, p. 660. MARSHALL, J., concurred in the judgment. BLACKMUN, J., filed a dissenting opinion, in which BURGER, C. J., and POWELL and REHNQUIST, JJ., joined, *post*, p. 662.

W. Michael Mayock argued the cause and filed a brief for petitioner in No. 79–67. *Glenn Zell* argued the cause and filed a brief for petitioners in No. 79–148.

Elliott Schulder argued the cause for the United States in both cases. With him on the brief were *Solicitor General McCree, Assistant Attorney General Heymann, Jerome M. Feit,* and *Patty Merkamp Stemler.*

MR. JUSTICE STEVENS announced the judgment of the Court and delivered an opinion, in which MR. JUSTICE STEWART joined.

Having lawfully acquired possession of a dozen cartons of motion pictures, law enforcement officers viewed several reels of 8-millimeter film on a Government projector. Labels on the individual film boxes indicated that they contained obscene pictures. The question is whether the Fourth Amendment required the agents to obtain a warrant before they screened the films.

Only a few of the bizarre facts need be recounted. On September 25, 1975, 12 large, securely sealed packages containing 871 boxes of 8-millimeter film depicting homosexual activities were shipped by private carrier from St. Petersburg, Fla., to Atlanta, Ga. The shipment was addressed to "Leggs, Inc.,"[1] but was mistakenly delivered to a substation in the suburbs of Atlanta, where "L'Eggs Products, Inc.," regularly received deliveries. Employees of the latter company opened

[1] There was no "Leggs, Inc." "Leggs" was the nickname of a woman employed by one of petitioners' companies. The packages indicated that the intended recipient would pick them up and pay for them at the carrier's terminal in Atlanta.

each of the packages, finding the individual boxes of film. They examined the boxes, on one side of which were suggestive drawings, and on the other were explicit descriptions of the contents. One employee opened one or two of the boxes, and attempted without success to view portions of the film by holding it up to the light.[2] Shortly thereafter, they called a Federal Bureau of Investigation agent who picked up the packages on October 1, 1975.

Thereafter, without making any effort to obtain a warrant or to communicate with the consignor or the consignee of the shipment, FBI agents viewed the films with a projector. The record does not indicate exactly when they viewed the films, but at least one of them was not screened until more than two months after the FBI had taken possession of the shipment.[3]

On April 6, 1977, petitioners were indicted on obscenity charges relating to the interstate transportation of 5 of the 871 films in the shipment. A motion to suppress and return the films was denied, and petitioners were convicted on multiple counts of violating 18 U. S. C. §§ 371, 1462, and 1465. Over Judge Wisdom's dissent, the Court of Appeals for the Fifth Circuit affirmed, 592 F. 2d 788, and rehearing was denied, 597 F. 2d 63 (1979). We granted certiorari, 444 U. S. 914,[4] and now reverse.

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[2] Each reel was eight millimeters in width. Petitioner Walter informs us that, excluding three millimeters for sprocketing and one millimeter for the border, the film itself is only four millimeters wide. Brief for Petitioner in No. 79–67, p. 30, n. 8. Since the scenes depicted within the frame are necessarily even more minute, it is easy to understand why such films cannot be examined successfully with the naked eye.

[3] The FBI had meanwhile received no request from the consignee or the consignor of the films for their return, but the agents had been told by employees of L'Eggs Products, Inc., that inquiries had been made as to their whereabouts.

[4] The petition for certiorari in No. 79–67 presented 10 separate questions, and the petition in No. 79–148 presented 5 separate questions. Except

In his concurrence in *Stanley* v. *Georgia,* 394 U. S. 557, 569, MR. JUSTICE STEWART expressed the opinion that the warrantless projection of motion picture films was an unconstitutional invasion of the privacy of the owner of the films. After noting that the agents in that case were lawfully present in the defendant's home pursuant to a warrant to search for wagering paraphernalia, MR. JUSTICE STEWART wrote:

> "This is not a case where agents in the course of a lawful search came upon contraband, criminal activity, or criminal evidence in plain view. For the record makes clear that the contents of the films could not be determined by mere inspection. . . . After finding them, the agents spent some 50 minutes exhibiting them by means of the appellant's projector in another upstairs room. Only then did the agents return downstairs and arrest the appellant.
>
> "Even in the much-criticized case of *United States* v. *Rabinowitz,* 339 U. S. 56, the Court emphasized that 'exploratory searches . . . cannot be undertaken by officers with or without a warrant.' *Id.*, at 62. This record presents a bald violation of that basic constitutional rule. To condone what happened here is to invite a government official to use a seemingly precise and legal warrant only as a ticket to get into a man's home, and, once inside, to launch forth upon unconfined searches and indiscriminate seizures as if armed with all the unbridled and illegal power of a general warrant.
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> "Because the films were seized in violation of the Fourth and Fourteenth Amendments, they were inadmis-

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with respect to the issues discussed in the text, we have determined that certiorari was improvidently granted. We therefore dismiss as to the other questions that have been briefed and argued. For purposes of decision, we accept the Government's argument that the delivery of the films to the FBI by a third party was not a "seizure" subject to the warrant requirement of the Fourth Amendment.

sible in evidence at the appellant's trial." *Id.*, at 571–572 (footnote omitted).

Even though the cases before us involve no invasion of the privacy of the home, and notwithstanding that the nature of the contents of these films was indicated by descriptive material on their individual containers, we are nevertheless persuaded that the unauthorized exhibition of the films constituted an unreasonable invasion of their owner's constitutionally protected interest in privacy. It was a search; there was no warrant; the owner had not consented; and there were no exigent circumstances.

It is perfectly obvious that the agents' reason for viewing the films was to determine whether their owner was guilty of a federal offense. To be sure, the labels on the film boxes gave them probable cause to believe that the films were obscene and that their shipment in interstate commerce had offended the federal criminal code. But the labels were not sufficient to support a conviction and were not mentioned in the indictment. Further investigation—that is to say, a search of the contents of the films—was necessary in order to obtain the evidence which was to be used at trial.

The fact that FBI agents were lawfully in possession of the boxes of film did not give them authority to search their contents. Ever since 1878 when Mr. Justice Field's opinion for the Court in *Ex parte Jackson*, 96 U. S. 727, established that sealed packages in the mail cannot be opened without a warrant, it has been settled that an officer's authority to possess a package is distinct from his authority to examine its contents.[5] See *Arkansas* v. *Sanders*, 442 U. S. 753, 758; *United*

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[5] "In th[e] enforcement [of regulations as to what may be transported in the mails], a distinction is to be made between different kinds of mail matter,—between what is intended to be kept free from inspection, such as letters, and sealed packages subject to letter postage; and what is open to inspection, such as newspapers, magazines, pamphlets, and other printed matter, purposely left in a condition to be examined. Letters and

States v. *Chadwick*, 433 U. S. 1, 10. When the contents of the package are books or other materials arguably protected by the First Amendment, and when the basis for the seizure is disapproval of the message contained therein, it is especially important that this requirement be scrupulously observed.[6]

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sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail, they can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household. No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth amendment of the Constitution." 96 U. S., at 732–733.

And later in his opinion, Mr. Justice Field again noted that "regulations excluding matter from the mail cannot be enforced in a way which would require or permit an examination into letters, or sealed packages subject to letter postage, without warrant, issued upon oath or affirmation, in the search for prohibited matter. . . ." *Id.*, at 735.

[6] "This is the history which prompted the Court less than four years ago to remark that '[t]he use by government of the power of search and seizure as an adjunct to a system for the suppression of objectionable publications is not new.' *Marcus* v. *Search Warrant*, 367 U. S. 717, at 724. 'This history was, of course, part of the intellectual matrix within which our constitutional fabric was shaped. The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression.' *Id.*, at 729. As MR. JUSTICE DOUGLAS has put it, 'The commands of our First Amendment (as well as the prohibitions of the Fourth and the Fifth) reflect the teachings of *Entick* v. *Carrington*, [19 How. St. Tr. 1029 (1765)]. These three amendments are indeed closely related, safeguarding not only privacy and protection against self-incrimination

Nor does the fact that the packages and one or more of the boxes had been opened by a private party before they were acquired by the FBI excuse the failure to obtain a search warrant. It has, of course, been settled since *Burdeau* v. *McDowell*, 256 U. S. 465, that a wrongful search or seizure conducted by a private party does not violate the Fourth Amendment and that such private wrongdoing does not deprive the government of the right to use evidence that it has acquired lawfully. See *Coolidge* v. *New Hampshire*, 403 U. S. 443, 487–490. In these cases there was nothing wrongful about the Government's acquisition of the packages or its examination of their contents to the extent that they had already been examined by third parties. Since that examination had uncovered the labels, and since the labels established probable cause to believe the films were obscene, the Government argues that the limited private search justified an unlimited official search. That argument must fail, whether we view the official search as an expansion of the private search or as an independent search supported by its own probable cause.

When an official search is properly authorized—whether by consent or by the issuance of a valid warrant—the scope of the search is limited by the terms of its authorization.[7] Consent

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but "conscience and human dignity and freedom of expression as well."' *Frank* v. *Maryland*, 359 U. S. 360, 376 (dissenting opinion).

"In short, what this history indispensably teaches is that the constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas which they contain." *Stanford* v. *Texas*, 379 U. S. 476, 484–485.

See also *Roaden* v. *Kentucky*, 413 U. S. 496, 501. Although there were 871 reels of film in the shipment, there were only 25 different titles. Since only five of the titles were used as a basis for prosecution, it may be presumed that the other films were not obscene.

[7] "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another." *Marron* v. *United States*, 275 U. S. 192, 196.

to search a garage would not implicitly authorize a search of an adjoining house; a warrant to search for a stolen refrigerator would not authorize the opening of desk drawers. Because "indiscriminate searches and seizures conducted under the authority of 'general warrants' were the immediate evils that motivated the framing and adoption of the Fourth Amendment," *Payton* v. *New York*, 445 U. S. 573, 583, that Amendment requires that the scope of every authorized search be particularly described.[8]

If a properly authorized official search is limited by the particular terms of its authorization, at least the same kind of strict limitation must be applied to any official use of a private party's invasion of another person's privacy. Even though some circumstances—for example, if the results of the private search are in plain view when materials are turned over to the Government—may justify the Government's reexamination of the materials, surely the Government may not exceed the scope of the private search unless it has the right to make an independent search. In these cases, the private party had not actually viewed the films. Prior to the Government screening, one could only draw inferences about what was on the films.[9] The projection of the films was a significant expansion of the search that had been conducted previously by a private party and therefore must be characterized as a separate search. That separate search was not supported by any exigency, or by a warrant even though one could have easily been obtained.[10]

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[8] The Warrant Clause of the Fourth Amendment expressly provides that no warrant may issue except those "particularly describing the place to be searched, and the persons or things to be seized."

[9] Since the viewing was first done by the Government when it screened the films with a projector, we have no occasion to decide whether the Government would have been required to obtain a warrant had the private party been the first to view them.

[10] The fact that the labels on the boxes established probable cause to believe the films were obscene clearly cannot excuse the failure to obtain a

The Government claims, however, that because the packages had been opened by a private party, thereby exposing the descriptive labels on the boxes, petitioners no longer had any reasonable expectation of privacy in the films, and that the warrantless screening therefore did not invade any privacy interest protected by the Fourth Amendment. But petitioners expected no one except the intended recipient either to open the 12 packages or to project the films. The 12 cartons were securely wrapped and sealed, with no labels or markings to indicate the character of their contents.[11] There is no reason why the consignor of such a shipment would have any lesser expectation of privacy than the consignor of an ordinary locked suitcase.[12] The fact that the cartons were unexpectedly

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warrant; for if probable cause dispensed with the necessity of a warrant, one would never be needed.

Contrary to the dissent, *post*, at 665–666, n. 3, there were no impracticalities in these cases that would vitiate the warrant requirement. The inability to serve a warrant on the owner of property to be searched does not make execution of the warrant unlawful. See ALI, Model Code of Pre-Arraignment Procedure § 220.3 (4) (Prop. Off. Draft 1975). Obviously, such inability does not render a warrant unnecessary under the Fourth Amendment. Nor is it clear in this case that it would have been impossible to serve petitioners with a search warrant had the FBI made any effort to find them prior to screening the films. See n. 3, *supra*.

[11] For the same reason, one may not deem petitioners to have consented to the screening merely because the labels on the unexposed boxes were explicit.

Nor can petitioners' failure to make a more prompt claim to the Government for return of the films be fairly regarded as an abandonment of their interest in preserving the privacy of the shipment. As subsequent events have demonstrated, such a request could reasonably be expected to precipitate criminal proceedings. We cannot equate an unwillingness to invite a criminal prosecution with a voluntary abandonment of any interest in the contents of the cartons. In any event, the record in this case does indicate that the defendants made a number of attempts to locate the films before they were examined by the FBI agents.

[12] The consignor's expectation of privacy in the contents of a carton delivered to a private carrier must be measured by the condition of the package at the time it was shipped unless there is reason to assume that

opened by a third party before the shipment was delivered to its intended consignee does not alter the consignor's legitimate expectation of privacy. The private search merely frustrated that expectation in part.[13] It did not simply strip the remaining unfrustrated portion of that expectation of all Fourth Amendment protection.[14] Since the additional search conducted by the FBI—the screening of the films—was not supported by any justification, it violated that Amendment.

We therefore conclude that the rationale of MR. JUSTICE STEWART's concurrence in *Stanley* v. *Georgia*, 394 U. S. 557,

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it would be opened before it arrives at its destination. Thus, for example, if a gun case is delivered to a carrier, there could then be no expectation that the contents would remain private, cf. *Arkansas* v. *Sanders*, 442 U. S. 753, 764–765, n. 13; but if the gun case were enclosed in a locked suitcase, the shipper would surely expect that the privacy of its contents would be respected.

The dissent asserts, *post*, at 665, that "[a]ny subjective expectation of privacy on the part of petitioners was undone . . . by their own actions and the private search." But it is difficult to understand how petitioners' subjective expectation of privacy could have been altered in any way by subsequent events of which they were obviously unaware.

[13] A partial invasion of privacy cannot automatically justify a total invasion. As Learned Hand noted in a somewhat different context: "It is true that when one has been arrested in his home or his office, his privacy has already been invaded; but that interest, though lost, is altogether separate from the interest in protecting his papers from indiscriminate rummage, even though both are customarily grouped together as parts of the 'right of privacy.'" *United States* v. *Rabinowitz*, 176 F. 2d 732, 735 (CA2 1949), rev'd, 339 U. S. 56. Judge Hand's view was ultimately vindicated in *Chimel* v. *California*, 395 U. S. 752, 768, which specifically disapproved this Court's decision in *Rabinowitz*. See also MR. JUSTICE STEWART's opinion concurring in the result in *Stanley* v. *Georgia*, 394 U. S. 557, 571–572, quoted *supra*, at 653–654.

[14] It is arguable that a third party's inspection of the contents of "private books, papers, memoranda, etc." could be so complete that there would be no additional search by the FBI when it re-examines the materials. Cf. *Burdeau* v. *McDowell*, 256 U. S. 465, 470. But this is not such a case, because it was clearly necessary for the FBI to screen the films, which the private party had not done, in order to obtain the evidence needed to accomplish its law enforcement objectives.

is applicable to this case and that it requires that the judgments of the Court of Appeals be reversed.

It is so ordered.

MR. JUSTICE MARSHALL concurs in the judgment.

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN joins, concurring in part and concurring in the judgment.

I agree with MR. JUSTICE STEVENS that the Government's warrantless projection of the films constituted a search that infringed petitioners' Fourth Amendment interests despite the fact that the Government had acquired the films from a private party.[1] I write separately, however, because I disagree with MR. JUSTICE STEVENS' suggestion that it is an open question whether the Government's projection of the films would have infringed any Fourth Amendment interest if private parties had projected the films before turning them over to the Government, *ante*, at 657, n. 9. The notion that private searches insulate from Fourth Amendment scrutiny subsequent governmental searches of the same or lesser scope is inconsistent with traditional Fourth Amendment principles. Nor does it follow from our recognition in *Burdeau* v. *McDowell*, 256 U. S. 465 (1921), and *Coolidge* v. *New Hampshire*, 403 U. S. 443, 487–490 (1971), that the Fourth Amendment proscribes only governmental action.[2]

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[1] Although MR. JUSTICE STEVENS' opinion refers to the films as having been "lawfully acquired" by the Government, *ante*, at 651, 654, 656, I note that he does not reach the question whether the Government's acquisition of the films was a "seizure" subject to the warrant requirement of the Fourth Amendment, *ante*, at 653, n. 4, a question on which the Court of Appeals was divided. 592 F. 2d 788, 792–793, 800–802 (CA5 1979). Likewise, I do not address this question.

[2] Neither *Burdeau* v. *McDowell* nor *Coolidge* v. *New Hampshire* supports the proposition that private searches insulate subsequent governmental searches from Fourth Amendment scrutiny. In *Burdeau* the Court held that the actions of a private party in illegally seizing evidence will not be attributed to the Government for Fourth Amendment purposes

I agree with MR. JUSTICE STEVENS that there was "nothing wrongful" about the Government's examination of the contents of the packages that had been opened by private parties. When the private parties turned the films over to the Government, the packages already had been opened, and the Government saw no more than what was exposed to plain view. No Fourth Amendment interest was implicated by this conduct because the opening of the packages cannot be attributed to the Government and considered a governmental search.[3] As the Court noted in *Coolidge* v. *New Hampshire*, *supra*, at 489, where a private party produced evidence for government inspection, "it was not incumbent on the police to stop her or avert their eyes."

This does not mean, however, that the Government subsequently may conduct the same kind of search that private parties have conducted without implicating Fourth Amendment interests. The contrary view would permit Government agents to conduct warrantless searches of personal property whenever probable cause exists as a result of a prior private search. We have previously held, however, that police must obtain a warrant before searching a suspect's luggage even

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when the private party turns the evidence over to the Government. The Court noted that because "no official of the Federal Government had anything to do with the wrongful seizure of the petitioner's property, . . . [i]t is manifest that there was no invasion of the security afforded by the Fourth Amendment against unreasonable search and seizure, as whatever wrong was done was the act of individuals in taking the property of another." 256 U. S., at 475. Similarly, in *Coolidge* v. *New Hampshire*, the Court held that a wife's voluntary action in turning over to police her husband's guns and clothing did not constitute a search and seizure by the government. 403 U. S., at 487–490.

[3] Because the private party's opening of the packages exposed their contents to plain view and made it unnecessary for the FBI agents to open the packages, there was no governmental search when the FBI viewed their contents. Except in such circumstances, I do not understand how a third party's inspection of a package's contents "could be so complete that there would be no additional search by the FBI when it re-examines the materials," *ante*, at 659, n. 14.

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if they have probable cause to believe that it contains contraband. *Arkansas* v. *Sanders*, 442 U. S. 753 (1979); *United States* v. *Chadwick*, 433 U. S. 1 (1977). The fact that such probable cause may be the product of a private search would not alter the need to comply with the warrant requirement. Thus, if the private parties in these cases had projected the films before turning them over to the Government, the Government still would have been required to obtain a warrant for its subsequent screening of them. As MR. JUSTICE STEVENS recognizes, petitioners possessed a legitimate expectation of privacy in the films, and this expectation was infringed by the Government's unauthorized screening of them. Unlike the opening of the packages that destroyed their privacy by exposing their contents to the plain view of subsequent observers, a private screening of the films would not have destroyed petitioners' privacy interest in them. Thus the Government's subsequent screening of the films constituted an independent, governmental search that would have infringed petitioners' Fourth Amendment interests without regard to any previous screening by private parties.

I therefore concur in part and in the judgment.

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST join, dissenting.

The Court at least preserves the integrity of the rule specifically recognized long ago in *Burdeau* v. *McDowell*, 256 U. S. 465 (1921). That rule is to the effect that the Fourth Amendment proscribes only governmental action, and does not apply to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official.

I disagree with MR. JUSTICE STEVENS' opinion's parsing of the cases' "bizarre facts" see *ante*, at 651, to reach a result that

the Government's screening of the films in question was an additional and unconstitutional search. The facts, indeed unusual, convince me that, by the time the FBI received the films, these petitioners had no remaining expectation of privacy in their contents.

The cartons in which the films were contained were shipped by petitioners via Greyhound, a private carrier, to a fictitious addressee, and with the shipper fictitiously identified. The private examination of the packages by employees of L'Eggs Products, Inc., whom Greyhound innocently asked to pick up the packages, revealed that they contained films and that the films were of an explicit sexual nature. This was obvious from the drawings and labels on the containers, drawings that MR. JUSTICE STEVENS' opinion describes as "suggestive," and descriptions he refers to as "explicit." *Ante,* at 652. The containers thus clearly revealed the nature of their contents. See 592 F. 2d 788, 793–794, and n. 5 (CA5 1979). The opinion acknowledges that "there was nothing wrongful about the Government's acquisition of the packages or its examination of their contents to the extent that they had already been examined by third parties." *Ante,* at 656. But in finding that the FBI's "projection of the films was a significant expansion of the search that had been conducted previously by a private party," *ante,* at 657, the opinion seems conveniently to have overlooked the fact that the FBI received the film cartons *after* they had been opened, and *after* the films' labels had been exposed to the public.

I agree with the conclusion reached by the Court of Appeals' majority:

> "Under these circumstances, since the L'Eggs employees so fully ascertained the nature of the films before contacting the authorities, we find that the FBI's subsequent viewing of the movies on a projector did not 'change the nature of the search' and was not an additional search

subject to the warrant requirement." 592 F. 2d, at 793–794.[1]

The STEVENS opinion's contrary conclusion apparently is based on the view that petitioners had a legitimate expectation of privacy in the contents of these films, which they had protected by sealing them securely in the proverbial "plain brown wrapper," that was "frustrated" only "in part," *ante*, at 659, by the earlier private search.[2] But it seems to me that the opinion ignores the fact that the partial frustration of petitioners' subjective expectation of privacy was directly attributable to their own actions. The District Court described it well when it ruled:

> "And it seems to me, under the circumstances of this case, that shipping or causing or suffering to be shipped by a common carrier, namely, Greyhound Bus Lines, with a fictitious name given for the shipper as well as the fictitious name given for the consignee or addressee,

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[1] The Court of Appeals noted, 592 F. 2d, at 794, n. 6, and placed some reliance on, the observations of Judge William H. Webster in his dissenting opinion in *United States* v. *Haes*, 551 F. 2d 767 (CA8 1977):

"Can it be seriously argued that an agent receiving a suspected book or magazine from a freight carrier employee could not reasonably open the publication and peruse its pages to determine whether its contents offended the law? . . . Would a government agent who used a magnifying glass or other mechanical aid to identify an object be vulnerable to a claim of an unreasonable search independent of the lawful private search which produced the object? I think clearly not.

"The film in this case was not a means of concealing something else. In looking at the film through a projector, the agents did no more than view the motion pictures in the manner in which they were intended to be viewed." *Id.*, at 772–773 (footnote omitted).

The present cases are even stronger ones for recognizing the legality of the Government's projection of the film than the case Judge Webster posed. When the FBI screened these films, they already were aware of the nature of their contents.

[2] In contrast, I am at a loss to explain the conclusion stated in MR. JUSTICE WHITE's opinion, *ante*, at 662, that even "a private screening of the films would not have destroyed petitioners' privacy interest in them."

amounts to a relinquishment or abandonment of any reasonable expectation of privacy.

"Or, stated another way, it seems to me that it was reasonably foreseeable in those circumstances that what actually occurred would occur. That is to say, that there was substantial likelihood that the material would be misdelivered and fall into the hands of some third party, as actually happened in this case, where it would be opened and its privacy, if it had any, invaded." App. 37–38, quoted in part in 592 F. 2d, at 791.

Given the facts, and the STEVENS opinion's conclusions based thereon, I cannot help but wonder at the concession that "if a gun case is delivered to a carrier, there could then be no expectation that the contents would remain private." *Ante*, at 659, n. 12. The films in question were in a state no different from MR. JUSTICE STEVENS' hypothetical gun case when they reached the FBI. Their contents were obvious from "the condition of the package," *ante*, at 658, n. 12, and those contents had been exposed as a result of a purely private search that did not implicate the Fourth Amendment. Moreover, it was petitioners' own actions that made it likely that such a private search would occur. The opinion fails to explain, at least to my satisfaction, why petitioners' subjective expectation of privacy at the time they shipped the films, rather than at the time the films came into possession of the FBI (with the resulting protection of constitutional safeguards from unreasonable governmental action), controls this inquiry. Any subjective expectation of privacy on the part of petitioners was undone by that time by their own actions and the private search. In any event, it was abandoned by their shunning the property, under the circumstances of these cases, for over 20 months.[3]

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[3] All this is reinforced by the impracticalities the Court would impose upon the FBI in these cases. The STEVENS opinion and the WHITE opinion both insist that a warrant should have been obtained before any of the

We tend occasionally to strain credulity and to spin the thread of argument so thin that we depart from the common-sense approach to an obvious fact situation. It seems to me to be beyond the limits of sound precedent to exclude the evidence of petitioners' crimes in the face of the "bizarre" developments that transpired here, developments that petitioners brought upon themselves. But the cases are strange and particular ones. The margin for reversal is narrow, and I rest assured that sound constitutional precepts will survive the result the Court reaches today.

I would affirm the judgments of the Court of Appeals.

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films were viewed. One might inquire, on whom the warrant be served? Surely, not on L'Eggs Products, Inc., which no longer had possession and wanted only to wish these films a speedy good riddance. And surely not on the shippers, who purposefully had concealed their identities.

UNITED STATES v. RADDATZ

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 79-8. Argued February 25, 1980—Decided June 23, 1980

Prior to his trial on federal criminal charges, respondent moved to suppress certain incriminating statements he had made. Over objections, the District Court referred the motion to a Magistrate for an evidentiary hearing pursuant to a provision of the Federal Magistrates Act, 28 U. S. C. § 636 (b)(1), which authorizes a district court to refer such a motion to a magistrate and thereafter to determine and decide such motion based on the record developed before the magistrate, including the magistrate's proposed findings of fact and recommendations. Section 636 (b)(1) also provides that the judge shall make a "de novo determination" of those portions of the magistrate's report, findings, or recommendations to which objection is made, and that the judge may accept, reject, or modify, in whole or in part, the magistrate's findings or recommendations; alternatively the judge may receive further evidence or recommit the matter to the magistrate with instructions. Based on his view of the credibility of the testimony at the hearing on respondent's motion, the Magistrate found that respondent had knowingly, intelligently, and voluntarily made the inculpatory statements and recommended that the motion to suppress be denied. Over respondent's objections to the Magistrate's report, the District Court accepted the recommendation and denied the motion to suppress, stating that it had considered the transcript of the Magistrate's hearing, the parties' proposed findings of fact, conclusions of law, and supporting memoranda, the Magistrate's recommendation, and oral argument of counsel. Respondent was then tried and convicted, but the Court of Appeals reversed, holding, *inter alia*, that respondent had been deprived of due process by the District Court's failure personally to hear the controverted testimony on the motion to suppress.

Held:

1. Under the statute—which calls for "de novo determination," not a *de novo* hearing—the District Court was not required to rehear the testimony on which the Magistrate based his findings and recommendations in order to make an independent evaluation of credibility. The legislative history discloses that Congress purposefully used the word

determination rather than *hearing*, believing that Art. III was satisfied if the ultimate adjudicatory determination was reserved to the Art. III officer, and that Congress intended to permit whatever reliance the judge, in the exercise of sound judicial discretion, chose to place on the magistrate's proposed findings and recommendations. Pp. 673–676.

2. The statute strikes the proper balance between the demands of due process under the Fifth Amendment and the constraints of Art. III. Pp. 677–684.

(a) The nature of the issues presented and the interests implicated in a motion to suppress evidence do not require, as a matter of due process, that the district judge must actually hear the challenged testimony. While the resolution of a suppression motion may determine the outcome of the case, the interests underlying a voluntariness hearing do not coincide with the criminal law objective of determining guilt or innocence, but are of a lesser magnitude than those in the criminal trial itself. The due process rights claimed here are adequately protected by the statute, under which the district judge alone acts as the ultimate decisionmaker, with the broad discretion to accept, reject, or modify the magistrate's proposed findings, or to hear the witnesses live to resolve conflicting credibility claims. The statutory scheme also includes sufficient procedures to alert the district court whether to exercise its discretion to conduct a hearing and view the witnesses itself. Pp. 677–681.

(b) Although the statute permits the district court to give the magistrate's proposed findings of fact and recommendations such weight as their merit commands and the sound discretion of the judge warrants, that delegation does not violate Art. III so long as the ultimate decision is made by the district court. Congress has not sought to delegate the task of rendering a final decision on a suppression motion to a non-Art. III officer, but instead has made clear that the district court has plenary discretion whether to authorize a magistrate to hold an evidentiary hearing and that the magistrate acts subsidiary to and only in aid of the court, the entire process thereafter taking place under the court's total control and jurisdiction. Pp. 681–683.

592 F. 2d 976, reversed.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, REHNQUIST, and STEVENS, JJ., joined. BLACKMUN, J., filed a concurring opinion, *post*, p. 684. POWELL, J., filed an opinion concurring in part and dissenting in part, *post*, p. 686. STEWART, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 687. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 694.

Andrew J. Levander argued the cause *pro hac vice* for the United States. With him on the briefs were *Solicitor General McCree, Assistant Attorney General Heymann,* and *Patty Merkamp Stemler.*

Joan B. Gottschall, by appointment of the Court, 444 U. S. 923, argued the cause for respondent. With her on the brief was *Terence F. MacCarthy.**

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari, 444 U. S. 824, to resolve the constitutionality of a provision of the Federal Magistrates Act, 28 U. S. C. § 636 (b)(1)(B), which permits a district court to refer to a magistrate a motion to suppress evidence and authorizes the district court to determine and decide such motion based on the record developed before a magistrate, including the magistrate's proposed findings of fact and recommendations.

I

Respondent Raddatz was indicted on March 31, 1977, in the Northern District of Illinois for unlawfully receiving a firearm in violation of 18 U. S. C. § 922 (h). Prior to trial, respondent moved to suppress certain incriminating statements he had made to police officers and to agents of the Bureau of Alcohol, Tobacco, and Firearms. Over his objections, the District Court referred the motion to a Magistrate for an evidentiary hearing pursuant to the Federal Magistrates Act, 28 U. S. C. § 636 (b)(1)(B).

The evidence received at the suppression hearing disclosed that on August 8, 1976, two police officers responded to a report of a crime in progress. When they arrived at the scene, they observed respondent standing next to one Jimmy Baston, who was lying on the street, bleeding from the head.

**George F. Galland, Jr.*, filed a brief for the Chicago Council of Lawyers as *amicus curiae* urging affirmance.

Respondent was placed under arrest for illegal use of a weapon and was given *Miranda* warnings. The arresting officers testified that respondent explained at the time of his arrest and after the warning that he had been fighting with Baston over a family dispute and had brought the gun with him in case any of Baston's friends tried to interfere.

In due course, state charges were filed against respondent. One month later, on November 19, 1976, Agents Russell and McCulloch of the Bureau of Alcohol, Tobacco, and Firearms interviewed respondent at his home. According to their testimony at the suppression hearing, the agents had been informed by state officials that a state firearms charge was pending against respondent. The agents questioned respondent about the gun found in his possession at the time he was arrested because it had at one time been owned by an out-of-state man who had been slain in an unsolved homicide. At this interview, respondent gave a different version of the events, stating that he had seized the gun from Baston during their August 8 fight and that he did not know where Baston had obtained a gun. The agents asked respondent to help them locate Baston and told him they would inform the United States Attorney of his cooperation if he were subsequently prosecuted.

Respondent's testimony before the Magistrate concerning the November 19 interview varied from that of the federal agents. According to his testimony, he was informed that he would shortly be indicted for violations of federal firearms laws, but that if he agreed to cooperate, "somebody would talk to the prosecutor, and it would be dismissed." He also testified that he was told that if he did not agree to help, he could find himself "going to the Federal penitentiary for a long time."

On January 12, 1977, respondent telephoned the agents and requested a meeting. At this interview, he retracted his November 19 version and stated that he had not taken the gun from Baston, but had obtained it from his half-brother.

He testified at the suppression hearing that he made the incriminating statements at the January 12 meeting only after first obtaining confirmation from the agents of their November 19 promise that the indictment would be dismissed if he cooperated. The agents testified that no such promise was ever made to respondent, either on November 19 or on January 12. They testified that at the January 12 meeting respondent agreed to act as an informant and that they gave him $10 at that time to assist him in gathering information.

A final meeting occurred on January 14, 1977. Respondent returned to the local offices of the Bureau of Alcohol, Tobacco, and Firearms, accompanied by his wife and children. He was informed by Agent McCulloch that his case had been referred to the United States Attorney for prosecution. The agents again discussed with him the possibility of his becoming an informant, and repeated their promise that any cooperation would be brought to the attention of the United States Attorney. Agent McCulloch gave respondent $50 to pay expenses of acquiring information.

II

The focus of respondent's legal argument at the suppression hearing was that under *Malloy* v. *Hogan*, 378 U. S. 1, 7 (1964), and *Bram* v. *United States*, 168 U. S. 532, 542–543 (1897), his confession was not freely and voluntarily given. He contended that he had been induced to utter the incriminating statements through a promise of immunity and sought to demonstrate a course of conduct on the part of the agents supportive of such a promise.

In his report and findings, the Magistrate recommended that the motion to suppress the statements made on August 8, November 19, and January 12 be denied. He made findings that respondent had knowingly, intelligently, and voluntarily made inculpatory statements on all three occasions. Moreover, the Magistrate specifically stated: "I find the testimony of the Alcohol, Tobacco and Firearms Agent more credi-

ble . . . ; I find that Federal agents never advised [respondent] that charges against him would be dismissed, if he cooperated." App. to Pet. for Cert. 41a. The evidence before the Magistrate showed that respondent had altered his version of events on several occasions.

Respondent filed objections to the Magistrate's report. In rendering its decision, the District Court stated that it considered the transcript of the hearing before the Magistrate on the motion to suppress, the parties' proposed findings of fact, conclusions of law, and supporting memoranda, and that it read the recommendation of the Magistrate and heard oral argument of counsel. Finding "that the three statements given by the defendant and sought to be suppressed were made voluntarily," the District Court accepted the recommendation of the Magistrate and denied the motion to suppress.

By agreement of the parties, the court tried respondent on the basis of the transcript of the suppression hearing, and stipulations that the firearm had been manufactured in Florida and that respondent had been convicted of eight felonies. He was found guilty and sentenced to six months' imprisonment to be followed by four and one-half years on probation.

The Court of Appeals reversed. 592 F. 2d 976. It first rejected the statutory arguments, holding that the District Court had the power to refer to a magistrate the motion to suppress and did not abuse its discretion under the statute in deciding the issue without hearing live testimony of disputed questions of fact. Turning to the constitutional issues, the court held that the referral provisions of the Federal Magistrates Act, 28 U. S. C. § 636 (b)(1)(B), did not violate Art. III of the Constitution because the statute required the District Court to make a *de novo* determination of any disputed portion of the Magistrate's proposed findings and recommendations. However, the Court of Appeals held that respondent had been deprived of due process by the failure of the District Court personally to hear the controverted testimony. Where

credibility is crucial to the outcome, "the district court cannot constitutionally exercise its discretion to refuse to hold a hearing on contested issues of fact in a criminal case." 592 F. 2d, at 986. The District Court was directed to hold a new hearing.

III

We first address respondent's contention that under the statute, the District Court was required to rehear the testimony on which the Magistrate based his findings and recommendations in order to make an independent evaluation of credibility. The relevant statutory provisions authorizing a district court to refer matters to a magistrate and establishing the mode of review of the magistrate's actions are in 28 U. S. C. § 636 (b)(1). In § 636 (b)(1)(A), Congress provided that a district court judge could designate a magistrate to "hear and determine" any pretrial matter pending before the court, except certain "dispositive" motions. Review by the district court of the magistrate's determination of these nondispositive motions is on a "clearly erroneous or contrary to law" standard.

Certain "dispositive" motions, including a "motion . . . to suppress evidence in a criminal case," are covered by § 636 (b)(1)(B). As to these "dispositive" motions, the district judge may "designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court of [the] motion." However, the magistrate has no authority to make a final and binding disposition. Within 10 days after the magistrate files his proposed findings and recommendations, any party may file objections. The statute then provides:

> "A judge of the court shall make a de novo *determination* of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole

or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions." § 636 (b)(1) (emphasis added).

It should be clear that on these dispositive motions, the statute calls for a *de novo* determination, not a *de novo* hearing. We find nothing in the legislative history of the statute to support the contention that the judge is required to rehear the contested testimony in order to carry out the statutory command to make the required "determination."[1] Congress enacted the present version of § 636 (b) as part of the 1976 amendments to the Federal Magistrates Act in response to this Court's decision in *Wingo* v. *Wedding*, 418 U. S. 461 (1974). *Wingo* held that as a matter of statutory construction, the 1968 Magistrates Act did not authorize magistrates to hold evidentiary hearings in federal habeas corpus cases. Congress amended the Act "in order to clarify and further define the additional duties which may be assigned to a United States Magistrate in the discretion of a judge of the district court." S. Rep. No. 94-625, p. 1 (1976) (hereinafter S. Rep.); H. R. Rep. No. 94-1609, p. 2 (1976) (hereinafter H. R. Rep.).

The bill as reported out of the Senate Judiciary Committee did not include the language requiring the district court to make a *de novo* determination.[2] Rather, it included only the

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[1] Before the Court of Appeals, respondent apparently conceded that the statute permits the procedures employed here. His statutory arguments in the Court of Appeals were that the reference was invalid because not made pursuant to required enabling rules and that the Court of Appeals should exercise its supervisory powers to prohibit the procedure employed. That court rejected both arguments, and he has pursued neither before this Court.

[2] As originally introduced in the Senate, the bill provided that upon request by a party to a proceeding before a magistrate, the district "court shall *hear* de novo those portions of the report or specific proposed findings of fact or conclusions of law to which objection is made." S. 1283, 94th

language permitting the district court to "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." Yet the Senate Report which accompanied the bill emphasized that the purpose of the bill's language was to vest "ultimate adjudicatory power over dispositive motions" in the district court while granting the "widest discretion" on how to treat the recommendations of the magistrate. S. Rep., at 10.

The House Judiciary Committee added to the Senate bill the present language of the statute, providing that the judge shall make a "de novo determination" of contested portions of the magistrate's report upon objection by any party. According to the House Report, "[t]he amendment states expressly what the Senate implied: i. e. that the district judge in making the ultimate determination of the matter, would have to give fresh consideration to those issues to which specific objection has been made by a party." The Report goes on to state, quite explicitly, what was intended by "de novo determination":

> "The use of the words 'de novo determination' *is not intended to require the judge to actually conduct a new hearing* on contested issues. Normally, the judge, on application, will consider the record which has been developed before the magistrate and make his own determination on the basis of that record, without being bound to adopt the findings and conclusions of the magistrate. In some specific instances, however, it may be necessary for the judge to modify or reject the findings of the magistrate, to take additional evidence, recall witnesses, or recommit the matter to the magistrate for further proceedings." H. R. Rep., at 3.

Cong., 1st Sess. (1975) (emphasis added). As reported out of the Senate Judiciary Committee, however, this language, including the word "hear," was deleted.

Further evidence that Congress did not intend to require the district court to rehear the witnesses is provided in the House Committee Report's express adoption of the Ninth Circuit's procedures for district court review of a magistrate's credibility recommendations as announced in *Campbell* v. *United States District Court for the Northern District of California,* 501 F. 2d 196, cert. denied, 419 U. S. 879 (1974). There, in language quoted in the Committee Report, the court had stated: " 'If [the district court] finds there is a problem as to the credibility of a witness or witnesses or for other good reasons, *it may, in the exercise of its discretion,* call and hear the testimony of a witness or witnesses in an adversary proceeding. It is not required to hear any witness and not required to hold a *de novo* hearing of the case.' " H. R. Rep., at 3–4 (emphasis added), quoting 501 F. 2d, at 206.[3]

Congressional intent, therefore, is unmistakable. Congress focused on the potential for Art. III constraints in permitting a magistrate to make decisions on dispositive motions. See S. Rep., at 6; H. R. Rep., at 8. The legislative history discloses that Congress purposefully used the word *determination* rather than *hearing,* believing that Art. III was satisfied if the ultimate adjudicatory determination was reserved to the district court judge. And, in providing for a "de novo determination" rather than *de novo* hearing, Congress intended to permit whatever reliance a district judge, in the exercise of sound judicial discretion, chose to place on a magistrate's proposed findings and recommendations. See *Mathews* v. *Weber,* 423 U. S. 261, 275 (1976).

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[3] We conclude that to construe § 636 (b)(1)(C) to require the district court to conduct a second hearing whenever either party objected to the magistrate's credibility findings would largely frustrate the plain objective of Congress to alleviate the increasing congestion of litigation in the district courts. We cannot "impute to Congress a purpose to paralyze with one hand what it sought to promote with the other." *Clark* v. *Uebersee Finanz-Korporation,* 332 U. S. 480, 489 (1947).

IV

Having rejected respondent's statutory argument, we turn to his constitutional challenge. He contends that the review procedures established by §§ 636 (b)(1)(B) and (C), permitting the district court judge to make a *de novo* determination of contested credibility assessments without personally hearing the live testimony, violate the Due Process Clause of the Fifth Amendment and Art. III of the United States Constitution.

A

The guarantees of due process call for a "hearing appropriate to the nature of the case." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 313 (1950). The issue before us, therefore, is whether the nature of the issues presented and the interests implicated in a motion to suppress evidence require that the district court judge must actually hear the challenged testimony. The core of respondent's challenge to the statute is that "[t]he one who decides must hear." *Morgan* v. *United States*, 298 U. S. 468, 481 (1936). Here, he contends, only the magistrate "hears," but the district court is permitted to "decide" by reviewing the record compiled before the magistrate and making a final determination.

In *Mathews* v. *Eldridge*, 424 U. S. 319, 335 (1976), we emphasized that three factors should be considered in determining whether the flexible concepts of due process have been satisfied: (a) the private interests implicated; (b) the risk of an erroneous determination by reason of the process accorded and the probable value of added procedural safeguards; and (c) the public interest and administrative burdens, including costs that the additional procedures would involve. In providing the fullest measure of due process protection, the Court of Appeals stressed that in this particular case the success or failure of the motion to suppress would, as a practical matter, determine the outcome of the prosecution.

Of course, the resolution of a suppression motion can and

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often does determine the outcome of the case; this may be true of various pretrial motions. We have repeatedly pointed out, however, that the interests underlying a voluntariness hearing do not coincide with the criminal law objective of determining guilt or innocence.[4] See, *e. g.*, *United States* v. *Janis*, 428 U. S. 433, 453–454 (1976); *United States* v. *Peltier*, 422 U. S. 531, 535–536, 538–539 (1975); *Rogers* v. *Richmond*, 365 U. S. 534, 540–544 (1961). In *Lego* v. *Twomey*, 404 U. S. 477 (1972), we considered whether the prosecution was required to prove beyond a reasonable doubt that a confession was voluntary. In holding that a preponderance of the evidence was sufficient, we stated that "the purpose that a voluntariness hearing is designed to serve has nothing whatever to do with improving the reliability of jury verdicts." *Id.*, at 486. Accord, *Jackson* v. *Denno*, 378 U. S. 368, 384–385 (1964), holding that the "reliability of a confession has nothing to do with its voluntariness." A defendant who has not prevailed at the suppression hearing remains free to present evidence and argue to—and may persuade—the jury that the confession was not reliable and therefore should be disregarded.[5] See 18 U. S. C. § 3501 (a).[6]

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[4] Under the Fifth Amendment, a criminal defendant may not be compelled to testify against himself. In that sense, the exclusion of involuntary confessions derives from the Amendment itself. *United States* v. *Janis*, 428 U. S. 433, 443 (1976).

[5] *Lego* v. *Twomey*, 404 U. S. 477 (1972), also rejected the argument that because of the high value society places on the constitutional right to be free from compulsory self-incrimination, due process requires proof of voluntariness beyond a reasonable doubt. This Court found no indication that federal rights would suffer from determining *admissibility* by a preponderance of the evidence.

[6] Nothing in the Magistrates Act or other statute precludes renewal at trial of a motion to suppress evidence even though such motion was denied before trial. A district court's authority to consider anew a suppression motion previously denied is within its sound judicial discretion. See generally *Gouled* v. *United States*, 255 U. S. 298, 312 (1921); *Rouse* v. *United States*, 123 U. S. App. D. C. 348, 359 F. 2d 1014 (1966).

This Court on other occasions has noted that the interests at stake in a suppression hearing are of a lesser magnitude than those in the criminal trial itself. At a suppression hearing, the court may rely on hearsay and other evidence, even though that evidence would not be admissible at trial. *United States* v. *Matlock*, 415 U. S. 164, 172–174 (1974); *Brinegar* v. *United States*, 338 U. S. 160, 172–174 (1949); Fed. Rules Evid. 104 (a), 1101 (d)(1). Furthermore, although the Due Process Clause has been held to require the Government to disclose the identity of an informant at trial, provided the identity is shown to be relevant and helpful to the defense, *Roviaro* v. *United States*, 353 U. S. 53, 60–61 (1957), it has never been held to require the disclosure of an informant's identity at a suppression hearing. *McCray* v. *Illinois*, 386 U. S. 300 (1967). We conclude that the process due at a suppression hearing may be less demanding and elaborate than the protections accorded the defendant at the trial itself.

To be sure, courts must always be sensitive to the problems of making credibility determinations on the cold record. More than 100 years ago, Lord Coleridge stated the view of the Privy Council that a retrial should not be conducted by reading the notes of the witnesses' prior testimony:

> "The most careful note must often fail to convey the evidence fully in some of its most important elements. . . . It cannot give the look or manner of the witness: his hesitation, his doubts, his variations of language, his confidence or precipitancy, his calmness or consideration; . . . the dead body of the evidence, without its spirit; which is supplied, when given openly and orally, by the ear and eye of those who receive it." *Queen* v. *Bertrand*, 4 Moo. P. C. N. S. 460, 481, 16 Eng. Rep. 391, 399 (1867).

This admonition was made with reference to an appellate court's review of a *nisi prius* judge in a trial on the merits;

here we are dealing with a situation more comparable to a special master's findings or actions of an administrative tribunal on findings of a hearing officer.

The Court of Appeals rejected an analogy to administrative agency cases because of its view that the interest inherent in a suppression motion was often the equivalent, as a practical matter, of the trial itself. Our view of the due process demands of a motion to suppress evidence makes those agency cases relevant, although to be sure we do not suggest that the interests inherent in administrative adjudications are always equivalent to those implicated in a constitutional challenge to the admissibility of evidence in a criminal case. Generally, the ultimate factfinder in administrative proceedings is a commission or board, and such trier has not heard the witnesses testify. See, *e. g.*, 5 U. S. C. § 557 (general rule under the Administrative Procedure Act); 29 U. S. C. § 160 (c) (National Labor Relations Board); 33 U. S. C. § 921 (b)(3) (Benefits Review Board); 17 CFR § 207.17 (g)(2) (1979) (Securities and Exchange Commission). While the commission or board—or an administrator—may defer to the findings of a hearing officer, that is not compelled. See, *e. g.*, *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474 (1951); *NLRB* v. *Mackay Radio & Tel. Co.*, 304 U. S. 333, 350–351 (1938); *Morgan* v. *United States*, 298 U. S. 468 (1936); *Utica Mutual Ins. Co.* v. *Vincent*, 375 F. 2d 129, 132 (CA2) (Friendly, J.), cert. denied, 389 U. S. 839 (1967).

We conclude that the due process rights claimed here are adequately protected by §§ 636 (b)(1)(B) and (C). While the district court judge alone acts as the ultimate decisionmaker, the statute grants the judge the broad discretion to accept, reject, or modify the magistrate's proposed findings. That broad discretion includes hearing the witnesses live to resolve conflicting credibility claims. Finally, we conclude that the statutory scheme includes sufficient procedures to alert the

district court whether to exercise its discretion to conduct a hearing and view the witnesses itself.[7]

B

In passing the 1976 amendments to the Federal Magistrates Act, Congress was alert to Art. III values concerning the vesting of decisionmaking power in magistrates.[8] Accordingly, Congress made clear that the district court has plenary discretion whether to authorize a magistrate to hold an evidentiary hearing and that the magistrate acts subsidiary to and only in aid of the district court. Thereafter, the entire process takes place under the district court's total control and jurisdiction.

We need not decide whether, as suggested by the Government, Congress could constitutionally have delegated the task of rendering a final decision on a suppression motion to a non-Art. III officer. See *Palmore* v. *United States*, 411 U. S. 389 (1973). Congress has not sought to make any such delegation. Rather, Congress has provided that the magistrate's

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[7] Neither the statute nor its legislative history reveals any specific consideration of the situation where a district judge after reviewing the record in the process of making a *de novo* "determination" has doubts concerning the credibility findings of the magistrate. The issue is not before us, but we assume it is unlikely that a district judge would *reject* a magistrate's proposed findings on credibility when those findings are dispositive and substitute the judge's own appraisal; to do so without seeing and hearing the witness or witnesses whose credibility is in question could well give rise to serious questions which we do not reach.

[8] The Committee Reports noted several instances prior to the 1976 amendments where Congress had vested in officers of the court, other than the judge, the power to exercise discretion in performing an adjudicatory function, "subject always to ultimate review by a judge of the court," citing 11 U. S. C. § 67 (c) (reference to bankruptcy referee) and 28 U. S. C. § 1920 (power of clerk of court to tax costs). By analogy, Congress reasoned that permitting the exercise of an adjudicatory function by a magistrate, subject to ultimate review by the district court, would also pass constitutional muster. S. Rep., at 6; H. R. Rep., at 8.

proposed findings and recommendations shall be subjected to a *de novo* determination "by the judge who . . . then exercise[s] the ultimate authority to issue an appropriate order." S. Rep., at 3. Moreover, "[t]he authority—and the responsibility—to make an informed, final determination . . . remains with the judge." *Mathews* v. *Weber*, 423 U. S., at 271.

On his Art. III claim, *Crowell* v. *Benson*, 285 U. S. 22 (1932), and its progeny offer little comfort to respondent.[9] There, the Court stated that "[i]n cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function." *Id.*, at 60. See also *Ng Fung Ho* v. *White*, 259 U. S. 276 (1922).[10] While stating that "the enforcement of constitutional rights requires that the Federal court should determine such an issue upon its own record and the facts elicited before it," 285 U. S., at 64, the Court pointedly noted a "distinction of controlling importance" between records formed before administrative agencies and those compiled by officers of the court such as masters in chancery or commissioners in admiralty where the proceeding is "constantly subject to the court's control." We view the statutory scheme here as rendering a magistrate's recommendations

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[9] In *Crowell*, in reviewing the constitutionality of the delegation of factfinding to administrative officers to consider claims under the Longshoremen's and Harbor Workers' Compensation Act, the Court was concerned that Congress could not reach beyond the constitutional limits which are inherent in the admiralty and maritime jurisdiction. It stated that unless the injuries to which the Act relates occurred upon the navigable waters of the United States, they would fall outside that jurisdiction. 285 U. S., at 55.

[10] The *Crowell* Court rejected a wholesale attack on any delegation of factfinding to the administrative tribunal. It noted that "there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges." *Id.*, at 51–52.

more analogous to a master or a commissioner than to an administrative agency for Art. III purposes.[11]

Moreover, four years later, in *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38 (1936), Mr. Chief Justice Hughes substantially cut back on the Court's *Crowell* holding, which he had authored, and on which respondent relies. The question there was whether administrative rate regulations were unconstitutionally confiscatory. While reaffirming his statement that administrative agencies cannot finally determine "constitutional facts," Mr. Chief Justice Hughes noted:

> "But this judicial duty to exercise an independent judgment does not require or justify disregard of the weight which may properly attach to findings [by an administrative body] upon hearing and evidence. On the contrary, the judicial duty is performed in the light of the proceedings already had and may be greatly facilitated by the assembling and analysis of the facts in the course of the legislative determination." 298 U. S., at 53.

See also *Estep* v. *United States,* 327 U. S. 114, 122–123 (1946). Thus, although the statute permits the district court to give to the magistrate's proposed findings of fact and recommendations "such weight as [their] merit commands and the sound discretion of the judge warrants," *Mathews* v. *Weber, supra,* at 275, that delegation does not violate Art. III so long as the ultimate decision is made by the district court.

We conclude that the statute strikes the proper balance

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[11] In exercising our original jurisdiction under Art. III, we appoint special masters who may be either Art. III judges or members of the Bar; the role of the master is, for these purposes, analogous to that of a magistrate. The master is generally charged to "take such evidence as may be . . . necessary," *Nebraska* v. *Iowa,* 379 U. S. 996 (1965), and to "find the facts specially and state separately his conclusions of law thereon." *Mississippi* v. *Louisiana,* 346 U. S. 862 (1953). In original cases, as under the Federal Magistrates Act, the master's recommendations are advisory only, yet this Court regularly acts on the basis of the master's report and exceptions thereto.

between the demands of due process and the constraints of Art. III. Accordingly, the judgment of the Court of Appeals is

Reversed.

MR. JUSTICE BLACKMUN, concurring.

While I join the Court's opinion, my analysis of the due process issue differs somewhat from that set forth therein, and I write separately to articulate it. The Court seems to focus on the diminished importance of pretrial suppression motions and the acceptability in some agency proceedings of decision-making without personal observation of witnesses. For me, these considerations are of less importance than the practical concern for accurate results that is the focus of the Due Process Clause. In testing the challenged procedure against that criterion, I would distinguish between instances where the district court rejects the credibility-based determination of a magistrate and instances, such as this one, where the court adopts a magistrate's proposed result.[1]

In the latter context, the judge accurately can be described as a "backup" jurist whose review serves to enhance reliability and benefit the defendant. Respondent was afforded procedures by which a neutral decisionmaker, after seeing and hearing the witnesses, rendered a decision.[2] After that decisionmaker found against him, respondent received a second

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[1] This is not to say that a district court's rejection of a magistrate's recommendation in favor of a defendant will inevitably violate the Due Process Clause.

[2] The magistrate, of course, makes only a recommendation, rather than a formal decision. But, at least in this context, I see no reason to believe that the process of "recommending" is more susceptible to error than "finally deciding." And even if we were to speculate that some additional risk of error inheres in "recommending," I would conclude that it is more than offset by the doublecheck provided by the district judge and the congressional determination that this procedure permits independent judicial evaluation of suppression motions while conserving scarce judicial resources.

turn, albeit on a cold record, before another neutral decisionmaker. In asking us to invalidate the magistrate program, respondent in effect requests removal of the second level of procedural protections afforded him and others like him.[3] In my view, such a result would tend to undermine, rather than augment, accurate decisionmaking. It therefore is not a result I could embrace under the Due Process Clause.

Although MR. JUSTICE MARSHALL ably argues that this characterization of the magistrate procedure clashes with Art. III, I am not persuaded. As the Court observes, the handling of suppression motions invariably remains completely in the control of the federal district court. The judge may initially decline to refer any matter to a magistrate. When a matter is referred, the judge may freely reject the magistrate's recommendation. He may rehear the evidence in whole or in part. He may call for additional findings or otherwise "recommit the matter to the magistrate with instructions." See 28 U. S. C. § 636 (b)(1). Moreover, the magistrate himself is subject to the Art. III judge's control. Magistrates are appointed by district judges, § 631 (a), and subject to removal by them, § 631 (h). In addition, district judges retain plenary authority over when, what, and how many pretrial matters are assigned to magistrates, and "[e]ach district court shall establish rules pursuant to which the magistrates shall discharge their duties." § 636 (b)(4). Thus, the only conceivable danger of a "threat" to the "independence" of the magistrate comes from within, rather than without, the judicial department.

It is also significant that the Magistrates Act imposes significant requirements to ensure competency and impartiality, §§ 631 (b), (c), and (i), 632, 637 (1976 ed. and

[3] Certainly respondent does not have a due process right to have an Art. III judge resolve all factual issues surrounding his suppression motion. If he did, virtually every decision on a suppression motion in a state court would violate the Due Process Clause.

Supp. II), including a rule generally barring reduction of salaries of full-time magistrates, § 634 (b). Even assuming that, despite these protections, a controversial matter might be delegated to a magistrate who is susceptible to outside pressures, the district judge—insulated by life tenure and irreducible salary—is waiting in the wings, fully able to correct errors. Under these circumstances, I simply do not perceive the threat to the judicial power or the independence of judicial decisionmaking that underlies Art. III. We do not face a procedure under which "Congress [has] delegate[d] to a non-Art. III judge the authority to make final determinations on issues of fact." *Post*, at 703 (dissenting opinion). Rather, we confront a procedure under which Congress has vested in Art. III judges the discretionary power to delegate certain functions to competent and impartial assistants, while ensuring that the judges retain complete supervisory control over the assistants' activities.

MR. JUSTICE POWELL, concurring in part and dissenting in part.

I agree with the Court's interpretation of the Federal Magistrates Act in Part III of its opinion. The terms and legislative record of § 636 (b)(1) plainly indicate that Congress intended to vest broad discretion in the district courts to decide whether or not to rehear witnesses already heard by a magistrate in a suppression proceeding.

The Court recognizes that "serious questions" would be raised if a district judge rejected a magistrate's proposed findings on credibility. See *ante*, at 681, n. 7. But the Court finds no error in this case, where the District Court accepted the Magistrate's judgment on credibility. I would reach a different conclusion. Under the standards set out in *Mathews v. Eldridge*, 424 U. S. 319, 335 (1976), due process requires a district court to rehear crucial witnesses when, as in this case, a suppression hearing turns *only* on credibility. As MR. JUSTICE MARSHALL points out in his dissenting opinion,

the private interests at stake in a suppression hearing often are substantial. Moreover, the risk of erroneous deprivation of rights is real when a decider of fact has not heard and observed the crucial witnesses. The value of hearing and seeing those witnesses testify is undeniable. Finally, the government interest in limiting rehearing is not sufficient to outweigh these considerations.

In sum, I agree with MR. JUSTICE MARSHALL's statement that, under the Due Process Clause of the Fifth Amendment, a hearing requirement should be imposed

> "only in situations in which the case turns on issues of credibility that cannot be resolved on the basis of a record. . . . If the district judge offered a statement of reasons presenting his independent view of the facts and explaining in some reasoned manner why it was not necessary for him to hear the witnesses in order to adopt that view, it would be an exceptionally rare case in which an abuse of discretion should be found." *Post*, at 701–702.*

I would affirm the judgment of the Court of Appeals on this ground.

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

A federal indictment was returned charging the respondent, who had previously been convicted of a felony, with unlawfully receiving a firearm in violation of 18 U. S. C. § 922 (h) (1). Before the trial, the respondent filed in the District Court a motion to suppress various incriminating statements he had made to agents of the Federal Bureau of Alcohol,

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*The classic situation requiring a hearing *de novo* is when the record of a suppression proceeding contains little beyond a "swearing contest." In many cases, however, the entire record will contain additional evidence—direct or circumstantial—that fully supports the magistrate's recommendation. In those cases, the district court may decide, within its sound discretion, not to hear witnesses.

Tobacco, and Firearms.[1] Pursuant to the Federal Magistrates Act (Act), 28 U. S. C. § 636 (b)(1),[2] the District Judge referred this motion to a Magistrate, who held an evidentiary hearing and then recommended that the respondent's motion be denied. Without taking further evidence the District Judge accepted the Magistrate's recommendation and denied

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[1] The respondent also moved to suppress certain statements the Government claimed he had made to Chicago police officers shortly after his arrest. At the suppression hearing, the respondent denied having ever made such remarks. A Chicago police officer testified to the contrary, making the issue one for determination at trial by the trier of fact.

[2] Title 28 U. S. C. § 636 (b)(1) provides:

"Notwithstanding any provision of law to the contrary—

"(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

"(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for postrial [*sic*] relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

"(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

"Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions."

the motion to suppress. The Court of Appeals reversed holding that the respondent was constitutionally entitled to a hearing by the judge before his suppression motion could be denied. Today this Court reverses that judgment. I dissent, because I believe that the statute itself required a hearing before the judge in this case.

The statute provides that a district judge, in ruling on a motion to suppress, "shall make a *de novo determination* of those portions of the [magistrate's] report or specified proposed findings or recommendations to which objection is made." 28 U. S. C. § 636 (b)(1) (emphasis added). It is my view that the judge could not make the statutorily required "de novo determination" of the critically contested factual issues in this case without personally observing the demeanor of the witnesses.

At the hearing before the Magistrate the respondent testified that he had made the incriminating statements to the federal agents only because they promised that he would not be prosecuted if he cooperated, and offered to employ him as an informer. The agents gave a different version of the relevant events. They expressly testified that at no time was the respondent ever told that he would not be prosecuted. Instead, according to the agents, he was simply told that any assistance he might provide would be mentioned to the United States Attorney. Their story also undermined the respondent's testimony that he had been offered employment as an informer before he made the incriminating statements.

If the respondent's testimony was true, his motion to suppress evidence of his incriminating statements should have been granted. See *Malloy* v. *Hogan*, 378 U. S. 1, 7; *Bram* v. *United States*, 168 U. S. 532, 542–543. The Magistrate, however, did not believe him, expressly finding that "the testimony of the Alcohol, Tobacco and Firearms agent[s is] more credible" and that the "Federal agents never advised Raddatz that charges against him would be dismissed, if he cooperated." In concluding for this reason that the motion should be denied,

the Magistrate properly exercised the authority granted him by 28 U. S. C. § 636 (b)(1)(B) "to submit . . . proposed findings of fact and recommendations for the disposition" of the suppression motion. But the Act also empowered the respondent to object to these findings. He did so, and the responsibility then devolved on the District Judge to "make a de novo determination" of the contested issues of fact.

The phrase "de novo determination" has an accepted meaning in the law. It means an independent determination of a controversy that accords no deference to any prior resolution of the same controversy. Thus, in *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U. S. 1, 23, the Court had occasion to define "de novo proceeding" as a review that was "unfettered by any prejudice from the [prior] agency proceeding and free from any claim that the [agency's] determination is supported by substantial evidence."[3] And, in *United States* v. *First City National Bank*, 386 U. S. 361, 368, this Court observed that "review de novo" means "that the court should make an independent determination of the issues" and should "not . . . give any special weight to the [prior] determination of" the administrative agency.[4]

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[3] In *Renegotiation Board* v. *Bannercraft Clothing Co.*, the Court was construing the following language in the Renegotiation Act of 1951 as amended:

"Any contractor . . . aggrieved by an order of the Board [of Renegotiation] determining the amount of excessive profits received or accrued by such contractor . . . may—

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file a petition with the Court of Claims for a redetermination thereof. . . . A proceeding before the Court of Claims to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo. . . ." 65 Stat. 21, as amended, 50 U. S. C. App. § 1218.

[4] In *United States* v. *First City National Bank*, 386 U. S. 361, the Court was construing 12 U. S. C. § 1828 (c)(7)(A), which provides that in an antitrust action brought under the Bank Merger Act of 1966 the court "shall review de novo the issues presented."

Here, the District Judge was faced with a transcript that contained two irreconcilable accounts of the critical facts. Neither version was intrinsically incredible or, for that matter, less plausible on its face than the other. Moreover, there was in the record no evidence inherently more trustworthy than that supported by human recollection. In these circumstances, the District Judge could not make the statutorily mandated "de novo determination" without being exposed to the one kind of evidence that no written record can ever reveal—the demeanor of the witnesses.[5] In declining to conduct a hearing in this case, the District Judge thus necessarily gave the Magistrate's prior assessment of credibility the kind of "special weight" that the "de novo determination" standard does not permit.

Contrary to the Court's assertion, nothing in the legislative history of the 1976 amendments to the Federal Magistrates Act compels a different conclusion. Congress, to be sure, explicitly rejected a version of the ultimately enacted bill that would have required a district judge always to "hear de novo" those aspects of the case whose proposed resolution by the magistrate dissatisfied one or more of the parties. Compare S. Rep. No. 94–625, p. 2 (1976) (hereinafter S. Rep.) (bill as reported by Senate Committee on the Judiciary), with S. 1283, 94th Cong., 1st Sess. (1975) (bill as originally introduced by Senator Burdick). Moreover, as the Court points out, the Report of the House Judiciary Committee says that "[t]he use of the words 'de novo determination' is not in- on contested issues." H. R. Rep. No. 94–1609, p. 3 (1976) (hereinafter H. R. Rep.).

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[5] In other contexts, the Courts of Appeals have held that critical issues of credibility can be resolved only by personally hearing live testimony. See, *e. g.*, *Weahkee* v. *Perry*, 190 U. S. App. D. C. 359, 370, 587 F. 2d 1256, 1267 (1978) (Title VII of Civil Rights Act of 1964); *Hackley* v. *Roudebush*, 171 U. S. App. D. C. 376, 427, and n. 202, 520 F. 2d 108, 159, and n. 202 (1975) (same); *Pignatello* v. *Attorney General*, 350 F. 2d 719, 723–724 (CA2 1965) (Immigration and Nationality Act).

Other passages in the legislative history, however, make clear that these indications of legislative intent comport with the plain language of the statute. As the Senate and House Reports emphasize, "the ultimate adjudicatory power over" suppression and other dispositive motions is to be "exercised by [a district] judge . . . after receiving assistance from and the recommendation of the magistrate." S. Rep., at 10; H. R. Rep., at 11. Thus, according to the House Report, a district judge, "in making the ultimate determination of the matter, would have to give *fresh consideration* to those issues to which specific objection has been made by a party." *Id.*, at 3 (emphasis supplied). The Report describes this responsibility as follows:

> "*Normally*, the judge . . . will consider the record which has been developed before the magistrate and make his own determination on the basis of that record. . . . In some specific instances, however, it may be *necessary* for the judge . . . *to take additional evidence*, recall witnesses. . . ." *Ibid.* (emphasis supplied).

See also 122 Cong. Rec. 35182 (1976) (Rep. Railsback). It is thus evident that Congress anticipated that occasions would arise when a district judge could not make the requisite "de novo determination" without hearing the evidence himself.[6]

Congress' prime objective in 1976 was to overrule this Court's decision in *Wingo* v. *Wedding*, 418 U. S. 461, which had interpreted the then existing Federal Magistrates Act as

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[6] Nothing in the passage from the opinion of the Court of Appeals in *Campbell* v. *United States District Court*, 501 F. 2d 196, 206–207 (CA9 1974), that is quoted in the House Report can be read to mean anything different. In *Campbell*, the court said that a district court "may, in the exercise of its discretion, call and hear the testimony of a witness or witnesses" when "it finds there is a problem as to the credibility of a witness or witnesses or for other good reasons." Nothing said in *Campbell*, however, implied that a district judge's failure to call a witness or witnesses is invariably permissible.

barring a magistrate from holding an evidentiary hearing on a petition for habeas corpus. See S. Rep., at 3, 9; H. R. Rep., at 5, 11. The 1976 Act thus granted magistrates the power to take evidence on matters like habeas corpus petitions and motions to suppress. By enacting such legislation, Congress obviously anticipated that hearings conducted by magistrates would in many instances obviate the need for district judges to take evidence as well.

It does not follow, however, that Congress told district judges that they need not conduct hearings in every case where an evidentiary hearing has been conducted by a magistrate, regardless of the circumstances. Instead, Congress expressly limited the "clearly erroneous" standard of review to pretrial motions that are termed non-"dispositive" in the Act's legislative history, see S. Rep., at 7, 9–10; H. R. Rep., at 9, 10–11, and excluded habeas corpus petitions, motions to suppress, and other important motions from that category, see 28 U. S. C. § 636 (b)(1).

The Court suggests that a plain reading of the statutory language would, as a practical matter, frustrate the Act's objective of alleviating the increasing congestion of litigation in the district courts. But, as I interpret the statutory language, district judges need not always hold evidentiary hearings in order properly to dispose of suppression motions. Although many motions to suppress turn on issues of credibility, many do not. A suppression motion predicated, for instance, on the claim that a search warrant was not supported by an adequate affidavit could normally be resolved without the taking of any testimony.

More importantly, the "de novo determination" requirement of the Federal Magistrates Act applies to a much wider range of motions and applications than simply pretrial motions to suppress.[7] Some of these—such as motions to dismiss for failure to state a claim, motions for judgment on the pleadings,

[7] See n. 2, *supra*.

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and motions for summary judgment—presume as a legal matter the lack of any need for an evidentiary hearing, even at the magistrate's level. Others—such as motions for injunctive relief, motions to dismiss or quash an indictment, motions to dismiss or to permit maintenance of a class action, motions to dismiss an action involuntarily, applications for post-trial relief made by those convicted of criminal offenses, and petitions by prisoners challenging conditions of confinement—could often, as a practical matter, be granted or denied by a district court on the strength alone of the transcript of the magistrate's hearing and his recommendation. Thus, contrary to the Court's suggestion, the plain reading I would give to the pertinent statutory language would not equate "de novo determination" with "de novo hearing."

Since I believe that the plain language of the statute required the District Judge in this case to hear the conflicting factual testimony of the witnesses, I would affirm the judgment of the Court of Appeals.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

I agree with my Brother STEWART that the statutory provision for "a de novo determination of . . . specified proposed findings . . . to which objection is made," 28 U. S. C. § 636 (b)(1), should be construed to require the district court to conduct an evidentiary hearing when there are case-dispositive issues of credibility that cannot be resolved on the basis of the record compiled before the magistrate. I write separately to express my view that unless the Act is construed in that fashion, its application in this case is impermissible under the Due Process Clause of the Fifth Amendment and under Art. III.

In my view, the Due Process Clause requires that a judicial officer entrusted with finding the facts in a criminal case must hear the testimony whenever a fair resolution of disputed issues cannot be made on the basis of a review of the cold

record. Accordingly, if the Act permits the district judge not to hear the witnesses, but at the same time requires him to make a *de novo* determination of the facts, its application violates the Due Process Clause in any case that turns on issues of credibility that cannot be resolved on the written record. This infirmity cannot be avoided by interpreting the Act to allow the district judge to give final effect to the magistrate's findings on issues of credibility. Such an interpretation would render the Act fatally inconsistent with Art. III of the Constitution, which entitles a criminal defendant in a federal court to an independent determination of the case-dispositive facts by an Art. III judge.

I

The Court of Appeals held that the unconsented referral of the suppression motion to the Magistrate was not an unlawful delegation of the federal judicial power to a non-Art. III judge. To reach this conclusion, it relied on its understanding that the Act required the District Judge to make a *de novo* determination of all contested issues. At the same time, it concluded that the Due Process Clause required the District Judge to hear the witnesses before making a *de novo* determination of the facts. The Court rejects this conclusion in an analysis suggesting that the individual's interest in vindicating his right against compulsory self-incrimination is an unimportant one. I disagree.

A

One of the most deeply engrained principles in Anglo-American jurisprudence requires that an official entrusted with finding facts must hear the testimony on which his findings will be based. As I explained in *Swisher* v. *Brady*, 438 U. S. 204, 229–233 (1978) (dissenting opinion),[1] our constitutional

[1] *Swisher* involved a Maryland procedure whereby a master first made factual findings with respect to the issue of juvenile delinquency, and a judge subsequently conducted a *de novo* review of the evidence. The

tradition rejects the notion that factual findings in criminal cases may be made by an official who acts in isolation and on the basis of a cold record.

The principle that "[t]he one who decides must hear," *Morgan* v. *United States*, 298 U. S. 468, 481 (1936), is supported by two distinct rationales. First, judicial factfinding on the basis of a written record carries an intolerably high risk of error. Any experienced lawyer is aware that findings of fact frequently rest on impressions of demeanor and other factors which do not appear on the face of the record. As the Court stated in *Holiday* v. *Johnston*, 313 U. S. 342, 352 (1941), "[o]ne of the essential elements of the determination of the crucial facts is the weighing and appraising of the testimony." Accordingly, the Court has rejected the proposition "that an appraisal of the truth of the [witness'] oral testimony by a master or commissioner is, in the light of the purpose and object of the proceeding, the equivalent of the judge's own exercise of the function of the trier of the facts." See also *Wingo* v. *Wedding*, 418 U. S. 461 (1974); *United States* v. *Oregon Medical Society*, 343 U. S. 326, 339 (1952); *Dyer* v. *MacDougall*, 201 F. 2d 265, 268–269 (CA2 1952).

The principle is not, however, based solely on the constitutional interest in accurate factfinding. It also derives from the notion that, as a matter of basic fairness, a person facing the prospect of grievous loss is entitled to relate his version of the facts to the official entrusted with judging its accuracy. The Due Process Clause "promot[es] participation and dia-

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judge's review was confined to the record, with the exception that he could receive additional evidence when the parties did not object. The Court held that the procedure did not violate the Double Jeopardy Clause, but reserved the due process issue on the ground that it was not properly presented. Writing for myself and my Brothers BRENNAN and POWELL, I expressed the view that the issue was before us and that the procedure violated the due process principle that, where demeanor evidence is critical, the ultimate factfinder in a criminal case must hear the witnesses on whose testimony his findings will be based.

logue . . . in the decisionmaking process," *Marshall* v. *Jerrico, Inc.*, 446 U. S. 238, 242 (1980), by ensuring that individuals adversely affected by governmental action may confront the ultimate decisionmaker and thus play some part in formulating the ultimate decision. See *Carey* v. *Piphus*, 435 U. S. 247 (1978); *Board of Curators, Univ. of Mo.* v. *Horowitz*, 435 U. S. 78, 103, n. 15 (1978) (MARSHALL, J., concurring in part and dissenting in part).[2] In this respect, the requirement that a finder of facts must hear the testimony offered by those whose liberty is at stake derives from deep-seated notions of fairness and human dignity. See *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123, 170 (1951) (Frankfurter, J., concurring). A rule that would allow a criminal defendant to face a jail sentence on the basis of factual findings made by one who has not heard the evidence is, in my view, foreign to notions of fair adjudicative procedure embodied in the Due Process Clause.[3]

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[2] Cf. Michelman, Formal and Associational Aims in Procedural Due Process, in J. Pennock & J. Chapman, Due Process: Nomos XVIII, pp. 126–171 (1977). I do not, of course, mean to suggest that all adverse effects fall within the categories of "life, liberty, [and] property" under the Fifth and Fourteenth Amendments. In recent years the Court has held that those terms encompass only so-called statutory entitlements and certain kinds of grievous losses. See *Vitek* v. *Jones*, 445 U. S. 480 (1980); cf. *PruneYard Shopping Center* v. *Robins*, *ante*, at 93–94, and n. 2 (MARSHALL, J., concurring).

[3] The principle that deference must be paid to the findings of the official who hears the testimony is reflected in a wide variety of areas of the law. Under Rule 52 of the Federal Rules of Civil Procedure, a trial court's factual findings may be reversed only when "clearly erroneous," a standard that reflects the common understanding that "[f]ace to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth." *United States* v. *Oregon Medical Society*, 343 U. S. 326, 339 (1952). For this reason, the successor of a trial judge who has resigned or died after the conclusion of a trial is ordinarily barred from resolving factual disputes on the basis of the trial transcript. *Brennan* v.

I do not, of course, mean to suggest that a district judge must hear the witnesses in every case, or even in all cases in which issues of credibility are raised. An actual rehearing would be required only in cases involving case-dispositive issues that are impossible to resolve on the basis of the written record. But as my Brother STEWART demonstrates, the District Judge could not make an independent finding in this case without hearing the witnesses. Neither respondent's nor the agents' story carried inherent indicia of reliability. Both accounts suffered from inconsistencies. In the end the issue was solely one of credibility. On the basis of the cold record, the District Judge had no basis for determining whether the respondent or the agents were telling the truth. He was required, therefore, either blindly to accept the Magistrate's findings as to matters of credibility or to flip a coin. The first course is forbidden by the statute and by Art. III;[4] the second is forbidden by the requirements of fair adjudicative procedure that the Due Process Clause reflects.

B

It is true that the principle that "[t]he one who decides must hear" should not be applied with mechanical rigidity. Administrators are permitted to base factual findings on a record compiled before a hearing examiner who does not play a role in formulating the ultimate findings. See *Morgan* v.

Grisso, 91 U. S. App. D. C. 101, 198 F. 2d 532 (1952); *United States* v. *Nugent*, 100 F. 2d 215 (CA6 1938), cert. denied, 306 U. S. 648 (1939). And in *United States ex rel. Graham* v. *Mancusi*, 457 F. 2d 463 (CA2 1972) (Friendly, J.), the court applied the principle in habeas corpus proceedings to invalidate a procedure under which a state appellate court had entered a conviction for a lesser offense when reversal of the original conviction was required because of improperly admitted evidence. The court stated: "Due process forbids that, when an issue of fact is presented, a man should [illegible] sent to prison without the trier of the facts having seen and heard his accusers and himself, if he desires to testify, and weighing their credibility in the light of their demeanor on the stand." *Id.*, at 463.

[4] See Part II, *infra*.

United States, 298 U. S. 468, 481 (1936); 2 K. Davis, Administrative Law Treatise § 11.02 (1958). Similar qualifications of the principle have been recognized by lower courts in certain civil contexts. See, *e. g.*, *Utica Mutual Ins. Co.* v. *Vincent*, 375 F. 2d 129 (CA2), cert. denied, 389 U. S. 839 (1967) (National Labor Relations Board determination of proper unit in a representation election). The Court errs, however, in suggesting that those exceptions provide support for the decision announced today. In a number of the cases in which such exceptions have been permitted, the factual issues to be resolved did not at all depend on issues of credibility; the demeanor of the witnesses was entirely irrelevant. See examples cited *ante*, at 680. And in other cases, the factfinder was not entrusted, as was the District Judge here, with making a *de novo* determination, but was instead permitted to give appropriate deference to the conclusions of the official who conducted the hearing. See 2 K. Davis, *supra*, § 10.04.

I am aware of no case, and the Court cites none, in which a federal court has upheld a procedure in which a judge is required to conduct a *de novo* determination without hearing the witnesses when the factual issues have turned on issues of credibility that cannot be fairly resolved on the basis of the record. Under such a procedure, the judge's determination is so inevitably arbitrary, and so plainly a blind guess, that I believe it to be prohibited by the Due Process Clause under any circumstances. But even if I were not so persuaded, the answer in the present context would be clear, for the simple reason that this case is criminal in nature. It is, of course, in such cases that the need for scrupulous observance of procedural safeguards is greatest. Whatever the appropriate limits of the principle that the factfinder must hear the witnesses where demeanor evidence is critical, the principle is fully applicable to criminal cases.

As the Court correctly observes, see *ante*, at 677, under *Mathews* v. *Eldridge*, 424 U. S. 319, 335 (1976), the determination of "what process is due" turns on a balancing of three

factors: "[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." The Court recites this test, but it does not even attempt to apply it.

Instead, the Court resolves the due process issue solely by distinguishing a motion to suppress evidence from a criminal trial. See *ante*, at 677–681. To state the obvious point that guilt or innocence is not determined in a suppression hearing, however, is only the beginning of the inquiry. That fact does not render the interest of both the defendant and the public in vindicating the right against compulsory self-incrimination an unimportant one, or make it analogous to other interests, such as those involved in a securities transaction, that have been thought to merit comparatively little due process protection, see *ante*, at 680. *Mathews* contemplates and requires a thorough inquiry into the three factors it specifies rather than the conclusory approach taken by the Court today.

The private interests at stake here are hardly insignificant. The suppression hearing was conducted to determine whether the agents had violated respondent's privilege against self-incrimination, an interest that the Constitution singles out for special protection and that our cases recognize as fundamentally important. See, *e. g.*, *Miranda* v. *Arizona*, 384 U. S. 436 (1966). Moreover, respondent's liberty was wholly dependent on whether the trier of fact believed his account of his confession rather than that of the agents. The subsequent history of the case confirms this fact. As my Brother POWELL has explained: "In our criminal justice system as it has developed, suppression hearings often are as important as the trial which may follow. The government's case may turn

upon the confession or other evidence that the defendant seeks to suppress, and the trial court's ruling on such evidence may determine the outcome of the case." *Gannett Co.* v. *DePasquale,* 443 U. S. 368, 397, n. 1 (1979) (POWELL, J., concurring). See also *id.,* at 434 (BLACKMUN, J., dissenting in part). Indeed, Congress itself recognized the importance of suppression motions by providing for a *de novo* determination by the district judge.

Second, both the risk of an erroneous deprivation and the probable value of the additional safeguard were substantial. The issues presented here could not be resolved *de novo* solely on the basis of the record. As my Brother STEWART suggests, the case was a classic swearing match: the only issues were ones of credibility. The risk of error could be minimized only if the District Judge heard the witnesses himself.

The Court itself confirms that if the judge does not hear the witnesses his decisions on credibility issues can only be a blind guess, when it intimates that a district judge may not *reject* a magistrate's findings without hearing the witnesses. See *ante,* at 680–681. The sole distinction that can be drawn between accepting the magistrate's findings and rejecting them is that in the former case the district judge is deferring to the magistrate. But the Court rejects this distinction by asserting, in order to avoid the Art. III objection, that in either event it is the district judge who "[makes] the ultimate decision." See *ante,* at 683.

Finally, the governmental interest—essentially one of administrative convenience—is not in this context substantial. The Court of Appeals' holding would not require the district judge to hear the witnesses whenever objection is made to the magistrate's findings. A rehearing requirement would be imposed only in situations in which the case turns on issues of credibility that cannot be resolved on the basis of a record. Nor is there much force to the Government's argument that an occasional rehearing of the witnesses would impose an

intolerable burden on the district courts.[5] Finally, I would afford the district judge considerable discretion to determine whether a rehearing of the witnesses was required in order for him to make the requisite *de novo* determination. If the district judge offered a statement of reasons presenting his independent view of the facts and explaining in some reasoned manner why it was not necessary for him to hear the witnesses in order to adopt that view, it would be an exceptionally rare case in which an abuse of discretion should be found.

In this case, it is plain that a *de novo* determination could not be made without hearing the witnesses. I am therefore brought to the conclusion that the Due Process Clause required the District Judge to rehear the witnesses. Indeed, a contrary conclusion would suggest that, save for the criminal trial itself, there may be *no* settings in which the principle that "[t]he one who decides must hear" will carry force.

In *Speiser* v. *Randall*, 357 U. S. 513, 520 (1958), we observed that "the outcome of a lawsuit—and hence the vindication of legal rights—depends more often on how the factfinder appraises the facts than on a disputed construction of a statute or interpretation of a line of precedents." By today's decision, the Court permits the vindication of Fifth Amendment rights to depend on a form of bureaucratic factfinding foreign to our

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[5] Experience shows that motions to suppress evidence consume a relatively small proportion of the time of federal district judges. A recent study indicated that suppression motions involving confessions were filed in only 4% of all federal criminal cases. GAO, Impact of the Exclusionary Rule on Federal Criminal Prosecutions, Report by the Comptroller General of the United States, App. II, p. 8 (Apr. 19, 1979). Moreover, a rehearing by the district judge would be required only in some of those cases, since the rehearing requirement would be imposed solely in situations (1) involving case-dispositive issues that (2) could not be resolved on the basis of the record and (3) that were contested by a party. Finally, the rehearing requirement would create an additional burden only where the judge would otherwise choose not to hear the witnesses. In light of these factors, the incremental expenses that would be imposed by the ruling of the Court of Appeals would be relatively small.

constitutional traditions. I am unwilling to join in that enterprise.

II

The due process infirmity cannot be remedied by interpreting the statute to permit the district judge to give final effect to the magistrate's findings on issues of credibility. Such an interpretation would render the Act fatally inconsistent with Art. III of the Constitution. The Court attempts to avoid this conclusion by suggesting that the district judge retains "control" of the suppression motion and by indicating that Art. III in any event does not prohibit a federal court from giving final effect to a magistrate's findings of fact. I find neither argument convincing.

A

At the outset, it is important to observe that the Court's suggestion that "a magistrate's recommendations [are] analogous to [those of] a master or a commissioner," *ante*, at 682–683, is highly misleading. If the motion to suppress turns on issues of credibility that cannot be resolved on the basis of the record, and if the district judge does not hear the witnesses, the magistrate's report is no mere "recommendation." Unless the district judge ventures a blind guess, that report is effectively the final determination of the facts underlying the suppression motion. For this reason, it is simply incorrect to say that the "ultimate decision is made by the district court." *Ante*, at 683. This case squarely presents the issue whether, in a criminal case tried in federal court, Congress may delegate to a non-Art. III judge the authority to make final determinations on issues of fact.

Article III vests the "judicial Power of the United States . . . in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." It provides that judges "both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation,

which shall not be diminished during their Continuance in Office."

The rationale underlying the tenure and salary protections of Art. III has often been stated and need not be rehearsed in detail here. But it is worth remembering that the Framers of the Constitution believed that those protections were necessary in order to guarantee that the judicial power of the United States would be placed in a body of judges insulated from majoritarian pressures and thus able to enforce constitutional principles without fear of reprisal or public rebuke. See The Federalist Nos. 78 and 79; *Glidden Co.* v. *Zdanok*, 370 U. S. 530 (1962) (plurality opinion); *O'Donoghue* v. *United States*, 289 U. S. 516, 530 (1933).

In this case it is agreed that magistrates are not Art. III judges. Appointed by the judges of the district court, they serve 8-year terms. They are subject to removal by the judges of the district court for "incompetency, misconduct, neglect of duty, or physical or mental disability." If the Judicial Conference concludes that "the services performed by his office are no longer needed," 28 U. S. C. § 631 (h), a magistrate's office may be terminated. None of these factors, of course, suggests that a magistrate will be unable to perform his assigned tasks fairly and in accordance with constitutional principles. But there can be no doubt that one holding the office of magistrate is unprotected by the safeguards that the Framers regarded as indispensable to assuring the independence of the federal judiciary.

It is true that a number of our decisions have recognized Congress' authority to create legislative tribunals unprotected by the tenure and salary provisions of Art. III. See *Glidden Co.* v. *Zdanok*, *supra*, at 543–552, and cases cited. Those decisions do not, however, provide any support for the proposition that Congress may, with respect to suppression hearings in criminal cases, displace the federal judiciary and entrust the finding of case-dispositive facts to a non-Art. III tribunal.

The rationale of our decisions involving legislative courts has been far more limited, focusing on Congress' plenary power over specialized areas of geography or subject matter and on the manifest need for a more flexible tribunal to perform adjudicatory functions in those areas. See generally 370 U. S., at 543–552. Nor has the Court suggested that it will defer blindly to a congressional determination that an alternative tribunal is necessary. "The touchstone of decision in all these cases has been the need to exercise the jurisdiction then and there and for a transitory period. Whether constitutional limitations on the exercise of judicial power have been held inapplicable has depended on the particular local setting, the practical necessities, and the possible alternatives." *Id.*, at 547–548. Thus "the requirements of Art. III, *which are applicable where laws of national applicability and affairs of national concern are at stake,* must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment." *Palmore* v. *United States,* 411 U. S. 389, 407–408 (1973) (emphasis added). Congress has never attempted to displace Art. III courts when laws of nationwide applicability were involved, and nothing in our prior decisions suggests that it may constitutionally do so.[6]

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[6] The Government contends that since Congress is constitutionally entitled not to create federal courts, see *Palmore* v. *United States,* 411 U. S. 389 (1973); *Sheldon* v. *Sill,* 8 How. 441 (1850), and may instead entrust the resolution of federal questions to state courts, it follows that Congress also has the authority to create federal tribunals that do not carry the safeguards of Art. III. Such a view would, of course, render the requirements of Art. III practically meaningless by permitting Congress to vest the judicial power in whatever tribunal it chose.

The argument is unpersuasive for two additional reasons. First, it represents a revival of the now discredited idea that Congress may attach whatever conditions it wishes to entities or programs that it is free not to create. Cf. *Vitek* v. *Jones,* 445 U. S., at 487–494. But there is no logical infirmity in concluding that although Congress is free not to create

Our decision in *United States ex rel. Toth* v. *Quarles*, 350 U. S. 11 (1955), confirms that there are severe limits on Congress' authority to displace Art. III courts. In that case the Government attempted to try a civilian ex-serviceman in a military tribunal. The Court agreed that Congress' authority under Art. I, § 8, cl. 14, "To make Rules for the Government and Regulation of the land and naval Forces" permitted it to subject persons in the Armed Services to trial by court-martial. Nonetheless, it concluded that the clause should not be construed to encompass civilian ex-servicemen. Such a construction, the Court held, "necessarily encroaches on the jurisdiction of federal courts set up under Article III of the Constitution." *Id.*, at 15. The Court emphasized that "[t]he provisions of Article III were designed to give judges maximum freedom from possible coercion or influence by the executive or legislative branches of the Government." *Id.*, at 16. Accordingly, Congress' power to circumvent criminal trials in Art. III tribunals would not "be inferred through the Necessary and Proper Clause," but would instead call "for limitation to 'the least possible power adequate to the end

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federal courts, if it chooses to do so, those courts must be as described in Art. III, subject to limited exceptions.

Second, the argument misconceives the intentions that underlay the constitutional compromise embodied in Art. III. The Framers were especially concerned about the possibility of an alliance between federal judges and the Congress. For this reason, they ensured that federal judges would be isolated from the legislative branch of the Federal Government and protected from congressional reprisal. State courts were perceived as necessarily independent from the Federal Government and as a relatively reliable buffer against its excesses. No such assurance would be possible with respect to federal judges unprotected by the provisions of Art. III. It follows from those assumptions that under Art. III, Congress is generally prohibited from creating specially accountable federal tribunals but at the same time is permitted to entrust issues of federal law to state tribunals. See generally Tushnet, Invitation to a Wedding: Some Thoughts on Article III and a Problem of Statutory Interpretation, 60 Iowa L. Rev. 937, 944–945 (1975); cf. R. Berger, Congress v. The Supreme Court 8, 117–119 (1969).

proposed,' " *id.*, at 22–23 (emphasis omitted), quoting *Anderson* v. *Dunn*, 6 Wheat. 204, 231 (1821). The *Quarles* decision has been applied in other contexts to limit sharply Congress' power to try civilians in Art. I courts. See *Reid* v. *Covert*, 354 U. S. 1 (1957) (civilian dependents living with servicemen on military base may not be tried in Art. I court); *O'Callahan* v. *Parker*, 395 U. S. 258 (1969) (crimes that are not service connected may not be tried in Art. I court). In my view, *Quarles* and its progeny foreclose the conclusion that Congress may use its Art. I powers to create legislative tribunals in order to divest Art. III courts of their authority to conduct federal criminal proceedings.

B

At the Court observes, see *ante*, at 681, Congress has not in this case attempted to substitute magistrates for Art. III judges on a wholesale basis. The district court retains authority over questions of law. Under the Court's construction, it is also compelled to make a *de novo* determination of the facts, to the extent that that task can be performed on the basis of an evidentiary record. Reasoning by analogy from the context of masters and commissioners, the Court suggests that the retained power of the district court is sufficient to satisfy the requirements of Art. III. As I have explained, however, when a district judge does not hear the witnesses, it is the magistrate who makes the final determination of factual questions in any case involving issues of credibility that cannot be resolved on the basis of the record. The Court's conclusion must therefore rest on an understanding that the requirements of Art. III are fully applicable when the issues are ones of law, but not when the issues are factual in nature. See *ante*, at 683. I am unable to discern any such distinction in Art. III or in any other provision of the Constitution.

As the Court rightly observes, the primary case relevant to the question is *Crowell* v. *Benson*, 285 U. S. 22 (1932). There the Court upheld the constitutionality of an administrative

scheme by which deputy commissioners adjudicated compensation claims under the Longshoremen's and Harbor Workers' Compensation Act, but at the same time ruled that the federal district court must find *de novo* whether a master-servant relationship existed and whether the injury occurred on the navigable waters of the United States. Mr. Chief Justice Hughes, speaking for the Court, did rely on the "historic practice" of permitting the courts to be assisted in factual findings by masters and commissioners, *id.*, at 51. But the Court's opinion in *Crowell* provides no authority for the statutory scheme upheld today.

The Court in *Crowell* expressly rejected the proposition that Congress had authority to displace the federal judiciary by removing all questions of fact from Art. III courts. "In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function." *Id.*, at 60. The Court's reasoning on this point bears quotation in full:

> "[T]he question is not the ordinary one as to the propriety of provision for administrative determinations. . . . It is rather a question of the appropriate maintenance of the Federal judicial power in requiring the observance of constitutional restrictions. It is the question whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency . . . for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend. The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the conclusion that there is no limitation of their use, and that the Congress could com-

pletely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the Executive Department. That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law." *Id.*, at 56–57.

The Court relied on *Ng Fung Ho* v. *White*, 259 U. S. 276 (1922), where it held that persons involved in deportation proceedings and claiming to be citizens of the United States are constitutionally entitled to a *de novo* judicial determination of their factual claims. "[W]hen fundamental rights are in question, this Court has repeatedly emphasized 'the difference in security of judicial over administrative action.'" *Crowell* v. *Benson, supra*, at 61, quoting *Ng Fung Ho* v. *White, supra*, at 285. In this respect, the Court found that its earlier discussion of the historical use of masters and commissioners was irrelevant, for even as to factual issues "their reports are essentially advisory, a distinction of controlling importance when questions of a fundamental character are in issue." *Crowell* v. *Benson, supra*, at 61.

In his celebrated dissent, Mr. Justice Brandeis rejected the view that the particular factual issues in *Crowell* were ones that must constitutionally be resolved *de novo* in an Art. III court. He did agree, however, that there are some issues of fact which must be found independently in an Art. III court. "[U]nder certain circumstances," he stated, "the constitutional requirement of due process is a requirement of judicial process." *Id.*, at 87. As he explained in a subsequent opinion: "A citizen who claims that his liberty is being infringed is entitled, upon habeas corpus, to the opportunity of *a judicial determination of the facts*. And, so highly is this liberty prized, that the opportunity must be accorded to any resident

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of the United States who claims to be a citizen." *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 77 (1936) (concurring opinion) (emphasis added).[7]

It may fairly be said that in certain respects at least, Mr. Justice Brandeis' views in *Crowell* and *St. Joseph Stock Yards* have become the law. It can no longer be claimed that a person is entitled under Art. III or the Due Process Clause to a *de novo* judicial determination of the facts in every case that implicates constitutional rights. Yet neither *Crowell* nor *Ng Fung Ho* has been overruled, and the Court has cited both with approval in recent years. See *Agosto* v. *INS,* 436 U. S. 748, 753 (1978); *Atlas Roofing Co.* v. *Occupational Safety Comm'n,* 430 U. S. 442, 450, n. 7 (1977). Cf. *Hampton* v. *Mow Sun Wong,* 426 U. S. 88, 118 (1976) (REHNQUIST, J., dissenting); *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 102, and n. 20 (1973) (BRENNAN, J., dissenting).[8] There is

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[7] Federal courts on habeas corpus are not obliged to examine the facts independently in every case. Under *Townsend* v. *Sain,* 372 U. S. 293 (1963), deference to the state-court findings is permitted in the absence of any allegation of procedural irregularity. As the holdings of *Ng Fung Ho* and *Crowell* make clear, however, this deference is based on the special role played by state courts in the federal system, and not on any rule allowing Congress to create non-Art. III tribunals to make findings of fact that are binding on Art. III courts. See n. 6, *supra.*

[8] In *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 53 (1936), the Court indicated that, in the context of a claim of unconstitutional confiscation, the requirement of independent judicial judgment would be satisfied even if the court gives "the weight which may properly attach to findings [by an administrative body] upon hearing and evidence." In subsequent cases the Court has made clear that the scope of judicial review of confiscation claims may be limited to the substantial evidence test. See *FPC* v. *National Gas Pipeline Co.,* 315 U. S. 575 (1942); *FPC* v. *Hope Natural Gas Co.,* 320 U. S. 591 (1944); *Alabama Public Service Comm'n* v. *Southern R. Co.,* 341 U. S. 341, 348 (1951); *American Trucking Assns.* v. *United States,* 344 U. S. 298 (1953). See generally 4 K. Davis, Administrative Law Treatise § 29.09 (1958). But the Court errs if it reads *St. Joseph Stock Yards* to establish the far more radical proposition that *all* questions of fact may be transferred to and decided by non-Art. III

no basis, then, for a conclusion that there are *no* circumstances in which a person is entitled to a determination of the facts by an Art. III court. In my view, both Mr. Chief Justice Hughes and Mr. Justice Brandeis were correct on one of the few propositions on which they were in agreement in *Crowell*: that there remain some cases in which an opportunity for an independent judicial determination of the facts is constitutionally required.

The Court's conclusion to the contrary appears premised on its perception that, under the Act, effective control of suppression motions remains in the hands of district judges, and the submission of "recommendations" by magistrates is a relatively mechanical task for which the special characteristics of an Art. III judge are unnecessary. But in view of the likely finality of the magistrate's decision and the importance of fact-finding to the process of legal decision, that view is unsupportable. As I have explained, in cases like this one the magistrate's decision is effectively unreviewable if the district judge does not hear the witnesses. The fact that the judge is permitted to hear the witnesses is an irrelevance in any case in which he does not do so. Moreover, the Court has emphasized that the vindication of constitutional rights more frequently depends on findings of fact than abstract principles of law. See *Speiser* v. *Randall*, 357 U. S., at 520. And it cannot seriously be suggested that the majoritarian pressures the Framers sought to avoid by the tenure and salary protections of Art. III become inapplicable when the relevant question is one of fact. Indeed, it is precisely in resolving constitutional issues that are dependent on questions of credibility as between a government official and one accused of crime that a detached and independent arbiter may be most indispensable. A contrary conclusion would mean that the

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federal tribunals. See *ante*, at 683. Our continued adherence to *Ng Fung Ho* v. *White*, 259 U. S. 276 (1922), demonstrates that such a reading would be unwarranted.

protections of Art. III, viewed as so fundamental by the Framers of the Constitution, were intended to apply solely to appellate judges.

C

Since I reject the suggestion that every issue of fact may be removed from Art. III courts and submitted instead to federal magistrates, the question remains whether a suppression hearing is one of the admittedly few contexts in which independent factfinding by an Art. III judge is constitutionally required. I believe that it is.

As noted above, Mr. Justice Brandeis would have restricted the requirement of independent judicial factfinding to situations in which personal liberty was at stake, such as habeas corpus and deportation. I agree that for both criminal cases and deportation, a citizen is constitutionally entitled to an independent determination of the case-dispositive facts by an Art. III court. My conclusion is based on two factors, the nature of the issue and the individual interest in a determination by an Art. III judge.[9] Resolution of the issues involved in criminal cases and deportation proceedings does not require specialization or expertise in an area in which a federal judge is untrained. Moreover, the Framers adopted Art. III precisely in order to protect individual interests of the sort involved here.[10] In my view, the independence provided by

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[9] See L. Jaffe, Judicial Control of Administrative Action 640–648 (1965). In my view, this standard is far preferable to a test that would draw a rigid line between issues of law and issues of fact, and hold that, with the exception of the criminal trial, the latter need never be resolved independently by an Art. III court. No such line appears in the Constitution, and it is contradicted by the rationale that underlies the tenure and salary protections of Art. III.

[10] Alexander Hamilton justified the tenure and salary protections of Art. III in this fashion:

"That inflexible and uniform adherence to the rights of the constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by

Art. III is hardly dispensable in finding facts underlying a motion to suppress evidence on Fifth Amendment grounds. Nor, for these purposes, is it possible to distinguish between suppression motions and the trial itself; as experience shows, the primary issues in a criminal case often deal with whether evidence should be excluded because illegally obtained. I am therefore brought to the conclusion that the Constitution entitled respondent to an independent judicial determination of the facts on which his motion to suppress was based.[11]

III

The Court's holding today is undoubtedly influenced by its sympathy with Congress' perception that the assistance of federal magistrates was a necessary measure to ensure that the already severe pressures on the federal district courts do not become overwhelming. I too sympathize with that concern. And I applaud the conspicuous and conscientious legislative effort to conform to the dictates of the Constitution by ensuring maximum control of suppression motions by the federal district courts. I agree with my Brother STEWART that § 636

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a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence. . . .

. . . . .

Next to permanency in office, nothing can contribute more to the independence of the judges, than a fixed provision for their support. . . . In the general course of human nature, *a power over a man's subsistence amounts to a power over his will.*" The Federalist No. 78, p. 489, and No. 79, p. 491 (Gideon ed. 1818) (emphasis in original).

[11] Actual rehearing of the witnesses, of course, would be required only in exceptional cases. In most circumstances the requirement of independent judicial factfinding would be satisfied on the basis of record review. It is only when that task cannot fairly be performed in the absence of the witnesses that a *de novo* hearing should be required. And as I have indicated, see *supra*, at 701–702, if the district judge offered a statement of reasons explaining why it was not necessary for him to hear the witnesses, an abuse of discretion would be found quite rarely. See n. 5, *supra; ante*, at 693–694 (STEWART, J., dissenting).

(b)(1) should be construed to avoid the constitutional objections and to require the district court to call witnesses when a fair resolution of the facts is not otherwise possible.

The Court's unwillingness to construe the relevant provision in this fashion may be attributable to an understandable desire to minimize existing burdens on federal district judges, burdens that may seem especially unnecessary with respect to the gathering and evaluation of the facts. But the replacement of Art. III judges with magistrates, even if the replacement extends only to the finding of facts, erodes principles that strike near the heart of the constitutional order. In such contexts considerations of administrative cost are least forceful, and the Court must be most wary lest principles that were meant to endure be sacrificed to expediency. I would affirm the decision of the Court of Appeals.

SUN SHIP, INC. *v.* PENNSYLVANIA ET AL.

APPEAL FROM THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 79-343. Argued April 14, 1980—Decided June 23, 1980

Held: A State may apply its workers' compensation scheme to land-based injuries that fall within the coverage of the Longshoremen's and Harbor Workers' Compensation Act (Act), as amended in 1972. Pp. 717-726.

(a) Under the law governing jurisdiction over marine-related injuries before 1972, nonlocal maritime injuries fell under the Act, "maritime but local" injuries "upon the navigable waters of the United States," 33 U. S. C. § 903 (a), could be compensated either under the Act or under state law, and injuries suffered beyond navigable waters—albeit within the range of federal admiralty jurisdiction—were remediable only under state law. Cf. *Davis* v. *Department of Labor*, 317 U. S. 249; *Calbeck* v. *Travelers Insurance Co.*, 370 U. S. 114; *Nacirema Operating Co.* v. *Johnson*, 396 U. S. 212. Pp. 717-719.

(b) The extension of federal jurisdiction landward beyond the shoreline of the navigable waters of the United States under the 1972 amendments of the Act supplements, rather than supplants, state compensation law. The language of the 1972 amendments cannot fairly be understood as pre-empting state workers' remedies from the field of the Act, and thereby resurrecting the jurisdictional monstrosity that existed before the clarifying opinions in *Davis, supra,* and *Calbeck, supra.* Nor does the legislative history suggest a congressional decision to exclude state laws from the terrain newly occupied by the post-1972 Act. Pp. 719-722.

(c) The disparities which Congress had in view in amending the Act lay primarily in the paucity of relief under *state* compensation laws, and concurrent jurisdiction for state and federal compensation laws is not inconsistent with the amendments' policy of raising awards to a federal minimum. Even though, if state remedial schemes are more generous than federal law, concurrent jurisdiction could result in more favorable awards for workers' injuries than under an exclusively federal compensation system, there is no evidence that Congress was concerned about a disparity between adequate federal benefits and *superior* state benefits, the *quid pro quo* to employers for the 1972 landward extension of the Act being simply the abolition of the longshoremen's unseaworthiness remedy. Nor does the bare fact that the federal and state com-

pensation systems are different give rise to a conflict that, from the employer's standpoint, necessitates exclusivity for each system within a separate sphere, since, even were the Act exclusive within its field, many employers would be compelled to abide by state-imposed responsibilities lest a claim fall beyond the Act's scope. Pp. 723–726.

41 Pa. Commw. 302, 398 A. 2d 1111, affirmed.

BRENNAN, J., delivered the opinion for a unanimous Court.

Jeffery C. Hayes argued the cause for appellant. With him on the briefs was *Thomas E. Zemaitis.*

Joseph Lurie argued the cause and filed a brief for appellees.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The single question presented by these consolidated cases is whether a State may apply its workers' compensation scheme to land-based injuries that fall within the coverage of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), as amended in 1972. 33 U. S. C. §§ 901–950. We hold that it may.

I

The individual appellees are five employees of appellant Sun Ship, Inc., a shipbuilding and ship repair enterprise located on the Delaware River, a navigable water of the United States in Pennsylvania. Each employee was injured after the effective date of the 1972 amendments to the LHWCA while involved in shipbuilding or ship repair activities. Although the LHWCA applied to the injuries sustained, each appellee filed claims for benefits under the Pennsylvania Workmen's Compensation Act with state authorities. Appellant contended that the federal compensation statute was the employees' exclusive remedy. In upholding awards to

*Briefs of *amici curiae* urging affirmance were filed by *Solicitor General McCree, Deputy Solicitor General Geller, Laurie M. Streeter,* and *Joshua T. Gillelan II* for the United States; and by *Patrick N. McTeague* for Local No. 6, Industrial Union of Marine and Shipbuilding Workers of America, AFL–CIO.

each appellee,[1] the Pennsylvania Workmen's Compensation Appeal Board ruled that the LHWCA did not pre-empt state compensation laws. The Commonwealth Court affirmed, and the Supreme Court of Pennsylvania denied petitions for allowance of appeal. We noted probable jurisdiction, 444 U. S. 1011 (1980), and affirm.

II

The evolution of the law of compensation for workers injured in maritime precincts is familiar. In 1917, *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, declared that States were constitutionally barred from applying their compensation systems to maritime injuries, and thus interfering with the overriding federal policy of a uniform maritime law. Subsequent decisions invalidated congressional efforts to delegate compensatory authority to the States within this national maritime sphere. *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149 (1920); *Washington* v. *W. C. Dawson & Co.,* 264 U. S. 219 (1924). At the same time, the Court began to narrow the *Jensen* doctrine by identifying circumstances in which the subject of litigation might be maritime yet "local in character," and thus amenable to relief under state law. *Western Fuel Co.* v. *Garcia,* 257 U. S. 233 (1921); *Grant Smith-Porter Ship Co.* v. *Rohde,* 257 U. S. 469 (1922). And, in 1927, Congress was finally successful in extending a measure of protection to marine workers excluded by *Jensen* by enacting a federal compensation law—the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 901 *et seq.* That statute provided, in pertinent part, that "[c]ompensation shall be payable [for an injury] . . . occurring upon the navigable waters of the United States . . . if recovery . . .

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[1] Initially referees heard each of the claims. Four referees granted compensation, rejecting appellant's pre-emption argument. The referee in appellee Fields' case determined that a compensable injury had been inflicted, but agreed with appellant's jurisdictional contention, and dismissed the case.

through workmen's compensation proceedings may not validly be provided by State law." 44 Stat. 1426.

Federal and state law were thus linked together to provide theoretically complete coverage for maritime laborers. But the boundary at which state remedies gave way to federal remedies was far from obvious in individual cases. As a result, the injured worker was compelled to make a jurisdictional guess before filing a claim; the price of error was unnecessary expense and possible foreclosure from the proper forum by statute of limitations. *Davis* v. *Department of Labor*, 317 U. S. 249, 254 (1942). After a decade and a half during which there had not been formulated "any guiding, definite rule to determine the extent of state power in advance of litigation," *id.*, at 253, the Court determined that the border between federal and state compensation schemes was less a line than a "twilight zone," in which "employees must have their rights determined case by case . . . ," *id.*, at 256. Within this zone, *Davis* effectively established a regime of concurrent jurisdiction.

Calbeck v. *Travelers Insurance Co.*, 370 U. S. 114 (1962), further overlapped federal and state-law coverage for marine workers. *Calbeck* held that the LHWCA comprehended "all injuries sustained by employees on navigable waters," *id.*, at 124, without regard to whether the locus of an event was "maritime but local," and hence within the scope of state compensation provisions. We interpreted the statutory phrase "if recovery . . . may not validly be provided by State law" to mean that the LHWCA would

> "reac[h] all those cases of injury to employees on navigable waters as to which *Jensen, Knickerbocker* and *Dawson* had rendered questionable the availability of a state compensation remedy . . . [,] whether or not a particular one was also within the constitutional reach of a state workmen's compensation law." *Id.*, at 126–127.

Yet having extended the LHWCA into the "maritime but local" zone, *Calbeck* did not overturn *Davis* by treating the

federal statute as exclusive. To the contrary, *Calbeck* relied upon *Davis,* and discussed at length its proposition that an injury within the "maritime but local" sphere might be compensated under either state or federal law. 370 U. S., at 128–129. So, too, *Calbeck*'s explanation of *Avondale Marine Ways, Inc.* v. *Henderson,* 346 U. S. 366 (1953), indicated that although an injury might be compensable under the Longshoremen's Act, "there is little doubt that a state compensation act could validly have been applied to it." 370 U. S., at 129. Even more significantly, *Calbeck*'s ruling that one of the employees in a consolidated case should not be held to have elected to pursue state remedies was necessarily premised upon the view that state relief was concurrently available. *Id.,* at 131–132; see also *Nacirema Co.* v. *Johnson,* 396 U. S. 212, 220–221 (1969); *Nations* v. *Morris,* 483 F. 2d 577 (CA5 1973) (Brown, C. J.).

Before 1972, then, marine-related injuries fell within one of three jurisdictional spheres as they moved landward. At the furthest extreme, *Jensen* commanded that nonlocal maritime injuries fall under the LHWCA. "Maritime but local" injuries "upon the navigable waters of the United States," 33 U. S. C. § 903 (a), could be compensated under the LHWCA or under state law. And injuries suffered beyond navigable waters—albeit within the range of federal admiralty jurisdiction—were remediable only under state law. *Nacirema Co.* v. *Johnson, supra.*

III

In 1972, Congress superseded *Nacirema Co.* v. *Johnson* by extending the LHWCA landward beyond the shoreline of the navigable waters of the United States. Pub. L. 92–576, 86 Stat. 1251, amending 33 U. S. C. § 903 (a). In so doing, the Longshoremen's Act became, for the first time, a source of relief for injuries which had always been viewed as the province of state compensation law.

Absent any contradicting signal from Congress, the principles of *Davis* v. *Department of Labor, supra,* and of *Calbeck*

v. *Travelers Insurance Co., supra,* direct the conclusion that the 1972 extension of federal jurisdiction supplements, rather than supplants, state compensation law. Given that the pre-1972 Longshoremen's Act ran concurrently with state remedies in the "maritime but local" zone, it follows that the post-1972 expansion of the Act landward would be concurrent as well. For state regulation of worker injuries is even more clearly appropriate ashore than it is upon navigable waters. Compare *State Industrial Comm'n* v. *Nordenholt Corp.,* 259 U. S. 263 (1922), with *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205 (1917). Furthermore, the "jurisdictional dilemma," *Davis, supra,* at 255, that results when employees must claim relief under one of two exclusive compensation schemes is as acute when the jurisdictional boundary between schemes is fixed upon land, as it is when the line is drawn between two maritime spheres. To read the 1972 amendments as compelling laborers to seek relief under two mutually exclusive remedial systems would lead to the prejudicial consequences which we described in *Davis* as

> "defeat[ing] the purpose of the federal act, which seeks to give 'to these hardworking men, engaged in a somewhat hazardous employment, the justice involved in the modern principle of compensation,' and the state Acts . . . which ai[m] at 'sure and certain relief for workmen.'" 317 U. S., at 254.

See *Calbeck, supra,* at 126.

The language of the 1972 amendments cannot fairly be understood as pre-empting state workers' remedies from the field of the LHWCA, and thereby resurrecting the jurisdictional monstrosity that existed before the clarifying opinions in *Davis* and *Calbeck.* Appellant focuses our attention upon the deletion from amended § 903 (a) of the phrase: "[i]f recovery . . . through workmen's compensation proceedings may not validly be provided by State law." But, if anything, that change reinforces our previous interpretation of that sec-

tion as contemplating concurrent jurisdiction. *Calbeck, supra,* at 126. For it was that reference to state law which provided the strongest (although ultimately unsuccessful) argument for reading the pre-1972 § 903 (a) as an exclusive jurisdictional provision. *Calbeck,* 370 U. S., at 132 (STEWART, J., dissenting). Whether Congress accepted *Calbeck*'s view that the state-law clause was *consonant* with concurrent jurisdiction, or the dissenters' construction of the clause as *inconsistent* with concurrent jurisdiction, the deletion of that language in 1972—if it indicates anything—may logically only imply acquiescence in *Calbeck*'s conclusion that the LHWCA operates within the same ambit as state workers' remedies.[2] It would be a *tour de force* of statutory misinterpretation to treat the *removal* of phrasing that arguably establishes exclusive jurisdiction as manifesting the intent to command such exclusivity.

Nor does the legislative history suggest a congressional decision to exclude state laws from the terrain newly occupied by the post-1972 Longshoremen's Act. Appellant can draw little support from general expressions of intent to alleviate unjust disparities in recovery conditioned upon the location of marine laborers at the time of an accident; as Part IV, *infra,* demonstrates, concurrency of jurisdiction in no way undercuts that commendable policy. And appellant is not much assisted by fixing upon the sentence in the bill Reports that declares:

> "It is apparent that if the Federal benefit structure embodied in Committee bill is enacted, there would be a

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[2] If Congress joined in *Calbeck*'s understanding that the phrase underscored the LHWCA's application where state-law compensability had been drawn into question by *Jensen,* then the striking of the language may be explained on the ground of its superfluity once Congress had pushed the federal Act landward beyond the *Jensen* line. If the Court took the dissenters' position that the state-law clause imposed jurisdictional exclusivity, then its deletion indicates repeal of any such exclusivity. Finally, Congress may simply have endeavored to reaffirm the correctness of the *Calbeck* result by removing possibly contradictory language.

> substantial disparity in benefits payable to a permanently disabled longshoreman, depending on which side of the water's edge the accident occurred, *if State laws are permitted to continue to apply to injuries occurring on land.*" S. Rep. No. 92–1125, p. 13 (1972); H. R. Rep. No. 92–1441, p. 10 (1972) (emphasis added).

That statement likely means only that state laws should not be permitted to apply *exclusively* to injuries occurring upon land; the "substantial disparity in benefits" that troubled Congress is eliminated once federal law provides a concurrent or supplementary route to compensation. And, in any event, as Professors Gilmore and Black have noted, "the statement does not appear to be entitled to much weight," since the "part of the Committee Report which is devoted to the shoreward extension of LH[W]CA coverage does not so much as mention the pre-1972 case law on 'maritime but local' and the 'twilight zone.' . . ." G. Gilmore & C. Black, The Law of Admiralty 425 (2d ed. 1975) (hereafter Gilmore & Black).[3] In particular, there is no intimation of intent to overrule *Davis* and *Calbeck*—a significant omission in light of the care which the Reports elsewhere take in identifying the Supreme Court cases to be overturned by the abolition of longshoremen's actions for unseaworthiness. See S. Rep. No. 92–1125, *supra*, at 8–12; H. R. Rep. No. 92–1441, *supra*, at 4–8; Gilmore & Black 425.

We therefore find no sign in the 1972 amendments to the LHWCA that Congress wished to alter the accepted understanding that federal jurisdiction would coexist with state compensation laws in that field in which the latter may constitutionally operate under the *Jensen* doctrine.[4]

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[3] "It may be that the writer of the Report mistakenly assumed that the LH[W]CA had always provided the exclusive compensation remedy for injuries which occurred on navigable waters and consequently assumed that it would also be exclusive with respect to the land injuries newly covered by the amendments." Gilmore & Black 425.

[4] Appellant also argues that a mandate for exclusive jurisdiction may be

IV

Appellant vigorously contends, nevertheless, that jurisdictional exclusivity is—in "fact" or in "law"—implied in the LHWCA. Pointing to declarations of congressional policy to eliminate disparities in compensation to marine workers depending on whether they were injured on land or over water, S. Rep. No. 92–1125, *supra*, at 12–13; H. R. Rep. No. 92–1441, *supra*, at 10–11, appellant urges that concurrent remedial jurisdiction on land would defeat the uniformity principle underlying the statute.

As the Reports make clear, the disparities which Congress had in view in amending the LHWCA lay primarily in the paucity of relief under *state* compensation laws.[5] The thrust of the amendments was to "upgrade the benefits." S. Rep. No. 92–1125, *supra*, at 1; see *Northeast Marine Terminal Co.* v. *Caputo*, 432 U. S. 249, 261–262 (1977). Concurrent jurisdiction for state and federal compensation laws is in no way inconsistent with this policy of raising awards to a federal

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discerned in 33 U. S. C. § 905 (a), which provides in pertinent part that "[t]he liability of an employer . . . shall be exclusive and in place of all other liability of such employer to the employee. . . ." Since that provision predates the 1972 amendments, however, appellant's interpretation would also discredit our previous decisions in *Davis* v. *Department of Labor*, 317 U. S. 249 (1942), and *Calbeck* v. *Travelers Insurance Co.*, 370 U. S. 114 (1962). In fact, *Calbeck* upheld an award under the LHWCA against which had been credited payments made under the aegis of a state compensation statute; we noted that 33 U. S. C. § 905 was "not involved in this case," 370 U. S., at 132, n. 16. Thus, we did not construe § 905 (a) to exclude remedies offered by other jurisdictions. See Gilmore & Black 432–433, and n. 335d; cf. *Industrial Comm'n* v. *McCartin*, 330 U. S. 622 (1947). The 1972 amendments signify no rejection of this interpretation.

[5] "To make matters worse, most State Workmen's Compensation laws provide benefits which are inadequate; even the better State laws generally come nowhere close to meeting the National Commission on State Workmen's Compensation Laws recommended standard of a maximum limit on benefits. . . ." S. Rep. No. 92–1125, p. 12 (1972); H. R. Rep. No. 92–1441, p. 10 (1972).

minimum. When laborers file claims under the LHWCA, they are compensated under federal standards. And workers who commence their actions under state law will generally be able to make up the difference between state and federal benefit levels by seeking relief under the Longshoremen's Act, if the latter applies.[6]

To be sure, if state remedial schemes are more generous than federal law, concurrent jurisdiction could result in more favorable awards for workers' injuries than under an exclusively federal compensation system.[7] But we find no evidence that Congress was concerned about a disparity between adequate federal benefits and *superior* state benefits. Rather, it seems that the *quid pro quo* to the employers for the landward extension of the LHWCA by the 1972 amendments was simply abolition of the longshoremen's unseaworthiness remedy. See S. Rep. No. 92–1125, *supra,* at 4–5; H. R. Rep. No. 92–1441, *supra,* at 1; *Northeast Marine Terminal Co.* v. *Caputo, supra,* at 261–262. Indeed, it is noteworthy that in their discussion of advantages to employers under the 1972 amendments, the bill Reports dwell upon the rejection of the

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[6] Most often, state workmen's compensation laws will not be treated as making awards thereunder final or conclusive. See *Calbeck* v. *Travelers Insurance Co., supra,* at 131–132; *Industrial Comm'n* v. *McCartin, supra;* Gilmore & Black 431–433; 4 A. Larson, Law of Workmen's Compensation §§ 85.20, 89.53 (a) and (b) (1979); Larson, The Conflict of Laws Problem Between the Longshoremen's Act and State Workmen's Compensation Acts, 45 S. Cal. L. Rev. 699, 729–730 (1972). Admittedly, if a particular state compensation law provision does indisputably declare its awards final, a conflict with the LHWCA may possibly arise where a claimant seeks inferior state benefits in the first instance. But the consequences to the claimant of this error would be less drastic than those of a mistake under the rule appellant contemplates—under which a misstep could result in no benefits. At any rate, although the question is not directly before us, we observe that if federal preclusion ever need be implied to cope with this remote contingency, a less disruptive approach would be to pre-empt the state compensation exclusivity clause, rather than to pre-empt the entire state compensation statute as appellant suggests.

[7] But this situation will be exceedingly rare. See 4 A. Larson, Law of Workmen's Compensation, *supra,* § 89.27, at 16–180.

unseaworthiness action, and do not mention pre-emption of state remedies. See S. Rep. No. 92–1125, *supra*, at 4–5; H. R. Rep. No. 92–1441, *supra*, at 1.

Finally, we are not persuaded that the bare fact that the federal and state compensation systems are different gives rise to a conflict that, from the employer's standpoint, necessitates exclusivity for each compensation system within a separate sphere. Mandating exclusive jurisdiction will not relieve employers of their distinct obligations under state and federal compensation law. The line that circumscribes the jurisdictional compass of the LHWCA—a compound of "status" and "situs"—is no less vague than its counterpart in the pre-"twilight zone" *Jensen* era. See generally *P. C. Pfeiffer Co.* v. *Ford*, 444 U. S. 69 (1980); *Northeast Marine Terminal Co.* v. *Caputo, supra;* Gilmore & Black 424, 428–430; 4 A. Larson, Law of Workmen's Compensation § 89.70, p. 16–283 (1979). Thus, even were the LHWCA exclusive within its field, many employers would be compelled to abide by state imposed responsibilities lest a claim fall beyond the scope of the LHWCA.[8] Our observation about exclusive jurisdiction in *Davis* v. *Department of Labor* is apt whether jurisdictional barriers are erected on land or at the water's edge: "The horns of the jurisdictional dilemma press as sharply on employers as on employees." 317 U. S., at 255.

Of one thing we may be certain. The exclusivity rule which appellant urges upon us would thrust employees into the same jurisdictional peril from which they were rescued by *Davis* and *Calbeck* v. *Travelers Insurance Co.* See Gilmore & Black 425.[9] The legislative policy animating the LHWCA's land-

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[8] See also Larson, 45 S. Cal. L. Rev., *supra*, at 736–737.

Of course, there is no danger of double recovery under concurrent jurisdiction since employers' awards under one compensation scheme would be credited against any recovery under the second scheme. See, *e. g., Calbeck* v. *Travelers Insurance Co., supra*, at 131.

[9] "Indeed a theory of concurrent jurisdiction . . . seems to be the only sensible way of dealing with state and federal statutes which meet at some vaguely defined line." Gilmore & Black 425.

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ward shift was remedial; the amendments framers acted out of solicitude for the workers. See *P. C. Pfeiffer Co., supra*, at 74–75; *Northeast Marine Terminal Co.*, 432 U. S., at 268. To adopt appellant's position, then, would blunt the thrust of the 1972 amendments, and frustrate Congress' intent to aid injured maritime laborers. We decline to do so in the name of "uniformity."

Accordingly, we affirm.

It is so ordered.

UNITED STATES v. PAYNER

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 78-1729. Argued February 20, 1980—Decided June 23, 1980

At respondent's nonjury trial for falsifying a federal income tax return by denying that he maintained a foreign bank account, respondent moved to suppress a loan guarantee agreement in which he pledged the funds in the bank account as security. The District Court found respondent guilty on the basis of all the evidence, but then (1) found that the Government had discovered the guarantee agreement as the result of a flagrantly illegal search of a bank officer's briefcase, (2) suppressed all the Government's evidence except for respondent's tax return and related testimony, and (3) set aside the conviction for failure to demonstrate knowing falsification. The court held, *inter alia*, that, although the illegal search did not violate respondent's Fourth Amendment rights, the inherent supervisory power of the federal courts required it to exclude evidence tainted by the illegal search. The Court of Appeals affirmed.

Held:

1. Respondent lacks standing under the Fourth Amendment to suppress the documents illegally seized from the bank officer. A defendant's Fourth Amendment rights are violated only when the challenged conduct invaded *his* legitimate expectation of privacy rather than that of a third party, and respondent possessed no privacy interest in the documents seized in this case. Cf. *Rakas* v. *Illinois*, 439 U. S. 128; *United States* v. *Miller*, 425 U. S. 435. Pp. 731–733.

2. The supervisory power of the federal courts does not authorize a court to suppress otherwise admissible evidence on the ground that it was seized unlawfully from a third party not before the court. Under the Fourth Amendment, the interest in deterring illegal searches does not justify the exclusion of tainted evidence at the instance of a party who was not the victim of the challenged practices. And the values assigned to the competing interests of deterring illegal searches and of furnishing the trier of fact with all relevant evidence do not change because a court has elected to analyze the question under the supervisory power instead of the Fourth Amendment. Such power does not extend so far as to confer on the judiciary discretionary power to dis-

regard the considered limitations of the law it is charged with enforcing. Pp. 733–737.

590 F. 2d 206, reversed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, REHNQUIST, and STEVENS, JJ., joined. BURGER, C. J., filed a concurring opinion, *post*, p. 737. MARSHALL, J., filed a dissenting opinion, in which BRENNAN and BLACKMUN, JJ., joined, *post*, p. 738.

Solicitor General McCree argued the cause for the United States. With him on the brief were *Assistant Attorney General Ferguson, Robert E. Lindsay,* and *James A. Bruton.*

Bennet Kleinman argued the cause for respondent. With him on the brief were *Bernard J. Stuplinski* and *Michael H. Diamant.*

MR. JUSTICE POWELL delivered the opinion of the Court.

The question is whether the District Court properly suppressed the fruits of an unlawful search that did not invade the respondent's Fourth Amendment rights.

I

Respondent Jack Payner was indicted in September 1976 on a charge of falsifying his 1972 federal income tax return in violation of 18 U. S. C. § 1001.[1] The indictment alleged that respondent denied maintaining a foreign bank account at a time when he knew that he had such an account at the Castle Bank and Trust Company of Nassau, Bahama Islands. The Government's case rested heavily on a loan guarantee agreement dated April 28, 1972, in which respondent pledged

[1] Title 18 U. S. C. § 1001 provides in relevant part:

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully . . . makes any false, fictitious or fraudulent statements or representations, . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both."

the funds in his Castle Bank account as security for a $100,000 loan.

Respondent waived his right to jury trial and moved to suppress the guarantee agreement. With the consent of the parties, the United States District Court for the Northern District of Ohio took evidence on the motion at a hearing consolidated with the trial on the merits. The court found respondent guilty as charged on the basis of all the evidence. The court also found, however, that the Government discovered the guarantee agreement by exploiting a flagrantly illegal search that occurred on January 15, 1973. The court therefore suppressed "all evidence introduced in the case by the Government with the exception of Jack Payner's 1972 tax return . . . and the related testimony." 434 F. Supp. 113, 136 (1977). As the tax return alone was insufficient to demonstrate knowing falsification, the District Court set aside respondent's conviction.[2]

The events leading up to the 1973 search are not in dispute. In 1965, the Internal Revenue Service launched an investigation into the financial activities of American citizens in the Bahamas. The project, known as "Operation Trade Winds," was headquartered in Jacksonville, Fla. Suspicion focused on the Castle Bank in 1972, when investigators learned that a suspected narcotics trafficker had an account there. Special Agent Richard Jaffe of the Jacksonville office asked Norman Casper, a private investigator and occasional informant, to learn what he could about the Castle Bank and its depositors. To that end, Casper cultivated his friendship with Castle

[2] The unusual sequence of rulings was a byproduct of the consolidated hearing conducted by the District Court. The court initially failed to enter judgment on the merits. At the close of the evidence, it simply granted respondent's motion to suppress. After the Court of Appeals for the Sixth Circuit dismissed the Government's appeal for want of jurisdiction, the District Court vacated the order granting the motion to suppress and entered a verdict of guilty. The court then reinstated its suppression order and set aside the verdict. Respondent does not challenge these procedures.

Bank vice-president Michael Wolstencroft. Casper introduced Wolstencroft to Sybol Kennedy, a private investigator and former employee. When Casper discovered that the banker intended to spend a few days in Miami in January 1973, he devised a scheme to gain access to the bank records he knew Wolstencroft would be carrying in his briefcase. Agent Jaffe approved the basic outline of the plan.

Wolstencroft arrived in Miami on January 15 and went directly to Kennedy's apartment. At about 7:30 p. m., the two left for dinner at a Key Biscayne restaurant. Shortly thereafter, Casper entered the apartment using a key supplied by Kennedy. He removed the briefcase and delivered it to Jaffe. While the agent supervised the copying of approximately 400 documents taken from the briefcase, a "lookout" observed Kennedy and Wolstencroft at dinner. The observer notified Casper when the pair left the restaurant, and the briefcase was replaced. The documents photographed that evening included papers evidencing a close working relationship between the Castle Bank and the Bank of Perrine, Fla. Subpoenas issued to the Bank of Perrine ultimately uncovered the loan guarantee agreement at issue in this case.

The District Court found that the United States, acting through Jaffe, "knowingly and willfully participated in the unlawful seizure of Michael Wolstencroft's briefcase. . . ." *Id.*, at 120. According to that court, "the Government affirmatively counsels its agents that the Fourth Amendment standing limitation permits them to purposefully conduct an unconstitutional search and seizure of one individual in order to obtain evidence against third parties. . . ." *Id.*, at 132–133. The District Court also found that the documents seized from Wolstencroft provided the leads that ultimately led to the discovery of the critical loan guarantee agreement. *Id.*, at 123.[3] Although the search did not impinge upon the

[3] The United States argued in the District Court and the Court of Appeals that the guarantee agreement was discovered through an independent investigation untainted by the briefcase search. The Government also

respondent's Fourth Amendment rights, the District Court believed that the Due Process Clause of the Fifth Amendment and the inherent supervisory power of the federal courts required it to exclude evidence tainted by the Government's "knowing and purposeful *bad faith hostility* to any person's fundamental constitutional rights." *Id.*, at 129; see *id.*, at 133, 134–135.

The Court of Appeals for the Sixth Circuit affirmed in a brief order endorsing the District Court's use of its supervisory power. 590 F. 2d 206 (1979) (*per curiam*). The Court of Appeals did not decide the due process question. We granted certiorari, 444 U. S. 822 (1979), and we now reverse.

II

This Court discussed the doctrine of "standing to invoke the [Fourth Amendment] exclusionary rule" in some detail last Term. *Rakas* v. *Illinois*, 439 U. S. 128, 138 (1978). We reaffirmed the established rule that a court may not exclude evidence under the Fourth Amendment unless it finds that an unlawful search or seizure violated the defendant's own constitutional rights. *Id.*, at 133–140. See, *e. g.*, *Brown* v. *United States*, 411 U. S. 223, 229–230 (1973); *Alderman* v. *United States*, 394 U. S. 165, 171–172 (1969); *Simmons* v. *United States*, 390 U. S. 377, 389 (1968). And the defendant's Fourth Amendment rights are violated only when the challenged conduct invaded *his* legitimate expectation of privacy rather than that of a third party. *Rakas* v. *Illinois*, 439 U. S., at 143; *id.*, at 149–152 (POWELL, J., concurring); *Combs* v. *United States*, 408 U. S. 224, 227 (1972); *Mancusi* v. *DeForte*, 392 U. S. 364, 368 (1968).

The foregoing authorities establish, as the District Court recognized, that respondent lacks standing under the Fourth

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denied that its agents willfully encouraged Casper's illegal behavior. For purposes of this opinion, we need not question the District Court's contrary findings on either point.

Amendment to suppress the documents illegally seized from Wolstencroft. 434 F. Supp., at 126. The Court of Appeals did not disturb the District Court's conclusion that "Jack Payner possessed no privacy interest in the Castle Bank documents that were seized from Wolstencroft." *Ibid.;* see 590 F. 2d, at 207. Nor do we. *United States* v. *Miller,* 425 U. S. 435 (1976), established that a depositor has no expectation of privacy and thus no "protectable Fourth Amendment interest" in copies of checks and deposit slips retained by his bank. *Id.,* at 437; see *id.,* at 442. Nothing in the record supports a contrary conclusion in this case.[4]

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[4] We are not persuaded by respondent's suggestion that the Bahamian law of bank secrecy creates an expectation of privacy not present in *United States* v. *Miller,* 425 U. S. 435 (1976). At the outset, it is not clear that secret information regarding this respondent's account played any role in the investigation that led to the discovery of the critical loan guarantee agreement. See *supra,* at 730. Even if the causal link were established, however, respondent's claim lacks merit. He cites a provision, 1909 Bah. Acts, ch. 4, that is no longer in effect. Bank secrecy is now safeguarded by § 19 of the Banks Act, Bah. Islands Rev. Laws, ch. 96 (1965), as added, 1965 Bah. Acts, No. 65, which provides in relevant part:

"(1) Except for the purpose of the performance of his duties or the exercise of his functions under this Act or when lawfully required to do so by any court of competent jurisdiction within the Colony or under the provisions of any law, no person shall disclose any information relating to the affairs of . . . the customer of a bank which he has acquired in the performance of his duties or the exercise of his functions under this Act."

See also the Banks and Trust Companies Regulation Act, 1965 Bah. Acts, No. 64, § 10, as amended, 1968 Bah. Acts, No. 34, 1969 Bah. Acts, No. 20, 1971 Bah. Acts, No. 15. The statute is hardly a blanket guarantee of privacy. Its application is limited; it is hedged with exceptions; and we have been directed to no authority construing its terms. Moreover, American depositors know that their own country requires them to report relationships with foreign financial institutions. 31 U. S. C. § 1121; 31 CFR § 103.24 (1979). See generally *California Bankers Assn.* v. *Shultz,* 416 U. S. 21, 59–63, 71–76 (1974). We conclude that respondent lacked a reasonable expectation of privacy in the Castle Bank records that documented his account.

The District Court and the Court of Appeals believed, however, that a federal court should use its supervisory power to suppress evidence tainted by gross illegalities that did not infringe the defendant's constitutional rights. The United States contends that this approach—as applied in this case—upsets the careful balance of interests embodied in the Fourth Amendment decisions of this Court. In the Government's view, such an extension of the supervisory power would enable federal courts to exercise a standardless discretion in their application of the exclusionary rule to enforce the Fourth Amendment. We agree with the Government.

III

We certainly can understand the District Court's commendable desire to deter deliberate intrusions into the privacy of persons who are unlikely to become defendants in a criminal prosecution. See 434 F. Supp., at 135. No court should condone the unconstitutional and possibly criminal behavior of those who planned and executed this "briefcase caper." [5]

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[5] "The security of persons and property remains a fundamental value which law enforcement officers must respect. Nor should those who flout the rules escape unscathed." *Alderman* v. *United States*, 394 U. S. 165, 175 (1969). We note that in 1976 Congress investigated the improprieties revealed in this record. See Oversight Hearings into the Operations of the IRS before a Subcommittee of the House Committee on Government Operations (Operation Tradewinds, Project Haven, and Narcotics Traffickers Tax Program), 94th Cong., 1st Sess. (1975). As a result, the Commissioner of Internal Revenue "called off" Operation Trade Winds. Tr. of Oral Arg. 35. The Commissioner also adopted guidelines that require agents to instruct informants on the requirements of the law and to report known illegalities to a supervisory officer, who is in turn directed to notify appropriate state authorities. IR Manual §§ 9373.3 (3), 9373.4 (Manual Transmittal 9–21, Dec. 27, 1977). Although these measures appear on their face to be less positive than one might expect from an agency charged with upholding the law, they do indicate disapproval of the practices found to have been implemented in this case. We cannot assume that similar lawless conduct, if brought to the attention of

Indeed, the decisions of this Court are replete with denunciations of willfully lawless activities undertaken in the name of law enforcement. *E. g., Jackson* v. *Denno*, 378 U. S. 368, 386 (1964); see *Olmstead* v. *United States*, 277 U. S. 438, 485 (1928) (Brandeis, J., dissenting). But our cases also show that these unexceptional principles do not command the exclusion of evidence in every case of illegality. Instead, they must be weighed against the considerable harm that would flow from indiscriminate application of an exclusionary rule.

Thus, the exclusionary rule "has been restricted to those areas where its remedial objectives are most efficaciously served." *United States* v. *Calandra*, 414 U. S. 338, 348 (1974). The Court has acknowledged that the suppression of probative but tainted evidence exacts a costly toll upon the ability of courts to ascertain the truth in a criminal case. *E. g., Rakas* v. *Illinois*, 439 U. S., at 137–138; *United States* v. *Ceccolini*, 435 U. S. 268, 275–279 (1978); *Stone* v. *Powell*, 428 U. S. 465, 489–491 (1976); see *Michigan* v. *Tucker*, 417 U. S. 433, 450–451 (1974).[6] Our cases have consistently recognized that unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably the truth-finding functions of judge and jury. *E. g., Stone* v. *Powell, supra*, at 485–489; *United States* v. *Calandra, supra*, at 348. After all, it is the defendant, and not the constable, who stands trial.

The same societal interests are at risk when a criminal defendant invokes the supervisory power to suppress evidence seized in violation of a third party's constitutional rights. The supervisory power is applied with some caution even

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responsible officials, would not be dealt with appropriately. To require in addition the suppression of highly probative evidence in a trial against a third party would penalize society unnecessarily.

[6] See also *Kaufman* v. *United States*, 394 U. S. 217, 237–238 (1969) (Black, J., dissenting); Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665, 736–746, 755–756 (1970).

when the defendant asserts a violation of his own rights.[7] In *United States* v. *Caceres*, 440 U. S. 741, 754–757 (1979), we refused to exclude all evidence tainted by violations of an executive department's rules. And in *Elkins* v. *United States*, 364 U. S. 206, 216 (1960), the Court called for a restrained application of the supervisory power.

> "[A]ny apparent limitation upon the process of discovering truth in a federal trial ought to be imposed only upon the basis of considerations which outweigh the general need for untrammeled disclosure of competent and relevant evidence in a court of justice." *Ibid.*

See also *Nardone* v. *United States*, 308 U. S. 338, 340 (1939).

We conclude that the supervisory power does not authorize a federal court to suppress otherwise admissible evidence on the ground that it was seized unlawfully from a third party not before the court. Our Fourth Amendment decisions have established beyond any doubt that the interest in deterring illegal searches does not justify the exclusion of tainted evidence at the instance of a party who was not the victim of the challenged practices. *Rakas* v. *Illinois*, *supra*, at 137; *Alderman* v. *United States*, 394 U. S., at 174–175.[8]

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[7] Federal courts may use their supervisory power in some circumstances to exclude evidence taken from the *defendant* by "willful disobedience of law." *McNabb* v. *United States*, 318 U. S. 332, 345 (1943); see *Elkins* v. *United States*, 364 U. S. 206, 223 (1960); *Rea* v. *United States*, 350 U. S. 214, 216–217 (1956); cf. *Hampton* v. *United States*, 425 U. S. 484, 495 (1976) (POWELL, J., concurring in judgment). This Court has never held, however, that the supervisory power authorizes suppression of evidence obtained from third parties in violation of Constitution, statute, or rule. The supervisory power merely permits federal courts to supervise "the administration of criminal justice" among the parties before the bar. *McNabb* v. *United States*, *supra*, at 340.

[8] "The deterrent values of preventing the incrimination of those whose rights the police have violated have been considered sufficient to justify the suppression of probative evidence even though the case against the defendant is weakened or destroyed. We adhere to that judgment. But

The values assigned to the competing interests do not change because a court has elected to analyze the question under the supervisory power instead of the Fourth Amendment. In either case, the need to deter the underlying conduct and the detrimental impact of excluding the evidence remain precisely the same.

The District Court erred, therefore, when it concluded that

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we are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth." *Alderman* v. *United States, supra,* at 174–175. See also *Stone* v. *Powell,* 428 U. S. 465, 488–489 (1976); *United States* v. *Calandra,* 414 U. S. 338, 348 (1974).

The dissent, *post,* at 746, urges that the balance of interests under the supervisory power differs from that considered in *Alderman* and like cases, because the supervisory power focuses upon the "need to protect the integrity of the federal courts." Although the District Court in this case relied upon a deterrent rationale, we agree that the supervisory power serves the "twofold" purpose of deterring illegality and protecting judicial integrity. See *post,* at 744. As the dissent recognizes, however, the Fourth Amendment exclusionary rule serves precisely the same purposes. *Ibid.,* citing, *inter alia, Dunaway* v. *New York,* 442 U. S. 200, 218 (1979), and *Mapp* v. *Ohio,* 367 U. S. 643, 659–660 (1961). Thus, the Fourth Amendment exclusionary rule, like the supervisory power, is applied in part "to protect the integrity of the *court,* rather than to vindicate the constitutional rights of the defendant. . . ." *Post,* at 747; see generally *Stone* v. *Powell, supra,* at 486; *United States* v. *Calandra, supra,* at 348.

In this case, where the illegal conduct did not violate the respondent's rights, the interest in preserving judicial integrity and in deterring such conduct is outweighed by the societal interest in presenting probative evidence to the trier to fact. See the first paragraph, *supra;* see also, *e. g., Stone* v. *Powell, supra,* at 485–486. None of the cases cited by the dissent, *post,* at 744–745, supports a contrary view, since none of those cases involved criminal defendants who were not themselves the victims of the challenged practices. Thus, our decision today does not limit the traditional scope of the supervisory power in any way; nor does it render that power "superfluous." *Post,* at 748. We merely reject its use as a substitute for established Fourth Amendment doctrine.

"society's interest in deterring [bad faith] conduct by exclusion outweigh[s] society's interest in furnishing the trier of fact with all relevant evidence." 434 F. Supp., at 135. This reasoning, which the Court of Appeals affirmed, amounts to a substitution of individual judgment for the controlling decisions of this Court.[9] Were we to accept this use of the supervisory power, we would confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing. We hold that the supervisory power does not extend so far.

The judgment of the Court of Appeals is

Reversed.

MR. CHIEF JUSTICE BURGER, concurring.

I join the Court's opinion because Payner—whose guilt is not in doubt—cannot take advantage of the Government's violation of the constitutional rights of Wolstencroft, for he is not a party to this case. The Court's opinion makes clear the reason for that sound rule.

Orderly government under our system of separate powers calls for internal self-restraint and discipline in each Branch; this Court has no general supervisory authority over operations of the Executive Branch, as it has with respect to the federal courts. I agree fully with the Court that the exclusionary rule is inapplicable to a case of this kind, but the Court's holding should not be read as condoning the conduct

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[9] The same difficulty attends respondent's claim to the protections of the Due Process Clause of the Fifth Amendment. The Court of Appeals expressly declined to consider the Due Process Clause. But even if we assume that the unlawful briefcase search was so outrageous as to offend fundamental "'canons of decency and fairness,'" *Rochin* v. *California*, 342 U. S. 165, 169 (1952), quoting *Malinski* v. *New York*, 324 U. S. 401, 417 (1945) (opinion of Frankfurter, J.), the fact remains that "[t]he limitations of the Due Process Clause . . . come into play only when the Government activity in question violates some protected right of the *defendant*," *Hampton* v. *United States*, *supra*, at 490 (plurality opinion).

of the IRS "private investigators" disclosed by this record, or as approval of their evidence-gathering methods.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN and MR. JUSTICE BLACKMUN join, dissenting.

The Court today holds that a federal court is unable to exercise its supervisory powers to prevent the use of evidence in a criminal prosecution in that court, even though that evidence was obtained through intentional illegal and unconstitutional conduct by agents of the United States, because the defendant does not satisfy the standing requirement of the Fourth Amendment. That holding effectively turns the standing rules created by this Court for assertions of Fourth Amendment violations into a sword to be used by the Government to permit it deliberately to invade one person's Fourth Amendment rights in order to obtain evidence against another person. Unlike the Court, I do not believe that the federal courts are unable to protect the integrity of the judicial system from such gross Government misconduct.

I

The facts as found by the District Court need to be more fully stated in order to establish the level of purposeful misconduct to which agents of the United States have sunk in this case. Operation Trade Winds was initiated by the Internal Revenue Service (IRS) in 1965 to gather information about the financial activities of American citizens in the Bahamas. The investigation was supervised by Special Agent Richard Jaffe in the Jacksonville, Fla., office. It was not until June 1972 that the investigation focused on the Castle Bank and Trust Company of the Bahamas. In late October 1972 Jaffe asked one of his informants, Norman Casper, to obtain the names and addresses of the individuals holding accounts with the Castle Bank. Casper set to work soon thereafter. He was already an acquaintance of Michael Wol-

stencroft, vice-president and trust officer of the Castle Bank. Casper knew that Wolstencroft frequently visited the United States carrying a briefcase with documents from the Castle Bank. Casper therefore introduced Wolstencroft to Sybil Kennedy, a private detective who worked for Casper. In early January 1973, Casper learned that Wolstencroft planned a business trip to the United States on January 15, 1973, and that he would have Castle Bank records with him on that trip. Plans for the "briefcase caper," as Casper called it, began in earnest.

As found by the District Court, Casper discussed the details of the plan with Jaffe on several occasions during the week before Wolstencroft's trip.[1] Casper told Jaffe that he could get the needed documents from Wolstencroft, but that Jaffe would have to supply photographic services. On January 11, Casper specifically informed Jaffe that he planned to enter an apartment and take Wolstencroft's briefcase. Jaffe then stated that he would have to clear the operation with his superior, Troy Register, Jr., Chief of the IRS Intelligence Division in Jacksonville. Clearance was obtained, and Jaffe told Casper to proceed with the plan.[2] Casper called Jaffe the following day and asked if the IRS could refer him to a locksmith who could be "trusted." Jaffe gave him such a referral.[3]

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[1] The Court rather blandly states that "Agent Jaffe approved the basic outline of the plan," *ante*, at 730. Such a characterization is misleading in light of the findings of the District Court. As is noted in the text *infra*, Jaffe knew explicit details of the operation in advance and helped to make the arrangements by recommending a locksmith who could be "trusted," by providing a safe and convenient location for the photographing of the documents, and by providing a photographer from the IRS.

[2] Jaffe testified in the District Court that "[w]hatever I knew, he [Register] knew." See 434 F. Supp. 113, 121, n. 40; Tr. 513.

[3] It was clear why Casper needed a locksmith who could be "trusted." Casper testified as follows in the District Court:

"Q. Isn't it a fact, Mr. Casper, you knew you were committing an illegal

The plans were finalized by the time of Wolstencroft's arrival on January 15. Wolstencroft went directly to Sybil Kennedy's apartment. The couple eventually went to a restaurant for dinner.[4] Using a key provided by Kennedy,[5] Casper entered the apartment and *stole* Wolstencroft's briefcase. Casper then rendezvoused with the IRS-recommended locksmith in a parking lot five blocks from the apartment; the locksmith made a key to fit the lock on the case. Casper took the briefcase and newly made key to the home of an IRS agent. Jaffe had selected that location for the photograph-

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act, and you wanted somebody who could be trusted to keep his mouth shut about it?

"A. There is that possibility, yes.

"Q. Isn't that the fact?

. . . . .

"A. Yes." 434 F. Supp., at 119, n. 20; Tr. 452–453.

It is interesting to note that even the locksmith who could be "trusted" refused to enter Kennedy's apartment with Casper. *Id.*, at 451.

The Government contends that when Agent Jaffe made the referral he did not know what use Casper intended to make of such a locksmith. Brief for United States 6, n. 4. The District Court found, however, that Jaffe already knew at the time of the referral that Casper intended to enter Kennedy's apartment and to take and open Wolstencroft's briefcase. There were, then, only two logical alternatives why Casper would want such a locksmith: to make a key to enter the briefcase, or to make a key to enter the apartment. Either way, Jaffe must have known that Casper's conduct was improper, and yet Jaffe made the referral anyway.

[4] It was not established at trial what occurred in Kennedy's apartment prior to the couple's departure for dinner. Since it was peculiarly within the power of the United States to produce Kennedy as a witness and since the Government did not explain her absence from the trial, the District Court inferred that Kennedy's testimony "would be unfavorable to the Government by further delineating the improprieties" of the "briefcase caper." 434 F. Supp., at 119, n. 22.

[5] The District Court, after hearing the testimony of both Casper and Jaffe, disbelieved Jaffe's assertion that Casper had informed him beforehand that Kennedy had given Casper a key with which to enter the apartment. See *id.*, at 119, n. 15, 121, n. 40. See also n. 3, *supra*.

ing because it was only eight blocks from the parking lot where Casper met the locksmith and Jaffe knew there was a need to act with haste.[6] The briefcase was opened in Jaffe's presence. Jaffe, Casper, and an IRS photography expert then photographed over 400 documents.[7] Casper had arranged for Kennedy and Wolstencroft to be watched on their date, and this lookout called Casper at the IRS agent's home when the couple finished their dinner. After all the documents had been copied, Casper relocked the briefcase and returned it to Kennedy's apartment. The entire "caper" lasted approximately one and one-half hours.

The illegalities of agents of the United States did not stop even at that point, however. During the following two weeks, Jaffe told Casper that the IRS needed additional information. Casper therefore sent Kennedy to visit Wolstencroft in the Bahamas. While there, acting pursuant to Casper's instructions, Kennedy stole a rolodex file from Wolstencroft's office. This file was turned over to Jaffe, who testified in the District Court that he had not cared how the rolodex file had been obtained.[8]

The IRS paid Casper $8,000 in cash for the services he rendered in obtaining the information about Castle Bank. Casper in turn paid approximately $1,000 of this money to Kennedy for her role in the "briefcase caper" and the theft of the rolodex file.

The "briefcase caper" revealed papers which showed a close relationship between the Castle Bank and a Florida bank.

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[6] 434 F. Supp., at 120, n. 25; Tr. 494–496.

[7] As noted previously, Casper had told Jaffe to provide the photographic equipment. Jaffe testified that one of the cameras used was a "microfilmer" which was "much quicker" than a regular camera. This camera had been brought by the IRS because "Casper had to get the documents and the briefcase back to the apartment prior to the return of the owner." *Id.*, at 493–495. This testimony again shows that Jaffe was fully aware in advance that the activities of the evening were improper.

[8] See 434 F. Supp., at 120, and n. 34; Tr. 501.

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Subpoenas issued to that Florida bank resulted in the uncovering of the loan guarantee agreement which was the principal piece of evidence against respondent at trial. It is that loan agreement and the evidence discovered as a result of it that the District Court reluctantly[9] suppressed under the Due Process Clause of the Fifth Amendment and under its supervisory powers.

The District Court made several key findings concerning the level of misconduct of agents of the United States in these activities. The District Court found that "the United States, through its agents, Richard Jaffe, and others, knowingly and willfully participated in the unlawful seizure of Michael Wolstencroft's briefcase, and encouraged its informant, Norman Casper, to arrange the theft of a rolodex from the offices of Castle Bank." 434 F. Supp. 113, 120–121 (ND Ohio 1977) (footnotes omitted). The District Court concluded that "the United States was an active participant in the admittedly criminal conduct in which Casper engaged. . . ." *Id.*, at 121. The District Court found that "the illegal conduct of the government officials involved in this case compels the conclusion that they knowingly and purposefully obtained the briefcase materials with *bad faith hostility* toward the strictures imposed on their activities by the Constitution." *Id.*, at 130 (footnote omitted) (emphasis in original). The District Court considered the actions of Jaffe and Casper "outrageous," *ibid.*, because they "plotted, schemed and ultimately acted in contravention of the United States Constitution and laws of Florida, knowing that their conduct was illegal." *Ibid.*

The most disturbing finding by the District Court, however, related to the intentional manipulation of the standing requirements of the Fourth Amendment by agents of the United States, who are, of course, supposed to uphold and

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[9] See 434 F. Supp., at 124, 129, 134, n. 74.

enforce the Constitution and laws of this country. The District Court found:

> "It is evident that the Government and its agents, including Richard Jaffe, were, and are, well aware that under the standing requirement of the Fourth Amendment, evidence obtained from a party pursuant to an unconstitutional search is admissible against third parties who's [*sic*] own privacy expectations are not subject to the search, even though the cause for the unconstitutional search was to obtain evidence incriminating those third parties. This Court finds that, in its desire to apprehend tax evaders, a desire the Court fully shares, the Government affirmatively counsels its agents that the Fourth Amendment standing limitation permits them to purposefully conduct an unconstitutional search and seizure of one individual in order to obtain evidence against third parties, who are the real targets of the governmental intrusion, and that the IRS agents in this case acted, and will act in the future, according to that counsel. Such governmental conduct compels the conclusion that Jaffe and Casper transacted the 'briefcase caper' with a purposeful, bad faith hostility toward the Fourth Amendment rights of Wolstencroft in order to obtain evidence against persons like Payner." *Id.*, at 131–133 (footnotes omitted).

The Court of Appeals did not disturb any of these findings. 590 F. 2d 206 (CA6 1979) (*per curiam*). Nor does the Court today purport to set them aside. See *ante*, at 730–731, n. 3. But cf. *ante*, at 733–734, n. 5. It is in the context of these findings—intentional illegal actions by Government agents taken in bad-faith hostility toward the constitutional rights of Wolstencroft for the purpose of obtaining evidence against persons such as the respondent through manipulation of the standing requirements of the Fourth Amendment—that the suppression issue must be considered.

II

This Court has on several occasions exercised its supervisory powers over the federal judicial system in order to suppress evidence that the Government obtained through misconduct. See, *e. g.*, *McNabb* v. *United States*, 318 U. S. 332 (1943); *Upshaw* v. *United States*, 335 U. S. 410 (1948); *Mesarosh* v. *United States*, 352 U. S. 1 (1956); *Mallory* v. *United States*, 354 U. S. 449 (1957); *Elkins* v. *United States*, 364 U. S. 206 (1960). Cf. *Rea* v. *United States*, 350 U. S. 214 (1956) (supervisory powers used to enjoin federal agent from testifying in state criminal prosecution concerning illegal search and from turning over to the State evidence illegally seized). The rationale for such suppression of evidence is twofold: to deter illegal conduct by Government officials, and to protect the integrity of the federal courts. *McNabb* v. *United States*, *supra*, at 342, 345, 347; *Mesarosh* v. *United States*, *supra*, at 14; *Elkins* v. *United States*, *supra*, at 217, 222–223. Cf. *Mapp* v. *Ohio*, 367 U. S. 643, 659–660 (1961) (Fourth and Fourteenth Amendments); *Brown* v. *Illinois*, 422 U. S. 590, 599–600 (1975) (Fourth and Fourteenth Amendments); *Dunaway* v. *New York*, 442 U. S. 200, 218 (1979) (Fourth and Fourteenth Amendments). The Court has particularly stressed the need to use supervisory powers to prevent the federal courts from becoming accomplices to such misconduct. See, *e. g.*, *McNabb* v. *United States*, *supra*, at 345 ("Plainly, a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law"); *Mesarosh* v. *United States*, *supra*, at 14 (the Court should use its supervisory powers in federal criminal cases "to see that the waters of justice are not polluted"); *Elkins* v. *United States*, *supra*, at 223 (federal courts should not be "accomplices in the willful disobedience of a Constitution they are sworn to uphold").

The need to use the Court's supervisory powers to suppress evidence obtained through governmental misconduct was perhaps best expressed by Mr. Justice Brandeis in his famous dissenting opinion in *Olmstead* v. *United States*, 277 U. S. 438, 471–485 (1928):

> "Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face." *Id.*, at 485.

Mr. Justice Brandeis noted that "a court will not redress a wrong when he who invokes its aid has unclean hands," *id.*, at 483, and that in keeping with that principle the court should not lend its aid in the enforcement of the criminal law when the government itself was guilty of misconduct. "Then aid is denied despite the defendant's wrong. It is denied in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination." *Id.*, at 484. See also *id.*, at 469–471 (Holmes, J., dissenting); *id.*, at 488 (Stone, J., dissenting); *Lopez* v. *United States*, 373 U. S. 427, 453, n. 3 (1963) (BRENNAN, J., dissenting).[10]

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[10] The Court's opinion inexplicably ignores this basic thrust of our prior supervisory powers cases, and instead implies that the only value served

The reason for this emphasis on the need to protect the integrity of the federal courts through the use of supervisory powers can be derived from the factual contexts in which supervisory powers have been exercised. In large part when supervisory powers have been invoked the Court has been faced with intentional illegal conduct. It has not been the case that "[t]he criminal is to go free because the constable has blundered," *People* v. *Defore*, 242 N. Y. 13, 21, 150 N. E. 585, 587 (1926). In these cases there has been no "blunder" by the Government agent at all; rather, the agent has intentionally violated the law for the explicit purpose of obtaining the evidence in question. Cf. *Lopez* v. *United States, supra,* at 440 (supervisory powers should be exercised only if there has been "manifestly improper conduct by federal officials"). If the federal court permits such evidence, the intended product of deliberately illegal Government action, to be used to obtain a conviction, it places its imprimatur upon such lawlessness and thereby taints its own integrity.

The present case falls within that category. The District Court found, and the record establishes, a deliberate decision by Government agents to violate the constitutional rights of Wolstencroft for the explicit purpose of obtaining evidence against persons such as Payner. The actions of the Government agents—stealing the briefcase, opening it, and photographing all the documents inside—were both patently in violation of the Fourth Amendment rights of Wolstencroft [11] and plainly in violation of the criminal law.[12] The Govern-

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by suppression is deterrence of future misconduct. See *ante,* at 736. Deterrence is one purpose behind the suppression of evidence in such situations, but it is by no means the only one.

[11] The Government conceded below that Wolstencroft's Fourth Amendment rights had been violated. 434 F. Supp., at 126. See Tr. 502. See also Brief for United States in No. 78-5278 (CA6), p. 20. Cf. Tr. of Oral Arg. 14; Brief for United States 39. The Court agrees that the conduct was unconstitutional. *Ante,* at 733.

[12] The Court characterizes the actions of Jaffe and Casper in the brief-

ment knew exactly what information it wanted, and it was that information which was stolen from Wolstencroft. Similarly, the Government knew that it wanted to prosecute persons such as Payner, and it made a conscious decision to forgo any opportunity to prosecute Wolstencroft in order to obtain illegally the evidence against Payner and others.[13]

Since the supervisory powers are exercised to protect the integrity of the *court*, rather than to vindicate the constitutional rights of the defendant, it is hard to see why the Court today bases its analysis entirely on Fourth Amendment standing rules. The point is that the federal judiciary should not be made accomplices to the crimes of Casper, Jaffe, and others. The only way the IRS can benefit from the evidence it chose to obtain illegally is if the evidence is admitted at trial against persons such as Payner; that was the very point of the criminal exercise in the first place. If the IRS is permitted to obtain a conviction in federal court based almost entirely on that illegally obtained evidence and its fruits,

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case incident as "possibly criminal behavior," *ibid.* The District Court concluded that the actions of the IRS appeared to constitute a prima facie case of criminal larceny under Florida law, and possibly violated other criminal laws of that State as well. 434 F. Supp., at 130, n. 66. Casper admitted in the District Court that he knew he was committing an illegal act. Tr. 452–453. The stealing of the rolodex file from Wolstencroft's office was also both unconstitutional and criminal. That theft, however, produced no additional evidence against Payner. See 434 F. Supp., at 123, n. 56.

[13] See *id.*, at 129, n. 65, 131–133, and n. 69. See also Tr. 505.

Wolstencroft in fact was indicted for aiding and abetting Payner. Brief for United States 3, n. 2. However, Wolstencroft is a Bahamian resident, and did not return to the United States to answer the indictment. *Ibid.* The mere fact that the Government went through the steps of indicting Wolstencroft does not in any way undermine the District Court's finding, based on substantial evidence in the record, that Wolstencroft was never the target of the IRS investigation. In light of the Government's concession that Wolstencroft's Fourth Amendment rights were violated, it is hard to see how the banker could be successfully prosecuted on the aiding and abetting charge.

then the judiciary has given full effect to the deliberate wrongdoings of the Government. The federal court does indeed become the accomplice of the Government lawbreaker, an accessory after the fact, for without judicial use of the evidence the "caper" would have been for nought. Such a pollution of the federal courts should not be permitted.[14]

It is particularly disturbing that the Court today chooses to allow the IRS deliberately to manipulate the standing rules of the Fourth Amendment to achieve its ends. As previously noted, the District Court found that "the Government affirmatively counsels its agents that the Fourth Amendment standing limitation permits them to purposefully conduct an unconstitutional search and seizure of one individual in order to obtain evidence against third parties, who are the real targets of the governmental intrusion, and that the IRS agents in this case acted, *and will act in the future*, according to that counsel." 434 F. Supp., at 132–133 (emphasis supplied). Whatever role those standing limitations may play, it is clear that they were never intended to be a sword to be used by the Government in its deliberate choice to sacrifice the constitutional rights of one person in order to prosecute another.

The Court's decision to engraft the standing limitations of the Fourth Amendment onto the exercise of supervisory powers is puzzling not only because it runs contrary to the major purpose behind the exercise of the supervisory powers—to protect the integrity of the court—but also because it appears to render the supervisory powers superfluous. In order to establish that suppression of evidence under the supervisory powers would be proper, the Court would also require

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[14] It is simply not a sufficient cure for the Court to denounce the actions of the IRS, ante, at 734, while at the same time rewarding the Government for this conduct by permitting the IRS to use the evidence in the very manner which was the purpose of the illegal and unconstitutional activities.

Payner to establish a violation of his Fourth or Fifth Amendment rights,[15] in which case suppression would flow directly from the Constitution. This approach is totally unfaithful to our prior supervisory power cases, which, contrary to the Court's suggestion, are not constitutional cases in disguise.

I also do not understand the basis for the Court's assertion that this is not a case in which the District Court was supervising the administration of justice "among the parties before the bar," *ante*, at 735, n. 7, and therefore supervisory powers are inapplicable. Clearly the Government is before the bar. Equally clearly, the Government embarked on this deliberate pattern of lawless behavior for the express purpose of gaining evidence against persons such as Payner, so there can be

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[15] The Court appears to suggest that there can be no suppression of evidence based on a violation of the Due Process Clause in this case because it was not Payner who was the immediate victim of the Government's outrageous conduct. *Ante*, at 737, n. 9. Although the District Court concluded that the evidence should be suppressed under the Due Process Clause as well as under its supervisory powers, the Court of Appeals specifically did not reach that issue, 590 F. 2d 206 (CA6 1979) (*per curiam*), and the Government purposely did not raise the issue in this Court. See Pet. for Cert. 21, n. 13. The Court therefore should not reach out to address the issue in a footnote.

In addition, the only authority cited by the Court for its suggestion is *Hampton* v. *United States*, 425 U. S. 484, 490 (1976) (plurality opinion). *Hampton* was only a plurality opinion, and the issue for which the Court purports to cite it was not raised by the facts of that case. Similarly, in the Court of Appeals below the United States was able to cite only *Sims* v. *Georgia*, 389 U. S. 404, 407 (1967), a case plainly not on point, and the sentence from the *Hampton* plurality opinion quoted by the Court, *ante*, at 737, n. 9, for the proposition that Payner lacked standing to raise a due process argument. See Brief for United States in No. 78-5278 (CA6), pp. 21-22; Reply Brief for United States in No. 78-5278, p. 6. The issue whether the standing limitations this Court has imposed for challenging Fourth Amendment violations also apply for violations of the Due Process Clause based on outrageous Government conduct has not yet been settled by this Court. Cf. 434 F. Supp., at 129, n. 65, and authorities discussed therein. The due process issue should be left for consideration in the first instance by the Court of Appeals on remand.

no legitimate claim that the illegal actions are only tangentially related to the present prosecution. Instead, the Government misconduct is at the very heart of this case; without the evidence produced by the illegal conduct, there would have been no case at all, and Payner would never have been brought before the bar. This is simply not a case in which a federal court has attempted to exercise "general supervisory authority over operations of the Executive Branch," *ante*, at 737 (BURGER, C. J., concurring). Rather, this is a case where the District Court refused to be made an accomplice to illegal conduct by the IRS by permitting the agency to use the proceeds of its crimes for the very purpose for which they were committed—to convict persons such as Payner.

Contrary to the Court's characterization, this is also not a case in which there has been "indiscriminate" or "unbending" application of the exclusionary rule. The District Court noted that "exclusion on the basis of supervisory power is only done as a last resort," 434 F. Supp., at 134, n. 74. That court concluded that suppression was proper only where there had been "purposefully illegal" conduct by the Government to obtain the evidence or where the Government's conduct was "motivated by an intentional bad faith hostility to a constitutional right." *Id.*, at 134–135 (footnotes omitted). In this case, both those threshold requirements were met, and the District Court in addition concluded that absent suppression there was no deterrent to continued lawless conduct undertaken by the IRS to facilitate these types of prosecutions.[16] This is not "a 'chancellor's foot' veto [by the District

[16] There is no suggestion by the Government that any action has been taken against Casper, Jaffe, or others for the conduct exposed in this case. The Court admits that the corrective measures taken by the IRS "appear on their face to be less positive than one might expect from an agency charged with upholding the law," *ante*, at 733, n. 5. The District Court specifically found that the Government agents knew they were violating the Constitution at the time, 434 F. Supp., at 135, n. 79, and that continued manipulation of the standing limitations of the Fourth Amendment

Court] over law enforcement practices of which it did not approve," *United States* v. *Russell*, 411 U. S. 423, 435 (1973); *Hampton* v. *United States*, 425 U. S. 484, 490 (1976) (plurality opinion). As my Brother POWELL noted on a prior occasion: "The fact that there is sometimes no sharply defined standard against which to make these judgments [of fundamental fairness] is not itself a sufficient reason to deny the federal judiciary's power to make them when warranted by the circumstances. . . . Nor do I despair of our ability in an appropriate case to identify appropriate standards for police practices without relying on the 'chancellor's' 'fastidious squeamishness or private sentimentalism.'" *Hampton* v. *United States, supra*, at 495, n. 6 (concurring in judgment). That appropriate case has arrived, and the Court should prevent the Government from profiting by use in the federal courts of evidence deliberately obtained by illegal actions taken in bad-faith hostility to constitutional rights.

I would affirm the judgment of the Court of Appeals and suppress the fruits of the Government's illegal action under the Court's supervisory powers.[17] Accordingly, I dissent.

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by the IRS could be deterred only by suppression of the evidence, *id.*, at 133.

[17] The Government argues that Rule 402 of the Federal Rules of Evidence stripped the federal judiciary of its supervisory powers to exclude evidence obtained through gross misconduct by agents of the United States. In the Court of Appeals this argument was relegated to one footnote, see Brief for United States in No. 78-5278 (CA6), p. 41, n. 27. The Court does not address the issue. I would merely note that the Government's discussion of the legislative history behind Rule 402 fails to convince me that it was Congress' intent to attempt such a radical curtailment of the long-established supervisory powers of the federal judiciary. See *United States* v. *Jacobs*, 547 F. 2d 772, 777 (CA2 1976), cert. dism'd as improvidently granted, 436 U. S. 31 (1978).

ROADWAY EXPRESS, INC. *v.* PIPER ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 79-701. Argued April 15, 1980—Decided June 23, 1980

Respondents were counsel for the plaintiffs in a civil rights class action in Federal District Court against petitioner alleging that its employment policies discriminated on the basis of race. Because respondents failed to comply with orders relating to discovery and the filing of briefs, petitioner moved to dismiss the suit and requested an award of attorney's fees and court costs under Federal Rule of Civil Procedure 37. The District Court dismissed the action with prejudice and ordered respondents to pay petitioner's costs and attorney's fees for the entire lawsuit. The court found justification for its ruling in the confluence of the civil rights statutes, 42 U. S. C. §§ 1988, 2000e-5 (k), which allow the prevailing party to recover attorney's fees "as part of the costs" of litigation, and 28 U. S. C. § 1927, which permits a court to tax the excess "costs" of a proceeding against a lawyer "who so multiplies the proceedings . . . as to increase costs unreasonably and vexatiously. . . ." However, the Court of Appeals vacated and remanded, holding that respondents were not liable for attorney's fees and rejecting the view that the civil rights statutes could be read into § 1927.

Held:

1. Title 28 U. S. C. § 1927 cannot be read to support the sanction of taxing attorney's fees against counsel who unreasonably extend court proceedings, by defining the term "costs" therein according to the civil rights statutes as including attorney's fees. Pp. 757-763.

(a) It may be assumed that when the first version of § 1927 was enacted in 1813, Congress followed the "American rule" that attorney's fees ordinarily are not among the "costs" that a winning party may recover. In an 1853 statute Congress substantially re-enacted the provisions now codified in § 1927 as part of a uniform, comprehensive measure setting the fees and costs for all federal actions. The history of the 1853 Act suggests that § 1927 should be read together with the provisions currently codified in 28 U. S. C. § 1920 which, without including attorney's fees, enumerate the costs that ordinarily may be taxed to a losing party. Moreover, petitioner offered no evidence that Congress intended to incorporate into § 1927 the attorney's fee provisions of 42 U. S. C. §§ 1988, 2000e-5 (k), which do not mention attorney liability for costs and fees. Pp. 759-761.

(b) The statutory interpretation proposed by petitioner could introduce into § 1927 distinctions unrelated to its goal of controlling abuses of judicial processes. The fee provisions of the civil rights laws are sensitive to the merits of the action and to antidiscrimination policy, restrict recovery to prevailing parties, and have been construed to treat plaintiffs and defendants somewhat differently. In contrast, § 1927 does not distinguish between winners and losers or between plaintiffs and defendants, and is indifferent to the equities of a dispute and to the values advanced by the substantive law. Moreover, petitioner's statutory construction would create an unjustifiable two-tier system of attorney sanctions whereby lawyers in cases brought under statutes permitting the award of attorney's fees would face stiffer penalties for prolonging litigation than would other attorneys. Pp. 761–763.

2. Rule 37 (b)'s sanctions for failure to comply with discovery orders, including holding parties and counsel personally liable for expenses, "including attorney's fees," must be applied diligently both to penalize those whose conduct may be deemed to warrant such a sanction, and to deter those who might be tempted to such conduct in the absence of such a deterrent. *National Hockey League* v. *Metropolitan Hockey Club*, 427 U. S. 639. On remand, the District Court will have the authority to act upon petitioner's request for costs and attorney's fees under Rule 37 (b). Pp. 763–764.

3. In narrowly defined circumstances federal courts have inherent power to assess attorney's fees against counsel. The general rule is that a litigant cannot recover his counsel fees, but that rule does not apply when the opposing party has acted in bad faith, including bad faith in the conduct of the litigation. In view of a court's power over members of its bar, if it may tax counsel fees against a party who has litigated in bad faith, it certainly may assess those expenses against counsel who willfully abuse judicial processes. In this case, the trial court did not make a specific finding as to whether counsel's conduct constituted or was tantamount to bad faith, a finding that should precede any sanction under the court's inherent powers. Pp. 764–767.

599 F. 2d 1378, affirmed and remanded.

POWELL, J., delivered the opinion of the Court, in which BRENNAN, WHITE, and MARSHALL, JJ., joined; in Parts I, II, and IV of which STEWART and REHNQUIST, JJ., joined; in all but Part II–A and the first sentence of Part IV of which BLACKMUN, J., joined; and in Part II–B of which STEVENS, J., joined. BLACKMUN, J., *post*, p. 768, and STEVENS, J., *post*, p. 769, filed opinions concurring in part and dissenting in part. BURGER, C. J., filed a dissenting opinion, *post*, p. 771.

Miles Curtiss McKee argued the cause for petitioner. With him on the briefs was *Armin J. Moeller, Jr.*

Herschel E. Richard, Jr., argued the cause and filed a brief for respondents.

Harriet S. Shapiro argued the cause for the United States et al. as *amici curiae* urging affirmance. With her on the brief were *Solicitor General McCree, Assistant Attorney General Days, Leroy D. Clark, Joseph T. Eddins, Lutz Alexander Prager*, and *Raymond R. Baca.**

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether federal courts have statutory or inherent power to tax attorney's fees directly against counsel who have abused the processes of the courts.

I

In June 1975, two former employees and one unsuccessful job applicant brought a civil rights class action against petitioner Roadway Express, Inc. (Roadway). The complaint filed in the United States District Court for the Western District of Louisiana alleged that Roadway's employment policies discriminated on the basis of race, and asked for equitable relief.[1]

Counsel for the plaintiffs—Robert E. Piper, Jr., Frank E. Brown, Jr., and Bobby Stromile—are the respondents in the present case. In September 1975, respondents served interrogatories on Roadway. Having secured an extension from the District Court, Roadway answered the interrogatories on January 5, 1976, and served its own set of interrogatories at the same time. Thereafter, however, the litigation was stalled by respondents' uncooperative behavior.

**Jack Greenberg* and *James M. Nabrit III* filed a brief for the NAACP Legal Defense and Educational Fund, Inc., as *amicus curiae* urging affirmance.

[1] The initial complaint also named a local of the International Brotherhood of Teamsters as defendant.

On April 13, 1976, Roadway moved for an order compelling answers to its interrogatories. The motion was set for argument on the morning of April 21, but counsel for the plaintiffs did not appear. They did attend a rescheduled hearing that afternoon, and the Magistrate ordered that the interrogatories be answered by May 24. Respondents ignored that deadline and, in fact, never answered the interrogatories. Roadway also served notice in April that it would take depositions from all three plaintiffs in early May. One of the plaintiffs did not appear on the appointed days, however, and he never was deposed.

The respondents showed no greater respect for the orders of the District Court than for the requests of their adversaries. On April 7, the court instructed counsel for both sides to file briefs evaluating the impact of a recent decision in a related case. Although respondents' brief was due within 10 days, nothing arrived for six weeks. On May 19, the District Court gave respondents 10 additional days to file a brief or face dismissal of the action. No brief was ever submitted.

On June 14, Roadway moved to dismiss the suit under Federal Rule of Civil Procedure 37.[2] Roadway also requested an award of attorney's fees and court costs. On June 30, the District Court heard argument and dismissed the action with prejudice. A second hearing, limited to the question of costs and attorney's fees, was held in October 1976.

The District Court's opinion sharply criticized the respondents for their "deliberate inaction" in handling the case. *Monk* v. *Roadway Express, Inc.*, 73 F. R .D. 411, 417 (1977). Observing that respondents apparently had not advised their

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[2] If a party "fails to obey an order to provide or permit discovery," Rule 37 (b)(2)(C) allows the district court to "dismis[s] the action or proceeding or any part thereof, or rende[r] a judgment by default against the disobedient party." Rule 37 (b)(2)(E) also permits a court to "require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure. . . ."

clients that the suit was a class action, *id.*, at 414, 417, the court concluded that the three lawyers "improvidently enlarged and inadequately prosecuted" the action, *id.*, at 417. As a sanction, the court ordered them to pay Roadway's costs and attorney's fees for the entire lawsuit. The total assessment exceeded $17,000. *Monk* v. *Roadway Express, Inc.*, 599 F. 2d 1378, 1381 (CA5 1979).

The District Court found justification for its ruling in the confluence of several statutes. The civil rights statutes allow the prevailing party to recover attorney's fees "as part of the costs" of litigation. See 42 U. S. C. §§ 1988, 2000e–5 (k). And 28 U. S. C. § 1927 permits a court to tax the excess "costs" of a proceeding against a lawyer "who so multiplies the proceedings . . . as to increase costs unreasonably and vexatiously. . . ."[3] Read together, the District Court concluded, the statutes authorize the assessment of costs and attorney's fees against respondents.

The United States Court of Appeals for the Fifth Circuit found no clear error in the ruling that respondents had violated § 1927. 599 F. 2d, at 1381. The appellate court held, however, that respondents were not liable for attorney's fees. It rejected the District Court's view that the civil rights statutes can be read into § 1927. The civil rights laws, the court wrote, "provide for attorneys' fees awards against unsuccessful *parties* to a suit, and they focus on actions which are frivolous, unreasonable, and baseless. . . ." 599 F. 2d, at 1383 (emphasis in original). In contrast, § 1927 deals only

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[3] Section 1927 states in full:

"Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs."

As the Court of Appeals pointed out, "§ 1927 provides only for *excess* costs caused by the plaintiffs' attorneys' vexatious behavior and consequent multiplication of the proceedings, and not for the total costs of the litigation." 599 F. 2d 1378, 1383 (CA5 1979) (emphasis in original).

with attorney conduct and involves taxing costs against counsel. The Court of Appeals vacated the District Court's order and remanded for recalculation of costs under § 1927. We granted certiorari, 444 U. S. 1012 (1980).

II

This case involves the problem of what sanctions may be imposed on lawyers who unreasonably extend court proceedings.[4] Two specific provisions have been said to be controlling in this case: 28 U. S. C. § 1927, and Federal Rule of Civil Procedure 37. This opinion considers both provisions.

A

Section 1927 provides that lawyers who multiply court proceedings vexatiously may be assessed the excess "costs" they create. The provision, however, does not define the critical word. Only if "costs" includes attorney's fees can § 1927 support the sanction in this case.

Courts generally have defined costs under § 1927 according to 28 U. S. C. § 1920, which enumerates the costs that ordinarily may be taxed to a losing party. *E. g., United States* v. *Ross,* 535 F. 2d 346, 350 (CA6 1976); *Kiefel* v. *Las Vegas Hacienda, Inc.,* 404 F. 2d 1163, 1170 (CA7 1968), cert. denied *sub nom. Hubbard* v. *Kiefel,* 395 U. S. 908 (1969).

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[4] Due to sloth, inattention, or desire to seize tactical advantage, lawyers have long indulged in dilatory practices. Cf. C. Dickens, Bleak House 2–5 (1948). A number of factors legitimately may lengthen a lawsuit, and the parties themselves may cause some of the delays. Nevertheless, many actions are extended unnecessarily by lawyers who exploit or abuse judicial procedures, especially the liberal rules for pretrial discovery. See Burger, Agenda for 2000 A. D.—A Need for Systematic Anticipation, 70 F. R. D. 83, 95–96 (1976); ABA, Report of Pound Conference Follow-Up Task Force, 74 F. R. D. 159, 191–192 (1976); U. S. Dept. of Justice, C. Ellington, A Study of Sanctions for Discovery Abuse 117 (1979). The glacial pace of much litigation breeds frustration with the federal courts and, ultimately, disrespect for the law.

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Section 1920 lists clerk's and marshal's fees, court reporter charges, printing and witness fees, copying costs, interpreting costs, and the fees of court-appointed experts. Section 1920 also permits the assessment of the attorney "docket" fees set by 28 U. S. C. § 1923. In this case, that fee is $20. 28 U. S. C. § 1923 (a).

Roadway insists, however, that its recovery should not be restricted to the costs listed in § 1920. It argues that since courts look to § 1920 to determine the costs taxable under § 1927, they should be equally free to define costs according to other statutes that may be involved in a lawsuit. Roadway emphasizes that the civil rights statutes allow the award of attorney's fees "as part of the costs" of the litigation. 42 U. S. C. § 2000e-5 (k); 42 U. S. C. § 1988.[5] Accordingly, Roadway asks that we reinstate the District Court's award. This superficially appealing argument cannot survive careful consideration.

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[5] Section 2000e-5 (k) states: "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the [Equal Employment Opportunity] Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person."

Section 1988 provides in relevant part: "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceedings [to enforce] a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

For the purposes of the issues in this opinion, the two provisions may be considered to have the same substantive content. See *Lopez* v. *Arkansas County Independent School Dist.*, 570 F. 2d 541, 545 (CA5 1978); *Mid-Hudson Legal Services, Inc.* v. *G & U, Inc.*, 578 F. 2d 34, 37-38 (CA2 1978). They authorize fee awards in identical language, and Congress acknowledged the close connection between the two statutes when it approved § 1988. S. Rep. No. 94-1011, pp. 2-6 (1976); H. R. Rep. No. 94-1558, pp. 5-8 (1976).

1

Congress enacted the first version of § 1927 in 1813. It was drafted by a Senate Committee appointed "to inquire what Legislative provision is necessary to prevent multiplicity of suits or processes, where a single suit or process might suffice. . . ." 26 Annals of Cong. 29 (1813). The resulting legislation provided in part that any person who "multiplied the proceedings in any cause . . . so as to increase costs unreasonably and vexatiously" could be held liable for "any excess of costs so incurred." Act of July 22, 1813, 3 Stat. 21. The sparse legislative history makes this provision difficult to interpret.[6]

In construing "costs," however, we may look to the contemporaneous understanding of the term. Cf. *Gilbert* v. *United States,* 370 U. S. 650, 655 (1962). In 1796 the Court decided *Arcambel* v. *Wiseman,* 3 Dall. 306. That ruling overturned an award of counsel fees on the ground that "[t]he general practice of the *United States* is in op[p]osition to it." *Ibid.* Thus, the Court recognized the "American rule" that attorney's fees ordinarily are not among the costs that a winning party may recover. See *Fleischmann Distilling Corp.* v. *Maier Brewing Co.,* 386 U. S. 714, 717–718 (1967). We may assume that Congress followed that rule when it approved the 1813 Act.

Congress returned to the problems of the federal courts in 1853, when it approved a comprehensive measure setting the fees and costs for all federal actions. Act of Feb. 26, 1853, 10 Stat. 162; see *Alyeska Pipeline Co.* v. *Wilderness Society,* 421 U. S. 240, 251–253 (1975). Some of those provisions survive, largely intact, in 28 U. S. C. §§ 1920 and 1923. See

[6] A letter from the Secretary of the Treasury to the House of Representatives in 1842 suggests that the provision was prompted by the practices of certain United States Attorneys. H. R. Doc. No. 25, 27th Cong., 3d Sess., 21–22 (1842). Some of those officers, who were paid on a piecework basis, apparently had filed unnecessary lawsuits to inflate their compensation.

10 Stat. 161–162, 168. The 1853 statute also substantially re-enacted the earlier provision that allows lawyers who multiply legal proceedings to be taxed with the extra "costs" they generate. That provision, now codified as § 1927, has remained basically unchanged since 1853.[7]

This history suggests that § 1920 and § 1927 should be read together as part of the integrated statute approved in 1853. See *Erlenbaugh* v. *United States,* 409 U. S. 239, 243–244 (1972); 2A C. Sands, Sutherland on Statutory Construction § 51.03, p. 299 (4th ed. 1973). The 1853 Act specified the costs recoverable in federal litigation and also allowed the award of excess "costs" against counsel who vexatiously multiply litigation. The most reasonable construction is that the Act itself defined those costs that may be recovered from counsel. Congress, of course, may amend those provisions that derive from the 1853 Act.[8] In the absence of express modification of those provisions by Congress, however, we should not look beyond the Act for the definition of costs under § 1927.

The available legislative material supports this view. Congress in 1853 prescribed taxable costs for the same reasons it authorized the assessment of costs against dilatory attorneys: "[T]o prevent abuses arising from ingenious constructions . . . to discourage unnecessary prolixity, old useless forms, and the multiplication of proceedings, and the prosecutions of several suits which might better be joined in one."

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[7] The attorney liability portion of the 1853 Act was codified as § 982 of the Revised Statutes, while the cost-setting portions were included as §§ 823 and 824. The portions assumed their present positions at §§ 1920, 1923, and 1927 of Title 28 in the Revised Code of 1948. See 28 U. S. C. §§ 1920, 1923, 1927 (1946 ed., Supp. II).

[8] For example, in 1978 Congress added 28 U. S. C. § 1920 (6) (1976 ed., Supp. II), providing for recovery of interpreting costs. Pub. L. 95–539, § 7, 92 Stat. 2044. Congress is now considering legislation that would expand § 1927 in all cases to include "costs, expenses and attorney's fees. . . ." H. R. 4047, 96th Cong., 1st Sess. (1979); S. 390, 96th Cong., 1st Sess., § 4 (1979).

H. R. Rep. No. 50, 32d Cong., 1st Sess., 6 (1852); see also *Alyeska Pipeline Co.* v. *Wilderness Society, supra,* at 251–253. Above all, Congress sought to standardize the treatment of costs in federal courts, to "make them uniform—make the law explicit and definite." H. R. Rep. No. 50, *supra,* at 6. The sponsor of the legislation spoke of the need for "uniform rule[s]," Cong. Globe, 32d Cong., 2d Sess., App. 207 (1853) (Sen. Bradbury), while other Senators agreed that the legislation was designed to impose "uniformity," *id.,* at 584 (Sen. Bayard); see also *id.,* at 589 (Sen. Geyer).

Roadway presses us to abandon the uniform approach of the 1853 Act. Because prevailing parties now may recover counsel fees in civil rights suits, Roadway argues that the statutes authorizing those recoveries should be read to modify § 1927. But Roadway offers no evidence that Congress intended to incorporate those attorney's fee provisions into § 1927. Neither § 1988 nor § 2000e–5 (k) makes any mention of attorney liability for costs and fees. Roadway identifies nothing in the legislative records of those provisions that suggests that Congress meant to control the conduct of litigation.[9] Without any evidence that Congress wished to alter the uniform structure established by the 1853 Act, we are reluctant to disrupt it. See *Fleischmann Distilling Corp.* v. *Maier Brewing Co., supra,* at 719–720.

2

The statutory interpretation proposed by Roadway not only runs counter to the apparent intent of Congress in 1813 and 1853, but also could introduce into the statute distinctions unrelated to its goal. Indeed, Roadway's argument could result in virtually random application of § 1927 on the basis of other

[9] The Senate Report accompanying § 1988 stated that the bill authorizes "an award of attorneys' fees against a *party*. . . ." S. Rep. No. 94–1011, p. 5 (1976) (emphasis supplied). This reference reinforces the view that the statute was not intended to permit recovery from opposing counsel.

laws that do not address the problem of controlling abuses of judicial processes.

The fee provisions of the civil rights laws are acutely sensitive to the merits of an action and to antidiscrimination policy. Unlike § 1927, both § 1988 and § 2000e–5 (k) restrict recovery to prevailing parties. In addition, those provisions have been construed to treat plaintiffs and defendants somewhat differently. Prevailing plaintiffs in civil rights cases win fee awards unless "special circumstances would render such an award unjust," *Newman* v. *Piggie Park Enterprises*, 390 U. S. 400, 402 (1968) (*per curiam*), but a prevailing defendant may be awarded counsel fees only when the plaintiff's underlying claim is "frivolous, unreasonable, or groundless." *Christiansburg Garment Co.* v. *EEOC*, 434 U. S. 412, 422 (1978). This distinction advances the congressional purpose to encourage suits by victims of discrimination while deterring frivolous litigation.

But § 1927 does not distinguish between winners and losers, or between plaintiffs and defendants. The statute is indifferent to the equities of a dispute and to the values advanced by the substantive law. It is concerned only with limiting the abuse of court processes. Dilatory practices of civil rights plaintiffs are as objectionable as those of defendants. In order to assess counsel fees against respondents under § 1927, the Court would have to adopt one of two alternatives. It could incorporate into § 1927 the normative considerations of the civil rights laws that are foreign to the 1813 enactment. Or the Court could select on an ad hoc basis those features of § 1988 and § 2000e–5 (k) that should be read into § 1927. The first course would alter fundamentally the nature of § 1927; the second would constitute standardless judicial lawmaking.

Moreover, Roadway's statutory construction would create a two-tier system of attorney sanctions. A number of federal statutes permit the award of attorney's fees. See *Alyeska*

Pipeline Co. v. *Wilderness Society*, 421 U. S., at 260, n. 33. Under Roadway's view of § 1927, lawyers in cases brought under those statutes would face stiffer penalties for prolonging litigation than would other attorneys. There is no persuasive justification for subjecting lawyers in different areas of practice to differing sanctions for dilatory conduct. A court's processes may be as abused in a commercial case as in a civil rights action. Without an express indication of congressional intent, we must hesitate to reach the imaginative outcome urged by Roadway, particularly when a more plausible construction flows from the original enactments in 1813 and 1853. To avoid the arbitrary results of Roadway's argument, *Commissioner* v. *Brown*, 380 U. S. 563, 571 (1965), citing *Helvering* v. *Hammel*, 311 U. S. 504, 510–511 (1941), we must reject the claim that § 1988 and § 2000e–5 (k) may supplant the framework established by the 1853 Act.

B

Federal Rule of Civil Procedure 37 (b) authorizes sanctions for failure to comply with discovery orders. The District Court may bar the disobedient party from introducing certain evidence, or it may direct that certain facts shall be "taken to be established for the purposes of the action. . . ." The Rule also permits the trial court to strike claims from the pleadings, and even to "dismiss the action . . . or render a judgment by default against the disobedient party." See *National Hockey League* v. *Metropolitan Hockey Club*, 427 U. S. 639 (1976) (*per curiam*); *Dellums* v. *Powell*, 184 U. S. App. D. C. 339, 566 F. 2d 231 (1977). Both parties and counsel may be held personally liable for expenses, "including attorney's fees," caused by the failure to comply with discovery orders.[10] Rule 37 sanctions must be applied diligently

[10] See *Stanziale* v. *First National City Bank*, 74 F. R. D. 557 (SDNY 1977) (attorneys); *Charron* v. *Meaux*, 66 F. R. D. 64 (SDNY 1975) (party); *Chesa International, Ltd.* v. *Fashion Associates, Inc.*, 425 F.

both "to penalize those whose conduct may be deemed to warrant such a sanction, [and] to deter those who might be tempted to such conduct in the absence of such a deterrent." *National Hockey League* v. *Metropolitan Hockey Club, supra*, at 643.

The respondents in this case never have complied with the District Court's order that they answer Roadway's interrogatories. That failure was the immediate ground for dismissing the case, 73 F. R. D., at 412, and it also exposed respondents and their clients to liability under Rule 37 (b) for the resulting costs and attorney's fees. Indeed, Roadway's motion for dismissal sought recovery of those expenses under Rule 37. On the remand of this action, the District Court will have the authority to act upon that request.

III

Roadway also contends that the District Court's ruling was a proper exercise of the court's inherent powers.[11] The inherent powers of federal courts are those which "are necessary to the exercise of all others." *United States* v. *Hudson*, 7 Cranch 32, 34 (1812). The most prominent of these is the contempt sanction, "which a judge must have and exercise in protecting the due and orderly administration of justice and in maintaining the authority and dignity of the court. . . ." *Cooke* v. *United States*, 267 U. S. 517, 539 (1925); see 4 W. Blackstone, Commentaries *282–*285. Because inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion. See *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418,

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Supp. 234 (SDNY), aff'd, 573 F. 2d 1288 (CA2 1977) (joint liability of attorney and party).

[11] MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST would not reach the inherent power question considered in Part III of the opinion. Rather, they view that question as a substantial issue that should be addressed by the District Court on remand.

450–451 (1911); *Green* v. *United States*, 356 U. S. 165, 193–194 (1958) (Black, J., dissenting). There are ample grounds for recognizing, however, that in narrowly defined circumstances federal courts have inherent power to assess attorney's fees against counsel.

In *Link* v. *Wabash R. Co.*, 370 U. S. 626, 632 (1962), this Court recognized the "well-acknowledged" inherent power of a court to levy sanctions in response to abusive litigation practices. The trial court had dismissed an action for failure to prosecute. Mr. Justice Harlan wrote for the Court:

> "The authority of a federal trial court to dismiss a plaintiff's action with prejudice because of his failure to prosecute cannot seriously be doubted. The power to invoke this sanction is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts. The power is of ancient origin, having its roots in judgments of *nonsuit* and *non prosequitur* entered at common law, *e. g.*, 3 Blackstone, Commentaries (1768), 295–296, and dismissals for want of prosecution of bills in equity, *e. g.*, *id.*, at 451." *Id.*, at 629–630 (footnote omitted).

The Court denied that Federal Rule of Civil Procedure 41 (b) limits a court's power to dismiss for failure to prosecute to instances where a defendant moves for dismissal. The Court wrote: "The authority . . . to dismiss *sua sponte* for lack of prosecution has generally been considered an 'inherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs. . . ." 370 U. S., at 630. Since the assessment of counsel fees is a less severe sanction than outright dismissal, *Link* strongly supports Roadway's contention here.

Of course, the general rule in federal courts is that a litigant cannot recover his counsel fees. See *Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U. S., at 257. But that rule does

not apply when the opposing party has acted in bad faith. In *Alyeska,* we acknowledged the "inherent power" of courts to

> "assess attorneys' fees for the 'willful disobedience of a court order . . . as part of the fine to be levied on the defendant[,] *Toledo Scale Co.* v. *Computing Scale Co.,* 261 U. S. 399, 426–428 (1923),' *Fleischmann Distilling Corp.* v. *Maier Brewing Co., supra,* at 718; or when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons . . . .' *F. D. Rich Co.* [v. *United States ex rel. Industrial Lumber Co.*], 417 U. S. [116], at 129 [(1974)] (citing *Vaughan* v. *Atkinson,* 369 U. S. 527 (1962))." *Id.,* at 258–259.

The bad-faith exception for the award of attorney's fees is not restricted to cases where the action is filed in bad faith. "'[B]ad faith' may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation." *Hall* v. *Cole,* 412 U. S. 1, 15 (1973). See *Browning Debenture Holders' Comm.* v. *DASA Corp.,* 560 F. 2d 1078, 1088 (CA2 1977). This view coincides with the ruling in *Link, supra,* which approved judicial power to dismiss a case not because the substantive claim was without merit, but because the plaintiff failed to pursue the litigation.

The power of a court over members of its bar is at least as great as its authority over litigants.[12] If a court may tax counsel fees against a party who has litigated in bad faith, it certainly may assess those expenses against counsel who willfully abuse judicial processes. See Renfrew, Discovery Sanctions: A Judicial Perspective, 67 Calif. L. Rev. 264, 268

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[12] See generally *In re Bithoney,* 486 F. 2d 319 (CA1 1973); *Flaksa* v. *Little River Marine Constr. Co.,* 389 F. 2d 885, 888–889 (CA5), cert. denied, 392 U. S. 928 (1968); *Gamble* v. *Pope & Talbot, Inc.,* 307 F. 2d 729, 735–736 (CA3) (en banc) (Biggs, C. J., dissenting), cert. denied *sub nom. United States District Court* v. *Mahoney,* 371 U. S. 888 (1962).

(1979).[13] Like other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record.[14] But in a proper case, such sanctions are within a court's powers.

IV

We affirm the ruling of the Court of Appeals on § 1927. Since the District Court did not consider the costs and fees that Roadway might recover under Rule 37, that question must be addressed on remand. Similarly, the trial court did not make a specific finding as to whether counsel's conduct in this case constituted or was tantamount to bad faith, a finding that would have to precede any sanction under the court's inherent power. The case is remanded to the Court of

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[13] New York courts have ordered attorneys who delay litigation to pay costs or fines to the opposing party. *E. g., Moran* v. *Rynar*, 39 App. Div. 2d 718, 332 N. Y. S. 2d 138 (1972); *Kahn* v. *Stamp*, 52 App. Div. 2d 748, 382 N. Y. S. 2d 199 (1976); *Gillet* v. *Beth Israel Medical Center*, 99 Misc. 2d 172, 415 N. Y. S. 2d 738 (Sup. Ct. 1979). The state-court opinions cite no statutory authority for their holdings, apparently relying on the inherent powers of those courts. *Moran* v. *Rynar, supra*, noted favorable commentary on *Schwarz* v. *United States*, 384 F. 2d 833, 836 (CA2 1967), which suggested that courts faced with cases "of inexcusable neglect by counsel [should consider] imposing substantial costs and attorney's fees payable by offending counsel personally to the opposing party. . . ." Although the New York courts have sanctioned lawyers for mere negligence, this opinion addresses only bad-faith conduct.

[14] Some due process implications of sanctions for misconduct of litigation were discussed in *Societe Internationale* v. *Rogers*, 357 U. S. 197, 208–212 (1958), which reversed the dismissal of an action for failure to comply with a pretrial discovery order. The due process concerns posed by an outright dismissal are plainly greater than those presented by assessing counsel fees against lawyers. Cf. *Schwarz* v. *United States, supra*. Moreover, *Societe Internationale* did not involve willful misconduct or bad faith. The Court found that the party whose claim was dismissed had been barred by a Swiss criminal statute from complying with the order. 357 U. S., at 209, 211.

Appeals with directions to return it to the District Court for proceedings consistent with this opinion.

So ordered.

MR. JUSTICE BLACKMUN, concurring in part and dissenting in part.

I join the Court's opinion except Part II–A thereof and except the first sentence of Part IV thereof.

Essentially for the reasons stated in the first three paragraphs of the respective opinions of THE CHIEF JUSTICE and of MR. JUSTICE STEVENS, I do not join Part II–A. I add to those reasons my concern that the Court's analysis means that 28 U. S. C. § 1927 does not permit imposition on opposing counsel of "excess" attorney's fees generated by his vexatiousness and otherwise shifted to his client under 42 U. S. C. § 2000e–5 (k), 42 U. S. C. § 1988, or any other specialized attorney's fees provisions. See *Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U. S. 240, 260, n. 33 (1975) (collecting statutes). This construction of the statute penalizes the innocent client, while insulating his wrongdoing attorney. That result, in my view, clashes with common sense, basic fairness, and the plain meaning of the statute. See *Owen* v. *City of Independence*, 445 U. S. 622, 654 (1980) ("Elemental notions of fairness dictate that one who causes a loss should bear the loss"). See also 122 Cong. Rec. 31832 (1976) (regarding proposed § 1988: "Mr. ABOUREZK. So if somebody thought, some lawyer thought, he was going to make a lot of money by bringing civil rights suits *he would be subject to being penalized himself;* is that not correct? Mr. HATHAWAY. The Senator is correct.") (emphasis added).[1]

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[1] One point regarding the Court's analysis of § 1927 seems to me to merit special mention. In rejecting the District Court's reading of that statute, the Court concludes that "a prevailing defendant may be awarded counsel fees *only* when the plaintiff's underlying claim is 'frivolous, unreasonable, or groundless.'" *Ante*, at 762 (emphasis added), citing *Christiansburg Garment Co.* v. *EEOC*, 434 U. S. 412, 422 (1978). This state-

Significantly different considerations of policy and fairness bear on the inherent-power issue addressed in Part III of the Court's opinion. I believe, however, that the opinion marshals persuasive reasons for recognizing a component of the bad-faith exception of the American Rule authorizing recovery of attorney's fees directly from a vexatious opposing counsel.[2]

MR. JUSTICE STEVENS, concurring in part and dissenting in part.

By its terms, 28 U. S. C. § 1927 applies to "cases in any court of the United States" and allows the recovery of excess costs from "[a]ny attorney" who vexatiously multiplies the proceedings "in any case."[1] This language is broad enough to encompass a civil rights class action alleging racial discrim-

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ment has two troubling implications. First, it would seem to pretermit the § 1927 issue, which the Court goes on to consider at length. Clearly, the District Court based its attorney's fee award on counsel's conduct during the suit, rather than on the absence of a meritorious claim. If only the latter can support fee-shifting under § 1988 or § 2000e-5 (k), attorney's fees were not "reasonable" in the first place, the predicate for applying § 1927 was lacking, and this case presents no occasion to construe that provision. Second, the Court's reading of *Christiansburg Garment* is a questionable one that may produce undesirable results in future cases. *Christiansburg Garment* simply did not present the issue whether "frivolous, unreasonable, or groundless" *conduct* by a plaintiff in the course of prosecuting a colorable claim might justify fee-shifting in favor of the defendant under § 1988 or § 2000e-5 (k). In my view, there are strong arguments that attorney's fees generated by such conduct would be "reasonable" within the meaning of those statutes. I am troubled that the Court reaches the opposite conclusion without explaining why.

[2] The Court does not explore the specific features of this exception. Most significantly, it does not address the permissibility of applying this new exception to award attorney's fees beyond those actually attributable to the culpable attorney's vexatious actions (*i. e.*, "excess costs" under § 1927). Like the Court, I am willing to let this issue be considered in the first instance on the remand.

[1] See *ante*, at 756, n. 3.

ination in employment. Two separate statutes specifically authorize the recovery of attorney's fees "as part of the costs" in this kind of litigation.[2] Of course, such fees, like any other cost items, are normally recoverable only from the losing litigant rather than from the attorney personally. But it seems to me that § 1927 gives the court the power to assess against counsel any item of cost that could be assessed against a party when that attorney unreasonably and vexatiously multiplies the proceedings.

The Court seems concerned about the fact that the standards for allowing a *party* to recover fees differ for plaintiffs and defendants in civil rights litigation. *Ante,* at 762. I simply do not understand the relevance of that concern. As I read § 1927, the sanction may be applied to an obstreperous lawyer regardless of whether his client prevails, so long as fees may be awarded as part of the costs in the litigation.

The Court also states that there "is no persuasive justification" for subjecting lawyers in different areas of practice to the risk of differing sanctions. *Ante,* at 763. But Congress has made a legislative decision to treat lawyers in civil rights litigation differently than they are treated in most types of litigation. Because of that congressional determination, lawyers in these cases are more likely to be well paid than other lawyers and, conversely, their misconduct may subject their clients to liability for the fees of opposing counsel. A conclusion that such special treatment also subjects these lawyers to an additional risk for failing to observe the normal proprieties that obtain in litigation does not strike me as anomalous.

Ironically, the Court rejects my rather straightforward approach to the statutory language because it "would constitute standardless judicial lawmaking," *ante,* at 762, but then, in Part III of its opinion, embarks on a venture of its own that

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[2] Title 42 U. S. C. § 1988 and § 2000e–5 (k) both authorize an award of attorney's fees to the prevailing party "as part of the costs" of the litigation.

surely fits that description neatly. Although a trial court has inherent contempt powers, I have the gravest doubts about its inherent power to order a lawyer to pay damages to an opposing litigant. Since it is not at all necessary to reach out to decide that issue, however, I would simply answer the statutory question presented by the certiorari petition.

Although I do not disagree with the Court's discussion of Rule 37 in Part II–B of its opinion, I respectfully dissent from its construction of § 1927 and its inherent-power holding.

MR. CHIEF JUSTICE BURGER, dissenting.

I dissent from the Court's holding that it was improper for the District Court to look to 42 U. S. C. §§ 1988 and 2000e–5 (k) to determine whether attorney's fees were assessable as part of the excess costs which the respondent attorneys could be made to pay under 28 U. S. C. § 1927.

Section 1927 does not itself attempt to define the costs which an attorney may be forced to pay because of vexatious, dilatory tactics and conduct, except to state that the attorney may be forced to pay only the *excess* costs generated by his misconduct. One must look elsewhere to determine the types of costs which are assessable. It may be correct that ordinarily a court would look to 28 U. S. C. § 1920, which does not include attorney's fees among its enumerated items. But whether or not attorney's fees are recoverable as costs depends on the type of action involved. In *Hutto* v. *Finney,* 437 U. S. 678, 697 (1978), the Court noted that "there are a large number of statutory and common-law situations in which allowable costs include counsel fees." In a footnote, the Court observed: "In 1975, we listed 29 statutes allowing federal courts to award attorney's fees in certain suits. See *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U. S., at 260–261, n. 33. Some of these statutes define attorney's fees as an element of costs, while others separate fees from other taxable costs. Compare 42 U. S. C. § 2000a–3 (b) with 29 U. S. C. § 216 (b) (1970 ed., Supp. V)." *Id.,* at 697, n. 28.

Title 42 U. S. C. § 2000a–3 (b), in pertinent part, states that the court in its discretion "may allow the prevailing party . . . a reasonable attorney's fee as part of the costs . . . ," whereas 29 U. S. C. § 216 (b) states that the court shall "allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." Comparing the language of these sections to that of 42 U. S. C. §§ 1988 and 2000e–5 (k) at issue here, it seems plain to me that §§ 1988 and 2000e–5 (k) fall within the first category—statutes which define attorney's fees as an element of costs. The Court said this in so many words in *Hutto* with regard to § 1988. 437 U. S., at 695.

Thus, by statute, in Title VII actions, or in actions to enforce 42 U. S. C. §§ 1981, 1983, 1985, and 1986, attorney's fees are an element of costs. Sections 1988 and 2000e–5 (k) state that the awards may be made to the prevailing party, as was the instant award. They do not state who is to bear the costs. Normally, of course, the losing party will bear the costs. But if the court finds that the costs have been increased "unreasonably and vexatiously," § 1927 empowers the court to make the errant attorneys themselves bear the excess costs occasioned by their misconduct. That is what happened here.

Respondents correctly point out that this Court has held in *Christiansburg Garment Co.* v. *EEOC*, 434 U. S. 412 (1978), that if the award is against the plaintiff, the suit must be found to have been frivolous, unreasonable, or without foundation. But that case does not determine the standard for an award of excess costs against an attorney. Section 1927 itself provides that standard; the attorney must have so multiplied the proceedings as to have increased costs unreasonably and vexatiously. Here, both the District Court and the Court of Appeals agreed that that standard had been met.

Given this disposition, I would not reach the other issues decided by the Court today.

Syllabus

O'BANNON, SECRETARY OF PUBLIC WELFARE OF PENNSYLVANIA v. TOWN COURT NURSING CENTER ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 78-1318. Argued November 6, 1979—Decided June 23, 1980

After the Department of Health, Education, and Welfare (HEW) and the Pennsylvania Department of Public Welfare (DPW) had revoked the authority of Town Court Nursing Center (a nursing home) to provide elderly residents of the home with nursing care at government expense under Medicare and Medicaid provider agreements, the home and several of its patients (respondents) brought suit in Federal District Court, alleging, *inter alia*, that the patients were entitled to an evidentiary hearing on the merits of the revocation before the Medicaid payments were discontinued. The District Court ultimately rejected this argument. On appeal, the Court of Appeals reversed, holding that the patients had a constitutionally protected property interest in continued residence at the nursing home that gave them a right to a predetermination hearing on whether the home's Medicare and Medicaid provider agreements should be renewed. In so holding, the court relied on three Medicaid provisions: 42 U. S. C. § 1396a (a)(23) (1976 ed., Supp. II), which gives Medicaid recipients the right to obtain services from any qualified facility, a federal regulation prohibiting certified facilities from transferring or discharging a patient except for specified reasons, and a federal regulation prohibiting the reduction or termination of financial assistance without a hearing.

Held: The patients have no interest in receiving benefits for care in a particular facility that entitles them, as a matter of constitutional law, to a hearing before HEW and DPW can decertify that facility. Whatever legal rights the patients may have against the nursing home for failing to maintain its status as a qualified nursing home, the enforcement by HEW and DPW of their valid regulations did not directly affect the patients' legal rights or deprive them of any constitutionally protected interest in life, liberty, or property. Pp. 784-790.

(a) Whether viewed singly or in combination, the Medicaid provisions relied upon by the Court of Appeals do not confer a right to continued residence in the nursing home of one's choice. While 42 U. S. C. § 1396a (a)(23) (1976 ed., Supp. II) by implication gives recipients the right to be free from government interference with the choice to remain in a

home that continues to be qualified, it does not confer a right to continue to receive benefits for care in a home that has been decertified. Although the regulations in question protect patients by limiting the circumstances under which a home may transfer or discharge a Medicaid recipient, they do not purport to limit the Government's right to make a transfer necessary by decertifying a facility. And, since decertification does not reduce or terminate a patient's financial assistance, but merely requires him to use it for care at a different facility, regulations granting recipients the right to a hearing prior to a reduction in financial benefits are irrelevant. Pp. 785–786.

(b) This case does not involve the withdrawal of direct benefits. Rather, it involves the Government's attempt to confer an indirect benefit on Medicaid patients by imposing and enforcing minimum standards of care on facilities like Town Court. When enforcement of those standards requires decertification of a facility, there may be an immediate, adverse impact on some residents. But that impact, which is an indirect and incidental result of the Government's enforcement action, does not amount to a deprivation of any interest in life, liberty, or property. Pp. 786–789.

586 F. 2d 280, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, POWELL, and REHNQUIST, JJ., joined. BLACKMUN, J., filed an opinion concurring in the judgment, *post*, p. 790. BRENNAN, J., filed a dissenting opinion, *post*, p. 805. MARSHALL, J., took no part in the consideration or decision of the case.

Norman J. Watkins, Special Deputy Attorney General of Pennsylvania, argued the cause for petitioner. With him on the briefs was *Edward G. Biester, Jr.* *Richard A. Allen* argued the cause for the Secretary of Health, Education, and Welfare, respondent under this Court's Rule 21 (4), in support of petitioner. With him on the briefs were *Solicitor General McCree, Assistant Attorney General Babcock, Deputy Solicitor General Easterbrook*, and *William Kanter*.

Nathan L. Posner argued the cause for respondents. With him on the brief were *William F. Coyle, Jeffrey B. Albert*, and *Abraham C. Reich*.*

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*Briefs of *amici curiae* urging affirmance were filed by *Michael H. Mar-*

MR. JUSTICE STEVENS delivered the opinion of the Court.

The question presented is whether approximately 180 elderly residents of a nursing home operated by Town Court Nursing Center, Inc., have a constitutional right to a hearing before a state or federal agency may revoke the home's authority to provide them with nursing care at government expense. Although we recognize that such a revocation may be harmful to some patients, we hold that they have no constitutional right to participate in the revocation proceedings.

Town Court Nursing Center, Inc. (Town Court), operates a 198-bed nursing home in Philadelphia, Pa. In April 1976 it was certified by the Department of Health, Education, and Welfare (HEW) as a "skilled nursing facility," thereby becoming eligible to receive payments from HEW and from the Pennsylvania Department of Public Welfare (DPW), for providing nursing care services to aged, disabled, and poor persons in need of medical care. After receiving its certification,[1] Town Court entered into formal "provider agreements" with both HEW and DPW. In those agreements HEW and DPW agreed to reimburse Town Court for a period of one year for care provided to persons eligible for Medicare or Medicaid benefits under the Social Security Act,[2] on the condition that Town Court continue to qualify as a skilled nursing facility.

On May 17, 1977, HEW notified Town Court that it

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cus, *Gary Roberts*, *John L. Carroll*, and *Morris Dees* for Jill Harris et al.; by *Kalman Finkel*, *John E. Kirklin*, and *Philip M. Gassel* for the Legal Aid Society of New York City et al.; and by *Toby S. Edelman* and *Edward C. King* for the National Citizens' Coalition for Nursing Home Reform.

[1] The certification in 1976 was Town Court's second; it had first been certified in 1967. It was decertified in 1974 as a result of substantial noncompliance with both state and federal requirements.

[2] The Medicare Program, see 42 U. S. C. § 1395 *et seq.*, which is primarily for the benefit of the aged and the disabled, is financed and administered entirely by the Federal Government (HEW); the Medicaid Program, see 42 U. S. C. § 1396 *et seq.*, which is primarily designed for the poor, is a cooperative federal-state program.

no longer met the statutory and regulatory standards for skilled nursing facilities and that, consequently, its Medicare provider agreement would not be renewed.[3] The HEW notice stated that no payments would be made for services rendered after July 17, 1977, explained how Town Court might request reconsideration of the decertification decision, and directed it to notify Medicare beneficiaries that payments were being discontinued. Three days later DPW notified Town Court that its Medicaid provider agreement would also not be renewed.[4]

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[3] HEW based its determination on a survey conducted by DPW, which recommended that the home be decertified. In its notice to Town Court HEW stated in part:

"In order to participate in the Medicare Program, a skilled nursing facility must meet the statutory requirements contained in section 1861 (j) of the Act, 42 USC 1395 x (j), as well as all other health and safety requirements established by the Secretary in subpart J, part 405, title 20 of the Code of Federal Regulations. A participating skilled nursing facility is required to be in compliance with all of the eighteen conditions of participation for such facilities contained in subpart J.

"On May 8–11, 1977, the Pennsylvania Department of Health performed a survey of your facility. That survey found that your facility does not comply with seven of the eighteen conditions of participation. The seven conditions not being complied with are:

"II.	Governing Body and Management	(405.1121)
"III.	Medical Direction	(405.1122)
"IV.	Physical Services	(405.1123)
"V.	Nursing Services	(405.1124)
"VIII.	Pharmaceutical Services	(405.1127)
"XIII.	Medical Records	(405.1132)
"XV.	Physical Environment	(405.1134)

"Your facility's failure to comply with these conditions of participation precludes renewal of your agreement. Renewal is also precluded by the fact that your facility has failed to maintain compliance with numerous standards which had previously been determined to be met. Please refer to 20 CFR 405.1908 (d)." App. 295a–296a.

[4] The State agency's letter read in part:

"Because the Medicare Program has terminated your participation, the Department of Public Welfare has no alternative but to likewise ter-

Town Court requested HEW to reconsider its termination decision. While the request was pending, Town Court and six of its Medicaid patients [5] filed a complaint in the United States District Court for the Eastern District of Pennsylvania alleging that both the nursing home and the patients were entitled to an evidentiary hearing on the merits of the decertification decision before the Medicaid payments were discontinued. The complaint alleged that termination of the payments would require Town Court to close and would cause the individual plaintiffs to suffer both a loss of benefits and "immediate and irreparable psychological and physical harm." App. 11a.

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minate your participation under the Medical Assistance Program. The Federal regulations, 45 C. F. R. § 249.33 (a)(9), require that a State medical assistance plan must:

"'Provide that in the case of skilled nursing facilities certified under the provisions of title XVIII of the Social Security Act, the term of a provider agreement shall be subject to the same terms and conditions and coterminous with the period of approval of eligibility specified by the Secretary pursuant to that title, *and upon notification that an agreement with a facility under title XVIII of the Act has been terminated or cancelled, the single State agency will take appropriate action to terminate the facility's participation under the plan.* A facility whose agreement has been cancelled or otherwise terminated may not be issued another agreement until the reasons which cause the cancellation or termination have been removed and reasonable assurance provided the survey agency that they will not recur.' (emphasis supplied)

"Because of the requirements of HEW, your facility must be terminated from participation in the Medical Assistance Program effective June 18, 1977." *Id.*, at 291a–292a.

[5] At the time the suit was filed, no Town Court residents were Medicare recipients. However, Town Court did have a Medicare provider agreement with HEW, the nonrenewal of which automatically triggered the nonrenewal of its Medicaid agreement. See n. 4, *supra*.

Although the plaintiffs filed their action on behalf of a class of all Medicaid recipients in the home, the District Court never certified the class. Thus, the action has proceeded throughout the Court of Appeals and in this Court as an individual action on behalf of the six named plaintiffs.

The District Court granted a preliminary injunction against DPW and HEW, requiring payments to be continued for new patients as well as for patients already in the home and prohibiting any patient transfers until HEW acted on Town Court's petition for reconsideration. After HEW denied that petition, the District Court dissolved the injunction and denied the plaintiffs any further relief, except that it required HEW and DPW to pay for services actually provided to patients.

Town Court and the six patients filed separate appeals from the denial of the preliminary injunction, as well as a motion, which was subsequently granted, for reinstatement of the injunction pending appeal. HEW cross-appealed from the portion of the District Court's order requiring payment for services rendered after the effective date of the termination. DPW took no appeal and, though named as an appellee, took no position on the merits.

The United States Court of Appeals for the Third Circuit, sitting en banc, unanimously held that there was no constitutional defect in the HEW procedures that denied Town Court an evidentiary hearing until after the termination had become effective and the agency had ceased paying benefits.[6] The

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[6] Relying on this Court's decision in *Mathews* v. *Eldridge*, 424 U. S. 319, the Court of Appeals held that Town Court's property interests were sufficiently protected by informal pretermination procedures and by the opportunity for an administrative hearing and federal court review after benefits had been terminated:

"As was true in *Eldridge*, the decision not to renew a provider agreement is an easily documented, sharply focused decision in which issues of credibility and veracity play little role. It is based in most cases upon routine, standard, unbiased reports by health care professionals. Those professionals evaluate the provider in light of well-defined criteria that were developed in the administrative rule-making process. Written submissions are adequate to allow the provider to present his case. Given the extensive documentation that the provider is able to submit in response to the findings of the survey teams, the provider is unlikely to need an evidentiary hearing in order to present his position more effectively. In any

Court of Appeals came to a different conclusion, however, with respect to the patients' claim to a constitutional right to a pretermination hearing. *Town Court Nursing Center, Inc.* v. *Beal*, 586 F. 2d 280 (1978).[7]

Relying on the reasoning of *Klein* v. *Califano*, 586 F. 2d 250 (CA3 1978) (en banc), decided the same day, a majority of the court concluded that the patients had a constitutionally protected property interest in continued residence at Town Court that gave them a right to a pretermination hearing. In *Klein* the court identified three Medicaid provisions—a statute giving Medicaid recipients the right to obtain services from any qualified facility,[8] a regulation prohibiting certified

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event, there is ample opportunity to expand orally upon written submissions during the exit interview or in discussions during the survey itself. There is opportunity to submit additional evidence after notice of deficiencies is given, and the evidence upon which the recommendation of the survey team is based is disclosed fully to the provider. Moreover, the criteria used to evaluate the provider are well known in advance to the provider, and compliance is readily proved or disproved by written submission. Finally, review by an administrative law judge, by the Appeals Council of HEW, and ultimately by the federal courts, insures that the decision of the Secretary will be thoroughly examined before becoming final.

"As stated in *Eldridge*, the public interest in preserving scarce financial and administrative resources is strong. Given the large number of providers participating in Medicare and the frequent surveys that are required, we believe that the costs of providing pre-termination hearings would be substantial. Further, the public has a strong interest in insuring that elderly and infirm nursing home patients are not required to stay in non-complying homes longer than is necessary to assure that the provider had adequate notice and opportunity to respond to charges of deficiencies." *Town Court Nursing Center, Inc.* v. *Beal*, 586 F. 2d 266, 277–278 (CA3 1978).

Town Court did not seek further review of this determination.

[7] At the time the litigation began Frank S. Beal was the Pennsylvania Secretary of Public Welfare. He has since been replaced in that position by Helen B. O'Bannon, the petitioner in this Court.

[8] Title 42 U. S. C. § 1396a (a)(23) (1976 ed., Supp. II) provides, in relevant part:

"[A]ny individual eligible for medical assistance (including drugs) may

facilities from transferring or discharging a patient except for certain specified reasons,[9] and a regulation prohibiting the reduction or termination of financial assistance without a hearing[10]—which, in its view, created a "legitimate entitlement to continued residency at the home of one's choice absent specific cause for transfer." *Id.*, at 258. It then cited the general due process maxim that, whenever a governmental benefit may be withdrawn only for cause, the recipient is entitled to a hearing as to the existence of such cause. See *Memphis Light, Gas & Water Division* v. *Craft*, 436 U. S. 1, 11. Finally, it held that, since the inevitable consequence of decertifying a facility is the transfer of all its residents receiving Medicaid benefits, a decision to decertify should be treated as a decision to transfer, thus triggering the patients' right to a hearing on the issue of whether there is adequate cause for the transfer.[11]

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obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required (including an organization which provides such services, or arranges for their availability, on a prepayment basis), who undertakes to provide him such services. . . ."

The same "free choice of providers" is also guaranteed by 42 CFR § 431.51 (1979).

[9] Title 42 CFR § 405.1121 (k)(4) (1979) requires skilled nursing facilities that are licensed either as Medicaid or Medicare providers to establish written policies and procedures to ensure that each patient admitted to the facility "[i]s transferred or discharged only for medical reasons, or for his welfare or that of other patients, or for nonpayment of his stay (except as prohibited by titles XVIII or XIX of the Social Security Act), and is given reasonable advance notice to ensure orderly transfer or discharge. . . ."

[10] Title 45 CFR § 205.10 (a)(5) (1979) provides, in relevant part, that an "opportunity for a hearing shall be granted to any applicant who requests a hearing because his or her claim for financial assistance . . . or medical assistance is denied, . . . and to any recipient who is aggrieved by any agency action resulting in suspension, reduction, discontinuance, or termination of assistance."

[11] "Because a decision to decertify a nursing home as an unqualified

Applying this reasoning in *Town Court*, six judges held that the patients were entitled to a pretermination hearing on the issue of whether Town Court's Medicare and Medicaid provider agreements should be renewed.[12] The court thus reinstated that portion of the preliminary injunction that prohibited patient transfers until after the patients had been granted a hearing and affirmed that portion that required HEW and DPW to continue paying benefits on behalf of Town Court residents. It then remanded, leaving the nature of the hearing to be accorded the patients to be determined, in the first instance, by the District Court. Three judges dissented, concluding that neither the statutes nor the regulations granted

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provider is tantamount to an order to transfer a patient for his welfare. Medicaid residents threatened with transfer are entitled to some form of hearing on the existence of the condition or cause for transfer—whether the home is a qualified provider and whether decertification is for the patients' welfare." 586 F. 2d, at 258.

[12] Three judges joined a brief opinion announcing the judgment of the court authored by Judge Aldisert, which disposed of the case in a summary fashion based on the reasoning of *Klein* v. *Califano*. Judge Adams wrote a concurring opinion, which was also joined by three judges (two of whom also joined Judge Aldisert), in which he attempted to explain more fully the reasoning in *Klein*. Referring to the three provisions relied upon in *Klein*, Judge Adams stated that they

". . . paint three distinct points in the landscape of a 'legitimate claim of entitlement' that Medicaid beneficiaries can assert. Taken alone, the interest created by each of these clauses might be dismissed as not rising to the level of a cognizable property interest. However, when viewed together, they compel the conclusion that they identify three aspects of an 'underlying substantive interest' that enjoys the stature of 'property.'" (Footnote omitted.) 586 F. 2d, at 287.

Judge Adams also relied, to some extent, on the hardship that nursing home residents might suffer if forced to transfer to another home, stating that the "health" and "home" interests the residents possess in remaining in a particular nursing home are "among those that most persons would regard as being encompassed by the protections of the due process clause." *Id.*, at 289. Finally, unlike Judge Aldisert, Judge Adams went on to suggest what types of procedures would be necessary before Medicaid patients could be transferred.

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the patients any substantive interest in decertification proceedings and that they had no constitutionally protected property right in uninterrupted occupancy.[13]

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[13] Chief Judge Seitz summarized his response to the three parts of the majority's analysis as follows:

"The majority finds that continued residency in the nursing home of one's choice absent specific cause for transfer is an underlying substantive interest created by three Medicaid provisions. Under the first, 42 U. S. C. § 1396a (a)(23), a Medicaid recipient may obtain medical care 'from any institution . . . qualified to perform the service or services required.' Clearly, what the majority characterizes as a recipient's right to obtain medical care from a 'freely selected provider' is limited to a choice among institutions which have been determined by the Secretary to be 'qualified.' Next, the majority's reliance on 45 C. F. R. § 205.10 (a)(5), ensuring a notice and hearing to a recipient whose benefits are suspended, reduced, discontinued or terminated, is obviously misplaced. As the majority itself notes, the decertification of these facilities did not reduce or suspend the residents' rights to continued benefits.

"Finally, the majority relies upon 45 C. F. R. § 249.12 (a)(1)(ii)(B)(4), which establishes as one requirement for an institution's certification that each resident admitted to that institution be 'transferred or discharged only for medical reasons or for his welfare or that of other patients, or for nonpayment for his stay.' The majority reads this provision as a limitation on the Secretary's power to interrupt a recipient's residence at a particular institution. Clearly, however, this provision is a standard of conduct imposed by the Secretary upon the provider. Violation of this standard is one of many grounds for decertifying the offending institution. See 45 C. F. R. §§ 249.33 (a)(2), 249.10 (b)(15). The provision creates no 'substantive interest' in the residents vis-a-vis the Secretary.

"Moving to its minor premise, the majority postulates that a decision to decertify is tantamount to a decision to transfer individual residents. Practically, of course, this may be a consequence in most cases, at least where an institution fails to remedy its insufficiencies. Analytically, however, the two decisions are different. Decertification focuses on the institution's noncompliance with HEW's standards. The majority does not and cannot contend that recipients have a right to remain in an institution that the Secretary has found, by appropriate procedures, to be in substantial noncompliance with the standards. 'Transfer trauma,' although a legitimate concern for some residents, is necessarily subordinate to the threat posed to all residents by substandard conditions." *Id.*, at 295–296.

DPW filed a petition for certiorari, which we granted.[14] 441 U. S. 904. We now reverse, essentially for the reasons stated by Chief Judge Seitz in his dissent.

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[14] The patients urge us to dismiss the petition without reaching the merits on the ground that there is no one before the Court who may properly argue the petitioner's position. Thus, they contend that DPW is foreclosed from arguing here because, although it was formally an appellee in the Court of Appeals, it deliberately took a neutral position on the merits in that court. And they argue that HEW, which did argue the merits below, is foreclosed from arguing them here because it did not petition for certiorari. While we accept the patients' argument with respect to the portion of the injunction requiring continued payments for Medicaid patients, we reject it insofar as the main issue presented by the petition—the right of the patients to a pretermination hearing—is concerned.

When the District Court ruled against the patients and Town Court on their right to a pretermination hearing, it nevertheless ordered HEW and DPW to continue making payments for services actually rendered, no doubt to ensure that there would be no break in care or benefits while the patients were being transferred. The patients appealed on the hearing issue, but HEW alone cross-appealed on the issue of whether it should continue paying benefits assuming that there was no right to a pretermination hearing. DPW did not file a cross-appeal, thus accepting the District Court's order that it continue paying its share of benefits. Under these circumstances, DPW's petition for certiorari could not revive the issue of the propriety of that order. And, since HEW did not file a petition for certiorari, we have no occasion to review it now.

However, the patients' jurisdictional argument fails insofar as the hearing issue is concerned. Because it contributes funds to the Medicaid program and has joint supervisory responsibilities with the Federal Government over Medicaid providers, DPW clearly has a sufficient interest in this question to give it standing to argue the merits. And, since it was victorious in the District Court on this issue, there was no need for it to file an appeal in order to keep it alive. Finally, although we would not normally allow a party to make an argument it had not raised below, the fact that the same argument was vigorously asserted by HEW and fully addressed by the Court of Appeals removes any prudential barrier to review that might otherwise exist.

Because it was a party to the proceeding below, HEW was automatically joined as a respondent when DPW filed its petition in this Court. See this Court's Rule 21 (4). In that capacity, it may seek reversal of the judgment of the Court of Appeals on any ground urged in that court.

At the outset, it is important to remember that this case does not involve the question whether HEW or DPW should, as a matter of administrative efficiency, consult the residents of a nursing home before making a final decision to decertify it.[15] Rather, the question is whether the patients have an interest in receiving benefits for care in a particular facility that entitles them, as a matter of constitutional law, to a hearing before the Government can decertify that facility. The patients have identified two possible sources of such a right. First, they contend that the Medicaid provisions relied upon by the Court of Appeals give them a property right to remain in the home of their choice absent good cause for transfer and therefore entitle them to a hearing on whether such cause exists. Second, they argue that a transfer may have such severe physical or emotional side effects that it is tantamount to a deprivation of life or liberty, which must be preceded by a due process hearing.[16] We find both arguments unpersuasive.[17]

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[15] As Judge Adams pointed out in his concurring opinion, HEW and DPW would no doubt benefit from patient input on the questions whether the facility meets the applicable standards and, if not, whether decertification should be postponed pending attempts to bring the home into compliance. 586 F. 2d, at 292–293. Indeed, HEW recognizes the value of patient input, requiring patient interviews to be conducted under some circumstances as a part of the periodic review of a facility's qualifications. See 42 CFR § 456.608 (1979). The fact that a person may be an important, or even critical, witness does not, however, give him a constitutional right to testify.

[16] The patients cite a number of studies indicating that removal to another home may cause "transfer trauma," increasing the possibility of death or serious illness for elderly, infirm patients. They also argue that associational interests, such as friendship among patients and staff and family ties, may be disrupted if the patients are scattered to other nursing homes, perhaps in other areas of the country. In denying the motion for a preliminary injunction, the District Court did not take evidence or make any findings on the harm that might result from a transfer. Nevertheless, we assume for purposes of this decision that there is a risk that

[*Footnote 17 is on p. 785*]

Whether viewed singly or in combination, the Medicaid provisions relied upon by the Court of Appeals do not confer a right to continued residence in the home of one's choice. Title 42 U. S. C. § 1396a (a)(23) (1976 ed., Supp. II) gives recipients the right to choose among a range of *qualified* providers, without government interference. By implication, it also confers an absolute right to be free from government interference with the choice to remain in a home that continues to be qualified. But it clearly does not confer a right on a recipient to enter an unqualified home and demand a hearing to certify it, nor does it confer a right on a recipient to continue to receive benefits for care in a home that has been decertified. Second, although the regulations do protect patients by limiting the circumstances under which a *home* may transfer or discharge a Medicaid recipient, they do not purport to limit the Government's right to make a transfer necessary by decertifying a facility.[18] Finally, since decerti-

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some residents may encounter severe emotional and physical hardship as a result of a transfer.

[17] The patients also argue that they are third-party beneficiaries of the provider agreement between DPW and Town Court and that this status somehow entitles them to more than Town Court itself is entitled to—namely, a pretermination hearing. They also argue that a legitimate entitlement to continued care in the home of their choice arises out of Pennsylvania's long history of providing free medical care for those who are indigent. Nothing in the cited Pennsylvania statutes or court decisions, however, purports to create the kind of broad entitlement that the patients claim. In any event, neither of these state-law arguments was advanced in the courts below and therefore neither may provide the basis for an affirmance in this Court.

[18] This regulation is clearly designed to prevent abuses by providers and not to define the Government's obligations or limit its powers in any way. Although the regulation allows a home to transfer or discharge a patient for medical reasons, we may assume that the Government could not order a patient transferred out of a qualified facility simply because it believed such a transfer was medically indicated. In other words, we assume that the statute referred to above would prohibit any such interference with the patient's free choice among qualified providers.

fication does not reduce or terminate a patient's financial assistance, but merely requires him to use it for care at a different facility, regulations granting recipients the right to a hearing prior to a reduction in financial benefits are irrelevant.

In holding that these provisions create a substantive right to remain in the home of one's choice absent specific cause for transfer, the Court of Appeals failed to give proper weight to the contours of the right conferred by the statutes and regulations. As indicated above, while a patient has a right to continued benefits to pay for care in the qualified institution of his choice, he has no enforceable expectation of continued benefits to pay for care in an institution that has been determined to be unqualified.

The Court of Appeals also erred in treating the Government's decision to decertify Town Court as if it were equivalent in every respect to a decision to transfer an individual patient. Although decertification will inevitably necessitate the transfer of all those patients who remain dependent on Medicaid benefits, it is not the same for purposes of due process analysis as a decision to transfer a particular patient or to deny him financial benefits, based on his individual needs or financial situation.

In the Medicare and the Medicaid programs the Government has provided needy patients with both direct benefits and indirect benefits. The direct benefits are essentially financial in character; the Government pays for certain medical services and provides procedures to determine whether and how much money should be paid for patient care. The net effect of these direct benefits is to give the patients an opportunity to obtain medical services from providers of their choice that is comparable, if not exactly equal, to the opportunity available to persons who are financially independent. The Government cannot withdraw these direct benefits with-

out giving the patients notice and an opportunity for a hearing on the issue of their eligibility for benefits.[19]

This case does not involve the withdrawal of direct benefits. Rather, it involves the Government's attempt to confer an indirect benefit on Medicaid patients by imposing and enforcing minimum standards of care on facilities like Town Court. When enforcement of those standards requires decertification of a facility, there may be an immediate, adverse impact on some residents. But surely that impact, which is an indirect and incidental result of the Government's enforcement action, does not amount to a deprivation of any interest in life, liberty, or property.

Medicaid patients who are forced to move because their nursing home has been decertified are in no different position for purposes of due process analysis than financially independent residents of a nursing home who are forced to move because the home's state license has been revoked. Both groups of patients are indirect beneficiaries of government programs designed to guarantee a minimum standard of care for patients as a class. Both may be injured by the closing of a home due to revocation of its state license or its decertification as a Medicaid provider. Thus, whether they are private patients or Medicaid patients, some may have difficulty locating other homes they consider suitable or may suffer both emotional and physical harm as a result of the disruption associated with their move. Yet none of these patients would lose the ability to finance his or her continued care in a properly licensed or certified institution. And, while they might have a claim against the nursing home for damages,[20] none would have any claim against the responsible governmental authorities for the deprivation of an interest in life, liberty, or prop-

[19] 45 CFR § 205.10 (a) (5) (1979). See also *Goldberg* v. *Kelly*, 397 U. S. 254.

[20] This would, of course, depend on the contract between the patients and the nursing home, if any, and the provisions of the applicable state law.

erty. Their position under these circumstances would be comparable to that of members of a family who have been dependent on an errant father; they may suffer serious trauma if he is deprived of his liberty or property as a consequence of criminal proceedings, but surely they have no constitutional right to participate in his trial or sentencing procedures.

The simple distinction between government action that directly affects a citizen's legal rights, or imposes a direct restraint on his liberty, and action that is directed against a third party and affects the citizen only indirectly or incidentally, provides a sufficient answer to all of the cases on which the patients rely in this Court. Thus, *Memphis Light, Gas & Water Division* v. *Craft*, 436 U. S. 1, involved the direct relationship between a publicly owned utility and its customers; the utility had provided its customers with a legal right to receive continued service as long as they paid their bills. We held that under these circumstances the utility's customers had a constitutional right to a hearing on a disputed bill before their service could be discontinued. But nothing in that case implies that if a public utility found it necessary to cut off service to a nursing home because of delinquent payments, it would be required to offer patients in the home an opportunity to be heard on the merits of the credit dispute. This would be true even if the termination of utility service required the nursing home to close and caused serious inconvenience or harm to patients who would therefore have to move. As in this case, such patients might have rights against the home, and might also have direct relationships with the utility concerning their own domestic service, but they would have no constitutional right to interject themselves into the dispute between the public utility and the home.[21]

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[21] Similarly, in *Perry* v. *Sindermann*, 408 U. S. 593, and *Arnett* v. *Kennedy*, 416 U. S. 134, the Court was concerned with the direct relationship between a public employer and its employees. The character of that relationship determined whether the employee possessed an expectancy of continued employment that was legally enforceable against his employer—

Over a century ago this Court recognized the principle that the due process provision of the Fifth Amendment does not apply to the indirect adverse effects of governmental action. Thus, in the *Legal Tender Cases*, 12 Wall. 457, 551, the Court stated:

> "That provision has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals."

More recently, in *Martinez* v. *California*, 444 U. S. 277, we rejected the argument made by the parents of a girl murdered by a parolee that a California statute granting absolute immunity to the parole board for its release decisions deprived their daughter of her life without due process of law:

> "A legislative decision that has an incremental impact on the probability that death will result in any given situation—such as setting the speed limit at 55-miles-per-hour instead of 45—cannot be characterized as state action depriving a person of life just because it may set in motion a chain of events that ultimately leads to the random death of an innocent bystander." *Id.*, at 281.

Similarly, the fact that the decertification of a home may lead to severe hardship for some of its elderly residents does not turn the decertification into a governmental decision to impose that harm.[22]

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or at least could not be terminated by the employer without observing certain minimal safeguards. But those cases raised no question concerning the right of an employee who loses his job as a result of government action directed against a third party.

[22] We, of course, need not and do not hold that a person may never have a right to a hearing before his interests may be indirectly affected by government action. Conceivably, for example, if the Government were acting against one person for the purpose of punishing or restraining

Whatever legal rights these patients may have against Town Court for failing to maintain its status as a qualified skilled nursing home—and we express no opinion on that subject—we hold that the enforcement by HEW and DPW of their valid regulations did not directly affect their legal rights or deprive them of any constitutionally protected interest in life, liberty, or property.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

MR. JUSTICE BLACKMUN, concurring in the judgment.

Although the Court reaches the result I reach, I find its analysis simplistic and unsatisfactory. I write separately to explain why and to set forth the approach I feel should be followed.

The patients rest their due process claim on two distinct foundations. First, they assert a property interest in continued residence at their home. Second, they claim life and liberty interests tied to their physical and psychological well-being. According to the patients, because each of these interests is threatened directly by decertification, they are constitutionally entitled to a hearing on the propriety of that action. Unlike the Court, I find it necessary to treat these distinct arguments separately.

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another, the indirectly affected individual might have a constitutional right to some sort of hearing. But in this case the Government is enforcing its regulations against the home for the benefit of the patients as a whole and the home itself has a strong financial incentive to contest its enforcement decision; under these circumstances the parties suffering an indirect adverse effect clearly have no constitutional right to participate in the enforcement proceedings.

I

In my view, the Court deals far too casually with § 1902 (a)(23) of the Social Security Act, 42 U. S. C. § 1396 (a)(23) (1976 ed., Supp. II), in rejecting the patients' "property" claim.[1] That provision guarantees that a patient may receive nursing home care "from any institution . . . qualified to perform the . . . services . . . who undertakes to provide him such services." The statute thus vests each patient with a broad right to resist governmental removal, which can be disrupted only when the Government establishes the home's noncompliance with program participation requirements. Given this fact and our precedents, one can easily understand why seven judges of the Court of Appeals adopted the patients' argument. It would seem that, because the Government has generated a "justifiable expectation that [the patients] would not be transferred except for misbehavior or upon the occurrence of other specified events," *Vitek* v. *Jones*, 445 U. S. 480, 489 (1980), they are "entitled . . . to the benefits of appropriate procedures in connection with determining the conditions that warranted [their] transfer." *Id.*,

[1] I agree with the Court that 45 CFR § 205.10 (a)(5) (1979) does not help the patients. Even assuming that provision might otherwise be relevant, it merely prescribes procedures that must attend removal of a benefit. Thus, it has no bearing on whether a property interest exists. See *Bishop* v. *Wood*, 426 U. S. 341, 345, 347 (1976); Monaghan, Of "Liberty" and "Property," 62 Cornell L. Rev. 405, 442–443, n. 232 (1977). I am less comfortable with the Court's treatment of 42 CFR § 442.311 (c) (1979), restated from 45 CFR § 249.12 (a)(1)(ii)(B)(4) (1976), which limits transfers by the home. After all, "[i]t is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." *Board of Regents* v. *Roth*, 408 U. S. 564, 577 (1972). Since reliance can be generated by inhibitions on private, as well as governmental, alteration of the status quo, I am inclined to think that this provision, if applicable to Town Court, furnishes some support to the patients' claim of a protected expectancy. Accord: *Brede* v. *Director for Dept. of Health for Hawaii*, 616 F. 2d 407, 410–411 (CA9 1980).

at 490. Especially since the patients assert an interest in a home,[2] I believe their claim to property has substantial force.

I agree with Judge Adams of the Court of Appeals that it "begs the question," 586 F. 2d 280, 287 (concurring opinion), to counter this argument with the observation that § 1396 (a)(23) expressly gives the patients only a right to stay in *qualified* facilities. See *ante*, at 785. We have repeatedly rejected as too facile an approach that looks no further than the face of the statute to define the scope of protected expectancies. See *Vitek* v. *Jones*, 445 U. S., at 490–491, and n. 6, citing *Arnett* v. *Kennedy*, 416 U. S. 134 (1974) (concurring and dissenting opinions); The Supreme Court, 1975 Term, 90 Harv. L. Rev. 56, 99 (1976) ("six Justices in *Arnett* must have looked outside the statute to consider the impact of government action on citizen expectations and reliance"). Here, as in numerous cases in which we have recognized protected interests, disqualification of the home is the very condition that alone permits disruption of the status quo and that the patients wish to contest. See *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U. S. 1, 11–12 (1978) ("Because petitioners may terminate service only 'for cause,' respondents assert a 'legitimate claim of entitlement' within the protection of the Due Process Clause") (footnote omitted).

Perhaps aware that its treatment of § 1396 (a)(23) is in some tension with our precedents, the Court launches another

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[2] It is well recognized that the Due Process Clause of the United States Constitution grew out of the "law of the land" provision of Magna Carta and its later manifestations in English statutory law. That the home was at the center of those property interests historically sought to be protected by due process is underscored by the fact the phrase "due process of law" first appeared in the following codification: "No man of what state or condition he be, shall be *put out of his lands or tenements* nor taken, nor disinherited, nor put to death, without he be brought to answer by due process of law." 28 Edw. III, ch. 3 (1354) (emphasis added), as quoted in The Constitution of the United States of America, Analysis and Interpretation 1138 (Cong. Research Serv. 1973).

line of analysis. It reasons that "decertification . . . is not the same for purposes of due process analysis as a decision to transfer a particular patient." *Ante*, at 786. I am left wondering why. Certainly, the "real world" effect of the two actions is the same. Thus the Court's assertion will come as cold comfort to patients forced to relocate because of this decision. I also wonder why this analytical differentiation matters in determining whether the patients possess a constitutionally protected interest. Certainly decertification results in the loss of exactly the same interest—the ability to stay in one's home—that a patient subject to an individual transfer suffers. The Court does not explain to my satisfaction why in the latter case, but not in the former, a constitutionally protected interest is affected.

I have no quarrel with the Court's observation that the Due Process Clause generally is unconcerned with "indirect" losses. I fear, however, that such platitudes often submerge analytical complexities in particular cases. Cf. *Sherbert* v. *Verner*, 374 U. S. 398, 404 (1963); *Braunfeld* v. *Brown*, 366 U. S. 599, 607 (1961) (plurality opinion); *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 461 (1958); *American Communications Assn.* v. *Douds*, 339 U. S. 382, 402 (1950). I also question whether that generalization has relevance here.[3] Even assuming it does, the Court's treatment of it

[3] It seems to me that the indirect character of a harm at least normally has to do with whether state action has "deprived" a person of a protected interest, not with whether a protected interest exists. Thus, in *Martinez* v. *California*, 444 U. S. 277 (1980), a case relied on by the Court, there was no question that the interest destroyed, a woman's life, was constitutionally protected. The Court concluded, however, that the loss of that life was "too remote a consequence" of government conduct to be deemed a deprivation attributable to state action. *Id.*, at 285. I would similarly distinguish the Court's "errant father" and "unpaid utility" hypotheticals as instances where no governmental deprivation occurred. Since the deprivation issue was neither briefed in this Court nor addressed below, I think there is a serious question whether the Court's inquiry into the indirect character of the patient's loss has any place in this case.

leaves me unimpressed. To say that the decertification decision directly affects the home is not to say that it "indirectly" affects the patients. Transfer is not only the "inevitabl[e]," *ante*, at 786, clearly foreseeable consequences of decertification; a basic *purpose* of decertification is to force patients to relocate. Thus, not surprisingly, § 1396 (a)(23) specifically ties the patients' right to continued residence in a home to qualification of the facility. Under these circumstances, I have great difficulty concluding that the patients' loss of their home should be characterized as "indirect and incidental," *ante*, at 787, "consequential," *Meyer* v. *Richmond*, 172 U. S. 82, 94 (1898); "collateral," see *Hannah* v. *Larche*, 363 U. S. 420, 443 (1960); or "remote and indeterminate," *Goodrich* v. *Detroit*, 184 U. S. 432, 437 (1902).[4] To be sure, decertification-induced transfer are designed to benefit patients. See *ante*, at 787. But so are a wide range of other governmental acts that invoke due process protections for the intended beneficiary. See, *e. g.*, *Vitek* v. *Jones*, *supra*; *Parham* v. *J. R.*, 442 U. S. 584 (1979). See also *In re Gault*, 387 U. S. 1 (1967). Indeed a basic purpose of affording a hearing in such cases is to test the Government's judgment that its action will in fact prove to be beneficial.

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[4] Because the "indirectness" of a result inevitably is a question of degree, and because countervailing considerations are likely to appear, I would prefer to treat "indirectness" as, at most, but one factor in the "property interest" calculus, which carries greater or lesser significance depending on the particular case. If I were to agree that the sole question here is whether the patients' loss must be rigidly characterized as either "indirect" or "direct," I doubt that I would reach the result the Court does. And if I did, I would undoubtedly rely on the policy-informed factors identified hereinafter, rather than on an essentially *ipse dixit* judgment informed by strained analogies. This would be so whether the relevant inquiry was whether a property interest exists or whether a deprivation had occurred. Cf. Monaghan, 62 Cornell L. Rev., at 428 (existence of "deprivation . . . depends . . . on such matters as the nature of the invasion, its magnitude, and the character of the justification asserted").

In my view, there exists a more principled and sensible analysis of the patients' "property" claim. Given § 1396 (a) (23), I am forced to concede that the patients have some form of property interest in continued residence at Town Court. And past decisions compel me to observe that where, as here, a substantial restriction inhibits governmental removal of a presently enjoyed benefit, a property interest normally will be recognized.[5] To state a general rule, however, is not to decide a specific case. The Court never has held that *any* substantive restriction upon removal of *any* governmental benefit gives rise to a generalized property interest in its continued enjoyment. Indeed, a majority of the Justices of this Court are already on record as concluding that the term "property" sometimes incorporates limiting characterizations of statutorily bestowed interests. See *Arnett* v. *Kennedy*, 416 U. S. 134 (1974) (plurality opinion); *Goss* v. *Lopez*, 419 U. S. 565, 586–587, and n. 4 (1975) (dissenting opinion). See also *Smith* v. *Organization of Foster Families*, 431 U. S. 816, 856, 860–861 (1977) (opinion concurring in judgment). See generally Van Alstyne, Cracks in

[5] See *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U. S. 1, 11 (1978) (receipt of services from public utility not terminable except for "good and sufficient cause"); *Bishop* v. *Wood*, 426 U. S., at 345, n. 8 (finding determinative that public employment was terminable "at will," rather than for cause); *Goss* v. *Lopez*, 419 U. S. 565, 573–574 (1975) (public education must be continued absent "misconduct"); *Board of Regents* v. *Roth*, 408 U. S., at 578 (distinguishing situation where nonrenewal of state college professor's employment authorized only for "sufficient cause"); *Goldberg* v. *Kelly*, 397 U. S. 254, 262 (1970) (public support payments to be continued unless recipient not qualified). See also *Vitek* v. *Jones*, 445 U. S. 480, 488–491 (1980); *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1, 9–11 (1979); *Montanye* v. *Haymes*, 427 U. S. 236, 242 (1976); *Meachum* v. *Fano*, 427 U. S. 215, 226–227 (1976); *Wolff* v. *McDonnell*, 418 U. S. 539, 558 (1974); *Gagnon* v. *Scarpelli*, 411 U. S. 778 (1973); *Morrissey* v. *Brewer*, 408 U. S. 471 (1972). See generally *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 276 (1856) (Fifth Amendment "cannot be so construed as to leave congress free to make any process 'due process of law,' by its mere will").

"The New Property" Adjudicative Due Process in the Administrative State, 62 Cornell L. Rev. 445, 460–466 (1977). Common sense and sound policy support this recognition of some measure of flexibility in defining "new property" expectancies. Public benefits are not held in fee simple. And even if we analogize the patients' claim to "continued residence" to holdings more familiar to the law of private property—even to interests in homes, such as life tenancies—we would find that those interests are regularly subject to easements, conditions subsequent, possibilities of reverter, and other similar limitations. In short, it does not suffice to say that a litigant holds property. The inquiry also must focus on the dimensions of that interest. See *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972).

The determinative question is whether the litigant holds such a legitimate "claim of entitlement" that the Constitution, rather than the political branches, must define the procedures attending its removal. *Id.*, at 578. Claims of entitlement spring from expectations that are "justifiable," *Vitek* v. *Jones*, 445 U. S., at 489; "protectible," *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1, 7 (1979); "sufficient," *Bishop* v. *Wood*, 426 U. S. 341, 344 (1976); or "proper," *id.*, at 362 (dissenting opinion). In contrast, the Constitution does not recognize expectancies that are "unilateral," *Board of Regents* v. *Roth*, 408 U. S., at 577, or "too ephemeral and insubstantial." *Meachum* v. *Fano*, 427 U. S. 215, 228 (1976).

To mouth these labels does not advance analysis far. We must look further to determine which set of labels applies to particular constellations of fact. Whether protected entitlements exist and how far they extend, although dependent on subconstitutional rules, see, *e. g.*, *Bishop* v. *Wood*, *supra*, are ultimately questions of constitutional law. See *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U. S., at 9; Monaghan, Of "Liberty" and "Property," 62 Cornell L. Rev. 405, 435–436 (1977). Application of that law will seldom pose difficulties

when the Government has exercised its option to bestow a benefit wholly at will, see *Bishop* v. *Wood, supra,* or the litigant has identified a "for cause" condition resembling those held to be property-creating in past cases. Cases, however, will not always fit neatly into these categories. And when such cases arise, some new analysis is needed. In my view, that inquiry should be broad-gauged. Reason and shared perceptions should be consulted to define the scope of the claimant's "justifiable" expectations. Nor should constitutional policy be ignored in deciding whether constitutional protections attach. This approach not only permits sensible application of due process protections; it reflects the unremarkable reality that reasonable legal rules themselves comport with reasonable expectations.

In applying this analysis to this case, four distinct considerations convince me that—even though the statutes place a significant substantive restriction on transferring patients—their expectancy in remaining in their home is conditioned upon its status as a qualified provider.

(1) The lengthy process of deciding the disqualification question has intimately involved Town Court. The home has been afforded substantial procedural protections, and, throughout the process, has shared with the patients who wish to stay there an intense interest in keeping the facility certified. These facts are functionally important. Procedural due process seeks to ensure the accurate determination of decisional facts, and informed, unbiased exercises of official discretion. See, *e. g., Fuentes* v. *Shevin,* 407 U. S. 67, 81 (1972); *Morrissey* v. *Brewer,* 408 U. S. 471, 480 (1972). To the extent procedural safeguards achieve these ends, they reduce the likelihood that persons will forfeit important interests without sufficient justification. In this case, since the home had the opportunity and incentive to make the very arguments the patients might make, their due process interest in accurate and informed decisionmaking already, in large measure, was satisfied. This point embodies more than

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an abstract argument of policy. "[T]he rights of parties are habitually protected in court by those who act in a representative capacity." *Voeller* v. *Neilston Warehouse Co.*, 311 U. S. 531, 537 (1941). See also *New Orleans Debenture Redemption Co.* v. *Louisiana*, 180 U. S. 320 (1901); *Bernheimer* v. *Converse*, 206 U. S. 516, 532 (1907). Thus, not surprisingly the Court heretofore has recognized that where known rules provide procedures through which we may expect others to protect a property holder's less directly threatened interests, that fact favors viewing compliance with those procedures as defining the outer limits of the property holder's expectancy. See *Kersh Lake Dist.* v. *Johnson*, 309 U. S. 485 (1940); *McCaughey* v. *Lyall*, 224 U. S. 558 (1912).

(2) Town Court is more than a *de facto* representative of the patients' interests; it is the underlying source of the benefit they seek to retain. Again, this fact is important, for the property of a recipient of public benefits must be limited, as a general rule, by the governmental power to remove, through prescribed procedures, the underlying source of those benefits. The Constitution would not have entitled John Kelly to a fair hearing if New York had chosen to disband its public assistance programs rather than to cut off his particular award. See *Goldberg* v. *Kelly*, 397 U. S. 254 (1970). Nor would Texas have had to afford process to Professor Sindermann had it decided for budgetary reasons to close Odessa Junior College. See *Perry* v. *Sindermann*, 408 U. S. 593 (1972). And we would be surprised to learn that Dwight Lopez had a constitutional right to procedures before the Ohio Department of Education suspended classes at Columbus High School for 10 days due to the discovery of faulty electrical wiring requiring that much time for repair work. See *Goss* v. *Lopez*, 419 U. S. 565 (1975). These observations comport with common understanding and shared expectations. A farmer may sue for conversion if his upstream neighbor improperly diverts his water. But both can

only grumble if the spring rains cease and the river runs dry.[6]

(3) That the asserted deprivation of property extends in a nondiscriminatory fashion to some 180 patients also figures in my calculus. See *Dent* v. *West Virginia*, 129 U. S. 114, 124 (1889) (legislation comports with due process if, among other things, "it be general in its operation upon the subjects to which it relates"). "Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meet-

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[6] This common-sense notion is supported by the Court's holding nearly a century ago in *Fox* v. *Cincinnati*, 104 U. S. 783 (1882). Ohio had dredged the Miami and Erie Canal which had one of its termini at the Ohio River in Cincinnati. Pursuant to statutory authority, the State entered into contracts with owners of land bordering the canal. Under these contracts, the State provided the landowners with water to generate hydraulic power in return for rents. Fox leased water from the State in 1855. In 1863, the State granted Cincinnati a portion of the canal so that a street might be laid. The city built the street, and Fox, alleging that the project ruined his lease, sued the city. The city responded that the State had implicitly rescinded Fox's lease by abandoning the canal. Fox replied that, if this were so, the grant was void because it deprived him of property without due process of law and without just compensation. *Id.*, at 785.

The Court perceived the issue to be "whether there is anything in the lease . . . which prevents the State from making such an abandonment." *Ibid.* It answered the question in the negative. The State could abandon the canal whenever the "public necessities" justified abandonment. *Ibid.* No specific provision in the lease was required "because the right to abandon followed necessarily from the right to build. . . . Every lessee of power took his lease and put up his improvements with full notice of the reserved right of the State to discontinue its canal and stop his supply of water." *Id.*, at 786. See *Kirk* v. *Providence Mill Co.*, 279 U. S. 807 (1929); *Kirk* v. *Maumee Valley Co.*, 279 U. S. 797 (1929). If a State may abandon a canal without invading the "property" of a lessee of its waters, it also generally may "abandon" a college, *Perry* v. *Sindermann*, 408 U. S. 593 (1972), or a high school, *Goss* v. *Lopez*, 419 U. S. 565 (1975), or a nursing home Medicaid provider.

ing or an assembly of the whole." *Bi-Metallic Investment Co.* v. *State Board*, 239 U. S. 441, 445 (1915). See *Bowles* v. *Willingham*, 321 U. S. 503, 519–520 (1944); *Goodrich* v. *Detroit*, 184 U. S., at 438. When governmental action affects more than a few individuals, concerns beyond economy, efficiency, and expedition tip the balance against finding that due process attaches.[7] We may expect that as the sweep of governmental action broadens, so too does the power of the affected group to protect its interests outside rigid constitutionally imposed procedures.[8] Moreover, "the case for due

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[7] The need for expeditious removal of patients from unsafe and unhealthful homes surely is substantial. See Lieberman, Relocation Research and Social Policy, 14 The Gerontologist 494, 500 (1974) ("Taking individuals out of environments that were sterile and barren and putting them into environments that were more humanizing and demanding produced positive results"). And providing procedures at the usual "meaningful time and in a meaningful manner," *Armstrong* v. *Manzo*, 380 U. S. 545, 552 (1965), will inevitably delay beneficial transfer of some nursing home residents. See Brown, An Appraisal of the Nursing Home Enforcement Process, 17 Ariz. L. Rev. 304, 337 (1975) ("While the cases granting a prior hearing [to nursing home operators] seem to reflect judicial concern for the consequences of the proposed action on the patients of the affected facility, the effect has been to allow patients to remain in seriously deficient homes undercutting enforcement activities aimed at remedying these deficiencies"); *id.*, at 338 ("because the homes may be expected to use any available delaying tactics, the process proceeds at a snail's pace").

[8] "General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule." *Bi-Metallic Investment Co.* v. *State Board*, 239 U. S. 441, 445 (1915). Of course, we cannot ignore that this generalization does not always work well in practice. Thus, the Court has recognized that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities." *United States* v. *Carolene Products Co.*, 304 U. S. 144, 153, n. 4 (1938). While nursing home patients may indeed make up a "minority," they are not so much the victims of social prejudice as of physical

process protection grows stronger as the identity of the persons affected by a government choice becomes clearer; and the case becomes stronger still as the precise nature of the effect on each individual comes more determinately within the decisionmaker's purview. For when government acts in a way that singles out identifiable individuals—in a way that is likely to be premised on suppositions about specific persons—it activates the special concern about being personally *talked to* about the decision rather than simply being *dealt with.*" L. Tribe, American Constitutional Law § 10-7, pp. 503-504 (1978) (emphasis in original). I agree with this general statement and find its "flipside" informative here.

(4) Finally, I find it important that the patients' interest has been jeopardized not at all because of alleged shortcomings on their part. Frequently, significant interests are subjected to adverse action upon a contested finding of fault, impropriety, or incompetence. In these contexts the Court has seldom hesitated to require that a hearing be afforded the "accused." See, *e. g.*, *Dixon* v. *Love*, 431 U. S. 105, 112-113 (1977); *Goss* v. *Lopez*, 419 U. S. 565 (1975); *Wolff* v. *McDonnell*, 418 U. S. 539 (1974); *Arnett* v. *Kennedy*, 416 U. S. 134 (1974). This tendency reflects due process values extending beyond the need for accurate determinations. Affording procedural protections also aims at " 'generating the feeling, so important to a popular government, that justice has been done.' " *Marshall* v. *Jerrico, Inc.*, 446 U. S. 238, 242 (1980), quoting *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 172 (1951) (concurring opinion). It may be that patients' participation in the decertification decision would vaguely heighten their and others' sense of the decision's legitimacy, even though the decision follows

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infirmity and social neglect. Moreover, concerned friends and relatives or organized interest groups may, and often do, step forward to protect the interests of nursing home patients.

extensive government inspections undertaken with the very object of protecting the patients' interests. Even so, that interest is far less discernible in this context than when a stigmatizing determination of wrongdoing or fault supplements removal of a presently enjoyed benefit. See, *e. g.*, *Goss* v. *Lopez*, 419 U. S., at 574–575. See also *Vitek* v. *Jones*, 445 U. S. 480 (1980).

For these reasons, I am willing to recognize in this case that "the very legislation which 'defines' the 'dimension' of the [patient's] entitlement, while providing a right to [remain in a home] generally, does not establish this right free of [disqualification of the home] in accord with [federal statutory] law." *Goss* v. *Lopez*, 419 U. S., at 586–587 (dissenting opinion).[9]

II

Citing articles and empirical studies, the patients argue that the trauma of transfer so substantially exacerbates mortality rates, disease, and psychological decline that decertification deprives them of life and liberty.[10] Although the

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[9] Although basic analytical differences divide the Court and me, I am heartened by the Court's seeming recognition that most, if not all, of the factors I have identified and explained may figure, in future cases, in due process analysis. See *ante*, at 789–790, n. 22.

[10] I question whether the life and liberty issue decided by the Court is properly presented. The District Court refused to extend a preliminary injunction after a brief hearing. In that court, the plaintiffs only touched on the concept of transfer trauma. There was no explicit argument that the patients were threatened with a deprivation of life or liberty; rather, the danger of transfer trauma was noted only as a circumstance raising a likelihood of irreparable injury justifying injunctive relief. See Memorandum of Law in Support of Application for Temporary Restraining Order and Motion for Preliminary Injunction (filed July 20, 1977) (asserting only "taking of property without due process"). The transfer trauma studies cited to this Court were not cited to the District Judge. Testimony regarding transfer trauma was limited to the little-explained assertion of an expert witness that removal would subject some patients in the group to endangerment of their lives or aggravation of their ill-

Court assumes that "transfer trauma" exists, see *ante*, at 784, and n. 16, it goes on to reject this argument. By focusing solely on the "indirectness" of resulting physical and psychological trauma, the Court implies that regardless of the degree of the demonstrated risk that widespread illness or even death attends decertification-induced transfers, it is of no moment. I cannot join such a heartless holding. Earlier this Term, the Court recognized that a liberty interest emanates even from the likelihood that added stigma or harmful treatment might attend transfer from a prison to a mental hospital. *Vitek* v. *Jones, supra;* see also *Parham* v. *J. R.*, 442 U. S., at 601. For me it follows easily that a governmental decision that imposes a high risk of death or serious illness on identifiable patients must be deemed to have an impact on their liberty.[11] Nor am I soothed by the palliative that this harm is "indirect"; in my view, where such drastic consequences attend governmental action, their foreseeability, at least generally, must suffice to require input by those who must endure them. See *Brede* v. *Director for Dept. of Health for Hawaii*, 616 F. 2d 407, 412 (CA9 1980).[12]

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nesses. App. 252a–253a. In the Court of Appeals, the patients again did not contend that decertification exposed them to a deprivation of life or liberty. See Reply Brief for Appellants in CA3 Nos. 77–2221 et al., p. 10 (raising only "property interest" argument). It is to be remembered that this case arises from the refusal to extend a preliminary injunction—an order preceded by limited development of the record and not guided by focused presentation of legal arguments. "[T]his Court above all others must limit its review of interlocutory orders." *Goldstein* v. *Cox*, 396 U. S. 471, 478 (1970).

[11] Blackstone, whose vision of liberty unquestionably informed the Framers of the Bill of Rights, see *Gannett Co.* v. *DePasquale*, 443 U. S. 368, 424 (1979) (opinion concurring in part and dissenting in part), wrote that "[t]he right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, *his health*, and his reputation." 1 W. Blackstone, Commentaries *129 (emphasis added).

[12] The Court observes that "the fact that the decertification of a home may lead to severe hardship for some of its elderly residents does not

The fact of the matter, however, is that the patients cannot establish that transfer trauma is so substantial a danger as to justify the conclusion that transfers deprive them of life or liberty. Substantial evidence suggests that "transfer trauma" does not exist, and many informed researchers have concluded at least that this danger is unproved.[13] Recognition of a constitutional right plainly cannot rest on such an inconclusive body of research and opinion. It is for this reason, and not for that stated by the Court, that I would reject the patients' claim of a deprivation of life and liberty.

III

Few statements are more familiar to judges than Holmes' pithy observation that "hard cases make bad law." I fear that the Court's approach to this case may manifest the perhaps equally valid proposition that easy cases make bad law. Sometimes, I suspect, the intuitively sensed obviousness of a case induces a rush to judgment, in which a convenient rationale is too readily embraced without full consideration of its internal coherence or future ramifications. With re-

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turn the decertification into a governmental decision to impose that harm." *Ante*, at 789. I question the relevance of this observation. When the government erroneously commits a person to a mental hospital, it is not "deci[ding] to impose . . . harm" either. But we have recognized that the risk that such action "may lead to severe hardship" is sufficiently great to justify a hearing for the transferee. *Vitek* v. *Jones*, 445 U. S. 480 (1980).

[13] See Borup, Gallego, & Heffernan, Relocation and its Effect on Mortality, 19 The Gerontologist 135, 136 (1979) (noting that 6 previous studies found increased mortality rates, while 12 did not: "findings have been ambiguous and appear to be contradictory"); *id.*, at 138 (concluding on basis of new study that "relocation does not increase the probability of mortality"); Bourestom & Tars, Alterations in Life Patterns Following Nursing Home Relocation, 14 The Gerontologist 506 (1974); Lieberman, Relocation Research and Social Policy, 14 The Gerontologist 494, 495 (1974).

spect, I express my concern that that path has been followed here.

I concur in the judgment.

MR. JUSTICE BRENNAN, dissenting.

Respondents have a constitutionally protected property interest in their " 'legitimate entitlement to continued residency at the home of [their] choice absent specific cause for transfer.' " *Town Court Nursing Center, Inc.* v. *Beal*, 586 F. 2d 280, 286 (CA3 1978) (Adams, J., concurring), quoting *Klein* v. *Califano*, 586 F. 2d 250, 258 (CA3 1978). The statutory and regulatory scheme gives a patient the right to choose any qualified nursing home. 42 U. S. C. §§ 1395a and 1396a (a)(23) (1976 ed., Supp. II). Once a patient has chosen a facility, the scheme carefully protects against undesired transfers by limiting the circumstances under which a home may transfer patients. 42 CFR § 442.311 (c) (1979). And a qualified nursing home, which must have met detailed federal requirements to gain certification, 42 U. S. C. §§ 1395x (j) (1976 ed. and Supp. II) and 1396a (a)(28), cannot be decertified unless the Government can show good cause. See 42 U. S. C. § 1395cc (b)(2) (1976 ed., Supp. II). Thus the scheme is designed to enable a patient to stay in the chosen home unless there is a specific reason to justify a transfer.

Respondent patients chose a home which was, at the time, qualified. They moved into the home reasonably expecting that they would not be forced to move unless, for some sufficient reason, the home became unsuitable for them. The Government's disqualification of the home is, of course, one such reason. Respondents have no right to receive benefits if they choose to live in an unqualified home. That does not mean, however, that they have no right to be heard on the question whether the home is qualified—the answer to which will determine whether they must move to another home and suffer the allegedly great ills encompassed by the term "transfer trauma." See *ante*, at 784–785, n. 16. The Government's

action in withdrawing the home's certification deprives them of the expectation of continued residency created by the statutes and regulations. Under our precedents, they are certainly "entitled . . . to the benefits of appropriate procedures" in connection with the decertification. *Vitek* v. *Jones*, 445 U. S. 480, 490 (1980); *Perry* v. *Sindermann*, 408 U. S. 593 (1972).*

The requirements of due process, to be sure, are flexible and are meant to be practical. See *Mathews* v. *Eldridge*, 424 U. S. 319 (1976); *Morrissey* v. *Brewer*, 408 U. S. 471 (1972). Here, the provider is entitled to formal proceedings in connection with the disqualification of the home. To the extent that patients want to remain in a home, their interests very nearly coincide with the home's own interests. The patients can count on the home to argue that it should not be disqualified. Nevertheless, the patients have some interests which are separate from the interests of the provider, and they could contribute some information relevant to the decertification decision if they were given an opportunity. See *ante*, at 784, n. 15. There is no indication that the patients have been accorded any opportunity to present their views on decertification. Because they were accorded no procedural protection, I dissent.

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*It is no answer to say that respondents' only right is to stay in a *qualified* home, *ante*, at 785, because whether the home is qualified is precisely the issue to be determined. Nor is it an answer to say that respondents are third parties not "directly" affected by the governmental action. *Ante*, at 786–788. As the Court admits, the regulatory scheme operates for the direct benefit of the patients, *ante*, at 789–790, n. 22, and it generates expectations and reliance just as deserving of protection as other statutory entitlements.

MOHASCO CORP. v. SILVER

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 79-616. Argued March 25, 1980—Decided June 23, 1980

Section 706 (c) of the Civil Rights Act of 1964 (Act) provides that in the case of an alleged unlawful employment practice occurring in a State having a law prohibiting such practices no charge may be "filed" with the Equal Employment Opportunity Commission (EEOC) before the expiration of 60 days after proceedings have been commenced in the appropriate state agency unless such proceedings have been earlier terminated. Section 706 (e) requires that an unlawful employment practice charge be "filed" in such a State within 300 days after the alleged practice occurred or within 30 days after the aggrieved person receives notice that the state agency has terminated its proceedings, whichever is earlier. Petitioner employer discharged respondent employee on August 29, 1975. On June 15, 1976—291 days later—the EEOC received a letter from respondent claiming that petitioner had discriminated against him because of his religion, and this letter was promptly referred to the appropriate New York agency, which in due course determined that there was no merit to the charge. Meanwhile, on August 20, 1976—more than 60 days after respondent's letter had been submitted to the EEOC and 357 days after respondent's discharge—the EEOC notified petitioner that respondent had filed an employment discrimination charge. About a year later, on August 24, 1977, the EEOC issued its determination that there was no reasonable cause to believe respondent's charge was true and notified respondent that he had a statutory right to file a private action. Respondent then commenced such an action 91 days later in Federal District Court. Granting summary judgment for petitioner, the District Court held that § 706 (c) precluded any filing with the EEOC until a date 60 days after June 15, 1976, and because that date was 51 days beyond § 706 (e)'s 300-day time limit for filing in so-called "deferral States," the charge was not timely filed. The Court of Appeals reversed, holding that the District Court's literal reading of the Act did not give sufficient weight to the Act's overriding purpose of insuring that employment discrimination is redressed, that it was necessary to conclude that a charge is "filed" for purposes of § 706 (e) when received, and "filed" as required by § 706 (c) when the state deferral period ends, and that therefore the letter received by the EEOC

on June 15, 1976, had been filed within 300 days as required by § 706 (e) but had not been filed during the 60-day deferral period for purposes of § 706 (c).

Held: A literal reading of §§ 706 (c) and (e) so as to give the word "filed" the same meaning in both subsections gives full effect to the several policies reflected in the Act. Under this literal reading, respondent's charge was not timely filed, because it was "filed" on the 351st day (60 days after June 15, 1976, or the earliest date upon which the EEOC could allow the charge to be filed), by which time the applicable 300-day limitations period had run. Pp. 815–826.

(a) The Act's legislative history is entirely consistent with the wording of the Act itself, there being nothing to indicate that complainants in some States were to be allowed to proceed with less diligence than those in other States or to give deferral state complainants any advantage over nondeferral state complainants with respect to the time for filing unlawful employment practice charges. Pp. 818–824.

(b) A literal reading of the statute is not unfair to victims of employment discrimination who often proceed without the assistance of counsel. P. 825.

(c) There is no merit to respondent's argument based on the EEOC's interpretation, since that agency's interpretation cannot supersede the language chosen by Congress. P. 825.

(d) Nor is there any merit to the argument that a less literal reading of the statute allowing the EEOC to treat a letter received on the 291st day as "filed" and interpreting § 706 (c)'s prohibition as merely requiring the EEOC to postpone any action on a charge for at least 60 days, would adequately effectuate the policy of deferring to state agencies. Congress clearly intended to encourage the prompt processing of all employment discrimination charges. To accept respondent's position would add a 60-day period to the schedule mandated by Congress and would unreasonably give the word "filed" two different meanings in the same section of the Act. Pp. 825–826.

602 F. 2d 1083, reversed.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, POWELL, and REHNQUIST, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 826.

Thomas Mead Santoro argued the cause for petitioner. With him on the briefs was *Francis J. Holloway*.

Judith P. Vladeck argued the cause for respondent. With her on the brief was *Sheldon Engelhard*. *Edwin S. Kneedler* argued the cause for the United States et al. as *amici curiae* urging affirmance. With him on the brief were *Solicitor General McCree, Assistant Attorney General Days, Deputy Solicitor General Claiborne, Leroy D. Clark, Joseph T. Eddins,* and *Lutz Alexander Prager.**

MR. JUSTICE STEVENS delivered the opinion of the Court.

The question in this Title VII case is whether Congress intended the word "filed" to have the same meaning in subsections (c)[1] and (e)[2] of § 706 of the Civil Rights Act of 1964,

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**Robert E. Williams* and *Douglas S. McDowell* filed a brief for the Equal Employment Advisory Council as *amicus curiae* urging reversal.

[1] "In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection [(b)] by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority." 86 Stat. 104.

[2] "A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice

78 Stat. 260, as amended in 1972, 86 Stat. 104–105, 42 U. S. C. §§ 2000e–5 (c) and (e). The former subsection prohibits the filing of an unfair employment practice charge with the federal Equal Employment Opportunity Commission (EEOC) until after a state fair employment practices agency has had an opportunity to consider it. The latter subsection requires that in all events the charge must be filed with the EEOC within 300 days of the occurrence. We hold that a literal reading of the two subsections gives full effect to the several policies reflected in the statute.

On August 29, 1975, Mohasco Corp. discharged the respondent from his position as senior marketing economist.[3] On June 15, 1976—291 days later—the EEOC received a letter from respondent asserting that Mohasco had discriminated against him because of his religion. The letter was promptly referred to the New York State Division of Human Rights. That state agency reviewed the matter[4] and, in due course, determined that there was no merit in the charge.[5]

Meanwhile, on August 20, 1976—a date more than 60 days after respondent's letter had been submitted to the EEOC and

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or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency." 86 Stat. 105.

[3] According to respondent's complaint, he holds a masters degree in economics from Columbia University. Record Item No. 1, p. 3.

[4] The District Court stated that "[t]he period of limitation for filing a complaint with the New York State Division of Human Rights is one year. N. Y. Exec. Law § 297 (5) (McKinney Supp. 1977)." App. to Pet. for Cert. A14.

[5] The determination by the New York State Division of Human Rights that there was no probable cause to believe Mohasco had engaged in the discriminatory conduct described by respondent was issued on February 9, 1977. That determination was upheld by order of the New York State Human Rights Appeal Board on December 22, 1977.

357 days after respondent's discharge—the EEOC notified Mohasco that respondent had filed a charge of employment discrimination.[6]

About a year later, on August 24, 1977, the EEOC issued its determination that "there is not reasonable cause to believe the charge is true,"[7] and formally notified respondent that if he wished to pursue the matter further, he had a statutory right to file a private action in a federal district court within 90 days.[8] Respondent commenced this litigation 91 days later[9] in the United States District Court for the Northern District of New York.[10]

The District Court granted Mohasco's motion for summary judgment on the ground that respondent's failure to file a

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[6] The notice was on a printed form which merely advised Mohasco of the name of the charging party, the date of the alleged violation, and that the nature of the charge was an alleged discharge on the basis of religion. The notice further advised Mohasco that "[b]ecause of the Commission's volume of pending work, we are unable to tell you when we are able to schedule investigation of this charge; . . ." App. 18. One might therefore infer that as of 1976, the EEOC had not overcome its enormous backlog as documented in 1971. See H. R. Rep. No. 92-238, p. 64 (1971), Legislative History of Equal Employment Opportunity Act of 1972 (Committee Print compiled for the Senate Committee on Labor and Public Welfare by the Subcommittee on Labor), p. 124 (1972) (hereinafter 1972 Leg. Hist.); S. Rep. No. 92-415, p. 23, 1972 Leg. Hist. 432; *Occidental Life Ins. Co.* v. *EEOC*, 432 U. S. 355, 369, n. 24.

[7] App. to Pet. for Cert. A49.

[8] App. 19.

[9] Petitioner did not assert respondent's failure to file the action within 90 days as a defense.

[10] The *pro se* complaint prayed for an injunction against alleged continuing unlawful employment practices, compensatory damages against Mohasco and several of its executives jointly and severally in the sum of $100,000, punitive damages against Mohasco in the sum of $1 million and against each individual defendant in the sum of $100,000. Record Item No. 1, p. 19. The District Court dismissed the complaint against the individual defendants on the ground that they had not been named in the original charge. The validity of that dismissal is not before us.

timely charge with the EEOC deprived the court of subject-matter jurisdiction. The court concluded that June 15, 1976 (the 291st day), could not be treated as the date that respondent's charge was "filed" with the EEOC, because § 706 (c) provides that in States which have their own fair employment practice agencies—and New York is such a State—"no charge may be filed . . . by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated. . . ." Since no proceedings had been commenced before the New York agency prior to June 15, 1976, and since the proceedings that were commenced at that time did not terminate within 60 days, the District Court read § 706 (c) as precluding any filing with the EEOC until 60 days after June 15, 1976.[11] Because that date was 51 days beyond § 706 (e)'s 300-day time limit for filing in so-called "deferral States," the charge was not timely filed.

The District Court refused to apply an EEOC regulation[12]

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[11] The District Court noted that the EEOC's letter forwarding respondent's charge to the state agency had stated that the EEOC would automatically file the charge *"at the expiration date of the deferral period,* unless the EEOC was notified of an earlier termination of proceedings by the Division of Human Rights." App. to Pet. for Cert. A15 (emphasis in original). Thus, the Court concluded that the EEOC itself did not deem the charge filed until 60 days after June 15, 1976. *Ibid.*

[12] Title 29 CFR § 1601.12 (b)(1)(v)(A) (1977) states:

"In cases where the document is submitted to the Commission more than 180 days from the date of the alleged violation but within the period of limitation of the particular 706 Agency, the case shall be deferred pursuant to the procedures set forth above: *Provided, however,* That unless the Commission is earlier notified of the termination of the State or local proceedings, the Commission will consider the charge to be filed with the Commission on the 300th day following the alleged discrimination and will commence processing the case. Where the State or local agency terminates its proceedings prior to the 300th day following the alleged act of discrimination, without notification to the Commission of such termination, the Commission will consider the charge to be filed with the Com-

that would have treated respondent's charge as timely because it was submitted to the EEOC within 300 days of the practice complained of and also within the applicable New York limitations period.[13] The District Court held that the regulation was contrary to the plain language of the statute, and in any event, had not been followed by the EEOC itself in this case.[14]

Over the dissent of Judge Meskill, the Court of Appeals for the Second Circuit reversed. 602 F. 2d 1083 (1979). It recognized that the District Court had read the statute literally, but concluded that a literal reading did not give sufficient weight to the overriding purpose of the Act. In the majority's view, in order to be faithful to "the strong federal policy in insuring that employment discrimination is redressed," *id.*, at 1087, it was necessary "to conclude that a charge is 'filed' for purposes of § 706 (e) when received, and 'filed' as required by § 706 (c) when the state deferral period ends." *Ibid.* By giving the word "filed" two different meanings, the court concluded that the letter received by the EEOC on June 15, 1976, had been filed within 300 days as required by § 706 (e),[15] but had not been filed during the 60-day deferral period for purposes of § 706 (c).

Judge Meskill believed that a literal reading of the statute was not only consistent with its basic purpose, but was also warranted by the additional purpose of "requir[ing] prompt action on the part of Title VII plaintiffs." 602 F. 2d, at 1092. He noted that Congress had imposed a general requirement of filing within 180 days, and that the exceptional period of 300 days for deferral States was merely intended to give the charging party a fair opportunity to invoke his state remedy with-

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mission on the date the person making the charge is notified of the termination."

A current regulation to substantially the same effect is found at 29 CFR §§ 1601.13 (a), (c), (d)(2)(iii) (1979).

[13] See n. 4, *supra*.

[14] App. to Pet. for Cert. A15. See n. 11, *supra*.

[15] The 300-day period expired on June 24, 1976.

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out jeopardizing his federal rights; the exception was not intended to allow residents of deferral States to proceed with less diligence than was generally required.

Because there is a conflict among the Courts of Appeals on the proper interpretation of the word "filed" in this statute,[16]

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[16] The decision of the Court of Appeals in this case is consistent with the decision of the Tenth Circuit in *Vigil* v. *American Tel. & Tel. Co.*, 455 F. 2d 1222 (1972), but is in conflict with the decision of the Seventh Circuit in *Moore* v. *Sunbeam Corp.*, 459 F. 2d 811 (1972). *Anderson* v. *Methodist Evangelical Hospital, Inc.*, 464 F. 2d 723 (CA6 1972), cited *Vigil* with approval, though the court's conclusion that the plaintiff's filing in that case was timely would have been the same under the construction of § 706 adopted in the *Moore* case.

The approach of the Eighth Circuit, see *Olson* v. *Rembrandt Printing Co.*, 511 F. 2d 1228 (1975), also conflicts with the decision of the Second Circuit in this case, but in a way that substantially differs from that of the Seventh Circuit decision in *Moore*. *Olson* held that in order to preserve his rights under Title VII, a complainant must under all circumstances initially file his charge with either a state fair employment practices agency or the EEOC within 180 days of the discriminatory occurrence. See also *Geromette* v. *General Motors Corp.*, 609 F. 2d 1200 (CA6 1979) (citing *Olson* with approval, thus perhaps signalling a retreat from *Anderson*'s endorsement of *Vigil*); *Rodriguez* v. *Southern Pacific Transp. Co.*, 587 F. 2d 980 (CA9 1978). Cf. *Ciccone* v. *Textron Inc.*, 616 F. 2d 1216 (CA1 1980) (substantially same approach under similar provisions in the Age Discrimination in Employment Act, 29 U. S. C. §§ 621–634).

As indicated n. 19, *infra*, we believe that the restrictive approach exemplified by *Olson*, is not supported by the statute. Under the *Moore* decision, which we adopt today, a complainant in a deferral State having a fair employment practices agency over one year old need only file his charge within 240 days of the alleged discriminatory employment practice in order to insure that his federal rights will be preserved. If a complainant files later than that (but not more than 300 days after the practice complained of), his right to seek relief under Title VII will nonetheless be preserved if the State happens to complete its consideration of the charge prior to the end of the 300-day period. In a State with a fair employment practices agency less than one year old, however, a complainant must file within 180 days in order to be sure that his federal rights will be preserved, since the EEOC must defer consideration during

we granted certiorari. 444 U. S. 990.[17] We now reverse.

We first review the plain meaning of the relevant statutory language; we next examine the legislative history of the 1964 Act and the 1972 amendments for evidence that Congress intended the statute to have a different meaning; and finally we consider the policy arguments in favor of a less literal reading of the Act.

I

Section 706 (e) begins with the general rule that a "charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred. . . ."[18] Since respondent's letter was submitted to the EEOC 291 days after the occurrence, he plainly did not exercise the diligence required by that general rule. Nor, as we shall explain, did he have to; but it should be pointed out that had he sent his charge to either the state agency or the EEOC within 180 days, he would have had no difficulty in complying with the terms of the exception to that general rule allowing a later filing with the EEOC in deferral States.

That exception allows a filing with the EEOC after 180 days if "the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant

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proceedings before such a new agency for up to 120 days. See 42 U. S. C. § 2000e-5 (c), n. 1, *supra*.

[17] The District Court refused to consider respondent's allegations that discrimination in the form of blacklisting had continued beyond the date of his discharge, since in its view that allegation was not fairly comprised by respondent's June 15, 1976, letter to the EEOC. The Court of Appeals unanimously reversed on that point, and remanded the case to the District Court. Petitioner sought review of that ruling in this Court, but we limited our grant of certiorari to the timeliness question discussed in today's opinion. For purposes of decision, we assume that the discrimination complained of ended with respondent's discharge on August 29, 1975.

[18] Section 706 (e) is quoted in full in n. 2, *supra*.

or seek relief from such practice. . . ."[19] When respondent submitted his letter to the EEOC, he had not yet instituted any state proceedings. Under the literal terms of the statute, it could therefore be argued that he did not bring himself within the exception to the general 180-day requirement. But in *Love* v. *Pullman Co.*, 404 U. S. 522, 525, we held that "[n]othing in the Act suggests that the state proceedings may not be initiated by the EEOC acting on behalf of the complainant rather than by the complainant himself. . . ." Here, state proceedings were instituted by the EEOC when it immediately forwarded his letter to the state agency on June 15, 1976. Accordingly, we treat the state proceedings as having been instituted on that date. Since the EEOC could not proceed until either state proceedings had ended or 60 days had passed, the proceedings were "initially instituted with a State . . . agency" prior to their official institution with the

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[19] This language has been construed to require that the filing with the state agency be made within 180 days. *Olson* v. *Rembrandt Printing Co.*, see n. 16, *supra*. Although that construction is consistent with the general rule announced at the beginning of § 706 (e), and is supported by one Congressman's understanding of the procedures at the time of the 1972 amendment to that section, see 1972 Leg. Hist. 1863 (remarks of Rep. Dent), Congress included no express requirement that state proceedings be initiated by any specific date in the portion of the subsection that relates to time limitations in deferral States. Further, there are contemporaneous indications in the legislative history, which, while not authoritative, contradict Representative Dent's views. See nn. 41–43, *infra*. See also *Doski* v. *M. Goldseker Co.*, 539 F. 2d 1326, 1330–1332 (CA4 1976) (rejecting both *Olson* and its reliance on the analysis of Rep. Dent).

In any event, we do not believe that a court should read in a time limitation provision that Congress has not seen fit to include, see *Occidental Life Ins. Co* v. *EEOC*, 432 U. S. 355, at least when dealing with "a statutory scheme in which laymen, unassisted by trained lawyers initiate the process." *Love* v. *Pullman Co.*, 404 U. S. 522, 527. In contrast to the construction of the statute we adopt today, the *Olson* approach, urged upon us by petitioner and *amicus*, is not compelled by the plain meaning of the statutory language.

EEOC. Therefore, respondent came within § 706 (e)'s exception allowing a federal filing more than 180 days after the occurrence.

That exception states that "such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier. . . ." Since the State proceedings did not terminate until well after the expiration of the 300-day period, see n. 5, *supra,* the 300-day limitations period is the one applicable to respondent's charge. The question, then, is whether the June 15, 1976, letter was "filed" when received by the EEOC within the meaning of subsection (e) of § 706.

The answer is supplied by subsection (c), which imposes a special requirement for cases arising in deferral States: "no charge may be filed under subsection [(b)] by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated. . . ." Thus, in terms, the statute prohibited the EEOC from allowing the charge to be filed on the date the letter was received. Although, as the Court held in *Love* v. *Pullman Co., supra,* it was proper for the EEOC to hold respondent's "complaint in 'suspended animation,' *automatically filing it upon termination of the State proceedings,*"[20] 404 U. S., at 526 (emphasis added), that means that the charge was filed on the 351st day, not the 291st. By that time, however, the 300-day period had run and the filing was therefore untimely.

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[20] The Court further noted that "[i]t is clear that Congress found nothing wrong, in this circumstance, with EEOC's holding the charge in abeyance until a state agency is given a chance to act." 404 U. S., at 526, n. 6.

II

In contrast to this rather straightforward reading of the statute, respondent urges us to give the word "filed" two different meanings within the same statutory section in order better to effectuate Congress' purpose underlying Title VII. Essentially, his argument is that a rule permitting filings for up to 300 days after the discriminatory occurrence—regardless of the rule against filing during the deferral period—would help further the cause of eliminating discriminatory employment practices. We therefore turn to the legislative history, but in doing so we emphasize that the words of the statute are not ambiguous. Nor does a literal reading of them lead to "absurd or futile results," *United States* v. *American Trucking Assns.*, 310 U. S. 534, 543. For time limitations are inevitably arbitrary to some extent; and the limitations at issue here are not so short [21] that a plaintiff's remedy is effectively denied for all practical purposes without an opportunity for a hearing.[22]

A

It is unquestionably true that the 1964 statute was enacted to implement the congressional policy against discriminatory employment practices,[23] and that that basic policy must inform construction of this remedial legislation. It must also be recognized, however, in light of the tempestuous legislative proceedings that produced the Act, that the ultimate product reflects other, perhaps countervailing, purposes that some Members of Congress sought to achieve. The present lan-

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[21] Compare the 6-month limitation provision for filing complaints with the National Labor Relations Board under the Labor Management Relations Act, 29 U. S. C. § 160 (b).

[22] We are not confronted with a case in which it is claimed that the plaintiff was reasonably unaware of the existence of his cause of action until after the expiration of the limitations period. Cf. *United States* v. *Kubrick*, 444 U. S. 111 (medical malpractice action).

[23] See, *e. g.*, S. Rep. No. 867, 88th Cong., 2d Sess., 1 (1964) (hereinafter 1964 Senate Report).

guage was clearly the result of a compromise. It is our task to give effect to the statute as enacted. See *Toussie* v. *United States*, 397 U. S. 112, 123–124.[24]

The typical time limitation provision in the numerous proposed civil rights bills required the filing of a charge with the new federal fair employment practices agency within six months of the discriminatory conduct.[25] These initial proposals did not provide for mandatory deferral by the federal agency during comparable state administrative proceedings,[26] though some proposals would have authorized the federal agency to enter agreements of cooperation with state agencies, under which the federal agency would refrain from processing charges in specified cases.[27]

On February 10, 1964, the House of Representatives passed H. R. 7152, its version of the comprehensive Civil Rights Act. Title VII of that bill contained a 6-month limitation provision for the filing of charges with the EEOC, and directed the EEOC to enter into agreements with state agencies providing for suspension of federal enforcement.[28] In the Senate, H. R. 7152 met with exceptionally strong opposition. The principal opposition focussed not on the details of the bill, but on its fundamental purpose. During the course of one of the longest filibusters in the history of the Senate, the bipartisan leadership of the Senate carefully forged the compromise substitute

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[24] See also *Hodgson* v. *Lodge 851, Int'l Assn. of Machinists & Aerospace Workers*, 454 F. 2d 545, 562 (CA7 1971) (Stevens, J., dissenting).

[25] See, *e. g*, Hearings on Miscellaneous Proposals Regarding the Civil Rights of Persons within the Jurisdiction of the United States before Subcommittee No. 5 of the House Judiciary Committee, 88th Cong., 1st Sess., 97, 188, 899, 2294 (1963) (hereinafter 1963 House Judiciary Committee Hearings). Others contained 1-year provisions, see *id.*, at 10, 50, and at one point the Senate Committee on Labor and Public Welfare Committee recommended a bill with a 2-year provision. See 1964 Senate Report, at 13.

[26] See, *e. g.*, 1963 House Judiciary Committee Hearings 9–10, 50.

[27] *Id.*, at 2296; 1964 Senate Report, at 16.

[28] See 110 Cong. Rec. 2511–2512, 12598 (1964).

(Dirksen compromise) that was ultimately to become in substantial part the Civil Rights Act of 1964. The purpose of the compromise was to attract sufficient support to achieve the two-thirds vote necessary for cloture.[29] This effort was successful. Fifteen days after the Dirksen compromise was offered as an amendment, a cloture motion carried the necessary votes.[30]

Section 706 (d)[31] of the compromise provided for a 90-day limitations period for filing discrimination claims with the EEOC in nondeferral States, the period ultimately adopted in the 1964 version of the Act. It was the first time the 90-day figure appeared in any proposed bill, and its appearance was unaccompanied by any explanation. Section 706 (b) of the compromise introduced the mandatory deferral concept for the first time, providing that during a 60-day deferral period, "no charge may be filed"—language that figures so prominently in this case. In such deferral States, § 706 (d) extended the time for filing with the EEOC to 210 days.

Since the Senate did not explain why it adopted a time limitation of only half that adopted by the House, one can only speculate. But it seems clear that the 90-day provision to some must have represented a judgment that most genuine claims of discrimination would be promptly asserted and that the costs associated with processing and defending stale or dormant claims outweigh the federal interest in guaranteeing a remedy to every victim of discrimination. To others it must have represented a necessary sacrifice of the rights of some victims of discrimination in order that a civil rights bill could be enacted. Section 706 (b) was rather clearly intended to increase the role of States and localities in resolving charges

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[29] *Id.*, at 12593–12594 (remarks of Sen. Clark).

[30] See *id.*, at 11926, 13327.

[31] The 1972 amendment added a new subsection (a) to § 706. Subsections (b) and (d) in the 1964 version with certain changes thus became the current subsections (c) and (e) in the amended 1972 version.

of employment discrimination.[32] And § 706 (d)'s longer time of 210 days for filing with the EEOC in deferral States was included to prevent forfeiture of a complainant's federal rights while participating in state proceedings.[33]

But neither this latter provision nor anything else in the legislative history contains any "suggestion that complainants in some States were to be allowed to proceed with less diligence than those in other states." *Moore* v. *Sunbeam Corp.*, 459 F. 2d 811, 825, n. 35 (CA7 1972). The history identifies only one reason for treating workers in deferral States differently from workers in other States: to give state agencies an opportunity to redress the evil at which the federal legislation was aimed, and to avoid federal intervention unless its need was demonstrated.[34] The statutory plan was not designed to give the worker in a deferral State the option of choosing between his state remedy and his federal remedy, nor indeed simply to allow him additional time in which to obtain state relief. Had that been the plan, a simple statute prescribing a 90-day period in nondeferral States and a 210-day period in deferral States would have served the legislative purpose. Instead, Congress chose to prohibit the filing of any federal charge until after state proceedings had been completed or until 60 days had passed, whichever came sooner.

To be sure, in deferral States having fair employment practices agencies over one year old, Congress in effect gave com-

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[32] See 110 Cong. Rec. 11937 (1964) (remarks of Sen. Humphrey); *id.*, at 8193, 13087 (remarks of Sen. Dirksen): "[W]ith respect to the enforcement of the title, we undertook to keep primary, exclusive jurisdiction in the hands of the State commissions for a sufficient period of time to let them work out their own problems at the local level."

[33] See *id.*, at 12819.

[34] At the time, it was believed that 60 days was more than sufficient time for state administrative resolution of employment discrimination complaints. See *id.*, at 13087 (remarks of Sen. Dirksen): "In the case of California, FEPC [fair employment practice commission] cases are disposed of in an average of about 5 days. In my own State [Illinois] it is approximately 14 days."

plainants an additional 60 days in which initially to file a charge and still ensure preservation of their federal rights. In other words, under the 1964 Act, a complainant in such a deferral State could have filed on the 150th day, and then filed with the EEOC on the 210th day at the end of the 60-day deferral period, while a complainant in a nondeferral State had to file on the 90th day with the EEOC. But there is no reason to believe that the 1964 Congress intended deferral state complainants to have the additional advantage of being able to ignore the 210-day limitation period when they failed to invoke their rights early enough to allow the 60-day deferral period to expire within the 210-day period.

In sum, the legislative history of the 1964 statute is entirely consistent with the wording of the statute itself.

B

In 1972, Congress amended § 706 by changing the general limitations period from 90 days to 180 days and correspondingly extended the maximum period for deferral States from 210 days to 300 days.[35] The amendment did not make any change in the procedural scheme, however, although such a change was proposed and rejected.

As initially introduced in the House of Representatives, the proposed 1972 amendments to Title VII would have deleted § 706 (b)'s prohibition against the filing of a federal charge until 60 days after the institution of state proceedings, and would have substituted language merely prohibiting the EEOC from taking any action on the charge until the prescribed period had elapsed.[36] The House, however, concluded that no change in this aspect of the 1964 statute should be made, and deleted the amendment prior to passage.[37] The Senate version of the amendments passed with

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[35] 86 Stat. 104–105.

[36] H. R. 1746, 92d Cong., 1st Sess. (Jan. 22, 1972), 1972 Leg. Hist. 4.

[37] H. R. 1746, *supra*, 1972 Leg. Hist. 326.

the provision merely prohibiting the EEOC from taking any action on a charge in the deferral period.[38] But at conference, the position of the House prevailed on the understanding that the law as interpreted in *Love* v. *Pullman Co.*, 404 U. S. 522, was controlling.[39] As already noted, our literal reading of the word "filed" in § 706 is fully supported by the *Love* opinion.[40]

It is true that a section-by-section analysis of the 1972 amendments filed by Senator Williams refers to the then recent decision of the Tenth Circuit in *Vigil* v. *American Tel. & Tel. Co.*, 455 F. 2d 1222 (1972), see n. 16, *supra*, with approval, and that that case supports respondent's reading of the Act. But we do not find that isolated reference—which was first inserted into the legislative history after the completion of the work of both the Senate Committee and House Committee, as well as after the Report of the joint conference just referred to[41]—to represent either a sound interpretation of the 1964 enactment[42] or a conscious intention of Congress to

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[38] S. 2525, 92d Cong., 2d Sess. (Feb. 21, 1971), 1972 Leg. Hist. 1781.

[39] S. Rep. No. 92–681, p. 17 (1972), 1972 Leg. Hist. 1815:

"The Senate amendment contained two provisions allowing the Commission to defer to state and local equal employment opportunity agencies. It deleted the language of existing law providing that no charge may be filed during the 60-day period allowed for the deferral and substituted a provision prohibiting the Commission from acting on such a charge until the expiration of the 60-day period. *The House bill made no change in existing law.* The Senate receded with an amendment that would restate the existing law on the deferral of charges to state agencies. The conferees left existing law intact with the understanding that the decision in *Love* v. *Pullman* [*Co.*, 404] U. S. [522 (1972)] interpreting the existing law to allow the Commission to receive a charge (but not act on it) during such deferral period is controlling." (Emphasis added.)

[40] See n. 20, *supra*.

[41] The section-by-section analysis is dated March 6, 1972. The Conference Report quoted in n. 39, *supra*, is dated March 2, 1972.

[42] In *Oscar Mayer & Co.* v. *Evans*, 441 U. S. 750, 758, we rejected a similar argument: "Respondent argues finally that a Committee Report

change existing law. The point at which it appears in the legislative history simply refutes any notion that Congress focussed on the precise issue, much less adopted the approach of the *Vigil* case.[43] To the extent that Congress focussed on the issue at all in 1972, it expressly rejected the language that would have mandated the exact result that respondent urges.

III

Finally we consider the additional points advanced in support of respondent's position: (1) that it is unfair to victims of discrimination who often proceed without the assistance of counsel; (2) that it is contrary to the interpretation of the Act by the agency charged with responsibility for its enforce-

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that accompanied 1978 ADEA amendments[, which made no change in the language at issue in the case,] supports his construction of § 14 (b). This Committee Report suggested that resort to state remedies should be optional under § 14 (b). See S. Rep. No. 95–493, pp. 6–7 (1978), adopted in Joint Explanatory Statement of the Committee of Conference, H. R. Conf. Rep. No. 95–950, pp. 7, 12 (1978).

"We are not persuaded. The Senate Report No. 95–493 was written 11 years after the ADEA was passed in 1967, and such '[l]egislative observations . . . are in no sense part of the legislative history.' *United Airlines, Inc.* v. *McMann*, 434 U. S. 192, 200 n. 7 (1977). 'It is the intent of the Congress that enacted [the section] . . . that controls.' *Teamsters* v. *United States*, 431 U. S. 324, 354 n. 39 (1977). Whatever evidence is provided by the 1978 Committee Report of the intent of Congress in 1967, it is plainly insufficient to overcome the clear and convincing evidence that Congress intended § 14 (b) to have the same meaning as § 706 (c). We therefore hold that under § 14 (b) of the ADEA, as under § 706 (c) of Title VII, resort to administrative remedies in deferral States by individual claimants is mandatory, not optional." (Footnotes omitted.)

See also *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, *ante*, at 116–120.

[43] Indeed as we pointed out in n. 19, *supra*, Congressman Dent had an entirely different understanding of the limitations period that Congress adopted. Representative Dent's remarks are dated March 8, 1972.

ment; and (3) that a less literal reading of the Act would adequately effectuate the policy of deferring to state agencies.

The unfairness argument is based on the assumption that a lay person reading the statute would assume that he had 300 days in which to file his first complaint with either a state or federal agency. We find no merit in this argument. We believe that a lay person would be more apt to regard the general obligation of filing within 180 days as the standard of diligence he must satisfy, and that one who carefully read the entire section would understand it to mean exactly what it says.

We must also reject any suggestion that the EEOC may adopt regulations that are inconsistent with the statutory mandate. As we have held on prior occasions, its "interpretation" of the statute cannot supersede the language chosen by Congress.[44]

Finally, we reject the argument that the timeliness requirements would be adequately served by allowing the EEOC to treat a letter received on the 291st day as "filed" and interpreting the § 706 (c) prohibition as merely requiring it to postpone any action on the charge for at least 60 days. There are two reasons why this interpretation is unacceptable.

By choosing what are obviously quite short deadlines, Congress clearly intended to encourage the prompt processing of all charges of employment discrimination.[45] Under a literal reading of the Act, the EEOC has a duty to commence its investigation no later than 300 days after the alleged occurrence; under respondent's "interpretation" of § 706 (c), that duty might not arise for 360 days. Perhaps the addition of another 60-day delay in the work of an already seriously overburdened agency is not a matter of critical importance. But in a statutory scheme in which Congress carefully prescribed a series of deadlines measured by numbers of days—rather

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[44] See *General Electric Co.* v. *Gilbert*, 429 U. S. 125, 140–142.

[45] S. Rep. No. 92–415, p. 24 (1971), 1972 Leg. Hist. 433.

than months or years—we may not simply interject an additional 60-day period into the procedural scheme. We must respect the compromise embodied in the words chosen by Congress. It is not our place simply to alter the balance struck by Congress in procedural statutes by favoring one side or the other in matters of statutory construction.

In the end, we cannot accept respondent's position without unreasonably giving the word "filed" two different meanings in the same section of the statute. Even if the interests of justice might be served in this particular case by a bifurcated construction of that word, in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law.

Accordingly, the judgment of the Court of Appeals is reversed.

So ordered.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

This might be viewed as "one of those cases that occasionally appears in the procedural area where it is more important that it be decided (in order to dispel existing conflict . . .) than that it be decided correctly." *Oscar Mayer & Co.* v. *Evans*, 441 U. S. 750, 766 (1979) (concurring opinion). But I cannot concur in the result the Court reaches today. For reasons set out below, I believe that the Court's decision neither is correct as a matter of statutory construction, nor does it dispel the existing decisional conflict, see *ante*, at 814–815, n. 16, in an acceptable fashion. I would affirm the holding of the Court of Appeals that, in a deferral State, a Title VII complaint is timely filed with the EEOC if it is "filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred." § 706 (e), 42 U. S. C. § 2000e–5 (e).

I

The Court finds its interpretation of the interplay between §§ 706 (c) and (e) of Title VII, 42 U. S. C. §§ 2000e–5 (c) and (e), to be based upon a "rather straightforward reading of the statute." *Ante,* at 818. That finding is cast into some doubt when one carefully considers the language, structure, and purpose of § 706. Moreover, the relevant legislative history leaves no room whatsoever for doubt that the Court's perception of Congress' intent is erroneous.

The rule the Court adopts today requires a Title VII complainant residing in a deferral State to file a charge of employment discrimination within 240 days of the allegedly unlawful act, in order to be certain that his complaint is timely. Yet the numeral "240" nowhere appears in Title VII. It seems a bit odd that Congress, in enacting "a statutory scheme in which laymen, unassisted by trained lawyers initiate the process," *Love* v. *Pullman Co.,* 404 U. S. 522, 527 (1972); see *ante,* at 816, n. 19, would create a filing rule that a complainant could not locate by reading any single statutory provision. One commentator has observed:

> "A case of employment discrimination may require a party to refer to the United States Code for the first and only time in his life. An intelligent, but isolated reading of section 706 (e) could easily lead one to believe that 300 days is the time limitation for filing an initial claim with the EEOC. A complainant should not be penalized for Congressional ambiguity, or because he does not possess the reading ability of one trained in statutory interpretation. This indeed is the level of skill required to find the 'hidden' 240-day limitation advocated by the district court in *Silver.*" Comment, 55 Notre Dame Law. 396, 410 (1980).

Of course, as was stated just the other day, "[o]ur compass is not to read a statute to reach what we perceive . . . is a 'sensible result.'" *Bifulco* v. *United States, ante,* at 401

(concurring opinion); yet, where alternative meanings of Congress' words are plausible, we should not close our eyes to those alternatives through a strong-armed invocation of the plain-meaning rule. I believe that an alternative to the Court's interpretation of the interplay between §§ 706 (c) and (e) does exist, and that Congress intended to adopt that alternative.

The Court of Appeals in this case viewed § 706 (e), standing alone, as stating the filing requirements for one who wishes to institute a charge of employment discrimination with the EEOC. It concluded that "the requirement in § 706 (c) that no charge be 'filed' before the deferral period ends simply means that the EEOC may not *process* a Title VII complaint until sixty days after it has been referred to a state agency." 602 F. 2d 1083, 1088 (1979) (emphasis supplied). The dual meaning that the Court of Appeals gave to the word "filed" might seem strained at first blush, but that court's interpretation is supported by the structure of Title VII. Reading the word "filed" to mean two different things in the two subsections avoids an interpretation of the statute that requires a lay person to determine the time requirements for filing a complaint through reference to two separate provisions. Moreover, the Court of Appeals' interpretation of the meaning of the word "filed" in § 706 (c) in no way detracts from Congress' purpose in enacting that subsection—to prevent the EEOC from taking action on a discrimination complaint until the relevant state agencies have had an opportunity to resolve the employee's dispute with his employer. See *ante*, at 821. Given these considerations, I am not willing to reject the Court of Appeals' interpretation of the statute out of hand.

Furthermore, examination of Title VII's legislative history leads me to conclude that Congress, in 1972, adopted the interpretation of the statute that the Court of Appeals was later to espouse. In examining this legislative history, it is important to note that the EEOC, the agency charged by

Congress with administering Title VII, has always treated as timely a charge filed within the 300-day period specified in § 706 (e), without regard to the 60-day deferral period specified in § 706 (c). See 29 CFR § 1601.12 (b)(1)(v)(A) (1977); 29 CFR § 1601.13 (a) (1979). Aside from the fact that the EEOC's consistent interpretation of the filing requirements is " 'entitled to great deference,' " *Oscar Mayer & Co.* v. *Evans*, 441 U. S., at 761, quoting from *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 434 (1971), that interpretation was approved by Congress expressly when it re-enacted the forerunners to the present §§ 706 (c) and (e) in 1972. Under such circumstances, this Court is bound to accept the agency's interpretation.[1]

In 1971, the pertinent House and Senate Committees both reported bills to amend Title VII that would have deleted the "no charge shall be filed" language from § 706 (c), and substituted in its place a provision that "the Commission shall take no action with respect to the investigation of such charge" until the deferral period had expired. See S. Rep. No. 92-415, p. 56 (1971); H. R. Rep. No. 92-238, p. 43 (1971).[2] Had either of these bills been enacted, the Court

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[1] It seems significant that the Court today "adopts," *ante*, at 814, n. 16, the decision in *Moore* v. *Sunbeam Corp.*, 459 F. 2d 811 (CA7 1972), the initial opinion in which was filed *prior to* the passage of the 1972 re-enactment of §§ 706 (c) and (e). See *id.*, at 830 (order on petition for rehearing). In *Moore*, the Seventh Circuit stated that the legislative history of the 1972 re-enactment was not relevant to a proper interpretation of Title VII's filing requirements, as they were enacted in 1964. *Ibid.* Today, this Court goes a step further in failing to give that legislative history appropriate weight in interpreting the 1972 re-enactment.

[2] The Senate Committee on Labor and Welfare explained the need for an amendment to the forerunner of § 706 (c) in the following terms:

"The only change in the present law is to delete the phrase 'no charge may be filed' with the Commission by an aggrieved person in [a deferral] State or locality. The present statute is somewhat ambiguous respecting Commission action on charges filed prior to resort to the State or local agency. The new language clarifies the present statute by permitting the

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of Appeals' interpretation of Title VII's filing requirements could not be questioned. The proposed amendments to § 706 (c) generated no controversy during the debates in either House. For reasons completely unrelated to the question presented here, however, the House of Representatives adopted a substitute bill that made no change in the language of § 706 (c). See Legislative History of the Equal Employment Opportunity Act of 1972 (Committee Print compiled for the Senate Committee on Labor and Public Welfare by the Subcommittee on Labor), pp. 326–332 (1972).[3] The Senate, on the other hand, retained the Committee on Labor and Public Welfare's amendment to the forerunner of § 706 (c). See 118 Cong. Rec. 4945 (1972); Legislative History, p. 1781.

The Conference Committee did not adopt the Senate bill's version of § 706 (c), but its explanation for failing to do so is clear and is critical to an understanding of the effect of the 1972 amendments on the question presented here. The Conference Committee stated:

> "The Senate amendment contained two provisions allowing the Commission to defer to state and local equal employment opportunity agencies. It deleted the language of existing law providing that no charge may be filed during the 60-day period allowed for the deferral and substituted a provision prohibiting the Commission from acting on such a charge until the expiration of the 60-day period. The House bill made no change in existing law. The Senate receded with an amendment that

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charge to be filed but prohibiting the Commission from taking action with respect thereto until the prescribed period has elapsed." S. Rep. No. 92–415, p. 36 (1971).

[3] There is absolutely no support in the reports of the House debates for the Court's implication, *ante*, at 822–823, that the House expressly considered the desirability of effecting a change in the forerunner to § 706 (c) and purposefully rejected the amendment that had been proposed by its Committee on Education and Labor.

> would re-state the existing law on the deferral of charges to state agencies. *The conferees left existing law intact with the understanding that the decision in Love* v. *Pullman,* [404] U. S. [522] (. . . 1972) *interpreting the existing law to allow the Commission to receive a charge (but not act on it) during such deferral period is controlling.*" S. Conf. Rep. No. 92–681, p. 17 (1972); H. R. Conf. Rep. No. 92–899, p. 17 (1972) (emphasis supplied).

In addition, a section-by-section analysis prepared by Senators Williams and Javits, and presented to both Houses along with the Conference Report, contained the following explanation of re-enacted § 706 (c):

> "No change . . . was deemed necessary in view of the recent Supreme Court decision of *Love* v. *Pullman Co.* . . . which approved the present EEOC deferral procedures as fully in compliance with the intent of the Act. That case held that the EEOC may receive and defer a charge to a State agency on behalf of a complainant and begin to process the charge in the EEOC upon lapse of the 60-day deferral period, even though the language provides that no charge can be filed under § 706 (a) by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law. *Similarly, the recent circuit court decision in Vigil* v. *AT&T,* [455] F. 2d [1222] . . . (10th Cir. 1972), *which provided that in order to protect the aggrieved person's right to file with the EEOC within the time periods specified in sections 706 (c) and (d), a charge filed with a State or local agency may also be filed with the EEOC during the 60-day deferral period, is within the intent of this Act.*" 118 Cong. Rec. 7167 (1972) (Senate); *id.,* at 7564 (House) (emphasis supplied).[4]

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[4] The Court fails to credit the Williams-Javits section-by-section analysis as an authoritative interpretation of the 1972 re-enactment of § 706,

In the face of these indicia of Congress' intent, the Court states blithely that "our literal reading of the word 'filed' in § 706 is fully supported by the *Love* opinion." *Ante*, at 823. But even setting aside its questionable dismissal of the Williams-Javits section-by-section analysis, see n. 4, *supra*, the Court here obviously errs in interpreting the Conference Report itself. The relevant inquiry is not what this Court actually held in *Love*, as the Court seems to think, but what the Conference Committee, writing some six weeks after *Love*, thought that the Court held. The passage, quoted above, from the Conference Report makes it clear that the conferees believed the import of the *Love* decision was that the proposed Senate amendment to § 706 (c) was totally unnecessary. Congress thus believed this Court to have held that existing law permitted the EEOC to treat as timely those charges filed in a deferral State within 300 days, without regard to the "no charge may be filed" language of § 706 (c), and intended that that interpretation should continue to be considered "controlling."

The Court concludes that Congress in 1972 "expressly rejected the language that would have mandated the exact

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primarily because it fails to recognize the Conference Committee's intent that the re-enacted section be interpreted differently from the Court's perception of what would constitute "a sound interpretation of the 1964 enactment." *Ante*, at 823. It is the legislative history of the 1972 amendments that is of primary relevance here, and the compilation of that history prepared by the Subcommittee on Labor for use of the Senate Committee on Labor and Public Welfare (cited throughout the Court's opinion), endorses the Williams-Javits section-by-section analysis as "a more detailed explanation of all the provisions of the bill as viewed by the sponsors and legislative leaders." Legislative History of the Equal Employment Opportunity Act of 1972 (Committee Print compiled for the Senate Committee on Labor and Public Welfare by the Subcommittee on Labor), p. xv, n. 3 (1972). The analysis of re-enacted § 706 presented to the House by Representative Dent, discussed by the Court, *ante*, at 816, n. 19, on the other hand, does not purport to speak for the views of the sponsors and managers of the 1972 amendments. See 118 Cong. Rec. 7569 (1972).

result that respondent urges." *Ante*, at 824. But a fair analysis of the legislative history demonstrates that Congress re-enacted §§ 706 (c) and (e) with an expectation that those provisions, as re-enacted, would be interpreted to mandate the result that had long been accepted by the EEOC. The Court's decision today not only ignores Congress' avowed intent but it also is inconsistent with our past opinions recognizing that "[w]hen a Congress that re-enacts a statute voices its approval of an administrative or other interpretation thereof, Congress is treated as having adopted that interpretation, and this Court is bound thereby." *United States* v. *Sheffield Board of Comm'rs*, 435 U. S. 110, 134 (1978); *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 414, n. 8 (1975) (construing 1972 amendments to Title VII).

II

Despite the Court's failure to give effect to the obvious intent of Congress in enacting the 1972 amendments, one might be tempted to go along with the rule it creates today if that rule had at least the advantage of creating a fixed and settled procedure for the filing of a Title VII complaint. But measured by the standard of practicality and ease of administration, I find the Court's rule sadly wanting.

Contemplate for a moment the plight of the local EEOC officer charged with responsibility for explaining the Court's rule to a prospective Title VII complainant in one of the Nation's 42 deferral States.[5] The prospective complainant informs the officer that he was fired from his job nine months ago, and now has reason to believe that his discharge was motivated by racial discrimination. He wants to know whether he still may file a timely charge with the EEOC. Under the Court's rule, the EEOC officer will not be able to

[5] The EEOC in its current regulations, 29 CFR § 1601.74 (a) (1979), lists 42 statewide deferral agencies, in addition to deferral agencies for the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, and a substantial number of municipalities and counties.

Reporter's Note

Orders commencing with June 20, 1980, begin with page 931. The preceding orders in 447 U. S., from June 9 through June 16, 1980, were reported in Parts 1 and 2 at 901–931. These page numbers are the same as they will be in the bound volume, thus making the *permanent* citations available upon publication of the preliminary prints of the United States Reports.

No. 79–6264. CHRISTENSEN *v.* COMMISSIONER OF INTERNAL REVENUE, 446 U. S. 943; and

No. 79–6417. TURNER *v.* GRAHAM, GOVERNOR OF FLORIDA, ET AL., 446 U. S. 934. Petitions for rehearing denied.

No. 79–1347. SPENCER *v.* GREYHOUND LINES, INC., ET AL., 445 U. S. 909. Motion of petitioner for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

JUNE 20, 1980

Dismissal Under Rule 60

No. 79–1747. PENTHOUSE INTERNATIONAL, LTD. *v.* MCAULIFFE, SOLICITOR GENERAL OF FULTON COUNTY, GEORGIA. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 60. Reported below: 610 F. 2d 1353.

JUNE 23, 1980

Certiorari Granted—Vacated and Remanded

No. 79–5080. WILLEFORD *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Hicks* v. *Oklahoma, ante,* p. 343.

No. 79–5145. SAM *v.* OKLAHOMA. Ct. Crim. App. Okla. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Hicks* v. *Oklahoma, ante,* p. 343.

No. 79–5338. BYNUM *v.* UNITED STATES. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Bifulco* v. *United States, ante,* p. 381. Reported below: 605 F. 2d 1206.

No. 79-5184. LAUREL *v.* UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Treating the motion for leave to file and the petition for writ of mandamus as a petition for writ of certiorari, certiorari granted. Order vacated and case remanded for further consideration in light of *Bifulco* v. *United States, ante*, p. 381.

No. 79-5530. MEYER *v.* UNITED STATES. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Bifulco* v. *United States, ante*, p. 381. Reported below: 609 F. 2d 511.

No. 79-5485. SELLERS ET AL. *v.* UNITED STATES. C. A. 8th Cir. Motion of petitioners for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Bifulco* v. *United States, ante*, p. 381. Reported below: 603 F. 2d 53.

No. 79-5555. CATES *v.* UNITED STATES. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Bifulco* v. *United States, ante*, p. 381. Reported below: 599 F. 2d 447.

No. 79-5584. SEPULVEDA *v.* UNITED STATES. C. A. 2d Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Bifulco* v. *United States, ante*, p. 381. Reported below: 607 F. 2d 998.

Vacated and Remanded After Certiorari Granted

No. 79-5267. PEREZ *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. [Certiorari granted, 444 U. S. 1070.] Judgment vacated and case remanded for further consideration in light of the decision in *Cuyler* v. *Sullivan*, 446 U. S. 335, 342-345

(1980), on the application of the Sixth and Fourteenth Amendments to claims arising from the conduct of retained counsel. Reported below: 594 F. 2d 159.

Miscellaneous Orders

No. A-980. HAMPEL *v.* MOTEL PROPERTIES, INC. Application to stay the judgment of the Supreme Court of Georgia, addressed to MR. JUSTICE MARSHALL and referred to the Court, denied.

No. A-1056. DELONG *v.* UNITED STATES. Application for stay of the mandate of the United States Court of Appeals for the Fourth Circuit, addressed to MR. JUSTICE STEVENS and referred to the Court, denied.

No. A-1079. RUDOLF WOLFF & CO., LTD. *v.* NEIMAN, DBA THE LONDON GROUP (1974). Application to recall and stay the mandate of the United States Court of Appeals for the Seventh Circuit, addressed to MR. JUSTICE WHITE and referred to the Court, denied.

No. D-185. IN RE DISBARMENT OF MITCHELL. Disbarment entered. [For earlier order herein, see 446 U. S. 906.]

No. 79-408. CITY OF MILWAUKEE ET AL. *v.* ILLINOIS ET AL. C. A. 7th Cir. [Certiorari granted, 445 U. S. 926.] Motions of Mid-America Legal Foundation and National League of Cities et al. for leave to file briefs as *amici curiae* granted.

No. 79-824. FEDERAL COMMUNICATIONS COMMISSION ET AL. *v.* WNCN LISTENERS GUILD ET AL.;

No. 79-825. INSILCO BROADCASTING CORP. ET AL. *v.* WNCN LISTENERS GUILD ET AL.;

No. 79-826. AMERICAN BROADCASTING COS., INC., ET AL. *v.* WNCN LISTENERS GUILD ET AL.; and

No. 79-827. NATIONAL ASSOCIATION OF BROADCASTERS ET AL. *v.* WNCN LISTENERS GUILD ET AL. C. A. D. C. Cir. [Certiorari granted, 445 U. S. 914.] Motion of Washington Legal Foundation for leave to file a brief as *amicus curiae* granted.

No. 78–1945. UNIVERSITIES RESEARCH ASSN., INC. *v.* COUTU ET AL. C. A. 7th Cir. [Certiorari granted, 445 U. S. 925.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* granted and five additional minutes allotted for that purpose. Respondents also allotted five additional minutes for oral argument.

No. 79–838. MAINE ET AL. *v.* THIBOUTOT ET VIR. Sup. Jud. Ct. Me. [Certiorari granted, 444 U. S. 1042.] Motion of respondents for leave to file a supplemental brief after argument granted.

No. 79–1127. ESTELLE, CORRECTIONS DIRECTOR *v.* SMITH. C. A. 5th Cir. [Certiorari granted, 445 U. S. 926.] Motion of American Psychiatric Assn. for leave to file a brief as *amicus curiae* granted.

No. 79–1186. DENNIS *v.* SPARKS ET AL., DBA SIDNEY A. SPARKS, TRUSTEE. C. A. 5th Cir. [Certiorari granted, 445 U. S. 942.] Motion of American Civil Liberties Union for leave to file a brief as *amicus curiae* granted.

No. 79–1420. FIRESTONE TIRE & RUBBER CO. *v.* RISJORD. C. A. 8th Cir. [Certiorari granted, 446 U. S. 934.] Motion of respondent to supplement the record granted.

No. A–1072 (79–1893). FREEDOM INSTITUTE OF AMERICA ET AL. *v.* NEW JERSEY. Application for release of Rev. Jerome Heinemann, addressed to MR. JUSTICE STEVENS and referred to the Court, denied.

No. 79–1941. DIAMOND, COMMISSIONER OF PATENTS AND TRADEMARKS *v.* SHERWOOD. C. C. P. A. Motion of respondents to expedite consideration of the petition for writ of certiorari denied.

Certiorari Denied

No. 79–415. UNITED STATES *v.* MEARNS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 599 F. 2d 1296.

No. 79-1399. STRAWBERRY WATER USERS ASSN. ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: — Ct. Cl. —, 611 F. 2d 838.

No. 79-1840. SCARBOROUGH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 613 F. 2d 62.

No. 79-6167. WYMORE *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 377 So. 2d 283.

No. 79-6227. ROSARIO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 615 F. 2d 1363.

No. 79-6592. WILKERSON *v.* WILKERSON ET AL. Ct. App. D. C. Certiorari denied.

No. 79-735. SEARS, ROEBUCK & CO. *v.* SAN DIEGO COUNTY DISTRICT COUNCIL OF CARPENTERS. Sup. Ct. Cal. Certiorari denied. MR. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 25 Cal. 3d 317, 599 P. 2d 676.

No. 79-1308. BUTTERWORTH, CORRECTIONAL SUPERINTENDENT *v.* LOVETT. C. A. 1st Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 610 F. 2d 1002.

No. 79-1576. MILLER, ACTING DIRECTOR, DEPARTMENT OF PUBLIC AID OF ILLINOIS *v.* DILDA ET AL. C. A. 7th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 612 F. 2d 1055.

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Pages 1-296; 901

Official Records
of
The Supreme Court

June 25 Through June 27, 1980

Henry J. Lind
Reporter of Decisions

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, Chief Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM H. REHNQUIST, Associate Justice.
JOHN PAUL STEVENS, Associate Justice.

OFFICERS OF THE COURT

BENJAMIN R. CIVILETTI, Attorney General.
WADE H. McCREE, Jr., Solicitor General.
MICHAEL RODAK, Jr., Clerk.
HENRY C. LIND, Reporter of Decisions.
ALFRED WONG, Marshal.
ROGER F. JACOBS, Librarian.

SUPREME COURT OF THE UNITED STATES

Allotment of Justices

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, *viz.:*

For the District of Columbia Circuit, Warren E. Burger, Chief Justice.

For the First Circuit, William J. Brennan, Jr., Associate Justice.

For the Second Circuit, Thurgood Marshall, Associate Justice.

For the Third Circuit, William J. Brennan, Jr., Associate Justice.

For the Fourth Circuit, Warren E. Burger, Chief Justice.

For the Fifth Circuit, Lewis F. Powell, Jr., Associate Justice.

For the Sixth Circuit, Potter Stewart, Associate Justice.

For the Seventh Circuit, John Paul Stevens, Associate Justice.

For the Eighth Circuit, Harry A. Blackmun, Associate Justice.

For the Ninth Circuit, William H. Rehnquist, Associate Justice.

For the Tenth Circuit, Byron R. White, Associate Justice.

December 19, 1975.

(For next previous allotment, see 404 U. S., p. v.)

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Full faith and credit—Virginia workers' compensation award—District of Columbia supplemental award.—Court of Appeals' judgment reversing administrative order which upheld supplemental award under District of Columbia Workmen's Compensation Act to petitioner, a District of Columbia resident who was hired there by respondent (which was principally located there) but was injured while employed by respondent in Virginia and received an award of disability benefits under Virginia law which excluded any other recovery "at common law or otherwise"—Court of Appeals having held that supplemental award was precluded by Full Faith and Credit Clause—is reversed. Thomas v. Washington Gas Light Co., p. 261.

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makes criminal the conduct penalized here does not render penalty under § 311 (b)(6) criminal in nature. United States v. Ward, p. 242.

Right to jury trial—Capital offenses—Exclusion of prospective jurors.—Exclusion of prospective jurors, pursuant to a Texas statute, because they were unwilling or unable to take an oath that mandatory penalty of death or life imprisonment, which depended on jury's answers to certain question at sentencing phase of state trial for capital offense, would not "affect [their] deliberations on any issue of fact," violated Sixth and Fourteenth Amendments. Adams v. Texas, p. 38.

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WORDS AND PHRASES.

1. *"Any action."* Civil Rights Attorney's Fees Awards Act of 1976, 42 U. S. C. § 1988. Maine v. Thiboutot, p. 1.
2. *"Civil penalty."* § 311 (b)(6), Federal Water Pollution Control Act, 33 U. S. C. § 1321 (b)(6). United States v. Ward, p. 242.

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3. *"Prevailing party."* Civil Rights Attorney's Fees Awards Act of 1976, 42 U. S. C. § 1988. Maher v. Gagne, p. 122.

4. *"Secured by the Constitution and laws."* Civil Rights Act of 1871, 42 U. S. C. § 1983. Maine v. Thiboutot, p. 1.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1979

MAINE ET AL. *v.* THIBOUTOT ET VIR.

CERTIORARI TO THE SUPREME JUDICIAL COURT OF MAINE

No. 79-838. Argued April 22, 1980—Decided June 25, 1980

Held:

1. Title 42 U. S. C. § 1983—which provides that anyone who, under color of state statute, regulation, or custom deprives another of any rights, privileges, or immunities "secured by the Constitution *and laws*" shall be liable to the injured party—encompasses claims based on purely statutory violations of federal law, such as respondents' state-court claim that petitioners had deprived them of welfare benefits to which they were entitled under the federal Social Security Act. Given that Congress attached no modifiers to the phrase "and laws," the plain language of the statute embraces respondents' claim, and even were the language ambiguous this Court's earlier decisions, including cases involving Social Security Act claims, explicitly or implicitly suggest that the § 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law. Cf., *e. g., Rosado* v. *Wyman,* 397 U. S. 397; *Edelman* v. *Jordan,* 415 U. S. 651; *Monell* v. *New York City Dept. of Social Services,* 436 U. S. 658. Pp. 4-8.

2. In view of its plain language and legislative history, the Civil Rights Attorney's Fees Awards Act of 1976, 42 U. S. C. § 1988—which provides that attorney's fees may be awarded to the prevailing party (other than the United States) in "*any* action . . . to enforce" a provision of § 1983, *inter alia,* and which makes no exception for statutory § 1983 actions—authorizes the award of attorney's fees in such actions.

Moreover, it follows from the legislative history and from the Supremacy Clause that the fee provision is part of the § 1983 remedy whether the action is brought in a federal court or, as was the instant action, in a state court. Pp. 8–11.

405 A. 2d 230, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which STEWART, WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. POWELL, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 11.

James Eastman Smith, Assistant Attorney General of Maine, argued the cause for petitioners. With him on the briefs was *Richard S. Cohen*, Attorney General.

Robert Edmond Mittel argued the cause for respondents. With him on the brief were *Susan Calkins* and *Hugh Calkins*.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The case presents two related questions arising under 42 U. S. C. §§ 1983 and 1988. Respondents brought this suit in the Maine Superior Court alleging that petitioners, the State of Maine and its Commissioner of Human Services, violated § 1983 by depriving respondents of welfare benefits

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*A brief of *amici curiae* urging reversal was filed by *Edward G. Biester, Jr.*, Attorney General, and *Robert E. Kelly* and *Allen C. Warshaw*, Deputy Attorneys General, for the Commonwealth of Pennsylvania, joined by officials for their respective States as follows: *Francis X. Bellotti*, Attorney General of Massachusetts, and *Garrick F. Cole*, Assistant Attorney General; *John J. Degnan*, Attorney General of New Jersey, and *Andrea Silkowitz*, Deputy Attorney General; *Thomas D. Rath*, Attorney General of New Hampshire; *M. Jerome Diamond*, Attorney General of Vermont, and *Benson Scotch*, Assistant Attorney General; *Dennis J. Roberts II*, Attorney General of Rhode Island, *Allen P. Rubine*, Deputy Attorney General, and *John S. Foley* and *Eileen G. Cooney*, Special Assistant Attorneys General; and *Richard S. Gebelein*, Attorney General of Delaware, and *Regina M. Small*, State Solicitor.

Briefs of *amici curiae* urging affirmance were filed by *Bruce J. Ennis* for the American Civil Liberties Union et al.; and by *Carol Goodman* for the Volunteer Lawyers Project of the Boston Bar Association et al.

to which they were entitled under the federal Social Security Act, specifically 42 U. S. C. § 602 (a)(7). The petitioners present two issues: (1) whether § 1983 encompasses claims based on purely statutory violations of federal law, and (2) if so, whether attorney's fees under § 1988 may be awarded to the prevailing party in such an action.[1]

I

Respondents, Lionel and Joline Thiboutot, are married and have eight children, three of whom are Lionel's by a previous marriage. The Maine Department of Human Services notified Lionel that, in computing the Aid to Families with Dependent Children (AFDC) benefits to which he was entitled for the three children exclusively his, it would no longer make allowance for the money spent to support the other five children, even though Lionel is legally obligated to support them. Respondents, challenging the State's interpretation of 42 U. S. C. § 602 (a)(7), exhausted their state administrative remedies and then sought judicial review of the administrative action in the State Superior Court. By amended complaint, respondents also claimed relief under § 1983 for themselves and others similarly situated. The Superior Court's judgment enjoined petitioners from enforcing the challenged rule and ordered them to adopt new regulations, to notify class members of the new regulations, and to pay the correct amounts retroactively to respondents and prospectively to eligible class members.[2] The court, however, denied respondents' motion for attorney's fees. The Supreme Judicial Court of Maine, 405 A. 2d 230 (1979), concluded that re-

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[1] Petitioners also argue that jurisdiction to hear § 1983 claims rests exclusively with the federal courts. Any doubt that state courts may also entertain such actions was dispelled by *Martinez* v. *California*, 444 U. S. 277, 283–284, n. 7 (1980). There, while reserving the question whether state courts are *obligated* to entertain § 1983 actions, we held that Congress has not barred them from doing so.

[2] The State did not appeal the judgment against it.

spondents had no entitlement to attorney's fees under state law, but were eligible for attorney's fees pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641, 42 U. S. C. § 1988.[3] We granted certiorari. 444 U. S. 1042 (1980). We affirm.

II

Section 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution *and laws,* shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." (Emphasis added.)

The question before us is whether the phrase "and laws," as used in § 1983, means what it says, or whether it should be limited to some subset of laws. Given that Congress attached no modifiers to the phrase, the plain language of the statute undoubtedly embraces respondents' claim that petitioners violated the Social Security Act.

Even were the language ambiguous, however, any doubt as to its meaning has been resolved by our several cases suggesting, explicitly or implicitly, that the § 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law. *Rosado* v. *Wyman,* 397 U. S. 397 (1970), for example, "held that suits in federal court under § 1983 are proper to secure compliance with the provisions of the Social Security Act on the part of participating States." *Edelman* v. *Jordan,* 415 U. S. 651, 675 (1974). *Monell* v. *New York*

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[3] The Supreme Judicial Court remanded to allow the Superior Court to exercise its discretion under § 1988 to determine the appropriate disposition of the fee request.

City Dept. of Social Services, 436 U. S. 658, 700–701 (1978), as support for its conclusion that municipalities are "persons" under § 1983, reasoned that "there can be no doubt that § 1 of the Civil Rights Act [of 1871] was intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights." Similarly, *Owen* v. *City of Independence*, 445 U. S. 622, 649 (1980), in holding that the common-law immunity for discretionary functions provided no basis for according municipalities a good-faith immunity under § 1983, noted that a court "looks only to whether the municipality has conformed to the requirements of the Federal Constitution and statutes." *Mitchum* v. *Foster*, 407 U. S. 225, 240, n. 30 (1972), and *Lynch* v. *Household Finance Corp.*, 405 U. S. 538, 543, n. 7 (1972), noted that § 1983's predecessor "was enlarged to provide protection for rights, privileges, or immunities secured by federal law." *Greenwood* v. *Peacock*, 384 U. S. 808, 829–830 (1966), observed that under § 1983 state "officers may be made to respond in damages not only for violations of rights conferred by federal equal civil rights laws, but for violations of other federal constitutional and statutory rights as well." The availability of this alternative sanction helped support the holding that 28 U. S. C. § 1443 (1) did not permit removal to federal court of a state prosecution in which the defense was that the state law conflicted with the defendants' federal rights. As a final example, Mr. Justice Stone, writing in *Hague* v. *CIO*, 307 U. S. 496, 525–526 (1939), expressed the opinion that § 1983 was the product of an "exten[sion] to include rights, privileges and immunities secured by the laws of the United States as well as by the Constitution."

While some might dismiss as dictum the foregoing statements, numerous and specific as they are, our analysis in several § 1983 cases involving Social Security Act (SSA) claims has relied on the availability of a § 1983 cause of action for statutory claims. Constitutional claims were also raised

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in these cases, providing a jurisdictional base, but the statutory claims were allowed to go forward, and were decided on the merits, under the court's pendent jurisdiction. In each of the following cases § 1983 was necessarily the exclusive statutory cause of action because, as the Court held in *Edelman* v. *Jordan*, 415 U. S., at 673–674; *id.*, at 690 (MARSHALL, J., dissenting), the SSA affords no private right of action against a State. *Miller* v. *Youakim*, 440 U. S. 125, 132, and n. 13 (1979) (state foster care program inconsistent with SSA); *Quern* v. *Mandley*, 436 U. S. 725, 729, and n. 3 (1978) (state emergency assistance program consistent with SSA); *Van Lare* v. *Hurley*, 421 U. S. 338 (1975) (state shelter allowance provisions inconsistent with SSA); *Townsend* v. *Swank*, 404 U. S. 282 (1971) (state prohibition against AFDC aid for college students inconsistent with SSA); *King* v. *Smith*, 392 U. S. 309, 311 (1968) (state cohabitation prohibition inconsistent with SSA). Cf. *Hagans* v. *Lavine*, 415 U. S. 528, 532–533, 543 (1974) (District Court had jurisdiction to decide whether state recoupment provisions consistent with SSA); *Carter* v. *Stanton*, 405 U. S. 669, 670 (1972) (District Court had jurisdiction to decide whether state absent-spouse rule consistent with SSA).

In the face of the plain language of § 1983 and our consistent treatment of that provision, petitioners nevertheless persist in suggesting that the phrase "and laws" should be read as limited to civil rights or equal protection laws.[4] Petitioners suggest that when § 1 of the Civil Rights Act of 1871, 17 Stat. 13, which accorded jurisdiction and a remedy for deprivations of rights secured by "the Constitution of the United States," was divided by the 1874 statutory revision into a remedial section, Rev. Stat. § 1979, and jurisdictional

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[4] Where the plain language, supported by consistent judicial interpretation, is as strong as it is here, ordinarily "it is not *necessary* to look beyond the words of the statute." *TVA* v. *Hill*, 437 U. S. 153, 184, n. 29 (1978).

sections, Rev. Stat. §§ 563 (12) and 629 (16), Congress intended that the same change made in § 629 (16) be made as to each of the new sections as well. Section 629 (16), the jurisdictional provision for the circuit courts and the model for the current jurisdictional provision, 28 U. S. C. § 1343 (3), applied to deprivations of rights secured by "the Constitution of the United States, or of any right secured by any law providing for equal rights." On the other hand, the remedial provision, the predecessor of § 1983, was expanded to apply to deprivations of rights secured by "the Constitution and laws," and § 563 (12), the provision granting jurisdiction to the district courts, to deprivations of rights secured by "the Constitution of the United States, or of any right secured by any law of the United States."

We need not repeat at length the detailed debate over the meaning of the scanty legislative history concerning the addition of the phrase "and laws." See *Chapman* v. *Houston Welfare Rights Organization*, 441 U. S. 600 (1979); *id.*, at 623 (POWELL, J., concurring); *id.*, at 646 (WHITE, J., concurring in judgment); *id.*, at 672 (STEWART, J., dissenting). One conclusion which emerges clearly is that the legislative history does not permit a definitive answer. *Id.*, at 610–611; *id.*, at 674 (STEWART, J., dissenting). There is no express explanation offered for the insertion of the phrase "and laws." On the one hand, a principal purpose of the added language was to "ensure that federal legislation providing specifically for equality of rights would be brought within the ambit of the civil action authorized by that statute." *Id.*, at 637 (POWELL, J., concurring). On the other hand, there are no indications that that was the only purpose, and Congress' attention was specifically directed to this new language. Representative Lawrence, in a speech to the House of Representatives that began by observing that the revisers had very often changed the meaning of existing statutes, 2 Cong. Rec. 825 (1874), referred to the civil rights statutes as "possibly [showing] ver-

bal modifications bordering on legislation," *id.*, at 827. He went on to read to Congress the original and revised versions. In short, Congress was aware of what it was doing, and the legislative history does not demonstrate that the plain language was not intended.[5] Petitioners' arguments amount to the claim that had Congress been more careful, and had it fully thought out the relationship among the various sections,[6] it might have acted differently. That argument, however, can best be addressed to Congress, which, it is important to note, has remained quiet in the face of our many pronouncements on the scope of § 1983. Cf. *TVA* v. *Hill*, 437 U. S. 153 (1978).

III

Petitioners next argue that, even if this claim is within § 1983, Congress did not intend statutory claims to be covered by the Civil Rights Attorney's Fees Awards Act of 1976,

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[5] In his concurring opinion in *Chapman* v. *Houston Welfare Rights Organization*, 441 U. S. 600 (1979), MR. JUSTICE POWELL's argument proceeds on the basis of the flawed premise that Congress did not intend to change the meaning of existing laws when it revised the statutes in 1874. He assumed that Congress had instructed the revisers not to make changes, and that the revisers had obeyed those instructions. In fact, the second section of the statute creating the revision commission, 14 Stat. 75, mandated that the commissioners "mak[e] such alterations as may be necessary to reconcile the contradictions, supply the omissions, and amend the imperfections of the original text." Furthermore, it is clear that Congress understood this mandate to authorize the commission to do more than merely "copy and arrange in proper order, and classify in heads the actual text of statutes in force." 2 Cong. Rec. 825 (1874). We have already decided that the "customary stout assertions of the codifiers that they had merely clarified and reorganized without changing substance" cannot be taken at face value. *United States* v. *Price*, 383 U. S. 787, 803 (1966) (holding that the revisers significantly broadened the forerunner of 18 U. S. C. § 242).

[6] There is no inherent illogic in construing § 1983 more broadly than § 1343 (3) was construed in *Chapman* v. *Houston Welfare Rights Organization*, *supra*. It would only mean that there are statutory rights which Congress has decided cannot be enforced in the federal courts unless 28 U. S. C. § 1331 (a)'s $10,000 jurisdictional amount is satisfied.

which added the following sentence to 42 U. S. C. § 1988 (emphasis added):

> "In *any action* or proceeding *to enforce* a provision of sections 1981, 1982, *1983*, 1985, and 1986 of this title, title IX of Public Law 92–318 [20 U. S. C. 1681 *et seq.*] or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964 [42 U. S. C. 2000d *et seq.*], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

Once again, given our holding in Part II, *supra*, the plain language provides an answer. The statute states that fees are available in *any* § 1983 action. Since we hold that this statutory action is properly brought under § 1983, and since § 1988 makes no exception for statutory § 1983 actions, § 1988 plainly applies to this suit.[7]

The legislative history is entirely consistent with the plain language. As was true with § 1983, a major purpose of the Civil Rights Attorney's Fees Awards Act was to benefit those claiming deprivations of constitutional and civil rights. Principal sponsors of the measure in both the House and the Senate, however, explicitly stated during the floor debate that the statute would make fees available more broadly. Represent-

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[7] The States appearing as *amici* suggest that *Hutto* v. *Finney*, 437 U. S. 678 (1978), left open the issue whether Congress, exercising its power under § 5 of the Fourteenth Amendment, could set aside the States' Eleventh Amendment immunity in statutory as opposed to constitutional cases. *Hutto*, however, concluded alternatively that the Eleventh Amendment did not bar attorney's fee awards in federal courts because the fee awards are part of costs, which "have traditionally been awarded without regard for the State's Eleventh Amendment immunity." *Id.*, at 695. No Eleventh Amendment question is present, of course, where an action is brought in a state court since the Amendment, by its terms, restrains only "[t]he Judicial power of the United States."

ative Drinan explained that the Act would apply to § 1983 and that § 1983 "authorizes suits against State and local officials based upon Federal statutory as well as constitutional rights. For example Blue against Craig, 505 F. 2d 830 (4th Cir. 1974)." 122 Cong. Rec. 35122 (1976).[8] Senator Kennedy also included a SSA case as an example of the cases "enforc[ing] the rights promised by Congress or the Constitution" which the Act would embrace.[9] *Id.*, at 33314.[10] In short, there can be no question that Congress passed the Fees Act anticipating that it would apply to statutory § 1983 claims.

Several States, participating as *amici curiae*, argue that even if § 1988 applies to § 1983 claims alleging deprivations of statutory rights, it does not apply in state courts. There is no merit to this argument.[11] As we have said above, *Mar-*

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[8] In *Blue* v. *Craig*, the plaintiffs claimed that North Carolina's Medicaid plan was inconsistent with the SSA.

[9] "In a case now pending, officials accepted Social Security Act funds for years for certain medical screening programs when in fact they had no such programs in most of the State. *Bond* v. *Stanton*, 528 F. 2d 688 (7th Cir. 1976)." 122 Cong. Rec. 33314 (1976). In the same list of examples, Senator Kennedy included *La Raza Unida* v. *Volpe*, 57 F. R. D. 94 (ND Cal. 1972), in which plaintiffs demonstrated violations of "the Department of Transportation Act of 1966 and various sections of 23 U. S. C. dealing with housing displacement and relocation." *Id.*, at 95.

[10] The Committee Reports are in accord. The Senate Report recognized that actions under § 1983 covered by the Act would include suits "redressing violations of the Federal Constitution or laws." S. Rep. No. 94–1011, p. 4 (1976). The House Report, after suggesting that a party prevailing on a claim which could not support a fee award should be entitled to a determination on an attached claim covered by § 1988 in order to determine eligibility for fees, recognizes that a special problem is presented because "[i]n some instances . . . the claim with fees may involve a constitutional question. . . ." H. R. Rep. No. 94–1558, p. 4, n. 7 (1976). The negative pregnant is that in other instances the claim with fees need not involve a constitutional question.

[11] The state courts which have addressed this issue have reached that same result. 405 A. 2d 230, 239 (Me. 1979) (case below); *Ramirez* v.

tinez v. *California*, 444 U. S. 277 (1980), held that § 1983 actions may be brought in state courts. Representative Drinan described the purpose of the Civil Rights Attorney's Fees Awards Act as "authoriz[ing] the award of a reasonable attorney's fee in actions brought in State or Federal courts." 122 Cong. Rec. 35122 (1976). And Congress viewed the fees authorized by § 1988 as "an integral part of the remedies necessary to obtain" compliance with § 1983. S. Rep. No. 94–1011, p. 5 (1976). It follows from this history and from the Supremacy Clause that the fee provision is part of the § 1983 remedy whether the action is brought in federal or state court.[12]

Affirmed.

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, dissenting.

The Court holds today, almost casually, that 42 U. S. C. § 1983 creates a cause of action for deprivations under color of state law of any federal statutory right. Having transformed purely statutory claims into "civil rights" actions under § 1983, the Court concludes that 42 U. S. C. § 1988 per-

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County of Hudson, 169 N. J. Super. 455, 404 A. 2d 1271 (1979); *Tobeluk* v. *Lind*, 589 P. 2d 873 (Alaska 1979); *Young* v. *Toia*, 66 App. Div. 2d 377, 413 N. Y. S. 2d 530 (1979); *Lange* v. *Nature Conservancy, Inc.*, 24 Wash. App. 416, 422, 601 P. 2d 963, 967 (1979); *Board of Trustees* v. *Holso*, 584 P. 2d 1009 (Wyo. 1978); *Thorpe* v. *Durango School District*, 41 Colo. App. 473, 591 P. 2d 1329 (1978), cert. granted by Colorado Supreme Court (1979).

[12] If fees were not available in state courts, federalism concerns would be raised because most plaintiffs would have no choice but to bring their complaints concerning state actions to federal courts. Moreover, given that there is a class of cases stating causes of action under § 1983 but not cognizable in federal court absent the $10,000 jurisdictional minimum of § 1331 (a), see n. 6, *supra*, some plaintiffs would be forced to go to state courts, but contrary to congressional intent, would still face financial disincentives to asserting their claimed deprivations of federal rights.

mits the "prevailing party" to recover his attorney's fees. These two holdings dramatically expand the liability of state and local officials and may virtually eliminate the "American Rule" in suits against those officials.

The Court's opinion reflects little consideration of the consequences of its judgment. It relies upon the "plain" meaning of the phrase "and laws" in § 1983 and upon this Court's assertedly "consistent treatment" of that statute. *Ante*, at 4, 6. But the reading adopted today is anything but "plain" when the statutory language is placed in historical context. Moreover, until today this Court never had held that § 1983 encompasses all purely statutory claims. Past treatment of the subject has been incidental and far from consistent. The only firm basis for decision is the historical evidence, which convincingly shows that the phrase the Court now finds so clear was—and remains—nothing more than a shorthand reference to equal rights legislation enacted by Congress. To read "and laws" more broadly is to ignore the lessons of history, logic, and policy.

Part I of this opinion examines the Court's claim that it only construes the "plain meaning" of § 1983, while Part II reviews the historical evidence on the enactment. Part III considers the practical consequences of today's decision. The final substantive section demonstrates that this Court's precedents do not support the Court's ruling today.

I

Section 1983 provides in relevant part that "[e]very person who, under color of [state law,] subjects . . . any . . . person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured. . . ." The Court asserts that "the phrase 'and laws' . . . means what it says," because "Congress attached no modifiers to the phrase. . . ." *Ante*, at 4. Finding no "definitive" contrary indications in the legislative history of § 1983, the Court concludes that that statute provides a

remedy for violations of the Social Security Act. The Court suggests that those who would read the phrase "and laws" more narrowly should address their arguments to Congress. *Ante*, at 8.

If we were forbidden to look behind the language in legislative enactments, there might be some force to the suggestion that "and laws" must be read to include all federal statutes. *Ante*, at 4.[1] But the "plain meaning" rule is not as inflexible as the Court imagines. Although plain meaning is always the starting point, *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 756 (1975) (POWELL, J., concurring), this Court rarely ignores available aids to statutory construction. See, *e. g.*, *Cass* v. *United States*, 417 U. S. 72, 77–79 (1974); *Harrison* v. *Northern Trust Co.*, 317 U. S. 476, 479 (1943), quoting *United States* v. *American Trucking Assns., Inc.*, 310 U. S. 534, 543–544 (1940). We have recognized consistently that statutes are to be interpreted " 'not only by a considera-

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[1] The "plain meaning" of "and laws" may be more elusive than the Court admits. One might expect that a statute referring to all rights secured either by the Constitution or by the laws would employ the disjunctive "or." This is precisely what Congress did in the only civil rights Act that referred to laws when it was originally enacted. Act of May 31, 1870, § 6, 16 Stat. 141 (now codified at 18 U. S. C. § 241). That statute created criminal penalties for conspiracy to deprive persons of rights secured by "the Constitution *or* laws." *Ibid.* (emphasis added). Five years later, when Congress enacted a statute providing for general federal-question jurisdiction, it described matters "arising under the Constitution *or* laws." Act of Mar. 3, 1875, § 1, 18 Stat. 470 (emphasis added) (now codified at 28 U. S. C. § 1331).

In contrast, a natural reading of the conjunctive "and" in § 1983 would require that the right at issue be secured both by the Constitution and by the laws. In 1874, this would have included the rights set out in the Civil Rights Act of 1866, which had been incorporated in the Fourteenth Amendment and re-enacted in the Civil Rights Act of 1870. See Gressman, The Unhappy History of Civil Rights Legislation, 50 Mich. L. Rev. 1323, 1329, 1333–1334 (1952). The legislative history does not suggest that the Court should adopt such a limited construction. But an advocate of "plain meaning" hardly can ignore the ambiguity.

tion of the words themselves, but by considering, as well, the context, the purposes of the law, and the circumstances under which the words were employed.'" *District of Columbia* v. *Carter*, 409 U. S. 418, 420 (1973), quoting *Puerto Rico* v. *Shell Co.*, 302 U. S. 253, 258 (1937); see generally *TVA* v. *Hill*, 437 U. S. 153, 204–205, and n. 14 (1978) (POWELL, J., dissenting).

The rule is no different when the statute in question is derived from the civil rights legislation of the Reconstruction era. Those statutes "must be given the meaning and sweep" dictated by "their origins and their language"—not their language alone. *Lynch* v. *Household Finance Corp.*, 405 U. S. 538, 549 (1972). When the language does not reflect what history reveals to have been the true legislative intent, we have readily construed the civil rights Acts to include words that Congress inadvertently omitted. See *Examining Board* v. *Flores de Otero*, 426 U. S. 572, 582–586 (1976) (interpreting 28 U. S. C. § 1343 (3) to confer jurisdiction upon territorial courts). Thus, "plain meaning" is too simplistic a guide to the construction of § 1983.

Blind reliance on plain meaning is particularly inappropriate where, as here, Congress inserted the critical language without explicit discussion when it revised the statutes in 1874. See *ante*, at 6–7. Indeed, not a single shred of evidence in the legislative history of the adoption of the 1874 revision mentions this change. Since the legislative history also shows that the revision generally was not intended to alter the meaning of existing law, see Part II, *infra*, this Court previously has insisted that apparent changes be scrutinized with some care. As Mr. Justice Holmes observed, the Revised Statutes are "not lightly to be read as making a change. . . ." *United States* v. *Sischo*, 262 U. S. 165, 168–169 (1923).

II

The origins of the phrase "and laws" in § 1983 were discussed in detail in two concurring opinions last Term. Com-

pare *Chapman* v. *Houston Welfare Rights Org.*, 441 U. S. 600, 623 (1979) (POWELL, J., concurring), with *id.*, at 646 (WHITE, J., concurring in judgment). I shall not recount the full historical evidence presented in my *Chapman* opinion. Nevertheless, the Court's abrupt dismissal of the proposition that "Congress did not intend to change the meaning of existing laws when it revised the statutes in 1874," *ante*, at 8, n. 5, reflects a misconception so fundamental as to require a summary of the historical record.

A

Section 1983 derives from § 1 of the Civil Rights Act of 1871, which provided a cause of action for deprivations of constitutional rights only. "Laws" were not mentioned. Act of Apr. 20, 1871, 17 Stat. 13. The phrase "and laws" was added in 1874, when Congress consolidated the laws of the United States into a single volume under a new subject-matter arrangement. See 2 Cong. Rec. 827 (Jan. 21, 1874) (remarks of Rep. Lawrence). Consequently, the intent of Congress in 1874 is central to this case.

In addition to creating a cause of action, § 1 of the 1871 Act conferred concurrent jurisdiction upon "the district or circuit courts of the United States. . . ." 17 Stat. 13. In the 1874 revision, the remedial portion of § 1 was codified as § 1979 of the Revised Statutes, which provided for a cause of action in terms identical to the present § 1983. The jurisdictional portion of § 1 was divided into § 563 (12), conferring district court jurisdiction, and § 629 (16), conferring circuit court jurisdiction. Although §§ 1979, 563 (12), and 629 (16) came from the same source, each was worded differently. Section 1979 referred to deprivations of rights "secured by the Constitution and laws"; § 563 (12) described rights secured "by the Constitution of the United States, or . . . by any law of the United States"; and § 629 (16) encompassed rights secured "by the Constitution of the United States, or . . . by any law providing for equal rights of citizens of the United

States."[2] When Congress merged the jurisdiction of circuit and district courts in 1911, the narrower language of § 629 (16) was adopted and ultimately became the present 28 U. S. C. § 1343 (3). Act of Mar. 3, 1911, § 24 (14), 36 Stat. 1092.[3]

B

In my view, the legislative history unmistakably shows that the variations in phrasing introduced in the 1874 revision were inadvertent, and that each section was intended to have precisely the same scope. *Chapman* v. *Houston Welfare Rights Org., supra,* at 631–640 (POWELL, J., concurring). Moreover, the only defensible interpretation of the contemporaneous legislative record is that the reference to "laws" in each section was intended "to do no more than ensure that federal legislation providing specifically for equality of rights would be brought within the ambit of the civil action authorized by [§ 1979]." 441 U. S., at 637. Careful study of the available materials leaves no serious doubt that the Court's contrary conclusion is completely at odds with the intent of Congress in 1874. *Id.,* at 640.

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[2] The 1874 revision also drew a third jurisdictional provision from § 1 of the 1871 Act. That provision authorized review in this Court, without regard to the amount in controversy, of "[a]ny final judgment . . . in any case brought on account of the deprivation of any right, privilege, or immunity secured by the Constitution of the United States, or of any right or privilege of a citizen of the United States." Rev. Stat. § 699 (4). Thus, § 1 actually became four separate statutes in 1874. In the Court's view, Congress intended to broaden the remedial and district court jurisdictional provisions to encompass violations of *all* laws, while simultaneously restricting circuit court jurisdiction to "laws providing for equal rights." Although the Court does not mention § 699 (4), that statute is not easily read to encompass rights secured by any federal law. Thus, the Court attributes to Congress an intention to create a new class of civil rights claims which could be litigated in district but not circuit courts, and without any right of review in this Court. I would not assume that Congress intended such senseless jurisdictional results.

[3] Section 563 (12) did not survive the 1911 revision.

The Court holds today that the foregoing reasoning is based on a "flawed premise," because Congress instructed the Revision Commission to change the statutes in certain respects. *Ante*, at 8, n. 5; Act of June 27, 1866, § 2, 14 Stat. 75. But it is the Court's premise that is flawed. The Revision Commission, which worked for six years on the project, submitted to Congress a draft that did contain substantive changes.[4] But a Joint Congressional Committee, which was appointed in early 1873 to transform the draft into a bill, concluded that it would be "utterly impossible to carry the measure through, if it was understood that it contained new legislation." 2 Cong. Rec. 646 (Jan. 14, 1874) (remarks of Rep. Poland); see Act of Mar. 3, 1873, 17 Stat. 579. Therefore, the Committee employed Thomas Jefferson Durant to "strike out . . . modifications of the existing law" "wherever the meaning of the law had been changed." 2 Cong. Rec. 646 (Jan. 14, 1874) (remarks of Rep. Poland); see *id.*, at 826 (Jan. 21, 1874) (remarks of Rep. Lawrence); *id.*, at 129 (Dec. 10, 1873) (remarks of Rep. Butler). On December 10, 1873, Durant's completed work was introduced in the House with the solemn assurance that the bill "embodies the law as it is." *Ibid.*[5]

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[4] It is worth noting, however, that the statute creating the Revision Commission also directed that the revisers "shall suggest to Congress" all statutory imperfections they had corrected and "the mode" in which they had done so. Act of June 27, 1866, § 3, 14 Stat. 75. The revisers obeyed this directive by placing marginal comments next to each section they deemed to have amended the law. See 2 Cong. Rec. 648 (Jan. 14, 1874) (Rep. Hoar). That no such comment accompanied § 1979 is strong evidence that the revisers intended no substantive change. See 1 Revision of the United States Statutes as Drafted by the Commissioners Appointed for that Purpose 947 (1872).

[5] These assurances were repeated again and again. Representative Butler told his colleagues that the Committee had "not attempted to change the law [in force on December 1, 1873], in a single word or letter, so as to make a different reading or different sense." 2 Cong. Rec. 129 (Dec. 10, 1873). A month later, Representative Poland stated that the bill was

The House met in a series of evening sessions to review the bill and to restore original meaning where necessary. During one of these sessions, Representative Lawrence delivered the speech upon which the Court now relies. *Ante*, at 7–8. Lawrence explained that the revisers often had separated existing statutes into substantive, remedial, and criminal sections to accord with the new organization of the statutes by topic. He read both the original and revised versions of the civil rights statutes to illustrate the arrangement, and "possibly [to] show verbal modifications bordering on legislation." 2 Cong. Rec. 827 (Jan. 21, 1874). After reading § 1979 without mentioning the addition of "and laws," Lawrence stated that "[a] comparison of all these will present a fair specimen of the manner in which the work has been done, and from these all can judge of the accuracy of the translation." *Id.*, at 828. Observing that "[t]his mode of classifying . . . to some extent duplicates in the revision portions of statutes" that previously were one, Lawrence praised "the general accuracy" of the revision. *Ibid.* Nothing in this sequence of remarks supports the decision of the Court today. There was no mention of the addition of "and laws" nor any hint that the reach of § 1983 was to be extended. If Lawrence had any such intention, his statement to the House was

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meant to be "an exact transcript, an exact reflex, of the existing statute law of the United States—that there shall be nothing omitted and nothing changed." *Id.*, at 646 (Jan. 14, 1874). Senator Conkling said that "the aim throughout has been to preserve absolute identity of meaning. . . ." *Id.*, at 4220 (May 25, 1874). See *Chapman* v. *Houston Welfare Rights Org.*, 441 U. S. 600, 625–627 (1979) (POWELL, J., concurring).

Contrary to the Court's suggestion, *ante*, at 8, n. 5, this Court never has held that "the revisers significantly broadened the forerunner of 18 U. S. C. § 242." *United States* v. *Price*, 383 U. S. 787 (1966), involved the interpretation of 18 U. S. C. § 241. The opinion contained dictum to the effect that the similarly worded § 242 was expanded in 1874. 383 U. S., at 803. But the Court did not consider the legislative history of the 1874 revision, and the passing reference to § 242 certainly is not binding precedent.

a singularly disingenuous way of proposing a major piece of legislation.

In context, it is plain that Representative Lawrence did not mention changes "bordering on legislation" as a way of introducing substantive changes in § 1 of the 1871 Act. Rather, he was emphasizing that the revision was not intended to modify existing statutes, and that his reading might reveal errors that should be eliminated. No doubt Congress "was aware of what it was doing." *Ante*, at 8. It was meeting specially in one last attempt to detect and strike out legislative changes that may have remained in the proposed revision despite the best efforts of Durant and the Joint Committee. No representative challenged those sections of the Revised Statutes that derived from § 1 of the Civil Rights Act of 1871. That silence reflected the understanding of those present that "and laws" did not alter the original meaning of the statute.[6] The Members of Congress who participated in the yearlong effort to expunge all substantive alterations from the Revised Statutes evinced no intent whatever to enact a far-reaching modification of § 1 of the Civil Rights Act of 1871. The relevant evidence, largely ignored by the Court today, shows that Congress painstakingly sought to avoid just such changes.

III

The legislative history alone refutes the Court's assertion that the 43d Congress intended to alter the meaning of § 1983. But there are other compelling reasons to reject the Court's interpretation of the phrase "and laws." First, by reading those words to encompass every federal enactment, the Court extends § 1983 beyond the reach of its jurisdictional counter-

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[6] The addition of "and laws" did not change the meaning of § 1 because Congress assumed that that phrase referred only to federal equal rights legislation. In 1874, the only such legislation was contained in the 1866 and 1870 Civil Rights Acts, which conferred rights also secured by the recently adopted Fourteenth Amendment. See n. 1, *supra*.

part. Second, that reading creates a broad program for enforcing federal legislation that departs significantly from the purposes of § 1983. Such unexpected and plainly unintended consequences should be avoided whenever a statute reasonably may be given an interpretation that is consistent with the legislative purpose. See *Sorrells* v. *United States*, 287 U. S. 435, 446–448 (1932); *United States* v. *Ryan*, 284 U. S. 167, 175 (1931); *Holy Trinity Church* v. *United States*, 143 U. S. 457, 459 (1892).

A

The Court acknowledges that its construction of § 1983 creates federal "civil rights" for which 28 U. S. C. § 1343 (3) supplies no federal jurisdiction. *Ante*, at 8, n. 6.[7] The Court finds no "inherent illogic" in this view. *Ibid.* But the gap in the Court's logic is wide indeed in light of the history and purpose of the civil rights legislation we consider today. Sections 1983 and 1343 (3) derive from the same section of the same Act. See *ante*, at 6–7. As originally enacted, the two sections necessarily were coextensive. See *Chapman* v. *Houston Welfare Rights Org.*, 441 U. S., at 616. And this Court has emphasized repeatedly that the right to a federal forum in every case was viewed as a crucial ingredient in the federal remedy afforded by § 1983.

We have stated, for example, that a major purpose of the Civil Rights Acts was to "involve the federal judiciary" in the effort to exert federal control over state officials who refused to enforce the law. *District of Columbia* v. *Carter*, 409 U. S., at 427. Congress did so in part because it thought the state courts at the time would not provide an impartial forum. See *id.*, at 426–429. See generally *Monroe* v. *Pape*, 365 U. S.

[7] Section 1343 (3) supplies jurisdiction for claims involving rights secured by the Constitution "or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States." Neither § 1983 itself nor the Social Security Act provides for equal rights within the meaning of this section. *Chapman* v. *Houston Welfare Rights Org.*, *supra*.

167, 174–183 (1961); Developments in the Law—Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1150–1153 (1977). Thus, Congress elected to afford a "uniquely federal remedy," *Mitchum* v. *Foster*, 407 U. S. 225, 239 (1972), that is, a " 'federal right *in federal courts*,' " *District of Columbia* v. *Carter, supra*, at 428, quoting *Monroe* v. *Pape, supra*, at 180 (emphasis added). Four Terms ago, we considered the origins of § 1343 (3) and § 1983 and concluded that "the two provisions were meant to be, and are, complementary." *Examining Board* v. *Flores de Otero*, 426 U. S., at 583; see *Lynch* v. *Household Finance Corp.*, 405 U. S., at 543, n. 7.

The Court ignores these perceptions and dismisses without explanation the proposition, explicitly accepted in *Flores*, that § 1983 and § 1343 (3) are coextensive. The Court cites no evidence that Congress ever intended to alter so fundamentally its original remedial plan, and I am aware of none.[8] Nearly every commentator who has considered the question has concluded that § 1343 (3) was intended to supply federal jurisdiction in all § 1983 actions. See *Chapman* v. *Houston Welfare Rights Org., supra*, at 637, n. 19 (POWELL, J., concurring) (collecting citations).[9] Since § 1343 (3) covers stat-

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[8] In the Court's view today, § 1983 actions based on statutes unrelated to equal rights could have been brought in district but not circuit courts after 1874. See n. 2, *supra*. When Congress merged the two jurisdictional provisions in 1911, the narrower language of the circuit court provision was adopted. Act of Mar. 3, 1911, § 24 (14), 36 Stat. 1092. Yet there is no indication in the legislative history of the 1911 Act that Congress intended to change the scope of federal jurisdiction. The Senate Report states that the new section "merges the jurisdiction now vested in the district court . . . and in the circuit courts . . . and vests it in the district courts." S. Rep. No. 388, 61st Cong., 2d Sess., pt. 1, pp. 15, 50–51 (1910).

[9] One author thought it "idiotic" to interpret § 1343 (3) and § 1983 differently. Cover, Establishing Federal Jurisdiction in Actions Brought to Vindicate Statutory (Federal) Rights When No Violations of Constitutional Rights Are Alleged, 2 Clearinghouse Rev., No. 16, pp. 5, 25 (1969). "Only when there is no uncertainty should the courts conclude that Congress has set up a remedial system which overlooks nothing but the minor

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utory claims only when they arise under laws providing for the equal rights of citizens. *Chapman* v. *Houston Welfare Rights Org., supra,* at 615–618, the same limitation necessarily is implicit in § 1983. The Court's decision to apply that statute without regard to the scope of its jurisdictional counterpart is at war with the plainly expressed intent of Congress.

B

The Court's opinion does not consider the nature or scope of the litigation it has authorized. In practical effect, today's decision means that state and local governments, officers, and employees [10] now may face liability whenever a person believes he has been injured by the administration of *any* federal-state cooperative program, whether or not that program is related to equal or civil rights.[11]

1

Even a cursory survey of the United States Code reveals that literally hundreds of cooperative regulatory and social welfare enactments may be affected.[12] The States now par-

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technicality of giving jurisdiction to some court. The courts should be especially reluctant to reach such a result when there is every evidence that a federal forum was a focal point of the legislation." *Ibid.*

[10] Section 1983 actions may be brought against States, municipalities and other subdivisions, officers, and employees. Although I will refer to all such potential defendants as "state defendants" for purposes of this opinion, there may be a notable difference among them. States are protected against retroactive damages awards by the Eleventh Amendment, and individual defendants generally can claim immunity when they act in good faith. Municipalities, however, will be strictly liable for errors in the administration of complex federal statutes. See *Owen* v. *City of Independence,* 445 U. S. 622 (1980).

[11] The only exception will be in cases where the governing statute provides an exclusive remedy for violations of its terms. See *Adickes* v. *Kress & Co.,* 398 U. S. 144, 150–151, n. 5 (1970); cf. *Great American Fed. S. & L. Assn.* v. *Novotny,* 442 U. S. 366 (1979).

[12] An incomplete sample of statutes requiring federal-state cooperation is collected in the Appendix to this opinion. Plaintiffs also may contend

ticipate in the enforcement of federal laws governing migrant labor, noxious weeds, historic preservation, wildlife conservation, anadromous fisheries, scenic trails, and strip mining. Various statutes authorize federal-state cooperative agreements in most aspects of federal land management. In addition, federal grants administered by state and local governments now are available in virtually every area of public administration. Unemployment, Medicaid, school lunch subsidies, food stamps, and other welfare benefits may provide particularly inviting subjects of litigation. Federal assistance also includes a variety of subsidies for education, housing, health care, transportation, public works, and law enforcement. Those who might benefit from these grants now will be potential § 1983 plaintiffs.

No one can predict the extent to which litigation arising from today's decision will harass state and local officials; nor can one foresee the number of new filings in our already overburdened courts. But no one can doubt that these consequences will be substantial. And the Court advances no reason to believe that any Congress—from 1874 to the present day—intended this expansion of federally imposed liability on state defendants.

Moreover, state and local governments will bear the entire burden of liability for violations of statutory "civil rights" even when federal officials are involved equally in the admin-

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that state activities unrelated to cooperative programs have burdened rights secured by federal statutes. *E. g., Chase* v. *McMasters*, 573 F. 2d 1011, 1017–1019 (CA8), cert. denied, 439 U. S. 965 (1978) (authority of Secretary of the Interior to hold Indian lands); *Wirth* v. *Surles*, 562 F. 2d 319 (CA4 1977), cert. denied, 435 U. S. 933 (1978) (extradition of prisoners); *Bomar* v. *Keyes*, 162 F. 2d 136, 139 (CA2), cert. denied, 332 U. S. 825 (1947) (right to sit on federal juries); *Gage* v. *Commonwealth Edison Co.*, 356 F. Supp. 80, 88 (ND Ill. 1972) (right to an environmental impact statement prior to action in which federal agency participates); *McGuire* v. *Amrein*, 101 F. Supp. 414, 417, 419–420 (Md. 1951) (federal ban on the tapping of telephones).

istration of the affected program. Section 1983 grants no right of action against the United States, and few of the foregoing cooperative programs provide expressly for private actions to enforce their terms. Thus, private litigants may sue responsible federal officials only in the relatively rare case in which a cause of action may be implied from the governing substantive statute. Cf. *Transamerica Mortgage Advisors* v. *Lewis*, 444 U. S. 11 (1979); *Touche Ross & Co.* v. *Redington*, 442 U. S. 560 (1979). It defies reason to believe that Congress intended—without discussion—to impose such a burden only upon state defendants.

Even when a cause of action against federal officials is available, litigants are likely to focus efforts upon state defendants in order to obtain attorney's fees under the liberal standard of 42 U. S. C. § 1988. There is some evidence that § 1983 claims already are being appended to complaints solely for the purpose of obtaining fees in actions where "civil rights" of any kind are at best an afterthought. In this case, for example, the respondents added a § 1983 count to their complaint some years after the action was initiated, apparently in response to the enactment of the Civil Rights Attorney's Fees Awards Act of 1976. See also *United States* v. *Imperial Irrigation Dist.*, 595 F. 2d 525, 529 (CA9 1979), rev'd on other grounds *sub nom. Bryant* v. *Yellen*, 447 U. S. 352 (1980). The uses of this technique have not been explored fully. But the rules of pendent jurisdiction are quite liberal, and plaintiffs who prevail on pendent claims may win awards under § 1988. *Maher* v. *Gagne*, *post*, p. 122. Consequently, ingenious pleaders may find ways to recover attorney's fees in almost any suit against a state defendant.[13] Nothing in the legislative history of the Civil Rights Attorney's Fees Awards Act of 1976 suggests that Congress in-

[13] See Wolf, Pendent Jurisdiction, Multi-Claim Litigation, and the 1976 Civil Rights Attorney's Fees Awards Act, 2 W. New Eng. L. Rev. 193, 249 (1979).

tended to remove so completely the protection of the "American Rule" in suits against state defendants.[14]

2

When Congress revised the statutes in 1874, it hardly could have anticipated the subsequent proliferation of federal statutes. Yet, congressional power to enact laws under the Spending and Commerce Clauses was well known in 1874. Congress need not have foreseen the ultimate scope of those powers to have understood that the expansion of § 1983 to statutory claims would have serious consequences.

Today's decision confers upon the courts unprecedented authority to oversee state actions that have little or nothing to do with the individual rights defined and enforced by the civil rights legislation of the Reconstruction era.[15] This result cannot be reconciled with the purposes for which § 1983 was enacted. It also imposes unequal burdens on state and federal officials in the joint administration of federal programs and may expose state defendants to liability for attorney's fees in virtually every case. If any Member of the 43d Congress had suggested legislation embodying these results, the proposal certainly would have been hotly debated. It is sim-

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[14] The few references to statutory claims cited by the Court, *ante*, at 10, and n. 9, fall far short of demonstrating that Congress considered or intended the consequences of the Court's interpretation of § 1983.

[15] Section 1983 was passed for the express purpose of "enforc[ing] the Provisions of the Fourteenth Amendment." Act of Apr. 20, 1871, 17 Stat. 13; see *Lynch* v. *Household Finance Corp.*, 405 U. S. 538, 545 (1972); *Monroe* v. *Pape*, 365 U. S. 167, 171 (1961). The Civil Rights Attorney's Fees Awards Act of 1976 also was passed under the Enforcement Clauses of the Thirteenth and Fourteenth Amendments. 122 Cong. Rec. 33315 (1976) (remarks of Sen. Abourezk); *id.*, at 35123 (remarks of Rep. Drinan). I do not imply that either statute must be limited strictly to claims arising under the post-Civil War Amendments. That Congress elected to proceed under the enforcement powers suggests, however, an intention to protect enduring civil rights rather than the virtually limitless entitlements created by federal statutes.

ply inconceivable that Congress, while professing a firm intention not to make substantive changes in the law, nevertheless intended to enact a major new remedial program by approving—without discussion—the addition of two words to a statute adopted only three years earlier.

IV

The Court finally insists that its interpretation of § 1983 is foreordained by a line of precedent so strong that further analysis is unnecessary. *Ante*, at 4–5. It is true that suits against state officials alleging violations of the Social Security Act have become commonplace in the last decade. *Ibid.* The instant action follows that pattern. Thus, the Court implies, today's decision is a largely inconsequential reaffirmation of a statutory interpretation that has been settled authoritatively for many years.

This is a tempting way to avoid confronting the serious issues presented by this case. But the attempt does not withstand analysis. Far from being a long-accepted fact, purely statutory § 1983 actions are an invention of the last 20 years. And the Court's seesaw approach to § 1983 over the last century leaves little room for certainty on any question that has not been discussed fully and resolved explicitly by this Court. Compare *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978), with *Monroe* v. *Pape*, 365 U. S. 167 (1961). Yet, until last Term, neither this Court nor any Justice ever had undertaken—directly and thoroughly—a consideration of the question presented in this case.

A

Commentators have chronicled the tortuous path of judicial interpretation of the Civil Rights Acts enacted after the Civil War. See Gressman, The Unhappy History of Civil Rights Legislation, 50 Mich. L. Rev. 1323 (1952); Note, Developments in the Law—Section 1983 and Federalism, 90

Harv. L. Rev. 1133 (1977); Note, The Proper Scope of the Civil Rights Acts, 66 Harv. L. Rev. 1285 (1953). One writer found only 21 cases decided under § 1983 in the first 50 years of its history. Comment, The Civil Rights Act: Emergence of an Adequate Federal Civil Remedy?, 26 Ind. L. J. 361, 363 (1951). Another lamented, as late as 1952, that the statute could not be given its intended broad effect without a "judicial and constitutional upheaval of the first magnitude." Gressman, *supra*, at 1357. That upheaval ultimately did take place, and § 1983 actions now constitute a substantial share of the federal caseload.[16] Nevertheless, cases dealing with purely statutory civil rights claims remain nearly as rare as in the early years.

Holt v. *Indiana Manufacturing Co.*, 176 U. S. 68 (1900), appears to be the first reported decision to deal with a statutory claim under § 1983. In that case, the Court dismissed for want of jurisdiction a claim based upon the Constitution and the federal patent laws. The Court stated that §§ 1979, 563 (12), and 629 (16) of the Revised Statutes "refer to civil rights only and are inapplicable here." 176 U. S., at 72. Since *Holt* involved both constitutional and statutory claims, its "civil rights" limitation later was viewed as a general restriction on the application of § 1983.

Although constitutional claims under § 1983 generally were limited to "personal" rights in the wake of *Holt* and Mr. Justice Stone's influential opinion in *Hague* v. *CIO*, 307 U. S.

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[16] Between 1961 and 1977, the number of cases filed in federal court under civil rights statutes increased from 296 to 13,113. See *Butz* v. *Economou*, 438 U. S. 478, 526 (1978) (REHNQUIST, J., dissenting). New filings have remained relatively constant from 1977 to date. See Director of the Administrative Office of the United States Courts Ann. Rep. 6, Table 6 (1979). These figures do not include the many prisoner petitions filed annually under 42 U. S. C. § 1983. *Ibid.* If prisoner petitions are included, the number of civil rights cases filed in 1979 rises to 24,951. See *id.*, at A16–A17, Table C–3.

496, 531 (1939),[17] purely statutory claims remained virtually unrecognized. When the United States Court of Appeals for the Second Circuit considered a statutory claim nearly half a century after *Holt*, it found no case whatever "in which the right or privilege at stake was secured by a 'law' of the United States." *Bomar* v. *Keyes*, 162 F. 2d 136, 139, cert. denied, 332 U. S. 825 (1947). The plaintiff in *Bomar* was a public school teacher who alleged that the school board had discharged her because of absences incurred while exercising her statutory right to serve on a federal jury. The Court of Appeals concluded that the complaint stated a claim under §1983. 162 F. 2d, at 139.

The opinion in *Bomar*, which cited no authority and reviewed no legislative history, provoked widespread commentary. See generally Note, The Propriety of Granting a Federal Hearing for Statutorily Based Actions under the Reconstruction-Era Civil Rights Acts: *Blue* v. *Craig*, 43 Geo. Wash. L. Rev. 1343, 1363–1364, and n. 169 (1975). But it appears to have had little practical effect.[18] The issue did not arise with any frequency until the late 1960's, when challenges to state administration of federal social welfare legislation became commonplace. The lower courts responded to these

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[17] Drawing on *Holt* v. *Indiana Manufacturing Co.*, Mr. Justice Stone argued that § 1983 applies only to rights involving "personal liberty, not dependent for [their] existence upon the infringement of property rights." *Hague* v. *CIO*, 307 U. S., at 531. This view was widely held until this Court rejected it in *Lynch* v. *Household Finance Corp.*, 405 U. S. 538 (1972). See Note, The Propriety of Granting a Federal Hearing for Statutorily Based Actions under the Reconstruction-Era Civil Rights Acts: *Blue* v. *Craig*, 43 Geo. Wash. L. Rev. 1343, 1359–1361 (1975). *Lynch* explained the result in *Holt* as a product of special restrictions on federal jurisdiction over challenges to the collection of state taxes. 405 U. S., at 542–543, n. 6.

[18] The prevailing view limiting § 1983 actions to "personal" rights may have discouraged statutory claims. See n. 17, *supra*. And there was little occasion to consider whether § 1983 was limited to "equal rights" statutes, because the personal/property rights distinction served much the same purpose. Note, 43 Geo. Wash. L. Rev., at 1361, n. 157.

suits with conflicting conclusions. Some found § 1983 applicable to all federal statutory claims.[19] Others refused to apply it to purely statutory rights.[20] Yet others believed that § 1983 covered some but not all rights derived from nonconstitutional sources.[21] Numerous scholarly comments discussed the possible solutions, without reaching a consensus.[22]

B

The courts and commentators who debated the issue during this period were singularly obtuse if, as the Court now asserts, all doubt as to the meaning of "and laws" had been resolved by a long line of consistent authority going back to 1939. *Ante*, at 4–5. I know of no court or commentator who has

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[19] *E. g., Blue* v. *Craig*, 505 F. 2d 830, 835–838 (CA4 1974) (Social Security Act); *Gomez* v. *Florida State Employment Service*, 417 F. 2d 569, 579 (CA5 1969) (Wagner-Peyser Act of 1933); *La Raza Unida of Southern Alameda County* v. *Volpe*, 440 F. Supp. 904, 908–910 (ND Cal. 1977) (Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970).

[20] *E. g., Wynn* v. *Indiana State Department of Public Welfare*, 316 F. Supp. 324, 330–333 (ND Ind. 1970) (Social Security Act).

[21] *E. g., Chase* v. *McMasters*, 573 F. 2d, at 1017, and n. 5 (relationship between Federal Government and Indians embodied in the Indian Organization Act of 1934 has "constitutional dimensions"); *McCall* v. *Shapiro*, 416 F. 2d 246, 249–250 (CA2 1969) (Social Security Act not a statute providing for equal or civil rights); *First Nat. Bank of Omaha* v. *Marquette Nat. Bank*, 482 F. Supp. 514, 521–522 (Minn. 1979) (National Bank Act restriction on interest rates not a statute providing for equal or civil rights); cf. *Schatte* v. *International Alliance of Theatrical Stage Employees*, 182 F. 2d 158, 166–167 (CA9 1950) (Social Security Act and National Labor Relations Act enforceable only by remedies prescribed therein).

[22] See Cover, *supra* n. 9, at 24–25; Herzer, Federal Jurisdiction Over Statutorily-Based Welfare Claims, 6 Harv. Civ. Rights-Civ. Lib. L. Rev. 1, 6–8, 19 (1970); Note, 43 Geo. Wash. L. Rev., *supra* n. 17, at 1361–1362; Note, Federal Jurisdiction over Challenges to State Welfare Programs, 72 Colum. L. Rev. 1404, 1426 (1972); Note, The Proper Scope of the Civil Rights Acts, 66 Harv. L. Rev. 1285, 1299–1300 (1953); Note, 16 Geo. Wash. L. Rev. 253, 263 (1948).

thought that all such doubt had been extinguished before today.[23]

The Court quotes the statement in *Edelman* v. *Jordan*, 415 U. S. 651, 675 (1974), that *Rosado* v. *Wyman*, 397 U. S. 397 (1970), "'held that suits in federal court under § 1983 are proper to secure compliance with the provisions of the Social Security Act on the part of participating States.'" *Ante*, at 4. If that statement is true, the confusion remaining after *Rosado* is simply inexplicable. In fact, of course, *Rosado* established no such proposition of law. The plaintiffs in that case challenged a state welfare provision on constitutional grounds, premising jurisdiction upon 28 U. S. C. § 1343 (3), and added a pendent statutory claim. This Court held first that the District Court retained its power to adjudicate the statutory claim even after the constitutional claim, on which § 1343 (3) jurisdiction was based, became moot. 397 U. S., at 402–405. The opinion then considered the merits of the plaintiffs' argument that New York law did not comport with the Social Security Act. *Id.*, at 407–420. Although the Court had to assume the existence of a private right of action to enforce that Act, the opinion did not discuss or purport to decide whether § 1983 applies to statutory claims.

Rosado is not the only case to have assumed *sub silentio* that welfare claimants have a cause of action to challenge the adequacy of state programs under the Social Security Act. As the Court observes, many of our recent decisions construing the Act made the same unspoken assumption. *Ante*, at 6. It does not necessarily follow that the Court in those cases assumed that the cause of action was provided by § 1983 rather than the Social Security Act itself.[24] But even if it

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[23] See, *e. g.*, *La Raza Unida of Southern Alameda County* v. *Volpe*, *supra*, at 908 (issue "has yet to be definitively resolved").

[24] Contrary to the Court's suggestion, *ante*, at 6, *Edelman* v. *Jordan*, 415 U. S. 651 (1974), did not exclude the possibility of an implied private right of action under the Social Security Act. *Edelman* held only that a

did, these cases provide no support for the Court's ruling today. "[W]hen questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us." *Hagans* v. *Lavine*, 415 U. S. 528, 535, n. 5 (1974); see *Monell* v. *New York City Dept. of Social Services*, 436 U. S., at 663; *United States* v. *More*, 3 Cranch 159, 172 (1805). This rule applies with even greater force to questions involving the availability of a cause of action, because the question whether a cause of action exists—unlike the existence of federal jurisdiction—may be assumed without being decided. *Burks* v. *Lasker*, 441 U. S. 471, 476, and n. 5 (1979). Thus, the Court's ruling finds no support in past cases in which the issue was not squarely raised. Here, as in *Hagans* v. *Lavine*, *supra*, at 535, n. 5, we must approach the question "as an open one calling for a canvass of the relevant . . . considerations." [25]

The Court also relies upon "numerous and specific" dicta in prior decisions. *Ante*, at 5. But none of the cited cases contains anything more than a bare assertion of the proposition that is to be proved. Most say much less than that. For example, the Court occasionally has referred to § 1983 as a remedy for violations of "federally protected rights" or of "the Federal Constitution and statutes." *Monell* v. *New York City Dept. of Social Services*, *supra*, at 700–701; *Owen* v. *City of Independence*, 445 U. S. 622, 649, 650 (1980). These generalized references merely restate the language of the statute. They shed no light on the question whether all or

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State does not waive its Eleventh Amendment immunity by participating in the federal assistance program established by that Act. *Id.*, at 673–674. Thus, the lower courts properly have regarded the question as undecided. *Holley* v. *Lavine*, 605 F. 2d 638, 646–647 (CA2 1979); *Podrazik* v. *Blum*, 479 F. Supp. 182, 187–188 (NDNY 1979).

[25] In finding an open question in *Hagans*, the Court expressly declined to follow the implicit holdings of no less than eight decisions of this Court. 415 U. S., at 535, n. 5.

only some statutory rights are protected. To the extent they have any relevance to the issue at hand, they could be countered by the frequent occasions on which the Court has referred to § 1983 as a remedy for constitutional violations without mentioning statutes.[26] But the debate would be meaningless, for none of these offhand remarks provides the remotest support for the positions taken in this case.[27]

The only remaining decisions in the Court's "consistent" line of precedents are *Greenwood* v. *Peacock*, 384 U. S. 808, 829–830 (1966), and *Edelman* v. *Jordan*, 415 U. S., at 675. In each case, the Court asserted—without discussion and in the course of disposing of other issues—that § 1983's coverage of statutory rights extended beyond federal equal rights laws. Neither contains any discussion of the question; neither cites relevant authority.[28] Nor has this Court always uncritically assumed the proposition for which *Greenwood* and *Edelman*

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[26] *E. g.*, *Monroe* v. *Pape*, 365 U. S., at 172; see *Procunier* v. *Navarette*, 434 U. S. 555, 561–562 (1978); *Wood* v. *Strickland*, 420 U. S. 308, 322 (1975).

[27] Slightly more specific support may be gleaned from three opinions stating that the Revised Statutes of 1874 "enlarged" or "extended" § 1983's predecessor to provide protection for rights secured by federal laws as well as by the Constitution. *Mitchum* v. *Foster*, 407 U. S. 225, 240, n. 30 (1972); *Lynch* v. *Household Finance Corp.*, 405 U. S., at 543, n. 7; *Hague* v. *CIO*, 307 U. S., at 525–526 (opinion of Stone, J.). But each statement was pure dictum incorporated in a discussion of the historical background of § 1343 (3). Moreover, each merely noted the evident change in language worked by the revisers. None implies that *all* statutory rights are covered by § 1983. Mr. Justice Stone, for example, undoubtedly would be surprised to learn that his opinion—in which he argued that § 1983 applied only to "personal" rights—stands for the proposition that statutory rights are covered without limitation.

[28] *Greenwood* v. *Peacock*, 384 U. S., at 828–829, cited only § 1983 itself and the leading case of *Monroe* v. *Pape*, *supra*. *Monroe* had nothing whatever to do with statutory claims. In *Edelman* v. *Jordan*, 415 U. S., at 675, the Court relied exclusively on *Rosado* v. *Wyman*, 397 U. S. 397 (1970), which also did not discuss the coverage of § 1983. See *supra*, at 30.

now are said to stand. On the same day the Court decided *Edelman*, it refused to express a view on the question whether § 1983 creates a cause of action for purely statutory claims. *Hagans* v. *Lavine*, *supra*, at 534, n. 5. The point was reserved again in *Southeastern Community College* v. *Davis*, 442 U. S. 397, 404–405, n. 5 (1979).

To rest a landmark decision of this Court on two statements made in dictum without critical examination would be extraordinary in any case. In the context of § 1983, it is unprecedented. Our decisions construing the civil rights legislation of the Reconstruction era have repudiated "blind adherence to the principle of *stare decisis*. . . ." *Greenwood* v. *Peacock*, *supra*, at 831. As Mr. Justice Frankfurter once observed, the issues raised under § 1983 concern "a basic problem of American federalism" that "has significance approximating constitutional dimension." *Monroe* v. *Pape*, 365 U. S., at 222 (dissenting opinion). Although Mr. Justice Frankfurter's view did not prevail in *Monroe*, we have heeded consistently his admonition that the ordinary concerns of *stare decisis* apply less forcefully in this than in other areas of the law. *E. g.*, *Monell* v. *New York City Dept. of Social Services*, *supra*. Against this backdrop, there is no justification for the Court's reliance on unexamined dicta as the principal support for a major extension of liability under § 1983.

V

In my view, the Court's decision today significantly expands the concept of "civil rights" and creates a major new intrusion into state sovereignty under our federal system. There is no probative evidence that Congress intended to authorize the pervasive judicial oversight of state officials that will flow from the Court's construction of § 1983. Although today's decision makes new law with far-reaching consequences, the Court brushes aside the critical issues of congres-

sional intent, national policy, and the force of past decisions as precedent. I would reverse the judgment of the Supreme Judicial Court of Maine.

APPENDIX TO OPINION OF POWELL, J., DISSENTING

A small sample of statutes that arguably could give rise to § 1983 actions after today may illustrate the nature of the "civil rights" created by the Court's decision. The relevant enactments typically fall into one of three categories: (A) regulatory programs in which States are encouraged to participate, either by establishing their own plans of regulation that meet conditions set out in federal statutes, or by entering into cooperative agreements with federal officials; (B) resource management programs that may be administered by cooperative agreements between federal and state agencies; and (C) grant programs in which federal agencies either subsidize state and local activities or provide matching funds for state or local welfare plans that meet federal standards.

A. Joint regulatory endeavors

1. Federal Insecticide, Fungicide, and Rodenticide Act, 86 Stat. 973, as amended, 7 U. S. C. § 136 *et seq.* (1976 ed. and Supp. III); see, *e. g.*, §§ 136u, 136v (1976 ed., Supp. III).
2. Federal Noxious Weed Act of 1974, 88 Stat. 2148, 7 U. S. C. §§ 2801–2813; see § 2808.
3. Historic Sites, Buildings, and Antiquities Act, 49 Stat. 666, as amended, 16 U. S. C. §§ 461–467 (1976 ed. and Supp. III); see § 462 (e).
4. Fish and Wildlife Coordination Act, 48 Stat. 401, as amended, 16 U. S. C. §§ 661–666c; see § 661.
5. Anadromous Fish Conservation Act, 79 Stat. 1125, as amended, 16 U. S. C. §§ 757a–757d (1976 ed., Supp. III); see § 757a (a) (1976 ed., Supp. III).
6. Wild Free-Roaming Horses and Burros Act, 85 Stat.

649, as amended, 16 U. S. C. §§ 1331–1340 (1976 ed. and Supp. III); see § 1336.

7. Marine Mammal Protection Act of 1972, 86 Stat. 1027, as amended, 16 U. S. C. §§ 1361–1407 (1976 ed. and Supp. III); see § 1379.
8. Wagner-Peyser National Employment System Act, 48 Stat. 113, 29 U. S. C. § 49 *et seq.;* see § 49g (employment of farm laborers).
9. Surface Mining Control and Reclamation Act of 1977, 91 Stat. 447, 30 U. S. C. §§ 1201–1328 (1976 ed., Supp. III); see § 1253 (1976 ed., Supp. III).
10. Interstate Commerce Act, 49 Stat. 548, as amended, 49 U. S. C. § 11502 (a)(2) (1976 ed., Supp. III) (enforcement of highway transportation law).

B. Resource management

1. Laws involving the administration and management of national parks and scenic areas: *e. g.,* Act of May 15, 1965, § 6, 79 Stat. 111, 16 U. S. C. § 281e (Nez Perce National Historical Park); Act of Sept. 21, 1959, § 3, 73 Stat. 591, 16 U. S. C. § 410u (Minute Man National Historical Park); Act of Oct. 27, 1972, § 4, 86 Stat. 1302, 16 U. S. C. § 460bb–3 (b) (Muir Woods National Monument).
2. Laws involving the administration of forest lands: *e. g.,* Act of Mar. 1, 1911, § 2, 36 Stat. 961, 16 U. S. C. § 563; Act of Aug. 29, 1935, 49 Stat. 963, 16 U. S. C. §§ 567a–567b.
3. Laws involving the construction and management of water projects: *e. g.,* Water Supply Act of 1958, § 301, 72 Stat. 319, 43 U. S. C. § 390b; Boulder Canyon Projects Act, §§ 4, 8, 45 Stat. 1058, 1062, as amended, 43 U. S. C. §§ 617c, 617g; Rivers and Harbors Appropriation Act of 1899, § 9, 30 Stat. 1151, 33 U. S. C. § 401.
4. National Trails System Act, 82 Stat. 919, as amended, 16

U. S. C. §§ 1241–1249 (1976 ed. and Supp. III); see § 1246 (h) (1976 ed., Supp. III).

5. Outer Continental Shelf Lands Act Amendment of 1978, § 208, 92 Stat. 652, 43 U. S. C. § 1345 (1976 ed., Supp. III) (oil leasing).

C. Grant programs

In addition to the familiar welfare, unemployment, and medical assistance programs established by the Social Security Act, these may include:

1. Food Stamp Act of 1964, 78 Stat. 703, as amended, 7 U. S. C. §§ 2011–2026 (1976 ed. and Supp. III); see, *e. g.*, §§ 2020 (e)–2020 (g) (1976 ed., Supp. III).
2. Small Business Investment Act of 1958, § 602 (d), 72 Stat. 698, as amended, 15 U. S. C. § 636 (d) (1976 ed., Supp. III).
3. Education Amendments of 1978, 92 Stat. 2153, as amended, 20 U. S. C. § 2701 *et seq.* (1976 ed., Supp. III); see, *e. g.*, §§ 2734, 2902.
4. Federal-Aid Highway Act legislation, *e. g.*, 23 U. S. C. §§ 128, 131 (1976 ed. and Supp. III).
5. Comprehensive Employment and Training Act Amendments of 1978, 92 Stat. 1909, 29 U. S. C. § 801 *et seq.* (1976 ed., Supp. III); see, *e. g.*, §§ 823, 824.
6. United States Housing Act of 1937, as added, 88 Stat. 653, and amended, 42 U. S. C. § 1437 *et seq.* (1976 ed. and Supp. III); see, *e. g.*, §§ 1437d (c), 1437j.
7. National School Lunch Act, 60 Stat. 230, as amended, 42 U. S. C. § 1751 *et seq.* (1976 ed. and Supp. III); see, *e. g.*, § 1758 (1976 ed. and Supp. III).
8. Public Works and Economic Development Act of 1965, 79 Stat. 552, as amended, 42 U. S. C. § 3121 *et seq.*; see, *e. g.*, §§ 3132, 3151a, 3243.
9. Justice System Improvement Act of 1979, 93 Stat. 1167, 42 U. S. C. § 3701 *et seq.* (1976 ed., Supp. III); see, *e. g.*, §§ 3742, 3744 (c).

10. Juvenile Justice and Delinquency Prevention Act of 1974, 88 Stat. 1109, as amended, 42 U. S. C. § 5601 *et seq.* (1976 ed. and Supp. III); see, *e. g.*, § 5633 (1976 ed. and Supp. III).
11. Energy Conservation and Production Act, 90 Stat. 1125, as amended, 42 U. S. C. § 6801 *et seq.* (1976 ed. and Supp. III); see, *e. g.*, §§ 6805, 6836 (1976 ed. and Supp. III).
12. Developmentally Disabled Assistance and Bill of Rights Act, § 125, 89 Stat. 496, as amended, 42 U. S. C. § 6000 *et seq.* (1976 ed. and Supp. III); see, *e. g.*, §§ 6011, 6063 (1976 ed. and Supp. III).
13. Urban Mass Transportation Act of 1964, 78 Stat. 302, as amended, 49 U. S. C. § 1601 *et seq.* (1976 ed. and Supp. III); see, *e. g.*, §§ 1602, 1604 (g)–(m) (1976 ed. and Supp. III).

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ADAMS *v.* TEXAS

CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 79-5175. Argued March 24, 1980—Decided June 25, 1980

Trials for capital offenses in Texas are conducted in two phases. First, the jury considers the question of the defendant's guilt or innocence. If the jury finds the defendant guilty, the trial court holds a separate sentencing proceeding at which additional evidence in mitigation or aggravation is admissible. The jury is then required by statute to answer three specific questions concerning (1) whether the defendant's conduct causing the death at issue was deliberate, (2) whether the defendant's conduct in the future would constitute a continuing threat to society, and (3) whether his conduct in killing the victim was unreasonable in response to the victim's provocation, if any. If the jury answers "Yes" to each of these questions, the court must impose a death sentence, but if the jury answers "No" to any of the questions, the court imposes a life sentence. At the petitioner's murder trial, the Texas trial judge, pursuant to statute (§ 12.31 (b)), excluded from the jury a number of prospective jurors who were unwilling or unable to take an oath that the mandatory penalty of death or life imprisonment would not "affect [their] deliberations on any issue of fact." The jury that was selected convicted petitioner and answered the statutory questions in the affirmative at the punishment phase, thus causing the death sentence to be imposed. On appeal, the Texas Court of Criminal Appeals rejected petitioner's contention that the prospective jurors had been excluded in violation of *Witherspoon* v. *Illinois*, 391 U. S. 510, wherein it was held that a State may not constitutionally execute a death sentence imposed by a jury culled of all those who revealed during *voir dire* examination that they had conscientious scruples against or were otherwise opposed to capital punishment.

Held: Section 12.31 (b) was applied in this case to exclude jurors in contravention of the Sixth and Fourteenth Amendments as construed and applied in *Witherspoon, supra*. Pp. 43-51.

(a) The general proposition established by *Witherspoon* and related cases that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath, is applicable to the bifurcated procedure employed by Texas in capital cases. If the Texas juror is to obey his

oath and follow Texas law, he must be willing not only to accept that in certain circumstances death is an acceptable penalty but also to answer the three statutory questions without conscious distortion or bias. Pp. 43–47.

(b) *Witherspoon* and § 12.31 (b) may not coexist as separate and independent bases for excluding jurors so as to permit exclusion under § 12.31 (b) on grounds broader than permitted by *Witherspoon*. Although the State could, consistently with *Witherspoon*, use § 12.31 (b) to exclude prospective jurors whose views on capital punishment are such as to make them unable to follow the law or obey their oaths, the use of § 12.31 (b) to exclude jurors on broader grounds based on their opinions concerning the death penalty is impermissible. The appearance of neutrality created by the theoretical availability of § 12.31 (b) as a defense challenge to prospective jurors who favor the death penalty is not sufficiently substantial to take § 12.31 (b) out of *Witherspoon*'s ambit. Pp. 47–49.

(c) As § 12.31 (b) was employed here, the touchstone of the inquiry was not whether putative jurors could and would follow their instructions and answer the posited questions in the affirmative if they honestly believed the evidence warranted it beyond reasonable doubt, but rather whether the fact that the imposition of the death penalty would follow automatically from affirmative answers to the questions would have any effect at all on the jurors' performance of their duties. Such a test could, and did, exclude jurors whose only fault was to take their responsibilities with special seriousness or to acknowledge honestly that they might or might not be affected. It does not appear that these individuals were so irrevocably opposed to capital punishment as to frustrate the State's legitimate efforts to administer its constitutionally valid death penalty scheme. Accordingly, the Constitution disentitles the State to execute a death sentence imposed by a jury from which such prospective jurors have been excluded. Pp. 49–51.

577 S. W. 2d 717, reversed.

WHITE, J., delivered the opinion of the Court, in which BRENNAN, STEWART, BLACKMUN, POWELL, and STEVENS, JJ., joined. BRENNAN, J., filed a concurring opinion, *post*, p. 51. BURGER, C. J., concurred in the judgment. MARSHALL, J., filed an opinion concurring in the judgment, *post*, p. 51. REHNQUIST, J., filed a dissenting opinion, *post*, p. 52.

Melvyn Carson Bruder argued the cause for petitioner. With him on the brief were *J. Stephen Cooper* and *George A. Preston*.

Douglas M. Becker, Assistant Attorney General of Texas, argued the cause for respondent. With him on the brief were *Mark White*, Attorney General, *John W. Fainter, Jr.*, First Assistant Attorney General, *Ted L. Hartley*, Executive Assistant Attorney General, and *W. Barton Boling*, Assistant Attorney General.*

MR. JUSTICE WHITE delivered the opinion of the Court.

This capital case presents the question whether Texas contravened the Sixth and Fourteenth Amendments as construed and applied in *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968), when it excluded members of the venire from jury service because they were unable to take an oath that the mandatory penalty of death or imprisonment for life would not "affect [their] deliberations on any issue of fact." We hold that there were exclusions that were inconsistent with *Witherspoon*, and we therefore reverse the sentence of death imposed on the petitioner.

I

Trials for capital offenses in Texas are conducted in a two-phase proceeding. See Tex. Code Crim. Proc. Ann., Art. 37.071 (Vernon Supp. 1979). In the first phase, the jury considers the question of the defendant's guilt or innocence. If the jury finds the defendant guilty of a capital offense, the trial court holds a separate sentencing proceeding at which a wide range of additional evidence in mitigation or aggravation is admissible. The jury is then required to answer the following questions based on evidence adduced during either phase of the trial:

> "(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and

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**Jack Greenberg, James M. Nabrit III, Joel Berger, John Charles Boger*, and *Anthony G. Amsterdam* filed a brief for the NAACP Legal Defense and Educational Fund, Inc., as *amicus curiae* urging reversal.

with the reasonable expectation that the death of the deceased or another would result;

"(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

"(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased." Art. 37.071 (b).

If the jury finds beyond a reasonable doubt that the answer to each of these questions is "Yes," the court is required to impose a sentence of death. If the jury finds that the answer to any of the three questions is "No," the court imposes a sentence of life imprisonment. Arts. 37.071 (c), (e).

The petitioner in this case was charged with the capital offense of murdering a peace officer.[1] During *voir dire* examination of individual prospective jurors, the prosecutor, and sometimes the trial judge, intensively inquired as to whether

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[1] Under Tex. Penal Code Ann. § 19.03 (a)(1) (1974), whoever "murders a peace officer or fireman who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or fireman" is guilty of a capital felony. Texas also authorizes the death penalty for four other offenses: murder committed in the course of kidnaping, burglary, robbery, forcible rape, or arson; murder committed for remuneration; murder committed while escaping or attempting to escape from a penal institution; and murder of a prison employee by a prison inmate. § 19.03.

Under the current Texas capital punishment scheme, the jury's discretion over sentencing is limited both by § 19.03, which authorizes the death penalty for only a small class of aggravated crimes, and by Tex. Code Crim. Proc. Ann., Art. 37.071 (Vernon Supp. 1979), which mandates a sentence of death if, but only if, the jury answers "Yes" to each of the statutory penalty questions. This system was adopted in response to the Court's judgment in *Branch* v. *Texas,* decided together with *Furman* v. *Georgia,* 408 U. S. 238 (1972), which struck down a statute giving the jury absolute discretion whether to impose the death penalty or not. The Court upheld the revised Texas capital punishment scheme in *Jurek* v. *Texas,* 428 U. S. 262 (1976).

their attitudes about the death penalty permitted them to take the oath set forth in Tex. Penal Code Ann. § 12.31 (b) (1974). Section 12.31 (b) provides as follows:

> "Prospective jurors shall be informed that a sentence of life imprisonment or death is mandatory on conviction of a capital felony. A prospective juror shall be disqualified from serving as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact."

Typically, the prospective juror was first advised that the State was seeking the death penalty and asked to state his general views on the subject, which were sometimes explored in considerable depth. He was then informed in detail of the special procedure used by Texas in capital cases, including in particular the fact that "Yes" answers to the three punishment questions would automatically result in the trial judge's imposing the death sentence. Finally, he was asked whether he could state under oath, as required by § 12.31 (b), that the mandatory penalty of death or imprisonment for life would not affect his deliberations on any issue of fact. On the State's submission and over petitioner's objections, the trial judge excused a number of prospective jurors who were unwilling or unable to take the § 12.31 (b) oath.

The jury selected under this procedure convicted the petitioner of the charged offense and answered the statutory questions affirmatively at the punishment phase, thus causing the trial judge to impose the death sentence as required by Art. 37.071 (e). On appeal, the petitioner argued that prospective jurors had been excluded in violation of this Court's decision in *Witherspoon* v. *Illinois, supra.* The Texas Court of Criminal Appeals rejected the contention on the authority of its previous cases, which had "consistently held that the statutory scheme for the selection of jurors in capital cases in Texas, and in particular the application of [§ 12.31 (b)] to the punishment issues, comports with the constitutional require-

ments of *Witherspoon*." 577 S. W. 2d 717, 728 (1979). We granted the petition for a writ of certiorari, 444 U. S. 990 (1979), limited to the following questions:

> "(1) Is the doctrine of *Witherspoon* v. *Illinois*, 391 U. S. 510, applicable to the bifurcated procedure employed by Texas in capital cases? (2) If so, did the exclusion from jury service in the present case of prospective jurors pursuant to Texas Penal Code § 12.31 (b) violate the doctrine of *Witherspoon* v. *Illinois, supra*?" [2]

II

A

Witherspoon involved a state procedure for selecting juries in capital cases, where the jury did the sentencing and had complete discretion as to whether the death penalty should be imposed. In this context, the Court held that a State may not constitutionally execute a death sentence imposed by a jury culled of all those who revealed during *voir dire* examination that they had conscientious scruples against or were otherwise opposed to capital punishment. The State was held to have no valid interest in such a broad-based rule of exclusion, since "[a] man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him . . . and can thus obey the oath he takes as a juror." *Witherspoon* v. *Illinois*, 391 U. S., at 519. The defendant, on the other hand, was seriously prejudiced by the State's practice. The jury which sentenced him to death fell "woefully short of that impartiality to which the petitioner was entitled" on the issue of punishment, *id.*, at 518. By excluding all those who opposed capital punishment, the

[2] In *Burns* v. *Estelle*, 592 F. 2d 1297 (1979), a panel of the Court of Appeals for the Fifth Circuit found that the application of Tex. Penal Code Ann. § 12.31 (b) (1974) to the facts of that case violated *Witherspoon*. The en banc Fifth Circuit has since set the case for rehearing en banc. 598 F. 2d 1016 (1979). The court held oral argument on January 8, 1980, but has as yet issued no decision.

State "crossed the line of neutrality" and "produced a jury uncommonly willing to condemn a man to die." *Id.*, at 520, 521.

The Court recognized that the State might well have power to exclude jurors on grounds more narrowly drawn:

> "[N]othing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt.*" *Id.*, at 522–523, n. 21 (emphasis in original).

This statement seems clearly designed to accommodate the State's legitimate interest in obtaining jurors who could follow their instructions and obey their oaths. For example, a juror would no doubt violate his oath if he were not impartial on the question of guilt. Similarly, the Illinois law in effect at the time *Witherspoon* was decided required the jury at least to *consider* the death penalty, although it accorded the jury absolute discretion as to whether or not to impose it. A juror wholly unable even to consider imposing the death penalty, no matter what the facts of a given case, would clearly be unable to follow the law of Illinois in assessing punishment.

In *Boulden* v. *Holman*, 394 U. S. 478, 483–484 (1969), we again emphasized the State's legitimate interest in obtaining jurors able to follow the law:

> "[I]t is entirely possible that a person who has a 'fixed opinion against' or who does not 'believe in' capital punishment might nevertheless be perfectly able as a juror to abide by existing law—to follow conscientiously the in-

> structions of a trial judge and to consider fairly the imposition of the death sentence in a particular case."

And in *Lockett* v. *Ohio,* 438 U. S. 586, 595–596 (1978), we upheld against a *Witherspoon* challenge the exclusion of several jurors who were unable to respond affirmatively to the following question:

> "[D]o you feel that you could take an oath to well and truely [*sic*] try this case . . . and follow the law, or is your conviction so strong that you cannot take an oath, knowing that a possibility exists in regard to capital punishment?"

This line of cases establishes the general proposition that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. The State may insist, however, that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court.

B

We have little difficulty in concluding that this rule applies to the bifurcated procedure employed by Texas in capital cases.[3] This procedure differs from the Illinois statute in effect at the time *Witherspoon* was decided in three principal ways: (1) the *Witherspoon* jury assessed punishment at the same time as it rendered its verdict, whereas in Texas the jury considers punishment in a subsequent penalty proceeding; (2) the *Witherspoon* jury was given unfettered discretion to impose the death sentence or not, whereas the

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[3] In *Davis* v. *Georgia,* 429 U. S. 122 (1976), the Court applied the *Witherspoon* doctrine to a case arising under a death penalty scheme similar in some respects to the current Texas system. Petitioner and *amicus* suggest that *Davis* conclusively establishes the applicability of *Witherspoon* to the present case. We do not treat the question as foreclosed, however, because the issue was not explicitly raised in that case.

discretion of a Texas jury is circumscribed by the requirement that it impartially answer the statutory questions; and (3) the *Witherspoon* jury directly imposed the death sentence, whereas Texas juries merely give answers to the statutory questions, which in turn determine the sentence pronounced by the trial judge. Because of these differences, the jury plays a somewhat more limited role in Texas than it did in Illinois. If the juror is to obey his oath and follow the law of Texas, he must be willing not only to accept that in certain circumstances death is an acceptable penalty but also to answer the statutory questions without conscious distortion or bias. The State does not violate the *Witherspoon* doctrine when it excludes prospective jurors who are unable or unwilling to address the penalty questions with this degree of impartiality.

Nevertheless, jurors in Texas must determine whether the evidence presented by the State convinces them beyond reasonable doubt that each of the three questions put to them must be answered in the affirmative. In doing so, they must consider both aggravating and mitigating circumstances, whether appearing in the evidence presented at the trial on guilt or innocence or during the sentencing proceedings. Jurors will characteristically know that affirmative answers to the questions will result in the automatic imposition of the death penalty, *Hovila* v. *State*, 532 S. W. 2d 293, 294 (Tex. Crim. App. 1975), and each of the jurors whose exclusion is challenged by petitioner was so informed. In essence, Texas juries must be allowed to consider "on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." *Jurek* v. *Texas*, 428 U. S. 262, 271 (1976) (opinion of STEWART, POWELL, and STEVENS, JJ.). This process is not an exact science, and the jurors under the Texas bifurcated procedure unavoidably exercise a range of judgment and discretion while remaining true to their instructions and their oaths.

With these considerations in mind, it is apparent that a Texas juror's views about the death penalty might influence

the manner in which he performs his role but without exceeding the "guided jury discretion," 577 S. W. 2d, at 730, permitted him under Texas law. In such circumstances, he could not be excluded consistently with *Witherspoon*. Exclusions under § 12.31 (b), like other exclusions, must be examined in this light.[4]

C

The State urges that *Witherspoon* and § 12.31 (b) may coexist as separate and independent bases for excluding jurors in Texas and that exclusion under the statute is consistent with the Sixth and Fourteenth Amendments as construed in *Witherspoon*. Brief for Respondent 48. It is the State's position that even if some jurors in the present case were excluded on grounds broader than that permitted under *Witherspoon*, the exclusion was nevertheless proper under § 12.31 (b). The State's argument is consistent with the holdings of decisions in the Texas Court of Criminal Appeals which have considered the relationship between *Witherspoon* and § 12.31 (b).[5] The argument, such as it is, is unpersuasive.

As an initial matter, it is clear beyond peradventure that *Witherspoon* is not a ground for challenging any prospective

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[4] Even the State concedes that *Witherspoon* "applies" to the Texas system. Brief for Respondent 36–48. The State suggests that this proposition is questionable as a matter of "logic," but agrees that Texas experience and case law conclusively demonstrate *Witherspoon's* applicability. The Texas Court of Criminal Appeals has consistently held that *Witherspoon* is "alive and well" in that State. *E. g., Woodkins* v. *State*, 542 S. W. 2d 855, 862 (1976), cert. denied, 431 U. S. 960 (1977); *Burns* v. *State*, 556 S. W. 2d 270, 275, cert. denied, 434 U. S. 935 (1977); *Brock* v. *State*, 556 S. W. 2d 309, 312, cert. denied, 434 U. S. 1002 (1977); *Whitmore* v. *State*, 570 S. W. 2d 889, 893 (1976).

[5] *E. g., Moore* v. *State*, 542 S. W. 2d 664, 672 (1976), cert. denied, 431 U. S. 949 (1977); *Woodkins* v. *State, supra*, at 862; *Shippy* v. *State*, 556 S. W. 2d 246, 251, cert. denied, 434 U. S. 935 (1977); *Burns* v. *State, supra*, at 275–276; *Freeman* v. *State*, 556 S. W. 2d 287, 297–298 (1977), cert. denied, 434 U. S. 1088 (1978); *Brock* v. *State, supra*, at 313; *Hughes* v. *State*, 562 S. W. 2d 857, 859–861, cert. denied, 439 U. S. 903 (1978); *Hughes* v.

juror. It is rather a limitation on the State's power to exclude: if prospective jurors are barred from jury service because of their views about capital punishment on "any broader basis" than inability to follow the law or abide by their oaths, the death sentence cannot be carried out. *Witherspoon* v. *Illinois*, 391 U. S., at 522, n. 21. While this point may seem too obvious to bear repetition, it is apparent from their frequent references to *Witherspoon* as a ground for "disqualifying" prospective jurors[6] that the State, and the Texas Court of Criminal Appeals, might have fallen into the error of assuming that *Witherspoon* and § 12.31 (b) are both grounds for exclusion, so that there is no conflict if § 12.31 (b) excludes prospective jurors that *Witherspoon* does not.

Nor do we agree with the State's argument that because it has a different origin and purpose § 12.31 (b) cannot and will not lead to exclusions forbidden by *Witherspoon*. Unlike grounds for exclusion having nothing to do with capital punishment, such as personal bias, ill health, financial hardship, or peremptory challenges, § 12.31 (b) focuses the inquiry directly on the prospective juror's beliefs about the death penalty, and hence clearly falls within the scope of the *Witherspoon* doctrine. The State could, consistently with *Witherspoon*, use § 12.31 (b) to exclude prospective jurors whose views on capital punishment are such as to make them unable to follow the law or obey their oaths. But the use of § 12.31

State, 563 S. W. 2d 581, 583 (1978), cert. denied, 440 U. S. 950 (1979); *Bodde* v. *State*, 568 S. W. 2d 344, 348–349 (1978), cert. denied, 440 U. S. 968 (1979); *Whitmore* v. *State*, *supra*, at 893; *Garcia* v. *State*, 581 S. W. 2d 168, 174–175 (1979), cert. pending, No. 79–5464; *Burks* v. *State*, 583 S. W. 2d 389, 393–394 (1979), cert. pending, No. 79–5533.

[6] *E. g.*, Brief for Respondent 34, 42, 48; *Moore* v. *State*, *supra*, at 672; *Brock* v. *State*, *supra*, at 313; *Hughes* v. *State*, 562 S. W. 2d, at 860; *Hughes* v. *State*, 563 S. W. 2d, at 586; *Chambers* v. *State*, 568 S. W. 2d 313, 320 (1978), cert. denied, 440 U. S. 928 (1979); *Bodde* v. *State*, *supra*, at 348; *Garcia* v. *State*, *supra*, at 175.

(b) to exclude jurors on broader grounds based on their opinions concerning the death penalty is impermissible.

Finally, we cannot agree that § 12.31 (b) is "neutral" with respect to the death penalty since under that section the defendant may challenge jurors who state that their views in favor of the death penalty will affect their deliberations on fact issues. Despite the hypothetical existence of the juror who believes literally in the Biblical admonition "an eye for an eye," see *Witherspoon* v. *Illinois, supra,* at 536 (Black, J., dissenting), it is undeniable, and the State does not seriously dispute, that such jurors will be few indeed as compared with those excluded because of scruples against capital punishment. The appearance of neutrality created by the theoretical availability of § 12.31 (b) as a defense challenge is not sufficiently substantial to take the statute out of the ambit of *Witherspoon.*

III

Based on our own examination of the record, we have concluded that § 12.31 (b) was applied in this case to exclude prospective jurors on grounds impermissible under *Witherspoon* and related cases. As employed here, the touchstone of the inquiry under § 12.31 (b) was not whether putative jurors could and would follow their instructions and answer the posited questions in the affirmative if they honestly believed the evidence warranted it beyond reasonable doubt. Rather, the touchstone was whether the fact that the imposition of the death penalty would follow automatically from affirmative answers to the questions would have any effect at all on the jurors' performance of their duties. Such a test could, and did, exclude jurors who stated that they would be "affected" by the possibility of the death penalty, but who apparently meant only that the potentially lethal consequences of their decision would invest their deliberations with greater seriousness and gravity or would involve them emo-

tionally.[7] Others were excluded only because they were unable positively to state whether or not their deliberations would in any way be "affected."[8] But neither nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever is equivalent to an unwillingness or an inability on the part of the jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty. The grounds for excluding these jurors were consequently insufficient under the Sixth and Fourteenth Amendments. Nor in our view would the Constitution permit the exclusion of jurors from the penalty phase of a Texas murder trial if they aver that they will honestly find the facts and answer the questions in the affirmative if they are convinced beyond reasonable doubt, but not otherwise, yet who frankly concede that the prospects of the death penalty may affect what their honest judgment of the facts will be or what they may deem to be a reasonable doubt. Such assessments and judgments by jurors are inherent in the jury system, and to exclude all jurors who would be in the slightest way affected by the prospect of the death penalty or by their views about such a penalty would be to deprive the defendant of the impartial jury to which he or she is entitled under the law.

We repeat that the State may bar from jury service those whose beliefs about capital punishment would lead them to ignore the law or violate their oaths. But in the present case Texas has applied § 12.31 (b) to exclude jurors whose only fault was to take their responsibilities with special seriousness or to acknowledge honestly that they might or might not

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[7] Prospective jurors Mahon, Jenson, and Ferguson fell into this category. As Jenson said at one point during his *voir dire* examination:

"Well, I think it probably would [affect my deliberations] because afterall [*sic*], you're talking about a man's life here. You definitely don't want to take it lightly." Tr. of *Voir Dire* 367.

[8] Prospective jurors Coyle, White, McDonald, and Riddle were excluded on this ground.

be affected. It does not appear in the record before us that these individuals were so irrevocably opposed to capital punishment as to frustrate the State's legitimate efforts to administer its constitutionally valid death penalty scheme. Accordingly, the Constitution disentitles the State to execute a sentence of death imposed by a jury from which such prospective jurors have been excluded.

The judgment of the Texas Court of Criminal Appeals is consequently reversed to the extent that it sustains the imposition of the death penalty.

So ordered.

THE CHIEF JUSTICE concurs in the judgment.

MR. JUSTICE BRENNAN, concurring.

Although I join the Court's opinion, I continue to believe that the death penalty is, in all circumstances, contrary to the Eighth Amendment's prohibition against imposition of cruel and unusual punishments. *Gregg* v. *Georgia,* 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting).

MR. JUSTICE MARSHALL, concurring in the judgment.

I continue to believe that the death penalty is, under all circumstances, cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. *Furman* v. *Georgia,* 408 U. S. 238, 314–374 (1972) (MARSHALL, J., concurring); *Gregg* v. *Georgia,* 428 U. S. 153, 231–241 (1976) (MARSHALL, J., dissenting); *Godfrey* v. *Georgia,* 446 U. S. 420, 437–440 (1980) (MARSHALL, J., concurring in judgment). In addition, I agree with the Court that the exclusion of veniremen in this case violated the doctrine of *Witherspoon* v. *Illinois,* 391 U. S. 510 (1968). I do not, however, join in the Court's assumption that the death penalty may ever be imposed without violating the command of the Eighth Amendment that no "cruel and unusual punishments" be imposed. Cf.

Beck v. *Alabama*, 447 U. S. 625, 646 (1980) (MARSHALL, J., concurring in judgment). I join in the judgment of the Court.

MR. JUSTICE REHNQUIST, dissenting.

The Court today holds that, under *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968), the State of Texas may not excuse from service on a jury considering a capital case persons who are unwilling or unable to swear that the possibility that the defendant will be executed will not affect their deliberations on any issue of fact. Thus, at a time when this Court should be re-examining the doctrinal underpinnings of *Witherspoon* in light of our intervening decisions in capital cases, it instead expands that precedent as if those underpinnings had remained wholly static and would benefit from expansion of the holding. I find myself constrained to dissent.

At the time *Witherspoon* was decided, Illinois, like many States, gave the juries in capital cases complete and unbridled discretion in considering the death penalty. In the words of *Witherspoon* itself, "the State of Illinois empowered the jury . . . to answer 'yes' or 'no' to the question whether this defendant was fit to live." 391 U. S., at 521, n. 20. This feature of the capital-sentencing scheme under consideration in that case was perhaps the single most important factor in this Court's ultimate decision:

> "[I]n Illinois . . . the jury is given broad discretion to decide whether or not death *is* "the proper penalty" in a given case, and a juror's general views about capital punishment play an inevitable role in any such decision.
>
> "A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror. But a jury from which all such men have been excluded cannot perform the task demanded of it. Guided by neither rule nor standard,

'free to select or reject as it [sees] fit,' a jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death." *Id.*, at 519 (emphasis in original; footnote omitted).

However one feels about the constitutionality of excluding persons with qualms about the death penalty from such a jury, one has to admit that the conditions that formed the predicate for *Witherspoon* no longer exist. Our recent decisions on the constitutionality of the death penalty leave little doubt that, contrary to this Court's only slightly less recent decision in *McGautha* v. *California*, 402 U. S. 183 (1971), a State may not leave the decision whether to impose capital punishment upon a particular defendant solely to the untrammeled discretion of a jury. See *Furman* v. *Georgia*, 408 U. S. 238 (1972); *Gregg* v. *Georgia*, 428 U. S. 153 (1976); *Proffitt* v. *Florida*, 428 U. S. 242 (1976); *Jurek* v. *Texas*, 428 U. S. 262 (1976); *Roberts* v. *Louisiana*, 428 U. S. 325 (1976).

The statute presently in force in Texas requires imposition of the death penalty if the jury in a capital case answers three questions in the affirmative:

"(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

"(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

"(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased." Tex. Code Crim. Proc. Ann., Art. 37.071 (b) (Vernon Supp. 1979).

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If the jury answers any of these inquiries in the negative, capital punishment cannot be imposed.

It is hard to imagine a system of capital sentencing that leaves less discretion in the hands of the jury while at the same time allowing them to consider the particular circumstances of each case—that is, to perform their assigned task at all. In upholding this system against constitutional challenge in *Jurek* v. *Texas*, *supra*, the opinion announcing the judgment stressed that this procedure "guides and focuses the jury's *objective consideration* of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death." *Id.*, at 274 (emphasis added). Given this mandate to a jury in a capital case to answer certain specific questions on the basis of the evidence submitted, I see no reason why Texas should not be entitled to require each juror to swear that he or she will answer those questions without regard to their possible cumulative consequences.

In holding otherwise, the Court seems to recognize that the jury's role in this case is fundamentally different from that considered in *Witherspoon*. It nevertheless dismisses this difference on the grounds that the sentencing process employed by Texas "is not an exact science" and that "the jurors under the Texas bifurcated procedure unavoidably exercise a range of judgment and discretion while remaining true to their instructions and their oaths." *Ante*, at 46. I would suggest that the Court's observations in this regard are as true when applied to the initial determination of guilt as they are when applied to the sentencing proceeding. In either determination, a juror is required to make "unscientific" determinations and to exercise a good deal of discretion within the bounds of his or her oath. In fact, I can see no plausible distinction between the role of the jury in the guilt/innocence phase of the trial and its role, as defined by the State of Texas, in the sentencing phase. No one would suggest, however, that jurors could not be excused for cause

if they declined to swear that the possibility of capital punishment would not affect their determination of the defendant's guilt or innocence. Cf. *Witherspoon* v. *Illinois*, 391 U. S., at 523, n. 21 ("Nor . . . does today's holding render invalid the *conviction*, as opposed to the *sentence*, in this or any other case").

In his dissent in *Witherspoon*, Mr. Justice Black pointed out that society, as much as the defendant, has a right to an impartial jury. *Id.*, at 535. He also observed that, if a person could not be excluded from a jury for being "too soft" on the death penalty, then a court would be without a basis for excluding someone who was "too hard." As he wrote, "I would not dream of foisting on a criminal defendant a juror who admitted that he had conscientious or religious scruples against *not* inflicting the death sentence on any person convicted of murder (a juror who claims, for example, that he adheres literally to the Biblical admonition of 'an eye for an eye')." *Id.*, at 536 (emphasis added). I cannot believe that the Court would question the excusal of a juror who would not take the challenged oath for those same reasons. To dismiss this possibility, as does the Court here, because "such jurors will be few indeed," *ante*, at 49, is not only to engage in unsupportable speculation, but also to miss the point of Mr. Justice Black's argument. The question is not one of statistical parity, but of logical consistency.

Like the Texas Court of Criminal Appeals, I do not read *Witherspoon* as casting any doubt upon the constitutionality of the oath required by Tex. Penal Code Ann. § 12.31 (b) (1974). See *Hughes* v. *State*, 563 S. W. 2d 581 (1978); *Freeman* v. *State*, 556 S. W. 2d 287 (1977); *Burns* v. *State*, 556 S. W. 2d 270 (1977); *Boulware* v. *State*, 542 S. W. 2d 677 (1976). I therefore would affirm the judgment of the court below.

OHIO *v.* ROBERTS

CERTIORARI TO THE SUPREME COURT OF OHIO

No. 78-756. Argued November 26, 1979—Decided June 25, 1980

At respondent's preliminary hearing in an Ohio state court on charges of forgery of a check in the name of one Bernard Isaacs and of possession of stolen credit cards belonging to Isaacs and his wife, respondent's counsel called as a witness the Isaacs' daughter, who testified that she had permitted respondent to use her apartment for several days while she was away. However, she refused to admit that she had given respondent checks and the credit cards without informing him that she did not have permission to use them. Respondent's counsel did not ask to have the witness declared hostile or to place her on cross-examination. At respondent's subsequent criminal trial, he testified that the daughter had given him her parents' checkbook and credit cards with the understanding that he could use them. When the daughter failed to appear at the trial despite the State's having issued five separate subpoenas to her at her parents' residence, the State offered in rebuttal the transcript of her preliminary hearing testimony, relying on an Ohio statute which permits the use of such testimony when the witness "cannot for any reason be produced at the trial." At a *voir dire* hearing on admissibility, conducted after the defense objected to the use of the transcript as violative of the Sixth Amendment's Confrontation Clause, the mother, as the sole witness, testified that the daughter had left home soon after the preliminary hearing; that about a year before the trial a San Francisco social worker had communicated with the parents about the daughter's welfare application filed there; that the last time the daughter telephoned, some seven or eight months before trial, she told her parents that she "was traveling" outside Ohio, but did not reveal where she was; that the mother knew of no way to reach the daughter in case of an emergency; and that she did not know of anybody who knew where the daughter was. The trial court admitted the transcript into evidence, and respondent was convicted. Affirming the Ohio Court of Appeals' reversal of the conviction, the Ohio Supreme Court held that the transcript was inadmissible because the daughter had not been actually cross-examined at the preliminary hearing and was absent at trial, the admission of the transcript thus having violated respondent's confrontation right.

Held: The introduction in evidence at respondent's trial of the daughter's

preliminary hearing testimony was constitutionally permissible. Pp. 62–77.

(a) When a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness. Cf. *Mancusi* v. *Stubbs*, 408 U. S. 204. Pp. 62–66.

(b) The daughter's prior testimony at the preliminary hearing bore sufficient "indicia of reliability." Cf. *California* v. *Green*, 399 U. S. 149. It need not be decided whether, under *Green*, the mere opportunity to cross-examine satisfies the Confrontation Clause, for defense counsel tested the daughter's testimony with the equivalent of significant cross-examination. His questioning, which was replete with leading questions, clearly partook of cross-examination as a matter of *form* and comported with the principal *purpose* of cross-examination by challenging the daughter's veracity. Regardless of how state law might formally characterize the questioning, it afforded substantial compliance with the purposes behind the confrontation requirement. Nor can this case be distinguished from *Green* merely because the daughter was not personally available for questioning at trial or because respondent had a different lawyer at trial from the one at the preliminary hearing. Moreover, this case does not fall among those in which a particularized search for "indicia of reliability" must be made. Pp. 67–73.

(c) On the facts presented, the trial court and the Ohio Supreme Court correctly concluded that the daughter's unavailability to appear at the trial, in the constitutional sense, was established. Pp. 74–77.

55 Ohio St. 2d 191, 378 N. E. 2d 492, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and STEVENS, JJ., joined, *post*, p. 77.

John E. Shoop argued the cause and filed a brief for petitioner.

Marvin R. Plasco argued the cause and filed a brief for respondent.*

**Solicitor General McCree, Assistant Attorney General Heymann, Sara*

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents issues concerning the constitutional propriety of the introduction in evidence of the preliminary hearing testimony of a witness not produced at the defendant's subsequent state criminal trial.

I

Local police arrested respondent, Herschel Roberts, on January 7, 1975, in Lake County, Ohio. Roberts was charged with forgery of a check in the name of Bernard Isaacs, and with possession of stolen credit cards belonging to Isaacs and his wife Amy.

A preliminary hearing was held in Municipal Court on January 10. The prosecution called several witnesses, including Mr. Isaacs. Respondent's appointed counsel had seen the Isaacs' daughter, Anita, in the courthouse hallway, and called her as the defense's only witness. Anita Isaacs testified that she knew respondent, and that she had permitted him to use her apartment for several days while she was away. Defense counsel questioned Anita at some length and attempted to elicit from her an admission that she had given respondent checks and the credit cards without informing him that she did not have permission to use them. Anita, however, denied this. Respondent's attorney did not ask to have the witness declared hostile and did not request permission to place her on cross-examination. The prosecutor did not question Anita.

A county grand jury subsequently indicted respondent for forgery, for receiving stolen property (including the credit cards), and for possession of heroin. The attorney who represented respondent at the preliminary hearing withdrew upon

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Sun Beale, Jerome M. Feit, and *Kathleen A. Felton* filed a brief for the United States as *amicus curiae* urging reversal.

Steven M. Cox filed a brief for the Ohio Public Defenders Association as *amicus curiae* urging affirmance.

becoming a Municipal Court Judge, and new counsel was appointed for Roberts.

Between November 1975 and March 1976, five subpoenas for four different trial dates [1] were issued to Anita at her parents' Ohio residence. The last three carried a written instruction that Anita should "call before appearing." She was not at the residence when these were executed. She did not telephone and she did not appear at trial.

In March 1976, the case went to trial before a jury in the Court of Common Pleas. Respondent took the stand and testified that Anita Isaacs had given him her parents' checkbook and credit cards with the understanding that he could use them. Tr. 231–232. Relying on Ohio Rev. Code Ann. § 2945.49 (1975),[2] which permits the use of preliminary examination testimony of a witness who "cannot for any reason be produced at the trial," the State, on rebuttal, offered the transcript of Anita's testimony. Tr. 273–274.

Asserting a violation of the Confrontation Clause and, indeed, the unconstitutionality thereunder of § 2945.49, the defense objected to the use of the transcript. The trial court conducted a *voir dire* hearing as to its admissibility. Tr. 194–199. Amy Isaacs, the sole witness at *voir dire*, was questioned by both the prosecutor and defense counsel concerning her daughter's whereabouts. Anita, according to her mother, left home for Tucson, Ariz., soon after the prelimi-

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[1] A number of continuances were granted for reasons unrelated to Anita's absence.

[2] The statute reads:

"Testimony taken at an examination or a preliminary hearing at which the defendant is present, or at a former trial of the cause, or taken by deposition at the instance of the defendant or the state, may be used whenever the witness giving such testimony dies, or cannot for any reason be produced at the trial, or whenever the witness has, since giving such testimony, become incapacitated to testify. If such former testimony is contained within a bill of exceptions, or authenticated transcript of such testimony, it shall be proven by the bill of exceptions, or transcript, otherwise by other testimony."

nary hearing. About a year before the trial, a San Francisco social worker was in communication with the Isaacs about a welfare application Anita had filed there. Through the social worker, the Isaacs reached their daughter once by telephone. Since then, however, Anita had called her parents only one other time and had not been in touch with her two sisters. When Anita called, some seven or eight months before trial, she told her parents that she "was traveling" outside Ohio, but did not reveal the place from which she called. Mrs. Isaacs stated that she knew of no way to reach Anita in case of an emergency. App. 9. Nor did she "know of anybody who knows where she is." *Id.*, at 11. The trial court admitted the transcript into evidence. Respondent was convicted on all counts.

The Court of Appeals of Ohio reversed. After reviewing the *voir dire*, that court concluded that the prosecution had failed to make a showing of a "good-faith effort" to secure the absent witness' attendance, as required by *Barber* v. *Page*, 390 U. S. 719, 722–725 (1968). The court noted that "we have no witness from the prosecution to testify . . . that no one on behalf of the State could determine Anita's whereabouts, [or] that anyone had exhausted contact with the San Francisco social worker." App. 5. Unavailability would have been established, the court said, "[h]ad the State demonstrated that its subpoenas were never actually served on the witness and that they were unable to make contact in any way with the witness. . . . Until the Isaacs' voir dire, requested by the defense, the State had done nothing, absolutely nothing, to show the Court that Anita would be absent because of unavailability, and they showed no effort having been made to seek out her whereabouts for purpose of trial." *Ibid.*

The Supreme Court of Ohio, by a 4–3 vote, affirmed, but did so on other grounds. 55 Ohio St. 2d 191, 378 N. E. 2d 492 (1978). It first held that the Court of Appeals had erred in concluding that Anita was not unavailable. *Barber* v. *Page* was distinguished as a case in which "the government knew where

the absent witness was," whereas Anita's "whereabouts were entirely unknown." 55 Ohio St. 2d, at 194, 378 N. E. 2d, at 495. "[T]he trial judge could reasonably have concluded from Mrs. Isaacs' *voir dire* testimony that due diligence could not have procured the attendance of Anita Isaacs"; he "could reasonably infer that Anita had left San Francisco"; and he "could properly hold that the witness was unavailable to testify in person." *Id.*, at 195, 378 N. E. 2d, at 495–496.

The court, nonetheless, held that the transcript was inadmissible. Reasoning that normally there is little incentive to cross-examine a witness at a preliminary hearing, where the "ultimate issue" is only probable cause, *id.*, at 196, 378 N. E. 2d, at 496, and citing the dissenting opinion in *California* v. *Green*, 399 U. S. 149, 189 (1970), the court held that the mere opportunity to cross-examine at a preliminary hearing did not afford constitutional confrontation for purposes of trial. See 55 Ohio St. 2d, at 191, 378 N. E. 2d, at 493 (court syllabus).[3] The court distinguished *Green*, where this Court had ruled admissible the preliminary hearing testimony of a declarant who was present at trial, but claimed forgetfulness. The Ohio court perceived a "dictum" in *Green* that suggested that the mere opportunity to cross-examine renders preliminary hearing testimony admissible. 55 Ohio St. 2d, at 198, and n. 2, 378 N. E. 2d, at 497, and n. 2, citing 399 U. S., at 165–166. But the court concluded that *Green* "goes no further than to suggest that cross-examination actually conducted at preliminary hearing *may* afford adequate confrontation for purposes of a later trial." 55 Ohio St. 2d, at 199, 378 N. E. 2d, at 497 (emphasis in original). Since Anita had not been cross-examined at the preliminary hearing and was absent at trial, the introduction of the transcript of her testimony was held to have violated respondent's confrontation

[3] The Ohio "syllabus rule" is stated in *Baltimore & Ohio R. Co.* v. *Baillie*, 112 Ohio St. 567, 570, 148 N. E. 233, 234 (1925). See *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U. S. 562, 565 (1977).

right. The three dissenting justices would have ruled that "'the test is the opportunity for full and complete cross-examination rather than the use which is made of that opportunity'" (citing *United States* v. *Allen*, 409 F. 2d 611, 613 (CA10 1969)). 55 Ohio St. 2d, at 200, 378 N. E. 2d, at 498.

We granted certiorari to consider these important issues under the Confrontation Clause. 441 U. S. 904 (1979).

II

A

The Court here is called upon to consider once again the relationship between the Confrontation Clause and the hearsay rule with its many exceptions. The basic rule against hearsay, of course, is riddled with exceptions developed over three centuries. See E. Cleary, McCormick on Evidence § 244 (2d ed. 1972) (McCormick) (history of rule); *id.*, §§ 252–324 (exceptions).[4] These exceptions vary among jurisdictions as to number, nature, and detail. See, *e. g.*, Fed. Rules Evid. 803, 804 (over 20 specified exceptions). But every set of exceptions seems to fit an apt description offered more than 40 years ago: "an old-fashioned crazy quilt made of patches cut from a group of paintings by cubists, futurists and surrealists." Morgan & Maguire, Looking Backward and Forward at Evidence, 50 Harv. L. Rev. 909, 921 (1937).

The Sixth Amendment's Confrontation Clause, made applicable to the States through the Fourteenth Amendment, *Pointer* v. *Texas*, 380 U. S. 400, 403–405 (1965); *Davis* v. *Alaska*, 415 U. S. 308, 315 (1974), provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be con-

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[4] With the caveat, "[s]implification has a measure of falsification," McCormick defines hearsay evidence as

"testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter." § 246, p. 584.

fronted with the witnesses against him." If one were to read this language literally, it would require, on objection, the exclusion of any statement made by a declarant not present at trial. See *Mattox* v. *United States*, 156 U. S. 237, 243 (1895) ("[T]here could be nothing more directly contrary to the letter of the provision in question than the admission of dying declarations"). But, if thus applied, the Clause would abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme.

The historical evidence leaves little doubt, however, that the Clause was intended to exclude some hearsay. See *California* v. *Green*, 399 U. S., at 156–157, and nn. 9 and 10; see also McCormick § 252, p. 606. Moreover, underlying policies support the same conclusion. The Court has emphasized that the Confrontation Clause reflects a preference for face-to-face confrontation at trial,[5] and that "a primary interest secured by [the provision] is the right of cross-examination." *Douglas* v. *Alabama*, 380 U. S. 415, 418 (1965).[6] In short, the Clause envisions

"a personal examination and cross-examination of the

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[5] See *California* v. *Green*, 399 U. S. 149, 157 (1970) ("it is this literal right to 'confront' the witness at the time of the trial that forms the core of the values furthered by the Confrontation Clause"); *id.*, at 172–189 (concurring opinion); *Barber* v. *Page*, 390 U. S. 719, 725 (1968); *Dowdell* v. *United States*, 221 U. S. 325, 330 (1911).

[6] See also *Davis* v. *Alaska*, 415 U. S. 308, 315 (1974); *Bruton* v. *United States*, 391 U. S. 123, 126 (1968); *Pointer* v. *Texas*, 380 U. S. 400, 406–407 (1965); *California* v. *Green*, 399 U. S., at 158 (cross-examination is the "'greatest legal engine ever invented for the discovery of truth,'" quoting 5 J. Wigmore, Evidence § 1367 (3d ed. 1940)). Of course, these purposes are interrelated, since one critical goal of cross-examination is to draw out discrediting demeanor to be viewed by the factfinder. See *Government of Virgin Islands* v. *Aquino*, 378 F. 2d 540, 548 (CA3 1967).

Confrontation at trial also operates to ensure reliability in other ways. First, "[t]he requirement of personal presence . . . undoubtedly makes it more difficult to lie against someone, particularly if that person is an accused and present at trial." 4 J. Weinstein & M. Berger, Weinstein's

> witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox* v. *United States,* 156 U. S., at 242–243.

These means of testing accuracy are so important that the absence of proper confrontation at trial "calls into question the ultimate 'integrity of the fact-finding process.'" *Chambers* v. *Mississippi,* 410 U. S. 284, 295 (1973), quoting *Berger* v. *California,* 393 U. S. 314, 315 (1969).

The Court, however, has recognized that competing interests, if "closely examined," *Chambers* v. *Mississippi,* 410 U. S., at 295, may warrant dispensing with confrontation at trial. See *Mattox* v. *United States,* 156 U. S., at 243 ("general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case"). Significantly, every jurisdiction has a strong interest in effective law enforcement, and in the development and precise formulation of the rules of evidence applicable in criminal proceedings. See *Snyder* v. *Massachusetts,* 291 U. S. 97, 107 (1934); *California* v. *Green,* 399 U. S., at 171–172 (concurring opinion).

This Court, in a series of cases, has sought to accommodate these competing interests. True to the common-law tradition, the process has been gradual, building on past decisions, drawing on new experience, and responding to changing conditions. The Court has not sought to "map out a theory of the Confrontation Clause that would determine the validity

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Evidence ¶ 800 [01], p. 800–10 (1979). See also Note, 54 Iowa L. Rev. 360, 365 (1968). Second, it "insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury." *California* v. *Green,* 399 U. S., at 158.

of all . . . hearsay 'exceptions.'" *California* v. *Green*, 399 U. S., at 162. But a general approach to the problem is discernible.

B

The Confrontation Clause operates in two separate ways to restrict the range of admissible hearsay. First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case (including cases where prior cross-examination has occurred), the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant. See *Mancusi* v. *Stubbs*, 408 U. S. 204 (1972); *Barber* v. *Page*, 390 U. S. 719 (1968). See also *Motes* v. *United States*, 178 U. S. 458 (1900); *California* v. *Green*, 399 U. S., at 161–162, 165, 167, n. 16.[7]

The second aspect operates once a witness is shown to be unavailable. Reflecting its underlying purpose to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence, the Clause countenances only hearsay marked with such trustworthiness that "there is no material departure from the reason of the general rule." *Snyder* v. *Massachusetts*, 291 U. S., at 107. The principle recently was formulated in *Mancusi* v. *Stubbs:*

> "The focus of the Court's concern has been to insure that there 'are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant,' *Dutton* v. *Evans, supra*, at 89, and to 'afford the trier of fact a satisfactory basis for evaluating

[7] A demonstration of unavailability, however, is not always required. In *Dutton* v. *Evans*, 400 U. S. 74 (1970), for example, the Court found the utility of trial confrontation so remote that it did not require the prosecution to produce a seemingly available witness. Cf. Read, The New Confrontation—Hearsay Dilemma, 45 S. Cal. L. Rev. 1, 43, 49 (1972); The Supreme Court, 1970 Term, 85 Harv. L. Rev. 3, 194–195, 197–198 (1971).

the truth of the prior statement,' *California* v. *Green*, *supra*, at 161. It is clear from these statements, and from numerous prior decisions of this Court, that even though the witness be unavailable his prior testimony must bear some of these 'indicia of reliability.' " 408 U. S., at 213.

The Court has applied this "indicia of reliability" requirement principally by concluding that certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the "substance of the constitutional protection." *Mattox* v. *United States*, 156 U. S., at 244.[8] This reflects the truism that "hearsay rules and the Confrontation Clause are generally designed to protect similar values," *California* v. *Green*, 399 U. S., at 155, and "stem from the same roots," *Dutton* v. *Evans*, 400 U. S. 74, 86 (1970). It also responds to the need for certainty in the workaday world of conducting criminal trials.

In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.[9]

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[8] See, *e. g.*, *Pointer* v. *Texas*, 380 U. S., at 407 (dying declarations); *Mattox* v. *United States*, 156 U. S., at 243–244 (same); *Mancusi* v. *Stubbs*, 408 U. S. 204, 213–216 (1972) (cross-examined prior-trial testimony); Comment, 30 La. L. Rev. 651, 668 (1970) ("Properly administered the business and public records exceptions would seem to be among the safest of the hearsay exceptions").

[9] The complexity of reconciling the Confrontation Clause and the hearsay rules has triggered an outpouring of scholarly commentary. Few observers have commented without proposing, roughly or in detail, a basic approach. Some have advanced theories that would shift the general mode of analysis in favor of the criminal defendant. See F. Heller, The Sixth

III

We turn first to that aspect of confrontation analysis deemed dispositive by the Supreme Court of Ohio, and

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Amendment 105 (1951); Seidelson, Hearsay Exceptions and the Sixth Amendment, 40 Geo. Wash. L. Rev. 76, 91–92 (1971) (all hearsay should be excluded except, perhaps, when prosecution shows absolute necessity, high degree of trustworthiness, and "total absence" of motive to falsify); The Supreme Court, 1967 Term, 82 Harv. L. Rev. 63, 237 (1968); Note, 31 Vand. L. Rev. 682, 694 (1978).

Others have advanced theories that would relax constitutional restrictions on the use of hearsay by the prosecutor. See 5 J. Wigmore, Evidence § 1397, p. 159 (J. Chadbourn rev. 1974); Note, The Confrontation Test for Hearsay Exceptions: An Uncertain Standard, 59 Calif. L. Rev. 580, 594 (1971) ("fixed procedural definition of the confrontation clause makes the actual protection afforded depend upon the particular evidence rules in force in each state"); Younger, Confrontation and Hearsay: A Look Backward, A Peek Forward, 1 Hofstra L. Rev. 32 (1973); Westen, The Future of Confrontation, 77 Mich. L. Rev. 1185 (1979); Graham, The Confrontation Clause, the Hearsay Rule, and the Forgetful Witness, 56 Texas L. Rev. 151 (1978); Note, 75 Yale L. J. 1434 (1966). See *California* v. *Green*, 399 U. S., at 172–189 (Harlan, J., concurring) (Confrontation Clause requires only that prosecution produce available witnesses; Due Process Clause bars conviction "where the critical issues at trial were supported only by *ex parte* testimony not subjected to cross-examination, and not found to be reliable by the trial judge," *id.*, at 186, n. 20).

Still others have proposed theories that might either help or hurt the accused. See Graham, The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One, 8 Crim. L. Bull. 99, 129 (1972); Baker, The Right to Confrontation, the Hearsay Rules, and Due Process, 6 Conn. L. Rev. 529 (1974); Comment, 13 UCLA L. Rev. 366, 376–377 (1966) (advocating sliding-scale "probative value-need quotient"); Comment, 52 Texas L. Rev. 1167, 1190–1191 (1974).

Finally, a number of commentators, while sometimes criticizing particular results or language in past decisions, have generally agreed with the Court's present approach. See Davenport, The Confrontation Clause and The Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis, 85 Harv. L. Rev. 1378, 1405 (1972); Read, The New Confrontation-Hearsay Dilemma, 45 S. Cal. L. Rev. 1, 48 (1972) ("the traditional approach . . . with its recognition of a core constitutional value to be preserved, but with its reluctance to make sweeping declarations as to the

answered by it in the negative—whether Anita Isaacs' prior testimony at the preliminary hearing bore sufficient "indicia of reliability." Resolution of this issue requires a careful comparison of this case to *California* v. *Green, supra.*

A

In *Green,* at the preliminary hearing, a youth named Porter identified Green as a drug supplier. When called to the stand at Green's trial, however, Porter professed a lapse of memory. Frustrated in its attempt to adduce live testimony, the prosecution offered Porter's prior statements. The trial judge ruled the evidence admissible, and substantial portions of the preliminary hearing transcript were read to the jury. This Court found no error. Citing the established rule that prior trial testimony is admissible upon retrial if the declarant becomes unavailable, *Mattox* v. *United States,* 156 U. S. 237 (1895); *Mancusi* v. *Stubbs,* 408 U. S. 204 (1972), and recent dicta suggesting the admissibility of preliminary hearing testimony under proper circumstances, *Barber* v. *Page,* 390 U. S., at 725–

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meaning of that right . . . is the best . . . compromise"); Note, 113 U. Pa. L. Rev. 741, 748, and n. 38 (1965) (requiring "adequate substitute for confrontation," while recognizing that no substitute can be "fully adequate"). See also Natali, *Green, Dutton* and *Chambers:* Three Cases in Search of a Theory, 7 Rutgers-Camden L. J. 43, 62 (1975); The Supreme Court, 1970 Term, 85 Harv. L. Rev. 3, 199 (1971).

Notwithstanding this divergence of critical opinion, we have found no commentary suggesting that the Court has misidentified the basic interests to be accommodated. Nor has any commentator demonstrated that prevailing analysis is out of line with the intentions of the Framers of the Sixth Amendment. Convinced that "no rule will perfectly resolve all possible problems," Natali, 7 Rutgers-Camden L. J., at 73, we reject the invitation to overrule a near-century of jurisprudence. Our reluctance to begin anew is heightened by the Court's implicit prior rejection of principal alternative proposals, see *Dutton* v. *Evans,* 400 U. S., at 93–100 (concurring opinion), and *California* v. *Green,* 399 U. S., at 172–189 (concurring opinion); the mutually critical character of the commentary; and the Court's demonstrated success in steering a middle course among proposed alternatives.

726; *Pointer* v. *Texas*, 380 U. S., at 407, the Court rejected Green's Confrontation Clause attack. It reasoned:

> "Porter's statement at the preliminary hearing had already been given under circumstances closely approximating those that surround the typical trial. Porter was under oath; respondent was represented by counsel—the same counsel in fact who later represented him at the trial; respondent had every opportunity to cross-examine Porter as to his statement; and the proceedings were conducted before a judicial tribunal, equipped to provide a judicial record of the hearings." 399 U. S., at 165.

These factors, the Court concluded, provided all that the Sixth Amendment demands: "substantial compliance with the purposes behind the confrontation requirement." *Id.*, at 166.[10]

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[10] This reasoning appears in Part III of *Green*, the only section of that opinion directly relevant to the issue raised here. The Ohio court in the present case appears to have dismissed Part III as "dictum." 55 Ohio St. 2d, at 198, 378 N. E. 2d, at 497. The United States has suggested that Part III properly is viewed as an "alternative holding." Brief for United States as *Amicus Curiae* 24, n. 15. Either view, perhaps, would diminish *Green's* precedential significance. We accept neither.

In Part II of *Green*, the Court held that use of a trial witness' prior inconsistent statements as substantive evidence did not, as a general rule, violate the Confrontation Clause. In Part III, the Court went further and held: "Porter's preliminary hearing testimony was admissible . . . wholly apart from the question of whether respondent had an effective opportunity for confrontation at the subsequent trial. For Porter's statement at the preliminary hearing had already been given under circumstances closely approximating those that surround the typical trial." 399 U. S., at 165. In Part IV, the Court returned to the general rule articulated in Part II. The Court contrasted cases in which the declarant testifies at trial that he has forgotten the underlying events, rather than claiming recollection but advancing an inconsistent story. The Court noted that commentators disagreed over whether the former class of cases should be brought within the general rule articulated in Part II. *Id.*, at 169, n. 18. Given the difficulty of the issue, which was neither briefed in this Court nor addressed below, the Court remanded the case for a determination of whether assertedly inconsistent remarks made by Porter to a police

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This passage and others in the *Green* opinion suggest that the *opportunity* to cross-examine at the preliminary hearing—even absent actual cross-examination—satisfies the Confrontation Clause. Yet the record showed, and the Court recognized, that defense counsel in fact had cross-examined Porter at the earlier proceeding. *Id.*, at 151. Thus, MR. JUSTICE BRENNAN, writing in dissent, could conclude only that "[p]erhaps" "the mere opportunity for face-to-face encounter [is] sufficient." *Id.*, at 200, n. 8. See Note, 52 Texas L. Rev. 1167, 1170 (1974).

We need not decide whether the Supreme Court of Ohio correctly dismissed statements in *Green* suggesting that the mere opportunity to cross-examine rendered the prior testimony admissible. See Westen, The Future of Confrontation, 77 Mich. L. Rev. 1185, 1211 (1979) (issue is "truly difficult to resolve under conventional theories of confrontation"). Nor need we decide whether *de minimis* questioning is sufficient, for defense counsel in this case tested Anita's testimony with the equivalent of significant cross-examination.

B

Counsel's questioning clearly partook of cross-examination as a matter of *form*. His presentation was replete with leading questions,[11] the principal tool and hallmark of cross-

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officer could be admitted under the rule of Part II. Since the critical reason for this disposition was Porter's asserted forgetfulness at trial, the same result clearly would have obtained in regard to Porter's preliminary hearing testimony were it not for the Court's holding in Part III. It follows that Part III was not an alternative holding, and certainly was not dictum. That portion of the opinion alone dispositively established the admissibility of Porter's preliminary hearing testimony. See also Note, 59 Calif. L. Rev., at 589; The Supreme Court, 1969 Term, 84 Harv. L. Rev. 1, 114–115 (1970).

[11] No less than 17 plainly leading questions were asked, as indicated by phrases in counsel's inquiries: "is[n't] it a fact . . . that"; "is it to your knowledge, then, that . . ."; "is[n't] that correct"; "you never gave them . . ."; "this wasn't then in the pack . . ."; "you have never [not] seen [discussed; talked] . . ."; "you never gave. . . ."

examination. In addition, counsel's questioning comported with the principal *purpose* of cross-examination: to challenge "whether the declarant was sincerely telling what he believed to be the truth, whether the declarant accurately perceived and remembered the matter he related, and whether the declarant's intended meaning is adequately conveyed by the language he employed." Davenport, The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis, 85 Harv. L. Rev. 1378 (1972). Anita's unwillingness to shift the blame away from respondent became discernible early in her testimony. Yet counsel continued to explore the underlying events in detail. He attempted, for example, to establish that Anita and the defendant were sharing an apartment, an assertion that was critical to respondent's defense at trial and that might have suggested ulterior personal reasons for unfairly casting blame on the defendant. At another point, he directly challenged Anita's veracity by seeking to have her admit that she had given the credit cards to respondent to obtain a television. When Anita denied this, defense counsel elicited the fact that the only television she owned was a "Twenty Dollar . . . old model." App. 21. Cf. *Davis* v. *Alaska,* 415 U. S. 308, 316–317 (1974).

Respondent argues that, because defense counsel never asked the court to declare Anita hostile, his questioning necessarily occurred on direct examination. See *State* v. *Minneker,* 27 Ohio St. 2d 155, 271 N. E. 2d 821 (1971). But however state law might formally characterize the questioning of Anita, it afforded "substantial compliance with the purposes behind the confrontation requirement," *Green,* 399 U. S., at 166, no less so than classic cross-examination. Although Ohio law may have authorized objection by the prosecutor or intervention by the court, this did not happen. As in *Green,* respondent's counsel was not "significantly limited in any way in the scope or nature of his cross-examination." *Ibid.*

We are also unpersuaded that *Green* is distinguishable on the ground that Anita Isaacs—unlike the declarant Porter in *Green*—was not personally available for questioning *at trial*. This argument ignores the language and logic of *Green*:

> "Porter's statement would, we think, have been admissible at trial even in Porter's absence if Porter had been actually unavailable. . . . That being the case, we do not think a different result should follow where the witness is actually produced." *Id.*, at 165.

Nor does it matter that, unlike Green, respondent had a different lawyer at trial from the one at the preliminary hearing. Although one might strain one's reading of *Green* to assign this factor some significance, respondent advances no reason of substance supporting the distinction. Indeed, if we were to accept this suggestion, *Green* would carry the seeds of its own demise; under a "same attorney" rule, a defendant could nullify the effect of *Green* by obtaining new counsel after the preliminary hearing was concluded.

Finally, we reject respondent's attempt to fall back on general principles of confrontation, and his argument that this case falls among those in which the Court must undertake a particularized search for "indicia of reliability." Under this theory, the factors previously cited—absence of face-to-face contact at trial, presence of a new attorney, and the lack of classic cross-examination—combine with considerations uniquely tied to Anita to mandate exclusion of her statements. Anita, respondent says, had every reason to lie to avoid prosecution or parental reprobation. Her unknown whereabouts is explicable as an effort to avoid punishment, perjury, or self-incrimination. Given these facts, her prior testimony falls on the unreliable side, and should have been excluded.

In making this argument, respondent in effect asks us to disassociate preliminary hearing testimony previously subjected to cross-examination from previously cross-examined

prior-trial testimony, which the Court has deemed generally immune from subsequent confrontation attack. Precedent requires us to decline this invitation. In *Green* the Court found guarantees of trustworthiness in the accouterments of the preliminary hearing itself; there was no mention of the inherent reliability or unreliability of Porter and his story. See also *Mancusi* v. *Stubbs,* 408 U. S., at 216.

In sum, we perceive no reason to resolve the reliability issue differently here than the Court did in *Green.* "Since there was an adequate opportunity to cross-examine [the witness], and counsel . . . availed himself of that opportunity, the transcript . . . bore sufficient 'indicia of reliability' and afforded ' "the trier of fact a satisfactory basis for evaluating the truth of the prior statement." ' " 408 U. S., at 216.[12]

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[12] We need not consider whether defense counsel's questioning at the preliminary hearing surmounts some inevitably nebulous threshold of "effectiveness." In *Mancusi,* to be sure, the Court explored to some extent the adequacy of counsel's cross-examination at the earlier proceeding. See 408 U. S., at 214–215. That discussion, however, must be read in light of the fact that the defendant's representation at the earlier proceeding, provided by counsel who had been appointed only four days prior thereto, already had been held to be ineffective. See *id.,* at 209. Under those unusual circumstances, it was necessary to explore the character of the actual cross-examination to ensure that an adequate opportunity for full cross-examination had been afforded to the defendant. Cf. *Pointer* v. *Texas,* 380 U. S., at 407. We hold that in all but such extraordinary cases, no inquiry into "effectiveness" is required. A holding that every case involving prior testimony requires such an inquiry would frustrate the principal objective of generally validating the prior-testimony exception in the first place—increasing certainty and consistency in the application of the Confrontation Clause.

The statement in *Mancusi* quoted in the text indicates the propriety of this approach. To the same effect is *Mattox* v. *United States,* 156 U. S., at 244 ("The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination").

IV

Our holding that the Supreme Court of Ohio erred in its "indicia of reliability" analysis does not fully dispose of the case, for respondent would defend the judgment on an alternative ground. The State, he contends, failed to lay a proper predicate for admission of the preliminary hearing transcript by its failure to demonstrate that Anita Isaacs was not available to testify in person at the trial. All the justices of the Supreme Court of Ohio rejected this argument. 55 Ohio St. 2d, at 195 and 199, 378 N. E. 2d, at 495 and 497.

A

The basic litmus of Sixth Amendment unavailability is established: "[A] witness is not 'unavailable' for purposes of . . . the exception to the confrontation requirement unless the prosecutorial authorities have made a *good-faith effort* to obtain his presence at trial." *Barber* v. *Page*, 390 U. S., at 724–725 (emphasis added). Accord, *Mancusi* v. *Stubbs*, *supra*; *California* v. *Green*, 399 U. S., at 161–162, 165, 167, n. 16; *Berger* v. *California*, 393 U. S. 314 (1969).

Although it might be said that the Court's prior cases provide no further refinement of this statement of the rule, certain general propositions safely emerge. The law does not require the doing of a futile act. Thus, if no possibility of procuring the witness exists (as, for example, the witness' intervening death), "good faith" demands nothing of the prosecution. But if there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith *may* demand their effectuation. "The lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness." *California* v. *Green*, 399 U. S., at 189, n. 22 (concurring opinion, citing *Barber* v. *Page*, *supra*). The ultimate question is whether the witness is unavailable despite good-faith efforts undertaken prior to trial to locate and present that witness. As with other evi-

dentiary proponents, the prosecution bears the burden of establishing this predicate.

B

On the facts presented we hold that the trial court and the Supreme Court of Ohio correctly concluded that Anita's unavailability, in the constitutional sense, was established.

At the *voir dire* hearing, called for by the defense, it was shown that some four months prior to the trial the prosecutor was in touch with Amy Isaacs and discussed with her Anita's whereabouts. It may appropriately be inferred that Mrs. Isaacs told the prosecutor essentially the same facts to which she testified at *voir dire:* that the Isaacs had last heard from Anita during the preceding summer; that she was not then in San Francisco, but was traveling outside Ohio; and that the Isaacs and their other children knew of no way to reach Anita even in an emergency. This last fact takes on added significance when it is recalled that Anita's parents earlier had undertaken affirmative efforts to reach their daughter when the social worker's inquiry came in from San Francisco. This is not a case of parents abandoning all interest in an absent daughter.

The evidence of record demonstrates that the prosecutor issued a subpoena to Anita at her parents' home, not only once, but on five separate occasions over a period of several months. In addition, at the *voir dire* argument, the prosecutor stated to the court that respondent "witnessed that I have attempted to locate, I have subpoenaed, there has been a *voir dire* of the witness' parents, and they have not been able to locate her for over a year." App. 12.

Given these facts, the prosecution did not breach its duty of good-faith effort. To be sure, the prosecutor might have tried to locate by telephone the San Francisco social worker with whom Mrs. Isaacs had spoken many months before and might have undertaken other steps in an effort to find Anita. One, in hindsight, may always think of other things. Never-

theless, the great improbability that such efforts would have resulted in locating the witness, and would have led to her production at trial, neutralizes any intimation that a concept of reasonableness required their execution. We accept as a general rule, of course, the proposition that "the possibility of a refusal is not the equivalent of asking and receiving a rebuff." *Barber* v. *Page*, 390 U. S., at 724, quoting from the dissenting opinion in that case in the Court of Appeals (381 F. 2d 479, 481 (CA10 1966)). But the service and ineffectiveness of the five subpoenas and the conversation with Anita's mother were far more than mere reluctance to face the possibility of a refusal. It was investigation at the last-known real address, and it was conversation with a parent who was concerned about her daughter's whereabouts.

Barber and *Mancusi* v. *Stubbs, supra,* are the cases in which this Court has explored the issue of constitutional unavailability. Although each is factually distinguishable from this case, *Mancusi* provides significant support for a conclusion of good-faith effort here,[13] and *Barber* has no contrary significance. Insofar as this record discloses no basis for concluding that Anita was abroad, the case is factually weaker than *Mancusi;* but it is stronger than *Mancusi* in the sense that the Ohio prosecutor, unlike the prosecutor in *Mancusi,* had no clear indication, if any at all, of Anita's whereabouts. In *Barber,* the Court found an absence of good-faith effort where

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[13] In *Mancusi,* the declarant "who had been born in Sweden but had become a naturalized American citizen, had returned to Sweden and taken up permanent residence there." 408 U. S., at 209. While in this country, he had testified against Stubbs at his Tennessee trial for murder and kidnaping. Stubbs was convicted, but obtained habeas corpus relief 10 years later, and was retried by Tennessee. Before the second trial, the prosecution sent a subpoena to be served in Texas, the declarant's last place of residence in this country. It could not be served. The Court rejected Stubbs' assertion that the prosecution had not undertaken good-faith efforts in failing to do more. "Tennessee . . . was powerless to compel his attendance . . . either through its own process or through established procedures." 408 U. S., at 212.

the prosecution made no attempt to secure the presence of a declarant incarcerated in a federal penitentiary in a neighboring State. There, the prosecution knew where the witness was, procedures existed whereby the witness could be brought to the trial, and the witness was not in a position to frustrate efforts to secure his production. Here, Anita's whereabouts were not known, and there was no assurance that she would be found in a place from which she could be forced to return to Ohio.

We conclude that the prosecution carried its burden of demonstrating that Anita was constitutionally unavailable for purposes of respondent's trial.

The judgment of the Supreme Court of Ohio is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL and MR. JUSTICE STEVENS join, dissenting.

The Court concludes that because Anita Isaacs' testimony at respondent's preliminary hearing was subjected to the equivalent of significant cross-examination, such hearsay evidence bore sufficient "indicia of reliability" to permit its introduction at respondent's trial without offending the Confrontation Clause of the Sixth Amendment. As the Court recognizes, however, the Constitution imposes the threshold requirement that the prosecution must demonstrate the unavailability of the witness whose prerecorded testimony it wishes to use against the defendant. Because I cannot agree that the State has met its burden of establishing this predicate, I dissent.[1]

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[1] Because I am convinced that the State failed to lay a proper foundation for the admission of Anita Isaacs' preliminary hearing testimony, I have no occasion to consider whether that testimony had in fact been subjected to full and effective adverse questioning and whether, even conceding the adequacy of the prior cross-examination, the significant dif-

"There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Pointer* v. *Texas*, 380 U. S. 400, 405 (1965). Accord, *Berger* v. *California*, 393 U. S. 314, 315 (1969); *Barber* v. *Page*, 390 U. S. 719, 721 (1968); *Pointer* v. *Texas*, *supra*, at 410 (STEWART, J., concurring); *Kirby* v. *United States*, 174 U. S. 47, 55–56 (1899). Historically, the inclusion of the Confrontation Clause in the Bill of Rights reflected the Framers' conviction that the defendant must not be denied the opportunity to challenge his accusers in a direct encounter before the trier of fact. See *California* v. *Green*, 399 U. S. 149, 156–158 (1970); *Park* v. *Huff*, 506 F. 2d 849, 861–862 (CA5 1975) (Gewin, J., concurring). At the heart of this constitutional guarantee is the accused's right to compel the witness "to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox* v. *United States*, 156 U. S. 237, 242–243 (1895). See also *California* v. *Green*, *supra*, at 174–183 (Harlan, J., concurring).

Despite the literal language of the Sixth Amendment,[2] our cases have recognized the necessity for a limited exception to the confrontation requirement for the prior testimony of a witness who is unavailable at the defendant's trial. In keeping with the importance of this provision in our constitutional scheme, however, we have imposed a heavy burden on the prosecution either to secure the presence of the witness or to

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ferences in the nature and objectives of the preliminary hearing and the trial preclude substituting confrontation at the former proceeding for the constitutional requirement of confrontation at the latter. See *California* v. *Green*, 399 U. S. 149, 195–203 (1970) (BRENNAN, J., dissenting).

[2] "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

demonstrate the impossibility of that endeavor. *Barber* v. *Page, supra,* held that the absence of a witness from the jurisdiction does not excuse the State's failure to attempt to compel the witness' attendance at trial; in such circumstances, the government must show that it has engaged in a diligent effort to locate and procure the witness' return. "In short, a witness is not 'unavailable' for purposes of the foregoing exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." *Id.,* at 724–725. See, *e. g., United States* v. *Mann,* 590 F. 2d 361, 367 (CA1 1978); *United States* v. *Lynch,* 163 U. S. App. D. C. 6, 18–19, 499 F. 2d 1011, 1023–1024 (1974); *Government of the Virgin Islands* v. *Aquino,* 378 F. 2d 540, 549–552 (CA3 1967). See generally 5 J. Wigmore, Evidence § 1405 (J. Chadbourn rev. 1974) and cases cited therein.

In the present case, I am simply unable to conclude that the prosecution met its burden of establishing Anita Isaacs' unavailability. From all that appears in the record—and there has been no suggestion that the record is incomplete in this respect—the State's *total* effort to secure Anita's attendance at respondent's trial consisted of the delivery of five subpoenas in her name to her parents' residence, and three of those were issued after the authorities had learned that she was no longer living there.[3] At least four months before the trial began, the prosecution was aware that Anita had moved away; yet during that entire interval it did nothing whatsoever to try to make contact with her. It is difficult to believe that the State would have been so derelict in attempting to secure the witness' presence at trial had it not had her

[3] The five subpoenas, all of which were issued to Anita at her parents' address, showed that returns were made on November 3 and 4, 1975, December 10, 1975, February 3, 1976, and February 25, 1976, respectively. During the course of the *voir dire* of Anita's mother, the prosecutor indicated that sometime in November 1975 the Isaacs had told him that Anita had left home. See Tr. 197; *ante,* at 75.

favorable preliminary hearing testimony upon which to rely in the event of her "unavailability." The perfunctory steps which the State took in this case can hardly qualify as a "good-faith effort." In point of fact, it was no effort at all.

The Court, however, is apparently willing to excuse the prosecution's inaction on the ground that any endeavor to locate Anita Isaacs was unlikely to bear fruit. See *ante*, at 75–76. I not only take issue with the premise underlying that reasoning—that the improbability of success can condone a refusal to conduct even a cursory investigation into the witness' whereabouts—but I also seriously question the Court's conclusion that a bona fide search in the present case would inevitably have come to naught.

Surely the prosecution's mere speculation about the difficulty of locating Anita Isaacs cannot relieve it of the obligation to attempt to find her. Although the rigor of the undertaking might serve to palliate a failure to prevail, it cannot justify a failure even to try. Just as *Barber* cautioned that "the possibility of a refusal is not the equivalent of asking and receiving a rebuff," 390 U. S., at 724 (quoting the decision below, 381 F. 2d 479, 481 (CA10 1966) (Aldrich, J., dissenting)), so, too, the possibility of a defeat is not the equivalent of pursuing all obvious leads and returning emptyhanded. The duty of "good-faith effort" would be meaningless indeed "if that effort were required only in circumstances where success was guaranteed." *Mancusi* v. *Stubbs*, 408 U. S. 204, 223 (1972) (MARSHALL, J., dissenting).

Nor do I concur in the Court's bleak prognosis of the likelihood of procuring Anita Isaacs' attendance at respondent's trial.[4] Although Anita's mother testified that she had no

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[4] In attempting to distinguish this case from *Barber* v. *Page*, 390 U. S. 719 (1968), and demonstrate the reasonableness of the State's conduct, the Court states that "there was no assurance that [Anita] would be found in a place from which she could be forced to return to Ohio." *Ante*, at 77. Once located, however, it is extremely unlikely that Anita could have resisted the State's efforts to secure her return. The Uniform

current knowledge of her daughter's whereabouts, the prosecution possessed sufficient information upon which it could have at least initiated an investigation. As the Court acknowledges, one especially promising lead was the San Francisco social worker to whom Mrs. Isaacs had spoken and with whom Anita had filed for welfare. What the Court fails to mention, however, is that the prosecution had more to go on than that datum alone. For example, Mrs. Isaacs testified that on the same day she talked to the social worker, she also spoke to her daughter. And although Mrs. Isaacs told defense counsel that she knew of no way to get in touch with her daughter in an emergency, Tr. 195, in response to a similar question from the prosecutor she indicated that someone in Tucson might be able to contact Anita. *Id.*, at 198–199. It would serve no purpose here to essay an exhaustive catalog of the numerous measures the State could have taken in a diligent attempt to locate Anita. It suffices simply to note that it is not "hindsight," see *ante*, at 75, that permits us to envision how a skilled investigator armed with this information (and any additional facts not brought out through the *voir dire*) [5] might have discovered Anita's whereabouts

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Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings enables prosecuting authorities in one State to obtain an order from a court in another State compelling the witness' appearance to testify in court in the first State. The Uniform Act has been adopted in the District of Columbia, the Panama Canal Zone, Puerto Rico, the Virgin Islands, and every State in the Union except Alabama. 11 U. L. A. 1 (Supp. 1980).

[5] The Court of Appeals of Ohio expressed some doubt as to whether Mrs. Isaacs had been totally forthcoming in professing no knowledge of the whereabouts of her daughter, who had been linked to respondent's criminal involvements and who, in Mrs. Isaacs' words, "wants to make her own way, and forget all the unpleasantness that happened here, and prove something to herself and to us, and to think about her future and forget her past." Tr. 195–196. See App. 5–6. These reservations about the candidness of Mrs. Isaacs' testimony provide yet another reason why the State was not justified in relying solely on the Isaacs' representations to establish Anita's unavailability.

with reasonable effort. Indeed, precisely because the prosecution did absolutely nothing to try to locate Anita, hindsight does not enhance the vista of investigatory opportunities that were available to the State had it actually attempted to find her.

In sum, what the Court said in *Barber* v. *Page*, 390 U. S., at 725, is equally germane here: "[S]o far as this record reveals, the sole reason why [the witness] was not present to testify in person was because the State did not attempt to seek [her] presence. The right of confrontation may not be dispensed with so lightly."

UNITED STATES *v.* SALVUCCI ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 79-244. Argued March 26, 1980—Decided June 25, 1980

Respondents were charged with unlawful possession of stolen mail. The checks that formed the basis of the indictment had been seized by police during a search, conducted pursuant to a warrant, of an apartment rented by one respondent's mother. Respondents moved to suppress the checks on the ground that the affidavit supporting the application for the search warrant was inadequate to show probable cause. The District Court granted the motion. The Court of Appeals affirmed, holding, in reliance on *Jones* v. *United States*, 362 U. S. 257, that since respondents were charged with crimes of possession, they were entitled to claim "automatic standing" to challenge the legality of the search without regard to whether they had an expectation of privacy in the premises searched.

Held: Defendants charged with crimes of possession may only claim the benefits of the exclusionary rule if their own Fourth Amendment rights have in fact been violated. *Jones* v. *United States, supra,* overruled. Pp. 86–95.

(a) The "dilemma" identified in *Jones* (and given as one of the two reasons for establishing the "automatic standing" rule as an exception to the exclusionary rule) that a defendant charged with a possessory offense might only be able to establish his standing to challenge a search and seizure by giving self-incriminating testimony admissible as evidence of his guilt, was eliminated by *Simmons* v. *United States,* 390 U. S. 377, wherein it was held that testimony given by a defendant in support of a motion to suppress cannot be admitted as evidence of his guilt at trial. Pp. 89–90.

(b) The second reason given in *Jones* for the "automatic standing" rule that such rule would prevent the "vice of prosecutorial self-contradiction" whereby the Government would assert that the defendant possessed the goods in question for purposes of criminal liability while simultaneously asserting that he did not possess them for the purposes of claiming the protections of the Fourth Amendment, has likewise been eroded. It is now the rule that a prosecutor, without legal contradiction, may simultaneously maintain that a defendant criminally possessed the seized goods but was not subject to a Fourth Amendment deprivation.

Rakas v. *Illinois*, 439 U. S. 128. The underlying assumption for such "vice of prosecutorial self-contradiction" that possession of seized goods is the equivalent of Fourth Amendment "standing" to challenge the search creates too broad a gauge for measurement of Fourth Amendment rights. Rather, it must be asked not merely whether the defendant has a possessory interest in the items seized but also whether he had an expectation of privacy in the area searched. Pp. 90–93.

(c) The issue whether the prosecutor, although not permitted under *Simmons* v. *United States*, *supra*, to use a defendant's testimony at a suppression hearing as substantive evidence of guilt at trial, may still be permitted to use such testimony to impeach the defendant at trial, need not be resolved here, since it is an issue that more aptly relates to the proper breadth of the *Simmons* privilege and not to the need for retaining automatic standing. Pp. 93–94.

(d) Respondents' argument that the "automatic standing" rule should be retained since it maximizes the deterrence of illegal police conduct by permitting an expanded class of potential challengers, is without merit. Pp. 94–95.

599 F. 2d 1094, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, POWELL, and STEVENS, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 95.

Mark I. Levy argued the cause for the United States. With him on the briefs were *Solicitor General McCree*, *Assistant Attorney General Heymann*, and *Deputy Solicitor General Frey*.

Willie J. Davis, by appointment of the Court, 444 U. S. 1067, argued the cause and filed a brief for respondent Salvucci. *John C. McBride*, by appointment of the Court, 444 U. S. 1067, argued the cause and filed a brief for respondent Zackular.

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Relying on *Jones* v. *United States*, 362 U. S. 257 (1960), the Court of Appeals for the First Circuit held that since respondents were charged with crimes of possession, they were

entitled to claim "automatic standing" to challenge the legality of the search which produced the evidence against them, without regard to whether they had an expectation of privacy in the premises searched. 599 F. 2d 1094 (1979). Today we hold that defendants charged with crimes of possession may only claim the benefits of the exclusionary rule if their own Fourth Amendment rights have in fact been violated. The automatic standing rule of *Jones* v. *United States, supra,* is therefore overruled.

I

Respondents, John Salvucci and Joseph Zackular, were charged in a federal indictment with 12 counts of unlawful possession of stolen mail, in violation of 18 U. S. C. § 1708. The 12 checks which formed the basis of the indictment had been seized by the Massachusetts police during the search of an apartment rented by respondent Zackular's mother. The search was conducted pursuant to a warrant.

Respondents filed a motion to suppress the checks on the ground that the affidavit supporting the application for the search warrant was inadequate to demonstrate probable cause. The District Court granted respondents' motions and ordered that the checks be suppressed.[1] The Government sought reconsideration of the District Court's ruling, contending that respondents lacked "standing" to challenge the constitutionality of the search. The District Court reaffirmed its suppression order and the Government appealed.

The Court of Appeals affirmed, holding that respondents had "standing" and the search warrant was constitutionally inadequate. The court found that the respondents were not required to establish a legitimate expectation of privacy in the premises searched or the property seized because they were entitled to assert "automatic standing" to object to the search

[1] The District Court held that the affidavit was deficient because the affiant relied on double hearsay, and failed to specify the dates on which information included in the affidavit had been obtained.

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and seizure under *Jones* v. *United States, supra.* The court observed that the vitality of the *Jones* doctrine had been challenged in recent years, but that "[u]ntil the Supreme Court rules on this question, we are not prepared to hold that the automatic standing rule of *Jones* has been . . . overruled. . . . That is an issue which the Supreme Court must resolve." 599 F. 2d, at 1098. The Court of Appeals was obviously correct in its characterization of the status of *Jones,* and we granted certiorari in order to resolve the controversy.[2] 444 U. S. 989 (1979).

II

As early as 1907, this Court took the position that remedies for violations of constitutional rights would only be afforded to a person who "belongs to the class for whose sake the constitutional protection is given." *Hatch* v. *Reardon,* 204 U. S. 152, 160. The exclusionary rule is one form of remedy afforded for Fourth Amendment violations, and the Court in *Jones* v. *United States* held that the *Hatch* v. *Reardon* principle properly limited its availability. The Court reasoned that ordinarily "it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he . . . establish, that he himself was the victim of an invasion of privacy." 362 U. S., at 261. Subsequent attempts to vicariously assert violations of the Fourth Amendment rights of others have been repeatedly rejected by this Court. *Alderman* v. *United States,* 394 U. S. 165, 174 (1969); *Brown* v. *United States,* 411 U. S.

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[2] The Courts of Appeals have divided on the continued applicability of the automatic standing rule. The Sixth Circuit abandoned the rule after our decision in *Simmons* v. *United States,* 390 U. S. 377 (1968). See, *e. g., United States* v. *Hunter,* 550 F. 2d 1066 (1977). Most of the remaining Circuits appear to have retained the rule, but many with "misgivings." See, *e. g., United States* v. *Oates,* 560 F. 2d 45, 52 (CA2 1977); *United States* v. *Edwards,* 577 F. 2d 883, 892 (CA5), cert. denied, 439 U. S. 968 (1978).

223, 230 (1973). Most recently, in *Rakas* v. *Illinois*, 439 U. S. 128 (1978), we held that "it is proper to permit only defendants whose Fourth Amendment rights have been violated to benefit from the [exclusionary] rule's protections." *Id.*, at 134.

Even though the Court in *Jones* recognized that the exclusionary rule should only be available to protect defendants who have been the victims of an illegal search or seizure, the Court thought it necessary to establish an exception. In cases where possession of the seized evidence was an essential element of the offense charged, the Court held that the defendant was not obligated to establish that his own Fourth Amendment rights had been violated, but only that the search and seizure of the evidence was unconstitutional.[3] Upon such a showing, the exclusionary rule would be available to prevent the admission of the evidence against the defendant.

The Court found that the prosecution of such possessory offenses presented a "special problem" which necessitated the departure from the then settled principles of Fourth Amendment "standing."[4] Two circumstances were found to require this exception. First, the Court found that in order to establish standing at a hearing on a motion to suppress, the defendant would often be "forced to allege facts the proof of which would tend, if indeed not be sufficient, to convict him," since several Courts of Appeals had "pinioned a defendant within this dilemma" by holding that evidence adduced at the motion

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[3] In *Brown* v. *United States*, 411 U. S. 223, 229 (1973), this Court clarified that the automatic standing rule of *Jones* was applicable only where the offense charged "possession of the seized evidence at the time of the contested search and seizure."

[4] In *Rakas*, this Court discarded reliance on concepts of "standing" in determining whether a defendant is entitled to claim the protections of the exclusionary rule. The inquiry, after *Rakas*, is simply whether the defendant's rights were violated by the allegedly illegal search or seizure. Because *Jones* was decided at a time when "standing" was designated as a separate inquiry, we use that term for the purposes of re-examining that opinion.

to suppress could be used against the defendant at trial. 362 U. S., at 262. The Court declined to embrace any rule which would require a defendant to assert his Fourth Amendment claims only at the risk of providing the prosecution with self-incriminating statements admissible at trial. The Court sought resolution of this dilemma by relieving the defendant of the obligation of establishing that his Fourth Amendment rights were violated by an illegal search or seizure.

The Court also commented that this rule would be beneficial for a second reason. Without a rule prohibiting a Government challenge to a defendant's "standing" to invoke the exclusionary rule in a possessory offense prosecution, the Government would be allowed the "advantage of contradictory positions." *Id.*, at 263. The Court reasoned that the Government ought not to be allowed to assert that the defendant possessed the goods for purposes of criminal liability, while simultaneously asserting that he did not possess them for the purposes of claiming the protections of the Fourth Amendment. The Court found that "[i]t is not consonant with the amenities, to put it mildly, of the administration of criminal justice to sanction such squarely contradictory assertions of power by the Government." *Id.*, at 263–264. Thus in order to prevent both the risk that self-incrimination would attach to the assertion of Fourth Amendment rights, as well as to prevent the "vice of prosecutorial self-contradiction," see *Brown* v. *United States*, *supra*, at 229, the Court adopted the rule of "automatic standing."

In the 20 years which have lapsed since the Court's decision in *Jones*, the two reasons which led the Court to the rule of automatic standing have likewise been affected by time. This Court has held that testimony given by a defendant in support of a motion to suppress cannot be admitted as evidence of his guilt at trial. *Simmons* v. *United States*, 390 U. S. 377 (1968). Developments in the principles of Fourth Amendment standing, as well, clarify that a prosecutor may, with legal consistency and legitimacy, assert that a defendant

charged with possession of a seized item did not have a privacy interest violated in the course of the search and seizure. We are convinced not only that the original tenets of the *Jones* decision have eroded, but also that no alternative principles exist to support retention of the rule.

A

The "dilemma" identified in *Jones,* that a defendant charged with a possessory offense might only be able to establish his standing to challenge a search and seizure by giving self-incriminating testimony admissible as evidence of his guilt, was eliminated by our decision in *Simmons* v. *United States, supra.* In *Simmons,* the defendant Garrett was charged with bank robbery. During the search of a codefendant's mother's house, physical evidence used in the bank robbery, including a suitcase, was found in the basement and seized. In an effort to establish his standing to assert the illegality of the search, Garrett testified at the suppression hearing that the suitcase was similar to one he owned and that he was the owner of the clothing discovered inside the suitcase. Garrett's motion to suppress was denied, but his testimony was admitted into evidence against him as part of the Government's case-in-chief at trial. This Court reversed, finding that "a defendant who knows that his testimony may be admissible against him at trial will sometimes be deterred from presenting the testimonial proof of standing necessary to assert a Fourth Amendment claim." 390 U. S., at 392–393. The Court found that, in effect, the defendant was

> "obliged either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination. In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another. We therefore hold that when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment

> grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection." *Id.*, at 394.

This Court's ruling in *Simmons* thus not only extends protection against this risk of self-incrimination in all of the cases covered by *Jones,* but also grants a form of "use immunity" to those defendants charged with nonpossessory crimes. In this respect, the protection of *Simmons* is therefore broader than that of *Jones.* Thus, as we stated in *Brown* v. *United States,* 411 U. S., at 228, "[t]he self-incrimination dilemma, so central to the *Jones* decision, can no longer occur under the prevailing interpretation of the Constitution [in *Simmons*]."

B

This Court has identified the self-incrimination rationale as the cornerstone of the *Jones* opinion. See *Brown* v. *United States, supra,* at 228. We need not belabor the question of whether the "vice" of prosecutorial contradiction could alone support a rule countenancing the exclusion of probative evidence on the grounds that someone other than the defendant was denied a Fourth Amendment right. The simple answer is that the decisions of this Court, especially our most recent decision in *Rakas* v. *Illinois,* 439 U. S. 128 (1978), clearly establish that a prosecutor may simultaneously maintain that a defendant criminally possessed the seized good, but was not subject to a Fourth Amendment deprivation, without legal contradiction. To conclude that a prosecutor engaged in self-contradiction in *Jones,* the Court necessarily relied on the unexamined assumption that a defendant's possession of a seized good sufficient to establish criminal culpability was also sufficient to establish Fourth Amendment "standing." This assumption, however, even if correct at the time, is no longer so.[5]

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[5] Respondent Salvucci cites this Court's decision in *United States* v. *Jeffers,* 342 U. S. 48 (1951), as support for the view that legal ownership

The person in legal possession of a good seized during an illegal search has not necessarily been subject to a Fourth Amendment deprivation.[6] As we hold today in *Rawlings* v. *Kentucky, post,* p. 98, legal possession of a seized good is not a proxy for determining whether the owner had a Fourth Amendment interest for it does not invariably represent the protected Fourth Amendment interest. This Court has repeatedly repudiated the notion that "arcane distinctions developed in property and tort law" ought to control our Fourth Amendment inquiry. *Rakas* v. *Illinois, supra,* at 143. In another section of the opinion in *Jones* itself, the Court concluded that, "it is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law. . . ." 362 U. S., at 266. See also *Mancusi* v. *DeForte,* 392 U. S. 364 (1968); *Warden* v. *Hayden,* 387 U. S. 294 (1967).

While property ownership is clearly a factor to be considered in determining whether an individual's Fourth Amendment rights have been violated, see *Rakas, supra,* at 144, n. 12, property rights are neither the beginning nor the end of this Court's inquiry. In *Rakas,* this Court held that an illegal search only violates the rights of those who have "a legitimate

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of the seized good was sufficient to confer Fourth Amendment "standing." In *Rakas,* however, we stated that "[s]tanding in *Jeffers* was based on Jeffers' possessory interest in *both* the premises searched and the property seized." 439 U. S., at 136. (Emphasis added.)

[6] Legal possession of the seized good may be sufficient in some circumstances to entitle a defendant to seek the return of the seized property if the seizure, as opposed to the search, was illegal. See, *e. g., United States* v. *Lisk,* 522 F. 2d 228 (CA7 1975) (Stevens, J.), cert. denied, 423 U. S. 1078 (1976), although in that case the property was ultimately found not to have been illegally seized. We need not explore this issue since respondents did not challenge the constitutionality of the seizure of the evidence.

expectation of privacy in the invaded place." 439 U. S., at 140. See also *Mancusi* v. *DeForte, supra.*

We simply decline to use possession of a seized good as a substitute for a factual finding that the owner of the good had a legitimate expectation of privacy in the area searched. In *Jones,* the Court held not only that automatic standing should be conferred on defendants charged with crimes of possession, but, alternatively, that Jones had actual standing because he was "legitimately on the premises" at the time of the search. In *Rakas,* this Court rejected the adequacy of this second *Jones* standard, finding that it was "too broad a gauge for measurement of Fourth Amendment rights." 439 U. S., at 142. In language appropriate to our consideration of the automatic standing rule as well, we reasoned:

> "In abandoning 'legitimately on premises' for the doctrine that we announce today, we are not forsaking a time-tested and workable rule, which has produced consistent results when applied, solely for the sake of fidelity to the values underlying the Fourth Amendment. Rather, we are rejecting blind adherence to a phrase which at most has superficial clarity and which conceals underneath that thin veneer all of the problems of line drawing which must be faced in any conscientious effort to apply the Fourth Amendment. Where the factual premises for a rule are so generally prevalent that little would be lost and much would be gained by abandoning case-by-case analysis, we have not hesitated to do so. . . . We would not wish to be understood as saying that legitimate presence on the premises is irrelevant to one's expectation of privacy, but it cannot be deemed controlling." *Id.*, at 147–149.

As in *Rakas,* we again reject "blind adherence" to the other underlying assumption in *Jones* that possession of the seized good is an acceptable measure of Fourth Amendment interests. As in *Rakas,* we find that the *Jones* standard "creates too

broad a gauge for measurement of Fourth Amendment rights" and that we must instead engage in a "conscientious effort to apply the Fourth Amendment" by asking not merely whether the defendant had a possessory interest in the items seized, but whether he had an expectation of privacy in the area searched. Thus neither prosecutorial "vice," nor the underlying assumption of *Jones* that possession of a seized good is the equivalent of Fourth Amendment "standing" to challenge the search, can save the automatic standing rule.

C

Even though the original foundations of *Jones* are no longer relevant, respondents assert that principles not articulated by the Court in *Jones* support retention of the rule. First, respondents maintain that while *Simmons* v. *United States*, 390 U. S. 377 (1968), eliminated the possibility that the prosecutor could use a defendant's testimony at a suppression hearing as substantive evidence of guilt at trial, *Simmons* did not eliminate other risks to the defendant which attach to giving testimony on a motion to suppress.[7] Principally, respondents assert that the prosecutor may still be permitted to use the defendant's testimony to impeach him at trial.[8] This Court

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[7] The respondents argue that the prosecutor's access to the suppression testimony will unfairly provide the prosecutor with information advantageous to the preparation of his case and trial strategy. This argument, however, is surely applicable equally to possessory and nonpossessory offenses. This Court has clearly declined to expand the *Jones* rule to other classes of offenses, *Alderman* v. *United States*, 394 U. S. 165 (1969); *Brown* v. *United States*, 411 U. S. 223 (1973), and thus respondents' rationale cannot support the retention of a special rule of automatic standing here.

[8] A number of courts considering the question have held that such testimony is admissible as evidence of impeachment. *Gray* v. *State*, 43 Md. App. 238, 403 A. 2d 853 (1979); *People* v. *Douglas*, 66 Cal. App. 3d 998, 136 Cal. Rptr. 358 (1977); *People* v. *Sturgis*, 58 Ill. 2d 211, 317 N. E. 2d 545 (1974). See also *Woody* v. *United States*, 126 U. S. App. D. C. 353, 354–355, 379 F. 2d 130, 131–132 (Burger, J.), cert. denied, 389 U. S. 961 (1967).

has not decided whether *Simmons* precludes the use of a defendant's testimony at a suppression hearing to impeach his testimony at trial.[9] But the issue presented here is quite different from the one of whether "use immunity" extends only through the Government's case-in-chief, or beyond that to the direct and cross-examination of a defendant in the event he chooses to take the stand. That issue need not be and is not resolved here, for it is an issue which more aptly relates to the proper breadth of the *Simmons* privilege, and not to the need for retaining automatic standing.

Respondents also seek to retain the *Jones* rule on the grounds that it is said to maximize the deterrence of illegal police conduct by permitting an expanded class of potential challengers. The same argument has been rejected by this Court as a sufficient basis for allowing persons whose Fourth Amendment rights were not violated to nevertheless claim the benefits of the exclusionary rule. In *Alderman* v. *United States*, 394 U. S., at 174–175, we explicitly stated:

> "The deterrent values of preventing the incrimination of those whose rights the police have violated have been considered sufficient to justify the suppression of probative evidence even though the case against the defendant is weakened or destroyed. We adhere to that judgment. But we are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth."

See also *Rakas* v. *Illinois*, 439 U. S., at 137; *United States* v. *Ceccolini*, 435 U. S. 268, 275–276 (1978); *United States* v. *Calandra*, 414 U. S. 338, 350–351 (1974). Respondents' de-

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[9] This Court has held that "the protective shield of *Simmons* is not to be converted into a license for false representations. . . ." *United States* v. *Kahan*, 415 U. S. 239, 243 (1974).

terrence argument carries no special force in the context of possessory offenses and we therefore again reject it.

We are convinced that the automatic standing rule of *Jones* has outlived its usefulness in this Court's Fourth Amendment jurisprudence. The doctrine now serves only to afford a windfall to defendants whose Fourth Amendment rights have *not* been violated. We are unwilling to tolerate the exclusion of probative evidence under such circumstances since we adhere to the view of *Alderman* that the values of the Fourth Amendment are preserved by a rule which limits the availability of the exclusionary rule to defendants who have been subjected to a violation of their Fourth Amendment rights.

This action comes to us as a challenge to a pretrial decision suppressing evidence. The respondents relied on automatic standing and did not attempt to establish that they had a legitimate expectation of privacy in the areas of Zackular's mother's home where the goods were seized. We therefore think it appropriate to remand so that respondents will have an opportunity to demonstrate, if they can, that their own Fourth Amendment rights were violated. See *Combs* v. *United States*, 408 U. S. 224 (1972).

Reversed and remanded.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

Today the Court overrules the "automatic standing" rule of *Jones* v. *United States*, 362 U. S. 257 (1960), because it concludes that the rationale underpinning the rule has been "eroded," *ante*, at 89. I do not share that view.

A defendant charged with a possessory offense who moves to suppress the items he is charged with possessing must now establish at the suppression hearing that the police conduct of which he complains violated his personal Fourth Amendment rights. In many cases, a defendant will be able to make the required showing only by taking the stand and testifying about his interest in the place searched and the evidence

seized; the need for the defendant's own testimony may, in fact, be more likely to arise in possession cases than in cases involving other types of offenses. The holding in *Jones* was premised, in part, on the unfairness of "pinion[ing] a defendant within th[e] dilemma," 362 U. S., at 262, of being able to assert his Fourth Amendment claim only by relinquishing his Fifth Amendment privilege against self-incrimination. The Court finds that this dilemma no longer exists because *Simmons* v. *United States*, 390 U. S. 377 (1968), held that testimony given by a defendant in support of a motion to suppress "may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection." *Id.*, at 394.

I cannot agree that *Simmons* provides complete protection against the "self-incrimination dilemma," *Brown* v. *United States*, 411 U. S. 223, 228 (1973). Respondents contend that the testimony given at the suppression hearing might be held admissible for impeachment purposes and, while acknowledging that that question is not before us in this case, the majority broadly hints that this is so. *Ante*, at 94, n. 9; see *Harris* v. *New York*, 401 U. S. 222 (1971); *United States* v. *Kahan*, 415 U. S. 239 (1974); *United States* v. *Havens*, 446 U. S. 620 (1980); *Jenkins* v. *Anderson*, 447 U. S. 231 (1980); but see *New Jersey* v. *Portash*, 440 U. S. 450 (1979). The use of the testimony for impeachment purposes would subject a defendant to precisely the same dilemma, unless he was prepared to relinquish his constitutional right to testify in his own defense, and would thereby create a strong deterrent to asserting Fourth Amendment claims. One of the purposes of *Jones* and *Simmons* was to remove such obstacles. See *Simmons*, *supra*, at 392–394. Moreover, the opportunity for cross-examination at the suppression hearing may enable the prosecutor to elicit incriminating information beyond that offered on direct examination to establish the requisite Fourth Amendment interest. Even if such information could not be introduced at the subsequent trial, it might be helpful to the prosecution in developing its case or deciding its trial strategy. The fur-

nishing of such a tactical advantage to the prosecution should not be the price of asserting a Fourth Amendment claim. *Simmons*, therefore, does not eliminate the possibility that a defendant will be deterred from presenting a Fourth Amendment claim because of "the risk that the words which he utters may later be used to incriminate him." *Simmons, supra,* at 393. Accordingly, I conclude that this part of the reasoning in *Jones* remains viable.

A second ground for relieving the defendant charged with possession from the necessity of showing "an interest in the premises searched or the property seized" was that "to hold to the contrary . . . would be to permit the Government to have the advantage of contradictory positions as a basis for conviction," *Jones,* 362 U. S., at 263. That is, since "possession both convicts and confers standing," *ibid.*, the Government, which had charged the defendant with possession, would not be permitted to deny that he had standing. By holding today in *Rawlings* v. *Kentucky, post,* p. 98, that a person may assert a Fourth Amendment claim only if he has a privacy interest in the area that was searched, the Court has, to be sure, done away with that logical inconsistency. For reasons stated in my dissenting opinion in that case, I believe that holding is diametrically opposed to the meaning of the Fourth Amendment as it has always been understood.

In sum, I find neither of the Court's grounds for abandoning *Jones* persuasive. The automatic standing rule is a salutary one which protects the rights of defendants and eliminates the wasteful requirement of making a preliminary showing of standing in pretrial proceedings involving possessory offenses, where the charge itself alleges an interest sufficient to support a Fourth Amendment claim. I dissent.

RAWLINGS *v.* KENTUCKY

CERTIORARI TO THE SUPREME COURT OF KENTUCKY

No. 79-5146. Argued March 26, 1980—Decided June 25, 1980

When police officers, armed with a warrant to arrest one Marquess, arrived at his house, another resident of the house and four visitors, including petitioner, were there. While searching the house unsuccessfully for Marquess, several officers smelled marihuana smoke and saw marihuana seeds. Two of the officers left to obtain a warrant to search the house, and the other officers detained the occupants, allowing them to leave only if they consented to a body search. About 45 minutes later, the officers returned with the search warrant; the warrant was read to the remaining occupants, including petitioner, and they were also given "*Miranda*" warnings; and one Cox, an occupant, was ordered to empty her purse, which contained drugs that were controlled substances under Kentucky law. Cox told petitioner, who was standing nearby in response to an officer's command, "to take what was his," and petitioner immediately claimed ownership of the drugs. At that time, an officer searched petitioner, finding $4,500 in cash and a knife, and petitioner was then formally arrested. Petitioner was indicted for possessing with intent to sell the controlled substances recovered from Cox's purse, and the Kentucky trial court denied petitioner's motion to suppress, as fruits of an illegal detention and illegal searches, the drugs, the money, and the statements made by him when the police discovered the drugs. Petitioner's conviction was affirmed by the Kentucky Court of Appeals, and the Kentucky Supreme Court in turn affirmed, holding that petitioner had no "standing" to contest the search of Cox's purse because he had no legitimate or reasonable expectation of freedom from governmental intrusion into the purse, and that the search uncovering the money in petitioner's pocket was justifiable as incident to a lawful arrest based on probable cause.

Held:

1. The conclusion that petitioner did not sustain his burden of proving that he had a legitimate expectation of privacy in Cox's purse so as to allow him to challenge the validity of the search of the purse is supported by the record, which includes petitioner's admission at the suppression hearing that he did not believe that the purse would be free from governmental intrusion. Nor was petitioner entitled to challenge

the search, regardless of his expectation of privacy, merely because he claimed ownership of the drugs in the purse. While petitioner's ownership of the drugs is one fact to be considered, "arcane" concepts of property law do not control the ability to claim the protections of the Fourth Amendment. Cf. *Rakas* v. *Illinois*, 439 U. S. 128. Pp. 104–106.

2. Under the totality of circumstances present (the giving of *Miranda* warnings, the short lapse of time between petitioner's detention and his admissions being outweighed by the "congenial atmosphere" in the house during this interval, his admissions being apparently spontaneous reactions to the discovery of the drugs in Cox's purse, the police conduct not appearing to rise to the level of conscious or flagrant misconduct requiring prophylactic exclusion of petitioner's admissions, and petitioner not having argued that his admissions were anything other than voluntary), Kentucky carried its burden of showing that petitioner's statements to the police admitting his ownership of the drugs were acts of free will unaffected by any illegality in his detention, assuming, *arguendo*, that the police violated the Fourth and Fourteenth Amendments by detaining petitioner and his companions in the house while they obtained a search warrant. Cf. *Brown* v. *Illinois*, 422 U. S. 590. Pp. 106–110.

3. The search of petitioner's person that uncovered the money and the knife was valid as incident to his formal arrest. Once he admitted ownership of the drugs found in Cox's purse, the police had probable cause to arrest him, and where the arrest followed quickly after the search of petitioner's person it is not important that the search preceded the arrest rather than vice versa. Pp. 110–111.

581 S. W. 2d 348, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, and STEVENS, JJ., joined, and in Parts I and II–A of which STEWART and WHITE, JJ., joined. BLACKMUN, J., filed a concurring opinion, *post*, p. 111. WHITE, J., filed an opinion concurring in part, in which STEWART, J., joined, *post*, p. 113. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 114.

J. Vincent Aprile II argued the cause and filed briefs for petitioner.

Victor Fox, Assistant Attorney General of Kentucky, argued the cause for respondent. With him on the brief were *Steven L. Beshear*, Attorney General, and *Gerald Henry* and *Patrick B. Kimberlin III*, Assistant Attorneys General.

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner David Rawlings was convicted by the Commonwealth of Kentucky on charges of trafficking in, and possession of, various controlled substances. Throughout the proceedings below, Rawlings challenged the admissibility of certain evidence and statements on the ground that they were the fruits of an illegal detention and illegal searches. The trial court, the Kentucky Court of Appeals, and the Supreme Court of Kentucky all rejected Rawlings' challenges. We granted certiorari, 444 U. S. 989, and now affirm.

I

In the middle of the afternoon on October 18, 1976, six police officers armed with a warrant for the arrest of one Lawrence Marquess on charges of drug distribution arrived at Marquess' house in Bowling Green, Ky. In the house at the time the police arrived were one of Marquess' housemates, Dennis Saddler, and four visitors, Keith Northern, Linda Braden, Vanessa Cox, and petitioner David Rawlings. While searching unsuccessfully in the house for Marquess, several police officers smelled marihuana smoke and saw marihuana seeds on the mantel in one of the bedrooms. After conferring briefly, Officers Eddie Railey and John Bruce left to obtain a search warrant. While Railey and Bruce were gone, the other four officers detained the occupants of the house in the living room, allowing them to leave only if they consented to a body search. Northern and Braden did consent to such a search and were permitted to depart. Saddler, Cox, and petitioner remained seated in the living room.

Approximately 45 minutes later, Railey and Bruce returned with a warrant authorizing them to search the house. Railey read the warrant to Saddler, Cox, and petitioner, and also read "*Miranda*" warnings from a card he carried in his pocket. At that time, Cox was seated on a couch with petitioner seated to her left. In the space between them was Cox's handbag.

After Railey finished his recitation, he approached petitioner

and told him to stand. Officer Don Bivens simultaneously approached Cox and ordered her to empty the contents of her purse onto a coffee table in front of the couch. Among those contents were a jar containing 1,800 tablets of LSD and a number of smaller vials containing benzphetamine, methamphetamine, methyprylan, and pentobarbital, all of which are controlled substances under Kentucky law.

Upon pouring these objects out onto the coffee table, Cox turned to petitioner and told him "to take what was his." App. 62. Petitioner, who was standing in response to Officer Railey's command, immediately claimed ownership of the controlled substances. At that time, Railey searched petitioner's person and found $4,500 in cash in petitioner's shirt pocket and a knife in a sheath at petitioner's side. Railey then placed petitioner under formal arrest.

Petitioner was indicted for possession with intent to sell the various controlled substances recovered from Cox's purse. At the suppression hearing, he testified that he had flown into Bowling Green about a week before his arrest to look for a job and perhaps to attend the local university. He brought with him at that time the drugs later found in Cox's purse. Initially, petitioner stayed in the house where the arrest took place as the guest of Michael Swank, who shared the house with Marquess and Saddler. While at a party at that house, he met Cox and spent at least two nights of the next week on a couch at Cox's house.

On the morning of petitioner's arrest, Cox had dropped him off at Swank's house where he waited for her to return from class. At that time, he was carrying the drugs in a green bank bag. When Cox returned to the house to meet him, petitioner dumped the contents of the bank bag into Cox's purse. Although there is dispute over the discussion that took place, petitioner testified that he "asked her if she would carry this for me, and she said, 'yes'. . . ." App. 42.[1] Petitioner

[1] At petitioner's trial, Vanessa Cox described the transfer of possession quite differently. She testified that, as she and petitioner were getting

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then left the room to use the bathroom and, by the time he returned, discovered that the police had arrived to arrest Marquess.

The trial court denied petitioner's motion to suppress the drugs and the money and to exclude the statements made by petitioner when the police discovered the drugs. According to the trial court, the warrant obtained by the police authorized them to search Cox's purse. Moreover, even if the search of the purse was illegal, the trial court believed that petitioner lacked "standing" to contest that search. Finally, the trial court believed that the search that revealed the money and the knife was permissible "under the exigencies of the situation." *Id.*, at 21. After a bench trial, petitioner was found guilty of possession with intent to sell LSD and of possession of benzphetamine, methamphetamine, methyprylan, and pentobarbital.

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ready to leave the house, petitioner asked "would you please carry this for me" and simultaneously dumped the drugs into her purse. According to Cox, she looked into her purse, saw the drugs, and said "would you please take this, I do not want this in my purse." Petitioner allegedly replied "okay, just a minute, I will," and then went out of the room. At that point the police entered the house. Tr. 12–14. David Saddler, who was in the next room at the time of the transfer, corroborated Cox's version of the events, testifying that he heard Cox say "I do not want this in my purse" and that he heard petitioner reply "don't worry" or something to that effect. *Id.*, at 100.

Although none of the lower courts specifically found that Cox did not consent to the bailment, the trial court clearly was skeptical about petitioner's version of events:

"The Court finds it unbelievable that just of his own volition, David Rawlings put the contraband in the purse of Mrs. Cox just a minute before the officers knocked on the door. He had been carrying these things around Bowling Green in a bank deposit sack for days, either on his person or in his pocket, and it is unworthy of belief that just immediately before the officers knocked on the door that he put them in the purse of Vanessa Cox. It is far more plausible to believe that he saw the officers pull up out front and then elected to 'push them off' on Vanessa Cox, believing that search was probable, possible, and emminent [*sic*]." App. 21.

The Kentucky Court of Appeals affirmed. Disagreeing with the trial court, the appellate court held that petitioner did have "standing" to dispute the legality of the search of Cox's purse but that the detention of the five persons present in the house and the subsequent searches were legitimate because the police had probable cause to arrest all five people in the house when they smelled the marihuana smoke and saw the marihuana seeds.

The Supreme Court of Kentucky in turn affirmed, but again on a somewhat different rationale. See 581 S. W. 2d 348 (1979). According to the Supreme Court, petitioner had no "standing" because he had no "legitimate or reasonable expectation of freedom from governmental intrusion" into Cox's purse. *Id.*, at 350, citing *Rakas* v. *Illinois*, 439 U. S. 128 (1978). Moreover, according to the Supreme Court, the search uncovering the money in petitioner's pocket, which search followed petitioner's admission that he owned the drugs in Cox's purse, was justifiable as incident to a lawful arrest based on probable cause.

II

In this Court, petitioner challenges three aspects of the judgment below. First, he claims that he did have a reasonable expectation of privacy in Cox's purse so as to allow him to challenge the legality of the search of that purse.[2] Second, petitioner argues that his admission of ownership was the fruit of an illegal detention that began when the police refused to let the occupants of the house leave unless they consented to a search. Third, petitioner contends that the search uncovering the money and the knife was itself illegal.

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[2] Petitioner also claims that he is entitled to "automatic standing" to contest the legality of the search that uncovered the drugs. See *Jones* v. *United States*, 362 U. S. 257 (1960). Our decision today in *United States* v. *Salvucci*, *ante*, p. 83, disposes of this contention adversely to him.

A

In holding that petitioner could not challenge the legality of the search of Cox's purse, the Supreme Court of Kentucky looked primarily to our then recent decision in *Rakas* v. *Illinois, supra,* where we abandoned a separate inquiry into a defendant's "standing" to contest an allegedly illegal search in favor of an inquiry that focused directly on the substance of the defendant's claim that he or she possessed a "legitimate expectation of privacy" in the area searched. See *Katz* v. *United States,* 389 U. S. 347 (1967). In the present case, the Supreme Court of Kentucky looked to the "totality of the circumstances," including petitioner's own admission at the suppression hearing that he did not believe that Cox's purse would be free from governmental intrusion,[3] and held that petitioner "[had] not made a sufficient showing that his legitimate or reasonable expectations of privacy were violated" by the search of the purse. 581 S. W. 2d, at 350.

We believe that the record in this case supports that conclusion. Petitioner, of course, bears the burden of proving not only that the search of Cox's purse was illegal, but also that he had a legitimate expectation of privacy in that purse. See

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[3] Under questioning by his own counsel, petitioner testified as follows:

"Q72 Did you feel that Vannessa [*sic*] Cox's purse would be free from the intrusion of the officers as you sat there? When you put the pills in her purse, did you feel that they would be free from governmental intrusion?

"A No sir." App. 48.

The trial court also credited this statement, noting immediately:

"You know what, I believe this boy tells the truth. You all wanted to bring him in here before the Court, and he said, 'no, I want a jury.' He said 'no, I don't understand that.' And I don't blame him for not understanding that. That's the first time I've ever seen such a thing brought on before this Court, and I've been here for quite a few years as an attorney, of course.

"Now, no question but what the boy fully understood what was meant by that. None at all in the Court's mind. If you want to go ahead, you can do so." *Ibid.*

Rakas v. *Illinois, supra,* at 131, n. 1; *Simmons* v. *United States,* 390 U. S. 377, 389–390 (1968). At the time petitioner dumped thousands of dollars worth of illegal drugs into Cox's purse, he had known her for only a few days. According to Cox's uncontested testimony, petitioner had never sought or received access to her purse prior to that sudden bailment. Contrast *Jones* v. *United States,* 362 U. S. 257, 259 (1960). Nor did petitioner have any right to exclude other persons from access to Cox's purse. See *Rakas* v. *Illinois, supra,* at 149. In fact, Cox testified that Bob Stallons, a longtime acquaintance and frequent companion of Cox's, had free access to her purse and on the very morning of the arrest had rummaged through its contents in search of a hairbrush. Moreover, even assuming that petitioner's version of the bailment is correct and that Cox did consent to the transfer of possession,[4] the precipitous nature of the transaction hardly supports a reasonable inference that petitioner took normal precautions to maintain his privacy. Contrast *United States* v. *Chadwick,* 433 U. S. 1, 11 (1977); *Katz* v. *United States, supra,* at 352. In addition to all the foregoing facts, the record also contains a frank admission by petitioner that he had no subjective expectation that Cox's purse would remain free from governmental intrusion, an admission credited by both the trial court and the Supreme Court of Kentucky. See n. 3, *supra,* and accompanying text.

Petitioner contends nevertheless that, because he claimed ownership of the drugs in Cox's purse, he should be entitled to challenge the search regardless of his expectation of privacy. We disagree. While petitioner's ownership of the drugs is undoubtedly one fact to be considered in this case, *Rakas* emphatically rejected the notion that "arcane" concepts of property law ought to control the ability to claim the protections of the Fourth Amendment. See 439 U. S., at 149–150, n. 17. See also *United States* v. *Salvucci, ante,* at 91–92.

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[4] But see n. 1, *supra.*

Had petitioner placed his drugs in plain view, he would still have owned them, but he could not claim any legitimate expectation of privacy. Prior to *Rakas*, petitioner might have been given "standing" in such a case to challenge a "search" that netted those drugs but probably would have lost his claim on the merits. After *Rakas*, the two inquiries merge into one: whether governmental officials violated any legitimate expectation of privacy held by petitioner.

In sum, we find no reason to overturn the lower court's conclusion that petitioner had no legitimate expectation of privacy in Cox's purse at the time of the search.

B

We turn, then, to petitioner's contention that the occupants of the house were illegally detained by the police and that his admission to ownership of the drugs was a fruit of that illegal detention. Somewhat surprisingly, none of the courts below confronted this issue squarely, even though it would seem to be presented under any analysis of this case except that adopted by the Kentucky Court of Appeals, which concluded that the police officers were entitled to arrest the five occupants of the house as soon as they smelled marihuana smoke and saw the marihuana seeds.

We can assume both that this issue was properly presented in the Kentucky courts and that the police violated the Fourth and Fourteenth Amendments by detaining petitioner and his companions in the house while they obtained a search warrant for the premises. Even given such a constitutional violation, however, exclusion of petitioner's admissions would not be necessary unless his statements were the result of his illegal detention. As we noted in *Brown* v. *Illinois*, 422 U. S. 590, 603 (1975), where we rejected a "but for" approach to the admissibility of such statements, "persons arrested illegally frequently may decide to confess, as an act of free will unaffected by the initial illegality." In *Brown* we also set forth

the standard for determining whether such statements were tainted by antecedent illegality:

> "The question whether a confession is the product of a free will . . . must be answered on the facts of each case. No single fact is dispositive. . . . The *Miranda* warnings are an important factor, to be sure, in determining whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factor to be considered. The temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct are all relevant. The voluntariness of the statement is a threshold requirement. And the burden of showing admissibility rests, of course, on the prosecution." *Id.*, at 603–604 (footnotes and citations omitted).

See also *Dunaway* v. *New York*, 442 U. S. 200, 218 (1979). As already noted, the lower courts did not undertake the inquiry suggested by *Brown*. Nevertheless, as in *Brown* itself, we believe that "the trial resulted in a record of amply sufficient detail and depth from which the determination may be made." 422 U. S., at 604.

First, we observe that petitioner received *Miranda* warnings only moments before he made his incriminating statements, a consideration *Brown* treated as important, although not dispositive, in determining whether the statements at issue were obtained by exploitation of an illegal detention.

Second, *Brown* calls our attention to the "temporal proximity of the arrest and the confession. . . ." *Id.*, at 603. In this case, petitioner and his companions were detained for a period of approximately 45 minutes. Although under the strictest of custodial conditions such a short lapse of time might not suffice to purge the initial taint, we believe it necessary to examine the precise conditions under which the occupants of this house were detained. By all accounts, the three people who chose not to consent to a body search in order to leave sat

quietly in the living room or, at least initially, moved freely about the first floor of the house. Upon being informed that he would be detained until Officers Railey and Bruce returned with a search warrant, Dennis Saddler "just went on in and got a cup of coffee and sat down and started waiting" for the officers to return. Tr. 109. When asked by petitioner's counsel whether there was "any show of force or violence by you or Dave or anybody else," Saddler explained:

> "A Oh, no. One person tried to sick my four and a half month old dog on one of the officers. (laughing)
>
> "Q48 You're saying that in a joking manner?
>
> "A Yeah. He just wagged his tail.
>
> "Q49 And other than that, that's the most violent thing you proposed toward these police officers; is that correct?
>
> "A Yes sir. I would—they were more or less courteous to us and were trying to be—we offered them coffee or a drink of water or whatever they wanted." *Id.*, at 113.

According to Saddler, petitioner's first reaction when the officers told him that he would be detained pending issuance of a search warrant was to "[get] up and put an album on. . . ." *Id.*, at 110. As even the dissenting judge in the Court of Appeals noted: "[A]ll witnesses for both sides of this litigation agreed to the congenial atmosphere existing during the forty-five minute interval. . . ." App. 73 (Lester, J., dissenting). We think that these circumstances outweigh the relatively short period of time that elapsed between the initiation of the detention and petitioner's admissions.

Third, *Brown* suggests that we inquire whether any circumstances intervened between the initial detention and the challenged statements. Here, where petitioner's admissions were apparently spontaneous reactions to the discovery of his drugs in Cox's purse, we have little doubt that this factor weighs heavily in favor of a finding that petitioner acted "of free will unaffected by the initial illegality." 422 U. S., at

603. Nor need we speculate as to petitioner's motivations in admitting ownership of the drugs, since he explained them later to Lawrence Marquess and Dennis Saddler. Under examination by petitioner's counsel, Marquess testified as follows:

> "Q1 Mr. Marquess, when you were talking to David Rawlings in the jail, and he told you that the things were dumped out on the table and that he admitted they were his, did he tell you why he did that?
>
> "A Well, he said Vanessa [Cox] was freaking out, you know, or something.
>
> "Q2 Did he tell you that he did that to protect her or words to that effect?
>
> "A Well, now, I mean he said he was going to take what was his, I mean, he wasn't going to try to pin that on her." Tr. 130.

Saddler offered additional insight into petitioner's motivations:

> "Q114 Did Dave Rawlings make any statements to you in jail about any of these substances?
>
> "A Yes sir.
>
> "Q115 And would you tell the Court what statements he made?
>
> "A Well, his main concern was whether or not Vanessa Cox was going to say anything, and he just kept talking and harping on that, and I don't know how many times he mentioned it, you know, 'I hope she doesn't break,' or hope she doesn't talk. And I saw her walking on the sidewalk through the windows and got a little upset about that because we all thought she turned State's evidence." *Id.*, at 103.

Fourth, *Brown* mandates consideration of "the purpose and flagrancy of the official misconduct. . . ." 422 U. S., at 604. The officers who detained petitioner and his companions uniformly testified that they took those measures to avoid the

asportation or destruction of the marihuana they thought was present in the house and that they believed that a warrant authorizing them to search the house would also authorize them to search the five occupants of the house. While the legality of temporarily detaining a person at the scene of suspected drug activity to secure a search warrant may be an open question,[5] and while the officer's belief about the scope of the warrant they obtained may well have been erroneous under our recent decision in *Ybarra* v. *Illinois*, 444 U. S. 85 (1979), the conduct of the police here does not rise to the level of conscious or flagrant misconduct requiring prophylactic exclusion of petitioner's statements. Contrast *Brown* v. *Illinois*, *supra*, at 605.

Finally, while *Brown* requires that the voluntariness of the statement be established as a threshold requirement, petitioner has not argued here or in any other court that his admission to ownership of the drugs was anything other than voluntary. Thus, examining the totality of circumstances present in this case, we believe that the Commonwealth of Kentucky has carried its burden of showing that petitioner's statements were acts of free will unaffected by any illegality in the initial detention.

C

Petitioner also contends that the search of his person that uncovered the money and the knife was illegal. Like the

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[5] "The reasonableness of seizures that are less intrusive than a traditional arrest, see *Dunaway* v. *New York*, 442 U. S. 200, 209–210 (1979); *Terry* v. *Ohio*, 392 U. S. 1, 20 (1968), depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.' *Pennsylvania* v. *Mimms*, 434 U. S. 106, 109 (1977); *United States* v. *Brignoni-Ponce*, [422 U. S. 873, 878 (1975)]. Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Brown* v. *Texas*, 443 U. S. 47, 50–51 (1979).

Supreme Court of Kentucky, we have no difficulty upholding this search as incident to petitioner's formal arrest. Once petitioner admitted ownership of the sizable quantity of drugs found in Cox's purse, the police clearly had probable cause to place petitioner under arrest. Where the formal arrest followed quickly on the heels of the challenged search of petitioner's person, we do not believe it particularly important that the search preceded the arrest rather than vice versa. See *Bailey* v. *United States*, 128 U. S. App. D. C. 354, 357, 389 F. 2d 305, 308 (1967); *United States* v. *Brown*, 150 U. S. App. D. C. 113, 114, 463 F. 2d 949, 950 (1972). See also *Cupp* v. *Murphy*, 412 U. S. 291 (1973); *United States* v. *Gorman*, 355 F. 2d 151, 160 (CA2 1965) (dictum), cert. denied, 384 U. S. 1024 (1966).[6]

III

Having found no error in the lower courts' refusal to suppress the evidence challenged by petitioner, we believe that the judgment of the Supreme Court of Kentucky should be, and the same hereby is,

Affirmed.

MR. JUSTICE BLACKMUN, concurring.

I join the Court's opinion, but I write separately to explain my somewhat different approach to the issues addressed in Part II–A thereof.

In my view, *Rakas* v. *Illinois*, 439 U. S. 128 (1978), recognized two analytically distinct but "invariably intertwined" issues of substantive Fourth Amendment jurisprudence. *Id.*, at 139. The first is "whether [a] disputed search or seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect," *id.*, at 140; the second

[6] The fruits of the search of petitioner's person were, of course, not necessary to support probable cause to arrest petitioner.

is whether "the challenged search or seizure violated [that] Fourth Amendment righ[t]." *ibid.* The first of these questions is answered by determining whether the defendant has a "legitimate expectation of privacy" that has been invaded by a governmental search or seizure. The second is answered by determining whether applicable cause and warrant requirements have been properly observed.

I agree with the Court that these two inquiries "merge into one," *ante,* at 106, in the sense that both are to be addressed under the principles of Fourth Amendment analysis developed in *Katz* v. *United States,* 389 U. S. 347 (1967), and its progeny. But I do not read today's decision, or *Rakas,* as holding that it is improper for lower courts to treat these inquiries as distinct components of a Fourth Amendment claim. Indeed, I am convinced that it would invite confusion to hold otherwise. It remains possible for a defendant to prove that his legitimate interest of privacy was invaded, and yet fail to prove that the police acted illegally in doing so. And it is equally possible for a defendant to prove that the police acted illegally, and yet fail to prove that his own privacy interest was affected.

Nor do I read this Court's decisions to hold that property interests cannot be, in some circumstances at least, weighty factors in establishing the existence of Fourth Amendment rights. Not every concept of ownership or possession is "arcane." Not every interest in property exists only in the desiccated atmosphere of ancient maxims and dusty books. Earlier this Term the Court recognized that "the right to exclude" is an essential element of modern property rights. *Kaiser Aetna* v. *United States,* 444 U. S. 164, 179–180 (1979). In my view, that "right to exclude" often may be a principal determinant in the establishment of a legitimate Fourth Amendment interest. Accordingly, I would confine analysis to the facts of this case. On those facts, however, I agree that petitioner's possessory interest in the vials of controlled

substances is not sufficient to create a privacy interest in Vanessa Cox's purse, and that such an interest was not otherwise conferred by any agreement between petitioner and Cox.

MR. JUSTICE WHITE, with whom MR. JUSTICE STEWART joins, concurring in part.

Although I join Parts I and II–A of the Court's opinion, I do not join Parts II–B, II–C, and III because I believe that the fruits inquiry undertaken in Part II–B should not be done in the first instance in this Court. As the Court recognizes, the Supreme Court of Kentucky did not address the question whether petitioner's admission to ownership of the drugs was the fruit of an illegal detention, even though the question was presented there. The state-court majority did state that in concluding that the search of petitioner's person was incident to a valid arrest it "disregard[ed] as irrelevant the detention during the period in which the officers were procuring a search warrant." The court also observed that "[t]his search was not explored in detail at the suppression hearing" and that "the sequence of the search of the purse and Rawlings' admission of ownership of the drugs is not clearly established in the record." The court then concluded that "[c]learly, after Rawlings admitted ownership of the drugs, the officers were entitled to arrest and search the person, or search and then arrest." 581 S. W. 2d 348, 350 (Ky. 1979).

In proceeding in this manner, the Supreme Court of Kentucky plainly failed properly to dispose of a federal question, as the Court implicitly recognizes. Because the fruits question was never addressed below and was barely mentioned in the briefs before this Court, I would vacate the judgment below and remand to permit the state court to address the question under the correct legal standard. This Court should not attempt to decide a factual issue on a record that the

state court itself apparently thought inadequate for that purpose.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

The vials of pills found in Vanessa Cox's purse and petitioner's admission that they belonged to him established his guilt conclusively. The State concedes, as it must, that the search of the purse was unreasonable and in violation of the Fourth Amendment, see *Ybarra* v. *Illinois,* 444 U. S. 85 (1979), and the Court assumes that the detention which led to the search, the seizure, and the admissions also violated the Fourth Amendment, *ante,* at 106. Nevertheless, the Court upholds the conviction. I dissent.

I

The Court holds first that petitioner may not object to the introduction of the pills into evidence because the unconstitutional actions of the police officers did not violate his personal Fourth Amendment rights. To reach this result, the Court holds that the Constitution protects an individual against unreasonable searches and seizures only if he has "a 'legitimate expectation of privacy' in the area searched." *Ante,* at 104. This holding cavalierly rejects the fundamental principle, unquestioned until today, that an interest in either the place searched or the property seized is sufficient to invoke the Constitution's protections against unreasonable searches and seizures.

The Court's examination of previous Fourth Amendment cases begins and ends—as it must if it is to reach its desired conclusion—with *Rakas* v. *Illinois,* 439 U. S. 128 (1978). Contrary to the Court's assertion, however, *Rakas* did not establish that the Fourth Amendment protects individuals against unreasonable searches and seizures only if they have a privacy interest in the place searched. The question before the Court in *Rakas* was whether the defendants could estab-

lish their right to Fourth Amendment protection simply by showing that they were "legitimately on [the] premises" searched, see *Jones* v. *United States,* 362 U. S. 257, 267 (1960). Overruling that portion of *Jones,* the Court held that when a Fourth Amendment objection is based on an interest in the place searched, the defendant must show an actual invasion of his personal privacy interest. The petitioners in *Rakas* did not claim that they had standing either under the *Jones* automatic standing rule for persons charged with possessory offenses, which the Court overrules today, see *United States* v. *Salvucci, ante,* p. 83, or because their possessory interest in the items seized gave them "actual standing." No Fourth Amendment claim based on an interest in the property seized was before the Court, and, consequently, the Court did not and could not have decided whether such a claim could be maintained. In fact, the Court expressly disavowed any intention to foreclose such a claim ("This is not to say that such [casual] visitors could not contest the lawfulness of the seizure of evidence or the search if their own property were seized during the search," 439 U. S., at 142, n. 11), and suggested its continuing validity ("[P]etitioners' claims must fail. They asserted neither a property nor a possessory interest in the automobile, *nor an interest in the property seized," id.,* at 148 (emphasis supplied)).

The decision today, then, is not supported by the only case directly cited in its favor.* Further, the Court has ignored

*The Court invites the reader to "contrast" *Jones* v. *United States,* 362 U. S. 257 (1960), which it expressly overrules, and to "see" *Simmons* v. *United States,* 390 U. S. 377, 389–390 (1968). *Ante,* at 105, 104. The passage cited in *Simmons* contains the following language: "At one time, a defendant who wished to assert a Fourth Amendment objection was required to show that he was the owner or possessor *of the seized property* or that he had a possessory interest in the searched premises." 390 U. S., at 389–390 (emphasis supplied). The Court in *Simmons* then observed that *Jones* had "relaxed" those standing requirements by holding that in a case charging a possessory offense "the Government is precluded from denying that the defendant has the requisite possessory interest to chal-

a long tradition embodying the opposite view. *United States* v. *Jeffers*, 342 U. S. 48 (1951), for example, involved a seizure of contraband alleged to belong to the defendant from a hotel room occupied by his two aunts. The Court rejected the Government's argument that because the search of the room did not invade Jeffers' privacy he lacked standing to suppress the evidence. It held that standing to object to the seizure could not be separated from standing to object to the search, for "[t]he search and seizure are . . . incapable of being untied." *Id.*, at 52. The Court then concluded that Jeffers "unquestionably had standing . . . unless the contraband nature of the narcotics seized precluded his assertion, for purposes of the exclusionary rule, of *a property interest therein.*" *Ibid.* (emphasis supplied).

Similarly, *Jones* v. *United States*, *supra*, is quite plainly premised on the understanding that an interest in the seized property is sufficient to establish that the defendant "himself was the victim of an invasion of privacy." 362 U. S., at 261. The Court observed that the "conventional standing requirement," *id.*, at 262, required the defendant to "claim either to have *owned or possessed the seized property* or to have had a substantial possessory interest in the premises searched," *id.*, at 261 (emphasis supplied). The Court relaxed that rule for defendants charged with possessory offenses because "[t]he same element . . . which has caused a dilemma, *i. e.*, that *possession both convicts and confers standing*, eliminates any necessity for a preliminary showing of an interest in the premises searched *or the property seized*, which ordinarily is

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lenge the admission of the evidence. . . ." 390 U. S., at 390. The Court also "contrasts" two other cases in connection with its subsidiary point that a "bailment" that is "precipitous" may not be enough to show that a person "took normal precautions to maintain his privacy." *Ante*, at 105. The Court also cites *Katz* v. *United States*, 389 U. S. 347 (1967), as the source of the phrase "legitimate expectation of privacy." But *Katz* did not purport to restrict the interest protected by the Fourth Amendment, see *infra*, at 119–120.

required when standing is challenged." *Id.*, at 263 (emphasis supplied). Instead, "[t]he possession on the basis of which petitioner is to be and was convicted suffices to give him standing," *id.*, at 264.

Simmons v. *United States,* 390 U. S. 377 (1968), proceeded upon a like understanding. The Court there reiterated that prior to *Jones* "a defendant who wished to assert a Fourth Amendment objection was required to show that he was the owner or possessor *of the seized property* or that he had a possessory interest in the searched premises." 390 U. S., at 389–390 (emphasis supplied). *Jones* had changed that rule only with respect to defendants charged with possessory offenses, so the defendant Garrett, who was charged with armed robbery, had to establish standing. Because he was not "legitimately on [the] premises" at the time of the search, see *Jones, supra,* at 267, "[t]he only, or at least the most natural, way in which he could found standing to object to the admission of the suitcase was to testify that he was its owner." 390 U. S., at 391 (footnote omitted). See also *Brown* v. *United States,* 411 U. S. 223, 228 (1973); *Mancusi* v. *DeForte,* 392 U. S. 364, 367 (1968).

The Court's decision today is not wrong, however, simply because it is contrary to our previous cases. It is wrong because it is contrary to the Fourth Amendment, which guarantees that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." The Court's reading of the Amendment is far too narrow. The Court misreads the guarantee of security "*in* their persons, houses, papers, and effects, *against* unreasonable searches and seizures" to afford protection only against unreasonable searches and seizures *of* persons and places.

The Fourth Amendment, it seems to me, provides in plain language that if one's security in one's "effects" is disturbed by an unreasonable search and seizure, one has been the victim of a constitutional violation; and so it has always been

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understood. Therefore the Court's insistence that in order to challenge the legality of the search one must also assert a protected interest in the premises is misplaced. The interest in the item seized is quite enough to establish that the defendant's personal Fourth Amendment rights have been invaded by the government's conduct.

The idea that a person cannot object to a search unless he can show an interest in the premises, even though he is the owner of the seized property, was squarely rejected almost 30 years ago in *United States* v. *Jeffers, supra.* There the Court stated:

> "The Government argues . . . that the search did not invade respondent's privacy and that he, therefore, lacked the necessary standing to suppress the evidence seized. The significant act, it says, is the seizure of the goods of the respondent without a warrant. We do not believe the events are so easily isolable. Rather they are bound together by one sole purpose—to locate and seize the narcotics of respondent. The search and seizure are, therefore, incapable of being untied. To hold that this search and seizure were lawful as to the respondent would permit a quibbling distinction to overturn a principle which was designed to protect a fundamental right." *Id.*, at 52.

When the government seizes a person's property, it interferes with his constitutionally protected right to be secure in his effects. That interference gives him the right to challenge the reasonableness of the government's conduct, including the seizure. If the defendant's property was seized as the result of an unreasonable search, the seizure cannot be other than unreasonable.

In holding that the Fourth Amendment protects only those with a privacy interest in the place searched, and not those with an ownership or possessory interest in the things seized, the Court has turned the development of the law of search

and seizure on its head. The history of the Fourth Amendment shows that it was designed to protect property interests as well as privacy interests; in fact, until *Jones* the question whether a person's Fourth Amendment rights had been violated turned on whether he had a property interest in the place searched or the items seized. *Jones* and *Katz* v. *United States,* 389 U. S. 347 (1967), expanded our view of the protections afforded by the Fourth Amendment by recognizing that privacy interests are protected even if they do not arise from property rights. But that recognition was never intended to exclude interests that had historically been sheltered by the Fourth Amendment from its protection. Neither *Jones* nor *Katz* purported to provide an exclusive definition of the interests protected by the Fourth Amendment. Indeed, as *Katz* recognized: "That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all." 389 U. S., at 350. Those decisions freed Fourth Amendment jurisprudence from the constraints of "subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical." *Jones,* 362 U. S., at 266. Rejection of those finely drawn distinctions as irrelevant to the concerns of the Fourth Amendment did not render property rights wholly outside its protection, however. Not every concept involving property rights, we should remember, is "arcane." Cf. *ante,* at 105.

In fact, the Court rather inconsistently denies that property rights may, by themselves, entitle one to the protection of the Fourth Amendment, but simultaneously suggests that a person may claim such protection only if his expectation of privacy in the premises searched is so strong that he may exclude all others from that place. See *ante,* at 105–106; *Rakas* v. *Illinois,* 439 U. S., at 149. Such a harsh threshold require-

ment was not imposed even in the heyday of a property rights oriented Fourth Amendment.

II

Petitioner also contends that his admission of ownership of the drugs should have been suppressed as the fruit of an unlawful detention. The state courts did not pass on that claim, and no factual record was developed which would shed light on the proper disposition of the claim. In such circumstances, it would be appropriate for us to defer to the state court and permit it to make the initial determination. Nevertheless, the majority proceeds to dispose of petitioner's claim by concluding that, even if the detention was illegal, "petitioner's statements were acts of free will unaffected by any illegality in the initial detention." *Ante,* at 110. I disagree.

Petitioner's admissions, far from being "spontaneous," *ante,* at 108, were made in response to Vanessa Cox's demand that petitioner "take what was his." In turn, it is plain that her statement was the direct product of the illegal search of her purse. And that search was made possible only because the police refused to let anyone in the house depart unless they "consented" to a body search; that detention the Court has assumed was illegal. Under these circumstances petitioner's admissions were obviously the fruit of the illegal detention and should have been suppressed.

III

In the words of Mr. Justice Frankfurter: "A decision [of a Fourth Amendment claim] may turn on whether one gives that Amendment a place second to none in the Bill of Rights, or considers it on the whole a kind of nuisance, a serious impediment in the war against crime." *Harris* v. *United States,* 331 U. S. 145, 157 (1947) (dissenting opinion). Today a majority of the Court has substantially cut back the protection afforded by the Fourth Amendment and the ability of the

people to claim that protection, apparently out of concern lest the government's ability to obtain criminal convictions be impeded. A slow and steady erosion of the ability of victims of unconstitutional searches and seizures to obtain a remedy for the invasion of their rights saps the constitutional guarantee of its life just as surely as would a substantive limitation. Because we are called on to decide whether evidence should be excluded only when a search has been "successful," it is easy to forget that the standards we announce determine what government conduct is reasonable in searches and seizures directed at persons who turn out to be innocent as well as those who are guilty. I continue to believe that ungrudging application of the Fourth Amendment is indispensable to preserving the liberties of a democratic society. Accordingly, I dissent.

MAHER, COMMISSIONER OF INCOME MAINTENANCE OF CONNECTICUT v. GAGNE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 78-1888. Argued January 9, 1980—Decided June 25, 1980

Respondent is a recipient of benefits under Connecticut's federally funded Aid to Families with Dependent Children (AFDC) program. She brought this action in Federal District Court under 42 U. S. C. § 1983, alleging that Connecticut's AFDC regulations denied her credit for substantial portions of her actual work-related expenses, thus reducing the level of her benefits, and that such regulations violated the Social Security Act and the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Ultimately, the case was settled and the District Court entered a consent decree that provided for a substantial increase in the standard allowances for work-related expenses and gave AFDC recipients the right to prove that their actual work-related expenses were in excess of the standard. The District Court then awarded respondent's counsel a fee pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, 42 U. S. C. § 1988, which provides that in any action to enforce 42 U. S. C. § 1983, *inter alia*, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. The court held that respondent was entitled to fees under the Act because, in addition to her statutory claim, she had alleged constitutional claims that were sufficiently substantial to support federal jurisdiction. The Court of Appeals affirmed.

Held:

1. Under § 1988 the district courts' authority to award attorney's fees is not limited to cases in which § 1983 is invoked as a remedy for a constitutional violation or a violation of a federal statute providing for the protection of civil or equal rights. As the Court holds in *Maine* v. *Thiboutot*, *ante*, p. 1, § 1988 applies to all types of § 1983 actions, including actions based solely on Social Security Act violations. Thus, even if respondent's claim could be characterized as arising solely out of a Social Security Act violation, this would not preclude the award of attorney's fees under § 1988. Pp. 128–129.

2. The fact that respondent prevailed through a settlement rather than through litigation does not preclude her from claiming attorney's fees

as the "prevailing party" within the meaning of § 1988. And petitioner's contention that respondent did not gain sufficient relief through the consent decree to be considered the prevailing party is without merit in view of the District Court's contrary finding, which was upheld by the Court of Appeals. Pp. 129–130.

3. The District Court was not barred by the Eleventh Amendment from awarding attorney's fees against the State. Respondent alleged constitutional violations which both courts below held to be sufficiently substantial to support federal jurisdiction, and the constitutional issues remained in the case until the consent decree was entered. Under these circumstances, petitioner's Eleventh Amendment claim is foreclosed by *Hutto* v. *Finney*, 437 U. S. 678. In *Hutto*, the Court rejected the argument that the general language of the Act was insufficient to remove an Eleventh Amendment barrier, noting that "this Court has never viewed the Eleventh Amendment as barring such awards, even in suits between States and individual litigants." *Id.*, at 695. Moreover, even if the Eleventh Amendment would otherwise present a barrier to an award of attorney's fees against a State, Congress clearly acted within its power under § 5 of the Fourteenth Amendment in removing that barrier. Under § 5, Congress may pass any legislation that is appropriate to enforce the Fourteenth Amendment's guarantees, and a statute awarding attorney's fees in a case in which the plaintiff prevails on a wholly statutory, non-civil-rights claim pendent to a substantial constitutional claim or in one in which both a statutory and a substantial constitutional claim are settled favorably to the plaintiff without adjudication falls within the category of "appropriate" legislation. Pp. 130–133.

594 F. 2d 336, affirmed.

STEVENS, J., delivered the opinion of the Court, in which BRENNAN, STEWART, WHITE, MARSHALL, and BLACKMUN, JJ., joined, and in Part II of which BURGER, C. J., and POWELL and REHNQUIST, JJ., joined. POWELL, J., filed an opinion concurring in part and concurring in the judgment, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 133.

Edmund C. Walsh, Assistant Attorney General of Connecticut, argued the cause for petitioner. With him on the brief was *Carl R. Ajello*, Attorney General.

Joan Eisenman Pilver argued the cause for respondent. With her on the brief were *Michael B. Trister* and *David C. Shaw*.

MR. JUSTICE STEVENS delivered the opinion of the Court.

In an action brought under 42 U. S. C. § 1983, the court, in its discretion, may allow the prevailing party to recover a reasonable attorney's fee as part of the award of costs.[1] The question presented by this petition is whether fees may be assessed against state officials after a case has been settled by the entry of a consent decree, without any determination that the plaintiff's constitutional rights have been violated.

Petitioner is responsible for the administration of Connecticut's Aid to Families with Dependent Children (AFDC), a federally funded public assistance program.[2] Respondent is a working recipient of AFDC benefits. Under state and federal regulations, the amount of her benefits depends, in part, on her net earnings, which are defined as her wages minus certain work-related expenses. In 1975 respondent filed a complaint in the United States District Court for the District of Connecticut alleging that Connecticut's AFDC regulations denied her credit for substantial portions of her actual work-related expenses,[3] thus reducing the level of her benefits. Her

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[1] The Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641, provides:

"In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

This statute is codified in 42 U. S. C. § 1988; in the codification § 1979 of the Revised Statutes has been renumbered to refer to § 1983 of Title 42 of the United States Code.

[2] The action was filed against petitioner's predecessor in office, Nicholas Norton, Commissioner of Welfare of the State of Connecticut. The title of the position has since been changed to "Commissioner of Income Maintenance." We shall simply refer to the Commissioner as "petitioner."

[3] Connecticut's Department of Social Services Manual provided that only certain enumerated expenses could be deducted; the amounts allowed

complaint alleged that these regulations violated § 402 (a)(7) of the Social Security Act, 42 U. S. C. § 602 (a)(7),[4] and the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution.[5] The complaint further alleged that relief was authorized by 42 U. S. C. § 1983[6] and invoked federal jurisdiction under 28 U. S. C. § 1343.[7]

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for lunches and automobile transportation were limited to 50 cents per working day and 6 cents per mile respectively. App. 66. The complaint alleged that respondent's actual transportation expenses were 13.9 cents per mile and that her meal expenses amounted to $1.65 per day. *Id.*, at 8.

[4] The statute requires States to take into consideration "any expenses reasonably attributable to the earning of . . . income." In *Shea* v. *Vialpando*, 416 U. S. 251, this Court held that participating States could not place arbitrary limits on the amount of work-related expenses that could be claimed by recipients. Although States may use standardized allowances for the sake of administrative convenience, they must give recipients the opportunity to demonstrate that their actual expenses exceed the standard.

[5] In her complaint respondent alleged:

"28. Defendants' practice and policy constitute an invidious discrimination against persons whose work-related expenses exceed the allowances set forth in Index 332.31 and violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by forbidding plaintiff and the class she represents ever from controverting the presumption that their work-related expenses exceeding the transportation and food allowances of Index 332.31 are reasonable.

. . . . .

"32. Defendants' practice and policy violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution in that:

"a) Defendants' practice and policy establish an irrebutable [*sic*] presumption that the plaintiff's work-related transportation and lunch allowances are unreasonable and operate to deny plaintiff and the class she represents a fair opportunity to rebut it.

"b) The standard lunch and transportation allowances contained in Index 332.31 are arbitrary in that they were not developed by a statistically fair averaging, nor do they reflect current prices." App. 9–10.

[6] "Every person, who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be sub-

[*Footnote 7 is on p. 126*]

A few months after the action was commenced, while discovery was underway, petitioner amended the AFDC regulations to authorize a deduction for all reasonable work-related expenses. After an interval of almost a year and a half, respondent filed an amended complaint alleging that actual expenses in excess of certain standard allowances were still being routinely disallowed. Thereafter, a settlement was negotiated and the District Court entered a consent decree that, among other things, provided for a substantial increase in the standard allowances and gave AFDC recipients the right to prove that their actual work-related expenses were in excess of the standard.[8] The parties informally agreed that the question whether respondent was entitled to recover attorney's fees would be submitted to the District Court after the entry of the consent decree.

Following an adversary hearing, the District Court awarded respondent's counsel a fee of $3,012.19. 455 F. Supp. 1344

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jected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[7] Title 28 U. S. C. §§ 1343 (3) and (4) provide as follows:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

. . . . .

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

"(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

[8] As is customary, the consent decree did not purport to adjudicate respondent's statutory or constitutional claims. Rather, it explicitly stated that "[n]othing in this Consent Decree is intended to constitute an admission of fault by either party to this action." App. 76.

(1978). The court held that respondent was the "prevailing party" within the meaning of § 1988 because, while not prevailing "in every particular," she had won "substantially all of the relief originally sought in her complaint" in the consent decree. *Id.*, at 1347. The court also rejected petitioner's argument that an award of fees against him was barred by the Eleventh Amendment in the absence of a judicial determination that respondent's constitutional rights had been violated. Relying on the basic policy against deciding constitutional claims unnecessarily, the court held that respondent was entitled to fees under the Act because, in addition to her statutory claim, she had alleged constitutional claims that were sufficiently substantial to support federal jurisdiction under the reasoning of *Hagans* v. *Lavine*, 415 U. S. 528.

The Court of Appeals affirmed, 594 F. 2d 336 (CA2 1979), holding that Congress intended to authorize an award of fees in this kind of situation and that it had the constitutional power to do so.[9] We granted certiorari to consider both the statutory and constitutional questions. 444 U. S. 824.

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[9] The court rejected petitioner's constitutional claim on two grounds. First, it held that the Eleventh Amendment does not apply to an award of attorney's fees because such fees are ancillary to the imposition of prospective relief within the reasoning of *Edelman* v. *Jordan*, 415 U. S. 651. Second, the court held that, even if the Eleventh Amendment did apply, Congress had the power to authorize the assessment of fees in a case such as this under the Fourteenth Amendment:

"The State contends, however, that Congress' power under the Fourteenth Amendment to override state sovereign immunity extends only to suits in which a party prevails on a *constitutional* claim. On this view, Congress cannot validly authorize a fee award against a state in the absence of a judicial determination that plaintiff had a meritorious constitutional claim. We disagree. We think it is within Congress' Fourteenth Amendment power to authorize a fee award when a party prevails on a statutory claim as long as the pendent constitutional claim is a substantial one and arises out of the same operative facts. Such a fee award furthers the Congressional goal of encouraging suits to vindicate constitutional rights without undermining the longstanding judicial policy of avoiding unnecessary decision of important constitutional issues. As we understand the

I

Petitioner's first argument is that Congress did not intend to authorize the award of attorney's fees in every type of § 1983 action, but rather limited the courts' authority to award fees to cases in which § 1983 is invoked as a remedy for a constitutional violation or a violation of a federal statute providing for the protection of civil rights or equal rights. In support of this contention, petitioner relies on our holding in *Chapman* v. *Houston Welfare Rights Organization*, 441 U. S. 600, that there is no federal jurisdiction under § 1343 over § 1983 claims outside these categories and that there is therefore no jurisdiction under § 1343 over a § 1983 claim based solely on a violation of the Social Security Act. Characterizing respondent's claim in this case as arising solely out of a Social Security Act violation, petitioner argues that the District Court had no authority under § 1988 to award her attorney's fees.

Even if petitioner's characterization of respondent's claim were correct,[10] his argument would have to be rejected. In *Maine* v. *Thiboutot*, *ante*, p. 1, decided this day, we hold that § 1988 applies to all types of § 1983 actions, including actions based solely on Social Security Act violations. As MR. JUSTICE BRENNAN's opinion for the Court in *Thiboutot*

Supreme Court decisions, any appropriate means of implementing the Fourteenth Amendment overrides the State's Eleventh Amendment rights, see, *e. g.*, *Fitzpatrick* v. *Bitzer*, *supra*, 427 U. S., at 453, 456; *Katzenbach* v. *Morgan*, 384 U. S. 641, 648–650 (1966). We hold that the authorization of attorneys' fees to be awarded under the standards set forth above is an appropriate way to achieve the competing goals described above." (Emphasis in original.) 594 F. 2d, at 342.

[10] Petitioner ignores the fact that respondent did allege constitutional claims which the District Court and the Court of Appeals both found to be sufficiently substantial to support federal jurisdiction under *Hagans* v. *Lavine*, 415 U. S. 528. Under these circumstances petitioner could not have prevailed on his statutory argument even if the Court had reached the opposite result in *Thiboutot*. See n. 15, *infra*.

demonstrates, neither the language of § 1988 nor its legislative history provides any basis for importing the distinctions *Chapman* made among § 1983 actions for purposes of federal jurisdiction into the award of attorney's fees by a court that possesses jurisdiction over the claim.[11]

We also find no merit in petitioner's suggestion that respondent was not the "prevailing party" within the meaning of § 1988. The fact that respondent prevailed through a settlement rather than through litigation does not weaken her claim to fees. Nothing in the language of § 1988 conditions the District Court's power to award fees on full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated. Moreover, the Senate Report expressly stated that "for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief." S. Rep. No. 94–1011, p. 5 (1976).

Nor can we accept petitioner's contention that respondent

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[11] The jurisdictional statute at issue in *Chapman*, 28 U. S. C. § 1343, specifically limits district court jurisdiction to cases in which the plaintiff alleges a violation of a right secured by the Constitution or by a federal statute "providing for equal rights" or "civil rights." Inasmuch as it does not create substantive rights at all, but merely provides a remedy for the violation of rights conferred by the Constitution or other statutes, § 1983 does not fall within the category of statutes providing for equal rights or civil rights. Therefore, there is not automatically federal jurisdiction under § 1343 whenever a plaintiff files a § 1983 claim; rather, the court must look to the underlying substantive right that was allegedly violated to determine whether that right was conferred by the Constitution or by a civil rights statute.

Section 1988 does not contain language like that in § 1343. Rather, § 1988 provides that attorney's fees may be awarded to the prevailing party "[i]n any action or proceeding to enforce [§ 1983]." Although the reference to actions "to enforce" § 1983 is somewhat imprecise in light of the fact that § 1983 does not itself create substantive rights, the legislative history makes it perfectly clear that the Act was intended to apply in any action for which § 1983 provides a remedy. See *Maine* v. *Thiboutot, ante,* at 9–10.

did not gain sufficient relief through the consent decree to be considered the prevailing party. The District Court's contrary finding was based on its familiarity with the progress of the litigation through the pleading, discovery, and settlement negotiation stages. That finding was upheld by the Court of Appeals, and we see no reason to question its validity. See *Graver Mfg. Co.* v. *Linde Co.*, 336 U. S. 271, 275.

II

Petitioner's second argument is that, regardless of Congress' intent, a federal court is barred by the Eleventh Amendment from awarding fees against a State in a case involving a purely statutory, non-civil-rights claim.[12] Petitioner argues that Congress may empower federal courts to award fees against the States only insofar as it is exercising its power under § 5 of the Fourteenth Amendment to enforce substantive rights conferred by that Amendment. Thus, petitioner contends that fees can only be assessed in § 1983 actions brought to vindicate Fourteenth Amendment rights or to enforce civil rights statutes that were themselves enacted pursuant to § 5 of the Fourteenth Amendment.[13]

In this case, there is no need to reach the question whether a federal court could award attorney's fees against a State based on a statutory, non-civil-rights claim. For, contrary to petitioner's characterization, respondent did allege violations of her Fourteenth Amendment due process and equal protec-

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[12] The Eleventh Amendment provides:

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

The Eleventh Amendment issue was not before the Court in *Thiboutot* because that case involved an award of fees by a state court pursuant to § 1988. *Ante*, at 9, n. 7.

[13] "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

tion rights, which the District Court and the Court of Appeals both held to be sufficiently substantial to support federal jurisdiction under *Hagans* v. *Lavine*, 415 U. S. 528. Although petitioner is correct that the trial judge did not find any constitutional violation, the constitutional issues remained in the case until the entire dispute was settled by the entry of a consent decree. Under these circumstances, petitioner's Eleventh Amendment claim is foreclosed by our decision in *Hutto* v. *Finney*, 437 U. S. 678.

In *Hutto*, we rejected the argument of the Attorney General of Arkansas that the general language of § 1988 was insufficient to overcome a State's claim of immunity under the Eleventh Amendment, noting that "[t]he Court has never viewed the Eleventh Amendment as barring such awards, even in suits between States and individual litigants." [14] *Id.*, at

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[14] Referring to the argument of the Attorney General, we said:

"[H]e argues that these plain indications of legislative intent are not enough. In his view, Congress must enact express statutory language making the States liable if it wishes to abrogate their immunity. The Attorney General points out that this Court has sometimes refused to impose retroactive liability on the States in the absence of an extraordinarily explicit statutory mandate. See *Employees* v. *Missouri Public Health & Welfare Dept.*, 411 U. S. 279; see also *Edelman* v. *Jordan*, 415 U. S. 651. But these cases concern retroactive liability for prelitigation conduct rather than expenses incurred in litigation seeking only prospective relief.

"The Act imposes attorney's fees 'as part of the costs.' Costs have traditionally been awarded without regard for the States' Eleventh Amendment immunity. The practice of awarding costs against the States goes back to 1849 in this Court. See *Missouri* v. *Iowa*, 7 How. 660, 681; *North Dakota* v. *Minnesota*, 263 U. S. 583 (collecting cases). The Court has never viewed the Eleventh Amendment as barring such awards, even in suits between States and individual litigants.

"In *Fairmont Creamery Co.* v. *Minnesota*, 275 U. S. 70, the State challenged this Court's award of costs, but we squarely rejected the State's claim of immunity. Far from requiring an explicit abrogation of state immunity, we relied on a statutory mandate that was entirely silent on the question of state liability. The power to make the award was supported by 'the inherent authority of the Court in the orderly administra-

695. Moreover, even if the Eleventh Amendment would otherwise present a barrier to an award of fees against a State, Congress was clearly acting within its power under § 5 of the Fourteenth Amendment in removing that barrier. Under § 5 Congress may pass any legislation that is appropriate to enforce the guarantees of the Fourteenth Amendment. A statute awarding attorney's fees to a person who prevails on a Fourteenth Amendment claim falls within the category of "appropriate" legislation. And clearly Congress was not limited to awarding fees only when a constitutional or civil rights claim is actually decided. We agree with the courts below that Congress was acting within its enforcement power in allowing the award of fees in a case in which the plaintiff prevails on a wholly statutory, non-civil-rights claim pendent to a substantial constitutional claim or in one in which both a statutory and a substantial constitutional claim are settled favorably to the plaintiff without adjudication.[15] As

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tion of justice as between all parties litigant.' *Id.*, at 74. A federal court's interest in orderly, expeditious proceedings 'justifies [it] in treating the state just as any other litigant and in imposing costs upon it' when an award is called for. *Id.*, at 77.

"Just as a federal court may treat a State like any other litigant when it assesses costs, so also may Congress amend its definition of taxable costs and have the amended class of costs apply to the States, as it does to all other litigants, without expressly stating that it intends to abrogate the States' Eleventh Amendment immunity. For it would be absurd to require an express reference to state litigants whenever a filing fee, or a new item, such as an expert witness' fees, is added to the category of taxable costs." 437 U. S., at 695–697 (footnotes omitted).

[15] The legislative history makes it clear that Congress intended fees to be awarded where a pendent constitutional claim is involved, even if the statutory claim on which the plaintiff prevailed is one for which fees cannot be awarded under the Act. The Report of the Committee on the Judiciary of the House of Representatives accompanying H. R. 15460, a bill substantially identical to the Senate bill that was finally enacted, stated:

"To the extent a plaintiff joins a claim under one of the statutes enumerated in H. R. 15460 with a claim that does not allow attorney fees, that

the Court of Appeals pointed out, such a fee award "furthers the Congressional goal of encouraging suits to vindicate constitutional rights without undermining the longstanding judicial policy of avoiding unnecessary decision of important constitutional issues." 594 F. 2d, at 342. It is thus an appropriate means of enforcing substantive rights under the Fourteenth Amendment.[16]

The judgment is affirmed.

So ordered.

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, concurring in the judgment, and in Part II of the Court's opinion.

Respondent's complaint presented claims under both the Social Security Act and the Fourteenth Amendment. Follow-

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plaintiff, if it prevails on the non-fee claim, is entitled to a determination on the other claim for the purpose of awarding counsel fees. *Morales* v. *Haines*, 486 F. 2d 880 (7th Cir. 1973). In some instances, however, the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the non-constitutional claim is dispositive. *Hagans* v. *Lavine*, 415 U. S. 528 (1974). In such cases, if the claim for which fees may be awarded meets the 'substantiality' test, see *Hagans* v. *Lavine, supra; United Mine Workers* v. *Gibbs*, 383 U. S. 715 (1966), attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a 'common nucleus of operative fact.' *United Mine Workers* v. *Gibbs, supra*, at 725." H. R. Rep. No. 94–1558, p. 4, n. 7 (1976).

[16] Petitioner seeks to distinguish this case from *Hutto* v. *Finney* on the ground that *Hutto* involved an adjudication of a constitutional violation, rather than a statutory violation. However, as MR. JUSTICE REHNQUIST noted in his dissent, 437 U. S., at 717–718, the underlying claim in *Hutto* was predicated on the Eighth Amendment as made applicable to the States by the Fourteenth Amendment rather than on any substantive provision of the Fourteenth Amendment itself. The prisoners' claim in *Hutto* was therefore arguably more analogous to the statutory claim involved in this case than to the constitutional claims asserted here or to the equal protection claim asserted in *Fitzpatrick* v. *Bitzer*, 427 U. S. 445.

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ing a settlement between the parties, the District Court ruled that respondent is a "prevailing party" under 42 U. S. C. § 1988, and that she alleged "substantial" constitutional claims as defined in *Hagans* v. *Lavine*, 415 U. S. 528 (1974).

In this situation, the District Court and the Court of Appeals for the Second Circuit both found, the award of attorney's fees under § 1988 does not require an adjudication on the merits of the constitutional claims. I agree with this conclusion. Consequently, I see no reason to reach out, as the Court does in Part I of its opinion, to apply today's ruling in *Maine* v. *Thiboutot, ante,* p. 1. See *ante,* at 128–129. That decision holds that plaintiffs may win attorney's fees under § 1988 when they bring an action under 42 U. S. C. § 1983 without any constitutional claim whatever. For the reasons given in my dissenting opinion in *Thiboutot,* I believe that decision seriously misconceives the congressional purpose behind § 1983. In this case, however, the complaint included a substantial constitutional claim which "remained in the case until the entire dispute was settled by the entry of a consent decree." *Ante,* at 131. Since Congress has made plain its intent that fees be awarded to "prevailing" parties in these circumstances, see *ante,* at 132–133, n. 15, we have no occasion to look behind the settlement agreement to evaluate further the constitutional cause of action.

In contrast, Part II of the Court's opinion resolves the Eleventh Amendment question on the narrow ground that respondent alleged "substantial" Fourteenth Amendment claims. *Ante,* at 131. *Hutto* v. *Finney,* 437 U. S. 678 (1978), held that since Congress may qualify the States' Eleventh Amendment immunity under the Enforcement Clause of the Fourteenth Amendment, § 1988 authorizes fee awards against States in these circumstances. I believe that Congress should not be deemed to have qualified the Eleventh Amendment in the absence of explicit evidence of that intent. See *Hutto, supra,* at 704 (POWELL, J., concurring in part and dissent-

ing in part). Nevertheless, I accept *Hutto* as binding precedent for this case and note only that the Court has reserved the question "whether a federal court could award attorney's fees against a State based on a statutory, non-civil-rights claim." *Ante,* at 130.

WHITE MOUNTAIN APACHE TRIBE ET AL. *v.* BRACKER ET AL.

CERTIORARI TO THE COURT OF APPEALS OF ARIZONA

No. 78-1177. Argued January 14, 1980—Decided June 27, 1980

Pursuant to a contract with an organization of petitioner White Mountain Apache Tribe, petitioner Pinetop Logging Co. (Pinetop), a non-Indian enterprise authorized to do business in Arizona, felled tribal timber on the Fort Apache Reservation and transported it to the tribal organization's sawmill. Pinetop's activities were performed solely on the reservation. Respondents, state agencies and members thereof, sought to impose on Pinetop Arizona's motor carrier license tax, which is assessed on the basis of the carrier's gross receipts, and its use fuel tax, which is assessed on the basis of diesel fuel used to propel a motor vehicle on any highway within the State. Pinetop paid the taxes under protest and then brought suit in state court, asserting that under federal law the taxes could not lawfully be imposed on logging activities conducted exclusively within the reservation or on hauling activities on Bureau of Indian Affairs (BIA) and tribal roads. The trial court awarded summary judgment to respondents, and the Arizona Court of Appeals affirmed in pertinent part, rejecting petitioners' pre-emption claim.

Held: The Arizona taxes are pre-empted by federal law. Cf. *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U. S. 685. Pp. 141-153.

(a) The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been pre-empted by operation of federal law. Where, as here, a State asserts authority over the conduct of non-Indians engaging in activity on the reservation, a particularized inquiry must be made into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law. Pp. 141-145.

(b) The Federal Government's regulation of the harvesting, sale, and management of tribal timber, and of the BIA and tribal roads, is so pervasive as to preclude the additional burdens sought to be imposed here by assessing the taxes in question against Pinetop for operations that are conducted solely on BIA and tribal roads within the reservation. Pp. 145-149.

(c) Imposition of the taxes in question would undermine the federal policy of assuring that the profits from timber sales would inure to the

Tribe's benefit; would also undermine the Secretary of the Interior's ability to make the wide range of determinations committed to his authority concerning the setting of fees and rates with respect to the harvesting and sale of tribal timber; and would adversely affect the Tribe's ability to comply with the sustained-yield management policies imposed by federal law. Pp. 149–150.

(d) Respondents' generalized interest in raising revenue is insufficient, in the context of this case, to permit its proposed intrusion into the federal regulatory scheme with respect to the harvesting and sale of tribal timber. P. 150.

120 Ariz. 282, 585 P. 2d 891, reversed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, BLACKMUN, and POWELL, JJ., joined. POWELL, J., filed a concurring opinion, *post*, p. 170. STEVENS, J., filed a dissenting opinion, in which STEWART and REHNQUIST, JJ., joined, *post*, p. 153.

Neil Vincent Wake argued the cause for petitioner Pinetop Logging Co. *Michael J. Brown* argued the cause for petitioner White Mountain Apache Tribe. With them on the briefs were *Leo R. Beus* and *Kathleen A. Rihr*.

Ian A. Macpherson, Assistant Attorney General of Arizona, argued the cause for respondents. With him on the brief were *Robert K. Corbin*, Attorney General, and *Anthony B. Ching*, Solicitor General.

Elinor Hadley Stillman argued the cause for the United States as *amicus curiae* urging reversal. With her on the brief were *Solicitor General McCree, Assistant Attorney General Moorman, Deputy Solicitor General Claiborne,* and *Robert L. Klarquist*.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

In this case we are once again called upon to consider the extent of state authority over the activities of non-Indians engaged in commerce on an Indian reservation. The State of Arizona seeks to apply its motor carrier license and use fuel taxes to petitioner Pinetop Logging Co. (Pinetop), an enter-

prise consisting of two non-Indian corporations authorized to do business in Arizona and operating solely on the Fort Apache Reservation. Pinetop and petitioner White Mountain Apache Tribe contend that the taxes are pre-empted by federal law or, alternatively, that they represent an unlawful infringement on tribal self-government. The Arizona Court of Appeals rejected petitioners' claims. We hold that the taxes are pre-empted by federal law, and we therefore reverse.

I

The 6,500 members of petitioner White Mountain Apache Tribe reside on the Fort Apache Reservation in a mountainous and forested region of northeastern Arizona.[1] The Tribe is organized under a constitution approved by the Secretary of the Interior under the Indian Reorganization Act, 25 U. S. C. § 476. The revenue used to fund the Tribe's governmental programs is derived almost exclusively from tribal enterprises. Of these enterprises, timber operations have proved by far the most important, accounting for over 90% of the Tribe's total annual profits.[2]

The Fort Apache Reservation occupies over 1,650,000 acres, including 720,000 acres of commercial forest. Approximately 300,000 acres are used for the harvesting of timber on a "sustained yield" basis, permitting each area to be cut every 20 years without endangering the forest's continuing productivity. Under federal law, timber on reservation land is owned by the United States for the benefit of the Tribe and cannot be harvested for sale without the consent of Congress.

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[1] The Fort Apache Reservation was originally established as the White Mountain Reservation by an Executive Order signed by President Grant on November 9, 1871. By the Act of Congress of June 7, 1897, 30 Stat. 64, the White Mountain Reservation was divided into the Fort Apache and San Carlos Reservations.

[2] In 1973, for example, tribal enterprises showed a net profit of $1,667,091, $1,508,713 of which was attributable to timber operations.

Acting under the authority of 25 CFR § 141.6 (1979) and the tribal constitution, and with the specific approval of the Secretary of the Interior, the Tribe in 1964 organized the Fort Apache Timber Co. (FATCO), a tribal enterprise that manages, harvests, processes, and sells timber. FATCO, which conducts all of its activities on the reservation, was created with the aid of federal funds. It employs about 300 tribal members.

The United States has entered into contracts with FATCO, authorizing it to harvest timber pursuant to regulations of the Bureau of Indian Affairs. FATCO has itself contracted with six logging companies, including Pinetop, which perform certain operations that FATCO could not carry out as economically on its own.[3] Since it first entered into agreements with FATCO in 1969, Pinetop has been required to fell trees, cut them to the correct size, and transport them to FATCO's sawmill in return for a contractually specified fee. Pinetop employs approximately 50 tribal members. Its activities, performed solely on the Fort Apache Reservation, are subject to extensive federal control.

In 1971 respondents[4] sought to impose on Pinetop the two state taxes at issue here. The first, a motor carrier license tax, is assessed on "[e]very common motor carrier of property and every contract motor carrier of property." Ariz. Rev. Stat. Ann. § 40–641 (A)(1) (Supp. 1979). Pinetop is a "contract motor carrier of property" since it is engaged in "the transportation by motor vehicle of property, for compensation, on any public highway." § 40–601 (A)(1) (1974). The motor carrier license tax amounts to 2.5% of the carrier's gross receipts. § 40–641 (A)(1) (Supp. 1979). The second tax at issue is an excise or use fuel tax designed "[f]or the

[3] FATCO initially attempted to perform some of its own logging and hauling operations but found itself unable to do these tasks economically.

[4] Respondents are the Arizona Highway Department, the Arizona Highway Commission, and individual members of each entity.

purpose of partially compensating the state for the use of its highway." Ariz. Rev. Stat. Ann. § 28–1552 (Supp. 1979). The tax amounts to eight cents per gallon of fuel used "in the propulsion of a motor vehicle on any highway within this state." *Ibid.* The use fuel tax was assessed on Pinetop because it uses diesel fuel to propel its vehicles on the state highways within the Fort Apache Reservation.

Pinetop paid the taxes under protest,[5] and then brought suit in state court, asserting that under federal law the taxes could not lawfully be imposed on logging activities conducted exclusively within the reservation or on hauling activities on Bureau of Indian Affairs and tribal roads.[6] The Tribe agreed to reimburse Pinetop for any tax liability incurred as a result of its on-reservation business activities, and the Tribe intervened in the action as a plaintiff.[7]

Both petitioners and respondents moved for summary judgment on the issue of the applicability of the two taxes to Pinetop. Petitioners submitted supporting affidavits from the manager of FATCO, the head forester of the Bureau of Indian Affairs, and the Chairman of the White Mountain Apache Tribal Council; respondents offered no affidavits dis-

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[5] Between November 1971 and May 1976 Pinetop paid under protest $19,114.59 in use fuel taxes and $14,701.42 in motor carrier license taxes. Since that time it has continued to pay taxes pending the outcome of this case. Refund litigation is pending in state court with respect to the five other non-Indian contractors employed by the Tribe, and that litigation has been stayed pending the outcome of this suit.

[6] For purposes of this action petitioners have conceded Pinetop's liability for both motor carrier license and use fuel taxes attributable to travel on state highways within the reservation. Pinetop has maintained records of fuel attributable to travel on those highways, and computations would evidently be made in order to allocate a portion of the gross receipts taxable under the motor carrier license tax to state highways.

[7] When Pinetop contracted to undertake timber operations for FATCO in 1969, both Pinetop and FATCO believed that it would not be required to pay state taxes. After respondents assessed the taxes at issue, FATCO agreed to pay them to avoid the loss of Pinetop's services.

puting the factual assertions by petitioners' affiants. The trial court awarded summary judgment to respondents,[8] and the petitioners appealed to the Arizona Court of Appeals. The Court of Appeals rejected petitioners' pre-emption claim. 120 Ariz. 282, 585 P. 2d 891 (1978). Purporting to apply the test set forth in *Pennsylvania* v. *Nelson,* 350 U. S. 497 (1956), the court held that the taxes did not conflict with federal regulation of tribal timber, that the federal interest was not so dominant as to preclude assessment of the challenged state taxes, and that the federal regulatory scheme did not "occupy the field." The court also concluded that the state taxes would not unlawfully infringe on tribal self-government. The Arizona Supreme Court declined to review the decision of the Court of Appeals. We granted certiorari. 444 U. S. 823 (1980).

II

Although "[g]eneralizations on this subject have become . . . treacherous," *Mescalero Apache Tribe* v. *Jones,* 411 U. S. 145, 148 (1973), our decisions establish several basic principles with respect to the boundaries between state regulatory authority and tribal self-government. Long ago the Court departed from Mr. Chief Justice Marshall's view that "the laws of [a State] can have no force" within reservation boundaries, *Worcester* v. *Georgia,* 6 Pet. 515, 561 (1832).[9] See *Moe* v. *Salish & Kootenai Tribes,* 425 U. S. 463, 481–483

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[8] After the trial court entered summary judgment on the issue of the applicability of the state taxes, the case proceeded to trial on the state-law issue of the manner of calculating the motor vehicle license tax. Final judgment was entered for respondents on all issues after trial. The Arizona Court of Appeals reversed the decision of the Superior Court on the calculation of the motor vehicle license tax. 120 Ariz. 282, 291, 585 P. 2d 891, 900 (1978).

[9] The shift in approach is discussed in *Williams* v. *Lee,* 358 U. S. 217, 219 (1959); *Organized Village of Kake* v. *Egan,* 369 U. S. 60, 71–75 (1962); and *McClanahan* v. *Arizona State Tax Comm'n,* 411 U. S. 164, 172 (1973).

(1976); *New York ex rel. Ray* v. *Martin*, 326 U. S. 496 (1946); *Utah & Northern R. Co.* v. *Fisher*, 116 U. S. 28 (1885). At the same time we have recognized that the Indian tribes retain "attributes of sovereignty over both their members and their territory." *United States* v. *Mazurie*, 419 U. S. 544, 557 (1975). See also *United States* v. *Wheeler*, 435 U. S. 313, 323 (1978); *Santa Clara Pueblo* v. *Martinez*, 436 U. S. 49, 55–56 (1978). As a result, there is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members. The status of the tribes has been described as "an anomalous one and of complex character," for despite their partial assimilation into American culture, the tribes have retained "a semi-independent position . . . not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided." *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164, 173 (1973), quoting *United States* v. *Kagama*, 118 U. S. 375, 381–382 (1886).

Congress has broad power to regulate tribal affairs under the Indian Commerce Clause, Art. 1, § 8, cl. 3. See *United States* v. *Wheeler*, *supra*, at 322–323. This congressional authority and the "semi-independent position" of Indian tribes have given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members. First, the exercise of such authority may be pre-empted by federal law. See, *e. g.*, *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U. S. 685 (1965); *McClanahan* v. *Arizona State Tax Comm'n*, *supra*. Second, it may unlawfully infringe "on the right of reservation Indians to make their own laws and be ruled by them." *Williams* v. *Lee*, 358 U. S. 217, 220 (1959). See also *Washington* v. *Yakima Indian Nation*, 439 U. S. 463, 502 (1979); *Fisher*

v. *District Court*, 424 U. S. 382 (1976) (*per curiam*); *Kennerly* v. *District Court of Montana*, 400 U. S. 423 (1971). The two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members. They are related, however, in two important ways. The right of tribal self-government is ultimately dependent on and subject to the broad power of Congress. Even so, traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important "backdrop," *McClanahan* v. *Arizona State Tax Comm'n, supra*, at 172, against which vague or ambiguous federal enactments must always be measured.

The unique historical origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of pre-emption that have emerged in other areas of the law. Tribal reservations are not States, and the differences in the form and nature of their sovereignty make it treacherous to import to one notions of pre-emption that are properly applied to the other. The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been pre-empted by operation of federal law. *Moe* v. *Salish & Kootenai Tribes, supra*, at 475. As we have repeatedly recognized, this tradition is reflected and encouraged in a number of congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development.[10] Ambiguities in federal

[10] For example, the Indian Financing Act of 1974, 25 U. S. C. § 1451 *et seq.*, states: "It is hereby declared to be the policy of Congress . . . to help develop and utilize Indian resources, both physical and human, to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources and where they will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities." Similar policies underlie the Indian Self-Determination and Education Assistance Act of 1975,

law have been construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence. See *McClanahan* v. *Arizona State Tax Comm'n*, *supra*, at 174–175, and n. 13. We have thus rejected the proposition that in order to find a particular state law to have been pre-empted by operation of federal law, an express congressional statement to that effect is required.[11] *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, *supra*. At the same time any applicable regulatory interest of the State must be given weight. *McClanahan* v. *Arizona State Tax Comm'n*, *supra*, at 171, and "automatic exemptions 'as a matter of constitutional law'" are unusual. *Moe* v. *Salish & Kootenai Tribes*, 425 U. S., at 481, n. 17.

When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest. See *Moe* v. *Salish & Kootenai Tribes*, *supra*, *at* 480–481; *McClanahan* v. *Arizona State Tax Comm'n*. More difficult questions arise where, as here, a State asserts authority over the conduct of non-Indians engaging in activity on the reservation. In such cases we have examined the language of the relevant federal treaties and statutes in terms of both the broad

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25 U. S. C. § 450 *et seq.*, as well as the Indian Reorganization Act of 1934, 25 U. S. C. § 461 *et seq.*, whose "intent and purpose . . . was 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.'" *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145, 152 (1973), quoting H. R. Rep. No. 1804, 73d Cong., 2d Sess., 6 (1934). See also *Santa Clara Pueblo* v. *Martinez*, 436 U. S. 49 (1978). Cf. Gross, Indian Self-Determination and Tribal Sovereignty: An Analysis of Recent Federal Policy, 56 Texas L. Rev. 1195 (1978).

[11] In the case of "Indians going beyond reservation boundaries," however, a "nondiscriminatory state law" is generally applicable in the absence of "express federal law to the contrary." *Mescalero Apache Tribe* v. *Jones*, *supra*, at 148–149.

policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence. This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law. Compare *Warren Trading Post Co.* v. *Arizona Tax Comm'n, supra,* and *Williams* v. *Lee, supra,* with *Moe* v. *Salish & Kootenai Tribes, supra,* and *Thomas* v. *Gay,* 169 U. S. 264 (1898). Cf. *McClanahan* v. *Arizona State Tax Comm'n,* 411 U. S., at 171; *Mescalero Apache Tribe* v. *Jones,* 411 U. S., at 148.

III

With these principles in mind, we turn to the respondents' claim that they may, consistent with federal law, impose the contested motor vehicle license and use fuel taxes on the logging and hauling operations of petitioner Pinetop. At the outset we observe that the Federal Government's regulation of the harvesting of Indian timber is comprehensive. That regulation takes the form of Acts of Congress, detailed regulations promulgated by the Secretary of the Interior, and day-to-day supervision by the Bureau of Indian Affairs. Under 25 U. S. C. §§ 405–407, the Secretary of the Interior is granted broad authority over the sale of timber on the reservation.[12]

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[12] Federal policies with respect to tribal timber have a long history. In *United States* v. *Cook,* 19 Wall. 591 (1874), and *Pine River Logging Co.* v. *United States,* 186 U. S. 279 (1902), the Court held that tribal members had no right to sell timber on reservation land unless the sale was related to the improvement of the land. At the same time the Court interpreted the governing statute as designed "to permit deserving Indians, who had no other sufficient means of support, to cut . . . a limited quantity of . . . timber . . . and to use the proceeds for their support . . . , provided that 10 percent of the gross proceeds should go to the stumpage or

Timber on Indian land may be sold only with the consent of the Secretary, and the proceeds from any such sales, less administrative expenses incurred by the Federal Government, are to be used for the benefit of the Indians or transferred to the Indian owner. Sales of timber must "be based upon a consideration of the needs and best interests of the Indian owner and his heirs." 25 U. S. C. § 406 (a). The statute specifies the factors which the Secretary must consider in making that determination.[13] In order to assure the continued productivity of timber-producing land on tribal reservations, timber on unallotted lands "may be sold in accordance with the principles of sustained yield." 25 U. S. C. § 407. The Secretary is granted power to determine the disposition of the proceeds from timber sales. He is authorized to promulgate regulations for the operation and management of Indian forestry units. 25 U. S. C. § 466.

Acting pursuant to this authority, the Secretary has promulgated a detailed set of regulations to govern the harvesting

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poor fund of the tribe, from which the old, sick and otherwise helpless might be supported." *Id.*, at 285–286.

The Attorney General interpreted the holding in *Cook* to mean that Indians had no right to reservation timber. See 19 Op. Atty. Gen. 194 (1888). This interpretation was overturned by Congress by Act of June 25, 1910, ch. 431, 36 Stat. 855, as amended, 25 U. S. C. § 407, and also repudiated in *United States* v. *Shoshone Tribe*, 304 U. S. 111 (1938). Thus, as the Court summarized in *United States* v. *Algoma Lumber Co.*, 305 U. S. 415, 420 (1939), "[u]nder . . . established principles applicable to land reservations created for the benefit of the Indian tribes, the Indians are beneficial owners of the land and the timber standing upon it and of the proceeds of their sale, subject to the plenary power of control by the United States, to be exercised for the benefit and protection of the Indians." See 25 U. S. C. § 196; *United States* v. *Mitchell*, 445 U. S. 535 (1980).

[13] Those factors include "(1) the state of growth of the timber and the need for maintaining the productive capacity of the land for the benefit of the owner and his heirs, (2) the highest and the best use of the land, including the advisability and practicality of devoting it to other uses for the benefit of the owner and his heirs, and (3) the present and future financial needs of the owner and his heirs." 25 U. S. C. § 406 (a).

and sale of tribal timber. Among the stated objectives of the regulations is the "development of Indian forests by the Indian people for the purpose of promoting self-sustaining communities, to the end that the Indians may receive from their own property not only the stumpage value, but also the benefit of whatever profit it is capable of yielding and whatever labor the Indians are qualified to perform." 25 CFR § 141.3 (a)(3) (1979). The regulations cover a wide variety of matters: for example, they restrict clear-cutting, § 141.5; establish comprehensive guidelines for the sale of timber, § 141.7; regulate the advertising of timber sales, §§ 141.8–141.9; specify the manner in which bids may be accepted and rejected, § 141.11; describe the circumstances in which contracts may be entered into, §§ 141.12–141.13; require the approval of all contracts by the Secretary, § 141.13; call for timber-cutting permits to be approved by the Secretary, § 141.19; specify fire protective measures, § 141.21; and provide a board of administrative appeals, § 141.23. Tribes are expressly authorized to establish commercial enterprises for the harvesting and logging of tribal timber. § 141.6.

Under these regulations, the Bureau of Indian Affairs exercises literally daily supervision over the harvesting and management of tribal timber. In the present case, contracts between FATCO and Pinetop must be approved by the Bureau; indeed, the record shows that some of those contracts were drafted by employees of the Federal Government. Bureau employees regulate the cutting, hauling, and marking of timber by FATCO and Pinetop. The Bureau decides such matters as how much timber will be cut, which trees will be felled, which roads are to be used, which hauling equipment Pinetop should employ, the speeds at which logging equipment may travel, and the width, length, height, and weight of loads.

The Secretary has also promulgated detailed regulations governing the roads developed by the Bureau of Indian Affairs.

25 CFR Part 162 (1979). Bureau roads are open to "[f]ree public use." § 162.8. Their administration and maintenance are funded by the Federal Government, with contributions from the Indian tribes. §§ 162.6–162.6a. On the Fort Apache Reservation the Forestry Department of the Bureau has required FATCO and its contractors, including Pinetop, to repair and maintain existing Bureau and tribal roads and in some cases to construct new logging roads. Substantial sums have been spent for these purposes. In its federally approved contract with FATCO, Pinetop has agreed to construct new roads and to repair existing ones. A high percentage of Pinetop's receipts are expended for those purposes, and it has maintained separate personnel and equipment to carry out a variety of tasks relating to road maintenance.

In these circumstances we agree with petitioners that the federal regulatory scheme is so pervasive as to preclude the additional burdens sought to be imposed in this case. Respondents seek to apply their motor vehicle license and use fuel taxes on Pinetop for operations that are conducted solely on Bureau and tribal roads within the reservation.[14] There is no room for these taxes in the comprehensive federal regulatory scheme. In a variety of ways, the assessment of state taxes would obstruct federal policies. And equally important, respondents have been unable to identify any regulatory function or service performed by the State that would justify

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[14] In oral argument counsel for respondents appeared to concede that the asserted state taxes could not lawfully be applied to tribal roads and was unwilling to defend the contrary conclusion of the court below, which made no distinction between Bureau and tribal roads under state and federal law. Tr. of Oral Arg. 34–37. Contrary to respondents' position throughout the litigation and in their brief in this Court, counsel limited his argument to a contention that the taxes could be asserted on the roads of the Bureau of Indian Affairs. *Ibid.* For purposes of federal pre-emption, however, we see no basis, and respondents point to none, for distinguishing between roads maintained by the Tribe and roads maintained by the Bureau of Indian Affairs.

the assessment of taxes for activities on Bureau and tribal roads within the reservation.

At the most general level, the taxes would threaten the overriding federal objective of guaranteeing Indians that they will "receive . . . the benefit of whatever profit [the forest] is capable of yielding. . . ." 25 CFR § 141.3 (a)(3) (1979). Underlying the federal regulatory program rests a policy of assuring that the profits derived from timber sales will inure to the benefit of the Tribe, subject only to administrative expenses incurred by the Federal Government. That objective is part of the general federal policy of encouraging tribes "to revitalize their self-government" and to assume control over their "business and economic affairs." *Mescalero Apache Tribe* v. *Jones,* 411 U. S., at 151. The imposition of the taxes at issue would undermine that policy in a context in which the Federal Government has undertaken to regulate the most minute details of timber production and expressed a firm desire that the Tribe should retain the benefits derived from the harvesting and sale of reservation timber.

In addition, the taxes would undermine the Secretary's ability to make the wide range of determinations committed to his authority concerning the setting of fees and rates with respect to the harvesting and sale of tribal timber. The Secretary reviews and approves the terms of the Tribe's agreements with its contractors, sets fees for services rendered to the Tribe by the Federal Government, and determines stumpage rates for timber to be paid to the Tribe. Most notably in reviewing or writing the terms of the contracts between FATCO and its contractors, federal agents must predict the amount and determine the proper allocation of all business expenses, including fuel costs. The assessment of state taxes would throw additional factors into the federal calculus, reducing tribal revenues and diminishing the profitability of the enterprise for potential contractors.

Finally, the imposition of state taxes would adversely affect the Tribe's ability to comply with the sustained-

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yield management policies imposed by federal law. Substantial expenditures are paid out by the Federal Government, the Tribe, and its contractors in order to undertake a wide variety of measures to ensure the continued productivity of the forest. These measures include reforestation, fire control, wildlife promotion, road improvement, safety inspections, and general policing of the forest. The expenditures are largely paid for out of tribal revenues, which are in turn derived almost exclusively from the sale of timber. The imposition of state taxes on FATCO's contractors would effectively diminish the amount of those revenues and thus leave the Tribe and its contractors with reduced sums with which to pay out federally required expenses.

As noted above, this is not a case in which the State seeks to assess taxes in return for governmental functions it performs for those on whom the taxes fall. Nor have respondents been able to identify a legitimate regulatory interest served by the taxes they seek to impose. They refer to a general desire to raise revenue, but we are unable to discern a responsibility or service that justifies the assertion of taxes imposed for on-reservation operations conducted solely on tribal and Bureau of Indian Affairs roads. Pinetop's business in Arizona is conducted solely on the Fort Apache Reservation. Though at least the use fuel tax purports to "compensat[e] the state for the use of its highways," Ariz. Rev. Stat. Ann. § 28–1552 (Supp. 1979), no such compensatory purpose is present here. The roads at issue have been built, maintained, and policed exclusively by the Federal Government, the Tribe, and its contractors. We do not believe that respondents' generalized interest in raising revenue is in this context sufficient to permit its proposed intrusion into the federal regulatory scheme with respect to the harvesting and sale of tribal timber.

Respondents' argument is reduced to a claim that they may assess taxes on non-Indians engaged in commerce on the reservation whenever there is no express congressional statement

to the contrary. That is simply not the law. In a number of cases we have held that state authority over non-Indians acting on tribal reservations is pre-empted even though Congress has offered no explicit statement on the subject. See *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U. S. 685 (1965); *Williams* v. *Lee*, 358 U. S. 217 (1958); *Kennerly* v. *District Court of Montana*, 400 U. S. 423 (1971). The Court has repeatedly emphasized that there is a significant geographical component to tribal sovereignty, a component which remains highly relevant to the pre-emption inquiry; though the reservation boundary is not absolute, it remains an important factor to weigh in determining whether state authority has exceeded the permissible limits. " 'The cases in this Court have consistently guarded the authority of Indian governments over their reservations.' " *United States* v. *Mazurie*, 419 U. S., at 558, quoting *Williams* v. *Lee*, *supra*, at 223. Moreover, it is undisputed that the economic burden of the asserted taxes will ultimately fall on the Tribe.[15] Where, as here, the Federal Government has undertaken comprehensive regulation of the harvesting and sale of tribal timber, where a number of the policies underlying the federal regulatory scheme are threatened by the taxes respondents seek to impose, and where respondents are unable to justify the taxes except in terms of a generalized interest in raising revenue, we believe that the proposed exercise of state authority is impermissible.[16]

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[15] Of course, the fact that the economic burden of the tax falls on the Tribe does not by itself mean that the tax is pre-empted, as *Moe* v. *Salish & Kootenai Tribes*, 425 U. S. 463 (1976), makes clear. Our decision today is based on the pre-emptive effect of the comprehensive federal regulatory scheme, which, like that in *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U. S. 685 (1965), leaves no room for the additional burdens sought to be imposed by state law.

[16] Respondents also contend that the taxes are authorized by the Buck Act, 4 U. S. C. § 105 *et seq.*, and the Hayden-Cartwright Act, 4 U. S. C. § 104. In *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, *supra*, at 691,

Both the reasoning and result in this case follow naturally from our unanimous decision in *Warren Trading Post Co.* v. *Arizona Tax Comm'n, supra.* There the State of Arizona sought to impose a "gross proceeds" tax on a non-Indian company which conducted a retail trading business on the Navajo Indian Reservation. Referring to the tradition of sovereign power over the reservation, the Court held that the "comprehensive federal regulation of Indian traders" prohibited the assessment of the attempted taxes. *Id.*, at 688. No federal statute by its terms precluded the assessment of state tax. Nonetheless, the "detailed regulations," specifying "in the most minute fashion," *id.*, at 689, the licensing and regulation of Indian traders, were held "to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders." *Id.*, at 690. The imposition of those burdens, we held, "could . . . disturb and disarrange the statutory plan" because the economic burden of the state taxes would eventually be passed on to the Indians themselves. *Id.*, at 691. We referred to the fact that the Tribe had been "largely free to run the reservation and its affairs without state control, a policy which has automatically relieved Arizona of all burdens for carrying on those same responsibilities." *Id.*, at 690. And we emphasized that "since federal legislation has left the State with no duties or responsibilities respecting the reservation Indians, we cannot believe that Congress intended to leave to the State the privilege of levying this tax." *Id.*, at 691. The present case, we conclude,

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n. 18, we squarely held that the Buck Act did not apply to Indian reservations, and respondents present no sufficient reason for us to depart from that holding. We agree with petitioners that the Hayden-Cartwright Act, which authorizes state taxes "on United States military or other reservations," was not designed to overcome the otherwise pre-emptive effect of federal regulation of tribal timber. We need not reach the more general question whether the Hayden-Cartwright Act applies to Indian reservations at all.

is in all relevant respects indistinguishable from *Warren Trading Post.*

The decision of the Arizona Court of Appeals is

Reversed.

[For concurring opinion of MR. JUSTICE POWELL, see *post,* p. 170.]

MR. JUSTICE STEVENS, with whom MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST join, dissenting.

The State of Arizona imposes use fuel and motor carrier license taxes on certain businesses in order to compensate it for their greater than normal use of public roads. See *post,* at 174, n. 3 (POWELL, J., concurring). The issue originally presented to this Court was whether the State was prohibited from imposing such taxes on a non-Indian joint venture (Pinetop Logging Co.) hired by the petitioner Tribe to perform logging operations on the Fort Apache Reservation, when the taxes were based on Pinetop's use of roads located solely within the reservation. In light of the concessions made by both sides at various stages of the litigation, however, I doubt that we should reach that issue in this case. Moreover, even if the merits were properly before us, I could not agree with the Court's determination that the state taxes are pre-empted by federal law.

Between March 1971 and May 1976, Pinetop paid under protest use fuel taxes of $19,114.59 and motor carrier license taxes of $14,701.42. The Arizona Court of Appeals determined that the latter assessment improperly denied Pinetop a 60% credit to which it was entitled under state law.[1] After allowance for that credit, the total amount of the disputed taxes for the 4½-year period is reduced to about $25,000 or $5,000–$6,000 per year.

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[1] Under Arizona law, logging operations are exempt from the motor carrier license tax if the wood they haul is used for pulpwood. In this case 60% of the logs hauled by Pinetop were to be used for pulpwood.

The taxes actually in dispute, however, are considerably less. Pinetop concedes that some of its operations are subject to tax and the State concedes that Pinetop is entitled to additional credits. To understand these concessions it is necessary to note that Pinetop's vehicles operate on four different kinds of roads within the Fort Apache Reservation: (1) state highways; (2) federally funded (Bureau of Indian Affairs) roads serving recreational public needs; (3) tribal roads exclusively financed and maintained by the Indians; and (4) private logging roads built and maintained by loggers such as Pinetop.[2]

Although Pinetop represents that its use of the Arizona state highways within the reservation is extremely limited, it does not dispute its tax liability for such use. On the other hand, in this Court the State expressly conceded that its assessments were improper under state law to the extent that they applied to operations on either private logging roads[3]

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[2] In paragraph XIII of their complaint, petitioners alleged:

"There are four categories of roads in the Ft. Apache Indian Reservation which are used by the Plaintiffs in their logging operations: (1) tribal roads financed and maintained by the Indians exclusively; (2) federally funded (Bureau of Indian Affairs) roads serving recreational public needs; (3) state highways; and (4) logging roads built and maintained by loggers. In transporting timber from the woods to the sawmill, plaintiffs' vehicles travel substantially over tribal and BIA roads, although short portions of many of the trips are on state highways.

"The only category of roads on the Fort Apache Indian Reservation which are built or maintained by the State of Arizona, is category (3), state highways. Categories (1), (2), and (4) are financed and maintained by sources other than monies from the State of Arizona. Tribal, BIA and logging roads are not public highways within the meaning of Arizona Revised Statutes Sec. 40-601.9, and thus any use fuel and license motor carrier taxes on these roads are inappropriate."

[3] At oral argument, the Assistant Attorney General of the State of Arizona stated:

"But so long as the road remained a private thoroughfare they would not be so traveled and use of those road [*sic*] would not be subject to the State tax." Tr. of Oral Arg. 32.

or tribal roads.[4] If it is conceded that the State may tax Pinetop's use of public roads maintained by the State and may not tax the use of tribal or private roads, the question that arises is whether the public roads maintained by the

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Later in the argument he was asked the following question and gave the following answer:

"Mr. Macpherson, quite apart from the question in this case which involves Indian tribes, what about a private owner of land—whether it is the Weyerhauseur Company or a rancher who owns many square miles of ranch land, does Arizona impose a tax upon his fuel if the vehicle that he owns is used exclusively on his own private property 365 days a year, or this year 366, and never on the public roads of Arizona?

"MR. MACPHERSON: It does not, Your Honor." *Id.*, at 39.

[4] With respect to tribal roads, the Assistant Attorney General advised the Court at oral argument:

"However, the fact of the matter is that under current State law, under the legislative scheme that exists in Arizona right now, Arizona has no intention of going forward on some purported theory that because the Court of Appeals decision says we can, that we can go ahead and tax use on these tribal roads. I have been assured of that by my client by telephone last night. And other than that we would put that before the Court to apprise the court of what the true facts are." *Id.*, at 35.

In rebuttal, counsel for petitioners expressed surprise at, but nevertheless accepted, the concession made by the State. Counsel stated:

"My good friend, Mr. Macpherson, has just said some remarkable things.

"I think I hear him saying that the State is no longer interested in collecting taxes from tribal roads on the reservation which are not Bureau of Indian Affairs roads. If that is what he said, then I am delighted to accept him accept his concession. But I must also correct some of the suggestions he has made.

"His predecessor, the Attorney for the State of Arizona, argued in the State appellate courts that the State was claiming the right to tax tribal roads. The judgment of the lower court gives the State the right to tax tribal roads. And that is the judgment we are burdened with and that is the judgment which we bring to this Court.

"Our opening briefs state that is the issue. Their briefs acknowledge that is the issue . . . and that was the issue before the Court.

. . . . .

"Trial counsel, Mr. Beus who is here, informs me over the lunch period

Bureau of Indian Affairs are more akin to the former or to the latter. It appears that the BIA roads are like the state highways insofar as they are open to use by the general public.[5] On the other hand, it also appears that they were constructed

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that his understanding was that administrative agreement included the payment of certain taxes allocable to tribal roads.

"QUESTION: Well, as I say, that is of some importance, at least to me, whether there is an issue to taxes, either fuel or gross receipts taxes imposed on vehicles insofar as their use was confined to tribal roads.

"Is there, or is there not a dispute?

"MR. WAKE: I submit there was until Mr. Macpherson spoke.

"QUESTION: Well, now you submit there isn't. And I—

"MR. WAKE: I submit there isn't because [counsel] has conceded the issue or [is] withdrawing the issue. And perhaps he can clarify his remarks.

"QUESTION: You say you accept it gladly.

"MR. WAKE: I accept it gladly but—

"QUESTION: You have won your case on the—

"MR. WAKE: Your Honor, I would point out that that being the concession as I understand it, it would be appropriate in any event the judgment of the lower court to be correct in that regard since—" *Id.*, at 54–56.

[5] The following colloquy occurred at oral argument:

"QUESTION: What I meant to say is your real fight is over the right to tax on BIA roads.

"Does the record tell us much about those roads, for example does it tell us whether the State police are on those roads or whether they have speed limits or things like that?

"MR. MACPHERSON: Your Honor, the record does not specifically go into that much detail.

"QUESTION: However, it presents us with a hypothetical case quite different from the one you asked us to decide.

"MR. MACPHERSON: Well, Mr. Justice Stevens, the case is—we felt it necessary as an ethical consideration to apprise the Court of what the actual situation is.

"But, having said that, the issue, the legal issue, if it please the Court, may still be decided with respect to the BIA road use. The fact of the matter is that BIA roads pursuant to Federal—the Code of Federal Regulations are required to be open to free public use, as a matter of Federal law." *Id.*, at 36–37.

and maintained by the Federal Government and are policed by federal and tribal officers.[6]

Under these circumstances I think the most appropriate disposition would be to vacate the judgment of the Arizona Court of Appeals and remand for further consideration in light of the concessions made on behalf of the State in this Court. As the Court and MR. JUSTICE POWELL point out, it is difficult to see why those concessions are not an acknowledgment that the State has no authority to tax the use of roads in which it has no interest. See *ante*, at 148, n. 14 (opinion of the Court); *post*, at 174 (POWELL, J., concurring). If the state court were given an opportunity to focus on this point, we might well find that there is no remaining federal issue to be decided.

Even assuming, however, that the state courts would uphold the imposition of taxes based on the use of BIA roads, despite their similarities to private and tribal roads, I would not find those taxes to be pre-empted by federal law. In *Warren Trading Post* v. *Arizona Tax Comm'n*, 380 U. S. 685, the Court held that state taxation of a non-Indian doing business with a tribe on the reservation was pre-empted because the taxes threatened to "disturb and disarrange" a pervasive scheme of federal regulation and because there was no governmental interest on the State's part in imposing such a burden. See *Central Machinery Co.* v. *Arizona State Tax Comm'n*, *post*, at 168 (STEWART, J., dissenting). In this case we may assume, *arguendo*, that the second factor relied

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[6] "QUESTION: Did I understand you to say that Arizona has no responsibility for maintaining the BIA roads?

"MR. MACPHERSON: This is correct, Your Honor.

"QUESTION: And did it contribute to the construction of those roads?

"MR. MACPHERSON: So far as the record shows, it did not, Your Honor.

"QUESTION: And no police responsibility, either?

"MR. MACPHERSON: That is correct, Your Honor. . . ." *Id.*, at 41–42.

upon in *Warren Trading Post* is present. As a result, Pinetop may well have a right to be free from taxation as a matter of due process or equal protection.[7] But I cannot agree that it has a right to be free from taxation because of its business relationship with the petitioner Tribe.

As the Court points out, the Federal Government has imposed a detailed scheme of regulation on the tribal logging business. Thus, among other things, the BIA approves and sometimes drafts contracts between the Tribe and non-Indian logging companies such as Pinetop and requires the Tribe and its contractors to follow its dictates as to where to cut, haul, and mark timber, and as to which roads to construct and repair. *Ante*, at 148, n. 14. The Court reasons that, because the imposition of state taxes on non-Indian contractors is likely to increase the price of their services to the Tribe and thus decrease the profitability of the tribal enterprise, the taxes would substantially interfere with this scheme. Thus, the Court states that the taxes threaten the "overriding federal objective" of guaranteeing Indians all the profits the forest is capable of yielding, "undermine" the Federal Government's ability to set fees and rates with respect to non-Indian contractors, and "adversely affect the Tribe's ability to comply with the sustained-yield management policies imposed by federal law." *Ante*, at 149–150.

From a practical standpoint, the Court's prediction of massive interference with federal forest-management programs seems overdrawn, to say the least. The logging operations involved in this case produced a profit of $1,508,713 for the Indian tribal enterprise in 1973. As noted above, the maximum annual taxes Pinetop would be required to pay would

[7] The Due Process Clause may prohibit a State from imposing a tax on the use of completely private roads if the tax is designed to reimburse it for use of state-owned roads. Or it may be that once the State has decided to exempt private roads from its taxing system, it is also required, as a matter of equal protection, to exempt other types of roads that are identical to private roads in all relevant respects.

be $5,000–$6,000 or less than 1% of the total annual profits. Given the State's concession in this Court that the use of certain roads should not have been taxed as a matter of state law, the actual taxes Pinetop would be required to pay would probably be considerably less.[8] It is difficult to believe that these relatively trivial taxes could impose an economic burden that would threaten to "obstruct federal policies."

Under these circumstances I find the Court's reliance on the indirect financial burden imposed on the Indian Tribe by state taxation of its contractors disturbing. As a general rule, a tax is not invalid simply because a nonexempt taxpayer may be expected to pass all or part of the cost of the tax through to a person who is exempt from tax. See *United States* v. *Detroit,* 355 U. S. 466, 469; cf. *Washington* v. *Confederated Tribes of Colville Indian Reservation,* 447 U. S. 134. In *Warren Trading Post* the Court found an exception to this rule where Congress had chosen to regulate the relationship between an Indian tribe and a non-Indian trader to such an extent that there was no room for the additional burden of state taxation. In this case, since the state tax is unlikely to have a serious adverse impact on the tribal business, I would not infer the same congressional intent to confer a tax immunity. Although this may be an appropriate way in which to subsidize Indian industry and encourage Indian self-government, I would require more explicit evidence of congressional intent than that relied on by the Court today.

I respectfully dissent.

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[8] The parties have not told us what portion of the taxes is attributable to the use of each of the various types of roads. Thus, we cannot determine how much tax Pinetop would be required to pay for its use of BIA roads.

CENTRAL MACHINERY CO. *v.* ARIZONA STATE TAX COMMISSION

APPEAL FROM THE SUPREME COURT OF ARIZONA

No. 78-1604. Argued January 14, 1980—Decided June 27, 1980

Held: Arizona had no jurisdiction to impose a tax on appellant Arizona corporation's sale of farm machinery to an Indian tribe, where the sale took place on an Indian reservation even though appellant did not have a permanent place of business on the reservation and was not licensed to trade with Indians. Since the transaction was plainly subject to regulation under the federal statutes and implementing regulations governing the licensing of Indian traders, federal law pre-empts the asserted state tax. It is irrelevant that appellant was not a licensed Indian trader, since it is the existence of the Indian trader statutes, not their administration, that pre-empts the field of transactions with Indians occurring on reservations. Nor is it relevant that appellant did not maintain a permanent place of business on the reservation, since the Indian trader statutes and regulations apply no less to a nonresident who sells goods to Indians on a reservation than they do to a resident trader. The purpose of these statutes and regulations to protect Indians from becoming victims of fraud in dealings with sellers of goods would be easily circumvented if a seller could avoid federal regulations simply by failing to adopt a permanent place of business on a reservation or to obtain a federal license. Pp. 163–166.

121 Ariz. 183, 589 P. 2d 426, reversed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, and BLACKMUN, JJ., joined. STEWART, J., filed a dissenting opinion, in which POWELL, REHNQUIST, and STEVENS, JJ., joined, *post*, p. 166. POWELL, J., filed a dissenting opinion, *post*, p. 170.

Rodney B. Lewis argued the cause for appellant. With him on the briefs were *Richard B. Collins, Jeanne S. Whiteing,* and *Z. Simpson Cox.*

Ian A. Macpherson, Assistant Attorney General of Arizona, argued the cause for appellee. With him on the brief was *Robert K. Corbin,* Attorney General.

Deputy Solicitor General Claiborne argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General McCree, Assistant Attorney General Moorman,* and *Robert L. Klarquist.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This case presents the question whether a State may tax the sale of farm machinery to an Indian tribe when the sale took place on an Indian reservation and was made by a corporation that did not reside on the reservation and was not licensed to trade with Indians.

I

Appellant is a corporation chartered by and doing business in Arizona. In 1973 it sold 11 farm tractors to Gila River Farms, an enterprise of the Gila River Indian Tribe. The Tribe is federally recognized and is governed by a constitution adopted pursuant to the Indian Reorganization Act, 25 U. S. C. § 476. Gila River Farms conducts farming operations on tribal and individual trust land within the Gila River Reservation, which was established in Arizona by the Act of Feb. 28, 1859, ch. 66, 11 Stat. 388, 401.

Appellant's salesman solicited the sale of these tractors on the reservation, the contract was made there, and payment for and delivery of the tractors also took place there. Appellant does not have a permanent place of business on the reservation, and it is not licensed under 25 U. S. C. §§ 261–264 and 25 CFR Part 251 (1979) to engage in trade with Indians on reservations. The transaction was approved, however, by the Bureau of Indian Affairs.

The State of Arizona imposes a "transaction privilege tax" on the privilege of doing business in the State. Ariz. Rev. Stat. Ann. §§ 42–1309, 42–1312, 42–1361 (Supp. 1979).[1]

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[1] At the time of the transaction in question, Ariz. Rev. Stat. Ann. § 42–1309 (Supp. 1979) provided:

"A. There is levied and there shall be collected . . . privilege taxes measured by the amount or volume of business transacted by persons on

The tax amounts to a percentage of the gross receipts of the taxable entity. The tax is assessed against the seller of goods, not against the purchaser. In this case, appellant added the amount of this tax—$2,916.62—as a separate item to the price of the tractors, thereby increasing by that amount the total purchase price paid by Gila River Farms. Appellant paid this tax to the State under protest and instituted state administrative proceedings to claim a refund.[2] The administrative claim was denied, and appellant then filed this action in state court, contending that federal regulation of Indian trading pre-empted application of the state tax to the transaction in question. The Superior Court for Maricopa County held that the State had no jurisdiction to tax the transaction, and accordingly it ordered a refund. The Supreme Court of Ari-

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account of their business activities, and in the amounts to be determined by the application of rates against values, gross proceeds of sales, or gross income, as the case may be, in accordance with the schedule as set forth in §§ 42–1310 through 42–1315."

At the time of the transaction, Ariz. Rev. Stat. Ann. § 42–1312 (Supp. 1979) provided:

"A. The tax imposed by subsection A of § 42–1309 shall be levied and collected at an amount equal to two per cent of the gross proceeds of sales or gross income from the business upon every person engaging or continuing within this state in the business of selling any tangible personal property whatever at retail. . . ."

At the time of the transaction, Ariz. Rev. Stat. Ann. § 42–1361 (Supp. 1973) provided:

"A. There is levied and shall be collected by the department of revenue a tax:

"1. On the privilege of doing business in this state, measured by the amount or volume of business transacted by persons on account of their business activities, and in the amounts to be determined by the application, against values, gross proceeds of sales, or gross income, as the case may be, in accordance with the provisions and schedules as set forth in [§ 42–1301 et seq.], at rates equal to fifty per cent of the rates imposed in such article." 1973 Ariz. Sess. Laws, ch. 123, § 117.

[2] It is stipulated that appellant will pay over any tax refund to Gila River Farms.

zona reversed. *State* v. *Central Machinery Co.*, 121 Ariz. 183, 589 P. 2d 426 (1978).

We noted probable jurisdiction, 444 U. S. 822 (1979), and now reverse.

II

In 1790, Congress passed a statute regulating the licensing of Indian traders. Act of July 22, 1790, ch. 33, 1 Stat. 137. Ever since that time, the Federal Government has comprehensively regulated trade with Indians to prevent "fraud and imposition" upon them. H. R. Rep. No. 474, 23d Cong., 1st Sess., 11 (1834) (Committee Report with respect to Indian Trade and Intercourse Act of 1834, ch. 161, 4 Stat. 729). In the current regulatory scheme, the Commissioner of Indian Affairs has "the sole power and authority to appoint traders to the Indian tribes and to make . . . rules and regulations . . . specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians." 25 U. S. C. § 261. All persons desiring to trade with Indians are subject to the Commissioner's authority. 25 U. S. C. § 262. The President is authorized to prohibit the introduction of any article into Indian land. 25 U. S. C. § 263. Penalties are provided for unlicensed trading, introduction of goods, or residence on a reservation for the purpose of trade. 25 U. S. C. § 264. The Commissioner has promulgated detailed regulations to implement these statutes. 25 CFR Part 251 (1979).

In *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U. S. 685 (1965), the Court unanimously held that these "apparently all-inclusive regulations and the statutes authorizing them," *id.*, at 690, prohibited the State of Arizona from imposing precisely the same tax as is at issue in the present case on the operator of a federally licensed retail trading post located on a reservation. We determined that these regulations and statutes are "in themselves sufficient to show that Congress has taken the business of Indian trading on reservations so

fully in hand that no room remains for state laws imposing additional burdens upon traders." *Ibid.* We noted that the Tribe had been left " 'largely free to run the reservation and its affairs without state control, a policy which has automatically relieved Arizona of all burdens for carrying on those same responsibilities.' " *Ibid.* See *White Mountain Apache Tribe* v. *Bracker, ante,* at 152.

There are only two distinctions between *Warren Trading Post, supra,* and the present case: appellant is not a licensed Indian trader, and it does not have a permanent place of business on the reservation.[3] The Supreme Court of Arizona concluded that these distinctions indicated that federal law did not bar imposing the transaction privilege tax on appellant. We disagree.

The contract of sale involved in the present case was executed on the Gila River Reservation, and delivery and payment were effected there. Under the Indian trader statutes, 25 U. S. C. §§ 261–264, this transaction is plainly subject to federal regulation. It is irrelevant that appellant is not a licensed Indian trader. Indeed, the transaction falls squarely within the language of 25 U. S. C. § 264, which makes

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[3] It is irrelevant that the sale was made to a tribal enterprise rather than to the Tribe itself. See *Mescalero Apache Tribe* v. *Jones,* 411 U. S. 145, 157, n. 13 (1973). Nor may appellee distinguish the present case from *Warren Trading Post* by contending that the tax at issue in this case falls upon the seller of goods and not the buyer because it is a tax on the privilege of doing business in Arizona rather than a sales tax. The tax at issue in the present case is precisely the same tax involved in *Warren Trading Post.* The argument made by appellee in the present case was used by the Supreme Court of Arizona in *Warren Trading Post* to uphold imposition of the tax. *Warren Trading Post Co.* v. *Moore,* 95 Ariz. 110, 387 P. 2d 809 (1963). Our reversal of that decision recognized that, regardless of the label placed upon this tax, its imposition as to on-reservation sales to Indians could "disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commission." 380 U. S., at 691. See *id.,* at 686, and n. 1.

it a criminal offense for "[a]ny person . . . to introduce goods, or to trade" without a license "in the Indian country, or on any Indian reservation." It is the existence of the Indian trader statutes, then, and not their administration, that pre-empts the field of transactions with Indians occurring on reservations.[4]

Nor is it relevant that appellant did not maintain a permanent place of business on the reservation. The Indian trader statutes and their implementing regulations apply no less to a nonresident person who sells goods to Indians on a reservation than they do to a resident trader. See 25 U. S. C. § 262 ("[a]ny person desiring to trade with the Indians on any Indian reservation" subject to regulatory authority of Commissioner of Indian Affairs); 25 U. S. C. § 263 ("President is authorized . . . to prohibit the introduction of goods . . . into the country belonging to any Indian tribe"); 25 U. S. C. § 264 (making it an offense for "[a]ny person" to introduce goods or to trade on a reservation without a license). Indeed, an implementing regulation expressly provides for the licensing of "itinerant peddlers," 25 CFR § 251.9 (b) (1979), who are by definition nonresidents, see 25 CFR § 252.3 (i) (1979). One of the fundamental purposes of these statutes and regulations—to protect Indians from becoming victims of fraud in dealings with persons selling goods—would be easily circumvented if a seller could avoid federal regulation simply by failing to adopt a permanent place of business on a reservation or by failing to obtain a federal license.

Since the transaction in the present case is governed by the Indian trader statutes, federal law pre-empts the asserted state tax. As we held in *Warren Trading Post, supra,* at

[4] In any event, it should be recognized that the transaction at issue in this case was subjected to comprehensive federal regulation. Although appellant was not licensed to engage in trading with Indians, the Bureau of Indian Affairs had approved both the contract of sale for the tractors in question and the tribal budget, which allocated money for the purchase of this machinery.

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691, n. 18, by enacting these statutes Congress "has undertaken to regulate reservation trading in such a comprehensive way that there is no room for the States to legislate on the subject." It may be that in light of modern conditions the State of Arizona should be allowed to tax transactions such as the one involved in this case. Until Congress repeals or amends the Indian trader statutes, however, we must give them "a sweep as broad as [their] language," *United States* v. *Price*, 383 U. S. 787, 801 (1966), and interpret them in light of the intent of the Congress that enacted them, see *Wilson* v. *Omaha Indian Tribe*, 442 U. S. 653, 666 (1979); *Oliphant* v. *Suquamish Indian Tribe*, 435 U. S. 191, 206 (1978).[5]

The decision of the Supreme Court of Arizona is

Reversed.

MR. JUSTICE STEWART, with whom MR. JUSTICE POWELL, MR. JUSTICE REHNQUIST, and MR. JUSTICE STEVENS join, dissenting.

The question before us is whether the appellant is immune from a state tax imposed on the proceeds of the sale by it of farm machinery to an Indian tribe. The Court concludes that an affirmative answer is required by the rationale of *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U. S. 685, a case that is similar in some respects to this one. While I agree that *Warren Trading Post* states the relevant legal principles, I cannot agree that those principles lead to the result reached by the Court in this case. Accordingly, I dissent.

In *Warren Trading Post*, the Court held that the State of Arizona may not impose the same tax involved here on the operator of a federally licensed retail trading business located on an Indian reservation. The Court determined that

[5] We decline appellee's invitation to re-examine our conclusion in *Warren Trading Post*, 380 U. S., at 691, n. 18, that the Buck Act, 4 U. S. C. §§ 105–110, does not permit States to tax transactions on Indian reservations.

the "apparently all-inclusive [federal] regulations and the statutes authorizing them," *id.*, at 690, under which the trader in that case had been licensed, were "in themselves sufficient to show that Congress has taken the business of trading on reservations so fully in hand that no room remains for state laws imposing additional burdens on traders," *ibid.*

As the Court recognizes, the circumstances of this case differ from those presented by *Warren Trading Post.* Specifically, the appellant here is not a licensed Indian trader and does not have a permanent place of business on the reservation. See *ante,* at 164. The Court considers these differences immaterial, however, apparently because, as it reads the relevant statutes, the appellant *could* have been subjected to regulation somewhat like that in *Warren Trading Post,* though in fact it was not. Thus the Court relies on 25 U. S. C. § 264, which makes it unlawful for "[a]ny person . . . to introduce goods, or to trade" without a license "in the Indian country, or on any Indian reservation."

Even assuming that the Court correctly reads the statutory language to reach anybody who sells goods "on any Indian reservation," I cannot understand why the Court ascribes to that fact the significance that it does. The question, after all, is not whether the appellant may be required to have a license, but rather, as the Arizona Supreme Court correctly believed, whether the state tax "runs afoul of any congressional enactments" dealing with the affairs of reservation Indians, *State* v. *Central Machinery Co.,* 121 Ariz. 183, 184, 589 P. 2d 426, 427 (1978). This Court has consistently recognized that "'[e]nactments of the federal government passed to protect and guard its Indian wards only affect the operation, within the [reservation,] of such state laws as conflict with the federal enactments,'" *Moe* v. *Salish & Kootenai Tribes,* 425 U. S. 463, 483, quoting *United States* v. *McGowan,* 302 U. S. 535, 539.[1] With regard to the determinative issue

[1] As MR. JUSTICE POWELL observes in his dissenting opinion, *post,* at 172, the Court in *Moe* v. *Salish & Kootenai Tribes* rejected the contention that

whether Arizona's tax in this case is inconsistent with federal law, the Court says only that "[i]t is the existence of the Indian trader statutes . . . that pre-empts the field of transactions with Indians occurring on reservations," *ante*, at 165 (footnote omitted), and that those statutes must be given "a sweep as broad as [their] language," *ante*, at 166, quoting *United States* v. *Price*, 383 U. S. 787, 801.[2]

But the rationale of the decision in *Warren Trading Post*, *supra*, was not so simple as this. The grounds of that decision were twofold. First, as the Court today reiterates, a tax on the gross income of a licensed trader residing on the reservation could "disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable," *id.*, at 691. Second, the Court saw in that case no governmental justification to support the State's "put[ting] financial burdens on [the trader] or the Indians with whom it deals in addition to those Congress or the tribes have prescribed," *ibid.* Because Congress for nearly a century had "left the Indians . . . free to run the reservation and its affairs without state control," Arizona had been "automatically relieved . . . of all burdens for carrying on those same responsibilities," *id.*, at 690. That being so, the Court did not "believe that Congress intended to leave to the State the privilege of levying this tax," *id.*, at 691.

Neither of these considerations is present here. First, although the appellant was obliged to obtain federal approval of the sale transaction in this case, see 25 U. S. C. §§ 262, 264, it was not subjected to the much more comprehensive regulation that governs licensed traders engaged in a continuous course of dealing with reservation Indians. See 25 CFR

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the Indian trader statutes occupy the field so completely as to pre-empt all state laws affecting those who trade on the reservation with reservation Indians.

[2] The Court's construction of the trader statutes, in fact, sweeps far more broadly than their language, no portion of which indicates a congressional intention to immunize anybody from state taxation.

Part 251 (1979). In these circumstances, the Court's expressed belief that the minimal regulation to which the appellant was subject "leaves no room" for the state tax in this case strikes me as hyperbolic. Even were the appellant administratively required to possess a license, taxation of an isolated sale by it to the Indians simply would not jeopardize those federal and tribal interests involved in the thorough regulation of on-reservation merchants trading continuously with the Indians—the situation dealt with in *Warren Trading Post*. There the financial burdens of state taxation would have impaired the Commissioner's ability to prescribe "the kind and quantity of goods and the prices at which such goods shall be sold to the Indians," 25 U. S. C. § 261, and might have threatened the very existence of the resident trader's enterprise, on which the tribe depended for its essential commerce. No similar risks exist in a case such as this one, involving an isolated sales transaction. The viability of the seller may be assumed from its willingness to trade, and the reasonableness of the terms of sale may be guaranteed, as they were in this case, by the Commissioner's review of them. It is true that the prices paid by the Indians might be lower if the appellant is immune from the tax. But that is hardly relevant. The Court has on more than one occasion sustained state taxation of transactions occurring on Indian reservations, notwithstanding the fact that the economic burden of the tax fell indirectly on the Indian tribe or its members. See *Washington* v. *Confederated Tribes*, 447 U. S. 134, 151, 156–157; *Moe* v. *Salish & Kootenai Tribes, supra*. Cf. *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145, 148.

Second, the Court inexplicably ignores the State's wholly legitimate purpose in taxing the appellant, a corporation that does business within the State at large and presumably derives substantial benefits from the services provided by the State at taxpayer's expense.[3] Aside from entering the reser-

[3] "The State also has a legitimate governmental interest in raising

vation to solicit and execute the contract of sale and to receive payment, circumstances that are certain to characterize all sales to reservation Indians after today's decision, the appellant conducts its affairs in all respects like any other business to which the State's nondiscriminatory tax concededly applies. Thus, quite unlike the circumstances in *Warren Trading Post*, the State in this case has not been relieved of all duties or responsibilities respecting the business it would tax. Yet, despite the settled teaching of the Court's decisions in this area that every relevant state interest is to be given weight, see *Washington* v. *Confederated Tribes, supra; McClanahan* v. *Arizona State Tax Comm'n,* 411 U. S. 164, 171; cf. *White Mountain Apache Tribe* v. *Bracker, ante,* at 144, the Court does not even consider the State's valid governmental justification for taxing the transaction here involved.

It is important to recognize the limits inherent in the principles of federal pre-emption on which the *Warren Trading Post* decision rests. Those limits make necessary in every case such as this a careful inquiry into pertinent federal, tribal, and state interests, without which a rational accommodation of those interests is not possible. Had such an inquiry been made in this case, I am convinced the Court could not have concluded that Arizona's exercise of the sovereign power to tax its non-Indian citizens had been pre-empted by federal law.

MR. JUSTICE POWELL, dissenting in No. 78–1604 and concurring in No. 78–1177.

I write separately because I would distinguish *Central Machinery Co.* v. *Arizona State Tax Comm'n, ante,* p. 160, from *White Mountain Apache Tribe* v. *Bracker, ante,* p. 136.

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revenues, and that interest is likewise strongest when the tax is directed at [economic value created off of the reservation] and when the taxpayer is the recipient of state services." *Washington* v. *Confederated Tribes,* 447 U. S. 134, 157.

I agree with the Court that a non-Indian contractor continuously engaged in logging upon a reservation is subject to such pervasive federal regulation as to bring into play the preemption doctrine of *Warren Trading Post Co.* v. *Arizona Tax Comm'n,* 380 U. S. 685 (1965). But *Warren Trading Post* simply does not apply to routine state taxation of a non-Indian corporation that makes a single sale to reservation Indians. I therefore join the Court's opinion in *White Mountain Apache Tribe,* but I dissent from its decision in *Central Machinery.*

I

Central Machinery

Warren Trading Post held that Arizona could not levy its transaction privilege tax against a company regularly engaged in retail trading with the Indians upon a reservation. The company operated under a federal license, and it was subject to the federal regulatory scheme authorized by 25 U. S. C. §§ 261–264. "These apparently all-inclusive regulations," the Court concluded, "show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders." 380 U. S., at 690.

The Court today is too much persuaded by the superficial similarity between *Warren Trading Post* and *Central Machinery.* The Court mistakenly concludes that a company having no license to trade with the Indians and no place of business within a reservation is engaged in "the business of Indian trading on reservations. . . ." 380 U. S., at 690. Although "[a]ny person" desiring to sell goods to Indians inside a reservation must secure federal approval, see 25 U. S. C. §§ 262, 264, the federal regulations—and the facts of this case—show that a person who makes a single approved sale need not become a fully regulated Indian trader. Even itinerant peddlers who engage in a pattern of selling within a reservation are merely "considered as traders" for purposes

of the licensing requirement. 25 CFR § 251.9 (b) (1979). "The business of a licensed trader," in fact, "must be managed by the bonded principal, who must habitually reside upon the reservation. . . ." 25 CFR § 251.14 (1979).[1] Since *Warren Trading Post* involved a resident trader subject to the complete range of federal regulation, the Court had no occasion to consider whether federal regulation also pre-empts state taxation of a seller who enters a reservation to make a single transaction.[2]

Our most recent cases undermine the notion that 25 U. S. C. §§ 261–264 occupy the field so as to pre-empt all state regulation affecting licensed Indian traders. The unanimous Court in *Moe* v. *Salish & Kootenai Tribes*, 425 U. S. 463, 481–483 (1976), concluded that a State could require tribal retailers to prepay a tax validly imposed on non-Indian customers. Rejecting an argument based on *Warren Trading Post*, the Court concluded that federal laws "'passed to protect and guard [the Indians] only affect the operation, within the [reservation], of such state laws as conflict with the federal enactments.'" 425 U. S., at 483, quoting *United States* v. *McGowan*, 302 U. S. 535, 539 (1938). In *Washington* v. *Confederated Tribes*, 447 U. S. 134, 159–160 (1980), the

[1] The regulation dealing with itinerant peddlers was promulgated after the decision in *Warren Trading Post*. See 30 Fed. Reg. 8267 (1965). Thus, the regulations before the Court in *Warren Trading Post* required all licensed Indian traders to conduct their businesses under the management of a habitual resident upon the reservation. 25 CFR § 251.14 (1958).

[2] At oral argument, counsel for Central Machinery conceded that the State could have taxed the transaction in question if it had been completed at the firm's usual place of business. Tr. of Oral Arg. 7. Thus, Central Machinery's argument reduces to the proposition that the locus of the transaction is dispositive. Quite apart from the opportunities for tax evasion that it creates, this position is unsound. Persons who make an unauthorized sale to Indians upon a reservation can be prosecuted. 25 U. S. C. § 264; see *United States ex rel. Hornell* v. *One 1976 Chevrolet Station Wagon*, 585 F. 2d 978 (CA10 1978). But that certainly does not prove that all persons who make an authorized sale are subject to the pervasive regulation considered in *Warren Trading Post*.

Court holds that a State can require licensed traders to keep detailed tax records of their sales to both Indians and non-Indians. Cf. *Confederated Tribes* v. *Washington,* 446 F. Supp. 1339, 1347, 1358–1359 (ED Wash. 1978) (three-judge court).

Finally, unlike taxes imposed upon an Indian trader engaged in a continuous course of dealing within the reservation, the tax assessed against Central Machinery does not "to a substantial extent frustrate the evident congressional purpose of ensuring that no burden shall be imposed upon Indian traders for trading with Indians . . . except as authorized by Acts of Congress or by valid regulations promulgated under those Acts." *Warren Trading Post, supra,* at 691. In this case, the Bureau of Indian Affairs approved all aspects of the only sale Central Machinery made to the Gila River Indian Tribe. The contract price approved by the Bureau included costs attributable to the very tax that Central Machinery now seeks to recover. *Ante,* at 161–162. Thus, the State's tax did not interfere with "the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable. . . ." *Warren Trading Post,* 380 U. S., at 691. Since a seller not licensed to trade with the Indians must secure specific federal approval for each isolated transaction, there is no danger that ordinary state business taxes upon the seller will impair the Bureau's ability to prevent fraudulent or excessive pricing. To hold the seller immune from state taxes otherwise due upon a single transaction with the Indians gives the non-Indian seller a windfall or the Indian buyer an unwarranted advantage over all others who deal with the seller.

II

White Mountain Apache Tribe

White Mountain Apache Tribe presents a different situation. Petitioner Pinetop Logging Co. operates solely and continuously upon an Indian reservation under its contract

with a tribal enterprise. Pinetop's daily operations are controlled by a comprehensive federal regulatory scheme designed to assure the Indian tribes the greatest possible return from their timber. Federal officials direct Pinetop's hauling operations down to such details as choice of equipment, selection of routes, speeds of travel, and dimensions of the loads. *Ante*, at 146–148. Pinetop does all of the hauling at issue in this case over roads constructed, maintained, and regulated by the White Mountain Apache Tribe and the Bureau of Indian Affairs. The Bureau requires the Tribe and its contractors to repair existing roads and to construct new roads necessary for sustained logging. Pinetop exhausts a large percentage of its gross income in performing these contractual obligations. *Ante*, at 148.

Since the Federal Government, the Tribe, and its contractors are solely responsible for the roads that Pinetop uses, I "cannot believe that Congress intended to leave to the State the privilege of levying" road use taxes upon Pinetop's operations. See *Warren Trading Post, supra*, at 691. The State has no interest in raising revenues from the use of Indian roads that cost it nothing and over which it exercises no control. See *Washington* v. *Confederated Tribes, supra*, at 162–164.[3] The addition of these taxes to the road construction and repair expenses that Pinetop already bears also would interfere with the federal scheme for maintaining roads essential to successful Indian timbering. See 380 U. S., at

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[3] The motor carrier license tax imposed by Ariz. Rev. Stat. Ann. § 40–641 (Supp. 1979) is a tax on the privilege of engaging in a business that makes inordinate use of public roads. See *Purolator Security, Inc.* v. *Thorneycroft*, 116 Ariz. 394, 396–397, 569 P. 2d 824, 826–827 (1977); *Campbell* v. *Commonwealth Plan, Inc.*, 101 Ariz. 554, 557, 422 P. 2d 118, 121 (1966). All revenues from this tax are earmarked for maintenance and improvement of the State's highways. Ariz. Rev. Stat. Ann. § 40–641 (C) (Supp. 1979). The fuel use excise tax imposed by Ariz. Rev. Stat. Ann. § 28–1551 (Supp. 1979) is "for the purpose of partially compensating the state for the use of its highways." § 28–1552 (Supp. 1979).

691. The Tribe or its contractors would pay twice for use of the same roads. This double exaction could force federal officials to reallocate work from non-Indian contractors to the tribal enterprise itself or to make costly concessions to the contractors. I therefore join the Court in concluding that this case "is in all relevant respects indistinguishable from *Warren Trading Post.*" *Ante,* at 153.

DAWSON CHEMICAL CO. ET AL. *v.* ROHM & HAAS CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 79-669. Argued April 21, 1980—Decided June 27, 1980

Title 35 U. S. C. § 271 (c) provides that "[w]hoever sells a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer." Section 271 (d) provides that "[n]o patent owner otherwise entitled to relief for infringement or contributory infringement of a patent shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having done one or more of the following: (1) derived revenue from acts which if performed by another without his consent would constitute contributory infringement of the patent; (2) licensed or authorized another to perform acts which if performed without his consent would constitute contributory infringement of the patent; (3) sought to enforce his patent rights against infringement or contributory infringement." Respondent chemical manufacturer obtained a patent on the method or process for applying propanil, a chemical compound herbicide, to inhibit the growth of undesirable plants in rice crops. Propanil is a nonstaple commodity that has no use except through practice of the patented method. Petitioners manufactured and sold propanil for application to rice crops, with directions to purchasers to apply the propanil in accordance with respondent's patented method. Respondent filed suit in Federal District Court, seeking injunctive relief and alleging that petitioners contributed to infringement of its patent rights by farmers who purchased and used petitioners' propanil and that petitioners induced such infringement by instructing the farmers how to apply the herbicide. Petitioners responded by requesting licenses for the patented method, but when respondent refused to grant licenses, petitioners raised a defense of patent misuse, claiming that there had been misuse because respondent had "tied" the sale of patent rights to the purchase of propanil, an unpatented and unpatentable article, and because it refused to grant licenses to other propanil producers. The District Court granted summary judgment for petitioners on the ground that respondent was barred from obtaining relief against infringers be-

cause it had attempted illegally to extend its patent monopoly. The court ruled that the language of § 271 (d) specifying conduct that is deemed not to be patent abuse did not encompass the totality of respondent's conduct. The Court of Appeals reversed, holding that, by specifying in § 271 (d) conduct that is not to be deemed patent misuse, Congress conferred upon a patentee the right to exclude others and reserve to itself, if it chooses, the right to sell nonstaples used substantially only in its invention, and that since respondent's conduct was designed to accomplish only what the statute contemplated, petitioners' misuse defense was of no avail.

Held: Respondent has not engaged in patent misuse, either by its method of selling propanil, or by its refusal to license others to sell that commodity. Pp. 187–223.

(a) Viewed against the backdrop of judicial precedent involving the doctrines of contributory infringement and patent misuse, the language and structure of § 271 support respondent's contention that, because § 271 (d) immunizes its conduct from the charge of patent misuse, it should not be barred from seeking relief against contributory infringement. Section 271 (c) identifies the basic dividing line between contributory infringement and patent misuse and adopts a restrictive definition of contributory infringement that distinguishes between staple and nonstaple articles of commerce. Section 271 (c)'s limitations on contributory infringement are counterbalanced by the limitations on patent misuse in § 271 (d), which effectively confer upon the patentee, as a lawful adjunct of his patent rights, a limited power to exclude others from competition in nonstaple goods. Respondent's conduct is not dissimilar in either nature or effect from the three species of conduct that are expressly excluded by § 271 (d) from characterization as misuse. It sells propanil, authorizes others to use it, and sues contributory infringers, all protected activities. While respondent does not license others to sell propanil, nothing on the face of the statute requires it to do so. And, although respondent's linkage of two protected activities—sale of propanil and authorization to practice the patented process—together in a single transaction is not expressly covered by § 271 (d), petitioners have failed to identify any way in which such "tying" of two expressly protected activities results in any extension of control over unpatented materials beyond what § 271 (d) already allows. Pp. 200–202.

(b) The relevant legislative materials, especially the extensive congressional hearings that led up to the final enactment of § 271 in 1952, reinforce the conclusion that § 271 (d) was designed to immunize from the charge of patent misuse behavior similar to that in which respondent has

engaged, and that, by enacting §§ 271 (c) and (d), Congress granted to patent holders a statutory right to control nonstaple goods that are capable only of infringing use in a patented invention and are essential to that invention's advance over prior art. There is nothing in the legislative history to show that respondent's behavior falls outside § 271 (d)'s scope. Pp. 202–215.

(c) The above interpretation of § 271 (d) is not foreclosed by decisions in this Court following passage of the 1952 Patent Act. Contrary to petitioners' assertion, this Court in those decisions did not continue to apply the holdings of *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661, and *Mercoid Corp.* v. *Minneapolis-Honeywell Regulator Co.*, 320 U. S. 680—that even an attempt to control the market for unpatented goods having no use outside a patented invention would constitute patent misuse—and did not effectively construe § 271 (d) to codify the result of the *Mercoid* decisions. The staple-nonstaple distinction supplies the controlling benchmark and ensures that the patentee's right to prevent others from contributorily infringing his patent affects only the market for the invention itself. *Aro Mfg. Co.* v. *Convertible Top Co.*, 365 U. S. 336, and *Aro Mfg. Co.* v. *Convertible Top Co.*, 377 U. S. 476, distinguished. Pp. 215–220.

599 F. 2d 685, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, POWELL, and REHNQUIST, JJ., joined. WHITE, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined, *post*, p. 223. STEVENS, J., filed a dissenting opinion, *post*, p. 240.

Ned L. Conley argued the cause and filed briefs for petitioners.

Rudolf E. Hutz argued the cause for respondent. With him on the brief were *Arthur G. Connolly*, *Januar D. Bove, Jr.*, *James M. Mulligan*, *George W. F. Simmons*, *William E. Lambert III*, and *J. Fay Hall, Jr.*

Eugene L. Bernard argued the cause for the National Agricultural Chemicals Association as *amicus curiae* urging affirmance. With him on the brief were *Frank L. Neuhauser*, *William K. Wells, Jr.*, and *John D. Conner*.*

**Solicitor General McCree, Assistant Attorney General Litvack, Deputy Solicitor General Wallace, Robert B. Nicholson, Robert V. Allen, Roger*

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents an important question of statutory interpretation arising under the patent laws. The issue before us is whether the owner of a patent on a chemical process is guilty of patent misuse, and therefore is barred from seeking relief against contributory infringement of its patent rights, if it exploits the patent only in conjunction with the sale of an unpatented article that constitutes a material part of the invention and is not suited for commercial use outside the scope of the patent claims. The answer will determine whether respondent, the owner of a process patent on a chemical herbicide, may maintain an action for contributory infringement against other manufacturers of the chemical used in the process. To resolve this issue, we must construe the various provisions of 35 U. S. C. § 271, which Congress enacted in 1952 to codify certain aspects of the doctrines of contributory infringement and patent misuse that previously had been developed by the judiciary.

I

The doctrines of contributory infringement and patent misuse have long and interrelated histories. The idea that a patentee should be able to obtain relief against those whose

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B. Ardewelt, and *Frederic Freilicher* filed a brief for the United States as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *William J. Butler, Jr.*, and *Frank M. Northam* for the American Chemical Society; by *John H. Pickering, Donald F. Turner, Robert A. Hammond III*, and *A. Stephen Hut, Jr.*, for the Chemical Manufacturers Association; by *Paul B. Bell, C. Lee Cook, Jr., James H. Marsh, Jr.*, and *Roger W. Parkhurst* for the Licensing Executives Society (U. S. A.), Inc.; by *Robert H. Morse* and *Thomas J. Houser* for the National Association of Manufacturers; by *Eric P. Schellin* for the National Small Business Association; by *Barry D. Rein, Stanley H. Lieberstein*, and *Kenneth E. Madsen* for the New York Patent Law Association; by *Philip Elman, Joel E. Hoffman*, and *William R. Weissman* for the Pharmaceutical Manufacturers Association; and by *Timothy L. Tilton* and *Howard W. Bremer* for the Society of University Patent Administrators et al.

acts facilitate infringement by others has been part of our law since *Wallace* v. *Holmes*, 29 F. Cas. 74 (No. 17,100) (CC Conn. 1871). The idea that a patentee should be denied relief against infringers if he has attempted illegally to extend the scope of his patent monopoly is of somewhat more recent origin, but it goes back at least as far as *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 502 (1917). The two concepts, contributory infringement and patent misuse, often are juxtaposed, because both concern the relationship between a patented invention and unpatented articles or elements that are needed for the invention to be practiced.

Both doctrines originally were developed by the courts. But in its 1952 codification of the patent laws Congress endeavored, at least in part, to substitute statutory precepts for the general judicial rules that had governed prior to that time. Its efforts find expression in 35 U. S. C. § 271:

> "(a) Except as otherwise provided in this title, whoever without authority makes, uses or sells any patented invention, within the United States during the term of the patent therefor, infringes the patent.
>
> "(b) Whoever actively induces infringement of a patent shall be liable as an infringer.
>
> "(c) Whoever sells a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer.
>
> "(d) No patent owner otherwise entitled to relief for infringement or contributory infringement of a patent shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having

done one or more of the following: (1) derived revenue from acts which if performed by another without his consent would constitute contributory infringement of the patent; (2) licensed or authorized another to perform acts which if performed without his consent would constitute contributory infringement of the patent; (3) sought to enforce his patent rights against infringement or contributory infringement."

Of particular import to the present controversy are subsections (c) and (d). The former defines conduct that constitutes contributory infringement; the latter specifies conduct of the patentee that is *not* to be deemed misuse.

A

The catalyst for this litigation is a chemical compound known to scientists as "3,4-dichloropropionanilide" and referred to in the chemical industry as "propanil." In the late 1950's, it was discovered that this compound had properties that made it useful as a selective, "post-emergence" herbicide particularly well suited for the cultivation of rice. If applied in the proper quantities, propanil kills weeds normally found in rice crops without adversely affecting the crops themselves. It thus permits spraying of general areas where the crops are already growing, and eliminates the necessity for hand weeding or flooding of the rice fields. Propanil is one of several herbicides that are commercially available for use in rice cultivation.

Efforts to obtain patent rights to propanil or its use as a herbicide have been continuous since the herbicidal qualities of the chemical first came to light. The initial contender for a patent monopoly for this chemical compound was the Monsanto Company. In 1957, Monsanto filed the first of three successive applications for a patent on propanil itself. After lengthy proceedings in the United States Patent Office, a patent, No. 3,382,280, finally was issued in 1968. It was de-

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cleared invalid, however, when Monsanto sought to enforce it by suing Rohm and Haas Company (Rohm & Haas), a competing manufacturer, for direct infringement. *Monsanto Co.* v. *Rohm & Haas Co.*, 312 F. Supp. 778 (ED Pa. 1970), aff'd, 456 F. 2d 592 (CA3), cert. denied, 407 U. S. 934 (1972). The District Court held that propanil had been implicitly revealed in prior art dating as far back as 1902, even though its use as a herbicide had been discovered only recently. 312 F. Supp., at 787–790. Monsanto subsequently dedicated the patent to the public, and it is not a party to the present suit.

Invalidation of the Monsanto patent cleared the way for Rohm & Haas, respondent here, to obtain a patent on the method or process for applying propanil. This is the patent on which the present lawsuit is founded. Rohm & Haas' efforts to obtain a propanil patent began in 1958. These efforts finally bore fruit when, on June 11, 1974, the United States Patent Office issued Patent No. 3,816,092 (the Wilson patent) to Harold F. Wilson and Dougal H. McRay.[1] The patent contains several claims covering a method for applying propanil to inhibit the growth of undesirable plants in areas containing established crops.[2] Rohm & Haas has been the sole owner of the patent since its issuance.

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[1] The patent was issued to Rohm & Haas as the result of an interference proceeding in the United States Patent Office between Rohm & Haas and Monsanto. In that proceeding the Patent Office decided that Wilson, and not the applicant for the Monsanto patent (Huffman), was actually the first to invent the process for using propanil as a herbicide.

[2] The Wilson patent contains several claims relevant to this proceeding. Of these the following are illustrative:

1. "A method for selectively inhibiting growth of undesirable plants in an area containing growing undesirable plants in an established crop, which comprises applying to said area 3, 4-dichloropropionanilide at a rate of application which inhibits growth of said undesirable plants and which does not adversely affect the growth of said established crop."

2. "The method according to claim 1 wherein the 3, 4-dichloropropionanilide is applied in a composition comprising 3, 4-dichloropropionanilide and an inert diluent therefor at a rate of between 0.5 and 6 pounds of

Petitioners, too, are chemical manufacturers. They have manufactured and sold propanil for application to rice crops since before Rohm & Haas received its patent. They market the chemical in containers on which are printed directions for application in accordance with the method claimed in the Wilson patent. Petitioners did not cease manufacture and sale of propanil after that patent issued, despite knowledge that farmers purchasing their products would infringe on the patented method by applying the propanil to their crops. Accordingly, Rohm & Haas filed this suit, in the United States District Court for the Southern District of Texas, seeking injunctive relief against petitioners on the ground that their manufacture and sale of propanil interfered with its patent rights.

The complaint alleged not only that petitioners contributed to infringement by farmers who purchased and used petitioners' propanil, but also that they actually induced such infringement by instructing farmers how to apply the herbicide. See 35 U. S. C. §§ 271 (b) and (c). Petitioners responded to the suit by requesting licenses to practice the patented method. When Rohm & Haas refused to grant such licenses, however, petitioners raised a defense of patent misuse and counterclaimed for alleged antitrust violations by respondent. The parties entered into a stipulation of facts, and petitioners moved for partial summary judgment. They argued that Rohm & Haas has misused its patent by conveying the right to practice the patented method only to purchasers of its own propanil.

The District Court granted summary judgment for petitioners. 191 USPQ 691 (1976). It agreed that Rohm & Haas was barred from obtaining relief against infringers of its patent because it had attempted illegally to extend its patent monopoly. The District Court recognized that 35 U. S. C.

3, 4-dichloropropionanilide per acre." 191 USPQ 691, 695 (SD Tex. 1976).

§ 271 (d) specifies certain conduct which is not to be deemed patent misuse. The court ruled, however, that "[t]he language of § 271 (d) simply does not encompass the totality of [Rohm & Haas'] conduct in this case." 191 USPQ, at 704. It held that respondent's refusal to grant licenses, other than the "implied" licenses conferred by operation of law upon purchasers of its propanil, constituted an attempt by means of a "tying" arrangement to effect a monopoly over an unpatented component of the process. The District Court concluded that this conduct would be deemed patent misuse under the judicial decisions that preceded § 271 (d), and it held that "[n]either the legislative history nor the language of § 271 indicates that this rule has been modified." 191 USPQ, at 707.[3]

The United States Court of Appeals for the Fifth Circuit reversed. 599 F. 2d 685 (1979). It emphasized the fact that propanil, in the terminology of the patent law, is a "nonstaple" article, that is, one that has no commercial use except in connection with respondent's patented invention. After a thorough review of the judicial developments preceding enactment of § 271, and a detailed examination of the legislative history of that provision, the court concluded that the legislation restored to the patentee protection against contributory infringement that decisions of this Court theretofore had undermined. To secure that result, Congress found it necessary to cut back on the doctrine of patent misuse. The Court of Appeals determined that, by specifying in § 271 (d) conduct that is not to be deemed misuse, "Congress

[3] The District Court limited its ruling on the motion for partial summary judgment to the question of patent misuse. It admonished that "[n]othing in this ruling should be construed to be determinative" of petitioners' antitrust counterclaims. 191 USPQ, at 707. These counterclaims are based, *inter alia*, on allegations that Rohm & Haas engaged in coercive marketing practices prior to issuance of the Wilson patent. These charges are not implicated in this appeal, and they remain for development on remand.

did clearly provide for a patentee's right to exclude others and reserve to itself, if it chooses, the right to sell nonstaples used substantially only in its invention." 599 F. 2d, at 704 (emphasis in original). Since Rohm & Haas' conduct was designed to accomplish only what the statute contemplated, the court ruled that petitioners' misuse defense was of no avail.

We granted certiorari, 444 U. S. 1012 (1980), to forestall a possible conflict in the lower courts[4] and to resolve an issue of prime importance in the administration of the patent law.

B

For present purposes certain material facts are not in dispute. First, the validity of the Wilson patent is not in question at this stage in the litigation.[5] We therefore must assume that respondent is the lawful owner of the sole and exclusive right to use, or to license others to use, propanil as a herbicide on rice fields in accordance with the methods claimed in the Wilson patent. Second, petitioners do not dispute that their manufacture and sale of propanil together with instructions for use as a herbicide constitute contributory infringement of the Rohm & Haas patent. Tr. of Oral Arg. 14. Accordingly, they admit that propanil constitutes "a material part of [respondent's] invention," that it is "espe-

[4] There is no direct conflict, but a number of decisions exhibit some tension on questions of patent misuse and the scope of 35 U. S. C. § 271 (d). Cf., *e. g.*, *Ansul Co.* v. *Uniroyal, Inc.*, 306 F. Supp. 541, 562 (SDNY 1969), aff'd in part and rev'd in part, 448 F. 2d 872 (CA2 1971), cert. denied, 404 U. S. 1018 (1972); *Rohm & Haas Co.* v. *Roberts Chemicals, Inc.*, 245 F. 2d 693, 699 (CA4 1957); *Harte & Co.* v. *L. E. Carpenter & Co.*, 138 USPQ 578, 584 (SDNY 1963); *Sola Electric Co.* v. *General Electric Co.*, 146 F. Supp. 625, 647–648 (ND Ill. 1956). See also Nelson, Mercoid-Type Misuse is Alive, 56 J. Pat. Off. Soc. 134 (1974).

[5] In their answers to the complaint, petitioners asserted the invalidity of Rohm & Haas' patent on a variety of grounds. See 599 F. 2d 685, 687 (1979). These contentions have not yet been addressed or decided by either the District Court or the Court of Appeals.

cially made or especially adapted for use in an infringement of [the] patent," and that it is "not a staple article or commodity of commerce suitable for substantial noninfringing use," all within the language of 35 U. S. C. § 271 (c).[6] They also concede that they have produced and sold propanil with knowledge that it would be used in a manner infringing on respondent's patent rights. To put the same matter in slightly different terms, as the litigation now stands, petitioners admit commission of a tort and raise as their only defense to liability the contention that respondent, by engaging in patent misuse, comes into court with unclean hands.[7]

As a result of these concessions, our chief focus of inquiry must be the scope of the doctrine of patent misuse in light of the limitations placed upon that doctrine by § 271 (d). On this subject, as well, our task is guided by certain stipulations and concessions. The parties agree that Rohm & Haas makes and sells propanil; that it has refused to license petitioners or any others to do the same; that it has not granted express licenses either to retailers or to end users of the product; and that farmers who buy propanil from Rohm & Haas may use it, without fear of being sued for direct infringement, by virtue of an "implied license" they obtain when Rohm & Haas relinquishes its monopoly by selling the propanil. See App. 35–39. See also *United States* v. *Univis Lens Co.*, 316 U. S. 241, 249 (1942); cf. *Adams* v. *Burke*, 17 Wall. 453 (1873). The parties further agree that §§ 271 (d)(1) and (3) permit respondent both to sell propanil itself and to sue

[6] We follow the practice of the Court of Appeals and the parties by using the term "nonstaple" throughout this opinion to refer to a component as defined in 35 U. S. C. § 271 (c), the unlicensed sale of which would constitute contributory infringement. A "staple" component is one that does not fit this definition. We recognize that the terms "staple" and "nonstaple" have not always been defined precisely in this fashion.

[7] See *Thomson-Houston Electric Co.* v. *Ohio Brass Co.*, 80 F. 712, 721 (CA6 1897) (contributory infringement a tort); *Morton Salt Co.* v. *G. S. Suppiger Co.*, 314 U. S. 488, 492–494 (1942) (patent misuse linked to equitable doctrine of "unclean hands").

others who sell the same product without a license, and that under § 271 (d)(2) it would be free to demand royalties from others for the sale of propanil if it chose to do so.

The parties disagree over whether respondent has engaged in any additional conduct that amounts to patent misuse. Petitioners assert that there has been misuse because respondent has "tied" the sale of patent rights to the purchase of propanil, an unpatented and indeed unpatentable article, and because it has refused to grant licenses to other producers of the chemical compound. They argue that § 271 (d) does not permit any sort of tying arrangement, and that resort to such a practice excludes respondent from the category of patentees "otherwise entitled to relief" within the meaning of § 271 (d). Rohm & Haas, understandably, vigorously resists this characterization of its conduct. It argues that its acts have been only those that § 271 (d), by express mandate, excepts from characterization as patent misuse. It further asserts that if this conduct results in an extension of the patent right to a control over an unpatented commodity, in this instance the extension has been given express statutory sanction.

II

Our mode of analysis follows closely the trail blazed by the District Court and the Court of Appeals. It is axiomatic, of course, that statutory construction must begin with the language of the statute itself. But the language of § 271 is generic and freighted with a meaning derived from the decisional history that preceded it. The Court of Appeals appropriately observed that more than one interpretation of the statutory language has a surface plausibility. To place § 271 in proper perspective, therefore, we believe that it is helpful first to review in detail the doctrines of contributory infringement and patent misuse as they had developed prior to Congress' attempt to codify the governing principles.

As we have noted, the doctrine of contributory infringe-

ment had its genesis in an era of simpler and less subtle technology. Its basic elements are perhaps best explained with a classic example drawn from that era. In *Wallace* v. *Holmes*, 29 F. Cas. 74 (No. 17,100) (CC Conn. 1871), the patentee had invented a new burner for an oil lamp. In compliance with the technical rules of patent claiming, this invention was patented in a combination that also included the standard fuel reservoir, wick tube, and chimney necessary for a properly functioning lamp. After the patent issued, a competitor began to market a rival product including the novel burner but not the chimney. *Id.*, at 79. Under the sometimes scholastic law of patents, this conduct did not amount to direct infringement, because the competitor had not replicated every single element of the patentee's claimed combination. Cf., *e. g.*, *Prouty* v. *Ruggles*, 16 Pet. 336, 341 (1842). Yet the court held that there had been "palpable interference" with the patentee's legal rights, because purchasers would be certain to complete the combination, and hence the infringement, by adding the glass chimney. 29 F. Cas., at 80. The court permitted the patentee to enforce his rights against the competitor who brought about the infringement, rather than requiring the patentee to undertake the almost insuperable task of finding and suing all the innocent purchasers who technically were responsible for completing the infringement. *Ibid.* See also *Bowker* v. *Dows*, 3 F. Cas. 1070 (No. 1,734) (CC Mass. 1878).

The *Wallace* case demonstrates, in a readily comprehensible setting, the reason for the contributory infringement doctrine. It exists to protect patent rights from subversion by those who, without directly infringing the patent themselves, engage in acts designed to facilitate infringement by others. This protection is of particular importance in situations, like the oil lamp case itself, where enforcement against direct infringers would be difficult, and where the technicalities of patent law make it relatively easy to profit from another's invention without risking a charge of direct infringement.

See *Thomson-Houston Electric Co.* v. *Ohio Brass Co.*, 80 F. 712, 721 (CA6 1897) (Taft, Circuit Judge); Miller, Some Views on the Law of Patent Infringement by Inducement, 53 J. Pat. Off. Soc. 86, 87–94 (1971).

Although the propriety of the decision in *Wallace* v. *Holmes* seldom has been challenged, the contributory infringement doctrine it spawned has not always enjoyed full adherence in other contexts. The difficulty that the doctrine has encountered stems not so much from rejection of its core concept as from a desire to delimit its outer contours. In time, concern for potential anticompetitive tendencies inherent in actions for contributory infringement led to retrenchment on the doctrine. The judicial history of contributory infringement thus may be said to be marked by a period of ascendancy, in which the doctrine was expanded to the point where it became subject to abuse, followed by a somewhat longer period of decline, in which the concept of patent misuse was developed as an increasingly stringent antidote to the perceived excesses of the earlier period.

The doctrine of contributory infringement was first addressed by this Court in *Morgan Envelope Co.* v. *Albany Paper Co.*, 152 U. S. 425 (1894). That case was a suit by a manufacturer of a patented device for dispensing toilet paper against a supplier of paper rolls that fit the patented invention. The Court accepted the contributory infringement doctrine in theory but held that it could not be invoked against a supplier of perishable commodities used in a patented invention. The Court observed that a contrary outcome would give the patentee "the benefit of a patent" on ordinary articles of commerce, a result that it determined to be unjustified on the facts of that case. *Id.*, at 433.

Despite this wary reception, contributory infringement actions continued to flourish in the lower courts.[8] Eventually

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[8] See, *e. g.*, *Thomson-Houston Electric Co.* v. *Kelsey Electric R. Specialty Co.*, 72 F. 1016 (CC Conn. 1896); *American Graphophone Co.* v.

the doctrine gained more wholehearted acceptance here. In *Leeds & Catlin Co.* v. *Victor Talking Machine Co.*, 213 U. S. 325 (1909), the Court upheld an injunction against contributory infringement by a manufacturer of phonograph discs specially designed for use in a patented disc-and-stylus combination. Although the disc itself was not patented, the Court noted that it was essential to the functioning of the patented combination, and that its method of interaction with the stylus was what "mark[ed] the advance upon the prior art." *Id.*, at 330. It also stressed that the disc was capable of use only in the patented combination, there being no other commercially available stylus with which it would operate. The Court distinguished the result in *Morgan Envelope* on the broad grounds that "[n]ot one of the determining factors there stated exists in the case at bar," and it held that the attempt to link the two cases "is not only to confound essential distinctions made by the patent laws, but essential distinctions between entirely different things." 213 U. S., at 335.

The contributory infringement doctrine achieved its high-water mark with the decision in *Henry* v. *A. B. Dick Co.*, 224 U. S. 1 (1912). In that case a divided Court extended contributory infringement principles to permit a conditional licensing arrangement whereby a manufacturer of a patented printing machine could require purchasers to obtain all supplies used in connection with the invention, including such staple items as paper and ink, exclusively from the patentee. The Court reasoned that the market for these supplies was created by the invention, and that sale of a license to use the

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Amet, 74 F. 789 (CC ND Ill. 1896); *Thomson-Houston Electric Co.* v. *Ohio Brass Co., supra; Red Jacket Mfg. Co.* v. *Davis*, 82 F. 432, 439 (CA7 1897); *American Graphophone Co.* v. *Leeds*, 87 F. 873 (CC SDNY 1898); *Wilkins Shoe-Button Fastener Co.* v. *Webb*, 89 F. 982, 996 (CC ND Ohio 1898); *Canda* v. *Michigan Malleable Iron Co.*, 124 F. 486, 489 (CA6 1903); *James Heekin Co.* v. *Baker*, 138 F. 63, 66 (CA8 1905) (Van Devanter, Circuit Judge).

patented product, like sale of other species of property, could be limited by whatever conditions the property owner wished to impose. *Id.*, at 31–32. The *A. B. Dick* decision and its progeny in the lower courts led to a vast expansion in conditional licensing of patented goods and processes used to control markets for staple and nonstaple goods alike.[9]

This was followed by what may be characterized through the lens of hindsight as an inevitable judicial reaction. In *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 502 (1917), the Court signalled a new trend that was to continue for years thereafter.[10] The owner of a patent on projection equipment attempted to prevent competitors from selling film for use in the patented equipment by attaching to the projectors it sold a notice purporting to condition use of the machine on exclusive use of its film. The film previously had been patented but that patent had expired. The Court addressed the broad issue whether a patentee possessed the right to condition sale of a patented machine on the purchase of articles "which are no part of the patented machine, and which are not patented." *Id.*, at 508. Relying upon the rule that the scope of a patent "must be limited to the invention described in the claims," *id.*, at 511, the Court held that the attempted restriction on use of unpatented supplies was improper:

> "Such a restriction is invalid because such a film is obviously not any part of the invention of the patent in suit; because it is an attempt, without statutory warrant, to continue the patent monopoly in this particular char-

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[9] See F. Vaughan, Economics of Our Patent System 253–254 (1925) (collecting cases).

[10] In addition to this judicial reaction, there was legislative reaction as well. In 1914, partly in response to the decision in *Henry* v. *A. B. Dick Co.*, 224 U. S. 1 (1912), Congress enacted § 3 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 14. See *International Business Machines Corp.* v. *United States*, 298 U. S. 131, 137–138 (1936).

> acter of film after it has expired, and because to enforce it would be to create a monopoly in the manufacture and use of moving picture films, wholly outside of the patent in suit and of the patent law as we have interpreted it." *Id.*, at 518.

By this reasoning, the Court focused on the conduct of the patentee, not that of the alleged infringer. It noted that as a result of lower court decisions, conditional licensing arrangements had greatly increased, indeed, to the point where they threatened to become "perfect instrument[s] of favoritism and oppression." *Id.*, at 515. The Court warned that approval of the licensing scheme under consideration would enable the patentee to "ruin anyone unfortunate enough to be dependent upon its confessedly important improvements for the doing of business." *Ibid.* This ruling was directly in conflict with *Henry* v. *A. B. Dick Co., supra,* and the Court expressly observed that that decision "must be regarded as overruled." 243 U. S., at 518.

The broad ramifications of the *Motion Picture* case apparently were not immediately comprehended, and in a series of decisions over the next three decades litigants tested its limits. In *Carbice Corp.* v. *American Patents Corp.*, 283 U. S. 27 (1931), the Court denied relief to a patentee who, through its sole licensee, authorized use of a patented design for a refrigeration package only to purchasers from the licensee of solid carbon dioxide ("dry ice"), a refrigerant that the licensee manufactured.[11] The refrigerant was a well-known and widely used staple article of commerce, and the patent in question claimed neither a machine for making it nor a process for using it. *Id.*, at 29. The Court held that the patent holder and its licensee were attempting to exclude

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[11] In a subsequent decision rendered during the same Term, the Court held that the patent itself was invalid because the claimed package had been anticipated by prior art. *Carbice Corp.* v. *American Patents Corp.*, 283 U. S. 420 (1931).

competitors in the refrigerant business from a portion of the market, and that this conduct constituted patent misuse. It reasoned:

> "Control over the supply of such unpatented material is beyond the scope of the patentee's monopoly; and this limitation, inherent in the patent grant, is not dependent upon the peculiar function or character of the unpatented material or on the way in which it is used. Relief is denied because the [licensee] is attempting, without sanction of law, to employ the patent to secure a limited monopoly of unpatented material used in applying the invention." *Id.*, at 33–34.

The Court also rejected the patentee's reliance on the *Leeds & Catlin* decision. It found "no suggestion" in that case that the owner of the disc-stylus combination patent had attempted to derive profits from the sale of unpatented supplies as opposed to a patented invention. 283 U. S., at 34.

Other decisions of a similar import followed. *Leitch Mfg. Co.* v. *Barber Co.*, 302 U. S. 458 (1938), found patent misuse in an attempt to exploit a process patent for the curing of cement through the sale of bituminous emulsion, an unpatented staple article of commerce used in the process. The Court eschewed an attempt to limit the rule of *Carbice* and *Motion Picture* to cases involving explicit agreements extending the patent monopoly, and it stated the broad proposition that "every use of a patent as a means of obtaining a limited monopoly of unpatented material is prohibited." 302 U. S., at 463. *Morton Salt Co.* v. *G. S. Suppiger Co.*, 314 U. S. 488, 492–494 (1942), which involved an attempt to control the market for salt tablets used in a patented dispenser, explicitly linked the doctrine of patent misuse to the "unclean hands" doctrine traditionally applied by courts of equity. Its companion case, *B. B. Chemical Co.* v. *Ellis*, 314 U. S. 495, 495–498 (1942), held that patent misuse barred relief even where infringement had been actively induced, and that practical

difficulties in marketing a patented invention could not justify patent misuse.[12]

Although none of these decisions purported to cut back on the doctrine of contributory infringement itself, they were generally perceived as having that effect, and how far the developing doctrine of patent misuse might extend was a topic of some speculation among members of the patent bar.

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[12] This case arguably involved an application of the misuse doctrine to an attempt to control a nonstaple material. It arose from a suit for infringement of a process patent claiming a method for reinforcing insoles used in shoes. The patentee marketed its patented process in connection with sale of canvas duck that had been precoated with adhesive for use in the patented process. It claimed that suppliers of a rival adhesive-coated duck fabric, suitable for use in the patented method, had both contributed to and induced infringement of the patent. The Court of Appeals found patent misuse. It rejected, *inter alia*, the patentee's contention that *Carbice Corp.* v. *American Patents Corp.*, 283 U. S. 27 (1931), and *Leitch Mfg. Co.* v. *Barber Co.*, 302 U. S. 458 (1938), were inapplicable because the adhesive-coated duck was a nonstaple article. *B. B. Chemical Co.* v. *Ellis*, 117 F. 2d 829, 834–835 (CA1 1941). The question whether the allegedly nonstaple nature of the item affected the applicability of the *Carbice* and *Leitch* standards was presented to this Court on certiorari. See Pet. for Cert. in *B. B. Chemical Co.* v. *Ellis*, O. T. 1941, No. 75, p. 10. In the petitioner's brief on the merits, however, the nonstaple character of the item was not pressed as a ground for legal distinction, and respondents argued that the material was not a nonstaple. See Brief for Petitioner, O. T. 1941, No. 75, p. 20; Brief for Respondents, O. T. 1941, No. 75, pp. 11–13. The Court did not mention this question in its brief opinion. In contrast to the dissent, *post*, at 227–229, we decline in the absence of any articulated reasoning to speculate whether the Court accepted the respondents' view that only a staple commodity was involved, adopted some other position, or, as the failure to discuss *Leeds & Catlin Co.* v. *Victor Talking Machine Co.*, 213 U. S. 325 (1909), might suggest, simply chose not to address a matter that had not been fully presented. We also disagree with the dissent's attempt, *post*, at 229, n. 3, to equate the unconditional licenses belatedly proposed by the patentee in *B. B. Chemical* with the licensing scheme practiced in *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661 (1944), and *Mercoid Corp.* v. *Minneapolis-Honeywell Regulator Co.*, 320 U. S. 680 (1944). See *infra*, at 195–197.

The Court's decisions had not yet addressed the status of contributory infringement or patent misuse with respect to nonstaple goods, and some courts and commentators apparently took the view that control of nonstaple items capable only of infringing use might not bar patent protection against contributory infringement.[13] This view soon received a serious, if not fatal, blow from the Court's controversial decisions in *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661 (1944) (*Mercoid I*), and *Mercoid Corp.* v. *Minneapolis-Honeywell Regulator Co.*, 320 U. S. 680 (1944) (*Mercoid II*). In these cases, the Court definitely held that any attempt to control the market for unpatented goods would constitute patent misuse, even if those goods had no use outside a patented invention. Because these cases served as the point of departure for congressional legislation, they merit more than passing citation.

Both cases involved a single patent that claimed a combination of elements for a furnace heating system. Mid-Continent was the owner of the patent, and Honeywell was its licensee. Although neither company made or installed the furnace system, Honeywell manufactured and sold stoker switches especially made for and essential to the system's operation. The right to build and use the system was granted to purchasers of the stoker switches, and royalties owed the patentee were calculated on the number of stoker switches sold. Mercoid manufactured and marketed a competing stoker switch that was designed to be used only in the patented combination. Mercoid had been offered a sublicense

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[13] See, *e. g.*, *J. C. Ferguson Mfg. Works* v. *American Lecithin Co.*, 94 F. 2d 729, 731 (CA1), cert. denied, 304 U. S. 573 (1938); *Johnson Co.* v. *Philad Co.*, 96 F. 2d 442, 446–447 (CA9 1938); but see *Philad Co.* v. *Lechler Laboratories, Inc.*, 107 F. 2d 747, 748 (CA2 1939). See also Diamond, The Status of Combination Patents Owned by Sellers of an Element of the Combination, 21 J. Pat. Off. Soc. 843, 849–850 (1939); Thomas, The Law of Contributory Infringement, 21 J. Pat. Off. Soc. 811, 835, 842 (1939).

by the licensee but had refused to take one. It was sued for contributory infringement by both the patentee and the licensee, and it raised patent misuse as a defense.

In *Mercoid I* the Court barred the patentee from obtaining relief because it deemed the licensing arrangement with Honeywell to be an unlawful attempt to extend the patent monopoly. The opinion for the Court painted with a very broad brush. Prior patent misuse decisions had involved attempts "to secure a partial monopoly in supplies consumed . . . or unpatented materials employed" in connection with the practice of the invention. None, however, had involved an integral component necessary to the functioning of the patented system. 320 U. S., at 665. The Court refused, however, to infer any "difference in principle" from this distinction in fact. *Ibid.* Instead, it stated an expansive rule that apparently admitted no exception:

> "The necessities or convenience of the patentee do not justify any use of the monopoly of the patent to create another monopoly. The fact that the patentee has the power to refuse a license does not enable him to enlarge the monopoly of the patent by the expedient of attaching conditions to its use. . . . The method by which the monopoly is sought to be extended is immaterial. . . . When the patentee ties something else to his invention, he acts only by virtue of his right as the owner of property to make contracts concerning it and not otherwise. He then is subject to all the limitations upon that right which the general law imposes upon such contracts. The contract is not saved by anything in the patent laws because it relates to the invention. If it were, the mere act of the patentee could make the distinctive claim of the patent attach to something which does not possess the quality of invention. Then the patent would be diverted from its statutory purpose and become a ready instrument for economic control in domains where the

> anti-trust acts or other laws not the patent statutes define the public policy." *Id.*, at 666.

The Court recognized that its reasoning directly conflicted with *Leeds & Catlin Co.* v. *Victor Talking Machine Co., supra,* and it registered disapproval, if not outright rejection, of that case. 320 U. S., at 668. It also recognized that "[t]he result of this decision, together with those which have preceded it, is to limit substantially the doctrine of contributory infringement." *Id.*, at 669. The Court commented, rather cryptically, that it would not "stop to consider" what "residuum" of the contributory infringement doctrine "may be left." *Ibid.*

Mercoid II did not add much to the breathtaking sweep of its companion decision. The Court did reinforce, however, the conclusion that its ruling made no exception for elements essential to the inventive character of a patented combination. "However worthy it may be, however essential to the patent, an unpatented part of a combination patent is no more entitled to monopolistic protection than any other unpatented device." 320 U. S., at 684.

What emerges from this review of judicial development is a fairly complicated picture, in which the rights and obligations of patentees as against contributory infringers have varied over time. We need not decide how respondent would have fared against a charge of patent misuse at any particular point prior to the enactment of 35 U. S. C. § 271. Nevertheless, certain inferences that are pertinent to the present inquiry may be drawn from these historical developments.

First, we agree with the Court of Appeals that the concepts of contributory infringement and patent misuse "rest on antithetical underpinnings." 599 F. 2d, at 697. The traditional remedy against contributory infringement is the injunction. And an inevitable concomitant of the right to enjoin another from contributory infringement is the capacity to suppress competition in an unpatented article of commerce. See, *e. g.*,

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Thomson-Houston Electric Co. v. *Kelsey Electric R. Specialty Co.*, 72 F. 1016, 1018–1019 (CC Conn. 1896). Proponents of contributory infringement defend this result on the grounds that it is necessary for the protection of the patent right, and that the market for the unpatented article flows from the patentee's invention. They also observe that in many instances the article is "unpatented" only because of the technical rules of patent claiming, which require the placement of an invention in its context. Yet suppression of competition in unpatented goods is precisely what the opponents of patent misuse decry.[14] If both the patent misuse and contributory infringement doctrines are to coexist, then, each must have some separate sphere of operation with which the other does not interfere.

Second, we find that the majority of cases in which the patent misuse doctrine was developed involved undoing the damage thought to have been done by *A. B. Dick*. The desire to extend patent protection to control of staple articles of commerce died slowly, and the ghost of the expansive contributory infringement era continued to haunt the courts. As a result, among the historical precedents in this Court, only the *Leeds & Catlin* and *Mercoid* cases bear significant factual similarity to the present controversy. Those cases involved questions of control over unpatented articles that were essential to the patented inventions, and that were unsuited for any commercial noninfringing use. In this case, we face similar questions in connection with a chemical, pro-

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[14] Even in the classic contributory infringement case of *Wallace* v. *Holmes*, 29 F. Cas. 74 (No. 17,100) (CC Conn. 1871), the patentee's effort to control the market for the novel burner that embodied his invention arguably constituted patent misuse. If the patentee were permitted to prevent competitors from making and selling that element, the argument would run, he would have the power to erect a monopoly over the production and sale of the burner, an unpatented element, even though his patent right was limited to control over use of the burner in the claimed combination.

panil, the herbicidal properties of which are essential to the advance on prior art disclosed by respondent's patented process. Like the record disc in *Leeds & Catlin* or the stoker switch in the *Mercoid* cases, and unlike the dry ice in *Carbice* or the bituminous emulsion in *Leitch*, propanil is a nonstaple commodity which has no use except through practice of the patented method. Accordingly, had the present case arisen prior to *Mercoid*, we believe it fair to say that it would have fallen close to the wavering line between legitimate protection against contributory infringement and illegitimate patent misuse.

III

The *Mercoid* decisions left in their wake some consternation among patent lawyers [15] and a degree of confusion in the lower courts. Although some courts treated the *Mercoid* pronouncements as limited in effect to the specific kind of licensing arrangement at issue in those cases, others took a much more expansive view of the decision.[16] Among the

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[15] See, *e. g.*, Mathews, Contributory Infringement and the Mercoid Case, 27 J. Pat. Off. Soc. 260 (1945); Wiles, Joint Trespasses on Patent Property, 30 A. B. A. J. 454 (1944); Wood, The Tangle of Mercoid Case Implications, 13 Geo. Wash. L. Rev. 61 (1944); Comment, 42 Mich. L. Rev. 915 (1944).

[16] Compare, *e. g.*, *Harris* v. *National Machine Works, Inc.*, 171 F. 2d 85, 89–90 (CA10 1948), cert. denied, 336 U. S. 905 (1949); *Florence-Mayo Nuway Co.* v. *Hardy*, 168 F. 2d 778, 785 (CA4 1948); *Aeration Processes, Inc.* v. *Walter Kidde & Co.*, 77 F. Supp. 647, 654 (WDNY 1948); *Detroit Lubricator Co.* v. *Toussaint*, 57 F. Supp. 837, 838 (ND Ill. 1944); and *Hall* v. *Montgomery Ward & Co.*, 57 F. Supp. 430, 437–438 (ND W. Va. 1944), with *Galion Metallic Vault Co.* v. *Edward G. Budd Mfg. Co.*, 169 F. 2d 72, 75–76 (CA3), cert. denied, 335 U. S. 859 (1948); *Chicago Pneumatic Tool Co.* v. *Hughes Tool Co.*, 61 F. Supp. 767, 769 (Del. 1945), aff'd, 156 F. 2d 981 (CA3), cert. denied, 329 U. S. 781 (1946); *Landis Machinery Co.* v. *Chaso Tool Co.*, 141 F. 2d 800, 801 (CA6), cert. denied, 323 U. S. 720 (1944); *Master Metal Strip Service, Inc.* v. *Protex Weatherstrip Mfg. Co.*, 75 USPQ 32, 34–35 (ND Ill. 1947); and *Stroco Products, Inc.* v. *Mullenbach*, 67 USPQ 168, 170 (SD Cal. 1944).

latter group, some courts held that even the filing of an action for contributory infringement, by threatening to deter competition in unpatented materials, could supply evidence of patent misuse. See, *e. g., Stroco Products, Inc.* v. *Mullenbach*, 67 USPQ 168, 170 (SD Cal. 1944). This state of affairs made it difficult for patent lawyers to advise their clients on questions of contributory infringement and to render secure opinions on the validity of proposed licensing arrangements. Certain segments of the patent bar eventually decided to ask Congress for corrective legislation that would restore some scope to the contributory infringement doctrine. With great perseverance, they advanced their proposal in three successive Congresses before it eventually was enacted in 1952 as 35 U. S. C. § 271.

A

The critical inquiry in this case is how the enactment of § 271 affected the doctrines of contributory infringement and patent misuse. Viewed against the backdrop of judicial precedent, we believe that the language and structure of the statute lend significant support to Rohm & Haas' contention that, because § 271 (d) immunizes its conduct from the charge of patent misuse, it should not be barred from seeking relief. The approach that Congress took toward the codification of contributory infringement and patent misuse reveals a compromise between those two doctrines and their competing policies that permits patentees to exercise control over nonstaple articles used in their inventions.

Section 271 (c) identifies the basic dividing line between contributory infringement and patent misuse. It adopts a restrictive definition of contributory infringement that distinguishes between staple and nonstaple articles of commerce. It also defines the class of nonstaple items narrowly. In essence, this provision places materials like the dry ice of the *Carbice* case outside the scope of the contributory infringement doctrine. As a result, it is no longer necessary to resort

to the doctrine of patent misuse in order to deny patentees control over staple goods used in their inventions.

The limitations on contributory infringement written into § 271 (c) are counterbalanced by limitations on patent misuse in § 271 (d). Three species of conduct by patentees are expressly excluded from characterization as misuse. First, the patentee may "deriv[e] revenue" from acts that "would constitute contributory infringement" if "performed by another without his consent." This provision clearly signifies that a patentee may make and sell nonstaple goods used in connection with his invention. Second, the patentee may "licens[e] or authoriz[e] another to perform acts" which without such authorization would constitute contributory infringement. This provision's use in the disjunctive of the term "authoriz[e]" suggests that more than explicit licensing agreements is contemplated. Finally, the patentee may "enforce his patent rights against . . . contributory infringement." This provision plainly means that the patentee may bring suit without fear that his doing so will be regarded as an unlawful attempt to suppress competition. The statute explicitly states that a patentee may do "one or more" of these permitted acts, and it does not state that he must do any of them.

In our view, the provisions of § 271 (d) effectively confer upon the patentee, as a lawful adjunct of his patent rights, a limited power to exclude others from competition in nonstaple goods. A patentee may sell a nonstaple article himself while enjoining others from marketing that same good without his authorization. By doing so, he is able to eliminate competitors and thereby to control the market for that product. Moreover, his power to demand royalties from others for the privilege of selling the nonstaple item itself implies that the patentee may control the market for the nonstaple good; otherwise, his "right" to sell licenses for the marketing of the nonstaple good would be meaningless, since no one would be willing to pay him for a superfluous authorization. See Note, 70 Yale. L. J. 649, 659 (1961).

Rohm & Haas' conduct is not dissimilar in either nature or effect from the conduct that is thus clearly embraced within § 271 (d). It sells propanil; it authorizes others to use propanil; and it sues contributory infringers. These are all protected activities. Rohm & Haas does *not* license others to sell propanil, but nothing on the face of the statute requires it to do so. To be sure, the sum effect of Rohm & Haas' actions is to suppress competition in the market for an unpatented commodity. But as we have observed, in this its conduct is no different from that which the statute expressly protects.

The one aspect of Rohm & Haas' behavior that is not expressly covered by § 271 (d) is its linkage of two protected activities—sale of propanil and authorization to practice the patented process—together in a single transaction. Petitioners vigorously argue that this linkage, which they characterize pejoratively as "tying," supplies the otherwise missing element of misuse. They fail, however, to identify any way in which this "tying" of two expressly protected activities results in any extension of control over unpatented materials beyond what § 271 (d) already allows. Nevertheless, the language of § 271 (d) does not explicitly resolve the question when linkage of this variety becomes patent misuse. In order to judge whether this method of exploiting the patent lies within or without the protection afforded by § 271 (d), we must turn to the legislative history.

B

Petitioners argue that the legislative materials indicate at most a modest purpose for § 271. Relying mainly on the Committee Reports that accompanied the "Act to Revise and Codify the Patent Laws" (1952 Act), 66 Stat. 792, of which § 271 was a part, petitioners assert that the principal purpose of Congress was to "clarify" the law of contributory infringement as it had been developed by the courts, rather than to effect any significant substantive change. They note that

the 1952 Act undertook the major task of codifying all the patent laws in a single title, and they argue that substantive changes from recodifications are not lightly to be inferred. See *United States* v. *Ryder*, 110 U. S. 729, 739–740 (1884). They further argue that, whatever the impact of § 271 in other respects, there is not the kind of "clear and certain signal from Congress" that should be required for an extension of patent privileges. See *Deepsouth Packing Co.* v. *Laitram Corp.*, 406 U. S. 518, 531 (1972). We disagree with petitioners' assessment. In our view, the relevant legislative materials abundantly demonstrate an intent both to change the law and to expand significantly the ability of patentees to protect their rights against contributory infringement.

The 1952 Act was approved with virtually no floor debate. Only one exchange is relevant to the present inquiry. In response to a question whether the Act would effect any substantive changes, Senator McCarran, a spokesman for the legislation, commented that the Act "codif[ies] the patent laws." 98 Cong. Rec. 9323 (1952). He also submitted a statement, which explained that, although the general purpose of the Act was to clarify existing law, it also included several changes taken "[i]n view of decisions of the Supreme Court and others." *Ibid.* Perhaps because of the magnitude of the recodification effort, the Committee Reports accompanying the 1952 Act also gave relatively cursory attention to its features. Nevertheless, they did identify § 271 as one of the "major changes or innovations in the title." H. R. Rep. No. 1923, 82d Cong., 2d Sess., 5 (1952).[17] In explaining the provisions of § 271, the Reports stated that they were intended "to codify in statutory form the principles of contributory infringement and at the same time [to] eliminate . . . doubt and confusion" that had resulted from "decisions of the courts

[17] The House and Senate Committee Reports in their significant parts were identical. See S. Rep. No. 1979, 82d Cong., 2d Sess. (1952). We confine the citations in the text, therefore, to the House Report.

in recent years." *Id.*, at 9. The Reports also commented that §§ 271 (b), (c), and (d) "have as their main purpose clarification and stabilization." *Ibid.*

These materials sufficiently demonstrate that the 1952 Act did include significant substantive changes, and that § 271 was one of them.

The principal sources for edification concerning the meaning and scope of § 271, however, are the extensive hearings that were held on the legislative proposals that led up to the final enactment. In three sets of hearings over the course of four years, proponents and opponents of the legislation debated its impact and relationship with prior law. Draftsmen of the legislation contended for a restriction on the doctrine of patent misuse that would enable patentees to protect themselves against contributory infringers. Others, including representatives of the Department of Justice, vigorously opposed such a restriction.

Although the final version of the statute reflects some minor changes from earlier drafts, the essence of the legislation remained constant. References were made in the later hearings to testimony in the earlier ones.[18] Accordingly, we regard each set of hearings as relevant to a full understanding of the final legislative product. Cf., *e. g., Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384, 390 (1951); *Transcontinental & Western Air, Inc.* v. *CAB*, 336 U. S. 601, 605–606, n. 6 (1949). Together, they strongly reinforce the conclusion that § 271 (d) was designed to immunize from the charge of patent misuse behavior similar to that in which the respondent has engaged.

1. *The 1948 Hearings.* The first bill underlying § 271 was H. R. 5988, proposed to the 80th Congress. During the hearings on this bill its origin and purpose were carefully ex-

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[18] See, *e. g.*, Hearings on H. R. 3760 before Subcommittee No. 3 of the House Committee on the Judiciary, 82d Cong., 1st Sess., 150–151 (1951) (1951 Hearings) (testimony of Giles Rich).

plained. The New York Patent Law Association, which had supervised drafting of the legislation, submitted a prepared memorandum that candidly declared that the purpose of the proposal was to reverse the trend of Supreme Court decisions that indirectly had cut back on the contributory infringement doctrine. Hearings on H. R. 5988, etc., before the Subcommittee on Patents, Trade-Marks, and Copyrights of the House Committee on the Judiciary, 80th Cong., 2d Sess., 4 (1948) (1948 Hearings). The memorandum explained the rationale behind contributory infringement, and it gave as one example of its proper application the protection of a patent for use of a chemical:

> "[O]ne who supplies a hitherto unused chemical to the public for use in a new method is stealing the benefit of the discovery of the property of this chemical which made the new method possible. To enjoin him from distributing the chemical for use in the new method does not prevent him from doing anything which he could do before the new property of the chemical had been discovered." *Ibid.*

It criticized several decisions, including *Leitch* and *Carbice* as well as the two *Mercoids*, on the ground that together they had effectively excluded such "new-use inventions" from the protections of the patent law. 1948 Hearings, at 4–5. It went on to explain that the proposed legislation was designed to counteract this effect by providing that "the mere use or enforcement of the right to be protected against contributory infringement . . . shall not be regarded as misuse of the patent." *Id.*, at 6. This approach, the memorandum stated, "does away with the ground on which the Supreme Court has destroyed the doctrine of contributory infringement" and "is essential to make the rights against contributory infringers which are revived by the statute practically useful and enforceable." *Ibid.*

Testimony by proponents of the bill developed the same

theme. Giles Rich, then a prominent patent lawyer, was one of the draftsmen. He highlighted the tension between the judicial doctrines of contributory infringement and patent misuse. He stated that early patent misuse decisions "seem to us now to have been just," but that "this doctrine has been carried too far—so far that it . . . has practically eliminated from the law the doctrine of contributory infringement as a useful legal doctrine." *Id.*, at 9. To illustrate this point, he contrasted the *Carbice* and *Mercoid* cases, and noted that the latter had involved an item without any noninfringing use. Because it incorporated a staple-nonstaple distinction in the definition of contributory infringement, Mr. Rich argued that the bill would "correct [the] situation" left by *Mercoid* "without giving sanction to practices such as those in the Carbice case." 1948 Hearings, at 11.

Rich's testimony was followed by that of Robert W. Byerly, another draftsman. He stressed the confusion in which the *Mercoid* decisions had left the lower courts, and the need for Congress to define the scope of protection against contributory infringement by drawing a clear line between deliberate taking of another's invention and legitimate trade in staple articles of commerce. *Id.*, at 13–16. Byerly discussed the practical difficulties some patentees would encounter if suits against direct infringers were their only option to protect against infringement. *Id.*, at 13–14. He argued that the breadth of the Court's misuse decision in *Mercoid I* could be discerned from the fact that it "overruled" *Leeds & Catlin*. 1948 Hearings, at 14. He explained the section of the bill restricting the scope of patent misuse as intended to give the patentee recourse to either or both of two options: "A man can either say, 'you cannot sell the part of my invention to somebody else to complete it,' or he can say, 'yes, you can sell the part of my invention to help others complete it provided you pay me a royalty.'" *Id.*, at 16.

The bill attracted opponents as well, some of whom de-

fended the result of the *Mercoid* decisions.[19] In addition, Roy C. Hackley, Jr., Chief of the Patent Section, Department of Justice, made an appearance on behalf of the Department. He took the position that statutory clarification of the scope of contributory infringement was desirable, but he warned Congress against using language that might "permit illegal extension of the patent monopoly." *Id.*, at 69. On this ground he opposed the portion of the proposed bill that included language substantially similar to what is now § 271 (d). *Ibid.*

2. *The 1949 Hearings.* The 1948 bill did not come to a vote, but the patent bar resubmitted its proposal in 1949. Again, there were fairly extensive hearings, with debate, and again Rich led the list of favorable witnesses. He renewed his attempt to explain the legislation in terms of past decisions of this Court. The result in the *Carbice* case, he argued, was proper because the patentee had tried to interfere with the market in an old and widely used product. On the other hand, he cited the *Mercoid* cases as examples of a situation where "[t]here is no practical way to enforce that patent, except through a suit for contributory infringement against the party who makes the thing which is essentially the inventive subject matter [and] which, when put into use, creates infringement." Hearings on H. R. 3866 before Subcommittee No. 4 of the House Committee on the Judiciary, 81st Cong., 1st Sess., 11 (1950) (1949 Hearings).

To restore the doctrine of contributory infringement where it was most needed, Rich argued, it was essential to restrict *pro tanto* the judicially created doctrine of patent misuse:

> "I would like to recall that we are dealing with a problem which involves a conflict between two doctrines, contributory infringement and misuse.

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[19] See, *e. g.*, the testimony of I. E. McCabe, Chief Engineer of Mercoid Corp. 1948 Hearings, at 55–59. McCabe also testified at length in the 1949 and 1951 Hearings.

"It is crystal clear, when you have thoroughly studied this subject, that the only way you can make contributory infringement operative again as a doctrine, is to make some exceptions to the misuse doctrine and say that certain acts shall not be misuse. Then contributory infringement, which is there all the time, becomes operative again.

"Contributory infringement has been destroyed by the misuse doctrine; and to revive it you do not have to do anything with contributory infringement itself. You go back along the same road until you get to the point where you have contributory infringement working for you again." *Id.*, at 13–14.

Rich warned against going too far. He took the position that a law designed to reinstate the broad contributory infringement reasoning of *Henry* v. *A. B. Dick Co.*, 224 U. S. 1 (1912), "would kill itself in time." 1949 Hearings, at 17. The proposed legislation, however, "stopped short of that" and "said that you can control only things like the switches in the Mercoid case, which are especially made or adapted for use in connection with such patent and which are not suitable for actual, commercial, noninfringing use." *Ibid.*

In the 1949 Hearings, the Department of Justice pressed more vigorous opposition to the contributory infringement proposal than it had in 1948. Represented by John C. Stedman, Chief, Legislation and Clearance Section, Antitrust Division, the Department argued that legislation was unnecessary because the *Mercoid* decisions were correct, because they had not produced as much confusion as the proponents of the new legislation claimed, and because the legislation would produce new interpretive problems. 1949 Hearings, at 50–56. Stedman defended the result of the *Mercoid* decisions on the ground that marketing techniques employed in those cases were indistinguishable in effect from tying schemes previously considered by the Court. He took the view that the staple-

nonstaple distinction should be irrelevant for purposes of patent misuse. "If the owner of the patent is using his patent in a way to prevent the sale of unpatented elements, then the misuse doctrine would apply." *Id.*, at 54. Stedman added that the effect of the legislation would be to revive the *Leeds & Catlin* decision, a result the Department of Justice opposed. 1949 Hearings, at 59. Later in the hearings, he offered several methods of exploiting patent rights that arguably would eliminate the need for the contributory infringement doctrine, and he stated that a suit for contributory infringement could involve patent misuse, even if there were no conditional licensing of patent rights. *Id.*, at 76–77.

After Stedman's opening testimony, Rich was recalled for further questioning. Rich agreed with Stedman's assessment of the effect that the legislation would have, but argued that the Justice Department's arguments ignored the bill's limitation of contributory infringement to nonstaple articles. To clarify the effect of the statute, Rich declared:

> "[I]t is absolutely necessary, to get anywhere in the direction we are trying to go, to make some exception to the misuse doctrine because it is the conflict between the doctrine of contributory infringement and the doctrine of misuse that raises the problem." *Id.*, at 67.

He added:

> "The exception which we wish to make to the misuse doctrine would reverse the result in the Mercoid case; it would not reverse the result in the Carbice case." *Ibid.*

In response to questioning, Rich agreed that the bill would preserve both the contributory infringement and misuse doctrines as they had existed in this Court's cases prior to the *Mercoid* decisions. 1949 Hearings, at 68. He asserted that the method by which the patentee's invention was exploited in *Mercoid* was necessary given the nature of the businesses involved. 1949 Hearings, at 69. When asked whether the

proposed legislation would allow that kind of licensing activity, Rich responded with an unqualified "Yes." *Ibid.*

3. *The 1951 Hearings.* By the time the proposal for a statutory law of contributory infringement and patent misuse was presented to the 82d Congress, the battle lines of the earlier hearings had solidified substantially, and the representatives of the patent bar once again found themselves faced with the formidable opposition of the Department of Justice.

In his opening remarks before the 1951 Hearings, Rich reminded the congressional Subcommittee that, as a practical matter, it was necessary to deal with the contributory infringement and the misuse doctrines as a unit "if we are to tackle the problem at all." 1951 Hearings, at 152. He urged on the Subcommittee the need to eliminate confusion in the law left by the *Mercoid* decisions by drawing a "sensible line" between contributory infringement and patent misuse that would be "in accordance with public policy as it seems to exist today." 1951 Hearings, at 152. Rich also attempted to play down the controversiality of the proposal by arguing that a restrictive definition of contributory infringement had been incorporated into the bill. *Id.*, at 153–154.

When questioned about the effect of the bill on present law, Rich replied that it would not extend the contributory infringement doctrine unless "you take the point of view that there is no such things [*sic*] as contributory infringement today." *Id.*, at 158. He rejected the suggestion that the legislation would return the law of contributory infringement to the *A. B. Dick* era, and he reminded the Subcommittee that the law "would not touch the result of the Carbice decision." 1951 Hearings, at 161. Rich concluded his opening testimony with this explanation of subsection (d):

> "It deals with the misuse doctrine, and the reason it is necessary is that the Supreme Court has made it abundantly clear that there exist in the law today two doc-

trines, contributory infringement on the one hand, and misuse on the other, and that, where there is a conflict, the misuse doctrine must prevail because of the public interest inherently involved in patent cases.

"Other decisions following Mercoid have made it quite clear that at least some courts are going to say that any effort whatever to enforce a patent against a contributory infringer is in itself misuse. . . . Therefore we have always felt—we who study this subject particularly—that to put any measure of contributory infringement into law you must, to that extent and to that extent only, specifically make exceptions to the misuse doctrine, and that is the purpose of paragraph (d).

"It goes with, supports, and depends upon paragraph (c)." *Id.*, at 161–162.

The Department of Justice, now represented by Wilbur L. Fugate of the Antitrust Division, broadly objected to "writing the doctrine of contributory infringement into the law." *Id.*, at 165. Its most strenuous opposition was directed at what was to become § 271 (d). Fugate warned that this provision "would have the effect of wiping out a good deal of the law relating to misuse of patents, particularly with reference to tying-in clauses." *Ibid.* He repeatedly asserted that the language of subsection (d) was unclear, and that it was impossible to tell how far it would serve to insulate patentees from charges of misuse. See *id.*, at 167–169. But as the Department construed it, the subsection would "seriously impair the doctrine of misuse of patents in favor of the doctrine of contributory infringements." *Id.*, at 168. Fugate would not say that any of the three acts protected by subsection (d) were *per se* illegal, but he felt that they could become evidence of misuse in some contexts. *Id.*, at 168–169.

When Representative Crumpacker challenged Fugate's interpretation of the statute, Fugate replied that Rich had advanced the same construction, and he called upon Rich to

say whether he agreed. *Id.*, at 169. The following colloquy then took place:

> "Mr. RICH: I will agree with [Mr. Fugate's interpretation] to this extent: That as I testified it is necessary to make an exception to misuse to the extent that you revive contributory infringement in paragraph (c), and this whole section (d) is entirely dependent on (c). Where (d) refers to contributory infringement, it only refers to contributory infringement as defined in (c) and nothing more.
>
> "Mr. CRUMPACKER: In other words, all it says is that bringing an action against someone who is guilty of contributory infringement is not a misuse of the patent.
>
> "Mr. RICH: That is true." *Ibid.*

Rich and Fugate then discussed the law in the courts before and after the *Mercoid* decisions. In an effort to clarify the intendment of the statute, Congressman Rogers asked Rich to identify misuse decisions exemplifying the acts specified in the three parts of subsection (d). Rich identified the *Leitch* and *Carbice* cases as examples of situations where deriving revenue from acts that would be contributory infringement was held to be evidence of misuse; he stated that the *Mercoid* cases exemplified misuse from licensing others; and he referred to *Stroco Products, Inc.* v. *Mullenbach, supra,* as an example of a case where the mere bringing of an action against contributory infringers was found to exemplify misuse. 1951 Hearings, at 174–175. He again reminded the Subcommittee that the scope of subsection (d) was implicitly limited by the restrictive definition of contributory infringement in subsection (c), and he assured the Subcommittee that "[i]f [a patentee] has gone beyond those and done other acts which could be misuse, then the misuse doctrine would be applicable." *Id.*, at 175. As an example of such "other acts," he suggested that a patentee would be guilty of misuse if he tried to license others to produce staple articles used in a patented invention. *Ibid.*

C

Other legislative materials that we have not discussed bear as well on the meaning to be assigned to § 271 (d); but the materials that we have culled are exemplary, and they amply demonstrate the intended scope of the statute. It is the consistent theme of the legislative history that the statute was designed to accomplish a good deal more than mere clarification. It significantly changed existing law, and the change moved in the direction of expanding the statutory protection enjoyed by patentees. The responsible congressional Committees were told again and again that contributory infringement would wither away if the misuse rationale of the *Mercoid* decisions remained as a barrier to enforcement of the patentee's rights. They were told that this was an undesirable result that would deprive many patent holders of effective protection for their patent rights. They were told that Congress could strike a sensible compromise between the competing doctrines of contributory infringement and patent misuse if it eliminated the result of the *Mercoid* decisions yet preserved the result in *Carbice*. And they were told that the proposed legislation would achieve this effect by restricting contributory infringement to the sphere of nonstaple goods while exempting the control of such goods from the scope of patent misuse. These signals cannot be ignored. They fully support the conclusion that, by enacting §§ 271 (c) and (d), Congress granted to patent holders a statutory right to control nonstaple goods that are capable only of infringing use in a patented invention, and that are essential to that invention's advance over prior art.

We find nothing in this legislative history to support the assertion that respondent's behavior falls outside the scope of § 271 (d).[20] To the contrary, respondent has done nothing

[20] Petitioners argue that the exchange in the 1951 Hearings among Representative Crumpacker, Mr. Rich, and Mr. Fugate, see *supra*, at 210–212, counters our interpretation of the legislative history. They argue

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that would extend its right of control over unpatented goods beyond the line that Congress drew. Respondent, to be sure, has licensed use of its patented process only in connection with purchases of propanil. But propanil is a *nonstaple* product, and its herbicidal property is the heart of respondent's invention. Respondent's method of doing business is thus essentially the same as the method condemned in the *Mercoid* decisions, and the legislative history reveals that § 271 (d) was designed to retreat from *Mercoid* in this regard.

There is one factual difference between this case and *Mercoid:* the licensee in the *Mercoid* cases had offered a sublicense to the alleged contributory infringer, which offer had been refused. *Mercoid II*, 320 U. S., at 683. Seizing upon this difference, petitioners argue that respondent's unwillingness to offer similar licenses to its would-be competitors in the manufacture of propanil legally distinguishes this case and sets it outside § 271 (d). To this argument, there are at

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that Mr. Fugate initially interpreted § 271 (d) to allow tying arrangements, that this constuction was rejected by Crumpacker and disavowed by Rich, and that the contention ultimately was dropped by the Department of Justice. Although the relevant passage is not entirely free from doubt, we do not find petitioners' interpretation of it particularly persuasive. Rather, it appears that Fugate initially interpreted the statute to insulate the patentee from *any* charge of misuse so long as he also engaged in at least one of the practices specified in the statute. See 1951 Hearings, at 167. Representative Crumpacker demurred from this interpretation, and Rich reminded the Subcommittee of the limitation implicitly built into the scope of § 271 (d) by the restrictive definition of contributory infringement in § 271 (c). 1951 Hearings, at 169. Rich subsequently did state that an attempt to secure a monopoly on "unpatented articles" still would be patent misuse. *Id.*, at 172–173. But in the context of his clarification regarding the scope of subsection (c), his agreement to this proposition appears to be based on an assumption that the unpatented articles referred to were staples of commerce. Taken as a whole, this exchange suggests that § 271 (d) would afford no defense to a charge of misuse for an attempt to control staple materials; it does not, in our view, support the further conclusion that an attempt to control nonstaple materials should be subject to the same charge.

least three responses. First, as we have noted, § 271 (d) permits such licensing but does not require it. Accordingly, petitioners' suggestion would import into the statute a requirement that simply is not there. Second, petitioners have failed to adduce any evidence from the legislative history that the offering of a license to the alleged contributory infringer was a critical factor in inducing Congress to retreat from the result of the *Mercoid* decisions. Indeed, the *Leeds & Catlin* decision, which did not involve such an offer to license, was placed before Congress as an example of the kind of contributory infringement action the statute would allow. Third, petitioners' argument runs contrary to the long-settled view that the essence of a patent grant is the right to exclude others from profiting by the patented invention. 35 U. S. C. § 154; see *Continental Paper Bag Co.* v. *Eastern Paper Bag Co.*, 210 U. S. 405, 424–425 (1908); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U. S. 100, 135 (1969). If petitioners' argument were accepted, it would force patentees either to grant licenses or to forfeit their statutory protection against contributory infringement. Compulsory licensing is a rarity in our patent system,[21] and we decline to manufacture such a requirement out of § 271 (d).

IV

Petitioners argue, finally, that the interpretation of § 271 (d) which we have adopted is foreclosed by decisions of this

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[21] Compulsory licensing of patents often has been proposed, but it has never been enacted on a broad scale. See, *e. g.*, Compulsory Licensing of Patents under some Non-American Systems, Study of the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary, 85th Cong., 2d Sess., 1, 2 (Comm. Print 1959). Although compulsory licensing provisions were considered for possible incorporation into the 1952 revision of the patent laws, they were dropped before the final bill was circulated. See House Committee on the Judiciary, Proposed Revision and Amendment of the Patent Laws: Preliminary Draft, 81st Cong., 2d Sess., 91 (Comm. Print 1950).

Court following the passage of the 1952 Act. They assert that in subsequent cases the Court has continued to rely upon the *Mercoid* decisions, and that it has effectively construed § 271 (d) to codify the result of those decisions, rather than to return the doctrine of patent misuse to some earlier stage of development. We disagree.

The cases to which petitioners turn for this argument include some that have cited the *Mercoid* decisions as evidence of a general judicial "hostility to use of the statutorily granted patent monopoly to extend the patentee's economic control to unpatented products." *United States* v. *Loew's, Inc.*, 371 U. S. 38, 46 (1962); see also *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U. S. 313, 343–344 (1971). These decisions were not directly concerned with the doctrine of contributory infringement, and they did not require the Court to evaluate § 271 (d) or its impact on the holdings in *Mercoid*. Like other cases that do not specifically mention those decisions, see, *e. g.*, *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U. S., at 136, they state the general thrust of the doctrine of patent misuse without attending to its specific statutory limitations.

In another case, *Deepsouth Packing Co.* v. *Laitram Corp.*, 406 U. S. 518 (1972), the Court dealt only with the scope of direct infringement under § 271 (a). The question under consideration was whether a patent is infringed when unpatented elements are assembled into the combination outside the United States. The Court held that such assembly would not have constituted direct infringement prior to the enactment of § 271 (a), and it concluded that enactment of the statute effected no change in that regard. The Court cited *Mercoid I* for the well-established proposition that unless there has been direct infringement there can be no contributory infringement. 406 U. S., at 526. Again, the Court did not have occasion to focus on the meaning of § 271 (d).

The only two decisions that touch at all closely upon the issues of statutory construction presented here are *Aro Mfg.*

Co. v. *Convertible Top Co.*, 365 U. S. 336 (1961) (*Aro I*), and *Aro Mfg. Co.* v. *Convertible Top Co.*, 377 U. S. 476 (1964) (*Aro II*). These decisions emerged from a single case involving an action for contributory infringement based on the manufacture and sale of a specially cut fabric designed for use in a patented automobile convertible top combination. In neither case, however, did the Court directly address the question of § 271 (d)'s effect on the law of patent misuse.

The controlling issue in *Aro I* was whether there had been any *direct* infringement of the patent. The Court held that purchasers of the specially cut fabric used it for "repair" rather than "reconstruction" of the patented combination; accordingly, under the patent law they were not guilty of infringement. 365 U. S., at 340, 346. Since there was no direct infringement by the purchasers, the Court held that there could be no contributory infringement by the manufacturer of the replacement tops. This conclusion rested in part on a holding that § 271 (c) "made no change in the fundamental precept that there can be no contributory infringement in the absence of a direct infringement." *Id.*, at 341. It in no way conflicts with our decision.

As petitioners observe, *Aro I* does quote certain passages from the *Mercoid* decisions standing for the proposition that even single elements constituting the heart of a patented combination are not within the scope of the patent grant. 365 U. S., at 345. In context, these references to *Mercoid* are not inconsonant with our view of § 271 (d). In the course of its decision, the Court eschewed the suggestion that the legal distinction between "reconstruction" and "repair" should be affected by whether the element of the combination that has been replaced is an "essential" or "distinguishing" part of the invention. *Id.*, at 344. The Court reasoned that such a standard would "ascrib[e] to one element of the patented combination the status of patented invention in itself," and it drew from the *Mercoid* cases only to the extent that they described limitations on the scope of the patent

grant. 365 U. S., at 344–345. In a footnote, the Court carefully avoided reliance on the misuse aspect of those decisions. *Id.*, at 344, n. 10. Accordingly, it had no occasion to consider whether or to what degree § 271 (d) undermined the validity of the *Mercoid* patent misuse rationale.[22]

Aro II is a complicated decision in which the Court mustered different majorities in support of various aspects of its opinion. See 377 U. S., at 488, n. 8. After remand from *Aro I*, it became clear that the Court's decision in that case had not eliminated all possible grounds for a charge of contributory infringement. Certain convertible top combinations had been sold without valid license from the patentee. Because use of these tops involved direct infringement of the patent, there remained a question whether fabric supplied for their repair might constitute contributory infringement notwithstanding the Court's earlier decision.

Aro II decided several questions of statutory interpretation under § 271. First, it held that repair of an unlicensed combination was direct infringement under the law preceding enactment of § 271, and that the statute did not effect any change in this regard. 377 U. S., at 484. Like the constructions of § 271 (a) in *Aro I* and *Deepsouth Packing Co.*, this conclusion concerns a statutory provision not at issue in this case.

Second, the Court held that supplying replacement fabrics specially cut for use in the infringing repair constituted contributory infringement under § 271 (c). The Court held that the specially cut fabrics, when installed in infringing equipment, qualified as nonstaple items within the language of § 271 (c), and that supply of similar materials for infringing repair had been treated as contributory infringement under the judicial law that § 271 (c) was designed to codify. 377

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[22] In his concurring opinion in *Aro I*, Mr. Justice Black did address the scope of § 271 (d). 365 U. S., at 346, 347–350. His conclusion is inconsistent with today's decision.

U. S., at 485–488. It also held that § 271 (c) requires a showing that an alleged contributory infringer knew that the combination for which his component was especially designed was both patented and infringing. 377 U. S., at 488–491. We regard these holdings as fully consistent with our understanding of § 271 (c). In any event, since petitioners have conceded contributory infringement for the purposes of this decision, the scope of that subsection is not directly before us.

Third, the Court held that the alleged contributory infringer could not avoid liability by reliance on the doctrine of the *Mercoid* decisions. Although those decisions had cast contributory infringement into some doubt, the Court held that § 271 was enacted "for the express purpose . . . of overruling any blanket invalidation of the [contributory infringement] doctrine that could be found in the *Mercoid* opinions." 377 U. S., at 492. Although our review of the legislative history finds a broader intent, it is not out of harmony with *Aro II*'s analysis. The Court explicitly noted that a defense of patent misuse had not been pressed. *Id.*, at 491. Accordingly, its discussion of legislative history was limited to those materials supporting the observation, sufficient for purposes of the case, that any direct attack on the contributory infringement doctrine in its entirety would be contrary to the manifest purpose of § 271 (c). Since the Court in *Aro II* was not faced with a patent misuse defense, it had no occasion to consider other evidence in the hearings relating to the scope of § 271 (d).

Finally, in a segment of the Court's opinion that commanded full adherence of only four Justices, 377 U. S., at 493–500, it was stated that an agreement in which the patentee had released some purchasers of infringing combinations from liability defeated liability for contributory infringement with respect to replacement of convertible tops after the agreement went into effect. The plurality rejected the patentee's attempt to condition its release by reserving

"rights in connection with future sales of replacement fabrics." *Id.*, at 496. It relied on the *Carbice* and *Mercoid* decisions, as well as *United States* v. *Loew's, Inc., supra,* for the proposition that a patentee "cannot impose conditions concerning the unpatented supplies, ancillary materials, or components with which the use [of a patented combination] is to be effected." 377 U. S., at 497. This statement is qualified by the circumstances to which it applied. Because the Court already had determined in *Aro I* that replacement of wornout convertible top fabric constituted a permissible repair of the combination, the agreement sought to control an unpatented article in the context of a noninfringing use. The determination that the agreement defeated liability does not reflect resort to the principles of patent misuse; rather it betokens a recognition that the patentee, once it had authorized use of the combination, could not manufacture contributory infringement by contract where under the law there was none.

Perhaps the quintessential difference between the *Aro* decisions and the present case is the difference between the primary-use market for a chemical process and the replacement market out of which the *Aro* litigation arose. The repair-reconstruction distinction and its legal consequences are determinative in the latter context, but are not controlling here. Instead, the staple-nonstaple distinction, which *Aro I* found irrelevant to the characterization of replacements, supplies the controlling benchmark. This distinction ensures that the patentee's right to prevent others from contributorily infringing his patent affects only the market for the invention itself. Because of this significant difference in legal context, we believe our interpretation of § 271 (d) does not conflict with these decisions.

V

Since our present task is one of statutory construction, questions of public policy cannot be determinative of the outcome

unless specific policy choices fairly can be attributed to Congress itself. In this instance, as we have already stated, Congress chose a compromise between competing policy interests. The policy of free competition runs deep in our law. It underlies both the doctrine of patent misuse and the general principle that the boundary of a patent monopoly is to be limited by the literal scope of the patent claims. But the policy of stimulating invention that underlies the entire patent system runs no less deep. And the doctrine of contributory infringement, which has been called "an expression both of law and morals," *Mercoid I*, 320 U. S., at 677 (Frankfurter, J., dissenting), can be of crucial importance in ensuring that the endeavors and investments of the inventor do not go unrewarded.

It is, perhaps, noteworthy that holders of "new use" patents on chemical processes were among those designated to Congress as intended beneficiaries of the protection against contributory infringement that § 271 was designed to restore. See 1948 Hearings, at 4, 5, 18. We have been informed that the characteristics of practical chemical research are such that this form of patent protection is particularly important to inventors in that field. The number of chemicals either known to scientists or disclosed by existing research is vast. It grows constantly, as those engaging in "pure" research publish their discoveries.[23] The number of these chemicals that have known uses of commercial or social value, in contrast, is small. Development of new uses for existing chemicals is thus a major component of practical chemical research.

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[23] As of March 1980, the Chemical Registry System maintained by the American Chemical Society listed in excess of 4,848,000 known chemical compounds. The list grows at a rate of about 350,000 per year. The Society estimates that the list comprises between 50% and 60% of all compounds that ever have been prepared. See Brief for American Chemical Society as *Amicus Curiae* 4–5.

It is extraordinarily expensive.[24] It may take years of unsuccessful testing before a chemical having a desired property is identified, and it may take several years of further testing before a proper and safe method for using that chemical is developed.[25]

Under the construction of § 271 (d) that petitioners advance, the rewards available to those willing to undergo the time, expense, and interim frustration of such practical research would provide at best a dubious incentive. Others could await the results of the testing and then jump on the profit bandwagon by demanding licenses to sell the unpatented, nonstaple chemical used in the newly developed process. Refusal to accede to such a demand, if accompanied by any attempt to profit from the invention through sale of the unpatented chemical, would risk forfeiture of any patent protection whatsoever on a finding of patent misuse. As a result, noninventors would be almost assured of an opportunity to share in the spoils, even though they had contributed nothing to the discovery. The incentive to await the discoveries of others might well prove sweeter than the incentive to take the initiative oneself.

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[24] For example, the average cost of developing one new pharmaceutical drug has been estimated to run as high as $54 million. Hansen, The Pharmaceutical Development Process: Estimates of Development Costs and Times and the Effects of Proposed Regulatory Changes, in Issues in Pharmaceutical Economics 151, 180 (R. Chien ed. 1979).

[25] See Wardell, The History of Drug Discovery, Development, and Regulation, in Issues in Pharmaceutical Economics 1, 8–10 (R. Chien ed. 1979) (describing modern techniques and testing requirements for development of pharmaceuticals). Although testing of chemicals destined for pharmaceutical use may be the most extensive, testing for environmental effects of chemicals used in industrial or agricultural settings also can be both expensive and prolonged. See A. Wechsler, J. Harrison, & J. Neumeyer, Evaluation of the Possible Impact of Pesticide Legislation on Research and Development Activities of Pesticide Manufacturers 18–52 (Environmental Protection Agency, Office of Pesticide Programs, pub. no. 540/9–75–018, 1975). See generally A. Baines, F. Bradbury, & C. Suckling, Research in the Chemical Industry 82–163 (1969).

Whether such a regime would prove workable, as petitioners urge, or would lead to dire consequences, as respondent and several *amici* insist, we need not predict. Nor do we need to determine whether the principles of free competition could justify such a result. Congress' enactment of § 271 (d) resolved these issues in favor of a broader scope of patent protection. In accord with our understanding of that statute, we hold that Rohm & Haas has not engaged in patent misuse, either by its method of selling propanil, or by its refusal to license others to sell that commodity. The judgment of the Court of Appeals is therefore affirmed.

It is so ordered.

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE STEVENS join, dissenting.

For decades this Court has denied relief from contributory infringement to patent holders who attempt to extend their patent monopolies to unpatented materials used in connection with patented inventions. The Court now refuses to apply this "patent misuse" principle in the very area in which such attempts to restrain competition are most likely to be successful. The Court holds exempt from the patent misuse doctrine a patent holder's refusal to license others to use a patented process unless they purchase from him an unpatented product that has no substantial use except in the patented process. The Court's sole justification for this radical departure from our prior construction of the patent laws is its interpretation of 35 U. S. C. § 271, a provision that created exceptions to the misuse doctrine and that we have held must be strictly construed "in light of this nation's historical antipathy to monopoly," *Deepsouth Packing Co.* v. *Laitram Corp.*, 406 U. S. 518, 530 (1972). The Court recognizes, as it must, that § 271 does not on its face exempt the broad category of nonstaple materials from the misuse doctrine, yet construes it to do so based

on what it has gleaned from the testimony of private patent lawyers given in hearings before congressional Committees and from the testimony of Department of Justice attorneys opposing the bill. The Court has often warned that in construing statutes, we should be "extremely wary of testimony before committee hearings and of debates on the floor of Congress save for precise analyses of statutory phrases by the sponsors of the proposed laws." *S&E Contractors, Inc.* v. *United States,* 406 U. S. 1, 13, n. 9 (1972). We have expressed similar reservations about statements of the opponents of a bill: "The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of the statutory words is in doubt." *Schwegman Bros.* v. *Calvert Distillers Corp.,* 341 U. S. 384, 394–395 (1951). *NLRB* v. *Fruit Packers,* 377 U. S. 58, 66 (1964). Here, nothing in support of the Court's novel construction is to be found in the Committee Reports or in the statements of those Congressmen or Senators sponsoring the bill. The Court focuses only on the opposing positions of nonlegislators, none of which I find sufficient to constitute that "clear and certain signal from Congress" that is required before construing the 1952 Patent Act to extend the patent monopoly beyond pre-existing standards.

I

All parties to this litigation, as well as the courts below, agree that were it not for § 271 (d), respondent's refusal to license the use of its patent except to those who purchase unpatented propanil from it would be deemed patent misuse and would bar recovery from contributory infringement. 599 F. 2d 685, 688 (CA5 1979). In a long line of decisions commencing with *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.,* 243 U. S. 502 (1917), this Court has denied recovery to patent holders who attempt to extend their patent monopoly to unpatented materials used in connection with patented inventions. In *Motion Picture Patents* the Court held that

a license to use a patented motion picture projector could not be conditioned on the purchase of unpatented film from the patent holder. The Court emphasized that

> "the exclusive right granted in every patent must be limited to the invention described in the claims of the patent and that it is not competent for the owner of a patent . . . to, in effect, extend the scope of its patent monopoly by restricting the use of it to materials necessary in its operation but which are no part of the patented invention," *id.*, at 516.

Accordingly, the Court refused to enforce the patent against contributory infringers because "it would be gravely injurious to [the] public interest," which it deemed "more a favorite of the law than is the promotion of private fortunes." *Id.*, at 519.[1]

The "patent misuse" doctrine, as it came to be known, was further enunciated in *Carbice Corp.* v. *American Patents Development Corp.*, 283 U. S. 27 (1931). In *Carbice* the Court unanimously denied relief for contributory infringement where a patentee required users of its combination patent to purchase from its exclusive licensee unpatented material (dry ice) that was an essential component of the patented com-

[1] The Court rejected the argument that the licensing scheme was justified because it reduced the cost of the patented invention. The Court noted:

"It is argued as a merit of this system of sale . . . that the public is benefited by the sale of the machine at what is practically its cost and by the fact that the owner of the patent makes its entire profit from the sale of the supplies with which it is operated. This fact, if it be a fact, instead of commending, is the clearest possible condemnation of, the practice adopted, for it proves that under color of its patent the owner intends to and does derive its profit, not from the invention on which the law gives it a monopoly but from the unpatented supplies with which it is used and which are wholly without the scope of the patent monopoly, thus in effect extending the power to the owner of the patent to fix the price to the public of the unpatented supplies as effectively as he may fix the price on the patented machine." 243 U. S., at 517.

bination (a container for transporting frozen goods). The Court acknowledged that the owner of the process patent properly could "prohibit entirely the manufacture, sale, or use of such packages," or "grant licenses upon terms consistent with the limited scope of the patent monopoly" and "charge a royalty or license fee." However, the Court concluded that the patent holder "may not exact as the condition of a license that unpatented materials used in connection with the invention shall be purchased only from the licensor; and if it does so, relief against one who supplies such unpatented materials will be denied." *Id.*, at 31. The Court deemed immaterial the fact that "the unpatented refrigerant is one of the necessary elements of the patented product," for the patent holder had "no right to be free from competition in the sale of solid carbon dioxide" (dry ice) and "this limitation, inherent in the patent grant, is not dependent upon the peculiar function or character of the unpatented material or on the way in which it is used." *Id.*, at 33. If the owner of a combination patent were permitted to restrain competition in "unpatented materials used in its manufacture," then "[t]he owner of a patent for a machine might thereby secure a partial monopoly on the unpatented supplies consumed in its operation." *Id.*, at 32.

In *Leitch Mfg. Co.* v. *Barber Co.*, 302 U. S. 458 (1938), the Court, without dissent, denied relief to the holder of a process patent who licensed only those who purchased from it an unpatented material used in the patented process. Rather than expressly tying the grant of a patent license to purchase of unpatented material, the patent holder in *Leitch* merely sold unpatented materials used in the patented process, thereby granting purchasers an implied license to use the patent. The Court deemed this distinction to be "without legal significance" because "every use of a patent as a means of obtaining a limited monopoly of unpatented material is prohibited." *Id.*, at 463. The Court emphasized that the patent misuse doctrine "applies whatever the nature of the

device by which the owner of a patent seeks to effect such unauthorized extension of the monopoly." *Ibid.*

Four years later, the Court, again without dissent, applied the patent misuse doctrine to prohibit recovery against a direct infringer by a patent holder who required purchasers of a patented product to buy from it unpatented material for use in the patented product. *Morton Salt Co.* v. *G. S. Suppiger Co.*, 314 U. S. 488 (1942). In a companion case the Court denied relief from contributory infringement to a patent holder who licensed only those who purchased from it an unpatented component product specially designed for use in the patented process. *B. B. Chemical Co.* v. *Ellis*, 314 U. S. 495 (1942). In *B. B. Chemical* the lower courts had rejected the patent owner's attempt to distinguish previous patent misuse cases as involving efforts to control the use of staple materials with substantial noninfringing uses. 117 F. 2d 829, 834–835 (CA1 1941). This Court affirmed without dissent, holding that the patent misuse doctrine barred relief "in view of petitioner's use of the patent as the means of establishing a limited monopoly in its unpatented materials," *B. B. Chemical Co.* v. *Ellis, supra*, at 497, and necessarily rejecting petitioner's position that patent misuse was limited to staple products and did not apply when the alleged infringer went beyond selling an unpatented staple material and manufactured and sold materials useful only in the patented construct.[2] The Court rejected the patent holder's argument

[2] The patent involved in *B. B. Chemical Co.* v. *Ellis* covered a process for reinforcing shoe insoles by applying to them strips of reinforcing material coated with an adhesive. Rather than expressly licensing shoe manufacturers to use the patented process, the patentee sold them precoated reinforcing material which had been "slit into strips of suitable width for use by the patented method," 314 U. S., at 496, thereby granting purchasers implied licenses to use the patent. The patentee argued in the Court of Appeals for the First Circuit that application of the patent misuse doctrine is limited "to those situations in which the alleged contributory infringer supplies staple articles of commerce." 117 F. 2d 829, 834 (1941). As the Court of Appeals noted, the patentee "insists that where the articles

that it should be able to license only purchasers of the unpatented material because this was the only practicable way to exploit its process patent. "The patent monopoly is not enlarged by reason of the fact that it would be more convenient to the patentee to have it so, or because he cannot

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supplied are specially manufactured for use in this particular [patented] process, relief is not to be denied the patentee no matter what his course of business." *Ibid.* The Court of Appeals, expressly agreeing with the Court of Appeals for the Second Circuit and disagreeing with the contrary view of the Court of Appeals for the Ninth Circuit, rejected this view. It noted: "The language of [*Leitch Mfg. Co.* v. *Barber Co.*, 302 U. S. 458 (1938), and *Carbice Corp.* v. *American Patents Development Corp.*, 283 U. S. 27 (1931),] is extremely comprehensive and is by no means restricted to staple articles. . . . There is every indication that the Carbice and Leitch cases apply to specially designed non-patented articles. . . . [T]he emphasis is on the fact that the articles sold by the alleged contributory infringers were not covered by the plaintiff's patent although it conducted its business as though they were." *Id.*, at 834–835.

The patentee-petitioner pursued the staple-nonstaple distinction in its petition for certiorari, arguing that the patent misuse principle of *Carbice Corp.* v. *American Patents Development Corp.*, *supra*, and *Leitch Mfg. Co.* v. *Barber Co.*, *supra*, should not bar relief because the unpatented materials furnished by the defendants were not "staple articles of commerce" but rather were "especially designed and prepared for use in the process of the patent." Pet. for Cert., O. T. 1941, No. 75, p. 10. It also noted the conflict among the Courts of Appeals with respect to nonstaples and patent misuse and urged that certiorari be granted on this basis. The Court granted certiorari, and the Court of Appeals was affirmed over petitioner's arguments that the patent misuse doctrine should not bar relief when the defendant did more than make and sell an unpatented staple. Brief for Petitioner, O. T. 1941, No. 75, pp. 21–22. Petitioner's brief also called attention to the conflict in the cases, *id.*, at 36–37, and both respondents and the United States as *amicus curiae* argued that nonstaples, as well as staples, were subject to the misuse doctrine. Brief for Respondents, O. T. 1941, No. 75, pp. 11–12; Brief for United States as *Amicus Curiae*, O. T. 1941, No. 75, pp. 12–13. The issue was plainly not abandoned and was part and parcel of petitioner's argument that defendant went beyond selling a staple by manufacturing and selling materials expressly designed for and usable only as part of the patented use. The argument was rejected on the authority of the companion case, *Morton Salt Co.* v. *G. S. Suppiger Co.*, 314 U. S. 488 (1942).

avail himself of its benefits within the limits of the grant." 314 U. S., at 498. However, the Court reserved the question whether the patent misuse doctrine would apply if the patent holder also was willing to license manufacturers who did not purchase from it the unpatented material. *Ibid.*[3]

These decisions established, even before this Court's decisions in the *Mercoid* cases, *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661 (1944) (*Mercoid I*), and *Mercoid Corp.* v. *Minneapolis-Honeywell Regulator Co.*, 320 U. S. 680 (1944) (*Mercoid II*), that the patent misuse doctrine would bar recovery by a patent holder who refused to license others to use a patented process unless they purchased from him an unpatented product for use in the process.[4] Such

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[3] Two years after *B. B. Chemical,* in *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661 (1944), and *Mercoid Corp.* v. *Minneapolis-Honeywell Regulator Co.*, 320 U. S. 680 (1944), the Court was confronted with the question reserved in *B. B. Chemical:* whether the patent misuse doctrine would apply to a patent holder whose offers to license contributory infringers had been refused.

[4] Although the Court is willing to concede that *B. B. Chemical* "arguably involved an application of the misuse doctrine to an attempt to control a nonstaple material," *ante,* at 194, n. 12, it subsequently states that "among the historical precedents in this Court, only . . . *Leeds & Catlin* [*Co.* v. *Victor Talking Machine Co.*, 213 U. S. 325 (1909),] and [the] *Mercoid* cases bear significant factual similarity to the present controversy." *Ante,* at 198. The latter statement is particularly puzzling because *B. B. Chemical,* like this case, involved a patentee's initial refusal to license others to sell nonstaples, while *Mercoid,* unlike this case, involved a contributory infringer's refusal to accept proffered licenses.

Moreover, the Court implies, *ante,* at 195, n. 13, that until *Mercoid,* there was division in the Courts of Appeals with regard to whether the patent misuse doctrine applied to patentees attempting to control nonstaple items. Yet all of the authorities the Court cites are pre-*B. B. Chemical,* and it is apparent that in *B. B. Chemical* as in *Mercoid,* the Court treated staple and nonstaple materials alike insofar as patent misuse was concerned. It is especially interesting that the Court cites *J. C. Ferguson Works* v. *American Lecithin Co.*, 94 F. 2d 729, 731 (CA1), cert. denied, 304 U. S. 573 (1938), as a decision supporting the inapplicability of the misuse doctrine to efforts to control nonstaples. That case was a decision

conduct was deemed patent misuse because it involved an attempt to extend the patent monopoly beyond the scope of the invention to restrain competition in the sale of unpatented materials. This conduct was deemed misuse regardless of whether it was effected by means of express conditions in patent licenses or by a policy of granting only implied licenses to purchasers of unpatented materials, and even though unpatented materials "tied" to the license had no use other than as an integral part of the patented structure.

II

Respondent's conduct in this case clearly constitutes patent misuse under these pre-*Mercoid* decisions because respondent refuses to license others to use its patented process unless they purchase from it unpatented propanil. The fact that respondent accomplishes this end through the practice of granting implied licenses to those who purchase propanil from it is as devoid of legal significance to alter this conclusion as it was in *Leitch Mfg.* 302 U. S., at 463, and *B. B. Chemical,* 314 U. S., at 498. Moreover, the fact that propanil is a nonstaple product having no substantial use except in the patented process has been without significance at least since *B. B. Chemical* and only serves to reinforce the conclusion that respondent is attempting to extend the patent monopoly to unpatented materials. Because propanil has no substantial noninfringing use, it cannot be sold without incurring liability for contributory infringement unless the vendor has a license to sell propanil or its vendee has an unconditional license to use the patented process. Respondent's refusal to license those who do not purchase propanil from it thus effectively

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by the Court of Appeals for the First Circuit, and the same Court of Appeals in *B. B. Chemical* expressly indicated that its decision in *J. C. Ferguson* did not imply that the patent misuse doctrine was inapplicable to a patentee's efforts to control nonstaples. 117 F. 2d, at 834–835. In *B. B. Chemical* the Court of Appeals held that the patent misuse doctrine applied to nonstaples as well as staples, and this Court affirmed.

subjects all competing sellers of propanil to liability for contributory infringement. As the Court recognizes, *ante*, at 201, if this conduct is not deemed patent misuse, respondent will acquire the ability "to eliminate competitors and thereby to control the market" for propanil even though propanil is unpatented, unpatentable, and in the public domain.[5] This would permit an even more complete extension of the patent monopoly to a market for unpatented materials than would result from a patentee's attempts to control sales of staples that have substantial alternative uses outside of the patented process.

III

Despite the undoubted exclusionary impact of respondent's conduct on the market for unpatented propanil, the Court holds that such conduct no longer constitutes patent misuse solely because of congressional enactment of 35 U. S. C. § 271. Section 271 is no stranger to this Court. Our previous attempts to construe this statute have been guided by the principle that "we should not expand patent rights by overruling or modifying our prior cases construing the patent statutes, unless the argument for expansion of privilege is based on more than mere inference from ambiguous statutory language." *Deepsouth Packing Co.* v. *Laitram Corp.*, 406 U. S., at 531. "[I]n light of this Nation's historical antipathy to monopoly," we have concluded that "[w]e would require a clear and certain signal from Congress before approving the position of a litigant who, as respondent here, argues that the beachhead of privilege is wider, and the area of public use narrower, than courts had previously thought." *Id.*, at 530, 531. These principles are not less applicable to, and should

[5] Respondent's efforts to use its process patent to exclude, in effect, propanil from the public domain are particularly ironic because in prior litigation respondent successfully maintained, when sued for infringement, that propanil was unpatentable for lack of novelty. *Monsanto Co.* v. *Rohm & Haas Co.*, 456 F. 2d 592 (CA3 1972).

resolve the statutory question presented in, this case, because as the Court concedes, the language of § 271 (d) does not itself resolve the question and because nothing in the legislative materials to which the Court is forced to turn furnishes the necessary evidence of congressional intention.[6]

Section 271 (d) provides:

> "No patent owner otherwise entitled to relief for infringement or contributory infringement of a patent shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having done one or more of the following: (1) derived revenue from acts which if performed by another without his consent would constitute contributory infringement of the patent; (2) licensed or authorized another to perform acts which if performed without his consent would constitute contributory infringement of the patent; (3) sought to enforce his patent rights against infringement or contributory infringement."

The plain language of § 271 (d) indicates that respondent's conduct is not immunized from application of the patent misuse doctrine. The statute merely states that respondent may (1) derive revenue from sales of unpatented propanil, (2) license others to sell propanil, and (3) sue unauthorized sellers of propanil. While none of these acts can be deemed patent misuse if respondent is "otherwise entitled to relief," the statute does not state that respondent may exclude all competitors from the propanil market by refusing to license all those who do not purchase propanil from it. This is the very conduct that constitutes patent misuse under the tradi-

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[6] Although the Court acknowledges that we previously have construed § 271, *ante*, at 215–220, it ignores the principles of statutory construction followed in those cases apparently because the cases did not involve the precise question presented in this case. The Court fails to explain, however, why the need for "a clear and certain signal from Congress" is any less urgent in this case.

tional doctrine; thus the fact that respondent may have engaged in one or more of the acts enumerated in § 271 (d) does not preclude its conduct from being deemed patent misuse.

The Court of Appeals conceded that the foregoing would be "a plausible construction" of the statutory language, 599 F. 2d, at 688,[7] yet it chose instead to interpret subsection (d)(1) as granting respondent the "right to exclude others and reserve to itself, if it chooses, the right to sell nonstaples used substantially only in its invention." *Id.*, at 704. The court based this conclusion on the reasoning that "the rights to license another to sell [nonstaple] unpatented items would be rendered worthless if the only right conferred by (d)(1) were the right to sell the item as one competitor among many freely competing." *Id.*, at 703. This reasoning not only ignores the fact that royalties may be collected from competitors selling unpatented nonstaples, who still must obtain licenses from the patentee,[8] but it also is fundamentally inconsistent with the congressional policy "to preserve and foster competition" in the sale of unpatented materials, a policy that, as we have recognized, survived enactment of § 271. *Deepsouth Packing Co.* v. *Laitram Corp., supra,* at 530; *Aro Mfg. Co.* v. *Convertible Top Replacement Co.*, 365 U. S. 336 (1961) (*Aro I*); *Aro Mfg. Co.* v. *Convertible Top Replacement Co.*, 377 U. S. 476 (1964) (*Aro II*). Subsection (d)(1) leaves respondent free to "deriv[e] revenue" from sales of propanil

[7] The Court of Appeals noted not only that petitioner's interpretation of § 271 was "plausible," but also that it is supported by numerous commentators, that "the legislative history [of § 271] is not crystal clear," and that this Court's subsequent construction of § 271 "cut against" its reading of the statute. 599 F. 2d, at 688, 703, 705–706, and n. 29.

[8] Because respondent may collect royalties on these licenses, the right to license competing sellers of propanil is not without economic value. In any event, even if it is more efficient or more profitable for respondent to collect its returns by exacting monopoly profits from the sale of propanil, this does not justify extension of the patent monopoly to the market for unpatented materials. *B. B. Chemical Co.* v. *Ellis,* 314 U. S., at 498; see n. 1, *supra*.

without thereby being deemed guilty of patent misuse; but it does not free respondent to derive monopoly profits from the sale of an unpatented product by refusing to license competitors that do not purchase the unpatented product from it.[9]

The Court acknowledges that respondent refused to license others to sell propanil, but it observes that "nothing on the face of the statute requires it to do so." *Ante*, at 202; cf. *ante*, at 213–214. As much could be conceded, but it would not follow that respondent is absolved from a finding of patent misuse. Section 271 (d) does not define conduct that constitutes patent misuse; rather it simply outlines certain conduct that is not patent misuse. Because the terms of the statute are terms of exception, the absence of any express mention of a licensing requirement does not indicate that respondent's refusal to license others is protected by § 271 (d). This much seems elementary.[10]

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[9] Like the Court of Appeals, this Court concludes that, despite the silence of the statutory language, § 271 (d) must "effectively confer upon the patentee, as a lawful adjunct of his patent rights, a limited power to exclude others from competition in nonstaple goods." *Ante*, at 201. While it recognizes the anticompetitive impact of such a holding, the Court bases its conclusion on the assertion that the patentee's "power to demand royalties from others for the privilege of selling the nonstaple items itself implies that the patentee may control the market for the nonstaple good; otherwise, his 'right' to sell licenses for the marketing of the nonstaple good would be meaningless, since no one would be willing to pay him for a superfluous authorization." *Ibid.* I fail to see, however, why a license to practice a patented process would in any sense be "superfluous," for, as I have said, competitors selling propanil would still be required to obtain patent licenses from respondent. The fact that royalties could be collected on such licenses might have some effect on the propanil market, but it does not follow that respondent may refuse to grant any licenses, thereby excluding all competitors from the propanil market.

[10] The fact that respondent may not refuse to license competing sellers of propanil who do not purchase the product from it is not inconsistent with the notion that a patent holder is free to suppress his invention or to reserve it entirely to himself. Respondent may discontinue all sales

Nor does the legislative history of § 271 (d) indicate to me that Congress intended to exempt respondent's conduct from application of the patent misuse doctrine. This Court has already addressed this subject and there is at least a rough consensus on the impetus for the congressional action. In *Aro II, supra,* at 492, we held that "Congress enacted § 271 for the express purpose of reinstating the doctrine of contributory infringement as it had been developed by decisions prior to *Mercoid,* and of overruling any blanket invalidation of the doctrine that could be found in the *Mercoid* opinions. See, *e. g.,* 35 U. S. C. §§ 271 (c), (d); Hearings [on H. R. 3760 before Subcommittee No. 3 of House Committee on the Judiciary, 82d Cong., 1st Sess.], 159, 161–162; and the *Aro I* opinions of MR. JUSTICE BLACK, 365 U. S., at 348–349, and nn. 3–4; MR. JUSTICE HARLAN, *id.,* at 378, n. 6; and MR. JUSTICE BRENNAN, *id.,* at 365–367." As Mr. Justice Black stated in *Aro I,* § 271 (d) "was designed specifically to prevent the *Mercoid* case from being interpreted to mean that any effort to enforce a patent against a contributory infringer in itself constitutes a forefeiture of patent rights," 365 U. S., at 349, n. 4 (concurring opinion).

As these passages indicate, and as all parties agree, the impetus for enactment of § 271 was this Court's decisions in the *Mercoid* cases. Each case involved a suit by the owner of a combination patent seeking relief for contributory infringement against a company that had sold an unpatented article useful only in connection with the patented combination. Unlike the situation in *B. B. Chemical Co.* v. *Ellis,* 314 U. S. 495 (1942), the alleged contributory infringer in each case had refused an offer of a license "to make, use, and sell" components of the combination patent that was not condi-

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of propanil and all licensing of its patented process and yet itself continue to use propanil in the patented process without being guilty of patent misuse. But it may not sell propanil to others, thus granting them patent licenses by operation of law, while refusing to license competing sellers of propanil, thus effectively excluding them from the market.

tioned upon the purchase of unpatented materials. *Mid-Continent Investment Co.* v. *Mercoid Corp.*, 133 F. 2d 803, 810 (CA7 1942); *Mercoid II*, 320 U. S., at 682–683. Despite their offers to license, this Court denied relief on the grounds that the patentees were misusing their patents to extend the scope of the patent monopoly to unpatented articles useful only in connection with the patents. Mr. Justice Douglas, speaking for the Court in *Mercoid I*, concluded: "The result of this decision, together with those which have preceded it, is to limit substantially the doctrine of contributory infringement. What residuum may be left we need not stop to consider." 320 U. S., at 669.

In light of the Court's suggestion that the doctrine of contributory infringement might not have survived *Mercoid I*, there was "[c]onsiderable doubt and confusion as to the scope of contributory infringement," H. R. Rep. No. 1923, 82d Cong., 2d Sess., 9 (1952); S. Rep. No. 1979, 82d Cong., 2d Sess., 8 (1952). This confusion was understandable because the *Mercoid* decisions for the first time had applied the patent misuse doctrine to situations where contributory infringers had refused to accept patent licenses that were not conditioned on the purchase of unpatented materials from the patentee. As was indicated in *Aro II*, *supra*, at 492, the express purpose for the legislation was to reinstate the doctrine of contributory infringement that existed prior to *Mercoid* and to overrule any implication that *Mercoid* made the mere act of suing for contributory infringement a form of patent misuse.

The Court nevertheless follows a course quite at odds with the Court's prior approach to the construction of § 271. Conceding that the language of the section will not itself support its result, the Court turns to the legislative history of the section. It discovers nothing favoring its position in the Committee Reports, the floor debates, or in any materials orignating with the legislators who sponsored or managed the bill or who had any other intimate connection with the legislation. The Court is left with the opinions of private patent attorneys

as to the meaning of the proposed legislation and with the hearing testimony of representatives of the Department of Justice opposing the bill. We have generally been reluctant to rely on such citations for definitive guidance in construing legislation; [11] and we should not do so here, particularly when it means departing from the standards announced in our prior cases for construing the 1952 legislation.

However that may be, the testimony of the patent attorneys given in Committee hearings does not support the Court's broad holding that Congress intended to give patent holders complete control over nonstaple materials that otherwise would be in the public domain. Section 271 (c) does declare that selling a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing that the material or apparatus is especially made or especially adapted for use in an infringement of such patent, is contributory infringement, so long as the material or apparatus is not a staple article or commodity of commerce. Making or selling nonstaples especially made or adapted for use in practicing a patent is contributory infringement; but making or selling staples is not, however useful in practicing a patent.[12] But it does not follow that the patentee is never subject to the defense of patent misuse when he seeks to control the sale of a nonstaple used in connection with his patent. Section 271 (d) specifies precisely what acts he may perform with respect to the nonstaple and not be guilty of patent misuse. As the principal witness on whom the Court relies explained, these acts were specified as *exceptions* to what otherwise might have been considered patent misuse under the *Mercoid* decision. Hearings on H. R. 3760 before Subcommittee No. 3 of the

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[11] *S&E Contractors, Inc.* v. *United States*, 406 U. S. 1, 13, n. 9 (1972).

[12] Section 271 (c)'s limitation of the contributory infringement doctrine to sales of nonstaples does not establish that the exemptions contained in § 271 (d) are relevant only to infringement actions against sellers of nonstaples, for § 271 (d) is equally applicable to infringement actions brought under § 271 (b).

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House Committee on the Judiciary, 82d Cong., 1st Sess., 161–162 (1951) (hereinafter 1951 Hearings).

The Court offers little to support its position that § 271 (d) was intended to put nonstaples completely beyond the reach of the misuse doctrine. Otherwise, § 271 (c) could simply have stated that the patentee could have his appropriate remedies against contributory infringement as defined in the section without regard to the defense of patent misuse. Of course, this is precisely the result the Court arrives at, but this extends the exemption far beyond what the Committees were told § 271 (d) would effect. Indeed, the representations were that, aside from the exemptions spelled out in § 271 (d), a patentee's control of nonstaples would be subject to the doctrine of patent misuse. *Ibid.*

It is also apparent that the private patent attorneys understood the 1952 Act as not destroying the defense of patent misuse but as confining the defense to its pre-*Mercoid* reach. As I have said, *B. B. Chemical* denied a patentee relief in connection with a nonstaple article but left open whether the same would be true if licenses were available to but were refused by the alleged infringers. In *Mercoid I*, as the patentee in that case emphasized in its brief here, Brief for Respondent Mid-Continent Investment Co., O. T. 1943, Nos. 54 and 55, pp. 31, 39, the defendant-infringer had repeatedly refused licenses, but the Court nevertheless held that the misuse defense barred relief. To this extent, § 271 overturned *Mercoid* and intended to arm the patentee with the power to sue unlicensed contributory infringers selling nonstaple components used in connection with the patented process. But I do not understand the Committee witnesses, when pressed in the 1951 Hearings, to suggest that § 271 (d) authorized the patentee to condition the use of his process on purchasing the unpatented material from him and to exclude from the market all other manufacturers or sellers even though they would be willing to pay a reasonable royalty to the patent owner. For example, after listening to the witness, a member of the Committee

stated: "In other words, all [§ 271 (d)] says is that bringing an action against someone who is guilty of contributory infringement is not a misuse of the patent." The witness's response was: "That is true." 1951 Hearings, at 169.

I have no quarrel with this reading of § 271, but such reading falls far short of insulating the patentee from the misuse defense when he refuses licenses to competing manufacturers of an unpatentable nonstaple and conditions use of his patented process on the user's buying the nonstaple from the patentee itself, thereby employing his patent to profit from the manufacture and sale of an article in the public domain. This was patent misuse before *Mercoid,* and I fail to find convincing evidence in the congressional materials to indicate that Congress intended to overturn the prior law in this respect.[13] It is apparent that the Court overstates the legislative record when it says, *ante,* at 213, that Congress was told not only that contributory infringement would be confined to nonstaples but that § 271 would exempt the control of such goods from the scope of patent misuse. I find no statement such as this among those quoted or cited by the Court.[14]

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[13] The fact that § 271 was not intended to work a major repeal of the patent misuse doctrine is reflected in the treatment the legislation received on the floor of the House and Senate. As the Court of Appeals recognized, there was no debate on the House floor and scant comment in the Senate. Just prior to the Senate vote, Senator McCarran, chairman of the Judiciary Committee that had been responsible for the bill in the Senate, was asked by Senator Saltonstall: "Does the bill change the law in any way or only codify the present patent laws?" Senator McCarran replied: "It codifies the present patent laws." 98 Cong. Rec. 9323 (1952). Although Senator McCarran later referred to the desire to clarify confusion that may have arisen from *Mercoid,* there was no indication that the legislation would work a major repeal of the patent misuse doctrine.

[14] The Justice Department's opposition to congressional enactment of § 271 does not indicate that the statute was intended to immunize respondent's conduct in this case. "[W]e have often cautioned against the danger, when interpreting a statute, of reliance upon the views of its legislative opponents. In their zeal to defeat a bill, they understandably

I should add that even if the applicability of the patent misuse doctrine to nonstaple materials was not settled until *Mercoid*, overturning *Mercoid* where the infringer refused a license, would not resolve the case where, as here, the patentee refuses licenses to others and reserves to itself the entire market for the unpatentable, nonstaple article lying in the public domain. It may be true, as the Court emphasizes, *ante*, at 197, that the concepts of contributory infringement and patent misuse rest on antithetical foundations, but it does not follow that the price of their coexistence inevitably must be the wholesale suppression of competition in the markets for unpatentable nonstaples.

The Court offers reasons of policy for its obvious extension of patent monopoly, but whether to stimulate research and development in the chemical field it is necessary to give patentees monopoly control over articles not covered by their patents is a question for Congress to decide, and I would wait for that body to speak more clearly than it has.

Accordingly, I respectfully dissent.

MR. JUSTICE STEVENS, dissenting.

This patentee has offered no licenses, either to competing sellers of propanil or to consumers, except the implied license that is granted with every purchase of propanil from it. Thus, every license granted under this patent has been conditioned on the purchase of an unpatented product from the patentee. This is a classic case of patent misuse. As MR. JUSTICE WHITE demonstrates in his dissenting opinion, nothing in 35 U. S. C. § 271 (d) excludes this type of conduct from the well-established misuse doctrine.

The Court may have been led into reaching the contrary, and in my view erroneous, conclusion by the particular facts of this case. It appears that it would not be particularly

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tend to overstate its reach." *NLRB* v. *Fruit Packers*, 377 U. S. 58, 66 (1964).

profitable to exploit this patent by granting express licenses for fixed terms to users of propanil or by granting licenses to competing sellers. Under these circumstances, the patent may well have little or no commercial value unless the patentee is permitted to engage in patent misuse. But surely this is not a good reason for interpreting § 271 (d) to permit such misuse. For the logic of the Court's holding would seem to justify the extension of the patent monopoly to unpatented "nonstaples" even in cases in which the patent could be profitably exploited without misuse. Thus, for example, it appears that the Court's decision would allow a manufacturer to condition a long-term lease of a patented piece of equipment on the lessee's agreement to purchase tailormade—*i. e.*, nonstaple—supplies or components for use with the equipment exclusively from the patentee. Whether all of the five Members of the Court who have joined today's revision of § 271 (d) would apply their "nonstaple" exception in such a case remains to be seen. In all events, I respectfully dissent for the reasons stated in MR. JUSTICE WHITE's opinion, which I join.

UNITED STATES *v.* WARD, DBA L. O. WARD OIL & GAS OPERATIONS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 79-394. Argued February 26, 1980—Decided June 27, 1980

Section 311 (b)(3) of the Federal Water Pollution Control Act prohibits the discharge of oil into navigable waters. Section 311 (b)(5) requires any person in charge of an onshore facility to report any such discharge to the appropriate Government agency, and a failure to report subjects the person to a fine or imprisonment. Section 311 (b)(5) also provides for a form of "use immunity," by specifying that notification of the discharge or information obtained by the exploitation of such notification is not to be used against the reporting person in any criminal case, except for prosecution for perjury or for giving a false statement. Section 311 (b)(6) provides for the imposition of a "civil penalty" against any owner or operator of an onshore facility from which oil was discharged in violation of the Act. When oil escaped from a drilling facility leased by respondent and spilled into a tributary of the Arkansas River system, respondent notified the Environmental Protection Agency of the discharge, and this was reported to the Coast Guard, who assessed a $500 penalty against respondent under § 311 (b)(6). After his administrative appeal was denied, respondent filed suit in Federal District Court, seeking injunctive relief against enforcement of §§ 311 (b)(5) and (6) and collection of the penalty. The Government filed a separate suit to collect the penalty, and the suits were consolidated for trial. Prior to trial, the District Court rejected respondent's contention that the reporting requirements of § 311 (b)(5), as used to support a civil penalty under § 311 (b)(6), violated his right against compulsory self-incrimination, and ultimately the jury found that respondent's facility did, in fact, spill oil into the creek in question. The Court of Appeals reversed, holding that § 311 (b)(6) was sufficiently punitive to intrude upon the Fifth Amendment's protections against compulsory self-incrimination.

Held:

1. The penalty imposed by § 311 (b)(6) is civil and hence does not trigger the protections afforded by the Constitution to a criminal defendant. Pp. 248-251.

(a) It is clear that Congress intended in § 311 (b)(6) to impose a civil penalty upon persons in respondent's position, and to allow imposi-

tion of the penalty without regard to the procedural protections and restrictions available in criminal prosecutions. This intent is indicated by the fact that the authorized sanction is labeled a "civil penalty," and by the juxtaposition of such label with the criminal penalties set forth in § 311 (b)(5). P. 249.

(b) The fact that § 13 of the Rivers and Harbors Appropriation Act of 1899 makes criminal the conduct penalized in this case does not render the penalty under § 311 (b)(6) criminal in nature. The placement of criminal penalties in one statute and of civil penalties in another statute enacted 70 years later tends to dilute the force of the factor—the behavior to which the penalty applies is already a crime—considered, *inter alia*, in *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, as indicating that a penalty is criminal in nature. Neither that factor nor any of the other factors set forth in *Mendoza-Martinez* are sufficient to render unconstitutional the congressional classification of the penalty established in § 311 (b)(6). Pp. 249–251.

2. The proceeding in which the penalty was imposed was not "quasi-criminal" so as to implicate the Fifth Amendment's protection against self-incrimination. *Boyd* v. *United States*, 116 U. S. 616, distinguished. In light of overwhelming evidence that Congress intended to create a penalty civil in all respects and weak evidence of any countervailing punitive purpose or effect, it would be anomalous to hold that § 311 (b)(6) created a criminal penalty for the purposes of the Self-Incrimination Clause but a civil penalty for all other purposes. Pp. 251–254.

598 F. 2d 1187, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, and POWELL, JJ., joined. BLACKMUN, J., filed an opinion concurring in the judgment, in which MARSHALL, J., joined, *post*, p. 255. STEVENS, J., filed a dissenting opinion, *post*, p. 257.

Edwin S. Kneedler argued the cause for the United States. With him on the briefs were *Solicitor General McCree, Assistant Attorney General Moorman, Jacques B. Gelin,* and *Michael A. McCord.*

Stephen Jones argued the cause for respondent. With him on the brief was *David C. Butler.**

**James G. Watt* filed a brief for the Mountain States Legal Foundation et al. as *amici curiae* urging affirmance.

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

The United States seeks review of a decision of the United States Court of Appeals for the Tenth Circuit that a proceeding for the assessment of a "civil penalty" under § 311 (b)(6) of the Federal Water Pollution Control Act (FWPCA) is a "criminal case" within the meaning of the Fifth Amendment's guarantee against compulsory self-incrimination. We granted certiorari, 444 U. S. 939, and now reverse.

I

At the time this case arose,[1] § 311 (b)(3) of the FWPCA prohibited the discharge into navigable waters or onto adjoining shorelines of oil or hazardous substances in quantities determined by the President to be "harmful." [2] Section 311 (b)(5) of the Act imposed a duty upon "any person in charge of a vessel or of an onshore facility or an offshore facility" to report any discharge of oil or a hazardous substance into navigable waters to the "appropriate agency" of the United States Government. Should that person fail to supply such notification, he or she was liable to a fine of not more than $10,000 or imprisonment of not more than one year. Section 311 (b)(5) also provided for a form of "use immunity," specifying that "[n]otification received pursuant to this paragraph or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement." 33 U. S. C. § 1321 (b)(5).[3]

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[1] Section 311 was amended by the Clean Water Act of 1977, Pub. L. 95-217, 91 Stat. 1566, and the Federal Water Pollution Control Act Amendments of 1978, Pub. L. 95-576, 92 Stat. 2468. Except as noted, those amendments have no bearing on the present case. See nn. 2 and 4, *infra*.

[2] Section 311 (b)(3) was amended by the Federal Water Pollution Control Act Amendments of 1978, Pub. L. 95-576, 92 Stat. 2468, to prohibit the discharge of oil and hazardous substances "in such quantities as *may* be harmful" (emphasis added), as determined by the President.

[3] At the time in question, § 311 (b)(5) read in full:

"Any person in charge of a vessel or of an onshore facility or an offshore

Section 311 (b)(6) provided for the imposition of a "civil penalty" against "[a]ny owner or operator of any vessel, onshore facility, or offshore facility from which oil or a hazardous substance is discharged in violation" of the Act. In 1975, that subsection called for a penalty of up to $5,000 for each violation of the Act.[4] In assessing penalties, the Secretary of the appropriate agency was to take into account "the appropriateness of such penalty to the size of the business or of the owner or operator charged, the effect on the owner or operator's ability to continue in business, and the gravity of the violation. . . ." 33 U. S. C. § 1321 (b)(6).[5]

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facility shall, as soon as he has knowledge of any discharge of oil or a hazardous substance from such vessel or facility in violation of paragraph (3) of this subsection, immediately notify the appropriate agency of the United States Government of such discharge. Any such person who fails to notify immediately such agency of such discharge shall, upon conviction, be fined not more than $10,000, or imprisoned for not more than one year, or both. Notification received pursuant to this paragraph or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement."

[4] Section 311 (b)(6) was amended by the Federal Water Pollution Control Act Amendments of 1978, Pub. L. 95–576, 92 Stat. 2468, to authorize civil penalties of up to $50,000 per offense, or up to $250,000 per offense in cases where the discharge was the result of willful negligence or misconduct.

[5] At the time of the discharge in this case, § 311 (b)(6), as set forth in 33 U. S. C. § 1321(b)(6), read:

"Any owner or operator of any vessel, onshore facility, or offshore facility from which oil or a hazardous substance is discharged in violation of paragraph (3) of this subsection shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard is operating of not more than $5,000 for each offense. No penalty shall be assessed unless the owner or operator charged shall have been given notice and opportunity for a hearing on such charge. Each violation is a separate offense. Any such civil penalty may be compromised by such Secretary. In determining the amount of the penalty, or the amount agreed upon in compromise, the appropriateness of such penalty to the size of the business of the owner or operator charged, the effect on the owner or operator's ability to continue in business, and the gravity of the violation, shall be considered

According to § 311 (k) of the Act, funds collected from the assessment of penalties under § 311 (b)(6) were to be paid into a "revolving fund" together with "other funds received . . . under this section" and any money appropriated to the revolving fund by Congress. See 33 U. S. C. § 1321 (k). Money contained in this fund was to be used to finance the removal, containment, or dispersal of oil and hazardous substances discharged into navigable waters and to defray the costs of administering the Act. 33 U. S. C. § 1321 (*l*). Another section of the Act allowed the United States Government to collect the costs of removal, containment, or dispersal of a discharge from the person or corporation responsible for that discharge in cases where that person or corporation had been identified. 33 U. S. C. § 1321 (f).

On or about March 23, 1975, oil escaped from an oil retention pit at a drilling facility located near Enid, Okla., and eventually found its way into Boggie Creek, a tributary of the Arkansas River system.[6] At the time of the discharge, the premises were being leased by respondent L. O. Ward, who was doing business as L. O. Ward Oil & Gas Operations. On April 2, 1975, respondent Ward notified the regional office of the Environmental Protection Agency (EPA) that a discharge of oil had taken place. Ward later submitted a more complete written report of the discharge, which was in turn forwarded to the Coast Guard, the agency responsible for assessing civil penalties under § 311 (b)(6).

After notice and opportunity for hearing, the Coast Guard assessed a civil penalty against respondent in the amount

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by such Secretary. The Secretary of the Treasury shall withhold at the request of such Secretary the clearance required by section 91 of Title 46 of any vessel the owner or operator of which is subject to the foregoing penalty. Clearance may be granted in such cases upon the filing of a bond or other surety satisfactory to such Secretary."

[6] All parties concede that Boggie Creek is a "navigable water" within the meaning of 33 U. S. C. § 1362 (7).

of $500. Respondent filed an administrative appeal from this ruling, contending, *inter alia*, that the reporting requirements of § 311 (b)(5) of the Act violated his privilege against compulsory self-incrimination. The administrative appeal was denied.

On April 13, 1976, Ward filed suit in the United States District Court for the Western District of Oklahoma, seeking to enjoin the Secretary of Transportation, the Commandant of the Coast Guard, and the Administrator of EPA from enforcing §§ 311 (b)(5) and (6) and from collecting the penalty of $500. On June 4, 1976, the United States filed a separate suit in the same court to collect the unpaid penalty. The District Court eventually ordered the two suits consolidated for trial.

Prior to trial, the District Court rejected Ward's contention that the reporting requirements of § 311 (b)(5), as used to support a civil penalty under § 311 (b)(6), violated his right against compulsory self-incrimination. The case was tried to a jury, which found that Ward's facility did, in fact, spill oil into Boggie Creek. The District Court, however, reduced Ward's penalty to $250 because of the amount of oil that had spilled and because of its belief that Ward had been diligent in his attempts to clean up the discharge after it had been discovered.

The United States Court of Appeals for the Tenth Circuit reversed. *Ward* v. *Coleman*, 598 F. 2d 1187 (1979). Although admitting that Congress had labeled the penalty provided for in § 311 (b)(6) as civil and that the use of funds collected under that section to finance the administration of the Act indicated a "remedial" purpose for the provision, the Court of Appeals tested the statutory scheme against the standards set forth in *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 168–169 (1963),[7] and held that § 311 (b)(6) was sufficiently

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[7] The standards set forth were

"[w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it

punitive to intrude upon the Fifth Amendment's protections against compulsory self-incrimination. It therefore reversed and remanded for further proceedings in the collection suit.

II

The distinction between a civil penalty and a criminal penalty is of some constitutional import. The Self-Incrimination Clause of the Fifth Amendment, for example, is expressly limited to "any criminal case. . . ." Similarly, the protections provided by the Sixth Amendment are available only in "criminal prosecutions. . . ." Other constitutional protections, while not explicitly limited to one context or the other, have been so limited by decision of this Court. See, *e. g., Helvering* v. *Mitchell,* 303 U. S. 391, 399 (1938) (Double Jeopardy Clause protects only against two criminal punishments); *United States* v. *Regan,* 232 U. S. 37, 47–48 (1914) (proof beyond a reasonable doubt required only in criminal cases).

This Court has often stated that the question whether a particular statutorily-defined penalty is civil or criminal is a matter of statutory construction. See, *e. g., One Lot Emerald Cut Stones* v. *United States,* 409 U. S. 232, 237 (1972); *Helvering* v. *Mitchell, supra,* at 399. Our inquiry in this regard has traditionally proceeded on two levels. First, we have set out to determine whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other. See *One Lot Emerald Cut Stones* v. *United States, supra,* at 236–237. Second, where Congress has indicated an intention to establish a

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comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned. . . ." 372 U. S., at 168–169 (footnotes omitted).

civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention. See *Flemming* v. *Nestor*, 363 U. S. 603, 617–621 (1960). In regard to this latter inquiry, we have noted that "only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground." *Id.*, at 617. See also *One Lot Emerald Cut Stones* v. *United States*, *supra*, at 237; *Rex Trailer Co.* v. *United States*, 350 U. S. 148, 154 (1956).

As for our first inquiry in the present case, we believe it quite clear that Congress intended to impose a civil penalty upon persons in Ward's position. Initially, and importantly, Congress labeled the sanction authorized in § 311 (b)(6) a "civil penalty," a label that takes on added significance given its juxtaposition with the criminal penalties set forth in the immediately preceding subparagraph, § 311 (b)(5). Thus, we have no doubt that Congress intended to allow imposition of penalties under § 311 (b)(6) without regard to the procedural protections and restrictions available in criminal prosecutions.

We turn then to consider whether Congress, despite its manifest intention to establish a civil, remedial mechanism, nevertheless provided for sanctions so punitive as to "transfor[m] what was clearly intended as a civil remedy into a criminal penalty." *Rex Trailer Co.* v. *United States*, *supra*, at 154. In making this determination, both the District Court and the Court of Appeals found it useful to refer to the seven considerations listed in *Kennedy* v. *Mendoza-Martinez*, *supra*, at 168–169. This list of considerations, while certainly neither exhaustive nor dispositive, has proved helpful in our own consideration of similar questions, see, *e. g.*, *Bell* v. *Wolfish*, 441 U. S. 520, 537–538 (1979), and provides some guidance in the present case.

Without setting forth here our assessment of each of the seven *Mendoza-Martinez* factors, we think only one, the fifth, aids respondent. That is a consideration of whether "the

behavior to which [the penalty] applies is already a crime." 372 U. S., at 168–169. In this regard, respondent contends that § 13 of the Rivers and Harbors Appropriation Act of 1899, 33 U. S. C. § 407, makes criminal the precise conduct penalized in the present case. Moreover, respondent points out that at least one federal court has held that § 13 of the Rivers and Harbors Appropriation Act defines a "strict liability crime," for which the Government need prove no scienter. See *United States* v. *White Fuel Corp.*, 498 F. 2d 619 (CA1 1974). According to respondent, this confirms the lower court's conclusion that this fifth factor "falls clearly in favor of a finding that [§ 311 (b)(6)] is criminal in nature." 598 F. 2d, at 1193.

While we agree that this consideration seems to point toward a finding that § 311 (b)(6) is criminal in nature, that indication is not as strong as it seems at first blush. We have noted on a number of occasions that "Congress may impose both a criminal and a civil sanction in respect to the same act or omission." *Helvering* v. *Mitchell, supra,* at 399; *One Lot Emerald Cut Stones* v. *United States, supra,* at 235. Moreover, in *Helvering,* where we held a 50% penalty for tax fraud to be civil, we found it quite significant that "the Revenue Act of 1928 contains two separate and distinct provisions imposing sanctions," and that "these appear in different parts of the statute. . . ." 303 U. S., at 404. See also *One Lot Emerald Cut Stones* v. *United States, supra,* at 236–237. To the extent that we found significant the separation of civil and criminal penalties within the same statute, we believe that the placement of criminal penalties in one statute and the placement of civil penalties in another statute enacted 70 years later tends to dilute the force of the fifth *Mendoza-Martinez* criterion in this case.

In sum, we believe that the factors set forth in *Mendoza-Martinez,* while neither exhaustive nor conclusive on the issue, are in no way sufficient to render unconstitutional the congres-

sional classification of the penalty established in § 311 (b)(6) as civil. Nor are we persuaded by any of respondent's other arguments that he has offered the "clearest proof" that the penalty here in question is punitive in either purpose or effect.

III

Our conclusion that § 311 (b)(6) does not trigger all the protections afforded by the Constitution to a criminal defendant does not completelv dispose of this case. Respondent asserts that, even if the penalty imposed upon him was not sufficiently criminal in nature to trigger other guarantees, it was "quasi-criminal," and therefore sufficient to implicate the Fifth Amendment's protection against compulsory self-incrimination. He relies primarily in this regard upon *Boyd* v. *United States,* 116 U. S. 616 (1886), and later cases quoting its language.

In *Boyd,* appellants had been indicted under § 12 of an "Act to amend the customs revenue laws and to repeal moieties," for fraudulently attempting to deprive the United States of lawful customs duties payable on certain imported merchandise. According to the statute in question, a person found in violation of its provisions was to be "fined in any sum not exceeding $5,000 nor less than $50, or be imprisoned for any time not exceeding two years, or both; and, in addition to such fine, such merchandise shall be forfeited." 116 U. S., at 617. Despite the pending indictment, appellants filed a claim for the goods held by the United States. In response, the prosecutor obtained an order of the District Court requiring appellants to produce the invoice covering the goods at issue. Appellants objected that such an order violated the Fourth and Fifth Amendments by subjecting them to an unreasonable search and seizure and by requiring them to act as witnesses against themselves.

This Court found the Fifth Amendment applicable, even though the action in question was one contesting the forfeiture

of certain goods. According to the Court: "We are . . . clearly of opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offences committed by him, though they may be civil in form, are in their nature criminal." *Id.*, at 633–634. While at this point in its opinion, the Court seemed to limit its holding to proceedings involving the forfeiture of property, shortly after the quoted passage it broadened its reasoning in a manner that might seem to apply to the present case: "As, therefore, suits for *penalties and forfeitures* incurred by the commission of offences against the law, are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution, and of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself. . . ." *Id.*, at 634 (emphasis added).

Seven years later, this Court relied primarily upon *Boyd* in holding that a proceeding resulting in a "forfeit and penalty" of $1,000 for violation of an Act prohibiting the employment of aliens was sufficiently criminal to trigger the protections of the Self-Incrimination Clause of the Fifth Amendment. *Lees* v. *United States*, 150 U. S. 476 (1893). More recently, in *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U. S. 693 (1965), and *United States* v. *United States Coin & Currency*, 401 U. S. 715 (1971), this Court applied *Boyd* to proceedings involving the forfeiture of property for alleged criminal activity. *Plymouth Sedan* dealt with the applicability of the so-called exclusionary rule to a proceeding brought by the State of Pennsylvania to secure the forfeiture of a car allegedly involved in the illegal transportation of liquor. *Coin & Currency* involved the applicability of the Fifth Amendment privilege against compulsory self-incrimination in a proceeding brought by the United States to secure for-

feiture of $8,674 found in the possession of a gambler at the time of his arrest.

Read broadly, *Boyd* might control the present case. This Court has declined, however, to give full scope to the reasoning and dicta in *Boyd*, noting on at least one occasion that "[s]everal of *Boyd*'s express or implicit declarations have not stood the test of time." *Fisher* v. *United States*, 425 U. S. 391, 407 (1976). In *United States* v. *Regan*, 232 U. S. 37 (1914), for example, we declined to apply *Boyd*'s classification of penalties and forfeitures as criminal in a case where a defendant assessed with a $1,000 penalty for violation of the Alien Immigration Act claimed that he was entitled to have the Government prove its case beyond a reasonable doubt. *Boyd* and *Lees*, according to *Regan*, were limited in scope to the Fifth Amendment's guarantee against compulsory self-incrimination, which "is of broader scope than are the guarantees in Art. III and the Sixth Amendment governing trials and criminal prosecutions." 232 U. S., at 50. See also *Helvering* v. *Mitchell*, 303 U. S., at 400, n. 3. Similarly, in *Hepner* v. *United States*, 213 U. S. 103 (1909), this Court upheld the entry of a directed verdict against the appellant under a statute similar to that examined in *Lees*. According to *Hepner*, "the *Lees* and *Boyd cases* do not modify or disturb but recognize the general rule that penalties may be recovered by civil actions, although such actions may be so far criminal in their nature that the defendant cannot be compelled to testify against himself in such actions in respect to any matters involving, or that may involve, his being guilty of a criminal offense." *Id.*, at 112.

The question before us, then, is whether the penalty imposed in this case, although clearly not "criminal" enough to trigger the protections of the Sixth Amendment, the Double Jeopardy Clause of the Fifth Amendment, or the other procedural guarantees normally associated with criminal prosecutions, is nevertheless "so far criminal in [its] nature"

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as to trigger the Self-Incrimination Clause of the Fifth Amendment. Initially, we note that the penalty and proceeding considered in *Boyd* were quite different from those considered in this case. *Boyd* dealt with forfeiture of property, a penalty that had absolutely no correlation to any damages sustained by society or to the cost of enforcing the law. See also *Lees* v. *United States, supra* (fixed monetary penalty); *One 1958 Plymouth Sedan* v. *Pennsylvania, supra* (forfeiture); *United States* v. *United States Coin & Currency, supra* (forfeiture). Here the penalty is much more analogous to traditional civil damages. Moreover, the statute under scrutiny in *Boyd* listed forfeiture along with fine and imprisonment as one possible punishment for customs fraud, a fact of some significance to the *Boyd* Court. See 116 U. S., at 634. Here, as previously stated, the civil remedy and the criminal remedy are contained in separate statutes enacted 70 years apart. The proceedings in *Boyd* also posed a danger that the appellants would prejudice themselves in respect to later criminal proceedings. See *Hepner* v. *United States, supra,* at 112. Here, respondent is protected by § 311 (b)(5), which expressly provides that "[n]otification received pursuant to this paragraph or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except [for] prosecution for perjury or for giving a false statement." 33 U. S. C. § 1321 (b)(5).

More importantly, however, we believe that in the light of what we have found to be overwhelming evidence that Congress intended to create a penalty civil in all respects and quite weak evidence of any countervailing punitive purpose or effect it would be quite anomalous to hold that § 311 (b)(6) created a criminal penalty for the purposes of the Self-Incrimination Clause but a civil penalty for all other purposes. We do not read *Boyd* as requiring a contrary conclusion.

IV

We conclude that the penalty imposed by Congress was civil, and that the proceeding in which it was imposed was not "quasi-criminal" as that term is used in *Boyd* v. *United States, supra.* The judgment of the Court of Appeals is therefore

Reversed.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE MARSHALL joins, concurring in the judgment.

I agree with the Court that a proceeding for assessment of a monetary penalty under § 311 (b)(6) of the Federal Water Pollution Control Act, 33 U. S. C. § 1321 (b)(6), is not a "criminal case" within the meaning of the Fifth Amendment. I reach this conclusion, however, for a number of reasons in addition to those discussed in the Court's opinion.

The Court of Appeals engaged in a careful analysis of the standards set forth in *Kennedy* v. *Mendoza-Martinez,* 372 U. S. 144, 168–169 (1963), for distinguishing civil from criminal proceedings. These standards are cataloged in a footnote of the Court's opinion. *Ante,* at 247–248, n. 7. The Court of Appeals concluded that some of the seven stated factors offered little guidance in this case, while others supported a "criminal" designation. In particular, it found that scienter played a part in determining the amount of penalty assessments; that the penalties promote traditional retributive aims of punishment; that behavior giving rise to the assessment is subject to criminal punishment under § 13 of the Rivers and Harbors Appropriation Act of 1899, 33 U. S. C. § 407; and that the criteria employed by the Coast Guard to set the amount of assessments permit penalties that may be excessive in relation to alternative remedial or nonpunitive purposes. *Ward* v. *Coleman,* 598 F. 2d 1187, 1192–1194 (CA10 1979). The Court is content to discuss only one of

these findings. See *ante*, at 249–250. Because of the consideration given the others by the Court of Appeals, I think they deserve brief discussion, too.

My analysis of these other factors differs from that of the Court of Appeals in two principal respects. First, I do not agree with that court's apparent conclusion that none of the *Mendoza-Martinez* factors strongly supports a "civil" designation for a penalty proceeding under § 311 (b)(6). I conclude that imposition of a monetary penalty under this statute does not result in the imposition of an "affirmative disability or restraint" within the meaning of *Mendoza-Martinez*, 372 U. S., at 168; that monetary assessments are traditionally a form of civil remedy; and that, as the Court of Appeals conceded, 598 F. 2d., at 1193, § 311 (b)(6) serves remedial purposes dissociated from punishment. Although any one of these considerations by itself might not weigh heavily in favor of a "civil" designation, I think that cumulatively they point significantly in that direction.

Second, I would assign less weight to the role of scienter, the promotion of penal objectives, and the potential excessiveness of fines than did the Court of Appeals. *Mendoza-Martinez* suggested that a sanction that "comes into play *only* on a finding of *scienter*" might be indicative of a criminal proceeding. 372 U. S., at 168 (first emphasis added). Plainly, that is not the case here. Scienter is not mentioned on the face of the statute, and it is only one of many factors relevant to determination of an assessment under Coast Guard Commandant Instruction 5922.11B (Oct. 10, 1974). Furthermore, although the fines conceivably could be used to promote primarily deterrent or retributive ends, the fact that collected assessments are deposited in a revolving fund used to defray the expense of cleanup operations is a strong indicator of the pervasively civil and compensatory thrust of the statutory scheme. See § 311 (k), 33 U. S. C. § 1321 (k). Finally, while some of the factors employed by the Coast Guard to set

the amount of assessments undoubtedly could be used to exact excessive penalties, others are expressly related to the cost of cleanup and other remedial considerations. In the absence of evidence that excessive penalties actually have been assessed, I would be inclined to regard their likelihood as remote.

For these reasons, I agree with the Court that only the fifth *Mendoza-Martinez* factor, "whether the behavior to which [the sanction] applies is already a crime," 372 U. S., at 168, supports the respondent. Since I feel that this factor alone does not mandate characterization of the proceeding as "criminal" for purposes of the Fifth Amendment, particularly when other factors weigh in the opposite direction, I concur in the judgment.

MR. JUSTICE STEVENS, dissenting.

There are a host of situations in which the Government requires the citizen to provide it with information that may later be useful in proving that the citizen has some liability to the Government. In determining whether the combination of compulsion and liability is consistent with the Fifth Amendment, I would look to two factors: first, whether the liability actually imposed on the citizen is properly characterized as "criminal" and second, if so, whether the compulsion of information was designed to assist the Government in imposing such a penalty rather than furthering some other valid regulatory purpose.

Although this case is admittedly a close one, I am persuaded that the monetary penalty imposed on respondent pursuant to § 311 (b)(6) of the Federal Water Pollution Control Act, 33 U. S. C. § 1321 (b)(6), was a "criminal" sanction for purposes of the Fifth Amendment protection against compelled self-incrimination. As the Court of Appeals pointed out, penalties under § 311 (b)(6) are not calculated to reimburse the Government for the cost of cleaning up an

oil spill.[1] Rather, this part of the statute is clearly aimed at exacting retribution for causing the spill:

> "The penalties are based on such factors as the gravity of the violation, the degree of culpability and the prior record of the party. The fact that a party acted in good faith, could not have avoided the discharge and, once it occurred, undertook clean-up measures immediately is to be given no consideration in relation to the 'imposition or amount of a civil penalty.'" *Ward* v. *Coleman*, 598 F. 2d 1187, 1193 (CA10 1979).

I agree with the Court of Appeals that, under these circumstances, application of the factors set forth in *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, leads to the conclusion that the penalty is a criminal sanction rather than a purely regulatory measure.

That is not the end of the inquiry, however. A reporting requirement is not necessarily invalid simply because it may incriminate a few of the many people to whom it applies. Two examples from the tax field will illustrate my point. As this Court held in *Marchetti* v. *United States*, 390 U. S. 39, and *Grosso* v. *United States*, 390 U. S. 62, statutes that are plainly designed to obtain information from a limited class of persons engaged in criminal activity in order to facilitate their prosecution and conviction are invalid under the Fifth Amendment. On the other hand, when the general income tax laws require a full reporting of each taxpayer's income in order to fulfill the Government's regulatory objectives, the fact that a particular answer may incriminate a particular taxpayer is not a sufficient excuse for refusing to

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[1] An owner or operator is liable for cleanup costs or, in the event that the discharge is "nonremovable," for liquidated damages under 33 U. S. C. § 1321 (b)(2)(B)(i) and § 1321 (f). As the Court of Appeals noted, payment of these damages does not relieve the owner or operator of liability for civil penalties under § 311 (b)(6). *Ward* v. *Coleman*, 598 F. 2d 1187, 1191 (CA10 1978).

supply the relevant information required from every taxpayer. See *United States* v. *Oliver*, 505 F. 2d 301, 307–308 (CA7 1974).[2]

Thus, given that the statutory penalty in this case is a criminal sanction, the issue becomes what the primary purpose of requiring the citizen to report oil spills is. If it is to simplify the assessment and collection of penalties from those responsible, it should fall within the reasoning of *Marchetti* and *Grosso*. On the other hand, if the requirement is merely to assist the Government in its cleanup responsibilities and

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[2] As I suggested in *Oliver*:

"The enactment of special legislation designed to procure incriminating disclosures from a select group of persons engaged in criminal conduct was tantamount to an accusation commencing criminal proceedings against them. The statutory demand to register as a gambler was comparable to the inquisitor's demand that a suspect in custody admit his guilt. The admission, once made, would almost inevitably become a part of the record of a criminal proceeding against a person who had already been accused when he confessed. Just as the *Miranda* decision may be read as having enlarged the adversary proceeding to commence when the accused is first taken into custody, *Marchetti* and comparable cases have, for Fifth Amendment purposes, treated special statutes designed to secure incriminating information from inherently suspect classes of persons as the commencement of criminal proceedings against those from whom incriminating information is demanded. Under this analysis, we must test the applicability of the Fifth Amendment to self-reporting statute at the time that disclosure is compelled.

"The statute which defendant Oliver is accused of violating is applicable to the public at large, and its demands for information are neutral in the sense that they apply evenly to the few who have illegal earnings and the many who do not. The self-reporting requirements of the Internal Revenue Code are justified by acceptable reasons of policy, entirely unrelated to any purpose to obtain incriminating evidence against an accused person or group. Therefore, even though the disclosure of defendant's illegal income was compelled by statute, and even though we assume that such disclosure might well have been incriminating, the *Marchetti* holding does not justify the conclusion that the Fifth Amendment excuses defendant's obligation to report his entire income." (Footnotes omitted.) 505 F. 2d, at 307–308.

in its efforts to monitor the conditions of the Nation's waterways, it should be permissible. Although the question is again a close one, the automatic nature of the statutory penalty, which *must* be assessed in each and every case, convinces me that the reporting requirement is a form of compelled self-incrimination.[3] I therefore respectfully dissent.

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[3] As a result, I would hold that the Government could not use a report filed by an individual owner or operator in assessing a civil penalty under § 311 (b)(6). However, I believe the Government could still use such a report in assessing damages under either § 311 (b)(2)(B)(i) or § 311 (f), see n. 1, *supra*, since penalties assessed under those subsections are regulatory rather than punitive in character.

THOMAS v. WASHINGTON GAS LIGHT CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 79–116. Argued March 19, 1980—Decided June 27, 1980

Petitioner, a resident of the District of Columbia, received an award of disability benefits from the Virginia Industrial Commission under the Virginia Workmen's Compensation Act for injuries received in Virginia while employed by respondent employer (hereafter respondent), which was principally located in the District of Columbia, where petitioner was hired. Subsequently, petitioner received a supplemental award under the District of Columbia Workmen's Compensation Act over respondent's contention that since, as a matter of Virginia law, the Virginia award excluded any other recovery "at common law or otherwise" on account of the injury in Virginia, the District of Columbia's obligation to give that award full faith and credit precluded a second, supplemental award in the District. The administrative order upholding the supplemental award was reversed by the Court of Appeals, which held that the award was precluded by the Full Faith and Credit Clause.

Held: The judgment is reversed. Pp. 266–286; 286–290.

598 F. 2d 617, reversed.

MR. JUSTICE STEVENS, joined by MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE BLACKMUN, concluded that the Full Faith and Credit Clause does not preclude successive workmen's compensation awards, since a State has no legitimate interest within the context of the federal system in preventing another State from granting a supplemental compensation award when that second State would have had the power, as here, to apply its workmen's compensation law in the first instance. Pp. 266–286.

(a) The rule of *Industrial Comm'n of Wisconsin* v. *McCartin*, 330 U. S. 622, authorizing a State, by drafting or construing its workmen's compensation statute in "unmistakable language," directly to preclude a compensation award in another State, represents an unwarranted delegation to the States of this Court's responsibility for the final arbitration of full faith and credit questions. To vest the power of determining such extraterritorial effect in the State itself risks the very kind of parochial entrenchment on the interests of other States that it was the purpose of the Full Faith and Credit Clause and other provisions of Art. IV to prevent. A re-examination of *McCartin*'s "unmistakable language" test reinforces the conclusion that it does not provide an acceptable basis

on which to distinguish *Magnolia Petroleum Co.* v. *Hunt*, 320 U. S. 430, wherein it was held that the Full Faith and Credit Clause precluded an employee, who received a workmen's compensation award for injuries received in one State, from seeking supplementary compensation in another State where he had been hired. Pp. 266–272.

(b) In view, however, of the history of subsequent state cases showing that they overwhelmingly followed *McCartin* and applied the "unmistakable language" test in permitting successive workmen's compensation awards, the principal values underlying the doctrine of *stare decisis* would not be served by attempting either to revive *Magnolia* or to preserve the coexistence of *Magnolia* and *McCartin*. The latter attempt could only breed uncertainty and unpredictability, since the application of the "unmistakable language" rule necessarily depends on a determination by one state tribunal of the effect to be given to statutory language enacted by the legislature of a different State. And the former would represent a change that would not promote stability in the law. Moreover, since *Magnolia* has been so rarely followed, there is little danger that there has been any significant reliance on its rule. Hence, a fresh examination of the full faith and credit issue is appropriate. Pp. 272–277.

(c) Since petitioner could have sought a compensation award in the first instance in either Virginia or the District of Columbia even if one statute or the other purported to confer an exclusive remedy, respondent and its insurer, for all practical purposes, would have had to measure their potential liability exposure by the more generous of the two workmen's compensation schemes. It follows that a State's interest in limiting the potential liability of businesses within the State is not of controlling importance. Moreover, the state interest in providing adequate compensation to the injured worker would be fully served by the allowance of successive awards. Pp. 277–280.

(d) With respect to whether Virginia's interest in the integrity of its tribunal's determinations precludes a supplemental award in the District of Columbia, the critical differences between a court of general jurisdiction and an administrative agency with limited statutory authority foreclose the conclusion that constitutional rules applicable to court judgments are necessarily applicable to workmen's compensation awards. The Virginia Industrial Commission, although it could establish petitioner's rights under Virginia law, neither could nor purported to determine his rights under District of Columbia law. Full faith and credit must be given to the determination that the Commission had the authority to make but need not be given to determinations that it had no power to make. Since it was not requested, and had no authority, to

pass on petitioner's rights under District of Columbia law, there can be no constitutional objection to a fresh adjudication of those rights. While Virginia had an interest in having respondent pay petitioner the amounts specified in its award, allowing a supplementary recovery in the District of Columbia does not conflict with that interest. And whether or not petitioner sought an award from the less generous jurisdiction in the first instance, the vindication of that State's interest in placing a ceiling on employers' liability would inevitably impinge upon the substantial interests of the second jurisdiction in the welfare and subsistence of disabled workers—interests that a court of general jurisdiction might consider, but which must be ignored by the Virginia Industrial Commission. Pp. 280–285.

MR. JUSTICE WHITE, joined by MR. CHIEF JUSTICE BURGER and MR. JUSTICE POWELL, concluded that the Virginia Workmen's Compensation Act lacks the "unmistakable language" which *McCartin, supra,* requires if a workmen's compensation award is to preclude a subsequent award in another State. Pp. 289–290.

STEVENS, J., announced the judgment of the Court and delivered an opinion, in which BRENNAN, STEWART, and BLACKMUN, JJ., joined. WHITE, J., filed an opinion concurring in the judgment, in which BURGER, C. J., and POWELL, J., joined, *post,* p. 286. REHNQUIST, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post,* p. 290.

James F. Green argued the cause for petitioner. With him on the briefs were *Martin E. Gerel, James A. Mannino,* and *Mark L. Schaffer.*

Kevin J. Baldwin argued the cause for respondent Washington Gas Light Co. With him on the brief were *Lewis Carroll, Carl W. Belcher, Henry F. Krautwurst,* and *Douglas V. Pope. Alan I. Horowitz* argued the cause *pro hac vice* for the federal respondent. With him on the briefs were *Solicitor General McCree, Deputy Solicitor General Geller, Laurie M. Streeter,* and *Joshua T. Gillelan II.*

MR. JUSTICE STEVENS announced the judgment of the Court and delivered an opinion, in which MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE BLACKMUN joined.

Petitioner received an award of disability benefits under the Virginia Workmen's Compensation Act. The question

presented is whether the obligation of the District of Columbia to give full faith and credit to that award [1] bars a supplemental award under the District's Workmen's Compensation Act.[2]

Petitioner is a resident of the District of Columbia and was hired in the District of Columbia. During the year that he was employed by respondent, he worked primarily in the District but also worked in Virginia and Maryland. He sustained a back injury while at work in Arlington, Va., on January 22, 1971. Two weeks later he entered into an "Industrial Commission of Virginia Memorandum of Agreement as to Payment of Compensation" providing for benefits of $62 per week. Several weeks later the Virginia Industrial Commission approved the agreement and issued its award directing that payments continue "during incapacity," subject to various contingencies and changes set forth in the Virginia statute. App. 49.

In 1974, petitioner notified the Department of Labor of his

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[1] United States Constitution, Art. IV, § 1:

"Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

Title 28 U. S. C. § 1738 provides, in part:

"The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

. . . . .

"Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory, or Possession from which they are taken."

[2] The District of Columbia Workmen's Compensation Act, D. C. Code §§ 501–502 (1968), adopts the terms of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U. S. C. § 901 *et seq.* The program is administered by the United States Department of Labor.

intention to seek compensation under the District of Columbia Act. Respondent opposed the claim primarily[3] on the ground that since, as a matter of Virginia law, the Virginia award excluded any other recovery "at common law or otherwise" on account of the injury in Virginia,[4] the District of Columbia's obligation to give that award full faith and credit precluded a second, supplemental award in the District.

The Administrative Law Judge agreed with respondent that the Virginia award must be given res judicata effect in the District to the extent that it was res judicata in Virginia.[5] He held, however, that the Virginia award, by its terms, did not preclude a further award of compensation in Virginia.[6]

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[3] Respondent also contended that the claim was barred by limitations. The Administrative Law Judge ruled, however, that respondent's failure to file the report of injury required by the District of Columbia Act had tolled the statute and made respondent automatically liable for a 10% penalty. Respondent also argues in this Court that the LHWCA forbade the granting of an award where compensation could have been obtained under a state workmen's compensation program. Since the Court of Appeals passed on neither of these statutory arguments, they remain open on remand.

[4] Virginia Code § 65.1–40 (1980) provides:

"**Employee's rights under Act exclude all others.**—The rights and remedies herein granted to an employee when he and his employer have accepted the provisions of this Act respectively to pay and accept compensation on account of personal injury or death by accident shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin, at common law or otherwise, on account of such injury, loss of service or death."

[5] "Accordingly, it is concluded that, in the instant matter, Claimant's award under the Virginia compensation law must be given such faith and credit in the District as it is given in Virginia; that, to the extent that the Virginia award is *res judicata* in Virginia, it is *res judicata* in the District." App. 42.

[6] "The award did not effect a final settlement of the rights and liabilities of the parties. Rather, by its terms, it contemplated further awards.

. . . . .

"In view of the foregoing, it is determined that, because the Virginia award was not a bar to further recovery of compensation in Virginia, it

Moreover, he construed the statutory prohibition against additional recovery "at common law or otherwise" as merely covering "common law and other remedies under Virginia law."[7] After the taking of medical evidence, petitioner was awarded permanent total disability benefits payable from the date of his injury with a credit for the amounts previously paid under the Virginia award. *Id.*, at 31.

The Benefits Review Board upheld the award. 9 BRBS 760 (1978). Its order, however, was reversed by the United States Court of Appeals for the Fourth Circuit, judgment order reported at 598 F. 2d 617,[8] which squarely held that a "second and separate proceeding in another jurisdiction upon the same injury after a prior recovery in another State [is] precluded by the Full Faith and Credit Clause."[9] We granted certiorari, 444 U. S. 962, and now reverse.

I

Respondent contends that the District of Columbia was without power to award petitioner additional compensation because of the Full Faith and Credit Clause of the Constitution or, more precisely, because of the federal statute implementing that Clause.[10] An analysis of this contention must

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was not, under the full faith and credit concept, *res judicata* as a bar to further recovery of compensation under District law." *Id.*, at 46–47.

[7] *Id.*, at 48. He added that the exclusive remedy provisions "were not designed for extraterritorial extension to other sovereign jurisdictions. They do not preclude jurisdiction under District law." *Ibid.*

[8] See 33 U. S. C. § 921 (c), which provides for review of decisions of the Benefits Review Board "in the United States court of appeals for the circuit in which the injury occurred. . . ."

[9] The quoted language is from the Fourth Circuit's opinion in the similar case of *Pettus* v. *American Airlines*, 587 F. 2d 627, 630 (1978), cert. denied, 444 U. S. 883. In this case the Court of Appeals merely issued a brief unpublished order citing *Pettus*. App. 2a.

[10] The statute places on courts in the District of Columbia the same obligation to respect state judgments as is imposed on the courts of the several States. See n. 1, *supra*.

begin with two decisions from the 1940's that are almost directly on point: *Magnolia Petroleum Co.* v. *Hunt*, 320 U. S. 430, and *Industrial Comm'n of Wisconsin* v. *McCartin*, 330 U. S. 622.

In *Magnolia*, a case relied on heavily both by respondent and the Court of Appeals, the employer hired a Louisiana worker in Louisiana. The employee was later injured during the course of his employment in Texas. A tenuous majority [11] held that Louisiana was not permitted to award the injured worker supplementary compensation under the Louisiana Act after he had already obtained a recovery from the Texas Industrial Accident Board:

> "Respondent was free to pursue his remedy in either state but, having chosen to seek it in Texas, where the award was res judicata, the full faith and credit clause

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[11] Four Members of the Court—Justices Black, Douglas, Murphy, and Rutledge—dissented, expressing the opinion that the holding was not supported by precedent and did not accord proper respect to the States' interests in implementing their policies of compensating injured workmen.

Mr. Justice Jackson concurred in Mr. Chief Justice Stone's opinion for the Court, but only because he felt bound by *Williams* v. *North Carolina*, 317 U. S. 287, a decision from which he vigorously dissented. *Id.*, at 311. In that case, the Court held that North Carolina had to respect an *ex parte* divorce decree obtained in Nevada in a bigamy prosecution of a North Carolina resident. (It was assumed for purposes of decision that the petitioner was a bona fide domiciliary of Nevada at the time of the divorce, *id.*, at 302.) In his concurring opinion in *Magnolia*, Mr. Justice Jackson explained that he was "unable to see how Louisiana can be constitutionally free to apply its own workmen's compensation law to its citizens despite a previous adjudication in another state if North Carolina was not free to apply its own matrimonial policy to its own citizens after judgment on the subject in Nevada." 320 U. S., at 446.

Mr. Justice Douglas, author of the opinion for the Court in *Williams*, pointed out, in one of the two dissents filed in the *Magnolia* case, that as compared with the dual workmen's compensation award problem then before the Court, "questions of status, *i. e.*, marital capacity, involve conflicts between the policies of two States which are quite irreconcilable." 320 U. S., at 447.

precludes him from again seeking a remedy in Louisiana upon the same grounds." 320 U. S., at 444.

Little more than three years later, the Court severely curtailed the impact of *Magnolia*. In *McCartin*, the employer and the worker both resided in Illinois and entered into an employment contract there for work to be performed in Wisconsin. The employee was injured in the course of that employment. He initially filed a claim with the Industrial Commission of Wisconsin. Prior to this Court's decision in *Magnolia*, the Wisconsin Commission informed him that under Wisconsin law, he could proceed under the Illinois Workmen's Compensation Act, and then claim compensation under the Wisconsin Act, with credit to be given for any payments made under the Illinois Act. Thereafter, the employer and the employee executed a contract for payment of a specific sum in full settlement of the employee's right under Illinois law. The contract expressly provided, however, that it would "'not affect any rights that applicant may have under the Workmen's Compensation Act of the State of Wisconsin.'" 330 U. S., at 624. The employee then obtained a supplemental award from the Wisconsin Industrial Commission; but the Wisconsin state courts vacated it under felt compulsion of the intervening decision in *Magnolia*.

This Court reversed, holding without dissent[12] that *Magnolia* was not controlling. Although the Court could have relied exclusively on the contract provision reserving the employee's rights under Wisconsin law to distinguish the case from *Magnolia*, Mr. Justice Murphy's opinion provided a significantly different ground for the Court's holding when it said:

> "[T]he reservation spells out what we believe to be implicit in [the Illinois Workmen's Compensation] Act—namely, that an . . . award of the type here involved does not foreclose an additional award under the laws of

[12] Mr. Justice Rutledge concurred only in the result.

> another state. And in the setting of this case, that fact is of decisive significance." 330 U. S., at 630.

Earlier in the opinion, the Court had stated that "[o]nly some unmistakable language by a state legislature or judiciary would warrant our accepting . . . a construction" that a workmen's compensation statute "is designed to preclude any recovery by proceedings brought in another state." *Id.*, at 627–628. The Illinois statute, which the Court held not to contain the "unmistakable language" required to preclude a supplemental award in Wisconsin, broadly provided:

> " 'No common law or statutory right to recover damages for injury or death sustained by any employe while engaged in the line of his duty as such employe, other than the compensation herein provided, shall be available to any employe who is covered by the provisions of this act, . . .' " *Id.*, at 627.

The Virginia Workmen's Compensation Act's exclusive remedy provision, see n. 4, *supra*, is not exactly the same as Illinois'; but it contains no "unmistakable language" directed at precluding a supplemental compensation award in another State that was not also in the Illinois Act. Consequently, *McCartin* by its terms, rather than the earlier *Magnolia* decision, is controlling as between the two precedents. Nevertheless, the fact that we find ourselves comparing the language of two state statutes, neither of which has been construed by the highest court of either State, in an attempt to resolve an issue arising under the Full Faith and Credit Clause makes us pause to inquire whether there is a fundamental flaw in our analysis of this federal question.

II

We cannot fail to observe that, in the Court's haste to retreat from *Magnolia*,[13] it fashioned a rule that clashes with

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[13] *Magnolia* had not been well received. See Cheatham, Res Judicata

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normally accepted full faith and credit principles. It has long been the law that "the judgment of a state court should have the same credit, validity, and effect, in every other court in the United States, which it had in the state where it was pronounced." *Hampton* v. *McConnel*, 3 Wheat. 234, 235 (Marshall, C. J.,). See also *Mills* v. *Duryee*, 7 Cranch 481, 484 (Story, J.). This rule, if not compelled by the Full Faith and Credit Clause itself, see n. 18, *infra*, is surely required by 28 U. S. C. § 1738, which provides that the "Acts, records and judicial proceedings . . . [of any State] shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of [the] State . . . from which they are taken." See n. 1, *supra*.[14] Thus, in effect, by virtue of the full faith and credit obligations of the several States, a State is permitted to determine the extraterritorial effect of its judgments; but it may only do so indirectly, by prescribing the effect of its judgments within the State.

The *McCartin* rule, however, focusing as it does on the extraterritorial intent of the rendering State, is fundamentally different. It authorizes a State, by drafting or construing its legislation in "unmistakable language," directly to determine the extraterritorial effect of its workmen's compensation awards. An authorization to a state legislature of this character is inconsistent with the rule established in *Pacific Em-*

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and the Full Faith and Credit Clause: Magnolia Petroleum Co. v. Hunt, 44 Colum. L. Rev. 330, 344–346 (1944) (hereinafter Cheatham); Freund, Chief Justice Stone and the Conflict of Laws, 59 Harv. L. Rev. 1210, 1227–1230 (1946) (hereinafter Freund); Wolkin, Workmen's Compensation Award—Commonplace or Anomaly in Full Faith and Credit Pattern?, 92 U. Pa. L. Rev. 401, 405–411 (1944) (hereinafter Wolkin); Note, 23 Ind. L. J. 214 (1948); Note, 18 Tulane L. Rev. 509 (1944); Recent Cases, 12 Geo. Wash. L. Rev. 487 (1944).

[14] That statute, insofar as it is relevant here, reads exactly as it did when the first Congress passed it in 1790. See 1 Stat. 122.

ployers Ins. Co. v. *Industrial Accident Comm'n*, 306 U. S. 493, 502:

> "This Court must determine for itself how far the full faith and credit clause compels the qualification or denial of rights asserted under the laws of one state, that of the forum, by the statute of another state."

It follows inescapably that the *McCartin* "unmistakable language" rule represents an unwarranted delegation to the States of this Court's responsibility for the final arbitration of full faith and credit questions.[15] The Full Faith and

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[15] See *Magnolia*, 320 U. S., at 438; *Williams v. North Carolina*, 317 U. S., at 302; *Alaska Packers Assn.* v. *Industrial Accident Comm'n*, 294 U. S. 532, 547; Reese & Johnson, The Scope of Full Faith and Credit to Judgments, 49 Colum. L. Rev. 153, 161–162 (1949) (hereinafter Reese & Johnson):

"Full faith and credit is a national policy, not a state policy. Its purpose is not merely to demand respect from one state for another, but rather to give us the benefits of a unified nation by altering the status of otherwise 'independent, sovereign states.' Hence it is for federal law, not state law, to prescribe the measure of credit which one state shall give to another's judgment. In this regard, it is interesting to note that in dealing with full faith and credit to statutes the Supreme Court in recent years has accorded no weight to language which purported to give a particular statute extraterritorial effect.[49] There is every reason why a similar attitude should be taken with respect to judgments.

. . . . .

"[49] Pacific Employers Insurance Co. v. Industrial Accident Commission, 306 U. S. 493 (1939); Alaska Packers Assn. v. Industrial Accident Commission, 294 U. S. 532 (1935); Tennessee Coal Iron & R. R. Co. v. George, 233 U. S. 354 (1914); Atchison, T. & S. F. Ry. v. Sowers, 213 U. S. 55 (1909); . . . ." (Some footnotes omitted.)

In *Tennessee Coal Iron & R. Co.* v. *George*, cited in the authors' footnote, the Court held that a Georgia court, consistent with its full faith and credit obligations, could ignore a provision in the Alabama statute creating the cause of action there sued upon, which required that any suit to enforce the right of action "must be brought in a court of competent jurisdiction within the State of Alabama and not elsewhere." 233 U. S., at 358. The *Sowers* case is much like the *George* case. *Pacific Employers* and *Alaska Packers* are discussed in Part IV, *infra*.

Credit Clause "is one of the provisions incorporated into the Constitution by its framers for the purpose of transforming an aggregation of independent, sovereign States into a nation." *Sherrer* v. *Sherrer*, 334 U. S. 343, 355. To vest the power of determining the extraterritorial effect of a State's own laws and judgments in the State itself risks the very kind of parochial entrenchment on the interests of other States that it was the purpose of the Full Faith and Credit Clause and other provisions of Art. IV of the Constitution to prevent. See *Nevada* v. *Hall*, 440 U. S. 410, 424–425.[16]

Thus, a re-examination of *McCartin*'s "unmistakable language" test reinforces our tentative conclusion that it does not provide an acceptable basis on which to distinguish *Magnolia*. But if we reject that test, we must decide whether to overrule either *Magnolia* or *McCartin*. In making this kind of decision, we must take into account both the practical values served by the doctrine of *stare decisis* and the principles that inform the Full Faith and Credit Clause.

III

The doctrine of *stare decisis* imposes a severe burden on the litigant who asks us to disavow one of our precedents. For that doctrine not only plays an important role in orderly adjudication;[17] it also serves the broader societal interests in evenhanded, consistent, and predictable application of legal rules. When rights have been created or modified in reliance on established rules of law, the arguments against their change have special force.[18]

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[16] Cf. Note, Unconstitutional Discrimination in Choice of Law, 77 Colum. L. Rev. 272 (1977) (Privileges and Immunities Clause).

[17] "[I]mitation of the past, until we have a clear reason for a change, no more needs justification than appetite. It is a form of the inevitable to be accepted until we have a clear vision of what different things we want." O. Holmes, Collected Legal Papers 290 (1920).

[18] The doctrine of *stare decisis* has a more limited application when the precedent rests on constitutional grounds, because "correction through

It is therefore appropriate to begin the inquiry by considering whether a rule that permits, or a rule that forecloses, successive workmen's compensation awards is more consistent with settled practice. The answer to this question is pellucidly clear.

It should first be noted that *Magnolia*, by only the slimmest majority, see n. 11, *supra*, effected a dramatic change in the law that had previously prevailed throughout the United States. See Mr. Justice Black's dissent in *Magnolia*, 320 U. S.,

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legislative action is practically impossible." *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 407–408 (Brandeis, J., dissenting). See *Mitchell* v. *W. T. Grant Co.*, 416 U. S. 600, 627 (POWELL, J., concurring).

The full faith and credit area presents special problems, because the Constitution expressly delegates to Congress the authority "by general Laws [to] prescribe the Manner in which [the States'] Acts, Records and Proceedings shall be proved, *and the Effect thereof*." (Emphasis added.) See n. 1, *supra*. Yet it is quite clear that Congress' power in this area is not exclusive, for this Court has given effect to the Clause beyond that required by implementing legislation. See *Bradford Electric Co.* v. *Clapper*, 286 U. S. 145, in which the Court required the New Hampshire courts to respect a Vermont statute which precluded a worker from bringing a common-law action against his employer for job-related injuries where the employment relation was formed in Vermont, even though the injury occurred in New Hampshire. At the time the *Clapper* case was decided, the predecessor of 28 U. S. C. § 1738 included no reference to "Acts" in the sentence that required the forum State to accord the same full faith and credit to records and judicial proceedings as they have in the State from which they are taken. The reference to Acts was added for the first time in 1948. See *Carroll* v. *Lanza*, 349 U. S. 408, 422, n. 4 (Frankfurter, J., dissenting). Thus, the *Clapper* case rested on the constitutional Clause alone. *Carroll*, which for all intents and purposes buried whatever was left of *Clapper* after *Pacific Employers Ins. Co.* v. *Industrial Accident Comm'n*, 306 U. S. 493; see 349 U. S., at 412; n. 23, *infra*, cast no doubt on *Clapper*'s reliance on the Full Faith and Credit Clause itself.

Thus, while Congress clearly has the power to increase the measure of faith and credit that a State must accord to the laws or judgments of another State, there is at least some question whether Congress may cut back on the measure of faith and credit required by a decision of this Court. See Freund 1229–1230.

at 457–459, 462.[19] Of greater importance is the fact that as a practical matter the "unmistakable language" rule of construction announced in *McCartin* left only the narrowest area in which *Magnolia* could have any further precedential value. For the exclusivity language in the Illinois Act construed in *McCartin* was typical of most state workmen's compensation laws. Consequently, it was immediately recognized that *Magnolia* no longer had any significant practical impact.[20] Moreover, since a state legislature seldom focuses on the

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[19] Professor Larson has pointed out that prior to *Magnolia* and *McCartin*, "state courts, with virtual unanimity, had held or assumed that a prior award under the laws of another state was no bar to an award under local law made in accordance with the local law's own standards of applicability, always of course, with the understanding that the claimant could not have a complete double recovery but must deduct from its present recovery the amount of the prior award." 4 A. Larson, Workmen's Compensation Law § 85.10, at 16–15—16–16 (1980) (footnote omitted) (hereinafter A. Larson). See also Wolkin 403, n. 6.

As the majority opinion in *Magnolia* recognized, 320 U. S., at 441, n. 5, the American Law Institute's Restatement of Conflict of Laws § 403 (1934) was flatly contrary to the *Magnolia* result: "Award already had under the Workmen's Compensation Act of another state will not bar a proceeding under an applicable Act, but the amount paid on a prior award in another state will be credited on the second award." As we note below, see n. 21, *infra*, Texas' rule was otherwise.

[20] Virtually every commentator agrees that *McCartin* all but overruled *Magnolia*. See R. Leflar, American Conflicts Law § 162, p. 334 (3d ed. 1977); G. Stumberg, Principles of Conflict of Laws 221 (3d ed. 1963); 4 A. Larson §§ 85.10, 85.20, at 15–16, 16–17; Reese & Johnson 159 ("The dissenters in *Magnolia* saw their day of triumph in . . . *McCartin*. . . . [T]he facts were essentially identical with those of the *Magnolia* case; similarly, the workmen's compensation statutes involved in the two cases were not in any significant manner distinguishable"). See also Recent Cases, 60 Harv. L. Rev. 993, 993–994 (1947) ("By this decision the practical effect of the *Magnolia* case in preventing more than one state applying its workmen's compensation law to the same injury is almost completely nullified . . . , and may foreshadow a modification of 'full faith and credit' as to workmen's compensation judgments similar to that which occurred in regard to legislation"); Comment, 33 Cornell L. Q. 310, 315 (1947).

extraterritorial effect of its enactments,[21] and since a state court has even less occasion to consider whether an award under its State's law is intended to preclude a supplemental award under another State's Workmen's Compensation Act, the probability that any State would thereafter announce a new rule against supplemental awards in other States was extremely remote. As a matter of fact, subsequent cases in the state courts have overwhelmingly followed *McCartin* and permitted successive state workmen's compensation awards.[22]

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[21] Apparently only Nevada's Workmen's Compensation Act contains the unmistakable language required under the *McCartin* rule. Nevada Rev. Stat. § 616.525 (1979) provides in part:

"[I]f an employee who has been hired or is regularly employed in this state receives personal injury by accident arising out of and in the course of such employment outside this state, and he . . . accepts any compensation or benefits under the provisions of this chapter, the acceptance of such compensation shall constitute a waiver by such employee . . . of all rights and remedies against the employer at common law *or given under the laws of any other state,* and shall further constitute a full and complete release of such employer from any and all liability arising from such injury. . . ." (Emphasis added.)

In *Magnolia,* the Court noted the existence of a Texas statute precluding a supplemental award in Texas when an injured worker had obtained an award under the workmen's compensation law of another State. 320 U. S., at 435. But that provision, of course, was directed not at the effect Texas desired a Texas award to be given in a second State, but rather at the converse situation. That is, it governed the effect that the Texas Industrial Accident Board had to give to an award previously rendered in another State. See *id.,* at 454 (Black, J., dissenting). While the Texas statute so understood may be obliquely probative of the Texas Legislature's intent as regards the effect to be given a Texas award in another State, that intent is surely not indicated with the unmistakable language required by *McCartin.*

It is worth noting that the Virginia statute involved in this case expressly allows a second recovery in Virginia in certain cases in which a prior recovery has been obtained in another State. Va. Code § 65.1–61 (1980).

[22] See, *e. g., City Products Corp.* v. *Industrial Comm'n,* 19 Ariz. App. 286, 506 P. 2d 1071 (1973) (prior California award); *Jordan* v. *Industrial*

Thus, all that really remained of *Magnolia* after *McCartin* was a largely theoretical difference between what the Court described as "unmistakable language" and the broad language

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Comm'n, 117 Ariz. 215, 571 P. 2d 712 (App. 1977) (prior Texas award); *McGehee Hatchery Co.* v. *Gunter*, 234 Ark. 113, 350 S. W. 2d 608 (1961) (prior Mississippi award); *Reynolds Electrical & Engineering Co., Inc.* v. *Workmen's Compensation Appeals Bd.*, 65 Cal. 2d 429, 421 P. 2d 96 (1966) (prior Nevada award); *Industrial Track Builders of America* v. *Lemaster*, 429 S. W. 2d 403 (Ky. 1968) (prior Indiana award); *Ryder* v. *Insurance Co. of North America*, 282 So. 2d 771 (La. App. 1973) (prior Georgia award); *Griffin* v. *Universal Underwriters Ins. Co.*, 283 So. 2d 748 (La. 1973), cert. denied, 416 U. S. 904 (prior Texas award under statute involved in *Magnolia* held not to preclude second award in Louisiana in light of *McCartin*); *Lavoie's Case*, 334 Mass. 403, 135 N. E. 2d 750 (1956), cert. denied, 352 U. S. 927 (prior Rhode Island award); *Stanley* v. *Hinchliffe & Kenner*, 395 Mich. 645, 652–653, 238 N. W. 2d 13, 16 (1976) (prior California award) ("It is now widely accepted that *McCartin* severely limited, if not overruled, Magnolia . . ."); *Cook* v. *Minneapolis Bridge Construction Co.*, 231 Minn. 433, 43 N. W. 2d 792 (1950) (prior North Dakota award); *Hubbard* v. *Midland Constructors, Inc.*, 269 Minn. 425, 426, n. 1, 131 N. W. 2d 209, 211, n. 1 (1964) (prior South Dakota award); *Harrison Co.* v. *Norton*, 244 Miss. 752, 146 So. 2d 327 (1962) (prior Georgia award); *Bowers* v. *American Bridge Co.*, 43 N. J. Super. 48, 127 A. 2d 580 (1956), aff'd, 24 N. J. 390, 132 A. 2d 28 (1957) (prior Pennsylvania award); *Hudson* v. *Kingston Contracting Co.*, 58 N. J. Super. 455, 156 A. 2d 491 (1959) (prior Maryland award); *Cramer* v. *State Concrete Corp.*, 39 N. J. 507, 189 A. 2d 213 (1963) (prior New York award); *Bekkedahl* v. *North Dakota Workmen's Compensation Bureau*, 222 N. W. 2d 841 (N. D. 1974) (prior Montana award); *Spietz* v. *Industrial Comm'n*, 251 Wis. 168, 28 N. W. 2d 354 (1947) (prior Montana award).

But see *Gasch* v. *Britton*, 92 U. S. App. D. C. 64, 202 F. 2d 356 (1953) (2-to-1 decision, Fahy, J., dissenting) (prior Maryland award held preclusive of supplemental award in District of Columbia as construction of Maryland law, which construction was specifically rejected by *Hudson*, *supra*, and, significantly, by the Maryland Court of Appeals in a declaratory judgment action, see *Wood* v *Aetna Casualty and Surety Co.*, 260 Md. 651, 273 A. 2d 125 (1971)); *Cofer* v. *Industrial Comm'n*, 24 Ariz. App. 357, 359, n. 2, 538 P. 2d 1158, 1160, n. 2 (1975) (refusing to permit second award in Arizona after claimant obtained first award in Texas, under

of the exclusive remedy provision in the Illinois Workmen's Compensation Act involved in *McCartin*.

This history indicates that the principal values underlying the doctrine of *stare decisis* would not be served either by attempting to revive *Magnolia* or by attempting to preserve the uneasy coexistence of *Magnolia* and *McCartin*. The latter attempt could only breed uncertainty and unpredictability, since the application of the "unmistakable language" rule of *McCartin* necessarily depends on a determination by one state tribunal of the effect to be given to statutory language enacted by the legislature of a different State. And the former would represent a rather dramatic change that surely would not promote stability in the law. Moreover, since *Magnolia* has been so rarely followed, there appears to be little danger that there has been any significant reliance on its rule. We conclude that a fresh examination of the full faith and credit issue is therefore entirely appropriate.

IV

Three different state interests are affected by the potential conflict between Virginia and the District of Columbia. Virginia has a valid interest in placing a limit on the potential liability of companies that transact business within its borders. Both jurisdictions have a valid interest in the welfare of the injured employee—Virginia because the injury occurred within that State, and the District because the injured party was employed and resided there. And finally, Virginia has an interest in having the integrity of its formal determinations of contested issues respected by other sovereigns.

The conflict between the first two interests was resolved in *Alaska Packers Assn.* v. *Industrial Accident Comm'n*, 294 U. S. 532, and a series of later cases. In *Alaska Packers*,

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compulsion of *Magnolia*, but questioning that case's interpretation of the Texas statute, see n. 21, *supra;* specifically repudiated by *Jordan, supra;* and see *Griffin, supra*).

California, the State where the employment contract was made, was allowed to apply its own workmen's compensation statute despite the statute of Alaska, the place where the injury occurred, which was said to afford the exclusive remedy for injuries occurring there. *Id.*, at 539. The Court held that the conflict between the statutes of two States ought not to be resolved "by giving automatic effect to the full faith and credit clause, compelling the courts of each state to subordinate its own statutes to those of the other, but by appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight." *Id.*, at 547.

The converse situation was presented in *Pacific Employers Ins. Co.* v. *Industrial Accident Comm'n*, 306 U. S. 493. In that case the injury occurred in California, and the objection to California's jurisdiction was based on a statute of Massachusetts, the State where the employee resided and where the employment contract had been made. The Massachusetts statute provided that the remedy afforded was exclusive of the worker's " 'right of action at common law or under the law of any other jurisdiction.' " *Id.*, at 498. Again, however, California was permitted to provide the employee with an award under the California statute.[23]

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[23] The Court reasoned:

"The Supreme Court of California has recognized the conflict and resolved it by holding that the full faith and credit clause does not deny to the courts of California the right to apply its own statute awarding compensation for an injury suffered by an employee within the state.

"To the extent that California is required to give full faith and credit to the conflicting Massachusetts statute it must be denied the right to apply in its own courts its own statute, constitutionally enacted in pursuance of its policy to provide compensation for employees injured in their employment within the state. It must withhold the remedy given by its own statute to its residents by way of compensation for medical, hospital and nursing services rendered to the injured employee, and it must remit him to Massachusetts to secure the administrative remedy

The principle that the Full Faith and Credit Clause does not require a State to subordinate its own compensation policies to those of another State has been consistently applied in more recent cases. *Carroll* v. *Lanza*, 349 U. S. 408; *Crider* v. *Zurich Ins. Co.*, 380 U. S. 39; *Nevada* v. *Hall*, 440 U. S., at 421–424. Indeed, in the *Nevada* case the Court not only rejected the contention that California was required to respect a statutory limitation on the defendant's liability, but did so in a case in which the defendant was the sovereign State itself asserting, alternatively, an immunity from any liability in the courts of California.

It is thus perfectly clear that petitioner could have sought a compensation award in the first instance either in Virginia, the State in which the injury occurred, *Carroll* v. *Lanza*, *supra; Pacific Employers, supra,*[24] or in the District of Columbia, where petitioner resided, his employer was principally located, and the employment relation was formed, *Cardillo* v. *Liberty Mutual Ins. Co.*, 330 U. S. 469; *Alaska Packers Assn.* v. *Industrial Accident Comm'n, supra.* And as those cases underscore, compensation could have been sought under either

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which that state has provided. We cannot say that the full faith and credit clause goes so far.

"While the purpose of that provision was to preserve rights acquired or confirmed under the public acts and judicial proceedings of one state by requiring recognition of their validity in other states, the very nature of the federal union of states, to which are reserved some of the attributes of sovereignty, precludes resort to the full faith and credit clause as the means for compelling a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." 306 U. S., at 501.

[24] In *Carroll*, the Court observed that *"Pacific Employers Insurance Co.* v. *Commission*, 306 U. S. 493, departed . . . from the [*Bradford Electric Co.* v.] *Clapper* decision." 349 U. S., at 412. See n. 18, *supra.* The Court's retreat from the rigid *Clapper* rule, which at the time appeared constitutionally to require application of the workmen's compensation law of the State in which the employment relation was centered, to the more flexible balancing of the respective States' interests in *Pacific Employers* parallels the Court's movement from *Magnolia* to *McCartin.*

compensation scheme even if one statute or the other purported to confer an exclusive remedy on petitioner. Thus, for all practical purposes, respondent and its insurer would have had to measure their potential liability exposure by the more generous of the two workmen's compensation schemes in any event. It follows that a State's interest in limiting the potential liability of businesses within the State is not of controlling importance.

It is also manifest that the interest in providing adequate compensation to the injured worker would be fully served by the allowance of successive awards. In this respect the two jurisdictions share a common interest and there is no danger of significant conflict.

The ultimate issue, therefore, is whether Virginia's interest in the integrity of its tribunal's determinations forecloses a second proceeding to obtain a supplemental award in the District of Columbia. We return to the Court's prior resolution of this question in *Magnolia*.

The majority opinion in *Magnolia* took the position that the case called for a straightforward application of full faith and credit law: the worker's injury gave rise to a cause of action; relief was granted by the Texas Industrial Accident Board; that award precluded any further relief in Texas;[25] and further relief was therefore precluded elsewhere as well. The majority relied heavily on *Chicago, R. I. & P. R. Co.* v. *Schendel*, 270 U. S. 611, for the propositions that a workmen's compensation award stands on the same footing as a court judgment, and that a compensation award under one State's law is a bar to a second award under another State's law. See 320 U. S., at 441, 446.

But *Schendel* did not compel the result in *Magnolia*. See 320 U. S., at 448 (Douglas, J., dissenting); *id.*, at 457 (Black, J., dissenting).[26] In *Schendel*, the Court held that an Iowa state

[25] Whether the latter was true as a matter of Texas law is open to question. See nn. 21, 22, *supra*.

[26] See also Wolkin 410.

compensation award, which was grounded in a contested factual finding that the deceased railroad employee was engaged in intrastate commerce, precluded a subsequent claim under the Federal Employers' Liability Act (FELA) brought in the Minnesota state courts, which would have required a finding that the employee was engaged in interstate commerce. *Schendel* therefore involved the unexceptionable full faith and credit principle that resolutions of factual matters underlying a judgment must be given the same res judicata effect in the forum State as they have in the rendering State. See *Durfee* v. *Duke*, 375 U. S. 106; *Sherrer* v. *Sherrer*, 334 U. S., at 351–352. The Minnesota courts could not have granted relief under the FELA and also respected the factual finding made in Iowa.[27]

In contrast, neither *Magnolia* nor this case concerns a second State's contrary resolution of a factual matter determined in the first State's proceedings. Unlike the situation in *Schendel*, which involved two mutually exclusive remedies, compensation could be obtained under either Virginia's or the District's workmen's compensation statutes on the basis of the same set of facts. A supplemental award gives full effect to the facts determined by the first award and also allows full credit for payments pursuant to the earlier award. There is neither inconsistency nor double recovery.

We are also persuaded that *Magnolia*'s reliance on *Schendel* for the proposition that workmen's compensation awards stand on the same footing as court judgments was unwarranted. To be sure, as was held in *Schendel*, the factfindings of state administrative tribunals are entitled to the same res judicata effect in the second State as findings by a court. But the critical differences between a court of general juris-

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[27] "The Iowa proceeding was brought and determined upon the theory that Hope [the deceased worker] was engaged in intrastate commerce; the Minnesota action was brought and determined upon the opposite theory that he was engaged in interstate commerce. The point at issue was the same." 270 U. S., at 616.

diction and an administrative agency with limited statutory authority forecloses the conclusion that constitutional rules applicable to court judgments are necessarily applicable to workmen's compensation awards.

A final judgment entered by a court of general jurisdiction normally establishes not only the measure of the plaintiff's rights but also the limits of the defendant's liability. A traditional application of res judicata principles enables either party to claim the benefit of the judgment insofar as it resolved issues the court had jurisdiction to decide. Although a Virginia court is free to recognize the perhaps paramount interests of another State by choosing to apply that State's law in a particular case, the Industrial Commission of Virginia does not have that power. Its jurisdiction is limited to questions arising under the Virginia Workmen's Compensation Act. See Va. Code § 65:1–92 (1980). Typically, a workmen's compensation tribunal may only apply its own State's law.[28] In this case, the Virginia Commission could and did establish the full measure of petitioner's rights under Virginia law, but it neither could nor purported to determine his rights under the law of the District of Columbia. Full faith

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[28] See 4 A. Larson § 86.40, at 16–44; Cheatham 344. The reason for this is the special nature of a workmen's compensation remedy. It is not merely a grant of a lump-sum award at the end of an extended adversary proceeding. See 4 A. Larson § 84.20, at 16–9:

"[A] highly developed compensation system does far more than that. It stays with the claimant from the moment of the accident to the time he is fully restored to normal earning capacity. This may involve supervising an ongoing rehabilitation program, perhaps changing or extending it, perhaps providing, repairing, and replacing prosthetic devices, and supplying vocational rehabilitation. Apart from rehabilitation, optimum compensation administration may require reopening of the award from time to time for change of condition or for other reasons. . . ."

Thus, a workmen's compensation remedy is potentially quite different from the application of a particular State's law to a transitory cause of action based on fault. See generally *New York Central R. Co.* v. *White*, 243 U. S. 188.

and credit must be given to the determination that the Virginia Commission had the authority to make; but by a parity of reasoning, full faith and credit need not be given to determinations that it had no power to make.[29] Since it was not requested, and had no authority, to pass on petitioner's rights under District of Columbia law, there can be no constitutional objection to a fresh adjudication of those rights.[30]

It is true, of course, that after Virginia entered its award, that State had an interest in preserving the integrity of what

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[29] Cf. Restatement (Second) of Judgments § 61.2 (c) (Tent. Draft No. 5, 1978):

"(1) When any of the following circumstances exists, the general rule of § 61 [under which a valid judgment extinguishes a claim by its merger in the judgment] does not apply to extinguish a claim, and part or all of the claim subsists as a possible basis for a second action by the plaintiff against the defendant:

. . . . .

"(c) The plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts or restrictions on their authority to entertain multiple theories or demands for multiple remedies or forms of relief in a single action, and the plaintiff desires in the second action to rely on that theory or to seek that remedy or form of relief; . . ."

[30] While Professor Larson points out that there are some isolated examples of workmen's compensation tribunals technically having the power to go beyond the confines of their own States' statutes, see 4 A. Larson § 84.30, at 16–13, he also notes that there is "no decisional law . . . showing how this can be done if the filing of a claim with a specified tribunal in the other State is a condition precedent to recovery. Indeed, Vermont [whose statute grants its commission the authority to permit the assertion of rights created under the Acts of other States] refused to use this express statutory power when asked to apply the compensation law of Massachusetts, saying that 'the remedy is an integral part of the right given and the latter has no existence separate and apart from the former.'" *Ibid.* See *Grenier* v. *Alta Crest Farms, Inc.*, 115 Vt. 324, 330, 58 A. 2d 884, 888 (1948). Accordingly, it would seem to follow that unless the tribunal actually passes on the injured worker's rights under another State's law, the worker would not be precluded from seeking a second award in that other State.

it had done. And it is squarely within the purpose of the Full Faith and Credit Clause, as explained in *Pacific Employers*, 306 U. S., at 501, "to preserve rights acquired or confirmed under the public acts" of Virginia by requiring other States to recognize their validity. See n. 23, *supra*. Thus, Virginia had an interest in having respondent pay petitioner the amounts specified in its award. Allowing a supplementary recovery in the District does not conflict with that interest.

As we have already noted, Virginia also has a separate interest in placing a ceiling on the potential liability of companies that transact business within the State. But past cases have established that that interest is not strong enough to prevent other States with overlapping jurisdiction over particular injuries from giving effect to their more generous compensation policies when the employee selects the most favorable forum in the first instance. Thus, the only situations in which the *Magnolia* rule would tend to serve that interest are those in which an injured workman has either been constrained by circumstances to seek relief in the less generous forum or has simply made an ill-advised choice of his first forum.

But in neither of those cases is there any reason to give extra weight to the first State's interest in placing a ceiling on the employer's liability than it otherwise would have had. For neither the first nor the second State has any overriding interest in requiring an injured employee to proceed with special caution when first asserting his claim. Compensation proceedings are often initiated informally, without the advice of counsel, and without special attention to the choice of the most appropriate forum. Often the worker is still hospitalized when benefits are sought as was true in this case. And indeed, it is not always the injured worker who institutes the claim. See *Schendel*, 270 U. S., at 614.[31] This informality

[31] See also Cheatham 345, and Wolkin 410, pointing out the potential for overreaching by an employer more knowledgeable than the injured em-

is consistent with the interests of both States. A rule forbidding supplemental recoveries under more favorable workmen's compensation schemes would require a far more formal and careful choice on the part of the injured worker than may be possible or desirable when immediate commencement of benefits may be essential.

Thus, whether or not the worker has sought an award from the less generous jurisdiction in the first instance, the vindication of that State's interest in placing a ceiling on employers' liability would inevitably impinge upon the substantial interests of the second jurisdiction in the welfare and subsistence of disabled workers—interests that a court of general jurisdiction might consider, but which must be ignored by the Virginia Industrial Commission. The reasons why the statutory policy of exclusivity of the other jurisdictions involved in *Alaska Packers* and *Pacific Employers*, could not defeat California's implementation of its own compensation policies therefore continue to apply even after the entry of a workmen's compensation award.

Of course, it is for each State to formulate its own policy whether to grant supplemental awards according to its perception of its own interests. We simply conclude that the substantial interests of the second State in these circumstances should not be overridden by another State through an unnecessarily aggressive application of the Full Faith and Credit Clause,[32] as was implicitly recognized at the time of *McCartin*.

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ployee about the relative benefits available under the applicable workmen's compensation schemes. See *Magnolia*, 320 U. S., at 450 (Black, J., dissenting):

"Confined to a hospital [the injured worker] was told that he could not recover compensation unless he signed two forms presented to him. As found by the Louisiana trial judge there was printed on each of the forms 'in small type' the designation 'Industrial Accident Board, Austin, Texas.'"

[32] Cf. *Yarborough* v. *Yarborough*, 290 U. S. 202, 227 (Stone, J., dissenting).

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We therefore would hold that a State has no legitimate interest within the context of our federal system in preventing another State from granting a supplemental compensation award when that second State would have had the power to apply its workmen's compensation law in the first instance. The Full Faith and Credit Clause should not be construed to preclude successive workmen's compensation awards. Accordingly, *Magnolia Petroleum Co.* v. *Hunt* should be overruled.

The judgment of the Court of Appeals is

Reversed.

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE and MR. JUSTICE POWELL join, concurring in the judgment.

I agree that the judgment of the Court of Appeals should be reversed, but I am unable to join in the reasoning by which the plurality reaches that result. Although the plurality argues strenuously that the rule of today's decision is limited to awards by state workmen's compensation boards, it seems to me that the underlying rationale goes much further. If the employer had exercised its statutory right of appeal to the Supreme Court of Virginia and that Court upheld the award, I presume that the plurality's rationale would nevertheless permit a subsequent award in the District of Columbia. Otherwise, employers interested in cutting off the possibility of a subsequent award in another jurisdiction need only seek judicial review of the award in the first forum. But if such a judicial decision is not preclusive in the second forum, then it appears that the plurality's rationale is not limited in its effect to judgments of administrative tribunals.

The plurality contends that unlike courts of general jurisdiction, workmen's compensation tribunals generally have no power to apply the law of another State and thus cannot determine the rights of the parties thereunder. *Ante*, at 282. Yet I see no reason why a judgment should not be entitled to full res judicata effect under the Full Faith and Credit Clause merely because the rendering tribunal was obligated to apply

the law of the forum—provided, of course, as was certainly the case here, that the forum could constitutionally apply its law. The plurality's analysis seems to grant state legislatures the power to delimit the scope of a cause of action for federal full faith and credit purposes merely by enacting choice-of-law rules binding on the State's workmen's compensation tribunals. The plurality criticizes the *McCartin* case for vesting in the State the power to determine the extraterritorial effect of its own laws and judgments, *ante,* at 271; yet it seems that its opinion is subject to the same objection. In any event, I am not convinced that Virginia, by instructing its Industrial Commission to apply Virginia law, could be said to have intended that the cause of action which merges in the Virginia judgment would not include claims under the laws of other States which arise out of precisely the same operative facts.

As a matter of logic, the plurality's analysis would seemingly apply to many everyday tort actions. I see no difference for full faith and credit purposes between a statute which lays down a forum-favoring choice-of-law rule and a common-law doctrine stating the same principle. Hence when a court, having power in the abstract to apply the law of another State, determines by application of the forum's choice-of-law rules to apply the substantive law of the forum, I would think that under the plurality's analysis the judgment would not determine rights arising under the law of some other State. Suppose, for example, that in a wrongful-death action the court enters judgment on liability against the defendant, and determines to apply the law of the forum which sets a limit on the recovery allowed. The plurality's analysis would seem to permit the plaintiff to obtain a subsequent judgment in a second forum for damages exceeding the first forum's liability limit.

The plurality does say that factual determinations by a workmen's compensation board will be entitled to collateral-estoppel effect in a second forum. *Ante,* at 280–281. While this rule does, to an extent, circumscribe the broadest possible

implications of the plurality's reasoning, there would remain many cases, such as the wrongful-death example discussed above, in which the second forum could provide additional recovery as a matter of substantive law while remaining true to the first forum's factual determinations. Moreover, the dispositive issues in tort actions are frequently mixed questions of law and fact as to which the second forum might apply its own rule of decision without obvious violation of the principles articulated by four Members of the Court. Actions by the defendant which satisfy the relevant standard of care in the first forum might nevertheless be considered "negligent" under the law of the second forum.

Hence the plurality's rationale would portend a wide-ranging reassessment of the principles of full faith and credit in many areas. Such a reassessment is not necessarily undesirable if the results are likely to be healthy for the judicial system and consistent with the underlying purposes of the Full Faith and Credit Clause. But at least without the benefit of briefs and arguments directed to the issue, I cannot conclude that the rule advocated by the plurality would have such a beneficial impact.

One purpose of the Full Faith and Credit Clause is to bring an end to litigation. As the Court noted in *Riley* v. *New York Trust Co.*, 315 U. S. 343, 348–349 (1942):

> "Were it not for this full faith and credit provision, so far as the Constitution controls the matter, adversaries could wage again their legal battles whenever they met in other jurisdictions. Each state could control its own courts but itself could not project the effect of its decisions beyond its own boundaries."

The plurality's opinion is at odds with this principle of finality. Plaintiffs dissatisfied with a judgment would have every incentive to seek additional recovery elsewhere, so long as the first forum applied its own law and there was a colorable argument that as a matter of law the second forum would per-

mit a greater recovery. It seems to me grossly unfair that the plaintiff, having the initial choice of the forum, should be given the additional advantage of a second adjudication should his choice prove disappointing. Defendants, on the other hand, would no longer be assured that the judgment of the first forum is conclusive as to their obligations, and would face the prospect of burdensome and multiple litigation based on the same operative facts. Such litigation would also impose added strain on an already overworked judicial system.

Perhaps the major purpose of the Full Faith and Credit Clause is to act as a nationally unifying force. *Sherrer* v. *Sherrer,* 334 U. S. 343, 355 (1948). The plurality's rationale would substantially undercut that function. When a former judgment is set up as a defense under the Full Faith and Credit Clause, the court would be obliged to balance the various state interests involved. But the State of the second forum is not a neutral party to this balance. There seems to be a substantial danger—not presented by the firmer rule of res judicata—that the court in evaluating a full faith and credit defense would give controlling weight to its own parochial interests in concluding that the judgment of the first forum is not res judicata in the subsequent suit.

I would not overrule either *Magnolia* or *McCartin.* To my mind, Mr. Chief Justice Stone's opinion in *Magnolia* states the sounder doctrine; as noted, I do not see any overriding differences between workmen's compensation awards and court judgments that justify different treatment for the two. However, *McCartin* has been on the books for over 30 years and has been widely interpreted by state and federal courts as substantially limiting *Magnolia.* Unlike the plurality's opinion, *McCartin* is not subject to the objection that its principles are applicable outside the workmen's compensation area. Although I find *McCartin* to rest on questionable foundations, I am not now prepared to overrule it. And I agree with the plurality that *McCartin,* rather than *Magnolia,* is controlling as between the two precedents since the Virginia Workmen's

Compensation Act lacks the "unmistakable language" which *McCartin* requires if a workmen's compensation award is to preclude a subsequent award in another State. I therefore concur in the judgment.

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE MARSHALL joins, dissenting.

This is clearly a case where the whole is less than the sum of its parts. In choosing between two admittedly inconsistent precedents, *Magnolia Petroleum Co.* v. *Hunt*, 320 U. S. 430 (1943), and *Industrial Comm'n of Wisconsin* v. *McCartin*, 330 U. S. 622 (1947), six of us agree that the latter decision, *McCartin*, is analytically indefensible. See *ante*, at 269–272 (plurality opinion); *infra*, at 291. The remaining three Members of the Court concede that it "rest[s] on questionable foundations." *Ante*, at 289 (opinion of WHITE, J.). Nevertheless, when the smoke clears, it is *Magnolia* rather than *McCartin* that the plurality suggests should be overruled. See *ante*, at 285–286. Because I believe that *Magnolia* was correctly decided, and because I fear that the rule proposed by the plurality is both ill-considered and ill-defined, I dissent.

In his opinion for the Court in *Magnolia*, Mr. Chief Justice Stone identified the issue as "whether, under the full faith and credit clause, Art. IV, § 1 of the Constitution of the United States, an award of compensation for personal injury under the Texas Workmen's Compensation Law . . . bars a further recovery of compensation for the same injury under the Louisiana Workmen's Compensation Law. . . ." 320 U. S., at 432. A majority of this Court answered that inquiry in the affirmative,[1] holding that the injured employee "was free

[1] The plurality characterizes the majority in *Magnolia* as "tenuous" because Mr. Justice Jackson joined four other Members of the Court because he believed that the result was dictated by *Williams* v. *North Carolina*, 317 U. S. 287 (1942), a decision from which he had dissented. See *ante*, at 267, n. 11. I do not read Mr. Justice Jackson's concurrence as casting any doubt upon the logical underpinning of *Magnolia*. Instead, he seemed to

to pursue his remedy in either state but, having chosen to seek it in Texas, where the award was res judicata, the full faith and credit clause precludes him from again seeking a remedy in Louisiana upon the same grounds." *Id.*, at 444. With the substitution of Virginia and the District of Columbia for Texas and Louisiana, this case presents precisely the same question as *Magnolia*, and, I believe, demands precisely the same answer.

As the plurality today properly notes, *Magnolia* received rather rough treatment at the hands of a unanimous Court in *McCartin*. I need not dwell upon the inadequacies of that latter opinion, however, since the plurality itself spotlights those inadequacies quite convincingly. As it observes, *McCartin* is difficult, if not impossible, to reconcile with "normally accepted full faith and credit principles." *Ante*, at 270. I also agree completely with the plurality's ultimate conclusion that the rule announced in *McCartin* "represents an unwarranted delegation to the States of this Court's responsibility for the final arbitration of full faith and credit questions." *Ante*, at 271.

One might suppose that, having destroyed *McCartin's ratio decidendi*, the plurality would return to the eminently defensible position adopted in *Magnolia*. But such is not the case. The plurality instead raises the banner of *"stare decisis"* and sets out in search of a new rationale to support the result reached in *McCartin*, significantly failing to even attempt to do the same thing for *Magnolia*.

If such *post hoc* rationalization seems a bit odd, the theory ultimately chosen by the plurality is even odder. It would seem that, contrary to the assumption of this Court for at least the past 40 years, a judgment awarding workmen's

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direct his concurrence at what he perceived to be an inconsistency in the position adopted by Mr. Justice Black and Mr. Justice Douglas, both of whom had joined *Williams* but were dissenting in *Magnolia*. For a similar exchange, see *Dennis* v. *United States*, 339 U. S. 162, 173–175 (1950) (Jackson, J., concurring in result), and *id.*, at 175–181 (Black, J., dissenting).

compensation benefits is no longer entitled to full faith and credit unless, and only to the extent that, such a judgment resolves a disputed issue of fact. I believe that the plurality's justification for such a theory, which apparently first surfaced in a cluster of articles written in the wake of *Magnolia*,[2] does not withstand close scrutiny.

The plurality identifies three different "state interests" at stake in the present case: Virginia's interest in placing a limit on the potential liability of companies doing business in that State, Virginia's interest in the "integrity of its formal determinations of contested issues," and a shared interest of Virginia and the District of Columbia in the welfare of the injured employee. See *ante*, at 277. The plurality then undertakes to balance these interests and concludes that none of Virginia's concerns outweighs the concern of the District of Columbia for the welfare of petitioner.

Whenever this Court, or any court, attempts to balance competing interests it risks undervaluing or even overlooking important concerns. I believe that the plurality's analysis incorporates both errors. First, it asserts that Virginia's interest in limiting the liability of businesses operating within its borders can never outweigh the District of Columbia's interest in protecting its residents. In support of this proposition it cites *Alaska Packers Assn.* v. *Industrial Accident Comm'n*, 294 U. S. 532 (1935), and *Pacific Employers Ins. Co.* v. *Industrial Accident Comm'n*, 306 U. S. 493 (1939). Both of those cases, however, involved the degree of faith and credit to be afforded *statutes* of one State by the courts of another State. The present case involves an enforceable *judgment* entered by Virginia after adjudicatory proceedings. In *Magnolia* Mr. Chief Justice Stone, who authored *both Alaska*

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[2] See Cheatham, Res Judicata and the Full Faith and Credit Clause: Magnolia Petroleum Co. v. Hunt, 44 Colum. L. Rev. 330, 341–346 (1944); Freund, Chief Justice Stone and the Conflict of Laws, 59 Harv. L. Rev. 1210, 1229–1230 (1946); Reese & Johnson, The Scope of Full Faith and Credit to Judgments, 49 Colum L. Rev. 153, 176–177 (1949).

Packers and *Pacific Employers*, distinguished those two decisions for precisely this reason, chastising the lower court in that case for overlooking "the distinction, long recognized and applied by this Court, . . . between the faith and credit required to be given to judgments and that to which local common and statutory law is entitled under the Constitution and laws of the United States." 320 U. S., at 436. This distinction, which has also been overlooked by the plurality here, makes perfect sense, since Virginia surely has a stronger interest in limiting an employer's liability to a fixed amount when that employer has already been haled before a Virginia tribunal and adjudged liable than when the employer simply claims the benefit of a Virginia statute in a proceeding brought in another State.

In a similar vein, the plurality completely ignores any interest that Virginia might assert in the finality of its adjudications. While workmen's compensation awards may be "nonfinal" in the sense that they are subject to continuing supervision and modification, Virginia nevertheless has a cognizable interest in requiring persons who avail themselves of its statutory remedy to eschew other alternative remedies that might be available to them. Otherwise, as apparently is the result here, Virginia's efforts and expense on an applicant's behalf are wasted when that applicant obtains a duplicative remedy in another State.

At base, the plurality's balancing analysis is incorrect because it recognizes no significant difference between the events that transpired in this case and those that *would* have transpired had petitioner initially sought his remedy in the District of Columbia. But there are differences. The Commonwealth of Virginia has expended its resources, at petitioner's behest, to provide petitioner with a remedy for his injury and a resolution of his "dispute" with his employer. That employer similarly has expended its resources, again at petitioner's behest, in complying with the judgment entered by Virginia. These efforts, and the corresponding interests in seeing that

those efforts are not wasted, lie at the very heart of the divergent constitutional treatment of judgments and statutes. Compare *Magnolia Petroleum Co.* v. *Hunt* with *Alaska Packers Assn.* v. *Industrial Accident Comm'n,* and *Pacific Employers Ins. Co.* v. *Industrial Accident Comm'n.* In this case, of course, Virginia and respondent employer expended very few resources in the administrative process. But that observation lends no assistance to the plurality, which would flatly hold that Virginia has absolutely no power to guarantee that a workmen's compensation award will be treated as a final judgment by other States.

In further support of its novel rule, the plurality attempts to distinguish the judgment entered in this case from one entered by a "court of general jurisdiction." See *ante,* at 282–283. Specifically, the plurality points out that the Industrial Commission of Virginia, unlike a state court of general jurisdiction, was limited by statute to consideration of Virginia law. According to the plurality, because the Commission "was not requested, and had no authority, to pass on petitioner's rights under District of Columbia law, there can be no constitutional objection to a fresh adjudication of those rights." *Ante,* at 283. See also *ante,* at 285.

This argument might have some force if petitioner had somehow had Virginia law thrust upon him against his will. In this case, however, petitioner was free to choose the applicable law simply by choosing the forum in which he filed his initial claim. Unless the District of Columbia has an interest in forcing its residents to accept its law regardless of their wishes, I fail to see how the Virginia Commission's inability to look to District of Columbia law impinged upon that latter jurisdiction's interests. I thus fail to see why petitioner's election, as consummated in his Virginia award, should not be given the same full faith and credit as would be afforded a judgment entered by a court of general jurisdiction.

I suspect that my Brethren's insistence on ratifying *McCartin's* result despite condemnation of its rationale is grounded in no small part upon their concern that injured workers are often coerced or maneuvered into filing their claims in jurisdictions amenable to their employers. There is, however, absolutely no evidence of such overreaching in the present case. Indeed, had there been "fraud, imposition, [or] mistake" in the filing of petitioner's claim, he would have been permitted, upon timely motion, to vacate the award. See *Harris* v. *Diamond Construction Co.*, 184 Va. 711, 720, 36 S. E. 2d 573, 577 (1946). In this regard, the award received by petitioner is treated no differently than any other judicial award, nor should it be.

There are, of course, exceptional judgments that this Court has indicated are not entitled to full faith and credit. See, *e. g.*, *Huntington* v. *Attrile*, 146 U. S. 657 (1892) (penal judgments); *Fall* v. *Eastin*, 215 U. S. 1 (1909) (judgment purporting to convey property in another State). Such exceptions, however, have been "few and far between. . . ." *Williams* v. *North Carolina*, 317 U. S. 287, 295 (1942). Furthermore, as this Court noted in *Magnolia*, there would appear to be no precedent for an exception in the case of a money judgment rendered in a civil suit. See 320 U. S., at 438. In this regard, there is no dispute that the award authorized by the Industrial Commission of Virginia here is, at least as a matter of Virginia law, equivalent to such a money judgment. See Va. Code §§ 65.1–40, 65.1–100.1 (1980).

I fear that the plurality, in its zeal to remedy a perceived imbalance in bargaining power, would badly distort an important constitutional tenet. Its "interest analysis," once removed from the statutory choice-of-law context considered by the Court in *Alaska Packers* and *Pacific Employers*, knows no metes or bounds. Given the modern proliferation of quasi-judicial methods for resolving disputes and of various tribunals of limited jurisdiction, such a rule could only lead to

confusion.[3] I find such uncertainty unacceptable, and prefer the rule originally announced in *Magnolia Petroleum Co.* v. *Hunt*, a rule whose analytical validity is, even yet, unchallenged.

The Full Faith and Credit Clause did not allot to this Court the task of "balancing" interests where the "public Acts, Records, and judicial Proceedings" of a State were involved. It simply directed that they be given the "Full Faith and Credit" that the Court today denies to those of Virginia. I would affirm the judgment of the court below.

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[3] Arbitration awards, for example, have traditionally been afforded full faith and credit. See, *e. g.*, *Pan American Food Co.* v. *Lester Lawrence & Son, Inc.*, 147 F. Supp. 113 (ND Ill. 1956); *United States Plywood Corp.* v. *Hudson Lumber Co.*, 127 F. Supp. 489 (SDNY 1954); *Port Realty Development Corp.* v. *Aim Consolidated Distribution, Inc.*, 90 Misc. 2d 757, 395 N. Y. S. 2d 905 (1977). Yet such proceedings incorporate many of the same features found important by this Court in excepting workmen's compensation awards from that requirement. See also *ante*, at 288–289 (opinion of WHITE, J.).

Reporter's Note

The next page is purposely numbered 901. The numbers between 296 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDER OF JUNE 26, 1980

JUNE 26, 1980

Dismissal Under Rule 60

No. 79–1852. BLUE CROSS OF NORTHWEST OHIO *v.* JUMP, SUPERINTENDENT OF INSURANCE. Sup. Ct. Ohio. Certiorari dismissed under this Court's Rule 60. Reported below: 61 Ohio St. 2d 246, 400 N. E. 2d 892.

Preliminary Print
Volume 448 U.S. Part 2
Pages 297-733; 901-918; 1302-1349

Official Records
of
The Supreme Court

June 30 Through September 18, 1980

End of Term

Henry J. Lind
Reporter of Decisions

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, Chief Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM H. REHNQUIST, Associate Justice.
JOHN PAUL STEVENS, Associate Justice.

OFFICERS OF THE COURT

BENJAMIN R. CIVILETTI, Attorney General.
WADE H. McCREE, Jr., Solicitor General.
MICHAEL RODAK, Jr., Clerk.
HENRY C. LIND, Reporter of Decisions.
ALFRED WONG, Marshal.
ROGER F. JACOBS, Librarian.

SUPREME COURT OF THE UNITED STATES

Allotment of Justices

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, *viz.:*

For the District of Columbia Circuit, Warren E. Burger, Chief Justice.

For the First Circuit, William J. Brennan, Jr., Associate Justice.

For the Second Circuit, Thurgood Marshall, Associate Justice.

For the Third Circuit, William J. Brennan, Jr., Associate Justice.

For the Fourth Circuit, Warren E. Burger, Chief Justice.

For the Fifth Circuit, Lewis F. Powell, Jr., Associate Justice.

For the Sixth Circuit, Potter Stewart, Associate Justice.

For the Seventh Circuit, John Paul Stevens, Associate Justice.

For the Eighth Circuit, Harry A. Blackmun, Associate Justice.

For the Ninth Circuit, William H. Rehnquist, Associate Justice.

For the Tenth Circuit, Byron R. White, Associate Justice.

December 19, 1975.

(For next previous allotment, see 404 U. S., p. v.)

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Syllabus

HARRIS, SECRETARY OF HEALTH AND HUMAN SERVICES v. McRAE ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

No. 79-1268. Argued April 21, 1980—Decided June 30, 1980

Title XIX of the Social Security Act established the Medicaid program in 1965 to provide federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons. Since 1976, versions of the so-called Hyde Amendment have severely limited the use of any federal funds to reimburse the cost of abortions under the Medicaid program. Actions were brought in Federal District Court by appellees (including indigent pregnant women, who sued on behalf of all women similarly situated, the New York City Health and Hospitals Corp., which operates hospitals providing abortion services, officers of the Women's Division of the Board of Global Ministries of the United Methodist Church (Women's Division), and the Women's Division itself), seeking to enjoin enforcement of the Hyde Amendment on grounds that it violates, *inter alia*, the Due Process Clause of the Fifth Amendment and the Religion Clauses of the First Amendment, and that, despite the Hyde Amendment, a participating State remains obligated under Title XIX to fund all medically necessary abortions. Ultimately, the District Court, granting injunctive relief, held that the Hyde Amendment had substantively amended Title XIX to relieve a State of any obligation to fund those medically necessary abortions for which federal reimbursement is unavailable, but that the Amendment violates the equal protection component of the Fifth Amendment's Due Process Clause and the Free Exercise Clause of the First Amendment.

Held:

1. Title XIX does not require a participating State to pay for those medically necessary abortions for which federal reimbursement is unavailable under the Hyde Amendment. Pp. 306–311.

(a) The cornerstone of Medicaid is financial contribution by both the Federal Government and the participating State. Nothing in Title XIX as originally enacted or in its legislative history suggests that Congress intended to require a participating State to assume the full costs of providing any health services in its Medicaid plan. To the contrary, Congress' purpose in enacting Title XIX was to provide federal financial

assistance for all legitimate state expenditures under an approved Medicaid plan. Pp. 308–309.

(b) Nor does the Hyde Amendment's legislative history contain any indication that Congress intended to shift the entire cost of some medically necessary abortions to the participating States, but rather suggests that Congress has always assumed that a participating State would not be required to fund such abortions once federal funding was withdrawn pursuant to the Hyde Amendment. Pp. 310–311.

2. The funding restrictions of the Hyde Amendment do not impinge on the "liberty" protected by the Due Process Clause of the Fifth Amendment held in *Roe* v. *Wade*, 410 U. S. 113, 168, to include the freedom of a woman to decide whether to terminate a pregnancy. Pp. 312–318.

(a) The Hyde Amendment places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but rather, by means of unequal subsidization of abortion and other medical services, encourages alternative activity deemed in the public interest. Cf. *Maher* v. *Roe*, 432 U. S. 464. P. 315.

(b) Regardless of whether the freedom of a woman to choose to terminate her pregnancy for health reasons lies at the core or the periphery of the due process liberty recognized in *Wade*, *supra*, it does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices. Although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation, and indigency falls within the latter category. Although Congress has opted to subsidize medically necessary services generally, but not certain medically necessary abortions, the fact remains that the Hyde Amendment leaves an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all. Pp. 316–317.

(c) To translate the limitation on governmental power implicit in the Due Process Clause into an affirmative funding obligation would require Congress to subsidize the medically necessary abortion of an indigent woman even if Congress had not enacted a Medicaid program to subsidize other medically necessary services. Nothing in the Due Process Clause supports such an extraordinary result. Pp. 317–318.

3. Nor does the Hyde Amendment violate the Establishment Clause of the First Amendment. The fact that the funding restrictions in the Hyde Amendment may coincide with the religious tenets of the Roman

Catholic Church does not, without more, contravene that Clause. Pp. 319–320.

4. Appellees lack standing to raise a challenge to the Hyde Amendment under the Free Exercise Clause of the First Amendment. The named appellees consisting of indigent pregnant women suing on behalf of other women similarly situated lack such standing because none alleged, much less proved, that she sought an abortion under compulsion of religious belief. The named appellees consisting of officers of the Women's Division, although they provided a detailed description of their religious beliefs, failed to allege either that they are or expect to be pregnant or that they are eligible to receive Medicaid, and they therefore lacked the personal stake in the controversy needed to confer standing to raise such a challenge to the Hyde Amendment. And the Women's Division does not satisfy the standing requirements for an organization to assert the rights of its membership, since the asserted claim is one that required participation of the individual members for a proper understanding and resolution of their free exercise claims. Pp. 320–321.

5. The Hyde Amendment does not violate the equal protection component of the Due Process Clause of the Fifth Amendment. Pp. 321–326.

(a) While the presumption of constitutional validity of a statutory classification that does not itself impinge on a right or liberty protected by the Constitution disappears if the classification is predicated on criteria that are "suspect," the Hyde Amendment is not predicated on a constitutionally suspect classification. *Maher* v. *Roe, supra.* Although the impact of the Amendment falls on the indigent, that fact does not itself render the funding restrictions constitutionally invalid, for poverty, standing alone, is not a suspect classification. Pp. 322–323.

(b) Where, as here, Congress has neither invaded a substantive constitutional right or freedom, nor enacted legislation that purposefully operates to the detriment of a suspect class, the only requirement of equal protection is that congressional action be rationally related to a legitimate governmental interest. The Hyde Amendment satisfies that standard, since, by encouraging childbirth except in the most urgent circumstances, it is rationally related to the legitimate governmental objective of protecting potential life. Pp. 324–326.

Reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, and REHNQUIST, JJ., joined. WHITE, J., filed a concurring opinion, *post*, p. 327. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and BLACKMUN, JJ., joined, *post*, p. 329. MARSHALL,

J., *post*, p. 337, BLACKMUN, J., *post*, p. 348, and STEVENS, J., *post*, p. 349, filed dissenting opinions.

Solicitor General McCree argued the cause for appellant. With him on the briefs were *Assistant Attorney General Daniel* and *Eloise E. Davies*. *Victor G. Rosenblum, Dennis J. Horan, John D. Gorby, Carl Anderson, Patrick A. Trueman, A. Lawrence Washburn, Jr.*, and *Gerald E. Bodell* filed briefs for Buckley et al., appellees under this Court's Rule 10 (4), in support of appellant.

Rhonda Copelon argued the cause for appellees McRae et al. With her on the briefs were *Nancy Stearns, Sylvia Law, Ellen K. Sawyer, Janet Benshoof, Judith Levin, Harriet Pilpel*, and *Eve Paul*.*

MR. JUSTICE STEWART delivered the opinion of the Court.

This case presents statutory and constitutional questions concerning the public funding of abortions under Title XIX of the Social Security Act, commonly known as the "Medicaid" Act, and recent annual Appropriations Acts containing

*Briefs of *amici curiae* urging reversal were filed by *John T. Noonan, Jr.*, and *William B. Ball* for Representative Jim Wright et al.; and by *Wilfred R. Caron* and *Patrick F. Geary* for the United States Catholic Conference.

Briefs of *amici curiae* urging affirmance were filed by *Robert Abrams*, Attorney General, *Shirley Adelson Siegel*, Solicitor General, and *Peter Bienstock, Arnold D. Fleischer*, and *Barbara E. Levy*, Assistant Attorneys General, for the State of New York et al., joined by *Rufus L. Edmisten*, Attorney General of North Carolina, *William F. O'Connell*, Special Deputy Attorney General, and *Steven Mansfield Shaber*, Associate Attorney General, and *James A. Redden*, Attorney General of Oregon; by *Leo Pfeffer* for the American Ethical Union et al.; by *Barbara Ellen Handschu* for the Association of Legal Aid Attorneys of the City of New York—District 65—U. A. W. et al.; and by *Phyllis N. Segal* and *Judith I. Avner* for the National Organization for Women et al.

Briefs of *amici curiae* were filed by *Nadine Taub* for the Bergen-Passaic Health Systems Agency et al.; by *James G. Kolb* for the Coalition for Human Justice; by *Sanford Jay Rosen* for the National Council of Churches of Christ in the U. S. A.; and by *Sanford Jay Rosen* for the United Presbyterian Church in the U. S. A.

the so-called "Hyde Amendment." The statutory question is whether Title XIX requires a State that participates in the Medicaid program to fund the cost of medically necessary abortions for which federal reimbursement is unavailable under the Hyde Amendment. The constitutional question, which arises only if Title XIX imposes no such requirement, is whether the Hyde Amendment, by denying public funding for certain medically necessary abortions, contravenes the liberty or equal protection guarantees of the Due Process Clause of the Fifth Amendment, or either of the Religion Clauses of the First Amendment.

I

The Medicaid program was created in 1965, when Congress added Title XIX to the Social Security Act, 79 Stat. 343, as amended, 42 U. S. C. § 1396 *et seq.* (1976 ed. and Supp. II), for the purpose of providing federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons. Although participation in the Medicaid program is entirely optional, once a State elects to participate, it must comply with the requirements of Title XIX.

One such requirement is that a participating State agree to provide financial assistance to the "categorically needy" [1] with respect to five general areas of medical treatment: (1) inpatient hospital services, (2) outpatient hospital services, (3) other laboratory and X-ray services, (4) skilled nursing

[1] The "categorically needy" include families with dependent children eligible for public assistance under the Aid to Families with Dependent Children program, 42 U. S. C. § 601 *et seq.*, and the aged, blind, and disabled eligible for benefits under the Supplemental Security Income program, 42 U. S. C. § 1381 *et seq.* See 42 U. S. C. § 1396a (a)(10)(A). Title XIX also permits a State to extend Medicaid benefits to other needy persons, termed "medically needy." See 42 U. S. C. § 1396a (a)(10)(C). If a State elects to include the medically needy in its Medicaid plan, it has the option of providing somewhat different coverage from that required for the categorically needy. See 42 U. S. C. § 1396a (a)(13)(C).

facilities services, periodic screening and diagnosis of children, and family planning services, and (5) services of physicians. 42 U. S. C. §§ 1396a (a)(13)(B), 1396d (a)(1)–(5). Although a participating State need not "provide funding for all medical treatment falling within the five general categories, [Title XIX] does require that [a] state Medicaid pla[n] establish 'reasonable standards . . . for determining . . . the extent of medical assistance under the plan which . . . are consistent with the objectives of [Title XIX].' 42 U. S. C. § 1396a (a)(17)." *Beal* v. *Doe*, 432 U. S. 438, 441.

Since September 1976, Congress has prohibited—either by an amendment to the annual appropriations bill for the Department of Health, Education, and Welfare [2] or by a joint resolution—the use of any federal funds to reimburse the cost of abortions under the Medicaid program except under certain specified circumstances. This funding restriction is commonly known as the "Hyde Amendment," after its original congressional sponsor, Representative Hyde. The current version of the Hyde Amendment, applicable for fiscal year 1980, provides:

> "[N]one of the funds provided by this joint resolution shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest when such rape or incest has been reported promptly to a law enforcement agency or public health service." Pub. L. 96–123, § 109, 93 Stat. 926. See also Pub. L. 96–86, § 118, 93 Stat. 662.

This version of the Hyde Amendment is broader than that applicable for fiscal year 1977, which did not include the "rape or incest" exception, Pub. L. 94–439, § 209, 90 Stat.

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[2] The Department of Health, Education, and Welfare was recently renamed the Department of Health and Human Services. The original designation is retained for purposes of this opinion.

1434, but narrower than that applicable for most of fiscal year 1978,[3] and all of fiscal year 1979, which had an additional exception for "instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians," Pub. L. 95–205, § 101, 91 Stat. 1460; Pub. L. 95–480, § 210, 92 Stat. 1586.[4]

On September 30, 1976, the day on which Congress enacted the initial version of the Hyde Amendment, these consolidated cases were filed in the District Court for the Eastern District of New York. The plaintiffs—Cora McRae, a New York Medicaid recipient then in the first trimester of a pregnancy that she wished to terminate, the New York City Health and Hospitals Corp., a public benefit corporation that operates 16 hospitals, 12 of which provide abortion services, and others—sought to enjoin the enforcement of the funding restriction on abortions. They alleged that the Hyde Amendment violated the First, Fourth, Fifth, and Ninth Amendments of the Constitution insofar as it limited the funding of abortions to those necessary to save the life of the mother, while permitting the funding of costs associated with childbirth. Although the sole named defendant was the Secretary of Health, Education, and Welfare, the District Court permitted Senators James L. Buckley and Jesse A. Helms and Representative Henry J. Hyde to intervene as defendants.[5]

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[3] The appropriations for HEW during October and November 1977, the first two months of fiscal year 1978, were provided by joint resolutions that continued in effect the version of the Hyde Amendment applicable during fiscal year 1977. Pub. L. 95–130, 91 Stat. 1153; Pub. L. 95–165, 91 Stat. 1323.

[4] In this opinion, the term, "Hyde Amendment," is used generically to refer to all three versions of the Hyde Amendment, except where indicated otherwise.

[5] Although the intervenor-defendants are appellees in the Secretary's direct appeal to this Court, see this Court's Rule 10 (4), the term "appellees" is used in this opinion to refer only to the parties who were the plaintiffs in the District Court.

After a hearing, the District Court entered a preliminary injunction prohibiting the Secretary from enforcing the Hyde Amendment and requiring him to continue to provide federal reimbursement for abortions under the standards applicable before the funding restriction had been enacted. *McRae* v. *Mathews,* 421 F. Supp. 533. Although stating that it had not expressly held that the funding restriction was unconstitutional, since the preliminary injunction was not its final judgment, the District Court noted that such a holding was "implicit" in its decision granting the injunction. The District Court also certified the *McRae* case as a class action on behalf of all pregnant or potentially pregnant women in the State of New York eligible for Medicaid and who decide to have an abortion within the first 24 weeks of pregnancy, and of all authorized providers of abortion services to such women. *Id.,* at 543.

The Secretary then brought an appeal to this Court. After deciding *Beal* v. *Doe,* 432 U. S 438, and *Maher* v. *Roe,* 432 U. S. 464, we vacated the injunction of the District Court and remanded the case for reconsideration in light of those decisions. *Califano* v. *McRae,* 433 U. S. 916.

On remand, the District Court permitted the intervention of several additional plaintiffs, including (1) four individual Medicaid recipients who wished to have abortions that allegedly were medically necessary but did not qualify for federal funds under the versions of the Hyde Amendment applicable in fiscal years 1977 and 1978, (2) several physicians who perform abortions for Medicaid recipients, (3) the Women's Division of the Board of Global Ministries of the United Methodist Church (Women's Division), and (4) two individual officers of the Women's Division.

An amended complaint was then filed, challenging the various versions of the Hyde Amendment on several grounds. At the outset, the plaintiffs asserted that the District Court need not address the constitutionality of the Hyde Amend-

ment because, in their view, a participating State remains obligated under Title XIX to fund all medically necessary abortions, even if federal reimbursement is unavailable. With regard to the constitutionality of the Hyde Amendment, the plaintiffs asserted, among other things, that the funding restrictions violate the Religion Clauses of the First Amendment and the Due Process Clause of the Fifth Amendment.

After a lengthy trial, which inquired into the medical reasons for abortions and the diverse religious views on the subject,[6] the District Court filed an opinion and entered a judgment invalidating all versions of the Hyde Amendment on constitutional grounds.[7] The District Court rejected the plaintiffs' statutory argument, concluding that even though Title XIX would otherwise have required a participating State to fund medically necessary abortions, the Hyde Amendment had substantively amended Title XIX to relieve a State of that funding obligation. Turning then to the constitutional issues, the District Court concluded that the Hyde Amendment, though valid under the Establishment Clause,[8] violates the equal protection component of the Fifth Amendment's Due Process Clause and the Free Exercise Clause of the First Amendment. With regard to the Fifth Amendment, the District Court noted that when an abortion is "medically necessary to safeguard the pregnant woman's health, . . . the disentitlement to [M]edicaid assistance impinges directly on the woman's right to decide, in consultation with her physician and in reliance on his judgment, to terminate

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[6] The trial, which was conducted between August 1977 and September 1978, produced a record containing more than 400 documentary and film exhibits and a transcript exceeding 5,000 pages.

[7] *McRae* v. *Califano,* 491 F. Supp. 630.

[8] The District Court found no Establishment Clause infirmity because, in its view, the Hyde Amendment has a secular legislative purpose, its principal effect neither advances nor inhibits religion, and it does not foster an excessive governmental entanglement with religion.

her pregnancy in order to preserve her health."[9] *McRae* v. *Califano*, 491 F. Supp. 630, 737. The court concluded that the Hyde Amendment violates the equal protection guarantee because, in its view, the decision of Congress to fund medically necessary services generally but only certain medically necessary abortions serves no legitimate governmental interest. As to the Free Exercise Clause of the First Amendment, the court held that insofar as a woman's decision to seek a medically necessary abortion may be a product of her religious beliefs under certain Protestant and Jewish tenets, the funding restrictions of the Hyde Amendment violate that constitutional guarantee as well.

Accordingly, the District Court ordered the Secretary to "[c]ease to give effect" to the various versions of the Hyde Amendment insofar as they forbid payments for medically necessary abortions. It further directed the Secretary to "[c]ontinue to authorize the expenditure of federal matching funds [for such abortions]." App. 87. In addition, the court recertified the *McRae* case as a nationwide class action on behalf of all pregnant and potentially pregnant women eligible for Medicaid who wish to have medically necessary abortions, and of all authorized providers of abortions for such women.[10]

The Secretary then applied to this Court for a stay of the judgment pending direct appeal of the District Court's decision. We denied the stay, but noted probable jurisdiction of this appeal. 444 U. S. 1069.

II

It is well settled that if a case may be decided on either statutory or constitutional grounds, this Court, for sound

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[9] The District Court also apparently concluded that the Hyde Amendment operates to the disadvantage of a "suspect class," namely, teenage women desiring medically necessary abortions. See n. 26, *infra*.

[10] Although the original class included only those pregnant women in the first two trimesters of their pregnancy, the recertified class included all pregnant women regardless of the stage of their pregnancy.

jurisprudential reasons, will inquire first into the statutory question. This practice reflects the deeply rooted doctrine "that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Service, Inc.* v. *McLaughlin,* 323 U. S. 101, 105. Accordingly, we turn first to the question whether Title XIX requires a State that participates in the Medicaid program to continue to fund those medically necessary abortions for which federal reimbursement is unavailable under the Hyde Amendment. If a participating State is under such an obligation, the constitutionality of the Hyde Amendment need not be drawn into question in the present case, for the availability of medically necessary abortions under Medicaid would continue, with the participating State shouldering the total cost of funding such abortions.

The appellees assert that a participating State has an independent funding obligation under Title XIX because (1) the Hyde Amendment is, by its own terms, only a limitation on federal reimbursement for certain medically necessary abortions, and (2) Title XIX does not permit a participating State to exclude from its Medicaid plan any medically necessary service solely on the basis of diagnosis or condition, even if federal reimbursement is unavailable for that service.[11] It is thus the appellees' view that the effect of the Hyde Amendment is to withhold federal reimbursement for certain medically necessary abortions, but not to relieve a participating

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[11] The appellees argue that their interpretation of Title XIX finds support in *Beal* v. *Doe,* 432 U. S. 438. There the Court considered the question whether Title XIX permits a participating State to exclude *non*-therapeutic abortions from its Medicaid plan. Although concluding that Title XIX does not preclude a State's refusal "to fund *unnecessary*—though perhaps desirable—medical services," the Court observed that "serious statutory questions might be presented if a state Medicaid plan excluded necessary medical treatment from its coverage." *Id.,* at 444–445 (emphasis in original). The Court in *Beal,* however, did not address the possible effect of the Hyde Amendment upon the operation of Title XIX.

State of its duty under Title XIX to provide for such abortions in its Medicaid plan.

The District Court rejected this argument. It concluded that, although Title XIX would otherwise have required a participating State to include medically necessary abortions in its Medicaid program, the Hyde Amendment substantively amended Title XIX so as to relieve a State of that obligation. This construction of the Hyde Amendment was said to find support in the decisions of two Courts of Appeals, *Preterm, Inc.* v. *Dukakis,* 591 F. 2d 121 (CA1 1979), and *Zbaraz* v. *Quern,* 596 F. 2d 196 (CA7 1979), and to be consistent with the understanding of the effect of the Hyde Amendment by the Department of Health, Education, and Welfare in the administration of the Medicaid program.

We agree with the District Court, but for somewhat different reasons. The Medicaid program created by Title XIX is a cooperative endeavor in which the Federal Government provides financial assistance to participating States to aid them in furnishing health care to needy persons. Under this system of "cooperative federalism," *King* v. *Smith,* 392 U. S. 309, 316, if a State agrees to establish a Medicaid plan that satisfies the requirements of Title XIX, which include several mandatory categories of health services, the Federal Government agrees to pay a specified percentage of "the total amount expended . . . as medical assistance under the State plan. . . ." 42 U. S. C. § 1396b (a)(1). The cornerstone of Medicaid is financial contribution by both the Federal Government and the participating State. Nothing in Title XIX as originally enacted, or in its legislative history, suggests that Congress intended to require a participating State to assume the full costs of providing any health services in its Medicaid plan. Quite the contrary, the purpose of Congress in enacting Title XIX was to provide federal financial assistance for all legitimate state expenditures under an approved Medicaid plan. See S. Rep. No. 404, 89th Cong., 1st

Sess., pt. 1, pp. 83–85 (1965); H. R. Rep. No. 213, 89th Cong., 1st Sess., 72–74 (1965).

Since the Congress that enacted Title XIX did not intend a participating State to assume a unilateral funding obligation for any health service in an approved Medicaid plan, it follows that Title XIX does not require a participating State to include in its plan any services for which a subsequent Congress has withheld federal funding.[12] Title XIX was designed as a cooperative program of shared financial responsibility, not as a device for the Federal Government to compel a State to provide services that Congress itself is unwilling to fund. Thus, if Congress chooses to withdraw federal funding for a particular service, a State is not obliged to continue to pay for that service as a condition of continued federal financial support of other services. This is not to say that Congress may not now depart from the original design of Title XIX under which the Federal Government shares the financial responsibility for expenses incurred under an approved Medicaid plan. It is only to say that, absent an indication of contrary legislative intent by a subsequent Congress, Title XIX does not obligate a participating State to pay for those medical services for which federal reimbursement is unavailable.[13]

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[12] In *Preterm, Inc.* v. *Dukakis*, 591 F. 2d 121, 132 (CA1 1979), the opinion of the court by Judge Coffin noted:

"The Medicaid program is one of federal and state cooperation in funding medical assistance; a complete withdrawal of the federal prop in the system with the intent to drop the total cost of providing the service upon the states, runs directly counter to the basic structure of the program and could seriously cripple a state's attempts to provide other necessary medical services embraced by its plan." (Footnote omitted.)

[13] When subsequent Congresses have deviated from the original structure of Title XIX by obligating a participating State to assume the full costs of a service as a prerequisite for continued federal funding of other services, they have always expressed their intent to do so in unambiguous terms. See *Zbaraz* v. *Quern*, 596 F. 2d 196, 200, n. 12 (CA7 1979).

Thus, by the normal operation of Title XIX, even if a State were otherwise required to include medically necessary abortions in its Medicaid plan, the withdrawal of federal funding under the Hyde Amendment would operate to relieve the State of that obligation for those abortions for which federal reimbursement is unavailable.[14] The legislative history of the Hyde Amendment contains no indication whatsoever that Congress intended to shift the entire cost of such services to the participating States. See *Zbaraz* v. *Quern, supra,* at 200 ("no one, whether supporting or opposing the Hyde Amendment, ever suggested that state funding would be required"). Rather, the legislative history suggests that Congress has always assumed that a participating State would not be required to fund medically necessary abortions once federal funding was withdrawn pursuant to the Hyde Amendment.[15] See *Preterm, Inc.* v. *Dukakis, supra,* at 130 ("[t]he universal assumption in debate was that if the Amendment passed there would be no requirement that states carry on the service"). Accord, *Zbaraz* v. *Quern, supra,* at 200; *Hodgson* v. *Board of County Comm'rs,* 614 F. 2d 601, 612–613 (CA8

[14] Since Title XIX itself provides for variations in the required coverage of state Medicaid plans depending on changes in the availability of federal reimbursement, we need not inquire, as the District Court did, whether the Hyde Amendment is a substantive amendment to Title XIX. The present case is thus different from *TVA* v. *Hill,* 437 U. S. 153, 189–193, where the issue was whether continued appropriations for the Tellico Dam impliedly repealed the substantive requirements of the Endangered Species Act prohibiting the continued construction of the Dam because it threatened the natural habitat of an endangered species.

[15] Our conclusion that the Congress that enacted Title XIX did not intend a participating State to assume a unilateral funding obligation for any health service in an approved Medicaid plan is corroborated by the fact that subsequent Congresses simply assumed that the withdrawal of federal funding under the Hyde Amendment for certain medically necessary abortions would relieve a participating State of any obligation to provide for such services in its Medicaid plan. See the cases cited in the text, *supra.*

1980); *Roe* v. *Casey*, 623 F. 2d 829, 834–837 (CA3 1980). Accordingly, we conclude that Title XIX does not require a participating State to pay for those medically necessary abortions for which federal reimbursement is unavailable under the Hyde Amendment.[16]

III

Having determined that Title XIX does not obligate a participating State to pay for those medically necessary abortions for which Congress has withheld federal funding, we must consider the constitutional validity of the Hyde Amendment. The appellees assert that the funding restrictions of the Hyde Amendment violate several rights secured by the Constitution—(1) the right of a woman, implicit in the Due Process Clause of the Fifth Amendment, to decide whether to terminate a pregnancy, (2) the prohibition under the Establishment Clause of the First Amendment against any "law respecting an establishment of religion," and (3) the right to freedom of religion protected by the Free Exercise Clause of the First Amendment. The appellees also contend that, quite apart from substantive constitutional rights, the Hyde Amendment violates the equal protection component of the Fifth Amendment.[17]

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[16] A participating State is free, if it so chooses, to include in its Medicaid plan those medically necessary abortions for which federal reimbursement is unavailable. See *Beal* v. *Doe*, 432 U. S., at 447; *Preterm, Inc.* v. *Dukakis, supra*, at 134. We hold only that a State *need* not include such abortions in its Medicaid plan.

[17] The appellees also argue that the Hyde Amendment is unconstitutionally vague insofar as physicians are unable to understand or implement the exceptions to the Hyde Amendment under which abortions are reimbursable. It is our conclusion, however, that the Hyde Amendment is not void for vagueness because (1) the sanction provision in the Medicaid Act contains a clear scienter requirement under which good-faith errors are not penalized, see *Colautti* v. *Franklin*, 439 U. S. 379, 395, and, (2), in any event, the exceptions to the Hyde Amendment "are set out in terms that the ordinary person exercising ordinary common sense can

It is well settled that, quite apart from the guarantee of equal protection, if a law "impinges upon a fundamental right explicitly or implicitly secured by the Constitution [it] is presumptively unconstitutional." *Mobile* v. *Bolden,* 446 U. S. 55, 76 (plurality opinion). Accordingly, before turning to the equal protection issue in this case, we examine whether the Hyde Amendment violates any substantive rights secured by the Constitution.

A

We address first the appellees' argument that the Hyde Amendment, by restricting the availability of certain medically necessary abortions under Medicaid, impinges on the "liberty" protected by the Due Process Clause as recognized in *Roe* v. *Wade,* 410 U. S. 113, and its progeny.

In the *Wade* case, this Court held unconstitutional a Texas statute making it a crime to procure or attempt an abortion except on medical advice for the purpose of saving the mother's life. The constitutional underpinning of *Wade* was a recognition that the "liberty" protected by the Due Process Clause of the Fourteenth Amendment includes not only the freedoms explicitly mentioned in the Bill of Rights, but also a freedom of personal choice in certain matters of marriage and family life.[18] This implicit constitutional liberty, the Court in *Wade* held, includes the freedom of a woman to decide whether to terminate a pregnancy.

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sufficiently understand and comply with, without sacrifice to the public interest." *Broadrick* v. *Oklahoma,* 413 U. S. 601, 608.

[18] The Court in *Wade* observed that previous decisions of this Court had recognized that the liberty protected by the Due Process Clause "has some extension to activities relating to marriage, *Loving* v. *Virginia,* 388 U. S. 1, 12 (1967); procreation, *Skinner* v. *Oklahoma,* 316 U. S. 535, 541–542 (1942); contraception, *Eisenstadt* v. *Baird,* 405 U. S. [438,] 453–454; *id.,* at 460, 463–465 (WHITE, J., concurring in result); family relationships, *Prince* v. *Massachusetts,* 321 U. S. 158, 166 (1944); and child rearing and education, *Pierce* v. *Society of Sisters,* 268 U. S. 510, 535 (1925); *Meyer* v. *Nebraska,* [262 U. S. 390, 399 (1923)]." 410 U. S., at 152–153.

But the Court in *Wade* also recognized that a State has legitimate interests during a pregnancy in both ensuring the health of the mother and protecting potential human life. These state interests, which were found to be "separate and distinct" and to "gro[w] in substantiality as the woman approaches term," *id.*, at 162–163, pose a conflict with a woman's untrammeled freedom of choice. In resolving this conflict, the Court held that before the end of the first trimester of pregnancy, neither state interest is sufficiently substantial to justify any instrusion on the woman's freedom of choice. In the second trimester, the state interest in maternal health was found to be sufficiently substantial to justify regulation reasonably related to that concern. And at viability, usually in the third trimester, the state interest in protecting the potential life of the fetus was found to justify a criminal prohibition against abortions, except where necessary for the preservation of the life or health of the mother. Thus, inasmuch as the Texas criminal statute allowed abortions only where necessary to save the life of the mother and without regard to the stage of the pregnancy, the Court held in *Wade* that the statute violated the Due Process Clause of the Fourteenth Amendment.

In *Maher* v. *Roe,* 432 U. S. 464, the Court was presented with the question whether the scope of personal constitutional freedom recognized in *Roe* v. *Wade* included an entitlement to Medicaid payments for abortions that are not medically necessary. At issue in *Maher* was a Connecticut welfare regulation under which Medicaid recipients received payments for medical services incident to childbirth, but not for medical services incident to nontherapeutic abortions. The District Court held that the regulation violated the Equal Protection Clause of the Fourteenth Amendment because the unequal subsidization of childbirth and abortion impinged on the "fundamental right to abortion" recognized in *Wade* and its progeny.

It was the view of this Court that "the District Court misconceived the nature and scope of the fundamental right recognized in *Roe*." 432 U. S., at 471. The doctrine of *Roe* v. *Wade*, the Court held in *Maher*, "protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy," *id.*, at 473–474, such as the severe criminal sanctions at issue in *Roe* v. *Wade, supra,* or the absolute requirement of spousal consent for an abortion challenged in *Planned Parenthood of Central Missouri* v. *Danforth,* 428 U. S. 52.

But the constitutional freedom recognized in *Wade* and its progeny, the *Maher* Court explained, did not prevent Connecticut from making "a value judgment favoring childbirth over abortion, and . . . implement[ing] that judgment by the allocation of public funds." 432 U. S., at 474. As the Court elaborated:

> "The Connecticut regulation before us is different in kind from the laws invalidated in our previous abortion decisions. The Connecticut regulation places no obstacles—absolute or otherwise—in the pregnant woman's path to an abortion. An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires. The State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there. The indigency that may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions is neither created nor in any way affected by the Connecticut regulation." *Ibid.*

The Court in *Maher* noted that its description of the doctrine recognized in *Wade* and its progeny signaled "no retreat" from those decisions. In explaining why the con-

stitutional principle recognized in *Wade* and later cases—protecting a woman's freedom of choice—did not translate into a constitutional obligation of Connecticut to subsidize abortions, the Court cited the "basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy. Constitutional concerns are greatest when the State attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader." 432 U. S., at 475–476 (footnote omitted). Thus, even though the Connecticut regulation favored childbirth over abortion by means of subsidization of one and not the other, the Court in *Maher* concluded that the regulation did not impinge on the constitutional freedom recognized in *Wade* because it imposed no governmental restriction on access to abortions.

The Hyde Amendment, like the Connecticut welfare regulation at issue in *Maher*, places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but rather, by means of unequal subsidization of abortion and other medical services, encourages alternative activity deemed in the public interest. The present case does differ factually from *Maher* insofar as that case involved a failure to fund nontherapeutic abortions, whereas the Hyde Amendment withholds funding of certain medically necessary abortions. Accordingly, the appellees argue that because the Hyde Amendment affects a significant interest not present or asserted in *Maher*—the interest of a woman in protecting her health during pregnancy—and because that interest lies at the core of the personal constitutional freedom recognized in *Wade*, the present case is constitutionally different from *Maher*. It is the appellees' view that to the extent that the Hyde Amendment withholds funding for certain medically necessary abortions, it clearly impinges on the constitutional principle recognized in *Wade*.

It is evident that a woman's interest in protecting her health was an important theme in *Wade*. In concluding that the freedom of a woman to decide whether to terminate her pregnancy falls within the personal liberty protected by the Due Process Clause, the Court in *Wade* emphasized the fact that the woman's decision carries with it significant personal health implications—both physical and psychological. 410 U. S., at 153. In fact, although the Court in *Wade* recognized that the state interest in protecting potential life becomes sufficiently compelling in the period after fetal viability to justify an absolute criminal prohibition of nontherapeutic abortions, the Court held that even after fetal viability a State may not prohibit abortions "necessary to preserve the life or health of the mother." *Id.*, at 164. Because even the compelling interest of the State in protecting potential life after fetal viability was held to be insufficient to outweigh a woman's decision to protect her life or health, it could be argued that the freedom of a woman to decide whether to terminate her pregnancy for health reasons does in fact lie at the core of the constitutional liberty identified in *Wade*.

But, regardless of whether the freedom of a woman to choose to terminate her pregnancy for health reasons lies at the core or the periphery of the due process liberty recognized in *Wade*, it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices. The reason why was explained in *Maher*: although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category. The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency. Although Congress has opted to subsidize

medically necessary services generally, but not certain medically necessary abortions, the fact remains that the Hyde Amendment leaves an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all. We are thus not persuaded that the Hyde Amendment impinges on the constitutionally protected freedom of choice recognized in *Wade*.[19]

Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal

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[19] The appellees argue that the Hyde Amendment is unconstitutional because it "penalizes" the exercise of a woman's choice to terminate a pregnancy by abortion. See *Memorial Hospital* v. *Maricopa County*, 415 U. S. 250; *Shapiro* v. *Thompson*, 394 U. S. 618. This argument falls short of the mark. In *Maher*, the Court found only a "semantic difference" between the argument that Connecticut's refusal to subsidize nontherapeutic abortions "unduly interfere[d]" with the exercise of the constitutional liberty recognized in *Wade* and the argument that it "penalized" the exercise of that liberty. 432 U. S., at 474, n. 8. And, regardless of how the claim was characterized, the *Maher* Court rejected the argument that Connecticut's refusal to subsidize protected conduct, without more, impinged on the constitutional freedom of choice. This reasoning is equally applicable in the present case. A substantial constitutional question would arise if Congress had attempted to withhold all Medicaid benefits from an otherwise eligible candidate simply because that candidate had exercised her constitutionally protected freedom to terminate her pregnancy by abortion. This would be analogous to *Sherbert* v. *Verner*, 374 U. S. 398, where this Court held that a State may not, consistent with the First and Fourteenth Amendments, withhold *all* unemployment compensation benefits from a claimant who would otherwise be eligible for such benefits but for the fact that she is unwilling to work one day per week on her Sabbath. But the Hyde Amendment, unlike the statute at issue in *Sherbert*, does not provide for such a broad disqualification from receipt of public benefits. Rather, the Hyde Amendment, like the Connecticut welfare provision at issue in *Maher*, represents simply a refusal to subsidize certain protected conduct. A refusal to fund protected activity, without more, cannot be equated with the imposition of a "penalty" on that activity.

decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom. To hold otherwise would mark a drastic change in our understanding of the Constitution. It cannot be that because government may not prohibit the use of contraceptives, *Griswold* v. *Connecticut*, 381 U. S. 479, or prevent parents from sending their child to a private school, *Pierce* v. *Society of Sisters*, 268 U. S. 510, government, therefore, has an affirmative constitutional obligation to ensure that all persons have the financial resources to obtain contraceptives or send their children to private schools. To translate the limitation on governmental power implicit in the Due Process Clause into an affirmative funding obligation would require Congress to subsidize the medically necessary abortion of an indigent woman even if Congress had not enacted a Medicaid program to subsidize other medically necessary services. Nothing in the Due Process Clause supports such an extraordinary result.[20] Whether freedom of choice that is constitutionally protected warrants federal subsidization is a question for Congress to answer, not a matter of constitutional entitlement. Accordingly, we conclude that the Hyde Amendment does not impinge on the due process liberty recognized in *Wade*.[21]

B

The appellees also argue that the Hyde Amendment contravenes rights secured by the Religion Clauses of the First

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[20] As this Court in *Maher* observed: "The Constitution imposes no obligation on the [government] to pay the pregnancy-related medical expenses of indigent women, or indeed to pay any of the medical expenses of indigents." 432 U. S., at 469.

[21] Since the constitutional entitlement of a physician who administers medical care to an indigent woman is no broader than that of his patient, see *Whalen* v. *Roe*, 429 U. S. 589, 604, and n. 33, we also reject the appellees' claim that the funding restrictions of the Hyde Amendment violate the due process rights of the physician who advises a Medicaid recipient to obtain a medically necessary abortion.

Amendment. It is the appellees' view that the Hyde Amendment violates the Establishment Clause because it incorporates into law the doctrines of the Roman Catholic Church concerning the sinfulness of abortion and the time at which life commences. Moreover, insofar as a woman's decision to seek a medically necessary abortion may be a product of her religious beliefs under certain Protestant and Jewish tenets, the appellees assert that the funding limitations of the Hyde Amendment impinge on the freedom of religion guaranteed by the Free Exercise Clause.

1

It is well settled that "a legislative enactment does not contravene the Establishment Clause if it has a secular legislative purpose, if its principal or primary effect neither advances nor inhibits religion, and if it does not foster an excessive governmental entanglement with religion." *Committee for Public Education* v. *Regan,* 444 U. S. 646, 653. Applying this standard, the District Court properly concluded that the Hyde Amendment does not run afoul of the Establishment Clause. Although neither a State nor the Federal Government can constitutionally "pass laws which aid one religion, aid all religions, or prefer one religion over another," *Everson* v. *Board of Education,* 330 U. S. 1, 15, it does not follow that a statute violates the Establishment Clause because it "happens to coincide or harmonize with the tenets of some or all religions." *McGowan* v. *Maryland,* 366 U. S. 420, 442. That the Judaeo-Christian religions oppose stealing does not mean that a State or the Federal Government may not, consistent with the Establishment Clause, enact laws prohibiting larceny. *Ibid.* The Hyde Amendment, as the District Court noted, is as much a reflection of "traditionalist" values towards abortion, as it is an embodiment of the views of any particular religion. 491 F. Supp., at 741. See also *Roe* v. *Wade,* 410 U. S., at 138–141. In sum, we are convinced that the fact that the funding restrictions in the

Hyde Amendment may coincide with the religious tenets of the Roman Catholic Church does not, without more, contravene the Establishment Clause.

2

We need not address the merits of the appellees' arguments concerning the Free Exercise Clause, because the appellees lack standing to raise a free exercise challenge to the Hyde Amendment. The named appellees fall into three categories: (1) the indigent pregnant women who sued on behalf of other women similarly situated, (2) the two officers of the Women's Division, and (3) the Women's Division itself.[22] The named appellees in the first category lack standing to challenge the Hyde Amendment on free exercise grounds because none alleged, much less proved, that she sought an abortion under compulsion of religious belief.[23] See *McGowan* v. *Maryland*, *supra*, at 429. Although the named appellees in the second category did provide a detailed description of their religious beliefs, they failed to allege either that they are or expect to be pregnant or that they are eligible to receive Medicaid. These named appellees, therefore, lack the personal stake in the controversy needed to confer standing to raise such a challenge to the Hyde Amendment. See *Warth* v. *Seldin*, 422 U. S. 490, 498–499.

Finally, although the Women's Division alleged that its

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[22] The remaining named appellees, including the individual physicians and the New York City Health and Hospitals Corp., did not attack the Hyde Amendment on the basis of the Free Exercise Clause of the First Amendment.

[23] These named appellees sued on behalf of the class of "women of all religious and nonreligious persuasions and beliefs who have, in accordance with the teaching of their religion and/or the dictates of their conscience determined that an abortion is necessary." But since we conclude below that the named appellees have not established their own standing to sue, "[t]hey cannot represent a class of whom they are not a part." *Bailey* v. *Patterson*, 369 U. S. 31, 32–33. See also *O'Shea* v. *Littleton*, 414 U. S. 488, 494–495.

membership includes "pregnant Medicaid eligible women who, as a matter of religious practice and in accordance with their conscientious beliefs, would choose but are precluded or discouraged from obtaining abortions reimbursed by Medicaid because of the Hyde Amendment," the Women's Division does not satisfy the standing requirements for an organization to assert the rights of its membership. One of those requirements is that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt* v. *Washington Apple Advertising Comm'n,* 432 U. S. 333, 343. Since "it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion," *Abington School Dist.* v. *Schempp,* 374 U. S. 203, 223, the claim asserted here is one that ordinarily requires individual participation.[24] In the present case, the Women's Division concedes that "the permissibility, advisability and/or necessity of abortion according to circumstance is a matter about which there is diversity of view within . . . our membership, and is a determination which must be ultimately and absolutely entrusted to the conscience of the individual before God." It is thus clear that the participation of individual members of the Women's Division is essential to a proper understanding and resolution of their free exercise claims. Accordingly, we conclude that the Women's Division, along with the other named appellees, lack standing to challenge the Hyde Amendment under the Free Exercise Clause.

C

It remains to be determined whether the Hyde Amendment violates the equal protection component of the Fifth Amendment. This challenge is premised on the fact that, although

[24] For example, in *Board of Education* v. *Allen,* 392 U. S. 236, 249, the Court found no free exercise violation since the plaintiffs had "not contended that the [statute in question] in any way coerce[d] them *as individuals* in the practice of their religion." (Emphasis added.)

federal reimbursement is available under Medicaid for medically necessary services generally, the Hyde Amendment does not permit federal reimbursement of all medically necessary abortions. The District Court held, and the appellees argue here, that this selective subsidization violates the constitutional guarantee of equal protection.

The guarantee of equal protection under the Fifth Amendment is not a source of substantive rights or liberties,[25] but rather a right to be free from invidious discrimination in statutory classifications and other governmental activity. It is well settled that where a statutory classification does not itself impinge on a right or liberty protected by the Constitution, the validity of classification must be sustained unless "the classification rests on grounds wholly irrelevant to the achievement of [any legitimate governmental] objective." *McGowan* v. *Maryland,* 366 U. S., at 425. This presumption of constitutional validity, however, disappears if a statutory classification is predicated on criteria that are, in a constitutional sense, "suspect," the principal example of which is a classification based on race, *e. g., Brown* v. *Board of Education,* 347 U. S. 483.

1

For the reasons stated above, we have already concluded that the Hyde Amendment violates no constitutionally protected substantive rights. We now conclude as well that it is not predicated on a constitutionally suspect classification. In reaching this conclusion, we again draw guidance from the Court's decision in *Maher* v. *Roe.* As to whether the Con-

[25] An exception to this statement is to be found in *Reynolds* v. *Sims,* 377 U. S. 533, and its progeny. Although the Constitution of the United States does not confer the right to vote in state elections, see *Minor* v. *Happersett,* 21 Wall. 162, 178, *Reynolds* held that if a State adopts an electoral system, the Equal Protection Clause of the Fourteenth Amendment confers upon a qualified voter a substantive right to participate in the electoral process equally with other qualified voters. See, *e. g., Dunn* v. *Blumstein,* 405 U. S. 330, 336.

necticut welfare regulation providing funds for childbirth but not for nontherapeutic abortions discriminated against a suspect class, the Court in *Maher* observed:

> "An indigent woman desiring an abortion does not come within the limited category of disadvantaged classes so recognized by our cases. Nor does the fact that the impact of the regulation falls upon those who cannot pay lead to a different conclusion. In a sense, every denial of welfare to an indigent creates a wealth classification as compared to nonindigents who are able to pay for the desired goods or services. But this Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis." 432 U. S., at 470–471, citing *San Antonio School Dist.* v. *Rodriguez,* 411 U. S. 1, 29; *Dandridge* v. *Williams,* 397 U. S. 471.

Thus, the Court in *Maher* found no basis for concluding that the Connecticut regulation was predicated on a suspect classification.

It is our view that the present case is indistinguishable from *Maher* in this respect. Here, as in *Maher,* the principal impact of the Hyde Amendment falls on the indigent. But that fact does not itself render the funding restriction constitutionally invalid, for this Court has held repeatedly that poverty, standing alone, is not a suspect classification. See, *e. g., James* v. *Valtierra,* 402 U. S. 137. That *Maher* involved the refusal to fund nontherapeutic abortions, whereas the present case involves the refusal to fund medically necessary abortions, has no bearing on the factors that render a classification "suspect" within the meaning of the constitutional guarantee of equal protection.[26]

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[26] Although the matter is not free from doubt, the District Court seems to have concluded that teenage women desiring medically necessary abortions constitute a "suspect class" for purposes of triggering a heightened level of equal protection scrutiny. In this regard, the District Court observed that the Hyde Amendment "clearly operate[s] to the disadvan-

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The remaining question then is whether the Hyde Amendment is rationally related to a legitimate governmental objective. It is the Government's position that the Hyde Amendment bears a rational relationship to its legitimate interest in protecting the potential life of the fetus. We agree.

In *Wade*, the Court recognized that the State has an "important and legitimate interest in protecting the potentiality of human life." 410 U. S., at 162. That interest was found to exist throughout a pregnancy, "grow[ing] in substantiality as the woman approaches term." *Id.*, at 162–163. See also *Beal* v. *Doe*, 432 U. S., at 445–446. Moreover, in *Maher*, the Court held that Connecticut's decision to fund the costs associated with childbirth but not those associated with nontherapeutic abortions was a rational means of advancing the legitimate state interest in protecting potential life by

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tage of one suspect class, that is to the disadvantage of the statutory class of adolescents at a high risk of pregnancy . . . , and particularly those seventeen and under." 491 F. Supp., at 738. The "statutory" class to which the District Court was referring is derived from the Adolescent Health Services and Pregnancy Prevention and Care Act, 42 U. S. C. § 300a–21 *et seq.* (1976 ed., Supp. II). It was apparently the view of the District Court that since statistics indicate that women under 21 years of age are disproportionately represented among those for whom an abortion is medically necessary, the Hyde Amendment invidiously discriminates against teenage women.

But the Hyde Amendment is facially neutral as to age, restricting funding for abortions for women of all ages. The District Court erred, therefore, in relying solely on the disparate impact of the Hyde Amendment in concluding that it discriminated on the basis of age. The equal protection component of the Fifth Amendment prohibits only purposeful discrimination, *Washington* v. *Davis*, 426 U. S. 229, and when a facially neutral federal statute is challenged on equal protection grounds, it is incumbent upon the challenger to prove that Congress "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256, 279. There is no evidence to support such a finding of intent in the present case.

encouraging childbirth. 432 U. S., at 478–479. See also *Poelker* v. *Doe*, 432 U. S. 519, 520–521.

It follows that the Hyde Amendment, by encouraging childbirth except in the most urgent circumstances, is rationally related to the legitimate governmental objective of protecting potential life. By subsidizing the medical expenses of indigent women who carry their pregnancies to term while not subsidizing the comparable expenses of women who undergo abortions (except those whose lives are threatened),[27] Congress has established incentives that make childbirth a more attractive alternative than abortion for persons eligible for Medicaid. These incentives bear a direct relationship to the legitimate congressional interest in protecting potential life. Nor is it irrational that Congress has authorized federal reimbursement for medically necessary services generally, but not for certain medically necessary abortions.[28] Abortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life.

After conducting an extensive evidentiary hearing into issues surrounding the public funding of abortions, the District Court concluded that "[t]he interests of . . . the federal government . . . in the fetus and in preserving it are not sufficient, weighed in the balance with the woman's threatened health, to justify withdrawing medical assistance unless the

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[27] We address here the constitutionality of the most restrictive version of the Hyde Amendment, namely, that applicable in fiscal year 1976 under which federal funds were unavailable for abortions "except where the life of the mother would be endangered if the fetus were carried to term." Three versions of the Hyde Amendment are at issue in this case. If the most restrictive version is constitutionally valid, so too are the others.

[28] In fact, abortion is not the only "medically necessary" service for which federal funds under Medicaid are sometimes unavailable to otherwise eligible claimants. See 42 U. S. C. § 1396d (a)(17)(B) (inpatient hospital care of patients between 21 and 65 in institutions for tuberculosis or mental disease not covered by Title XIX).

woman consents . . . to carry the fetus to term." 491 F. Supp., at 737. In making an independent appraisal of the competing interests involved here, the District Court went beyond the judicial function. Such decisions are entrusted under the Constitution to Congress, not the courts. It is the role of the courts only to ensure that congressional decisions comport with the Constitution.

Where, as here, the Congress has neither invaded a substantive constitutional right or freedom, nor enacted legislation that purposefully operates to the detriment of a suspect class, the only requirement of equal protection is that congressional action be rationally related to a legitimate governmental interest. The Hyde Amendment satisfies that standard. It is not the mission of this Court or any other to decide whether the balance of competing interests reflected in the Hyde Amendment is wise social policy. If that were our mission, not every Justice who has subscribed to the judgment of the Court today could have done so. But we cannot, in the name of the Constitution, overturn duly enacted statutes simply "because they may be unwise, improvident, or out of harmony with a particular school of thought." *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 488, quoted in *Dandridge* v. *Williams*, 397 U. S., at 484. Rather, "when an issue involves policy choices as sensitive as those implicated [here] . . . , the appropriate forum for their resolution in a democracy is the legislature." *Maher* v. *Roe, supra,* at 479.

IV

For the reasons stated in this opinion, we hold that a State that participates in the Medicaid program is not obligated under Title XIX to continue to fund those medically necessary abortions for which federal reimbursement is unavailable under the Hyde Amendment. We further hold that the funding restrictions of the Hyde Amendment violate neither the Fifth Amendment nor the Establishment Clause of the First Amendment. It is also our view that the appellees

lack standing to raise a challenge to the Hyde Amendment under the Free Exercise Clause of the First Amendment. Accordingly, the judgment of the District Court is reversed, and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE WHITE, concurring.

I join the Court's opinion and judgment with these additional remarks.

Roe v. *Wade*, 410 U. S. 113 (1973), held that prior to viability of the fetus, the governmental interest in potential life was insufficient to justify overriding the due process right of a pregnant woman to terminate her pregnancy by abortion. In the last trimester, however, the State's interest in fetal life was deemed sufficiently strong to warrant a ban on abortions, but only if continuing the pregnancy did not threaten the life or health of the mother. In the latter event, the State was required to respect the choice of the mother to terminate the pregnancy and protect her health.

Drawing upon *Roe* v. *Wade* and the cases that followed it, MR. JUSTICE STEVENS' dissent extrapolates the general proposition that the governmental interest in potential life may in no event be pursued at the expense of the mother's health. It then notes that under the Hyde Amendment, Medicaid refuses to fund abortions where carrying to term threatens maternal health but finances other medically indicated procedures, including childbirth. The dissent submits that the Hyde Amendment therefore fails the first requirement imposed by the Fifth Amendment and recognized by the Court's opinion today—that the challenged official action must serve a legitimate governmental goal, *ante*, at 324.

The argument has a certain internal logic, but it is not legally sound. The constitutional right recognized in *Roe* v. *Wade* was the right to choose to undergo an abortion without coercive interference by the government. As the Court

points out, *Roe* v. *Wade* did not purport to adjudicate a right to have abortions funded by the government, but only to be free from unreasonable official interference with private choice. At an appropriate stage in a pregnancy, for example, abortions could be prohibited to implement the governmental interest in potential life, but in no case to the damage of the health of the mother, whose choice to suffer an abortion rather than risk her health the government was forced to respect.

Roe v. *Wade* thus dealt with the circumstances in which the governmental interest in potential life would justify official interference with the abortion choices of pregnant women. There is no such calculus involved here. The Government does not seek to interfere with or to impose any coercive restraint on the choice of any woman to have an abortion. The woman's choice remains unfettered, the Government is not attempting to use its interest in life to justify a coercive restraint, and hence in disbursing its Medicaid funds it is free to implement rationally what *Roe* v. *Wade* recognized to be its legitimate interest in a potential life by covering the medical costs of childbirth but denying funds for abortions. Neither *Roe* v. *Wade* nor any of the cases decided in its wake invalidates this legislative preference. We decided as much in *Maher* v. *Roe,* 432 U. S. 464 (1977), when we rejected the claims that refusing funds for nontherapeutic abortions while defraying the medical costs of childbirth, although not an outright prohibition, nevertheless infringed the fundamental right to choose to terminate a pregnancy by abortion and also violated the equal protection component of the Fifth Amendment. I would not abandon *Maher* and extend *Roe* v. *Wade* to forbid the legislative policy expressed in the Hyde Amendment.

Nor can *Maher* be successfully distinguished on the ground that it involved only nontherapeutic abortions that the Government was free to place outside the ambit of its Medicaid program. That is not the ground on which *Maher* pro-

ceeded. *Maher* held that the government need not fund elective abortions because withholding funds rationally furthered the State's legitimate interest in normal childbirth. We sustained this policy even though under *Roe* v. *Wade*, the government's interest in fetal life is an inadequate justification for coercive interference with the pregnant woman's right to choose an abortion, whether or not such a procedure is medically indicated. We have already held, therefore, that the interest balancing involved in *Roe* v. *Wade* is not controlling in resolving the present constitutional issue. Accordingly, I am satisfied that the straightforward analysis followed in MR. JUSTICE STEWART's opinion for the Court is sound.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL and MR. JUSTICE BLACKMUN join, dissenting.*

I agree entirely with my Brother STEVENS that the State's interest in protecting the potential life of the fetus cannot justify the exclusion of financially and medically needy women from the benefits to which they would otherwise be entitled solely because the treatment that a doctor has concluded is medically necessary involves an abortion. See *post*, at 351–352. I write separately to express my continuing disagreement [1] with the Court's mischaracterization of the nature of the fundamental right recognized in *Roe* v. *Wade*, 410 U. S. 113 (1973), and its misconception of the manner in which that right is infringed by federal and state legislation withdrawing all funding for medically necessary abortions.

Roe v. *Wade* held that the constitutional right to personal privacy encompasses a woman's decision whether or not to

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*[This opinion applies also to No. 79–4, *Williams et al.* v. *Zbaraz et al.*, No. 79–5, *Miller, Acting Director, Illinois Department of Public Aid, et al.* v. *Zbaraz et al.*, and No. 79–491, *United States* v. *Zbaraz et al.*, *post*, p. 358.]

[1] See *Maher* v. *Roe*, 432 U. S. 464, 482–490 (1977) (BRENNAN, J., dissenting).

terminate her pregnancy. *Roe* and its progeny[2] established that the pregnant woman has a right to be free from state interference with her choice to have an abortion—a right which, at least prior to the end of the first trimester, absolutely prohibits any governmental regulation of that highly personal decision.[3] The proposition for which these cases stand thus is not that the State is under an affirmative obligation to ensure access to abortions for all who may desire them; it is that the State must refrain from wielding its enormous power and influence in a manner that might burden the pregnant woman's freedom to choose whether to have an abortion. The Hyde Amendment's denial of public funds for medically necessary abortions plainly intrudes upon this constitutionally protected decision, for both by design and in effect it serves to coerce indigent pregnant women to bear children that they would otherwise elect not to have.[4]

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[2] *E. g., Doe* v. *Bolton*, 410 U. S. 179 (1973); *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S. 52 (1976); *Singleton* v. *Wulff*, 428 U. S. 106 (1976); *Bellotti* v. *Baird*, 443 U. S. 622 (1979); cf. *Carey* v. *Population Services International*, 431 U. S. 678 (1977).

[3] After the first trimester, the State, in promoting its interest in the mother's health, may regulate the abortion *procedure* in ways that are reasonably related to that end. And even after the point of viability is reached, state regulation in furtherance of its interest in the potentiality of human life may not go so far as to proscribe abortions that are necessary to preserve the life or health of the mother. See *Roe* v. *Wade*, 410 U. S. 113, 164–165 (1973).

[4] My focus throughout this opinion is upon the coercive impact of the congressional decision to fund one outcome of pregnancy—childbirth—while not funding the other—abortion. Because I believe this alone renders the Hyde Amendment unconstitutional, I do not dwell upon the other disparities that the Amendment produces in the treatment of rich and poor, pregnant and nonpregnant. I concur completely, however, in my Brother STEVENS' discussion of those disparities. Specifically, I agree that the congressional decision to fund all medically necessary procedures except for those that require an abortion is entirely irrational either as a means of allocating health-care resources or otherwise serving legitimate social welfare goals. And that irrationality in turn exposes the Amend-

When viewed in the context of the Medicaid program to which it is appended, it is obvious that the Hyde Amendment is nothing less than an attempt by Congress to circumvent the dictates of the Constitution and achieve indirectly what *Roe* v. *Wade* said it could not do directly.[5] Under Title XIX of the Social Security Act, the Federal Government reimburses participating States for virtually all medically necessary services it provides to the categorically needy. The sole limitation of any significance is the Hyde Amendment's prohibition against the use of any federal funds to pay for the

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ment for what it really is—a deliberate effort to discourage the exercise of a constitutionally protected right.

It is important to put this congressional decision in human terms. Nonpregnant women may be reimbursed for all medically necessary treatments. Pregnant women with analogous ailments, however, will be reimbursed only if the treatment involved does not happen to include an abortion. Since the refusal to fund will in some significant number of cases force the patient to forgo medical assistance, the result is to refuse treatment for some genuine maladies not because they need not be treated, cannot be treated, or are too expensive to treat, and not because they relate to a deliberate choice to abort a pregnancy, but merely because treating them would as a practical matter require termination of that pregnancy. Even were one of the view that legislative hostility to abortions could justify a decision to fund obstetrics and child delivery services while refusing to fund nontherapeutic abortions, the present statutory scheme could not be saved. For here, that hostility has gone a good deal farther. Its consequence is to leave indigent sick women without treatment simply because of the medical fortuity that their illness cannot be treated unless their pregnancy is terminated. Antipathy to abortion, in short, has been permitted not only to ride roughshod over a woman's constitutional right to terminate her pregnancy in the fashion she chooses, but also to distort our Nation's health-care programs. As a means of delivering health services, then, the Hyde Amendment is completely irrational. As a means of preventing abortions, it is concededly rational—brutally so. But this latter goal is constitutionally forbidden.

[5] Cf. *Singleton* v. *Wulff*, *supra*, at 118–119, n. 7:

"For a doctor who cannot afford to work for nothing, and a woman who cannot afford to pay him, the State's refusal to fund an abortion is as effective an 'interdiction' of it as would ever be necessary."

costs of abortions (except where the life of the mother would be endangered if the fetus were carried to term). As my Brother STEVENS persuasively demonstrates, exclusion of medically necessary abortions from Medicaid coverage cannot be justified as a cost-saving device. Rather, the Hyde Amendment is a transparent attempt by the Legislative Branch to impose the political majority's judgment of the morally acceptable and socially desirable preference on a sensitive and intimate decision that the Constitution entrusts to the individual. Worse yet, the Hyde Amendment does not foist that majoritarian viewpoint with equal measure upon everyone in our Nation, rich and poor alike; rather, it imposes that viewpoint only upon that segment of our society which, because of its position of political powerlessness, is least able to defend its privacy rights from the encroachments of state-mandated morality. The instant legislation thus calls for more exacting judicial review than in most other cases. "When elected leaders cower before public pressure, this Court, more than ever, must not shirk its duty to enforce the Constitution for the benefit of the poor and powerless." *Beal* v. *Doe*, 432 U. S. 438, 462 (1977) (MARSHALL, J., dissenting). Though it may not be this Court's mission "to decide whether the balance of competing interests reflected in the Hyde Amendment is wise social policy," *ante*, at 326, it most assuredly is our responsibility to vindicate the pregnant woman's constitutional right to decide whether to bear children free from governmental intrusion.

Moreover, it is clear that the Hyde Amendment not only was designed to inhibit, but does in fact inhibit the woman's freedom to choose abortion over childbirth. "Pregnancy is unquestionably a condition requiring medical services. . . . Treatment for the condition may involve medical procedures for its termination, or medical procedures to bring the pregnancy to term, resulting in a live birth. '[A]bortion and childbirth, when stripped of the sensitive moral arguments surrounding the abortion controversy, are simply two alter-

native medical methods of dealing with pregnancy. . . .'" *Beal* v. *Doe, supra*, at 449 (BRENNAN, J., dissenting) (quoting *Roe* v. *Norton*, 408 F. Supp. 660, 663, n. 3 (Conn. 1975)). In every pregnancy, one of these two courses of treatment is medically necessary, and the poverty-stricken woman depends on the Medicaid Act to pay for the expenses associated with that procedure. But under the Hyde Amendment, the Government will fund only those procedures incidental to childbirth. By thus injecting coercive financial incentives favoring childbirth into a decision that is constitutionally guaranteed to be free from governmental intrusion, the Hyde Amendment deprives the indigent woman of her freedom to choose abortion over maternity, thereby impinging on the due process liberty right recognized in *Roe* v. *Wade*.

The Court's contrary conclusion is premised on its belief that "[t]he financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency." *Ante*, at 316. Accurate as this statement may be, it reveals only half the picture. For what the Court fails to appreciate is that it is not simply the woman's indigency that interferes with her freedom of choice, but the combination of her own property and the Government's unequal subsidization of abortion and childbirth.

A poor woman in the early stages of pregnancy confronts two alternatives: she may elect either to carry the fetus to term or to have an abortion. In the abstract, of course, this choice is hers alone, and the Court rightly observes that the Hyde Amendment "places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy." *Ante*, at 315. But the reality of the situation is that the Hyde Amendment has effectively removed this choice from the indigent woman's hands. By funding all of the expenses associated with childbirth and none of the expenses incurred in terminating pregnancy, the Government literally makes an

offer that the indigent woman cannot afford to refuse. It matters not that in this instance the Government has used the carrot rather than the stick. What is critical is the realization that as a practical matter, many poverty-stricken women will choose to carry their pregnancy to term simply because the Government provides funds for the associated medical services, even though these same women would have chosen to have an abortion if the Government had also paid for that option, or indeed if the Government had stayed out of the picture altogether and had defrayed the costs of neither procedure.

The fundamental flaw in the Court's due process analysis, then, is its failure to acknowledge that the discriminatory distribution of the benefits of governmental largesse can discourage the exercise of fundamental liberties just as effectively as can an outright denial of those rights through criminal and regulatory sanctions. Implicit in the Court's reasoning is the notion that as long as the Government is not obligated to provide its citizens with certain benefits or privileges, it may condition the grant of such benefits on the recipient's relinquishment of his constitutional rights.

It would belabor the obvious to expound at any great length on the illegitimacy of a state policy that interferes with the exercise of fundamental rights through the selective bestowal of governmental favors. It suffices to note that we have heretofore never hesitated to invalidate any scheme of granting or withholding financial benefits that incidentally or intentionally burdens one manner of exercising a constitutionally protected choice. To take but one example of many, *Sherbert* v. *Verner*, 374 U. S. 398 (1963), involved a South Carolina unemployment insurance statute that required recipients to accept suitable employment when offered, even if the grounds for refusal stemmed from religious convictions. Even though the recipients possessed no entitlement to compensation, the Court held that the State could not cancel the

benefits of a Seventh-Day Adventist who had refused a job requiring her to work on Saturdays. The Court's explanation is particularly instructive for the present case:

> "Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.
>
> "Nor may the South Carolina court's construction of the statute be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant's 'right' but merely a 'privilege.' It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege. . . . [T]o condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties." *Id.*, at 404–406.

See also *Frost & Frost Trucking Co.* v. *Railroad Comm'n*, 271 U. S. 583 (1926); *Speiser* v. *Randall*, 357 U. S. 513 (1958); *Elfbrandt* v. *Russell*, 384 U. S. 11 (1966); *Goldberg* v. *Kelly*, 397 U. S. 254 (1970); *U. S. Dept. of Agriculture* v. *Moreno*, 413 U. S. 528 (1973); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546 (1975). Cf. *Shapiro* v. *Thompson*, 394 U. S. 618 (1969); *Memorial Hospital* v. *Maricopa County*, 415 U. S. 250 (1974).

The Medicaid program cannot be distinguished from these other statutory schemes that unconstitutionally burdened

fundamental rights.[6] Here, as in *Sherbert*, the government withholds financial benefits in a manner that discourages the exercise of a due process liberty: The indigent woman who chooses to assert her constitutional right to have an abortion can do so only on pain of sacrificing health-care benefits to which she would otherwise be entitled. Over 50 years ago, Mr. Justice Sutherland, writing for the Court in *Frost & Frost Trucking Co.* v. *Railroad Comm'n, supra,* at 593–594, made the following observation, which is as true now as it was then:

> "It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by

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[6] The Court rather summarily rejects the argument that the Hyde Amendment unconstitutionally penalizes the woman's exercise of her right to choose an abortion with the comment that "[a] refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity." *Ante,* at 317, n. 19. To begin with, the Court overlooks the fact that there is "more" than a simple refusal to fund a protected activity in this case; instead, there is a program that selectively funds but one of two choices of a constitutionally protected decision, thereby penalizing the election of the disfavored option.

Moreover, it is no answer to assert that no "penalty" is being imposed because the State is only refusing to pay for the specific costs of the protected activity rather than withholding other Medicaid benefits to which the recipient would be entitled or taking some other action more readily characterized as "punitive." Surely the Government could not provide free transportation to the polling booths only for those citizens who vote for Democratic candidates, even though the failure to provide the same benefit to Republicans "represents simply a refusal to subsidize certain protected conduct," *ibid.*, and does not involve the denial of any other governmental benefits. Whether the State withholds only the special costs of a disfavored option or penalizes the individual more broadly for the manner in which she exercises her choice, it cannot interfere with a constitutionally protected decision through the coercive use of governmental largesse.

which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."

I respectfully dissent.

MR. JUSTICE MARSHALL, dissenting.*

Three years ago, in *Maher* v. *Roe*, 432 U. S. 464 (1977), the Court upheld a state program that excluded nontherapeutic abortions from a welfare program that generally subsidized the medical expenses incidental to pregnancy and childbirth. At that time, I expressed my fear "that the Court's decisions will be an invitation to public officials, already under extraordinary pressure from well-financed and carefully orchestrated lobbying campaigns, to approve more such restrictions" on governmental funding for abortion. *Id.*, at 462 (dissenting in both *Maher* v. *Roe*, *supra*, and *Beal* v. *Doe*, 432 U. S. 438 (1977), and *Poelker* v. *Doe*, 432 U. S. 519 (1977)).

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*[This opinion applies also to No. 79-4, *Williams et al.* v. *Zbaraz et al.*, No. 79-5, *Miller, Acting Director, Illinois Department of Public Aid, et al.* v. *Zbaraz et al.*, and No. 79-491, *United States* v. *Zbaraz et al.*, *post*, p. 358.]

That fear has proved justified. Under the Hyde Amendment, federal funding is denied for abortions that are medically necessary and that are necessary to avert severe and permanent damage to the health of the mother. The Court's opinion studiously avoids recognizing the undeniable fact that for women eligible for Medicaid—poor women—denial of a Medicaid-funded abortion is equivalent to denial of legal abortion altogether. By definition, these women do not have the money to pay for an abortion themselves. If abortion is medically necessary and a funded abortion is unavailable, they must resort to back-alley butchers, attempt to induce an abortion themselves by crude and dangerous methods, or suffer the serious medical consequences of attempting to carry the fetus to term. Because legal abortion is not a realistic option for such women, the predictable result of the Hyde Amendment will be a significant increase in the number of poor women who will die or suffer significant health damage because of an inability to procure necessary medical services.

The legislation before us is the product of an effort to deny to the poor the constitutional right recognized in *Roe* v. *Wade*, 410 U. S. 113 (1973), even though the cost may be serious and long-lasting health damage. As my Brother STEVENS has demonstrated, see *post*, p. 349 (dissenting opinion), the premise underlying the Hyde Amendment was repudiated in *Roe* v. *Wade*, where the Court made clear that the state interest in protecting fetal life cannot justify jeopardizing the life or health of the mother. The denial of Medicaid benefits to individuals who meet all the statutory criteria for eligibility, solely because the treatment that is medically necessary involves the exercise of the fundamental right to chose abortion, is a form of discrimination repugnant to the equal protection of the laws guaranteed by the Constitution. The Court's decision today marks a retreat from *Roe* v. *Wade* and represents a cruel blow to the most powerless members of our society. I dissent.

I

In its present form, the Hyde Amendment restricts federal funding for abortion to cases in which "the life of the mother would be endangered if the fetus were carried to term" and "for such medical procedures necessary for the victims of rape or incest when such rape or incest has been reported promptly to a law enforcement agency or public health service." See *ante*, at 302. Federal funding is thus unavailable even when severe and long-lasting health damage to the mother is a virtual certainty. Nor are federal funds available when severe health damage, or even death, will result to the fetus if it is carried to term.

The record developed below reveals that the standards set forth in the Hyde Amendment exclude the majority of cases in which the medical profession would recommend abortion as medically necessary. Indeed, in States that have adopted a standard more restrictive than the "medically necessary" test of the Medicaid Act, the number of funded abortions has decreased by over 98%. App. 289.

The impact of the Hyde Amendment on indigent women falls into four major categories. First, the Hyde Amendment prohibits federal funding for abortions that are necessary in order to protect the health and sometimes the life of the mother. Numerous conditions—such as cancer, rheumatic fever, diabetes, malnutrition, phlebitis, sickle cell anemia, and heart disease—substantially increase the risks associated with pregnancy or are themselves aggravated by pregnancy. Such conditions may make an abortion medically necessary in the judgment of a physician, but cannot be funded under the Hyde Amendment. Further, the health risks of undergoing an abortion increase dramatically as pregnancy becomes more advanced. By the time a pregnancy has progressed to the point where a physician is able to certify that it endangers the life of the mother, it is in many cases too late to prevent her death because abortion is no

longer safe. There are also instances in which a woman's life will not be immediately threatened by carrying the pregnancy to term, but aggravation of another medical condition will significantly shorten her life expectancy. These cases as well are not fundable under the Hyde Amendment.

Second, federal funding is denied in cases in which severe mental disturbances will be created by unwanted pregnancies. The result of such psychological disturbances may be suicide, attempts at self-abortion, or child abuse. The Hyde Amendment makes no provision for funding in such cases.

Third, the Hyde Amendment denies funding for the majority of women whose pregnancies have been caused by rape or incest. The prerequisite of a report within 60 days serves to exclude those who are afraid of recounting what has happened or are in fear of unsympathetic treatment by the authorities. Such a requirement is, of course, especially burdensome for the indigent, who may be least likely to be aware that a rapid report to the authorities is indispensable in order for them to be able to obtain an abortion.

Finally, federal funding is unavailable in cases in which it is known that the fetus itself will be unable to survive. In a number of situations it is possible to determine in advance that the fetus will suffer an early death if carried to term. The Hyde Amendment, purportedly designed to safeguard "the legitimate governmental objective of protecting potential life," *ante*, at 325, excludes federal funding in such cases.

An optimistic estimate indicates that as many as 100 excess deaths may occur each year as a result of the Hyde Amendment.[1] The record contains no estimate of the health damage that may occur to poor women, but it shows that it will be considerable.[2]

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[1] See App. 294–296.

[2] For example, the risk of serious complications deriving from abortions were estimated to be about 100 times the number of deaths from abortions. See *id.*, at 200.

II

The Court resolves the equal protection issue in this case through a relentlessly formalistic catechism. Adhering to its "two-tiered" approach to equal protection, the Court first decides that so-called strict scrutiny is not required because the Hyde Amendment does not violate the Due Process Clause and is not predicated on a constitutionally suspect classification. Therefore, "the validity of classification must be sustained unless 'the classification rests on grounds wholly irrelevant to the achievement of [any legitimate governmental] objective.'" *Ante*, at 322 (bracketed material in original), quoting *McGowan* v. *Maryland*, 366 U. S. 420, 425 (1961). Observing that previous cases have recognized "the legitimate governmental objective of protecting potential life," *ante*, at 325, the Court concludes that the Hyde Amendment "establishe[s] incentives that make childbirth a more attractive alternative than abortion for persons eligible for Medicaid," *ibid.*, and is therefore rationally related to that governmental interest.

I continue to believe that the rigid "two-tiered" approach is inappropriate and that the Constitution requires a more exacting standard of review than mere rationality in cases such as this one. Further, in my judgment the Hyde Amendment cannot pass constitutional muster even under the rational-basis standard of review.

A

This case is perhaps the most dramatic illustration to date of the deficiencies in the Court's obsolete "two-tiered" approach to the Equal Protection Clause. See *San Antonio School Dist.* v. *Rodriguez*, 411 U. S 1, 98–110 (1973) (MARSHALL, J., dissenting); *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U. S. 307, 318–321 (1976) (MARSHALL, J., dissenting); *Maher* v. *Roe*, 432 U. S., at 457–458 (MARSHALL, J., dissenting); *Vance* v. *Bradley*, 440 U. S. 93, 113–115 (1979)

(MARSHALL, J., dissenting).[3] With all deference, I am unable to understand how the Court can afford the same level of scrutiny to the legislation involved here—whose cruel impact falls exclusively on indigent pregnant women—that it has given to legislation distinguishing opticians from opthalmologists, or to other legislation that makes distinctions between economic interests more than able to protect themselves in the political process. See *ante*, at 326, citing *Williamson* v. *Lee Optical Co.*, 348 U. S. 483 (1955). Heightened scrutiny of legislative classifications has always been designed to protect groups "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio School Dist.* v. *Rodriguez, supra*, at 28.[4] And while it is now clear that traditional "strict scrutiny" is unavailable to protect the poor against classifications that disfavor them, *Dandridge* v. *Williams*, 397 U. S. 471 (1970), I do not believe that legislation that imposes a crushing burden on indigent women can be treated with the same deference given to legislation distinguishing among business interests.

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[3] A number of individual Justices have expressed discomfort with the two-tiered approach, and I am pleased to observe that its hold on the law may be waning. See *Craig* v. *Boren*, 429 U. S. 190, 210–211, and n. * (1976) (POWELL, J., concurring); *id.*, at 211–212 (STEVENS, J., concurring); *post*, at 352, n. 4 (STEVENS, J., dissenting). Further, the Court has adopted an "intermediate" level of scrutiny for a variety of classifications. See *Trimble* v. *Gordon*, 430 U. S. 762 (1977) (illegitimacy); *Craig* v. *Boren, supra* (sex discrimination); *Foley* v. *Connelie*, 435 U. S. 291 (1978) (alienage). Cf. *University of California Regents* v. *Bakke*, 438 U. S. 265, 324 (1978) (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.) (affirmative action).

[4] For this reason the Court has on occasion suggested that classifications discriminating against the poor are subject to special scrutiny under the Fifth and Fourteenth Amendments. See *McDonald* v. *Board of Election*, 394 U. S. 802, 807 (1969); *Harper* v. *Virginia Bd. of Elections*, 383 U. S. 663, 668 (1966).

B

The Hyde Amendment, of course, distinguishes between medically necessary abortions and other medically necessary expenses.[5] As I explained in *Maher* v. *Roe, supra,* such classifications must be assessed by weighing " 'the importance of the governmental benefits denied, the character of the class, and the asserted state interests,' " *id.,* at 458, quoting *Massachusetts Bd. of Retirement* v. *Murgia, supra,* at 322. Under that approach, the Hyde Amendment is clearly invalid.[6]

As in *Maher,* the governmental benefits at issue here are "of absolutely vital importance in the lives of the recipients." *Maher* v. *Roe, supra,* at 458 (MARSHALL, J., dissenting). An indigent woman denied governmental funding for a medically necessary abortion is confronted with two grotesque choices. First, she may seek to obtain "an illegal abortion that poses a serious threat to her health and even her life." 432 U. S., at 458. Alternatively, she may attempt to bear the child, a course that may both significantly threaten her health and eliminate any chance she might have had "to control the direction of her own life," *id.,* at 459.

The class burdened by the Hyde Amendment consists of indigent women, a substantial proportion of whom are members of minority races. As I observed in *Maher,* nonwhite women obtain abortions at nearly double the rate of whites, *ibid.* In my view, the fact that the burden of the Hyde Amendment falls exclusively on financially destitute women

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[5] As my Brother STEVENS suggests, see *post,* at 355, n. 8 (dissenting opinion), the denial of funding for those few medically necessary services that are excluded from the Medicaid program is based on a desire to conserve federal funds, not on a desire to penalize those who suffer the excluded disabilities.

[6] In practical effect, my approach is not in this context dissimilar to that taken in *Craig* v. *Boren, supra,* at 197, where the Court referred to an intermediate standard of review requiring that classifications "must serve important governmental objectives and must be substantially related to achievement of those objectives."

suggests "a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *United States* v. *Carolene Products Co.*, 304 U. S. 144, 153, n. 4 (1938). For this reason, I continue to believe that "a showing that state action has a devastating impact on the lives of minority racial groups must be relevant" for purposes of equal protection analysis. *Jefferson* v. *Hackney*, 406 U. S. 535, 575–576 (1972) (MARSHALL, J., dissenting).

As I explained in *Maher*, the asserted state interest in protecting potential life is insufficient to "outweigh the deprivation or serious discouragement of a vital constitutional right of especial importance to poor and minority women." 432 U. S., at 461. In *Maher*, the Court found a permissible state interest in encouraging normal childbirth. *Id.*, at 477–479. The governmental interest in the present case is substantially weaker than in *Maher*, for under the Hyde Amendment funding is refused even in cases in which normal childbirth will not result: one can scarcely speak of "normal childbirth" in cases where the fetus will die shortly after birth, or in which the mother's life will be shortened or her health otherwise gravely impaired by the birth. Nevertheless, the Hyde Amendment denies funding even in such cases. In these circumstances, I am unable to see how even a minimally rational legislature could conclude that the interest in fetal life outweighs the brutal effect of the Hyde Amendment on indigent women. Moreover, both the legislation in *Maher* and the Hyde Amendment were designed to deprive poor and minority women of the constitutional right to choose abortion. That purpose is not constitutionally permitted under *Roe* v. *Wade*.

C

Although I would abandon the strict-scrutiny/rational-basis dichotomy in equal protection analysis, it is by no

means necessary to reject that traditional approach to conclude, as I do, that the Hyde Amendment is a denial of equal protection. My Brother BRENNAN has demonstrated that the Amendment is unconstitutional because it impermissibly infringes upon the individual's constitutional right to decide whether to terminate a pregnancy. See *ante*, at 332–334 (dissenting opinion). And as my Brother STEVENS demonstrates, see *post*, at 350–352 (dissenting opinion), the Government's interest in protecting fetal life is not a legitimate one when it is in conflict with "the preservation of the life or health of the mother," *Roe* v. *Wade*, 410 U. S., at 165, and when the Government's effort to make serious health damage to the mother "a more attractive alternative than abortion," *ante*, at 325, does not rationally promote the governmental interest in encouraging normal childbirth.

The Court treats this case as though it were controlled by *Maher*. To the contrary, this case is the mirror image of *Maher*. The result in *Maher* turned on the fact that the legislation there under consideration discouraged only nontherapeutic, or medically unnecessary, abortions. In the Court's view, denial of Medicaid funding for nontherapeutic abortions was not a denial of equal protection because Medicaid funds were available only for medically necessary procedures. Thus the plaintiffs were seeking benefits which were not available to others similarly situated. I continue to believe that *Maher* was wrongly decided. But it is apparent that while the plaintiffs in *Maher* were seeking a benefit not available to others similarly situated, appellees are protesting their exclusion from a benefit that is available to all others similarly situated. This, it need hardly be said, is a crucial difference for equal protection purposes.

Under Title XIX and the Hyde Amendment, funding is available for essentially all necessary medical treatment for the poor. Appellees have met the statutory requirements for eligibility, but they are excluded because the treatment that is medically necessary involves the exercise of a funda-

mental right, the right to choose an abortion. In short, these appellees have been deprived of a governmental benefit for which they are otherwise eligible, solely because they have attempted to exercise a constitutional right. The interest asserted by the Government, the protection of fetal life, has been declared constitutionally subordinate to appellees' interest in preserving their lives and health by obtaining medically necessary treatment. *Roe* v. *Wade, supra.* And finally, the purpose of the legislation was to discourage the exercise of the fundamental right. In such circumstances the Hyde Amendment must be invalidated because it does not meet even the rational-basis standard of review.

III

The consequences of today's opinion—consequences to which the Court seems oblivious—are not difficult to predict. Pregnant women denied the funding necessary to procure abortions will be restricted to two alternatives. First, they can carry the fetus to term—even though that route may result in severe injury or death to the mother, the fetus, or both. If that course appears intolerable, they can resort to self-induced abortions or attempt to obtain illegal abortions—not because bearing a child would be inconvenient, but because it is necessary in order to protect their health.[7] The result will not be to protect what the Court describes as "the legitimate governmental objective of protecting potential life," *ante,* at 325, but to ensure the destruction of both fetal and maternal life. "There is another world 'out there,' the existence of which the Court . . . either chooses to ignore or fears

[7] Of course, some poor women will attempt to raise the funds necessary to obtain a lawful abortion. A court recently found that those who were fortunate enough to do so had to resort to "not paying rent or utility bills, pawning household goods, diverting food and clothing money, or journeying to another state to obtain lower rates or fraudulently use a relative's insurance policy. . . . [S]ome patients were driven to theft." *Women's Health Services, Inc.* v. *Maher,* 482 F. Supp. 725, 731, n. 9.

to recognize." *Beal* v. *Doe*, 432 U. S., at 463 (BLACKMUN, J., dissenting). In my view, it is only by blinding itself to that other world that the Court can reach the result it announces today.

Ultimately, the result reached today may be traced to the Court's unwillingness to apply the constraints of the Constitution to decisions involving the expenditure of governmental funds. In today's decision, as in *Maher* v. *Roe*, the Court suggests that a withholding of funding imposes no real obstacle to a woman deciding whether to exercise her constitutionally protected procreative choice, even though the Government is prepared to fund all other medically necessary expenses, including the expenses of childbirth. The Court perceives this result as simply a distinction between a "limitation on governmental power" and "an affirmative funding obligation." *Ante*, at 318. For a poor person attempting to exercise her "right" to freedom of choice, the difference is imperceptible. As my Brother BRENNAN has shown, see *ante*, at 332–334 (dissenting opinion), the differential distribution of incentives—which the Court concedes is present here, see *ante*, at 325—can have precisely the same effect as an outright prohibition. It is no more sufficient an answer here than it was in *Roe* v. *Wade* to say that " 'the appropriate forum' " for the resolution of sensitive policy choices is the legislature. See *ante*, at 326, quoting *Maher* v. *Roe*, at 479.

More than 35 years ago, Mr. Justice Jackson observed that the "task of translating the majestic generalities of the Bill of Rights . . . into concrete restraints on officials dealing with the problems of the twentieth century, is one to disturb self-confidence." *West Virginia State Bd. of Education* v. *Barnette*, 319 U. S. 624, 639 (1943). These constitutional principles, he observed for the Court, "grew in soil which also produced a philosophy that the individual['s] . . . liberty was attainable through mere absence of governmental restraints." *Ibid.* Those principles must be "transplant[ed] . . . to a soil in which the *laissez-faire* concept or principle of non-

interference has withered at least as to economic affairs, and social advancements are increasingly sought through closer integration of society and through expanded and strengthened governmental controls." *Id.*, at 640.

In this case, the Federal Government has taken upon itself the burden of financing practically all medically necessary expenditures. One category of medically necessary expenditure has been singled out for exclusion, and the sole basis for the exclusion is a premise repudiated for purposes of constitutional law in *Roe* v. *Wade*. The consequence is a devastating impact on the lives and health of poor women. I do not believe that a Constitution committed to the equal protection of the laws can tolerate this result. I dissent.

MR. JUSTICE BLACKMUN, dissenting.*

I join the dissent of MR. JUSTICE BRENNAN and agree wholeheartedly with his and MR. JUSTICE STEVENS' respective observations and descriptions of what the Court is doing in this latest round of "abortion cases." I need add only that I find what I said in dissent in *Beal* v. *Doe*, 432 U. S. 438, 462 (1977), and its two companion cases, *Maher* v. *Roe*, 432 U. S. 464 (1977), and *Poelker* v. *Doe*, 432 U. S. 519 (1977), continues for me to be equally pertinent and equally applicable in these Hyde Amendment cases. There is "condescension" in the Court's holding that "she may go elsewhere for her abortion"; this is "disingenuous and alarming"; the Government "punitively impresses upon a needy minority its own concepts of the socially desirable, the publicly acceptable, and the morally sound"; the "financial argument, of course, is specious"; there truly is "another world 'out there,' the existence of which the Court, I suspect, either chooses to ignore

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or fears to recognize"; the "cancer of poverty will continue to grow"; and "the lot of the poorest among us," once again, and still, is not to be bettered.

MR. JUSTICE STEVENS, dissenting.*

"The federal sovereign, like the States, must govern impartially. The concept of equal justice under law is served by the Fifth Amendment's guarantee of due process, as well as by the Equal Protection Clause of the Fourteenth Amendment." *Hampton* v. *Mow Sun Wong*, 426 U. S. 88, 100. When the sovereign provides a special benefit or a special protection for a class of persons, it must define the membership in the class by neutral criteria; it may not make special exceptions for reasons that are constitutionally insufficient.

These cases involve the pool of benefits that Congress created by enacting Title XIX of the Social Security Act in 1965. Individuals who satisfy two neutral statutory criteria—financial need and medical need—are entitled to equal access to that pool. The question is whether certain persons who satisfy those criteria may be denied access to benefits solely because they must exercise the constitutional right to have an abortion in order to obtain the medical care they need. Our prior cases plainly dictate the answer to that question.

A fundamentally different question was decided in *Maher* v. *Roe*, 432 U. S. 464. Unlike these plaintiffs, the plaintiffs in *Maher* did not satisfy the neutral criterion of medical need; they sought a subsidy for nontherapeutic abortions—medical procedures which by definition they did not need. In rejecting that claim, the Court held that their constitutional right to choose that procedure did not impose a duty on

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the State to subsidize the exercise of that right. Nor did the fact that the State had undertaken to pay for the necessary medical care associated with childbirth require the State also to pay for abortions that were not necessary; for only necessary medical procedures satisfied the neutral statutory criteria. Nontherapeutic abortions were simply outside the ambit of the medical benefits program. Thus, in *Maher*, the plaintiffs' desire to exercise a constitutional right gave rise to neither special access nor special exclusion from the pool of benefits created by Title XIX.

These cases involve a special exclusion of women who, by definition, are confronted with a choice between two serious harms: serious health damage to themselves on the one hand and abortion on the other. The competing interests are the interest in maternal health and the interest in protecting potential human life. It is now part of our law that the pregnant woman's decision as to which of these conflicting interests shall prevail is entitled to constitutional protection.[1]

In *Roe* v. *Wade*, 410 U. S. 113, and *Doe* v. *Bolton*, 410 U. S. 179, the Court recognized that the States have a legitimate and protectable interest in potential human life. 410 U. S., at 162. But the Court explicitly held that prior to fetal viability that interest may not justify any governmental burden on the woman's choice to have an abortion[2] nor even any

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[1] "In *Roe* v. *Wade*, 410 U. S. 113, the Court held that a woman's right to decide whether to abort a pregnancy is entitled to constitutional protection. That decision . . . is now part of our law. . . ." *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S. 52, 101 (STEVENS, J., concurring in part and dissenting in part).

[2] *Roe* v. *Wade* involved Texas statutes making it a crime to "procure an abortion," except when attempted to save the pregnant woman's life. 410 U. S., at 117–118. *Doe* v. *Bolton* involved the somewhat less onerous Georgia statutes making abortion a crime in most circumstances, the exceptions being abortions to save the pregnant woman from life or permanent health endangerment, cases in which there was a very likely irremediable birth defect in the child, and cases in which the pregnancy was

regulation of abortion except in furtherance of the State's interest in the woman's health. In effect, the Court held that a woman's freedom to elect to have an abortion prior to viability has absolute constitutional protection, subject only to valid health regulations. Indeed, in *Roe* v. *Wade* the Court held that even after fetal viability, a State may "regulate, and even proscribe, abortion *except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.*" *Id.*, at 165 (emphasis added). We have a duty to respect that holding. The Court simply shirks that duty in this case.

If a woman has a constitutional right to place a higher value on avoiding either serious harm to her own health or perhaps an abnormal childbirth [3] than on protecting potential life, the exercise of that right cannot provide the basis for the denial of a benefit to which she would otherwise be entitled. The Court's sterile equal protection analysis evades this critical though simple point. The Court focuses exclusively on the "legitimate interest in protecting the potential life of the fetus." *Ante*, at 324. It concludes that since the Hyde Amendments further that interest, the exclusion they create is rational and therefore constitutional. But it is mis-

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the result of rape. Those exceptions were subject to burdensome prior medical approvals, which were held to be unconstitutional. Subsequent cases have invalidated other burdens on the pregnant woman's free choice to abort. See *Planned Parenthood of Central Missouri* v. *Danforth, supra* (consent required of husband or, for an unmarried woman under 18, of a parent); *Bellotti* v. *Baird*, 443 U. S. 622 (consent required of either parent or superior court judge if unmarried woman under 18).

[3] The Court rests heavily on the premise—recognized in both *Roe* and *Maher*—that the State's legitimate interest in preserving potential life provides a sufficient justification for funding medical services that are necessarily associated with normal childbirth without also funding abortions that are not medically necessary. The *Maher* opinion repeatedly referred to the policy of favoring "normal childbirth." See 432 U. S., at 477, 478, 479. But this case involves a refusal to fund abortions which are medically necessary to avoid abnormal childbirth.

leading to speak of the Government's legitimate interest in the fetus without reference to the context in which that interest was held to be legitimate. For *Roe* v. *Wade* squarely held that the States may not protect that interest when a conflict with the interest in a pregnant woman's health exists. It is thus perfectly clear that neither the Federal Government nor the States may exclude a woman from medical benefits to which she would otherwise be entitled solely to further an interest in potential life when a physician, "in appropriate medical judgment," certifies that an abortion is necessary "for the preservation of the life or health of the mother." *Roe* v. *Wade*, *supra*, at 165. The Court totally fails to explain why this reasoning is not dispositive here.[4]

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[4] These cases thus illustrate the flaw in the method of equal protection analysis by which one chooses among alternative "levels of scrutiny" and then determines whether the extent to which a particular legislative measure furthers a given governmental objective transcends the predetermined threshold. See *Craig* v. *Boren*, 429 U. S. 190, 211–212 (STEVENS, J., concurring). That method may simply bypass the real issue. The relevant question in these cases is whether the Court must attach greater weight to the individual's interest in being included in the class than to the governmental interest in keeping the individual out. Since *Roe* v. *Wade* squarely held that the individual interest in the freedom to elect an abortion and the state interest in protecting maternal health *both* outweigh the State's interest in protecting potential life prior to viability, the Court's "equal protection analysis" is doubly erroneous.

In responding to my analysis of this case, MR. JUSTICE WHITE has described the constitutional right recognized in *Roe* v. *Wade* as "the right to choose to undergo an abortion without coercive interference by the government" or a right "only to be free from unreasonable official interference with private choice." *Ante*, at 327, 328. No such language is found in the *Roe* opinion itself. Rather, that case squarely held that state interference is unreasonable if it attaches a greater importance to the interest in potential life than to the interest in protecting the mother's health. One could with equal justification describe the right protected by the First Amendment as the right to make speeches without coercive interference by the government and then sustain a government subsidy for all medically needy persons except those who publicly advocate a change of administration.

It cannot be denied that the harm inflicted upon women in the excluded class is grievous.[5] As the Court's comparison of the differing forms of the Hyde Amendment that have

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[5] The record is replete with examples of serious physical harm. See, *e. g.*, Judge Dooling's opinion in *McRae* v. *Califano*, 491 F. Supp. 630, 670:

"Women, particularly young women, suffering from diabetes are likely to experience high risks of health damage to themselves and their fetuses; the woman may become blind through the worsening during pregnancy of a diabetic retinopathy; in the case, particularly, of the juvenile diabetic, Dr. Eliot testified there is evidence that a series of pregnancies advances the diabetes faster; given an aggravated diabetic condition, other risks increased through pregnancy are kidney problems, and vascular problems of the extremities."

See also the affidavit of Jane Doe in No. 79-1268:

"3. I am 25 years old. I am married with four living children. Following the birth of my third child in November of 1976, I developed a serious case of phlebitis from which I have not completely recovered. Carrying another pregnancy to term would greatly aggravate this condition and increase the risk of blood clots to the lung.

"4. On July 29, 1977, I went to the Fertility Control Clinic at St. Paul-Ramsey Hospital, St. Paul, Minnesota to request an abortion. They informed me that a new law prohibits any federal reimbursement for abortions except those necessary to save the life of the mother and that they cannot afford to do this operation free for me.

"5. I cannot afford to pay for an abortion myself, and without Medicaid reimbursement, I cannot obtain a safe, legal abortion. According to the doctor, Dr. Jane E. Hodgson, without an abortion I might suffer serious and permanent health problems." App. in No. 79-1268, pp. 109-110.

And see the case of the Jane Doe in Nos. 79-4, 79-5, and 79-491, as recounted in Dr. Zbaraz' affidavit:

"Jane Doe is 38 years old and has had nine previous pregnancies. She has a history of varicose veins and thrombophlebitis (blood clots) of the left leg. The varicose veins can be, and in her case were, caused by multiple pregnancies: the weight of the uterus on her pelvic veins increased the blood pressure in the veins of her lower extremities; those veins dilated and her circulation was impaired, resulting in thrombophlebitis of her left leg. The varicosities of her lower extremities became so severe that they required partial surgical removal in 1973.

"2. Given this medical history, Jane Doe's varicose veins are almost

been enacted since 1976 demonstrates, the Court expressly approves the exclusion of benefits in "instances where severe and long-lasting physical health damage to the mother" is the predictable consequence of carrying the pregnancy to term. Indeed, as the Solicitor General acknowledged with commendable candor, the logic of the Court's position would justify a holding that it would be constitutional to deny funding to a medically and financially needy person even if abortion were the only lifesaving medical procedure available.[6] Because a denial of benefits for medically necessary abortions inevitably causes serious harm to the excluded women, it is tantamount to severe punishment.[7] In my judgment, that denial cannot be justified unless government may, in effect, punish women who want abortions. But as the Court unequivocally held in *Roe* v. *Wade*, this the government may not do.

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certain to recur if she continues her pregnancy. Such a recurrence would require a second operative procedure for their removal. Given her medical history, there is also about a 30% risk that her thrombophlebitis will recur during the pregnancy in the form of 'deep vein' thrombophlebitis (the surface veins of her left leg having previously been partially removed). This condition would impair circulation and might require prolonged hospitalization with bed rest.

"3. Considering Jane Doe's medical history of varicose veins and thrombophlebitis, particularly against the background of her age and multiple pregnancies, it is my view that an abortion is medically necessary for her, though not necessary to preserve her life." App. in Nos. 79–4, 79–5, and 79–491, p. 92.

[6] "QUESTION: Mr. Solicitor General, would you make the same rational basis argument if the Hyde amendment did not contain the exception for endangering the life of the mother, if it was her death rather than adverse impact on her health that was involved?

"Mr McCREE: I think I would." Tr. of Oral Arg. in 79–1268, p. 10.

[7] In this respect, these cases are entirely different from *Maher*, in which the Court repeatedly noted that the refusal to subsidize nontherapeutic abortions would merely result in normal childbirth. Surely the government may properly presume that no harm will ensue from normal childbirth.

Nor can it be argued that the exclusion of this type of medically necessary treatment of the indigent can be justified on fiscal grounds. There are some especially costly forms of treatment that may reasonably be excluded from the program in order to preserve the assets in the pool and extend its benefits to the maximum number of needy persons. Fiscal considerations may compel certain difficult choices in order to improve the protection afforded to the entire benefited class.[8] But, ironically, the exclusion of medically necessary abortions harms the entire class as well as its specific victims. For the records in both *McRae* and *Zbaraz* demonstrate that the cost of an abortion is only a small fraction of the costs associated with childbirth.[9] Thus, the decision to tolerate harm to indi-

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[8] This rationale may satisfactorily explain the exclusions from the Medicaid program noted by the Court. *Ante*, at 325, n. 28. In all events, it is safe to assume that those exclusions would conserve the assets of the pool.

[9] In the *Zbaraz* case, Judge Grady found that the average cost to the State of Illinois of an abortion was less than $150 as compared with the cost of a childbirth which exceeded $1,350. App. to Juris. Statement in No. 79–491, p. 14a, n. 8.

Indeed, based on an estimated cost of providing support to children of indigent parents together with their estimate of the number of medically necessary abortions that would be funded but for the Hyde Amendment, appellees in the *Zbaraz* case contend that in the State of Illinois alone the effect of the Hyde Amendment is to impose a cost of about $20,000,000 per year on the public fisc. Brief for Appellees in Nos. 79–4, 79–5, and 79–491, p. 60, n.

See also Judge Dooling's conclusion:

"While the debate [on the Hyde Amendment] in both years was on a rider to the departmental appropriations bill, it was quickly established that the restriction on abortion funding was not an economy measure; it was recognized that if an abortion was not performed for a medicaid eligible woman, the medicaid and other costs of childbearing and nurture would greatly exceed the cost of abortion. Opponents of funding restriction were equally at pains, however, to make clear that they did not favor funding abortion as a means of reducing the Government's social welfare costs." 491 F. Supp., at 644.

gent persons who need an abortion in order to avoid "serious and long-lasting health damage" is one that is financed by draining money out of the pool that is used to fund all other necessary medical procedures. Unlike most invidious classifications, this discrimination harms not only its direct victims but also the remainder of the class of needy persons that the pool was designed to benefit.

In *Maher* the Court stated:

> "The Constitution imposes no obligation on the States to pay the pregnancy-related medical expenses of indigent women, or indeed to pay any of the medical expenses of indigents. But when a State decides to alleviate some of the hardships of poverty by providing medical care, the manner in which it dispenses benefits is subject to constitutional limitations." 432 U. S., at 469–470 (footnote omitted).

Having decided to alleviate some of the hardships of poverty by providing necessary medical care, the government must use neutral criteria in distributing benefits. It may not deny benefits to a financially and medically needy person simply because he is a Republican, a Catholic, or an Oriental—or because he has spoken against a program the government has a legitimate interest in furthering. In sum, it may not create exceptions for the sole purpose of furthering a governmental interest that is constitutionally subordinate to the individual interest that the entire program was designed to protect. The Hyde Amendments not only exclude financially and medically needy persons from the pool of benefits for a constitutionally insufficient reason; they also require the expenditure of millions and millions of dollars in order to thwart the exercise of a constitutional right, thereby effectively inflicting serious and long-lasting harm on impoverished women who want and need abortions for valid medical reasons. In my judgment, these Amendments constitute an unjustifiable,

and indeed blatant, violation of the sovereign's duty to govern impartially.[10]

I respectfully dissent.

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[10] My conclusion that the Hyde Amendment violates the Federal Government's duty of impartiality applies equally to the Illinois statute at issue in *Zbaraz*.

WILLIAMS ET AL. *v.* ZBARAZ ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ILLINOIS

No. 79–4. Argued April 21, 1980—Decided June 30, 1980*

Appellees brought a class action in Federal District Court under 42 U. S. C. § 1983 to enjoin, on both federal statutory and constitutional grounds, enforcement of an Illinois statute prohibiting state medical assistance payments for all abortions except those necessary to save the life of the woman seeking the abortion. The District Court, granting injunctive relief, held that Title XIX of the Social Security Act, which established the Medicaid program, and the regulations promulgated thereunder require a participating State under such program to provide funding for all medically necessary abortions, and that the so-called Hyde Amendment prohibiting the use of federal funds to reimburse the costs of certain medically necessary abortions does not relieve a State of its independent obligation under Title XIX to provide Medicaid funding for all medically necessary abortions. The Court of Appeals reversed, holding that the Hyde Amendment altered Title XIX in such a way as to allow States to limit funding to the categories of abortions specified in that Amendment, but that a participating State may not, consistent with Title XIX, withhold funding of those medically necessary abortions for which federal reimbursement is available under the Hyde Amendment, and the case was remanded to the District Court for modification of its injunction and with directions to consider the constitutionality of the Hyde Amendment. The District Court then held that both the Illinois statute and the Hyde Amendment violate the equal protection guarantee of the Constitution insofar as they deny funding for "medically necessary abortions prior to the point of fetal viability."

Held:

1. The District Court lacked jurisdiction to consider the constitutionality of the Hyde Amendment, for the court acted in the absence of a case or controversy sufficient to permit an exercise of judicial power under Art. III of the Constitution. None of the parties ever challenged the validity of the Hyde Amendment, and appellees could have been awarded all the relief sought entirely on the basis of the District Court's

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*Together with No. 79–5, *Miller, Acting Director, Department of Public Aid of Illinois, et al.* v. *Zbaraz et al.*, and No. 79–491, *United States* v. *Zbaraz et al.*, also on appeal from the same court.

ruling as to the Illinois statute. The constitutionality of the Hyde Amendment was interjected as an issue only by the Court of Appeals' erroneous mandate, which could not create a case or controversy where none otherwise existed. P. 367.

2. Notwithstanding that the District Court had no jurisdiction to declare the Hyde Amendment unconstitutional, this Court has jurisdiction under 28 U. S. C. § 1252 over the "whole case," and thus may review the other issues preserved by these appeals. *McLucas* v. *DeChamplain*, 421 U. S. 21. Pp. 367–368.

3. A participating State is not obligated under Title XIX to pay for those medically necessary abortions for which federal reimbursement is unavailable under the Hyde Amendment. *Harris* v. *McRae*, *ante*, at 306–311. P. 369.

4. The funding restrictions in the Illinois statute, comparable to those in the Hyde Amendment, do not violate the Equal Protection Clause of the Fourteenth Amendment. *Harris* v. *McRae*, *ante*, at 324–326. P. 369.

469 F. Supp. 1212, vacated and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and BLACKMUN, JJ., joined, *ante*, p. 329. MARSHALL, J., *ante*, p. 337, BLACKMUN, J., *ante*, p. 348, and STEVENS, J., *ante*, p. 349, filed dissenting opinions.

Victor G. Rosenblum argued the cause for appellants in No. 79–4. With him on the briefs were *Dennis J. Horan*, *John D. Gorby*, and *Patrick A. Trueman*. *William A. Wenzel III*, Special Assistant Attorney General of Illinois, argued the cause for appellants in No. 79–5. With him on the briefs were *William J. Scott*, Attorney General, and *James C. O'Connell* and *Ellen P. Brewin*, Special Assistant Attorneys General. *Solicitor General McCree* argued the cause for the United States in No. 79–491. With him on the briefs were *Assistant Attorney General Daniel* and *Eloise E. Davies*.

Robert W. Bennett argued the cause for appellees in each case. With him on the brief were *Lois J. Lipton*, *David Goldberger*, *Aviva Futorian*, *Robert E. Lehrer*, and *James D. Weill*.†

†Briefs of *amici curiae* urging reversal in all cases were filed by *Robert*

MR. JUSTICE STEWART delivered the opinion of the Court.

This suit was brought as a class action under 42 U. S. C. § 1983 in the District Court for the Northern District of Illinois to enjoin the enforcement of an Illinois statute that prohibits state medical assistance payments for all abortions except those "necessary for the preservation of the life of the woman seeking such treatment."[1] The plaintiffs were

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B. Hansen, Attorney General, *Paul M. Tinker*, Assistant Attorney General, and *Lynn D. Wardle* for the State of Utah; by *Bronson C. La Follette*, Attorney General of Wisconsin, *F. Joseph Sensenbrenner, Jr.*, Assistant Attorney General, and *William J. Brown*, Attorney General of Ohio, for the States of Wisconsin et al.; by *George E. Reed* and *Patrick F. Geary* for the United States Catholic Conference; and by *Daniel J. Popeo* for the Washington Legal Foundation. *John J. Degnan*, Attorney General, *Erminie L. Conley*, Assistant Attorney General, and *Andrea M. Silkowitz*, Deputy Attorney General, filed a brief for the State of New Jersey as *amicus curiae* urging reversal in No. 79–5. *James Bopp, Jr.*, and *David D. Haynes* filed a brief for the National Right to Life Committee, Inc., as *amicus curiae* urging reversal in No. 79–4.

Briefs of *amici curiae* urging affirmance in all cases were filed by *Paul Bender, Thomas Harvey*, and *Roland Morris* for Jane Roe et al.; and by *Margo K. Rogers* and *Eve W. Paul* for the Planned Parenthood Federation of America, Inc., et al.

Briefs of *amici curiae* in all cases were filed by *Francis X. Bellotti*, Attorney General of Massachusetts, *Garrick F. Cole*, Assistant Attorney General, *John D. Ashcroft*, Attorney General of Missouri, *Paul L. Douglas*, Attorney General of Nebraska, and *William J. Brown*, Attorney General of Ohio, for the Commonwealth of Massachusetts et al.; by *Dorothy T. Lang* for the Physicians National Housestaff Association et al.; and by *Francis D. Morrissey* for Certain Physicians, Professors and Fellows of the American College of Obstetrics and Gynecology.

[1] The statute is codified as Ill. Rev. Stat., ch. 23 (1979). It provides in relevant part:

"§ 5–5. [Medical services.] The Illinois Department, by rule, shall determine the quantity and quality of the medical assistance for which payment will be authorized, and the medical services to be provided, which may include all or part of the following: [listing 16 categories of medical services], but not including abortions, or induced miscarriages or premature births, unless, in the opinion of a physician, such procedures

two physicians who perform medically necessary abortions for indigent women, a welfare rights organization, and Jane Doe, an indigent pregnant woman who alleged that she desired an abortion that was medically necessary, but not necessary to save her life. The defendant was the Director of the Illinois Department of Public Aid, the agency charged with administering the State's medical assistance programs.[2] Two other physicians intervened as defendants.

The plaintiffs challenged the Illinois statute on both federal statutory and constitutional grounds. They asserted, first, that Title XIX of the Social Security Act, commonly known as the "Medicaid" Act, 42 U. S. C. § 1396 *et seq.* (1976 ed. and Supp. II), requires Illinois to provide coverage in its Medicaid plan for all medically necessary abortions, whether or not the life of the pregnant woman is endangered. Second, the plaintiffs argued that the public funding by the State of medically necessary services generally, but not of certain medically necessary abortions, violates the Equal Protection Clause of the Fourteenth Amendment.

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are necessary for the preservation of the life of the woman seeking such treatment. . . ."

"§ 6–1. Eligibility requirements. . . . Nothing in this Article shall be construed to permit the granting of financial aid where the purpose of such aid is to obtain an abortion, induced miscarriage or induced premature birth unless, in the opinion of a physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment. . . ."

"§ 7–1. Eligibility requirements. Aid in meeting the costs of necessary medical, dental, hospital, boarding or nursing care, or burial shall be given under this Article [to eligible persons], except where such aid is for the purpose of obtaining an abortion, induced miscarriage or induced premature birth unless, in the opinion of a physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment. . . ."

[2] The medical assistance programs at issue here are the Illinois Medicaid plan, which is jointly funded by the Federal Government and the State of Illinois, and two fully state-funded programs, the Illinois General Assistance and Local Aid to Medically Indigent Programs.

The District Court initially held that it would abstain from considering the complaint until the state courts had construed the challenged statute.[3] The plaintiffs appealed, and the Court of Appeals for the Seventh Circuit reversed. *Zbaraz* v. *Quern*, 572 F. 2d 582. The appellate court held that abstention was inappropriate under the circumstances, and remanded the case for further proceedings, including consideration of the plaintiffs' motion for a preliminary injunction. On remand, the District Court certified two plaintiff classes: (1) a class of all pregnant women eligible for the Illinois medical assistance programs who desire medically necessary, but not life-preserving, abortions, and (2) a class of all Illinois physicians who perform medically necessary abortions for indigent women and who are certified to obtain reimbursement under the Illinois medical assistance programs.

Addressing the merits of the complaint, the District Court concluded that Title XIX and the regulations promulgated thereunder require a participating State under the Medicaid program to provide funding for all medically necessary abortions. According to the District Court, the so-called "Hyde Amendment"—under which Congress has prohibited the use of federal funds to reimburse the costs of certain medically necessary abortions[4]—does not relieve a State of its independ-

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[3] All opinions of the District Court other than that now under review are unreported.

[4] Since September 1976, Congress has prohibited—by means of the "Hyde Amendment" to the annual appropriations for the Department of Health, Education, and Welfare (now the Department of Health and Human Services)—the use of any federal funds to reimburse the cost of abortions under the Medicaid program except under certain specified circumstances. The current version of the Hyde Amendment, applicable for fiscal year 1980, provides:

"[N]one of the funds provided by this joint resolution shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest when such rape or incest has been reported promptly to a law enforcement agency or public

ent obligation under Title XIX to provide Medicaid funding for all medically necessary abortions. Thus, the District Court permanently enjoined the enforcement of the Illinois statute insofar as it denied payments for abortions that are "medically necessary or medically indicated according to the professional medical judgment of a licensed physician in Illinois, exercised in light of all factors affecting a woman's health." *Zbaraz* v. *Quern,* 469 F. Supp. 1212, 1215, n. 4.

The Court of Appeals again reversed. *Zbaraz* v. *Quern,* 596 F. 2d 196. Reaching the same conclusion as had the Court of Appeals for the First Circuit in *Preterm, Inc.,* v. *Dukakis,* 591 F. 2d 121, the court held that the Hyde Amendment "alters Title XIX in such a way as to allow states to limit funding to the categories of abortions specified in that amendment." 596 F. 2d, at 199. It further held, however, that a participating State may not, consistent with Title XIX, withhold funding for those medically necessary abortions for which federal reimbursement is available under the Hyde Amendment.[5] Accordingly, the case was remanded to the District

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health service." Pub. L. 96–123, § 109, 93 Stat. 926. See also Pub. L. 96–86, § 118, 93 Stat. 662.

This version of the Hyde Amendment is broader than that applicable for fiscal year 1977, which did not include the "rape or incest" exception, Pub. L. 94–439, § 209, 90 Stat. 1434, but narrower than that applicable for most of fiscal year 1978 and all of fiscal year 1979, which had an additional exception for "instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians," Pub. L. 95–205, § 101, 91 Stat. 1460; Pub. L. 95–480, § 210, 92 Stat. 1586. In this opinion, the term, "Hyde Amendment," is used generically to refer to all three versions, except where indicated otherwise.

[5] Neither the Director of the Illinois Department of Public Aid nor the intervening-physicians sought review of the judgment of the Court of Appeals. The District Court in the proceedings now on appeal proceeded on the premise that Title XIX obligates Illinois to fund all abortions reimbursable under the Hyde Amendment. That issue, therefore, is not before us on these appeals.

Court with instructions that the permanent injunction be modified so as to require continued state funding only "for those abortions fundable under the Hyde Amendment." [6] *Id.*, at 202. The Court of Appeals also directed the District Court to proceed expeditiously to resolve the constitutional questions it had not reached. The District Court was specifically directed to consider "whether the Hyde Amendment, by limiting funding for abortions to certain circumstances even if such abortions are medically necessary, violates the Fifth Amendment." *Ibid.* (footnote omitted).

On the second remand, the District Court notified the Attorney General of the United States that the constitutionality of an Act of Congress had been drawn into question, and the United States intervened, pursuant to 28 U. S. C. § 2403 (a), to defend the constitutionality of the Hyde Amendment.[7]

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[6] Although the medical assistance programs funded exclusively by the State are not governed directly by either Title XIX or the Hyde Amendment, the Court of Appeals concluded that the modified injunction requiring state payments for abortions fundable under the Hyde Amendment should apply to all three Illinois medical assistance programs, see n. 2, *supra*. 596 F. 2d, at 202–203. Relying on a statement in the State's brief, the Court of Appeals held that the challenged Illinois statute was intended to represent the State's understanding of the congressional purpose reflected in the original Hyde Amendment. *Id.*, at 203. The Court of Appeals thus declined to sever the various funding restrictions in the Illinois statute.

[7] Section 2403 (a) provides:

"In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The United States shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality."

Zbaraz v. *Quern*, 469 F. Supp. 1212, 1215, n. 3. In view of the fact that the plaintiffs had not challenged the Hyde Amendment, but rather only the Illinois statute, the District Court expressed misgivings about the propriety of passing on the constitutionality of the federal law. But noting that the same reasoning would apply in determining the constitutional validity of both the Illinois statute and the Hyde Amendment, the District Court observed: "Although we are not persuaded that the federal and state enactments are inseparable and would hesitate to inject into the proceeding the issue of the constitutionality of a law not directly under attack by plaintiffs, we are obviously constrained to obey the Seventh Circuit's mandate. Therefore, while our discussion of the constitutional questions will address only the Illinois statute, the same analysis applies to the Hyde Amendment and the relief granted will encompass both laws." *Ibid.*

The District Court then concluded that both the Illinois statute and the Hyde Amendment are unconstitutional insofar as they deny funding for "medically necessary abortions prior to the point of fetal viability." *Id.*, at 1221. If the public funding of abortions were restricted to those covered by the Hyde Amendment, the District Court thought that the effect would "be to increase substantially maternal morbidity and mortality among indigent pregnant women." *Id.*, at 1220. The District Court held that the state and federal funding restrictions violate the constitutional standard of equal protection because

> "a pregnant woman's interest in her health so outweighs any possible state interest in the life of a non-viable fetus that, for a woman medically in need of an abortion, the state's interest is not legitimate. At the point of viability, however, 'the relative weights of the respective interests involved' shift, thereby legitimizing the state's interests. After that point, therefore, . . . a state may withhold funding for medically necessary abortions that

are not life-preserving, even though it funds all other medically necessary operations." *Id.*, at 1221.

Accordingly, the District Court enjoined the Director of the Illinois Department of Public Aid from enforcing the Illinois statute to deny payment under the state medical assistance programs for medically necessary abortions prior to fetal viability.[8] The District Court did not, however, enjoin any action by the United States.

The intervening-defendant physicians, the Director of the Illinois Department of Public Aid, and the United States each appealed directly to this Court, averring jurisdiction under 28 U. S. C. § 1252. This Court consolidated the appeals and postponed further consideration of the question of jurisdiction until the hearing on the merits. 444 U. S. 962.

I

The asserted basis for this Court's jurisdiction over these appeals is 28 U. S. C. § 1252, which provides in relevant part:

> "Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States . . . holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party."

It is quite obvious that the literal requirements of § 1252 are satisfied in the present cases, for these appeals were taken from the final judgment of a federal court declaring unconstitutional an Act of Congress—the Hyde Amendment—in a

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[8] The District Court refused to stay its order, and the Director of the Illinois Department of Public Aid and the intervening-defendant physicians moved in this Court for a stay pending appeal. That motion was denied. 442 U. S. 1309 (STEVENS, J., in chambers). A reapplication by the intervening-defendant physicians also was denied. 442 U. S. 915.

civil action to which the United States was a party by reason of its intervention pursuant to 28 U. S. C. § 2403 (a).

It is equally clear, however, that the appellees and the United States are correct in asserting that the District Court in fact lacked jurisdiction to consider the constitutionality of the Hyde Amendment, for the court acted in the absence of a case or controversy sufficient to permit an exercise of judicial power under Art. III of the Constitution. None of the parties to these cases ever challenged the validity of the Hyde Amendment, and the appellees could have been awarded all the relief they sought entirely on the basis of the District Court's ruling with regard to the Illinois statute.[9] The constitutional validity of the Hyde Amendment was interjected as an issue in these cases only by the erroneous mandate of the Court of Appeals. But, even though the District Court was simply following that mandate, the directive of the Court of Appeals could not create a case or controversy where none otherwise existed. It is clear, therefore, that the District Court exceeded its jurisdiction under Art. III in declaring the Hyde Amendment unconstitutional.

The question thus arises whether the District Court's lack of jurisdiction in declaring the Hyde Amendment unconstitutional divests this Court of jurisdiction over these appeals. We think not. As the Court in *McLucas* v. *DeChamplain*, 421 U. S. 21, 31–32, observed:

> "Our previous cases have recognized that this Court's jurisdiction under § 1252 in no way depends on whether the district court had jurisdiction. On the contrary, an appeal under § 1252 brings before us, not only the constitutional question, but the whole case, including thresh-

[9] Title XIX does not prohibit "[a] participating State . . . [from] includ[ing] in its Medicaid plan those medically necessary abortions for which federal reimbursement is unavailable [under the Hyde Amendment]." *Harris* v. *McRae*, *ante*, at 311, n. 16.

old issues of subject-matter jurisdiction, and whether a three-judge court was required." (Citations omitted.)

Thus, in the *McLucas* case, which involved an appeal under § 1252 from a single-judge District Court, this Court pretermitted the question whether the single-judge District Court had had jurisdiction to enter the challenged preliminary injunction, and instead resolved the appeal on the merits. It follows from *McLucas* that, notwithstanding the fact that the District Court was without jurisdiction to declare the Hyde Amendment unconstitutional, this Court has jurisdiction over these appeals and thus may review the "whole case." [10]

II

Disposition of the merits of these appeals does not require extended discussion. Insofar as we have already concluded that the District Court lacked jurisdiction to declare the Hyde Amendment unconstitutional, that portion of its judgment must be vacated. See, *e. g.*, *United States* v. *Johnson*, 319 U. S. 302; *Muskrat* v. *United States*, 219 U. S. 346. The remaining questions concern the Illinois statute. The appellees argue that (1) Title XIX requires Illinois to provide coverage in its state Medicaid plan for all medically necessary abortions, whether or not the life of the pregnant woman is endangered, and (2) the funding by Illinois of medically necessary services generally, but not of certain medically nec-

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[10] Although this Court need not pass on the remainder of the judgment in a case in which an appeal under § 1252 is taken from a court that lacked jurisdiction to declare a federal statute unconstitutional, see *FHA* v. *The Darlington, Inc.*, 352 U. S. 977, we are empowered to do so because "an appeal under § 1252 brings before us, not only the constitutional question, but the whole case." *McLucas* v. *DeChamplain*, 421 U. S., at 31. Here, there is no reason not to resolve the "whole case" on the merits. The remainder of the case that is properly before this Court, and which clearly involves a justiciable controversy, includes both the appellees' federal statutory and constitutional challenges to the Illinois statute.

essary abortions, violates the Equal Protection Clause of the Fourteenth Amendment.[11] Both arguments are foreclosed by our decision today in *Harris* v. *McRae, ante*, p. 279. As to the appellees' statutory argument, we have concluded in *McRae* that a participating State is not obligated under Title XIX to pay for those medically necessary abortions for which federal reimbursement is unavailable under the Hyde Amendment. As to their constitutional argument, we have concluded in *McRae* that the Hyde Amendment does not violate the equal protection component of the Fifth Amendment by withholding public funding for certain medically necessary abortions, while providing funding for other medically necessary health services. It follows, for the same reasons, that the comparable funding restrictions in the Illinois statute do not violate the Equal Protection Clause of the Fourteenth Amendment.

Accordingly, the judgment of the District Court is vacated,

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[11] This case was decided by the District Court under the version of the Hyde Amendment applicable during fiscal year 1979, and Congress has since narrowed the ambit of the Hyde Amendment for fiscal year 1980, see n. 4, *supra*. The recent statutory revision does not, however, affect the outcome of either issue now before the Court. The statutory issue is not affected, because we today conclude in *Harris* v. *McRae, ante*, at 306–311, that Title XIX does not require a participating State to fund those medically necessary abortions for which federal reimbursement is unavailable under the Hyde Amendment, including the version of the Hyde Amendment applicable for fiscal year 1980. The constitutional issue is not affected, because, regardless of whether the State of Illinois is obligated to fund all abortions for which federal reimbursement is available under the Hyde Amendment, we conclude in *Harris* v. *McRae* that even the most restrictive version of the Hyde Amendment—which is similar to the Illinois statute at issue here—does not violate the equal protection standard of the Constitution. Since the outcome of these issues is not affected by the recent changes in the Hyde Amendment, we need not defer review in order to provide the District Court with an opportunity to evaluate the effects of these changes in the federal law.

and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

[For dissenting opinion of MR. JUSTICE BRENNAN, see *ante*, p. 329.]

[For dissenting opinion of MR. JUSTICE MARSHALL, see *ante*, p. 337.]

[For dissenting opinion of MR. JUSTICE BLACKMUN, see *ante*, p. 348.]

[For dissenting opinion of MR. JUSTICE STEVENS, see *ante*, p. 349.]

UNITED STATES v. SIOUX NATION OF INDIANS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

No. 79–639. Argued March 24, 1980—Decided June 30, 1980

Under the Fort Laramie Treaty of 1868, the United States pledged that the Great Sioux Reservation, including the Black Hills, would be "set apart for the absolute and undisturbed use and occupation" of the Sioux Nation (Sioux), and that no treaty for the cession of any part of the reservation would be valid as against the Sioux unless executed and signed by at least three-fourths of the adult male Sioux population. The treaty also reserved the Sioux' right to hunt in certain unceded territories. Subsequently, in 1876, an "agreement" presented to the Sioux by a special Commission but signed by only 10% of the adult male Sioux population, provided that the Sioux would relinquish their rights to the Black Hills and to hunt in the unceded territories, in exchange for subsistence rations for as long as they would be needed. In 1877, Congress passed an Act (1877 Act) implementing this "agreement" and thus, in effect, abrogated the Fort Laramie Treaty. Throughout the ensuing years, the Sioux regarded the 1877 Act as a breach of that treaty, but Congress did not enact any mechanism by which they could litigate their claims against the United States until 1920, when a special jurisdictional Act was passed. Pursuant to this Act, the Sioux brought suit in the Court of Claims, alleging that the Government had taken the Black Hills without just compensation, in violation of the Fifth Amendment. In 1942, this claim was dismissed by the Court of Claims, which held that it was not authorized by the 1920 Act to question whether the compensation afforded the Sioux in the 1877 Act was an adequate price for the Black Hills and that the Sioux' claim was a moral one not protected by the Just Compensation Clause. Thereafter, upon enactment of the Indian Claims Commission Act in 1946, the Sioux resubmitted their claim to the Indian Claims Commission, which held that the 1877 Act effected a taking for which the Sioux were entitled to just compensation and that the 1942 Court of Claims decision did not bar the taking claim under res judicata. On appeal, the Court of Claims, affirming the Commission's holding that a want of fair and honorable dealings on the Government's part was evidenced, ultimately held that the Sioux were entitled to an award of at least $17.5 million, without interest, as damages under the Indian Claims Commission Act,

for the lands surrendered and for gold taken by trespassing prospectors prior to passage of the 1877 Act. But the court further held that the merits of the Sioux' taking claim had been reached in its 1942 decision and that therefore such claim was barred by res judicata. The court noted that only if the acquisition of the Black Hills amounted to an unconstitutional taking would the Sioux be entitled to interest. Thereafter, in 1978, Congress passed an Act (1978 Act) providing for *de novo* review by the Court of Claims of the merits of the Indian Claims Commission's holding that the 1877 Act effected a taking of the Black Hills, without regard to res judicata, and authorizing the Court of Claims to take new evidence in the case. Pursuant to this Act, the Court of Claims affirmed the Commission's holding. In so affirming, the court, in order to decide whether the 1877 Act had effected a taking or whether it had been a noncompensable act of congressional guardianship over tribal property, applied the test of whether Congress had made a good-faith effort to give the Sioux the full value of their land. Under this test, the court characterized the 1877 Act as a taking in exercise of Congress' power of eminent domain over Indian property. Accordingly, the court held that the Sioux were entitled to an award of interest on the principal sum of $17.1 million (the fair market value of the Black Hills as of 1877), dating from 1877.

Held:

1. Congress' enactment of the 1978 Act, as constituting a mere waiver of the res judicata effect of a prior judicial decision rejecting the validity of a legal claim against the United States, did not violate the doctrine of the separation of powers either on the ground that Congress impermissibly disturbed the finality of a judicial decree by rendering the Court of Claims' earlier judgments in the case mere advisory opinions, or on the ground that Congress overstepped its bounds by granting the Court of Claims jurisdiction to decide the merits of the Black Hills claim, while prescribing a rule for decision that left that court no adjudicatory function to perform. *Cherokee Nation* v. *United States*, 270 U. S. 476. Congress, under its broad constitutional power to define and "to pay the Debts . . . of the United States," may recognize its obligation to pay a moral debt not only by direct appropriation, but also by waiving an otherwise valid defense to a legal claim against the United States. When the Sioux returned to the Court of Claims following passage of the 1978 Act, they were in pursuit of judicial enforcement of a new legal right. Congress in no way attempted to prescribe the outcome of the Court of Claims' new review of the merits. *United States* v. *Klein*, 13 Wall. 128, distinguished. Pp. 390–407.

2. The Court of Claims' legal analysis and factual findings fully support its conclusion that the 1877 Act did not effect a "mere change in the form of investment of Indian tribal property," but, rather, effected a taking of tribal property which had been set aside by the Fort Laramie Treaty for the Sioux' exclusive occupation, which taking implied an obligation on the Government's part to make just compensation to the Sioux. That obligation, including an award of interest, must now be paid. The principles that it "must [be] presume[d] that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that [it] exercised its best judgment in the premises," *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 568, are inapplicable in this case. The question whether a particular congressional measure was appropriate for protecting and advancing a tribe's interests, and therefore not subject to the Just Compensation Clause, is factual in nature, and the answer must be based on a consideration of all the evidence presented. While a reviewing court is not to second-guess a legislative judgment that a particular measure would serve the tribe's best interests, the court is required, in considering whether the measure was taken in pursuance of Congress' power to manage and control tribal lands for the Indians' welfare, to engage in a thorough and impartial examination of the historical record. A presumption of congressional good faith cannot serve to advance such an inquiry. Pp. 407–423.

220 Ct. Cl. —, 601 F. 2d 1157, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, MARSHALL, POWELL, and STEVENS, JJ., joined, and in Parts III and V of which WHITE, J., joined. WHITE, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 424. REHNQUIST, J., filed a dissenting opinion, *post*, p. 424.

Deputy Solicitor General Claiborne argued the cause for the United States. With him on the briefs were *Solicitor General McCree, Assistant Attorney General Moorman, William Alsup, Dirk D. Snel,* and *Martin W. Matzen.*

Arthur Lazarus, Jr., argued the cause for respondents. With him on the brief were *Marvin J. Sonosky, Reid P. Chambers, Harry R. Sachse,* and *William Howard Payne.**

**Steven M. Tullberg* and *Robert T. Coulter* filed a brief for the Indian Law Resource Center as *amicus curiae*.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case concerns the Black Hills of South Dakota, the Great Sioux Reservation, and a colorful, and in many respects tragic, chapter in the history of the Nation's West. Although the litigation comes down to a claim of interest since 1877 on an award of over $17 million, it is necessary, in order to understand the controversy, to review at some length the chronology of the case and its factual setting.

I

For over a century now the Sioux Nation has claimed that the United States unlawfully abrogated the Fort Laramie Treaty of April 29, 1868, 15 Stat. 635, in Art. II of which the United States pledged that the Great Sioux Reservation, including the Black Hills, would be "set apart for the absolute and undisturbed use and occupation of the Indians herein named." *Id.*, at 636. The Fort Laramie Treaty was concluded at the culmination of the Powder River War of 1866–1867, a series of military engagements in which the Sioux tribes, led by their great chief, Red Cloud, fought to protect the integrity of earlier-recognized treaty lands from the incursion of white settlers.[1]

The Fort Laramie Treaty included several agreements central to the issues presented in this case. First, it established the Great Sioux Reservation, a tract of land bounded on the east by the Missouri River, on the south by the northern border of the State of Nebraska, on the north by the forty-sixth parallel of north latitude, and on the west by the one

[1] The Sioux territory recognized under the Treaty of September 17, 1851, see 11 Stat. 749, included all of the present State of South Dakota, and parts of what is now Nebraska, Wyoming, North Dakota, and Montana. The Powder River War is described in some detail in D. Robinson, A History of the Dakota or Sioux Indians 356–381 (1904), reprinted in 2 South Dakota Historical Collections (1904). Red Cloud's career as a warrior and statesman of the Sioux is recounted in 2 G. Hebard & E. Brininstool, The Bozeman Trail 175–204 (1922).

hundred and fourth meridian of west longitude,[2] in addition to certain reservations already existing east of the Missouri. The United States "solemnly agree[d]" that no unauthorized persons "shall ever be permitted to pass over, settle upon, or reside in [this] territory." *Ibid.*

Second, the United States permitted members of the Sioux tribes to select lands within the reservation for cultivation. *Id.*, at 637. In order to assist the Sioux in becoming civilized farmers, the Government promised to provide them with the necessary services and materials, and with subsistence rations for four years. *Id.*, at 639.[3]

Third, in exchange for the benefits conferred by the treaty, the Sioux agreed to relinquish their rights under the Treaty of September 17, 1851, to occupy territories outside the reservation, while reserving their "right to hunt on any lands north of North Platte, and on the Republican Fork of the Smoky Hill river, so long as the buffalo may range thereon in such numbers as to justify the chase." *Ibid.* The Indians also expressly agreed to withdraw all opposition to the build-

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[2] The boundaries of the reservation included approximately half the area of what is now the State of South Dakota, including all of that State west of the Missouri River save for a narrow strip in the far western portion. The reservation also included a narrow strip of land west of the Missouri and north of the border between North and South Dakota.

[3] The treaty called for the construction of schools and the provision of teachers for the education of Indian children, the provision of seeds and agricultural instruments to be used in the first four years of planting, and the provision of blacksmiths, carpenters, millers, and engineers to perform work on the reservation. See 15 Stat. 637–638, 640. In addition, the United States agreed to deliver certain articles of clothing to each Indian residing on the reservation, "on or before the first day of August of each year, for thirty years." *Id.*, at 638. An annual stipend of $10 per person was to be appropriated for all those members of the Sioux Nation who continued to engage in hunting; those who settled on the reservation to engage in farming would receive $20. *Ibid.* Subsistence rations of meat and flour (one pound of each per day) were to be provided for a period of four years to those Indians upon the reservation who could not provide for their own needs. *Id.*, at 639.

ing of railroads that did not pass over their reservation lands, not to engage in attacks on settlers, and to withdraw their opposition to the military posts and roads that had been established south of the North Platte River. *Ibid.*

Fourth, Art. XII of the treaty provided:

> "No treaty for the cession of any portion or part of the reservation herein described which may be held in common shall be of any validity or force as against the said Indians, unless executed and signed by at least three fourths of all the adult male Indians, occupying or interested in the same." *Ibid.*[4]

The years following the treaty brought relative peace to the Dakotas, an era of tranquility that was disturbed, however, by renewed speculation that the Black Hills, which were included in the Great Sioux Reservation, contained vast quantities of gold and silver.[5] In 1874 the Army planned and undertook an exploratory expedition into the Hills, both for the purpose of establishing a military outpost from which to control those Sioux who had not accepted the terms of the Fort Laramie Treaty, and for the purpose of investigating "the country about which dreamy stories have been told." D. Jackson, Custer's Gold 14 (1966) (quoting the 1874 annual report of Lieutenant General Philip H. Sheridan, as Commander of the Military Division of the Missouri, to the Secretary of War). Lieutenant Colonel George Armstrong Custer led the expedition of close to 1,000 soldiers and teamsters, and a substantial number of military and civilian aides.

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[4] The Fort Laramie Treaty was considered by some commentators to have been a complete victory for Red Cloud and the Sioux. In 1904 it was described as "the only instance in the history of the United States where the government has gone to war and afterwards negotiated a peace conceding everything demanded by the enemy and exacting nothing in return." Robinson, *supra* n. 1, at 387.

[5] The history of speculation concerning the presence of gold in the Black Hills, which dated from early explorations by prospectors in the 1830's, is capsulized in D. Jackson, Custer's Gold 3–7 (1966).

Custer's journey began at Fort Abraham Lincoln on the Missouri River on July 2, 1874. By the end of that month they had reached the Black Hills, and by mid-August had confirmed the presence of gold fields in that region. The discovery of gold was widely reported in newspapers across the country.[6] Custer's florid descriptions of the mineral and timber resources of the Black Hills, and the land's suitability for grazing and cultivation, also received wide circulation, and had the effect of creating an intense popular demand for the "opening" of the Hills for settlement.[7] The only obstacle to "progress" was the Fort Laramie Treaty that reserved occupancy of the Hills to the Sioux.

Having promised the Sioux that the Black Hills were reserved to them, the United States Army was placed in the position of having to threaten military force, and occasionally to use it, to prevent prospectors and settlers from trespassing on lands reserved to the Indians. For example, in September 1874, General Sheridan sent instructions to Brigadier General Alfred H. Terry, Commander of the Department of Dakota, at Saint Paul, directing him to use force to prevent companies of prospectors from trespassing on the Sioux Reservation. At the same time, Sheridan let it be known that

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[6] In 1974, the Center for Western Studies completed a project compiling contemporary newspaper accounts of Custer's expedition. See H. Krause & G. Olson, Prelude to Glory (1974). Several correspondents traveled with Custer on the expedition and their dispatches were published by newspapers both in the Midwest and the East. *Id.*, at 6.

[7] See Robinson, *supra* n. 1, at 408–410; A. Tallent, The Black Hills 130 (1975 reprint of 1899 ed.); J. Vaughn, The Reynolds Campaign on Powder River 3–4 (1961).

The Sioux regarded Custer's expedition in itself to be a violation of the Fort Laramie Treaty. In later negotiations for cession of the Black Hills, Custer's trail through the Hills was referred to by a chief known as Fast Bear as "that thieves' road." Jackson, *supra* n. 5, at 24. Chroniclers of the expedition, at least to an extent, have agreed. See *id.*, at 120; G. Manypenny, Our Indian Wards xxix, 296–297 (1972 reprint of 1880 ed.).

he would "give a cordial support to the settlement of the Black Hills," should Congress decide to "open up the country for settlement, by extinguishing the treaty rights of the Indians." App. 62–63. Sheridan's instructions were published in local newspapers. See *id.*, at 63.[8]

Eventually, however, the Executive Branch of the Government decided to abandon the Nation's treaty obligation to preserve the integrity of the Sioux territory. In a letter dated November 9, 1875, to Terry, Sheridan reported that he had met with President Grant, the Secretary of the Interior, and the Secretary of War, and that the President had decided that the military should make no further resistance to the occupation of the Black Hills by miners, "it being his belief that such resistance only increased their desire and complicated the troubles." *Id.*, at 59. These orders were to be enforced "quietly," *ibid.*, and the President's decision was to remain "confidential." *Id.*, at 59–60 (letter from Sheridan to Sherman).

With the Army's withdrawal from its role as enforcer of the Fort Laramie Treaty, the influx of settlers into the Black Hills increased. The Government concluded that the only practical course was to secure to the citizens of the United States the right to mine the Black Hills for gold. Toward

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[8] General William Tecumseh Sherman, Commanding General of the Army, as quoted in the Saint Louis Globe in 1875, described the military's task in keeping prospectors out of the Black Hills as "the same old story, the story of Adam and Eve and the forbidden fruit." Jackson, *supra* n. 5, at 112. In an interview with a correspondent from the Bismarck Tribune, published September 2, 1874, Custer recognized the military's obligation to keep all trespassers off the reservation lands, but stated that he would recommend to Congress "the extinguishment of the Indian title at the earliest moment practicable for military reasons." Krause & Olson, *supra* n. 6, at 233. Given the ambivalence of feeling among the commanding officers of the Army about the practicality and desirability of its treaty obligations, it is perhaps not surprising that one chronicler of Sioux history would describe the Government's efforts to dislodge invading settlers from the Black Hills as "feeble." F. Hans, The Great Sioux Nation 522 (1964 reprint).

that end, the Secretary of the Interior, in the spring of 1875, appointed a commission to negotiate with the Sioux. The commission was headed by William B. Allison. The tribal leaders of the Sioux were aware of the mineral value of the Black Hills and refused to sell the land for a price less than $70 million. The commission offered the Indians an annual rental of $400,000, or payment of $6 million for absolute relinquishment of the Black Hills. The negotiations broke down.[9]

In the winter of 1875–1876, many of the Sioux were hunting in the unceded territory north of the North Platte River, reserved to them for that purpose in the Fort Laramie Treaty. On December 6, 1875, for reasons that are not entirely clear, the Commissioner of Indian Affairs sent instructions to the Indian agents on the reservation to notify those hunters that if they did not return to the reservation agencies by January 31, 1876, they would be treated as "hostiles." Given the severity of the winter, compliance with these instructions was impossible. On February 1, the Secretary of the Interior nonetheless relinquished jurisdiction over all hostile Sioux, including those Indians exercising their treaty-protected hunting rights, to the War Department. The Army's campaign against the "hostiles" led to Sitting Bull's notable victory over Custer's forces at the battle of the Little Big Horn on June 25. That victory, of course, was short-lived, and those Indians who surrendered to the Army were returned to the reservation, and deprived of their weapons and horses, leaving them completely dependent for survival on rations provided them by the Government.[10]

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[9] The Report of the Allison Commission to the Secretary of the Interior is contained in the Annual Report of the Commissioner of Indian Affairs (1875), App. 146, 158–195. The unsuccessful negotiations are described in some detail in Jackson, *supra* n. 5, at 116–118, and in Robinson, *supra* n. 1, at 416–421.

[10] These events are described by Manypenny, *supra* n. 7, at 294–321, and Robinson, *supra* n. 1, at 422–438.

In the meantime, Congress was becoming increasingly dissatisfied with the failure of the Sioux living on the reservation to become self-sufficient.[11] The Sioux' entitlement to subsistence rations under the terms of the Fort Laramie Treaty

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[11] In Dakota Twilight (1976), a history of the Standing Rock Sioux, Edward A. Milligan states:

"Nearly seven years had elapsed since the signing of the Fort Laramie Treaty and still the Sioux were no closer to a condition of self-support than when the treaty was signed. In the meantime the government had expended nearly thirteen million dollars for their support. The future treatment of the Sioux became a matter of serious moment, even if viewed from no higher standard than that of economics." *Id.*, at 52.

One historian has described the ration provisions of the Fort Laramie Treaty as part of a broader reservation system designed by Congress to convert nomadic tribesmen into farmers. Hagan, The Reservation Policy: Too Little and Too Late, in Indian-White Relations: A Persistent Paradox 157–169 (J. Smith & R. Kvasnicka, eds., 1976). In words applicable to conditions on the Sioux Reservation during the years in question, Professor Hagan stated:

"The idea had been to supplement the food the Indians obtained by hunting until they could subsist completely by farming. Clauses in the treaties permitted hunting outside the strict boundaries of the reservations, but the inevitable clashes between off-reservation hunting parties and whites led this privilege to be first restricted and then eliminated. The Indians became dependent upon government rations more quickly than had been anticipated, while their conversion to agriculture lagged behind schedule.

"The quantity of food supplied by the government was never sufficient for a full ration, and the quality was frequently poor. But in view of the fact that most treaties carried no provision for rations at all, and for others they were limited to four years, the members of Congress tended to look upon rations as a gratuity that should be terminated as quickly as possible. The Indian Service and military personnel generally agreed that it was better to feed than to fight, but to the typical late nineteenth-century member of Congress, not yet exposed to doctrines of social welfare, there was something obscene about grown men and women drawing free rations. Appropriations for subsistence consequently fell below the levels requested by the secretary of the interior.

"That starvation and near-starvation conditions were present on some of the sixty-odd reservations every year for the quarter century after the Civil War is manifest." *Id.*, at 161 (footnotes omitted).

had expired in 1872. Nonetheless, in each of the two following years, over $1 million was appropriated for feeding the Sioux. In August 1876, Congress enacted an appropriations bill providing that "hereafter there shall be no appropriation made for the subsistence" of the Sioux, unless they first relinquished their rights to the hunting grounds outside the reservation, ceded the Black Hills to the United States, and reached some accommodation with the Government that would be calculated to enable them to become self-supporting. Act of Aug. 15, 1876, 19 Stat. 176, 192.[12] Toward this end, Congress requested the President to appoint another commission to negotiate with the Sioux for the cession of the Black Hills.

This commission, headed by George Manypenny, arrived in the Sioux country in early September and commenced meetings with the head men of the various tribes. The members of the commission impressed upon the Indians that the United States no longer had any obligation to provide them with subsistence rations. The commissioners brought with them the text of a treaty that had been prepared in advance. The principal provisions of this treaty were that the Sioux would relinquish their rights to the Black Hills and other lands west of the one hundred and third meridian, and their rights to hunt in the unceded territories to the north, in exchange for subsistence rations for as long as they would be needed to ensure the Sioux' survival. In setting out to obtain the tribes' agreement to this treaty, the commission ignored the stipulation of the Fort Laramie Treaty that any cession of the lands contained within the Great Sioux Reservation would have to be joined in by three-fourths of the adult males. Instead, the treaty was presented just to Sioux

[12] The chronology of the enactment of this bill does not necessarily support the view that it was passed in reaction to Custer's defeat at the Battle of the Little Big Horn on June 25, 1876, although some historians have taken a contrary view. See Jackson, *supra* n. 5, at 119.

chiefs and their leading men. It was signed by only 10% of the adult male Sioux population.[13]

Congress resolved the impasse by enacting the 1876 "agreement" into law as the Act of Feb. 28, 1877 (1877 Act). 19 Stat. 254. The Act had the effect of abrogating the earlier Fort Laramie Treaty, and of implementing the terms

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[13] The commission's negotiations with the chiefs and head men is described by Robinson, *supra* n. 1, at 439–442. He states:

"As will be readily understood, the making of a treaty was a forced put, so far as the Indians were concerned. Defeated, disarmed, dismounted, they were at the mercy of a superior power and there was no alternative but to accept the conditions imposed upon them. This they did with as good grace as possible under all of the conditions existing." *Id.*, at 442.

Another early chronicler of the Black Hills region wrote of the treaty's provisions in the following chauvinistic terms:

"It will be seen by studying the provisions of this treaty, that by its terms the Indians from a material standpoint lost much, and gained but little. By the first article they lose all rights to the unceded Indian territory in Wyoming from which white settlers had then before been altogether excluded; by the second they relinquish all right to the Black Hills, and the fertile valley of the Belle Fourche in Dakota, without additional material compensation; by the third conceding the right of way over the unceded portions of their reservation; by the fourth they receive such supplies only, as were provided by the treaty of 1868, restricted as to the points for receiving them. The only real gain to the Indians seems to be embodied in the fifth article of the treaty [Government's obligation to provide subsistence rations]. The Indians, doubtless, realized that the Black Hills was destined soon to slip out of their grasp, regardless of their claims, and therefore thought it best to yield to the inevitable, and accept whatever was offered them.

"They were assured of a continuance of their regular daily rations, and certain annuities in clothing each year, guaranteed by the treaty of 1868, and what more could they ask or desire, than that a living be provided for themselves, their wives, their children, and all their relations, including squaw men, indirectly, thus leaving them free to live their wild, careless, unrestrained life, exempt from all the burdens and responsibilities of civilized existence? In view of the fact that there are thousands who are obliged to earn their bread and butter by the sweat of their brows, and that have hard work to keep the wolf from the door, they should be satisfied." Tallent, *supra* n. 7, at 133–134.

of the Manypenny Commission's "agreement" with the Sioux leaders.[14]

The passage of the 1877 Act legitimized the settlers' invasion of the Black Hills, but throughout the years it has been regarded by the Sioux as a breach of this Nation's solemn obligation to reserve the Hills in perpetuity for occupation by the Indians. One historian of the Sioux Nation commented on Indian reaction to the Act in the following words:

> "The Sioux thus affected have not gotten over talking about that treaty yet, and during the last few years they have maintained an organization called the Black Hills Treaty Association, which holds meetings each year at the various agencies for the purpose of studying the

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[14] The 1877 Act "ratified and confirmed" the agreement reached by the Manypenny Commission with the Sioux tribes. 19 Stat. 254. It altered the boundaries of the Great Sioux Reservation by adding some 900,000 acres of land to the north, while carving out virtually all that portion of the reservation between the one hundred and third and one hundred and fourth meridians, including the Black Hills, an area of well over 7 million acres. The Indians also relinquished their rights to hunt in the unceded lands recognized by the Fort Laramie Treaty, and agreed that three wagon roads could be cut through their reservation. *Id.*, at 255.

In exchange, the Government reaffirmed its obligation to provide all annuities called for by the Fort Laramie Treaty, and "to provide all necessary aid to assist the said Indians in the work of civilization; to furnish to them schools and instruction in mechanical and agricultural arts, as provided for by the treaty of 1868." *Id.*, at 256. In addition, every individual was to receive fixed quantities of beef or bacon and flour, and other foodstuffs, in the discretion of the Commissioner of Indian Affairs, which "shall be continued until the Indians are able to support themselves." *Ibid.* The provision of rations was to be conditioned, however, on the attendance at school by Indian children, and on the labor of those who resided on lands suitable for farming. The Government also promised to assist the Sioux in finding markets for their crops and in obtaining employment in the performance of Government work on the reservation. *Ibid.*

Later congressional actions having the effect of further reducing the domain of the Great Sioux Reservation are described in *Rosebud Sioux Tribe* v. *Kneip*, 430 U. S. 584, 589 (1977).

> treaty with the intention of presenting a claim against the government for additional reimbursements for the territory ceded under it. Some think that Uncle Sam owes them about $9,000,000 on the deal, but it will probably be a hard matter to prove it." F. Fiske, The Taming of the Sioux 132 (1917).

Fiske's words were to prove prophetic.

II

Prior to 1946, Congress had not enacted any mechanism of general applicability by which Indian tribes could litigate treaty claims against the United States.[15] The Sioux, however, after years of lobbying, succeeded in obtaining from Congress the passage of a special jurisdictional Act which provided them a forum for adjudication of all claims against the United States "under any treaties, agreements, or laws of Congress, or for the misappropriation of any of the funds or lands of said tribe or band or bands thereof." Act of June 3, 1920, ch. 222, 41 Stat. 738. Pursuant to this statute, the Sioux, in 1923, filed a petition with the Court of Claims alleging that the Government had taken the Black Hills without just compensation, in violation of the Fifth Amendment. This claim was dismissed by that court in 1942. In a lengthy and unanimous opinion, the court concluded that it was not authorized by the Act of June 3, 1920, to question whether the compensation afforded the Sioux by Congress in 1877 was an adequate price for the Black Hills, and that the Sioux' claim in this regard was a moral claim not protected by the Just Compensation Clause. *Sioux Tribe* v. *United States*, 97 Ct. Cl. 613 (1942), cert. denied, 318 U. S. 789 (1943).

In 1946, Congress passed the Indian Claims Commission Act, 60 Stat. 1049, 25 U. S. C. § 70 *et seq.*, creating a new forum to hear and determine all tribal grievances that had

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[15] See § 9 of the Act of Mar. 3, 1863, 12 Stat. 767; § 1 of the Tucker Act of Mar. 3, 1887, 24 Stat. 505.

arisen previously. In 1950, counsel for the Sioux resubmitted the Black Hills claim to the Indian Claims Commission. The Commission initially ruled that the Sioux had failed to prove their case. *Sioux Tribe* v. *United States,* 2 Ind. Cl. Comm'n 646 (1954), aff'd, 146 F. Supp. 229 (Ct. Cl. 1956). The Sioux filed a motion with the Court of Claims to vacate its judgment of affirmance, alleging that the Commission's decision had been based on a record that was inadequate, due to the failings of the Sioux' former counsel. This motion was granted and the Court of Claims directed the Commission to consider whether the case should be reopened for the presentation of additional evidence. On November 19, 1958, the Commission entered an order reopening the case and announcing that it would reconsider its prior judgment on the merits of the Sioux claim. App. 265–266; see *Sioux Tribe* v. *United States,* 182 Ct. Cl. 912 (1968) (summary of proceedings).

Following the Sioux' filing of an amended petition, claiming again that the 1877 Act constituted a taking of the Black Hills for which just compensation had not been paid, there ensued a lengthy period of procedural sparring between the Indians and the Government. Finally, in October 1968, the Commission set down three questions for briefing and determination: (1) What land and rights did the United States acquire from the Sioux by the 1877 Act? (2) What, if any, consideration was given for that land and those rights? And (3) if there was no consideration for the Government's acquisition of the land and rights under the 1877 Act, was there any payment for such acquisition? App. 266.

Six years later, by a 4-to-1 vote, the Commission reached a preliminary decision on these questions. *Sioux Nation* v. *United States,* 33 Ind. Cl. Comm'n 151 (1974). The Commission first held that the 1942 Court of Claims decision did not bar the Sioux' Fifth Amendment taking claim through application of the doctrine of res judicata. The Commission concluded that the Court of Claims had dismissed the earlier

suit for lack of jurisdiction, and that it had not determined the merits of the Black Hills claim. The Commission then went on to find that Congress, in 1877, had made no effort to give the Sioux full value for the ceded reservation lands. The only new obligation assumed by the Government in exchange for the Black Hills was its promise to provide the Sioux with subsistence rations, an obligation that was subject to several limiting conditions. See n. 14, *supra*. Under these circumstances, the Commission concluded that the consideration given the Indians in the 1877 Act had no relationship to the value of the property acquired. Moreover, there was no indication in the record that Congress ever attempted to relate the value of the rations to the value of the Black Hills Applying the principles announced by the Court of Claims in *Three Tribes of Fort Berthold Reservation* v. *United States*, 182 Ct. Cl. 543, 390 F. 2d 686 (1968), the Commission concluded that Congress had acted pursuant to its power of eminent domain when it passed the 1877 Act, rather than as a trustee for the Sioux, and that the Government must pay the Indians just compensation for the taking of the Black Hills.[16]

The Government filed an appeal with the Court of Claims

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[16] The Commission determined that the fair market value of the Black Hills as of February 28, 1877, was $17.1 million. In addition, the United States was held liable for gold removed by trespassing prospectors prior to that date, with a fair market value in the ground of $450,000. The Commission determined that the Government should receive a credit for all amounts it had paid to the Indians over the years in compliance with its obligations under the 1877 Act. These amounts were to be credited against the fair market value of the lands and gold taken, and interest as it accrued. The Commission decided that further proceedings would be necessary to compute the amounts to be credited and the value of the rights-of-way across the reservation that the Government also had acquired through the 1877 Act.

Chairman Kuykendall dissented in part from the Commission's judgment, arguing that the Sioux' taking claim was barred by the res judicata effect of the 1942 Court of Claims decision.

from the Commission's interlocutory order, arguing alternatively that the Sioux' Fifth Amendment claim should have been barred by principles of res judicata and collateral estoppel, or that the 1877 Act did not effect a taking of the Black Hills for which just compensation was due. Without reaching the merits, the Court of Claims held that the Black Hills claim was barred by the res judicata effect of its 1942 decision. *United States* v. *Sioux Nation*, 207 Ct. Cl. 234, 518 F. 2d 1298 (1975). The court's majority recognized that the practical impact of the question presented was limited to a determination of whether or not an award of interest would be available to the Indians. This followed from the Government's failure to appeal the Commission's holding that it had acquired the Black Hills through a course of unfair and dishonorable dealing for which the Sioux were entitled to damages, without interest, under § 2 of the Indian Claims Commission Act, 60 Stat. 1050, 25 U. S. C. § 70a (5). Only if the acquisition of the Black Hills amounted to an unconstitutional taking would the Sioux be entitled to interest. 207 Ct. Cl., at 237, 518 F. 2d, at 1299.[17]

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[17] See *United States* v. *Tillamooks*, 341 U. S. 48, 49 (1951) (recognizing that the "traditional rule" is that interest is not to be awarded on claims against the United States absent an express statutory provision to the contrary and that the "only exception arises when the taking entitles the claimant to just compensation under the Fifth Amendment"). In *United States* v. *Klamath Indians*, 304 U. S. 119, 123 (1938), the Court stated: "The established rule is that the taking of property by the United States in the exertion of its power of eminent domain implies a promise to pay just compensation, *i. e.*, value at the time of the taking plus an amount sufficient to produce the full equivalent of that value paid contemporaneously with the taking."

The Court of Claims also noted that subsequent to the Indian Claims Commission's judgment, Congress had enacted an amendment to 25 U. S. C. § 70a, providing generally that expenditures made by the Government "for food, rations, or provisions shall not be deemed payments on the claim." Act of Oct. 27, 1974, § 2, 88 Stat. 1499. Thus, the Government would no longer be entitled to an offset from any judgment eventually awarded the Sioux based on its appropriations for subsistence rations

The court affirmed the Commission's holding that a want of fair and honorable dealings in this case was evidenced, and held that the Sioux thus would be entitled to an award of at least $17.5 million for the lands surrendered and for the gold taken by trespassing prospectors prior to passage of the 1877 Act. See n. 16, *supra*. The court also remarked upon President Grant's duplicity in breaching the Government's treaty obligation to keep trespassers out of the Black Hills, and the pattern of duress practiced by the Government on the starving Sioux to get them to agree to the sale of the Black Hills. The court concluded: "A more ripe and rank case of dishonorable dealings will never, in all probability, be found in our history, which is not, taken as a whole, the disgrace it now pleases some persons to believe." 207 Ct. Cl., at 241, 518 F. 2d, at 1302.

Nonetheless, the court held that the merits of the Sioux' taking claim had been reached in 1942, and whether resolved "rightly or wrongly," *id.*, at 249, 518 F. 2d, at 1306, the claim was now barred by res judicata. The court observed that interest could not be awarded the Sioux on judgments obtained pursuant to the Indian Claims Commission Act, and that while Congress could correct this situation, the court could not. *Ibid.*[18] The Sioux petitioned this Court for a writ of certiorari, but that petition was denied. 423 U. S 1016 (1975).

The case returned to the Indian Claims Commission, where the value of the rights-of-way obtained by the Government through the 1877 Act was determined to be $3,484, and where it was decided that the Government had made no payments to the Sioux that could be considered as offsets. App. 316.

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in the years following the passage of the 1877 Act. 207 Ct. Cl., at 240, 518 F. 2d, at 1301. See n. 16, *supra*.

[18] Judge Davis dissented with respect to the court's holding on res judicata, arguing that the Sioux had not had the opportunity to present their claim fully in 1942. 207 Ct. Cl., at 249, 518 F. 2d, at 1306.

The Government then moved the Commission to enter a final award in favor of the Sioux in the amount of $17.5 million, see n. 16, *supra*, but the Commission deferred entry of final judgment in view of legislation then pending in Congress that dealt with the case.

On March 13, 1978, Congress passed a statute providing for Court of Claims review of the merits of the Indian Claims Commission's judgment that the 1877 Act effected a taking of the Black Hills, without regard to the defenses of res judicata and collateral estoppel. The statute authorized the Court of Claims to take new evidence in the case, and to conduct its review of the merits *de novo*. Pub. L. 95–243, 92 Stat. 153, amending § 20 (b) of the Indian Claims Commission Act. See 25 U. S. C. § 70s (b) (1976 ed., Supp. II).

Acting pursuant to that statute, a majority of the Court of Claims, sitting en banc, in an opinion by Chief Judge Friedman, affirmed the Commission's holding that the 1877 Act effected a taking of the Black Hills and of rights-of-way across the reservation. 220 Ct. Cl. —, 601 F. 2d 1157 (1979).[19] In doing so, the court applied the test it had earlier articulated in *Fort Berthold*, 182 Ct. Cl., at 553, 390 F. 2d, at 691, asking whether Congress had made "a good faith effort to give the Indians the full value of the land," 220 Ct. Cl., at —, 601 F. 2d, at 1162, in order to decide whether the 1877 Act had effected a taking or whether it had been a noncompensable act of congressional guardianship over tribal property. The court characterized the Act as a taking, an exercise of Congress' power of eminent domain over Indian property. It distinguished broad statements seemingly leading to a contrary

[19] While affirming the Indian Claims Commission's determination that the acquisition of the Black Hills and the rights-of-way across the reservation constituted takings, the court reversed the Commission's determination that the mining of gold from the Black Hills by prospectors prior to 1877 also constituted a taking. The value of the gold, therefore, could not be considered as part of the principal on which interest would be paid to the Sioux. 220 Ct. Cl., at —, 601 F. 2d, at 1171–1172.

result in *Lone Wolf* v. *Hitchcock*, 187 U. S. 553 (1903), as inapplicable to a case involving a claim for just compensation. 220 Ct. Cl., at —, 601 F. 2d, at 1170.[20]

The court thus held that the Sioux were entitled to an award of interest, at the annual rate of 5%, on the principal sum of $17.1 million, dating from 1877.[21]

We granted the Government's petition for a writ of certiorari, 444 U. S. 989 (1979), in order to review the important constitutional questions presented by this case, questions not only of longstanding concern to the Sioux, but also of significant economic import to the Government.

III

Having twice denied petitions for certiorari in this litigation, see 318 U. S. 789 (1943); 423 U. S. 1016 (1975), we are confronted with it for a third time as a result of the amendment, above noted, to the Indian Claims Commission Act of 1946, 25 U. S. C. § 70s (b) (1976 ed., Supp. II), which

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[20] The *Lone Wolf* decision itself involved an action by tribal leaders to enjoin the enforcement of a statute that had the effect of abrogating the provisions of an earlier-enacted treaty with an Indian tribe. See Part IV-B, *infra*.

[21] Judge Nichols concurred in the result, and all of the court's opinion except that portion distinguishing *Lone Wolf*. He would have held *Lone Wolf*'s principles inapplicable to this case because Congress had not created a record showing that it had considered the compensation afforded the Sioux under the 1877 Act to be adequate consideration for the Black Hills. He did not believe that *Lone Wolf* could be distinguished on the ground that it involved an action for injunctive relief rather than a claim for just compensation. 220 Ct. Cl., at —, 601 F. 2d, at 1175–1176.

Judge Bennett, joined by Judge Kunzig, dissented. The dissenters would have read *Lone Wolf* broadly to hold that it was within Congress' constitutional power to dispose of tribal property without regard to good faith or the amount of compensation given. "The law we should apply is that once Congress has, through negotiation or statute, recognized the Indian tribes' rights in the property, has disposed of it, and has given value to the Indians for it, that is the end of the matter." 220 Ct. Cl., at —, 601 F. 2d, at 1182.

directed the Court of Claims to review the merits of the Black Hills takings claim without regard to the defense of res judicata. The amendment, approved March 13, 1978, provides:

> "Notwithstanding any other provision of law, upon application by the claimants within thirty days from the date of the enactment of this sentence, the Court of Claims shall review on the merits, without regard to the defense of res judicata or collateral estoppel, that portion of the determination of the Indian Claims Commission entered February 15, 1974, adjudging that the Act of February 28, 1877 (19 Stat. 254), effected a taking of the Black Hills portion of the Great Sioux Reservation in violation of the fifth amendment, and shall enter judgment accordingly. In conducting such review, the Court shall receive and consider any additional evidence, including oral testimony, that either party may wish to provide on the issue of a fifth amendment taking and shall determine that issue de novo." 92 Stat. 153.

Before turning to the merits of the Court of Claims' conclusion that the Act of February 28, 1877, effected a taking of the Black Hills, we must consider the question whether Congress, in enacting this 1978 amendment, "has inadvertently passed the limit which separates the legislative from the judicial power." *United States* v. *Klein*, 13 Wall. 128, 147 (1872).

A

There are two objections that might be raised to the constitutionality of this amendment, each framed in terms of the doctrine of separation of powers. The first would be that Congress impermissibly has disturbed the finality of a judicial decree by rendering the Court of Claims' earlier judgments in this case mere advisory opinions. See *Hayburn's Case*, 2 Dall. 409, 410–414 (1792) (setting forth the views of three Circuit Courts, including among their complements Mr. Chief

Justice Jay, and Justice Cushing, Wilson, Blair, and Iredell, that the Act of March 23, 1792, 1 Stat. 243, was unconstitutional because it subjected the decisions of the Circuit Courts concerning eligibility for pension benefits to review by the Secretary of War and the Congress). The objection would take the form that Congress, in directing the Court of Claims to reach the merits of the Black Hills claim, effectively reviewed and reversed that court's 1975 judgment that the claim was barred by res judicata, or its 1942 judgment that the claim was not cognizable under the Fifth Amendment. Such legislative review of a judicial decision would interfere with the independent functions of the Judiciary.

The second objection would be that Congress overstepped its bounds by granting the Court of Claims jurisdiction to decide the merits of the Black Hills claim, while prescribing a rule for decision that left the court no adjudicatory function to perform. See *United States* v. *Klein*, 13 Wall., at 146; *Yakus* v. *United States*, 321 U. S. 414, 467–468 (1944) (Rutledge, J., dissenting). Of course, in the context of this amendment, that objection would have to be framed in terms of Congress' removal of a single issue from the Court of Claims' purview, the question whether res judicata or collateral estoppel barred the Sioux' claim. For in passing the amendment, Congress left no doubt that the Court of Claims was free to decide the merits of the takings claim in accordance with the evidence it found and applicable rules of law. See n. 23, *infra*.

These objections to the constitutionality of the amendment were not raised by the Government before the Court of Claims. At oral argument in this Court, counsel for the United States, upon explicit questioning, advanced the position that the amendment was not beyond the limits of legislative power.[22] The question whether the amendment

[22] In response to a question from the bench, Government counsel stated: "I think Congress is entitled to say, 'You may have another opportunity to litigate your lawsuit.'" Tr. of Oral Arg. 30.

impermissibly interfered with judicial power was debated, however, in the House of Representatives, and that body concluded that the Government's waiver of a "technical legal defense" in order to permit the Court of Claims to reconsider the merits of the Black Hills claim was within Congress' power to enact.[23]

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[23] Representative Gudger of North Carolina persistently argued the view that the amendment unconstitutionally interfered with the powers of the Judiciary. He dissented from the Committee Report in support of the amendment's enactment, stating:

"I do not feel that when the Federal Judiciary has adjudicated a matter through appellate review and no error has been found by the Supreme Court of the United States in the application by the lower court (in this instance the Court of Claims) of the doctrine of res judicata or collateral estoppel that the Congress of the United States should enact legislation which has the effect of reversing the decision of the Judiciary." H. R. Rep. No. 95-529, p. 17 (1977).

Representative Gudger stated that he could support a bill to grant a special appropriation to the Sioux Nation, acknowledging that it was for the purpose of extinguishing Congress' moral obligation arising from the Black Hills claim, "but I cannot justify in my own mind this exercise of congressional review of a judicial decision which I consider contravenes our exclusively legislative responsibility under the separation of powers doctrine." *Id.*, at 18.

The Congressman, in the House debates, elaborated upon his views on the constitutionality of the amendment. He stated that the amendment would create "a real and serious departure from the separation-of-powers doctrine, which I think should continue to govern us and has governed us in the past." 124 Cong. Rec. H897 (Feb. 9, 1978). He continued:

"I submit that this bill has the precise and exact effect of reversing a decision of the Court of Claims which has heretofore been sustained by the Supreme Court of the United States. Thus, it places the Congress of the United States in the position of reviewing and reversing a judicial decision in direct violation of the separation-of-powers doctrine so basic to our tripartite form of government.

"I call to your attention that, in this instance, we are not asked to change the law, applicable uniformly to all cases of like nature throughout the land, but that this bill proposes to change the application of the law with respect to one case only. In doing this, we are not legislating, we are adjudicating. Moreover, we are performing the adjudicatory func-

The question debated on the floor of the House is one the answer to which is not immediately apparent. It requires us to examine the proper role of Congress and the courts in

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tion with respect to a case on which the Supreme Court of the United States has acted. Thus, in this instance, we propose to reverse the decision of the Supreme Court of our land." *Ibid.*

Representative Gudger's views on the effect of the amendment vis-à-vis the independent powers of the Judiciary were not shared by his colleagues. Representative Roncalio stated:

"I want to emphasize that the bill does not make a congressional determination of whether or not the United States violated the fifth amendment. It does not say that the Sioux are entitled to the interest on the $17,500,000 award. It says that the court will review the facts and law in the case and determine that question." *Id.*, at H898.

Representative Roncalio also informed the House that Congress in the past had enacted legislation waiving the defense of res judicata in private claims cases, and had done so twice with respect to Indian claims. *Ibid.* He mentioned the Act of Mar. 3, 1881, 21 Stat. 504 (which actually waived the effect of a prior award made to the Choctaw Nation by the Senate), and the Act of Feb. 7, 1925, 43 Stat. 812 (authorizing the Court of Claims and the Supreme Court to consider claims of the Delaware Tribe "de novo, upon a legal and equitable basis, and without regard to any decision, finding, or settlement heretofore had in respect of any such claims"). Both those enactments were also brought to the attention of a Senate Subcommittee in hearings on this amendment conducted during the previous legislative session. See Hearing on S. 2780 before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, 94th Cong., 2d Sess., 16–17 (1976) (letter from Morris Thompson, Commissioner of Indian Affairs). The enactments referred to by Representative Roncalio were construed, respectively, in *Choctaw Nation* v. *United States*, 119 U. S. 1, 29–32 (1886), and *Delaware Tribe* v. *United States*, 74 Ct. Cl. 368 (1932).

Representative Pressler also responded to Representative Gudger's interpretation of the proposed amendment, arguing that "[w]e are, indeed, here asking for a review and providing the groundwork for a review. I do not believe that we would be reviewing a decision; indeed, the same decision might be reached." 124 Cong. Rec. H899 (Feb. 9, 1978). Earlier, Representative Meeds clearly had articulated the prevailing congressional view on the effect of the proposed amendment. After summarizing the history of the Black Hills litigation, he stated:

"I go through that rather complicated history for the purpose of point-

recognizing and determining claims against the United States, in light of more general principles concerning the legislative and judicial roles in our tripartite system of government. Our examination of the amendment's effect, and of this Court's precedents, leads us to conclude that neither of the two separation-of-powers objections described above is presented by this legislation.

B

Our starting point is *Cherokee Nation* v. *United States*, 270 U. S. 476 (1926). That decision concerned the Special Act of Congress, dated March 3, 1919, 40 Stat. 1316, conferring jurisdiction upon the Court of Claims "to hear, consider, and determine the claim of the Cherokee Nation against the United States for interest, in addition to all other interest heretofore allowed and paid, alleged to be owing from the United States to the Cherokee Nation on the funds arising from the judgment of the Court of Claims of May eighteenth, nineteen hundred and five." In the judgment referred to by the Act, the Court of Claims had allowed 5% simple interest on four Cherokee claims, to accrue from the date of liability. *Cherokee Nation* v. *United States*, 40 Ct. Cl. 252 (1905). This Court had affirmed that judgment, including the interest award. *United States* v. *Cherokee Nation*, 202 U. S. 101,

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ing out to the Members that the purpose of this legislation is not to decide the matter on the merits. That is still for the court to do. The purpose of this legislation is only to waive the defense of res judicata and to waive this technical defense, as we have done in a number of other instances in this body, so this most important claim can get before the courts again and can be decided without a technical defense and on the merits." *Id.*, at H668 (Feb. 6, 1978).

See also S. Rep. No. 95-112, p. 6 (1977) ("The enactment of [the amendment] is needed to waive certain legal prohibitions so that the Sioux tribal claim may be considered on its merits before an appropriate judicial forum"); H. R. Rep. No. 95-529, p. 6 (1977) ("The enactment of [the amendment] is needed to waive certain technical legal defenses so that the Sioux tribal claim may be considered on its merits before an appropriate judicial forum").

123–126 (1906). Thereafter, and following payment of the judgment, the Cherokee presented to Congress a new claim that they were entitled to compound interest on the lump sum of principal and interest that had accrued up to 1895. It was this claim that prompted Congress, in 1919, to reconfer jurisdiction on the Court of Claims to consider the Cherokee's entitlement to that additional interest.

Ultimately, this Court held that the Cherokee were not entitled to the payment of compound interest on the original judgment awarded by the Court of Claims. 270 U. S., at 487–496. Before turning to the merits of the interest claim, however, the Court considered "the effect of the Act of 1919 in referring the issue in this case to the Court of Claims." *Id.*, at 485–486. The Court's conclusion concerning that question bears close examination:

> "The judgment of this Court in the suit by the Cherokee Nation against the United States, in April, 1906 (202 U. S. 101), already referred to, awarded a large amount of interest. The question of interest was considered and decided, and it is quite clear that but for the special Act of 1919, above quoted, the question here mooted would have been foreclosed as *res judicata*. In passing the Act, Congress must have been well advised of this, and the only possible construction therefore to be put upon it is that Congress has therein expressed its desire, so far as the question of interest is concerned, to waive the effect of the judgment as *res judicata*, and to direct the Court of Claims to re-examine it and determine whether the interest therein allowed was all that should have been allowed, or whether it should be found to be as now claimed by the Cherokee Nation. The Solicitor General, representing the Government, properly concedes this to be the correct view. *The power of Congress to waive such an adjudication of course is clear.*" *Id.*, at 486 (last emphasis supplied).

The holding in *Cherokee Nation* that Congress has the power to waive the res judicata effect of a prior judgment entered in the Government's favor on a claim against the United States is dispositive of the question considered here. Moreover, that holding is consistent with a substantial body of precedent affirming the broad constitutional power of Congress to define and "to pay the Debts . . . of the United States." U. S. Const., Art. I, § 8, cl. 1. That precedent speaks directly to the separation-of-powers objections discussed above.

The scope of Congress' power to pay the Nation's debts seems first to have been construed by this Court in *United States* v. *Realty Co.*, 163 U. S. 427 (1896). There, the Court stated:

> "The term 'debts' includes those debts or claims which rest upon a merely equitable or honorary obligation, and which would not be recoverable in a court of law if existing against an individual. The nation, speaking broadly, owes a 'debt' to an individual when his claim grows out of general principles of right and justice; when, in other words, it is based upon considerations of a moral or merely honorary nature, such as are binding on the conscience or the honor of an individual, although the debt could obtain no recognition in a court of law. The power of Congress extends at least as far as the recognition and payment of claims against the government which are thus founded." *Id.*, at 440.

Other decisions clearly establish that Congress may recognize its obligation to pay a moral debt not only by direct appropriation, but also by waiving an otherwise valid defense to a legal claim against the United States, as Congress did in this case and in *Cherokee Nation*. Although the Court in *Cherokee Nation* did not expressly tie its conclusion that Congress had the power to waive the res judicata effect of a judgment in favor of the United States to Congress' consti-

tutional power to pay the Nation's debts, the *Cherokee Nation* opinion did rely on the decision in *Nock* v. *United States*, 2 Ct. Cl. 451 (1867). See 270 U. S., at 486.

In *Nock*, the Court of Claims was confronted with the precise question whether Congress invaded judicial power when it enacted a joint resolution, 14 Stat. 608, directing that court to decide a damages claim against the United States "in accordance with the principles of equity and justice," even though the merits of the claim previously had been resolved in the Government's favor. The court rejected the Government's argument that the joint resolution was unconstitutional as an exercise of "judicial powers" because it had the effect of setting aside the court's prior judgment. Rather, the court concluded:

> "It is unquestionable that the Constitution has invested Congress with no judicial powers; it cannot be doubted that a legislative direction to a court to find a judgment in a certain way would be little less than a judgment rendered directly by Congress. But here Congress do not attempt to award judgment, nor to grant a new trial *judicially;* neither have they *reversed* a decree of this court; nor attempted in any way to interfere with the administration of justice. Congress are here to all intents and purposes the defendants, and as such they come into court through this resolution and say that they will not plead the former trial in bar, nor interpose the legal objection which defeated a recovery before." 2 Ct. Cl., at 457–458 (emphases in original).

The *Nock* court thus expressly rejected the applicability of separation-of-powers objections to a congressional decision to waive the res judicata effect of a judgment in the Government's favor.[24]

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[24] The joint resolution at issue in *Nock* also limited the amount of the judgment that the Court of Claims could award Nock to a sum that had

The principles set forth in *Cherokee Nation* and *Nock* were substantially reaffirmed by this Court in *Pope* v. *United States*, 323 U. S. 1 (1944). There Congress had enacted special legislation conferring jurisdiction upon the Court of

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been established in a report of the Solicitor of the Treasury to the Senate. See 14 Stat. 608. The court rejected the Government's argument that the Constitution had not vested in Congress "such discretion to fetter or circumscribe the course of justice." See 2 Ct. Cl., at 455. The court reasoned that this limitation on the amount of the claimant's recovery was a valid exercise of Congress' power to condition waivers of the sovereign immunity of the United States. "[I]t would be enough to say that the defendants cannot be sued except with their own consent; and Congress have the same power to give this consent to a second action as they had to give it to a first." *Id.*, at 458.

Just because we have addressed our attention to the ancient Court of Claims' decision in *Nock*, it should not be inferred that legislative action of the type at issue here is a remnant of the far-distant past. Special jurisdictional Acts waiving affirmative defenses of the United States to legal claims, and directing the Court of Claims to resolve the merits of those claims, are legion. See *Mizokami* v. *United States*, 188 Ct. Cl. 736, 740–741, and nn. 1 and 2, 414 F. 2d 1375, 1377, and nn. 1 and 2 (1969) (collecting cases). A list of cases, in addition to those discussed in the text, that have recognized or acted upon Congress' power to waive the defense of res judicata to claims against the United States follows (the list is not intended to be exhaustive): *United States* v. *Grant*, 110 U. S. 225 (1884); *Lamborn & Co.* v. *United States*, 106 Ct. Cl. 703, 724–728, 65 F. Supp. 569, 576–578 (1946); *Menominee Tribe* v. *United States*, 101 Ct. Cl. 10, 19 (1944); *Richardson* v. *United States*, 81 Ct. Cl. 948, 956–957 (1935); *Delaware Tribe* v. *United States*, 74 Ct. Cl. 368 (1932); *Garrett* v. *United States*, 70 Ct. Cl. 304, 310–312 (1930).

In *Richardson*, the Court of Claims observed:

"The power of Congress by special act to waive any defense, either legal or equitable, which the Government may have to a suit in this court, as it did in the *Nock* and *Cherokee Nation cases*, has never been questioned. The reports of the court are replete with cases where Congress, impressed with the equitable justice of claims which have been rejected by the court on legal grounds, has, by special act, waived defenses of the Government which prevented recovery and conferred jurisdiction on the court to again adjudicate the case. In such instances the court proceeded in conformity with the provisions of the act of reference and in cases, too numerous for

Claims, "notwithstanding any prior determination, any statute of limitations, release, or prior acceptance of partial allowance, to hear, determine, and render judgment upon" certain claims against the United States arising out of a construction contract. Special Act of Feb. 27, 1942, § 1, 56 Stat. 1122. The court was also directed to determine Pope's claims and render judgment upon them according to a particular formula for measuring the value of the work that he had performed. The Court of Claims construed the Special Act as deciding the questions of law presented by the case, and leaving it the role merely of computing the amount of the judgment for the claimant according to a mathematical formula. *Pope* v. *United States*, 100 Ct. Cl. 375, 379–380, 53 F. Supp 570, 571–572 (1944). Based upon that reading of the Act, and this Court's decision in *United States* v. *Klein*, 13 Wall. 128 (1872) (see discussion *infra*, at 402–405), the Court of Claims held that the Act unconstitutionally interfered with judicial independence. 100 Ct. Cl., at 380–382, 53 F. Supp., at 572–573. It distinguished *Cherokee Nation* as a case in which Congress granted a claimant a new trial, without directing the courts how to decide the case. 100 Ct. Cl., at 387, and n. 5, 53 F. Supp., at 575, and n. 5.

This Court reversed the Court of Claims' judgment. In

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citation here, awarded judgments to claimants whose claims had previously been rejected." 81 Ct. Cl., at 957.

Two similar decisions by the United States Court of Appeals for the Eighth Circuit are of interest. Both involved the constitutionality of a joint resolution that set aside dismissals of actions brought under the World War Veterans' Act, 1924, 38 U. S. C. § 445 (1952 ed.), and authorized the reinstatement of those war-risk insurance disability claims. The Court of Appeals found no constitutional prohibition against a congressional waiver of an adjudication in the Government's favor, or against conferring upon claimants against the United States the right to have their cases heard again on the merits. See *James* v. *United States*, 87 F. 2d 897, 898 (1937); *United States* v. *Hossmann*, 84 F. 2d 808, 810 (1936). The court relied, in part, on the holding in *Cherokee Nation*, and the sovereign immunity rationale applied in *Nock*.

doing so, the Court differed with the Court of Claims' interpretation of the effect of the Special Act. First, the Court held that the Act did not disturb the earlier judgment denying Pope's claim for damages. "While inartistically drawn the Act's purpose and effect seem rather to have been to create a new obligation of the Government to pay petitioner's claims where no obligation existed before." 323 U. S., at 9. Second, the Court held that Congress' recognition of Pope's claim was within its power to pay the Nation's debts, and that its use of the Court of Claims as an instrument for exercising that power did not impermissibly invade the judicial function:

> "We perceive no constitutional obstacle to Congress' imposing on the Government a new obligation where there had been none before, for work performed by petitioner which was beneficial to the Government and for which Congress thought he had not been adequately compensated. The power of Congress to provide for the payment of debts, conferred by § 8 of Article I of the Constitution, is not restricted to payment of those obligations which are legally binding on the Government. It extends to the creation of such obligations in recognition of claims which are merely moral or honorary. . . . *United States* v. *Realty Co.*, 163 U. S. 427. . . . Congress, by the creation of a legal, in recognition of a moral, obligation to pay petitioner's claims plainly did not encroach upon the judicial function which the Court of Claims had previously exercised in adjudicating that the obligation was not legal. [Footnote citing *Nock* and other cases omitted.] Nor do we think it did so by directing that court to pass upon petitioner's claims in conformity to the particular rule of liability prescribed by the Special Act and to give judgment accordingly. . . . See *Cherokee Nation* v. *United States*, 270 U. S. 476, 486." *Id.*, at 9–10.

In explaining its holding that the Special Act did not invade the judicial province of the Court of Claims by directing it to reach its judgment with reference to a specified formula, the Court stressed that Pope was required to pursue his claim in the usual manner, that the earlier factual findings made by the Court of Claims were not necessarily rendered conclusive by the Act, and that, even if Congress had stipulated to the facts, it was still a judicial function for the Court of Claims to render judgment on consent. *Id.*, at 10–12.

To be sure, the Court in *Pope* specifically declined to consider "just what application the principles announced in the *Klein* case could rightly be given to a case in which Congress sought, *pendente lite*, to set aside the judgment of the Court of Claims in favor of the Government and to require relitigation of the suit." *Id.*, at 8–9. The case before us might be viewed as presenting that question. We conclude, however, that the separation-of-powers question presented in this case has already been answered in *Cherokee Nation*, and that that answer is completely consistent with the principles articulated in *Klein*.

The decision in *United States* v. *Klein*, 13 Wall. 128 (1872), arose from the following facts: Klein was the administrator of the estate of V. F. Wilson, the deceased owner of property that had been sold by agents of the Government during the War Between the States. Klein sued the United States in the Court of Claims for the proceeds of that sale. His lawsuit was based on the Abandoned and Captured Property Act of March 3, 1863, 12 Stat. 820, which afforded such a cause of action to noncombatant property owners upon proof that they had "never given any aid or comfort to the present rebellion." Following the enactment of this legislation, President Lincoln had issued a proclamation granting "a full pardon" to certain persons engaged "in the existing rebellion" who desired to resume their allegiance to the Government, upon the condition that they take and maintain a prescribed

oath. This pardon was to have the effect of restoring those persons' property rights. See 13 Stat. 737. The Court of Claims held that Wilson's taking of the amnesty oath had cured his participation in "the . . . rebellion," and that his administrator, Klein, was thus entitled to the proceeds of the sale. *Wilson* v. *United States,* 4 Ct. Cl. 559 (1869).

The Court of Claims' decision in Klein's case was consistent with this Court's later decision in a similar case, *United States* v. *Padelford,* 9 Wall. 531 (1870), holding that the Presidential pardon purged a participant "of whatever offence against the laws of the United States he had committed . . . and relieved [him] from any penalty which he might have incurred." *Id.,* at 543. Following the Court's announcement of the judgment in *Padelford,* however, Congress enacted a proviso to the appropriations bill for the Court of Claims. The proviso had three effects: First, no Presidential pardon or amnesty was to be admissible in evidence on behalf of a claimant in the Court of Claims as the proof of loyalty required by the Abandoned and Captured Property Act. Second, the Supreme Court was to dismiss, for want of jurisdiction, any appeal from a judgment of the Court of Claims in favor of a claimant who had established his loyalty through a pardon. Third, the Court of Claims henceforth was to treat a claimant's receipt of a Presidential pardon, without protest, as conclusive evidence that he had given aid and comfort to the rebellion, and to dismiss any lawsuit on his behalf for want of jurisdiction. Act of July 12, 1870, ch. 251, 16 Stat. 230, 235.

The Government's appeal from the judgment in Klein's case was decided by this Court following the enactment of the appropriations proviso. This Court held the proviso unconstitutional notwithstanding Congress' recognized power "to make 'such exceptions from the appellate jurisdiction' [of the Supreme Court] as should seem to it expedient." 13 Wall., at 145. See U. S. Const., Art. III, § 2, cl. 2. This

holding followed from the Court's interpretation of the proviso's effect:

> "[T]he language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. Its great and controlling purpose is to deny to pardons granted by the President the effect which this court had adjudged them to have." 13 Wall., at 145.

Thus construed, the proviso was unconstitutional in two respects: First, it prescribed a rule of decision in a case pending before the courts, and did so in a manner that required the courts to decide a controversy in the Government's favor.

> "The court is required to ascertain the existence of certain facts and thereupon to declare that its jurisdiction on appeal has ceased, by dismissing the bill. What is this but to prescribe a rule for the decision of a cause in a particular way? In the case before us, the Court of Claims has rendered judgment for the claimant and an appeal has been taken to this court. We are directed to dismiss the appeal, if we find that the judgment must be affirmed, because of a pardon granted to the intestate of the claimants. Can we do so without allowing one party to the controversy to decide it in its own favor? Can we do so without allowing that the legislature may prescribe rules of decision to the Judicial Department of the government in cases pending before it?
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> . . . . .
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> ". . . Can [Congress] prescribe a rule in conformity with which the court must deny to itself the jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor? This question seems to us to answer itself." *Id.*, at 146–147.

Second, the rule prescribed by the proviso "is also liable to just exception as impairing the effect of a pardon, and thus

infringing the constitutional power of the Executive." *Id.*, at 147. The Court held that it would not serve as an instrument toward the legislative end of changing the effect of a Presidential pardon. *Id.*, at 148.

It was, of course, the former constitutional objection held applicable to the legislative proviso in *Klein* that the Court was concerned about in *Pope*. But that objection is not applicable to the case before us for two reasons. First, of obvious importance to the *Klein* holding was the fact that Congress was attempting to decide the controversy at issue in the Government's own favor. Thus, Congress' action could not be grounded upon its broad power to recognize and pay the Nation's debts. Second, and even more important, the proviso at issue in *Klein* had attempted "to prescribe a rule for the decision of a cause in a particular way." 13 Wall., at 146. The amendment at issue in the present case, however, like the Special Act at issue in *Cherokee Nation*, waived the defense of res judicata so that a legal claim could be resolved on the merits. Congress made no effort in either instance to control the Court of Claims' ultimate decision of that claim. See n. 23, *supra*.[25]

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[25] Before completing our analysis of this Court's precedents in this area, we turn to the question whether the holdings in *Cherokee Nation*, *Nock*, and *Pope*, might have been based on views, once held by this Court, that the Court of Claims was not, in all respects, an Art. III court, and that claims against the United States were not within Art. III's extension of "judicial Power" "to Controversies to which the United States shall be a Party." U. S. Const., Art. III, § 2, cl. 1. See *Williams* v. *United States*, 289 U. S. 553 (1933).

Pope itself would seem to dispel any such conclusion. See 323 U. S., at 12–14. Moreover, Mr. Justice Harlan's plurality opinion announcing the judgment of the Court in *Glidden Co.* v. *Zdanok*, 370 U. S. 530 (1962), lays that question to rest. In *Glidden*, the plurality observed that "it is probably true that Congress devotes a more lively attention to the work performed by the Court of Claims, and that it has been more prone to modify the jurisdiction assigned to that court." *Id.*, at 566. But they concluded that that circumstance did not render the decisions of

C

When Congress enacted the amendment directing the Court of Claims to review the merits of the Black Hills claim, it neither brought into question the finality of that court's earlier judgments, nor interfered with that Court's judicial function in deciding the merits of the claim. When the Sioux returned to the Court of Claims following passage of the

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the Court of Claims legislative in character, nor, impliedly, did those instances of "lively attention" constitute impermissible interferences with the Court of Claims' judicial functions.

"Throughout its history the Court of Claims has frequently been given jurisdiction by special act to award recovery for breach of what would have been, on the part of an individual, at most a moral obligation. . . . Congress has waived the benefit of *res judicata*, *Cherokee Nation* v. *United States*, 270 U. S. 476, 486, and of defenses based on the passage of time. . . .

"In doing so, as this Court has uniformly held, Congress has enlisted the aid of judicial power whose exercise is amenable to appellate review here. . . . Indeed the Court has held that Congress may for reasons adequate to itself confer bounties upon persons and, by consenting to suit, convert their moral claim into a legal one enforceable by litigation in an undoubted constitutional court. *United States* v. *Realty Co.*, 163 U. S. 427.

"The issue was settled beyond peradventure in *Pope* v. *United States*, 323 U. S. 1. There the Court held that for Congress to direct the Court of Claims to entertain a claim theretofore barred for any legal reason from recovery—as, for instance, by the statute of limitations, or because the contract had been drafted to exclude such claims—was to invoke the use of judicial power, notwithstanding that the task might involve no more than computation of the sum due. . . . After this decision it cannot be doubted that when Congress transmutes a moral obligation into a legal one by specially consenting to suit, it authorizes the tribunal that hears the case to perform a judicial function." *Id.*, at 566–567.

The Court in *Glidden* held that, at least since 1953, the Court of Claims has been an Art. III court. See *id.*, at 585–589 (opinion concurring in result). In his opinion concurring in the result, Mr. Justice Clark did not take issue with the plurality's view that suits against the United States are "Controversies to which the United States shall be a Party," within the meaning of Art. III. Compare 370 U. S., at 562–565 (plurality opinion), with *id.*, at 586–587 (opinion concurring in result).

amendment, they were there in pursuit of judicial enforcement of a new legal right. Congress had not "reversed" the Court of Claims' holding that the claim was barred by res judicata, nor, for that matter, had it reviewed the 1942 decision rejecting the Sioux' claim on the merits. As Congress explicitly recognized, it only was providing a forum so that a new judicial review of the Black Hills claim could take place. This review was to be based on the facts found by the Court of Claims after reviewing all the evidence, and an application of generally controlling legal principles to those facts. For these reasons, Congress was not reviewing the merits of the Court of Claims' decisions, and did not interfere with the finality of its judgments.

Moreover, Congress in no way attempted to prescribe the outcome of the Court of Claims' new review of the merits. That court was left completely free to reaffirm its 1942 judgment that the Black Hills claim was not cognizable under the Fifth Amendment, if upon its review of the facts and law, such a decision was warranted. In this respect, the amendment before us is a far cry from the legislatively enacted "consent judgment" called into question in *Pope*, yet found constitutional as a valid exercise of Congress' broad power to pay the Nation's debts. And, for the same reasons, this amendment clearly is distinguishable from the proviso to this Court's appellate jurisdiction held unconstitutional in *Klein*.

In sum, as this Court implicitly held in *Cherokee Nation*, Congress' mere waiver of the res judicata effect of a prior judicial decision rejecting the validity of a legal claim against the United States does not violate the doctrine of separation of powers.

IV

A

In reaching its conclusion that the 1877 Act effected a taking of the Black Hills for which just compensation was due the Sioux under the Fifth Amendment, the Court of Claims

relied upon the "good faith effort" test developed in its earlier decision in *Three Tribes of Fort Berthold Reservation* v. *United States*, 182 Ct. Cl. 543, 390 F. 2d 686 (1968). The *Fort Berthold* test had been designed to reconcile two lines of cases decided by this Court that seemingly were in conflict. The first line, exemplified by *Lone Wolf* v. *Hitchcock*, 187 U. S. 553 (1903), recognizes "that Congress possesse[s] a paramount power over the property of the Indians, by reason of its exercise of guardianship over their interests, and that such authority might be implied, even though opposed to the strict letter of a treaty with the Indians." *Id.*, at 565. The second line, exemplified by the more recent decision in *Shoshone Tribe* v. *United States*, 299 U. S. 476 (1937), concedes Congress' paramount power over Indian property, but holds, nonetheless, that "[t]he power does not extend so far as to enable the Government 'to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation.'" *Id.*, at 497 (quoting *United States* v. *Creek Nation*, 295 U. S. 103, 110 (1935)). In *Shoshone Tribe*, Mr. Justice Cardozo, in speaking for the Court, expressed the distinction between the conflicting principles in a characteristically pithy phrase: "Spoliation is not management." 299 U. S., at 498.

The *Fort Berthold* test distinguishes between cases in which one or the other principle is applicable:

> "It is obvious that Congress cannot simultaneously (1) act as trustee for the benefit of the Indians, exercising its plenary powers over the Indians and their property, as it thinks is in their best interests, and (2) exercise its sovereign power of eminent domain, taking the Indians' property within the meaning of the Fifth Amendment to the Constitution. In any given situation in which Congress has acted with regard to Indian people, it must have acted either in one capacity or the other. Congress can own two hats, but it cannot wear them both at the same time.

"Some guideline must be established so that a court can identify in which capacity Congress is acting. The following guideline would best give recognition to the basic distinction between the two types of congressional action: Where Congress makes a good faith effort to give the Indians the full value of the land and thus merely transmutes the property from land to money, there is no taking. This is a mere substitution of assets or change of form and is a traditional function of a trustee." 182 Ct. Cl., at 553, 390 F. 2d, at 691.

Applying the *Fort Berthold* test to the facts of this case, the Court of Claims concluded that, in passing the 1877 Act, Congress had not made a good-faith effort to give the Sioux the full value of the Black Hills. The principal issue presented by this case is whether the legal standard applied by the Court of Claims was erroneous.[26]

B

The Government contends that the Court of Claims erred insofar as its holding that the 1877 Act effected a taking of the Black Hills was based on Congress' failure to indicate affirmatively that the consideration given the Sioux was of

[26] It should be recognized at the outset that the inquiry presented by this case is different from that confronted in the more typical of our recent "taking" decisions. *E. g., Kaiser Aetna* v. *United States*, 444 U. S. 164 (1979); *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104 (1978). In those cases the Court has sought to "determin[e] when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Penn Central*, 438 U. S., at 124. Here, there is no doubt that the Black Hills were "taken" from the Sioux in a way that wholly deprived them of their property rights to that land. The question presented is whether Congress was acting under circumstances in which that "taking" implied an obligation to pay just compensation, or whether it was acting pursuant to its unique powers to manage and control tribal property as the guardian of Indian welfare, in which event the Just Compensation Clause would not apply.

equivalent value to the property rights ceded to the Government. It argues that "the true rule is that Congress must be assumed to be acting within its plenary power to manage tribal assets if it reasonably can be concluded that the legislation was intended to promote the welfare of the tribe." Brief for United States 52. The Government derives support for this rule principally from this Court's decision in *Lone Wolf* v. *Hitchcock*.

In *Lone Wolf*, representatives of the Kiowa, Comanche, and Apache Tribes brought an equitable action against the Secretary of the Interior and other governmental officials to enjoin them from enforcing the terms of an Act of Congress that called for the sale of lands held by the Indians pursuant to the Medicine Lodge Treaty of 1867, 15 Stat. 581. That treaty, like the Fort Laramie Treaty of 1868, included a provision that any future cession of reservation lands would be without validity or force "unless executed and signed by at least three fourths of all the adult male Indians occupying the same." *Id.*, at 585. The legislation at issue, Act of June 6, 1900, 31 Stat. 672, was based on an agreement with the Indians that had not been signed by the requisite number of adult males residing on the reservation.

This Court's principal holding in *Lone Wolf* was that "the legislative power might pass laws in conflict with treaties made with the Indians." 187 U. S., at 566. The Court stated:

> "The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so. When, therefore, treaties were entered into between the United States and a tribe of Indians it was never doubted that the *power* to abrogate existed in Con-

gress, and that in a contingency such power might be availed of from considerations of governmental policy, particularly if consistent with perfect good faith towards the Indians." *Ibid.* (Emphasis in original.) [27]

The Court, therefore, was not required to consider the contentions of the Indians that the agreement ceding their lands had been obtained by fraud, and had not been signed by the requisite number of adult males. "[A]ll these matters, in any event, were solely within the domain of the legislative authority and its action is conclusive upon the courts." *Id.*, at 568.

In the penultimate paragraph of the opinion, however, the Court in *Lone Wolf* went on to make some observations seemingly directed to the question whether the Act at issue might constitute a taking of Indian property without just compensation. The Court there stated:

> "The act of June 6, 1900, which is complained of in the bill, was enacted at a time when the tribal relations between the confederated tribes of Kiowas, Comanches and Apaches still existed, and that statute and the statutes supplementary thereto dealt with the disposition of tribal property and purported to give an adequate consideration for the surplus lands not allotted among the Indians or reserved for their benefit. Indeed, the controversy which this case presents is concluded by the decision in *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, decided at this term, where it was held that full administrative power was possessed by Congress over Indian

[27] This aspect of the *Lone Wolf* holding, often reaffirmed, see, *e. g.*, *Rosebud Sioux Tribe* v. *Kneip*, 430 U. S. 584, 594 (1977), is not at issue in this case. The Sioux do not claim that Congress was without power to take the Black Hills from them in contravention of the Fort Laramie Treaty of 1868. They claim only that Congress could not do so inconsistently with the command of the Fifth Amendment: "nor shall private property be taken for public use, without just compensation."

tribal property. In effect, the action of Congress now complained of was but an exercise of such power, a mere change in the form of investment of Indian tribal property, the property of those who, as we have held, were in substantial effect the wards of the government. *We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that the legislative branch of the government exercised its best judgment in the premises.* In any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation. If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress and not to the courts. The legislation in question was constitutional." *Ibid.* (Emphasis supplied.)

The Government relies on the italicized sentence in the quotation above to support its view "that Congress must be assumed to be acting within its plenary power to manage tribal assets if it reasonably can be concluded that the legislation was intended to promote the welfare of the tribe." Brief for United States 52. Several adjoining passages in the paragraph, however, lead us to doubt whether the *Lone Wolf* Court meant to state a general rule applicable to cases such as the one before us.

First, *Lone Wolf* presented a situation in which Congress "purported to give an adequate consideration" for the treaty lands taken from the Indians. In fact, the Act at issue set aside for the Indians a sum certain of $2 million for surplus reservation lands surrendered to the United States. 31 Stat. 678; see 187 U. S., at 555. In contrast, the background of the 1877 Act "reveals a situation where Congress did not 'purport' to provide 'adequate consideration,' nor was there

any meaningful negotiation or arm's-length bargaining, nor did Congress consider it was paying a fair price." 220 Ct. Cl., at —, 601 F. 2d, at 1176 (concurring opinion).

Second, given the provisions of the Act at issue in *Lone Wolf,* the Court reasonably was able to conclude that "the action of Congress now complained of was but . . . a mere change in the form of investment of Indian tribal property." Under the Act of June 6, 1900, each head of a family was to be allotted a tract of land within the reservation of not less than 320 acres, an additional 480,000 acres of grazing land were set aside for the use of the tribes in common, and $2 million was paid to the Indians for the remaining surplus. 31 Stat. 677–678. In contrast, the historical background to the opening of the Black Hills for settlement, and the terms of the 1877 Act itself, see Part I, *supra,* would not lead one to conclude that the Act effected "a mere change in the form of investment of Indian tribal property."

Third, it seems significant that the views of the Court in *Lone Wolf* were based, in part, on a holding that "Congress possessed full power in the matter." Earlier in the opinion the Court stated: "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government." 187 U. S., at 565. Thus, it seems that the Court's conclusive presumption of congressional good faith was based in large measure on the idea that relations between this Nation and the Indian tribes are a political matter, not amenable to judicial review. That view, of course, has long since been discredited in takings cases, and was expressly laid to rest in *Delaware Tribal Business Comm.* v. *Weeks,* 430 U. S. 73, 84 (1977).[28]

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[28] For this reason, the Government does not here press *Lone Wolf* to its logical limits, arguing instead that its "strict rule" that the management and disposal of tribal lands is a political question, "has been relaxed

Fourth, and following up on the political question holding, the *Lone Wolf* opinion suggests that where the exercise of congressional power results in injury to Indian rights, "relief must be sought by an appeal to that body for redress and not to the courts." Unlike *Lone Wolf*, this case is one in which the Sioux have sought redress from Congress, and the Legislative Branch has responded by referring the matter to the courts for resolution. See Parts II and III, *supra*. Where Congress waives the Government's sovereign immunity, and expressly directs the courts to resolve a taking claim on the merits, there would appear to be far less reason to apply *Lone Wolf*'s principles of deference. See *United States* v. *Tillamooks*, 329 U. S. 40, 46 (1946) (plurality opinion).

The foregoing considerations support our conclusion that the passage from *Lone Wolf* here relied upon by the Government has limited relevance to this case. More significantly, *Lone Wolf*'s presumption of congressional good faith has little to commend it as an enduring principle for deciding questions

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in recent years to allow review under the Fifth Amendment rational-basis test." Brief for United States 55, n. 46. The Government relies on *Delaware Tribal Business Comm.* v. *Weeks*, 430 U. S., at 84–85, and *Morton* v. *Mancari*, 417 U. S. 535, 555 (1974), as establishing a rational-basis test for determining whether Congress, in a given instance, confiscated Indian property or engaged merely in its power to manage and dispose of tribal lands in the Indians' best interests. But those cases, which establish a standard of review for judging the constitutionality of Indian legislation under the Due Process Clause of the Fifth Amendment, do not provide an apt analogy for resolution of the issue presented here—whether Congress' disposition of tribal property was an exercise of its power of eminent domain or its power of guardianship. As noted earlier, n. 27, *supra*, the Sioux concede the constitutionality of Congress' unilateral abrogation of the Fort Laramie Treaty. They seek only a holding that the Black Hills "were appropriated by the United States in circumstances which involved an implied undertaking by it to make just compensation to the tribe." *United States* v. *Creek Nation*, 295 U. S. 103, 111 (1935). The rational-basis test proffered by the Government would be ill-suited for use in determining whether such circumstances were presented by the events culminating in the passage of the 1877 Act.

of the kind presented here. In every case where a taking of treaty-protected property is alleged,[29] a reviewing court must recognize that tribal lands are subject to Congress' power to control and manage the tribe's affairs. But the court must also be cognizant that "this power to control and manage [is] not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it [is] subject to limitations inhering in . . . a guardianship and to pertinent constitutional restrictions." *United States* v. *Creek Nation*, 295 U. S., at 109–110. Accord: *Menominee Tribe* v. *United States*, 391 U. S. 404, 413 (1968); *FPC* v. *Tuscarora Indian Nation*, 362 U. S. 99, 122 (1960); *United States* v. *Klamath Indians*, 304 U. S. 119, 123 (1938); *United States* v. *Shoshone Tribe*, 304 U. S. 111, 115–116 (1938); *Shoshone Tribe* v. *United States*, 299 U. S. 476, 497–498 (1937).

As the Court of Claims recognized in its decision below, the question whether a particular measure was appropriate for protecting and advancing the tribe's interests, and therefore not subject to the constitutional command of the Just Compensation Clause, is factual in nature. The answer must be based on a consideration of all the evidence presented. We do not mean to imply that a reviewing court is to second-guess, from the perspective of hindsight, a legislative judgment that a particular measure would serve the best interests of the tribe. We do mean to require courts, in considering whether a particular congressional action was taken in pursuance of Congress' power to manage and control tribal lands

[29] Of course, it has long been held that the taking by the United States of "unrecognized" or "aboriginal" Indian title is not compensable under the Fifth Amendment. *Tee-Hit-Ton Indians* v. *United States*, 348 U. S. 272, 285 (1955). The principles we set forth today are applicable only to instances in which "Congress by treaty or other agreement has declared that thereafter Indians were to hold the lands permanently." *Id.*, at 277. In such instances, "compensation must be paid for subsequent taking." *Id.*, at 277–278.

for the Indians' welfare, to engage in a thoroughgoing and impartial examination of the historical record. A presumption of congressional good faith cannot serve to advance such an inquiry.

C

We turn to the question whether the Court of Claims' inquiry in this case was guided by an appropriate legal standard. We conclude that it was. In fact, we approve that court's formulation of the inquiry as setting a standard that ought to be emulated by courts faced with resolving future cases presenting the question at issue here:

> "In determining whether Congress has made a good faith effort to give the Indians the full value of their lands when the government acquired [them], we therefore look to the objective facts as revealed by Acts of Congress, congressional committee reports, statements submitted to Congress by government officials, reports of special commissions appointed by Congress to treat with the Indians, and similar evidence relating to the acquisition. . . .
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> "The 'good faith effort' and 'transmutation of property' concepts referred to in *Fort Berthold* are opposite sides of the same coin. They reflect the traditional rule that a trustee may change the form of trust assets as long as he fairly (or in good faith) attempts to provide his ward with property of equivalent value. If he does that, he cannot be faulted if hindsight should demonstrate a lack of precise equivalence. On the other hand if a trustee (or the government in its dealings with the Indians) does not attempt to give the ward the fair equivalent of what he acquires from him, the trustee to that extent has taken rather than transmuted the property of the ward. In other words, an essential element of the inquiry under the *Fort Berthold* guideline is determining the adequacy of the consideration the government gave for the Indian lands it acquired. That in

quiry cannot be avoided by the government's simple assertion that it acted in good faith in its dealings with the Indians." 220 Ct. Cl., at —, 601 F. 2d, at 1162.[30]

D

We next examine the factual findings made by the Court of Claims, which led it to the conclusion that the 1877 Act effected a taking. First, the Court found that "[t]he only item of 'consideration' that possibly could be viewed as showing an attempt by Congress to give the Sioux the 'full value' of the land the government took from them was the requirement to furnish them with rations until they became self-sufficient." 220 Ct. Cl., at —, 601 F. 2d, at 1166. This finding is fully supported by the record, and the Government does not seriously contend otherwise.[31]

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[30] An examination of this standard reveals that, contrary to the Government's assertion, the Court of Claims in this case did not base its finding of a taking solely on Congress' failure in 1877 to state affirmatively that the "assets" given the Sioux in exchange for the Black Hills were equivalent in value to the land surrendered. Rather, the court left open the possibility that, in an appropriate case, a mere assertion of congressional good faith in setting the terms of a forced surrender of treaty-protected lands could be overcome by objective indicia to the contrary. And, in like fashion, there may be instances in which the consideration provided the Indians for surrendered treaty lands was so patently adequate and fair that Congress' failure to state the obvious would not result in the finding of a compensable taking.

To the extent that the Court of Claims' standard, in this respect, departed from the original formulation of the *Fort Berthold* test, see 220 Ct. Cl., at —, 601 F. 2d, at 1182–1183 (dissenting opinion), such a departure was warranted. The Court of Claims' present formulation of the test, which takes into account the adequacy of the consideration given, does little more than reaffirm the ancient principle that the determination of the measure of just compensation for a taking of private property "is a judicial and not a legislative question." *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 327 (1893).

[31] The 1877 Act, see *supra*, at 382–383, and n. 14, purported to provide the Sioux with "all necessary aid to assist the said Indians in the work of civilization," and "to furnish to them schools and instruction in mechani-

Second, the court found, after engaging in an exhaustive review of the historical record, that neither the Manypenny Commission, nor the congressional Committees that approved the 1877 Act, nor the individual legislators who spoke on its behalf on the floor of Congress, ever indicated a belief that the Government's obligation to provide the Sioux with rations constituted a fair equivalent for the value of the Black Hills and the additional property rights the Indians were forced to

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cal and agricultural arts, as provided for by the treaty of 1868." 19 Stat. 256. The Court of Claims correctly concluded that the first item "was so vague that it cannot be considered as constituting a meaningful or significant element of payment by the United States." 220 Ct. Cl., at —, 601 F. 2d, at 1166. As for the second, it "gave the Sioux nothing to which they were not already entitled [under the 1868 treaty]." *Id.*, at —, 601 F. 2d, at 1166.

The Government has placed some reliance in this Court on the fact that the 1877 Act extended the northern boundaries of the reservation by adding some 900,000 acres of grazing lands. See n. 14, *supra*. In the Court of Claims, however, the Government did "not contend . . . that the transfer of this additional land was a significant element of the consideration the United States gave for the Black Hills." 220 Ct. Cl., at —, n. 3, 601 F. 2d, at 1163, n. 3. And Congress obviously did not intend the extension of the reservation's northern border to constitute consideration for the property rights surrendered by the Sioux. The extension was effected in that article of the Act redefining the reservation's borders; it was not mentioned in the article which stated the consideration given for the Sioux' "cession of territory and rights." See 19 Stat. 255–256. Moreover, our characterizing the 900,000 acres as assets given the Sioux in consideration for the property rights they ceded would not lead us to conclude that the terms of the exchange were "so patently adequate and fair" that a compensable taking should not have been found. See n. 30, *supra*.

Finally, we note that the Government does not claim that the Indian Claims Commission and the Court of Claims incorrectly valued the property rights taken by the 1877 Act by failing to consider the extension of the northern border. Rather, the Government argues only that the 900,000 acres should be considered, along with the obligation to provide rations, in determining whether the Act, viewed in its entirety, constituted a good-faith effort on the part of Congress to promote the Sioux' welfare. See Brief for United States 73, and n. 58.

surrender. See *id.*, at ——, 601 F. 2d, at 1166–1168. This finding is unchallenged by the Government.

A third finding lending some weight to the Court's legal conclusion was that the conditions placed by the Government on the Sioux' entitlement to rations, see n. 14, *supra*, "further show that the government's undertaking to furnish rations to the Indians until they could support themselves did not reflect a congressional decision that the value of the rations was the equivalent of the land the Indians were giving up, but instead was an attempt to coerce the Sioux into capitulating to congressional demands." 220 Ct. Cl., at —, 601 F. 2d, at 1168. We might add only that this finding is fully consistent with similar observations made by this Court nearly a century ago in an analogous case.

In *Choctaw Nation* v. *United States*, 119 U. S. 1, 35 (1886), the Court held, over objections by the Government, that an earlier award made by the Senate on an Indian tribe's treaty claim "was fair, just, and equitable." The treaty at issue had called for the removal of the Choctaw Nation from treaty-protected lands in exchange for payments for the tribe's subsistence for one year, payments for cattle and improvements on the new reservation, an annuity of $20,000 for 20 years commencing upon removal, and the provision of educational and agricultural services. *Id.*, at 38. Some years thereafter the Senate had awarded the Indians a substantial recovery based on the latter treaty's failure to compensate the Choctaw for the lands they had ceded. Congress later enacted a jurisdictional statute which permitted the United States to contest the fairness of the Senate's award as a settlement of the Indian's treaty claim. In rejecting the Government's arguments, and accepting the Senate's award as "furnish[ing] the nearest approximation to the justice and right of the case," *id.*, at 35, this Court observed:

> "It is notorious as a historical fact, as it abundantly appears from the record in this case, that great pressure

had to be brought to bear upon the Indians to effect their removal, and the whole treaty was evidently and purposely executed, not so much to secure to the Indians the rights for which they had stipulated, as to effectuate the policy of the United States in regard to their removal. The most noticeable thing, upon a careful consideration of the terms of this treaty, is, that no money consideration is promised or paid for a cession of lands, the beneficial ownership of which is assumed to reside in the Choctaw Nation, and computed to amount to over ten millions of acres." *Id.*, at 37–38.

As for the payments that had been made to the Indians in order to induce them to remove themselves from their treaty lands, the Court, in words we find applicable to the 1877 Act, concluded:

> "It is nowhere expressed in the treaty that these payments are to be made as the price of the lands ceded; and they are all only such expenditures as the government of the United States could well afford to incur for the mere purpose of executing its policy in reference to the removal of the Indians to their new homes. *As a consideration for the value of the lands ceded by the treaty, they must be regarded as a meagre pittance.*" *Id.*, at 38 (emphasis supplied).

These conclusions, in light of the historical background to the opening of the Black Hills for settlement, see Part I, *supra*, seem fully applicable to Congress' decision to remove the Sioux from that valuable tract of land, and to extinguish their off-reservation hunting rights.

Finally, the Court of Claims rejected the Government's contention that the fact that it subsequently had spent at least $43 million on rations for the Sioux (over the course of three-quarters of a century) established that the 1877 Act was an act of guardianship taken in the Sioux' best interest. The court concluded: "The critical inquiry is what Congress

did—and how it viewed the obligation it was assuming—at the time it acquired the land, and not how much it ultimately cost the United States to fulfill the obligation." 220 Ct. Cl., at —, 601 F. 2d, at 1168. It found no basis for believing that Congress, in 1877, anticipated that it would take the Sioux such a lengthy period of time to become self-sufficient, or that the fulfillment of the Government's obligation to feed the Sioux would entail the large expenditures ultimately made on their behalf. *Ibid.* We find no basis on which to question the legal standard applied by the Court of Claims, or the findings it reached, concerning Congress' decision to provide the Sioux with rations.

E

The aforementioned findings fully support the Court of Claims' conclusion that the 1877 Act appropriated the Black Hills "in circumstances which involved an implied undertaking by [the United States] to make just compensation to the tribe." [32] *United States* v. *Creek Nation*, 295 U. S., at 111.

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[32] The dissenting opinion suggests, *post*, at 434–437, that the factual findings of the Indian Claims Commission, the Court of Claims, and now this Court, are based upon a "revisionist" view of history. The dissent fails to identify which materials quoted herein or relied upon by the Commission and the Court of Claims fit that description. The dissent's allusion to historians "writing for the purpose of having their conclusions or observations inserted in the reports of congressional committees," *post*, at 435, is also puzzling because, with respect to this case, we are unaware that any such historian exists.

The primary sources for the story told in this opinion are the factual findings of the Indian Claims Commission and the Court of Claims. A reviewing court generally will not discard such findings because they raise the specter of creeping revisionism, as the dissent would have it, but will do so only when they are clearly erroneous and unsupported by the record. No one, including the Government, has ever suggested that the factual findings of the Indian Claims Commission and the Court of Claims fail to meet that standard of review.

A further word seems to be in order. The dissenting opinion does not identify a single author, nonrevisionist, neorevisionist, or otherwise, who

We make only two additional observations about this case. First, dating at least from the decision in *Cherokee Nation* v. *Southern Kansas R. Co.*, 135 U. S. 641, 657 (1890), this Court has recognized that Indian lands, to which a tribe holds recognized title, "are held subject to the authority of the general government to take them for such objects as are germane to the execution of the powers granted to it; provided only, that they are not taken without just compensation being made to the owner." In the same decision the Court emphasized that the owner of such lands "is entitled to reasonable, certain and adequate provision for obtaining compensation before his occupancy is disturbed." *Id.*, at 659. The Court of Claims gave effect to this principle when it held that the Government's uncertain and indefinite obligation to provide the Sioux with rations until they became self-sufficient did not constitute adequate consideration for the Black Hills.

Second, it seems readily apparent to us that the obligation to provide rations to the Sioux was undertaken in order to ensure them a means of surviving their transition from the nomadic life of the hunt to the agrarian lifestyle Congress had chosen for them. Those who have studied the Government's reservation policy during this period of our Nation's history agree. See n. 11, *supra*. It is important to recognize

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takes the view of the history of the cession of the Black Hills that the dissent prefers to adopt, largely, one assumes, as an article of faith. Rather, the dissent relies on the historical findings contained in the decision rendered by the Court of Claims in 1942. That decision, and those findings, are not before this Court today. Moreover, the holding of the Court of Claims in 1942, to the extent the decision can be read as reaching the merits of the Sioux' taking claim, was based largely on the conclusive presumption of good faith toward the Indians which that court afforded to Congress' actions of 1877. See 97 Ct. Cl., at 669–673, 685. The divergence of results between that decision and the judgment of the Court of Claims affirmed today, which the dissent would attribute to historical revisionism, see *post*, at 434–435, is more logically explained by the fact that the former decision was based on an erroneous *legal* interpretation of this Court's opinion in *Lone Wolf*. See Part IV-B, *supra*.

that the 1877 Act, in addition to removing the Black Hills from the Great Sioux Reservation, also ceded the Sioux' hunting rights in a vast tract of land extending beyond the boundaries of that reservation. See n. 14, *supra*. Under such circumstances, it is reasonable to conclude that Congress' undertaking of an obligation to provide rations for the Sioux was a *quid pro quo* for depriving them of their chosen way of life, and was not intended to compensate them for the taking of the Black Hills.[33]

V

In sum, we conclude that the legal analysis and factual findings of the Court of Claims fully support its conclusion that the terms of the 1877 Act did not effect "a mere change in the form of investment of Indian tribal property." *Lone*

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[33] We find further support for this conclusion in Congress' 1974 amendment to § 2 of the Indian Claims Commission Act, 25 U. S. C. § 70a. See n. 17, *supra*. That amendment provided that in determining offsets, "expenditures for food, rations, or provisions shall not be deemed payments on the claim." The Report of the Senate Committee on Interior and Insular Affairs, which accompanied this amendment, made two points that are pertinent here. First, it noted that "[a]lthough couched in general terms, this amendment is directed to one basic objective—expediting the Indian Claims Commission's disposition of the famous Black Hills case." S. Rep. No. 93-863, p. 2 (1974) (incorporating memorandum prepared by the Sioux Tribes). Second, the Committee observed:

"The facts are, as the Commission found, that the United States disarmed the Sioux and denied them their traditional hunting areas in an effort to force the sale of the Black Hills. Having violated the 1868 Treaty and having reduced the Indians to starvation, the United States should not now be in the position of saying that the rations it furnished constituted payment for the land which it took. In short, the Government committed two wrongs: first, it deprived the Sioux of their livelihood; secondly, it deprived the Sioux of their land. What the United States gave back in rations should not be stretched to cover both wrongs." *Id.*, at 4–5.

See also R. Billington, Introduction, in National Park Service, Soldier and Brave xiv (1963) ("The Indians suffered the humiliating defeats that forced them to walk the white man's road toward civilization. Few conquered people in the history of mankind have paid so dearly for their defense of a way of life that the march of progress had outmoded").

Wolf v. *Hitchcock*, 187 U. S., at 568. Rather, the 1877 Act effected a taking of tribal property, property which had been set aside for the exclusive occupation of the Sioux by the Fort Laramie Treaty of 1868. That taking implied an obligation on the part of the Government to make just compensation to the Sioux Nation, and that obligation, including an award of interest, must now, at last, be paid.

The judgment of the Court of Claims is affirmed.

It is so ordered.

MR. JUSTICE WHITE, concurring in part and concurring in the judgment.

I agree that there is no constitutional infirmity in the direction by Congress that the Court of Claims consider this case without regard to the defense of res judicata. I also agree that the Court of Claims correctly decided this case. Accordingly, I concur in Parts III and V of the Court's opinion and in the judgment.

MR. JUSTICE REHNQUIST, dissenting.

In 1942, the Sioux Tribe filed a petition for certiorari requesting this Court to review the Court of Claims' ruling that Congress had not unconstitutionally taken the Black Hills in 1877, but had merely exchanged the Black Hills for rations and grazing lands—an exchange Congress believed to be in the best interests of the Sioux and the Nation. This Court declined to review that judgment. *Sioux Tribe* v. *United States*, 97 Ct. Cl. 613 (1942), cert. denied, 318 U. S. 789 (1943). Yet today the Court permits Congress to reopen that judgment which this Court rendered final upon denying certiorari in 1943, and proceeds to reject the 1942 Court of Claims' factual interpretation of the events in 1877. I am convinced that Congress may not constitutionally require the Court of Claims to reopen this proceeding, that there is no judicial principle justifying the decision to afford the respondents an additional

opportunity to litigate the same claim, and that the Court of Claims' first interpretation of the events in 1877 was by all accounts the more realistic one. I therefore dissent.

I

In 1920, Congress enacted a special jurisdictional Act, ch. 222, 41 Stat. 738, authorizing the Sioux Tribe to submit any legal or equitable claim against the United States to the Court of Claims. The Sioux filed suit claiming that the 1877 Act removing the Black Hills from the Sioux territory was an unconstitutional taking. In *Sioux Tribe* v. *United States, supra*, the Court of Claims considered the question fully and found that the United States had not taken the Black Hills from the Sioux within the meaning of the Fifth Amendment. It is important to highlight what that court found. It did not decide, as the Court today suggests, that it merely lacked jurisdiction over the claim presented by the Sioux. See *ante*, at 384. It found that under the circumstances presented in 1877, Congress attempted to improve the situation of the Sioux and the Nation by exchanging the Black Hills for 900,000 acres of grazing lands and rations for as long as they should be needed. The court found that although the Government attempted to keep white settlers and gold prospectors out of the Black Hills territory, these efforts were unsuccessful. The court concluded that this situation was such that the Government "believed serious conflicts would develop between the settlers and the Government, and between the settlers and the Indians." 97 Ct. Cl., at 659. It was also apparent to Congress that the Indians were still "incapable of supporting themselves." *Ibid.*

The court found that the Government therefore embarked upon a course designed to obtain the Indians' agreement to sell the Black Hills and "endeavored in every way possible during 1875 and 1876 to arrive at a mutual agreement with the Indians for the sale. . . ." *Id.*, at 681. Negotiation having failed, Congress then turned to design terms for the ac-

quisition of the Black Hills which it found to be in the best interest of both the United States and the Sioux. The court found that pursuant to the 1877 agreement, Congress provided the Indians with more than $43 million in rations as well as providing them with 900,000 acres of needed grazing lands. Thus the court concluded that "the record shows that the action taken was pursuant to a policy which the Congress deemed to be for the interest of the Indians and just to both parties." *Id.*, at 668. The court emphasized:

> "[T]he Congress, in an act enacted because of the situation encountered and pursuant to a policy which in its wisdom it deemed to be in the interest and for the benefit and welfare of the . . . Sioux Tribe, as well as for the necessities of the Government, required the Indians to sell or surrender to the Government a portion of their land and hunting rights on other land in return for that which the Congress, in its judgment, deemed to be adequate consideration for what the Indians were required to give up, which consideration the Government was not otherwise under any legal obligation to pay." *Id.*, at 667.

This Court denied certiorari. 318 U. S. 789 (1943).

During the course of further litigation commencing in 1950, the Sioux again resubmitted their claim that the Black Hills were taken unconstitutionally. The Government pleaded res judicata as a defense. The Court of Claims held that res judicata barred relitigation of the question since the original Court of Claims decision had clearly held that the appropriation of the Black Hills was not a taking because Congress in "exercising its plenary power over Indian tribes, took their land without their consent and substituted for it something conceived by Congress to be an equivalent." *United States* v. *Sioux Nation*, 207 Ct. Cl. 234, 243, 518 F. 2d 1298, 1303 (1975). The court found no basis for relieving the Sioux from the bar of res judicata finding that the disability "is not lifted if a later court disagrees with a prior one." *Id.*, at 244.

518 F. 2d, at 1303. The court thus considered the equities entailed by the application of res judicata in this case and held that relitigation was unwarranted. Again, this Court denied certiorari. 423 U. S. 1016 (1975).

Congress then passed another statute authorizing the Sioux to relitigate their taking claim in the Court of Claims. 92 Stat. 153. The statute provided that the Court of Claims "*shall* review on the merits" the Sioux claim that there was a taking and that the Court "*shall determine that issue de novo.*" (Emphasis added.) Neither party submitted additional evidence and the Court of Claims decided the case on the basis of the record generated in the 1942 case and before the Commission. On the basis of that same record, the Court of Claims has now determined that the facts establish that Congress did not act in the best interest of the Sioux, as the 1942 court found, but arbitrarily appropriated the Black Hills without affording just compensation. This Court now embraces this second, latter-day interpretation of the facts in 1877.

II

Although the Court refrains from so boldly characterizing its action, it is obvious from these facts that Congress has reviewed the decisions of the Court of Claims, set aside the judgment that no taking of the Black Hills occurred, set aside the judgment that there is no cognizable reason for relitigating this claim, and ordered a new trial. I am convinced that this is nothing other than an exercise of judicial power reserved to Art. III courts that may not be performed by the Legislative Branch under its Art. I authority.

Article III vests "the judical Power . . . of the United States" in federal courts. Congress is vested by Art. I with *legislative* powers, and may not itself exercise an appellate-type review of judicial judgments in order to alter their terms, or to order new trials of cases already decided. The judges in *Hayburn's Case*, 2 Dall. 409, 413, n. 4 (1792), stated

that "no decision of any court of the United States can, under any circumstances, in our opinion, agreeable to the Constitution, be liable to a reversion, or even suspension, by the Legislature itself, in whom no judicial power of any kind appears to be vested." We have interpreted the decision in *United States* v. *Klein*, 13 Wall. 128 (1872), as having "rested upon the ground that . . . Congress was without constitutional authority to control the exercise of . . . judicial power . . . by requiring this Court to set aside the judgment of the Court of Claims" and as holding that Congress may not "require a new trial of the issues . . . which the Court had resolved against [a party]." *Pope* v. *United States*, 323 U. S. 1, 8, 9 (1944).

This principle was again applied in *United States* v. *O'Grady*, 22 Wall. 641, 647 (1875), where the Court refused to legitimize a congressional attempt to revise a final judgment rendered by the Court of Claims finding that such judgments "are beyond all doubt the final determination of the matter in controversy; and it is equally certain that the judgments of the Court of Claims, where no appeal is taken to this court, are, under existing laws, *absolutely conclusive of the rights of the parties, unless a new trial is granted by that court*. . . ." (Emphasis added.) The Court further found that there is only one Supreme Court and "[i]t is quite clear that Congress cannot subject the judgments of the Supreme Court to the re-examination and revision of any other tribunal or any other department of the government." *Id.*, at 648. See also *Chicago & Southern Air Lines, Inc.* v. *Waterman S. S. Corp.*, 333 U. S. 103 (1948). Congress has exceeded the legislative boundaries drawn by these cases and the Constitution and exercised judicial power in a case already decided by effectively ordering a new trial.

The determination of whether this action is an exercise of legislative or judicial power is of course one of characterization. The fact that the judicial process is affected by an Act of Con-

gress is not dispositive since many actions which this Court has clearly held to be legitimate exercises of legislative authority do have an effect on the judiciary and its processes. Congress may legitimately exercise legislative powers in the regulation of judicial jurisdiction; and it may, like other litigants, change the import of a final judgment by establishing new legal rights after the date of judgment, and have an effect on the grounds available for a court's decision by waiving available defenses. But as the Court apparently concedes, Congress may not, in the name of those legitimate actions, review and set aside a final judgment of an Art. III court, and order the courts to rehear an issue previously decided in a particular case.

The Court relies heavily on the fact that Congress was acting pursuant to its power to pay the Nation's debts. No doubt, Congress has broad power to do just that, but it may do so only through the exercise of legislative, not judicial powers. Thus the question must be, not whether Congress was attempting to pay its debts through this Act, but whether it attempted to do so by means of judicial power. The Court suggests that the congressional action in issue is justified as either a permissible regulation of jurisdiction, the creation of a new obligation, or the mere waiver of a litigant's right. These alternative nonjudicial characterizations of the congressional action, however, are simply unpersuasive.

A

The Court first attempts to categorize this action as a permissible regulation of jurisdiction stating that all Congress has done is to "provid[e] a forum so that a new judicial review of the Black Hills claim could take place." But that is the essence of an appellate or trial court decision ordering a new trial. While Congress may *regulate* judicial functions it may not itself *exercise* them. Admittedly, it is not always readily apparent whether a particular action constitutes the assignment or the exercise of a judicial function since

the assignment of some functions is inherently judicial—such as assigning the trial court the task of rehearing a case because of error. The guidelines identified in our opinions, however, indicate that while Congress enjoys broad authority to regulate judicial proceedings in the context of a *class* of cases, *Johannessen* v. *United States*, 225 U. S. 227 (1912), when Congress regulates functions of the judiciary in a *pending* case it walks the line between judicial and legislative authority, and exceeds that line if it sets aside a judgment or orders retrial of a previously adjudicated issue. *United States* v. *Klein, supra*, at 145; *Pope* v. *United States, supra*.

By ordering a *re*hearing in a pending case, Congress does not merely assign a judicial function, it necessarily reviews and sets aside an otherwise final adjudication; actions which this Court concedes Congress cannot permissibly take under the decisions of this Court. *Ante*, at 391–392. The Court concludes that no "review" of the Court of Claims decisions (and our denials of certiorari) has occurred, and that the finality of the judgments has not been disturbed principally because Congress has not dictated a rule of decision that must govern the ultimate outcome of the adjudication. The fact that Congress did not dictate to the Court of Claims that a particular result be reached does not in any way negate the fact it has sought to exercise judicial power. This Court and other appellate courts often reverse a trial for error without indicating what the result should be when the claim is heard again.

It is also apparent that Congress must have "reviewed" the merits of the litigation and concluded that for some reason, the Sioux should have a second opportunity to air their claims. The order of a new trial inevitably reflects some measure of dissatisfaction with at least the manner in which the original claim was heard. It certainly seems doubtful that Congress would grant a litigant a new trial if convinced that the litigant had been fairly heard in the first instance. Unless Congress is assuming that there were deficiencies in the prior judicial

proceeding, why would it see fit to appropriate public money to have the claim heard once again? It would seem that Congress did not find the opinions of the Court of Claims fully persuasive. But it is not the province of Congress to judge the persuasiveness of the opinions of federal courts—that is the judiciary's province alone. It is equally apparent that Congress has set aside the judgments of the Court of Claims. Previously those judgments were dispositive of the issues litigated in them; Congress now says that they are not. The action of Congress cannot be justified as the regulation of the jurisdiction of the federal courts because it seeks to provide a forum for the purposes of reviewing a previously final judgment in a pending case.

B

The action also cannot be characterized and upheld as merely an exercise of a litigant's power to change the effect of a judgment by agreeing to obligations beyond those required by a particular judgment. This Court has clearly never found that the judicial power is encroached upon because Congress seeks to change the law after a question has been adjudicated. See, *e. g.*, *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 18 How. 421 (1856); *Hodges* v. *Snyder*, 261 U. S. 600 (1923). This is a recognition of the right of every litigant to pay his adversary more than the court says is required if he so chooses. Congress, acting under its spending powers is, like an individual, entitled to enlarge its obligations after the court has adjudicated a question. The decision in *Pope* v. *United States*, 323 U. S. 1 (1944), clearly rests upon this distinction.

But here Congress has made no change in the applicable law. It has not provided, as our opinions make clear it could have, that the Sioux should recover for all interest on the value of the Black Hills. Counsel for respondents in fact stated at oral argument that he could not persuade Congress "to go that far." Congress has not changed the rule of law, it simply directed the judiciary to try again. Congress may not attempt

to shift its legislative responsibilities and satisfy its constituents by discarding final judgments and ordering new trials.

C

The Court also suggests that the congressional action is but a "mere waiver" of a defense within a litigant's prerogative. *Ante*, at 407. Congress certainly is no different from other litigants in this regard, and if the congressional action in this case could convincingly be construed as having an effect no greater than an ordinary litigant's waiver, I certainly would not object that Congress was exercising judicial power. But it is apparent that the congressional action in issue accomplished far more than a litigant's waiver. Congress clearly required the Court of Claims to hear the case in full, and only if a waiver of res judicata by a litigant would always impose an obligation on a federal court to rehear such a claim, could it be said that Congress has exercised the power of a litigant rather than the power of a legislature.

While res judicata is a defense which can be waived, see Fed. Rule Civ. Proc. 8 (c), if a court is on notice that it has previously decided the issue presented, the court may dismiss the action *sua sponte*, even though the defense has not been raised. See *Hedger Transportation Corp.* v. *Ira S. Bushey & Sons*, 186 F. 2d 236 (CA2 1951); *Evarts* v. *Western Metal Finishing Co.*, 253 F. 2d 637, 639, n. 1 (CA9), cert. denied, 358 U. S. 815 (1958); *Scholla* v. *Scholla*, 92 U. S. App. D. C. 9, 201 F. 2d 211 (1953); *Hicks* v. *Holland*, 235 F. 2d 183 (CA6), cert. denied, 352 U. S. 855 (1956). This result is fully consistent with the policies underlying res judicata: it is not based solely on the defendant's interest in avoiding the burdens of twice defending a suit, but is also based on the avoidance of unnecessary judicial waste. *Commissioner* v. *Sunnen*, 333 U. S. 591, 597 (1948); *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U. S. 313, 328 (1971); *Parklane Hosiery Co.* v. *Shore*, 439 U. S. 322 (1979). The Court of Claims itself has indicated that it would not engage

in reconsideration of an issue previously decided by the Court of Claims without substantial justification:

> "It is well to remember that *res judicata* and its offspring, collateral estoppel, are not statutory defenses; they are defenses adopted by the courts in furtherance of prompt and efficient administration of the business that comes before them. They are grounded on the theory that one litigant cannot unduly consume the time of the court at the expense of other litigants, and that, once the court has finally decided an issue, a litigant cannot demand that it be decided again." *Warthen* v. *United States*, 157 Ct. Cl. 798, 800 (1962).

It matters not that the defendant has consented to the relitigation of the claim since the judiciary retains an independent interest in preventing the misallocation of judicial resources and second-guessing prior panels of Art. III judges when the issue has been fully and fairly litigated in a prior proceeding. Since the Court of Claims found in this case that there was no adequate reason for denying res judicata effect after the issue was raised and the respondents were given an opportunity to demonstrate why res judicata should not apply, it is clear that the issue has been heard again only because Congress used its legislative authority to mandate a rehearing. The Court of Claims apparently acknowledged that this in fact was the effect of the legislation, for it did not state that readjudication was the product of a waiver, but rather that through its decision the court "carried out the *obligation imposed upon us* in the 1978 jurisdictional statute." (Emphasis added.)

Nor do I find this Court's decision in *Cherokee Nation* v. *United States*, 270 U. S. 476 (1926), dispositive. Again, in *Cherokee Nation*, the Court was asked to consider and decide a question not previously adjudicated by the Court of Claims. The Court stated that the theory of interest presented in the second adjudication was not "presented either to the Court

of Claims or to this Court. It is a new argument not before considered." *Id.*, at 486. Thus even *Cherokee Nation* did not involve congressionally mandated judicial re-examination of a question previously decided by an Art. III court.

Here, in contrast, the issue decided is identical to that decided in 1942. It is quite clear from a comparison of the 1942 decision of the Court of Claims and the opinion of the Court today that the only thing that has changed is an interpretation of the events which occurred in 1877. The Court today concludes that the facts in this case "would not lead one to conclude that the Act effected 'a mere change in the form of investment of Indian tribal property.'" *Ante*, at 413. But that is precisely what the Court of Claims found in 1942. See *supra*, at 425–426. There has not even been a change in the law, for the Court today relies on decisions rendered long before the Court of Claims decision in 1942. It is the view of history, and not the law, which has evolved. See *infra*, at 434–437. The decision is thus clearly nothing more than a second interpretation of the precise factual question decided in 1942. As the dissenting judges in the Court of Claims aptly stated: "The facts have not changed. We have been offered no new evidence." 220 Ct. Cl. —, —, 601 F. 2d 1157, 1184.

It is therefore apparent that Congress has accomplished more than a private litigant's attempted waiver, more than legislative control over the general jurisdiction of the federal courts, and more than the establishment of a new rule of law for a previously decided case. What Congress has done is uniquely judicial. It has reviewed a prior decision of an Art. III court, eviscerated the finality of that judgment, and ordered a new trial in a pending case.

III

Even if I could countenance the Court's decision to reach the merits of this case, I also think it has erred in rejecting the 1942 court's interpretation of the facts. That court

rendered a very persuasive account of the congressional enactment. See *supra*, at 425–426. As the dissenting judges in the Court of Claims opinion under review pointedly stated: "The majority's view that the rations were not consideration for the Black Hills in untenable. What else was the money for?" 220 Ct. Cl., at —, 601 F. 2d, at 1183.

I think the Court today rejects that conclusion largely on the basis of a view of the settlement of the American West which is not universally shared. There were undoubtedly greed, cupidity, and other less-than-admirable tactics employed by the Government during the Black Hills episode in the settlement of the West, but the Indians did not lack their share of villainy either. It seems to me quite unfair to judge by the light of "revisionist" historians or the mores of another era actions that were taken under pressure of time more than a century ago.

Different historians, not writing for the purpose of having their conclusions or observations inserted in the reports of congressional committees, have taken different positions than those expressed in some of the materials referred to in the Court's opinion. This is not unnatural, since history, no more than law, is not an exact (or for that matter an inexact) science.

But the inferences which the Court itself draws from the letter from General Sheridan to General Sherman reporting on a meeting between the former with President Grant, the Secretary of the Interior, and the Secretary of War, as well as other passages in the Court's opinion, leave a stereotyped and one-sided impression both of the settlement regarding the Black Hills portion of the Great Sioux Reservation and of the gradual expansion of the National Government from the Proclamation Line of King George III in 1763 to the Pacific Ocean.

Ray Billington, a senior research associate at the Huntington Library in San Marino, Cal., since 1963, and a respected student of the settlement of the American West, em-

phasized in his introduction to the book Soldier and Brave (National Park Service, U. S. Dept. of the Interior, 1963) that the confrontations in the West were the product of a long history, not a conniving Presidential administration:

> "Three centuries of bitter Indian warfare reached a tragic climax on the plains and mountains of America's Far West. Since the early seventeenth century, when Chief Opechancanough rallied his Powhatan tribesmen against the Virginia intruders on their lands, each advance of the frontier had been met with stubborn resistance. At times this conflict flamed into open warfare: in King Phillips' rebellion against the Massachusetts Puritans, during the French and Indian Wars of the eighteenth century, in Chief Pontiac's assault on his new British overlords in 1763, in Chief Tecumseh's vain efforts to hold back the advancing pioneers of 1812, and in the Black Hawk War. . . .
>
> ". . . In three tragic decades, between 1860 and 1890, the Indians suffered the humiliating defeats that forced them to walk the white man's road toward civilization. Few conquered people in the history of mankind have paid so dearly for their defense of a way of life that the march of progress had outmoded.
>
> "This epic struggle left its landmarks behind, as monuments to the brave men, Indian and white, who fought and died that their manner of living might endure." *Id.*, at xiii–xiv.

Another history highlights the cultural differences which made conflict and brutal warfare inevitable:

> "The Plains Indians seldom practiced agriculture or other primitive arts, but they were fine physical specimens; and in warfare, once they had learned the use of the rifle, [were] much more formidable than the Eastern tribes who had slowly yielded to the white man. Tribe warred with tribe, and a highly developed sign language

was the only means of intertribal communication. The effective unit was the band or village of a few hundred souls, which might be seen in the course of its wanderings encamped by a watercourse with tipis erected; or pouring over the plain, women and children leading dogs and packhorses with their trailing travois, while gaily dressed braves loped ahead on horseback. They lived only for the day, recognized no rights of property, robbed or killed anyone if they thought they could get away with it, inflicted cruelty without a qualm, and endured torture without flinching." S. Morison, The Oxford History of the American People 539–540 (1965).

That there was tragedy, deception, barbarity, and virtually every other vice known to man in the 300-year history of the expansion of the original 13 Colonies into a Nation which now embraces more than three million square miles and 50 States cannot be denied. But in a court opinion, as a historical and not a legal matter, both settler and Indian are entitled to the benefit of the Biblical adjuration: "Judge not, that ye be not judged."

REID *v.* GEORGIA

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

No. 79–448. Decided June 30, 1980

Upon his early morning arrival at the Atlanta Airport on a commercial flight, petitioner was seen by a federal narcotics agent to look occasionally backward at a second man. Petitioner and the other man each carried a shoulder bag and apparently had no other luggage. When the two men left the terminal together, the agent asked them for identification, and after they had consented to a search of their persons and shoulder bags, petitioner tried to run away, and before being apprehended, abandoned his bag, which was subsequently found to contain cocaine. Prior to his trial on a charge of possessing cocaine, petitioner's motion to suppress the cocaine was granted by the Georgia trial court, but the Georgia Court of Appeals reversed, holding that the stop of petitioner was permissible, since he appeared to the agent to fit the so-called "drug courier profile."

Held: The agent could not, as a matter of law, have reasonably suspected petitioner of criminal activity on the basis of the observed circumstances. Only the fact that petitioner preceded another person and occasionally looked backward at him as they proceeded through the concourse relates to their particular conduct, whereas the other circumstances describe a very large category of presumably innocent travelers. The fact that the agent believed that petitioner and his companion were attempting to conceal the fact that they were traveling together is too slender a reed to support the seizure.

Certiorari granted; 149 Ga. App. 685, 255 S. E. 2d 71, vacated and remanded.

PER CURIAM.

The petitioner was indicted in the Superior Court of Fulton County, Ga., for possessing cocaine. At a hearing before trial, he moved to suppress the introduction of the cocaine as evidence against him on the ground that it had been seized from him by an agent of the federal Drug Enforcement Administration (DEA) in violation of his rights under the Fourth and Fourteenth Amendments.

The relevant facts were determined at the pretrial hearing and may be recounted briefly. The petitioner arrived at the Atlanta Airport on a commercial airline flight from Fort Lauderdale, Fla., in the early morning hours of August 14, 1978. The passengers left the plane in a single file and proceeded through the concourse. The petitioner was observed by an agent of the DEA, who was in the airport for the purpose of uncovering illicit commerce in narcotics. Separated from the petitioner by several persons was another man, who carried a shoulder bag like the one the petitioner carried. As they proceeded through the concourse past the baggage claim area, the petitioner occasionally looked backward in the direction of the second man. When they reached the main lobby of the terminal, the second man caught up with the petitioner and spoke briefly with him. They then left the terminal building together.

The DEA agent approached them outside of the building, identified himself as a federal narcotics agent, and asked them to show him their airline ticket stubs and identification, which they did. The airline tickets had been purchased with the petitioner's credit card and indicated that the men had stayed in Fort Lauderdale only one day. According to the agent's testimony, the men appeared nervous during the encounter. The agent then asked them if they would agree to return to the terminal and to consent to a search of their persons and their shoulder bags. The agent testified that the petitioner nodded his head affirmatively, and that the other responded, "Yeah, okay." As the three of them entered the terminal, however, the petitioner began to run and before he was apprehended, abandoned his shoulder bag. The bag, when recovered, was found to contain cocaine.

The Superior Court granted the petitioner's motion to suppress the cocaine, concluding that it had been obtained as a result of a seizure of him by the DEA agent without an articulable suspicion that he was unlawfully carrying narcotics. The Georgia Court of Appeals reversed. 149 Ga. App. 685,

255 S. E. 2d 71. It held that the stop of the petitioner was permissible, citing *Terry* v. *Ohio*, 392 U. S. 1 (1968), since the petitioner, "in a number of respects, fit a 'profile' of drug couriers compiled by the [DEA]." 149 Ga. App., at 686, 255 S. E. 2d, at 72. The appellate court also concluded that the petitioner had consented to return to the terminal for a search of his person, and that after he had attempted to flee and had discarded his shoulder bag, there existed probable cause for the search of the bag.

The Fourth and Fourteenth Amendments' prohibition of searches and seizures that are not supported by some objective justification governs all seizures of the person, "including seizures that involve only a brief detention short of traditional arrest. *Davis* v. *Mississippi*, 394 U. S. 721 (1969); *Terry* v. *Ohio*, 392 U. S. 1, 16–19 (1968)." *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 878 (1975).* While the Court has recognized that in some circumstances a person may be detained briefly, without probable cause to arrest him, any curtailment of a person's liberty by the police must be supported at least by a reasonable and articulable suspicion that the person seized is engaged in criminal activity. See *Brown* v. *Texas*, 443 U. S. 47, 51 (1979); *Delaware* v. *Prouse*, 440 U. S. 648, 661 (1979); *United States* v. *Brignoni-Ponce*, *supra*; *Adams* v. *Williams*, 407 U. S. 143, 146–149 (1972); *Terry* v. *Ohio*, *supra*.

The appellate court's conclusion in this case that the DEA agent reasonably suspected the petitioner of wrongdoing rested on the fact that the petitioner appeared to the agent to fit the so-called "drugs courier profile," a somewhat informal compilation of characteristics believed to be typical of persons unlawfully carrying narcotics. Specifically, the court thought

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*"Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a seizure has occurred." *Terry* v. *Ohio*, 392 U. S. 1, 19, n. 16 (1968). See also *id.*, at 34 (WHITE, J., concurring); *id.*, at 31, 32–33 (Harlan, J., concurring).

it relevant that (1) the petitioner had arrived from Fort Lauderdale, which the agent testified is a principal place of origin of cocaine sold elsewhere in the country, (2) the petitioner arrived in the early morning, when law enforcement activity is diminished, (3) he and his companion appeared to the agent to be trying to conceal the fact that they were traveling together, and (4) they apparently had no luggage other than their shoulder bags.

We conclude that the agent could not, as a matter of law, have reasonably suspected the petitioner of criminal activity on the basis of these observed circumstances. Of the evidence relied on, only the fact that the petitioner preceded another person and occasionally looked backward at him as they proceeded through the concourse relates to their particular conduct. The other circumstances describe a very large category of presumably innocent travelers, who would be subject to virtually random seizures were the Court to conclude that as little foundation as there was in this case could justify a seizure. Nor can we agree, on this record, that the manner in which the petitioner and his companion walked through the airport reasonably could have led the agent to suspect them of wrongdoing. Although there could, of course, be circumstances in which wholly lawful conduct might justify the suspicion that criminal activity was afoot, see *Terry* v. *Ohio*, *supra*, at 27–28, this is not such a case. The agent's belief that the petitioner and his companion were attempting to conceal the fact that they were traveling together, a belief that was more an "inchoate and unparticularized suspicion or 'hunch,'" 392 U. S., at 27, than a fair inference in the light of his experience, is simply too slender a reed to support the seizure in this case.

For these reasons, the judgment of the appellate court cannot be sustained insofar as it rests on the determination that the DEA agent lawfully seized the petitioner when he approached him outside the airline terminal. Accordingly, the petition for certiorari is granted, the judgment of the Georgia

Court of Appeals is vacated, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE REHNQUIST dissents for the reasons stated by MR. JUSTICE STEWART in his opinion in *United States* v. *Mendenhall*, 446 U. S. 544 (1980). He believes that the police conduct involved did not implicate the Fourteenth or Fourth Amendment rights of the petitioners.

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN join, concurring.[1]

This case is similar in many respects to *United States* v. *Mendenhall*, 446 U. S. 544 (1980), in which a defendant observed walking through an airport was stopped by DEA agents and asked for identification. The threshold question in *Mendenhall*, as here, was whether the agent's initial stop of the suspect constituted a seizure within the meaning of the Fourth Amendment. MR. JUSTICE STEWART, joined by MR. JUSTICE REHNQUIST, was of the opinion that the mere stopping of a person for identification purposes is not a seizure:

> "We conclude that a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.*, at 554.[2]

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[1] I agree, on the basis of the fragmentary facts apparently relied upon by the DEA agents in this case, that there was no justification for a "seizure."

[2] MR. JUSTICE STEWART also noted that "'[t]here is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets.'" 446 U. S., at 553, quoting *Terry* v. *Ohio*, 392 U. S. 1, 34 (1968) (WHITE, J., concurring). See also *ante*, at 440, n.

Thus, on the basis of facts remarkably similar to those in the present case, MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST decided that no seizure had occurred.

My concurring opinion in *Mendenhall*, in which THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN joined, did not consider the seizure issue because it had not been raised in the courts below. Even if the stop constituted a seizure, it was my view that the DEA agents had articulable and reasonable grounds for believing that the individual was engaged in criminal activity. Therefore, they did not violate the Fourth Amendment by stopping that person for routine questioning. I expressly stated, however, that my decision not to reach the seizure issue did not necessarily indicate disagreement with the views of MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST. *Id.*, at 560, n. 1.[3]

The state courts, which decided this case before our decision in *Mendenhall*, did not consider whether the petitioner had been seized. Rather, those courts apparently assumed that the stop for routine identification questioning constituted a seizure, and addressed only the question whether the agent's actions were justified by articulable and reasonable grounds of suspicion. Because we similarly do not consider the initial seizure question in our decision today, that issue remains open for consideration by the state courts in light of the opinions in *Mendenhall*.

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[3] MR. JUSTICE WHITE, joined by MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE STEVENS, filed a dissenting opinion in *Mendenhall* in which they concluded that the respondent had been detained in violation of the Fourth Amendment.

MABRY, COMMISSIONER, ARKANSAS DEPARTMENT OF CORRECTION *v.* KLIMAS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 79-622. Decided June 30, 1980

Respondent was convicted of burglary and grand larceny in an Arkansas state court and sentenced by the jury to the maximum sentence permissible under the state recidivist statute. On appeal, the Arkansas Supreme Court reversed, holding that evidence of certain prior felony convictions was inadmissible for the purpose of enhancing respondent's sentence, and revised the sentence to the permissible minimum. Respondent then brought a habeas corpus petition in Federal District Court, alleging that his sentencing after trial had been unconstitutional and was not remedied by the Arkansas Supreme Court's revision of it. The District Court dismissed the suit for want of jurisdiction, but the Court of Appeals reversed, holding that respondent had been denied due process of law by the failure to permit him to be resentenced by a jury, and that resentencing was required because the recidivist statute had been amended since respondent's trial and, if the amendment applied to him, would now provide a lower minimum sentence.

Held: Where the claim that respondent is entitled to be resentenced by reason of the amended recidivist statute apparently has not been presented to the state courts, a federal court, in the absence of any reason to believe that state judicial remedies would now be unavailable, is required to stay its hand to give the State the initial opportunity to pass upon and correct alleged violations of federal rights. The requirement of 28 U. S. C. §§ 2254 (b) and (c) that state remedies first be pursued is particularly appropriate where, as here, the federal constitutional claim arises from the alleged deprivation by state courts of rights created under state law.

Certiorari granted; 599 F. 2d 842, reversed and remanded.

PER CURIAM.

The respondent was convicted by a jury in an Arkansas court of burglary and grand larceny. In accordance with the recidivist statute then in effect in Arkansas, the members of the jury were instructed that if they found that the r

spondent had been convicted of three prior felony offenses, they could fix his sentence at not less than 21 and not more than 31½ years for both burglary and grand larceny. Evidence was admitted of seven prior felony convictions from Missouri and of six from Arkansas. The jury found that the petitioner had been convicted of three prior felonies, and set his punishment at 31½ years for each of the two offenses of which they had found him guilty. The trial judge ordered that the terms were to be served consecutively.

On appeal, the Arkansas Supreme Court reversed, concluding that the evidence of the Missouri convictions was inadmissible for the purpose of enhancing the respondent's sentence because it did not appear that he had had the assistance of counsel at the trial of those cases. 259 Ark. 301, 303–304, 534 S. W. 2d 202, 204, citing *Burgett* v. *Texas*, 389 U. S. 109 (1967). The court directed that the respondent be retried unless the State agreed to a reduction of his sentence to three years, the minimum sentence that he could have received for the burglary and larceny offenses. 259 Ark., at 309, 534 S. W. 2d, at 207. On rehearing, the court revised the sentence to 42 years, comprised of the two minimum terms of 21 years authorized for the offenses in the case of a defendant having three past convictions. The court reasoned that since the jury had been required to consider the six Arkansas convictions whose validity the respondent had not disputed at trial, it could not have fixed the punishment at less than 21 years for each offense.[1]

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[1] The respondent contends that the minimum sentence he could have received was 21, not 42 years, since the trial judge was allegedly authorized to direct that the burglary and larceny sentences run concurrently. This was also the view of Judge Henley, dissenting from the Court of Appeals' denial of en banc consideration of the case. 603 F. 2d 158, 159 (CA8 1979). Because the question was not decided either by the Arkansas Supreme Court or by the federal courts in this case, we do not now consider it.

The respondent then sought a writ of habeas corpus in a Federal District Court, alleging that his sentencing after trial had been unconstitutional and was not remedied by the Arkansas Supreme Court's revision of it to 42 years. The District Court dismissed the suit for want of jurisdiction, but the Court of Appeals reversed, concluding that the respondent had been denied due process of law by the State's failure to permit him to be resentenced by a jury, in accord with what it understood to be state statutory law. 599 F. 2d 842 (CA8 1979). The Court of Appeals acknowledged that the omission of discretionary resentencing by a jury would not have prejudiced the respondent if, as the Arkansas Supreme Court had concluded, he had received the most lenient sentence authorized by law for the offenses of which he had been convicted. Cf. *Hicks* v. *Oklahoma*, 447 U. S. 343 (1980).[2] But the Court of Appeals believed that resentencing was required in this case because the habitual offender statute had been amended since the respondent's trial, and, if applied to him, the amended statute would provide a lower minimum

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[2] In *Hicks* v. *Oklahoma*, this Court held that the right of a criminal defendant under state law to have his punishment fixed in the discretion of the trial jury gave him "a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion, cf. *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1, and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State. See *Vitek* v. *Jones*, 445 U. S. 480, 488–489, citing *Wolff* v. *McDonnell*, 418 U. S. 539; *Greenholtz* v. *Nebraska Penal Inmates, supra; Morrissey* v. *Brewer*, 408 U. S. 471." 447 U. S., at 346. The jury in *Hicks* had fixed the petitioner's punishment at 40 years, in accord with the mandatory terms of the State's habitual offender statute then in effect. On appeal, the mandatory provision was determined to be invalid, but the appellate court nonetheless affirmed the 40-year sentence because it was within the range of punishments that a correctly instructed jury could have imposed in any event. This Court concluded that the deprivation of a discretionary jury sentence that could well have been less than 40 years had denied the petitioner due process of law. *Ibid.*

sentence.[3] Accordingly, while the court expressed uncertainty whether the amendment applied to the respondent, it nonetheless ordered that the District Court issue the writ unless he was resentenced by a jury.

The claim that the respondent is entitled to be resentenced by reason of the amended recidivist statute apparently has not been presented to the state courts. In these circumstances, in the absence of any reason to believe that state judicial remedies would now be unavailable, a federal court is required to stay its hand "to give the State the initial 'opportunity to pass upon and correct' alleged violations of . . . federal rights." *Wilwording* v. *Swenson*, 404 U. S. 249, 250 (1971), quoting *Fay* v. *Noia*, 372 U. S. 391, 438 (1963). See *Picard* v. *Connor*, 404 U. S. 270, 277–278 (1971). The requirement that state remedies first be pursued, codified in the federal habeas corpus statute, 28 U. S. C. §§ 2254 (b) and (c), is particularly appropriate where, as here, the federal constitutional claim arises from the alleged deprivation by state courts of rights created under state law. The Court of Appeals acknowledged that the construction of the statute, plainly a matter for the state courts to decide, was at best uncertain. Obviously, therefore, the state courts can in no sense be said to have arbitrarily denied any right they were asked to accord.

The petition for certiorari and the respondent's motion for leave to proceed *in forma pauperis* are granted, the judgment of the Court of Appeals is reversed, and the case is remanded to that court for proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE MARSHALL concurs in the judgment.

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[3] The revised statute by its terms applies only to offenses committed after January 1, 1976. See Ark. Stat. Ann. §§ 41–102 (1) and (3) (1977). The respondent was convicted and sentenced in the trial court in 1975, and the case was reheard by the Arkansas Supreme Court in March 1976, when the court modified his sentence, presumably in accord with the state law then governing the case.

FULLILOVE ET AL. *v.* KLUTZNICK, SECRETARY OF COMMERCE, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 78-1007. Argued November 27, 1979—Decided July 2, 1980

The "minority business enterprise" (MBE) provision of the Public Works Employment Act of 1977 (1977 Act) requires that, absent an administrative waiver, at least 10% of federal funds granted for local public works projects must be used by the state or local grantee to procure services or supplies from businesses owned by minority group members, defined as United States citizens "who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts." Under implementing regulations and guidelines, grantees and their private prime contractors are required, to the extent feasible, in fulfilling the 10% MBE requirement, to seek out all available, qualified, bona fide MBE's, to provide technical assistance as needed, to lower or waive bonding requirements where feasible, to solicit the aid of the Office of Minority Business Enterprise, the Small Business Administration, or other sources for assisting MBE's in obtaining required working capital, and to give guidance through the intricacies of the bidding process. The administrative program, which recognizes that contracts will be awarded to bona fide MBE's even though they are not the lowest bidders if their bids reflect merely attempts to cover costs inflated by the present effects of prior disadvantage and discrimination, provides for handling grantee applications for administrative waiver of the 10% MBE requirement on a case-by-case basis if infeasibility is demonstrated by a showing that, despite affirmative efforts, such level of participation cannot be achieved without departing from the program's objectives. The program also provides an administrative mechanism to ensure that only bona fide MBE's are encompassed by the program, and to prevent unjust participation by minority firms whose access to public contracting opportunities is not impaired by the effects of prior discrimination.

Petitioners, several associations of construction contractors and subcontractors and a firm engaged in heating, ventilation, and air conditioning work, filed suit for declaratory and injunctive relief in Federal District Court, alleging that they had sustained economic injury due to enforcement of the MBE requirement and that the MBE provision on its face violated, *inter alia,* the Equal Protection Clause of the Four-

teenth Amendment and the equal protection component of the Due Process Clause of the Fifth Amendment. The District Court upheld the validity of the MBE program, and the Court of Appeals affirmed.

Held: The judgment is affirmed. Pp. 456–492; 517–522.

584 F. 2d 600, affirmed.

MR. CHIEF JUSTICE BURGER, joined by MR. JUSTICE WHITE and MR. JUSTICE POWELL, concluded that the MBE provision of the 1977 Act, on its face, does not violate the Constitution. Pp. 456–492.

(1) Viewed against the legislative and administrative background of the 1977 Act, the legislative objectives of the MBE provision, and the administrative program thereunder, were to ensure—without mandating the allocation of federal funds according to inflexible percentages solely based on race or ethnicity—that, to the extent federal funds were granted under the 1977 Act, grantees who elected to participate would not employ procurement practices that Congress had decided might result in perpetuation of the effects of prior discrimination which had impaired or foreclosed access by minority businesses to public contracting opportunities. Pp. 456–472.

(2) In considering the constitutionality of the MBE provision, it first must be determined whether the *objectives* of the legislation are within Congress' power. Pp. 472–480.

(a) The 1977 Act, as primarily an exercise of Congress' spending power under Art. I, § 8, cl. 1, "to provide for the . . . general Welfare," conditions receipt of federal moneys upon the recipient's compliance with federal statutory and administrative directives. Since the reach of the spending power is at least as broad as Congress' regulatory powers, if Congress, pursuant to its regulatory powers, could have achieved the objectives of the MBE program, then it may do so under the spending power. Pp. 473–475.

(b) Insofar as the MBE program pertains to the actions of private prime contractors, including those not responsible for any violation of antidiscrimination laws, Congress could have achieved its objectives under the Commerce Clause. The legislative history shows that there was a rational basis for Congress to conclude that the subcontracting practices of prime contractors could perpetuate the prevailing impaired access by minority businesses to public contracting opportunities, and that this inequity has an effect on interstate commerce. Pp. 475–476.

(c) Insofar as the MBE program pertains to the actions of state and local grantees, Congress could have achieved its objectives by use of its power under § 5 of the Fourteenth Amendment "to enforce, by appropriate legislation" the equal protection guarantee of that Amendment. Congress had abundant historical basis from which it could con-

clude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination, and that the prospective elimination of such barriers to minority-firm access to public contracting opportunities was appropriate to ensure that those businesses were not denied equal opportunity to participate in federal grants to state and local governments, which is one aspect of the equal protection of the laws. Cf., *e. g.*, *Katzenbach* v. *Morgan*, 384 U. S. 641; *Oregon* v. *Mitchell*, 400 U. S. 112. Pp. 476–478.

(d) Thus, the *objectives* of the MBE provision are within the scope of Congress' spending power. Cf. *Lau* v. *Nichols*, 414 U. S. 563. Pp. 479–480.

(3) Congress' use here of racial and ethnic criteria as a condition attached to a federal grant is a valid *means* to accomplish its constitutional objectives, and the MBE provision on its face does not violate the equal protection component of the Due Process Clause of the Fifth Amendment. Pp. 480–492.

(a) In the MBE program's remedial context, there is no requirement that Congress act in a wholly "color-blind" fashion. Cf., *e. g.*, *Swann* v. *Charlotte-Mecklenberg Board of Education*, 402 U. S. 1; *McDaniel* v. *Barresi*, 402 U. S. 39; *North Carolina Board of Education* v. *Swann*, 402 U. S. 43. Pp. 482–484.

(b) The MBE program is not constitutionally defective because it may disappoint the expectations of access to a portion of government contracting opportunities of nonminority firms who may themselves be innocent of any prior discriminatory actions. When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such "a sharing of the burden" by innocent parties is not impermissible. *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 777. Pp. 484–485.

(c) Nor is the MBE program invalid as being underinclusive in that it limits its benefit to specified minority groups rather than extending its remedial objectives to all businesses whose access to government contracting is impaired by the effects of disadvantage or discrimination. Congress has not sought to give select minority groups a preferred standing in the construction industry, but has embarked on a remedial program to place them on a more equitable footing with respect to public contracting opportunities, and there has been no showing that Congress inadvertently effected an invidious discrimination by excluding from coverage an identifiable minority group that has been the victim of a degree of disadvantage and discrimination equal to or greater than that suffered by the groups encompassed by the MBE program. Pp. 485–486.

(d) The contention that the MBE program, on its face, is overinclusive in that it bestows a benefit on businesses identified by racial or ethnic criteria which cannot be justified on the basis of competitive criteria or as a remedy for the present effects of identified prior discrimination, is also without merit. The MBE provision, with due account for its administrative program, provides a reasonable assurance that application of racial or ethnic criteria will be narrowly limited to accomplishing Congress' remedial objectives and that misapplications of the program will be promptly and adequately remedied administratively. In particular, the administrative program provides waiver and exemption procedures to identify and eliminate from participation MBE's who are not "bona fide," or who attempt to exploit the remedial aspects of the program by charging an unreasonable price not attributable to the present effects of past discrimination. Moreover, grantees may obtain a waiver if they demonstrate that their best efforts will not achieve or have not achieved the 10% target for minority firm participation within the limitations of the program's remedial objectives. The MBE provision may be viewed as a pilot project, appropriately limited in extent and duration and subject to reassessment and re-evaluation by the Congress prior to any extension or re-enactment. Pp. 486–489.

(4) In the continuing effort to achieve the goal of equality of economic opportunity, Congress has latitude to try new techniques such as the limited use of racial and ethnic criteria to accomplish remedial objectives, especially in programs where voluntary cooperation is induced by placing conditions on federal expenditures. When a program narrowly tailored by Congress to achieve its objectives comes under judicial review, it should be upheld if the courts are satisfied that the legislative objectives and projected administration of the program give reasonable assurance that the program will function within constitutional limitations. Pp. 490–492.

MR. JUSTICE MARSHALL, joined by MR. JUSTICE BRENNAN and MR. JUSTICE BLACKMUN, concurring in the judgment, concluded that the proper inquiry for determining the constitutionality of racial classifications that provide benefits to minorities for the purpose of remedying the present effects of past racial discrimination is whether the classifications serve important governmental objectives and are substantially related to achievement of those objectives, *University of California Regents* v. *Bakke*, 438 U. S. 265, 359 (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., concurring in judgment in part and dissenting in part), and that, judged under this standard, the 10% minority set-aside provision of the 1977 Act is plainly constitutional, the racial classifications being substantially related to the achievement of the important and

congressionally articulated goal of remedying the present effects of past racial discrimination. Pp. 517–521.

BURGER, C. J., announced the judgment of the Court and delivered an opinion, in which WHITE and POWELL, JJ., joined. POWELL, J., filed a concurring opinion, *post*, p. 495. MARSHALL, J., filed an opinion concurring in the judgment, in which BRENNAN and BLACKMUN, JJ., joined, *post*, p. 517. STEWART, J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post*, p. 522. STEVENS, J., filed a dissenting opinion, *post*, p. 532.

Robert G. Benisch argued the cause for petitioners Fullilove et al. With him on the briefs was *Robert J. Fink*. *Robert J. Hickey* argued the cause for petitioner General Building Contractors of New York State, Inc., the New York State Building Chapter, Associated General Contractors of America, Inc. With him on the briefs was *Peter G. Kilgore*.

Assistant Attorney General Days argued the cause for respondents. With him on the brief for respondent Secretary of Commerce were *Solicitor General McCree, Deputy Solicitor General Wallace, Brian K. Landsberg, Jessica Dunsay Silver*, and *Vincent F. O'Rourke, Jr.* *Robert Abrams*, Attorney General of New York, *Shirley Adelson Siegel*, Solicitor General, and *Arnold D. Fleischer* and *Barbara E. Levy*, Assistant Attorneys General, filed a brief for respondent State of New York. *Allen G. Schwartz, James G. Greilsheimer, L. Kevin Sheridan*, and *Frances M. Morris* filed a brief for respondents City of New York et al.*

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*Briefs of *amici curiae* urging reversal were filed by *Kenneth C. McGuiness, Douglas S. McDowell*, and *Daniel R. Levinson* for the Equal Employment Advisory Council; and by *Ronald A. Zumbrun* and *John H. Findley* for the Pacific Legal Foundation.

Briefs of *amici curiae* urging affirmance were filed by *Julian B. Wilkins* and *Jewel S. Lafontant* for Alpha Kappa Alpha Sorority, Inc.; by *E. Richard Larson, Burt Neuborne, Frank Askin*, and *Robert Sedler* for the American Civil Liberties Union et al.; by *Ronald J. Greene* for the American Savings & Loan League, Inc., et al.; by *Bill Lann Lee* for the Asian American Legal Defense and Education Fund, Inc.; by *John B. Jones, Jr., Norman Redlich, William L. Robinson, Richard T. Seymour, Norman J. Chachkin, Laurence S. Fordham, Henry P. Monaghan*, and

MR. CHIEF JUSTICE BURGER announced the judgment of the Court and delivered an opinion in which MR. JUSTICE WHITE and MR. JUSTICE POWELL joined.

We granted certiorari to consider a facial constitutional challenge to a requirement in a congressional spending program that, absent an administrative waiver, 10% of the federal funds granted for local public works projects must be used by the state or local grantee to procure services or supplies from businesses owned and controlled by members of statutorily identified minority groups. 441 U. S. 960 (1979).

I

In May 1977, Congress enacted the Public Works Employment Act of 1977, Pub. L. 95–28, 91 Stat. 116, which amended the Local Public Works Capital Development and Investment Act of 1976, Pub. L. 94–369, 90 Stat. 999, 42 U. S. C. § 6701 *et seq.* The 1977 amendments authorized an additional $4 billion appropriation for federal grants to be made by the Secretary of Commerce, acting through the Economic Development Administration (EDA), to state and local governmental entities for use in local public works projects. Among the changes made was the addition of the provision that has

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Robert D. Goldstein for the Lawyers' Committee for Civil Rights Under Law; by *Vilma S. Martinez, Morris J. Baller,* and *Joel G. Contreras* for the Mexican American/Hispanic Contractors and Truckers Association, Inc., et al.; by *Daniel T. Ingram, Jr.,* for the Minority Contractors Assistance Project, Inc.; by *Nathaniel R. Jones, J. Francis Pohlhaus,* and *John A. Fillion* for the National Association for the Advancement of Colored People et al.; by *Jack Greenberg, James M. Nabrit III, Eric Schnapper, Vernon E. Jordan, Jr.,* and *Robert L. Harris* for the NAACP Legal Defense and Educational Fund, Inc., et al.; and by *Robert T. Pickett* for the National Bar Association, Inc., et al.

Briefs of *amici curiae* were filed by *Arthur Kinoy* for the Affirmative Action Coordinating Center et al.; by *Robert A. Helman, Justin J. Finger, Jeffrey P. Sinensky,* and *Richard A. Weisz* for the Anti-Defamation League of B'nai B'rith; by *Walter R. Echo-Hawk* and *Robert S. Pelcyger* for the Minority Contractors Association, Inc.; and by *Bernard Parks* and *Lenwood A. Jackson* for the National Conference of Black Mayors, Inc.

become the focus of this litigation. Section 103 (f)(2) of the 1977 Act, referred to as the "minority business enterprise" or "MBE" provision, requires that: [1]

> "Except to the extent that the Secretary determines otherwise, no grant shall be made under this Act for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term 'minority business enterprise' means a business at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts."

In late May 1977, the Secretary promulgated regulations governing administration of the grant program which were amended two months later.[2] In August 1977, the EDA issued guidelines supplementing the statute and regulations with respect to minority business participation in local public works grants,[3] and in October 1977, the EDA issued a technical bulletin promulgating detailed instructions and information to assist grantees and their contractors in meeting the 10% MBE requirement.[4]

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[1] 91 Stat. 116, 42 U. S. C. § 6705 (f)(2) (1976 ed., Supp. II).

[2] 42 Fed. Reg. 27432 (1977), as amended by 42 Fed. Reg. 35822 (1977); 13 CFR Part 317 (1978).

[3] U. S. Dept. of Commerce, Economic Development Administration, Local Public Works Program, Round II, Guidelines For 10% Minority Business Participation In LPW Grants (1977) (hereinafter Guidelines), App. 156a–167a.

[4] U. S. Dept. of Commerce, Economic Development Administration, EDA Minority Business Enterprise (MBE) Technical Bulletin (Additional

On November 30, 1977, petitioners filed a complaint in the United States District Court for the Southern District of New York seeking declaratory and injunctive relief to enjoin enforcement of the MBE provision. Named as defendants were the Secretary of Commerce, as the program administrator, and the State and City of New York, as actual and potential project grantees. Petitioners are several associations of construction contractors and subcontractors, and a firm engaged in heating, ventilation, and air conditioning work. Their complaint alleged that they had sustained economic injury due to enforcement of the 10% MBE requirement and that the MBE provision on its face violated the Equal Protection Clause of the Fourteenth Amendment, the equal protection component of the Due Process Clause of the Fifth Amendment, and various statutory antidiscrimination provisions.[5]

After a hearing held the day the complaint was filed, the District Court denied a requested temporary restraining order and scheduled the matter for an expedited hearing on the merits. On December 19, 1977, the District Court issued a memorandum opinion upholding the validity of the MBE program and denying the injunctive relief sought. *Fullilove* v. *Kreps*, 443 F. Supp. 253 (SDNY 1977).

The United States Court of Appeals for the Second Circuit affirmed, 584 F. 2d 600 (CA2 1978), holding that "even under the most exacting standard of review the MBE provision passes constitutional muster." *Id.*, at 603. Considered in the context of many years of governmental efforts to remedy past racial and ethnic discrimination, the court

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Assistance and Information Available to Grantees and Their Contractors In Meeting The 10% MBE Requirement) (1977) (hereinafter Technical Bulletin); App. 129a–155a.

[5] 42 U. S. C. §§ 1981, 1983, 1985; Title VI, § 601 of the Civil Rights Act of 1964, 78 Stat. 252, 42 U. S. C. § 2000d; Title VII, § 701 *et seq.* of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.*

found it "difficult to imagine" any purpose for the program other than to remedy such discrimination. *Id.*, at 605. In its view, a number of factors contributed to the legitimacy of the MBE provision, most significant of which was the narrowed focus and limited extent of the statutory and administrative program, in size, impact, and duration, *id.*, at 607–608; the court looked also to the holdings of other courts of appeals and district courts that the MBE program was constitutional, *id.*, at 608–609.[6] It expressly rejected petitioners' contention that the 10% MBE requirement violated the equal protection guarantees of the Constitution.[7] *Id.*, at 609.

II

A

The MBE provision was enacted as part of the Public Works Employment Act of 1977, which made various amendments to Title I of the Local Public Works Capital Development and Investment Act of 1976. The 1976 Act was in-

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[6] *Ohio Contractors Assn.* v. *Economic Development Administration*, 580 F. 2d 213 (CA6 1978); *Constructors Assn.* v. *Kreps*, 573 F. 2d 811 (CA3 1978); *Rhode Island Chapter, Associated General Contractors* v. *Kreps*, 450 F. Supp. 338 (RI 1978); *Associated General Contractors* v. *Secretary of Commerce*, No. 77–4218 (Kan. Feb. 9, 1978); *Carolinas Branch, Associated General Contractors* v. *Kreps*, 442 F. Supp. 392 (SC 1977); *Ohio Contractors Assn.* v. *Economic Development Administration*, 452 F. Supp. 1013 (SD Ohio 1977); *Montana Contractors' Assn.* v. *Secretary of Commerce*, 439 F. Supp. 1331 (Mont. 1977); *Florida East Coast Chapter* v. *Secretary of Commerce*, No. 77–8351 (SD Fla. Nov. 3, 1977); but see *Associated General Contractors* v. *Secretary of Commerce*, 441 F. Supp. 955 (CD Cal. 1977), vacated and remanded for consideration of mootness, 438 U. S. 909 (1978), on remand, 459 F. Supp. 766 (CD Cal.), vacated and remanded *sub nom. Armistead* v. *Associated General Contractors of California*, *post*, p. 908.

[7] Both the Court of Appeals and the District Court rejected petitioners' various statutory arguments without extended discussion. 584 F. 2d, at 608, n. 15; 443 F. Supp., at 262.

tended as a short-term measure to alleviate the problem of national unemployment and to stimulate the national economy by assisting state and local governments to build needed public facilities.[8] To accomplish these objectives, the Congress authorized the Secretary of Commerce, acting through the EDA, to make grants to state and local governments for construction, renovation, repair, or other improvement of local public works projects.[9] The 1976 Act placed a number of restrictions on project eligibility designed to assure that federal moneys were targeted to accomplish the legislative purposes.[10] It established criteria to determine grant priorities and to apportion federal funds among political jurisdictions.[11] Those criteria directed grant funds toward areas of high unemployment.[12] The statute authorized the appropriation of up to $2 billion for a period ending in September 1977;[13] this appropriation was soon consumed by grants made under the program.

Early in 1977, Congress began consideration of expanded appropriations and amendments to the grant program. Under administration of the 1976 appropriation, referred to as "Round I" of the local public works program, applicants seeking some $25 billion in grants had competed for the $2 billion in available funds; of nearly 25,000 applications, only some 2,000 were granted.[14] The results provoked widespread

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[8] H. R. Rep. No. 94–1077, p. 2 (1976). The bill discussed in this Report was accepted by the Conference Committee in preference to the Senate version. S. Conf. Rep. No. 94–939, p. 1 (1976); H. R. Conf. Rep. No. 94–1260, p. 1 (1976).

[9] 90 Stat. 999, 42 U. S. C. § 6702.

[10] 90 Stat. 1000, 42 U. S. C. § 6705.

[11] 90 Stat. 1000, 42 U. S. C. § 6707.

[12] 90 Stat. 1001, 42 U. S. C. § 6707 (c).

[13] 90 Stat. 1002, 42 U. S. C. § 6710. The actual appropriation of the full amount authorized was made several weeks later. Pub. L. 94–447, 90 Stat. 1497.

[14] 123 Cong. Rec. 2136 (1977) (remarks of Sen. Randolph).

concern for the fairness of the allocation process.[15] Because the 1977 Act would authorize the appropriation of an additional $4 billion to fund "Round II" of the grant program,[16] the congressional hearings and debates concerning the amendments focused primarily on the politically sensitive problems of priority and geographic distribution of grants under the supplemental appropriation.[17] The result of this attention was inclusion in the 1977 Act of provisions revising the allocation criteria of the 1976 legislation. Those provisions, however, retained the underlying objective to direct funds into areas of high unemployment.[18] The 1977 Act also added new restrictions on applicants seeking to qualify for federal grants;[19] among these was the MBE provision.

The origin of the provision was an amendment to the House version of the 1977 Act, H. R. 11, offered on the floor of the House on February 23, 1977, by Representative Mitchell of Maryland.[20] As offered, the amendment provided:[21]

> "Notwithstanding any other provision of law, no grant shall be made under this Act for any local public works project unless at least 10 per centum of the articles, materials, and supplies which will be used in such project are procured from minority business enterprises. For purposes of this paragraph, the term 'minority business

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[15] See, *e. g.*, Hearings on H. R. 11 and Related Bills before the Subcommittee on Economic Development of the House Committee on Public Works and Transportation, 95th Cong., 1st Sess. (1977); H. R. Rep. No. 95–20 (1977); S. Rep. No. 95–38 (1977).

[16] 91 Stat. 119, 42 U. S. C. § 6710 (1976 ed., Supp. II). The actual appropriation of the full authorized amount was made the same day. Pub. L. 95–29, 91 Stat. 123.

[17] *E. g.*, Hearings, *supra* n. 15; 123 Cong. Rec. 5290–5353 (1977); *id.*, at 7097–7176.

[18] 91 Stat. 117, 42 U. S. C. § 6707 (1976 ed., Supp. II).

[19] 91 Stat. 116, 42 U. S. C. § 6705 (1976 ed., Supp. II).

[20] 123 Cong. Rec. 5097 (1977) (remarks of Rep. Mitchell).

[21] *Id.*, at 5098.

enterprise' means a business at least 50 percent of which is owned by minority group members or, in case of publicly owned businesses, at least 51 percent of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts."

The sponsor stated that the objective of the amendment was to direct funds into the minority business community, a sector of the economy sorely in need of economic stimulus but which, on the basis of past experience with Government procurement programs, could not be expected to benefit significantly from the public works program as then formulated.[22] He cited the marked statistical disparity that in fiscal year 1976 less than 1% of all federal procurement was concluded with minority business enterprises, although minorities comprised 15–18% of the population.[23] When the amendment was put forward during debate on H. R. 11,[24] Representative Mitchell reiterated the need to ensure that minority firms would obtain a fair opportunity to share in the benefits of this Government program.[25]

The amendment was put forward not as a new concept, but rather one building upon prior administrative practice.

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[22] *Id.*, at 5097–5098.

[23] *Id.*, at 5098.

[24] *Id.*, at 5327. As reintroduced, the first sentence of the amendment was modified to provide:

"Notwithstanding any other provision of law, no grant shall be made under this Act for any local public works project unless at least 10 per centum of the dollar volume of each contract shall be set aside for minority business enterprise and, or, unless at least 10 per centum of the articles, materials, and supplies which will be used in such project are procured from minority business enterprises."

[25] *Id.*, at 5327–5328.

In his introductory remarks, the sponsor rested his proposal squarely on the ongoing program under § 8 (a) of the Small Business Act, Pub. L. 85–536, § 2, 72 Stat. 389, which, as will become evident, served as a model for the administrative program developed to enforce the MBE provision: [26]

> "The first point in opposition will be that you cannot have a set-aside. Well, Madam Chairman, we have been doing this for the last 10 years in Government. The 8-A set-aside under SBA has been tested in the courts more than 30 times and has been found to be legitimate and bona fide. We are doing it in this bill."

Although the proposed MBE provision on its face appeared mandatory, requiring compliance with the 10% minority participation requirement "[n]otwithstanding any other provision of law," its sponsor gave assurances that existing administrative practice would ensure flexibility in administration if, with respect to a particular project, compliance with the 10% requirement proved infeasible.[27]

Representative Roe of New Jersey then suggested a change of language expressing the twin intentions (1) that the federal administrator would have discretion to waive the 10% requirement where its application was not feasible, and (2) that the grantee would be mandated to achieve at least 10% participation by minority businesses unless infeasibility was demonstrated.[28] He proposed as a substitute for the first sentence of the amendment the language that eventually was enacted: [29]

> "Except to the extent that the Secretary determines otherwise, no grant shall be made under this Act for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per-

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[26] *Id.*, at 5327.

[27] *Id.*, at 5327–5328.

[28] *Id.*, at 5328 (remarks of Rep. Roe).

[29] *Ibid.*

cent of the amount of each grant shall be expended for minority business enterprises."

The sponsor fully accepted the suggested clarification because it retained the directive that the initial burden of compliance would fall on the grantee. That allocation of burden was necessary because, as he put it, "every agency of the Government has tried to figure out a way to avoid doing this very thing. Believe me, these bureaucracies can come up with 10,000 ways to avoid doing it." [30]

Other supporters of the MBE amendment echoed the sponsor's concern that a number of factors, difficult to isolate or quantify, seemed to impair access by minority businesses to public contracting opportunities. Representative Conyers of Michigan spoke of the frustration of the existing situation, in which, due to the intricacies of the bidding process and through no fault of their own, minority contractors and businessmen were unable to gain access to government contracting opportunities.[31]

Representative Biaggi of New York then spoke to the need for the amendment to "promote a sense of economic equality in this Nation." He expressed the view that without the amendment, "this legislation may be potentially inequitable to minority businesses and workers" in that it would perpetuate the historic practices that have precluded minority businesses from effective participation in public contracting opportunities.[32] The amendment was accepted by the House.[33]

Two weeks later, the Senate considered S. 427, its package of amendments to the Local Public Works Capital Development and Investment Act of 1976. At that time Senator Brooke of Massachusetts introduced an MBE amendment,

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[30] *Id.*, at 5329 (remarks of Rep. Mitchell).

[31] *Id.*, at 5330 (remarks of Rep. Conyers).

[32] *Id.*, at 5331 (remarks of Rep. Biaggi).

[33] *Id.*, at 5332.

worded somewhat differently than the House version, but aimed at achieving the same objectives.[34] His statement in support of the 10% requirement reiterated and summarized the various expressions on the House side that the amendment was necessary to ensure that minority businesses were not deprived of access to the government contracting opportunities generated by the public works program.[35]

The Senate adopted the amendment without debate.[36] The Conference Committee, called to resolve differences between the House and Senate versions of the Public Works Employment Act of 1977, adopted the language approved by the House for the MBE provision.[37] The Conference Reports added only the comment: "This provision shall be dependent on the availability of minority business enterprises located in the project area." [38]

The device of a 10% MBE participation requirement, subject to administrative waiver, was thought to be required to assure minority business participation; otherwise it was thought that repetition of the prior experience could be ex-

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[34] *Id.*, at 7155–7156 (remarks of Sen. Brooke). The first paragraph of Senator Brooke's formulation was identical to the version originally offered by Representative Mitchell, quoted in the text, *supra*, at 458–459. A second paragraph of Senator Brooke's amendment provided:

"This section shall not be interpreted to defund projects with less than 10 percent minority participation in areas with minority population of less than 5 percent. In that event, the correct level of minority participation will be predetermined by the Secretary in consultation with EDA and based upon its lists of qualified minority contractors and its solicitation of competitive bids from all minority firms on those lists." 123 Cong. Rec. 7156 (1977).

[35] *Ibid.*

[36] *Ibid.*

[37] S. Conf. Rep. No. 95–110, p. 11 (1977); H. R. Conf. Rep. No. 95–230, p. 11 (1977).

[38] *Ibid.* The Conference Committee bill was agreed to by the Senate, 123 Cong. Rec. 12941–12942 (1977), and by the House, *id.*, at 13242–13257, and was signed into law on May 13, 1977.

pected, with participation by minority business accounting for an inordinately small percentage of government contracting. The causes of this disparity were perceived as involving the longstanding existence and maintenance of barriers impairing access by minority enterprises to public contracting opportunities, or sometimes as involving more direct discrimination, but not as relating to lack—as Senator Brooke put it—"of capable and qualified minority enterprises who are ready and willing to work." [39] In the words of its sponsor, the MBE provision was "designed to begin to redress this grievance that has been extant for so long." [40]

B

The legislative objectives of the MBE provision must be considered against the background of ongoing efforts directed toward deliverance of the century-old promise of equality of economic opportunity. The sponsors of the MBE provision in the House and the Senate expressly linked the provision to the existing administrative programs promoting minority opportunity in government procurement, particularly those related to § 8 (a) of the Small Business Act of 1953.[41] Section 8 (a) delegates to the Small Business Administration (SBA) an authority and an obligation "whenever it determines such action is necessary" to enter into contracts with any procurement agency of the Federal Government to furnish required goods or services, and, in turn, to enter into subcontracts with small businesses for the performance of such contracts. This authority lay dormant for a decade. Commencing in 1968, however, the SBA was directed by the President [42] to develop a program pursuant to its § 8 (a) authority to assist small

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[39] *Id.*, at 7156 (remarks of Sen. Brooke).

[40] *Id.*, at 5330 (remarks of Rep. Mitchell).

[41] *Id.*, at 5327; *id.*, at 7156 (remarks of Sen. Brooke).

[42] Exec. Order No. 11375, 3 CFR 684 (1966–1970 Comp.); Exec. Order No. 11518, 3 CFR 907 (1966–1970 Comp.).

business concerns owned and controlled by "socially or economically disadvantaged" persons to achieve a competitive position in the economy.

At the time the MBE provision was enacted, the regulations governing the § 8 (a) program defined "social or economic disadvantage" as follows: [43]

> "An applicant concern must be owned and controlled by one or more persons who have been deprived of the opportunity to develop and maintain a competitive position in the economy because of social or economic disadvantage. Such disadvantage may arise from cultural, social, chronic economic circumstances or background, or other similar cause. Such persons include, but are not limited to, black Americans, American Indians, Spanish-Americans, oriental Americans, Eskimos, and Aleuts. . . ."

The guidelines accompanying these regulations provided that a minority business could not be maintained in the program, even when owned and controlled by members of the identified minority groups, if it appeared that the business had not been deprived of the opportunity to develop and maintain a competitive position in the economy because of social or economic disadvantage.[44]

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[43] 13 CFR § 124.8-1 (c)(1) (1977).

[44] U. S. Small Business Administration, Office of Business Development, Section 8 (a) Program, Standard Operating Procedure 15-16 (1976); see H. R. Rep. No. 94-468, p. 30 (1975) ("[T]he relevant rules and regulations require such applicant to identify with the disadvantages of his or her racial group generally, and that such disadvantages must have personally affected the applicant's ability to enter into the mainstream of the business system"); U. S. Small Business Administration, Office of Minority Small Business and Capital Ownership Development, MSB & COD Programs, Standard Operating Procedure 20 (1979) ("The social disadvantage of individuals, including those within the above-named [racial and ethnic] groups, shall be determined by SBA on a case-by-case basis. Membership alone in any group is not conclusive that an individual is socially disadvantaged").

As the Congress began consideration of the Public Works Employment Act of 1977, the House Committee on Small Business issued a lengthy report summarizing its activities, including its evaluation of the ongoing § 8 (a) program.[45] One chapter of the Report, entitled "Minority Enterprises and Allied Problems of Small Business," summarized a 1975 committee report of the same title dealing with this subject matter.[46] The original report, prepared by the House Subcommittee on SBA Oversight and Minority Enterprise, observed: [47]

> "The subcommittee is acutely aware that the economic policies of this Nation must function within and be guided by our constitutional system which guarantees 'equal protection of the laws.' *The effects of past inequities stemming from racial prejudice have not remained in the past. The Congress has recognized the reality that past discriminatory practices have, to some degree, adversely affected our present economic system.*
>
> "While minority persons comprise about 16 percent of the Nation's population, of the 13 million businesses in the United States, only 382,000, or approximately 3.0 percent, are owned by minority individuals. The most recent data from the Department of Commerce also indicates that the gross receipts of all businesses in this country totals about $2,540.8 billion, and of this amount only $16.6 billion, or about 0.65 percent was realized by minority business concerns.
>
> "These statistics are not the result of random chance. The presumption must be made that past discriminatory systems have resulted in present economic inequities. In order to right this situation, the Congress has formulated certain remedial programs designed to uplift those socially

[45] H. R. Rep. No. 94–1791 (1977).

[46] *Id.*, at 124–149.

[47] H. R. Rep. No. 94–468, pp. 1–2 (1975) (emphasis added).

or economically disadvantaged persons to a level where they may effectively participate in the business mainstream of our economy.*

"*For the purposes of this report the term 'minority' shall include only such minority individuals as are considered to be economically or socially disadvantaged." [48]

The 1975 Report gave particular attention to the § 8 (a) program, expressing disappointment with its limited effectiveness.[49] With specific reference to government construction contracting, the Report concluded, "there are substantial § 8 (a) opportunities in the area of Federal construction, but . . . the practices of some agencies preclude the realization of this potential." [50] The Subcommittee took "full notice . . . as evidence for its consideration" of reports submitted to the Congress by the General Accounting Office and by the U. S. Commission on Civil Rights, which reflected a similar dissatisfaction with the effectiveness of the § 8 (a) program.[51] The

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[48] Another chapter of the 1977 Report of the House Committee on Small Business summarized a review of the SBA's Security Bond Guarantee Program, making specific reference to minority business participation in the construction industry:

"The very basic problem disclosed by the testimony is that, over the years, there has developed a business system which has traditionally excluded measurable minority participation. In the past more than the present, this system of conducting business transactions overtly precluded minority input. Currently, we more often encounter a business system which is racially neutral on its face, but because of past overt social and economic discrimination is presently operating, in effect, to perpetuate these past inequities. Minorities, until recently, have not participated to any measurable extent, in our total business system generally, or in the construction industry, in particular." H. R. Rep. No. 94–1791, p. 182 (1977), summarizing H. R. Rep. No. 94–840, p. 17 (1976).

[49] H. R. Rep. No. 94–468, pp. 28–30 (1975).

[50] *Id.*, at 29.

[51] *Id.*, at 11; U. S. General Accounting Office, Questionable Effectiveness of the § 8 (a) Procurement Program, GGD–75–57 (1975); U. S. Comm'n on Civil Rights, Minorities and Women as Government Contractors (May 1975).

Civil Rights Commission report discussed at some length the barriers encountered by minority businesses in gaining access to government contracting opportunities at the federal, state, and local levels.[52] Among the major difficulties confronting minority businesses were deficiencies in working capital, inability to meet bonding requirements, disabilities caused by an inadequate "track record," lack of awareness of bidding opportunities, unfamiliarity with bidding procedures, preselection before the formal advertising process, and the exercise of discretion by government procurement officers to disfavor minority businesses.[53]

The Subcommittee Report also gave consideration to the operations of the Office of Minority Business Enterprise, an agency of the Department of Commerce organized pursuant to Executive Orders[54] to formulate and coordinate federal efforts to assist the development of minority businesses. The Report concluded that OMBE efforts were "totally inadequate" to achieve its policy of increasing opportunities for subcontracting by minority businesses on public contracts. OMBE efforts were hampered by a "glaring lack of specific objectives which each prime contractor should be required to achieve," by a "lack of enforcement provisions," and by a "lack of any meaningful monitoring system."[55]

Against this backdrop of legislative and administrative programs, it is inconceivable that Members of both Houses were not fully aware of the objectives of the MBE provision and of the reasons prompting its enactment.

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[52] *Id.*, at 16–28, 86–88.

[53] *Ibid.*

[54] Exec. Order No. 11458, 3 CFR 779 (1966–1970 Comp.); Exec. Order No. 11625, 3 CFR 616 (1971–1975 Comp.).

[55] H. R. Rep. No. 94–468, p. 32 (1975). For other congressional observations with respect to the effect of past discrimination on current business opportunities for minorities, see, *e. g.*, H. R. Rep. No. 92–1615, p. 3 (1972); H. R. Rep. No. 95–949, p. 8 (1978); S. Rep. No. 95–1070, pp. 14–15 (1978); S. Rep. No. 96–31, pp. 107, 123–124 (1979); see also, *e. g.*, H. R. Doc. No. 92–169, p. 4 (1971); H. R. Doc. No. 92–194, p. 1 (1972).

C

Although the statutory MBE provision itself outlines only the bare bones of the federal program, it makes a number of critical determinations: the decision to initiate a limited racial and ethnic preference; the specification of a minimum level for minority business participation; the identification of the minority groups that are to be encompassed by the program; and the provision for an administrative waiver where application of the program is not feasible. Congress relied on the administrative agency to flesh out this skeleton, pursuant to delegated rulemaking authority, and to develop an administrative operation consistent with legislative intentions and objectives.

As required by the Public Works Employment Act of 1977, the Secretary of Commerce promulgated regulations to set into motion "Round II" of the federal grant program.[56] The regulations require that construction projects funded under the legislation must be performed under contracts awarded by competitive bidding, unless the federal administrator has made a determination that in the circumstances relating to a particular project some other method is in the public interest. Where competitive bidding is employed, the regulations echo the statute's requirement that contracts are to be awarded on the basis of the "lowest responsive bid submitted by a bidder meeting established criteria of responsibility," and they also restate the MBE requirement.[57]

EDA also has published guidelines devoted entirely to the administration of the MBE provision. The guidelines outline the obligations of the grantee to seek out all available, qualified, bona fide MBE's, to provide technical assistance as needed, to lower or waive bonding requirements where

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[56] 91 Stat. 117, 42 U. S. C. § 6706 (1976 ed., Supp. II); 13 CFR Part 317 (1978).

[57] 91 Stat. 116, 42 U. S. C. § 6705 (e)(1) (1976 ed., Supp. II); 13 CFR § 317.19 (1978).

feasible, to solicit the aid of the Office of Minority Business Enterprise, the SBA, or other sources for assisting MBE's in obtaining required working capital, and to give guidance through the intricacies of the bidding process.[58]

EDA regulations contemplate that, as anticipated by Congress, most local public works projects will entail the award of a predominant prime contract, with the prime contractor assuming the above grantee obligations for fulfilling the 10% MBE requirement.[59] The EDA guidelines specify that when prime contractors are selected through competitive bidding, bids for the prime contract "shall be considered by the Grantee to be responsive only if at least 10 percent of the contract funds are to be expended for MBE's."[60] The administrative program envisions that competitive incentive will motivate aspirant prime contractors to perform their obligations under the MBE provision so as to qualify as "responsive" bidders. And, since the contract is to be awarded to the lowest responsive bidder, the same incentive is expected to motivate prime contractors to seek out the most competitive of the available, qualified, bona fide minority firms. This too is consistent with the legislative intention.[61]

The EDA guidelines also outline the projected administration of applications for waiver of the 10% MBE requirement, which may be sought by the grantee either before or during the bidding process.[62] The Technical Bulletin issued by EDA discusses in greater detail the processing of waiver requests, clarifying certain issues left open by the guidelines. It specifies that waivers may be total or partial, depending on

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[58] Guidelines 2–7; App. 157a–160a. The relevant portions of the guidelines are set out in the Appendix to this opinion, ¶ 1.

[59] Guidelines 2; App. 157a; see 123 Cong. Rec. 5327–5328 (1977) (remarks of Rep. Mitchell and Rep. Roe).

[60] Guidelines 8; App. 161a.

[61] See 123 Cong. Rec. 5327–5328 (1977) (remarks of Rep. Mitchell and Rep. Roe).

[62] Guidelines 13–16; App. 165a–167a. The relevant portions of the guidelines are set out in the Appendix to this opinion, ¶ 2.

the circumstances,[63] and it illustrates the projected operation of the waiver procedure by posing hypothetical questions with projected administrative responses. One such hypothetical is of particular interest, for it indicates the limitations on the scope of the racial or ethnic preference contemplated by the federal program when a grantee or its prime contractor is confronted with an available, qualified, bona fide minority business enterprise who is not the lowest competitive bidder. The hypothetical provides: [64]

> "*Question:* Should a request for waiver of the 10% requirement based on an unreasonable price asked by an MBE ever be granted?
>
> "*Answer:* It is possible to imagine situations where an MBE might ask a price for its product or services that is unreasonable and where, therefore, a waiver is justified. However, before a waiver request will be honored, the following determinations will be made:
>
> "a) The MBE's quote is unreasonably priced. This determination should be based on the nature of the product or service of the subcontractor, the geographic location of the site and of the subcontractor, prices of similar products or services in the relevant market area, and general business conditions in the market area. Furthermore, a subcontractor's price should not be considered unreasonable if he is merely trying to cover his costs because the price results from disadvantage which affects the MBE's cost of doing business or results from discrimination.
>
> "b) The contractor has contacted other MBEs and has no meaningful choice but to accept an unreasonably high price."

This announced policy makes clear the administrative understanding that a waiver or partial waiver is justified (and will

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[63] Technical Bulletin 5; App. 136a.

[64] Technical Bulletin 9–10; App. 143a.

be granted) to avoid subcontracting with a minority business enterprise at an "unreasonable" price, *i. e.*, a price above competitive levels which cannot be attributed to the minority firm's attempt to cover costs inflated by the present effects of disadvantage or discrimination.

This administrative approach is consistent with the legislative intention. It will be recalled that in the Report of the House Subcommittee on SBA Oversight and Minority Enterprise the Subcommittee took special care to note that when using the term "minority" it intended to include "only such minority individuals as are considered to be economically or socially disadvantaged." [65] The Subcommittee also was cognizant of existing administrative regulations designed to ensure that firms maintained on the lists of bona fide minority business enterprises be those whose competitive position is impaired by the effects of disadvantage and discrimination. In its Report, the Subcommittee expressed its intention that these criteria continue to govern administration of the SBA's § 8 (a) program.[66] The sponsors of the MBE provision, in their reliance on prior administrative practice, intended that the term "minority business enterprise" would be given that same limited application; this even found expression in the legislative debates, where Representative Roe made the point: [67]

> "[W]hen we are talking about companies held by minority groups . . . [c]ertainly people of a variety of backgrounds are included in that. That is not really a measurement. They are talking about people in the minority and deprived."

The EDA Technical Bulletin provides other elaboration of the MBE provision. It clarifies the definition of "minority

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[65] Text accompanying n. 48, *supra*.

[66] H. R. Rep. No. 94-468, p. 30 (1975).

[67] 123 Cong. Rec. 5330 (1977) (remarks of Rep. Roe).

group members."[68] It also indicates EDA's intention "to allow credit for utilization of MBEs only for those contracts in which involvement constitutes a basis for strengthening the long-term and continuing participation of the MBE in the construction and related industries."[69] Finally, the Bulletin outlines a procedure for the processing of complaints of "unjust participation by an enterprise or individuals in the MBE program," or of improper administration of the MBE requirement.[70]

III

When we are required to pass on the constitutionality of an Act of Congress, we assume "the gravest and most delicate duty that this Court is called on to perform." *Blodgett* v. *Holden*, 275 U. S. 142, 148 (1927) (opinion of Holmes, J.). A program that employs racial or ethnic criteria, even in a remedial context, calls for close examination; yet we are bound to approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to "provide for the . . . general Welfare of the United States" and "to enforce, by appropriate legislation" the equal protection guarantees of the Fourteenth Amendment. Art. I, § 8, cl. 1; Amdt. 14, § 5. In *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U. S. 94, 102 (1973), we accorded "great weight to the decisions of Congress" even though the legislation implicated fundamental constitutional rights guaranteed by the First Amendment. The rule is not different when a congressional program raises equal protection concerns. See, *e. g.*, *Cleland* v. *National College of Business*, 435 U. S. 213 (1978); *Mathews* v. *De Castro*, 429 U. S. 181 (1976).

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[68] Technical Bulletin 1; App. 131a–132a. These definitions are set out in the Appendix to this opinion, ¶ 3.

[69] Technical Bulletin 3; App. 135a.

[70] Technical Bulletin 19; App. 155a. The relevant portions of the Technical Bulletin are set out in the Appendix to this opinion, ¶ 4.

Here we pass, not on a choice made by a single judge or a school board, but on a considered decision of the Congress and the President. However, in no sense does that render it immune from judicial scrutiny, and it "is not to say we 'defer' to the judgment of the Congress . . . on a constitutional question," or that we would hesitate to invoke the Constitution should we determine that Congress has overstepped the bounds of its constitutional power. *Columbia Broadcasting, supra,* at 103.

The clear objective of the MBE provision is disclosed by our necessarily extended review of its legislative and administrative background. The program was designed to ensure that, to the extent federal funds were granted under the Public Works Employment Act of 1977, grantees who elect to participate would not employ procurement practices that Congress had decided might result in perpetuation of the effects of prior discrimination which had impaired or foreclosed access by minority businesses to public contracting opportunities. The MBE program does not mandate the allocation of federal funds according to inflexible percentages solely based on race or ethnicity.

Our analysis proceeds in two steps. At the outset, we must inquire whether the *objectives* of this legislation are within the power of Congress. If so, we must go on to decide whether the limited use of racial and ethnic criteria, in the context presented, is a constitutionally permissible *means* for achieving the congressional objectives and does not violate the equal protection component of the Due Process Clause of the Fifth Amendment.

A

(1)

In enacting the MBE provision, it is clear that Congress employed an amalgam of its specifically delegated powers. The Public Works Employment Act of 1977, by its very nature, is primarily an exercise of the Spending Power. U. S.

Const., Art. I, § 8, cl. 1. This Court has recognized that the power to "provide for the . . . general Welfare" is an independent grant of legislative authority, distinct from other broad congressional powers. *Buckley* v. *Valeo*, 424 U. S. 1, 90–91 (1976); *United States* v. *Butler*, 297 U. S. 1, 65–66 (1936). Congress has frequently employed the Spending Power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives. This Court has repeatedly upheld against constitutional challenge the use of this technique to induce governments and private parties to cooperate voluntarily with federal policy. *E. g., California Bankers Assn.* v. *Shultz*, 416 U. S. 21 (1974); *Lau* v. *Nichols*, 414 U. S. 563 (1974); *Oklahoma* v. *CSC*, 330 U. S. 127 (1947); *Helvering* v. *Davis*, 301 U. S. 619 (1937); *Steward Machine Co.* v. *Davis*, 301 U. S. 548 (1937).

The MBE program is structured within this familiar legislative pattern. The program conditions receipt of public works grants upon agreement by the state or local governmental grantee that at least 10% of the federal funds will be devoted to contracts with minority businesses, to the extent this can be accomplished by overcoming barriers to access and by awarding contracts to bona fide MBE's. It is further conditioned to require that MBE bids on these contracts are competitively priced, or might have been competitively priced but for the present effects of prior discrimination. Admittedly, the problems of administering this program with respect to these conditions may be formidable. Although the primary responsibility for ensuring minority participation falls upon the grantee, when the procurement practices of the grantee involve the award of a prime contract to a general or prime contractor, the obligations to assure minority participation devolve upon the private contracting party; this is a contractual condition of eligibility for award of the prime contract.

Here we need not explore the outermost limitations on the objectives attainable through such an application of the Spending Power. The reach of the Spending Power, within its sphere, is at least as broad as the regulatory powers of Congress. If, pursuant to its regulatory powers, Congress could have achieved the objectives of the MBE program, then it may do so under the Spending Power. And we have no difficulty perceiving a basis for accomplishing the objectives of the MBE program through the Commerce Power insofar as the program objectives pertain to the action of private contracting parties, and through the power to enforce the equal protection guarantees of the Fourteenth Amendment insofar as the program objectives pertain to the action of state and local grantees.

(2)

We turn first to the Commerce Power. U. S. Const., Art. I, § 8, cl. 3. Had Congress chosen to do so, it could have drawn on the Commerce Clause to regulate the practices of prime contractors on federally funded public works projects. *Katzenbach* v. *McClung*, 379 U. S. 294 (1964); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241 (1964). The legislative history of the MBE provision shows that there was a rational basis for Congress to conclude that the subcontracting practices of prime contractors could perpetuate the prevailing impaired access by minority businesses to public contracting opportunities, and that this inequity has an effect on interstate commerce. Thus Congress could take necessary and proper action to remedy the situation. *Ibid.*

It is not necessary that these prime contractors be shown responsible for any violation of antidiscrimination laws. Our cases dealing with application of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, express no doubt of the congressional authority to prohibit practices "challenged as perpetuating the effects of [not unlawful] discrimination occurring prior to the effective date of the Act." *Franks* v.

Bowman Transporation Co., 424 U. S. 747, 761 (1976); see *California Brewers Assn.* v. *Bryant*, 444 U. S. 598 (1980); *Teamsters* v. *United States*, 431 U. S. 324 (1977); *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405 (1975); *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971). Insofar as the MBE program pertains to the actions of private prime contractors, the Congress could have achieved its objectives under the Commerce Clause. We conclude that in this respect the objectives of the MBE provision are within the scope of the Spending Power.

(3)

In certain contexts, there are limitations on the reach of the Commerce Power to regulate the actions of state and local governments. *National League of Cities* v. *Usery*, 426 U. S. 833 (1976). To avoid such complications, we look to § 5 of the Fourteenth Amendment for the power to regulate the procurement practices of state and local grantees of federal funds. *Fitzpatrick* v. *Bitzer*, 427 U. S. 445 (1976). A review of our cases persuades us that the objectives of the MBE program are within the power of Congress under § 5 "to enforce, by appropriate legislation" the equal protection guarantees of the Fourteenth Amendment.

In *Katzenbach* v. *Morgan*, 384 U. S. 641 (1966), we equated the scope of this authority with the broad powers expressed in the Necessary and Proper Clause, U. S. Const., Art. I, § 8, cl. 18. "Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." 384 U. S., at 651. In *Katzenbach*, the Court upheld § 4 (e) of the Voting Rights Act of 1965, 79 Stat. 439, 42 U. S. C. § 1973b (e), which prohibited application of state English-language literacy requirements to otherwise qualified voters who had completed the sixth grade in an accredited American school in

which a language other than English was the predominant medium of instruction. To uphold this exercise of congressional authority, the Court found no prerequisite that application of a literacy requirement violate the Equal Protection Clause. 384 U. S., at 648–649. It was enough that the Court could perceive a basis upon which Congress could reasonably predicate a judgment that application of literacy qualifications within the compass of § 4 (e) would discriminate in terms of access to the ballot and consequently in terms of access to the provision or administration of governmental programs. *Id.*, at 652–653.

Four years later, in *Oregon* v. *Mitchell*, 400 U. S. 112 (1970), we upheld § 201 of the Voting Rights Act Amendments of 1970, 84 Stat. 315, which imposed a five-year nationwide prohibition on the use of various voter-qualification tests and devices in federal, state, and local elections. The Court was unanimous, albeit in separate opinions, in concluding that Congress was within its authority to prohibit the use of such voter qualifications; Congress could reasonably determine that its legislation was an appropriate method of attacking the perpetuation of prior purposeful discrimination, even though the use of these tests or devices might have discriminatory effects only. See *City of Rome* v. *United States*, 446 U. S. 156, 176–177 (1980). Our cases reviewing the parallel power of Congress to enforce the provisions of the Fifteenth Amendment, U. S. Const., Amdt. 15, § 2, confirm that congressional authority extends beyond the prohibition of purposeful discrimination to encompass state action that has discriminatory impact perpetuating the effects of past discrimination. *South Carolina* v. *Katzenbach*, 383 U. S. 301 (1966); cf. *City of Rome*, *supra*.

With respect to the MBE provision, Congress had abundant evidence from which it could conclude that minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpet-

uated the effects of prior discrimination. Congress, of course, may legislate without compiling the kind of "record" appropriate with respect to judicial or administrative proceedings. Congress had before it, among other data, evidence of a long history of marked disparity in the percentage of public contracts awarded to minority business enterprises. This disparity was considered to result not from any lack of capable and qualified minority businesses, but from the existence and maintenance of barriers to competitive access which had their roots in racial and ethnic discrimination, and which continue today, even absent any intentional discrimination or other unlawful conduct. Although much of this history related to the experience of minority businesses in the area of federal procurement, there was direct evidence before the Congress that this pattern of disadvantage and discrimination existed with respect to state and local construction contracting as well. In relation to the MBE provision, Congress acted within its competence to determine that the problem was national in scope.

Although the Act recites no preambulary "findings" on the subject, we are satisfied that Congress had abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination. Accordingly, Congress reasonably determined that the prospective elimination of these barriers to minority firm access to public contracting opportunities generated by the 1977 Act was appropriate to ensure that those businesses were not denied equal opportunity to participate in federal grants to state and local governments, which is one aspect of the equal protection of the laws. Insofar as the MBE program pertains to the actions of state and local grantees, Congress could have achieved its objectives by use of its power under § 5 of the Fourteenth Amendment. We conclude that in this respect the objectives of the MBE provision are within the scope of the Spending Power.

(4)

There are relevant similarities between the MBE program and the federal spending program reviewed in *Lau* v. *Nichols*, 414 U. S. 563 (1974). In *Lau*, a language barrier "effectively foreclosed" non-English-speaking Chinese pupils from access to the educational opportunities offered by the San Francisco public school system. *Id.*, at 564–566. It had not been shown that this had resulted from any discrimination, purposeful or otherwise, or from other unlawful acts. Nevertheless, we upheld the constitutionality of a federal regulation applicable to public school systems receiving federal funds that prohibited the utilization of "criteria or methods of administration *which have the effect* . . . of defeating or substantially impairing accomplishment of the objectives of the [educational] program as respect individuals of a particular race, color, or national origin." *Id.*, at 568 (emphasis added). Moreover, we upheld application to the San Francisco school system, as a recipient of federal funds, of a requirement that "[w]here inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students." *Ibid.*

It is true that the MBE provision differs from the program approved in *Lau* in that the MBE program directly employs racial and ethnic criteria as a means to accomplish congressional objectives; however, these objectives are essentially the same as those approved in *Lau*. Our holding in *Lau* is instructive on the exercise of congressional authority by way of the MBE provision. The MBE program, like the federal regulations reviewed in *Lau*, primarily regulates state action in the use of federal funds voluntarily sought and accepted by the grantees subject to statutory and administrative conditions. The MBE participation requirement is directed at

the utilization of criteria, methods, or practices thought by Congress to have the effect of defeating, or substantially impairing, access by the minority business community to public funds made available by congressional appropriations.

B

We now turn to the question whether, as a *means* to accomplish these plainly constitutional objectives, Congress may use racial and ethnic criteria, in this limited way, as a condition attached to a federal grant. We are mindful that "[i]n no matter should we pay more deference to the opinion of Congress than in its choice of instrumentalities to perform a function that is within its power," *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, 337 U. S. 582, 603 (1949) (opinion of Jackson, J.). However, Congress may employ racial or ethnic classifications in exercising its Spending or other legislative powers only if those classifications do not violate the equal protection component of the Due Process Clause of the Fifth Amendment. We recognize the need for careful judicial evaluation to assure that any congressional program that employs racial or ethnic criteria to accomplish the objective of remedying the present effects of past discrimination is narrowly tailored to the achievement of that goal.

Again, we stress the limited scope of our inquiry. Here we are not dealing with a remedial decree of a court but with the legislative authority of Congress. Furthermore, petitioners have challenged the constitutionality of the MBE provision on its face; they have not sought damages or other specific relief for injury allegedly flowing from specific applications of the program; nor have they attempted to show that as applied in identified situations the MBE provision violated the constitutional or statutory rights of any party to this case.[71] In

[71] In their complaint, in order to establish standing to challenge the validity of the program, petitioners alleged as "[s]pecific examples" of economic injury three instances where one of their number assertedly

these circumstances, given a reasonable construction and in light of its projected administration, if we find the MBE program on its face to be free of constitutional defects, it must be upheld as within congressional power. *Parker* v. *Levy*, 417 U. S. 733, 760 (1974); *Fortson* v. *Dorsey*, 379 U. S. 433, 438–439 (1965); *Aptheker* v. *Secretary of State*, 378 U. S. 500, 515 (1964); see *United States* v. *Raines*, 362 U. S. 17, 20–24 (1960).

Our review of the regulations and guidelines governing administration of the MBE provision reveals that Congress enacted the program as a strictly remedial measure; moreover, it is a remedy that functions prospectively, in the manner of an injunctive decree. Pursuant to the administrative program, grantees and their prime contractors are required to seek out all available, qualified, bona fide MBE's; they are required to provide technical assistance as needed, to lower or waive bonding requirements where feasible, to solicit the aid of the Office of Minority Business Enterprise, the SBA, or other sources for assisting MBE's to obtain required working capital, and to give guidance through the intricacies of the bidding process. *Supra*, at 468–469. The program assumes that grantees who undertake these efforts in good faith will obtain at least 10% participation by minority business enterprises. It is recognized that, to achieve this target, contracts will be awarded to available, qualified, bona fide MBE's even though they are not the lowest competitive bidders, so long as their higher bids, when challenged, are found to reflect merely attempts to cover costs inflated by the present effects of prior disadvantage and discrimination. *Supra*, at 470–471. There is available to the grantee a provision authorized by Congress for administrative waiver on

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would have been awarded a public works contract but for enforcement of the MBE provision. Petitioners requested only declaratory and injunctive relief against continued enforcement of the MBE provision; they did not seek any remedy for these specific instances of assertedly unlawful discrimination. App. 12a–13a, 17a–19a.

a case-by-case basis should there be a demonstration that, despite affirmative efforts, this level of participation cannot be achieved without departing from the objectives of the program. *Supra*, at 469–470. There is also an administrative mechanism, including a complaint procedure, to ensure that only bona fide MBE's are encompassed by the remedial program, and to prevent unjust participation in the program by those minority firms whose access to public contracting opportunities is not impaired by the effects of prior discrimination. *Supra*, at 471–472.

(1)

As a threshold matter, we reject the contention that in the remedial context the Congress must act in a wholly "color-blind" fashion. In *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 18–21 (1971), we rejected this argument in considering a court-formulated school desegregation remedy on the basis that examination of the racial composition of student bodies was an unavoidable starting point and that racially based attendance assignments were permissible so long as no absolute racial balance of each school was required. In *McDaniel* v. *Barresi*, 402 U. S. 39, 41 (1971), citing *Swann*, we observed: "In this remedial process, steps will almost invariably require that students be assigned 'differently because of their race.' Any other approach would freeze the status quo that is the very target of all desegregation processes." (Citations omitted.) And in *North Carolina Board of Education* v. *Swann*, 402 U. S. 43 (1971), we invalidated a state law that absolutely forbade assignment of any student on account of race because it foreclosed implementation of desegregation plans that were designed to remedy constitutional violations. We held that "[j]ust as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy." *Id.*, at 46.

In these school desegregation cases we dealt with the authority of a federal court to formulate a remedy for unconstitutional racial discrimination. However, the authority of a court to incorporate racial criteria into a remedial decree also extends to statutory violations. Where federal anti-discrimination laws have been violated, an equitable remedy may in the appropriate case include a racial or ethnic factor. *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747 (1976); see *Teamsters* v. *United States*, 431 U. S. 324 (1977); *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405 (1975). In another setting, we have held that a state may employ racial criteria that are reasonably necessary to assure compliance with federal voting rights legislation, even though the state action does not entail the remedy of a constitutional violation. *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 430 U. S. 144, 147–165 (1977) (opinion of WHITE, J., joined by BRENNAN, BLACKMUN, and STEVENS, JJ.); *id.*, at 180–187 (BURGER, C. J., dissenting on other grounds).

When we have discussed the remedial powers of a federal court, we have been alert to the limitation that "[t]he power of the federal courts to restructure the operation of local and state governmental entities 'is not plenary. . . .' [A] federal court is required to tailor 'the scope of the remedy' to fit the nature and extent of the . . . violation." *Dayton Board of Education* v. *Brinkman*, 433 U. S. 406, 419–420 (1977) (quoting *Milliken* v. *Bradley*, 418 U. S. 717, 738 (1974), and *Swann* v. *Charlotte-Mecklenburg Board of Education*, *supra*, at 16).

Here we deal, as we noted earlier, not with the limited remedial powers of a federal court, for example, but with the broad remedial powers of Congress. It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees. Congress not only may induce voluntary action to assure compliance

with existing federal statutory or constitutional antidiscrimination provisions, but also, where Congress has authority to declare certain conduct unlawful, it may, as here, authorize and induce state action to avoid such conduct. *Supra*, at 473–480.

(2)

A more specific challenge to the MBE program is the charge that it impermissibly deprives nonminority businesses of access to at least some portion of the government contracting opportunities generated by the Act. It must be conceded that by its objective of remedying the historical impairment of access, the MBE provision can have the effect of awarding some contracts to MBE's which otherwise might be awarded to other businesses, who may themselves be innocent of any prior discriminatory actions. Failure of nonminority firms to receive certain contracts is, of course, an incidental consequence of the program, not part of its objective; similarly, past impairment of minority-firm access to public contracting opportunities may have been an incidental consequence of "business as usual" by public contracting agencies and among prime contractors.

It is not a constitutional defect in this program that it may disappoint the expectations of nonminority firms. When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such "a sharing of the burden" by innocent parties is not impermissible. *Franks, supra*, at 777; see *Albemarle Paper Co., supra; United Jewish Organizations, supra*. The actual "burden" shouldered by nonminority firms is relatively light in this connection when we consider the scope of this public works program as compared with overall construction contracting opportunities.[72] Moreover, although we may assume that the com-

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[72] The Court of Appeals relied upon Department of Commerce statistics to calculate that the $4.2 billion in federal grants conditioned upon compliance with the MBE provision amounted to about 2.5% of the total

plaining parties are innocent of any discriminatory conduct, it was within congressional power to act on the assumption that in the past some nonminority businesses may have reaped competitive benefit over the years from the virtual exclusion of minority firms from these contracting opportunities.

(3)

Another challenge to the validity of the MBE program is the assertion that it is underinclusive—that it limits its benefit to specified minority groups rather than extending its remedial objectives to all businesses whose access to government contracting is impaired by the effects of disadvantage or discrimination. Such an extension would, of course, be appropriate for Congress to provide; it is not a function for the courts.

Even in this context, the well-established concept that a legislature may take one step at a time to remedy only part of a broader problem is not without relevance. See *Dandridge* v. *Williams*, 397 U. S. 471 (1970); *Williamson* v. *Lee Optical Co.*, 348 U. S. 483 (1955). We are not reviewing a federal program that seeks to confer a preferred status upon a nondisadvantaged minority or to give special assistance to only one of several groups established to be similarly disadvantaged minorities. Even in such a setting, the Congress is not without a certain authority. See, *e. g.*, *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U. S. 256 (1979); *Califano* v. *Webster*, 430 U. S. 313 (1977); *Morton* v. *Mancari*, 417 U. S. 535 (1974).

The Congress has not sought to give select minority groups a preferred standing in the construction industry, but has

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of nearly $170 billion spent on construction in the United States during 1977. Thus, the 10% minimum minority business participation contemplated by this program would account for only 0.25% of the annual expenditure for construction work in the United States. *Fullilove* v. *Kreps*, 584 F. 2d, at 607.

embarked on a remedial program to place them on a more equitable footing with respect to public contracting opportunities. There has been no showing in this case that Congress has inadvertently effected an invidious discrimination by excluding from coverage an identifiable minority group that has been the victim of a degree of disadvantage and discrimination equal to or greater than that suffered by the groups encompassed by the MBE program. It is not inconceivable that on very special facts a case might be made to challenge the congressional decision to limit MBE eligibility to the particular minority groups identified in the Act. See *Vance* v. *Bradley*, 440 U. S. 93, 109–112 (1979); *Oregon* v. *Mitchell*, 400 U. S., at 240 (opinion of BRENNAN, WHITE, and MARSHALL, JJ.). But on this record we find no basis to hold that Congress is without authority to undertake the kind of limited remedial effort represented by the MBE program. Congress, not the courts, has the heavy burden of dealing with a host of intractable economic and social problems.

(4)

It is also contended that the MBE program is overinclusive—that it bestows a benefit on businesses identified by racial or ethnic criteria which cannot be justified on the basis of competitive criteria or as a remedy for the present effects of identified prior discrimination. It is conceivable that a particular application of the program may have this effect; however, the peculiarities of specific applications are not before us in this case. We are not presented here with a challenge involving a specific award of a construction contract or the denial of a waiver request; such questions of specific application must await future cases.

This does not mean that the claim of overinclusiveness is entitled to no consideration in the present case. The history of governmental tolerance of practices using racial or ethnic criteria for the purpose or with the effect of imposing an invidious discrimination must alert us to the deleterious

effects of even benign racial or ethnic classifications when they stray from narrow remedial justifications. Even in the context of a facial challenge such as is presented in this case, the MBE provision cannot pass muster unless, with due account for its administrative program, it provides a reasonable assurance that application of racial or ethnic criteria will be limited to accomplishing the remedial objectives of Congress and that misapplications of the program will be promptly and adequately remedied administratively.

It is significant that the administrative scheme provides for waiver and exemption. Two fundamental congressional assumptions underlie the MBE program: (1) that the present effects of past discrimination have impaired the competitive position of businesses owned and controlled by members of minority groups; and (2) that affirmative efforts to eliminate barriers to minority-firm access, and to evaluate bids with adjustment for the present effects of past discrimination, would assure that at least 10% of the federal funds granted under the Public Works Employment Act of 1977 would be accounted for by contracts with available, qualified, bona fide minority business enterprises. Each of these assumptions may be rebutted in the administrative process.

The administrative program contains measures to effectuate the congressional objective of assuring legitimate participation by disadvantaged MBE's. Administrative definition has tightened some less definite aspects of the statutory identification of the minority groups encompassed by the program.[73] There is administrative scrutiny to identify and

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[73] The MBE provision, 42 U. S. C. § 6705 (f)(2) (1976 ed., Supp. II), classifies as a minority business enterprise any "business at least 50 per centum of which is owned by minority group members or, in the case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members." Minority group members are defined as "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts." The administrative definitions are set

eliminate from participation in the program MBE's who are not "bona fide" within the regulations and guidelines; for example, spurious minority-front entities can be exposed. A significant aspect of this surveillance is the complaint procedure available for reporting "unjust participation by an enterprise or individuals in the MBE program." *Supra*, at 472. And even as to specific contract awards, waiver is available to avoid dealing with an MBE who is attempting to exploit the remedial aspects of the program by charging an unreasonable price, *i. e.*, a price not attributable to the present effects of past discrimination. *Supra*, at 469–471. We must assume that Congress intended close scrutiny of false claims and prompt action on them.

Grantees are given the opportunity to demonstrate that their best efforts will not succeed or have not succeeded in achieving the statutory 10% target for minority firm participation within the limitations of the program's remedial objectives. In these circumstances a waiver or partial waiver is available once compliance has been demonstrated. A waiver may be sought and granted at any time during the contracting process, or even prior to letting contracts if the facts warrant.

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out in the Appendix to this opinion, ¶ 3. These categories also are classified as minorities in the regulations implementing the nondiscrimination requirements of the Railroad Revitalization and Regulatory Reform Act of 1976, 45 U. S. C. § 803, see 49 CFR § 265.5 (i) (1978), on which Congress relied as precedent for the MBE provision. See 123 Cong. Rec. 7156 (1977) (remarks of Sen. Brooke). The House Subcommittee on SBA Oversight and Minority Enterprise, whose activities played a significant part in the legislative history of the MBE provision, also recognized that these categories were included within the Federal Government's definition of "minority business enterprise." H. R. Rep. No. 94–468, pp. 20–21 (1975). The specific inclusion of these groups in the MBE provision demonstrates that Congress concluded they were victims of discrimination. Petitioners did not press any challenge to Congress' classification categories in the Court of Appeals; there is no reason for this Court to pass upon the issue at this time.

Nor is the program defective because a waiver may be sought only by the grantee and not by prime contractors who may experience difficulty in fulfilling contract obligations to assure minority participation. It may be administratively cumbersome, but the wisdom of concentrating responsibility at the grantee level is not for us to evaluate; the purpose is to allow the EDA to maintain close supervision of the operation of the MBE provision. The administrative complaint mechanism allows for grievances of prime contractors who assert that a grantee has failed to seek a waiver in an appropriate case. Finally, we note that where private parties, as opposed to governmental entities, transgress the limitations inherent in the MBE program, the possibility of constitutional violation is more removed. See *Steelworkers* v. *Weber*, 443 U. S. 193, 200 (1979).

That the use of racial and ethnic criteria is premised on assumptions rebuttable in the administrative process gives reasonable assurance that application of the MBE program will be limited to accomplishing the remedial objectives contemplated by Congress and that misapplications of the racial and ethnic criteria can be remedied. In dealing with this facial challenge to the statute, doubts must be resolved in support of the congressional judgment that this limited program is a necessary step to effectuate the constitutional mandate for equality of economic opportunity. The MBE provision may be viewed as a pilot project, appropriately limited in extent and duration, and subject to reassessment and re-evaluation by the Congress prior to any extension or re-enactment.[74] Miscarriages of administration could have only a transitory economic impact on businesses not encompassed by the program, and would not be irremediable.

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[74] Cf. GAO, Report to the Congress, Minority Firms on Local Public Works Projects—Mixed Results, CED-79-9 (Jan. 16, 1979); U. S. Dept. of Commerce, Economic Development Administration, Local Public Works Program Interim Report on 10 Percent Minority Business Enterprise Requirement (Sept. 1978).

IV

Congress, after due consideration, perceived a pressing need to move forward with new approaches in the continuing effort to achieve the goal of equality of economic opportunity. In this effort, Congress has necessary latitude to try new techniques such as the limited use of racial and ethnic criteria to accomplish remedial objectives; this is especially so in programs where voluntary cooperation with remedial measures is induced by placing conditions on federal expenditures. That the program may press the outer limits of congressional authority affords no basis for striking it down.

Petitioners have mounted a facial challenge to a program developed by the politically responsive branches of Government. For its part, the Congress must proceed only with programs narrowly tailored to achieve its objectives, subject to continuing evaluation and reassessment; administration of the programs must be vigilant and flexible; and, when such a program comes under judicial review, courts must be satisfied that the legislative objectives and projected administration give reasonable assurance that the program will function within constitutional limitations. But as Mr. Justice Jackson admonished in a different context in 1941: [75]

> "The Supreme Court can maintain itself and succeed in its tasks only if the counsels of self-restraint urged most earnestly by members of the Court itself are humbly and faithfully heeded. After the forces of conservatism and liberalism, of radicalism and reaction, of emotion and of self-interest are all caught up in the legislative process and averaged and come to rest in some compromise measure such as the Missouri Compromise, the N. R. A., the A. A. A., a minimum-wage law, or some other legislative policy, a decision striking it down closes an area of compromise in which conflicts have actually, if only

[75] R. Jackson, The Struggle for Judicial Supremacy 321 (1941).

temporarily, been composed. Each such decision takes away from our democratic federalism another of its defenses against domestic disorder and violence. The vice of judicial supremacy, as exerted for ninety years in the field of policy, has been its progressive closing of the avenues to peaceful and democratic conciliation of our social and economic conflicts."

Mr. Justice Jackson reiterated these thoughts shortly before his death in what was to be the last of his Godkin Lectures: [76]

> "I have said that in these matters the Court must respect the limitations on its own powers because judicial usurpation is to me no more justifiable and no more promising of permanent good to the country than any other kind. So I presuppose a Court that will not depart from the judicial process, will not go beyond resolving cases and controversies brought to it in conventional form, and will not consciously encroach upon the functions of its coordinate branches."

In a different context to be sure, that is, in discussing the latitude which should be allowed to states in trying to meet social and economic problems, Mr. Justice Brandeis had this to say:

> "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation." *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 311 (1932) (dissenting opinion).

Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees. This case is one which requires, and which has received, that kind

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[76] R. Jackson, The Supreme Court in the American System of Government 61–62 (1955).

of examination. This opinion does not adopt, either expressly or implicitly, the formulas of analysis articulated in such cases as *University of California Regents* v. *Bakke*, 438 U. S. 265 (1978). However, our analysis demonstrates that the MBE provision would survive judicial review under either "test" articulated in the several *Bakke* opinions. The MBE provision of the Public Works Employment Act of 1977 does not violate the Constitution.[77]

Affirmed.

APPENDIX TO OPINION OF BURGER, C. J.

¶ 1. The EDA guidelines, at 2–7, provide in relevant part:

> "The primary obligation for carrying out the 10% MBE participation requirement rests with EDA Grantees. . . . The Grantee and those of its contractors which will make subcontracts or purchase substantial supplies from other firms (hereinafter referred to as 'prime contractors') must seek out all available *bona fide* MBE's and make every effort to use as many of them as possible on the project.
>
> "An MBE is *bona fide* if the minority group ownership interests are real and continuing and not created solely to meet 10% MBE requirements. For example, the minority group owners or stockholders should possess control over management, interest in capital and interest in earnings commensurate with the percentage of owner-

[77] Although the complaint alleged that the MBE program violated several federal statutes, n. 5, *supra*, the only statutory argument urged upon us is that the MBE provision is inconsistent with Title VI of the Civil Rights Act of 1964. We perceive no inconsistency between the requirements of Title VI and those of the MBE provision. To the extent any statutory inconsistencies might be asserted, the MBE provision—the later more specific enactment—must be deemed to control. See, *e. g.*, *Morton* v. *Mancari*, 417 U. S. 535, 550–551 (1974). *Preiser* v. *Rodriguez*, 411 U. S. 475, 489–490 (1973); *Bulova Watch Co.* v. *United States*, 365 U. S. 753, 758 (1961); *United States* v. *Borden Co.*, 308 U. S. 188, 198–202 (1939).

ship on which the claim of minority ownership status is based. . . .

"An MBE is available if the project is located in the market area of the MBE and the MBE can perform project services or supply project materials at the time they are needed. The relevant market area depends on the kind of services or supplies which are needed. . . . EDA will require that Grantees and prime contractors engage MBE's from as wide a market area as is economically feasible.

"An MBE is qualified if it can perform the services or supply the materials that are needed. Grantees and prime contractors will be expected to use MBE's with less experience than available nonminority enterprises and should expect to provide technical assistance to MBE's as needed. Inability to obtain bonding will ordinarily not disqualify an MBE. Grantees and prime contractors are expected to help MBE's obtain bonding, to include MBE's in any overall bond or to waive bonding where feasible. The Small Business Administration (SBA) is prepared to provide a 90% guarantee for the bond of any MBE participating in an LPW [local public works] project. Lack of working capital will not ordinarily disqualify an MBE. SBA is prepared to provide working capital assistance to any MBE participating in an LPW project. Grantees and prime contractors are expected to assist MBE's in obtaining working capital through SBA or otherwise.

". . . [E]very Grantee should make sure that it knows the names, addresses and qualifications of all relevant MBE's which would include the project location in their market areas. . . . Grantees should also hold prebid conferences to which they invite interested contractors and representatives of . . . MBE support organizations.

"Arrangements have been made through the Office of Minority Business Enterprise . . . to provide assistance

to Grantees and prime contractors in fulfilling the 10% MBE requirement. . . .

"Grantees and prime contractors should also be aware of other support which is available from the Small Business Administration. . . .

". . . [T]he Grantee must monitor the performance of its prime contractors to make sure that their commitments to expend funds for MBE's are being fulfilled. . . . Grantees should administer every project tightly. . . ."

¶ 2. The EDA guidelines, at 13–15, provide in relevant part:

"Although a provision for waiver is included under this section of the Act, EDA will only approve a waiver under exceptional circumstances. The Grantee must demonstrate that there are not sufficient, relevant, qualified minority business enterprises whose market areas include the project location to justify a waiver. The Grantee must detail in its waiver request the efforts the Grantee and potential contractors have exerted to locate and enlist MBE's. The request must indicate the specific MBE's which were contacted and the reason each MBE was not used. . . .

. . . . .

"Only the Grantee can request a waiver. . . . Such a waiver request would ordinarily be made after the initial bidding or negotiation procedures proved unsuccessful. . . .

. . . . .

"[A] Grantee situated in an area where the minority population is very small may apply for a waiver before requesting bids on its project or projects. . . ."

¶ 3. The EDA Technical Bulletin, at 1, provides the following definitions:

"a) Negro—An individual of the black race of African origin.

"b) Spanish-speaking—An individual of a Spanish-speaking culture and origin or parentage.

"c) Oriental—An individual of a culture, origin or parentage traceable to the areas south of the Soviet Union, East of Iran, inclusive of islands adjacent thereto, and out to the Pacific including but not limited to Indonesia, Indochina, Malaysia, Hawaii and the Philippines.

"d) Indian—An individual having origins in any of the original people of North America and who is recognized as an Indian by either a tribe, tribal organization or a suitable authority in the community. (A suitable authority in the community may be: educational institutions, religious organizations, or state agencies.)

"e) Eskimo—An individual having origins in any of the original peoples of Alaska.

"f) Aleut—An individual having origins in any of the original peoples of the Aleutian Islands."

"4. The EDA Technical Bulletin, at 19, provides in relevant part:

"Any person or organization with information indicating unjust participation by an enterprise or individuals in the MBE program or who believes that the MBE participation requirement is being improperly applied should contact the appropriate EDA grantee and provide a detailed statement of the basis for the complaint.

"Upon receipt of a complaint, the grantee should attempt to resolve the issues in dispute. In the event the grantee requires assistance in reaching a determination, the grantee should contact the Civil Rights Specialist in the appropriate Regional Office.

"If the complainant believes that the grantee has not satisfactorily resolved the issues raised in his complaint, he may personally contact the EDA Regional Office."

MR. JUSTICE POWELL, concurring.

Although I would place greater emphasis than THE CHIEF JUSTICE on the need to articulate judicial standards of review

in conventional terms, I view his opinion announcing the judgment as substantially in accord with my own views. Accordingly, I join that opinion and write separately to apply the analysis set forth by my opinion in *University of California Regents* v. *Bakke*, 438 U. S. 265 (1978) (hereinafter *Bakke*).

The question in this case is whether Congress may enact the requirement in § 103 (f)(2) of the Public Works Employment Act of 1977 (PWEA), that 10% of federal grants for local public work projects funded by the Act be set aside for minority business enterprises. Section 103 (f)(2) employs a racial classification that is constitutionally prohibited unless it is a necessary means of advancing a compelling governmental interest. *Bakke, supra*, at 299, 305; see *In re Griffiths*, 413 U. S. 717, 721–722 (1973); *Loving* v. *Virginia*, 388 U. S. 1, 11 (1967); *McLaughlin* v. *Florida*, 379 U. S. 184, 196 (1964). For the reason stated in my *Bakke* opinion, I consider adherence to this standard as important and consistent with precedent.

The Equal Protection Clause, and the equal protection component of the Due Process Clause of the Fifth Amendment, demand that any governmental distinction among groups must be justifiable. Different standards of review applied to different sorts of classifications simply illustrate the principle that some classifications are less likely to be legitimate than others. Racial classifications must be assessed under the most stringent level of review because immutable characteristics, which bear no relation to individual merit or need, are irrelevant to almost every governmental decision. See, *e. g.*, *Anderson* v. *Martin*, 375 U. S. 399, 402-404 (1964). In this case, however, I believe that § 103 (f)(2) is justified as a remedy that serves the compelling governmental interest in eradicating the continuing effects of past discrimination identified by Congress.[1]

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[1] Although racial classifications require strict judicial scrutiny, I do not agree that the Constitution prohibits all racial classification. MR. JUS-

I

Racial preference never can constitute a compelling state interest. "'Distinctions between citizens solely because of their ancestry' [are] 'odious to a free people whose institutions are founded upon the doctrine of equality.'" *Loving* v. *Virginia*, *supra*, at 11, quoting *Hirabayashi* v. *United States*, 320 U. S. 81, 100 (1943). Thus, if the set-aside merely expresses a congressional desire to prefer one racial or ethnic group over another, § 103 (f)(2) violates the equal protection component in the Due Process Clause of the Fifth Amendment. See *Bolling* v. *Sharpe*, 347 U. S. 497, 499 (1954).

The Government does have a legitimate interest in ameliorating the disabling effects of identified discrimination. *Bakke*, *supra*, at 307; see, *e. g.*, *Keyes* v. *School District No. 1, Denver, Colo.*, 413 U. S. 189, 236 (1973) (POWELL, J., concurring in part and dissenting in part); *McDaniel* v. *Barresi*, 402 U. S. 39, 41 (1971); *North Carolina Board of Education* v. *Swann*, 402 U. S. 43, 45–46 (1971); *Green* v. *County School Board*, 391 U. S. 430, 437–438 (1968). The existence of illegal discrimination justifies the imposition of a remedy that will "make persons whole for injuries suffered on account of unlawful . . . discrimination." *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 418 (1975). A critical inquiry, therefore, is whether § 103 (f)(2) was enacted as a means of redressing such discrimination. But this Court has never approved race-conscious remedies absent judicial, administrative, or legislative findings of constitutional or statutory violations. *Bakke*, *supra*, at 307; see, *e. g.*, *Teamsters* v. *United*

TICE STEWART recognizes the principle that I believe is applicable: "Under our Constitution, any official action that treats a person differently on account of his race or ethnic origin is inherently suspect and presumptively invalid." *Post*, at 523. But, in narrowly defined circumstances, that presumption may be rebutted. Cf. *Lee* v. *Washington*, 390 U. S. 333, 334 (1968) (Black, Harlan, and STEWART, JJ., concurring).

States, 431 U. S. 324, 367–376 (1977); *United Jewish Organizations* v. *Carey*, 430 U. S. 144, 155–159 (1977) (opinion of WHITE, J.); *South Carolina* v. *Katzenbach*, 383 U. S. 301, 308–315 (1966).

Because the distinction between permissible remedial action and impermissible racial preference rests on the existence of a constitutional or statutory violation, the legitimate interest in creating a race-conscious remedy is not compelling unless an appropriate governmental authority has found that such a violation has occurred. In other words, two requirements must be met. First, the governmental body that attempts to impose a race-conscious remedy must have the authority to act in response to identified discrimination. Cf. *Hampton* v. *Mow Sun Wong*, 426 U. S. 88, 103 (1976). Second, the governmental body must make findings that demonstrate the existence of illegal discrimination. In *Bakke*, the Regents failed both requirements. They were entrusted only with educational functions, and they made no findings of past discrimination. Thus, no compelling governmental interest was present to justify the use of a racial quota in medical school admissions. *Bakke*, *supra*, at 309–310.

Our past cases also establish that even if the government proffers a compelling interest to support reliance upon a suspect classification, the means selected must be narrowly drawn to fulfill the governmental purpose. *In re Griffiths*, 413 U. S., at 721–722. In *Bakke*, for example, the state university did have a compelling interest in the attainment of a diverse student body. But the method selected to achieve that end, the use of a fixed admissions quota, was not appropriate. The Regents' quota system eliminated some nonminority applicants from all consideration for a specified number of seats in the entering class, although it allowed minority applicants to compete for all available seats. 438 U. S., at 275–276. In contrast, an admissions program that recognizes race as a factor, but not the sole factor, in assessing an applicant's qualifications serves the university's interest in di-

versity while ensuring that each applicant receives fair and competitive consideration. *Id.*, at 317–318.

In reviewing the constitutionality of § 103 (f)(2), we must decide: (i) whether Congress is competent to make findings of unlawful discrimination; (ii) if so, whether sufficient findings have been made to establish that unlawful discrimination has affected adversely minority business enterprises, and (iii) whether the 10% set-aside is a permissible means for redressing identifiable past discrimination. None of these questions may be answered without explicit recognition that we are reviewing an Act of Congress.

II

The history of this Court's review of congressional action demonstrates beyond question that the National Legislature is competent to find constitutional and statutory violations. Unlike the Regents of the University of California, Congress properly may—and indeed must—address directly the problems of discrimination in our society. See *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241, 257 (1964). In *Katzenbach* v. *McClung*, 379 U. S. 294, 304 (1964), for example, this Court held that Congress had the power under the Commerce Clause to prohibit racial discrimination in public restaurants on the basis of its "finding[s] that [such discrimination] had a direct and adverse effect on the free flow of interstate commerce."

Similarly, after hearing "overwhelming" evidence of private employment discrimination, see H. R. Rep. No. 914, 88th Cong., 1st Sess., pt. 2, p. 26 (1963), Congress enacted Title VII of the Civil Rights Act of 1964 in order "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 800 (1973). Acting to further the purposes of Title VII Congress vested in the federal courts broad equitable discretion

to ensure that "'persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.'" *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 764 (1976), quoting Section-by-Section Analysis of H. R. 1746, accompanying the Equal Employment Opportunity Act of 1972—Conference Report, 118 Cong. Rec. 7166, 7168 (1972).

In addition, Congress has been given the unique constitutional power of legislating to enforce the provisions of the Thirteenth, Fourteenth, and Fifteenth Amendments.[2] At an early date, the Court stated that "[i]t is the power of Congress which has been enlarged" by the enforcement provisions of the post-Civil War Amendments. *Ex parte Virginia*, 100 U. S. 339, 345 (1880). In *Jones* v. *Alfred H. Mayer & Co.*, 392 U. S. 409, 441–443 (1968), the Court recognized Congress' competence to determine that private action inhibiting the right to acquire and convey real property was racial discrimination forbidden by the Thirteenth Amendment. Subsequently, we held that Congress' enactment of 42 U. S. C. § 1981 pursuant to its powers under the Thirteenth Amendment, see *Runyon* v. *McCrary*, 427 U. S. 160, 168–170, 179 (1976), provides to all persons a federal remedy for racial discrimination in private employment. See *McDonald* v. *Sante Fe Transportation Co.*, 427 U. S. 273, 295–296 (1976); *Johnson* v. *Railway Express Agency*, 421 U. S. 454, 459–460 (1975).

In *Katzenbach* v. *Morgan*, 384 U. S. 641 (1966), the Court considered whether § 5 of the Fourteenth Amendment gave Congress the power to enact § 4 (e) of the Voting Rights Act of 1965, 42 U. S. C. § 1973b (e). Section 4 (e) provides

[2] Section 2 of the Thirteenth Amendment, which abolished slavery, provides that "Congress shall have power to enforce this article by appropriate legislation." In virtually identical language, § 5 of the Fourteenth Amendment and § 2 of the Fifteenth Amendment give Congress the power to enforce the provisions of those Amendments.

that no person educated in Puerto Rico may be denied the right to vote in any election for failure to read or write the English language. The Court held that Congress was empowered to enact § 4 (e) as a remedy for discrimination against the Puerto Rican community. 384 U. S., at 652–653. Implicit in its holding was the Court's belief that Congress had the authority to find, and had found, that members of this minority group had suffered governmental discrimination.

Congress' authority to find and provide for the redress of constitutional violations also has been confirmed in cases construing the Enforcement Clause of the Fifteenth Amendment. In *South Carolina* v. *Katzenbach*, 383 U. S., at 308, for example, the Court upheld the Voting Rights Act of 1965, 42 U. S. C. § 1973 *et seq.*, as an appropriate remedy for violations of the Fifteenth Amendment. It noted that Congress had found "insidious and pervasive" discrimination demanding "ster[n] and . . . elaborate" measures. 383 U. S., at 309. Most relevant to our present inquiry was the Court's express approval of Congress' decision to "prescrib[e] remedies for voting discrimination which go into effect without the need for prior adjudication." *Id.*, at 327–328.[3]

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[3] Among the remedies approved in *South Carolina* v. *Katzenbach* was the temporary suspension of literacy tests in some jurisdictions. The Voting Rights Act Amendments of 1970, 42 U. S. C. § 1973aa *et seq.*, temporarily banned the use of literacy tests in all jurisdictions In *Oregon* v. *Mitchell*, 400 U. S. 112 (1970), this Court, speaking through five separate opinions, unanimously upheld that action as a proper exercise of Congress' authority under the post-Civil War Amendments. See *id.*, at 117 (Black, J.); *id.*, at 135 (Douglas, J.); *id.*, at 152 (Harlan, J.); *id.*, at 229 (BRENNAN, WHITE, and MARSHALL, JJ.); *id.*, at 281 (STEWART, J., with whom BURGER, C. J. and BLACKMUN, J., concurred). MR. JUSTICE STEWART said:

"Congress was not required to make state-by-state findings concerning . . . actual impact of literacy requirements on the Negro citizen's access to the ballot box. In the interests of uniformity, Congress may paint with a much broader brush than may this Court, which must confine itself to the judicial function of deciding individual cases and controversies upon

It is beyond question, therefore, that Congress has the authority to identify unlawful discriminatory practices, to prohibit those practices, and to prescribe remedies to eradicate their continuing effects. The next inquiry is whether Congress has made findings adequate to support its determination that minority contractors have suffered extensive discrimination.

III

A

The petitioners contend that the legislative history of § 103 (f)(2) reflects no congressional finding of statutory or constitutional violations. Crucial to that contention is the assertion that a reviewing court may not look beyond the legislative history of the PWEA itself for evidence that Congress believed it was combating invidious discrimination. But petitioners' theory would erect an artificial barrier to full understanding of the legislative process.

Congress is not an adjudicatory body called upon to resolve specific disputes between competing adversaries. Its constitutional role is to be representative rather than impartial, to make policy rather than to apply settled principles of law. The petitioners' contention that this Court should treat the debates on § 103 (f)(2) as the complete "record" of congressional decisionmaking underlying that statute is essentially a plea that we treat Congress as if it were a lower federal court. But Congress is not expected to act as though it were duty bound to find facts and make conclusions of law. The creation of national rules for the governance of our society simply does not entail the same concept of recordmaking that is appropriate to a judicial or administrative proceeding. Congress has no responsibility to confine its vision to the facts and evidence adduced by particular parties. Instead, its special

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individual records. The findings that Congress made when it enacted the Voting Rights Act of 1965 would have supported a nationwide ban on literacy tests." *Id.*, at 284 (citation omitted).

attribute as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue. One appropriate source is the information and expertise that Congress acquires in the consideration and enactment of earlier legislation. After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area.

Acceptance of petitioners' argument would force Congress to make specific factual findings with respect to each legislative action. Such a requirement would mark an unprecedented imposition of adjudicatory procedures upon a coordinate branch of Government. Neither the Constitution nor our democratic tradition warrants such a constraint on the legislative process. I therefore conclude that we are not confined in this case to an examination of the legislative history of § 103 (f)(2) alone. Rather, we properly may examine the total contemporary record of congressional action dealing with the problems of racial discrimination against minority business enterprises.

B

In my view, the legislative history of § 103 (f)(2) demonstrates that Congress reasonably concluded that private and governmental discrimination had contributed to the negligible percentage of public contracts awarded minority contractors.[4]

[4] I cannot accept the suggestion of the Court of Appeals that § 103 (f)(2) must be viewed as serving a compelling state interest if the reviewing court can "perceive a basis" for legislative action. *Fullilove* v. *Kreps*, 584 F. 2d 600, 604–605 (1978), quoting *Katzenbach* v. *Morgan*, 384 U. S. 641, 656 (1966). The "perceive a basis" standard refers to congressional authority to act, not to the distinct question whether that action violates the Due Process Clause of the Fifth Amendment.

In my view, a court should uphold a reasonable congressional finding of discrimination. A more stringent standard of review would impinge upon Congress' ability to address problems of discrimination, see *supra*, at 500–503; a standard requiring a court to "perceive a basis" is essentially

The opinion of THE CHIEF JUSTICE provides a careful overview of the relevant legislative history, see *ante*, at 456–467, to which only a few words need be added.

Section 103 (f)(2) originated in an amendment introduced on the floor of the House of Representatives by Representative Mitchell. Congressman Mitchell noted that the Federal Government was already operating a set-aside program under § 8 (a) of the Small Business Act, 15 U. S. C. § 637 (a). He described his proposal as "the only sensible way for us to begin to develop a viable economic system for minorities in this country, with the ultimate result being that we are going to eventually be able to . . . end certain programs which are merely support survival programs for people which do not contribute to the economy." 123 Cong. Rec. 5327 (1977).[5] Senator Brooke, who introduced a similar measure in the Senate, reminded the Senate of the special provisions previously enacted into § 8 (a) of the Small Business Act and the Railroad Revitalization and Regulatory Reform Act of 1976, 90 Stat. 149, 49 U. S. C. § 1657a, which, he stated, demonstrated the validity of his amendment. 123 Cong. Rec. 7155–7156 (1977).

Section 8 (a) of the Small Business Act provides that the Small Business Administration may enter into contracts with the Federal Government and subcontract them out to small businesses. The Small Business Administration has been directed by Executive Order to employ § 8 (a) to aid socially and economically disadvantaged persons. *Ante*, at 463–464.[6]

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meaningless in this context. Such a test might allow a court to justify legislative action even in the absence of affirmative evidence of congressional findings.

[5] During subsequent debate in the House, Representative Conyers emphasized that minority businesses "through no fault of their own simply have not been able to get their foot in the door." 123 Cong. Rec. 5330 (1977); see *id.*, at 5331 (remarks of Rep. Biaggi).

[6] In 1969, 1970, and 1971, the President issued Executive Orders directing federal aid for minority business enterprises. See Exec. Order No.

The operation of the § 8 (a) program was reviewed by congressional Committees between 1972 and 1977. In 1972, the House Subcommittee on Minority Small Business Enterprise found that minority businessmen face economic difficulties that "are the result of past social standards which linger as characteristics of minorities as a group." H. R. Rep. No. 92-1615, p. 3 (1972). In 1975, the House Subcommittee on SBA Oversight and Minority Enterprise concluded that "[t]he effect of past inequities stemming from racial prejudice have not remained in the past," and that low participation by minorities in the economy was the result of "past discriminatory practices." H. R. Rep. No. 94-468, pp. 1-2 (1975). In 1977, the House Committee on Small Business found that

> "over the years, there has developed a business system which has traditionally excluded measurable minority participation. In the past more than the present, this system of conducting business transactions overtly precluded minority input. Currently, we more often encounter a business system which is racially neutral on its face, but because of past overt social and economic discrimination is presently operating, in effect, to perpetuate these past inequities." H. R. Rep. No. 94-1791, p. 182 (1977).

11458, 3 CFR 779 (1966-1970 Comp.); Exec. Order No. 11518, 3 CFR 907 (1966-1970 Comp.); Exec. Order No. 11625, 3 CFR 616 (1971-1975 Comp.). The President noted that "members of certain minority groups through no fault of their own have been denied the full opportunity to [participate in the free enterprise system]," Exec. Order No. 11518, 3 CFR 908 (1966-1970 Comp.), and that the "opportunity for full participation in our free enterprise system by socially and economically disadvantaged persons is essential if we are to obtain social and economic justice." Exec. Order No. 11625, 3 CFR 616 (1971-1975 Comp.). Assistance to minority business enterprises through the § 8 (a) program has been designed to promote the goals of these Executive Orders. *Ray Baillie Trash Hauling, Inc.* v. *Kleppe*, 477 F. 2d 696, 706 (CA5 1973), cert. denied, 415 U. S. 914 (1974).

The Committee's Report was issued on January 3, 1977, less than two months before Representative Mitchell introduced § 103 (f)(2) into the House of Representatives.[7]

In light of these legislative materials and the discussion of legislative history contained in THE CHIEF JUSTICE's opinion, I believe that a court must accept as established the conclusion that purposeful discrimination contributed significantly to the small percentage of federal contracting funds that minority business enterprises have received. Refusals to subcontract work to minority contractors may, depending upon the identity of the discriminating party, violate Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d *et seq.*, or 42 U. S. C. § 1981, or the Fourteenth Amendment. Although the discriminatory activities were not identified with the exactitude expected in judicial or administrative adjudication, it must be remembered that "Congress may paint with a much broader brush than may this Court. . . ." *Oregon* v. *Mitchell*, 400 U. S. 112, 284 (1970) (STEWART, J., concurring in part and dissenting in part).[8]

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[7] Two sections of the Railroad Revitalization and Regulatory Reform Act also reflect Congress' recognition of the need for remedial steps on behalf of minority businesses. Section 905, 45 U. S. C. § 803, prohibits discrimination in any activity funded by the Act, and § 906, 49 U. S. C. § 1657a, establishes a Minority Resource Center to assist minority businessmen to obtain contracts and business opportunities related to the maintenance and rehabilitation of railroads. The provisions were enacted by a Congress that recognized the "established national policy, since at least the passage of the Civil Rights Act of 1964, to encourage and assist in the development of minority business enterprise." S. Rep. No. 94–499, p. 44 (1975) (Commerce Committee). In January 1977, the Department of Transportation issued regulations pursuant to 45 U. S. C. § 803 (d) that require contractors to formulate affirmative-action programs to ensure that minority businesses receive a fair proportion of contract opportunities. See 49 CFR §§ 265.9–265.17 (1978). See also nn. 11 and 12, *infra*.

[8] Although this record suffices to support the congressional judgment that minority contractors suffered identifiable discrimination, Congress need not be content with findings that merely meet constitutional standards. Race-conscious remedies, popularly referred to as affirmative-action

IV

Under this Court's established doctrine, a racial classification is suspect and subject to strict judicial scrutiny. As noted in Part I, the government may employ such a classification only when necessary to accomplish a compelling governmental purpose. See *Bakke*, 438 U. S., at 305. The conclusion that Congress found a compelling governmental interest in redressing identified discrimination against minority contractors therefore leads to the inquiry whether use of a 10% set-aside is a constitutionally appropriate means of serving that interest. In the past, this "means" test has been virtually impossible to satisfy. Only two of this Court's modern cases have held the use of racial classifications to be constitutional. See *Korematsu* v. *United States*, 323 U. S. 214 (1944); *Hirabayshi* v. *United States*, 320 U. S. 81 (1943). Indeed, the failure of legislative action to survive strict scrutiny has led some to wonder whether our review of racial classifications has been strict in theory, but fatal in fact. See Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972).

A

Application of the "means" test necessarily demands an understanding of the type of congressional action at issue. This is not a case in which Congress has employed a racial classification solely as a means to confer a racial preference. Such a purpose plainly would be unconstitutional. *Supra*,

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programs, almost invariably affect some innocent persons. See *infra*, at 514. Respect and support for the law, especially in an area as sensitive as this, depend in large measure upon the public's perception of fairness. See *Bakke*, 438 U. S. 265, 319, n. 53 (1978); J. Wilkinson, From *Brown* to *Bakke* 264–266 (1979); Perry, Modern Equal Protection: A Conceptualization and Appraisal, 79 Colum. L. Rev. 1023, 1048–1049 (1979). It therefore is important that the legislative record supporting race-conscious remedies contain evidence that satisfies fairminded people that the congressional action is just.

at 497. Nor has Congress sought to employ a racially conscious means to further a nonracial goal. In such instances, a nonracial means should be available to further the legitimate governmental purpose. See *Bakke, supra,* at 310–311.

Enactment of the set-aside is designed to serve the compelling governmental interest in redressing racial discrimination. As this Court has recognized, the implementation of any affirmative remedy for redress of racial discrimination is likely to affect persons differently depending upon their race. See, *e. g., North Carolina Board of Education* v. *Swann,* 402 U. S., at 45–46. Although federal courts may not order or approve remedies that exceed the scope of a constitutional violation, see *Milliken* v. *Bradley,* 433 U. S. 267, 280–281 (1977); *Dayton Board of Education* v. *Brinkman,* 433 U. S. 406 (1977); *Austin Independent School District* v. *United States,* 429 U. S. 990, 991 (1976) (POWELL, J., concurring), this Court has not required remedial plans to be limited to the least restrictive means of implementation. We have recognized that the choice of remedies to redress racial discrimination is "a balancing process left, within appropriate constitutional or statutory limits, to the sound discretion of the trial court." *Franks* v. *Bowman Transportation Co.,* 424 U. S., at 794 (POWELL, J., concurring in part and dissenting in part).

I believe that the Enforcement Clauses of the Thirteenth and Fourteenth Amendments give Congress a similar measure of discretion to choose a suitable remedy for the redress of racial discrimination. The legislative history of § 5 of the Fourteenth Amendment is particularly instructive. Senator Howard, the member of the Joint Committee on Reconstruction who introduced the Amendment into the Senate, described § 5 as "a direct affirmative delegation of power to Congress to carry out all the principles of all [the] guarantees" of § 1 of the Amendment. Cong. Globe, 39th Cong., 1st Sess., 2766 (1866). Furthermore, he stated that § 5

> "casts upon the Congress the responsibility of seeing to it, for the future, that all the sections of the amendment

are carried out in good faith, and that no State infringes the rights of persons or property. I look upon this clause as indispensable for the reason that it thus imposes upon the Congress this power and this duty." *Id.*, at 2768.

Senator Howard's emphasis on the importance of congressional action to effectuate the goals of the Fourteenth Amendment was echoed by other Members of Congress. Representative Stevens, also a member of the Reconstruction Committee, said that the Fourteenth Amendment "allows Congress to correct the unjust legislation of the States," *id.*, at 2459, and Senator Poland wished to leave no doubt "as to the power of Congress to enforce principles lying at the very foundation of all republican government. . . ." *Id.*, at 2961. See *id.*, at 2512–2513 (remarks of Rep. Raymond); *id.*, at 2511 (Rep. Eliot); *Ex parte Virginia*, 100 U. S., at 345.[9]

Although the Framers of the Fourteenth Amendment may have contemplated that Congress, rather than the federal courts, would be the prime force behind enforcement of the Fourteenth Amendment, see 6 C. Fairman, History of the Supreme Court of the United States: Reconstruction and Reunion, Part 1, pp. 1295, 1296 (1971), they did not believe that congressional action would be unreviewable by this Court. Several Members of Congress emphasized that a primary purpose of the Fourteenth Amendment was to place the provisions of the Civil Rights Act of 1866 "in the eternal firmament of the Constitution." Cong. Globe, 39th Cong., 1st Sess., 2462 (1866) (remarks of Rep. Garfield). See *id.*, at 2459 (remarks of Rep. Stevens); *id.*, at 2465 (remarks of Rep. Thayer); *id.*, at 2498 (remarks of Rep. Broomall). By 1866, Members of Congress fully understood that judicial review was the means by which action of the Legislative and Execu-

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[9] See also *Jones* v. *Alfred H. Mayer & Co.*, 392 U. S. 409, 440–441 (1968), quoting Cong. Globe, 39th Cong., 1st Sess., 322 (1866) (remarks of Sen. Trumbull on Congress' authority under the Thirteenth Amendment).

tive Branches would be required to conform to the Constitution. See, *e. g.*, *Marbury* v. *Madison*, 1 Cranch 137 (1803).

I conclude, therefore, that the Enforcement Clauses of the Thirteenth and Fourteenth Amendments confer upon Congress the authority to select reasonable remedies to advance the compelling state interest in repairing the effects of discrimination. But that authority must be exercised in a manner that does not erode the guarantees of these Amendments. The Judicial Branch has the special responsibility to make a searching inquiry into the justification for employing a race-conscious remedy. Courts must be sensitive to the possibility that less intrusive means might serve the compelling state interest equally as well. I believe that Congress' choice of a remedy should be upheld, however, if the means selected are equitable and reasonably necessary to the redress of identified discrimination. Such a test allows the Congress to exercise necessary discretion but preserves the essential safeguard of judicial review of racial classifications.

B

When reviewing the selection by Congress of a race-conscious remedy, it is instructive to note the factors upon which the Courts of Appeals have relied in a closely analogous area. Courts reviewing the proper scope of race-conscious hiring remedies have considered (i) the efficacy of alternative remedies, *NAACP* v. *Allen*, 493 F. 2d 614, 619 (CA5 1974); *Vulcan Society Inc.* v. *Civil Service Comm'n*, 490 F. 2d 387, 398 (CA2 1973), (ii) the planned duration of the remedy, *id.*, at 399; *United States* v. *Wood, Wire & Metal Lathers Local 46*, 471 F. 2d 408, 414, n. 12 (CA2), cert. denied, 412 U. S. 939 (1973), (iii) the relationship between the percentage of minority workers to be employed and the percentage of minority group members in the relevant population or work force, *Association Against Discrimination* v. *Bridgeport*, 594 F. 2d 306, 311 (CA2 1979); *Boston Chapter NAACP* v. *Beecher*, 504 F. 2d 1017, 1026–1027 (CA1 1974), cert. denied,

421 U. S. 910 (1975); *Bridgeport Guardians, Inc.* v. *Bridgeport Civil Service Comm'n*, 482 F. 2d 1333, 1341 (CA2 1973), cert. denied, 421 U. S. 991 (1975); *Carter* v. *Gallagher*, 452 F. 2d 315, 331 (CA8) (en banc), cert. denied, 406 U. S. 950 (1972), and (iv) the availability of waiver provisions if the hiring plan could not be met, *Associated General Contractors, Inc.* v. *Altshuler*, 490 F. 2d 9, 18–19 (CA1 1973), cert. denied, 416 U. S. 957 (1974).

By the time Congress enacted § 103 (f)(2) in 1977, it knew that other remedies had failed to ameliorate the effects of racial discrimination in the construction industry. Although the problem had been addressed by antidiscrimination legislation, executive action to remedy employment discrimination in the construction industry, and federal aid to minority businesses, the fact remained that minority contractors were receiving less than 1% of federal contracts. See 123 Cong. Rec. 7156 (1977) (remarks of Sen. Brooke). Congress also knew that economic recession threatened the construction industry as a whole. Section 103 (f)(2) was enacted as part of a bill designed to stimulate the economy by appropriating $4 billion in federal funds for new public construction. Since the emergency public construction funds were to be distributed quickly,[10] any remedial provision designed to prevent those funds from perpetuating past discrimination also had to be effective promptly. Moreover, Congress understood that any effective remedial program had to provide minority contractors the experience necessary for continued success without federal assistance.[11] And Congress knew that the

[10] The PWEA provides that federal moneys be committed to state and local grantees by September 30, 1977. 42 U. S. C. § 6707 (h)(1) (1976 ed., Supp. II). Action on applications for funds was to be taken within 60 days after receipt of the application, § 6706, and on-site work was to begin within 90 days of project approval, § 6705 (d).

[11] In 1972, a congressional oversight Committee addressed the "complex problem—how to achieve economic prosperity despite a long history of racial bias." See H. R. Rep. No. 92–1615, p. 3 (Select Committee on

ability of minority group members to gain experience had been frustrated by the difficulty of entering the construction trades.[12] The set-aside program adopted as part of this emer-

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Small Business). The Committee explained how the effects of discrimination translate into economic barriers:

"In attempting to increase their participation as entrepreneurs in our economy, the minority businessman usually encounters several major problems. These problems, which are economic in nature, are the result of past social standards which linger as characteristics of minorities as a group.

"The minority entrepreneur is faced initially with the lack of capital, the most serious problem of all beginning minorities or other entrepreneurs. Because minorities as a group are not traditionally holders of large amounts of capital, the entrepreneur must go outside his community in order to obtain the needed capital. Lending firms require substantial security and a track record in order to lend funds, security which the minority businessmen usually cannot provide. Because he cannot produce either, he is often turned down.

. . . . .

"Functional expertise is a necessity for the successful operation of any enterprise. Minorities have traditionally assumed the role of the labor force in business with few gaining access to positions whereby they could learn not only the physical operation of the enterprise, but also the internal functions of management." *Id.*, at 3–4.

[12] When Senator Brooke introduced the PWEA set-aside in the Senate, he stated that aid to minority businesses also would help to alleviate problems of minority unemployment. 123 Cong. Rec. 7156 (1977). Congress had considered the need to remedy employment discrimination in the construction industry when it refused to override the "Philadelphia Plan." The "Philadelphia Plan," promulgated by the Department of Labor in 1969, required all federal contractors to use hiring goals in order to redress past discrimination. See *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F. 2d 159, 163 (CA3), cert. denied, 404 U. S. 854 (1971). Later that year, the House of Representatives refused to adopt an amendment to an appropriations bill that would have had the effect of overruling the Labor Department's order. 115 Cong. Rec. 40921 (1969). The Senate, which had approved such an amendment, then voted to recede from its position. *Id.*, at 40749.

During the Senate debate, several legislators argued that implementation of the Philadelphia Plan was necessary to ensure equal opportunity. See *id.*, at 40740 (remarks of Sen. Scott); *id.*, at 40741 (remarks of

gency legislation serves each of these concerns because it takes effect as soon as funds are expended under PWEA and because it provides minority contractors with experience that could enable them to compete without governmental assistance.

The § 103 (f)(2) set-aside is not a permanent part of federal contracting requirements. As soon as the PWEA program concludes, this set-aside program ends. The temporary nature of this remedy ensures that a race-conscious program will not last longer than the discriminatory effects it is designed to eliminate. It will be necessary for Congress to re-examine the need for a race-conscious remedy before it extends or re-enacts § 103 (f)(2).

The percentage chosen for the set-aside is within the scope of congressional discretion. The Courts of Appeals have approved temporary hiring remedies insuring that the percentage of minority group workers in a business or governmental agency will be reasonably related to the percentage of minority group members in the relevant population. *Boston Chapter NAACP* v. *Beecher*, 504 F. 2d, at 1027; *Bridgeport Guardians, Inc.* v. *Bridgeport*, 482 F. 2d, at 1341; *Carter* v. *Gallagher*, 452 F. 2d, at 331. Only 4% of contractors are members of minority groups, see *Fullilove* v. *Kreps*, 584 F. 2d 600, 608 (1978), although minority group members constitute about 17% of the national population, see *Constructors Association of Western Pennsylvania* v. *Kreps*, 441 F. Supp. 936, 951 (WD Pa. 1977), aff'd, 573 F. 2d 811 (CA3 1978). The choice of a 10% set-aside thus falls roughly halfway

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Sen. Griffith); *id.*, at 40744 (remarks of Sen. Bayh). Senator Percy argued that the Plan was needed to redress discrimination against blacks in the construction industry. *Id.*, at 40742–40743. The day following the Senate vote to recede from its earlier position, Senator Kennedy noted "exceptionally blatant" racial discrimination in the construction trades. He commended the Senate's decision that "the Philadelphia Plan should be a useful and necessary tool for insuring equitable employment of minorities." *Id.*, at 41072.

between the present percentage of minority contractors and the percentage of minority group members in the Nation.

Although the set-aside is pegged at a reasonable figure, its effect might be unfair if it were applied rigidly in areas of the country where minority group members constitute a small percentage of the population. To meet this concern, Congress enacted a waiver provision into § 103 (f)(2). The factors governing issuance of a waiver include the availability of qualified minority contractors in a particular geographic area, the size of the locale's minority population, and the efforts made to find minority contractors. U. S. Dept. of Commerce, Local Public Works Program, Round II, Guidelines for 10% Minority Business Participation LPW Grants (1977); App. 165a–167a. We have been told that 1,261 waivers had been granted by September 9, 1979. Brief for Secretary of Commerce 62, n. 37.

C

A race-conscious remedy should not be approved without consideration of an additional crucial factor—the effect of the set-aside upon innocent third parties. See *Teamsters* v. *United States*, 431 U. S., at 374–375. In this case, the petitioners contend with some force that they have been asked to bear the burden of the set-aside even though they are innocent of wrongdoing. I do not believe, however, that their burden is so great that the set-aside must be disapproved. As noted above, Congress knew that minority contractors were receiving only 1% of federal contracts at the time the set-aside was enacted. The PWEA appropriated $4 billion for public work projects, of which it could be expected that approximately $400 million would go to minority contractors. The Court of Appeals calculated that the set-aside would reserve about 0.25% of all the funds expended yearly on construction work in the United States for approximately 4% of the Nation's contractors who are members of a minority group. 584 F. 2d., at 607–608. The set-aside would have

no effect on the ability of the remaining 96% of contractors to compete for 99.75% of construction funds. In my view, the effect of the set-aside is limited and so widely dispersed that its use is consistent with fundamental fairness.[13]

Consideration of these factors persuades me that the set-aside is a reasonably necessary means of furthering the compelling governmental interest in redressing the discrimination that affects minority contractors. Any marginal unfairness to innocent nonminority contractors is not sufficiently significant—or sufficiently identifiable—to outweigh the governmental interest served by § 103 (f)(2). When Congress acts to remedy identified discrimination, it may exercise discretion in choosing a remedy that is reasonably necessary to accomplish its purpose. Whatever the exact breadth of that discretion, I believe that it encompasses the selection of the set-aside in this case.[14]

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[13] Although I believe that the burden placed upon nonminority contractors is not unconstitutional, I reject the suggestion that it is legally irrelevant. Apparently on the theory that Congress could have enacted no set-aside and provided $400 million less in funding, the Secretary of Commerce argues that "[n]onminorities have lost no right or legitimate expectation by the addition of Section 103 (f)(2) to the 1976 Act." Brief for Secretary of Commerce 61. But the United States may not employ unconstitutional classifications, or base a decision upon unconstitutional considerations, when it provides a benefit to which a recipient is not legally entitled. Cf. *Califano* v. *Goldfarb*, 430 U. S. 199, 210–212 (1977) (opinion of BRENNAN, J.); *Richardson* v. *Belcher*, 404 U. S. 78, 81 (1971) ("To characterize an Act of Congress as conferring a 'public benefit' does not, of course, immunize it from scrutiny under the Fifth Amendment").

[14] Petitioners have suggested a variety of alternative programs that could be used in order to aid minority business enterprises in the construction industry. My view that this set-aside is within the discretion of Congress does not imply that other methods are unavailable to Congress. Nor do I conclude that use of a set-aside always will be an appropriate remedy or that the selection of a set-aside by any other governmental body would be constitutional. See *Bakke*, 438 U. S., at 309–310. The degree of specificity required in the findings of discrimination and the breadth of

V

In the history of this Court and this country, few questions have been more divisive than those arising from governmental action taken on the basis of race. Indeed, our own decisions played no small part in the tragic legacy of government-sanctioned discrimination. See *Plessy* v. *Ferguson*, 163 U. S. 537 (1896); *Dred Scott* v. *Sandford*, 19 How. 393 (1857). At least since the decision in *Brown* v. *Board of Education*, 347 U. S. 483 (1954), the Court has been resolute in its dedication to the principle that the Constitution envisions a Nation where race is irrelevant. The time cannot come too soon when no governmental decision will be based upon immutable characteristics of pigmentation or origin. But in our quest to achieve a society free from racial classification, we cannot ignore the claims of those who still suffer from the effects of identifiable discrimination.

Distinguishing the rights of all citizens to be free from racial classifications from the rights of some citizens to be made whole is a perplexing, but necessary, judicial task. When we first confronted such an issue in *Bakke*, I concluded that the Regents of the University of California were not competent to make, and had not made, findings sufficient to uphold the use of the race-conscious remedy they adopted. As my opinion made clear, I believe that the use of racial classifications, which are fundamentally at odds with the ideals of a democratic society implicit in the Due Process and Equal Protection Clauses, cannot be imposed simply to serve transient social or political goals, however worthy they may be. But the issue here turns on the scope of congressional power, and Congress has been given a unique constitutional role in the enforcement of the post-Civil War Amendments. In this case, where Congress determined that minority contractors were victims of purposeful discrimination and where

discretion in the choice of remedies may vary with the nature and authority of a governmental body.

Congress chose a reasonably necessary means to effectuate its purpose, I find no constitutional reason to invalidate § 103 (f)(2).[15]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN and MR. JUSTICE BLACKMUN join, concurring in the judgment.

My resolution of the constitutional issue in this case is governed by the separate opinion I coauthored in *University of California Regents* v. *Bakke*, 438 U. S. 265, 324–379 (1978). In my view, the 10% minority set-aside provision of the Public Works Employment Act of 1977 passes constitutional muster under the standard announced in that opinion.[1]

I

In *Bakke*, I joined my Brothers BRENNAN, WHITE, and BLACKMUN in articulating the view that "racial classifications are not *per se* invalid under [the Equal Protection Clause of] the Fourteenth Amendment." *Id.*, at 356 (opinion concurring in judgment in part and dissenting in part) (hereinafter cited as joint separate opinion).[2] We acknowledged that "a

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[15] Petitioners also contend that § 103 (f)(2) violates Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d *et seq.* Because I believe that the set-aside is constitutional, I also conclude that the program does not violate Title VI. See *Bakke*, 438 U. S., at 287 (opinion of POWELL, J.); *id.*, at 348–350 (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.).

[1] On the authority of *Bakke*, it is also clear to me that the set-aside provision does not violate Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d *et seq.* In *Bakke* five Members of the Court were of the view that the prohibitions of Title VI—which outlaws racial discrimination in any program or activity receiving federal financial assistance—are coextensive with the equal protection guarantee of the Fourteenth Amendment. See 438 U. S., at 328 (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.); *id.*, at 287 (opinion of POWELL, J.).

[2] In *Bakke*, the issue was whether a special minority admissions program of a state medical school violated the Equal Protection Clause of the Fourteenth Amendment. In the present case, the issue is whether the minority set-aside provision violates the equal protection component of

government practice or statute which . . . contains 'suspect classifications' is to be subjected to 'strict scrutiny' and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available." *Id.*, at 357. Thus, we reiterated the traditional view that racial classifications are prohibited if they are irrelevant. *Ibid.* In addition, we firmly adhered to "the cardinal principle that racial classifications that stigmatize—because they are drawn on the presumption that one race is inferior to another or because they put the weight of government behind racial hatred and separatism—are invalid without more." *Id.*, at 357–358.

We recognized, however, that these principles outlawing the irrelevant or pernicious use of race were inapposite to racial classifications that provide benefits to minorities for the purpose of remedying the present effects of past racial discrimination.[3] Such classifications may disadvantage some whites, but whites as a class lack the " 'traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.' " *Id.*, at 357 (quoting *San Antonio Independent School District* v. *Rodriguez*, 411 U. S. 1, 28 (1973)). See also *United States* v. *Carolene Products Co.*, 304 U. S.

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the Due Process Clause of the Fifth Amendment. As noted in *Bakke*, " '[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.' " *Id.*, at 367, n. 43 (joint separate opinion) (quoting *Buckley* v. *Valeo*, 424 U. S. 1, 93 (1976) (*per curiam*)).

[3] In *Bakke*, the Medical School of the University of California at Davis had adopted a special admissions program in which 16 out of the 100 places in each entering class were reserved for disadvantaged minorities. A major purpose of this program was to ameliorate the present effects of past racial discrimination. See 438 U. S., at 362 (joint separate opinion); *id.*, at 305–306 (opinion of POWELL, J.).

144, 152, n. 4 (1938). Because the consideration of race is relevant to remedying the continuing effects of past racial discrimination, and because governmental programs employing racial classifications for remedial purposes can be crafted to avoid stigmatization, we concluded that such programs should not be subjected to conventional "strict scrutiny"—scrutiny that is strict in theory, but fatal in fact. *Bakke, supra,* at 362 (joint separate opinion).

Nor did we determine that such programs should be analyzed under the minimally rigorous rational-basis standard of review. 438 U. S., at 358. We recognized that race has often been used to stigmatize politically powerless segments of society, and that efforts to ameliorate the effects of past discrimination could be based on paternalistic stereotyping, not on a careful consideration of modern social conditions. In addition, we acknowledged that governmental classification on the immutable characteristic of race runs counter to the deep national belief that state-sanctioned benefits and burdens should bear some relationship to individual merit and responsibility. *Id.,* at 360–361.

We concluded, therefore, that because a racial classification ostensibly designed for remedial purposes is susceptible to misuse, it may be justified only by showing "an important and articulated purpose for its use." *Id.,* at 361. "In addition, any statute must be stricken that stigmatizes any group or that singles out those least well represented in the political process to bear the brunt of a benign program." *Ibid.* In our view, then, the proper inquiry is whether racial classifications designed to further remedial purposes serve important governmental objectives and are substantially related to achievement of those objectives. *Id.,* at 359.

II

Judged under this standard, the 10% minority set-aside provision at issue in this case is plainly constitutional. Indeed, the question is not even a close one.

As MR. CHIEF JUSTICE BURGER demonstrates, see *ante*, at 456–467, it is indisputable that Congress' articulated purpose for enacting the set-aside provision was to remedy the present effects of past racial discrimination. See also the concurring opinion of my Brother POWELL, *ante*, at 503–506. Congress had a sound basis for concluding that minority-owned construction enterprises, though capable, qualified, and ready and willing to work, have received a disproportionately small amount of public contracting business because of the continuing effects of past discrimination. Here, as in *Bakke*, 438 U. S., at 362 (joint separate opinion), "minority underrepresentation is substantial and chronic, and . . . the handicap of past discrimination is impeding access of minorities to" the benefits of the governmental program. In these circumstances remedying these present effects of past racial discrimination is a sufficiently important governmental interest to justify the use of racial classification. *Ibid.* See generally *id.*, at 362–373.[4]

Because the means chosen by Congress to implement the set-aside provision are substantially related to the achieve-

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[4] Petitioners argue that the set-aside is invalid because Congress did not create a sufficient legislative record to support its conclusion that racial classifications were required to ameliorate the present effects of past racial discrimination. In petitioners' view, Congress must make particularized findings that past violations of the Equal Protection Clause and antidiscrimination statutes have a current effect on the construction industry.

This approach is fundamentally misguided. Unlike the courts, Congress is engaged in the broad mission of framing general social rules, not adjudicating individual disputes. Our prior decisions recognize Congress' authority to "require or authorize preferential treatment for those likely disadvantaged by societal racial discrimination. Such legislation has been sustained even without a requirement of findings of intentional racial discrimination by those required or authorized to accord preferential treatment, or a case-by-case determination that those to be benefited suffered from racial discrimination." *Bakke*, 438 U. S., at 366 (joint separate opinion).

See also *ante*, at 478; the concurring opinion of my Brother POWELL, *ante*, at 502–503.

ment of its remedial purpose, the provision also meets the second prong of our *Bakke* test. Congress reasonably determined that race-conscious means were necessary to break down the barriers confronting participation by minority enterprises in federally funded public works projects. That the set-aside creates a quota in favor of qualified and available minority business enterprises does not necessarily indicate that it stigmatizes. As our opinion stated in *Bakke*, "[f]or purposes of constitutional adjudication, there is no difference between" setting aside "a predetermined number of places for qualified minority applicants rather than using minority status as a positive factor to be considered in evaluating the applications of disadvantaged minority applicants." *Id.*, at 378. The set-aside, as enacted by Congress and implemented by the Secretary of Commerce, is carefully tailored to remedy racial discrimination while at the same time avoiding stigmatization and penalizing those least able to protect themselves in the political process. See *ante*, at 480–489. Cf. the concurring opinion of my Brother POWELL, *ante*, at 508–515. Since under the set-aside provision a contract may be awarded to a minority enterprise only if it is qualified to do the work, the provision stigmatizes as inferior neither a minority firm that benefits from it nor a nonminority firm that is burdened by it. Nor does the set-aside "establish a quota in the invidious sense of a ceiling," *Bakke*, *supra*, at 375 (joint separate opinion), on the number of minority firms that can be awarded public works contracts. In addition, the set-aside affects only a miniscule amount of the funds annually expended in the United States for construction work. See *ante*, at 484–485, n. 72.

In sum, it is clear to me that the racial classifications employed in the set-aside provision are substantially related to the achievement of the important and congressionally articulated goal of remedying the present effects of past racial discrimination. The provision, therefore, passes muster under the equal protection standard I adopted in *Bakke*.

III

In my separate opinion in *Bakke*, 438 U. S., at 387–396, I recounted the "ingenious and pervasive forms of discrimination against the Negro" long condoned under the Constitution and concluded that "[t]he position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment." *Id.*, at 387, 395. I there stated:

> "It is because of a legacy of unequal treatment that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence, and prestige in America. For far too long, the doors to those positions have been shut to Negroes. If we are ever to become a fully integrated society, one in which the color of a person's skin will not determine the opportunities available to him or her, we must be willing to take steps to open those doors." *Id.*, at 401–402.

Those doors cannot be fully opened without the acceptance of race-conscious remedies. As my Brother BLACKMUN observed in *Bakke:* "In order to get beyond racism, we must first take account of race. There is no other way." *Id.*, at 407 (separate opinion).

Congress recognized these realities when it enacted the minority set-aside provision at issue in this case. Today, by upholding this race-conscious remedy, the Court accords Congress the authority necessary to undertake the task of moving our society toward a state of meaningful equality of opportunity, not an abstract version of equality in which the effects of past discrimination would be forever frozen into our social fabric. I applaud this result. Accordingly, I concur in the judgment of the Court.

MR. JUSTICE STEWART, with whom MR. JUSTICE REHNQUIST joins, dissenting.

"Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. . . . The law regards man

as man, and takes no account of his surroundings or of his color. . . ." Those words were written by a Member of this Court 84 years ago. *Plessy* v. *Ferguson*, 163 U. S. 537, 559 (Harlan, J., dissenting). His colleagues disagreed with him, and held that a statute that required the separation of people on the basis of their race was constitutionally valid because it was a "reasonable" exercise of legislative power and had been "enacted in good faith for the promotion [of] the public good. . . ." *Id.*, at 550. Today, the Court upholds a statute that accords a preference to citizens who are "Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts," for much the same reasons. I think today's decision is wrong for the same reason that *Plessy* v. *Ferguson* was wrong, and I respectfully dissent.

A

The equal protection standard of the Constitution has one clear and central meaning—it absolutely prohibits invidious discrimination by government. That standard must be met by every State under the Equal Protection Clause of the Fourteenth Amendment. *Loving* v. *Virginia*, 388 U. S. 1, 10; *Hill* v. *Texas*, 316 U. S. 400; *Strauder* v. *West Virginia*, 100 U. S. 303, 307–308; *Slaughter-House Cases*, 16 Wall. 36, 71–72. And that standard must be met by the United States itself under the Due Process Clause of the Fifth Amendment. *Washington* v. *Davis*, 426 U. S. 229, 239; *Bolling* v. *Sharpe*, 347 U. S. 497.[1] Under our Constitution, any official action that treats a person differently on account of his race or ethnic origin is inherently suspect and presumptively invalid. *McLaughlin* v. *Florida*, 379 U. S. 184, 192; *Bolling* v. *Sharpe*, *supra*, at 499; *Korematsu* v. *United States*, 323 U. S. 214, 216.[2]

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[1] "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." *Buckley* v. *Valeo*, 424 U. S. 1, 93.

[2] By contrast, nothing in the Constitution prohibits a private person from discriminating on the basis of race in his personal or business affairs. See *Steelworkers* v. *Weber*, 443 U. S. 193. The Fourteenth Amendment

The hostility of the Constitution to racial classifications by government has been manifested in many cases decided by this Court. See, *e. g.*, *Loving* v. *Virginia*, *supra*; *McLaughlin* v. *Florida*, *supra*; *Brown* v. *Board of Education*, 347 U. S. 483; *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337. And our cases have made clear that the Constitution is wholly neutral in forbidding such racial discrimination, whatever the race may be of those who are its victims. In *Anderson* v. *Martin*, 375 U. S. 399, for instance, the Court dealt with a state law that required that the race of each candidate for election to public office be designated on the nomination papers and ballots. Although the law applied equally to candidates of whatever race, the Court held that it nonetheless violated the constitutional standard of equal protection. "We see *no relevance*," the Court said, "in the State's pointing up the race of the candidate as bearing upon his qualifications for office." *Id.*, at 403 (emphasis added). Similarly, in *Loving* v. *Virginia*, *supra*, and *McLaughlin* v. *Florida*, *supra*, the Court held that statutes outlawing miscegenation and interracial cohabitation were constitutionally invalid, even though the laws penalized all violators equally. The laws were unconstitutional for the simple reason that they penalized individuals solely because of their race, whatever their race might be. See also *Goss* v. *Board of Education*, 373 U. S. 683; *Buchanan* v. *Warley*, 245 U. S. 60.[3]

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limits only the actions of the States; the Fifth Amendment limits only the actions of the National Government.

[3] *University of California Regents* v. *Bakke*, 438 U. S. 265, and *United Jewish Organizations* v. *Carey*, 430 U. S. 144, do not suggest a different rule. The Court in *Bakke* invalidated the racially preferential admissions program that had deprived Bakke of equal access to a place in the medical school of a state university. In *United Jewish Organizations* v. *Carey*, a state legislature had apportioned certain voting districts with an awareness of their racial composition. Since the plaintiffs there had "failed to show that the legislative reapportionment plan had either the purpose or the effect of discriminating against them on the basis of their race," no

This history contains one clear lesson. Under our Constitution, the government may never act to the detriment of a person solely because of that person's race.[4] The color of a person's skin and the country of his origin are immutable facts that bear no relation to ability, disadvantage, moral culpability, or any other characteristics of constitutionally permissible interest to government. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi* v. *United States*, 320 U. S. 81, 100, quoted in *Loving* v. *Virginia, supra*, at 11.[5]

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constitutional violation had occurred. 430 U. S., at 179–180 (concurring opinion). No person in that case was deprived of his electoral franchise.

More than 35 years ago, during the Second World War, this Court did find constitutional a governmental program imposing injury on the basis of race. See *Korematsu* v. *United States*, 323 U. S. 214; *Hirabayashi* v. *United States*, 320 U. S. 81. Significantly, those cases were decided not only in time of war, but in an era before the Court had held that the Due Process Clause of the Fifth Amendment imposes the same equal protection standard upon the Federal Government that the Fourteenth Amendment imposes upon the States. See *Bolling* v. *Sharpe*, 347 U. S. 497.

[4] A court of equity may, of course, take race into account in devising a remedial decree to undo a violation of a law prohibiting discrimination on the basis of race. See *Teamsters* v. *United States*, 431 U. S. 324; *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747; *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 18–32. But such a judicial decree, following litigation in which a violation of law has been determined, is wholly different from generalized legislation that awards benefits and imposes detriments dependent upon the race of the recipients. See text in Part B, *infra*.

[5] As Mr. Justice Murphy wrote in dissenting from the Court's opinion and judgment in *Korematsu* v. *United States, supra*, at 242:

"Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States."

See also *DeFunis* v. *Odegaard*, 416 U. S. 312, 331–344 (Douglas, J., dissenting); A. Bickel, The Morality of Consent 132–133 (1975).

In short, racial discrimination is by definition individious discrimination.

The rule cannot be any different when the persons injured by a racially biased law are not members of a racial minority. The guarantee of equal protection is "universal in [its] application, to all persons . . . without regard to any differences of race, of color, or of nationality." *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369. See *In re Griffiths*, 413 U. S. 717; *Hernandez* v. *Texas*, 347 U. S. 475; *Truax* v. *Raich*, 239 U. S. 33, 39–43; *Strauder* v. *West Virginia*, 100 U. S., at 308. The command of the equal protection guarantee is simple but unequivocal: In the words of the Fourteenth Amendment: "No State shall . . . deny to *any* person . . . the equal protection of the laws." Nothing in this language singles out some "persons" for more "equal" treatment than others. Rather, as the Court made clear in *Shelley* v. *Kraemer*, 334 U. S. 1, 22, the benefits afforded by the Equal Protection Clause "are, by its terms, guaranteed to the individual. [They] are personal rights." From the perspective of a person detrimentally affected by a racially discriminatory law, the arbitrariness and unfairness is entirely the same, whatever his skin color and whatever the law's purpose, be it purportedly "for the promotion of the public good" or otherwise.

No one disputes the self-evident proposition that Congress has broad discretion under its spending power to disburse the revenues of the United States as it deems best and to set conditions on the receipt of the funds disbursed. No one disputes that Congress has the authority under the Commerce Clause to regulate contracting practices on federally funded public works projects, or that it enjoys broad powers under § 5 of the Fourteenth Amendment "to enforce by appropriate legislation" the provisions of that Amendment. But these self-evident truisms do not begin to answer the question before us in this case. For in the exercise of its powers, Congress must obey the Constitution just as the legislatures of all the States must obey the Constitution in the exercise of their

powers. If a law is unconstitutional, it is no less unconstitutional just because it is a product of the Congress of the United States.

B

On its face, the minority business enterprise (MBE) provision at issue in this case denies the equal protection of the law. The Public Works Employment Act of 1977 directs that all project construction shall be performed by those private contractors who submit the lowest competitive bids and who meet established criteria of responsibility. 42 U. S. C. § 6705 (e)(1) (1976 ed., Supp. II). One class of contracting firms—defined solely according to the racial and ethnic attributes of their owners—is, however, excepted from the full rigor of these requirements with respect to a percentage of each federal grant. The statute, on its face and in effect, thus bars a class to which the petitioners belong from having the opportunity to receive a government benefit, and bars the members of that class solely on the basis of their race or ethnic background. This is precisely the kind of law that the guarantee of equal protection forbids.

The Court's attempt to characterize the law as a proper remedial measure to counteract the effects of past or present racial discrimination is remarkably unconvincing. The Legislative Branch of government is not a court of equity. It has neither the dispassionate objectivity nor the flexibility that are needed to mold a race-conscious remedy around the single objective of eliminating the effects of past or present discrimination.[6]

But even assuming that Congress has the power, under § 5 of the Fourteenth Amendment or some other constitutional pro-

[6] See n. 4, *supra*. In *McDaniel* v. *Barresi*, 402 U. S. 39, the Court approved a county's voluntary race-conscious redrafting of its public school pupil assignment system in order to eliminate the effects of past unconstitutional racial segregation of the pupils. But no pupil was deprived of a public school education as a result.

vision, to remedy previous illegal racial discrimination, there is no evidence that Congress has in the past engaged in racial discrimination in its disbursement of federal contracting funds. The MBE provision thus pushes the limits of any such justification far beyond the equal protection standard of the Constitution. Certainly, nothing in the Constitution gives Congress any greater authority to impose detriments on the basis of race than is afforded the Judicial Branch.[7] And a judicial decree that imposes burdens on the basis of race can be upheld only where its sole purpose is to eradicate the actual effects of illegal race discrimination. See *Pasadena City Board of Education* v. *Spangler*, 427 U. S. 424.

The provision at issue here does not satisfy this condition. Its legislative history suggests that it had at least two other objectives in addition to that of counteracting the effects of past or present racial discrimination in the public works construction industry.[8] One such purpose appears to have been to as-

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[7] Section 2 of the Thirteenth Amendment gives Congress the authority to "enforce" the provisions of § 1 of the same Amendment, and § 5 of the Fourteenth Amendment provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Neither section grants to Congress the authority to require the States to flout their obligation under § 1 of the Fourteenth Amendment to afford "the equal protection of the laws" or the power to enact legislation that itself violates the equal protection component of the Fifth Amendment.

[8] The legislative history of the MBE provision itself contains not one mention of racial discrimination or the need to provide a mechanism to correct the effects of such discrimination. From the context of the Act, however, it is reasonable to infer that the program was enacted, at least in part, to remedy perceived past and present racial discrimination. In 1977 Congress knew that many minority business enterprises had historically suffered racial discrimination in the economy as a whole and in the construction industry in particular. See H. R. Rep. No. 94–1791, pp. 182–183 (1977); H. R. Rep. No. 94–468, pp. 1–2 (1975); To Amend and Extend the Local Public Works Capital Development and Investment Act: Hearings on H. R. 11 and Related Bills before the Subcommittee on Economic Development of the House Committee on Public Works and

sure to minority contractors a certain percentage of federally funded public works contracts.[9] But, since the guarantee of equal protection immunizes from capricious governmental treatment "persons"—not "races," it can never countenance laws that seek racial balance as a goal in and of itself. "Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." *University of California Regents* v. *Bakke*, 438 U. S. 265, 307 (opinion of POWELL, J.). Second, there are indications that the MBE provision may have been enacted to compensate for the effects of social, educational, and economic "disadvantage."[10] No race, however, has a monopoly on social, educational, or eco-

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Transportation, 95th Cong., 1st Sess., 939 (1977) (statement of Rep. Conyers). Some of this discrimination may well, in fact, have violated one or more of the state and federal antidiscrimination laws.

[9] See 123 Cong. Rec. 5327 (1977) (Rep. Mitchell) ("all [the MBE provision] attempts to do is to provide that those who are in minority businesses get a *fair share of the action* from this public works legislation") (emphasis supplied). Moreover, sponsors of the legislation repeatedly referred to the low participation rate of minority businesses in federal procurement programs. See *id.*, at 5331 (Rep. Biaggi); *id.*, at 5327–5328 (Rep. Mitchell); *id.*, at 5097–5098 (Rep. Mitchell); *id.*, at 7156 (Sen. Brooke).

[10] See *id.*, at 5330 (Rep. Conyers) ("minority contractors and businessmen who are trying to enter in on the bidding process . . . get the 'works' almost every time. The bidding process is one whose intricacies defy the imaginations of most of us here"). That the elimination of "disadvantage" is one of the program's objectives is an inference that finds support in the agency's own interpretation of the statute. See U. S. Dept. of Commerce, Economic Development Administration, EDA Minority Business Enterprise Technical Bulletin (Additional Assistance and Information Available to Grantees and Their Contractors In Meeting The 10% MBE Requirement) 9–10 (1977) (Technical Bulletin) ("a [minority] subcontractor's price should not be considered unreasonable if he is merely trying to cover his costs because the price results from *disadvantage* which affects the MBE's costs of doing business *or* results from *discrimination*" (emphasis added)).

nomic disadvantage,[11] and any law that indulges in such a presumption clearly violates the constitutional guarantee of equal protection. Since the MBE provision was in whole or in part designed to effectuate objectives other than the elimination of the effects of racial discrimination, it cannot stand as a remedy that comports with the strictures of equal protection, even if it otherwise could.[12]

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[11] For instance, in 1978, 83.4% of persons over the age of 25 who had not completed high school were "white," see U. S. Dept. of Commerce Bureau of the Census, Statistical Abstract of the United States 145 (1979), and in 1977, 79.0% of households with annual incomes of less than $5,000 were "white," see *id.*, at 458.

[12] Moreover, even a properly based judicial decree will be struck down if the scope of the remedy it provides is not carefully tailored to fit the nature and extent of the violation. See *Dayton Board of Education* v. *Brinkman*, 433 U. S. 406, 419–420; *Milliken* v. *Bradley*, 418 U. S. 717. Here, assuming that the MBE provision was intended solely as a remedy for past and present racial discrimination, it sweeps far too broadly. It directs every state and local government covered by the program to set aside 10% of its grant for minority business enterprises. Waivers from that requirement are permitted, but only where insufficient numbers of minority businesses capable of doing the work at nonexorbitant prices are located in the relevant contracting area. No waiver is provided for any governmental entity that can prove a history free of racial discrimination. Nor is any exemption permitted for nonminority contractors that are able to demonstrate that they have not engaged in racially discriminatory behavior. Finally, the statute makes no attempt to direct the aid it provides solely toward those minority contracting firms that arguably still suffer from the effects of past or present discrimination.

These are not the characteristics of a racially conscious remedial decree that is closely tailored to the evil to be corrected. In today's society, it constitutes far too gross an oversimplification to assume that every single Negro, Spanish-speaking citizen, Oriental, Indian, Eskimo, and Aleut potentially interested in construction contracting currently suffers from the effects of past or present racial discrimination. Since the MBE set-aside must be viewed as resting upon such an assumption, it necessarily paints with too broad a brush. Except to make whole the identified victims of racial discrimination, the guarantee of equal protection prohibits the government from taking detrimental action against innocent people on the basis of the sins of others of their own race.

C

The Fourteenth Amendment was adopted to ensure that every person must be treated equally by each State regardless of the color of his skin. The Amendment promised to carry to its necessary conclusion a fundamental principle upon which this Nation had been founded—that the law would honor no preference based on lineage.[13] Tragically, the promise of 1868 was not immediately fulfilled, and decades passed before the States and the Federal Government were finally directed to eliminate detrimental classifications based on race. Today, the Court derails this achievement and places its imprimatur on the creation once again by government of privileges based on birth.

The Court, moreover, takes this drastic step without, in my opinion, seriously considering the ramifications of its decision. Laws that operate on the basis of race require definitions of race. Because of the Court's decision today, our statute books will once again have to contain laws that reflect the odious practice of delineating the qualities that make one person a Negro and make another white.[14] Moreover, racial discrimination, even "good faith" racial discrimination, is inevitably a two-edged sword. "[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth." *University of California Regents* v. *Bakke, supra,* at 298 (opin-

[13] The Framers of our Constitution lived at a time when the Old World still operated in the shadow of ancient feudal traditions. As products of the Age of Enlightenment, they set out to establish a society that recognized no distinctions among white men on account of their birth. See U. S. Const., Art. I, § 9, cl. 8 ("No Title of Nobility shall be granted by the United States"). The words Thomas Jefferson wrote in 1776 in the Declaration of Independence, however, contained the seeds of a far broader principle: "We hold these truths to be self-evident: that all men are created equal. . . ."

[14] See Technical Bulletin, *supra* n. 10, at 1. Cf., Ga. Code § 53-312 (1937); Tex. Penal Code, Art. 493 (Vernon 1938).

ion of POWELL, J.). Most importantly, by making race a relevant criterion once again in its own affairs the Government implicitly teaches the public that the apportionment of rewards and penalties can legitimately be made according to race—rather than according to merit or ability—and that people can, and perhaps should, view themselves and others in terms of their racial characteristics. Notions of "racial entitlement" will be fostered, and private discrimination will necessarily be encouraged.[15] See *Hughes* v. *Superior Court*, 339 U. S. 460, 463–464; T. Eastland & W. Bennett, Counting by Race 139–170 (1979); Van Alstyne, Rites of Passage: Race, the Supreme Court, and the Constitution, 46 U. Chi. L. Rev. 775 (1979).

There are those who think that we need a new Constitution, and their views may someday prevail. But under the Constitution we have, one practice in which government may never engage is the practice of racism—not even "temporarily" and not even as an "experiment."

For these reasons, I would reverse the judgment of the Court of Appeals.

MR. JUSTICE STEVENS, dissenting.

The 10% set-aside contained in the Public Works Employment Act of 1977, 91 Stat. 116 (Act), creates monopoly privileges in a $400 million market for a class of investors defined solely by racial characteristics. The direct beneficiaries of these monopoly privileges are the relatively small number of persons within the racial classification who represent the entrepreneurial subclass—those who have, or can borrow, working capital.

History teaches us that the costs associated with a sovereign's grant of exclusive privileges often encompass more

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[15] "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example." *Olmstead* v. *United States*, 277 U. S. 438, 485 (Brandeis, J., dissenting).

than the high prices and shoddy workmanship that are familiar handmaidens of monopoly; they engender animosity and discontent as well. The economic consequences of using noble birth as a basis for classification in 18th-century France, though disastrous, were nothing as compared with the terror that was engendered in the name of "égalité" and "fraternité." Grants of privilege on the basis of characteristics acquired at birth are far from an unmixed blessing.

Our historic aversion to titles of nobility[1] is only one aspect of our commitment to the proposition that the sovereign has a fundamental duty to govern impartially.[2] When government accords different treatment to different persons, there must be a reason for the difference.[3] Because racial

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[1] "Such pure discrimination is most certainly not a 'legitimate purpose' for our Federal Government, which should be especially sensitive to discrimination on grounds of birth. 'Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.' *Hirabayashi* v. *United States*, 320 U. S. 81, 100. From its inception, the Federal Government has been directed to treat all its citizens as having been 'created equal' in the eyes of the law. The Declaration of Independence states:

"'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.'

"And the rationale behind the prohibition against the grant of any title of nobility by the United States, see U. S. Const., Art. I, § 9, cl. 8, equally would prohibit the United States from attaching any badge of ignob[illegible] to a citizen at birth." *Mathews* v. *Lucas*, 427 U. S. 495, 520–521, [illegible] (STEVENS, J., dissenting).

[2] "The federal sovereign, like the States, must govern impartia[illegible]. The concept of equal justice under law is served by the Fifth Amendment's guarantee of due process, as well as by the Equal Protection Clause of the Fourteenth Amendment." *Hampton* v. *Mow Sun Wong*, 426 U. S. 88, 100.

See also *Harris* v. *McRae*, *ante*, at 349, 356–357 (STEVENS, J., dissenting); *Craig* v. *Boren*, 429 U. S. 190, 211 (STEVENS, J., concurring).

[3] "As a matter of principle and in view of my attitude toward the equal

characteristics so seldom provide a relevant basis for disparate treatment,[4] and because classifications based on race are potentially so harmful to the entire body politic,[5] it is espe-

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protection clause, I do not think differences of treatment under law should be approved on classification because of differences unrelated to the legislative purposes. The equal protection clause ceases to assure either equality or protection if it is avoided by any conceivable difference that can be pointed out between those bound and those left free. This Court has often announced the principle that the differentiation must have an appropriate relation to the object of the legislation or ordinance." *Railway Express Agency* v. *New York*, 336 U. S. 106, 115 (Jackson, J., concurring).

[4] "Habit, rather than analysis, makes it seem acceptable and natural to distinguish between male and female, alien and citizens, legitimate and illegitimate; for too much of our history there was the same inertia in distinguishing between black and white. But that sort of stereotyped reaction may have no rational relationship—other than pure prejudicial discrimination—to the stated purpose for which the classification is being made." *Mathews* v. *Lucas, supra,* at 520–521 (STEVENS, J., dissenting) (footnote omitted).

[5] Indeed, the very attempt to define with precision a beneficiary's qualifying racial characteristics is repugnant to our constitutional ideals. The so-called guidelines developed by the Economic Development Administration, see the appendix to the opinion of THE CHIEF JUSTICE, ¶ 3, *ante,* at 494–495, are so general as to be fairly innocuous; as a consequence they are too vague to be useful. For example, it is unclear whether the firm described in n. 16, *infra,* would be eligible for the 10% set-aside. If the National Government is to make a serious effort to define racial classes by criteria that can be administered objectively, it must study precedents such as the First Regulation to the Reichs Citizenship Law of November 14, 1935, translated in 4 Nazi Conspiracy and Aggression, Document No. 1417-PS, pp. 8–9 (1946):

"On the basis of Article 3, Reichs Citizenship Law, of 15 Sept. 1935 (RGB1. I, page 146) the following is ordered:

. . . . .

"Article 5

"1. A Jew is anyone who descended from at least three grandparents who were racially full Jews. Article 2, par. 2, second sentence will apply.

"2. A Jew is also one who descended from two full Jewish parents, if: (a) he belonged to the Jewish religious community at the time this law

cially important that the reasons for any such classification be clearly identified and unquestionably legitimate.

The statutory definition of the preferred class includes "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts." All aliens and all nonmembers of the racial class are excluded. No economic, social, geographical, or historical criteria are relevant for exclusion or inclusion. There is not one word in the remainder of the Act or in the legislative history that explains why any Congressman or Senator favored this particular definition over any other or that identifies the common characteristics that every member of the preferred class was believed to share.[6] Nor does the Act or its history ex-

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was issued, or who joined the community later; (b) he was married to a Jewish person, at the time the law was issued, or married one subsequently; (c) he is the offspring from a marriage with a Jew, in the sense of Section 1, which was contracted after the Law for the protection of German blood and German honor became effective (RGBl. I, page 1146 of 15 Sept. 1935); (d) he is the offspring of an extramarital relationship, with a Jew, according to Section 1, and will be born out of wedlock after July 31, 1936."

[6] In 1968, almost 10 years before the Act was passed, the Small Business Administration had developed a program to assist small business concerns owned or controlled by "socially or economically disadvantaged persons." The agency's description of persons eligible for such assistance stated that such "persons include, but are not limited to, black Americans, American Indians, Spanish-Americans, oriental Americans, Eskimos and Aleuts. . . ." See opinion of THE CHIEF JUSTICE, *ante*, at 463–464. This may be the source of the definition of the class at issue in this case. See also *ante*, at 487–488, n. 73. But the SBA's class of socially or economically disadvantaged persons neither included all persons in the racial class nor excluded all nonmembers of the racial class. Race was used as no more than a factor in identifying the class of the disadvantaged. The difference between the statutory quota involved in this case and the SBA's 1968 description of those whose businesses were to be assisted under § 8 (a) of the Small Business Act is thus at least as great as the difference between the University of California's racial quota and the Harvard ad-

plain why 10% of the total appropriation was the proper amount to set aside for investors in each of the six racial subclasses.[7]

Four different, though somewhat interrelated, justifications for the racial classification in this Act have been advanced: first, that the 10% set-aside is a form of reparation for past injuries to the entire membership of the class; second, that it is an appropriate remedy for past discrimination against minority business enterprises that have been denied access to public contracts; third, that the members of the favored class have a special entitlement to "a piece of the action" when government is distributing benefits; and, fourth, that the program is an appropriate method of fostering greater minority participation in a competitive economy. Each of these asserted justifications merits separate scrutiny.

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missions system that MR. JUSTICE POWELL regarded as critical in *University of California Regents* v. *Bakke*, 438 U. S. 265, 315–318.

[7] It was noted that the value of the federal contracts awarded to minority business firms in prior years had amounted to less than 1% of the total; since the statutory set-aside of 10% may be satisfied by subcontracts to minority business enterprises, it is possible that compliance with the statute would not change the 1% figure.

The legislative history also revealed that minority business enterprises represented about 3 or 4% of all eligible firms; the history does not indicate, however, whether the 10% figure was intended to provide the existing firms with three times as much business as they could expect to receive on a random basis or to encourage members of the class to acquire or form new firms. An Economic Development Administration guideline arguably implies that new investments made in order to take advantage of the 10% set-aside would not be considered "bona fide." See appendix to the opinion of THE CHIEF JUSTICE, *ante*, at 492.

The 10% figure bears no special relationship to the relative size of the entire racial class, to any of the six subclasses, or to the population of the subclasses in the areas where they primarily reside. The Aleuts and the Eskimos, for example, respectively represent less than 1% and 7% of the population of Alaska, see The New Columbia Encyclopedia 47, 59, 891 (4th ed. 1975), while Spanish-speaking or Negro citizens represent a majority or almost a majority in a large number of urban areas.

I

Racial characteristics may serve to define a group of persons who have suffered a special wrong and who, therefore, are entitled to special reparations. Congress has recognized, for example, that the United States has treated some Indian tribes unjustly and has created procedures for allowing members of the injured classes to obtain classwide relief. See, *e. g., Delaware Tribal Business Committee* v. *Weeks,* 430 U. S. 73. But as I have formerly suggested, if Congress is to authorize a recovery for a class of similarly situated victims of a past wrong, it has an obligation to distribute that recovery among the members of the injured class in an even-handed way. See *id.,* at 97–98 (STEVENS, J., dissenting). Moreover, in such a case the amount of the award should bear some rational relationship to the extent of the harm it is intended to cure.

In his eloquent separate opinion in *University of California Regents* v. *Bakke,* 438 U. S. 265, 387, MR. JUSTICE MARSHALL recounted the tragic class-based discrimination against Negroes that is an indelible part of America's history. I assume that the wrong committed against the Negro class is both so serious and so pervasive that it would constitutionally justify an appropriate classwide recovery measured by a sum certain for every member of the injured class. Whether our resources are adequate to support a fair remedy of that character is a policy question I have neither the authority nor the wisdom to address. But that serious classwide wrong cannot in itself justify the particular classification Congress has made in this Act. Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification. Quite obviously, the history of discrimination against black citizens in America cannot justify a grant of privileges to Eskimos or Indians.

Even if we assume that each of the six racial subclasses has suffered its own special injury at some time in our his-

tory, surely it does not necessarily follow that each of those subclasses suffered harm of identical magnitude. Although "the Negro was dragged to this country in chains to be sold in slavery," *Bakke, supra,* at 387 (opinion of MARSHALL, J.), the "Spanish-speaking" subclass came voluntarily, frequently without invitation, and the Indians, the Eskimos and the Aleuts had an opportunity to exploit America's resources before the ancestors of most American citizens arrived. There is no reason to assume, and nothing in the legislative history suggests, much less demonstrates, that each of the subclasses is equally entitled to reparations from the United States Government.[8]

At best, the statutory preference is a somewhat perverse form of reparation for the members of the injured classes. For those who are the most disadvantaged within each class are the least likely to receive any benefit from the special privilege even though they are the persons most likely still to be suffering the consequences of the past wrong.[9] A ran-

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[8] Ironically, the Aleuts appear to have been ruthlessly exploited at some point in their history by Russian fur traders. See The New Columbia Encyclopedia, *supra,* at 59.

[9] For a similar reason, the discrimination against males condemned in *Califano* v. *Goldfarb,* 430 U. S. 199, could not be justified as a remedy for past discrimination against females. That case involved a statutory provision which relieved widows from the obligation of proving dependency on their deceased spouses in order to obtain benefits, but did not similarly relieve widowers.

"The widows who benefit from the disparate treatment are those who were sufficiently successful in the job market to become nondependent on their husbands. Such a widow is the least likely to need special benefits. The widow most in need is the one who is 'suddenly forced into a job market with which she is unfamiliar, and in which, because of her former economic dependency, she will have fewer skills to offer.' [*Kahn* v. *Shevin,* 416 U. S. 351,] 354. To accept the *Kahn* justification we must presume that Congress deliberately gave a special benefit to those females least likely to have been victims of the historic discrimination discussed in *Kahn.*" *Id.,* at 221 (STEVENS, J., concurring in judgment).

dom distribution to a favored few is a poor form of compensation for an injury shared by many.

My principal objection to the reparation justification for this legislation, however, cuts more deeply than my concern about its inequitable character. We can never either erase or ignore the history that MR. JUSTICE MARSHALL has recounted. But if that history can justify such a random distribution of benefits on racial lines as that embodied in this statutory scheme, it will serve not merely as a basis for remedial legislation, but rather as a permanent source of justification for grants of special privileges. For if there is no duty to attempt either to measure the recovery by the wrong or to distribute that recovery within the injured class in an evenhanded way, our history will adequately support a legislative preference for almost any ethnic, religious, or racial group with the political strength to negotiate "a piece of the action" for its members.

Although I do not dispute the validity of the assumption that each of the subclasses identified in the Act has suffered a severe wrong at some time in the past, I cannot accept this slapdash statute as a legitimate method of providing class-wide relief.

II

The Act may also be viewed as a much narrower remedial measure—one designed to grant relief to the specific minority business enterprises that have been denied access to public contracts by discriminatory practices.

The legislative history of the Act does not tell us when, or how often, any minority business enterprise was denied such access. Nevertheless, it is reasonable to infer that the number of such incidents has been relatively small in recent years. For, as noted by the Solicitor General, in the last 20 years Congress has enacted numerous statutes designed to eliminate discrimination and its effects from federally funded

programs.[10] Title VI of the Civil Rights Act of 1964 unequivocally and comprehensively prohibits discrimination on the basis of race in any program or activity receiving federal financial assistance. In view of the scarcity of litigated claims on behalf of minority business enterprises during this period, and the lack of any contrary evidence in the legislative record, it is appropriate to presume that the law has generally been obeyed.

Assuming, however, that some firms have been denied public business for racial reasons, the instant statutory remedy is nevertheless demonstrably much broader than is necessary to right any such past wrong. For the statute grants the special preference to a class that includes (1) those minority-owned firms that have successfully obtained business in the past on a free competitive basis and undoubtedly are capable of doing so in the future as well; (2) firms that have never attempted to obtain any public business in the past; (3) firms that were initially formed after the Act was passed, including those that may have been organized simply to take advantage of its provisions;[11] (4) firms that have tried to obtain public business but were unsuccessful for reasons that are unrelated to the racial characteristics of their stockholders;

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[10] "The statute with the most comprehensive coverage is Title VI of the Civil Rights Act of 1964, 42 U. S. C. 2000d *et seq.*, which broadly prohibits discrimination on the basis of race, color, or national origin in any program or activity receiving federal financial assistance. Since the passage of Title VI, many other specific federal grant statutes have contained similar prohibitions against discrimination in particular funded activities. See, *e. g.*, State and Local Fiscal Assistance Amendments of 1976, 31 U. S. C. 1242; Energy Conservation and Production Act, 42 U. S. C. 6870; Housing and Community Development Act of 1974, 42 U. S. C. 5309; Comprehensive Employment and Training Act of 1973, 29 U. S. C. 991." Brief for Secretary of Commerce 21, n. 7.

[11] Although the plain language of the statute appears to include such firms, as I have already noted, n. 7, *supra*, the EDA guidelines may consider such newly formed firms ineligible for the statutory set-aside

and (5) those firms that have been victimized by racial discrimination.

Since there is no reason to believe that any of the firms in the first four categories had been wrongfully excluded from the market for public contracts, the statutory preference for those firms cannot be justified as a remedial measure. And since a judicial remedy was already available for the firms in the fifth category,[12] it seems inappropriate to regard the preference as a remedy designed to redress any specific wrongs.[13] In any event, since it is highly unlikely that the composition of the fifth category is at all representative of the entire class of firms to which the statute grants a valuable preference, it is ill-fitting to characterize this as a "narrowly tailored" remedial measure.[14]

III

The legislative history of the Act discloses that there is a group of legislators in Congress identified as the "Black Caucus" and that members of that group argued that if the Federal Government was going to provide $4 billion of new

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[12] See *University of California Regents* v. *Bakke*, 438 U. S., at 418–421 (opinion of STEVENS, J.). See also § 207 (d) of the Public Works Employment Act of 1976, 90 Stat. 1008, 42 U. S. C. § 6727 (d).

[13] I recognize that the EDA has issued a Technical Bulletin, relied on heavily by THE CHIEF JUSTICE, *ante*, at 469–472, which distinguishes between higher bids quoted by minority subcontractors which are attributable to the effects of disadvantage or discrimination and those which are not. That is, according to the Bulletin, if it is determined that a subcontractor's uncompetitive high price is not attributable to the effects of discrimination, a contractor may be entitled to relief from the 10% set-aside requirement. But even assuming that the Technical Bulletin accurately reflects Congress' intent in enacting the set-aside, it is not easy to envision how one could realistically demonstrate with any degree of precision, if at all, the extent to which a bid has been inflated by the effects of disadvantage or past discrimination. Consequently, while THE CHIEF JUSTICE describes the set-aside as a remedial measure, it plainly operates as a flat quota.

[14] See THE CHIEF JUSTICE's opinion, *ante*, at 480.

public contract business, their constituents were entitled to "a piece of the action."

It is neither unusual nor reprehensible for Congressmen to promote the authorization of public construction in their districts. The flow of capital and employment into a district inevitably has both direct and indirect consequences that are beneficial. As MR. JUSTICE BRENNAN noted in *Elrod* v. *Burns*, 427 U. S. 347, however, the award of such contracts may become a form of political patronage that is dispensed by the party in power.[15] Although the practice of awarding such contracts to political allies may be as much a part of our history as the employment practices condemned in *Elrod*, it would surely be unconstitutional for the legislature to specify that all, or a certain portion, of the contracts authorized by a specific statute must be given to businesses controlled by members of one political party or another. That would be true even if the legislative majority was convinced that a grossly disproportionate share had been awarded to members of the opposite party in previous years.

In the short run our political processes might benefit from legislation that enhanced the ability of representatives of minority groups to disseminate patronage to their political backers. But in the long run any rule that authorized the award of public business on a racial basis would be just as objectionable as one that awarded such business on a purely partisan basis.

The legislators' interest in providing their constituents with favored access to benefits distributed by the Federal Government is, in my opinion, a plainly impermissible justification for this racial classification.

IV

The interest in facilitating and encouraging the participa-

[15] "Nonofficeholders may be the beneficiaries of lucrative government contracts for highway construction, buildings, and supplies." 427 U. S. at 353.

tion by minority business enterprises in the economy is unquestionably legitimate. Any barrier to such entry and growth—whether grounded in the law or in irrational prejudice—should be vigorously and thoroughly removed. Equality of economic and investment opportunity is a goal of no less importance than equality of employment opportunity. This statute, however, is not designed to remove any barriers to entry. Nor does its sparse legislative history detail any insuperable or even significant obstacles to entry into the competitive market.

Three difficulties encountered by minority business enterprises in seeking governmental business on a competitive basis are identified in the legislative history. There were references to (1) unfamiliarity with bidding procedures followed by procurement officers, (2) difficulties in obtaining financing, and (3) past discrimination in the construction industry.

The first concern is no doubt a real problem for all businesses seeking access to the public contract market for the first time. It justifies a thorough review of bidding practices to make sure that they are intelligible and accessible to all. It by no means justifies an assumption that minority business enterprises are any less able to prepare and submit bids in proper form than are any other businessmen. Consequently, that concern does not justify a statutory classification on racial grounds.

The second concern would justify legislation prohibiting private discrimination in lending practices or authorizing special public financing for firms that have been or are unable to borrow money for reasons unrelated to their credit rating. It would not be an adequate justification for a requirement that a fixed percentage of all loans made by national banks be made to Eskimos or Orientals regardless of their ability to repay the loans. Nor, it seems to me, does it provide a sufficient justification for granting a preference to a broad class that includes, at one extreme, firms that have no credit

problem [16] and at the other extreme, firms whose unsatisfactory credit rating will prevent them from taking advantage of the statutory preference even though they are otherwise qualified to do the work. At best, the preference for minority business enterprises is a crude and inadequate response to the evils that flow from discriminatory lending practices.

The question whether the history of past discrimination has created barriers that can only be overcome by an unusual measure of this kind is more difficult to evaluate. In analyzing this question, I think it is essential to draw a distinction between obstacles placed in the path of minority business enterprises by others and characteristics of those firms that may impair their ability to compete.

It is unfortunately but unquestionably true that irrational racial prejudice persists today and continues to obstruct minority participation in a variety of economic pursuits, presumably including the construction industry. But there are two reasons why this legislation will not eliminate, or even tend to eliminate, such prejudice. First, prejudice is less likely to be a significant factor in the public sector of the economy than in the private sector because both federal and

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[16] An example of such a firm was disclosed in the record of a recent case involving a claimed preference for a firm controlled by Indian shareholders:

"Based on the facts that were developed in the District Court, . . . the Indian community in general does not benefit from the [Bureau of Indian Affairs'] interpretation of [the Buy Indian Act].

"The facts that were developed in the District Court show that the beneficiaries of this interpretation were the owners of Indian Nations Construction Company. The president of that company is a one-fourth degree Indian who is an administrative law judge for the Department of Health, Education, and Welfare by occupation. The vice president of that company was a one-quarter blood Choctaw who is a self-employed rancher and who states his net worth at just under a half million dollars. The treasurer and general manager of that corporation is a non-Indian and he states his net worth at $1.3 million." Tr. of Oral Arg. in *Andrus* v. *Glover Construction Co.*, O. T. 1979, No. 79–48, pp. 26–27.

state laws have prohibited discrimination in the award of public contracts for many years. Second, and of greater importance, an absolute preference that is unrelated to a minority firm's ability to perform a contract inevitably will engender resentment on the part of competitors excluded from the market for a purely racial reason and skepticism on the part of customers and suppliers aware of the statutory classification. It thus seems clear to me that this Act cannot be defended as an appropriate method of reducing racial prejudice.

The argument that our history of discrimination has left the entire membership of each of the six racial classes identified in the Act less able to compete in a free market than others is more easily stated than proved. The reduction in prejudice that has occurred during the last generation has accomplished much less than was anticipated; it nevertheless remains true that increased opportunities have produced an ever-increasing number of demonstrations that members of disadvantaged races are entirely capable not merely of competing on an equal basis, but also of excelling in the most demanding professions. But, even though it is not the actual predicate for this legislation, a statute of this kind inevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race.[17] Because that perception—especially when fostered by the Congress of the United States—can only exacerbate rather than reduce racial prejudice, it will delay the time when race will become a truly irrelevant, or at least insignificant, factor. Unless Congress clearly articulates the need and basis for a racial classification, and also tailors the classification to its justification, the Court should not uphold this kind of statute.

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[17] See *United Jewish Organizations* v. *Carey*, 430 U. S. 144, 173–174 (BRENNAN, J., concurring in part): "[E]ven preferential treatment may act to stigmatize its recipient groups, for although intended to correct systemic or institutional inequities, such a policy may imply to some the recipients' inferiority and especial need for protection."

This Act has a character that is fundamentally different from a carefully drafted remedial measure like the Voting Rights Act of 1965. A consideration of some of the dramatic differences between these two legislative responses to racial injustice reveals not merely a difference in legislative craftsmanship but a difference of constitutional significance. Whereas the enactment of the Voting Rights Act was preceded by exhaustive hearings and debates concerning discriminatory denial of access to the electoral process, and became effective in specific States only after specific findings were made, this statute authorizes an automatic nationwide preference for all members of a diverse racial class regardless of their possible interest in the particular geographic areas where the public contracts are to be performed. Just why a wealthy Negro or Spanish-speaking investor should have a preferred status in bidding on a construction contract in Alaska—or a citizen of Eskimo ancestry should have a preference in Miami or Detroit—is difficult to understand in light of either the asserted remedial character of the set-aside or the more basic purposes of the public works legislation.

The Voting Rights Act addressed the problem of denial of access to the electoral process. By outlawing specific practices, such as poll taxes and special tests, the statute removed old barriers to equal access; by requiring preclearance of changes in voting practices in covered States, it precluded the erection of new barriers. The Act before us today does not outlaw any existing barriers to access to the economic market and does nothing to prevent the erection of new barriers. On the contrary, it adopts the fundamentally different approach of creating a new set of barriers of its own.

A comparable approach in the electoral context would support a rule requiring that at least 10% of the candidates elected to the legislature be members of specified racial minorities. Surely that would be an effective way of ensuring black citizens the representation that has long been their due.

Quite obviously, however, such a measure would merely create the kind of inequality that an impartial sovereign cannot tolerate. Yet that is precisely the kind of "remedy" that this Act authorizes. In both political and economic contexts, we have a legitimate interest in seeing that those who were disadvantaged in the past may succeed in the future. But neither an election nor a market can be equally accessible to all if race provides a basis for placing a special value on votes or dollars.

The ultimate goal must be to eliminate entirely from governmental decisionmaking such irrelevant factors as a human being's race. The removal of barriers to access to political and economic processes serves that goal.[18] But the creation of new barriers can only frustrate true progress. For as MR. JUSTICE POWELL[19] and Mr. Justice Douglas[20] have perceptively observed, such protective barriers reinforce habitual ways of thinking in terms of classes instead of individuals. Preferences based on characteristics acquired at birth foster intolerance and antagonism against the entire membership of the favored classes.[21] For this reason, I am firmly convinced

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[18] "The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized." *DeFunis* v. *Odegaard,* 416 U. S. 312, 342 (Douglas, J., dissenting).

[19] See *University of California Regents* v. *Bakke,* 438 U. S., at 298.

[20] *DeFunis* v. *Odegaard, supra,* at 343 (dissenting opinion).

[21] In his *Bakke* opinion, *supra,* MR. JUSTICE POWELL stated:

"It is far too late to argue that the guarantee of equal protection to *all* persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others." 438 U. S., at 295.

In support of that proposition he quoted Professor Bickel's comment on the self-contradiction of that argument:

"'The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society.'" *Id.,* at 295, n. 35.

that this "temporary measure" will disserve the goal of equal opportunity.

V

A judge's opinion that a statute reflects a profoundly unwise policy determination is an insufficient reason for concluding that it is unconstitutional. Congress has broad power to spend money to provide for the "general Welfare of the United States," to "regulate Commerce . . . among the several States," to enforce the Civil War Amendments, and to discriminate between aliens and citizens. See *Hampton* v. *Mow Sun Wong*, 426 U. S. 88, 101–102, n. 21.[22] But the exercise of these broad powers is subject to the constraints imposed by the Due Process Clause of the Fifth Amendment. That Clause has both substantive and procedural components; it performs the office of both the Due Process and Equal Protection Clauses of the Fourteenth Amendment in requiring that the federal sovereign act impartially.

Unlike MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST, however, I am not convinced that the Clause contains an absolute prohibition against any statutory classification based on race. I am nonetheless persuaded that it does impose a special obligation to scrutinize any governmental decisionmaking process that draws nationwide distinctions between citizens on the basis of their race and incidentally also discriminates against noncitizens in the preferred racial classes.[23]

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[22] This preferential set-aside specifically discriminates in favor of citizens of the United States. See *supra*, at 535.

[23] "When the Federal Government asserts an overriding national interest as justification for a discriminatory rule which would violate the Equal Protection Clause if adopted by a State, due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve that interest." *Hampton* v. *Mow Sun Wong*, 426 U. S. 88, 103.

"It is perfectly clear that neither the Congress nor the President has ever *required* the Civil Service Commission to adopt the citizenship requirement as a condition of eligibility for employment in the federal civil service. On the other hand, in view of the fact that the policy has been in effect since the Commission was created in 1883, it is fair to infer that

For just as procedural safeguards are necessary to guarantee impartial decisionmaking in the judicial process, so can they play a vital part in preserving the impartial character of the legislative process.[24]

In both its substantive and procedural aspects this Act is markedly different from the normal product of the legislative decisionmaking process. The very fact that Congress for the first time in the Nation's history has created a broad legislative classification for entitlement to benefits based solely on racial characteristics identifies a dramatic difference between this Act and the thousands of statutes that preceded it. This dramatic point of departure is not even mentioned in the statement of purpose of the Act or in the Reports of either the House or the Senate Committee that processed the legislation,[25] and was not the subject of any testimony or inquiry

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both the Legislature and the Executive have been aware of the policy and have acquiesced in it. In order to decide whether such acquiescence should give the Commission rule the same support as an express statutory or Presidential command, it is appropriate to review the extent to which the policy has been given consideration by Congress or the President, and the nature of the authority specifically delegated to the Commission." *Id.*, at 105.

[24] See Linde, Due Process of Lawmaking, 55 Neb. L. Rev. 197, 255 (1976):

"For the last few years have reawakened our appreciation of the primacy of process over product in a free society, the knowledge that no ends can be better than the means of their achievement. 'The highest morality is almost always the morality of process,' Professor Bickel wrote about Watergate a few months before his untimely death. If this republic is remembered in the distant history of law, it is likely to be for its enduring adherence to legitimate institutions and processes, not for its perfection of unique principles of justice and certainly not for the rationality of its laws. This recognition now may well take our attention beyond the processes of adjudication and of executive government to a new concern with the due process of lawmaking." (Footnote omitted.)

[25] The only reference to any minority business enterprises in the Senate Report was a suggestion that Indians had been receiving *too great a share* of the public contracts. The Report stated:

"Some concern was expressed that Indians—with exceptionally high struc-

in any legislative hearing on the bill that was enacted. It is true that there was a brief discussion on the floor of the House as well as in the Senate on two different days, but only a handful of legislators spoke and there was virtually no debate. This kind of perfunctory consideration of an unprecedented policy decision of profound constitutional importance to the Nation is comparable to the accidental malfunction of the legislative process that led to what I regarded as a totally unjustified discrimination in *Delaware Tribal Business Committee* v. *Weeks*, 430 U. S., at 97.

Although it is traditional for judges to accord the same presumption of regularity to the legislative process no matter how obvious it may be that a busy Congress has acted precipitately, I see no reason why the character of their procedures may not be considered relevant to the decision whether the legislative product has caused a deprivation of liberty or property without due process of law.[26] Whenever

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tural unemployment levels—were awarded projects at a per capita value far in excess of non-Indian communities." S. Rep. No. 95-38, p. 3 (1977).

The Court quotes three paragraphs from a lengthy Report issued by the House Committee on Small Business in 1977, *ante*, at 465–466, implying that the contents of that Report were considered by Congress when it enacted the 10% minority set-aside. But that Report was not mentioned by anyone during the very brief discussion of the set-aside amendment. When one considers the vast quantity of written material turned out by the dozens of congressional committees and subcommittees these days, it is unrealistic to assume that a significant number of legislators read, or even were aware of, that Report. Even if they did, the Report does not contain an explanation of this 10% set-aside for six racial subclasses.

Indeed, the broad racial classification in this Act is totally unexplained. Although the legislative history discussed by THE CHIEF JUSTICE and by MR. JUSTICE POWELL explains why Negro citizens are included within the preferred class, there is absolutely no discussion of why Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts were also included. See n. 6, *supra*.

[26] "It is not a new thought that 'to guarantee the democratic legitimacy of political decisions by establishing essential rules for the political process' is the central function of judicial review, as Dean Rostow and Profes-

Congress creates a classification that would be subject to strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment if it had been fashioned by a state legislature, it seems to me that judicial review should include a consideration of the procedural character of the decision-making process.[27] A holding that the classification was not adequately preceded by a consideration of less drastic alternatives or adequately explained by a statement of legislative purpose would be far less intrusive than a final determination that the substance of the decision is not "narrowly tailored to the achievement of that goal."[28] Cf. THE CHIEF JUSTICE's opinion, *ante*, at 480; MR. JUSTICE MARSHALL's opinion concurring in the judgment, *ante*, at 521. If the general language of the Due Process Clause of the Fifth Amendment

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sor Strong, among others, have argued." Linde, *supra*, 55 Neb. L. Rev., at 251.

[27] See Sandalow, Judicial Protection of Minorities, 75 Mich. L. Rev. 1162, 1188 (1977):

"[I]f governmental action trenches upon values that may reasonably be regarded as fundamental, that action should be the product of a deliberate and broadly based political judgment. The stronger the argument that governmental action does encroach upon such values, the greater the need to assure that it is the product of a process that is entitled to speak for the society. Legislation that has failed to engage the attention of Congress, like the decisions of subordinate governmental institutions, does not meet that test, for it is likely to be the product of partial political pressures that are not broadly reflective of the society as a whole."

[28] "Fear of legislative resentment at judicial interference is not borne out by experience where procedural review exists, any more than it was after the Supreme Court told Congress that it had used faulty procedure in unseating Representative Adam Clayton Powell. It is far more cause for resentment to invalidate the substance of a policy that the politically accountable branches and their constitutents support than to invalidate a lawmaking procedure that can be repeated correctly, yet we take substantive judicial review for granted. Strikingly, the reverse view of propriety prevails in a number of nations where courts have never been empowered to set aside policies legitimately enacted into law but do have power to test the process of legitimate enactment." Linde, *supra*, 55 Neb. L. Rev., at 243 (footnotes omitted).

authorizes this Court to review Acts of Congress under the standards of the Equal Protection Clause of the Fourteenth Amendment—a clause that cannot be found in the Fifth Amendment—there can be no separation-of-powers objection to a more tentative holding of unconstitutionality based on a failure to follow procedures that guarantee the kind of deliberation that a fundamental constitutional issue of this kind obviously merits.[29]

In all events, rather than take the substantive position expressed in MR. JUSTICE STEWART's dissenting opinion, I would hold this statute unconstitutional on a narrower ground. It cannot fairly be characterized as a "narrowly tailored" racial classification because it simply raises too many serious questions that Congress failed to answer or even to address in a responsible way.[30] The risk that habitual attitudes toward

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[29] The conclusion to THE CHIEF JUSTICE's opinion states:

"Any preference based on racial or ethnic criteria must necessarily receive a *most searching examination* to make sure that it does not conflict with constitutional guarantees." *Ante*, at 491 (emphasis added).

I agree with this statement but it seems to me that due process requires that the "most searching examination" be conducted in the first instance by Congress rather than by a federal court.

[30] For example, why were these six racial classifications, and no others, included in the preferred class? Why are aliens excluded from the preference although they are not otherwise ineligible for public contracts? What percentage of Oriental blood or what degree of Spanish-speaking skill is required for membership in the preferred class? How does the legacy of slavery and the history of discrimination against the descendants of its victims support a preference for Spanish-speaking citizens who may be directly competing with black citizens in some overpopulated communities? Why is a preference given only to owners of business enterprises and why is that preference unaccompanied by any requirement concerning the employment of disadvantaged persons? Is the preference limited to a subclass of persons who can prove that they are subject to a special disability caused by past discrimination, as the Court's opinion indicates? Or is every member of the racial class entitled to a preference as the statutory language seems plainly to indicate? Are businesses formed just to take advantage of the preference eligible?

classes of persons, rather than analysis of the relevant characteristics of the class, will serve as a basis for a legislative classification is present when benefits are distributed as well as when burdens are imposed. In the past, traditional attitudes too often provided the only explanation for discrimination against women, aliens, illegitimates, and black citizens. Today there is a danger that awareness of past injustice will lead to automatic acceptance of new classifications that are not in fact justified by attributes characteristic of the class as a whole.

When Congress creates a special preference, or a special disability, for a class of persons, it should identify the characteristic that justifies the special treatment.[31] When the classification is defined in racial terms, I believe that such particular identification is imperative.

In this case, only two conceivable bases for differentiating the preferred classes from society as a whole have occurred to me: (1) that they were the victims of unfair treatment in the past and (2) that they are less able to compete in the future. Although the first of these factors would justify an appropriate remedy for past wrongs, for reasons that I have already stated, this statute is not such a remedial measure. The second factor is simply not true. Nothing in the record of this case, the legislative history of the Act, or experience that we

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[31] "Of course, a general rule may not define the benefited class by reference to a distinction which irrationally differentiates between identically situated persons. Differences in race, religion, or political affiliation could not rationally justify a difference in eligibility for social security benefits, for such differences are totally irrelevant to the question whether one person is economically dependent on another. But a distinction between married persons and unmarried persons is of a different character." *Califano* v. *Jobst,* 434 U. S. 47, 53.

"If there is no group characteristic that explains the discrimination, one can only conclude that it is without any justification that has not already been rejected by the Court." *Foley* v. *Connelie,* 435 U. S. 291, 312 (STEVENS, J., dissenting).

may notice judicially provides any support for such a proposition. It is up to Congress to demonstrate that its unique statutory preference is justified by a relevant characteristic that is shared by the members of the preferred class. In my opinion, because it has failed to make that demonstration, it has also failed to discharge its duty to govern impartially embodied in the Fifth Amendment to the United States Constitution.

I respectfully dissent.

RICHMOND NEWSPAPERS, INC., ET AL. *v.* VIRGINIA ET AL.

APPEAL FROM THE SUPREME COURT OF VIRGINIA

No. 79-243. Argued February 19, 1980—Decided July 2, 1980

At the commencement of a fourth trial on a murder charge (the defendant's conviction after the first trial having been reversed on appeal, and two subsequent retrials having ended in mistrials), the Virginia trial court granted defense counsel's motion that the trial be closed to the public without any objections having been made by the prosecutor or by appellants, a newspaper and two of its reporters who were present in the courtroom, defense counsel having stated that he did not "want any information being shuffled back and forth when we have a recess as to . . . who testified to what." Later that same day, however, the trial judge granted appellants' request for a hearing on a motion to vacate the closure order, and appellants' counsel contended that constitutional considerations mandated that before ordering closure the court should first decide that the defendant's rights could be protected in no other way. But the trial judge denied the motion, saying that if he felt that the defendant's rights were infringed in any way and others' rights were not overridden he was inclined to order closure, and ordered the trial to continue "with the press and public excluded." The next day, the court granted defendant's motion to strike the prosecution's evidence, excused the jury, and found the defendant not guilty. Thereafter, the court granted appellants' motion to intervene *nunc pro tunc* in the case, and the Virginia Supreme Court dismissed their mandamus and prohibition petitions and, finding no reversible error, denied their petition for appeal from the closure order.

Held: The judgment is reversed. Pp. 563-581; 584-598; 598-601; 601-604.

Reversed.

MR. CHIEF JUSTICE BURGER, joined by MR. JUSTICE WHITE and MR. JUSTICE STEVENS, concluded that the right of the public and press to attend criminal trials is guaranteed under the First and Fourteenth Amendments. Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public. *Gannett Co.* v. *DePasquale,* 443 U. S. 368, distinguished. Pp. 563-581.

(a) The historical evidence of the evolution of the criminal trial in Anglo-American justice demonstrates conclusively that at the time this Nation's organic laws were adopted, criminal trials both here and in England had long been presumptively open, thus giving assurance that the proceedings were conducted fairly to all concerned and discouraging perjury, the misconduct of participants, or decisions based on secret bias or partiality. In addition, the significant community therapeutic value of public trials was recognized: when a shocking crime occurs, a community reaction of outrage and public protest often follows, and thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion. To work effectively, it is important that society's criminal process "satisfy the appearance of justice," *Offutt* v. *United States*, 348 U. S. 11, 14, which can best be provided by allowing people to observe such process. From this unbroken, uncontradicted history, supported by reasons as valid today as in centuries past, it must be concluded that a presumption of openness inheres in the very nature of a criminal trial under this Nation's system of justice. Cf., *e. g.*, *Levine* v. *United States*, 362 U. S. 610. Pp. 563–575.

(b) The freedoms of speech, press, and assembly, expressly guaranteed by the First Amendment, share a common core purpose of assuring freedom of communication on matters relating to the functioning of government. In guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees; the First Amendment right to receive information and ideas means, in the context of trials, that the guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time the First Amendment was adopted. Moreover, the right of assembly is also relevant, having been regarded not only as an independent right but also as a catalyst to augment the free exercise of the other First Amendment rights with which it was deliberately linked by the draftsmen. A trial courtroom is a public place where the people generally—and representatives of the media—have a right to be present, and where their presence historically has been thought to enhance the integrity and quality of what takes place. Pp. 575–578.

(c) Even though the Constitution contains no provision which by its terms guarantees to the public the right to attend criminal trials, various fundamental rights, not expressly guaranteed, have been recognized as indispensable to the enjoyment of enumerated rights. The right to attend criminal trials is implicit in the guarantees of the First Amend-

ment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and of the press could be eviscerated. Pp. 579–580.

(d) With respect to the closure order in this case, despite the fact that this was the accused's fourth trial, the trial judge made no findings to support closure; no inquiry was made as to whether alternative solutions would have met the need to ensure fairness; there was no recognition of any right under the Constitution for the public or press to attend the trial; and there was no suggestion that any problems with witnesses could not have been dealt with by exclusion from the courtroom or sequestration during the trial, or that sequestration of the jurors would not have guarded against their being subjected to any improper information. Pp. 580–581.

MR. JUSTICE BRENNAN, joined by MR. JUSTICE MARSHALL, concluded that the First Amendment—of itself and as applied to the States through the Fourteenth Amendment—secures the public a right of access to trial proceedings, and that, without more, agreement of the trial judge and the parties cannot constitutionally close a trial to the public. Historically and functionally, open trials have been closely associated with the development of the fundamental procedure of trial by jury, and trial access assumes structural importance in this Nation's government of laws by assuring the public that procedural rights are respected and that justice is afforded equally, by serving as an effective restraint on possible abuse of judicial power, and by aiding the accuracy of the trial factfinding process. It was further concluded that it was not necessary to consider in this case what countervailing interests might be sufficiently compelling to reverse the presumption of openness of trials, since the Virginia statute involved—authorizing trial closures at the unfettered discretion of the judge and parties—violated the First and Fourteenth Amendments. Pp. 584–598.

MR. JUSTICE STEWART concluded that the First and Fourteenth Amendments clearly give the press and the public a right of access to trials, civil as well as criminal; that such right is not absolute, since various considerations may sometimes justify limitations upon the unrestricted presence of spectators in the courtroom; but that in the present case the trial judge apparently gave no recognition to the right of representatives of the press and members of the public to be present at the trial. Pp. 598–601.

MR. JUSTICE BLACKMUN, while being of the view that *Gannett Co.* v. *DePasquale, supra,* was in error, both in its interpretation of the Sixth Amendment generally, and in its application to the suppression hearing

involved there, and that the right to a public trial is to be found in the Sixth Amendment, concluded, as a secondary position, that the First Amendment must provide some measure of protection for public access to the trial, and that here, by closing the trial, the trial judge abridged these First Amendment interests of the public. Pp. 601–604.

BURGER, C. J., announced the Court's judgment and delivered an opinion, in which WHITE and STEVENS, JJ., joined. WHITE, J., *post*, p. 581, and STEVENS, J., *post*, p. 582, filed concurring opinions. BRENNAN, J., filed an opinion concurring in the judgment, in which MARSHALL, J., joined, *post*, p. 584. STEWART, J., *post*, p. 598, and BLACKMUN, J., *post*, p. 601, filed opinions concurring in the judgment. REHNQUIST, J., filed a dissenting opinion, *post*, p. 604. POWELL, J., took no part in the consideration or decision of the case.

Laurence H. Tribe argued the cause for appellants. With him on the briefs were *Andrew J. Brent, Alexander Wellford, Leslie W. Mullins,* and *David Rosenberg.*

Marshall Coleman, Attorney General of Virginia, argued the cause for appellees. With him on the brief were *James E. Moore, Leonard L. Hopkins, Jr., Martin A. Donlan, Jr.,* and *Jerry P. Slonaker,* Assistant Attorneys General.*

MR. CHIEF JUSTICE BURGER announced the judgment of the Court and delivered an opinion, in which MR. JUSTICE WHITE and MR. JUSTICE STEVENS joined.

The narrow question presented in this case is whether the right of the public and press to attend criminal trials is guaranteed under the United States Constitution.

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*Briefs of *amici curiae* urging reversal were filed by *John J. Degnan,* Attorney General, and *John De Cicco, Anthony J. Parrillo,* and *Debra L. Stone,* Deputy Attorneys General, for the State of New Jersey; by *Stephen Bricker* and *Bruce J. Ennis* for the American Civil Liberties Union et al.; by *Arthur B. Hanson, Frank M. Northam, Mitchell W. Dale,* and *Richard M. Schmidt, Jr.,* for the American Newspaper Publishers Association et al.; by *E. Barrett Prettyman, Jr., Erwin G. Krasnow, Arthur B. Sackler* and *J. Laurent Scharff* for The Reporters Committee for Freedom of the Press et al.; and by *Edward Bennett Williams, John B. Kuhns,* and *Kevin T. Baine* for The Washington Post et al.

I

In March 1976, one Stevenson was indicted for the murder of a hotel manager who had been found stabbed to death on December 2, 1975. Tried promptly in July 1976, Stevenson was convicted of second-degree murder in the Circuit Court of Hanover County, Va. The Virginia Supreme Court reversed the conviction in October 1977, holding that a bloodstained shirt purportedly belonging to Stevenson had been improperly admitted into evidence. *Stevenson* v. *Commonwealth*, 218 Va. 462, 237 S. E. 2d 779.

Stevenson was retried in the same court. This second trial ended in a mistrial on May 30, 1978, when a juror asked to be excused after trial had begun and no alternate was available.[1]

A third trial, which began in the same court on June 6, 1978, also ended in a mistrial. It appears that the mistrial may have been declared because a prospective juror had read about Stevenson's previous trials in a newspaper and had told other prospective jurors about the case before the retrial began. See App. 35a–36a.

Stevenson was tried in the same court for a fourth time beginning on September 11, 1978. Present in the courtroom when the case was called were appellants Wheeler and McCarthy, reporters for appellant Richmond Newspapers, Inc. Before the trial began, counsel for the defendant moved that it be closed to the public:

> "[T]here was this woman that was with the family of the deceased when we were here before. She had sat in the Courtroom. I would like to ask that everybody be excluded from the Courtroom because I don't want any information being shuffled back and forth when we have

[1] A newspaper account published the next day reported the mistrial and went on to note that "[a] key piece of evidence in Stevenson's original conviction was a bloodstained shirt obtained from Stevenson's wife soon after the killing. The Virginia Supreme Court, however, ruled that the shirt was entered into evidence improperly." App. 34a.

a recess as to what—who testified to what." Tr. of Sept. 11, 1978 Hearing on Defendant's Motion to Close Trial to the Public 2–3.

The trial judge, who had presided over two of the three previous trials, asked if the prosecution had any objection to clearing the courtroom. The prosecutor stated he had no objection and would leave it to the discretion of the court. *Id.*, at 4. Presumably referring to Va. Code § 19.2–266 (Supp. 1980), the trial judge then announced: "[T]he statute gives me that power specifically and the defendant has made the motion." He then ordered "that the Courtroom be kept clear of all parties except the witnesses when they testify." Tr., *supra*, at 4–5.[2] The record does not show that any objections to the closure order were made by anyone present at the time, including appellants Wheeler and McCarthy.

Later that same day, however, appellants sought a hearing on a motion to vacate the closure order. The trial judge granted the request and scheduled a hearing to follow the close of the day's proceedings. When the hearing began, the court ruled that the hearing was to be treated as part of the trial; accordingly, he again ordered the reporters to leave the courtroom, and they complied.

At the closed hearing, counsel for appellants observed that no evidentiary findings had been made by the court prior to the entry of its closure order and pointed out that the court had failed to consider any other, less drastic measures within its power to ensure a fair trial. Tr. of Sept. 11, 1978 Hearing on Motion to Vacate 11–12. Counsel for appellants argued that constitutional considerations mandated that before ordering closure, the court should first decide that the rights of the defendant could be protected in no other way.

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[2] Virginia Code § 19.2–266 (Supp. 1980) provides in part:

"In the trial of all criminal cases, whether the same be felony or misdemeanor cases, the court may, in its discretion, exclude from the trial any persons whose presence would impair the conduct of a fair trial, provided that the right of the accused to a public trial shall not be violated."

Counsel for defendant Stevenson pointed out that this was the fourth time he was standing trial. He also referred to "difficulty with information between the jurors," and stated that he "didn't want information to leak out," be published by the media, perhaps inaccurately, and then be seen by the jurors. Defense counsel argued that these things, plus the fact that "this is a small community," made this a proper case for closure. *Id.*, at 16–18.

The trial judge noted that counsel for the defendant had made similar statements at the morning hearing. The court also stated:

> "[O]ne of the other points that we take into consideration in this particular Courtroom is layout of the Courtroom. I think that having people in the Courtroom is distracting to the jury. Now, we have to have certain people in here and maybe that's not a very good reason. When we get into our new Court Building, people can sit in the audience so the jury can't see them. The rule of the Court may be different under those circumstances. . . ." *Id.*, at 19.

The prosecutor again declined comment, and the court summed up by saying:

> "I'm inclined to agree with [defense counsel] that, if I feel that the rights of the defendant are infringed in any way, [when] he makes the motion to do something and it doesn't completely override all rights of everyone else, then I'm inclined to go along with the defendant's motion." *Id.*, at 20.

The court denied the motion to vacate and ordered the trial to continue the following morning "with the press and public excluded." *Id.*, at 27; App. 21a.

What transpired when the closed trial resumed the next day was disclosed in the following manner by an order of the court entered September 12, 1978:

> "[I]n the absence of the jury, the defendant by counsel

made a Motion that a mis-trial be declared, which motion was taken under advisement.

"At the conclusion of the Commonwealth's evidence, the attorney for the defendant moved the Court to strike the Commonwealth's evidence on grounds stated to the record, which Motion was sustained by the Court.

"And the jury having been excused, the Court doth find the accused NOT GUILTY of Murder, as charged in the Indictment, and he was allowed to depart." *Id.*, at 22a.[3]

On September 27, 1978, the trial court granted appellants' motion to intervene *nunc pro tunc* in the Stevenson case. Appellants then petitioned the Virginia Supreme Court for writs of mandamus and prohibition and filed an appeal from the trial court's closure order. On July 9, 1979, the Virginia Supreme Court dismissed the mandamus and prohibition petitions and, finding no reversible error, denied the petition for appeal. *Id.*, at 23a–28a.

Appellants then sought review in this Court, invoking both our appellate, 28 U. S. C. § 1257 (2), and certiorari jurisdiction. § 1257 (3). We postponed further consideration of the question of our jurisdiction to the hearing of the case on the merits. 444 U. S. 896 (1979). We conclude that jurisdiction by appeal does not lie;[4] however, treating the filed

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[3] At oral argument, it was represented to the Court that tapes of the trial were available to the public as soon as the trial terminated. Tr. of Oral Arg. 36.

[4] In our view, the validity of Va. Code § 19.2–266 (Supp. 1980) was not sufficiently drawn in question by appellants before the Virginia courts to invoke our appellate jurisdiction. "It is essential to our jurisdiction on appeal . . . that there be an explicit and timely insistence in the state courts that a state statute, as applied, is repugnant to the federal Constitution, treaties or laws." *Charleston Federal Savings & Loan Assn.* v. *Alderson*, 324 U. S. 182, 185 (1945). Appellants never explicitly challenged the statute's validity. In both the trial court and the State Supreme Court, appellants argued that constitutional rights of the public and the press prevented the court from closing a trial without first

papers as a petition for a writ of certiorari pursuant to 28 U. S. C. § 2103, we grant the petition.

The criminal trial which appellants sought to attend has long since ended, and there is thus some suggestion that the case is moot. This Court has frequently recognized, however, that its jurisdiction is not necessarily defeated by the practical termination of a contest which is short-lived by nature. See, *e. g., Gannett Co.* v. *DePasquale,* 443 U. S. 368, 377–378 (1979); *Nebraska Press Assn.* v. *Stuart,* 427 U. S. 539, 546–547 (1976). If the underlying dispute is "capable of repetition, yet evading review," *Southern Pacific Terminal Co.* v. *ICC,* 219 U. S. 498, 515 (1911), it is not moot.

Since the Virginia Supreme Court declined plenary review, it is reasonably foreseeable that other trials may be closed by other judges without any more showing of need than is presented on this record. More often than not, criminal trials will be of sufficiently short duration that a closure order "will evade review, or at least considered plenary review in this Court." *Nebraska Press, supra,* at 547. Accordingly, we turn to the merits.

II

We begin consideration of this case by noting that the precise issue presented here has not previously been before this

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giving notice and an opportunity for a hearing to the public and the press and exhausting every alternative means of protecting the defendant's right to a fair trial. Given appellants' failure explicitly to challenge the statute, we view these arguments as constituting claims of rights under the Constitution, which rights are said to limit the exercise of the discretion conferred by the statute on the trial court. Cf. *Phillips* v. *United States,* 312 U. S. 246, 252 (1941) ("[A]n attack on lawless exercise of authority in a particular case is not an attack upon the constitutionality of a statute conferring the authority . . ."). Such claims are properly brought before this Court by way of our certiorari, rather than appellate, jurisdiction. See, *e. g., Kulko* v. *California Superior Court,* 436 U. S. 84, 90, n. 4 (1978); *Hanson* v. *Denckla,* 357 U. S. 235, 244, and n. 4 (1958). We shall, however, continue to refer to the parties as appellants and appellee. See *Kulko, supra.*

Court for decision. In *Gannett Co.* v. *DePasquale, supra*, the Court was not required to decide whether a right of access to *trials*, as distingushed from hearings on *pre*trial motions, was constitutionally guaranteed. The Court held that the Sixth Amendment's guarantee to the accused of a public trial gave neither the public nor the press an enforceable right of access to a *pre*trial suppression hearing. One concurring opinion specifically emphasized that "a hearing on a motion before trial to suppress evidence is not a *trial*. . . ." 443 U. S., at 394 (BURGER, C. J., concurring). Moreover, the Court did not decide whether the First and Fourteenth Amendments guarantee a right of the public to attend trials. *id.*, at 392, and n. 24; nor did the dissenting opinion reach this issue. *Id.*, at 447 (opinion of BLACKMUN, J.).

In prior cases the Court has treated questions involving conflicts between publicity and a defendant's right to a fair trial; as we observed in *Nebraska Press Assn.* v. *Stuart, supra*, at 547, "[t]he problems presented by this [conflict] are almost as old as the Republic." See also, *e. g., Gannett, supra; Murphy* v. *Florida*, 421 U. S. 794 (1975); *Sheppard* v. *Maxwell*, 384 U. S. 333 (1966); *Estes* v. *Texas*, 381 U. S. 532 (1965). But here for the first time the Court is asked to decide whether a criminal trial itself may be closed to the public upon the unopposed request of a defendant, without any demonstration that closure is required to protect the defendant's superior right to a fair trial, or that some other overriding consideration requires closure.

A

The origins of the proceeding which has become the modern criminal trial in Anglo-American justice can be traced back beyond reliable historical records. We need not here review all details of its development, but a summary of that history is instructive. What is significant for present purposes is that throughout its evolution, the trial has been open to all who cared to observe.

In the days before the Norman Conquest, cases in England were generally brought before moots, such as the local court of the hundred or the county court, which were attended by the freemen of the community. Pollock, English Law Before the Norman Conquest, in 1 Select Essays in Anglo-American Legal History 88, 89 (1907). Somewhat like modern jury duty, attendance at these early meetings was compulsory on the part of the freemen, who were called upon to render judgment. *Id.*, at 89–90; see also 1 W. Holdsworth, A History of English Law 10, 12 (1927).[5]

With the gradual evolution of the jury system in the years after the Norman Conquest, see, *e. g.*, *id.*, at 316, the duty of all freemen to attend trials to render judgment was relaxed, but there is no indication that criminal trials did not remain public. When certain groups were excused from compelled attendance, see the Statute of Marlborough, 52 Hen. 3, ch. 10 (1267); 1 Holdsworth, *supra*, at 79, and n. 4, the statutory exemption did not prevent them from attending; Lord Coke observed that those excused "are not compellable to come, but left to their own liberty." 2 E. Coke, Institutes of the Laws of England 121 (6th ed. 1681).[6]

Although there appear to be few contemporary statements

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[5] That there is little in the way of a contemporary record from this period is not surprising. It has been noted by historians, see E. Jenks, A Short History of English Law 3–4 (2d ed. 1922), that the early Anglo-Saxon laws "deal rather with the novel and uncertain, than with the normal and undoubted rules of law. . . . Why trouble to record that which every village elder knows? Only when a disputed point has long caused bloodshed and disturbance, or when a successful invader . . . insists on a change, is it necessary to draw up a code." *Ibid.*

[6] Coke interpreted certain language of an earlier chapter of the same statute as specifically indicating that court proceedings were to be public in nature: "These words [*In curia Domini Regis*] are of great importance, for all Causes ought to be heard, ordered, and determined before the Judges of the King's Courts *openly* in the King's Courts, *whither all persons may resort*. . . ." 2 E. Coke, Institutes of the Laws of England 103 (6th ed. 1681) (emphasis added).

on the subject, reports of the Eyre of Kent, a general court held in 1313–1314, evince a recognition of the importance of public attendance apart from the "jury duty" aspect. It was explained that

> "the King's will was that all evil doers should be punished after their deserts, and that justice should be ministered indifferently to rich as to poor; *and for the better accomplishing of this,* he prayed the community of the county *by their attendance* there to lend him their aid in the establishing of a happy and certain peace that should be both for the honour of the realm and for their own welfare." 1 Holdsworth, *supra,* at 268, quoting from the S. S. edition of the Eyre of Kent, vol. i., p. 2 (emphasis added).

From these early times, although great changes in courts and procedure took place, one thing remained constant: the public character of the trial at which guilt or innocence was decided. Sir Thomas Smith, writing in 1565 about "the definitive proceedinges in causes criminall," explained that, while the indictment was put in writing as in civil law countries:

> "All the rest is doone openlie in the presence of the Judges, the Justices, the enquest, the prisoner, *and so manie as will or can come so neare as to heare it,* and all depositions and witnesses given aloude, *that all men may heare from the mouth of the depositors and witnesses what is saide.*" T. Smith, De Republica Anglorum 101 (Alston ed. 1972) (emphasis added).

Three centuries later, Sir Frederick Pollock was able to state of the "rule of publicity" that, "[h]ere we have one tradition, at any rate, which has persisted through all changes." F. Pollock, The Expansion of the Common Law 31–32 (1904). See also E. Jenks, The Book of English Law 73–74 (6th ed. 1967): "[O]ne of the most conspicuous features of English justice, that all judicial trials are held in open court, to which the

public have free access, . . . appears to have been the rule in England from time immemorial."

We have found nothing to suggest that the presumptive openness of the trial, which English courts were later to call "one of the essential qualities of a court of justice," *Daubney* v. *Cooper*, 10 B. & C. 237, 240, 109 Eng. Rep. 438, 440 (K. B. 1829), was not also an attribute of the judicial systems of colonial America. In Virginia, for example, such records as there are of early criminal trials indicate that they were open, and nothing to the contrary has been cited. See A. Scott, Criminal Law in Colonial Virginia 128–129 (1930); Reinsch, The English Common Law in the Early American Colonies, in 1 Select Essays in Anglo-American Legal History 367, 405 (1907). Indeed, when in the mid-1600's the Virginia Assembly felt that the respect due the courts was "by the clamorous unmannerlynes of the people lost, and order, gravity and decoram which should manifest the authority of a court in the court it selfe neglected," the response was not to restrict the openness of the trials to the public, but instead to prescribe rules for the conduct of those attending them. See Scott, *supra*, at 132.

In some instances, the openness of trials was explicitly recognized as part of the fundamental law of the Colony. The 1677 Concessions and Agreements of West New Jersey, for example, provided:

> "That in all publick courts of justice for tryals of causes, civil or criminal, any person or persons, inhabitants of the said Province may freely come into, and attend the said courts, and hear and be present, at all or any such tryals as shall be there had or passed, that justice may not be done in a corner nor in any covert manner." Reprinted in Sources of Our Liberties 188 (R. Perry ed. 1959).

See also 1 B. Schwartz, The Bill of Rights: A Documentary History 129 (1971).

The Pennsylvania Frame of Government of 1682 also provided "[t]hat all courts shall be open . . . ." Sources of Our Liberties, *supra*, at 217; 1 Schwartz, *supra*, at 140, and this declaration was reaffirmed in § 26 of the Constitution adopted by Pennsylvania in 1776. See 1 Schwartz, *supra*, at 271. See also §§ 12 and 76 of the Massachusetts Body of Liberties, 1641, reprinted in 1 Schwartz, *supra*, at 73, 80.

Other contemporary writings confirm the recognition that part of the very nature of a criminal trial was its openness to those who wished to attend. Perhaps the best indication of this is found in an address to the inhabitants of Quebec which was drafted by a committee consisting of Thomas Cushing, Richard Henry Lee, and John Dickinson and approved by the First Continental Congress on October 26, 1774. 1 Journals of the Continental Congress, 1774–1789, pp. 101, 105 (1904) (Journals). This address, written to explain the position of the Colonies and to gain the support of the people of Quebec, is an "exposition of the fundamental rights of the colonists, as they were understood by a representative assembly chosen from all the colonies." 1 Schwartz, *supra*, at 221. Because it was intended for the inhabitants of Quebec, who had been "educated under another form of government" and had only recently become English subjects, it was thought desirable for the Continental Congress to explain "the inestimable advantages of a free English constitution of government, which it is the privilege of all English subjects to enjoy." 1 Journals 106.

> "[One] great right is that of trial by jury. This provides, that neither life, liberty nor property, can be taken from the possessor, until twelve of his unexceptionable countrymen and peers of his vicinage, who from that neighbourhood may reasonably be supposed to be acquainted with his character, and the characters of the witnesses, upon a fair trial, and full enquiry, face to face, *in open Court, before as many of the people as chuse to*

attend, shall pass their sentence upon oath against him. . . ." *Id.*, at 107 (emphasis added).

B

As we have shown, and as was shown in both the Court's opinion and the dissent in *Gannett*, 443 U. S., at 384, 386, n. 15, 418–425, the historical evidence demonstrates conclusively that at the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open. This is no quirk of history; rather, it has long been recognized as an indispensable attribute of an Anglo-American trial. Both Hale in the 17th century and Blackstone in the 18th saw the importance of openness to the proper functioning of a trial; it gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality. See, *e. g.*, M. Hale, The History of the Common Law of England 343–345 (6th ed. 1820); 3 W. Blackstone, Commentaries *372–*373. Jeremy Bentham not only recognized the therapeutic value of open justice but regarded it as the keystone:

> "Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance." 1 J. Bentham, Rationale of Judicial Evidence 524 (1827).[7]

Panegyrics on the values of openness were by no means confined to self-praise by the English. Foreign observers of English criminal procedure in the 18th and early 19th cen-

[7] Bentham also emphasized that open proceedings enhanced the performance of all involved, protected the judge from imputations of dishonesty, and served to educate the public. Rationale of Judicial Evidence, at 522–525.

turies came away impressed by the very fact that they had been freely admitted to the courts, as many were not in their own homelands. See L. Radzinowicz, A History of English Criminal Law 715, and n. 96 (1948). They marveled that "the whole juridical procedure passes in public," 2 P. Grosley, A Tour to London; or New Observations on England 142 (Nugent trans. 1772), quoted in Radzinowicz, *supra,* at 717, and one commentator declared:

> "The main excellence of the English judicature consists in publicity, in the free trial by jury, and in the extraordinary despatch with which business is transacted. The publicity of their proceedings is indeed astonishing. *Free access to the courts is universally granted.*" C. Goede, A Foreigner's Opinion of England 214 (Horne trans. 1822). (Emphasis added.)

The nexus between openness, fairness, and the perception of fairness was not lost on them:

> "[T]he judge, the counsel, and the jury, are constantly exposed to public animadversion; and this greatly tends to augment the extraordinary confidence, which the English repose in the administration of justice." *Id.,* at 215.

This observation raises the important point that "[t]he publicity of a judicial proceeding is a requirement of much broader bearing than its mere effect upon the quality of testimony." 6 J. Wigmore, Evidence § 1834, p. 435 (J. Chadbourn rev. 1976).[8] The early history of open trials in part reflects the widespread acknowledgment, long before there were behavioral scientists, that public trials had significant community therapeutic value. Even without such experts to frame

[8] A collateral aspect seen by Wigmore was the possibility that someone in attendance at the trial or who learns of the proceedings through publicity may be able to furnish evidence in chief or contradict "falsifiers." 6 Wigmore, at 436. Wigmore gives examples of such occurrences. *Id.,* at 436, and n. 2.

the concept in words, people sensed from experience and observation that, especially in the administration of criminal justice, the means used to achieve justice must have the support derived from public acceptance of both the process and its results.

When a shocking crime occurs, a community reaction of outrage and public protest often follows. See H. Weihofen, The Urge to Punish 130–131 (1956). Thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion. Without an awareness that society's responses to criminal conduct are underway, natural human reactions of outrage and protest are frustrated and may manifest themselves in some form of vengeful "self-help," as indeed they did regularly in the activities of vigilante "committees" on our frontiers. "The accusation and conviction or acquittal, as much perhaps as the execution of punishment, operat[e] to restore the imbalance which was created by the offense or public charge, to reaffirm the temporarily lost feeling of security and, perhaps, to satisfy that latent 'urge to punish.'" Mueller, Problems Posed by Publicity to Crime and Criminal Proceedings, 110 U. Pa. L. Rev. 1, 6 (1961).

Civilized societies withdraw both from the victim and the vigilante the enforcement of criminal laws, but they cannot erase from people's consciousness the fundamental, natural yearning to see justice done—or even the urge for retribution. The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is "done in a corner [or] in any covert manner." *Supra*, at 567. It is not enough to say that results alone will satiate the natural community desire for "satisfaction." A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted. To work effectively, it is important that society's criminal

process "satisfy the appearance of justice," *Offutt* v. *United States*, 348 U. S. 11, 14 (1954), and the appearance of justice can best be provided by allowing people to observe it.

Looking back, we see that when the ancient "town meeting" form of trial became too cumbersome, 12 members of the community were delegated to act as its surrogates, but the community did not surrender its right to observe the conduct of trials. The people retained a "right of visitation" which enabled them to satisfy themselves that justice was in fact being done.

People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing. When a criminal trial is conducted in the open, there is at least an opportunity both for understanding the system in general and its workings in a particular case:

> "The educative effect of public attendance is a material advantage. Not only is respect for the law increased and intelligent acquaintance acquired with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy." 6 Wigmore, *supra*, at 438. See also 1 J. Bentham, Rationale of Judicial Evidence, at 525.

In earlier times, both in England and America, attendance at court was a common mode of "passing the time." See, *e. g.*, 6 Wigmore, *supra*, at 436; Mueller, *supra*, at 6. With the press, cinema, and electronic media now supplying the representations or reality of the real life drama once available only in the courtroom, attendance at court is no longer a widespread pastime. Yet "[i]t is not unrealistic even in this day to believe that public inclusion affords citizens a form of legal education and hopefully promotes confidence in the fair administration of justice." *State* v. *Schmit*, 273 Minn. 78, 87–88, 139 N. W. 2d 800, 807 (1966). Instead of acquiring information about trials by firsthand observation or by word

of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense, this validates the media claim of functioning as surrogates for the public. While media representatives enjoy the same right of access as the public, they often are provided special seating and priority of entry so that they may report what people in attendance have seen and heard. This "contribute[s] to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system. . . ." *Nebraska Press Assn.* v. *Stuart*, 427 U. S., at 587 (BRENNAN, J., concurring in judgment).

C

From this unbroken, uncontradicted history, supported by reasons as valid today as in centuries past, we are bound to conclude that a presumption of openness inheres in the very nature of a criminal trial under our system of justice. This conclusion is hardly novel; without a direct holding on the issue, the Court has voiced its recognition of it in a variety of contexts over the years.[9] Even while holding, in *Levine* v.

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[9] "Of course trials must be public and the public have a deep interest in trials." *Pennekamp* v. *Florida*, 328 U. S. 331, 361 (1946) (Frankfurter, J, concurring).

"A trial is a public event. What transpires in the court room is public property." *Craig* v. *Harney*, 331 U. S. 367, 374 (1947) (Douglas, J.).

"[W]e have been unable to find a single instance of a criminal trial conducted in camera in any federal, state, or municipal court during the history of this country. Nor have we found any record of even one such secret criminal trial in England since abolition of the Court of Star Chamber in 1641, and whether that court ever convicted people secretly is in dispute. . . .

"This nation's accepted practice of guaranteeing a public trial to an accused has its roots in our English common law heritage. The exact date of its origin is obscure, but it likely evolved long before the settlement of our land as an accompaniment of the ancient institution of jury trial." *In re Oliver*, 333 U. S. 257, 266 (1948) (Black, J.) (footnotes omitted).

"One of the demands of a democratic society is that the public should know what goes on in courts by being told by the press what happens

United States, 362 U. S. 610 (1960), that a criminal contempt proceeding was not a "criminal prosecution" within the meaning of the Sixth Amendment, the Court was careful to note that more than the Sixth Amendment was involved:

> "[W]hile the right to a 'public trial' is explicitly guaranteed by the Sixth Amendment only for 'criminal prosecutions,' that provision is a reflection of the notion, deeply rooted in the common law, that 'justice must satisfy the appearance of justice.' . . . [D]ue process demands appropriate regard for the requirements of a public proceeding in cases of criminal contempt . . . as it does for all adjudications through the exercise of the judicial power, barring narrowly limited categories of exceptions. . . ." *Id.*, at 616.[10]

And recently in *Gannett Co.* v. *DePasquale*, 443 U. S. 368 (1979), both the majority, *id.*, at 384, 386, n. 15, and dissenting opinion, *id.*, at 423, agreed that open trials were part of the common-law tradition.

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there, to the end that the public may judge whether our system of criminal justice is fair and right." *Maryland* v. *Baltimore Radio Show, Inc.*, 338 U. S. 912, 920 (1950) (Frankfurter, J., dissenting from denial of certiorari).

"It is true that the public has the right to be informed as to what occurs in its courts, . . . reporters of all media, including television, are always present if they wish to be and are plainly free to report whatever occurs in open court. . . ." *Estes* v. *Texas*, 381 U. S. 532, 541–542 (1965) (Clark, J.); see also *id.*, at 583–584 (Warren, C. J., concurring). (The Court ruled, however, that the televising of the criminal trial over the defendant's objections violated his due process right to a fair trial.)

"The principle that justice cannot survive behind walls of silence has long been reflected in the 'Anglo-American distrust for secret trials.'" *Sheppard* v. *Maxwell*, 384 U. S. 333, 349 (1966) (Clark, J.).

[10] The Court went on to hold that, "on the particular circumstances of the case," 362 U. S., at 616, the accused could not complain on appeal of the "so-called 'secrecy' of the proceedings," *id.*, at 617, because, with counsel present, he had failed to object or to request the judge to open the courtroom at the time.

Despite the history of criminal trials being presumptively open since long before the Constitution, the State presses its contention that neither the Constitution nor the Bill of Rights contains any provision which by its terms guarantees to the public the right to attend criminal trials. Standing alone, this is correct, but there remains the question whether, absent an explicit provision, the Constitution affords protection against exclusion of the public from criminal trials.

III

A

The First Amendment, in conjunction with the Fourteenth, prohibits governments from "abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." These expressly guaranteed freedoms share a common core purpose of assuring freedom of communication on matters relating to the functioning of government. Plainly it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted; as we have shown, recognition of this pervades the centuries-old history of open trials and the opinions of this Court. *Supra,* at 564–575, and n. 9.

The Bill of Rights was enacted against the backdrop of the long history of trials being presumptively open. Public access to trials was then regarded as an important aspect of the process itself; the conduct of trials "before as many of the people as chuse to attend" was regarded as one of "the inestimable advantages of a free English constitution of government." 1 Journals 106, 107. In guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees. "[T]he First Amendment goes beyond protection of the press and the self-

expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 783 (1978). Free speech carries with it some freedom to listen. "In a variety of contexts this Court has referred to a First Amendment right to 'receive information and ideas.'" *Kleindienst* v. *Mandel*, 408 U. S. 753, 762 (1972). What this means in the context of trials is that the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted. "For the First Amendment does not speak equivocally. . . . It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow." *Bridges* v. *California*, 314 U. S. 252, 263 (1941) (footnote omitted).

It is not crucial whether we describe this right to attend criminal trials to hear, see, and communicate observations concerning them as a "right of access," cf. *Gannett, supra*, at 397 (POWELL, J., concurring); *Saxbe* v. *Washington Post Co.*, 417 U. S. 843 (1974); *Pell* v. *Procunier*, 417 U. S. 817 (1974),[11] or a "right to gather information," for we have recognized that "without some protection for seeking out the news, freedom of the press could be eviscerated." *Branzburg* v. *Hayes*, 408 U. S. 665, 681 (1972). The explicit, guaranteed rights to speak and to publish concerning what takes place at a

[11] *Procunier* and *Saxbe* are distinguishable in the sense that they were concerned with penal institutions which, by definition, are not "open" or public places. Penal institutions do not share the long tradition of openness, although traditionally there have been visiting committees of citizens, and there is no doubt that legislative committees could exercise plenary oversight and "visitation rights." *Saxbe*, 417 U. S., at 849, noted that "limitation on visitations is justified by what the Court of Appeals acknowledged as 'the truism that prisons are institutions where public access is generally limited.' 161 U. S. App. D. C., at 80, 494 F. 2d, at 999. See *Adderley* v. *Florida*, 385 U. S. 39, 41 (1966) [jails]." See also *Greer* v. *Spock*, 424 U. S. 828 (1976) (military bases).

trial would lose much meaning if access to observe the trial could, as it was here, be foreclosed arbitrarily.[12]

B

The right of access to places traditionally open to the public, as criminal trials have long been, may be seen as assured by the amalgam of the First Amendment guarantees of speech and press; and their affinity to the right of assembly is not without relevance. From the outset, the right of assembly was regarded not only as an independent right but also as a catalyst to augment the free exercise of the other First Amendment rights with which it was deliberately linked by the draftsmen.[13]

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[12] That the right to attend may be exercised by people less frequently today when information as to trials generally reaches them by way of print and electronic media in no way alters the basic right. Instead of relying on personal observation or reports from neighbors as in the past, most people receive information concerning trials through the media whose representatives "are entitled to the same rights [to attend trials] as the general public." *Estes* v. *Texas*, 381 U. S., at 540.

[13] When the First Congress was debating the Bill of Rights, it was contended that there was no need separately to assert the right of assembly because it was subsumed in freedom of speech. Mr. Sedgwick of Massachusetts argued that inclusion of "assembly" among the enumerated rights would tend to make the Congress "appear trifling in the eyes of their constituents. . . . If people freely converse together, they must assemble for that purpose; it is a self-evident, unalienable right which the people possess; it is certainly a thing that never would be called in question. . . ." 1 Annals of Cong. 731 (1789).

Since the right existed independent of any written guarantee, Sedgwick went on to argue that if it were the drafting committee's purpose to protect all inherent rights of the people by listing them, "they might have gone into a very lengthy enumeration of rights," but this was unnecessary, he said, "in a Government where none of them were intended to be infringed." *Id.*, at 732.

Mr. Page of Virginia responded, however, that at times "such rights have been opposed," and that "people have . . . been prevented from assembling together on their lawful occasions":

"[T]herefore it is well to guard against such stretches of authority, by inserting the privilege in the declaration of rights. If the people could

"The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental." *De Jonge* v. *Oregon*, 299 U. S. 353, 364 (1937). People assemble in public places not only to speak or to take action, but also to listen, observe, and learn; indeed, they may "assembl[e] for any lawful purpose," *Hague* v. *CIO*, 307 U. S. 496, 519 (1939) (opinion of Stone, J.). Subject to the traditional time, place, and manner restrictions, see, *e. g.*, *Cox* v. *New Hampshire*, 312 U. S. 569 (1941); see also *Cox* v. *Louisiana*, 379 U. S. 559, 560–564 (1965), streets, sidewalks, and parks are places traditionally open, where First Amendment rights may be exercised, see *Hague* v. *CIO*, *supra*, at 515 (opinion of Roberts, J.); a trial courtroom also is a public place where the people generally—and representatives of the media—have a right to be present, and where their presence historically has been thought to enhance the integrity and quality of what takes place.[14]

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be deprived of the power of assembling under any pretext whatsoever, they might be deprived of every other privilege contained in the clause." *Ibid.* The motion to strike "assembly" was defeated. *Id.*, at 733.

[14] It is of course true that the right of assembly in our Bill of Rights was in large part drafted in reaction to restrictions on such rights in England. See, *e. g.*, 1 Geo. 1, stat. 2, ch. 5 (1714); cf. 36 Geo. 3, ch. 8 (1795). As we have shown, the right of Englishmen to attend trials was not similarly limited; but it would be ironic indeed if the very historic openness of the trial could militate against protection of the right to attend it. The Constitution guarantees more than simply freedom from those abuses which led the Framers to single out particular rights. The very purpose of the First Amendment is to guarantee all facets of each right described; its draftsmen sought both to protect the "rights of Englishmen" and to enlarge their scope. See *Bridges* v. *California*, 314 U. S. 252, 263–265 (1941).

"There are no contrary implications in any part of the history of the period in which the First Amendment was framed and adopted. No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly, and petition than the people of Great Britain had ever enjoyed." *Id.*, at 265.

C

The State argues that the Constitution nowhere spells out a guarantee for the right of the public to attend trials, and that accordingly no such right is protected. The possibility that such a contention could be made did not escape the notice of the Constitution's draftsmen; they were concerned that some important rights might be thought disparaged because not specifically guaranteed. It was even argued that because of this danger no Bill of Rights should be adopted. See, *e. g.*, The Federalist No. 84 (A. Hamilton). In a letter to Thomas Jefferson in October 1788, James Madison explained why he, although "in favor of a bill of rights," had "not viewed it in an important light" up to that time: "I conceive that in a certain degree . . . the rights in question are reserved by the manner in which the federal powers are granted." He went on to state that "there is great reason to fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude." 5 Writings of James Madison 271 (G. Hunt ed. 1904).[15]

But arguments such as the State makes have not precluded recognition of important rights not enumerated. Notwithstanding the appropriate caution against reading into the Constitution rights not explicitly defined, the Court has acknowledged that certain unarticulated rights are implicit in enumerated guarantees. For example, the rights of association and of privacy, the right to be presumed innocent, and the right to be judged by a standard of proof beyond a rea-

[15] Madison's comments in Congress also reveal the perceived need for some sort of constitutional "saving clause," which, among other things, would serve to foreclose application to the Bill of Rights of the maxim that the affirmation of particular rights implies a negation of those not expressly defined. See 1 Annals of Cong. 438–440 (1789). See also, *e. g.*, 2 J. Story, Commentaries on the Constitution of the United States 651 (5th ed. 1891). Madison's efforts, culminating in the Ninth Amendment, served to allay the fears of those who were concerned that expressing certain guarantees could be read as excluding others.

sonable doubt in a criminal trial, as well as the right to travel, appear nowhere in the Constitution or Bill of Rights. Yet these important but unarticulated rights have nonetheless been found to share constitutional protection in common with explicit guarantees.[16] The concerns expressed by Madison and others have thus been resolved; fundamental rights, even though not expressly guaranteed, have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined.

We hold that the right to attend criminal trials [17] is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and "of the press could be eviscerated." *Branzburg*, 408 U. S., at 681.

D

Having concluded there was a guaranteed right of the public under the First and Fourteenth Amendments to attend the trial of Stevenson's case, we return to the closure order challenged by appellants. The Court in *Gannett* made clear that although the Sixth Amendment guarantees the accused a right to a public trial, it does not give a right to a private trial. 443 U. S., at 382. Despite the fact that this was the fourth trial of the accused, the trial judge made no findings to support closure; no inquiry was made as to whether alterna-

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[16] See, *e. g.*, *NAACP* v. *Alabama*, 357 U. S. 449 (1958) (right of association); *Griswold* v. *Connecticut*, 381 U. S. 479 (1965), and *Stanley* v. *Georgia*, 394 U. S. 557 (1969) (right to privacy); *Estelle* v. *Williams*, 425 U. S. 501, 503 (1976), and *Taylor* v. *Kentucky*, 436 U. S. 478, 483–486 (1978) (presumption of innocence); *In re Winship*, 397 U. S. 358 (1970) (standard of proof beyond a reasonable doubt); *United States* v. *Guest*, 383 U. S. 745, 757–759 (1966), and *Shapiro* v. *Thompson*, 394 U. S. 618, 630 (1969) (right to interstate travel).

[17] Whether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open.

tive solutions would have met the need to ensure fairness; there was no recognition of any right under the Constitution for the public or press to attend the trial. In contrast to the pretrial proceeding dealt with in *Gannett,* there exist in the context of the trial itself various tested alternatives to satisfy the constitutional demands of fairness. See, *e. g., Nebraska Press Assn.* v. *Stuart,* 427 U. S., at 563–565; *Sheppard* v. *Maxwell,* 384 U. S., at 357–362. There was no suggestion that any problems with witnesses could not have been dealt with by their exclusion from the courtroom or their sequestration during the trial. See *id.,* at 359. Nor is there anything to indicate that sequestration of the jurors would not have guarded against their being subjected to any improper information. All of the alternatives admittedly present difficulties for trial courts, but none of the factors relied on here was beyond the realm of the manageable. Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public.[18] Accordingly, the judgment under review is

Reversed.

MR. JUSTICE POWELL took no part in the consideration or decision of this case.

MR. JUSTICE WHITE, concurring.

This case would have been unnecessary had *Gannett Co.* v. *DePasquale,* 443 U. S. 368 (1979), construed the Sixth

[18] We have no occasion here to define the circumstances in which all or parts of a criminal trial may be closed to the public, cf., *e. g.,* 6 J. Wigmore, Evidence § 1835 (J. Chadbourn rev. 1976), but our holding today does not mean that the First Amendment rights of the public and representatives of the press are absolute. Just as a government may impose reasonable time, place, and manner restrictions upon the use of its streets in the interest of such objectives as the free flow of traffic, see, *e. g., Cox* v. *New Hampshire,* 312 U. S. 569 (1941), so may a trial judge, in the interest of the fair administration of justice, impose reasonable limitations on access to a trial. "[T]he question in a particular case is whether that control is

Amendment to forbid excluding the public from criminal proceedings except in narrowly defined circumstances. But the Court there rejected the submission of four of us to this effect, thus requiring that the First Amendment issue involved here be addressed. On this issue, I concur in the opinion of THE CHIEF JUSTICE.

MR. JUSTICE STEVENS, concurring.

This is a watershed case. Until today the Court has accorded virtually absolute protection to the dissemination of information or ideas, but never before has it squarely held that the acquisition of newsworthy matter is entitled to any constitutional protection whatsoever. An additional word of emphasis is therefore appropriate.

Twice before, the Court has implied that any governmental restriction on access to information, no matter how severe and no matter how unjustified, would be constitutionally acceptable so long as it did not single out the press for special disabilities not applicable to the public at large. In a dissent joined by MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL in *Saxbe* v. *Washington Post Co.*, 417 U. S. 843, 850, MR. JUSTICE POWELL unequivocally rejected the conclusion that "*any* governmental restriction on press access to information,

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exerted so as not to deny or unwarrantedly abridge . . . the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places." *Id.*, at 574. It is far more important that trials be conducted in a quiet and orderly setting than it is to preserve that atmosphere on city streets. Compare, *e. g.*, *Kovacs* v. *Cooper*, 336 U. S. 77 (1949), with *Illinois* v. *Allen*, 397 U. S. 337 (1970), and *Estes* v. *Texas*, 381 U. S. 532 (1965). Moreover, since courtrooms have limited capacity, there may be occasions when not every person who wishes to attend can be accommodated. In such situations, reasonable restrictions on general access are traditionally imposed, including preferential seating for media representatives. Cf. *Gannett*, 443 U. S., at 397–398 (POWELL, J., concurring); *Houchins* v. *KQED, Inc.*, 438 U. S. 1, 17 (1978) (STEWART, J., concurring in judgment); *id.*, at 32 (STEVENS, J., dissenting).

so long as it is nondiscriminatory, falls outside the purview of First Amendment concern." *Id.*, at 857 (emphasis in original). And in *Houchins* v. *KQED, Inc.*, 438 U. S. 1, 19–40, I explained at length why MR. JUSTICE BRENNAN, MR. JUSTICE POWELL, and I were convinced that "[a]n official prison policy of concealing . . . knowledge from the public by arbitrarily cutting off the flow of information at its source abridges the freedom of speech and of the press protected by the First and Fourteenth Amendments to the Constitution." *Id.*, at 38. Since MR. JUSTICE MARSHALL and MR. JUSTICE BLACKMUN were unable to participate in that case, a majority of the Court neither accepted nor rejected that conclusion or the contrary conclusion expressed in the prevailing opinions.[1] Today, however, for the first time, the Court unequivocally holds that an arbitrary interference with access to important information is an abridgment of the freedoms of speech and of the press protected by the First Amendment.

It is somewhat ironic that the Court should find more reason to recognize a right of access today than it did in *Houchins*. For *Houchins* involved the plight of a segment of society least able to protect itself, an attack on a long-standing policy of concealment, and an absence of any legitimate justification for abridging public access to information about how government operates. In this case we are protecting the interests of the most powerful voices in the community, we are concerned with an almost unique exception to an established tradition of openness in the conduct of crim-

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[1] "Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control." 438 U. S., at 15 (opinion of BURGER, C. J.).

"The First and Fourteenth Amendments do not guarantee the public a right of access to information generated or controlled by government. . . . The Constitution does no more than assure the public and the press equal access once government has opened its doors." *Id.*, at 16 (STEWART, J., concurring in judgment).

inal trials, and it is likely that the closure order was motivated by the judge's desire to protect the individual defendant from the burden of a fourth criminal trial.[2]

In any event, for the reasons stated in Part II of my *Houchins* opinion, 438 U. S., at 30–38, as well as those stated by THE CHIEF JUSTICE today, I agree that the First Amendment protects the public and the press from abridgment of their rights of access to information about the operation of their government, including the Judicial Branch; given the total absence of any record justification for the closure order entered in this case, that order violated the First Amendment.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, concurring in the judgment.

Gannett Co. v. *DePasquale*, 443 U. S. 368 (1979), held that the Sixth Amendment right to a public trial was personal to the accused, conferring no right of access to pretrial proceedings that is separately enforceable by the public or the press. The instant case raises the question whether the First Amendment, of its own force and as applied to the States through

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[2] Neither that likely motivation nor facts showing the risk that a fifth trial would have been necessary without closure of the fourth are disclosed in this record, however. The absence of any articulated reason for the closure order is a sufficient basis for distinguishing this case from *Gannett Co.* v. *DePasquale*, 443 U. S. 368. The decision today is in no way inconsistent with the perfectly unambiguous holding in *Gannett* that the rights guaranteed by the Sixth Amendment are rights that may be asserted by the accused rather than members of the general public. In my opinion the Framers quite properly identified the party who has the greatest interest in the right to a public trial. The language of the Sixth Amendment is worth emphasizing:

"In all criminal prosecutions, *the accused* shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." (Emphasis added.)

the Fourteenth Amendment, secures the public an independent right of access to trial proceedings. Because I believe that the First Amendment—of itself and as applied to the States through the Fourteenth Amendment—secures such a public right of access, I agree with those of my Brethren who hold that, without more, agreement of the trial judge and the parties cannot constitutionally close a trial to the public.[1]

I

While freedom of expression is made inviolate by the First Amendment, and, with only rare and stringent exceptions, may not be suppressed, see, *e. g., Brown* v. *Glines,* 444 U. S. 348, 364 (1980) (BRENNAN, J., dissenting); *Nebraska Press Assn.* v. *Stuart,* 427 U. S. 539, 558–559 (1976); *id.,* at 590 (BRENNAN, J., concurring in judgment); *New York Times Co.* v. *United States,* 403 U. S. 713, 714 (1971) (*per curiam* opinion); *Near* v. *Minnesota ex rel. Olson,* 283 U. S. 697, 715–716 (1931), the First Amendment has not been viewed by the Court in all settings as providing an equally categorical assurance of the correlative freedom of access to information, see, *e. g., Saxbe* v. *Washington Post Co.,* 417 U. S. 843, 849

[1] Of course, the Sixth Amendment remains the source of the *accused's* own right to insist upon public judicial proceedings. *Gannett Co.* v. *DePasquale,* 443 U. S. 368 (1979).

That the Sixth Amendment explicitly establishes a public trial right does not impliedly foreclose the derivation of such a right from other provisions of the Constitution. The Constitution was not framed as a work of carpentry, in which all joints must fit snugly without overlapping. Of necessity, a document that designs a form of government will address central political concerns from a variety of perspectives. Significantly, this Court has recognized the open trial right both as a matter of the Sixth Amendment and as an ingredient in Fifth Amendment due process. See *Levine* v. *United States,* 362 U. S. 610, 614, 616 (1960); cf. *In re Oliver,* 333 U. S. 257 (1948) (Fourteenth Amendment due process). Analogously, racial segregation has been found independently offensive to the Equal Protection and Fifth Amendment Due Process Clauses. Compare *Brown* v. *Board of Education,* 347 U. S. 483, 495 (1954), with *Bolling* v. *Sharpe,* 347 U. S. 497, 499–500 (1954).

(1974); *Zemel* v. *Rusk*, 381 U. S. 1, 16–17 (1965); see also *Houchins* v. *KQED, Inc.*, 438 U. S. 1, 8–9 (1978) (opinion of BURGER, C. J.); *id.*, at 16 (STEWART, J., concurring in judgment); *Gannett Co.* v. *DePasquale*, *supra*, at 404–405 (REHNQUIST, J., concurring). But cf. *id.*, at 397–398 (POWELL, J., concurring); *Houchins*, *supra*, at 27–38 (STEVENS, J., dissenting); *Saxbe*, *supra*, at 856–864 (POWELL, J., dissenting); *Pell* v. *Procunier*, 417 U. S. 817, 839–842 (1974) (Douglas, J., dissenting).[2] Yet the Court has not ruled out a public access component to the First Amendment in every circumstance. Read with care and in context, our decisions must therefore be understood as holding only that any privilege of access to governmental information is subject to a degree of restraint dictated by the nature of the information and countervailing interests in security or confidentiality. See *Houchins*, *supra*, at 8–9 (opinion of BURGER, C. J.) (access to prisons); *Saxbe*, *supra*, at 849 (same); *Pell*, *supra*, at 831–832 (same); *Estes* v. *Texas*, 381 U. S. 532, 541–542 (1965) (television in courtroom); *Zemel* v. *Rusk*, *supra*, at 16–17 (validation of passport to unfriendly country). These cases neither comprehensively nor absolutely deny that public access to information may at times be implied by the First Amendment and the principles which animate it.

The Court's approach in right-of-access cases simply reflects the special nature of a claim of First Amendment right to gather information. Customarily, First Amendment guarantees are interposed to protect communication between speaker

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[2] A conceptually separate, yet related, question is whether the media should enjoy greater access rights than the general public. See, *e. g.*, *Saxbe* v. *Washington Post Co.*, 417 U. S., at 850; *Pell* v. *Procunier*, 417 U. S., at 834–835. But no such contention is at stake here. Since the media's right of access is at least equal to that of the general public, see *ibid.*, this case is resolved by a decision that the state statute unconstitutionally restricts public access to trials. As a practical matter, however, the institutional press is the likely, and fitting, chief beneficiary of a right of access because it serves as the "agent" of interested citizens, and funnels information about trials to a large number of individuals.

and listener. When so employed against prior restraints, free speech protections are almost insurmountable. See *Nebraska Press Assn.* v. *Stuart, supra,* at 558–559; *New York Times Co.* v. *United States, supra,* at 714 (*per curiam* opinion). See generally Brennan, Address, 32 Rutgers L. Rev. 173, 176 (1979). But the First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a *structural* role to play in securing and fostering our republican system of self-government. See *United States* v. *Carolene Products Co.,* 304 U. S. 144, 152–153, n. 4 (1938); *Grosjean* v. *American Press Co.,* 297 U. S. 233, 249–250 (1936); *Stromberg* v. *California,* 283 U. S. 359, 369 (1931); Brennan, *supra,* at 176–177; J. Ely, Democracy and Distrust 93–94 (1980); T. Emerson, The System of Freedom of Expression 7 (1970); A. Meiklejohn, Free Speech and Its Relation to Self-Government (1948); Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L. J. 1, 23 (1971). Implicit in this structural role is not only "the principle that debate on public issues should be uninhibited, robust, and wide-open," *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 270 (1964), but the antecedent assumption that valuable public debate—as well as other civic behavior—must be informed.[3] The structural

[3] This idea has been foreshadowed in MR. JUSTICE POWELL's dissent in *Saxbe* v. *Washington Post Co., supra,* at 862–863:

"What is at stake here is the societal function of the First Amendment in preserving free public discussion of governmental affairs. No aspect of that constitutional guarantee is more rightly treasured than its protection of the ability of our people through free and open debate to consider and resolve their own destiny. . . . '[The] First Amendment is one of the vital bulwarks of our national commitment to intelligent self-government.' . . . It embodies our Nation's commitment to popular self-determination and our abiding faith that the surest course for developing sound national policy lies in a free exchange of views on public issues. And public debate must not only be unfettered; it must also be informed. For that reason this Court has repeatedly stated that First Amendment concerns encompass the receipt of information and ideas as well as the right of free expression." (Footnote omitted.)

model links the First Amendment to that process of communication necessary for a democracy to survive, and thus entails solicitude not only for communication itself, but also for the indispensable conditions of meaningful communication.[4]

However, because "the stretch of this protection is theoretically endless," Brennan, *supra*, at 177, it must be invoked with discrimination and temperance. For so far as the participating citizen's need for information is concerned, "[t]here are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow." *Zemel* v. *Rusk*, *supra*, at 16–17. An assertion of the prerogative to gather information must accordingly be assayed by considering the information sought and the opposing interests invaded.[5]

This judicial task is as much a matter of sensitivity to practical necessities as it is of abstract reasoning. But at least

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[4] The technique of deriving specific rights from the structure of our constitutional government, or from other explicit rights, is not novel. The right of suffrage has been inferred from the nature of "a free and democratic society" and from its importance as a "preservative of other basic civil and political rights. . . ." *Reynolds* v. *Sims*, 377 U. S. 533, 561–562 (1964); *San Antonio School Dist.* v. *Rodriguez*, 411 U. S. 1, 34, n. 74 (1973). So, too, the explicit freedoms of speech, petition, and assembly have yielded a correlative guarantee of certain associational activities. *NAACP* v. *Button*, 371 U. S. 415, 430 (1963). See also *Rodriguez*, *supra*, at 33–34 (indicating that rights may be implicitly embedded in the Constitution); 411 U. S., at 62–63 (BRENNAN, J., dissenting); *id.*, at 112–115 (MARSHALL, J., dissenting); *Lamont* v. *Postmaster General*, 381 U. S. 301, 308 (1965) (BRENNAN, J., concurring).

[5] Analogously, we have been somewhat cautious in applying First Amendment protections to communication by way of nonverbal and nonpictorial conduct. Some behavior is so intimately connected with expression that for practical purposes it partakes of the same transcendental constitutional value as pure speech. See, *e. g.*, *Tinker* v. *Des Moines School District*, 393 U. S. 503, 505–506 (1969). Yet where the connection between expression and action is perceived as more tenuous, communicative interests may be overridden by competing social values. See, *e. g.*, *Hughes* v. *Superior Court*, 339 U. S. 460, 464–465 (1950).

two helpful principles may be sketched. First, the case for a right of access has special force when drawn from an enduring and vital tradition of public entree to particular proceedings or information. Cf. *In re Winship*, 397 U. S. 358, 361–362 (1970). Such a tradition commands respect in part because the Constitution carries the gloss of history. More importantly, a tradition of accessibility implies the favorable judgment of experience. Second, the value of access must be measured in specifics. Analysis is not advanced by rhetorical statements that all information bears upon public issues; what is crucial in individual cases is whether access to a particular government process is important in terms of that very process.

To resolve the case before us, therefore, we must consult historical and current practice with respect to open trials, and weigh the importance of public access to the trial process itself.

II

"This nation's accepted practice of guaranteeing a public trial to an accused has its roots in our English common law heritage." *In re Oliver*, 333 U. S. 257, 266 (1948); see *Gannett Co.* v. *DePasquale*, 443 U. S., at 419–420 (BLACKMUN, J., concurring and dissenting). Indeed, historically and functionally, open trials have been closely associated with the development of the fundamental procedure of trial by jury. *In re Oliver, supra*, at 266; Radin, The Right to a Public Trial, 6 Temp. L. Q. 381, 388 (1932).[6] Pre-eminent English legal observers and commentators have unreservedly acknowledged and applauded the public character of the common-law

[6] "[The public trial] seems almost a necessary incident of jury trials, since the presence of a jury . . . already insured the presence of a large part of the public. We need scarcely be reminded that the jury was the *patria*, the 'country' and that it was in that capacity and not as judges, that it was summoned." Radin, The Right to a Public Trial, 6 Temp. L. Q. 381, 388 (1932); see 3 W. Blackstone, Commentaries *349 ("trial *by jury;* called also the trial *per pais*, or *by the country*"); T. Smith, De Republica Anglorum 79 (1970).

trial process. See T. Smith, De Republica Anglorum 77, 81–82 (1970);[7] 2 E. Coke, Institutes of the Laws of England 103 (6th ed. 1681); 3 W. Blackstone, Commentaries *372–*373;[8] M. Hale, The History of the Common Law of England 342–344 (6th ed. 1820);[9] 1 J. Bentham, Rationale of Judicial Evidence 584–585 (1827). And it appears that "there is little record, if any, of secret proceedings, criminal or civil, having occurred at any time in known English history." *Gannett, supra*, at 420 (BLACKMUN, J., concurring and dissenting); see also *In re Oliver, supra*, at 269, n. 22; Radin, *supra*, at 386–387.

This legacy of open justice was inherited by the English settlers in America. The earliest charters of colonial government expressly perpetuated the accepted practice of public trials. See Concessions and Agreements of West New Jersey, 1677, ch. XXIII;[10] Pennsylvania Frame of Government, 1682, Laws Agreed Upon in England, V.[11] "There is no evidence that any colonial court conducted criminal trials behind closed doors. . . ." *Gannett Co.* v. *DePasquale, supra*, at 425 (BLACKMUN, J., concurring and dissenting). Subsequently framed state constitutions also prescribed open trial proceedings. See, *e. g.*, Pennsylvania Declaration of Rights, 1776, IX;[12] North Carolina Declaration of Rights, 1776, IX;[13] Vermont Declaration of Rights, X (1777);[14] see also *In re Oliver*, 333 U. S., at 267. "Following the ratification in 1791 of the Federal Constitution's Sixth Amendment, . . . most of the original states and those subsequently admitted to

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[7] First published in 1583.

[8] First published in 1765.

[9] First edition published in 1713.

[10] Quoted in 1 B. Schwartz, The Bill of Rights: A Documentary History 129 (1971).

[11] *Id.*, at 140.

[12] *Id.*, at 265.

[13] *Id.*, at 287.

[14] *Id.*, at 323.

the Union adopted similar constitutional provisions." *Ibid.*[15] Today, the overwhelming majority of States secure the right to public trials. *Gannett, supra,* at 414–415, n. 3 (BLACKMUN, J., concurring and dissenting); see also *In re Oliver, supra,* at 267–268, 271, and nn. 17–20.

This Court too has persistently defended the public character of the trial process. *In re Oliver* established that the Due Process Clause of the Fourteenth Amendment forbids closed criminal trials. Noting the "universal rule against secret trials," 333 U. S., at 266, the Court held that

> "[i]n view of this nation's historic distrust of secret proceedings, their inherent dangers to freedom, and the universal requirement of our federal and state governments that criminal trials be public, the Fourteenth Amendment's guarantee that no one shall be deprived of his liberty without due process of law means at least that an accused cannot be thus sentenced to prison." *Id.,* at 273.[16]

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[15] To be sure, some of these constitutions, such as the Pennsylvania Declaration of Rights, couched their public trial guarantees in the language of the accused's rights. But although the Court has read the Federal Constitution's explicit public trial provision, U. S. Const., Amdt. 6, as benefiting the defendant alone, it does not follow that comparably worded state guarantees must be so construed. See *Gannett Co.* v. *DePasquale,* 443 U. S., at 425, and n. 9 (BLACKMUN, J., concurring and dissenting); cf. also *Mallott* v. *State,* 608 P. 2d 737, 745, n. 12 (Alaska 1980). And even if the specific state public trial protections must be invoked by defendants, those state constitutional clauses still provide evidence of the importance attached to open trials by the founders of our state governments. Indeed, it may have been thought that linking public trials to the accused's privileges was the most effective way of assuring a vigorous representative for the popular interest.

[16] Notably, *Oliver* did not rest upon the simple incorporation of the Sixth Amendment into the Fourteenth, but upon notions intrinsic to due process, because the criminal contempt proceedings at issue in the case were "not within 'all criminal prosecutions' to which [the Sixth] . . . Amendment applies." *Levine* v. *United States,* 362 U. S. 610, 616 (1960); see also n. 1, *supra.*

Even more significantly for our present purpose, *Oliver* recognized that open trials are bulwarks of our free and democratic government: public access to court proceedings is one of the numerous "checks and balances" of our system, because "contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power," *id.*, at 270. See *Sheppard* v. *Maxwell*, 384 U. S. 333, 350 (1966). Indeed, the Court focused with particularity upon the public trial guarantee "as a safeguard against any attempt to employ our courts as instruments of persecution," or "for the suppression of political and religious heresies." *Oliver*, *supra*, at 270. Thus, *Oliver* acknowledged that open trials are indispensable to First Amendment political and religious freedoms.

By the same token, a special solicitude for the public character of judicial proceedings is evident in the Court's rulings upholding the right to report about the administration of justice. While these decisions are impelled by the classic protections afforded by the First Amendment to pure communication, they are also bottomed upon a keen appreciation of the structural interest served in opening the judicial system to public inspection.[17] So, in upholding a privilege for reporting truthful information about judicial misconduct proceedings, *Landmark Communications, Inc.* v. *Virginia*, 435 U. S. 829 (1978), emphasized that public scrutiny of the operation of a judicial disciplinary body implicates a major purpose of the First Amendment—"discussion of governmental affairs," *id.*, at 839. Again, *Nebraska Press Assn.* v. *Stuart*, 427 U. S., at 559, noted that the traditional guarantee against prior restraint "should have particular force as applied to reporting of criminal proceedings. . . ." And *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 492 (1975), instructed that

[17] As Mr. Justice Holmes pointed out in his opinion for the Massachusetts Supreme Judicial Court in *Cowley* v. *Pulsifer*, 137 Mass. 392, 394 (1884), "the privilege [to publish reports of judicial proceedings] and the access of the public to the courts stand in reason upon common ground." See *Lewis* v. *Levy*, El., Bl., & El. 537, 120 Eng. Rep. 610 (KB 1858).

"[w]ith respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice." See *Time, Inc.* v. *Firestone*, 424 U. S. 448, 473–474, 476–478 (1976) (BRENNAN, J., dissenting) (open judicial process is essential to fulfill "the First Amendment guarantees to the people of this Nation that they shall retain the necessary means of control over their institutions . . .").

Tradition, contemporaneous state practice, and this Court's own decisions manifest a common understanding that "[a] trial is a public event. What transpires in the court room is public property." *Craig* v. *Harney*, 331 U. S. 367, 374 (1947). As a matter of law and virtually immemorial custom, public trials have been the essentially unwavering rule in ancestral England and in our own Nation. See *In re Oliver*, 333 U. S., at 266–268; *Gannett Co.* v. *DePasquale*, 443 U. S., at 386, n. 15; *id.*, at 418–432, and n. 11 (BLACKMUN, J., concurring and dissenting).[18] Such abiding adherence to the principle of open trials "reflect[s] a profound judgment about the way in which law should be enforced and justice administered." *Duncan* v. *Louisiana*, 391 U. S. 145, 155 (1968).

III

Publicity serves to advance several of the particular purposes of the trial (and, indeed, the judicial) process. Open trials play a fundamental role in furthering the efforts of our judicial system to assure the criminal defendant a fair and accurate adjudication of guilt or innocence. See, *e. g.*, *Estes* v. *Texas*, 381 U. S., at 538–539. But, as a feature of our

[18] The dictum in *Branzburg* v. *Hayes*, 408 U. S. 665, 684–685 (1972), that "[n]ewsmen . . . may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial . . . ," is not to the contrary; it simply notes that rights of access may be curtailed where there are sufficiently powerful countervailing considerations. See *supra*, at 588.

governing system of justice, the trial process serves other, broadly political, interests, and public access advances these objectives as well. To that extent, trial access possesses specific structural significance.[19]

The trial is a means of meeting "the notion, deeply rooted in the common law, that 'justice must satisfy the appearance of justice.'" *Levine* v. *United States*, 362 U. S. 610, 616 (1960), quoting *Offutt* v. *United States*, 348 U. S. 11, 14 (1954); accord, *Gannett Co.* v. *DePasquale*, *supra*, at 429 (BLACKMUN, J., concurring and dissenting); see *Cowley* v. *Pulsifer*, 137 Mass. 392, 394 (1884) (Holmes, J.). For a civilization founded upon principles of ordered liberty to survive and flourish, its members must share the conviction that they are governed equitably. That necessity underlies constitutional provisions as diverse as the rule against takings without just compensation, see *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74, 82–83, and n. 7 (1980), and the Equal Protection Clause. It also mandates a system of justice that demonstrates the fairness of the law to our citizens. One

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[19] By way of analogy, we have fashioned rules of criminal procedure to serve interests implicated in the trial process beside those of the defendant. For example, the exclusionary rule is prompted not only by the accused's interest in vindicating his own rights, but also in part by the independent "'imperative of judicial integrity.'" See, *e. g.*, *Terry* v. *Ohio*, 392 U. S. 1, 12–13 (1968), quoting *Elkins* v. *United States*, 364 U. S. 206, 222 (1960); *United States* v. *Calandra*, 414 U. S. 338, 357–359 (1974) (BRENNAN, J., dissenting); *Olmstead* v. *United States*, 277 U. S. 438, 484–485 (1928) (Brandeis, J., dissenting); *id.*, at 470 (Holmes, J., dissenting). And several Members of this Court have insisted that criminal entrapment cannot be "countenanced" because the "obligation" to avoid "enforcement of the law by lawless means . . . goes beyond the conviction of the particular defendant before the court. Public confidence in the fair and honorable administration of justice . . . is the transcending value at stake." *Sherman* v. *United States*, 356 U. S. 369, 380 (1958) (Frankfurter, J., concurring in result); see *United States* v. *Russell*, 411 U. S. 423, 436–439 (1973) (Douglas, J., dissenting); *id.*, at 442–443 (STEWART, J., dissenting); *Sorrells* v. *United States*, 287 U. S. 435, 455 (1932) (opinion of Roberts, J.); *Casey* v. *United States*, 276 U. S. 413, 423, 425 (1928) (Brandeis, J., dissenting).

major function of the trial, hedged with procedural protections and conducted with conspicuous respect for the rule of law, is to make that demonstration. See *In re Oliver, supra,* at 270, n. 24.

Secrecy is profoundly inimical to this demonstrative purpose of the trial process. Open trials assure the public that procedural rights are respected, and that justice is afforded equally. Closed trials breed suspicion of prejudice and arbitrariness, which in turn spawns disrespect for law. Public access is essential, therefore, if trial adjudication is to achieve the objective of maintaining public confidence in the administration of justice. See *Gannett, supra,* at 428–429 (BLACKMUN, J., concurring and dissenting).

But the trial is more than a demonstrably just method of adjudicating disputes and protecting rights. It plays a pivotal role in the entire judicial process, and, by extension, in our form of government. Under our system, judges are not mere umpires, but, in their own sphere, lawmakers—a coordinate branch of *government.*[20] While individual cases turn upon the controversies between parties, or involve particular prosecutions, court rulings impose official and practical consequences upon members of society at large. Moreover, judges bear responsibility for the vitally important task of construing and securing constitutional rights. Thus, so far as the

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[20] The interpretation and application of constitutional and statutory law, while not legislation, is lawmaking, albeit of a kind that is subject to special constraints and informed by unique considerations. Guided and confined by the Constitution and pertinent statutes, judges are obliged to be discerning, to exercise judgment, and to prescribe rules. Indeed, at times judges wield considerable authority to formulate legal policy in designated areas. See, *e. g., Moragne* v. *States Marine Lines,* 398 U. S. 375 (1970); *Banco Nacional de Cuba* v. *Sabbatino,* 376 U. S. 398 (1964); *Textile Workers* v. *Lincoln Mills,* 353 U. S. 448, 456–457 (1957); P. Areeda, Antitrust Analysis 45–46 (2d ed. 1974) ("Sherman Act [is] . . . a general authority to do what common law courts usually do: to use certain customary techniques of judicial reasoning . . . and to develop, refine, and innovate in the dynamic common law tradition").

trial is the mechanism for judicial factfinding, as well as the initial forum for legal decisionmaking, it is a genuine governmental proceeding.

It follows that the conduct of the trial is pre-eminently a matter of public interest. See *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S., at 491–492; *Maryland* v. *Baltimore Radio Show*, 338 U. S. 912, 920 (1950) (opinion of Frankfurter, J., respecting denial of certiorari). More importantly, public access to trials acts as an important check, akin in purpose to the other checks and balances that infuse our system of government. "The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power," *In re Oliver*, 333 U. S., at 270—an abuse that, in many cases, would have ramifications beyond the impact upon the parties before the court. Indeed, "'[w]ithout publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account.'" *Id.*, at 271, quoting 1 J. Bentham, Rationale of Judicial Evidence 524 (1827); see 3 W. Blackstone, Commentaries *372; M. Hale, History of the Common Law of England 344 (6th ed. 1820); 1 J. Bryce, The American Commonwealth 514 (rev. 1931).

Finally, with some limitations, a trial aims at true and accurate factfinding. Of course, proper factfinding is to the benefit of criminal defendants and of the parties in civil proceedings. But other, comparably urgent, interests are also often at stake. A miscarriage of justice that imprisons an innocent accused also leaves a guilty party at large, a continuing threat to society. Also, mistakes of fact in civil litigation may inflict costs upon others than the plaintiff and defendant. Facilitation of the trial factfinding process, therefore, is of concern to the public as well as to the parties.[21]

Publicizing trial proceedings aids accurate factfinding. "Public trials come to the attention of key witnesses unknown

[21] Further, the interest in insuring that the innocent are not punished may be shared by the general public, in addition to the accused himself.

to the parties." *In re Oliver, supra,* at 270, n. 24; see *Tanksley* v. *United States,* 145 F. 2d 58, 59 (CA9 1944); 6 J. Wigmore, Evidence § 1834 (J. Chadbourn rev. 1976). Shrewd legal observers have averred that

> "open examination of witnesses *viva voce,* in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination . . . where a witness may frequently depose that in private, which he will be ashamed to testify in a public and solemn tribunal." 3 Blackstone, *supra,* at *373.

See *Tanksley* v. *United States, supra,* at 59–60; Hale, *supra,* at 345; 1 Bentham, *supra,* at 522–523. And experience has borne out these assertions about the truthfinding role of publicity. See Hearings on S. 290 before the Subcommittee on Constitutional Rights and the Subcommittee on Improvements in Judicial Machinery of the Senate Judiciary Committee, 89th Cong., 1st Sess., pt. 2, pp. 433–434, 437–438 (1966).

Popular attendance at trials, in sum, substantially furthers the particular public purposes of that critical judicial proceeding.[22] In that sense, public access is an indispensable element of the trial process itself. Trial access, therefore, assumes structural importance in our "government of laws," *Marbury* v. *Madison,* 1 Cranch 137, 163 (1803).

IV

As previously noted, resolution of First Amendment public access claims in individual cases must be strongly influenced

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[22] In advancing these purposes, the availability of a trial transcript is no substitute for a public presence at the trial itself. As any experienced appellate judge can attest, the "cold" record is a very imperfect reproduction of events that transpire in the courtroom. Indeed, to the extent that publicity serves as a check upon trial officials, "[r]ecordation . . . would be found to operate rather as cloa[k] than chec[k]; as cloa[k] in reality, as chec[k] only in appearance." *In re Oliver,* 333 U. S., at 271, quoting 1 J. Bentham, Rationale of Judicial Evidence 524 (1827); see *id.,* at 577–578.

by the weight of historical practice and by an assessment of the specific structural value of public access in the circumstances. With regard to the case at hand, our ingrained tradition of public trials and the importance of public access to the broader purposes of the trial process, tip the balance strongly toward the rule that trials be open.[23] What countervailing interests might be sufficiently compelling to reverse this presumption of openness need not concern us now,[24] for the statute at stake here authorizes trial closures at the unfettered discretion of the judge and parties.[25] Accordingly, Va. Code § 19.2–266 (Supp. 1980) violates the First and Fourteenth Amendments, and the decision of the Virginia Supreme Court to the contrary should be reversed.

MR. JUSTICE STEWART, concurring in the judgment.

In *Gannett Co.* v. *DePasquale,* 443 U. S. 368, the Court held that the Sixth Amendment, which guarantees "the accused" the right to a public trial, does not confer upon representatives of the press or members of the general public any right of access to a trial.[1] But the Court explicitly left

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[23] The presumption of public trials is, of course, not at all incompatible with reasonable restrictions imposed upon courtroom behavior in the interests of decorum. Cf. *Illinois* v. *Allen,* 397 U. S. 337 (1970). Thus, when engaging in interchanges at the bench, the trial judge is not required to allow public or press intrusion upon the huddle. Nor does this opinion intimate that judges are restricted in their ability to conduct conferences in chambers, inasmuch as such conferences are distinct from trial proceedings.

[24] For example, national security concerns about confidentiality may sometimes warrant closures during sensitive portions of trial proceedings, such as testimony about state secrets. Cf. *United States* v. *Nixon,* 418 U. S. 683, 714–716 (1974).

[25] Significantly, closing a trial lacks even the justification for barring the door to pretrial hearings: the necessity of preventing dissemination of suppressible prejudicial evidence to the public before the jury pool has become, in a practical sense, finite and subject to sequestration.

[1] The Court also made clear that the Sixth Amendment does not give the accused the right to a *private* trial. 443 U. S., at 382. Cf. *Singer* v.

open the question whether such a right of access may be guaranteed by other provisions of the Constitution, *id.*, at 391–393. MR. JUSTICE POWELL expressed the view that the First and Fourteenth Amendments do extend at least a limited right of access even to pretrial suppression hearings in criminal cases, *id.*, at 397–403 (concurring opinion). MR. JUSTICE REHNQUIST expressed a contrary view, *id.*, at 403–406 (concurring opinion). The remaining members of the Court were silent on the question.

Whatever the ultimate answer to that question may be with respect to pretrial suppression hearings in criminal cases, the First and Fourteenth Amendments clearly give the press and the public a right of access to trials themselves, civil as well as criminal.[2] As has been abundantly demonstrated in Part II of the opinion of THE CHIEF JUSTICE, in MR. JUSTICE BRENNAN's concurring opinion, and in MR. JUSTICE BLACKMUN's dissenting opinion last Term in the *Gannett* case, *supra*, at 406, it has for centuries been a basic presupposition of the Anglo-American legal system that trials shall be public trials. The opinions referred to also convincingly explain the many good reasons why this is so. With us, a trial is by very definition a proceeding open to the press and to the public.

In conspicuous contrast to a military base, *Greer* v. *Spock*, 424 U. S. 828; a jail, *Adderley* v. *Florida*, 385 U. S. 39; or a prison, *Pell* v. *Procunier*, 417 U. S. 817, a trial courtroom is a public place. Even more than city streets, sidewalks, and

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United States, 380 U. S. 24 (Sixth Amendment right of trial by jury does not include right to be tried without a jury).

[2] It has long been established that the protections of the First Amendment are guaranteed by the Fourteenth Amendment against invasion by the States. *E. g.*, *Gitlow* v. *New York*, 268 U. S. 652. The First Amendment provisions relevant to this case are those protecting free speech and a free press. The right to speak implies a freedom to listen, *Kleindienst* v. *Mandel*, 408 U. S. 753. The right to publish implies a freedom to gather information, *Branzburg* v. *Hayes*, 408 U. S. 665, 681. See concurring opinion of MR. JUSTICE BRENNAN, *ante*, p. 584, *passim*.

parks as areas of traditional First Amendment activity, *e. g.*, *Shuttlesworth* v. *Birmingham*, 394 U. S. 147, a trial courtroom is a place where representatives of the press and of the public are not only free to be, but where their presence serves to assure the integrity of what goes on.

But this does not mean that the First Amendment right of members of the public and representatives of the press to attend civil and criminal trials is absolute. Just as a legislature may impose reasonable time, place, and manner restrictions upon the exercise of First Amendment freedoms, so may a trial judge impose reasonable limitations upon the unrestricted occupation of a courtroom by representatives of the press and members of the public. Cf. *Sheppard* v. *Maxwell*, 384 U. S. 333. Much more than a city street, a trial courtroom must be a quiet and orderly place. Compare *Kovacs* v. *Cooper*, 336 U. S. 77, with *Illinois* v. *Allen*, 397 U. S. 337, and *Estes* v. *Texas*, 381 U. S. 532. Moreover, every courtroom has a finite physical capacity, and there may be occasions when not all who wish to attend a trial may do so.[3] And while there exist many alternative ways to satisfy the constitutional demands of a fair trial,[4] those demands may also sometimes justify limitations upon the unrestricted presence of spectators in the courtroom.[5]

Since in the present case the trial judge appears to have

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[3] In such situations, representatives of the press must be assured access. *Houchins* v. *KQED, Inc.*, 438 U. S. 1, 16 (opinion concurring in judgment).

[4] Such alternatives include sequestration of juries, continuances, and changes of venue.

[5] This is not to say that only constitutional considerations can justify such restrictions. The preservation of trade secrets, for example, might justify the exclusion of the public from at least some segments of a civil trial. And the sensibilities of a youthful prosecution witness, for example, might justify similar exclusion in a criminal trial for rape, so long as the defendant's Sixth Amendment right to a public trial were not impaired. See, *e. g.*, *Stamicarbon, N. V.* v. *American Cyanamid Co.*, 506 F. 2d 532, 539–542 (CA2 1974).

given no recognition to the right of representatives of the press and members of the public to be present at the Virginia murder trial over which he was presiding, the judgment under review must be reversed.

It is upon the basis of these principles that I concur in the judgment.

MR. JUSTICE BLACKMUN, concurring in the judgment.

My opinion and vote in partial dissent last Term in *Gannett Co.* v. *DePasquale,* 443 U. S. 368, 406 (1979), compels my vote to reverse the judgment of the Supreme Court of Virginia.

I

The decision in this case is gratifying for me for two reasons:

It is gratifying, first, to see the Court now looking to and relying upon legal history in determining the fundamental public character of the criminal trial. *Ante,* at 564–569, 572–574, and n. 9. The partial dissent in *Gannett,* 443 U. S., at 419–433, took great pains in assembling—I believe adequately—the historical material and in stressing its importance to this area of the law. See also MR. JUSTICE BRENNAN's helpful review set forth as Part II of his opinion in the present case. *Ante,* at 589–593. Although the Court in *Gannett* gave a modicum of lip service to legal history, 443 U. S., at 386, n. 15, it denied its obvious application when the defense and the prosecution, with no resistance by the trial judge, agreed that the proceeding should be closed.

The Court's return to history is a welcome change in direction.

It is gratifying, second, to see the Court wash away at least some of the graffiti that marred the prevailing opinions in *Gannett.* No fewer than 12 times in the primary opinion in that case, the Court (albeit in what seems now to have be-

come clear dicta) observed that its Sixth Amendment closure ruling applied to the *trial* itself. The author of the first concurring opinion was fully aware of this and would have restricted the Court's observations and ruling to the suppression hearing. *Id.*, at 394. Nonetheless, he *joined* the Court's opinion, *ibid.*, with its multiple references to the trial itself; the opinion was not a mere concurrence in the Court's judgment. And MR. JUSTICE REHNQUIST, in his separate concurring opinion, quite understandably observed, as a consequence, that the Court was holding "without qualification," that " 'members of the public have no constitutional right under the Sixth and Fourteenth Amendments to attend criminal trials.' " *id.*, at 403, quoting from the primary opinion, *id.*, at 391. The resulting confusion among commentators [1] and journalists [2] was not surprising.

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[1] See, *e. g.*, Stephenson, Fair Trial-Free Press: Rights in Continuing Conflict, 46 Brooklyn L. Rev. 39, 63 (1979) ("intended reach of the majority opinion is unclear" (footnote omitted)); The Supreme Court, 1978 Term, 93 Harv. L. Rev. 60, 65 (1979) ("widespread uncertainty over what the Court held"); Note, 51 U. Colo. L. Rev. 425, 432–433 (1980) ("*Gannett* can be interpreted to sanction the closing of trials"; citing "the uncertainty of the language in *Gannett*," and its "ambiguous sixth amendment holding"); Note, 11 Tex. Tech. L. Rev. 159, 170–171 (1979) ("perhaps much of the present and imminent confusion lies in the Court's own statement of its holding"); Borow & Kruth, Closed Preliminary Hearings, 55 Calif. State Bar J. 18, 23 (1980) ("Despite the public disclaimers . . . , the majority holding appears to embrace the right of access to trials as well as pretrial hearings"); Goodale, Gannett Means What it Says; But Who Knows What it Says?, Nat. L. J., Oct. 15, 1979, p. 20; see also Keeffe, The Boner Called Gannett, 66 A. B. A. J. 227 (1980).

[2] The press—perhaps the segment of society most profoundly affected by *Gannett*—has called the Court's decision "cloudy," Birmingham Post-Herald, Aug. 21, 1979, p. A4; "confused," Chicago Sun-Times, Sept. 20, 1979, p. 56 (cartoon); "incoherent," Baltimore Sun, Sept. 22, 1979, p. A14; "mushy," Washington Post, Aug. 10, 1979, p. A15; and a "muddle," Time, Sept. 17, 1979, p. 82, and Newsweek, Aug. 27, 1979, p. 69.

II

The Court's ultimate ruling in *Gannett,* with such clarification as is provided by the opinions in this case today, apparently is now to the effect that there is no *Sixth* Amendment right on the part of the public—or the press—to an open hearing on a motion to suppress. I, of course, continue to believe that *Gannett* was in error, both in its interpretation of the Sixth Amendment generally, and in its application to the suppression hearing, for I remain convinced that the right to a public trial is to be found where the Constitution explicitly placed it—in the Sixth Amendment.[3]

The Court, however, has eschewed the Sixth Amendment route. The plurality turns to other possible constitutional sources and invokes a veritable potpourri of them—the Speech Clause of the First Amendment, the Press Clause, the Assembly Clause, the Ninth Amendment, and a cluster of penumbral guarantees recognized in past decisions. This course is troublesome, but it is the route that has been selected and, at least for now, we must live with it. No purpose would be served by my spelling out at length here the reasons for my saying that the course is troublesome. I need do no more than observe that uncertainty marks the nature—and strictness—of the standard of closure the Court adopts. The plurality opinion speaks of "an overriding interest articulated in findings," *ante,* at 581; MR. JUSTICE STEWART reserves, perhaps not inappropriately, "reasonable limitations," *ante,* at 600; MR. JUSTICE BRENNAN presents his separate analytical framework; MR. JUSTICE POWELL in *Gannett* was critical of those Justices who, relying on the Sixth Amendment, concluded

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[3] I shall not again seek to demonstrate the errors of analysis in the Court's opinion in *Gannett.* I note, however, that the very existence of the present case illustrates the utter fallacy of thinking, in this context, that "the public interest is fully protected by the participants in the litigation." *Gannett Co.* v. *DePasquale,* 443 U. S., at 384. Cf. *id.,* at 438–439 (opinion in partial dissent).

that closure is authorized only when "strictly and inescapably necessary," 443 U. S., at 339–400; and MR. JUSTICE REHNQUIST continues his flat rejection of, among others, the First Amendment avenue.

Having said all this, and with the Sixth Amendment set to one side in this case, I am driven to conclude, as a secondary position, that the First Amendment must provide some measure of protection for public access to the trial. The opinion in partial dissent in *Gannett* explained that the public has an intense need and a deserved right to know about the administration of justice in general; about the prosecution of local crimes in particular; about the conduct of the judge, the prosecutor, defense counsel, police officers, other public servants, and all the actors in the judicial arena; and about the trial itself. See 443 U. S., at 413, and n. 2, 414, 428–429, 448. See also *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 492 (1975). It is clear and obvious to me, on the approach the Court has chosen to take, that, by closing this criminal trial, the trial judge abridged these First Amendment interests of the public.

I also would reverse, and I join the judgment of the Court.

MR. JUSTICE REHNQUIST, dissenting.

In the Gilbert & Sullivan operetta "Iolanthe," the Lord Chancellor recites:

> "The Law is the true embodiment
> of everything that's excellent,
> It has no kind of fault or flaw,
> And I, my Lords, embody the Law."

It is difficult not to derive more than a little of this flavor from the various opinions supporting the judgment in this case. The opinion of THE CHIEF JUSTICE states:

> "[H]ere for the first time the Court is asked to decide whether a criminal trial itself may be closed to the public upon the unopposed request of a defendant, without any

> demonstration that closure is required to protect the defendant's superior right to a fair trial, or that some other overriding consideration requires closure." *Ante*, at 564.

The opinion of MR. JUSTICE BRENNAN states:

> "Read with care and in context, our decisions must therefore be understood as holding only that any privilege of access to governmental information is subject to a degree of restraint dictated by the nature of the information and countervailing interests in security or confidentiality." *Ante*, at 586.

For the reasons stated in my separate concurrence in *Gannett Co.* v. *DePasquale*, 443 U. S. 368, 403 (1979), I do not believe that either the First or Sixth Amendment, as made applicable to the States by the Fourteenth, requires that a State's reasons for denying public access to a trial, where both the prosecuting attorney and the defendant have consented to an order of closure approved by the judge, are subject to any additional constitutional review at our hands. And I most certainly do not believe that the Ninth Amendment confers upon us any such power to review orders of state trial judges closing trials in such situations. See *ante*, at 579, n. 15.

We have at present 50 state judicial systems and one federal judicial system in the United States, and our authority to reverse a decision by the highest court of the State is limited to only those occasions when the state decision violates some provision of the United States Constitution. And that authority should be exercised with a full sense that the judges whose decisions we review are making the same effort as we to uphold the Constitution. As said by Mr. Justice Jackson, concurring in the result in *Brown* v. *Allen*, 344 U. S. 443, 540 (1953), "we are not final because we are infallible, but we are infallible only because we are final."

The proper administration of justice in any nation is bound to be a matter of the highest concern to all thinking citizens.

But to gradually rein in, as this Court has done over the past generation, all of the ultimate decisionmaking power over how justice shall be administered, not merely in the federal system but in each of the 50 States, is a task that no Court consisting of nine persons, however gifted, is equal to. Nor is it desirable that such authority be exercised by such a tiny numerical fragment of the 220 million people who compose the population of this country. In the same concurrence just quoted, Mr. Justice Jackson accurately observed that "[t]he generalities of the Fourteenth Amendment are so indeterminate as to what state actions are forbidden that this Court has found it a ready instrument, in one field or another, to magnify federal, and incidentally its own, authority over the states." *Id.*, at 534.

However high-minded the impulses which originally spawned this trend may have been, and which impulses have been accentuated since the time Mr. Justice Jackson wrote, it is basically unhealthy to have so much authority concentrated in a small group of lawyers who have been appointed to the Supreme Court and enjoy virtual life tenure. Nothing in the reasoning of Mr. Chief Justice Marshall in *Marbury* v. *Madison*, 1 Cranch 137 (1803), requires that this Court through ever-broadening use of the Supremacy Clause smother a healthy pluralism which would ordinarily exist in a national government embracing 50 States.

The issue here is not whether the "right" to freedom of the press conferred by the First Amendment to the Constitution overrides the defendant's "right" to a fair trial conferred by other Amendments to the Constitution; it is instead whether any provision in the Constitution may fairly be read to prohibit what the trial judge in the Virginia state-court system did in this case. Being unable to find any such prohibition in the First, Sixth, Ninth, or any other Amendment to the United States Constitution, or in the Constitution itself, I dissent.

Syllabus

INDUSTRIAL UNION DEPARTMENT, AFL-CIO v. AMERICAN PETROLEUM INSTITUTE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 78-911. Argued October 10, 1979—Decided July 2, 1980*

The Occupational Safety and Health Act of 1970 (Act) delegates broad authority to the Secretary of Labor (Secretary) to promulgate standards to ensure safe and healthful working conditions for the Nation's workers (the Occupational Safety and Health Administration (OSHA) being the agency responsible for carrying out this authority). Section 3 (8) of the Act defines an "occupational safety and health standard" as a standard that is "reasonably necessary or appropriate to provide safe or healthful employment." Where toxic materials or harmful physical agents are concerned, a standard must also comply with § 6 (b) (5), which directs the Secretary to "set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity." When the toxic material or harmful physical agent to be regulated is a carcinogen, the Secretary has taken the position that no safe exposure level can be determined and that § 6 (b) (5) requires him to set an exposure limit at the lowest technologically feasible level that will not impair the viability of the industries regulated. In this case, after having determined that there is a causal connection between benzene (a toxic substance used in manufacturing such products as motor fuels, solvents, detergents, and pesticides) and leukemia (a cancer of the white blood cells), the Secretary promulgated a standard reducing the permissible exposure limit on airborne concentrations of benzene from the consensus standard of 10 parts benzene per million parts of air (10 ppm) to 1 ppm, and prohibiting dermal contact with solutions containing benzene. On pre-enforcement review, the Court of Appeals held the standard invalid because it was based on findings unsupported by the administrative record. The court concluded that OSHA had exceeded its standard-setting authority because it had not been shown that the 1 ppm exposure limit was "reasonably necessary or appropriate to provide safe and healthful employment" as required by § 3 (8), and that

*Together with No. 78-1036, *Marshall, Secretary of Labor* v. *American Petroleum Institute et al.*, also on certiorari to the same court.

§ 6 (b)(5) did not give OSHA the unbridled discretion to adopt standards designed to create absolutely risk-free workplaces regardless of cost.

Held: The judgment is affirmed. Pp. 630–662; 667–671; 672–688. 581 F. 2d 493, affirmed.

MR. JUSTICE STEVENS, joined by MR. CHIEF JUSTICE BURGER, MR. JUSTICE STEWART, and MR. JUSTICE POWELL, concluded that the standard in question is invalid. Pp. 630–652, 658–659.

(a) The Court of Appeals was correct in refusing to enforce the 1 ppm exposure limit on the ground that it was not supported by appropriate findings. OSHA's rationale for lowering the permissible exposure limit from 10 ppm to 1 ppm was based, not on any finding that leukemia has ever been caused by exposure to 10 ppm of benzene and that it will *not* be caused by exposure to 1 ppm, but rather on a series of assumptions indicating that some leukemia might result from exposure to 10 ppm and that the number of cases might be reduced by lowering the exposure level to 1 ppm. Pp. 630–638.

(b) By empowering the Secretary to promulgate standards that are "reasonably necessary or appropriate to provide safe or healthful employment and places of employment" as required by § 3 (8), the Act implies that, before promulgating any standard, the Secretary must make a finding that the workplaces in question are not safe. But "safe" is not the equivalent of "risk-free." A workplace can hardly be considered "unsafe" unless it threatens the workers with a significant risk of harm. Therefore, before the Secretary can promulgate *any* permanent health or safety standard, he must make a threshold finding that the place of employment is unsafe in the sense that significant risks are present and can be eliminated or lessened by a change in practices. This requirement applies to permanent standards promulgated pursuant to § 6 (b)(5), as well as to other types of permanent standards, there being no reason why § 3 (8)'s definition of a standard should not be deemed incorporated by reference into § 6 (b)(5). Moreover, requiring the Secretary to make a threshold finding of significant risk is consistent with the scope of his regulatory power under § 6 (b)(5) to promulgate standards for "*toxic* materials" and "*harmful* physical agents." This interpretation is supported by other provisions of the Act, such as § 6 (g), which requires the Secretary, in determining the priority for establishing standards, to give due regard to the urgency of the need for mandatory safety and health standards for particular industries or workplaces, and § 6 (b)(8), which requires the Secretary, when he substantially alters an

existing consensus standard, to explain how the new rule will "better effectuate" the Act's purposes. Pp. 639–646.

(c) The Act's legislative history also supports the conclusion that Congress was concerned, not with absolute safety, but with the elimination of significant harm. Pp. 646–652.

(d) Where the Secretary relied on a special policy for carcinogens that imposed the burden on industry of proving the existence of a safe level of exposure, thereby avoiding his threshold responsibility of establishing the need for more stringent standards, he exceeded his power. Pp. 658–659.

MR. JUSTICE STEVENS, joined by MR. CHIEF JUSTICE BURGER and MR. JUSTICE STEWART, also concluded that:

1. The burden was on OSHA to show, on the basis of substantial evidence, that it is at least more likely than not that long-term exposure to 10 ppm of benzene presents a significant risk of material health impairment. Here, OSHA did not even attempt to carry such burden of proof. Imposing such a burden on OSHA will not strip it of its ability to regulate carcinogens, nor will it require it to wait for deaths to occur before taking any action. The requirement that a "significant" risk be identified is not a mathematical straitjacket; OSHA is not required to support its finding that a significant risk exists with anything approaching scientific certainty; and the record in this case and OSHA's own rulings on other carcinogens indicate that there are a number of ways in which OSHA can make a rational judgment about the relative significance of the risks associated with exposure to a particular carcinogen. Pp. 652–658.

2. OSHA did not make the required finding with respect to the dermal contact ban that the ban was "reasonably necessary and appropriate" to remove a significant risk of harm from such contact, but rather acted on the basis of the absolute, no-risk policy that it applies to carcinogens under the assumptions that not only is benzene in small doses a carcinogen but also that it can be absorbed through the skin in sufficient amounts to present a carcinogenic risk. These assumptions are not a proper substitute for the findings of significant risk of harm required by the Act. Pp. 659–662.

MR. JUSTICE POWELL, agreeing that neither the airborne concentration standard nor the dermal contact standard satisfied the Act's requirements, would not hold that OSHA did not even attempt to carry its burden of proof on the threshold question whether exposure to benzene at 10 ppm presents a significant risk to human health. He concluded that, even assuming OSHA had met such burden, the Act also requires OSHA to determine that the economic effects of its standard bear a

reasonable relationship to the expected benefits. A standard is neither "reasonably necessary" nor "feasible," as required by the Act, if it calls for expenditures wholly disproportionate to the expected health and safety benefits. Here, although OSHA did find that the "substantial costs" of the benzene regulations were justified, the record contains neither adequate documentation of this conclusion nor any evidence that OSHA weighed the relevant considerations. The agency simply announced its finding of cost-justification without explaining the method by which it determined that the benefits justified the costs and their economic effects. Pp. 667–671.

MR. JUSTICE REHNQUIST would invalidate, as constituting an invalid delegation of legislative authority to the Secretary, the relevant portion of § 6 (b)(5) of the Act as it applies to any toxic substance or harmful physical agent for which a safe level is, according to the Secretary, unknown or otherwise "infeasible." In the case of such substances, the language of § 6 (b)(5) gives the Secretary absolutely no indication where on the continuum of relative safety he should set the standard. Nor is there anything in the legislative history, the statutory context, or any other source traditionally examined by this Court to provide specificity to the feasibility criterion in § 6 (b)(5). Pp. 672–688.

STEVENS, J., announced the judgment of the Court and delivered an opinion, in which BURGER, C. J., and STEWART, J., joined, and in Parts I, II, III–A, III–B, III–C, and III–E of which POWELL, J., joined. BURGER, C. J., filed a concurring opinion, *post*, p. 662. POWELL, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 664. REHNQUIST, J., filed an opinion concurring in the judgment, *post*, p. 671. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, WHITE, and BLACKMUN, JJ., joined, *post*, p. 688.

George H. Cohen argued the cause for petitioner in No. 78–911. With him on the briefs were *Robert M. Weinberg, J. Albert Woll, Laurence Gold, Elliot Bredhoff*, and *George Kaufmann*. *William Alsup* argued the cause for petitioner in No. 78–1036. With him on the briefs were *Solicitor General McCree, Deputy Solicitor General Easterbrook, Benjamin W. Mintz*, and *Dennis K. Kade*.

Edward W. Warren argued the cause for respondents American Petroleum Institute et al. in both cases. With him on the brief were *Stark Ritchie, Martha Beauchamp, Neil J. King,*

John H. Pickering, Robert R. Bonczek, John F. Dickey, Robert L. Ackerly, and *Harold B. Scoggins, Jr. Charles F. Lettow* argued the cause for respondents Rubber Manufacturers Association, Inc., et al. in both cases. With him on the brief was *John C. Murphy, Jr.*†

MR. JUSTICE STEVENS announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE and MR. JUSTICE STEWART joined and in Parts I, II, III–A, III–B, III–C, and III–E of which MR. JUSTICE POWELL joined.

The Occupational Safety and Health Act of 1970 (Act), 84 Stat. 1590, 29 U. S. C. § 651 *et seq.*, was enacted for the purpose of ensuring safe and healthful working conditions for every working man and woman in the Nation. This litigation concerns a standard promulgated by the Secretary of Labor to regulate occupational exposure to benzene, a substance which has been shown to cause cancer at high exposure levels. The principal question is whether such a showing is a sufficient basis foı a standard that places the most stringent limitation on exposure to benzene that is technologically and economically possible.

The Act delegates broad authority to the Secretary to promulgate different kinds of standards. The basic definition

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†Briefs of *amici curiae* urging reversal were filed by *John A. Fillion* for the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America; and by *Richard E. Ayres* for the Natural Resources Defense Council, Inc.

Briefs of *amici curiae* urging affirmance were filed by *Alfred V. J. Prather* for Anaconda Co.; by *Anthony J. Obadal* and *Stephen C. Yohay* for the Capital Legal Foundation; and by *Robert V. Zener, Stephen A. Bokat,* and *William L. Kovacs* for the Chamber of Commerce of the United States.

Briefs of *amici curiae* were filed by *William J. Kilberg, Thaddeus Holt,* and *Lawrence Z. Lorber* for ASARCO Inc.; by *David B. Robinson* for the Chocolate Manufacturers Association; and by *James R. Richards* for Joseph Cimino et al.

of an "occupational safety and health standard" is found in § 3 (8), which provides:

> "The term 'occupational safety and health standard' means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 84 Stat. 1591, 29 U. S. C. § 652 (8).

Where toxic materials or harmful physical agents are concerned, a standard must also comply with § 6 (b)(5), which provides:

> "The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life. Development of standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws." 84 Stat. 1594, 29 U. S. C. § 655 (b)(5).[1]

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[1] The second and third sentences of this section, which impose feasibility limits on the Secretary and allow him to take into account the best available evidence in developing standards, may apply to all health and safety standards. This conclusion follows if the term "subsection" used in the second sentence refers to the entire subsection 6 (b) (which sets out procedures for the adoption of all types of health and safety standards), rather than simply to the toxic materials subsection, § 3 (b)(5). While MR. JUSTICE MARSHALL, *post*, at 694, and respondents agree with this

Wherever the toxic material to be regulated is a carcinogen, the Secretary has taken the position that no safe exposure level can be determined and that § 6 (b)(5) requires him to set an exposure limit at the lowest technologically feasible level that will not impair the viability of the industries regulated. In this case, after having determined that there is a causal connection between benzene and leukemia (a cancer of the white blood cells), the Secretary set an exposure limit on airborne concentrations of benzene of one part benzene per million parts of air (1 ppm), regulated dermal and eye contact with solutions containing benzene, and imposed complex monitoring and medical testing requirements on employers whose workplaces contain 0.5 ppm or more of benzene. 29 CFR §§ 1910.1028 (c), (e) (1979).

On pre-enforcement review pursuant to 29 U. S. C. § 655 (f), the United States Court of Appeals for the Fifth Circuit held the regulation invalid. *American Petroleum Institute* v. *OSHA*, 581 F. 2d 493 (1978). The court concluded that the Occupational Safety and Health Administration (OSHA) [2] had exceeded its standard-setting authority because it had not shown that the new benzene exposure limit was "reasonably necessary or appropriate to provide safe or healthful employment" as required by § 3 (8),[3] and because § 6 (b)(5)

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position, see Brief for Respondents 39; see also Currie, OSHA, 1976 Am. Bar Found. Research J. 1107, 1137, n. 151, the Government does not, see Brief for Federal Parties 58; see also Berger & Riskin, Economic and Technological Feasibility in Regulating Toxic Substances Under the Occupational Safety and Health Act, 7 Ecology L. Q. 285, 294 (1978). There is no need for us to decide this issue in these cases.

[2] OSHA is the administrative agency within the Department of Labor that is responsible for promulgating and enforcing standards under the Act. In this opinion, we refer to the "Secretary," "OSHA" and the "Agency" interchangeably.

[3] "The Act imposes on OSHA the obligation to enact only standards that are reasonably necessary or appropriate to provide safe or healthful workplaces. If a standard does not fit in this definition, it is not one that OSHA is authorized to enact." 581 F. 2d, at 502.

does "not give OSHA the unbridled discretion to adopt standards designed to create absolutely risk-free workplaces regardless of costs." [4] Reading the two provisions together, the Fifth Circuit held that the Secretary was under a duty to determine whether the benefits expected from the new standard bore a reasonable relationship to the costs that it imposed. *Id.*, at 503. The court noted that OSHA had made an estimate of the costs of compliance, but that the record lacked substantial evidence of any discernible benefits.[5]

We agree with the Fifth Circuit's holding that § 3 (8) requires the Secretary to find, as a threshold matter, that the

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[4] "Although 29 U. S. C. A. § 655 (b)(5) requires the goal of attaining the highest degree of health and safety protection for the employee, it does not give OSHA the unbridled discretion to adopt standards designed to create absolutely risk-free workplaces regardless of cost. To the contrary, that section requires standards to be feasible, and it contains a number of pragmatic limitations in the form of specific kinds of information OSHA must consider in enacting standards dealing with toxic materials. Those include 'the best available evidence,' 'research, demonstrations, experiments, and such other information as may be appropriate,' 'the latest available scientific data in the field,' and 'experience gained under this and other health and safety laws.' Moreover, in standards dealing with toxic materials, just as with all other occupational safety and health standards, the conditions and other requirements imposed by the standard must be 'reasonably necessary or appropriate to provide safe or healthful employment and places of employment.' 29 U. S. C. A. § 652 (8)." *Ibid.*

[5] "The lack of substantial evidence of discernable benefits is highlighted when one considers that OSHA is unable to point to any empirical evidence documenting a leukemia risk at 10 ppm even though that has been the permissible exposure limit since 1971. OSHA's assertion that benefits from reducing the permissible exposure limit from 10 ppm to 1 ppm are likely to be appreciable, an assumption based only on inferences drawn from studies involving much higher exposure levels rather than on studies involving these levels or sound statistical projections from the high-level studies, does not satisfy the reasonably necessary requirement limiting OSHA's action. *Aqua Slide* requires OSHA to estimate the extent of expected benefits in order to determine whether those benefits bear a reasonable relationship to the standard's demonstrably high costs." *Id.*, at 503–504.

toxic substance in question poses a significant health risk in the workplace and that a new, lower standard is therefore "reasonably necessary or appropriate to provide safe or healthful employment and places of employment." Unless and until such a finding is made, it is not necessary to address the further question whether the Court of Appeals correctly held that there must be a reasonable correlation between costs and benefits, or whether, as the federal parties argue, the Secretary is then required by § 6 (b)(5) to promulgate a standard that goes as far as technologically and economically possible to eliminate the risk.

Because these are unusually important cases of first impression, we have reviewed the record with special care. In this opinion, we (1) describe the benzene standard, (2) analyze the Agency's rationale for imposing a 1 ppm exposure limit, (3) discuss the controlling legal issues, and (4) comment briefly on the dermal contact limitation.

I

Benzene is a familiar and important commodity. It is a colorless, aromatic liquid that evaporates rapidly under ordinary atmospheric conditions. Approximately 11 billion pounds of benzene were produced in the United States in 1976. Ninety-four percent of that total was produced by the petroleum and petrochemical industries, with the remainder produced by the steel industry as a byproduct of coking operations. Benzene is used in manufacturing a variety of products including motor fuels (which may contain as much as 2% benzene), solvents, detergents, pesticides, and other organic chemicals. 43 Fed. Reg. 5918 (1978).

The entire population of the United States is exposed to small quantities of benzene, ranging from a few parts per billion to 0.5 ppm, in the ambient air. Tr. 1029–1032. Over one million workers are subject to additional low-level exposures as a consequence of their employment. The majority of these employees work in gasoline service stations, benzene

production (petroleum refineries and coking operations), chemical processing, benzene transportation, rubber manufacturing, and laboratory operations.[6]

Benzene is a toxic substance. Although it could conceivably cause harm to a person who swallowed or touched it, the principal risk of harm comes from inhalation of benzene vapors. When these vapors are inhaled, the benzene diffuses through the lungs and is quickly absorbed into the blood.

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[6] OSHA's figures indicate that 795,000 service station employees have some heightened exposure to benzene as a result of their employment. See 2 U. S. Dept. of Labor, OSHA, Technology Assessment and Economic Impact Study of an OSHA Regulation for Benzene, p. D-7 (May 1977) (hereinafter Economic Impact Statement); 11 Record, Ex. 5B, p. D-7. These employees are specifically excluded from the regulation at issue in this case. See *infra*, at 628. OSHA states that another 629,000 employees, who are covered by the regulation, work in the other industries described. 43 Fed. Reg. 5935 (1978).

It is not clear from the record or its explanation of the permanent standard how OSHA arrived at the estimate of 629,000 exposed employees. OSHA's consultant, Arthur D. Little, Inc., estimated that there were 191,000 exposed employees, 30,000 of whom were exposed to 1 ppm or more of benzene. 1 Economic Impact Statement, p. 3-5; 11 Record, Ex. 5A, p. 3-5. In its explanation of the permanent standard OSHA stated that there were 1,440 exposed employees who worked in benzene plants, 98,000 in other petroleum refineries, 24,000 in coke ovens, 4,000 in light oil plants, 2,760 in the petrochemical industry, 52,345 who worked in bulk terminals, 23,471 drivers who loaded benzene from those terminals, 74,000 in oil and gas production, 17,000 in pipeline work, 100 at tank-car facilities, 200 at tank-truck facilities, 480 on barges, 11,400 in tire-manufacturing plants, and 13,050 in other types of rubber production. 43 Fed. Reg. 5936-5938 (1978). Although OSHA gave no estimate for laboratory workers, the A. D. Little study indicated that there were 25,000 exposed workers in that industry. These figures add up to 347,246 exposed employees—approximately 282,000 less than the overall estimate of 629,000. It is possible that some or all of these employees work in the "other industies" briefly described in OSHA's explanation; these are primarily small firms that manufacture adhesives, paint and ink or that use benzene solvents. *Id.*, at 5939. No estimate of the number of exposed employees in those industries or the aggregate cost of compliance by those industries is given either by OSHA or by A. D. Little in its consulting report.

Exposure to high concentrations produces an almost immediate effect on the central nervous system. Inhalation of concentrations of 20,000 ppm can be fatal within minutes; exposures in the range of 250 to 500 ppm can cause vertigo, nausea, and other symptoms of mild poisoning. 43 Fed. Reg. 5921 (1978). Persistent exposures at levels above 25–40 ppm may lead to blood deficiencies and diseases of the blood-forming organs, including aplastic anemia, which is generally fatal.

Industrial health experts have long been aware that exposure to benzene may lead to various types of nonmalignant diseases. By 1948 the evidence connecting high levels of benzene to serious blood disorders had become so strong that the Commonwealth of Massachusetts imposed a 35 ppm limitation on workplaces within its jurisdiction. In 1969 the American National Standards Institute (ANSI) adopted a national consensus standard of 10 ppm averaged over an 8-hour period with a ceiling concentration of 25 ppm for 10-minute periods or a maximum peak concentration of 50 ppm. *Id.*, at 5919. In 1971, after the Occupational Safety and Health Act was passed, the Secretary adopted this consensus standard as the federal standard, pursuant to 29 U. S. C. § 655 (a).[7]

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[7] Section 6 (a) of the Act, as set forth in 29 U. S. C. § 655 (a), provides:

"Without regard to chapter 5 of Title 5 or to the other subsections of this section, the Secretary shall, as soon as practicable during the period beginning with the effective date of this chapter and ending two years after such date, by rule promulgate as an occupational safety or health standard any national consensus standard, and any established Federal standard, unless he determines that the promulgation of such a standard would not result in improved safety or health for specifically designated employees. In the event of conflict among any such standards, the Secretary shall promulgate the standard which assures the greatest protection of the safety or health of the affected employees."

In this case the Secretary complied with the directive to choose the most protective standard by selecting the ANSI standard of 10 ppm, rather than the 25 ppm standard adopted by the American Conference of Government Industrial Hygienists. 43 Fed. Reg. 5919 (1978).

As early as 1928, some health experts theorized that there might also be a connection between benzene in the workplace and leukemia.[8] In the late 1960's and early 1970's a number of epidemiological studies were published indicating that workers exposed to high concentrations of benzene were subject to a significantly increased risk of leukemia.[9] In a 1974 report recommending a permanent standard for benzene, the National Institute for Occupational Safety and Health

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[8] See Delore & Borgomano, Leucémie aiguë au cours de l'intoxication benzenique. Sur l'origine toxique de certaines leucémies aiguës et leurs relations avec les anémies graves, 9 Journal de Medécine de Lyon 227 (1928). A translation of that document appears in the benzene administrative record. 2 Record, Ex. 2–60. See also Hunter, Chronic Exposure to Benzene (Benzol). II. The Clinical Effects, 21 J. Ind. Hyg. & Toxicol. 331 (1939), 3 Record, Ex. 2–74, which refers to "leucemia" as a side effect of chronic exposure to benzene.

[9] Dr. Muzaffer Aksoy, a Turkish physician who testified at the hearing on the proposed benzene standard, did a number of studies concerning the effects of benzene exposure on Turkish shoemakers. The workers in Dr. Aksoy's studies used solvents containing large percentages of benzene and were constantly exposed to high concentrations of benzene vapors (between 150 and 650 ppm) under poorly ventilated and generally unhygienic conditions. See Aksoy, Acute Leukemia Due to Chronic Exposure to Benzene, 52 Am. J. of Medicine 160 (1972); 1 Record, Ex. 2–29; Aksoy, Benzene (Benzol): Its Toxicity and Effects on the Hematopoietic System, Istanbul Faculty of Medicine Monograph Series No. 51 (1970), 2 Record, Ex. 2–55; Aksoy, Erdem, & DinCol, Leukemia in Shoe-Workers Exposed Chronically to Benzene, 44 Blood 837 (1974), 2 Record, Ex. 2–53 (reporting on 26 shoeworkers who had contracted leukemia from 1967 to 1973; this represented an incidence of 13 per 100,000 rather than the 6 cases per 100,000 that would normally be expected).

Dr. Enrico Vigliani also reported an excess number of leukemia cases among Italian shoemakers exposed to glues containing a high percentage of benzene and workers in rotogravure plants who had been exposed over long periods of time to inks and solvents containing as much as 60% benzene. See Vigliani & Saita, Benzene and Leukemia, 271 New Eng. J. of Medicine 872–876 (1964); 1 Record, Ex. 2–27; Forni & Vigliani, Chemical Leukemogenesis in Man, 7 Ser. Haemat. 211 (1974); 2 Record, Ex. 2–50.

(NIOSH), OSHA's research arm,[10] noted that these studies raised the "distinct possibility" that benzene caused leukemia. But, in light of the fact that all known cases had occurred at very high exposure levels, NIOSH declined to recommend a change in the 10 ppm standard, which it considered sufficient to protect against nonmalignant diseases. NIOSH suggested that further studies were necessary to determine conclusively whether there was a link between benzene and leukemia and, if so, what exposure levels were dangerous.[11]

Between 1974 and 1976 additional studies were published which tended to confirm the view that benzene can cause leukemia, at least when exposure levels are high.[12] In an

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[10] Title 29 U. S. C. § 669 (a)(3) requires the Department of Health Education and Welfare (HEW) (now the Department of Health and Human Services) to develop "criteria" dealing with toxic materials and harmful physical agents that describe "exposure levels that are safe for various periods of employment." HEW's obligations under this section have been delegated to NIOSH, 29 U. S. C. § 671.

[11] See Dept. of HEW, NIOSH, Criteria for a Recommended Standard—Occupational Exposure to Benzene 74–75 (Pub. No. 74–137, 1974); 1 Record, Ex. 2–3. In response to a letter from the Director of the Office of Standards Division, NIOSH stated that its 10 ppm standard was designed to protect against leukemia, as well as other health risks. NIOSH noted, however, that further research was necessary in order to establish adequate dose-response data for benzene and leukemia. 12 Record, Ex. 32A, 32B.

[12] Aksoy published another study in 1976 reporting on an additional eight leukemia cases uncovered after 1973. In that article, he also noted that a 1969 ban on the use of benzene as a solvent had led to a decline in the number of reported leukemia cases beginning in 1974. Aksoy, Types of Leukemia in Chronic Benzene Poisoning, 55 Acta Haematologica 65 (1976); 1 Record, Ex. 2–30. Vigliani also noted a decline in leukemia cases in Italy after benzene was no longer used in glues and inks. See Vigliani & Forni, Benzene and Leukemia, 11 Environmental Res. 122 (1976); 1 Record, Ex. 2–15; Vigliani, Leukemia Associated with Benzene Exposure, 271 Annals N. Y. Acad. of Sciences 143 (1976); 2 Record, Ex. 2–49. In the latter study Vigliani noted that in the past 100% pure ben-

August 1976 revision of its earlier recommendation, NIOSH stated that these studies provided "conclusive" proof of a causal connection between benzene and leukemia. 1 Record, Ex. 2–5, p. 100. Although it acknowledged that none of the intervening studies had provided the dose-response data it had found lacking two years earlier, *id.*, at 9, NIOSH nevertheless recommended that the exposure limit be set as low as possible. As a result of this recommendation, OSHA contracted with a consulting firm to do a study on the costs to industry of complying with the 10 ppm standard then in effect or, alternatively, with whatever standard would be the lowest feasible. Tr. 505–506.

In October 1976, NIOSH sent another memorandum to OSHA, seeking acceleration of the rulemaking process and "strongly" recommending the issuance of an emergency temporary standard pursuant to § 6 (c) of the Act, 29 U. S. C. § 655 (c),[13] for benzene and two other chemicals believed to

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zene solvents had been used and workers had been exposed on a prolonged basis to concentrations of 200–500 ppm, with peaks of up to 1500 ppm.

A number of epidemiological studies were also done among American rubber workers during this period. Dr. A. J. McMichael's studies indicated a ninefold increase in the risk of contracting leukemia among workers who were heavily exposed in the 1940's and 1950's to pure benzene used as a solvent. McMichael, Spirtas, Kupper, & Gamble, Solvent Exposure and Leukemia Among Rubber Workers: An Epidemiologic Study, 17 J. of Occup. Med. 234, 238 (1975); 2 Record, Ex. 2–37. See also Andjelkovic, Taulbee, & Symons, Mortality Experience of a Cohort of Rubber Workers, 1964–1973, 18 J. of Occup. Med. 387 (1976); 2 Record, Ex. 2–54 (also indicating an excess mortality rate from leukemia among rubber workers).

[13] Section 655 (c) provides:

"(1) The Secretary shall provide, without regard to the requirements of chapter 5 of title 5, for an emergency temporary standard to take immediate effect upon publication in the Federal Register if he determines (A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from

be carcinogens. NIOSH recommended that a 1 ppm exposure limit be imposed for benzene.[14] 1 Record, Ex. 2–6. Apparently because of the NIOSH recommendation, OSHA asked its consultant to determine the cost of complying with a 1 ppm standard instead of with the "minimum feasible" standard. Tr. 506–507. It also issued voluntary guidelines for benzene, recommending that exposure levels be limited to 1 ppm on an 8-hour time-weighted average basis wherever possible. 2 Record, Ex. 2–44.

In the spring of 1976, NIOSH had selected two Pliofilm plants in St. Marys and Akron, Ohio, for an epidemiological study of the link between leukemia and benzene exposure. In April 1977, NIOSH forwarded an interim report to OSHA indicating at least a fivefold increase in the expected incidence of leukemia for workers who had been exposed to ben-

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new hazards, and (B) that such emergency standard is necessary to protect employees from such danger.

"(2) Such standard shall be effective until superseded by a standard promulgated in accordance with the procedures prescribed in paragraph (3) of this subsection.

"(3) Upon publication of such standard in the Federal Register the Secretary shall commence a proceeding in accordance with subsection (b) of this section, and the standard as published shall also serve as a proposed rule for the proceeding. The Secretary shall promulgate a standard under this paragraph no later than six months after publication of the emergency standard as provided in paragraph (2) of this subsection."

[14] At the hearing on the permanent standard NIOSH representatives testified that they had selected 1 ppm initially in connection with the issuance of a proposed standard for vinyl chloride. In that proceeding they had discovered that 1 ppm was approximately the lowest level detectable through the use of relatively unsophisticated monitoring instruments. With respect to benzene, they also thought that 1 ppm was an appropriate standard because any lower standard might require the elimination of the small amounts of benzene (in some places up to 0.5 ppm) that are normally present in the atmosphere. Tr. 1142–1143. NIOSH's recommendation was *not* based on any evaluation of the feasibility, either technological or economic, of eliminating all exposures above 1 ppm. *Id.*, at 1156.

zene at the two plants from 1940 to 1949.[15] The report submitted to OSHA erroneously suggested that exposures in the two plants had generally been between zero and 15 ppm during the period in question.[16] As a result of this new evidence

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[15] Seven fatalities from leukemia were discovered out of the 748 workers surveyed. However, Dr. Infante, who conducted the study, stated that his statistical techniques had probably underestimated the number of leukemia cases that had actually occurred. *Id.*, at 747. The normal expected incidence of leukemia in such a population would be 1.4. 2 Record, Ex. 2–51, p. 6.

[16] The authors' statement with respect to exposure levels was based on a 1946 report by the Ohio Industrial Commission indicating that, after some new ventilation equipment had been installed, exposures at the St. Marys plant had been brought within "safe" limits, in most instances ranging from zero to 10 to 15 ppm. *Id.*, at 3. As the authors later admitted, the level considered "safe" in 1946 was 100 ppm. Tr. 814–815. Moreover, only one of the seven workers who died of leukemia had begun working at St. Marys after 1946. Five of the others had worked at the Akron plant, which employed 310 of the 748 workers surveyed. *Id.*, at 2537–2538. A 1948 report by the Ohio Department of Health indicated exposure levels at the Akron plant of well over 100 ppm, with excursions in some areas up to 1000 ppm. 17 Record, Ex. 84A, App. A, pp. 61–62. Surveys taken in the intervening years, as well as testimony by St. Marys employees at the hearing on the proposed standard, Tr. 3432–3437, indicated that both of the plants may have had relatively high exposures through the 1970's.

Industry representatives argued at the hearing that this evidence indicated that the exposure levels had been very high, as they had been in the other epidemiological studies conducted in the past. See Post-Hearing Brief for American Petroleum Institute in No. H–059 (OSHRC), pp. 23–37; 31 Record, Ex. 217–33, pp. 23–37. NIOSH witnesses, however, simply stated that actual exposure levels for the years in question could not be determined; they did agree, however, that their study should *not* be taken as proof of a fivefold increase in leukemia risk at 10–15 ppm. Tr. 814–815. In its explanation of the permanent standard, OSHA agreed with the NIOSH witnesses that no dose-response relationship could be inferred from the study:

"Comments at the hearing demonstrated that there were area exposures during this study period exceeding these levels [10–15 ppm], at times reaching values of hundreds of parts per million. Since no personal moni-

and the continued prodding of NIOSH, 1 Record, Ex. 2–7, OSHA did issue an emergency standard, effective May 21, 1977, reducing the benzene exposure limit from 10 ppm to 1 ppm, the ceiling for exposures of up to 10 minutes from 25 ppm to 5 ppm, and eliminating the authority for peak concentrations of 50 ppm. 42 Fed. Reg. 22516 (1977). In its explanation accompanying the emergency standard, OSHA stated that benzene had been shown to cause leukemia at exposures below 25 ppm and that, in light of its consultant's report, it was feasible to reduce the exposure limit to 1 ppm. *Id.*, at 22517, 22521.

On May 19, 1977, the Court of Appeals for the Fifth Circuit entered a temporary restraining order preventing the emergency standard from taking effect. Thereafter, OSHA abandoned its efforts to make the emergency standard effective and instead issued a proposal for a permanent standard patterned almost entirely after the aborted emergency standard. *Id.*, at 27452.

In its published statement giving notice of the proposed permanent standard, OSHA did not ask for comments as to whether or not benzene presented a significant health risk at exposures of 10 ppm or less. Rather, it asked for comments as to whether 1 ppm was the minimum feasible exposure limit.[17] *Ibid.* As OSHA's Deputy Director of Health Standards, Grover Wrenn, testified at the hearing, this formulation

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toring data are available, any conclusion regarding the actual individual time-weighted average exposure is speculative. Because of the lack of definitive exposure data, OSHA cannot derive any conclusions linking the excess leukemia risk observed with any specific exposure level." 43 Fed. Reg. 5927 (1978).

[17] OSHA also sought public comment as to whether certain industries should be exempt from compliance, whether the proposed compliance procedures and labeling techniques were adequate, what the environmental and economic consequences of the regulation would be, and whether it was feasible to replace benzene in solvents and other products of which it constituted more than 1%.

of the issue to be considered by the Agency was consistent with OSHA's general policy with respect to carcinogens.[18] Whenever a carcinogen is involved, OSHA will presume that no safe level of exposure exists in the absence of clear proof establishing such a level and will accordingly set the exposure limit at the lowest level feasible.[19] The proposed 1 ppm ex-

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[18] It became clear at the hearing that OSHA had not promulgated the proposed standard in response to any new concern about the nonmalignant effects of low-level benzene exposure. See Tr. 126–127:

"Is it accurate to say that the reason why the—why OSHA has proposed to reduce the exposure limits in the standard below the current levels is because of a perceived risk of leukemia, and not because of any new evidence it has received that the current standards are inadequate to protect against acute or chronic benzene toxicity, other than leukemia?

"MR. WRENN: I think I will simply refer the part of my statement you were referring to, in which it says, it is however benzene's leukemogenicity which is of greatest concern to OSHA. That is certainly the central issue within the ETS [emergency temporary standard] and the proposed standard."

[19] Mr. Wrenn testified:

"The proposed standard requires that employee exposure to benzene in air be reduced to one part per million, with a five part per million ceiling allowable over any fifteen minute period during an eight hour work shift, and prohibits eye or prolonged skin contact with liquid benzene.

"This airborne exposure limit is based on OSHA's established regulatory policy, that in the absence of a demonstrated safe level, or a no effect level for a carcinogen, it will be assumed that none exist, and that the agency will attempt to limit employee exposure to the lowest level feasible." *Id.*, at 29–30.

See also:

"MR. WARREN: Mr. Wrenn, in promulgating the emergency temporary, and proposed permanent, benzene standards, OSHA relies heavily, and I am quoting from your testimony now, on the regulatory policy that there is no safe level for carcinogens at any—for any exposed population, and the fact that leukemia, and a leukemogen is a carcinogen, is that correct?

"MR. WRENN: I believe that I stated that slightly differently in my oral summary of the statement than it is stated in the statement itself. I said that in the absence of a known or demonstrated safe level or no

posure limit in this case thus was established not on the basis of a proven hazard at 10 ppm, but rather on the basis of "OSHA's best judgment at the time of the proposal of the feasibility of compliance with the proposed standard by the [a]ffected industries." Tr. 30. Given OSHA's cancer policy, it was in fact irrelevant whether there was any evidence at all of a leukemia risk at 10 ppm. The important point was that there was no evidence that there was *not* some risk, however small, at that level. The fact that OSHA did not ask for comments on whether there was a safe level of exposure for benzene was indicative of its further view that a demonstration of such absolute safety simply could not be made.[20]

Public hearings were held on the proposed standard, commencing on July 19, 1977. The final standard was issued on February 10, 1978. 29 CFR § 1910.1028 (1979).[21] In its final form, the benzene standard is designed to protect workers from whatever hazards are associated with low-level benzene

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effect level, our policy is to assume that none exists, and to regulate accordingly." *Id.*, at 48–49.

"MR. WRENN: I would prefer to state it as I have on a couple of occasions already this morning, and that in the absence of a demonstrated safe level of exposure, we will assume that none exists for the purpose of regulatory policy." *Id.*, at 50.

[20] In answer to the question of what demonstration would suffice to establish a "safe level," Mr. Wrenn stated:

"I would like to draw a distinction, however, between what I have referred to as the demonstration that a safe level exists, and speculation or elaborate theories that one may make, and I think that the agency in its history and very likely its future regulatory policy, would, in the face of evidence demonstrating that a carcinogenic hazard does exist or did exist, in this particular set of circumstances, would be very reluctant to accept as the basis for its regulatory decisions, a theoretical argument that a safe level may, in fact, exist for a particular substance." *Id.*, at 51–52.

A NIOSH representative who testified later put it more succinctly, stating that ". . . if benzene causes leukemia, and if leukemia is a cancer, then exposure really is almost moot." *Id.*, at 1007.

[21] An amendment to the standard was promulgated on June 27, 1978. 43 Fed. Reg. 27962. See n. 22, *infra*.

exposures by requiring employers to monitor workplaces to determine the level of exposure, to provide medical examinations when the level rises above 0.5 ppm, and to institute whatever engineering or other controls are necessary to keep exposures at or below 1 ppm.

In the standard as originally proposed by OSHA, the employer's duty to monitor, keep records, and provide medical examinations arose whenever *any* benzene was present in a workplace covered by the rule.[22] Because benzene is omnipresent in small quantities, NIOSH and the President's Council on Wage and Price Stability recommended the use of an "action level" to trigger monitoring and medical examination requirements. Tr. 1030–1032; App. 121–133. OSHA accepted this recommendation, providing under the final standard that, if initial monitoring discloses benzene concentrations below 0.5 ppm averaged over an 8-hour work day, no further action is required unless there is a change in the company's practices.[23] If exposures are above the action

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[22] Apart from its exclusion of gasoline storage and distribution facilities (an exclusion retained in the final rule, see text, at n. 25, *infra*), the proposed rule also excluded from coverage work operations in which liquid mixtures containing 1% or less benzene were used. After a year this exclusion was to be narrowed to operations where 0.1% benzene solutions were used. The rationale for the exclusion was that airborne exposures from such liquids would generally be within the 1 ppm limit. However, testimony at the hearing on the proposed rule indicated that there was no "consistent predictable relationship" between benzene content in a liquid and the resulting airborne exposure. Therefore, OSHA abandoned the idea of a percentage exclusion for liquid benzene in its final standard. 43 Fed. Reg. 5942 (1978).

OSHA later reconsidered its position and, in an amendment to the permanent standard, reinstated an exclusion for liquids, setting the level at 0.5%, to be reduced to 0.1% after three years, *id.*, at 27962.

[23] The exemption from the monitoring and medical testing portions of the standard for workplaces with benzene exposure levels below 0.5 ppm was not predicated on any finding that regulation of such workplaces was not feasible. OSHA's consultant, Arthur D. Little, Inc. concluded that 1 ppm was a feasible exposure limit even assuming that there was no

level, but below the 1 ppm exposure limit, employers are required to monitor exposure levels on a quarterly basis and to provide semiannual medical examinations for their exposed employees. Neither the concept of an action level, nor the specific level selected by OSHA, is challenged in this proceeding.

Whenever initial monitoring indicates that employees are subject to airborne concentrations of benzene above 1 ppm averaged over an 8-hour workday, with a ceiling of 5 ppm for any 15-minute period, employers are required to modify their plants or institute work practice controls to reduce exposures within permissible limits. Consistent with OSHA's general policy, the regulation does not allow respirators to be used if engineering modifications are technologically feasible.[24] Employers in this category are also required to perform monthly monitoring so long as their workplaces remain above 1 ppm, provide semiannual medical examinations to exposed workers, post signs in and restrict access to "regulated areas" where the permissible exposure limit is exceeded, and conduct employee training programs where necessary.

The standard also places strict limits on exposure to liquid

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action level (or, to put it another way, assuming that the action level was zero). Rather, it was, as NIOSH witnesses stated, a practical decision based on a determination that, where benzene exposures are below 0.5 ppm, they will be unlikely ever to rise above the permissible exposure level of 1 ppm. NIOSH was also concerned that, in the absence of an action level, employers who used sophisticated analytical equipment might be required to monitor and provide medical examinations simply because of the presence of benzene in the ambient air. Tr. 1030–1032, 1133–1134.

[24] Indeed, in its explanation of the standard OSHA states that an employer is required to institute engineering controls (for example, installing new ventilation hoods) even if those controls are insufficient, by themselves, to achieve compliance and respirators must therefore be used as well. 43 Fed. Reg. 5952 (1978). OSHA's preference for engineering modifications is based on its opinion that respirators are rarely used properly (because they are uncomfortable, are often not properly fitted, etc.) and therefore cannot be considered adequate protective measures.

benzene. As originally framed, the standard totally prohibited any skin or eye contact with any liquid containing any benzene. Ultimately, after the standard was challenged, OSHA modified this prohibition by excluding liquids containing less than 0.5% benzene. After three years, that exclusion will be narrowed to liquids containing less than 0.1% benzene.

The permanent standard is expressly inapplicable to the storage, transportation, distribution, sale, or use of gasoline or other fuels subsequent to discharge from bulk terminals.[25] This exception is particularly significant in light of the fact that over 795,000 gas station employees, who are exposed to an average of 102,700 gallons of gasoline (containing up to 2% benzene) annually, are thus excluded from the protection of the standard.[26]

As presently formulated, the benzene standard is an expensive way of providing some additional protection for a relatively small number of employees. According to OSHA's figures, the standard will require capital investments in engineering controls of approximately $266 million, first-year operating costs (for monitoring, medical testing, employee training, and respirators) of $187 million to $205 million and

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[25] It is also inapplicable to work operations involving 0.5% liquid benzene (0.1% after three years), see n. 22, *supra*, and to the handling of benzene in sealed containers or systems, except insofar as employers are required to provide cautionary notices and appropriate employee training.

[26] Prior to the introduction of the action-level concept, A. D. Little estimated that compliance costs for the service station industry might be as high as $4 billion. Tr. 508–509. Moreover, A. D. Little's Economic Impact Statement indicated that service station employees were generally exposed to very low levels of benzene. 1 Economic Impact Statement, p. 4–21; 11 Record, Ex. 5A, p. 4–21. Still, in its explanation accompanying the permanent standard OSHA did not rule out regulation of this industry entirely, stating that it was in the process of studying whether and to what extent it should regulate exposures to gasoline in general. 43 Fed. Reg. 5943 (1978).

recurring annual costs of approximately $34 million.[27] 43 Fed. Reg. 5934 (1978). The figures outlined in OSHA's explanation of the costs of compliance to various industries indicate that only 35,000 employees would gain any benefit from the regulation in terms of a reduction in their exposure to benzene.[28] Over two-thirds of these workers (24,450) are employed in the rubber-manufacturing industry. Compliance costs in that industry are estimated to be rather low with no capital costs and initial operating expenses estimated at only $34 million ($1,390 per employee); recurring annual costs would also be rather low, totaling less than $1 million. By contrast, the segment of the petroleum refining industry that produces benzene would be required to incur $24 million in capital costs and $600,000 in first-year operating expenses to provide additional protection for 300 workers ($82,000 per employee), while the petrochemical industry would be required to incur $20.9 million in capital costs and $1 million in initial operating expenses for the benefit of 552 employees ($39,675 per employee).[29] *Id.*, at 5936–5938.

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[27] OSHA's estimate of recurring annual costs was based on the assumption that the exposure levels it had projected would be confirmed by initial monitoring and that, after the first year, engineering controls would be successful in bringing most exposures within the 1 ppm limit. Under these circumstances, the need for monitoring, medical examinations, and respirators would, of course, be drastically reduced.

[28] Three hundred of these employees work in benzene plants, 5,000 in other petroleum refineries, 4,000 in light oil plants, 552 in the petrochemical industry, 156 in benzene transportation, 1,250 in laboratories, 11,400 in tire-manufacturing plants, and 13,050 in other rubber-manufacturing plants. OSHA also estimated that another 16,216 workers (5,000 in petroleum refineries, 1,104 in the petrochemical industry, 7,300 in bulk terminals, 312 in benzene transportation, and 2,500 in laboratories) would be exposed to 0.5 to 1 ppm of benzene and thus would receive a benefit in terms of more comprehensive medical examinations. *Id.*, at 5936–5938.

[29] The high cost per employee in the latter two industries is attributable to OSHA's policy of requiring engineering controls rather than allowing respirators to be used to reduce exposures to the permissible limit. The

Although OSHA did not quantify the benefits to each category of worker in terms of decreased exposure to benzene, it appears from the economic impact study done at OSHA's direction that those benefits may be relatively small. Thus, although the current exposure limit is 10 ppm, the actual exposures outlined in that study are often considerably lower. For example, for the period 1970–1975 the petrochemical industry reported that, out of a total of 496 employees exposed to benzene, only 53 were exposed to levels between 1 and 5 ppm and only 7 (all at the same plant) were exposed to between 5 and 10 ppm. 1 Economic Impact Statement, p. 4–6, Table 4–2; 11 Record, Ex. 5A, p. 4–6, Table 4–2. See also *id.*, Tables 4.3–4.8 (indicating sample exposure levels in various industries).

II

The critical issue at this point in the litigation is whether the Court of Appeals was correct in refusing to enforce the 1 ppm exposure limit on the ground that it was not supported by appropriate findings.[30]

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relatively low estimated cost per employee in the rubber industry is based on OSHA's assumption that other solvents and adhesives can be substituted for those that contain benzene and that capital costs will therefore not be required.

[30] The other issue before us is whether the Court of Appeals correctly refused to enforce the dermal contact ban. That issue is discussed in Part IV, *infra*.

In the court below respondents also challenged the monitoring and medical testing requirements, arguing that certain industries should have been totally exempt from them and that, as to other industries, the Agency had not demonstrated that all the requirements were reasonably necessary to ensure worker health and safety. They also argued that OSHA's requirement that the permissible exposure limit be met through engineering controls rather than through respirators was not reasonably necessary under the Act. Because it invalidated the 1 ppm exposure limit, the Fifth Circuit had no occasion to deal with these issues, and they are not now before this Court.

Any discussion of the 1 ppm exposure limit must, of course, begin with the Agency's rationale for imposing that limit.[31] The written explanation of the standard fills 184 pages of the printed appendix. Much of it is devoted to a discussion of the voluminous evidence of the adverse effects of exposure to benzene at levels of concentration well above 10 ppm. This discussion demonstrates that there is ample justification for regulating occupational exposure to benzene and that the prior limit of 10 ppm, with a ceiling of 25 ppm (or a peak of 50 ppm) was reasonable. It does not, however, provide direct support for the Agency's conclusion that the limit should be reduced from 10 ppm to 1 ppm.

The evidence in the administrative record of adverse effects of benzene exposure at 10 ppm is sketchy at best. OSHA noted that there was "no dispute" that certain nonmalignant blood disorders, evidenced by a reduction in the level of red or white cells or platelets in the blood, could result from exposures of 25–40 ppm. It then stated that several studies had indicated that relatively slight changes in normal blood values could result from exposures below 25 ppm and perhaps below 10 ppm. OSHA did not attempt to make any estimate based on these studies of how significant the risk of nonmalignant disease would be at exposures of 10 ppm or less.[32] Rather, it stated that because of the lack of data concerning the linkage between low-level exposures and blood abnormalities, it was impossible to construct a dose-response

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[31] As we have often held, the validity of an agency's determination must be judged on the basis of the agency's stated reasons for making that determination. See *SEC* v. *Chenery Corp.*, 318 U. S. 80, 95 ("[A]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained"); *FPC* v. *Texaco Inc.*, 417 U. S. 380, 397; *FTC* v. *Sperry & Hutchinson Co.*, 405 U. S. 233, 249.

[32] As OSHA itself noted, some blood abnormalities caused by benzene exposure may not have any discernible health effects, while others may lead to significant impairment and even death. 43 Fed. Reg. 5921 (1978).

curve at this time.[33] OSHA did conclude, however, that the studies demonstrated that the current 10 ppm exposure limit was inadequate to ensure that no single worker would suffer a nonmalignant blood disorder as a result of benzene exposure. Noting that it is "customary" to set a permissible exposure limit by applying a safety factor of 10–100 to the lowest level at which adverse effects had been observed, the Agency stated that the evidence supported the conclusion that the limit should be set at a point "substantially less than 10 ppm" even if benzene's leukemic effects were not considered. 43 Fed. Reg. 5924–5925 (1978). OSHA did not state, however, that the nonmalignant effects of benzene exposure justified a reduction in the permissible exposure limit to 1 ppm.[34]

OSHA also noted some studies indicating an increase in chromosomal aberrations in workers chronically exposed to

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[33] "A dose-response curve shows the relationship between different exposure levels and the risk of cancer [or any other disease] associated with those exposure levels. Generally, exposure to higher levels carries with it a higher risk, and exposure to lower levels is accompanied by a reduced risk." 581 F. 2d, at 504, n. 24.

OSHA's comments with respect to the insufficiency of the data were addressed primarily to the lack of data at low exposure levels. OSHA did not discuss whether it was possible to make a rough estimate, based on the more complete epidemiological and animal studies done at higher exposure levels, of the significance of the risks attributable to those levels, nor did it discuss whether it was possible to extrapolate from such estimates to derive a risk estimate for low-level exposures.

[34] OSHA did not invoke the automatic rule of reducing exposures to the lowest limit feasible that it applies to cancer risks. Instead, the Secretary reasoned that prudent health policy merely required that the permissible exposure limit be set "sufficiently below the levels at which adverse effects have been observed to assure adequate protection for all exposed employees." 43 Fed. Reg. 5925 (1978). While OSHA concluded that application of this rule would lead to an exposure limit "substantially less than 10 ppm," it did not state either what exposure level it considered to present a significant risk of harm or what safety factor should be applied to that level to establish a permissible exposure limit.

concentrations of benzene "probably less than 25 ppm." [35] However, the Agency took no definitive position as to what these aberrations meant in terms of demonstrable health effects and stated that no quantitative dose-response relationship had yet been established. Under these circumstances, chromosomal effects were categorized by OSHA as an "adverse biological event of serious concern which may pose or reflect a potential health risk and as such, must be considered in the larger purview of adverse health effects associated with benzene. *Id.*, at 5932–5934.

With respect to leukemia, evidence of an increased risk (*i. e.*, a risk greater than that borne by the general population) due to benzene exposures at or below 10 ppm was even sketchier. Once OSHA acknowledged that the NIOSH study it had relied upon in promulgating the emergency standard did not support its earlier view that benzene had been shown to cause leukemia at concentrations below 25 ppm, see n. 12, *supra*, there was only one study that provided any evidence of such an increased risk. That study, conducted by the Dow Chemical Co., uncovered three leukemia deaths, versus 0.2 expected deaths, out of a population of 594 workers; it appeared that the three workers had never been exposed to more than 2 to 9 ppm of benzene. The authors of the study, however, concluded that it could not be viewed as proof of a relationship between low-level benzene exposure and leukemia because all three workers had probably been occupationally exposed to a number of other potentially carcinogenic chemicals at other points in their careers and because no leukemia deaths had been uncovered among workers who had been exposed to much higher levels of benzene. In its explanation of the permanent standard, OSHA stated that the possibility that these three leukemias had been caused by benzene exposure could not be

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[35] While citing these studies, OSHA also noted that other studies of similarly exposed workers had not indicated any increased level of chromosome damage.

ruled out and that the study, although not evidence of an increased risk of leukemia at 10 ppm, was therefore "consistent with the findings of many studies that there is an excess leukemia risk among benzene exposed employees." 43 Fed. Reg. 5928 (1978). The Agency made no finding that the Dow study, any other empirical evidence, or any opinion testimony demonstrated that exposure to benzene at or below the 10 ppm level had ever in fact caused leukemia. See 581 F. 2d, at 503, where the Court of Appeals noted that OSHA was "unable to point to any empirical evidence documenting a leukemia risk at 10 ppm. . . ."

In the end OSHA's rationale for lowering the permissible exposure limit to 1 ppm was based, not on any finding that leukemia has ever been caused by exposure to 10 ppm of benzene and that it will *not* be caused by exposure to 1 ppm, but rather on a series of assumptions indicating that some leukemias might result from exposure to 10 ppm and that the number of cases might be reduced by reducing the exposure level to 1 ppm. In reaching that result, the Agency first unequivocally concluded that benzene is a human carcinogen.[36] Second, it concluded that industry had failed to prove that there is a safe threshold level of exposure to benzene below which no excess leukemia cases would occur. In reaching this conclusion OSHA rejected industry contentions that certain epidemiological studies indicating no excess risk of leukemia among workers exposed at levels below 10 ppm were sufficient to establish that the threshold level of safe exposure was at or above

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[36] "The evidence in the record conclusively establishes that benzene is a human carcinogen. The determination of benzene's leukemogenicity is derived from the evaluation of all the evidence in totality and is not based on any one particular study. OSHA recognizes, as indicated above that individual reports vary considerably in quality, and that some investigations have significant methodological deficiencies. While recognizing the strengths and weaknesses in individual studies, OSHA nevertheless concludes that the benzene record as a whole clearly establishes a causal relationship between benzene and leukemia." *Id.*, at 5931.

10 ppm.[37] It also rejected an industry witness' testimony that a dose-response curve could be constructed on the basis of the reported epidemiological studies and that this curve indicated that reducing the permissible exposure limit from 10 to 1 ppm would prevent at most one leukemia and one other cancer death every six years.[38]

Third, the Agency applied its standard policy with respect to carcinogens,[39] concluding that, in the absence of definitive

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[37] In rejecting these studies, OSHA stated that: "Although the epidemiological method can provide strong evidence of a causal relationship between exposure and disease in the case of positive findings, it is by its very nature relatively crude and an insensitive measure." After noting a number of specific ways in which such studies are often defective, the Agency stated that it is ". . . OSHA's policy when evaluating negative studies, to hold them to higher standards of methodological accuracy." *Id.*, at 5931–5932. Viewing the industry studies in this light, OSHA concluded that each of them had sufficient methodological defects to make them unreliable indicators of the safety of low-level exposures to benzene.

[38] OSHA rejected this testimony in part because it believed the exposure data in the epidemiological studies to be inadequate to formulate a dose-response curve. It also indicated that even if the testimony was accepted—indeed as long as there was any increase in the risk of cancer—the Agency was under an obligation to "select the level of exposure which is most protective of exposed employees." *Id.*, at 5941.

[39] In his dissenting opinion, MR. JUSTICE MARSHALL states that the Agency did not rely "blindly on some Draconian carcinogen 'policy'" in setting a permissible exposure limit for benzene. He points to the large number of witnesses the Agency heard and the voluminous record it compiled as evidence that it relied instead on the particular facts concerning benzene. With all due respect, we disagree with MR. JUSTICE MARSHALL's interpretation of the Agency's rationale for its decision. After hearing the evidence, the Agency relied on the same policy view it had stated at the outset, see *supra*, at 623–625, namely, that, in the absence of clear evidence to the contrary, it must be assumed that no safe level exists for exposure to a carcinogen. The Agency also reached the entirely predictable conclusion that industry had not carried its concededly impossible burden, see n. 41, *infra*, of proving that a safe level of exposure exists for benzene. As the Agency made clear later in its proposed generic cancer policy, see n. 51, *infra*, it felt compelled to allow industry witnesses to go over the same ground in each regulation dealing with a carcinogen, despite

proof of a safe level, it must be assumed that *any* level above zero presents *some* increased risk of cancer.[40] As the federal parties point out in their brief, there are a number of scientists and public health specialists who subscribe to this view, theorizing that a susceptible person may contract cancer from the absorption of even one molecule of a carcinogen like benzene. Brief for Federal Parties 18–19.[41]

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its policy view. The generic policy, which has not yet gone into effect, was specifically designed to eliminate this duplication of effort in each case by foreclosing industry from arguing that there is a safe level for the particular carcinogen being regulated. 42 Fed. Reg. 54154–54155 (1977).

[40] "As stated above, the positive studies on benzene demonstrate the causal relationship of benzene to the induction of leukemia. Although these studies, for the most part involve high exposure levels, it is OSHA's view that once the carcinogenicity of a substance has been established qualitatively, any exposure must be considered to be attended by risk when considering any given population. OSHA therefore believes that occupational exposure to benzene at low levels poses a carcinogenic risk to workers." 43 Fed. Reg. 5932 (1978).

[41] The so-called "one hit" theory is based on laboratory studies indicating that one molecule of a carcinogen may react in the test tube with one molecule of DNA to produce a mutation. The theory is that, if this occurred in the human body, the mutated molecule could replicate over a period of years and eventually develop into a cancerous tumor. See OSHA's Proposed Rule on the Identification, Classification and Regulation of Toxic Substances Posing a Potential Carcinogenic Risk, 42 Fed. Reg. 54148, 54165–54167 (1977). Industry witnesses challenged this theory, arguing that the presence of several different defense mechanisms in the human body make it unlikely that a person would actually contract cancer as a result of absorbing one carcinogenic molecule. Thus, the molecule might be detoxified before reaching a critical site, damage to a DNA molecule might be repaired, or a mutated DNA molecule might be destroyed by the body's immunological defenses before it could develop into a cancer. Tr. 2836.

In light of the improbability of a person contracting cancer as a result of a single hit, a number of the scientists testifying on both sides of the issue agreed that every individual probably does have a threshold exposure limit below which he or she will not contract cancer. See, *e. g.*, *id.*, at 1179–1181. The problem, however, is that individual susceptibility appears to vary greatly and there is at present no way to calculate each

Fourth, the Agency reiterated its view of the Act, stating that it was required by § 6 (b)(5) to set the standard either at the level that has been demonstrated to be safe or at the lowest level feasible, whichever is higher. If no safe level is established, as in this case, the Secretary's interpretation of the statute automatically leads to the selection of an exposure limit that is the lowest feasible.[42] Because of benzene's importance to the economy, no one has ever suggested that it would be feasible to eliminate its use entirely, or to try to limit exposures to the small amounts that are omnipresent. Rather, the Agency selected 1 ppm as a workable exposure level, see n. 14, *supra*, and then determined that compliance with that level was technologically feasible and that "the economic impact of . . . [compliance] will not be such as to threaten the financial welfare of the affected firms or the general economy." 43 Fed. Reg. 5939 (1978). It therefore held that 1 ppm was the minimum feasible exposure level within the meaning of § 6 (b)(5) of the Act.

Finally, although the Agency did not refer in its discussion of the pertinent legal authority to any duty to identify the anticipated benefits of the new standard, it did conclude that some benefits were likely to result from reducing the exposure limit from 10 ppm to 1 ppm. This conclusion was based, again, not on evidence, but rather on the assumption that the risk of leukemia will decrease as exposure levels decrease. Although the Agency had found it impossible to construct a dose-response curve that would predict with any accuracy the

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and every person's threshold. Thus, even industry witnesses agreed that if the standard must ensure with absolute certainty that every single worker is protected from any risk of leukemia, only a zero exposure limit would suffice. *Id.*, at 2492, 2830.

[42] "There is no doubt that benzene is a carcinogen and must, for the protection and safety of workers, be regulated as such. Given the inability to demonstrate a threshold or establish a safe level, it is appropriate that OSHA prescribe that the permissible exposure to benzene be reduced to the lowest level feasible." 43 Fed. Reg. 5932 (1978).

number of leukemias that could be expected to result from exposures at 10 ppm, at 1 ppm, or at any intermediate level, it nevertheless "determined that the benefits of the proposed standard are likely to be appreciable."[43] 43 Fed. Reg. 5941 (1978). In light of the Agency's disavowal of any ability to determine the numbers of employees likely to be adversely affected by exposures of 10 ppm, the Court of Appeals held this finding to be unsupported by the record. 581 F. 2d, at 503.[44]

It is noteworthy that at no point in its lengthy explanation did the Agency quote or even cite § 3 (8) of the Act. It made no finding that any of the provisions of the new standard were "reasonably necessary or appropriate to provide safe or healthful employment and places of employment." Nor did it allude to the possibility that any such finding might have been appropriate.

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[43] At an earlier point in its explanation, OSHA stated:

"There is general agreement that benzene exposure causes leukemia as well as other fatal diseases of the bloodforming organs. In spite of the certainty of this conclusion, there does not exist an adequate scientific basis for establishing the quantitative dose response relationship between exposure to benzene and the induction of leukemia and other blood diseases. The uncertainty in both the actual magnitude of expected deaths and in the theory of extrapolation from existing data to the OSHA exposure levels places the estimation of benefits on 'the frontiers of scientific knowledge.' While the actual estimation of the number of cancers to be prevented is highly uncertain, the evidence indicates that the number may be appreciable. There is general agreement that even in the absence of the ability to establish a 'threshold' or 'safe' level for benzene and other carcinogens, a dose response relationship is likely to exist; that is, exposure to higher doses carries with it a higher risk of cancer, and conversely, exposure to lower levels is accompanied by a reduced risk, even though a precise quantitative relationship cannot be established." *Id.*, at 5940.

[44] The court did, however, hold that the Agency's other conclusions—that there is *some* risk of leukemia at 10 ppm and that the risk would decrease by decreasing the exposure limit to 1 ppm—were supported by substantial evidence. 581 F. 2d, at 503.

III

Our resolution of the issues in these cases turns, to a large extent, on the meaning of and the relationship between § 3 (8), which defines a health and safety standard as a standard that is "reasonably necessary and appropriate to provide safe or healthful employment," and § 6 (b)(5), which directs the Secretary in promulgating a health and safety standard for toxic materials to "set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity. . . ."

In the Government's view, § 3 (8)'s definition of the term "standard" has no legal significance or at best merely requires that a standard not be totally irrational. It takes the position that § 6 (b)(5) is controlling and that it requires OSHA to promulgate a standard that either gives an absolute assurance of safety for each and every worker or reduces exposures to the lowest level feasible. The Government interprets "feasible" as meaning technologically achievable at a cost that would not impair the viability of the industries subject to the regulation. The respondent industry representatives, on the other hand, argue that the Court of Appeals was correct in holding that the "reasonably necessary and appropriate" language of § 3 (8), along with the feasibility requirement of § 6 (b)(5), requires the Agency to quantify both the costs and the benefits of a proposed rule and to conclude that they are roughly commensurate.

In our view, it is not necessary to decide whether either the Government or industry is entirely correct. For we think it is clear that § 3 (8) does apply to all permanent standards promulgated under the Act and that it requires the Secretary, before issuing any standard, to determine that it is reasonably necessary and appropriate to remedy a significant risk of material health impairment. Only after the Secretary has made the threshold determination that such a risk exists

with respect to a toxic substance, would it be necessary to decide whether § 6 (b)(5) requires him to select the most protective standard he can consistent with economic and technological feasibility, or whether, as respondents argue, the benefits of the regulation must be commensurate with the costs of its implementation. Because the Secretary did not make the required threshold finding in these cases, we have no occasion to determine whether costs must be weighed against benefits in an appropriate case.

A

Under the Government's view, § 3 (8), if it has any substantive content at all,[45] merely requires OSHA to issue stand-

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[45] We cannot accept the argument that § 3 (8) is totally meaningless. The Act authorizes the Secretary to promulgate three different kinds of standards—national consensus standards, permanent standards, and temporary emergency standards. The only substantive criteria given for two of these—national consensus standards and permanent standards for safety hazards not covered by § 6 (b)(5)—are set forth in § 3. While it is true that § 3 is entitled "definitions," that fact does not drain each definition of substantive content. For otherwise there would be no purpose in defining the critical terms of the statute. Moreover, if the definitions were ignored, there would be no statutory criteria at all to guide the Secretary in promulgating either national consensus standards or permanent standards other than those dealing with toxic materials and harmful physical agents. We may not expect Congress to display perfect craftmanship, but it is unrealistic to assume that it intended to give no direction whatsoever to the Secretary in promulgating most of his standards.

The structure of the separate subsection describing emergency temporary standards, 29 U. S. C. § 655 (c), quoted n. 13, *supra*, supports this conclusion. It authorizes the Secretary to bypass the normal procedures for setting permanent standards if he makes two findings: (A) that employees are exposed to "grave danger" from exposure to toxic substances and (B) that an emergency standard is "necessary" to protect the employees from that danger. Those findings are to be compared with those that are implicitly required by the definition of the permanent standard—(A) that there be a significant—as opposed to a "grave"—risk, and (B) that additional regulation is "reasonably necessary or appropriate"—as opposed to "necessary." It would be anomalous for Congress to require specific find-

ards that are reasonably calculated to produce a safer or more healthy work environment. Tr. of Oral Arg. 18, 20. Apart from this minimal requirement of rationality, the Government argues that § 3 (8) imposes no limits on the Agency's power, and thus would not prevent it from requiring employers to do whatever would be "reasonably necessary" to eliminate all risks of any harm from their workplaces.[46] With respect to toxic substances and harmful physical agents, the Government takes an even more extreme position. Relying on § 6 (b)(5)'s direction to set a standard "which most adequately assures . . . that no employee will suffer material impairment of health or functional capacity," the Government contends that the Secretary is required to impose standards that either guarantee workplaces that are free from any risk of material health impairment, however small, or that come as close as possible to doing so without ruining entire industries.

If the purpose of the statute were to eliminate completely and with absolute certainty any risk of serious harm, we would agree that it would be proper for the Secretary to interpret §§ 3 (8) and 6 (b)(5) in this fashion. But we think it is clear that the statute was not designed to require employers to provide absolutely risk-free workplaces whenever it is technologically feasible to do so, so long as the cost is not great enough to destroy an entire industry. Rather, both the language and structure of the Act, as well as its legislative history, indicate that it was intended to require the elimination, as far as feasible, of significant risks of harm.

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ings for temporary standards but to give the Secretary a *carte blanche* for permanent standards.

[46] The Government does not concede that the feasibility requirement in the second sentence of § 6 (b)(5) applies to health and safety standards other than toxic substances standards. See n. 1, *supra*. However, even if it did, the Government's interpretation of the term "feasible," when coupled with its view of § 3 (8), would still allow the Agency to require the elimination of even insignificant risks at great cost, so long as an entire industry's viability would not be jeopardized.

B

By empowering the Secretary to promulgate standards that are "reasonably necessary or appropriate to provide safe or healthful employment and places of employment," the Act implies that, before promulgating any standard, the Secretary must make a finding that the workplaces in question are not safe. But "safe" is not the equivalent of "risk-free." There are many activities that we engage in every day—such as driving a car or even breathing city air—that entail some risk of accident or material health impairment; nevertheless, few people would consider these activities "unsafe." Similarly, a workplace can hardly be considered "unsafe" unless it threatens the workers with a significant risk of harm.

Therefore, before he can promulgate *any* permanent health or safety standard, the Secretary is required to make a threshold finding that a place of employment is unsafe—in the sense that significant risks are present and can be eliminated or lessened by a change in practices. This requirement applies to permanent standards promulgated pursuant to § 6 (b)(5), as well as to other types of permanent standards. For there is no reason why § 3 (8)'s definition of a standard should not be deemed incorporated by reference into § 6 (b)(5). The standards promulgated pursuant to § 6 (b)(5) are just one species of the genus of standards governed by the basic requirement. That section repeatedly uses the term "standard" without suggesting any exception from, or qualification of, the general definition; on the contrary, it directs the Secretary to select "*the* standard"—that is to say, one of various possible alternatives that satisfy the basic definition in § 3 (8)—that is most protective.[47] Moreover, requiring the

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[47] Section 6 (b)(5) parallels § 6 (a) in this respect. Section 6 (a) requires the Secretary, when faced with a choice between two national consensus standards, to choose the more protective standard, see n. 7, *supra*. Just as § 6 (a) does not suggest that this more protective standard need not meet the definition of a national consensus standard set forth in § 3 (9),

Secretary to make a threshold finding of significant risk is consistent with the scope of the regulatory power granted to him by § 6 (b)(5), which empowers the Secretary to promulgate standards, not for chemicals and physical agents generally, but for "*toxic* materials" and "*harmful* physical agents." [48]

This interpretation of §§ 3 (8) and 6 (b)(5) is supported by the other provisions of the Act. Thus, for example, § 6 (g) provides in part that

> "[i]n determining the priority for establishing standards under this section, the Secretary shall give due regard to the urgency of the need for mandatory safety and health standards for particular industries, trades,

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so § 6 (b)(5) does not suggest that the most protective toxic material standard need not conform to the definition of a "standard" in § 3 (8).

[48] The rest of § 6 (b)(5), while requiring the Secretary to promulgate the standard that "most adequately assures . . . that no employee will suffer material impairment of health or functional capacity," also contains phrases implying that the Secretary should consider differences in degrees of significance rather than simply a total elimination of all risks. Thus, the standard to be selected is one that "most adequately assures, to the extent feasible, on the basis of the best available evidence," that no such harm will result. The Secretary is also directed to take into account "research, demonstrations, experiments, and such other information as may be appropriate" and to consider "[i]n addition to the attainment of the highest degree of health and safety protection for the employee . . . the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws."

MR. JUSTICE MARSHALL states that our view of § 3 (8) would make the first sentence in § 6 (b)(5) superfluous. We disagree. The first sentence of § 6 (b)(5) requires the Secretary to select a highly protective standard once he has determined that a standard should be promulgated. The threshold finding that there is a need for such a standard in the sense that there is a significant risk in the workplace is not unlike the threshold finding that a chemical is toxic or a physical agent is harmful. Once the Secretary has made the requisite threshold finding, § 6 (b)(5) directs him to choose the most protective standard that still meets the definition of a standard under § 3 (8), consistent with feasibility.

crafts, occupations, businesses, workplaces or work environments."

The Government has expressly acknowledged that this section requires the Secretary to undertake some cost-benefit analysis before he promulgates any standard, requiring the elimination of the most serious hazards first.[49] If such an analysis must precede the promulgation of any standard, it seems manifest that Congress intended, at a bare minimum, that the Secretary find a significant risk of harm and therefore a probability of significant benefits before establishing a new standard.

Section 6 (b)(8) lends additional support to this analysis. That subsection requires that, when the Secretary substantially alters an existing consensus standard, he must explain how the new rule will "better effectuate" the purposes of the Act.[50] If this requirement was intended to be more than a meaningless formality, it must be read to impose upon the Secretary the duty to find that an existing national consensus standard is not adequate to protect workers from a continuing and significant risk of harm. Thus, in this case, the Secretary was required to find that exposures at the current permissible

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[49] "First, 29 U. S. C. § 655 (g) requires the Secretary to establish priorities in setting occupational health and safety standards so that the more serious hazards are addressed first. In setting such priorities the Secretary must, of course, consider the relative costs, benefits and risks." Reply Brief for Federal Parties 13. The Government argues that the Secretary's setting of priorities under this section is not subject to judicial review. Tr. of Oral Arg. 23. While we agree that a court cannot tell the Secretary which of two admittedly significant risks he should act to regulate first, this section, along with §§ 3 (8) and 6 (b)(5), indicates that the Act does limit the Secretary's power to requiring the elimination of significant risks.

[50] Section 6 (b)(8), as set forth in 29 U. S. C. § 655 (b)(8), provides:

"Whenever a rule promulgated by the Secretary differs substantially from an existing national consensus standard, the Secretary shall, at the same time, publish in the Federal Register a statement of the reasons why the rule as adopted will better effectuate the purposes of this chapter than the national consensus standard."

exposure level of 10 ppm present a significant risk of harm in the workplace.

In the absence of a clear mandate in the Act, it is unreasonable to assume that Congress intended to give the Secretary the unprecedented power over American industry that would result from the Government's view of §§ 3 (8) and 6 (b)(5), coupled with OSHA's cancer policy. Expert testimony that a substance is probably a human carcinogen—either because it has caused cancer in animals or because individuals have contracted cancer following extremely high exposures—would justify the conclusion that the substance poses some risk of serious harm no matter how minute the exposure and no matter how many experts testified that they regarded the risk as insignificant. That conclusion would in turn justify pervasive regulation limited only by the constraint of feasibility. In light of the fact that there are literally thousands of substances used in the workplace that have been identified as carcinogens or suspect carcinogens, the Government's theory would give OSHA power to impose enormous costs that might produce little, if any, discernible benefit.[51]

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[51] OSHA's proposed generic cancer policy, 42 Fed. Reg. 54148 (1977), indicates that this possibility is not merely hypothetical. Under its proposal, whenever there is a certain quantum of proof—either from animal experiments, or, less frequently, from epidemiological studies—that a substance causes cancer at any exposure level, an emergency temporary standard would be promulgated immediately, requiring employers to provide monitoring and medical examinations and to reduce exposures to the lowest feasible level. A proposed rule would then be issued along the same lines, with objecting employers effectively foreclosed from presenting evidence that there is little or no risk associated with current exposure levels. *Id.*, at 54154–54155; 29 CFR, Part 1990 (1977).

The scope of the proposed regulation is indicated by the fact that NIOSH has published a list of 2,415 potential occupational carcinogens, NIOSH, Suspected Carcinogens: A Subfile of the Registry of Toxic Effects of Chemical Substances (HEW Pub. No. 77–149, 2d ed. 1976). OSHA has tentatively concluded that 269 of these substances have been proved to be carcinogens and therefore should be subject to full regulation. See OSHA Press Release, USDL 78–625 (July 14, 1978).

If the Government were correct in arguing that neither § 3 (8) nor § 6 (b)(5) requires that the risk from a toxic substance be quantified sufficiently to enable the Secretary to characterize it as significant in an understandable way, the statute would make such a "sweeping delegation of legislative power" that it might be unconstitutional under the Court's reasoning in *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 539 and *Panama Refining Co.* v. *Ryan*, 293 U. S. 388. A construction of the statute that avoids this kind of open-ended grant should certainly be favored.

C

The legislative history also supports the conclusion that Congress was concerned, not with absolute safety, but with the elimination of significant harm. The examples of industrial hazards referred to in the Committee hearings and debates all involved situations in which the risk was unquestionably significant. For example, the Senate Committee on Labor and Public Welfare noted that byssinosis, a disabling lung disease caused by breathing cotton dust, affected as many as 30% of the workers in carding or spinning rooms in some American cotton mills and that as many as 100,000 active or retired workers were then suffering from the disease. It also noted that statistics indicated that 20,000 out of 50,000 workers who had performed insulation work were likely to die of asbestosis, lung cancer, or mesothelyioma as a result of breathing asbestos fibers. Another example given of an occupational health hazard that would be controlled by the Act was betanaphthylamine, a "chemical so toxic that any exposure at all is likely to cause the development of bladder cancer over a period of years." S. Rep. No. 91–1282, pp. 3–4 (1970); Legislative History of the Occupational Safety and Health Act of 1970 (Committee Print compiled for the Senate Committee on Labor and Public Welfare), pp. 143–144 (1971) (hereafter Leg. Hist.).

Moreover, Congress specifically amended § 6 (b)(5) to make

it perfectly clear that it does not require the Secretary to promulgate standards that would assure an absolutely risk-free workplace. Section 6 (b)(5) of the initial Committee bill provided that

> "[t]he Secretary, in promulgating standards under this subsection, shall set the standard which most adequately and feasibly assures, on the basis of the best available evidence, that no employee will suffer *any* impairment of health or functional capacity, or diminished life expectancy even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life." (Emphasis supplied.) S. 2193, 91st Cong., 2d Sess., p. 39 (1970); Leg. Hist. 242.

On the floor of the Senate, Senator Dominick questioned the wisdom of this provision, stating:

> "How in the world are we ever going to live up to that? What are we going to do about a place in Florida where mosquitoes are getting at the employee—perish the thought that there may be mosquitoes in Florida? But there are black flies in Minnesota and Wisconsin. Are we going to say that if employees get bitten by those for the rest of their lives they will not have been done any harm at all? Probably they will not be, but do we know?" 116 Cong. Rec. 36522 (1970); Leg. Hist. 345.

He then offered an amendment deleting the entire subsection.[52]

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[52] In criticizing the Committee bill, Senator Dominick also made the following observations:

"It is unrealistic to attempt, as this section apparently does, to establish a utopia free from any hazards. Absolute safety is an impossibility and it will only create confusion in the administration of this act for the Congress to set clearly unattainable goals." 116 Cong. Rec. 37614 (1970); Leg. Hist. 480.

"But I ask, Mr. President, just thinking about that language, let us take a fellow who is a streetcar conductor or a bus conductor at the present time. How in the world, in the process of the pollution we have in the streets

After discussions with the sponsors of the Committee bill, Senator Dominick revised his amendment. Instead of deleting the first sentence of § 6 (b)(5) entirely, his new amendment limited the application of that subsection to toxic materials and harmful physical agents and changed "any" impairment of health to "material" impairment.[53] In discussing this change, Senator Dominick noted that the Committee's bill read as if a standard had to "assure that, no matter what anybody was doing, the standard would protect him for the rest of his life against any foreseeable hazard." Such an "unrealistic standard," he stated, had not been intended by the sponsors of the bill. Rather, he explained that the intention of the bill, as implemented by the amendment, was to require the Secretary

> "to use his best efforts to promulgate the best available standards, and in so doing, . . . he should take into account that anyone working in toxic agents and physical

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or in the process of the automobile accidents that we have all during a working day of any one driving a bus or trolley car, or whatever it may be, can we set standards that will make sure he will not have any risk to his life for the rest of his life? It is totally impossible for this to be put in a bill; and yet it is in the committee bill." *Id.*, at 37337; Leg. Hist. 423.

As an opponent of the legislation, Senator Dominick may have exaggerated the significance of the problem since the language in § 3 (8) already was sufficient to prevent the Secretary from trying "to establish a utopia free from any hazards." Nevertheless, the fact that Congress amended the bill to allay Senator Dominick's concern demonstrates that it did not intend the statute to achieve "clearly unattainable goals."

[53] Senator Dominick had also been concerned that the placement of the word "feasibly" could be read to require the Secretary to "ban all occupations in which there remains *some* risk of injury, impaired health, or life expectancy," since the way to most "adequately" and "feasibly" assure absolute protection might well be to prohibit the occupation entirely. *Id.*, at 36530; Leg. Hist. 366–367. In his final amendment, he attempted to cure this problem by relocating the feasibility requirement, changing "the standard which most adequately and feasibly assures" to "the standard which most adequately assures, to the extent feasible."

agents which might be harmful may be subjected to such conditions for the rest of his working life, so that we can get at something which might not be toxic now, if he works in it a short time, but if he works in it the rest of his life might be very dangerous; and we want to make sure that such things are taken into consideration in establishing standards." *Id.*, at 37622–37623; Leg. Hist. 502–503.[54]

Senator Williams, one of the sponsors of the Committee bill, agreed with the interpretation, and the amendment was adopted.

In their reply brief the federal parties argue that the Dominick amendment simply means that the Secretary is not required to eliminate threats of insignificant harm; they argue that § 6 (b)(5) still requires the Secretary to set standards that ensure that not even one employee will be subject to any risk of serious harm—no matter how small that risk may be.[55]

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[54] MR. JUSTICE MARSHALL argues that Congress could not have thought § 3 (8) had any substantive meaning inasmuch as § 6 (b)(5), as originally drafted, applied to all standards and not simply to standards for toxic materials and harmful physical substances. However, as this legislative history indicates, it appears that the omission of the words "toxic substances" and "harmful physical agents" from the original draft of § 6 (b)(5) was entirely inadvertent. As Senator Dominick noted, the Committee had always intended that subsection to apply only to that limited category of substances. The reason that Congress drafted a special section for these substances was not, as MR. JUSTICE MARSHALL suggests, because it thought that there was a need for special protection in these areas. Rather, it was because Congress recognized that there were special problems in regulating health risks as opposed to safety risks. In the latter case, the risks are generally immediate and obvious, while in the former, the risks may not be evident until a worker has been exposed for long periods of time to particular substances. It was to ensure that the Secretary took account of these long-term risks that Congress enacted § 6 (b)(5).

[55] Reply Brief for Federal Parties 24–26. While it is true that some of Senator Dominick's comments were concerned with the relative unimportance of minor injuries (see his "fly" example quoted *supra*, at 647), it is

This interpretation is at odds with Congress' express recognition of the futility of trying to make all workplaces totally risk-free. Moreover, not even OSHA follows this interpretation of § 6 (b)(5) to its logical conclusion. Thus, if OSHA is correct that the only no-risk level for leukemia due to benzene exposure is zero and if its interpretation of § 6 (b)(5) is correct, OSHA should have set the exposure limit as close to zero as feasible. But OSHA did not go about its task in that way. Rather, it began with a 1 ppm level, selected at least in part to ensure that employers would not be required to eliminate benzene concentrations that were little greater than the so-called "background" exposures experienced by the population at large. See n. 14, *supra*. Then, despite suggestions by some labor unions that it was feasible for at least some industries to reduce exposures to well below 1 ppm,[56] OSHA decided to apply the same limit to all, largely as a matter of administrative convenience. 43 Fed. Reg. 5947 (1978).

OSHA also deviated from its own interpretation of § 6 (b)(5) in adopting an action level of 0.5 ppm below which monitoring and medical examinations are not required. In light of OSHA's cancer policy, it must have assumed that some employees would be at risk because of exposures below 0.5 ppm. These employees would thus presumably benefit from medical examinations, which might uncover any benzene-related problems. OSHA's consultant advised the Agency that it was technologically and economically feasible to require that such examinations be provided. Nevertheless, OSHA adopted an action level, largely because the insignificant ben-

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clear that he was also concerned with the remote possibility of major injuries, see n. 52, *supra*.

[56] One union suggested a 0.5 ppm permissible exposure limit for oil refineries and a 1 ppm ceiling (rather than a time-weighted average) exposure for all other industries, with no use of an action level, Tr. 1250, 1257. Another wanted a 1 ppm ceiling limit for all industries, *id.*, at 3375–3376.

efits of giving such examinations and performing the necessary monitoring did not justify the substantial cost.[57]

OSHA's concessions to practicality in beginning with a 1 ppm exposure limit and using an action level concept implicitly adopt an interpretation of the statute as not requiring regulation of insignificant risks.[58] It is entirely consistent with this interpretation to hold that the Act also requires the Agency to limit its endeavors in the standard-setting area to eliminating significant risks of harm.

Finally, with respect to the legislative history, it is important to note that Congress repeatedly expressed its concern about allowing the Secretary to have too much power over American industry. Thus, Congress refused to give the Secretary the power to shut down plants unilaterally because of an imminent danger, see *Whirlpool Corp.* v. *Marshall*, 445 U. S. 1, and narrowly circumscribed the Secretary's power to issue temporary emergency standards.[59] This effort by

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[57] "A need for an action level is also suggested by the record evidence that some minimal exposure to benzene occurs naturally from animal and plant matter (Tr. 749–750; 759–760). Naturally occurring benzene concentrations, it appears, may range from 0.02 to 15 parts per billion (Ex. 117, p. 1). Additionally, it was suggested by certain employers that their operations be exempted from the requirements of the standard because these operations involve only intermittent and low level exposures to benzene. The use of the action level concept should accommodate these concerns in all cases where exposures are indeed extremely low since it substantially reduces the monitoring of employees who are below the action level and removes for these employees the requirements for medical surveillance. At the same time, employees with *significant* overexposure are afforded the full protection of the standard." (Emphasis added.) 43 Fed. Reg. 5942 (1978).

[58] The Government also states that it is OSHA's policy to attempt to quantify benefits wherever possible. While this is certainly a reasonable position, it is not consistent with OSHA's own view of its duty under § 6 (b)(5). In light of the inconsistencies in OSHA's position and the legislative history of the Act, we decline to defer to the Agency's interpretation.

[59] In *Florida Peach Growers Assn., Inc.* v. *U. S. Dept. of Labor*, 489 F. 2d 120, 130, and n. 16 (CA5 1974), the court noted that Congress intended

Congress to limit the Secretary's power is not consistent with a view that the mere possibility that some employee somewhere in the country may confront some risk of cancer is a sufficient basis for the exercise of the Secretary's power to require the expenditure of hundreds of millions of dollars to minimize that risk.

D

Given the conclusion that the Act empowers the Secretary to promulgate health and safety standards only where a significant risk of harm exists, the critical issue becomes how to define and allocate the burden of proving the significance of the risk in a case such as this, where scientific knowledge is imperfect and the precise quantification of risks is therefore impossible. The Agency's position is that there is substantial evidence in the record to support its conclusion that there is no absolutely safe level for a carcinogen and that, therefore, the burden is properly on industry to prove, apparently beyond a shadow of a doubt, that there *is* a safe level for benzene exposure. The Agency argues that, because of the uncertainties in this area, any other approach would render it helpless, forcing it to wait for the leukemia deaths that it believes are likely to occur [60] before taking any regulatory action.

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to restrict the use of emergency standards, which are promulgated without any notice or hearing. It held that, in promulgating an emergency standard, OSHA must find not only a danger *of* exposure or even some danger *from* exposure, but also a grave danger from exposure necessitating emergency action. Accord, *Dry Color Mfrs. Assn., Inc.* v. *U. S. Dept. of Labor*, 486 F. 2d 98, 100 (CA3 1973) (an emergency standard must be supported by something more than a possibility that a substance may cause cancer in man).

Congress also carefully circumscribed the Secretary's enforcement powers by creating a new, independent board to handle appeals from citations issued by the Secretary for noncompliance with health and safety standards. See 29 U. S. C. §§ 659–661.

[60] As noted above, OSHA acknowledged that there was no empirical evidence to support the conclusion that there was any risk whatsoever of deaths due to exposures at 10 ppm. What OSHA relied upon was a theory

We disagree. As we read the statute, the burden was on the Agency to show, on the basis of substantial evidence, that it is at least more likely than not that long-term exposure to 10 ppm of benzene presents a significant risk of material health impairment. Ordinarily, it is the proponent of a rule or order who has the burden of proof in administrative proceedings. See 5 U. S. C. § 556 (d). In some cases involving toxic substances, Congress has shifted the burden of proving that a particular substance is safe onto the party opposing the proposed rule.[61] The fact that Congress did not follow this course in enacting OSHA indicates that it intended the Agency to bear the normal burden of establishing the need for a proposed standard.

In this case OSHA did not even attempt to carry its burden of proof. The closest it came to making a finding that benzene presented a significant risk of harm in the workplace was its statement that the benefits to be derived from lowering the permissible exposure level from 10 to 1 ppm were "likely" to be "appreciable." The Court of Appeals held that this finding was not supported by substantial evidence. Of greater importance, even if it were supported by substantial evidence, such a finding would not be sufficient to satisfy the Agency's obligations under the Act.

The inadequacy of the Agency's findings can perhaps be

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that, because leukemia deaths had occurred at much higher exposures, some (although fewer) were also likely to occur at relatively low exposures. The Court of Appeals specifically held that its conclusion that the number was "likely" to be appreciable was unsupported by the record. See *supra*, at 638.

[61] See *Environmental Defense Fund, Inc.* v. *EPA*, 179 U. S. App. D. C. 43, 49, 57–63, 548 F. 2d 998, 1004, 1012–1018 (1977), cert. denied, 431 U. S. 925, where the court rejected the argument that the EPA has the burden of proving that a pesticide is unsafe in order to suspend its registration under the Federal Insecticide, Fungicide, and Rodenticide Act. The court noted that Congress had deliberately shifted the ordinary burden of proof under the Administrative Procedure Act, requiring manufacturers to establish the continued safety of their products.

illustrated best by its rejection of industry testimony that a dose-response curve can be formulated on the basis of current epidemiological evidence and that, even under the most conservative extrapolation theory, current exposure levels would cause at most two deaths out of a population of about 30,000 workers every six years. See n. 38, *supra*. In rejecting this testimony, OSHA made the following statement:

> "In the face of the record evidence of numerous actual deaths attributable to benzene-induced leukemia and other fatal blood diseases, OSHA is unwilling to rely on the hypothesis that at most two cancers every six years would be prevented by the proposed standard. By way of example, the Infante study disclosed seven excess leukemia deaths in a population of about 600 people over a 25-year period. While the Infante study involved higher exposures then those currently encountered, the incidence rates found by Infante, together with the numerous other cases reported in the literature of benzene leukemia and other fatal blood diseases, make it difficult for OSHA to rely on the [witness'] hypothesis to assure the statutorily mandated protection of employees. In any event, due to the fact that there is no safe level of exposure to benzene and that it is impossible to precisely quantify the anticipated benefits, OSHA must select the level of exposure which is most protective of exposed employees." 43 Fed. Reg. 5941 (1978).

There are three possible interpretations of OSHA's stated reason for rejecting the witness' testimony: (1) OSHA considered it probable that a greater number of lives would be saved by lowering the standard from 10 ppm; (2) OSHA thought that saving two lives every six years in a work force of 30,000 persons is a significant savings that makes it reasonable and appropriate to adopt a new standard; or (3) even if the small number is not significant and even if the savings may be even smaller, the Agency nevertheless believed it had

a statutory duty to select the level of exposure that is most protective of the exposed employees if it is economically and technologically feasible to do so. Even if the Secretary did not intend to rely entirely on this third theory, his construction of the statute would make it proper for him to do so. Moreover, he made no express findings of fact that would support his 1 ppm standard on any less drastic theory. Under these circumstances, we can hardly agree with the Government that OSHA discharged its duty under the Act.

Contrary to the Government's contentions, imposing a burden on the Agency of demonstrating a significant risk of harm will not strip it of its ability to regulate carcinogens, nor will it require the Agency to wait for deaths to occur before taking any action. First, the requirement that a "significant" risk be identified is not a mathematical straitjacket. It is the Agency's responsibility to determine, in the first instance, what it considers to be a "significant" risk. Some risks are plainly acceptable and others are plainly unacceptable. If, for example, the odds are one in a billion that a person will die from cancer by taking a drink of chlorinated water, the risk clearly could not be considered significant. On the other hand, if the odds are one in a thousand that regular inhalation of gasoline vapors that are 2% benzene will be fatal, a reasonable person might well consider the risk significant and take appropriate steps to decrease or eliminate it. Although the Agency has no duty to calculate the exact probability of harm, it does have an obligation to find that a significant risk is present before it can characterize a place of employment as "unsafe." [62]

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[62] In his dissenting opinion, *post*, at 706, MR. JUSTICE MARSHALL states: "[W]hen the question involves determination of the acceptable level of risk, the ultimate decision must necessarily be based on considerations of policy as well as empirically verifiable facts. Factual determinations can at most define the risk in some statistical way; the judgment whether that risk is tolerable cannot be based solely on a resolution of

Second, OSHA is not required to support its finding that a significant risk exists with anything approaching scientific certainty. Although the Agency's findings must be supported by substantial evidence, 29 U. S. C. § 655 (f), § 6 (b)(5) specifically allows the Secretary to regulate on the basis of the "best available evidence." As several Courts of Appeals have held, this provision requires a reviewing court to give OSHA some leeway where its findings must be made on the frontiers of scientific knowledge. See *Industrial Union Dept., AFL–CIO* v. *Hodgson*, 162 U. S. App. D. C. 331, 340, 499 F. 2d 467, 476 (1974); *Society of the Plastics Industry, Inc.* v. *OSHA*, 509 F. 2d 1301, 1308 (CA2 1975), cert. denied, 421 U. S. 992. Thus, so long as they are supported by a body of reputable scientific thought, the Agency is free to use conservative assumptions in interpreting the data with respect to carcinogens, risking error on the side of overprotection rather than underprotection.[63]

Finally, the record in this case and OSHA's own rulings on other carcinogens indicate that there are a number of ways in which the Agency can make a rational judgment about the

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the facts." We agree. Thus, while the Agency must support its finding that a certain level of risk exists by substantial evidence, we recognize that its determination that a particular level of risk is "significant" will be based largely on policy considerations. At this point we have no need to reach the issue of what level of scrutiny a reviewing court should apply to the latter type of determination.

[63] MR. JUSTICE MARSHALL states that, under our approach, the Agency must either wait for deaths to occur or must "deceive the public" by making a basically meaningless determination of significance based on totally inadequate evidence. MR. JUSTICE MARSHALL's view, however, rests on the erroneous premise that the only reason OSHA did not attempt to quantify benefits in this case was because it could not do so in any reasonable manner. As the discussion of the Agency's rejection of an industry attempt at formulating a dose-response curve demonstrates, however, see *supra*, at 653–655, the Agency's rejection of methods such as dose-response curves was based at least in part on its view that nothing less than absolute safety would suffice.

relative significance of the risks associated with exposure to a particular carcinogen.[64]

It should also be noted that, in setting a permissible exposure level in reliance on less-than-perfect methods, OSHA would have the benefit of a backstop in the form of monitor-

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[64] For example, in the coke-oven emissions standard, OSHA had calculated that 21,000 exposed coke-oven workers had an annual excess mortality of over 200 and that the proposed standard might well eliminate the risk entirely. 41 Fed. Reg. 46742, 46750 (1976), upheld in *American Iron & Steel Inst.* v. *OSHA*, 577 F. 2d 825 (CA3 1978), cert. pending *sub nom. Republic Steel Corp.* v. *OSHA*, No. 78–919. In hearings on the coke-oven emissions standard, the Council on Wage and Price Stability estimated that 8 to 35 lives would be saved each year, out of an estimated population of 14,000 workers, as a result of the proposed standard. Although noting that the range of benefits would vary depending on the assumptions used, OSHA did not make a finding as to whether its own staff estimate or CWPS's was correct, on the ground that it was not required to quantify the expected benefits of the standard or to weigh those benefits against the projected costs.

In other proceedings, the Agency has had a good deal of data from animal experiments on which it could base a conclusion on the significance of the risk. For example, the record on the vinyl chloride standard indicated that a significant number of animals had developed tumors of the liver, lung, and skin when they were exposed to 50 ppm of vinyl chloride over a period of 11 months. One hundred out of 200 animals died during that period. 39 Fed. Reg. 35890, 35891 (1974). Similarly, in a 1974 standard regulating 14 carcinogens, OSHA found that one of the substances had caused lung cancer in mice or rats at 1 ppm and even 0.1 ppm, while another had caused tumors in 80% of the animals subjected to high doses. *Id.*, at 3756, 3757, upheld in *Synthetic Organic Chemical Mfrs. Assn.* v. *Brennan*, 503 F. 2d 1155 (CA3 1974), cert. denied, 420 U. S. 973, and *Synthetic Organic Chemical Mfrs. Assn.* v. *Brennan*, 506 F. 2d 385 (CA3 1974), cert. denied, 423 U. S. 830.

In this case the Agency did not have the benefit of animal studies, because scientists have been unable as yet to induce leukemia in experimental animals as a result of benzene exposure. It did, however, have a fair amount of epidemiological evidence, including both positive and negative studies. Although the Agency stated that this evidence was insufficient to construct a precise correlation between exposure levels and cancer risks, it would at least be helpful in determining whether it is more likely than not that there is a significant risk at 10 ppm.

ing and medical testing. Thus, if OSHA properly determined that the permissible exposure limit should be set at 5 ppm, it could still require monitoring and medical testing for employees exposed to lower levels.[65] By doing so, it could keep a constant check on the validity of the assumptions made in developing the permissible exposure limit, giving it a sound evidentiary basis for decreasing the limit if it was initially set too high.[66] Moreover, in this way it could ensure that workers who were unusally susceptible to benzene could be removed from exposure before they had suffered any permanent damage.[67]

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Because our review of these cases has involved a more detailed examination of the record than is customary, it must

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[65] See *GAF Corp.* v. *Occupational Safety and Health Review Comm'n*, 183 U. S. App. D. C. 20, 561 F. 2d 913 (1977), where the court upheld the asbestos standard insofar as it required employers to provide medical examinations for employees exposed to any asbestos fibers, even if they were exposed to concentrations below the permissible exposure limit.

The respondent industry representatives have never disputed OSHA's power to require monitoring and medical examinations in general, although they did object to some of the specific requirements imposed in this case. See n. 30, *supra*. Because of our disposition of the case, we have no occasion to pass on these specific objections or to determine what cost-benefit considerations, if any, should govern the Agency's imposition of such requirements.

[66] This is precisely the type of information-gathering function that Congress had in mind when it enacted § 6 (b)(7), which empowers the Secretary to require medical examinations to be furnished to employees exposed to certain hazards and potential hazards "in order to most effectively determine whether the health of such employees is adversely affected by such exposure." See S. Rep. No. 91-1282, p. 7 (1970); Leg. Hist. 147.

[67] In its explanation of the final standard OSHA noted that there was some testimony that blood abnormalities would disappear after exposure had ceased. 43 Fed. Reg. 5946 (1978). Again, however, OSHA refused to rely on the hypothesis that this would always occur. Yet, in requiring medical examinations of employees exposed to between 0.5 ppm and 1 ppm, OSHA was essentially providing itself with the same kind of backstop.

be emphasized that we have neither made any factual determinations of our own, nor have we rejected any factual findings made by the Secretary. We express no opinion on what factual findings this record might support, either on the basis of empirical evidence or on the basis of expert testimony; nor do we express any opinion on the more difficult question of what factual determinations would warrant a conclusion that significant risks are present which make promulgation of a new standard reasonably necessary or appropriate. The standard must, of course, be supported by the findings actually made by the Secretary, not merely by findings that we believe he might have made.

In this case the record makes it perfectly clear that the Secretary relied squarely on a special policy for carcinogens that imposed the burden on industry of proving the existence of a safe level of exposure, thereby avoiding the Secretary's threshold responsibility of establishing the need for more stringent standards. In so interpreting his statutory authority, the Secretary exceeded his power.

IV

Throughout the administrative proceedings, the dermal contact issue received relatively little attention. In its proposed rule OSHA recommended a total ban on skin and eye contact with liquid benzene on the basis of its policy that "in dealing with a carcinogen, all potential routes of exposure (i. e., inhalation, ingestion, and skin absorption) [should] be limited to the extent feasible." 43 Fed. Reg. 5948 (1978). There was little opposition to this requirement at the hearing on the proposed rule, apparently because the proposed rule also excluded from both the permissible exposure level and the dermal contact ban work operations involving liquid mixtures containing 1% (and after one year, 0.1%) or less benzene.

In its final standard, however, OSHA eliminated the percentage exclusion for liquid benzene, on the ground that there was no predictable correlation between the percentage of ben-

zene in a liquid and the airborne exposure arising from it. See n. 22, *supra*. Although the extent to which liquid benzene is absorbed through the skin is concededly unknown, OSHA also refused to exempt any liquids, no matter how little benzene they contained, from the ban on dermal contact. In support of this position it stated that there was no evidence to "suggest that the absorption rate depends on the amount of benzene present in the liquid." 43 Fed. Reg. 5948–5949 (1978).

After the permanent standard was promulgated, OSHA received a number of requests from various industries that the percentage exclusion for liquids containing small amounts of benzene be reinstated. Those concerned with airborne exposures argued that they should not be required to monitor workplaces simply because they handled petroleum-based products in which benzene is an unavoidable contaminant. Others concerned with the dermal contact ban made similar arguments. In particular, tire manufacturers argued that it was impossible for them to comply with the ban because gloves cannot be worn during certain tire-building operations in which solvents are used and solvents containing absolutely no benzene are not commercially available.

Because of these requests, OSHA held a new series of hearings and promulgated an amendment to the rule, reinstating the percentage exclusion, but lowering it from the proposed 1% to 0.5%. The Agency did, however, provide for a 3-year grace period before the exclusion dropped to 0.1%, rather than the one year that had originally been proposed. In explaining its amendment, OSHA reiterated its policy with respect to carcinogens, stating that, because there is no absolutely safe level for any type of exposure, exposures by whatever route must be limited to the extent feasible. For airborne exposures, a zero permissible exposure limit had not been feasible. However, in most industries a ban on any dermal contact was feasible since compliance could be achieved simply by the use of protective clothing, such as impermeable

gloves. The Agency recognized that the dermal contact ban could present a problem for tire manufacturers, but stated that the percentage exclusion would alleviate the problem, because solvents containing 0.5% or less benzene were available in sufficient quantities. Although it noted that solvents containing 0.1% or less benzene were not then available in quantity, the Agency stated that a 3-year grace period would be sufficient to "allow time for increased production of solvents containing lower amounts of benzene and for development and evaluation of alternative methods of compliance with the standard's dermal provision." *Id.*, at 27968–27969.

The Court of Appeals struck down the dermal contact prohibition on two grounds. First, it held that the record did not support a finding that the ban would result in quantifiable benefits in terms of a reduced leukemia risk; therefore, it was not "reasonably necessary" within the meaning of § 3 (8) of the Act. Second, the court held that the Agency's conclusion that benzene may be absorbed through the skin was not based on the best available evidence as required by § 6 (b)(5). 581 F. 2d, at 505–506. On the second ground, the court noted that the evidence on the issue of absorption of benzene through the skin was equivocal, with some studies indicating that it could be absorbed and some indicating that it could not. All of these studies were relatively old and the only expert who had testified on the issue stated that a simple test was now available to determine, with a great deal of accuracy, whether and to what extent absorption will result. In light of § 6 (b)(5), which requires the Agency to promulgate standards on the basis of the "best available evidence" and "the latest available scientific data in the field," the court held that where there is uncontradicted testimony that a simple test will resolve the issue, the Agency is required to acquire that information before "promulgating regulations which would require an established industry to change long-followed work processes that are not demonstrably unsafe." 581 F. 2d, at 508.

While the court below may have been correct in holding that, under the peculiar circumstances of this case, OSHA was required to obtain more information, there is no need for us to reach that issue. For, in order to justify a ban on dermal contact, the Agency must find that such a ban is "reasonably necessary and appropriate" to remove a significant risk of harm from such contact. The Agency did not make such a finding, but rather acted on the basis of the absolute, no-risk policy that it applies to carcinogens. Indeed, on this issue the Agency's position is even more untenable, inasmuch as it was required to assume not only that benzene in small doses is a carcinogen, but also that it can be absorbed through the skin in sufficient amounts to present a carcinogenic risk. These assumptions are not a proper substitute for the findings of a significant risk of harm required by the Act.

The judgment of the Court of Appeals remanding the petition for review to the Secretary for further proceedings is affirmed.

It is so ordered.

MR. CHIEF JUSTICE BURGER, concurring.

This case presses upon the Court difficult unanswered questions on the frontiers of science and medicine. The statute and the legislative history give ambiguous signals as to how the Secretary is directed to operate in this area. The opinion by MR. JUSTICE STEVENS takes on a difficult task to decode the message of the statute as to guidelines for administrative action.

To comply with statutory requirements, the Secretary must bear the burden of "finding" that a proposed health and safety standard is "reasonably necessary or appropriate to provide safe or healthful employment and places of employment." This policy judgment entails the subsidiary finding that the pre-existing standard presents a "significant risk" of material health impairment for a worker who spends his entire employment life in a working environment where ex-

posure remains at maximum permissible levels. The Secretary's factual finding of "risk" must be "quantified sufficiently to enable the Secretary to characterize it as significant in an understandable way." *Ante*, at 646. Precisely what this means is difficult to say. But because these mandated findings were not made by the Secretary, I agree that the 1 ppm benzene standard must be invalidated. However, I would stress the differing functions of the courts and the administrative agency with respect to such health and safety regulation.

The Congress is the ultimate regulator, and the narrow function of the courts is to discern the meaning of the statute and the implementing regulations with the objective of ensuring that in promulgating health and safety standards the Secretary "has given reasoned consideration to each of the pertinent factors" and has complied with statutory commands. *Permian Basin Area Rate Cases*, 390 U. S. 747, 792 (1968). Our holding that the Secretary must retrace his steps with greater care and consideration is not to be taken in derogation of the scope of legitimate agency discretion. When the facts and arguments have been presented and duly considered, the Secretary must make a policy judgment as to whether a specific risk of health impairment is significant in terms of the policy objectives of the statute. When he acts in this capacity, pursuant to the legislative authority delegated by Congress, he exercises the prerogatives of the legislature—to focus on only one aspect of a larger problem, or to promulgate regulations that, to some, may appear as imprudent policy or inefficient allocation of resources. The judicial function does not extend to substantive revision of regulatory policy. That function lies elsewhere—in Congressional and Executive oversight or amendatory legislation—although, to be sure the boundaries are often ill-defined and indistinct.

Nevertheless, when discharging his duties under the statute, the Secretary is well admonished to remember that a heavy responsibility burdens his authority. Inherent in this statutory scheme is authority to refrain from regulation of

insignificant or *de minimis* risks. See *Alabama Power Co.* v. *Costle*, 196 U. S. App. D. C. 161, 606 F. 2d 1068 (1979) (*per curiam*). When the administrative record reveals only scant or minimal risk of material health impairment, responsible administration calls for avoidance of extravagant, comprehensive regulation. Perfect safety is a chimera; regulation must not strangle human activity in the search for the impossible.

MR. JUSTICE POWELL, concurring in part and in the judgment.

I join Parts I, II, III–A, III–B, III–C, and III–E of the plurality opinion.[1] The Occupational Safety and Health Administration relied in large part on its "carcinogen policy"—which had not been adopted formally—in promulgating the benzene exposure and dermal contact regulation at issue in this case.[2] For the reasons stated by the plurality, I agree that §§ 6 (b)(5) and 3 (8) of the Occupational Safety and Health Act of 1970, 29 U. S. C. §§ 655 (b)(5) and 652 (8), must be read together. They require OSHA to make a threshold finding that proposed occupational health standards are reasonably necessary to provide safe workplaces. When OSHA acts to reduce existing national consensus standards,

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[1] These portions of the plurality opinion primarily address OSHA's special carcinogen policy, rather than OSHA's argument that it also made evidentiary findings. I do not necessarily agree with every observation in the plurality opinion concerning the presence or absence of such findings. I also express no view on the question whether a different interpretation of the statute would violate the nondelegation doctrine of *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495 (1935), and *Panama Refining Co.* v. *Ryan*, 293 U. S. 388 (1935). See *post*, at 672–687 (REHNQUIST, J., concurring in judgment).

[2] The Secretary of Labor promulgated the relevant standard pursuant to his statutory authority. Since OSHA is the agency responsible for developing such regulations under the Secretary's direction, this opinion refers to "OSHA" or "the agency" as the decisionmaker most directly concerned.

therefore, it must find that (i) currently permissible exposure levels create a significant risk of material health impairment; and (ii) a reduction of those levels would significantly reduce the hazard.

Although I would not rule out the possibility that the necessary findings could rest in part on generic policies properly adopted by OSHA, see McGarity, Substantive and Procedural Discretion in Administrative Resolution of Science Policy Questions: Regulating Carcinogens in EPA and OSHA, 67 Geo. L. J. 729, 754–759 (1979), no properly supported agency policies are before us in this case.[3] I therefore agree with the plurality that the regulation is invalid to the extent it rests upon the assumption that exposure to known carcinogens always should be reduced to a level proved to be safe or, if no such level is found, to the lowest level that the affected industry can achieve with available technology.

I

If the disputed regulation were based exclusively on this "carcinogen policy," I also would agree that we need not consider whether the Act requires OSHA to determine that the benefits of a proposed standard are reasonably related to the costs of compliance. *Ante,* at 615. As the Court of Appeals for the Fifth Circuit recognized, however, OSHA takes the "fall-back position" that its regulation is justified by specific findings based upon the voluminous evidentiary record compiled in this case. *American Petroleum Institute* v. *OSHA,* 581 F. 2d 493, 503. OSHA found, for example, that the num-

[3] OSHA has adopted a formal policy for regulating carcinogens effective April 21, 1980. 45 Fed. Reg. 5282 (1980) (to be codified at 29 CFR, Part 1990). But no such policy was in effect when the agency promulgated its benzene regulation. Moreover, neither the factual determinations nor the administrative judgments upon which the policy rests are supported adequately on this record alone. Accordingly, we have no occasion to consider the extent to which valid agency policies may supply a basis for a finding that health risks exist in particular cases.

ber of cancers prevented by reducing permissible exposure levels from 10 ppm to 1 ppm "may be appreciable," that "the benefits of the proposed standard are likely to be appreciable," and that the "substantial costs [of the new standard] are justified in light of the hazards." 43 Fed. Reg. 5940–5941 (1978). Thus, OSHA found—at least generally—that the hazards of benzene exposure at currently permissible levels are serious enough to justify an expenditure of hundreds of millions of dollars. For me, that finding necessarily subsumes the conclusion that the health risk is "significant." If OSHA's conclusion is supported by substantial evidence, the threshold requirement discussed in the plurality opinion would be satisfied.

As I read its opinion, the plurality does not consider whether the agency's findings are supported by substantial evidence. The Court of Appeals found them insufficient because OSHA failed "to estimate the extent of expected benefits. . . ." 581 F. 2d, at 504. That court apparently would have required OSHA to supply a specific numerical estimate of benefits derived through mathematical techniques for "risk quantification" or "cost-effectiveness analysis." *Id.*, at 504, n. 23; see *id.*, at 504–505. I do not agree with the Court of Appeals' conclusion that the statute requires quantification of risk in every case.

The statutory preference for the "best available evidence," 29 U. S. C. § 655 (b)(5), implies that OSHA must use the best known techniques for the accurate estimation of risks and benefits when such techniques are available. But neither the statute nor the legislative history suggests that OSHA's hands are tied when reasonable quantification cannot be accomplished by any known methods. See *post*, at 693 (MARSHALL, J., dissenting). In this litigation, OSHA found that "it is impossible to precisely quantify the anticipated benefits. . . ." 43 Fed. Reg. 5941 (1978). If this finding is supported by substantial evidence, the statute does not prevent the Secretary from finding a significant health hazard on the

basis of the weight of expert testimony and opinion. I do not understand the plurality to hold otherwise. See *ante*, at 662.

For the foregoing reasons, I would not hold that "OSHA did not even attempt to carry its burden of proof" on the threshold question whether exposure to benzene at 10 ppm presents a significant risk to human health. *Ante*, at 653. In my view, the question is whether OSHA successfully carried its burden on the basis of record evidence. That question in turn reduces to two principal issues. First, is there substantial evidence supporting OSHA's determination that available quantification techniques are too imprecise to permit a reasonable numerical estimate of risks? If not, then OSHA has failed to show that its regulation rests on the "best available evidence." Second, is OSHA's finding of significant risks at current exposure levels supported by substantial evidence? If not, then OSHA has failed to show that the new regulation is reasonably necessary to provide safe and healthful workplaces.

II

Although I regard the question as close, I do not disagree with the plurality's view that OSHA has failed, on this record, to carry its burden of proof on the threshold issues summarized above. But even if one assumes that OSHA properly met this burden, see *post*, at 697–701, 713–714 (MARSHALL, J., dissenting), I conclude that the statute also requires the agency to determine that the economic effects of its standard bear a reasonable relationship to the expected benefits. An occupational health standard is neither "reasonably necessary" nor "feasible," as required by statute, if it calls for expenditures wholly disproportionate to the expected health and safety benefits.

OSHA contends that § 6 (b)(5) not only permits but actually requires it to promulgate standards that reduce health risks without regard to economic effects, unless those effects

would cause widespread dislocation throughout an entire industry.[4] Under the threshold test adopted by the plurality today, this authority will exist only with respect to "significant" risks. But the plurality does not reject OSHA's claim that it must reduce such risks without considering economic consequences less serious than massive dislocation. In my view, that claim is untenable.

Although one might wish that Congress had spoken with greater clarity, the legislative history and purposes of the statute do not support OSHA's interpretation of the Act.[5]

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[4] OSHA argues that § 6 (b)(5) requires it to promulgate standards that are "feasible" only in the sense that they are "capable of achievement": that is, achievable "at bearable cost with available technology." Brief for Federal Parties 57. The lower courts have indicated that a standard is not "infeasible" under OSHA's test unless it would precipitate "massive economic dislocation" in the affected industry. See, *e. g.*, *American Federation of Labor* v. *Brennan*, 530 F. 2d 109, 123 (CA3 1975). In this case, OSHA simply asked a consulting firm to ascertain the costs of complying with a 1 ppm standard. See *ante*, at 621. OSHA then concluded that "the economic impact of [compliance] will not . . . threaten the financial welfare of the affected firms or the general economy." 43 Fed. Reg. 5939 (1978). The cost of complying with a standard may be "bearable" and still not reasonably related to the benefits expected. A manufacturing company, for example, may have financial resources that enable it to pay the OSHA-ordered costs. But expenditures for unproductive purposes may limit seriously its financial ability to remain competitive and provide jobs.

[5] I will not repeat the detailed summary of the legislative history contained in the plurality opinion. *Ante*, at 646–652. Many of the considerations that the plurality relies upon to show Congress' concern with significant harms persuade me that Congress did not intend OSHA to reduce each significant hazard without regard to economic consequences. Senator Williams, a sponsor of the legislation, stated: "Our bill is fair and reasonable. It is a good-faith effort to balance the need of workers to have a sa[f]e and healthy work environment against the requirement of industry to function without undue interference." 116 Cong. Rec. 37342 (1970); Legislative History of the Occupational Safety and Health Act of 1970 (Committee Print compiled for the Senate Committee on Labor and Public Welfare), p. 435 (1971). There could be no such "balance' if OSHA were

It is simply unreasonable to believe that Congress intended OSHA to pursue the desirable goal of risk-free workplaces to the extent that the economic viability of particular industries—or significant segments thereof—is threatened. As the plurality observes, OSHA itself has not chosen to carry out such a self-defeating policy in all instances. *Ante,* at 650. If it did, OSHA regulations would impair the ability of American industries to compete effectively with foreign businesses and to provide employment for American workers.[6]

I therefore would not lightly assume that Congress intended OSHA to require reduction of health risks found to be significant *whenever* it also finds that the affected indus-

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authorized to impose standards without regard to economic consequences short of serious dislocation.

Senator Dominick described a preliminary version of § 6 (b) (5) as follows:

"What we were trying to do in the bill . . . was to say that when we are dealing with toxic agents or physical agents, we ought to take such steps as are *feasible and practical* to provide an atmosphere within which a person's health or safety would not be affected. Unfortunately, we had language providing that anyone [*sic*] would be assured that no one would have a hazard. . . .

"It was an unrealistic standard. . . ." 116 Cong. Rec. 37622 (1970); Legislative History, *supra,* at 502 (emphasis added).

Senator Dominick's objection to the "unrealistic" standard of the forerunner of § 6 (b) (5) does not imply that he thought § 3 (8) of the Act lacked substantive content. See *post,* at 710–711 (MARSHALL, J., dissenting). The Senator hardly would have proposed that § 6 (b) (5) be deleted entirely, see *ante,* at 647, if he had not thought that other sections of the Act required health regulations that were reasonable and practical.

[6] Congress has assigned OSHA an extremely difficult and complex task, and the guidance afforded OSHA is considerably less than clear. The agency's primary responsibility, reflected in its title, is to minimize health and safety risks in the workplace. Yet the economic health of our highly industrialized society requires a high rate of employment and an adequate response to increasingly vigorous foreign competition. There can be little doubt that Congress intended OSHA to balance reasonably the societal interest in health and safety with the often conflicting goal of maintaining a strong national economy.

try can bear the costs. See n. 4, *supra*. Perhaps more significantly, however, OSHA's interpretation of § 6 (b)(5) would force it to regulate in a manner inconsistent with the important health and safety purposes of the legislation we construe today. Thousands of toxic substances present risks that fairly could be characterized as "significant." Cf. *ante*, at 645, n. 51. Even if OSHA succeeded in selecting the gravest risks for earliest regulation, a standard-setting process that ignored economic considerations would result in a serious misallocation of resources and a lower effective level of safety than could be achieved under standards set with reference to the comparative benefits available at a lower cost.[7] I would not attribute such an irrational intention to Congress.

In this case, OSHA did find that the "substantial costs" of the benzene regulations are justified. See *supra*, at 665–666. But the record before us contains neither adequate documentation of this conclusion, nor any evidence that OSHA weighed the relevant considerations. The agency simply announced its finding of cost-justification without explaining the method by which it determines that the benefits justify the costs and their economic effects. No rational system of regulation can permit its administrators to make policy judgments without explaining how their decisions effectuate the purposes of the governing law, and nothing in the statute authorizes such laxity in this case.[8] Since neither the air-

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[7] For example, OSHA's reading of § 6 (b)(5) could force the depletion of an industry's resources in an effort to reduce a single risk by some speculative amount, even though other significant risks remain unregulated.

[8] The decision that costs justify benefits is largely a policy judgment delegated to OSHA by Congress. When a court reviews such judgments under the "substantial evidence" standard mandated by 29 U. S. C. § 655 (f), the court must determine whether the responsible agency has "careful[ly] identifi[ed] . . . the reasons why [it] chooses to follow one course rather than another" as the most reasonable method of effectuating the purposes of the applicable law. *Industrial Union Dept.* v. *Hodgson*, 162 U. S. App. D. C. 331, 339–340, 499 F. 2d 467, 475–476 (1974). Since OSHA failed to identify its reasons in these cases, I express no

borne concentration standard nor the dermal contact standard for exposure to benzene satisfies the requirements of the governing statute, I join the Court's judgment affirming the judgment of the Court of Appeals.

MR. JUSTICE REHNQUIST, concurring in the judgment.

The statutory provision at the center of the present controversy, § 6 (b)(5) of the Occupational Safety and Health Act of 1970, states, in relevant part, that the Secretary of Labor

> ". . . in promulgating standards dealing with toxic materials or harmful physical agents . . . shall set the standard which most adequately assures, *to the extent feasible*, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life." 84 Stat. 1594, 29 U. S. C. § 655 (b)(5) (emphasis added).

According to the Secretary, who is one of the petitioners herein, § 6 (b)(5) imposes upon him an absolute duty, in regulating harmful substances like benzene for which no safe level is known, to set the standard for permissible exposure at the lowest level that "can be achieved at bearable cost with available technology." Brief for Federal Parties 57. While the Secretary does not attempt to refine the concept of "bearable cost," he apparently believes that a proposed standard is economically feasible so long as its impact "will not be such as to threaten the financial welfare of the affected firms or the general economy." 43 Fed. Reg. 5939 (1978).

Respondents reply, and the lower court agreed, that § 6 (b)(5) must be read in light of another provision in the

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opinion as to the standard of review that may be appropriate in other situations.

same Act, § 3 (8), which defines an "occupational health and safety standard" as

> ". . . a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 84 Stat. 1591, 29 U. S. C. § 652 (8).

According to respondents, § 6 (b)(5), as tempered by § 3 (8), requires the Secretary to demonstrate that any particular health standard is justifiable on the basis of a rough balancing of costs and benefits.

In considering these alternative interpretations, my colleagues manifest a good deal of uncertainty, and ultimately divide over whether the Secretary produced sufficient evidence that the proposed standard for benzene will result in any appreciable benefits at all. This uncertainty, I would suggest, is eminently justified, since I believe that this litigation presents the Court with what has to be one of the most difficult issues that could confront a decisionmaker: whether the statistical possibility of future deaths should ever be disregarded in light of the economic costs of preventing those deaths. I would also suggest that the widely varying positions advanced in the briefs of the parties and in the opinions of MR. JUSTICE STEVENS, THE CHIEF JUSTICE, MR. JUSTICE POWELL, and MR. JUSTICE MARSHALL demonstrate, perhaps better than any other fact, that Congress, the governmental body best suited and most obligated to make the choice confronting us in this litigation, has improperly delegated that choice to the Secretary of Labor and, derivatively, to this Court.

I

In his Second Treatise of Civil Government, published in 1690, John Locke wrote that "[t]he power of the legislative, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive

grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws and place it in other hands." [1] Two hundred years later, this Court expressly recognized the existence of and the necessity for limits on Congress' ability to delegate its authority to representatives of the Executive Branch: "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Field* v. *Clark,* 143 U. S. 649, 692 (1892).[2]

The rule against delegation of legislative power is not, however, so cardinal a principle as to allow for no exception. The Framers of the Constitution were practical statesmen, who saw that the doctrine of separation of powers was a two-sided coin. James Madison, in Federalist Paper No. 48, for example, recognized that while the division of authority among the various branches of government was a useful principle, "the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained." The Federalist No. 48, p. 308 (H. Lodge ed. 1888).

This Court also has recognized that a hermetic sealing-off of the three branches of government from one another could easily frustrate the establishment of a National Government

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[1] J. Locke, Second Treatise of Civil Government, in the Tradition of Freedom, ¶ 141, p. 244 (M. Mayer ed. 1957). In the same treatise, Locke also wrote that "[t]he legislative cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others." *Ibid.*

[2] As early as 1812, this Court had considered and rejected an argument that a statute authorizing the President to terminate a trade embargo on Britain and France if those two nations ceased violating "the neutral commerce of the United States" delegated too much discretion to the Executive Branch. See *The Brig Aurora* v. *United States,* 7 Cranch 382, 383, 386, 388.

capable of effectively exercising the substantive powers granted to the various branches by the Constitution. Mr. Chief Justice Taft, writing for the Court in *J. W. Hampton & Co.* v. *United States*, 276 U. S. 394 (1928), noted the practicalities of the balance that has to be struck:

> "[T]he rule is that in the actual administration of the government Congress or the Legislature should exercise the legislative power, the President or the State executive, the Governor, the executive power, and the Courts or the judiciary the judicial power, and in carrying out that constitutional division into three branches it is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President, or to the Judicial branch, or if by law it attempts to invest itself or its members with either executive power or judicial power. This is not to say that the three branches are not co-ordinate parts of one government and that each in the field of its duties may not invoke the action of the two other branches in so far as the action invoked shall not be an assumption of the constitutional field of action of another branch. In determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination." *Id.*, at 406.

During the third and fourth decades of this century, this Court within a relatively short period of time struck down several Acts of Congress on the grounds that they exceeded the authority of Congress under the Commerce Clause or under the nondelegation principle of separation of powers, and at the same time struck down state statutes because they violated "substantive" due process or interfered with interstate commerce. See generally R. Jackson, The Struggle for Judicial Supremacy 48–123 (1949). When many of these decisions were later overruled, the principle that Congress

could not simply transfer its legislative authority to the Executive fell under a cloud. Yet in my opinion decisions such as *Panama Refining Co.* v. *Ryan*, 293 U. S. 388 (1935), suffer from none of the excesses of judicial policymaking that plagued some of the other decisions of that era. The many later decisions that have upheld congressional delegations of authority to the Executive Branch have done so largely on the theory that Congress may wish to exercise its authority in a particular field, but because the field is sufficiently technical, the ground to be covered sufficiently large, and the Members of Congress themselves not necessarily expert in the area in which they choose to legislate, the most that may be asked under the separation-of-powers doctrine is that Congress lay down the general policy and standards that animate the law, leaving the agency to refine those standards, "fill in the blanks," or apply the standards to particular cases. These decisions, to my mind, simply illustrate the principle stated more than 50 years ago by Mr. Chief Justice Taft that delegations of legislative authority must be judged "according to common sense and the inherent necessities of the governmental co-ordination." 276 U. S., at 406.

Viewing the legislation at issue here in light of these principles, I believe that it fails to pass muster. Read literally, the relevant portion of § 6 (b)(5) is completely precatory, admonishing the Secretary to adopt the most protective standard if he can, but excusing him from that duty if he cannot. In the case of a hazardous substance for which a "safe" level is either unknown or impractical, the language of § 6 (b)(5) gives the Secretary absolutely no indication where on the continuum of relative safety he should draw his line. Especially in light of the importance of the interests at stake, I have no doubt that the provision at issue, standing alone, would violate the doctrine against uncanalized delegations of legislative power. For me the remaining question, then, is whether additional standards are ascertainable from the legislative history or statutory context of § 6 (b)(5) or, if not, whether

such a standardless delegation was justifiable in light of the "inherent necessities" of the situation.

II

One of the primary sources looked to by this Court in adding gloss to an otherwise broad grant of legislative authority is the legislative history of the statute in question. The opinions of MR. JUSTICE STEVENS and MR. JUSTICE MARSHALL, however, give little more than a tip of the hat to the legislative origins of § 6 (b)(5). Such treatment is perhaps understandable, since the legislative history of that section, far from shedding light on what important policy choices Congress was making in the statute, gives one the feeling of viewing the congressional purpose "by the dawn's early light."

The precursor of § 6 (b)(5) was placed in the Occupational Safety and Health Act of 1970 while that bill was pending in the House Committee on Education and Labor. At that time, the section read:

> "The Secretary, in promulgating standards under this subsection, shall set the standard which most adequately assures, on the basis of the best available professional evidence, that no employee will suffer any impairment of health, or functional capacity, or diminished life expectancy even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life." § 7 (a)(4), H. R. 16785, 91st Cong., 2d Sess., 49 (1970); Legislative History of the Occupational Safety and Health Act of 1970 (Committee Print compiled for the Senate Committee on Labor and Public Welfare), p. 943 (1971) (hereinafter Leg. Hist.).

Three aspects of this original proposal are particularly significant. First, and perhaps most importantly, as originally introduced the provision contained no feasibility limitation, providing instead that the Secretary "shall set the standard which most adequately assures" that no employee will suffer

harm. Second, it would have required the Secretary to protect employees from "any" impairment of health or functional capacity. Third, on its face, although perhaps not in its intent, the provision applied to both health and safety standards promulgated under the Act.[3]

There can be little doubt that, at this point in its journey through Congress, § 6 (b)(5) would have required the Secretary, in regulating toxic substances, to set the permissible level of exposure at a safe level or, if no safe level was known, at zero. When the Senate Committee on Labor and Public Welfare considered a provision identical in almost all respects to the House version, however, Senator Javits objected that the provision in question "might be interpreted to require absolute health and safety in all cases, regardless of feasibility. . . ." S. Rep. No. 91–1282, p. 58 (1970); Leg. Hist. 197. See also 116 Cong. Rec. 37327 (1970); Leg. Hist. 418. The Committee therefore amended the bill to provide that the Secretary "shall set the standard which most adequately *and feasibly*" assured that no employee would suffer any impairment of health. S. 2193, 91st Cong., 2d Sess., p. 39 (1970); Leg. Hist. 242 (emphasis added). The only additional explanation for this change appeared in the Senate Report accompanying the bill to the Senate floor. There, the Committee explained:

> "[S]tandards promulgated under section 6 (b) shall represent *feasible requirements*, which, where appropriate, shall be based on research, experiments, demonstrations, past experience, and the latest available scientific

[3] Respondents argue that, despite its seemingly general application, the original version of § 6 (b)(5) actually referred only to health hazards as opposed to safety hazards. See Addendum B to Brief for Respondents 5b–6b. In support of this proposition, they cite a portion of the legislative history where the House Committee on Education and Labor stated that the proposed version of § 6 (b)(5) would apply when the Secretary set an "occupational health standard." H. R. Rep. No. 91–1291, p. 18 (1970); Leg. Hist. 848.

data. Such standards should be directed at assuring, *so far as possible*, that no employee will suffer impaired health or functional capacity or diminished life expectancy, by reason of exposure to the hazard involved, even though such exposure may be over the period of his entire working life." S. Rep. No. 91–1282, p. 7 (1970); Leg. Hist. 147 (emphasis added).

Despite Senator Javits' inclusion of the words "and feasibly" in the provision, participants in the floor debate immediately characterized § 6 (b)(5) as requiring the Secretary "to establish a utopia free from any hazards" and to "assure that there will not be any risk at all." 116 Cong. Rec. 37614 (1970); Leg. Hist. 480–481 (remarks of Sen. Dominick). Senator Saxbe stated:

"When we come to saying that an employer must guarantee that such an employee is protected from any possible harm, I think it will be one of the most difficult areas we are going to have to ascertain. . . .

"I believe the terms that we are passing back and forth are going to have to be identified." *Id.*, at 26522; Leg. Hist. 345.

In response to these concerns, Senator Dominick introduced a substitute for the proposed provision, deleting the sentence at issue here entirely. He explained that his amendment would delete

"the requirement in section 6 (b)(5) that the Secretary will establish occupational safety and health standards which most adequately and feasibly assure to the extent possible that *no* employee will suffer *any* impairment of health or functional capacity, or diminished life expectancy even if the employee has regular exposure to the hazard dealt with by the standard for the period of his working life.

"This requirement is inherently confusing and unrealistic. It could be read to require the Secretary to ban all

occupations in which there remains *some* risk of injury, impaired health, or life expectancy. In the case of all occupations, it will be impossible to eliminate all risks to safety and health. Thus, the present criteria could, if literally applied, close every business in this nation. In addition, in many cases, the standard which might most 'adequately' and 'feasibly' assure the elimination of the danger would be the prohibition of the occupation itself.

"If the provision is intended as no more than an admonition to the Secretary to do his duty, it seems unnecessary and could, if deemed advisable be included in the legislative history." (Emphasis in original.) *Id.*, at 36530; Leg. Hist. 367.

Eventually, Senator Dominick and his supporters settled for the present language of § 6 (b)(5). This agreement resulted in three changes from the original version of the provision as amended by Senator Javits. First, the provision was altered to state explicitly that it applied only to standards for "toxic materials or harmful physical agents," in apparent contrast with safety standards. Second, the Secretary was no longer admonished to protect employees from "any" impairment of their health, but rather only from "material" impairments. Third, and most importantly for our purposes, the phrase "most adequately and feasibly assures" was revamped to read "most adequately assures, to the extent feasible."

We have been presented with a number of different interpretations of this shift. According to the Secretary, Senator Dominick recognized that he could not delete the seemingly absolute requirements of § 6 (b)(5) entirely, and instead agreed to limit its application to toxic materials or harmful physical agents and to specify that the Secretary was only to protect employees from material impairment of their health. Significantly, the Secretary asserts that his mandate to set such standards at the safest level technologically and eco-

nomically achievable remained unchanged by the Dominick amendment. According to the Secretary, the change in language from "most adequately and feasibly assures" to "most adequately assures, to the extent feasible," represented only a slight shift in emphasis, perhaps suggesting "a preference for health protection over cost." App. to Brief for Federal Parties 7a, n. 2. See also Brief for Federal Parties 59.

MR. JUSTICE MARSHALL reads this history quite differently. In his view, the version of § 6 (b)(5) that reached the Senate floor did not "clearly embod[y] the feasibility requirement" and thus was soundly criticized as being unrealistic. See *post*, at 693. It was only as a result of the floor amendments, which replaced "most adequately and feasibly assures" with "most adequately assures, to the extent feasible," that the Secretary clearly was authorized to reject a standard if it proved technologically or economically infeasible. See also *post*, at 710, and 720–721, n. 34.

Respondents cast yet a third light on these events, focusing upon a few places in the legislative history where the words "feasible" and "reasonable" were used more or less interchangeably. See S. Rep. No. 91–2193, pp. 8–10 (1969); Leg. Hist. 38–40, 115 Cong. Rec. 22517 (1969) (Sen. Javits). It is their contention that, when Congress said "feasible," it meant cost-justified. According to respondents, who agree in this regard with the Secretary, the meaning of the feasibility requirement did not change substantially between the version that left the Senate Committee on Labor and Public Welfare and the version that was ultimately adopted as part of the Act.

To my mind, there are several lessons to be gleaned from this somewhat cryptic legislative history. First, as pointed out by MR. JUSTICE MARSHALL, to the extent that Senator Javits, Senator Dominick, and other Members were worried about imposing upon the Secretary the impossible burden of assuring absolute safety, they did not view § 3 (8) of the Act

as a limitation on that duty. I therefore find it difficult to accept the conclusion of the lower court, as embellished by respondents, that § 3 (8) acts as a general check upon the Secretary's duty under § 6 (b)(5) to adopt the most protective standard feasible.

Second, and more importantly, I believe that the legislative history demonstrates that the feasibility requirement, as employed in § 6 (b)(5), is a legislative mirage, appearing to some Members but not to others, and assuming any form desired by the beholder. I am unable to accept MR. JUSTICE MARSHALL's argument that, by changing the phrasing of § 6 (b)(5) from "most adequately and feasibly assures" to "most adequately assures, to the extent feasible," the Senate injected into that section something that was not already there.[4] If I am correct in this regard, then the amendment introduced by Senator Javits to relieve the Secretary of the duty to create a risk-free workplace left Senator Dominick free to object to the amended provision on the same grounds. Perhaps Senator Dominick himself offered the aptest description of the feasibility requirement as "no more than an admonition to the Secretary to do his duty. . . ." 116 Cong. Rec. 36530 (1970); Leg. Hist. 367.

In sum, the legislative history contains nothing to indicate that the language "to the extent feasible" does anything other

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[4] The legislative history indicates strongly that Senator Dominick himself saw little, if any, difference between the phrases "most adequately and feasibly assures" and "most adequately assures, to the extent feasible." In the course of his earlier attempt to delete the first sentence of § 6 (b)(5) entirely, he paraphrased the unamended version of that section as requiring the Secretary to promulgate standards that "most adequately and feasibly assure *to the extent possible*" that no employee would suffer harm. See 116 Cong. Rec. 36530 (1970); Leg. Hist. 367 (emphasis added). Unless Senator Dominick found a significant difference between the words "possible" and "feasible," it is clear that there is little difference between Senator Dominick's perception of what the unamended section required in the way of feasibility and what that section required after his amendment.

than render what had been a clear, if somewhat unrealistic, standard largely, if not entirely, precatory. There is certainly nothing to indicate that these words, as used in § 6 (b)(5), are limited to technological and economic feasibility. When Congress has wanted to limit the concept of feasibility in this fashion, it has said so, as is evidenced in a statute enacted the same week as the provision at issue here.[5] I also question whether the Secretary wants to assume the duties such an interpretation would impose upon him. In these cases, for example, the Secretary actually declined to adopt a standard lower than 1 ppm for some industries, not because it was economically or technologically infeasible, but rather because "different levels for different industries would result in serious administrative difficulties." 43 Fed. Reg. 5947 (1978). See also *ante*, at 650 (plurality opinion). If § 6 (b)(5) authorizes the Secretary to reject a more protective standard in the interest of administrative feasibility, I have little doubt that he could reject such standards for any reason whatsoever, including even political feasibility.

III

In prior cases this Court has looked to sources other than the legislative history to breathe life into otherwise vague delegations of legislative power. In *American Power & Light Co.* v. *SEC*, 329 U. S. 90, 104 (1946), for example, this Court concluded that certain seemingly vague delegations "derive[d] much meaningful content from the purpose of the Act, its factual background and the statutory context in which they appear." Here, however, there is little or nothing in the

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[5] Sections 211 (c)(2)(A) and (B) of the Clean Air Act, as amended on Dec. 31, 1970, 84 Stat. 1698, authorize the Environmental Protection Agency to regulate, control, or prohibit automotive fuel additives after "consideration of other *technologically or economically feasible* means of achieving emission standards. . . ." 42 U. S. C. § 7545 (c)(2)(A) (1976 ed., Supp. II) (emphasis added).

remaining provisions of the Occupational Safety and Health Act to provide specificity to the feasibility criterion in § 6 (b)(5). It may be true, as suggested by MR. JUSTICE MARSHALL, that the Act as a whole expresses a distinct preference for safety over dollars. But that expression of preference, as I read it, falls far short of the proposition that the Secretary must eliminate marginal or insignificant risks of material harm right down to an industry's breaking point.

Nor are these cases like *Lichter* v. *United States,* 334 U. S. 742, 783 (1948), where this Court upheld delegation of authority to recapture "excessive profits" in light of a pre-existing administrative practice. Here, the Secretary's approach to toxic substances like benzene could not have predated the enactment of § 6 (b)(5) itself. Moreover, there are indications that the postenactment administrative practice has been less than uniform. For example, the Occupational Safety and Health Review Commission (OSHRC), the body charged with adjudicating citations issued by the Secretary under the Act, apparently does not agree with the definition of "feasibility," advanced in these cases by the Secretary. In *Continental Can Co.,* 4 OSHC 1541, 1976–1977 OSHD ¶ 21,009 (1976), the Commission reasoned:

> "Clearly, employers have finite resources available for use to abate health hazards. And just as clearly if they are to be made to spend without limit for abatement of this hazard their financial ability to abate other hazards, including life threatening hazards, is reduced." *Id.,* at 1547, 1976–1977 OSHD, p. 25,256.

Furthermore, the record in these cases contains at least one indication that the Secretary himself was, at one time, quite uncertain what limits § 6 (b)(5) placed upon him. In announcing the proposed 1 ppm standard and discussing its economic ramifications, the Secretary explained that "[w]hile the precise meaning of feasibility is not clear from the Act, it is

OSHA's view that the term may include the economic ramifications of requirements imposed by standards." 43 Fed. Reg. 5934 (1978). This candid and tentative statement falls far short of the Secretary's present position that economic and technological considerations set the only limits on his duty to adopt the most protective standard. Finally, as noted earlier, the Secretary has failed to apply his present stringent view uniformly, rejecting in these cases a lower standard for some industries on the grounds of administrative convenience.

In some cases where broad delegations of power have been examined, this Court has upheld those delegations because of the delegatee's residual authority over particular subjects of regulation. In *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 307 (1936), this Court upheld a statute authorizing the President to prohibit the sale of arms to certain countries if he found that such a prohibition would "contribute to the reestablishment of peace." This Court reasoned that, in the area of foreign affairs, Congress "must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved." *Id.*, at 320. Similarly, *United States* v. *Mazurie*, 419 U. S. 544 (1975), upheld a broad delegation of authority to various Indian tribes to regulate the introduction of liquor into Indian country. According to *Mazurie* limitations on Congress' authority to delegate legislative power are "less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter." *Id.*, at 556–557. In the present cases, however, neither the Executive Branch in general nor the Secretary in particular enjoys any independent authority over the subject matter at issue.

Finally, as indicated earlier, in some cases this Court has abided by a rule of necessity, upholding broad delegations of authority where it would be "unreasonable and impracticable

to compel Congress to prescribe detailed rules" regarding a particular policy or situation. *American Power & Light Co.* v. *SEC*, 329 U. S., at 105. See also *Buttfield* v. *Stranahan*, 192 U. S. 470, 496 (1904). But no need for such an evasive standard as "feasibility" is apparent in the present cases. In drafting § 6 (b)(5), Congress was faced with a clear, if difficult, choice between balancing statistical lives and industrial resources or authorizing the Secretary to elevate human life above all concerns save massive dislocation in an affected industry. That Congress recognized the difficulty of this choice is clear from the previously noted remark of Senator Saxbe, who stated that "[w]hen we come to saying that an employer must guarantee that such an employee is protected from any possible harm, I think it will be one of the most difficult areas we are going to have to ascertain." 116 Cong. Rec. 36522 (1970); Leg. Hist. 345. That Congress chose, intentionally or unintentionally, to pass this difficult choice on to the Secretary is evident from the spectral quality of the standard it selected and is capsulized in Senator Saxbe's unfulfilled promise that "the terms that we are passing back and forth are going to have to be identified." *Ibid.*

IV

As formulated and enforced by this Court, the nondelegation doctrine serves three important functions. First, and most abstractly, it ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will. See *Arizona* v. *California*, 373 U. S. 546, 626 (1963) (Harlan, J., dissenting in part); *United States* v. *Robel*, 389 U. S. 258, 276 (1967) (BRENNAN, J., concurring in result). Second, the doctrine guarantees that, to the extent Congress finds it necessary to delegate authority, it provides the recipient of that authority with an

"intelligible principle" to guide the exercise of the delegated discretion. See *J. W. Hampton & Co.* v. *United States*, 276 U. S., at 409; *Panama Refining Co.* v. *Ryan*, 293 U. S., at 430. Third, and derivative of the second, the doctrine ensures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards. See *Arizona* v. *California*, *supra*, at 626 (Harlan, J., dissenting in part); *American Power & Light Co.* v. *SEC*, *supra*, at 106.

I believe the legislation at issue here fails on all three counts. The decision whether the law of diminishing returns should have any place in the regulation of toxic substances is quintessentially one of legislative policy. For Congress to pass that decision on to the Secretary in the manner it did violates, in my mind, John Locke's caveat—reflected in the cases cited earlier in this opinion—that legislatures are to make laws, not legislators. Nor, as I think the prior discussion amply demonstrates, do the provisions at issue or their legislative history provide the Secretary with any guidance that might lead him to his somewhat tentative conclusion that he must eliminate exposure to benzene as far as technologically and economically possible. Finally, I would suggest that the standard of "feasibility" renders meaningful judicial review impossible.

We ought not to shy away from our judicial duty to invalidate unconstitutional delegations of legislative authority solely out of concern that we should thereby reinvigorate discredited constitutional doctrines of the pre-New Deal era. If the nondelegation doctrine has fallen into the same desuetude as have substantive due process and restrictive interpretations of the Commerce Clause, it is, as one writer has phrased it, "a case of death by association." J. Ely, Democracy and Distrust, A Theory of Judicial Review 133 (1980). Indeed, a number of observers have suggested that this Court should once more take up its burden of ensuring that Congress does not unnecessarily delegate important choices of social policy to po-

litically unresponsive administrators.[6] Other observers, as might be imagined, have disagreed.[7]

If we are ever to reshoulder the burden of ensuring that Congress itself make the critical policy decisions, these are surely the cases in which to do it. It is difficult to imagine a more obvious example of Congress simply avoiding a choice which was both fundamental for purposes of the statute and yet politically so divisive that the necessary decision or compromise was difficult, if not impossible, to hammer out in the legislative forge. Far from detracting from the substantive authority of Congress, a declaration that the first sentence of § 6 (b)(5) of the OSHA constitutes an invalid delegation to the Secretary of Labor would preserve the authority of Congress. If Congress wishes to legislate in an area which it has not previously sought to enter, it will in today's political world undoubtedly run into opposition no matter how the legislation is formulated. But that is the very essence of legislative authority under our system. It is the hard choices, and not the filling in of the blanks, which must be made by the elected representatives of the people. When fundamental policy decisions underlying important legislation about to be enacted are to be made, the buck stops with Congress and the President insofar as he exercises his constitutional role in the legislative process.

I would invalidate the first sentence of § 6 (b)(5) of the Occupational Safety and Health Act of 1970 as it applies to

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[6] See J. Ely, Democracy and Distrust, A Theory of Judicial Review 131–134 (1980); J. Freedman, Crisis and Legitimacy, The Administrative Process and American Government 78–94 (1978); T. Lowi, The End of Liberalism: Ideology, Policy, and the Crisis of Public Authority 129–146, 297–299 (1969); Wright, Beyond Discretionary Justice, 81 Yale L. J. 575, 582–587 (1972); Waist-Deep in Regulation, Washington Post, Nov. 3, 1979, p. A10, col. 1. Cf. W. Douglas, Go East, Young Man 217 (1974).

[7] See K. Davis, Discretionary Justice: A Preliminary Inquiry 49–51 (1969); Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1669, 1693–1697 (1975). Cf. Jaffe, The Illusion of the Ideal Administration, 86 Harv. L. Rev. 1183, 1190, n. 37 (1973).

any toxic substance or harmful physical agent for which a safe level, that is, a level at which "no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to [that hazard] for the period of his working life," is, according to the Secretary, unknown or otherwise "infeasible." Absent further congressional action, the Secretary would then have to choose, when acting pursuant to § 6 (b)(5), between setting a safe standard or setting no standard at all.[8] Accordingly, for the reasons stated above, I concur in the judgment of the Court affirming the judgment of the Court of Appeals.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE BLACKMUN join, dissenting.

In cases of statutory construction, this Court's authority is limited. If the statutory language and legislative intent are plain, the judicial inquiry is at an end. Under our jurisprudence, it is presumed that ill-considered or unwise legislation will be corrected through the democratic process; a court is not permitted to distort a statute's meaning in order to make it conform with the Justices' own views of sound social policy. See *TVA* v. *Hill*, 437 U. S. 153 (1978).

Today's decision flagrantly disregards these restrictions on judicial authority. The plurality ignores the plain meaning of the Occupational Safety and Health Act of 1970 in order to bring the authority of the Secretary of Labor in line with the plurality's own views of proper regulatory policy. The unfortunate consequence is that the Federal Government's efforts to protect American workers from cancer and other crippling diseases may be substantially impaired.

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[8] This ruling would not have any effect upon standards governing toxic substances or harmful physical agents for which safe levels are feasible, upon extant standards promulgated as "national concensus standards" under § 6 (a), nor upon the Secretary's authority to promulgate "emergency temporary standards" under § 6 (c).

The first sentence of § 6 (b)(5) of the Act provides:

> "The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life." 29 U. S. C. § 655 (b)(5).

In this case the Secretary of Labor found, on the basis of substantial evidence, that (1) exposure to benzene creates a risk of cancer, chromosomal damage, and a variety of nonmalignant but potentially fatal blood disorders, even at the level of 1 ppm; (2) no safe level of exposure has been shown; (3) benefits in the form of saved lives would be derived from the permanent standard; (4) the number of lives that would be saved could turn out to be either substantial or relatively small; (5) under the present state of scientific knowledge, it is impossible to calculate even in a rough way the number of lives that would be saved, at least without making assumptions that would appear absurd to much of the medical community; and (6) the standard would not materially harm the financial condition of the covered industries. The Court does not set aside any of these findings. Thus, it could not be plainer that the Secretary's decision was fully in accord with his statutory mandate "most adequately [to] assur[e] . . . that no employee will suffer material impairment of health or functional capacity. . . ."

The plurality's conclusion to the contrary is based on its interpretation of 29 U. S. C. § 652 (8), which defines an occupational safety and health standard as one "which requires conditions . . . reasonably necessary or appropriate to provide safe or healthful employment. . . ." According to the plurality, a standard is not "reasonably necessary or appropriate"

unless the Secretary is able to show that it is "at least more likely than not," *ante*, at 653, that the risk he seeks to regulate is a "significant" one. *Ibid.* Nothing in the statute's language or legislative history, however, indicates that the "reasonably necessary or appropriate" language should be given this meaning. Indeed, both demonstrate that the plurality's standard bears no connection with the acts or intentions of Congress and is based only on the plurality's solicitude for the welfare of regulated industries. And the plurality uses this standard to evaluate not the agency's decision in this case, but a strawman of its own creation.

Unlike the plurality, I do not purport to know whether the actions taken by Congress and its delegates to ensure occupational safety represent sound or unsound regulatory policy. The critical problem in cases like the one at bar is scientific uncertainty. While science has determined that exposure to benzene at levels above 1 ppm creates a definite risk of health impairment, the magnitude of the risk cannot be quantified at the present time. The risk at issue has hardly been shown to be insignificant; indeed, future research may reveal that the risk is in fact considerable. But the existing evidence may frequently be inadequate to enable the Secretary to make the threshold finding of "significance" that the Court requires today. If so, the consequence of the plurality's approach would be to subject American workers to a continuing risk of cancer and other fatal diseases, and to render the Federal Government powerless to take protective action on their behalf. Such an approach would place the burden of medical uncertainty squarely on the shoulders of the American worker, the intended beneficiary of the Occupational Safety and Health Act. It is fortunate indeed that at least a majority of the Justices reject the view that the Secretary is prevented from taking regulatory action when the magnitude of a health risk cannot be quantified on the basis of current techniques. See *ante*, at 666 (POWELL, J., concurring in part

and concurring in judgment); see also *ante*, at 656, and n. 63 (plurality opinion).

Because today's holding has no basis in the Act, and because the Court has no authority to impose its own regulatory policies on the Nation, I dissent.

I

Congress enacted the Occupational Safety and Health Act as a response to what was characterized as "the grim history of our failure to heed the occupational health needs of our workers." [1] The failure of voluntary action and legislation at the state level, see S. Rep. No. 91–1282, p. 4 (1970); Leg. Hist. 144, had resulted in a "bleak" and "worsening" [2] situation in which 14,500 persons had died annually as a result of conditions in the workplace. In the four years preceding the Act's passage, more Americans were killed in the workplace than in the contemporaneous Vietnam War, *id.*, at 2; Leg. Hist. 142. The Act was designed as "a safety bill of rights for close to 60 million workers." [3] Its stated purpose is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." 29 U. S. C. § 651 (b). See *Altas Roofing Co.* v. *Occupational Safety and Health Review Comm'n*, 430 U. S. 442, 444–445 (1977).

The Act is enforced primarily through two provisions. First, a "general duty" is imposed upon employers to furnish employment and places of employment "free from recognized hazards that are causing or are likely to cause death or serious physical harm. . . ." 29 U. S. C. §654 (a)(1). Second, the Secretary of Labor is authorized to set "occupational safety

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[1] Legislative History of the Occupational Safety and Health Act of 1970 (Committee Print compiled for the Senate Committee on Labor and Public Welfare), p. iii (1971) (Foreword by Senator Williams) (hereinafter Leg. Hist.).

[2] S. Rep. No. 91–1282, p. 2 (1970); Leg. Hist. 142.

[3] Leg. Hist. iii.

and health standards," defined as standards requiring "conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 U. S. C. § 652 (8).

The legislative history of the Act reveals Congress' particular concern for health hazards of "unprecedented complexity" that had resulted from chemicals whose toxic effects "are only now being discovered." S. Rep. No. 91-1282, p. 2 (1970); Leg. Hist. 142. "Recent scientific knowledge points to hitherto unsuspected cause-and-effect relationships between occupational exposures and many of the so-called chronic diseases—cancer, respiratory ailments, allergies, heart disease, and others." *Ibid.* Members of Congress made repeated references to the dangers posed by carcinogens and to the defects in our knowledge of their operation and effect.[4] One of the primary purposes of the Act was to ensure regulation of these "insidious 'silent' killers." [5]

This special concern led to the enactment of the first sentence of 29 U. S. C. § 655 (b)(5), which, as noted above, provides:

> "The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life."

This directive is designed to implement three legislative pur-

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[4] S. Rep. No. 91-1282, p. 2 (1970), Leg. Hist. 142; 116 Cong. Rec. 37326 (1970), Leg. Hist. 415 (Sen. Williams); H. R. Rep. No. 91-1291, p. 19 (1970), Leg. Hist. 849; 116 Cong. Rec. 38392-38393 (1970), Leg. Hist. 1049 (Rep. Karth).

[5] 116 Cong. Rec. 38375 (1970); Leg. Hist. 1003 (Sen. Daniels).

poses. First, Congress recognized that there may be substances that become dangerous only upon repeated or frequent exposure.[6] The Secretary was therefore required to provide protection even from substances that would cause material impairment only upon exposure occurring throughout an employee's working life. Second, the requirement that the Secretary act on the basis of "the best *available* evidence" was intended to ensure that the standard-setting process would not be destroyed by the uncertainty of scientific views. Recognizing that existing knowledge may be inadequate, Congress did not require the Secretary to wait until definitive information could be obtained. Thus "it is not intended that the Secretary be paralyzed by debate surrounding diverse medical opinions." H. R. Rep. No. 91–1291, p. 18 (1970); Leg. Hist. 848. Third, Congress' special concern for the "silent killers" was felt to justify an especially strong directive to the Secretary in the standard-setting process. 116 Cong. Rec. 37622 (1970); Leg. Hist. 502 (Sen. Dominick).

The authority conferred by § 655 (b)(5), however, is not absolute. The subsection itself contains two primary limitations. The requirement of "material" impairment was designed to prohibit the Secretary from regulating substances that create a trivial hazard to affected employees.[7] Moreover, all standards promulgated under the subsection must be "feasible." During the floor debates Congress expressed concern that a prior version of the bill, not clearly embodying the feasibility requirement, would require the Secretary to close down whole industries in order to eliminate risks of impairment. This standard was criticized as unrealistic.[8]

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[6] *Id.*, at 37623, Leg. Hist. 503 (Sen. Dominick); H. R. No. 91–1291, p. 28 (1970), Leg. Hist. 858.

[7] See n. 34, *infra*.

[8] An earlier version of the bill had provided:

"The Secretary, in promulgating standards under this subsection, shall set the standard which most adequately and feasibly assures, on the basis of the best available evidence, that no employee will suffer any impairment

The feasibility requirement was imposed as an affirmative limit on the standard-setting power.

The remainder of § 655 (b)(5), applicable to all safety and health standards, requires the Secretary to base his standards "upon research, demonstrations, experiments, and such other information as may be appropriate." In setting standards, the Secretary is directed to consider "the attainment of the highest degree of health and safety protection for the employee" and also "the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws."

The Act makes provision for judicial review of occupational safety and health standards promulgated pursuant to § 655 (b)(5). The reviewing court must uphold the Secretary's

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of health or functional capacity, or diminished life expectancy even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life." S. 2193, 91st Cong., 2d Sess., 39 (1970); Leg. Hist. 242.

This standard, it was feared, "could be read to require the Secretary to ban all occupations in which there remains *some* risk of injury, impaired health, or life expectancy. In the case of all occupations, it will be impossible to eliminate all risks to safety and health. Thus, the present criteria could, if literally applied, close every business in this nation. In addition, in many cases, the standard which might most 'adequately' and 'feasibly' assure the elimination of the danger would be the prohibition of the occupation itself." 116 Cong. Rec. 36530 (1970); Leg. Hist. 367 (Statement on Amendment of Sen. Dominick). In explaining the present language, Senator Dominick stated:

"What we were trying to do in the bill—unfortunately, we did not have the proper wording or the proper drafting—was to say that when we are dealing with toxic agents or physical agents, we ought to take such steps as are feasible and practical to provide an atmosphere within which a person's health or safety would not be affected. Unfortunately, we had language providing that anyone would be assured that no one would have a hazard . . . so that no one would have any problem for the rest of his working life.

"It was an unrealistic standard. As modified, we would be approaching the problem by looking at the problem and setting a standard or criterion which would not result in harm." *Id.*, at 37622; Leg. Hist. 502.

determinations if they are supported by "substantial evidence in the record considered as a whole." 29 U. S. C. § 655 (f). It is to that evidence that I now turn.

II

The plurality's discussion of the record in this case is both extraordinarily arrogant and extraordinarily unfair. It is arrogant because the plurality presumes to make its own factual findings with respect to a variety of disputed issues relating to carcinogen regulation. See, *e. g.*, *ante*, at 656–657, and n. 64. It should not be necessary to remind the Members of this Court that they were not appointed to undertake independent review of adequately supported scientific findings made by a technically expert agency.[9] And the plurality's discussion is unfair because its characterization of the Secretary's report bears practically no resemblance to what the Secretary actually did in this case. Contrary to the plurality's suggestion, the Secretary did not rely blindly on some Draconian carcinogen "policy." See *ante*, at 624–625, 635–636. If he had, it would have been sufficient for him to have observed that

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[9] I do not, of course, suggest that it is appropriate for a federal court reviewing agency action blindly to defer to the agency's findings of fact and determinations of policy. Under *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U. S. 402, 416 (1971), courts must undertake a "searching and careful" judicial inquiry into those factors. Such an inquiry is designed to require the agency to take a "hard look," *Kleppe* v. *Sierra Club*, 427 U. S. 390, 410, n. 21 (1976) (citation omitted), by considering the proper factors and weighing them in a reasonable manner. There is also room for especially rigorous judicial scrutiny of agency decisions under a rationale akin to that offered in *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152, n. 4 (1938). See *Environmental Defense Fund* v. *Ruckelshaus*, 142 U. S. App. D. C. 74, 439 F. 2d 584 (1971).

I see no basis, however, for the approach taken by the plurality today, which amounts to nearly *de novo* review of questions of fact and of regulatory policy on behalf of institutions that are by no means unable to protect themselves in the political process. Such review is especially inappropriate when the factual questions at issue are ones about which the Court cannot reasonably be expected to have expertise.

benzene is a carcinogen, a proposition that respondents do not dispute. Instead, the Secretary gathered over 50 volumes of exhibits and testimony and offered a detailed and evenhanded discussion of the relationship between exposure to benzene at all recorded exposure levels and chromosomal damage, aplastic anemia, and leukemia. In that discussion he evaluated, and took seriously, respondents' evidence of a safe exposure level. See also *ante,* at 666 (POWELL, J., concurring in part and in judgment).

The hearings on the proposed standard were extensive, encompassing 17 days from July 19 through August 10, 1977. The 95 witnesses included epidemiologists, toxologists, physicians, political economists, industry representatives, and members of the affected work force. Witnesses were subjected to exhaustive questioning by representatives from a variety of interested groups and organizations.

Three basic positions were presented at the hearings. The first position was that the proposed 1 ppm standard was necessary because exposure to benzene would cause material impairment of the health of workers no matter how low the exposure level. Some direct evidence indicated that exposure to benzene had caused chromosomal damage, blood disorders, and leukemia at or below the 10 ppm level itself. More important, it was suggested that the recorded effects of benzene at higher levels required an inference that leukemia and other disorders would result at levels of 1 ppm and lower, especially after the prolonged exposure typical in industrial settings. Therefore, the standard should be set at the lowest feasible level, which was 1 ppm.

The second position was that a 1 ppm exposure level would itself pose an unwarranted threat to employee health and safety and that the available evidence necessitated a significantly lower level. An exposure limit below 1 ppm, it was argued, would be feasible. There were suggestions that benzene was gradually being replaced in many of the affected

industries and that most companies were already operating at or below the 1 ppm level.

The third position was that the 1971 standard should be retained. Proponents of this position suggested that evidence linking low levels of benzene exposure to leukemia was uncertain, that the current exposure limit was sufficiently safe, and that the benefits of the proposed standard would be insufficient to justify the standard's costs. In addition, there was testimony that the expenses required by the proposed standard would be prohibitive.

The regulations announcing the permanent standard for benzene are accompanied by an extensive statement of reasons summarizing and evaluating the results of the hearings. The Secretary found that the evidence showed that exposure to benzene causes chromosomal damage, a variety of nonmalignant blood disorders, and leukemia. 43 Fed. Reg. 5921 (1978). He concluded that low concentrations imposed a hazard that was sufficiently grave to call for regulatory action under the Act.

Evidence of deleterious effects. The Secretary referred to studies which conclusively demonstrated that benzene could damage chromosomes in blood-forming cells. *Id.*, at 5932. There was testimony suggesting a causal relationship between chromosomal damage and leukemia, although it could not be determined whether and to what extent such damage would impair health. *Id.*, at 5933.[10] Some studies had suggested chromosomal damage at exposure levels of 10–25 ppm and lower.[11] No quantitative dose-response curve, showing the relationship between exposure levels and incidence of chromosomal damage, could yet be established. *Id.*, at 5933–5934. The evidence of chromosomal damage was, in the Secretary's view, a cause for "serious concern." *Id.*, at 5933.

The most common effect of benzene exposure was a de-

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[10] Tr. 258–259, 1039.

[11] *Id.*, at 148, 200–201, 258.

crease in the levels of blood platelets and red and white blood cells. If sufficiently severe, the result could be pancytopenia or aplastic anemia, noncancerous but potentially fatal diseases. There was testimony that some of the nonmalignant blood disorders caused by benzene exposure could progress to, or represented, a preleukemic stage which might eventually evolve into a frank leukemia. *Id.*, at 5922.[12]

Considerable evidence showed an association between benzene and nonmalignant blood disorders at low exposure levels. Such an association had been established in one study in which the levels frequently ranged from zero to 25 ppm with some concentrations above 100 ppm, *ibid.;* in another they ranged from 5 to 30 ppm, *id.*, at 5923. Because of the absence of adequate data, a dose-response curve showing the relationship between benzene exposure and blood disorders could not be constructed. There was considerable testimony, however, that such disorders had resulted from exposure to benzene at or near the current level of 10 ppm and lower.[13] The Secretary concluded that the current standard did not provide adequate protection. He observed that a "safety factor" of 10 to 100 was generally used to discount the level at which a causal connection had been found in existing studies.[14] Under this approach, he concluded that, quite apart from any leukemia risk, the permissible exposure limit should be set at a level considerably lower than 10 ppm.

Finally, there was substantial evidence that exposure to benzene caused leukemia. The Secretary concluded that the evidence established that benzene was a carcinogen. A causal relationship between benzene and leukemia was first reported in France in 1897, and since that time similar results had been found in a number of countries, including Italy, Turkey, Japan, Switzerland, the Soviet Union, and the United

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[12] *Id.*, at 145, 173–174, 352, 1227, 1928, 3206; 15 Record, Ex 43B, p. 166.
[13] *Id.*, at 149, 360–361, 997, 1023, 2543, 2689, 3203; 11 Record, Ex. 3.
[14] Tr. 149, 1218, 2692, 2847.

States. The latest study, undertaken by the National Institute for Occupational Safety and Health (NIOSH) in the 1970's, reported a fivefold excess over the normal incidence of leukemia among workers exposed to benzene at industrial plants in Ohio. There was testimony that this study seriously understated the risk.[15]

The Secretary reviewed certain studies suggesting that low exposure levels of 10 ppm and more did not cause any excess incidence of leukemia. Those studies, he suggested, suffered from severe methodological defects, as their authors frankly acknowledged.[16] Finally, the Secretary discussed a study suggesting a statistically significant excess in leukemia at levels of 2 to 9 ppm. *Ibid.*[17] He found that, despite certain deficiencies in the study, it should be considered as consistent with other studies demonstrating an excess leukemia risk among employees exposed to benzene. *Id.*, at 5928.

Areas of uncertainty. The Secretary examined three areas

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[15] *Id.*, at 308, 314, 747, 768, 769–770, 874, 2445. As the Secretary observed, the issue of the exposure level in the NIOSH study was extensively debated during the hearings. A report from the Industrial Commission of Ohio suggested that concentrations generally ranged from zero to 10 or 15 ppm. But the Secretary concluded that evidence at the hearings showed that area exposures during the study period had sometimes substantially exceeded that level. Because of the conflicting evidence and the absence of monitoring data, he found that the excess leukemia risk observed in the NIOSH study could not be linked to any particular exposure level.

[16] As to the study on which industry relied most heavily, for example, the Secretary, largely repeating the author's own admissions, observed that (1) a number of employees included in the sample may not have been exposed to benzene at any time; (2) there was inadequate followup of numerous employees, so that persons who may have contracted leukemia were not included in the data; (3) the diagnoses were subject to serious question, and cases of leukemia may have gone unnoticed; (4) no determination of exposure levels had been made; and (5) the occupational histories of the workers were admittedly incomplete. 43 Fed. Reg. 5928 (1978).

[17] Tr. 1023–1024, 1227; 22A Record, Ex. 154.

of uncertainty that had particular relevance to his decision. First, he pointed to evidence that the latency period for benzene-induced leukemia could range from 2 to over 20 years. *Id.*, at 5930. Since lower exposure levels lead to an increase in the latency period, it would be extremely difficult to obtain evidence showing the dose-response relationship between leukemia and exposure to low levels of benzene. Because there has been no adequate monitoring in the past, it would be practically impossible to determine what the exposure levels were at a time sufficiently distant so that the latency period would have elapsed. The problem was compounded by the difficulty of conducting a suitable study. Because exposure levels approaching 10 ppm had been required only recently, direct evidence showing the relationship between leukemia and exposure levels between 1 and 10 ppm would be unavailable in the foreseeable future.

Second, the Secretary observed that individuals have differences in their susceptibility to leukemia. *Ibid.* Among those exposed to benzene was a group of unknown but possibly substantial size having various "predisposing factors" whose members were especially vulnerable to the disease. *Id.*, at 5930, 5946. The permanent standard was designed to minimize the effects of exposure for these susceptible individuals as well as for the relatively insensitive, *id.*, at 5946, and also to facilitate early diagnosis and treatment. *Id.*, at 5930.

The Secretary discussed the contention that a safe level of exposure to benzene had been demonstrated. From the testimony of numerous scientists, he concluded that it had not. *Id.*, at 5932.[18] He also found that although no dose-response curve could be plotted, *id.*, at 5946,[19] the extent of the risk

[18] The testimony of Dr. Aksoy, one of the world's leading experts, was typical: "[E]ven one ppm . . . causes leukemia." Tr. 204. See also *id.*, at 30, 150, 262, 328, 351–352, 363–364, 394, 745–746, 1057, 1210, 2420; 9 Record, Ex. 2.8–272, p. 1.

[19] Tr. 130, 360, 414–415, 416–417, 760–761, 781–782, 925, 1055–1056; 17 Record, Ex. 75, p. 2; 1 Record, Ex. 2–4, p. 11.

would decline with the exposure level. *Ibid.*[20] Exposure at a level of 1 ppm would therefore be less dangerous than exposure at one of 10 ppm. The Secretary found that the existing evidence justified the conclusion that he should not "wait for answers" while employees continued to be exposed to benzene at hazardous levels.

Finally, the Secretary responded to the argument that the permissible exposure level should be zero or lower than 1 ppm. *Id.*, at 5947.[21] Even though many industries had already achieved the 1 ppm level, he found that a lower level would not be feasible. *Ibid.*

Costs and benefits. The Secretary offered a detailed discussion of the role that economic considerations should play in his determination. He observed that standards must be "feasible," both economically and technologically. In his view the permanent standard for benzene was feasible under both tests. The economic impact would fall primarily on the more stable industries, such as petroleum refining and petrochemical production. *Id.*, at 5934. These industries would be able readily to absorb the costs or to pass them on to consumers. None of the 20 affected industries, involving 157,000 facilities and 629,000 exposed employees, *id.*, at 5935, would be unable to bear the required expenditures, *id.*, at 5934. He concluded that the compliance costs were "well within the financial capability of the covered industries." *Id.*, at 5941. An extensive survey of the national economic impact of the standard, undertaken by a private contractor, found first-year operating costs of between $187 and $205 million, recurring annual costs of $34 million, and investment in engineering controls of about $266 million.[22] Since respondents have not at-

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[20] Tr. 382, 401, 405, 1372, 2846, 2842–2843.

[21] *Id.*, at 148–149 ("the permissible exposure limit for benzene should be zero") (testimony of Dr. Aksoy). See also *id.*, at 1251 *et seq.*, 3506 *et seq.*

[22] The plurality's estimate of the amount of expenditure per employee, see *ante*, at 629, is highly misleading. Most of the costs of the benzene

tacked the Secretary's basic conclusions as to cost, the Secretary's extensive discussion need not be summarized here.

Finally, the Secretary discussed the benefits to be derived from the permanent standard. During the hearings, it had been argued that the Secretary should estimate the health benefits of the proposed regulation. To do this he would be required to construct a dose-response curve showing, at least in a rough way, the number of lives that would be saved at each possible exposure level. Without some estimate of benefits, it was argued, the Secretary's decisionmaking would be defective. During the hearings an industry witness attempted to construct such a dose-response curve. Restricting himself to carcinogenic effects, he estimated that the proposed standard would save two lives every six years and suggested that this relatively minor benefit would not justify the regulation's costs.

The Secretary rejected the hypothesis that the standard would save only two lives in six years. This estimate, he concluded, was impossible to reconcile with the evidence in the record. *Ibid.*[23] He determined that, because of numer-

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standard would be incurred only once and would thus protect an unascertainable number of employees in the future; that number will be much higher than the number of employees currently employed.

[23] The projection, designed as an extrapolation from an amalgamation of existing studies, was dependent on a number of assumptions which the Secretary could reasonably view as questionable. Indeed, the witness himself stated that his estimate was based on "a lousy set of data," was "slightly better than a guess," Tr. 2772, and that there was "no real basis," *id.*, at 2719, for a dose-response curve on which the estimate was wholly dependent.

The witness' assumptions were severely tested during the hearings, see *id.*, at 2795 *et seq.*, and the Secretary could reasonably reject them on the basis of the evidence in the record. For example: (1) The witness appeared to assume that in previous tests leukemia had been contracted after a lifetime of exposure; the evidence afforded no basis for that assumption, and the duration of exposure may have been quite short for particular employees. If the duration period was short, the witness' estimate would have been much too low. (2) The witness assumed that exposure levels in the NIOSH study were around 100 ppm. The Secretary

ous uncertainties in the existing data, it was impossible to construct a dose-response curve by extrapolating from those data to lower exposure levels.[24] More generally, the Secre-

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found, however, that no such assumption could be made, and there was evidence that exposure levels had generally been between zero and 10–15 ppm. (3) The witness assumed that the dose-response curve was linear at all levels, but there was no basis for that assumption. In the case of vinyl chloride (another carcinogen for which the Secretary has promulgated exposure standards), recent evidence suggested that the dose-response curve rises steeply at low doses and becomes less steep as the levels are increased. (4) Twenty-five percent of the workers in the NIOSH study had not been found, and the witness assumed that they were still alive and would not contract leukemia. Six hundred additional workers exposed in that study were still alive; the witness assumed they too would not contract leukemia. There was considerable testimony that, for these and other reasons, the NIOSH study significantly underestimated the risk. The witness assumes that it had not. (5) The NIOSH study found a fivefold excess risk from benzene exposure; the witness assumed that the excess was much lower, despite the NIOSH finding and the testimony that that finding was a significant understatement of the risk. In light of these uncertainties, the Secretary could conclude that the witness' estimate was unsupportable.

[24] Witnesses testifying to the inability to construct a dose-response curve referred primarily to the impossibility of correlating the incidence of leukemia, blood disorders, and chromosomal damage with the levels and duration of exposure in past studies. Thus Dr. Herman Kraybill of the National Cancer Institute testified:

"[W]e like to estimate risk factors. This has been done, as many of you recall, with vinyl chloride several years ago.

". . . [T]o estimate the risk factors on [the basis of] experimental data, this presupposes if you have good toxicity data. When I say toxicity data, I mean good dose-response data on vinyl chloride, which indeed we did have that.

"But with benzene, it appeared that we didn't have this situation, so therefore, most of us gave up. . . .

. . . . .

". . . With benzene, we sort of struck out." *Id.*, at 760–761.

Because of the enormous uncertainties in levels and duration of exposure in prior studies, any assumptions would necessarily be arbitrary. The possible range of assumptions was so great that the ultimate conclusion would be entirely uninformative. See *id.*, at 360, 415, 1055–1056.

tary observed that it had not been established that there was a safe level of exposure for benzene. Since there was considerable testimony that the risk would decline with the exposure level, *id.*, at 5940, the new standard would save lives. The number of lives saved "may be appreciable," but there was no way to make a more precise determination.[25] The question was "on the frontiers of scientific knowledge." *Ibid.*

The Secretary concluded that, in light of the scientific uncertainty, he was not required to calculate benefits more precisely. *Id.*, at 5941. In any event he gave "careful consideration" to the question of whether the admittedly substantial costs were justified in light of the hazards of benzene exposure. He concluded that those costs were "necessary" in order to promote the purposes of the Act.

III

A

This is not a case in which the Secretary found, or respondents established, that no benefits would be derived from a permanent standard, or that the likelihood of benefits was insignificant. Nor was it shown that a quantitative estimate of benefits could be made on the basis of "the best available evidence." Instead, the Secretary concluded that benefits will result, that those benefits "may" be appreciable, but that the dose-response relationship of low levels of benzene

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[25] At one point the Secretary did indicate that appreciable benefits were "likely" to result. The Court of Appeals held that this conclusion was unsupported by substantial evidence. The Secretary's suggestion, however, was made in the context of a lengthy discussion intended to show that appreciable benefits "may" be predicted but that their likelihood could not be quantified. The suggestion should not be taken as a definitive statement that appreciable benefits were more probable than not.

For reasons stated *infra*, there is nothing in the Act to prohibit the Secretary from acting when he is unable to conclude that appreciable benefits are more probable than not.

exposure and leukemia, nonmalignant blood disorders, and chromosomal damage was impossible to determine. The question presented is whether, in these circumstances, the Act permits the Secretary to take regulatory action, or whether he must allow continued exposure until more definitive information becomes available.

As noted above, the Secretary's determinations must be upheld if supported by "substantial evidence in the record considered as a whole." 29 U. S. C. § 655 (f). This standard represents a legislative judgment that regulatory action should be subject to review more stringent than the traditional "arbitrary and capricious" standard for informal rulemaking. We have observed that the arbitrary and capricious standard itself contemplates a searching "inquiry into the facts" in order to determine "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park* v. *Volpe,* 401 U. S. 402, 416 (1971). Careful performance of this task is especially important when Congress has imposed the comparatively more rigorous "substantial evidence" requirement. As we have emphasized, however, judicial review under the substantial evidence test is ultimately deferential. See, *e. g., Richardson* v. *Perales,* 402 U. S. 389, 401 (1971); *Consolo* v. *Federal Maritime Comm'n,* 383 U. S. 607, 618–621 (1966). The agency's decision is entitled to the traditional presumption of validity, and the court is not authorized to substitute its judgment for that of the Secretary. If the Secretary has considered the decisional factors and acted in conformance with the statute, his ultimate decision must be given a large measure of respect. *Id.,* at 621.

The plurality is insensitive to three factors which, in my view, make judicial review of occupational safety and health standards under the substantial evidence test particularly difficult. First, the issues often reach a high level of technical complexity. In such circumstances the courts are required to immerse themselves in matters to which they are unaccus-

tomed by training or experience. Second, the factual issues with which the Secretary must deal are frequently not subject to any definitive resolution. Often "the factual finger points, it does not conclude." *Society of Plastics Industry, Inc.* v. *OSHA*, 509 F. 2d 1301, 1308 (CA2) (Clark, J.), cert. denied, 421 U. S. 992 (1975). Causal connections and theoretical extrapolations may be uncertain. Third, when the question involves determination of the acceptable level of risk, the ultimate decision must necessarily be based on considerations of policy as well as empirically verifiable facts. Factual determinations can at most define the risk in some statistical way; the judgment whether that risk is tolerable cannot be based solely on a resolution of the facts.

The decision to take action in conditions of uncertainty bears little resemblance to the sort of empirically verifiable factual conclusions to which the substantial evidence test is normally applied. Such decisions were not intended to be unreviewable; they too must be scrutinized to ensure that the Secretary has acted reasonably and within the boundaries set by Congress. But a reviewing court must be mindful of the limited nature of its role. See *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U. S. 519 (1978). It must recognize that the ultimate decision cannot be based solely on determinations of fact, and that those factual conclusions that have been reached are ones which the courts are ill-equipped to resolve on their own.

Under this standard of review, the decision to reduce the permissible exposure level to 1 ppm was well within the Secretary's authority. The Court of Appeals upheld the Secretary's conclusions that benzene causes leukemia, blood disorders, and chromosomal damage even at low levels, that an exposure level of 10 ppm is more dangerous than one of 1 ppm, and that benefits will result from the proposed standard. It did not set aside his finding that the number of lives that would be saved was not subject to quantification.

Nor did it question his conclusion that the reduction was "feasible."

In these circumstances, the Secretary's decision was reasonable and in full conformance with the statutory language requiring that he "set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life." 29 U. S. C. § 655 (b) (5). On this record, the Secretary could conclude that regular exposure above the 1 ppm level would pose a definite risk resulting in material impairment to some indeterminate but possibly substantial number of employees. Studies revealed hundreds of deaths attributable to benzene exposure. Expert after expert testified that no safe level of exposure had been shown and that the extent of the risk declined with the exposure level. There was some direct evidence of incidence of leukemia, nonmalignant blood disorders, and chromosomal damage at exposure levels of 10 ppm and below. Moreover, numerous experts testified that existing evidence required an inference that an exposure level above 1 ppm was hazardous. We have stated that "well-reasoned expert testimony—based on what is known and uncontradicted by empirical evidence—may in and of itself be 'substantial evidence' when first-hand evidence on the question . . . is unavailable." *FPC* v. *Florida Power & Light Co.*, 404 U. S. 453, 464–465 (1972). Nothing in the Act purports to prevent the Secretary from acting when definitive information as to the quantity of a standard's benefits is unavailable.[26] Where, as here, the deficiency in

[26] This is not to say that the Secretary is prohibited from examining relative costs and benefits in the process of setting priorities among hazardous substances, or that systematic consideration of costs and benefits is not to be attempted in the standard-setting process. Efforts to quantify costs and benefits, like statements of reasons generally, may help to promote informed consideration of decisional factors and facilitate

knowledge relates to the extent of the benefits rather than their existence, I see no reason to hold that the Secretary has exceeded his statutory authority.

B

The plurality avoids this conclusion through reasoning that may charitably be described as obscure. According to the plurality, the definition of occupational safety and health standards as those "reasonably necessary or appropriate to provide safe or healthful . . . working conditions" requires the Secretary to show that it is "more likely than not" that the risk he seeks to regulate is a "significant" one. *Ante*, at 653. The plurality does not show how this requirement can be plausibly derived from the "reasonably necessary or appropriate" clause. Indeed, the plurality's reasoning is refuted by the Act's language, structure, and legislative history, and it is foreclosed by every applicable guide to statutory construction. In short, the plurality's standard is a fabrication bearing no connection with the acts or intentions of Congress.

At the outset, it is important to observe that "reasonably necessary or appropriate" clauses are routinely inserted in regulatory legislation, and in the past such clauses have uniformly been interpreted as general provisos that regulatory actions must bear a reasonable relation to those statutory purposes set forth in the statute's substantive provisions. See, *e. g.*, *FCC* v. *National Citizens Committee for Broadcasting*, 436 U. S. 775, 796–797 (1978); *Mourning* v. *Family Publications Service, Inc.*, 411 U. S. 356, 369 (1973); *Thorpe*

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judicial review. See *Dunlop* v. *Bachowski*, 421 U. S. 560, 571–574 (1975). The Secretary indicates that he has attempted to quantify costs and benefits in the past. See 43 Fed. Reg. 54354, 54427–54431 (1978) (lead); *id.*, at 27350, 27378–27379 (cotton dust).

It is not necessary in the present case to say whether the Secretary must show a reasonable relation between costs and benefits. Discounting for the scientific uncertainty, the Secretary expressly—and reasonably—found such a relation here.

v. *Housing Authority of the City of Durham*, 393 U. S. 268, 280–281 (1969). The Court has never—until today—interpreted a "reasonably necessary or appropriate" clause as having a substantive content that supersedes a specific congressional directive embodied in a provision that is focused more particularly on an agency's authority. This principle, of course, reflects the common understanding that the determination of whether regulations are "reasonably necessary" may be made only by reference to the legislative judgment reflected in the statute; it must not be based on a court's own, inevitably subjective view of what steps should be taken to promote perceived statutory goals.

The plurality suggests that under the "reasonably necessary" clause, a workplace is not "unsafe" unless the Secretary is able to convince a reviewing court that a "significant" risk is at issue. *Ante*, at 642. That approach is particularly embarrassing in this case, for it is contradicted by the plain language of the Act. The plurality's interpretation renders utterly superfluous the first sentence of § 655 (b)(5), which, as noted above, requires the Secretary to set the standard "which most adequately assures . . . that no employee will suffer material impairment of health." Indeed, the plurality's interpretation reads that sentence out of the Act. By so doing, the plurality makes the test for standards regulating toxic substances and harmful physical agents substantially identical to the test for standards generally—plainly the opposite of what Congress intended. And it is an odd canon of construction that would insert in a vague and general definitional clause a threshold requirement that overcomes the specific language placed in a standard-setting provision. The most elementary principles of statutory construction demonstrate that precisely the opposite interpretation is appropriate. See, *e. g.*, *FPC* v. *Texaco Inc.*, 417 U. S. 380, 394–395 (1974); *Clark* v. *Uebersee Finanz-Korp.*, 332 U. S. 480, 488–489 (1947). In short, Congress could have provided that the Secretary may not take regulatory action until the existing

scientific evidence proves the risk at issue to be "significant,"[27] but it chose not to do so.

The plurality's interpretation of the "reasonably necessary or appropriate" clause is also conclusively refuted by the legislative history. While the standard-setting provision that the plurality ignores received extensive legislative attention, the definitional clause received *none at all.* An earlier version of the Act, see n. 8, *supra,* did not embody a clear feasibility constraint and was not restricted to toxic substances or to "material" impairments. The "reasonably necessary or appropriate" clause was contained in this prior version of the bill, as it was at all relevant times. In debating this version, Members of Congress repeatedly expressed concern that it would require a risk-free universe. See, *e. g., ante,* at 646–649. The definitional clause was not mentioned at all, an omission that would be incomprehensible if Congress intended

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[27] It is useful to compare the Act with other regulatory statutes in which Congress has required a showing of a relationship between costs and benefits or of an "unreasonable risk." In some statutes Congress has expressly required cost-benefit analysis or a demonstration of some reasonable relation between costs and benefits. See 33 U. S. C. § 701a (Flood Control Act of 1936); 42 U. S. C. § 7545 (c)(2)(B) (1976 ed., Supp. II) (Clean Air Act); 33 U. S. C. § 1314 (b)(4)(B) (1976 ed., Supp. II) (Clean Water Act). In others Congress has imposed two independent requirements: that administrative action be "feasible" and justified by a balancing of costs and benefits, *e. g.,* 43 U. S. C. § 1347 (b) (1976 ed., Supp. II) (Outer Continental Shelf Lands Act); 42 U. S. C. § 6295 (a)(2)(D) (1976 ed., Supp. II) (Energy Policy and Conservation Act). This approach demonstrates a legislative awareness of the difference between a feasibility constraint and a constraint based on weighing costs and benefits. See *infra,* at 719–720. In still others Congress has authorized regulation of "unreasonable risk," a term which has been read by some courts to require a balancing of costs and benefits. See, *e. g., Aqua Slide 'N' Dive Corp.* v. *Consumer Product Safety Comm'n,* 569 F. 2d 831 (CA5 1978) (construing 15 U. S. C. § 2058 (c)(2)(A) (Consumer Product Safety Act)); *Forester* v. *Consumer Product Safety Comm'n,* 182 U. S. App. D. C. 153, 559 F. 2d 774 (1977) (construing 15 U. S. C. § 1261 (s) (Child Protection and Toy Safety Act)).

by that clause to require the Secretary to quantify the risk he sought to regulate in order to demonstrate that it was "significant."

The only portions of the legislative history on which the plurality relies, see *ibid.*, have nothing to do with the "reasonably necessary or appropriate" clause from which the "threshold finding" requirement is derived. Those portions consisted of criticisms directed toward the earlier version of the statute *which already contained the definitional clause.* These criticisms, in turn, were met by subsequent amendments that limited application of the strict "no employee will suffer" clause to toxic substances, inserted an explicit feasibility constraint, and modified the word "impairment" by the adjective "material." It is disingenuous at best for the plurality to suggest that isolated statements in the legislative history, expressing concerns that were met by subsequent amendments not requiring any "threshold" finding, can justify reading such a requirement into a "reasonably necessary" clause that was in the Act all along.[28]

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[28] The plurality also relies on its perception that if the "reasonably necessary" clause were not given the meaning it ascribes to it, there would be no guidance for "standards other than those dealing with toxic materials and harmful physical agents." *Ante*, at 640, n. 45. For two reasons this argument is without force. First, even if the "reasonably necessary" clause does have independent content, and even if that content is as the plurality describes it, it cannot under any fairminded reading supersede the express language of § 655 (b)(5) for toxic substances and harmful physical agents.

Second, as noted above, an earlier version of the bill applied the "no employee will suffer" language to all substances. At that time, there was no "gap," and accordingly it could not be argued that the "reasonably necessary or appropriate" clause had the content the plurality ascribes to it. In this light, the plurality's reasoning must be that when Congress amended the bill to apply the strict § 655 (b)(5) requirements only to toxic substances, the definitional clause gained an independent meaning that in turn comprehended all standards. But surely this argument turns congressional purposes on their head. It reasons that when

The plurality's various structural arguments are also unconvincing. The fact that a finding of "grave danger" is required for temporary standards, see *ante*, at 640, n. 45, hardly implies that the Secretary must show for permanent standards that it is more probable than not that the substance to be regulated poses a "significant" risk. Nor is the reference to "*toxic* materials," *ante*, at 643, in any way informative. And the priority-setting provision, *ante*, at 643–644, cannot plausibly be read to condition the Secretary's standard-setting authority on an ability to meet the Court's "threshold" requirement.

The plurality ignores applicable canons of construction, apparently because it finds their existence inconvenient. But as we stated quite recently, the inquiry into statutory purposes should be "informed by an awareness that the regulation is entitled to deference unless it can be said not to be a reasoned and supportable interpretation of the Act." *Whirlpool Corp.* v. *Marshall*, 445 U. S. 1, 11 (1980). Can it honestly be said that the Secretary's interpretation of the Act is "unreasoned" or "unsupportable"? And as we stated in the same case, "safety legislation is to be liberally construed to effectuate the congressional purpose." *Id.*, at 13. The plurality's disregard of these principles gives credence to the frequently voiced criticism that they are honored only when the Court finds itself in substantive agreement with the agency action at issue.

In short, today's decision represents a usurpation of decisionmaking authority that has been exercised by and properly belongs with Congress and its authorized representatives.

Congress singled out toxic substances for special regulation, it simultaneously created a more lenient ("reasonably necessary") test for standards generally, and that once that more lenient test was applicable, it somehow superseded the strict requirements for toxic substances. That reasoning is both illogical and circular. Nor is there any basis for the plurality's suggestion, see *ante*, at 649, n. 54, that the original bill's application to all standards was "entirely inadvertent."

The plurality's construction has no support in the statute's language, structure, or legislative history. The threshold finding that the plurality requires is the plurality's own invention. It bears no relationship to the acts or intentions of Congress, and it can be understood only as reflecting the personal views of the plurality as to the proper allocation of resources for safety in the American workplace.

C

The plurality is obviously more interested in the consequences of its decision than in discerning the intention of Congress. But since the language and legislative history of the Act are plain, there is no need for conjecture about the effects of today's decision. "It is not for us to speculate, much less act, on whether Congress would have altered its stance had the specific events of this case been anticipated." *TVA* v. *Hill,* 437 U. S., at 185. I do not pretend to know whether the test the plurality erects today is, as a matter of policy, preferable to that created by Congress and its delegates: the area is too fraught with scientific uncertainty, and too dependent on considerations of policy, for a court to be able to determine whether it is desirable to require identification of a "significant" risk before allowing an administrative agency to take regulatory action. But in light of the tenor of the plurality opinion, it is necessary to point out that the question is not one-sided, and that Congress' decision to authorize the Secretary to promulgate the regulation at issue here was a reasonable one.

In this case the Secretary found that exposure to benzene at levels above 1 ppm posed a definite albeit unquantifiable risk of chromosomal damage, nonmalignant blood disorders, and leukemia. The existing evidence was sufficient to justify the conclusion that such a risk was presented, but it did not permit even rough quantification of that risk. Discounting for the various scientific uncertainties, the Secretary gave

"careful consideration to the question of whether th[e] substantial costs" of the standard "are justified in light of the hazards of exposure to benzene," and concluded that "these costs are necessary in order to effectuate the statutory purpose . . . and to adequately protect employees from the hazards of exposure to benzene." 43 Fed. Reg. 5941 (1978).

In these circumstances it seems clear that the Secretary found a risk that is "significant" in the sense that the word is normally used. There was some direct evidence of chromosomal damage, nonmalignant blood disorders, and leukemia at exposures at or near 10 ppm and below. In addition, expert after expert testified that the recorded effects of benzene exposure at higher levels justified an inference that an exposure level above 1 ppm was dangerous. The plurality's extraordinarily searching scrutiny of this factual record reveals no basis for a conclusion that quantification is, on the basis of "the best available evidence," possible at the present time. If the Secretary decided to wait until definitive information was available, American workers would be subjected for the indefinite future to a possibly substantial risk of benzene-induced leukemia and other illnesses. It is unsurprising, at least to me, that he concluded that the statute authorized him to take regulatory action now.

Under these circumstances, the plurality's requirement of identification of a "significant" risk will have one of two consequences. If the plurality means to require the Secretary realistically to "quantify" the risk in order to satisfy a court that it is "significant," the record shows that the plurality means to require him to do the impossible. But regulatory inaction has very significant costs of its own. The adoption of such a test would subject American workers to a continuing risk of cancer and other serious diseases; it would disable the Secretary from regulating a wide variety of carcinogens for which quantification simply cannot be undertaken at the present time.

There are encouraging signs that today's decision does not extend that far.[29] My Brother POWELL concludes that the Secretary is not prevented from taking regulatory action "when reasonable quantification cannot be accomplished by any known methods." See *ante,* at 666. The plurality also indicates that it would not prohibit the Secretary from promulgating safety standards when quantification of the benefits is impossible. See *ante,* at 656–657, and n. 63. The Court might thus allow the Secretary to attempt to make a very rough quantification of the risk imposed by a carcinogenic substance, and give considerable deference to his finding that the risk was significant. If so, the Court would permit the Secretary to promulgate precisely the same regulation involved in this case if he had not relied on a carcinogen "policy," but undertaken a review of the evidence and the

[29] The plurality suggests that it is for the agency "to determine, in the first instance, what it considers to be a 'significant' risk," and that the agency "is free to use conservative assumptions in interpreting the data. . . ." *Ante,* at 655, 656. Moreover, my Brother POWELL would not require "quantification of risk in every case." *Ante,* at 666 (opinion concurring in part and concurring in judgment). As I read his opinion, MR. JUSTICE POWELL would have permitted the Secretary to promulgate the standard at issue here if the Secretary had provided a more carefully reasoned explanation of his conclusion that the risk at issue justified the admittedly significant costs of the benzene standard. MR. JUSTICE POWELL also suggests that such a conclusion would be subject to relatively deferential review. *Ante,* at 670–671, n. 8.

In this respect, the differences between my approach and that of MR. JUSTICE POWELL may be comparatively narrow. We are agreed on two propositions that I regard as critical to a fairminded interpretation of the Act: (1) the Secretary may regulate risks that are not subject to quantification on the basis of the "best available evidence"; and (2) the Secretary's judgment that a particular health risk merits regulatory action is subject to limited judicial scrutiny. It is encouraging that at least five Members of the Court accept these basic propositions.

For reasons stated in the text, however, I disagree with my Brother POWELL's conclusion that it is appropriate to hold in this case that the Act requires the Secretary to show a reasonable relationship between costs and benefits.

expert testimony and concluded, on the basis of conservative assumptions, that the risk addressed is a significant one. Any other interpretation of the plurality's approach would allow a court to displace the agency's judgment with its own subjective conception of "significance," a duty to be performed without statutory guidance.

The consequences of this second approach would hardly be disastrous; indeed, it differs from my own principally in its assessment of the basis for the Secretary's decision in this case. It is objectionable, however, for three reasons. First, the requirement of identification of a "significant" risk simply has no relationship to the statute that the Court today purports to construe. Second, if the "threshold finding" requirement means only that the Secretary must find "that there is a need for such a standard," *ante*, at 643, n. 48, the requirement was plainly satisfied by the Secretary's express statement that the standard's costs "are necessary in order to effectuate the statutory purpose . . . and to adequately protect employees from the hazards of exposure to benzene." 43 Fed. Reg. 5941 (1978). Third, the record amply demonstrates that in light of existing scientific knowledge, no purpose would be served by requiring the Secretary to take steps to quantify the risk of exposure to benzene at low levels. Any such quantification would be based not on scientific "knowledge" as that term is normally understood, but on considerations of policy. For carcinogens like benzene, the assumptions on which a dose-response curve must be based are necessarily arbitrary. To require a quantitative showing of a "significant" risk, therefore, would either paralyze the Secretary into inaction or force him to deceive the public by acting on the basis of assumptions that must be considered too speculative to support any realistic assessment of the relevant risk. See McGarity, Substantive and Procedural Discretion in Administrative Resolution of Science Policy Questions: Regulating Carcinogens in EPA and OSHA, 67 Geo. L. J. 729, 806 (1979). It is encouraging that the Court appears willing

not to require quantification when it is not fairly possible. See *ante*, at 656–657, and n. 63.

Though it is difficult to see how a future Congress could be any more explicit on the matter than was the Congress that passed the Act in 1970, it is important to remember that today's decision is subject to legislative reversal. Congress may continue to believe that the Secretary should not be prevented from protecting American workers from cancer and other fatal diseases until scientific evidence has progressed to a point where he can convince a federal court that the risk is "significant." Today's decision is objectionable not because it is final, but because it places the burden of legislative inertia on the beneficiaries of the safety and health legislation in question in this case. By allocating the burden in this fashion, the Court requires the American worker to return to the political arena and to win a victory that he won once before in 1970. I am unable to discern any justification for that result.

D

Since the plurality's construction of the "reasonably necessary or appropriate" clause is unsupportable, I turn to a brief discussion of the other arguments that respondents offer in support of the judgment below.

First, respondents characterize the Act as a pragmatic statute designed to balance the benefits of a safety and health regulation against its costs. Respondents observe that the statute speaks in terms of relative protection by providing that safety must be assured "so far as possible," 29 U. S. C. § 651 (b), and by stating that the "no material impairment" requirement is to be imposed only "to the extent feasible." [30]

[30] Finding obscurity in the word "feasible," my Brother REHNQUIST invokes the nondelegation doctrine, which was last used to invalidate an Act of Congress in 1935. *A. L. A. Schecter Poultry Corp.* v. *United States*, 295 U. S. 495 (1935). While my Brother REHNQUIST eloquently argues that there remains a place for such a doctrine in our jurisprudence, I am frankly puzzled as to why the issue is thought to be of any relevance

Respondents contend that the term feasibility should be read to require consideration of the economic burden of a standard, not merely its technological achievability. I do not understand the Secretary to disagree. But respondents present no argument that the expenditure required by the benzene standard is not feasible in that respect. The Secretary concluded on the basis of substantial evidence that the costs of the standard would be readily absorbed by the 20 affected industries. One need not define the feasibility requirement with precision in order to conclude that the benzene standard is "feasible" in the sense that it will not materially harm the financial condition of the regulated industries.

Respondents suggest that the feasibility requirement should be understood not merely to refer to a standard's expense, but also to mandate a finding that the benefits of an occupational safety and health standard bear a reasonable relation

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here. The nondelegation doctrine is designed to assure that the most fundamental decisions will be made by Congress, the elected representatives of the people, rather than by administrators. Some minimal definiteness is therefore required in order for Congress to delegate its authority to administrative agencies.

Congress has been sufficiently definite here. The word "feasible" has a reasonably plain meaning, and its interpretation can be informed by other contexts in which Congress has used it. See n. 27, *supra*. Since the term is placed in the same sentence with the "no employee will suffer" language, it is clear that "feasible" means technologically and economically achievable. Under the Act, the Secretary is afforded considerably more guidance than are other administrators acting under different regulatory statutes. In short, Congress has made "the critical policy decisions" in this case, see *ante*, at 687 (REHNQUIST, J., concurring in judgment).

The plurality's apparent suggestion, see *ante*, at 646, that the nondelegation doctrine might be violated if the Secretary were permitted to regulate definite but nonquantifiable risks is plainly wrong. Such a statute would be quite definite and would thus raise no constitutional question under *Schechter Poultry*. Moreover, Congress could rationally decide that it would be better to require industry to bear "feasible" costs than to subject American workers to an indeterminate risk of cancer and other fatal diseases.

to its costs. I believe that the statute's language, structure, and legislative history foreclose respondents' position. In its ordinary meaning an activity is "feasible" if it is capable of achievement, not if its benefits outweigh its costs. See Webster's Third New International Dictionary 831 (1976). Moreover, respondents' interpretation would render § 655 (b)(5) internally inconsistent by reading into the term "feasible" a requirement irreconcilable with the express language authorizing the Secretary to set standards assuring that "no employee will suffer material impairment. . . ." Respondents' position would render that language merely hortatory. As noted above, no cost-benefit analysis is referred to at any point in the statute or its legislative history, an omission which cannot be deemed inadvertent in light of the explicit cost-benefit requirements inserted into other regulatory legislation.[31] Finally, the legislative history of the feasibility requirement, see n. 8, *supra*, demonstrates that Congress' sole concern was that standards be economically and technologically achievable. The legislative intent was to prevent the Secretary from materially harming the financial condition of regulated industries in order to eliminate risks of impairment. Congress did not intend to preclude the Secretary from taking regulatory action where, as here, no such threat to industry is posed.[32]

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[31] See n. 27, *supra*.

[32] Congress' antipathy toward cost-benefit balancing is evident throughout the legislative history of the Act. For example:

"The costs that will be incurred by employers in meeting the standards of health and safety to be established under this bill are, in my view, reasonable and necessary costs of doing business. Whether we, as individuals, are motivated by simple humanity or by simple economics, we can no longer permit profits to be dependent upon an unsafe or unhealthy worksite." 116 Cong. Rec. 41766 (1970); Leg. Hist. 1150–1151 (Sen. Eagleton).

Similarly, Senator Yarborough stated:

"We are talking about people's lives, not the indifference of some cost accountants. We are talking about assuring the men and women who

In order to decide this case, however, it is not necessary to resolve the question whether the term "feasibility" may contemplate some balancing of the costs and benefits of regulatory action.[33] Taking into account the uncertainties in existing knowledge, the Secretary made an express finding that the hazards of benzene exposure were sufficient to justify the regulation's costs. 43 Fed. Reg. 5941 (1978). Any requirement to balance costs and benefits cannot be read to invalidate this wholly rational conclusion. A contrary result, forcing the Secretary to wait for quantitative data that may not be available in the foreseeable future, would run directly counter to the protective purposes of the Act.[34]

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work in our plants and factories that they will go home after a day's work with their bodies intact. We are talking about assuring our American workers who wo[r]k with deadly chemicals that when they have accumulated a few year's seniority they will not have accumulated lung congestion and poison in their bodies, or something that will strike them down before they reach retirement age." *Id.*, at 37625; Leg. Hist. 510.

[33] Nor need I discuss the possibility, raised by counsel for the federal parties in oral argument, that a decision to regulate a substance posing a negligible threat to health and safety could itself be challenged as arbitrary and capricious under the Administrative Procedure Act. See Tr. of Oral Arg. 23.

[34] Respondents also rely on the statutory requirement that the Secretary may act only to prevent "material" impairment. They contend that the standard promulgated here does not fall within that category because the risk is so low. This interpretation derives no support from the statute or its legislative history. The statute itself states that standards should ensure that no employee will suffer "material impairment," not material *risk* of impairment.

The language is consistent with the legislative history. In an early version of the Act, the word "impairment" was modified by "any" rather than "material." See n. 8, *supra*. The feasibility and materiality requirements were added simultaneously as part of an effort to qualify the original language authorizing the Secretary to ensure that "no employee will suffer any impairment of health or functional capacity, or diminished life expectancy." Senator Dominick was concerned that the

Finally, respondents suggest broadly that the Secretary did not fulfill his statutory responsibility to act on the basis of "research, demonstrations, experiments," and to consider "the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws." 29 U. S. C. § 655 (b)(5). Here, they contend, the Secretary based his decision solely on "views and arguments." Brief for Respondents 52. I disagree. The Secretary compiled an extensive record composed of over 50 volumes of exhibits. Most of those exhibits are the reported results of research and demonstrations representing "the latest available scientific data." The Secretary offered a careful discussion of these data in the statement accompanying the permanent standard. His ultimate conclusions were grounded in extensive findings of fact. Where, as here, there are gaps in existing knowledge, the Secretary's decision must necessarily be based on considerations of policy as well as on empirically verifiable facts.

In passing the Occupational Safety and Health Act of 1970, Congress was aware that it was authorizing the Secretary to regulate in areas of scientific uncertainty. But it intended to require stringent regulation even when definitive information was unavailable. In reducing the permissible level of exposure to benzene, the Secretary applied proper legal standards. His determinations are supported by substantial evi-

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phrase "any" impairment would require the Secretary to prevent insect bites. 116 Cong. Rec. 36522 (1970); Leg. Hist. 345.

The respondents' construction would pose an enormous obstacle to efforts to regulate toxic substances under § 655 (b)(5). The probability of contracting cancer will in most contexts be quite small with respect to any particular employee. If the statute were read to authorize the Secretary to act only to assure that "no employee will suffer material risk of impairment," the Secretary would be disabled from regulating substances which poses a small risk with respect to any particular employee but which will nonetheless result in the death of numerous members of the employee pool.

dence. The Secretary's decision was one, then, which the governing legislation authorized him to make.[35]

IV

In recent years there has been increasing recognition that the products of technological development may have harmful effects whose incidence and severity cannot be predicted with certainty. The responsibility to regulate such products has fallen to administrative agencies. Their task is not an enviable one. Frequently no clear causal link can be established between the regulated substance and the harm to be averted. Risks of harm are often uncertain, but inaction has considerable costs of its own. The agency must decide whether to take regulatory action against possibly substantial risks or to wait until more definitive information becomes available—a judg-

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[35] Although the Court of Appeals accepted the Secretary's finding that dermal contact with benzene could cause leukemia, it set aside the dermal contact standard because of the Secretary's failure to perform an experiment recommended by an industry witness. The failure to conduct this test, according to the court, violated the statutory requirement that the Secretary act on the basis of "the best available evidence" and "the latest available scientific data in the field."

In the hearings before the agency, respondents presented no substantial challenge to the position that benzene could be absorbed through the skin, and there was evidence in the record to support that position. Both animal and human studies had found such absorption. In these circumstances, the Secretary was not obligated to undertake additional studies simply because a witness testified that such studies would be informative. The imposition of such a requirement would paralyze the standard-setting process. The Secretary's mandate is to act on the basis of "available" evidence, not evidence which may become available in the future.

In setting aside the dermal contact standard, the Court of Appeals also relied on its conclusion that the Secretary had not shown that quantifiable benefits would result from the standard. As the discussion above indicates, the court applied incorrect legal standards in so holding.

ment which by its very nature cannot be based solely on determinations of fact.[36]

Those delegations, in turn, have been made on the understanding that judicial review would be available to ensure that the agency's determinations are supported by substantial evidence and that its actions do not exceed the limits set by Congress. In the Occupational Safety and Health Act, Congress expressed confidence that the courts would carry out this important responsibility. But in this case the plurality has far exceeded its authority. The plurality's "threshold finding" requirement is nowhere to be found in the Act and is antithetical to its basic purposes. "The fundamental policy questions appropriately resolved in Congress . . . are *not* subject to re-examination in the federal courts under the guise of judicial review of agency action." *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U. S., at 558 (emphasis in original). Surely this is no less true of the decision to ensure safety for the American worker than the decision to proceed with nuclear power. See *ibid.*

Because the approach taken by the plurality is so plainly irreconcilable with the Court's proper institutional role, I am certain that it will not stand the test of time. In all likelihood, today's decision will come to be regarded as an extreme reaction to a regulatory scheme that, as the Members of the plurality perceived it, imposed an unduly harsh burden on regulated industries. But as the Constitution "does not enact Mr. Herbert Spencer's Social Statics," *Lochner* v. *New York*, 198 U. S. 45, 75 (1905) (Holmes, J., dissenting), so the responsibility to scrutinize federal administrative action does not authorize this Court to strike its own balance between the

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[36] See W. Lowrance, Of Acceptable Risk: Science and the Determination of Safety (1976); Stewart, Paradoxes of Liberty, Integrity and Fraternity: The Collective Nature of Environmental Quality and Judicial Review of Administrative Action, 7 Environ. L. 463, 469–472 (1977).

costs and benefits of occupational safety standards. I am confident that the approach taken by the plurality today, like that in *Lochner* itself, will eventually be abandoned, and that the representative branches of government will once again be allowed to determine the level of safety and health protection to be accorded to the American worker.

HAMMETT v. TEXAS

ON MOTION TO WITHDRAW PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 79-5050. Decided July 2, 1980

Petitioner's unopposed motion to withdraw a petition for certiorari filed by his attorney seeking review of petitioner's murder conviction and death sentence is granted under this Court's Rule 60, where there is no issue as to petitioner's competence. Such withdrawal does not foreclose an application for collateral relief.

Motion granted. Reported below: 578 S. W. 2d 699.

PER CURIAM.

William Jack Hammett, the petitioner in this case, has been convicted of murder and sentenced to death. The conviction and sentence were affirmed by the Texas Court of Criminal Appeals, 578 S. W. 2d 699 (1979). The petitioner states, and his attorney does not deny, that he informed his counsel that he did not wish to pursue any further appeals in his case. Nevertheless, counsel filed a petition requesting review by this Court.

Petitioner now moves for dismissal of the petition, stating under oath that he "made this decision voluntarily and with full knowledge of the consequences, only after due consideration of all facts and circumstances regarding the case." Affidavit of June 3, 1980. Under Rule 60 of the Rules of the Supreme Court, a petitioner or appellant may withdraw a petition or appeal. In response to this motion, petitioner's counsel does not question petitioner's competence. The State of Texas does not oppose petitioner's motion. In the absence of any issue as to petitioner's competence to withdraw the petition filed against his will, there is no basis under Rule 60 for denying this motion. See *Gilmore* v. *Utah,* 429 U. S. 1012, 1014 (1976) (BURGER, C. J., concurring). Moreover, withdrawal of the petition will not foreclose an appropriate

application for collateral relief. Accordingly, the motion to withdraw the petition is granted.

It is so ordered.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

The Court today permits petitioner, a prisoner acting *pro se*, to take the first step towards enforcement of his death sentence by withdrawing the petition for writ of certiorari filed on his behalf by his appointed counsel. I continue to adhere to my view that the death penalty is unconstitutional under all circumstances, and accordingly I dissent. In addition, however, the present decision is indefensible even under the more restrictive view of the Eighth Amendment taken by a majority of my Brethren.

The Court takes its action today despite the fact that we have already granted certiorari in a similar case to determine whether the Constitution is violated by the manner in which the State of Texas acquires psychiatric testimony introduced at the punishment phase of the trial to obtain a jury verdict setting the punishment at death. *Estelle* v. *Smith*, 445 U. S. 926 (1980). The United States Court of Appeals for the Fifth Circuit has already held that the established pattern of conduct by which the State of Texas obtains the testimony necessary to send a defendant to his death violates the Fifth, Sixth, and Fourteenth Amendments. *Smith* v. *Estelle*, 602 F. 2d 694 (1979). Thus the Court today acquiesces in the petitioner's apparent decision to be executed despite the fact that we may hold next Term that the death penalty cannot be enforced in cases such as this one. I do not believe that a defendant may by his consent permit a State to impose a punishment forbidden by the Constitution; "the procedure the Court approves today amounts to nothing less than state-administered suicide." *Lenhard* v. *Wolff*, 444 U. S. 807, 815 (1979) (MARSHALL, J., dissenting).

I

A few facts about this case must be briefly stated in order to place the present motion in its proper context. Petitioner was originally tried for capital murder in the spring of 1977. Although the jury found the defendant guilty of capital murder, a mistrial was declared after the jury was unable to agree on the punishment during the sentencing phase of the trial. See 578 S. W. 2d 699, 706 (Tex. Crim. App. 1979). The second trial was held in the fall of 1977, and petitioner was again found guilty of capital murder. The jury answered the requisite questions in the affirmative, and the punishment was therefore assessed at death.[1]

The Texas Court of Criminal Appeals initially reversed the judgment of the trial court. See App. to Pet. for Cert., Exhibit A. The Court of Criminal Appeals concluded that it was error to deny petitioner's motion for appointment of a psychologist to examine petitioner for the purpose of testifying on his behalf concerning the probability that petitioner would commit future criminal acts of violence.[2] On the

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[1] By state statute the jury in a capital case in Texas must decide three questions:

"(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

"(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

"(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased." Tex. Code Crim. Proc. Ann., Art. 37.071 (b) (Vernon Supp. 1979). An affirmative answer to each question must be unanimous, and if all three questions are answered affirmatively then the death penalty "shall" be imposed. Tex. Code Crim. Proc. Ann., Arts. 37.071 (d)(1) and (e) (Vernon Supp. 1979).

[2] The Texas Court of Criminal Appeals reasoned:

"Those who face an accusation of being likely to commit criminal acts of violence that will constitute a continuing threat to society face a pecu-

State's motion for rehearing, however, that opinion was withdrawn and the court affirmed the conviction and sentence. 578 S. W. 2d 699 (1979). The court concluded that petitioner's motion for appointment of a defense psychologist had been made too late.

The central issue raised by the petition for certiorari in this case concerns the use of psychiatric testimony during the punishment stage of a Texas capital case.[3] Prior to the first trial, the court appointed Dr. Bill W. Henry, a psychiatrist, to examine petitioner to determine his mental competency to stand trial. Dr. Henry filed two written reports with the court, based on two interviews with petitioner, concluding that the defendant was competent to stand trial. Counsel apparently was not present at either interview. Cf. *id.*, at

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liarly unique charge with ominous consequences. In this jurisdiction the use of the expert opinion testimony of those in the behavioral sciences has frequently been resorted to by the prosecution, and this Court has consistently approved such use, often basing the sufficiency of the evidence to support a death-producing verdict on that evidence. . . . Given the role such evidence has come to play, the unique character of the issue, the extreme consequences that rest on resolution of the issue, and the tremendous diversity of opinions on such matters within the field of experts that may qualify to give such evidence on the issue, it cannot be denied that for accused persons facing the possibility of death, expert behavioral witnesses for the defense are necessities, not luxuries." App. to Pet. for Cert., Exhibit A, pp. 3–4.

See also 578 S. W. 2d 699, 720–721 (Tex. Crim. App. 1979) (Odom, J., concurring).

[3] In the Texas Court of Criminal Appeals petitioner argued, *inter alia*, that "the trial court erred in allowing a psychiatrist who was appointed to examine the [defendant] with respect to his competency to stand trial to testify at the punishment phase of the trial." *Id.*, at 705. A similar argument is made in the petition for certiorari. See, *e. g.*, Pet. for Cert. 6–7: "[T]he circumstances surrounding the State's presentation of Dr. Henry's testimony at the punishment stage of trial was grossly unfair and the defendant was thus denied due process of law," citing *Smith* v. *Estelle*, 445 F. Supp. 647 (ND Tex. 1977). See also Pet. for Cert. 14–16, 17–18.

705. No issue of competency was raised during the guilt phase of either of petitioner's trials.

At the punishment stage of each trial, however, the State was permitted to call Dr. Henry as an expert witness. The State examined Dr. Henry on whether there was a probability that the petitioner would commit criminal acts of violence in the future that would constitute a continuing threat to society. That issue is, of course, one of the statutorily required questions which must be presented to the jury in the sentencing phase of a Texas capital case; if the jury finds beyond a reasonable doubt that such a probability of future violent crime exists, in addition to the other statutorily mandated findings, then the death penalty must be imposed.[4] Based on the pretrial psychiatric examinations which were supposedly limited to the question whether the petitioner was legally competent to stand trial, Dr. Henry testified that the defendant was a "person suffering of an antisocial personality," *id.*, at 706, and that petitioner would probably commit criminal acts of violence in the future.

II

It has become clear that the scenario just described constitutes a customary pattern of conduct by the authorities in Texas capital cases. This is by no means the first time that a pretrial examination allegedly sought only to ascertain the defendant's competence to stand trial has been used as the basis for punishment-stage testimony by the court-appointed psychiatrist that the defendant has an antisocial personality and is likely to commit future violent crimes. The cases in the Texas Court of Criminal Appeals reflecting this pattern of official conduct are legion. See, *e. g.*, *Wilder* v. *State*, 583 S. W. 2d 349 (1979), cert. pending, No. 79–5002; *Armour* v. *State*, 583 S. W. 2d 349 (1979), cert. pending, No. 79–5007; *Bell* v. *State*, 582 S. W. 2d 800 (1979), cert. pend-

[4] See n. 1, *supra*.

ing, No. 79–5199; *Garcia* v. *State*, 581 S. W. 2d 168 (1979), cert. pending, No. 79–5464; *Woods* v. *State*, 569 S. W. 2d 901 (1978), cert. pending, No. 79–721; *Livingston* v. *State*, 542 S. W. 2d 655 (1976), cert. denied, 431 U. S. 933 (1979); *Gholson* v. *State*, 542 S. W. 2d 395 (1976), cert. denied, 432 U. S. 911 (1977); *Smith* v. *State*, 540 S. W. 2d 693 (1976), cert. denied, 430 U. S. 922 (1977), death penalty vacated *sub nom. Smith* v. *Estelle*, 445 F. Supp. 647 (ND Tex. 1977), aff'd, 602 F. 2d 694 (CA5 1979), cert. granted, 445 U. S. 926 (1980); *Hurd* v. *State*, 513 S. W. 2d 936 (1974); *Armstrong* v. *State*, 502 S. W. 2d 731 (1973). The use at the punishment stage of testimony by the psychiatrist appointed by the court to establish the defendant's competency to stand trial has the official sanction of the Texas Court of Criminal Appeals. See *Armour* v. *State, supra; Livingston* v. *State, supra; Gholson* v. *State, supra.*

The United States Court of Appeals for the Fifth Circuit has concluded that this practice violates the Fifth and Sixth Amendments as made applicable to the States through the Due Process Clause of the Fourteenth Amendment. See *Smith* v. *Estelle*, 602 F. 2d 694 (1979), aff'g 445 F. Supp. 647 (ND Tex. 1977). The Court of Appeals held that "a defendant may not be compelled to speak to a psychiatrist who can use his statements against him at the sentencing phase of a capital trial," 602 F. 2d, at 708, that the defendant must be warned that he has the right to remain silent, and that if a defendant indicates that he wishes to remain silent he may not be questioned by the psychiatrist to determine future dangerousness, *ibid.*[5] That court also found that

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[5] In the instant case there is evidence that in fact petitioner did not want to cooperate with Dr. Henry during the interview. See 578 S. W. 2d, at 705; Brief in Opposition 4.

The State's response to the petition for certiorari alleges that Dr. Henry informed petitioner of his right not to participate and that the psychiatrist terminated the first interview after petitioner chose not to continue. *Ibid.* Even if that was the case, it does not necessarily mean that the

whether to submit to a pretrial psychiatric examination in a Texas capital case "is a vitally important decision, literally a life or death matter," *ibid.* The examination is therefore a critical stage in the prosecution, and the defendant is entitled to the assistance of counsel under the Sixth Amendment. *Id.*, at 708–709.

Because of the seriousness of the issues raised and the conflict between the Texas Court of Criminal Appeals and the United States Court of Appeals for the Fifth Circuit, we have already granted certiorari in *Estelle* v. *Smith*, 445 U. S. 926 (1980). Should this Court agree with the federal court, the death penalty imposed on petitioner in the instant case would have to be reconsidered because of the manner in which the crucial psychiatric testimony against him was obtained.

Nevertheless, the Court today permits petitioner, acting *pro se*, to withdraw his petition for certiorari, thereby setting in motion the steps by which the defendant may be put to death by the State of Texas.[6] It appears that petitioner does not intend to prosecute any challenge to his conviction and sentence;[7] petitioner asks this Court to permit

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procedure used in this case complies with the constitutional requirements discussed by the Court of Appeals in *Smith* v. *Estelle*, and, of course, when this Court reviews that decision we may conclude that the Court of Appeals took an overly narrow view of the constitutional requirements. If this Court affirms the judgment of the Court of Appeals in *Estelle* v. *Smith*, cert. granted, 445 U. S. 926 (1980), at the very least the procedure by which Dr. Henry obtained the information from petitioner from which the psychiatrist derived his testimony would have to be closely scrutinized to see if it satisfied constitutional demands.

[6] According to the State of Texas, if the petition for writ of certiorari is dismissed by this Court, the mandate would then issue from the Texas Court of Criminal Appeals to the trial court. Petitioner would then be formally sentenced to be executed on a date 30 days or more from the date of sentencing. Response to Motion to Dismiss 3. See also Tex. Code Crim. Proc. Ann., Art. 43.14 (Vernon 1979).

[7] Petitioner states that "I no longer wish to appeal (or challenge) my conviction in this case." Motion to Dismiss 1. He also asks this Court

him to withdraw his petition for certiorari "so that the [death] sentence may be carried out." Motion to Dismiss 2. Petitioner in effect seeks to waive a challenge to his execution,[8] despite the fact that the issue of the constitutionality of the practice by which he was sentenced to die is presently pending before this Court. In my judgment, there can be no such waiver. See *Lenhard* v. *Wolff*, 444 U. S., at 810 (MARSHALL, J., dissenting); *Gilmore* v. *Utah*, 429 U. S. 1012, 1019 (1976) (MARSHALL, J., dissenting).

In *Gilmore*, MR. JUSTICE WHITE, joined by MR. JUSTICE BRENNAN and myself, asserted that "the consent of a convicted defendant in a criminal case does not privilege a State to impose a punishment otherwise forbidden by the Eighth Amendment." *Id.*, at 1018 (dissenting opinion). In a separate dissenting opinion, I expressed the view that "the Eighth Amendment not only protects the rights of individuals not to be victims of cruel and unusual punishment, but that it also expresses a fundamental interest of society in ensuring that state authority is not used to administer barbaric punishments." *Id.*, at 1019 (MARSHALL, J., dissenting). "Society is not powerless . . . to resist a defendant's effort to prompt the exercise of capital force," *Lenhard* v. *Wolff*, *supra*, at 812 (MARSHALL, J., dissenting). The defendant has no right to "state-administered suicide." *Id.*, at 815.

"to set aside this writ and issue an order so stating to the state court so that the sentence may be carried out." *Id.*, at 2.

[8] It is questionable whether petitioner fully understands what he is seeking to waive. In his papers petitioner "moves the Court to dismiss the Appal [*sic*] or Habeas Corpus Application," *id.*, at 1. He does not appear to know whether his appointed attorney filed a petition for certiorari, an appeal, or a habeas corpus application. *Ibid.* It is certainly possible that petitioner has reached his present decision without full knowledge or understanding of the Court of Appeals decision in *Smith* v. *Estelle*, our grant of certiorari to review that decision, or the effect that *Estelle* v. *Smith* may have on his sentence of death. Cf. *Gilmore* v. *Utah*, 429 U. S. 1012, 1019 (1976) (MARSHALL, J., dissenting).

These observations have no less force because here the imposition of the death penalty under these circumstances may be held by a majority of my Brethren to violate the Fifth and Sixth Amendments rather than the Eighth Amendment. Indeed, these views have added force in this case because the procedure employed by the State has been successfully challenged on constitutional grounds in federal court, and the issue of the constitutionality of the manner in which the State obtains the psychiatric testimony necessary to convince the jury that the defendant will probably commit acts of criminal violence in the future is presently pending before this Court. Cf. *Gilmore* v. *Utah,* 429 U. S., at 1018 (WHITE, J., dissenting); *id.,* at 1019 (MARSHALL, J., dissenting); *Lenhard* v. *Wolff, supra,* at 811–812, n. 3 (MARSHALL, J., dissenting).

If this Court agrees with the Court of Appeals in *Estelle* v. *Smith,* then the death penalty imposed on petitioner in the present case must be reconsidered. Under these circumstances I cannot accept the Court's decision to permit the petitioner to withdraw his petition for certiorari and thereby run the risk that the State of Texas will take a life which it is constitutionally prohibited from taking. I dissent.

MR. JUSTICE BLACKMUN, dissenting.

I would not grant this *pro se* application summarily, but would set it for plenary consideration upon briefs and arguments submitted by petitioner's appointed counsel and the State. See *Gilmore* v. *Utah,* 429 U. S. 1012, 1020 (1976) (dissenting opinion).

Reporter's Note

Orders commencing with June 30, 1980, begin with page 901. The preceding order in 448 U. S., of June 26, 1980, was reported in Part 1, at 901. These page numbers are the same as they will be in the bound volume, thus making the *permanent* citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FROM JUNE 26 THROUGH SEPTEMBER 18, 1980

JUNE 26, 1980

Dismissal Under Rule 60

No. 79–1852. BLUE CROSS OF NORTHWEST OHIO *v.* JUMP, SUPERINTENDENT OF INSURANCE. Sup. Ct. Ohio. Certiorari dismissed under this Court's Rule 60. Reported below: 61 Ohio St. 2d 246, 400 N. E. 2d 892.

JUNE 30, 1980

Affirmed on Appeal

No. 79–1436. MINNESOTA ET AL. *v.* PLANNED PARENTHOOD OF MINNESOTA. Affirmed on appeal from C. A. 8th Cir. MR. CHIEF JUSTICE BURGER, MR. JUSTICE WHITE, and MR. JUSTICE REHNQUIST would note probable jurisdiction and set case for oral argument. Reported below: 612 F. 2d 359.

Appeal Dismissed

No. 79–1027. KING, GOVERNOR OF MASSACHUSETTS, ET AL. *v.* PRETERM, INC., ET AL. Appeal from C. A. 1st Cir. dismissed for want of jurisdiction. MR. JUSTICE REHNQUIST, being of the view that the order of the Court of Appeals "amending its mandate" to embrace the invalidation of an entirely separate statute is not governed by *FTC* v. *Minneapolis-Honeywell Co.*, 344 U. S. 206 (1952), dissents from dismissal of the appeal and would note probable jurisdiction and set case for oral argument. Reported below: 591 F. 2d 121.

Certiorari Granted—Reversed and Remanded. (See No. 79–622, *ante*, p. 444.)

Certiorari Granted—Vacated and Remanded. (See also No. 79–448, *ante*, p. 438.)

No. 79–393. UNITED STATES *v.* CONWAY. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Salvucci*, *ante*, p. 83, and *Rawlings* v. *Kentucky*, *ante*, p. 98. Reported below: 595 F. 2d 1157.

No. 78–1902. INTERNATIONAL LONGSHOREMEN'S ASSN., AFL–CIO *v.* CONSOLIDATED EXPRESS, INC., ET AL.;

No. 78–1905. NEW YORK SHIPPING ASSN., INC., ET AL. *v.* CONSOLIDATED EXPRESS, INC., ET AL.; and

No. 79–221. CONSOLIDATED EXPRESS, INC., ET AL. *v.* NEW YORK SHIPPING ASSN., INC., ET AL. C. A. 3d Cir. Certiorari granted, judgment vacated, and cases remanded for further consideration in light of *NLRB* v. *Longshoremen*, 447 U. S. 490 (1980). Reported below: 602 F. 2d 494.

No. 79–809. GRASSI *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Walter* v. *United States*, 447 U. S. 649 (1980). Reported below: 602 F. 2d 1192.

No. 79–921. OHIO *v.* SMITH. Sup. Ct. Ohio. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Ohio* v. *Roberts*, *ante*, p. 56. MR. JUSTICE STEWART and MR. JUSTICE STEVENS dissent. Reported below: 58 Ohio St. 2d 344, 390 N. E. 2d 778.

No. 79–1242. TIFFANY CONSTRUCTION CO., INC. *v.* BUREAU OF REVENUE OF NEW MEXICO. Ct. App. N. M. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *White Mountain Apache Tribe* v. *Bracker*, *ante*, p. 136, and *Central Machinery Co.* v. *Arizona Tax Comm'n*, *ante*, p. 160. Reported below: 93 N. M. 593, 603 P. 2d 332.

No. 79–1481. UNITED STATES *v.* DICKINSON ET AL. C. A. 2d Cir. Motions of respondents Dickinson and Montanino for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *United States* v. *Salvucci, ante,* p. 83. Reported below: 615 F. 2d 1351.

No. 79–1677. CALIFORNIA *v.* VELASQUEZ. Sup. Ct. Cal. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Adams* v. *Texas, ante,* p. 38. Reported below: 26 Cal. 3d 425, 606 P. 2d 341.

No. 79–5026. WILLIAMSON *v.* ALABAMA;
No. 79–5301. WILSON *v.* ALABAMA;
No. 79–5458. HORSLEY *v.* ALABAMA;
No. 79–5525. CADE *v.* ALABAMA;
No. 79–5563. BALDWIN *v.* ALABAMA;
No. 79–5709. THOMAS *v.* ALABAMA;
No. 79–5741. RITTER *v.* ALABAMA; and
No. 79–5835. MACK *v.* ALABAMA. Sup. Ct. Ala. Motions of petitioners for leave to proceed *in forma pauperis* and certiorari granted. Judgments vacated and cases remanded for further consideration in light of *Beck* v. *Alabama,* 447 U. S. 625 (1980). Reported below: No. 79–5026, 370 So. 2d 1066; No. 79–5301, 371 So. 2d 943; No. 79–5458, 374 So. 2d 375; No. 79–5525, 375 So. 2d 828; No. 79–5563, 372 So. 2d 32; No. 79–5709, 373 So. 2d 1167; No. 79–5741, 375 So. 2d 270; No. 79–5835, 375 So. 2d 504.

No. 79–5804. BURROUGHS *v.* GEORGIA. Sup. Ct. Ga. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Illinois* v. *Vitale,* 447 U. S. 410 (1980). Reported below: 244 Ga. 288, 260 S. E. 2d 5.

No. 79-6150. MATHEWS *v.* OHIO. Ct. App. Ohio, Licking County. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Illinois* v. *Vitale*, 447 U. S. 410 (1980).

No. 79-6190. CRAWFORD *v.* ALABAMA. Sup. Ct. Ala. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Beck* v. *Alabama*, 447 U. S. 625 (1980), and *United States* v. *Henry*, 447 U. S. 264. Reported below: 377 So. 2d 159.

Miscellaneous Orders

No. A-1060. CRAIG *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA ET AL. (FORD MOTOR CO. ET AL., REAL PARTIES IN INTEREST). Application for stay of trial court proceedings, addressed to MR. JUSTICE BRENNAN and referred to the Court, denied.

No. A-1074. BLUE *v.* SEVENTH DISTRICT COMMITTEE OF THE VIRGINIA STATE BAR. Application for stay of the order of the Supreme Court of Virginia, dated April 18, 1980, addressed to MR. JUSTICE BRENNAN and referred to the Court, denied.

No. A-1093. SILO *v.* KELLY, WARDEN, ET AL. Application for stay of trial court proceedings, addressed to MR. JUSTICE STEVENS and referred to the Court, denied.

No. A-1167. ZANT, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER *v.* POTTS ET AL. Application to vacate the order dated June 28, 1980, of the United States Court of Appeals for the Fifth Circuit and for other relief, addressed to MR. JUSTICE POWELL, and by him referred to the Court, denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of this application.

No. 85, Orig. TEXAS *v.* OKLAHOMA. It is ordered that John A. Carver, Jr., Esquire, of Denver, Colo., be appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem necessary to call for. The Master is directed to submit such reports as he may deem appropriate.

The compensation of the Special Master, the allowances to him, the compensation paid to his technical, stenographic and clerical assistants, the cost of printing his report, and all other proper expenses shall be charged against and be borne by the parties in such proportion as the Court may hereafter direct.

It is further ordered that if the position of Special Master in this case becomes vacant during a recess of the Court, THE CHIEF JUSTICE shall have authority to make a new designation which shall have the same effect as if originally made by the Court. [For earlier order herein, see 444 U. S. 1065.]

No. A-1134. PENNHURST STATE SCHOOL AND HOSPITAL ET AL. *v.* HALDERMAN ET AL. (No. 79-1404); MAYOR OF PHILADELPHIA ET AL. *v.* HALDERMAN ET AL. (No. 79-1408); PENNSYLVANIA ASSOCIATION FOR RETARDED CITIZENS ET AL. *v.* PENNHURST STATE SCHOOL AND HOSPITAL ET AL. (No. 79-1414); COMMISSIONERS AND MENTAL HEALTH/MENTAL RETARDATION ADMINISTRATOR FOR BUCKS COUNTY ET AL. *v.* HALDERMAN ET AL. (No. 79-1415); and PENNHURST PARENTS-STAFF ASSN. *v.* HALDERMAN ET AL. (No. 79-1489). C. A. 3d Cir. [Certiorari granted, 447 U. S. 904.] Motion of petitioner in No. 79-1489 for stay of the judgment of the Court of Appeals, pending final disposition of the cases in this Court, granted to the extent that the judgment mandates the movement of residents of the Pennhurst facility to "appropriate community living arrangements." In all other respects, the motion is

denied. MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, MR. JUSTICE BLACKMUN, and MR. JUSTICE POWELL would deny the motion.

No. 79–1989. CITIZENS PARTY ET AL. *v.* MANCHIN, SECRETARY OF STATE OF WEST VIRGINIA. Sup. Ct. App. W. Va. Motion of appellants to expedite consideration of the appeal and for emergency relief denied.

Certiorari Granted

No. 79–395. UNITED STATES *v.* MORRISON. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 602 F. 2d 529.

Certiorari Denied

No. 79–297. HORN, COMMISSIONER, DIVISION OF EMPLOYMENT SECURITY, DEPARTMENT OF LABOR AND INDUSTRY OF NEW JERSEY, ET AL. *v.* ROSS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 598 F. 2d 1312.

No. 79–375. WHITMIRE ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 595 F. 2d 1303.

No. 79–1035. NEW YORK SHIPPING ASSN., INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL.;

No. 79–1036. INTERNATIONAL LONGSHOREMEN'S ASSN., AFL–CIO *v.* NATIONAL LABOR RELATIONS BOARD ET AL.;

No. 79–1099. TIDEWATER MOTOR TRUCK ASSN. *v.* INTERNATIONAL LONGSHOREMEN'S ASSN., AFL–CIO, ET AL.;

No. 79–1109. HOUFF TRANSFER, INC. *v.* INTERNATIONAL LONGSHOREMEN'S ASSN., AFL–CIO, ET AL.; and

No. 79–1110. DOLPHIN FORWARDING, INC. *v.* INTERNATIONAL LONGSHOREMEN'S ASSN., AFL–CIO, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 198 U. S. App. D. C. 157, 613 F. 2d 890.

No. 79–64. ZBARAZ ET AL. *v.* MILLER, ACTING DIRECTOR, DEPARTMENT OF PUBLIC AID OF ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 596 F. 2d 196.

No. 79–1460. NATIONAL VAN LINES, INC., ET AL. *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U. S. DEPARTMENT OF LABOR, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 198 U. S. App. D. C. 239, 613 F. 2d 972.

No. 79–5179. TRACY ET AL. *v.* PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE. Pa. Commw. Ct. Certiorari denied. Reported below: 40 Pa. Commw. 186, 396 A. 2d 913.

No. 79–6128. SMITH *v.* HARTMAN, SHERIFF. C. A. 4th Cir. Certiorari denied. Reported below: 609 F. 2d 510.

No. 79–5533. BURKS *v.* TEXAS. Ct. Crim. App. Tex.;
No. 79–6099. STARVAGGI *v.* TEXAS. Ct. Crim. App. Tex.; and
No. 79–6350. BARFIELD *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: No. 79–5533, 583 S. W. 2d 389; No. 79–6099, 593 S. W. 2d 323; No. 79–6350, 298 N. C. 306, 259 S. E. 2d 510.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 65, Orig. TEXAS *v.* NEW MEXICO, 446 U. S. 540; and
No. 78–1522. ANDRUS, SECRETARY OF THE INTERIOR *v.* UTAH, 446 U. S. 500. Petitions for rehearing denied.

No. 78–1557. NACHMAN CORP. *v.* PENSION BENEFIT GUARANTY CORP. ET AL., 446 U. S. 359;

No. 78–1821. UNITED STATES *v.* MENDENHALL, 446 U. S. 544;

No. 79–1434. MANDEL ET AL. *v.* NEW YORK, 446 U. S. 949;

No. 79–6152. HAYES *v.* VALLEY BANK OF NEVADA; and HAYES *v.* GLADSTONE ET AL., 446 U. S. 902;

No. 79–6237. RODRIGUES *v.* CITY OF SPARKS, NEVADA, ET AL., 446 U. S. 931; and

No. 79–6261. JAFFER *v.* CITY OF MIAMI ET AL., 446 U. S. 931. Petitions for rehearing denied.

No. 79–6108. ARMOUR ET AL. *v.* NIX ET AL., 446 U. S. 930. Petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

JULY 2, 1980

Dismissal Under Rule 53. (See No. 79–5050, *ante*, p. 725.)

Vacated and Remanded on Appeal

No. 78–1107. ARMISTEAD ET AL. *v.* ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA ET AL.;

No. 78–1108. CITY OF LOS ANGELES ET AL. *v.* ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA ET AL.;

No. 78–1114. LOS ANGELES COUNTY ET AL. *v.* ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA ET AL.;

No. 78–1382. KLUTZNICK, SECRETARY OF COMMERCE *v.* ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA ET AL.; and

No. 78–1442. NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, LOS ANGELES BRANCH *v.* ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA ET AL. Appeals from D. C. C. D. Cal. Judgment vacated and cases remanded for further consideration in light of *Fullilove* v. *Klutznick*, *ante*, p. 448. MR. JUSTICE STEWART, MR. JUSTICE REHNQUIST, and MR. JUSTICE STEVENS would affirm the judgment. Reported below: 459 F. Supp. 766.

Miscellaneous Orders

No. A-1135. RAILWAY LABOR EXECUTIVES' ASSN. *v.* GIBBONS, TRUSTEE, ET AL. Application for stay of the preliminary injunction entered by the United States District Court for the Northern District of Illinois on June 9, 1980, denied. MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE REHNQUIST would grant the application. MR. JUSTICE BRENNAN took no part in the consideration or decision of this application.

No. A-1168. KLUTZNICK, SECRETARY OF COMMERCE, ET AL. *v.* CONTROL DATA CORP. ET AL. Application of the Solicitor General to vacate the order of the United States Court of Appeals for the District of Columbia Circuit, entered June 24, 1980, granted. MR. JUSTICE BRENNAN dissents. MR. CHIEF JUSTICE BURGER, MR. JUSTICE BLACKMUN, and MR. JUSTICE STEVENS took no part in the consideration or decision of this application.

Probable Jurisdiction Noted

No. 79-1631. DEMOCRATIC PARTY OF THE UNITED STATES OF AMERICA ET AL. *v.* LA FOLLETTE ET AL. Appeal from Sup. Ct. Wis. Probable jurisdiction noted. The judgment of the Supreme Court of Wisconsin, filed January 19, 1980, is stayed pending the issuance of the mandate of this Court. Reported below: 93 Wis. 2d 473, 287 N. W. 2d 519.

Certiorari Granted. (See also No. 79-243, *ante*, p. 555.)

No. 78-918. REPUBLIC STEEL CORP. *v.* OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION ET AL.; and

No. 78-919. AMERICAN IRON & STEEL INSTITUTE ET AL. *v.* OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION ET AL. C. A. 3d Cir. Motion of American Petroleum Institute et al. for leave to file a brief as *amici curiae* in No. 78-919 granted. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 577 F. 2d 825.

No. 79-1213. MINNICK ET AL. *v.* CALIFORNIA DEPARTMENT OF CORRECTIONS ET AL. Ct. App. Cal., 1st App. Dist. Certiorari granted. Reported below: 95 Cal. App. 3d 506, 157 Cal. Rptr. 260.

No. 79-1356. JOHNSON ET AL. *v.* BOARD OF EDUCATION OF THE CITY OF CHICAGO ET AL. C. A. 7th Cir. Certiorari granted. Reported below: 604 F. 2d 504.

No. 79-1601. SUMNER, WARDEN *v.* MATA. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 611 F. 2d 754.

Certiorari Denied

No. 79-489. MEROLA *v.* BELL, JUSTICE, SUPREME COURT OF NEW YORK, ET AL.; and

No. 79-561. NEW YORK NEWS, INC. *v.* BELL, JUSTICE, SUPREME COURT OF NEW YORK, ET AL. Ct. App. N. Y. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 47 N. Y. 2d 985, 393 N. E. 2d 1038.

Rehearing Denied

No. 79-901. OHIO *v.* KORN, 445 U. S. 911;

No. 79-1216. SYROVATKA ET UX. *v.* EHRLICH, DIRECTOR, DEPARTMENT OF PUBLIC WELFARE OF NEBRASKA, ET AL., 446 U. S. 935;

No. 79-1297. VICTORSON ET AL. *v.* UNITED STATES, 446 U. S. 936;

No. 79-6145. LEE *v.* GARRISON, WARDEN, ET AL., 446 U. S. 967;

No. 79-6175. HOLMES v. FLORIDA, 446 U. S. 913;

No. 79-6262. JAFFER *v.* ONGIE, CLERK, CITY OF MIAMI, 446 U. S. 943; and

No. 79-6354. PICKING *v.* HUGHES, GOVERNOR OF MARYLAND, ET AL., 446 U. S. 944. Petitions for rehearing denied.

No. 78–986. ARKANSAS LOUISIANA GAS CO. *v.* HALL ET AL., 444 U. S. 878. Petition for rehearing denied. MR. JUSTICE STEWART took no part in the consideration or decision of this petition.

No. 79–1428. A. H. ROBINS CO., INC., ET AL. *v.* ROSS ET AL., 446 U. S. 946. Petition for rehearing denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition.

JULY 11, 1980

Dismissal Under Rule 53

No. 79–1665. PIPER AIRCRAFT CORP. *v.* DAVIS, EXECUTOR. C. A. 4th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 615 F. 2d 606.

JULY 14, 1980

Dismissal Under Rule 53

No. 79–1943. ALESSI ET AL. *v.* RAYBESTOS-MANHATTAN, INC., ET AL. C. A. 3d Cir. Certiorari dismissed as to petitioner Vogt under this Court's Rule 53. Reported below: 616 F. 2d 1238.

AUGUST 11, 1980

Rehearing Denied

No. 78–630. WASHINGTON ET AL. *v.* CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION ET AL., 447 U. S. 134;

No. 78–1729. UNITED STATES *v.* PAYNER, 447 U. S. 727;

No. 79–305. UNITED STATES *v.* HAVENS, 446 U. S. 620;

No. 79–421. BRYANT ET AL. *v.* YELLEN ET AL., 447 U. S. 352;

No. 79–425. CALIFORNIA ET AL. *v.* YELLEN ET AL., 447 U. S. 352;

No. 79–435. IMPERIAL IRRIGATION DISTRICT ET AL. *v.* YELLEN ET AL., 447 U. S. 352; and

No. 79–1101. CATALANO, INC., ET AL. *v.* TARGET SALES, INC., ET AL., 446 U. S. 643. Petitions for rehearing denied.

No. 79-1136. BROWN & ROOT, INC., ET AL. *v.* JOYNER ET AL., 446 U. S. 981;

No. 79-1175. WM. T. BURNETT & CO., INC. *v.* GENERAL TIRE & RUBBER CO., 446 U. S. 951;

No. 79-1228. IVY ET AL. *v.* SECURITY BARGE LINES, INC., 446 U. S. 956;

No. 79-1294. HARRIS, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* ROSARIO ET AL., 446 U. S. 651;

No. 79-1377. ANDERSON, WARDEN *v.* CHARLES, 447 U. S. 404;

No. 79-1433. MASKENY ET AL. *v.* UNITED STATES, 447 U. S. 921;

No. 79-1506. LAGUTA ET AL. *v.* OHIO, 446 U. S. 952;

No. 79-1549. GEECK ET AL. *v.* CITY OF NEW ORLEANS ET AL., 446 U. S. 961;

No. 79-1627. GREEN V. COUNTY OF ALAMEDA ET AL., 446 U. S. 984;

No. 79-1671. WARNER ET AL. *v.* SOVEREIGN NEWS CO. ET AL., 447 U. S. 923;

No. 79-5921. BLAKE *v.* GEORGIA, 446 U. S. 988;

No. 79-5954. RUBIES ET AL. *v.* UNITED STATES, 446 U. S. 940;

No. 79-5975. BOWEN *v.* GEORGIA, 446 U. S. 970;

No. 79-5996. PEERY *v.* SIELAFF, CORRECTIONS DIRECTOR, ET AL., 446 U. S. 940;

No. 79-6055. HEITMAN *v.* MISSOURI, 446 U. S. 941;

No. 79-6188. MOORE *v.* ZANT, WARDEN, 446 U. S. 947;

No. 79-6196. GEROMETTE *v.* GENERAL MOTORS CORP., 446 U. S. 985;

No. 79-6209. STANLEY ET AL. *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA, 447 U. S. 925;

No. 79-6248. MA *v.* HAZELWOOD ET AL., 446 U. S. 942; and

No. 79-6250. GRAY *v.* MISSISSIPPI, 446 U. S. 988. Petitions for rehearing denied.

No. 79-6298. DIOQUINO *v.* WORKERS' COMPENSATION APPEALS BOARD ET AL., 446 U. S. 944;

No. 79-6314. IRVIN *v.* NANNI ET AL., 446 U. S. 985;

No. 79-6356. HOP-WAH, AKA GREEN *v.* HOPPER, WARDEN, 446 U. S. 968;

No. 79-6404. CROOKER *v.* U. S. DEPARTMENT OF JUSTICE, 447 U. S. 908;

No. 79-6405. DAVIS *v.* NEW YORK, 446 U. S. 986;

No. 79-6412. MUINA *v.* DEPARTMENT OF PROFESSIONAL LICENSING OF MONTANA ET AL., 446 U. S. 981;

No. 79-6422. BURGER *v.* GEORGIA, 446 U. S. 988;

No. 79-6443. PROFIT *v.* CITY OF NIAGARA FALLS, NEW YORK, ET AL., 447 U. S. 901;

No. 79-6450. YOUNG *v.* BALTIMORE COUNTY BOARD OF EDUCATION ET AL., 446 U. S. 955;

No. 79-6457. JOHNSON *v.* CARTER, PRESIDENT OF THE UNITED STATES, 447 U. S. 909;

No. 79-6470. FRANKLIN *v.* GEORGIA, 447 U. S. 930;

No. 79-6487. CRISAFI *v.* WIETHE, 447 U. S. 927;

No. 79-6488. WOODARD *v.* WACHOVIA BANK & TRUST CO. ET AL., 447 U. S. 928;

No. 79-6494. GINSBURG *v.* TIGHE, 447 U. S. 910;

No. 79-6540. PROFFITT *v.* UNITED STATES, 447 U. S. 910;

No. 79-6551. SMILEY *v.* CORCORAN, LOS ANGELES COUNTY CLERK, ET AL., 447 U. S. 910;

No. 79-6594. RUCKER *v.* CITY OF SAINT LOUIS ET AL., 447 U. S. 910;

No. 79-6605. WESTOVER *v.* UNITED STATES, 447 U. S. 929; and

No. 79-6614. DOBBS *v.* HOPPER, WARDEN, 447 U. S. 930. Petitions for rehearing denied.

No. 79-912. HANRAHAN ET AL. *v.* HAMPTON ET AL., 446 U. S. 754; and

No. 79-914. JOHNSON ET AL. *v.* HAMPTON ET AL., 446 U. S. 754. Petition for rehearing denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition.

No. 79–1553. COLEMAN *v.* MONTANA, 446 U. S. 970. Motion of petitioner for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

No. 79–5575. JAGNANDAN ET AL. *v.* MISSISSIPPI STATE UNIVERSITY ET AL., 444 U. S. 1026. Motion for leave to file a petition for rehearing denied.

AUGUST 13, 1980

Dismissal Under Rule 53

No. 79–6885. BEASLEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 615 F. 2d 917.

AUGUST 15, 1980

Miscellaneous Order

No. 80–182. CELEBREZZE, SECRETARY OF STATE OF OHIO *v.* ANDERSON ET AL. C. A. 6th Cir. Motion to expedite consideration of the petition for writ of certiorari denied without prejudice to its later renewal. MR. JUSTICE POWELL and MR. JUSTICE STEVENS would grant the motion.

AUGUST 20, 1980

Dismissal Under Rule 53

No. 79–1908. LEE VISION CENTER, INC. *v.* VAUGHT. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 613 F. 2d 313.

AUGUST 22, 1980

Dismissal Under Rule 53

No. 79–1654. AMBOOK ENTERPRISES, AKA AMERICAN BOOK CLUB *v.* TIME INC. ET AL. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 612 F. 2d 604.

Miscellaneous Orders

No. A-1101. SAYLES *v.* HART, U. S. DISTRICT JUDGE. Application to vacate the order of the United States Court of Appeals for the District of Columbia Circuit, addressed to MR. JUSTICE BRENNAN and referred to the Court, denied.

No. A-1138. HOMEOWNER'S ENTERPRISES, INC. *v.* THOMPSON ET AL. Application for stay of trial proceedings, addressed to MR. JUSTICE BRENNAN and referred to the Court, denied.

No. A-1154. WOOD, DBA NATIONAL PHOTO SERVICES *v.* CHACE COMPANY ADVERTISING, INC., ET AL. Application for recall and stay of the mandate of the United States Court of Appeals for the Ninth Circuit, addressed to MR. JUSTICE BRENNAN and referred to the Court, denied.

No. A-1160. PAYNE *v.* UNITED STATES. Application for bail pending appeal to the United States Court of Appeals for the Seventh Circuit, addressed to MR. JUSTICE STEWART and referred to the Court, denied.

No. A-1169. QUINAULT PACIFIC CORP. ET AL. *v.* AETNA BUSINESS CREDIT, INC., ET AL. Application for stay, addressed to MR. JUSTICE STEVENS and referred to the Court, denied.

No. A-27. PRINCE GEORGE'S COUNTY, MARYLAND *v.* STATE WATER CONTROL BOARD ET AL. Application for stay of an order of the United States District Court for the District of Columbia, addressed to MR. JUSTICE REHNQUIST and referred to the Court, denied.

No. A-77. ALADDIN HOTEL CORP. ET AL. *v.* NEVADA GAMING COMMISSION ET AL. C. A. 9th Cir. Application for stay, addressed to MR. JUSTICE STEVENS and referred to the Court, denied.

No. A-33. O'HAIR ET AL. *v.* HILL ET AL. C. A. 5th Cir. Application for preliminary injunction, addressed to MR. JUSTICE BRENNAN and referred to the Court, denied.

No. A-1162 (79-1815). SALOB *v.* AMBACH, COMMISSIONER OF EDUCATION OF NEW YORK, ET AL. Application for stay, addressed to MR. JUSTICE BRENNAN and referred to the Court, denied.

No. A-52 (80-5263). BULLWINKLE *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Application for stay, addressed to MR. JUSTICE STEVENS and referred to the Court, denied.

Rehearing Denied

No. 79-8. UNITED STATES *v.* RADDATZ, 447 U. S. 667;

No. 79-343. SUN SHIP, INC. *v.* PENNSYLVANIA ET AL., 447 U. S. 715;

No. 79-394. UNITED STATES *v.* WARD, DBA L. O. WARD OIL & GAS OPERATIONS, *ante,* p. 242;

No. 79-6334. ATTWELL *v.* UNDERCOFLER, CHIEF JUSTICE, SUPREME COURT OF GEORGIA, ET AL., 446 U. S. 955;

No. 79-6362. DOBBERT *v.* FLORIDA, 447 U. S. 912; and

No. 79-6592. WILKERSON *v.* WILKERSON ET AL., 447 U. S. 935. Petitions for rehearing denied.

SEPTEMBER 3, 1980

Dismissal Under Rule 53

No. 80-4. MITSUBISHI INTERNATIONAL CORP., INC. *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON (BRS, INC., REAL PARTY IN INTEREST). C. A. 9th Cir. Certiorari dismissed under this Court's Rule 53.

SEPTEMBER 4, 1980

Dismissal Under Rule 53

No. 79-6781. PADGETT *v.* UNITED STATES. C. A. 8th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 619 F. 2d 783.

SEPTEMBER 10, 1980

Dismissal Under Rule 53

No. 78–918. REPUBLIC STEEL CORP. *v.* OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION ET AL.; and

No. 78–919. AMERICAN IRON & STEEL INSTITUTE ET AL. *v.* OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION ET AL. C. A. 3d Cir. [Certiorari granted, *ante*, p. 909.] Writs of certiorari dismissed under this Court's Rule 53.

SEPTEMBER 12, 1980

Dismissal Under Rule 53

No. 79–1203. LUCKY MC URANIUM CORP *v.* GEOMET EXPLORATION, LTD. Sup. Ct. Ariz. [Certiorari granted, 447 U. S. 920.] Writ of certiorari dismissed under this Court's Rule 53.

SEPTEMBER 17, 1980

Rehearing Denied

No. 79–4. WILLIAMS ET AL. *v.* ZBARAZ ET AL., *ante*, p. 358;

No. 79–5. MILLER, ACTING DIRECTOR, DEPARTMENT OF PUBLIC AID OF ILLINOIS, ET AL. *v.* ZBARAZ ET AL., *ante*, p. 358;

No. 79–491. UNITED STATES *v.* ZBARAZ ET AL., *ante*, p. 358; and

No. 79–1268. HARRIS, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* MCRAE ET AL., *ante*, p. 297. Motions of Richard Abel et al. and Abortion Rights Council of Minnesota et al. for leave to file briefs as *amici curiae* granted. Petitions for rehearing denied.

No. 79–561. NEW YORK NEWS, INC. *v.* BELL, JUSTICE, SUPREME COURT OF NEW YORK, ET AL., *ante*, p. 910;

No. 79–669. DAWSON CHEMICAL CO. ET AL. V. ROHM & HAAS CO., *ante*, p. 176; and

No. 79–1615. HALL *v.* CALIFORNIA ET AL., 447 U. S. 917. Petitions for rehearing denied.

No. 79–1634. STARR ET AL. *v.* NIXON, FORMER PRESIDENT OF THE UNITED STATES, ET AL., 446 U. S. 953;

No. 79–1714. ALEXANDER *v.* LOS ANGELES COUNTY CIVIL SERVICE COMMISSION ET AL., 447 U. S. 924;

No. 79–6099. STARVAGGI *v.* TEXAS, *ante*, p. 907; and

No. 79–6350. BARFIELD *v.* NORTH CAROLINA, *ante*, p. 907.

Petitions for rehearing denied.

SEPTEMBER 18, 1980

Certiorari Denied

No. 80–182. CELEBREZZE, SECRETARY OF STATE OF OHIO *v.* ANDERSON ET AL. C. A. 6th Cir. Renewed motion of petitioner to expedite consideration of the petition for writ of certiorari granted. Certiorari before judgment denied. MR. JUSTICE STEWART, MR. JUSTICE WHITE, and MR. JUSTICE REHNQUIST would grant the petition and set the case for oral argument during the week of October 6, 1980.

Reporter's Note

The next page is purposely numbered 1301. The numbers between 918 and 1301 were intentionally omitted in order to make it possible to publish in-chambers opinions in the current preliminary print of the United States Reports with *permanent* page numbers, thus making the official citations immediately available.

OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

RAILWAY LABOR EXECUTIVES' ASSN. *v.* GIBBONS, TRUSTEE, ET AL.

ON APPLICATION FOR STAY

No. A-1135. Decided June 28, 1980

An application to stay the District Court's preliminary injunction against implementation of the labor protection arrangement provisions of the Rock Island Railroad Transition and Employee Assistance Act in connection with the liquidation in bankruptcy of the Chicago, Rock Island and Pacific Railroad, is denied. It appearing that a stay would set in motion a chain of events that would lead to substantial payments to employees of the railroad that would be unconstitutional and unrecoverable, a sufficient showing of irreparable damage to the estate has been made to support the preliminary injunction.

MR. JUSTICE STEVENS, Circuit Justice.

Proceedings to reorganize the Chicago, Rock Island and Pacific Railroad (the Rock Island) pursuant to § 77 of the Bankruptcy Act, 11 U. S. C. § 205, have been pending before Judge McGarr in the United States District Court for the Northern District of Illinois for over five years. Because the Rock Island had been sustaining continuing substantial losses, on January 25, 1980, Judge McGarr ordered the Trustee to prepare and file a preliminary plan of liquidation. On May 27, 1980, the Interstate Commerce Commission filed an advisory report with the District Court concluding "that abandonment of the Rock Island and its dissolution as an operating railroad is required by the public convenience and necessity." Consistent with its own precedents, the Commission apparently did not recommend that any special labor protection condition be imposed on the Rock Island in

connection with the abandonment. On June 2, 1980, after receiving briefs and hearing argument, Judge McGarr entered an order authorizing complete abandonment of all Rock Island operations and expressly holding that "no labor protection arrangements may be imposed on the Rock Island estate."

Two days earlier, however, the President had signed Public Law 96–254, 94 Stat. 399, 45 U. S. C. A. § 1001 *et seq.* (Sept. 1980 Supp.), entitled the Rock Island Railroad Transition and Employee Assistance Act (Act). Section 106 (a) of the Act required the Trustee, within 10 days, to enter into an agreement with the collective-bargaining representatives of Rock Island employees and former employees to provide for labor protection payments to terminated employees. Section 106 (b) authorized the Interstate Commerce Commission to impose a labor protection arrangement on the estate if the Trustee failed to reach agreement with the unions. Section 110 of the Act authorized the Trustee to borrow up to $75 million from the United States to provide the funds for payments pursuant to that arrangement. It further provides that such borrowing, as well as the employee protection claims themselves, should be treated as an expense of administration. It is my understanding that, effectively, the employee protection payments and any concomitant obligations of repayment to the United States are thus given priority over the claims of the general creditors on the assets of the estate. The Act further provides that no court may stay the payment of any labor protection benefits. And finally, § 110 (e) provides: "Except in connection with obligations guaranteed under this section, the United States shall incur no liability in connection with any employee protection agreement or arrangement entered into under § 106 of this Title." [1]

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[1] An explanation of the Act is found in the Senate proceedings. See remarks of Senator Kassebaum of Kansas, 126 Cong. Rec. S2280–S2281

Within the 10-day period, the Trustee applied for a preliminary injunction against implementation of the labor protection arrangement provisions of the Act on the ground that

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(Mar. 6, 1980). In substance, it appears that the Senator was particularly concerned with preserving the possibility of selling a portion of the Rock Island, known as the Tucumcari Line from Kansas City to New Mexico, to the Southern Pacific Railroad. She explained that the bill extended "directed service" of the Rock Island, which as I understand it, means service ordered by the Federal Government with any losses incurred underwritten by the Federal Government. She indicated that in February representatives of the labor unions and the acquiring railroads had worked out labor agreements adequate to protect employees who would be re-employed by the acquiring roads, but that there was a substantial risk that no protection would be made available to terminated employees who would not be re-employed, and that the smooth transfer might be interrupted by a broad strike called to obtain compensation for the employees who lost their jobs. It was in order to avoid this prospect that the bill was apparently designed to compel the estate to make adequate termination payments that it was not already obligated to make to those terminated employees. It also appears that the original plan was to fund $50 million for those employees, $30 million of which would be secured by the Government as a high priority administration expense, the other $20 million being subordinated to the claims of all other creditors. The total loan was changed to $75 million prior to passage, and, more significantly, all of which was to be given the high priority of an administration expense. Thus, Congress rather clearly indicated its intent that the Government ultimately not be required to underwrite any of the employee protection payments, but rather to have them imposed entirely as a burden on the Rock Island estate.

See also the remarks of Congressman Madigan, 126 Cong. Rec. H2329 (Mar. 28, 1980), in support of H. R. 6837, which included two titles, the first containing provisions for the completion of the northeast corridor. Title II, which became the Rock Island Railroad Transition and Employee Assistance Act, seemed primarily intended to authorize so-called "directed service" to be funded by the Federal Government, but it also included the employee protection program. With respect to the latter, Congressman Madigan stated, in part:

"There is a $75 million guaranteed obligation in this bill for labor protection payments to the Rock Island employees whose jobs are terminated. That is not an appropriation of Federal funds that will not be returned; it is a priority claim against the estate of the Rock Island Railroad, and

the statute authorized an unconstitutional taking of the property of the estate. Judge McGarr granted that relief, concluding that (1) the procedural provisions of the Act required him to take action immediately in order to preserve the estate from irreparable damage, (2) there were no pre-existing contractual or statutory obligations to make labor protection payments that were being quantified by the Act, and (3) it would serve neither a public purpose nor the interest of the estate in view of the total abandonment of the Rock Island's operations that had been authorized. He also implicitly concluded that the statutory program could not be justified as necessary to facilitate sales by the Trustee of portions of the railroad's operating properties.

On June 21, 1980, applicant Railway Labor Executives' Association applied to me in my capacity as Circuit Justice for a stay of Judge McGarr's preliminary injunction.[2] Four days later, on June 25, 1980, the United States filed a memorandum supporting that stay application. The applicant contends that the estate will not suffer irreparable damage by simply permitting the negotiation of a labor protection plan to commence. It argues that even if payments pursuant to such a plan would result in an unconstitutional taking of the estate's property, the estate might still be able to convince Judge McGarr that the statutory prohibition against court orders prohibiting payments pursuant to such arrangement is

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it is structured exactly the same as the Milwaukee bill which we passed late last year.

. . . . .

"At the risk of being redundant, I would like to repeat, the $750 million for the Northeast corridor is in the President's budget. *The money for the Rock Island Railroad will be paid back from the estate of the Rock Island Railroad.*" *Ibid.* (Emphasis added.)

It is worth noting that the "Milwaukee bill" concerned a genuine railroad reorganization, not a liquidation.

[2] Appeal lies to this Court under 28 U. S. C. § 1252, since Judge McGarr held an Act of Congress unconstitutional.

unconstitutional, and that it would be better to enjoin such payments rather than the negotiation of the underlying plan. Alternatively, it is argued that a remedy against the Government to make the estate whole may ultimately be available in the Court of Claims under the Tucker Act if it turns out that any payments made were unconstitutionally required.

Like Judge McGarr, I do not find persuasive any of the suggestions that the Act could not cause the estate irreparable harm. And while the Solicitor General suggests that a Tucker Act remedy *may* exist in the event of an unconstitutional taking, see Memorandum for United States 5–6, it is obvious that his suggestion is equivocal. Moreover, having read the parties' submissions, I am now of the opinion that Judge McGarr was probably correct in concluding that the Act authorizes an unconstitutional taking of property of the estate. It appears to direct a transfer of $75 million off the top of the estate's assets to the employees. While such a transfer might be permissible in the course of a genuine reorganization, at least as of this moment, I have difficulty perceiving how, in the context of a liquidation, this is anything other than a simple taking of the property of the general creditors, as the Trustee argues.

Accordingly, since there is a strong possibility that a stay would set in motion a chain of events that would lead to substantial payments that would be unconstitutional and unrecoverable, I believe that a sufficient showing of irreparable damage has been made to support the entry of the preliminary injunction. Necessarily, my views are tentative, based as they are on the relatively brief submissions of the parties. Nonetheless, for the foregoing reasons, I have decided to deny the application for a stay.

ROSTKER, DIRECTOR OF SELECTIVE SERVICE, ET AL. v. GOLDBERG ET AL.

ON APPLICATION FOR STAY

No. A-70. Decided July 19, 1980

An application to stay, pending review on appeal, the three-judge District Court's order invalidating the registration provisions of the Military Selective Service Act on the ground that exclusion of females from such provisions constitutes gender-based discrimination in violation of the equal protection component of the Fifth Amendment, is granted. It appears that there is a "reasonable probability" that four Justices will note probable jurisdiction, that there are "fair" prospects for a reversal, and that, in balancing the irreparable harm that allegedly would result to the Government if the stay is denied against the harm that allegedly would result to the persons required to register under the Act if the stay is granted, the equities favor the Government.

MR. JUSTICE BRENNAN, Circuit Justice.

This is an application for a stay pending review on appeal of the July 18, 1980, order of a three-judge District Court for the Eastern District of Pennsylvania invalidating the registration provisions of the Military Selective Service Act, 50 U. S. C. App. § 451 *et seq.*, and enjoining the Government from enforcing them.[1] At stake are the Government's plans

[1] Briefly, the procedural history of this case is as follows: The original complaint was filed in June 1971 by male citizens subject to registration and induction who argued that the Selective Service Act violated several of their constitutional rights, including the right to equal protection of the laws guaranteed by the Fifth Amendment. Application to the United States District Court for the Eastern District of Pennsylvania for the convening of a three-judge court under the then applicable statute, 28 U. S. C. § 2282 (1970 ed.), was denied, and the suit was dismissed. On review, the United States Court of Appeals for the Third Circuit upheld the dismissal of all claims except that founded upon the failure to conscript females. The Court of Appeals remanded the case to the District Court for a determination of the substantiality of the equal protection claim, and of plaintiffs' standing to raise that issue. On remand, the Dis

to register more than four million males born in 1960 and 1961 in the two weeks commencing on July 21.

The District Court concluded that the exclusion of females from the registration provisions constitutes gender-based discrimination and that the federal parties had failed to demonstrate that the exclusion was substantially related to an important governmental interest. Accordingly, it found the provisions violative of the equal protection component of the Fifth Amendment. The applicants, Bernard Rostker, Director of Selective Service, *et al.*, urge both that the District Court applied too strict a standard of scrutiny in light of the national defense interests at stake, and that even under the standard which that court applied the decision not to include females could be justified. Beyond that, the applicants contend that the Government will suffer irreparable injury if it is not permitted to go forward with implementation of the President's July 21 through August 2 call for draft registration, while respondents—a class including persons required to register within the next two weeks—will suffer only minor and remediable harms should I decide to stay the District Court's injunction. Respondents submit that the three-judge court properly decided the constitutional question before it, that

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trict Court found that plaintiffs had standing, and convened a three-judge court.

On July 1, 1974, the three-judge court, with Judge Rosenn dissenting, denied defendants' motion to dismiss. *Rowland* v. *Tarr*, 378 F. Supp. 766 (1974). There were no further proceedings until June 1979, when the court proposed to dismiss the case due to inaction. Additional discovery ensued, and on February 17, 1980, defendants' motion for summary judgment was denied. On July 1, 1980, a plaintiff class of potential registrants was certified, and on July 18, 1980, the District Court entered its order enjoining registration under the Selective Service Act and declined to enter a stay of execution.

Although the statute authorizing three-judge courts in actions such as this was repealed in 1976, Pub. L. 94–381, §§ 1 and 2, 90 Stat. 1119 (Aug. 12, 1976), the Act remains applicable to suits filed before the date of repeal, § 7, 90 Stat. 1120.

its injunction was proper, and that its subsequent decision to deny a stay of that injunction was likewise appropriate.

The principles that control a Circuit Justice's consideration of in-chambers stay application are well established. Relief from a single Justice is appropriate only in those extraordinary cases where the applicant is able to rebut the presumption that the decisions below—both on the merits and on the proper interim disposition of the case—are correct. *Whalen* v. *Roe*, 423 U. S. 1313, 1316–1317 (1975) (MARSHALL, J., in chambers). In a case like the present one, this can be accomplished only if a four-part showing is made. First, it must be established that there is a "reasonable probability" that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction, *Graves* v. *Barnes*, 405 U. S. 1201, 1203–1204 (1972) (POWELL, J., in chambers); *Mahan* v. *Howell*, 404 U. S. 1201, 1202 (1971) (Black, J., in chambers). Second, the applicant must persuade me that there is a fair prospect that a majority of the Court will conclude that the decision below was erroneous. While related to the first inquiry, this question may involve somewhat different considerations, especially in cases presented on direct appeal. *Times-Picayune Publishing Corp.* v. *Schulingkamp*, 419 U. S. 1301, 1305 (1974) (POWELL, J., in chambers); *Graves* v. *Barnes*, *supra*, at 1203–1204. Third, there must be a demonstration that irreparable harm is likely to result from the denial of a stay. *Whalen* v. *Roe*, *supra*, at 1316; *Graves* v. *Barnes*, *supra*, at 1203. And fourth, in a close case it may be appropriate to "balance the equities"—to explore the relative harms to applicant and respondent, as well as the interests of the public at large. Cf. *Holtzman* v. *Schlesinger*, 414 U. S. 1304, 1308–1309 (1973) (MARSHALL, J., in chambers) (citing cases); *Republican Committee* v. *Ripon Society*, 409 U. S. 1222, 1224 (1972) (REHNQUIST, J., in chambers).

That the first prong of this test is satisfied is undeniable.

The importance of the question and the substantiality of the constitutional issues are beyond cavil. The second prong is more troubling. In my judgment the case is a difficult and perplexing one. My task, however, is not to determine my own view on the merits, but rather to determine the prospect of reversal by this Court as a whole. In the past, the standard of review to be applied in gender-based discrimination cases has been a subject of considerable debate, compare *Schlesinger* v. *Ballard*, 419 U. S. 498 (1975), with *Craig* v. *Boren*, 429 U. S. 190 (1976). And my Brethren's application of the standard upon which we have finally settled in a context as sensitive as that before me cannot be predicted with anything approaching certainty. Nonetheless, it does seem to me that the prospects of reversal can be characterized as "fair." I therefore turn to the interrelated inquiries that make up the third and fourth prongs of the approach set forth above.

The applicants identify three distinct injuries that the United States would sustain if the District Court's order were to remain in force and this Court were then to uphold the Selective Service Act. First, during the life of the District Court's injunction, the United States is barred from instituting registration without time-consuming congressional action, even in the face of a clear and present threat to national security. Accordingly, the Nation's military capability to respond to emergencies would remain uncertain until the full Court completes review of their ruling below.[2] See Affidavit of W. Graham Claytor, Deputy Secretary of Defense, at 2 (July 16, 1980); Affidavit of Bernard Rostker, Director of Selective Service, at 2 (July 15, 1980). Second, the inauguration of registration by the President and the Congress was

[2] Further, inasmuch as congressional appropriations for registration lapse on September 30, 1980, at the end of the current fiscal year, Affidavit of John P. White, Deputy Director of Office of Management and Budget, at 6 (July 15, 1980), a decision by the full Court in favor of the Government after that date will necessitate additional delay while Congress authorizes a new appropriation.

not merely a predicate to possible future conscription. It was an act of independent foreign policy significance—a deliberate response to developments overseas. Thus, a suspension of registration until a decision on its validity is reached might frustrate coordinate branches in shaping foreign policy. Affidavit of John P. White, Deputy Director of Office of Management and Budget, at 2–4 (July 15, 1980); Affidavit of W. Graham Claytor, *supra*, at 3; Affidavit of Warren Christopher, Deputy Secretary of State, at 1–2 (July 12, 1980).[3] Third, considerable resources have been expended in preparation for the imminent registration effort. The Government has distributed publicity material, trained and assigned personnel, engaged computer support, and entered into contractual arrangements, all with a view toward the commencement of actual registration on Monday, July 21. Should the Government ultimately prevail at some future date, these preparations will have to be replicated at considerable expense. Affidavit of Bernard Rostker, *supra*, at 4–5; Affidavit of John P. White, *supra*, at 6. While difficult to evaluate with precision, these are considerations of palpable weight.

For their part, respondents urge that should they eventually succeed on the merits they will have suffered irreparable injury by virtue of having had to register during the pendency of the Government's appeal. But although registration imposes material interim obligations upon respondents—including the duty to appear—I cannot say that the inconvenience of those impositions outweighs the gravity of the harm to the United States should the stay requested be refused. Nor does an irremediable injury stem from the fact that respond-

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[3] To be sure, the extent and duration of these irreparable injuries could be curtailed if the Government were substantially to amend the Selective Service Act during the period preceding review by this Court. In light of the serious question raised by this case, however, the Government should not be obliged to abandon an important statutory scheme without an opportunity for plenary consideration by the Court.

ents' names will be enrolled upon registration lists. If respondents' claim is upheld, the destruction of those lists can be ordered. On balance, therefore, I conclude that the equities favor the Government. Accordingly, I have today entered an order staying execution and enforcement of the District Court's judgment.

IN RE ROCHE

ON APPLICATION FOR STAY

No. A-66. Decided July 23, 1980

An application to stay, pending a petition for certiorari, a Massachusetts Supreme Judicial Court Justice's order adjudicating applicant television news reporter in civil contempt for refusal to disclose the identities of news sources in connection with disciplinary proceedings against a state judge, and the Supreme Judicial Court's affirmance of such order, is granted. It appears reasonably probable that four Justices will vote to grant certiorari, that there is a fair prospect of reversal, and that, in considering the irreparable harm that would result to applicant if the stay is denied, the balance of equities favors a stay.

MR. JUSTICE BRENNAN, Circuit Justice.

This is an application for a stay of enforcement, pending a petition for a writ of certiorari, of the July 10, 1980, order of a single justice of the Massachusetts Supreme Judicial Court, adjudicating applicant in civil contempt for refusal to disclose the identities of news sources, and of the July 16, 1980, order of the Supreme Judicial Court affirming the adjudication of contempt.

Applicant Roche is a reporter who participated in a television news team's investigation of a number of state judges. On January 11, 1979, applicant broadcasted a television news story about alleged misconduct by respondent, a State District Court Justice. The report prompted an investigation by the Massachusetts Commission on Judicial Conduct that culminated in the filing of formal proceedings.

In anticipation of disciplinary hearings, the Commission furnished the state judge with the names of 65 witnesses whom the Commission proposed to call. Among these was applicant. On May 16, the Commission issued an order allowing the judge to depose 11 of the 65 witnesses, including applicant. At his deposition, applicant testified about his own observa-

tions in the course of his investigation, and indicated a willingness to reveal the content of interviews with any individual who could be independently identified as one of applicant's sources. Accordingly, applicant did communicate to respondent judge the substance of his interviews with those persons who publicly appeared on the television news broadcast. Applicant also conceded that names of all the people whom he had previously interviewed were contained in the list of witnesses for the disciplinary hearings. Citing a newsman's "privilege," however, applicant refused to specify or discuss those on the list whom he had interviewed in confidence, unless they had first been identified by other means.

In the course of some procedural skirmishing, applicant Roche moved for a protective order from Justice Kaplan of the Supreme Judicial Court based upon this asserted newsman's privilege, and respondent judge sought an order compelling applicant to identify his sources. Justice Kaplan referred the issue to the Conduct Commission, which ruled that the claim of newsman's privilege under the First Amendment was insubstantial, and that applicant should divulge the identities of his sources so that the respondent judge could prepare to impeach or correct the testimony of those sources during the hearings. Upon renewal of the motions to him, Justice Kaplan concurred in the Commission's view. He reasoned that inasmuch as the applicant had consented to disclose the substance of interviews with sources if otherwise identified—as through the process of deposing each of the 65 hearing witnesses—the net effect of applicant's claim of privilege was simply to compel the respondent judge to sift through a series of deponents to obtain information directly available from the reporter. Justice Kaplan concluded that "no significant principle [was] to be served by the suggested approach," Applicant's Ex. B., p. 4, and, on July 7, ordered Roche to respond to questions about unidentified sources.

Applicant subsequently appeared at a deposition but once again declined to identify his undisclosed sources. On July

10, Justice Kaplan adjudicated him in civil contempt, and stayed execution of the contempt order. The adjudication of contempt was affirmed by the full Supreme Judicial Court on July 16, and the next day Justice Kaplan ordered that the stay of civil contempt sanctions be vacated on July 21. Upon application to me as Circuit Justice, I entered an interim order continuing the stay pending filing of a response and further order of the Circuit Justice or this Court.

Only recently, I have had occasion to review the principles that guide a Circuit Justice's determination of stay applications. *Rostker* v. *Goldberg, ante,* p. 1306. Generally, a stay will issue upon a four-part showing that (1) there is a "reasonable probability" that four Justices will find the issue sufficiently substantial to grant certiorari; (2) there is a "fair prospect that a majority of the Court will conclude that the decision below was erroneous," *ante,* at 1308; *Times-Picayune Publishing Corp.* v. *Schulingkamp,* 419 U. S. 1301, 1305 (1974) (POWELL, J., in chambers);[1] (3) irreparable harm to applicant is likely to result if the request for a stay is denied; and (4) the "balance of equities"—to the parties and to the public—favors the issuance of a stay.

Predicting the probability of a grant of certiorari and of a reversal of the decision below in this case is an uncertain undertaking. The question of a newsman's privilege to conceal sources is not a matter of first impression. *Branzburg* v. *Hayes,* 408 U. S. 665 (1972), held that the First Amendment does not provide newsmen with an absolute or qualified testimonial privilege to be free of relevant questioning about

[1] In *Rostker,* my evaluation of the "fair prospect" for reversal of the decision below was conducted in the context of a direct appeal. Where review is sought by the more discretionary avenue of writ of certiorari, however, the consideration of prospects for reversal dovetails, to a greater extent, with the prediction that four Justices will vote to hear the case. Thus, it may be that the "fair prospect"-of-reversal criterion has less independent significance in a stay determination when review will be sought by way of certiorari.

sources by a grand jury. More recently, two of my Brethren found the prospects for review by the full Court insufficient to warrant staying contempt proceedings against a New York Times reporter for his failure to submit documents to *in camera* judicial inspection in compliance with a subpoena for those documents by the defendant in a murder trial. *New York Times Co.* v. *Jascalevich,* 439 U. S. 1317 (1978) (WHITE, J., in chambers); *New York Times Co.* v. *Jascalevich,* 439 U. S. 1331 (1978) (MARSHALL, J., in chambers).

At the same time, there is support for the proposition that the First Amendment interposes a threshold barrier to the subpoenaing of confidential information and work product from a newsgatherer. Four dissenting Justices in *Branzburg* discerned at least some protection in the First Amendment for confidences garnered during the course of newsgathering. 408 U. S., at 721 (Douglas, J., dissenting); *id.,* at 744–747 (STEWART, J., dissenting, joined by BRENNAN and MARSHALL, JJ.). And MR. JUSTICE POWELL, who joined the Court in *Branzburg,* wrote separately to emphasize that requests for reporter's documents should be carefully weighed with due deference to the "vital constitutional and societal interests" at stake. *Id.,* at 710. Consequently, I do not believe that the Court has foreclosed news reporters from resisting a subpoena on First Amendment grounds.[2]

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[2] The opinions in chambers denying the requested stay in *New York Times Co.* v. *Jascalevich* on the basis of the unlikelihood of review turned not upon the general meritlessness of a newsman's privilege, but more particularly upon the improbability that such a privilege would be applied to preclude *in camera* inspection of papers by a judge. 439 U. S., at 1322–1323 (WHITE, J.); 439 U. S., at 1337 (MARSHALL, J.); see *United States* v. *Nixon,* 418 U. S. 683 (1974).

Respondent also suggests that *Herbert* v. *Lando,* 441 U. S. 153, 167–169 (1979), contradicts any assertion of a newsman's privilege. That decision, however, dealt with discovery of editorial processes when the collective state of mind of a news organization was directly in issue in a suit against that organization.

Assuming that there is at least a limited First Amendment right to resist intrusion into newsgatherers' confidences, this case presents an apt occasion for its invocation. As determined by Justice Kaplan below, respondent judge could have obtained the information sought from the applicant by other adequate—albeit somewhat roundabout—methods. Thus, this case does not present a question of necessity for the confidences subpoenaed. What is ranged against the asserted First Amendment interests of the applicant is essentially respondent's convenience. If I am correct, therefore, that a majority of the Court recognizes at least some degree of constitutional protection for newsgatherers' confidences, it is reasonably probable that four of my Brothers will vote to grant certiorari, and there is a fair prospect that the Court will reverse the decision below.[3]

Turning to consider the irreparable harm of the applicant in the absence of a stay, and to weigh the "balance of equities," I conclude that these favor the continuation of the stay below pending a petition for writ of certiorari and disposition thereof. Without such a stay, applicant must either surrender his secrets (and moot his claim of right to protect them) or face commitment to jail. If the stay remains in force, on the other hand, the judge subject to the disciplinary inquiry can obtain the information he seeks by deposing the hearing witnesses. The hardship that this would impose—although not negligible—does not outweigh the unpalatable choice that civil contempt would impose upon the applicant. Finally, even respondent's burden of going forward without the desired cooperation of the applicant can be alleviated by an agreement with the Commission to continue disciplinary

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[3] Civil contempt proceedings such as these—against a nonparty and colored by First Amendment overtones—are appealable for purposes of our review. *New York Times Co.* v. *Jascalevich*, *supra*, at 1318–1319 (WHITE, J., in chambers). The judgment sought to be stayed has been affirmed by the Supreme Judicial Court of Massachusetts and is final.

proceedings until resolution of applicant's petition for a writ of certiorari.[4]

Having decided that a stay pending a timely petition for writ of certiorari and disposition thereof is warranted,[5] I have today entered an order continuing my stay of enforcement of the order of the single justice of July 10, 1980, adjudicating applicant Roche in civil contempt.

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[4] Respondent judge suggests that "the ends of justice might . . . be served by the Circuit Justice ordering a stay of the formal proceedings against the Respondent." Memorandum in Opposition 7. Should the Commission and respondent judge be unable to agree upon a continuance, respondent judge is, of course, free to apply for a stay of the proceedings in accordance with proper procedures.

[5] For the reasons stated in this opinion, I believe that applicant's showing is sufficient to support my order of a stay notwithstanding the denial of an indefinite stay below. Cf. *Rostker* v. *Goldberg, ante,* p. 1306.

McDANIEL ET AL. v. SANCHEZ ET AL.

ON APPLICATION FOR STAY

No. A-126. Decided August 14, 1980

An application to stay, pending the disposition of a petition for certiorari, the Court of Appeals' judgment requiring applicant Texas county officials to proceed with procedures for the "preclearance," under Section 5 of the Voting Rights Act of 1965, of a new apportionment plan for county commissioner precincts ordered by the District Court and approved by the county commissioners, is granted. It appears that there is a "reasonable probability" that four Members of this Court will vote to grant certiorari and that the balance as to the possibility of "irreparable harm" favors the applicants.

MR. JUSTICE POWELL, Circuit Justice.

This is an application for a stay of the judgment of the United States Court of Appeals for the Fifth Circuit, pending consideration of a petition for certiorari. Applicants are officials of Kleberg County, Tex., who have been ordered by the United States District Court for the Southern District of Texas to proceed immediately with procedures for the "preclearance" of a new apportionment plan for county commissioner precincts under § 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 42 U. S. C. § 1973c.

I

This suit began in 1978 as a class action challenging the boundary lines of the four county commissioner precincts in Kleberg County. Plaintiffs claimed that these precincts, as drawn, violated the one-person, one-vote principle and unconstitutionally diluted the voting strength of Mexican-Americans. After a trial, the District Court found that the precincts did violate the one-person, one-vote principle, but ruled that plaintiffs had failed to meet their burden of proof on the dilution claim.

The District Court then directed defendants to submit a proposed new apportionment plan. That plan was drawn by a university professor selected by the County Commissioners and approved for submission to the District Court by the Commissioners. The District Court approved the plan and rejected an argument by plaintiffs that preclearance under the Voting Rights Act was necessary, relying on *East Carroll Parish School Board* v. *Marshall,* 424 U. S. 636 (1976) (*per curiam*). In *East Carroll* this Court stated that "court ordered plans resulting from equitable jurisdiction over adversary proceedings are not controlled by § 5." *Id.,* at 638, n. 6

On appeal, the Fifth Circuit reversed in a *per curiam* opinion. 615 F. 2d 1023 (1980). It relied on this Court's later decision in *Wise* v. *Lipscomb,* 437 U. S. 535 (1978), for the proposition that plans drawn up or approved by a legislative body are "legislative" plans even if submitted in response to a court order. As a result, the Court of Appeals found that the plan in this case is legislative and concluded that it is subject to the preclearance provisions of § 5. The court remanded the case for appropriate action and the District Court then ordered applicants to begin the § 5 procedures "immediately." On July 25, 1980, the Fifth Circuit denied a stay pending consideration of a petition for a writ of certiorari.

II

The preclearance procedures at issue here require either an action in the District Court for the District of Columbia for a declaratory judgment that the new plan is not racially discriminatory, or submission of the plan to the Attorney General of the United States, who may interpose an objection within 60 days. 42 U. S. C. § 1973c. See *Allen* v. *State Board of Elections,* 393 U. S. 544, 548–550 (1969). Applicants will argue in their petition for certiorari that they should not be required to follow these procedures because this apportionment plan was court-ordered and was not the prod-

uct of a legislative action. They argue in this application that their petition is likely to be granted because the decisions of this Court have left unsettled the principles that determine which apportionment plans are essentially "legislative," as opposed to "judicial," in nature. They further argue that a stay is necessary in order to prevent their claim from becoming moot before it can be heard.

In *Wise* v. *Lipscomb, supra,* we faced the question whether a plan for the election of members of the City Council of Dallas was judicial or legislative. The existing system of electing members at large had been declared unconstitutional, and the city had been given an opportunity by the court to produce a substitute plan. Because the plan submitted by the City Council, and approved by the District Court, included a provision for the election of several council members at large, it was necessary to decide whether the plan was invalid under *East Carroll, supra,* in which we held that *judicially* imposed plans should not, absent special circumstances, include multimember districts.

The Court in *Wise* decided that the Dallas plan was legislative, rather than judicial, and therefore was exempt from the higher level of scrutiny accorded to judicial plans. MR. JUSTICE WHITE, in an opinion joined by MR. JUSTICE STEWART, viewed the plan as one enacted by the City Council, emphasizing that in his view the Council was exercising its lawful powers in so acting. 437 U. S., at 546–547. MR. JUSTICE MARSHALL, in a dissent joined by MR. JUSTICE BRENNAN and MR. JUSTICE STEVENS, agreed that the power of the legislative body under state law to enact the plan at issue is an important factor, but disagreed about the powers possessed by the City Council in that case. He concluded that the Council could only have acted pursuant to a court order and that the case was therefore controlled by *East Carroll, supra,* at 638, n. 6, where we labeled a plan "judicial" partly because

the legislative body had no authority to reapportion itself. 437 U. S., at 550–554. My opinion concurring in part and concurring in the judgment, joined by the three remaining Justices, asserted that assumptions about state law were "unnecessary" because the "essential point is that the Dallas City Council exercised a legislative judgment, reflecting the policy choices of the elected representatives of the people, rather than the remedial directive of a federal court." *Id.*, at 548.

Arguably, it was this last approach that the Court of Appeals followed in the present case. It determined that the plan was a legislative one because it was approved for submission by the Commissioners of Kleberg County. The Court of Appeals was apparently unconcerned that the reapportionment might be outside the Commissioners' legislative powers.[1] If so, it can be contended that the court was following an approach that has been endorsed by only a minority of Justices. Applicants also make a substantial argument that this approach is inconsistent with the decision in *East Carroll,* as that case has been interpreted by the majority of this Court.[2]

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[1] Under Tex. Rev. Civ. Stat. Ann., Art. 2.04 (1) (Vernon Supp. 1979), the Commissioners can only enact a reapportionment plan during their July or August terms. See *Wilson* v. *Weller,* 214 S. W. 2d 473 (Tex. Civ. App. 1948). The plan in this case was submitted in November. Respondents contend, however, that the Commissioners have an "inherent" power to reapportion their precincts when a "vacuum" has been created by a court ruling that the existing precincts are drawn unconstitutionally.

[2] Indeed, this apparent inconsistency may have produced a conflict within the Fifth Circuit on the issues raised here. In *Marshall* v. *Edwards,* 582 F. 2d 927 (1978) (en banc), cert. denied, 442 U. S. 909 (1979), a case involving the same litigation as *East Carroll* but an entirely different plan, the Fifth Circuit labeled that plan "court-ordered" partly because the legislative body merely submitted it, rather than adopting it. 582 F. 2d, at 933–934. Applicants contend that the Commissioners acted in a similarly limited fashion here.

III

It is fair to say that the opinions in *East Carroll* and *Wise* v. *Lipscomb* fall considerably short of providing clear guidance to the courts that initially address this difficult issue. It would be helpful, therefore, for this Court to exercise its responsibility to provide such guidance. It seems to me that this case presents the opportunity.

I mention briefly the settled principles that govern the granting of stays. *Times-Picayune Publishing Corp.* v. *Schulingkamp*, 419 U. S. 1301, 1305 (1974) (POWELL, J., in chambers); *Graves* v. *Barnes*, 405 U. S. 1201, 1203–1204 (1972) (POWELL, J., in chambers). In view of the ambiguity of our precedents (to which I may have contributed), I cannot say whether the possibility of reversal is significant. I do think there is a "reasonable probability" that four Members of the Court will consider the issue sufficiently meritorious—and the need for clarification sufficiently evident—to warrant a grant of certiorari. The applicants assert that, absent a stay, they will be required immediately to expend substantial money on preclearance procedures, and that this expenditure will be irretrievable. They argue further that without a stay their petition to this Court will become moot. The balance as to the possibility of "irreparable harm" seems to favor the applicants.

I will therefore enter an order recalling the mandate and staying the judgment of the United States Court of Appeals for the Fifth Circuit pending disposition of the petition for certiorari.

WILLHAUCK v. FLANAGAN ET AL.

ON APPLICATION FOR STAY

No. A-169. Decided August 28, 1980

An application for a stay pending appeal to the Court of Appeals from the District Court's order denying applicant's request for a temporary restraining order enjoining, on double jeopardy grounds, two separate Massachusetts state-court prosecutions against him, is denied. Applicant has not alleged sufficient irreparable harm to warrant considering whether there is a reasonable probability that four Justices of this Court would consider the issue whether an exception to the doctrine of *Younger* v. *Harris*, 401 U. S. 37, should be made for double jeopardy claims to be sufficiently meritorious to grant certiorari should the merits of the case eventually come before this Court.

MR. JUSTICE BRENNAN, Circuit Justice.

This is an application for a stay pending appeal to the United States Court of Appeals for the First Circuit from an order of the United States District Court for the District of Massachusetts denying a request for a temporary restraining order. The facts are briefly as follows. On July 2, 1979, the applicant, Francis A. Willhauck, Jr., allegedly led local police on a high-speed automobile chase through Norfolk and Suffolk Counties. He was finally arrested in Suffolk County and charged with various offenses by the District Attorneys in both counties. In Norfolk County (Quincy District Court), he was charged with driving so as to endanger, failure to stop for a police officer, failure to slow down for an intersection, and driving at an unreasonable speed. In Suffolk County (West Roxbury District Court), he was also charged with driving so as to endanger and failure to stop for a police officer, and in addition was charged with assault and battery with a motor vehicle.

With the complaints pending in the respective county District Courts, applicant moved in Quincy District Court to

consolidate the cases into a single proceeding there pursuant to Rule 37 of the Massachusetts Rules of Criminal Procedure. However, since the Rule requires the written approval of both prosecuting attorneys to effectuate transfer and consolidation, his attempt failed when one of the District Attorneys apparently declined to approve the consolidation. Applicant subsequently moved for consolidation in at least one of the Superior Courts of Norfolk and Suffolk Counties, where his indictment was handed down, but the motion was similarly denied.

Finally, applicant brought his claim before a single justice of the Massachusetts Supreme Judicial Court, contending, *inter alia,* that failure to consolidate would put him twice in jeopardy for the same offenses, in violation of the Constitution. The justice dismissed it in a four-page memorandum and order for judgment entered June 19, 1980, rejecting applicant's argument that the charges in the two counties were for a single offense. He also noted that, even if he had the power to transfer and consolidate the two trials, he would refuse to do so because, in his view, this would be an unwarranted intrusion and interference with the lower courts and prosecutors.

On August 1, 1980, Willhauck brought an action pursuant to 42 U. S. C. § 1983 in Federal District Court to obtain a declaration that Massachusetts Rule of Criminal Procedure 37 (b)(2), giving prosecuting attorneys a veto over transfer and consolidation, violates the Double Jeopardy and Due Process Clauses of the Constitution. He sought a temporary restraining order, a preliminary injunction, and a permanent injunction against the two county District Attorneys to enjoin their criminal prosecutions against him. The District Court entered an order denying a temporary restraining order on August 12, 1980, on the basis that applicant's prayer for relief did not fall within one of the recognized exceptions to the rule announced in *Younger* v. *Harris,* 401 U. S. 37 (1971). Will-

hauck later moved for a stay of the District Court order in the Court of Appeals for the First Circuit pending appeal. The Court of Appeals denied this motion on August 13, 1980, assuming without deciding that the District Court's order was "in reality" an order denying a preliminary injunction.

Willhauck now applies to me as Circuit Justice for a stay pending resolution of his appeal to the Court of Appeals for the First Circuit. The cases against him appear to be proceeding simultaneously in Suffolk Superior and Quincy District Courts. He was scheduled for "status" hearings in the two courts on August 14, or August 14 and 15, 1980. Applicant advises me that both cases now have been continued until September 12, 1980.

In my view, Willhauck has a potentially substantial double jeopardy claim, if not on the face of the Massachusetts Rule or as applied to him, then simply on the possibility the State may conduct simultaneous prosecutions against him in two separate courts on the same offenses. Whether the *Younger* doctrine would bar federal intervention in a continuing state criminal proceeding in this simultaneous prosecution context or, for that matter, in a case where the claim of double jeopardy is made after jeopardy has attached in the first proceeding, seems to me an open question. The principles of *Abney* v. *United States,* 431 U. S. 651 (1977), and *Harris* v. *Washington,* 404 U. S. 55 (1971) (*per curiam*), suggest that an exception to *Younger* for double jeopardy claims may be appropriate, at least when all state remedies have been exhausted.

Nevertheless, I do not find that applicant has alleged sufficient irreparable harm for me to consider whether there is a reasonable probability that four Justices would consider the above issue sufficiently meritorious to grant certiorari, should the merits of the case eventually come before us. Neither trial has begun and no jury has been empaneled. Until a jury is empaneled and sworn, *Crist* v. *Bretz,* 437 U. S. 28, 38

(1978), or, in a bench trial, until the first witness is sworn, *id.*, at 37, n. 15 (federal rule); *Serfass* v. *United States*, 420 U. S. 377, 388 (1975) (federal rule), jeopardy does not attach. Accordingly, applicant's constitutional claim is premature. Of course, once jeopardy does attach in one of the trials, applicant should be able to make his claim before the second trial judge, at which time the courts can give due consideration to his claim.

Therefore, I deny the application for a stay pending appeal.

CERTAIN NAMED AND UNNAMED NON-CITIZEN CHILDREN AND THEIR PARENTS *v.* TEXAS

ON APPLICATION TO VACATE STAY

No. A-179. Decided September 4, 1980

An application to vacate the Court of Appeals' stay, pending appeal, of the District Court's injunction prohibiting Texas education officials from denying free education to any child, otherwise eligible, due to the child's immigration status—the District Court having held that a Texas statute which prohibits use of state funds to educate alien children who are not "legally admitted" to the United States, violates the Equal Protection Clause of the Fourteenth Amendment—is granted. This order is without prejudice to a school district's ability to apply for a stay of the District Court's injunction, which stay would be justified if the district can demonstrate that, because of the number of undocumented alien children within its jurisdiction or because of exceptionally limited resources, the injunction's operation would severely hamper the provision of education to all its students during the coming year. Because of the significance of the District Court's constitutional ruling, it appears, even before decision by the Court of Appeals, that there is a reasonable probability that this Court will grant certiorari or note probable jurisdiction, and it is not unreasonable to believe that five Members of the Court may agree with the District Court's decision. Also, the balance of harms weighs heavily on the side of undocumented alien children, who will suffer irreparable harm from denial of public education if the stay is not vacated.

MR. JUSTICE POWELL, Circuit Justice.

This is an application to vacate an order of the United States Court of Appeals for the Fifth Circuit, staying, pending appeal, an injunction entered by the United States District Court for the Southern District of Texas. The District Court held that § 21.031 of the Texas Education Code (Supp. 1980), which prohibits the use of state funds to educate alien children who are not "legally admitted" to the United States, violates the Equal Protection Clause of the Fourteenth

Amendment.[1] The court enjoined state education officials from denying free public education to any child, otherwise eligible, due to the child's immigration status. The District Court denied the State of Texas' motion to stay its injunction, because the court found that a stay "would substantially harm the plaintiffs and would not serve the public interest." The Court of Appeals, upon subsequent motion of the State, stayed the injunction pending appeal without opinion.

Plaintiffs below, and applicants here, are a class of school-age, "undocumented" alien children, who have been denied a free public education by the operation of § 21.031, and their parents.[2] Precise calculation of the number of children in Texas encompassed by this description is impossible. The State estimates that there are 120,000 such children, but the District Court rejected this figure as "untenable" and accepted a more modest estimate of 20,000 children. These undocumented children have not been legally admitted to the United States through established channels of immigration. None, however, is presently the subject of deportation proceedings, and many, the District Court found, are not deportable under federal immigration laws. The District Court concluded that "the great majority of the undocumented children . . . are or will become permanent residents of this country."

This case came before the District Court as a result of a consolidation, by the Judicial Panel on Multidistrict Litigation, of lawsuits filed in all federal judicial districts in Texas against the State and state education officials challenging the validity of § 21.031. No other State has a similar statute. The court found that § 21.031 effectively denied an educa-

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[1] Another Federal District Court in Texas had previously held that § 21.031 violates the Equal Protection Clause as applied to the Tyler Independent School District. *Doe* v. *Plyler*, 458 F. Supp. 569 (ED Tex. 1978), appeal pending, No. 78-3311 (CA5).

[2] The United States intervened on the side of plaintiffs below and has filed here a statement in support of the application to vacate the stay.

tion to the plaintiff children. Although they could attend school upon payment of tuition, the court further found that such payment is beyond the means of their families. It held that the Equal Protection Clause applies to all people residing in the United States, including unlawful aliens. It recognized that no precedent of this Court directly supports this ruling, and, therefore, relied on analogous rulings of this Court, see, *e. g., Mathews* v. *Diaz,* 426 U. S. 67, 77 (1976) (Due Process Clause applies to aliens unlawfully residing in the United States), and precedents in lower courts, see *Bolanos* v. *Kiley,* 509 F. 2d 1023, 1025 (CA2 1975) (dictum). In addition, the court found guidance in the language of the Equal Protection Clause, which extends protection to *persons* within a State's jurisdiction, and ruled that a state law which purports to act on any person residing within the State is subject to scrutiny under the Clause.

The District Court then determined that the Texas statute was subject to strict scrutiny because it impaired a fundamental right of access to existing public education. It sought to distinguish *San Antonio School District* v. *Rodriguez,* 411 U. S. 1 (1973), which held that the Constitution does not protect a right to education, at least beyond training in the basic skills necessary for the exercise of other fundamental rights such as voting and free expression. *Id.,* at 29–39. The court observed that § 21.031 established a complete bar to any education for the plaintiff children, and thus raised the question reserved in *Rodriguez* of whether there is a fundamental right under the Constitution to minimal education. It stressed that an affirmative answer to this question would not involve the federal courts in overseeing the quality of education offered by the States, an involvement condemned in *Rodriguez.* Applying strict scrutiny, the court held the statute violative of the Equal Protection Clause because it was not justified by a compelling state interest. While not explicitly so holding, the court also implied that it would hold the statute unconstitutional even if it applied rational-basis

scrutiny or merely required that the law be substantially related to an important state interest.

I

"The power of a Circuit Justice to dissolve a stay is well settled." *New York* v. *Kleppe*, 429 U. S. 1307, 1310 (1976) (MARSHALL, J., in chambers). See *Meredith* v. *Fair*, 83 S. Ct. 10, 9 L. Ed. 2d 43 (1962) (Black, J., in chambers). The well-established principles that guide a Circuit Justice in considering an application to stay a judgment entered below are equally applicable when considering an application to vacate a stay.

> "[T]here must be a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; there must be a significant possibility of reversal of the lower court's decision; and there must be a likelihood that irreparable harm will result if that decision is not stayed." *Times-Picayune Publishing Corp.* v. *Schulingkamp*, 419 U. S. 1301, 1305 (1974) (POWELL, J., in chambers).

When an application to vacate a stay is considered, this formulation must be modified, of course: there must be a significant possibility that a majority of the Court eventually will agree with the District Court's decision.

Respect for the judgment of the Court of Appeals dictates that the power to dissolve its stay, entered prior to adjudication of the merits, be exercised with restraint. A Circuit Justice should not disturb, "except upon the weightiest considerations, interim determinations of the Court of Appeals in matters pending before it." *O'Rourke* v. *Levine*, 80 S. Ct. 623, 624, 4 L. Ed. 2d 615, 616 (1960) (Harlan, J., in chambers). The reasons supporting this reluctance to overturn interim orders are plain: when a court of appeals has not yet ruled on the merits of a controversy, the vacation of an interim

order invades the normal responsibility of that court to provide for the orderly disposition of cases on its docket. Unless there is a reasonable probability that the case will eventually come before this Court for plenary consideration, a Circuit Justice's interference with an interim order of a court of appeals cannot be justified solely because he disagrees about the harm a party may suffer. The applicants, therefore, bear an augmented burden of showing both that the failure to vacate the stay probably will cause them irreparable harm and that the Court eventually either will grant certiorari or note probable jurisdiction.

This is the exceptional case where it appears, even before decision by the Court of Appeals, that there is a reasonable probability that this Court will grant certiorari or note probable jurisdiction. The District Court's holding that the Equal Protection Clause applied to unlawful aliens raises a difficult question of constitutional significance. It also involves a pressing national problem: the number of unlawful aliens residing in our country has risen dramatically. In more immediate terms, the case presents a challenge to the administration of Texas public schools of importance to the State's residents. The decision of the Court of Appeals may resolve satisfactorily the immediate question. But the overarching question of the application of the Equal Protection Clause to unlawful aliens appears likely to remain.

It is more difficult to say whether there is a significant probability that a majority of this Court eventually will agree with the District Court's decision. *Mathews* v. *Diaz* upheld the power of the Federal Government to make distinctions between classes of aliens in the provision of Medicare benefits against a claim that the classification violated the Due Process Clause. The Court's resolution of the case rested, however, on Congress' necessarily broad power over all aspects of immigration and naturalization, and we specifically stated that "equal protection analysis . . . involves significantly different considerations because it concerns the

relationship between aliens and the States rather than between aliens and the Federal Government." 426 U. S., at 84–85. The District Court relied explicitly on this distinction in holding that the Equal Protection Clause applies to the State's treatment of unlawful aliens. Likewise, as mentioned above, the court relied on a reservation in *San Antonio School District* v. *Rodriguez, supra,* to find room for its holding that there is a constitutional right to a minimal level of free public education. Thus, while not finding direct support in our precedents, the court concluded that these holdings are consistent with established constitutional principles.

Although the question is close, it is not unreasonable to believe that five Members of the Court may agree with the decision of the District Court. This is not to suggest that I have reached any decision on the merits of this case or that I think it more probable than not that we will agree with the District Court. Rather, it recognizes that the court's decision is reasoned, that it presents novel and important issues, and is supported by considerations that may be persuasive to the Court of Appeals or to this Court. Further, it may be possible to accept the District Court's decision without fully embracing the full sweep of its analysis.

II

Applicants also have presented convincing arguments that they will suffer irreparable harm if the stay is not vacated. The District Court, having before it the voluminous evidence presented during trial, explicitly relied on the probable harm to plaintiffs in denying the State's motion to stay the injunction. Undocumented alien children have not been able to attend Texas public schools since the challenged statute was enacted in 1975. The harm caused these children by lack of education needs little elucidation. Not only are the children consigned to ignorance and illiteracy; they also are denied the benefits of association in the classroom with students and teachers of diverse backgrounds. Instead, most

of the children remain idle, or are subjected prematurely to physical toil, conditions that may lead to emotional and behavioral problems. These observations appear to be supported by findings about the condition of the children in question.

The State argues that the stay works minimal harm on applicants because they have been out of school for five years. Absence for the additional year needed to settle this controversy will not add further irreparable harm. It seems to me that this argument is meritless on its face. Expert testimony presented at trial indicates that delay in entering school will tend to exacerbate the deprivations already suffered and mitigate the efficacy of whatever relief eventually may be deemed appropriate.

The State does not argue that it or the Texas Education Agency will be harmed directly if the stay is vacated. The primary involvement of the State and the Agency is to provide state funds to local, independent school districts. See generally *San Antonio School District* v. *Rodriguez*, 411 U. S., at 6–17. Nor does the State allege that it will be compelled to furnish additional funds for the upcoming school year. Rather, it submits that its total expenditure will be "diluted" by $70 per pupil by the addition of the new students. Certainly, this decrease in per pupil expenditure from a current figure of $1,200 is not *de minimis*. But the core of the State's argument is that the stay was necessary to avoid irreparable harm to the independent school districts. It contends that the influx of new Spanish-speaking students will strain the abilities of the districts to provide bilingual education, and thus cause the districts to violate existing or pending rules governing the provision of bilingual education. These legal difficulties seem speculative.

Perhaps the greater danger is that the quality of education in some districts would suffer during the coming year. The admission of numbers of illiterate, solely Spanish-speaking

children may tax the resources of a school district. The affidavits submitted to the Court of Appeals document the possibility of severe stress only in the Houston Independent School District.[3] Affidavits submitted by the applicants indicate, however, that many school districts are prepared to accept the undocumented children and do not foresee that their assimilation will unduly strain their abilities to provide a customary education to all their pupils.

Under these circumstances, I conclude that the balance of harms weighs heavily on the side of the children, certainly in those school districts where the ability of the local schools to provide education will not be threatened. I therefore will vacate the stay instituted by the Court of Appeals, which applies to all school districts within Texas. This order shall be without prejudice to the ability of an individual school district, or the State on its behalf, to apply for a stay of the District Court's injunction. If the district can demonstrate that, because of the number of undocumented alien children within its jurisdiction or because of exceptionally limited resources, the operation of the injunction would severely hamper the provision of education to all its students during the coming year, the granting of a stay would be justified.[4]

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[3] The State argues here that serious difficulties can be expected in the Dallas and Brownsville school districts as well.

[4] Applicants indicate that the District Court already has expressed a willingness to consider staying its injunction in those school districts that can demonstrate exceptional difficulty in admitting the children this fall.

MOORE ET AL. v. BROWN ET AL.

ON APPLICATION FOR STAY

No. A-195. Decided September 5, 1980

An application to stay the District Court's preliminary injunction, which ordered Alabama election officials to conduct district rather than at-large voting to fill vacancies on the Mobile County School Board, is denied. The District Court may have erred in entering such injunction without hearing further evidence or making fresh findings of fact after its prior decision that the at-large voting system violated the Fourteenth Amendment by diluting the effectiveness of black votes had been vacated and the case had been remanded for further proceedings (see *Williams* v. *Brown*, 446 U. S. 236). But in the present posture of the case the unacceptable alternative to allowing the District Court's preliminary injunction to stand would be to enjoin the coming election entirely and to allow incumbents whose terms have expired to remain in office until an at-large election can be held.

MR. JUSTICE POWELL, Circuit Justice.

The applicants, the Mobile County School Board and its Commissioners, request that I stay a preliminary injunction entered by the District Court in another phase of the litigation over the composition of the Board The injunction ordered Alabama election officials to conduct district rather than at-large voting to fill School Board vacancies.

This Term, in *City of Mobile* v. *Bolden*, 446 U. S. 55 (1980), this Court considered a constitutional challenge to Mobile's system of at-large elections for City Commissioners. MR. JUSTICE STEWART wrote for a plurality of four Justices and concluded that the plaintiffs were required to prove a racially discriminatory *purpose* to show that Mobile's at-large voting system violated the Fourteenth Amendment. The District Court, by contrast, had thought it sufficient to show that the existing election system had the *effect* of impeding the election of blacks. The Court of Appeals for the Fifth Cir-

cuit had affirmed.[1] Because we disagreed with the analysis of the District Court and Court of Appeals, we reversed and remanded for further proceedings.

Bolden's companion case, *Williams* v. *Brown*, 446 U. S. 236 (1980) (*Brown I*), involved at-large elections for the School Board. In that case as well, the District Court and Fifth Circuit had held unconstitutional a system of at-large elections, relying on analysis similar to that used by them in *Bolden*. We therefore vacated the judgment and remanded for further proceedings in light of *Bolden*. Approximately 11 weeks later, the Court of Appeals in turn vacated the decision of the District Court and remanded the case to it.

I

The Alabama Legislature created the Mobile County Board of School Commissioners in 1826. Commissioners then were elected at large. That practice has continued to the present day.[2] Under current law, the Board is composed of five persons who serve staggered 6-year terms. The at-large election system contains no obstacle to ballot access by blacks. In *Brown I*, however, the District Court nevertheless concluded that the system of at-large elections "diluted" the effectiveness of black votes. The court ordered a phased-in system of district elections to increase the likelihood that blacks would be elected to the Board. Under the District Court's plan, Mobile County was divided into five districts. Two of the district seats were filled in elections in 1978.[3] Another dis-

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[1] Although recognizing that a discriminatory purpose had to be proved, the Court of Appeals had thought that the "aggregate" of discriminatory effects was sufficient to establish a discriminatory purpose.

[2] In 1975, after this suit was filed, the state legislature passed a local Act restructuring the Board into five single-member districts. A state court subsequently held that the Act violated the Alabama Constitution because of a defect in its publication.

[3] On August 29, 1978, I denied an application to stay the District Court's plan pending review by this Court.

trict seat was scheduled to be filled in an election this fall. The two remaining district seats were to be filled in 1982.

Under the District Court's original plan, however, the introduction of district seats did not necessarily correspond to the expiration of incumbents' terms of office. Only one at-large seat expired in 1978, but two new district seats were added that year.[4] Thus, since 1978 the Board has operated with six members rather than five. The District Court therefore ordered one of the at-large Commissioners whose term is to expire in 1980 to act as the nonvoting "chairman" of the Board during the remainder of his term.[5]

In sum, at the time we vacated the District Court's original plan, the Board contained six members, two of whom had been elected from districts pursuant to the plan. Two at-large seats were due to expire this fall, and one new district member would be elected. Thus, the coming election would have resulted in a return to a five-member Board, three of whom would have been elected from districts.

II

Controversy has followed our decision vacating the District Court's original district election plan. At least some of the at-large Commissioners thought that our decision in effect invalidated the election of the two district Commissioners chosen in 1978. Accordingly, some persons refused to acknowledge the legitimacy of the votes of the district members. Under these circumstances, the Board is reported to have been paralyzed since April.

The District Court reassumed jurisdiction over the case on July 11, 1980. Two primary issues confronted the court. First, as I have noted, substantial dispute had arisen over the legitimacy of the two 1978 district elections. Board members disagreed with one another, not only substantively, but also

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[4] A black was elected to each district seat in 1978.

[5] The nonvoting "chairman" did have the power to break ties.

on the threshold question of whether two of their number were even official Board members at all. In sum, the Board could not function. The District Court resolved the deadlock by holding that the 1978 winners remained the official Board members.

The second issue concerned future elections. Under the District Court's original plan, one district election was to have been held in 1980, and two at-large seats were to expire. The district primary was scheduled for Tuesday, September 2, and the general election for November 4. Without taking evidence or making findings of fact, the District Court on July 25 entered a preliminary injunction that would, as the court characterized it, "preserv[e] the status quo pending a decision on remand." The injunction reinstated the district election plan that we had vacated in April. The injunction was appropriate, according to the District Court, because plaintiffs would be irreparably harmed if the at-large election were held. Holding the district election, by contrast, would not impose significant harm to defendants or to the public interest. Finally, the court thought that the plaintiffs had "a substantial likelihood" of eventually prevailing on the merits.

Defendants—applicants here—sought a stay of the injunction pending appeal. Specifically, they asked that the District Court enjoin the district election scheduled for this fall, and permit the two at-large members now on the Board to continue to serve past the normal expiration of their terms. The District Court denied the requested stay on August 19. Defendants next asked the Fifth Circuit to stay the preliminary injunction. On August 26, that court denied the stay without opinion. Late Thursday, August 28, defendants applied to me to stay the preliminary injunction.

III

I have serious concerns about the process and reasoning underlying the District Court's entry of a preliminary injunction. The District Court and the Court of Appeals in *Brown*

I had invalidated the at-large election law and imposed a system of district elections. We vacated their judgment, and remanded the case for further proceedings. On remand, the District Court purportedly acted to preserve the status quo *pendente lite*, but did so by reinstating its own election plan that we had vacated. After our remand, I would have thought that the slate was wiped clean until there had been further evidence, or at least fresh findings of fact. Until then, the status quo was the presumptively valid election system provided by Alabama law—not the judge-made election plan that we had vacated.

I also was troubled by two additional elements of the District Court's analysis. First, it concluded that the balance of harms heavily favored entering the preliminary injunction. The court seemed to perceive little or no harm to the defendants, and to the public interest, resulting from reinstatement of the judge-created election plan. The court's injunction, however, imposes on Mobile a method of selecting its School Board members that had not been enacted by state or local elected representatives. While the preliminary injunction is in effect, district elections will be held. These elections may produce—indeed, the District Court intended that they produce—Commissioners who would not have been elected under the longstanding system of at-large elections. As MR. JUSTICE STEVENS observed, "the responsibility for drawing political boundaries is generally committed to the legislative process." *City of Mobile* v. *Bolden*, 446 U. S., at 91 (STEVENS, J., concurring). The District Court appeared to ignore the fact that altering the voting system established by Alabama law more than a century ago, and since maintained, is a substantial intrusion on local self-government.

Second, the court concluded that plaintiffs had "a substantial likelihood" of success on the merits. Yet, the court made no finding of fact, nor indeed alluded to any fact known to it, to justify that conclusion. Compare Fed. Rule Civ. Proc. 52 (a) ("in granting or refusing interlocutory injunctions the

court shall . . . set forth the findings of fact and conclusions of law which constitute the grounds of its action"). Nor did the District Court explain how the plaintiffs would prove a purposeful violation of constitutional rights as required by the plurality's decision in *Bolden*.[6] Indeed, although we had directed that proceedings on remand be conducted in light of this Court's decision in *Bolden*, our opinion in that case was not mentioned in the District Court's opinion.

IV

It may well be, for the reasons stated above, that the District Court erred in entering the preliminary injunction.[7] The court at least offered unsatisfactory reasons for its decision. Yet, I am reluctant to stay the effect of the injunction. The parties agree that, at this late date, if an election is to occur this fall at all, it must be the district election ordered by the District Court.[8] The applicants therefore urge me to grant a stay that would prevent holding any election at all, and to keep in office, until an at-large election can be held, the incumbents whose terms are due to expire. In *Times-Picayune*

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[6] Moreover, in *Brown I*, the District Court itself had recognized that, in general, it is "a difficult task" to prove "overt racial considerations in the actions of government officials." App., O. T. 1979, No. 78-357, p. 30a.

[7] This opinion is not intended to convey any doubt about the legitimacy of the status of the two Commissioners elected in 1978 pursuant to the District Court's then-operative district election plan. The applicants do not challenge that aspect of the District Court's order.

[8] As often happens (and for reasons that rarely are explained) emergency applications with respect to elections reach us on the eve of the weekend before the election. This places the Court, or the Circuit Justice (as is usually the case), in the unwelcome position of ruling under serious time constraints on the validity of an election that has been planned for months. This is an example. The application was presented to me less than five full days (including the Labor Day weekend) before the scheduled primary election. Had proceedings on remand moved more expeditiously, it might have been possible to hold this fall the at-large elections envisioned by Alabama law.

Publishing Corp. v. *Schulingkamp*, 419 U. S. 1301, 1305 (1974) (POWELL, J., in chambers), I summarized the principles that normally guide a Circuit Justice in considering a request for a stay. Although applicants here forcefully argue that the *Times-Picayune* requirements are fully met, I have concluded not to stay the injunction. A Circuit Justice should exercise restraint before staying an interim order entered by a District Court and affirmed by a Court of Appeals.[9] This caution seems especially pertinent where a scheduled election would be enjoined. Thus, in the posture in which this case now comes to me—and in light of the unacceptable alternative of enjoining the fall election and retaining in office incumbents whose terms have expired—I decline to stay the preliminary injunction.[10]

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[9] Just recently, I commented:

"A Circuit Justice should not disturb, 'except upon the weightiest considerations, interim determinations of the Court of Appeals in matters pending before it.' *O'Rourke* v. *Levine*, 80 S. Ct. 623, 624, 4 L. Ed. 2d 615, 616 (1960) (Harlan, J., in chambers). The reasons supporting this reluctance to overturn interim orders are plain: when a court of appeals has not yet ruled on the merits of a controversy, the vacation of an interim order invades the normal responsibility of that court to provide for orderly disposition of cases on its docket." *Certain Named and Unnamed Noncitizen Children* v. *Texas*, *ante*, at 1330–1331 (in chambers).

[10] Because of the time constraints that I have mentioned, see n. 8, *supra*, I issued an order denying the stay on Friday, August 29, reserving the right subsequently to file this opinion.

GREGORY-PORTLAND INDEPENDENT SCHOOL DISTRICT *v.* UNITED STATES ET AL.

ON REAPPLICATION FOR STAY

No. A-203. Decided September 8, 1980

A reapplication to stay, pending appeal to the Court of Appeals, the District Court's decision ordering the busing of students within the applicant school district, is denied.

MR. JUSTICE REHNQUIST.

Applicants have requested me to grant a stay pending appeal to the Court of Appeals for the Fifth Circuit of a decision by the District Court ordering the busing of students within the applicant district. The application, as was proper, was first submitted to MR. JUSTICE POWELL, the Circuit Justice for the Fifth Circuit, and denied by him. It has now been resubmitted to me. As indicated by the cases discussed in the application for stay, *e. g., Columbus Board of Education* v. *Penick*, 439 U. S. 1348 (1978), this Court has been divided for a number of years as to the constitutional propriety of busing orders. If I were casting my vote as a single Justice of this Court, rather than as an individual Justice empowered to grant a stay, I would in all likelihood not only vote to grant certiorari in the case if the Court of Appeals for the Fifth Circuit affirmed it, but would also give the most serious consideration to voting on the merits to reverse that decision. However, as has been frequently pointed out, that is not the role of an individual or Circuit Justice in a case such as this. That obligation is to determine whether four Justices would vote to grant certiorari, to balance the so-called "stay equities," and to give some consideration as to predicting the final outcome of the case in this Court.

For these reasons, and because MR. JUSTICE POWELL is the Circuit Justice for the Fifth Circuit, and more familiar with the situation of any case in it than I could be, I am unwilling to "second-guess" his own denial of the application in this case. I accordingly deny the application for a stay.

BOARD OF EDUCATION OF CITY OF LOS ANGELES v. SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES (MARY ELLEN CRAWFORD ET AL., REAL PARTIES IN INTEREST)

ON APPLICATION FOR STAY

No. A-214. Decided September 12, 1980

An application to stay, pending consideration of a petition for certiorari, the California Supreme Court's order which left standing a lower court's order requiring mandatory reassignment and busing of upwards of 80,000 first through ninth grade students attending approximately 165 elementary and junior high schools in the Los Angeles school system, is denied. Although this Court would probably have jurisdiction over the present action should a petition for certiorari be filed by the applicant Board, nevertheless it is unlikely that four Justices of this Court would vote to grant certiorari in this case, and a stay granted less than a week before the scheduled opening of school, when school officials and state courts are still trying to put in place the final pieces of a desegregation plan, would not be a proper exercise of the function of a Circuit Justice.

MR. JUSTICE REHNQUIST, Circuit Justice.

The Board of Education of the Los Angeles Unified School District requests that I stay an order of the California Supreme Court, dated August 27, 1980, which left standing an order of the Superior Court of the State of California for Los Angeles County requiring mandatory reassignment of between 80,000 and 100,000 first through ninth grade students attending approximately 165 elementary and junior high schools pending consideration by this Court of its petition for certiorari. On July 7, 1980, the Superior Court entered its final remedial order in this action, finding that the Board had participated in racial discriminatory practices which led to the segregation in the school district and requiring the Board to implement a mandatory busing plan pursuant to guidelines contained in the order. The Board applied to the

Court of Appeal of California to stay the Superior Court's order and, on August 6, 1980, that court partially stayed the order insofar as it relied on a definition of a desegregated school as one where there is a plurality of white students not in excess of 5% over the next largest ethnic group in the school and insofar as it required mandatory busing of students currently attending substantially desegregated schools. The Court of Appeal, however, in all other respects denied the Board's petition for a stay, thus precipitating the current situation where upwards of 80,000 pupils will be bused at the start of school on Monday, September 16, 1980. The court also accelerated the date of oral argument so that the appeal could be heard in January 1981. On August 27, 1980, the California Supreme Court denied, without opinion, the Board's application for a writ of mandamus and/or prohibition to stay in its entirety the order of the Superior Court and recommended that the Court of Appeal accelerate oral argument even further. The California Supreme Court also denied a motion by the original plaintiffs in this action, minority schoolchildren, to vacate the partial stay entered by the Court of Appeal.

This case comes to me after extensive and complicated litigation. Briefly stated, in 1970, the Superior Court issued an opinion finding that the segregation in the school district was *de jure* in nature and that the Board had taken "affirmative" steps which it "knew or should have known" would perpetuate segregation in the district. The specific items detailed in the court's findings included the Board's adoption of (1) a neighborhood school policy, (2) an "open transfer" policy, (3) a "feeder school" policy, and (4) "mandatory attendance areas." In *Crawford* v. *Board of Education*, 17 Cal. 3d 280, 551 P. 2d 28 (1976), the California Supreme Court accepted the finding of *de jure* segregation, but did not base its affirmance of the Superior Court's order of mandatory busing on that ground, holding instead that the California Con-

stitution permitted busing to be ordered regardless of the cause of segregation. On September 8, 1978, I denied a stay for this reason. *Bustop, Inc.* v. *Los Angeles Board of Education,* 439 U. S. 1380 (in chambers).

During remand, the California Constitution was amended by way of a state referendum, Proposition I, adopted in November 1979 to eliminate state independent grounds as a basis for court-ordered busing, and the Board contended that the Superior Court's 10-year-old findings did not justify a finding of a federal constitutional violation or the system-wide remedy of mandatory assignment of children by race. In its July 7, 1980, order, the Superior Court apparently rejected that argument, reasoning that the California Supreme Court, in *Crawford,* affirmed the finding of *de jure* segregation. Contrary to the assertions of the respondents, it seems to me that this application necessarily turns on a question of federal constitutional law, as other courts have held. Indeed, I find myself unable to articulate the point better than Judge Cohn of the Superior Court of San Mateo County in *Tinsley* v. *Palo Alto Unified School District,* No. 206010 (July 10, 1980):

> "Turning to the argument that Proposition I violates the 14th Amendment of the U. S. Constitution, inasmuch as it merely limits California courts to what the federal courts can do under the federal constitution, it is indeed difficult to accept the contention that by limiting a state court's jurisdiction to that of the federal courts, there is somehow a violation of [the] federal constitution."

There is an initial question as to whether this Court would have jurisdiction over the present action if a petition for writ of certiorari were filed. In *Fisher* v. *District Court,* 424 U. S. 382, 385, n. 7 (1976), this Court stated:

> "The writ of supervisory control issued by the Montana Supreme Court is a final judgment within our jurisdic-

tion under 28 U. S. C. § 1257 (3). It is available only in original proceedings of the Montana Supreme Court . . . and although it may issue in a broad range of circumstances, it is not equivalent to an appeal. . . . A judgment that terminates original proceedings in a state appellate court, in which the only issue decided concerns the jurisdiction of a lower state court, is final, even if further proceedings are to be had in the lower court. *Madruga* v. *Superior Court,* 346 U. S. 556, 557 n. 1 (1954). . . ."

In this action, the Board's petition for a writ of mandamus and/or prohibition was a distinct lawsuit which was fully and finally determined by the California Supreme Court's judgment of August 27, 1980. I am thus persuaded that this Court would in all probability have jurisdiction over the present action should a petition for certiorari be filed by the Board.

There is no question here as to the standing of the Board, since it is a party to an action which has been required by the Superior Court (respondent) to mandatorily reassign an extraordinarily large number of students in what the Board claims is the largest school district in the Nation. There might be some question of "standing" if the petitioners were a group of whites, "Anglos," or whatever the current terminology used to describe them is, for if the latest 1979 school census submitted by the Board in its application is to be credited, they themselves would be a "minority." That census indicates that in kindergarten and the first three grades of the school affected by the busing order, students classified as "white" ranged from 17.9% to 21.9% of the school population, those classified as "black" ranged from 18.3% to 22.1%, and those classified as "Hispanic" ranged from 57.8% to 48.9%. Application, at 18 (compiled from trial exhibit 11B).

As seems typical with school cases, applications for stay are presented to a Circuit Justice of this Court close to the

opening of school. It appears that the process leading to the formulation of a mandatory busing plan, and the inevitable challenge to it, takes time which apparently is devoted in sufficient amount only as the deadline of school opening approaches. And as has been noted before in many Circuit Justices opinions, the Circuit Justice faces a difficult problem in acting on a stay. The Justice is not to determine how he would vote on the merits, but rather forecast whether four Justices would vote to grant certiorari when the petition is presented, predict the probable outcome of the case if certiorari were granted, and balance the traditional stay equities. All of this requires that a Justice cultivate some skill in the reading of tea leaves as well as in the process of legal reasoning.

The thrust of the Board's petition is that the Superior Court, by relying on the 1970 finding of *de jure* segregation, erroneously found that the Board had violated the Fourteenth Amendment. The Board contends that the Superior Court was required to conduct a hearing as to the existence of a federal constitutional violation rather than rely on 10-year-old findings, since the case law as to what constitutes *de jure* segregation has changed in those years. Were this case presently before the entire Court on certiorari, I would in all probability vote to grant certiorari, since it seems to me that on the basis of the application the findings are even less supportive of a constitutional violation than were those upheld in *Columbus Board of Education* v. *Penick,* 443 U. S. 449 (1979), and *Dayton Board of Education* v. *Brinkman,* 443 U. S. 526 (1979). But that is not the question before a Circuit Justice, and I do not think I in good conscience could say that four Justices of this Court would vote to grant certiorari in this case. One factor militating against the granting of certiorari here is that the Court of Appeal has recognized that the significance of the *Crawford* court's "affirmance" of the finding of *de jure* segregation is ambiguous and it has indicated that it will carefully review the Superior Court's find-

ings of a constitutional violation on review this fall or early next year.

Because the merits of the Board's argument are not free from doubt, the proper disposition of this application for a stay turns on the equities. The Board's primary contention here is that "white flight," which all parties concede has taken place in the school district, will accelerate if this plan is put into effect. Not only will increased "white flight" injure the Board in financial terms, such as in reduced pupil reimbursement from the State, but a reduction in the number of white students in the district will defeat any hope of further desegregating the schools in the district. Indeed, the Superior Court found that over the past two years, when a mandatory busing plan has been in effect, the district has lost 50,000 white students and that 25,000 of those students withdrew from the district to avoid mandatory reassignment. Because projections indicated that the school district in 1987 will consist of only 14% white students, the Superior Court asserted that its task was to achieve the optimal use of white students in the schools so that the maximum number of schools may be desegregated.

I find this analysis somewhat troublesome, since it puts "white" students much in the position of textbooks, visual aids, and the like—an element that every good school should have. And it appears clear that this Court, sooner or later, will have to confront the issue of "white flight" by whatever term it is denominated, *Estes* v. *Metropolitan Branches of Dallas NAACP*, 444 U. S. 437, 438 (1980) (POWELL, J., dissenting from the dismissal of a writ of certiorari as improvidently granted). As MR. JUSTICE POWELL has observed: "A desegregation remedy that does not take account of the social and educational consequences of extensive student transportation can be neither fair nor effective." *Id.*, at 452.

The Court of Appeal here has partially mitigated the potential harm to the Board resulting from "white flight" by rejecting the Superior Court's rigid definition of a desegre-

gated school as one in which there is a plurality of white pupils not in excess of 5% over the next largest ethnic group in the school and by prohibiting mandatory reassignment of students to or from a school which is substantially desegregated. Nonetheless, upwards of 80,000 students will still be bused, although even with school to begin on September 16th it appears from the Board's own application to this Court that the "exact number and identity of all participating schools have not been finalized." I think that a stay granted less than a week before the scheduled opening of school, when school officials and state courts are still trying to put in place the final pieces of a plan, would not be a proper exercise of my function as a Circuit Justice, even though were I voting on the merits of a petition for certiorari challenging the plan I would, as presently advised, feel differently. The application for a stay is accordingly

Denied.

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Official Records
of
The Supreme Court

October 6 Through December 9, 1980

Henry J. Lind
Reporter of Decisions

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, Chief Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM H. REHNQUIST, Associate Justice.
JOHN PAUL STEVENS, Associate Justice.

OFFICERS OF THE COURT

BENJAMIN R. CIVILETTI, Attorney General.
WADE H. McCREE, Jr., Solicitor General.
MICHAEL RODAK, Jr., Clerk.
HENRY C. LIND, Reporter of Decisions.
ALFRED WONG, Marshal.
ROGER F. JACOBS, Librarian.

SUPREME COURT OF THE UNITED STATES

Allotment of Justices

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, *viz.:*

For the District of Columbia Circuit, Warren E. Burger, Chief Justice.

For the First Circuit, William J. Brennan, Jr., Associate Justice.

For the Second Circuit, Thurgood Marshall, Associate Justice.

For the Third Circuit, William J. Brennan, Jr., Associate Justice.

For the Fourth Circuit, Warren E. Burger, Chief Justice.

For the Fifth Circuit, Lewis F. Powell, Jr., Associate Justice.

For the Sixth Circuit, Potter Stewart, Associate Justice.

For the Seventh Circuit, John Paul Stevens, Associate Justice.

For the Eighth Circuit, Harry A. Blackmun, Associate Justice.

For the Ninth Circuit, William H. Rehnquist, Associate Justice.

For the Tenth Circuit, Byron R. White, Associate Justice.

December 19, 1975.

(For next previous allotment, see 404 U. S., p. v.)

PROCEEDINGS IN THE SUPREME COURT OF THE UNITED STATES IN MEMORY OF JUSTICE DOUGLAS*

TUESDAY, NOVEMBER 18, 1980

Present: CHIEF JUSTICE BURGER, JUSTICE BRENNAN, JUSTICE STEWART, JUSTICE WHITE, JUSTICE MARSHALL, JUSTICE BLACKMUN, JUSTICE POWELL, and JUSTICE STEVENS.

THE CHIEF JUSTICE said:

The Court is in special session this afternoon to receive the Resolutions of the Bar in the Supreme Court in tribute to the late Justice William O. Douglas.

Mr. Solicitor General McCree addressed the Court as follows:

MR. CHIEF JUSTICE, and may it please the Court:

The members of the Bar of the Supreme Court of the United States meet today to record our respect and admiration for William Orville Douglas, who served with the greatest distinction as Associate Justice for 36 years and 6 months, longer than any Justice in the history of the Court. In these Resolutions, we wish to memorialize his career and contributions to the law and the jurisprudence of this Court.

I

Justice Douglas was appointed to the Court by President

*Justice Douglas, who retired from active service on the Court effective November 12, 1975 (423 U. S. IV, VII), died in Washington, D. C., on January 19, 1980 (444 U. S., Part 2, pp. I, III). Services were held at the National Presbyterian Church, Washington, D. C., prior to his interment in Arlington National Cemetery on January 23, 1980.

Franklin D. Roosevelt to succeed Justice Brandeis. He was sworn in by Chief Justice Hughes on April 17, 1939. He was barely 40 years old.

Douglas' birthplace was the small town of Maine, Minnesota, but his early life, through college, was spent in the State of Washington. His family roots were in Vermont and Nova Scotia; his early life was ruggedly Western and storybook American. His father, a Presbyterian minister, died when Douglas was only five years old, and the young Douglas' life was marked by the hard work necessitated by inadequate family finances.

His college experience was at Whitman College in his home state. Despite the lack of funds, he made his way to Columbia University in New York City and managed to support himself by a variety of jobs. He received his LL. B. degree from Columbia in 1925, graduating second in his class. From 1925 to 1927, he was an associate in the prestigious New York law firm headed by Paul D. Cravath; and it is typical of Douglas that at the same time he was engaged in satisfying the relentless demands of that position, he was also teaching at Columbia Law School.

The brief period of law practice in the Cravath firm was not happy for Douglas; but his subsequent career, including his work as a Justice of this Court, provides evidence that it honed his skills at an early date and furnished a focus for his initial interests in the law. He soon resigned his position at Cravath's and went back to his native Yakima, Washington; but after a brief and unsatisfactory experiment in practicing small-town law, Douglas returned to New York City and in 1927 became an assistant professor on the Columbia Law School staff.

His field of interest was business law, reflecting the insecurities of his precarious economic background; but even in this apparently pedestrian area, he soon demonstrated that safe and familiar paths were not for him. Among his fellow faculty members were some restless men of remarkable intellectual power, originality and daring who were profoundly

dissatisfied with the conventional "trade-school" character of law school research and teaching. They demanded that research and teaching at the law school should be oriented with the materials of life; that they be grounded in the actual problems of society; and that the resources of other disciplines should be utilized in the study and formulation of the law. As Douglas describes the movement, the rebels were "dubbed the leaders of 'sociological jurisprudence.'" [1]

Douglas quickly allied himself with this group, and when in the spring of 1928, the President of Columbia designated a new Dean of the Law School who was unacceptable to them, Douglas, along with some of his colleagues, resigned from the faculty, and Douglas accepted an offer to join the faculty of the Yale Law School as assistant professor. The young Robert Hutchins had become Dean of that school and had commenced its revitalization along lines strikingly similar to those which had been advocated by the Columbia insurgents.

Douglas' career at Yale remained solidly rooted in business law—but with a vast difference from the conventional approach to the study and teaching of the subject. As he did throughout his working life—at the Securities and Exchange Commission and on this Court—he sought, first and last, to find the realities of problems and their social, economic and human impact. He was neither pro-business nor anti-business; neither pro-establishment nor anti-establishment. He sought the facts; he pursued reality; his guiding objective was to sharpen the tools of the law and the art of the lawyer so that they would relate to the real world, and to criticize and mold them so that they would serve their conceded purposes: fairness, honesty and responsiveness. To proceed from abstract principle to practice, from doctrine to decision, was anathema to the young professor.

His output was prodigious. With collaborators, he published a series of books completely reorganizing the teaching and study of business law. They included business as well

[1] Go East, Young Man, p. 160.

as legal materials, assembled and organized on a "functional" basis. He wrote and published scholarly articles and book reviews; he originated and pursued, with the collaboration of a sociologist, elaborate, detailed field investigations of business failures in a number of jurisdictions; in 1929–1932, he conducted a study of bankruptcies for the Yale Institute of Human Relations and the Department of Commerce; in his never-ending search for the materials of real life in his chosen field, he instituted a collaborative teaching and research program with the Harvard Business School.

It is interesting, in view of his later career, that Douglas' prodigious output and his intense activity during these years, including years of social and political ferment in the Nation, were substantially devoid of any indication of interest in professional matters or social problems outside of his chosen field of business affairs.

II

By 1933, Douglas' reputation as an innovative and brillant expert in the field of business was firmly established. It was inevitable, therefore, that in the early days of the New Deal he would receive a call to Washington. In 1934, at the request of SEC Chairman Joseph P. Kennedy, Douglas became Director of the SEC's study of reorganization and protective committees. In his hands, this study became a thorough inquest into the aftermath of large corporate failures. It furnished the dramatic foundation for Douglas' subsequent achievements at the SEC and established his reputation as a formidable and effective figure in Franklin Roosevelt's government.[2]

In January 1936, at age 37, he was appointed a Commissioner of the SEC. Promptly, in a number of speeches, he began to call for reforms in the securities markets and the investment banking community. In September 1937, he was appointed Chairman of the SEC, succeeding James Landis.

[2] See Securities and Exchange Commission, "Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees" (U. S. G. P. O., 1937–38).

He served in that post for 18 months, until his appointment as Associate Justice. Within a few weeks after assuming the chairmanship of the SEC, he launched his remarkable effort to reorganize the New York Stock Exchange, a reform which he regarded as the core requirement of raising the standards of the financial markets. He prosecuted the program with vigor, daring and astuteness. Aided by events, chief of which was the Richard Whitney scandal, Douglas achieved remarkable success.

In this struggle, as throughout his career, Douglas evidenced the profound influence of Justice Brandeis' philosophy, a philosophy which articulated conceptions that Douglas, as a small-town Westerner, found to be entirely congenial. His SEC career demonstrated Douglas' restless refusal to confine his work within established patterns which did not meet the rigorous standards that seemed to him to be called for; and it evidenced his independence, relentless courage and fierce dedication to achievement of the objectives that he formulated. He was not a follower; he regarded the existing state of affairs not as a prescription for comfortable continuity, but as a summons for improvement. In deciding upon objectives and plotting his course, he sought neither collaborators nor participants; rather, after cold and surgical analysis, he independently formulated his positions and struck out boldly to achieve his goal. The extraordinary fact, however, is that he coupled these highly individualistic traits with shrewd, practical sense which enabled him to achieve, to a remarkable degree, acceptance of his ideas and implementation of his programs. They were frequently programs which initially appeared impossibly visionary; but his political and practical acumen, coupled with his burning intensity and ability to enlist loyal support, enabled him to win a surprising degree of acceptance.

In his chosen field, Douglas was a superb technician. His practical experience was limited; but the cutting edge of his mind, his insistence upon the assembly of fact, fact, fact; and his extraordinary capacity for work, enabled him to master

the intricacies of corporate finance and securities trading and the dynamics and mechanics of business and finance. But to him, learning was not an invitation to acceptance; it was an avenue to questioning, to challenge, and a summons to reform practices and institutions to meet his stern standards of upright conduct and efficient result.

III

Douglas' great career as SEC Chairman ended when, in April 1939, he began his long career as an Associate Justice of this Court. There was little reason in his career to that date to anticipate that he would soon become a leader in the vindication of human rights. There was every reason to predict that he would become the Court's expert in cases involving business, and that, in this role, he would insist upon strict standards of probity, fairness and responsibility. He quickly demonstrated the latter.

During his first full term on the bench, he wrote for the Court in *Case* v. *Los Angeles Lumber Co.*, 308 U. S. 106 (1939), to hold that reorganization plans under the Bankruptcy Act for financially distressed corporations must comply with an "absolute priority" rule. Each successive class of creditors and stockholders, in the order and amount of their liquidation priorities, must be fully compensated in new securities of the reorganized corporation before anything could be given to a junior class. This was their contract among themselves and with the corporation; and fair dealing demanded that the contract be honored.[3]

In succeeding terms of the Court, Douglas wrote many opinions for the Court and a number of dissents in cases

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[3] In two cases in subsequent terms, Douglas characteristically buttressed the "absolute priority" rule by insisting upon standards for valuation which provided some assurance that the new distribution of shares and interests to stockholders and creditors would be realistic—that is, based upon prospective earnings. *Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510, 525–526 (1941); *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 318 U. S. 523, 540 (1943).

involving business affairs. In all of them, his technical proficiency is evident; but successively, his opinions in business cases demonstrated the widening of his horizons. More and more, his opinions for the Court and in dissent referred to the writings and philosophy of Justice Brandeis, and included not only an insistence upon fair dealing, strict performance of contract obligations, and a concern for the interests of investors, but also an evolving tendency to take into account more general public interests. For example, his landmark opinion for the Court in *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591 (1944), substantially adopted the Brandeis-Holmes view of ratemaking, and he insisted that "the fixing of 'just and reasonable' rates, involves a balancing of the investor and the consumer interests."

His memorable dissent in *United States* v. *Columbia Steel Co.*, 334 U. S. 495, 535–536 (1948), as a Brandeisian essay on the subject of bigness. His early opinion in *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 221 (1940), holding that a combination to fix prices was illegal per se under the Sherman Act, similarly exhibited his aversion to the use of aggregated power and his commitment to the Brandeisian ideal of independent, competitive business entities.

Again, in majority and dissenting opinions, announcing a theme which he had advocated in his days as a law school professor, he demonstrated that he would strictly apply statutory principles to inhibit or discourage the extension of the control of the "money trust" over American business—a theme for which he acknowledged indebtedness to Justice Brandeis.[4]

The emergence of Justice Douglas as the great civil libertarian is a fascinating story. When he first became a member of the Court, his colleagues were Chief Justice Hughes and Justices McReynolds, Butler, Stone, Roberts, Black, Reed and Frankfurter. In 1940, Butler was succeeded by

[4] See Directors Who Do Not Direct, 47 Harv. L. Rev. 1305 (1934); *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 636 (1953) (dissent); *Blau* v. *Lehman*, 368 U. S. 403, 419–420 (1962) (dissent).

Frank Murphy; in 1941, McReynolds and Chief Justice Hughes were succeeded by Roosevelt's nominees, Byrnes and Jackson; and in 1943, Rutledge was appointed to succeed Justice Byrnes who had resigned after a short tenure. Douglas' longest association had been with Justice Frankfurter, dating to the days when they were law teachers; but their friendly personal relationship had been colored by the strong differences between the Young Turks of the Yale Law School and the less ebullient law faculty at Harvard, led by Frankfurter. For this reason, and perhaps more importantly, by reason of temperament and background, it quickly occurred that Douglas' closest association among his colleagues was not with Justice Frankfurter, but with Hugo Black. Douglas and Black early found common ground which they generally occupied until the 1960's when their positions on significant civil rights issues diverged.

Douglas has been quoted as saying that it takes a dozen years on the Court for a Justice's judicial philosophy to mature. There is no evidence that his period of maturation was so long, but in his early years on the Court, his votes in several civil rights cases were later to be regretted and repudiated by him. An early test came in the *Gobitis* case in 1940,[5] a case challenging the expulsion from public school of two children of the Jehovah's Witnesses sect for refusal to comply with a flag-salute ordinance. The Court rejected the challenge and sustained the ordinance. Only Justice Harlan F. Stone dissented. Frankfurter wrote the Court's opinion and Douglas, as well as Justices Black, Murphy and Reed—the other Roosevelt appointees—joined. Two years later, in *Jones* v. *City of Opelika*,[6] in which the Court held that the imposition upon Jehovah's Witnesses of a licensing fee for solicitation sales of their literature was constitutional, Black, Douglas and Murphy, dissenting, confessed that *Gobitis* was wrongly decided. Both *Gobitis* and *Opelika*, in their view,

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[5] *Minersville School District* v. *Gobitis*, 310 U. S. 586 (1940).
[6] 316 U. S. 584 (1942).

wrongly approved a "device" which "tends to suppress the free exercise of a religion practiced by a minority group."[7]

Similarly, in 1942, Justice Douglas joined in a decision which, in effect, reaffirmed the ruling in *Olmstead* v. *United States,* 277 U. S. 438 (1928), that warrantless wiretapping did not violate the Fourth Amendment.[8] Douglas agreed with the majority, which included Justice Black, despite the fact that Chief Justice Stone and Justices Frankfurter and Murphy dissented and indicated their readiness to overrule *Olmstead.*[9]

These early votes, which are anomalous in view of Justice Douglas' later positions, may be explained on a variety of possible grounds: New Justices often are inclined to accept the views of the majority in areas in which they do not consider themselves expert; Douglas' views in the area had not fully developed; and he was following the lead of Justice Black and other Justices whom he respected.

Douglas' votes in the Japanese internment cases, which also appear somewhat anomalous in view of his subsequent history, may have a different or additional basis. In 1943, he voted with the majority in condoning the indiscriminate internment of Japanese; a year later he joined Justice Black's majority opinion sanctioning exclusion of a Japanese from his home town in California. In his separate opinion in the 1943 case, he explained his vote: It was wartime; Pearl Harbor had been bombed; and Douglas was unwilling to "sit in judgment on the military requirements of that hour."[10]

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[7] *Id.,* at 623. In 1943, the Court reversed *Gobitis. West Virginia Board of Education* v. *Barnette,* 319 U. S. 624 (1943).

[8] *Goldman* v. *United States,* 316 U. S. 129 (1942) (use of detectaphone).

[9] In 1952, Douglas, in dissent, urged that both *Olmstead* and *Goldman* should be overruled. *On Lee* v. *United States,* 343 U. S. 747, 762 (1952). Fifteen years later, the Court accepted the views urged by Douglas in *On Lee. Katz* v. *United States,* 389 U. S. 347, 353 (1967).

[10] *Hirabayashi* v. *United States,* 320 U. S. 81, 106 (1943); *Korematsu* v. *United States,* 323 U. S. 214 (1944). He later characterized the decisions in the two cases as "extreme"; and in 1944, in the *Endo* case, he

Soon, however, Justice Douglas found his stride and began the establishment of his position as an undeviating champion of individual rights. His conception of individual rights was comprehensive. As he ultimately formulated it, the "Blessings of Liberty" included not only physical security, but *"autonomous control over the development and expression of one's intellect, interests, tastes, and personality"* and *"freedom of choice in the basic decisions of one's life respecting marriage, divorce, procreation, contraception, and the education and upbringing of children."* [11] He maintained that all of these were sternly and broadly guaranteed by our Constitution and that the Court was their ultimate guardian; and he rejected what he regarded as the artificial and labored distinctions which could be drawn by nice analysis of the words of the Constitution or differentiations between the Constitution's mandates and prohibitions directed to the federal and state governments, respectively.

His insistence upon judicial action to vindicate this sweeping conception of constitutional guarantees met bitter opposition from members of the public who were opposed to the social, economic and political implications of Douglas' insistence upon pervasive individual rights, and from those who feared or challenged the unconventionality of his jurisprudence. But the time was appropriate for newly revealed constitutional values. Douglas' bold ideas were launched during the 1940's, 50's and 60's, at a time of ferment and revolutionary change in societal mores. A wave of suppression, typified by Senator Joseph McCarthy, was eventually met and overwhelmed by a tide of insistence upon individual rights and individual permissiveness; the pressures of egalitarianism, with its accompanying insistence upon the divine right of each individual, were enormous; and Douglas' ex-

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wrote for the Court that the Government could not continue to detain a Japanese-American after her loyalty had been established. *Ex parte Endo*, 323 U. S. 283 (1944).

[11] Separate opinion concurring in *Roe* v. *Wade*, 410 U. S. 113 (1973), and *Doe* v. *Bolton*, 410 U. S. 179 (1973). 410 U. S., at 211.

alted conception found a ready and receptive constituency. It is perhaps this phenomenon of history—the fact that Douglas' positions coincided with vast social changes—rather than successive changes in the membership of the Court, that accounts for the remarkable degree to which his innovative views became accepted constitutional doctrine and national principle. It may be that Douglas' views would not have met with comprehensive acceptance by the Court if it had not been for changes in its membership; but it is equally likely that the succeeding Court would not have embraced the full measure of libertarian principles if it had not been for the pioneering of Justice Douglas.

Douglas was largely responsible for the establishment of the right of privacy as a distinct value protected by the Bill of Rights. Literalists may complain that the Constitution does not refer to a "right of privacy"; but to Douglas, principle and essence are controlling, and the "right of privacy" is a statement of the essence of the specific constitutional guarantees. Certainly, its recognition as a distinct right is useful and seminal. It is a dramatic embodiment of Douglas' insistence that our Constitution's protection of individual rights is comprehensive and is not to be confined to a narrow literal parsing of its words.

In 1952, the Court held that a municipal transit company could broadcast radio programs, including commercial announcements, on its buses and streetcars. In his dissenting opinion, Douglas asserted that the right to "liberty" as used in the Fifth Amendment, "mean[s] more than freedom from unlawful governmental restraint; it must include privacy as well. . . . The right to be let alone is indeed the beginning of all freedom." [12] This is obviously a doctrine of vast implications, incorporating, by a stroke of creative conceptualism, the comprehensive view of constitutionally guaranteed liberties which Douglas was later to formulate.[13]

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[12] *Public Utilities Commission* v. *Pollak*, 343 U. S. 451, 467 (1952).

[13] Concurring opinion in *Roe* v. *Wade* and *Doe* v. *Bolton, supra,* n. 11.

Douglas was later to invoke the principle of privacy in a variety of circumstances dealing with governmental actions affecting individuals.[14] The boldest use of the "right" appeared in 1965, when Douglas wrote the opinion of the Court in *Griswold* v. *Connecticut*, 381 U. S. 479 (1965), which invalidated a Connecticut law forbidding the use of contraceptives. Douglas' opinion "for the Court" based the decision squarely upon the right of privacy. He argued that the right of privacy exists by necessary implication from specific provisions of the Constitution; that "its existence is necessary in making the express guarantees fully meaningful" (*id.*, at 483).[15] As concurring opinions in *Griswold* contended, the grounds for the Court's decision could have been formulated on a less enterprising basis; but the support which the Court's opinion provides for a distinct, constitutional right of privacy is significant. Using that newly articulated right as a specific instrument or as an aid to broaden the literal words of the Bill of Rights, the application of the Constitution's specific guarantees of individual liberties could be substantially expanded.

A kindred doctrinal innovation which Douglas propounded is the right to travel, a "right" which unlike the "right to privacy" had little or no antecedents in the Court's opinions. In 1941, the Court held that California's "Okie" law was an unconstitutional burden on commerce. Douglas concurred, but on the grounds that the right to travel was a guarantee of citizenship under the Fourteenth Amendment's privileges and immunities clause.[16] Twenty-seven years later, in

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[14] See, *e. g.*, *Wyman* v. *James*, 400 U. S. 309, 326, 329 (1971), in which Douglas, in dissent, invokes the privacy of the home as demonstrating the unconstitutionality under the Fourth Amendment of inspection of a welfare recipient's house.

[15] He elaborated this proposition by a picturesque literary flight: that "specific guarantees in the Bill of Rights . . . have penumbras, formed by emanations from those guarantees that help give them life and substance" (381 U. S., at 484).

[16] *Edwards* v. *California*, 314 U. S. 160, 177 (1941).

Shapiro v. *Thompson*,[17] a majority of the Court recognized the right to travel as "fundamental" under the Fourteenth Amendment.

In a number of other instances, Justice Douglas had the satisfaction of participating in Court decisions adopting principles which he had first articulated in dissent. Conspicuous among these are decisions dealing with the scope of the right to counsel, as to which Douglas shared Justice Black's views. In *Crooker* v. *California*, 357 U. S. 433, 441 (1958), Douglas had dissented from a decision of the Court sustaining the conviction of a defendant on the basis of a confession made without counsel, after five or six hours of interrogation. In a concurring opinion in 1961, *Culombe* v. *Connecticut*, 367 U. S. 568, 637 (1961), he urged that the Court should accept the principle "that any accused—whether rich or poor—has the right to consult a lawyer before talking with the police."

Gradually, beginning with *Massiah* v. *United States*, 377 U. S. 201 (1964), and *Escobedo* v. *Illinois*, 378 U. S. 478 (1964), and culminating in *Miranda* v. *Arizona*, 384 U. S. 436 (1966), the Court adopted Justice Douglas' views on the matter as it did in many other areas: Once an individual is "taken into custody or otherwise deprived of his freeedom in any significant way," he must be advised of his Fifth Amendment right to be silent and of his Sixth Amendment right to counsel, by appointment of a lawyer by the state, if necessary; and if the person apprehended indicates that he wants an attorney, all interrogation "must cease until an attorney is present." [18]

Similary, Douglas, in 1942, joined Justice Black in dissent

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[17] 394 U. S. 618 (1969).

[18] 384 U. S., at 478–479, 474. See also Douglas' opinion for the Court in *Hamilton* v. *Alabama*, 368 U. S. 52, 54–55 (1961) (right to counsel at arraignment), and the Court's decision, in which Douglas joined, in *White* v. *Maryland*, 373 U. S. 59 (1963) (preliminary hearing in advance of arraignment is a "critical step in a criminal proceeding" at which defendant must have counsel).

from the Court's decision upholding a state conviction despite the denial of counsel at trial, *Betts* v. *Brady*, 316 U. S. 455, 474 (1942). More than 20 years later, they had the satisfaction of participating in the overruling of this decision in *Gideon* v. *Wainwright*, 372 U. S. 335 (1963).[19]

In 1951, Douglas alone noted his dissent from the Court's order affirming a decision upholding the Virginia poll tax, *Butler* v. *Thompson*, 341 U. S. 937 (1951). In 1966, he wrote the Court's opinion holding, under the equal protection clause, that a state could not impose a poll tax as a condition of voting. *Harper* v. *Virginia Board of Elections*, 383 U. S. 663 (1966).

Justice Douglas' opinions in the right to counsel cases, as in other cases where he alone or in conjunction with others expanded judicial enforcement of procedural rights in criminal cases, illuminate his characteristic approach. Typically, the cases involved indigents and the underprivileged; and to Douglas, their predicaments were a summons to close scrutiny of the process by which government imposed penalties upon them. It was the meaning, the essence of the situation presented, that to him was the essential premise from which conclusions followed.[20] By contrast, the approach of Justice Black, his colleague and collaborator for many years, was more conventional; Black was a strict constructionist of the words of the Constitution, who proceeded to conclusions drawn, by his lights, from carefully considered analysis of the meaning of the words of the Constitution. Students of the Constitution and the judicial process will find this difference in approach, coupled with a long-term—but not complete—coincidence of conclusions, a fruitful source of analysis and speculation.

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[19] *Cf.*, Douglas' opinion for the Court in *Haley* v. *Ohio*, 332 U. S. 596 (1948) (confession of 15-year-old after ordeal of questioning without counsel).

[20] See his opinion for the Court in *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U. S. 535 (1942), holding unconstitutional, as a violation of equal protection, the Oklahoma statute providing for compulsory sterilization of criminals after a third felony conviction.

This is not to say, however, that Douglas' pioneering represented departures from the precepts of the Constitution. The remarkable degree to which his conclusions were eventually adopted by the Court, and the fact that they have largely withstood the test of time, provide evidence of their harmony with our basic law. Indeed, it may be said that his preconceptions were those which animated our Constitution, and that his conclusions were immanent in that document. Nor can it be said that he was heedless of the need, commanded by the rule of law, to justify conclusions by doctrine. The point is that he did not hesitate to articulate, and proceed on the basis of, doctrines which he formulated, sometimes with piercing originality. The process, to him, was consistent with and mandated by the magnificent generality of the basic provisions of our Constitution and their essential purpose.

His intense insistence that the individual in confrontation with the power of the state must be accorded the fullest protection of the Constitution, is manifest in the votes that he cast as a member of this Court. He believed that the guarantees to the accused in criminal prosecutions were "not only a protection against conviction and prosecution but a safeguard of conscience and human dignity and freedom of expression as well." [21] And so, he strongly objected to the dilution of the Fifth Amendment's privilege against self-incrimination by requiring testimony where "transactional" or "use" immunity was granted.[22] The privilege is a fundamental barrier to state oppression, and a symbol and manifestation of the ultimate sovereignty of the individual, and Douglas fiercely opposed its diminution. Similarly, aware of Justice Brandeis' admonition that "in the development of our liberty insistence upon procedural regularity has been a large factor," [23] he opposed the narrow application of the Fourth

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[21] *Ullman* v. *United States*, 350 U. S. 422, 440, 445 (1956) (dissent).

[22] *Kastigar* v. *United States*, 406 U. S. 441, 466 (1972) (dissent).

[23] *Burdeau* v. *McDowell*, 256 U. S. 465, 477 (1921).

Amendment's prohibition of the invasion of the individual's domain by unreasonable searches and seizures.[24]

In the controversies involving the First Amendment, Justice Douglas established his position as an uncompromising advocate of the broadest interpretation of the freedoms of speech, the press and religion. Building on a view expressed by Justice Stone,[25] Douglas, along with Black, asserted that the First Amendment's freedoms were in a "preferred position" in our constitutional scheme; and they insisted that state as well as federal action infringing upon basic rights must be subjected to strict scrutiny.[26] Street orators denouncing the President;[27] racists uttering libelous abuse of blacks and abusively criticizing the Court itself;[28] Communists circulating radical propaganda[29]—all were entitled to the shield of the First Amendment. If their utterances provoked listeners to throw stones and bottles, it was the duty of the police to protect the speaker from the crowd and not vice versa.[30]

Douglas was troubled by the question whether this right to speak freely should be limited by the "clear and present danger" test. As early as 1949, he made clear his view that the danger must rise "far above public inconvenience, annoyance or unrest," *Terminiello*, 337 U. S., at 4. In 1957, he stated his own version of the test: that the First Amendment guarantee of freedom of expression is absolute and can be qualified only when the expression "is so closely brigaded with illegal action as to be an inseparable part of it." *Roth*

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[24] *E. g., McCray* v. *Illinois*, 386 U. S. 300, 314 (1967) (dissent); see also his eventual position on wiretapping and his views on the right to counsel, discussed above.

[25] *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152, n. 4 (1938).

[26] See *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943); *Poulos* v. *New Hampshire*, 345 U. S. 395, 422 (1953) (dissent); *Terminiello* v. *Chicago*, 337 U. S. 1, 4 (1949).

[27] *Feiner* v. *New York*, 340 U. S. 315, 329 (1951) (dissent).

[28] *Beauharnais* v. *Illinois*, 343 U. S. 250, 284–287 (1952) (dissent).

[29] *Dennis* v. *United States*, 341 U. S. 494, 581, 589–590 (1951) (dissent).

[30] *Terminiello* v. *Chicago, supra.*

v. *United States*, 354 U. S. 476, 508, 514 (1957). Eventually, in 1969, he announced that, at least in time of peace, he had "great misgivings" about the "clear and present danger" test because he believed that it had been wrongly applied "by judges so wedded to the *status quo* that critical analysis made them nervous." *Brandenburg* v. *Ohio*, 395 U. S. 444, 454 (1969) (concurring).

Where the conflict between freedom and the societal interest in the avoidance of physical disorder is not presented, Douglas' view was absolute: "[t]he First Amendment is couched in absolute terms—freedom of speech shall not be abridged," *Beauharnais, supra*, note 28, at 285; "The matter is beyond the power of the legislature to regulate, control or condition," *Poulos, supra*, note 26, at 423. Censorship of movies or written material, in his judgment, is absolutely prohibited by the First Amendment.[31] Teachers may not be subjected to loyalty tests or dismissed for membership in alleged subversive organizations.[32] His belief in open advocacy and debate also induced in him an unwillingness to tolerate governmental actions which, in his view, shielded governmental action—even Presidential acts—from public scrutiny.[33]

In the 1960's, Douglas' broad view of the scope of First Amendment protection for the expression of views resulted in significant differences with Justice Black. Black refused to vote to invalidate a conviction under state trespass laws of students who demonstrated in front of a county jail where

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[31] *Byrne* v. *Karalexis*, 396 U. S. 976, 977 (1969) (dissent); *cf.*, *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 70 (1973) (dissent); *Hannegan* v. *Esquire, Inc.*, 327 U. S. 146 (1946).

[32] *Adler* v. *Board of Education*, 342 U. S. 485, 508 (1952) (dissent).

[33] *E. g.*, he joined the Court's decision in the Pentagon papers case, *New York Times Co.* v. *United States*, 403 U. S. 713 (1971), and he regarded the Court's action, which he joined, approving a lower court order compelling President Nixon to surrender tape records of conversations, *United States* v. *Nixon*, 418 U. S. 683 (1974), as of great importance. See J. Simon, Independent Journey, The Life of William O. Douglas, 429 (1980).

some of their fellow protestors against segregation were incarcerated. Douglas dissented. *Adderley* v. *Florida*, 385 U. S. 39 (1966). Douglas' insistence that symbolic expression was equally entitled to protection with verbal expression was unacceptable to Justice Black in the 1960's. This was evident in Black's dissent from the Court's opinion, in which Douglas joined, holding that students could not be dismissed from a public school for wearing black armbands in class to protest the Vietnam war. *Tinker* v. *Des Moines Community School District*, 393 U. S. 503 (1969). And in *United States* v. *O'Brien*, 391 U. S. 367, 389 (1968), Douglas dissented from a Court decision in which Justice Black joined, sustaining a conviction for the burning of a draft card. Later, in *Brandenburg* v. *Ohio*, *supra*, at 450, Douglas, concurring, stated that the Court's decision in *O'Brien* "was not, with all respect, consistent with the First Amendment" (395 U. S., at 455); O'Brien's act, he said, was protected by the First Amendment as a "symbolic protest" (*id.*, at 456).

Black and Douglas, however, had never wavered in their solid resistance to the pressures of McCarthyism which were formidable in the loyalty cases. In 1951, the Court had held invalid the Attorney General's compilation, without notice or opportunity for rebuttal, of a list of subversive organizations affiliation with which was grounds for dismissal from federal employment under President Truman's executive order. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123 (1951). On the same day, by a four-to-four decision, the Court left standing the dismissal from government service of Dorothy Bailey on the basis of membership in organizations on the Attorney General's list and the undisclosed statement of anonymous informers.[34] Both Black and Douglas wrote separate, concurring opinions in the *Joint Anti-Fascist* case; Douglas' opinion is especially significant because he expressly criticized the result in the *Bailey* case which, he said, presents "an excellent illustration of how dan-

[34] *Bailey* v. *Richardson*, 341 U. S. 918 (1951).

gerous a departure from our constitutional standards can be." 341 U. S., at 179–180.

Justice Douglas believed that the First Amendment established an impenetrable barrier between the government and religious establishments and beliefs. From the early years of his tenure as a Justice of this Court, he voted "no" as to religious instruction or prayer in public schools; [35] he voted "no" to government loan of textbooks to parochial schools; [36] and in 1970, he alone voted to strike down the tax exemption for property used solely for religious purposes.[37]

He believed that racial segregation was an evil and that the Court should be vigilant and resourceful in finding that segregation, by whatever means and wherever it occurred, in public or private places, violated the equal protection clause of the Fourteenth Amendment; [38] and he early and steadfastly insisted that laws burdening the right of suffrage to the prejudice of the underprivileged were constitutionally intolerable. See, *e. g., Day-Brite Lighting, Inc.* v. *Missouri*, 342 U. S. 421 (1952).

In this area, as in all other matters affecting the liberty and dignity of the individual, history may well agree that Chief Justice Marshall's tribute to the Court over which he presided is applicable to Justice Douglas: that he "never sought to enlarge the judicial power beyond its proper bounds, nor feared to carry it to the fullest extent that duty required." [39]

Finally, as we survey the remarkable career of Justice Douglas, we acknowledge with gratitude and reverence his extraordinary contributions in other fields—in addition to the

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[35] *Illinois ex rel. McCollum* v. *Board of Education of School Dist. No. 71, Champaign County, Ill.*, 333 U. S. 203 (1948); *Engel* v. *Vitale*, 370 U. S. 421 (1962).

[36] *Board of Education of Central School District No. 1* v. *Allen*, 392 U. S. 236, 254 (1968) (dissent).

[37] *Walz* v. *Tax Commission*, 397 U. S. 664, 700 (1970) (dissent).

[38] *E. g., Palmer* v. *Thompson*, 403 U. S. 217, 231 (1971) (dissent); *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163, 179 (1972) (dissent).

[39] Quoted in Justice Frankfurter's dissent, *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 668 (1943).

law—to the preservation and development of freedom in our Nation and to the evolution of constitutional principle. Our survey has been confined to Justice Douglas' career in the law. The sheer volume of his output during his 36 years on the Court is overwhelming; but it does not measure his activities during that time. It is an extraordinary fact that, simultaneously, he was in the vanguard of other great causes. He was a world traveler who, in a number of impressive publications, alerted the Nation to the problems and aspirations of the people of the less developed parts of our planet, which have become a central fact in the life of our Nation and the world. He was a prophet and pioneer with respect to environmental concerns; his activities and writings were of early and signal importance in developing programs for the protection of our forests, rivers, streams and mountains.

In a real sense, his myriad activities were intertwined. He was deeply aware that our freedoms are dependent not only upon the quality of our understanding of constitutional principles and their faithful and relentless application, but also upon our interrelationship with the other peoples of the world, and upon the quality of the land in which we live. All of these concerns he accepted as personal challenges to himself, to his understanding, his energy, and his ability and willingness to risk the consequences of unconventionality. To him, the existence of a problem was a challenge to probe its depth and composition, and a summons to devise and advocate a solution.

As a Justice, he did not hesitate to stand alone;[40] he was not intimidated by harsh criticism or the stridency of the McCarthyites; as an environmentalist, in eloquent language, he insisted that not only national policy, but the courts should respond to the call to preserve our natural heritage.[41] As a world citizen, passionately devoted to peace, he was

[40] *E. g.*, the stay of execution that he granted in the *Rosenberg* case, *Rosenberg* v. *United States*, 346 U. S. 273, 313 (1953).

[41] See *United States* v. *Reserve Mining Co.*, 419 U. S. 802 (1974) (dissent from denial of application to vacate stay); and *Sierra Club* v. *Morton*, 405 U. S. 727, 741 (1972) (dissent).

ready to test the limits of Presidential power to engage in military operations.[42]

WHEREFORE, it is RESOLVED that we, the Bar of the Supreme Court of the United States, express our profound sorrow that Associate Justice William Orville Douglas is no longer with us; we express our deep gratitude for his outstanding and original contributions to the evolution of constitutional doctrine; and our admiration and appreciation of his unfailing courage and his insistence upon the principles that he considered to reflect the genius of our Constitution and the highest aspirations of our people. We record our acknowledgment of his participation as a constructive leader in three of the great issues of our time: The expansion of human rights and liberty, the protection of the environment, and the recognition of the rightful demands of the less privileged people of the world. We are grateful to him for providing his example of fearless dedication which has inspired us and will inspire future generations of lawyers and judges; and it is further

RESOLVED, that the Solicitor General be asked to present these Resolutions to the Court and that the Attorney General be asked to move that they be inscribed upon the Court's permanent records.

THE CHIEF JUSTICE said:

Thank you, Mr. Solicitor General, and I recognize the Attorney General of the United States.

Mr. Attorney General Civiletti addressed the Court as follows:

MR. CHIEF JUSTICE and may it please the Court.

The Bar of the Court met today to honor the memory of

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[42] *Holtzman* v. *Schlesinger*, 414 U. S. 1316 (1973) (the Cambodian bombing) (Douglas, acting alone, granted stay); see, also, his dissents from denial of certiorari to review legality of the Vietnam war: *e. g., Sarnoff* v. *Schultz*, 409 U. S. 929 (1972); *Mitchell* v. *United States*, 386 U. S. 972 (1967).

William O. Douglas, Associate Justice of the Supreme Court from 1939 to 1975.

In the 36 years during which Mr. Justice Douglas served on the Court, this Nation emerged from an economic depression, fought a World War and two other serious armed conflicts, struggled to eliminate race prejudice and its pervasive effects, came to recognize the threat that unthinking and ravaging industrial production posed to its ecological systems, and faced increasing complexities in its social life that tested its political and economic institutions. All of these problems came before this Court in one form or another, and Mr. Justice Douglas was always ready to confront them. He brought to them a brilliant mind, open to ideas and creative solutions; but he rejected any approach that appeared to be out of harmony with the liberties rooted in the Bill of Rights. He brought to these contests a prodigious energy: he was not only the most prolific author of opinions ever to sit on the Court, but also the author of over thirty books on a wide variety of subjects. But most of all he brought to this work a great passion and the courage and ability to express it for us and for those to come after us.

Early in his tenure on the Court he made important contributions in the area of economic regulation—as might have been expected in light of his experience as an attorney with a Wall Street firm, as a director of bankruptcy studies at Yale Law School, and as a member, and then Chairman, of the Securities and Exchange Commission. His opinion for the Court in *Pepper* v. *Litton*, 308 U. S. 295 (1939), most clearly displays the strength of his views concerning the obligations of corporate fiduciaries. In that opinion, which upheld the challenge of an independent trustee in bankruptcy to a claim based on a judgment against the bankrupt corporation collusively procured by the dominant stockholder, he emphasized the breadth of the fiduciary obligation owed by a corporate officer. That standard of conduct, he wrote, "is designed for the protection of the entire community of interests in the corporation—creditors as well as stockholders." *Id.*, at 307.

Mr. Justice Douglas was the author of numerous other opinions construing the federal Bankruptcy Act, including careful and detailed treatments of complicated problems involving railroad reorganizations in *Meyer* v. *Fleming*, 327 U. S. 161 (1946), and *Gardner* v. *New Jersey*, 329 U. S. 565 (1947).

He also made a significant impact on the field of antitrust law. His opinions include *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U. S. 508 (1972), and *Otter Tail Power Co.* v. *United States*, 410 U. S. 366 (1973), and an early opinion, sure to remain bedrock for generations to come—his masterful treatment of price manipulation in *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940). Until that opinion was handed down, it was supposed by many lawyers and businessmen that agreements that affected price levels but did not literally fix prices were not *per se* unlawful and thus could be defended against Sherman Act charges by proof that the agreement has a benign purpose, such as the elimination of competitive evils. Mr. Justice Douglas scotched that defense in the much quoted holding that "[u]nder the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*." *Id.*, at 223. Nearly 30 years later, in *United States* v. *Container Corporation of America*, 393 U. S. 333 (1969), he returned to this subject, writing an opinion for the Court holding that the reciprocal exchange of price information by the corporate defendants in that case violated section 1 of the Sherman Act.

In his *Socony* opinion, Mr. Justice Douglas spoke of the Sherman Act as a "charter of freedom" (310 U. S., at 221), a view that followed from his deep distrust of large concentrations of power having no effective social accountability. In one of the addresses collected in his book titled Democracy and Finance, published in 1940, he expressed the view that the trend toward large corporate combinations threatened

not only our competitive system, individual initiative and freedom of opportunity which was the essence of capitalism, but also other important democratic values. He looked to government as an important source of countervailing power and thus, in decisions such as his opinion for the Court in *Federal Power Commission* v. *Hope Natural Gas Company*, 320 U. S. 591 (1944), *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584 (1941), and *United States* v. *Detroit & Cleveland Navigation Co.*, 326 U. S. 236 (1945) (the latter an Interstate Commerce Commission case), he expressed a willingness to accord broad powers and discretion to the independent administrative agencies as they sought to carry out congressional mandates to protect the public interest in the matters regulated by those agencies.

But Mr. Justice Douglas was by no means an uncritical advocate of government regulation of American life. He was, above all, the champion of the individual, and in many of his most memorable opinions—notably those grounded on the First Amendment—he emphasized the importance of maintaining space, free from government interference, in which each individual can express his views, enjoy his privacy, and live his life according to his own lights. Maintaining this freedom was essential, he believed, not only for the benefit of each individual, but also for the health of society as a whole. Thus in *Terminiello* v. *Chicago*, 337 U. S. 1, 4 (1949), upholding the right of a speaker to express views that angered a crowd gathered outside the auditorium in which he spoke, Mr. Justice Douglas observed that "[t]he vitality of civil and political institutions in our society depends on free discussion [; and the] right to speak freely and to promote diversity of ideas and programs is . . . one of the chief distinctions that sets us apart from totalitarian regimes." And he added provocatively: "[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." In his

dissent in *Dennis* v. *United States*, 341 U. S. 494 (1951), speaking out against convictions under the Smith Act for what he regarded as the mere act of teaching Marxist-Leninist doctrine and organizing others to do the same, he expressed the belief that the "airing of ideas releases pressures which otherwise might become destructive," and that in an atmosphere of free and full discussion, false ideas will be exposed and will "gain few adherents" (*id.*, at 584).

Mr. Justice Douglas' belief that the First Amendment also guaranteed a right of individual privacy and that this too was essential to a healthy society was in no way inconsistent with his vision of a robust, lively, and diverse America, for it was the heavy hand of government meddling in areas protected under the First Amendment that he opposed, not the babble and jostle of crowds in public spaces. Perhaps his best known opinion concerned with this right is *Griswold* v. *Connecticut*, 381 U. S. 479 (1965), recognizing a "zone of privacy created by several fundamental constitutional guarantees" (*id.*, at 485), and prohibiting government intervention in the sensitive and personal decisions of married couples concerning procreation. But the note was struck earlier in his dissent in *Public Utilities Commission* v. *Pollak*, 343 U. S. 451 (1952), a case concerned with the Commission's approval of a public transit system's practice of broadcasting radio programs consisting of musical selections and commercials in streetcars and buses. To Mr. Justice Douglas, this was government-approved coercion of a "captive audience" (*id.*, at 468), not only an intrusion on the transit riders' private ruminations but a form of regimentation; for some centralized official body was choosing the programs rather than leaving it to the people to make their own choices between "competing entertainments" (*id.*, at 469).

If Mr. Justice Douglas spoke frequently in dissenting opinions and in concurrences that bore his unique, unmistakable imprint, he sometimes spoke prophetically, setting forth a view that would eventually command a majority of the Court. Thus his dissent on the Fourth Amendment warrant

issue in *Frank* v. *Maryland,* 359 U. S. 360 (1959), bore fruit in the Court's opinions in *Camara* v. *Municipal Court,* 387 U. S. 523 (1967), and *See* v. *Seattle,* 387 U. S. 541 (1967); and he dissented on the Fifth Amendment self-incrimination issue in *Cohen* v. *Hurley,* 366 U. S. 117 (1961), subsequently overruled in *Spevack* v. *Klein,* 385 U. S. 511 (1967), in which he wrote the plurality opinion. His dissent in *South* v. *Peters,* 339 U. S. 276, 277 (1950), from the Court's *per curiam* opinion, which held that a constitutional challenge to Georgia's county unit system presented a political issue as to which the District Court properly withheld relief, was later vindicated in this Court's reapportionment decisions.

In the brief time we have here, it is not possible to discuss all of the areas in which Mr. Justice Douglas has made contributions. In his long tenure on the Court he dealt with the full range of issues that came before it, making significant contributions in cases concerning civil rights, securities regulation, the military and the selective service system, and in cases coming within the Court's original jurisdiction. But no discussion of Mr. Justice Douglas' career would be complete without reference to his concern for the environment. In his dissenting opinion in *Sierra Club* v. *Morton,* 405 U. S. 727 (1972), a case concerned with the highly technical doctrine of standing, he explained why, in cases involving environmental issues, he would accord standing to anyone representing "the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers" (*id.,* at 741)—valleys, alpine meadows, groves of trees, and rivers, all of them essential to the survival of fish, birds, and wildlife (*id.,* at 743). In this opinion, Mr. Justice Douglas spoke out again in favor of nurturing a diverse community but here he extended the community to include all forms of life—"the pileated woodpecker as well as the coyote and bear, the lemmings as well as the trout in the streams" (*id.,* at 752). This dissent lacks the significance in the development of the doctrine of standing that his opinion for the Court in a case such as *Barlow* v. *Collins,* 397 U. S. 159 (1970), enjoys; but it stands as a

reminder both of the source from which he drew much of his strength and inspiration and of the distinctive voice of a man unafraid to step to the music of a different drummer.

MR. CHIEF JUSTICE, in the name of the lawyers of this nation and, in particular, of the Bar of this Court, I respectfully request that the resolutions presented to you in honor and celebration of the memory of the late Mr. Justice Douglas be accepted by this Court.

THE CHIEF JUSTICE said:

Thank you, Mr. Attorney General and Mr. Solicitor General, and on behalf of the Court I particularly thank you for these splendid resolutions summarizing the career and in memory of our late colleague and friend, Justice Douglas.

We ask that you convey to the members of the Committee on Resolutions our deep appreciation of their very appropriate presentation here today.

Your motion, Mr. Attorney General, that these resolutions be made part of the permanent record of this Court is granted.

Justice Douglas' long tenure on this Court, without more, sufficed to make him a unique figure in the Court's annals. In his 36 years on the Court our country experienced massive and pervasive changes in its social, political, and economic structure. Worldwide conflicts disturbed and altered American life, leaving in their wake mountains of intractable problems.

During this long tenure on the Court Justice Douglas participated in more than one-fourth of all the reported cases in this Court since 1790, a record, as you have pointed out in your resolutions, unparalleled. But more important even than the volume is the nature of the issues the Court was called upon to deal with during this period. You have mentioned some of the specific cases and specific issues.

Bill Douglas and I were colleagues on the Court for six years, and even during that short span the Court was confronted with some of the most vexing and sensitive and com-

plex issues in the history of the Court. Disagreement on such issues is of course the norm. It has always been so, and always will be under our system. Indeed, it is imperative that this be the case, for a pattern of unanimity is alien to democratic institutions.

I share with others great respect for his keen mind, his unwavering commitment to his own beliefs, and his zest for grappling with new problems. All of us were the beneficiaries of his unparalleled firsthand knowledge of a multitude of past decisions of the Court, and in conferences now we miss his verbal footnotes describing the details of the evolution of many of those decisions.

Bill Douglas lived life to the fullest in the manner of the rugged individualists who opened this continent, people he admired so much. The opening of this continent was a task for strong, independent, assertive, vigorous, creative, and imaginative people. The words I have just used really describe Bill Douglas. He exemplified them. He exemplified all these qualities.

As we know, his adventurous, questing spirit led him all over the world. He traveled in order to experience the beauty of the natural environment, and to understand other people, to probe into their ways of life, to learn of their suffering and of their aspirations. In one of our many visits in my chambers over a cup of tea he said once that his travels throughout the world had given him a better understanding of the grandeur and majesty of the American democratic idea and ideal, of our commitment to freedom, and the success of our Constitution. He shared the conviction of his friend, Henry Steele Commager, that nothing in all history succeeded like America.

Few Justices of this Court in our history sought more, I think, to press for reexamination of established patterns and accepted perceptions of our social and economic and political structure. His lifelong pursuit of his own ideals demonstrates that people of imagination and courage who feel deeply, as he did, and who act on their beliefs, as he did, are

those who make others think and rethink conventional beliefs. With Justice Holmes he believed that to live life fully one must share in the passions and actions of his time. And long before the word "ecology" had found its way into the popular vocabulary he was, as both the Attorney General and the Solicitor General have told us, an ardent student of conservation, and an advocate of the preservation of the gifts of nature.

Those of us who live by the Potomac, indeed, all of the people of this country, owe a debt to Bill Douglas for his protests and his efforts which saved the Chesapeake and Ohio Canal from what he called "the roar of the wheels and the sound of the horns." Due largely to him the Canal was preserved and declared a National Historic Park. And many of us here today were present when the Canal was dedicated in his name, pursuant to an Act of the Congress.

In his fourscore years, Bill Douglas climbed many mountains; not just the visible mountains on our continent and other continents, but mountains of the law and mountains of ideas, economic, social, and political. Like so many restless, dynamic, inquisitive human beings, he left trails of his philosophical and his physical explorations so that others may share them and, if they wish, follow his trail.

Some aspects of Bill Douglas' image, his public image—in part, at least—reflect the distortions inherent in modern life, and the penchant to put public figures into immutable slots. He was called a godless atheist and a leftist activist. But of course, as we well know, he was neither. He had strong views as to how to preserve the freedom of the private enterprise system from even some of its own flaws.

He was a deeply religious man, but religious in his own way, and not in any orthodox pattern. His range of moods reflected the range of his interests in life, and that covered virtually all of the human condition. Sometimes like a comet, as we know, he would flare and as quickly subside. But his intimates who understood him relished the light and ignored the heat.

He was unconcerned about his public image. In fact, I think, he took no little delight in confounding his critics. The ill-advised and, happily, short-lived thrust at an impeachment naturally disturbed him as it would disturb any man, and he properly resented it. But even on that his concern was not for long. At times he could have explained himself and warded off some of the hostility that was aimed at him from time to time, but for various reasons, he declined to do so.

I sometimes wondered whether or not he chafed in the inescapably monastic life on this Court, and longed really to be in the rough and tumble of the political arena or the business world, where he could let himself go giving blows and warding them off. He took a pixie delight sometimes in baiting his critics into even more violent hyperbole, and with a good writer's skill he used hyperbole to make his own points.

There were many fields of human activity in which Bill Douglas would have made a notable mark in life. In the world of business, as I suggested; in politics; in education; perhaps even in science. His exuberant, dynamic energies spilled far beyond the stately processes of the judiciary and into many other areas of American life as we know. And we are all richer for his sojourn here.

As I did in paying respects to him at the time of his death, I recall to you now, in closing, something he said near the end of his active career on this Court. Here are his words.

"I think the heart of America is sound. I think the conscience of America is bright, and I think the future, the future of America is great."

His words should give heart to all of us as we face the future and remember his rich life.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1980

COLORADO *v.* BANNISTER

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

No. 79-1901. Decided October 20, 1980

Shortly after a police officer observed a speeding automobile, he heard a police radio dispatch which reported that a theft of motor vehicle parts, including chrome lug nuts, had occurred in the area, and which described two suspects. A few minutes later, he again spotted the speeding automobile and followed it into a service station for the purpose of issuing a traffic citation. As he approached the car, respondent and his companion stepped out of it, and during an ensuing conversation with the car's occupants the officer observed chrome lug nuts and lug wrenches in plain view in the car. Recognizing that the car's occupants met the description of the suspects, the officer arrested them and seized the lug nuts and wrenches. Before respondent's trial on charges of stealing motor vehicle parts, the trial court granted his motion to suppress the seized items, and the Colorado Supreme Court affirmed.

Held: The circumstances in this case provided probable cause for the officer's seizure of the incriminating items without a warrant. Cf. *Carroll* v. *United States*, 267 U. S. 132; *Chambers* v. *Maroney*, 399 U. S. 42.

Certiorari granted; — Colo. —, 607 P. 2d 987, vacated and remanded.

PER CURIAM.

In the early morning of October 15, 1979, an officer of the Colorado Springs Police Department observed a blue 1967

Pontiac GTO automobile moving along a road at a speed above the legal limit. Before the officer could pursue the vehicle, it disappeared from his sight. Shortly thereafter, the officer heard a police radio dispatch reporting that a theft of motor vehicle parts had occurred in the area he was patrolling in his car. The radio dispatch announced that a number of chrome lug nuts were among the items stolen, and provided a description of two suspects. A few minutes after hearing the report, the officer spotted the same automobile he had seen earlier, still speeding. He saw the car enter a service station, and followed it there for the purpose of issuing a traffic citation to its driver.

As the officer approached the car, both of its occupants, including the respondent, stepped out of it. A conversation between the officer and the respondent ensued, just outside the closed front door of the automobile. At this time, the officer observed chrome lug nuts in an open glove compartment located between the vehicle's front bucket seats, as well as two lug wrenches on the floorboard of the back seat. These items were in plain view, illuminated by the lights of the service station. Recognizing that the respondent and his companion met the description of those suspected of stealing motor vehicle parts, the officer immediately arrested both of them. He then seized the lug nuts and wrenches.

Before the date scheduled for his trial on charges of stealing motor vehicle parts, the respondent moved to suppress the items that the arresting officer had seized. The trial court granted the motion, and its decision was affirmed by the Supreme Court of Colorado.[1] The State subsequently filed a petition for certiorari in this Court.

The provisions of the Fourth Amendment are enforceable against the States through the Fourteenth, and it is axiomatic that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable

[1] — Colo. —, 607 P. 2d 987 (1980).

under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz* v. *United States*, 389 U. S. 347, 357 (1967). One of these exceptions, recognized at least since *Carroll* v. *United States*, 267 U. S. 132 (1925), exists when an automobile or other vehicle is stopped and the police have probable cause to believe it contains evidence of a crime. See *Arkansas* v. *Sanders*, 442 U. S. 753, 760 (1979). *Carroll* upheld the legality of a search that was conducted immediately after a vehicle was stopped. Since *Carroll*, warrantless searches have been found permissible even when a car was searched after being seized and moved to a police station. *Texas* v. *White*, 423 U. S. 67 (1975); *Chambers* v. *Maroney*, 399 U. S. 42 (1970). In each of these latter cases, the search was constitutionally permissible because an immediate, on-the-scene search would have been permissible. *Texas* v. *White*, *supra*, at 68; *Chambers* v. *Maroney*, *supra*, at 52.

At issue in the present case is a seizure that occurred on the scene shortly after a speeding car was stopped. Thus, if there was probable cause "that the contents of the automobile offend against the law," *Carroll*, *supra*, at 159, the warrantless seizure was permissible.[2]

Probable cause in this case is self-evident. Indeed, the Supreme Court of Colorado acknowledged that there was probable cause, but mistakenly concluded that a warrant was required to open the car door and seize the items within.

The officer could not stop the vehicle the first time he

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[2] Another factor that contributes to the justification for the absence of a warrant in such a situation is that "the circumstances that furnish probable cause to search a particular auto for particular articles are most often unforeseeable." *Chambers*, 399 U. S., at 50–51. See also *Cardwell* v. *Lewis*, 417 U. S. 583, 595 (1974). This factor applies with particular force in this case. As the reason for the stop was wholly unconnected with the reason for the subsequent seizure, it would be especially unreasonable to require a detour to a magistrate before the unanticipated evidence could be lawfully seized.

detected it speeding, but he accosted it at his next opportunity, when it entered the service station. His subsequent approach to the side of the automobile in order to issue a traffic citation to its driver was entirely legitimate.[3] Standing by the front door of the car, the officer happened to see items matching the description of some of those recently stolen in the vicinity, and observed that the occupants of the car met the description of those suspected of the crime. These circumstances provided not only probable cause to arrest, but under *Carroll* and *Chambers*, probable cause to seize the incriminating items without a warrant.[4]

The petition for certiorari and the respondent's motion for leave to proceed *in forma pauperis* are granted, the judgment of the Supreme Court of Colorado is vacated, and the case is remanded to that court for proceedings not inconsistent with this opinion.

It is so ordered.

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[3] There can be no question that the stopping of a vehicle and the detention of its occupants constitute a "seizure" within the meaning of the Fourth Amendment. *Delaware* v. *Prouse*, 440 U. S. 648, 653 (1979); *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 556–558 (1976); *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 878 (1975).

[4] The respondent does not dispute that the items seized were illuminated by the lights of the service station, or that they were in the plain view of the officer as he spoke to him beside the front door of the car. There was no evidence whatsoever that the officer's presence to issue a traffic citation was a pretext to confirm any other previous suspicion about the occupants.

HUGHES v. ROWE ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 79-6000. Decided November 10, 1980

Petitioner, a state prisoner, was placed in a segregation cell for a violation of prison regulations, was given a hearing two days later, and, after admitting the violation, was sentenced to 10 days' segregation. After exhausting administrative remedies, petitioner brought a federal-court civil rights action against respondent Illinois corrections officers under 42 U. S. C. § 1983. The complaint, which was prepared without the assistance of counsel, raised federal questions concerning, *inter alia*, the initial decision to place petitioner in segregation without a prior hearing. Respondents filed no affidavits denying or explaining the facts alleged by petitioner. The District Court dismissed the complaint without taking any evidence and later ordered petitioner to pay counsel fees under 42 U. S. C. § 1988 for services rendered by the Attorney General of Illinois in representing respondents in the action. The Court of Appeals affirmed.

Held:

1. Although petitioner's allegations as to bias of certain of the officers conducting the disciplinary hearing after his initial segregation, procedural irregularities at the hearing, unequal treatment, and cruel and unusual punishment were properly dismissed for failure to state a claim—even under the controlling principle that a prisoner's complaint prepared without counsel should not be dismissed unless it appears beyond doubt that he can prove no set of facts entitling him to relief—nevertheless the complaint was adequate at least to require some response from respondents, by way of affidavit or otherwise, to petitioner's claim that his initial confinement to segregation violated due process because it occurred without a prior hearing. Segregation without a prior hearing may violate due process if the postponement of procedural protections is not justified by apprehended emergency conditions. Here, the record did not show that petitioner's immediate segregation was necessitated by emergency conditions, and an administrative regulation authorizing segregation pending investigation of disciplinary matters, where required "in the interest of institutional security and safety," did not justify dismissal of the suit in the absence of any showing that concern for institutional security and safety was the basis for petitioner's immediate segregation without a prior hearing.

2. The award of attorney's fees entered against petitioner was improper. The defendant in an action brought under 42 U. S. C. § 1983 may recover attorney's fees from the plaintiff only if the district court finds "that the plaintiff's action was frivolous, unreasonable, or without foundation," cf. *Christiansburg Garment Co.* v. *EEOC*, 434 U. S. 412, 421. No such finding supported the fee award in this case, and the limitations apply with special force in an action, such as here, initiated by an uncounseled prisoner. Moreover, the fact that a prisoner's complaint, even when liberally construed, cannot survive a motion to dismiss does not, without more, entitle the defendant to attorney's fees.

Certiorari granted; reversed and remanded.

PER CURIAM.

Petitioner, an inmate of the Illinois State Penitentiary, asks us to review an order dismissing his civil rights action against the respondent corrections officers and directing him to pay counsel fees of $400 for services rendered by the Attorney General of Illinois in representing the respondents in that action.

After granting a motion to dismiss the complaint for failure to state a constitutional violation, the District Court ordered petitioner to show cause why fees of $400 should not be taxed against him under 42 U. S. C. § 1988. Because he did not respond to that order, the fee award was entered.[1] A motion to reconsider was later denied on the ground that petitioner's suit was "meritless."[2] The Court of Appeals disposed of the

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[1] The order entered by District Judge McMillen on October 18, 1978, reads as follows:

"On August 7, 1978, we ordered plaintiff to show cause within twenty (20) days thereof why defendants' attorneys' fees in the amount of $400 should not be taxed against plaintiff under 42 U. S. C. § 1988. Because plaintiff has not complied with or otherwise responded to that order, we hereby tax defendants' fees in the amount of $400 against him pursuant to 42 U. S. C. § 1988."

[2] On December 5, 1978, Judge McMillen entered the following order denying petitioner's motion for reconsideration:

"On October 18, 1978, we ordered that the defendants' attorneys fees in the amount of $400 should be taxed against the plaintiff pursuant to 42

novel question presented by petitioner by affirming the fee award in an unpublished order.[3] We now grant the motion for leave to proceed *in forma pauperis* and the petition for certiorari and reverse the judgment of the Court of Appeals.

I

On September 20, 1977, petitioner was charged with a violation of prison regulations and placed in segregation. At a disciplinary hearing two days later, petitioner admitted that

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U. S. C. § 1988. Plaintiff has filed a motion to reconsider said action. Plaintiff's motion to reconsider is denied and attorneys fees in the amount of $400 will be taxed against the plaintiff, as the suit was meritless."

[3] Rule 35 (c)(1) of the Circuit Rules of the United States Court of Appeals for the Seventh Circuit identifies those decisions warranting publication:

"A published opinion will be filed when the decision

"(i) establishes a new, or changes an existing, rule of law;

"(ii) involves an issue of continuing public interest;

"(iii) criticizes or questions existing law;

"(iv) constitutes a significant and nonduplicative contribution to legal literature

"(A) by a historical review of law,

"(B) by describing legislative history, or

"(C) by resolving or creating a conflict in the law;

"(v) reverses a judgment or denies enforcement of an order when the lower court or agency has published an opinion supporting the judgment or order; or

"(vi) is pursuant to an order of remand from the Supreme Court and is not rendered merely in ministerial obedience to specific directions of that Court."

When a decision does not satisfy these criteria, it is to be filed as an unpublished order. Circuit Rule 35 (c)(2). Unpublished orders may not be cited as precedent in any federal court within the Seventh Circuit. Circuit Rule 35 (b)(2)(iv).

Although petitioner's appeal was decided in an unpublished order purportedly having no precedential significance, three members of the Court of Appeals, Chief Judge Fairchild and Judges Swygert and Bauer, nonetheless voted to rehear the case en banc. Judge Swygert filed a written dissent from the order denying the petition for rehearing en banc.

he and two other inmates had consumed a homemade alcoholic beverage; his punishment was confinement to segregation for 10 days,[4] demotion to C-grade, and loss of 30 days' statutory good time.

Petitioner exhausted his administrative remedies and then filed a complaint under 42 U. S. C. § 1983 in the United States District Court for the Northern District of Illinois on the form used by prisoners who are not represented by counsel. The facts stated on the form raised two federal questions of arguable merit: (1) the decision to place petitioner in a segregation cell on September 20, 1977, was not preceded by a hearing and was not justified by any emergency or other necessity; (2) two of the officers who conducted the disciplinary hearing after petitioner had been in segregation for two days were biased against him.[5] Respondents, represented by the State Attorney General's Office, moved to dismiss the complaint, but filed no affidavits denying or explaining the facts alleged by petitioner. After allowing petitioner to file various amendments and additional papers, the District

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[4] It is unclear from the record whether this sentence included the two days petitioner spent in segregation prior to the disciplinary hearing, or whether he was sentenced to 10 days' segregation in addition to the time already served. There apparently is also some confusion with respect to the exact sentence imposed on petitioner at the hearing. The District Court's order dismissing the complaint indicates that petitioner was sentenced to 30 days in segregation. The Court of Appeals' order, on the other hand, states that he was sentenced to 10 days in segregation. The petition for writ of certiorari and respondents' brief in opposition filed in this Court are similarly inconsistent on this point. The record seems to indicate that petitioner was sentenced to 10 days in segregation. The uncertainty with respect to petitioner's posthearing segregation is not, however, material to our decision in this case.

[5] Petitioner also alleged that respondents violated their own procedural regulations, and that it was a denial of equal protection of the laws and cruel and unusual punishment to impose a more severe sentence on him than on the other two inmates involved in the incident, since he had confessed to drinking and they had not.

Court dismissed the complaint without taking any evidence. Thereafter the fee award was made.

In its order affirming the action of the District Court, the Court of Appeals correctly noted that the Due Process Clause of the Fourteenth Amendment affords a prisoner certain minimum procedural safeguards before disciplinary action may be taken against him.[6] Because the record did not reveal a violation of those safeguards at the hearing on September 22, the Court of Appeals concluded that the complaint had been properly dismissed. However, the Court of Appeals seems to have overlooked the fact, clearly stated in petitioner's brief on appeal, that the disciplinary hearing did not take place until two days after petitioner was placed in segregation on September 20. Nothing in the papers filed on behalf of the respondents purports to justify or explain the segregation of petitioner for two days in advance of the disciplinary hearing.

II

Petitioner's complaint, like most prisoner complaints filed in the Northern District of Illinois, was not prepared by counsel. It is settled law that the allegations of such a complaint, "however inartfully pleaded" are held "to less stringent standards than formal pleadings drafted by lawyers . . . ." *Haines* v. *Kerner,* 404 U. S. 519, 520 (1972). See also *Maclin* v. *Paulson,* 627 F. 2d 83, 86 (CA7 1980); *French* v.

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[6] As the Court of Appeals noted:

"The Supreme Court has delineated the standard to be applied in determining whether a prisoner has been afforded his minimum due process rights. Wolff v. McDonnell, 418 U. S. 539 . . . (1974). The prisoner is entitled to (1) advance written notice of the charges against him or her; (2) an opportunity to call witnesses and present documentary evidence, provided that to do so will not jeopardize institutional safety or correctional goals, before a sufficiently impartial hearing board; (3) a written statement by the fact finder of 'the evidence relied upon and reasons for the disciplinary action taken.' "

Heyne, 547 F. 2d 994, 996 (CA7 1976). Such a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Haines, supra*, at 520–521.[7] And, of course, the allegations of the complaint are generally taken as true for purposes of a motion to dismiss. *Cruz* v. *Beto*, 405 U. S. 319, 322 (1972).

Applying these principles to petitioner's amended complaint, we conclude that all but one of its allegations were properly dismissed for failure to state a claim. Petitioner's allegations of bias and procedural irregularities in the September 22 hearing, unequal treatment, and cruel and unusual punishment, even when liberally construed, were insufficient to require any further proceedings in the District Court. We therefore affirm the dismissal of these claims.

Petitioner's allegation that he had been confined unnecessarily to segregation is of a different character. It can be construed as a contention that his confinement to segregation violated due process because it took place without a prior hearing. It is clear from the facts alleged in the amended complaint that petitioner was confined in segregation for two days before a hearing was held. Indeed, petitioner expressly stated this claim in procedural due process terms in his response to the defendants' motion to dismiss the amended complaint.[8]

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[7] The Court reaffirmed the principles of *Haines* in *Estelle* v. *Gamble*, 429 U. S. 97, 106 (1976):

"As the Court unanimously held in *Haines* v. *Kerner*, 404 U. S. 519 (1972), a *pro se* complaint, 'however inartfully pleaded,' must be held to 'less stringent standards than formal pleadings drafted by lawyers' and can only be dismissed for failure to state a claim if it appears '"beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."' *Id.*, at 520–521, quoting *Conley* v. *Gibson*, 355 U. S. 41, 45–46 (1957)."

[8] In a document entitled, "Response to: Motion to Dismiss or For Sum-

Segregation of a prisoner without a prior hearing may violate due process if the postponement of procedural protections is not justified by apprehended emergency conditions. See *Hayes* v. *Walker*, 555 F. 2d 625, 633 (CA7), cert. denied, 434 U. S. 959 (1977). The amended complaint alleged that segregation was unnecessary in petitioner's case because his offense did not involve violence and he did not present a "clear and present danger." There is no suggestion in the record that immediate segregation was necessitated by emergency conditions. Defendants did make the unsworn assertion that petitioner was placed in segregation on "temporary investigative status," [9] but the significance of this designation is unclear and it does not, without more, dispose of petitioner's procedural due process claim. The District Court, in dismissing the amended complaint, merely concluded that temporary segre-

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mary Judgment/& Memorandum in Support of Motion to Dismiss or For Summary Judgment," petitioner alleged:

"*Placement in Segregation:* Plaintiff was placed in Segregation on September 20, 1977, with *no* hearing what-so-ever. No reasons provided him as to *why* it was necessary to place him in segregation. *No* Resident Information Report issued him, stating he was being placed in segregation, under *investigation* status." Response, at 2 (emphasis in original).

Petitioner thereafter asserted that "[c]lassification to segregation must comply with procedural due process." *Id.*, at 4, 7. Petitioner went on to assert that his placement in segregation on September 20 was "completely unnecessary, because plaintiff posed no immediate threat to the safety and security of the institution. . . ." *Id.*, at 8. Later in the response, petitioner discussed his due process claim in detail. *Id.*, at 15–16.

[9] In their Memorandum in Support of Motion to Dismiss or for Summary Judgment, respondents asserted:

"Plaintiff's placement in segregation cellhouse on September 20, 1977 on temporary investigative status pending hearing of the resident information reports on September 22, 1977 does not rise to the level of a constitutional deprivation. No disciplinary sanctions constituting a grievous loss were imposed prior to a disciplinary hearing. The transfer of a resident from one cell to another does not trigger due process protections. *Meachum* v. *Fano*, 427 U. S. 215 . . . (1976)."

gation pending investigation was not actionable.[10] The court cited an Illinois Department of Corrections Administrative Regulation which authorized segregation of prisoners pending investigation of disciplinary matters, where required "in the interest of institutional security and safety."[11] In the absence of any showing that concern for institutional security and safety was the basis for immediate segregation of petitioner without a prior hearing, this regulation does not justify dismissal of petitioner's suit for failure to state a claim.

Our discussion of this claim is not intended to express any view on its merits. We conclude merely that the amended complaint was adequate at least to require some response from the defendants, by way of affidavit or otherwise, to petitioner's claim that he was unjustifiably placed in segregation without a prior hearing. Although petitioner's pleadings are prolix and lacking in stylistic precision, this is not a case like *Estelle v. Gamble*, 429 U. S. 97 (1976), in which a *pro se* litigant's detailed recitation of the facts reveals on its face the insufficiency of the complaint. We cannot say with assurance that petitioner can prove no set of facts in support of his claim

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[10] The District Court's order dismissing petitioner's complaint stated:

"Plaintiff complains that his placement in segregation between the evening of September 20 and his hearing on September 22 was 'unnecessary' because no violence was involved in the incident. We find that his temporary placement in segregation pending the hearing, which was brought within the required 72 hour period, is not actionable. See A. R. 804 (G), effective December 1, 1976."

[11] This regulation, Administrative Regulation § 804 (II) (G), provides, in pertinent part:

"It is recognized that incidents occur which, in the interest of institutional security and safety, require that a resident be removed from the general population and placed in a holding unit pending the completion of an investigation. As the holding unit functions in the same manner as a segregation unit (except that single celling is not required in the holding unit), a resident must be provided with the same procedural safeguards and services as are required by this regulation relative to placements, conditions and services in a segregation unit."

entitling him to relief. *Haines* v. *Kerner*, 404 U. S., at 521. Accordingly, the Court of Appeals should have reversed the dismissal of this claim and remanded for further proceedings.[12]

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[12] The dissenting opinion rests on the alternative and somewhat inconsistent grounds that prehearing solitary confinement was (a) proper punishment for an offense that was already adequately proved, (b) necessary in order to forestall the development of a contrived defense, and (c) harmless because petitioner subsequently received a fair hearing. The record reveals that these grounds are not sufficient to justify the dismissal of petitioner's complaint.

On the basis of petitioner's admission that he had been drinking, plus unsworn allegations in the reports of the corrections officers, the dissent concludes that petitioner was intoxicated on September 20 and that he posed a threat to prison security and safety sufficiently serious to warrant immediate segregation.

There is little doubt that some intoxicated prisoners may pose a threat to prison security justifying segregation without a hearing. The problem in this case is that the record does not establish, and the District Court did not find, that petitioner was in fact intoxicated or that his condition presented a threat to institutional security. Indeed, at no point in this litigation have the respondents asserted, by affidavit or otherwise, that petitioner was placed in segregation on September 20 because of such security concerns.

The dissent also speculates that inmates suspected of violations of prison regulations, if allowed to remain in the general prison population pending disciplinary proceedings, will fabricate alibi defenses and intimidate potential witnesses. *Post*, at 22. This danger would apparently justify automatic investigative segregation of all inmate suspects. Ironically, however, even the Administrative Regulation cited by the District Court, see n. 11, *supra*, does not purport to justify such blanket segregation. Moreover, automatic investigative segregation is particularly inappropriate for an inmate, like petitioner, who has already admitted guilt; fabrication of alibis or intimidation of witnesses seems unlikely in such a case. While investigative concerns might, in particular cases, justify prehearing segregation, nothing in the present record suggests that these concerns were at work in this case.

Either the institutional security or the investigative justification postulated by the dissent might well be dispositive had the District Court made appropriate findings. The respondents did not, however, present these justifications to the District Court and the District Court accord-

III

The award of attorney's fees entered against petitioner must be vacated.

In *Christiansburg Garment Co.* v. *EEOC*, 434 U. S. 412 (1978), we held that the defendant in an action brought under Title VII of the Civil Rights Act of 1964 may recover attorney's fees from the plaintiff only if the District Court finds "that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Id.*, at 421. Although arguably a different standard might be applied in a civil rights action under 42 U. S. C. § 1983, we can perceive no reason for applying a less stringent standard. The plaintiff's action must be meritless in the sense that it is groundless or without foundation. The fact that a plaintiff may ultimately lose his case is not in itself a sufficient justification for the assessment of fees. As we stated in *Christiansburg:*

> "To take the further step of assessing attorney's fees against plaintiffs simply because they do not finally pre-

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ingly made no such findings. The record is entirely consistent with the possibility that an inmate who admittedly had been drinking posed no threat at all to prison security and had no intent to deny the facts, but did want an opportunity to establish mitigating circumstances before being placed in solitary confinement. The dissent's emphasis upon petitioner's admission confuses the distinction, previously recognized by this Court, between the question of guilt and the question of appropriate punishment. Cf. *Morrissey* v. *Brewer*, 408 U. S. 471, 483–484 (1972).

Finally, even if the subsequent hearing accorded petitioner minimized or eliminated any compensable harm resulting from the initial denial of procedural safeguards, his constitutional claim is nonetheless actionable. *Carey* v. *Piphus*, 435 U. S. 247, 266–267 (1978). "Because the right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed . . . the denial of procedural due process should be actionable for nominal damages without proof of actual injury." *Id.*, at 266 (footnote omitted).

vail would substantially add to the risks inhering in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII. Hence, a plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." 434 U. S., at 422.

No such finding supported the fee award in this case.

These limitations apply with special force in actions initiated by uncounseled prisoners. Faithful adherence to the principles of *Haines* v. *Kerner* dictates that attorney's fees should rarely be awarded against such plaintiffs. The fact that a prisoner's complaint, even when liberally construed, cannot survive a motion to dismiss does not, without more, entitle the defendant to attorney's fees. An unrepresented litigant should not be punished for his failure to recognize subtle factual or legal deficiencies in his claims. As the Court noted in *Christiansburg,* even if the law or the facts are somewhat questionable or unfavorable at the outset of litigation, a party may have an entirely reasonable ground for bringing suit. 434 U. S., at 422.

Despite the lower court's conclusion to the contrary, the allegations of petitioner's amended complaint are definitely not meritless in the *Christiansburg* sense. Even those allegations that were properly dismissed for failure to state a claim deserved and received the careful consideration of both the District Court and the Court of Appeals.[13] Allegations that,

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[13] As Judge Swygert noted in his dissent from the order denying rehearing en banc, see n. 3, *supra,* the District Court dismissed petitioner's claims only after detailed consideration resulting in a seven-page opinion. According to Judge Swygert:

"It is quite evident from the detailed treatment given by the district court to the issues raised by plaintiff's complaint that the suit was not groundless or meritless. That fact is corroborated by this court's treatment of the same issues on appeal."

upon careful examination, prove legally insufficient to require a trial are not, for that reason alone, "groundless" or "without foundation" as required by *Christiansburg*.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

THE CHIEF JUSTICE would grant the petition and set the case for oral argument.

JUSTICE STEWART would affirm the judgment of the Court of Appeals insofar as it affirmed the District Court's dismissal of the petitioner's complaint. He substantially agrees, however, with what is said in Part III of the Court's *per curiam* opinion, and for those reasons would reverse the judgment insofar as it affirmed the award of attorney's fees entered against the petitioner.

JUSTICE WHITE concurring in part and concurring in the result.

I agree with the result reached in Part II of the *per curiam* opinion. Under *Wolff* v. *McDonnell*, 418 U. S. 539 (1974), a prior hearing was required for the particular disciplinary action involved here—segregation and loss of good time. But as *Wolff* makes clear, Fourteenth Amendment procedural protections were triggered only because under state law—here prison regulations—segregation and good-time reductions could be imposed only for serious disciplinary lapses and only after a prior hearing.[1] Under these regulations, segregation

[1] Illinois Department of Corrections Administrative Regulations in effect at the time of this incident provided that a Program Team could act on charges of minor rule violations, but that an Adjustment Committee hearing was required on all other charges of rule violations, "including those which may result in programmatic removal from the population, demotion in grade, or loss of good time." Administrative Regulation § 804 (II)(A)(4). The regulations also provided that a resident must be in-

prior to a hearing could occur only for reasons of prison security and safety.[2] I agree that there have been no findings that warranted dispensing with the prior hearing.

It is well to point out, however, that although petitioner sought compensatory and punitive damages, as well as declaratory relief, he had a full hearing within 48 hours of his confinement, his guilt was properly established (indeed, he admitted his conduct as he had before), and the discipline imposed on him was found to be justified. Even if petitioner is successful in proving a due process deprivation, his damage would be limited to that flowing from postponement of a hearing for two days. Under *Carey* v. *Piphus*, 435 U. S. 247 (1978), it is likely that only nominal damages would be awardable.

I am in accord with Part III of the Court's opinion.

JUSTICE REHNQUIST, dissenting.

In its effort to distill some vaguely tenable claim from petitioner's complaint, the Court ignores crucial admissions in

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formed, *inter alia*, that "if found guilty of a serious rule violation [by the Adjustment Committee] and found to be a danger to the institutional community, he may be placed in segregation and/or deprived of his current grade and statutory good time credit." § 804 (II) (B) (4).

[2] Illinois Department of Corrections Administrative Regulations authorized confinement of a resident in a holding unit pending the completion of an investigation "in the interest of institutional security and safety." See § 804 (II) (G) (1), quoted in full in the majority opinion, *ante*, at 12, n. 11. The regulations also authorized confinement of a resident in a holding unit in two other situations, again for security reasons. Section 804 (II) (E) (1) provided:

"Whenever it is necessary to remove a resident from the general population on an emergency basis due to serious aggressive behavior and/or for safekeeping, the shift captain and/or unit manager must authorize the placement of a resident in a holding unit until the next meeting of the Adjustment Committee, which in no case may exceed 72 hours."

Section 804 (II) (F) (1) provided:

"Whenever it is deemed necessary by the Chief Administrative Officer to

the complaint itself which fatally undermine any claim of constitutional deprivation. As I read the Court opinion, it holds that the District Court erred in dismissing petitioner's complaint solely because the complaint can be construed to allege that petitioner was placed in segregation without a prior hearing, although he was given an adequate hearing before a review board 40 hours later. The Court recognizes that petitioner admitted before the review board that he violated prison regulations by consuming homemade alcohol, *ante*, at 7–8, but fails to recognize that he had also admitted his guilt *at the time of the incident*. In his amended complaint petitioner alleged:

> "[I] was placed in segregation unnecessarily on September 20, 1977, because there was no violence involved, and I was not a 'clear and present' danger. Additionally, I had admitted to Captain C. D. Tuttle that I had been drinking." Amended Complaint 13.[1]

The complaint also reveals that petitioner has "a problem with alcohol." *Id.*, at 14.[2] In light of these admissions it is difficult to see what purpose the hearing which the Court rules may have been constitutionally required would have served. The hearing would not be held to determine if petitioner violated prison regulations; he admitted that he had when apprehended. Nor would the hearing be held to determine appropriate punishment. That hearing, before the re-

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transfer a resident to another correctional facility for security reasons, the resident may be confined in a holding unit for not more than 72 hours. See ARs 819 and 822 on transfers."

[1] The resident information report filled out by Captain Tuttle and served on petitioner the night the incident occurred confirms that petitioner admitted to drinking at that time.

[2] The nature of this problem was elaborated in a grievance filed by petitioner two days after the review board hearing. There he stated he has "had a problem with [a]lcohol ever since I was fifteen years old, and nowhere in my past record will you find any sort of arrest that didn't involve [a]lcohol or drugs."

view board, was held 40 hours later, and the Court concedes that no matter how liberally petitioner's complaint is construed it does not state any claim concerning the conduct of that hearing or the punishment. *Ante*, at 10. The sole purpose the hearing could have served would be to determine if petitioner should have been removed from the general prison population for the short period between the occurrence of the incident at 7:30 the night of September 20 and the review board hearing held before noon on September 22.

In light of the facts admitted by petitioner, however, it is clear that he cannot state a claim against the prison officials for not holding such a hearing. The reports which petitioner admitted being guilty of described his condition as "tipsy, speech slurred" and stated that petitioner "had all the appearance of being drunk" and "appeared to be intoxicated." In his grievance filed on September 24 petitioner again admitted that he had gotten "drunk" the night of the 20th.[3] Intoxicated

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[3] The Court, *ante*, at 13, n. 12, states that our conclusion that petitioner was intoxicated rests on reports by the officers and petitioner's admission that he had been drinking. This statement overlooks the September 24 grievance filed by petitioner, wherein he reviewed what he considered the highlights of his prison career and asked "why, with all the things I had going for myself, and being so close to appearing before the Parole Board, *did I get drunk* and louse up the good record I had?" (emphasis supplied). It also overlooks that petitioner admitted being guilty of the reports which described his condition as noted in the text. Petitioner did not argue before the review board, as one of his drinking companions did, that although he had been drinking he was not intoxicated. But even more importantly, the Court's effort to distinguish between an inmate who has been drinking in violation of prison regulations and an intoxicated inmate, or an intoxicated inmate who poses a threat to prison security and safety and one who does not, places an intolerable burden on prison officials, who apparently must, at the risk of money damages, decide precisely when a drinking inmate is drunk or even how a particular inmate will react when drunk. This is completely at odds with the established rule that prison officials are accorded great deference in the discharge of their central responsibility for prison security and discipline, see *infra*, at 20.

inmates surely pose a serious threat to prison security and safety, and the placing of petitioner in temporary investigative status was authorized by a prison regulation providing for such action "in the interest of institutional security and safety." This Court has on several occasions stressed that "central to all other corrections goals is the institutional consideration of internal security within corrections facilities themselves." *Bell* v. *Wolfish*, 441 U. S. 520, 546–547 (1979) (quoting *Pell* v. *Procunier*, 417 U. S. 817, 823 (1974)). See *Jones* v. *North Carolina Prisoners' Labor Union*, 433 U. S. 119, 129 (1977); *Procunier* v. *Martinez*, 416 U. S. 396, 412 (1974). "Prison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel . . . ." *Bell* v. *Wolfish*, *supra*, at 547. This Court has also repeatedly recognized that the judiciary, "ill-equipped" to deal with "complex and difficult" problems of running a prison, must accord the decisions of prison officials great deference. See, *e. g.*, *Jones* v. *North Carolina Prisoners' Labor Union*, *supra*, at 126; *Procunier* v. *Martinez*, *supra*, at 405. This rule applies with its greatest force when prison officials act to preserve the central goal of institutional discipline. "Prison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell* v. *Wolfish*, *supra*, at 547. Against this well-established background, and with petitioner's admitted violation of prison regulations by consuming homemade alcohol, it is clear that the prison officials acted within their discretion in removing petitioner from the general prison population. Even the Court of Appeals authority relied upon by the Court recognized that claims such as the present one must be based on allegations of "bad faith" or "mere pretext." *Hayes* v. *Walker*, 555 F. 2d 625, 633 (CA7 1977) (quoting *La Batt* v. *Twomey*, 513 F. 2d 641, 647 (CA7 1975)). Because petitioner has admitted to being intoxicated, however, it is clear that he cannot claim

the prison officials acted out of bad faith or on mere pretext. Their decision to remove him from the general prison population was "rationally related to the reasonable, indeed to the central, objectives of prison administration," *Jones* v. *North Carolina Prisoners' Labor Union, supra*, at 129.

Indeed, it is difficult to envision exactly how an intoxicated inmate would participate in any meaningful way in a hearing held immediately after the drinking incident. A strong argument could certainly be advanced that it would have been a violation of petitioner's rights to hold a hearing when he was, as he admitted, drunk.

This case is thus like *Codd* v. *Velger*, 429 U. S. 624 (1977), where we held that no constitutional violation occurred when an untenured employee was discharged without a hearing. No hearing was required to permit the employee to clear his name, since he did not dispute the truth of the allegedly stigmatizing reason for the discharge. Here the case is even stronger, since petitioner not only does not contend he was innocent of any violation but also admitted his guilt at the time of the incident. In *Codd* no hearing was required on whether the discharge was justified in light of the employee's conduct because the employee had no property interest in continued employment. So, too, here no hearing was required on whether removal from the general prison population pending convening of the review board was justified, since this decision is within the discretion of prison officials and, in view of petitioner's admissions, no abuse of discretion can be shown.[4]

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[4] The Court's citation of *Morrissey* v. *Brewer*, 408 U. S. 471 (1972), and *Carey* v. *Piphus*, 435 U. S. 247 (1978), begs the question whether a hearing prior to the review board hearing was required in this case. In both of these cases the Court held that a hearing was generally required *prior* to the deprivations involved, so that even if the deprivations were later found to have been justified, a constitutional violation occurred if no prior hearing had been held. Here, however, the Court recognizes that "appropriate findings" by the District Court concerning petitioner's intoxication or investigative concerns would be dispositive, presumably

Even if petitioner had not represented a threat to prison security himself, his removal from the general prison population for a brief period [5] was fully justified in order to protect the integrity of the later hearing before the review board. Permitting inmates to return to the general prison population following a serious breach of prison discipline or violation of prison rules poses difficulties in terms of alibi construction and witness intimidation. The problems were certainly present in this case, where one of three inmates involved in a single incident admitted the charges but the other two denied them. The argument that such investigative justifications cannot outweigh the burden imposed on an innocent or possibly innocent inmate, whatever its merit in other cases, is of course not applicable in this case where petitioner has admitted and continues to admit his guilt.

Nothing in the foregoing detracts from the rule of *Haines* v. *Kerner*, 404 U. S. 519 (1972), concerning the liberality with which *pro se* inmate complaints are to be read, since the complaint itself contains the admission of guilt which undermines any colorable claim. I would also note that petitioner filed his original and amended complaints on forms designed to make it easier for *pro se* inmates to articulate their claims. Such forms should make the problem of *Haines* v. *Kerner* recur less frequently by isolating the relevant information for the District Court Judge. The Court notes that the District Court gave petitioner's complaint "careful consideration," and Judge Swygert below argued that "it is quite evi-

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because they would indicate no hearing was required. Thus so far as is discernible the Court's reasoning is not the lack of hearing before confinement, but the fact of possible *wrongful* confinement without a prior hearing. Findings are not necessary when petitioner's own admissions conclusively undermine any possible claim that the prison officials acted in bad faith or on mere pretext.

[5] Prison regulations permit segregation on temporary investigative status for no more than 72 hours; petitioner had his review board hearing within 40 hours of the incident.

dent from the detailed treatment given by the [D]istrict [C]ourt to the issues . . . that the suit was not groundless or meritless." It is odd, however, to reverse a District Court for spending considerable time and effort before concluding that a complaint was meritless. The fact that the District Court carefully examined petitioner's complaint for any possible claim before dismissing it is hardly evidence that a colorable claim must exist. Quite the contrary, it is a strong indication that no claim could be found no matter how deeply the District Court probed.

The award of attorney's fees was entirely proper in this case. The District Court expressly found that petitioner's suit was meritless in response to respondents' motion, which was based on *Christiansburg Garment Co.* v. *EEOC,* 434 U. S. 412 (1978), and cited that case extensively. It is clear, therefore, that the District Court was using "meritless" as that term was understood in *Christiansburg, supra,* at 421 ("the term 'meritless' is to be understood as meaning groundless or without foundation, rather than simply that the plaintiff has ultimately lost his case").

The decision whether to award attorney's fees under 42 U. S. C. § 1988 is committed to the discretion of the district courts, who are intimately familiar with the course of the litigation. Like the Court of Appeals for the Seventh Circuit, I cannot say that the District Court abused its discretion in awarding attorney's fees in this case. In light of petitioner's own admissions it was clear from the outset that he could state no cognizable claim. This is not a case, such as was suggested in *Christiansburg, supra,* at 422, where the claim appeared meritorious at the outset and only later was refuted by facts which emerged on discovery or at trial. The decisive facts were stated in the complaint and they were not merely "questionable" or "unfavorable," as the Court suggests, *ante,* at 15; they were dispositive.

DENNIS *v.* SPARKS ET AL., DBA SIDNEY A. SPARKS, TRUSTEE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 79-1186. Argued October 8, 1980—Decided November 17, 1980

After a Texas state court's injunction against respondents' production of minerals from certain oil leases was dissolved by an appellate court as having been illegally issued, respondents filed suit in Federal District Court alleging a cause of action for damages under 42 U. S. C. § 1983 against the judge who issued the injunction, the corporation that had obtained the injunction, its owner, and the sureties on the injunction bond (one of whom is the petitioner). Respondents claimed that the injunction had been corruptly issued as the result of a conspiracy between the judge and the other defendants, thus causing a deprivation of property without due process of law. The District Court dismissed the action, holding that the judge was immune from liability in a § 1983 suit because the injunction was a judicial act within the jurisdiction of the state court, and that with the dismissal of the judge the remaining defendants could not be said to have conspired "under color" of state law within the meaning of § 1983. The Court of Appeals agreed that the judge was immune from suit, but ultimately reversed as to the dismissal of the claims against the other defendants.

Held: The action against the private parties accused of conspiring with the judge is not subject to dismissal. Private persons, jointly engaged with state officials in a challenged action, are acting "under color" of law for purposes of § 1983 actions. And the judge's immunity from damages liability for an official act that was allegedly the product of a corrupt conspiracy involving bribery of the judge does not change the character of his action or that of his co-conspirators. Historically at common law, judicial immunity does not insulate from damages liability those private persons who corruptly conspire with a judge. Nor has the doctrine of judicial immunity been considered historically as excusing a judge from responding as a witness when his co-conspirators are sued, even though a charge of conspiracy and judicial corruption will be aired and decided. *Gravel* v. *United States*, 408 U. S. 606, distinguished. The potential harm to the public from denying immunity to co-conspirators if the factfinder mistakenly upholds a charge of a corrupt conspiracy is outweighed by the benefits of providing a remedy

against those private persons who participate in subverting the judicial process and in so doing inflict injury on other persons. Pp. 27–32.

604 F. 2d 976, affirmed.

WHITE, J., delivered the opinion for a unanimous Court.

Finley L. Edmonds argued the cause and filed a brief for petitioner.

Garland F. Smith argued the cause and filed a brief for respondents.*

JUSTICE WHITE delivered the opinion of the Court.

In January 1973, a judge of the 229th District Court of Duval County, Tex., enjoined the production of minerals from certain oil leases owned by respondents. In June 1975, the injunction was dissolved by an appellate court as having been illegally issued. Respondents then filed a complaint in the United States District Court purporting to state a cause of action for damages under 42 U. S. C. § 1983.[1] Defendants were the Duval County Ranch Co., Inc., which had obtained the injunction, the sole owner of the corporation, the judge who entered the injunction, and the two individual

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*Briefs of *amici curiae* urging reversal were filed by *Jim Smith*, Attorney General, and *Gerald B. Curington*, Assistant Attorney General, for the State of Florida; and by *Mark White*, Attorney General, *John W. Fainter, Jr.*, First Assistant Attorney General, *Ted L. Hartley*, Executive Assistant Attorney General, and *Laura S. Martin* and *Lonny F. Zwiener*, Assistant Attorneys General, for the State of Texas.

Suzanne M. Lynn filed a brief for the American Civil Liberties Union as *amicus curiae* urging affirmance.

[1] Title 42 U. S. C. § 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

sureties on the injunction bond, one of whom is now petitioner in this Court. Essentially, the claim was that the injunction had been corruptly issued as the result of a conspiracy between the judge and the other defendants, thus causing a deprivation of property, *i. e.*, two years of oil production, without due process of law.

All defendants moved to dismiss, the judge asserting judicial immunity and the other defendants urging dismissal for failure to allege action "under color" of state law, a necessary component of a § 1983 cause of action. The District Court concluded that because the injunction was a judicial act within the jurisdiction of the state court, the judge was immune from liability in a § 1983 suit, whether or not the injunction had issued as the result of a corrupt conspiracy. Relying on *Haldane* v. *Chagnon*, 345 F. 2d 601 (CA9 1965), the District Court also ruled that with the dismissal of the judge the remaining defendants could not be said to have conspired under color of state law within the meaning of § 1983. The action against them was accordingly dismissed "for failure to state a claim upon which relief can be granted."

In a *per curiam* opinion, a panel of the Court of Appeals for the Fifth Circuit affirmed, agreeing that the judge was immune from suit and that because "the remaining defendants, who are all private citizens, did not conspire with any person against whom a valid § 1983 suit can be stated," *Sparks* v. *Duval County Ranch Co.*, 588 F. 2d 124, 126 (1979), existing authorities in the Circuit required dismissal of the claims against these defendants as well.[2] The case was reconsidered en banc, prior Circuit authority was overruled and the District Court judgment was reversed insofar as it had dismissed claims against the defendants other than the judge. *Sparks* v. *Duval County Ranch Co.*, 604 F. 2d

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[2] *Slavin* v. *Curry*, 574 F. 2d 1256 (1978); *Perez* v. *Borchers*, 567 F. 2d 285 (1978); *Humble* v. *Foreman*, 563 F. 2d 780 (1977); *Hill* v. *McClellan*, 490 F. 2d 859 (1974); *Guedry* v. *Ford*, 431 F. 2d 660 (1970).

976 (1979). The court ruled that there was no good reason in law, logic, or policy for conferring immunity on private persons who persuaded the immune judge to exercise his jurisdiction corruptly. Because the judgment below was inconsistent with the rulings of other Courts of Appeals [3] and involves an important issue, we granted the petition for certiorari. 445 U. S. 942. We now affirm.

Based on the doctrine expressed in *Bradley* v. *Fisher*, 13 Wall. 335 (1872), this Court has consistently adhered to the rule that "judges defending against § 1983 actions enjoy absolute immunity from damages liability for acts performed in their judicial capacities. *Pierson* v. *Ray*, 386 U. S. 547 (1967); *Stump* v. *Sparkman*, 435 U. S. 349 (1978)." *Supreme Court of Virginia* v. *Consumers Union*, 446 U. S. 719, 734–735 (1980). The courts below concluded that the judicial immunity doctrine required dismissal of the § 1983 action against the judge who issued the challenged injunction, and as the case comes to us, the judge has been properly dismissed from the suit on immunity grounds. It does not follow, however, that the action against the private parties accused of conspiring with the judge must also be dismissed.

As the Court of Appeals correctly understood our cases to hold, to act "under color of" state law for § 1983 purposes does not require that the defendant be an officer of the State. It is enough that he is a willful participant in joint action with the State or its agents. Private persons, jointly engaged

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[3] *Kurz* v. *Michigan*, 548 F. 2d 172 (CA6 1977); *Hazo* v. *Geltz*, 537 F. 2d 747 (CA3 1976); *Hansen* v. *Ahlgrimm*, 520 F. 2d 768 (CA7 1975); *Sykes* v. *California*, 497 F. 2d 197 (CA9 1974). See also *Haldane* v. *Chagnon*, 345 F. 2d 601, 604–605 (CA9 1965); but see *Briley* v. *California*, 564 F. 2d 849, 858, n. 10 (CA9 1977). The Court of Appeals for the First Circuit has for some time held the present views of the Fifth Circuit. *Slotnick* v. *Staviskey*, 560 F. 2d 31 (1977); *Kermit Construction Corp.* v. *Banco Credito y Ahorro Ponceno*, 547 F. 2d 1 (1976). The Court of Appeals for the Eighth Circuit has recently agreed. *White* v. *Bloom*, 621 F. 2d 276 (1980).

with state officials in the challenged action, are acting "under color" of law for purposes of § 1983 actions. *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 152 (1970); *United States* v. *Price*, 383 U. S. 787, 794 (1966).[4] Of course, merely resorting to the courts and being on the winning side of a lawsuit does not make a party a co-conspirator or a joint actor with the judge. But here the allegations were that an official act of the defendant judge was the product of a corrupt conspiracy involving bribery of the judge. Under these allegations, the private parties conspiring with the judge were acting under color of state law; and it is of no consequence in this respect that the judge himself is immune from damages liability. Immunity does not change the character of the judge's action or that of his co-conspirators.[5] Indeed, his

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[4] In this respect, our holding in *Adickes* v. *S. H. Kress & Co.* was as follows:

"The involvement of a state official in such a conspiracy plainly provides the state action essential to show a direct violation of petitioner's Fourteenth Amendment equal protection rights, whether or not the actions of the police were officially authorized, or lawful; *Monroe* v. *Pape*, 365 U. S. 167 (1961); see *United States* v. *Classic*, 313 U. S. 299, 326 (1941); *Screws* v. *United States*, 325 U. S. 91, 107–111 (1945); *Williams* v. *United States*, 341 U. S. 97, 99–100 (1951). Moreover, a private party involved in such a conspiracy, even though not an official of the State, can be liable under § 1983. 'Private persons, jointly engaged with state officials in the prohibited action, are acting "under color" of law for purposes of the statute. To act "under color" of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents,' *United States* v. *Price*, 383 U. S. 787, 794 (1966)." 398 U. S., at 152. (Footnote omitted.)

[5] Title 18 U. S. C. § 242, the criminal analog of § 1983, also contains a color-of-state-law requirement and we have interpreted the color-of-state-law requirement in these sections coextensively. *Adickes* v. *S. H. Kress & Co.*, *supra*, at 152, n. 7. A state judge can be found criminally liable under § 242 although that judge may be immune from damages under § 1983. See *Imbler* v. *Pachtman*, 424 U. S. 409, 429 (1976); *O'Shea* v. *Littleton*, 414 U. S. 488, 503 (1974). In either case, the judge has acted under color of state law.

immunity is dependent on the challenged conduct being an official judicial act within his statutory jurisdiction, broadly construed. *Stump* v. *Sparkman*, 435 U. S. 349, 356 (1978); *Bradley* v. *Fisher*, *supra*, at 352, 357. Private parties who corruptly conspire with a judge in connection with such conduct are thus acting under color of state law within the meaning of § 1983 as it has been construed in our prior cases. The complaint in this case was not defective for failure to allege that the private defendants were acting under color of state law, and the Court of Appeals was correct in rejecting its prior case authority to the contrary.

Petitioner nevertheless insists that unless he is held to have an immunity derived from that of the judge, the latter's official immunity will be seriously eroded. We are unpersuaded. The immunities of state officials that we have recognized for purposes of § 1983 are the equivalents of those that were recognized at common law, *Owen* v. *City of Independence*, 445 U. S. 622, 637–638 (1980); *Imbler* v. *Pachtman*, 424 U. S. 409, 417 (1976); *Pierson* v. *Ray*, 386 U. S. 547, 554 (1967), and the burden is on the official claiming immunity to demonstrate his entitlement. Cf. *Butz* v. *Economou*, 438 U. S. 478, 506 (1978). Thus, in *Owen* v. *City of Independence*, *supra*, a municipality's claim that it could assert the immunity of its officers and agents in a § 1983 damages action was rejected since there was no basis for such a right at common law. Here, petitioner has pointed to nothing indicating that, historically, judicial immunity insulated from damages liability those private persons who corruptly conspire with the judge.[6]

In *Gravel* v. *United States*, 408 U. S. 606 (1972), we recognized that the Speech or Debate Clause conferred im-

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[6] Insofar as the immunity issue is concerned, it is interesting to note that petitioner observes that he would not be immune in the Texas courts, even if the judge is. Brief for Petitioner 28.

munity upon a Senator's aide as well as the Senator, but only in those situations where the conduct of the aide would be a protected legislative act if performed by the Senator himself. *Id.*, at 618. Here, there could be no claim that petitioner or any of the other private parties was actually performing a judicial act or was in any sense an official aide of the judge. Not surprisingly, petitioner does not argue that judges must conspire with private parties in order that judicial duties may be properly accomplished.

It is urged that if petitioner and other private co-conspirators of the judge are to be subject to § 1983 damages actions and if a case such as this is to go to trial, the charge of conspiracy and judicial corruption will necessarily be aired and decided, the consequence being that the judge, though not a party and immune from liability, will be heavily involved, very likely as a witness forced to testify about and defend his judicial conduct. It is true that, based on the Speech or Debate Clause, we have held that Members of Congress need not respond to questions about their legislative acts, *Gravel* v. *United States, supra,* at 616–617; and, in general, the scope of state legislative immunity for purposes of § 1983 has been patterned after immunity under the Speech or Debate Clause. *Supreme Court of Virginia* v. *Consumers Union,* 446 U. S., at 732–734. But there is no similar constitutionally based privilege immunizing judges from being required to testify about their judicial conduct in third-party litigation. Nor has any demonstration been made that historically the doctrine of judicial immunity not only protected the judge from liability but also excused him from responding as a witness when his co-conspirators are sued. Even if the judge were excused from testifying, it would not follow that actions against private parties must be dismissed.

Of course, testifying takes time and energy that otherwise might be devoted to judicial duties; and, if cases such as this

survive initial challenge and go to trial, the judge's integrity and that of the judicial process may be at stake in such cases. But judicial immunity was not designed to insulate the judiciary from all aspects of public accountability. Judges are immune from § 1983 damages actions, but they are subject to criminal prosecutions as are other citizens. *O'Shea* v. *Littleton,* 414 U. S. 488, 503 (1974). Neither are we aware of any rule generally exempting a judge from the normal obligation to respond as a witness when he has information material to a criminal or civil proceeding.[7] Cf. *United States* v. *Nixon,* 418 U. S. 683, 705–707 (1974).

Judicial immunity arose because it was in the public interest to have judges who were at liberty to exercise their independent judgment about the merits of a case without fear of being mulcted for damages should an unsatisfied litigant be able to convince another tribunal that the judge acted not only mistakenly but with malice and corruption. *Pierson* v. *Ray, supra,* at 554; *Bradley* v. *Fisher,* 13 Wall., at 349, 350, n. ‡. In terms of undermining a judge's independence and his judicial performance, the concern that his conduct will be examined in a collateral proceeding against those with whom he allegedly conspired, a proceeding in which he cannot be held liable for damages and which he need not defend, is not of the same order of magnitude as the prospects of being a defendant in a damages action from complaint to verdict with the attendant possibility of being held liable for damages if the factfinder mistakenly upholds the charge of malice or of a corrupt conspiracy with others. These concerns are not insubstantial, either for the judge or for the public, but we agree with the Court of Appeals that the potential harm to the public from denying immunity to private co-conspirators

[7] Whether the federal courts should be especially alert to avoid undue interference with the state judicial system flowing from demands upon state judges to appear as witnesses need not be addressed at this time.

is outweighed by the benefits of providing a remedy against those private persons who participate in subverting the judicial process and in so doing inflict injury on other persons.

The judgment of the Court of Appeals is

Affirmed.

ALLIED CHEMICAL CORP. ET AL. v. DAIFLON, INC.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 79-1895. Decided November 17, 1980

Held: Where the District Court, because of error in certain of its evidentiary rulings in respondent's private antitrust action, had entered a nonappealable interlocutory order granting a new trial after the jury had returned a verdict for respondent, the Court of Appeals erred in issuing a writ of mandamus directing the trial court to restore the verdict as to liability but permitting a new trial on damages. The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations. The party seeking issuance of the writ must have no other adequate means to obtain the relief he desires, and thus a trial court's ordering of a new trial, which is reviewable on direct appeal after a final judgment has been entered, rarely, if ever, will justify the issuance of the writ. To overturn a new-trial order by way of mandamus undermines the policy against piecemeal appellate review.

Certiorari granted; 612 F. 2d 1249, reversed.

PER CURIAM.

Respondent, Daiflon, Inc., is a small importer of refrigerant gas that brought an antitrust suit against all domestic manufacturers of the gas. Petitioner E. I. du Pont de Nemours & Co. was accused of monopolizing the industry in violation of § 2 of the Sherman Act, 15 U. S. C. § 2. All petitioners were accused of conspiring to drive respondent out of business in violation of § 1 of the Sherman Act, 15 U. S. C. § 1.

After a 4-week trial, the jury returned a verdict for the respondent and awarded $2.5 million in damages. In a subsequent oral order, the trial court denied petitioners' motion for a judgment notwithstanding the verdict, but granted a motion for new trial. The trial court acknowledged in its oral order that it had erred during trial in certain of its evidentiary rulings and that the evidence did not support the amount of the jury award.

Respondent then filed a petition for a writ of mandamus with the Court of Appeals for the Tenth Circuit requesting that it instruct the trial court to reinstate the jury verdict. The Court of Appeals, without a transcript of the trial proceedings before it,[1] issued a writ of mandamus directing the trial court to restore the jury verdict as to liability but permitting the trial court to proceed with a new trial on damages. *Daiflon, Inc.* v. *Bohanon*, 612 F. 2d 1249. Petitioners seek review of this action of the Court of Appeals by their petition for certiorari with this Court.

An order granting a new trial is interlocutory in nature and therefore not immediately appealable. The question presented by this petition is therefore whether a litigant may obtain a review of an order concededly not appealable by way of mandamus. If such review were permissible, then the additional question would be presented as to whether the facts in this particular case warrant the issuance of the writ.

It is not disputed that the remedy of mandamus is a drastic one, to be invoked only in extraordinary situations. *Will* v. *United States*, 389 U. S. 90, 95 (1967); *Bankers Life & Cas. Co.* v. *Holland*, 346 U. S. 379, 382–385 (1953); *Ex parte Fahey*, 332 U. S. 258, 259 (1947). On direct appeal from a *final* decision, a court of appeals has broad authority to "modify, vacate, set aside or reverse" an order of a district court, and it may direct such further action on remand "as may be just under the circumstances." 28 U. S. C. § 2106. By contrast, under the All Writs Act, 28 U. S. C. § 1651 (a), courts of appeals may issue a writ of mandamus only when "necessary or appropriate in aid of their respective jurisdic-

[1] The Court of Appeals did request that each party prepare a summary of the evidence presented in the trial court. The petitioners objected to this procedure which substituted a summary prepared by each party in lieu of the trial transcript. The court acknowledged in its opinion that the summary eventually filed by the petitioners only summarized the testimony of one witness and that the court was unaware of the identity or the testimony given by the petitioners' other witness.

tions." Although a simple showing of error may suffice to obtain a reversal on direct appeal, to issue a writ of mandamus under such circumstances "would undermine the settled limitations upon the power of an appellate court to review interlocutory orders." *Will* v. *United States, supra,* at 98, n. 6.

This Court has recognized that the writ of mandamus "has traditionally been used in the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.'" *Will* v. *United States, supra,* at 95, quoting *Roche* v. *Evaporated Milk Assn.,* 319 U. S. 21, 26 (1943). Only exceptional circumstances, amounting to a judicial usurpation of power, will justify the invocation of this extraordinary remedy. *Will* v. *United States, supra,* at 95.

The reasons for this Court's chary authorization of mandamus as an extraordinary remedy have often been explained. See *Kerr* v. *United States District Court,* 426 U. S. 394, 402–403 (1976). Its use has the unfortunate consequence of making a district court judge a litigant, and it indisputably contributes to piecemeal appellate litigation. It has been Congress' determination since the Judiciary Act of 1789 that as a general rule appellate review should be postponed until after final judgment has been rendered by the trial court. A judicial readiness to issue the writ of mandamus in anything less than an extraordinary situation would "run the real risk of defeating the very policies sought to be furthered by that judgment of Congress." *Id.,* at 403. In order to insure that the writ will issue only in extraordinary circumstances, this Court has required that a party seeking issuance have no other adequate means to attain the relief he desires, *ibid.; Roche* v. *Evaporated Milk Assn., supra,* at 26, and that he satisfy the "burden of showing that [his] right to issuance of the writ is 'clear and indisputable.'" *Bankers Life & Cas. Co.* v. *Holland, supra,* at 384, quoting *United States* v.

Duell, 172 U. S. 576, 582 (1899). In short, our cases have answered the question as to the availability of mandamus in situations such as this with the refrain: "What never? Well, *hardly* ever!"

A trial court's ordering of a new trial rarely, if ever, will justify the issuance of a writ of mandamus. On the contrary, such an order is not an uncommon feature of any trial which goes to verdict. A litigant is free to seek review of the propriety of such an order on direct appeal after a final judgment has been entered. Consequently, it cannot be said that the litigant "has no other adequate means to seek the relief he desires." The authority to grant a new trial, moreover, is confided almost entirely to the exercise of discretion on the part of the trial court. Where a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is "clear and indisputable." *Will* v. *Calvert Fire Ins. Co.*, 437 U. S. 655, 666 (1978) (plurality opinion).

To overturn an order granting a new trial by way of mandamus indisputably undermines the policy against piecemeal appellate review. Under the rationale employed by the Court of Appeals, any discretionary order, regardless of its interlocutory nature, may be subject to immediate judicial review.[2] Such a rationale obviously encroaches on the conflicting policy against piecemeal review, and would leave that policy at the mercy of any court of appeals which chose to disregard it.[3]

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[2] It is worth noting that this case does not present the first instance in which the Court of Appeals felt it appropriate to overturn a new trial order by the use of a common-law writ. In *Kanatser* v. *Chrysler Corp.*, 199 F. 2d 610 (CA10 1952), the court reached the same result by granting a writ of certiorari.

[3] Even if it be appropriate in certain circumstances to use mandamus to review a discretionary order by a trial court, the new trial order entered in this case would not appear to be a likely candidate. A trial judge is not required to enter supporting findings of facts and conclusions of law when granting a new trial motion. See Fed. Rule

The petition for a writ of certiorari is therefore granted, and the order of the Court of Appeals granting the writ of mandamus is

Reversed.

JUSTICE STEWART and JUSTICE STEVENS took no part in the consideration or decision of this case.

JUSTICE BLACKMUN, with whom JUSTICE WHITE joins, dissenting.

I have no quarrel with the general principles enunciated by the Court in its *per curiam* opinion. Of course, only exceptional circumstances justify the extraordinary remedy of mandamus. I sense, however, from the rather voluminous material that is before us (as contrasted with the average petition for certiorari), and from the Court of Appeals' careful review of the law and the decided cases concerning the use of the mandamus power, that this is an unusual case and that there well may be more here than appears at first glance. I therefore would not decide, peremptorily and summarily, what circumstances, if any, justify a federal appellate court's issuance of a writ of mandamus to overturn a trial court's order granting a new trial.* Instead, I would grant the

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Civ. Proc. 52 (a). It cannot be contended with any certainty that the trial court in this case, when entering its oral order granting a new trial, intended to set forth each and every reason for its order. The trial court did note, however, that it had made errors in the admission of certain documentary evidence and that it felt the petitioners had not received a fair trial. Given that the Court of Appeals did not have a complete transcript of the proceedings before it, see n. 1, *supra*, and that there could be other unarticulated bases for the new trial order, it would seem all but impossible for the Court of Appeals to hold as a matter of law that the trial court clearly abused its discretion in entering the new trial order.

*To the extent that the Court's decision in this case is based upon the inadequacy of the record before the Court of Appeals, the proper remedy is to remand for further proceedings based upon a complete record.

petition for certiorari and give the case plenary consideration so that we may examine carefully the factors and considerations that prompted the Court of Appeals to issue the writ. I feel that the case deserves at least that much.

STONE ET AL. v. GRAHAM, SUPERINTENDENT OF PUBLIC INSTRUCTION OF KENTUCKY

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

No. 80-321. Decided November 17, 1980

Held: A Kentucky statute requiring the posting of a copy of the Ten Commandments, purchased with private contributions, on the wall of each public school classroom in the State has no secular legislative purpose, and therefore is unconstitutional as violating the Establishment Clause of the First Amendment. While the state legislature required the notation in small print at the bottom of each display that "[t]he secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States," such an "avowed" secular purpose is not sufficient to avoid conflict with the First Amendment. The pre-eminent purpose of posting the Ten Commandments, which do not confine themselves to arguably secular matters, is plainly religious in nature, and the posting serves no constitutional educational function. Cf. *Abington School District* v. *Schempp*, 374 U. S. 203. That the posted copies are financed by voluntary private contributions is immaterial, for the mere posting under the auspices of the legislature provides the official support of the state government that the Establishment Clause prohibits. Nor is it significant that the Ten Commandments are merely posted rather than read aloud, for it is no defense to urge that the religious practices may be relatively minor encroachments on the First Amendment

Certiorari granted; 599 S. W. 2d 157, reversed.

PER CURIAM.

A Kentucky statute requires the posting of a copy of the Ten Commandments, purchased with private contributions, on the wall of each public classroom in the State.[1] Peti-

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[1] The statute provides in its entirety:

"(1) It shall be the duty of the superintendent of public instruction, provided sufficient funds are available as provided in subsection (3) of this Section, to ensure that a durable, permanent copy of the Ten Com-

tioners, claiming that this statute violates the Establishment and Free Exercise Clauses of the First Amendment,[2] sought an injunction against its enforcement. The state trial court upheld the statute, finding that its "avowed purpose" was "secular and not religious," and that the statute would "neither advance nor inhibit any religion or religious group" nor involve the State excessively in religious matters. App. to Pet. for Cert. 38–39. The Supreme Court of the Commonwealth of Kentucky affirmed by an equally divided court. 599 S. W. 2d 157 (1980). We reverse.

This Court has announced a three-part test for determining whether a challenged state statute is permissible under the Establishment Clause of the United States Constitution:

> "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally the statute must not foster 'an excessive government entanglement with religion.'" *Lemon* v. *Kurtzman,* 403 U. S. 602, 612–613 (1971) (citations omitted).

If a statute violates any of these three principles, it must be

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mandments shall be displayed on a wall in each public elementary and secondary school classroom in the Commonwealth. The copy shall be sixteen (16) inches wide by twenty (20) inches high.

"(2) In small print below the last commandment shall appear a notation concerning the purpose of the display, as follows: 'The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States.'

"(3) The copies required by this Act shall be purchased with funds made available through voluntary contributions made to the state treasurer for the purposes of this Act." 1978 Ky. Acts, ch. 436, § 1 (effective June 17, 1978), Ky. Rev. Stat. § 158.178 (1980).

[2] The First Amendment provides in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ." This prohibition is applicable to the States through the Fourteenth Amendment. *Abington School District* v. *Schempp,* 374 U. S. 203, 215–216 (1963).

struck down under the Establishment Clause. We conclude that Kentucky's statute requiring the posting of the Ten Commandments in public school rooms has no secular legislative purpose, and is therefore unconstitutional.

The Commonwealth insists that the statute in question serves a secular legislative purpose, observing that the legislature required the following notation in small print at the bottom of each display of the Ten Commandments: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." 1978 Ky. Acts, ch. 436, § 1 (effective June 17, 1978), Ky. Rev. Stat. § 158.178 (1980).

The trial court found the "avowed" purpose of the statute to be secular, even as it labeled the statutory declaration "self-serving." App. to Pet. for Cert. 37. Under this Court's rulings, however, such an "avowed" secular purpose is not sufficient to avoid conflict with the First Amendment. In *Abington School District* v. *Schempp*, 374 U. S. 203 (1963), this Court held unconstitutional the daily reading of Bible verses and the Lord's Prayer in the public schools, despite the school district's assertion of such secular purposes as "the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature." *Id.*, at 223.

The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths,[3] and no legislative recitation of a supposed secular purpose can blind us to that fact. The Commandments do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder,

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[3] As this Court commented in *Abington School District* v. *Schempp*, *supra*, at 224, "Surely the place of the Bible as an instrument of religion cannot be gainsaid . . . ."

adultery, stealing, false witness, and covetousness. See Exodus 20: 12–17; Deuteronomy 5: 16–21. Rather, the first part of the Commandments concerns the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day. See Exodus 20: 1–11; Deuteronomy 5: 6–15.

This is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like. *Abington School District* v. *Schempp*, *supra*, at 225. Posting of religious texts on the wall serves no such educational function. If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments. However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause.

It does not matter that the posted copies of the Ten Commandments are financed by voluntary private contributions, for the mere posting of the copies under the auspices of the legislature provides the "official support of the State . . . Government" that the Establishment Clause prohibits. 374 U. S., at 222; see *Engel* v. *Vitale*, 370 U. S. 421, 431 (1962).[4] Nor is it significant that the Bible verses involved in this case are merely posted on the wall, rather than read aloud as in *Schempp* and *Engel*, for "it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment." *Abington School District* v. *Schempp*, *supra*, at 225. We conclude that Ky. Rev.

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[4] Moreover, while the actual copies of the Ten Commandments were purchased through private contributions, the State nevertheless expended public money in administering the statute. For example, the statute requires that the state treasurer serve as a collecting agent for the contributions. Ky. Rev. Stat. § 158.178 (3) (1980).

Stat. § 158.178 (1980) violates the first part of the *Lemon* v. *Kurtzman* test, and thus the Establishment Clause of the Constitution.[5]

The petition for a writ of certiorari is granted, and the judgment below is reversed.

It is so ordered.

THE CHIEF JUSTICE and JUSTICE BLACKMUN dissent. They would grant certiorari and give this case plenary consideration.

JUSTICE STEWART dissents from this summary reversal of the courts of Kentucky, which, so far as appears, applied wholly correct constitutional criteria in reaching their decisions.

JUSTICE REHNQUIST, dissenting.

With no support beyond its own *ipse dixit*, the Court concludes that the Kentucky statute involved in this case "has *no* secular legislative purpose," *ante*, at 41 (emphasis supplied), and that "[t]he pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature," *ibid.* This even though, as the trial court found, "[t]he General Assembly thought the statute had a secular legislative purpose and specifically said so." App. to Pet. for Cert. 37. The Court's summary rejection of a secular purpose articulated by the legislature and confirmed by the state court is without precedent in Establishment Clause jurisprudence. This Court regularly looks to legislative articulations of a statute's purpose in Establishment Clause cases

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[5] The Supreme Court cases cited by the dissenting opinion as contrary, *Committee for Public Education* v. *Nyquist*, 413 U. S. 756 (1973); *Sloan* v. *Lemon*, 413 U. S. 825 (1973); *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971); *Board of Education* v. *Allen*, 392 U. S. 236 (1968), are easily distinguishable: all are cases involving state assistance to private schools. Such assistance has the obvious legitimate secular purpose of promoting educational opportunity. The posting of the Ten Commandments on classroom walls has no such secular purpose.

and accords such pronouncements the deference they are due. See, *e. g.*, *Committee for Public Education* v. *Nyquist*, 413 U. S. 756, 773 (1973) ("we need touch only briefly on the requirement of a 'secular legislative purpose.' As the recitation of legislative purposes appended to New York's law indicates, each measure is adequately supported by legitimate, nonsectarian state interests"); *Lemon* v. *Kurtzman*, 403 U. S. 602, 613 (1971) ("the statutes themselves clearly state they are intended to enhance the quality of the secular education"); *Sloan* v. *Lemon*, 413 U. S. 825, 829–830 (1973); *Board of Education* v. *Allen*, 392 U. S. 236, 243 (1968). See also *Florey* v. *Sioux Falls School District*, 619 F. 2d 1311, 1314 (CA8) (upholding rules permitting public school Christmas observances with religious elements as promoting the articulated secular purpose of "advanc[ing] the student's knowledge and appreciation of the role that our religious heritage has played in the social, cultural and historical development of civilization"), cert. denied, *post*, p. 987. The fact that the asserted secular purpose may overlap with what some may see as a religious objective does not render it unconstitutional. As this Court stated in *McGowan* v. *Maryland*, 366 U. S. 420, 445 (1961), in upholding the validity of Sunday closing laws, "the present purpose and effect of most of [these laws] is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the state from achieving its secular goals."

Abington School District v. *Schempp*, 374 U. S. 203 (1963), repeatedly cited by the Court, is not to the contrary. No statutory findings of secular purpose supported the challenged enactments in that case. In one of the two cases considered in *Abington School District* the trial court had determined that the challenged exercises were intended by the State to be religious exercises. *Id.*, at 223. A contrary finding is presented here. In the other case no specific finding had been

made, and "the religious character of the exercise was admitted by the State," *id.*, at 224.[1]

The Court rejects the secular purpose articulated by the State because the Decalogue is "undeniably a sacred text," *ante*, at 41. It is equally undeniable, however, as the elected representatives of Kentucky determined, that the Ten Commandments have had a significant impact on the development of secular legal codes of the Western World. The trial court concluded that evidence submitted substantiated this determination. App. to Pet. for Cert. 38. See also *Anderson* v. *Salt Lake City Corp.*, 475 F. 2d 29, 33 (CA10 1973) (upholding construction on public land of monument inscribed with Ten Commandments because they have "substantial secular attributes"). Certainly the State was permitted to conclude that a document with such secular significance should be placed before its students, with an appropriate statement of the document's secular import. See *id.*, at 34 ("It does not seem reasonable to require removal of a passive monument, involving no compulsion, because its accepted precepts, as a foundation for law, reflect the religious nature of an ancient era").[2] See also *Opinion of the Justices*, 108 N. H. 97, 228 A. 2d 161 (1967) (upholding placement of plaques with the motto "In God We Trust" in public schools).

The Establishment Clause does not require that the public sector be insulated from all things which may have a religious

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[1] The Court noted that even if the State's purpose were not strictly religious, "it is sought to be accomplished through readings, without comment, from the Bible." 374 U. S., at 224. Here of course there was no compelled reading, and there was comment accompanying the text of the Commandments, mandated by statute and focusing on their secular significance.

[2] The Court's emphasis on the religious nature of the first part of the Ten Commandments is beside the point. The document as a whole has had significant secular impact, and the Constitution does not require that Kentucky students see only an expurgated or redacted version containing only the elements with directly traceable secular effects.

significance or origin. This Court has recognized that "religion has been closely identified with our history and government," *Abington School District, supra,* at 212, and that "[t]he history of man is inseparable from the history of religion," *Engel* v. *Vitale,* 370 U. S. 421, 434 (1962). Kentucky has decided to make students aware of this fact by demonstrating the secular impact of the Ten Commandments. The words of Justice Jackson, concurring in *McCollum* v. *Board of Education,* 333 U. S. 203, 235–236 (1948), merit quotation at length:

> "I think it remains to be demonstrated whether it is possible, even if desirable, to comply with such demands as plaintiff's completely to isolate and cast out of secular education all that some people may reasonably regard as religious instruction. Perhaps subjects such as mathematics, physics or chemistry are, or can be, completely secularized. But it would not seem practical to teach either practice or appreciation of the arts if we are to forbid exposure of youth to any religious influences. Music without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view. . . . I should suppose it is a proper, if not an indispensable, part of preparation for a worldly life to know the roles that religion and religions have played in the tragic story of mankind. The fact is that, for good or for ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences, derived from paganism, Judaism, Christianity—both Catholic and Protestant—and other faiths accepted by a large part of the world's peoples. One can hardly respect the system of education that would leave the student wholly ignorant of the currents of religious thought that move the world society for a part in which he is being prepared."

I therefore dissent from what I cannot refrain from describing as a cavalier summary reversal, without benefit of oral argument or briefs on the merits, of the highest court of Kentucky.

WISCONSIN ET AL. *v.* ILLINOIS ET AL.

ON BILL IN EQUITY

No. 1, Orig. Decree April 21, 1930—Decree enlarged May 22, 1933—Decree entered June 12, 1967—Decree amended December 1, 1980*

Decree amended.

Decree reported: 281 U. S. 696; decree enlarged: 289 U. S. 395; decree entered: 388 U. S. 426.

ORDERED:

A. Paragraph 3 of the Decree entered by the Court herein on June 12, 1967, is amended to read as follows:

3. For the purpose of determining whether the total amount of water diverted from Lake Michigan by the State of Illinois and its municipalities, political sub-divisions, agencies and instrumentalities is not in excess of the maximum amount permitted by this decree, the amounts of domestic pumpage from the lake by the State and its municipalities, political sub-divisions, agencies and instrumentalities the sewage and sewage effluent derived from which reaches the Illinois waterway, either above or below Lockport, shall be added to the amount of direct diversion into the canal from the lake and storm runoff reaching the canal from the Lake Michigan watershed computed as provided in Paragraph 2 of this decree. The annual accounting period shall consist of twelve months terminating on the last day of September. A period of forty (40) years, consisting of the current annual accounting period and the previous thirty-nine (39) such periods (all after the effective date of this decree), shall be permitted, when necessary, for achieving an average diversion which is not in excess of the maximum permitted amount; provided, however, that the average diversion in any annual accounting

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*Together with No. 2, Orig., *Michigan* v. *Illinois et al.*, and No. 3, Orig., *New York* v. *Illinois et al.*

period shall not exceed 3680 cubic feet per second, except that in any two (2) annual accounting periods within a forty (40) year period, the average annual diversion may not exceed 3840 cubic feet per second as a result of extreme hydrologic conditions; and, that for the first thirty-nine (39) years the cumulative algebraic sum of each annual accounting period's average diversion minus 3200 cubic feet per second shall not exceed 2000 cubic feet per second-years. All measurements and computations required by this decree shall be made by the appropriate officers, agencies or instrumentalities of the State of Illinois, or the Corps of Engineers of the United States Army subject to agreement with and cost-sharing by the State of Illinois for all reasonable costs including equipment, using the best current engineering practice and scientific knowledge. If made by the State of Illinois, the measurements and computations shall be conducted under the continuous supervision and direction of the Corps of Engineers of the United States Army in cooperation and consultation with the United States Geological Survey, including but not limited to periodic field investigation of measuring device calibration and data gathering. All measurements and computations made by the State of Illinois shall be subject to periodic audit by the Corps of Engineers. An annual report on the measurements and computations required by this decree shall be issued by the Corps of Engineers. Best current engineering practice and scientific knowledge shall be determined within six (6) months after implementation of the decree based upon a recommendation from a majority of the members of a three-member committee. The members of this committee shall be appointed by the Chief of Engineers of the United States Army Corps of Engineers. The members shall be selected on the basis of recognized experience and technical expertise in flow measurement or hydrology. None of the committee members shall be employees of the Corps of Engineers or employees or paid consultants of any of the parties to these proceedings other than

the United States. The Corps of Engineers shall convene such a committee upon implementation of this decree and at least each five (5) years after implementation of this decree to review and report to the Corps of Engineers and the parties on the method of accounting and the operation of the accounting procedure. Reasonable notice of these meetings must be given to each of the parties. Each party to these proceedings shall have the right to attend committee meetings, inspect any and all measurement facilities and structures, have access to any data and reports and be permitted to take its own measurements.

B. Paragraph 5 of the said Decree entered by the Court herein is amended by adding thereto an additional sentence to read as follows:

The amendment to Paragraph 3 of this decree shall take effect on the first day of October following the passage into law by the General Assembly of the State of Illinois of an amendment to the Level of Lake Michigan Act providing that the amount used for dilution in the Sanitary and Ship Canal for water quality purposes shall not be increased above three hundred twenty (320) cubic feet per second, and that in allocations to new users of Lake Michigan water, allocations for domestic purposes be given priority and to the extent practicable allocations to new users of Lake Michigan water shall be made with the goal of reducing withdrawals from the Cambrian-Ordovician aquifer.

C. A certified copy of the above legislation shall be served upon the parties and filed with the Clerk of the Supreme Court by the State of Illinois. If no party raises an objection to the adequacy of the legislation within 30 days of service, Illinois will have complied with the requirements of the amendment made by this Order to paragraph 5 of the Decree entered by the Court herein on June 12, 1967. Any such objection shall be raised in the manner set forth in Paragraph 7 of said Decree.

IT IS FURTHER ORDERED THAT:

Each of the parties to this proceeding shall bear its own costs. The expenses of the Special Master shall be borne by the State of Illinois and the Metropolitan Sanitary District of Greater Chicago, three-fifths thereof by the State of Illinois and two-fifths thereof by the Metropolitan Sanitary District of Greater Chicago.

JUSTICE MARSHALL took no part in the consideration or decision of this order.

STATEMENT OF INTENT AND TECHNICAL BASIS FOR PROPOSED AMENDMENTS TO 1967 DECREE

This statement sets forth the intent of the parties and the technical basis for the revisions to certain of the provisions of paragraphs 3 and 5 of the 1967 Decree.

The proposed change in the 1967 Decree has been designed to alter in part the provisions of the existing Decree that prevent Illinois from effectively utilizing and managing the 3200 cubic feet per second (cfs) of Lake Michigan water which Illinois was allocated.

Under the existing system, increasing amounts of impervious areas and increasing demand by domestic users elevate the risk that the language of the decree will be violated in any one or five year period if additional allocations are made by the State to domestic users for a period of years consistent with good management practice.

The proposed change accomplishes the following:

1. Increases the period for determining compliance with the 3200 cfs limit from a five year running average to a forty year running average;
2. During the first thirty-nine years of the decree, allows Illinois to exceed the 3200 cfs limit by 2000 cfs-years in the aggregate (one cfs-year is the volume of water resulting from an average flow of one cfs for a period of one year);

3. Limits the average diversion in any one accounting period to 115% of 3200 cfs, but in two years of any forty year period permits the average diversion to reach 120% of 3200 cfs, to allow for extreme hydrologic conditions.

The lengthening of the averaging period from five to forty years reduces the variability of the averaged figure, thus decreasing the amount of water that needs to be held in reserve for storm water runoff and increasing the amount of water that may be allocated for domestic purposes to reduce in part the pumpage from the Cambrian-Ordovician aquifer.

The lengthening of the averaging period also allows an increase in the planning period to a period of time that is more compatible with the life of certain types of water supply facilities, thus permitting more efficient use of the available diversion without increasing the total allowable diversion, and permitting better management of all the water resources of the region.

In establishing the limits of paragraph three of the amended decree, the available data and uncertainties as to the behavior of and interactions between the various elements of the hydrologic regime under current and future conditions were limiting factors.

To estimate maximum hydrologic variations that must be considered in the allocation accounting process, the forty-four year precipitation and runoff data contained in "Water Yield, Urbanization, and the North Branch of the Chicago River," a report by the Northeastern Illinois Planning Commission and Hydrocomp, Inc., dated October 14, 1976, were used. These data assumed a 30% imperviousness factor and were used by the parties to approximate the conditions of the entire Lake Michigan diversion watershed at the present time.

These data indicate that the maximum departure above the mean annual stormwater flow is 59%. Assuming, there-

fore, that the mean annual stormwater flow is 683 cfs, the maximum departure is 405 cfs. This could result in a diversion of 13% above the allowable 3200 cfs maximum. Given the relatively short period of record and the likelihood of increased runoff resulting from urbanization, it was agreed that a 15% exceedance, to a maximum of 3680 cfs, would be allowed in any year to accommodate high stormflows and that in any two years of the 40 year accounting period the diversion may be increased by 20%, to a maximum of 3840 cfs, to accommodate extraordinary hydrologic conditions.

Because of year-to-year variations in storm runoff there will be series of years when the average annual diversion will need to exceed 3200 cfs for best management, and some years when the diversion will be less than the 3200 cfs average. Calculations of the cumulative sum of the annual departures show that the maximum cumulative exceedance of 3200 cfs would be slightly below 1500 cfs-years as indicated by the forty-four years of data that were used. The possibility exists that in the initial forty year period the cumulative exceedance may be greater than 1500 cfs-years. Since the record used is relatively short and urbanization is likely to increase runoff, the maximum cumulative exceedance has been established at 2000 cfs-years.

The goal of this amended Decree is to maintain the long-term average annual diversion of water from Lake Michigan at or below 3200 cfs.

COUNTY OF IMPERIAL, CALIFORNIA, ET AL. *v.* MUNOZ ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 79–1003. Argued October 15, 1980—Decided December 2, 1980

Petitioner county obtained an injunction in a California state court prohibiting the owner of a tract of land from selling water from a well on the premises for use outside the county in violation of a conditional use permit required by a county zoning ordinance and allowing the sale of water only for use within the county. The California Supreme Court affirmed, and this Court dismissed the tract owner's appeal. Meanwhile, respondents, merchants involved in the tract owner's sale of water to Mexico, brought suit in Federal District Court in California, challenging the conditional permit on the ground that it violated the Commerce Clause, and secured a preliminary injunction restraining petitioner county from enforcing the permit. The court rejected the county's argument that the Anti-Injunction Act—which prohibits a federal court from granting an injunction "to stay proceedings in a State court" except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments—operated to prohibit the court from so enjoining the county. The United States Court of Appeals affirmed, holding that the state trial court proceedings had terminated, that the federal injunction, therefore, did not violate the rule that the Anti-Injunction Act cannot be evaded by addressing a federal injunction to the parties rather than the state court, and that, moreover, under *Hale* v. *Bimco Trading, Inc.*, 306 U. S. 375, third parties were not barred under that Act from challenging a statute on federal constitutional grounds when the statute was also under litigation in the state courts.

Held: The Court of Appeals erred in finding the Anti-Injunction Act inapplicable to prohibit the District Court from enjoining petitioner county from enforcing the tract owner's permit. Pp. 58–60.

(a) The Court of Appeals' view that after a state court has entered an injunction, its proceedings are concluded for Anti-Injunction Act purposes is contrary to the holding of *Atlantic Coast Line R. Co.* v. *Locomotive Engineers*, 398 U. S. 281, that although a federal injunction against a certain party's giving effect to a state-court injunction was

directed only at that party the injunction was nevertheless one "to stay proceedings in a State court" within the meaning of the Anti-Injunction Act. Pp. 58–59.

(b) *Hale* v. *Bimco Trading, Inc., supra,* does not govern this case, where neither the District Court nor the Court of Appeals addressed the question whether respondents were "strangers to the state court proceeding" who were not bound as though they were parties to such proceeding. Unless respondents were such "strangers," the federal injunction was barred by the Anti-Injunction Act. Pp. 59–60.

604 F. 2d 1174, vacated and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, and REHNQUIST, JJ., joined. POWELL, J., filed a concurring opinion, *post,* p. 60. BLACKMUN, J., filed an opinion concurring in the result, *post,* p. 61. BRENNAN, J., filed a dissenting opinion, in which STEVENS, J., joined, *post,* p. 62. MARSHALL, J., filed a dissenting statement, *post,* p. 63.

James H. Harmon argued the cause and filed briefs for petitioners.

William H. Kronberger, Jr., argued the cause for respondents. With him on the briefs was *Murry Luftig.**

JUSTICE STEWART delivered the opinion of the Court.

The Anti-Injunction Act, 28 U. S. C. § 2283, provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

This case presents issues respecting the scope of that Act.

I

In 1972, Donald C. McDougal bought from W. Erle Simpson a tract of land in Imperial County, Cal. Although the

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**Donald McDougal, Jr.,* filed a brief for Donald C. McDougal as *amicus curiae.*

tract was in a residential subdivision, the county's zoning ordinance allowed the tract's owner to develop its natural resources if he could obtain a conditional-use permit. With the land, McDougal acquired such a permit, which allowed him to sell well water on the condition that it be sold only for use within the county. Simpson had never challenged that condition, nor had he ever sold much water from his well. Like Simpson, McDougal did not challenge the condition, but he did sell a good deal of water, and he sold some of it for use outside the county. McDougal's neighbors grew irritated by the many trucks carrying water from McDougal's premises, and they complained to the county. The county sought to vindicate its zoning ordinance and permit by asking a California Superior Court for injunctive and declaratory relief that would prohibit McDougal from selling water for consumption outside the county.

The state trial court enjoined McDougal from "conducting a trucking operation on the premises similar to that which occurred commencing on or about June 30, 1972." [1] On appeal to the California Supreme Court, McDougal argued that the permit's geographic restriction was invalid. The state appellate court declined to reach that argument, since "a landowner or his successor in title is barred from challenging a condition imposed upon the granting of a special permit if he has acquiesced therein by either specifically agreeing to the condition or failing to challenge its validity, and accepted the benefits afforded by the permit." *County of Imperial* v. *McDougal*, 19 Cal. 3d 505, 510–511, 564 P. 2d 14, 18. The California Supreme Court thus affirmed the Superior Court's decision that the sale of water outside the county violated the ordinance, although it reversed the Superior Court's finding that the frequent truck traffic at McDougal's premises violated the zoning ordinance. McDougal appealed that

[1] The state trial court opinion is unreported.

judgment to this Court, which dismissed his appeal for want of a substantial federal question. 434 U. S. 944.

The respondents in this case are Mexican merchants: Respondent Munoz has a contract with McDougal to be his broker in arranging sales of water to Mexico; respondents Martinez and De Leon have agreed to purchase McDougal's water for consumption in Mexico. Although none of the respondents was a named party to the suit against McDougal in the state courts, all of them were interested and—to an undetermined degree—involved in it, and Munoz participated as *amicus curiae* before the California Supreme Court. Twelve days after that court had denied McDougal's petition for rehearing, and even before this Court had dismissed his appeal, the respondents initiated the present litigation by filing in the United States District Court for the Southern District of California a complaint seeking declaratory and injunctive relief to prevent the County of Imperial from enforcing the terms of McDougal's conditional permit. They argued in the District Court that those terms violated the Commerce Clause of the Constitution. Art. I, § 8, cl. 3. The District Court concluded that respondents would suffer irreparable harm were there no injunction, and that they would probably succeed on the merits. Accordingly, the court issued a preliminary injunction restraining the county "from enforcing the restriction in the use permit which prohibits sale of water for use outside Imperial County." [2]

Some months later, the California Superior Court ordered McDougal to show cause why he should not be held guilty of contempt for violating the court's injunction by selling water for use outside the county. After proceedings in which the county participated, he was found guilty of contempt and again ordered to cease selling water for use outside of Imperial County. That order was stayed, however, pending

[2] The District Court opinion is unreported.

the outcome of the county's appeal of the federal trial court's order to the United States Court of Appeals for the Ninth Circuit. Subsequently, the Court of Appeals affirmed the District Court's order of preliminary injunction, 604 F. 2d 1174, and this Court granted the county's petition for a writ of certiorari. 445 U. S. 903.

II

The county has maintained throughout the present litigation that the Anti-Injunction Act operates to prohibit the District Court from enjoining it from enforcing the terms of McDougal's permit. In rejecting that argument, the District Court cited *Hale* v. *Bimco Trading, Inc.*, 306 U. S. 375, and said that "this court may, if otherwise appropriate, restrain the operation of an unconstitutional statute; surely it does not lose the right to do so merely because the statute has been tested in the state courts." In reaching the same conclusion, the Court of Appeals reasoned that the state trial court proceedings had terminated, and that the injunction, therefore, did not violate the rule that the Act cannot be evaded by addressing a federal injunction to the parties rather than to the state court. It also agreed with the District Court that, under the *Hale* case, "third parties are not barred under the Anti-Injunction Act from challenging a statute on federal constitutional grounds when the statute is also under litigation in the state courts." 604 F. 2d, at 1176.

In our view the threshold reasoning of the Court of Appeals disregarded the teaching of this Court's opinion in *Atlantic Coast Line R. Co.* v. *Locomotive Engineers*, 398 U. S. 281. In that case, the railroad had secured a state-court injunction prohibiting the union from picketing a railroad facility. Two years later, the union tried but failed to convince the state court to dissolve the injunction in light of an intervening decision of this Court. The union did not appeal that decision, but instead persuaded a federal court

to enjoin the railroad "from giving effect to or availing [itself] of the benefits of" the state-court injunction. *Id.*, at 287. This Court held that "although this federal injunction is in terms directed only at the railroad it is an injunction 'to stay proceedings in a State court.' " *Ibid.* The view of the Court of Appeals in the present case that after a state court has entered an injunction, its proceedings are concluded for the purposes of the Anti-Injunction Act was thus contrary to the square holding of the *Atlantic Coast Line* case.

The Court of Appeals' final reason (and the District Court's only reason) for finding the Act inapplicable was this Court's decision in *Hale* v. *Bimco Trading, Inc., supra.* There, a cement company had secured from a state court a writ of mandamus ordering the state road department to enforce a statute requiring the inspection of cement imported into the State. Bimco Trading, Inc., subsequently obtained a federal-court injunction restraining the road department from enforcing the statute. This Court held that 28 U. S. C. § 379 (1934 ed.)—the predecessor of the current Anti-Injunction Act—did not bar the federal injunction, since to hold otherwise would have been to

> "assert that a successful mandamus proceeding in a state court against state officials to enforce a challenged statute, bars injunctive relief in a United States district court against enforcement of the statute by state officials at the suit of strangers to the state court proceedings. This assumes that the mandamus proceeding bound the independent suitor in the federal court as though he were a party to the litigation in the state court. This, of course, is not so." 306 U. S., at 377–378.

Neither the District Court nor the Court of Appeals addressed the question whether respondents in this case were "strangers to the state court proceeding" who were not bound "as though [they were parties] to the litigation in the state

court."[3] Unless respondents were such "strangers," the injunction they sought was barred by the Act.[4]

Accordingly, the judgment is vacated, and the case is remanded to the Court of Appeals.

It is so ordered.

JUSTICE POWELL, concurring.

Although I join the opinion of the Court on the basis of its reading of *Hale* v. *Bimco Trading, Inc.*, 306 U. S. 375 (1939), I record my willingness to reconsider *Hale*. It has rarely been cited and—as the Court reads it today—it creates an

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[3] The dissenting opinion today rests entirely on the supposition that the Court of Appeals has already decided this question. That supposition is demonstrably untenable:

The Court of Appeals found that the Anti-Injunction Act was inapplicable, and proceeded to consider the merits of the petitioners' res judicata defense, a defense based upon the judgment in the state litigation. The court held that the doctrine of res judicata did not in any event apply in the circumstances here presented, and accordingly explicitly declined to consider whether the respondents had been "in privity" with McDougal in the state litigation. Since the court did not even decide that the respondents had not been in privity with McDougal in the state litigation, it most assuredly could not have decided and did not decide that the respondents were "strangers to the state court proceeding."

[4] The respondents contend that their suit comes within one of the statutory exceptions to the Act. First, they urge that the "in aid of jurisdiction" exception applies. They apparently reason that the District Court was not barred from entering a declaratory judgment, that a declaratory judgment unsupported by an injunction would be a nullity, and that therefore an injunction was necessary "in aid of" the District Court's subject-matter jurisdiction over Commerce Clause questions. This argument proves too much, since by its reasoning the exception, and not the rule, would always apply. Second, respondents assert that this case falls within the exception to the Act for injunctions "expressly authorized by Act of Congress." They cite *Mitchum* v. *Foster*, 407 U. S. 225, for the undoubted proposition that suits under 42 U. S. C. § 1983 are within that exception. This argument cannot prevail, however, for the simple reason that the respondents' complaint did not rely on or even so much as mention § 1983.

exception to the coverage of the Anti-Injunction Act that I think is contrary to the policy of that Act.

JUSTICE BLACKMUN, concurring in the result.

For me, the Court's opinion is somewhat opaque. Perhaps it is intentionally so.

I agree with JUSTICE BRENNAN that respondents were—and were necessarily determined by the Court of Appeals to be—"strangers to the state court proceeding," *post*, at 62, who were not bound by the state-court litigation. No principle of res judicata evoked by the California litigation applies to them.

I join the Court in vacating the Court of Appeals' judgment and remanding the case, however, for I am troubled by that court's apparent misreading of *Atlantic Coast Line R. Co.* v. *Locomotive Engineers*, 398 U. S. 281 (1970), and by its analysis of the effect of the Anti-Injunction Act, 28 U. S. C. § 2283, upon the particular facts of this case.

At the same time, I am disturbed by what seems to me to be the implication of this Court's opinion, namely, that the Anti-Injunction Act does not apply when the state litigation involves different parties. If I am correct that this is the premise, I believe that the Court is indulging in a new exposition of the meaning of *Hale* v. *Bimco Trading, Inc.*, 306 U. S. 375 (1939). The Anti-Injunction Act imposes a flat and positive prohibition. It then allows three exceptions. None of those exceptions is applicable to the situation before us, which involves a single-use restriction on a single parcel of land. The precedent of *Hill* v. *Martin*, 296 U. S. 393, 403 (1935), *Atlantic Coast Line R. Co., supra*, and *Vendo Co.* v. *Lektro-Vend Corp.*, 433 U. S. 623, 630 (1977), supports a conclusion that the Anti-Injunction Act bars the federal court from issuing an injunction against enforcement of this use restriction. Yet, a holding to that effect would not oust the federal court of jurisdiction to order other forms of relief, such as a declaratory judgment. It is worth noting, or so it

appears to me, that the state court has made clear, by its stay of the contempt order, that it will abide by the federal resolution of the constitutional issue.*

The situation presented by this case is an inevitable result of our having two independent judicial systems. The Anti-Injunction Act cannot eliminate all conflicts, and was not so intended. It precludes federal injunctions that interfere with state proceedings. Heretofore, this Court has applied the Act's restrictions strictly. I would expect that approach to be continued.

JUSTICE BRENNAN, with whom JUSTICE STEVENS joins, dissenting.

To vacate and remand to the Court of Appeals to determine whether respondents were "strangers to the state court proceeding" within the meaning of *Hale* v. *Bimco Trading, Inc.*, 306 U. S. 375, 377–378 (1939), is to require the Court of Appeals to perform a task it undoubtedly has already performed. The Court of Appeals concluded that respondents' lawsuit did not contravene the Anti-Injunction Act, 28 U. S. C. § 2283, and relied on *Hale* as a basis for its conclusion. Necessarily implicit in that conclusion was the court's judgment that the *Hale* test had in all pertinent respects been satisfied and that, accordingly, respondents were "strangers to the state court proceeding." [1]

The Court identifies nothing in the record to support a conclusion that respondents were not "strangers to the state court proceeding," apart, perhaps, from respondent Munoz' participation as *amicus curiae* before the California Supreme

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**Hale* v. *Bimco Trading, Inc.*, 306 U. S. 375 (1939), is distinguishable, for that case involved an attack on a state statute and a complete legislative scheme that was being applied to many parties in many different circumstances. That situation differs significantly from the particularized use restriction with which the present litigation is concerned.

[1] The District Court similarly concluded that *Hale* v. *Bimco Trading, Inc.*, did not bar the instant lawsuit and thus necessarily also found that respondents were "strangers to the state court proceeding."

Court. Even if *amicus* status were sufficient to require Munoz' withdrawal as a party,[2] it is undisputed that neither respondent Martinez nor respondent De Leon played any role in the state-court litigation. The Court's statement that "all of [the respondents] were interested and—to an undetermined degree—involved in it," *ante*, at 57, is, therefore, unfounded.[3]

Under these circumstances, to require the Court of Appeals to find—yet again—that respondents were "strangers to the state court proceeding" is an unnecessary waste of judicial resources. Accordingly, I dissent from the remand and would affirm.

JUSTICE MARSHALL also dissents but would dismiss the writ as improvidently granted.

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[2] The language of *Hale* quoted by the Court, *ante*, at 59, suggests that *amicus* status does not impair one's standing as a "stranger," since the Court contrasted an "independent suitor in the federal court" with "a party to the litigation in the state court." 306 U. S., at 378. Munoz clearly was not such a party.

[3] The District Court stated:

"But the plaintiffs herein have no common property interest with McDougal. At issue in the state proceeding was McDougal's use permit; the use permit is a part of the land and runs with the land, as the California Supreme Court expressly held. The plaintiffs have no property interest in McDougal's land or in his use permit. Their interest is in the steps taken by the County to enforce what they perceive as an unconstitutional ordinance. Therefore, since the property interest which was litigated in the state courts was exclusively McDougal's and not the plaintiffs', it must follow that the plaintiffs were not in privity with McDougal and his state court judgment does not bar them from proceeding with this lawsuit." App. to Pet. for Cert. B–5.

While it is true, as the Court notes, *ante*, at 60, n. 3, that the Court of Appeals, unlike the District Court, "declined to consider whether the respondents had been 'in privity' with McDougal in the state litigation," that refusal has no bearing on the disposition of petitioners' Anti-Injunction Act claim. With respect to that claim, the court necessarily found that respondents were "strangers to the state court proceeding," and its disposition of the res judicata claim on a ground other than privity is irrelevant.

ENVIRONMENTAL PROTECTION AGENCY *v.* NATIONAL CRUSHED STONE ASSOCIATION ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 79–770. Argued October 7, 1980—Decided December 2, 1980*

Under § 301 (b) of the Federal Water Pollution Control Act, the Environmental Protection Agency (EPA) is to set 1977 effluent limitations for categories of point sources, requiring such sources to meet standards based on application of the "best practicable control technology currently available" (BPT), and 1987 limitations, requiring all point sources to meet standards based on application of the "best available technology economically achievable" (BAT). Section 301 (c) of the Act provides for variances from 1987 BAT effluent limitations for individual point sources upon a showing "that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operators; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants." However, the Act contains no similar variance provision authorizing consideration of the economic ability of the individual operator to meet the cost of complying with 1977 BPT standards. In 1977, the EPA promulgated BPT pollution discharge limitations for the coal mining industry and for certain portions of the mineral mining and processing industry. Under the regulations, a greater than normal cost of implementation will be considered in acting on a request for a variance, but a variance will not be granted on the basis of the applicant's economic inability to meet the cost of implementing the uniform standard. Respondents sought review of the regulations in various Courts of Appeals, challenging both the substantive standards and the variance clause. All of the petitions were transferred to the Court of Appeals for the Fourth Circuit, which set aside the variance provision as unduly restrictive and required the EPA to consider, *inter alia*, the factors set out in § 301 (c), including the applicant's economic capability.

Held: The Court of Appeals erred in not accepting the EPA's interpretation of the Act. The EPA is not required by the Act to consider eco-

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*Together with *Costle, Administrator, Environmental Protection Agency* v. *Consolidation Coal Co. et al.*, also on certiorari to the same court (see this Court's Rule 19.4).

nomic capability in granting variances from its uniform BPT standards. Pp. 73–85.

(a) The statute's plain language does not support the Court of Appeals' position. Section 301 (c)'s requirement for a BAT variance of "reasonable further progress" toward the elimination of pollutant discharges refers to the prior BPT standard, but there is no comparable prior standard with respect to BPT limitations. And since BPT limitations do not require an industrial category to commit the maximum resources economically possible to pollution control, even if affordable, the § 301 (c) BAT variance factor as to the maximum use of technology within the applicant's economic capability is inapposite in the BPT context. More importantly, under the Act, the Administrator of the EPA, in determining BPT limitations, is directed to consider the benefits of effluent reductions as compared to the cost of pollution control in defining the best practicable technology at a level that would effect the 1977 goal of substantially reducing total pollution produced by each industrial category. Thus, the statute contemplated regulations that would require a substantial number of point sources with the poorest performances either to conform to BPT standards or to cease production. To allow a BPT variance based on economic capability and not to require adherence to the prescribed minimum technology would permit the employment of the very practices that the Administrator had rejected in establishing the best practicable technology currently available in the industry. Pp. 73–78.

(b) The EPA's interpretation of the statutory language is also supported by the legislative history, which shows that Congress understood that the economic capability provision of § 301 (c) was limited to BAT variances; foresaw and accepted the economic hardship, including the closing of some plants, that BPT effluent limitations would cause; and took certain steps to alleviate this hardship, steps which did not include allowing a BPT variance based on economic capability. Pp. 79–83.

(c) In the face of § 301 (c)'s explicit limitation to BAT variances and in the absence of any other specific direction in the statute to provide for BPT variances in connection with permits for individual point sources, the Administrator adopted a reasonable construction of the statutory mandate, and the Court of Appeals erred in concluding that, since BAT limitations are to be more stringent than BPT limitations, the variance provision for the latter must be at least as flexible as that for the former with respect to affordability. Pp. 83–84.

601 F. 2d 111 and 604 F. 2d 239, reversed.

WHITE, J., delivered the opinion of the Court, in which all other Members joined, except POWELL, J., who took no part in the consideration or decision of the cases.

Andrew J. Levander argued the cause *pro hac vice* for petitioners. With him on the briefs were *Solicitor General McCree, Acting Assistant Attorney General MacBeth,* and *Michele B. Corash.*

George C. Freeman, Jr., argued the cause for respondents Consolidation Coal Co. et al. *Theodore L. Garrett* argued the cause for respondents National Crushed Stone Association et al. With Messrs. Freeman and Garrett on the brief were *Michael B. Barr, Robert F. Stauffer, Lawrence A. Demase, Frank J. Clements,* and *Ronald R. Janke.*†

JUSTICE WHITE delivered the opinion of the Court.

In April and July 1977, the Environmental Protection Agency (EPA), acting under the Federal Water Pollution Control Act (Act), as amended, 86 Stat. 816, 33 U. S. C. § 1251 *et seq.*, promulgated pollution discharge limitations for the coal mining industry and for that portion of the mineral mining and processing industry comprising the crushed-stone, construction-sand, and gravel categories.[1] Although the Act does not expressly authorize or require variances from the 1977 limitation, each set of regulations contained a variance provision.[2] Respondents sought review of the regulations in

†*J. Taylor Banks* and *Ronald J. Wilson* filed a brief for the Natural Resources Defense Council, Inc., as *amicus curiae* urging reversal.

William W. Becker filed a brief for the New England Legal Foundation as *amicus curiae* urging affirmance.

[1] The coal mining standards were published at 42 Fed. Reg. 21380 *et seq.* (1977), adopting 40 CFR Part 434. The mineral mining and processing standards were published at 42 Fed. Reg. 35843 *et seq.* (1977), adopting 40 CFR Part 436.

[2] The variance provision reads as follows:

"In establishing the limitations set forth in this section, EPA took into account all information it was able to collect, develop and solicit with

various Courts of Appeals, challenging both the substantive standards and the variance clause.[3] All of the petitions for review were transferred to the Court of Appeals for the Fourth Circuit. In *National Crushed Stone Assn.* v. *EPA*, 601 F. 2d 111 (1979), and in *Consolidation Coal Co.* v. *Costle*, 604 F. 2d 239 (1979), the Court of Appeals set aside the

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respect to factors (such as age and size of plant, raw materials, manufacturing processes, products produced, treatment technology available, energy requirements and costs) which can affect the industry subcategorization and effluent levels established. It is, however, possible that data which would affect these limitations have not been available and, as a result, these limitations should be adjusted for certain plants in this industry. An individual discharger or other interested person may submit evidence to the Regional Administrator (or to the State, if the State has the authority to issue NPDES permits) that factors relating to the equipment or facilities involved, the process applied, or other such factors related to such discharger are fundamentally different from the factors considered in the establishment of the guidelines. On the basis of such evidence or other available information, the Regional Administrator (or the State) will make a written finding that such factors are or are not fundamentally different for that facility compared to those specified in the Development Document. If such fundamentally different factors are found to exist, the Regional Administrator or the State shall establish for the discharger effluent limitations in the NPDES permit either more or less stringent than the limitations established herein, to the extent dictated by such fundamentally different factors. Such limitation must be approved by the Administrator of the Environmental Protection Agency. The Administrator may approve or disapprove such limitations, specify other limitations, or initiate proceedings to revise these regulations."

See 40 CFR § 434.22 (1980) (coal preparation plants); § 434.32 (acid mine drainage); § 434.42 (alkaline mine drainage); § 436.22 (crushed stone) and § 436.32 (construction sand and gravel).

[3] The actions were brought under § 509 (b)(1)(E), which, as set forth in 33 U. S. C. § 1369 (b)(1)(E), gives the courts of appeals jurisdiction to review "the Administrator's action . . . in approving or promulgating any effluent limitation or other limitation under section 1311 . . . of this title. . . ." Plaintiffs in *National Crushed Stone* were three producers and their trade association. Plaintiffs in *Consolidation Coal* were 17 coal producers, their trade association, 5 citizens' environmental associations, and the Commonwealth of Pennsylvania.

variance provision as "unduly restrictive" and remanded the provision to EPA for reconsideration.[4]

To obtain a variance from the 1977 uniform discharge limitations a discharger must demonstrate that the "factors relating to the equipment or facilities involved, the process applied, or other such factors relating to such discharger are fundamentally different from the factors considered in the establishment of the guidelines." Although a greater than normal cost of implementation will be considered in acting on a request for a variance, economic ability to meet the costs will not be considered.[5] A variance, therefore, will not be granted on the basis of the applicant's economic inability to meet the costs of implementing the uniform standard.

The Court of Appeals for the Fourth Circuit rejected this position. It required EPA to "take into consideration, among other things, the statutory factors set out in § 301 (c)," which authorizes variances from the more restrictive pollution limitations to become effective in 1987 and which specifies economic capability as a major factor to be taken into account.[6] The court held that

"'if [a plant] is doing all that the maximum use of

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[4] In *National Crushed Stone*, the Court of Appeals also vacated and remanded the substantive regulations. That action is not before the Court. In *Consolidation Coal*, the substantive regulations were upheld.

[5] EPA has explained its position as follows:

"Thus a plant may be able to secure a BPT variance by showing that the plant's own compliance costs with the national guideline limitation would be x times greater than the compliance costs of the plants EPA considered in setting the national BPT limitation. A plant may not, however, secure a BPT variance by alleging that the plant's own financial status is such that it cannot afford to comply with the national BPT limitation." 43 Fed. Reg. 50042 (1978).

[6] Section 301 (c), 86 Stat. 844, 33 U. S. C. § 1311 (c), allows the Administrator to grant a variance "upon a showing by the owner or operator . . . that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or opera-

technology within its economic capability will permit and if such use will result in reasonable further progress toward the elimination of the discharge of pollutants . . . no reason appears why [it] should not be able to secure such a variance should it comply with any other requirements of the variance.' " 601 F. 2d, at 124, quoting from *Appalachian Power Co.* v. *Train,* 545 F. 2d 1351, 1378 (CA4 1976).

We granted certiorari to resolve the conflict between the decisions below and *Weyerhaeuser Co.* v. *Costle,* 191 U. S. App. D. C. 309, 590 F. 2d 1011 (1978), in which the variance provision was upheld. 444 U. S. 1069.

I

We shall first briefly outline the basic structure of the Act, which translates Congress' broad goal of eliminating "the discharge of pollutants into the navigable waters," 33 U. S. C. § 1251 (a)(1), into specific requirements that must be met by individual point sources.[7]

Section 301 (b) of the Act, 33 U. S. C. § 1311 (b) (1976 ed. and Supp. III), authorizes the Administrator to set effluent limitations for categories of point sources.[8] With respect to existing point sources, the section provides for implementation of increasingly stringent effluent limitations in two steps. The first step to be accomplished by July 1, 1977, requires all point sources to meet standards based on "the application of

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tor; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants."

[7] A "point source" is defined as "any discernible, confined and discrete conveyance, . . . from which pollutants are or may be discharged." § 502 (14), 33 U. S. C. § 1362 (14) (1976 ed., Supp. III).

[8] Throughout this opinion "Administrator" refers to the Administrator of EPA. In *E. I. du Pont de Nemours & Co.* v. *Train,* 430 U. S. 112 (1977), we sustained the Administrator's authority to issue the 1977 effluent limitations.

the best practicable control technology currently available [BPT] as defined by the Administrator . . . ." § 301 (b)(1)(A). The second step, to be accomplished by July 1, 1987, requires all point sources to meet standards based on application of the "best available technology economically achievable [BAT] for such category or class . . . ."[9] § 301 (b)(2)(A). Both sets of limitations—BPT's followed within 10 years by BAT's—are to be based upon regulatory guidelines established under § 304 (b).

Section 304 (b) of the Act, 33 U. S. C. § 1314 (b), is again divided into two sections corresponding to the two levels of technology, BPT and BAT. Under § 304 (b)(1) the Administrator is to quantify "the degree of effluent reduction attainable through the application of the best practicable control technology currently available [BPT] for classes and categories of point sources . . . ." In assessing the BPT the Administrator is to consider

> "the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application, . . . the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate." 33 U. S. C. § 1314 (b)(1)(B).

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[9] The Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, required that the second-stage standards be met by 1983. This deadline was extended in the Clean Water Act of 1977, 91 Stat. 1567. Depending on the nature of the pollutant, the deadline for the more stringent limitations now falls between July 1, 1984, and July 1, 1987. The 1977 Act also replaced the BAT standard with a new standard, "best conventional pollutant control technology [BCT]," for certain so-called "conventional pollutants." 33 U. S. C. § 1311 (b)(2)(E) (1976 ed., Supp. III). The distinction between BCT and BAT is not relevant to the issue presented here.

Similar directions are given the Administrator for determining effluent reductions attainable from the BAT except that in assessing BAT total cost is no longer to be considered in comparison to effluent reduction benefits.[10]

Section 402 authorizes the establishment of the National Pollutant Discharge Elimination System (NPDES), under which every discharger of pollutants is required to obtain a permit. The permit requires the discharger to meet all the applicable requirements specified in the regulations issued under § 301. Permits are issued by either the Administrator or state agencies that have been approved by the Administrator.[11] The permit "transform[s] generally applicable effluent limitations . . . into the obligations (including a timetable for compliance) of the individual discharger. . . ." *EPA* v. *California ex rel. State Water Resources Control Board*, 426 U. S. 200, 205 (1976).

Section 301 (c) of the Act explicitly provides for modifying the 1987 (BAT) effluent limitations with respect to individual point sources. A variance under § 301 (c) may be obtained upon a showing "that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination

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[10] Senator Muskie, the principal Senate sponsor of the Act, described the "limited cost-benefit analysis" employed in setting BPT standards as being intended to "limit the application of technology only where the additional degree of effluent reduction is wholly out of proportion to the costs of achieving such marginal level of reduction. . . ." Remarks of Senator Muskie reprinted in Legislative History of the Water Pollution Control Act Amendments of 1972 (Committee Print compiled for the Senate Committee on Public Works by the Library of Congress) Ser. No. 93–1, p. 170 (1973) (hereafter Leg. Hist.). Section 304 (b)(2)(B) lists "cost" as a factor to consider in assessing BAT, although it does not state that costs shall be considered in relation to effluent reduction.

[11] Establishment of state permit programs is authorized by § 402 (b), 33 U. S. C. § 1342 (b) (1976 ed., Supp. III). At present, over 30 States and covered territories operate their own NPDES programs.

of the discharge of pollutants." Thus, the economic ability of the individual operator to meet the costs of effluent reductions may in some circumstances justify granting a variance from the 1987 limitations.

No such explicit variance provision exists with respect to BPT standards, but in *E. I. du Pont de Nemours & Co.* v. *Train*, 430 U. S. 112 (1977), we indicated that a variance provision was a necessary aspect of BPT limitations applicable by regulations to classes and categories of point sources. *Id.*, at 128. The issue in this case is whether the BPT variance provision must allow consideration of the economic capability of an individual discharger to afford the costs of the BPT limitation. For the reasons that follow, our answer is in the negative.[12]

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[12] In *Du Pont*, we held that pre-enforcement review of the BPT variance provision would be "premature," 430 U. S., at 128, n. 19. In its petition for certiorari in this case, EPA argued that the Court of Appeals erred in reviewing the variance clause prior to application of the regulation to a particular discharger's request for a variance. EPA has now abandoned this position. We agree with the Court of Appeals that whatever may have been true at the time of *Du Pont*, pre-enforcement review of the variance provision is no longer premature since EPA has now taken the definitive position that the factors specified in § 301 (c) apply only to BAT limitations, and not to BPT limitations. See 43 Fed. Reg. 44847–44848, 50042 (1978); 44 Fed. Reg. 32893–32894 (1979). But cf. n. 25, *infra*. The Court of Appeals for the District of Columbia Circuit reached the same conclusion in considering the identical variance clause in the context of BPT standards for paper mills:

"In the three years that have now elapsed since *du Pont* was briefed and argued in the Fourth Circuit, however, enough indicia of the Agency's attitude toward the 1977 variance provision under the Act has [*sic*] accumulated so that its administration is anything but 'a matter of speculation.'" *Weyerhaeuser Co.* v. *Costle*, 191 U. S. App. D. C. 309, 330, 590 F. 2d 1011, 1032 (1978) (citation omitted).

This is the proper result under the twofold test articulated in *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 149 (1967), for evaluating the ripeness of administrative action. First, the issue is "fit" for judicial decision, because it involves only a question of law: whether the Court of

II

The plain language of the statute does not support the position taken by the Court of Appeals. Section 301 (c) is limited on its face to modifications of the 1987 BAT limitations. It says nothing about relief from the 1977 BPT requirements. Nor does the language of the Act support the position that although § 301 (c) is not itself applicable to BPT standards, it requires that the affordability of the prescribed 1977 technology be considered in BPT variance decisions.[13]

Appeals properly construed the Act to require EPA to consider § 301 (c) factors in granting BPT variances. Second, failure to review the variance issue now would cause "hardship" to the parties. The regulations in question affect thousands of point sources throughout the country—about 4,800 crushed-stone facilities and 6,000 coal facilities, many of them involved in this case through their trade associations. The resolution of this conflict will determine for some of these plants whether they will continue to exist or not, and for many others it will determine the level of funding they must budget for pollution controls. They should not be left to speculate on what the regulations require of them. Similarly, EPA represents to the Court that a failure to resolve the issue will cause some hardship to EPA: "a present ruling . . . would advance rather than impede the administrative enforcement of the Act." Brief for Petitioners 21, n. 17.

Moreover, in *Du Pont, supra,* we held that a uniform BPT effluent regulation must contain a variance provision, if it is to be valid. EPA has definitively stated that economic capability will not be a ground for a variance. Section 509 (b)(1)(E) provides for judicial review of effluent limitations promulgated pursuant to § 301, and these actions were brought under that section. Since the variance clause is an integral part of the regulation, review of the regulation must reach the question of whether this limitation on the scope of the variance provision renders the regulation invalid under *Du Pont.*

Finally, the fact that the Court of Appeals for the Fourth Circuit held the variance provision to be invalid, while the Court of Appeals for the District of Columbia Circuit in *Weyerhaeuser, supra,* upheld the same provision provides yet another reason for this Court to settle this controversy at this time. For all of these reasons, the issue is ripe for judicial review.

[13] It is true that in *Du Pont* we said there "[was no] radical difference in the mechanism used to impose limitations for the 1977 and the 198[7] deadlines" and that "there is no indication in either § 301 or § 304 that

This would be a logical reading of the statute only if the factors listed in § 301 (c) bore a substantial relationship to the considerations underlying the 1977 limitations as they do to those controlling the 1987 regulations. This is not the case.

The two factors listed in § 301 (c)—"maximum use of technology within the economic capability of the owner or operator" and "reasonable further progress toward the elimination of the discharge of pollutants"—parallel the general definition of BAT standards as limitations that "require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward . . . eliminating the discharge of all pollutants . . . ." § 301 (b)(2). A § 301 (c) variance, thus, creates for a particular point source a BAT standard that represents for it the same sort of economic and technological commitment as the general BAT standard creates for the class. As with the general BAT standard, the variance assumes that the 1977 BPT standard has been met by the point source and that the modification represents a commitment of the maximum resources economically possible to the ultimate goal of eliminating all polluting discharges.

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the § 304 guidelines play a different role in setting 1977 limitations." 430 U. S., at 127. But our decision in *Du Pont* was that the 1977 limitations, like the 1987 limitations, could be set by regulation and for classes of point sources. It dealt with the power of the Administrator and the procedures he was to employ. There was no suggestion, nor could there have been, that the 1977 BPT and the 1987 BAT limitations were to have identical purposes or content. It follows that no proper inference could be drawn from *Du Pont* that the grounds for issuing variances from the 1987 limitations should also be the grounds for permitting individual point sources to depart from 1977 standards. Indeed, our opinion recognized that § 301 (c) was designed for BAT limitations, 430 U. S., at 121, 127, n. 17. Had we thought that § 301 (c) governed variances from both the BAT and BPT standards, there would have been no need to postpone to another day, as we did in 430 U. S., at 128, n. 19, the question whether the variance clause contained in the 1977 regulations had the proper scope. That scope would have been defined by § 301 (c).

No one who can afford the best available technology can secure a variance.

There is no similar connection between § 301 (c) and the considerations underlying the establishment of the 1977 BPT limitations. First, § 301 (c)'s requirement of "reasonable further progress" must have reference to some prior standard. BPT serves as the prior standard with respect to BAT. There is, however, no comparable, prior standard with respect to BPT limitations.[14] Second, BPT limitations do not require an industrial category to commit the maximum economic resources possible to pollution control, even if affordable. Those point sources already using a satisfactory pollution control technology need take no additional steps at all. The § 301 (c) variance factor, the "maximum use of technology within the economic capability of the owner or operator," would therefore be inapposite in the BPT context. It would not have the same effect there that it has with respect to BAT's, *i. e.*, it would not apply the general requirements to an individual point source.

More importantly, to allow a variance based on the maximum technology affordable by the point source, even if that technology fails to meet BPT effluent limitations, would undercut the purpose and function of BPT limitations. Rather than the 1987 requirement of the best measures economically and technologically feasible, the statutory provisions for 1977 contemplate regulations prohibiting discharges from any point source in excess of the effluent produced by the best practicable technology currently available

[14] Also, the ultimate goal expressed in § 301 (c), "the elimination of the discharge of pollutants," reflects the "national goal" specified in § 301 (b)(2)(A) of "eliminating the discharge of all pollutants." This is not the aim of a BPT limitation; its more modest purpose is to effect a first step toward this goal. Thus, while BAT limitations may be regarded as falling between a level of effluent reduction already achieved and the ultimate goal, the frame of reference within which BPT limitations are established contains neither the prior nor the subsequent measure.

in the industry. The Administrator was referred to the industry and to existing practices to determine BPT. He was to categorize point sources, examine control practices in exemplary plants in each category, and, after weighing benefits and costs and considering other factors specified by § 304, determine and define the best practicable technology at a level that would effect the obvious statutory goal for 1977 of substantially reducing the total pollution produced by each category of the industry.[15] Necessarily, if pollution is to be diminished, limitations based on BPT must forbid the level of effluent produced by the most pollution-prone segment of the industry, that segment not measuring up to "the average of the best existing performance." So understood, the statute contemplated regulations that would require a substantial number of point sources with the poorest performances either to conform to BPT standards or to cease production. To allow a variance based on economic capability and not to require adherence to the prescribed minimum technology would permit the employment of the very practices that the Administrator had rejected in establishing the best practicable technology currently in use in the industry.

To put the matter another way, under § 304, the Administrator is directed to consider the benefits of effluent reductions as compared to the costs of pollution control in determining BPT limitations. Thus, every BPT limitation represents a conclusion by the Administrator that the costs imposed on the industry are worth the benefits in pollution reduction

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[15] EPA defines BPT as "the average of the best existing performance by plants of various sizes, ages and unit processes within each industrial category or subcategory. This average is not based upon a broad range of plants within an industrial category or subcategory, but is based upon performance levels achieved by exemplary plants." 39 Fed. Reg. 6580 (1974). See also EPA, Effluent Guidelines Div., Development Document for Mineral Mining and Processing Point Source Category, 409 (1979) and Development Document for Coal Mining, 225 (1976). Support for this definition is found in the legislative history, Leg. Hist. 169–170 (remarks of Sen. Muskie); *id.*, at 231 (remarks of Rep. Jones).

that will be gained by meeting those limits. To grant a variance because a particular owner or operator cannot meet the normal costs of the technological requirements imposed on him, and not because there has been a recalculation of the benefits compared to the costs, would be inconsistent with this legislative scheme and would allow a level of pollution inconsistent with the judgment of the Administrator.[16]

In terms of the scheme implemented by BPT limitations, the factors that the Administrator considers in granting variances do not suggest that economic capability must also be a determinant. The regulations permit a variance where "factors relating to the equipment or facilities involved, the process applied, or such other factors relating to such discharger are fundamentally different from the factors considered in the establishment of the guidelines." If a point source can show that its situation, including its costs of compliance, is not within the range of circumstances considered by the Administrator, then it may receive a variance, whether or not the source could afford to comply with the minimum standard.[17] In such situations, the variance is an acknowledg-

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[16] Respondents fail to consider this tension between a general calculation of costs and benefits and a particularized consideration of costs when they argue that because EPA only has authority to promulgate industrywide BPT regulations by analogy to its authority to promulgate industrywide BAT regulations, the same kind of economic capability/effluent reduction balancing relevant to a BAT variance must apply as well to a BPT variance.

[17] Respondents argue that precluding consideration of economic capability in determining whether to grant a variance effectively precludes consideration of the "total costs" for the individual point source. Respondents rely upon a statement by Representative Jones as to the meaning of "total cost" in § 304 (b) (1) (B):

"internal, or plant, costs sustained by the owner or operator and those external costs such as potential unemployment, dislocation and rural area economic development sustained by the community, area, or region." Leg. Hist. 231.

Unless economic capability is considered, it is argued, it will be impossible

ment that the uniform BPT limitation was set without reference to the full range of current practices, to which the Administrator was to refer. Insofar as a BPT limitation was determined without consideration of a current practice fundamentally different from those that were considered by the Administrator, that limitation is incomplete. A variance based on economic capability, however, would not have this character: it would allow a variance simply because the point source could not afford a compliance cost that is not fundamentally different from those the Administrator has already considered in determining BPT. It would force a displacement of calculations already performed, not because those calculations were incomplete or had unexpected effects, but only because the costs happened to fall on one particular operator, rather than on another who might be economically better off.

Because the 1977 limitations were intended to reduce the total pollution produced by an industry, requiring compliance with BPT standards necessarily imposed additional costs on the segment of the industry with the least effective technology. If the statutory goal is to be achieved, these costs must be borne or the point source eliminated. In our view, requiring variances from otherwise valid regulations where dischargers cannot afford normal costs of compliance would undermine the purpose and the intended operative effect of the 1977 regulations.

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to consider the potential external costs of meeting a BPT limitation, caused by a plant closing. Although there is some merit to respondents' contention, we do not believe it supports the decision of the Court of Appeals. The court did not hold that economic capability is relevant only if it discloses "fundamentally different" external costs from those considered by EPA in establishing the BPT limitation; rather, the court held that the factors included in § 301 (c) *must* be taken into consideration. Section 301 (c) makes economic capability, regardless of its effect on external costs, a ground for a variance. It is this position that we reject.

III

The Administrator's present interpretation of the language of the statute is amply supported by the legislative history, which persuades us that Congress understood that the economic capability provision of § 301 (c) was limited to BAT variances; that Congress foresaw and accepted the economic hardship, including the closing of some plants, that effluent limitations would cause; and that Congress took certain steps to alleviate this hardship, steps which did not include allowing a BPT variance based on economic capability.[18]

There is no indication that Congress intended § 301 (c) to reach further than the limitations of its plain language. The statement of the House managers of the Act described § 301 (c) as "not intended to justify modifications which would not represent an upgrading over the July 1, 1977, requirements of 'best practicable control technology.'" Leg. Hist. 232. The Conference Report noted that a § 301 (c) variance could only be granted after the effective date of BPT limitations

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[18] Since any variance provision will permit nonuniformity with the general BPT standard for a given category, we cannot attribute much weight to those passages in the legislative history, to which EPA points, that express a desire and expectation that "each polluter within a category or class of industrial sources . . . achieve nationally uniform effluent limitations based on 'best practicable' technology no later than July 1, 1977." See Leg. Hist. 162 (statement of Sen. Muskie). See also, *e. g.*, *id.*, at 170; *id.*, at 302, 309 (Conference Report); *id.*, at 787 (Report of House Committee on Public Works). Moreover, EPA has itself stated that a variance does not represent an exception to BPT or BAT limitations, but rather sets an individualized BPT or BAT limitation for that point source: "No discharger . . . may be excused from the Act's requirement to meet BPT [and] BAT . . . through this variance clause. A discharger may instead receive an individualized definition of such a limitation or standard where the nationally prescribed limit is shown to be more or less stringent than appropriate for the discharger under the Act." 44 Fed. Reg. 32893 (1979). Therefore, expressions of an intent that "all" point sources meet BPT standards by 1977 do not necessarily support EPA's argument.

and could only be applied to BAT limitations. Similarly, the Senate Report on the Conference action emphasized that one of the purposes of the BPT limitation was to avoid imposing on the "Administrator any requirement . . . to determine the economic impact of controls on any individual plant in a single community." Leg. Hist. 170.

Nor did Congress restrict the reach of § 301 (c) without understanding the economic hardships that uniform standards would impose. Prior to passage of the Act, Congress had before it a report jointly prepared by EPA, the Commerce Department, and the Council on Environmental Quality on the impact of the pollution control measures on industry.[19] That report estimated that there would be 200 to 300 plant closings caused by the first set of pollution limitations. Comments in the Senate debate were explicit: "There is no doubt that we will suffer some disruptions in our economy because of our efforts; many marginal plants may be forced to close." Leg. Hist. 1282 (Sen. Bentsen).[20] The House managers explained the Conference position as follows:

> "If the owner or operator of a given point source determines that he would rather go out of business than meet the 1977 requirements, the managers clearly expect that any discharge issued in the interim would reflect the fact that all discharges not in compliance with such 'best practicable technology currently available' would cease by June 30, 1977." *Id.*, at 231.

Congress did not respond to this foreseen economic impact by making room for variances based on economic impact. In fact, this possibility was specifically considered and rejected:

> "The alternative [to a loan program] would be waiving strict environmental standards where economic hardship

[19] U. S. Council on Environmental Quality, Dept. of Commerce, & EPA, The Economic Impact of Pollution Control (Mar. 1972). See Leg. Hist. 156, 523.

[20] See also remarks quoted in n. 22, *infra*.

could be shown. But the approach of giving variances to pollution controls based on economic grounds has long ago shown itself to be a risky course: All too often, the variances become a tool used by powerful political interests to obtain so many exemptions for pollution control standards and timetables on the filmsiest [*sic*] of pretenses that they become meaningless. In short, with variances, exceptions to pollution cleanup can become the rule, meaning further tragic delay in stopping the destruction of our environment." *Id.*, at 1355 (Sen. Nelson).

Instead of economic variances, Congress specifically added two other provisions to address the problem of economic hardship.

First, provision was made for low-cost loans to small businesses to help them meet the cost of technological improvements. 86 Stat. 898, amending § 7 of the Small Business Act, 15 U. S. C. § 636. The Conference Report described the provision as authorizing the Small Business Administration "to make loans to assist small business concerns . . . if the Administrator determines that the concern is likely to suffer substantial economic injury without such assistance." Leg. Hist. 153. Senator Nelson, who offered the amendment providing for these loans, saw the loans as an alternative to the dangers of an economic variance provision that he felt might otherwise be necessary.[21] Several Congressmen understood the loan program as an alternative to forced closings: "It is the smaller business that is hit hardest by these laws and their enforcement. And it is that same class of business that has the least resources to meet the demands of this enforcement. . . . Without assistance, many of these businesses may face extinction." *Id.*, at 1359 (Sen. McIntyre).[22]

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[21] See quotation above.

[22] Similar remarks were made by Representative Harrington ("No one in Congress wishes to legislate so irresponsibly that we drive out of

Second, an employee protection provision was added, giving EPA authority to investigate any plant's claim that it must cut back production or close down because of pollution control regulations. § 507 (e), 86 Stat. 890, 33 U. S. C. § 1367 (e).[23] This provision had two purposes: to allow EPA constantly to monitor the economic effect on industry of pollution control rules and to undercut economic threats by industry that would create pressure to relax effluent limitation rules.[24] Congressman Fraser explained this second purpose as follows:

> "[T]he purpose of the amendment is to provide for a public hearing in the case of an industry claim that

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business those who sincerely wish to abide by the new pollution laws but who, because of a bad state of the economy, will be forced to close. The $800 million authorized by this section may not be completely adequate. But it is a start," Leg. Hist. 450).

[23] Section 507 (e) provides in pertinent part: "The Administrator shall conduct continuing evaluations of potential loss or shifts of employment which may result from the issuance of any effluent limitation or order under this chapter, including, where appropriate, investigating threatened plant closures or reductions in employment allegedly resulting from such limitation or order. Any employee who is discharged or laid-off, threatened with discharge or lay-off . . . because of the alleged results of any effluent limitation or order issued under this chapter . . . may request the Administrator to conduct a full investigation of the matter. . . . [T]he Administrator shall make findings of fact as to the effect of such effluent limitation or order on employment and on the alleged discharge, lay off, or discrimination and shall make such recommendations as he deems appropriate. Such report, findings, and recommendations shall be available to the public." 33 U. S. C. § 1367 (e).

[24] See Leg. Hist. 654–659. Representative Abzug emphasized the first purpose of the provision: "This amendment will allow the Congress to get a close look at the effects on employment of legislation such as this, and will thus place us in a position to consider such remedial legislation as may be necessary to ameliorate those effects." *Id.*, at 658. Representative Miller noted that "some economic hardship, especially in smaller communities who rely on single, older plants, may result from the requirements of the pending bill," but opposed this provision because he thought that economic hardships caused by the Act should be addressed systematically by modifying the Economic Development Act. *Ibid.*

enforcement of these water-control standards will force it to relocate or otherwise shut down operations. . . . I think too many companies use the excuse of compliance, or the need for compliance, to change operations that are going to change anyway. It is this kind of action that gives the whole antipollution effort a bad name and causes a great deal of stress and strain in the community." Leg. Hist. 659.

The only protection offered by the provision, however, is the assurance that there will be a public inquiry into the facts behind such an economic threat. The section specifically concludes that "[n]othing in this subsection shall be construed to require or authorize the Administrator to modify or withdraw any effluent limitation or order issued under this chapter." § 507 (e), 33 U. S. C. § 1367 (e).

As we see it, Congress anticipated that the 1977 regulations would cause economic hardship and plant closings: "[T]he question . . . is not what a court thinks is generally appropriate to the regulatory process; it is what Congress intended for *these* regulations." *Du Pont,* 430 U. S., at 138.

IV

It is by now a commonplace that "when faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration." *Udall* v. *Tallman,* 380 U. S. 1, 16 (1965).[25] The statute itself does not provide

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[25] Respondents contend that deference to agency interpretation is not appropriate in this case because EPA has not consistently interpreted the BPT variance requirements. However, in only one instance has EPA stated that it would consider economic capability in relation to BPT variance applications. 43 Fed. Reg. 44846–44848 (1978). This was in response to the Court of Appeals decision in *Appalachian Power Co.* v. *Train,* 545 F. 2d 1351 (CA4 1976), and EPA specifically limited this change to steam electric power generating plants, which were the subject of the court's order.

for BPT variances in connection with permits for individual point sources, and we had no occasion in *Du Pont* to address the adequacy of the Administrator's 1977 variance provision. In the face of § 301 (c)'s explicit limitation and in the absence of any other specific direction to provide for variances in connection with permits for individual point sources, we believe that the Administrator has adopted a reasonable construction of the statutory mandate.

In rejecting EPA's interpretation of the BPT variance provision, the Court of Appeals relied on a mistaken conception of the relation between BPT and BAT standards. The court erroneously believed that since BAT limitations are to be more stringent than BPT limitations, the variance provision for the latter must be at least as flexible as that for the former with respect to affordability.[26] The variances permitted by § 301 (c) from the 1987 limitations, however, can reasonably be understood to represent a cost in decreased effluent reductions that can only be afforded once the minimal standard expressed in the BPT limitation has been reached.[27]

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[26] This argument appears in *Appalachian Power, supra,* at 1359, which the Court of Appeals relies upon in *Crushed Stone.* 601 F. 2d, at 123.

The Court of Appeals also believed that because there will be situations in which the BPT and the BAT standards are identical, see Development Document for Mineral Mining, *supra* n. 15, at 438, it would be illogical to allow a variance based on economic capability for the latter but not for the former. The result would be to "close a plant in 1979 which would be allowed to operate under a variance in 1983." 601 F. 2d, at 124. This assumes, however, that a variance would be available even though BPT standards had not been met, an assumption which EPA rejects, Brief for Petitioners 27, and which is questionable in light of the legislative history. Leg. Hist. 232 ("This provision [§ 301 (c)] is not intended to justify modifications which would not represent an upgrading over the July 1, 1977, requirements of 'best practicable control technology.'" (Rep. Jones, chairman of the House Conferees)). The suggested contradiction is accordingly unlikely to appear. In any event, it is of minor significance in considering the facial validity of the 1977 variance provisions.

[27] We find no support for respondents' contention that Congress implicitly approved the Court of Appeals' reading of the variance provision,

We conclude, therefore, that the Court of Appeals erred in not accepting EPA's interpretation of the Act. EPA is not required by the Act to consider economic capability in granting variances from its uniform BPT regulations.

The judgments of the Court of Appeals are

Reversed.

JUSTICE POWELL took no part in the consideration or decision of these cases.

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when it considered and passed the 1977 amendments to the Act. Respondents rely primarily on the discussion of *Appalachian Power* in a document prepared by the Library of Congress for the House Committee on Public Works and Transportation, Case Law Under the FWPCA Amendments of 1972 (Comm. Print 1977). However, that document notes that there was at that time a conflict in the United States Courts of Appeals over the validity of the variance provision and in no way indicates that the *Appalachian Power* decision was the correct interpretation. *Id.*, at 28.

PACILEO, SHERIFF *v.* WALKER

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

No. 79-2040. Decided December 8, 1980

Respondent, who had escaped from the Arkansas Department of Corrections, was apprehended in California and was served with a warrant of arrest and rendition issued by the Governor of California pursuant to the Governor of Arkansas' request for extradition. Respondent thereafter challenged the issuance of the warrant in both state and federal courts. Ultimately, the California Supreme Court issued a writ of habeas corpus directing a California trial court to conduct an inquiry as to whether the Arkansas penitentiary in which respondent would be confined was presently operated in conformance with the Eighth Amendment of the Federal Constitution.

Held: The Extradition Clause, Art. IV, § 2, cl. 2, and its implementing statute, 18 U. S. C. § 3182, do not give the courts of the "asylum" or "sending" State authority to inquire into the prison conditions of the "demanding" State. Once the Governor of California issued the warrant, claims as to constitutional defects in the Arkansas penal system should be heard in the courts of Arkansas, not those of California.

Certiorari granted; reversed and remanded.

PER CURIAM.

The United States Constitution provides that "[a] person charged in any State with Treason, Felony or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime." Art. IV, § 2, cl. 2.

In this case, there is no dispute as to the facts necessary to resolve the legal question presented. In 1975, respondent James Dean Walker escaped from the Arkansas Department of Corrections and remained at large until he was apprehended in California in 1979. In December 1979, the Governor of Arkansas requested the arrest and rendition of respondent, alleging that respondent was a fugitive from

justice. In February 1980, the Governor of California honored the request of the Governor of Arkansas and duly issued a warrant of arrest and rendition. This warrant was then served upon respondent by the Sheriff of El Dorado County, Cal. Respondent thereafter challenged the Governor's issuance of the warrant in both state and federal courts. He was unsuccessful until he reached the Supreme Court of California, which, on April 9, 1980, issued a writ of habeas corpus directing the Superior Court of El Dorado County to "conduct hearings to determine if the penitentiary in which Arkansas seeks to confine petitioner is presently operated in conformance with the Eighth Amendment of the United States Constitution and thereafter to decide the petition on its merits."

Petitioner Sheriff contends that Art. IV, § 2, cl. 2, and its implementing statute, 18 U. S. C. § 3182, do not give the courts of the "asylum" or "sending" State authority to inquire into the prison conditions of the "demanding" State. We agree. In *Michigan* v. *Doran*, 439 U. S. 282 (1978), our most recent pronouncement on the subject, we stated that "[i]nterstate extradition was intended to be a summary and mandatory executive proceeding derived from the language of Art. IV, § 2, cl. 2, of the Constitution." *Id.*, at 288. We further stated:

> "A governor's grant of extradition is prima facie evidence that the constitutional and statutory requirements have been met. . . . Once the governor has granted extradition, a court considering release on habeas corpus can do no more than decide (a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive. These are historic facts readily verifiable." *Id.*, at 289.

In *Sweeney* v. *Woodall*, 344 U. S. 86 (1952), this Court held that a fugitive from Alabama could not raise in the federal courts of Ohio, the asylum State, the constitutionality of his confinement in Alabama. We stated:

> "Considerations fundamental to our federal system require that the prisoner test the claimed unconstitutionality of his treatment by Alabama in the courts of that State. Respondent should be required to initiate his suit in the courts of Alabama, where all parties may be heard, where all pertinent testimony will be readily available, and where suitable relief, if any is necessary, may be fashioned." *Id.*, at 90.

We think that the Supreme Court of California ignored the teachings of these cases when it directed one of its own trial courts of general jurisdiction to conduct an inquiry into the present conditions of the Arkansas penal system. Once the Governor of California issued the warrant for arrest and rendition in response to the request of the Governor of Arkansas, claims as to constitutional defects in the Arkansas penal system should be heard in the courts of Arkansas, not those of California. "To allow plenary review in the asylum state of issues that can be fully litigated in the charging state would defeat the plain purposes of the summary and mandatory procedures authorized by Art. IV, § 2." *Michigan* v. *Doran, supra,* at 290.

The petition for certiorari is granted, the judgment of the Supreme Court of California is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

JUSTICE MARSHALL, dissenting.

Because *Michigan* v. *Doran*, 439 U. S. 282 (1978), did not involve a claimed violation of the Eighth Amendment, and

because *Sweeney* v. *Woodall*, 344 U. S. 86 (1952), did not involve a state court's decision to grant state habeas corpus relief, I do not believe that they control the question raised here, and I would set the case for plenary review.

ALLEN ET AL. v. McCURRY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 79-935. Argued October 8, 1980—Decided December 9, 1980

At a hearing before respondent's criminal trial, a Missouri court denied, in part, respondent's motion to suppress, on Fourth and Fourteenth Amendment grounds, certain evidence that had been seized by the police. Respondent was subsequently convicted, and the conviction was affirmed on appeal. Because he did not assert that the state courts had denied him a "full and fair opportunity" to litigate his search-and-seizure claim, respondent was barred by *Stone* v. *Powell*, 428 U. S. 465, from seeking a writ of habeas corpus in a federal district court. Nevertheless, he sought federal-court redress for the alleged constitutional violation by bringing a suit for damages under 42 U. S. C. § 1983 against the officers who had seized the evidence in question. The Federal District Court granted summary judgment for the defendants, holding that collateral estoppel prevented respondent from relitigating the search-and-seizure question already decided against him in the state courts. The Court of Appeals reversed and remanded, noting that *Stone* v. *Powell*, *supra*, barred respondent from federal habeas corpus relief and that the § 1983 suit was, therefore, respondent's only route to a federal forum for his constitutional claim, and directed the trial court to allow him to proceed to trial unencumbered by collateral estoppel.

Held: The Court of Appeals erred in holding that respondent's inability to obtain federal habeas corpus relief upon his Fourth Amendment claim renders the doctrine of collateral estoppel inapplicable to his § 1983 suit. Nothing in the language or legislative history of § 1983 discloses any congressional intent to deny binding effect to a state-court judgment or decision when the state court, acting within its proper jurisdiction, has given the parties a full and fair opportunity to litigate federal claims, and thereby has shown itself willing and able to protect federal rights. Nor does anything in § 1983's legislative history reveal any purpose to afford less deference to judgments in state criminal proceedings than to those in state civil proceedings. Pp. 94-105.

606 F. 2d 795, reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, REHNQUIST, and STEVENS, JJ., joined. BLACKMUN,

J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 105.

John J. FitzGibbon argued the cause for petitioners. With him on the briefs were *Eugene P. Freeman* and *Robert H. Dierker, Jr.*

Jeffrey J. Shank argued the cause and filed a brief for respondent.*

JUSTICE STEWART delivered the opinion of the Court.

At a hearing before his criminal trial in a Missouri court, the respondent, Willie McCurry, invoked the Fourth and Fourteenth Amendments to suppress evidence that had been seized by the police. The trial court denied the suppression motion in part, and McCurry was subsequently convicted after a jury trial. The conviction was later affirmed on appeal. *State* v. *McCurry*, 587 S. W. 2d 337 (Mo. App.). Because he did not assert that the state courts had denied him a "full and fair opportunity" to litigate his search and seizure claim, McCurry was barred by this Court's decision in *Stone* v. *Powell*, 428 U. S. 465, from seeking a writ of habeas corpus in a federal district court. Nevertheless, he sought federal-court redress for the alleged constitutional violation by bringing a damages suit under 42 U. S. C. § 1983 against the officers who had entered his home and seized the evidence in question. We granted certiorari to consider whether the unavailability of federal habeas corpus prevented the police officers from raising the state courts' partial rejection of McCurry's constitutional claim as a collateral estoppel defense to the § 1983 suit against them for damages. 444 U. S. 1070.

**Stephen H. Sachs*, Attorney General of Maryland, *Emory A. Plitt, Jr.*, Assistant Attorney General, *George P. Agnost, Fred E. Inbau, Wayne W. Schmidt*, and *James P. Manak* filed a brief for Americans for Effective Law Enforcement, Inc., et al., as *amici curiae* urging reversal.

Michael A. Wolff filed a brief for the American Civil Liberties Union of Eastern Missouri as *amicus curiae*.

I

In April 1977, several undercover police officers, following an informant's tip that McCurry was dealing in heroin, went to his house in St. Louis, Mo., to attempt a purchase.[1] Two officers, petitioners Allen and Jacobsmeyer, knocked on the front door, while the other officers hid nearby. When McCurry opened the door, the two officers asked to buy some heroin "caps." McCurry went back into the house and returned soon thereafter, firing a pistol at and seriously wounding Allen and Jacobsmeyer. After a gun battle with the other officers and their reinforcements, McCurry retreated into the house; he emerged again when the police demanded that he surrender. Several officers then entered the house without a warrant, purportedly to search for other persons inside. One of the officers seized drugs and other contraband that lay in plain view, as well as additional contraband he found in dresser drawers and in auto tires on the porch.

McCurry was charged with possession of heroin and assault with intent to kill. At the pretrial suppression hearing, the trial judge excluded the evidence seized from the dresser drawers and tires, but denied suppression of the evidence found in plain view. McCurry was convicted of both the heroin and assault offenses.

McCurry subsequently filed the present § 1983 action for $1 million in damages against petitioners Allen and Jacobsmeyer, other unnamed individual police officers, and the city of St. Louis and its police department. The complaint alleged a conspiracy to violate McCurry's Fourth Amendment rights, an unconstitutional search and seizure of his house, and an assault on him by unknown police officers after he had been arrested and handcuffed. The petitioners moved for summary judgment. The District Court apparently under-

[1] The facts are drawn from the Court of Appeals' opinion. 606 F. 2d 795 (CA8).

stood the gist of the complaint to be the allegedly unconstitutional search and seizure and granted summary judgment, holding that collateral estoppel prevented McCurry from relitigating the search-and-seizure question already decided against him in the state courts. 466 F. Supp. 514 (ED Mo. 1978).[2]

The Court of Appeals reversed the judgment and remanded the case for trial. 606 F. 2d 795 (CA8 1979).[3] The appellate court said it was not holding that collateral estoppel was generally inapplicable in a § 1983 suit raising issues determined against the federal plaintiff in a state criminal trial. *Id.*, at 798. But noting that *Stone* v. *Powell, supra*, barred McCurry from federal habeas corpus relief, and invoking "the special role of the federal courts in protecting civil rights." 606 F. 2d, at 799, the court concluded that the § 1983 suit was McCurry's only route to a federal forum for his

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[2] The merits of the Fourth Amendment claim are discussed in the opinion of the Missouri Court of Appeals. *State* v. *McCurry*, 587 S. W. 2d 337. The state courts upheld the entry of the house as a reasonable response to emergency circumstances, but held illegal the seizure of any evidence discovered as a result of that entry except what was in plain view. *Id.*, at 340. McCurry therefore argues here that even if the doctrine of collateral estoppel generally applies to this case, he should be able to proceed to trial to obtain damages for the part of the seizure declared illegal by the state courts. The petitioners contend, on the other hand, that the complaint alleged essentially an illegal entry, adding that only the entry could possibly justify the $1 million prayer. Since the state courts upheld the entry, the petitioners argue that if collateral estoppel applies here at all, it removes from trial all issues except the alleged assault. The United States Court of Appeals, however, addressed only the broad question of the applicability of collateral estoppel to § 1983 suits brought by plaintiffs in McCurry's circumstances, and questions as to the scope of collateral estoppel with respect to the particular issues in this case are not now before us.

[3] Beyond holding that collateral estoppel does not apply in this case, the Court of Appeals noted that the District Court had overlooked the conspiracy and assault charges. 606 F. 2d, at 797, and n. 1.

constitutional claim and directed the trial court to allow him to proceed to trial unencumbered by collateral estoppel.[4]

II

The federal courts have traditionally adhered to the related doctrines of res judicata and collateral estoppel. Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. *Cromwell* v. *County of Sac*, 94 U. S. 351, 352. Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case. *Montana* v. *United States*, 440 U. S. 147, 153.[5] As this Court and other courts have often recognized, res judicata and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication. *Id.*, at 153–154.

In recent years, this Court has reaffirmed the benefits of collateral estoppel in particular, finding the policies underlying it to apply in contexts not formerly recognized at common law. Thus, the Court has eliminated the requirement of mutuality in applying collateral estoppel to bar relitiga-

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[4] Nevertheless, relying on the doctrine of *Younger* v. *Harris*, 401 U. S. 37, the Court of Appeals directed the District Court to abstain from conducting the trial until McCurry had exhausted his opportunities for review of his claim in the state appellate courts. 606 F. 2d, at 799.

[5] The Restatement of Judgments now speaks of res judicata as "claim preclusion" and collateral estoppel as "issue preclusion." Restatement (Second) of Judgments § 74 (Tent. Draft No. 3, Apr. 15, 1976). Some courts and commentators use "res judicata" as generally meaning both forms of preclusion.

Contrary to a suggestion in the dissenting opinion, *post*, at 113, n. 12, this case does not involve the question whether a § 1983 claimant can litigate in federal court an issue he might have raised but did not raise in previous litigation.

tion of issues decided earlier in federal-court suits, *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U. S. 313, and has allowed a litigant who was not a party to a federal case to use collateral estoppel "offensively" in a new federal suit against the party who lost on the decided issue in the first case, *Parklane Hosiery Co.* v. *Shore*, 439 U. S. 322.[6] But one general limitation the Court has repeatedly recognized is that the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a "full and fair opportunity" to litigate that issue in the earlier case. *Montana* v. *United States, supra*, at 153; *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation, supra*, at 328–329.[7]

The federal courts generally have also consistently accorded preclusive effect to issues decided by state courts. *E. g., Montana* v. *United States, supra; Angel* v. *Bullington*, 330 U. S. 183. Thus, res judicata and collateral estoppel not only reduce unnecessary litigation and foster reliance on ad-

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[6] In *Blonder-Tongue* the Court noted other trends in the state and federal courts expanding the preclusive effects of judgments, such as the broadened definition of "claim" in the context of res judicata and the greater preclusive effect given criminal judgments in subsequent civil cases. 402 U. S., at 326.

[7] Other factors, of course, may require an exception to the normal rules of collateral estoppel in particular cases. *E. g., Montana* v. *United States*, 440 U. S., at 162 (unmixed questions of law in successive actions between the same parties on unrelated claims).

Contrary to the suggestion of the dissent, *post*, at 112–113, our decision today does not "fashion" any new, more stringent doctrine of collateral estoppel, nor does it hold that the collateral-estoppel effect of a state-court decision turns on the single factor of whether the State gave the federal claimant a full and fair opportunity to litigate a federal question. Our decision does not "fashion" any doctrine of collateral estoppel at all. Rather, it construes § 1983 to determine whether the conventional doctrine of collateral estoppel applies to the case at hand. It must be emphasized that the question whether any exceptions or qualifications within the bounds of that doctrine might ultimately defeat a collateral-estoppel defense in this case is not before us. See n. 2, *supra*.

judication, but also promote the comity between state and federal courts that has been recognized as a bulwark of the federal system. See *Younger* v. *Harris*, 401 U. S. 37, 43–45.

Indeed, though the federal courts may look to the common law or to the policies supporting res judicata and collateral estoppel in assessing the preclusive effect of decisions of other federal courts, Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so:

> "The . . . judicial proceedings of any court of any State . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State . . . ." 28 U. S. C. § 1738.[8]

Huron Holding Corp. v. *Lincoln Mine Operating Co.*, 312 U. S. 183, 193; *Davis* v. *Davis*, 305 U. S. 32, 40. It is against this background that we examine the relationship of § 1983 and collateral estoppel, and the decision of the Court of Appeals in this case.

III

This Court has never directly decided whether the rules of res judicata and collateral estoppel are generally applicable to § 1983 actions. But in *Preiser* v. *Rodriguez*, 411 U. S. 475, 497, the Court noted with implicit approval the view of other federal courts that res judicata principles fully apply to civil rights suits brought under that statute. See also *Huffman* v. *Pursue*, 420 U. S. 592, 606, n. 18; *Wolff* v.

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[8] This statute has existed in essentially unchanged form since its enactment just after the ratification of the Constitution, Act of May 26, 1790, ch. 11, 1 Stat. 122, and its re-enactment soon thereafter, Act of Mar. 27, 1804, ch. 56, 2 Stat. 298–299. Congress has also provided means for authenticating the records of the state proceedings to which the federal courts are to give full faith and credit. 28 U. S. C. § 1738.

McDonnell, 418 U. S. 539, 554, n. 12.[9] And the virtually unanimous view of the Courts of Appeals since *Preiser* has been that § 1983 presents no categorical bar to the application of res judicata and collateral estoppel concepts.[10] These federal appellate court decisions have spoken with little explanation or citation in assuming the compatibility of § 1983 and rules of preclusion, but the statute and its legislative history clearly support the courts' decisions.

Because the requirement of mutuality of estoppel was still alive in the federal courts until well into this century, see *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation, supra*, at 322–323, the drafters of the 1871 Civil Rights Act, of which § 1983 is a part, may have had less reason to concern themselves with rules of preclusion than a modern Congress would. Nevertheless, in 1871 res judicata and collateral estoppel could certainly have applied in federal suits following state-court litigation between the same parties or their privies, and nothing in the language of § 1983 remotely expresses any congressional intent to contravene the common-law rules of preclusion or to repeal the express stat-

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[9] The cases noted in *Preiser* applied res judicata to issues decided both in state civil proceedings, *e. g.*, *Coogan* v. *Cincinnati Bar Assn.*, 431 F. 2d 1209, 1211 (CA6 1970), and state criminal proceedings, *e. g.*, *Goss* v. *Illinois*, 312 F. 2d 257, 259 (CA7 1963).

[10] *E. g.*, *Robbins* v. *District Court*, 592 F. 2d 1015 (CA8 1979); *Jennings* v. *Caddo Parish School Bd.*, 531 F. 2d 1331 (CA5 1976); *Lovely* v. *Laliberte*, 498 F. 2d 1261 (CA1 1974); *Brown* v. *Georgia Power Co.*, 491 F. 2d 117 (CA5 1974); *Tang* v. *Appellate Division*, 487 F. 2d 138 (CA2 1973).

A very few courts have suggested that the normal rules of claim preclusion should not apply in § 1983 suits in one peculiar circumstance: Where a § 1983 plaintiff seeks to litigate in federal court a federal issue which he could have raised but did not raise in an earlier state-court suit against the same adverse party. *Graves* v. *Olgiati*, 550 F. 2d 1327 (CA2 1977); *Lombard* v. *Board of Ed. of New York City*, 502 F. 2d 631 (CA2 1974); *Mack* v. *Florida Bd. of Dentistry*, 430 F. 2d 862 (CA5 1970). These cases present a narrow question not now before us, and we intimate no view as to whether they were correctly decided.

utory requirements of the predecessor of 28 U. S. C. § 1738, see n. 8, *supra*. Section 1983 creates a new federal cause of action.[11] It says nothing about the preclusive effect of state-court judgments.[12]

Moreover, the legislative history of § 1983 does not in any clear way suggest that Congress intended to repeal or restrict the traditional doctrines of preclusion. The main goal of the Act was to override the corrupting influence of the Ku Klux Klan and its sympathizers on the governments and law enforcement agencies of the Southern States, see *Monroe* v. *Pape*, 365 U. S. 167, 174, and of course the debates show that one strong motive behind its enactment was grave congressional concern that the state courts had been deficient in

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[11] "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U. S. C. § 1983.

It has been argued that, since there remains little federal common law after *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, to hold that the creation of a federal cause of action by itself does away with the rules of preclusion would take away almost all meaning from § 1738. Currie, Res Judicata: The Neglected Defense, 45 U. Chi. L. Rev. 317, 328 (1978).

[12] By contrast, the roughly contemporaneous statute extending the federal writ of habeas corpus to state prisoners expressly rendered "null and void" any state-court proceeding inconsistent with the decision of a federal habeas court, Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 386 (current version at 28 U. S. C. § 2254), and the modern habeas statute also expressly adverts to the effect of state-court criminal judgments by requiring the applicant for the writ to exhaust his state-court remedies, 28 U. S. C. § 2254 (b), and by presuming a state-court resolution of a factual issue to be correct except in eight specific circumstances, § 2254 (d). In any event, the traditional exception to res judicata for habeas corpus review, see *Preiser* v. *Rodriguez*, 411 U. S. 475, 497, provides no analogy to § 1983 cases, since that exception finds its source in the unique purpose of habeas corpus—to release the applicant for the writ from unlawful confinement. *Sanders* v. *United States*, 373 U. S. 1, 8.

protecting federal rights, *Mitchum* v. *Foster*, 407 U. S. 225, 241–242; *Monroe* v. *Pape*, *supra*, at 180.[13] But in the context of the legislative history as a whole, this congressional concern lends only the most equivocal support to any argument that, in cases where the state courts have recognized the constitutional claims asserted and provided fair procedures for determining them, Congress intended to override § 1738 or the common-law rules of collateral estoppel and res judicata. Since repeals by implication are disfavored, *Radzanower* v. *Touche Ross & Co.*, 426 U. S. 148, 154, much clearer support than this would be required to hold that § 1738 and the traditional rules of preclusion are not applicable to § 1983 suits.

As the Court has understood the history of the legislation, Congress realized that in enacting § 1983 it was altering the balance of judicial power between the state and federal courts. See *Mitchum* v. *Foster*, *supra*, at 241. But in doing so, Congress was adding to the jurisdiction of the federal courts, not subtracting from that of the state courts. See *Monroe* v. *Pape*, *supra*, at 183 ("The federal remedy is supplementary to the state remedy . . .").[14] The debates contain several references to the concurrent jurisdiction of the state courts over federal questions,[15] and numerous sugges-

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[13] See, *e. g.*, Cong. Globe, 42d Cong., 1st Sess., 374–376 (1871) (Rep. Lowe); *id.*, at 394 (Rep. Rainey); *id.*, at 653 (Sen. Osborn).

[14] To the extent that Congress in the post-Civil War period did intend to deny full faith and credit to state-court decisions on constitutional issues, it expressly chose the very different means of postjudgment removal for state-court defendants whose civil rights were threatened by biased state courts and who therefore "are denied or cannot enforce [their civil rights] in the courts or judicial tribunals of the State." Act of Apr. 9, 1866, ch. 31, § 3, 14 Stat. 27.

[15] *E. g.*, Cong. Globe, 42d Cong., 1st Sess., 514 (1871) (Rep. Poland); *id.*, at 695 (Sen. Edmunds); see *Martinez* v. *California*, 444 U. S. 277, 283–284, n. 7 (noting that the state courts may entertain § 1983 claims, while reserving the question whether the state courts must do so).

tions that the state courts would retain their established jurisdiction so that they could, when the then current political passions abated, demonstrate a new sensitivity to federal rights.[16]

To the extent that it did intend to change the balance of power over federal questions between the state and federal courts, the 42d Congress was acting in a way thoroughly consistent with the doctrines of preclusion. In reviewing the legislative history of § 1983 in *Monroe* v. *Pape, supra,* the Court inferred that Congress had intended a federal remedy in three circumstances: where state substantive law was facially unconstitutional, where state procedural law was

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[16] Senator Edmunds, the floor manager of the bill in the Senate, observed at the end of the debates:

"The bill, like all bills of this character, in its first and second sections, is a declaration of rights and a provision for the punishment of conspiracies against constitutional rights, and a redress for wrongs. It does not undertake to overthrow any court. . . . It does not undertake to interpose itself out of the regular order of the administration of law. It does not attempt to deprive any State of the honor which is due the punishment of crime. It is a law acting upon the citizen like every other law, and it is a law to be enforced by the courts through the regular and ordinary processes of judicial administration, and in no other way, until forcible resistance shall be offered to the quiet and ordinary course of justice." Cong. Globe, 42d Cong., 1st Sess., 697-698 (1871).

Representative Coburn expressed his belief that after passage of the Act "the tumbling and tottering States will spring up and resume the long-neglected administration of law in their own courts, giving, as they ought, themselves, equal protection to all." *Id.*, at 460. Representative Sheldon noted:

"Convenience and courtesy to the States suggest a sparing use [of national authority] and never so far as to supplant the State authority except in cases of extreme necessity, and when the State governments criminally refuse or neglect those duties which are imposed on them. . . . It seems to me to be sufficient, and at the same time to be proper, to make a permanent law affording to every citizen a remedy in the United States courts for injuries to him in those rights declared and guaranteed by the Constitution. . . ." *Id.*, at 368.

inadequate to allow full litigation of a constitutional claim, and where state procedural law, though adequate in theory, was inadequate in practice. 365 U. S., at 173–174. In short, the federal courts could step in where the state courts were unable or unwilling to protect federal rights. *Id.*, at 176. This understanding of § 1983 might well support an exception to res judicata and collateral estoppel where state law did not provide fair procedures for the litigation of constitutional claims, or where a state court failed to even acknowledge the existence of the constitutional principle on which a litigant based his claim. Such an exception, however, would be essentially the same as the important general limit on rules of preclusion that already exists: Collateral estoppel does not apply where the party against whom an earlier court decision is asserted did not have a full and fair opportunity to litigate the claim or issue decided by the first court. See *supra*, at 95. But the Court's view of § 1983 in *Monroe* lends no strength to any argument that Congress intended to allow relitigation of federal issues decided after a full and fair hearing in a state court simply because the state court's decision may have been erroneous.[17]

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[17] The dissent suggests, *post*, at 112, that the Court's decision in *England* v. *Medical Examiners*, 375 U. S. 411, demonstrates the impropriety of affording preclusive effect to the state-court decision in this case. The *England* decision is inapposite to the question before us. In the *England* case, a party first submitted to a federal court his claim that a state statute violated his constitutional rights. The federal court abstained and remitted the plaintiff to the state courts, holding that a state-court decision that the statute did not apply to the plaintiff would moot the federal question. *Id.*, at 413. The plaintiff submitted both the state- and federal-law questions to the state courts, which decided both questions adversely to him. *Id.*, at 414. This Court held that in such a circumstance, a plaintiff who properly reserved the federal issue by informing the state courts of his intention to return to federal court, if necessary, was not precluded from litigating the federal question in federal court. The holding in *England* depended entirely on this Court's view of the purpose of abstention in such a case: Where a plaintiff properly invokes federal-

The Court of Appeals in this case acknowledged that every Court of Appeals that has squarely decided the question has held that collateral estoppel applies when § 1983 plaintiffs attempt to relitigate in federal court issues decided against them in state criminal proceedings.[18] But the court noted that the only two federal appellate decisions invoking collateral estoppel to bar relitigation of Fourth Amendment claims decided adversely to the § 1983 plaintiffs in state courts came before this Court's decision in *Stone* v. *Powell*, 428 U. S. 465.[19] It also noted that some of the decisions hold-

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court jurisdiciton in the first instance on a federal claim, the federal court has a duty to accept that jurisdiction. *Id.*, at 415. Abstention may serve only to postpone, rather than to abdicate, jurisdiction, since its purpose is to determine whether resolution of the federal question is even necessary, or to obviate the risk of a federal court's erroneous construction of state law. *Id.*, at 416, and n. 7. These concerns have no bearing whatsoever on the present case.

[18] *E. g., Fernandez* v. *Trias Monge*, 586 F. 2d 848, 854 (CA1 1978); *Wiggins* v. *Murphy*, 576 F. 2d 572, 573 (CA4 1978); *Martin* v. *Delcambre*, 578 F. 2d 1164, 1165 (CA5 1978); *Winters* v. *Lavine*, 574 F. 2d 46, 58 (CA2 1978); *Metros* v. *United States District Court*, 441 F. 2d 313 (CA10 1971); *Kauffman* v. *Moss*, 420 F. 2d 1270, 1274 (CA3 1970); *Mulligan* v. *Schlachter*, 389 F. 2d 231, 233 (CA6 1968).

Dictum in *Ney* v. *California*, 439 F. 2d 1285, 1288 (CA9 1971), suggested that applying collateral estoppel in § 1983 actions might make the Civil Rights Act "a dead letter," but in that case, because the state prosecutor had agreed to withdraw the evidence allegedly seized in violation of the Fourth Amendment, the state court had never decided the constitutional claim. In *Brubaker* v. *King*, 505 F. 2d 534, 537–538 (1974), the Court of Appeals for the Seventh Circuit held that since the issues in the state and federal cases were different—the legality of police conduct in the former and the good faith of the police in the latter—the state decision could not have preclusive effect in the federal court. This solution, however, fails to recognize that a state-court decision that the police acted legally cannot but foreclose a claim that they acted in bad faith. At least one Federal District Court has relied on the *Brubaker* case. *Clark* v. *Lutcher*, 436 F. Supp. 1266 (MD Pa. 1977).

[19] *Metros* v. *United States District Court, supra; Mulligan* v. *Schlachter, supra.*

ing collateral estoppel applicable to § 1983 actions were based at least in part on the estopped party's access to another federal forum through habeas corpus.[20] The Court of Appeals thus concluded that since *Stone* v. *Powell* had removed McCurry's right to a hearing of his Fourth Amendment claim in federal habeas corpus, collateral estoppel should not deprive him of a federal judicial hearing of that claim in a § 1983 suit.

Stone v. *Powell* does not provide a logical doctrinal source for the court's ruling. This Court in *Stone* assessed the costs and benefits of the judge-made exclusionary rule within the boundaries of the federal courts' statutory power to issue writs of habeas corpus, and decided that the incremental deterrent effect that the issuance of the writ in Fourth Amendment cases might have on police conduct did not justify the cost the writ imposed upon the fair administration of criminal justice. 428 U. S., at 489–496. The *Stone* decision concerns only the prudent exercise of federal-court jurisdiction under 28 U. S. C. § 2254. It has no bearing on § 1983 suits or on the question of the preclusive effect of state-court judgments.

The actual basis of the Court of Appeals' holding appears to be a generally framed principle that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court, regardless of the legal posture in which the federal claim arises. But the authority for this principle is difficult to discern. It cannot lie in the Constitution, which makes no such guarantee, but leaves the scope of the jurisdiction of the federal district courts to the wisdom of Congress.[21] And no such authority is to be found in § 1983 itself. For reasons already discussed at length, nothing in the language or legislative history of

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[20] *E. g., Rimmer* v. *Fayetteville Police Department*, 567 F. 2d 273, 276 (CA4 1977); *Thistlewaite* v. *City of New York*, 497 F. 2d 339, 343 (CA2 1973); *Alexander* v. *Emerson*, 489 F. 2d 285, 286 (CA5 1973).

[21] U. S. Const., Art. III.

§ 1983 proves any congressional intent to deny binding effect to a state-court judgment or decision when the state court, acting within its proper jurisdiction, has given the parties a full and fair opportunity to litigate federal claims, and thereby has shown itself willing and able to protect federal rights. And nothing in the legislative history of § 1983 reveals any purpose to afford less deference to judgments in state criminal proceedings than to those in state civil proceedings.[22] There is, in short, no reason to believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in a state proceeding in which he would rather not have been engaged at all.[23]

Through § 1983, the 42d Congress intended to afford an opportunity for legal and equitable relief in a federal court for certain types of injuries. It is difficult to believe that the drafters of that Act considered it a substitute for a federal writ of habeas corpus, the purpose of which is not to redress civil injury, but to release the applicant from unlawful physical confinement. *Preiser* v. *Rodriguez*, 411 U. S., at 484; *Fay* v. *Noia*, 372 U. S. 391, 399, n. 5,[24] particularly in light of the

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[22] The remarks of the proponents of § 1983 quoted in n. 16, *supra*, suggest the contrary. The Court of Appeals did not in any degree rest its holding on disagreement with the common view that judgments in criminal proceedings as well as in civil proceedings are entitled to preclusive effect. See, *e. g.*, *Emich Motors Corp.* v. *General Motors Corp.*, 340 U. S. 558.

[23] The Court of Appeals did not suggest that the prospect of collateral estoppel in a § 1983 suit would deter a defendant in a state criminal case from raising Fourth Amendment claims, and it is difficult to imagine a defendant risking conviction and imprisonment because he hoped to win a later civil judgment based upon an allegedly illegal search and seizure.

[24] Under the modern statute, federal habeas corpus is bounded by a requirement of exhaustion of state remedies and by special procedural rules, 28 U. S. C. § 2254, which have no counterparts in § 1983, and which therefore demonstrate the continuing illogic of treating federal habeas and § 1983 suits as fungible remedies for constitutional violations.

extremely narrow scope of federal habeas relief for state prisoners in 1871.

The only other conceivable basis for finding a universal right to litigate a federal claim in a federal district court is hardly a legal basis at all, but rather a general distrust of the capacity of the state courts to render correct decisions on constitutional issues. It is ironic that *Stone* v. *Powell* provided the occasion for the expression of such an attitude in the present litigation, in view of this Court's emphatic reaffirmation in that case of the constitutional obligation of the state courts to uphold federal law, and its expression of confidence in their ability to do so. 428 U. S., at 493–494, n. 35; see *Robb* v. *Connolly*, 111 U. S. 624, 637 (Harlan, J.).

The Court of Appeals erred in holding that McCurry's inability to obtain federal habeas corpus relief upon his Fourth Amendment claim renders the doctrine of collateral estoppel inapplicable to his § 1983 suit.[25] Accordingly, the judgment is reversed, and the case is remanded to the Court of Appeals for proceedings consistent with this opinion.

It is so ordered.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

The legal principles with which the Court is concerned in this civil case obviously far transcend the ugly facts of respondent's criminal convictions in the courts of Missouri for heroin possession and assault.

The Court today holds that notions of collateral estoppel apply with full force to this suit brought under 42 U. S. C. § 1983. In my view, the Court, in so ruling, ignores the clear import of the legislative history of that statute and disregards the important federal policies that underlie its

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[25] We do not decide *how* the body of collateral-estoppel doctrine or 28 U. S. C. § 1738 should apply in this case. See n. 2, *supra*.

enforcement. It also shows itself insensitive both to the significant differences between the § 1983 remedy and the exclusionary rule, and to the pressures upon a criminal defendant that make a free choice of forum illusory. I do not doubt that principles of preclusion are to be given such effect as is appropriate in a § 1983 action. In many cases, the denial of res judicata or collateral estoppel effect would serve no purpose and would harm relations between federal and state tribunals. Nonetheless, the Court's analysis in this particular case is unacceptable to me. It works injustice on this § 1983 plaintiff, and it makes more difficult the consistent protection of constitutional rights, a consideration that was at the core of the enacters' intent. Accordingly, I dissent.

In deciding whether a common-law doctrine is to apply to § 1983 when the statute itself is silent, prior cases uniformly have accorded the intent of the legislators great weight.[1] For example, in reference to the judicially created immunity doctrine, the Court has observed that when the "immunity claimed . . . was well established at common law at the time § 1983 was enacted, and where its rationale was compatible with the purposes of the Civil Rights Act, we have construed the statute to incorporate that immunity." *Owen* v. *City of Independence*, 445 U. S. 622, 638 (1980).[2] This very proper inquiry must be made in order to ensure that § 1983 will continue to serve the important goals intended for it by the 42d Congress. In the present case, however, the Court minimizes the significance of the legislative history and discounts its own prior explicit interpretations of the statute. Its discussion is limited to articulating what it terms the single fundamental principle of res judicata and collateral estoppel.

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[1] See, *e. g.*, *Maine* v. *Thiboutot*, 448 U. S. 1 (1980); *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978); *Imbler* v. *Pachtman*, 424 U. S. 409 (1976).

[2] See also *Robertson* v. *Wegmann*, 436 U. S. 584 (1978) (survival of action); *Carey* v. *Piphus*, 435 U. S. 247 (1978) (nature of damages award).

Respondent's position merits a quite different analysis. Although the legislators of the 42d Congress did not expressly state whether the then existing common-law doctrine of preclusion would survive enactment of § 1983, they plainly anticipated more than the creation of a federal statutory remedy to be administered indifferently by either a state or a federal court.[3] The legislative intent, as expressed by supporters[4] and understood by opponents,[5] was to restructure relations

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[3] Senator Osborn's remarks of April 13, 1871, illustrate the contemporary understanding:

"That the State courts in the several States have been unable to enforce the criminal laws of their respective States or to suppress the disorders existing, and in fact that the preservation of life and property in many sections of the country is beyond the power of the State government, is a sufficient reason why Congress should [enact protective legislation]. . . .

"The question now is, what and where is the remedy? I believe the true remedy lies chiefly in the United States district and circuit courts. If the State courts had proven themselves competent to suppress the local disorders, or to maintain law and order, we should not have been called upon to legislate upon this subject at all. But they have not done so. We are driven by existing facts to provide for the several States in the South what they have been unable fully to provide for themselves; *i. e.*, the full and complete administration of justice in the courts. And the courts with reference to which we legislate must be the United States courts." Cong. Globe, 42d Cong., 1st Sess., 653.

[4] See, *e. g.*, *id.*, at 460 (remarks of Rep. Coburn, whom the Court by its reference to the Congressman's "spring up and resume" observation, *ante*, at 100, n. 16, would interpret the other way) ("The United States courts are further above mere local influence than the county courts; their judges can act with more independence, cannot be put under terror, as local judges can; their sympathies are not so nearly identified with those of the vicinage; the jurors are taken from the State, and not the neighborhood; they will be able to rise above prejudices or bad passions or terror more easily. . . . We believe that we can trust our United States courts, and we propose to do so"); Cong. Globe, 42d Cong., 1st Sess., App., at 79 (comments of Rep. Perry) ("The first section provides redress by civil action *in the Federal courts* for a deprivation of any rights, privileges, and immunities secured by the Constitution . . .") (emphasis added).

[5] *Id.*, at 396 (comments of Rep. Rice) ("[The bill] is but a bold and dangerous assertion of both the power and the duty of the Federal Gov-

between the state and federal courts.[6] Congress deliberately opened the federal courts to individual citizens in response to the States' failure to provide justice in their own courts. Contrary to the view presently expressed by the Court, the 42d Congress was not concerned solely with procedural regularity. Even where there was procedural regularity, which the Court today so stresses, Congress believed that substantive justice was unobtainable.[7] The availability of the federal

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ernment to intervene in the internal affairs and police regulations of the States and to suspend the exercise of their rightful authority. . . . It is at war with the spirit of a republican Government"); *id.*, at 416 (comments of Rep. Biggs) ("[If this bill should pass] we have by law done what has never before been done in our history, whatever the provocation, namely: authorized the punishment of crimes and offenses of a personal character among us under the Federal tribunals, which shall be of equal authority in criminal cases with our own State courts, and in many cases shall be of superior authority, and of an altogether extraordinary character[.] First, for the violation of the rights, privileges, and immunities of the citizen a civil remedy is to be had by proceedings in the Federal courts, State authorization in the premises to the contrary notwithstanding"); *id.*, App., at 86 (comments of Rep. Storm) ("Now these questions could all be tried, I take it, in the State courts, and by a writ of error, as provided by the twenty-fifth section of the act of 1789, could be brought before the Supreme Court for review. . . . But the first section of this bill does not allow that right. It takes the whole question away at once and forever; and I say that on the ground of delay it is objectionable"). See also *id.*, at 686–687 (comments of Sen. Schurz); *id.*, App., at 216 (comments of Sen. Thurman).

[6] See *id.*, App., at 149 (comments of Rep. Garfield) (stating that Congress, in considering this legislation, must seek equipoise between opposing poles of government, on the one hand, "that despotism which shallows and absorbs all power in a single-central, government," and, on the other, the "extreme doctrine of local sovereignty which makes nationality impossible").

[7] See *id.*, App., at 78 (comments of Rep. Perry) ("Sheriffs, having eyes to see, see not; judges, having ears to hear, hear not; witnesses conceal the truth or falsify it; grand and petit juries act as if they might be accomplices. In the presence of these gangs all the apparatus and machinery of civil government, all the processes of justice, skulk away as if government and justice were crimes and feared detection. Among the most dan-

forum was not meant to turn on whether, in an individual case, the state procedures were adequate. Assessing the state of affairs as a whole, Congress specifically made a determination that federal oversight of constitutional determinations through the federal courts was necessary to ensure the effective enforcement of constitutional rights.

That the new federal jurisdiction was conceived of as concurrent with state jurisdiction does not alter the significance of Congress' opening the federal courts to these claims. Congress consciously acted in the broadest possible manner.[8] The legislators perceived that justice was not being done in

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gerous things an injured party can do is to appeal to justice. Of the uncounted scores and hundreds of atrocious mutilations and murders it is credibly stated that not one has been punished"); *id.*, at 653 (comments of Sen. Osborn) ("The State courts, mainly under the influence of this [Klan] oath, are utterly powerless"); *id.*, at 394 (remarks of Rep. Rainey) ("The question is sometimes asked, Why do not the courts of law afford redress? Why the necessity of appealing to Congress? We answer that the courts are in many instances under the control of those who are wholly inimical to the impartial administration of law and equity. What benefit would result from appeal to tribunals whose officers are secretly in sympathy with the very evil against which we are striving?"); *id.*, App., at 153 (comments of Rep. Garfield) ("But the chief complaint is not that the laws of the State are unequal, but that even where the laws are just and equal on their face, yet, by a systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them"); *id.*, App., at 166–167 (comments of Rep. Williams regarding Klan methods of securing perjured testimony).

[8] Representative Shellabarger, the bill's sponsor, stated:

"This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. It would be most strange and, in civilized law, monstrous were this not the rule of interpretation. As has been again and again decided by your own Supreme Court of the United States, and everywhere else where there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people." *Id.*, App., at 68.

the States then dominated by the Klan, and it seems senseless to suppose that they would have intended the federal courts to give full preclusive effect to prior state adjudications. That supposition would contradict their obvious aim to right the wrongs perpetuated in those same courts.

I appreciate that the legislative history is capable of alternative interpretations. See the Court's opinion, *ante*, at 98–101. I would have thought, however, that our prior decisions made very clear which reading is required. The Court repeatedly has recognized that § 1983 embodies a strong congressional policy in favor of federal courts' acting as the primary and final arbiters of constitutional rights.[9] In *Monroe* v. *Pape*, 365 U. S. 167 (1961), the Court held that Congress passed the legislation in order to substitute a federal forum for the ineffective, although plainly available, state remedies:

> "It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." *Id.*, at 180.[10]

The Court appears to me to misconstrue the plain meaning of *Monroe*. It states that in that case "the Court inferred that Congress had intended a federal remedy in three circumstances: where state substantive law was facially unconstitutional, where state procedural law was inadequate to allow

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[9] *E. g.*, *Monroe* v. *Pape*, 365 U. S. 167 (1961); *McNeese* v. *Board of Education*, 373 U. S. 668 (1963); *Zwickler* v. *Koota*, 389 U. S. 241 (1967).

[10] To the extent that *Monroe* v. *Pape* held that a municipality was not a "person" within the meaning of § 1983, it was overruled by the Court in *Monell* v. *New York City Dept. of Social Services*, 436 U. S., at 664–689. That ruling, of course, does not affect *Monroe*'s authoritative pronouncement of the legislative purposes of § 1983.

full litigation of a constitutional claim, and where state procedural law, though adequate in theory, was inadequate in practice." *Ante*, at 100–101. It is true that the Court in *Monroe* described those three circumstances as the "three main aims" of the legislation. 365 U. S., at 173. Yet in that case, the Court's recounting of the legislative history and its articulation of these three purposes were intended only as illustrative of *why* the 42d Congress chose to establish a federal remedy in federal court, not as a delineation of *when* the remedy would be available. The Court's conclusion was that this remedy was to be available no matter what the circumstances of state law:

> "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked. Hence the fact that Illinois by its constitution and laws outlaws unreasonable searches and seizures is no barrier to the present suit in the federal court." *Id.*, at 183.

In *Mitchum* v. *Foster*, 407 U. S. 225 (1972), the Court reiterated its understanding of the effect of § 1983 upon state and federal relations:

> "Section 1983 was thus a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th century. . . . The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.' *Ex parte Virginia*, 100 U. S., at 346." *Id.*, at 242.[11]

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[11] The Court also stated:

"This legislative history makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation

At the very least, it is inconsistent now to narrow, if not repudiate, the meaning of *Monroe* and *Mitchum* and to alter our prior understanding of the distribution of power between the state and federal courts.

One should note also that in *England* v. *Medical Examiners*, 375 U. S. 411 (1964), the Court had affirmed the federal courts' special role in protecting constitutional rights under § 1983. In that case it held that a plaintiff required by the abstention doctrine to submit his constitutional claim first to a state court could not be precluded entirely from having the federal court, in which he initially had sought relief, pass on his constitutional claim. The Court relied on "the unqualified terms in which Congress, pursuant to constitutional authorization, has conferred specific categories of jurisdiction upon the federal courts," and on its "fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims." *Id.*, at 415. The Court set out its understanding as to when a litigant in a § 1983 case might be precluded by prior litigation, holding that "if a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then—whether or not he seeks direct review of the state decision in this Court—he has elected to forgo his right to return to the District Court." *Id.*, at 419. I do not understand why the Court today should abandon this approach.

The Court now fashions a new doctrine of preclusion, applicable only to actions brought under § 1983, that is more

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with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts." 407 U. S., at 242.

strict and more confining than the federal rules of preclusion applied in other cases. In *Montana* v. *United States*, 440 U. S. 147 (1979), the Court pronounced three major factors to be considered in determining whether collateral estoppel serves as a barrier in the federal court:

> "[W]hether the issues presented . . . are in substance the same . . . ; whether controlling facts or legal principles have changed significantly since the state-court judgment; and finally, whether other special circumstances warrant an exception to the normal rules of preclusion." *Id.*, at 155.

But now the Court states that the collateral estoppel effect of prior state adjudication should turn on only one factor, namely, what it considers the "one general limitation" inherent in the doctrine of preclusion: "that the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case." *Ante*, at 95, 101. If that one factor is present, the Court asserts, the litigant properly should be barred from relitigating the issue in federal court.[12] One cannot deny that this factor is an important one. I do not believe, however, that the doctrine of preclusion requires the inquiry to be so narrow,[13] and my understanding of the policies underlying § 1983 would lead me to consider all relevant factors in each case before concluding that preclusion was warranted.

In this case, the police officers seek to prevent a criminal defendant from relitigating the constitutionality of their conduct in searching his house, after the state trial court had

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[12] This articulation of the preclusion doctrine of course would bar a § 1983 litigant from relitigating any issue he *might* have raised, as well as any issue he actually litigated in his criminal trial.

[13] See Restatement (Second) of Judgments § 68.1 (Tent. Draft No. 4, Apr. 15, 1977); F. James & G. Hazard, Civil Procedure §§ 11.16–11.22 (2d ed. 1977).

found that conduct in part violative of the defendant's Fourth Amendment rights and in part justified by the circumstances. I doubt that the police officers, now defendants in this § 1983 action, can be considered to have been in privity with the State in its role as prosecutor. Therefore, only "issue preclusion" [14] is at stake.

The following factors persuade me to conclude that this respondent should not be precluded from asserting his claim in federal court. First, at the time § 1983 was passed, a nonparty's ability, as a practical matter, to invoke collateral estoppel was nonexistent. One could not preclude an opponent from relitigating an issue in a new cause of action, though that issue had been determined conclusively in a prior proceeding, unless there was "mutuality." [15] Additionally, the definitions of "cause of action" and "issue" were narrow.[16] As a result, and obviously, no preclusive effect could arise out of a criminal proceeding that would affect subsequent *civil* litigation. Thus, the 42d Congress could not have anticipated or approved that a criminal defendant, tried and con-

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[14] See *Cromwell* v. *County of Sac*, 94 U. S. 351 (1877); F. James & G. Hazard, Civil Procedure §§ 11.3, 11.16 (2d ed. 1977).

[15] *Triplett* v. *Lowell*, 297 U. S. 638 (1936), overruled by the Court in *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U. S. 313 (1971); *Bigelow* v. *Old Dominion Copper Mining & Smelting Co.*, 225 U. S. 111 (1912); F. James & G. Hazard, Civil Procedure § 11.2 (2d ed. 1977); Restatement of Judgments § 93 (1942); 1B J. Moore, Federal Practice ¶¶ 0.412 [1], 0.441 [3] (2d ed. 1974).

[16] Compare McCaskill, Actions and Causes of Action, 34 Yale L. J. 614, 638 (1925) (defining "cause of action" as "that group of operative facts which, standing alone, would show a single right in the plaintiff and a single delict to that right giving cause for the state, through its courts, to afford relief to the party or parties whose right was invaded"), with C. Clark, Handbook on the Law of Code Pleading 84 (1928) (adopting "modern" rule expanding "cause of action" to include more than one "right"). See also 1 H. Herman, Law of Estoppel and Res Judicata §§ 92, 96 ("cause of action"), 98, 103, 111 ("issue") (1886); Developments in the Law—Res Judicata, 65 Harv. L. Rev. 818, 826, 841–843 (1952).

victed in state court, would be precluded from raising against police officers a constitutional claim arising out of his arrest.

Also, the process of deciding in a state criminal trial whether to exclude or admit evidence is not at all the equivalent of a § 1983 proceeding. The remedy sought in the latter is utterly different. In bringing the civil suit the criminal defendant does not seek to challenge his conviction collaterally. At most, he wins damages. In contrast, the exclusion of evidence may prevent a criminal conviction. A trial court, faced with the decision whether to exclude relevant evidence, confronts institutional pressures that may cause it to give a different shape to the Fourth Amendment right from what would result in civil litigation of a damages claim. Also, the issue whether to exclude evidence is subsidary to the purpose of a criminal trial, which is to determine the guilt or innocence of the defendant, and a trial court, at least subconsciously, must weigh the potential damage to the truth-seeking process caused by excluding relevant evidence. See *Stone* v. *Powell*, 428 U. S. 465, 489–495 (1976). Cf. *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U. S. 388, 411–412 (1971) (dissenting opinion).

A state criminal defendant cannot be held to have chosen "voluntarily" to litigate his Fourth Amendment claim in the state court. The risk of conviction puts pressure upon him to raise all possible defenses.[17] He also faces uncertainty about the wisdom of forgoing litigation on *any* issue, for there is the possibility that he will be held to have waived his right to appeal on that issue. The "deliberate bypass" of state procedures, which the imposition of collateral estoppel under these circumstances encourages, surely is not a preferred goal. To hold that a criminal defendant who raises a Fourth Amendment claim at his criminal trial "freely and without reservation submits his federal claims for decision by the state

[17] See *Moran* v. *Mitchell*, 354 F. Supp. 86, 88–89 (ED Va. 1973) (noting the defendant's dilemma).

courts," see *England* v. *Medical Examiners*, 375 U. S., at 419, is to deny reality. The criminal defendant is an involuntary litigant in the state tribunal, and against him all the forces of the State are arrayed. To force him to a choice between forgoing either a potential defense or a federal forum for hearing his constitutional civil claim is fundamentally unfair.

I would affirm the judgment of the Court of Appeals.

UNITED STATES v. DiFRANCESCO

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 79-567. Argued October 6, 1980—Decided December 9, 1980

The Organized Crime Control Act of 1970, 18 U. S. C. § 3576, grants the United States the right, under specified conditions, to appeal the sentence imposed upon a "dangerous special offender." Respondent was convicted of federal racketeering offenses at a trial in Federal District Court. He was sentenced as a dangerous special offender under 18 U. S. C. § 3575 to two 10-year prison terms, to be served concurrently with each other and with a 9-year sentence previously imposed on convictions at an unrelated federal trial. The United States sought review of the dangerous special offender sentences under § 3576, claiming that the District Court abused its discretion in imposing sentences that amounted to additional imprisonment of respondent for only one year, in the face of the findings the court made after the dangerous special offender hearing. The Court of Appeals dismissed the appeal on double jeopardy grounds.

Held: Section 3576 does not violate the Double Jeopardy Clause of the Fifth Amendment. Pp. 126–143.

(a) Section 3576 does not violate the Double Jeopardy Clause's guarantee against multiple trials. "[W]here a Government appeal presents no threat of successive prosecutions, the Double Jeopardy Clause is not offended." *United States* v. *Martin Linen Supply Co.*, 430 U. S. 564, 569–570. Accordingly, the Government's taking of a review of respondent's sentence does not in itself offend double jeopardy principles just because its success might deprive respondent of the benefit of a more lenient sentence. Neither the history of sentencing practices, nor the pertinent rulings of this Court, nor even considerations of double jeopardy policy support the proposition that a criminal sentence, once pronounced, is to be accorded constitutional finality similar to that which attaches to a jury's verdict of acquittal. The Double Jeopardy Clause does not provide the defendant with a right to know at any specific moment in time what the exact limit of his punishment will turn out to be. Pp. 132–138.

(b) The increase of a sentence on review under § 3576 does not constitute multiple punishment in violation of the Double Jeopardy Clause. The argument that the defendant perceives the length of his sentence as

finally determined when he begins to serve it, and that the trial judge should be prohibited from thereafter increasing the sentence, has no force where, as in the dangerous special offender statute, Congress has specifically provided that the sentence is subject to appeal. Under such circumstances, there can be no expectation of finality in the original sentence. Pp. 138–139.

(c) The conclusion that § 3576 violates neither the guarantee against multiple punishment nor the guarantee against multiple trials is consistent with those opinions in which this Court has upheld the constitutionality of two-stage criminal proceedings. Cf. *Swisher* v. *Brady*, 438 U. S. 204. Pp. 139–141.

604 F. 2d 769, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which WHITE, MARSHALL, and STEVENS, JJ., joined, *post*, p. 143. STEVENS, J., filed a dissenting opinion, *post*, p. 152.

Deputy Solicitor General Frey argued the cause for the United States. With him on the briefs were *Solicitor General McCree, Assistant Attorney General Heymann*, and *Victor D. Stone*.

Edgar C. DeMoyer argued the cause and filed a brief for respondent.*

JUSTICE BLACKMUN delivered the opinion of the Court.

The Organized Crime Control Act of 1970, Pub. L. 91–452, 84 Stat. 922, contains, among other things, a definition of "dangerous special offender," 18 U. S. C. §§ 3575 (e) and (f); [1] authorizes the imposition of an increased sentence upon

*Briefs of *amici curiae* urging affirmance were filed by *Quin Denvir* and *Laurance S. Smith* for the State Public Defender of California; and by *Martin Michaelson* for the American Civil Liberties Union.

[1] Section 3575 provides, so far as pertinent for this case:

"(a) Whenever an attorney charged with the prosecution of a defendant in a court of the United States for an alleged felony committed when the defendant was over the age of twenty-one years has reason to believe that the defendant is a dangerous special offender such attorney, a reasonable time before trial or acceptance by the court of a plea of guilty or nolo con-

a convicted dangerous special offender, § 3575 (b); and grants the United States the right, under specified conditions, to

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tendere, may sign and file with the court, and may amend, a notice (1) specifying that the defendant is a dangerous special offender who upon conviction for such felony is subject to the imposition of a sentence under subsection (b) of this section, and (2) setting out with particularity the reasons why such attorney believes the defendant to be a dangerous special offender. In no case shall the fact that the defendant is alleged to be a dangerous special offender be an issue upon the trial of such felony, [or] be disclosed to the jury . . . .

"(b) Upon any plea of guilty or nolo contendere or verdict or finding of guilty of the defendant of such felony, a hearing shall be held before sentence is imposed, by the court sitting without a jury. The court shall fix a time for the hearing, and notice thereof shall be given to the defendant and the United States at least ten days prior thereto. The court shall permit the United States and counsel for the defendant, or the defendant if he is not represented by counsel, to inspect the presentence report sufficiently prior to the hearing as to afford a reasonable opportunity for verification. . . . In connection with the hearing, the defendant and the United States shall be entitled to assistance of counsel, compulsory process, and cross-examination of such witnesses as appear at the hearing. A duly authenticated copy of a former judgment or commitment shall be prima facie evidence of such former judgment or commitment. If it appears by a preponderance of the information, including information submitted during the trial of such felony and the sentencing hearing and so much of the presentence report as the court relies upon, that the defendant is a dangerous special offender, the court shall sentence the defendant to imprisonment for an appropriate term not to exceed twenty-five years and not disproportionate in severity to the maximum term otherwise authorized by law for such felony. Otherwise it shall sentence the defendant in accordance with the law prescribing penalties for such felony. The court shall place in the record its findings, including an identification of the information relied upon in making such findings, and its reasons for the sentence imposed.

. . . . .

"(e) A defendant is a special offender for purposes of this section if—

. . . . .

"(3) such felony was, or the defendant committed such felony in furtherance of, a conspiracy with three or more other persons to engage in a pattern of conduct criminal under applicable laws of any jurisdiction, and the defendant did, or agreed that he would, initiate, organize, plan, finance,

take that sentence to the Court of Appeals for review, § 3576.[2] The issue presented by this case is whether § 3576,

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direct, manage, or supervise all or part of such conspiracy or conduct, or give or receive a bribe or use force as all or part of such conduct.

". . . For purposes of paragraphs (2) and (3) of this subsection, criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristic[s] and are not isolated events.

"(f) A defendant is dangerous for purposes of this section if a period of confinement longer than that provided for such felony is required for the protection of the public from further criminal conduct by the defendant."

[2] Section 3576 reads in full as follows:

"With respect to the imposition, correction, or reduction of a sentence after proceedings under section 3575 of this chapter, a review of the sentence on the record of the sentencing court may be taken by the defendant or the United States to a court of appeals. Any review of the sentence taken by the United States shall be taken at least five days before expiration of the time for taking a review of the sentence or appeal of the conviction by the defendant and shall be diligently prosecuted. The sentencing court may, with or without motion and notice, extend the time for taking a review of the sentence for a period not to exceed thirty days from the expiration of the time otherwise prescribed by law. The court shall not extend the time for taking a review of the sentence by the United States after the time has expired. A court extending the time for taking a review of the sentence by the United States shall extend the time for taking a review of the sentence or appeal of the conviction by the defendant for the same period. The taking of a review of the sentence by the United States shall be deemed the taking of a review of the sentence and an appeal of the conviction by the defendant. Review of the sentence shall include review of whether the procedure employed was lawful, the findings made were clearly erroneous, or the sentencing court's discretion was abused. The court of appeals on review of the sentence may, after considering the record, including the entire presentence report, information submitted during the trial of such felony and the sentencing hearing, and the findings and reasons of the sentencing court, affirm the sentence, impose or direct the imposition of any sentence which the sentencing court could originally have imposed, or remand for further sentencing proceedings and imposition of sentence, except that a sentence may be made more severe only on review of the sentence taken by the United

authorizing the United States so to appeal, violates the Double Jeopardy Clause[3] of the Fifth Amendment of the Constitution.[4]

States and after hearing. Failure of the United States to take a review of the imposition of the sentence shall, upon review taken by the United States of the correction or reduction of the sentence, foreclose imposition of a sentence more severe than that previously imposed. Any withdrawal or dismissal of review of the sentence taken by the United States shall foreclose imposition of a sentence more severe than that reviewed but shall not otherwise foreclose the review of the sentence or the appeal of the conviction. The court of appeals shall state in writing the reasons for its disposition of the review of the sentence. Any review of the sentence taken by the United States may be dismissed on a showing of abuse of the right of the United States to take such review."

Section 3576 has a twin in 21 U. S. C. § 849 (h). This was enacted as § 409 (h) of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91-513, 84 Stat. 1266.

[3] "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ." U. S. Const., Amdt. 5.

[4] Academic and professional commentary on the general issue is divided. For conclusions that prosecution appeals of sentences do not violate the Double Jeopardy Clause, see Westen, The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences, 78 Mich. L. Rev. 1001 (1980); Stern, Government Appeals of Sentences: A Constitutional Response to Arbitrary and Unreasonable Sentences, 18 Am. Crim. L. Rev. 51 (1980); Dunsky, The Constitutionality of Increasing Sentences on Appellate Review, 69 J. Crim. L. & Criminology 19 (1978). For conclusions that such appeals are unconstitutional, see Spence, The Federal Criminal Code Reform Act of 1977 and Prosecutorial Appeal of Sentences: Justice or Double Jeopardy?, 37 Md. L. Rev. 739 (1978); Freeman & Earley, *United States v. DiFrancesco:* Government Appeal of Sentences, 18 Am. Crim. L. Rev. 91 (1980); Note, 63 Va. L. Rev. 325 (1977); Report on Government Appeal of Sentences, 35 Bus. Lawyer 617, 624–628 (1980). At least one commentator-witness some time ago regarded the answer to the constitutional issue as "simply unclear." Low, Special Offender Sentencing, 8 Am. Crim. L. Q. 70, 91 (1970) (reprint of statement submitted at Hearings on S. 30 et al. before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 91st Cong., 1st Sess., 184, 197 (1969)).

See also ABA Standards for Criminal Justice 20–1.1 (d), and appended commentary, pp. 20–7 through 20–13 (2d ed. 1980).

I

At a 1977 jury trial in the United States District Court for the Western District of New York, respondent Eugene DiFrancesco was convicted of conducting the affairs of an enterprise through a pattern of racketeering activity, and of conspiring to commit that offense, in violation of 18 U. S. C. §§ 1962 (c) and (d).[5] At another jury trial in 1978—before a different judge in the same district—based on an indictment returned prior to the racketeering indictment, respondent was convicted of damaging federal property, in violation of 18 U. S. C. § 1361, of unlawfully storing explosive materials, in violation of 18 U. S. C. § 842 (j), and of conspiring to commit those offenses, in violation of 18 U. S. C. § 371.[6]

Respondent was first sentenced, in March 1978, on his convictions at the later trial. He received eight years on the charge for damaging federal property and five years on the conspiracy charge, these sentences to be served concurrently, and one year on the unlawful storage charge, to be served consecutively to the other sentences. This made a total of nine years' imprisonment. In April, respondent was sentenced as a dangerous special offender under § 3575 to two 10-year terms on the racketeering counts upon which he was convicted at the earlier trial; the court specified that these sentences were to be served concurrently with each other and with the sentences imposed in March. The dangerous special

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[5] The maximum punishment for a violation of § 1962 is a fine of not more than $25,000 or imprisonment for not more than 20 years, or both, plus specified forfeitures. § 1963.

[6] Section 1361 specifies that the maximum punishment for its violation, if the damage exceeds $100, is a fine of not more than $10,000 or imprisonment for not more than 10 years, or both. The maximum punishment for a violation of § 842 (j) is a fine of not more than $1,000 or imprisonment for not more than one year, or both. § 844 (b). Section 371 specifies that the maximum punishment for its violation, when the offense that is the object of the conspiracy is not a misdemeanor, is a fine of not more than $10,000 or imprisonment of not more than five years, or both.

offender charge and sentences thus resulted in additional punishment of only about a year.

Respondent appealed the respective judgments of conviction to the Court of Appeals for the Second Circuit, and the United States sought review, under § 3576, of the sentences imposed upon respondent as a dangerous special offender. The Court of Appeals unanimously affirmed the judgments of conviction. By a divided vote, however, that court dismissed the Government's appeal on double jeopardy grounds. 604 F. 2d 769 (1979). The two judges in the majority thus did not address the merits of the special offender issue. The third judge, while agreeing that the Government's appeal was to be dismissed, based that conclusion not on constitutional grounds, as did the majority, but on the grounds that §§ 3575 and 3576 were inapplicable to the facts of the case. 604 F. 2d, at 787.[7] Because of the importance of the constitutional question, we granted the Government's petition for certiorari, which confined itself to that single issue. 444 U. S. 1070 (1980). Respondent has not filed a cross-petition.

II

At the earlier racketeering trial, the evidence showed that respondent was involved in an arson-for-hire scheme in the Rochester, N. Y., area that was responsible for at least eight fires between 1970 and 1973; that the ring collaborated with property owners to set fire to buildings in return for shares of the insurance proceeds; and that insurers were defrauded of approximately $480,000 as a result of these fires. At the second trial, the evidence showed that respondent partici-

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[7] The applicability of §§ 3575 and 3576 to this respondent, the issue upon which the concurring judge rested his conclusion, is not before us. The majority of the Court of Appeals observed, in passing, that the trial court "properly could find that the statute was applicable." 604 F. 2d, at 780–781, n. 13. In any event, the issue may be considered, if there is any reason for so doing, on remand.

pated in the 1970 "Columbus Day bombings," including the bombing of the federal building at Rochester.

Prior to the first trial, the Government, in accordance with § 3575 (a), filed with the trial court a notice alleging that respondent was a dangerous special offender. This notice recited the Government's intention to seek enhanced sentences on the racketeering counts in the event respondent was convicted at that trial. After respondent was found guilty, a dangerous special offender hearing, pursuant to § 3575 (b), was held. At the hearing, the Government relied upon the testimony adduced at the trial and upon public documents that attested to other convictions of respondent for the Columbus Day bombings, for loansharking, and for murder. App. 27–28, 30. The defense offered no evidence. It conceded the validity of the public records, *id.*, at 31–32, but objected to any consideration of the murder offense because that conviction had been vacated on appeal. *Id.*, at 28–29.

The District Court made findings of fact and ruled that respondent was a dangerous special offender within the meaning of the statute. The findings set forth respondent's criminal record and stated that that record revealed "virtually continuous criminal conduct over the past eight years, interrupted only by relatively brief periods of imprisonment in 1975, 1976 and 1977." *Id.*, at 41. The court found, in addition, that respondent's "criminal history, based upon proven facts, reveals a pattern of habitual and knowing criminal conduct of the most violent and dangerous nature against the lives and property of the citizens of this community. It further shows the defendant's complete and utter disregard for the public safety. The defendant, by virtue of his own criminal record, has shown himself to be a hardened habitual criminal from whom the public must be protected for as long a period as possible. Only in that way can the public be protected from further violent and dangerous criminal

conduct by the defendant." *Id.*, at 43.[8] The court thereupon sentenced respondent under § 3575 (b) to the concurrent 10-year terms hereinabove described. App. 45–46.

The United States then took its appeal under § 3576, claiming that the District Court abused its discretion in imposing sentences that amounted to additional imprisonment of respondent for only one year, in the face of the findings the court made after the dangerous special offender hearing.[9]

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[8] The court then summarized its findings and set forth its conclusion as follows:

"In sum, this Court, on the basis of the facts above, finds that the defendant was over the age of 21 years when the crimes for which he stands convicted were committed; that the defendant stands convicted of two felonies; that one felony was committed in furtherance of a conspiracy (18 U. S. C. 1962 (c)); that the other felony was itself a conspiracy (18 U. S. C. 1962 (d)); that the conspiracy and the substantive crime involved at least four persons other than the defendant . . . ; that the conspiracy and the substantive crime was to engage in a pattern of conduct which was criminal under the laws of the State of New York (New York Penal Code, Article 150) and of the United States (18 U. S. C. 1341); that the defendant did initiate, organize, plan, direct, manage and supervise at least part of the conspiracy and the substantive criminal acts; [and that confinement of the defendant for a period longer than that provided for violation of 18 U. S. C. 1962 (c) or 1962 (d) is required for the protection of the public from further criminal conduct by the defendant.]

"WHEREFORE, it is the finding of this Court that the defendant Eugene DiFrancesco, having been convicted of two felony charges before this Court on October 31, 1977, and having been over the age of 21 years at the time of the commission of those felonies is a dangerous special offender within the meaning of sections 3575 (e) (3) and 3575 (f) of Title 18 of the United States Code, and therefore subject to the sentencing provisions of section 3575 (b) of Title 18 of the United States Code." App. 43–44.

The bracketed phrase is in the findings as typed, but a line has been drawn through it in ink by hand. No persuasive explanation for this deletion, if it is one, has been offered this Court.

[9] It was indicated at oral argument, Tr. of Oral Arg. 5, 37, 39, and in one of the briefs, Brief for Respondent 12, as well as in the opinion of the

The dismissal of the Government's appeal by the Court of Appeals rested specifically upon its conclusion, which it described as "inescapable," that "to subject a defendant to the risk of substitution of a greater sentence, upon an appeal by the government, is to place him a second time 'in jeopardy of life or limb.'" 604 F. 2d, at 783.

III

While this Court, so far as we are able to ascertain, has never invalidated an Act of Congress on double jeopardy grounds, it has had frequent occasion recently to consider and pass upon double jeopardy claims raised in various contexts. See *United States* v. *Jorn*, 400 U. S. 470 (1971); *Colten* v. *Kentucky*, 407 U. S. 104 (1972); *Illinois* v. *Somerville*, 410 U. S. 458 (1973); *Chaffin* v. *Stynchcombe*, 412 U. S. 17 (1973); *United States* v. *Wilson*, 420 U. S. 332 (1975); *United States* v. *Jenkins*, 420 U. S. 358 (1975); *Serfass* v. *United States*, 420 U. S. 377 (1975); *Breed* v. *Jones*, 421 U. S. 519 (1975); *United States* v. *Dinitz*, 424 U. S. 600 (1976); *Ludwig* v. *Massachusetts*, 427 U. S. 618 (1976); *United States* v. *Martin Linen Supply Co.*, 430 U. S. 564 (1977); *Lee* v. *United States*, 432 U. S. 23 (1977); *Arizona* v. *Washington*, 434 U. S. 497 (1978); *Burks* v. *United States*, 437 U. S. 1 (1978); *Greene* v. *Massey*, 437 U. S. 19 (1978); *Crist* v. *Bretz*, 437 U. S. 28 (1978); *Sanabria* v. *United States*, 437 U. S. 54 (1978); *United States* v. *Scott*, 437 U. S. 82

Court of Appeals, 604 F. 2d, at 781, and n. 17, that this is the first case in which the United States specifically has sought review of a sentence under § 3576. Inasmuch as the statute was enacted a decade ago, this fact might be said to indicate either little use of the special offender statute by the United States, or prosecutorial concern about its constitutionality, or that federal trial judges are imposing sufficiently severe sentences on special offenders to make review unnecessary. No definitive explanation, however, has been offered. An attempt on the part of this Court to explain the nonuse of the statute would be speculation, and we shall not indulge in it.

(1978); *Swisher* v. *Brady*, 438 U. S. 204 (1978); *Whalen* v. *United States*, 445 U. S. 684 (1980); *Illinois* v. *Vitale*, 447 U. S. 410 (1980).

These cited cases are the additions of just the past decade to the less numerous list of well-known double jeopardy decisions of past years. Among those earlier cases are *United States* v. *Perez*, 9 Wheat. 579 (1824); *Ex parte Lange*, 18 Wall. 163 (1874), *United States* v. *Ball*, 163 U. S. 662 (1896); *Kepner* v. *United States*, 195 U. S. 100 (1904); *Green* v. *United States*, 355 U. S. 184 (1957); *Fong Foo* v. *United States*, 369 U. S. 141 (1962); *Downum* v. *United States*, 372 U. S. 734 (1963); *United States* v. *Tateo*, 377 U. S. 463 (1964).

That the Clause is important and vital in this day is demonstrated by the host of recent cases. That its application has not proved to be facile or routine is demonstrated by acknowledged changes in direction or in emphasis. See, *e. g.*, *United States* v. *Scott*, *supra*, overruling *United States* v. *Jenkins*, *supra;* and *Burks* v. *United States*, 437 U. S., at 18, overruling, at least in part, certain prior cases in the area. See also Note, 24 Minn. L. Rev. 522 (1940); Westen & Drubel, Toward a General Theory of Double Jeopardy, 1978 S. Ct. Rev. 81, 82. Nonetheless, the following general principles emerge from the Court's double jeopardy decisions and may be regarded as essentially settled:

—The general design of the Double Jeopardy Clause of the Fifth Amendment is that described in *Green* v. *United States:*

> "The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. . . . The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individ-

> nal for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." 355 U. S., at 187–188.

See also *Serfass* v. *United States,* 420 U. S., at 387–388; *Crist* v. *Bretz,* 437 U. S., at 35. This concept has ancient roots centering in the common-law pleas of *autre fois acquit, autre fois convict,* and pardon, 4 W. Blackstone, Commentaries 329–330 (1st ed. 1769), and found expression in the legal tradition of colonial America. See *Green* v. *United States,* 355 U. S., at 187; *id.,* at 200 (dissenting opinion); *United States* v. *Wilson,* 420 U. S., at 339–342; *United States* v. *Scott,* 437 U. S., at 87.

—The stated design, in terms of specific purpose, has been expressed in various ways. It has been said that "a" or "the" "primary purpose" of the Clause was "to preserve the finality of judgments," *Crist* v. *Bretz,* 437 U. S., at 33, or the "integrity" of judgments, *United States* v. *Scott,* 437 U. S., at 92. But it has also been said that "central to the objective of the prohibition against successive trials" is the barrier to "affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Burks* v. *United States,* 437 U. S., at 11; *Swisher* v. *Brady,* 438 U. S., at 215–216. Implicit in this is the thought that if the Government may reprosecute, it gains an advantage from what it learns at the first trial about the strengths of the defense case and the weaknesses of its own. See *United States* v. *Scott,* 437 U. S., at 105, n. 4 (dissenting opinion); *United States* v. *Wilson,* 420 U. S., at 352.

Still another consideration has been noted:

> "Because jeopardy attaches before the judgment becomes final, the constitutional protection also embraces the defendant's 'valued right to have his trial completed by a particular tribunal.' " *Arizona* v. *Washington,* 434

U. S., at 503, quoting from *Wade* v. *Hunter*, 336 U. S. 684, 689 (1949).

See *Swisher* v. *Brady*, 438 U. S., at 214–215; *Crist* v. *Bretz*, 437 U. S., at 36.

On occasion, stress has been placed upon punishment:

> "It is the punishment that would legally follow the second conviction which is the real danger guarded against by the Constitution." *Ex parte Lange*, 18 Wall., at 173.

—The Court has summarized:

> "That guarantee [against double jeopardy] has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." (Footnotes omitted.) *North Carolina* v. *Pearce*, 395 U. S. 711, 717 (1969).[10]

See *Illinois* v. *Vitale*, 447 U. S., at 415.

—An acquittal is accorded special weight. "The constitutional protection against double jeopardy unequivocally prohibits a second trial following an acquittal," for the "public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though 'the acquittal was based upon an egregiously erroneous foundation.' See *Fong Foo* v. *United States*, 369 U. S. 141, 143. If the innocence of the accused has been confirmed by a final judgment, the Constitution conclusively presumes that a second trial would be unfair." *Arizona* v. *Washington*, 434 U. S., at 503. The law "attaches particular significance to an acquittal." *United States* v. *Scott*, 437 U. S., at 91.

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[10] This recital is described as this Court's "favorite saying about double jeopardy" and is the subject of comment, not uncritical, in Professor Westen's provocative and thoughtful article, The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences, 78 Mich. L. Rev. 1001, 1062–1063 (1980).

This is justified on the ground that, however mistaken the acquittal may have been, there would be an unacceptably high risk that the Government, with its superior resources, would wear down a defendant, thereby "enhancing the possibility that even though innocent he may be found guilty." *Green* v. *United States*, 355 U. S., at 188. See also *United States* v. *Martin Linen Supply Co.*, 430 U. S., at 571, 573, n. 12. "[W]e necessarily afford absolute finality to a jury's *verdict* of acquittal—no matter how erroneous its decision" (emphasis in original). *Burks* v. *United States*, 437 U. S., at 16.[11]

—The result is definitely otherwise in cases where the trial has not ended in an acquittal. This Court has long recognized that the Government may bring a second prosecution where a mistrial has been occasioned by "manifest necessity." *United States* v. *Perez*, 9 Wheat. at 580. See *Arizona* v. *Washington*, 434 U. S., at 514–516; *Illinois* v. *Somerville*, 410 U. S. 458 (1973). Furthermore, reprosecution of a defendant who has successfully moved for a mistrial is not barred, so long as the Government did not deliberately seek to provoke the mistrial request. *United States* v. *Dinitz*, 424 U. S., at 606–611.

Similarly, where the trial has been terminated prior to a jury verdict at the defendant's request on grounds unrelated to guilt or innocence, the Government may seek appellate review of that decision even though a second trial would be necessitated by a reversal. See *United States* v. *Scott*, 437 U. S., at 98–99. *A fortiori*, the Double Jeopardy Clause does not bar a Government appeal from a ruling in favor of the defendant after a guilty verdict has been entered by the trier of fact. See *United States* v. *Wilson, supra; United States* v. *Rojas*, 554 F. 2d 938, 941 (CA9 1977); *United States* v. *De Garces*, 518 F. 2d 1156, 1159 (CA2 1975).

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[11] Professor Westen describes it succinctly this way:

"The prohibition on retrial following an acquittal is based on a jury's prerogative to acquit against the evidence . . . ." *Id.*, at 1012, 1063.

Finally, if the first trial has ended in a conviction, the double jeopardy guarantee "imposes no limitations whatever upon the power to *retry* a defendant who has succeeded in getting his first conviction set aside" (emphasis in original). *North Carolina* v. *Pearce*, 395 U. S., at 720. "It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction." *United States* v. *Tateo*, 377 U. S., at 466. "[T]o require a criminal defendant to stand trial again after he has successfully invoked a statutory right of appeal to upset his first conviction is not an act of governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect." *United States* v. *Scott*, 437 U. S., at 91. There is, however, one exception to this rule: the Double Jeopardy Clause prohibits retrial after a conviction has been reversed because of insufficiency of the evidence. *Burks* v. *United States, supra; Greene* v. *Massey*, 437 U. S., at 24.

—Where the Clause does apply, "its sweep is absolute." *Burks* v. *United States*, 437 U. S., at 11, n. 6.

—The United States "has no right of appeal in a criminal case, absent explicit statutory authority." *United States* v. *Scott*, 437 U. S., at 84–85. But with the enactment of the first paragraph of what is now 18 U. S. C. § 3731 by Pub. L. 91–644 in 1971, 84 Stat. 1890, permitting a Government appeal in a criminal case except "where the double jeopardy clause of the United States Constitution prohibits further prosecution," the Court necessarily concluded that "Congress intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit." *United States* v. *Wilson*, 420 U. S., at 337. See also *United States* v. *Scott*, 437 U. S., at 85.[12]

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[12] And, of course, it is surely settled that the Double Jeopardy Clause of the Fifth Amendment has application to the States through the Fourteenth Amendment. *Benton* v. *Maryland*, 395 U. S. 784 (1969); *Illinois* v. *Vitale*, 447 U. S. 410, 415 (1980).

IV

From these principles, certain propositions pertinent to the present controversy emerge:

A. The Double Jeopardy Clause is *not* a complete barrier to an appeal by the prosecution in a criminal case. "[W]here a Government appeal presents no threat of successive prosecutions, the Double Jeopardy Clause is not offended." *United States* v. *Martin Linen Supply Co.*, 430 U. S., at 569–570. See also *United States* v. *Wilson*, 420 U. S., at 342; *United States* v. *Scott*, *supra*. From this it follows that the Government's taking a review of respondent's sentence does not in itself offend double jeopardy principles just because its success might deprive respondent of the benefit of a more lenient sentence. Indeed, in *Wilson* and again in *Scott* the defendant had won a *total* victory in the trial court, for that tribunal had terminated the case in a manner that would have allowed him to go free. The Government, nevertheless, over the constitutional challenge, was allowed to appeal.

B. The double jeopardy focus, thus, is not on the appeal but on the relief that is requested, and our task is to determine whether a criminal sentence, once pronounced, is to be accorded constitutional finality and conclusiveness similar to that which attaches to a jury's verdict of acquittal. We conclude that neither the history of sentencing practices, nor the pertinent rulings of this Court, nor even considerations of double jeopardy policy support such an equation.

As has been noted above, the Court has said that the prohibition against multiple trials is the "controlling constitutional principle." *United States* v. *Wilson*, 420 U. S., at 346; *United States* v. *Martin Linen Supply Co.*, 430 U. S., at 569. But, of course, the Court's cases show that even the protection against retrial is not absolute. It is acquittal that prevents retrial even if legal error was committed at the trial. *United States* v. *Ball*, 163 U. S. 662 (1896). This is why the "law attaches particular significance to an acquittal." *United*

States v. *Scott*, 437 U. S., at 91. Appeal of a sentence, therefore, would seem to be a violation of double jeopardy only if the original sentence, as pronounced, is to be treated in the same way as an acquittal is treated, and the appeal is to be treated in the same way as a retrial. Put another way, the argument would be that, for double jeopardy finality purposes, the imposition of the sentence is an "implied acquittal" of any greater sentence. See Van Alstyne, In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant, 74 Yale L. J. 606, 634–635 (1965).

We agree with the Government that this approach does not withstand analysis. Any reliance the Court of Appeals may have placed on *Kepner* v. *United States*, 195 U. S. 100 (1904),[13] is misplaced, for the focus of *Kepner* was on the undesirability of a second *trial*. There are, furthermore, fundamental distinctions between a sentence and an acquittal, and to fail to recognize them is to ignore the particular significance of an acquittal.

Historically, the pronouncement of sentence has never carried the finality that attaches to an acquittal. The common-law writs of *autre fois acquit* and *autre fois convict* were protections against retrial. See *United States* v. *Wilson*, 420 U. S., at 340. Although the distinction was not of great importance early in the English common law because nearly all felonies, to which double jeopardy principles originally were limited, were punishable by the critical sentences of death or deportation, see Comment, Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee, 65 Yale L. J. 339, 342–343 (1956), it gained importance when sentences of imprisonment became common. The trial court's increase of a sentence, so long as it took place

[13] While the challenge in *Kepner* was based not on the Double Jeopardy Clause, but on a statute extending double jeopardy protection to the Philippines, this Court has accepted that decision "as having correctly stated the relevant double jeopardy principles." See *United States* v. *Wilson*, 420 U. S. 332, 346, n. 15 (1975).

during the same term of court, was permitted. This practice was not thought to violate any double jeopardy principle. See *Ex parte Lange*, 18 Wall., at 167; *id.*, at 192–194 (dissenting opinion); 3 E. Coke, Institutes § 438 (13th ed. 1789). See also *Commonwealth* v. *Weymouth*, 84 Mass. 144 (1861). The common law is important in the present context, for our Double Jeopardy Clause was drafted with the common-law protections in mind. See *United States* v. *Wilson*, 420 U. S., at 340–342; *Green* v. *United States*, 355 U. S., at 200–201 (dissenting opinion). This accounts for the established practice in the federal courts that the sentencing judge may recall the defendant and increase his sentence, at least (and we venture no comment as to this limitation) so long as he has not yet begun to serve that sentence. See, *e. g.*, *United States* v. *DiLorenzo*, 429 F. 2d 216, 221 (CA2 1970), cert. denied, 402 U. S. 950 (1971); *Vincent* v. *United States*, 337 F. 2d 891, 894 (CA8 1964), cert. denied, 380 U. S. 988 (1965). Thus it may be said with certainty that history demonstrates that the common law never ascribed such finality to a sentence as would prevent a legislative body from authorizing its appeal by the prosecution. Indeed, countries that trace their legal systems to the English common law permit such appeals. See Can. Rev. Stat. §§ 605 (1)(b) and 748 (b)(ii) (1970), Martin's Annual Criminal Code 523, 636 (E. Greenspan ed. 1979); New Zealand Crimes Act 1961, as amended by the Crimes Amendment Act of 1966, 1 Repr. Stat. N. Z. § 383 (2) (1979). See M. Friedland, Double Jeopardy 290 (1969).

C. This Court's decisions in the sentencing area clearly establish that a sentence does not have the qualities of constitutional finality that attend an acquittal. In *Bozza* v. *United States*, 330 U. S. 160 (1947), the defendant was convicted of a crime carrying a mandatory minimum sentence of fine and imprisonment. The trial court, however, sentenced the defendant only to imprisonment. Later on the same day, the judge recalled the defendant and imposed both fine and im-

prisonment. This Court held that there was no double jeopardy. "The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner." *Id.*, at 166–167. What the judge had done "did not twice put petitioner in jeopardy for the same offense." *Id.*, at 167. And in *North Carolina* v. *Pearce*, 395 U. S. 711 (1969), the Court held that there was no absolute constitutional bar to the imposition of a more severe sentence on reconviction after the defendant's successful appeal of the original judgment of conviction. The rule of *Pearce*, permitting an increase of sentence on retrial is a "well-established part of our constitutional jurisprudence." *Id.*, at 720. See *Chaffin* v. *Stynchcombe*, 412 U. S., at 24. See also *Stroud* v. *United States*, 251 U. S. 15 (1919). If any rule of finality had applied to the pronouncement of a sentence, the original sentence in *Pearce* would have served as a ceiling on the one imposed at retrial.[14] While *Pearce* dealt

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[14] The principal dissent fails to recognize the import of *Pearce*. According to that dissent, the "analytic similarity of a verdict of acquittal and the imposition of sentence" requires the conclusion that sentences may not be increased after imposition without violating the Double Jeopardy Clause. *Post*, at 146. Thus, the imposition of a 10-year sentence where a 25-year sentence is permissible is, in the dissent's view, an implicit acquittal of the greater sentence. *Ibid.* But precisely this argument was unsuccessfully advanced by Justices Douglas and Harlan in *Pearce*. See 395 U. S., at 726–728, and n. 1 (Douglas, J., concurring); *id.*, at 744–746 (Harlan, J., concurring in part and dissenting in part). The majority in *Pearce* thus rejected the notion that the imposition of a sentence less than the maximum operates as an implied acquittal of any greater sentence. See *id.*, at 720, and n. 16.

Further, the principal dissent's attempt to distinguish *Pearce* on the grounds that there the imposition of the sentence followed a retrial, rather than an appeal, is unconvincing. In *Green* v. *United States*, 355 U. S. 184 (1957), the Court held that a defendant who had been convicted of the lesser included offense of second-degree murder at his first trial could not be convicted of the greater offense of first-degree murder on retrial; thus, the conviction of the lesser included offense operated as an implicit acquittal of the greater. Since the defendant sought and obtained a retrial in each

with the imposition of a new sentence after retrial rather than, as here, after appeal, that difference is no more than a "conceptual nicety." *North Carolina* v. *Pearce*, 395 U. S., at 722.

D. The double jeopardy considerations that bar reprosecution after an acquittal do not prohibit review of a sentence. We have noted above the basic design of the double jeopardy provision, that is, as a bar against repeated attempts to convict, with consequent subjection of the defendant to embarrassment, expense, anxiety, and insecurity, and the possibility that he may be found guilty even though innocent. These considerations, however, have no significant application to the prosecution's statutorily granted right to review a sentence. This limited appeal does not involve a retrial or approximate the ordeal of a trial on the basic issue of guilt or innocence. Under § 3576, the appeal is to be taken promptly and is essentially on the record of the sentencing court. The defendant, of course, is charged with knowledge of the statute and its appeal provisions, and has no expectation of finality in his sentence until the appeal is concluded or the time to appeal has expired. To be sure, the appeal may prolong the period of any anxiety that may exist, but it does so only for the finite period provided by the statute. The appeal is no more of an ordeal than any Government appeal under 18 U. S. C. § 3731 from the dismissal of an indictment or information. The defendant's primary concern and anxiety obviously relate to the determination of innocence or guilt, and that already is behind him. The defendant is subject to no risk of being harassed and then convicted, although innocent. Furthermore, a sentence is characteristically determined in

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case, the difference in result reached in *Green* and *Pearce* can be explained only on the grounds that the imposition of sentence does not operate as an implied acquittal of any greater sentence.

JUSTICE STEVENS' dissent, with its reliance on Justice Harlan's separate opinion in *Pearce*, concurring in part and dissenting in part, 395 U. S., at 744, in effect argues nothing more than that *Pearce* was wrongly decided. We are not inclined to overrule *Pearce*.

large part on the basis of information, such as the presentence report, developed outside the courtroom. It is purely a judicial determination, and much that goes into it is the result of inquiry that is nonadversary in nature.

E. The Double Jeopardy Clause does not provide the defendant with the right to know at any specific moment in time what the exact limit of his punishment will turn out to be. Congress has established many types of criminal sanctions under which the defendant is unaware of the precise extent of his punishment for significant periods of time, or even for life, yet these sanctions have not been considered to be violative of the Clause. Thus, there is no double jeopardy protection against revocation of probation and the imposition of imprisonment. See, *e. g., Thomas* v. *United States,* 327 F. 2d 795 (CA10), cert. denied, 377 U. S. 1000 (1964). There are other situations where probation or parole may be revoked and sentence of imprisonment imposed. See, *e. g., United States* v. *Kuck,* 573 F. 2d 25 (CA10 1978); *United States* v. *Walden,* 578 F. 2d 966, 972 (CA3 1978), cert. denied, 444 U. S. 849 (1979); *United States* v. *Jones,* 540 F. 2d 465 (CA10 1976), cert. denied, 429 U. S. 1101 (1977); *Dunn* v. *United States,* 182 U. S. App. D. C. 261, 561 F. 2d 259 (1977). While these criminal sanctions do not involve the increase of a final sentence, and while the defendant is aware at the original sentencing that a term of imprisonment later may be imposed, the situation before us is different in no critical respect. Respondent was similarly aware that a dangerous special offender sentence is subject to increase on appeal. His legitimate expectations are not defeated if his sentence is increased on appeal any more than are the expectations of the defendant who is placed on parole or probation that is later revoked.

All this highlights the distinction between acquittals and sentences. *North Carolina* v. *Pearce* and *Bozza* v. *United States* demonstrate that the Double Jeopardy Clause does not require that a sentence be given a degree of finality that prevents its later increase. Because of the critical difference be-

tween an acquittal and a sentence, the acquittal cases, such as *Kepner* v. *United States*, 195 U. S. 100 (1904), and *Fong Foo* v. *United States*, 369 U. S. 141 (1962), do not require a contrary result.

V

We turn to the question whether the increase of a sentence on review under § 3576 constitutes multiple punishment in violation of the Double Jeopardy Clause. The Court of Appeals found that it did. 604 F. 2d, at 784–787. This conclusion appears to be attributable primarily to that court's extending to an appeal this Court's dictum in *United States* v. *Benz*, 282 U. S. 304, 307 (1931), to the effect that the federal practice of barring an increase in sentence by the trial court after service of the sentence has begun is constitutionally based.[15] The real and only issue in *Benz*, however, was whether the trial judge had the power to *reduce* a defendant's sentence after service had begun. The Court held that the trial court had such power. It went on to say gratuitously, however, *id.*, at 307–308, and with quotations from a textbook and from *Ex parte Lange*, 18 Wall., at 167, 173, that the trial court may not *increase* a sentence, even though the increase is effectuated during the same court session, if the defendant has begun service of his sentence. But the dictum's source, *Ex parte Lange*, states no such principle. In *Lange* the trial court erroneously imposed both imprisonment and fine, even though it was authorized by statute to impose only one or the other of these two punishments. Lange had paid the fine and served five days in prison. The trial court then resentenced him to a year's imprisonment. The fine having been paid and the defendant having suffered one of the alternative punishments, "the power of the court to punish further was gone." *Id.*, at 176. The Court also observed that to impose

[15] Somewhat similar dicta are present in *Murphy* v. *Massachusetts*, 177 U. S. 155, 160 (1900), and in the plurality opinion in *Reid* v. *Covert*, 354 U. S. 1, 37–38, n. 68 (1957). The latter is not a double jeopardy case.

a year's imprisonment (the maximum) after five days had been served was to punish twice for the same offense. *Id.*, at 175. The holding in *Lange*, and thus the dictum in *Benz*, are not susceptible of general application. We confine the dictum in *Benz* to *Lange*'s specific context. Although it might be argued that the defendant perceives the length of his sentence as finally determined when he begins to serve it, and that the trial judge should be prohibited from thereafter increasing the sentence, that argument has no force where, as in the dangerous special offender statute, Congress has specifically provided that the sentence is subject to appeal. Under such circumstances there can be no expectation of finality in the original sentence. See S. Rep. No. 91-617, p. 97 (1969); Dunsky, The Constitutionality of Increasing Sentences on Appellate Review, 69 J. Crim. L. & Criminology 19, 32 (1978).

The guarantee against multiple punishment that has evolved in the holdings of this Court plainly is not involved in this case. As *Ex parte Lange* demonstrates, a defendant may not receive a greater sentence than the legislature has authorized. No double jeopardy problem would have been presented in *Ex parte Lange* if Congress had provided that the offense there was punishable by both fine and imprisonment, even though that is multiple punishment. See *Whalen* v. *United States*, 445 U. S., at 688-689; *id.*, at 697-698 (concurring opinion). The punishment authorized by Congress under §§ 3575 and 3576 is clear and specific and, accordingly, does not violate the guarantee against multiple punishment expounded by *Ex parte Lange*.

VI

The conclusion that § 3576 violates neither the guarantee against multiple punishment nor the guarantee against multiple trials is consistent with those opinions in which the Court has upheld the constitutionality of two-stage criminal pro-

ceedings. See *Ludwig* v. *Massachusetts*, 427 U. S., at 630–632. See also *Colten* v. *Kentucky*, 407 U. S., at 118–120.[16]

Swisher v. *Brady*, 438 U. S. 204 (1978), affords particular support and, indeed, precedent for the decision we reach. That case concerned a Maryland scheme for the use of a master in a Juvenile Court proceeding. The master, after receiving evidence, concluded that the State had failed to show beyond a reasonable doubt that the minor had committed an assault and robbery. The master's recommendation to the Juvenile Court set forth that conclusion. The State filed exceptions, as it was authorized to do under a procedural rule, and the minor responded with a motion to dismiss the notice of exceptions on the ground that the procedural rule, with its provision for a *de novo* hearing, violated the Double Jeopardy Clause. The state courts denied relief. On federal habeas, this Court held that the Maryland system did not violate the Clause. Important in the decision was the fact that the system did not provide the prosecution a "second crack." *Id.*, at 216. The record before the master was closed "and additional evidence can be received by the Juvenile Court judge only with the consent of the minor." *Ibid.* The Court also held that there was nothing in the procedure that "unfairly subjects the defendant to the embarrassment, expense, and ordeal of a second trial. . . ." *Ibid.* The "burdens are more akin to those resulting from a judge's permissible request for post-

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[16] We read § 3576 as establishing at the most a two-stage sentencing procedure. Indeed, the original bill introduced in Congress specifically stated that the sentence was not to be considered final until after disposition of review or until the expiration of the time for appeal. S. 30, 91st Cong., 1st Sess., § 3577 (1969); Measures Relating to Organized Crime: Hearings on S. 30 et al. before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 91st Cong., 1st Sess., 28–29 (1969). Congress, however, was advised that this language was not needed in order to preserve the constitutionality of the statute, and it was omitted. *Id.*, at 196, and n. 18. See 65 Cornell L. Rev. 715, 730 (1980).

trial briefing or argument following a bench trial than to the 'expense' of a full-blown second trial . . . ." *Id.*, at 217. And "[t]o the extent the Juvenile Court judge makes supplemental findings . . .—either *sua sponte*, in response to the State's exceptions, or in response to the juvenile's exceptions, and either on the record or on a record supplemented by evidence to which the parties raise no objection—he does so without violating the constraints of the Double Jeopardy Clause." *Id.*, at 219.

The Court in *Swisher* characterized the proceedings before the master and those before the Juvenile Court judge as a continuing single process and distinguished the situation in *Breed* v. *Jones*, 421 U. S. 519 (1975), where it had been held that a juvenile was placed twice in jeopardy when, after an adjudicatory finding in Juvenile Court, he was transferred to an adult criminal court and tried and convicted for the same conduct.

Like the Maryland system at issue in *Swisher*, § 3576 does not subject a defendant to a second trial. The Maryland system, of course, concerns a master, whereas § 3576 concerns a federal trial court. This difference, however, is of no constitutional consequence, for the federal trial court has no power to impose a final dangerous special offender sentence that is not subject to appeal. Section 3576, indeed, is more limited in scope than the Maryland procedure in *Swisher*. The federal statute specifies that the Court of Appeals may increase the sentence only if the trial court has abused its discretion or employed unlawful procedures or made clearly erroneous findings. The appellate court thus is empowered to correct only a legal error. Under the Maryland procedure involved in *Swisher*, the judge need not find legal error on the part of the master; he is free to make a *de novo* determination of the facts relating to guilt or innocence. If that is consistent with the guarantee against double jeopardy, as the Court held it was, the limited appellate review of a sentence authorized by § 3576 is necessarily constitutional.

The exaltation of form over substance is to be avoided. The Court has said that in the double jeopardy context it is the substance of the action that is controlling, and not the label given that action. See *United States* v. *Martin Linen Supply Co.*, 430 U. S., at 571; *United States* v. *Wilson*, 420 U. S., at 336. Congress could have achieved the purpose of § 3576 by a slightly different statute whose constitutionality would be unquestionable. Congress might have provided that a defendant found to be a dangerous special offender was to receive a specified mandatory term, but that the trial court then could recommend a lesser sentence to the court of appeals, which would be free to accept the recommendation or to reject it. That scheme would offer no conceivable base for a double jeopardy objection. Yet the impact on the defendant would be exactly the same as, and possibly worse than, the impact under § 3576 as written. No double jeopardy policy is advanced by approving one of these procedures and declaring the other unconstitutional.

It is perhaps worth noting in passing that § 3576 represents a considered legislative attempt to attack a specific problem in our criminal justice system, that is, the tendency on the part of some trial judges "to mete out light sentences in cases involving organized crime management personnel." The Challenge of Crime in a Free Society, Report by the President's Commission on Law Enforcement and Administration of Justice 203 (1967). Section 3576 was Congress' response to that plea. See S. Rep. No. 91-617, pp. 85-87 (1969). The statute is limited in scope and is narrowly focused on the problem so identified. It is not an example of "Government oppression" against which the Double Jeopardy Clause stands guard. See *United States* v. *Scott*, 437 U. S., at 99. It has been observed elsewhere that sentencing is one of the areas of the criminal justice system most in need of reform. See M. Frankel, Criminal Sentences: Law Without Order (1973); P. O'Donnell, M. Churgin, & D. Curtis, Toward a Just and

Effective Sentencing System (1977). Judge Frankel himself has observed that the "basic problem" in the present system is "the unbridled power of the sentencers to be arbitrary and discriminatory." Frankel, *supra*, at 49. Appellate review creates a check upon this unlimited power, and should lead to a greater degree of consistency in sentencing.

We conclude that § 3576 withstands the constitutional challenge raised in the case before us. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BRENNAN, with whom JUSTICE WHITE, JUSTICE MARSHALL, and JUSTICE STEVENS join, dissenting.

Title 18 U. S. C. § 3576 [1] authorizes the United States to appeal [2] from a sentence imposed by a federal district judge on the ground that the sentence is too lenient and further permits the appellate court to increase the severity of the initial sentence. The Court holds that § 3576 violates neither

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[1] Section 3576 states in pertinent part:

"[A] review of the sentence on the record of the sentencing court may be taken by the defendant or the United States to a court of appeals. . . . Review of the sentence shall include review of whether the procedure employed was lawful, the findings made were clearly erroneous, or the sentencing court's discretion was abused. The court of appeals on review of the sentence may, after considering the record, including the entire presentence report, information submitted during the trial of such felony and the sentencing hearing, and the findings and reasons of the sentencing court, affirm the sentence, impose or direct the imposition of any sentence which the sentencing court could originally have imposed, or remand for further sentencing proceedings and imposition of sentence, except that a sentence may be made more severe only on review of the sentence taken by the United States and after hearing . . . ."

[2] The United States may appeal decisions in a criminal case only if so authorized by statute. *United States* v. *Scott*, 437 U. S. 82, 84–85 (1978); *United States* v. *Sanges*, 144 U. S. 310 (1892).

the prohibition against multiple punishments nor the prohibition against multiple trials embodied in the Double Jeopardy Clause of the Fifth Amendment.[3] Because the Court fundamentally misperceives the appropriate degree of finality to be accorded the imposition of sentence by the trial judge, it reaches the erroneous conclusion that enhancement of a sentence pursuant to § 3576 is not an unconstitutional multiple punishment. I respectfully dissent.

I

The Court acknowledges, as it must, that the Double Jeopardy Clause has two principal purposes: to "protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense," *Green* v. *United States,* 355 U. S. 184, 187 (1957), and to prevent imposition of multiple punishments for the same offense, *North Carolina* v. *Pearce,* 395 U. S. 711, 717 (1969). An overriding function of the Double Jeopardy Clause's prohibition against multiple trials is to protect against multiple punishments: "It is the punishment that would legally follow the second conviction which is the real danger guarded against by the Constitution." *Ex parte Lange,* 18 Wall. 163, 173 (1874).

An unconstitutional punishment need not derive exclusively from a second prosecution, but may stem from the imposition of more than one sentence following a single prosecution. *Ex parte Lange, supra,* and *In re Bradley,* 318 U. S. 50 (1943), provide examples of unconstitutional multiple punishments flowing from a single trial—imprisonment *and* fine for an offense punishable by either imprisonment *or* fine—but neither case purports to exhaust the reach of the Double Jeopardy Clause's prohibition against multiple punishments. Indeed, this Court has consistently assumed that an increase in the

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[3] "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ." U. S. Const., Amdt 5.

severity of a sentence subsequent to its imposition—the issue presented in this case—also constitutes multiple punishment in violation of the Double Jeopardy Clause.[4] For example, in *United States* v. *Benz*, 282 U. S. 304, 307 (1931), the Court stated that "[t]he distinction that the court during the same term may amend a sentence so as to mitigate the punishment, but not so as to increase it [is based] upon the ground that to increase the penalty is to subject the defendant to double punishment for the same offense . . . ."[5] Similarly, in *Reid* v. *Covert*, 354 U. S. 1, 37–38, n. 68 (1957), the Court stated: "In *Swaim* v. *United States*, 165 U. S. 553, this Court held that the President or commanding officer had power to return a case to a court-martial for an increase in sentence. If the double jeopardy provisions of the Fifth Amendment were applicable such a practice would be unconstitutional." Although the *Benz* and *Reid* statements may be dicta, nevertheless, the Court of Appeals correctly stated that "[a]lthough such dicta . . . are not legally binding, their number and the high authority of their sources offer impressive evidence of the strength and prevalence of the view that the double jeopardy clause bars an increase in the sentence imposed by the district court." 604 F. 2d 769, 785 (CA2 1979). My Brother REHNQUIST only recently noted that "the Double Jeopardy Clause as interpreted in *Ex parte Lange* prevents a sentencing court from increasing a defendant's sentence

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[4] Under my view of the double jeopardy protection against multiple punishments, a sentence may not be increased once a technically correct sentence has been imposed. I would distinguish correction of a technically improper sentence which the Court has always allowed. See, *e. g.*, *Bozza* v. *United States*, 330 U. S. 160, 165–167 (1947).

[5] The Court dismisses the significance of *Benz* because it cited *Ex parte Lange*, 18 Wall. 163 (1874), which did not present the precise issue on which, according to the Court, *Benz* "gratuitously," *ante*, at 138, opined. It is true that *Lange* raised an issue somewhat different from *Benz*, but *Lange* did decide a question of unconstitutional multiple punishment. *Benz'* citation of *Lange*, then, was entirely appropriate.

for any particular statutory offense, even though the second sentence is within the limits set by the legislature." *Whalen* v. *United States*, 445 U. S. 684, 703 (1980) (dissenting opinion).

II

Not only has the Court repeatedly said that sentences may not be increased after imposition without violating the double jeopardy prohibition against multiple punishments, but the analytic similarity of a verdict of acquittal and the imposition of sentence requires this conclusion. A verdict of acquittal represents the factfinder's conclusion that the evidence does not warrant a finding of guilty. *United States* v. *Martin Linen Supply Co.*, 430 U. S. 564, 572 (1977). Similarly, a guilty verdict of second-degree murder where the charge to the jury permitted it to find defendant guilty of first-degree murder represents the factfinder's *implicit* finding that the facts do not warrant a first-degree murder conviction. Thus, a retrial on first-degree murder is constitutionally impermissible. *Green* v. *United States, supra;* see *Price* v. *Georgia*, 398 U. S. 323 (1970). The sentencing of a convicted criminal is sufficiently analogous to a determination of guilt or innocence that the Double Jeopardy Clause should preclude government appeals from sentencing decisions very much as it prevents appeals from judgments of acquittal. The sentencing proceeding involves the examination and evaluation of facts about the defendant, which may entail the taking of evidence, and the pronouncement of a sentence. Thus, imposition of a 10-year sentence where a 25-year sentence is permissible under the sentencing statute constitutes a finding that the facts justify only a 10-year sentence and that a higher sentence is unwarranted. In both acquittals and sentences, the trier of fact makes a factual adjudication that removes from defendant's burden of risk the charges of which he was acquitted and the potential sentence which he did not receive. Unless there is a basis for according greater

finality[6] to acquittals, whether explicit or implicit, than to sentences, the Court's result is untenable.[7]

The Court proffers several reasons why acquittals and sentences should be treated differently. None of them is persuasive. First, the Court suggests that common-law historical evidence supports its distinction between the finality accorded to verdicts and to sentences. *Ante*, at 133–134. The Court's observation that the "common-law writs of *autre fois acquit* and *autre fois convict* were protections against retrial," *ante*, at 133, is true, but that fact does not dispose of the additional purpose of the Double Jeopardy Clause to prevent multiple punishments of the sort authorized by § 3576. Moreover, the practice of increasing a sentence "so long as it took place during the same term of court," *ante*, at 133–134, or "so long as [the defendant] has not yet begun to serve that sentence," *ante*, at 134, has never been sanctioned by this Court.

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[6] The finality accorded sentences has been recognized in other contexts. *Berman* v. *United States*, 302 U. S. 211, 212 (1937) (Sentence is appealable by defendant notwithstanding suspension of execution. "Final judgment in a criminal case means sentence. The sentence is the judgment"); see *Corey* v. *United States*, 375 U. S. 169 (1963).

[7] The Court suggests that "[t]he law 'attaches particular significance to an acquittal,'" *ante*, at 129, quoting *United States* v. *Scott*, 437 U. S., at 91, and that "'we necessarily afford absolute finality to a jury's *verdict* of acquittal—no matter how erroneous its decision,'" *ante*, at 130, quoting *Burks* v. *United States*, 437 U. S. 1, 16 (1978) (emphasis in original). See *Fong Foo* v. *United States*, 369 U. S. 141, 143 (1962) (directed verdict of acquittal by trial judge in middle of jury trial is entitled to finality and is unreviewable by appeal even though "based upon an egregiously erroneous foundation"). That explains in part the result reached in *United States* v. *Wilson*, 420 U. S. 332 (1975), which allowed an appellate court to reinstate a guilty verdict which was nullified by the trial judge's post-verdict dismissal of the indictment. *Wilson* involved correction of an error of law and reinstatement of an already existing fact adjudication. However, under § 3576, there is no fact adjudication for the court of appeals to reinstate where the purpose of the appeal is to increase the defendant's sentence. The appellate court would have to make its own fact determination and judgment as to the defendant's proper sentence.

Second, the Court posits that the Government's right to appeal a final sentence imposed by a trial judge "is different in no critical respect," *ante*, at 137, from parole and probation revocation, an extraordinary statement that overlooks obvious differences between the proceedings. A defendant knows after sentencing the maximum length of time he may serve, a maximum which can only be shortened by parole or probation. On the other hand, since parole and probation by definition are conditional, a defendant is on notice from the outset that a breach of those conditions may result in revocation of beneficial treatment. At the very worst from the defendant's point of view, the original sentence may be reinstated. Furthermore, revocation of parole or probation only results from a change in circumstance subsequent to the grant of parole or probation. Here the Government's appeal of sentence is not predicated on a defendant's activity since imposition of the original sentence, and the Government would be unlikely to present evidence of such activity.

Third, the Court argues that Congress could have provided that dangerous special offenders be sentenced to a specified mandatory term that could then be reduced on appeal by the court of appeals. *Ante*, at 142. The Court thus concludes that striking down § 3576 would elevate "form over substance" since Congress could have obtained the same result sought by § 3576 "by a slightly different statute whose constitutionality would be unquestionable." *Ante*, at 142. This is a strange conclusion, for we must review statutes as they are written, not as they might have been written. In any event, the Court's hypothetical legislation is not "slightly different," but substantially different from § 3576: it would create a wholly unprecedented change in the relationship between trial and appellate courts. As long as Congress retains the present court structure in which the sentences of trial courts are final judgments, the "form" as well as the "substance" of the law militate against Government appeals in this situation.

Fourth, and apparently central to the Court's refusal to

accord finality to sentences is its faulty characterization of the sentencing phase of a criminal prosecution. Although the Court acknowledges that the double jeopardy guarantee is at least in part directed at protecting the individual from government oppression and undue embarrassment, expense, anxiety, and insecurity, *Green* v. *United States*, 355 U. S., at 187,[8] it reaches the startling conclusion that "[t]his limited appeal," *ante*, at 136, exposes the defendant to minimal incremental embarrassment and anxiety because "the determination of innocence or guilt . . . is already behind him." *Ibid.* I believe that the Court fundamentally misunderstands the import to the defendant of the sentencing proceeding.

I suggest that most defendants are more concerned with how much time they must spend in prison than with whether their record shows a conviction. This is not to say that the ordeal of trial is not important. And obviously it is the conviction itself which is the predicate for time in prison. But clearly, the defendant does not breathe a sigh of relief once he has been found guilty. Indeed, an overwhelming number of criminal defendants are willing to enter plea bargains in order to keep their time in prison as brief as possible.[9]

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[8] Another purpose of the Double Jeopardy Clause is to prevent "enhancing the possibility that even though innocent, [a defendant] may be found guilty." *Green* v. *United States*, 355 U. S., at 188. A similar analysis applies with respect to sentencing. Repeated attempts at sentencing are as likely to produce an unjustifiably harsh sentence as repeated trials are likely to result in an unwarranted guilty verdict. In both instances, the Government seeks a second opportunity to present evidence it could have presented in the first instance. *Burks* v. *United States, supra*, at 11; see 18 U. S. C. § 3576 ("The court of appeals . . . may . . . remand for further sentencing proceedings and imposition of sentence").

[9] For the 12 months ending June 30, 1979, of 32,913 convictions in the United States District Courts, 27,295 were by guilty plea and by plea of *nolo contendere*. Annual Report of the Director of the Administrative Office of the United States Courts 286 (1979).

Under the Court's view, there might be no double jeopardy bar against a Government appeal from the sentence meted out pursuant to a guilty

Surely, the Court cannot believe then that the sentencing phase is merely incidental and that defendants do not suffer acute anxiety. To the convicted defendant, the sentencing phase is certainly as critical as the guilt-innocence phase. To pretend otherwise as a reason for holding 18 U. S. C. § 3576 valid is to ignore reality.

The Court's contrary view rests on the circular notion that the defendant "has no expectation of finality in his sentence until the [Government] appeal [pursuant to § 3576] is concluded or the time to appeal has expired." *Ante*, at 136. That is, the very statute which increases and prolongs the defendant's anxiety alleviates it by conditioning his expectations. Logically extended, the Court's reasoning could lead to the conclusion that the Double Jeopardy Clause permits Government appeals from verdicts of acquittal.[10] If the purpose of insulating the verdict of acquittal from further proceedings is, at least in part,[11] out of concern that defendants not be subjected to Government oppression, the Congress could dispose of this objection by a statute authorizing the Government to appeal from verdicts of acquittal. Under the Court's view, such a statute would "charge" the defendant "with knowledge" of its provisions and thus eradicate any expectation of finality in his acquittal.

Finally, the Court attempts to differentiate the finality of acquittals from the finality of sentences through reliance on *North Carolina* v. *Pearce*, 395 U. S. 711 (1969), and *Swisher* v. *Brady*, 438 U. S. 204 (1978). Neither decision supports the Court's result. In *Pearce*, the Court allowed the imposi-

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plea. While defendants might bargain with prosecutors over the latter's appellate rights, that possibility is irrelevant for determining the double jeopardy consequences of an appeal from a sentence imposed pursuant to a plea bargain.

[10] The Court, of course, acknowledges that verdicts of acquittal are not appealable.

[11] Finality is also accorded to acquittals to protect against retrials leading to erroneous guilty verdicts. See n. 8, *supra*.

tion of a longer sentence upon retrial following appellate reversal of the defendant's conviction. Our holding rested "ultimately upon the premise that the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean." 395 U. S., at 721. But *Pearce* allowed imposition of a longer sentence because sentencing followed a retrial rather than an appeal.[12] It is the fact of the retrial itself that gives the trial court power to impose a new sentence up to the statutory maximum. As *Pearce* observed, there is a difference between "increases in existing sentences" and "the imposition of wholly new sentences after wholly new trials." *Id.*, at 722. Since the Government does not argue that it is entitled to a new trial, *Pearce* provides no support for enhancement of an already existing sentence on appeal.

The Court's reliance on *Swisher* v. *Brady, supra*, is similarly misplaced. There, the Court upheld a Maryland rule allowing juvenile court judges to set aside proposed findings and recommendations of masters and to hold *de novo* proceedings that could ultimately lead to a harsher result for the juveniles. But *Swisher* is critically different from this case because the master under Maryland law had no *authority* to adjudicate facts or to impose a sentence, but could merely

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[12] The reason for allowing retrials following reversal of convictions rests on a legitimate concern for the "sound administration of justice. Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction." *United States* v. *Tateo*, 377 U. S. 463, 466 (1964). Appeals of sentences by the Government pursuant to § 3576 do not implicate the considerations identified in *Tateo*. Section 3576 authorizes appeals of sentences which, in the Government's view, are simply too low. Indeed, as the court below noted, respondent was sentenced to 10 years' imprisonment and had already begun serving his sentence. There was no possibility here, therefore, that respondent would be "granted immunity from punishment." 377 U. S., at 466.

transmit the results of his investigation to the trial judge for the latter's review.[13] Here, by contrast, the federal district judge had full power to conduct a trial to a conclusion of guilt or innocence and then to impose a final sentence upon the defendant if convicted. Merely because § 3576 provides the Government with appellate rights does not convert the judge's imposition of sentence into a mere recommendation.

III

Because the Court has demonstrated no basis for differentiating between the finality of acquittals and the finality of sentences, I submit that a punishment enhanced by an appellate court is an unconstitutional multiple punishment.[14] To conclude otherwise, as the Court does, is to create an exception to basic double jeopardy protection which, if carried to its logical conclusion,[15] might not prevent Congress, on double jeopardy grounds, from authorizing the Government to appeal verdicts of acquittal. Such a result is plainly impermissible under the Double Jeopardy Clause.

I, therefore, dissent.

JUSTICE STEVENS, dissenting.

While I join JUSTICE BRENNAN's dissent, I also note that neither today nor in its opinion in *North Carolina* v. *Pearce*,

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[13] Moreover, in *Swisher*, no evidence could be introduced once the proceeding before the master was terminated, unless the juvenile consented to the introduction of additional evidence. By contrast, § 3576 contemplates additional evidentiary proceedings in connection with appellate review of sentences. See nn. 1 and 8, *supra*.

[14] Similarly, subsequent fact adjudication by the court of appeals or by the district court on remand to it for an evidentiary hearing pursuant to 18 U. S. C. § 3576 is akin to an unconstitutional second trial following a verdict of acquittal.

[15] Under the Court's view, there is no double jeopardy bar to imposition of additional punishment by an appellate court *after* the defendant has completed service of the sentence imposed by the trial court, although such an outcome is not contemplated by § 3576 as presently drafted and would presumably violate due process in any event.

395 U. S. 711 (1969), has the Court adequately responded to Justice Harlan's powerful analysis of the double jeopardy issue in that case. *Id.*, at 744–751 (concurring in part and dissenting in part). Its purported response in *Pearce*—that although the rationale for allowing a more severe punishment after a retrial "has been variously verbalized, it rests ultimately upon the premise that the original conviction has, at the defendant's behest, been wholly nullified," *id.*, at 720–721—clearly has no application to the question whether a more severe sentence may be imposed at the *prosecutor's* behest when the original conviction has *not* been nullified.

The straightforward analysis by Justice Harlan is worthy of emphasis:

> "Every consideration enunciated by the Court in support of the decision in *Green* [v. *United States*, 355 U. S. 184 (1957)] applies with equal force to the situation at bar. In each instance, the defendant was once subjected to the risk of receiving a maximum punishment, but it was determined by legal process that he should receive only a specified punishment less than the maximum. See *id.*, at 190. And the concept or fiction of an 'implicit acquittal' of the greater offense, *ibid.*, applies equally to the greater sentence: in each case it was determined at the former trial that the defendant or his offense was of a certain limited degree of 'badness' or gravity only, and therefore merited only a certain limited punishment. . . .
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> "If, as a matter of policy and practicality, the imposition of an increased sentence on retrial has the same consequences whether effected in the guise of an increase in the degree of offense or an augmentation of punishment, what other factors render one route forbidden and the other permissible under the Double Jeopardy Clause? It cannot be that the provision does not comprehend 'sentences'—as distinguished from 'offenses'—for it has long been established that once a prisoner commences service of sentence, the Clause prevents a court from

vacating the sentence and then imposing a greater one. See *United States* v. *Benz*, 282 U. S. 304, 306–307 (1931); *Ex parte Lange*, 18 Wall. 163, 168, 173 (1874)." *Id.*, at 746–747.

The Court's response to this analysis is nothing more than a rather wooden extrapolation from a rationale that, however it may be "variously verbalized," *id.*, at 720–721, is wholly irrelevant to the important question presented by this case.

Because I agree with what JUSTICE BRENNAN has written today as well as with what Justice Harlan wrote in 1969, I respectfully dissent.

WEBB'S FABULOUS PHARMACIES, INC., ET AL. v. BECKWITH, CLERK OF THE CIRCUIT COURT OF SEMINOLE COUNTY, ET AL.

APPEAL FROM THE SUPREME COURT OF FLORIDA

No. 79-1033. Argued October 14, 15, 1980—Decided December 9, 1980

Held: Appellee county's taking as its own, under the authority of a Florida statute, the interest accruing on an interpleader fund deposited in the registry of a county court was a taking violative of the Fifth and Fourteenth Amendments, where a fee, based on the amount of the principal deposited as prescribed by another Florida statute, was also charged for the court clerk's services in receiving the fund into the registry, and where the deposited fund was concededly private and was required by statute in order for the depositor to avail itself of statutory protection from the claims of creditors and others. Neither the Florida Legislature by statute nor the Florida courts by judicial decree may accomplish the result the county sought simply by recharacterizing the principal of the deposited fund as "public money" because it was held temporarily by the court. The earnings of the fund are incidents of ownership of the fund itself and are property just as the fund itself is property. Pp. 159-165.

374 So. 2d 951, reversed.

BLACKMUN, J., delivered the opinion for a unanimous Court.

Harvey M. Alper argued the cause and filed a brief for appellants.

Harry A. Stewart argued the cause for appellees. With him on the brief were *Gerald L. Knight* and *Nikki Clayton.*

JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the issue whether it is constitu ional for a county to take as its own, under the authority of a state statute, the interest accruing on an interpleader fund deposited in the registry of the county court, when a fee, prescribed by another statute, is also charged for the clerk's

services in receiving the fund into the registry. The statute which is the object of the constitutional challenge here is Fla. Stat. §28.33 (1977).[1]

I

On February 12, 1976, appellant Eckerd's of College Park, Inc., entered into an agreement to purchase for $1,812,145.77 substantially all the assets of Webb's Fabulous Pharmacies, Inc. Both Eckerd's and Webb's are Florida corporations. At the closing, Webb's debts appeared to be greater than the purchase price. Accordingly, in order to protect itself and as permitted by the Florida Bulk Transfers Act, Fla. Stat. § 676.106 (4) (1977),[2] Eckerd's filed a complaint of interpleader in the Circuit Court of Seminole County, Fla., inter-

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[1] Section 28.33, enacted as 1973 Fla. Laws, ch. 73-282, § 1, reads in pertinent part:

"The clerk of the circuit court in each county shall make an estimate of his projected financial needs for the county and shall invest any funds in designated depository banks in interest-bearing certificates or in any direct obligations of the United States in compliance with federal laws relating to receipt of and withdrawal of deposits. . . . Moneys deposited in the registry of the court shall be deposited in interest-bearing certificates at the discretion of the clerk, subject to the above guidelines. . . . *All interest accruing from moneys deposited shall be deemed income of the office of the clerk of the circuit court* investing such moneys and shall be deposited in the same accounts as are other fees and commissions of the clerk's office. Each clerk shall, as soon as is practicable after the end of the fiscal year, report to the county governing authority the total interest earned on all investments during the preceding year." (Emphasis supplied.)

[2] Section 676.106 (4), which derives from the Uniform Commercial Code, reads:

"A transferee may within ten days after taking possession of the goods, discharge his obligations under this section by an action in the circuit court for the county where the transferor had his principal place of business in this state interpleading all creditors in the list of creditors required by [§] 676.104. In such event the court shall require the consideration to be deposited into the registry of the court and thereupon shall decree the goods to be free and clear of the claims of such creditors and that such creditors should file their claims with the court."

pleading as defendants both Webb's and Webb's creditors (almost 200 in number) and tendering the purchase price to the court.

Pursuant to § 676.106 (4), the Circuit Court thereupon ordered that the amount tendered be paid to the court's clerk and that the clerk deposit it "in an assignable interest-bearing account at the highest interest." App. 4a. The court specifically reserved decision on the issue of entitlement, as between the clerk and Webb's creditors, to the interest earned on the fund while so deposited, stating that the transfer to the clerk was without prejudice to the creditors' claims to that interest. *Id.*, at 4a–5a. Eckerd's tendered the sum to the clerk on July 13, 1976, *id.*, at 6a, and that official proceeded to make the required investment.

The clerk deducted from the interpleader fund so deposited the sum of $9,228.74 as his fee, prescribed by Fla. Stat. § 28.24 (14) (1977),[3] "for services rendered" for "receiving money into the registry of court." The fee, as the statute directed, was calculated upon the amount placed in the registry, that is, 1% of the first $500, and ½% of the remainder.

On July 5, 1977, almost a year after the tender and payment, the Circuit Court upon its own motion[4] appointed a receiver for Webb's. Among the receiver's stated duties were

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[3] Section 28.24, as then in force, read in pertinent part:

"The clerk of the circuit court shall make the following charges for services rendered by his office in recording documents and instruments and in performing the duties enumerated:

. . . . .

"(14) For receiving money into the registry of court:

"(a) First $500.00, percent..... 1

"(b) Each subsequent $100.00, percent..... ½"

The statute has since been amended in ways not relevant to the present litigation.

[4] The appellants suggest that the court acted *sua sponte* because of the continuing insistence of the clerk and Seminole County that the county was entitled to the interest being earned on the fund, and to bring the interest period in controversy to an end. Brief for Appellants 10.

the determination of the number and amount of claims filed against the interpleader fund and the preparation and filing with the court of a list of those claims. App. 9a. The receiver filed a motion for an order directing the clerk to deliver the fund to him. *Id.*, at 12a. The motion was granted, *id.*, at 14a, and the principal of the fund, reduced by the $9,228.74 statutory fee and by $40,200 that had been paid out pursuant to court order, was paid to the receiver on July 21. The interest earned on the interpleader fund while it was held by the clerk, but which was not turned over to the receiver, then exceeded $90,000. Interest earned thereafter on the amount so retained brought the total to more than $100,000. Tr. of Oral Arg. 34. It is this aggregate interest that is the subject matter of the present litigation. Appellants make no objection to the clerk's statutory fee of $9,228.74 taken pursuant to § 28.24 (14). Tr. of Oral Arg. 6; Brief for Appellants 6, 9.

The receiver then moved that the court direct the clerk to pay the accumulated interest to the receiver. App. 22a, 26a, 33a. The Circuit Court ruled favorably to the receiver, holding that the clerk "is not entitled to any interest earned, accrued or received on monies deposited in the registry of this Court pursuant to the Court's order . . . ; the creditors herein are the rightful parties entitled to all such interest earned on the interpleader fund while it is held by the Clerk of this Court." *Id.*, at 35a.

Seminole County and the clerk appealed to the Florida District Court of Appeal. That court transferred the cause to the Supreme Court of Florida. The Supreme Court, in a *per curiam* opinion with one justice dissenting in part, ruled that § 28.33 was "constitutional" and reversed the judgment of the Circuit Court. 374 So. 2d 951 (1979). The stated rationale was that a fund so deposited is "considered 'public money'" from the date of deposit until it leaves the account: that "the statute takes only what it creates"; and that "[t]here is no unconstitutional taking because interest earned on the clerk

of the circuit court's registry account is not private property." *Id.*, at 952–953.[5]

Because it had been held elsewhere that a county's appropriation of the interest earned on private funds deposited in court in an interpleader action is an unconstitutional taking, *Sellers* v. *Harris County*, 483 S. W. 2d 242 (Tex. 1972); see *McMillan* v. *Robeson County*, 262 N. C. 413, 137 S. E. 2d 105 (1964), we noted probable jurisdiction. 445 U. S. 925 (1980).

II

It is at once apparent that Florida's statutes would allow respondent Seminole County to exact two tolls while the interpleader fund was held by the clerk of the court. The first

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[5] Although it is not entirely clear that the federal constitutional issue was presented to the Circuit Court, the propriety of the clerk's claim to the interest was clearly raised there as an issue under the Florida Constitution. See p. 6 of the receiver's memorandum in support of his motion for direction to the clerk to remit (p. 77 of the Original Record on Appeal). That memorandum, however, contains at least one reference to "pertinent provisions of the *Florida Constitution* and its Federal counterpart" (emphasis in original), *ibid.*, and there are "due process" arguments beginning at p. 4 of the receiver's reply memorandum. Furthermore, the Circuit Court, in granting the receiver's motion for a *nunc pro tunc* order correcting an omission from the record, specifically stated that § 28.33 and 1973 Fla. Laws, ch. 73–282, "are unconstitutional to the extent that the provisions thereof pertain to private monies held in the registry of the court in pending litigation and specifically to those monies held in the registry of the court in this case." App. 40a–41a.

In any event, the federal constitutional issue appears to have been raised in the Supreme Court of Florida. See Tr. of Oral Arg. 4. While there is no specific reference to the Federal Constitution in the court's *per curiam* opinion, the court spoke specifically of the receiver's argument that the statute "constitutes either a taking without due process of law or an unlawful tax," 374 So. 2d, at 952, and ruled that there was "no unconstitutional taking." *Id.*, at 953. We are satisfied that the Supreme Court of Florida upheld the statute against both federal and state constitutional challenges. This is a sufficient base for this Court's consideration of the federal issue.

was the statutory fee of $9,228.74 "for services rendered," as § 28.24 recites, by the clerk's office for "receiving money into the registry of court." That fee was determined by the amount of the principal deposited.

The second would be the retention of the amount, in excess of $100,000, consisting of "[a]ll interest accruing from moneys deposited." This toll would be exacted because of § 28.33's provision that the interest "shall be deemed income of the office of the clerk of the circuit court."

An initial reading of § 28.33 might prompt one to conclude that, so far as it concerns entitlement to interest, the statute applies only to interest on funds clearly owned by the county (such as charges for certifications) and that it does not apply to interest on private funds deposited under the direction of another statute. The Florida Supreme Court, however, has read § 28.33 otherwise and has ruled that it applies to interest earned on deposited private funds. That reading of the State's statute is within the Florida court's competency, and we must take the statute as so read and interpreted.

III

The pertinent words of the Fifth Amendment of the Constitution of the United States are the familiar ones: "nor shall private property be taken for public use, without just compensation." That prohibition, of course, applies against the States through the Fourteenth Amendment. *Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U. S. 226, 239 (1897); *Penn Central Transportation Co.* v. *New York City,* 438 U. S. 104, 122 (1978). Our task is to determine whether the second exaction by Seminole County amounted to a "taking"—it was obviously uncompensated—within the Amendment's proscription.

The principal sum deposited in the registry of the court plainly was private property, and was not the property of Seminole County. This is the rule in Florida, *Phipps* v. *Watson,* 108 Fla. 547, 551, 147 So. 234, 235 (1933), as well as

elsewhere. See *Coudert* v. *United States*, 175 U. S. 178 (1899); *Branch* v. *United States*, 100 U. S. 673 (1880); *Sellers* v. *Harris County*, 483 S. W. 2d, at 243. We do not understand that the appellees contend otherwise so far as the fund's principal is concerned.

Appellees submit, Tr. of Oral Arg. 26, 29—and we accept the proposition—that, apart from statute, Florida law does not require that interest be earned on a registry deposit. See 374 So. 2d, at 953. We, of course, also accept the further proposition, pressed upon us by the appellees, that "[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ." *Board of Regents* v. *Roth*, 408 U. S. 564, 577 (1972). But a mere unilateral expectation or an abstract need is not a property interest entitled to protection. See, for example, *Fox River Paper Co.* v. *Railroad Comm'n*, 274 U. S. 651 (1927); *United States* v. *Willow River Power Co.*, 324 U. S. 499 (1945). See also *Penn Central Transportation Co.* v. *New York City, supra; Andrus* v. *Allard*, 444 U. S. 51 (1979).

Webb's creditors, however, had more than a unilateral expectation. The deposited fund was the amount received as the purchase price for Webb's assets. It was property held only for the ultimate benefit of Webb's creditors, not for the benefit of the court and not for the benefit of the county. And it was held only for the purpose of making a fair distribution among those creditors. Eventually, and inevitably, that fund, less proper charges authorized by the court, would be distributed among the creditors as their claims were recognized by the court. The creditors thus had a state-created property right to their respective portions of the fund.

It is true, of course, that none of the creditor claimants had any right to the deposited fund until their claims were recognized and distribution was ordered. See *Aron* v. *Snyder*, 90

U. S. App. D. C. 325, 327, 196 F. 2d 38, 40, cert. denied, 344 U. S. 854 (1952). That lack of immediate right, however, does not automatically bar a claimant ultimately determined to be entitled to all or a share of the fund from claiming a proper share of the interest, the fruit of the fund's use, that is realized in the interim. To be sure, § 28.33 establishes as a matter of Florida law that interest is to be earned on deposited funds. But the State's having mandated the accrual of interest does not mean the State or its designate is entitled to assume ownership of the interest.

We therefore turn to the interest issue. What would justify the county's retention of that interest? It is obvious that the interest was not a fee for services, for any services obligation to the county was paid for and satisfied by the substantial fee charged pursuant to § 28.24 and described specifically in that statute as a fee "for services" by the clerk's office. Section 28.33, in contrast, in no way relates the interest of which it speaks to "services rendered." Indeed, if the county were entitled to the interest, its officials would feel an inherent pressure and possess a natural inclination to defer distribution, for that interest return would be greater the longer the fund is held; there would be, therefore, a built-in disincentive against distributing the principal to those entitled to it.

The usual and general rule is that any interest on an interpleaded and deposited fund follows the principal and is to be allocated to those who are ultimately to be the owners of that principal. See, *e. g., James Talcott, Inc.* v. *Allahabad Bank, Ltd.*, 444 F. 2d 451, 463 (CA5), cert. denied *sub nom. City Trade & Industries, Ltd.* v. *Allahabad Bank, Ltd.*, 404 U. S. 940 (1971); *Murphy* v. *Travelers Ins. Co.*, 534 F. 2d 1155, 1165 (CA5 1976); *In re Brooks & Woodington, Inc.*, 505 F. 2d 794, 799 (CA7 1974); *McMillan* v. *Robeson County*, 262 N. C., at 417, 137 S. E. 2d, at 108; *Seller* v. *Harris County*, 483 S. W. 2d, at 243; *Southern Oregon Co.* v. *Gage*, 100 Ore. 424, 433, 197 P. 276, 279 (1921); *Board of Law Library*

Trustees v. *Lowery*, 67 Cal. App. 2d 480, 154 P. 2d 719 (1945); *Kiernan* v. *Cleland*, 47 Idaho 200, 273 P. 938 (1929).[6]

The Florida Supreme Court, in ruling contrary to this long established general rule, relied on the words of § 28.33 and then proceeded on the theory that without the statute the clerk would have no authority to invest money held in the registry, that in some way the fund assumes temporarily the status of "public money" from the time it is deposited until it leaves the account, and that the statute "takes only what it creates." Then follows the conclusion that the interest "is not private property." 374 So. 2d, at 952–953.

This Court has been permissive in upholding governmental action that may deny the property owner of some beneficial use of his property or that may restrict the owner's full exploitation of the property, if such public action is justified as promoting the general welfare. See, *e. g.*, *Andrus* v. *Allard*, 444 U. S., at 64–68; *Penn Central Transportation Co.* v. *New York City*, 438 U. S., at 125–129.

Here, however, Seminole County has not merely "adjust[ed] the benefits and burdens of economic life to promote the common good." *Id.*, at 124. Rather, the exaction is a forced contribution to general governmental revenues, and it is not reasonably related to the costs of using the courts. Indeed, "[t]he Fifth Amendment's guarantee . . . was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U. S. 40, 49 (1960).

No police power justification is offered for the deprivation. Neither the statute nor appellees suggest any reasonable basis to sustain the taking of the interest earned by the interpleader fund. The county's appropriation of the beneficial use of the

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[6] The appellees at oral argument conceded that if coupon bonds, rather than cash, had been deposited in the registry, the coupons would follow the principal and could not be claimed by the county under § 28.33. Tr. of Oral Arg. 31.

UNITED STATES RAILROAD RETIREMENT BOARD *v.* FRITZ

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

No. 79-870. Argued October 6, 1980—Decided December 9, 1980

The Railroad Retirement Act of 1974 (1974 Act) fundamentally restructured the railroad retirement system under the predecessor 1937 Act, which had included provisions whereby a person who worked for both railroad and nonrailroad employers and who qualified for both railroad retirement and social security benefits received benefits under both systems and an accompanying "windfall" benefit. Although providing that employees who lacked the requisite 10 years of railroad employment to qualify for railroad retirement benefits as of the January 1, 1975, changeover date would not receive any windfall benefits, the 1974 Act preserved windfall benefits for individuals who had retired and were receiving dual benefits as of the changeover date. A provision of the 1974 Act, 45 U. S. C. § 231b (h)(1), also preserved windfall benefits for employees who had qualified for dual benefits as of the changeover date, but who had not yet retired, if they had (1) performed some railroad service in 1974 or (2) had a "current connection" with the railroad industry as of December 31, 1974, or their later retirement date, or (3) completed 25 years of railroad service as of December 31, 1974. The 1974 Act further provided, 45 U. S. C. § 231b (h)(2), that employees who had qualified for railroad benefits as of the changeover date, but lacked a current connection with the railroad industry in 1974 and 25 years of railroad employment, could obtain a lesser amount of windfall benefits if they had qualified for social security benefits as of the year (prior to 1975) they left railroad employment. Appellee and others filed a class action in Federal District Court for a declaratory judgment that § 231b (h) is unconstitutional under the Due Process Clause of the Fifth Amendment, contending that it was irrational for Congress to distinguish between employees who had more than 10 years but less than 25 years of railroad employment simply on the basis of whether they had a "current connection" with the railroad industry as of the changeover date or as of the date of retirement. The District Court certified a plaintiff class of all persons eligible to retire between January 1, 1975, and January 31, 1977, who were permanently insured under the Social Security Act as of December 31, 1974, but who were not eligible to receive any windfall benefits because they had left the

railroad industry before 1974, had no "current connection" with it at the end of 1974, and had less than 25 years of railroad service. The court held that the differentiation based solely on whether an employee was "active" in the railroad business as of 1974 was not "rationally related" to the congressional purposes of insuring the solvency of the railroad retirement system and protecting vested benefits.

Held: The challenged provisions of the 1974 Act do not deny the plaintiff class equal protection of the laws guaranteed by the Fifth Amendment. Pp. 174–179.

(a) When social and economic legislation enacted by Congress is challenged on equal protection grounds as being violative of the Fifth Amendment, the rational-basis standard is the appropriate standard of judicial review. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality. This Court will not invalidate on equal protection grounds legislation that it simply deems unwise or unartfully drawn. Cf., *e. g.*, *Dandridge* v. *Williams*, 397 U. S. 471; *Jefferson* v. *Hackney*, 406 U. S. 535. Pp. 174–176.

(b) Under such principles, § 231b (h) does not violate the Fifth Amendment. Because Congress could have eliminated windfall benefits for all classes of employees, it is not constitutionally impermissible for Congress to have drawn lines between groups of employees for the purpose of phasing out those benefits. Congress did not achieve its purpose in a patently arbitrary or irrational way, since it could properly conclude that persons who had actually acquired statutory entitlement to windfall benefits while still employed in the railroad industry had a greater equitable claim to those benefits than the members of the plaintiff class who were no longer in railroad employment when they became eligible for dual benefits. Furthermore, the "current connection" test is not a patently arbitrary means for determining which employees are "career railroaders," the class for whom the 1974 Act was designed. Pp. 176–178.

(c) Nor is there merit to the District Court's conclusion that Congress was unaware of what it accomplished or that it was misled by the groups that appeared before it. The language of the statute is clear, and it has been historically assumed that Congress intended what it enacted. P. 179.

Reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, and POWELL, JJ., joined.

STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 180. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 182.

Edwin S. Kneedler argued the cause for appellant. With him on the briefs were *Solicitor General McCree, Deputy Solicitor General Geller, Dale G. Zimmerman, Edward S. Hintzke,* and *James E. Lanter.*

Daniel P. Byron argued the cause for appellee. With him on the brief were *Phillip A. Terry* and *Gill Deford.**

JUSTICE REHNQUIST delivered the opinion of the Court.

The United States District Court for the Southern District of Indiana held unconstitutional a section of the Railroad Retirement Act of 1974, 88 Stat. 1305, as amended, 45 U. S. C. § 231 *et seq.*, and the United States Railroad Retirement Board has appealed to this Court pursuant to 28 U. S. C. § 1252. We noted probable jurisdiction. 444 U. S. 1069 (1980).

The 1974 Act fundamentally restructured the railroad retirement system. The Act's predecessor statute, adopted in 1937, provided a system of retirement and disability benefits for persons who pursued careers in the railroad industry. Under that statute, a person who worked for both railroad and nonrailroad employers and who qualified for railroad retirement benefits and social security benefits, 42 U. S. C. § 401 *et seq.*, received retirement benefits under both systems and an accompanying "windfall" benefit.[1] The legislative

*Briefs of *amici curiae* urging reversal were filed by *Richard T. Conway* for the National Railway Labor Conference; and by *Edward D. Friedman* for the Railway Labor Executives Association.

Briefs of *amici curiae* urging affirmance were filed by *Jonathan A. Weiss* for Legal Services for the Elderly; and by *Steven F. Bright* and *Gary E. Smith* for T. W. Smith et al.

[1] Under the old Act, as under the new, an employee who worked 10 years in the railroad business qualified for railroad retirement benefits. If the employee also worked outside the railroad industry for a sufficient

history of the 1974 Act shows that the payment of windfall benefits threatened the railroad retirement system with bankruptcy by the year 1981.[2] Congress therefore determined to place the system on a "sound financial basis" by eliminating future accruals of those benefits.[3] Congress also enacted

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enough time to qualify for social security benefits, he qualified for dual benefits. Due to the formula under which those benefits were computed, however, persons who split their employment between railroad and nonrailroad employment received dual benefits in excess of the amount they would have received had they not split their employment. For example, if 10 years of either railroad or nonrailroad employment would produce a monthly benefit of $300, an additional 10 years of the same employment at the same level of creditable compensation would not double that benefit, but would increase it by some lesser amount to say $500. If that 20 years of service had been divided equally between railroad and nonrailroad employment, however, the social security benefit would be $300 and the railroad retirement benefit would also be $300, for a total benefit of $600. The $100 difference in the example constitutes the "windfall" benefit. See generally, S. Rep. No. 93–1163, pp. 2–3 (1974); H. R. Rep. No. 93–1345, pp. 2–3 (1974).

[2] The relevant Committee Reports stated: "Resolution of the so called 'dual benefit' problem is central both to insuring the fiscal soundness of the railroad retirement system and to establishing equitable retirement benefits for all railroad employees." S. Rep. No. 93–1163, *supra*, at 11; H. R. Rep. No. 93–1345, *supra*, at 11. The reason for the problem was that a financial interchange agreement entered into in 1951 between the social security and railroad systems caused the entire cost of the windfall benefits to be borne by the railroad system, not the social security system. The annual drain on the railroad system amounted to approximately $450 million per year, and if it were not for "the problem of dual beneficiaries, the railroad retirement system would be almost completely solvent." S. Rep. No. 93–1163, *supra*, at 8; H. R. Rep. No. 93–1345, *supra*, at 7.

[3] S. Rep. No. 93–1163, *supra*, at 1; H. R. Rep. No. 93–1345, *supra*, at 1. Congress eliminated future accruals of windfall benefits by establishing a two-tier system for benefits. The first tier is measured by what the social security system would pay on the basis of combined railroad and nonrailroad service, while the second tier is based on railroad service alone. However, both tiers are part of the railroad retirement system, rather than the first tier being placed directly under social security, and

various transitional provisions, including a grandfather provision, § 231b (h),[4] which expressly preserved windfall benefits for some classes of employees.

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the benefits actually paid by social security on the basis of nonrailroad employment are deducted so as to eliminate the windfall benefit.

The Railroad Retirement Act of 1974 had its origins in 1970 when Congress created the Commission on Railroad Retirement to study the actuarial soundness of the railroad retirement system. The Commission submitted its report in 1972 and identified "dual benefits and their attendant windfalls" as a principal cause of the system's financial difficulties. It also found that windfall benefits were inequitable, favoring those employees who split their employment over those employees who spent their entire career in the railroad industry. Report of the Commission on Railroad Retirement, The Railroad Retirement System: Its Coming Crisis, H. R. Doc. No. 92-350 (1972). It therefore recommended that future accruals of windfall benefits be eliminated by the establishment of a two-tier system, somewhat similar to the type of system eventually adopted by Congress. It also recommended that "legally vested rights of railroad workers" be preserved. An employee who was fully insured under both the railroad and social security systems as of the changeover date (*i. e.*, by having at least 10 years of railroad employment and the requisite length of social security employment) was deemed to have "legally vested rights."

Following receipt of the Commission's report, Congress requested members of management, labor, and retirees to form a Joint Labor Management Railroad Retirement Negotiating Committee (hereinafter referred to as the Joint Committee) and submit a report, "tak[ing] into account" the recommendations of the Commission. The Joint Committee outlined its proposals in the form of a letter to Congress, dated April 10, 1974. 120 Cong. Rec. 18391-18392 (1974). Although it agreed with the Commission that future accruals of windfall benefits be eliminated, it differed as to the protection to be afforded those already statutorily entitled to benefits and recommended the transitional provisions that were eventually adopted by Congress. A bill embodying those principles was drafted and submitted to Congress, where the relevant committees held lengthy hearings and submitted detailed Reports. See S. Rep. No. 93-1163, *supra;* H. R. Rep. No. 93-1345, *supra.*

[4] Section 3 (h) of the Railroad Retirement Act of 1974, 88 Stat. 1323, 45 U. S. C. § 231b (h), provides in pertinent part:

"(1) The amount of the annuity . . . of an individual who (A) will have (i) rendered service as an employee to an employer, or as an em-

In restructuring the Railroad Retirement Act in 1974, Congress divided employees into various groups. *First*, those employees who lacked the requisite 10 years of railroad employment to qualify for railroad retirement benefits as of January 1, 1975, the changeover date, would have their retirement benefits computed under the new system and would not receive any windfall benefit. *Second*, those individuals already retired and already receiving dual benefits as of the changeover date would have their benefits computed under the old system and would continue to receive a windfall benefit.[5] *Third*, those employees who had qualified for both railroad and social security benefits as of the changeover date, but who had not yet retired as of that date (and thus were

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ployee representative, during the calendar year 1974, or (ii) had a current connection with the railroad industry on December 31, 1974, or at the time his annuity under section 2 (a) (1) of this Act began to accrue, or (iii) completed twenty-five years of service prior to January 1, 1975, and (B) will have (i) completed ten years of service prior to January 1, 1975, and (ii) been permanently insured under the Society Security Act on December 31, 1974, shall be increased by an amount equal to [the amount of windfall dual benefit he would have received prior to January 1, 1975] . . . .

"(2) The amount of the annuity . . . to an individual who (A) will not have met the conditions set forth in subclause (i), (ii), or (iii) of clause (A) of subdivision (1) of this subsection, but (B) will have (i) completed ten years of service prior to January 1, 1975, and (ii) been permanently insured under the Social Security Act as of December 31 of the calendar year prior to 1975 in which he last rendered service as an employee to an employer, or as an employee representative, shall be increased by an amount equal to the amount . . . [of windfall benefit calculated at time he left the railroad service] . . . ."

The relevant Committee Reports stated that the most "difficult problem" was the "manner in which dual benefits should be phased out on an equitable basis." S. Rep. No. 93–1163, *supra*, at 11; H. R. Rep. No. 93–1345, *supra*, at 11.

[5] 88 Stat. 1353, see note following 45 U. S. C. § 231. The transition provisions in Title II of the bill are not included in the United States Code. The windfall amount for retired employees is preserved by §§ 204 (a) (3) and (4) of the Act.

not yet receiving dual benefits), were entitled to windfall benefits if they had (1) performed some railroad service in 1974 or (2) had a "current connection" with the railroad industry as of December 31, 1974,[6] or (3) completed 25 years of railroad service as of December 31, 1974. 45 U. S. C. § 231b (h)(1). *Fourth,* those employees who had qualified for railroad benefits as of the changeover date, but lacked a current connection with the railroad industry in 1974 and lacked 25 years of railroad employment, could obtain a lesser amount of windfall benefit if they had qualified for social security benefits as of the year (prior to 1975) they left railroad employment. 45 U. S. C. § 231b (h)(2).[7]

Thus, an individual who, as of the changeover date, was unretired and had 10 years of railroad employment and sufficient nonrailroad employment to qualify for social security benefits is eligible for the full windfall amount if he worked for the railroad in 1974 or had a current connection with the railroad as of December 31, 1974, or his later retirement date. But an unretired individual with 24 years of railroad service and sufficient nonrailroad service to qualify for social security benefits is not eligible for a full windfall amount unless he worked for the railroad in 1974, or had a current connection with the railroad as of December 31, 1974, or his later retirement date. And an employee with 10 years of railroad employment who qualified for social security benefits only after

[6] The term "current connection" is defined in 45 U. S. C. § 231 (o) to mean, in general, employment in the railroad industry in 12 of the preceding 30 calendar months.

[7] The amount of the "windfall component" is greater under subsection (1) than under subsection (2) of 45 U. S. C. § 231b (h). The former consists of benefits computed on the basis of social security service through December 31, 1974, while the latter is computed on the basis of social security service only through the year in which the individual left the railroad industry. The difference corresponds to the different dates by which the retired employee must have been permanently insured under the Social Security Act in order to be eligible for any windfall benefit.

leaving the railroad industry will not receive a reduced windfall benefit while an employee who qualified for social security benefits prior to leaving the railroad industry would receive a reduced benefit. It was with these complicated comparisons that Congress wrestled in 1974.

Appellee and others filed this class action in the United States District Court for the Southern District of Indiana, seeking a declaratory judgment that 45 U. S. C. § 231b (h) is unconstitutional under the Due Process Clause of the Fifth Amendment because it irrationally distinguishes between classes of annuitants.[8] The District Court eventually certified a class of all persons eligible to retire between January 1, 1975, and January 31, 1977, who were permanently insured under the Social Security Act as of December 31, 1974, but who were not eligible to receive any "windfall component" because they had left the railroad industry before 1974, had no "current connection" with it at the end of 1974, and had less than 25 years of railroad service.[9] Appellee contended below that it was irrational for Congress to have drawn a distinction between employees who had more than 10 years but less than 25 years of railroad employment simply on the basis of whether they had a "current connection" with the

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[8] Although "the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'" *Schneider* v. *Rusk*, 377 U. S. 163, 168 (1964). Thus, if a federal statute is valid under the equal protection component of the Fifth Amendment, it is perforce valid under the Due Process Clause of that Amendment. *Richardson* v. *Belcher*, 404 U. S. 78, 81 (1971).

[9] It is somewhat unclear precisely who is and is not within the class certified by the District Court. By its terms, the class certified by the District Court would appear to include those employees who qualified for reduced windfall benefits under § 231b (h)(2) by reason of their qualifying for social security benefits as of the year they left the railroad industry. It appears, however, that the District Court intended to include in the class only those, like appellee Fritz, who subsequently qualified for social security benefits and who are therefore ineligible for even the reduced windfall benefit.

railroad industry as of the changeover date or as of the date of retirement.

The District Court agreed with appellee that a differentiation based solely on whether an employee was "active" in the railroad business as of 1974 was not "rationally related" to the congressional purposes of insuring the solvency of the railroad retirement system and protecting vested benefits. We disagree and reverse.

The initial issue presented by this case is the appropriate standard of judicial review to be applied when social and economic legislation enacted by Congress is challenged as being violative of the Fifth Amendment to the United States Constitution. There is no claim here that Congress has taken property in violation of the Fifth Amendment, since railroad benefits, like social security benefits, are not contractual and may be altered or even eliminated at any time. *Hisquierdo* v. *Hisquierdo,* 439 U. S. 572, 575 (1979); *Flemming* v. *Nestor,* 363 U. S. 603, 608–611 (1960). And because the distinctions drawn in § 231b (h) do not burden fundamental constitutional rights or create "suspect" classifications, such as race or national origin, we may put cases involving judicial review of such claims to one side. *San Antonio Independent School District* v. *Rodriguez,* 411 U. S. 1 (1973); *Vance* v. *Bradley,* 440 U. S. 93 (1979).

Despite the narrowness of the issue, this Court in earlier cases has not been altogether consistent in its pronouncements in this area. In *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 78–79 (1911), the Court said that "[w]hen the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time that the law was enacted must be assumed." On the other hand, only nine years later in *F. S. Royster Guano Co.* v. *Virginia,* 253 U. S. 412, 415 (1920), the Court said that for a classification to be valid under the Equal Protection Clause of the Fourteenth

Amendment it "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation . . . ."

In more recent years, however, the Court in cases involving social and economic benefits has consistently refused to invalidate on equal protection grounds legislation which it simply deemed unwise or unartfully drawn.

Thus in *Dandridge* v. *Williams*, 397 U. S. 471, 485–486 (1970), the Court rejected a claim that Maryland welfare legislation violated the Equal Protection Clause of the Fourteenth Amendment. It said:

> "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.' *Metropolis Theatre Co.* v. *City of Chicago*, 228 U. S. 61, 68–70. . . .
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> . . . "[The rational-basis standard] is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy."

Of like tenor are *Vance* v. *Bradley*, *supra*, at 97, and *New Orleans* v. *Dukes*, 427 U. S. 297, 303 (1976). Earlier, in *Flemming* v. *Nestor*, *supra*, at 611, the Court upheld the constitutionality of a social security eligibility provision, saying:

> "[I]t is not within our authority to determine whether the Congressional judgment expressed in that Section is sound or equitable, or whether it comports well or ill with

purposes of the Act. . . . The answer to such inquiries must come from Congress, not the courts. Our concern here, as often, is with power, not with wisdom."

And in a case not dissimilar from the present one, in that the State was forced to make a choice which would undoubtedly seem inequitable to some members of a class, we said:

> "Applying the traditional standard of review under [the Equal Protection Clause], we cannot say that Texas' decision to provide somewhat lower welfare benefits for [Aid to Families with Dependent Children] recipients is invidious or irrational. Since budgetary constraints do not allow the payment of the full standard of need for all welfare recipients, the State may have concluded that the aged and infirm are the least able of the categorical grant recipients to bear the hardships of an inadequate standard of living. While different policy judgments are of course possible, it is not irrational for the State to believe that the young are more adaptable than the sick and elderly, especially because the latter have less hope of improving their situation in the years remaining to them. Whether or not one agrees with this state determination, there is nothing in the Constitution that forbids it." *Jefferson* v. *Hackney*, 406 U. S. 535, 549 (1972).

Applying those principles to this case, the plain language of § 231b (h) marks the beginning and end of our inquiry.[10]

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[10] This opinion and JUSTICE BRENNAN's dissent cite a number of equal protection cases including *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61 (1911); *F. S. Royster Guano Co.* v. *Virginia*, 253 U. S. 412 (1920); *Morey* v. *Doud*, 354 U. S. 457 (1957); *Flemming* v. *Nestor*, 363 U. S. 603 (1960); *Massachusetts Board of Retirement* v. *Murgia*, 427 U. S. 307 (1976); *New Orleans* v. *Dukes*, 427 U. S. 297 (1976); *Johnson* v. *Robison*, 415 U. S. 361 (1974); *U. S. Dept. of Agriculture* v. *Moreno*, 413 U. S. 528 (1973); *U. S. Dept. of Agriculture* v. *Murry*, 413 U. S. 508 (1973); *Weinberger* v. *Wiesenfeld*, 420 U. S. 636 (1975); and *James* v. *Strange*, 407

There Congress determined that some of those who in the past received full windfall benefits would not continue to do so. Because Congress could have eliminated windfall benefits for all classes of employees, it is not constitutionally impermissible for Congress to have drawn lines between groups of employees for the purpose of phasing out those benefits. *New Orleans* v. *Dukes, supra,* at 305.

The only remaining question is whether Congress achieved its purpose in a patently arbitrary or irrational way. The classification here is not arbitrary, says appellant, because it is an attempt to protect the relative equities of employees and to provide benefits to career railroad employees. Congress fully protected, for example, the expectations of those employees who had already retired and those unretired employees who had 25 years of railroad employment. Conversely, Congress denied all windfall benefits to those employees who lacked 10 years of railroad employment. Congress additionally provided windfall benefits, in lesser amount, to those employees with 10 years' railroad employment who had qualified for social security benefits at the time they had left railroad em-

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U. S. 128 (1972). The most arrogant legal scholar would not claim that all of these cases applied a uniform or consistent test under equal protection principles. And realistically speaking, we can be no more certain that this opinion will remain undisturbed than were those who joined the opinion in *Lindsley, supra, Royster Guano Co., supra,* or any of the other cases referred to in this opinion and in the dissenting opinion. But like our predecessors and our successors, we are obliged to apply the equal protection component of the Fifth Amendment as we believe the Constitution requires and in so doing we have no hesitation in asserting, contrary to the dissent, that where social or economic regulations are involved *Dandridge* v. *Williams,* 397 U. S. 471 (1970), and *Jefferson* v. *Hackney,* 406 U. S. 535 (1972), together with this case, state the proper application of the test. The comments in the dissenting opinion about the proper cases for which to look for the correct statement of the equal protection rational-basis standard, and about which cases limit earlier cases, are just that: comments in a dissenting opinion.

ployment, regardless of a current connection with the industry in 1974 or on their retirement date.

Thus, the only eligible former railroad employees denied full windfall benefits are those, like appellee, who had no statutory entitlement to dual benefits at the time they left the railroad industry, but thereafter became eligible for dual benefits when they subsequently qualified for social security benefits. Congress could properly conclude that persons who had actually acquired statutory entitlement to windfall benefits while still employed in the railroad industry had a greater equitable claim to those benefits than the members of appellee's class who were no longer in railroad employment when they became eligible for dual benefits. Furthermore, the "current connection" test is not a patently arbitrary means for determining which employees are "career railroaders," particularly since the test has been used by Congress elsewhere as an eligibility requirement for retirement benefits.[11] Congress could assume that those who had a current connection with the railroad industry when the Act was passed in 1974, or who returned to the industry before their retirement, were more likely than those who had left the industry prior to 1974 and who never returned, to be among the class of persons who pursue careers in the railroad industry, the class for whom the Railroad Retirement Act was designed. *Hisquierdo* v. *Hisquierdo,* 439 U. S., at 573.

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[11] The "current connection" test has been used since 1946 as an eligibility requirement for both occupational disability and survivor annuities, 45 U. S. C. §§ 231a (a)(1)(iv), 231a (d)(1) (ch. 709, §§ 203, 205, 213, 60 Stat. 726–735), and it has been used since 1966 in determining eligibility for a supplemental annuity. 45 U. S. C. § 231a (b)(1). (Pub. L. 89–699, § 1, 80 Stat. 1073.)

Appellee contends that the "current connection" test is impermissible because it draws a distinction not on the duration of employment but rather on the time of employment. But this Court has clearly held that Congress may condition eligibility for benefits such as these on the character as well as the duration of an employee's ties to an industry. *Mathews* v. *Diaz,* 426 U. S. 67, 83 (1976).

Where, as here, there are plausible reasons for Congress' action, our inquiry is at an end. It is, of course, "constitutionally irrelevant whether this reasoning in fact underlay the legislative decision," *Flemming* v. *Nestor*, 363 U. S., at 612, because this Court has never insisted that a legislative body articulate its reasons for enacting a statute. This is particularly true where the legislature must necessarily engage in a process of line-drawing. The "task of classifying persons for . . . benefits . . . inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line," *Mathews* v. *Diaz*, 426 U. S. 67, 83–84 (1976), and the fact the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration.

Finally, we disagree with the District Court's conclusion that Congress was unaware of what it accomplished or that it was misled by the groups that appeared before it. If this test were applied literally to every member of any legislature that ever voted on a law, there would be very few laws which would survive it. The language of the statute is clear, and we have historically assumed that Congress intended what it enacted. To be sure, appellee lost a political battle in which he had a strong interest, but this is neither the first nor the last time that such a result will occur in the legislative forum. What we have said is enough to dispose of the claims that Congress not only failed to accept appellee's argument as to restructuring *in toto*, but that such failure denied him equal protection of the laws guaranteed by the Fifth Amendment.[12]

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[12] As we have recently stated: "The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." *Vance* v. *Bradley*, 440 U. S. 93, 97 (1979) (footnote omitted).

For the foregoing reasons, the judgment of the District Court is

Reversed.

JUSTICE STEVENS, concurring in the judgment.

In my opinion JUSTICE BRENNAN's criticism of the Court's approach to this case merits a more thoughtful response than that contained in footnote 10, *ante*, at 176–177. JUSTICE BRENNAN correctly points out that if the analysis of legislative purpose requires only a reading of the statutory language in a disputed provision, and if any "conceivable basis" for a discriminatory classification will repel a constitutional attack on the statute, judicial review will constitute a mere tautological recognition of the fact that Congress did what it intended to do. JUSTICE BRENNAN is also correct in reminding us that even though the statute is an example of "social and economic legislation," the challenge here is mounted by individuals whose legitimate expectations of receiving a fixed retirement income are being frustrated by, in effect, a breach of a solemn commitment by their Government. When Congress deprives a small class of persons of vested rights that are protected—and, indeed, even enhanced [1]—for others who are in a similar though not identical position, I believe the Constitution requires something more than merely a "conceivable" or a "plausible" explanation for the unequal treatment.

I do not, however, share JUSTICE BRENNAN's conclusion that every statutory classification must further an objective that can be confidently identified as the "actual purpose" of the legislature. Actual purpose is sometimes unknown. Moreover, undue emphasis on actual motivation may result in identically worded statutes being held valid in one State and invalid in a neighboring State.[2] I therefore believe that we

[1] The 1974 Act provided increased benefits for spouses, widows, survivors, and early retirees. See 45 U. S. C. § 231c (g).

[2] Compare *Rundlett* v. *Oliver*, 607 F. 2d 495 (CA1 1979) (upholding Maine's statutory rape law), with *Meloon* v. *Helgemoe*, 564 F. 2d 602

must discover a correlation between the classification and either the actual purpose of the statute or a legitimate purpose that we may reasonably presume to have motivated an impartial legislature. If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect. If, however, the adverse impact may reasonably be viewed as an acceptable cost of achieving a larger goal, an impartial lawmaker could rationally decide that that cost should be incurred.

In this case we need not look beyond the actual purpose of the legislature. As is often true, this legislation is the product of multiple and somewhat inconsistent purposes that led to certain compromises. One purpose was to eliminate in the future the benefit that is described by the Court as a "windfall benefit" and by JUSTICE BRENNAN as an "earned dual benefit." That aim was incident to the broader objective of protecting the solvency of the entire railroad retirement program. Two purposes that conflicted somewhat with this broad objective were the purposes of preserving those benefits that had already vested and of increasing the level of payments to beneficiaries whose rights were not otherwise to be changed. As JUSTICE BRENNAN emphasizes, Congress originally intended to protect *all* vested benefits, but it ultimately sacrificed some benefits in the interest of achieving other objectives.

Given these conflicting purposes, I believe the decisive questions are (1) whether Congress can rationally reduce the vested benefits of some employees to improve the solvency of the entire program while simultaneously increasing the benefits of others; and (2) whether, in deciding which vested benefits to reduce, Congress may favor annuitants whose railroad service was more recent than that of disfavored annuitants who had an equal or greater quantum of employment.

(CA1 1977), cert. denied, 436 U. S. 950 (1978) (striking down New Hampshire's statutory rape law).

My answer to both questions is in the affirmative. The congressional purpose to eliminate dual benefits is unquestionably legitimate; that legitimacy is not undermined by the adjustment in the level of remaining benefits in response to inflation in the economy. As for the second question, some hardship—in the form of frustrated long-term expectations—must inevitably result from any reduction in vested benefits. Arguably, therefore, Congress had a duty—and surely it had the right to decide—to eliminate no more vested benefits than necessary to achieve its fiscal purpose. Having made that decision, any distinction it chose within the class of vested beneficiaries would involve a difference of degree rather than a difference in entitlement. I am satisfied that a distinction based upon currency of railroad employment represents an impartial method of identifying that sort of difference. Because retirement plans frequently provide greater benefits for recent retirees than for those who retired years ago—and thus give a greater reward for recent service than for past service of equal duration—the basis for the statutory discrimination is supported by relevant precedent. It follows, in my judgment, that the timing of the employees' railroad service is a "reasonable basis" for the classification as that term is used in *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, *ante*, at 174, and *Dandridge* v. *Williams*, 397 U. S. 471, *ante*, at 175, as well as a "ground of difference having a fair and substantial relation to the object of the legislation," as those words are used in *F. S. Royster Guano Co.* v. *Virginia*, 253 U. S. 412, *ante*, at 174–175.

Accordingly, I concur in the judgment.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Appellee Gerhard Fritz represents a class of retired former railroad employees who were statutorily entitled to Railroad Retirement and Social Security benefits, including an overlap herein called the "earned dual benefit," until enactment of

the Railroad Retirement Act of 1974, which divested them of their entitlement to the earned dual benefit. The Act did not affect the entitlements of other railroad employees with equal service in railroad and nonrailroad jobs, who can be distinguished from appellee class only because they worked at least one day for, or retained a "current connection" with, a railroad in 1974.

The only question in this case is whether the equal protection component of the Fifth Amendment [1] bars Congress from allocating pension benefits in this manner. The answer to this question turns in large part on the way in which the strictures of equal protection are conceived by this Court. See *Morey* v. *Doud*, 354 U. S. 457, 472 (1957) (Frankfurter, J., dissenting). The parties agree that the legal standard applicable to this case is the "rational basis" test. The District Court applied this standard below, see Conclusion of Law No. 7, reprinted at App. to Juris. Statement 28a. The Court today purports to apply this standard, but in actuality fails to scrutinize the challenged classification in the manner established by our governing precedents. I suggest that the mode of analysis employed by the Court in this case virtually immunizes social and economic legislative classifications from judicial review.

I

A legislative classification may be upheld only if it bears a rational relationship to a legitimate state purpose. *Vance* v. *Bradley*, 440 U. S. 93, 97 (1979); *Massachusetts Board of Retirement* v. *Murgia*, 427 U. S. 307, 312 (1976) (*per curiam*); *New Orleans* v. *Dukes*, 427 U. S. 297, 303 (1976) (*per curiam*). Perhaps the clearest statement of this Court's present approach to "rational basis" scrutiny may be found in *Johnson* v. *Robison*, 415 U. S. 361 (1974). In considering the constitutionality of limitations on the availability of edu-

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[1] See *Weinberger* v. *Wiesenfeld*, 420 U. S. 636, 638, n. 2 (1975).

cational benefits under the Veterans' Readjustment Benefits Act of 1966, eight Members of this Court agreed that

> "our analysis of the classification proceeds on the basis that, although an individual's right to equal protection of the laws 'does not deny . . . the power to treat different classes of persons in different ways[;] . . . [it denies] the power to legislate that different treatment be accorded the persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. *A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."*' " *Id.*, at 374–375 (quoting *F. S. Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 415 (1920)) (ellipses and brackets in original) (emphasis supplied).

The enactments of Congress are entitled to a presumption of constitutionality, and the burden rests on those challenging a legislative classification to demonstrate that it does not bear the "fair and substantial relation to the object of the legislation," *ibid.*, required under the Constitution. *Mathews* v. *Lucas*, 427 U. S. 495, 510 (1976).

Nonetheless, the rational-basis standard "is not a toothless one," *ibid.*, and will not be satisfied by flimsy or implausible justifications for the legislative classification, proffered after the fact by Government attorneys. See, *e. g.*, *Jimenez* v. *Weinberger*, 417 U. S. 628 (1974); *U. S. Dept. of Agriculture* v. *Moreno*, 413 U. S. 528 (1973); *U. S. Dept. of Agriculture* v. *Murry*, 413 U. S. 508 (1973); *James* v. *Strange*, 407 U. S. 128 (1972). When faced with a challenge to a legislative classification under the rational-basis test, the court should ask, first, what the purposes of the statute are, and, second, whether the classification is rationally related to achievement of those purposes.

II

The purposes of the Railroad Retirement Act of 1974 are clear, because Congress has commendably stated them in the House and Senate Reports accompanying the Act. A section of the Reports is entitled "Principal Purpose of the Bill." It notes generally that "[t]he bill provides for a complete restructuring of the Railroad Retirement Act of 1937, and will place it on a sound financial basis,"[2] and then states:

> "Persons who already have vested rights under both the Railroad Retirement and the Social Security systems will in the future be permitted to receive benefits computed under both systems just as is true under existing law." H. R. Rep. No. 93-1345, pp. 1, 2 (1974); S. Rep. No. 93-1163, pp. 1, 2 (1974).[3]

Moreover, Congress explained that this purpose was based on considerations of fairness and the legitimate expectations of the retirees:

> "[A]ny plan to eliminate these dual benefits should include protection of the equities of existing beneficiaries

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[2] Of course, the legitimate governmental interest in restoring the Railroad Retirement system to fiscal soundness does not, in itself, serve to support the challenged classification in this case. At issue is why Congress discriminated among two classes of railroad retirees. The overall interest in saving money is irrelevant to this discrimination.

[3] Several pages later, the Reports again make clear that persons with vested rights to earned dual benefits would retain them:

"It must be recognized that the bill actually takes benefits away from certain railroad employees—those who have not already qualified for Social Security benefits." H. R. Rep. No. 93-1345, at 6; S. Rep. No. 93-1163, at 7.

Only in technical discussions and in the section-by-section analyses do the Reports reflect the actual consequences of the Act on the appellee class. See H. R. Rep. No. 93-1345, at 12, 39-40; S. Rep. No. 93-1163, at 12, 38-39.

The Administration also understood the Act to preserve rights to vested earned dual benefits. See H. R. Rep. No. 93-1345, at 81-82 (supplemental report from the Office of Management and Budget).

and employees with claims upon such benefits. Dual beneficiaries cannot fairly be criticized, since they have merely secured the benefits to which they are entitled under existing law. That is why their equities should be preserved." H. R. No. 93-1345, at 11; S. Rep. No. 93-1163, at 11.

Thus, a "principal purpose" of the Railroad Retirement Act of 1974, as explicitly stated by Congress, was to preserve the vested earned benefits of retirees who had already qualified for them. The classification at issue here, which deprives some retirees of vested dual benefits that they had earned prior to 1974, directly conflicts with Congress' stated purpose. As such, the classification is not only rationally unrelated to the congressional purpose; it is inimical to it.

III

The Court today avoids the conclusion that § 231b (h) must be invalidated by deviating in three ways from traditional rational-basis analysis. First, the Court adopts a tautological approach to statutory purpose, thereby avoiding the necessity for evaluating the relationship between the challenged classification and the legislative purpose. Second, it disregards the actual stated purpose of Congress in favor of a justification which was never suggested by any Representative or Senator, and which in fact conflicts with the stated congressional purpose. Third, it upholds the classification without any analysis of its rational relationship to the identified purpose.

A

The Court states that "the plain language of [45 U. S. C.] § 231b (h) marks the beginning and end of our inquiry." *Ante*, at 176. This statement is strange indeed, for the "plain language" of the statute can tell us only what the classification is; it can tell us nothing about the purpose of the classification, let alone the relationship between the classification

and that purpose. Since § 231b (h) deprives the members of appellee class of their vested earned dual benefits, the Court apparently assumes that Congress must have *intended* that result. But by presuming purpose from result, the Court reduces analysis to tautology. It may always be said that Congress intended to do what it in fact did. If that were the extent of our analysis, we would find every statute, no matter how arbitrary or irrational, perfectly tailored to achieve its purpose. But equal protection scrutiny under the rational-basis test requires the courts first to deduce the independent objectives of the statute, usually from statements of purpose and other evidence in the statute and legislative history, and second to analyze whether the challenged classification rationally furthers achievement of those objectives. The Court's tautological approach will not suffice.

B

The Court analyzes the rationality of § 231b (h) in terms of a justification suggested by Government attorneys, but never adopted by Congress. The Court states that it is " 'constitutionally irrelevant whether this reasoning in fact underlay the legislative decision.' " *Ante*, at 179 (quoting *Flemming* v. *Nestor*, 363 U. S. 603, 612 (1960)). In fact, however, equal protection analysis has evolved substantially on this question since *Flemming* was decided. Over the past 10 years, this Court has frequently recognized that the actual purposes of Congress, rather than the *post hoc* justifications offered by Government attorneys, must be the primary basis for analysis under the rational-basis test. In *Weinberger* v. *Wiesenfeld*, 420 U. S. 636, 648, n. 16 (1975), we said:

> "This Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation." (Citing cases.)

Thus, in *San Antonio Independent School District* v. *Rodriguez,* 411 U. S. 1, 17 (1973), this Court stated that a challenged classification will pass muster under "rational basis" scrutiny only if it "rationally furthers some legitimate, *articulated* state purpose" (emphasis added), and in *Massachusetts Board of Retirement* v. *Murgia,* 427 U. S., at 314, we stated that such a classification will be sustained only if it "rationally furthers the purposes *identified by the State.*" (Emphasis added.) Moreover, in *Johnson* v. *Robison,* 415 U. S., at 381–382, we upheld a classification on the finding that "[t]hese quantitative and qualitative distinctions, *expressly recognized by Congress,* form a rational basis for Congress' classification . . . ." (Emphasis added.) See also *Califano* v. *Goldfarb,* 430 U. S. 199, 212–213 (1977).

From these cases and others it is clear that this Court will no longer sustain a challenged classification under the rational-basis test merely because Government attorneys can suggest a "conceivable basis" upon which it might be thought rational. The standard we have applied is properly deferential to the Legislative Branch: where Congress has articulated a legitimate governmental objective, and the challenged classification rationally furthers that objective, we must sustain the provision. In other cases, however, the courts must probe more deeply. Where Congress has expressly stated the purpose of a piece of legislation, but where the challenged classification is either irrelevant to or counter to that purpose, we must view any *post hoc* justifications proffered by Government attorneys with skepticism. A challenged classification may be sustained only if it is rationally related to achievement of an *actual* legitimate governmental purpose.

The Court argues that Congress chose to discriminate against appellee for reasons of equity, stating that "Congress could properly conclude that persons who had actually acquired statutory entitlement to windfall benefits while still employed in the railroad industry had a greater equitable

claim to those benefits than the members of appellee's class who were no longer in railroad employment when they became eligible for dual benefits."[4] *Ante*, at 178. This statement turns Congress' assessment of the equities on its head. As I have shown,[5] Congress expressed the view that it would be inequitable to deprive any retirees of any portion of the benefits they had been promised and that they had earned under prior law. See also H. R. Rep. No. 93–1345, pp. 4, 11 (1974); S. Rep. No. 93–1163, pp. 4, 11 (1974); 120 Cong. Rec. 35613 (1974) (statement of Rep. Hudnut); *id.*, at 35614 (statement of Rep. Shuster); *id.*, at 35615 (statement of Rep. Morgan). The Court is unable to cite even one statement in the legislative history by a Representative or Senator that makes the equitable judgment it imputes to Congress. In the entire legislative history of the Act, the only persons to state that the equities justified eliminating appellee's earned dual benefits were representatives of railroad management and labor, whose self-serving interest in bringing about this result destroys any basis for attaching weight to their statements.[6]

The factual findings of the District Court concerning the development of § 231b (h), amply supported by the legislative history, are revealing on this point.[7] In 1970, Congress

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[4] The Court's quoted justification fails on its face to support the challenged classification. Despite the Court's apparent belief to the contrary, some members of the appellee class did "actually acquir[e] statutory entitlement" to dual benefits while still employed in the railroad industry, see *ante*, at 178, but nevertheless were deprived of a portion of those benefits. See § 231b (h)(2). Under the Court's own reasoning, therefore, these persons were arbitrarily and impermissibly treated.

[5] See *supra*, at 185–186.

[6] See discussion following, *infra*.

[7] The Court does not claim that the District Court's factual findings were clearly erroneous, though it does state its disagreement with one lower court conclusion. See *ante*, at 179. Therefore, the factual findings of the District Court govern the litigation in this Court, and in any event, are amply supported by the record.

established a Commission to investigate the actuarial soundness of the Railroad Retirement system and to make recommendations for its reform. See Pub. L. 91–377, 84 Stat. 791. The Commission was composed of one railroad management representative, one railroad labor representative, and three public representatives. The Commission submitted a report in 1972, recommending, *inter alia*, that railroad retirees in the future no longer be permitted to earn full Railroad Retirement and Social Security benefits without offset. The Commission insisted, however, that

> "[i]ndividuals who have vested rights to social security benefits by virtue of permanently or fully insured status, but cannot exercise them because they are not at retirement age under railroad retirement, should be guaranteed an equivalent right in dollar terms to the staff tier portion of their benefits, including vested dual benefits . . . ." Commission on Railroad Retirement, The Railroad Retirement System: Its Coming Crisis, H. R. Doc. No. 92–350, p. 368 (1972).

After receiving the Commission report, Congress asked railroad management and labor representatives to negotiate and submit a bill to restructure the Railroad Retirement system, which should "take into account the specific recommendations of the Commission on Railroad Retirement." Pub. L. 93–69, § 107, 87 Stat. 165. The members of this Joint Labor-Management Negotiating Committee were not appointed by public officials, nor did they represent the interests of the appellee class, who were no longer active railroaders or union members.[8]

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[8] The use of a Joint Labor-Management Negotiating Committee to draft legislation concerning the Railroad Retirement system was not novel. In fact, such a committee drafted the original Railroad Retirement Act of 1937 and several amending Acts since then. See *Hisquierdo* v. *Hisquierdo*, 439 U. S. 572, 574, n. 3 (1979); Railroad Retirement Act—Supplemental Benefits, Hearings on H. R. 17285 before the Subcommittee on Com-

In an initial proposed restructuring of the system, the Joint Committee devised a means whereby the system deficit could be completely eliminated without depriving retirees of vested earned benefits. See Finding of Fact No. 43, reprinted at App. to Juris. Statement 12a. However, labor representatives demanded that benefits be increased for their current members, the cost to be offset by divesting the appellee class of a portion of the benefits they had earned under prior law. See Findings of Fact Nos. 39, 40, 44, reprinted *id.*, at 11a–12a. As the District Court found:

> "Essentially, the railroad labor negotiators traded off the plaintiff class of beneficiaries to achieve added benefits for their current employees, even though doing so violated the basic Congressional purposes of the negotiations. Furthermore, by sacrificing the plaintiff class, the railroad labor unions breached the duty of fair representation they owed to the plaintiff class, which duty resulted from the labor unions' purported representation of the plaintiff class' interests in the [Joint Committee] negotiations." Finding of Fact No. 44, reprinted *id.*, at 12a–13a.

Congress conducted hearings to consider the Joint Committee's recommendations, but never directed its attention to their effect on persons in appellee class' situation. In fact, the Joint Committee negotiators and Railroad Retirement Board members who testified at congressional hearings perpetuated the inaccurate impression that all retirees with earned vested dual benefits under prior law would retain their benefits unchanged. For example, Mr. William H. Dempsey, chairman of the management negotiators on the Joint

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merce and Finance of the House Committee on Interstate and Foreign Commerce, 89th Cong., 2d Sess., 2–3 (1966); Railroad Retirement, Hearings on H. R. 1362 before the House Committee on Interstate and Foreign Commerce, 79th Cong., 1st Sess., 448 (1945); Commission on Railroad Retirement, The Railroad Retirement System: Its Coming Crisis, H. R. Doc. No. 92–350, p. 147 (1972).

Committee and principal witness at the hearings, told the committee:

> "[P]rotection [will] be accorded to people who are on the rolls now receiving dual benefits and those who are vested under both systems as of January 1, 1975, the idea of the Commission being, and we agree with this, that these individuals had a right to rely upon the law as it existed when they were working. They have made their contributions. They have relied upon the law. They . . . should be protected." Restructuring of the Railroad Retirement System: Hearings on H. R. 15301 before the House Committee on Interstate and Foreign Commerce, 93d Cong., 2d Sess., 214 (1974).

Accord, *id.*, at 190 (statement of Mr. Dempsey); *id.*, at 194 (statement of Mr. Dempsey); *id.*, at 204 (statement of Rep. Dingell); *id.*, at 213–214 (statement of Mr. Dempsey); *id.*, at 242 (statement of Mr. Dempsey); *id.*, at 248 (statement of Mr. James L. Cowen, Chairman of the Railroad Retirement Board); *id.*, at 249 (statement of Mr. Cowen); *id.*, at 335 (statements of Messrs. Neil P. Speirs and Wythe D. Quarles, Jr., members of the Railroad Retirement Board); *id.*, at 351 (statement of Mr. Speirs).

Most striking is the following colloquy between Representative Dingell and Mr. Dempsey:

> "Mr. DINGELL. Who is going to be adversely affected? Somebody has to get it in the neck on this. Who is going to be that lucky fellow?
>
> "Mr. DEMPSEY. Well, I don't think so really. I think this is the situation in which every one wins. Let me explain.
>
> . . . . .
>
> "Mr. DINGELL. Mr. Dempsey, I see some sleight of hand here but I don't see how it is happening. I applaud it but I would like to understand it. My problem is that you are going to go to a realistic system that is going

to cost less but pay more in benefits. Now if you have accomplished this, I suggest we should put you in charge of the social security system." *Id.*, at 199, 201.

The Act was passed in the form drafted by the Joint Committee without any amendment relevant to this case.[9]

Of course, a misstatement or several misstatements by witnesses before Congress would not ordinarily lead us to conclude that Congress misapprehended what it was doing. In this instance, however, where complex legislation was drafted by outside parties and Congress relied on them to explain it, where the misstatements are frequent and unrebutted, and where no Member of Congress can be found to have stated the effect of the classification correctly, we are entitled to suspect that Congress may have been misled. As the District Court found: "At no time during the hearings did Congress even give a hint that it understood that the bill by its language eliminated an earned benefit of plaintiff's class." Finding of Fact No. 63, reprinted at App. to Juris. Statement 22a.

Therefore, I do not think that this classification was rationally related to an *actual* governmental purpose.

C

The third way in which the Court has deviated from the principles of rational-basis scrutiny is its failure to analyze

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[9] Congress' unfortunate tendency to pass Railroad Retirement legislation drafted by labor and management representatives without adequate scrutiny was criticized by the Commission on Railroad Retirement in its 1972 report:

"The historical record shows that past policy formulation has not always abided by the key criteria of equity and sound financing. Generally the major provisions of the system have been the product of negotiations between railway labor and the carriers in a bargaining process often reflecting conflicts or the exercise of power in an industry which directly affects the public welfare. The results of this bargaining process have, at times, been less than fully screened by the Federal Government before they were ratified by Congressional action and given Presidential approval." H. R. Doc. No. 92-350, *supra*, at 147.

whether the challenged classification is genuinely related to the purpose identified by the Court. Having suggested that "equitable considerations" underlay the challenged classification—in direct contradiction to Congress' evaluation of those considerations, and in the face of evidence that the classification was the product of private negotiation by interested parties, inadequately examined and understood by Congress—the Court proceeds to accept that suggestion without further analysis.

An unadorned claim of "equitable" considerations is, of course, difficult to assess. It seems to me that before a court may accept a litigant's assertion of "equity," it must inquire what principles of equity or fairness might genuinely support such a judgment. But apparently the Court does not demand such inquiry, for it has failed to address any equitable considerations that might be relevant to the challenged classification.

In my view, the following considerations are of greatest relevance to the equities of this case: (1) contribution to the system; (2) reasonable expectation and reliance; (3) need; and (4) character of service to the railroad industry. With respect to each of these considerations, I would conclude that the members of appellee class have as great an equitable claim to their earned dual benefits as do their more favored co-workers, who remain entitled to their earned dual benefits under § 231b (h).

Contribution to the system. The members of the appellee class worked in the railroad industry for more than 10 but fewer than 25 years, and also worked in nonrailroad jobs for the required number of years for vesting under Social Security—usually 40 quarters. During that time, they contributed to both the Railroad Retirement and Social Security systems, and met all requirements of the law for the vesting of benefits under those systems. In this respect, they are identical to their more favored co-workers, who contributed no more of their earnings to the systems than did appellee

class. On the basis of contributions to the systems, therefore, there is no reason for this discrimination.

Reasonable expectation and reliance. Throughout their working lives, the members of appellee class were assured that they would receive retirement benefits in accordance with the terms of the law as it then stood. See Finding of Fact No. 70, reprinted at App. to Juris. Statement 25a. No less than their more favored co-workers, they chose career paths and made calculations for their retirement based on these assurances. For Congress to change its rules and strip them of these benefits at the time of their retirement seems decidedly inequitable. As the District Court found:

> "The class' reliance on the earned railroad retirement benefit and on the anticipated receipt of full dual benefits is clear from the evidence adduced herein.
>
> . . . . .
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> "Equally clear from the evidence is the fact that the class' reliance has been to the class' detriment. Class members have been forced to alter substantially their mode of retirement living due to the drastic reduction of Railroad Retirement benefits worked by the 1974 Act. This point was confirmed in the [Joint Committee] negotiations shortly prior to the sending of its report to Congress in April, 1974: 'Mr. Dempsey: . . . The benefit [dual benefit] is one that if we were starting out we would not have at all. So theoretically we would urge that it be out completely as of January 1, 1975. But we cannot do that—we have people who are relying on benefits, not responsible for them but merely working for them under the rules as they stood.' " Findings of Fact Nos. 70, 71, reprinted *id.*, at 25a–26a.

In fact, this reliance was one of the principal reasons Congress resolved not to disturb the vested earned dual benefits of retirees.[10]

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[10] Cf. *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U. S. 359,

Need. The appellee class is composed of fixed-income elderly people, no longer capable of re-entering the work force to reacquire benefits once earned but now lost. The average loss to the class members is about $88 per month, no small element in the monthly budget. The record provides no reason to suppose that members of the appellee class are any less likely to be in need than are their co-workers.

Character of service to the railroad industry. Members of the appellee class worked at least 10 years for the railroad industry by 1974, and many of them worked as long as 24 years. Their duration of railroad employment—surely the best measure of their service to the industry—was equal to that of their co-workers. In fact, some members of the class worked *over twice as long* in the railroad industry as did some of those who retained their rights to a dual benefit. Finding of Fact No. 60, reprinted *id.*, at 21a–22a. Admittedly, the members of the appellee class retired from railroad work prior to 1974, but the record shows that many left railroad work involuntarily, not because of a lack of commitment to the industry. Finding of Fact No. 72, reprinted *id.*, at 26a. Moreover, since one purpose of the Railroad Retirement system was to encourage railroad workers to retire early, so as to create positions for younger workers, *Hisquierdo* v. *Hisquierdo*, 439 U. S. 572, 573–574 (1979), it is hardly fair to fault the appellee class now for having done so.

Even if I were able to accept the notion that Congress considered it equitable to deprive a class of railroad retirees of a portion of their vested earned benefits because they no longer worked for the railroad, I would still consider the means adopted in § 231b (h) irrational.[11] Under this provision, a

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374 (1980) (one of Congress' central purposes in passing the Employee Retirement Income Security Act was "to prevent the 'great personal tragedy' suffered by employees whose vested benefits are not paid when pension plans are terminated" (footnote omitted)).

[11] Contrary to the Court's suggestion, this is not a "line-drawing" case, where the Congress must make a division at some point along an ad-

retiree is favored by retention of his full vested earned benefits if he had worked so much as one day for a railroad in 1974. This is a plainly capricious basis for distinguishing among retirees, every one of whom had worked in the industry for at least *10 years:* the fortuity of one day of employment in a particular year should not govern entitlement to benefits earned over a lifetime.[12]

I therefore conclude that the Government's proffered justification of "equitable considerations," accepted without question by the Court, cannot be defended. Rather, as the legislative history repeatedly states, equity and fairness demand that the members of appellees class like their co-workers, retain the vested dual benefits they earned prior to 1974. A conscientious application of rational-basis scrutiny demands, therefore, that § 231b (h) be invalidated.

IV

Equal protection rationality analysis does not empower the courts to second-guess the wisdom of legislative classifications. On this we are agreed, and have been for over 40 years. On the other hand, we are not powerless to probe beneath claims by Government attorneys concerning the means and ends of

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mittedly rationally conceived continuum. See *ante,* at 179. Here, Congress has isolated a particular class of retirees on the basis of a distinction that is utterly irrelevant to any actual or legitimate governmental purpose.

[12] The wholly arbitrary nature of this classification is highlighted by an analysis of the exception in § 231 (h)(2). Under this subsection, some members of the appellee class are entitled to retain a portion of their earned dual benefit, albeit at a reduced level, while the others are divested of the dual benefit altogether. The basis for this added twist is the timing of their qualification for Railroad Retirement and Social Security. Those who qualified for Social Security first retain a portion of their dual benefit; those who qualified for Railroad Retirement first do not. Needless to say, the retirees had no notice at the time that the timing of qualification would make any difference to their entitlement to benefits. This kind of after-the-fact shifting of the rules for retirement benefits has not been justified and cannot be justified.

Congress. Otherwise, we would defer not to the considered judgment of Congress, but to the arguments of litigators. The instant case serves as an example of the unfortunate consequence of such misplaced deference. Because the Court is willing to accept a tautological analysis of congressional purpose, an assertion of "equitable" considerations contrary to the expressed judgment of Congress, and a classification patently unrelated to achievement of the identified purpose, it succeeds in effectuating neither equity nor congressional intent.

I respectfully dissent.

VINCENT *v.* TEXAS

APPEAL FROM THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 79-5962. Argued November 5, 1980—Decided December 9, 1980

Appeal dismissed. Reported below: 586 S. W. 2d 880.

Robert D. McCutcheon, by appointment of the Court, 446 U. S. 934, argued the cause and filed a brief for appellant.

Douglas M. Becker, Assistant Attorney General of Texas, argued the cause for appellee. With him on the brief were *Mark White,* Attorney General, *John W. Fainter, Jr.,* First Assistant Attorney General, and *W. Barton Boling* and *Dawn Bruner,* Assistant Attorneys General.

PER CURIAM.

The appeal is dismissed for want of a properly presented federal question.

THE CHIEF JUSTICE and JUSTICE POWELL would dismiss for want of jurisdiction.

Reporter's Note

The next page is purposely numbered 801. The numbers between 199 and 801 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FROM OCTOBER 6 THROUGH DECEMBER 8, 1980

October 6, 1980

Appeals Dismissed

No. 79–1483. Supermarkets General Corp., t/a Hochschild Kohn Department Store *v.* Maryland. Appeal from Ct. App. Md. dismissed for want of substantial federal question. Reported below: 286 Md. 611, 409 A. 2d 250.

No. 79–1594. Bowen *v.* Bowen. Appeal from Ct. Civ. App. Tex., 11th Sup. Jud. Dist., dismissed for want of substantial federal question.

No. 79–1703. Fulkerson *v.* State Bar of California. Appeal from Sup. Ct. Cal. dismissed for want of substantial federal question.

No. 79–1772. Calderone *v.* Ferrigno, Administrator, Board of Education of the City School District of New York City, et al. Appeal from App. Div., Sup. Ct. N. Y., 2d Jud. Dept., dismissed for want of substantial federal question. Reported below: 69 App. Div. 2d 901, 416 N. Y. S. 2d 158.

No. 79–1776. Harding *v.* Melton, Commissioner of New York State Department of Motor Vehicles, et al. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 49 N. Y. 2d 739, 402 N. E. 2d 1171.

No. 79–1819. United Illuminating Co. et al. *v.* City of New Haven et al. Appeal from Sup. Ct. Conn. dismissed for want of substantial federal question. Reported below: 179 Conn. 627, 427 A. 2d 830.

No. 79-1880. LAKE LAWRENCE, INC. *v.* THURSTON COUNTY ET AL. Appeal from Sup. Ct. Wash. dismissed for want of substantial federal question. Reported below: 92 Wash. 2d 656, 601 P. 2d 494.

No. 79-1989. CITIZENS PARTY ET AL. *v.* MANCHIN, SECRETARY OF STATE OF WEST VIRGINIA. Appeal from Sup. Ct. App. W. Va. dismissed for want of substantial federal question. Reported below: — W. Va. —, 270 S. E. 2d 634.

No. 79-2028. ALDENS, INC. *v.* TULLY ET AL. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 49 N. Y. 2d 525, 404 N. E. 2d 703.

No. 79-2066. BEER ET AL. *v.* AUSTIN, SECRETARY OF STATE OF MICHIGAN, ET AL. Appeal from Sup. Ct. Mich. dismissed for want of substantial federal question. Reported below: 408 Mich. 957.

No. 79-6281. IN RE ADOPTION OF E. M. A. (DIXON, APPELLANT). Appeal from Sup. Ct. Pa. dismissed for want of substantial federal question. Reported below: 487 Pa. 152, 409 A. 2d 10.

No. 79-6825. CATER *v.* ILLINOIS. Appeal from App. Ct. Ill., 3d Dist., dismissed for want of substantial federal question. Reported below: 78 Ill. App. 3d 983, 398 N. E. 2d 28.

No. 80-21. HEART MINISTRIES, INC., ET AL. *v.* KANSAS EX REL. O'SULLIVAN, COUNTY ATTORNEY, RENO COUNTY, KANSAS. Appeal from Sup. Ct. Kan. dismissed for want of substantial federal question. Reported below: 227 Kan. 244, 607 P. 2d 1102.

No. 80-32. HYNNING *v.* DUFIEF MORTGAGE, INC., ET AL. Appeal from Cir. Ct. Arlington County, Va., dismissed for want of substantial federal question.

No. 80-51. BRIDGES *v.* VIRGINIA DEPARTMENT OF MENTAL HEALTH AND MENTAL RETARDATION. Appeal from Sup. Ct. Va. dismissed for want of substantial federal question.

No. 80-61. FULTZ *v.* KENTUCKY. Appeal from Ct. App. Ky. dismissed for want of substantial federal question. Reported below: 596 S. W. 2d 28.

No. 80-90. NATIONAL WOOD PRESERVERS, INC. *v.* PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES ET AL.; and

No. 80-98. ROGERS ET UX. *v.* PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES ET AL. Appeals from Sup. Ct. Pa. dismissed for want of substantial federal question. Reported below: 489 Pa. 221, 414 A. 2d 37.

No. 80-144. UNITED FEDERATION OF TEACHERS WELFARE FUND *v.* STATE HUMAN RIGHTS APPEAL BOARD ET AL. Appeal from App. Div., Sup. Ct. N. Y., 1st Jud. Dept., dismissed for want of substantial federal question.

No. 80-5065. JEROKOVITCH *v.* RICCIUTI ET AL. Appeal from Sup. Ct. Pa. dismissed for want of substantial federal question. Reported below: 488 Pa. 537, 412 A. 2d 1106.

No. 79-1530. TOWN *v.* RENO, STATE ATTORNEY OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, ET AL. Appeal from Sup. Ct. Fla. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 377 So. 2d 648.

No. 79-1889. RIVERA *v.* OREGON STATE EMPLOYEES ASSN. ET AL. Appeal from D. C. Ore. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 80-5093. PAYNE *v.* TEXAS. Appeal from Ct. Crim. App. Tex. dismissed for want of substantial federal question. Reported below: 596 S. W. 2d 911.

No. 79-1969. ACKERLEY COMMUNICATIONS, INC., ET AL. *v.* CITY OF SEATTLE ET AL.; and

No. 79-1972. DIAMOND PARKING, INC. *v.* CITY OF SEATTLE. Appeals from Sup. Ct. Wash. dismissed for want of jurisdiction. Treating the papers whereon the appeals were taken as petitions for writs of certiorari, certiorari denied. Reported below: 92 Wash. 2d 905, 602 P. 2d 1177.

No. 79-2026. SALORIO ET AL. *v.* GLASER, DIRECTOR, DIVISION OF TAXATION, DEPARTMENT OF THE TREASURY OF NEW JERSEY. Appeal from Sup. Ct. N. J. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 82 N. J. 482, 414 A. 2d 943.

No. 79-6626. WILLIAMS *v.* MISSISSIPPI. Appeal from C. A. 5th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 608 F. 2d 1021.

No. 79-6634. LINDEN *v.* ST. MARTIN'S PRESS ET AL. Appeal from C. A. 2d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 79-6678. DONNELLY *v.* MIDDLESEX SUPERIOR COURT ET AL. Appeal from Ct. App. Mass. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: — Mass. App. —, 399 N. E. 2d 37.

No. 79-6646. PRENZLER *v.* REED. Appeal from Ct. App. Cal., 4th App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 79-6652. RODRIGUEZ *v.* UNITED STATES ARMY ET AL. Appeal from C. A. 2d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 79-6672. CASEY *v.* AULT, CORRECTIONS DIRECTOR. Appeal from C. A. 10th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 79-6820. BRACKETT *v.* ESTELLE, CORRECTIONS DIRECTOR. Appeal from C. A. 5th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 79-6847. HARSHFIELD *v.* RICKETTS, CORRECTIONS DIRECTOR, ET AL. Appeal from C. A. 10th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 79-6866. MASONE *v.* MASONE. Appeal from Ct. App. N. Y. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 49 N. Y. 2d 916, 405 N. E. 2d 713.

No. 79-6898. GRADY ET AL. *v.* MCLEAN. Appeal from App. Div., Sup. Ct. N. Y., 4th Jud. Dept., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 73 App. Div. 2d 1067, 425 N. Y. S. 2d 439.

No. 80–138. VANDERLINDEN, EXECUTOR *v.* VANDERLINDEN, EXECUTOR. Appeal from Ct. App. Iowa dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 297 N. W. 2d 382.

No. 80–80. PRINCE GEORGE'S PROPERTIES, INC. *v.* PRINCE GEORGE'S COUNTY, MARYLAND, ET AL. Appeal from Ct. Sp. App. Md. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 44 Md. App. 759.

No. 80–5018. BRESSLER *v.* FIRST APPELLATE COURT OF CALIFORNIA, DISTRICT ONE, ET AL. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 80–5079. REED *v.* SCHWAB ET AL. Appeal from Sup. Ct. Ore. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 79–1720. DOVE ET AL. *v.* INDIANA. Appeal from Sup. Ct. Ind. dismissed for want of substantial federal question. JUSTICE BRENNAN and JUSTICE MARSHALL would note probable jurisdiction and set case for oral argument. Reported below: — Ind. —, 397 N. E. 2d 580.

No. 79–1846. NEW HAMPSHIRE ET AL. *v.* MARSHALL, SECRETARY OF LABOR, ET AL. Appeal from C. A. 1st Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. JUSTICE POWELL would note probable jurisdiction and set case for oral argument. Reported below: 616 F. 2d 240.

No. 79–1722. PITSENBERGER *v.* PITSENBERGER. Appeal from Ct. App. Md. Motion of appellee for leave to proceed *in forma pauperis* granted. Appeal dismissed for want of substantial federal question. Reported below: 287 Md. 20, 410 A. 2d 1052.

No. 79–1865. OSTRAGER *v.* STATE BOARD OF CONTROL ET AL. Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of substantial federal question. JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 99 Cal. App. 3d 1, 160 Cal. Rptr. 317.

No. 79–1939. VARA ET AL. *v.* CITY OF HOUSTON ET AL. Appeal from Ct. Civ. App. Tex., 14th Sup. Jud. Dist., dismissed for want of properly presented federal question. Reported below: 583 S. W. 2d 935.

No. 79–2041. CLAYTON *v.* CENTRAL SCHOOL DISTRICT No. 1 OF THE TOWNS OF CONKLIN ET AL. Appeal from Ct. App. N. Y. dismissed for want of properly presented federal question. Reported below: 49 N. Y. 2d 888, 405 N. E. 2d 235.

No. 79–6519. ZACKAI *v.* BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES FOR CHICAGO STATE UNIVERSITY. Appeal from Sup. Ct. Ill. dismissed for want of properly presented federal question. Reported below: 78 Ill. 2d 143, 399 N. E. 2d 590.

No. 79–2033. WOODWARD, ADMINISTRATOR *v.* BURNHAM CITY HOSPITAL ET AL. Appeal from Sup. Ct. Ill. dismissed for want of substantial federal question. JUSTICE BLACKMUN would note probable jurisdiction and set case for oral argument. Reported below: 79 Ill. 2d 295, 402 N. E. 2d 560.

No. 80–14. FAYETTEVILLE STREET CHRISTIAN SCHOOL ET AL. *v.* NORTH CAROLINA ET AL. Appeal from Sup. Ct. N. C. dismissed for want of jurisdiction. Reported below: 299 N. C. 351, 261 S. E. 2d 908.

No. 79–6630. ROCHE *v.* BIG MOOSE OIL FIELD TRUCK SERVICE ET AL. Appeal from Sup. Ct. La. dismissed for want of substantial federal question. JUSTICE BLACKMUN would note probable jurisdiction and set case for oral argument. Reported below: 381 So. 2d 396.

No. 79–6719. CONRAD *v.* PENN ET AL. Appeal from D. C. D. C. dismissed for want of jurisdiction.

No. 79–2044. NATIONAL COALITION FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY ET AL. *v.* HUFSTEDLER, SECRETARY OF EDUCATION, ET AL. Appeal from D. C. S. D. N. Y. dismissed for want of jurisdiction. JUSTICE STEWART took no part in the consideration or decision of this case. Reported below: 489 F. Supp. 1248.

No. 80–77. LOPEZ, GUARDIAN *v.* CITY OF DAYTON, OHIO, ET AL. Appeal from Ct. App. Ohio, Montgomery County, dismissed for want of jurisdiction.

No. 80–125. MEADS ET AL. *v.* CARTER, PRESIDENT OF THE UNITED STATES, ET AL. Appeal from D. C. D. C. dismissed for want of jurisdiction.

Vacated and Remanded on Appeal

No. 79–1938. MITCHELL, DIRECTOR, DEPARTMENT OF SOCIAL SERVICES OF UTAH, ET AL. *v.* D. R. Appeal from C. A. 10th Cir. Motion of appellee for leave to proceed *in forma pauperis* granted. Judgment vacated and case remanded for further consideration in light of *Harris* v. *McRae*, 448 U. S. 297 (1980), and *Williams* v. *Zbaraz*, 448 U. S. 358 (1980). JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, would affirm the judgment of the United States Court of Appeals for the Tenth Circuit. He therefore dissents and does so for the reasons set forth in the respective dissenting opinions filed by him and JUSTICE BRENNAN in *Harris* v. *McRae* and its companion cases, 448 U. S., at 348 and 329. Reported below: 617 F. 2d 203.

Certiorari Granted—Vacated and Remanded

No. 79-1557. MASSACHUSETTS *v.* HURLEY. Sup. Jud. Ct. Mass. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Cuyler* v. *Sullivan,* 446 U. S. 335 (1980). Reported below: — Mass. —, 405 N. E. 2d 97.

No. 79-1602. MISSOURI *v.* MORGAN. Sup. Ct. Mo. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Whalen* v. *United States,* 445 U. S. 684 (1980). Reported below: 592 S. W. 2d 796.

No. 79-1751. NEW YORK *v.* CONYERS. Ct. App. N. Y. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Jenkins* v. *Anderson,* 447 U. S. 231 (1980). Reported below: 49 N. Y. 2d 174, 400 N. E. 2d 342.

No. 79-1789. COTTON WAREHOUSE ASSN. ET AL. *v.* MARSHALL, SECRETARY OF LABOR, ET AL. C. A. D. C. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Industrial Union Dept.* v. *American Petroleum Institute,* 448 U. S. 607 (1980). Reported below: 199 U. S. App. D. C. 54, 617 F. 2d 636.

No. 79-1796. FREEMAN, DIRECTOR, MISSOURI DEPARTMENT OF SOCIAL SERVICES, ET AL. *v.* REPRODUCTIVE HEALTH SERVICES ET AL. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Harris* v. *McRae,* 448 U. S 297 (1980); *Williams* v. *Zbaraz,* 448 U. S. 358 (1980); and *Maher* v. *Gagne,* 448 U. S. 122 (1980). JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissents and does so for the reasons set forth in the respective dissenting opinions filed by him

and JUSTICE BRENNAN in *Harris* v. *McRae* and its companion cases, 448 U. S., at 348 and 329. Reported below: 614 F. 2d 585.

No. 79-2003. CALIFORNIA *v.* LANPHEAR. Sup. Ct. Cal. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Adams* v. *Texas*, 448 U. S. 38 (1980). Reported below: 26 Cal. 3d 814, 608 P. 2d 689.

No. 79-2004. FRANZEN ET AL. *v.* SMITH. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Jenkins* v. *Anderson*, 447 U. S. 231 (1980). Reported below: 618 F. 2d 1204.

No. 79-6514. LEWIS *v.* LOUISIANA STATE PENITENTIARY. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Cuyler* v. *Sullivan*, 446 U. S. 335 (1980). Reported below: 612 F. 2d 577.

No. 79-6770. GAVIN *v.* ANDERSON, WARDEN. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of the position presently asserted by the Attorney General of Michigan in his memorandum filed September 2, 1980. JUSTICE REHNQUIST dissents. Reported below: 620 F. 2d 302.

No. 80-5006. COON *v.* ALABAMA. Sup. Ct. Ala. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Beck* v. *Alabama*, 447 U. S. 625 (1980). Reported below: 380 So. 2d 990.

Certiorari Dismissed

No. 79-1996. DISTRICT ATTORNEY OF SACRAMENTO COUNTY *v.* SACRAMENTO COUNTY CIVIL SERVICE COMMISSION ET AL. Sup. Ct. Cal. Certiorari dismissed as moot. Reported below: 26 Cal. 3d 257, 604 P. 2d 1365.

No. 80-5122. BROWNELL *v.* ILLINOIS. Sup. Ct. Ill. Certiorari dismissed for want of jurisdiction. Reported below: 79 Ill. 2d 508, 404 N. E. 2d 181.

Miscellaneous Orders

No. A-1020 (O. T. 1979). GIOVINAZZI *v.* NEW JERSEY. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. A-1177 (O. T. 1979). JAFFER *v.* CITY OF MIAMI ET AL. Cir. Ct. Fla., Dade County. Application for stay, addressed to JUSTICE WHITE and referred to the Court, denied.

No. A-161. VON MEDLIN ET AL. *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CRUZ (COUNTY OF SANTA CRUZ, REAL PARTY IN INTEREST). Application for stay, addressed to JUSTICE POWELL and referred to the Court, denied.

No. A-232. MOBLEY ET AL. *v.* FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES. Application for stay of adoption, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. A-238. RAPIDES PARISH SCHOOL BOARD ET AL. *v.* VALLEY ET AL. D. C. W. D. La. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. 5, Orig. UNITED STATES *v.* CALIFORNIA. The Solicitor General is requested to file a response to the petition for rehearing within 30 days. JUSTICE MARSHALL took no part in the consideration or decision of this order. [For earlier order herein, see, *e. g.*, 447 U. S. 1.]

No. 1, Orig. WISCONSIN ET AL. *v.* ILLINOIS ET AL.;

No. 2, Orig. MICHIGAN *v.* ILLINOIS ET AL.; and

No. 3, Orig. NEW YORK *v.* ILLINOIS ET AL. Report of the Special Master received and ordered filed. Exceptions, if any, to the report may be filed within 14 days. Replies, if any, to the exceptions may be filed within seven days. Report of the Special Master with respect to costs received and ordered filed. JUSTICE MARSHALL took no part in the consideration or decision of these orders. [For earlier order herein, see, *e. g.*, 441 U. S. 921.]

No. 83, Orig. MARYLAND ET AL. *v.* LOUISIANA. Report of the Special Master on Motions of the Plaintiffs for Judgment on the Pleadings and of the Defendant for Dismissal of the Complaint received and ordered filed. Report of the Special Master filed May 14, 1980, and Report of the Special Master filed October 6, 1980, are set for oral argument in due course. [For earlier order herein, see, *e. g.*, 447 U. S. 902.]

No. 78–1841. CUYLER, CORRECTIONAL SUPERINTENDENT, ET AL. *v.* ADAMS. C. A. 3d Cir. [Certiorari granted, 444 U. S. 1069.] Motion of respondent for leave to proceed further herein *in forma pauperis* granted.

No. 79–395. UNITED STATES *v.* MORRISON. C. A. 3d Cir. [Certiorari granted, 448 U. S. 906.] Motion of respondent for appointment of counsel granted, and it is ordered that Salvatore J. Cucinotto, Esquire, of Philadelphia, Pa., be appointed to serve as counsel for respondent in this case.

No. 79–770. ENVIRONMENTAL PROTECTION AGENCY *v.* NATIONAL CRUSHED STONE ASSN. ET AL.; and COSTLE, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY *v.* CONSOLIDATION COAL CO. ET AL. C. A. 4th Cir. [Certiorari granted, 444 U. S. 1069.] Motion of the Solicitor General to permit Andrew J. Levander, Esquire, to present oral argument *pro hac vice* granted.

No. 79–408. CITY OF MILWAUKEE ET AL. *v.* ILLINOIS ET AL. C. A. 7th Cir. [Certiorari granted, 445 U. S. 926.] Motion of the Solicitor General to permit Andrew J. Levander, Esquire, to present oral argument *pro hac vice* granted.

No. 79–900. FEDERAL TRADE COMMISSION ET AL. *v.* STANDARD OIL COMPANY OF CALIFORNIA. C. A. 9th Cir. [Certiorari granted, 445 U. S. 903.] Motion of Washington Legal Foundation for leave to file a brief as *amicus curiae* granted.

No. 79–983. UNITED STATES *v.* WILL ET AL. D. C. N. D. Ill. [Probable jurisdiction postponed, 444 U. S. 1068]; and

No. 79–1689. UNITED STATES *v.* WILL ET AL. D. C. N. D. Ill. [Probable jurisdiction postponed, 447 U. S. 919.] Motion of appellees for divided argument granted.

No. 79–1260. CHANDLER ET AL. *v.* FLORIDA. Sup. Ct. Fla. [Probable jurisdiction noted, 446 U. S. 907.] Motion of CBS, Inc., for leave to file a brief as *amicus curiae* granted. Motion of Post-Newsweek Stations, Florida, Inc., for leave to participate in oral argument as *amicus curiae* denied.

No. 79–1266. STEADMAN *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 5th Cir. [Certiorari granted, 446 U. S. 917.] Motions of Securities Industry Association and National Committee of Discount Security Brokers for leave to participate in oral argument as *amici curiae* denied.

No. 79–1356. JOHNSON ET AL. *v.* BOARD OF EDUCATION OF THE CITY OF CHICAGO ET AL. C. A. 7th Cir. [Certiorari granted, 448 U. S. 910.] Motion of Pacific Legal Foundation for leave to file a brief as *amicus curiae* granted. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* granted, and 15 additional minutes allotted for that purpose. Respondents also allotted 15 additional minutes for oral argument.

No. 79–1336. CHICAGO & NORTH WESTERN TRANSPORTATION CO. *v.* KALO BRICK & TILE CO. Ct. App. Iowa. [Certiorari granted, 446 U. S. 951.] Motion of the Solicitor General for additional time for oral argument as *amicus curiae* granted, and five additional minutes allotted for that purpose. Respondent also allotted an additional five minutes for oral argument.

No. 79–1404. PENNHURST STATE SCHOOL AND HOSPITAL ET AL. *v.* HALDERMAN ET AL.;

No. 79–1408. MAYOR OF PHILADELPHIA ET AL. *v.* HALDERMAN ET AL.;

No. 79–1414. PENNSYLVANIA ASSOCIATION FOR RETARDED CITIZENS ET AL. *v.* PENNHURST STATE SCHOOL AND HOSPITAL ET AL.;

No. 79–1415. COMMISSIONERS AND MENTAL HEALTH/MENTAL RETARDATION ADMINISTRATOR FOR BUCKS COUNTY ET AL. *v.* HALDERMAN ET AL.; and

No. 79–1489. PENNHURST PARENTS-STAFF ASSN. *v.* HALDERMAN ET AL. C. A. 3d Cir. [Certiorari granted, 447 U. S. 904.] Motion of petitioners to dispense with printing appendix denied.

No. 79–1515. UNITED STATES *v.* SWANK ET AL. Ct. Cl. [Certiorari granted, 446 U. S. 934.] Motions of respondents for additional time for oral argument and for divided argument denied.

No. 79–1896. ARKANSAS LOUISIANA GAS CO. *v.* HALL ET AL. Ct. App. La., 2d Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States. JUSTICE STEWART took no part in the consideration or decision of this order.

No. 79–6436. RAY *v.* SOWDERS, REFORMATORY SUPERINTENDENT, 446 U. S. 969. Respondent is requested to file a response to the petition for rehearing within 30 days.

No. 79–1601. SUMNER, WARDEN *v.* MATA. C. A. 9th Cir. [Certiorari granted, 448 U. S. 910.] Motion of petitioner to dispense with printing appendix denied. Motion of respondent for appointment of counsel granted, and it is ordered that Ezra Hendon, Esquire, of San Francisco, Cal., be appointed to serve as counsel for respondent in this case.

No. 79–1841. GRANDDAD BREAD, INC. *v.* CONTINENTAL BAKING CO. C. A. 9th Cir.;

No. 79–1856. EATON CORP. *v.* FOX. C. A. 6th Cir.;

No. 79–1922. CENTRAL OF GEORGIA RAILROAD CO. *v.* HENDLEY. C. A. 5th Cir.;

No. 79–1953. FREEMAN, DIRECTOR, MISSOURI DEPARTMENT OF SOCIAL SERVICES, ET AL. *v.* CHAMBLY ET AL. C. A. 8th Cir.;

No. 79–2059. AMERICAN ELECTRIC POWER CO., INC., ET AL. *v.* CITY OF MISHAWAKA, INDIANA, ET AL. C. A. 7th Cir.;

No. 80–60. HERWEG ET VIR *v.* RAY, GOVERNOR OF IOWA, ET AL. C. A. 8th Cir.; and

No. 80–146. SHIFFRIN ET AL. *v.* BRATTON ET AL. C. A. 7th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 79–1835. ROBERTS *v.* RANDALL, U. S. CIRCUIT JUDGE, ET AL. Motion for leave to file petition for writ of certiorari and/or other relief denied.

No. 79–6689. STEELMAN *v.* RICKETTS, CORRECTIONS DIRECTOR, ET AL.;

No. 79–6896. STEELMAN *v.* RICKETTS, CORRECTIONS DIRECTOR, ET AL.; and

No. 80–5196. IN RE OLIVER. Motions for leave to file petitions for writs of habeas corpus denied.

No. 79–1527. ALASKA ET AL. *v.* MCGLYNN, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus denied.

No. 79–1787. LEONARD M. *v.* COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT (CALIFORNIA, REAL PARTY IN INTEREST);

No. 79–6742. REINER *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN ET AL.;

No. 79–6748. WHITE *v.* LIVELY, U. S. CIRCUIT JUDGE, ET AL.;

No. 80–163. IN RE CHESTNUTT MANAGEMENT CORP.;

No. 80–5181. IN RE GREEN; and

No. 80–5185. IN RE GREEN. Motions for leave to file petitions for writs of mandamus denied.

No. 79–6648. WRIGHT *v.* UNITED STATES. Motion for leave to file petition for writ of mandamus and other relief denied.

No. 79–6804. JACKSON ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS. Motion for leave to file petition for writ of mandamus and prohibition denied.

No. 79–6699. PAUL *v.* STAFFORD, U. S. DISTRICT JUDGE;

No. 80–5155. IN RE HERNANDEZ; and

No. 80–5164. IN RE ALLEN. Motions for leave to file petitions for writs of mandamus and/or prohibition denied.

No. 79–2018. MAROULIS *v.* COUNTY COURT OF DUTCHESS COUNTY ET AL. Motion for leave to file petition for writ of prohibition denied.

Probable Jurisdiction Noted or Postponed

No. 79–1740. BALL ET AL. *v.* JAMES ET AL. Appeal from C. A. 9th Cir. Probable jurisdiction noted. Reported below: 613 F. 2d 180.

No. 80–231. ANDRUS, SECRETARY OF THE INTERIOR, ET AL. *v.* INDIANA ET AL. Appeal from D. C. S. D. Ind. Probable jurisdiction noted. Reported below: 501 F. Supp. 452.

No. 79–1423. WESTERN & SOUTHERN LIFE INSURANCE CO. *v.* STATE BOARD OF EQUALIZATION OF CALIFORNIA. Appeal from Ct. App. Cal., 2d App. Dist. Probable jurisdiction noted. Reported below: 99 Cal. App. 3d 410, 159 Cal. Rptr. 539.

No. 79–1538. ANDRUS, SECRETARY OF THE INTERIOR *v.* VIRGINIA SURFACE MINING & RECLAMATION ASSN., INC., ET AL.; and

No. 79–1596. VIRGINIA SURFACE MINING & RECLAMATION ASSN., INC., ET AL. *v.* ANDRUS, SECRETARY OF THE INTERIOR. Appeals from D. C. W. D. Va. Probable jurisdiction noted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 483 F. Supp. 425.

No. 79–6779. LITTLE *v.* STREATER. Appeal from App. Sess., Super. Ct. Conn., New Haven Jud. Dist. Motion of appellant for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted.

No. 79–1952. CALIFORNIA MEDICAL ASSN. ET AL. *v.* FEDERAL ELECTION COMMISSION ET AL. Appeal from C. A. 9th Cir. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Reported below: 641 F. 2d 619.

Certiorari Granted

No. 79–1429. AMERICAN TEXTILE MANUFACTURERS INSTITUTE, INC., ET AL. *v.* MARSHALL, SECRETARY OF LABOR, ET AL.; and

No. 79–1583. NATIONAL COTTON COUNCIL OF AMERICA *v.* MARSHALL, SECRETARY OF LABOR, ET AL. C. A. D. C. Cir. Certiorari in No. 79–1429 granted limited to Questions 1, 2, and 4 presented by the petition. Certiorari in No. 79–1583 granted. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 199 U. S. App. D. C. 54, 617 F. 2d 636.

No. 79–1252. CALIFORNIA ET AL. *v.* SIERRA CLUB ET AL.; and

No. 79–1502. KERN COUNTY WATER AGENCY ET AL. *v.* SIERRA CLUB ET AL. C. A. 9th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 610 F. 2d 581.

No. 79–1890. ANDRUS, SECRETARY OF THE INTERIOR, ET AL. *v.* ALASKA ET AL.; and

No. 79–1904. KENAI PENINSULA BOROUGH *v.* ALASKA ET AL. C. A. 9th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 612 F. 2d 1210.

No. 79–1977. RODRIGUEZ *v.* COMPASS SHIPPING CO., LTD., ET AL.; PEREZ *v.* ARYA NATIONAL SHIPPING LINE, LTD.; and BARULEC *v.* OVE SKOU, R. A. C. A. 2d Cir. Certiorari granted limited to Questions 1, 2, and 3 presented by the petition. Reported below: 617 F. 2d 955 (first case); 622 F. 2d 575 (second case); 622 F. 2d 572 (third case).

No. 80–45. JOHNSON *v.* J. O. L. Ct. App. D. C. Certiorari granted and case set for oral argument in tandem with No. 79–5932, *Doe et al.* v. *Delaware* [probable jurisdiction noted, 445 U. S. 942]. Reported below: 409 A. 2d 1073.

No. 80–83. MUSKIE, SECRETARY OF STATE *v.* AGEE. C. A. D. C. Cir. Certiorari granted. Motion of respondent to vacate the stay heretofore entered by THE CHIEF JUSTICE denied. Reported below: 203 U. S. App. D. C. 46, 629 F. 2d 80.

No. 79–1709. ALBERNAZ ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted. Reported below: 612 F. 2d 906.

No. 79–1907. COMMISSIONER OF INTERNAL REVENUE *v.* PORTLAND CEMENT COMPANY OF UTAH. C. A. 10th Cir. Certiorari granted. Reported below: 614 F. 2d 724.

No. 79–1944. J. TRUETT PAYNE CO., INC. *v.* CHRYSLER MOTORS CORP. C. A. 5th Cir. Certiorari granted. Reported below: 607 F. 2d 1133.

No. 79–2006. BARRENTINE ET AL. *v.* ARKANSAS-BEST FREIGHT SYSTEM, INC., ET AL. C. A. 8th Cir. Motion of respondents to dismiss the memorandum for the United States as *amicus curiae* granted. Certiorari granted. Reported below: 615 F. 2d 1194.

No. 79–6423. LASSITER *v.* DEPARTMENT OF SOCIAL SERVICES OF DURHAM COUNTY. Ct. App. N. C. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 43 N. C. App. 525, 259 S. E. 2d 336.

No. 79–6740. BULLINGTON *v.* MISSOURI. Sup. Ct. Mo. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 594 S. W. 2d 908.

No. 79–6853. WEBB *v.* WEBB. Sup. Ct. Ga. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 245 Ga. 650, 266 S. E. 2d 463.

No. 80–5060. CARTER *v.* KENTUCKY. Sup. Ct. Ky. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 598 S. W. 2d 763.

No. 79–6624. ROSALES-LOPEZ *v.* UNITED STATES. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1 presented by the petition. Reported below: 617 F. 2d 1349.

No. 79–6777. STEAGALD *v.* UNITED STATES. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1 presented by the petition. Reported below: 606 F. 2d 540 and 615 F. 2d 642.

No. 80–11. MERRION ET AL., DBA MERRION & BAYLESS, ET AL. *v.* JICARILLA APACHE TRIBE ET AL.; and

No. 80–15. AMOCO PRODUCTION CO. ET AL. *v.* JICARILLA APACHE TRIBE ET AL. C. A. 10th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. JUSTICE STEWART took no part in the consideration or decision of these petitions. Reported below: 617 F. 2d 537.

Certiorari Denied. (See also Nos. 79–1530, 79–1846, 79–1889, 79–1969, 79–1972, 79–2026, 79–6626, 79–6634, 79–6646, 79–6652, 79–6672, 79–6678, 79–6820, 79–6847, 79–6866, 79–6898, 80–80, 80–138, 80–5018, and 80–5079, *supra.*)

No. 79–1362. AMERICAN FIDELITY LIFE INSURANCE CO. ET AL. *v.* ALABAMA FARM BUREAU MUTUAL CASUALTY INSURANCE CO., INC. C. A. 5th Cir. Certiorari denied. Reported below: 606 F. 2d 602.

No. 79–1376. PLISS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 622 F. 2d 577.

No. 79–1389. REINE *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 377 So. 2d 131.

No. 79–1406. CITY OF LOS ANGELES *v.* GREATER WESTCHESTER HOMEOWNERS ASSN. ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 26 Cal. 3d 86, 603 P. 2d 1329.

No. 79–1410. DUPART ET AL. *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 383 So. 2d 1226.

No. 79–1494. CLARK *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 613 F. 2d 391.

No. 79–1522. POTASHNICK ET AL. *v.* PORT CITY CONSTRUCTION CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 609 F. 2d 1101.

No. 79–1534. BUTLER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 608 F. 2d 1372.

No. 79-1544. MOORE *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 588 S. W. 2d 396.

No. 79-1552. DEPARTMENT OF REVENUE OF ALABAMA ET AL. *v.* FOX, FORMERLY DBA CHEROKEE CONSTRUCTION CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 609 F. 2d 178.

No. 79-1560. GARRETT *v.* ILLINOIS. C. A. 7th Cir. Certiorari denied. Reported below: 612 F. 2d 1038.

No. 79-1570. SMITH *v.* COTTON BROTHERS BAKING CO., INC. C. A. 5th Cir. Certiorari denied. Reported below: 609 F. 2d 738.

No. 79-1580. WOOTEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 615 F. 2d 1363.

No. 79-1586. ROBERTS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 644 F. 2d 683.

No. 79-1592. WEST *v.* BERGLAND, SECRETARY OF AGRICULTURE, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 611 F. 2d 710.

No. 79-1595. SHARPE *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 370 So. 2d 42.

No. 79-1599. SCM CORP. *v.* FEDERAL TRADE COMMISSION. C. A. 2d Cir. Certiorari denied. Reported below: 612 F. 2d 707.

No. 79-1610. DROBENA ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 612 F. 2d 1095.

No. 79-1611. METZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 608 F. 2d 147.

No. 79-1628. RUBIN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 96 Cal. App. 3d 968, 158 Cal. Rptr. 488.

No. 79–1635. SOUTH DAKOTA *v.* ANDRUS, SECRETARY OF THE INTERIOR, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 614 F. 2d 1190.

No. 79–1641. CARTER ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 613 F. 2d 256.

No. 79–1643. BOSCO *v.* BECK, REGION II ADMINISTRATOR, U. S. ENVIRONMENTAL PROTECTION AGENCY, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 614 F. 2d 769.

No. 79–1646. WEST GULF MARITIME ASSN. *v.* FEDERAL MARITIME COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 198 U. S. App. D. C. 59, 610 F. 2d 1001.

No. 79–1647. KOWALIK ET UX. *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 614 F. 2d 690.

No. 79–1652. MILLER *v.* LANDRIEU, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 198 U. S. App. D. C. 58, 610 F. 2d 1000.

No. 79–1653. WEARLY ET AL. *v.* FEDERAL TRADE COMMISSION ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 616 F. 2d 662.

No. 79–1655. HEAVY LIFT SERVICES, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 607 F. 2d 1121.

No. 79–1661. KEARNEY-NATIONAL, INC. *v.* BURNDY CORP. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1286.

No. 79–1667. HANNAHVILLE INDIAN COMMUNITY ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: —— Ct. Cl. ——, 614 F. 2d 1273.

No. 79–1672. LEA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 426.

No. 79–1673. ACAVINO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 620 F. 2d 290.

No. 79–1675. VICKNAIR ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 610 F. 2d 372.

No. 79–1685. BREITNER ET AL. *v.* HARRIS, DBA RICHARD HARRIS BUILDERS. C. A. 6th Cir. Certiorari denied.

No. 79–1686. RILEY *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 79–1687. KNIGHT ET AL. *v.* HEANEY, U. S. CIRCUIT JUDGE, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 614 F. 2d 1162.

No. 79–1688. MARCELLO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 79–1691. SUBAITANI *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 39 Md. App. 768.

No. 79–1696. ARNOLD ET AL. *v.* ELK GROVE VILLAGE. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 111.

No. 79–1697. ROWAN DRILLING CO. ET AL. *v.* WINK. C. A. 5th Cir. Certiorari denied. Reported below: 611 F. 2d 98.

No. 79–1704. GRCICH *v.* JOGODA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 615 F. 2d 1353.

No. 79–1705. INDEPENDENT BANKERS ASSOCIATION OF AMERICA *v.* HEIMANN, COMPTROLLER OF THE CURRENCY, UNITED STATES DEPARTMENT OF THE TREASURY. C. A. D. C. Cir. Certiorari denied. Reported below: 198 U. S. App. D. C. 431, 613 F. 2d 1164.

No. 79-1706. ANDREWS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 618 F. 2d 646.

No. 79-1707. DACOSTA ET AL. *v.* DACOSTA ET AL. Sup. Ct. Pa. Certiorari denied. Reported below: 487 Pa. 616, 410 A. 2d 782.

No. 79-1710. KONDRAT *v.* BYRON. Ct. App. Ohio, Lake County. Certiorari denied.

No. 79-1712. CARPENTERS DISTRICT COUNCIL OF SOUTHERN COLORADO ET AL. *v.* REID BURTON CONSTRUCTION, INC. C. A. 10th Cir. Certiorari denied. Reported below: 614 F. 2d 698.

No. 79-1717. WRITERS GUILD OF AMERICA, WEST, INC., ET AL. *v.* AMERICAN BROADCASTING COS., INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 609 F. 2d 355.

No. 79-1721. CARLE FOUNDATION *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 611 F. 2d 1192.

No. 79-1724. YEH *v.* SYSTEM DEVELOPMENT CORP. C. A. 9th Cir. Certiorari denied. Reported below: 614 F. 2d 778.

No. 79-1725. CITY OF BOCA RATON *v.* BOCA VILLAS CORP. ET AL.; and CITY OF BOCA RATON *v.* ARVIDA CORP. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 371 So. 2d 154 (first case); 371 So. 2d 160 (second case).

No. 79-1726. LEFKOWITZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 618 F. 2d 1313.

No. 79-1728. HOT SPRINGS COUNTY SCHOOL DISTRICT NUMBER ONE ET AL. *v.* WASHAKIE COUNTY SCHOOL DISTRICT NUMBER ONE ET AL. Sup. Ct. Wyo. Certiorari denied. Reported below: 606 P. 2d 310.

No. 79-1727. DILLON *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: — Ct. Cl. —, 618 F. 2d 124.

No. 79-1729. MCBRIDE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 615 F. 2d 1358.

No. 79-1730. COUNTY OF SANTA BARBARA *v.* COLLINS. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 99 Cal. App. 3d 537, 160 Cal. Rptr. 399.

No. 79-1731. STURGIS *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 379 So. 2d 534.

No. 79-1736. DARNEILLE ET AL. *v.* CARO. C. A. 2d Cir. Certiorari denied.

No. 79-1737. OGLE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 613 F. 2d 233.

No. 79-1741. WILSON ET AL. *v.* OMAHA INDIAN TRIBE ET AL.;

No. 79-1744. RGP, INC., ET AL. *v.* OMAHA INDIAN TRIBE ET AL.; and

No. 79-1779. IOWA ET AL. *v.* OMAHA INDIAN TRIBE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 614 F. 2d 1153.

No. 79-1742. AMERICAN STERILIZER CO. *v.* SYBRON CORP. ET AL.; and

No. 79-1916. SYBRON CORP. ET AL. *v.* AMERICAN STERILIZER CO. C. A. 3d Cir. Certiorari denied. Reported below: 614 F. 2d 890.

No. 79-1746. KILROY *v.* COSTLE, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 614 F. 2d 225.

No. 79–1748. General Committee of Adjustment, United Transportation Union E *v.* Burlington Northern, Inc., et al. C. A. 8th Cir. Certiorari denied. Reported below: 620 F. 2d 161.

No. 79–1752. Adams et al. *v.* United States et al. C. A. 8th Cir. Certiorari denied. Reported below: 620 F. 2d 1277.

No. 79–1753. Conway et al. *v.* Mississippi. Sup. Ct. Miss. Certiorari denied. Reported below: 381 So. 2d 1019.

No. 79–1755. Gullo *v.* Lambert et al. Cir. Ct. Arlington County, Va. Certiorari denied.

No. 79–1756. Keenan Motors, Inc. *v.* A. R. D. Corp. C. A. 3d Cir. Certiorari denied. Reported below: 620 F. 2d 287.

No. 79–1759. Eliason Corp. *v.* National Sanitation Foundation et al. C. A. 6th Cir. Certiorari denied. Reported below: 614 F. 2d 126.

No. 79–1761. Seay *v.* North Carolina. Ct. App. N. C. Certiorari denied. Reported below: 44 N. C. App. 301, 260 S. E. 2d 786.

No. 79–1762. Tower Loan of Mississippi, Inc. *v.* Harris. C. A. 5th Cir. Certiorari denied. Reported below: 609 F. 2d 120.

No. 79–1763. Chlorine Institute, Inc., et al. *v.* Occupational Safety and Health Administration et al. C. A. 5th Cir. Certiorari denied. Reported below: 613 F. 2d 120.

No. 79–1765. Arthur Andersen & Co. *v.* Stewart et al. C. A. 1st Cir. Certiorari denied. Reported below: 614 F. 2d 11.

No. 79–1768. Myers *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 613 F. 2d 230.

No. 79–1767. WILMINGTON UNITED NEIGHBORHOODS ET AL. *v.* U. S. DEPARTMENT OF HEALTH AND HUMAN SERVICES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 615 F. 2d 112.

No. 79–1769. SANDERS *v.* OLIVER ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 611 F. 2d 804.

No. 79–1770. SWINEHART *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 614 F. 2d 853.

No. 79–1771. TRIO PROCESS CORP. ET AL. *v.* L. GOLDSTEIN'S SONS, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 612 F. 2d 1353.

No. 79–1774. LOOK *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: — Mass. —, 402 N. E. 2d 470.

No. 79–1775. KONDRAT *v.* MITROVICH ET AL. Ct. App. Ohio, Lake County. Certiorari denied.

No. 79–1778. FLISK, RECEIVER *v.* PEOPLES GAS LIGHT & COKE CO. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 79–1781. MOREJON-PACHECO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 610 F. 2d 1296.

No. 79–1782. SHOEMAKER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 615 F. 2d 1363.

No. 79–1783. SMITH *v.* OHIO. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 79–1785. NORTHERN NATURAL GAS CO. *v.* PREMIER RESOURCES, LTD. C. A. 10th Cir. Certiorari denied. Reported below: 616 F. 2d 1171.

No. 79–1786. SHAFFER *v.* BOND. Ct. App. Okla. Certiorari denied.

No. 79–1788. JUSTAK *v.* BOCHNOWSKI ET AL. Ct. App. Ind. Certiorari denied. Reported below: — Ind. App. —, 391 N. E. 2d 872.

No. 79–1790. WATSON ET UX. *v.* COLLEX, INC. C. A. 3d Cir. Certiorari denied. Reported below: 615 F. 2d 1355.

No. 79–1792. MCALESTER CORP., DBA ALRIDGE HOTEL, ET AL. *v.* MARSHALL, SECRETARY OF LABOR. C. A. 10th Cir. Certiorari denied.

No. 79–1793. HARRISON *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 622 F. 2d 573.

No. 79–1797. DONOVAN WIRE & IRON CO. *v.* WHEELING-PITTSBURGH STEEL CORP. C. A. 4th Cir. Certiorari denied. Reported below: 614 F. 2d 945.

No. 79–1799. LAUFGAS *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 79–1801. LIBBEY-OWENS-FORD CO. *v.* EIRHART ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 616 F. 2d 278.

No. 79–1803. GREEN ET AL. *v.* LOUISIANA; and

No. 79–2045. DUPUIS ET AL. *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 378 So. 2d 934.

No. 79–1804. GARCIA-JARAMILLO *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 604 F. 2d 1236.

No. 79–1807. NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 615 F. 2d 1361.

No. 79–1806. BISSO TOWBOAT CO. *v.* BAZILE. C. A. 5th Cir. Certiorari denied. Reported below: 606 F. 2d 101.

No. 79–1808. BONFOEY *v.* EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 610 F. 2d 816.

No. 79–1811. DOE ET AL. *v.* IRWIN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 615 F. 2d 1162.

No. 79–1813. WEBB ET AL. *v.* UNITED STATES; and
No. 79–6782. JOHNS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 615 F. 2d 672.

No. 79–1815. SALOB *v.* AMBACH, COMMISSIONER OF EDUCATION OF NEW YORK, ET AL. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 73 App. Div. 2d 756, 423 N. Y. S. 2d 305.

No. 79–1817. NELIPOWITZ *v.* CHRISTO ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1289.

No. 79–1818. BEACON NATIONAL INSURANCE CO. ET AL. *v.* TEXAS STATE BOARD OF INSURANCE ET AL. Ct. Civ. App. Tex., 3d Sup. Jud. Dist. Certiorari denied. Reported below: 582 S. W. 2d 616.

No. 79–1821. KESLER *v.* INDIANA SUPREME COURT DISCIPLINARY COMMISSION. Sup. Ct. Ind. Certiorari denied. Reported below: — Ind. —, 397 N. E. 2d 574.

No. 79–1823. NORTHFIELD CHEESE CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. Reported below: 620 F. 2d 289.

No. 79–1824. MALLOW ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 79–1828. PAVILONIS *v.* KING, GOVERNOR OF MASSACHUSETTS, ET AL.; and PAVILONIS *v.* SECRETARY OF EDUCATION. C. A. 1st Cir. Certiorari denied.

No. 79–1831. HECKER *v.* TOWNSHIP OF DOVER. Super. Ct. N. J. Certiorari denied.

No. 79–1833. AKRON, CANTON & YOUNGSTOWN RAILROAD CO. ET AL. *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 611 F. 2d 1162.

No. 79–1836. FOWLER ET UX. *v.* GENERAL DEVELOPMENT CORP. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 98.

No. 79–1837. ROBINSON *v.* GRIEVANCE COMMITTEE OF THE SEVENTH JUDICIAL DISTRICT. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 70 App. Div. 2d 209, 420 N. Y. S. 2d 430.

No. 79–1839. FAZIO ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 611 F. 2d 1066.

No. 79–1842. D. J. MCDUFFIE, INC., ET AL. *v.* OLD RELIABLE FIRE INSURANCE CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 608 F. 2d 145.

No. 79–1843. MASON ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: — Ct. Cl. —, 615 F. 2d 1343.

No. 79–1844. DEPARTMENT OF NATURAL RESOURCES OF WASHINGTON ET AL. *v.* THURSTON COUNTY ET AL. Sup. Ct. Wash. Certiorari denied. Reported below: 92 Wash. 2d 656, 601 P. 2d 494.

No. 79–1845. CASTAGNA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 620 F. 2d 1026.

No. 79–1847. MASON *v.* MCDOWELL. C. A. 3d Cir. Certiorari denied. Reported below: 614 F. 2d 770.

No. 79-1848. RETAIL STORE EMPLOYEES UNION, LOCAL NO. 919, ET AL. *v.* UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1291.

No. 79-1849. RINGLING BROS.-BARNUM & BAILEY COMBINED SHOWS, INC., ET AL. *v.* NEW YORK STATE TAX COMMISSION ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 72 App. Div. 2d 978, 421 N. Y. S. 2d 752.

No. 79-1850. MARTEN ET AL. *v.* THIES, DIRECTOR, SAN BERNARDINO COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 99 Cal. App. 3d 161, 160 Cal. Rptr. 57.

No. 79-1851. BARNDT *v.* WISSAHICKON SCHOOL DISTRICT ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 615 F. 2d 1352.

No. 79-1854. LANGE ET AL. *v.* NATURE CONSERVANCY, INC., ET AL. Ct. App. Wash. Certiorari denied. Reported below: 24 Wash. App. 416, 601 P. 2d 963.

No. 79-1855. EASTALCO ALUMINUM CO. *v.* PUBLIC SERVICE COMMISSION OF MARYLAND ET AL. Ct. Sp. App. Md. Certiorari denied. Reported below: 44 Md. App. 754.

No. 79-1858. CASTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 615 F. 2d 1111.

No. 79-1859. GREYHOUND CORP. ET AL. *v.* MT. HOOD STAGES, INC., DBA PACIFIC TRAILWAYS. C. A. 9th Cir. Certioari denied. Reported below: 616 F. 2d 394.

No. 79-1860. GOINGS *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 79-1861. EPP ET AL. *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 79–1864. FIUMARA ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 620 F. 2d 290.

No. 79–1866. SKALICKY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 615 F. 2d 1117.

No. 79–1867. JONES *v.* ALEXANDER, SECRETARY OF THE ARMY. C. A. 5th Cir. Certiorari denied. Reported below: 609 F. 2d 778.

No. 79–1868. POTTER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 616 F. 2d 384.

No. 79–1869. S & M MATERIALS CO. *v.* SOUTHERN STONE CO., INC. C. A. 5th Cir. Certiorari denied. Reported below: 612 F. 2d 198.

No. 79–1871. CASTILLO *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 3d Cir. Certiorari denied. Reported below: 614 F. 2d 769.

No. 79–1872. HOOD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 620 F. 2d 305.

No. 79–1873. HERTHEL *v.* UNITED STATES;
No. 79–6673. HOLT *v.* UNITED STATES;
No. 79–6674. JOHNSON *v.* UNITED STATES; and
No. 79–6688. AHLBRAND *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 620 F. 2d 305.

No. 79–1875. ENERGY CONSUMERS & PRODUCERS ASSN., INC. *v.* DEPARTMENT OF ENERGY. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 632 F. 2d 129.

No. 79–1876. BLAKE ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Reported below: 615 F. 2d 731.

No. 79–1877. UNION OIL COMPANY OF CALIFORNIA *v.* EVANSON ET AL. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 619 F. 2d 72.

No. 79-1879. BOHACK CORP. *v.* IOWA BEEF PROCESSORS, INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 615 F. 2d 777.

No. 79-1882. BOYLAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 620 F. 2d 359.

No. 79-1884. WISCONSIN ET AL. *v.* REESE, TRUSTEE IN BANKRUPTCY, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 612 F. 2d 963.

No 79-1885. LAW ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 614 F. 2d 775.

No. 79-1888. ORION RESEARCH INC. *v.* ENVIRONMENTAL PROTECTION AGENCY. C. A. 1st Cir. Certiorari denied. Reported below: 615 F. 2d 551.

No. 79-1893. FREEDOM INSTITUTE OF AMERICA ET AL. *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 79-1894. PAGNIELLO *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 79-1897. G. G. S., INC. *v.* LINOLEX SYSTEMS, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 110.

No. 79-1898. L'HOSTE ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 609 F. 2d 796.

No. 79-1899. LOUISIANA *v.* MENNE. Sup. Ct. La. Certiorari denied. Reported below: 380 So. 2d 14.

No. 79-1900. FREEMAN *v.* O'NEAL STEEL, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 609 F. 2d 1123.

No. 79-1902. ROSENBAUM *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 113.

No. 79–1903. BEELER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 620 F. 2d 305.

No. 79–1905. SEA ISLAND BROADCASTING CORPORATION OF SOUTH CAROLINA *v.* FEDERAL COMMUNICATIONS COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: 200 U. S. App. D. C. 187, 627 F. 2d 240.

No. 79–1906. MAYOR OF BALTIMORE ET AL. *v.* BARGER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 616 F. 2d 730.

No. 79–1911. RUTH *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: — Pa. Super. —, 424 A. 2d 544.

No. 79–1912. FULTZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 622 F. 2d 204.

No. 79–1914. HARBOUR *v.* HARBOUR. Ct. Civ. App. Tex., 14th Sup. Jud. Dist. Certiorari denied. Reported below: 590 S. W. 2d 828.

No. 79–1915. CITY OF CLEVELAND *v.* KRUPANSKY, U. S. DISTRICT JUDGE, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 619 F. 2d 572 and 576.

No. 79–1917. CHAPLAIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 621 F. 2d 1272.

No. 79–1919. HUWALDT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 622 F. 2d 590.

No. 79–1921. TREASURER, PRINCE GEORGE'S COUNTY, MARYLAND *v.* WASHINGTON NATIONAL ARENA LIMITED PARTNERSHIP ET AL. Ct. App. Md. Certiorari denied. Reported below: 287 Md. 38, 410 A. 2d 1060.

No. 79–1923. AGAPITO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 620 F. 2d 324.

No. 79-1924. INDEPENDENT ORDER OF FORESTERS *v.* BIER ET AL. Super. Ct. Cal., County of Los Angeles. Certiorari denied.

No. 79-1925. MOUNTAINEER EXCAVATING CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 102.

No. 79-1926. UNION CAMP CORP. *v.* SEABOARD COAST LINE RAILROAD CO. C. A. 5th Cir. Certiorari denied. Reported below: 613 F. 2d 604.

No. 79-1927. FRANCIS *v.* UNITED STATES; and
No. 80-292. DELILLO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 620 F. 2d 939.

No. 79-1928. TULLY CORPORATION OF VIRGINIA *v.* WINTER, A MINOR BY WINTER. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 113.

No. 79-1929. BANKS ET UX. *v.* PHILLIPS. Ct. App. N. C. Certiorari denied. Reported below: 43 N. C. App. 739, 260 S. E. 2d 97.

No. 79-1930. ALBERNAZ ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 585 F. 2d 1234 and 612 F. 2d 906.

No. 79-1931. SANDER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 615 F. 2d 215.

No. 79-1932. THORNTON *v.* EQUIFAX, INC. C. A. 8th Cir. Certiorari denied. Reported below: 619 F. 2d 700.

No. 79-1933. WESLEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 614 F. 2d 1297.

No. 79-1934. DANIELS *v.* SOUTHERN CALIFORNIA RAPID TRANSIT DISTRICT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 615 F. 2d 1367.

No. 79-1935. SOUTHERN PACIFIC TRANSPORTATION CO. *v.* BAILEY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 613 F. 2d 1385.

No. 79-1936. MARENO, A MINOR BY MARENO *v.* WALKER ET AL. C. A. 2d Cir. Certiorari denied.

No. 79-1937. WALNUT PROPERTIES, INC. *v.* LONG BEACH CITY COUNCIL. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 100 Cal. App. 3d 1018, 161 Cal. Rptr. 411.

No. 79-1940. U. S. CABLEVISION CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 341.

No. 79-1942. SHAFFER *v.* COOK, JUDGE. Sup. Ct. Okla. Certiorari denied.

No. 79-1945. RONCKETTI ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied.

No. 79-1947. SCHAFFAN ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. Reported below: 614 F. 2d 860.

No. 79-1948. WINNEBAGO TRIBE OF NEBRASKA *v.* RAY, DISTRICT ENGINEER, UNITED STATES ARMY CORPS OF ENGINEERS, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 621 F. 2d 269.

No. 79-1949. KAIN *v.* S.S. VJAZMA ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 612 F. 2d 577.

No. 79-1950. BERK, EXECUTRIX *v.* COUNTY OF LOS ANGELES ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 26 Cal. 3d 201, 605 P. 2d 381.

No. 79-1951. PUCKETT *v.* PAULDING COUNTY, GEORGIA, BY ITS BOARD OF COMMISSIONERS. Sup. Ct. Ga. Certiorari denied. Reported below: 245 Ga. 439, 265 S. E. 2d 579.

No. 79-1954. THOMPSON *v.* J. S. YOUNG CO.; and THOMPSON *v.* OIL, CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO. C. A. 4th Cir. Certiorari denied. Reported below: 612 F. 2d 1310 (both cases).

No. 79-1955. HAYS *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied.

No. 79-1956. CLEAN LAND AIR WATER CORP. *v.* WASTE SYSTEMS, INC., ET AL. C. A. 5th Cir. Certiorari denied.

No. 79-1957. PISEL ET UX. *v.* ITT CONTINENTAL BAKING CO. ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 61 Ohio St. 2d 142, 399 N. E. 2d 1243.

No. 79-1958. INDIANA REFRIGERATOR LINES, INC. *v.* WISCONSIN PACKING CO., INC. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 441.

No. 79-1960. POWERS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 622 F. 2d 317.

No. 79-1961. BEARCE, ADMINISTRATOR, ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 614 F. 2d 556.

No. 79-1962. MURRAY *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 621 F. 2d 1163.

No. 79-1963. PRESIDIO BRIDGE CO. *v.* MUSKIE, SECRETARY OF STATE, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 612 F. 2d 578.

No. 79-1965. COUNTY OF LOS ANGELES ET AL. *v.* MARSHALL, SECRETARY OF LABOR, ET AL; and

No. 80-72. MARSHALL, SECRETARY OF LABOR, ET AL. *v.* COUNTY OF LOS ANGELES ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: — U. S. App. D. C. —, 631 F. 2d 767.

No. 79-1966. COLONIAL PENN INSURANCE CO. *v.* SHOCKLEY. C. A. 5th Cir. Certiorari denied. Reported below: 615 F. 2d 233.

No. 79-1968. GORDON *v.* BOARD OF GOVERNORS OF FEDERAL RESERVE SYSTEM ET AL. C. A. 5th Cir. Certiorari denied.

No. 79-1971. JACOBSEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 614 F. 2d 292.

No. 79-1973. MOLLY MURPHY'S, INC., ET AL. *v.* MASTERS. C. A. 10th Cir. Certiorari denied.

No. 79-1974. LETTS INDUSTRIES, INC. *v.* WIERSEMA. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 112.

No. 79-1975. METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, MARION COUNTY, INDIANA *v.* BUCKLEY ET AL.;

No. 79-2001. BOWEN, GOVERNOR OF INDIANA, ET AL. *v.* BUCKLEY ET AL.;

No. 79-2067. METROPOLITAN SCHOOL DISTRICT OF LAWRENCE, WARREN AND WAYNE TOWNSHIPS, MARION COUNTY, INDIANA, ET AL. *v.* BUCKLEY ET AL.;

No 80-99. SCHOOL TOWN OF SPEEDWAY, INDIANA, ET AL. *v.* BUCKLEY ET AL.;

No. 80-115. HOUSING AUTHORITY OF THE CITY OF INDIANAPOLIS, INDIANA *v.* BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, ET AL.; and

No. 80-129. BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, ET AL. *v.* METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, INDIANA, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 637 F. 2d 1101.

No. 79-1976. RAYMER *v.* DOUBLEDAY & CO., INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 615 F. 2d 241.

No. 79–1978. WEEREN ET AL. *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 26 Cal. 3d 654, 607 P. 2d 1279.

No. 79–1979. GARRAHY, GOVERNOR OF RHODE ISLAND, ET AL. *v.* PALMIGIANO ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 616 F. 2d 598.

No. 79–1980. THOMAS, DBA J & J EXXON, ET AL. *v.* CITY OF MARIETTA, GEORGIA, ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 245 Ga. 485, 265 S. E. 2d 775.

No. 79–1981. ARRIGALE ET UX. *v.* INTERNATIONAL FIDELITY INSURANCE CO. C. A. 3d Cir. Certiorari denied. Reported below: 615 F. 2d 1353.

No. 79–1982. FULCHER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 200 U. S. App. D. C. 121, 626 F. 2d 985.

No. 79–1983. LOCAL 13889, UNITED STEELWORKERS OF AMERICA *v.* SMITH ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 619 F. 2d 1229.

No. 79–1985. JOURDAIN ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. Reported below: 617 F. 2d 507.

No. 79–1986. APPLEMAN ET AL. *v.* BEACH, ASSESSOR OF BERNALILLO COUNTY, ET AL. Sup. Ct. N. M. Certiorari denied. Reported below: 94 N. M. 237, 608 P. 2d 1119.

No. 79–1987. YIAMOUYIANNIS *v.* CONSUMERS UNION OF THE UNITED STATES, INC. C. A. 2d Cir. Certiorari denied. Reported below: 619 F. 2d 932.

No. 79–1990. ARCHER *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 49 N. Y. 2d 978, 406 N. E. 2d 804.

No. 79-1991. LOWENSCHUSS *v.* BLUHDORN ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 613 F. 2d 18.

No. 79-1992. LAVELLE *v.* WORKERS' COMPENSATION APPEALS BOARD OF CALIFORNIA ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 79-1993. HORAK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 625 F. 2d 767.

No. 79-1994. BALANO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 618 F. 2d 624.

No. 79-1999. FRANKLIN PROPERTY CO., DBA HILTON INN *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 617 F. 2d 447.

No. 79-2000. COHEN V. PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 489 Pa. 167, 413 A. 2d 1066.

No. 79-2002. KONSKI ENGINEERS, P. C., ET AL. *v.* LEVITT, COMPTROLLER OF NEW YORK, ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 49 N. Y. 2d 850, 404 N. E. 2d 1337.

No. 79-2005. SHARROW *v.* HOLTZMAN. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1290.

No. 79-2007. WILLIAMS *v.* INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 617 F. 2d 441.

No. 79-2008. SANTA FE LAND IMPROVEMENT CO. *v.* CITY OF BERKELEY ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 26 Cal. 3d 515, 606 P. 2d 362.

No. 79-2011. ELLIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 617 F. 2d 604.

No. 79–2012. GALLAGHER *v.* CHRYSLER CORP. C. A. 6th Cir. Certiorari denied. Reported below: 613 F. 2d 167.

No. 79–2013. ANGRIST *v.* UNITED STATES; and

No. 79–2017. WEXLER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 621 F. 2d 1218.

No. 79–2015. THOMAS ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 617 F. 2d 436.

No. 79–2020. HAMMETT *v.* ROCKWELL INTERNATIONAL CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 614 F. 2d 1295.

No. 79–2021. STRAND *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 617 F. 2d 571.

No. 79–2022. BUCHER ET AL. *v.* SHUMWAY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 622 F. 2d 572.

No. 79–2023. PATINO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 633 F. 2d 208.

No. 79–2024. URBATEC *v.* YUMA COUNTY, ARIZONA. C. A. 9th Cir. Certiorari denied. Reported below: 614 F. 2d 1216.

No. 79–2025. STERRITT TRUCKING, INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied.

No. 79–2027. ANDERSON, LEGAL REPRESENTATIVE OF ANDERSON'S ESTATE, ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 614 F. 2d 535.

No. 79–2029. HOEHLING *v.* UNIVERSAL CITY STUDIOS, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 618 F. 2d 972.

No. 79–2031. INSURANCE COMPANY OF NORTH AMERICA *v.* POYNER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 618 F. 2d 1186.

No. 79-2035. ALLEN *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 380 So. 2d 313.

No. 79-2036. FARRI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 622 F. 2d 579.

No. 79-2037. MISSOURI *v.* NATIONAL ORGANIZATION FOR WOMEN, INC. C. A. 8th Cir. Certiorari denied. Reported below: 620 F. 2d 1301.

No. 79-2038. KIMBROUGH *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 78 Ill. App. 3d 1200, 406 N. E. 2d 1161.

No. 79-2039. CASASSA *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 49 N. Y. 2d 668, 404 N. E. 2d 1310.

No. 79-2042. BRONSTEIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 623 F. 2d 1327.

No. 79-2043. WIGGINESS, INC., ET AL. *v.* FRUCHTMAN, COMMISSIONER, DEPARTMENT OF BUILDINGS OF NEW YORK CITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 628 F. 2d 1346.

No. 79-2046. DAZET *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 378 So. 2d 1369.

No. 79-2047. SIMMONS *v.* IOWA ET AL. Sup. Ct. Iowa. Certiorari denied. Reported below: 290 N. W. 2d 589.

No. 79-2048. DYKSTRA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 622 F. 2d 595.

No. 79-2050. CHROME PLATE, INC. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 614 F. 2d 990.

No. 79-2052. SMITH *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 154 Ga. App. 190, 267 S. E. 2d 826.

No. 79–2053. SINN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 622 F. 2d 415.

No. 79–2055. MAZUR *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari before judgment denied.

No. 79–2057. POWELL *v.* NIGRO. C. A. D. C. Cir. Certiorari denied.

No. 79–2058. SILVERNAIL *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 25 Wash. App. 185, 605 P. 2d 1279.

No. 79–2061. ALSOBROOK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 620 F. 2d 139.

No. 79–2063. MCILROY ET AL., EXECUTORS *v.* ARKANSAS ET AL. Sup. Ct. Ark. Certiorari denied. Reported below: 268 Ark. 227, 595 S. W. 2d 659.

No. 79–2069. BULGIER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 472.

No. 79–2070. 0.086 ACRES OF LAND ET AL. *v.* DEPARTMENT OF TRANSPORTATION OF GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 154 Ga. App. 118, 267 S. E. 2d 651.

No. 79–2071. SCOTT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 615 F. 2d 918.

No. 79–2072. WILLIAMS ET UX. *v.* NEW YORK STATE HIGHER EDUCATION SERVICES CORP. C. A. 2d Cir. Certiorari denied. Reported below: 619 F. 2d 216.

No. 79–2073. BEHLING ET AL. *v.* SCHMIDT ET AL., DBA BROWN DEER DEVELOPMENT CO. Sup. Ct. Wis. Certiorari denied. Reported below: 95 Wis. 2d 731, 291 N. W. 2d 581.

No. 79–2074. ALLEN *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 382 So. 2d 11.

No. 79-2075. WISE *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 79-2076. YOUNG *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 618 F. 2d 1281.

No. 79-2077. NEW YORK WATER SERVICE CORP. *v.* PUBLIC SERVICE COMMISSION OF NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 49 N. Y. 2d 706, 405 N. E. 2d 710.

No. 79-2079. BURGESS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 620 F. 2d 305.

No. 79-2081. INENDINO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 622 F. 2d 592.

No. 79-2082. ANNICARO *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 375 So. 2d 860.

No. 79-2083. UNITED STEELWORKERS OF AMERICA ET AL. *v.* HOMER D. BRONSON CO. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1287.

No. 79-2084. SAN ANTONIO PORTLAND CEMENT CO. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 611 F. 2d 1148.

No. 79-6083. MCCOWAN *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 226 Kan. 752, 602 P. 2d 1363.

No. 79-6236. GODDARD *v.* VAUGHN, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below 614 F. 2d 929.

No. 79-6267. DEWITT *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 286 N. W. 2d 379.

No. 79-6285. HUDSON *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 286 Md. 569, 409 A. 2d 692.

No. 79-6321. BROWN *v.* MITCHELL, WARDEN. Sup. Ct. Va. Certiorari denied.

No. 79-6322. MITCHELL *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 593 S. W. 2d 280.

No. 79-6325. COOPER *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 79-6331. SAUNDERS *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 401 A. 2d 629.

No. 79-6348. LOWERY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 612 F. 2d 584.

No. 79-6365. BLADES *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 619 P. 2d 875.

No. 79-6372. WHITE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 377 So. 2d 1149.

No. 79-6373. RAGLAND *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 612 F. 2d 584.

No. 79-6380. INORIO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 622 F. 2d 576.

No. 79-6384. DEBENEDICTIS ET AL. *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 370 So. 2d 37.

No. 79-6385. STALLINGS *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 592 S. W. 2d 465.

No. 79-6387. COHEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 617 F. 2d 56.

No. 79-6396. FLYNN *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 92 Wis. 2d 427, 285 N. W. 2d 710.

No. 79-6403. LAPA *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 79-6407. GANEY *v.* EDWARDS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 609 F. 2d 507.

No. 79-6410. JAMES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 614 F. 2d 777.

No. 79-6434. PHELPS *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 245 Ga. 338, 265 S. E..2d 53.

No. 79-6447. HOLMES *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 79-6448. MARSHALL *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 372 So. 2d 477.

No. 79-6449. MONTIGUE *v.* OREGON. Sup. Ct. Ore. Certiorari denied. Reported below: 288 Ore. 359, 605 P. 2d 656.

No. 79-6453. MCGILL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 612 F. 2d 584.

No. 79-6454. STRUM *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 617 F. 2d 604.

No. 79-6456. PARTON *v.* WYRICK, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 614 F. 2d 154.

No. 79-6458. JOHNSON *v.* CITY OF BIRMINGHAM, ALABAMA. Ct. Crim. App. Ala. Certiorari denied.

No. 79-6460. JORDAN, AKA ADAMS *v.* OREGON. Sup. Ct. Ore. Certiorari denied. Reported below: 288 Ore. 391, 605 P. 2d 646.

No. 79-6467. WILLIS ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 617 F. 2d 604.

No. 79-6472. JONES *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 75 Ill. App. 3d 945, 393 N. E. 2d 1372.

No. 79-6474. BLACK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 609 F. 2d 1330.

No. 79-6477. CLARK *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 592 S. W. 2d 709.

No. 79-6481. FEISTMAN ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 614 F. 2d 776.

No. 79-6482. BRITT ET AL. *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 152 Ga. App. 695, 263 S. E. 2d 691.

No. 79-6484. CARO-CARVAJAL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 622 F. 2d 576.

No. 79-6499. EAKER *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 380 So. 2d 19.

No. 79-6500. WARREN *v.* GOVERNMENT NATIONAL MORTGAGE ASSN. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 611 F. 2d 1229.

No. 79-6506. COVINO *v.* MORRIS, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 79-6507. MARTINOVSKY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 618 F. 2d 118.

No. 79-6515. MASTERS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 612 F. 2d 1117.

No. 79-6516. CADENA *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 611 F. 2d 1385.

No. 79-6517. DIAZ *v.* ILLINOIS. App. Ct., Ill., 1st Dist. Certiorari denied. Reported below: 75 Ill. App. 3d 387, 394 N. E. 2d 465.

No. 79-6520. GREEN *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: — Ind. App. —, 390 N. E. 2d 1087.

No. 79-6521. MADRID *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 595 S. W. 2d 106.

No. 79-6522. ORTEGO *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 382 So. 2d 921.

No. 79-6524. GENTRY *v.* SMITH, REFORMATORY SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 612 F. 2d 580.

No. 79-6525. CEBALLO *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 380 So. 2d 626.

No. 79-6526. LATHAM *v.* HARRIS, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 620 F. 2d 285.

No. 79-6529. COX *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 79-6530. HARRIS *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 79-6533. HUANG *v.* ROSEN ET AL. Ct. App. D. C. Certiorari denied.

No. 79-6534. PUSTELNIK *v.* CANNONITO ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 1111.

No. 79-6535. WITHERS *v.* LEVINE, CORRECTION COMMISSIONER, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 615 F. 2d 158.

No. 79-6536. YOUNG *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 82 N. J. 292, 412 A. 2d 798.

No. 79-6541. SMITH *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 72 App. Div. 2d 636, 421 N. Y. S. 2d 144.

No. 79-6542. O'HERN *v.* CHICAGO TYPOGRAPHICAL UNION NO. 16 ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 605 F. 2d 559.

No. 79-6543. LEBLANC *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 612 F. 2d 1012.

No. 79-6544. SMITH *v.* COX, CORRECTIONAL SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. Reported below: 612 F. 2d 1310.

No. 79-6545. GORDON *v.* REDMAN, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 3d Cir. Certiorari denied.

No. 79-6548. HALL, ADMINISTRATRIX *v.* PARAMOUNT PICTURES CORP. ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 197 U. S. App. D. C. 180, 607 F. 2d 494.

No. 79-6549. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 613 F. 2d 573.

No. 79-6550. MOSES *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 245 Ga. 180, 263 S. E. 2d 916.

No. 79-6552. [illegible] *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 620 F. 2d 305.

No. 79-6553. [illegible] *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 615 F. 2d 704.

No. 79-6554. LOPEZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 615 F. 2d 1363.

No. 79-6555. CLOUDY *v.* REARDON. C. A. 7th Cir. Certiorari denied. Reported below: 614 F. 2d 774.

No. 79-6556. CRAWFORD *v.* EGELER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 617 F. 2d 602.

No. 79-6557. PHIPPS *v.* ROGERS, SHERIFF. C. A. 5th Cir. Certiorari denied. Reported below: 612 F. 2d 578.

No. 79-6559. BERRY *v.* ROBINSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 95.

No. 79-6560. GOW *v.* COUNTY OF DADE. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 371 So. 2d 493.

No. 79-6561. LONG *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 44 Md. App. 757.

No. 79-6562. KULWIEC *v.* AIR LINE PILOTS ASSN. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1288.

No. 79-6563. DAIGLE *v.* HAWAII. Sup. Ct. Haw. Certiorari denied.

No. 79-6564. LARD *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 79-6565. PHILLIPS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 79-6566. FELTON *v.* HARRIS, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 79-6568. SCOTT *v.* WARDEN, MARYLAND PENITENTIARY. Ct. Sp. App. Md. Certiorari denied.

No. 79-6569. CAREAGA *v.* JAMES, JUDGE, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 616 F. 2d 1062.

No. 79-6571. MUHAMMAD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 611 F. 2d 375.

No. 79-6573. BOAG *v.* CARDWELL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 79-6575. ROBINSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 620 F. 2d 306.

No. 79-6577. AUZENNE *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 380 So. 2d 626.

No. 79-6578. FARMER *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 79-6579. MATTHEWS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 620 F. 2d 288.

No. 79-6582. CABALDON *v.* ROMERO, WARDEN, ET AL.; and CORDOVA ET AL. *v.* ROMERO, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 614 F. 2d 1267 (second case).

No. 79-6586. DANIELS *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 61 Ohio St. 2d 220, 400 N. E. 2d 399.

No. 79-6589. KING *v.* MORLEY, JUDGE. Sup. Ct. Ohio. Certiorari denied.

No. 79-6590. AMAR *v.* CALIFORNIA; and
No. 79-6591. AMAR *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 79-6593. FIRMAN *v.* WARE, SHERIFF. C. A. 4th Cir. Certiorari denied. Reported below: 615 F. 2d 1357.

No. 79-6595. WARD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 622 F. 2d 298.

No. 79-6597. LAVONTE *v.* HARBER ET UX. Ct. App. Ore. Certiorari denied.

No. 79-6600. BLACKMON *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 608 F. 2d 183.

No. 79-6606. PRATT *v.* PARRATT, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 615 F. 2d 486.

No. 79-6607. THOMAS *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 61 Ohio St. 2d 254, 400 N. E. 2d 897.

No. 79-6613. GRUZEN *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 267 Ark. 380, 591 S. W. 2d 342.

No. 79-6616. HOFF *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 81 N. J. 401, 408 A. 2d 795.

No. 79-6617. LANE ET AL. *v.* AHUMADA. Sup. Ct. Miss. Certiorari denied. Reported below: 381 So. 2d 147.

No. 79-6620. MAXFILL *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 79-6621. STEVENS *v.* KIRKPATRICK. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 100.

No. 79-6622. PURYEAR *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 79-6623. STEELMAN *v.* BRAY, SHERIFF. C. A. 10th Cir. Certiorari denied.

No. 79-6627. TARKOWSKI *v.* ILLINOIS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 112.

No. 79-6628. TARKOWSKI *v.* COUNTY OF LAKE ET AL. C. A. 7th Cir. Reported below: 618 F. 2d 114.

No. 79-6631. GLEASON *v.* WYSE, YOUTH CENTER SUPERINTENDENT, ET AL. C. A. 1st Cir. Certiorari denied.

No. 79-6632. AMATO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 620 F. 2d 290.

No. 79-6633. MATHIS *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 242 Ga. 761, 251 S. E. 2d 305.

No. 79-6635. ROSS *v.* FAIRFAX COUNTY GOVERNMENT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 103.

No. 79-6638. YOUNG, AKA CLOUDY *v.* SYDOW, CAPTAIN, INDIANA STATE PRISON. C. A. 7th Cir. Certiorari denied. Reported below: 622 F. 2d 590.

No. 79-6640. RAHMAN, AKA MCGEE *v.* KOEHLER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 79-6641. CORBETT *v.* BORDENKIRCHER, PENITENTIARY SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 615 F. 2d 722.

No. 79-6642. MCKINLEY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 73 Ill. App. 3d 1107, 395 N. E. 2d 1246.

No. 79-6643. FINKLEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 615 F. 2d 1354.

No. 79-6644. CARTE *v.* PERINI, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied.

No. 79-6645. JOHNSON *v.* NUNES ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 627 F. 2d 1087.

No. 79-6647. MCFARLAND *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 287 N. W. 2d 162.

No. 79-6649. COLOMBANI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 628 F. 2d 1346.

No. 79-6650. SKIDMORE *v.* CONSOLIDATED RAIL CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 619 F. 2d 157.

No. 79-6651. CALDWELL ET AL. *v.* HENDERSON, REGIONAL DIRECTOR, BUREAU OF PRISONS, ET AL. C. A. 7th Cir. Certiorari denied.

No. 79-6653. WHITE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 620 F. 2d 306.

No. 79-6654. MCILVAIN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 79-6655. HANSON ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 618 F. 2d 1261.

No. 79-6656. CORSANI *v.* SENA, JUDGE, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 622 F. 2d 572.

No. 79-6657. MEJIA *v.* NEW YORK SHERATON HOTEL. C. A. 2d Cir. Certiorari denied.

No. 79-6658. NEAL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 620 F. 2d 305.

No. 79-6659. FAUST *v.* WATKINS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 615 F. 2d 1356.

No. 79-6660. MONEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 620 F. 2d 311.

No. 79-6661. OPACKI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 620 F. 2d 305.

No. 79-6662. VARGAS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 621 F. 2d 54.

No. 79-6664. ALFORD *v.* CENTRAL INTELLIGENCE AGENCY. C. A. 5th Cir. Certiorari denied. Reported below: 610 F. 2d 348.

No. 79-6665. DiSanto *v.* Massachusetts. Ct. App. Mass. Certiorari denied. Reported below: — Mass. App. —, 397 N. E. 2d 672.

No. 79-6666. Ciarcia et al. *v.* Thomas, U. S. District Judge. C. A. 6th Cir. Certiorari denied.

No. 79-6667. O'Dillon *v.* Georgia. Sup. Ct. Ga. Certiorari denied. Reported below: 245 Ga. 342, 265 S. E. 2d 18.

No. 79-6668. Birt *v.* Hopper, Warden. Sup. Ct. Ga. Certiorari denied. Reported below: 245 Ga. 221, 265 S. E. 2d 276.

No. 79-6670. Ford *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 620 F. 2d 290.

No. 79-6671. Goodman et al. *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 622 F. 2d 587.

No. 79-6675. Boyd *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 620 F. 2d 129.

No. 79-6676. Sullivan *v.* Estelle, Corrections Director. C. A. 5th Cir. Certiorari denied. Reported below: 617 F. 2d 294.

No. 79-6677. Pappas *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 620 F. 2d 306.

No. 79-6679. McCall *v.* Ohio. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 79-6680. Lebedun *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 615 F. 2d 1358.

No. 79-6681. Morton *v.* Stynchcombe, Sheriff, et al. C. A. 5th Cir. Certiorari denied. Reported below: 614 F. 2d 292.

No. 79-6683. POWELL *v.* BOOZER, ACTING REGIONAL ADMINISTRATOR, UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL. C. A. 9th Cir. Certiorari before judgment denied.

No. 79-6684. THIEL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 619 F. 2d 778.

No. 79-6685. ROE *v.* UNITED STATES ATTORNEY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 618 F. 2d 980.

No. 79-6686. BOLDEN *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 380 So. 2d 40.

No. 79-6687. TARKOWSKI *v.* ROBERT BARTLETT REALTY CO. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 109.

No. 79-6690. ROSADO ET AL. *v.* CIVILETTI, ATTORNEY GENERAL, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 621 F. 2d 1179.

No. 79-6691. THOMPSON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 594 S. W. 2d 456.

No. 79-6692. ROMERO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 610 F. 2d 814.

No. 79-6693. RIDEOUT *v.* UNITED STATES; and
No. 80-7. JABARA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 618 F. 2d 1319.

No. 79-6694. ESCALANTE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 637 F. 2d 1197.

No. 79-6695. CARTER *v.* THOMAS. C. A. 5th Cir. Certiorari denied.

No. 79-6696. HARBOLT *v.* DEPARTMENT OF STATE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 616 F. 2d 772.

No. 79-6697. ANDERSON *v.* MITCHELL ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 95.

No. 79-6698. FRAZIER *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 79-6700. MONTGOMERY *v.* BORDENKIRCHER, PENITENTIARY SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 620 F. 2d 127.

No. 79-6701. HOOK *v.* NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 620 F. 2d 285.

No. 79-6702. RAMOS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 73 App. Div. 2d 1065, 423 N. Y. S. 2d 974.

No. 79-6703. CROOKER *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 620 F. 2d 313.

No. 79-6707. BOGGS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 612 F. 2d 991.

No. 79-6708. JOSEPH *v.* GOVERNMENT OF THE VIRGIN ISLANDS. C. A. 3d Cir. Certiorari denied. Reported below: 612 F. 2d 572.

No. 79-6709. ALLISON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 616 F. 2d 779.

No. 79-6710. O'BRIEN *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 79-6711. THIESS *v.* FRANKLIN SQUARE HOSPITAL, INC., ET AL. Ct. Sp. App. Md. Certiorari denied. Reported below: 44 Md. App. 761.

No. 79-6712. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 616 F. 2d 759.

No. 79-6713. JEFFERSON *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 379 So. 2d 1389.

No. 79-6714. HELTON *v.* MOORE, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 617 F. 2d 603.

No. 79-6717. MCCORMICK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 620 F. 2d 295.

No. 79-6718. BIG DAY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 79-6720. GAMINEE ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 620 F. 2d 311.

No. 79-6721. SHEEHY ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 1234.

No. 79-6722. CERBO *v.* FAUVER, CORRECTIONS COMMISSIONER, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 616 F. 2d 714.

No. 79-6723. LONGORIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 624 F. 2d 66.

No. 79-6725. SILVA *v.* NEW YORK STATE DEPARTMENT OF AGRICULTURE AND MARKETS ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1290.

No. 79-6726. CARTER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 621 F. 2d 238.

No. 79-6727. KULWIEC *v.* UNITED AIR LINES, INC. C. A. 2d Cir. Certiorari denied. Reported below: 622 F. 2d 574.

No. 79-6728. RODRIGUEZ *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 72 App. Div. 2d 671, 422 N. Y. S. 2d 272.

No. 79-6729. WILLIAMS *v.* TALLAHASSEE MOTORS, INC. C. A. 5th Cir. Certiorari denied. Reported below: 607 F. 2d 689.

No. 79-6730. SCOTT *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 592 S. W. 2d 644.

No. 79-6732. INGRAM *v.* UNITED STATES; and
No. 80-5077. PORTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 622 F. 2d 588.

No. 79-6733. TILLER *v.* CARTER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 105.

No. 79-6734. LEE *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 79-6735. LAYTON *v.* PHEND, REFORMATORY SUPERINTENDENT. C. A. 7th Cir. Certiorari denied. Reported below: 622 F. 2d 592.

No. 79-6736. ENGLISH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 620 F. 2d 150.

No. 79-6737. HAWKINS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 618 F. 2d 117.

No. 79-6738. WHITE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 621 F. 2d 940.

No. 79-6739. KNOTT *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 379 So. 2d 1064.

No. 79-6741. CARABALLO *v.* NEW YORK. Sup. Ct. N. Y., Kings County. Certiorari denied.

No. 79-6744. GARRETT *v.* HUTTO, CORRECTIONS DIRECTOR. Sup. Ct. Va. Certiorari denied.

No. 79-6746. EAKER *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 100 Cal. App. 3d 1007, 161 Cal. Rptr. 417.

No. 79-6747. WHITE *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN. C. A. 6th Cir. Certiorari denied.

No. 79-6750. HARRYMAN *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 616 F. 2d 870.

No. 79-6753. ROSS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 598 S. W. 2d 885.

No. 79-6754. AHMETI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 633 F. 2d 206.

No. 79-6755. SHABAZZ, AKA PHILLIPS *v.* WILLIAMS ET AL. Sup. Ct. Okla. Certiorari denied. Reported below: 608 P. 2d 1131.

No. 79-6756. LEBEL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 622 F. 2d 1054.

No. 79-6757. RUCKER *v.* FICKAS ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 624 F. 2d 1108.

No. 79-6758. LUMBERT *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 79-6759. LANTZY *v.* HOWARD. C. A. 3d Cir. Certiorari denied.

No. 79-6760. MIRELES *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 79 Ill. App. 3d 173, 398 N. E. 2d 150.

No. 79-6762. BIB'LE *v.* STATE BAR OF CALIFORNIA ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 26 Cal. 3d 548, 606 P. 2d 733.

No. 79-6763. MOUTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 617 F. 2d 1379.

No. 79-6764. DAY *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied. Reported below: 94 N. M. 753, 617 P. 2d 142.

No. 79-6767. DAVIS *v.* STEPHENSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 620 F. 2d 293.

No. 79-6768. CARTER *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 73 App. Div. 2d 953, 424 N. Y. S. 2d 15.

No. 79-6769. LITTLE *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 153 Ga. App. 574, 266 S. E. 2d 265.

No. 79-6771. SCOTLAND *v.* GOVERNMENT OF THE VIRGIN ISLANDS. C. A. 3d Cir. Certiorari denied. Reported below: 622 F. 2d 578.

No. 79-6772. CLUGSTON ET AL. *v.* MICHIGAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 617 F. 2d 602.

No. 79-6773. ARTUSO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 618 F. 2d 192.

No. 79-6774. YAGY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 628 F. 2d 1346.

No. 79-6775. RUDD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 618 F. 2d 783.

No. 79-6776. ZAMORSKY *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 82 N. J. 287, 412 A. 2d 793.

No. 79-6778. BELTON *v.* PILVAX PRINTING CORP. ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 49 N. Y. 2d 830, 404 N. E. 2d 1335.

No. 79-6780. LEE *v.* WILLINS ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 617 F. 2d 320.

No. 79-6783. PAYNE *v.* OHIO. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 79–6784. CANADY *v.* UNITED STATES C. A. 5th Cir. Certiorari denied. Reported below: 615 F. 2d 694.

No. 79–6785. PRATER *v.* BROWN. C. A. 9th Cir. Certiorari denied.

No. 79–6786. WELLS *v.* SOUTHERN AIRWAYS, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 616 F. 2d 107.

No. 79–6787. SANCHEZ-JARAMILLO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 637 F. 2d 1094.

No. 79–6788. EASTON *v.* OREGON STATE BAR. Sup. Ct. Ore. Certiorari denied. Reported below: 289 Ore. 99, 610 P. 2d 270.

No. 79–6789. SMALLWOOD *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 414 A. 2d 8[illegible].

No. 79–6790. ARTHUR *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 488 Pa. 262, 412 A. 2d 498.

No. 79–6791. PARSLEY *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: — Ind. —, 401 N. E. 2d 1360.

No. 79–6792. TARKO *v.* BUCHANAN, DBA ARNOLD A. SEMLER, INC. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 111.

No. 79–6793. DAVIDSON *v.* WILKINSON, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 1215.

No. 79–6795. DUTT *v.* ALABAMA STATE UNIVERSITY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 614 F. 2d 1295.

No. 79-6796. NABORS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 620 F. 2d 305.

No. 79-6797. GRIFFIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 617 F. 2d 1342.

No. 79-6800. WILLIAMS *v.* MARYLAND. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 107.

No. 79-6802. WATTS *v.* HARRIS, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 5th Cir. Certiorari denied. Reported below: 614 F. 2d 515.

No. 79-6803. PADGETT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 619 F. 2d 783.

No. 79-6805. NAVARRO-SALAZAR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 620 F. 2d 311.

No. 79-6807. PARISIE *v.* IRVING, DIRECTOR, ILLINOIS PRISONER REVIEW BOARD, ET AL. C. A. 7th Cir. Certiorari denied.

No. 79-6808. BOYD *v.* SMITH, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 79-6810. PIGGIE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 622 F. 2d 486.

No. 79-6811. JAFFER *v.* DIEFFENDERFER, DADE COUNTY ELECTIONS SUPERVISOR, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 612 F. 2d 577.

No. 79-6812. MARTIN *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 616 F. 2d 566.

No. 79-6813. HAMILTON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 79-6814. LUPO *v.* HENDERSON, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 79-6815. AUSTIN *v.* WOODARD ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 622 F. 2d 581.

No. 79-6816. VENTURA *v.* CUPP, PENITENTIARY SUPERINTENDENT. Sup. Ct. Ore. Certiorari denied. Reported below: 289 Ore. 45; and 289 Ore. 135, 610 P. 2d 1232.

No. 79-6817. HERNANDEZ-ROJAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 617 F. 2d 533.

No. 79-6818. SMITH *v.* ASSIGNMENT OFFICE OF MONTGOMERY COUNTY CIRCUIT COURT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 622 F. 2d 586.

No. 79-6819. RIGDON *v.* RUSSELL ANACONDA ALUMINUM CO. ET AL. Sup. Ct. Miss. Certiorari denied. Reported below: 381 So. 2d 983.

No. 79-6821. HORTON, AKA BYNUM *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 622 F. 2d 580.

No. 79-6822. PINSON *v.* MAYWEBB HOSIERY MILLS ET AL. Sup. Ct. Miss. Certiorari denied. Reported below: 380 So. 2d 244.

No. 79-6823. WILSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 621 F. 2d 927.

No. 79-6824. WILLIS *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: — Ct. Cl. —, — F. 2d —.

No. 79-6827. HOLLEY *v.* COUNTY OF LOS ANGELES, CALIFORNIA, ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 102 Cal. App. 3d 926, 162 Cal. Rptr. 636.

No. 79-6828. MAINS *v.* BUTTERWORTH ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 619 F. 2d 83.

No. 79-6831. HUNTER *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 614 F. 2d 1296.

No. 79-6832. COLLINS *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 79-6836. MURCHISON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 630 F. 2d 1322.

No. 79-6837. TARKOWSKI *v.* SCOTT, ATTORNEY GENERAL OF ILLINOIS, ET AL. Sup. Ct. Ill. Certiorari denied.

No. 79-6838. TARKOWSKI *v.* ILLINOIS ET AL. Sup. Ct. Ill. Certiorari denied.

No. 79-6839. MOON *v.* OHIO. Ct. App. Ohio, Summit County. Certiorari denied.

No. 79-6840. RAY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 622 F. 2d 588.

No. 79-6841. NEELEY *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 79 Ill. App. 3d 528, 398 N. E. 2d 988.

No. 79-6842. GARRETT *v.* DIRECTOR, DEPARTMENT OF CORRECTIONS OF VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 79-6843. HOUSE *v.* FOGG, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 79-6844. MENDOZA-BAUTISTA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 618 F. 2d 118.

No. 79-6845. RIDDELL *v.* BRADLEY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 618 F. 2d 117.

No. 79-6849. CARTER *v.* MITCHELL, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 610 F. 2d 809.

No. 79-6850. ORTIZ *v.* HARRIS, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 620 F. 2d 285.

No. 79-6851. EYLER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 621 F. 2d 1255.

No. 79-6852. KRZEMINSKI *v.* PERINI, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 614 F. 2d 121.

No. 79-6855. LEWIS *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 79-6857. CROSBY *v.* UNITED STATES DEPARTMENT OF THE AIR FORCE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1286.

No. 79-6859. SMITH *v.* DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 615 F. 2d 1251.

No. 79-6861. MARATTY *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 597 S. W. 2d 609.

No. 79-6863. ANTILL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 615 F. 2d 648.

No. 79-6864. CARROLL *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: — Ind. —, 402 N. E. 2d 1234.

No. 79-6865. CARTER *v.* ADMINISTRATIVE JUDGES OF THE SUPREME COURT OF NEW YORK, KINGS COUNTY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 79-6867. HUSLAGE ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 622 F. 2d 580.

No. 79-6868. BUTLER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 622 F. 2d 258.

No. 79-6869. DOWD *v.* CUYLER, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 624 F. 2d 1089.

No. 79-6871. MCINERNEY *v.* BERMAN ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 621 F. 2d 20.

No. 79-6874. BOWEN *v.* OHIO. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 79-6875. NUTTER *v.* OHIO. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 79-6877. FASANO *v.* HALL ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 615 F. 2d 555.

No. 79-6878. COOPER *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: — Ind. —, 403 N. E. 2d 826.

No. 79-6879. DOE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 631 F. 2d 110.

No. 79-6880. ISAACS ET AL. *v.* BALKCOM, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 79-6881. ABU-BAKR, AKA KING *v.* COSTELLO ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 622 F. 2d 590.

No. 79-6882. BUCHANAN *v.* NORRIS, JAILER. C. A. 6th Cir. Certiorari denied. Reported below: 620 F. 2d 301.

No. 79-6883. RODRIGUEZ *v.* ROMERO, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 79-6886. GONZALES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 617 F. 2d 104.

No. 79-6889. BRINKLEY *v.* LEFEVRE, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 621 F. 2d 45.

No. 79-6890. FORSBERG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 618 F. 2d 117.

No. 79-6891. MCCRARY *v.* MEROLA, DISTRICT ATTORNEY OF BRONX COUNTY. C. A. 2d Cir. Certiorari denied. Reported below: 633 F. 2d 205.

No. 79-6892. BRYAN *v.* BYRD ET AL. C. A. 4th Cir. Certiorari denied.

No. 79-6893. SNEAD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 79-6894. SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 618 F. 2d 280.

No. 79-6895. PHILLIPS *v.* BROWN, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 79-6897. HAMPEL *v.* MOTEL PROPERTIES, INC. Ct. App. Ga. Certiorari denied. Reported below: 153 Ga. App. 507, 266 S. E. 2d 805.

No. 80-1. GREEN *v.* BARTHOLOMEW ET AL. C. A. 2d Cir. Certiorari denied.

No. 80-2. SMITH *v.* CHRYSLER CORP. C. A. 5th Cir. Certiorari denied. Reported below: 616 F. 2d 566.

No. 80-3. KELLOGG MALL ASSOCIATES *v.* BOARD OF COUNTY COMMISSIONERS OF SEDGWICK COUNTY, KANSAS, ET AL. Sup. Ct. Kan. Certiorari denied. Reported below: 227 Kan. 231, 607 P. 2d 1330.

No. 80–6. INTERNATIONAL LONGSHOREMEN'S ASSN., LOCAL 1402 *v.* MARSHALL, SECRETARY OF LABOR. C. A. 5th Cir. Certiorari denied. Reported below: 617 F. 2d 96.

No. 80–8. EVANS *v.* MATNEY. C. A. 10th Cir. Certiorari denied.

No. 80–9. ERATH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 614 F. 2d 777.

No. 80–10. BUTLER *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: — Ct. Cl. —, — F. 2d —.

No. 80–16. LAKESIDE POULTRY RANCH, INC., ET AL. *v.* WALLACE, DIRECTOR, DEPARTMENT OF FOOD AND AGRICULTURE OF CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 618 F. 2d 116.

No. 80–18. UNIVERSAL WASTE CONTROL ET AL. *v.* WESTERN WASTE SERVICE SYSTEMS. C. A. 9th Cir. Certiorari denied. Reported below: 616 F. 2d 1094.

No. 80–19. LEWIS ET AL. *v.* ANDERSON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 615 F. 2d 778.

No. 80–22. ORGANIZZAZOINE NAVOBI ITALIANA (URUGUAY), S. A., ET AL. *v.* TRANS INTERNATIONAL AIRLINES. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 114.

No. 80–23. SEELIG ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 622 F. 2d 207.

No. 80–24. CONTINENTAL TRAINING SERVICES, INC., ET AL. *v.* VENZARA. C. A. 5th Cir. Certiorari denied. Reported below: 614 F. 2d 292.

No. 80–27. DEVOTO ET AL. *v.* PACIFIC FIDELITY LIFE INSURANCE CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 618 F. 2d 1340.

No. 80–30. STALLER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 616 F. 2d 1284.

No. 80–31. MILLIKEN, GOVERNOR OF MICHIGAN, ET AL. *v.* BRADLEY ET AL.;

No. 80–48. BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF THE CITY OF DETROIT, MICHIGAN, ET AL. *v.* MILLIKEN, GOVERNOR OF MICHIGAN, ET AL.; and

No. 80–104. LULAC COUNCIL 11054 ET AL. *v.* MILLIKEN, GOVERNOR OF MICHIGAN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 620 F. 2d 1143.

No. 80–33. SMITTY BAKER COAL CO., INC. *v.* UNITED MINE WORKERS OF AMERICA. C. A. 4th Cir. Certiorari denied. Reported below. 620 F. 2d 416.

No. 80–34. IVARY *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: — Ct. Cl. —, — F. 2d —.

No. 80–36. THOMPSON ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: — Ct. Cl. —, — F. 2d —.

No. 80–38. ALMEDA MALL, INC., ET AL. *v.* HOUSTON LIGHTING & POWER CO. C. A. 5th Cir. Certiorari denied. Reported below: 615 F. 2d 343.

No. 80–40. BERNITSKY ET AL., T/A BERNITSKY BROTHERS COAL CO., SLOPE 2 *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 620 F. 2d 948.

No. 80–42. STROUTH *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied.

No. 80–44. DUAL MANUFACTURING & ENGINEERING, INC., ET AL. *v.* BURRIS INDUSTRIES, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 619 F. 2d 660.

No. 80–46. PILOTTI *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 73 App. Div. 2d 846, 423 N. Y. S. 2d 358.

No. 80–47. McIntyre *v.* Louisiana. Sup. Ct. La. Certiorari denied. Reported below: 381 So. 2d 408.

No. 80–52. Board of Education of Baltimore County *v.* Equal Employment Opportunity Commission. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 97.

No. 80–58. Dreier *v.* Yanik et al. C. A. 3d Cir. Certiorari denied. Reported below: 620 F. 2d 288.

No. 80–62. Weisman *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 624 F. 2d 1118.

No. 80–63. Raley's, Inc. *v.* National Labor Relations Board et al. C. A. 9th Cir. Certiorari denied. Reported below: 608 F. 2d 1374.

No. 80–65. Stevens *v.* Ohio. Ct. App. Ohio, Clermont County. Certiorari denied.

No. 80–66. Goldberg *v.* Warden, Allenwood Federal Prison Camp. C. A. 3d Cir. Certiorari denied. Reported below: 622 F. 2d 60.

No. 80–67. Electrical Products Division of Midland-Ross Corp. *v.* National Labor Relations Board. C. A. 3d Cir. Certiorari denied. Reported below: 617 F. 2d 977.

No. 80–69. Neal-Cooper Grain Co. *v.* International Commodities Export Corp. C. A. 7th Cir. Certiorari denied. Reported below: 622 F. 2d 590.

No. 80–70. Caire *v.* Stassi, dba John A. Stassi Real Estate. Sup. Ct. La. Certiorari denied. Reported below: 379 So. 2d 1056.

No. 80–71. Hinson *v.* New Jersey. Super. Ct. N. J. Certiorari denied.

No. 80–73. American Home Assurance Co. *v.* Commercial Union Assurance Co. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 379 So. 2d 757.

No. 80–79. EDWARDS ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 201 U. S. App. D. C. 1, 627 F. 2d 460.

No. 80–81. ORTEGA *v.* PEREZ. Sup. Ct. P. R. Certiorari denied.

No. 80–85. TAYLOR, SECRETARY OF HEALTH AND REHABILITATIVE SERVICES OF FLORIDA *v.* GOLDEN ISLES CONVALESCENT CENTER, INC., DBA HALLANDALE REHABILITATION CENTER, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 616 F. 2d 1355.

No. 80–86. DUCK ET AL. *v.* HARLESS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 619 F. 2d 611.

No. 80–87. 3,218.9 ACRES IN WARREN COUNTY, PENNSYLVANIA, ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 619 F. 2d 288.

No. 80–88. SANCHEZ *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 384 So. 2d 1385.

No. 80–89. LEAK REPAIRS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. Reported below: 622 F. 2d 592.

No. 80–91. DICK *v.* HARRIS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 4th Cir. Certiorari denied.

No. 80–92. ARTARIAN *v.* ARTAR. Ct. Sp. App. Md. Certiorari denied. Reported below: 45 Md. App. 751.

No. 80–93. MACFARLANE *v.* BERTLING ET UX. Ct. App. Ore. Certiorari denied. Reported below: 45 Ore. App. 1, 607 P. 2d 232.

No. 80–96. SAVOY FAUCET CO., INC., DBA SAVOY BRASS MANUFACTURING CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. Reported below: 628 F. 2d 1345.

No. 80–101. SMITH *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 93 Wash. 2d 329, 610 P. 2d 869.

No. 80–102. MADSEN *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 125 Ariz. 346, 609 P. 2d 1046.

No. 80–109. ESTATE OF SHELTON ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 10th Cir. Certiorari denied. Reported below: 612 F. 2d 1276.

No. 80–110. TAMARI ET AL., DBA WAHBE TAMARI & SONS CO. *v.* BACHE HALSEY STUART, INC., FORMERLY BACHE & CO., INC. C. A. 7th Cir. Certiorari denied. Reported below: 619 F. 2d 1196.

No. 80–112. MCKNIGHT *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. Reported below: — Colo. —, 607 P. 2d 1007.

No. 80–113. SCHERER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 622 F. 2d 592.

No. 80–114. WILHELM ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. Reported below: 622 F. 2d 580.

No. 80–119. GILL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 623 F. 2d 540.

No. 80–121. OFFICE & PROFESSIONAL EMPLOYEES INTERNATIONAL UNION LOCAL 28, AFL–CIO *v.* MIDWEST STOCK EXCHANGE, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 620 F. 2d 629.

No. 80–122. SPARKS *v.* WESTERN SHORE PUBLISHING CORP. ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 199 U. S. App. D. C. 10, 615 F. 2d 1369.

No. 80–123. GLASER, DIRECTOR, DIVISION OF TAXATION, DEPARTMENT OF THE TREASURY OF NEW JERSEY *v.* SALORIO ET AL. Sup. Ct. N. J. Certiorari denied. Reported below: 82 N. J. 482, 414 A. 2d 943.

No. 80–124. WADE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 617 F. 2d 294.

No. 80–127. TEXAS *v.* FAULDER. Ct. Crim. App. Tex. Certiorari denied. Reported below: 611 S. W. 2d 630.

No. 80–130. WALLS *v.* DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT. Ct. App. D. C. Certiorari denied.

No. 80–131. CARRICARTE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 384 So. 2d 1261.

No. 80–134. BOARD OF EDUCATION OF THE ALTMAR-PARISH-WILLIAMSTOWN CENTRAL SCHOOL DISTRICT ET AL. *v.* AMBACH, COMMISSIONER OF EDUCATION OF NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 49 N. Y. 2d 986, 406 N. E. 2d 1061.

No. 80–136. CHOCALLO, ADMINISTRATIVE LAW JUDGE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 620 F. 2d 290 and 622 F. 2d 578.

No. 80–139. PENNSYLVANIA PIPELINE, INC. *v.* NORTHERN CALIFORNIA DISTRICT COUNCIL OF HOD CARRIERS ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 103 Cal. App. 3d 163, 162 Cal. Rptr. 851.

No. 80–140. M. G. R. S., INC. *v.* CALIFORNIA STATE BOARD OF EQUALIZATION. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 80–141. KELLEY MANUFACTURING CO. *v.* LILLISTON CORP. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 100.

No. 80–143. DETWEILER *v.* DETWEILER. Super. Ct. Pa. Certiorari denied. Reported below: — Pa. Super. —, 425 A. 2d 12.

No. 80–149. MISCELLANEOUS DRIVERS & HELPERS UNION, LOCAL 610 *v.* PULITZER PUBLISHING CO. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 618 F. 2d 1275.

No. 80–150. HARTFORD ACCIDENT & INDEMNITY CO. *v.* MILES. Ct. Civ. App. Tex., 2d Sup. Jud. Dist. Certiorari denied. Reported below: 590 S. W. 2d 223.

No. 80–152. BOCRA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 623 F. 2d 281.

No. 80–160. RUSECKAS *v.* GUNSTEN, T/A GUNSTEN AGENCY, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 622 F. 2d 586.

No. 80–165. MAISLIN TRANSPORT OF DELAWARE ET AL. *v.* FARRELL LINES, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 616 F. 2d 619.

No. 80–168. HUTCHER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 622 F. 2d 1083.

No. 80–179. AUTRY ET AL. *v.* FLORES ET UX. C. A. 9th Cir. Certiorari denied. Reported below: 617 F. 2d 1386.

No. 80–181. GORE ET AL. *v.* WOCHNER ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 620 F. 2d 183.

No. 80–187. RUSH *v.* BAYFRONT MEDICAL CENTER, INC. C. A. 5th Cir. Certiorari denied. Reported below: 617 F. 2d 294.

No. 80–188. KONSCOL *v.* GEORGIA EX REL. KONSCOL. Sup. Ct. Ga. Certiorari denied.

No. 80–198. BOUCHER *v.* CITY OF HAVRE, MONTANA, ET AL. Sup. Ct. Mont. Certiorari denied. Reported below: — Mont. —, 609 P. 2d 275.

No. 80–209. GELMAN ET AL. *v.* FEDERAL ELECTION COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: — U. S. App. D. C. —, 631 F. 2d 939.

No. 80–211. JOHNSTON *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 620 F. 2d 305.

No. 80–230. OHIO SUBURBAN WATER CO. *v.* PUBLIC UTILITIES COMMISSION OF OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 62 Ohio St. 2d 17, 402 N. E. 2d 539.

No. 80–232. MARCHESE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 620 F. 2d 290.

No. 80–234. ADKINSON *v.* ALASKA. Sup. Ct. Alaska. Certiorari denied. Reported below: 611 P. 2d 528.

No. 80–250. CRAMER *v.* METROPOLITAN FEDERAL SAVINGS & LOAN ASSN. ET AL. C. A. 6th Cir. Certiorari denied.

No. 80–268. MCCURRY ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 624 F. 2d 1091.

No. 80–271. RATLIFF *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 623 F. 2d 1293.

No. 80–294. GREENE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 626 F. 2d 75.

No. 80–5001. ROHNER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 619 F. 2d 82.

No. 80–5002. WOOD *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 596 S. W. 2d 394.

No. 80–5003. JONES *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: — Pa. Super. —, 418 A. 2d 346.

No. 80–5005. YANEZ *v.* ROMERO, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 619 F. 2d 851.

No. 80–5007. MOBLEY *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 80–5009. ZILLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 623 F. 2d 562.

No. 80–5012. LEWIS ET AL. *v.* LEWIS ET AL. Super. Ct. Pa. Certiorari denied. Reported below: —— Pa. Super. ——, 414 A. 2d 375.

No. 80–5013. COOKES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 624 F. 2d 194.

No. 80–5015. BROWN *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 80–5016. KEY *v.* BOARD OF VOTER REGISTRATION OF CHARLESTON COUNTY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 622 F. 2d 88.

No. 80–5017. WILLIS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 104 Cal. App. 3d 433, 163 Cal. Rptr. 718.

No. 80–5020. SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 620 F. 2d 299.

No. 80–5021. WOODS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 621 F. 2d 844.

No. 80–5024. TALAMANTE *v.* ROMERO, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 620 F. 2d 784.

No. 80–5026. WASSERBERGER *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 49 N. Y. 2d 980, 406 N. E. 2d 805.

No. 80–5027. FERRIS *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF SOLANO, ET AL. (CALIFORNIA, REAL PARTY IN INTEREST). Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 80–5029. JAUDON *v.* SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 7th Cir. Certiorari denied. Reported below: 622 F. 2d 591.

No. 80–5031. INGRAM *v.* STEPHENSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 622 F. 2d 584.

No. 80–5034. BROWN *v.* MARYLAND. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 1057.

No. 80–5035. GALLAGHER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 620 F. 2d 797.

No. 80–5036. PETERSON *v.* BARKSDALE, SHERIFF, ET AL. C. A. 6th Cir. Certiorari denied.

No. 80–5038. ALLEN *v.* HILTON ET AL. C. A. 3d Cir. Certiorari denied.

No. 80–5039. LIVINGSTON *v.* OKLAHOMA ET AL. Ct. Crim. App. Okla. Certiorari denied.

No. 80–5040. LEE *v.* DUCKWORTH, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 622 F. 2d 590.

No. 80–5041. JONES *v.* YOUNG ET AL. C. A. 5th Cir. Certiorari denied.

No. 80–5044. GREENWOOD *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 80–5045. PINCIARO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 622 F. 2d 588.

No. 80–5046. DANZEY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 620 F. 2d 286.

No. 80–5047. SNEAD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 80–5051. NEWBOLD *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 614 F. 2d 46.

No. 80–5052. GULLICK *v.* NEW HAMPSHIRE. Sup. Ct. N. H. Certiorari denied. Reported below: 120 N. H. —, 411 A. 2d 1113.

No. 80–5054. BASZNER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 624 F. 2d 1101.

No. 80–5056. GREENE *v.* OHIO. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 80–5059. WEDRA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 618 F. 2d 192.

No. 80–5062. NEAL *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 383 So. 2d 507.

No. 80–5063. DIETRICH *v.* LIMBS, UNITED STATES MARSHAL. C. A. 9th Cir. Certiorari denied. Reported below: 624 F. 2d 190.

No. 80–5064. GREEN *v.* ARMSTRONG RUBBER CO. C. A. 5th Cir. Certiorari denied. Reported below: 612 F. 2d 967.

No. 80–5066. CLAYTON *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 62 Ohio St. 2d 45, 402 N. E. 2d 1189.

No. 80–5068. ROBERTS *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 62 Ohio St. 2d 170, 405 N. E. 2d 247.

No. 80–5070. SHIRLEY *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 245 Ga. 616, 266 S. E. 2d 218.

No. 80–5075. MELTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 80–5076. RIDDELL *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied.

No. 80-5081. SANDOVAL *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 80-5082. TILLI *v.* CAPABIANCO ET AL. C. A. 3d Cir. Certiorari denied.

No. 80-5086. VANDERDOES *v.* ST. CLAUDE GENERAL HOSPITAL OF NEW ORLEANS, LTD. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 378 So. 2d 207.

No. 80-5087. VANDERDOES *v.* OCHSNER CLINIC ET AL. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 377 So. 2d 1368.

No. 80-5088. GOODLEY *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 618 F. 2d 116.

No. 80-5090. SEALE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 624 F. 2d 1101.

No. 80-5091. REED *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 620 F. 2d 709.

No. 80-5092. KING *v.* MASSACHUSETTS. Ct. App. Mass. Certiorari denied. Reported below: — Mass. App. —, 403 N. E. 2d 142.

No. 80-5094. ALFORD *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 80-5095. PRAZAK *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 623 F. 2d 152.

No. 80-5097. BURNETT *v.* ILLINOIS. C. A. 7th Cir. Certiorari denied. Reported below: 619 F. 2d 668.

No. 80-5100. CARTERA *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 80-5102. WINKLE *v.* GRAND NATIONAL BANK. Sup. Ct. Ark. Certiorari denied. Reported below: 267 Ark. 123, 601 S. W. 2d 559.

No. 80-5105. SORRELLS *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied.

No. 80-5107. FLORES *v.* ONION ET AL., JUDGES. C. A. 5th Cir. Certiorari denied.

No. 80-5109. TARKOWSKI *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied.

No. 80-5111. ARANDA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 624 F. 2d 194.

No. 80-5114. LOYD *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: — Ind. —, 398 N. E. 2d 1260.

No. 80-5120. BOSTIC *v.* DURHAM COUNTY SUPERIOR COURT. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 95.

No. 80-5121. MOORE *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 80 Ill. App. 3d 995, 400 N. E. 2d 525.

No. 80-5124. SHAW *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: — Ct. Cl. —, 622 F. 2d 520.

No. 80-5125. ALDRIDGE ET AL. *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Santa Clara. Certiorari denied.

No. 80-5126. FRANK *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 80-5129. DOWNING *v.* EASTON HOSPITAL ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 601 F. 2d 574.

No. 80-5130. NELSON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 80-5131. WILSON ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 80–5133. MOLINARIO *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 383 So. 2d 345.

No. 80–5135. MONTGOMERY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 620 F. 2d 753.

No. 80–5138. BAKER *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: — Ind. —, 403 N. E. 2d 1069.

No. 80–5140. ZAUN ET AL. *v.* CAPPARELLI ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 111.

No. 80–5141. JOHNSON *v.* LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 615 F. 2d 1360.

No. 80–5145. MCGUIRK *v.* FAIR ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 622 F. 2d 597.

No. 80–5147. COURTNEY *v.* BLAND, CORRECTIONS COMMISSIONER. C. A. 6th Cir. Certiorari denied. Reported below: 620 F. 2d 301.

No. 80–5148. HOLLEY *v.* ANDERSON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 624 F. 2d 1099.

No. 80–5149. HARFLINGER *v.* LANE, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 624 F. 2d 1104.

No. 80–5152. WITT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 618 F. 2d 283.

No. 80–5153. AGENA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 627 F. 2d 1088.

No. 80–5154. CROW ET AL. *v.* MISSOURI. Ct. App. Mo., Southern Dist. Certiorari denied. Reported below: 600 S. W. 2d 162.

No. 80-5156. EZZELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 624 F. 2d 194.

No. 80-5157. CROOKER *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 627 F. 2d 1087.

No. 80-5159. BONDS *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 43 N. C. App. 467, 259 S. E. 2d 377; and 45 N. C. App. 62, 262 S. E. 2d 340.

No. 80-5165. SMITH *v.* STRIKE FORCE, DEPARTMENT OF JUSTICE, ET AL. C. A. 6th Cir. Certiorari denied.

No. 80-5166. LILLIBRIDGE, TRUSTEE, ET AL. *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 620 F. 2d 305.

No. 80-5174. GALLAGHER *v.* CRIST, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 622 F. 2d 594.

No. 80-5177. WADE *v.* FRANKLIN STRICKLIN LAND SURVEYORS, INC. Sup. Ct. Ark. Certiorari denied.

No. 80-5180. KUYKENDALL ET AL. *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 80-5182. CRENSHAW *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 274 S. C. 475, 266 S. E. 2d 61.

No. 80-5197. DEWEEVER *v.* SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 2d Cir. Certiorari denied.

No. 80-5210. HICKS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 80-5211. THURMOND *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 627 F. 2d 1094.

No. 80-5218. MATTHEWS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 624 F. 2d 1091.

No. 80–5223. BERLAND *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 623 F. 2d 746.

No. 80–5233. NABKEY *v.* CITY OF GRAND RAPIDS ET AL. Ct. App. Mich. Certiorari denied.

No. 80–5247. HOLGUIN-HERNANDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 624 F. 2d 194.

No. 80–5250. GONZALEZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 624 F. 2d 1105.

No. 80–5251. CHAUSSEE *v.* PUTMAN, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 620 F. 2d 309.

No. 80–5257. DONKIS *v.* ROHRBAUGH ET AL. C. A. 4th Cir. Certiorari denied.

No. 80–5261. FIELDS *v.* COOK, JUDGE, ET AL. Ct. Crim. App. Okla. Certiorari denied.

No. 80–5270. GREER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 80–5277. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 622 F. 2d 588.

No. 80–5286. NAVA-RAMIREZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 624 F. 2d 1109.

No. 80–5289. TARGEN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 633 F. 2d 208.

No. 80–5290. RUSSELL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 79–1234. RICHARDSON ET AL. *v.* LOKEY. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 600 F. 2d 1265.

No. 79–1446. MICHIGAN *v.* HAMPTON. Sup. Ct. Mich. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 407 Mich. 354, 285 N. W. 2d 284.

No. 79–1829. MICHIGAN *v.* COMBS. Ct. App. Mich. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 79–1887. BLUM, COMMISSIONER OF NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES *v.* STENSON. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 628 F. 2d 1345.

No. 79–1891. ESTELLE, CORRECTIONS DIRECTOR *v.* PAPRSKAR. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 612 F. 2d 1003.

No. 80–28. WILMOT, CORRECTIONAL SUPERINTENDENT *v.* WALKER. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 628 F. 2d 1346.

No. 80–204. RYDER TRUCK LINES, INC. *v.* FARMER. Sup. Ct. Ga. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 245 Ga. 734, 266 S. E. 2d 922.

No. 80–257. WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA *v.* SCOTT. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 617 F. 2d 99.

No. 79–1525. NAISBITT, EXECUTOR, ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 611 F. 2d 1350.

No. 79–1838. RAISEN *v.* RAISEN ET AL. Sup. Ct. Fla. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 379 So. 2d 352.

No. 79–1870. ADULT BOOKMART, INC. *v.* GEORGIA. Ct. App. Ga. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 152 Ga. App. 838, 264 S. E. 2d 273.

No. 79–1878. STANSBERRY, DBA UNIVERSAL STUDIO, ET AL. *v.* HOLMES, HARRIS COUNTY DISTRICT ATTORNEY, ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 613 F. 2d 1285.

No. 79–6835. HUNTER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 77 Ill. App. 3d 1106, 402 N. E. 2d 443.

No. 80–5004. WHISENHUNT *v.* GEORGIA. Ct. App. Ga. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 152 Ga. App. 829, 264 S. E. 2d 271.

No. 80–5118. ROSSER *v.* LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL NO. 438. C. A. 5th Cir. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 616 F. 2d 221.

No. 80–5160. EVANS *v.* SOWDERS, REFORMATORY SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 620 F. 2d 302.

No. 79–1612. AMERICAN BROADCASTING COS., INC., ET AL. *v.* VEGOD CORP. ET AL. Sup. Ct. Cal. Motions of California Department of Consumer Affairs, National Association of Broadcasters, and Times Mirror Co. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 25 Cal. 3d 763, 603 P. 2d 14.

No. 79–1555. TENNESSEE *v.* BERRY. Sup. Ct. Tenn. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 592 S. W. 2d 553.

No. 79–1574. BROWN ET AL. *v.* STONE ET AL. Sup. Ct. Miss. Certiorari denied. JUSTICE WHITE would dismiss the petition as moot. JUSTICE STEWART would grant certiorari. Reported below: 378 So. 2d 218.

No. 79–1656. PEREZ ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE STEWART would grant certiorari. Reported below: 610 F. 2d 1266.

No. 79–1708. NEW YORK *v.* S & E SHIPPING CORP. ET AL.;
No. 79–1716. S & E SHIPPING CORP. *v.* UNITED STATES ET AL.; and
No. 79–1718. SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, AFL–CIO *v.* UNITED STATES ET AL. C. A. 2d Cir. Motion of Seaboard Allied Milling Corp. et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 600 F. 2d 349.

No. 79–1732. HILTON, AKA MILTON, ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. JUSTICE BRENNAN, JUSTICE WHITE, and JUSTICE POWELL would grant certiorari. Reported below: 619 F. 2d 127.

No. 79–1863. HARPER ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. JUSTICE BRENNAN, JUSTICE WHITE, and JUSTICE POWELL would grant certiorari. Reported below: 617 F. 2d 35.

No. 79–1750. FINGAR *v.* SEABOARD COAST LINE RAILROAD CO. C. A. 5th Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 606 F. 2d 648.

No. 79–1739. INUPIAT COMMUNITY OF THE ARCTIC SLOPE *v.* ATLANTIC RICHFIELD CO. ET AL.; and

No. 79–1743. UNITED STATES *v.* ATLANTIC RICHFIELD CO. ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. JUSTICE STEWART and JUSTICE POWELL took no part in the consideration or decision of these petitions. Reported below: 612 F. 2d 1132.

No. 79–2080. MEAD CORP. ET AL. *v.* ADAMS EXTRACT CO. ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 614 F. 2d 958.

No. 80–82. LEMONS ET AL. *v.* CITY AND COUNTY OF DENVER ET AL. C. A. 10th Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 620 F. 2d 228.

No. 79–1791. FLYNT *v.* GEORGIA. Ct. App. Ga. Certiorari denied. JUSTICE BRENNAN, JUSTICE STEWART, and JUSTICE MARSHALL would grant certiorari and reverse the conviction. Reported below: 153 Ga. App. 232, 264 S. E. 2d 669.

No. 79–1918. HAWKINS *v.* CITY OF BIRMINGHAM; and JOLDERFIELD *v.* CITY OF BIRMINGHAM. Ct. Crim. App. Ala. Certiorari denied. JUSTICE BRENNAN, JUSTICE STEWART, and JUSTICE MARSHALL would grant certiorari and reverse the convictions. Reported below: 380 So. 2d 994 (first case); 380 So. 2d 990 (second case).

No. 79–6345. THOMAS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. JUSTICE BRENNAN, JUSTICE STEWART, and JUSTICE MARSHALL would grant certiorari and reverse the conviction. Reported below: 613 F. 2d 787.

No. 79–1802. TOMLIN ET AL. *v.* WOODRUFF ET AL. C. A. 6th Cir. Motion of Tennessee Bar Association for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 616 F. 2d 924.

No. 80–5014. MAXWELL ET AL. *v.* GEORGIA. Ct. App. Ga. Certiorari denied. JUSTICE BRENNAN, JUSTICE STEWART, and JUSTICE MARSHALL would grant certiorari and reverse the convictions. Reported below: 152 Ga. App. 776, 264 S. E. 2d 254.

No. 79–1809. MOON *v.* ROADWAY EXPRESS, INC.; and

No. 79–1810. ROGERS *v.* FRITO-LAY, INC. C. A. 5th Cir. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 611 F. 2d 1074.

No. 79–1816. METHODIST HOSPITAL OF KENTUCKY, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 6th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 619 F. 2d 563.

No. 79–1892. LAREDO COCA-COLA BOTTLING CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 613 F. 2d 1338.

No. 79–1820. BADGER *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied. JUSTICE STEWART and JUSTICE POWELL would grant certiorari.

No. 79–1825. FEDERAL ENERGY REGULATORY COMMISSION *v.* PANHANDLE EASTERN PIPE LINE CO. C. A. D. C. Cir. Certiorari denied. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 198 U. S. App. D. C. 387, 613 F. 2d 1120.

No. 79–1883. WESTINGHOUSE ELECTRIC CORP. *v.* HUNTER ET AL. C. A. 6th Cir. Certiorari denied. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 616 F. 2d 267.

No. 79–1946. MORAN *v.* GOULD CORP. ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 612 F. 2d 728.

No. 80–43. TEMPLETON'S SERVICE, INC., ET AL. *v.* MOBIL OIL CORP. Temp. Emerg. Ct. App. Certiorari denied. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 624 F. 2d 1084.

No. 79–1853. DURHAM DISTRIBUTORS, INC., ET AL. *v.* BOMBARDIER LTD. ET AL. C. A. 1st Cir. Certiorari denied. JUSTICE STEWART would grant certiorari. Reported below: 605 F. 2d 1 and 615 F. 2d 575.

No. 79–6475. BROWN *v.* MARYLAND ET AL. C. A. 4th Cir. Certiorari denied. JUSTICE STEWART would grant certiorari. Reported below: 612 F. 2d 1306.

No. 79–1857. ALCOA STEAMSHIP CO., INC. *v.* M/V NORDIC REGENT ET AL. C. A. 2d Cir. Motions of Association of Trial Lawyers of America, American Institute of Marine Underwriters, and National Industrial Traffic League for leave to file briefs as *amici curiae* granted. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 636 F. 2d 860.

No. 79–1874. STIPE ET AL. *v.* UNITED STATES. C. A. 10th Cir. Motion of petitioners to defer consideration of the petition for writ of certiorari denied. Certiorari denied. Reported below: 620 F. 2d 237.

No. 79–1910. ILLINOIS CENTRAL GULF RAILROAD CO. *v.* KAISER ALUMINUM & CHEMICAL CORP. C. A. 8th Cir. Certiorari denied. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 615 F. 2d 470.

No. 79-1967. IMPERIAL DISTRIBUTORS, INC., ET AL. *v.* UNITED STATES ET AL. C. A. 1st Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 617 F. 2d 892.

No. 79-2056. MILLER *v.* TEXAS STATE BOARD OF BARBER EXAMINERS. C. A. 5th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 615 F. 2d 650.

No. 79-6570. HOLTAN *v.* NEBRASKA. Sup. Ct. Neb.;

No. 79-6580. HOUSTON *v.* TENNESSEE. Sup. Ct. Tenn.;

No. 79-6585. STEVENS *v.* GEORGIA. Sup. Ct. Ga.;

No. 79-6619. ALDRIDGE *v.* FLORIDA. Sup. Ct. Fla.;

No. 79-6636. FITZPATRICK *v.* MONTANA. Sup. Ct. Mont.;

No. 79-6706. CAMPBELL *v.* ZANT, WARDEN. Sup. Ct. Ga.;

No. 79-6752. EVANS *v.* ARIZONA. Sup. Ct. Ariz.;

No. 79-6798. FITZPATRICK *v.* SENTENCE REVIEW DIVISION OF SUPREME COURT OF MONTANA. Sup. Ct. Mont.;

No. 79-6809. TUCKER *v.* GEORGIA. Sup. Ct. Ga.;

No. 79-6826. PREJEAN *v.* LOUISIANA. Sup. Ct. La.;

No. 79-6830. MCCLESKY *v.* GEORGIA. Sup. Ct. Ga.;

No. 79-6876. PIERRE *v.* MORRIS, WARDEN. Sup. Ct. Utah;

No. 79-6887. ANDREWS *v.* MORRIS, WARDEN. Sup. Ct. Utah;

No. 80-5042. ENGLISH *v.* TEXAS. Ct. Crim. App. Tex.;

No. 80-5080. PRESNELL *v.* ZANT, WARDEN. Super. Ct. Ga., Butts County; and

No. 80-5113. WILLIAMS *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: No. 79-6570, 205 Neb. 314, 287 N. W. 2d 671; No. 79-6580, 593 S. W. 2d 267; No. 79-6585, 245 Ga. 583, 266 S. E. 2d 194; No. 79-6636, — Mont. —, 606 P. 2d 1343; No. 79-6706, 245 Ga. 368, 265 S. E. 2d 22; No. 79-6752, 120 Ariz. 158, 584 P. 2d 1149, and

124 Ariz. 526, 606 P. 2d 16; No. 79–6809, 245 Ga. 68, 263 S. E. 2d 109; No. 79–6826, 379 So. 2d 240; No. 79–6830, 245 Ga. 108, 263 S. E. 2d 146; No. 79–6876, 607 P. 2d 812; No. 79–6887, 607 P. 2d 816; No. 80–5042, 592 S. W. 2d 949; No. 80–5113, 205 Neb. 56, 287 N. W. 2d 18.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 79–6765. KELLY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 620 F. 2d 305.

No. 80–59. CARMI *v.* METROPOLITAN ST. LOUIS SEWER DISTRICT ET AL. C. A. 8th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 620 F. 2d 672.

No. 79–6431. AHUMADA *v.* UNITED STATES;

No. 79–6609. MONROY *v.* UNITED STATES; and

No. 79–6705. OSPINA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE WHITE would grant certiorari. Reported below: 614 F. 2d 61.

No. 79–6531. HALL *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. Sup. Ct. Fla. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: 385 So. 2d 757.

No. 79–6610. PRIESTER *v.* BANKER'S TRUST OF SOUTH CAROLINA, ADMINISTRATOR, ET AL. C. A. 4th Cir. Certiorari denied. JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN would grant certiorari. Reported below: 618 F. 2d 103.

No. 79-6794. COLEMAN *v.* SENTENCE REVIEW DIVISION OF SUPREME COURT OF MONTANA. Sup. Ct. Mont. Stay of execution of sentence of death heretofore granted by JUSTICE MARSHALL on August 27, 1980, vacated. Certiorari denied.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia,* 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 80-97. BURNS *v.* SULLIVAN ET AL. C. A. 1st Cir. Certiorari denied. JUSTICE BRENNAN would grant certiorari limited to Question 2 presented by the petition. Reported below: 619 F. 2d 99.

No. 80-5053. QUINONES *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. JUSTICE STEWART would grant certiorari. Reported below: 592 S. W. 2d 933.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia,* 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 80-5110. ROSEE *v.* BOARD OF TRADE OF CITY OF CHICAGO ET AL. C. A. 7th Cir. Motion of petitioner to defer consideration of the petition for writ of certiorari denied. Certiorari denied. Reported below: 618 F. 2d 114.

Rehearing Denied

No. 79-1600. BOMBARDIER LTD. ET AL. *v.* ENGINE SPECIALTIES, INC., 446 U. S. 983. Petition for rehearing denied.

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Appeals Dismissed

No. 80–55. Mastrangelo *v.* Pennsylvania. Appeal from Sup. Ct. Pa. dismissed for want of substantial federal question. Justice Brennan and Justice Stevens would note probable jurisdiction and set case for oral argument. Reported below: 489 Pa. 254, 414 A. 2d 54.

No. 80–173. Barmat *v.* Robertson, Superintendent, Arizona Department of Liquor Licenses and Control, et al. Appeal from Ct. App. Ariz. dismissed for want of substantial federal question. Reported below: 125 Ariz. 514, 611 P. 2d 101.

No. 80–5212. Prenzler *v.* Pike et al. Appeal from Ct. App. Cal., 4th App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 80–5213. Prenzler *v.* Pike et al. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction.

Vacated and Remanded on Appeal

No. 79–1862. Globe Newspaper Co. *v.* Superior Court for the County of Norfolk. Appeal from Sup. Jud. Ct. Mass. Judgment vacated and case remanded for further consideration in light of *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S. 555 (1980). Reported below: — Mass. —, 401 N. E. 2d 360.

Certiorari Granted—Vacated and Remanded

No. 80–183. Illinois *v.* Weber. App. Ct. Ill., 3d Dist. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *United States* v. *Salvucci*, 448 U. S. 83 (1980). Reported below: 80 Ill. App. 3d 1025, 400 N. E. 2d 926.

No. 80-5187. TAYLOR *v.* UNITED STATES. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of the position presently asserted by the Solicitor General in his memorandum for the United States filed September 17, 1980. JUSTICE WHITE and JUSTICE REHNQUIST dissent. Reported below: 624 F. 2d 1092.

Miscellaneous Orders

No. A-230. HAYDEN *v.* FLORIDA. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A-239. GLUCK *v.* GLUCK. Sup. Ct. Conn. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. A-251. WOOD *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA. C. A. 9th Cir. Application for stay, addressed to JUSTICE WHITE and referred to the Court, denied.

No. A-286. CALIFORNIA *v.* BRAESEKE. Sup. Ct. Cal. The stay heretofore entered by JUSTICE REHNQUIST is continued pending the timely filing and disposition of a petition for writ of certiorari.

No. A-303. MYERS ET AL. *v.* NATIONAL BROADCASTING CO., INC., ET AL. C. A. 2d Cir. Application for stay, presented to JUSTICE MARSHALL, and by him referred to the Court, denied.

No. 78-1318. O'BANNON, SECRETARY OF PUBLIC WELFARE OF PENNSYLVANIA *v.* TOWN COURT NURSING CENTER ET AL., 447 U. S. 773. Motion of respondent Town Court Nursing Center, Inc., to amend the judgment denied. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. D-188. IN RE DISBARMENT OF KESLER. Disbarment entered. [For earlier order herein, see 446 U. S. 915.]

No. 79-404. UNITED STATES *v.* CORTEZ ET AL. C. A. 9th Cir. [Certiorari granted, 447 U. S. 904.] Motion of respondents for divided argument granted.

No. 79-408. CITY OF MILWAUKEE ET AL. *v.* ILLINOIS ET AL. C. A. 7th Cir. [Certiorari granted, 445 U. S. 926.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* granted.

No. 79-824. FEDERAL COMMUNICATIONS COMMISSION ET AL. *v.* WNCN LISTENERS GUILD ET AL.;

No. 79-825. INSILCO BROADCASTING CORP. ET AL. *v.* WNCN LISTENERS GUILD ET AL.;

No. 79-826. AMERICAN BROADCASTING COS., INC., ET AL. *v.* WNCN LISTENERS GUILD ET AL.; and

No. 79-827. NATIONAL ASSOCIATION OF BROADCASTERS ET AL. *v.* WNCN LISTENERS GUILD ET AL. C. A. D. C. Cir. [Certiorari granted, 445 U. S. 914.] Motion of the Solicitor General for divided argument granted. Motion of petitioners in No. 79-825 for divided argument denied.

No. 79-1157. ROSEWELL, TREASURER OF COOK COUNTY, ILLINOIS, ET AL. *v.* LASALLE NATIONAL BANK, TRUSTEE. C. A. 7th Cir. [Certiorari granted, 445 U. S. 925.] Motion of Cook County Legal Assistance Foundation ex rel. Fred Schubert for leave to file a brief as *amicus curiae* granted.

No. 79-1171. MINNESOTA *v.* CLOVER LEAF CREAMERY CO. ET AL. Sup. Ct. Minn. [Certiorari granted, 445 U. S. 949.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* granted.

No. 79-1420. FIRESTONE TIRE & RUBBER CO. *v.* RISJORD. C. A. 8th Cir. [Certiorari granted, 446 U. S. 934.] Motion of petitioner to supplement the record granted.

No. 79–1320. KASSEL, DIRECTOR OF TRANSPORTATION, ET AL. *v.* CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE. C. A. 8th Cir. [Probable jurisdiction noted, 446 U. S. 950.] Motion of Association of American Railroads for leave to file a brief as *amicus curiae* granted.

No. 79–1601. SUMNER, WARDEN *v.* MATA. C. A. 9th Cir. [Certiorari granted, 448 U. S. 910.] Motion of petitioner for divided argument denied.

No. 79–1631. DEMOCRATIC PARTY OF THE UNITED STATES OF AMERICA ET AL. *v.* LA FOLLETTE ET AL. Sup. Ct. Wis. [Probable jurisdiction noted, 448 U. S. 909.] Motion of the Democratic Conference for leave to file a brief as *amicus curiae* granted. Motion of appellees for divided argument granted. Request for additional time for oral argument denied.

No. 79–1764. TEXAS DEPARTMENT OF COMMUNITY AFFAIRS *v.* BURDINE. C. A. 5th Cir. [Certiorari granted, 447 U. S. 920.] Motion of Lonny F. Zweiner, Esquire, to permit Gregory Wilson, Esquire, to present oral argument *pro hac vice* on behalf of petitioner granted.

No. 80–5311. IN RE HERNANDEZ; and

No. 80–5312. IN RE HERNANDEZ. Petitions for writs of habeas corpus denied.

Probable Jurisdiction Noted

No. 79–1640. SCHAD ET AL. *v.* BOROUGH OF MOUNT EPHRAIM. Appeal from Super. Ct. N. J., App. Div. Probable jurisdiction noted.

No. 80–195. METROMEDIA, INC., ET AL. *v.* CITY OF SAN DIEGO ET AL. Appeal from Sup. Ct. Cal. Probable jurisdiction noted. Reported below: 26 Cal. 3d 848, 610 P. 2d 407.

Certiorari Granted

No. 79–1777. COMPLETE AUTO TRANSIT, INC., ET AL. *v.* REIS ET AL. C. A. 6th Cir. Certiorari granted. Reported below: 614 F. 2d 1110.

No. 80–169. UNITED PARCEL SERVICE, INC. *v.* MITCHELL. C. A. 2d Cir. Certiorari granted. Reported below: 624 F. 2d 394.

No. 80–180. MCDANIEL ET AL. *v.* SANCHEZ ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 615 F. 2d 1023.

No. 79–1794. MICHIGAN *v.* SUMMERS. Sup. Ct. Mich. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 407 Mich. 432, 286 N. W. 2d 226.

No. 79–1997. CONNECTICUT BOARD OF PARDONS ET AL. *v.* DUMSCHAT ET AL. C. A. 2d Cir. Motion of respondents Brown and Czaja for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 618 F. 2d 216.

Certiorari Denied. (See also No. 80–5212, *supra.*)

No. 79–2030. BOSTICK ET AL. *v.* BOORSTIN, LIBRARIAN OF CONGRESS. C. A. D. C. Cir. Certiorari denied. Reported below: 199 U. S. App. D. C. 289, 617 F. 2d 871.

No. 79–2064. WALDBAUM *v.* FAIRCHILD PUBLICATIONS, INC. C. A. D. C. Cir. Certiorari denied. Reported below: 201 U. S. App. D. C. 301, 627 F. 2d 1287.

No. 79–6848. CARVER *v.* MCELROY, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 616 F. 2d 565.

No. 79–6856. CHEERS *v.* SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 7th Cir. Certiorari denied. Reported below: 610 F. 2d 463.

No. 80–17. BOWERS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 618 F. 2d 117.

No. 80–35. WEINGARTEN *v.* BLOCK ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 102 Cal. App. 3d 129, 162 Cal. Rptr. 701.

No. 80–41. ILLINOIS ET AL. *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 622 F. 2d 591.

No. 80–53. NORTH AMERICAN SOCCER LEAGUE ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 613 F. 2d 1379.

No. 80–75. KECO INDUSTRIES, INC. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 6th Cir. Certiorari denied. Reported below: 617 F. 2d 443.

No. 80–78. PROVENZANO ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 620 F. 2d 985.

No. 80–107. MENOMINEE TRIBE OF INDIANS ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: — Ct. Cl. —, — F. 2d —.

No. 80–111. BARR ET AL., ADMINISTRATORS *v.* CITY OF NEW YORK ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 74 App. Div. 2d 834, 425 N. Y. S. 2d 439.

No. 80–117. PATEL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 617 F. 2d 1358.

No. 80–153. HEADY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 620 F. 2d 305.

No. 80–155. AMSTAR CORP. *v.* DOMINO'S PIZZA, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 615 F. 2d 252.

No. 80–156. MASSACHUSETTS *v.* HUGHES. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: — Mass. —, 404 N. E. 2d 1239.

No. 80–162. TURNER *v.* RAYNES. C. A. 5th Cir. Certiorari denied. Reported below: 611 F. 2d 92.

No. 80–164. DANNING, TRUSTEE IN BANKRUPTCY *v.* PACIFIC PROPELLER, INC. C. A. 9th Cir. Certiorari denied. Reported below: 620 F. 2d 731.

No. 80–166. COLBY *v.* HARRIS, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 2d Cir. Certiorari denied. Reported below: 622 F. 2d 644.

No. 80–171. SAVE THE BAY, INC. *v.* UNITED STATES CORPS OF ENGINEERS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 610 F. 2d 322.

No. 80–178. OGIONY ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 617 F. 2d 14.

No. 80–186. WRIGHT *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 154 Ga. App. 400, 268 S. E. 2d 378.

No. 80–190. DIAMOND *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 617 F. 2d 292.

No. 80–194. RAMIREZ *v.* UNITED STATES. Ct. Cl. Certiorari denied.

No. 80–197. WORLDWIDE CHURCH OF GOD, INC., ET AL. *v.* CALIFORNIA. Super. Ct. Cal., County of Los Angeles. Certiorari denied.

No. 80–200. MORSEY *v.* GREEN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 615 F. 2d 917.

No. 80-205. Toso *v.* City of Santa Barbara. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 101 Cal. App. 3d 934, 162 Cal. Rptr. 210.

No. 80-206. Teague *v.* City of St. Louis, Missouri. C. A. 8th Cir. Certiorari denied. Reported below: 615 F. 2d 773.

No. 80-210. Armstrong *v.* Maple Leaf Apartments, Ltd., et al. C. A. 10th Cir. Certiorari denied. Reported below: 622 F. 2d 466.

No. 80-212. Mize et al. *v.* Securities and Exchange Commission. C. A. 5th Cir. Certiorari denied. Reported below: 615 F. 2d 1046.

No. 80-216. Kaufman *v.* New Jersey. Super. Ct. N. J. Certiorari denied.

No. 80-217. Howell *v.* Thomas, Sheriff. C. A. 5th Cir. Certiorari denied.

No. 80-220. Unidentified Remains of a Vessel *v.* Platoro Ltd., Inc. C. A. 5th Cir. Certiorari denied. Reported below: 614 F. 2d 1051.

No. 80-225. Love *v.* South Carolina. Sup. Ct. S. C. Certiorari denied. Reported below: — S. C. —, 271 S. E. 2d 110.

No. 80-229. Sellers et al. *v.* Rupert et al. Ct. App. N. Y. Certiorari denied. Reported below: 50 N. Y. 2d 881, 408 N. E. 2d 671.

No. 80-5033. Palmigiano *v.* Houle. C. A. 1st Cir. Certiorari denied. Reported below: 618 F. 2d 877.

No. 80-5043. Harvey *v.* Sims. Ct. App. Ga. Certiorari denied. Reported below: 153 Ga. App. 556, 265 S. E. 2d 879.

No. 80–5071. CALHOUN *v.* WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied.

No. 80–5078. NAVARRO *v.* UNITED STATES PAROLE COMMISSION. C. A. 5th Cir. Certiorari denied. Reported below: 616 F. 2d 566.

No. 80–5085. ANDERSON *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. D. C. Cir. Certiorari denied.

No. 80–5104. HACKETT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 623 F. 2d 343.

No. 80–5128. FOREMAN *v.* BEE BINDERY, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 622 F. 2d 592.

No. 80–5144. WARREN *v.* HARVEY, ACTING DIRECTOR, WHITING FORENSIC INSTITUTE. C. A. 2d Cir. Certiorari denied. Reported below: 632 F. 2d 925.

No. 80–5178. HAMILTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 626 F. 2d 348.

No. 80–5183. HOWARD *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 598 S. W. 2d 763.

No. 80–5192. RENFRO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 620 F. 2d 569.

No. 80–5195. BEAL *v.* BEAL. Ct. App. Wash. Certiorari denied. Reported below: 24 Wash. App. 1030.

No. 80–5198. MCCRARY *v.* PETTIGRASS. C. A. 2d Cir. Certiorari denied.

No. 80–5201. SNEED *v.* HENSLEY, DETECTIVE, ASHEVILLE POLICE DEPARTMENT, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 620 F. 2d 295.

No. 80–5205. STEINKE *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 292 N. W. 2d 243.

No. 80–5206. COWART *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 617 F. 2d 112.

No. 80–5220. DISILVESTRO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 633 F. 2d 203.

No. 80–5221. ANGELUCCI *v.* FITZGERALD, CORRECTIONS COMMISSIONER, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 633 F. 2d 202.

No. 80–5225. CAULEY *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 74 App. Div. 2d 831, 425 N. Y. S. 2d 272.

No. 80–5234. BLEIER *v.* GENERAL SERVICES ADMINISTRATION ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 620 F. 2d 308.

No. 80–5239. PENN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: — F. 2d —.

No. 80–5259. GODFREY *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 383 So. 2d 575.

No. 80–5260. TURNER *v.* COUNTY OF SISKIYOU ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 80–5262. NELSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 622 F. 2d 588.

No. 80–5294. BERMAN *v.* BOARD OF REVIEW, NEW JERSEY DEPARTMENT OF LABOR AND INDUSTRY, ET AL. Super. Ct. N. J. Certiorari denied.

No. 80–5295. LUTHER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 627 F. 2d 1093.

No. 80–5299. STONE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 622 F. 2d 580.

No. 80–5301. HIGGINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 622 F. 2d 1042.

No. 80–5313. GREEN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 630 F. 2d 566.

No. 80–5314. GREEN *v.* CARLSON, DIRECTOR, FEDERAL BUREAU OF PRISONS, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 80–5318. VEZZANA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 633 F. 2d 208.

No. 80–5326. GRAHAM *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 622 F. 2d 57.

No. 80–5329. KALSBECK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 625 F. 2d 123.

No. 80–5331. TAFERO *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 616 F. 2d 566.

No. 80–5332. SCHMIDT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 626 F. 2d 616.

No. 80–5334. WERTZ ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 625 F. 2d 1128.

No. 80–5347. FLEMING *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 246 Ga. 90, 270 S. E. 2d 185.

No. 80–5415. IN RE GREEN. C. A. D. C. Cir. Certiorari denied.

No. 80–5416. GREEN *v.* BEAVER, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied.

No. 79–1457. INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL–CIO, LOCAL 1969, ET AL. *v.* BISE ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE BRENNAN, JUSTICE WHITE, and JUSTICE MARSHALL would grant certiorari. Reported below: 618 F. 2d 1299.

No. 79–1713. RED LAKE BAND OF CHIPPEWA INDIANS *v.* MINNESOTA ET AL. C. A. 8th Cir. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 614 F. 2d 1161.

No. 79–1920. SAFEWAY STORES, INC., ET AL. *v.* MEAT PRICE INVESTIGATORS ASSN. ET AL.;

No. 79–1959. MEAT PRICE INVESTIGATORS ASSN. ET AL. *v.* SAFEWAY STORES, INC., ET AL.;

No. 79–2060. BLACK ET AL. *v.* ALBERTSON'S, INC., ET AL.;

No. 80–103. LOWE ET AL. *v.* SAFEWAY STORES, INC., ET AL.; and

No. 80–105. AGEE ET AL. *v.* SAFEWAY STORES, INC., ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of these petitions. Reported below: 600 F. 2d 1148.

No. 79–1988. EARTH SATELLITE CORP. ET AL. *v.* HASTINGS ET AL. C. A. D. C. Cir. Motion of respondent Hastings for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 202 U. S. App. D. C. 85, 628 F. 2d 85.

No. 80–237. OHIO *v.* YOUNG. Sup. Ct. Ohio. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 62 Ohio St. 2d 370, 406 N. E. 2d 499.

No. 79–6512. HOLLOWAY *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 362 So. 2d 333.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

The Court in this case denies certiorari to review what I believe is an important due process question requiring interpretation of our decisions in *Keeble* v. *United States,* 412 U. S. 205 (1973), and *Beck* v. *Alabama,* 447 U. S. 625 (1980).

The facts, taken from the state-court opinion and the undisputed allegations of the petition, may be summarized briefly. On November 7, 1972, a man was killed in Dade County, Fla. Five days later, petitioner voluntarily turned himself over to the Miami police in connection with the killing. After issuing *Miranda* warnings, the police took two separate statements from petitioner concerning the victim's death. Petitioner was then released. On November 29, he communicated with one of the police detectives and furnished a third statement.

About three and one-half years later, on June 23, 1976, petitioner and a codefendant were indicted for the capital felony of first-degree murder based on the 1972 killing. Following presentation of all the evidence, the trial court decided over petitioner's objection that it would not instruct the jury on the lesser included state offenses of second-degree murder, third-degree murder, and manslaughter, on the ground that the Florida statute of limitations had run on these lesser offenses.[1] The jury was instructed solely as to first-degree murder. Petitioner was convicted and sentenced to life imprisonment.

On appeal, the Florida District Court of Appeal affirmed the conviction. 362 So. 2d 333 (1978). The appellate court concluded that a defendant has no state or federal constitutional right to have a court instruct on lesser offenses where "any conviction returned as to such offense would be a nullity." *Id.*, at 335. After accepting jurisdiction and hearing argument, the Supreme Court of Florida, with one dissent, denied certiorari. 379 So. 2d 953 (1980).

This Court's decision in *Keeble* v. *United States, supra,* casts doubt on the validity of the state court's analysis. In *Keeble,* the Court held that an Indian charged with a federal

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[1] At the time of the killing, the statute of limitations for each of the lesser offenses was two years. Fla. Stat. § 932.465 (1972). There was no period of limitations for the crime of first-degree murder. *Ibid.*

crime under the Major Crimes Act was entitled to an instruction on a lesser included offense even though the Act did not confer federal jurisdiction over the defendant for the lesser crime. The Court explained the value of such a safeguard:

> "[I]f the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction—in this context or any other—precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction." (Emphasis in original). 412 U. S., at 212–213.

More recently, in *Beck* v. *Alabama, supra,* the Court held that the death sentence may not constitutionally be imposed after a jury verdict of guilt of a capital offense if the jury has not been permitted to consider an alternative verdict of guilt of a lesser included offense. In reaffirming the Court's commitment to the lesser-offense doctrine, the Court observed that "the nearly universal acceptance of the rule in both state and federal courts establishes the value to the defendant of this procedural safeguard." 447 U. S., at 637.

Thus the Court more than once has expressed the understanding that a lesser-included-offense option minimizes the risk of undermining the reasonable-doubt standard. Florida, whose laws here apply, apparently has reached the same understanding, and requires that any person indicted for a "degree crime" such as first-degree murder[2] is entitled to

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[2] See Fla. Stat. § 782.04 (1976 and Supp. 1980) (defining murder as a degree crime).

have the jury instructed on all degrees of the offense.[3] It is not disputed that, absent the running of the statute of limitations, petitioner would have been so entitled in this case.

On the record presented, it appears that the State's own delay in bringing an indictment against petitioner may have caused the statute of limitations to run. Serious due process concerns are raised if the State through prosecutorial inaction can avoid its own mandate to instruct on lesser degrees of an offense. Assuming that petitioner's uncontested version of the facts is accurate, I believe such conduct merits plenary review.

Even if we were to find, upon a fuller development of the record, that the State bears no onus for the delay in securing an indictment, I am inclined to the view that petitioner retains his right to a lesser-offense instruction. The Court's decisions in both *Keeble* and *Beck* imply that affording jurors a less drastic alternative may be constitutionally necessary to enhance or preserve their essential factfinding function.[4] Whether the trial court properly may enter a judgment of guilt should the jury convict for a lesser included offense seems to me a separate, *legal* matter with which the factfinder need have no concern.[5] Because I believe that a trial

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[3] Florida Rule of Criminal Procedure 3.490 reads as follows:

"*Determination of Degree of Offense* If the indictment or information charges an offense which is divided into degrees, without specifying the degree, the jurors may find the defendant guilty of any degree of the offense charged; if the indictment or information charges a particular degree the jurors may find the defendant guilty of the degree charged or of any lesser degree. The court shall in all such cases charge the jury as to the degrees of the offense."

[4] Both *Keeble* and *Beck* stop short of explicitly holding that a defendant is entitled to a lesser-included-offense instruction as a matter of due process. In the circumstances of those cases, however, such a holding was not necessary in order to prescribe the lesser-offense instruction.

[5] The legal question may be determined by whether the defendant himself chooses to invoke a statute of limitations defense. At least two cir-

court's asserted lack of jurisdiction may not be dispositive of the due process concerns here invoked, I would grant the petition for certiorari.

No. 79-6583. MOOREFIELD *v.* UNITED STATES SECRET SERVICE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 611 F. 2d 1021.

JUSTICE WHITE, with whom JUSTICE BRENNAN joins, dissenting.

Because the decision in this case is subject to serious question under the reasoning of *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U. S. 214 (1978), I dissent from the denial of certiorari.

The Secret Service maintains an open file on petitioner, who has twice been convicted of threatening to kill the President. In January 1976, petitioner filed an administrative request with the Service to inspect that file, or at least such portions of it as could be segregated from exempt portions.[1] There were at that time no proceedings pending against petitioner. His request was denied in its entirety.[2] This decision was

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cuits have held that a defendant can effectively waive this defense. *United States* v. *Wild*, 179 U. S. App. D. C. 232, 236–238, 551 F. 2d 418, 422–424, cert. denied, 431 U. S. 916 (1977); *United States* v. *Doyle*, 348 F. 2d 715, 718–719, and n. 3 (CA2), cert. denied, 382 U. S. 843 (1965) (waiver by guilty plea); *United States* v. *Parrino*, 212 F. 2d 919, 922 (CA2), cert. denied, 348 U. S. 840 (1954) (same). The court in *Wild*, in concluding that the statute of limitations constitutes an affirmative defense to be raised by the defendant rather than a jurisdictional bar to prosecution, relied heavily on this Court's prior statement to that effect in *United States* v. *Cook*, 17 Wall. 168, 179 (1872). See also *Biddinger* v. *Commissioner of Police*, 245 U. S. 128, 135 (1917). There is no indication in the record before us as to how petitioner acted in this regard, or even whether he was presented with a choice.

[1] The Court of Appeals recognized that Moorefield's convictions did not affect his right to see the file.

[2] The Secret Service cited seven Freedom of Information Act exemptions in refusing the original request. These exemptions appear in 5 U. S. C. §§ 552 (b)(2), (5), (7)(A, C–F).

upheld on administrative appeal and in subsequent judicial proceedings brought under the Freedom of Information Act, 5 U. S. C. § 552 (a)(4)(B). During the course of these proceedings, petitioner learned that the file he sought consisted of 225 pages. Despite a request by petitioner, at no time was this file itemized and indexed in such a way as to correlate particular portions of the file with particular exemption provisions of the Act.

The District Court conducted an *in camera* inspection of the file and then granted respondents' motion for summary judgment, finding that disclosure "would constitute a threat to ongoing enforcement activities and to certain individuals within [and] without the Secret Service." The Court of Appeals affirmed, 611 F. 2d 1021 (CA5 1980), relying on this Court's interpretation of Exemption 7 (A) of the Act, 5 U. S. C. § 552 (b)(7)(A), in *Robbins Tire*.

The Act requires that records and materials in the possession of federal agencies be made available on demand, unless the requested material falls within one of nine statutory exemptions. Exemption 7 (A) states: "This section does not apply to matters that are . . . (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings . . . ." The present language of this Exemption is the result of a 1974 amendment to the Act. The Act, prior to 1974, had exempted from disclosure all "investigatory files compiled for law enforcement purposes." 5 U. S. C. § 552 (b)(7) (1970 ed.). In *Robbins Tire* we surveyed the meaning and scope of Exemption 7 (A) in light of the legislative history that led to its narrowing in 1974. We concluded that the purpose of the 1974 amendment had been "to eliminate 'blanket exemptions' for Government records simply because they were found in investigatory files compiled for law enforcement purposes . . . ." 437 U. S., at 236.

The Court of Appeals decision in this case creates a "blanket exemption" for any open Secret Service file. The court reached this result by means of a novel interpretation of the phrase "enforcement proceedings" and a questionable inference from *Robbins Tire*. First, the court interpreted "enforcement proceedings" to include more than adjudicatory procedures. It held that because Secret Service investigations are "directed toward an active and concrete effort to enforce the law," 611 F. 2d, at 1025, they qualify as "enforcement proceedings" under the Act. Second, *Robbins Tire* permits agencies to make "generic determinations" that disclosure of certain kinds of materials would interfere with enforcement proceedings. The Court of Appeals held that Secret Service files qualify as such a generic determination. Thus, any Secret Service file related to an open investigation is wholly exempted, without more, from disclosure.

The Court of Appeals thought that the prophylactic aim of the Secret Service distinguishes it from other law enforcement agencies that conduct "investigations with a view towards apprehending law-breakers and bringing them to justice." 611 F. 2d, at 1025. Clearly, however, other law enforcement agencies have prophylactic goals, and the acts the Secret Service investigates are crimes. See, *e. g.*, 18 U. S. C. § 871 (threats against the President are punishable by fine and imprisonment). If Secret Service investigations, without limitation, qualify as enforcement proceedings regardless of whether or not there is an adjudicatory proceeding pending or imminent, then arguably many investigatory files of other law enforcement agencies also qualify for exemption.

Robbins Tire concluded that a generic determination that disclosure of witness statements prior to unfair labor practice hearings would interfere with those proceedings was permissible under Exemption 7 (A). The decision of the Court of Appeals, however, did not make a generic determination with

respect to a kind of document, but rather with respect to a kind of investigatory file. Such a file could include various types of documents. This seems inconsistent with what the Court said in *Robbins Tire:*

> "by substituting the word 'records' for 'files,' [the 1974 amendment] would make clear that courts had to consider the nature of the particular document as to which exemption was claimed, in order to avoid the possibility of impermissible 'commingling' by an agency's placing in an investigatory file material that did not legitimately have to be kept confidential." 437 U. S., at 229–230.

Accordingly, I would issue the writ and give this case plenary consideration.

No. 80–157. E. R. SQUIBB & SONS, INC. *v.* SINDELL ET AL.;

No. 80–158. UPJOHN CO. *v.* SINDELL ET AL.;

No. 80–170. REXALL DRUG CO. ET AL. *v.* SINDELL ET AL.; and

No 80–172. ABBOTT LABORATORIES *v.* SINDELL ET AL. Sup. Ct. Cal. Certiorari denied. JUSTICE STEWART took no part in the consideration or decision of these petitions. Reported below: 26 Cal. 3d 588, 607 P. 2d 924.

No. 80–175. WOODLANDS TELECOMMUNICATIONS CORP. *v.* SOUTHWESTERN BELL TELEPHONE CO. C. A. 5th Cir. Certiorari denied. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 615 F. 2d 1372.

No. 80–5208. VINSON *v.* RICHMOND POLICE DEPARTMENT ET AL. C. A. 4th Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 618 F. 2d 107.

No. 80–5235. FINNEY *v.* BALKCOM, WARDEN. Super. Ct. Ga., Tattnall County;

No. 80–5252. STEELMAN *v.* ARIZONA. Sup. Ct. Ariz.; and

No. 80–5268. ANTONE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 80–5252, 120 Ariz. 301, 585 P. 2d 1213; No. 80–5268, 382 So. 2d 1205.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia,* 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 79–1694. HAMILTON *v.* GENERAL MOTORS CORP., 447 U. S. 907. Petition for rehearing denied.

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Dismissal Under Rule 53. (See No. 79–972, *infra.*)

Affirmed on Appeal

No. 80–215. EDWARDS ET AL. *v.* SERVICE MACHINE & SHIPBUILDING CORP., INC., ET AL. Affirmed on appeal from C. A. 5th Cir. Reported below: 617 F. 2d 70.

Appeals Dismissed

No. 80–116. DARRIGO *v.* STATE COMMISSION ON JUDICIAL CONDUCT ET AL. Appeal from App. Div., Sup. Ct. N. Y., 1st Jud. Dept., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. JUSTICE WHITE and JUSTICE STEVENS would dismiss for want of substantial federal question. Reported below: 74 App. Div. 2d 801, 426 N. Y. S. 2d 1006.

No. 80–235. CRENSHAW *v.* BLANTON, GOVERNOR OF TENNESSEE, ET AL. Appeal from Ct. App. Tenn. dismissed for want of properly presented federal question. Reported below: 606 S. W. 2d 285.

No. 80–5173. CLAY, ADMINISTRATOR *v.* HALL ET AL. Appeal from Ct. App. Tenn. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 597 S. W. 2d 737.

No. 80–5272. BROWN *v.* KANSAS WORKMEN'S COMPENSATION FUND. Appeal from Sup. Ct. Kan. dismissed for want of substantial federal question. JUSTICE STEWART took no part in the consideration or decision of this case. Reported below: 227 Kan. 645, 608 P. 2d 1356.

Certiorari Granted—Vacated and Remanded. (See also No. 79–1901, *ante,* p. 1.)

No. 79–1970. CICCONE *v.* TEXTRON, INC. C. A. 1st Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Mohasco Corp.* v. *Silver,* 447 U. S. 807 (1980). Reported below: 616 F. 2d 1216.

No. 79–1998. CALIFORNIA *v.* TERESINSKI. Sup. Ct. Cal. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *United States* v. *Crews,* 445 U. S. 463 (1980). Reported below: 26 Cal. 3d 457, 605 P. 2d 874.

No. 80–208. EWALD *v.* GREAT ATLANTIC & PACIFIC TEA CO., INC. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Mohasco Corp.* v. *Silver,* 447 U. S. 807 (1980). Reported below: 620 F. 2d 1183.

No. 80–5275. BRACEWELL *v.* ALABAMA. Ct. Crim. App. Ala. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Beck* v. *Alabama,* 447 U. S. 625 (1980). Reported below: — So. 2d —.

Certiorari Dismissed

No. 79–972. WESTVACO CORP. ET AL. *v.* ADAMS EXTRACT CO. ET AL. C. A. 5th Cir. [Certiorari granted, 447 U. S. 919.] Motion of respondents Owens-Illinois, Inc., et al. to dismiss the writ of certiorari granted. Motion of Westvaco Corp. to dismiss the writ of certiorari pursuant to Rule 53 granted. Motion of Mead Corp. for leave to intervene as a party petitioner denied. Certiorari dismissed. JUSTICE POWELL took no part in the consideration or decision of this case.

Vacated and Remanded After Certiorari Granted

No. 79–1356. JOHNSON ET AL. *v.* BOARD OF EDUCATION OF THE CITY OF CHICAGO ET AL. C. A. 7th Cir. [Certiorari granted, 448 U. S. 910.] Judgment vacated and case remanded for further consideration in light of the subsequent development described in the suggestion of mootness filed by respondents on October 2, 1980; the response of petitioners filed on October 10, 1980; the response of the United States as *amicus curiae* filed on October 10, 1980; and the reply filed on October 15, 1980.

Miscellaneous Orders

No. A–146 (80–5216). SCOTT *v.* FLORIDA. Application for stay of proceedings in the Supreme Court of Florida, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. A-253 (80-552). CALIFORNIA MANUFACTURERS ASSN. ET AL. *v.* INDUSTRIAL WELFARE COMMISSION OF CALIFORNIA ET AL.; and

No. A-254 (80-560). SAN JOAQUIN NISEI FARMERS LEAGUE ET AL. *v.* INDUSTRIAL WELFARE COMMISSION OF CALIFORNIA ET AL. Sup. Ct. Cal. The order entered by JUSTICE REHNQUIST on September 26, 1980, staying the issuance of a peremptory writ of mandate is vacated, and applications are denied.

No. A-322. SKEEN ET AL. *v.* HOOPER, SECRETARY OF STATE OF NEW MEXICO. Application for injunction, presented to JUSTICE WHITE, and by him referred to the Court, denied.

No. A-333. WHIG PARTY OF ALABAMA ET AL. *v.* SIEGELMAN, SECRETARY OF STATE OF ALABAMA, ET AL. C. A. 5th Cir. Application for injunction and other relief, presented to JUSTICE BRENNAN, and by him referred to the Court, denied.

No. D-186. IN RE DISBARMENT OF COOPER. Disbarment entered. [For earlier order herein, see 446 U. S. 915.]

No. D-190. IN RE DISBARMENT OF FUSCIELLO. Disbarment entered. [For earlier order herein, see 446 U. S. 915.]

No. D-191. IN RE DISBARMENT OF SCHILPP. Disbarment entered. [For earlier order herein, see 446 U. S. 933.]

No. D-194. IN RE DISBARMENT OF AMOS. Disbarment entered. [For earlier order herein, see 447 U. S. 902.]

No. 79-1388. KIRCHBERG *v.* FEENSTRA ET AL. C. A. 5th Cir. [Probable jurisdiction noted, 446 U. S. 917.] Suggestion of mootness filed by appellees Edwards and Louisiana rejected.

No. 80-83. MUSKIE, SECRETARY OF STATE *v.* AGEE. C. A. D. C. Cir. [Certiorari granted, *ante,* p. 818.] Motion of respondent to expedite denied.

No. 80–255. GEORGIA POWER CO. *v.* 138.30 ACRES OF LAND ET AL. C. A. 5th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 80–293. UNITEX LTD. ET AL. *v.* DAN RIVER, INC. C. A. 4th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States. JUSTICE POWELL took no part in the consideration or decision of this order.

No. 80–5422. IN RE MAGEE; and

No. 80–5447. IN RE MOORE. Petitions for writs of habeas corpus denied.

Probable Jurisdiction Postponed

No. 80–5. MCCARTY *v.* MCCARTY. Appeal from Ct. App. Cal., 1st App. Dist. Further consideration of question of jurisdiction postponed to hearing of case on the merits.

Certiorari Granted

No. 79–1734. PARRATT ET AL. *v.* TAYLOR. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 620 F. 2d 307.

No. 79–1711. MIDDLESEX COUNTY SEWERAGE AUTHORITY ET AL. *v.* NATIONAL SEA CLAMMERS ASSN. ET AL.;

No. 79–1754. JOINT MEETING OF ESSEX AND UNION COUNTIES *v.* NATIONAL SEA CLAMMERS ASSN. ET AL.;

No. 79–1760. CITY OF NEW YORK ET AL. *v.* NATIONAL SEA CLAMMERS ASSN. ET AL.; and

No. 80–12. ENVIRONMENTAL PROTECTION AGENCY ET AL. *v.* NATIONAL SEA CLAMMERS ASSN. ET AL. C. A. 3d Cir. Certiorari granted limited to the following questions:

1. Whether the Federal Water Pollution Control Act, 33 U. S. C. § 1251 *et seq.* (1976 ed. and Supp. III), and the Marine Protection, Research, and Sanctuaries Act of 1972,

33 U. S. C. § 1401 *et seq.* (1976 ed. and Supp. III), imply a private right of action independent of the rights explicitly created by the citizens suit provisions of those Acts, 33 U. S. C. § 1415 (g).

2. Whether a private citizen has standing to maintain a federal common law nuisance action for alleged damages sustained resulting from ocean pollution as a general federal question under 28 U. S. C. § 1331.

3. Whether any federal common law nuisance action for alleged damages sustained resulting from ocean pollution, if available to a private citizen, is not preempted by the present regulatory scheme governing ocean pollution established by the Federal Water Pollution Control Act and the Marine Protection, Research, and Sanctuaries Act.

Cases consolidated and a total of one hour allotted for oral argument. Reported below: 616 F. 2d 1222.

Certiorari Denied. (See also Nos. 80–116 and 80–5173, *supra.*)

No. 79–1637. J. P. STEVENS & Co., INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 612 F. 2d 881.

No. 79–1913. AAACON AUTO TRANSPORT, INC. *v.* MILLER. C. A. 5th Cir. Certiorari denied. Reported below: 614 F. 2d 292.

No. 79–6724. SHAW *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below 598 S. W. 2d 883.

No. 79–6751. JACOBS *v.* ROWE, CORRECTIONS DIRECTOR, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 114.

No. 79–6833. KRAMARCZYK *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 78 Ill. App. 3d 6, 396 N. E. 2d 1081.

No. 80-37. LESTER *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 101 Cal. App. 3d 613, 161 Cal. Rptr. 703.

No. 80-95. ENVIRONMENTAL DEFENSE FUND, INC., ET AL. *v.* ALEXANDER, SECRETARY OF THE ARMY, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 614 F. 2d 474.

No. 80-106. SAICI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 633 F. 2d 206.

No. 80-118. DAY ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 611 F. 2d 1122.

No. 80-128. INVESTORS RESEARCH CORP. ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 202 U. S. App. D. C. 168, 628 F. 2d 168.

No. 80-132. BERG *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 620 F. 2d 1026.

No. 80-145. UNDERWOOD ET AL. *v.* SECRETARY OF THE INTERIOR. C. A. 9th Cir. Certiorari denied. Reported below: 618 F. 2d 117.

No. 80-154. MOLES *v.* MORTON F. PLANT HOSPITAL, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 617 F. 2d 293.

No. 80-199. BERKLEY MACHINE WORKS & FOUNDRY CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. Reported below: 623 F. 2d 898.

No. 80-218. SHERWOOD *v.* BROWN, SECRETARY OF DEFENSE, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 619 F. 2d 47.

No. 80-219. BIG BEAR SUPERMARKETS NO. 3 *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 640 F. 2d 924.

No. 80–228. SUBURBAN REALTY CO. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 615 F. 2d 171.

No. 80–240. JONES ET AL. *v.* KNELLER ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 633 F. 2d 204.

No. 80–244. ALDRIDGE *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 153 Ga. App. 744, 266 S. E. 2d 513.

No. 80–247. TAMA MEAT PACKING CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. D. C. Cir. Certiorari denied.

No. 80–248. RUDOLF WOLFF & CO., LTD. *v.* NEIMAN, DBA LONDON GROUP (1974). C. A. 7th Cir. Certiorari denied. Reported below: 619 F. 2d 1189.

No. 80–249. SCHARA ET AL. *v.* ANACONDA CO. Sup. Ct. Mont. Certiorari denied. Reported below: — Mont. —, 610 P. 2d 132.

No. 80–253. YANOWITZ *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 80–260. MILESTONE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 626 F. 2d 264.

No. 80–261. LAROCHELLE ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 618 F. 2d 116.

No. 80–267. MANNING *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 80–269. CONNECTICUT *v.* GOLD. Sup. Ct. Conn. Certiorari denied. Reported below: — Conn. —, — A. 2d —.

No. 80-272. T. F. H. PUBLICATIONS, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. Reported below: 622 F. 2d 579.

No. 80-279. RIEGEL TEXTILE CORP. *v.* GRYC, BY GRYC, ET AL. Sup. Ct. Minn. Certiorari denied. Reported below: 297 N. W. 2d 727.

No. 80-282. YOW *v.* AMERICAN HOME ASSURANCE CO. C. A. 4th Cir. Certiorari denied. Reported below: 622 F. 2d 589.

No. 80-285. CHVOSTA *v.* PIERRE ET AL. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 80-287. SHEMITZ *v.* DEERE & CO., INC. C. A. 7th Cir. Certiorari denied. Reported below: 623 F. 2d 1180.

No. 80-288. SHUFFMAN, EXECUTRIX *v.* HARTFORD TEXTILE CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 628 F. 2d 1345.

No. 80-303. RENFRO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 620 F. 2d 497.

No. 80-312. BONO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 624 F. 2d 1091.

No. 80-570. STROOM *v.* CIVILETTI, ATTORNEY GENERAL. C. A. D. C. Cir. Certiorari before judgment denied.

No. 80-5037. GREER *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 592 S. W. 2d 645.

No. 80-5050. JOHNS *v.* NANAWALE COMMUNITY ASSN. ET AL. C. A. 9th Cir. Certiorari denied.

No. 80-5069. MATA *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 125 Ariz. 243, 609 P. 2d 58.

No. 80-5096. RAUB *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 637 F. 2d 1205.

No. 80-5117. ELLIS *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 488 Pa. 594, 413 A. 2d 384.

No. 80-5186. PATTERSON *v.* GARRINGTON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 80-5203. PHILLIPS *v.* OKLAHOMA ET AL. Ct. Crim. App. Okla. Certiorari denied.

No. 80-5207. DAVIS *v.* STEPHENSON, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 628 F. 2d 1348.

No. 80-5244. QUIGG *v.* CRIST, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 616 F. 2d 1107.

No. 80-5264. MONTGOMERY *v.* NATIONAL MULTIPLE SCLEROSIS SOCIETY. C. A. D. C. Cir. Certiorari denied.

No. 80-5267. NORRIS *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 80-5271. ROACH *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 80-5292. CLARK *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 416 A. 2d 717.

No. 80-5293. BOYD *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied.

No. 80-5333. MAYES *v.* SOWDERS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 621 F. 2d 850.

No. 80-5340. MEIER *v.* HUGHES TOOL CO. C. A. 10th Cir. Certiorari denied.

No. 80-5342. FORD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 627 F. 2d 807.

No. 80-5348. BARRETT *v.* U. S. CUSTOMS SERVICE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 614 F. 2d 291.

No. 80-5362. KLINE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 624 F. 2d 1091.

No. 80-5365. DEMARCO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 624 F. 2d 1091.

No. 80-5367. SACCO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 80-5374. GARCIA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 625 F. 2d 162.

No. 80-5383. PRICE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 622 F. 2d 1042.

No. 80-5386. YATES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 627 F. 2d 1094.

No. 80-5389. BROWN, AKA DENNIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 80-5390. WADE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 626 F. 2d 867.

No. 80-5391. LAGATTUTA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 624 F. 2d 1091.

No. 80-5395. DEVLIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 627 F. 2d 1093.

No. 80-5409. BENTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 622 F. 2d 587.

No. 80-5413. MIZE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 626 F. 2d 866.

No. 80–5418. FORREST *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 623 F. 2d 1107.

No. 80–5438. WARGO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 79–1545. AMSTAR CORP. *v.* SOUTHERN PACIFIC TRANSPORT COMPANY OF TEXAS AND LOUISIANA. C. A. 5th Cir. Certiorari denied. Reported below: 607 F. 2d 1100.

JUSTICE BLACKMUN, dissenting.

It seems to me that the Court's denial of certiorari in this case utterly ignores the parties' intent in executing a consent to a judgment and in their subsequent actions pursuant thereto.

Petitioner is a sugar refiner. It filed suit under § 20 (11) of the Interstate Commerce Act, 24 Stat. 386, as amended, 49 U. S. C. § 20 (11),[1] against respondent, a common carrier by motor, for damage to a cargo of sugar respondent undertook to transport. Although respondent by its formal answer denied liability, the real issue in the litigation proved to be the amount for which respondent was liable. Petitioner-shipper took the position that, under *Gore Products, Inc.* v. *Texas & N. O. R. Co.*, 34 So. 2d 418 (La. App. 1948), the proper measure of damages was the profit lost by petitioner on the completed sale, or $7,529.28. Respondent-carrier, on the other hand, contended that the proper measure was the cost of reprocessing the sugar for resale to another customer, or $488.65.[2] Respondent moved for partial summary judgment only on the issue of the quantum of damages. Over

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[1] Section 20 (11) was repealed in 1978 by Pub. L. 95–473, § 4 (b), 92 Stat. 1466, but the Interstate Commerce Act was reenacted as positive law by the same statute. 92 Stat. 1337.

[2] The smaller amount is not in dispute. Respondent has not agreed that the larger amount is correct, but it states that it "has always assumed" that the profit lost on the completed sale of the sugar was in excess of the smaller amount. Brief in Opposition 2.

petitioner's objection, the United States District Court for the Eastern District of Louisiana granted that motion, leaving open, so far as that court was concerned, the issue of liability. The partial summary judgment, being interlocutory, of course was not then appealable. See 28 U. S. C. §§ 1291 and 1292.

After a pretrial conference, the parties by their counsel entered into a stipulation of facts, App. to Pet. for Cert. 29a, and submitted to the court a "Joint Motion for Approval of Consent Judgment." *Id.*, at 32a.[3] The District Court then entered its "Consent Judgment upon Joint Stipulation of Facts," *id.*, at 26a, the final paragraph of which recited:

> "This judgment is rendered in recognition of the reservation by the plaintiff of its right to prosecute an appeal in this action in connection with this judgment and in connection with the partial summary judgment rendered on March 14, 1979." *Id.*, at 27a.

The smaller of the two sums was then paid to petitioner. It thereupon executed a satisfaction of judgment, *id.*, at 34a, still reciting its reservation.[4]

Petitioner in due course appealed to the United States Court of Appeals for the Fifth Circuit. Both sides devoted their briefs in that court exclusively to the liability issue. The Court of Appeals, however, with a short *per curiam* opinion, held that, on the authority of another *per curiam* opin-

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[3] This Joint Motion recited:

"Amstar Corporation joins in this motion with full reservation of its right to prosecute an appeal in this action, both with respect to the attached consent judgment and with respect to the partial summary judgment granted in this action on March 14, 1979." App. to Pet. for Cert. 33a.

[4] The satisfaction provided:

"This Satisfaction of Judgment has been executed by Amstar Corporation with full reservation of its right to prosecute an appeal in this action in connection with the judgment entered on May 3, 1979, and in connection with the partial summary judgment rendered on March 14, 1979." *Id.*, at 34a.

ion, *White & Yarborough* v. *Dailey*, 228 F. 2d 836 (CA5 1955), (the governing authority of which I seriously question), "the fact that both parties freely consented to the entry of a final judgment precludes an appeal from it." 607 F. 2d 1100 (1979).

It seems to me to be clear that any consent on the part of petitioner did not reach the disputed difference between $7,529.28 and $488.65. To the extent that the Court of Appeals' holding rests on the suggestion in *White & Yarborough* v. *Dailey*, 228 F. 2d, at 837, that an appeal will not lie when payment of the judgment has been accepted, that holding is inconsistent with *United States* v. *Hougham*, 364 U. S. 310 (1960), where this Court said:

> "It is a generally accepted rule of law that where a judgment is appealed on the ground that the damages awarded are inadequate, acceptance of payment of the amount of the unsatisfactory judgment does not, standing alone, amount to an accord and satisfaction of the entire claim." *Id.*, at 312.

Nor does the mere fact that the parties entered into a consent judgment preclude appeal. In *Swift & Co.* v. *United States*, 276 U. S. 311 (1928), it was observed:

> "The decree sought to be vacated was entered with the defendants' consent. Under the English practice a consent decree could not be set aside by appeal or bill of review, except in case of clerical error. . . . In this Court a somewhat more liberal rule has prevailed. Decrees entered by consent have been reviewed upon appeal or bill of review where there was a claim of lack of actual consent to the decree as entered . . . ." *Id.*, at 323–324.

Here there is "a claim of lack of actual consent." See also *Nashville, C. & St. L. R. Co.* v. *United States*, 113 U. S. 261 (1885); *Pacific R. Co.* v. *Ketchum*, 101 U. S. 289 (1880).

The Court of Appeals' opinion also seems to me to be in

some tension, if not outright conflict, on the point at issue, with *diLeo* v. *Greenfield,* 541 F. 2d 949, 952 (CA2 1976); *United States ex rel. H & S Industries, Inc.* v. *F. D. Rich Co.,* 525 F. 2d 760, 764–765 (CA7 1975); and *Gadsden* v. *Fripp,* 330 F. 2d 545, 548 (CA4 1964).

It may well be that upon review of the merits of the District Court's judgment, respondent will prevail. It seems to me, however, that petitioner is entitled to a ruling on the merits of its appeal to the Court of Appeals, and is not to be foreclosed by a strict concept of consent and acceptance in the face of facts that the asserted consent was specifically limited and that petitioner consistently and persistently disclaimed full settlement of the lawsuit. Indeed, until the case arrived here, respondent does not appear to have claimed otherwise.

The amount in contest is not large, but that fact in itself is no reason for this Court's lack of interest in a case where the principle is important. I would give serious consideration to a summary reversal of the judgment of the Court of Appeals. At the least, I would grant certiorari and set the case for argument.

No. 79–1735. JARRETT *v.* JARRETT. Sup. Ct. Ill. Certiorari denied. Reported below: 78 Ill. 2d 337, 400 N. E. 2d 421.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

This petition raises the significant question whether the state may deprive a divorced mother of the custody of her children through operation of a conclusive presumption that her cohabitation with an unmarried adult male constitutes custody not in the best interests of the children, however strong the contrary evidence. Because the decision below[1] conflicts with the import of relevant precedent of this Court, I dissent from the denial of a writ of certiorari.

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[1] 78 Ill. 2d 337, 400 N. E. 2d 421 (1979).

In December 1976, petitioner Jacqueline Jarrett was divorced from respondent Walter Jarrett. Jacqueline was given custody of their three daughters, then aged 12, 10, and 7. Jacqueline was also awarded use of the family home and child support; Walter had visitation rights, and the children regularly spent their weekends with him. In April 1977, Jacqueline told Walter that her friend, Wayne Hammon, was going to move into the family home. Walter objected and one week later filed a custody modification petition, seeking custody of his children on the grounds that he objected to his ex-wife's nonmarital relationship and did not wish his daughters to be raised in what he regarded to be an immoral atmosphere.

Following a hearing at which Jacqueline, Walter, and Hammon testified, the Circuit Court modified its original decree and granted custody of the children to Walter, finding the custody change necessary for the "moral and spiritual well-being and development" of the children. 78 Ill. 2d 337, 342, 400 N. E. 2d 421, 422 (1979). The Appellate Court reversed, reasoning that the Circuit Court made no finding and identified no evidence that Jacqueline was unfit to retain custody and, further, that there was no evidence that the change in custody was necessary to serve the best interests of the children.

A divided Illinois Supreme Court reversed the Appellate Court and reinstated the Circuit Court's modified custody decree. Applying the Illinois rule that a change in custody will be ordered only if necessary to serve the best interests of the child, the State Supreme Court found that Jacqueline's ostensible violation of the Illinois fornication statute [2] evinced a "disregard for existing standards of conduct [that] instructs her children, by example, that they, too, may ignore

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[2] Section 11-8 of the Criminal Code of 1961 provides that "[a]ny person who cohabits or has sexual intercourse with another not his spouse commits fornication if the behavior is open and notorious." Ill. Rev. Stat., ch. 38, § 11-8 (1977).

them, and could well encourage the children to engage in similar activity in the future." *Id.*, at 346–347, 400 N. E. 2d, at 424 (citations omitted). The court, therefore, concluded that retention of custody by Jacqueline adversely affected the best interests of the children since there was a possibility of harm to them, even though it might become manifest only in the future, there being no showing of current actual harm.[3] *Stanley* v. *Illinois*, 405 U. S. 645 (1972), was distinguished on the ground that *Stanley* invalidated a conclusive presumption that an unwed father is unfit to exercise custody over his children, whereas the conclusion in the instant case rested not on a conclusive presumption, but on a finding reached after Jacqueline was afforded a full hearing on the question whether she was an inadequate parent.

The decision of the Illinois Supreme Court that, in effect, a divorced woman's ostensible violation of the Illinois fornication statute presumptively harmed the best interests of the children and that this was conclusive for purposes of custody presents a serious question under the Fourteenth Amendment. Giving conclusive effect to such a violation would appear to contravene the teaching of *Stanley* v. *Illinois:*

> "It may be, as the State insists, that most unmarried fathers are unsuitable and neglectful parents. It may also be that Stanley is such a parent and that his children should be placed in other hands. But all unmarried fathers are not in this category; some are wholly suited to have custody of their children. . . . Given the opportunity to make his case, Stanley may have been seen to be deserving of custody of his offspring." *Id.*, at 654–655 (footnotes omitted).

I had supposed that *Stanley* established the proposition that "the interest of a parent in the companionship, care, custody,

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[3] The best interests of the child may be sufficiently adversely affected to justify custody modification under Illinois law where, *inter alia*, "the child's present environment endangers seriously his physical, mental, moral or emotional health. . . ." Ill. Rev. Stat., ch. 40, § 610 (b)(3) (1977).

and management of his or her children," *id.*, at 651, cannot be determined by the evidentiary shortcut of a conclusive presumption. Thus, for purposes of this case, *Stanley* would seem to foreclose custody modification on the basis of a similar conclusive presumption of serious adverse effect on the children's best interests despite whatever contrary evidence may have been or might be adduced. This is particularly true since there is no rational basis for the conclusive presumption actually utilized, whether Jacqueline is viewed as having violated the fornication statute only or as being a lawbreaker generally.

Nothing in the record or in logic supports a conclusion that divorced parents who fornicate, for that reason alone, are unfit or adversely affect the well-being and development of their children in any degree over and above whatever adverse effect separation and divorce may already have had on the children. Illinois seldom, if ever, enforces its fornication statute[4] and therefore can hardly contend that there is a rational correlation between divorced parents who fornicate and divorced parents who impair the healthy development of their children.

Nor can Jacqueline be presumed to have an adverse effect on her children's well-being because she is a lawbreaker, for surely such a presumption would be irrationally overbroad. It would make no sense to treat murder, fornication, and traffic violations similarly for purposes of custody modification. If Illinois' enforcement record is an indication of how important it views violations of various laws, it appears that Illinois attempts to enforce its traffic laws more frequently than its "seldom-enforced fornication statute." 78 Ill. 2d, at 352, 400 N. E. 2d, at 427 (Moran, J., dissenting). If Jacqueline had violated Illinois' traffic laws, she might have lost her driver's license, but surely not custody of her children.

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[4] Illinois did not enforce its fornication statute in this case.

Moreover, not only is there no basis for conclusively presuming that Jacqueline's cohabitation would adversely affect her children sufficiently to justify modification, but any such conclusion is unequivocally rejected by the record which affirmatively shows that the "children were healthy, well adjusted, and well care for." *Id.*, at 351, 400 N. E. 2d, at 426 (Goldenhersh, C. J., dissenting). There was no evidence of actual harm; nor was there evidence, statistical or otherwise, to suggest that the children's current exposure to their mother's cohabitation might result in harm to them that might become manifest only in the future. Surely, in any event, it is no more likely that divorced mothers who fornicate are unfit than are unwed fathers. Thus, this case squarely presents the question whether the Due Process Clause entitles Jacqueline to a meaningful hearing at which the trial judge determines, without use of a conclusive presumption, whether violation of the fornication statute adversely affects the well-being of the children.

Further, we should grant the petition and address the constitutional question it so clearly presents because the answer to that question has important implications for many households. The 1978 Census Bureau Statistics cited by the Illinois Supreme Court reveal that there are 1.1 million households composed of an unmarried man and woman and that upwards of 25% of those households also include at least one child. *Id.*, at 345, 400 N. E. 2d, at 424. While the statistics do not reveal how many of these households were formed after a divorce, and with respect to which the noncustodial divorced parent may be able to seek custody, the crude figures alone suggest that the custodial pattern is a pervasive one.

Accordingly, I dissent from the denial of certiorari and would grant the petition and set the case for oral argument.

MR. JUSTICE BLACKMUN also dissents from the denial of certiorari and would set the case for argument.

No. 79–1909. CALIFORNIA *v.* MUSANTE. Ct. App. Cal., 4th App. Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below 102 Cal. App. 3d 156, 162 Cal. Rptr. 158.

No. 79–1964. ANDRUS, SECRETARY OF THE INTERIOR *v.* BAKER. C. A. 9th Cir. Certiorari denied. Reported below: 613 F. 2d 224.

JUSTICE BLACKMUN, with whom JUSTICE MARSHALL and JUSTICE POWELL join, dissenting.

The issue in this case is whether the Secretary of the Interior has applied an improper standard for determining that a mineral discovery is "valuable" under 30 U. S. C. § 22.[1] Because I believe that issue to be an important one deserving review here, and because the decision and judgment of the Court of Appeals may well thwart a proper attempt on the part of the Secretary to reject excessive mining claims while preserving the public's right to enjoy its lands, I dissent from the denial of certiorari.

In 1952, respondent began to mine cinders from a cone located within a volcanic field on public land near Flagstaff, Arizona. In 1965, he applied to the Bureau of Land Management of the Department of the Interior for a patent covering five 20-acre placer mining claims for cinders on land on which he claimed to have discovered "valuable mineral deposits." Respondent's claims covered an estimated 15 million tons of cinders. At the request of the Forest Service of the Depart-

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[1] Section 22 reads:

"Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."

ment of Agriculture, the Bureau issued an administrative contest complaint seeking cancellation of those claims.[2] Over the period from 1953 to 1976, respondent extracted and marketed less than one million tons; of this amount, a substantial portion was sold for purposes not cognizable under the mining laws. The Secretary considered these factors, along with the marginal profitability of the local cinders market, in concluding that respondent's total reserves far exceeded reasonable market demand for the foreseeable future. While validating two of respondent's claims, the Interior Board of Land Appeals nullified two others, reasoning that development of all four claims would be imprudent. 23 I. B. L. A. 319 (1976). Respondents sought judicial review in the United States District Court for the District of Arizona. On cross-motions for summary judgment, that court affirmed the agency's decision. The Court of Appeals, however, vacated and remanded, holding that the Secretary had exceeded his statutory powers in relying on an "excess reserves" analysis to limit the patentability of a mineral claim. 613 F. 2d 224 (CA9 1980).

Two complementary methods for determining whether a mineral deposit is of value have been developed over time. For many years, the "prudent person" test called for validation of mineral claims whenever extraction of the discovered deposits offered a "reasonable prospect of success" to a "person of ordinary prudence." *Castle* v. *Womble,* 19 L. D. 455, 457 (1894). This Court approved that test on numerous occasions, most recently in *Andrus* v. *Charlestone Stone Products Co.,* 436 U. S. 604 (1978). As a refinement on what at times perhaps appeared to be an imprecise standard, the Secretary came to require an applicant to show that his claimed deposit could be extracted and marketed at a profit. In *United States* v. *Coleman,* 390 U. S. 599, 603 (1968), this Court reversed a Court of Appeals' conclusion to the effect that the

[2] The Bureau later dismissed its complaint as to one of the claims.

marketability standard was "different and more onerous" than the prudent person test. The Court viewed the modification as "an admirable effort to identify with greater precision and objectivity the factors relevant to a determination that a mineral deposit is 'valuable'." *Id.*, at 602.

I believe that, as in *Coleman*, the Court of Appeals may have unduly restrained the Secretary's authority to evaluate claims of mineral discoveries on public lands; its ruling appears to be based on the perception, possibly a misperception, that the Secretary's "excess reserves" analysis does violence to the statute. In light of that ruling, one now may expect the assertion of additional claims involving "valuable" mineral deposits not marketable in the foreseeable future. This can, and probably will, result in the withdrawal of vast acreage from the public domain for purposes unrelated to mining. Even if Congress later acts to implement the "excess reserves" concept, a prospect at best uncertain, such prospective legislation might not return to the public trust those claims already perfected pursuant to the Court of Appeals' ruling. See *Best* v. *Humboldt Placer Mining Co.*, 371 U. S. 334, 335–336 (1963).

The case thus raises a substantial question regarding administration of public lands, and surely is arguably in conflict with the rationale of *United States* v. *Coleman*. I therefore would grant certiorari and have the issue resolved only after plenary consideration.

No. 79–1995. City of Los Angeles *v.* Lyons. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 615 F. 2d 1243.

Justice White, with whom Justice Powell and Justice Rehnquist join, dissenting.

Respondent in this case seeks injunctive and declaratory relief under 42 U. S. C. § 1983 to restrain an alleged practice of the Los Angeles Police Department. Because I believe

that respondent's standing to seek this relief is open to serious question in the light of *O'Shea* v. *Littleton,* 414 U. S. 488 (1974), and *Rizzo* v. *Goode,* 423 U. S. 362 (1976), I dissent from the denial of certiorari.

In February 1977, respondent filed a seven-count complaint against the city of Los Angeles and four of its police officers. Respondent alleged that the four officers stopped his car for a minor traffic violation and that, without any provocation or reason to fear for their safety, they applied strangleholds around his neck, rendering him unconscious. He further alleged that the use of strangleholds in such non-life-threatening situations was a policy of the police department. Respondent sought damages, and injunctive and declaratory relief, claiming that the use of strangleholds in non-life-threatening situations violates the First, Fourth, Eighth, and Fourteenth Amendments.

The only issue before this Court is whether in seeking injunctive and declaratory relief respondent has stated a case or controversy within the jurisdiction of the federal courts. The Court of Appeals, reversing the District Court, held that respondent did have standing. The Court of Appeals distinguished this case from *O'Shea* v. *Littleton, supra,* and *Rizzo* v. *Goode, supra,* on two grounds: First, there was a greater likelihood in this case that respondent would be subjected at some future date to the alleged illegal conduct; second, respondent did not seek "structural relief" requiring the federal courts to supervise the conduct of state officials, but only an injunction against the use of an established police practice.[1]

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[1] The Court of Appeals also suggests that since respondent would have had standing to challenge the practice in the short period of time between his being stopped by the police and their use of a stranglehold upon him, the standing problem here can be analyzed in terms of mootness doctrine. The court believed that although respondent no longer has a live controversy, he falls within two exceptions to the mootness doctrine. First, a voluntary cessation of challenged conduct does not moot a claim if there is a strong possibility of its recurrence. Second, respondent's claim is one

O'Shea and *Rizzo* made clear that the federal courts are not the forum in which dissatisfied citizens may air their disagreements with government policy. The jurisdiction of the federal courts is limited by the case-or-controversy requirement of Art. III. Unless a party demonstrates a "personal stake in the outcome," *Baker* v. *Carr*, 369 U. S. 186, 204 (1962), the disagreement may not be settled by the federal courts. For purposes of equitable relief, "[p]ast exposure to illegal conduct does not in itself show a present case or controversy . . . if unaccompanied by any continuing, present adverse effects" and if there is no "real and immediate threat of repeated injury" to the plaintiff. *O'Shea* v. *Littleton, supra,* at 495–496. Here, the prospect of future injury rests on the likelihood that respondent will again be stopped or arrested and have the allegedly unconstitutional procedures applied to him. In *O'Shea,* we held that this kind of possibility does not satisfy the case-or-controversy requirement.

There is no question that there is a case or controversy with respect to respondent's right to damages for an alleged past violation of his constitutional rights.[2] However, with respect to a threat of future injury, respondent's position cannot be distinguished from that of any other person who may at some future date have a confrontation with the Los Angeles police. This is the kind of injury we have previously characterized as "abstract" and, therefore, insuf-

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that is "capable of repetition, yet evading review." The first ground, however, merely restates the problem: it is precisely because petitioner does not threaten harm to respondent except in the abstract manner in which everyone in Los Angeles is threatened that respondent's standing is questionable. The second ground is not applicable because the constitutional issue would be addressed in a damages action brought under § 1983.

[2] If this controversy constitutes a § 1983 cause of action, the constitutional issue would be fully litigated in the damages suit.

ficient to create the personal stake required by Art. III. *Id.*, at 494.

We could not conclude that respondent has standing to press his claims for equitable relief without re-examining our holdings in *O'Shea* and *Rizzo* on the limits of the case-or-controversy requirement of Art. III. Of course, we cannot give plenary consideration to every misapplication of constitutional requirements, but the decision of the Court of Appeals appears so at odds with our precedents that I dissent from denial of certiorari.

No. 79–2068. THOMPSON *v.* MEDICAL LICENSING BOARD OF INDIANA ET AL. Ct. App. Ind. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: — Ind. App. —, 389 N. E. 2d 43, and — Ind. App. —, 398 N. E. 2d 679.

No. 80–147. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, LOCAL NO. 627 *v.* GEORGE E. HOFFMAN & SONS, INC. C. A. 7th Cir. Certiorari denied. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 617 F. 2d 1234.

No. 80–259. RUTHERFORD ET AL. *v.* UNITED STATES ET AL. C. A. 10th Cir. Motion of American Cancer Society, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 616 F. 2d 455.

No. 80–266. HOWELL *v.* CITY OF BIRMINGHAM. Ct. Crim. App. Ala. Certiorari denied. JUSTICE BRENNAN, JUSTICE STEWART, and JUSTICE MARSHALL would grant certiorari and reverse the conviction. Reported below: 383 So. 2d 567.

No. 80–275. DAVIS ET AL. *v.* WILLIAMS ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE STEWART would grant certiorari. Reported below: 617 F. 2d 1100.

No. 80–290. FIORE *v.* MASSACHUSETTS. Ct. App. Mass. Certiorari denied. JUSTICE BRENNAN, JUSTICE STEWART, and JUSTICE MARSHALL would grant certiorari. Reported below: — Mass. App. —, 403 N. E. 2d 953.

No. 80–5127. PINEIRO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 620 F. 2d 299.

No. 80–5158. ALFREY ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 620 F. 2d 551.

No. 80–5204. HULSEY *v.* ARKANSAS. Sup. Ct. Ark.;
No. 80–5215. DAMPIER *v.* GEORGIA. Sup. Ct. Ga.; and
No. 80–5228. MATA *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: No. 80–5204, — Ark. —, 595 S. W. 2d 934; No. 80–5215, 245 Ga. 426, 265 S. E. 2d 565, and 245 Ga. 882, 268 S. E. 2d 349; No. 80–5228, 125 Ariz. 233, 609 P. 2d 48.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 80–5284. SARTO *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied. JUSTICE MARSHALL would grant certiorari.

OCTOBER 21, 1980

*Miscellaneous Orders**

No. A–332. NATIONAL REPUBLICAN SENATORIAL COMMITTEE *v.* DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE ET AL. Motion to vacate the temporary stay, heretofore entered by the THE CHIEF JUSTICE on October 17, 1980, denied.

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*For order amending the Court's Rules, see *post*, p. —.

October 27, 1980

Dismissal Under Rule 53

No. 80–5055. Kennedy *v.* Fairman, Warden. C. A. 7th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 618 F. 2d 1242.

November 3, 1980

Appeals Dismissed

No. 79–6743. Allison *v.* Fulton-De Kalb Hospital Authority. Appeal from Sup. Ct. Ga. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 245 Ga. 445, 265 S. E. 2d 575.

Justice Brennan, with whom Justice Marshall joins, dissenting.

The issue on this appeal is whether the Georgia Supreme Court's reliance upon a newly announced state procedural rule requiring litigants to raise federal constitutional claims earlier than other claims constituted reliance upon an independent and adequate state ground barring this Court's jurisdiction.

Appellee Fulton-De Kalb Hospital Authority filed a complaint on February 5, 1975, against appellant Allison for hospital expenses incurred by his 16-year-old daughter when she gave birth to an illegitimate child. There was no contract between Allison and the hospital. Instead, the suit was brought under a now repealed Georgia paternal child-support statute making it the duty of the father to provide for the "maintenance, protection, and education of his child" until majority. Ga. Code § 74–105 (1978).[1]

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[1] The new Georgia statute, enacted soon after this Court's decision in *Orr* v. *Orr,* 440 U. S. 268 (1979), states:

"Until majority, it is the joint and several duty of each parent to provide for the maintenance, protection, and education of the child, except to

Allison's answer to the complaint denied owing any money; however, his answer failed to raise any constitutional challenge to the statute. In April 1976, the hospital answered interrogatories revealing, *inter alia,* that Allison was billed because of his status as father of the minor patient. Almost three years later, but still before the start of trial, *Orr* v. *Orr,* 440 U. S. 268 (1979), was decided by this Court, and Allison amended his answer to include an equal protection challenge to the statute. His case was tried several days later, and resulted in entry of judgment for the hospital. Observing that the debt was incurred more than four years before *Orr* was decided, the trial court, without analysis, concluded, *inter alia,* that the constitutional defense established by *Orr* should not be given retroactive effect.

On appeal, the Georgia Supreme Court affirmed the judgment, refusing to reach the constitutional question on the ground that it had not been timely raised. The court noted that under state case law, constitutional challenges must be raised "at the first opportunity," which the court interpreted as occurring when "the law which is subject to constitutional objection comes to the attention of the challenger's attorney," 245 Ga. 445, 446, 265 S. E. 2d 575, 576 (1980). In this case, the court interpreted the rule to require constitutional challenge at least at the time the hospital answered Allison's interrogatories.

Because I entertain serious doubt whether our decided cases permit the Georgia Supreme Court to avoid decision of Allison's federal constitutional claim by charging him with the duty to anticipate application of the new procedural rule announced in his case, *NAACP* v. *Alabama,* 357 U. S. 449, 457–458 (1958), and because I doubt in any event that the rule serves a legitimate state interest, *Henry* v. *Mississippi,*

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the extent that the duty of one parent is otherwise or further defined by court order." Ga. Code Ann. § 74–105 (1979).

379 U. S. 443, 447–448 (1965); *Ward* v. *Board of County Comm'rs*, 253 U. S. 17, 22–23 (1920), I think that the case presents a substantial federal question: whether the new rule constitutes an independent and adequate state ground precluding our consideration of Allison's federal constitutional claim.

The Georgia Supreme Court's interpretation of "at the first opportunity" is not supported by prior precedent in the Georgia case law.[2] But more important, Georgia's civil practice statute directly conflicts with the Georgia Supreme Court's interpretation. That statute states that a "party may amend his pleading as a matter of course and without leave of court at any time before the entry of a pre-trial order." Ga. Code § 81A–115 (a) (1978). Appellant asserts, without contradiction from appellee, that there was no pretrial order entered prior to appellant's amendment of his answer. Therefore, it would appear that Allison was entitled to amend his pleading (as he did) under § 81A–115 (a) "as

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[2] The Georgia Supreme Court cited only *Brackett* v. *State*, 227 Ga. 493, 181 S. E. 2d 380 (1971), and 5 Encyclopedia of Georgia Law § 182 (1977), to support its holding. But *Brackett* states without further explanation the general proposition that constitutional claims must be raised "at the first opportunity." 227 Ga., at 495, 181 S. E. 2d, at 382. The claim in *Brackett* was not raised before the start of trial, as here, but after the guilty verdict was returned. It was this timing the court considered to be too late. The Encyclopedia states that constitutional claims generally may not be raised after trial, and also comments that, if the constitutional "point is apparent at the outset, it may be raised by demurrer or other pleading." § 182, p. 530. Certainly appellant might properly believe that amending his answer before trial would suffice under this view of the law.

Other Georgia cases dealing with the definition of "at the first opportunity" similarly fail to support the Georgia Supreme Court's interpretation here. See, *e. g.*, *Woods* v. *State*, 222 Ga. 321, 322, 149 S. E. 2d 674, 677 (1966); *Loomis* v. *State*, 203 Ga. 394, 404–405, 47 S. E. 2d 58, 64 (1948); *Boyers* v. *State*, 198 Ga. 838, 841–843, 33 S. E. 2d 251, 254–255 (1945).

a matter of course and without leave of court."[3] The Georgia Supreme Court, inexplicably, does not refer to this statute. Certainly appellant cannot be charged with anticipating the Georgia Supreme Court's interposition of this new procedural rule.[4] This is yet another case, therefore, where novelty in procedural requirements cannot defeat review by this Court when a party justifiably acted in reliance on prior state law. *Blair* v. *Kentucky*, No. 79–1795, and *Carpenter* v. *Kentucky*, No. 79–1798, *post*, p. 962 (BRENNAN, J., joined by MARSHALL, J., dissenting);[5] *NAACP* v. *Alabama*, *supra*, at 457–458.

In any event, it is highly doubtful that this rule serves a legitimate state interest. The rule discriminates against federal constitutional claims by placing additional burdens on them that are not placed on state-law claims: the federal constitutional challenge can only be considered if raised as soon as the challenging party becomes aware of the allegedly unconstitutional law; the state-law challenge can be considered if it is raised at any time prior to entry of a pretrial order. Such a distinction between federal constitutional and state-law claims belies any genuine state interest in the rule. At least as long as the constitutional claim is made at a time when the court may consider and decide it without disruption

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[3] Even if a pretrial order had been entered, the result here would be the same. The statute further states that a "party may [thereafter] amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Ga. Code § 81A–115 (a) (1978). The statute nowhere suggests that constitutional claims will be treated specially. The Georgia Supreme Court's new rule vitiates the discretion given by the statutory language to the trial judge to grant leave to amend "when justice so requires."

[4] The trial court itself thought appellant's constitutional claim timely, and gave it full consideration.

[5] Unlike petitioners in *Blair* and *Carpenter*, however, since this is a civil case, appellant will have no other federal-court remedy if we refuse to consider his appeal.

of the proceeding, the state interest in judicial efficiency is served. The Georgia Supreme Court asserts that a defendant must not be allowed to delay the raising of "defenses indefinitely in hopes that a decision will be rendered which provides him with an arguable constitutional defense," 245 Ga., at 446–447, 265 S. E. 2d, at 576–577,[6] but surely this rationale is equally applicable to changes in state law. Similarly, the rationale that requiring early presentation of claims might serve state interests in promoting settlement before trial and apprising parties of the opposing side's case is equally applicable to state-law as well as constitutional claims. In short, the Georgia Supreme Court's procedural rule effects an unnecessary and irrational discrimination against federal constitutional claims.

I would therefore at least postpone the question of jurisdiction and set the case for oral argument.[7]

No. 80–189. GRANT-BILLINGSLEY WHOLESALE LIQUOR CO., INC. *v.* LENNEN, SECRETARY OF REVENUE OF KANSAS, ET AL. Appeal from Sup. Ct. Kan. dismissed for want of substantial federal question. JUSTICE WHITE would note probable jurisdiction and set case for oral argument. JUSTICE BRENNAN took no part in the consideration or decision of this case. Reported below: 227 Kan. 179, 606 P. 2d 102.

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[6] Appellant did move for four continuances before the trial began, but there is no evidence of bad-faith dilatory tactics.

[7] Appellee does not appear to contest Allison's claim that the challenged statute is unconstitutional. Indeed, § 1 of the Family and Domestic Relations Law Amended Act (1979) states:

"It is the intent of this Act to revise and modernize certain laws of this State which relate to intrafamilial duties, rights, and obligations, including laws relating to . . . support of minors . . . so as to comply with those standards of equal protection under the law announced in the United States Supreme Court decision in the case of *Orr* v. *Orr*." 1979 Ga. Laws 469.

The remaining question, therefore, is whether *Orr* should be given retroactive effect in this case. See *Chevron Oil Co.* v. *Huson*, 404 U. S. 97, 105–109 (1971).

No. 80–301. WAYNE HAVEN NURSING HOME ET AL. *v.* FINLEY, STATE COMMISSIONER OF HEALTH, ET AL. Appeal from Sup. Ct. N. J. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 83 N. J. 67, 415 A. 2d 1147.

No. 80–313. SUTTON *v.* JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS. Appeal from App. Div., Sup. Ct. N. Y., 2d Jud. Dept., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 70 App. Div. 2d 467, 421 N. Y. S. 2d 371.

No. 80–5061. O'CONNOR ET UX. *v.* PALLUDAN CORP. Appeal from Sup. Ct. Nev. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 80–5308. BECKER *v.* EVANS. Appeal from C. A. 3d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 80–322. KORN *v.* OHIO. Appeal from Ct. App. Ohio, Marion County, dismissed for want of substantial federal question.

No. 80–377. VOGEL *v.* ROBINSON ET AL. Appeal from App. Ct. Ill., 3d Dist., dismissed for want of substantial federal question. Reported below: 80 Ill. App. 3d 312, 399 N. E. 2d 688.

No. 80–5361. GOUDIE *v.* HACKMAN ET AL. Appeal from Sup. Ct. Va. dismissed for want of substantial federal question.

Certiorari Granted—Vacated and Remanded

No. 79–1886. CALIFORNIA *v.* LEVEL. Ct. App. Cal., 2d App. Dist. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded to the Court of Appeal to consider whether its judgment is based upon federal or state constitutional grounds, or both. See *California* v. *Krivda,* 409 U. S. 33 (1972). Reported below: 103 Cal. App. 3d 899, 162 Cal. Rptr. 682.

No. 80–74. TAPIA-ACUNA *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of the position presently asserted by the Solicitor General in his brief filed October 3, 1980. THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE REHNQUIST dissent and would deny the petition for writ of certiorari. Reported below: 620 F. 2d 311.

No. 80–274. CALIFORNIA *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA (ENGERT ET AL., REAL PARTIES IN INTEREST). Ct. App. Cal., 1st App. Dist. Motion of respondents Engert and Gamble for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded to the Court of Appeal to consider whether its judgment is based upon federal or state constitutional grounds, or both. See *California* v. *Krivda,* 409 U. S. 33 (1972). JUSTICE BRENNAN, JUSTICE STEWART, and JUSTICE STEVENS dissent. Reported below: 105 Cal. App. 3d 365, 164 Cal. Rptr. 210.

No. 80–5132. C. P. *v.* DISTRICT OF COLUMBIA. Ct. App. D. C. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Rhode Island* v. *Innis,* 446 U. S. 291 (1980). Reported below: 411 A. 2d 643.

Miscellaneous Orders

No. A-357. MARQUEZ ET AL. *v.* CARTER, PRESIDENT OF THE UNITED STATES, ET AL.; and

No. A-361. PUERTO RICO *v.* MUSKIE, SECRETARY OF STATE, ET AL. C. A. 1st Cir. The order entered by JUSTICE BRENNAN on October 24, 1980, is vacated, and the applications for stay are denied.

No. 79-395. UNITED STATES *v.* MORRISON. C. A. 3d Cir. [Certiorari granted, 448 U. S. 906.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 79-678. SAN DIEGO GAS & ELECTRIC CO. *v.* CITY OF SAN DIEGO ET AL. Ct. App. Cal., 4th App. Dist. [Probable jurisdiction postponed, 447 U. S. 919.] Motion of the Solicitor General for divided argument denied. Motion of San Diego Urban League for divided argument denied.

No. 79-814. DELTA AIR LINES, INC. *v.* AUGUST. C. A. 7th Cir. [Certiorari granted, 446 U. S. 907.] Motion of the Solicitor General for divided argument granted.

No. 79-824. FEDERAL COMMUNICATIONS COMMISSION ET AL. *v.* WNCN LISTENERS GUILD ET AL.;

No. 79-825. INSILCO BROADCASTING CORP. ET AL. *v.* WNCN LISTENERS GUILD ET AL.;

No. 79-826. AMERICAN BROADCASTING COS., INC., ET AL. *v.* WNCN LISTENERS GUILD ET AL.; and

No. 79-827. NATIONAL ASSOCIATION OF BROADCASTERS ET AL. *v.* WNCN LISTENERS GUILD ET AL. C. A. D. C. Cir. [Certiorari granted, 445 U. S. 914.] Motion of respondents for divided argument granted.

No. 79-983. UNITED STATES *v.* WILL ET AL. D. C. N. D. Ill. [Probable jurisdiction postponed, 444 U. S. 1068]; and

No. 79-1689. UNITED STATES *v.* WILL ET AL. D. C. N. D. Ill. [Probable jurisdiction postponed, 447 U. S. 919.] Motion of Washington State Bar Assn. for leave to file an untimely brief as *amicus curiae* denied.

No. 79–1056. NORTHWEST AIRLINES, INC. *v.* TRANSPORT WORKERS UNION OF AMERICA, AFL–CIO, ET AL. C. A. D. C. Cir. [Certiorari granted, 447 U. S. 920.] Motion of Trans World Airlines, Inc., for leave to file a brief as *amicus curiae* granted. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* denied. JUSTICE BLACKMUN took no part in the consideration or decision of these motions.

No. 79–1176. CITY OF MEMPHIS ET AL. *v.* GREENE ET AL. C. A. 6th Cir. [Certiorari granted, 446 U. S. 934.] Motion of Hein Park Civic Association for leave to file a brief as *amicus curiae* granted. Motion of respondents for divided argument denied.

No. 79–1213. MINNICK ET AL. *v.* CALIFORNIA DEPARTMENT OF CORRECTIONS ET AL. Ct. App. Cal., 1st App. Dist. [Certiorari granted, 448 U. S. 910.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* denied.

No. 79–1236. CARSON ET AL. *v.* AMERICAN BRANDS, INC., T/A AMERICAN TOBACCO CO., ET AL. C. A. 4th Cir. [Certiorari granted, 447 U. S. 920.] Motion of respondent Unions for divided argument granted. Motion of the Solicitor General for divided argument granted.

No. 79–1260. CHANDLER ET AL. *v.* FLORIDA. Sup. Ct. Fla. [Probable jurisdiction noted, 446 U. S. 907.] Motion of appellee for divided argument granted.

No. 79–6624. ROSALES-LOPEZ *v.* UNITED STATES. C. A. 9th Cir. [Certiorari granted, *ante*, p. 819.] Motion for appointment of counsel granted and it is ordered that John J. Cleary, Esquire, of San Diego, Cal., be appointed to serve as counsel for petitioner in this case.

No. 79–1404. PENNHURST STATE SCHOOL AND HOSPITAL ET AL. *v.* HALDERMAN ET AL.;

No. 79–1408. MAYOR OF PHILADELPHIA ET AL. *v.* HALDERMAN ET AL.;

No. 79–1414. PENNSYLVANIA ASSOCIATION FOR RETARDED CITIZENS ET AL. *v.* PENNHURST STATE SCHOOL AND HOSPITAL ET AL.;

No. 79–1415. COMMISSIONERS AND MENTAL HEALTH/MENTAL RETARDATION ADMINISTRATOR FOR BUCKS COUNTY ET AL. *v.* HALDERMAN ET AL.; and

No. 79–1489. PENNHURST PARENTS-STAFF ASSN. *v.* HALDERMAN ET AL. C. A. 3d Cir. [Certiorari granted, 447 U. S. 904.] Motion of Congress of Advocates for the Retarded, Inc., et al. for leave to file a brief as *amici curiae* granted. Motion of respondents for divided argument granted. Motion of Illinois et al. for leave to participate in oral argument as *amici curiae* denied. Motion of petitioners for divided argument granted. Motion of American Psychiatric Association for leave to participate in oral argument as *amicus curiae* denied.

No. 79–5962. VINCENT *v.* TEXAS. Ct. Crim. App. Tex. [Probable jurisdiction postponed, 445 U. S. 960.] Motion of appellee to dismiss the appeal denied.

No. 79–6777. STEAGALD *v.* UNITED STATES. C. A. 5th Cir. [Certiorari granted, *ante*, p. 819.] Motion for appointment of counsel granted, and it is ordered that John Richard Young, Esquire, of Atlanta, Ga., be appointed to serve as counsel for petitioner in this case.

No. 79–6779. LITTLE *v.* STREATER. App. Sess., Super. Ct. Conn., New Haven Jud. Dist. [Probable jurisdiction noted, *ante*, p. 817.] Motion for appointment of counsel granted, and it is ordered that Jon C. Blue, Esquire, of Hartford, Conn., be appointed to serve as counsel for appellant in this case.

No. 80–299. JOHN NUVEEN & CO., INC., ET AL. *v.* SANDERS ET AL. C. A. 7th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States. JUSTICE STEVENS took no part in the consideration or decision of this order.

No. 80–323. COLUMBIA BROADCASTING SYSTEM, INC. *v.* AMERICAN SOCIETY OF COMPOSERS, AUTHORS, AND PUBLISHERS ET AL. C. A. 2d Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States. JUSTICE STEWART took no part in the consideration or decision of this order.

No. 80–461. RETAIL, WHOLESALE & DEPARTMENT STORE UNION, AFL–CIO *v.* G. C. MURPHY CO. C. A. 3d Cir. Motion of petitioners to expedite consideration of the petition for writ of certiorari denied.

No. 80–5202. IN RE MAGEE. Petition for writ of mandamus denied.

No. 80–5341. IN RE JACKSON. Petition for writ of mandamus and/or prohibition denied.

Probable Jurisdiction Noted

No. 79–1943. ALESSI ET AL. *v.* RAYBESTOS-MANHATTAN, INC., ET AL. Appeal from C. A. 3d Cir. Probable jurisdiction noted, case consolidated with No. 80–193 [*Buczynski et al.* v. *General Motors Corp. et al.*], *infra,* and a total of one hour allotted for oral argument. Reported below: 616 F. 2d 1238.

Certiorari Granted

No. 79–1144. TEXAS INDUSTRIES, INC. *v.* RADCLIFF MATERIALS, INC., ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 604 F. 2d 897.

No. 80–298. MONROE *v.* STANDARD OIL CO. C. A. 6th Cir. Certiorari granted. Reported below: 613 F. 2d 641.

No. 80–317. UNIVERSITY OF TEXAS ET AL. *v.* CAMENISCH. C. A. 5th Cir. Certiorari granted. Reported below: 616 F. 2d 127.

No. 80–429. COUNTY OF WASHINGTON, OREGON, ET AL. *v.* GUNTHER ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 602 F. 2d 882 and 623 F. 2d 1303.

No. 80–54. ITT GILFILLAN *v.* CLAYTON; and

No. 80–5049. CLAYTON *v.* INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ET AL. C. A. 9th Cir. Motion of petitioners in No. 80–5049 for leave to proceed *in forma pauperis* granted. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 623 F. 2d 563.

No. 80–193. BUCZYNSKI ET AL. *v.* GENERAL MOTORS CORP. ET AL. C. A. 3d Cir. Certiorari granted, case consolidated with No. 79–1943 [*Alessi et al.* v. *Raybestos-Manhattan, Inc., et al.*], *supra*, and a total of one hour allotted for oral argument. Reported below: 616 F. 2d 1238.

No. 80–207. CBS, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.;

No. 80–213. AMERICAN BROADCASTING COS., INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.; and

No. 80–214. NATIONAL BROADCASTING CO., INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 202 U. S. App. D. C. 369, 629 F. 2d 1.

No. 80–120. ST. MARTIN EVANGELICAL LUTHERAN CHURCH ET AL. *v.* SOUTH DAKOTA. Sup. Ct. S. D. Motion of Alabama et al. for leave to file a brief as *amici curiae* granted. Certiorari granted. Reported below: — S. D. —, 290 N. W. 2d 845.

No. 80–332. RHODES, GOVERNOR OF OHIO, ET AL. *v.* CHAPMAN ET AL. C. A. 6th Cir. Motion of respondent Chapman for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 624 F. 2d 1099.

No. 80–5303. BELTRAN *v.* MYERS, DIRECTOR, CALIFORNIA STATE DEPARTMENT OF HEALTH, ET AL. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted limited to Question 1 presented by the petition. Reported below: 622 F. 2d 1304.

Certiorari Denied. (See also Nos. 79–6743, 80–301, 80–313, 80–5061, and 80–5308, *supra.*)

No. 79–2051. CITY OF APOPKA, FLORIDA, ET AL. *v.* DOWDELL ET AL. C. A. 5th Cir. Certiorari denied.

No. 79–2054. LEWIS ET AL. *v.* MCGRAW ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 619 F. 2d 192.

No. 79–2062. CHOATE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 619 F. 2d 21.

No. 79–6761. JOHNSON *v.* ESTELLE, CORRECTIONS DIRECTOR. Ct. Crim. App. Tex. Certiorari denied.

No. 79–6829. HENDERSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 620 F. 2d 295.

No. 79–6834. EVANS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 80 Ill. App. 3d 444, 399 N. E. 2d 1333.

No. 79–6854. KEAGBINE *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 77 Ill. App. 3d 1039, 396 N. E. 2d 1341.

No. 79–6870. BYRNE *v.* MISSOURI. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 595 S. W. 2d 301.

No. 79-6888. THERIAULT *v.* CHARLES COLSON PRISON FELLOWSHIP ET AL. C. A. 6th Cir. Certiorari denied.

No. 80-20. SQUIRES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 622 F. 2d 591.

No. 80-57. DOUBLE "Q", INC. *v.* ANDRUS, SECRETARY OF THE INTERIOR. C. A. 6th Cir. Certiorari denied. Reported below: 617 F. 2d 602.

No. 80-76. VALDES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 617 F. 2d 59.

No. 80-135. STEVENS *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 80-159. GREEN *v.* AMERADA HESS CORP. C. A. 5th Cir. Certiorari denied. Reported below: 612 F. 2d 212.

No. 80-161. FREEDLANDER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 625 F. 2d 111.

No. 80-192. MARTORANO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 620 F. 2d 912.

No. 80-241. KABLE PRINTING CO. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 622 F. 2d 591.

No. 80-246. COMMUNITY GRAIN, INC. *v.* COOK INDUSTRIES, INC. C. A. 5th Cir. Certiorari denied. Reported below: 614 F. 2d 978.

No. 80-280. CONSOLIDATED OIL & GAS, INC., ET AL. *v.* KING RESOURCES CO. ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 614 F. 2d 703.

No. 80-281. OKC CORP. *v.* WILLIAMS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 614 F. 2d 58.

No. 80-284. SEQUOYAH ET AL. *v.* TENNESSEE VALLEY AUTHORITY. C. A. 6th Cir. Certiorari denied. Reported below: 620 F. 2d 1159.

No. 80-296. EMPRESAS ELECTRONICAS WALSER, INC., ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: — Ct. Cl. —, — F. 2d —.

No. 80-300. VIELEHR *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 104 Cal. App. 3d 392, 163 Cal. Rptr. 795.

No. 80-306. COLEBANK ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. D. C. Cir. Certiorari denied. Reported below: 198 U. S. App. D. C. 57, 610 F. 2d 999.

No. 80-307. STEPHENS INSTITUTE, DBA ACADEMY OF ART COLLEGE *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 620 F. 2d 720.

No. 80-314. FACTORS ETC., INC. *v.* MEMPHIS DEVELOPMENT FOUNDATION. C. A. 6th Cir. Certiorari denied. Reported below: 616 F. 2d 956.

No. 80-316. ALEXANDER *v.* GINO'S INC. C. A. 3d Cir. Certiorari denied. Reported below: 621 F. 2d 71.

No. 80-319. MENCHACA ET UX. *v.* CHRYSLER CREDIT CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 613 F. 2d 507.

No. 80-324. CONIGLIO *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 74 App. Div. 2d 1004, 426 N. Y. S. 2d 891.

No. 80-325. RADOMSKI, AKA KNIGHT *v.* KNIGHT ET AL. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 414 A. 2d 1211.

No. 80-326. JOHNSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 622 F. 2d 507.

No. 80–334. SILVERMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 633 F. 2d 206.

No. 80–335. WILLIAMS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 623 F. 2d 535.

No. 80–339. SECURITY MANAGEMENT CO., INC., ET AL. *v.* ROTHENBERG ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 617 F. 2d 1149.

No. 80–344. QUINAULT PACIFIC CORP. ET AL. *v.* AETNA BUSINESS CREDIT, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 616 F. 2d 893.

No. 80–345. QUINAULT PACIFIC CORP. ET AL. *v.* AETNA BUSINESS CREDIT, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 617 F. 2d 293.

No. 80–349. NATIONAL CHAMBER ALLIANCE FOR POLITICS ET AL. *v.* FEDERAL ELECTION COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 200 U. S. App. D. C. 322, 627 F. 2d 375.

No. 80–350. SEA-LAND SERVICE, INC., ET AL. *v.* MILOS. C. A. 2d Cir. Certiorari denied. Reported below: 622 F. 2d 574.

No. 80–353. SANTORA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 619 F. 2d 1052.

No. 80–355. REYNOLDS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 624 F. 2d 95.

No. 80–357. MCMAHON ET AL. *v.* CITY OF VIRGINIA BEACH. Sup. Ct. Va. Certiorari denied. Reported below: 221 Va. 102, 267 S. E. 2d 130.

No. 80–360. MIDESSA TELEVISION CO., INC., ET AL. *v.* MIDLAND TELECASTING CO. C. A. 5th Cir. Certiorari denied. Reported below: 617 F. 2d 1141.

No. 80–361. MALMED ET AL. *v.* THORNBURGH, GOVERNOR OF PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 621 F. 2d 565.

No. 80–363. LEWIS *v.* LEWIS ET AL. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 80–364. ATESER ET UX. *v.* PUBLIC HOSPITAL DISTRICT NUMBER ONE, DBA VALLEY GENERAL HOSPITAL, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 620 F. 2d 309.

No. 80–367. PRESBYTERIAN CHURCH OF HARRISBURG *v.* LIBERTY MUTUAL INSURANCE CO. Super. Ct. Pa. Certiorari denied. Reported below: — Pa. Super. —, 417 A. 2d 660.

No. 80–370. FARKAS *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied.

No. 80–373. DRIZIN ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 10th Cir. Certiorari denied. Reported below: 622 F. 2d 512.

No. 80–385. SHAW *v.* HOSPITAL AUTHORITY OF COBB COUNTY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 614 F. 2d 946.

No. 80–408. BAKER ET UX. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 617 F. 2d 292.

No. 80–413. KANSAS CITY SOUTHERN RAILWAY CO. *v.* GREAT LAKES CARBON CORP. C. A. 8th Cir. Certiorari denied. Reported below: 624 F. 2d 822.

No. 80–414. COLLINS ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 621 F. 2d 832.

No. 80–417. ANDERSON *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 153 Ga. App. 841, 267 S. E. 2d 259.

No. 80-430. GRASSI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 616 F. 2d 1295.

No. 80-433. COLE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 622 F. 2d 98.

No. 80-448. TUCKER *v.* HARTFORD NATIONAL BANK & TRUST CO. Sup. Ct. Conn. Certiorari denied. Reported below: — Conn. —, — A. 2d —.

No. 80-462. TRIMARCHE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 636 F. 2d 1206.

No. 80-475. SPRINGPARK ASSOCIATES *v.* CROWN LIFE INSURANCE CO. C. A. 9th Cir. Certiorari denied. Reported below: 623 F. 2d 1377.

No. 80-479. FRENCH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 628 F. 2d 1069.

No. 80-492. ANDERSON *v.* BOLGER, POSTMASTER GENERAL, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 619 F. 2d 81.

No. 80-513. LANE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 624 F. 2d 1336.

No. 80-527. MYERS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 635 F. 2d 932.

No. 80-538. CIAMPAGLIA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 628 F. 2d 632.

No. 80-539. TALBERT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 620 F. 2d 299.

No. 80-5019. BORRELLI *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 621 F. 2d 1092.

No. 80-5030. SINCLAIR *v.* BROWN, DISTRICT ATTORNEY, PARISH OF EAST BATON ROUGE. Sup. Ct. La. Certiorari denied. Reported below: 385 So. 2d 787.

No. 80-5032. THOMPSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 624 F. 2d 1109.

No. 80-5072. WATSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 622 F. 2d 588.

No. 80-5083. GAY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 623 F. 2d 673.

No. 80-5089. MCDONALD *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 387 So. 2d 1116.

No. 80-5101. JOHNSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 623 F. 2d 339.

No. 80-5106. CROSS *v.* MITCHELL, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. Reported below: 620 F. 2d 293.

No. 80-5112. PERRY *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 104 Cal. App. 3d 268, 163 Cal. Rptr. 522.

No. 80-5115. WATTS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 80-5137. GREEN *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 50 N. Y. 2d 891, 408 N. E. 2d 675.

No. 80-5151. BAUN *v.* CIVILETTI, ATTORNEY GENERAL, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 80-5167. BILBREY *v.* OKLAHOMA ET AL. Ct. Crim. App. Okla. Certiorari denied.

No. 80-5170. ALBRIGHT *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 96 Wis. 2d 122, 291 N. W. 2d 487

No. 80-5175. BULLOCK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 615 F. 2d 1082.

No. 80–5184. EDWARDS *v.* ANDREWS, ASSISTANT WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 80–5191. HARRIS *v.* ADAMS. C. A. 5th Cir. Certiorari denied. Reported below: 611 F. 2d 543.

No. 80–5193. WRIGHT *v.* LEFEVRE, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 80–5209. BRYANT *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 50 N. Y. 2d 949, 409 N. E. 2d 999.

No. 80–5217. BROWN *v.* JERNIGAN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 622 F. 2d 914.

No. 80–5222. HOLT *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 80–5229. MCKINNEY *v.* OKLAHOMA ET AL. Ct. Crim. App. Okla. Certiorari denied.

No. 80–5238. BURLESON *v.* TURNER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 626 F. 2d 859.

No. 80–5240. RIDDLE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 615 F. 2d 1363.

No. 80–5242. SPRADLEY *v.* FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 618 F. 2d 783.

No. 80–5243. HARNEST *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 595 S. W. 2d 865.

No. 80–5246. BRACKETT *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 246 Ga. 160, 269 S. E. 2d 420.

No. 80–5254. KINNELL *v.* ATKINS ET AL. C. A. 10th Cir. Certiorari denied.

No. 80–5255. KINNELL *v.* MEARA, BURBON COUNTY ATTORNEY, ET AL. C. A. 10th Cir. Certiorari denied.

No. 80-5256. SANDERS ET AL. *v.* HANKINS. Ct. Sp. App. Md. Certiorari denied.

No. 80-5265. BAGGETT *v.* NORTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 626 F. 2d 859.

No. 80-5273. GHIONE *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 624 F. 2d 191.

No. 80-5274. TWYMAN *v.* HESS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 80-5276. LANDI *v.* CALIFORNIA. Super. Ct. Cal., County of Solano. Certiorari denied.

No. 80-5278. MARTINEZ *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied. Reported below: 94 N. M. 436, 612 P. 2d 228.

No. 80-5280. CHICCO *v.* JONES ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 627 F. 2d 1087.

No. 80-5285. INGRAM *v.* PRUITT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 626 F. 2d 861.

No. 80-5287. GREEN *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 80-5288. PHILLIPS *v.* NIGH, GOVERNOR OF OKLAHOMA, ET AL. Sup. Ct. Okla. Certiorari denied.

No. 80-5291. SMITH *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 600 S. W. 2d 344.

No. 80-5296. TYSON *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 628 F. 2d 1346.

No. 80-5298. GERHARDT ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 627 F. 2d 1093.

No. 80-5300. LEONARD *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 300 N. C. 223, 266 S. E. 2d 631.

No. 80-5309. DICKINSON *v.* SEIGLER ET AL. C. A. 5th Cir. Certiorari denied.

No. 80-5315. MAGGARD *v.* FLORIDA PAROLE COMMISSION. C. A. 5th Cir. Certiorari denied. Reported below: 616 F. 2d 890.

No. 80-5319. JOHNSON *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 80-5322. CAMP *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 104 Cal. App. 3d 244, 163 Cal. Rptr. 510.

No. 80-5323. FLOYD *v.* MISSOURI. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 598 S. W. 2d 517.

No. 80-5330. HARRIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 632 F. 2d 837.

No. 80-5336. MOSER *v.* WILSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 626 F. 2d 862.

No. 80-5343. DOWLING *v.* GOVERNMENT OF THE VIRGIN ISLANDS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 633 F. 2d 660.

No. 80-5358. DANTZLER *v.* DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES OF FLORIDA EX REL. MORRIS. Sup. Ct. Fla. Certiorari denied. Reported below: 386 So. 2d 635.

No. 80-5363. BUSIC ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 624 F. 2d 1091.

No. 80–5368. SALINAS *v.* UNITED STATES; and

No. 80–5393. MALDONADO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 618 F. 2d 1092.

No. 80–5370. YOUNG *v.* DUCKWORTH, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 80–5373. COCHRAN *v.* MANOS. C. A. 6th Cir. Certiorari denied. Reported below: 620 F. 2d 301.

No. 80–5376. MCCLURE *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 4th Cir. Certiorari denied.

No. 80–5397. MCDONALD *v.* SMITH, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 624 F. 2d 1100.

No. 80–5404. PANA *v.* CUYLER ET AL. C. A. 3d Cir. Certiorari denied.

No. 80–5419. HARRIS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 201 U. S. App. D. C. 15, 627 F. 2d 474.

No. 80–5421. STEPHENS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 624 F. 2d 1106.

No. 80–5431. MOORE *v.* MOORE. C. A. 4th Cir. Certiorari denied. Reported below: 631 F. 2d 729.

No. 80–5434. ROBERTSON *v.* WARDEN, MARYLAND PENITENTIARY. C. A. 4th Cir. Certiorari denied. Reported below: 624 F. 2d 1095.

No. 80–5437. ARMSTRONG *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 627 F. 2d 1093.

No. 80–5453. TECUMSEH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 630 F. 2d 749.

No. 80–5469. WRIGHT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 622 F. 2d 792.

No. 80–5483. EUBANKS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 80–5486. PAUL *v.* UNITED STATES BUREAU OF PRISONS. C. A. 6th Cir. Certiorari denied. Reported below: 627 F. 2d 1092.

No. 80–5489. CLAYTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 622 F. 2d 1042.

No. 79–1795. BLAIR *v.* KENTUCKY; and

No. 79–1798. CARPENTER ET AL. *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 592 S. W. 2d 132.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

These petitions present the question whether the decision of the Supreme Court of Kentucky rests upon an independent and adequate state procedural ground that bars this Court's review of petitioners' constitutional claim, *inter alia,* that their convictions were based on a record lacking sufficient evidence. Because the question of when and how failure to comply with state procedural rules precludes our consideration of a federal constitutional claim is itself a federal question, *Henry* v. *Mississippi,* 379 U. S. 443, 447–448 (1965), and because I have serious doubts whether the Kentucky Supreme Court could properly insist on compliance with the procedural rule it invoked, I dissent from the denial of certiorari.

Petitioners Carpenter, Borders, and Blair were convicted in a Kentucky trial court of wanton endangerment in the first degree and criminal mischief in the third degree. The charges stemmed from the allegation that they fired a shotgun at businesses and automobiles injuring one person and damaging property. All three petitioners moved for directed verdict of acquittal at the close of the Commonwealth's case, and also moved for new trial after the jury verdict. Both motions were grounded on claims that the evidence was insufficient to sustain guilty verdicts. However, no petitioner

moved for a directed verdict on that ground at the close of all the evidence.

The Kentucky intermediate appellate court entertained petitioners' appeals from their convictions, and set them aside after finding that the evidence was insufficient to sustain the convictions.[1] The Supreme Court of Kentucky affirmed as to Carpenter and Borders, but reversed as to Blair. The court rejected the Commonwealth's argument that under state procedural law, *Kimbrough* v. *Commonwealth,* 550 S. W. 2d 525, 529 (Ky. 1977), petitioners Carpenter and Borders' failure at the close of all the evidence to move for a directed verdict for insufficiency of the evidence forfeited their right of review on that ground. Citing *Vachon* v. *New Hampshire,* 414 U. S. 478, 480 (1974), the Kentucky Supreme Court not only held that "the evidence was insufficient" but also concluded that "the record before us contains *no relevant evidence* linking Carpenter and Borders to the charged offenses." (Emphasis added.) Blair's case differed, the court held, because there was "relevant evidence" as to him. See *Thompson* v. *Louisville,* 362 U. S. 199, 206 (1960). The court therefore applied the *Kimbrough* rule and held that Blair had waived his right to raise the insufficiency-of-the-evidence issue on appeal.

The Commonwealth filed a petition for rehearing. This time, the Kentucky Supreme Court reversed itself and reinstated the convictions of Carpenter and Borders. The Court held that, "as clarified in *Kimbrough,* . . . in order for the issue of the sufficiency of the evidence to be preserved for appellate review, the party wishing to use the insufficiency as a basis for his appeal must have moved for a directed verdict at the close of all the evidence, not just at the close of the Commonwealth's case in chief." 592 S. W. 2d 132, 133 (1979).

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[1] The Court of Appeals initially remanded for a new trial but six months later withdrew that original opinion and substituted a new one reversing the convictions outright.

But *Kimbrough* was decided eight months after petitioners' trial and announced new Kentucky law. Prevailing Kentucky law at the time of the trial embodied the procedural rule that the issue of insufficiency of the evidence was preserved for appellate review when the motion for a directed verdict was made *either* at the close of the Commonwealth's case *or* at the close of all the evidence. *Crain* v. *Commonwealth,* 484 S. W. 2d 839, 842 (1972).[2] Plainly petitioners could not fairly be charged with anticipating the new rule first announced eight months after their trial. This is thus clearly a case where "[n]ovelty in procedural requirements cannot be permitted to thwart review in this Court applied

[2] Every other case cited by the Kentucky Supreme Court in support of the *Kimbrough* procedural rule was decided after *Kimbrough.* The Commonwealth's brief cites two cases, *Delong* v. *Commonwealth,* 225 Ky. 461, 9 S. W. 2d 136, 137 (1928), and *Harvey* v. *Commonwealth,* 423 S. W. 2d 535, 537 (Ky. 1967), both decided before petitioners' trial, for the view that *Kimbrough* merely reiterated prior state law. If anything, however, these two cases lend support for the opposite proposition that, prior to *Kimbrough,* the court would review a claim that the trial court erred in denying a motion for a directed verdict made at the close of the prosecutor's case. In *Delong,* the defendants claimed that the trial court's failure to direct a verdict on their motion at the close of the Commonwealth's case was reversible error. The appellate court noted that, instead of resting their case after their motion, defendants proceeded to "take the stand and . . . furnis[h] enough evidence themselves to sustain the conviction." 225 Ky., at 463, 9 S. W. 2d, at 137. The court therefore declined to reverse the trial court, not because defendants failed to renew their motions for directed verdicts, but precisely because the court, after reviewing the full evidentiary record, found sufficient evidence to support their convictions.

In *Harvey,* the court similarly concluded after a review of all the evidence that "any deficiency which may have existed in the Commonwealth's evidence" was rectified after defendant presented his evidence. 423 S. W. 2d, at 537. For this reason, the court found no reversible error in the trial court's failure to direct the verdict at the conclusion of the Commonwealth's evidence. This appellate posture also has been regularly followed by the Kentucky courts in the civil context in reviewing a motion for a directed verdict at the close of the plaintiff's case. *E. g., Lyon* v. *Prater,* 351 S. W. 2d 173, 175 (Ky. 1961).

for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." *NAACP* v. *Alabama*, 357 U. S. 449, 457–458 (1958). See *Henry* v. *Mississippi*, 379 U. S., at 448, n. 3.[3]

This case is particularly compelling given the two explicit findings by the Supreme Court and Court of Appeals of Kentucky to the effect that the evidence was not only insufficient but irrelevant to support the guilty verdicts of Carpenter and Borders.[4] Although petitioners may now obtain federal habeas corpus relief, it is wasteful of sparse judicial resources to require resort to that remedy since the issues presented are only questions of law and no hearing is required to develop a record upon which to decide the cases.[5]

Because I am unable to reconcile the Kentucky Supreme Court's procedural holding in the present cases with its unambiguous procedural rule applicable at the time of petitioners' trial, I would grant the petitions for certiorari.

No. 80-64. EGBERT *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. JUSTICE BRENNAN and JUSTICE WHITE would grant certiorari. Reported below: 227 Kan. 266, 606 P. 2d 1022.

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[3] The Commonwealth's argument that Kentucky Criminal Rule 9.54 (2), applicable at the time of petitioners' trial, effectively embodied the *Kimbrough* rule, is unavailing. The Kentucky Supreme Court relied solely on *Kimbrough* and later cases in reversing itself and did not so much as mention Rule 9.54 (2). In any event, the Rule, which deals with motions for jury instructions "fairly and adequately presented," on its face does not support the *Kimbrough* rule, and interpretative case law is similarly unsupportive.

[4] Because the convictions of Carpenter and Borders were struck down under the "no evidence" test, *Thompson* v. *Louisville*, 362 U. S. 199, 206 (1960), it follows *a fortiori* that the convictions were faulty under the now controlling insufficiency-of-the-evidence constitutional standard, *Jackson* v. *Virginia*, 443 U. S. 307, 318–319 (1979). Moreover, although the Supreme Court found "relevant evidence" linking Blair to the crime, this would not end the inquiry as to him under the *Jackson* test.

[5] This is certainly true at least as to Carpenter and Borders.

No. 80–100. LORAIN JOURNAL CO. ET AL. *v.* MILKOVICH. Ct. App. Ohio, Lake County. Motions of Beacon Journal Publishing Co. et al. and Ohio Newspapers Association for leave to file briefs as *amici curiae* granted. Certiorari denied. JUSTICE STEWART would deny this petition for want of a final judgment. Reported below: 65 Ohio App. 2d 143, 416 N. E. 2d 662.

JUSTICE BRENNAN, dissenting.

This petition for certiorari raises an important question concerning limitations on the authority of trial courts to grant dismissals, summary judgments, or judgments notwithstanding the verdict[1] in favor of media defendants in libel actions, based on the qualified privilege outlined in *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964).

On January 8, 1975, the News-Herald of Willoughby, Ohio, published a column by sportswriter Ted Diadiun criticizing respondent Michael Milkovich, a wrestling coach at Maple Heights High School, who is treated as a "public figure" for purposes of this case. Headlined "Maple beat the law with the 'big lie,'" the column accused Milkovich of lying about a fracas that occurred during one of his team's wrestling matches.

On February 9, 1974, the Maple High wrestling team, coached by Milkovich, faced a team from Mentor High School. A brawl involving both wrestlers and spectators erupted after a controversial ruling by a referee. Several wrestlers were injured. The Ohio High School Athletic Association (OHSAA) subsequently conducted a hearing into the occurrence, censured Milkovich for his conduct at the match,

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[1] Although the decision below concerned directed verdicts, its holding would affect the courts' treatment of summary judgments and judgments notwithstanding the verdict as well. In each of these situations, the court is called upon to answer the same question: whether there is sufficient evidence for the jury to find actual malice under the applicable "clear and convincing evidence" burden of proof.

placed his team on probation for the school year, and declared the team ineligible to compete in the state wrestling tournament. Diadiun attended and reported on both the match and the hearing, at which Milkovich had defended his behavior. Thereafter, a group of parents and high school wrestlers filed suit in Franklin County Common Pleas Court, claiming that the OHSAA had denied the team due process. Milkovich, not a party to that lawsuit, appeared as a witness for the plaintiffs. On January 7, 1975, the court held that due process had been denied, and enjoined the team's suspension. *Barrett* v. *Ohio High School Athletic Assn.*, No. 74CV-09-3390.[2]

Diadiun did not attend the court hearing, review the transcript, or read the court's opinion, but he wrote a column about the decision based on his own recollection of the wrestling match and ensuing OHSAA hearing and on a description of the court proceeding given him by an OHSAA Commissioner. In the column, Diadiun stated that Milkovich and others had "misrepresented" the occurrences at the OHSAA hearing, and that Milkovich's testimony "had enough contradictions and obvious untruths so that the six board members were able to see through it." Diadiun went on to say, however, that at the later court hearing Milkovich and a fellow witness "apparently had their version of the incident polished and reconstructed, and the judge apparently believed them." Diadiun concluded that anyone who had attended the match "knows in his heart that Milkovich . . . lied at the hearing after. . . having given his solemn oath to tell the truth. But [he] got away with it."

Milkovich filed a libel action in state court against petitioners Diadiun, the News-Herald, and the latter's parent

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[2] The court ruled that the wrestling team was denied its right to cross-examine witnesses and to call witnesses on its behalf. The court did not make any factual findings concerning the underlying occurrences, nor did it comment on those occurrences.

corporation. Petitioners moved for summary judgment. The court held that Milkovich is a public figure for purposes of the *New York Times* test,[3] but denied summary judgment. The action was then tried to a jury. After five days of trial, at the close of Milkovich's evidence, petitioners moved for a directed verdict. They argued that Milkovich had failed to proffer sufficient evidence from which the jury could conclude that Diadiun's column had been published with actual malice under the *New York Times* test. The court granted the motion for directed verdict, stating that the evidence, considered most strongly in favor of Milkovich, "fails to establish by clear and convincing proof that the article . . . was published with knowledge of its falsity or in reckless disregard of the truth."

Milkovich appealed to the State Court of Appeals, which reversed and remanded for trial. The court stated that Diadiun's column conflicted with the factual determination reached in the earlier Common Pleas Court injunctive action, and held that this conflict alone constituted sufficient evidence of actual malice to withstand petitioner's motion for directed verdict.[4] Petitioners appealed to the Ohio Supreme Court,

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[3] The ruling that Milkovich is a public figure is unchallenged.

[4] The court stated:

"In the instant case, a court of law, based on the evidence before it, and having the right to determine where the truth lay, even though on a due process question, determined the truth in favor of the plaintiff and the wrestling team he coached. Thus, he had his day in court and was, at that time at least, exonerated by the only recognized arbiter of the truth in our American judicial system, but thereafter was still called a liar for the testimony he allegedly gave during that trial. . . . It would appear that, though the press might be at liberty to criticize the judicial process and the results of a given case, unless and until the judgment of the court is overturned on appeal, the determination of what constitutes the truth has been made. Thus, any news article written either as fact as a news item, or as opinion, that is published knowing that it conflicts with a judicial determination of the truth, may, in our opinion, be regarded as a reckless disregard of the truth so as to constitute 'actual

and also sought review in the nature of certiorari. The Ohio Supreme Court dismissed the appeal as raising "no substantial constitutional question" and otherwise denied review. The court also denied petitioners' motion for rehearing.[5]

The import of the Ohio appellate court's holding is plainly that, even in the absence of proof of knowing falsehood or reckless disregard for the truth, a newspaper forfeits its right to a directed verdict, summary judgment, or judgment notwithstanding the verdict on the issue of actual malice if it has published a statement that conflicts, however tangentially, with a decision by a court. This holding is clearly contrary to the First Amendment and to the relevant precedents of this Court. I had supposed it was settled that newspapers are privileged to publish their views of the facts, so long as those views are not recklessly or knowingly false. It matters not that such views may conflict with those of a court, for the press is free to differ with judicial determinations. In the libel area, neither a court nor any other institution is the "recognized arbiter of the truth," as the court below asserted. See *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 339–340 (1974).[6]

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malice' so as to be actionable libel of a public person. Whether, in a given case, it constitutes a reckless disregard of the truth, is not, in our opinion, a question of law, but a question of fact based on the evidence before the court." 65 Ohio App. 2d 143, —, 416 N. E. 2d 662, 666 (1979).

[5] Although the appellate court below remanded the case for retrial, including a jury determination on the actual-malice issue, the decision was nonetheless a final judgment for purposes of 28 U. S. C. § 1257. A decision in favor of petitioners would terminate the litigation, while a failure to decide the question now would leave the press in Ohio "operating in the shadow of . . . a rule of law . . . the constitutionality of which is in serious doubt." *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 486 (1975); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241, 246–247 (1974).

[6] Indeed, at common law, a factual finding embodied in the judgment in another cause could not even be used as evidence of that fact in court. 5 J. Wigmore, Evidence § 1671a, pp. 806–807 (Chadbourn rev. 1974).

One part of the "strategic protection" that decisions of this Court have extended to the press in the libel area is the insistence that a public figure can prevail "only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth." *Gertz* v. *Robert Welch, Inc., supra*, at 342; *New York Times Co.* v. *Sullivan*, 376 U. S., at 285–286. The court in a libel action has a responsibility to ensure that sufficient evidence of actual malice has been introduced to permit a jury finding under this exacting standard. This protection must not be withdrawn merely because the press account may have differed with the conclusions of a court, lest the "uninhibited, robust, and wide-open." *New York Times* v. *Sullivan, supra*, at 270, discussion of judicial proceedings be deterred. See *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S. 555 (1980).

The consequence of the erroneous ruling in this case is particularly apparent on the facts: petitioners were denied a directed verdict on the strength of a prior court opinion that did not even discuss, let alone decide, what had happened at the disrupted wrestling match or whether Milkovich had testified truthfully. The court had merely ruled that the Maple High School wrestling team was denied certain procedural safeguards required under due process. Thus, it is abundantly apparent that the state court's conclusion that Diadiun wrote this column "knowing that it conflicts with a judicial determination of the truth" is unpersuasive even on its own terms.

Because in my view the decision of the Ohio appellate court in this case seriously contravenes the principles of the First Amendment as interpreted by this Court, and threatens to chill the freedom of newspapers in Ohio to publish their view of the facts where they differ with the view of the courts, I dissent and would grant certiorari to review this important question of constitutional law.

No. 80-137. DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT OF LOUISIANA *v.* BEAIRD-POULAN, INC. C. A. 5th Cir. Certiorari denied. Reported below: 616 F. 2d 255.

JUSTICE REHNQUIST, dissenting.

More than half a century ago, this Court observed that "[t]he settled policy of Congress, in authorizing the taking of land and appurtenances, has been to limit the right to compensation to interests in the land taken." *Mitchell* v. *United States,* 267 U. S. 341, 346 (1925). In 1970, however, Congress enacted the Uniform Relocation Assistance and Real Property Acquisition Policies Act, wherein it declared its purpose to "establish a uniform policy for the fair and equitable treatment of persons displaced as a result of Federal and federally assisted programs in order that such persons shall not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole." 84 Stat. 1895, 42 U. S. C. § 4621. The substantive provisions of the Act provide for actual reasonable expenses in moving the condemnee, his business, his family, his farm, or other personal property, and actual reasonable expenses in searching for a replacement business or farm. The only substantive provisions of the Act dealing with state condemnations in general are carefully treated in 42 U. S. C. §§ 4627 and 4630, which forbid the head of a "Federal agency" from approving a "grant to, or contract or agreement with, a State agency, under which Federal financial assistance will be available to pay all or part of the cost of any program or project . . . unless he receives satisfactory assurances from such State agency" that fair and reasonable relocation payments and assistance shall be provided to or for displaced persons, as are required to be provided by a federal agency under the earlier sections of the Act.

We may expect frequent interaction between the Federal and State Governments such as is contemplated by the Act, and the fact that this case raises serious questions under the

Act concerning federal jurisdiction would lead me to grant certiorari.

Beaird-Poulan, a corporation engaged in the manufacture of chain saws, owned a 16.5-acre tract of land in Louisiana. It operated plant facilities on the front portion of this tract, while the rest consisted of unimproved timberland not used for business purposes in any way. In May 1971 the Louisiana Department of Transportation and Development (DOTD) expropriated a 3-acre section of the unused portion of the tract for construction of Interstate 220, a federally assisted highway project. Beaird-Poulan moved some of its facilities to a new plant location after the expropriation, and filed suit against DOTD and the United States Secretary of Transportation in Federal District Court to recover its moving expenses. It alleged that its action arose under the Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U. S. C. § 4601 *et seq.* Pursuant to § 4630 Louisiana had enacted its own Relocation Assistance Act, La. Rev. Stat. Ann. §§ 38:3101–3110 (West Supp. 1980).

The United States District Court, after preliminary litigation as to the meaning of the Louisiana Constitution, ordered respondent to submit its claim to petitioner, and ordered that petitioner conduct a full, fair, and complete adversary hearing, retaining "jurisdiction of this case to review the administrative determination." After considering respondent's claim petitioner denied it both because the state legislation was not in effect when the claim arose, and because respondent did not qualify as a displaced person.

Beaird-Poulan did not seek either rehearing or review of the DOTD decision in state court [1] but rather filed a motion in Federal District Court stating that it was "aggrieved by the administrative determination . . . and desires that this Court

[1] It appears that such review is available after exhaustion of administrative remedies. See, *e. g., Bounds* v. *State of Louisiana, Department of Highways,* 333 So. 2d 714 (La. App.), writ refused, 338 So. 2d 295 (La. 1976).

review the administrative determination." Over DOTD's objection the court took the case and supplemented the administrative record. The court based its jurisdiction on 28 U. S. C. § 1331 (a) (1976 ed., Supp. III), and concluded that its function was "to review [the DOTD] decision denying relocation assistance benefits." It rejected a contention that judicial review was unavailable, concluding that Congress intended to foreclose review under a separate section covering acquisition policies, 42 U. S. C. § 4651, but not under the relocation provision, 42 U. S. C. § 4622. On the merits the court ruled that Beaird-Poulan was a displaced person and directed DOTD to determine the amount of its moving expenses. 441 F. Supp. 866. The Fifth Circuit affirmed in a one-sentence *per curiam* adopting the District Court opinion as its own. 616 F. 2d 255.

The District Court determined that Congress did not intend to preclude judicial review of *federal* relocation payment determinations under 42 U. S. C. § 4622, but it failed to note that the case before it involved a relocation payment determination made not by a *federal* agency, but by a state agency under state law. Nothing in the Act purports to give federal courts the power to review such determinations of state agencies. Although such silence may not preclude federal judicial review of *federal* agency decisions under the Administrative Procedure Act, 5 U. S. C. § 701, the APA is of course not applicable to state agencies.

The rule that applies to cases such as the present one was stated a quarter of a century ago in *Chicago, R. I. & P. R. Co.* v. *Stude,* 346 U. S. 574 (1954). The railroad, pursuant to Iowa law, condemned certain land. It appealed the local sheriff's award of compensation to the Federal District Court, alleging diversity of citizenship and seeking to limit the award. This Court sustained a dismissal of the action: "The United States District Court . . . does not sit to review on appeal action taken administratively . . . in a state proceed-

ing. . . . The Iowa Code does not purport to authorize such an appeal, Congress has provided none by statute, and the Federal Rules of Civil Procedure make no such provision." *Id.*, at 581.

The District Court cited 28 U. S. C. § 1331 (a) (1976 ed., Supp. III) as the basis for its jurisdiction, but the present case does not "arise under" federal law. The proceedings before the DOTD, which the District Court purported to review, were grounded on La. Rev. Stat. Ann. § 38:3101 *et seq.* (West Supp. 1980). Although this state legislation is similar to the federal Act, and was enacted in response to 42 U. S. C. § 4630, it is nonetheless still a state law. Nothing in the federal Act gives displaced persons a direct cause of action against state agencies, nor does respondent cite any evidence in the legislative history suggesting that such an action was contemplated. On the contrary, the Act encourages States to make appropriate relocation payments under their own laws by conditioning the availability of federal funds on the provision of such payments. *Ibid.* The carrot of federal funds, not the stick of private suits, was chosen by Congress as the means of providing relocation payments to those displaced by the States for federally assisted projects.

Because the District Court assumed to the contrary, and exercised jurisdiction either to review the decision of the state agency or to entertain a direct action against the state agency, I would grant the petitioner agency's petition for certiorari.

No. 80–184. ILLINOIS *v.* DOWDELL. App. Ct. Ill., 3d Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 81 Ill. App. 3d 266, 401 N. E. 2d 295.

No. 80–185. KLIPPAN, GMBH *v.* VOLKSWAGEN OF AMERICA, INC. Sup. Ct. Alaska. Certiorari denied. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 611 P. 2d 498.

No. 80–224. WESTINGHOUSE ELECTRIC CORP. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 4th Cir. Certiorari denied. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 618 F. 2d 107.

No. 80–305. ALABAMA DAIRY COMMISSION ET AL. *v.* DELVIEW MEADOW GOLD DIVISION, BEATRICE FOODS CO., ET AL. Sup. Ct. Ala. Certiorari denied. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 383 So. 2d 511.

No. 80–337. ROBERTS *v.* SEARS, ROEBUCK & CO. C. A. 7th Cir. Certiorari denied. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 617 F. 2d 460.

No. 80–263. ITHACA COLLEGE FACULTY ASSN., NYSUT–AFT *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN would grant certiorari. Reported below: 623 F. 2d 224.

No. 80–297. HOLDING *v.* BVA CREDIT CORP. ET AL. C. A. 4th Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 618 F. 2d 99.

No. 80–5248. INMATES, RICHMOND CITY JAIL *v.* WINSTON ET AL. C. A. 4th Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 622 F. 2d 584.

No. 80–405. TRAN CON CORP., DBA PALLADIUM *v.* ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD (RICE, DIRECTOR, DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, REAL PARTY IN INTEREST). Ct. App. Cal., 1st App. Dist. Certiorari denied. JUSTICE BRENNAN would grant certiorari.

No. 80–308. ORTHO PHARMACEUTICAL CORP. *v.* MCKENNA ET VIR. C. A. 3d Cir. Certiorari denied. JUSTICE STEWART and JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 622 F. 2d 657.

No. 80–352. KALINSKY ET AL. *v.* GENERAL DYNAMICS CORP. ET AL. C. A. 9th Cir. Motion of California Trial Lawyers Association for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 622 F. 2d 1315.

No. 80–5103. DOWNS *v.* FLORIDA. Sup. Ct. Fla.;

No. 80–5317. REDD *v.* BALKCOM, WARDEN. Sup. Ct. Ga.; and

No. 80–5359. DAVIS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: No. 80–5359, 597 S. W. 2d 358.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 79–1245. ACAVINO *v.* UNITED STATES, 446 U. S. 951. Petition for rehearing denied.

NOVEMBER 5, 1980

Dismissal Under Rule 53

No. 80–5403. PRATT *v.* UNITED STATES. C. A. 1st Cir. Certiorari dismissed under this Court's Rule 53.

NOVEMBER 7, 1980

Dismissal Under Rule 53

No. 80–5526. SANDERS *v.* UNITED STATES. C. A. 6th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 627 F. 2d 1094.

NOVEMBER 10, 1980

Appeals Dismissed

No. 80–318. EXXON CORP. ET AL. *v.* CITY OF MENTOR, OHIO. Appeal from Ct. App. Ohio, Lake County, dismissed for want of substantial federal question.

No. 80–401. RUBIN ET UX. *v.* GLASER, DIRECTOR, DIVISION OF TAXATION, DEPARTMENT OF THE TREASURY OF NEW JERSEY, ET AL. Appeal from Sup. Ct. N. J. dismissed for want of substantial federal question. Reported below: 83 N. J. 299, 416 A. 2d 382.

No. 80–5427. ROBERTS *v.* MCCOY ET AL. Appeal from C. A. 5th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 621 F. 2d 439.

No. 80–5528. CONRAD *v.* RODINO, MEMBER OF CONGRESS, ET AL. Appeal from D. C. D. C. dismissed for want of jurisdiction.

No. 80–5529. CONRAD *v.* CARTER, PRESIDENT OF THE UNITED STATES, ET AL. Appeal from D. C. D. C. dismissed for want of jurisdiction.

Certiorari Granted—Reversed and Remanded. (See No. 79–6000, *ante,* p. 5.)

Certiorari Granted—Vacated and Remanded

No. 80–365. WASHINGTON *v.* FITZSIMMONS. Sup. Ct. Wash. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded to the Supreme Court of Washington to consider whether its judgment is based upon federal or state constitutional grounds, or both. See *California* v. *Krivda,* 409 U. S. 33 (1972). JUSTICE BRENNAN, JUSTICE STEWART, JUSTICE MARSHALL, and JUSTICE STEVENS dissent. Reported below: 93 Wash. 2d 436, 610 P. 2d 893.

Miscellaneous Orders

No. A-292. BIZZARD *v.* UNITED STATES. Application for bail and/or writ of habeas corpus, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A-388. MCLAIN *v.* MEIER, SECRETARY OF STATE OF NORTH DAKOTA, ET AL. Application for stay and injunctive relief, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. D-196. IN RE DISBARMENT OF BROADWELL. It is ordered that Paul Herbert Broadwell of Phoenix, Ariz., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-197. IN RE DISBARMENT OF CAMPBELL. It is ordered that William H. Campbell, of Omaha, Neb., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-201. IN RE DISBARMENT OF NOONAN. It is ordered that Francis Patrick Noonan, of Poolesville, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-203. IN RE DISBARMENT OF HENDERSON. It is ordered that Alan Burton Henderson, of Towson, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–195. IN RE DISBARMENT OF CORY. It is ordered that Ernest Neal Cory, Jr., of Laurel, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–198. IN RE DISBARMENT OF FOGEL. It is ordered that Martin Fogel, of Rockville, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–205. IN RE DISBARMENT OF SILASKI. It is ordered that George S. Silaski, of Kalamazoo, Mich., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–206. IN RE DISBARMENT OF KERPELMAN. It is ordered that Leonard Jules Kerpelman, of Baltimore, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–207. IN RE DISBARMENT OF WALSH. It is ordered that Bernard Walsh, Jr., of Papillion, Neb., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 79–880. KISSINGER ET AL. *v.* HALPERIN ET AL. C. A. D. C. Cir. [Certiorari granted, 446 U. S. 951.] Motion of Bertram Zweibon et al. for leave to file a brief as *amici curiae* granted. JUSTICE REHNQUIST took no part in the consideration or decision of this motion.

No. 79–1056. NORTHWEST AIRLINES, INC. *v.* TRANSPORT WORKERS UNION OF AMERICA, AFL–CIO, ET AL. C. A. D. C. Cir. [Certiorari granted, 447 U. S. 920.] Motions of International Union of Electrical, Radio & Machine Workers, AFL–CIO; Mary P. Laffey et al.; and American Federation of Labor and Congress of Industrial Organizations et al. for leave to file briefs as *amici curiae* granted. JUSTICE BLACKMUN took no part in the consideration or decision of these motions.

No. 79–1404. PENNHURST STATE SCHOOL AND HOSPITAL ET AL. *v.* HALDERMAN ET AL;

No. 79–1408. MAYOR OF PHILADELPHIA ET AL. *v.* HALDERMAN ET AL.;

No. 79–1414. PENNSYLVANIA ASSOCIATION FOR RETARDED CITIZENS ET AL. *v.* PENNHURST STATE SCHOOL AND HOSPITAL ET AL.;

No. 79–1415. COMMISSIONERS AND MENTAL HEALTH/MENTAL RETARDATION ADMINISTRATOR FOR BUCKS COUNTY ET AL. *v.* HALDERMAN ET AL.; and

No. 79–1489. PENNHURST PARENTS-STAFF ASSN. *v.* HALDERMAN ET AL. C. A. 3d Cir. [Certiorari granted, 447 U. S. 904.] Motions of National Association of Retarded Citizens et al. and plaintiffs in *Brewster* v. *Dukakis*, et al., for leave to participate in oral argument as *amici curiae* denied.

No. 79–1734. PARRATT ET AL. *v.* TAYLOR. C. A. 8th Cir. [Certiorari granted, *ante*, p. 917.] Motion of respondent for appointment of counsel granted, and it is ordered that Kevin Colleran, Esquire, of Lincoln, Neb., be appointed to serve as counsel for respondent in this case.

No. 80–419. ARIZONA *v.* MARICOPA COUNTY MEDICAL SOCIETY ET AL. C. A. 9th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 80–704. GIBBONS, TRUSTEE, ET AL. *v.* RAILWAY LABOR EXECUTIVES' ASSN. ET AL. C. A. 7th Cir. Motion of petitioners to expedite consideration of the petition for writ of certiorari denied.

No. 80–5560. IN RE CORLEY. Petition for writ of habeas corpus denied.

No. 79–2016. IN RE INTERSIMONE. Motion for leave to file petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 80–84. ANDERSON BROS. FORD ET AL. *v.* VALENCIA ET AL. C. A. 7th Cir. Motion of respondents for leave to proceed *in forma pauperis* and certiorari granted limited to Questions 1 and 2 presented by the petition. Reported below: 617 F. 2d 1278.

No. 80–5116. JENKINS *v.* BREWER. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 624 F. 2d 1106.

Certiorari Denied. (See also No. 80–5427, *supra.*)

No. 79–1524. CITIZENS CASUALTY COMPANY OF NEW YORK *v.* SLOTKIN ET AL.;

No. 79–1535. MCGRATH *v.* SLOTKIN ET AL.;

No. 79–1571. MCGRATH *v.* SLOTKIN ET AL.; and

No. 79–1719. AMERICAN MUTUAL INSURANCE COMPANY OF BOSTON *v.* SLOTKIN ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 301.

No. 79–6663. TROZZO ET AL. *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 79–6766. WARDEN *v.* KIDD, CIRCUIT COURT CLERK OF JEFFERSON COUNTY, MISSOURI. C. A. 8th Cir. Certiorari denied. Reported below: 620 F. 2d 308.

No. 79-6858. PARKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 619 F. 2d 82.

No. 79-6872. THOMAS *v.* MUSKIE, SECRETARY OF STATE, ET AL.; and

No. 79-6873. THOMAS *v.* MUSKIE, SECRETARY OF STATE, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 79-6899. CASON *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 596 S. W. 2d 436.

No. 80-39. VOLZ *v.* UNITED STATES DEPARTMENT OF JUSTICE. C. A. 10th Cir. Certiorari denied. Reported below: 619 F. 2d 49.

No. 80-236. NEWMAN MEMORIAL HOSPITAL, INC., ET AL. *v.* HACKNEY, ADMINISTRATRIX. C. A. 10th Cir. Certiorari denied. Reported below: 621 F. 2d 1069.

No. 80-262. DACEY *v.* COTTER ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 622 F. 2d 573.

No. 80-368. FEDERAL ELECTION COMMISSION *v.* AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS. C. A. D. C. Cir. Certiorari denied. Reported below: 202 U. S. App. D. C. 97, 628 F. 2d 97.

No. 80-369. AVINS *v.* WHITE. C. A. 3d Cir. Certiorari denied. Reported below: 627 F. 2d 637.

No. 80-371. RAO *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 74 App. Div. 2d 964, 425 N. Y. S. 2d 888.

No. 80-374. REYNOLDS, DBA BEN'S AUTO SALES *v.* YAZZIE ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 623 F. 2d 638.

No. 80-375. SHAMES *v.* SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO (SHAMES, REAL PARTY IN INTEREST). Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 80–376. BURDEN *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 105 Cal. App. 3d 917, 166 Cal. Rptr. 542.

No. 80–383. ADCOCK *v.* IOWA. Ct. App. Iowa. Certiorari denied. Reported below: 292 N. W. 2d 878.

No. 80–394. SHRIVER *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: — P. 2d —.

No. 80–397. LEE ET AL. *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: — Ind. App. —, 397 N. E. 2d 1047.

No. 80–407. THOMPSON *v.* TURNER, ASSISTANT DIRECTOR, ALABAMA STATE HIGHWAY DEPARTMENT. C. A. 5th Cir. Certiorari denied. Reported below: 616 F. 2d 1259.

No. 80–409. THOMAS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 624 F. 2d 1108.

No. 80–411. MORSEBURG *v.* BALYON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 621 F. 2d 972.

No. 80–424. RUSSELL *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 227 Kan. 897, 610 P. 2d 1122.

No. 80–432. CITY OF NEWARK, NEW JERSEY, ET AL. *v.* NATURAL RESOURCES COUNCIL, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF NEW JERSEY, ET AL. Sup. Ct. N. J. Certiorari denied. Reported below: 82 N. J. 530, 414 A. 2d 1304.

No. 80–438. GRAYDON *v.* PASADENA REDEVELOPMENT AGENCY ET AL. (HAHN, INC., REAL PARTY IN INTEREST). Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 104 Cal. App. 3d 631, 164 Cal. Rptr. 56.

No. 80–445. LIGONS *v.* BECHTEL POWER CORP. C. A. 8th Cir. Certiorari denied. Reported below: 625 F. 2d 771.

No. 80-453. ROBERTS *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 80-457. WILSON *v.* FIRESTONE, SECRETARY OF STATE OF FLORIDA, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 623 F. 2d 345.

No. 80-460. MERLO ET AL. *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 80-540. BROOKS *v.* SUPREME COURT OF SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: — S. C. —, 267 S. E. 2d 74.

No. 80-5073. CLAYTON *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 616 F. 2d 565.

No. 80-5146. MIDDLEBROOKS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 618 F. 2d 273.

No. 80-5150. CHAFIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 622 F. 2d 927.

No. 80-5237. WARD *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 24 Wash. App. 761, 603 P. 2d 857.

No. 80-5304. SAMUELS *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 50 N. Y. 2d 1035, 409 N. E. 2d 1368.

No. 80-5328. PHIPPS ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 622 F. 2d 1000.

No. 80-5337. GALADA *v.* GUILLEN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 626 F. 2d 860.

No. 80-5344. MITCHELL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 625 F. 2d 158.

No. 80–5345. BROWN *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 599 S. W. 2d 498.

No. 80–5346. SPRINGFIELD *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 96 Wis. 2d 740, 297 N. W. 2d 510.

No. 80–5352. DANIELS *v.* JAGO. C. A. 6th Cir. Certiorari denied. Reported below: 627 F. 2d 1089.

No. 80–5356. BLAKNEY *v.* SCHOOL DISTRICT OF PHILADELPHIA; and

No. 80–5357. BLAKNEY *v.* SCHOOL DISTRICT OF PHILADELPHIA. C. A. 3d Cir. Certiorari denied.

No. 80–5364. ENGLISH *v.* HARRIS, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 5th Cir. Certiorari denied. Reported below: 620 F. 2d 297.

No. 80–5366. TONEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 615 F. 2d 277.

No. 80–5369. HICKS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 80–5372. GUNN *v.* ANDERSON. C. A. 6th Cir. Certiorari denied.

No. 80–5375. GUSS *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 80–5377. WILLIAMS *v.* HINTON. C. A. 4th Cir. Certiorari denied. Reported below: 622 F. 2d 589.

No. 80–5378. BABERS *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 616 F. 2d 178.

No. 80–5396. HEFFNER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 80–5401. DANKERT *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 154 Ga. App. 392, 268 S. E. 2d 435.

No. 80–5420. CHOW *v.* SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP. C. A. 9th Cir. Certiorari denied. Reported below: 622 F. 2d 594.

No. 80–5474. DEGGENDORF *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 626 F. 2d 47.

No. 80–5500. DEVINCENT *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 632 F. 2d 147.

No. 80–5509. JEWELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 628 F. 2d 1351.

No. 79–6715. CULBERSON *v.* MISSISSIPPI. Sup. Ct. Miss.;
No. 79–6862. STONE *v.* FLORIDA. Sup. Ct. Fla.;
No. 79–6884. FAIR *v.* GEORGIA. Sup. Ct. Ga.;
No. 80–5119. MULLIGAN *v.* GEORGIA. Sup. Ct. Ga.;
No. 80–5163. ESQUIVEL *v.* TEXAS. Ct. Crim. App. Tex.;
No. 80–5249. REDDIX *v.* MISSISSIPPI. Sup. Ct. Miss.; and
No. 80–5399. JORDAN *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: No. 79–6715, 379 So. 2d 499; No. 79–6862, 378 So. 2d 765; No. 79–6884, 245 Ga. 868, 268 S. E. 2d 316; No. 80–5119, 245 Ga. 266, 264 S. E. 2d 204; No. 80–5163, 595 S. W. 2d 516; No. 80–5249, 381 So. 2d 999; No. 80–5399, 126 Ariz. 283, 614 P. 2d 825.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 80-5523. FRASQUILLO-ZOMOSA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 626 F. 2d 99.

No. 80-5524. COURY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 620 F. 2d 299.

No. 80-5527. HOSKINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 628 F. 2d 295.

No. 80-5534. LEYBA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 627 F. 2d 1059.

No. 80-5535. GARCIA-ANGUIANA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 626 F. 2d 867.

No. 80-359. JOHNSON, FOR THE USE OF ROSSIELLO *v.* ALLSTATE INSURANCE CO. C. A. 7th Cir. Certiorari denied. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 629 F. 2d 1244.

No. 80-502. FLOREY ET AL. *v.* SIOUX FALLS SCHOOL DISTRICT 49-5 ET AL. C. A. 8th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 619 F. 2d 1311.

Rehearing Denied

No. 79-6410. JAMES *v.* UNITED STATES, *ante,* p. 846;

No. 79-6531. HALL *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA, *ante,* p. 892;

No. 79-6533. HUANG *v.* ROSEN ET AL., *ante,* p. 848;

No. 79-6892. BRYAN *v.* BYRD ET AL., *ante,* p. 868;

No. 80-5124. SHAW *v.* UNITED STATES, *ante,* p. 881;

No. 80-5166. LILLIBRIDGE, TRUSTEE, ET AL. *v.* UNITED STATES ET AL., *ante,* p. 883; and

No. 80-5218. MATTHEWS *v.* UNITED STATES, *ante,* p. 883. Petitions for rehearing denied.

NOVEMBER 17, 1980

Affirmed on Appeal

No. 80–333. TOWN OF SOUTHAMPTON *v.* TROYER ET AL. Affirmed on appeal from C. A. 2d Cir. For the reasons stated in his dissent in *Schaumburg* v. *Citizens for Better Environment*, 444 U. S. 620, 639 (1980), JUSTICE REHNQUIST would reverse the judgment of the Court of Appeals. Reported below: 628 F. 2d 1346.

Appeals Dismissed

No. 80–5263. BULLWINKLE *v.* CALIFORNIA; and

No. 80–5456. BULLWINKLE *v.* CALIFORNIA. Appeals from Ct. App. Cal., 2d App. Dist., dismissed for want of substantial federal question. Reported below: 105 Cal. App. 3d 82, 164 Cal. Rptr. 163.

No. 80–5440. SHAO FEN CHIN, ADMINISTRATOR *v.* ST. LUKE'S HOSPITAL CENTER ET AL. Appeal from Ct. App. N. Y. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 50 N. Y. 2d 928.

Certiorari Granted—Reversed and Remanded. (See No. 79–1895, *ante*, p. 33; and No. 80–321, *ante*, p. 39.)

Certiorari Granted—Vacated and Remanded

No. 79–6745. PATRICK *v.* GEORGIA;

No. 80–5010. HARDY *v.* GEORGIA; and

No. 80–5266. THOMAS *v.* GEORGIA. Sup. Ct. Ga. Motions of petitioners for leave to proceed *in forma pauperis* and certiorari granted. Judgments vacated and cases remanded for further consideration in light of *Godfrey* v. *Georgia*, 446 U. S. 420 (1980). CHIEF JUSTICE BURGER, JUSTICE BLACKMUN, JUSTICE POWELL, and JUSTICE REHNQUIST dissent. Reported below: No. 79–6745, 245 Ga. 417, 265 S. E. 2d 553; No. 80–5010, 245 Ga. 272, 264 S. E. 2d 209; No. 80–5266, 245 Ga. 688, 266 S. E. 2d 499.

Vacated and Remanded After Certiorari Granted

No. 80-45. JOHNSON *v.* J. O. L. Ct. App. D. C. [Certiorari granted, *ante*, p. 818.] Judgment vacated and case remanded for further consideration in light of the position presently asserted by the respondent in his motion to dismiss filed October 27, 1980; the opposition filed thereto by petitioner on November 6, 1980; and the reply filed thereto by respondent on November 13, 1980.

Miscellaneous Orders

No. A-385. ZOBEL ET UX. *v.* WILLIAMS, COMMISSIONER OF REVENUE OF ALASKA, ET AL. Application for stay, presented to JUSTICE REHNQUIST, and by him referred to the Court, granted. The mandate of the Supreme Court of Alaska is stayed pending the timely filing and disposition of the appeal. JUSTICE REHNQUIST dissents.

No. D-199. IN RE DISBARMENT OF FISCHER. It is ordered that Charles Fischer, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-202. IN RE DISBARMENT OF EASLER. It is ordered that William R. Easler, of Spartanburg, S. C., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-204. IN RE DISBARMENT OF SCHLATER. It is ordered that Donald E. Schlater, of Havertown, Pa., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-208. IN RE DISBARMENT OF NOREN. It is ordered that Donald H. Noren, of Plantation, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-209. IN RE DISBARMENT OF PATT. It is ordered that Seymour Harold Patt, of Reno, Nev., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-210. IN RE DISBARMENT OF BURKA. It is ordered that Leonard W. Burka, of Washington, D. C., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-211. IN RE DISBARMENT OF BARBUTO. It is ordered that James Vito Barbuto, of Akron, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 85, Orig. TEXAS *v.* OKLAHOMA. Motion of Texas Power & Light Co. for leave to intervene referred to the Special Master. [For earlier order herein, see 444 U. S. 1065.]

No. 79-1056. NORTHWEST AIRLINES, INC. *v.* TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO, ET AL. C. A. D. C. Cir. [Certiorari granted, 447 U. S. 920.] Motion of the Solicitor General for divided argument granted. JUSTICE BLACKMUN took no part in the consideration or decision of this motion.

No. 79–1388. KIRCHBERG *v.* FEENSTRA ET AL. C. A. 5th Cir. [Probable jurisdiction noted, 446 U. S. 917.] Motion of NOW Legal Defense and Education Fund et al. for leave to file a brief as *amici curiae* granted.

No. 79–1538. ANDRUS, SECRETARY OF THE INTERIOR *v.* VIRGINIA SURFACE MINING & RECLAMATION ASSN., INC., ET AL.; and

No. 79–1596. VIRGINIA SURFACE MINING & RECLAMATION ASSN., INC., ET AL. *v.* ANDRUS, SECRETARY OF THE INTERIOR. D. C. W. D. Va. [Probable jurisdiction noted, *ante*, p. 817.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 80–5116. JENKINS *v.* BREWER. C. A. 7th Cir. [Certiorari granted, *ante*, p. 981.] Motion of petitioner for appointment of counsel granted, and it is ordered that John Seelig Elson, Esquire, of Chicago, Ill., be appointed to serve as counsel for petitioner in this case.

No. 80–5385. IN RE WILLIAMS. Petition for writ of habeas corpus denied.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would vacate the death sentence in this case.

Certiorari Granted

No. 79–1517. FEDERATED DEPARTMENT STORES, INC., ET AL. *v.* MOITIE ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 611 F. 2d 1267.

No. 80–348. H. A. ARTISTS & ASSOCIATES, INC., ET AL. *v.* ACTORS' EQUITY ASSN. ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 622 F. 2d 647.

Certiorari Denied. (See also No. 80–5440, *supra.*)

No. 79–1830. HEISE *v.* VILLAGE OF PEWAUKEE. Sup. Ct. Wis. Certiorari denied. Reported below: 92 Wis. 2d 333, 285 N. W. 2d 859.

No. 79–1984. STRUBE *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: — Pa. Super. —, 418 A. 2d 365.

No. 79–2009. LEVINSON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 75 Ill. App. 3d 429, 394 N. E. 2d 509.

No. 79–2019. KELLER, DISTRICT ATTORNEY FOR CLAYTON JUDICIAL CIRCUIT, STATE OF GEORGIA *v.* SEPTUM, INC. C. A. 5th Cir. Certiorari denied. Reported below: 614 F. 2d 456.

No. 79–2078. SWARTOUT *v.* CIVIL SERVICE COMMISSION OF SPOKANE ET AL. Ct. App. Wash. Certiorari denied. Reported below: 25 Wash. App. 174, 605 P. 2d 796.

No. 80–68. STROUSE ET AL. *v.* CARTER, JUDGE. Sup. Ct. Okla. Certiorari denied.

No. 80–133. LEVITT & SONS OF PUERTO RICO, INC. *v.* COMMERCIAL INSURANCE CO. C. A. 1st Cir. Certiorari denied. Reported below: 627 F. 2d 1087.

No. 80–142. HAYES *v.* PENNSYLVANIA ET AL. Sup. Ct. Pa. Certiorari denied. Reported below: 489 Pa. 419, 414 A. 2d 318.

No. 80–223. HOWE ET AL. *v.* ALLIED VAN LINES, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 622 F. 2d 1147.

No. 80–256. GLENN *v.* SHIPP ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 617 F. 2d 603.

No. 80–286. WOOTERS ET AL. *v.* JORNLIN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 622 F. 2d 580.

No. 80-351. MAGNELLI *v.* PENNSYLVANIA ET AL. Pa. Commw. Ct. Certiorari denied. Reported below: 47 Pa. Commw. 597, 408 A. 2d 904.

No. 80-354. DRESSER INDUSTRIES, INC. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: 202 U. S. App. D. C. 345, 628 F. 2d 1368.

No. 80-362. FAUSNER ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied.

No. 80-380. GREGORY ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 626 F. 2d 11.

No. 80-391. AKERS *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1285.

No. 80-421. FOXMAN ET UX. *v.* RENISON. C. A. 2d Cir. Certiorari denied. Reported below: 625 F. 2d 429.

No. 80-425. NORTON ET AL. *v.* LEADVILLE CORP. Ct. App. Colo. Certiorari denied.

No. 80-426. SCHWARZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 624 F. 2d 193.

No. 80-440. SIKORA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 635 F. 2d 1175.

No. 80-447. OLSEN *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 293 N. W. 2d 216.

No. 80-464. DICKISON ET AL. *v.* GOLDSCHMIDT, SECRETARY OF TRANSPORTATION, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 624 F. 2d 1106.

No. 80-466. SORIANO *v.* MOORE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 618 F. 2d 783.

No. 80–469. SPEIRS ET AL. *v.* BANK OF NEVADA ET AL. Sup. Ct. Nev. Certiorari denied. Reported below: 95 Nev. 870, 603 P. 2d 1074.

No. 80–473. SOUTHERN PACIFIC TRANSPORTATION CO. *v.* EVANS, TEMPORARY ADMINISTRATRIX, ET AL. Ct. Civ. App. Tex., 1st Sup. Jud. Dist. Certiorari denied. Reported below: 590 S. W. 2d 515.

No. 80–476. DEMARCO *v.* PENNSYLVANIA STATE BOARD OF MEDICAL EDUCATION AND LICENSURE. Pa. Commw. Ct. Certiorari denied. Reported below: 47 Pa. Commw. 500, 408 A. 2d 572.

No. 80–523. WALSH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 623 F. 2d 489.

No. 80–536. SERAPHIM *v.* WISCONSIN ET AL. Sup. Ct. Wis. Certiorari denied. Reported below: 97 Wis. 2d 485, 294 N. W. 2d 485.

No. 80–587. STOTTS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 623 F. 2d 710.

No. 80–595. SMITH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 629 F. 2d 650.

No. 80–600. WITSCHNER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 624 F. 2d 840.

No. 80–604. WALKER *v.* BARRY, MAYOR OF DISTRICT OF COLUMBIA, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 201 U. S. App. D. C. 82, 627 F. 2d 541.

No. 80–619. LONEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 633 F. 2d 212.

No. 80–626. GRAVETT *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 45 Md. App. 768.

No. 80–634. FIELDS ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 633 F. 2d 207.

No. 80–5022. WHITE *v.* BLOOM ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 621 F. 2d 276.

No. 80–5025. GALADA *v.* TICE. C. A. 4th Cir. Certiorari denied. Reported below: 622 F. 2d 583.

No. 80–5067. SCOTT ET AL. *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 80–5099. SILVA *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 80–5108. EVELAND *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 80–5142. DAVIS *v.* ANDERSON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 80–5162. EIGNER *v.* HARRIS, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 4th Cir. Certiorari denied. Reported below: 622 F. 2d 583.

No. 80–5176. WILLIAMS *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 383 So. 2d 564.

No. 80–5190. BERARDI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 629 F. 2d 723.

No. 80–5199. CARMEL *v.* UNITED STATES PAROLE COMMISSION. C. A. 2d Cir. Certiorari denied.

No. 80–5200. GRIFFIN *v.* STEPHENSON, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 622 F. 2d 583.

No. 80–5253. KEZIAH *v.* NORTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 622 F. 2d 584.

No. 80-5349. MAULDIN *v.* GRANT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 620 F. 2d 303.

No. 80-5354. WELCH *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: — Ark. —, 599 S. W. 2d 717.

No. 80-5371. NOE *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 384 So. 2d 1046.

No. 80-5380. RODIC *v.* THISTLEDOWN RACING CLUB ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 615 F. 2d 736.

No. 80-5384. WOODARD *v.* WACHOVIA BANK & TRUST CO. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 626 F. 2d 864.

No. 80-5400. BEMBER *v.* CONNECTICUT. App. Sess., Super. Ct. Conn. Certiorari denied.

No. 80-5402. MCQUEEN *v.* STEPHENSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 622 F. 2d 585 and 626 F. 2d 862.

No. 80-5406. JOHL *v.* PERKINS. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 74 App. Div. 2d 743, 424 N. Y. S. 2d 807.

No. 80-5407. PATTERSON *v.* MERCER ET AL. C. A. 6th Cir. Certiorari denied.

No. 80-5408. PETERS *v.* BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSN. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 628 F. 2d 1357.

No. 80-5412. JONES *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 622 F. 2d 124.

No. 80–5435. LARREA *v.* SMITH, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 633 F. 2d 204.

No. 80–5436. ROSENBERG *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 633 F. 2d 208.

No. 80–5441. GROFT *v.* HUNTINGDON COUNTY, PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied.

No. 80–5443. MCCRAY *v.* BURRELL. C. A. 4th Cir. Certiorari denied. Reported below: 622 F. 2d 705.

No. 80–5459. BLACK *v.* DALSHEIM, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 636 F. 2d 1200.

No. 80–5462. BENJAMIN *v.* HOWARD, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 3d Cir. Certiorari denied.

No. 80–5477. WHEELER *v.* DAVIS, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 627 F. 2d 1094.

No. 80–5507. ARTWAY *v.* DEL TUFO, UNITED STATES ATTORNEY, ET AL. C. A. 3d Cir. Certiorari denied.

No. 80–5508. SNEED *v.* BRESSON, ACTING CHIEF, PRIVACY ACTS BRANCH, RECORDS MANAGEMENT DIV., U. S. DEPT. OF JUSTICE, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 626 F. 2d 863.

No. 80–5519. DUGGER ET AL. *v.* VANDEVER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 627 F. 2d 1089.

No. 80–5542. MANGRUM *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 418 A. 2d 1071.

No. 80–5543. CHRISTENSEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 628 F. 2d 1357.

No. 80-5544. GUERRIERO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 626 F. 2d 867.

No. 80-5553. KAISER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 624 F. 2d 1095.

No. 80-5568. LEDESMA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 632 F. 2d 670.

No. 80-5579. JACKSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 627 F. 2d 883.

No. 79-1834. COCA-COLA BOTTLING COMPANY OF MEMPHIS *v.* NATIONAL LABOR RELATIONS BOARD ET AL.; and COCA-COLA BOTTLING COMPANY OF MEMPHIS *v.* INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, LOCAL UNION NO. 1196. C. A. 6th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 616 F. 2d 949 (first case); 615 F. 2d 1360 (second case).

No. 79-6341. MARTIN *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 376 So. 2d 300.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

JUSTICE STEWART, dissenting.

The Louisiana jury that imposed the death penalty upon the petitioner found two aggravating circumstances: (1) the petitioner had knowingly created a risk of death or great bodily harm to more than one person; and (2) he had committed the offense in an especially heinous, atrocious, or cruel manner. 376 So. 2d 300, 311-312. In affirming the death

sentence, the Louisiana Supreme Court held that the jury had properly found the first aggravating circumstance. *Id.*, at 312. It then reasoned that since the jury had had the power to sentence the petitioner to death on the basis of a single aggravating circumstance, there was no need for it to review the correctness of the jury's finding of the second aggravating circumstance. *Ibid.*

Under the state death penalty statute, however, while the jury was permitted to impose capital punishment where it found only a single aggravating circumstance, it was not required to do so. La. Code Crim. Proc. Ann., Art. 905.3 (West Supp. 1980). The Louisiana court's reasoning, therefore, ignores the possibility that some of the jurors may have voted for the death sentence because of the existence of the second aggravating circumstance alone, or that others may have voted for the death penalty only because of the existence of the two aggravating circumstances.

The jury's verdict thus makes it impossible to determine whether some or all of the jurors may have relied on the existence of the second aggravating circumstance in reaching their decision to impose the sentence of death. Accordingly, I would grant the petition for certiorari, vacate the judgment of the Louisiana Supreme Court, and remand this case to that court for consideration of the validity of the jury's finding of the second aggravating circumstance. *Stromberg* v. *California*, 283 U. S. 359, 368.

No. 79-6615. DRAKE *v.* ZANT, WARDEN. Super. Ct. Ga., Butts County; and

No. 79-6704. WESTBROOK *v.* BALKCOM, WARDEN. Sup. Ct. Ga. Certiorari denied.

JUSTICE STEVENS, concurring.

After our decision in *Godfrey* v. *Georgia*, 446 U. S. 420, the Supreme Court of Georgia, in cases remanded by this Court for further consideration in light of *Godfrey*, decided to ad-

here to its prior position that a death penalty imposed on the basis of a plurality of aggravating circumstances, each of which has been established by proof beyond a reasonable doubt, will not be set aside simply because one of those aggravating circumstances is vulnerable. See, *e. g.*, *Hamilton* v. *State*, 246 Ga. 264, 271 S. E. 2d 173 (1980); *Brooks* v. *State*, 246 Ga. 262, 271 S. E. 2d 172 (1980); *Collins* v. *State*, 246 Ga. 261, 271 S. E. 2d 352 (1980).* Because the Georgia Supreme Court's position is clear, and because I consider it consistent with this Court's decisions, I think the Court has correctly decided to deny certiorari in both No. 79–6704 and No. 79–6615, even though similar cases were remanded to the Georgia Supreme Court for reconsideration immediately after we decided *Godfrey*.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428

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*In *Brooks*, the Georgia Supreme Court stated:

"Having reconsidered the facts of the present case as directed, this court now reaffirms on two, independent grounds, the appellant's sentence of death for the murder of Carol Jeannine Galloway.

"First, in the present case, the jury's verdict for the death sentence was predicated, not only on Code Ann. § 27–2534.1 (b)(7), but also on Code Ann. § 27–2534.1 (b)(2) (the jury found, beyond a reasonable doubt, that the murder was committed during the appellant's commission of a rape and an armed robbery).

" 'Where two or more statutory aggravating circumstances are found by the jury, the failure of one circumstance does not so taint the proceedings as to invalidate the other aggravating circumstance found and the sentence of death based thereon.' Gates v. State, 244 Ga. 587, 599 (261 SE 2d 349) (1979).

"Therefore, we reaffirm the appellant's sentence of death on the ground that the jury's finding of Code Ann. § 27–2534.1 (b)(2) was supported by legally sufficient evidence." 246 Ga., at 263, 271 S. E. 2d, at 172–173. Justice Hill concurred only on the basis of the *Gates* rationale. *Ibid.*

U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

JUSTICE STEWART, dissenting.

I would grant the petition for certiorari in No. 79–6615, vacate the judgment insofar as it approved the imposition of the death sentence, and remand the case for reconsideration. See *Martin* v. *Louisiana, ante,* p. 998 (dissenting opinion).

I would vacate the judgment of the Supreme Court of Georgia in No. 79–6704, insofar as it left undisturbed the death penalty, and remand the case to that court for further consideration in light of *Godfrey* v. *Georgia,* 446 U. S. 420 (1980).

The sentence of death was imposed in this case upon the basis of the statutory aggravating circumstance involved in the *Godfrey* case (Ga. Code § 27–2534.1 (b)(7) (1978)), and an additional statutory aggravating circumstance. If, after *Godfrey,* the Supreme Court of Georgia should decide that the § (b)(7) aggravating circumstance could not constitutionally justify the death sentence, Georgia law would prohibit a further finding that the error was harmless simply because of the existence of the other aggravating circumstance. Under Georgia's capital sentencing scheme, the trial court is the sentencing authority. Ga. Code §§ 27–2503 (b), 27–2534.1 (b) (1978). In addition, the sentencer has the power to decline to impose the death penalty even if it finds that one or more statutory aggravating circumstances are present in the case. See *Fleming* v. *State,* 240 Ga. 142, 146–147, 240 S. E. 2d 37, 40–41 (1977); *Hawes* v. *State,* 240 Ga. 327, 334–335, 240 S. E. 2d 833, 839 (1977). See also *Gregg* v. *Georgia,* 428 U. S. 153, 203. Thus, under Georgia's capital punishment scheme, only the trial judge or jury can know and determine what to do when upon appellate review it has been concluded that a particular aggravating circumstance should not have been considered in sentencing the defendant to death.

I had thought that it was on the basis of precisely this reasoning that the Court only months ago unanimously acted as it did with respect to four cases which were, in all relevant respects, indistinguishable from this one. See *Davis* v. *Georgia*, 446 U. S. 961; *Collins* v. *Georgia*, 446 U. S. 961; *Baker* v. *Georgia*, 446 U. S. 961; *Hamilton* v. *Georgia*, 446 U. S. 961.

JUSTICE WHITE, dissenting.

I dissent from the denial of certiorari in these cases. I would vacate the judgment in each case insofar as it affirmed the imposition of the death sentence and would remand for reconsideration in light of *Godfrey* v. *Georgia*, 446 U. S. 420 (1980). The judgment in each case was entered prior to our decision in *Godfrey*. In each case, the jury found two statutory aggravating circumstances which permit imposition of the death penalty under Georgia law, one of which was that involved in *Godfrey*. In each case the Georgia Supreme Court sustained both circumstances in its mandatory review of the sentence.

We have remanded such cases before, and we should do so now. This would allow the Georgia Supreme Court in the first instance to determine whether the death penalty should be sustained without regard to the validity of the *Godfrey* circumstance. I would not make that determination here, as the Court is apparently doing; for I do not understand the Georgia cases cited by JUSTICE STEVENS to hold either that the Georgia Supreme Court is without power to set aside a death penalty if it sustains only one of the aggravating circumstances found by the jury or that, although the court has that power, it invariably will not disturb the death penalty in such situations. Of course, the Georgia Supreme Court could avoid any such question if on remand it found sufficient grounds to sustain the *Godfrey* aggravating circumstance.

Nor do I believe that the Constitution requires the Georgia Supreme Court to vacate the sentences if it fails to sustain the *Godfrey* aggravating circumstance. The cases now before us involve only sentencing, not guilt or innocence, and there is no constitutional right to jury sentencing. The imposition of a death sentence, despite a failure to sustain all of the aggravating circumstances found by the jury, does not conflict with either *Stromberg* v. *California*, 283 U. S. 359 (1931), or *Street* v. *New York*, 394 U. S. 576 (1969). The Georgia Supreme Court has held that under Georgia law it has the power to determine whether or not a death sentence should be imposed under these circumstances. As I see it, this does not violate the United States Constitution.

No. 80–5216. SCOTT *v.* FLORIDA. Sup. Ct. Fla.;

No. 80–5335. JONES *v.* MISSISSIPPI. Sup. Ct. Miss.; and

No. 80–5495. RUSSELL *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: No. 80–5335, 381 So. 2d 983; No. 80–5495, 598 S. W. 2d 238.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 80–273. HART AND MILLER ISLANDS AREA ENVIRONMENTAL GROUP, INC., ET AL. *v.* UNITED STATES ARMY CORPS OF ENGINEERS ET AL. C. A. 4th Cir. Motions of Sierra Club et al. and Bair Island Investments, Inc., et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. JUSTICE WHITE and JUSTICE BLACKMUN would grant certiorari. Reported below: 621 F. 2d 1281.

No. 80–329. SMITH *v.* MCCRAY. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 622 F. 2d 705.

No. 80–201. SILVER CREEK PACKING CO. *v.* MARSHALL, SECRETARY OF LABOR. C. A. 9th Cir. Motion of Nisei Farmers League for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 615 F. 2d 848.

No. 80–488. MASSACHUSETTS *v.* BRANT. Sup. Jud. Ct. Mass. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: — Mass. —, 406 N. E. 2d 1021.

No. 80–506. KAPLAN *v.* POINTER ET AL. C. A. D. C. Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 80–477. AD HOC '78 ET AL. *v.* ROUSE PHILADELPHIA, INC., ET AL. Super. Ct. Pa. Motion of American Civil Liberties Foundation of Pennsylvania for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: — Pa. Super. —, 417 A. 2d 1248.

No. 80–5172. COLE *v.* STEVENSON, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 4th Cir. Certiorari denied. JUSTICE BRENNAN, JUSTICE WHITE, and JUSTICE MARSHALL would grant certiorari. Reported below: 620 F. 2d 1055.

No. 80–5350. FRYBERG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE BLACKMUN would grant certiorari. Reported below: 622 F. 2d 1010.

Rehearing Denied

No. 79–1530. TOWN *v.* RENO, STATE ATTORNEY OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, ET AL., *ante*, p. 803;

No. 79–1889. RIVERA *v.* OREGON STATE EMPLOYEES ASSN. ET AL., *ante*, p. 803;

No. 79–6458. JOHNSON *v.* CITY OF BIRMINGHAM, ALABAMA, *ante*, p. 846; and

No. 79–6506. COVINO *v.* MORRIS, WARDEN, ET AL., *ante*, p. 847. Petitions for rehearing denied.

No. 79–6585. STEVENS *v.* GEORGIA, *ante*, p. 891;

No. 79–6785. PRATER *v.* BROWN, *ante*, p. 862;

No. 80–5016. KEY *v.* BOARD OF VOTER REGISTRATION OF CHARLESTON COUNTY ET AL., *ante*, p. 877;

No. 80–5029. JAUDON *v.* SECRETARY OF HEALTH AND HUMAN SERVICES, *ante*, p. 878;

No. 80–5082. TILLI *v.* CAPABIANCO ET AL., *ante*, p. 880; and

No. 80–5177. WADE *v.* FRANKLIN STRICKLIN LAND SURVEYORS, INC., *ante*, p. 883. Petitions for rehearing denied.

NOVEMBER 25, 1980

Miscellaneous Order

No. A–453. MISSOURI KANSAS TEXAS RAILROAD CO. *v.* UNITED STATES ET AL. The order heretofore entered by JUSTICE POWELL on November 21, 1980, at 7 p. m., is vacated and the application for stay presented to JUSTICE POWELL, and by him referred to the Court, is denied. The application, filed November 22, 1980, at 12:05 p. m., for an order enjoining the effectiveness of the merger between Burlington Northern Inc. and St. Louis-San Francisco Railroad Co., is denied. Treating the application for a temporary stay as an application for stay of the judgment of the United States Court of Appeals for the Fifth Circuit pending the timely filing and disposition of a petition for writ of certiorari, the application for stay is denied. JUSTICE MARSHALL took no part in the consideration or decision of this order.

DECEMBER 1, 1980

Appeal Dismissed

No. 80–422. TEMPLE UNIVERSITY OF THE COMMONWEALTH SYSTEM OF HIGHER EDUCATION ET AL. *v.* PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE ET AL. Appeal from Sup. Ct. Pa. dismissed for want of substantial federal ques-

tion. JUSTICE BRENNAN and JUSTICE BLACKMUN would note probable jurisdiction and set case for oral argument. Reported below: 490 Pa. 207, 415 A. 2d 413.

Miscellaneous Orders

No. A-409. PFAFF ET AL. *v.* WELLS, SHERIFF. Application for enlargement from custody pending appeal, addressed to JUSTICE MARSHALL and referred to the Court, denied. JUSTICE MARSHALL took no part in the consideration or decision of this application.

No. A-426. CUARON ET AL. *v.* UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT ET AL. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied. JUSTICE MARSHALL took no part in the consideration or decision of this application.

No. D-171. IN RE DISBARMENT OF GARCIA. Disbarment entered. [For earlier order herein, see 444 U. S. 894.]

No. D-183. IN RE DISBARMENT OF BARNES. Disbarment entered. [For earlier order herein, see 444 U. S. 1029.]

No. D-184. IN RE DISBARMENT OF CAIN. Disbarment entered. [For earlier order herein, see 444 U. S. 1042.]

No. D-187. IN RE DISBARMENT OF WOLK. Disbarment entered. [For earlier order herein, see 446 U. S. 915.]

No. D-189. IN RE DISBARMENT OF MANN. Disbarment entered. [For earlier order herein, see 446 U. S. 915.]

No. D-200. IN RE DISBARMENT OF MCMAHON. It is ordered that Joseph R. McMahon, of Miami, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-212. IN RE DISBARMENT OF GROSS. It is ordered that Nelson G. Gross, of Saddle River, N. J., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-213. IN RE DISBARMENT OF HALVERSON. It is ordered that John Byron Halverson, of Yorba Linda, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 80, Orig. COLORADO *v.* NEW MEXICO ET AL. The amended answer to the bill of complaint is referred to the Special Master. [For earlier order herein, see, *e. g.*, 441 U. S. 902.]

No. 78-1577. SEARS, ROEBUCK & CO. *v.* COUNTY OF LOS ANGELES ET AL. Ct. App. Cal., 2d App. Dist. [Certiorari granted, 444 U. S. 823.] Motion of petitioner for leave to file a supplemental brief after argument granted. JUSTICE STEWART and JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. 79-1429. AMERICAN TEXTILE MANUFACTURERS INSTITUTE, INC., ET AL. *v.* MARSHALL, SECRETARY OF LABOR, ET AL. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 817.] Motion of American Iron & Steel Institute for leave to file a brief as *amicus curiae* granted.

No. 79-1944. J. TRUETT PAYNE CO., INC. *v.* CHRYSLER MOTORS CORP. C. A. 5th Cir. [Certiorari granted, *ante*, p. 819.] Motion of Vanco Beverage, Inc., for leave to file a brief as *amicus curiae* granted.

No. 79–6853. WEBB *v.* WEBB. Sup. Ct. Ga. [Certiorari granted, *ante*, p. 819.] Motion of respondent for leave to proceed further herein *in forma pauperis* granted. Motion of J. Reese Franklin, Esquire, and W. S. Perry, Esquire, to withdraw as counsel for respondent granted. Motion of respondent for appointment of counsel granted, and it is ordered that Manley F. Brown, Esquire, of Macon, Ga., be appointed to serve as counsel for respondent in this case.

No. 80–11. MERRION ET AL., DBA MERRION & BAYLESS, ET AL. *v.* JICARILLA APACHE TRIBE ET AL.; and

No. 80–15. AMOCO PRODUCTION CO. ET AL. *v.* JICARILLA APACHE TRIBE ET AL. C. A. 10th Cir. [Certiorari granted, *ante*, p. 820.] Motions of Mountain States Legal Foundation, Salt River Project Agricultural Improvement and Power District et al., and Shell Oil Co. et al. for leave to file briefs as *amici curiae* granted. Motion of petitioners for divided argument granted. Request for additional time for oral argument denied. JUSTICE STEWART took no part in the consideration or decision of these motions.

No. 80–54. ITT GILFILLAN *v.* CLAYTON; and

No. 80–5049. CLAYTON *v.* INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 950.] Motion for appointment of counsel granted, and it is ordered that John T. McTernan, Esquire, of Los Angeles, Cal., be appointed to serve as counsel for Clifford E. Clayton in these cases. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. 80–503. KING, CHIEF, FAIRFAX COUNTY POLICE DEPARTMENT, ET AL. *v.* WALLACE ET AL. C. A. 4th Cir. Motion of respondents to consolidate this case with No. 79–6777, *Steagald* v. *United States* [certiorari granted, *ante*, p. 819], denied.

No. 80–532. Florida Department of Health and Rehabilitative Services et al. *v.* Florida Nursing Home Assn. et al. C. A. 5th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 80–781. International Union of Electrical, Radio & Machine Workers, AFL–CIO, CLC, et al. *v.* Westinghouse Electric Corp. C. A. 3d Cir. Motion of petitioners to expedite consideration of the petition for writ of certiorari denied. Justice Stewart and Justice Marshall took no part in the consideration or decision of this motion.

No. 80–5574. In re Raines. Petition for writ of habeas corpus denied.

No. 80–5502. In re Johnson. Petition for writ of mandamus denied.

No. 80–738. In re Pennhurst Parents-Staff Assn. Petition for writ of mandamus and prohibition and other relief denied. Justice Marshall took no part in the consideration or decision of this petition.

Probable Jurisdiction Noted

No. 80–251. Rostker, Director of Selective Service *v.* Goldberg et al. Appeal from D. C. E. D. Pa. Motion of Stacey Acker et al. for leave to intervene denied. Probable jurisdiction noted. Reported below: 509 F. Supp. 586.

Certiorari Granted

No. 80–242. Hidalgo, Secretary of the Navy *v.* Nakshian. C. A. D. C. Cir. Certiorari granted. Reported below: 202 U. S. App. D. C. 59, 628 F. 2d 59.

No 80–493. United States Department of Education *v.* Seattle University. C. A. 9th Cir. Certiorari granted. Reported below: 621 F. 2d 992.

Certiorari Denied

No. 79-6806. MENZIES *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 79-6846. CREACH *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 79 Ill. 2d 96, 402 N. E. 2d 228.

No. 80-25. BARRY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 80-50. MCDONALD *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 597 S. W. 2d 365.

No. 80-151. ALTUS NEWSPAPERS, INC., DBA ALTUS TIMES DEMOCRAT, ET AL. *v.* AKINS. Sup. Ct. Okla. Certiorari denied. Reported below: 609 P. 2d 1263.

No. 80-167. WRIGHTING *v.* APPELLATE DEPARTMENT, SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA (CALIFORNIA, REAL PARTY IN INTEREST). Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 80-191. CARLSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 617 F. 2d 518.

No. 80-221. INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO, ET AL. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 631 F. 2d 81.

No. 80-222. CUSTER ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: — Ct. Cl. —, 622 F. 2d 554.

No. 80-226. JACKSON *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 383 So. 2d 781.

No. 80-258. SEKAQUAPTEWA *v.* MACDONALD; and

No. 80-265. MACDONALD *v.* SEKAQUAPTEWA. C. A. 9th Cir. Certiorari denied. Reported below: 619 F. 2d 801.

No. 80–277. CALLOW *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 80–320. COSTELLO *v.* BOARD OF APPEALS OF THE TOWN OF CONCORD. Ct. App. Mass. Certiorari denied. Reported below: — Mass. App. —, 402 N. E. 2d 100.

No. 80–342. WOOD WALKER & CO. *v.* MARBURY MANAGEMENT, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 629 F. 2d 705.

No. 80–358. STRICOF *v.* STRICOF. Ct. App. Mich. Certiorari denied.

No. 80–366. GREAT LAKES INTERNATIONAL, INC. *v.* KLUTZNICK, SECRETARY OF COMMERCE, ET AL.; and

No. 80–549. JACKMAN & CO. ET AL. *v.* GREAT LAKES INTERNATIONAL, INC. C. A. 2d Cir. Certiorari denied. Reported below: 633 F. 2d 203.

No. 80–372. MITCHELL *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 154 Ga. App. 399; 268 S. E. 2d 360.

No. 80–389. COASTAL PETROLEUM CO. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 207 Ct. Cl. 701, 524 F. 2d 1206.

No. 80–390. SMITH *v.* DAWS, POSTMASTER, MIAMI, FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 614 F. 2d 1069.

No. 80–393. WALLS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 624 F. 2d 1091.

No. 80–395. MINYE *v.* UNIVERSITY OF MICHIGAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 624 F. 2d 1100.

No. 80–398. PIAMBINO ET AL. *v.* SYLVA ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 610 F. 2d 1306.

No. 80-399. CONFORTE ET UX. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 624 F. 2d 869.

No. 80-400. WENINGER *v.* UNITED STATES C. A. 10th Cir. Certiorari denied. Reported below: 624 F. 2d 163.

No. 80-412. GOOD HOPE REFINERIES, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C A. 5th Cir. Certiorari denied. Reported below: 620 F. 2d 57.

No. 80-423. CHISM *v.* NORFOLK & WESTERN RAILWAY CO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 80-449. IN RE WALTER STRAUS & SON, INC. C. A. 5th Cir. Certiorari denied.

No. 80-450. CARNEY ET UX. *v.* AHMANSON TRUST CO. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 80-463. DOMINION TOOL & DIE CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 623 F. 2d 484.

No. 80-467. HOLMES *v.* DISTRICT OF COLUMBIA. Ct. App. D. C. Certiorari denied. Reported below: 418 A. 2d 142.

No. 80-468. PRECES *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 378 So. 2d 77.

No. 80-481. KALMANOVITZ *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: — U. S. App. D. C. —, 629 F. 2d 62.

No. 80-489. DUZAC *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 622 F. 2d 911.

No. 80-491. BURLESON *v.* HOWARD. Ct. App. D. C. Certiorari denied.

No. 80-501. GUTI ET AL. *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 25 Wash. App. 1043.

No. 80-504. LAUFGAS *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 80-505. ARLINGHAUS, EXECUTRIX *v.* RITENOUR ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 622 F. 2d 629.

No. 80-507. RAHIN ET UX. *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 80-508. NICOLETTE ET AL. *v.* BLOCH, U. S. DISTRICT JUDGE, ET AL. C. A. 3d Cir. Certiorari denied.

No. 80-509. MONGIELLO *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 76 App. Div. 2d 807, 429 N. Y. S. 2d 338.

No. 80-512. BALTIMORE COUNTY, MARYLAND *v.* RAYMOND INTERNATIONAL BUILDERS, INC., ET AL. Ct. Sp. App. Md. Certiorari denied. Reported below: 45 Md. App. 247, 412 A. 2d 1296.

No. 80-514. LOCAL UNION NO. 137, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, ET AL. *v.* FRITO-LAY, INC. C. A. 9th Cir. Certiorari denied. Reported below: 623 F. 2d 1354.

No. 80-517. JUNEAU SQUARE CORP. ET AL. *v.* FIRST WISCONSIN NATIONAL BANK OF MILWAUKEE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 624 F. 2d 798.

No. 80-520. JARVILL ET AL. *v.* CITY OF EUGENE ET AL. Sup. Ct. Ore. Certiorari denied. Reported below: 289 Ore. 157, 613 P. 2d 1.

No. 80–522. First American National Bank of Nashville *v.* Scarboro. C. A. 6th Cir. Certiorari denied. Reported below: 619 F. 2d 621.

No. 80–524. Russell et al. *v.* Tennessee. Ct. Crim. App. Tenn. Certiorari denied.

No. 80–525. Buschmann *v.* United New York Sandy Hook Pilots' Assn. et al. Ct. App. N. Y. Certiorari denied. Reported below: 50 N. Y. 2d 1041, 410 N. E. 2d 747.

No. 80–531. Schneider *v.* Bowes et al. C. A. 9th Cir. Certiorari denied. Reported below: 624 F. 2d 193.

No. 80–534. Adler *v.* New York. Ct. App. N. Y. Certiorari denied. Reported below: 50 N. Y. 2d 730, 409 N. E. 2d 888.

No. 80–546. Studiengesellschaft Kohle m.b.H., Trustee *v.* Eastman Kodak Co. C. A. 5th Cir. Certiorari denied. Reported below: 616 F. 2d 1315.

No. 80–555. Cota *v.* County of Los Angeles et al. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 105 Cal. App. 3d 282, 164 Cal. Rptr. 323.

No. 80–563. Premo Pharmaceutical Laboratories, Inc., et al. *v.* Eli Lilly & Co. C. A. 3d Cir. Certiorari denied. Reported below: 630 F. 2d 120.

No. 80–564. Duplantis *v.* Louisiana. Sup. Ct. La. Certiorari denied. Reported below: 388 So. 2d 751.

No. 80–579. Carden et ux. *v.* Montana. C. A. 9th Cir. Certiorari denied. Reported below: 626 F. 2d 82.

No. 80–638. Seidman *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 636 F. 2d 1222.

No. 80–641. Kalman *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 634 F. 2d 619.

No. 80–645. BURGIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 621 F. 2d 1352.

No. 80–647. PIERCE ET AL. *v.* NECA–IBEW WELFARE TRUST FUND. C. A. 6th Cir. Certiorari denied. Reported below: 620 F. 2d 589.

No. 80–656. APPLING COUNTY, GEORGIA, ET AL. *v.* MUNICIPAL ELECTRIC AUTHORITY OF GEORGIA ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 621 F. 2d 1301.

No. 80–679. DELGADO ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 615 F. 2d 294.

No. 80–687. CLAFLIN *v.* CLAFLIN. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 82 Ill. App. 3d 246, 402 N. E. 2d 673.

No. 80–696. AMERICAN TRANSFER & STORAGE CO. *v.* BROWN. Sup. Ct. Tex. Certiorari denied. Reported below: 601 S. W. 2d 931.

No. 80–701. THOMPSON *v.* UNITED STATES DEPARTMENT OF JUSTICE, DRUG ENFORCEMENT ADMINISTRATION. C. A. 9th Cir. Certiorari denied. Reported below: 624 F. 2d 194.

No. 80–5011. BROWER *v.* UNITED STATES; and
No. 80–5023. MARINO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 617 F. 2d 76.

No. 80–5048. BURBANK *v.* WARDEN, ILLINOIS STATE PENITENTIARY, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 113.

No. 80–5143. MOLINARIO *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 384 So. 2d 759.

No. 80–5169. BROWN *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 96 Wis. 2d 238, 291 N. W. 2d 528.

No. 80-5171. HUDSON *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 382 So. 2d 479.

No. 80-5189. KLIMAS *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 94 Wis. 2d 288, 288 N. W. 2d 157.

No. 80-5194. TURNER *v.* YOUNG. C. A. 4th Cir. Certiorari denied. Reported below: 622 F. 2d 587.

No. 80-5279. PRICE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 623 F. 2d 587.

No. 80-5305. SAVAGE *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 50 N. Y. 2d 673, 409 N. E. 2d 858.

No. 80-5325. TURPIN *v.* CITY OF WEST HAVEN. C. A. 2d Cir. Certiorari denied. Reported below: 619 F. 2d 196.

No. 80-5394. WOODS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 624 F. 2d 195.

No. 80-5414. MAGEE *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 80-5417. INDORATO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 628 F. 2d 711.

No. 80-5423. PONTICELLI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 622 F. 2d 985.

No. 80-5424. SMITH *v.* SHOEMAKER, CHIEF, ADULT PROBATION AUTHORITY, ET AL. C. A. 6th Cir. Certiorari denied.

No. 80-5425. FARIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 624 F. 2d 1091.

No. 80-5426. BASTIAN *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 620 F. 2d 297.

No. 80-5430. MAPLE *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 80-5439. MIDDLETON *v.* NELSON. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 80-5442. FORE *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 220 Va. 1007, 265 S. E. 2d 729.

No. 80-5444. SWEETWINE *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 288 Md. 199, 421 A. 2d 60.

No. 80-5446. WILLIAMS *v.* MARSHALL, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 628 F. 2d 934.

No. 80-5448. EVERETTE *v.* STEPHENSON. C. A. 4th Cir. Certiorari denied. Reported below: 626 F. 2d 860.

No. 80-5449. HENDERSON, AKA COLLIER *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 387 So. 2d 93.

No. 80-5450. ABU-BAKR *v.* ROWE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 624 F. 2d 1107.

No. 80-5455. JONES *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 624 F. 2d 1096.

No. 80-5458. CAVEGN *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 294 N. W. 2d 717.

No. 80-5460. FRANKLIN *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied.

No. 80-5461. WILLIAMS, AKA MTHAWABU *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 385 So. 2d 214.

No. 80-5464. MAINS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 627 F. 2d 1093.

No. 80-5465. NICKENS *v.* WHITE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 622 F. 2d 967.

No. 80-5473. GUYNN *v.* JEFFERSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 626 F. 2d 860.

No. 80-5476. GORNICK *v.* ILLINOIS ET AL. C. A. 7th Cir. Certiorari denied.

No. 80-5479. HUNTER *v.* ELLIS, JUDGE. Sup. Ct. Ore. Certiorari denied.

No. 80-5480. ALBERTI *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 77 App. Div. 2d 602, 430 N. Y. S. 2d 6.

No. 80-5482. STOKELEY ET AL. *v.* SMITH, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 633 F. 2d 206.

No. 80-5487. MILLER ET AL. *v.* JAGO, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 624 F. 2d 1100.

No. 80-5493. LEVASSEUR *v.* HAWAII. Int. Ct. App. Haw. Certiorari denied. Reported below: — Haw. App. —, 613 P. 2d 1328.

No. 80-5496. OLIVENCIA *v.* CAMPBELL ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 620 F. 2d 291.

No. 80-5497. THOMAS *v.* CUYLER ET AL. C. A. 3d Cir. Certiorari denied.

No. 80-5501. CHESTNUT *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 51 N. Y. 2d 14, 409 N. E. 2d 958.

No. 80–5505. WINSTEAD *v.* ROGERS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 624 F. 2d 1095.

No. 80–5512. DANKERT *v.* CLERK, SUPERIOR COURT, COBB COUNTY, GEORGIA, ET AL. C. A. 5th Cir. Certiorari denied.

No. 80–5513. MCNEAL *v.* BORDENKIRCHER, WARDEN. Sup. Ct. App. W. Va. Certiorari denied.

No. 80–5515. PETERSON *v.* PETERSON. Sup. Ct. Minn. Certiorari denied.

No. 80–5521. BRADLEY *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 76 App. Div. 2d 939, 429 N. Y. S. 2d 48.

No. 80–5532. MAHL *v.* BOARD OF TRUSTEES OF FIRE FIGHTERS PENSION AND RELIEF FUND FOR THE CITY OF NEW ORLEANS. C. A. 5th Cir. Certiorari denied. Reported below: 625 F. 2d 1015.

No. 80–5536. HESELIUS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 80–5537. JONES *v.* CIVILETTI, ATTORNEY GENERAL, ET AL. C. A. 4th Cir. Certiorari denied.

No. 80–5539. GRINAN *v.* GIEGOLD. C. A. 3d Cir. Certiorari denied.

No. 80–5541. WRIGHT *v.* ZAHRADNICK, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 609 F. 2d 513.

No. 80–5545. HARRIS *v.* OPENHAUS ET AL. C. A. 9th Cir. Certiorari denied.

No. 80–5546. MARTINEZ *v.* ROMERO. C. A. 10th Cir. Certiorari denied. Reported below: 626 F. 2d 807.

No. 80–5549. ANDREWS *v.* ROBERTSON, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 80-5550. SHEHADEH *v.* GREEN HOTELS, INC., ET AL. Ct. App. D. C. Certiorari denied.

No. 80-5552. WOODWARD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 80-5558. GARDNER *v.* MISSOURI. Ct. App. Mo., Southern Dist. Certiorari denied. Reported below: 600 S. W. 2d 614.

No. 80-5559. BREEST *v.* PERRIN, WARDEN. C. A. 1st Cir. Certiorari denied. Reported below: 624 F. 2d 1112.

No. 80-5583. PORRES DE RICO *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 628 F. 2d 1357.

No. 80-5592. WILLIAMS *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 80-5593. URIBE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 633 F. 2d 208.

No. 80-5594. PELCZARSKI *v.* SOUTHEASTERN BANK & TRUST CO. ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 627 F. 2d 1087.

No. 80-5607. STONE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 472 F. 2d 909.

No. 80-5611. WILLIAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 626 F. 2d 697.

No. 80-5614. SMITH *v.* KEOHANE, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 80-5619. REED *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 627 F. 2d 1013.

No. 80-5621. BLACK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 633 F. 2d 218.

No. 80–5628. CROWHURST *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 629 F. 2d 1297.

No. 80–5630. ACEVEDO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 627 F. 2d 68.

No. 80–5642. RADA-SOLANO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 625 F. 2d 577.

No. 80–5649. ANDERSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 627 F. 2d 161.

No. 80–5655. MCCRAY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 620 F. 2d 299.

No. 79–1385. DUVAL COUNTY RANCH CO., INC., ET AL. *v.* SPARKS ET AL., DBA SIDNEY A. SPARKS, TRUSTEE. C. A. 5th Cir. Certiorari denied. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below 604 F. 2d 976.

No. 80–311. ARTHUR ANDERSEN & CO. *v.* UNITED STATES ET AL. C. A. 1st Cir. Certiorari denied. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 623 F. 2d 720.

No. 80–346. VIRGINIA ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 620 F. 2d 1018.

No. 80–378. CHRYSLER CORP. *v.* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: — U. S. App. D. C. —, 631 F. 2d 865.

No. 79–2032. STARLING *v.* BEARD ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE STEWART would grant certiorari. Reported below: 613 F. 2d 312.

No. 80–435. VALTEK, INC., ET AL. *v.* CONTROL COMPONENTS, INC., ET AL. C. A. 5th Cir. Motion of Patent Law Association of Chicago for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 609 F. 2d 763 and 616 F. 2d 892.

No. 80–511. GENERAL ELECTRIC CO. *v.* CURTISS-WRIGHT CORP. C. A. 3d Cir. Certiorari denied. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 624 F. 2d 1089.

No. 80–554. COHN ET AL. *v.* NATIONAL BROADCASTING CO., INC., ET AL. Ct. App. N. Y. Certiorari denied. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 50 N. Y. 2d 885, 408 N. E. 2d 672.

No. 80–519. NELSON OIL CO., INC. *v.* SHELL OIL CO. Temp. Emerg. Ct. App. Motion of Independent Terminal Operators Association for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 627 F. 2d 228.

No. 80–556. CENTRAL LIQUOR CO. ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. JUSTICE WHITE dissents from the denial of certiorari because the judgment below is in conflict with the judgments of other Courts of Appeals. *E. g., United States* v. *Alessi*, 536 F. 2d 978 (CA2 1976), and *United States* v. *Griffin*, 617 F. 2d 1342 (CA9 1980). Reported below: 628 F. 2d 1264.

No. 80–561. CONTROL DATA CORP. *v.* POTTER INSTRUMENT CO. C. A. 4th Cir. Certiorari denied. JUSTICE WHITE dissents from the denial of certiorari because the judgment below is in conflict with the judgments of other Courts of Appeals. *E. g., Martinez* v. *Trainor*, 556 F. 2d 818, 821 (CA7 1977); *Jusino* v. *Morales & Tio*, 139 F. 2d 946 (CA1 1944); *Virginia Land Co.* v. *Miami Shipbuilding Corp.*, 201 F. 2d 506 (CA5 1953).

No. 80-543. NEW YORK *v.* HOWARD. Ct. App. N. Y. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 50 N. Y. 2d 583, 408 N. E. 2d 908.

No. 80-5134. GORMLEY *v.* DIRECTOR, CONNECTICUT STATE DEPARTMENT OF ADULT PROBATION, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 632 F. 2d 938.

JUSTICE WHITE, dissenting.

Under Connecticut law, a person is guilty of a misdemeanor when "with intent to harass, annoy or alarm another person, he makes a telephone call, whether or not a conversation ensues, in a manner likely to cause annoyance or alarm." Conn. Gen. Stat. § 53a-183 (a)(3) (1975 rev.). Petitioner was convicted of violating this statute after she made a telephone call to a woman with whom she had some personal quarrel. Following an unsuccessful direct appeal in the state courts,[1] petitioner brought a federal habeas corpus action arguing that under the First and Fourteenth Amendments the statute was unconstitutionally overbroad. The Court of Appeals for the Second Circuit found no constitutional infirmity. The petition for certiorari challenges that judgment.

To be sure, a State has a valid interest in protecting its citizens against unwarranted invasions of privacy. *Rowan* v. *Post Office Department,* 397 U. S. 728 (1970). See generally Note, Give Me a Home Where No Salesmen Phone: Telephone Solicitation and the First Amendment, 7 Hastings Const. L. Q. 129 (1979). This is especially true when unprotected speech, such as obscenity or threats of physical violence, is involved. But it is equally clear that a State may not pursue these interests by unduly infringing on what would

[1] On direct appeal in the state courts, the First Amendment argument presented here was raised and rejected by the Appellate Session of the Superior Court, *State* v. *Anonymous,* 34 Conn. Supp. 689, 389 A. 2d 1270, appeal denied, 174 Conn. 803, 382 A. 2d 1332 (1978).

otherwise be protected speech. It is therefore critical to recall that speech may be "annoying" without losing its First Amendment protection [2] and that the Connecticut statute on its face criminalizes any telephone call that annoys and was intended to do so. It is not difficult to imagine various clearly protected telephone communications that would fall within the ban of the Connecticut statute.[3] As such it is fairly arguable that the statute is substantially overbroad and hence unconstitutional. *Lewis* v. *New Orleans*, 415 U. S. 130 (1974); *Gooding* v. *Wilson*, 405 U. S. 518 (1972).[4]

Beyond the obvious tension between our prior cases and the judgment below is the difference in opinion among those courts that have considered constitutional challenges to similar state statutes. Contrary to the decision reached by the

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[2] *Norwell* v. *Cincinnati*, 414 U. S. 14 (1973); *Coates* v. *Cincinnati*, 402 U. S. 611, 615–616 (1971). See *Terminiello* v. *Chicago*, 337 U. S. 1 (1949).

[3] For example, the Supreme Court of Illinois found that a similar statute risked criminal prosecution for a variety of situations involving protected speech.

"Conceivably, this section could make criminal a single telephone call made by a consumer who wishes to express his dissatisfaction over the performance of a product or service; a call by a businessman disturbed with another's failure to perform a contractual obligation; by an irate citizen, perturbed with the state of public affairs, who desires to express his opinion to a public official; or by an individual bickering over family matters." *People* v. *Klick*, 66 Ill. 2d 269, 274, 362 N. E. 2d 329, 331–332 (1977).

[4] Given that the overbreadth may be substantial, petitioner has standing to raise the First Amendment claim even if the words she used were unprotected threats of violence. *Broadrick* v. *Oklahoma*, 413 U. S. 601 (1973). Furthermore, the case was submitted to the jury under an instruction which would have permitted a conviction if petitioner was found to have made *either* an annoying or threatening call with the requisite intent. The general verdict did not reveal on what ground the conviction rested. Even assuming that the facts could have supported a guilty verdict based on petitioner's unprotected speech, petitioner may have been convicted for making a merely annoying communication.

Court of Appeals in this case, state appellate courts have invalidated substantially equivalent provisions as being unconstitutionally overbroad. *People* v. *Klick*, 66 Ill. 2d 269, 362 N. E. 2d 329 (1977) (invalidating statute making it a crime for anyone who "[w]ith intent to annoy another, makes a telephone call, whether or not conversation thereby ensues"); *State* v. *Dronso*, 90 Wis. 2d 149, 279 N. W. 2d 710 (Ct. App. 1979) (same). Another court has invalidated a like statute on the grounds that it was unconstitutionally vague. *State* v. *Blair*, 287 Ore. 519, 601 P. 2d 766 (1979) (statute made it a crime to communicate by telephone "in a manner likely to cause annoyance or alarm" to the receiver). On the other hand, various state courts, like the Connecticut court in this case, have rejected overbreadth challenges to telephone harassment statutes. See, *e. g.*, *State* v. *Elder*, 382 So. 2d 687 (Fla. 1980) (statute prohibiting a person from making a telephone call "whether or not conversation ensues, without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person at the called number"); *Constantino* v. *State*, 243 Ga. 595, 255 S. E. 2d 710 (1979) (prohibiting repeated telephoning "for the purpose of annoying, harassing or molesting another or his family"). See generally *United States* v. *Lampley*, 573 F. 2d 783 (CA3 1978); *People* v. *Smith*, 89 Misc. 2d 789, 392 N. Y. S. 2d 968 (1977). The above cases demonstrate that the state courts are not in agreement concerning application of First Amendment principles in this area of the law.

The foregoing suggests that even if the Court is of the view that the judgment below is correct, there is sufficient reason to grant certiorari and issue a judgment to this effect. Accordingly, I dissent.

No. 80–5463. MARTIN-TRIGONA *v.* GOULETAS ET AL. C. A. 7th Cir. Certiorari denied. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 634 F. 2d 354.

Rehearing Denied

No. 79-1410. DUPART ET AL. *v.* LOUISIANA, *ante*, p. 820;

No. 79-1704. GRCICH *v.* JOGODA ET AL., *ante*, p. 823;

No. 79-1732. HILTON, AKA MILTON, ET AL. *v.* UNITED STATES, *ante*, p. 887;

No. 79-1737. OGLE *v.* UNITED STATES, *ante*, p. 825;

No. 79-1804. GARCIA-JARAMILLO *v.* IMMIGRATION AND NATURALIZATION SERVICE, *ante*, p. 828;

No. 79-1815. SALOB *v.* AMBACH, COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK, ET AL., *ante*, p. 829;

No. 79-1836. FOWLER ET UX. *v.* GENERAL DEVELOPMENT CORP., *ante*, p. 830;

No. 79-1863. HARPER ET AL. *v.* UNITED STATES, *ante*, p. 887;

No. 79-1876. BLAKE ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE, *ante*, p. 832;

No. 79-1902. ROSENBAUM *v.* COMMISSIONER OF INTERNAL REVENUE, *ante*, p. 833;

No. 79-1934. DANIELS *v.* SOUTHERN CALIFORNIA RAPID TRANSIT DISTRICT ET AL., *ante*, p. 835;

No. 79-1961. BEARCE, ADMINISTRATOR, ET AL. *v.* UNITED STATES, *ante*, p. 837;

No. 79-1965. COUNTY OF LOS ANGELES ET AL. *v.* MARSHALL, SECRETARY OF LABOR, ET AL., *ante*, p. 837;

No. 79-1992. LAVELLE *v.* WORKERS' COMPENSATION APPEALS BOARD OF CALIFORNIA ET AL., *ante*, p. 840;

No. 79-2057. POWELL *v.* NIGRO, *ante*, p. 843;

No. 79-2058. SILVERNAIL *v.* WASHINGTON, *ante*, p. 843;

No. 79-2071. SCOTT *v.* UNITED STATES, *ante*, p. 843;

No. 79-6610. PRIESTER *v.* BANKER'S TRUST OF SOUTH CAROLINA, ADMINISTRATOR, ET AL., *ante*, p. 892;

No. 79-6619. ALDRIDGE *v.* FLORIDA, *ante*, p. 891; and

No. 79-6650. SKIDMORE *v.* CONSOLIDATED RAIL CORP. ET AL., *ante*, p. 854. Petitions for rehearing denied.

No. 79-6664. ALFORD *v.* CENTRAL INTELLIGENCE AGENCY, *ante*, p. 854;

No. 79-6681. MORTON *v.* STYNCHCOMBE, SHERIFF, ET AL., *ante*, p. 855;

No. 79-6690. ROSADO ET AL. *v.* CIVILETTI, ATTORNEY GENERAL, ET AL., *ante*, p. 856;

No. 79-6711. THIESS *v.* FRANKLIN SQUARE HOSPITAL, INC., ET AL., *ante*, p. 857;

No. 79-6757. RUCKER *v.* FICKAS ET AL., *ante*, p. 860;

No. 79-6772. CLUGSTON ET AL. *v.* MICHIGAN ET AL., *ante*, p. 861;

No. 79-6818. SMITH *v.* ASSIGNMENT OFFICE OF MONTGOMERY COUNTY CIRCUIT COURT ET AL., *ante*, p. 864;

No. 79-6826. PREJEAN *v.* LOUISIANA, *ante*, p. 891;

No. 79-6831. HUNTER *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA, *ante*, p. 865;

No. 79-6861. MARATTY *v.* KENTUCKY, *ante*, p. 866;

No. 80-1. GREEN *v.* BARTHOLOMEW ET AL., *ante*, p. 868;

No. 80-32. HYNNING *v.* DUFIEF MORTGAGE, INC., ET AL., *ante*, p. 802;

No. 80-44. DUAL MANUFACTURING & ENGINEERING, INC., ET AL. *v.* BURRIS INDUSTRIES, INC., ET AL., *ante*, p. 870;

No. 80-163. IN RE CHESTNUTT MANAGEMENT CORP., *ante*, p. 816;

No. 80-211. JOHNSTON *v.* UNITED STATES ET AL., *ante*, p. 876;

No. 80-5050. JOHNS *v.* NANAWALE COMMUNITY ASSN. ET AL., *ante*, p. 921;

No. 80-5051. NEWBOLD *v.* UNITED STATES POSTAL SERVICE ET AL., *ante*, p. 878;

No. 80-5053. QUINONES *v.* TEXAS, *ante*, p. 893; and

No. 80-5173. CLAY, ADMINISTRATOR *v.* HALL ET AL., *ante*, p. 914. Petitions for rehearing denied.

No. 80–5220. DiSilvestro *v.* United States, *ante*, p. 903. Petition for rehearing denied.

No. 5, Orig. United States *v.* California, 447 U. S. 1. Petition for rehearing denied. Justice Marshall took no part in the consideration or decision of this petition.

No. 79–1396. International Business Machines Corp. *v.* Greyhound Computer Corp., 446 U. S. 929; and

No. 79–1397. International Business Machines Corp. *v.* Greyhound Computer Corp., 446 U. S. 916. Motion for leave to file petition for rehearing denied. Justice Marshall, Justice Blackmun, and Justice Stevens took no part in the consideration or decision of this motion.

No. 79–1722. Pitsenberger *v.* Pitsenberger, *ante*, p. 807. Motion of appellant for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

No. 79–2044. National Coalition for Public Education and Religious Liberty et al. *v.* Hufstedler, Secretary of Education, et al., *ante*, p. 808. Petition for rehearing denied. Justice Blackmun dissents. Justice Stewart took no part in the consideration or decision of this petition.

December 5, 1980

Dismissal Under Rule 53

No. 80–559. Vanderwater *v.* Lopez. C. A. 7th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 620 F. 2d 1229.

December 8, 1980

Appeals Dismissed

No. 80–176. Dana Corp. et al. *v.* California et al.; and

No. 80–177. Contignitron Co. *v.* California et al. Appeals from Ct. App. Cal., 2d App. Dist., dismissed for want of substantial federal question. Reported below: 103 Cal. App. 3d 424, 162 Cal. Rptr. 875.

No. 80–551. BUTCHER *v.* SUPERIOR COURT OF LOS ANGELES COUNTY (HENNEFER ET AL., REAL PARTIES IN INTEREST). Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of substantial federal question.

No. 80–662. SULLIVAN *v.* KAISER ENGINEERS, INC., ET AL. Appeal from Sup. Ct. Ohio dismissed for want of substantial federal question. Reported below: 62 Ohio St. 2d 304, 405 N. E. 2d 302.

No. 80–552. CALIFORNIA MANUFACTURERS ASSN. ET AL. *v.* INDUSTRIAL WELFARE COMMISSION OF CALIFORNIA ET AL. Appeal from Sup. Ct. Cal. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 27 Cal. 3d 690, 613 P. 2d 579.

No. 80–591. VALAD ELECTRIC HEATING CORP. *v.* TED R. BROWN & ASSOCIATES, INC., ET AL. Appeal from Sup. Ct. Utah dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 618 P. 2d 1004.

No. 80–5451. REED *v.* DEL CHEMICAL CORP. Appeal from Ct. App. Ore. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 44 Ore. App. 79, 605 P. 2d 759.

Certiorari Granted—Reversed and Remanded. (See No. 79–2040, *ante,* p. 86.)

Miscellaneous Orders

No. A–397. LEAD INDUSTRIES ASSN., INC., ET AL. *v.* MARSHALL, SECRETARY OF LABOR, ET AL.; and

No. A–404. NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC. *v.* MARSHALL, SECRETARY OF LABOR, ET AL. The requests of applicants, Lead Industries Association, Inc., and

National Association of Recycling Industries, Inc., for a stay of the Occupational Safety and Health Administration's final standard for occupational exposure to lead, 29 CFR § 1910.1025 (1979), and of the decision of the United States Court of Appeals for the District of Columbia Circuit sustaining in part and remanding in part that standard, — U. S. App. D. C. —, — F. 2d —, are granted in the following respects, pending the filing and disposition of petitions for certiorari.

It is ordered the the following portions of 29 CFR § 1910.1025 (1979) are stayed:

(1) Sections 1910.1025 (e)(1), (4), (5), (6), which provide for compliance by engineering and work practice controls.

(2) Section 1910.1025 (e)(3), which governs written compliance programs, except for paragraph (F).

(3) Section 1910.1025 (f)(2)(ii), which relates to the use of respirators in situations in which engineering and work practice controls are not sufficient. During the period of this stay, employers shall provide a powered, air-purifying respirator in lieu of the respirator specified in Table II of (f)(2)(i) when the physical characteristics of the employee are such that the respirators specified in Table II are inadequate for his or her protection. All other sections of the regulation that refer to paragraph (f) shall incorporate only those portions of (f) not stayed herein.

(4) Section 1910.1025 (i), governing hygiene facilities and practices, to the extent that it requires the construction of new facilities or substantial renovation of existing facilities.

(5) Sections 1910.1025 (j)(2) and (j)(3)(ii)(D) insofar as they require biological monitoring and medical examination for zinc protoporphyrin; and § 1910.1025 (j)(3)(iii), which requires a multiple physician review mechanism.

(6) Section 1910.1025 (m), dealing with signs.

(7) Section 1910.1025 (r), startup dates, to the extent that its obligations are inconsistent with the substantive requirements of this order.

The motion to stay the application of all other sections of the standard not specifically stayed by this order is denied.

The motion to stay the judgment and order of the Court of Appeals is granted insofar as the judgment and order require action inconsistent with the stay hereby entered. Otherwise, the motion to stay the judgment and order is denied, including the motion to stay the administrative proceedings ordered by the Court of Appeals.

JUSTICE POWELL took no part in the consideration or decision of these applications.

No. A-458. DAWSON *v.* HOLGUIN ET AL. 6th Jud. Dist. Ct., Grant County, N. M. Application for stay of proceedings, addressed to JUSTICE POWELL and referred to the Court, denied.

No. 79-1252. CALIFORNIA ET AL. *v.* SIERRA CLUB ET AL.; and

No. 79-1502. KERN COUNTY WATER AGENCY ET AL. *v.* SIERRA CLUB ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 818.] Motion of the Solicitor General for additional time for oral argument and for divided argument granted, and an additional 20 minutes allotted the federal respondents for that purpose.

No. 83, Orig. MARYLAND ET AL. *v.* LOUISIANA. Motion of the Solicitor General and cross-motion of Louisiana for divided argument granted. Requests for additional time for oral argument granted, and a total of one hour and forty minutes allotted for oral argument. [For earlier order herein, see, *e. g.*, *ante*, p. 812.]

No. 79-1890. ANDRUS, SECRETARY OF THE INTERIOR, ET AL. *v.* ALASKA ET AL.; and

No. 79-1904. KENAI PENINSULA BOROUGH *v.* ALASKA ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 818.] Motion of the Solicitor General for divided argument granted.

No. 79-1944. J. TRUETT PAYNE CO., INC. *v.* CHRYSLER MOTORS CORP. C. A. 5th Cir. [Certiorari granted, *ante*, p. 819.] Motion of Ricky Hasbrouck et al. for leave to file a brief as *amici curiae* granted.

No. 79-2006. BARRENTINE ET AL. *v.* ARKANSAS-BEST FREIGHT SYSTEM, INC., ET AL. C. A. 8th Cir. [Certiorari granted, *ante*, p. 819.] Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as *amicus curiae* granted.

No. 79-6423. LASSITER *v.* DEPARTMENT OF SOCIAL SERVICES OF DURHAM COUNTY. Ct. App. N. C. [Certiorari granted, *ante*, p. 819.] Motion of North Carolina Civil Liberties Union for leave to file a brief as *amicus curiae* granted.

No. 79-6624. ROSALES-LOPEZ *v.* UNITED STATES. C. A. 9th Cir. [Certiorari granted, *ante*, p. 819.] Motion of the Solicitor General to permit George W. Jones, Esquire, to present oral argument *pro hac vice* granted.

No. 79-6853. WEBB *v.* WEBB. Sup. Ct. Ga. [Certiorari granted, *ante*, p. 819.] Motion of National Center on Women and Family Law, Inc., et al., for leave to file a brief as *amici curiae* granted.

No. 80-11. MERRION ET AL., DBA MERRION & BAYLESS, ET AL. *v.* JICARILLA APACHE TRIBE ET AL.; and

No. 80-15. AMOCO PRODUCTION CO. ET AL. *v.* JICARILLA APACHE TRIBE ET AL. C. A. 10th Cir. [Certiorari granted, *ante*, p. 820.] Motion of the Solicitor General for divided argument on behalf of respondents granted. JUSTICE STEWART took no part in the consideration or decision of this motion.

No. 80-5617. IN RE RELIFORD. Petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 80–581. COMMONWEALTH EDISON CO. ET AL. *v.* MONTANA ET AL. Appeal from Sup. Ct. Mont. Probable jurisdiction noted. Case set for oral argument in tandem with consolidated cases No. 80–11, *Merrion et al., dba Merrion & Bayless, et al.* v. *Jicarilla Apache Tribe et al.*, and No. 80–15, *Amoco Production Co. et al.* v. *Jicarilla Apache Tribe et al., supra.* The Solicitor General is invited to file a brief in this case expressing the views of the United States. Reported below: — Mont. —, 615 P. 2d 847.

Certiorari Granted

No. 80–264. STAATS, COMPTROLLER GENERAL OF THE UNITED STATES, ET AL. *v.* BRISTOL LABORATORIES DIVISION OF BRISTOL-MYERS CO. C. A. 2d Cir. Certiorari granted. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 620 F. 2d 17.

No. 80–590. GULF OFFSHORE CO., A DIVISION OF POOL CO. *v.* MOBIL OIL CORP. ET AL. Ct. Civ. App. Tex., 14th Sup. Jud. Dist. Certiorari granted. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 594 S. W. 2d 496.

No. 80–420. FLYNT ET AL. *v.* OHIO. Sup. Ct. Ohio. Certiorari granted. Reported below: 63 Ohio St. 2d 132, 407 N. E. 2d 15.

No. 80–441. GULF OIL CO. ET AL. *v.* BERNARD ET AL. C. A. 5th Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 619 F. 2d 459.

Certiorari Denied. (See also Nos. 80–552, 80–591, and 80–5451, *supra.*)

No. 80–239. FEDERAL INSURANCE CO. *v.* SOLO CUP CO. C. A. 7th Cir. Certiorari denied. Reported below: 619 F. 2d 1178.

No. 80-252. TEXAS A & M UNIVERSITY ET AL. *v.* GAY STUDENT SERVICES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 612 F. 2d 160.

No. 80-331. HICKS ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 614 F. 2d 1295.

No. 80-379. JOHNSON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 200 U. S. App. D. C. 240, 627 F. 2d 293.

No. 80-404. UNITED STATES FIDELITY & GUARANTY CO. *v.* HENDERSON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 620 F. 2d 530.

No. 80-494. RIVCOM CORP. *v.* AGRICULTURAL LABOR RELATIONS BOARD ET AL. Sup. Ct. Cal. Certiorari denied.

No. 80-510. SINGH ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 628 F. 2d 758.

No. 80-533. LA CORBIERE *v.* SAN DIEGO STATE UNIVERSITY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 622 F. 2d 594.

No. 80-550. HONOLULU SPORTING GOODS CO., LTD., A DIVISION OF ZALE CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 620 F. 2d 310.

No. 80-558. WEINGARDEN *v.* UNITED STATES;
No. 80-632. GOLDEN *v.* UNITED STATES; and
No. 80-682. TAPERT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 625 F. 2d 111.

No. 80-560. SAN JOAQUIN NISEI FARMERS LEAGUE ET AL. *v.* INDUSTRIAL WELFARE COMMISSION OF CALIFORNIA ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 27 Cal. 3d 690, 613 P. 2d 579.

No. 80–562. HATAMI *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 80–566. CHAVIS ET AL. *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 45 N. C. App. 438, 263 S. E. 2d 356.

No. 80–567. PEREA *v.* STOUT ET AL. Ct. App. N. M. Certiorari denied. Reported below: 94 N. M. 595, 613 P. 2d 1034.

No. 80–572. SAMBS *v.* CITY OF BROOKFIELD. Sup. Ct. Wis. Certiorari denied. Reported below: 97 Wis. 2d 356, 293 N. W. 2d 504.

No. 80–575. THOMPSON *v.* NATIONAL RAILROAD PASSENGER CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 621 F. 2d 814.

No. 80–589. CITY OF MANASSAS PARK ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: — Ct. Cl. —, 633 F. 2d 181.

No. 80–621. WASHINGTON *v.* HANTON. Sup. Ct. Wash. Certiorari denied. Reported below: 94 Wash. 2d 129, 614 P. 2d 1280.

No. 80–658. FREY ET AL. *v.* PANZA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 621 F. 2d 596.

No. 80–665. SOUTHLAND NEWS, INC. *v.* CITY OF SPRINGFIELD, ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 624 F. 2d 1106.

No. 80–725. SHELTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 624 F. 2d 193.

No. 80–739. AAA TRUCKING CORP. ET AL. *v.* GREEN ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 80-751. ESCOBEDO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 623 F. 2d 1098.

No. 80-5008. SIMMONS *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 381 So. 2d 803.

No. 80-5188. LONG *v.* MASON, HEAD OF CORRECTIONS. Ct. App. Ore. Certiorari denied. Reported below: 45 Ore. App. 335, 608 P. 2d 624.

No. 80-5224. JOHNSON *v.* HAMILTON, JUDGE. Sup. Ct. App. W. Va. Certiorari denied. Reported below: — W. Va. —, 266 S. E. 2d 125.

No. 80-5231. PRUITT *v.* SOUTH CAROLINA ET AL. Sup. Ct. S. C. Certiorari denied. Reported below: — S. C. —, 266 S. E. 2d 779.

No. 80-5321. JOHNSON *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 44 Md. App. 756.

No. 80-5457. QUINONES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 636 F. 2d 1222.

No. 80-5466. HENRIKSEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 624 F. 2d 194.

No. 80-5471. WHITEHEAD *v.* MITCHELL, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. Reported below: 628 F. 2d 1352.

No. 80-5530. MOORE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 634 F. 2d 627.

No. 80-5538. CORLEY *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 416 A. 2d 713.

No. 80-5540. GRINAN *v.* TRESPALACIOS. C. A. 3d Cir. Certiorari denied.

No. 80–5547. BLUE *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 80–5556. HAMLET *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 80–5557. ROBINSON *v.* MCCALL ET AL.; ROBINSON *v.* WOODARD ET AL.; ROBINSON *v.* NORTH CAROLINA ET AL.; ROBINSON *v.* SALMON ET AL.; and ROBINSON *v.* UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT. C. A. 4th Cir. Certiorari denied. Reported below: 626 F. 2d 862 (first case); 626 F. 2d 863 (second and third cases); 628 F. 2d 1350 (fourth case); 634 F. 2d 625 (fifth case).

No. 80–5562. BUCHANAN *v.* SOWDERS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 633 F. 2d 213.

No. 80–5564. MOBLEY ET AL. *v.* FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 386 So. 2d 329.

No. 80–5575. JENKINS *v.* WEST VIRGINA BOARD OF PROBATION AND PAROLE. Sup. Ct. App. W. Va. Certiorari denied.

No. 80–5587. SMITH *v.* BORDENKIRCHER, WARDEN. Sup. Ct. App. W. Va. Certiorari denied.

No. 80–5598. GOOLSBY *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: — S. C. —, 268 S. E. 2d 31.

No. 80–5601. DILLARD *v.* BORDENKIRCHER, WARDEN. Sup. Ct. App. W. Va. Certiorari denied.

No. 80–5609. VADER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 630 F. 2d 792.

No. 80–5620. FLEMING *v.* UNITED STATES SUPREME COURT ET AL. C. A. 3d Cir. Certiorari denied.

No. 80–5648. FENNELL *v.* UNITED STATES; and
No. 80–5656. WRIGHT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 626 F. 2d 494.

No. 80–5651. WILLIAMS *v.* BORDENKIRCHER, WARDEN. Sup. Ct. App. W. Va. Certiorari denied.

No. 80–5668. BATIMANA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 623 F. 2d 1366.

No. 80–5669. THORNHILL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 633 F. 2d 219.

No. 80–5670. TAYLOR *v.* UNITED STATES; and
No. 80–5680. MAULDIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 636 F. 2d 1204.

No. 80–5673. DEVINCENT *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 632 F. 2d 145.

No. 80–5676. HAMPTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 633 F. 2d 219.

No. 80–5690. TIERNAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 639 F. 2d 777.

No. 80–5695. BANCROFT ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 628 F. 2d 632.

No. 80–5701. MONTGOMERY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 80–416. MERCK & CO., INC. *v.* STAATS, COMPTROLLER GENERAL OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari before judgment denied. JUSTICE STEWART took no part in the consideration or decision of this petition.

No. 80–434. SMITHKLINE CORP. *v.* STAATS, COMPTROLLER GENERAL OF THE UNITED STATES, ET AL. C. A. 3d Cir. Certiorari before judgment denied. JUSTICE STEWART took no part in the consideration or decision of this petition.

No. 80-458. CITY OF SOUTH LAKE TAHOE ET AL. *v.* CALIFORNIA TAHOE REGIONAL PLANNING AGENCY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 625 F. 2d 231.

JUSTICE WHITE, with whom JUSTICE MARSHALL joins, dissenting.

In *Board of Education* v. *Allen*, 392 U. S. 236 (1968), this Court held that members of a local school board had standing to challenge in federal court the constitutionality of a state statute that required them to lend books to parochial school students. Addressing the constitutional requirement that the parties have a "personal stake in the outcome" of the litigation, the Court found such a "stake" in the dilemma that the appellants confronted: a choice between violating their oaths of office to support the United States Constitution or refusing to comply with the statutory requirements, a step which was "likely to bring their expulsion from office and also a reduction in state funds for their school district." *Id.*, at 241, n. 5. The Court of Appeals in the present case stated that

> "[w]ere *Allen* the last word from the Supreme Court on standing, we could simply adopt [its] rationale . . . and determine that the councilmembers in the case before us have standing on the basis that they believe that enforcing the . . . ordinances would violate their oaths of office." 625 F. 2d 231, 236 (1980).

The court declined to follow *Allen*, however, holding instead that our subsequent cases have effectively overruled *Allen*. I do not believe that we have *sub silentio* overruled *Allen*. The Courts of Appeals, however, are in conflict over its continuing validity. Compare *Regents of the Univ. of Minn.* v. *NCAA*, 560 F. 2d 352, 363–364 (CA8 1977), and *Aguayo* v. *Richardson*, 473 F. 2d 1090, 1100 (CA2 1973), with *Finch* v. *Mississippi State Medical Assn., Inc.*, 585 F. 2d 765 (CA5 1978). If the *Allen* doctrine is to be reconsidered, it should be done by this Court, and not by the various Courts of Appeals. I therefore dissent from the denial of certiorari.

The California Tahoe Regional Planning Agency (CTRPA) is a political subdivision of the State of California, exercising responsibility for the development and enforcement of plans for land and resource development in the Lake Tahoe region of California. Cal. Gov't Code Ann. § 67040 *et seq.* (West Supp. 1980). The city of South Lake Tahoe lies within the geographic area regulated by the CTRPA. Petitioners, the city, its Mayor and four council members, are required by law to enforce CTRPA regulations, Cal. Gov't Code Ann. §§ 67072, 67102 (West Supp. 1980). A willful failure of a state official to perform his duty is a misdemeanor, Cal. Gov't Code Ann. § 1222 (West 1980), which may result in removal from office. Cal. Penal Code. Ann. § 661 (West 1970).

In August 1975, the CTRPA enacted the plan of land-use and transportation regulations that is the subject of this lawsuit. Petitioners, believing that enforcement of these regulations would be unconstitutional on a number of grounds,[1] brought suit in Federal District Court seeking injunctive and declaratory relief. The District Court dismissed the action, believing that federal-court abstention was appropriate. The Court of Appeals affirmed, holding that petitioners did not have standing to invoke the jurisdiction of the federal courts.

The Court of Appeals relied primarily on *Schlesinger* v. *Reservists to Stop the War*, 418 U. S. 208 (1974), and *United States* v. *Richardson*, 418 U. S. 166 (1974), to support its conclusion that petitioners could no longer claim standing under

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[1] Specifically, petitioners alleged that enforcement of the challenged regulations would (1) take property for public use without just compensation and without due process of law, in violation of the Fifth and Fourteenth Amendments; (2) deprive persons subject to the regulations of equal protection of the laws, in violation of the Fifth and Fourteenth Amendments; (3) unreasonably infringe the right to travel, in violation of the Fourteenth Amendment; and (4) conflict with and frustrate the land-use ordinance and transportation plan of the Tahoe Regional Planning Compact, which was approved by Congress, in violation of the Supremacy Clause of Art. VI.

Allen. Those cases held that Art. III requires that a party assert more than "the generalized interest of all citizens in constitutional governance" to invoke the jurisdiction of the federal courts. I do not doubt the validity of this principle. See *Los Angeles* v. *Lyons, ante*, p. 934 (WHITE, J., dissenting from denial of certiorari). *Allen*, however, was not, nor could it have been, an exception to this constitutional requirement. Therefore, I do not believe that *Schlesinger* and *Richardson* have had the effect the lower court ascribed to them.

Appellants in *Allen* did not simply express abstract disapproval of a government policy; rather, they were required by their position to act to implement that policy and a failure to act would have threatened immediate injury. At the same time, however, appellants were bound by their oaths to act in a contrary manner. It was this dilemma that created a personal stake in the controversy and that distinguishes their situation from that of the parties in either *Schlesinger* or *Richardson*.[2] Nor is it sufficient to argue that this dilemma could be avoided simply by resignation, as suggested by the concurring opinion below: this alternative only further distinguishes the plaintiffs from other citizens and demonstrates their concrete interests in the controversy. Petitioners in this case face exactly the same kind of dilemma. Therefore, as the Court of Appeals noted, *Allen* controls this situation if it is still good law.

The Court of Appeals also held that the city had no stand-

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[2] *Allen* also suggested, as an alternative ground, that appellants had standing because a refusal to enforce the statute could bring about a reduction in the state funds for their school districts. On this theory, appellants had standing to represent the interests of their institution and the larger group of people that would be adversely affected by the reduction in funding. Similarly, petitioners in this case alleged that the city would suffer a loss of funds, through a decrease in property values and thereby tax revenues, and sought standing as the representatives of this larger group of residents that would be adversely affected by the statute.

ing because a political subdivision of a State may not raise constitutional objections to the validity of a state statute, citing, *Williams* v. *Mayor of Baltimore*, 289 U. S. 36, 40 (1933); *Newark* v. *New Jersey*, 262 U. S. 192, 196 (1923); *Trenton* v. *New Jersey*, 262 U. S. 182, 188 (1923); *City of New York* v. *Richardson*, 473 F. 2d 923, 929 (CA2 1973); *Aguayo* v. *Richardson, supra*, at 1100–1101. Such a *per se* rule is inconsistent with *Allen*, in which one of the appellants was a local board of education. Furthermore, there is a conflict in the Circuits over the validity of such a rule. Cf. *Rogers* v. *Brockette*, 588 F. 2d 1057, 1067–1071 (CA5 1979), and *City of New York* v. *Richardson, supra*.

Because the jurisdictional questions raised by this case are important and have received conflicting answers in the Courts of Appeals and because the case raises a question of the continuing validity of our own precedent, I would grant certiorari and set the case for plenary consideration.

JUSTICE BRENNAN would also grant the petition for writ of certiorari.

No. 80–574. ATTORNEY GENERAL OF NEW JERSEY *v.* BISACCIA. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 623 F. 2d 307.

No. 80–482. LEAD INDUSTRIES ASSN., INC. *v.* ENVIRONMENTAL PROTECTION AGENCY; and

No. 80–483. ST. JOE MINERALS CORP. *v.* ENVIRONMENTAL PROTECTION AGENCY. C. A. D. C. Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of these petitions. Reported below: — U. S. App. D. C. —, — F. 2d —.

No. 80–609. JOHNSON *v.* NORDSTROM-LARPENTEUR AGENCY, INC. C. A. 8th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 623 F. 2d 1279.

No. 80–515. York *v.* Federal Home Loan Bank Board et al. C. A. 4th Cir. Motions of National Association of State Savings and Loan Supervisors and North Carolina Savings and Loan League for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 624 F. 2d 495.

No. 80–5058. David Levell W. *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied.

Justice Marshall, dissenting.

Petitioner, a 13-year-old minor, was taken from his home to a police station for questioning by police officers who had neither an arrest warrant nor probable cause for his arrest. The court below held that there was no violation of petitioner's constitutional rights because the officers acted on instructions from his mother. Because I believe the case presents an important question concerning a parent's authority to waive her minor child's right under the Fourth and Fourteenth Amendments to be free from "unreasonable seizures," I dissent from denial of the petition for a writ of certiorari.

I

On March 8, 1979, an investigator with the Los Angeles Police Department told two of his subordinates that he had been in contact with a mother about one of her children who allegedly had been involved in a burglary. He told the officers that the mother had agreed to bring the minor to the police station the previous day but had failed to do so, and he instructed the officers to go to the woman's house and find out when she would bring her son to the station.

At the house, the officers were invited into a bedroom where they saw petitioner's mother lying in bed. The officers informed her of the reason for their visit and asked why she had not brought her son to the police station the previous day as she had promised. Petitioner's mother explained that her car had broken down, and when the officers asked her if

she could bring the boy in that day, she told them that her car was still not working. The officers next inquired where her son was. The mother pointed to petitioner, who was lying in another bed in the same room, and told him to wake up. The officers then asked her when she would be able to bring her son in and she replied: "Well, you officers are here. You can take him down." She told the officers that she had been having trouble with her son and wanted to know if he had been involved in a burglary so she could notify his probation officer. She then told petitioner to get out of bed and get dressed because the officers were waiting for him. Petitioner dressed and left the house with the officers, who placed him in handcuffs before driving him to the police station. At the station, petitioner was given the warnings required by *Miranda* v. *Arizona*, 384 U. S. 436 (1966). He indicated that he understood them, waived his rights, and confessed to the burglary.[1]

A petition was filed against petitioner in juvenile court charging him with burglary in violation of § 459 of the California Penal Code Ann. (West Supp. 1980). Petitioner filed a motion to suppress the confession he made at the police station as the fruit of an illegal arrest. At the combined suppression and adjudication hearing, the State conceded that the police officers had neither an arrest warrant nor probable cause to arrest petitioner at the time he was taken to the station for questioning. Nonetheless, the court denied the suppression motion and relied on the confession in sustaining the charge against petitioner. At the dispositional hearing, the court ordered that petitioner be removed from the custody of his mother. Physical confinement was set at a maximum period of two years.

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[1] This statement of facts is from the opinion of the court below which was originally published at 103 Cal. App. 3d 469 (1980) (advance sheets) and included as petitioner's appendix to his petition for certiorari before this Court. On July 18, 1980, the California Supreme Court ordered that the opinion not be published in the official California Appellate Reports.

On appeal, a divided California Court of Appeal affirmed the judgment of the juvenile court. The majority found no proof that petitioner had agreed to accompany the officers to the station. But relying on California cases that had "recognized and acknowledged the supervisorial authority and control of parents over their children,"[2] the majority held that petitioner's constitutional rights were not violated because both petitioner and the police officers complied with his mother's request that he be taken to the station for questioning.[3] The Supreme Court of California denied a petition for a hearing without opinion.[4]

II

If petitioner had been five years older when the arrest occurred, there would be no question that the judgment below must be reversed. In *Dunaway* v. *New York*, 442 U. S. 200, 216 (1979), we held that "detention for custodial interrogation—regardless of its label—intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrests." Here, the court below specifically found that petitioner did not personally consent to accompany the officers to the station.[5] The officers did not ask petitioner if he was willing to accompany them to the station. And the officers did not believe that petitioner was accompanying them voluntarily, for they placed him in handcuffs to prevent him escaping en route to the station. Moreover, as respondent concedes, the officers had neither a warrant nor probable cause to arrest petitioner

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[2] App. to Pet. for Cert. 6.

[3] On this issue, the dissenting judge argued that the police officers violated petitioner's constitutional right by detaining him for custodial interrogation at a time when they had neither a warrant nor probable cause for his arrest. *Id.*, at 15–20 (Jefferson, J., dissenting).

[4] Two judges of that court indicated that they would have granted the petition for a hearing.

[5] *Id.*, at 5.

when they took him to the station for questioning. If he were an adult, petitioner's subsequent confession would have to be suppressed as the fruit of an illegal arrest. *Wong Sun* v. *United States*, 371 U. S. 471 (1963).[6]

The court below reached a different result solely because petitioner is a minor. Thus, the case squarely presents the question whether a constitutional violation occurred when petitioner, a minor, was taken from his home to a police station for questioning by police officers who, although they had his mother's consent to their action, had neither an arrest warrant nor probable cause for petitioner's arrest. I believe that the Court should consider this issue.

The Court has never previously considered the scope of Fourth Amendment protections when asserted by a minor.[7] Indeed, we have never attempted to define the "totality of the relationship of the juvenile and the state." *In re Gault*, 387 U. S. 1, 13 (1967). Nonetheless our cases have established that minors "are 'persons' under our Constitution . . . possessed of fundamental rights which the state must respect . . . ." *Tinker* v. *Des Moines School Dist.*, 393 U. S. 503, 511 (1969). As we explained in *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S. 52, 74 (1976): "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of maturity. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."[8]

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[6] There is no suggestion that the causal connection between petitioner's detention and his confession was broken in a manner which might purge the taint of the arrest.

[7] The Fourth Amendment is applicable to the States through the Fourteenth Amendment. *Mapp* v. *Ohio*, 367 U. S. 643 (1961).

[8] We have held that minors are entitled to constitutional protection for freedom of speech, *Tinker* v. *Des Moines School Dist.*, 393 U. S. 503 (1969); *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943), equal protection against racial discrimination, *Brown* v. *Board of Education*, 347 U. S. 483 (1954), and due process in civil proceedings, *Goss* v. *Lopez*, 419 U. S. 565 (1975).

Moreover, our cases have exhibited particular sensitivity to minors' claims to constitutional protection against deprivations of liberty by the State. Because loss of liberty is no less a deprivation for a child than for an adult, *In re Gault*, 387 U. S., at 27, we have held that a minor's right with respect to many of these claims is virtually coextensive with an adult's. Thus, we have extended the Fourteenth Amendment's guarantee against deprivation of liberty without due process of law to minors involved in juvenile proceedings. We have held that a minor facing juvenile charges is entitled to notice, counsel, and confrontation of witnesses. *Id.*, at 33, 36–37, 57. "'Neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law.'" *Id.*, at 13, quoting with approval *Haley* v. *Ohio*, 332 U. S. 596, 601 (1948) (Douglas, J., plurality opinion). Similarly, our cases have accorded minors the right against self-incrimination, *In re Gault*, *supra*, protection against coerced confessions, *Gallegos* v. *Colorado*, 370 U. S. 49 (1962); *Haley* v. *Ohio*, *supra*, guarantees against double jeopardy, *Breed* v. *Jones*, 421 U. S. 519 (1975), and the presumption of innocence implemented by the government's burden to prove guilt beyond a reasonable doubt, *In re Winship*, 397 U. S. 358 (1970).

I believe that if the Court examined this issue, we would be hard-pressed to find reasons to distinguish these rights, which clearly apply to minors, from the Fourth Amendment right invoked by petitioner.[9] No less than due process pro-

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[9] Many state and lower federal courts have extended Fourth Amendment guarantees to minors involved in juvenile proceedings. See, *e. g.*, *Brown* v. *Fauntleroy*, 143 U. S. App. D. C. 116, 442 F. 2d 838 (1971); *Cooley* v. *Stone*, 134 U. S. App. D. C. 317, 414 F. 2d 1213 (1969); *In re Scott K.*, 24 Cal. 3d 395, 595 P. 2d 105 (1979); *In re Harvey*, 222 Pa. Super. 222, 229, 295 A. 2d 93, 96–97 (1972); *In re Morris*, 29 Ohio Misc. 71, 278 N. E. 2d 701 (1971); *Ciulla* v. *State*, 434 S. W. 2d 948, 950 (Tex. Civ. App. 1968); *State* v. *Lowry*, 95 N. J. Super. 307, 313–317, 230 A. 2d 907, 910–912 (1967); *In re Williams*, 49 Misc. 2d 154, 169–170, 267 N. Y. S. 2d

tections, the guarantee against unreasonable governmental searches and seizures "defines the rights of the individual and delimits the powers which the state may exercise." *In re Gault, supra*, at 20 (footnote omitted). As the Court has stated, the Fourth Amendment protects "[t]he security of one's privacy against arbitrary intrusion by the police . . . ." *Wolf* v. *Colorado*, 338 U. S. 25, 27 (1949). Neither the court below nor respondent goes so far as to suggest that minors enjoy no protection of this personal privacy under the Fourth Amendment. Instead, respondent argues that the court below correctly held that petitioner's mother had lawful authority to instruct the police officers to take her son to the station for questioning. Respondent contends that inasmuch as petitioner's mother could have brought him to the station herself, she merely authorized the officers to do what she could have done herself.

Essential to this claim is the assumption that a parent's right to guide her child's upbringing[10] includes the authority to waive a constitutional right that the child may have.[11]

91, 109–110 (Ulster Cty. Family Ct. 1966); *Urbasek* v. *People*, 76 Ill. App. 2d 375, 222 N. E. 2d 233 (1966).

[10] See *Wisconsin* v. *Yoder*, 406 U. S 205, 232 (1972); *Pierce* v. *Society of Sisters*, 268 U S. 510, 534–535 (1925).

[11] The Fourth Amendment's warrant and probable-cause requirements impose limits on the actions of the police. Respondent concedes that the police had neither a warrant nor probable cause for petitioner's detention. His mother's consent could not and did not supply the requisite probable cause or warrant. Even though petitioner's mother could have taken him to the station herself, it does not follow from this that she had the authority to waive petitioner's Fourth Amendment right and permit the police to detain him without complying with constitutional requirements.

The Supreme Court of California rejected a similar claim by the State in another case that also involved a minor's Fourth Amendment right. *In re Scott K., supra*. In that case a police officer obtained permission from a parent to search a box that belonged to his minor son. The court rejected the State's suggestion that because the father could have searched the box himself, he had the authority to permit the police to search it.

I find this assumption extremely disturbing for I see no way to cabin its implications. If a parent may, without even consulting the child, waive his constitutional rights, then the police may constitutionally coerce confessions from minors so long as the officers have the parents' consent to their action. Even more troubling, there is nothing in respondent's reasoning to preclude a juvenile court from finding a minor guilty upon proof less than beyond a reasonable doubt, as long as the parent waives that critical due process requirement. The view of parental authority advanced by respondent and adopted by the court below suggests no reason to bar these actions.

But even assuming that the view of parental authority espoused by the court below is correct, there is a major inconsistency in the court's reasoning. The court's view of parental authority rests on the supposition that petitioner was too immature to make the decision about whether to go to the station with the police officers for himself. But if that is the case, I find it hard to discern the logic of the same court's conclusion that petitioner was capable of making a knowing and intelligent waiver of his *Miranda* rights, whose application to a minor are not in doubt. Surely, if a minor in his home lacks the capacity to decide whether to accompany police officers to the station for questioning, there must be some question about the same minor's capacity to make a knowing and intelligent waiver of his rights at the police station. A coherent view, fully adopting the court's theory of a minor's incapacity, would result in the exclusion of petitioner's confession because he would be deemed incapable of waiving his *Miranda* rights. And his conviction would be reversed because it was based on the confession.[12]

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[12] Alternatively, if petitioner is presumed capable of making a knowing and intelligent decision, as the court below assumed in connection with his waiver of his *Miranda* rights, then petitioner could object to being taken, handcuffed, to the police station. And he would here be permitted to

Because I believe that the case raises important questions that were not adequately addressed by the court below, I would grant the petition for a writ of certiorari and set the case for plenary consideration.

JUSTICE BRENNAN and JUSTICE WHITE, agreeing for the most part with JUSTICE MARSHALL's dissenting opinion, would also grant certiorari.

No. 80–5123. MCKENZIE *v.* MONTANA. Sup. Ct. Mont. Certiorari denied. Reported below: — Mont. —, 608 P. 2d 428.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

On two prior occasions, this Court has vacated decisions of the Supreme Court of Montana in this death penalty case and remanded the case for further consideration. *McKenzie* v. *Montana*, 443 U. S. 903 (1979); *McKenzie* v. *Montana*, 433 U. S. 905 (1977). In both instances, we directed the Supreme Court of Montana to reconsider the case in light of intervening decisions of this Court establishing that due process forbids a State from placing on a defendant the burden to disprove an element of the offense charged. *McKenzie* v. *Montana*, 443 U. S. 903 (1979) (directing reconsideration in light of *Sandstrom* v. *Montana*, 442 U. S. 510 (1979)); *McKenzie* v. *Montana*, 433 U. S. 905 (1977) (directing reconsideration in light of *Patterson* v. *New York*, 432 U. S. 197 (1977)). On each remand, the state court reaffirmed the conviction and reinstated the death penalty. — Mont. —,

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claim violation of the Fourth Amendment's probable-cause and warrant requirements by the police. This view is perhaps more consistent with decisions by this Court that have recognized the rights of minors faced with decisions that critically affect their own lives. See *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S. 52 (1976) (upholding pregnant minor's right to make an abortion decision without parental consent).

608 P. 2d 428 (1980); — Mont. —, 581 P. 2d 1205 (1978). In its most recent decision in this case, the State Supreme Court conceded that the jury instructions unconstitutionally shifted to petitioner the burden to disprove that he had the criminal intent necessary to support conviction. — Mont., at —, 608 P. 2d, at 457–458. The court nonetheless avoided granting petitioner a new trial by deeming this constitutional violation "harmless error." *Id.*, at —, 608 P. 2d, at 458–459. A state court's analysis of harmless error in a typical case may not present a question worthy of full review by this Court, yet, where, as here, the death penalty is the result, close scrutiny is required. Because I find the court's analysis of harmless error lacking of evenhanded treatment, I dissent from this Court's denial of certiorari.

Petitioner was charged with two counts of deliberate homicide, two counts of aggravated kidnaping, one count of sexual intercourse without consent, and two counts of aggravated assault, all arising from the death of one woman. A major element in petitioner's defense was that he was incapable of "knowingly" or "purposely" committing the homicide. Petitioner and the prosecutor produced conflicting psychiatric and psychological testimony at trial concerning petitioner's ability to understand the criminal nature of his conduct and to conform his conduct to the requirements of law. Although petitioner's capacity to form the required criminal intent was thus put directly in issue, over petitioner's specific objection, the judge repeatedly directed the jury that "the law also presumes that a person intends the ordinary consequences of his voluntary act" and that "an unlawful act was done with an unlawful intent." [1] The trial court essentially instructed the

[1] Instruction 31 gave general directions on methods of proof about mental state. It stated that "the law expressly directs the jury to reason: That an unlawful act was done with an unlawful intent and also that a person is presumed to intend the ordinary consequences of his voluntary act," but Instruction 32 noted that a "particular purpose" may be inferred but not assumed. App. to Pet. for Cert. 20g–21g. Instruction 33

jury that it could presume the necessary criminal intent if it found petitioner had committed the acts charged. Petitioner was convicted of deliberate homicide and aggravated kidnaping, and sentenced to death.

In *Sandstrom* v. *Montana*, *supra*, we explicitly held that instructions of the kind challenged by petitioner violate due process because they shift to the defendant the burden to persuade the jury that he lacked the requisite criminal intent. On remand of the instant case in light of *Sandstrom*, the Montana court agreed that the challenged instructions unconstitutionally shifted the burden of proving the intent element of the crime from the State to the defendant. — Mont., at —, 608 P. 2d, at 457. The court, however, reasoned that not all such constitutional errors are prejudicial [2]

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concerned the method of proof applicable to the offense of deliberate homicide. That instruction directed that if the jury found that petitioner committed an illegal act on the victim, "the law presumes that an unlawful act was done with an unlawful intent; that is, the law expressly directs you to reason from such unlawful act that the defendant acted with an unlawful intent, or purpose." *Id.*, at 22g. Instruction 35 described the method of proof applicable to kidnaping. It provided that because no particular purpose was required as an element of the offense, the requisite mental state could be established presumptively. Thus, if the jury found that petitioner restrained the victim "either by secreting her in a place of isolation, or by using physical force, or by threatening to use physical force to hold her, the law presumes that he acted therein with unlawful intent, purpose or knowledge, and expressly directs you to so reason." *Id.*, at 26g–27g. Instruction 37 provided that proof of the mental state requisite for sexual intercourse without consent "can be made by presumption." *Id.*, at 28g. Similarly, Instruction 38 specified that the mental state necessary for aggravated assault could be proved by the presumption that "'[a]n unlawful act was done with an unlawful intent, and the legal presumption that a person is presumed to intend the ordinary consequences of his voluntary act' can be used to prove the mental state of knowingly." *Id.*, at 30g.

[2] This Court has not decided whether it can ever be harmless to instruct a jury that it may presume criminal intent from the fact of the criminal act. See *Sandstrom* v. *Montana*, 442 U. S. 510, 526–527 (1979) (remanding on that issue).

and concluded that this Court has never mandated which of three possible standards for evaluating the harmlessness of a constitutional error [3] must be used. The court then selected the standard that permits a court to sustain the conviction despite the constitutional error where there is "overwhelming evidence" of guilt. *Id.*, at —, 608 P. 2d, at 458. Finally, the court found such overwhelming evidence was present in this case.

But what evidence did the court find sufficient to overcome the constitutional error of directing the jury to presume the presence of the requisite criminal intent from the nature of the acts committed? The Montana court itself relied solely on "the vicious manner in which the crimes were committed" in concluding that petitioner "purposely and knowingly intended" to commit the crimes. *Id.*, at —, 608 P. 2d, at 459. I cannot help but be shocked that in taking this approach, the Montana court simply applied the forbidden presumption. In so doing, the court neglected to perform its task on review: it failed to examine whether the disapproved instructions could have infected the jury verdict. Instead, the court served as another factfinder, again impermissibly placing the burden on petitioner to disprove that the nature of his acts established the requisite criminal intent. It surely cannot be that a verdict following an unconstitutional instruction permitting the jury to presume criminal intent can be im-

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[3] The court reasoned:

"At least three definable approaches appear in the United States Supreme Court cases: (1) Focusing on the erroneously admitted evidence or other constitutional error to determine whether it might have contributed to the conviction[,] e. g., *Fahy* v. *Connecticut* (1963), 375 U. S. 85 . . . ; (2) excluding the constitutional infirmity where overwhelming evidence supports the conviction [,] e. g., *Milton* v. *Wainwright* (1972), 407 U. S. 371 . . . ; (3) determining whether the tainted evidence is merely cumulative or duplicates properly admitted evidence[,] e. g., *Harrington* v. *California* (1969), 395 U. S. 250 . . . ." — Mont., at —, 608 P. 2d, at 458.

munized from reversal because the reviewing court also impermissibly presumes criminal intent.

This result was perhaps inevitable once the state court selected the "overwhelming evidence" of guilt standard to analyze whether the constitutional error was harmless. For whatever value that standard may have in reviewing a verdict following introduction of evidence obtained in violation of constitutional guarantees, see, *e. g.*, *Milton* v. *Wainwright*, 407 U. S. 371 (1972), use of the standard actually precludes effective review of the prejudicial impact of unconstitutional jury instructions.[4] Where isolated, tainted evidence is at issue, the reviewing court may exclude that evidence from its assessment of whether the remaining evidence supports the conviction. But where the constitutional error occurred in the jury instructions, no isolated portion of the record can be eliminated from the judicial assessment. Nor can the effect of the instructions be evaluated by examining the evidence alone, and ignoring the unconstitutional instructions. For the precise issue in such cases is the manner in which the jury could have assessed the evidence as a whole, not the importance of any particular piece of evidence to sustain the verdict. In selecting the "overwhelming evidence" standard on the theory that "an appellate court should view the case as a whole in assessing harmless or prejudicial error," — Mont., at —, 608 P. 2d, at 458, the state court neglected to review the possible effect of the unconstitutional instructions on the jury's verdict.

The possibility that a constitutional error in jury instructions was harmless must be evaluated on the premise that the jury acted lawfully and reasonably followed the erroneous

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[4] The Montana court acknowledged "criticism of this standard by text writers and legal commentators." *Id.*, at —, 608 P. 2d, at 458. See, *e. g.*, Field, Assessing the Harmlessness of Federal Constitutional Error—A Process in Need of a Rationale, 125 U. Pa. L. Rev. 15, 32–36 (1976).

instruction.[5] Then the court must ask whether the defective instruction may have contributed to the jury verdict.[6] And, before finding the error harmless, the reviewing court must be convinced beyond a reasonable doubt that the error did not so contribute. *Chapman* v. *California*, 386 U. S. 18 (1967). Indeed, on remand in *State* v. *Sandstrom*, — Mont. —, —, 603 P. 2d 244, 245 (1979), the Supreme Court of Montana followed just this analysis. We had remanded *Sandstrom* for consideration of questions such as whether the use of the disapproved instruction was harmless error in that case, and whether such error could ever be harmless. *Sandstrom* v. *Montana*, 442 U. S., at 526–527. In response, the State Supreme Court correctly applied *Chapman* in reasoning that it could find harmless error only upon concluding:

> "[T]he offensive instruction could not reasonably have contributed to the jury verdict. In considering the instruction, and the fact that intent was the main issue in

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[5] See generally R. Traynor, The Riddle of Harmless Error 73–74 (1970).

[6] Before this Court, Montana argues that even if petitioner's conviction for deliberate homicide resulted from the unconstitutional presumption of intent, his conviction for aggravated kidnaping is untainted by the error. Montana claims that because this is the case, the death penalty can stand, as only one sentence was imposed, despite petitioner's conviction on both the homicide and kidnaping counts. This argument, which was never adopted by the state court, is fatally flawed because instructions on the kidnaping charge also included the disapproved presumption of criminal intent. As Montana itself acknowledges, "the jury was then informed that they could employ the *Sandstrom* presumption to find that [kidnaping] was done 'purposely' or 'knowingly.'" Brief in Opposition 7. Montana argues that any error from this instruction was cured by the additional instructions on aggravated kidnaping. These instructions directed that after finding that petitioner committed the kidnaping, the jury could infer, but not presume, he also had particular criminal purposes to inflict bodily injury, to terrorize, or to facilitate the commission of other crimes. These additional requirements could not, however, eliminate the role of the forbidden instruction in the initial finding of a kidnaping.

> the District Court trial, we cannot make that assertion. The erroneous instruction goes to a vital element of the proof of the crime, namely the intent of the defendant Sandstrom in committing the homicide. If the jury followed the instruction, it could have presumed the intent without proof beyond a reasonable doubt." — Mont., at —, 603 P. 2d, at 245.

Therefore, the court ordered a new trial for Sandstrom. The Montana court subsequently applied the same reasoning in *State* v. *Hamilton*, — Mont. —, —, 605 P. 2d 1121, 1132 (1980) (appellate court must determine impact of instruction upon a reasonable jury).

It appears that only in petitioner's case is the Montana court unwilling to apply this analysis.[7] This seems to be yet another case in which a court sanctions "egregious violations of the constitutional rights of criminal defendants by blandly reciting the formula 'harmless error.'" *Briggs* v. *Connecticut*, 447 U. S. 912, 915 (1980) (MARSHALL and BRENNAN, JJ., dissenting). However unpleasant the facts of this or other cases may be, the courts are obligated to protect the constitutional rights of the defendant. Due to concern that petitioner's rights have not been preserved, this Court has already remanded this case twice. I can understand the Court's reluctance to entertain this case yet again, for we presume that lower courts adhere to the purposes of remands from this Court. Yet the Montana court has failed to fulfill its obligation to carry out the mandate of our decisions.[8] There-

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[7] Petitioner is also the only person on whom Montana imposed the death sentence under a statute enacted in 1973 before it was amended to provide different procedures for deliberate homicide and aggravated kidnaping, the offenses relevant here. See Mont. Rev. Codes Ann. § 94-5-304 (1974 Supp.), Mont. Code Ann. §§ 45-2-101 (52), 46-18-101, 46-18-111 to 46-18-112 (1979).

[8] For this reason, this case seems a particularly apt one for seeking federal habeas corpus relief. The dissenting judge in the Montana court

fore, I would grant certiorari and set the case for plenary consideration.

I also adhere to my view that the death penalty is, under all circumstances, a cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Furman* v. *Georgia*, 408 U. S. 238, 314–371 (1972) (MARSHALL, J., concurring); *Gregg* v. *Georgia*, 428 U. S. 153, 231–241 (1976) (MARSHALL, J., dissenting); *Lockett* v. *Ohio*, 438 U. S. 586, 619–621 (1978) (MARSHALL, J., concurring in judgment), and on that basis alone I would grant certiorari and vacate the death sentence in this case.

No. 80–5488. SWINDLER *v.* ARKANSAS. Sup. Ct. Ark.; and

No. 80–5602. DAVIS *v.* GEORGIA ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: No. 80–5488, 267 Ark. 418, 592 S. W. 2d 91; No. 80–5602, 246 Ga. 200, 269 S. E. 2d 461.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 80–91. DICK *v.* HARRIS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., *ante*, p. 872;

No. 80–194. RAMIREZ *v.* UNITED STATES, *ante*, p. 900;

No. 80–217. HOWELL *v.* THOMAS, SHERIFF, *ante*, p. 901;

No. 80–285. CHVOSTA *v.* PIERRE ET AL., *ante*, p. 921; and

No. 80–5268. ANTONE *v.* FLORIDA, *ante*, p. 913. Petitions for rehearing denied.

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found the majority's decision unsupportable. — Mont., at —, —, —, 608 P. 2d, at 459, 462, 465 (Shea, J., dissenting).

Reporter's Note

The next page is purposely numbered 1301. The numbers between 1057 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

O'CONNOR, BY HER PARENTS AND NEXT FRIENDS, O'CONNOR ET UX. *v.* BOARD OF EDUCATION OF SCHOOL DISTRICT 23 ET AL.

ON APPLICATION TO VACATE STAY

No. A-384. Decided November 4, 1980

An application to vacate the Court of Appeals' stay pending appeal of the District Court's preliminary injunction requiring respondent school officials to allow plaintiff-applicant, a female junior high school student, to try out for the boys' basketball teams, is denied. As required by an interscholastic athletic conference's rules, the school maintained separate teams for boys and girls for contact sports, including basketball, and the refusal to allow applicant to try out for the boys' teams was based solely on her sex. The Court of Appeals' en banc decision to enter the stay is entitled to great deference. It appears at this stage of the proceedings that the gender-based classification, which apparently was adopted in full compliance with the regulations of the Department of Health, Education, and Welfare, is reasonable in substantially all of its applications, and it cannot be said to be unconstitutional simply because it might appear arbitrary in an individual case such as applicant's. Without a gender-based classification in competitive contact sports, there would be a substantial risk that boys would dominate the girls' programs and deny them an equal opportunity to compete in interscholastic events.

JUSTICE STEVENS, Circuit Justice.

On October 27, 1980, a panel of the United States Court of Appeals for the Seventh Circuit granted a stay pending appeal of a preliminary injunction entered by the District Court in favor of the plaintiff. Two days later, the Court of Appeals sitting en banc entered an order continuing the stay. The plaintiff has submitted to me, in my capacity as Circuit Justice, an application to vacate this stay. For the

reasons explained below, I have decided not to vacate the stay entered by the Court of Appeals.

I

On October 22, 1980, plaintiff Karen O'Connor, represented by her father and her mother, filed a verified complaint and a motion for a temporary restraining order and preliminary injunction, supported by appropriate affidavits, in the United States District Court for the Northern District of Illinois. Her papers allege the following facts which, since they have not yet been denied or contradicted by countervailing affidavits or evidence, must be accepted as true.

Karen is an 11-year-old sixth-grade student at MacArthur Junior High School; she is 4′11″ tall and weighs 103 pounds. For at least four years she has successfully competed with boys in various organized basketball programs. A professional basketball coach who witnessed her play with boys and girls aged 10 to 13 during the summer of 1980 rates her ability as equal to or better than a female high school sophomore player and equal to that of a male eighth-grade player.

MacArthur Junior High School is a member of the Mid-Suburban Junior High School Conference, an association of six junior high schools engaged in interscholastic athletics. MacArthur has programs for seventh-grade and for eighth-grade teams; sixth-grade students are eligible to try out for both the seventh-grade and the eighth-grade teams. Students of either sex may compete on the same teams in some noncontact sports, but Conference rules require separate teams for boys and girls for contact sports. Contact sports include "boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose of major activity of which involves bodily contact." See Complaint ¶ 35.

On August 27, 1980, Karen's father requested that she be permitted to try out for the boys' basketball teams. After a series of requests and refusals, Karen and her parents com-

menced this litigation, seeking both a temporary order requiring defendants to allow her to participate in the tryouts which were originally scheduled to commence on October 27, 1980, and permanent relief allowing her to play in interscholastic competition if she made either the seventh-grade or the eighth-grade team.

After an adversary hearing, on October 23, 1980, the District Court rendered an oral opinion and granted temporary relief to the plaintiff. The court held that the plaintiff had established a likelihood of success on the merits and that she would suffer irreparable injury if temporary relief was denied. The court concluded that she had a constitutionally protected interest in equal access to training and competition that would develop her athletic talents. The court rejected the two justifications presented by the defendants at the hearing.

First, without deciding whether the provision of separate but equal facilities to male and female students would avoid any constitutional objection, the District Court found that the separate programs offered by the defendants were not in fact equal because Karen's opportunity to compete with persons of substantially lesser skill in the girls' program was not as valuable as the opportunity to compete with those who are equal or superior to her in ability in the boys' program.

Second, the defendants argued that if they allowed Karen to try out for the boys' teams, they would have to allow boys to try out for the girls' teams, and since boys generally have superior athletic ability, the boys would dominate the girls' programs and ultimately deprive girls of a fair opportunity to engage in competitive athletics. The District Court rejected this argument, stating merely that the defendants had not persuaded it that there were no less restrictive alternatives available, other than completely separate programs classified entirely on the basis of sex.

The District Court refused to grant a stay pending appeal. As I understand the facts, defendants thereafter (1) post-

poned the tryouts;[1] (2) filed an appeal from the preliminary injunction requiring them to allow Karen to try out for the boys' teams; and (3) applied to the Court of Appeals for a stay of the District Court's injunction. On October 27, by a vote of 2 to 1, a three-judge panel granted a stay, without opinion. On October 29, 1980, the Court of Appeals, sitting en banc, voted 5 to 3 to continue the stay pending the appeal. On October 31, 1980, the plaintiff filed her petition to vacate the stay entered by the Court of Appeals, supported by various papers filed in the District Court and the Court of Appeals. Defendants filed their response on November 3, 1980.

II

Although I have the power, acting as Circuit Justice, to dissolve the stay entered by the Court of Appeals, *Holtzman* v. *Schlesinger*, 414 U. S. 1304, 1308 (1973) (MARSHALL, J., in chambers), this power is to be exercised "with the greatest of caution and should be reserved for exceptional circumstances." *Ibid.* A Court of Appeals' decision to enter a stay is entitled to great deference, *Commodity Futures Trading Comm'n* v. *British American Commodity Options Corp.*, 434 U. S. 1316, 1319 (1977) (MARSHALL, J., in chambers); such deference is especially appropriate when the Court of Appeals has acted en banc. Nevertheless, the question presented by the application is sufficiently difficult to justify careful consideration.[2] In answering that question, I shall first identify certain propositions that seem to be adequately established.

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[1] The papers filed on behalf of Karen in this Court suggest that the defendants rescheduled the tryouts in order to deprive Karen of the opportunity to try out for the boys' teams while the defendants sought a stay from the Court of Appeals. The defendants assert that the rescheduling was required because of the postponement, due to inclement weather, of another athletic event. Because the motive underlying the rescheduling is not relevant to the question presented here, resolution of this factual conflict is unnecessary.

[2] The difficulty of the question presented by the defendants' request for

First, there is no dispute about the fact that the defendants have acted under color of state law and that their refusal to allow Karen to try out for the boys' teams is based solely on the fact that she is a girl. Whether or not Karen's interest in improving her athletic skills is characterized as "fundamental" or something less, I think it is clear that the defendants have the burden of justifying a discrimination of this kind.

Second, since the burden of justification was on the defendants, at this stage of the proceeding the stay entered by the Court of Appeals cannot be upheld on grounds not yet supported by the record, even though it may remain open to the defendants to offer additional evidence at a full trial. Thus, for example, the defendants have preserved the right to offer evidence to support the proposition that the exclusion of girls from the boys' teams is necessary to protect female athletes from harm. They were unable to present evidence supporting such a justification at the preliminary hearing, however, and therefore this justification is not available to them at this stage of this proceeding. Defendants have also made no claim that the *boys'* athletic program would be harmed in any way by allowing Karen to participate.[3] Nor have they suggested

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a stay is illustrated by the fact that Judge Cudahy, a member of the majority of the panel which granted the stay on October 27, dissented from the Court of Appeals' en banc decision to continue the stay on October 29.

[3] In their response filed in this Court, the defendants have suggested that the girls' basketball program will be injured if Karen is allowed to participate in the boys' program, because the girls' program will then be deprived of its best athlete. This justification, like the need to protect female athletes from physical or psychological harm, while plausible, is not supported by the present record. It cannot, therefore, be used as a basis for upholding the stay entered by the Court of Appeals. The fact that defendants advance this argument indicates that they regard Karen as still eligible to participate in the girls' program even though she declined to participate in the girls' tryouts while this matter has been pending.

that the exclusion of Karen is necessary in order to protect Karen from harm.

Third, although the record is incomplete, plaintiff does not appear to dispute defendants' representation that the separate athletic programs for the girls are equal to the boys' programs in the sense that the time, money, personnel, and facilities devoted to each are equal. Defendants are therefore correct in putting to one side the cases in which a number of courts have ordered schools to allow girls to participate on boys' teams following a showing that the girls' programs were inferior.

Fourth, in deciding whether to vacate the stay, I have a duty to consider the potential of irreparable harm to the respective parties. Although defendants have argued to the contrary, I am persuaded that the District Court was correct in concluding that, if Karen will probably succeed on the merits, she would suffer greater harm than would the defendants by allowing her to try out for the boys' teams. I am therefore persuaded that the stay can only be supported by the sufficiency of the defendants' showing that there is an adequate reason for discriminating against Karen because of her sex.

In my opinion, the question whether the discrimination is justified cannot depend entirely on whether the girls' program will offer Karen opportunities that are equal in all respects to the advantages she would gain from the higher level of competition in the boys' program. The answer must depend on whether it is permissible for the defendants to structure their athletic programs by using sex as one criterion for eligibility. If the classification is reasonable in substantially all of its applications, I do not believe that the general rule can be said to be unconstitutional simply because it appears arbitrary in an individual case.[4]

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[4] I share District Judge Marshall's view that if attention is confined to the application of the rule to Karen—rather than to the general

It seems to me that there can be little question about the validity of the classification in most of its normal applications. Without a gender-based classification in competitive contact sports, there would be a substantial risk that boys would dominate the girls' programs and deny them an equal opportunity to compete in interscholastic events. The defendants' program appears to have been adopted in full compliance with the regulations promulgated by the Department of Health, Education, and Welfare.[5] Although such compliance certainly does not confer immunity on the defendants,

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validity of the rule—the discrimination does appear arbitrary. In some respects, Karen's claim is no different from that of any other sixth or seventh grader. The younger children are permitted to try out for the eighth-grade teams, but the eighth graders are excluded from the seventh-grade teams because their participation would be unfair to the younger students. The fact that an eighth grader must face competition from talented seventh graders without reciprocal rights indicates that there is no necessary reason why boys may not be required to compete with talented girls without reciprocal rights. I would also note that Karen's claim is supported by the Court's equal protection analysis in *Caban* v. *Mohammed*, 441 U. S. 380, 391–394 (1979); see *id.*, at 409–412 (STEVENS, J., dissenting).

[5] The Department of Health, Education, and Welfare, pursuant to Title IX of the Education Amendments of 1972, 20 U. S. C. § 1681, promulgated regulations designed to eliminate discrimination on the basis of sex in education programs and activities receiving federal financial assistance. One of these regulations, specifically addressing gender-based discrimination in athletic programs, provides in part:

"[A] recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose of major activity of which involves bodily contact." 45 CFR § 86.41 (b) (1979).

it does indicate a strong probability that the gender-based classification can be adequately justified. At least that probability is sufficient to persuade me that I should adhere to the practice of according deference to the judgment of the majority of my colleagues on the Court of Appeals.

The application to vacate the stay is denied.